

Federal Court



Cour fédérale

Date: 20151218

Docket: T-668-15

Citation: 2015 FC 1401

Ottawa, Ontario, December 18, 2015

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

BALRAJ SHOAN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

ORDER AND REASONS

[1] The Applicant moves to strike the affidavit filed by the Respondent in response to his judicial review application on the basis that the Respondent's deponent failed to attend his oral examination. The Respondent consents to the requested Order on the ground that the deponent was not - and will not - be able to attend an oral examination due to his medical condition. However, in a cross-motion, the Respondent seeks leave to file a replacement affidavit. The Applicant opposes the cross-motion. Both motions were brought under Rule 369 of the *Federal Court Rules*, SOR/98-106 (the Rules).

[2] The relevant facts are these. The Applicant is seeking judicial review of a decision from the Chairman of the Canadian Radio-television and Communications Commission (CRTC), Jean-Pierre Blais, dated April 7, 2015, accepting the recommendations made to him regarding administrative measures to be put in place to address the results of an investigation into a harassment complaint filed against the Applicant.

[3] The Applicant, a Commissioner of the CRTC, is primarily challenging the process that led to the impugned decision. On June 8, 2015, he swore and served an affidavit in support of his judicial review application. On August 27, 2015, the Respondent filed an affidavit in response sworn by the Secretary-General of the CRTC, John Traversy.

[4] After a number of unsuccessful attempts at securing a date for an oral examination of Mr. Traversy, the Applicant served the Respondent with a Direction to Attend requiring Mr. Traversy to attend an oral examination on October 23, 2015. The Respondent then advised that Mr. Traversy would not be able to attend as he was on medical leave. Mr. Traversy did not in fact attend the oral examination scheduled for October 23, 2015.

[5] On November 3, 2015, the Applicant moved to have Mr. Traversy's affidavit struck out from the Court record under Rule 97 of the Rules, on the basis of Mr. Traversy's failure to attend the oral examination. In the alternative, the Applicant sought an order that the Chairman of the CRTC, Mr. Blais, attend for cross-examination on behalf of the Respondent.

[6] As indicated previously, the Respondent reacted to the Applicant's motion by consenting to the removal of Mr. Traversy's affidavit from the Court record and by seeking leave to file the affidavit of Helen McIntosh, former Director General of Human Resources at the CRTC for the purpose of replacing the Traversy affidavit.

[7] According to subsection 18.4(1) of the *Federal Courts Act*, RSC, 1985, c F-7, judicial review proceedings are summary proceedings. They are procedurally governed by Part V of the Rules. Pursuant to Rules 306 and 307, each party's evidence consists of affidavit evidence and Rule 308 confers on each party the right to cross-examine the other side's deponent(s) within the stipulated timeline.

[8] The general rules governing cross-examination on affidavits are found at Rules 87 to 100. Rule 97, in particular, provides that where a person fails to attend an oral examination, as was the case here, the Court may either (i) order the person to attend or re-attend, as the case may be, at his or her own expense, (ii) strike all or part of the person's evidence, including an affidavit made by the person, or (iii) dismiss the proceeding or give judgment by default, as the case may be.

[9] The authority granted by Rule 97 is discretionary (*LS Entertainment Group Inc v Formosa Video (Canada) Ltd*, 2005 FC 1347, at para 49, 281 FTR 99) but as a general rule, affidavits will be struck if the deponent does not appear for cross-examination and replacement affidavits will not be allowed unless there are justifiable grounds (*Nedship Bank NV v Zoodotis (The)*, 184 FTR 308 at para 2, 98 ACWS 3(d) 279). In *Bayer AG v Apotex Inc* 154 FTR 229, 82

ACWS (3d) 566, the Court held, at paragraph 11 of the decision, that in considering procedural disputes such as this one, each case turns on its own facts and the Court must have regard to fairness and the expedition of proceedings. This is consistent with the Rules' interpretative guiding principle found at Rule 3, which states that the Rules must be interpreted and applied "so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits."

[10] In support of its cross-motion, the Respondent claims that allowing the McIntosh affidavit would cause no prejudice to the Applicant whereas refusing it would be seriously prejudicial to the Respondent and would deny the Application Judge a full evidentiary record upon which to determine the issues raised by the Applicant's judicial review application. In particular, the Respondent contends that the McIntosh affidavit (i) confirms and supports the Traversy affidavit, a brief and straight-forward affidavit tendered primarily for the purposes of providing evidence on the selection process that led to the appointment of the harassment investigator, (ii) raises no new issues and (iii) would not cause any significant delay in the proceedings as it can be served immediately upon leave being granted, and that cross-examination can be held within a reasonable period of time thereafter. The Respondent further contends that if leave is denied, there will be a lack of evidence in response to the Applicant's judicial review application, which can hardly be justified by the simple unavailability of its original affiant for cross-examination in the circumstances of this case.

[11] The Respondent submits that these are ample grounds justifying an exception to the general rule against replacement affidavits.

[12] The Applicant claims that the cross-motion ought to be dismissed since:

- a. there are no justifiable grounds for Mr. Traversy's refusal to attend cross-examination as no evidence was provided in support of the contention that Mr. Traversy is too ill for examination;
- b. even if there were, leave to file the McIntosh affidavit should be denied as (i) he has already been prejudiced by the delay caused by Mr. Traversy's refusal to attend cross-examination and would continue to suffer prejudice by the further delay resulting from the filing of the McIntosh affidavit; and (ii) he would be prejudiced by said affidavit given that Ms. McIntosh has no knowledge of anything whatsoever that occurred after the selection of the investigator and thus cannot speak at all to the majority of the issues that form the basis of the present judicial review application.

[13] I do not agree with the Applicant.

[14] First, I find that the failure to provide evidence of Mr. Traversy's condition is not fatal to the Respondent's cross-motion. The issue here is not whether the Traversy affidavit should remain on file despite the fact that Mr. Traversy failed to attend cross-examination since the Respondent consents to the removal of that affidavit from the record. In other words, the Respondent is not seeking an exception to the general rule that an affidavit will be struck if the deponent does not appear for cross-examination. Although it would have been preferable to find

such evidence on record, the fact that none was submitted is not, in and of itself, sufficient to dismiss the cross-motion in the particular circumstances of this case.

[15] Second, the end-result of the Applicant's opposition to the cross-motion is to deprive the Respondent of any possibility to file evidence in response to the judicial review application. This seems to me to be a too drastic and unfair outcome given the nature of the proceedings - a judicial review of a decision taken in the context of the implementation of government and CRTC's policies on harassment prevention and resolution in the workplace - and the nature of the evidence at stake, which is institutional in nature. Mr. Traversy is an institutional witness, not a party to the present proceedings. So is Ms. McIntosh. Again, the dispute about the replacement of the Traversy affidavit by the McIntosh affidavit is a procedural dispute which must be decided having regard to the fairness and the expedition of the proceedings.

[16] It is a fact that this dispute has delayed the proceedings and could have a further delaying effect if the cross-motion is granted but this is certainly not to a point where it could reasonably be said that the position of the Applicant in these proceedings is prejudiced or jeopardized. The proceedings were initiated about six months ago, the Respondent has indicated that it is in a position to serve the McIntosh affidavit immediately upon the cross-motion being granted and cross-examination of Ms McIntosh could be held within a reasonable period of time thereafter. I fail to see how this schedule of events could be prejudicial to the Applicant.

[17] I am not persuaded either that the Applicant would be prejudiced by the McIntosh affidavit on the basis that Ms. McIntosh has no knowledge of anything whatsoever that occurred

after the selection of the investigator and thus cannot speak at all to the majority of the issues that form the basis of the present judicial review proceedings. As indicated previously, the 7-page Traversy affidavit was tendered primarily for the purposes of providing evidence on the selection of the harassment investigator. The McIntosh affidavit is consistent with the Traversy affidavit in this respect. Ms. McIntosh, in her capacity of Director General of the CRTC's Human Resources Department provided advice to Mr. Traversy on this very issue and was directly involved in the selection process. Although Mr. Traversy, according to his affidavit, had personal interactions with the Applicant and the complainant and had a greater involvement in the matters in issue in this judicial review application, Ms. McIntosh appears to be as knowledgeable and well-versed regarding the selection process and, in this respect, a proper substitute to Mr. Traversy. The McIntosh affidavit raises, in this regard, no new issues.

[18] The fact that the McIntosh affidavit does not cover facts forming the basis of the Applicant's judicial review application, as does for that matter the Traversy affidavit, is of no avail to the Applicant. As the Respondent correctly points out, it is entitled to choose which facts and evidence it will file and rely on in response to the application. As such, the Respondent was - and is still - not required to provide evidence on the majority, or even any, of the facts that form the basis of the said application (*Merck & Frosst Canada v Canada*, [1994] FCJ No. 662 at para 26 (FCA); *Tajgardoon v Canada*, [2000] FCJ No. 1450, at para 12 (FCTD)). In other words, the Applicant is expected to make his own case on his own evidence. Cross-examination on affidavit, contrary to the discovery process applicable in proceedings brought by an action, is limited in scope. It does not allow the Applicant to make his case beyond the relevant matters arising from the affidavit itself (*Merck & Frosst Canada*, above at para 26). At the end of the

day, it will be up to the Application judge to determine whether the Respondent's evidence, in light of the entire record, support its contention that the Applicant's judicial review application should fail.

[19] In such context, I find that the filing of the McIntosh affidavit would not be prejudicial to the Applicant.

[20] Both the motion and the cross-motion are therefore granted. The McIntosh affidavit shall be served by December 22, 2015, and Ms. McIntosh's cross-examination shall be completed within 20 days of service of the affidavit or within such timeline agreed upon by the parties.

[21] The Applicant is entitled to his costs on his motion to strike the Traversy's affidavit in any event of the cause, including the costs of preparing and attending the cross-examination scheduled for October 23, 2015. The Applicant's request that the Respondent be ordered to pay for any subsequent cross-examination is denied.

[22] The Respondent is not seeking costs on the cross-motion. None will be awarded.

ORDER

THIS COURT ORDERS that:

1. The motion to have the affidavit of Mr. John Traversy, sworn on August 27, 2015, struck from the Court record is granted, with costs to the Applicant, including the costs of preparing and attending the cross-examination scheduled for October 23, 2015;
2. The cross-motion for leave to serve the affidavit of Ms. Helen McIntosh, sworn on November 12, 2015, is granted, without costs;
3. The cross-examination on Ms. McIntosh's affidavit shall be completed within 20 days of service of said affidavit or within such timeline agreed upon by the parties;
4. Unless the Court orders otherwise, any further step in the present proceedings shall be governed by the timelines provided for under part 5 of the *Federal Courts Rules*.

"René LeBlanc"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-668-15

STYLE OF CAUSE: BALRAJ SHOAN v ATTORNEY GENERAL OF CANADA

MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES*

ORDER AND REASONS: LEBLANC J.

DATED: DECEMBER 18, 2015

WRITTEN REPRESENTATIONS BY:

Mr. Craig J. Stehr FOR THE APPLICANT

Ms. Kathryn Hucal and Ms. Susan Keenan FOR THE RESPONDENT

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