Federal Court of Appeal | Cour d'appel fédérale

Date: 20151124

Docket: A-316-15

Citation: 2015 FCA 263

Present: STRATAS J.A.

BETWEEN:

ELIZABETH BERNARD

Applicant

and

CANADA REVENUE AGENCY, TREASURY BOARD AND PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA

Respondents

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on November 24, 2015.

REASONS FOR ORDER BY: STRATAS J.A.

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REASONS FOR ORDER

STRATAS J.A.

[1] The applicant filed an affidavit in support of her application for judicial review of a decision of the Public Service Labour Relations and Employment Board. The respondent, the Professional Institute of the Public Service of Canada, now moves for an order striking out certain paragraphs and exhibits in the affidavit. The precise paragraphs and exhibits will be

identified at the conclusion of these reasons. Another respondent, the Canada Revenue Agency, supports the Institute's motion in a one-page submission.

[2] For the reasons set out below, I shall grant the motion with costs to the Institute.

A. Background facts: the proceedings before the Board and this application for judicial review

[3] Before the Board, the applicant sought reconsideration of an earlier Board decision dated February 21, 2008. She alleged that a panel member in that case was biased. On June 29, 2015, the Board dismissed the applicant's request that it reconsider the 2008 decision.

[4] The Board's 2015 decision—not the Board's 2008 decision—is the subject-matter of the application for judicial review now before this Court.

B. The Institute's objection to the applicant's affidavit

[5] As mentioned above, the Institute objects to certain paragraphs and exhibits in the affidavit the applicant offers in support of her application.

[6] The Institute stresses that this is an application for judicial review. It observes that, as a general rule, on an application for judicial review this Court can consider only the evidence that was before the administrative decision-maker when it made its decision. It says that the impugned paragraphs and exhibits in the applicant's affidavit were not before the administrative

decision-maker in this case, here the Public Service Labour Relations and Employment Board. Thus, they must be struck.

C. The applicant's response

[7] In response to the Institute's motion, the applicant has filed an affidavit. On motions in writing, a party responding to the motion must file an affidavit and a written representation. The applicant's affidavit is a mixture of facts and argument. It complies neither with the Rules on motions in writing nor Rule 81(1). However, out of generosity to the applicant, I have considered her affidavit as, essentially, a combined affidavit and written representation.

[8] The applicant submits that the paragraphs and the exhibits are relevant to alleged bias on the part of one of the members of the Board and an overall breach of natural justice. However, the alleged bias and failure of natural justice relates to the 2008 decision, not the 2015 decision.

D. Analysis

(1) Should the motion be heard at this time?

[9] The first question is whether the Institute's motion to strike out the impugned paragraphs and exhibits should be decided now or left for the hearing panel. Some issues are best decided by the panel hearing the application, not by a motions judge dealing with issues on an interlocutory basis.

[10] Whether the Court should provide an advance ruling on an evidentiary issue or, for that matter, any other issue in an application for judicial review is a matter of discretion to be exercised on the basis of recognized factors: *Association of Universities and Colleges of Canada v. Access Copyright*, 2012 FCA 22, 428 N.R. 297 at paragraph 11; *Collins v. Canada*, 2014 FCA 240, 466 N.R. 127 at paragraph 6.

[11] One factor is whether the advance ruling would allow the hearing to proceed in a more timely and orderly fashion: *Collins*, above at paragraph 6, *McConnell v. Canada (Canadian Human Rights Commission)*, 2004 FC 817, aff'd 2005 FCA 389. Another factor is whether the result of the motion is relatively clear cut or obvious: *Collins* at paragraph 6; *Canadian Tire Corp. Ltd. v. P.S. Partsource Inc.*, 2001 FCA 8, 267 N.R. 135. If reasonable minds might differ on the issue, the ruling should be left to the panel hearing the appeal: *McKesson Canada Corporation v. Canada*, 2014 FCA 290, 267 N.R. 135 at paragraph 9; *Gitxaala Nation v. Canada*, 2015 FCA 27 at paragraph 7.

[12] In the circumstances of this case, I shall decide the Institute's motion. As will be seen, the result of the motion is clear and obvious. Dealing with it now will allow the hearing of the application to proceed in a more timely and orderly way. Further, an earlier direction of this Court instructed the Institute to raise this matter by way of interlocutory motion rather than raising it as a preliminary issue at the outset of the hearing of the application.

(2) The merits of the motion

(a) The principles governing the admission of new evidence on an application for judicial review

[13] The general rule is that evidence that could have been placed before the administrative decision-maker, here the Board, is not admissible before the reviewing court: *Connolly v. Canada (Attorney General)*, 2014 FCA 294, 466 N.R. 44 at paragraph 7; *Access Copyright*, above.

[14] There are exceptions to the general rule. These shall be discussed shortly. However, the exceptions are best understood as circumstances where the rationale behind the general rule is not offended. Thus, it is essential to review the rationale behind the general rule and to articulate it accurately, with precision.

[15] The Institute, relying on an authority that predates the above authorities by several years, suggests that the rationale supporting the general rule is one of "judicial efficiency," namely the need for courts to be shielded from being another forum for fact-finding when the administrative decision-maker is available to fact-find: *Abbott Laboratories Limited v. Canada (Attorney General)*, 2008 FCA 354, [2009] 3 F.C.R. 547 at paragraph 37.

[16] In fact, as explained in the later authorities, the general rule exists not just for efficiency. It rests upon something more fundamental.

[17] Applications for judicial review are proceedings where a reviewing court is invited to overturn decisions Parliament has entrusted to an administrative decision-maker. In this context, the administrative decision-maker and the reviewing court have differing roles that must not be confused:

> In determining the admissibility of the…affidavit, the differing roles played by this Court and the [administrative decision-maker] must be kept front of mind. Parliament gave the [administrative decision-maker] – not this Court – the jurisdiction to determine certain matters on the merits, such as whether to make an interim tariff, what its content should be, and any permissible terms associated with it. As part of that task, it is for [the administrative decision-maker] – not this Court – to make findings of fact, ascertain the applicable law, consider whether there are any issues of policy that should be brought to bear on the matter, apply the law and policy to the facts it has found, make conclusions and, where relevant, consider the issue of remedy. In this case, the [administrative decision-maker] has already discharged its role, deciding on the merits to make an interim tariff and to refuse to amend it.
>
> Now before the Court is an application for judicial review from this decision on the merits. In such proceedings, this Court has only limited powers under the *Federal Courts Act* to review the [administrative decision-maker's] decision. This Court can only review the overall legality of what the [administrative decision-maker] has done, not delve into or re-decide the merits of what the [administrative decision-maker] has done.
>
> Because of this demarcation of roles between this Court and the [administrative decision-maker], this Court cannot allow itself to become a forum for fact-finding on the merits of the matter. Accordingly, as a general rule, the evidentiary record before this Court on judicial review is restricted to the evidentiary record that was before the [administrative decision-maker]. In other words, evidence that was not before the [administrative decision-maker] and that goes to the merits of the matter before the Board is not admissible in an application for judicial review in this Court. As was said by this Court in *Gitxsan Treaty Society v. Hospital Employees' Union*, [2000] 1 F.C. 135 at pages 144-45 (C.A.), "[t]he essential purpose of judicial review is the review of decisions, not the determination, by trial *de novo*, of questions that were not adequately canvassed in evidence at the tribunal or trial court." See also *Kallies v. Canada*, 2001 FCA 376 at paragraph 3; *Bekker v. Canada*, 2004 FCA 186 at paragraph 11.

(*Access Copyright*, above at paragraphs 17-19, adopted in *Connolly*, above at paragraph 7; see also *Delios v. Canada (Attorney General)*, 2015 FCA 117 at paragraphs 41-42.)

[18] This rationale—the need to recognize the differing roles of administrative decision-makers and reviewing courts—is rooted in larger values that continually manifest themselves in the administrative law cases. These values—the rule of law, good administration, democracy and the separation of powers—animate all of administrative law. See generally Paul Daly, "Administrative Law: A Values-Based Approach" in John Bell, Mark Elliott, Jason Varuhas and Philip Murray eds., *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart, Oxford, 2015).

[19] As mentioned above, the authorities show that the general rule admits of certain exceptions. There are three recognized exceptions and the list of exceptions is not closed. The exceptions are recognized because they are consistent with the rationale behind the general rule and administrative law values more generally.

[20] The first recognized exception is the background information exception. Sometimes on judicial review parties will file an affidavit that contains summaries and background aimed at assisting the reviewing court in understanding the record before it. For example, where there is a large record consisting of many thousands of documents, it is permissible for a party to file an affidavit identifying, summarizing and highlighting, without argumentation, the documents that are key to the reviewing court's understanding of the record.

[21] In *Delios*, above, I put it this way (at paragraph 45):

> The "general background" exception applies to non-argumentative orienting statements that assist the reviewing court in understanding the history and nature of the case that was before the administrative decision-maker. In judicial reviews of complex administrative decisions where there is procedural and factual complexity and a record comprised of hundreds or thousands of documents, reviewing courts find it useful to receive an affidavit that briefly reviews in a neutral and uncontroversial way the procedures that took place below and the categories of evidence that the parties placed before the administrator. As long as the affidavit does not engage in spin or advocacy – that is the role of the memorandum of fact and law – it is admissible as an exception to the general rule.

[22] But "[c]are must be taken to ensure that the affidavit does not go further and provide [fresh] evidence relevant to the merits of the matter decided by the administrative decision-maker, invading the role of the latter as fact-finder and merits-decider": *Access Copyright*, above at paragraph 20; *Delios*, above at paragraph 46.

[23] The background information exception exists because it is entirely consistent with the rationale behind the general rule and administrative law values more generally. The background information exception respects the differing roles of the administrative decision-maker and the reviewing court, the roles of merits-decider and reviewer, respectively, and in so doing respects the separation of powers. The background information placed in the affidavit is not new information going to the merits. Rather, it is just a summary of the evidence relevant to the merits that was before the merits-decider, the administrative decision-maker. In no way is the reviewing court encouraged to invade the administrative decision-maker's role as merits-decider, a role given to it by Parliament. Further, the background information exception assists this Court's task of reviewing the administrative decision (*i.e.*, this Court's task of applying rule of

law standards) by identifying, summarizing and highlighting the evidence most relevant to that task.

[24] The second recognized exception is really just a particular species of the first. Sometimes a party will file an affidavit disclosing the complete absence of evidence on a certain subject-matter. In other words, the affidavit tells the reviewing court not what is in the record—which is the first exception—but rather what cannot be found in the record: see *Keeprite Workers' Independent Union v. Keeprite Products Ltd.* (1980), 29 O.R. (2d) 513 (C.A.) and *Access Copyright*, above at paragraph 20. This can be useful where the party alleges that an administrative decision is unreasonable because it rests upon a key finding of fact unsupported by any evidence at all. This too is entirely consistent with the rationale behind the general rule and administrative law values more generally, for the reasons discussed in the preceding paragraph.

[25] The third recognized exception concerns evidence relevant to an issue of natural justice, procedural fairness, improper purpose or fraud that could not have been placed before the administrative decision-maker and that does not interfere with the role of the administrative decision-maker as merits-decider: see *Keeprite* and *Access Copyright*, both above; see also *Mr. Shredding Waste Management Ltd. v. New Brunswick (Minister of Environment and Local Government)*, 2004 NBCA 69, 274 N.B.R. (2d) 340 (improper purpose); *St. John's Transportation Commission v. Amalgamated Transit Union, Local 1662* (1998), 161 Nfld. & P.E.I.R. 199 (fraud). To illustrate this exception, suppose that after an administrative decision was made and the decision-maker has become *functus* a party discovers that the decision was

prompted by a bribe. Also suppose that the party introduces into its notice of application the ground of the failure of natural justice resulting from the bribe. The evidence of the bribe is admissible by way of an affidavit filed with the reviewing court.

[26] I note parenthetically that if the evidence of natural justice, procedural fairness, improper purpose or fraud were available at the time of the administrative proceedings, the aggrieved party would have to object and adduce the evidence supporting the objection before the administrative decision-maker. Where the party could reasonably be taken to have had the capacity to object before the administrative decision-maker and does not do so, the objection cannot be made later on judicial review: *Zündel v. Canada (Human Rights Commission)*, (2000), 195 D.L.R. (4th) 399; 264 N.R. 174; *In re Human Rights Tribunal and Atomic Energy of Canada Limited*, [1986] 1 F.C. 103 (C.A.).

[27] The third recognized exception is entirely consistent with the rationale behind the general rule and administrative law values more generally. The evidence in issue could not have been raised before the merits-decider and so in no way does it interfere with the role of the administrative decision-maker as merits-decider. It also facilitates this court's ability to review the administrative decision-maker on a permissible ground of review (*i.e.*, this Court's task of applying rule of law standards).

[28] The list of exceptions is not closed. In some cases, reviewing courts have received affidavit evidence that facilitates their reviewing task and does not invade the administrative decision-maker's role as fact-finder and merits-decider: *Hartwig v. Saskatchewan*

(Commissioner of Inquiry), 2007 SKCA 74, 284 D.L.R. (4th) 268 at paragraph 24. For example, in one case the applicant wished to submit that the administrative decision-maker's decision was unreasonable because it wrongly construed certain submissions made by counsel as admissions. But counsel's submissions to the administrative decision-maker were not in the record filed with reviewing court. The reviewing court admitted evidence of counsel's submissions so that it could assess whether the decision was unreasonable: *Ontario Shores Centre for Mental Health v. O.P.S.E.U.*, 2011 ONSC 358. In another case, a reviewing court admitted a partial transcript of proceedings before an administrative decision-maker. The transcript was prepared by one of the parties, not by the administrative decision-maker. In the circumstances, the reviewing court was satisfied that the partial transcript was reliable, did not work unfairness or prejudice, and was necessary to allow it to review the administrative decision: *SELI Canada Inc. v. Construction and Specialized Workers' Union, Local 1611*, 2011 BCCA 353, 336 D.L.R. (4th) 577.

(b) Applying the principles in this case

[29] In the present case, the issue before the Board was whether it should reconsider its 2008 decision because of bias or a failure of natural justice on the part of the panel that made that decision. In short, on the merits, was there the sort of bias or failure of natural justice that warranted reconsideration of the 2008 decision?

[30] On this, the Board was the merits-decider and in that capacity was the forum for the introduction of evidence relevant to the merits. Any evidence concerning bias or a failure of natural justice concerning the 2008 decision had to be brought before the Board.

[31] This Court is the reviewer, not the merits-decider. As the reviewer—particularly when engaged in reasonableness review—this Court examines the acceptability and defensibility of the Board's decision on the merits, including its factual findings. Thus, normally, this Court does not accept new evidence relevant to the merits. The general rule is that this Court is not the merits-decider.

[32] Here, the impugned paragraphs and exhibits the applicant places before this Court on judicial review violate the general rule. They are evidence that goes to the merits of the matter before the Board, namely whether there was bias or a failure of natural justice that warranted reconsideration of the 2008 decision. This evidence was available at the time of the Board's proceedings. The applicant did not place it before the Board.

[33] The Board decided the merits on the basis of the evidence before it. Now this Court is reviewing the Board's decision, not re-determining the merits. The evidence contained in the impugned paragraphs and exhibits—evidence that goes to the merits—is not admissible here.

[34] In this case, the recognized exceptions to the general rule do not apply. In a way, this is not surprising because the rationales underlying the general rule support the inadmissibility of the applicant's affidavit in this application.

[35] The evidence the applicant seeks to introduce in the impugned paragraphs and exhibits was actually or reasonably available to her with some diligence at the time of the Board's decision. It was relevant to the Board's consideration of the merits before it, namely whether the

2008 decision was vitiated by bias or a failure of natural justice. The evidence in the impugned paragraphs and exhibits should have been placed before the Board as the merits-decider, not before this Court as reviewer.

[36] It follows that the impugned paragraphs and exhibits should not be placed before the Court. In this application for judicial review, they are inadmissible.

E. The Board's letter to the Court

[37] The Board recently became aware of the Institute's motion. It was concerned about the affidavit filed by the applicant on this motion and wanted to object to it. But it was unsure about how it should express its objection. So one of the Board's in-house counsel sent a letter to the Court seeking "direction on how to proceed" and "what steps the Court would prefer that the Board follow with respect to its objection to the…affidavit."

[38] I choose to characterize the Board's letter as an informal motion for directions from the Court under Rule 54. There is no other way to characterize it.

[39] Under Rule 54, it is not for this Court to give legal, tactical or practical advice to any party. Rule 54 is no substitute for reading the Rules and assessing on one's own how to use them.

[40] Gratuitously and informally, helpful Registry staff may try to assist with queries about the Rules, particularly queries from self-represented litigants. But it remains the responsibility of all parties, particularly represented parties, to work out procedural matters for themselves.

[41] The Rules provide answers to just about all the practical questions that arise in proceedings in the Federal Courts. Indeed, for those questions not directly addressed by the Rules, the so-called gap rule, Rule 4, may assist. Rule 55 even allows the Court on motion to vary or dispense with compliance with a Rule. Given these rules and many others, rare are the situations where a party must resort to Rule 54 rather than bringing a motion under one or more other rules.

[42] Rule 54 allows a party to move for directions concerning "the procedure to be followed under [the] Rules." Those words, the existence of other rules and procedural case law, and the role of this Court as an independent, impartial and neutral decision-maker inform us as to when directions may be sought and granted under Rule 54.

[43] A party should use Rule 54 as a last resort. In moving for directions under Rule 54, a party should identify with precision the ambiguity or uncertainty arising under the Rules and the facts of the case, the practical consequence and importance of the ambiguity or uncertainty, and why this Court's assistance is required by way of a Rule 54 motion rather than bringing a motion under another rule or working the matter out for itself.

[44] In the case of filings—an area where parties frequently seek directions—resort to Rule 54 is always unnecessary. Where ambiguity or uncertainty exists about a filing, a party should attempt to file and if the Registry refuses to allow the filing, the party can ask the Registry under Rule 72 to place the matter before a judge for a ruling.

[45] Here, the Board could not use Rule 54. The Board could have worked out matters for itself. It simply had to review the Rules and decide for itself what steps it should take. For example, in order to assert its objection to the applicant's affidavit, the Board could have moved for leave to add itself to the motion as a necessary party or to intervene. Both options exist under the Rules. Whether it wished to avail itself of those options was a practical or tactical decision for the Board.

[46] An administrative decision-maker that writes the sort of letter the Board wrote here, in circumstances where it is neither a party nor an intervener and in circumstances where its decision is under review, should be careful for other reasons: *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44.

[47] Accordingly, in this case I declined to give the Board the directions it sought and disregarded its letter. As mentioned above, I considered the applicant's affidavit in this motion on its own terms.

F. Disposition of the Institute's motion

[48] For the reasons set out above, the Institute's motion is granted with costs. The impugned paragraphs and exhibits are struck. The impugned paragraphs are paragraphs 14-21 of the affidavit of the applicant sworn on August 7, 2015. The impugned exhibits are "K" to "R", inclusive, appended to that affidavit.

[49] The applicant shall include her affidavit in the application record, but with paragraphs 14-21 crossed out and exhibits "K" to "R" removed. The Registry shall not accept the application record for filing unless the applicant has complied with this requirement and all other usual filing requirements.

[50] The applicant shall file her application record and her memorandum of fact and law within forty-five days of this Court's order.

[51] An order shall issue in accordance with these reasons.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-316-15
STYLE OF CAUSE:	ELIZABETH BERNARD v. CANADA REVENUE AGENCY, TREASURY BOARD AND PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	STRATAS J.A.
DATED:	NOVEMBER 24, 2015

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