Federal Court of Appeal  Cour d'appel fédérale

Date: 20140605

Docket: A-149-14

Citation: 2014 FCA 145

CORAM: **TRUDEL J.A.**
STRATAS J.A.
WEBB J.A.

BETWEEN:

ONTARIO FEDERATION OF ANGLERS AND HUNTERS

Appellant

- and -

ALDERVILLE INDIAN BAND now known as Mississaugas of Alderville First Nation, GIMAA JIM BOB MARSDEN suing on his own behalf and on behalf of the members of the Mississaugas of Alderville First Nation, BEAUSOLEIL INDIAN BAND now known as Beausoleil First Nation, GIMAA RODNEY MONAGUE suing on his own behalf and on behalf of the members of the Beausoleil First Nation, CHIPPEWAS OF GEORGINA ISLAND INDIAN BAND now known as Chippewas of Georgina Island First Nation, GIMAANINIIKWE DONNA BIG CANOE suing on her own behalf and on behalf of the members of the Chippewas of Georgina Island First Nation, CHIPPEWAS OF RAMA INDIAN BAND now known as Mnjikaning First Nation, GIMAANINIIKWE SHARON STINSON-HENRY suing on her own behalf and on behalf of the members of the Mnjikaning First Nation, CURVE LAKE INDIAN BAND now known as Curve Lake First Nation, GIMAA KEITH KNOTT suing on his own behalf and on behalf

of the members of the Curve Lake First Nation, HIAWATHA INDIAN BAND now known as Hiawatha First Nation, GIMAANINIIKWE LAURIE CARR suing on her own behalf and on behalf of the members of the Hiawatha First Nation, MISSISSAUGAS OF SCUGOG INDIAN BAND now known as Mississaugas of Scugog Island First Nation, GIMAANINIIKWE TRACY GAUTHIER suing on her own behalf and on behalf of the members of the Mississaugas of Scugog Island First Nation, HER MAJESTY THE QUEEN and HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

Respondents

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on June 5, 2014.

REASONS FOR ORDER BY: STRATAS J.A.

CONCURRED IN BY: TRUDEL J.A.
WEBB J.A.

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HIAWATHA INDIAN BAND now known as Hiawatha First Nation, GIMAANINIIKWE LAURIE CARR suing on her own behalf and on behalf of the members of the Hiawatha First Nation, MISSISSAUGAS OF SCUGOG INDIAN BAND now known as Mississaugas of Scugog Island First Nation, GIMAANINIIKWE TRACY GAUTHIER suing on her own behalf and on behalf of the members of the Mississaugas of Scugog Island First Nation, HER MAJESTY THE QUEEN and HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

Respondents

REASONS FOR ORDER

STRATAS J.A.

[1] The appellant appeals from the order of the Federal Court (*per* Justice Mandamin) dated February 18, 2014: 2014 FC 155. The Federal Court dismissed the appellant's motion for leave to intervene in *Alderville First Nations et al. v. Canada et al.* (court file T-195-92).

[2] Three motions are before me:

- *The timeliness motion*. The respondents other than the federal Crown and Ontario Crown (the "respondent Indian Bands") move for an order striking the notice of appeal on the ground that it was filed late.

- *The motion attacking various grounds of appeal.* Both the respondent Indian Bands and the Ontario Crown move against various portions of the notice of

appeal primarily on the ground that they are scandalous, frivolous, vexatious and irrelevant to the issues before the Court.

- *The motion to determine contents of the appeal book*. The appellant seeks an order allowing it to include various materials into the appeal book.

[3] I would strike the notice of appeal on the ground that it has been filed late and the appellant is not entitled to an extension of time. Accordingly, it is not necessary to consider the motions concerning the propriety of the grounds of appeal or the contents of the appeal book.

A. Background facts

[4] The Federal Court pronounced its judgment on the appellant's motion to intervene on February 18, 2014. The appellant presented its notice of appeal for filing 22 days later, on March 12, 2014.

[5] Whether or not the notice of appeal was in time depends on whether the Federal Court's judgment is final or interlocutory. The deadline for the former is 30 days (excluding July and August): paragraph 27(2)(*b*) of the *Federal Courts Act*. The deadline for the latter is 10 days: paragraph 27(2)(*a*) of the *Federal Courts Act*.

[6] The Registry recognized that if the notice of appeal concerns an interlocutory matter, it was late. However, if it concerns a final matter, it was in time. The Registry was unsure whether

the Federal Court's judgment is final or interlocutory. So it referred the notice of appeal to a judge of this Court for direction.

[7] On March 19, 2014, this Court (*per* Justice Webb) directed that the notice of appeal be accepted provisionally for filing. However, this Court preserved the right of any party to move against the notice of appeal on the ground that it concerns an interlocutory matter and was filed late. The respondent Indian Bands have brought that motion.

B. The composition of this Court for the purposes of this motion

[8] Had the notice of appeal not been filed, a single judge could have ruled on the propriety of its filing under Rule 72 or Rule 74. However, once a notice of appeal is filed, there is an appeal before the Court. An order quashing the notice of appeal and ordering its removal from the court file terminates the appeal. To terminate an appeal, a panel of three judges is required. See *Rock-St Laurent v. Canada (Citizenship and Immigration)*, 2012 FCA 192 at paragraph 30.

[9] Accordingly, a panel of judges has been constituted to determine the motion to strike the notice of appeal.

C. The parties' positions on the motion to strike the notice of appeal

[10] The respondent Indian Bands say that the notice of appeal, presented for filing, concerns an interlocutory matter and, thus, was filed late.

[11] Both the appellant and the federal Crown say that the notice of appeal concerns a final matter and, thus, was filed in time. However, if it concerns an interlocutory matter, the appellant asks this Court to exercise its discretion *nunc pro tunc* in favour of granting an extension of time for filing. The appellant, the respondent Indian Bands and the federal Crown agree that this Court has the power to grant such an extension of time under subsection 27(2) of the *Federal Courts Act*. The Ontario Crown takes no position on this motion.

D. Is the Federal Court's order interlocutory or final?

[12] The appellant and the federal Crown both cite *Hollinger Inc. v. Ravelston Corp.*, 2008 ONCA 207, [2008] O.J. No. 1126 (C.A.) on the issue whether the Federal Court's order is interlocutory or final.

[13] Hollinger deals with Ontario's *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (as amended). The case at bar arises under the *Federal Courts Act*, R.S.C. 1985, c. F-7 (as amended) and the *Federal Courts Rules*, SOR/98-106 (as amended) (collectively, the "federal procedural rules"). Cases interpreting Ontario's rules are often of little assistance when we interpret federal procedural rules.

[14] Our task in interpreting federal procedural rules is to look at the exact words used in those rules – not Ontario's rules – and interpret them in light of related provisions, especially definition provisions. We must also examine the function served by those words in the wider

context of the rules, and the purposes behind the particular text and the rules as a whole. See *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559.

[15] Ontario's rules and the federal procedural rules do draw distinctions between final and interlocutory matters. But that is where the similarity ends.

[16] In the two sets of rules, the final and interlocutory concepts play different roles and further different purposes. Under Ontario's rules, the interlocutory-final distinction can affect which Court one proceeds to and whether one must seek leave to appeal; under the federal procedural rules, the interlocutory-final distinction affects only the deadline for filing a notice of appeal.

[17] *Hollinger*, *supra*, decided under Ontario's rules, is in part based on the role the interlocutory-final distinction plays in those rules.

[18] In *Hollinger*, a newspaper unsuccessfully moved for access to a court file in the face of a previously-imposed protective order. The Court of Appeal ruled that the order dismissing the newspaper's motion was final. It founded its decision on the fact that if the order were interlocutory, there would be real problems for the newspaper in exercising its right to appeal, such as having to bring multiple appeals in different courts because of the operation of provisions of the *Courts of Justice Act*: *Hollinger* at paragraphs 48-51. This problem does not exist under our federal procedural rules.

[19] *Hollinger* is part of a line of jurisprudence in Ontario to the effect that in determining whether an order is final or interlocutory one must look at the effect of the order on the party to whom it applies. In *Hollinger*, the effect of the dismissal of the motion was final on the newspaper.

[20] That proposition – that one must look at the effect of the order on the party to whom it applies – is foreclosed by the specific wording in the federal procedural rules, specifically sections 2 and 27 of the *Federal Courts Act*, *supra*. The relevant portions of these sections are as follows:

2. (1) In this Act,	**2.** (1) Les définitions qui suivent s'appliquent à la présente loi.
"final judgment" means any judgment or other decision that determines in whole or in part any substantive right of any of the parties in controversy in any judicial proceeding;	« jugement définitif » Jugement ou autre décision qui statue au fond, en tout ou en partie, sur un droit d'une ou plusieurs des parties à une instance.
…	…
27. (1) An appeal lies to the Federal Court of Appeal from any of the following decisions of the Federal Court:	**27.** (1) Il peut être interjeté appel, devant la Cour d'appel fédérale, des décisions suivantes de la Cour fédérale :
(*a*) a final judgment;	a) jugement définitif;
(*b*) a judgment on a question of law determined before trial;	b) jugement sur une question de droit rendu avant l'instruction;
(*c*) an interlocutory judgment; or	c) jugement interlocutoire;

(*d*) a determination on a reference made by a federal board, commission or other tribunal or the Attorney General of Canada.

d) jugement sur un renvoi d'un office fédéral ou du procureur général du Canada.

…

…

(2) An appeal under this section shall be brought by filing a notice of appeal in the Registry of the Federal Court of Appeal

(2) L'appel interjeté dans le cadre du présent article est formé par le dépôt d'un avis au greffe de la Cour d'appel fédérale, dans le délai imparti à compter du prononcé du jugement en cause ou dans le délai supplémentaire qu'un juge de la Cour d'appel fédérale peut, soit avant soit après l'expiration de celui-ci, accorder. Le délai imparti est de :

(*a*) in the case of an interlocutory judgment, within 10 days after the pronouncement of the judgment or within any further time that a judge of the Federal Court of Appeal may fix or allow before or after the end of those 10 days; and

a) dix jours, dans le cas d'un jugement interlocutoire;

(*b*) in any other case, within 30 days, not including any days in July and August, after the pronouncement of the judgment or determination appealed from or within any further time that a judge of the Federal Court of Appeal may fix or allow before or after the end of those 30 days.

b) trente jours, compte non tenu de juillet et août, dans le cas des autres jugements.

[21] To be a "final judgment," the Federal Court's order would have to determine "in whole or in part any substantive right of any of the parties" in "any judicial proceeding": section 2 of the *Federal Courts Act*. The word "proceeding" is consistently used in the *Federal Courts Act* to mean the matter before the Court – such as an action or application – and not a component of the matter, such as a motion: see, *e.g.*, subsections 17(4) and 17(5), section 23, and subsections 36(1), 36(5) and 39(1) of the *Federal Courts Act*.

[22] In this case, the "proceeding" is the action. The appellant is not a party to the action. The parties to the action are the respondent Indian Bands, the federal Crown and the Ontario Crown.

[23] Further, the appellant's substantive rights are not in issue. Intervention is not a substantive right. It is a procedural right to make submissions granted to a party for reasons quite independent of whether the party itself is asserting a substantive right. Interveners do not need to have, and often do not have, a substantive right in order to intervene. See *Canada (Attorney General) v. Pictou Landing First Nation*, 2014 FCA 21.

[24] In this case, the dismissal of the appellant's motion to intervene did not determine any of the appellant's substantive rights. Instead, it denied the appellant the procedural right to have a say in a proceeding where others' substantive rights are being determined.

[25] Put another way, the Federal Court's order determines the appellant's participatory claim, not a right to its own remedy under a cause of action under the Constitution, legislation or the common law.

[26] My conclusions in this regard are supported by earlier decisions in this Court, all to the effect that an order being appealed which does not determine substantive rights is interlocutory: *Reebok Canada v. Canada (Minister of National Revenue)* (1995), 179 N.R. 300 (F.C.A.) (an order granting leave to appeal); *Simpson Strong-Tie Co. v. Peak Innovations Inc.*, 2008 FCA 235 and 2008 FCA 236 (an order refusing to amend a statement of opposition); *Canada (Attorney General) v. Hennelly* (1995), 185 N.R. 389 (F.C.A.) (an order refusing an extension of time to file an application record). In particular, *Simpson Strong-Tie Co.* and *Hennelly* are rather analogous on their facts to the case at bar.

[27] Therefore, I conclude that the Federal Court's order was not a "final judgment." Instead, it was interlocutory. The appellant had to file its notice of appeal ten days from the pronouncement of the Federal Court's order. It failed to meet that deadline. Unless the appellant is entitled to an extension of time, the notice of appeal should be removed from the court file.

E. Is the appellant entitled to an extension of time?

[28] Paragraph 27(2)(*a*) provides that a judge of this Court may allow an appellant an extension of time to file its notice of appeal.

[29] The following factors bear upon the question whether this Court should grant the extension of time:

(1) a continuing intention to pursue the appeal;

(2) potential merit to the appeal;

(3) the absence of prejudice to any party to the appeal; and

(4) a reasonable explanation for the delay.

See *Grewal v. Canada (Minister of Employment & Immigration)*, [1985] 2 F.C. 263 (C.A.); *Canada (Attorney General) v. Larkman*, 2012 FCA 204 at paragraph 62. The importance of each factor depends upon the particular circumstances of the case.

[30] Further, not all of these four factors have to be resolved in the appellant's favour. For example, "a compelling explanation for the delay may lead to a positive response even if the case against the judgment appears weak, and equally a strong case may counterbalance a less satisfactory justification for the delay": *Grewal, supra* at page 282. In certain cases, particularly in unusual cases, other questions may be relevant. The overriding consideration is that the interests of justice be served. See generally *Grewal*, at pages 278-279.

[31] Whether the appellant had a continuing intention to appeal and whether the appellant has a reasonable explanation calls for the submission of evidence. The appellant's mere say-so in its written representations is not evidence. Here, the appellant has not filed an affidavit in support of granting an extension of time. The Court has no evidence on these points.

[32] Further, in my view, the appellant has failed to establish that the appeal has potential merit.

[33] The appellant takes no issue with the legal test the Federal Court applied. Instead, fairly characterized, the appellant contests vigorously the Federal Court's exercise of discretion.

[34] The Federal Court's exercise of discretion was suffused by factual appreciation. Thus, in this appeal, the standard of review will be palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. Palpable and overriding error is a high test:

> Palpable and overriding error is a highly deferential standard of review: *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401; *Peart v. Peel Regional Police Services* (2006), 217 O.A.C. 269 (C.A.) at paragraphs 158-59; [*Waxman v. Waxman* (2004), 186 O.A.C. 201 at paragraphs 278-84]. "Palpable" means an error that is obvious. "Overriding" means an error that goes to the very core of the outcome of the case. When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall.

(*Canada v. South Yukon Forest Corporation*, 2012 FCA 165.)

[35] The Federal Court offered many findings in support of its order, including the following:

- the issue on which the appellant sought to intervene is not present in the action;

- the appellant is trying to introduce a new issue in the action;

- the Federal Court does not need the appellant's assistance in determining whether *R. v. Howard*, [1994] 2 S.C.R. 299 is binding upon it;

- the appellant knew of the action before trial but delayed bringing its motion until well after the trial started;

- the other parties will suffer prejudice arising from added complexity and cost; and

- the appellant's assistance is not needed in light of the large, sophisticated parties already before the Court.

[36] The appellant does not address many of these findings, let alone explain how they are vitiated by palpable and overriding error. Instead, it seeks to reargue the merits of its motion – and indeed the merits of its position in the action if it were allowed to intervene.

[37] The appellant also submits that the Federal Court was biased because it failed to intervene in response to the aggressive rhetoric of counsel against the motion. The test for bias is a high one and the allegation is a serious one that should not be made idly: *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at paragraph 113; *Es-Sayyid v. Canada (Public Safety and Emergency Preparedness)*,

2012 FCA 59 at paragraph 50. Courts are accustomed to overstated, sometimes vitriolic submissions of overly-enthusiastic counsel. Their minds are not poisoned by such submissions. Indeed, the opposite is true – such submissions often repel. The appellant's submissions on bias have no potential merit.

[38] For the foregoing reasons, the appellant is not entitled to an extension of time.

F. Proposed disposition

[39] The notice of appeal was filed late and the appellant is not entitled to an extension of time. Accordingly, I would order that the notice of appeal be removed from the court file and the court file (A-149-14) be closed, with costs to the respondent Indian Bands.

"David Stratas"

J.A.

"I agree
Johanne Trudel J.A."

"I agree
Wyman W. Webb J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-149-14
STYLE OF CAUSE:	ONTARIO FEDERATION OF ANGLERS AND HUNTERS V. ALDERVILLE INDIAN BAND *et al.*

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	STRATAS J.A.
CONCURRED IN BY:	TRUDEL AND WEBB JJ.A.
DATED:	JUNE 5, 2014

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