Federal Court  Cour fédérale

Date: 20200128

Docket: DES-5-19

Citation: 2020 FC 137

Ottawa, Ontario, January 28, 2020

PRESENT: Mr. Justice James W. O'Reilly

BETWEEN:

IAN CARTER, *AMICUS CURIAE*

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

ORDER AND REASONS

I. Overview

[1] In 2018, Mr Awso Peshdary sought to challenge a warrant issued by this Court in 2012. The warrant authorized the Canadian Security Intelligence Service to use powers of surveillance over him. The Service turned over some of the information it gathered about Mr Peshdary to the Royal Canadian Mounted Police. The RCMP used that information to obtain additional warrants under the *Criminal Code* to investigate Mr Peshdary for terrorism-related offences. The RCMP's

investigation resulted in two criminal charges against Mr Peshdary, for which he faces trial in the Superior Court of Justice of Ontario.

[2] In response to Mr Peshdary's motion, I dismissed his request for further disclosure of documents in the possession of the Service that he believed would assist him in challenging the validity of the Service's warrant (2018 FC 850).

[3] I also dismissed Mr Peshdary's request to quash the warrant, even though I found that there had been material omissions in the warrant application and new evidence that should have been brought to the attention of the issuing judge (2018 FC 911).

[4] Mr Peshdary appealed both conclusions to the Federal Court of Appeal.

[5] Subsequently, new evidence was brought to my attention by counsel for the Service; the evidence was also shared with the *amicus curiae*, Mr Ian Carter, who had been assisting me in ongoing *ex parte* matters related to Mr Peshdary, namely, applications under s 38 of the *Canada Evidence Act*, RSC 1985, c C-5.

[6] This new evidence potentially put in doubt my earlier rulings and presented a procedural dilemma. Should the new evidence be provided to the Federal Court of Appeal to be considered on the appeal of my original Orders? Or, should the new evidence be considered by me on a motion for reconsideration of my original decision? If the latter, who should bring the motion?

[7] In the unique circumstances of this case, I have decided that the new evidence should form the basis of a motion for reconsideration that is initiated *proprio motu*, that is, at my own instance. Counsel for the Service and Mr Carter agree.

II. The Procedural Dilemma

[8] The usual rule is that any reconsideration of a decision that is under appeal falls to the appellate court to deal with (*Etienne v Canada* (FCA), 1993 FCJ No 1388 [*Etienne*]). A number of subsequent decisions have confirmed this general approach (*Pharmascience Inc v Canada (Minister of Health)*, 2003 FCA 333 at para 14; *Grenier v Canada*, 2007 TCC 93 at paras 15-16; *Del Zotto v Canada (Minister of National Revenue)* (FC), [2000] 2 CTC 357 [*Del Zotto*] at paras 7-10.

[9] However, the rule is not absolute. Generally, and understandably, it would be inappropriate for a first instance Court to reconsider a decision that is already the subject of an appeal. As Justice Hugessen pointed out in *Del Zotto*, this "can only give rise to confusion and is likely to draw the administration of justice into disrepute" (at para 10). But the first instance Court nevertheless retains a discretion to proceed with a motion for reconsideration notwithstanding the existence of an appeal.

[10] As Justice Michael Phelan has noted in *Musqueam Indian Band v Canada (Governor in Council)*, 2004 FC 931 [*Musqueam*], the Federal Court of Appeal in *Etienne* did not say that the first instance judge lacked jurisdiction to deal with a motion for reconsideration; rather, it found that it would be inappropriate for the judge to deal with it while the matter was under appeal. Justice Phelan interpreted this to mean that the judge has a discretion to entertain a motion for

reconsideration where it would serve the interests of efficacy and efficiency. The main point, according to Justice Phelan, is that Rule 399 of the *Federal Courts Rules*, SOR/98-106, the rule permitting motions for reconsideration, "cannot be used as a form of backdoor appeal as to permit counsel to rectify their record of the proceedings particularly when the order is a final one" (*Musqueam* at para 24).

[11] Here, the allegation is that there is information available that was before neither the judge who issued the original warrant, nor me on the motion to quash it. This information could now be put either before the Federal Court of Appeal to be considered along with the submissions of the parties on the appeal, or before me on a motion for reconsideration.

[12] However, it appears that the Federal Court of Appeal has concluded that the latter course is more appropriate in the circumstances. On being informed of the motion for reconsideration, the Court issued an Order postponing indefinitely a case management conference relating to the appeal pending the outcome of the motion. Accordingly, the issue of reconsideration is properly before me.

[13] Rule 399 allows a party to request, on motion, that an Order of the Court be set aside or varied because of a matter that arose or was discovered after the Order was issued. The new matter here is evidence that was not before me on Mr Peshdary's motion, and not before the judge who issued the original warrant. Therefore, the new evidence satisfies the requirement that there be a matter that arose subsequent to a court Order.

[14] However, the problem that arises here is that Rule 399 requires that a motion be brought by a party. The parties before me are the Attorney General of Canada (AGC) and Mr Awso Peshdary. The AGC cannot realistically be expected to ask me to reconsider an Order that was granted in its favour; it would have to argue against its own motion. Mr Awso Peshdary cannot realistically be expected to bring a motion for reconsideration based on evidence to which he does not have access. At present, the evidence is in the possession of the AGC and has been disclosed to Mr Carter, but not to Mr Peshdary.

[15] Some consideration was given to the possibility of granting Mr Carter standing to bring the motion for reconsideration, as is reflected in the style of cause, above. Indeed, counsel for the AGC originally favoured this approach, then had second thoughts. Ultimately, it was agreed that this approach would draw Mr Carter into performing a role unsuitable for an *amicus* – the actual initiation of proceedings before the Court, not simply assisting the Court in respect of proceedings brought by others.

[16] This leaves the possibility of my initiating a reconsideration on my own motion. Generally, where the Rules make reference to the Court acting on motion, a judge is precluded from initiating the motion (Rule 47(2); *Nowoselksy v Canada (Treasury Board – Solicitor General – Correctional Service)* 2004 FCA 418 at para 7).

[17] At the same time, the Court has the jurisdiction to control the proceedings before it and to dispense with the Rules in appropriate circumstances (Rule 55; *Canada (MNR) v RBC Life*

Insurance Co, 2013 FCA 50 at para 36). Its powers include acting on its own motion (*Mazhero v Fox*, 2014 FCA 226 at para 9).

[18] I note that there are unlikely to be inconsistent decisions from this Court and the Federal Court of Appeal in this matter. The appeal of my original Order is in abeyance until I deal with the motion for reconsideration. Once I have rendered a decision on that motion, it, too, can be appealed and the Federal Court of Appeal would have a complete record before it.

[19] In the circumstances, therefore, I find that the motion for reconsideration should proceed at my own instance.

III. Conclusion and Disposition

[20] I will reconsider my earlier decision on Mr Peshdary's motion to quash the 2012 warrant based on a new matter that arose after my Order was issued. The style of cause should be amended to remove Mr Carter's name as the applicant. The new style of cause should be "In re motion for reconsideration of the Court's Order in *Peshdary v AGC* (2018)".

ORDER IN DES-5-19

THIS COURT ORDERS that:

1. I will reconsider my earlier decision on Mr Peshdary's motion to quash the 2012 warrant based on a new matter that arose after my Order was issued.

2. The style of cause should be amended as follows: "In re motion for reconsideration of the Court's Order in *Peshdary v AGC* (2018)".

"James W. O'Reilly"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	DES-2-18
STYLE OF CAUSE:	IAN CARTER, *AMICUS CURIAE* v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	NOVEMBER 26, 2019
ORDER AND REASONS:	O'REILLY J.
ORDER AND REASONS ISSUED:	JANUARY 28, 2020

APPEARANCES:

Mr. Andre Seguin Mr. Marc Edmunds	FOR THE RESPONDENT
Mr Ian Carter	FOR THE APPLICANT

SOLICITORS OF RECORD:

Deputy Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT
Bayne, Sellar, Ertel, Carter Barristers and Solicitors Ottawa, Ontario	FOR THE APPLICANT