Federal Court of Appeal | Cour d'appel fédérale

Date: 20230511

Docket: A-272-22

Citation: 2023 FCA 98

Present: RENNIE J.A.

BETWEEN:

COLLINS NJOROGE

Appellant

and

ATTORNEY GENERAL OF CANADA and CANADIAN JUDICIAL COUNCIL

Respondents

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on May 11, 2023.

REASONS FOR ORDER BY: RENNIE J.A.

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REASONS FOR ORDER

RENNIE J.A.

[1] The Court has before it two motions. The first is a motion by the Canadian Judicial Council (CJC) to be joined as a respondent under Rule 338 or granted leave to intervene under Rule 109 of the *Federal Courts Rules*, S.O.R./98-106. The second is a motion brought by the appellant under Rule 466 to initiate contempt proceedings against the respondent, the Attorney General of Canada (AGC), and the CJC. The AGC also seeks an order that these proceedings be case managed.

[2] These motions arise in the context of an appeal to this Court from a decision of the Federal Court (unreported order dated December 9, 2022 in T-1417-22, *per* Lafrenière J.) dismissing an appeal from an Order of Horne A.J. (unreported order dated September 26, 2022 in T-1417-22). In that decision, Horne A.J. dismissed the appellant's motion to compel the transmission of certain documents from the CJC as part of the certified tribunal record pursuant to Rule 317.

[3] I turn to a brief description of the background to these motions.

[4] The appellant commenced a judicial review application in the Federal Court seeking to set aside a decision of the Executive Director of the CJC, which concluded that the CJC would not consider the appellant's complaint of judicial misconduct on the part of one judge of the British Columbia Supreme Court and four judges of the British Columbia Court of Appeal. In his notice of application, the appellant made a request under Rule 317 for the production of the record that had been before the CJC when it made its decision. The CJC, under Rule 318, objected on the basis that the appellant either already had the requested documents in his possession or the documents did not exist. The CJC also claimed deliberative privilege in respect of one document. The appellant's motion to compel production was dismissed by Horne A.J., essentially on the grounds advanced by the CJC. That decision was affirmed by Lafrenière J.

[5] Following the filing of a notice of appeal from Lafrenière J.'s decision in this Court, the CJC sought to file a notice of appearance under Rule 341. The appellant objected, noting that the CJC was not a party to the Federal Court proceedings. The matter came before Gleason J.A., who, on January 19, 2023, issued the following direction:

> However, under Rule 341, only a respondent can file a Notice of Appearance. The CJC was not a party in the Federal Court and therefore likely could not be named as a respondent under Rule 338.
>
> If the CJC is of the view that it has nonetheless pursued the appropriate course in light of the fact that Rule 318 allows it to object to a request under Rule 317 and the disposition of such request appears to be the object of this appeal, it shall bring a motion pursuant to Rule 369.2 seeking leave to file its Notice of Appearance as a non-party and outline in its materials the basis for its right to file the Notice of Appearance as a non-party, the extent of the participation that it seeks, as well as the time frame that it proposes for its participation.

[6] The appellant's motion under Rule 466 asserts that the AGC and CJC are in contempt for failing to comply with the direction and for not agreeing with his proposed contents of the appeal book under Rule 343.

[7] This motion may be readily disposed of.

[8] The direction does not obligate the parties to do anything within any prescribed time limits, and, in any event, the CJC moved on a timely basis to regularize its status before this Court. Further, the failure of the AGC to accede to the appellant's proposed contents of the appeal book cannot form the basis of an allegation of misconduct. Parties are under no obligation to agree to the contents of the appeal book. If the opposing parties are at an impasse, it is the appellant's obligation to bring a motion under Rule 343(2) to have the Court settle the issue.

[9] I would therefore dismiss the appellant's motion under Rule 466 with costs fixed at $500.00 in any event of the cause. Contempt is a serious matter and is not to be lightly alleged.

[10] While these reasons alone are sufficient to dispose of the contempt motion, I wish to briefly address the argument advanced by the AGC that contempt proceedings cannot arise from

failure to comply with a direction. Although it is not necessary to decide the point, suffice to say that the failure to comply with a direction appears to constitute conduct amounting to contempt under three categories listed in Rule 466: Rule 466(b) (“disobeys a process… of the Court”); Rule 466(c) (“interfere[s] with the orderly administration of justice”); or Rule 466(d) (“is an officer of the Court and fails to perform his or her duty”). Indeed, this Court has emphasized that a finding of contempt may result from a broad range of actions with the effect of obstructing justice, and does not arise only upon breach of an order of a tribunal or court (*Professional Institute of the Public Service of Canada v. Bremsak*, 2013 FCA 214 at para. 44).

[11] Directions are not mere suggestions as to what might happen in the conduct of a case, but are the expectation of the Court as to what will happen. Directions carry the weight of judicial authority and entail sanctions for non-compliance (*Fibrogen, Inc. v. Akebia Therapeutics, Inc.*, 2022 FCA 135 at para. 57). There are, however, many remedies short of contempt that are available where a party fails to comply with a direction. Those arise from the Court’s plenary jurisdiction to manage its own process and proceedings. Because of this, contempt in the context of failure to follow a direction is, necessarily, a rare occurrence.

[12] I turn to the motion by the CJC to be added as a party under Rule 338 or as an intervener under Rule 109. The appellant objects to the motion on the basis that a decision maker should not be a party in a proceeding where its own decision is at issue.

[13] Rule 338 and its associated jurisprudence are not as unequivocal as the appellant contends. The opening words of the Rule are “[u]nless the Court orders otherwise”. The

appropriate role for a decision maker whose decision is in issue in a proceeding is, therefore, a discretionary decision for the Court. The factors that need to be taken into account include the stage of proceedings (whether the proceeding is on the merits or at an interlocutory stage on a procedural issue as here), the substance of the issues on appeal and whether the tribunal appreciates and clearly respects the limitations on its role. A court will also be mindful of the importance of public perception of a tribunal's impartiality and want to ensure that, whatever the label assigned to a tribunal's role in the proceedings, neither the perception or reality of its impartiality is compromised (*Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44, [2015] 3 S.C.R. 147 at para. 57).

[14] Consistent with these considerations, tribunals ought, presumptively, to be added as interveners (*Air Passenger Rights v. Canada (Attorney General)*, 2022 FCA 64; *Lukács v. Canada (Transportation Agency)*, 2014 FCA 292 at para. 17; *Canada (Attorney General) v. Quadrini*, 2010 FCA 246, [2012] 2 F.C.R. 3 at para. 3). As interveners, tribunals often provide contextual evidence, describe their legislative framework and operating procedures and no more. The role of tribunals as interveners is not, however, invariable (*Girouard v. Canadian Judicial Council*, 2019 FCA 252; *Lukács v. Canada (Transportation Agency)*, 2016 FCA 103).

[15] The objective is to assign to the party/intervener the status that most closely aligns with the principles constraining the role of tribunals on applications for judicial review of their own decisions, and the substance of the issue to be determined by the Court. In this case, the substance of the role that the CJC will be permitted to play on the appeal is the same, regardless of how it is described or labelled—whether as an intervener or respondent.

[16] In this case, several factors point to adding the CJC as a respondent. Its memorandum of fact and law makes clear that it understands and respects the limitations on its role and that it will play no part in defending the decision on the merits (although this appeal, on an interlocutory point, does not address the merits of the judicial review application in any event). Moreover, the central issue on appeal—the question of deliberative privilege—shows the CJC to be, in substance, a true respondent. Finally, there are procedural advantages and added efficiencies if the CJC is joined as a respondent; the filing dates are co-ordinated with those of the other respondent, which will hasten the perfection of the appeal.

[17] The CJC will therefore be added as a respondent to this appeal.

[18] The request to have this matter case managed is dismissed. The appeal is not complex; either in terms of the number of issues, parties or evidence, and the court docket does not indicate that there have been a multiplicity of interlocutory proceedings. The parties appear, however, to be at an impasse in respect of the contents of the appeal book. Unless the parties reach an agreement as to the contents of the appeal book, the appellant shall bring a motion to settle the contents of the appeal book within 30 days of the date of these reasons and order.

"Donald J. Rennie"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-272-22
STYLE OF CAUSE:	COLLINS NJOROGE v. ATTORNEY GENERAL OF CANADA et al.

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	RENNIE J.A.
DATED:	MAY 11, 2023

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