

Federal Court of Appeal



Cour d'appel fédérale

Date: 20230309

Docket: A-245-21

Citation: 2023 FCA 55

**CORAM: LASKIN J.A.
MACTAVISH J.A.
MONAGHAN J.A.**

BETWEEN:

DR. GÁBOR LUKÁCS

Appellant

and

**MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS**

Respondent

Heard by online video conference hosted by the Registry on March 9, 2023.
Judgment delivered from the Bench at Ottawa, Ontario, on March 9, 2023.

REASONS FOR JUDGMENT OF THE COURT BY:

MACTAVISH J.A.

Federal Court of Appeal



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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Ottawa, Ontario, on March 9, 2023).

MACTAVISH J.A.

[1] Gábor Lukács appeals from a discretionary order of a case management judge (reported at 2021 FC 951). The judge refused to grant him leave pursuant to Rule 312 of the *Federal Courts Rules*, S.O.R./98-106 to file a supplementary affidavit as part of his record for use in both the underlying application for judicial review, and several preliminary motions.

[2] To put the appeal into context, Dr. Lukács complained to the Information Commissioner of Canada with respect to the refusal of the Canada Border Services Agency (CBSA) to grant him access to records that he had requested pursuant to the *Access to Information Act*, R.S.C. 1985, c. A-1. After the Information Commissioner found that Dr. Lukács' complaint was not well founded, he brought an application in the Federal Court pursuant to section 41 of the Act seeking a *de novo* consideration of whether the CBSA had properly withheld information.

[3] The parties were ultimately able to agree that a number of documents sought by Dr. Lukács should be provided to him. Dr. Lukács also identified certain documents to which he was no longer seeking access. The result of this was that only six small redactions remained in issue in the underlying application.

[4] The case management judge granted leave to Dr. Lukács to file his supplementary affidavit, including two of the exhibited documents for use on the application. The judge refused to allow him to use his supplementary affidavit, or any of the attached exhibits, in connection with the outstanding preliminary motions.

[5] Dr. Lukács says that the case management judge made numerous errors in denying him leave to adduce further evidence, and in failing to incorporate the agreement of the parties regarding certain documents into the order issued in relation to Dr. Lukács' motion. There is no merit to any of these submissions, and while we have carefully considered all of Dr. Lukács' submissions, we need only comment on some of them.

[6] As this Court observed at paragraph 11 of *L'Hirondelle v. Canada*, 2001 FCA 338, and reaffirmed in *Constant v. Canada*, 2012 FCA 87 at paragraph 12, case management judges must be afforded some “elbow room” to manage cases. Consequently, the Court should only interfere with orders made in the course of case management in the clearest case of a misuse of judicial discretion.

[7] In this case, the case management judge correctly identified the test for the admission of evidence under Rule 312 of the *Federal Courts Rules*, namely that the evidence must be admissible on the application for judicial review, and it must be relevant to an issue that is properly before the reviewing Court. She further noted that, as this Court observed at paragraph 2 of *Holy Alpha and Omega Church of Toronto v. Canada (Attorney General)*, 2009 FCA 101, in assessing whether the granting of an order under Rule 312 is in the interests of justice, the Court must also consider:

- a) whether the evidence sought to be adduced was available when the party filed its affidavits, or could have been available with the exercise of due diligence;
- b) whether the evidence will assist the Court, in the sense that it is relevant to an issue to be determined and sufficiently probative that it could affect the result; and
- c) whether the admission of the evidence will cause substantial or serious prejudice to the other party.

[8] There is nothing in the case management judge's reasons that would suggest that she misunderstood the concept of relevance. Nor did she err in having regard to the lengthy delays in this proceeding or the volume of material filed on this application. Indeed, section 45 of the Act provides that applications under section 41 are to be heard and determined in a summary way. However, despite the best efforts of the case management judge to move this matter along, this has not occurred in this case due to the proliferation of motions filed by the parties, and their request that the motions be determined in a particular order.

[9] Although the principle of proportionality was not specifically included in Rule 3 of the *Federal Courts Rules* at the time that the case management judge made the order under appeal, it was inherent in the Rule: *ViiV Healthcare Co. v. Gilead Sciences Canada, Inc.*, 2021 FCA 122 at para. 18. In accordance with this principle, judges are encouraged to apply the Rules in ways that prevent, eliminate or minimize conduct that causes delay and cost: *ViiV Healthcare*, above at para. 18; *Hryniak v. Mauldin*, 2014 SCC 7 at para. 31. Consequently, the case management judge was entitled to have regard to the volume of material that had already been filed on the application, the delays that had occurred to that point, and those that would result from a further expansion of the record.

[10] Finally, the case management judge did not err in declining to amend her order to reflect the parties' agreement with respect to three of the exhibits to Dr. Lukács' supplementary affidavit. As the case management judge noted, the respondent had clearly and repeatedly advised Dr. Lukács that the Minister did not oppose the inclusion of these documents in the record for use in relation to both the preliminary motions and the merits of the underlying

application. As a result, there was no need for this agreement to be incorporated into the Court's order.

[11] At the end of the day, Dr. Lukács has not convinced us that the case management judge made any error of law, or any palpable and overriding error of fact or of mixed fact and law, in her decision. Consequently, this appeal is dismissed, substantially for the reasons given by the case management judge.

“Anne L. Mactavish”

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-245-21

STYLE OF CAUSE: DR. GÁBOR LUKÁCS v.
MINISTER OF PUBLIC SAFETY
AND EMERGENCY
PREPAREDNESS

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CONFERENCE HOSTED BY
THE REGISTRY

DATE OF HEARING: MARCH 9, 2023

**REASONS FOR JUDGMENT OF THE COURT
BY:** LASKIN J.A.
MACTAVISH J.A.
MONAGHAN J.A.

DELIVERED FROM THE BENCH BY: MACTAVISH J.A.

APPEARANCES:

Dr. Gábor Lukács FOR THE APPELLANT ON HIS
OWN BEHALF

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