Federal Court  Cour fédérale

Date: 20100330

Docket: T-1753-08

Citation: 2010 FC 343

Ottawa, Ontario, March 30, 2010

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA AND THE ASSEMBLY OF FIRST NATIONS

Respondents

REASONS FOR ORDER AND ORDER

[1] This motion involves two appeals from a decision of Prothonotary Aronovitch in which she made two orders. The Attorney General of Canada appeals her order imposing a temporary stay of its underlying application for judicial review pending a hearing before the Canadian Human Rights Tribunal. The Respondents appeal her order dismissing their motion to strike the Attorney's General's underlying application for judicial review.

[2] In my view, neither appeal should succeed.

I. The Attorney General's Appeal of the Stay

(a) The Prothonotary's Decision

[3] The Respondents filed a complaint with the Canadian Human Rights Commission alleging that the Department of Indian and Northern Affairs Canada (INAC) discriminated in the provision of services to aboriginal children living on reserves. The substance of the complaint is that INAC fails to provide funding for welfare services equivalent to the levels provided by provincial and territorial governments. INAC challenged the complaint on the grounds that the Commission did not have jurisdiction to deal with it. INAC's position is that it is merely a funding agency and is not, therefore, providing a "service". Nevertheless, the Commission referred the complaint to the Canadian Human Rights Tribunal for a hearing.

[4] The Attorney General sought to have the Commission's referral decision judicially reviewed. The Respondents moved to strike the application for judicial review or, in the alternative, to have the Attorney General's application stayed pending the outcome of the proceedings before the Tribunal. Prothonotary Aronovitch granted the stay motion, after applying the accepted three-part test. She found that there was a serious issue involved, that the Respondents would suffer irreparable harm if the stay were not granted, and that the balance of convenience lay in having the application for judicial review held in abeyance while the Tribunal proceeded to hear the merits of the Respondents' complaint.

(b) Grounds for Appeal

[5] It is only where a prothonotary's decision relates to an issue vital to the final outcome of the case, or where the prothonotary's decision is clearly wrong, that the Court will intervene on appeal.

[6] The Attorney General argues that I should intervene because the merits of the application for judicial review may never be dealt with if it is stayed. While the same issues can be presented to the Tribunal, the Tribunal is not a supervisory body. Only the Federal Court can decide whether the Commission's referral decision was proper.

[7] In my view, the issue before the prothonotary related to a temporary stay of the Attorney General's application for judicial review. Clearly, it does not relate to an issue vital to the final outcome of that application. The application can be revived at the Attorney General's instance after the Tribunal has heard the merits of the complaint. If INAC succeeds before the Tribunal, the Attorney General may decide not to pursue the application for judicial review. If the Respondents succeed before the Tribunal, the Attorney General may decide to pursue its application for judicial review in an attempt to show that the matter never should have gone to the Tribunal. In either of those scenarios, the final outcome of the application would be unaffected by the granting of a temporary stay. Accordingly, there is no basis for the Court to intervene on this ground.

[8] In addition, the prothonotary's decision is not clearly wrong. She applied the accepted test for a stay, considered the submissions of the parties and weighed the evidence before her.

(c) Conclusion

[9] There are no grounds on which the Court can intervene on the Attorney General's appeal of the prothonotary's order imposing a temporary stay on the application for judicial review.

II. The Respondent's Appeal of the Dismissal of their Motion to Strike

(a) The Prothonotary's Decision

[10] The Respondents argued before the Prothonotary that the Attorney General's application for judicial review was bereft of any chance of success and, therefore, should be struck. Prothonotary Aronovitch found, however, that there was at least some support in the case law for the Attorney General's position and, therefore, that the Respondents' motion did not meet the strict test for striking an application (*David Bull Laboratories (Canada) Inc*. v. *Pharmacia Inc*., [1995] 1 F.C. 588 (C.A.)).

(b) Grounds for Appeal

[11] The prothonotary's decision clearly involved a matter relating to the final outcome of the Attorney General's application. Had her decision gone the other way, the application would have been terminated. Accordingly, I must decide whether the Respondents' motion to strike should be granted.

[12] The Respondents argue that the Attorney General cannot succeed in its application for judicial review. The role of the Commission is to decide whether a complaint should be referred to the Tribunal for a hearing. Under s. 41(1)(*d*) of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, the Commission must refer a complaint unless it appears to the Commission that the complaint falls outside the Commission's jurisdiction. Justice Marshall Rothstein concluded that this test means that the Commission must refer a complaint to the Commission unless it is "plain and obvious" that the Tribunal lacks jurisdiction (*Canada Post Corp*. v. *Canada (C.H.R.C.)* (1997), 130 F.T.R. 241). The Respondents also suggest that the Commission should be given considerable latitude in deciding whether a complaint should be referred for a hearing (*Bell Canada* v. *Communications, Energy and Paperworkers Union of Canada*, [1999] 1 F.C. 113 (C.A.)). Taking these propositions together, the Respondents submit that the Attorney General will not be able to persuade the Court to overturn the Commission's decision, because the Court will surely defer to the Commission's conclusion that it was not plain and obvious that their complaint fell outside the Commission's jurisdiction. The Commission considered the parties' submissions and concluded that jurisdictional questions, such as whether the complaint related to the provision of "services", were bound up with the actual substance of the complaint and ought to be decided along with the merits. There is no basis, argue the Respondents, on which this Court should intervene.

[13] The Attorney General relied on a case in which the Federal Court of Appeal concluded that the Commission's decision on a matter relating to jurisdiction must be correct: *Canada (A.G.)* v. *Watkin*, 2008 FCA 170. *Watkin* dealt with one of the same issues raised by the Attorney General here – whether the complaint related to the provision of a "service". The Federal Court of Appeal concluded that this was a "true question of jurisdiction" that should be reviewed on a correctness standard.

[14] The parties cited a number of other cases back and forth, but I find it unnecessary to analyze them. It is clear to me from the parties' submissions that there is a genuine legal question presented by the Attorney General's application for judicial review and that the case law does not provide a definitive answer to it. In these circumstances, I cannot say that the Attorney General's application is wholly without merit and, therefore, it ought not to be struck.

(c) Conclusion

[15] The Respondents have failed to satisfy me that the Attorney General's application is bereft of a chance of success. Therefore, I must dismiss their appeal.

ORDER

THIS COURT ORDERS that

1. The Attorney General of Canada's appeal is dismissed.

2. The Respondents' appeal is dismissed.

3. Given the outcome, there is no order as to costs.

"James W. O'Reilly"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1753-08
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APPEARANCES:

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