Federal Court of Appeal | Cour d'appel fédérale

Date: 20230929

Docket: A-28-23

Citation: 2023 FCA 199

[ENGLISH TRANSLATION]

CORAM: **DE MONTIGNY J.A.**
LEBLANC J.A.
GOYETTE J.A.

BETWEEN:

DARIUS BOSSÉ

Appellant

and

PUBLIC HEALTH AGENCY OF CANADA AND MINISTER OF HEALTH

Respondents

Heard at Ottawa, Ontario, on September 12, 2023.

Judgment delivered at Ottawa, Ontario, on September 29, 2023.

REASONS FOR JUDGMENT BY: DE MONTIGNY J.A.

CONCURRED IN BY: LEBLANC J.A.
GOYETTE J.A.

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REASONS FOR JUDGMENT

DE MONTIGNY J.A.

[1] This is an appeal from an interlocutory decision rendered on January 25, 2023, by Mr. Justice McHaffie of the Federal Court, in which he dismissed the appellant's motion to file two additional affidavits as part of an application under section 77 of the *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.) ("OLA") alleging that his language rights had been violated. The appellant maintains that Justice McHaffie erred in concluding that these two affidavits did not

meet the requirements of Rule 312 of the *Federal Courts Rules*, S.O.R./98-106 (the "Rules"), essentially on the grounds that he did not take into account the nature and specific objectives of the application for remedy created by this provision of the OLA.

[2] In my opinion, and for the reasons that follow, the trial judge did not err in exercising his discretion. Consequently, I am of the view that this appeal should be dismissed.

I. History and procedural background

[3] On June 28, 2022, the appellant filed a notice of application with the Federal Court under Rule 300 and section 77 of the OLA, alleging that the Public Health Agency of Canada ("PHAC") and the Minister of Health (the "respondents") had violated his language rights under sections 21, 22, 23, 25 and 28 of the OLA as well as subsection 20(1) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. The appellant alleges that the mobile application ArriveCAN (the "app") that he downloaded on an Apple phone, running the iOS mobile operating system, only worked in English on his phone and that he had found no way to change the operating language to French. This app had been made available to travellers entering Canada so that they could comply with the personal information obligations set out in the *Minimizing the Risk of Exposure to COVID-19 in Canada Order (Quarantine, Isolation and Other Obligations)*, P.C. 2021-0421, (2021) C. Gaz. I, Vol. 155, No. 14, 1500.

[4] The appellant had previously submitted 15 formal complaints (one complaint for each day of the mandatory quarantine period during which he had to provide his personal information

in English and use the app in English only) against PHAC with the Commissioner of Official Languages of Canada (the "Commissioner"). In the Commissioner's final investigation report, dated April 29, 2022, he concluded that the app was available in both official languages when it was launched and when the applicant used it. Although Apple phone users could not change the preferred language in the app itself, they could do so by changing their phone settings. The Commissioner did, however, conclude that the appellant's complaints were founded insofar as the federal institution did not adequately inform Apple phone users on how to proceed to access the app in the official language of their choice. Considering the measures that had already been taken by the institution to remedy the situation, the Commissioner did not issue any recommendations.

[5] In accordance with Rule 306, the appellant served his affidavit in support of his application on the respondents on August 12, 2022. In the affidavit, he sets out the facts surrounding the alleged violations of his rights and his unsuccessful attempts to access the app in French. He also describes the complaint that he filed to the Commissioner and the resulting report, in addition to referring to the content of certain Apple web pages explaining how to set up a mobile application to be available in several languages and allow users to set the language for each mobile application. He concludes by providing two examples of mobile applications that allow users to change their preferred language within the application itself, rather than through the phone settings, as was the case for the ArriveCAN app.

[6] On September 26, 2022, the respondents served two affidavits on the appellant under Rule 307. In one of those affidavits, Chulaka Ailapperuma, the director of the Canada Border

Services Agency division responsible for traveller systems innovation, explains how the features of the app were developed to comply with the requirements of the OLA, as well as how the app changed as new versions were released. He describes the different ways to change the language of an application, the challenges encountered by the app creators to configure it so that users could select either official language, and the changes that were made to the app following the complaints filed by the appellant, Mr. Bossé.

[7] The appellant then brought a motion under Rules 312 and 369 for leave to file two additional affidavits. The first, Mr. Cerallo's affidavit, was offered as an expert opinion on mobile applications. In his affidavit, Mr. Cerallo explains how a mobile application is developed and updated and provides his opinion that the ArriveCAN app is not very complicated and presents no particular challenges, technologically speaking. He adds that inserting and maintaining a customized language feature in a mobile application poses an additional challenge, but that this challenge is not insurmountable, and that a developer could have easily maintained a customized language feature within the app itself rather than through phone settings. Lastly, he states that the changes subsequently made to the ArriveCAN app and described in Mr. Ailapperuma's affidavit did not present any particular difficulties either.

[8] In his motion, the appellant indicates that Mr. Cerallo's affidavit was necessary to respond to the allegations in Mr. Ailapperuma's affidavit regarding the technical difficulties encountered by PHAC when developing the language features for the ArriveCAN app. He claims that he could never have anticipated the information provided by Mr. Ailapperuma in his affidavit and consequently could not have submitted the proposed evidence at the time of service

of his affidavit under Rule 306. Furthermore, the applicant alleges that the proposed evidence would be useful to the Federal Court in ruling on the issue in this case and that no substantial or serious prejudice would be caused to the respondents if this evidence were submitted.

[9] The second affidavit that the appellant is seeking to file is the affidavit of Ms. Rousseau, an articling student, and includes a number of document attachments (essentially, documents provided to the House of Commons of Canada's Standing Committee on Government Operations and Estimates related to planning, contracting and subcontracting as part of developing and launching the ArriveCAN app, as well as witness testimony before this Committee and news articles). It should be noted that none of these documents or testimonies deal with providing services in both official languages.

[10] In an order issued on January 25, 2023 (file no. T-1348-22), Justice McHaffie of the Federal Court dismissed the appellant's motion, relying on the test developed by this Court in *Forest Ethics Advocacy Association v. National Energy Board*, 2014 FCA 88 at paras. 4–6 (*Forest Ethics*), which the appellant himself cited. Even assuming that the preliminary admissibility and relevancy requirements had been met with respect to Mr. Cerallo's affidavit, Justice McHaffie found that it was not in the interests of justice to admit the affidavit into evidence because the appellant himself had mentioned in this affidavit how simple it was to add a customized language feature to a mobile application, and that he could not split his case to then enhance his own evidence once the respondents had submitted their evidence. Justice McHaffie also opined that Mr. Cerallo's affidavit did not really constitute a response to Mr. Ailapperuma's affidavit and would, on the contrary, derail the debate insofar as the central issue of the dispute is

not whether the app could have been developed more efficiently or cost-effectively, but rather whether the respondents had violated the appellant's language rights.

[11] As for Ms. Rousseau's affidavit, Justice McHaffie concluded that the attached documents did not meet the preliminary relevancy requirement. Even if these documents provide details on the costs related to rolling out the app and the subcontractors involved, they do not comment in any way on the language of the application, and are consequently of no use in determining whether the appellant's language rights were violated.

II. Issues

[12] On appeal, the appellant argues that the trial judge erred (i) in using a restrictive and formalistic approach to apply the principles guiding the exercise of his discretion to allow additional affidavits to be filed, without considering the unique nature of an application for remedy under section 77 of the OLA; (ii) in concluding that the additional affidavits are not relevant in deciding the issues in this case; and (iii) in awarding costs to the respondents because the motion does not raise an important new principle within the meaning of subsection 81(2) of the OLA. I will now address these issues in that order.

[13] In his written and oral submissions, the appellant mainly focused on Mr. Cerallo's affidavit and only made few brief comments regarding Ms. Rousseau's affidavit. There is indeed little to say about this affidavit, and the trial judge was right not to admit it into evidence in exercising his discretion. He committed no palpable and overriding error in concluding that this affidavit, the purpose of which was simply to enclose certain documents dealing with the costs

related to developing and implementing the app, and the government's decision to use private companies to help it in this process, was not relevant in any way. The appellant did not raise the issue of costs related to developing the app in his notice of application, and as the trial judge pointed out, none of the documents attached to Ms. Rousseau's affidavit addressed the language of the app. As a result, this affidavit, on its face, did not meet the preliminary relevancy requirement.

[14] Therefore, the reasons that follow will essentially discuss Mr. Cerallo's affidavit.

III. Analysis

A. *Did the Federal Court err in exercising its discretion under Rule 312, as the appellant claims, by not adjusting the case law criteria to take into account the particular nature of an application for remedy under section 77 of the OLA?*

[15] The application for remedy the appellant filed before the Federal Court is authorized under section 77 of the OLA. This is a special type of application in that only a person who has filed a complaint with the Commissioner can go before the Federal Court after receiving the Commissioner's report. That report, however, is not the subject of the application for remedy; rather, it is the merits of the complaint that the Federal Court must examine , the Commissioner's report being, in a way, only a prerequisite to the filing of the application for remedy provided for in section 77. As this Court indicated in *Canadian Food Inspection Agency v. Forum des Maires de la Péninsule Acadienne*, 2004 FCA 263 (at paras. 15–18) (*Forum des Maires*), this application for remedy cannot be characterized as an application for judicial review within the meaning of section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, but is basically similar to

an action. Procedurally, however, section 80 of the OLA specifies that an application made under section 77 of the OLA "shall be heard and determined in a summary manner in accordance with any special rules made in respect of such applications pursuant to section 46 of the *Federal Courts Act*." As the Court specified in *Forum des Maires*, in the absence of such special rules, an application for remedy under section 77 of the OLA proceeds in accordance with Part V of the Rules, which governs applications for judicial review.

[16] As mentioned above, it is Rule 312 that applies when a party would like to submit one or more additional affidavits. This rule does not specify how the Court must exercise its discretion in that regard, but case law has established a number of principles; which were summarized by Mr. Justice Stratas in *Forest Ethics* and are now authoritative. The party seeking to submit new evidence must first meet two preliminary requirements, namely, they must show that the evidence is admissible and relevant. If both requirements are met, the moving party must then satisfy the Court that submitting new evidence would serve the interests of justice. In this regard, the Court can consider the following three questions:

> (a) Was the evidence sought to be adduced available when the party filed its affidavits under Rule 306 or 308, as the case may be, or could it have been available with the exercise of due diligence?
>
> (b) Will the evidence 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?
>
> (c) Will the evidence cause substantial or serious prejudice to the other party?
>
> *Forest Ethics* at para. 6.

[17] The parties do not deny the relevance of these questions, and they even both referred to them in their submissions before the Federal Court. It is also based on these considerations that the Court concluded that it could not grant the appellant's motion and rejected Mr. Cerallo's and Ms. Rousseau's affidavits. The appellant can therefore not claim that the trial judge erred in the selection of the legal test on which he based his decision.

[18] Instead, the appellant claims that the trial judge erred by not taking into account the specific framework and nature of an application for remedy under the OLA in his application of Rule 312 and its case law criteria. Specifically, the appellant relies on the quasi-constitutional status of the OLA and the need to apply it in such a way that the rights enshrined in it are not ignored. He also refers to what he considers to be the [TRANSLATION] "defective" procedural framework that he finds himself in: not only can he not avail himself of the parties' obligation, under Rule 169, to disclose the documents relevant to the matter, but he also cannot request material as per Rule 317, which applies to judicial review. The only recourse available to an applicant to respond to evidence submitted by the respondents is therefore only leave to file additional affidavits. The appellant claims that the Federal Court, by not taking these considerations into account and by applying the principles set out in *Forest Ethics*, [TRANSLATION] "significantly and unjustifiably" restricted the means available to an applicant to file evidence as part of an application for remedy under the OLA.

[19] Before reviewing these arguments in depth, it is appropriate to determine the applicable standard of review on appeal. This standard is now well established: questions of law are subject to the correctness standard, while questions of fact or questions of mixed fact and law are

reviewed on the standard of palpable and overriding error, unless an extricable question of law can be identified: *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 8, 10, 19, and 26–37. These standards apply both to final decisions of the Federal Court and to discretionary decisions that are, by nature, interlocutory: *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215 at para. 79; *Decor Grates Incorporated v. Imperial Manufacturing Group Inc.*, 2015 FCA 100 at paras. 21–29; *Worldspan Marine Inc. v. Sargeant III*, 2021 FCA 130 at paras. 48 and 72.

[20] The appellant maintains that the issue of whether the trial judge failed to consider the specific nature of an application for remedy under section 77 of the OLA in his analysis is a question of law. I disagree. As mentioned above, the trial judge properly identified the applicable rule and the case law criteria that must guide him in applying this rule. The weight that he gave to the nature of the application for remedy and its procedural framework was based more on the application of that rule to the particular facts of the case than on the identification of the relevant legal standards. The issue raised by the appellant is therefore a question of mixed fact and law, and consequently, the standard of palpable and overriding error applies. I would also add that the trial judge did not overlook the specific nature of the application for remedy, but on the contrary explicitly took it into account, as we will see later.

[21] Consequently, this Court must show great deference in its review of the decision rendered by the Federal Court. As this Court evocatively stated in *Canada v. South Yukon Forest Corporation*, 2012 FCA 165 (at para. 46), when arguing a palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing; the entire tree must fall (see

also *Benhaim v. St-Germain*, 2016 SCC 48 at para. 38). This means that the alleged error must be obvious, such as when findings are made without any admissible evidence or are based on improper inferences, and be determinative of the outcome of the case: see *Mahjoub v. Canada (Citizenship and Immigration)*, 2017 FCA 157 at paras. 62 and 64; *Salomon v. Matte-Thompson*, 2019 SCC 14 at para. 33. That is a very onerous burden, especially since it has been established in the case law that permission to file additional affidavits should be granted only with great circumspection: *Mazhero v. Canada (Industrial Relations Board)*, 2002 FCA 295 at para. 5; *Thibodeau v. Halifax International Airport Authority*, 2019 FC 1149 at para. 14 (*Thibodeau*).

[22] As a result of this demanding standard of review, I have not been persuaded that the Federal Court erred in its application of Rule 312 to the two additional affidavits that the appellant wanted to file. The fact that an application for remedy under section 77 of the OLA falls under a particular procedural framework and is intended to implement quasi-constitutional language guarantees does not exempt an applicant from the general rules of evidence set out in Part V of the Rules. The principles underlying these rules, and in particular the obligation on parties not to split their case, apply to all applications for judicial review as well as all proceedings commenced under an Act of Parliament. This is notably the case for applications for review before the Federal Court provided for by section 41 of the *Access to Information Act*, R.S.C. 1985, c. A-1, which are also heard on the basis of complaints that have been filed, not on the Commissioner's report. The same can be said for an action, wherein the plaintiff cannot file their evidence-in-chief in rebuttal: see Peter J. Sankoff, *The Law of Witnesses and Evidence in Canada*, Carswell, 2019 (loose-leaf updated 2023, release 2), c. 7, sections 1A and 1B.

[23] As a result, I must agree with what Justice McHaffie indicated at paragraph 18 of his order:

> [TRANSLATION]
>
> . . . I conclude that it is not in the interests of justice to allow it to be filed as an additional affidavit. In arriving at this conclusion, I am aware that the purpose of this application is to protect and ensure respect for important language rights. In such a case, it is important that the Court have all the necessary evidence before it, and an overly restrictive or formalistic approach could undermine the strong protection of rights. Nevertheless, this does not do away with an applicant's general obligation to file evidence according to the rules . . .

[24] This excerpt shows that the trial judge was aware that the purpose of the appellant's underlying application for remedy was to ensure that his language rights were being upheld, and that the Court must be flexible in applying section 77 of the OLA to ensure that the important rights enshrined in the OLA are respected. I would add that Justice McHaffie also demonstrated flexibility by presuming that Mr. Cerallo's affidavit met the preliminary admissibility and relevancy requirements and in reviewing only the criteria related to the interests of justice.

[25] In any case, the appellant is not challenging the fundamental principle that a party cannot split their case. Instead, he is claiming that he was not in a situation where he could carry out such a manoeuvre because the relevant documents had not been disclosed by the federal institution and he could therefore not anticipate all the arguments that the respondents might put forward. The only way for him to respond to the elements included in the respondents' evidence, he claims, was to allow him to file additional affidavits through a flexible interpretation of Rule 312.

[26] However, there are several issues with this argument. Firstly, in his affidavit, the appellant himself mentions how simple it is to integrate language settings into an application. As Justice McHaffie underscored at paragraph 7 of his order, a section of his affidavit was titled [TRANSLATION] “Configuring a mobile application so that users can change their preferred language within the app is simple”. In that section, the appellant explains how these settings can be changed, referring to Apple and Android websites, and references other applications that allow users to change the application’s language without leaving the application. In doing so, that appellant should have expected that the respondents would respond to these statements, not only to present their own version of the facts, but also to protect themselves against a potential damages claim by the appellant. In that context, it was his responsibility to file all the evidence that he could have had access to in relation to how simple it is to configure language settings within an application. It is not a matter of requiring the appellant to anticipate all possible arguments that the respondents could make, as he argues, but rather requiring that he file all the relevant evidence that he intends to rely on as regards the issues that he is raising. According to *Forest Ethics*, the very purpose of the first question that a judge must ask to determine whether it is in the public interest to admit additional evidence is to prevent an applicant from splitting their case by waiting for the respondent’s evidence and then enhancing their own evidence by filing additional evidence.

[27] The appellant also tried to justify admitting Mr. Cerallo’s affidavit into evidence by claiming that it was the only way to respond to the respondents’ evidence. This argument cannot be accepted either. In his affidavit, Mr. Ailapperuma explains why the customized language feature had been removed from the ArriveCAN app and why other options had been preferred.

Mr. Cerallo did not contradict Mr. Ailapperuma's evidence; at most, he specified how a customized language feature is inserted into Apple's iOS operating system, how problems related to accessibility features are common but not insurmountable, and how we can [TRANSLATION] "assume" that a developer could have resolved these issues in a few weeks. Asked to comment on other statements by Mr. Ailapperuma as to the difficulties encountered in incorporating a linking feature within the ArriveCAN app and as to adding a pop-up window in an upcoming version of the app, Mr. Cerallo simply indicates once again that these challenges could have easily been overcome and that there are simple solutions to the problems raised.

[28] Thus, the fact that other options could have been considered to make the app available in both languages does not contradict Mr. Ailapperuma's affidavit. He simply explained how the ArriveCAN mobile app and website were developed, how the different versions of the Apple operating system manage language preferences, and how the mobile app was updated over time to take these different versions of Apple's iOS system into account. Furthermore, the appellant did not explain why this new evidence was not submitted at the same time as his affidavit since its only purpose is to further support his claims.

[29] In sum, I find that the Federal Court did not err in exercising its discretion under Rule 312. Ultimately, a flexible application of Rule 312 cannot exempt the appellant from his obligation to not split his case.

B. *Did the Federal Court err in concluding that the additional affidavits are not relevant in ruling on the issues in this case?*

[30] The appellant argues that the trial judge also erred in concluding that the additional affidavits are not relevant in ruling on the issues in this case. In his order, Justice McHaffie opined that the issue of whether the app could have been developed more efficiently or cost-effectively is not before the Court and would derail the debate. In more specific reference to the active offer obligation set out in section 28 of the OLA, Justice McHaffie added that he did not see how Mr. Cerallo's report could help determine whether the respondents took measures to inform the public that the app was available in both official languages.

[31] If section 28 of the OLA should be interpreted as imposing an obligation of means rather than of result, the appellant claims that Mr. Ailapperuma's affidavit would allow the respondents to argue that they made sufficient effort to meet their obligations, and that this effort must at least be taken into consideration to determine the appropriate remedy. Therefore, Mr. Cerallo's report could be relevant and useful in deciding on this issue.

[32] With respect, I find that the trial judge did not commit a palpable and overriding error in ruling that Mr. Cerallo's report would not be useful to the Court in deciding on the issue before it. In his notice of application, the appellant asked the Court to determine whether he had been informed that he could contact the federal institution and receive services from it in French. Knowing whether the app could have been developed more efficiently, quickly or cost-effectively and the options available, according to Mr. Cerallo's report, for incorporating a feature to change languages would not in any way help the Court determine whether there was a

violation of section 28 and the requirement it creates to actively offer services in both official languages.

C. *Did the Federal Court err in awarding costs to the respondents?*

[33] In his notice of appeal as well as his submissions, the appellant is also contesting the Federal Court's decision to award the costs of the motion (in the amount of $500) to the respondents. He claims that his motion raises important new issues, notably in relation to the application of the principles set out in *Forest Ethics* to applications for remedy under section 77 of the OLA.

[34] Awarding costs is clearly at the judge's discretion (Rule 400(1)), and appellate courts rarely intervene in the exercise of that discretion. As this Court has reiterated on many occasions, a trial judge enjoys considerable latitude in fashioning a costs award: see for example *MacFarlane v. Day & Ross Inc.*, 2014 FCA 199; *Bell Helicopter Textron Canada Limitée v. Eurocopter, société par actions simplifiée*, 2013 FCA 220 at paras. 7 and 8; *Alani v. Canada (Prime Minister)*, 2017 FCA 120. Subsection 81(1) of the OLA confirms this principle and provides that costs shall be determined at the Court's discretion and shall follow the event unless the Court orders otherwise.

[35] It is true, as the appellant states, that subsection 81(2) of the OLA allows the Court to award costs to the applicant even if they are unsuccessful in the result when the Court is of the opinion that the application has raised an important new principle in relation to the OLA. The trial judge concluded that the applicant's motion did not meet this condition, and the appellant

has not persuaded me that the judge erred in that regard. First, this is not the first time the test developed in *Forest Ethics* has been applied to a dispute relating to the application of the OLA: *Thibodeau* at para. 14. Second, Justice McHaffie's decision does not refer to the setting out of a new principle but rather to the application of the well-known principle that a party cannot split their case based on the particular facts of this case.

IV. Conclusion

[36] For all the above reasons, I find that the trial judge did not err in dismissing the appellant's motion and refusing to admit Mr. Cerallo's and Ms. Rousseau's affidavits into evidence.

[37] For all the above reasons, I determine that the appeal should be dismissed, with costs in the amount of $500.

"Yves de Montigny"
J.A.

"I agree.
René LeBlanc, J.A."

"I agree.
Nathalie Goyette, J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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