

Federal Court of Appeal



Cour d'appel fédérale

Date: 20131105

Docket: A-435-12

Citation: 2013 FCA 258

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

BETWEEN:

MATTHEW G. YEAGER

Appellant

and

**STOCKWELL DAY, MINISTER
(AS HE THEN WAS)
OF DEPARTMENT OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS, MINISTER
OF DEPARTMENT OF PUBLIC SAFETY,
AND ATTORNEY GENERAL OF CANADA**

Respondents

Heard at Toronto, Ontario, on November 5, 2013.

Judgment delivered from the Bench at Toronto, Ontario, on November 5, 2013.

REASONS FOR JUDGMENT OF THE COURT BY:

STRATAS J.A.

Federal Court of Appeal



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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Toronto, Ontario, on November 5, 2013).

STRATAS J.A.

[1] Mr. Yeager appeals from the judgment dated October 1, 2012 of the Federal Court (*per* Justice Near): 2012 FC 1157. The Federal Court dismissed Mr. Yeager's motion for reconsideration of an order made by Deputy Judge Tannenbaum.

[2] The events giving rise to the motion for reconsideration can be briefly summarized. Mr. Yeager brought a motion under Rule 317 for an order requiring the respondents to produce certain documents and to cross-examine certain of the respondents' officials for the purposes of a pending judicial review. The Deputy Judge dismissed the motion, finding that the documents sought did not exist and cross-examination was not available because the officials had not filed affidavits.

[3] The Deputy Judge made his order dismissing the motion on August 11, 2009. He was over 75 years of age at the time he made his order.

[4] Mr. Yeager did not appeal the Deputy Judge's order. Instead, on August 21, 2009, he brought a motion for reconsideration of the order under Rule 397.

[5] During these events, a challenge to the ability of Deputy Judges over 75 years of age to hear matters was pending in the Federal Court. Mr. Yeager's motion for reconsideration was held in abeyance until the challenge was finally determined. The Federal Court dismissed the challenge. But, on October 3, 2011, this Court allowed it: *Felipa v. Canada (Citizenship and Immigration)*, 2011 FCA 272. As a result of this Court's decision in *Felipa*, Deputy Judges over 75 years of age no longer could determine matters.

[6] After *Felipa*, Mr. Yeager resumed his motion for reconsideration of the Deputy Judge's order. He submitted the Deputy Judge's order should be set aside because, being over 75 years of age, he had no power to make it.

[7] On the motion for reconsideration, the Federal Court held that it did not have the legal authority to grant the relief sought under Rule 397. It added that the order, having not been appealed, must be taken to be valid under the *de facto* doctrine, relying upon *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, and other authorities.

[8] In this Court, Mr. Yeager challenges the bases for the Federal Court's decision. He also adds that the application of the *de facto* doctrine offends the constitutional guarantee of the rule of law found in the preamble to the *Constitution Act, 1982*.

[9] We agree with the Federal Court that it had no ability to set aside the order using the reconsideration power under Rule 397. The reconsideration power under Rule 397 is not the same as this Court's powers on appeal under section 52 of the *Federal Courts Act*, R.S.C. 1985, c. F-7. Instead, the reconsideration power is more limited – to correct small oversights, such as an inconsistency between the order and the reasons (Rule 397(1)(a)), the failure of the Court to deal with something that was put to it (Rule 397(1)(b)), and clerical mistakes, errors or omissions in the order (Rule 397(2)).

[10] In this case, Mr. Yeager did not appeal the Deputy Judge's order. Upon expiry of the deadline for filing a notice of appeal, and in the absence of a motion to extend the time to appeal, the matter became *res judicata*. Upon becoming *res judicata*, the order is presumed to be valid, absent proof of fraud in its making, even if there is a later change in the law: see, e.g., *Régie des rentes du Québec v. Canada Bread Company Ltd.*, 2013 SCC 46 at paragraph 55, citing *Roberge v. Bolduc*, [1991] 1 S.C.R. 374 at page 403. For example, where a person is convicted of a criminal

offence, is sitting in jail, and has not appealed his conviction, he cannot take advantage of a later, favourable court decision: *R. v. Wigman*, [1987] 1 S.C.R. 246 at paragraph 21. Accordingly, having not appealed the Deputy Judge's order, Mr. Yeager could not benefit from any subsequent changes in the law, such as the change wrought by *Felipa, supra*.

[11] In oral argument, in response to *Wigman, supra*, counsel for Mr. Yeager raised *R. v. Gamble*, [1988] 2 S.C.R. 595 as an example where relief was granted despite the absence of an appeal. But *Gamble* concerned an ongoing, and thus, present denial of parole eligibility, not an attempt to challenge the validity of an earlier judgment that had not been appealed.

[12] Also in oral argument, counsel for Mr. Yeager argued that interlocutory orders can be appealed after the main proceeding is determined. However, that rule is restricted to proceedings under the *Criminal Code*, R.S.C. 1985, c. C-46, which does not provide for interlocutory appeals: *R. v. Meltzer*, [1989] 1 S.C.R. 1764 and *R. v. Ouellette*, [1989] 1 S.C.R. 1781. One may appeal interlocutory orders from the Federal Court to this Court: *Federal Courts Act, supra*, paragraph 27(1)(c).

[13] In his memorandum, Mr. Yeager also invoked the constitutional guarantee of the rule of law. It does not support him. The Supreme Court has described this guarantee as:

...embracing three principles. The first recognizes that "the law is supreme over officials of the government as well as private individuals, and thereby preclusive of the influence of arbitrary power": *Reference re Manitoba Language Rights*, [supra] at p. 748. The second "requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order": *Reference re Manitoba Language Rights*, [supra] at p. 749. The third requires that "the relationship between the state and the individual...be regulated by law": *Reference re Secession of Quebec*, at para. 71.

(*British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473 at paragraph 58.)

[14] Mr. Yeager's claim does not fit within these three principles. Indeed, the principle of finality of judgments and orders embraced by the concept of *res judicata* is an integral part of the second principle, the preservation of order. We also do not see any merit in Mr. Yeager's section 7 Charter submissions or his submissions based on independence of the judiciary. In any event, we would add that constitutional arguments must be asserted within the framework of the practices and procedures of the Court, as embodied in the *Federal Courts Rules*: see, e.g., *Mills v. The Queen*, [1986] 1 S.C.R. 863. As mentioned above, the constitutional argument asserted by Mr. Yeager here – an argument that goes to the substantive validity of the order rather than correcting a slip or oversight by the Court – cannot be asserted in a motion for reconsideration under Rule 397.

[15] Finally, in his notice of appeal, Mr. Yeager seeks an extension of time to appeal. However, the failure to appeal as opposed to bringing a motion for reconsideration has not been satisfactorily explained and so, on the authorities, an extension of time cannot be granted: *Grewal v. Canada*, [1985] 2 F.C. 263.

[16] For the foregoing reasons, we shall dismiss the appeal with costs.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-435-12

(APPEAL FROM AN ORDER OF THE HONOURABLE MR. JUSTICE NEAR OF THE FEDERAL COURT OF CANADA (AS HE THEN WAS), DATED OCTOBER 1, 2012, DOCKET NO. T-91-09)

STYLE OF CAUSE:

MATTHEW G. YEAGER v.
STOCKWELL DAY, MINISTER
(AS HE THEN WAS) OF
DEPARTMENT OF PUBLIC
SAFETY AND EMERGENCY
PREPAREDNESS, MINISTER
OF DEPARTMENT OF PUBLIC
SAFETY, AND ATTORNEY
GENERAL OF CANADA

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: NOVEMBER 5, 2013

REASONS FOR JUDGMENT OF THE COURT BY: BLAIS C.J.
SHARLOW J.A.
STRATAS J.A.

DELIVERED FROM THE BENCH BY:

STRATAS J.A.

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