Federal Court of Appeal | Cour d'appel fédérale

Date: 20110105

Docket: A-431-10

Citation: 2011 FCA 1

Present: **MAINVILLE J.A.**

BETWEEN:

CHANTHIRAKUMAR SELLATHURAI

Appellant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on January 5, 2011.

REASONS FOR ORDER BY: MAINVILLE J.A.

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REASONS FOR ORDER

MAINVILLE J.A.

[1] The appellant is appealing an order of Justice Snider of the Federal Court dated November 3, 2010 and bearing citation number 2010 FC 1082. By that order, the judge asserted jurisdiction pursuant to section 87 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (*IRPA*) to uphold national security claims of privilege over certain documents which had been inadvertently disclosed to the appellant and his counsel. The judge also ordered the return of the disputed documents and the destruction of any copies thereof made in any form.

[2] The respondent has brought a motion to have this appeal quashed on the ground that this Court has no jurisdiction to hear it since the Federal Court judge did not certify that a serious

question of general importance is involved and did not state the question as required pursuant to paragraph 74(d) of *IRPA*.

[3] At the heart of this appeal lies the issue of whether the Federal Court judge should have proceeded to hear and determine the privilege claim pursuant to section 87 of *IRPA* or pursuant to some other provision, notably section 38 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5 (*CEA*).

[4] The Federal Court judge correctly identified this issue and extensively discussed and analysed it in her reasons at paragraphs 9 to 29. The Federal Court judge succinctly stated the issue as follows:

> [10] The Minister acknowledges that neither *IRPA* nor the *Federal Courts Rules*, SOR/98-106 provide an explicit statutory procedure for issues of inadvertent disclosure in the *IRPA* context. However, the Minister points to the fact that the Federal Court has been expressly tasked by Parliament to protect information in the *IRPA* context where disclosure would be injurious to national security or endanger the safety of any person (*IRPA*, s.77 to 87.1). The Minister further argues that this Court has plenary supervisory jurisdiction over the statutory scheme of *IRPA* which would allow this motion to be heard pursuant to s. 87 of *IRPA*, combined with the "gap rule" in s. 4 of the *Federal Courts Rules*.
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> [11] The Applicant, on the other hand, argues that this motion cannot be heard pursuant to s. 87 of *IRPA* because the inadvertent disclosure "has nothing to do" with any current judicial review application. The Applicant argues that the only vehicle for the Federal Court to determine this motion is s. 38 of *CEA*. The Applicant further submits that it is in the interests of justice to apply s. 38 of *CEA*, because this section, and not s. 87 of *IRPA*, allows for the proper balancing of the interests for and against disclosure.
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> [12] For the reasons that follow, I find the position of the Minister to be preferable. Specifically, I conclude that this Court has jurisdiction to apply s. 87 of *IRPA* to the Disputed Documents.

[5] In his notice of appeal, the appellant specifically raises as a ground for his appeal that the Federal Court judge erred in law and exceeded her jurisdiction in applying section 87 of *IRPA* rather than the provision of the *CEA*.

[6] With respect to judicial review of decisions made under *IRPA*, no appeal lies from the Federal Court to this Court unless, in rendering judgment, the Federal Court judge certifies that a serious question of general importance is involved and states the question pursuant to paragraph 74(d) of *IRPA*. This Court, however, has consistently held that this provision does not preclude an appeal under section 27 of the *Federal Courts Act*, R.S.C.1985, c. F-7 on the ground of jurisdictional error by a Federal Court judge: *Subhaschandran v. Canada (Solicitor General)*, [2005] 3 F.C.R. 255 at para. 17; *Horne v. Canada (Minister of Citizenship and Immigration)*, 2010 FCA 337 at paras. 3 and 4; *Horne v. Canada (Minister of Citizenship and Immigration)*, 2010 FCA 55 at para. 4; *Deng Estate v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FCA 234; *Lazareva v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 39. See also: *Zündel (Re)*, 2004 FCA 394, 331 N.R. 180; *Narvey v. Canada (Minister of Citizenship and Immigration)* (1999), 235 N.R. 305 (F.C.A.).

[7] Moreover, though this Court may, pursuant to paragraph 52(a) of the *Federal Courts Act*, quash an appeal in cases in which it has no jurisdiction, the standard for doing so on a preliminary motion is high: *Yukon Conservation Society v. National Energy Board*, [1979] 2 F.C. 14 (F.C.A.) at page 18; *Union of British Columbia Indian Chiefs v. Westcoast Transmission Co.* (1981), 37 N.R. 485 (F.C.A.), [1981] F.C.J. No. 513 (QL) at para. 6; *Abar v. Canada (Minister of Employment and*

Immigration) (1990), 120 N.R. 237 (F.C.A.). In *Yukon Conservation Society*, above, Justice Le Dain stated the standard as follows:

> Courts of Appeal will exercise the power of quashing or summarily dismissing an appeal where there is such manifest lack of substance in the appeal as to bring it within the character of vexatious proceedings, or where by a change of circumstances the issue between the parties or the "substratum of the litigation" has disappeared, so that a judgment of the court would not serve any practical purpose, except as to costs. *See National Life Ass. Co. v. McCoubrey* [1926] S.C.R. 277; *Coca-Cola Company of Canada Ltd. v. Mathews* [1944] S.C.R. 385; *Oatway v. Canadian Wheat Board* [1945] S.C.R. 204; *Canadian Cablesystems (Ontario) Ltd. v. Consumers Association of Canada* [1977] 2 S.C.R. 740.

[8] In *Arif v. Canada (Minister of Citizenship and Immigration)*, 2010 FCA 157 at para. 9, this Court recently decided in the context of an appeal in a citizenship case that the test set out under *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 applies to a preliminary motion to strike the appeal. Under this test, it must be "plain and obvious" that the appeal has no chance of success.

[9] In this case, I cannot conclude that the appeal manifestly lacks substance, nor can I conclude that it is plain and obvious that the appeal has no chance of success.

[10] As noted by the Federal Court judge in her reasons at paragraph 10 reproduced above, the respondent himself acknowledges that neither *IRPA* nor the *Federal Courts Rules*, SOR/98-106 provide for an explicit statutory procedure for issues of inadvertent disclosure in the *IRPA* context. The reasons of the Federal Court judge also disclose that the issue is not without doubt, notably at paragraph 28 of these reasons where reliance is placed on Rule 4 of the *Federal Courts Rules* (the "gap rule") in order to reach a conclusion on the matter.

[11] Consequently, in the circumstances of this case, it is preferable to allow the appeal to proceed and thus allow the panel of this Court which will be appointed to hear the appeal to determine whether this Court has jurisdiction in this matter.

[12] For these reasons, the respondent's motion to quash shall be dismissed with costs, but without prejudice to the respondent raising the jurisdictional issue under paragraph 74(d) of *IRPA* on the merits of this appeal.

"Robert M. Mainville"
J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-431-10
STYLE OF CAUSE:	CHANTHIRAKUMAR SELLATHURAI v. THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	MAINVILLE J.A.
DATED:	January 5, 2011

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