Federal Court of Appeal | Cour d'appel fédérale

Date: 20190501

Docket: A-89-18

Citation: 2019 FCA 102

CORAM: **DE MONTIGNY J.A.**
GLEASON J.A.
LOCKE J.A.

BETWEEN:

MARTHA COADY

Appellant

and

THE COMMISSIONER OF THE RCMP AND THE LIBRARIAN AND ARCHIVIST OF CANADA

Respondents

Heard at Ottawa, Ontario, on April 30, 2019.

Judgment delivered at Ottawa, Ontario, on May 1, 2019.

REASONS FOR JUDGMENT BY: GLEASON J.A.

CONCURRED IN BY: DE MONTIGNY J.A.
LOCKE J.A.

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REASONS FOR JUDGMENT

GLEASON J.A.

[1] The appellant appeals from the Federal Court's interlocutory judgment (*per* Martineau J.), dated March 7, 2018, dismissing her appeal from the Prothonotary's order (*per* Tabib P.), dated January 19, 2018. In that order, the Prothonotary dismissed the appellant's motion seeking to have a copy of the Royal Canadian Mounted Police (RCMP) Project Anecdote

investigation file (the disputed records) filed with the Federal Court. The Prothonotary also refused the appellant's request for an order prohibiting the Library and Archives of Canada (the LAC), which is directed by the named respondent, the Librarian and Archivist of Canada, from modifying or destroying the disputed records. The motion was made in the context of the appellant's application seeking disclosure of the disputed records under the *Access to Information Act*, R.S.C. 1985, c. A-1.

[2] In the context of this appeal, the appellant brought a motion to adduce fresh evidence which was placed before this panel for determination. The evidence consists of an affidavit from the appellant to which she attached a number of exhibits. Among them are what the appellant claims are excerpts from the disputed records that the appellant says she recently received from an unidentified person who received them in response to a request made under the *Access to Information Act*. The appellant claims these documents are search warrants that were executed against law firms as part of Project Anecdote and that members of the same firms were involved in previous proceedings against her, including proceedings that led to her disbarment, in which the circumstances that led to the Project Anecdote investigation were relevant.

[3] I will deal with the appellant's motion to adduce fresh evidence before turning to the merits of this appeal. The test governing such requests is well-established and requires that the party seeking to adduce fresh evidence establish that the evidence: (1) could not have been adduced at trial with the exercise of due diligence; (2) is relevant in that it bears on a decisive or potentially decisive issue on appeal; (3) is credible in the sense that it is reasonably capable of belief; and (4) is such that, if believed, could reasonably have affected the result in the court

below: *Palmer v. The Queen*, [1980] 1 S.C.R. 759 at p. 775, (1979) 30 N.R. 181; *May v. Ferndale Institution*, 2005 SCC 82, [2005] 3 S.C.R. 809 at para. 107. This test has been regularly applied by single judges of this Court when deciding motions seeking the admission of new evidence on appeal: see *Shire Canada Inc. v. Apotex Inc.*, 2011 FCA 10 at para. 17, 414 N.R. 270 (*Shire*); *Brace v. Canada*, 2014 FCA 92 at para. 11, 68 C.P.C. (7th) 81 (*Brace*). If the evidence fails to meet the foregoing criteria, the Court still possesses a residual discretion to admit the evidence on appeal. However, such discretion should be exercised sparingly and only in the "clearest of cases", where the interests of justice so require: *Shire* at para. 18; *Brace* at para. 12.

[4] Here, the new evidence the appellant seeks to introduce is entirely irrelevant to the issues that arise on this appeal. Whether law firms involved in disciplinary proceedings against the appellant were also the object of search warrants is irrelevant to whether the appellant is entitled to disclosure of the disputed records under the *Access to Information Act* or to whether the Prothonotary erred in refusing the requested protective order against the LAC. Thus, the appellant has failed to meet the test for admissibility.

[5] Given the wholly irrelevant nature of the documents the appellant seeks to adduce, there is no basis for the Court to exercise its discretion to admit them. I also agree with the respondents that many of the statements in the appellant's affidavit are purely speculative, alleging conspiratorial conduct and improper behaviour on the part of several judges or former judges and lawyers, without any proof. The nature of the allegations made in the appellant's affidavit is a further reason why it should not be admitted.

[6] I would accordingly dismiss the appellant's motion to adduce fresh evidence, with costs fixed in the all-inclusive amount of $600.00.

[7] Turning to the merits of this appeal, the standards of review set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 apply: *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215, [2017] 1 F.C.R. 331. Therefore, we are required to determine whether the Federal Court made a reviewable error in dismissing the appeal and are to review its legal determinations on the basis of correctness and its findings of fact or of mixed fact and law on the basis of palpable and overriding error: *Salomon v. Matte-Thompson*, 2019 SCC 14 at para. 34; *Sikes v. Encana Corporation*, 2017 FCA 37 at para. 12, 144 C.P.R. (4th) 472.

[8] In dismissing the appeal from the Prothonotary's decision, the Federal Court made four findings.

[9] First, it underscored that the appellant had conceded that her modified Notice of Application was aimed at reviewing the RCMP's decision to refuse to disclose the disputed records. The Federal Court therefore held that the Information Commissioner was not properly a party to the application and struck its name from the style of cause. The appellant does not dispute this finding before us.

[10] Second, the Federal Court at least implicitly endorsed the Prothonotary's finding that there was no basis for an application against the LAC because the appellant had not requested the disputed records from the LAC. There is no error in this determination.

[11] Third, the Federal Court held that the Prothonotary had not committed a palpable and overriding error in finding that the appellant's request for disclosure of the disputed records was premature as, in an application for review under section 41 of the *Access to Information Act*, the Court normally receives disputed records by way of an affidavit from the government institution that refused disclosure. As this stage in the application had not yet been reached, the Federal Court concluded that the Prothonotary did not err in finding the disclosure request to be premature.

[12] Finally, the Federal Court held that the appellant's request that the LAC be prohibited from destroying or modifying its copy of the disputed records should be refused as it was not fully argued before the Prothonotary, and there was no evidence to suggest that the LAC intended to destroy or modify the disputed records.

[13] The final two determinations are findings of mixed fact and law and therefore reviewable for palpable and overriding error. No such error was committed by the Federal Court as there was more than ample basis to support its conclusions, which, indeed, seem to me to be entirely correct.

[14] I would therefore dismiss this appeal with costs fixed in the all-inclusive amount of $2,400.00.

"Mary J.L. Gleason"
J.A.

"I agree.
Yves de Montigny J.A."

"I agree.
George R. Locke J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-89-18
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PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	APRIL 30, 2019
REASONS FOR JUDGMENT BY:	GLEASON J.A.
CONCURRED IN BY:	DE MONTIGNY J.A. LOCKE J.A.
DATED:	MAY 1, 2019

APPEARANCES:

Martha Coady	FOR THE APPELLANT (Self-represented)
Stephen Kurelek	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Nathalie G. Drouin Deputy Attorney General of Canada	FOR THE RESPONDENTS