Federal Court  Cour fédérale

Date: 20180405

Docket: T-979-17

Citation: 2018 FC 366

Ottawa, Ontario, April 5, 2018

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

KATHLEEN MAHOOD AND CANADIAN HUMAN RIGHTS TRIBUNAL AND CANADIAN AIR TRANSPORT SECURITY AUTHORITY

Respondents

JUDGMENT AND REASONS

I. Facts

[1] Ms. Kathleen Mahood filed a complaint against the Canadian Air Transport Security Authority (CATSA) at the Canadian Human Rights Commission (the Commission or CHRC) on October 21, 2015. Ms. Mahood alleges that CATSA's screening agents at the Calgary airport discriminated against her, on the basis that she uses medical marijuana to treat her disabilities.

Upon review by the Commission, her case was referred to the Canadian Human Rights Tribunal (the Tribunal or CHRT).

[2] The alleged events were captured by CATSA's Closed Circuit Television footage (CCTV footage), which is in CATSA's possession. Both CATSA and Ms. Mahood agree that the CCTV footage is relevant to the case. CATSA's position, however, is that the footage contains "substances of security measures whose unauthorized disclosure is prohibited under section 4.79(1) of the *Aeronautics Act* and section 32(2) of the *Canadian Air Transport Security Authority Act*".

[3] CATSA brought a motion before the Tribunal, requesting an order prohibiting the publication or disclosure of any evidence related to the CCTV footage, as well as an order that the other parties to the proceeding may consult the CCTV footage at CATSA's office, rather than making a copy of it. Pursuant to s 4.79 of the *Aeronautics Act*, CATSA's motion record, which included an affidavit that summarized the nature of the security measure, was served to the Minister to allow it to make submissions.

[4] The Attorney General of Canada (on behalf of the Minister) objected to the other parties being permitted to view its submissions related to the disclosure of the CCTV footage, arguing that the Act contemplated an *ex parte* proceeding; distinct from CATSA's motion before the Tribunal. The Tribunal considered the Minister's arguments, and rendered its decision on June 21, 2017. The June 21 decision is the subject of the judicial review before this Court. Ms. Mahood's human rights complaint has not yet been heard.

[5] For the reasons that follow the judicial review application is dismissed.

II. Decision Under Review

[6] The main issue before the CHRT was to determine the appropriate procedure for consideration of the production or discovery of a security measure pursuant to s 4.79(2) of the Act.

[7] The Tribunal notes that "[t]here is very little case law outlining the procedure contemplated by s 4.79 of the Act for consideration of the disclosure of security measures." The CHRT notes that 4.79(1) prohibits the disclosure of a security measure unless the disclosure is required by law. The Tribunal notes that the parties agree the CCTV footage is arguably relevant to the complaint, and therefore, production of the footage is required by the *Canadian Human Rights Act* (RSC 1985, c H-6) [*CHRA*] and the Tribunal's *Rules of Procedure*. The CHRT concludes that the CCTV footage "is not captured by the prohibition against disclosure in s 4.79(1), but rather by the exception". In other words, it is required by law.

[8] In terms of s 4.79(2), the Tribunal notes that the statute explicitly provides that the Tribunal must examine the security measure and hear the Minister's representations *in camera*. However, the Minister argues that the hearing must be conducted on an *ex parte* basis. The Tribunal notes that an *ex parte* hearing is "an extraordinary derogation from the requirement of natural justice". Moreover, the Tribunal notes the requirements of procedural fairness are even more acute when a party is self-represented, as is the case with Ms. Mahood.

[9] The Tribunal also notes that there are other provisions in the Act where Parliament saw fit to provide for an *ex parte* proceeding (s 4.5(2), s 8.7 (5) and s 14(4)). However, in s 4.79(2) there is no mention of an *ex parte* proceeding. The Tribunal concludes: "the fact that Parliament expressly provided for an *ex parte* hearing in the three instances cited above, and not in the case of s 4.79(2), indicates that it did not intend for the production or discovery hearing to be an *ex parte* proceeding."

[10] The Tribunal concluded at para 53 of the decision:

> [53] On the circumstances of the case before me, the process established in s. 4.79 of the Act is as follows:
>
> 1. Where production or discovery of a security measure (as prescribed in the *Act*) is sought, Notice of the request shall be given to the Minister.
>
> 2. On reasonable Notice to the parties and to the Minister, an *in camera* hearing will be conducted at which:
>
> a. the Minister is afforded a reasonable opportunity to make representations with regard to the security measure;
>
> b. the security measure is reviewed by the Tribunal;
>
> c. the parties have an opportunity to make submissions with regard to the security measure and public interest issues at stake;
>
> d. the Tribunal must determine whether, in respect of the requested production or discovery of the security measure, the public interest in the proper administration of justice outweighs in importance the public interest in aviation security;

a. if the Tribunal orders production or discovery of the security measure, the Tribunal must determine;

1. what restrictions or conditions should be placed on its production or discovery; and

2. whether any person should be required to give evidence relating to the security measure.

3. Notwithstanding the foregoing, where and as appropriate, the Tribunal may hear evidence or submissions regarding the security measure on an *ex parte* basis.

[11] The Member ordered that:

i. A hearing pursuant to s. 4.79(2) of the *Aeronautics Act*, shall be conducted in Ottawa, at a date and location to be fixed by the Registrar in consultation with the parties, and counsel to the Minister (the "Confidentiality Hearing");

ii. Prior to the date of the Confidentiality Hearing, the Minister will make arrangements with the Registry Office for the Member to review the security measure;

iii. The Confidentiality Hearing shall be conducted *in camera*, with any materials to be filed under seal;

iv. The Minister shall advise the Registrar of any further security arrangements it seeks for the Confidentiality Hearing; and

v. In the event that the Minister seeks to have any part of its representations made on an *ex parte* basis, such request shall be made at the outset of the Confidentiality Hearing.

III. Relevant Statutory Provisions

4.79 (1) Unless the Minister states under subsection 4.72(3) that this subsection does not apply in respect of a security measure, no person other than	4.79 (1) Sauf si le ministre soustrait la mesure de sûreté à l'application du présent paragraphe en vertu du paragraphe 4.72(3), seule la

the person who made the security measure shall disclose its substance to any other person unless the disclosure is required by law or is necessary to give effect to the security measure.

personne qui a pris la mesure peut en communiquer la teneur, sauf si la communication est soit légalement exigée, soit nécessaire pour la rendre efficace.

(2) If, in any proceedings before a court or other body having jurisdiction to compel the production or discovery of information, a request is made for the production or discovery of any security measure, the court or other body shall, if the Minister is not a party to the proceedings, cause a notice of the request to be given to the Minister, and, in camera, examine the security measure and give the Minister a reasonable opportunity to make representations with respect to it.

(2) Dans le cadre d'une procédure engagée devant lui, le tribunal ou tout autre organisme habilité à exiger la production et l'examen de renseignements et qui est saisi d'une demande à cet effet relativement à une mesure de sûreté aérienne fait notifier la demande au ministre si celui-ci n'est pas déjà partie à la procédure et, après examen de ces éléments à huis clos, lui donne la possibilité de présenter ses observations à ce sujet.

(3) If the court or other body concludes in the circumstances of the case that the public interest in the proper administration of justice outweighs in importance the public interest in aviation security, the court or other body shall order the production or discovery of the security measure, subject to any restrictions or conditions that the court or other body considers appropriate, and may require any person to give evidence that relates to the security measure.

(3) S'il conclut que, en l'espèce, l'intérêt public en ce qui touche la bonne administration de la justice a prépondérance sur l'intérêt public en ce qui touche la sûreté aérienne, le tribunal ou autre organisme doit ordonner la production et l'examen de la mesure de sûreté, sous réserve des restrictions ou conditions qu'il juge indiquées; il peut en outre enjoindre à toute personne de témoigner au sujet de la mesure.

IV. Issues

[12] This matter raises the following issues:

1. What is the applicable standard of review?
2. Are there special circumstances justifying a judicial review of the decision of the Tribunal, which was interlocutory in nature? Is the Application for Judicial Review premature?
3. Did the tribunal err in its interpretation of s 4.79 of the Act?

V. Submissions and Analysis

A. What is the applicable standard of review?

[13] The Applicant submits that the Tribunal's interpretation of s 4.79 of the Act is reviewable on a correctness standard. However, the Applicant contends that the interpretation of whether the production of the CCTV footage is required by law (pursuant to the *CHRA* and the Tribunal's *Rules of Procedure*) is reviewable on a reasonableness standard.

[14] The Respondent CATSA takes no position with respect to the submissions of the Applicant on this question. The Respondent CHRC submits that the proper standard of review is reasonableness.

[15] I agree with the Applicant's submissions. In *Dunsmuir v New Brunswick*, 2008 SCC 9, [*Dunsmuir*], the Supreme Court indicated at para 62 that there are two steps in the process of a

judicial review. First, the Court must determine if the jurisprudence has already established "in a satisfactory manner" the degree of deference to be accorded. Second, if the first step is "unfruitful", the Court must proceed to an analysis to determine the proper standard of review. Since there is no previous jurisprudence on the degree of deference to be afforded in this type of hearing, this Court would have to proceed with an analysis of the different factors set out by the Supreme Court in *Dunsmuir*, at para 64:

> The analysis must be contextual. As mentioned above, it is dependent on the application of a number of relevant factors, including: (1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue, and; (4) the expertise of the tribunal. In many cases, it will not be necessary to consider all of the factors, as some of them may be determinative in the application of the reasonableness standard in a specific case.

[16] That being said, the Supreme Court also wrote at para 60:

> courts must also continue to substitute their own view of the correct answer where the question at issue is one of general law "that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise" (*Toronto (City) v. C.U.P.E.*, at para. 62, *per* LeBel J.). Because of their impact on the administration of justice as a whole, such questions require uniform and consistent answers.

[17] In this case, the Tribunal was interpreting a provision in the *Aeronautics Act*, which is outside the Tribunal's area of expertise. In my view, the Tribunal's interpretation of s 4.79 of the Act must be reviewed on a correctness standard, and the Tribunal's interpretation on whether the CCTV footage is required by law under s 4.79(1) is reviewable on a reasonableness standard.

[18] The parties acknowledge the dearth of case law addressing the interpretation of s 4.79 as well as the process to be followed. It fell on the Tribunal member to embark on interpreting the statute. Under the circumstances, I can see no error on the part of the Tribunal member in her interpretation of s 4.79 of the *Aeronautics Act*. I will deal later with the reasonableness of the decision as to whether the CCTV footage is required by law.

B. Do special circumstances exist?

[19] Counsel for the Respondent, CHRC argues the application is premature and that the Applicant should submit its arguments once the Tribunal has decided on the procedure to be followed at the hearing of the objections.

[20] Counsel for the Respondent, CHRC also argues that the Applicant is seeking to create a situation where it can seek multiple judicial reviews.

[21] In my view, this application by the Attorney General is premature.

[22] I agree with the Respondent CHRC that the Applicant should submit its arguments once the Tribunal has decided on the procedure to be followed at the hearing. Further, the Tribunal member made it clear that she would review the CCTV footage prior to the confidentiality hearing. In light of this I do not agree with the Applicant that this hearing will bring a risk to national security since the CCTV footage will not be seen by the parties at that time. The Applicant should wait for the Tribunal to make its decision regarding the CCTV footage disclosure before bringing this application.

C. Did the Tribunal err in its interpretation of s 4.79?

[23] The Applicant submits the Tribunal made three reviewable errors: 1) The Tribunal erred in concluding that the production of the CCTV footage was required by law; 2) The Tribunal erred when it concluded that its interpretation did not frustrate the purpose of s 4.79 of the Act; 3) The Tribunal erred in concluding that the specific use of the term *ex parte* indicated that Parliament's intent was that the s 4.79(2) hearing is to be held with all parties present.

[24] The Respondent CATSA generally agrees with the submissions of the Applicant on the issue of the examination of the security measure contemplated under s 4.79 of the Act, but with some nuances namely that the CATSA should be a party to review the security measure since it is already in possession of it.

[25] The Respondent CHRC argues that the Tribunal did not err in its interpretation of s 4.79 of the *Aeronautics Act*. The Respondent CHRC submits that the central question in this application is one of statutory interpretation.

(1) Did the tribunal err in concluding that the production of the CCTV footage was required by law?

[26] The Applicant submits that the Tribunal's conclusion that the CCTV footage is required by law does not fall within a range of possible, acceptable outcomes. The Applicant first cites s 50(3) and (4) of the *CHRA*, which establish the powers of the Tribunal in respect of evidence. Under s 50(4), it is said that the Tribunal "may not admit or accept as evidence anything that

would be inadmissible in a court by reason of any privilege under the law of evidence." The Applicant also cites s 6(4) of the Tribunal's *Rules of Procedure*; which states: "Where a party has identified a document under 6(1)(d), it shall provide a copy of the document to all other parties." Finally, the Applicant refers to s 6(1)(d) of the Tribunal's *Rules of Procedures*:

> Within the time fixed by the Panel, each party shall serve and file a Statement of Particulars setting out […] a list of all documents in the party's possession, for which no privilege is claimed, that relate to a fact, issue, or form of relief sought in the case, including those facts, issues and forms of relief identified by other parties under this rule.

[27] The Applicant submits that CATSA listed the CCTV footage in its s 6(1)(e) list of documents over which it claimed privilege. The Applicant submits that CATSA is not required under the *Rules of Procedure* to produce the documents over which it has privilege, and that therefore, it was unreasonable for the Tribunal to conclude that the production of the CCTV footage was "required by law" under the *CHRA* and the *Rules of Procedure*.

[28] The Respondent CHRC replies that since CATSA is in possession of the CCTV footage, it is up to CATSA to make the argument that the production of the footage is not required by law. The Respondent CHRC also argues that the Applicant's argument is incorrect. The *CHRA* and the Tribunal's *Rules of Procedure* provide for each party the right to a full opportunity to present its case. Rule 6 of the Tribunal's *Rules of Procedure* provide that the parties must disclose all arguably relevant materials to the subject matter of the hearing. In this case, the Respondent CHRC argues that the CCTV footage is not only arguably relevant, but it is central to the case before the CHRT, and both parties to the complaint have indicated that they intend to rely on it during the proceeding before the Tribunal.

[29] I cannot agree that the Tribunal erred in concluding that the CCTV footage is required by law. CATSA did list the CCTV footage under 6(1)(e), however, as they stated in their submissions:

> CATSA took the position that the CCTV footage was subject to statutory, public interest and national security privileges when it listed relevant document to the proceeding in accordance with the *Rules of Procedure* of the Tribunal. However, CATSA indicated that it was willing to disclose the CCTV footage if measures were put in place regarding its use and disclosure.
>
> [My emphasis]

[30] The Tribunal's decision was correct when it concluded that the CCTV footage is arguably relevant to the complaint and consequently its production would be required by the *CHRA* and the Tribunal's *Rules of Procedure*. As acknowledged by the Tribunal member, both CATSA and the complainant view the CCTV footage as relevant to the complaint.

[31] CATSA proposed a flexible approach in how to balance the interests in the proper administration of justice with the public interest in aviation security. CATSA's main goal in noting the CCTV footage under 6(1)(e) was to make sure that the video would not be seen by the general public – however, CATSA does not want to prevent Ms. Mahood to see this footage. Given that CATSA agrees that Ms. Mahood should be able to see the footage, with restrictions as to confidentiality, I believe that the Tribunal correctly interpreted s 4.79(1).

(2) Did the Tribunal err when it concluded that its interpretation did not frustrate the purpose of s 4.79 of the Act?

[32] The Applicant argues that even if the CCTV footage was not prohibited under s 4.79(1), that the Tribunal's interpretation of s 4.79(2) frustrates the purpose of the Act, and produces absurd consequences. The Applicant contends that the purpose of the hearing provided for in s 4.79(2) is to allow the Court or other body to determine whether the security measure in question should be produced to the parties of the proceeding. The Applicant claims that:

> [i]f the purpose of the hearing is to determine whether the security measure should be produced or discovery of the security measure allowed in the context of the broader proceeding, then the purpose of s. 4.79(2) and s. 4.79(3) is frustrated if the security measure were to be viewed by all parties to the proceeding in the s. 4.79(2) hearing.

[33] I believe the Applicant is mistaken. The Tribunal clearly indicated that it would review the security measure before the "confidentiality hearing". This hearing is to hear submissions from the parties as to why they should – or should not – be able to view the CCTV footage; not to view the footage itself. In this regard, I agree with the Respondent CHRC.

(3) Did the Member err in her interpretation concerning the term "*ex parte*"?

[34] The Applicant argued that the Member erred by interpreting the term "*ex parte*" in three different provisions of the *Aeronautics Act* as evidence that Parliament did not intend for the hearing at a s 4.79(2) hearing to be held in the absence of the parties. The Applicant argues, firstly, that s 4.79(2) explicitly sets out who is to participate in the hearing and to use the term "*ex parte*" would be 'superfluous'. Secondly the use of s 4.79(2) is distinguishable from other sections where the term is used in that the reference in other sections is to an existing procedure.

[35] The Applicant further argues that on a plain reading of s 4.79(2) that only the Court or other body examines the security measure and only the Minister makes submissions with respect to the security measure. While I agree with the interpretation that only the Court or other body can review the security measure I cannot agree with the interpretation that only the Minister can make submissions. There are no such limitations as to who can make submissions on a plain reading of that section.

[36] I disagree with the Applicant's arguments with respect to statutory interpretation. In *Agraira v Canada*, 2013 SCC 36, the Supreme Court explains in para 81 that according to the presumption of consistent expression, "when different terms are used in a single piece of legislation, they must be understood to have different meanings. If Parliament has chosen to use different terms, it must have done so intentionally in order to indicate different meanings." This being said, s 4.79 states that the Minister must have a reasonable opportunity to make representations with respect to the security measure. The disposition does not state that *only* the Minister will be present, nor does it say that *no other party* may be present for the submissions. In any case, the Tribunal did find that "[i]n the event that the Minister seeks to have any part of its representations made on an ex parte basis, such request shall be made at the outset of the Confidentiality Hearing." I find this approach to be reasonable in light of the absence of judicial guidance on the proper process to follow.

[37] The Respondent CHRC submits that the plain reading rule is the manner in which the Court could seek Parliament's intent. The Respondent argues that the Court's role is not to impose a different policy choice than that made the Parliament but to ascertain what Parliament

intended to achieve by reviewing the statue in their grammatical and ordinary sense with the object of the Act. The Respondent suggests that reading "*ex parte*" in place of "in camera" fundamentally changes the nature of the relationship of the parties.

[38] The Applicant claims that a hearing with all the parties present would compromise aviation security. The Applicant submits that the purpose and objective of the *Aeronautics Act* is to ensure safety and security at Canadian airports and aerodromes. I agree that this is an objective but there is also a balancing of that objective with the proper administration of justice. As I have mentioned above, the hearing to be held with all the parties is not to view the CCTV footage, but to make submissions on if, and how, Ms. Mahood can see the footage. I disagree that aviation security might be compromised by this hearing. It is also important to note that the Tribunal member contemplated the possibility of the Minister requesting any part of its representations being made on an *ex parte* basis at the outset of the Confidentiality Hearing. I agree with the Respondent CATSA that there is limited case law on s 4.79 of the Act, and that the decision does not dictate a formal process for the hearing. With that in mind, I believe the Tribunal correctly interpreted s 4.79 of the Act. As a whole, the decision of the Tribunal was reasonable.

[39] For these reasons, the application for judicial review is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review of the Applicant be dismissed.

"Paul Favel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-979-17
STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA v CANADIAN HUMAN RIGHTS TRIBUNAL AND CATSA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	FEBRUARY 14, 2018
JUDGMENT AND REASONS:	FAVEL J.
DATED:	APRIL 5, 2018

APPEARANCES:

Wendy Wright	FOR THE APPLICANT
Daniel Poulin Ikram Warsame	FOR THE RESPONDENTS (CHRC)
Stefan Kimpton	FOR THE RESPONDENTS (CATSA)

SOLICITORS OF RECORD:

Attorney General of Canada Toronto, Ontario	FOR THE APPLICANT
Canadian Human Rights Commission Ottawa, Ontario	FOR THE RESPONDENTS (CHRC)
Fasken Martineau DuMoulin LLP Barristers and Solicitors Ottawa, Ontario	FOR THE RESPONDENTS (CATSA)