Federal Court of Appeal | Cour d'appel fédérale

Date: 20190619

Docket: A-194-18

Citation: 2019 FCA 184

CORAM: **BOIVIN J.A.**
RENNIE J.A.
GLEASON J.A.

BETWEEN:

JOSEPH HUBERT FRANCIS

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Ottawa, Ontario, on June 19, 2019.

Judgment delivered from the Bench at Ottawa, Ontario, on June 19, 2019.

REASONS FOR JUDGMENT OF THE COURT BY: RENNIE J.A.

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REASONS FOR JUDGMENT
(Delivered from the Bench at Ottawa, Ontario, on June 19, 2019).

RENNIE J.A.

[1] This is an appeal of a decision of the Federal Court (2018 FC 623 *per* McDonald J.) dismissing the appellant's appeal under Rule 51(1) of the *Federal Courts Rules*, SOR/98-106. The subject of that appeal was an order of Prothonotary Tabib denying the appellant's motion for an order granting advance costs. The appellant submitted that advanced costs were necessary in order for him to pursue declaratory relief in an action commenced in the Federal Court. The

declarations, in turn, were necessary for his defence to charges laid against him under the *Atlantic Fishery Regulations*, 1985, SOR/86-21 and the *Fisheries Act*, R.S.C., 1985, c. F-14, for unauthorized fishing in the Gulf of St. Lawrence. The declarations sought in the statement of claim relate to his treaty and aboriginal rights as a Mi`kmaw and member of the Elsipogtog First Nation of New Brunswick.

[2] A discretionary decision of a prothonotary will only be reversed on an error of law or a palpable and overriding error regarding a question of fact or mixed fact and law: *Hospira Healthcare Corp. v. Kennedy Institute of Rheumatology*, 2016 FCA 215, [2017] 1 F.C.R. 331, at paras. 64-65, 79 [*Hospira*]. This standard of review applies equally when this Court reviews a Federal Court judge's consideration of a prothonotary's decision: *Hospira* at paras. 83-84.

[3] The prerequisites for an advance costs order were established in *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71 at para. 40, [2003] 3 S.C.R. 371 [*Okanagan*]:

> 1. The party seeking interim costs genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial — in short, the litigation would be unable to proceed if the order were not made.
>
> 2. The claim to be adjudicated is *prima facie* meritorious; that is, the claim is at least of sufficient merit that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means.
>
> 3. The issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases.

[4] Advance costs orders are exceptional and will only be made in special circumstances as a last resort where an injustice would otherwise be done to both the individual applicant and the

public at large (*Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2 at paras. 36-41, [2007] 1 S.C.R. 38 [*Little Sisters*]). A court, however, enjoys residual discretion to consider all relevant factors arising in a given case (*Little Sisters* at para. 37).

[5] The prothonotary found that the appellant had insufficient funding to pursue his declaratory action in the Federal Court. However, the prothonotary also noted a lack of evidence whether the appellant was eligible to obtain legal aid funding to defend summary conviction proceedings pending against him in Québec. As the prothonotary was not satisfied on the law and evidence before her that criminal proceedings were inadequate to resolve aboriginal rights issues of the type advanced by the appellant, the appellant failed to establish that there was no other realistic option for bringing the issues to trial. The appellant failed to meet the first criteria.

[6] The Federal Court judge agreed with this finding. The Federal Court motions judge also stressed the personal nature of the declaratory relief sought by the appellant. The requirement that the funding be required to pursue "major constitutional litigation", as expressed in *R. v. Caron*, 2011 SCC 5 at para. 19, [2011] 1 S.C.R. 78, and that the issues transcend those of the appellant, was not met. The appellant therefore also failed to meet the third criteria.

[7] Before this Court, the appellant reiterates his contention that summary conviction proceedings are inadequate for dealing with his treaty and aboriginal rights claims, and therefore do not represent the type of "other realistic option" contemplated by the Supreme Court in

Okanagan. He submits, for example, that the declaratory relief he seeks is not available in a summary conviction proceeding.

[8] Both the prothonotary and the motions judge concluded that as it was open to the appellant to advance his treaty and aboriginal rights in the summary conviction proceedings and as there was insufficient evidence demonstrating whether adequate funding was available to him in that forum, an advance costs order should not be granted. The onus was on the appellant to persuade the Court otherwise, which he failed to do. Applying *Hospira*, we see no error that would justify this Court's intervention.

[9] It is sufficient to dispose of the appeal on the basis that there was no error in the application of the first of the *Okanagan* criteria. It is not necessary to consider the arguments pertaining to the appellant's standing to raise collective treaty and aboriginal rights or the impact of denying the advance costs order in the public interest.

[10] We will dismiss the appeal with costs.

"Donald J. Rennie"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM AN ORDER OF THE FEDERAL COURT DATED June 15, 2018, DOCKET NUMBER T-474-17 (2018 FC 623)

DOCKET:	A-194-18
STYLE OF CAUSE:	JOSEPH HUBERT FRANCIS v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	JUNE 19, 2019
REASONS FOR JUDGMENT OF THE COURT BY:	BOIVIN J.A. RENNIE J.A. GLEASON J.A.
DELIVERED FROM THE BENCH BY:	RENNIE J.A.
DATED:	JUNE 19, 2019

APPEARANCES:

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