Federal Court of Appeal  Cour d'appel fédérale

Date: 20190506

Docket: A-140-19

Citation: 2019 FCA 108

Present: **STRATAS J.A.**

BETWEEN:

SNC-LAVALIN GROUP INC., SNC-LAVALIN INTERNATIONAL INC. and SNC-LAVALIN CONSTRUCTION INC.

Appellants

and

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on May 6, 2019.

REASONS FOR ORDER BY: STRATAS J.A.

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REASONS FOR ORDER

STRATAS J.A.

[1] In a letter dated April 30, 2019, filed with the Court, the respondent seeks directions concerning a motion she intends to bring. By letter dated May 1, 2019, also filed with the Court, the appellants have responded.

[2] The Court regards the respondent's letter as an informal motion for directions under Rule 54. Both letters are very detailed, well-argued, clear and comprehensive. They have empowered this Court to give the directions sought.

[3] As will be seen, the Court also considers it necessary to make an order requiring the respondent, if she decides to bring the motion, to bring it in the near future. The order also schedules the steps in the motion, if brought. This will allow the appeal to proceed efficiently.

The underlying appeal

[4] This motion for directions takes place within the appellants' appeal from the order of the Federal Court striking out their notice of application for judicial review: 2019 FC 282 (*per* Kane J.). The Federal Court found that the appellants' application could not succeed in law.

[5] In their appeal, the appellants seek, among other things, an order permitting them to amend the notice of application that the Federal Court struck: paragraph 2 of the notice of appeal. They submit that new facts have emerged that warrant the amendment. In the appeal, they will argue that the notice of application, whether amended or not, can succeed and, thus, should not have been struck.

The Director's proposed motion

[6] The respondent intends to bring a motion striking out the appellants' request for an amendment to the notice of application. The respondent will submit that the appellants' request cannot possibly succeed and should not be granted.

The parties' submissions in their letters

[7] The respondent advises that the intended motion may require findings of fact to be made. Also the judge hearing the motion may have many questions. Thus, the respondent requests an oral hearing for the motion. The respondent adds that the open-courts principle requires that the motion should be heard orally. The respondent's thrust is that the Court has no choice but to hold an oral hearing.

[8] In substance, the appellants suggest that the respondent's request for directions is premature. They ask that the Director serve the motion record now so they can assess the situation and make informed submissions. They suggest that, given the grounds of appeal that are advanced, the evidentiary record before the Court is uncertain; but this uncertainty will be resolved when the contents of the appeal book are settled. Finally, the appellants suggest that only three judges of the Court, not a single judge of this Court, can determine the respondent's motion.

Is the seeking of directions inappropriate or premature?

[9] This Court has held that it is not in the business of giving legal or tactical advice to litigants under its power to give directions under Rule 54: *Bernard v. Canada (Revenue Agency)*, 2015 FCA 263 at paras. 37-47; *Olumide v. Canada*, 2016 FCA 287 at paras. 14-23.

[10] Here, this is not what the parties seek. Rather, they raise real concerns affecting the efficient and prompt progression of the appeal.

[11] In particular, in these circumstances, the respondent has acted appropriately in seeking the Court's direction in advance of bringing her motion. On rare occasions, an early approach to this Court can resolve misunderstandings and lead to the more efficient conduct of the matter. This is just such an occasion.

Oral hearings of interlocutory motions in this Court

[12] The respondent's position concerning oral hearings on interlocutory motions in this Court requires comment.

[13] This Court grants oral hearings on interlocutory motions only if the judge assigned to determine the motion believes that an oral hearing is necessary: see the reasoning in the Order dated April 29, 2019 in *Lessard-Gauvin v. Canada (Attorney General)*, file A-312-18 (English

translation attached as Schedule “A”). The parties are free to make submissions on the need for an oral hearing in their written representations on the motion: see Rule 369(2).

[14] The bottom-line is that all interlocutory motions in this Court are determined in writing unless the judge determining the motion orders otherwise.

Motions in writing and the open court principle

[15] Motions in writing are just as much open to the public as other motions. Absent a confidentiality order, the parties’ evidence and written representations and the Court’s reasons and orders are open and available to the public. Only the Court’s private deliberations are closed from the public, covered as they are by deliberative privilege.

Must an interlocutory motion be determined before the appeal hearing?

[16] Interlocutory motions need not be determined before the appeal hearing; often the proper course of action is to refer the motion to the panel hearing the appeal: see *Bernard*, above at paras. 9-11, *MediaTube Corp. v. Bell Canada*, 2018 FCA 127 at paras. 9-14, *McKesson Canada Corporation v. Canada*, 2014 FCA 290 at paras. 9-10, and cases cited therein.

[17] This is a discretionary call governed by several factors. The above authorities show that these include whether determining the motion on an interlocutory basis will allow the hearing to proceed in a more timely and orderly fashion and whether the result of the motion is clear-cut or

obvious. Overall, Rule 3 governs the exercise of this discretion: we are to adopt the course of action that "will secure the just, most expeditious and least expensive determination of every proceeding on its merits."

The nature of the respondent's intended motion

[18] The respondent's intended motion, as described, is likely to raise two questions. First, as a matter of law, can the relief sought in paragraph 2 of the notice of appeal be granted in these circumstances? And second, if so, as a matter of mixed law and fact, should relief be granted in these circumstances? The respondent will answer these questions negatively; the appellants will answer them positively.

Analysis

[19] Given the criteria in cases such as *Bernard*, *MediaTube* and *McKesson*, above, and given the objectives in Rule 3, the respondent's intended motion, if brought, should be made returnable to the panel hearing the appeal.

[20] In these circumstances, to do otherwise is to create the possibility of a multiplicity of hearings and unacceptable delay. For example, if the motion were determined before the appeal hearing, leave could be sought to the Supreme Court of Canada, and suddenly where once there was just one appeal, now there could be two, in two different places.

[21] The intended motion, as prosecuted and defended, may well evolve into a full canvassing of the merits of paragraph 2 of the notice of appeal. This favours leaving the motion to the appeal panel.

[22] Another advantage of placing the motion before the appeal panel is that the appeal panel can hear the motion orally at the same time as the rest of the appeal; this satisfies the parties' joint desire that the motion should be heard orally. Also there would be no jurisdictional question about whether a single judge can hear the motion: placing the motion before a three-judge appeal panel renders the jurisdictional question moot. Further, the appeal panel might be able to determine the appeal without dealing with the motion. Thus, judicial economy may be advanced by placing the motion before the appeal panel.

[23] I do not accept that the appeal hearing or the parties' submissions on the appeal will be unduly complicated by the presence of the motion. This Court frequently hears motions during appeal hearings. It is true that the motion might lengthen the hearing somewhat. But this can be accommodated. Finally, the respondent has not raised circumstances of urgency which would warrant determining the motion immediately.

Direction and order

[24] Thus, this Court directs that if the respondent decides to bring a motion to strike the ground in paragraph 2 of the notice of appeal, she should make her motion returnable to the panel hearing the appeal.

[25] In support of this direction and in the interests of timeliness, this Court will order that if the respondent intends to bring this motion to strike, she shall file her motion record within two weeks and the times under Rules 369(2) and (3) for the responding motion record and the reply shall thereafter apply. The parties may ask this Court to amend this schedule. The Court will be inclined to amend this schedule if it is persuaded that there will be no threat of unnecessary delay to the appeal hearing. For this purpose I shall remain seized.

[26] Since the intended motion will be returnable to the panel hearing the appeal, the parties are directed to file five copies of the motion record, responding motion record, and reply.

[27] If the respondent does not bring the intended motion to strike paragraph 2 of the notice of appeal, submissions concerning that ground of appeal of course may still be made at the hearing of the appeal.

Other issues

[28] It is unclear to the Court whether the appellants intend to place additional evidence before the panel hearing the appeal concerning the ground in paragraph 2 of the notice of appeal.

[29] As is well-known, the appeal book usually contains only the evidence that was before the first-instance court; anything else is usually considered to be fresh evidence. Fresh evidence can usually be received by this Court only by operation of law, by agreement of the parties, or by an

order made on motion. There are limited exceptions to this: see, *e.g.*, *MediaTube*, above at para. 58 and cases therein.

[30] In order to prevent any possible delay to the appeal hearing, the appellants are directed to make their position on the inclusion of additional evidence known as soon as possible. If a motion needs to be brought, it must be brought quickly.

[31] The parties are encouraged to discuss these issues and any other issues concerning the conduct of this appeal with a view to advancing the objectives of Rule 3.

"David Stratas"

J.A.

SCHEDULE A

[ENGLISH TRANSLATION]

Date: 20190429

Docket: A-312-18

Ottawa, Ontario, April 29, 2019

Present: PELLETIER J.A.

BETWEEN:

DAVID LESSARD-GAUVIN

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

ORDER

WHEREAS the Attorney General of Canada filed, on January 21, 2019, a motion for an order requiring the appellant, Mr. Lessard-Gauvin, to provide a security for costs in the amount of $4,471.00, which equals to the expected costs in this case;

WHEREAS the appellant advised the Court Registry on February 22, 2019 that he intended to file a motion for a confidentiality order in regards to the following:

1. The affidavit of David Lessard-Gauvin, including the exhibits, that will be included in the appellant's reply record to the respondent's motion for security for his costs; and

2. The paragraphs of the written submissions including information from David Lessard-Gauvin's affidavit, that is, personal information and documents about the appellant;

WHEREAS on March 13, 2019, de Montigny J. directed the appellant to file [TRANSLATION] "a complete record including his affidavit and submissions, identifying clearly the portions for which he seeks a confidentiality order and the grounds for that motion";

WHEREAS de Montigny J. directed that the Registry and the respondent [TRANSLATION] "shall treat the documents and information the appellant has identified as confidential in accordance with rule 152 until the Court has disposed of this motion";

WHEREAS on March 28, 2019, the appellant filed a motion record consisting of 191 pages in response to de Montigny J.'s direction, in which the appellant explains that in order to reply to the respondent's motion, he will have to disclose his financial information and medical record to explain his unstable income, without specifying what information this includes;

WHEREAS the appellant argues that a confidentiality order is necessary because public access to his financial information would put him at risk of identity theft or fraud, scams and financial extortion, and access to his medical record is likely to result in discrimination, namely with regard to finding or maintaining employment;

WHEREAS the appellant insists that his motion is not a motion filed under rule 369 of the *Federal Courts Rules*, SOR/98-106 (the Rules);

WHEREAS, notwithstanding de Montigny J.'s direction, the appellant did not file a complete record including his affidavit and submissions identifying clearly the portions for which he is seeking a confidentiality order and the grounds for that motion, but instead provided only general statements that do not allow the Court to determine the merits of the motion for a confidentiality order pertaining to the appellant's personal information;

WHEREAS rule 360 provides that no notice of motion may be filed unless it is expressly made returnable at sittings fixed under rule 34; at a time and place appointed under subsection 35(2); or in writing, under rule 369;

WHEREAS rule 34 does not apply to the Federal Court of Appeal because it does not hold General Sittings for the hearing of motions;

WHEREAS the administrator of the Federal Court of Appeal is not bound by subsection 35(2) of the Rules to schedule upon request a time and place for the hearing of a motion and that she does not schedule such a time unless a judge of the Court considers a hearing necessary for the disposal of the motion;

WHEREAS the undersigned is not of the opinion that a hearing is necessary for the disposal of this motion;

WHEREAS the motion as filed does not comply with rule 360 and should have been dismissed by the Registry on that ground;

WHEREAS dismissing the motion on that ground does not promote the interests of justice;

WHEREAS the orders the appellant is seeking at paragraphs 1 to 9 of his motion are moot if this Court dismisses the motion for a confidentiality order;

WHEREAS the orders the appellant is seeking at paragraphs 10 to 27 of his motion depend on the outcome of the respondent's motion;

THE COURT ORDERS that:

1. The appellant's motion be dismissed in full with costs;

2. The deadline for filing the appellant's record be extended to May 15, 2019.

"J.D. Denis Pelletier"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-140-19
STYLE OF CAUSE:	SNC-LAVALIN GROUP INC., SNC-LAVALIN INTERNATIONAL INC. AND SNC-LAVALIN CONSTRUCTION INC. v. THE DIRECTOR OF PUBLIC PROSECUTIONS

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	STRATAS J.A.
DATED:	MAY 6, 2019

WRITTEN REPRESENTATIONS BY:

William McNamara	FOR THE APPELLANTS
David Migicovsky	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Torys LLP Toronto, Ontario	FOR THE APPELLANTS
Perley-Robertson, Hill & McDougall LLP Ottawa, Ontario	FOR THE RESPONDENT