Federal Court of Appeal | Cour d'appel fédérale

Date: 20221215

Docket: A-342-21

Citation: 2022 FCA 219

CORAM: **WEBB J.A.**
LEBLANC J.A.
GOYETTE J.A.

BETWEEN:

MARTIN DUHAMEL

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard by online video conference hosted by the Registry on November 30, 2022.

Judgment delivered at Ottawa, Ontario, on December 15, 2022.

REASONS FOR JUDGMENT BY: WEBB J.A.

CONCURRED IN BY: LEBLANC J.A.
GOYETTE J.A.

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REASONS FOR JUDGMENT

WEBB J.A.

[1] The Acting Executive Director of the Canadian Judicial Council (CJC) dismissed Mr. Duhamel's complaint against a Judge of the British Columbia Supreme Court who dismissed his petitions for judicial review related to Coast Capital Savings Credit Union's application to become a federally regulated credit union. Mr. Duhamel brought an application for judicial

review of this decision of the Acting Executive Director of the CJC. The Federal Court dismissed this application for judicial review (2021 FC 1255). Mr. Duhamel then filed this appeal.

[2] This appeal was originally scheduled to be heard on November 29, 2022. A few days prior to November 29, 2022, Mr. Duhamel submitted his affidavit sworn on April 20, 2022 and a document identified as "Appellant's Additional Submissions". He indicated that he wanted to bring an oral motion before this Court.

[3] At the commencement of the hearing of this appeal, Mr. Duhamel confirmed that he was seeking to bring an oral motion before the Court. He indicated that his motion would be for directions under Rule 60 of the *Federal Courts Rules*, SOR/98-106, with respect to certain documents included in the appeal book. He also submitted that the certified record of the CJC was incomplete.

[4] Rule 60 allows the Court to permit a party who has not complied with the Rules or who has a gap in the proof of their case to remedy the problem:

60 At any time before judgment is given in a proceeding, the Court may draw the attention of a party to any gap in the proof of its case or to any non-compliance with these Rules and permit the party to remedy it on such conditions as the Court considers just.	**60** La Cour peut, à tout moment avant de rendre jugement dans une instance, signaler à une partie les lacunes que comporte sa preuve ou les règles qui n'ont pas été observées, le cas échéant, et lui permettre d'y remédier selon les modalités qu'elle juge équitables.

[5] In this case, presumably Mr. Duhamel is relying on the authority of the Court to permit a party to remedy an alleged non-compliance with the Rules.

[6] Rule 359 stipulates how a motion is to be brought before this Court:

359 Except with leave of the Court, a motion shall be initiated by a notice of motion, in Form 359, setting out	**359** Sauf avec l'autorisation de la Cour, toute requête est présentée au moyen d'un avis de requête établi selon la formule 359 et précise :
(*a*) in respect of a motion other than one brought under rule 369 or 369.2, the time, place and estimated duration of the hearing of the motion;	*a*) sauf s'il s'agit d'une requête présentée selon la règle 369 ou 369.2, la date, l'heure, le lieu et la durée prévue de l'audition de la requête;
(*b*) the relief sought;	*b*) la réparation recherchée;
(*c*) the grounds intended to be argued, including a reference to any statutory provision or rule to be relied on; and	*c*) les motifs qui seront invoqués, avec mention de toute disposition législative ou règle applicable;
(*d*) a list of the documents or other material to be used for the purposes of the motion.	*d*) la liste des documents et éléments matériels qui seront utilisés dans le cadre de la requête.

[7] Rule 359 stipulates that, except with leave of the Court, a motion is to be initiated by a notice of motion in Form 359. The document identified as Appellant's Additional Submissions is not in Form 359. In particular, the document does not identify the relief sought nor does it include any reference to any statutory provision or Rule that Mr. Duhamel would be relying on. It was only during the hearing of this appeal that Mr. Duhamel indicated that he was relying on Rule 60 and that he was seeking directions to have certain documents removed from the appeal book. Since Mr. Duhamel did not seek leave to initiate a motion otherwise than by a notice of motion in Form 359, the motion should be quashed and the Appellant's Additional Submissions should not be filed.

[8] In any event, even if this motion were properly before this Court, there are other reasons why it would be dismissed. Mr. Duhamel indicated that the direction he was seeking was related to the inclusion of two documents in the appeal book that, in his view, should not have been included (Tab 5 – Certified Record of the CJC and Tab 7 - *Canadian Judicial Council Procedures for the Review of Complaints or Allegations about Federally Appointed Judges*, effective July 29, 2015). However, the contents of the appeal book were settled by an earlier Order of this Court dated March 1, 2022. That Order specifically identified the documents in question as documents that were to be included in the appeal book. Mr. Duhamel now seeks to relitigate this issue.

[9] In *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, the Supreme Court of Canada outlined a number of techniques developed to prevent an abuse of the decision-making process:

> [20] The law has developed a number of techniques to prevent abuse of the decision-making process. One of the oldest is the doctrine estoppel *per rem judicatem* with its roots in Roman law, the idea that a dispute once judged with finality is not subject to relitigation: *Farwell v. The Queen* (1894), 22 S.C.R. 553, at p. 558; *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248, at pp. 267-68. The bar extends both to the cause of action thus adjudicated (variously referred to as claim or cause of action or action estoppel), as well as precluding relitigation of the constituent issues or material facts necessarily embraced therein (usually called issue estoppel): G. S. Holmested and G. D. Watson, Ontario Civil Procedure (loose-leaf), vol. 3 Supp., at 21 s. 17 et seq. Another aspect of the judicial policy favouring finality is the rule against collateral attack, i.e., that a judicial order pronounced by a court of competent jurisdiction should not be brought into question in subsequent proceedings except those provided by law for the express purpose of attacking it: *Wilson v. The Queen*, [1983] 2 S.C.R. 594; *R. v. Litchfield*, [1993] 4 S.C.R. 333; *R. v. Sarson*, [1996] 2 S.C.R. 223.

[10] The Order dated March 1, 2022 stipulated that the documents in question (Tabs 5 and 7 of the appeal book) were to be included in the appeal book. To now attempt to have these documents removed from the appeal book is an impermissible relitigation of the same issue (issue estoppel). This would be a sufficient basis to dismiss the motion.

[11] Mr. Duhamel also questioned whether the certified record of the CJC was complete as only two documents were included in this record – the letter to Mr. Duhamel indicating that his complaint did not raise an issue of conduct on the part of the particular Judge and a copy of the document "Ethical Principles for Judges".

[12] Rule 317 provides that a party may request material relevant to an application for judicial review that is in the possession of the particular tribunal:

317 (1) A party may request material relevant to an application that is in the possession of a tribunal whose order is the subject of the application and not in the possession of the party by serving on the tribunal and filing a written request, identifying the material requested.	**317 (1)** Toute partie peut demander la transmission des documents ou des éléments matériels pertinents quant à la demande, qu'elle n'a pas mais qui sont en la possession de l'office fédéral dont l'ordonnance fait l'objet de la demande, en signifiant à l'office une requête à cet effet puis en la déposant. La requête précise les documents ou les éléments matériels demandés.

[13] The request for the material in the possession of the CJC does not include the material that is in Mr. Duhamel's possession and, therefore, the CJC was not obligated to include any material submitted by Mr. Duhamel to the CJC (assuming he retained a copy of the material he submitted). It is far from clear what other material would be missing since Mr. Duhamel's

complaint was presumably in his possession and the decision of the Acting Executive Director of the CJC was based on this complaint. The question for the CJC was whether Mr. Duhamel had provided a sufficient basis, in his complaint, to warrant further consideration by the CJC.

[14] In any event, the application for judicial review was made to the Federal Court. The certified record of the CJC was produced in relation to this judicial review application. Any issues concerning the completeness of the certified record of the CJC should have been addressed at the Federal Court. There is no indication that Mr. Duhamel, at the Federal Court, raised the issue of whether the certified record of the CJC was incomplete. This is an appeal from the decision of the Federal Court and it is too late to now question whether the certified record of the CJC is complete.

[15] As a result, I would quash Mr. Duhamel's motion, with costs.

[16] With respect to the affidavit submitted by Mr. Duhamel, this was also the subject of a previous Direction of this Court dated May 19, 2022. This Direction stipulated that the affidavit was not to be filed "as it seeks to improperly augment the Appeal Book and contains some of the materials that this Court determined should not be included in the Appeal Book in *Duhamel v. Attorney General of Canada*, 2022 FCA 40".

[17] Mr. Duhamel submits that he is now attempting to resubmit this affidavit for a different reason, *i.e.* as support for his motion. Since his motion is not properly before this Court and should be quashed, this affidavit should not be filed. As well, this affidavit is still an attempt to

file documents this Court already determined are not to be included in the appeal book and therefore is an attempt to circumvent or relitigate the Order dated March 1, 2022. This is an additional reason why the affidavit should not be filed.

[18] With respect to Mr. Duhamel's appeal, this is an appeal from a decision of the Federal Court on a judicial review application. The Supreme Court of Canada in *Northern Regional Health Authority v. Horrocks*, 2021 SCC 42, at paragraph 10, referred to its earlier decision in *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36. In *Agraira*, the approach to be taken by an appellate court on an appeal from a decision of a lower court on a judicial review application was that the appellate court was to step into the shoes of the lower court. After citing the passage from *Agraira* that outlined this approach, the Supreme Court of Canada in *Horrocks* noted:

> This approach accords no deference to the reviewing judge's application of the standard of review. Rather, the appellate court performs a *de novo* review of the administrative decision (D.J.M. Brown, with the assistance of D. Fairlie, *Civil Appeals* (loose-leaf), at para. 14:45).

[19] The standard of review for the decision of the Acting Executive Director of the CJC is reasonableness (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 (*Vavilov*)).

[20] Mr. Duhamel based his complaint to the CJC on his allegation that the Judge in question was biased and that he failed to provide adequate reasons. The decision of the Acting Executive Director of the CJC dismissing his complaint, must be read in light of the particular allegations

raised by Mr. Duhamel, which are summarized in paragraph 6 of the reasons of the Federal Court:

> … [Mr. Duhamel] alleged that [the Judge]
>
> a. Did not provide reasons in respect of:
>
> i. what the Applicant calls a “lifetime gag order” issued against him;
>
> ii. the case management schedule;
>
> iii. all of the decisions to exclude evidence in the course of the case management;
>
> iv. deciding not to give notice of the Petitions to parties the Applicant claims would have been affected by their outcome; and
>
> v. concluding that the Petitions' grievances pertained to the actions of Coast Capital rather than [the Financial Institutions Commission].
>
> b. Exhibited bias against the Applicant in respect of the above-noted alleged failures to provide reasons, and in considering but declining to decide the issue of the Applicant's standing to bring the Petitions.

[21] The Acting Executive Director of the CJC found that the allegations raised by Mr. Duhamel were judicial matters. As a result, Mr. Duhamel had not raised any conduct issue that would warrant further consideration by the CJC.

[22] Mr. Duhamel submitted that the Acting Executive Director’s decision is not reasonable on the basis that any allegation of bias raises a conduct issue that should be considered by the CJC. He also submitted that in conducting judicial review, this Court should not look at the

underlying complaint he had made but rather only consider whether bias should always be considered a conduct matter for CJC to review.

[23] In *Vavilov*, the Supreme Court stated that reviewing courts are to read the administrative decision in light of the context of the proceedings, which would include the submissions of the parties:

> [94] The reviewing court must also read the decision maker's reasons in light of the history and context of the proceedings in which they were rendered. For example, the reviewing court might consider the evidence before the decision maker, the submissions of the parties, publicly available policies or guidelines that informed the decision maker's work, and past decisions of the relevant administrative body. This may explain an aspect of the decision maker's reasoning process that is not apparent from the reasons themselves, or may reveal that an apparent shortcoming in the reasons is not, in fact, a failure of justification, intelligibility or transparency. Opposing parties may have made concessions that had obviated the need for the decision maker to adjudicate on a particular issue; the decision maker may have followed a well-established line of administrative case law that no party had challenged during the proceedings; or an individual decision maker may have adopted an interpretation set out in a public interpretive policy of the administrative body of which he or she is a member.
>
> [emphasis added]

[24] In this case, Mr. Duhamel’s submission to the CJC was his complaint to the CJC. His complaint is part of the context in which the decision of the Acting Executive Director of the CJC was rendered. Therefore, it is to be reviewed by this Court to determine if that decision was reasonable.

[25] With respect to whether an allegation of bias should always be a matter for review by the CJC, the Supreme Court of Canada in *Moreau-Bérubé v. New Brunswick (Judicial Council)*,

2002 SCC 11, noted that it is the exceptional case that would warrant the intervention of a judicial council:

> [55] While the Canadian Judicial Council and provincial judicial councils receive many complaints against judges, in most cases these are matters properly dealt with through the normal appeal process. There have been very few occasions where the comments of a judge, made while acting in a judicial capacity, could not be adequately dealt with through the appeal process and have necessitated the intervention of a judicial council (see: Marshall Report, *supra*, where the Canadian Judicial Council inquiry panel concluded that the Nova Scotia Court of Appeal had been "inappropriately harsh in their condemnation of the victim of an injustice they were mandated to correct" (p. 35) after the Court of Appeal had noted, among other things, that any injustice suffered by Mr. Marshall was "more apparent than real" (p. 36); *Report to the Canadian Judicial Council by the Inquiry Committee appointed under subsection 63(1) of the Judges Act to conduct a public inquiry into the conduct of Mr. Justice Jean Bienvenue of the Superior Court of Quebec in R. v. T. Théberge* (1996), where removal from office was recommended, mainly for comments made while presiding over a sentencing hearing; and, Canadian Judicial Council file 98-128, where the Canadian Judicial Council released a letter expressing strong disapproval for comments made by a justice of the Alberta Court of Appeal in reasons delivered while sitting in his capacity as a judge in *Vriend v. Alberta* (1996), 1996 ABCA 87 (CanLII), 132 D.L.R. (4th) 595, and *R. v. Ewanchuk* (1998), 1998 ABCA 52 (CanLII), 13 C.R. (5th) 324).
>
> [emphasis added]

[26] The Supreme Court of Canada also drew a distinction between matters than can be addressed through the appeal process and those that "threaten the integrity of the judiciary as a whole" and would thus require the intervention of the judicial council:

> [60] Part of the expertise of the Judicial Council lies in its appreciation of the distinction between impugned judicial actions that can be dealt with in the traditional sense, through a normal appeal process, and those that may threaten the integrity of the judiciary as a whole, thus requiring intervention through the disciplinary provisions of the Act. …

[27] As also noted by this Court in *Consentino v. Canada (Attorney General)*, 2021 FCA 193, at paragraph 5, "[a]n unbroken line of jurisprudence suggests that matters that can be appealed are not the proper subject of a judicial conduct complaint".

[28] Mr. Duhamel acknowledged at the hearing of his appeal that the matters about which he was complaining could have been the subject of an appeal. His complaint of bias is based on what Mr. Duhamel considers inadequate reasons and a failure to decide the issue of his standing to bring the Petitions before the British Columbia Supreme Court. It was reasonable for the Acting Executive Director of the CJC to find that these matters could be the subject of an appeal and the particular matters that were the subject of Mr. Duhamel's complaint did not warrant any further consideration by the CJC.

[29] As a result, the decision of the Acting Executive Director of the CJC to dismiss Mr. Duhamel's complaint is reasonable and I would dismiss his appeal with costs.

"Wyman W. Webb"
J.A.

"I agree.
René LeBlanc J.A."

"I agree.
Nathalie Goyette J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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