Federal Court of Appeal

Cour d'appel fédérale

Date: 20120628

Docket: A-290-11

Citation: 2012 FCA 197

CORAM: **DAWSON J.A.**
GAUTHIER J.A.
STRATAS J.A.

BETWEEN:

SANDRA BUSCHAU, SHARON M. PARENT, ALBERT POY, DAVID ALLEN, EILEEN ANDERSON, CHRISTINE ASH, FREDERICK SCOTT ATKINSON, JASPAL BADYAL, MARY BALFRY, CAROLYN LOUISE BARRY, RAJ BHAMBER, EVELYN BISHOP, DEBORAH LOUISE BISSONNETTE, GEORGE BOSHKO, COLLEEN BURKE, BRIAN CARROLL, LYNN CASSIDY, FLORENCE K. COLBECK, PETER COLISTRO, ERNEST A. COTTLE, KEN DANN, DONNA DE FREITAS, TERRY DEWELL, KATRIN DOLEMEYER, ELIZABETH ENGEL, KAREN ENGLESON, GEORGE FIERHELLER, JOAN FISHER, GWEN FORD, DON R. FRASER, MABEL GARWOOD, CHERYL GERVAIS, ROSE GIBB, ROGER GILODO, MURRAY GJERNES, DAPHNE GOODE, KAREN L. GOULD, PETER JAMES HADIKIN, MARIAN HEIBLOEM-REEVES, THOMAS HOBLEY, JOHN IANNANTUONI, VINCENT A. IANNANTUONI, RON INGLIS, MEHROON JANMOHAMED, MICHAEL J. JERVIS, MARLYN KELLNER, KAREN KILBA, DOUGLAS JAMES KILGOUR, YOSHINORI KOGA, MARTIN KOSULJANDIC, URSULA M. KREIGER, WING LEE, ROBERT LESLIE, THOMAS A. LEWTHWAITE, HOLLY LI, DAVID LIDDELL, RITA LIM, BETTY C. LLOYD, ROB LOWRIE, CHE-CHUNG MA, JENNIFER MACDONALD, ROBERT JOHN MACLEOD, SHERRY M. MADDEN, TOM MAKORTOFF, FATIMA MANJI, EDWARD B. MASON, GLENN A. MCFARLANE, ONAGH METCALFE, DOROTHY MITCHELL, SHIRLEY C.T. MUI, WILLIAM NEAL, KATHERINE SHEILA NIMMO, GLORIA PAIEMENT, LYNDA PASACRETA, BARBARA PEAKE, VERA PICCINI, INEZ PINKERTON, DAVE PODWORNY, DOUG PONTIFEX, VICTORIA PROCHASKA, FRANK RADELJA, GALE RAUK, RUTH ROBERTS, ANN LOUISE RODGERS, CIFFORD JAMES ROE, PAMELA MAMON ROE, DELORES ROSE, SABRINA ROZA-PEREIRA, SANDRA RYBCHINSKY, KENNETH T. SALMOND, MARIE SCHNEIDER, ALEXANDER C. SCOTT, INDERJEET SHARMA, HUGH DONALD SHIEL, MICHAEL SHIRLEY, GEORGE ALLEN SHORT, GLENDA SIMONCIONI, NORM SMALLWOOD, GILLES A. ST. DENNIS, GERI STEPHEN, GRACE ISOBEL STONE, MARI TSANG, CARMEN TUVERA, SHEERA WAISMAN, MARGARET WATSON, GERTRUDE

WESTLAKE, ROBERT E. WHITE, PATRICIA JANE WHITEHEAD, AILEEN WILSON, ELAINE WIRTZ, JOE WUYCHUK, ZLATKA YOUNG

Appellants

and

ROGERS COMMUNICATIONS INCORPORATED

Respondent

Heard at Vancouver, British Columbia, on June 20, 2012.

Judgment delivered at Ottawa, Ontario, on June 28, 2012.

REASONS FOR JUDGMENT BY: DAWSON J.A.

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

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Appellants

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ROGERS COMMUNICATIONS INCORPORATED

Respondent

REASONS FOR JUDGMENT

DAWSON J.A.

[1] This is an appeal from a decision of the Federal Court. In thorough and thoughtful reasons (2011 FC 911, 337 D.L.R. (4th) 467) the Federal Court dismissed an application for judicial review of a decision, made on November 4, 2010, by the Office of the Superintendent of Financial Institutions Canada (Superintendent) not to give fresh consideration to eight issues raised by the appellants.

Factual Background

[2] As noted by the Federal Court Judge, the parties have engaged in a long-running dispute over an actuarial surplus accumulated in a defined benefit employee pension plan. The dispute has been adjudicated upon by judges of the Supreme Court of British Colombia, the British Colombia Court of Appeal, the Supreme Court of Canada, the Federal Court and this Court. At the commencement of the hearing we were advised by counsel for the appellants that we were the 27th, 28th and 29th judges required to rule on this dispute.

[3] The facts are carefully set out in the decision of the Federal Court. For the purpose of this appeal it is sufficient to note the following:

1. The appellants are members of the Premier Pension Plan (Plan) which has been administered by the respondent since it purchased the appellants' former employer, Premier Communications Ltd., in 1980.
2. Following litigation between the parties in the courts of British Columbia, in 2006 the Supreme Court of Canada ruled in *Buschau v. Rogers Communications Inc.*, 2006 SCC 28, [2006] 1 S.C.R. 973, that the appellants were not permitted to terminate the pension fund trust under the rule in *Saunders v. Vautier* because provisions in the *Pension Benefits Standards Act*, 1985, R.S.C. 1985, c. 32 (2nd Supp.) (Act) displaced the common law rule (Supreme Court reasons paragraphs 26 and 28). The Supreme Court also found that the Superintendent was best placed to determine whether the Plan had been terminated under the Act, or whether it should be terminated under the Act (Supreme Court reasons paragraphs 47-57).
3. Following this decision, the appellants requested that the Superintendent terminate the Plan or declare it already terminated. The respondent sought approval from the Superintendent of amendments which would open the Plan to new employees.
4. On April 27, 2007, the Superintendent decided both requests. The Superintendent approved the amendments sought by the respondent, and refused to terminate the Plan or declare it to have been terminated.

5. The appellants sought judicial review of the decision of the Superintendent. While initially successful in the Federal Court (2008 FC 1023, [2008] F.C.J. No. 1283), on appeal this Court set aside the decision of the Federal Court (2009 FCA 258, 393 N.R. 337) thus restoring the decision of the Superintendent.

6. Thereafter, the Supreme Court refused leave to appeal from the decision of this Court ([2009] S.C.C.A. No. 457).

7. On June 30, 2010, the appellants submitted eight questions to the Superintendent which were said to have not been addressed by the Superintendent in her earlier decision or which were said to have arisen since that decision. The questions are set out by the Judge at paragraph 37 of her reasons.

8. The decision of the Superintendent not to give fresh consideration to a number of issues is fully described at paragraphs 39 to 45 of the Judge's reasons. This was the decision which was the subject of the application for judicial review before the Federal Court.

The Decision of the Federal Court

[4] For the purpose of the issues raised on this appeal, the decision of the Federal Court may be summarized as follows.

[5] The Judge began by describing some of the key terms of the Plan: (1) the respondent could amend the Plan; (2) Plan assets could only be used for the exclusive benefit of Plan members; (3) the Plan permitted, but did not require, that an actuarial surplus be used to increase members'

benefits; and (4) an actual surplus realized on termination of the Plan was to be "distributed […] among the remaining Members". She then reviewed the many previous court decisions rendered in the context of the on-going dispute and summarized the Superintendent's 2010 decision.

[6] The Judge went on to address the eight questions the appellants had put before the Superintendent. She found the Superintendent's conclusion that the appellants' first four questions had previously been decided was reasonable. She then considered whether the Superintendent had jurisdiction to reconsider a prior decision.

[7] Since the Act neither permits nor prohibits reconsideration of a past decision and since the doctrine of issue estoppel applies to decisions of administrative tribunals, the Judge concluded that the Superintendent could exercise discretion under that doctrine to reopen a previously decided issue. The Judge then applied the doctrine of issue estoppel to the facts before her and found that the three pre-conditions of issue estoppel were met. In her view, the only reasonable conclusion open to the Superintendent was that the appellants were estopped from re-litigating questions 1 to 4.

[8] At paragraph 84 of her reasons, the Judge wrote:

> In the circumstances of this case, given the Superintendent's reasonable determination that the first four questions raised by the applicants were the same questions as had previously been determined, the only reasonable course of action available was to find that the applicants were estopped from raising the issues again. The Superintendent's 2007 Decision had been judicially reviewed and appealed up to the Federal Court of Appeal. It was only when the Supreme Court of Canada refused to grant leave that the applicants came back to the Superintendent with their re-formulations of, substantially, the same questions. This is tantamount to an abuse of process. This litigation has been ongoing, in one form or another, for over 15

> years. The public interest in finality is strong. In these circumstances, a determination that issue estoppel applies to prevent the applicants from re-raising questions one to four was the only decision available to the Superintendent within the range of possible, acceptable outcomes defensible in respect of the facts and law.

[9] The Judge then considered the appellants' submission that the Supreme Court's decision in *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39, [2009] 2 S.C.R. 678 had changed the law so that she should exercise her discretion not to apply issue estoppel. She concluded that *Nolan* did not "change the law in any way that is relevant to the questions at issue here." *Nolan* simply re-iterated the Supreme Court's statements in *Buschau*.

[10] It followed that while the Superintendent possessed discretion to reopen a past decision, pursuant to the doctrine of issue estoppel the Superintendent had not erred by refusing to reconsider the appellants' previously decided questions.

The Issues on Appeal

[11] The appellants frame the issues on this appeal to be:

1. Are the appellants precluded by the doctrine of issue estoppel from relitigating the issue of their "exclusive" entitlement to the surplus in the Plan on termination of the plan, and the issue of whether Rogers is entitled to use the said surplus to cover its contribution obligations for any new employees it adds to the Plan?

2. If the appellants are entitled to relitigate the above issues "and the court agrees that the original members (and they alone) are solely and exclusively entitled to the

> surplus on termination and Rogers cannot use the surplus for its contribution obligations for the new employees, should the judgment of [the Federal Court] herein be restored and the case sent back to the Superintendent to reconsider the remedy of termination or should this court exercise its power to do what the Superintendent should have done and terminate the plan"?

[12] With respect to the first issue, the appellants do not deny the applicability of the doctrine of issue estoppel. Rather, they submit that there are special circumstances which should permit them to reopen the questions decided against them previously by this Court. The special circumstances are said to be that:

1. The previous decision of this Court was made "in ignorance of the binding S.C.C. decision in *Nolan* and was therefore made *per incuriam*";

2. This Court "itself left considerable uncertainty as to what conclusions it reached regarding Rogers' right to 'get at the surplus'"; and,

3. This Court "appeared to take the unprecedented step of following the minority rather than the majority opinion in the S.C.C.".

The Procedural Motions

[13] Two interlocutory motions were presented at the hearing of the appeal. In the first, the appellants moved to introduce new evidence as well as evidence the Federal Court Judge refused to admit. This motion was opposed by the respondent. In the second, the respondent sought leave to

file an affidavit in opposition to the appellants' motion and, if the appellants were given leave to file new evidence, the respondent sought leave to file the same affidavit as evidence on the appeal.

[14] Judgment was reserved on these motions. In this portion of the reasons I now deal with these interlocutory motions.

[15] As explained above, this is an appeal from a decision of the Federal Court sitting in judicial review of a decision of the Superintendent. Judicial review is normally conducted on the basis of the record before the decision-maker. Additional evidence may be admitted on issues of procedural fairness and jurisdiction (*Ontario Assn. of Architects v. Assn. of Architectural Technologists of Ontario*, 2002 FCA 218, [2003] 1 F.C. 331, at paragraph 30). The evidence the appellants seek to adduce does not go to issues of jurisdiction or procedural fairness and no basis has been established for supplementing the tribunal record.

[16] While this, by itself, is a sufficient ground on which to dismiss the appellants' motion, I also find that the evidence the appellants seek to adduce is not relevant to the issue of whether the doctrine of issue estoppel applies to the questions raised by the appellants. Moreover, to the extent the appellants seek admission of evidence the Judge refused to admit, it is clearly not fresh evidence.

[17] I would therefore dismiss the appellants' interlocutory motion. As the substantive relief sought in the respondent's motion was contingent upon the appellants' motion being successful, I would dismiss this motion as well.

Consideration of the Issues Raised on Appeal

[18] As noted above, on this appeal the appellants do not dispute that the three pre-conditions to the operation of issue estoppel are present. Rather, they argue that special circumstances should permit them to reopen issues previously decided against them by this Court.

[19] The main point advanced by the appellants is that the prior decision of this Court must be deemed to have been overruled by the decision of the Supreme Court of Canada in *Nolan*, (a decision released approximately one month prior to the issuance of the decision of this Court).

[20] The Judge dealt with this submission at paragraphs 85 to 88 of her reasons:

> 85. The applicants argue, however, that the applicable law has changed since the Superintendent's 2007 Decision in such a way that the Superintendent was required, in her 2010 Decision, to exercise her discretion not to apply issue estoppel. While it is true that a change of law may warrant dispensing with issue estoppel in certain circumstances (*Hockin v Bank of British Columbia* (1995), 3 BCLR (3d) 193, 123 DLR (4th) 538 (CA)), I do not find that there has been a change of law in the current case. Neither the decision of the Supreme Court of Canada in *Nolan*, nor the decision in *Burke*, change the law in any way that is relevant to the questions at issue here.
>
> 86. The majority in *Nolan*, above, considered, among other things, the question of whether an employer could take contribution holidays with respect to a defined contribution component of a pension plan based on an actuarial surplus that had accumulated in a defined benefit component. The members of the defined benefit component analogized their situation to the situation at issue in *Buschau III*. They pointed to the fact that the majority in *Buschau III* had

> indicated that re-opening the Premier Plan to new members, and allowing contribution holidays in respect of those new members, would be "problematic". The Court found this analogy to be unconvincing. It indicated that the circumstances in *Buschau III* were different and proceeded to outline those circumstances. It explained how the respondent had unsuccessfully attempted to merge the Premier Plan into the Rogers plan and how the BCCA in *Buschau II* had found that re-opening the plan to new members would be improper. It indicated, "Deschamps J.'s remark about re-opening the plan being problematic was made in this context."
>
> 87. *Nolan* only re-iterated what was already stated by the Supreme Court in *Buschau III*, that it was "problematic" for the respondent to re-open the Premier Plan, given the previous decisions of the BC Courts. Neither the Court in *Buschau III*, nor the Court in *Nolan* went beyond this - the question as to whether the respondent was in fact entitled to re-open the Premier Plan remained unanswered. The Superintendent did answer it, however, in her 2007 Decision and she found that re-opening the Premier Plan was acceptable based on the plan's terms and the *PBSA*. The Federal Court of Appeal, in *Buschau IV*, upheld that decision as being reasonable.
>
> 88. Therefore, as it relates to the applicants' circumstances, the *Nolan* decision contains nothing new and, as a result, the Superintendent cannot be faulted for not addressing it in her decision.

[21] In my view, the Judge's analysis is correct in law and there is no basis for our intervention. Put at its simplest, in the passages relied upon by the appellants in *Nolan*, the Supreme Court described what it had previously decided in *Buschau*. Nothing was said that modified that earlier decision. As such, *Nolan* cannot have overruled this Court's decision in *Buschau*. I note that this Court's decision in *Buschau* and the Supreme Court's dismissal of the application for leave to appeal from that decision happened after the Supreme Court's decision in *Nolan*. Indeed, in their leave application, the appellants submitted that *Nolan* changed this Court's decision in *Buschau*, and that this Court had erred by relying on the minority decision of the Supreme Court in *Buschau*, but the Supreme Court did not grant leave.

[22] In oral argument, counsel for the appellants acknowledged that the other two grounds said to constitute special circumstances were “novel”. In my view, alleged deficiencies or uncertainties in the reasons given in support of a prior final decision cannot, as a matter of law, constitute special circumstances so as to oust application of the doctrine of *issue estoppel*. If this were so, there would be no finality to any decision. Any disappointed litigant could point to something in the earlier reasons and assert this as a ground for reopening the decision. That we are the 27th, 28th and 29th judges to consider the appellants’ entitlement to an actuarial surplus shows the importance and salutary nature of the principle of finality of litigation.

[23] It follows that the Judge made no error in finding that the appellants were not entitled to relitigate the issues previously decided against them. It further follows that it is not necessary to consider the appellants’ submissions on remedy.

Conclusion and Costs

[24] For these reasons, I would dismiss the appeal with costs.

[25] The respondent seeks costs on a solicitor and client basis. It submits that this appeal constitutes an abuse of process and that a strong statement must be made by way of an award of solicitor and client costs.

[26] I am not convinced that an award of solicitor and client costs is justified on the facts before us. Such costs are awarded only on rare occasions, for example where a party has displayed

reprehensible or scandalous conduct. In my view, the appellants' conduct cannot be so characterized.

[27] I am equally satisfied, however, that the appellants' efforts to relitigate issues that this Court has previously decided against them warrants an elevated order of costs. For that reason, I would order that, if not agreed, costs be assessed at the top of column V of the table to Tariff B of the *Federal Courts Rules*.

Postscript

[28] After the hearing we received unsolicited supplementary written submissions from the appellant. These submissions concern one aspect of the issue of relitigation and issues relating to costs. The respondent objects to the Court considering them. The respondent's objection is well-founded but, in any event, the unsolicited submissions do not affect in any way the outcome or the reasons for dismissing this appeal.

"Eleanor R. Dawson"
J.A.

"I agree.
Johanne Gauthier J.A."

"I agree.
David Stratas J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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DATED:	June 28, 2012

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