Federal Court of Appeal | Cour d'appel fédérale

Date: 20220118

Docket: A-99-21

Citation: 2022 FCA 9

[ENGLISH TRANSLATION]

CORAM: **GAUTHIER J.A.**
DE MONTIGNY J.A.
LEBLANC J.A.

BETWEEN:

CECILIA CONSTANTINESCU

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Matter dealt with in writing without appearance of the parties.

Judgment delivered at Ottawa, Ontario, on January 18, 2022.

REASONS FOR JUDGMENT BY: GAUTHIER J.A.

CONCURRED IN BY: DE MONTIGNY J.A.
LEBLANC J.A.

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REASONS FOR JUDGMENT

GAUTHIER J.A.

[1] In his motion made in writing, the Attorney General of Canada (AGC) is asking that this Court summarily dismiss this appeal because it is doomed to fail (*Dugré v. Canada (Attorney General)*, 2021 FCA 8, leave to appeal to SCC refused, 39614 (September 29, 2021)). I am of the opinion that this application can be disposed of in writing and that it is in the interests of justice to proceed in this manner (rules 3 and 369 of the *Federal Courts Rules*, SOR/98-106 (the Rules)).

[2] In the decision that is the subject of this appeal (2021 FC 213), the Federal Court dismissed the appellant's appeal from the order of Prothonotary Molgat dated February 12, 2021, striking her application for judicial review of an interlocutory decision by the Canadian Human Rights Tribunal (the Tribunal).

[3] This was the appellant's fourth application for judicial review challenging an interlocutory decision by the Tribunal to be struck on the basis that it was premature since the time that her complaint came before the Tribunal on May 31, 2017.

[4] The AGC submits that, as per the appellant's memorandum and notice of appeal, the appellant is not disputing the disposition of the Federal Court's order, which dismissed her appeal and thereby affirmed the striking out of her application for judicial review in T-471-20. She is not disputing that her application for judicial review was premature, nor that there are no exceptional circumstances providing a basis for finding that there is an exception to the important principle of non-interference by the courts in ongoing administrative proceedings.

[5] Rather, the appellant is asking that this Court allow the appeal and refer the matter back to the Federal Court to correct certain statements in paragraphs 4, 15, 22 and 24 of the Federal Court's reasons, which in the appellant's opinion are incorrect or were made in a subjective matter and affected her unfairly (for example, the word "*miné*" at paragraph 4 and the words "*ont nui*" at paragraph 24 of the French reasons, which were translated as "undermined" and "have detracted" respectively in the English version of the reasons). However, as I have stated, it is not being alleged that these so-called errors had an impact on the disposition of the order that is the

subject of this appeal. A party cannot appeal the reasons for an order rather than the disposition of that order.

[6] While this is not stated in the notice of appeal, it appears from the appellant's memorandum that the only part of the order that she is disputing is the awarding of costs in the amount of $1,500. According to the appellant, this is a denial of natural justice or a breach of the principles of procedural fairness. She is also relying on decisions rendered in various proceedings and contexts in which lower costs, or no costs, were awarded to the AGC. She points out that in some of these decisions, the AGC had not sought costs, whereas he is insisting on the awarding of high costs in her case, which is unfair and inappropriate given the circumstances.

[7] There is no doubt that the Federal Court judge was correct in dismissing the appeal, thus affirming the striking of this application for review ordered by the prothonotary. In so doing, the Federal Court applied the settled case law of this Court on premature applications. There were no exceptional circumstances in this case to allow for an exception to this principle. Furthermore, neither the Federal Court nor the prothonotary made a reviewable error (an error of law or a palpable and overriding error) in this regard. In fact, an interlocutory decision by the Tribunal dismissing an application for recusal submitted by the appellant remains an interlocutory decision that can be challenged when the Tribunal renders its final decision on the appellant's complaint (*Black v. Canada (Attorney General)*, 2013 FCA 201, at paras. 9 and 10 and *Air Canada v. Lorenz*, [2000] 1 FC 494). This is the same principle that was already explained to the

appellant both by the Federal Court and this Court (2019 FCA 315) within the context of her previous applications for review.

[8] Therefore, even if the appellant could establish that there was any inaccuracy or assessment error as is alleged in her memorandum and written submissions in response to the AGC's motion, none of these inaccuracies or errors could affect the well-foundedness of the finding that the application for judicial review was premature and therefore had to be struck. This is why she is not disputing the disposition of the judgment in this regard. I am satisfied that the appeal from the Federal Court order dismissing the appeal in T-471-20 is doomed to fail.

[9] As for the appeal on the awarding of costs, it is obvious that the Federal Court had to address the AGC's request for costs of $1,500. This is a discretionary decision that is reviewable on the standards of review set forth in *Housen v. Nicholaisen*, 2002 SCC 33.

[10] Awarding costs when the appellant had the opportunity to present her case before the Federal Court is not a breach of the principle of natural justice or of procedural justice. The assessment of the relevant factors is an issue that is subject to the standard of palpable and overriding error. This Court cannot substitute its own assessment or discretion for that of the Federal Court. It is a very high standard that is difficult to meet.

[11] Several relevant factors can be taken into account by the Federal Court in the exercise of its discretion (see rule 400). Generally, the awarding of costs is the natural consequence of the outcome of a proceeding. The losing party assumes the costs of the winning party. I would point

out that costs were awarded in the appellant's other applications for judicial review that were struck out for the same reasons, and that the amount set by the prothonotary ($700) was higher than the amount awarded by Justice Lafrenière in two previous files ($500). This Court also awarded costs in A-420-18 after dismissing the appeal that also included a challenge with respect to the costs awarded by the Federal Court. As no amount is specified by this Court, these costs are to be assessed at Column III of Tariff B of the Rules. Given the value of the units used in Tariff B and the fact that this appeal was dismissed after a hearing, it is quite clear that these costs will be higher than the amounts awarded prior to December 2019, when this Court issued that judgment.

[12] The amounts set out in Tariff B and the factors described above are sufficient in and of themselves to justify the costs sought by and awarded to the AGC.

[13] The Federal Court noted in its reasons that the appellant had filed eight proceedings at the Federal Court and two proceedings at the Court of Appeal (paragraph 5), which amounts to 10 applications since 2018 (paragraph 24). The Federal Court pointed out that these proceedings all required the use of public funds and judicial resources and detracted from the handling of the applicant's complaint. I understand from this that the Federal Court was rejecting the appellant's argument that she should not be required to pay costs under the circumstances of this case.

[14] The appellant challenges the description of the 10 proceedings at paragraph 24, indicating that they are not all applications for judicial review or appeals. She is not disputing that she did initiate 10 proceedings. For that matter, a simple review of the public registry of the Federal

Courts confirms it (T-1453-20, T-1874-19, T-1681-19, T-1125-19, T-102-19, T-1571-18, T-976-18, T-471-20, A-287-19 and A-420-18).

[15] It is unnecessary to debate the issue of whether, for example, an application for review under section 41 of the *Privacy Act*, R.S.C. 1985, c. P-21 could validly be described at paragraph 24 as an application for judicial review. This has no impact on whether the present appeal is doomed to fail as this is clearly a proceeding before the Federal Court described in paragraph 5 of the Federal Court's reasons; this cannot constitute a palpable and overriding error.

[16] Given the applicable standard of review, this Court cannot substitute its assessment of the facts to determine whether the various proceedings brought by the appellant did or did not detract from the handling of her complaint before the Tribunal. It is clear that, in fact, the handling of the complaint was stayed or delayed (appellant's memorandum at paras. 127–129 and 172) and that disclosure took a long time.

[17] In any event, even if I took for granted that the 10 proceedings in no way detracted from the handling of the complaint, this would not constitute an overriding error. As I have stated, the other factors described above were sufficient to justify the costs awarded in this case.

[18] The appellant cannot rely on her status as an unrepresented party or as a victim of the reprehensible act alleged in her complaint before the Tribunal to be exempt from the usual consequences of the proceedings that she has brought before the Court. The fact that, in other proceedings and other contexts, a party was ordered to pay a lower amount or that the AGC did

not request costs is not an argument justifying the intervention of this Court. I also note that if the appeal were not summarily dismissed with respect to the awarding of costs, the appellant would run the risk of being awarded higher costs than those that seem appropriate to me in this case at this stage of the proceedings.

[19] I therefore propose that the AGC's motion be allowed and that the appeal be dismissed.

[20] The AGC is seeking costs of $2,500. In my opinion, this amount seems too high at this stage of the proceedings. To avoid additional costs related to the assessment, I propose that costs be awarded in the all-inclusive amount of $500.

"Johanne Gauthier"
J.A.

"I agree.
Yves de Montigny J.A."

"I agree.
René LeBlanc J.A."

Certified true translation
Melissa Paquette, Jurilinguist

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-99-21

MATTER DEALT WITH IN WRITING WITHOUT APPEARANCE OF THE PARTIES

STYLE OF CAUSE:	CECILIA CONSTANTINESCU v. ATTORNEY GENERAL OF CANADA
REASONS FOR JUDGMENT BY:	GAUTHIER J.A.
CONCURRED IN BY:	DE MONTIGNY J.A. LEBLANC J.A.
DATED:	JANUARY 18, 2022

WRITTEN SUBMISSIONS BY:

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