Federal Court of Appeal | Cour d'appel fédérale

Date: 20141023

Docket: A-357-14

Citation: 2014 FCA 239

Present: **WEBB J.A.**

BETWEEN:

DR. GÁBOR LUKÁCS

Appellant

and

CANADA TRANSPORTATION AGENCY

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on October 23, 2014.

REASONS FOR ORDER BY: WEBB J.A.

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REASONS FOR ORDER

WEBB J.A.

[1] The respondent has brought a motion to determine the content of the appeal book in this matter because the respondent wants to include a document and the appellant objects to the inclusion of this document. The document in question is the "Annotated Dispute Adjudication Rules" (Annotation) and the version that the respondent is seeking to include in the appeal book, based on the submissions of counsel for the respondent, is the version that was amended and

published on the respondent's website on or around August 22, 2014 (paragraph 17 of the respondent's written representations).

[2] The appellant has, with leave, appealed to this Court from the *Canadian Transportation Dispute Adjudication Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings)* (Dispute Adjudication Rules) made by the respondent. In particular, the appellant is asking that paragraphs 41(2)(b), 41(2)(c), and 41(2)(d) of these Dispute Adjudication Rules be quashed as being *ultra vires* the powers of the respondent or "invalid because they are unreasonable and establish inherently unfair procedures that are inconsistent with the intent of Parliament in establishing the Agency" (appellant's notice of appeal, paragraphs (i) and (ii)). Although couched in different terms, it appears that essentially the appellant is questioning the authority of the respondent to make the Dispute Adjudication Rules in question.

[3] The right of appeal to this Court is granted by section 41 of the *Canada Transportation Act*, S.C. 1996, c. 10:

> 41. (1) An appeal lies from the Agency to the Federal Court of Appeal on a question of law or a question of jurisdiction on leave to appeal being obtained from that Court on application made within one month after the date of the decision, order, rule or regulation being appealed from, or within any further time that a judge of that Court under special circumstances allows, and on notice to the parties and the Agency, and on hearing those of them that appear and desire to be heard.
>
> 41. (1) Tout acte — décision, arrêté, règle ou règlement — de l'Office est susceptible d'appel devant la Cour d'appel fédérale sur une question de droit ou de compétence, avec l'autorisation de la cour sur demande présentée dans le mois suivant la date de l'acte ou dans le délai supérieur accordé par un juge de la cour en des circonstances spéciales, après notification aux parties et à l'Office et audition de ceux d'entre eux qui comparaissent et désirent être entendus.

[4] Therefore, appeals only lie on questions of law or jurisdiction. In this case the legal issue is essentially related to the authority of the respondent to make the Dispute Adjudication Rules in question. As a preliminary matter, it is difficult to discern how a document (the Annotation):

(a) purportedly created by the respondent to explain or clarify the Dispute Adjudication Rules;

(b) amended and published on its website over two months after the Dispute Adjudication Rules were adopted; and

(c) which, as part of the disclaimer at the beginning thereof, includes the statement that:

"This document is a reference tool only. It is not a substitute for legal advice and ***has no official sanction***" (emphasis added)

would assist in determining whether as a matter of law the respondent had the authority to adopt the Dispute Adjudication Rules in question.

[5] As noted by the respondent there was no prior hearing in this matter and therefore there were no documents that had been previously introduced before a tribunal or a court. The respondent is requesting that either this Court determine under Rule 343 of the *Federal Courts Rules* that the Annotation should be included as part of the appeal book, or that this Court grant leave under Rule 351 of the *Federal Courts Rules* to include the Annotation as new evidence.

[6] Since there was no prior hearing, the only facts submitted to any tribunal or court related to the Annotation will be those as submitted as part of this motion. In its motion record the respondent submitted an affidavit of Alexei Baturin. However, there is no mention of the Annotation in this affidavit.

[7] The written submissions of counsel for the respondent include the following:

> 12. The Dispute Adjudication Rules that are the subject of this appeal came into force on June 4, 2014. On that date, the Agency published the Annotation on its website.
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> 13. The Annotation was designed, as its introduction states, as a companion document to the Dispute Adjudication Rules, with the intention of providing explanations and clarifications of the Rules for those unfamiliar with the Agency and its processes.
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> 14. The Annotation was prepared by Agency staff and was approved for publication by the Agency's Chair and Chief Executive Officer. The document is intended as a soft law instrument to provide guidance on the Agency's procedures but is not intended to fetter the Agency's discretion in the adjudicative decision-making process.
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> 15. The Annotation is also intended to be an evergreen document, to be updated as needed.
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> 16. Having received comments from the appellant respecting concerns about the Agency's procedures under the new Dispute Adjudication Rules, the Agency amended its Annotation on or around August 22, 2014, to address the following issues:
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> a. The Agency's continued commitment to providing reasons for its decisions;

b. The possibility of requesting an opportunity to respond to a request to intervene in dispute proceedings before the Agency;

c. The possibility of requesting an opportunity to conduct a cross-examination on affidavit; and

d. The possibility of proceeding by way of oral hearing.

[8] There are a number of facts related to the creation and amendment of the Annotation in these written submissions. In dissenting reasons in *R. v. Schwartz,* [1988] 2 S.C.R. 443, Dickson C.J. (as he then was) stated certain general principles. There is no indication that the majority of the Justices of the Supreme Court of Canada disagreed with the general principles as expressed by Dickson C.J. In his reasons, Dickson C.J. stated that:

> 59 One of the hallmarks of the common law of evidence is that it relies on witnesses as the means by which evidence is produced in court. As a general rule, nothing can be admitted as evidence before the court unless it is vouched for viva voce by a witness. Even real evidence, which exists independently of any statement by any witness, cannot be considered by the court unless a witness identifies it and establishes its connection to the events under consideration. Unlike other legal systems, the common law does not usually provide for self-authenticating documentary evidence.
>
> 60 Parliament has provided several statutory exceptions to the hearsay rule for documents, but it less frequently makes exception to the requirement that a witness vouch for a document. For example, the *Canada Evidence Act* provides for the admission of financial and business records as evidence of the statements they contain, but it is still necessary for a witness to explain to the court how the records were made before the court can conclude that the documents can be admitted under the statutory provisions (see ss. 29(2) and 30(6)). Those explanations can be made by the witness by affidavit, but it is still necessary to have a witness....

[9] Facts are to be introduced by a witness, not as part of the written representations of counsel. Once introduced, counsel can refer to the facts. However, it does not seem to me that it is appropriate for counsel to refer to facts that have not been introduced by any witness, unless a Judge could take judicial notice of such facts. There was no suggestion by counsel in the written submissions submitted as part of the respondent's motion record that a Judge could (or should) take judicial notice of the alleged facts as set out in the paragraphs referred to above.

[10] In response to the written submission of the appellant, the respondent submitted a reply and included an affidavit of Mary Catharine Murphy. Rule 369(3) of the *Federal Courts Rules* provides that:

(3) A moving party may serve and file written representations in reply within four days after being served with a respondent's record under subsection (2).	(3) Le requérant peut signifier et déposer des prétentions écrites en réponse au dossier de réponse dans les quatre jours après en avoir reçu signification.

[11] The reply is to contain written representations only – not another affidavit. The appropriate manner in which the facts should have been introduced by the respondent was in the affidavit that was submitted as part of the respondent's record – not in the written submissions of counsel for the respondent or in an affidavit included with the reply.

[12] In the reply submissions, counsel for the respondent indicated that "since the Annotation is an Agency document that is prominently displayed on the home page of its Government website and is available to any member of the public, evidence of its existence by way of

affidavit is unnecessary". No authority for this proposition was provided. The reference to the document being available to any member of the public could suggest that perhaps the respondent is arguing that a Judge could take judicial notice of the existence of the Annotation. However, since this argument was not raised by counsel, I will not address it. In any event, it appears that the respondent is attempting to introduce the Annotation for what it says about the Rules in question, not simply to show that it exists.

[13] Therefore, none of the facts that the respondent has attempted to introduce in the written representations of counsel or in the affidavit included in the reply will be considered in this motion.

[14] As a result, the only facts submitted by the respondent that are properly part of this motion are the facts as set out in the affidavit of Alexei Baturin. Since there is no reference to the Annotation in this affidavit, there is no witness to introduce this document and the result is that the respondent is attempting to include in the appeal book a document without any facts related to the document.

[15] As a result the Annotation is not to be included in the appeal book, whether it is considered as existing evidence or new evidence under Rule 351 of the *Federal Courts Rules*.

[16] The respondent's motion to include the Annotation in the appeal book is dismissed. Since the appellant did not ask for costs, no costs are awarded.

"Wyman W. Webb"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-357-14
STYLE OF CAUSE:	DR. GÁBOR LUKÁCS v. CANADA TRANSPORTATION AGENCY

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	WEBB J.A.
DATED:	OCTOBER 23, 2014

WRITTEN REPRESENTATIONS BY:

Self-represented	FOR THE APPELLANT
Barbara Cuber	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Legal Services Branch Canadian Transportation Agency Gatineau, Quebec	FOR THE RESPONDENT