Federal Court of Appeal

Cour d'appel fédérale

Date: 20130909

Docket: A-481-12

Citation: 2013 FCA 201

CORAM: PELLETIER J.A.
TRUDEL J.A.
MAINVILLE J.A.

BETWEEN:

STEVE BLACK

Appellant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Heard at Calgary, Alberta, on June 12, 2013.

Judgment delivered at Ottawa, Ontario, on September 9, 2013.

REASONS FOR JUDGMENT BY: PELLETIER J.A.

CONCURRED IN BY: TRUDEL J.A.
MAINVILLE J.A.

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REASONS FOR JUDGMENT

PELLETIER J.A.

[1] In November 2010, Sergeant Steve Black's (Sgt. Black) commanding officer decided to institute formal disciplinary proceedings against him for alleged violations of the Royal Canadian Mounted Police's (RCMP) Code of Conduct. Later that month, an adjudication board was appointed by a third party to hear the complaint against Sgt. Black and the commanding officer was notified of its appointment. Subsection 43(4) of the *Royal Canadian Mounted Police Act*, R.S.C. 1985 c. R-10 (the Act) requires the commanding officer to give Sgt. Black notice of the hearing and

particulars of the allegations against him “forthwith” after being notified of the appointment of the adjudication board. The Notice of Disciplinary Hearing (Notice) was provided to Sgt. Black on September 30, 2011, some 10 months or so after the commanding officer was notified of the appointment of the adjudication board.

[2] When the adjudication board convened, Sgt. Black argued that the commanding officer’s failure to provide the Notice “forthwith” deprived the adjudication board of jurisdiction and asked that the charges against him under the Code of Conduct be dismissed. The adjudication board decided that, in the circumstances, the Notice had been served “forthwith” and dismissed the motion. The hearing was then adjourned, to be continued at a later date.

[3] In the interim, Sgt. Black brought an application for judicial review of the adjudication board’s decision. The issue before the Federal Court was whether it should judicially review the adjudication board’s interlocutory decision. Sgt. Black argued that the issue went to the adjudication board’s jurisdiction, an exceptional circumstance that justified his recourse to judicial review prior to exhausting his internal remedies. The respondent Attorney General of Canada (the Attorney General) maintained that Sgt. Black was bound to exhaust his internal remedies before resorting to judicial review, to which Sgt. Black replied that his statutory right of appeal to the Commissioner did not constitute an adequate alternate remedy, hence the exceptional circumstances justifying recourse to judicial review.

[4] The Federal Court, relying on this Court’s decision in *CB Powell Ltd v. Canada (Border Services Agency)*, 2010 FCA 61, [2011] 2 F.C.R. 332 (*CB Powell*), held that the “jurisdictional”

issue did not constitute an exceptional circumstance which justified a pre-emptive recourse to judicial review. The Court went on to find that the right of appeal to the Commissioner provided at section 45.14 of the Act was an adequate alternate remedy. In light of those conclusions, the Federal Court dismissed the application for judicial review without deciding if the Notice was served "forthwith", leaving that matter to be considered if and when Sgt. Black appealed the adjudication board's final decision to the Commissioner.

[5] For the reasons that follow, I would dismiss the appeal.

DISCUSSION

[6] The issue in this appeal is whether the Federal Court was justified in declining to hear Sgt. Black's application for judicial review. Since this is an appeal from the Federal Court on questions of law, the standard of review is correctness.

[7] The jurisprudence of this Court holds that it will not intervene with respect to an interlocutory decision of an administrative tribunal unless there are exceptional circumstances: see *Air Canada v. Lorenz (T.D.)*, [2000] 1 F.C. 494, [1999] F.C.J. No. 1383 (*Lorenz*) at paragraphs 37-38. Sgt. Black seeks to outflank this jurisprudence by arguing that the decision in this case is a final decision.

[8] It is true that the adjudication board's decision is final in the sense that it has decided the issue and that it has no plans to revisit it. That said, the adjudication board's decision simply deals

with a procedural matter that is not determinative of, the substantive issue between the parties, namely whether Sgt. Black has violated the Code of Conduct. It is therefore an interlocutory decision: see *Reebok Canada v. Canada (Deputy Minister of National Revenue, Customs and Excise - M.N.R.)*, [1995] F.C.J. No. 220 at paragraphs 7-11.

[9] Sgt. Black argues that the fact that his challenge goes to the jurisdiction of the adjudication board is an exceptional circumstance, a position that is supported by the jurisprudence which he cites, specifically *Pfeiffer v. Redling*, [1996] 3 F.C. 584 (*Pfeiffer*), *Lorenz*, cited above, and *Secord v. Saint John (City) Board of Police Commissioners*, 2006 NBQB 65, 300 N.B.R. (2d) 202 (*Secord*). Each of these cases involved a challenge to a tribunal's jurisdiction to proceed with the matter before it. In *Pfeiffer* and in *Secord*, the reviewing court held that an attack on the tribunal's "existence" was an exceptional circumstance. In *Lorenz*, Evans J., as he then was, found that while exceptional circumstances could justify judicial intervention with respect to an interlocutory decision, an allegation of bias against the tribunal member was not such a circumstance.

[10] In my view, this jurisprudence must be read in the light of this Court's decision in *CB Powell*. While not excluding the possibility that particular facts might justify judicial intervention with respect to an interlocutory decision, this Court reaffirmed the principle that the circumstances must be truly exceptional. In particular, the suggestion that a particular issue is jurisdictional does not meet the very high threshold for intervention:

> Over thirty years ago, that approach was discarded: *C.U.P.E. v. N.B. Liquor Corporation*, [1979] 2 S.C.R. 227. In that case, Dickson J. (as he then was), writing for a unanimous Supreme Court declared (at page 233), "The courts, in my view, should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be

> doubtfully so." Recently, the Supreme Court again commented on the old discarded approach, disparaging it as "a highly formalistic, artificial 'jurisdiction' test that could easily be manipulated": *Dunsmuir*, supra, at paragraph 43. Quite simply, the use of the label "jurisdiction" to justify judicial interference with ongoing administrative decision-making processes is no longer appropriate.
>
> …
>
> It is not surprising, then, that courts all across Canada have repeatedly eschewed interference with intermediate or interlocutory administrative rulings and have forbidden interlocutory forays to court, even where the decision appears to be a so-called "jurisdictional" issue: see e.g., *Matsqui Indian Band*, *supra*; *Greater Moncton International Airport Authority*, supra at paragraph 1; *Lorenz v. Air Canada*, [2000] 1 F.C. 494 (T.D.) at paragraphs 12 and 13; *Delmas*, supra; *Myers v. Law Society of Newfoundland* (1998), 163 D.L.R. (4th) 62 (Nfld. C.A.); *Canadian National Railway Co. v. Winnipeg City Assessor* (1998), 131 Man. R. (2d) 310 (C.A.); *Dowd v. New Brunswick Dental Society* (1999), 210 N.B.R. (2d) 386, 536 A.P.R. 386 (C.A.).
>
> *CB Powell*, cited above, at paragraphs 42 and 45

[11] As a result, the allegation of jurisdictional error does not, in and of itself, constitute an exceptional circumstance justifying judicial intervention with respect to an interlocutory decision.

[12] Sgt. Black seeks to supplement his exceptional circumstances argument by claiming that the right of appeal in section 45.14 of the Act is not an adequate alternate remedy because it does not allow him to raise issues of jurisdiction. The relevant portions of section 45.14 are reproduced below:

45.14 (1) Subject to this section, a party to a hearing before an adjudication board may appeal the decision of the board to the Commissioner in respect of	**45.14** (1) Sous réserve des autres dispositions du présent article, toute partie à une audience tenue devant un comité d'arbitrage peut en appeler de la décision de ce dernier devant le commissaire :
(*a*) any finding by the board that an allegation of contravention of the Code of Conduct by the member is	*a*) soit en ce qui concerne la conclusion selon laquelle est établie ou non, selon le cas, une

established or not established; or	contravention alléguée au code de déontologie;
(*b*) any sanction imposed or action taken by the board in consequence of a finding by the board that an allegation referred to in paragraph (*a*) is established.	*b*) soit en ce qui concerne toute peine ou mesure imposée par le comité après avoir conclu que l'allégation visée à l'alinéa *a*) est établie.
(2) For the purposes of this section, any dismissal of an allegation by an adjudication board pursuant to subsection 45.1(6) or on any other ground without a finding by the board that the allegation is established or not established is deemed to be a finding by the board that the allegation is not established.	(2) Pour l'application du présent article, le rejet par un comité d'arbitrage d'une allégation en vertu du paragraphe 45.1(6) ou pour tout autre motif, sans conclusion sur le bien-fondé de l'allégation, est réputé être une conclusion portant que cette dernière n'est pas établie.
(3) An appeal lies to the Commissioner on any ground of appeal, except that an appeal lies to the Commissioner by an appropriate officer in respect of a sanction or an action referred to in paragraph (1)(*b*) only on the ground of appeal that the sanction or action is not one provided for by this Act.	(3) Le commissaire entend tout appel, quel qu'en soit le motif; toutefois, l'officier compétent ne peut en appeler devant le commissaire de la peine ou de la mesure visée à l'alinéa (1)*b*) qu'au motif que la présente loi ne les prévoit pas.

[13] Sgt. Black argues that his right of appeal is limited to whether any of the allegations against him have been established and if so, whether the sanction imposed is one provided by law. He concludes from this that he cannot raise issues of jurisdiction in an appeal to the Commissioner. He goes on to say that subsection 45.14(3), which refers to "any ground of appeal" does not "extend the Commissioner's appellate jurisdiction beyond that already set out in subsection 45.14(1)": see Appellant's Memorandum of Fact and Law, at paragraph 21.

[14] In my view, Sgt. Black's reading of section 45.14 is excessively narrow. Granted, the words used to confer the right of appeal are somewhat unusual in the administrative law context, but they are undoubtedly familiar to those whose primary frame of reference is the *Criminal Code* R.S.C. 1985 c. C-46:

675. (1) A person who is convicted by a trial court in proceedings by indictment may appeal to the court of appeal	675. (1) Une personne déclarée coupable par un tribunal de première instance dans des procédures sur acte d'accusation peut interjeter appel, devant la cour d'appel :
(*a*) against his conviction (i) on any ground of appeal that involves a question of law alone, (ii) on any ground of appeal that involves a question of fact or a question of mixed law and fact, with leave of the court of appeal or a judge thereof or on the certificate of the trial judge that the case is a proper case for appeal, or (iii) on any ground of appeal not mentioned in subparagraph (i) or (ii) that appears to the court of appeal to be a sufficient ground of appeal, with leave of the court of appeal; or	*a*) de sa déclaration de culpabilité : (i) soit pour tout motif d'appel comportant une simple question de droit, (ii) soit pour tout motif d'appel comportant une question de fait, ou une question de droit et de fait, avec l'autorisation de la cour d'appel ou de l'un de ses juges ou sur certificat du juge de première instance attestant que la cause est susceptible d'appel, (iii) soit pour tout motif d'appel non mentionné au sous-alinéa (i) ou (ii) et jugé suffisant par la cour d'appel, avec l'autorisation de celle-ci;
(*b*) against the sentence passed by the trial court, with leave of the court of appeal or a judge thereof unless that sentence is one fixed by law.	*b*) de la sentence rendue par le tribunal de première instance, avec l'autorisation de la cour d'appel ou de l'un de ses juges, à moins que cette sentence ne soit de celles que fixe la loi.

[15] As the text of subsection 675(1) makes clear, the *object* of an appeal (conviction, sentence) does not dictate the *ground* of appeal (error of law, question of mixed fact and law).

[16] So it is for section 45.14 of the Act. Subsection 45.14(3) allows Sgt. Black to appeal against a finding that he has violated the Code of Conduct on any ground which is capable of resulting in a reversal of the adjudication board's finding, including a lack of jurisdiction. The distinction between subsection 45.13(1) and subsection 45.13(3) is the distinction between the *object* of an appeal and the *grounds* of that appeal.

[17] As a result, Sgt. Black's argument that his right of appeal is not an adequate alternate remedy fails.

[18] Finally, Sgt. Black argues that the fact that he must wait until the adjudication board renders its final decision before he can appeal its decision with respect to jurisdiction is an exceptional circumstance. He contends that a favourable decision on the jurisdiction issue at this juncture would put an end to the proceeding, thus sparing him, and others, the time and expense of a full hearing on the merits.

[19] This argument is fully answered by the following passage from *CB Powell*:

> This [the policy of discouraging judicial review of interlocutory decisions] prevents fragmentation of the administrative process and piecemeal court proceedings, eliminates the large costs and delays associated with premature forays to court and avoids the waste associated with hearing an interlocutory judicial review when the applicant for judicial

> review may succeed at the end of the administrative process anyway …. Further, only at the end of the administrative process will a reviewing court have all of the administrative decision-maker's findings; these findings may be suffused with expertise, legitimate policy judgments and valuable regulatory experience …. Finally, this approach is consistent with and supports the concept of judicial respect for administrative decision-makers who, like judges, have decision-making responsibilities to discharge….
>
> *CB Powell*, at paragraph 32 (citations omitted)

[20] Sgt. Black's desire to spare himself the time and expense of a full hearing on the merits has saddled him with the cost of proceedings in this Court and in the Federal Court and has delayed the resolution of the outstanding allegations against him by more than a year.

[21] I would therefore dismiss the appeal with costs.

"J.D. Denis Pelletier"

J.A.

"I agree
Johanne Trudel J.A."

"I agree
Robert M. Mainville J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-481-12
STYLE OF CAUSE:	STEVE BLACK v. THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	CALGARY, ALBERTA
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REASONS FOR JUDGMENT BY:	PELLETIER J.A.
CONCURRED IN BY:	TRUDEL J.A. MAINVILLE J.A.
DATED:	SEPTEMBER 9, 2013

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