Federal Court  Cour fédérale

**Date: 20160704**

**Docket: T-1526-14**

**Citation: 2016 FC 745**

**Montréal, Quebec, July 4, 2016**

**PRESENT: The Honourable Mr. Justice Locke**

**BETWEEN:**

**BOULERICE ET AL.**

**Applicants**

**and**

**ATTORNEY GENERAL OF CANADA,**
**BOARD OF INTERNAL ECONOMY,**
**SPEAKER OF THE HOUSE OF COMMONS**

**Respondents**

## ORDER AND REASONS

## I. Background

[1] This decision concerns a motion in appeal of a prothonotary's decision. The prothonotary's decision was made in the context of applications by Members of Parliament of the New Democratic Party (NDP) for judicial review of several decisions of the Board of Internal Economy of the House of Commons (BoIE) concerning the propriety of certain printing

and mailing costs incurred by the NDP. The respondents in the underlying applications are the Attorney General of Canada, the BoIE, and the Speaker of the House of Commons. For greater clarity, the applicants are referred to hereinafter as Boulerice *et al.*, and the respondents are referred to as the Board *et al.*

[2] In the context of the underlying applications, which have been joined together, the Board *et al.* made a motion to strike the applications on the ground that this Court lacks jurisdiction to hear and determine them because it would be interfering with the privileges and immunities held by the House of Commons. This motion is referred to hereinafter as the Jurisdiction Motion and is set to be heard over two days in January 2017.

[3] In the context of the Jurisdiction Motion, Boulerice *et al.* filed an affidavit of Maxime St-Hilaire, a professor of law and alleged expert in comparative constitutional law. The St-Hilaire affidavit comments on the issue of parliamentary privilege, including its history in Canada and how it is dealt with in other countries. In response to the filing of the St-Hilaire affidavit, the Board *et al.* made a motion to strike it on the ground that it attempts to introduce inadmissible evidence, namely expert evidence directed to the state of the law in Canada. The prothonotary dismissed that motion. The Board *et al.* now appeals that dismissal.

## II. The Prothonotary's Decision

[4] In his analysis, the prothonotary noted that the motion before him was an interlocutory motion within another interlocutory motion in the context of a judicial review application which should be heard and determined without delay and in a summary way: s 18.4(1) of the *Federal*

*Courts Act*, RSC 1985, c F-7. The prothonotary cited *David Bull Laboratories (Canada) Inc v Pharmacia Inc* (1994), 176 NR 48 (FCA), for the principle that a motion to dismiss a judicial review application should be entertained only in exceptional cases. The prothonotary then cited *Armstrong v Canada (Attorney General)*, 2005 FC 1013 [*Armstrong*], for the principle that a motion to strike an affidavit in the context of a judicial review application should be allowed only rarely, when it is in the interest of justice to do so, where a party will be materially prejudiced, or where not striking would impair the orderly hearing of the application.

[5] The prothonotary was not satisfied that the required exceptional circumstances had been established. Specifically, the prothonotary found that the Board *et al.* had failed to establish that they would suffer material prejudice if the St-Hilaire affidavit was not dismissed.

[6] The prothonotary went on to cite a passage from *Armstrong* which quoted from *Sawridge Band v Canada*, [2000] FCJ No 192 (QL), to the effect that the Court should resist striking an irregular affidavit even where "virtually every paragraph of the affidavit is proper argument and can properly be made by counsel."

[7] The prothonotary concluded by finding that, even if he was wrong in refusing to strike the St-Hilaire affidavit, the motion to strike was not made in a timely fashion as required by Rule 58(2) of the *Federal Courts Rules*, SOR/98-106 [Rules]. It therefore would have been dismissed on this ground in any case.

## III. Standard of Review

[8] The parties are agreed on the standard of review that is applicable to the present appeal. I must be satisfied that the prothonotary was clearly wrong, in the sense that his exercise of discretion was based on a wrong principle or a misapprehension of the facts: *Merck & Co Inc v Apotex Inc*, 2003 FCA 488 at para 19.

## IV. Analysis

[9] The Board *et al.* do not appear to dispute the principle that an affidavit should be struck only in exceptional circumstances. They cite *Gravel v Telus Communications Inc*, 2011 FCA 14 [*Gravel*], which, at para 5, alludes to this principle. As stated by the Federal Court of Appeal later in the same paragraph, "[t]he reason is quite simple: applications for judicial review must quickly proceed on the merits, and the procedural impacts of the nature of a motion to strike are to delay unduly and, more often than not, needlessly, a decision on the merits." This concern is doubled in the present case in which the motion to strike concerns not the application on the merits, but rather the Jurisdiction Motion.

[10] The Board *et al.* argue that the prothonotary erred in applying *Armstrong* without recognizing higher and more recent authority from the Federal Court of Appeal: *Gravel*, *Duyvenbode v Canada (Attorney General)*, 2009 FCA 120, *Canada (Attorney General) v Quadrini*, 2010 FCA 47 at para 18. However, I am not persuaded that any of these decisions modified the effect of *Armstrong*. In fact, as suggested in the preceding paragraph, *Gravel* seems

consistent with *Armstrong* on the test for striking an affidavit (or portions thereof) in the context of an application.

[11] The Board *et al.* also argue that the prothonotary proceeded on a wrong principle by failing to note Rule 81 of the Rules, which provides that, generally speaking, affidavits are to be confined to facts within the deponent's personal knowledge. In my view, this rule does not specifically address the admissibility of expert evidence concerning a disputed legal issue. The prothonotary did not err in this respect.

[12] The Board *et al.* raise a legitimate concern that the refusal to strike the St-Hilaire affidavit will set a precedent that could encourage parties in litigation to buttress their legal arguments with affidavits of experts on the legal issues in dispute. I recognize that one result of the prothonotary's decision is that the Board *et al.* will be forced to consider preparing and filing its own expert affidavit and cross-examining Mr. St-Hilaire. One might expect that the new expert would also be cross-examined. This could result in a parallel process in which the legal issues are argued as a battle of the experts. The Board *et al.* argue that all this will add complexity to the Jurisdiction Motion, and possibly delay both that motion and the hearing of the merits of the judicial review application, if necessary. The Board *et al.* assert that this result would be inconsistent with Rule 3 of the Rules, which provides that the Rules "should be interpreted and applied so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits." The Board *et al.* argue that the prothonotary erred by failing to take all this into account. However, the prothonotary did consider the potential for additional steps in

relation to the Jurisdiction Motion: see paragraph 23. Accordingly, I am not persuaded that the prothonotary proceeded on a wrong principle in this respect.

[13] The Board *et al.* note that there is an important difference in the potential effect on the Court of an expert report on a legal issue versus a lay affiant who simply includes some argument in an affidavit. The latter will likely have little influence on the Court, while the former may be given some weight. Indeed, this is presumably the reason that such an affidavit would be offered in the first place. However, in my view, this is insufficient reason to conclude that the prothonotary erred. The Court hearing the Jurisdiction Motion will be able to hear argument on the concern of the Board *et al.* in this respect, and ignore any evidence it concludes is inadmissible.

[14] In addition to asserting that the prothonotary erred by exercising his discretion based on a wrong principle, the Board *et al.* also argue that the prothonotary erred by misapprehending the facts. Specifically, the Board *et al.* point to the prothonotary's finding that they had not established that they will suffer a material prejudice or that the progress of this matter to a hearing on the merits would be significantly delayed or harmed if the St-Hilaire affidavit is not struck. The Board *et al.* argue that the prejudice was self-evident; no evidence was necessary. In my view, this is another issue on which it was open to the prothonotary to find that any prejudice that would be suffered by the Board *et al.* was not material.

[15] The Board *et al.* assert that, if the facts in this case are not sufficiently exceptional to justify striking the St-Hilaire affidavit, then no case would satisfy the exceptional circumstances

test. In my view, that was a consideration for the prothonotary, which I can review only in the event of a clear error, which I do not see in this case.

[16] Because of my conclusion that the prothonotary did not err in his decision not to strike the St-Hilaire affidavit, it is not necessary for me to consider whether the prothonotary erred in his alternative conclusion that the motion to strike the St-Hilaire affidavit should be dismissed on the basis that it was not made in a timely fashion.

## ORDER

**THIS COURT ORDERS that** the present motion is dismissed with costs.

"George R. Locke"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | T-1526-14 |
| **STYLE OF CAUSE:** | BOULERICE ET AL. v ATTORNEY GENERAL OF CANADA, BOARD OF INTERNAL ECONOMY, SPEAKER OF THE HOUSE OF COMMONS |
| **PLACE OF HEARING:** | OTTAWA, ONTARIO |
| **DATE OF HEARING:** | JUNE 29, 2016 |
| **ORDER AND REASONS:** | LOCKE J. |
| **DATED:** | JULY 4, 2016 |

**APPEARANCES:**

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