Federal Court of Appeal  Cour d'appel fédérale

Date: 20160607

Docket: A-337-15

Citation: 2016 FCA 172

[ENGLISH TRANSLATION]

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

BETWEEN:

DAVID LESSARD-GAUVIN

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Québec, Quebec, on May 31, 2016.

Judgment delivered at Ottawa, Ontario, on June 7, 2016.

REASONS FOR JUDGMENT:BY: DE MONTIGNY J.A.

CONCURRED IN BY: GAUTHIER J.A.
SCOTT J.A.:

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REASONS FOR JUDGMENT

DE MONTIGNY J.A.

[1] This is an appeal from a decision rendered by Mr. Justice Harrington of the Federal Court (docket T-641-15), whereby he granted the motion to dismiss presented by the respondent and, at the same time, dismissed his application for judicial review. That application essentially sought to challenge the decision by an Employment and Social Development Canada (the Department)

evaluation committee, which rejected his application for the external appointment process 2014-CSD-EA-QUE-2115 in a decision rendered on March 24, 2015.

[2] Despite the appellant's very detailed written and oral submissions, I am of the opinion that the trial judge did not err in allowing the respondent's motion to dismiss.

[3] The discretionary nature of judicial review is well settled in Canadian administrative law, and the common law jurisprudence in this field was confirmed by subsections 18(1) and 18.1(3) of the *Federal Courts Act*, R.S.C., 1985, c. F-7. Among the factors that the Federal Court can take into consideration when refusing to hear an application for judicial review is the availability of an adequate, effective alternative remedy: see, inter alia, *Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250, at paragraphs 84 et seq.; *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561; *Strickland v. Canada (Attorney General)*, 2015 SCC 37, at paragraphs 40–41; *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929; *Canada (Border Services Agency) v. C.B. Powell Limited*, 2010 FCA 61; *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3, at paragraphs 30 et seq.; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, [2011] 3 S.C.R. 654, at paragraph 22. The Supreme Court also reiterated that deference should be shown when a court of appeal reviews the exercise of such discretion.

[4] As a matter of fact, section 66 of the *Public Service Employment Act*, S.C. 2003, c. 22, subsections 12 and 13 (the Act), allows for such an alternative remedy, which was opted for, indeed, by the appellant. That provision allows the Public Service Commission (the

Commission) to revoke an appointment or not make an appointment, or take any corrective action that it considers appropriate if it is satisfied, following an investigation, that an external appointment is not based on merit or that an error, an omission or improper conduct affected the selection of the person appointed or proposed for appointment. In view of the Commission's wide-ranging investigative and remedial powers and that organization's independent nature, Judge Harrington could reasonably conclude that the mechanism provided by Parliament through section 66 of the Act constitutes an adequate, effective alternative remedy that the appellant should have exhausted before submitting an application for judicial review to the Federal Court.

[5] It is true that, in this case, the Commission concluded that it was not necessary to investigate the appointment process of which the appellant complained. However, I note that the Commission made this decision after examining the appellant's submissions, who alleged that an abuse of a right had been committed by the evaluation committee, and after reading the relevant policies in this case. Specifically, the Commission took into account the fact that the applicant's consent is not required to contact public service referees, and that a manager can determine the assessment methods that he or she considers appropriate in an appointment process under section 66 of the Act. To the extent that the appellant was not satisfied with that decision, he could have challenged it through the judicial review process (see, by analogy, *Agnaou v. Canada (Attorney General)*, 2015 FCA 30), as suggested to him by Harrington J. Not having done so, he cannot now claim that he exhausted all of his remedies.

[6] The appellant argued that this was not the most efficient method and it would apparently not allow him to directly challenge the selection committee's decision. I disagree. On the one

hand, the appellant was able to present essentially the same arguments before the Commission that he intended to raise in an application for judicial review of the selection committee's decision before this Court. On the other hand, the investigation conducted by the Commission is the mechanism chosen by Parliament as to challenges of an external appointment, and it is not open to this Court to override it, even if the appellant is of the opinion that it is not the best way to proceed.

[7] During the hearing, the appellant also referred us to a few cases from Quebec in support of his argument that he should be able to directly challenge the selection committee's decision through the judicial review process, as opposed to an application for judicial review of the Commission for not investigating: see, in particular, *Macdonell v. Quebec (Attorney General)*, [2000] R.J.Q. 1674 (C.A. Que.), affd. (sub nom. *Macdonell v. Quebec (Commission d'accès à l'information*), [2002] 3 S.C.R. 661; *Vaillancourt v. Dion*, 2010 QCCA 1499. These cases are part of a body of law that is distinct from the applicable law in this case and involve the Court of Quebec's refusal to grant leave to appeal; however, such a decision is not, in itself, subject to review, which is not the case for the Commission's decision in the case at hand. Moreover, those cases seem to me to confirm the principle of exhaustion of remedies. They hold that the Court of Quebec's refusal to grant leave to appeal called for the exercise of the Superior Court's superintending and reforming power, insofar as the administrative agency's decision thereby became final. These cases are therefore of no help to the appellant.

[8] As for the appellant's argument that the Commission's mechanism for investigation would not permit him to obtain the remedial action of a civil nature that he was seeking, it is

groundless. In addition, the Federal Court itself does not have jurisdiction to award damages as part of an application for judicial review, as the Supreme Court noted in *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, at paragraph 26. An application for judicial review is a summary procedure, the essential purpose of which is to invalidate unlawful decisions made by public authorities. Thus, the inability to obtain damages before the Commission cannot constitute an argument in support of the submission that the remedy provided for under section 66 of the Act does not constitute an effective and appropriate remedy.

[9] For all of these reasons, I propose that the appeal be dismissed with costs totalling $250 (all-inclusive) in favour of the respondent. At the request of the Court, the respondent in this case confirmed that he would not oppose a motion for an extension of time for filing the application for judicial review regarding the Commission's decision not to investigate. Given that nearly a year has already passed since the Commission made its decision, I conclude that it is in the best interests of justice that the appellant file his application for an extension of time in a reasonable time frame. If the appellant chooses to avail himself of this possibility, he must therefore file his application for an extension of time within 30 days of this judgment.

"Yves de Montigny"

J.A.

"I agree.
Johanne Gauthier J.A."

"I agree.
A.F. Scott J.A."

Certified true translation
François Brunet, Revisor

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-337-15
STYLE OF CAUSE:	DAVID LESSARD-GAUVIN v. THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	QUÉBEC, QUEBEC
DATE OF HEARING:	MAY 31, 2016
REASONS FOR JUDGMENT BY:	DE MONTIGNY J.A.
CONCURRED IN BY:	GAUTHIER J.A. SCOTT J.A.
DATED:	JUNE 7, 2016

APPEARANCES:

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