

Federal Court of Appeal



Cour d'appel fédérale

Date: 20160819

Docket: A-105-16

Citation: 2016 FCA 206

Present: WEBB J.A.

BETWEEN:

EDGAR SCHMIDT

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on August 19, 2016.

REASONS FOR ORDER BY:

WEBB J.A.

Federal Court of Appeal



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REASONS FOR ORDER

WEBB J.A.

[1] Mr. Schmidt has brought a motion for an order that the Attorney General of Canada pay his legal costs, retroactive to the date of appeal. Mr. Schmidt is also proposing that a direction be issued that he file a litigation budget with the Court Registry within seven days of such direction subject to amendment by him with leave of the Court.

[2] Mr. Schmidt had filed a statement of claim in the Federal Court challenging the Department of Justice's interpretation of its requirements to examine proposed legislation or

regulations. Prior to the hearing of the matter before the Federal Court, Mr. Schmidt obtained an order of the Federal Court that the Attorney General of Canada would pay his costs of that hearing.

[3] Mr. Schmidt was unsuccessful before the Federal Court and has filed an appeal of that decision. By this motion he is seeking the same entitlement to costs that he had before the Federal Court. His argument is essentially that since he was awarded advanced costs by the Federal Court, he should also be entitled to advanced costs in relation to the appeal of the decision of the Federal Court.

[4] The Supreme Court of Canada in *R. v. Caron*, 2011 SCC 5, [2011] 1 S.C.R. 78, set out the criteria that will govern an advanced costs award:

39 The *Okanagan* [*British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, [2003] 3 S.C.R. 371] criteria governing the discretionary award of interim (or "advanced") costs are three in number, as formulated by LeBel J., at para. 40:

1. The party seeking interim costs genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial -- in short, the litigation would be unable to proceed if the order were not made.
2. The claim to be adjudicated is *prima facie* meritorious; that is, the claim is at least of sufficient merit that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means.
3. The issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases.

Even where these criteria are met there is no "right" to a funding order. As stated by Bastarache and LeBel JJ. for the majority in *Little Sisters (No. 2)* [*Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2, [2007] 1 S.C.R. 38]:

In analysing these requirements, the court must decide, with a view to all the circumstances, whether the case is sufficiently special that it would be contrary to the interests of justice to deny the advance costs application, or whether it should consider other methods to facilitate the hearing of the case. The discretion enjoyed by the court affords it an opportunity to consider all relevant factors that arise on the facts. [Emphasis added [by Binnie J.]; para. 37.]

[5] The criterion that the party seeking advanced costs “genuinely cannot afford to pay for the litigation” is reiterated in *Caron*. It is also evident that all three of these criteria must be met as the Supreme Court noted that there are three criteria and that “[e]ven where these criteria are met there is no “right” to a funding order”.

[6] In paragraph 41 of *Caron* the Supreme Court specifically addressed the issue of whether Mr. Caron could afford to pay the litigation costs. The Court stated that:

41 ...The Queen's Bench judge declared himself "satisfied that Mr. Caron has no realistic means of paying the fees resulting from this litigation, and that all other possibilities for funding have been canvassed, but in vain" (para. 31). The Crown's objection on this point was not accepted in the courts below and those courts made no palpable error in reaching the conclusion they did.

[7] The requirement that the party seeking advanced costs must demonstrate that he “genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial” is still a requirement that must be satisfied.

[8] Mr. Schmidt argues that his case can be distinguished because he does not have anything to personally gain from the litigation. However, there is no indication in *Okanagan* or *Caron*, that this requirement is only applicable if the party has something to gain from the litigation. In my view, this is not a basis upon which these cases can be distinguished. It should also be noted

that these cases of the Supreme Court were heard as appeals from costs decisions made at the trial level. These cases did not address the issue of whether advanced costs should be awarded for an appeal. Whether it is appropriate to award advanced costs to an unsuccessful litigant to have the taxpayers fund his appeal or whether additional criteria should be considered in awarding advanced costs for an appeal are matters that will be left for another case. In any event, the criteria for awarding advanced costs for an appeal should not be less than the criteria for awarding such costs for a trial.

[9] In this case, there is no financial information concerning Mr. Schmidt's income or assets. Although at the time of the Federal Court order Mr. Schmidt had been suspended from his job as a lawyer with the Department of Justice without pay (and hence had no employment income), he is now retired. There is no indication of whether he is now receiving a pension.

[10] Mr. Schmidt, in his affidavit dated July 25, 2016, stated that individuals had donated \$3,253 towards the disbursements of this appeal. Therefore, it is far from clear that this appeal would be unable to proceed if advanced costs were not ordered.

[11] As a result, Mr. Schmidt has not satisfied the first requirement that he is unable to afford to pay for this appeal. Having failed to establish that the appeal could not proceed without the advanced costs award it is not necessary to consider the other criteria and his motion is dismissed.

[12] There is another matter that neither party addressed. Rule 400 of the *Federal Courts*

Rules, SOR/98-106, states that:

400 (1) The Court shall have full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid.

400 (1) La Cour a le pouvoir discrétionnaire de déterminer le montant des dépens, de les répartir et de désigner les personnes qui doivent les payer.

[13] The panel hearing an appeal decides the issue of what costs, if any, should be awarded and to whom such costs should be awarded. If a motion awarding advanced costs for an appeal is granted on a motion, this would mean that the single judge who decides the motion will be awarding the costs of the appeal to one party and therefore effectively prejudging the award of costs for an appeal. Neither party addressed the issue of whether a single judge would have that authority or whether it would be appropriate for such a motion to be heard by a panel of three judges who may not be the same three judges who will hear the appeal. This is another issue that will be deferred to another case.

[14] As a result, I would dismiss the motion for an order that the Attorney General of Canada pay Mr. Schmidt's costs of this appeal. The costs of this motion shall be in the cause.

"Wyman W. Webb"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:

A-105-16

STYLE OF CAUSE:

EDGAR SCHMIDT v. ATTORNEY
GENERAL OF CANADA

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:

WEBB J.A.

DATED:

AUGUST 19, 2016

WRITTEN REPRESENTATIONS BY:

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