Federal Court of Appeal | Cour d'appel fédérale

CANADA

Date: 20100721

Docket: A-388-09

Citation: 2010 FCA 195

CORAM: **LÉTOURNEAU J.A.**
SEXTON J.A.
EVANS J.A.

BETWEEN:

KEVIN R. AALTO, ROZA ARONOVITCH,
ROGER R. LAFRENIÈRE, MARTHA MILCZYNSKI
RICHARD MORNEAU and MIREILLE TABIB

Appellants

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Toronto, Ontario, on May 12, 2010.

Judgment delivered at Ottawa, Ontario, on July 21, 2010.

REASONS FOR JUDGMENT BY THE COURT

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REASONS FOR JUDGMENT

THE COURT

[1] This is an appeal by the six Prothonotaries of the Federal Court from a decision by Deputy Judge MacKay (Applications Judge), dated August 28, 2009 (2009 FC 861). The Applications Judge dismissed the Appellants' application for judicial review to set aside the Response of the Minister of Justice on behalf of the Government of Canada (Response), dated February 11, 2009. In that Response, the Government refused to implement all the recommendations made by the Special

Advisor on Prothonotaries' Compensation, the Honourable George W. Adams, Q.C., except a recommendation that their vacation entitlement be extended to six weeks.

[2] The Applications Judge held that the principal basis of the Response was reasonable, namely, the deteriorating state of public finances since Mr Adams delivered his recommendations to the Government on May 30, 2008, and the resulting imposition of pay restraint on the federal public service. The Applications Judge then went on to consider the additional reasons given in the Response for rejecting specific recommendations. He concluded that these reasons did not satisfy the test established by the Supreme Court of Canada in *Bodner v. Alberta*, 2005 SCC 44, [2005] 2 S.C.R. 286 (*Bodner*), for determining the constitutionality of a government's refusal to implement the recommendations of an independent person or body appointed to ensure a process for setting compensation consistent with the constitutional guarantee of judicial independence. Nevertheless, despite his findings of constitutional inadequacy, the Applications Judge declined to grant a remedy.

[3] The Appellants' principal argument in this appeal is that the Applications Judge erred in failing to grant at least a declaratory order that the constitutional guarantee of judicial independence through financial security had been breached by the additional reasons given in the Response to the particular recommendations of the Special Advisor. They also argue that the Applications Judge applied the wrong legal test in accepting that the Response was reasonable insofar as it was based on the damage to Canada's public finances caused by the global recession, which had led the Government to introduce legislation imposing restraint on federal public service compensation.

In our opinion, the appeal cannot succeed. Viewed globally and taking into consideration the deteriorating state of public finances, the Government's Response to the recommendations meets the standards of the *Bodner* test and is therefore constitutional. In the absence of a breach of the Constitution, the question of remedy does not arise.

[4] This conclusion makes it unnecessary for us to examine the other reasons given by the Government for rejecting Mr Adams' particular recommendations. In our view, it would serve little purpose for this Court to embark on such an inquiry.

[5] It is impossible to know now when public finances will have improved sufficiently to persuade the Government to revisit the Prothonotaries' compensation package. By that time, the Adams recommendations may have been overtaken by events and be of little relevance to the work of a new independent review. To the extent that Mr Adams' recommendations are still relevant, the Prothonotaries may rely on them in the new process and respond to the objections that the Government has already raised in the Response under review in the present proceedings. If the Government rejects recommendations emanating from the next independent review and the Prothonotaries make an application for judicial review, the Court can then consider the legality of the Government's response in the context of the new recommendations and the circumstances existing at that time.

[6] Two fundamental questions are not in dispute. First, the work of the Prothonotaries is integral to the administration of justice in the Federal Court. They perform case management

functions (including assisting parties to settle disputes), determine pre-hearing motions, and conduct trials where no more than $50,000 are at stake. Over the years, their role has expanded and the high quality of their work is unquestioned. The Prothonotaries relieve Judges of the Federal Court of a considerable burden and greatly contribute to the expeditious administration of justice by the Court.

[7] Second, Prothonotaries enjoy the constitutional guarantee of independence, including financial security, possessed by other judicial officers: judges of superior and provincial courts, and masters. The rule of law requires nothing less. Accordingly, the constitutional principles on which the process for the determination of judges' compensation is based also apply to the Prothonotaries, including the requirement of a periodic review of their salaries and other benefits on the basis of recommendations from an independent process.

[8] The Appellants argue, and we agree, that the constitutionality of the principal basis of the Government's Response must be based on the *Bodner* test. In *Bodner*, the Supreme Court of Canada held (at para. 29) that a government's response rejecting recommendations on judicial compensation is reviewable on a standard of "rationality". In applying that standard, a reviewing court should be deferential to the government's unique position in managing the country's financial affairs. The Court stated (at para. 30):

> The reviewing court is not asked to determine the adequacy of judicial remuneration. Instead, it must focus on the government's response and on whether the purpose of the commission process has been achieved. This is a deferential review which acknowledges both the government's unique position and accumulated expertise and its constitutional responsibility for management of the province's financial affairs. [Emphasis added]

[9] The Supreme Court formulated (at para. 31) a three-part test for determining whether a response is rational.

> (1) Has the government articulated a legitimate reason for departing from the commission's recommendations?
>
> (2) Do the government's reasons rely upon a reasonable factual foundation? And
>
> (3) Viewed globally, has the commission process been respected and have the purposes of the commission – preserving judicial independence and depoliticizing the setting of judicial remuneration – been achieved?

(i) Has the Government articulated a legitimate reason for departing from Mr Adams' recommendations?

[10] The first part of the *Bodner* test is "a screening mechanism": para. 32. By requiring a government to provide a "legitimate" reason for departing from recommendations made by an independent body, the first branch of the test serves to "[screen] out decisions with respect to judicial remuneration which are based on purely political considerations, or which are enacted for discriminatory reasons": *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, para. 183 (*Reference re PEI Judges*). A government's decision can only be justified for reasons that relate to the public interest, broadly understood (*ibid.*), deal in good faith with the issues at stake, and demonstrate that the recommendations have been duly taken into account. The reasons must also "reveal a consideration of the judicial office and an intention to deal with it appropriately": *Bodner* at para. 25.

[11] In the present case, the overarching consideration of the Government in departing from Mr Adams' recommendations was the deteriorating state of the global economic situation and its impact on the finances of the Government of Canada. The Government states that its concern is not primarily about the amount of money involved in responding more positively to the recommended enhancements of the six Prothonotaries' benefits and salaries, which are currently set by order in council at 69% of the salary paid to federally appointed judges. Rather, it says, to exempt the Prothonotaries from the statutory pay restraints imposed on the federal public service following the 2008 economic crisis could create the impression that the Government was favouring judicial officers in order to benefit itself as a frequent litigant in the Federal Court.

[12] In our opinion, these are legitimate reasons for the Response and satisfy the first part of the *Bodner* test. The Response was based on neither purely political considerations nor discriminatory reasons.

[13] In *Reference re PEI Judges*, the Supreme Court indicated (at para. 184) that "[a]cross-the-board measures which affect substantially every person who is paid from the public purse…are *prima facie* rational." Such actions, it continued, are generally "designed to effectuate the government's overall fiscal priorities, and hence will usually be aimed at furthering some sort of larger public interest." Moreover, the Court stated (at para. 196):

> Nothing would be more damaging to the reputation of the judiciary and the administration of justice than a perception that judges were not shouldering their share of the burden in difficult economic times.

(ii) Does the Government's Response rely upon a reasonable factual foundation?

[14] The second stage of the *Bodner* test requires a reviewing court to consider "the reasonableness and sufficiency of the factual foundation relied upon by the government in rejecting or varying the commission's recommendations": para. 33. A court must be appropriately deferential when reviewing the evidence available to determine whether there is a reasonable factual basis for a government's refusal to implement the recommendations.

[15] In the present case, the Government relied on two main documents: the 2009 Budget, which describes the deteriorating economic conditions both in Canada and internationally, and an affidavit filed by Benoit Robidoux, the General Director of the Economic and Fiscal Policy Branch at the Department of Finance. The Applications Judge accepted that these documents provide sufficient evidence to support the existence of extraordinary economic circumstances. Indeed, the Appellants concede that the economy deteriorated significantly after the Adams Report was released in May 2008.

[16] In justifying its decision, the Government is not required to present evidence capable of proving exceptional circumstances as a matter of fact: *Bodner* at para. 35. In light of the significant political and media attention that the deteriorating state of the global economy attracted, we are of the opinion that the material relied on by the Government demonstrates a reasonable factual basis for its decision, and that the second branch of the *Bodner* test is therefore satisfied.

(iii) When the Response is viewed globally, has the independent process been respected and its purposes achieved?

[17] The third part of the *Bodner* test requires a reviewing court to consider the Government's response from a global perspective. It requires the Court to "weigh the whole of the process and the response in order to determine whether they demonstrate that the government has engaged in a meaningful way with the process of the commission and has given a rational answer to its recommendations" (para. 38). Viewing a response "globally" means assessing it holistically, acknowledging its weaknesses, while also determining whether the overall purpose of the recommendations has been met despite any shortcomings:

> Although it may find fault with certain aspects of the process followed by the government or with some particular responses or lack of answer, the court must weigh and assess the government's participation in the process and its response in order to determine whether the response, viewed in its entirety, is impermissibly flawed even after the proper degree of deference is shown to the government's opinion on the issues. The focus shifts to the totality of the process and of the response (para. 38).

[18] The Supreme Court has emphasized the importance of flexibility in the judicial review process. Although a government is constitutionally obligated to provide legitimate reasons to justify its decision, deference must be shown to its response since the recommendations are ultimately not binding (para. 40).

[19] In justifying its decision on the basis of the prevailing economic circumstances, the Government, in the Response, expressed its awareness of the unique role of the judiciary and the need to preserve its independence through financial security:

> The Government accepts that compensation of judges -- and judicial officers such as prothonotaries -- is subject to certain unique requirements that do not apply with respect to others paid from the public purse. In particular, it is necessary to ensure that judicial compensation does not fall below the "minimum" required to protect financial security, including through erosion of compensation levels over time. The purpose of this minimum is to avoid the perception that judges might be susceptible to political pressure through economic manipulation as witnessed in many other countries.
>
> However, as a result of the link to the salaries of superior court judges, prothonotaries are currently protected against such erosion by annual statutory indexing, as well as the quadrennial review of judicial compensation which provides the mechanism for appropriate adjustments.
>
> This is not the time for the kind of major enhancements contemplated by the Special Advisor's Report. Indeed, exempting prothonotaries from across-the-board public sector restraint measures would more likely undermine than enhance the public's perception of their judicial independence and impartiality. (Emphasis added)

[20] The Applications Judge criticized the Government's failure to address Mr Adams' specific recommendations in a sufficiently diligent and detailed manner. We agree that the Government's Response is not as thorough as might be expected, given the nature of the issues at stake and the fact that no independent review of the Prothonotaries' compensation has taken place in over a decade.

[21] However, the Government has already established that the circumstances under which it considered the recommendations were quite exceptional. Since the Response was rational in attaching overriding importance to the state of the economy, it was not, in our opinion, unreasonable for the Government to have dealt relatively briefly with Mr Adams' specific recommendations.

[22] The Appellants attack the Response on three grounds: its failure to cost the rejected recommendations, to confirm that the restraint measures were temporary, and to provide evidence

that “across the board” treatment was applied to all, or substantially all, members of the federal public service. We are not persuaded that, whether considered individually or collectively, these allegations establish that the *Bodner* test has not been met.

[23] First, we are of the view that the Government is not constitutionally obliged to provide detailed costing information to demonstrate that the state of the economy prevents it from accepting Mr Adams’ recommendations. As we have already noted, the Government does not have to present evidence capable of proving exceptional circumstances as a matter of fact, provided that there is a reasonable factual foundation to support its position, as we have found that there was.

[24] Second, the *Expenditure Restraint Act*, S.C. 2009, c. 2 (“ERA”), exempted approximately 100,000 federal public employees from the pay restraint imposed by the ERA. However, the existence of these exemptions does not, in our opinion, invalidate the Government’s Response. Payments were made to implement agreements concluded before the statutory cut-off date of December 8, 2008. 70,000 of the employees in question were covered by the settlement of a pay equity claim, and the rest by a restructuring agreement.

[25] It is regrettable that the Government failed to respond to Mr Adams’ recommendations until February 11, 2009. This was five days after the introduction and first reading of the ERA, and more than two months after the date for the delivery of the Response set by the Order in Council establishing the review process. However, the consequences of this delay do not, in our view, constitute a “singling out” of the Prothonotaries. Moreover, they were partially exempted from these

restraints by subsection 13(4) of the Act since, like superior court judges, they continue to receive statutory, indexed adjustments to their remuneration.

[26] Third, as for the temporary nature of the restraint measures, the Government has already conceded that periodic reviews of the Prothonotaries' compensation will be necessary. The Court assumes that the Government will act in good faith, and will revisit the issues promptly and thoroughly when economic conditions improve.

(iv) Conclusions

[27] When considered in the context of the exceptional circumstances in the present case, and viewed globally, the Government's Response to Mr Adams' recommendations adequately respects the independent process and ensures that its purpose has been achieved.

[28] We would add only this. It took the Government an unduly long time to establish an independent process for setting and reviewing Prothonotaries' compensation, and to publish its Response to Mr Adams' recommendations. The fact that the Prothonotaries are only six in number does not warrant the Government's apparent lack of attention to their compensation. On the contrary, we would have thought that this would make the issues relatively easy to deal with.

[29] We expect the Government to give high priority to the Prothonotaries' compensation when economic conditions no longer require such sweeping public sector pay restraint. The current arrangements for their pensions and disability entitlement call for particularly prompt attention. Mr

Adams describes in his report the hardships that they have already caused to two former Prothonotaries. They do not reflect well on Canada's treatment of those responsible for the efficient and effective administration of justice.

[30] For these reasons, the appeal will be dismissed.

"Gilles Létourneau"
J.A.

"J. Edgar Sexton"
J.A.

"John M. Evans"
J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-388-09
(APPEAL FROM A DECISION OF DEPUTY JUDGE MACKAY DATED AUGUST 28, 2009, FILE NO. T-370-09)	
STYLE OF CAUSE:	Kevin R. Aalto, Roza Aronovitch, Roger R. Lafrenière, Martha Milczynski, Richard Morneau and Mireille Tabib
PLACE OF HEARING:	Toronto, Ontario
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DATED:	July 21, 2010

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