

Federal Court of Appeal



Cour d'appel fédérale

Date: 20190122

**Dockets: A-223-17
A-401-17**

Citation: 2019 FCA 12

**CORAM: STRATAS J.A.
NEAR J.A.
DE MONTIGNY J.A.**

Docket: A-223-17

BETWEEN:

JOSE LUIS FIGUEROA

Appellant

and

**THE MINISTER OF PUBLIC SAFETY AND EMERGENCY
PREPAREDNESS**

Respondent

Docket: A-401-17

BETWEEN:

JOSE LUIS FIGUEROA

Appellant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Heard at Vancouver, British Columbia, on January 17, 2019.

Judgment delivered at Ottawa, Ontario, on January 22, 2019.

REASONS FOR JUDGMENT OF THE COURT BY:

STRATAS J.A.

CONCURRED IN BY:

NEAR J.A.
DE MONTIGNY J.A.

Federal Court of Appeal



Cour d'appel fédérale

Date: 20190122

**Dockets: A-223-17
A-401-17**

Citation: 2019 FCA 12

**CORAM: STRATAS J.A.
NEAR J.A.
DE MONTIGNY J.A.**

Docket: A-223-17

BETWEEN:

JOSE LUIS FIGUEROA

Appellant

and

**THE MINISTER OF PUBLIC SAFETY AND EMERGENCY
PREPAREDNESS**

Respondent

Docket: A-401-17

BETWEEN:

JOSE LUIS FIGUEROA

Appellant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT

STRATAS J.A.

[1] Mr. Figueroa appeals from the dismissal by the Federal Court (*per* Lafrenière J.) of two of his applications for judicial review, one for failure to pay security for costs under a court order (file A-223-17) and the other for mootness (file A-401-17). I direct that a copy of these reasons be placed in both court files.

[2] In file A-401-17, the Attorney General requests that the style of cause be amended and he be named as the sole respondent. Under Rules 303 and 338 of the *Federal Courts Rules*, SOR/98-106, the amendment is proper. Therefore, I so order. The amended style of cause appears in both these reasons and the judgment of this Court in file A-401-17. As mentioned to Mr. Figueroa at the hearing of his appeals, this is only a technical change and has no effect on the substantive merits of his appeal in file A-401-17.

[3] Mr. Figueroa submits that the dismissals were substantively flawed. He requests that they be set aside. I reject this. The dismissals were highly fact-based and discretionary. Thus, they can be set aside only if vitiated by palpable and overriding error: *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215, [2017] 1 F.C.R. 331. The threshold for finding palpable and overriding error is very high indeed: *Benhaim v. St-Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352 at paras. 38-39. Here, that threshold has not been met.

[4] In file A-223-17, Mr. Figueroa submits that the Federal Court committed procedural error. In his view, the Federal Court dismissed his application for judicial review prematurely. He did not have an adequate opportunity to respond to the request for dismissal. The facts giving rise to this ground are as follows.

[5] The Federal Court's security for costs order provided that Mr. Figueroa had to provide the security within thirty days, failing which he would be barred from taking any further steps in his application for judicial review. Additionally, the respondent was granted leave to apply informally (*i.e.*, by letter) for a dismissal of Mr. Figueroa's application for judicial review if the deadline for posting the security for costs was not met. The security for costs order did not speak explicitly to whether Mr. Figueroa could respond to the respondent's letter.

[6] The thirty-day time period set out in the security for costs order went by without response from Mr. Figueroa. Soon after that, the respondent applied by informal letter for dismissal of the application for judicial review. Just seven days later, having heard nothing from Mr. Figueroa, the Federal Court dismissed Mr. Figueroa's application for judicial review.

[7] Mr. Figueroa notes that if this were a motion in writing for a dismissal under the Rules, he would have had ten days, not seven days, to respond: see Rule 369(2). In his view, the Federal Court granted the dismissal before he had a chance to respond.

[8] During the hearing, the respondent candidly and fairly conceded that upon receiving the respondent's application for dismissal, dismissal was not automatic; the Court had a discretion regarding whether to dismiss the application for judicial review or grant Mr. Figueroa more time.

[9] It follows that Mr Figueroa fairly had a right to respond. Further, I characterize the right granted by the Federal Court to the respondent to "apply informally" for dismissal as a right to bring a motion in writing by way of informal letter. Thus, Mr. Figueroa had at least ten days to respond. The Federal Court could not rule until that ten day period had elapsed. Here, the Federal Court ruled prematurely.

[10] During the hearing, I asked Mr. Figueroa what his explanation for the failure to obey the security for costs order would have been. If Mr. Figueroa had no viable explanation, then I would not have have given effect to his complaint about procedural fairness. No remedy can be given for breach of the procedural right to make submissions when it is certain that no viable submissions would have been made.

[11] I cannot reject Mr. Figueroa's procedural fairness claim on this basis. In argument, Mr. Figueroa offered the explanation of lack of financial resources for his non-compliance with the security for costs order. Is this a viable explanation? It is a close call. The Federal Court noted in its security for costs order that Mr Figueroa apparently had an ability to pay. But given what Mr. Figueroa told us during the hearing, I cannot rule out that Mr. Figueroa might have offered evidence and made representations concerning changes in his financial situation that might have convinced the Federal Court to give Mr. Figueroa more time to comply. Again, as the respondent

fairly and candidly admits, the Federal Court had a discretion to exercise—dismissal was not automatic.

[12] There is nothing wrong in principle for the Federal Court and this Court to provide, when appropriate, for a summary dismissal immediately upon receiving notice of non-compliance. Sometimes such an order is very much called for, particularly when a litigant has a history of non-compliance. There comes a point where enough is enough and a line must be drawn. And such a provision is procedurally fair: it gives advance notice to all that dismissal will be automatic and non-compliance of any sort will not be tolerated under any circumstance.

[13] Given the litigation history known to the Federal Court, it was certainly open to it in its security for costs order to provide for summary dismissal for non-compliance. But such a provision would have had to have been clear and unambiguous: *e.g.*, “failure to comply with this order will result in summary dismissal of the application without further notice,” or some similar language. Clarity and unambiguity are especially important in a case like this where an unrepresented litigant is involved.

[14] It follows that the Federal Court’s dismissal in file A-233-17 was premature and must be set aside.

[15] The Federal Court did not award costs in either of its dismissals. In these circumstances, I would not disrupt that exercise of discretion. However, in my view, the costs of the appeals should follow the results of the appeals.

[16] Therefore, I would allow the appeal in file A-223-17 with costs of the appeal to the appellant and set aside the Federal Court's dismissal. I would remit the respondent's application for dismissal back to the Federal Court to receive Mr. Figueroa's response and any reply from the respondent and then to determine the matter. The Federal Court is at liberty to give the parties directions concerning the deadlines to be met. I would dismiss the appeal in file A-401-17 with costs of the appeal to the respondent.

“David Stratas”

J.A.

“I agree
D.G. Near J.A.”

“I agree
Yves de Montigny J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS: A-223-17 and A-401-17

APPEAL FROM AN ORDER AND A JUDGMENT OF THE HONOURABLE MR. JUSTICE LAFRENIÈRE DATED JUNE 29, 2017 AND NOVEMBER 14, 2017, DOCKET NOS. T-427-15 AND T-1357-17

STYLE OF CAUSE: JOSE LUIS FIGUEROA v. THE
MINISTER OF PUBLIC SAFETY
AND EMERGENCY
PREPAREDNESS AND THE
ATTORNEY GENERAL OF
CANADA

PLACE OF HEARING: Vancouver, British Columbia

DATE OF HEARING: JANUARY 17, 2019

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: NEAR J.A.
DE MONTIGNY J.A.

DATED: JANUARY 22, 2019

APPEARANCES:

Jose Luis Figueroa ON HIS OWN BEHALF

Brett J. Nash FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Nathalie G. Drouin FOR THE RESPONDENTS
Deputy Attorney General of Canada