Federal Court of Appeal | Cour d'appel fédérale

Date: 20110210

Docket: A-428-10

Citation: 2011 FCA 54

Present: **LAYDEN-STEVENSON J.A.**

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

and

ABDULLAH ALMALKI, KHUZAIMAH KALIFAH,
ADBULRAHMAN ALMALKI, by his Litigation Guardian
Khuzaimah Kalifah, SAJEDA ALMALKI, by her Litigation Guardian
Khuzaimah Kalifah, MUAZ ALMALKI, by his Litigation Guardian
Khuzaimah Kalifah, ZAKARIYY A ALMALKI, by his Litigation Guardian
Khuzaimah Kalifah, NADIM ALMALKI, FATIMA ALMALKI,
AHMAD ABOU-ELMAATI, BADR ABOUELMAATI,
SAMIRA AL-SHALLASH, RASHAABOU-ELMAATI,
MUAYYED NUREDDIN, ABDUL JABBAR NUREDDIN,
FADILA SIDDIQU, MOFAK NUREDDIN, AYDIN NUREDDIN,
YASHAR NUREDDIN, AHMED NUREDDIN,
SARAB NUREDDIN, BYDA NUREDDIN

Respondents

Heard at Toronto, Ontario, on February 3, 2011.

Order delivered at Ottawa, Ontario, on February 10, 2011.

REASONS FOR ORDER BY: LAYDEN-STEVENSON J.A.

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REASONS FOR ORDER

LAYDEN-STEVENSON J.A.

[1] This motion raises the issue whether an *amicus curiae* or *amici curiae* should be appointed to assist this Court in relation to the *ex parte* appeal of the Attorney General (the Crown) from the judgment of Mosley J. of the Federal Court (the designated judge) wherein the judge, pursuant to paragraph 38.06 of the *Canada Evidence Act* (the Act), ordered the disclosure of certain information to the respondents.

Background

[2] The contextual background may be summarily stated. The respondents initiated civil actions against Canada in the Ontario Superior Court of Justice alleging Canada was complicit in their detention and torture in Syria (in the case of Mr. Elmaati, Egypt) and breached their rights under the *Canadian Charter of Rights and Freedoms* (the Charter). During the pre-trial stages, Canada disclosed to the respondents' counsel approximately 500 documents, 290 of which contained redactions. Some of the redactions were said to be made pursuant to section 38 of the Act on the grounds that the information was injurious to national security, national defence and international relations. Later, Canada asserted that it had inadvertently disclosed one document without redactions and gave notice under section 38 of the Act not to disclose the document. The appropriate notices in relation to all documents in issue were provided to the Attorney General pursuant to subsection 38.01(1) of the Act.

[3] Canada proceeded with a section 38 application in the Federal Court. After preliminary case management conferences, the matter was heard by the designated judge. The proceeding was treated as presumptively public with the exception of the portion which took place *ex parte* and *in camera*.

The Crown filed evidence in the form of both public and private *ex parte* affidavits. It appears that the Crown suggested during the case management phase that the matter was one in which the appointment of an *amicus curiae* might be considered. The designated judge's public reasons for judgment indicate that a formal motion for the appointment of an *amicus curiae* was brought by the respondents. The Crown consented to such an appointment, should the designated judge deem it necessary. Ultimately, the designated judge appointed Me Bernard Grenier and Me François Dadour as *amici curiae* to assist him in considering the evidence tendered and the issues raised in the *ex parte* hearings. At the conclusion of the proceeding, the designated judge ordered certain information released or summarized. "Sensitive information" is defined in section 38 as "information relating to international relations or national defence or national security that is in the possession of the Government of Canada, whether originating from inside or outside Canada, and is of a type that the Government of Canada is taking measures to safeguard."

[4] The Crown's appeal relates to information that the designated judge ordered released or summarized in 30 documents. The respondents move for the appointment of an *amicus curiae* or *amici curiae* to assist this Court during the Crown's *ex parte* appeal. The Crown opposes such an appointment on the basis that it is not necessary. In the alternative, the Crown maintains one *amicus curiae* would suffice.

The Common Ground

[5] The scheme contained within section 38 of the Act does not require or contemplate the appointment of an *amicus curiae*. However, the parties agree, and I concur, that the Court has

jurisdiction to appoint an *amicus curiae*: *Canada* (*A.G.*) *v. Khawaja*, [2008] 1 F.C.R. 621 (F.C.) aff'd [2008] 4 F.C.R. 3 (C.A.), leave to appeal dismissed, [2008] 1 S.C.R. ix (*Khawaja*); *Abou-Elmaati et al v. Canada* (*A.G.*) 2011 ONCA 95. The scheme provided in section 38 of the Act confers jurisdiction on designated judges of the Federal Court and judges of this Court on an appeal from a designated judge's judgment to authorize disclosure of information. While the scheme prohibits disclosure to the respondents or to anyone appointed on their behalf for the purpose of a section 38 application (*Khawaja* at paras. 132, 135 (C.A.)), an *amicus curiae* does not act in that capacity. The *amicus curiae* is appointed on the court's behalf to enable it to fully exercise its jurisdiction. The determining factor for the appointment of an *amicus curiae* is whether the court considers it necessary. If an *amicus curiae* is deemed to be necessary, the *amicus curiae* may be granted access to the *ex parte* information. Such was the situation in the proceeding before the designated judge in this case (Order dated March 26, 2010, Motion Record, Tab O).

The Positions of the Parties

[6] The Crown's submissions can be summarized in five points. First, it says that the appeal is limited to information contained in only 30 documents dealing with either human source information or information received from foreign agencies. The volume is significantly less than that before the designated judge, the appeal is narrow in scope and this Court is well-placed to reach a full and fair determination of the issues without the insertion of an additional actor into the proceedings.

[7] The Crown notes the distinction between the roles of the courts. The role of the appellate court is not to hear and weigh the evidence first-hand, but to analyze the designated judge's determinations against a specific standard of review. The question on appeal is whether the designated judge erred in law. At this stage, the evidence is immutable and the legal issues are narrowly focussed. Further, says the Crown, the need for an *amicus curiae* here is attenuated because of the *amici curiae's* full participation before the designated judge. Since the entire *ex parte* record will be before this Court, it will be privy to the *ex parte* transcripts, including the *amici curiae's* cross-examination of the Crown witnesses as well as the *amici curiae's* written and oral submissions. The positions adopted will be readily available for consideration by this Court.

[8] The Crown refers to its burden of demonstrating that the designated judge erred by ordering the disclosure of certain information. The respondents have no onus to meet, therefore, the need to advance the respondents' position during the *ex parte* segment of the appeal is significantly diminished.

[9] The utmost good faith duty of the Crown in an *ex parte* proceeding requires that the evidence presented be complete and thorough. No relevant information adverse to the interest of the Crown may be withheld. This duty mitigates any perception of unfairness.

[10] The Crown points to the fact that the underlying proceedings are civil actions for monetary damages. There are no section 7 Charter interests at stake as there were in the cases where an *amicus curiae* was appointed. The underlying proceedings in those cases were criminal or quasi-

criminal in nature (*Khawaja*; *Abdullah Khadr v. Canada* (*A.G.*), [2008] 3 F.C.R. 306 (F.C.); *Omar Khadr v. Canada* (*A.G.*), 2008 FC 807, 331 F.T.R. 1).

[11] The Crown's fall-back position is that because the issues are narrow and there are a limited number of documents on appeal, there is no need to appoint more than one *amicus curiae*. Either one of the two counsel appointed as *amici curiae* before the designated judge should be able to more than adequately assist the Court. The role of the *amicus curiae* should correspond to the level of assistance that the Court requires.

[12] The respondents refer to the voluminous and extensive record. Several affidavits with exhibits were filed and cross-examinations were conducted in both the public and *ex parte* segments of the proceeding. They note that the Crown requested, on motion, leave to reduce the requisite number of sets of appeal books and also asked to produce portions of the record in CD-ROM format. The respondents argue that there is no reason to suspect the *ex parte* record will be significantly less voluminous than the public record. No weight should be attached to the number of documents because 30 is not a small number. Moreover, a single document may be many pages long and contain more than one redaction.

[13] The respondents disagree with the Crown's submission that the appeal concerns narrow legal issues. They point to the Crown's notice of appeal and emphasize that, on its face, it raises issues with respect to the designated judge's application of the test articulated in *Canada* (*A.G.*) *v. Ribic*, [2005] 1 F.C.R. 33 (C.A.). In the respondents' view, the notice of appeal raises questions of

mixed fact and law that will necessitate reference to the record and a detailed review of the evidence pertaining to the alleged errors, including the affidavits and exhibits as well as the cross-examinations.

[14] According to the respondents, the good faith obligation of the Crown relates to ensuring that the full evidentiary record is before the Court. The Crown cannot fully, fairly or objectively represent to the Court all points of view or, at a minimum, will not appear to any reasonable observer to do so. The need to ensure a full, balanced and fair hearing militates in favour of the appointment of an *amicus curiae*.

[15] The respondents maintain, without disclosure and full participation throughout the process, they are not in a position to put forth full legal argument. This results in potential unfairness. The warranty associated with the adversarial system is removed. Absent the appointment of an *amicus curiae*, the Court is left to decide the appeal without the benefit of submissions that truly challenge the Crown's position. The Court's efforts, however conscientious, are not an effective substitute for informed adversarial participation. Moreover, the appellate court judges are less experienced than the designated judge in relation to the issues to be determined.

[16] Regarding the fact that the underlying actions are civil in nature, the respondents assert that the actions relate to claims against the conduct of Canada in international relations and investigations of national security. Section 7 of the Charter is engaged in the underlying proceedings. Further, although the Crown is subject to a duty of good faith, it is a defendant in the

underlying actions and is decidedly partisan. It is under no obligation to act in the broad public interest as it must in a criminal prosecution. From the respondents' perspective, to overcome the appearance that Crown counsel will not represent or speak for the respondents' interests and perspectives during the *ex parte* segment of the appeal, it is critical that both the Court and the public be confident a full and fair hearing will occur.

[17] The respondents maintain that since two *amici curiae* were before the designated judge, there should be two *amici curiae* before this Court.

Analysis

[18] The respondents rely heavily on the preservation of the adversarial system and public confidence in it to support their request for the appointment of an *amicus curiae*. While I do not minimize the legitimacy of these concerns, I regard it as settled law that Parliament may, when it considers it necessary and appropriate to do so, mandate through legislation a requirement for *ex parte* hearings: *Ruby v. Canada* (*Solicitor General*), [2002] 4 S.C.R. 3.

[19] The reality of our modern world is that information may be obtained from other countries or from informers on condition that it not be disclosed, or it may be so critical that it cannot be disclosed without risking public security: *Charkaoui v. Canada* (*Citizenship and Immigration*), [2007] 1 S.C.R. 350 at para. 61 (*Charkaoui*). At paragraph 77 of *Charkaoui*, the Supreme Court referred specifically and favourably to the section 38 scheme of the Act as being illustrative of

Parliament's concern for striking a sensitive balance between the need for protection of confidential information and the rights of the individual.

[20] It bears repeating that the section 38 scheme of the Act has been determined to be constitutional: *Khawaja*. Consequently, preservation of the adversarial system and public confidence in it are insufficient, on their own, to support the appointment of an *amicus curiae* in section 38 proceedings.

[21] In their submissions, both the Crown and the respondents, directly or impliedly, refer to the role of an *amicus curiae* as representing, at least in part, the interests of the respondents (Crown's memorandum of fact and law at para. 15; respondents' memorandum of fact and law at paras. 46 and 53, para. 58 having been withdrawn at the hearing of the motion). It is clear that courts have appointed an *amicus curiae* to represent the interests of a particular person or party. The evolution and flexibility of the role of the *amicus curiae* has been canvassed by Durno J. in *R. v. Cairenus* (2008), 232 C.C.C. (3d) 13 (Ont. Sup. Ct. J.). However, regard must always be had to context. When it is deemed necessary to appoint an *amicus curiae*, the nature of the role may vary. The needs of a designated judge may not be identical to those of an appellate court. The role must be prescribed accordingly. It will be important not to run afoul of the statements in paragraphs 132 and 135 of *Khawaja*. In my view, the role of an *amicus curiae* (if necessity is found) before this Court, on an appeal from a designated judge's judgment under subsection 38.09(1) of the Act, is to assist the Court. It is not to represent the respondents' interests.

[22] The Crown's reliance on its duty of utmost good faith and its burden to demonstrate that the designated judge erred goes only so far. Although it has an absolute obligation to ensure that the record is complete, there is no obligation on the Crown to argue against its own case.

[23] The fact that the underlying proceedings are civil rather than criminal, or quasi-criminal, in my view, is of no moment to the issue before me. It is anomalous that the Crown relied on the distinction before this Court when it did not do so before the designated judge. The Crown acknowledged at the hearing of this motion that it was not suggesting that an *amicus curiae* should only be appointed where liberty interests were engaged. In any event, the *ex parte* proceeding under the section 38 scheme is general in nature and does not engage liberty interests although the product of the proceeding may do so: *Khawaja* at para. 116. The significance of the underlying proceedings was the subject of comment by the designated judge at paragraphs 182 and 183 of his public reasons for judgment.

[24] At the end of the day, the appointment of an *amicus curiae* will depend solely upon whether the Court considers the appointment necessary to accomplish its statutory purpose. The inquiry is a fact-specific one and must be approached on a case-by-case basis. Desirability is insufficient.

[25] Turning to the specific matter before me, the respondents insist that resort must be had to the record, given the nature of the contents of the notice of appeal. As stated earlier, they insist that references to the evidentiary record will be required to tie the evidence to the legal issue. The Crown does not suggest otherwise. Its position is that the Court will have the full record before it, including

the evidence and the submissions of the *amici curiae* to the designated judge, and that is sufficient for the Court's purposes.

[26] I have three observations regarding the Crown's submissions. First, as a general rule, the memoranda of fact and law from the court of first instance are not included in the appeal record because the disposition of the appeal depends entirely on the evidence and the applicable legal principles. Only in exceptional circumstances is it relevant on an appeal to know what was argued by the parties in the court below: *McBride v. Canada* (*Minister of National Defence*), 2008 FCA 111; *Montana Band v. Canada*, 2001 FCA 176, 106 A.C.W.S. (3d) 392.

[27] Second, for the same reason, it is not at all clear to me that submissions made by the *amici curiae* to the designated judge would be of benefit to this Court given the disparity between the nature of the questions before the appellate court and those before the designated judge.

[28] Third, the respondents argue that an *amicus curiae* is required to "connect the dots" or "provide a roadmap" for this Court in view of the voluminous nature of the record and the likelihood of references to the evidence. They suggest that either of the *amici curiae* is well-positioned to assist the Court in this respect since both were before the designated judge and familiar with the record. The Crown did not respond directly to this submission although it did advise that the 30 documents comprise 208 pages containing four summaries and 26 lifts dealing with sources and foreign agencies.

[29] Because I found the respondents arguments attractive in this respect, I informed myself regarding the extent of the *ex parte* record. It comprises 17 volumes containing 6,154 pages. The transcripts are contained in three volumes running from page 5,005 to page 6,154 – there are 1,149 pages of transcript.

[30] It seems to me, if I were to rely on the Crown's suggestion, the Court would be placed in the insufferable position of searching for the proverbial needle in the haystack. With scarce judicial resources available, I do not consider it to be an effective use of the Court's time, with no guarantee that it will necessarily find what it is looking for, to wade through thousands of pages in search of evidence that could run contrary to that favourable to the Crown's submissions.

[31] This leads me to conclude that the appointment of an *amicus curiae* would be of significant benefit to the Court and that such an appointment is required to ensure that the Court can effectively accomplish its statutory mandate during the *ex parte* proceeding. That said, I agree with the Crown that one *amicus curiae* should suffice for purposes of the appeal, in view of the reduced number of documents and the familiarity that each of the *amici curiae* before the designated judge has with the section 38 proceeding. Each is also security-cleared and experienced in national security matters.

[32] As for the parameters of the role of the *amicus curiae* on this appeal, the *amicus curiae* should have access to the *ex parte* record, should file a memorandum of fact and law and book of authorities in response to the Crown's memorandum of fact and law and make oral arguments at the *ex parte* hearing of the appeal. The *amicus curiae* must keep confidential, from anyone not

participating in the *ex parte* hearing, all confidential information and documents to which he has access. The *amicus curiae* may attend the public segment of the appeal, but is to have no communication with the respondents, or their counsel, in relation to the appeal except as specifically authorized by order of the Court.

[33] As for which of the two *amici curiae* appearing before the designated judge should assume the role of *amicus curiae* on the appeal, I will leave that issue to be determined between the *amici curiae*. It may be that one is more familiar with the record than the other. I will permit counsel to confer with the *amici curiae* for the purpose of ascertaining which of them will appear as the *amicus curiae* before this Court. Counsel may also confer in relation to ascertaining the availability of all counsel, including the *amicus curiae*, for a hearing date. The Court should be advised by Monday, February 14, 2011, regarding which of the two *amici curiae* will assume the role of the *amicus curiae* before this Court and regarding the availability of all counsel and the *amicus curiae* for the hearing of the appeal, which is to be heard in Ottawa. The Crown has agreed to pay the reasonable fees and disbursements of the *amicus curiae*, as negotiated between the Crown and the *amicus curiae*, and to provide the appropriate level of administrative support and resources commensurate with the role and responsibilities of the *amicus curiae*.

[34] I wish to thank counsel for their submissions. They were of great assistance to me in my determination of this matter. The respondents requested costs of the motion; the Crown did not. Success has been divided and I do not think, in the circumstances, that this is an appropriate case for costs. Therefore, in the exercise of my discretion, I will not award costs.

[35] An order for the appointment of an *amicus curiae* and the parameters of his role will issue concurrent with these reasons. A further order appointing the specific *amicus curiae* will follow when it is determined which of the two *amici curiae* will assume the role.

"Carolyn Layden-Stevenson"
J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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