Federal Court of Appeal Cour d'appel fédérale

Date: 20110408

Docket: A-151-11

Citation: 2011 FCA 130

Present: **NADON J.A.**

BETWEEN:

ELIZABETH MAY

Applicant

and

CBC/RADIO CANADA, CTV TELEVISION NETWORK LTD.,
GLOBAL TELEVISION NETWORK INC. and
TVA GROUP INC.

Respondents

Heard at Ottawa, Ontario, on April 5, 2011.

Order delivered at Ottawa, Ontario, on April 5, 2011.

Reasons for Order delivered at Ottawa, Ontario, on April 8, 2011.

REASONS FOR ORDER BY: NADON J.A.

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REASONS FOR ORDER

NADON J.A.

[1] On Tuesday, April 5, 2011, I heard the applicant's motion for an expedited hearing under subsection 8(1) of the *Federal Courts Rules*, SOR/98-106. At the end of the hearing, I informed the parties that I would dismiss the motion and that Reasons would follow on Friday, April 8, 2011. These are the reasons for which I concluded that the applicant's motion should be dismissed.

[2] The issue is whether I should grant the applicant's motion for an expedited hearing of her application for judicial review.

[3] Ms. Elizabeth May, the applicant and current leader of the Green Party, commenced an application for judicial review on March 31, 2011, of the Canadian Radio-television and Telecommunications Commission's (the "CRTC") *Broadcast Information Bulletin* 2011-218 (the "Bulletin"). The Bulletin was issued pursuant to section 347 of the *Canada Elections Act*, which requires the CRTC to issue, within 4 days of the election writ being dropped, a set of guidelines pertaining to the applicability of the *Broadcasting Act* and its *Regulations* to the conduct of broadcasters during a general election.

[4] The Bulletin refers to the CRTC's *1995 Guidelines* (the "Guidelines") to the effect that not all party leaders need be included in the leaders' debates, as long as equitable coverage of all parties is provided during the election campaign such that the public is reasonably informed on all issues from a variety of viewpoints.

[5] The applicant requests two alternative forms of relief in her Notice of Application. First, she asks for a *mandamus* order from this Court requiring the CRTC to issue clear criteria as to which party leaders must be included in a leaders' debate, and that these criteria should require the inclusion of any leader whose party secured more than 2% of the popular vote in the prior election. In the alternative, she asks for a *mandamus* order requiring the respondents, the Canadian Broadcasting Corporation (the "CBC") and its broadcasting partners in the Broadcaster Consortium – namely, CTV Television Network Ltd., Global Television Network Inc. and TVA Group Inc. – to allow the applicant to participate in the leaders' debates scheduled for April 12 and 14, 2011.

[6] In support of her application, the applicant argues that the Bulletin is *ultra vires* the CRTC's powers because it violates her right of effective participation in a fair electoral process under section 3 of the *Canadian Charter of Rights and Freedoms* [*Charter*].

[7] In my view, the motion must be dismissed and this for several reasons.

[8] First, the applicant could have sought relief earlier than she did – a mere 12 days before the first leaders' debate. It was repeatedly argued by the applicant that she had no choice but to seek urgent relief, since the administrative action affecting her rights, the CRTC Bulletin, was issued only after the election writ was dropped, pursuant to section 347 of the *Canada Elections Act*. In her view, if the application had been brought earlier, the respondents would likely have argued that it was premature. Thus, if the hearing is not expedited, it will become moot.

[9] In essence, the applicant argues that the Bulletin is a decision or order of a federal board within the meaning of subsection 18.1(2) of the *Federal Courts Act* and that judicial review is impossible until such a decision or order has been made.

[10] This argument, in my respectful view, is wrong. While it is true that, normally, judicial review applications before this Court seek a review of decisions of federal bodies, it is well established in the jurisprudence that subsection 18.1(1) permits an application for judicial review "by anyone directly affected by the matter in respect of which relief is sought". The word "matter"

embraces more than a mere decision or order of a federal body, but applies to anything in respect of which relief may be sought: *Krause v. Canada*, [1999] 2 F.C. 476 at 491 (F.C.A.). Ongoing policies that are unlawful or unconstitutional may be challenged at any time by way of an application for judicial review seeking, for instance, the remedy of a declaratory judgment: *Sweet v. Canada* (1999), 249 N.R. 17.

[11] Here, the impugned CRTC Bulletin contains a reference to the Guidelines, which contain the same impugned rule. In fact, the same impugned rule has applied to leaders' debates in federal elections since 1995. As such, it qualifies as an "ongoing policy" that could have been and can be challenged at any time by the applicant. Consequently, the applicant did not need to wait until the Bulletin for the 2011 general election was issued to bring her application.

[12] Given this fact, I find that the proceeding is not "really urgent", but rather that the applicant simply prefers the matter to be expedited: *Canada (Canadian Wheat Board) v. Canada (Attorney General)*, 2007 FC 39 at paragraph 13. The lack of necessary urgency weighs against granting this motion.

[13] Second, the respondents, the applicant and the public interest would all suffer significant prejudice if the application were expedited. In *Dragan v. Canada (Minister of Citizenship and Immigration*), 2003 FCA 129 (Rothstein J.A., as he then was, deciding alone) [*Dragan*], this Court decided that prejudice to the respondent is a highly relevant factor in deciding whether a proceeding should be expedited: paragraph 13.

[14] Here, expediting the hearing will no doubt prejudice the respondents. If the hearing were expedited, the respondents would have to prepare significant *Charter* arguments, cross-examine the applicant's expert and any other affiants, as well as prepare their own expert report; all by Monday, April 11, 2011, at the latest. Such work would, in the circumstances, be a significant burden on the respondents.

[15] Further, in *Dragan*, this Court held that the "timetable is extraordinarily short" when the applicant sought an expedited hearing and a decision in 19 days. Here, this reasoning is even more applicable, given the extensive expert evidence and *Charter* argumentation that would need to be produced and the fact that a hearing and a decision would have to occur within 6 days.

[16] I also believe that expediting the hearing could prejudice the applicant. The Supreme Court of Canada has "cautioned against deciding constitutional cases without an adequate evidentiary record": *British Columbia (Attorney General) v. Christie*, 2007 SCC 21 at paragraph 28. Here, given the undoubtedly complex *Charter* arguments that could be made, I do not think an adequate evidentiary (and argumentative) record could be produced within 6 days. The applicant could be prejudiced if her application, which raises issues of considerable importance, had to be decided quickly and without an adequate record.

[17] Further, I believe expediting the hearing would prejudice the public interest. In *RJR-MacDonald v. Canada*, [1994] 1 S.C.R. 311 [*RJR-MacDonald*], a unanimous Supreme Court said

that in an interlocutory *Charter* proceeding, the public interest may be a reason to grant or refuse the relief sought: at page 344. Here, the applicant is asking this Court to allow an expedited hearing so that the important electoral rights protected by section 3 of the *Charter*, and other difficult *Charter* issues that arise, namely freedom of speech and freedom of the press, can be argued and determined in less than a week. I cannot conclude that it is in the public interest to have such a speedy determination regarding such important issues.

[18] Third, the application contains a formal defect. The applicant is right to argue that pursuant to paragraph 303(1)*(a)* of the *Federal Courts Rules*, the CRTC need not be named as a respondent in this application. But the Attorney General of Canada should have been named as a respondent in this application. After all, as the respondents argue, section 1 of the *Charter* places the burden of justifying a *Charter* breach on the shoulders of the government. It is not for the Broadcast Consortium to argue that the CRTC Bulletin is a reasonable limit proscribed by law that can be demonstrably justified in a free and democratic society. That argument is the government's to make.

[19] Thus, despite the Department of Justice's apparent disinterest in this case, the Attorney General of Canada should be named as a respondent and should be given the opportunity to adduce evidence and present arguments. The fact that the Attorney General is not a respondent is another consideration weighing against the granting of the applicant's motion.

[20] Fourth, the application for *mandamus* faces significant legal hurdles. The general rule is that a motions judge should not engage in an extensive review of the merits of the case: *RJR-*

MacDonald at page 338. However, one exception to this general rule is when "the result of the interlocutory motion will in effect amount to a final determination of the action": *ibid*.

[21] This exception applies in part here. The applicant makes clear in her Notice of Application that she is seeking a *mandamus* order, either against the CRTC or the respondents, requiring that the applicant be included in the 2011 federal election leaders' debate. In either case, if her application is not decided by April 12, 2011, it is probably moot. Of course, this Court has the discretion to hear an application even if it is moot: *Borowski v. Canada*, [1989] 1 S.C.R. 342. Still, the Supreme Court has said in *RJR-MacDonald* that a motions judge must consider the merits of a case "when the rights which the applicant seeks to protect can be exercised immediately, or not at all": at page 338. This reasoning applies here because if the hearing is not expedited, then the applicant will not be able to participate in the 2011 debates.

[22] I should note that at the hearing of the motion, counsel for the applicant emphasized that the applicant's choice of remedies may not have been precise, given the extreme speed with which the application was brought. I take this statement to mean that the applicant may be willing to pursue the non-time sensitive aspect of her application, namely, her contention that the Bulletin violates her section 3 *Charter* rights. This aspect of her application will not be rendered moot by this decision.

[23] Still, insofar as the 2011 leaders' debates are concerned, the result of this interlocutory motion amounts to a final determination of her application and, pursuant to *RJR-MacDonald,* I should consider the application's merits.

[24] Interestingly, *RJR-MacDonald* cites *Trieger v. Canadian Broadcasting Corp.* (1988), 54 D.L.R. (4th) 143 (ONSC) [*Trieger*] as an example of a situation where the motions judge should take a look at the merits of the application or the action before him. *Trieger* pertains to an application in 1988 by the leader of the Green Party for an injunction or a mandatory order requiring the broadcasters to include him in the 1988 leaders' debate. Although Mr. Trieger's situation and that of the applicant are not identical, they are analogous.

[25] In disposing of the motion before him, Campbell J. of the Ontario High Court of Justice expressed considerable doubt as to the chances of success of Mr. Trieger's application for an injunction and, as a result, refused to grant the interim order sought. In particular, I wish to highlight Campbell J.'s remarks at paragraphs 27, 29, 32 to 34 and 36, regarding the possibility of success of Mr. Trieger's injunction:

> 27. The applicants say that their rights to freedom of expression are infringed by the broadcast policy and by the non-enforcement of the broadcast policy. It is by no means clear on this record that their freedom of expression requires a court to force the media to carry their views to the public. It is by no means clear on this record that any citizen's right to vote is impaired by the failure of this group to get the media attention which it sincerely and profoundly believes it requires. To make the orders sought would not promote free public discussion in political debate. It would interfere with free public discussion and political debate by forcing on unwilling participants a certain debate format.
>
> […]
>
> 29. …
> In this case the applicants, in furtherance of their own constitutional rights, seek to interfere with the free right of the public and the other political leaders to uncurtailed political debate. The applicants seek to interfere with the right of the public to hear the scheduled debate and to interfere with the right of the scheduled leaders to

debate whom they want and when they want. To grant the order sought would interfere with the freedom of political debate of this country, would interfere with the freely scheduled debates that are about to proceed on Monday and Tuesday and would interfere with the constitutional right of the media to decide what they think is newsworthy without having newsworthiness dictated to them by any court.

30. I will say little more about the merits of the constitutional arguments raised by the applicants. The applicants in my view have some very considerable legal hurdles to overcome at trial. As to free speech, the right to speak does not necessarily carry with it the right to make someone else listen or the right to make someone else carry one's own message to the public. That point was made by Thurlow C.J. of the Federal Court in *Re New Brunswick Broadcasting Co. Ltd. v. C.R.T.C.* (1984), 13 D.L.R. (4th) 77 at p. 89, 2 C.P.R. (3d) 433, [1984] 2 F.C. 410 (C.A.) [citation omitted]

[…]

32. There is enough doubt on these points to require a full trial to determine whether or not the right to free speech carries with it, in the circumstances of this case, the right to force the media to carry anyone's message to the public.

33. This is a matter that should be decided at trial, not on any summary application of this kind brought upon short notice. It is sufficient to say that whatever the eventual decision of any court on the merits of this case, the applicants' constitutional rights to force what they want from the broadcasters is far from clear.

34. The same considerations apply to the applicants' arguments based on freedom of association and the right to vote. While the applicant relies on these freedoms, the order sought would vary significantly and interfere with the freedom of association of those with whom a debate would be forced. It would, alternatively, interfere with the right of voters to hear and see a scheduled debate which is likely to be of great public interest. I refer also to the interference with the rights and freedoms of the broadcast media under the Charter.

[…]

36. In conclusion I have such significant doubts about the legal, factual and constitutional basis of the applicants' case that I doubt there is in law a serious issue to be tried in the sense of sufficient strength to overbear the rights of the defendants to a trial, to overbear their constitutional rights and possibly the constitutional rights of others. While the public policy issues are serious issues the applicant has not established a serious enough legal basis for its case that it should get the remedy it

> seeks with no trial and indeed with no proper opportunity for the defendants to meet the case alleged against them.

[26] In my view, Campbell J.'s remarks are entirely apposite in the present matter.

[27] In addition to the above remarks, I would add that this Court has recently reiterated the applicable test for receiving a writ of *mandamus* in *Arsenault v. Canada (Attorney General)*, 2009 FCA 300 at para.32 [*Arsenault*] – a test which has been approved of by the Supreme Court in *Apotex Inc. v. Canada (Attorney General)*, [1994] 3 S.C.R. 110. This test is quite stringent. In respect of the applicant's claim for a *mandamus* order forcing the CRTC to issue guidelines with a particular content, I note that *Arsenault* holds that "*mandamus* is unavailable to compel the exercise of a "fettered discretion" in a particular way": paragraph 32. In respect of the applicant's claim for a *mandamus* order forcing the broadcasters to allow her to participate in the debates, I note that *Arsenault* requires a "public legal duty to act": *ibid*. Given these tests, I have significant doubts concerning the applicant's ability to obtain the relief sought.

[28] For all of these reasons, I dismissed the applicant's motion to expedite the hearing of her application.

"M. Nadon"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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