Federal Court of Appeal | Cour d'appel fédérale

Date: 20240418

Docket: A-31-23

Citation: 2024 FCA 75

CORAM: **RENNIE J.A.**
GLEASON J.A.
LOCKE J.A.

BETWEEN:

DEMOCRACY WATCH and
DUFF CONACHER

Appellants

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Toronto, Ontario, on April 15, 2024.

Judgment delivered at Toronto, Ontario, on April 18, 2024.

REASONS FOR JUDGMENT OF THE COURT BY: GLEASON J.A.
CONCURRED IN BY: RENNIE J.A.
LOCKE J.A.

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REASONS FOR JUDGMENT

GLEASON J.A.

[1] The appellants appeal from the judgment of the Federal Court in *Democracy Watch v. Canada (Attorney General)*, 2023 FC 31 (*per* Southcott J.). In that judgment, the Federal Court dismissed the appellants' application challenging the process by which judges are appointed under section 96 and 101 of the *Constitution Act, 1867*. The appellants alleged that the appointment process is subject to political discretionary control, influence, and interference by

the federal Minister of Justice and Cabinet. The appellants argued before the Federal Court that such control, influence, and interference undermines the institutional independence of the judiciary in violation of sections 7, 11(d), and 24 of the *Canadian Charter of Rights and Freedoms* and section 96 of the *Constitution Act, 1867*.

[2] Before us, the appellants submit that the Federal Court made reviewable errors in both its evidentiary rulings, in which it found much of the appellants' evidence to be inadmissible, and in its treatment of the merits of their application.

[3] As concerns the evidentiary rulings, the Federal Court struck several paragraphs in the two affidavits of one of the appellants, Duff Conacher, as well as several exhibits to those affidavits. The Federal Court found that these paragraphs and exhibits were either inadmissible hearsay evidence or inadmissible opinion evidence that was not tendered by a qualified expert witness. The Federal Court also held that the opinion evidence that the appellants sought to admit was irrelevant to the issues before it since the Court was required to apply an objective test to ascertain whether judges and courts may be reasonably perceived as independent.

[4] Much of the evidence struck by the Federal Court consisted of newspaper articles, editorials, and opinion pieces published in newspapers or on newspapers' websites. In addition, the Federal Court struck a letter from the Canadian Judicial Council (the CJC), a 2016 report from the International Commission of Jurists of Canada (the ICJC), an article written by a legal academic, and submissions from the President of the Canadian Bar Association (the CBA) and other associations regarding the judicial appointment process. The Federal Court found that the

latter sort of submissions and the academic article, while inadmissible as opinion evidence, could nonetheless be referred to by the appellants as authorities in support of their submissions.

[5] Before us, the appellants submit that the Federal Court made palpable and overriding errors in finding some of the foregoing evidence inadmissible. More particularly, they submit that the Federal Court ought to have found that two of the newspaper articles and the letter from the CJC, which the Federal Court struck as inadmissible hearsay, met the twin criteria for admissibility of reliability and necessity, and that the Federal Court erred in concluding otherwise. They also submit that the Federal Court erred in finding some of the evidence to be inadmissible opinion evidence, arguing that, contrary to what the Federal Court found, some of the opinion pieces published in newspapers, the report from the ICJC, and the statement from the President of the CBA, that the Federal Court characterized as opinion evidence, should have been accepted as reliable and necessary factual evidence or as being similar to evidence that relied on in *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569, [1997] S.C.J. No. 85 (QL) [*Libman*], *Harper v. Canada (Attorney General)*, 2004 SCC 33, [2004] 1 S.C.R. 827 [*Harper*], and *R. v. Bryan*, 2007 SCC 12, [2007] 1 S.C.R. 527 [*Bryan*].

[6] I disagree and, with one minor exception that is not germane to the outcome of this appeal, see no error in any of the Federal Court's evidentiary rulings.

[7] Newspaper articles are generally inadmissible as hearsay and lack the necessary reliability to be admitted as evidence before a court: see e.g. *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2018 FCA 104, 292 A.C.W.S. (3d) 678 at para. 39; *Canada (Citizenship and*

Immigration) v. Canadian Council for Refugees, 2021 FCA 72, [2021] 3 F.C.R. 294 at para. 150, rev'd (on other grounds) 2023 SCC 17, 481 D.L.R. (4th) 581. There is no basis for setting aside the Federal Court's conclusion regarding the inadmissibility of the newspaper articles that the appellants allege should have been admitted.

[8] I agree with the appellants that the Federal Court mischaracterized Exhibit "F" to the first affidavit of Mr. Conacher as a newspaper article at paragraph 33 of its Reasons. In fact, as the Federal Court acknowledged at paragraph 32 of its Reasons, Exhibit "F" to the first affidavit of Mr. Conacher is a letter taken from the website of CJC. In that letter, the CJC reported, among other things, that a member of the judiciary acknowledged that she provided the names of potential judicial appointments to the office of the Minister of Justice in response to inquiries.

[9] Despite this mischaracterization, I agree with the Federal Court that Exhibit "F" to Mr. Conacher's first affidavit includes inadmissible hearsay. The fact that a member of the judiciary acknowledged providing names of potential future appointments, as reported in the CJC's letter, is hearsay. I see no reviewable error in the Federal Court's conclusion that the appellants failed to establish the necessity of tendering the letter to establish the foregoing fact in light of their failure to tender any evidence regarding their inability to obtain direct evidence of the facts reported in the letter. In any event, the fact that consultations about appointments are undertaken by the Minister of Justice is not and was not denied by the respondent. Other such consultations are referenced in Exhibits "C", "D" and "E" to Mr. Conacher's second affidavit that the Federal Court allowed to stand.

[10] Turning to the items struck as being opinion evidence that the appellants impugn, the opinion pieces that appeared in newspapers or on websites are not factual, and to the extent they set out factual statements, are inadmissible hearsay for the reasons already noted. The portions of the report from the ICJC that the appellants seek to rely on is hearsay to the extent it reports on undisclosed surveys completed by ICJC members. There was no evidence from the appellants to support the reliability or the necessity of the admission of these hearsay statements. The balance of the ICJC report either outlines the appointment process, which was already before the Federal Court through direct evidence from the respondent's witness, or provides the opinion of the ICJC as to how the judicial appointment process could be modified. As for the letter from the President of the CBA, it sets out the opinion of that Association and is not factual.

[11] It is not disputed that these opinions were not offered by an expert and were not subject to cross-examination. As noted in *Mattel, Inc. v. 3894207 Canada Inc.*, 2006 SCC 22, [2006] 1 S.C.R. 772 at paragraph 43, where relevant, evidence about surveys of public opinion must be presented through a duly-qualified expert, who can be cross-examined about matters such as the survey design and conduct. Moreover, the expressions of opinion in the newspaper opinion pieces, the ICJC report, and the letter from the President of the CBA are distinguishable from the surveys and reports referred to in the *Libman*, *Harper* and *Bryan* cases. As the respondent rightly notes, the reports in those cases were either introduced through experts or were of an entirely different nature, such as the Royal Commission report that was before the Court in *Bryan*. None of the foregoing cases involved a party seeking to introduce opinion evidence through a lay witness, similar to what the appellants sought to tender in this case.

[12] I accordingly see no error in the Federal Court's conclusion to disallow the opinion pieces, the ICJC Report, or the statement from the President of the CBA.

[13] What the Federal Court was left with, and what is now before this Court, amounts to pure speculation about possible inappropriate considerations that might come into play in the judicial appointment process. Indeed, before us, the appellants cast their submissions in the form of what "could happen" in that process and the potential for a governing party to use candidates' past political affiliations as an important criterion for appointment. However, there is no evidence this occurred. The mere fact that the Minister of Justice appoints some of the members of Judicial Advisory Committees or may consult with others, including with cabinet colleagues, about potential judicial appointments falls well short of establishing that the institutional independence of the judiciary is undermined in violation of sections 7, 11(d) and 24 of the *Canadian Charter of Rights and Freedoms* and section 96 of the *Constitution Act, 1867*.

[14] I therefore conclude that the Federal Court did not err in dismissing the appellants' application. In the circumstances, I decline to make any comment on whether, in an appropriate case, a court might reach a different conclusion if there were different admissible evidence before it about the functioning or composition of Judicial Advisory Committees or consultations undertaken in the appointment process. That is best left for another day. I would therefore decline to draw a bright–line conclusion that the only essential conditions for institutional judicial independence are security of tenure, security of remuneration, and administrative independence. Indeed, in *Valente v. The Queen*, 1985 CanLII 25 (SCC), [1985] 2 S.C.R. 673, the

Supreme Court did not firmly foreclose the possibility that judicial independence might one day be found to encompass additional elements.

[15] I would accordingly dismiss this appeal. Although the respondent has requested costs, I would make no costs award for the same reasons that the Federal Court declined to award them.

"Mary J.L. Gleason"
J.A.

"I agree.
Donald J. Rennie J.A."

"I agree.
George R. Locke J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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APPEARANCES:

Wade Poziomka Nick Papageorge	FOR THE APPELLANTS
Christine Mohr Andrea Bourke Ned Djordjevic	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Ross & McBride LLP Hamilton, Ontario	FOR THE APPELLANTS
Shalene Curtis-Micallef Deputy Attorney General of Canada	FOR THE RESPONDENT