Federal Court of Appeal | Cour d'appel fédérale

Date: 20230321

Docket: A-108-21

Citation: 2023 FCA 64

CORAM: **WEBB J.A.**
RENNIE J.A.
LOCKE J.A.

BETWEEN:

TIMOTHY E. LEAHY

Appellant

and

MINISTER OF JUSTICE

Respondent

Heard at Toronto, Ontario, on March 14, 2023.

Judgment delivered at Ottawa, Ontario, on March 21, 2023.

REASONS FOR JUDGMENT BY: RENNIE J.A.

CONCURRED IN BY: WEBB J.A.
LOCKE J.A.

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REASONS FOR JUDGMENT

RENNIE J.A.

[1] This is an appeal of an order of the Federal Court (2021 FC 302, *per* Furlanetto J.). In that decision, Furlanetto J. granted the respondent's motion to strike the appellant's judicial review application of a decision of the Registrar of the Supreme Court of Canada (the Registrar). Under subsection 73(4) of the *Rules of the Supreme Court of Canada*, S.O.R./2002-156 (the

Rules), the Registrar had refused the appellant's motion for reconsideration of the Supreme Court's decision to dismiss his motion for leave to appeal from a decision of this Court.

[2] The procedural background that gives rise to this appeal may be briefly stated.

[3] The appellant sought a declaration in the Federal Court that he was permitted to appear as counsel in the Federal Courts despite not being a member of the Law Society of Ontario. The Minister of Justice moved, successfully, to strike the application (*Leahy v. Canada (Justice)*, 2019 FC 973, 63 Admin. L.R. (6th) 161). The appellant did not file a notice of appeal from the judgment striking his application within the 30-day limit prescribed by paragraph 27(2)(*b*) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, and later brought a motion for leave to extend the time within which he could do so. Stratas J.A., sitting as single judge of this Court, dismissed the motion and refused to extend the time within which the appellant could appeal. The appellant next sought leave to appeal Stratas J.A.'s decision to the Supreme Court. The Supreme Court dismissed the appellant's application for leave to appeal on October 15, 2020 (39254, 2020 CanLII 76217).

[4] The appellant then filed a motion for reconsideration of the Supreme Court's refusal to grant leave.

[5] The Registrar, noting the criteria prescribed in Rule 73 of the Rules, refused to accept the reconsideration motion because the appellant's accompanying affidavit did not establish the

exceedingly rare circumstances required for the filing of such a motion. This prompted the appellant to file his judicial review application, which was struck by the Federal Court.

[6] I see no error in the Federal Court's reasons. Furlanetto J. correctly identified the legal test to strike a notice of application for judicial review, where the application may only be struck where it is "so clearly improper as to be bereft of any possibility of success" (Reasons at para. 17, citing *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc. (C.A.)*, [1995] 1 F.C. 588, 1994 CanLII 3529 (FCA)). The judge noted that where there is clear and binding authority that is directly contrary to the position on which the application is based, the application meets the standard of being "bereft of any possibility of success" and may appropriately be struck at an early stage (Reasons at para. 18). That is the case here.

[7] Settled jurisprudence—specifically, the Supreme Court's decision in *Stubicar v. Canada*, 2014 SCC 38, [2014] 2 S.C.R. 104, the Federal Court of Appeal's decision in *Scheuneman v. Canada (Attorney General)*, 2003 FCA 194, 303 N.R. 359 [*Scheuneman*] and the Federal Court's decision in *Sydel v. Canada (Attorney General)*, 2013 FC 1116, 441 F.T.R. 310 [*Sydel*]—confirm that the Supreme Court cannot be compelled to consider a motion for reconsideration.

[8] The Supreme Court is not a federal board, commission or tribunal within the meaning of section 18.1 of the *Federal Courts Act*. To hold that the Federal Court could compel the Supreme Court to hear a motion for reconsideration would offend the principle that courts control their own processes, which is in turn an element of the unwritten constitutional principle of judicial

independence. Further, if the Federal Court could judicially review a decision or order of the Supreme Court, that decision itself would be subject to appeal to the Supreme Court (*Scheuneman* at para. 11; *Sydel* at paras. 56-58). The absurdity of the proposition is self-evident.

[9] The appellant argues that the Registrar is not a judge, and cannot therefore decide matters that bear on appeals to the Supreme Court. He further argues that, as applications for leave to appeal are considered by a panel of three judges of the Supreme Court, the same procedure must apply to his motion for reconsideration. I disagree with both of these arguments.

[10] Section 18 of the *Supreme Court Act*, R.S.C. 1985, c. S-26 authorizes the Registrar to exercise any jurisdiction of a judge sitting in chambers as may be conferred by general rules or orders made under that Act, and subsection 73(4) of the Rules specifically allows the Registrar to refuse to accept a motion for reconsideration. Lest there be any doubt on the point, section 12 of the Rules provides that every order of the Registrar shall be binding on the parties "as if the order had been made by a judge."

[11] I note as well that while subsection 43(3) of the *Supreme Court Act* requires a quorum of three judges to dispose of an application for leave, there is no equivalent requirement regarding the necessary quorum for the Supreme Court's decision on whether it should accept a motion for reconsideration. A motion for reconsideration is not the same as a motion for leave to appeal. The former engages an inquiry into circumstances extraneous to the decision of the Supreme Court itself, while the latter assesses the issues in the decision sought to be appealed against statutory criteria of national or public importance. Further, motions for reconsideration arise only

under the Rules; they are not governed by the *Supreme Court Act*, unlike applications for leave to appeal.

[12] I would dismiss the appeal with costs, which I would fix at $500.00.

"Donald J. Rennie"
J.A.

"I agree.
Webb J.A."

"I agree.
Locke J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-108-21
STYLE OF CAUSE:	TIMOTHY E. LEAHY v. MINISTER OF JUSTICE
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MARCH 14, 2023
REASONS FOR JUDGMENT BY:	RENNIE J.A.
CONCURRED IN BY:	WEBB J.A. LOCKE J.A.
DATED:	MARCH 21, 2023

APPEARANCES:

Timothy E. Leahy	ON HIS OWN BEHALF
James Schneider	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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