Federal Court of Appeal  Cour d'appel fédérale

Date: 20140930

Docket: A-135-14

Citation: 2014 FCA 216

CORAM: **DAWSON A/C.J.**
SHARLOW J.A.
NEAR J.A.

BETWEEN:

LARRY PETER KLIPPENSTEIN

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Winnipeg, Manitoba, on September 16, 2014.

Judgment delivered at Ottawa, Ontario, on September 30, 2014.

REASONS FOR JUDGMENT BY: NEAR J.A.

CONCURRED IN BY: DAWSON A/C.J.
SHARLOW J.A.

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REASONS FOR JUDGMENT

NEAR J.A.

I. Introduction

[1] Larry Peter Klippenstein appeals from the February 25, 2014 Order of the Federal Court (2014 FC 174, [2014] F.C.J. No. 219 (QL)) in which Justice Boivin dismissed his appeal of the July 8, 2013 Order of Prothonotary Lafrenière.

[2] Following a motion by the respondent under Rule 221(1) of the *Federal Courts Rules*, SOR/98-106, Prothonotary Lafrenière ordered that the appellant's Statement of Claim be struck, without leave to amend, on the basis that it disclosed no reasonable cause of action and was an abuse of process.

II. Facts

[3] The background facts of this matter are extensive. Justice Boivin set out the relevant facts in paragraphs 3 through 16 of his Reasons. For ease of reference, I have reproduced them here:

> [3] On September 20, 2012, Larry Peter Klippenstein (the plaintiff) initiated an application for judicial review of the Canadian Human Rights Commission's decision not to hear his complaint (Court File no. T-1744-12).
>
> [4] On October 3, 2012, the plaintiff attempted to file evidence with unsworn affidavits. The plaintiff refused to swear his affidavit on the Bible that was provided by this Court's Registry in Winnipeg because it was not an "undefiled" Bible. Being of Mennonite faith, he stated that acting otherwise would be an offence to his conscience. The Registry sought directions from the Court regarding the unsworn affidavit evidence.
>
> [5] On October 5, 2012, Justice Gleason of this Court issued directions in which she directed the plaintiff, pursuant to rules 363 and 80 of the Federal Courts Rules, SOR/98-106 (the Rules) and to section 15 of the Canada Evidence Act, RSC 1985, c C-5, to either obtain access to an "undefiled" Bible and swear on it, or to make a solemn affirmation to affirm his affidavit.
>
> [6] The plaintiff attempted to appeal this order for directions directly to the Supreme Court of Canada. The appeal was rejected by the registrar.
>
> [7] On April 11, 2013, Chief Justice Crampton of this Court issued a Notice of Status Review asking the plaintiff to submit representations explaining why his application should not be dismissed for delay. The plaintiff made no submission concerning the delay.
>
> [8] On April 30, 2013, Justice Manson of this Court issued an order dismissing the application for judicial review for delay.
>
> [9] On May 6, 2013, the plaintiff sent a letter to Court explaining that he never received the Notice of Status Review.

> [10] On May 8, 2013, Justice Manson of this Court issued directions directing the plaintiff to either bring a motion pursuant to Rule 399 to set aside the April 30, 2013 order, or to appeal the order to the Federal Court of Appeal. The plaintiff did neither and Justice Manson issued an order dismissing the judicial review application in the T-1744-12 proceeding.
>
> [11] On May 16, 2013, the plaintiff filed a statement of claim commencing an action against the Crown and initiating the present file (Court File no. T-874-13). In his statement of claim, he sought *inter alia* an order declaring the Federal Court Registry in Winnipeg in contempt of Court, an order directing a "Court who has the Jurisdiction" to hear his application, and an interim order providing a means of affirming or swearing his affidavit evidence that does not offend his conscience and an award of costs.
>
> [12] On May 23, 2013, the plaintiff applied for leave to appeal the April 30, 2013 Order in the T-1744-12 proceeding directly to the Supreme Court of Canada. After initially rejecting the application, the Supreme Court of Canada Registry accepted the application although it appeared to be premature.
>
> [13] On June 17, 2013, the defendant filed a motion to strike the plaintiff's statement of claim in the T-874-13 proceeding pursuant to Rule 221(1).
>
> [14] On July 8, 2013, Prothonotary Lafrenière of this Court issued an order in which he struck out the applicant's statement of claim in the T-874-13 proceeding without leave to amend and awarded costs in the amount of $300.00 to the defendant (Prothonotary's Order in Plaintiff's Motion Record at p 50).
>
> [15] On July 15, 2013, the plaintiff applied to appeal the order to this Court.
>
> [16] On October 17, 2013, the Supreme Court of Canada dismissed the appeal of the Court order dated April 30, 2013 in the T-1744-12 proceeding.

[4] Justice Boivin dismissed Mr. Klippenstein's appeal of Prothonotary Lafrenière's Order on February 25, 2014.

[5] Justice Boivin reviewed the motion to strike the appellant's Statement of Claim *de novo*. He determined that a *de novo* review was required because he was reviewing the discretionary decision of a prothonotary on a question vital to the final issue of the case.

[6] Justice Boivin found that the Prothonotary had not erred in striking the appellant's Statement of Claim. In so finding, he considered whether it was "plain and obvious" that the appellant's Statement of Claim disclosed no reasonable claim (citing *Hunt v Carey Canada Inc.*, [1990] 2 S.C.R. 959, 74 D.L.R. (4th) 321). Justice Boivin found that the Statement of Claim was very vague, entirely devoid of material facts, and did not identify a cause of action. Justice Boivin also held that the Statement of Claim constituted an abuse of process because the claims contained within it were nearly identical to the claims in the T-1744-12 proceeding.

[7] On March 6, 2014, Mr. Klippenstein filed a Notice of Appeal of Justice Boivin's decision in this Court under section 27 of the *Federal Courts Act*, R.S.C., 1985, c. F-7.

III. Standard of Review

[8] This Court may only interfere with a judge of the Federal Court's review of a prothonotary's discretionary decision if: the judge had no grounds to interfere with the prothonotary's decision, or, in the event such grounds existed, the judge's decision was arrived at on a wrong basis or was plainly wrong (*Apotex Inc. v. Bristol-Myers Squibb Company*, 2011 FCA 34, 414 N.R. 162 at paragraph 7, citing *Merck & Co., Inc. v. Apotex Inc.*, 2003 FCA 488, [2004] 2 F.C.R. 459 at paragraph 20 and *Z.I. Pompey Industrie v. ECU-Line N.V.*, 2003 SCC 27, [2003] 1 S.C.R. 450 at paragraph 18).

[9] In *St. Brieux (Town) v. Saskatchewan Watershed Authority*, 2012 FCA 169, 434 N.R. 65, Justice Stratas described this standard as requiring appellants to demonstrate that the Federal Court erred in a fundamental way (at paragraph 3).

IV. Analysis

[10] Mr. Klippenstein's principal argument is that the direction of Justice Gleason, dated October 5th, 2012, offended his religious values and did not provide him with a means of filing Court documents. In her direction, Justice Gleason referred to affirmation as a means by which Mr. Klippenstein could file affidavit evidence.

[11] Mr. Klippenstein, for religious reasons, is unable to swear an affidavit on the Bible provided by the Federal Court and the Federal Court of Appeal. Mr. Klippenstein states that he has been unable to find in the province of Manitoba a version of the Bible that he considers appropriate for swearing an affidavit.

[12] Mr. Klippenstein is willing to sign an affidavit by any means that does not carry a religious connotation. However, based on his understanding, the only acceptable means would be a "declaration". Mr. Klippenstein believes that an "affirmation" is unacceptable, as he considers the term "affirmation" in this context to carry a religious connotation.

[13] In my view, Mr. Klippenstein misunderstands the effect of an "affirmation", and in large measure, this entire case is based on this unfortunate misunderstanding.

[14] Pursuant to Rule 80(1) of the *Federal Courts Rules*, affidavits are to be drawn in compliance with Form 80A, which indicates that an affidavit may be sworn or affirmed. There is no requirement that an affirmation be made on any holy book. See also subsection 15(1) of the

Canada Evidence Act, R.S.C., 1985, c. C-5 to the same effect. In my respectful view, Mr. Klippenstein is simply mistaken about the meaning of "affirmation" in the *Federal Courts Rules*.

[15] Within the context of the *Federal Courts Rules*, the word "affirmation" is used to refer to a method of completing an affidavit that has no religious connotation. As such, Mr. Klippenstein has no basis upon which to refuse to provide the necessary Court documentation in support of the action he has commenced.

[16] Mr. Klippenstein also took the position that the Prothonotary had no jurisdiction to consider the motion to strike his statement of claim, citing Rule 30(1) of the *Federal Courts Rules*. Mr. Klippenstein argues that the provision in paragraph 30(1)(b), which allows a judge or a prothonotary not sitting in court to consider motions brought in accordance with Rule 369 (motions in writing) is dependent upon paragraph 30(1)(a), which requires the consent of all parties. Mr. Klippenstein argues that because he did not consent to the motion not being considered in open court, the Prothonotary did not have jurisdiction.

[17] I do not agree with this position. A plain reading of Rule 30(1) determines that paragraph 30(1)(b), which authorizes prothonotaries to consider motions in writing, is not dependant upon paragraph 30(1)(a). This is evident due to the presence of the word "or" between paragraphs (a), (b), and (c) of Rule 30(1). Further, Rule 221 of the *Federal Courts Rules* provides that the Court may strike a statement of claim. Prothonotaries are included within the definition of "the Court", as set out in section 2 the *Federal Courts Rules*.

[18] In any event, any problem that may have been present with respect to the consideration of the matter by the Prothonotary, a position that I do not accept, was resolved given that the motions judge properly conducted a *de novo* review of the Prothonotary's decision. In my view, the motions judge applied the correct principles of law and clearly understood the factual background in concluding that the statement of claim disclosed no reasonable cause of action. I find that Mr. Klippenstein has not demonstrated any error on the part of the motions judge in this regard, let alone an error that could be described as fundamental, warranting the intervention of this Court on the standard of review applicable to this appeal.

[19] Mr. Klippenstein referred to case law supporting his view that the motions judge sitting alone could not strike the statement of claim and that a panel of three judges was required (*Canada (Attorney General) v. Courchene*, 2010 MBCA 4, [2010] M.J. No. 1 (QL); *British Aviation Insurance Group v. Coseco Insurance Co.*, 2010 MBCA 56, [2010] M.J. No. 167 (QL)). These cases do not assist Mr. Klippenstein, as they concern a situation where an appeal judge is sitting alone and deciding whether an appeal should be dismissed, not the present situation where a Federal Court judge is sitting on appeal from a Prothonotary's Order, as provided for in the *Federal Courts Rules*.

[20] Finally, Mr. Klippenstein submitted in oral argument that this Court should grant leave for this matter to be appealed to the Supreme Court of Canada. Section 37.1 of the *Supreme Court Act*, R.S.C., 1985, c. S-26 provides as follows:

37.1 Subject to sections 39 and 42, an appeal to the Court lies with leave of the Federal Court of Appeal from a final judgment of the Federal Court of	**37.1** Sous réserve des articles 39 et 42, il peut être interjeté appel devant la Cour, avec l'autorisation de la Cour d'appel fédérale, d'un jugement

Appeal where, in its opinion, the question involved in the appeal is one that ought to be submitted to the Court for decision.	définitif rendu par cette dernière lorsqu'elle estime que la question en jeu devrait être soumise à la Cour.

Leave to the Supreme Court of Canada should only be granted under section 37.1 in exceptional situations. This provision may only be utilized when the question is of central importance to the judicial system and it is clear that the question "ought to be submitted to the Court for decision". Further, subsection 42(1) of the *Supreme Court Act* provides that leave may not be granted when the appeal is from a judgment or order made in the exercise of judicial discretion, except in very narrow circumstances not applicable here. The underlying decision in this matter, the striking of a statement of claim, is, in my view, an "order made in the exercise of judicial discretion". As such, this Court may not grant leave to the Supreme Court of Canada. However, if I am incorrect in this conclusion, it is my view that the question in this case is not of central importance to the judicial system. I would, therefore, deny leave in any event.

V. Conclusion

[21] For these reasons, the appeal is dismissed with costs set in the amount of $100.00. The application made to this Court for leave to appeal to the Supreme Court of Canada is denied.

"David G. Near"

J.A.

“I agree
Eleanor R. Dawson A/C.J.”

“I agree
Karen Sharlow J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM AN ORDER OF THE HONOURABLE JUSTICE BOIVIN, DATED FEBRUARY 25 2014, NO. 2014 FC 174.

DOCKET:	A-135-14
STYLE OF CAUSE:	LARRY PETER KLIPPENSTEIN v. HMTQ
PLACE OF HEARING:	WINNIPEG, MANITOBA
DATE OF HEARING:	SEPTEMBER 16, 2014
REASONS FOR JUDGMENT BY:	NEAR J.A.
CONCURRED IN BY:	DAWSON A/C.J. SHARLOW J.A.
DATED:	SEPTEMBER 30, 2014

APPEARANCES:

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Brendan Friesen	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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