

Federal Court
of Appeal



Cour d'appel
fédérale

Date: 20120508

Docket: A-305-11

Citation: 2012 FCA 142

**CORAM: BLAIS C.J.
LÉTOURNEAU J.A.
STRATAS J.A.**

BETWEEN:

SENATOR PATRICK BRAZEAU

Appellant

and

ALISA RENÉE LOMBARD

Respondent

Heard at Ottawa, Ontario, on May 8, 2012.

Judgment delivered from the Bench at Ottawa, Ontario, on May 8, 2012.

REASONS FOR JUDGMENT OF THE COURT BY:

STRATAS J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Ottawa, Ontario, on May 8, 2012)

STRATAS J.A.

[1] Senator Brazeau appeals from a costs award made against him by the Federal Court (*per* Justice Shore) on August 17, 2011.

[2] The costs award was made on a consent motion brought by Ms. Lombard for an extension of time for her to conduct cross-examinations. Ms. Lombard is a lawyer representing herself in these proceedings.

[3] In support of the motion, Ms. Lombard filed, among other things, a notice of motion and written consents to the motion, executed by counsel for the other parties to the motion, Senator Brazeau and the Canadian Human Rights Commission.

[4] The notice of motion contained a request for costs. The consents did not explicitly mention the issue of costs. The consents only stated that the parties consented to “the applicant’s motion for an extension of time of 56 days” for her to conduct cross-examinations. The consents predated the notice of motion. On this material, the Federal Court made the order, with costs to Ms. Lombard.

[5] Before the hearing in this Court, Senator Brazeau brought a motion to file an affidavit of one of his counsel. That material suggests that the parties never consented to the award of costs. The motion was granted. This affidavit was placed before us as fresh evidence, subject to submissions as to its relevance and weight.

[6] The material before the Federal Court on the issue of whether the parties agreed to the costs award is ambiguous. Therefore, we consider the affidavit to be relevant. We are prepared to give it weight.

[7] The affidavit discloses that counsel for Senator Brazeau executed the consent and delivered it to Ms. Lombard before seeing Ms. Lombard's notice of motion. A few days later, counsel for Senator Brazeau received Ms. Lombard's motion record, including the notice of motion and the request for costs contained in it, but did not review it.

[8] The affidavit also appends an exchange of correspondence that took place after the Federal Court made its order. Counsel for Senator Brazeau wrote Ms. Lombard advising her that the parties did not agree to costs and so the order should be corrected by removing the award of costs. In her responding letter, Ms. Lombard admitted that the motion record she filed "[did] not represent that either your client or the [Canadian Human Rights Commission] consented to costs." Nowhere else in her letter did Ms. Lombard state that Senator Brazeau consented to costs. Yet, she did not agree to correct the order.

[9] In our view, upon seeing that an award of costs had been made in circumstances where the material did not represent that Senator Brazeau and the Canadian Human Rights Commission consented to costs, and upon being alerted to the existence of a misunderstanding among the parties, Ms. Lombard should have corrected the matter.

[10] As well, the notice of motion for this consent order should not have sought costs absent a clear indication that costs were part of the consent.

[11] All of these events took place against the backdrop of Rule 410(2) which presumptively makes the party applying for an order for an extension of time – here Ms. Lombard – liable for costs. Also forming part of the backdrop is a practice among counsel that no costs are sought on consent motions, absent highly unusual circumstances.

[12] Ms. Lombard has filed no evidence explaining her conduct or taking issue with any of the above facts.

[13] In these circumstances, we are of the view that there was no consent to costs. Therefore, the costs award in the Federal Court's order cannot stand.

[14] Therefore, we shall allow the appeal and set aside the award of costs in paragraph 3 of the Federal Court's order of August 17, 2011. Senator Brazeau shall have his costs of the appeal.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-305-11

**APPEAL FROM AN ORDER OF THE HONOURABLE MR. JUSTICE SHORE DATED
AUGUST 17, 2011, DOCKET NO. T-741-11**

STYLE OF CAUSE: Seantor Patrick Brazeau v. Alisa
Renée Lombard

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: May 8, 2012

REASONS FOR JUDGMENT OF THE COURT BY: Blais C.J., Létourneau, Stratas JJ.A.

DELIVERED FROM THE BENCH BY: Stratas J.A.

APPEARANCES:

Andrew Lister FOR THE APPELLANT

Alisa Renée Lombard ON HER OWN BEHALF

SOLICITORS OF RECORD:

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