Federal Court of Appeal  Cour d'appel fédérale

Date 20141120

Docket: A-209-14

Citation: 2014 FCA 270

CORAM : **NOËL C.J.**
GAUTHIER J.A.
SCOTT J.A.

BETWEEN:

THE PUBLIC SECTOR INTEGRITY COMMISSIONER

Appellant (Respondent)

and

THE ATTORNEY GENERAL OF CANADA

(Respondent)

and

SYLVAIN MARCHAND

Respondent (Applicant)

Heard at Ottawa, Ontario, on November 18, 2014.

Judgment delivered at Ottawa, Ontario, on November 20, 2014.

REASONS FOR JUDGMENT BY: GAUTHIER J.A.

CONCURRED IN BY: NOËL C.J.
SCOTT J.A.

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REASONS FOR JUDGMENT

GAUTHIER J.A.

[1] In this appeal, the Public Sector Integrity Commissioner (the Commissioner) is challenging a decision of Justice Annis of the Federal Court dismissing his appeal from a decision of Prothonotary Tabib while at the same time amending paragraphs 2 to 6 of said order. The Commissioner is asking this Court to set aside the decision of the judge and to allow his appeal from the prothonotary's decision.

[2] In her order regarding a motion by the applicant pursuant to sections 317, 318 and 359 of the *Federal Courts Rules*, SOR/98-106 (the Rules), the prothonotary orders the Commissioner to disclose to the parties' counsel certain documents in his possession that were not before the decision-maker (Order, paragraph 2) and provides that counsel shall not divulge them to anyone, not even their clients, until otherwise ordered by the Court (Order, paragraph 3). The prothonotary also establishes a process for managing the case and the confidential information (Order, paragraphs 4 and 5) and awards the Commissioner and the Attorney General of Canada costs because the successful argument in favour of the disclosure request [TRANSLATION] "had not been raised in the motion record" (Order, paragraph 6).

[3] The issue before the prothonotary was not one that was vital to the final issue of the application for judicial review. In the circumstances, the judge could not vary the prothonotary's order unless the prothonotary's "exercise of discretion was based upon a wrong principle or a misapprehension of the facts" (*Z. I. Pompey Industrie v. ECU-Line*, 2003 FC 27, [2003] 1 S.C.R. 450 at paragraph 18).

[4] To obtain the disclosure of material that was not before the Commissioner when he made his decision, the applicant had to prove that the material sought is relevant within the meaning of Rule 317. First, since as a general rule a judicial review case must be decided on the basis of the information in the decision-maker's possession at the time the decision is made, the applicant had to raise in his request a ground of review that would allow the Court to consider evidence that was not before the Commissioner. These exceptions to the general rule are well settled by the case law. In the present case, the only relevant exception was a breach of procedural fairness, namely, the investigator's purported bias, which had allegedly tainted the entire investigation process. Second, the ground of review had to have a factual basis supported by appropriate evidence, as required (*Access Information Agency Inc. v. Canada (Transports*), 2007 FCA 224, [2007] F.C.J. No. 814, paragraphs 17 to 21). The second criterion is particularly important because it prevents an applicant raising a breach of procedural fairness simply to gain access to material that the applicant could not otherwise access.

[5] Before this Court and before the judge, the Commissioner argued that the prothonotary did not apply this test. The Commission further argued that the prothonotary erred, given that the relevance of all the testimony is highly speculative and essentially came down to asking whether the requested material [TRANSLATION] "could reveal" bias in the conduct of the investigation. The Commissioner adds that the prothonotary also failed to consider the applicant's true objective, as set out in his affidavit, which states that this information was needed so that he could [TRANSLATION] "challenge the probative value and truth of the complaints filed against him".

[6] I gather from paragraphs 30 to 38 of the judge's reasons, which address what he describes as the first issue (2004 FC 329), that he concluded that, having regard to the applicable test, the prothonotary had sufficient evidence in her possession to justify her decision that the applicant was "entitled to an additional disclosure on the basis of allegations of the investigator's bias". The Commissioner has not persuaded me that the judge erred in reaching this conclusion. I do not share the Commissioner's fear that the prothonotary's decision will throw the door wide open to [TRANSLATION] "fishing expeditions". The highly specific nature of the factual background in this case and the documents before the prothonotary allowed the prothonotary to exercise her discretion as she did. This was not a mere fishing expedition.

[7] As for the issue of the applicant's true objective, neither the judge nor the prothonotary had addressed it, since disclosing the additional information does not make otherwise inadmissible evidence admissible. The general rule mentioned in paragraph 4 above continues to apply with regard to evidence that the judge may consider. Therefore, the trier of fact will not be permitted to consider the additional information that will ultimately be included in the parties' records in accordance with Rules 309 and 310 except to decide whether there was a breach of procedural fairness in this case.

[8] As regards the relevance of all the testimony, this issue can be dealt with through the process established by the prothonotary. The Commissioner will have an opportunity to make submissions on this subject at that time and ensure that the confidentiality of this information is protected, as required.

[9] Only the respondents appealed from the prothonotary's order, and they challenged the applicant's right to disclosure of the information sought. The applicant did not file a cross-appeal and is not challenging the conditions set in paragraphs 2 to 6 of the order. Therefore, having concluded that the prothonotary had not erred in ordering the disclosure, the judge should have simply dismissed the appeal and referred the entire matter back to the prothonotary so that she could vary her order so as to include a new schedule.

[10] The Commissioner submits that in addition to having erred in varying paragraphs 2 to 6 of the prothonotary's order without these issues having been raised before him, the appeal judge also erred in raising issues 2 and 3 (see paragraph 20 of the Reasons), which he used to comment on the fundamental issues that would have to be decided by the trier of fact and that were not argued by the parties before him. The Commissioner also noted several examples of findings of fact made by the judge on the basis of the certified record without giving the parties the opportunity to present any relevant evidence on these subjects at this preliminary stage of the case.

[11] The applicant agrees that the judge raised these issues on his own initiative, but according to him, the judge did so to expedite the case, since these fundamental issues will be relevant and the judge's comments will be helpful when the case is heard on the merits, if not before.

[12] In a very recent decision (*R. v. Mian*, 2014 SCC 54, [2014] S.C.J. No. 54 [*Mian*]), the Supreme Court of Canada reminds us how and in what context a court of appeal may raise new grounds of appeal or other issues on its own initiative. There is no need to review all the arguments raised by the Commissioner in this regard. It is enough to reiterate that when a court of appeal exercises its discretion to raise a new issue and decide the matter on that basis, it must inform the parties of this in a timely manner to allow them to make all their submissions (*Mian*, paragraphs 54 to 59). The court of appeal must also be satisfied that there is a sufficient basis in the record on which to resolve the issue (*Mian*, paragraph 51) and that there would not be any procedural prejudice to either party (*Mian*, paragraph 52).

[13] I would add that it is often more prejudicial than helpful to comment at the interlocutory stage on issues that will be raised before the trier of fact, especially when, as in the present case, the answers to these question will depend on the context and the facts that will have to be established to the satisfaction of the trier of fact.

[14] For these reasons, I am of the opinion that this Court should intervene by setting aside the decision of the judge and rendering the decision that should have been rendered, which is to dismiss the appeal from the prothonotary's order, with costs.

[15] I would therefore allow the appeal in part. Given the divided outcome, the parties should bear their own costs.

"Johanne Gauthier"

J.A.

"I agree
Marc Noël C.J."

"I agree
A.F. Scott J.A."

Certified true translation
François Brunet, Revisor

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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CONCURRED IN BY:	NOËL C.J. SCOTT J.A.
DATED:	NOVEMBER 20, 2014

APPEARANCES:

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