Federal Court of Appeal  Cour d'appel fédérale

Date: 20200115

Docket: A-99-19

Citation: 2020 FCA 7

CORAM: **BOIVIN J.A.**
GLEASON J.A.
RIVOALEN J.A.

BETWEEN:

JOSE LUIS FIGUEROA

Appellant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

Heard at Vancouver, British Columbia, on January 14, 2020.

Judgment delivered at Vancouver, British Columbia, on January 15, 2020.

REASONS FOR JUDGMENT BY: BOIVIN J.A.

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

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REASONS FOR JUDGMENT

BOIVIN J.A.

[1] This is an appeal from the Federal Court's Order (*per* Lafrenière J.) dated February 18, 2019 (*Figueroa v. MPSEP* (18 February 2019), T-427-15 (FC)), dismissing the appellant's application for judicial review for his failure to pay security for costs on a redetermination after a successful appeal to the Federal Court of Appeal. The underlying file concerns the respondent's refusal to issue a certificate under section 83.07 of the *Criminal Code*, R.S.C. 1985, c. C-46.

[2] The procedural history of this file is as follows. On April 25, 2017, Prothonotary Lafrenière (as he then was) ordered the appellant to pay security for costs and granted leave to the respondent to apply informally to have the appellant's application dismissed if he failed to post security for costs within 30 days (*Figueroa v. MPSEP* (25 April 2017), T-427-15 (FC)). Lafrenière J. dismissed the application for judicial review on June 29, 2017, seven days after the respondent filed its informal request (by letter) for the Court to dismiss the appellant's application because he did not post security. The appellant successfully appealed this June 29, 2017 Order. The Federal Court of Appeal found that the Federal Court had ruled on the matter prematurely, given that under Rule 369(2) of the *Federal Courts Rules*, S.O.R./98-106, the appellant should have had 10 days, instead of 7 days, to respond to the request for dismissal *(Figueroa v. Canada (Public Safety and Emergency Preparedness)*, 2019 FCA 12, 301 A.C.W.S. (3d) 230 [*Figueroa FCA*]). The Federal Court of Appeal thus remitted the matter to the Federal Court so that it could receive the appellant's response and any reply from the respondent before determining the matter.

[3] In the Order dated February 18, 2019, dismissing the appellant's application for judicial review for the second time, Lafrenière J. made the following findings. First, he addressed the appellant's concern regarding the disposition of the respondent's request on the basis of written representations. He concluded that he could address the matter in writing, finding that the respondent's informal application did "not raise complex questions or issues" and that the appellant had not established that fairness required an oral hearing (Order at p. 2-3). Lafrenière J. then turned to the substance of the respondent's request. He observed that while the appellant had raised lack of financial resources to explain his failure to comply with the security for costs

Order before the Federal Court of Appeal, he had not raised this argument or provided evidence to support it before the Federal Court (*Ibid*. at p. 3). He noted that instead, the appellant had "take[n] issue with the steps leading to the Security for Costs Order and the Order itself" and that the appellant should have therefore appealed that Order instead of "call[ing] its legitimacy into question in subsequent enforcement proceedings" (*Ibid.* at pp. 3-4). He concluded that since the appellant had not provided "a viable explanation for his non-compliance" or evidence on why his application for judicial review should not be dismissed, nor asked for an extension of time to comply with the security for costs order or indicated whether he could post security, the application for judicial review should be dismissed (*Ibid*. at p. 4).

[4] The relevant standard of review is that set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 [*Housen*]. Under the *Housen* framework, questions of law are reviewable for correctness, whereas questions of mixed fact and law as well as questions of fact are reviewable for palpable and overriding error.

[5] The appellant raised a number of arguments before our Court. However, I am not convinced that Lafrenière J. committed a reviewable error.

[6] I would accordingly dismiss the appeal for the following reasons.

[7] First, it is noteworthy that upon deciding to send this matter back for redetermination, our Court mentioned that the Federal Court could dismiss the appellant's judicial review application if the applicant failed to post security for costs. Indeed, Stratas J.A. determined that "[g]iven the

litigation history known to the Federal Court, it was certainly open to it in its security for costs Order to provide for summary dismissal for non-compliance" (*Figueroa FCA* at para. 13). Hence, in allowing the appeal of the appellant, our Court did so not because security for costs was an improper reason to dismiss the application for judicial review, but rather because of the time given to the appellant to respond. I also observe that there is no evidence that the security for costs order has been satisfied in the present case.

[8] Second, with respect to the argument that it was problematic for Lafrenière J. to consider the motion for dismissal anew, this Court has indicated that it is not generally improper for judges to consider a matter that is remitted to them simply because they heard the matter the first time (*Janssen-Ortho Inc. v. Apotex Inc.*, 2011 FCA 58, 416 N.R. 372). Furthermore, the sections of the *Federal Courts Rules* upon which the appellant relies by analogy do not assist with his argument. There is no evidence that on this matter, Lafrenière J. was involved in a pre-trial or dispute resolution conference, to which Rules 266 and 391 refer and which usually involve settlement discussions between the parties. The appellant's arguments against Lafrenière J. having heard the redetermination have nothing to do with his involvement in settlement discussions between the parties. There is also no evidence in the record to displace the presumption of judicial impartiality in the circumstances. In light of these points, the distinction the appellant draws between a reconsideration and a redetermination is irrelevant.

[9] Third, the appellant contends that the wording of the security for costs order demonstrates two opposing stances on the part of Lafrenière J. On the one hand, says the appellant, Lafrenière J. ordered security for costs to be paid "forthwith", and this term usually indicates that a motion

should not have been brought or opposed, but, on the other hand, he did not order costs of the motion to be paid forthwith. However, the appellant's argument is based on a misunderstanding of Rule 401, which concerns costs for a motion, not security for costs for an entire proceeding.

[10] Fourth, the appellant's suggestion that Lafrenière J. did not properly consider the material before him because he miscounted the number of exhibits and pages of the appellant's submissions is clearly insufficient to displace the presumption that Lafrenière J. considered all the material before him (*Mahjoub v. Canada (Citizenship and Immigration)*, 2017 FCA 157, 53 Imm. L.R. (4th) 1).

[11] Fifth, while the appellant is correct to mention that Rule 141(5) of the *Federal Courts Rules* holds that to serve a document electronically, a party must have been served with the recipient's consent to such service, Rule 147 indicates that it was open to Lafrenière J. to validate the respondent's service, based on a plain reading of its wording:

> If a document has been served in a manner that is not authorized by these Rules or by an order of the Court, the Court may validate the service if it is satisfied that the document came to the notice of the person to be served or that it would have come to that person's notice except for the person's avoidance of service.

[12] Here, the appellant clearly received the respondent's written reply in accordance with Rule 147 such that there is no procedural unfairness at issue (Letter from the appellant to the Court dated February 17, 2019, Appeal Book at 178).

[13] Finally, it was open to Lafrenière J. to proceed by way of written representations as I agree that none of the issues were particularly complex or would have benefited from oral argument.

[14] For all of these reasons, the appellant has not demonstrated that the February 18, 2019 Order is wrong in law or is based on a palpable and overriding error due to a misapprehension of the facts.

[15] I would dismiss the appeal.

"Richard Boivin"
J.A.

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

"I agree
Marianne Rivoalen J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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APPEARANCES:

Jose Luis Figueroa	FOR THE APPELLANT (ON HIS OWN BEHALF)
Brett J. Nash	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Nathalie G. Drouin Deputy Attorney General of Canada	FOR THE RESPONDENT