Federal Court of Appeal | Cour d'appel fédérale

Date: 20170720

Dockets: A-259-16
A-260-16
A-261-16

Citation: 2017 FCA 160

CORAM: **NEAR J.A.**
RENNIE J.A.
GLEASON J.A.

BETWEEN:

APOTEX INC.

Appellant

and

MINISTER OF HEALTH and
ATTORNEY GENERAL OF CANADA and
THE INFORMATION COMMISSIONER
OF CANADA

Respondents

Heard at Toronto, Ontario, on March 27, 2017.

Judgment delivered at Ottawa, Ontario, on July 20, 2017.

REASONS FOR JUDGMENT BY: NEAR J.A.

CONCURRED IN BY: RENNIE J.A.
GLEASON J.A.

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REASONS FOR JUDGMENT

NEAR J.A.

I. Introduction

[1] At issue are three consolidated appeals of an order of the Federal Court, dated July 8, 2016 (2016 FC 776). Justice Kane (the Judge) dismissed Apotex Inc.'s (Apotex) motion to set aside Prothonotary Milczynski's (the Prothonotary) order, dated April 4, 2016, granting the

Information Commissioner of Canada (the Commissioner) leave to be added as a respondent to Apotex's underlying application for judicial review.

II. Background

[2] In response to three requests made under the *Access to Information Act*, R.S.C. 1985, c. A-1 (the Act), the Minister of Health (the Minister) decided to disclose records Apotex had previously submitted when seeking approval for a pharmaceutical product. On September 8, 2015 and October 22, 2015, pursuant to subsection 44(1) of the Act, Apotex applied for judicial review of the Minister's three decisions. Apotex alleged that the records were exempt from disclosure pursuant to subsection 20(1) of the Act, as the records contained: trade secrets; confidential financial, commercial, scientific, or technical information; and information that, if disclosed, could reasonably be expected to prejudice Apotex's competitive position or interfere with its contractual negotiations.

[3] On February 29, 2016, the Commissioner brought a motion in writing seeking leave to be added as a respondent to Apotex's application for judicial review pursuant to paragraph 42(1)(*c*) of the Act:

42 (1) The Information Commissioner may	42 (1) Le Commissaire à l'information a qualité pour :
(c) with leave of the Court, appear as a party to any review applied for under section 41 or 44.	c) comparaître, avec l'autorisation de la Cour, comme partie à une instance engagée en vertu des articles 41 ou 44.

[4] Apotex opposed the motion on the basis that the Commissioner had not demonstrated that her appearance was necessary in the application for judicial review as is required under Rule 104 of the *Federal Courts Rules*, SOR/98-106 (the Rules):

104 (1) At any time, the Court may	104 (1) La Cour peut, à tout moment, ordonner :
(b) order that a person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the proceeding may be effectually and completely determined be added as a party, but no person shall be added as a plaintiff or applicant without his or her consent, signified in writing or in such other manner as the Court may order.	(b) order that a person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the proceeding may be effectually and completely determined be added as a party, but no person shall be added as a plaintiff or applicant without his or her consent, signified in writing or in such other manner as the Court may order.

[5] The Prothonotary ordered, pursuant to paragraph 42(1)(*c*) of the Act, that the Commissioner be granted leave to be added as a party, specifically a respondent, in Apotex's application for judicial review. The Prothonotary did not provide detailed reasons for her order (*Apotex Inc. v. Minister of Health and Attorney General of Canada*, (4 April 2016), Ottawa T-1511-15, T-1782-15, T-1783-15 (F.C.)).

[6] Apotex brought a motion before the Judge to set aside the Prothonotary's order.

III. Decision of the Federal Court Judge

[7] The Judge applied the *Aqua-Gem* standard of review to the Prothonotary's order (*Canada v. Aqua-Gem Investments Ltd.*, [1993] 2 F.C.R. 425, 149 N.R. 273 (F.C.A.)). The parties had accepted that the decision to add the Commissioner as a respondent was not vital to the outcome

of Apotex's judicial review application (reasons at para. 11). Therefore, the Judge determined that the Prothonotary's discretionary order was owed deference and would not be disturbed unless "based upon a wrong principle or upon a misapprehension of facts" (reasons at paras. 9-15, 75-80).

[8] Before the Judge, Apotex submitted that the Prothonotary had legally erred by failing to properly apply Rule 104 to the Commissioner's request for leave to be added as a party. Apotex argued that, according to the decision of a single judge of this Court in *Air Canada v. Thibodeau*, 2012 FCA 14, 438 N.R. 321 [*Thibodeau*], Rule 104 imposes a strict test of necessity such that a respondent should only be added where it would be bound by the result in the underlying proceeding.

[9] The Judge determined that *Thibodeau* "should not be relied on for the proposition that necessity is the only test" (reasons at para. 64). The Judge found that the appellate judge in *Thibodeau* had not addressed the interplay between the Rules and the particular statutory provision at issue there, paragraph 78(1)(*c*) of the *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.), which matches the language in paragraph 42(1)(*c*) of the Act. The Judge also found that *Thibodeau* was distinguishable on the facts because, in that case, the Commissioner of Official Languages had chosen to be and participated as an intervener in the Federal Court and then sought party status, too late, on appeal (reasons at para. 65).

[10] The Judge found that if Rule 104 was strictly applied, the Commissioner would rarely meet the necessity test and, as a result, Parliament's intention that the Commissioner may be

granted leave to be a party under paragraph 42(1)(*c*) of the Act would be undermined. The Judge, therefore, determined that Rule 104 had to be "adapted accordingly" in light of the provisions in the Act (reasons at paras. 52-54). The Judge noted that this Court relied on the same principle when considering the predecessor to Rule 104 in *Canada (Human Rights Commission) v. Canada (Attorney General)*, [1994] 2 F.C.R. 447, 164 N.R. 361 (F.C.A.) [*Canada (HRC)*] (reasons at para 55). Justice Décary, writing on behalf of a panel of this Court, noted in *Canada (HRC)*:

> The Rules are subject, of course, to provisions in Acts of Parliament that may grant certain tribunals a distinct possibility of participating in judicial proceedings, either as a party or intervenor as of right, or as a party or intervenor with leave of the Court. Where such provisions exists, the Rules shall be adapted accordingly […] For examples of statutory provisions giving a tribunal the possibility of participating in judicial proceedings, see: the *Official Languages Act*, R.S.C., 1985 (4th Supp), c. 31, s. 78(1)(a), (b) and (c) and 78(3); the *Access to Information Act*, R.S.C. 1985, c. A-1, ss. 42(1)(a), (b) and (c)[...]
>
> (*Canada (HRC)* at 461, footnote 25)

[11] The Judge went on to consider the criteria, beyond necessity, that have guided the court in granting leave to the Commissioner to appear as a party under paragraph 42(1)(*c*) of the Act. The Judge cited, with approval, Prothonotary Tabib's approach in *Canon Canada Inc. v. Infrastructure Canada and the Information Commissioner of Canada*, (28 February 2014), Ottawa T-1987-13 (F.C.) [*Canon*]. There, Prothonotary Tabib noted that the criteria should be "akin to that on a motion for leave to intervene pursuant to Rule 109. The Court should be satisfied that the participation of the [Commissioner] would assist the Court to determine a factual or legal issue in the proceedings" (reasons at para. 71, citing *Canon* at 2-3). The Judge found that "this approach reflects the need to reconcile Rule 104 with the Act to respect both the intention of the Act and the requirement that leave be sought to be added as a party" (reasons at

para. 72). The Judge noted that the Commissioner will not automatically be added as a party but that the court should consider on a case by case basis "whether and how the addition of the Commissioner would assist the Court" (reasons at para.73).

[12] The Judge determined that even though the Commissioner had not demonstrated that her participation was necessary, the Prothonotary had found sufficient grounds to allow the Commissioner to appear as a party in accordance with paragraph 42(1)(*c*). The Judge concluded that there was no basis to interfere with this finding and, therefore, dismissed Apotex's motion to set aside the Prothonotary's order (reasons at para. 85).

IV. Issue

[13] I would characterize the issue on appeal as follows: Did the Judge err in refusing to interfere with the Prothonotary's order granting leave to the Commissioner to appear as a respondent to Apotex's application for judicial review?

V. Analysis

A. *Standard of Review*

[14] Following the Judge's decision, this Court revisited the standard of review to be applied to discretionary decisions of prothonotaries and decisions made by judges on appeals of prothonotaries' decisions in *Hospira Healthcare Corp. v. Kennedy Institute of Rheumatology*, 2016 FCA 215, 402 D.L.R. (4th) 497 [*Hospira*]. In *Hospira*, a five-member panel of this Court replaced the *Aqua-Gem* standard of review with that articulated in *Housen v. Nikolaisen*, 2002

SCC 33, [2002] 2 S.C.R. 235 [*Housen*]. As such, on appeal of a prothonotary's order to the Federal Court, a judge must review whether the prothonotary made an error of law or a palpable and overriding error in determining a question of fact or a question of mixed fact and law (*Hospira* at para. 79). Further, it was held that this Court must apply the *Housen* standard on appeal of a Federal Court judge's review of a prothonotary's order. Therefore, in the case at bar, this Court must determine whether the Judge erred in law or made a palpable and overriding error in refusing to interfere with the Prothonotary's order granting leave to the Commissioner to appear as a party (*Hospira* at paras. 83-84; see also *Sikes v. Encana Corporation*, 2017 FCA 37 at para. 12, 144 C.P.R. (4th) 472).

B. *Did the Judge err in refusing to interfere with the Prothonotary's order?*

[15] Apotex submits that the Judge erred in law in finding that Rule 104 did not apply to the Commissioner's request for leave to be added as a party. Apotex argues that *Thibodeau* was binding on the Judge and there was no basis to distinguish it from the matter before her. Further, Apotex argues that the Judge's interpretation creates an inconsistency with the test for granting leave to intervene under Rule 109.

[16] In my view, the Judge did not err in refusing to interfere with the Prothonotary's order even though the Commissioner had not demonstrated it was a *necessary* party to Apotex's application for judicial review. The Judge was not bound to strictly apply Rule 104 to the Commissioner's request. I agree with the Judge that *Thibodeau* is distinguishable and, in any event, a decision of a single judge of this Court sitting as a motions judge does not bind a three-member panel of this Court (*Sport Maska Inc. v. Bauer Hockey Corp.*, 2016 FCA 44 at paras. 37-

38, 480 N.R. 387). I find *Canada (HRC)*, a decision of a three-member panel of this Court, to be the more persuasive authority.

[17] Even in light of Rule 104, Parliament's intention to have an agent of Parliament appear in judicial proceedings as a party, with leave of the court, must be given effect. In my view, the necessity test provided for in Rule 104 would undermine the intent of paragraph 42(1)(*c*) of the Act, which grants the Commissioner the clear possibility of appearing as a party, with leave of the court, in judicial review proceedings before the Federal Court. I accept that, when exercising its discretion to grant leave under paragraph 42(1)(*c*), the court should be satisfied that the Commissioner would be of assistance to the court in the judicial review proceeding (see *Canon* at 2-3). While I recognize that this guiding criteria borrows language from Rule 109, I do not accept that the court is obligated to apply the factors relevant to a motion for leave to intervene under Rule 109 (see *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)*, [1990] 1 F.C.R. 90, 103 N.R. 391 (F.C.A.), where this Court affirmed the correctness of the factors set out by the Federal Court in [1990] 1 F.C.R. 74 at 79-80, 29 F.T.R. 267). I agree with Prothonotary Tabib in *Canon* where she determined that an assistance test furthers the Commissioner's participation, in accordance with Parliamentary intent, while still recognizing that paragraph 42(1)(*c*) does not give the Commissioner party status as of right.

[18] Whether the Commissioner will be of assistance must be assessed by the court on a case-by-case basis. For example, the Federal Court has previously granted the Commissioner leave to appear as a party where it was found that she would provide a distinct point of view on a motion for a confidentiality order (*Canon*) or where she had completed an investigation into the relevant

complaint and it was found that she would provide knowledge and expertise relating to the Act, its jurisprudence, and the relevant legal issue (*Porter Airlines Inc. v. Attorney General of Canada*, (23 March 2016), Ottawa T-1491-15 (F.C.) at paras. 4-5; see also *Canadian Tobacco Manufacturers' Council v. Canada (Minister of National Revenue)*, (18 August 2000) Ottawa T-877-00 (F.C.) at paras. 7-8).

[19] On a contested motion, where the parties raised different interpretations of the applicable legal test, it would have been helpful had the Prothonotary provided more detailed reasons for why she granted leave to the Commissioner to appear as a party. While the Judge's reasons included an analysis of what test the Commissioner must meet to be added as a respondent, the Judge did not clearly *apply* this test to assess whether and how the addition of the Commissioner would assist the Court in Apotex's particular application for judicial review. Rather, the Judge determined that the Commissioner provided sufficient grounds for the Prothonotary to grant leave in accordance with paragraph 42(1)(*c*) of the Act and that it was unnecessary to consider Apotex's opposition to these grounds because she was not considering the Prothonotary's order *de novo* (reasons at para. 85).

[20] When reviewed on the *Housen* standard, I find that the Judge did not err in refusing to interfere with the Prothonotary's finding of sufficient grounds to grant leave to the Commissioner to appear as a party. Before the Prothonotary, the Commissioner submitted that her participation in Apotex's application for judicial review would be of assistance to the court. Apotex had expressed an intention to reverse the order of evidence in its judicial review which, the Commissioner alleged, could reverse the burden of proof. The Commissioner argued that this

reversal was contrary to the jurisprudence under section 20 of the Act and would impact the access to information regime. The Commissioner highlighted her expertise and experience in the interpretation and administration of the Act, including the application of the section 20 exemption. The Commissioner also noted that none of the requesters of the records were parties to the application for judicial review and, as such, her participation would further the Court's consideration of requesters' rights. I recognize that there was limited evidence before the Prothonotary, however, in my view, there was a sufficient basis on which the Judge could have concluded that the Prothonotary did not commit a reviewable error in granting the Commissioner's motion.

VI. Conclusion

[21] For the foregoing reasons, I would dismiss the appeal, with costs.

"David G. Near"
J.A.

"I agree.
Donald J. Rennie J.A."

"I agree.
Mary J.L. Gleason J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

AN APPEAL FROM THE ORDER OF THE HONOURABLE JUSTICE KANE, DATED JULY 8, 2016, DOCKET NUMBER T-1511-15.

DOCKETS:	A-259-16, A-260-16, A-261-16
STYLE OF CAUSE:	APOTEX INC. v. MINISTER OF HEALTH and AGC and THE INFORMATION COMMISSIONER OF CANADA
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MARCH 27, 2017
REASONS FOR JUDGMENT BY:	NEAR J.A.
CONCURRED IN BY:	RENNIE J.A. GLEASON J.A.
DATED:	JULY 20, 2017

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