Federal Court of Appeal | Cour d'appel fédérale

Date: 20210210

Docket: A-339-18

Citation: 2021 FCA 25

CORAM: **WEBB J.A.**
WOODS J.A.
MACTAVISH J.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

IGOR MOZAJKO

Respondent

Heard by online video conference hosted by the registry on November 10, 2020.

Judgment delivered at Ottawa, Ontario, on February 10, 2021.

REASONS FOR JUDGMENT BY: WEBB J.A.

CONCURRED IN BY: WOODS J.A.
MACTAVISH J.A.

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REASONS FOR JUDGMENT

WEBB J.A.

[1] The appeal and the cross-appeal in this matter arise as a result of an Order of the Federal Court (Docket: T-92-18) which dismissed, in part, the motion of the Crown to strike Mr. Mozajko's statement of claim.

[2] In granting the Order, the Federal Court Judge noted that Mr. Mozajko's statement of claim advanced the same allegations that were raised by Mr. Harris (*Harris v. Canada*, 2018 FC

765) in his amended statement of claim that was also the subject of a motion to strike. By the Order dated July 20, 2018, the Federal Court Judge dismissed the motion to strike Mr. Harris' amended statement of claim in part. Adopting the reasons that he had given in the Harris action, the Federal Court Judge also dismissed the Crown's motion to strike Mr. Mozajko's statement of claim in part.

[3] Mr. Harris appealed to this Court seeking to reinstate the parts of his amended statement of claim that were struck and the Crown cross-appealed seeking to strike the parts of Mr. Harris' amended statement of claim that were not struck. By the Judgment dated September 18, 2019 (2019 FCA 232), this Court allowed the Crown's cross-appeal and dismissed Mr. Harris' appeal. The result was that Mr. Harris' amended statement of claim was struck, without leave to amend.

[4] In this appeal, Mr. Mozajko did not seek to distinguish his statement of claim from that of Mr. Harris but rather submitted that this Court erred in striking Mr. Harris' amended statement of claim. The Crown submitted that for the reasons adopted by this Court in *Harris v. Attorney General of Canada*, 2019 FCA 232, Mr. Mozajko's statement of claim should also be struck.

[5] At the hearing of this appeal, Mr. Mozajko only raised one issue: whether the failure of the Crown to serve notice of a constitutional question was fatal to the Crown's argument that his statement of claim should be struck. This argument is reflected in paragraphs 48 and 49 of his memorandum:

> 48. In the recent appeal of Harris v. HMTQ (A-175-19) of a motion to strike a S.52 claim of constitutional violation, both Justices Pelletier and Gauthier noted that there had been no Notice of Constitutional Question for the motion to strike a constitutional claim. Justice Gauthier said "the constitutionality must be argued to some extent if the Crown says the claim of unconstitutionality is frivolous."
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> 49. The Crown arguing that the facts do not show a constitutional violation is as constitutional an argument as me arguing that the facts do show a constitutional violation. In moving to strike a S.52 claim of constitutional violation, Respondent submits that a Notice of Constitutional Question should have been given herein as well. The Appellant failed to file a Notice of Constitutional Question below and therefore, Judge Brown's dismissal of the motion was therefore justified for other reasons and should be [*sic*] not be overturned.

[6] No citation is provided for the decision to which Mr. Mozajko is referring in paragraph 48 of his memorandum. I would note that the citation for the decision of this Court in appeal A-175-19 is 2020 FCA 124. The reasons were written by Justice Woods with Justices Pelletier and Gauthier concurring. However, the statement quoted by Mr. Mozajko above does not appear anywhere in these reasons.

[7] Subsections 57(1) and (2) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, state:

57 (1) If the constitutional validity, applicability or operability of an Act of Parliament or of the legislature of a province, or of regulations made under such an Act, is in question before the Federal Court of Appeal or the Federal Court or a federal board, commission or other tribunal, other than a service tribunal within the meaning of the National Defence Act, the Act or regulation shall not be judged to be invalid, inapplicable or inoperable unless notice has been served on the Attorney General of Canada and the	**57** (1) Les lois fédérales ou provinciales ou leurs textes d'application, dont la validité, l'applicabilité ou l'effet, sur le plan constitutionnel, est en cause devant la Cour d'appel fédérale ou la Cour fédérale ou un office fédéral, sauf s'il s'agit d'un tribunal militaire au sens de la Loi sur la défense nationale, ne peuvent être déclarés invalides, inapplicables ou sans effet, à moins que le procureur général du Canada et ceux des provinces n'aient été avisés conformément au paragraphe (2).

attorney general of each province in accordance with subsection (2).	
(2) The notice must be served at least 10 days before the day on which the constitutional question is to be argued, unless the Federal Court of Appeal or the Federal Court or the federal board, commission or other tribunal, as the case may be, orders otherwise.	(2) L'avis est, sauf ordonnance contraire de la Cour d'appel fédérale ou de la Cour fédérale ou de l'office fédéral en cause, signifié au moins dix jours avant la date à laquelle la question constitutionnelle qui en fait l'objet doit être débattue.

[8] Subsection 57(1) of the *Federal Courts Act* provides that where the constitutionality of an Act or regulation is in question, "the Act or regulation shall not be judged to be invalid, inapplicable or inoperable unless notice has been served". In this case, no Act or regulation has been "judged to be invalid, inapplicable or inoperable". Therefore, no notice of any constitutional question was required.

[9] In any event, neither subsection 57(1) nor subsection 57(2) of the *Federal Courts Act* specify who must serve the notice of the constitutional question. It would be logical that in any matter where a person is asking to have a particular Act or regulation "judged to be invalid, inapplicable or inoperable", the person who is requesting this result will want to ensure that the appropriate notice is served.

[10] As noted above, Mr. Mozajko did not seek to distinguish his statement of claim from the statement of claim filed by Mr. Harris. I would therefore allow the Crown's appeal. I would also dismiss Mr. Mozajko's cross-appeal. I would set aside the Order issued by the Federal Court in this matter. Rendering the decision that the Federal Court should have made, I would allow the

Crown's motion to strike Mr. Mozajko's statement of claim and I would strike his statement of claim without leave to amend. I would award the Crown costs in the amount of $3,500.

"Wyman W. Webb"
J.A.

"I agree
Judith Woods J.A."

"I agree
Anne L. Mactavish J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM AN ORDER OF THE FEDERAL COURT DATED OCTOBER 2, 2018, DOCKET NUMBER T-92-18

DOCKET:	A-339-18
STYLE OF CAUSE:	HER MAJESTY THE QUEEN v. IGOR MOZAJKO
PLACE OF HEARING:	HEARD BY ONLINE VIDEO CONFERENCE HOSTED BY THE REGISTRY
DATE OF HEARING:	NOVEMBER 10, 2020
REASONS FOR JUDGMENT BY:	WEBB J.A.
CONCURRED IN BY:	WOODS J.A. MACTAVISH J.A.
DATED:	FEBRUARY 10, 2021

APPEARANCES:

Jon Bricker Benjamin Wong	FOR THE APPELLANT
Igor Mozajko	ON HIS OWN BEHALF

SOLICITORS OF RECORD:

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