Federal Court  Cour fédérale

Date: 20210907

Docket: T-1862-17

Citation: 2021 FC 923

Ottawa, Ontario, September 7, 2021

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Plaintiffs

and

BOŽO JOZEPOVIĆ

Defendant

ORDER AND REASONS

[1] This is a motion pursuant to Rule 51 of the *Federal Court Rules*, SOR/98-106, appealing the decision of Prothonotary Tabib, dated June 3, 2021, 2021 FC 536, requiring the Plaintiff Ministers to disclose a number of documents over which privilege has been claimed. Disclosure was ordered because it was held that the nature of the proceeding required the Ministers to comply with the level of disclosure articulated in *R v Stinchcombe*, [1991] 3 SCR 326 [*Stinchcombe*].

[2] The action is brought under the provisions of Part II of the *Citizenship Act*, RSC 1985, c C-29. The Ministers are seeking:

(i) a declaration, pursuant to subsection 10.1(1) of the Citizenship Act, that the Defendant obtained Canadian citizenship by false representation or fraud or by knowingly concealing material circumstances, with respect to his involvement with war crimes or crimes against humanity in Bosnia; and

(ii) a declaration, pursuant to subsection 10.5(1) of the *Citizenship Act*, that the Defendant is inadmissible to Canada on the grounds of having violated human or international rights.

[3] If the subsection 10.1(1) declaration is granted, the Defendant's citizenship would be revoked: *Citizenship Act*, subsection 10.1(3). If the subsection 10.5(1) declaration is granted, then, pursuant to subsection 10.5(3) of the *Citizenship Act*, it would serve as a removal order under the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

[4] In the course of the litigation, the Ministers produced an affidavit of documents that listed several documents which the Ministers claimed were not producible because of litigation privilege. These included witness statements, transcripts of witness interviews, and affidavits from potential witnesses. Prothonotary Tabib ruled that many were producible, even though privileged, as the *Stinchcombe* principles applied to the litigation.

[5] The Ministers filed a motion appealing that Order to this Court, and the Defendant in response sought clarification from the Court that the Department of Justice documents which were not ordered to be released did not include affidavits prepared by it.

[6] Both parties prepared extensive memoranda on the merits of the appeal; however, prior to the hearing, the Court issued a Direction to the parties to address, as a preliminary matter, whether the Court had jurisdiction to hear this appeal:

> Section 10.6 of the *Citizenship Act*, under the heading "No appeal from interlocutory judgment", provides as follows:
>
> > 10.6 Despite paragraph 27(1)(c) of the *Federal Courts Act*, no appeal may be made from an interlocutory judgment made with respect to a declaration referred to in subsection 10.1(1) or 10.5(1).
>
> The Court questions whether an appeal lies to this Court from the decision of Prothonotary Tabib. The parties are directed to address this as a preliminary matter at the September 2, 2021 hearing.

[7] The Ministers' position is that section 10.6 of the *Citizenship Act*, does not bar an appeal of an interlocutory decision of a prothonotary, which is appealable pursuant to Rule 51(1) of the *Federal Courts Rules*. It only bars appeals of decisions of this Court to the Federal Court of Appeal, which would otherwise be appealable pursuant to paragraph 27(1)(c) of the *Federal Courts Act*. They assert that this is so because that is the only appeal specifically mentioned in section 10.6 of the *Citizenship Act*.

[8] They submit that if it was the intent of the legislators to also bar appeals from decisions of a prothonotary, the section would have specifically used wording to that effect, such as:

"Despite paragraph 27(1)(c) of the Federal Courts Act, and Rule 51(1) of the Federal Courts Rules, no appeal may be made from an interlocutory judgment made with respect to a declaration referred to in subsection 10.1(1) or 10.5(1)."

[9] The Defendant, with reluctance, submits that the within appeal is barred by virtue of section 10.6 of the *Citizenship Act*.

[10] There is no jurisprudence considering section 10.6 of the *Citizenship Act*. It is to be interpreted using the modern principle first enunciated by Elmer Driedger in *Construction of Statutes* (2nd ed 1983) and cited with approval by the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27, at page 41:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[11] In my view, the grammatical and ordinary sense of the words in section 10.6 of the *Citizenship Act* is that no appeal lies from any interlocutory judgment in an action for a declaration under subsection 10.1(1) or 10.5(1) of the *Citizenship Act*. The action here is for exactly that type of remedy.

[12] The interpretation urged upon the Court by the Ministers creates an unexpected and curious result. On their interpretation, if the motion for production is heard by a prothonotary, it may be appealed to a judge; however, if the same motion is heard by a judge, there is no appeal. I have been offered no persuasive reason why the legislators would choose to permit an appeal in

one circumstance but not the other, when it is the same motion being considered by each decision maker.

[13] I do not accept the Ministers' submission that a statutory provision barring an appeal from an order of a prothonotary under Rule 51(1) of the *Federal Courts Rules* requires that the statutory provision specifically references Rule 51(1). In fact, the opposite is the case. Rule 1.1(2) of the *Federal Courts Rules* provides that a statutory provision that is inconsistent with the Rules governs:

In the event of any inconsistency between these Rules and an Act of Parliament or a regulation made under such an Act, that Act or regulation prevails to the extent of the inconsistency.	Les dispositions de toute loi fédérale ou de ses textes d'application l'emportent sur les dispositions incompatible des présentes règles.

[14] The interplay of a statutory provision barring an appeal and Rule 1.1(2) was considered by this Court in *Yogalingam v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 540 [*Yogalingam*]. *Yogalingam* involved an appeal from a decision of a prothonotary on a motion to extend the time to file an application record. In finding that no appeal lies from that interlocutory judgment made in application for judicial review under the *IRPA*, Justice O'Keefe examined paragraph 72(2)(e) of the *IRPA* which provides as follows:

The following provisions govern an application under subsection (1):	Les dispositions suivantes s'appliquent à la demande d'autorisation :
[…]	[…]
(e) no appeal lies from the decision of the Court with respect to the application or	e) le jugement sur la demande et toute décision interlocutoire

with respect to an interlocutory judgment.	ne sont pas susceptibles d'appel.

He also examined the predecessor to Rule 1.1(2) which is worded identically to the current provision. He held that there was an inconsistency between Rule 51(1) and the *IRPA* and, accordingly, the *IRPA* prevailed and the Court had no jurisdiction to hear the appeal.

[15] Both paragraph 72(2)(e) of the *IRPA* and section 10.6 of the *Citizenship Act* make reference to "interlocutory judgments". The Ministers concede that the Order under appeal is interlocutory in nature. Having found no principled basis to interpret section 10.6 of the *Citizenship Act* as applying only to decisions made by judges of this Court, I must conclude that this Court is without jurisdiction to hear this appeal. The appeal must therefore be dismissed.

[16] The Defendant asks for the costs of this motion in any event of the cause. The Court accepts that both parties have incurred substantial costs making submissions on the merits of an appeal that has been found not to have been properly before this Court. On the other hand, the jurisdictional issue was not raised by the Defendant as a defence to the appeal.

[17] I am of the view that it is appropriate in the circumstances to award costs to the Defendant, but not in any event of the cause.

ORDER IN T-1862-17

THIS COURT ORDERS that this motion pursuant to Rule 51 of the *Federal Courts Rules*, appealing a decision of a prothonotary, is dismissed because section 10.6 of the *Citizenship Act* removes the Court's jurisdiction to hear an appeal of the prothonotary's decision in this matter, and costs are awarded to the Defendant in the cause.

"Russel W. Zinn"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1862-17
STYLE OF CAUSE:	THE MINISTER OF CITIZENSHIP AND IMMIGRATION ET AL v BOŽO JOZEPOVIĆ
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	SEPTEMBER 2, 2021
ORDER AND REASONS:	ZINN J.
DATED:	SEPTMBER 7, 2021

APPEARANCES:

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Ronald Poulton Edward Babin	FOR THE DEFENDANT

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