A-12-18

Court File No.:
(Below: T-604-16)

FEDERAL COURT OF APPEAL

DONALD BEST

Appellant

- and -

THE ATTORNEY GENERAL OF CANADA

and

THE HONOURABLE MR. JUSTICE J. BRYAN SHAUGHNESSY

Respondents

NOTICE OF APPEAL

TO THE RESPONDENT:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the appellant. The relief claimed by the appellant appears on the following page.

THIS APPEAL will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court directs otherwise, the place of hearing will be as requested by the appellant. The appellant requests that this appeal be heard at Toronto.

IF YOU WISH TO OPPOSE THIS APPEAL, to receive notice of any step in the appeal or to be served with any documents in the appeal, you or a solicitor acting for you must prepare a notice of appearance in Form 341 prescribed by the Federal Courts Rules and serve it on the appellant's solicitor, or where the appellant is self-represented, on the appellant, WITHIN 10 DAYS of being served with this notice of appeal.

IF YOU INTEND TO SEEK A DIFFERENT DISPOSITION of the order appealed from, you must serve and file a notice of cross-appeal in Form 341 prescribed by the Federal Courts Rules instead of serving and filing a notice of appearance.

Copies of the Federal Courts Rules information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPEAL, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

January 11, 2018

YOGINDER GULIA
REGISTRY OFFICER
AGENT DU GREFFE

Issued by:_____
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Counsel for the Respondent, the Honourable Mr. Justice J. Bryan Shaughnessy

APPEAL

THE APPELLANT APPEALS to the Federal Court of Appeal from the order of The Honourable Mr. Justice Boswell, dated December 14, 2017 by which he dismissed an application for judicial review of the dismissal of the Appellant's complaint against The Respondent, Justice Shaughnessy, by the Executive Director ("ED") of the Canadian Judicial Council ("CJC").

THE APPELLANT ASKS that the appeal be allowed and that orders in the nature of *certiorari*, mandamus and *quo warranto* be issued and declarations be made as sought in the judicial review.

THE GROUNDS OF APPEAL are as follows:

A. The Process used by the ED of the CJC:

1. The learned application judge erred in law, principle and jurisdiction in misconstruing the main process argument(s) as constitutional in nature. The primary argument was that it was unlawful and jurisdictional error for the ED to dismiss complaints to the CJC under the Judges Act [see para 14 of the Reasons];

2. The learned application judge erred in law, principle and jurisdiction in misconstruing the Appellant's arguments as an assertion that complaints could not be screened out or dismissed by the CJC. In fact, this was conceded. The issue was whether the ED had such authority or whether this could only be done by a member of the CJC (a judge) [see paras 15 and 21 of the Reasons];

3. The learned application judge erred in law, principle and jurisdiction in conflating the issue of unconstitutional exercise of discretion (per *Slaight Communications*) with the alleged jurisdictional error in respect of fettering of discretion [see para 16 of the Reasons]. The application judge failed to address either issue (see Grounds A13 and A14 *infra*);

4. The learned application judge erred in law, principle and jurisdiction in concluding that reliance on the CJC policy document: Ethical Principles for Judges ("EPFJ") was inconsistent with arguments advanced by the Appellant that there could be no reliance on policy as legal authority to dismiss a complaint. The former policy is an aid to understand the meaning of judicial misconduct as a guideline like Rules of Professional Conduct commentary. The latter policy cannot be used to give a person authority in respect to a statutory decision [see para 21 of the Reasons];

5. The learned application judge erred in law, principle and jurisdiction in interpreting the *Harrison* case as authority to delegate a statutory tribunal decision. It is only authority to delegate Ministerial functions in a Government. Department. The authority to dismiss a complaint regarding an individual's alleged misconduct is a Quasi-Judicial procedure [see paras 22-23 of the Reasons];

6. The learned application judge erred in law in ruling that the authority to delegate administrative functions to an ED under s. 62 of the *Judges Act* is applicable to the dismissal of a complaint. This was not a correct or a reasonable interpretation. Contrary to the reasons of the application judge, the difference between a decision by a judge (assigned by the Act to the Council (judge)) and an ED (not assigned to the ED by the Act) is an important distinction [see paras 25 and 26 of the Reasons];

7. The learned application judge erred in law, principle and jurisdiction in relying on the Review Procedure policy as if it provided legislative authority to the ED to dismiss complaints;

8. Having relied upon the Review Procedure policy as if it was legislative authority, the learned application judge erred in law, principle and jurisdiction in not dealing with the constitutional challenge to the Review Procedure.

9. The learned application judge erred in law, principle and jurisdiction in ruling that the rights of a complainant and, specifically, that the Constitutional rights of the complainant are not engaged in the making or the dismissal of a complaint.
   a) While there is no right to have a complaint result in a hearing, because there is a screening discretion, that discretion must be exercised in accordance with constitutional rights when such rights are engaged (*Slaight Communications*).
   b) A complainant has a statutory right to file a complaint about alleged judicial misconduct that is explicitly recognized in section 63(2) of the *Judges Act*. Some complaints may not relate to alleged misconduct that would, if true, constitute a violation of constitutional rights. Other complaints will relate to alleged misconduct that would, if true, constitute a violation of constitutional rights.
   c) In the latter situation, the dismissal of the complaint engages a statutory right to complaint about a constitutional violation. This is a statutory means of redressing the constitutional violation.
   d) The fact that the primary interest is the proper administration of justice does not mean that the rights of the complainant are not engaged (see *R. v. O'Connor* (SCC)).
   e) It would be an affront to all victims of crime or misconduct to say, as the application judge has said, that the rights of the complainant are not at stake in a criminal trial or complaint of misconduct. The finding of wrongdoing and the sanction flowing from such a finding engage the rights of the complainant. While one focus of a criminal trial is the rights of the accused, the rights of the complainant, who seeks vindication and sanction for the wrong done to him or her cannot be ignored. The same applies in respect of complaints of misconduct against any professional (lawyer, engineer or judge, etc.).

   Where the conduct that is the basis of the complaint is constitutional, the statutory right to complain cannot be dismissed except in accordance with the Constitution (e.g., principles of fundamental justice when s. 7 of the Charter is engaged). The application judge erred in law, principle and jurisdiction in ruling that only the judge's rights are at stake [see para 49 of the Reasons];

10. The Review Procedure definition of "conduct" is unconstitutional insofar as some complaints engage section 7 interests and the definition does not accord with principles of fundamental justice. The application judge erred in law, principle and jurisdiction in failing to rule that the definition of "conduct" in the Review Procedure was unconstitutionally:
    a) vagueness;
    b) arbitrary; and/or
    c) overbroad;

11. The Review Procedure definition of "public interest" is unconstitutional insofar as some complaints engage section 7 interests and the definition does not accord with principles of fundamental justice. The application judge erred in law principle and jurisdiction in failing to rule that the definition of "public interest" in the Review Procedure was unconstitutionally:
    a) vagueness;
    b) arbitrary; and/or
    c) overbroad;

12. The application judge erred in law, principle and jurisdiction in failing to address the unlawfulness of relying on criteria (abuse; conduct; public interest) in a policy. The SCC in *Brant Dairy* and other cases make it clear that it is unlawful to have standards for the exercise of discretion only in a policy. It must be in the Act or a regulation. While it may not be necessary to determine that this is a constitutional standard, it was argued that the Rule of Law or Parliamentary Supremacy constitutionally mandates this rule. While the constitutional nature of this rule was not accepted by the SCC in the *Pelland* case, there was no argument in respect of the Rule of Law or Parliamentary Supremacy in that case. Accordingly, pursuant to *Bedford*, stare decisis does not demand the same conclusion.

13. The application judge erred in law, principle and jurisdiction in failing to address the *Slaight Communications* issue re discretion. Discretion must be bounded by the Constitution.

14. The application judge erred in law, principle and jurisdiction in failing to recognize that the ED fettered his discretion in treating the Review Procedure policy like it was a statute. That was a fettering of discretion. The point is alluded to by the application judge but not addressed.

B. Standard of review

1. The application judge erred in law, principle and jurisdiction in not applying a standard of correctness in respect of the process issues (Section A) on the basis that these issues go to jurisdiction;

2. The application judge erred in law, principle and jurisdiction in respect of the merits in concluding that the issue was not one of general importance to the administration of justice that was not a special expertise of the ED:

a) It was conceded that the issue is one of general importance to the administration of justice. The only issue was whether the ED had special expertise in screening and dismissing complaints.
b) The SCC in *Moreau Berube* says that the special expertise is that of judges.
c) To say that the ED has special expertise because he has been acting unlawfully for 2 years is inappropriate [see para 34 of the Reasons]. This is the first challenge. At the time of the dismissal he had little experience. Further, if nobody challenges the lawfulness of a decision immediately, is experience is obtained and deference is accorded? Here, there was an immediate challenge. Delay in adjudication cannot be used to allow the acquiring of expertise [see para 32 of the Reasons];

3. The application judge erred in law, principle and jurisdiction in the standard being applied in respect of the merits in failing to recognize that the definition of conduct or judicial misconduct is jurisdictional;

4. The application judge erred in law, principle and jurisdiction in the standard being applied in respect of the merits in determining the issue based on whether the issue was a mixed question of fact and law:
   a) While the non-binding *Singh* case says so, the cases at the SCC indicate that this kind of question is not a mixed question of fact and law;
   b) This is not the test. The test is whether there is an "inextricable" question of mixed fact and law. The definition of conduct is a discrete and extricable legal issue [see para 33 f the Reasons];

C. Judicial Decision-Making as Conduct

1. The application judge erred in law, principle and jurisdiction in the definition of Judicial Decision-making ("JDM"). He accepted, as did all of the parties, that JDM can be conduct [see para 39 of the Reasons]. The ED did not engage in any analysis of whether the JDM was or was not conduct in this case. The ED said that ALL JDM is excluded from the Act. This was incorrect and unreasonable. The failure to overturn the decision on this basis is reversible error.
2. The application judge erred in law, principle and jurisdiction in failing to consider that defining the scope of judicial misconduct or conduct too narrowly was jurisdictional error [see paras 39-40 of the Reasons];

D. Incorrect or Unreasonable Decision:

1. The application judge erred in law, principle and jurisdiction in in accepting the argument that bad faith is required for JDM to constitute conduct or judicial misconduct:
   a) This proposition was accepted without any analysis;
   b) This proposition is an error of law, principle and jurisdiction:
      i) The only authority cited for this proposition were the CJC decisions in *Boilard* and *Matlow*.
      ii) Those decisions make it clear that this standard only applies to discretionary decisions such as recusal.

iii) Expressly, the CJC in *Matlow* said that it has no application to other decisions, including JDM.

Since JDM is not discretionary there is no basis in law to apply this bad faith standard [see paras 44 and 45 of the Reasons];

2. The application judge erred in law, principle and jurisdiction in relying on a ground in the Review Procedure (that the complaint is without substance or an abuse of process) that was not cited by the ED or the Respondents. This was perverse and unfair. There was not notice that this was going to be advanced by the application judge. There was no basis in the Record to apply a consideration that was not advanced by the decision-maker or the Respondents [see para 45 of the Reasons];

3. The application judge erred in law, principle and jurisdiction in completely misinterpreting the *Chiang* decision of the Ontario Court of Appeal. This decision was binding authority at the time of the alleged misconduct. It clearly says that what the Respondent Justice Shaughnessy did was not only wrong in law but clearly and obviously wrong. In *Chiang*, the Court does not say that it is acceptable to change the warrant to remove earned remission. It said that it was acceptable for Justice Lax, the judge whose decision was being appealed in that case, to do so because that was her original intent. The OCA clearly said that it was unlawful and inappropriate to do so otherwise (to change the sentence) [see para 47 of the Reasons];

4. The application judge erred in law, principle and jurisdiction in ruling that the phrase: "no remission is ordered" in the warrant of committal means no order was being made re remission [see para 47 of the Reasons]. The only reasonable interpretation of the warrant was that Justice Shaughnessy was making an order of "no remission". This is clear from the following circumstances:
   a) As is clear from *Chiang* (SCJ and OCA) and the legislation, this is **statutory** remission. A judge does not make an order as to remission. Accordingly, it would make no sense to say that he was making no order as to remission;
   b) That would only be said if someone requested it. Since there is nothing in the record indicating that remission was discussed it makes no sense to say no order was being made re remission.
   c) Further, if no order is to be made on an issue, the order is usually silent. Judges do not normally say that they are making no order as to X. They only address orders that are raised or usually made (i.e. no order as to costs).
   d) This was an argument that the AG of Canada advanced in their written materials but did not advance it orally because it became apparent that this interpretation of the order was absurd. Justice Shaughnessy as a party to the judicial review did not advance this argument.

5. The application judge erred in law, principle and jurisdiction in saying that the insertion of a no remission order in the warrant was not misconduct because it occurred as part of JDM [see para 47 of the Reasons]. This makes no sense. It was not part of JDM. It was not judicial. No order of this type (lengthening the time a person would spend in jail) could be

made without notice, in the absence of the accused in a quasi-criminal proceeding; not in open court or without an opportunity to challenge it. This was so basic as to be obvious.

6. The application judge erred in law, principle and jurisdiction in saying that the Ontario Court of Appeal said in *Chiang* that the proper remedy was appeal. The Court in *Chiang* did not address issues of judicial misconduct except to say that doing what Shaughnessy did was unlawful and improper (changing sentence). It did not say that misconduct should be addressed by appeal and not CJC complaint because it affirmed the correctness of what Lax, J. did. Unlike Justice Shaughnessy, Justice Lax did nothing wrong [see para 48 of the Reasons];

7. Separate and apart from the engagement of Charter rights in respect of the process [see Ground A9], the application judge erred in law, principle and jurisdiction in saying that only the judge's rights are at stake [see para 49 of the Reasons]. This error affects the correctness and reasonableness of the decision of the ED. If he had authority to dismiss the complaint, it was wrong to say that this was no judicial misconduct or that it was not in the public interest to proceed. If the complainant has rights, to dismiss a complaint without regard to those rights is incorrect and unreasonable.

8. The application judge erred in law, principle and jurisdiction in failing to address whether it was in the public interest to dismiss the complaint when it was so basic and serious that it dealt with basic propositions like non-arbitrariness; acting judicially; acting in open court and in the presence of the accused; notice and fair hearing.

9. The application judge erred in law, principle and jurisdiction in failing to address the fact that the ED based its decision on the proposition that all JDM was excluded as conduct. This was accepted by the application judge as false but formed no part of the decision on the judicial review. Not only was this an error in the definition of JDM as conduct (Grounds in Section C), but it goes to the correctness or reasonableness of the decision. Having accepted that the ED was wrong in law, this should have led to the overturning of the ED's decision.

DATED JANUARY 11, 2018.

[redacted]

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