

Date: 20100310

Docket: A-524-09

Citation: 2010 FCA 70

Present: PELLETIER J.A.

BETWEEN:

MARTHA KAHNAPACE

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on March 10, 2010.

REASONS FOR ORDER BY:

PELLETIER J.A.

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REASONS FOR ORDER

PELLETIER J.A.

[1] The appellant, Martha Kahnapace, seeks an order settling the contents of the appeal book and seeking leave to adduce new evidence on appeal.

[2] The only issue between the parties with respect to the contents of the appeal book is whether the memoranda of fact and law filed by the parties in the Federal Court should be included in the appeal book, the appellant arguing that they should and the respondent opposing their inclusion.

[3] The appellant says that the inclusion of the memoranda of fact and law will allow her to show that the Federal Court judge misapprehended her argument. In addition, she says that her

memorandum contains references to research evidence which will assist this court in its determination.

[4] Dealing with the second point first, evidence is not put before the Court by means of the memorandum of fact and law. It is put before the Court (at least in applications for judicial review) by means of affidavits and cross examination on those affidavits. A party cannot cite learned articles in the memorandum and hope to have these articles accepted as proof of the conclusions expressed by the authors of the articles. The Federal Court judge was aware of the critical commentary with respect to the Custody Rating Scale but found, correctly, that the validity and reliability of the scale could only be challenged by expert evidence tendered by way of affidavit. This justification for the inclusion of the memoranda of fact and law is not well founded.

[5] The appellant argues that the Federal Court judge misapprehended her argument in two points. To the extent that the misapprehension turns on the Federal Court judge's failure to give any weight to the "research evidence" referred to in the appellant's memorandum of fact and law (see paragraphs 7 and 8 of the Notice of Appeal), this argument fails for the reasons set out above.

[6] To the extent that the appellant seeks to introduce the memoranda of fact and law in order to assist this court in the determination of the arguments on the appeal (see paragraph 11 of the Notice of Appeal), the Court is confident that it can discern the issues on the basis of the Federal Court judge's reasons and the memoranda of fact and law to be produced by the parties for the purposes of the appeal.

[7] Since the parties agree on all other elements of the appeal book, the motion to settle the contents of the appeal book can be disposed of by ordering that the memoranda of fact and law before the Federal Court are not to be included in the appeal book.

[8] The new evidence which the appellant seeks to introduce deals with a different issue than the issue in the appeal. The appeal relates to the appellant's initial classification. The additional evidence deals with the appellant's dispute with correctional authorities with respect to the appropriate date for her two year review. This evidence will not assist the Court in the determination of the appeal. This aspect of the motion is dismissed.

[9] In the result, the contents of the appeal book will be limited to those items upon which the parties have reached agreement. For greater certainty, the appeal book(s) will not contain the memoranda of fact and law filed in the Federal Court nor the proposed new evidence.

"J.D. Denis Pelletier"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-524-09

STYLE OF CAUSE: MARTHA KAHNAPACE
and
ATTORNEY GENERAL OF
CANADA

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY: PELLETIER J.A.

DATED: MARCH 10, 2010

WRITTEN REPRESENTATIONS BY:

SARAH RAUCH FOR THE APPELLANT

CHARMAINE DE LOS REYES FOR THE RESPONDENT

SOLICITORS OF RECORD:

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