Federal Court  Cour fédérale

Date: 20101122

Docket: T-1073-09

Citation: 2010 FC 1173

Vancouver, British Columbia, November 22, 2010

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

CHRISTOPHER BENNETT

Applicant

and

THE ATTORNEY GENERAL FOR CANADA
and
THE MINISTER OF HEALTH FOR CANADA

Respondents

REASONS FOR ORDER AND ORDER

[1] The respondents appeal the Order of Prothonotary Lafrenière dated November 1, 2010, wherein he allowed the applicant's motion for leave to file additional evidence and a supplementary record pursuant to Rule 312(a) and (c) of the *Federal Courts Rules*, SOR/98-106.

[2] It is well established that the Court ought not to upset a discretionary order of a Prothonotary on appeal unless the Order is clearly wrong in that it was based upon a wrong principle or upon a misapprehension of the facts: *Merck & Co. v. Apotex Inc.*, 2003 FCA 488.

[3] The respondents submit that the Order under appeal was clearly wrong in that the Prothonotary applied the wrong test when granting leave to file additional evidence and because he misapprehended the "uncontroverted evidence before the Court in finding that the documents were 'clearly not available to the Applicant at the time he filed his affidavit in support of the application'."

[4] The Prothonotary correctly expressed the test for granting leave to file additional evidence in his Order. However, I have concluded that the Prothonotary either failed to properly apply the test to the facts before him or misapprehended the facts. The Order made was clearly wrong.

[5] On February 12, 2009, the applicant's counsel wrote to the Minister of Health asking that she exercise her discretion under section 56 of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 (CDSA) to permit the applicant to produce and possess sufficient marijuana so that he could continue to consume seven grams of marijuana per day without fear of prosecution pursuant to the prohibitions set out in the CDSA. It was submitted that it was in the public interest for him to receive such an exemption because he required access to marijuana for religious reasons. By letter dated May 29, 2009, the applicant was informed that the Minister would not grant the exemption because it would not be in the public interest.

[6] The applicant then filed this application on June 30, 2009 challenging both the constitutionality of the Minister's decision to refuse the exemption request and sections 4 and 7 of the CDSA.

[7] Pursuant to Rule 317 of the *Federal Courts Rules*, the Notice of Application included a request for documents seeking, among other things, "[a]ny document(s) outlining the criteria used by the Minster of Health (or her delegate) in deciding applications for exemptions pursuant to section 56 of the CDSA."

[8] In response, the respondents provided the applicant with a certified tribunal record pursuant to Rule 318 and, specifically with respect to the documents requested stated:

> There are no documents outlining the criteria used by the Minister of Health (or her delegate) in deciding on applications for exemptions in the public interest pursuant to section 56 of the *Controlled Drugs and Substances Act* that are relevant to the application made by the Applicant. For greatest clarity, the only document outlining criteria used by the Minister of Health (or her delegate) when deciding on applications for exemptions pursuant to section 56 of the *Controlled Drugs and Substances Act* is a document referring to exemptions for scientific purposes, which is not relevant to, and was not used in, the assessment of the exemption requested by the applicant.

[9] It appears that this statement was in error. It is now conceded by the respondents that a draft guidance document had been used in the assessment made by the Minister of Health in responding to a 2001 request for an exemption pursuant to section 56 of the CDSA in the public interest on religious grounds by members of a Montréal church that requested an exemption to consume a tea that contained three controlled substances (the Tea Request). The Tea Request indicated that the tea was traditionally consumed during their religious ceremonies. The Minister ultimately gave this request conditional approval.

[10] The applicant in his materials filed on this motion submits that the failure to produce the Tea Request documents was a deliberate attempt at concealment by the respondents. I make no

judgment on that submission; however, I would note that if the respondents were attempting to conceal documents for their own purposes, they were not alone. The applicant, in my view, for a time also concealed documents in his possession that he considered relevant to his application. Those are the documents he was granted leave by the Prothonotary to file.

[11] On November 3, 2009 the applicant filed his affidavit evidence in support of his application and on January 28, 2010 the respondents filed their evidence.

[12] The respondents' witness was cross-examined on her affidavit on May 20, 2010, during which she was presented with a bundle of some 395 pages that were numbered and each was marked as "Document Released Under the Access to Information Act" (the ATIP Release Package). The ATIP Release Package related to the 2001 Tea Request for an exemption pursuant to section 56 of the CDSA. The respondents objected to the admission of the ATIP Release Package into evidence at the cross-examination and it was entered as an exhibit only for identification purposes although the witness answered some questions relating to the documents.

[13] On August 9, 2010, the applicant filed his Application Record. It included the ATIP Release Package; however, the Court issued directions that the applicant could not adduce new evidence without leave of the Court. The record was accepted for filing, excluding the ATIP Release Package which was at Tab R of the Application Record.

[14] On October 4, 2010, the applicant filed a motion seeking leave pursuant to Rule 312 to have the ATIP Release Package included in the application record. This motion was determined by the Prothonotary pursuant to Rule 369, based on the written materials before him.

[15] The Prothonotary stated the test for the admission of new evidence as follows: “In deciding whether leave to file additional evidence should be granted pursuant to Rule 312 of the *Federal Courts Rules* (FCR), the Court must take into account the relevance of the proposed evidence, any prejudice to the opposing party, whether the additional evidence would be of assistance to the Court, and the overall interest of justice. ... The Court must also consider whether the evidence in question was available, and could have been adduced, at an earlier date."

[16] The Prothonotary in assessing whether the evidence was available and could have been adduced at an earlier date stated: “The documents were clearly not available to the Applicant at the time he filed his affidavit evidence in support of the application." In my view, based on the record before him, the Prothonotary misapprehended the facts when he concluded that the ATIP Release Package was not available to the applicant when he filed his affidavit in support of his application. Furthermore, the Prothonotary erred in considering only whether the documents were available to the applicant on the date he filed his affidavit, because the proper test is to consider whether the documents were available and could have been adduced by the applicant at an earlier date.

[17] The applicant’s Notice of Motion for leave to file additional evidence indicated as one of the grounds of the motion that “[t]hese documents were not in Applicant’s possession at the time he filed his Application and supporting Affidavits in this matter.” However, a statement of grounds

in a Notice of Motion is not evidence and there was no evidence filed by the applicant to support that assertion. The affidavit of the applicant in support of his motion merely stated that the documents he wished to file were "obtained from the government of Canada, and specifically from Health Canada, in response to an Access to Information request." He gave no indication when these documents came into his possession, nor any explanation for his delay in seeking leave to file them.

[18] In contrast, the respondents filed an affidavit in response to the motion setting out that Health Canada had received two requests under the *Access to Information Act* for documents related to the Tea Request. Health Canada is not provided with the name of a requester under that Act and therefore could not state with certainty whether one or both of the requests came from the applicant or his counsel. The first request was made on March 31, 2009 and the affiant states that the documents Health Canada released "appears to be identical to the ATIP release package that Mr. Bennett is now seeking to have admitted into evidence." The second release was made on December 21, 2009 and the affiant states that "while many of the documents are the same as the ATIP release package that the Applicant is now seeking to admit into evidence, the two packages are not identical."

[19] The applicant in this matter filed his affidavits in support of this application on November 3, 2009, long after the first package of documents was released by Health Canada and shortly before the second package was released. The finding of the Prothonotary that the "documents were clearly not available to the Applicant at the time he filed his affidavit evidence in support of the application" [emphasis added] can only be correct if the package of documents in the possession of the applicant were those released on December 21, 2009 and not those released earlier on

March 31, 2009. No such finding was expressly made by the Prothonotary and, in my view, such a finding could not be made based on the uncontroverted evidence that the only release package that appeared to be identical to that which was in the possession of the applicant was the package released on March 31, 2009. Accordingly, the Prothonotary reached his decision on a misapprehension of the facts.

[20] On this appeal, the applicant attempted to file an affidavit attaching as an exhibit a letter from Health Canada to his counsel dated December 21, 2009 enclosing documents responding to an Access to Information Act request "made by my counsel and that I sought to introduce as Tab R to my Record of Case [*sic*]." These are the documents the applicant sought leave to file. If accepted, the affidavit would appear to support the conclusion that these documents were in the applicant's possession only after December 21, 2009. It is noted that the applicant in this subsequent affidavit does not attest that he did not have any of the documents contained in the ATIP Release Package at an earlier date, as one would have expected given the respondents' evidence previously filed.

[21] The respondent objected to the applicant's new affidavit being filed on the appeal submitting that no new evidence ought to be admitted when considering an appeal from an Order of a Prothonotary: *Apotex Inc. v. Wellcome Foundation Ltd*., 2003 FC 1229 at para 10 citing *James River Corp. of Virginia v. Hallmark Cards, Inc.*, [1997] F.C.J. No. 152 at paras. 31-32.

[22] The applicant cited no authority where the Court on an appeal from an Order of the Prothonotary has considered new evidence relating to facts that was not before the Prothonotary. It makes no sense that the Court should consider new evidence on such an appeal. First, the Court

must decide whether the Prothonotary misapprehended the facts. That determination must be based on the record before the Prothonotary, not the record that might have been before him. Second, the Court conducts a *de novo* hearing. Such a hearing requires the judge to exercise his or her discretion based on the material that was before the Prothonotary; in other words, to reach the decision the Prothonotary would have reached had the decision not been based on a misapprehension of the facts or on a wrong principle.

[23] For these reasons I give no consideration to the new affidavit the applicant attempted to file. However, even if it had been accepted, the applicant still has offered no explanation for his delay in seeking leave to file this material. The leave motion was brought more than nine months after he admits to having the documents he now wishes to rely upon.

[24] Counsel for the applicant conceded that it was evident to him upon receipt of the ATIP Release Package that at least some of the documents would be relevant to the application that had been launched. The affidavit the applicant sought to file makes it clear that he was in possession of these documents well before the respondents filed their affidavits and well before he conducted a cross-examination of the respondents' affiant. This is not a situation where a party needs to deal with a matter that arose in cross-examination and could not have been foreseen with reasonable diligence. Rather, this is a situation where the applicant became aware of documents that he viewed as relevant to his application but which he also considered might be used to establish that the respondent's affiant had not been frank and truthful in stating that there were "no documents outlining the criteria used by the Minister of Health (or her delegate) in deciding on applications for exemptions in the public interest pursuant to section 56." The applicant made a tactical decision to

not seek the consent of the respondents to file these documents or to seek leave of the Court, absent that consent. He decided to hold them in abeyance and spring them upon the affiant in cross-examination. I would remind him of Matthew 26:52 – "He who lives by the sword dies by the sword."

[25] The applicant submits that the test is whether the documents were available to him when he filed his affidavit in support of the application. I do not agree. I agree with the observations made by Justice Teitelbaum in *Pfizer Canada Inc. v. Canada (Minister of Health)*, 2006 FC 984 at para. 20 that one must consider the rationale of the general rule that one cannot file additional evidence, namely that a party must put his best case forward at the first opportunity and cannot split his case.

> Pfizer also attempts to limit the reach of *Atlantic Engraving* by suggesting that it only applies to situations where cross-examination has already taken place. Although cross-examinations already occurred in *Atlantic Engraving*, the Federal Court of Appeal's reasoning in paragraph 9 of its decision suggests that a party must put its best case forward at the first opportunity and must not be able to split its case. While this meant that in *Atlantic Engraving* a party had to demonstrate that the evidence it sought to adduce was not available prior to the cross-examination stage, in other cases, a party seeking to adduce evidence may need to show that its evidence was not available at some other earlier date (such as at the time of filing its first affidavit evidence), in order to satisfy the Court that it is not attempting to split its case or is otherwise failing to put its best case forward at the first opportunity. I do not read the Federal Court of Appeal's reasoning as being limited to cases where cross-examination has already taken place. Rather, I extract from *Atlantic Engraving* the general concern that Rule 312 should not be used to allow a party to split its case or to delay putting its best case forward. [Emphasis added]

[26] In this case the applicant did not put his best case forward without delay, he delayed until after he had cross-examined the opposite parties' affiant. Further, as the only evidence properly

before the Court establishes that the only apparently identical package of documents to the ATIP Release Package was provided by Health Canada to an unknown requester on March 31, 2009, well before this application was launched, I must conclude that permitting this applicant to file the documents at this late stage constitutes case-splitting.

[27] The Court must also consider whether the evidence will assist the Court. In *Holy Alpha and Omega Church of Toronto v. Canada (Attorney General)*, 2009 FCA 101 the Court of Appeal indicated that in considering that factor the Court should ask "Is it relevant to an issue to be determined and sufficiently probative that it could affect the result?"

[28] The applicant in his Notice of Application seeks:

> 1. An order in the nature of *mandamus* compelling the Minister of Health to issue Applicant an exemption, pursuant to section 56 of the *Controlled Drugs and Substances Act*, from the application of sections 4 and 7 of the *Controlled Drugs and Substances Act* as applied to cannabis (marijuana) as set out in Schedule 2(1), so long as that cannabis is produced and possessed for Applicant's personal use.
>
> 2. A declaration of sections 4 and 7 of the *Controlled Drugs and Substances Act* as applied to cannabis (as set out in Schedule 2(1) to that Act) are invalid and violate the rights guaranteed by sections 2, 7 and 15 of the *Canadian Charter of Rights and Freedoms* (the "*Charter"*).

[29] The ATIP Release Package which the applicant seeks to file may support a submission that the applicant was treated differently than the applicant in the Tea Request. The ATIP Release Package also indicates the criteria used by the Minister in assessing that request; however, the respondent filed an affidavit on the motion before the Prothonotary attesting that the draft criteria guidance document used in the Tea Request was not used in assessing Mr. Bennett's request and

was never adopted as a policy of Health Canada. Therefore, at best this proposed new evidence may show that different criteria were used in assessing the applicant's request for an exemption than had been used in considering a request for an exemption for different controlled substances by a different applicant at an earlier date. While this evidence may be relevant to an issue in the application, I am not satisfied that it is sufficiently probative that it could affect the result.

[30] The respondent submits that admitting the evidence at this late date will cause prejudice in that the application is almost ready for hearing. The respondents have not filed their record and no date has been set for hearing by the Court. However, admission of the material will entail a delay of some months while the respondents file any additional materials in response, and cross-examinations take place. The respondents further submit that they will suffer prejudice because the new evidence is being submitted by way of an affidavit from the applicant and that while many of the documents contained in the ATIP Release Package are documents from persons within the Ministry of Health, others are not, and there is no person who can be cross-examined on them.

[31] The applicant submits that if there is any prejudice, it will be suffered by him as the delay will mean that there is a delay to him being able to produce and use marijuana for his religious purposes.

[32] I give little weight to the applicant's assertion that he will suffer prejudice from any delay as the delay is of his own making. Had he sought consent or leave to file the ATIP Release Package when he first received it, no delay would have resulted. Similarly, the delay that the respondents

will experience will be of short duration and would have been avoided had they filed an accurate Rule 317 response. In short, if there is any prejudice, it is equal for both parties.

[33] For these reasons, the respondents' appeal is allowed and the applicant's motion to file additional evidence and a supplementary record pursuant to Rules 312(a) and (c) is dismissed.

[34] In my discretion I have decided not to award the respondents their costs either here or below. While the applicant must shoulder some blame for the necessity of these late motions, so too must the respondents who failed to produce the ATIP Release Package as a part of its Rule 317 production, or to object at that time to its production.

THIS COURT ORDERS that this appeal is allowed and the Order of Prothonotary Lafrenière dated November 1, 2010 is set aside.

"Russel W. Zinn"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1073-09
STYLE OF CAUSE:	CHRISTOPHER BENNETT v. AGC et al.
PLACE OF HEARING:	Vancouver, BC
DATE OF HEARING:	November 17, 2010
REASONS FOR ORDER AND ORDER:	ZINN J.
DATED:	November 22, 2010

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