Federal Court of Appeal  Cour d'appel fédérale

Date: 20120620

Docket: A-282-11

Citation: 2012 FCA 188

CORAM: **NOËL J.A.**
TRUDEL J.A.
MAINVILLE J.A

BETWEEN:

HANI AL TELBANI

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Montréal, Quebec, on June 19, 2012.

Judgment delivered at Montréal, Quebec, on June 20, 2012.

REASONS FOR JUDGMENT BY: TRUDEL J.A.

CONCURRED IN BY: NOËL J.A.
MAINVILLE J.A

Federal Court of Appeal  Cour d'appel fédérale

Date: 20120620

Docket: A-282-11

Citation: 2012 FCA 188

CORAM: **NOËL J.A.**
TRUDEL J.A.
MAINVILLE J.A.

BETWEEN:

HANI AL TELBANI

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT

TRUDEL J.A.

[1] Hani Al Telbani is appealing an interlocutory order of the Federal Court (2011 FC 945) by which his motion for advance costs was dismissed. The appellant filed his motion in the context of proceedings in an application for non-disclosure of information instituted by the Attorney General of Canada under subsection 38.04(1) of the *Canada Evidence Act*, R.S.C. 1985, c. C-5 (Federal Court docket DES-2-10).

[2] The factual background in place before the Attorney General made his application is as follows. On June 4, 2008, Hani Al Telbani was refused the right to board an Air Canada flight to go to Saudi Arabia. At that time, he was given a copy of an emergency direction stating that the Minister of Transport, Infrastructure and Communities had determined that he posed an immediate threat to aviation safety. The appellant's name was on the no-fly list. Following that, the appellant filed two applications for judicial review in the Federal Court, the first challenging the initial decision to place his name on the no-fly list (T-973-08), and the second concerning the negative outcome of the re-examination of that initial decision (T-1696-09). This is the context in which the Attorney General filed his application for non-disclosure to protect certain pieces of information related to those applications for judicial review.

[3] Relying on the teachings of the Supreme Court of Canada in *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, [2003] 3 S.C.R. 371, the Federal Court judge (Judge) concluded that the three conditions required for advance costs to be ordered (*Okanagan* conditions) had not been met in this case. These are reproduced at paragraph 17 of the Federal Court's reasons and are not in dispute. The subject of this appeal concerns only the application of the facts to those conditions.

[4] Although the Judge readily acknowledged the link between the Attorney General's application and the appellant's applications for judicial review, he analyzed the *Okanagan* conditions in light of the Attorney General's application. The appellant submits that the Judge

should also have taken into account the seriousness of the issues raised in his two applications for judicial review. Had he done so, he would have concluded differently.

[5] At paragraphs 3 and 4 of his reasons, the Judge replied to that argument by first pointing out that he was ruling only on the Attorney General's application and that the Federal Court was not called upon to consider the merits of the appellant's two applications for judicial review. The Judge further noted that both of those files involved respondents other than the Attorney General, who did not intend to take a position on the claims made in those files, and that it would be up to the judge eventually responsible for ruling on both of those applications for judicial review to make a decision on advance costs in both files.

[6] Having made that decision, the Judge therefore analyzed the evidence in respect of the *Okanagan* conditions.

[7] Regarding the first condition, he stated that he was unable to conclude that the appellant was financially unable to pay for the litigation. More specifically, the Judge wrote the following:

> Not only has Mr. Al Telbani not proven his impecuniosity, but he has also failed to establish that there is no other alternative that would allow him to pay his legal fees.

[8] This is at best a finding of mixed fact and law in which this Court will only intervene if it is satisfied that the Judge erred in principle or reached a conclusion that is plainly wrong: *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, 2007 SCC

2, [2007] 1 S.C.R. 38, at paragraph 49; *Hamilton v. Open Window Bakery Ltd.*, [2004] 1 S.C.R. 303, 2004 SCC 9, at paragraph 27. I have not been satisfied that this was so.

[9] Litigants who ask the state to subsidize all or part of the costs incurred in a dispute against the state must show their financial inability by filing, at the very least, a detailed statement of their income and expenditures and a complete financial statement. This was not done in the case at bar.

[10] Furthermore, with regard to alternative sources of funds, such as a spouse or extended family members, litigants must file "a financial table which is as complete as possible" showing the financial situation of those persons: *Charkaoui, Re*, 2004 FC 900. Litigants must explain in sufficient detail the specific financial circumstances of those persons or, if applicable, provide valid reasons why they do not have access to alternative resources. In this case, the evidence submitted by the applicant is limited to two very general statements: he cannot impose a financial burden on his parents beyond the contributions they have already made to supporting him for his studies in Canada, and his other family members lack the financial means to assist him (Appellant's affidavit filed in the Federal Court, appeal book, page 46, at paragraphs 36 and 38). This evidence is insufficient to constitute a financial table which is as complete as possible. The record reveals nothing about the appellant's parents' financial means except that they are the ones who supported him financially during the course of his studies in Canada and that they would be inclined to help him so that he could settle in Saudi Arabia.

[11] It is therefore not surprising that the Judge found it difficult to establish a clear picture of the appellant's financial situation.

[12] It is not in dispute that the *Okanagan* conditions are conjunctive. Since the first condition was not satisfied, the motion had to be dismissed. However, in the event that he had erred, the Judge nonetheless pursued his analysis under the second and third conditions.

[13] Under the second condition, which raises the question of whether the claim to be adjudicated is *prima facie* meritorious and the collateral question of whether it would be contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the appellant lacks financial means, the Judge concluded that the appellant was not a respondent in the usual sense of the term in docket DES-2-10 in respect of which the motion for advance costs was filed. The Judge noted that two experienced state-funded counsel had been appointed as *amici curiae* to participate in both the *in camera* and public hearings required by the case and that only 31 documents were at issue. As a result, the workload of any counsel representing the appellant would be reduced. Thus, the Judge concluded that it would be "exorbitant to order advance costs" in such circumstances.

[14] Finally, turning to the third question, the Judge concluded that the issues raised by the appellant did not transcend his own interests and were not of public importance, having been resolved in previous cases. In this he was referring, among other things, to the appellant's stated intention to use the argument of constitutional invalidity against section 38 of the *Canada*

Evidence Act or the order to be made under that section (Appellant's Memorandum of Fact and Law, at paragraph 11). First of all, I note that the appellant has not yet filed with the Federal Court a Notice of Constitutional Question as required by section 57 of the *Federal Courts Act*, R.S.C. 1985, c. F-7. Second, the Judge correctly pointed out that the appellant's contentions on the validity of section 38 have already been decided by the Canadian courts. According to the Judge, it therefore cannot be argued "that these are issues of the utmost important and of public interest, especially as Mr. Al Telbani has failed to explain how the arguments he might raise would challenge the exhaustive analysis that the Supreme Court undertook in [*R. v. Ahmad*, 2011 SCC 6, [2011] SCJ No 6, and the Court of Appeal for Ontario in *Abou-Elmaati v. Canada (Attorney General)*, 2011 ONCA 95, [2011] OJ No 474]" (Judge's reasons at paragraph 33).

[15] As noted above, the Judge did not have to deal with the final two Okanagan conditions, but he decided to do so in *obiter*. Subject to the same caveat, I agree with his analysis.

[16] In short, I am not satisfied that the Judge erred in principle or made any other error warranting this Court's intervention in the analysis of the appellant's arguments supporting his motion for advance costs. Consequently, I would dismiss the appeal with costs in this Court.

"Johanne Trudel"

J.A.

"I concur.
Marc Noël, J.A."

"I concur.
Robert M. Mainville, J.A."

Certified true translation
Sarah Burns

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-282-11
(APPEAL OF AN ORDER BY JUSTICE DE MONTIGNY DATED JULY 27, 2011, COURT NO. DES-2-10)	
STYLE OF CAUSE:	HANI AL TELBANI and ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	June 19, 2012
REASONS FOR JUDGMENT BY:	TRUDEL J.A.
CONCURRED IN BY:	NOËL J.A. MAINVILLE J.A.
DATED:	June 20, 2012

APPEARANCES:

Johanne Doyon	FOR THE APPELLANT
Daniel Latulippe Luc Cadieux Catheryne Beaudette	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Doyon & Associés Inc. Montréal, Quebec	FOR THE APPELLANT
Myles J. Kirvan Deputy Attorney General of Canada	FOR THE RESPONDENT