Federal Court of Appeal | Cour d'appel fédérale

Date: 20170420

Docket: A-145-16

Citation: 2017 FCA 80

CORAM: **GAUTHIER J.A.**
BOIVIN J.A.
DE MONTIGNY J.A.

BETWEEN:

INDUSTRIELLE ALLIANCE,
ASSURANCE ET SERVICES FINANCIERS INC.

Appellant

and

KASSEM MAZRAANI

Respondent

and

MINISTER OF NATIONAL REVENUE

Respondent

Heard at Montréal, Quebec, on April 5, 2017.
Judgment delivered from the Bench at Montréal, Quebec, on April 5, 2017.
Reasons for Judgment delivered at Ottawa, Ontario, on April 20, 2017.

REASONS FOR JUDGMENT BY: BOIVIN J.A.

CONCURRED IN BY: GAUTHIER J.A.
DE MONTIGNY J.A.

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REASONS FOR JUDGMENT

BOIVIN J.A.

I. Introduction

[1] This is an appeal of a decision of Justice Archambault (the Judge) of the Tax Court of Canada (TCC), cited as 2016 TCC 65.

[2] On April 5, 2017, this Court rendered judgment from the bench with reasons to follow. In so doing, this Court granted the appeal, quashed the judgment below, and sent the matter back to the TCC for a new hearing before a different judge.

[3] In this appeal, the appellant, Industrielle Alliance, Assurance et Services Financiers Inc. (Industrielle Alliance), essentially submits that there were multiple violations of the official language rights of witnesses and its counsel during the hearing before the TCC.

[4] Mr. Mazraani, a self-represented respondent, submits that no such violations occurred, arguing that language is only a matter of communication and that the documentary evidence spoke for itself. Moreover, Mr. Mazraani contends that (i) the witnesses and counsel were all bilingual; (ii) all persons involved in the hearing before the TCC consented to addressing the TCC in English; and (iii) Industrielle Alliance raises language rights merely as a strategic move "to ambush the judgment of the TCC".

[5] The Minister of National Revenue (the Minister), also a respondent in this appeal, shares the position taken by Industrielle Alliance and further contends that Mr. Mazraani's official language rights were violated.

II. Issues on Appeal

[6] This appeal raises three questions:

1. Were the constitutional and quasi-constitutional official language rights of witnesses and counsel violated in the course of the hearing before the TCC?
2. Did the questions the Judge put to Industrielle Alliance's witnesses give rise to a reasonable apprehension of bias?
3. Did the Judge err in determining that Mr. Mazraani occupied insurable employment while working for Industrielle Alliance?

[7] Given this Court's finding that the constitutional and quasi-constitutional official language rights of witnesses, counsel for Industrielle Alliance, as well as Mr. Mazraani's rights were all violated in the course of the hearing before the TCC, it is unnecessary to determine whether Mr. Mazraani has been engaged in insurable employment while working for Industrielle Alliance, or the reasonable apprehension of bias issues. However, I will provide an observation in connection with the latter issue.

III. Official Language Rights before Proceedings in Federal Courts

[8] It is trite law that English and French are the official languages of Canada and have equality of status and equal rights and privileges in courts established by Parliament, including the TCC. Hence, any person who appears before or submits written pleadings to a federal court

has the constitutional right to use the official language of his or her choice: see section 133 of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5. This constitutional right is also reflected and confirmed in sections 16 and 19 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

[9] The Supreme Court of Canada in *MacDonald v. City of Montreal*, [1986] 1 S.C.R. 460 at 483, 27 D.L.R. (4th) 321 recalled that the constitutional right to use the official language of one's choice in courts covered by section 133 of the *Constitution Act, 1867* applies broadly to "litigants, counsel, witnesses, judges and other judicial officers".

[10] Significantly, a person's ability to express him or herself in both official languages does not impact such person's constitutional right to choose either French or English in the context of court proceedings. One's ability to speak both official languages is "irrelevant". In the words of the Supreme Court of Canada in *R. v. Beaulac*, [1999] 1 S.C.R. 768, 173 D.L.R. (4th) 193 at paragraph 45 [*Beaulac*]:

> In the present instance, much discussion was centered on the ability of the accused to express himself in English. This ability is irrelevant because the choice of language is not meant to support the legal right to a fair trial, but to assist the accused in gaining equal access to a public service that is responsive to his linguistic and cultural identity. …

[11] The Supreme Court of Canada further observed:

> Language is so intimately related to the form and content of expression that there cannot be true freedom of expression by means of language if one is prohibited

> from using the language of one's choice. Language is not merely a means or medium of expression; it colours the content and meaning of expression. It is, as the preamble of the *Charter of the French Language* itself indicates, a means by which a people may express its cultural identity. [Emphasis added.]
>
> *Ford v. Quebec (Attorney General),* [1988] 2 S.C.R. 712 at 748-749, 54 D.L.R. (4th) 577; cited in *Beaulac* at paras. 17, 34.

[12] The *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.) (OLA), which falls under the privileged category of quasi-constitutional legislation (*Thibodeau v. Air Canada,* 2014 SCC 67, [2014] 3 S.C.R. 340 at para. 12) provides as follows at sections 14 and 15:

14 English and French are the official languages of the federal courts, and either of those languages may be used by any person in, or in any pleading in or process issuing from, any federal court.	**14** Le français et l'anglais sont les langues officielles des tribunaux fédéraux; chacun a le droit d'employer l'une ou l'autre dans toutes les affaires dont ils sont saisis et dans les actes de procédure qui en découlent.
15 (1) Every federal court has, in any proceedings before it, the duty to ensure that any person giving evidence before it may be heard in the official language of his choice, and that in being so heard the person will not be placed at a disadvantage by not being heard in the other official language.	**15 (1)** Il incombe aux tribunaux fédéraux de veiller à ce que tout témoin qui comparaît devant eux puisse être entendu dans la langue officielle de son choix sans subir de préjudice du fait qu'il ne s'exprime pas dans l'autre langue officielle.
(2) Every federal court has, in any proceedings conducted before it, the duty to ensure that, at the request of any party to the proceedings, facilities are made available for the simultaneous interpretation of the proceedings, including the evidence given and taken, from one official language into the other.	**(2)** Il leur incombe également de veiller, sur demande d'une partie, à ce que soient offerts, notamment pour l'audition des témoins, des services d'interprétation simultanée d'une langue officielle à l'autre langue.
…	[…]

[13] Subsection 15(1) of the OLA thus establishes, *inter alia*, a positive duty on federal courts to ensure that any person giving evidence before them may be heard, without disadvantage, in the official language of his or her choice. Subsection 15(2) of the OLA further establishes a similar duty on the federal courts to ensure that simultaneous interpretation from one official language into the other is made available for any proceeding before it where a party requests such services. In so doing, the OLA reflects that the "freedom to choose [between French and English] is meaningless in the absence of a duty of the State to take positive steps to implement language guarantees" (*Beaulac* at para. 20).

[14] Against this background, I now turn to the issues at bar.

IV. Analysis

[15] The present proceedings were triggered by a determination on the part of the Canada Revenue Agency that Mr. Mazraani did not occupy insurable employment within the meaning of paragraph 5(1)(*a*) of the *Employment Insurance Act*, S.C. 1996, c. 23. The Minister subsequently confirmed this determination, which was challenged by Mr. Mazraani before the TCC.

[16] The appeal before the TCC was conducted pursuant to subsection 18.15(3) of the *Tax Court of Canada Act*, R.S.C. 1985, c. T-2, which directs the TCC to conduct the appeal "as informally and expeditiously as the circumstances and considerations of fairness permit". Mr. Mazraani, who was self-represented before the TCC, submitted his notice of appeal in English. The Minister, in accordance with section 18 of the OLA, submitted her reply in English.

Industrielle Alliance, the employer and an intervenor before the TCC, submitted its notice of intervention in French.

[17] Language issues arose on the second day of the hearing when counsel Turgeon for Industrielle Alliance indicated that his first witness, being Mr. Michaud, would be testifying in French. In response, Mr. Mazraani clearly indicated that he would need an interpreter if Mr. Michaud was to testify in French (Transcript, vol. 1 at pp. 269-270):

> JUSTICE ARCHAMBAULT: Fine. So let's start with Mr. Michaud. It's Michaud. It's not Comeau. It's Michaud.
>
> MR. TURGEON: Bruno Michaud. Monsieur Bruno Michaud.
>
> JUSTICE ARCHAMBAULT: O.K. So ---
>
> MR. TURGEON: That will testify in French if you have no ---
>
> JUSTICE ARCHAMBAULT: I don't have any problem except that the party – you don't understand French very well?
>
> MR. MAZRAANI: No.
>
> JUSTICE ARCHAMBAULT: So ---
>
> MR. TURGEON: And I hesitate to impose the witness ---
>
> JUSTICE ARCHAMBAULT: Okay. Because ---
>
> MR. TURGEON: Well, yeah, my colleague is referring to the Exhibit E-4 – A-4 that is – that he's speaking French.
>
> MR. JILWAN: His job application.
>
> --- (SHORT PAUSE)
>
> MR. TURGEON: And my client knows as a matter of fact that he's speaking French.
>
> JUSTICE ARCHAMBAULT: He picked up the lowest ---
>
> MR. TURGEON: Yeah.

> JUSTICE ARCHAMBAULT: --- the lowest level of French.
>
> Are you uncomfortable with having this witness testify in French?
>
> MR. MAZRAANI: Of course.
>
> JUSTICE ARCHAMBAULT: Would you need -- would you need an interpreter?
>
> MR. MAZRAANI: Of course.
>
> JUSTICE ARCHAMBAULT: Of course what?
>
> MR. MAZRAANI: I need an interpreter. I can't ---
>
> JUSTICE ARCHAMBAULT: You need an interpreter.
>
> MR. MAZRAANI: --- because this case is ---
>
> MR. TURGEON: Okay. Let me ---
>
> JUSTICE ARCHAMBAULT: Because I have to -- you know, I have to be fair to both parties. You know, I'm prepared to let him speak in French but then I would have to arrange for an interpreter for him.
>
> [Emphasis added.]

[18] Upon being informed by counsel Turgeon that the witness Mr. Michaud wanted to testify in French and that one of the parties, being Mr. Mazraani, needed an interpreter, it was incumbent upon the Judge to adjourn the hearing in order to arrange for interpretation services. It was his duty to respect Mr. Michaud's choice to testify in French and Mr. Mazraani's request for an interpreter (OLA, subsections 15(1), (2)).

[19] Instead, the Judge granted a break for counsel Turgeon to devise a compromise. Counsel Turgeon proposed that Mr. Michaud testify in English but that he be permitted to express himself in French on technical issues, which could then be translated into English. The Judge accepted

this "pragmatic" compromise. In doing so, the Judge failed to uphold his positive duty to ensure that witnesses are heard in the official language of their choice.

[20] Another violation of official language rights resulted from the Judge's treatment of another witness, Mr. Charbonneau, who had likewise expressed the desire to speak in French. Once counsel Turgeon began examining Mr. Charbonneau in French, the Judge interrupted the witness examination to request that it be conducted in English. Mr. Charbonneau replied by asking if he could respond in French. Rather than accede to this request, as required by subsection 15(1) of the OLA, the Judge focused on Mr. Mazraani's inability to understand French (Transcript, vol. 2 at pp. 608-609):

> [Translation]
>
> MR. TURGEON: MR. Charbonneau, can you tell us, since when are you connected to Industrielle Alliance...
>
> JUSTICE ARCHAMBAULT: Is it possible to -- to do it in English?
>
> MR. TURGEON: Oh, oh yeah, I'm sorry, I'm not sure ---
>
> JUSTICE ARCHAMBAULT: Can you speak?
>
> MR. CHARBONNEAU: Can I just say something?
>
> JUSTICE ARCHAMBAULT: Yes.
>
> MR. CHARBONNEAU: Yes, <u>as a matter of fact, I am better in French</u> …
>
> JUSTICE ARCHAMBAULT: Yes.
>
> MR. CHARBONNEAU: …and I am a little surprised because at work our meetings are, everything is done in French.
>
> JUSTICE ARCHAMBAULT: M'hm.
>
> MR. CHARBONNEAU: <u>Can I answer in French?</u>

> JUSTICE ARCHAMBAULT: But the taxpayer …the person before us today [Mr. Mazraani] whose case…whose case is the subject of this appeal…
>
> MR. CHARBONNEAU: Yes.
>
> JUSTICE ARCHAMBAULT: …tells us that he has a hard time understanding French. So we are asking as much as possible to the witnesses to speak English. Are you relatively comfortable speaking English?
>
> MR. CHARBONNEAU: Well I'll try …
>
> [Emphasis added.]

[21] During the course of the proceedings before the TCC, counsel Turgeon and other witnesses were treated similarly and were denied their right to choose to speak in French because of their English language skills (see for example: Transcript, vol. 2 at p. 555 (Ms. Lambert) and Transcript, vol. 4 at pp. 1256, 1336-1337 (counsel Turgeon)). In turn, each request to speak in the official language of their choice was treated by the Judge as a request for accommodation, as opposed to the exercise of protected official language rights.

[22] In each instance, the Judge coaxed counsel and the witnesses to use English. In conducting the proceedings, the Judge favoured English over French in order to accommodate Mr. Mazraani's limited understanding of French. This resulted in a violation of counsel Turgeon and the witnesses' official language rights. The Judge exerted subtle pressure on counsel Turgeon and the witnesses to forego their right to speak in the official language of their choice, in this case French (*Chiasson v. Chiasson*, 222 N.B.R. (2d) 233 (C.A.); [1999] N.B.J. No. 621 (QL)). Mr. Mazraani contends that the witnesses and counsel Turgeon freely consented to speak in English and that Industrielle Alliance's reliance on language rights is merely strategic. The transcript of the proceedings simply does not support such a conclusion.

[23] Mr. Mazraani also argues that no prejudice is suffered where an individual is capable of expressing him or herself in both official languages. This argument is ill-founded. A person appearing before a federal court has the constitutional right to express him or herself in the official language of his or her choice regardless of whether he or she is bilingual. In other words, the fact of being bilingual does not extinguish one's right to speak the official language of his or her choice: *Beaulac* at paragraph 45.

[24] Moreover, despite the efforts of the Judge to have the witnesses testify in English, a significant portion of the testimony was in French due to the difficulty some witnesses had expressing themselves in English. Of particular note is the testimony of Éric Leclerc, whose testimony had significant French portions (see for example: Transcript, vol. 4 at pp. 1206, 1207 1222, 1228, 1266, 1323, 1324, 1332). Although the Judge translated some of the witnesses' French testimony into English for Mr. Mazraani, many exchanges were left untranslated. At times, Mr. Mazraani expressed his inability to understand what was happening, saying "I have to understand" (Transcript, vol. 4 at pp. 1249, 1320). Given Mr. Mazraani's earlier request for interpretation services should there be testimony in French, it follows that the fact that witnesses and counsel Turgeon addressed the Judge in French with little to no translation constituted a violation of Mr. Mazraani's official language rights (Minister's Memorandum of Fact and Law at para. 59).

[25] At the hearing before this Court, Mr. Mazraani alleged that counsel Turgeon directed witnesses to speak in French in order to prevent him from understanding their testimony. While I

make no determination on this point, I note that the issue would not have arisen had the Judge adjourned for the purpose of securing interpretation services.

[26] In the end, the efforts of the Judge to be "pragmatic" in finding ways around adjourning and securing interpretation services resulted not only in the violation of the official language rights of counsel Turgeon and witnesses, but also the violation of Mr. Mazraani's official language rights. It simply was not open to the Judge to seek a shortcut around the official language rights of all those involved in the proceedings. The Judge's failure to exercise his duty to ensure that the official language rights at issue were protected not only resulted in their violation, but further resulted in delays that could have otherwise been avoided by an adjournment to secure proper interpretation services. Pragmatism does not trump the duty to respect the official language rights of all in the course of judicial proceedings.

[27] Finally, Industrielle Alliance submits that the Judge's interventions and questions to its witnesses gave rise to a reasonable apprehension of bias. Suffice it to say that the number of interruptions and questions the Judge put to the witnesses appears to be excessive, even in the context of a party being self-represented and the proceedings being conducted informally: see *NCJ Educational Services Limited v. Canada (National Revenue)*, 2009 FCA 131, 392 N.R. 11. For instance, Industrielle Alliance contends that the Judge put no less than 102 questions to the witness Mr. Michaud (Industrielle Alliance's Memorandum of Fact and Law at para. 50). But given my finding on the issue of official language rights, I make no determination in this regard.

[28] Likewise, it is unnecessary to consider the employment issue.

V. Conclusion

[29] I would therefore allow the appeal, quash the judgment below and remit the matter to the Tax Court of Canada for a new hearing before a different judge. It goes without saying that the transcript of the first trial shall not be relied upon either by the parties or the judge hearing the second trial. As the parties did not seek costs, none should be awarded.

"Richard Boivin"

J.A.

"I agree
Johanne Gauthier J.A."

"I agree
Yves de Montigny J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-145-16
STYLE OF CAUSE:	INDUSTRIELLE ALLIANCE, ASSURANCE ET SERVICES FINANCIERS INC. v. KASSEM MAZRAANI AND MINISTER OF NATIONAL REVENUE
PLACE OF HEARING:	MONTRÉAL, QUEBEC
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CONCURRED IN BY:	GAUTHIER J.A. DE MONTIGNY J.A.
DATED:	APRIL 20, 2017

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