Federal Court of Appeal | Cour d'appel fédérale

Date: 20221124

Docket: A-74-21

Citation: 2022 FCA 202

[ENGLISH TRANSLATION]

PRESENT: LEBLANC J.A.

BETWEEN:

REGIS BENIEY

Appellant/Cross-respondent

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent/Cross-appellant

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, on November 24, 2022.

REASONS FOR ORDER BY: LEBLANC J.A.

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REASONS FOR ORDER

LEBLANC J.A.

[1] This is a motion for contempt of court (the Contempt Motion) filed by the applicant, who is the appellant/cross-respondent in this appeal (the applicant). This motion is directed against Neil O'Brien, who, at the material time, was Assistant Director of Operations for the Access to Information and Privacy division of the Strategic Policy Branch at the Canada Border Services Agency (the Agency).

[2] The facts alleged against Mr. O'Brien (the affiant) arise from affidavits he swore—and answers to formal and informal written examinations he provided—in the context of a dispute between the Agency and the applicant based on the *Access to Information Act*, R.S.C. 1985, c. A-1 (the ATIA). On February 19, 2021, the Federal Court rendered its judgment (the Judgment), holding that the Agency had erred in its interpretation of subsection 19(1) of the ATIA dealing with the personal information exception and that, accordingly, it could not rely on this provision as it had done to sever information that should otherwise have been disclosed to the applicant under the access to information request he had filed with the Agency under the ATIA (*Beniey v. Canada (Public Safety and Emergency Preparedness)*, 2021 FC 164).

[3] It is useful to note as additional context that the starting point of this case was an incident that occurred on July 3, 2017, while the applicant was employed by the Agency. This incident, which occurred at work, involved an argument between the applicant and one of his supervisors regarding the end of the applicant's shift. The Agency subsequently held an investigation into the applicant's conduct during this event, and the applicant filed a grievance against his employer. In connection with this incident, on July 29, 2017, the applicant filed the aforementioned access to information request for the video recordings from the surveillance cameras at the applicant's workplace in the minutes leading up to and following the incident. This request gave rise to two complaints to the Information Commissioner, which were ultimately dismissed. It also gave rise to the dispute that led to the Judgment.

[4] The applicant is appealing that Judgment before us, even though, for the most part, the case was resolved in his favour. According to the applicant, the Federal Court did not rule on all

the issues before it and based its findings on [TRANSLATION] “grossly incorrect facts”. He would therefore like this Court to deal with those issues and set the record straight. However, leave to adduce fresh evidence (the Motion to Adduce Fresh Evidence), which, in his view, would have allowed the Court to provide the answers sought and set the record straight, was denied on July 28, 2021. In cross-appeal, the Agency challenges the scope the Federal Court gave to the exception in subsection 19(1) of the ATIA.

[5] Importantly, because the applicant failed in his attempt to broaden the scope of the exception, the issue raised in the cross-appeal now appears for all intents and purposes to be the only real issue in this appeal.

[6] The applicant bases the Contempt Motion on paragraph 466(*c*) of the *Federal Courts Rules*, S.O.R./98-106 (the Rules). Under this provision of the Rules, a person is guilty of contempt of Court who “acts in such a way as to interfere with the orderly administration of justice, or to impair the authority or dignity of the Court”. His submissions were prolix. Essentially, what I take from them is that, according to the applicant, the affiant was guilty of contempt because:

> (a) he concealed the fact that the Agency had forms (CCTV Transmittal Records) used in July 2017 to retrieve the video recordings sought in the access to information request and that the Agency was in possession of all the recordings described in these forms;
>
> (b) he falsely suggested that nothing had been severed from three of the seven recordings retrieved and sent to the applicant in response to his access to information

request, even though they had secretly been redacted. In so doing, he hindered the work of the Federal Court, which never knew that these three recordings were longer than the affiant indicated and therefore could not rule on the legality of the severances made by the Agency in respect of all the video recordings sent to the applicant;

(c) he did not make the complete version of the three video recordings at issue available to the Federal Court, as required by section 318 of the Rules; and

(d) he concealed the identity of Agency managers who also allegedly severed images pursuant to subsection 19(1) of the ATIA and did not inform the applicant of all the policies according to which the Agency processed the applicant's access to information request.

[7] After carefully reviewing the applicant's motion record, the Agency's responding motion record, and the applicant's reply, I find that the Contempt Motion cannot succeed. In other words, I am not satisfied that there is a *prima facie* case that contempt was committed, as subsection 467(3) of the Rules requires.

[8] Before providing support for the reasons that lead me to this conclusion, a jurisdictional issue must first be considered. With the exception of an affidavit sworn on April 26, 2021, as part of the Agency's reply to the Motion to Adduce Fresh Evidence (the FCA Affidavit), all the other acts alleged against the affiant (affidavits sworn and answers given to written examinations) are related to the proceedings before the Federal Court. We must therefore ask whether this Court is the appropriate forum for dealing with the Contempt Motion concerning what allegedly happened in the Federal Court.

[9] In a direction issued on July 8, 2022, the Court required that the applicant address this issue in his written submissions in support of the Contempt Motion. The applicant did so, essentially arguing that this Court is the [TRANSLATION] "most appropriate forum" to rule on the Motion as a whole because it has an inherent power to do so and, furthermore, because the Motion is intrinsically related to the [TRANSLATION] "lead appeal file" before the Court. According to him, there must be only one ruling on the contempt alleged against the affiant, regardless of [TRANSLATION] "the superior court before which [the affiant] committed the alleged actions".

[10] These arguments must fail. Here, the applicant is confusing the common law source of the courts' contempt power, which has existed "as long as the courts themselves" (*R. v. Vermette*, [1987] 1 S.C.R. 577 at 581 (*Vermette*); see also *Steward v. Canada (Minister of Employment and Immigration)*, [1988] 3 F.C. 452 (Court of Appeal) at 460) with the identity of the court before which contempt proceedings must—or may—be instituted in a given case.

[11] For the federal courts, this power has been codified—and the manner in which it is exercised set out—in sections 466 to 472 of the Rules (see also *Saugeen First Nation #29 v. Sebastian*, 2003 FCA 28, [2003] 3 F.C. 48 at paras. 19 and 37). This codified power may be exercised by the "Court", defined, as the case may be, as the Federal Court of Appeal or the Federal Court. The power is therefore vested in each of the two Courts, which under sections 3 and 4 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, are "continued as . . . additional court[s] of law, equity and admiralty in and for Canada, for the better administration of the laws of Canada and as . . . superior court[s] of record having civil and criminal jurisdiction". Although they were

once two divisions of the same Court, they now exist as separate bodies (Bernard Letarte *et al.*, *Recours et procédures devant les Cours fédérales* (Montreal: LexisNexis, 2013) at 7).

[12] Fundamentally, the contempt of court power exists to enable any court "to protect its processes" (*Vermette* at 585, emphasis added), except in specific cases where, as in *Vermette*, the court before which the contempt proceedings are brought does not have the power to hear them because it does not have the jurisdiction necessary to deal with contempts committed not in the face of the Court. This is patently not the case here. As provided in sections 466 and 468 of the Rules, the federal courts' jurisdiction in matters of contempt extends to contempts committed both in the presence of a judge and out of the presence of a judge.

[13] Each of the two Courts therefore has the power to protect its own processes. This power is identical, regardless of the Court where the contempt was allegedly committed; its scope is the same in both cases. In my opinion, nothing in the Rules allows one of the two federal courts to hear cases of contempt committed in proceedings before the other court, except of course when the Court of Appeal sits on appeal from a Federal Court contempt decision. In such a case, unlike the one here, this Court is asked to perform its appellate function, not a function of a court of first instance.

[14] I am therefore of the view that the only part of the Contempt Motion that this Court is empowered to consider concerns the FCA Affidavit, because it is the only act likely to engage "its processes".

[15] According to section 467 of the Rules, the contempt proceeding takes place in two steps. The first, the one now before the Court, involves determining whether, in light of the evidence submitted by the applicant, there is a *prima facie* case that the affiant committed contempt. Assuming the first step has been successfully completed, the second step involves making an order under subsection 467(1) of the Rules that requires the person concerned (a) to appear before a judge at the time and place stipulated in the order, (b) to be prepared to hear proof of the act with which the person is charged, and (c) to be prepared to present a defence. The Court must then rule on the merits of the alleged contempt.

[16] As the Simon Noël J. aptly pointed out in *Orr v. Fort McKay First Nation*, 2012 FC 1436 at paragraph 13 (*Orr*), "[a] contempt procedure is very serious. It requires strict compliance with the different steps that the Rules stipulate", given the "great consequences", up to and including imprisonment, that it can have on the person alleged to be in contempt.

[17] In the first step of the proceeding, the onus is on the applicant to demonstrate that the affiant was guilty of "wilful and contumacious conduct" (*Orr* at paragraph 13; *Chaudhry v. Canada*, 2008 FCA 173 at paragraph 6) and provide proof of "deliberate flouting" (*Orr* at paragraph 15). Therefore, in this case, proof of deliberate interference with the orderly administration of justice and deliberate impairment of the authority or dignity of the Court is required. This is a stringent burden, to say the least.

[18] The applicant has not met this burden.

[19] Before discussing the FCA Affidavit itself, I must make an initial observation. This affidavit was sworn, I repeat, in support of the Agency's reply to the Motion to Adduce Fresh Evidence. I also point out that this motion was dismissed because the Court was of the opinion that the fresh evidence the applicant wished to add to this Court's record [TRANSLATION] "existed at the time of the access to information request and is not determinative of an issue in the appeal".

[20] In the Motion to Adduce Fresh Evidence, the applicant argued, as he does here, that this evidence had not been made available to the Federal Court because of the [TRANSLATION] "subterfuges of [the Agency]," criticizing the Office of the Information Commissioner in passing for [TRANSLATION] "tolerating interference with his investigation . . . and allowing that interference to take place in the Federal Court". It should also be noted that the motion to adduce fresh evidence was combined with a motion for contempt of court. It covered all the bases, so to speak.

[21] In support of the Contempt Motion, the applicant repeats the same arguments based essentially on the same documentary evidence, which was not deemed determinative for the purposes of this appeal. In such a context, I fail to see how, given the close and for all intents and purposes unbreakable connection between the two motions, it could be held that we have before us a *prima facie* case of the contempt alleged, that is, a *prima facie* case of interference before this Court with the orderly administration of justice or impairment of the authority or the dignity of this Court.

[22] What this Court considers authoritative is the dismissal of the Motion to Adduce Fresh Evidence and, therefore, the dismissal of the applicant's attempt to raise before this Court the issues of subterfuge, concealment of evidence, and interference, which he insists on arguing via the Contempt Motion. In other words, the FCA Affidavit, which is not part of the Appeal Book and which will therefore not be considered by the Court when it hears and disposes of this appeal, will not and cannot have any bearing on the outcome of the appeal. In such a context, allowing the applicant to re-litigate these issues under the guise of alleged contempt would seriously undermine the authority of the order dismissing the Motion to Adduce Fresh Evidence.

[23] As for the FCA Affidavit itself, I can detect nothing in it, even at first glance, that resembles wilful and contumacious conduct on the part of the affiant with the objective of interfering with the orderly administration of justice before this Court or impairing the authority or dignity of this Court. In fact, the FCA Affidavit provides a detailed account of the various steps taken by the affiant's group to process the applicant's access to information request. In particular, the affiant discusses the steps taken to respond to the applicant's concerns, which were submitted to the Information Commissioner in a second complaint and later to the Privacy Commissioner, that some of the information sought by the access to information request was missing because it had been altered or destroyed.

[24] The affiant explained that he had verified these allegations. He had contacted the Agency's administrative region (the Southern Ontario Region) that was the primary source of the information sought by the access to information request and confirmed that the information that his group had to process under the ATIA, including the video recordings, was the information

the Southern Ontario Region had sent him in response to the access to information request. He pointed out that the Region had initially retrieved excerpts of the video recordings related to the incident on July 3, 2017, for the purposes of the disciplinary investigation then in progress and that those excerpts were retrieved even before the access to information request was made and the Agency's Access to Information group started processing it. He also noted that the information that had not been kept for the purposes of the administrative investigation had been destroyed within 30 days of the incident on July 3, 2017, in accordance with the information retention policies then in effect within the Agency.

[25] There is nothing suspicious in this account, unless it perpetuates the so-called lies, subterfuges, and other incidents of concealment alleged by the applicant. However, after having carefully examined all the evidence on the record, I am of the view that the applicant has failed to meet the burden incumbent on him to demonstrate this allegation.

[26] On this point, I agree with the Agency that the applicant has confused two distinct parts of the factual matrix: the part relating to the disciplinary investigation, in which the Southern Ontario Region retrieved excerpts from the video recordings that it considered relevant to the investigation and destroyed the rest in accordance with Agency policies, and the other part, which came later, relating to the processing of the access to information request. It appears that the affiant's group was dependent on the information given to them by the Southern Ontario Region, and that the group asked the questions that needed to be asked to provide the most comprehensive response possible to the applicant's access to information request (Motion Record, Exhibit RB-12).

[27] In all other respects, the applicant is asking us to draw a series of inferences from a tangled web of references, taken in isolation and often out of context, to various affidavits sworn by the affiant and to the answers he gave to the written examinations. This fragile house of cards is not sufficient to discharge the heavy burden imposed under subsection 467(3) of the Rules.

[28] Furthermore, the applicant asks us to follow his inferences in a context where he did not see fit to cross-examine the affiant regarding the FCA Affidavit to confront him with the alleged contradictions and deliberate omissions that the applicant asserts he committed in order to perpetuate the subterfuges and concealments of which he claims to be a victim. By choosing to proceed in this manner, the applicant further reduces the probative value of the argument he puts forward in the Contempt Motion.

[29] I would conclude by pointing out the following. Under the ATIA, federal institutions, not one or more specific individuals, are required to comply with the obligations they set out. The ATIA gives the Information Commissioner broad powers to ensure that these obligations are met. Here again, federal institutions are at the forefront when the Commissioner investigates a complaint and if the case is brought to court. Processing an access to information request generally involves several people, as was the case here. Attacking a particular individual, as the applicant does—and especially the way he does—is dangerous to say the least, and involves its share of challenges, which the applicant has not been able to meet.

[30] For the foregoing reasons, the applicant has not persuaded me that there is a *prima facie* case of the contempt alleged against the affiant. I will therefore dismiss the Contempt Motion in

its entirety. The Agency seeks costs and requests that they be payable forthwith, as permitted by subsection 401(2) of the Rules. I am of the opinion that this request is justified given the circumstances of this case. I therefore fix the amount of the costs at $1,000, as I am permitted to do under subsection 401(1) of the Rules.

"René LeBlanc"

J.A.

Certified true translation
Vera Roy, Jurilinguist

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-74-21
STYLE OF CAUSE:	REGIS BENIEY v. THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	LEBLANC J.A.
DATED:	November 24, 2022

WRITTEN SUBMISSIONS BY:

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