Federal Court  Cour fédérale

Date: 20120229

Docket: T-240-12

Citation: 2012 FC 280

Vancouver, British Columbia, February 29, 2012

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

MARK ELDON WILSON

Respondent on Motion (Applicant)

and

MINISTER OF JUSTICE AND ATTORNEY GENERAL OF CANADA THE HON. ROB NICHOLSON

Applicant on Motion (Respondents)

REASONS FOR ORDER AND ORDER

[1] There is some urgency to render justice on a short-term basis. Therefore, having heard this motion on Monday, I have asked counsel to be present on Wednesday morning to hear the oral reasons for order being rendered.

[2] On January 12, 2007, the Minister of Justice [the Minister or the Applicant on Motion] issued an Authority to Proceed [ATP] under section 15 of the *Extradition Act*, SC 1999, c 18

[the *Extradition Act* or the Act] for the extradition of Mark Eldon Wilson [Mr. Wilson or the Respondent on Motion].

[3] Mr. Wilson sought leave for judicial review of the ATP to the Federal Court on January 25, 2012. Therefore, the Minister is asking this Court to decline jurisdiction and to dismiss the application since the remedies sought are available in the already ongoing extradition proceedings in the British Columbia courts.

[4] Mr. Wilson seeks review of the ATP on the following grounds:

- The ATP was issued for fraud in accordance with section 380 of the *Criminal Code*, which has been amended in 2011 following the issuance of the ATP on January 12, 2007;
- The ATP was issued for conduct which is legal in the entrepreneurial context;
- The Minister continues to rely on the same ATP even after the provincial Court of Appeal overturned the committal order.

[5] I would first offer a brief summary of the extradition procedure. As mentioned, the ATP was issued by the Minister on January 12, 2007. The British Columbia Supreme Court then ordered Mr. Wilson committed to await surrender on December 17, 2009, and an order to surrender was made by the Minister on December 8, 2010. Mr. Wilson appealed the committal order and sought judicial review of the Minister's surrender decision in the British Columbia Court of Appeal. This court rendered judgment on December 6, 2011, and concluded that the case should be referred back to the Supreme Court for a new committal hearing on the basis that Mr. Wilson's application

to present evidence at the hearing was improperly dismissed and the application for judicial review of the surrender decision was declared moot.

[6] It is the Minister's position that the application for judicial review of the ATP of January 12, 2007 does not disclose any issues which are outside the jurisdiction of the British Columbia provincial courts under the *Extradition Act* and that the Federal Court should exercise its discretion to decline jurisdiction and dismiss the application. The Minister and the Attorney General of Canada therefore ask this Court to strike the application.

[7] In response to questions from the Court about the lateness in filing the application for judicial review of an ATP dated January 12, 2007, counsel for the respondents said at the hearing that the issue of delay in filing the application for judicial review is not to be dealt with at this time since, in her opinion, it would have been premature to file a motion to that effect.

[8] Mr. Wilson submits that adequate remedy *ab initio* cannot be obtained from the provincial courts since the starting point for the courts to consider the extradition proceedings follows the actual issuance of the ATP. It is argued that the ATP authorizes the Attorney General of Canada to move the proceedings to the committal hearing before the Supreme Court, but only when the Minister has exercised his discretion to issue the ATP. It is this legislative step of issuing the ATP that is the subject of the application for judicial review and Mr. Wilson therefore opposes the motion to strike.

[9] The test to be met on a motion to strike an application for judicial review is whether the application is "bereft of any possibility of success" (see *David Bull Laboratories (Canada) Inc v Pharmacia Inc*, [1995] 1 FC 588), subject to the following paragraph.

[10] In extradition procedures, the test will be met where the Court can conclude that there are adequate remedies available in the provincial courts (see *Coffey v Canada (Minister of Justice)*, 2005 FC 554, paras 12 and 15, following *Froom v Canada (Minister of Justice)* 2004 FCA 352 [*Froom*]).

[11] In Canada, the extradition process involves two (2) stages: the executive stage and the judicial stage. The ministerial involvement, being the executive stage, exists both at the ATP time of decision (section 15 of the Act) and later on with the order of surrender in accordance with sections 44 and 58 of the Act. The judicial stage follows the issue of the ATP through an extradition hearing (section 24 of the Act) and may bring a judge of the Supreme Court of British Columbia to render an order of committal (section 29 of the Act). An appeal of such a decision can also be made (section 49 of the Act). Furthermore, exceptionally the Court of Appeal may also be asked to judicially review a decision of the Federal Minister of Justice to issue an order to surrender (section 58 of the Act and see also *Canada (Justice) v Fischbacher*, 2009 SCC 46, [2009] 3 SCR 170 at para 23). There is no such exception for the provincial Court of Appeal to judicially review an ATP.

[12] The *Extradition Act* was a result of a complete revision of the extradition process from Canada based on the treaties that Canada was a part of. It was intended to make the procedure

more simple and expeditious. As was the case in the former statute, the *Extradition Act* gave the provincial superior and appellate courts jurisdiction over judicial functions. By doing so, the legislator recognized the experience and expertise of judges of these courts in criminal law, a strong and important component of the *Extradition Act* (see *Froom*, above, at paras 2 and 3).

[13] It is a well recognized fact and objective of our Canadian judicial system that before courts assume jurisdiction of any matter, they are to consider that another court cannot assume some of the same jurisdiction in order to prevent the possibility of multiple proceedings, forum shopping, and the potential for a plurality of contradictory decisions and numerous delays, which would not be in the interests of justice (see also *Froom* at para 7).

[14] In matters of extradition, our Court has been sensitive to the wish of the legislator to convey to the provincial superior and appellate courts the control of these important extradition procedures.

[15] As noted in no uncertain terms in *Froom*, above, at paragraph 12, the Federal Court can exercise its discretion and decline to assume the judicial review jurisdiction if the applicant has an alternative judicial forum which can consider adequate remedies. This discretionary decision can be taken if the judge, having reviewed the situation, comes to the conclusion that there are adequate remedies available in the other judicial forum and I would add that these remedies do not have to be a perfect replica of those available in the Federal Court.

[16] Mr. Wilson’s notice of application discloses that he is seeking the following remedies from this Court:

- leave to judicially review the ATP issued by the Minister;
- an order setting aside the ATP of January 12, 2007; and,
- a declaration that the ATP of January 12, 2007 is *functus*.

To see the grounds for such remedies, see paragraph 4 of the present reasons.

[17] As mentioned, counsel for the Minister submits that the British Columbia courts can grant adequate remedies if the grounds submitted are found to be right. Counsel for Mr. Wilson disagrees and argues that some of the remedies sought are not available to the provincial courts. Counsel does recognize that the ground dealing with the actions of Mr. Wilson as being legal and in conformity with the entrepreneurial context is a subject matter that calls for adequate remedies available to a section 29 of the Act extradition judge. It is submitted, however, that the other grounds relating to section 380 of the *Criminal Code* having been amended since the date of issuance of the ATP are not open to adequate remedies in the Supreme Court of British Columbia. The same is said of the argument of continual reliance on the ATP. It is argued that the ATP is the initiation point of the extradition process and should be judicially reviewed by the Federal Court.

[18] The Federal Court has the sole jurisdiction to deal with judicial reviews of decisions or orders of federal boards, commissions or other tribunals, except when the legislator provides otherwise, such as in section 57 of the *Extradition Act*. As opposed to an order to surrender, where the provincial Court of Appeal has jurisdiction to review the decision of the Minister, there is no exception provided for the ATP.

[19] The question to be answered is whether or not the British Columbia Supreme and Appeal Courts have adequate alternative remedies available to deal with the matters brought up by Mr. Wilson in the application for judicial review of the ATP dated January 12, 2007. If the answer is affirmative, then a judge of this court can use his discretion to dismiss the application for judicial review.

[20] It is impossible for a judge to predict whether adequate remedies will be available in the British Columbia Supreme Courts under the present circumstances. To a certain degree, a judge must be satisfied that in general such remedies, while not similar, are nevertheless available and adequate. At the same time, he must not be seen as taking away any valuable remedies that are potentially available to the applicant.

[21] In *Froom* above at paragraph 19, the Federal Court of Appeal made the following remark:

> However, I am unable to agree with the Judge that it necessarily follows that an extradition judge lacks the jurisdiction to provide an adequate remedy if the issuance of the authority to proceed is tainted by a significant impropriety on the part of the Minister in the issuance of the authority to proceed. On the contrary, it is my view that an extradition judge who is presented with evidence that the decision of the Minister to issue an authority to proceed was made arbitrarily or in bad faith, or was motivated by improper motives or irrelevant considerations, has the requisite jurisdiction to grant an appropriate remedy under the *Canadian Charter of Rights and Freedoms* or under the inherent jurisdiction of the superior courts to control their own process and prevent its abuse: *USA v Cobb*, [2001] SCR 587, *United States of America v Gillingham*, (2004) 239 DLR (4th) 320 (BCCA).

[22] This Court is aware of the availability of remedies both under the *Charter* and under the inherent jurisdiction of superior courts. The alternative remedies available in provincial courts appear to be adequate to render justice.

[23] At this stage, not having the insight and the benefit of full arguments on the grounds brought up and the remedies sought, it appears there are a good number of adequate remedies in the British Columbia courts, such as remedies under the *Charter*, abuse of power remedies, and the termination of proceedings on different grounds.

[24] Having said that, I am aware that an ATP can only be reviewed by the Federal Court and it may be that down the road, such an avenue is the only one that can render justice. As stated earlier, I cannot predict the future. The importance of the ATP has been recognized by Justice Groberman in *USA v Helfrich*, 2004 BCSC 297 at paragraph 35, where he wrote:

> I recognize that the power to issue an Authority to Proceed is a serious one, not only because of the potential consequences both for individual liberty and for international relations, but also because the powers of the Minister at this first stage of extradition are final in the sense that they are not reviewable by the extradition hearing judge or by the Court of Appeal. They can only be reviewed by way of judicial review.

[25] This Court does not wish to close a door that may become essential in the future. Only an extradition judge faced with the judicial reality at that time will be able to properly assess the arguments made, the importance to be given to them, and whether proper adequate alternative remedies exist to correct the wrong if required. Then, subject to the reasons given, it may be open to the extradition judge to conclude that the only proper remedies to be entertained are those available

in the Federal Court after the hearing of an application for judicial review of an ATP, and not those available in the courts of British Columbia.

[26] At the end of the hearing I suggested to counsel for the Minister, without having closely studied this avenue, that there may be other courses of action to be followed such as staying the application for judicial review of the ATP until a final decision is made in provincial courts. Counsel for the Minister responded that this approach may hinder the British Columbia courts. It was then suggested that the proper course to follow may be an undertaking by both counsel to recognize the possibility for Mr. Wilson to reapply to the Federal Court if there is no adequate remedy in the provincial courts in relation to the validity of the ATP. Counsel for Mr. Wilson made it clear that he wished for the application for judicial review of the ATP not to be dismissed, but that in the alternative if it was not available to him, he would go along with this approach.

[27] After the hearing, at my suggestion, counsel for the parties signed the following agreement:

> Mr. Wilson has leave to reapply (reopen?) to the Federal Court
> if he is unable to obtain an adequate remedy in provincial courts
> in relation to the validity of the authority to proceed.
>
> Signed “Amanda Lord”, counsel for the Minister
> “Gary Botting”, counsel for Mr. Wilson

(The choice to reapply or reopen was left to this Court.)

[28] Subject to the following comments, the Court concurs with the agreement between counsels. In order to implement this agreement, a judge of the British Columbia Supreme Court or Court of Appeal would have to state in his reasons that the provincial courts do not have available to them the proper required alternative remedies adequate to deal with the important arguments made in

relation to the ATP and that therefore, the proper course to follow would be an application for judicial review of the ATP in the Federal Court. Then, the applicant could reapply to the Federal Court.

[29] Having considered the following:

- The important role of the provincial courts in dealing with extradition procedures;
- The expertise that the provincial courts have in such extradition matters;
- The benefit to the judicial apparatus in having only one system of courts that deals with extradition procedures;
- The jurisdiction of the Federal Court to deal with judicial reviews of decisions of federal tribunals and commissions;
- The alternative adequate remedies that are available in the British Columbia provincial courts;
- The Federal Court of Appeal's decision in *Froom*, above, which clearly indicates that the Federal Court shall use its discretion to leave extradition matters to the provincial courts since proper alternative adequate remedies are available to them; and,
- The agreement arrived at by counsel for the parties whereby, if no alternative adequate remedies are available to Mr. Wilson in the provincial courts, the applicant may reapply to the Federal Court by filing an application for judicial review of the ATP.

[30] This Court, having reviewed the submissions and heard the parties, is of the opinion that there are alternative adequate remedies available in the provincial courts, but that at this stage it is impossible to predict what the situation will be in the future.

[31] The agreement arrived at by counsel is agreed to by this Court subject to the comments made above.

[32] No costs will be awarded as this involves a criminal matter.

[33] This Court therefore dismisses the application for judicial review of the ATP dated January 12, 2007, without prejudice to the applicant's right to bring a new application for judicial review of the ATP dated January 12, 2007, should the extradition judge(s) conclude that important issues have to be dealt with for which no alternative adequate remedies can be granted in the provincial courts and where the Federal Court is the only court that can grant such remedies.

ORDER

THIS COURT ORDERS that:

1. The motion to dismiss the judicial review of the ATP dated January 12, 2007 is granted without prejudice to the rights of the applicant to bring a new application for judicial review of the January 12, 2007 ATP as provided for by these reasons;

2. No costs shall be awarded.

"Simon Noël"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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