Federal Court of Appeal | Cour d'appel fédérale

Date: 20201019

Docket: A-163-18

Citation: 2020 FCA 174

CORAM: **STRATAS J.A.**
WEBB J.A.
RENNIE J.A.

BETWEEN:

BALRAJ SHOAN

Appellant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Heard by online video conference hosted by the registry on October 19, 2020.
Judgment delivered from the Bench at Ottawa, Ontario, on October 19, 2020.

REASONS FOR JUDGMENT OF THE COURT BY: STRATAS J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Ottawa, Ontario, on October 19, 2020).

STRATAS J.A.

[1] The appellant appeals from the judgment dated May 7, 2018 of the Federal Court (*per* Russell J.): 2018 FC 476. The Federal Court dismissed the appellant's application for judicial review of Order in Council PC 2017-0456. In that Order in Council, the Governor in Council terminated for cause the appellant's good behaviour appointment as a CRTC Commissioner. The

Federal Court rejected large portions of the appellant's affidavit evidence as inadmissible, found that the process leading up to the Order in Council was procedurally fair, and concluded that the Order in Council was substantively reasonable.

[2] We are all of the view that the appeal should be dismissed substantially for the reasons given by the Federal Court.

[3] The Federal Court did not commit any reviewable error in rejecting the appellant's affidavit evidence. We substantially agree with its analysis at paras. 157-164 and the submissions at paras. 37-41 of the Attorney General's memorandum of fact and law.

[4] Among other things, the normal rule is that evidence going to the merits of the administrative matter, here the appellant's appointment, is to be adduced before the administrative decision-maker: see, *e.g.*, *Bernard v. Canada Revenue Agency*, 2015 FCA 263, 479 N.R. 189; *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency*, 2012 FCA 22, 428 N.R. 297. We see nothing in this case that would displace the normal rule. Further, under Rule 81, opinion, argument and legal conclusions tendered in an affidavit are not admissible.

[5] In this Court, the appellant relies significantly on this inadmissible evidence. We disregard it.

[6] The appellant submits that the Governor in Council did not act in accordance with procedural fairness. Even assuming a high level of procedural fairness was owed (see comments to the contrary for some situations in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190), there was no violation of procedural fairness in this case: we substantially agree with the reasons of the Federal Court and the submissions of the Attorney General at paras. 50-70.

[7] We would add that a number of the appellant's procedural fairness concerns were not raised with the Governor in Council and, thus, he cannot raise them on judicial review: see, *e.g.*, *Irving Shipbuilding Inc. v. Canada (A.G.)*, 2009 FCA 116, [2010] 2 F.C.R. 488; *Maritime Broadcasting System Limited v. Canadian Media Guild*, 2014 FCA 59, 373 D.L.R. (4th) 167 at paras. 67-68. If the appellant was concerned that he was not being treated fairly, it was incumbent on him to raise a concern promptly. The record shows that he was not shy in raising concerns when need be.

[8] The appellant alleges that the Governor in Council had a closed mind. He points, among other things to the haste with which the Order in Council was made and the failure to purge the record of documents that were related to allegations that could not be relied upon. We are of the view that there is no evidence or insufficient evidence to support the submission of haste and haste by itself is insufficient. As well, the appellant has not persuaded us that the Governor in Council based its decision on an improper ground.

[9] The appellant submits that the standard of review of the substance of the Order in Council is correctness because the issues concerning it are of general importance. In *Canada*

(Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65, 441 D.L.R. (4th) 1 at paras. 58-62, the Supreme Court emphasizes that this is a very narrow exception to reasonableness review that will seldom apply. In words that apply here, the Supreme Court tells us (at para. 61) that the mere fact that a dispute is of "wider public concern"—what the appellant submits here—is insufficient to trigger this exception.

[10] Many of the appellant's submissions invite us to second-guess the Governor in Council. This is not our function in an appeal from the dismissal of a judicial review.

[11] In our view, the Order in Council is reasonable within the meaning of *Vavilov*. Here again, we substantially agree with the reasons of the Federal Court and the submissions of the Attorney General at paras. 80-95. To the extent that the Federal Court relied upon the reasons of the Federal Court *per* Strickland J. (an earlier determination in this case), the reliance was justified and appropriate. The appellant points to some alleged deficiencies in those reasons that the Federal Court *per* Russell J. relied upon. But even if there were deficiencies, these do not render the Order in Council unreasonable. The Order in Council, including its finding of cause for dismissal, is supported by sufficient evidence in key respects, divorced from issues of collegiality.

[12] The appellant moved for the admission of fresh evidence into this appeal. We received the appellant's submissions on this at the hearing of the appeal. The appellant has not persuaded us that he has met the stringent test set out in *Palmer v. The Queen*, [1980] 1 S.C.R. 759, 106 D.L.R. (3d) 212, as summarized in *Brace v. The Queen*, 2014 FCA 92, [2014] 4 C.T.C. 35 at

para. 11. In particular, the evidence, if admitted, could not reasonably be expected to affect the result of this appeal. Much of it could have been adduced earlier.

[13] The appellant also wishes to raise a new issue on appeal that he did not raise in his notice of application in the Federal Court, namely the Governor in Council's alleged obligation to investigate racial bias. New issues should generally not be heard by a reviewing court: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654 at paras. 22-26. This is doubly so in an appeal from the judgment of a reviewing court: *Quan v. Cusson*, 2009 SCC 62, [2009] 3 S.C.R. 712; *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19, [2002] 1 S.C.R. 678. For both these reasons, we exercise our discretion against entertaining this new issue.

[14] Therefore, we will dismiss the appeal with costs.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-163-18

APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE RUSSELL DATED MAY 7, 2018, DOCKET NO. T-796-17

STYLE OF CAUSE:	BALRAJ SHOAN v. THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	HEARD BY ONLINE VIDEO CONFERENCE HOSTED BY THE REGISTRY
DATE OF HEARING:	OCTOBER 19, 2020
REASONS FOR JUDGMENT OF THE COURT BY:	STRATAS J.A. WEBB J.A. RENNIE J.A.
DELIVERED FROM THE BENCH BY:	STRATAS J.A.

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