Federal Court Cour fédérale

Date: 20171204

Docket: T-300-17

Citation: 2017 FC 1093

Ottawa, Ontario, December 4, 2017

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

GERALD BRAKE

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

and

FEDERATION OF NEWFOUNDLAND INDIANS

Respondent

ORDER AND REASONS

I. Nature of the Matter

[1] This purports to be an appeal brought by the Applicant from a direction issued by Prothonotary Aylen [the Prothonotary] on October 5, 2017, made in the context of an application

for judicial review [the Direction]. The Applicant has a motion set for argument in March 2018, to convert the application for judicial review into an action, and to have the action certified as a class action. The Direction dismissed the Applicant's request to set a timetable for determining the Applicant's underlying application for judicial review. The underlying judicial review challenges certain membership decisions made in connection with the Qalipu Mi'kmaq First Nation Band. The Qalipu Mi'kmaq Band is a relatively recently created Indigenous Band in Newfoundland and Labrador established under the *Indian Act*, RSC 1985, c I-5. The purpose of converting the application into a certified class action would be to permit the Applicant and others to claim damages and other relief not available in an application for judicial review.

[2] After hearing argument on whether I should entertain an appeal of the Direction, I dismissed the motion with reasons to follow. My decision is in light of several decisions of the Federal Court of Appeal that establish that motions judges of the Federal Court should not entertain appeals from directions – as opposed to orders – issued by Prothonotaries of this Court. The following are my reasons.

II. Background Facts

[3] In addition to the Applicant's application for judicial review, there were, at one time, three other related proceedings before the Court, namely, *David Robert Wells v Canada (Attorney General and Federation of Newfoundland Indians* (Court File Number: T-638-17) and *Sandra Frances Wells v Canada (Attorney General) and Federation of Newfoundland Indians* (Court File Number: T-644-17) [collectively, the "Wells Proceedings")], and *Douglas Doucette v*

The Federation of Newfoundland Indians, the Qalipu Mi'kmaq First Nations Band and Her Majesty the Queen in Right of Canada (Court File Number: T-402-17) [*Doucette*].

[4] The Attorney General of Canada [the AG] appears to have reached an agreement with the applicants in the *Wells Proceedings* to move their cases forward as test cases. The Applicant was not party to that agreement, nor was he asked for input.

[5] Also by way of background, the Prothonotary struck the Amended Statement of Claim in the *Doucette* action, without leave to amend, on November 3, 2017.

[6] On May 3, 2017, in my capacity as case management judge with the assistance of the Prothonotary, I issued a direction requiring the parties to provide "a status report and proposed timetable for completion of the next steps" in this application. As a consequence, the Prothonotary held a case conference on June 5, 2017.

[7] Counsel for the parties in this matter and counsel in the *Wells Proceedings* and *Doucette* were present. The Applicant asked that his motion to convert and certify be heard before the AG's motion to stay this proceeding in favour of the *Wells Proceedings*.

[8] On June 6, 2017, the Prothonotary issued an order granting the Applicant's request: "[T]he Applicant's motion to certify this proceeding as a class proceeding and to convert the application to an action shall be heard prior to the Respondent's stay motion." The Prothonotary requested submissions respecting the proposed timetable which were submitted thereafter.

[9] The Prothonotary held another case conference on June 14, 2017, this time to finalize the timetable in this proceeding. On June 15, 2017, Prothonotary Aylen issued a direction setting out the timetable for the Applicant's certification and conversion motion including dates to serve affidavits (June 16, 2017 and October 16, 2017), complete cross-examinations (November 16, 2017), and dates to serve and file motion records (November 30, 2017 and December 22, 2017). As already mentioned, I will hear the Applicant's conversion and certification motions in March 2018.

[10] On July 18, 2017, the Applicant wrote to the AG to propose that the Applicant's judicial review application be determined on the merits together with the *Wells Proceedings,* and that this determination take place at the same time or shortly after the motion to convert his application to an action and his motion to certify the action as a class proceeding. This was opposed by the AG.

[11] On July 27, 2017, the Applicant wrote to the Prothonotary requesting a case management conference "to address a proposal by the Applicant for a timetable for a determination of the judicial review component of this proceeding". The AG replied, noting that the Applicant was aware that the *Wells Proceedings* and *Doucette* were continuing along set timetables, and that the June 6, 2017 order of the Prothonotary determined that the merits of the Applicant's application were to be determined after the Applicant's conversion and certification motions and the AG's motion to stay (depending on the outcome of the certification motion).

[12] On August 3, 2017, the Prothonotary requested further details on the Applicant's proposal, noting that, to date, the Applicant had provided the Court with minimal details,

particularly with respect to the “judicial review issues” he was seeking to have determined and on whose behalf those issues would be determined:

> Oral directions received from the Court: Mandy Aylen, Prothonotary dated 03-AUG-2017 directing that the Court is in receipt of a request by the Applicant for an in-person case management conference involving the parties in this proceeding and in T-638-17 and T-644-17, to discuss a proposal being made by the Applicant that the judicial review issues in this matter be determined at the same time as the judicial review proceedings T-638-17 and T-644-17. The Respondent opposes the request for an in person case management conference, as well as the proposal. The Court is prepared to convene a case management conference to address the Applicant's proposal, but not an in-person conference given the cost required for the Attorney General to travel to Toronto. There is no reason why the issues related to the Applicant's proposal cannot be canvassed by teleconference or video-conference. Moreover, the Court is not prepared to compel counsel in the Wells matters to attend the case management conference. They may attend voluntarily to observe if they so choose. The Applicant has provided the Court with minimal details regarding his proposal, particularly as it relates to what "judicial review issues' he is seeking to have determined under his proposed class (notwithstanding that there has been no certification of a class) or on his personal behalf. Accordingly, the Applicant shall provide the Court with a complete explanation of the exact proposal being put forward by no later than August 9, 2017. The Applicant shall canvass the availability of counsel for a case management conference during the month of August to address his proposal and advise the Court by no later than August 9, 2017 of the available dates and the parties' preference regarding video-conferencing or teleconferencing. If there are no jointly convenient dates in August, the Applicant shall provide the parties' availability for the period of September 19-29, 2017 placed on file on 03-AUG-2017. Confirmed in writing to the party(ies).

[13] The Applicant responded in correspondence dated August 4, 2017, in which he requested that the merits be determined at the same time as the conversion and certification motions.

[14] After further correspondence, the Prothonotary convened another case conference on October 5, 2017, to discuss the Applicant's proposal. The Applicant's proposal was opposed by the applicants in the *Wells Proceedings*, and by the Federation of Newfoundland Indians [FNI] (who received status as a Respondent on August 9, 2017).

[15] The Prothonotary issued the Direction on October 5, 2017, rejecting the Applicant's proposal to revise her previous direction, and confirmed that the current timetable for the certification and conversion motions remained in place. The Direction stated:

> A case management conference was held on October 5, 2017 to address the proposal raised by the Applicant in his letters dated July 18, July 27 and August 4, 2017 to have the judicial review issues raised in the proposed class proceeding determined on their merits at the same time or immediately after the certification and conversion motions, and together with the merits of the Wells applications. The Applicant's proposal was resisted by all other parties in the Brake proceedings and by all parties in the Wells applications.
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> Having considered the submissions of the parties, I decline to exercise my discretion to make the exceptional order requested by the Applicant. The Applicant has chosen to bring forward his issues by way of a proposed class proceeding and a timetable has been established for the certification and conversion motions. The Applicant has been aware of the Wells applications for many months and has chosen to continue with his certification and conversion motions, rather than abandoning them and seeking to have his application heard together with, or immediately after, the Wells applications.[1] I find that it would not result in the most just and least expensive determination of the Brake matter for the Court to compel the parties in the Brake matter to prepare evidence on the merits of the judicial review for a proposed class that has not yet been certified and in relation to questions of law that have not yet been recognized as common to the proposed class.

[1] By order dated August 9, 2017, the Prothonotary had directed that filings in the *Wells Proceedings* be made as follows: responding affidavits to be filed by August 18, 2017, cross-examinations to be completed by September 30, 2017, Applicants' record due by October 31, 2017, Respondent's record due by December 17, 2017, joint requisition for hearing to be filed by December 22, 2017.

> Accordingly, the Applicant's proposal is rejected. The current timetable for the certification and conversion motion remains in place.

[16] The matter before the Court is what purports to be an appeal from the Direction.

III. Issue

[17] The only issue is whether the Court should entertain the Applicant's purported appeal from the Direction.

IV. Analysis

[18] The law in connection with appeals from directions has, in my view, been settled by the Federal Court of Appeal in two decisions concerning purported appeals to this Court from directions issued by a Prothonotary.

[19] First, in *Peak Innovations Inc. v Simpson Strong-Tie Company, Inc*., 2011 FCA 81 [*Peak Innovations*] per Layden-Stevenson JA at paras 2 and 4, the Federal Court of Appeal ruled that an appeal from a prothonotary's direction ought not to be entertained in the first instance:

> [2] We are of the view that the appeal <u>ought not to have been entertained in the first instance.</u> The jurisprudence of this Court is well settled. No appeal lies from a direction: *Froom v. The Queen* 2003 FCA 141. It follows that, in the circumstances of this matter, no costs ought to have been awarded against the appellant.
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> […]
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> [4] We would add that, in circumstances where counsel is uncertain regarding, or wishes to challenge, the nature of a direction arising from a case management conference, counsel is at

> liberty to request, on motion, a formal order which sets out the substance of the direction.
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> [Emphasis added]

[20] I added the 4th paragraph of *Peak Innovations* for completeness; it is not applicable because there is neither uncertainty nor any issue with the nature of the Direction: the parties do not take issue with the nature of the Direction which is clear.

[21] The second decision of the Federal Court of Appeal is to the same effect. In *Tajdin v His Highness Prince Karim Aga Khan*, 2012 FCA 238 [*Tajdin*], Dawson JA determined that the motions judge erred by entertaining the appeal from the direction of a Prothonotary at para 4:

> [4] <u>We are of the view that the Motions Judge erred by entertaining the appeal from the direction of the prothonotary</u>. The jurisprudence is well-established that no appeal lies from a direction (*Peak Innovations Inc. v. Simpson Strong-Tie Co.*, 2011 FCA 81, [2011] F.C.J. No. 330; *Froom v. Canada (Minister of Justice)*, 2003 FCA 141, [2003] F.C.J. No. 448).
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> [Emphasis added.]

[22] These decisions are binding on me and I am not persuaded they should be disregarded. Nor are they distinguishable from the matter presently before me. They are based on the proposition that no appeal lies from a direction; a proposition that neither party disputed, and which is clear from Rule 51(1) of the *Federal Courts Rules*, SOR/98-106 [the *Rules*], which creates an appeal right to this Court in respect of "an order" of a Prothonotary, but not with respect to directions. While the *Rules*, in particular, paragraph 385(1)(a) authorize prothonotaries to make both orders and directions, the only appeal created is in respect of orders. I take it as

elementary that appeal rights must be created by statute or regulation, or *Rules* in the case of prothonotaries.

[23] The Federal Court of Appeal has consistently concluded that there is no appeal from a direction: *Peak Innovations* at para 2, *Tajdin* at para 4, and also see *Froom v Canada (Minister of Justice)*, 2003 FCA 141 [*Froom*] at para 3 per Evans JA to exactly the same effect: "[n]o right of appeal lies from a direction of the Court: *Pellikaan v Canada*, 2001 FCT 1415."

[24] In opposition, the Applicant points to cases which he says have modified this established legal principle. However, and with respect, I do not find his argument persuasive. While I agree the Federal Court of Appeal entertained an appeal from a direction in *Mazhero v Fox,* 2014 FCA 200 [*Mazhero*] per Sharlow JA at paras 12 and 19, the direction at issue put the Appellant in an impossible position:

> [12] That leaves Mr. Mazhero in an impossible position. He cannot pursue the two appeals that he was entitled to commence, because the other parties have not taken the steps required to permit him to file documents. At the same time Mr. Mazhero is left with no means by which he can seek an order requiring them to perfect their claims or formally abandon them.
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> …
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> [19] Mr. Mazhero is concerned that many of the steps taken in this matter have been done by means of a direction rather than an order. I share his concern. In my view, where a party or the Registry is being compelled to take certain action or to refrain from taking a certain action, an order should be made unless the Federal Courts Rules specifically contemplate a direction (for example, Rule 72 dealing with the right of the Registry to seek a direction as to the filing of irregular documents). By exception, a direction is appropriate where it is required to guide the parties or the Registry in matters of procedure, or to deal with a matter to which the parties have consented or that for other reasons may reasonably be considered not to be controversial. A direction

> should never be used in place of an order where it is reasonable to consider that a party may wish to appeal.

[25] In my respectful view, the situation for the Applicant is distinguishable. First of all, the Direction does not put the Applicant in an impossible position. His judicial review may still be determined, albeit on a timetable with which he disagrees. In addition, in these circumstances, the direction was appropriate to guide the parties on the procedure to follow in this matter. Scheduling timetables should not normally be seen as controversial, but rather, as routine matters for prothonotaries.

[26] The Applicant also relies on para 19 of *Mazhero* to say, in effect, that the Prothonotary should have issued an order instead of the Direction and if he is right, he must therefore have a right of appeal. But to accept that submission, it seems, to me, would be to permit the same argument to be made in respect of any direction, thereby creating a non-statutory right of appeal under the guise of reviewing the characterization of the Prothonotary's decision - *i.e.*, is it an order or a direction? I am not persuaded the Federal Court of Appeal intended its decisions in *Mazhero* to create an appeal where none is created by the *Rules* particularly in the face of its direct conclusion in *Peak Innovations* and *Tajdin* that there is no such right of appeal in the first place.

[27] The Applicant also relies upon *Ewonde v Canada*, 2017 FCA 112 [*Ewonde*] per Trudel JA at paras 21 and 23. There, the Federal Court of Appeal entertained an appeal from a direction. However, as with *Mazhero*, it does not appear that the Federal Court of Appeal's decisions in *Peak Innovation* and *Tajdin* were considered. In fact, *Ewonde* involved a direction that denied

the Applicant's fundamental language rights. In my respectful view, one cannot compare the Court's denial of fundamental language rights, to the rejection of one timeline in favour of another in the circumstances of a given case.

[28] In *Mazhero*, the Federal Court of Appeal intervened to prevent the Applicant from being put in an impossible position, and again intervened in *Ewonde* to protect fundamental language rights. I note no such fundamental rights are at issue in the matter at hand; the only issue is the timetable for hearing the Applicant's judicial review arguments. The Applicant argues that this is not simply a timetable issue, but that the issue is whether he can proceed with a separate motion. That is not correct. The issue is when, not whether, he will be able to proceed.

[29] In this connection, I note *Tajdin* concerned a direction issued in respect of a timetable, as indeed did the Federal Court of Appeal's earlier decision in *Froom* upon which both *Peak Innovations* and *Tajdin* rely.

[30] In my respectful view, not only the *Rules*, but binding decisions of the Federal Court of Appeal preclude me from entertaining this purported appeal.

[31] As a consequence, the appeal is dismissed. Both Respondents requested costs in that they were successful. The Applicant opposed because the matter arose in the context of a proposed certified class action in respect of which Rule 334.39 generally says there shall be no costs. In the circumstances, the parties shall bear their own costs.

ORDER

THIS COURT'S JUDGMENT IS that the Applicant's appeal from the Direction of Prothonotary Aylen dated October 5, 2006 is dismissed without costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	T-300-17
STYLE OF CAUSE:	GERALD BRAKE v ATTORNEY GENERAL OF CANADA and FEDERATION OF NEWFOUNDLAND INDIANS

MOTION HELD VIA VIDEOCONFERENCE ON NOVEMBER 17, 2017 BETWEEN OTTAWA, ONTARIO, TORONTO, ONTARIO AND ST. JOHN'S, NEWFOUNDLAND

ORDER AND REASONS:	BROWN J.
DATED:	DECEMBER 4, 2017

APPEARANCES:

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