Federal Court of Appeal

Cour d'appel fédérale

Date: 20160208

Docket: A-528-14

Citation: 2016 FCA 42

CORAM: **NADON J.A.**
PELLETIER J.A.
GAUTHIER J.A.

BETWEEN:

VIOLATOR No. 10

Appellant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Heard at Montréal, Quebec, on September 16, 2015.

Judgment delivered at Ottawa, Ontario on February 8, 2016.

REASONS FOR JUDGMENT BY: PELLETIER J.A.

CONCURRED IN BY: GAUTHIER J.A.
CONCURRING REASONS: NADON J.A.

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REASONS FOR JUDGMENT

PELLETIER J.A.

[1] This appeal once again opposes Violator no. 10 (the Violator) to the Attorney General of Canada. The issue in dispute involves the production of the documents. The Violator demands that certain documents be returned to it, including some not utilized by the decider in rendering the decision that is under appeal before the Federal Court. The Court ruled in favour of the Violator with respect to some of these documents, but denied its request regarding the others. The Violator asks this Court to grant it what the Federal Court denied it.

[2] Note that this dispute originated when the Financial Transactions and Reports Analysis Centre of Canada (the Centre) issued a Notice of Violation stating that the Violator had not complied with certain provisions of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, c. 17 (the Act). The Violator filed an appeal with the Federal Court under Section 73.21 of the Act. In order to complete its file in preparation for its defence, the Violator asked the Centre to send it a number of documents, which the Centre had or might have in its possession. The Centre responded, explaining why it believed that some of the documents sought could be returned to the Violator while others could not because some sensitive passages were redacted. There were discussions between the parties, which significantly reduced the number of documents at issue. In a letter dated September 25, 2013, the Violator demanded that certain documents be sent to it. The Centre denied this request.

[3] In response to that denial, the Violator brought a motion for an order to produce the documents in its September 25, 2103 letter as well as other documents that are no longer at issue. The Federal Court denied the motion in decision 2014 FC 1089. It noted that Rule 317 of the *Federal Courts Rules*, SOR/98-106, on which the Violator based his motion, has a limited scope. It applies only to the documents that were in the possession of the decision-maker when it rendered its decision and not in the possession of the person making the request. The Federal Court recognized that it could order a broader production in certain circumstances when the applicant alleges a breach of procedural fairness. But in such a case, the onus is on the applicant to produce evidence supporting that allegation. The Federal Court concluded that the Violator had not met this burden, but had alleged only a breach of procedural fairness. Furthermore, the discussions between the Violator and the Centre, following its September 25, 2013 letter, suggest

that the Violator intended to challenge the Notice of Violation even if the Centre did not submit to its motion to produce the documents. This undermined the Violator's claims that it was unable to defend itself properly without having access to these documents.

[4] The Violator raises two grounds of appeal before this Court. It argues that an appeal under Section 73.21 of the Act is not an application for judicial review, which favours a more generous production under Rules 317 and 350. That argument was pleaded before the Federal Court which did not accept it. Also, the Violator maintains that it met its burden of proof with respect to demonstrating a breach of procedural fairness.

[5] I am of the opinion that the Violator has failed to show that this Court would be justified in intervening. I would consequently dismiss the appeal with costs.

[6] The first issue to be addressed is that of the standard of review. The decision regarding the production of documents is a discretionary one: *Bristol-Myers Squibb Canada Co. v. Mylan Pharmaceuticals ULC*, 2011 FC 919, [2011] FCA no. 1201, at paragraph 6. The standard of review of a discretionary decision was recently examined by a panel of this Court in *Turmel v. Her Majesty the Queen*, 2016 FCA 9. After having reviewed the different cases that have discussed with the issue and the various formulas used to describe the standard of review, the Court concluded that the case law holds that in the absence of an error of principle, the Court cannot interfere unless there is an obvious, serious error that undercuts its integrity and viability. This is, indeed the standard that this Court has applied in interlocutory judgments, and it is the

appropriate standard in this case. That said, no matter how the applicable standard is worded, my decision would be the same.

[7] The first ground of appeal raised by the Violator is that where a statutory appeal, like the one provided for in Section 73.21 of the Act, favours a more ample production of documents than the one provided under Rule 317 and the relevant case law. The Violator cites some cases of the Federal Court where the Court refused to grant a broader production on the ground that this production would turn the judicial review into an appeal. In my opinion, the Violator incorrectly interpreted those cases.

[8] All those cases involved a broader application for production in the context of an application for judicial review. The Court denied this application on the ground that it would transform the application for judicial review, where only the legality of the decision is at issue, into an appeal where the merit of the decision is at issue. The Violator is correct in noting that there is a difference between an appeal and a judicial review proceeding. However, he overlooks the fact that the case law holds that a statutory appeal of an administrative tribunal decision should be similar to a judicial review proceeding:

> Where a court reviews a decision of a specialized administrative tribunal, the standard of review must be determined on the basis of administrative law principles. This is true regardless of whether the review is conducted in the context of an application for judicial review or of a statutory appeal (*Association des courtiers et agents immobiliers du Québec v. Proprio Direct inc.*, 2008 SCC 32, [2008] 2 S.C.R. 195, at paras. 13 and 18-21; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226, at paras. 17, 21, 27 and 36; *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247, at paras. 2 and 21; *Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc.*, 2001 SCC 36, [2001] 2 S.C.R. 100, at para. 27).
>
> *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3, at paragraph 38.

[9] In the state of the administrative law, there is no difference between a judicial review proceeding and a statutory appeal. In both cases, the Court shows deference, given the tribunal's expertise, and does not attempt to decide on its own whether the decision is well founded.

[10] Although we sit on the Federal Court of Appeal, the issue arises in the context of a statutory appeal from the decision rendered by the Centre. This appeal is similar to a judicial review proceeding and the rule governing the production of the documents is therefore the same as the one that applies to judicial review proceeding. The Federal Court committed no error in principle in concluding as it did.

[11] The second ground of appeal submitted by the Violator is that it discharged its burden of demonstrating that a broader production of documents is required because the Centre violated its right to procedural fairness. However, upon closer examination, the argument raised by the Violator is based on circular reasoning:

> [TRANSLATION]
>
> In its Notice of Appeal and its Motion, the appellant specifically challenged the fairness of [the Centre's] administrative process and pointed to the absence of adequate disclosure, thereby invalidating the decision. In the light of this breach of procedural fairness, the appellant argued that it was entitled to the documents request in the September 25 letter...
>
> The Memorandum of Fact and Law filed on behalf of the appellant, at paragraph 58.

[12] It is not because the Centre denied the Violator's motion for an order to produce the documents that the Violator's right to procedural fairness was infringed. It is incumbent upon the Violator to demonstrate how the refusal to grant a broader production hinders its ability to

respond to the case against it. Asserting that a breach of procedural fairness occurred does not constitute proof. I therefore agree with the Federal Court's finding that the Violator did not demonstrate the relevance of the documents requested.

[13] The irreducible fundamental difficulty which the Violator is facing is very well expressed in its own Memorandum of Fact and Law at paragraph 64:

> [TRANSLATION]
>
> Beyond the allegations mentioned above, the appellant could not provide other grounds to establish the relevance [of the documents at issue] because it ignored and still ignores the content and/or existence of the documents requested in its letter dated September 25, 2013.

[14] A request for production of documents whose existence and content are unknown amounts to a fishing expedition. *Telus Communications Company v. Canadian Radio-Television and Telecommunications Commission*, 2009 FCA 255, the case which the Violator cites, is of no assistance to the Violator. The controversy in this case was the uncertainty regarding the approach taken by the CRTC in ruling on a dispute between the Department of Public Works and Bell Canada. This Court ordered a broader production to cast light on this approach. The facts in this case are different.

[15] The Violator is well aware of the approach taken by the Centre. It does not agree with the conclusions drawn by the Centre pursuant to this approach, but that, in itself, does not entitle the Violator to a broader production than the one it has already received.

[16] In my opinion, the Federal Court has not committed an error in principle or an error that diminishes the integrity and validity of its decision when it concluded that the Violator had not shown that it was entitled to the production of the documents requested under Rule 317.

[17] I would consequently dismiss the appeal with costs.

"J.D. Denis Pelletier"
J.A.

"I agree.
Johanne Gauthier J.A."

Certified true translation
François Brunet, Revisor

<u>JUDGE NADON</u> (concurring reasons)

[18] I entirely agree with the comments of my colleague, Justice Pelletier, indicating that the appeal must be dismissed. I also share his view that our Court must show deference since the Federal Court's decision is discretionary.

[19] However, I cannot agree with my colleague when he suggests that we adopt the standard recently set out in *Turmel v. Canada* (2016 FCA 9) [*Turmel*] on January 16, 2016, according to which, in the absence of an error of principle, the Court cannot interfere unless there is "an obvious, serious error that undercuts its integrity and viability" (reasons of the majority paragraph 6).

[20] Prior to *Turmel*, our Court had since April 20, 2015 followed the standard set out in *Imperial Manufacturing Group Inc. v. Decor Grates Incorporated*, 2015 FCA 100, 472 N.R. 109 [*Decor Grates*], i.e. the standard adopted by the Supreme Court of Canada in *Housen v. Nikolaisen,* 2002 SCC 33, [2002] 2 S.C.R. 235 [*Housen*]. Consequently, our Court was required to review a judge's discretionary decision based on the standard of correctness with respect to questions of law, and based on the standard of palpable and overriding error with respect to questions of fact. For their part, questions of mixed fact and law were subject to the palpable and overriding error standard of review, absent an isolated error in law, in which case the standard of correctness applied.

[21] It is important to note that on December 22, 2008, in *Apotex Inc. v. AB Hassle*, 2008 FCA 416 at paragraph 21, [2008] FCA no. 1824 (QL) [*Apotex*], our Court unequivocally rejected the

contention that *Housen* applied to discretionary decisions. More specifically, Madam Justice Sharlow, writing on behalf of the Court, stated the following:

> [21] Both parties argued that the standard of review in this appeal is governed by *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235. However, that case deals with the standard of review on the appeal of the decision of a trial judge. It does not apply in this case, which involves an appeal of the discretionary decision of a judge on a motion to set aside a prohibition order on the basis of Rule 399 or the Federal Court's inherent continuing jurisdiction over injunctions and similar orders. This Court will not reverse such a discretionary decision in the absence of an error of law or a wrongful exercise of discretion in that no weight, or no sufficient weight, was given to relevant considerations, or consideration was given to irrelevant factors: *Elders Grain Co. v. Ralph Misener (The) (C.A.),* [2005] 3 F.C.R. 367, at paragraph 13 [*Elders Grain*].

[22] I note the fact that our decision in *Elders Grain*, upon which Sharlow J. relied, made reference, in support of her conclusion regarding the applicable standard in a discretionary decision, to several Supreme Court decisions including *Reza v. Canada* [1994] 2 S.C.R. 394, at pages 404 and 405 [*Reza*].

[23] Furthermore, despite extensive case law regarding the applicable standard of review, the Supreme Court has never taken a position in favour of a universal standard of review, i.e. a standard that applies to a judge's discretionary decisions, questions of fact, and questions of mixed fact and law arising from a judgment at trial. Very recently, in *Canadian Imperial Bank of Commerce v. Green*, 2015 SCC 60 at paragraph 95, [2015] S.C.J. no. 60 (QL) [*CIBC*], the Supreme Court reiterated the standard of review applicable to the discretionary decisions of a judge:

> [95] I must now decide whether the doctrine applies to the cases at bar. Before doing so, I should briefly outline the applicable standard of review. The standard that ordinarily applies to a judge’s discretionary decision on whether to grant an order *nunc pro tunc* is that of deference: if the judge has given sufficient weight to all the relevant considerations, an appellate court must defer to his or her exercise of discretion (*Reza v. Canada*, [1994] 2 S.C.R. 394, at page 404). However, if the judge’s discretion is exercised on the basis of an erroneous principle, an appellate court is entitled to intervene: *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217, at para. 54 [*Soulos*]. In *CIBC*, Strathy J. found that he did not have jurisdiction to make the order *nunc pro tunc*. It follows that he did not actually exercise any discretion, and there is therefore no decision to defer to. But, even if he had done so, his reasoning on whether the order should be granted *nunc pro tunc* was based on an erroneous principle in that he conflated the doctrine of *nunc pro tunc* with that of special circumstances and erroneously concluded that an order can be made *nunc pro tunc* only in the event of a slip or oversight. His decision is therefore not entitled to deference on appeal.

[24] A *nunc pro tunc* order is but one of many examples of a discretionary decision.

[25] Before moving ahead, I hasten to add that in this case, regardless of the standard that may apply, the result must be the same, i.e. the dismissal of the appeal. As a result, I do not have to choose a particular standard to determine the appeal.

[26] I find this situation unacceptable in that the parties and their counsel are entitled to know the standard that applies when they appear before our Court. Since 2008, our Court has adopted three different standards of review for discretionary decisions. The fact that the apparent purpose of the new discretionary decision stated in *Turmel* is to summarize the various ways of expressing deference with respect to discretionary decisions, without however changing its meaning, does not seem to me a satisfactory response, given that the three standards are not expressed exactly the same way. Moreover, it is not clear to me that the new standard set out in *Turmel* has the same meaning as those stated in *Housen* and *Apotex*.

[27] There is also the question as to whether we are bound by the Supreme Court's decision in *CIBC*, which reasserts the Supreme Court's prior decisions in *Reza* and *Soulos*. As the Supreme Court put it in *Canada v. Craig* 2012 SCC 473, we are bound to follow its decisions.

[28] In these circumstances, it seems to me that our Court should consider holding a hearing before five judges to arrive at an answer that will allow the parties to know the real standard that applies before this Court.

"M. Nadon"

J.A.

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

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CONCURRING REASONS:	NADON J.A.
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