Federal Court of Appeal | Cour d'appel fédérale

Date: 20160615

Docket: A-54-15

Citation: 2016 FCA 182

CORAM: **PELLETIER J.A.**
NEAR J.A.
BOIVIN J.A.

BETWEEN:

TAREK ZAGHBIB

Appellant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

Heard at Calgary, Alberta, on May 24, 2016.

Judgment delivered at Ottawa, Ontario, on June 15, 2016.

REASONS FOR JUDGMENT BY: PELLETIER J.A.

CONCURRED IN BY: NEAR J.A.
BOIVIN J.A.

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REASONS FOR JUDGMENT

PELLETIER J.A.

[1] Mr. Tarek Zaghbib appeals from the decision of the Federal Court, reported as 2015 FC 97, [2015] F.C.J. No. 57, (the Decision) dismissing his application for a writ of *mandamus* "directing the Respondent to investigate allegations that Ms. Meriem Erramani … has committed an act of marriage fraud": see Appeal Book (A.B.) at p. 16. Ms. Erramani is Mr. Zaghbib's estranged wife. The difficulty with this case is that between the time Mr. Zaghbib's application

was made and the time of the Federal Court hearing, the authorities addressed Mr. Zaghbib's complaint and decided to close their file. In the face of this decision, Mr. Zaghbib argued before the Federal Court that the respondent closed its file for the sole purpose of putting an end to his application which, he says, amounts to bad faith. He now seeks a new investigation. The Federal Court dismissed his application.

[2] In my view, the Federal Court came to the right conclusion but for the wrong reasons. I would therefore dismiss the appeal.

I. FACTS

[3] Mr. Zaghbib immigrated to Canada in 1999. In 2007, he mentioned to an acquaintance that he was looking for a wife; she suggested that he consider her cousin, Ms. Erramani, who lived in Morocco. Mr. Zaghbib made contact with Ms. Erramani by telephone and over a period of two years, he developed his relationship with her over through that medium. In November 2009, Mr. Zaghbib travelled to Morocco and on December 2, 2009, he and Ms. Erramani were married.

[4] Mr. Zaghbib returned to Canada later that month, leaving his new bride in Morocco. He promptly applied to sponsor her application for permanent residence. As part of that application, he signed a sponsor's undertaking in which he assumed responsibility to repay any social assistance payments made to his wife during the three years following her becoming a permanent resident.

[5] Ms. Erramani's application for permanent residence was eventually approved. When she arrived in Calgary on November 26, 2011, she was met by Mr. Zaghbib and some of her cousins who live in Calgary. At the request of Ms. Erramani's cousins, Mr. Zaghbib agreed that she could spend her first night in Calgary with them. The next day, Ms. Erramani telephoned Mr. Zaghbib to advise him that she had never loved him and had no intention of living with him. That same day, Mr. Zaghbib attended at the local office of Immigration, Refugees and Citizenship Canada to make a complaint. Shortly thereafter, Mr. Zaghbib submitted a Tip Sheet to the Canada Border Services Agency (the CBSA) complaining that he was a victim of marriage fraud.

[6] Mr. Zaghbib did not hear anything further from his wife until June 2012, when she informed him that she had returned to Morocco but that she wanted to reconcile. She said she would return to Canada in November 2012 but she did not. Since then, there has been no communication between them.

[7] In October 2013, Mr. Zaghbib's lawyer wrote to the respondent seeking confirmation that Mr. Zaghbib's complaint would be investigated, given that the latter was still liable under his sponsorship undertaking. Counsel did not receive the favour of a reply, with the result that Mr. Zaghbib's application for leave to commence an application for judicial review seeking an order of *mandamus* was filed in December 2013. Leave was granted in October 2014 and the matter was set down for hearing on January 13, 2015.

[8] In the meantime, the CBSA wrote to the parties on January 27, 2014, apparently pursuant to Rule 9 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22 as amended from time to time. That Rule provides that where the application for leave alleges that the written reasons of the tribunal have not been provided to the applicant, the tribunal shall either send the applicant the reasons for the decision or "an appropriate written notice." The CBSA's letter declared itself to be "the written notice" in the case. It set out the history of Mr. Zaghbib's complaint, indicated that the matter was assigned to a CBSA Inland Enforcement Officer on December 16, 2011 and explained that competing priorities had interfered with the officer's ability to complete an investigation of what was considered to be a low priority matter.

[9] Subsequently, on November 17, 2014, the CBSA wrote to the parties again. This letter also advised that it was "the written notice" in the case. In the letter, Officer Martin, Acting Supervisor of Inland Enforcement, advised that the officer responsible for this file had retired in August 2014. After reviewing the officer's caseload, Officer Martin closed the investigation as it was determined that the CBSA would not be able to conduct an investigation within a reasonable time frame. I shall refer to this letter as the Martin Letter.

[10] One week later, on November 25, 2014, Officer Martin swore an affidavit in support of the respondent's position on the application for *mandamus* (the Martin Affidavit) in which he deposed the following:

> 4. From my review of the file, I determined that there was insufficient evidence to proceed with a s. 44 report under *the Immigration and Refugee Protection Act*. This determination was based on the fact that the evidence that the marriage was not genuine consisted only of the uncorroborated allegation of the Applicant.

> 5. From my review of the file, I also decided to close the investigation for several reasons. Firstly, the investigation qualified as a low priority since it was non-criminal in nature. Secondly, the investigation was three years old and I considered it unlikely that it would come to completion in the near future. If assigned to a new investigation officer, it would be balanced against his or her own investigative file load. A typical case load for an Inland Enforcement Officer consists of up to 100 investigations, most of which would qualify as higher priority than the present investigation.
>
> 6. The investigation can be re-opened at any time if new evidence becomes available.
>
> A.B. page 150.

[11] Reading these letters and this affidavit in context, it appears that the January 27, 2014 letter was a kind of status report as it simply sets out the status of the investigation and explains the lack of progress in concluding the matter. The Martin Letter, as supplemented by the Martin Affidavit, appears to be intended to communicate the CBSA's decision and disposition of the complaint. The decision was that there was insufficient evidence for the officer to form the opinion that Ms. Erramani was inadmissible.

II. THE DECISION UNDER REVIEW

[12] After setting out the facts, the Federal Court framed the issue before it as follows:

> Was it within the discretion of the CBSA to choose not to begin an investigation into the Applicant's complaint, and should an order for mandamus be issued to compel the Respondent to commence an investigation in to the admissibility of the Applicant's estranged wife pursuant to sections 40 and 41 of the IRPA?
>
> A.B. page 7.

[13] The Federal Court identified reasonableness as the appropriate standard of review, relying upon the Supreme Court's decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190.

[14] Before addressing the issue of *mandamus*, the Federal Court took note of counsel's proposal for a remedy other than an order of *mandamus*:

> During oral argument, counsel for the Applicant invited the Court to consider an alternative remedy to an order for mandamus, namely to order the matter returned to the Officer's superior for reconsideration in respect of whether or not to conduct an investigation and write a section 44 report. That relief is not sought as part of this application, nor is it appropriate. This is not an application under the *IRPA*.
>
> Decision, at paragraph 19 (my emphasis).

[15] The Federal Court then turned to the seven criteria for the granting of an order of *mandamus*, as set out in the Federal Court decision in *Dragan v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 211, [2003] 4 F.C. 189, which, in turn, was based on this Court's decision in *Apotex Inc. v. Canada (A.G.)*, [1994] 1 F.C. 742 (C.A.), aff'd [1994] 3 S.C.R. 1100.

[16] The Federal Court then held that Mr. Zaghbib's application was not a justiciable matter because the question of whether and how to investigate his complaint was not a determination order, measure or question arising from the Act and as a result, there was no basis for an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c.27 (the Act), reproduced below:

72 (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised	72 (1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la

— under this Act is, subject to section 86.1, commenced by making an application for leave to the Court.	présente loi est, sous réserve de l'article 86.1, subordonné au dépôt d'une demande d'autorisation.

[17] The Federal Court then indicated, without more, that it did not agree with Mr. Zaghbib's allegation of bad faith on the part of the respondent.

[18] Acknowledging that since it had concluded that the matter was not justiciable, it was not necessary to deal with the issue of delay, the Federal Court nevertheless went on to consider that issue, one of the considerations in an application for *mandamus*. It accepted the respondent's submissions that prioritization of files was a necessary strategy employed by the CBSA to manage its officers' significant workloads. In light of all the circumstances, the Federal Court found that the Minister had reasonably exercised his discretion to best fulfill the requirements of his position and to promote the effective administration of the Act.

[19] The Federal Court then went on to find that any order made by the Immigration authorities would have no practical effect, another of the considerations for the granting of an order of *mandamus*, since it appeared from Mr. Zaghbib's own affidavit that his wife was no longer in the country. In addition, given the time it took to get his application on for hearing, the period during which Mr. Zaghbib was responsible for any social assistance received by his wife had expired. Such evidence as there was suggested that she had not, in fact, received social assistance, at least not in Alberta.

[20] The Federal Court then held that even if the matter were justiciable, Mr. Zaghbib would fail in his application for *mandamus* because the respondent was under no public duty to act with

respect to his complaint "in the time frame he experienced": Decision, at paragraph 29. Furthermore, while Mr. Zaghbib was directly affected by his wife's status, he was not personally owed a duty of investigation in the time which had elapsed in this case. The Federal Court's view was that, while Mr. Zaghbib was reasonably entitled to expect that the government would enforce its own legislation, the delay in dealing with his application was not, in light of the CBSA's workload and priorities, outside the range of reasonableness.

[21] The Federal Court concluded its analysis by ruling that the balance of convenience did not favour the granting of an order of *mandamus*.

[22] Finally, the Federal Court certified the following question at the request of the respondent:

> Can a writ of mandamus be issued to compel the Minister of Public Safety and Emergency Preparedness or the Canada Border Services Agency to investigate a complaint of marriage fraud made by a private citizen?

III. ANALYSIS

[23] The decision as to whether or not to grant an order of mandamus is a discretionary order: see Harelkin v. University of Regina, [1979] 2 S.C.R. 561 at page 574, [1979] S.C.J. No. 59; Canada (Director of Military Prosecutions) v. Canada (Court Martial, Administrator), 2007 FCA 390, [2007] F.C.J. No. 1650, at paragraph 35. As such, it is reviewable on a deferential standard except where it is based upon an error of law: see Turmel v. Canada, 2016 FCA 9, [2016] F.C.J. No. 77, at paragraphs 9-12.

[24] The parties approached the issues in this appeal from different perspectives. The respondent focussed almost exclusively on the issue of the conditions for the granting of an order of *mandamus*, seeking to get a negative answer to the certified question. Counsel for Mr. Zaghbib took a different tack. He attempted to put the Martin Letter and Affidavit in the worst possible light so as to persuade this Court to grant his client a remedy. Recognizing that he was constrained by the relief sought in the notice of application but obviously aware of the problem of mootness, he argued that some judicial flexibility was required to avoid the necessity of multiple proceedings in order to secure some relief for his client.

[25] In my view, the issues in this appeal are:

1- Did the Federal Court err in law in concluding that Mr. Zaghbib's complaint was not justiciable?

2- Was Mr. Zaghbib's application for an order of *mandamus* rendered moot by the Martin Letter and Affidavit?

3- Were the Martin Letter and Affidavit made in bad faith?

4- Is some form of relief available to Mr. Zaghbib in the context of the current application?

5- The certified question.

1. Did the Federal Court err in law in concluding that Mr. Zaghbib's complaint was not justiciable?

[26] In *Chiasson v. Canada*, 2003 FCA 155, [2003] F.C.J. No. 477, Strayer J.A. summarized the doctrine of justiciability with admirable concision:

> While the full scope of the justiciability doctrine need not be analyzed here in an appeal on a motion to strike, in my view a question is normally considered non-justiciable if there are no objective legal criteria to apply or no facts to be determined to decide the question, functions which normally are within the judicial role. It may also be non-justiciable if some other branch of government is

> conspicuously more appropriate, in our constitutional system, to decide the matter.
>
> *Chiasson*, cited above, at paragraph 8.

[27] This is not a case in which there are no objective criteria to apply or facts to be determined. Similarly, this is not a question which some other branch of government is conspicuously more appropriate to decide. This is not a case of non-justiciability.

[28] While the Judge's reasoning is not transparent, it appears that his finding that Mr. Zaghbib's complaint is not justiciable is a function of his conclusion that the decision as to whether or how to investigate is not a decision, determination, order, measure or question arising under the Act and therefore there was no basis for an application for judicial review under subsection 72(1) of the Act.

[29] The focus on whether Mr. Zaghbib's application was a "decision, determination, order, measure or question arising under the IRPA" betrays a misunderstanding of the thrust of section 72 of the Act. That section does not create a right to have a matter arising under the Act judicially reviewed. That right arises from sections 18 and 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7.

[30] Section 18 grants the Federal Court exclusive jurisdiction over judicial review of federal administrative action. Section 18.1 provides that an application for judicial review may be brought "by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought". A matter includes an order or decision but it is not limited to

decisions: see *Air Canada v. Toronto Port Authority*, 2011 FCA 347, [2013] 3 F.C.R. 605, at paragraphs 24-25. An allegation that a public officer has failed to discharge a duty imposed upon her by law is a matter which is amenable to judicial review.

[31] Section 72 simply imposes additional procedural requirements, in the immigration context, on the exercise of the right to seek judicial review. Subsection 72(1) provides that leave is required to commence an application for judicial review. It does not define when judicial review is available. The words "… any matter — a decision, determination or order made, a measure taken or a question raised — under this Act …" are not intended to limit the access to judicial review granted by section 18.1 but rather to ensure that they are given the broadest scope so as to include any matter, including "any question raised".

[32] I conclude that the question of whether the respondent has an obligation to investigate Mr. Zaghbib's complaint is a matter arising under the Act and is amenable to judicial review.

[33] The Federal Court may have had in mind that some matters are so wholly administrative that they are not amenable to judicial review. This line of reasoning is suggested by its reliance on *Jarada v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2006 FC 14, [2006] F.C.J. No. 7 [*Jarada*], a case in which a letter setting the date for the applicant's removal was the subject of an application for judicial review, without any attack on the removal order itself or without any request for a deferral of removal. The Court suggested that if every purely administrative act were subject to judicial review, public administration in Canada would grind to a halt: see *Jarada*, at paragraph 15. *Jarada* is misleading in that the issue is not the

administrative content of a particular act, or administrative efficiency, but the extent to which the applicant's rights are affected. In *1099065 Ontario Inc. (c.o.b. Outer Space Sports) v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FCA 47, [2008] F.C.J. No. 177, also relied upon by the Federal Court, the Court dismissed an attempt to judicially review a purely clerical function, namely a letter proposing one or more dates when the parties might meet. At paragraph 9 of the case, this Court held that if an administrative act does not "directly affect" someone, it is not subject to judicial review.

[34] In this case, the purpose of the investigation requested by Mr. Zaghbib was to determine if he had been the victim of marriage fraud with whatever consequences that may have had for his rights under the Act and his sponsorship undertaking. He was affected to the extent of his contingent liability. It cannot be said that his right to seek that investigation is a purely administrative matter. Nor, in my view, is it self-evident that the exercise of the discretion as to when and how to launch an investigation is beyond judicial review.

[35] In my view, the Federal Court erred in law when it concluded that Mr. Zaghbib's application for *mandamus* was not justiciable.

2. Was Mr. Zaghbib's application for an order of *mandamus* rendered moot by the Martin Letter and Affidavit?

[36] It does not appear from the Decision that the issue of mootness was raised in so many words by the respondent, the party in whose interest it was to do so. On the other hand, it is clear from Mr. Zaghbib's counsel's proposal for an alternative remedy that he was aware of the

difficulty posed by the fact that the respondent had finally turned its mind to his client's complaint and made a decision, a decision which he found unsatisfactory and made in bad faith. In light of this pleading and the tribunal record, the fact that the respondent had made a decision was clearly before the Court.

[37] It is also before this Court when one reviews Mr. Zaghbib's notice of appeal in which he seeks a direction "that the Minister of Public Safety and Emergency Preparedness or the Canada Border Services Agency conduct a new investigation into the matter by a new Officer": A.B. at page 1. Before there can be a new investigation, there must have been an "old" investigation.

[38] In spite of the fact that the issue of mootness was apparently not raised in express terms, it was incumbent on the Federal Court to address the issue. Where the issue before the Court is the alleged failure of the respondent to make a decision and the record discloses that a decision was made, a Court cannot ignore reality because one or the other of the parties chooses to do so.

[39] Mr. Zaghbib's notice of application seeks the following relief:

> For an Order of Mandamus directing the Respondent to investigate allegations that Ms Meriem Erramani … has committed an act of marriage fraud.

[40] It appears from the portions of the Martin Affidavit quoted earlier in these reasons that Officer Martin turned his mind to the question of marriage fraud when he found that there was insufficient evidence to proceed with a section 44 report. He made specific reference to the fact of Mr. Zaghbib's uncorroborated evidence. He also considered the low priority of the investigation relative to other investigative priorities and the likelihood that it would be

completed in a timely manner. He also considered the amount of time passed since the complaint was originally made.

[41] I recognize that Mr. Zaghbib has something to say about the quality of this decision. His counsel forcefully made the point that if a timely investigation had been undertaken, the deficiencies which are now relied upon by the respondent would not have been an issue. That said, where the question is whether the respondent has done that which was sought in the application for an order of *mandamus*, the Court's role is not to inquire into the merits of the decision unless it is so devoid of merit as to amount to a disguised refusal to act.

[42] While the decision in this case, and the process leading to it, are far from ideal, they are not so bereft of any justification as to amount to a refusal to act. The delay in commencing the investigation is explained by the respondent's allocation of limited resources and its prioritization scheme. Officer Martin did address his mind to the complaint and to the possibility of a report under section 44 of the Act. He considered whether a timely resolution was likely. Without pronouncing myself as to whether the decision is reasonable or not, it is sufficiently responsive to the request for an investigation to stand as a decision for the purposes of determining mootness in the application for *mandamus*.

[43] As a result, I find that Mr. Zaghbib's application for an order of *mandamus* is moot in light of the decision recorded in the Martin Letter and Affidavit.

3. Were the Martin Letter and Affidavit made in bad faith?

[44] Counsel for Mr. Zaghbib argued that the decision recorded in the Martin Letter and Affidavit was made in bad faith for the sole purpose of putting an end to his application for *mandamus*. He points to the fact that the Martin Letter, while dated November 17, 2014, reports that the decision to close Mr. Zaghbib's file was made October 17, 2014, 2 days after the Federal Court granted him leave to commence his application for *mandamus*.

[45] While I understand counsel's suspicions, the normal reaction to the allegation that a decision has not been made is to make that decision. The fact that a decision is made in response to an application for *mandamus* is not, in and of itself, evidence of bad faith.

[46] In this case, the fact that the respondent apparently did not plead mootness at the hearing before the Federal Court tends to confirm that the decision was not made solely for the benefit of disposing of the application for *mandamus*. If it had, counsel for the respondent would have argued that Mr. Zaghbib's application was moot. For whatever reason, it appears that this did not happen. But even if it had, the point made above would still hold, namely, an applicant who brings an application for *mandamus* to force a decision-maker to make a decision cannot complain when the decision-maker makes the decision before being ordered to do so by the Court.

[47] I find that the respondent's decision with respect to Mr. Zaghbib's complaint was not made in bad faith.

4. Is some form of relief available to Mr. Zaghbib in the context of the current application?

[48] I am aware that the dismissal of this appeal will force Mr. Zaghbib to start from scratch if he wishes to challenge the respondent's decision with respect to his complaint. He will have to obtain an extension of time to file his application for leave pursuant to paragraph 72(2)(*c*) of the Act. Then he will have to obtain leave from the Federal Court to proceed with his application for judicial review, which may or may not be granted. In order to obtain leave, he will have to incur the expense of preparing a new set of materials for use on the eventual application to set aside the respondent's decision. Such a course of events seems perverse when one considers that Mr. Zaghbib is already before the Court.

[49] It is true that once a question is certified, the appeal before this Court (and the Supreme Court) is not limited to the certified question: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, [1999] S.C.J. No. 39, at paragraph 12. Does this allow Mr. Zaghbib to argue before us that the respondent's decision is unreasonable and ought to be set aside? That is a new question which was not raised as such at the argument of the appeal. The respondent did not defend the reasonableness of the decision, focussing as it did on the question of whether the Minister could be compelled to launch an investigation. It is not open to us to set aside a decision whose reasonableness an issue was not before us.

[50] Can we return the matter to the Federal Court for consideration of whether the respondent's decision was reasonable? The effect of this would be to convert what began as an application for judicial review seeking *mandamus* to an application for judicial review seeking to

set aside a specific decision. Since both are applications for judicial review, one could argue that this is a single ongoing application for judicial review, in which the relief sought changed in the course of the application. The reality is a little more complex in that not only is different relief sought but a different decision or matter is being reviewed.

[51] A change in the subject matter of the judicial review is essentially a new judicial review. The language of subsection 72(1) requires leave for the commencement of an application for judicial review of any matter ("a decision, determination or order made, a measure taken or a question raised" – note the use of the singular). In the same vein, Rule 302 of the *Federal Courts Rules* SOR/98-106 stipulates that an application for judicial review shall be limited to a single order in respect of which relief is sought. To that extent, my earlier reference to "a single ongoing application for judicial review" is inapt.

[52] What little authority there is on this question in the Federal Court is against the proposition that an application for *mandamus* can be converted into an application for judicial review of the resulting decision: see *Figueroa v. Canada (Minister of Foreign Affairs Trade Development)*, 2015 FC 1341, [2015] F.C.J. No. 1415 [*Figueroa*]*; Farhadi v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 926, [2014] F.C.J. No. 959 [*Faradic*].

[53] In *Faradic*, the Federal Court held that the conversion of an application for *mandamus* into an application for judicial review of a decision was caught by the leave requirement in subsection 72(1) of the Act (see *Faradic*, paragraphs 19-23) while in *Figueroa*, the course of the proceeding together with the absence of a satisfactory record led the Court to refuse the

applicant's request that it judicially review the decision which resulted from the application for *mandamus*.

[54] As a result, I am unable to see how we might provide Mr. Zaghbib with relief within the framework of the application which was before the Federal Court.

5. The Certified Question

[55] The jurisprudence of this Court is clear that it has no jurisdiction to hear an appeal unless there is a legitimate certified question before it. A legitimate certified question is one which was dealt with in the Federal Court's reasons and which is dispositive of the appeal: see *Zaza v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 89, [2004] F.C.J. No. 368, at paragraph 12; *Canada (Minister of Citizenship and Immigration) v. Varela*, 2009 FCA 145, [2010] 1 F.C.R. 129 at paragraph 43; *O'Brien v. Canada (Minister of Citizenship and Immigration)*, 2016 FCA 159, [2016] F.C.J. No. 567, at paragraph 8.

[56] The certified question in this case did not arise on the facts because at the time the case was heard, a decision had been made even though the Minister, for reasons best known to him, proceeded as though none had. Furthermore, the Federal Court dealt with Mr. Zaghbib's application as one based on delay: "…he is not owed any duty of investigation by the CBSA in the time frame he experienced": see Decision, at paragraph 29. The right to an investigation of a complaint of marriage fraud by a private citizen qua citizen was not dealt with.

[57] It follows from this that this Court has no jurisdiction to hear this appeal which as a practical matter means that the appeal must be dismissed. However, as the reasons set out above make clear, the appeal would have been dismissed even if the Court had jurisdiction to hear the appeal. Why then write reasons which are obiter and, as such, have no precedential value?

[58] The fact that a court is without jurisdiction to hear an appeal does not mean that it cannot, as a courtesy to the litigant, explain why the appeal would have failed in any event. Given the pressure on judicial resources, such a courtesy is not to be expected as a matter of course or even upon request. But there are cases where the circumstances are such that the interests of justice are advanced by providing a litigant with evidence that he has in fact been heard. In my view, this is such a case. The respondent and Mr. Zaghbib were at cross-purposes before the Federal Court and before this Court. Unfortunately, the Federal Court did not address the real issue between the parties as it stood when they appeared before it. In the circumstances, I believe that Mr. Zaghbib is entitled to a more responsive decision than the one he got, a situation which I have attempted to remedy.

[59] For all of these reasons, I would therefore dismiss the appeal.

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

"I agree
D.G. Near J.A."

"I agree
Richard Boivin J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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CONCURRED IN BY:	NEAR J.A. BOIVIN J.A.
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