

Federal Court of Appeal



Cour d'appel fédérale

Date: 20160921

Docket: A-151-14

Citation: 2016 FCA 234

**CORAM: NADON J.A.
DAWSON J.A.
WOODS J.A.**

BETWEEN:

RACHEL EXETER

Appellant

and

**ATTORNEY GENERAL OF CANADA
(Deputy Head, Statistics Canada)**

Respondent

Heard at Ottawa, Ontario, on September 14, 2016.

Judgment delivered at Ottawa, Ontario, on September 21, 2016.

REASONS FOR JUDGMENT BY:

DAWSON J.A.

CONCURRED IN BY:

**NADON J.A.
WOODS J.A.**

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REASONS FOR JUDGMENT

DAWSON J.A.

[1] The appellant commenced an application for judicial review in the Federal Court. The appellant then moved for interlocutory relief before a prothonotary of the Federal Court. Dissatisfied with the resulting order, the appellant appealed from the order of the Prothonotary and requested a copy of the audio recording of the proceeding before the Prothonotary.

[2] After listening to the audio recording, the appellant believed that a portion of the audio recording was missing. The appellant sought an investigation into what she characterized to be “doctoring” of the audio recording (Exhibit 4 to the appellant’s affidavit). Legal counsel to the Federal Court responded that the Federal Court audio recording contained time-markers and time indicators that cannot be altered. Counsel further advised that a review of the audio recording “shows that there are no gaps in the time indicators thereby establishing that no segments of the recording have been deleted” (Exhibit 5 to the appellant’s affidavit).

[3] The appellant then moved “seeking directions from [the Federal] Court pursuant to Rules 4 and 54 of the *Federal Courts Rules* concerning the procedures to be followed under the Rules: for the production of an unaltered audio recording record in CFN: T-943-12 heard on May 15, 2013” (appellant’s notice of motion in the Federal Court).

[4] In her written representations in support of her motion for directions the appellant stated that:

21. The Applicant seeks direction from the Court in regard to the procedure in pursuing a proper investigation done by audio forensic experts, into the tampering of the audio of the recorded proceedings held May 15, 2013.

22. The Applicant seeks direction from the Court in regard to the procedure for obtaining the services of audio forensic specialist to verify the authenticity of the recording.

23. The Applicant seeks direction in obtaining a true copy of the audio recording record for use in her motion filed with this court on May 27, 2013.

[5] At paragraph 9 of her reply representations, the appellant repeated that she sought direction on what she characterized to be a procedural matter:

The Applicant seeks direction from this Court on the procedure for obtaining an audio forensic expert to validate the authenticity of this record. Such procedure are [*sic*] not found in the *Federal Courts Rules* or the *Federal Courts Act*.

[6] By order dated March 10, 2014, issued in Court File T-943-12 a judge of the Federal Court dismissed the motion for directions with costs. In the Judge's view:

- i. there was no convincing evidence in support of Ms. Exeter's allegation that the audio recording provided by the Court was not authentic;
- ii. even if the allegation was supported by clear and convincing evidence, Ms. Exeter had not been prejudiced; and,
- iii. there was no need to address Ms. Exeter's arguments based on her right to freedom of expression guaranteed by section 2(b) of the *Canadian Charter of Rights and Freedoms*.

[7] On this appeal from the order of the Federal Court, the appellant asserts a number of errors on the part of the Judge. In my view, he was correct to dismiss the appellant's motion for directions, although I reach this conclusion for reasons different from those of the Federal Court.

[8] In my respectful view, the appellant misconceives the purpose of Rule 54 which permits a person to bring a "motion for directions concerning the procedure to be followed under these Rules".

[9] Rule 54 was first enacted in the 1998 revision of the *Federal Courts Rules* that replaced the version of the Rules found in C.R.C. 1978, c. 663.

[10] In one of the first cases to consider the new rule (an authority relied upon by the appellant), Prothonotary Hargrave cautioned that “except in rare circumstances a Court should not be expected to intrude into such matters which more properly fall within the responsibility of counsel” (*Nash v. Sanjel Cementers Ltd.* (1999), 178 F.T.R. 296, 2 C.P.R. (4th) 528, at paragraph 3).

[11] This is so because in our adversarial system of justice the Court cannot give up its role as an independent and impartial decision-maker.

[12] It follows from this role that the Court cannot give legal or tactical advice to a party (*Bernard v. Canada (Revenue Agency)* 2015 FCA 263, 479 N.R. 189, at paragraph 39). The onus always rests on the party asserting a right to prove the facts which support the party’s claim and as an impartial decision-maker the Court cannot counsel a party on how to prove their case.

[13] In the present case, the appellant is obliged to marshal whatever expert or technical evidence she believes she requires to support her allegation that the audio recording provided by the Federal Court is in any way inaccurate or incomplete. As an impartial decision-maker the Court cannot recommend how to procure an “audio forensic specialist” nor can it give directions on how to pursue “a proper investigation done by audio forensic experts” nor can it assume the truth of the appellant’s assertions so as to give directions about “obtaining a true copy of the audio recording record” for use in the appellant’s appeal from the order of the Prothonotary.

[14] For the same reasons, the gap rule, Rule 4, does not assist the appellant.

[15] Because Rule 54 only permits the Court to give procedural directions, it follows that the Court is not required to adjudicate, and should not adjudicate, upon disputed issues in the course of giving procedural directions. Thus, when disposing of the request for directions, it was not relevant for the Court to consider whether the evidence supported the appellant's concerns or whether prejudice existed. It was similarly not relevant for the appellant to advance an argument based on section 2(b) of the *Canadian Charter of Rights and Freedoms*.

[16] The Federal Court was therefore correct to dismiss the request for directions.

[17] In oral argument the appellant referred to a request made to the Registry of the Federal Court for technical details concerning the digital audio recording system used by the Federal Court. This request post-dates the order under appeal and so is not relevant to the appeal. However, details in the possession of the Federal Court, or readily available to it, required by a forensic expert should be made available to the appellant on request, absent some circumstance that is not apparent on the record before this Court.

[18] For these reasons I would dismiss the appeal. In the circumstances, I would not award costs.

“Eleanor R. Dawson”

J.A.

“I agree.
M. Nadon J.A.”

“I agree.
J. Woods J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-151-14

STYLE OF CAUSE: RACHEL EXETER AND
ATTORNEY GENERAL OF CANADA
(DEPUTY HEAD, STATISTICS
CANADA)

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: SEPTEMBER 14, 2016

REASONS FOR JUDGMENT BY: DAWSON J.A.

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

DATED: SEPTEMBER 21, 2016

APPEARANCES:

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