Federal Court  Cour fédérale

Date: 20220610

Docket: T-1839-21

Citation: 2022 FC 871

Ottawa, Ontario, June 10, 2022

PRESENT: Prothonotary Benoit M. Duchesne

BETWEEN:

KARSON MACKIE

Applicant

and

VIA RAIL CANADA INC.

Respondent

REASONS AND ORDER

[1] The Court is seized with two motions in writing by the Respondent Via Rail Canada Inc. ["VIA Rail"], both served and filed on May 3, 2022, and two cross-motions by the Applicant Mr. Mackie to strike and dismiss VIA Rail's motions. These motions are made in the larger context of an Application for Judicial Review commenced by Mr. Mackie for the review of a decision made by the Canadian Human Rights Commission [the "CHRC"] in connection with a complaint he made against VIA Rail.

[2] VIA Rail's first motion is a motion in writing pursuant to Rules 312(c) and 369 of the *Federal Courts Rules,* SOR/98-106 [the "Rules"] for leave to file a supplementary record. The supplementary record is to include six (6) exhibits that had been filed as attachments to VIA Rail's March 24, 2020 written submissions filed with the CHRC in connection with Mr. Mackie's complaint. VIA Rail's second motion is for an order extending the time within which it may serve and file its responding record pursuant to Rules 8 and 310 of the *Rules* by 30 days.

[3] Mr. Mackie has filed a cross-motion to strike and dismiss each of VIA Rail's motions, but has not otherwise served or filed responding records to VIA Rail's motions. VIA Rail did not serve or file any responding record to Mr. Mackie's motions.

[4] The Court observes at the outset that there was no need for the parties to file four (4) separate motions in connection with the relief sought by VIA Rail. VIA Rail's motions should have been brought as a single motion in which two complementary and interrelated orders were sought. Fractioning the records to present two separate motions when a single motion based on the same evidence would have sufficed is neither proportionate, expeditious nor appropriate.

[5] A usual and proportionate response to opposing a motion is to follow the *Rules* and serve and file a responding motion record seeking the dismissal of the motion. A motion to strike a Notice of Motion or an entire motion is generally not an appropriate response to a motion. Generally speaking, a successful motion to strike requires that the moving party meet the very high threshold of demonstrating that it is plain and obvious that the motion that is sought to be struck has no chance of success on its face, whereas responding to a motion permits the

responding party to argue that it is more likely than not that the moving party has failed to discharge its burden of evidence and persuasion on the opposed motion. Although each motion turns on its own facts, it is difficult to conceive of situations where procedural motions such as the ones at issue here are legitimately and proportionately met with independent motions to strike rather than a responding record.

[6] Given the absence of proportionality in how the parties have proceeded on these motions, I shall consider the four motions as a single consolidated and opposed motion by applying the principles of Rule 3 of the *Rules.* Delivering four separate Orders as the parties' approach would suggest would be a waste of the Court's resources.

[7] VIA Rail's motions are granted and Mr. Mackie's motions to strike or dismiss VIA Rail's motions are dismissed for the reasons that follow.

I. **BACKGROUND**

[8] Mr. Mackie seeks the judicial review of an October 29, 2021 decision made by the CHRC in its complaint file 20191605. The CHRC decided to not deal with Mr. Mackie's complaint because it determined that there was a grievance process available to him to deal with the issues he had raised in his complaint.

[9] Mr. Mackie commenced his Application for Judicial Review by way of Notice of Application issued on December 3, 2021.

[10] Mr. Mackie served and filed his applicant's affidavits and documentary exhibit materials pursuant to Rule 306 by email on March 1, 2022. The materials filed by the parties in support of their positions on these motions suggest that VIA Rail did not serve or file any Rule 307 affidavit or documentary exhibits in response to Mr. Mackie's Rule 306 materials.

[11] Mr. Mackie's application record followed and was served upon VIA Rail by email on April 20, 2022. The application record contains the Rule 318 certified tribunal record [the "CTR"] transmitted by the CHRC on January 12, 2022, as is permitted pursuant to Rule 309(2)(e.1) of the *Rules.*

[12] VIA Rail reviewed Mr. Mackie's application record and the CTR he had included within it on April 21, 2022. VIA Rail observed at that time that its March 24, 2020, written submissions to the CHRC were included in the reproduced CTR, but that the six exhibits that it had originally filed as part of and in support of its written submissions were not included. These six exhibits are described as exhibits VIA-1 to VIA-6, inclusively, that include a collective bargaining agreement, a return to work agreement, exchanges of correspondence and a Memorandum of Agreement dated May 20, 2004. VIA Rail's evidence on these motions is that the six exhibits that were omitted from the CTR were in the CHRC's possession and before it when it made the decision that Mr. Mackie seeks to have reviewed. Accordingly, VIA Rail argues, they should be in the record before the reviewing court.

[13] On May 3, 2022, 13 days after being served with Mr. Mackie's application record and within the time to deliver its responding record, VIA Rail filed its two motions herein.

[14] VIA Rail's motions are in essence motions for orders permitting it to include in its responding record those exhibits that were omitted from but should have been included in and as part of its written submissions transmitted in the CTR, and for a consequent order granting it time to serve and file its responding record after the matter of the omitted CTR exhibits is determined by this Court.

[15] The Federal Court of Appeal's decision in *Canadian Copyright Licensing Agency (Access Copyright) v. Alberta*, 2015 FCA 268 (CanLII), [2016] 3 FCR 1 is instructive in resolving these motions. In *Access Copyright*, the Court was seized with the issue of how one brings the materials that were before the administrative decision-maker before the reviewing court. Justice Stratas wrote as follows:

> [15] Rule 317 can fulfil another purpose that is less lofty but still important. Parties before the administrative decision-maker will often have in their possession all of the material the administrative decision-maker considered in making its decision. But not always. And sometimes parties may be unsure whether they do. Sometimes they wish to confirm exactly what the administrative decision-maker actually considered in making its decision. Rule 317 of the *Federal Courts Rules* provides a means by which parties can achieve those ends.
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> [16] The administrative decision-maker responds to a Rule 317 request by following Rule 318. Under that Rule, it delivers to the requester the material that was before the decision-maker (and that the applicant does not have in its possession) at the time the decision at issue was made. Under Rule 318, the administrative decision-maker can also object to disclosure, for example on the basis of public interest privilege or legal professional privilege: see *Slansky*, above at paragraphs 277-283 on the issue of how to litigate a Rule 318 objection involving confidential material.
>
> [17] Materials produced by the administrative decision-maker in response to a Rule 317 request can simply be placed in the applicant's record or the respondent's record: see Rule 309(2)(*e.1*) and Rule 310(2)(*c.1*). When that is done, the material is in the

evidentiary record before the reviewing court and may be used by the parties and the court. No affidavit is necessary.

[18] For completeness, I should note two other things. First, the portions of any transcript of oral evidence before a tribunal may also be filed in the applicant's or respondent's record without an affidavit: see Rule 309(2)(*f*) and Rule 310(2)(*d*). Second, Rule 318 provides that in addition to delivering the material to the party that made the request under Rule 317, the administrative decision-maker must also "transmit" a certified copy of the material to the reviewing court. Note that the Rule uses the word "transmit," not "file." The material is not formally before the reviewing court in the sense of being a part of the reviewing court's evidentiary record: *Canada (Attorney General) v. Lacey*, 2008 FCA 242. Instead, the Registry is given the material in order to authenticate that materials contained in an application record under Rule 309(2)(*e.1*) or Rule 310(2)(*c.1*) are indeed those supplied by the administrative decision-maker: *Canada (Attorney General) v. Canadian North Inc.*, 2007 FCA 42 at paragraph 11.

[19] I turn now to material that the party has in its possession and that was before the administrative decision-maker at the time it made the decision in issue. This material is potentially relevant to the judicial review, but is not produced by a decision-maker in response to a Rule 317 request. Rules 309 and 310 do not permit this material to be filed into the applicant's record or the respondent's record. Thus, the parties must take affirmative steps to place that material before the reviewing court.

[20] Here, we must look at Rules 306-310. But before doing so, we must appreciate that those rules sit alongside a fundamental general principle: facts must be proven by admissible evidence. There are exceptions to this, such as the availability of judicial notice, the presence of legislative provisions speaking to the issue, and an agreed statement of facts (including an agreement that certain documents shall be admissible). Putting those exceptions aside, documents by themselves, not introduced by an affidavit authenticating them, are not admissible evidence. Documents simply stuffed into an application record are not admissible.

[21] Under Rule 306 and Rule 307, applicants and respondents, respectively, can serve upon each other an affidavit that appends the material. Parenthetically, for completeness, I note that material that was *not* before the administrative decision-maker can *potentially* be placed before the reviewing court by way of affidavit. However, there are restrictions and admissibility requirements unique to judicial review proceedings that must be

> obeyed: see, *e.g.*, *Bernard v. Professional Institute of the Public Service of Canada*, 2015 FCA 263 and cases referred to therein.
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> [22] Under Rules 306 and 307, parties need not include all of the material that was before the administrative decision-maker. To save costs and to simplify the record, they need only include the material necessary for their application. So under Rule 306, an applicant may serve an affidavit appending only some of the material. In response, a respondent might regard other parts of the material as being necessary. That respondent may use Rule 307 to serve an affidavit appending additional material. See generally *Canadian North*, above at paragraphs 3-5.
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> [23] Cross-examinations may be conducted on the affidavits: Rule 308. Why might cross-examinations be necessary? Sometimes there is uncertainty about whether certain material appended to the affidavits was in fact before the administrative decision-maker at the time it made its decision. The parties are entitled to test each other's positions on that. Down the road, a reviewing court might have to determine the content of the evidentiary record before proceeding further, and in some cases it may be assisted by the cross-examinations.

[16] In *Access Copyright*, *supra*, at paras. 25 and 26, the Federal Court of Appeal also held that documents that a party says were before the administrative decision-maker at the time it made its decision but were omitted from a CTR could not simply be included in a party's record pursuant to Rules 309 or 310. The documents had to be introduced by way of affidavit that explains that the documents at issue were before the administrative decision-maker when making the decision under review.

[17] I highlight this point because VIA Rail's motion seeks leave to simply file the six exhibits it has identified as being omitted from its written submissions contained in the CTR in a supplementary record without more. The relief sought assumes that there need not be some evidentiary support for the introduction of the omitted exhibits. The underlying assumption in VIA Rail's motion for an order pursuant to Rule 312(c) is incorrect as *Access Copyright*, above,

makes it clear. VIA Rail's other assumption as reflected in the wording contained in its notices of motion, affidavits and written representations was that the CTR was "filed" with the Court, thereby making its content part of the court's evidentiary record. The clear wording of Rule 318 and that the CTR is "transmitted" to the Court rather than "filed" with the Court is indicative that the CTR that is transmitted to the Court does not form part of the evidence filed with the Court until and unless the CTR's content is included in the parties' application records pursuant to Rule 309(2)(e.1) or 310(2)(c.1), as the case may be (see *Access Copyright*, *supra*, and, more recently, *Rémillard c. Canada (Revenu National)*, 2020 CF 1061; affirmed 2022 CAF 63). VIA Rail's motions could have been introduced pursuant to Rule 312(a) or, perhaps more appropriately given the apparent absence of Rule 307 responding affidavit material being served and filed in a timely manner, for an extension of time to deliver responding affidavit material pursuant to Rules 8 and 307. Regardless, VIA Rail's request for leave pursuant to Rule 312 will be considered.

[18] VIA Rail must satisfy two preliminary requirements for it to be successful on a motion for leave to file a supplementary record or additional evidence pursuant to Rule 312 (*Forest Ethics Advocacy Association v. National Energy Board*, 2014 FCA 88 (CanLII), at para. 4):

> (1) The evidence to be included with the Court's leave must be admissible on the application for judicial review; and,
>
> (2) The evidence must be relevant to an issue that is properly before the reviewing court.

[19] These two requirements are satisfied. The evidence in the record is that the six exhibits at issue were part of the materials before the CHRC at the time of the decision under review but were omitted from the CTR prepared and transmitted by the CHRC. The exhibits are therefore admissible on the application for judicial review if properly tendered. Their inclusion of a collective bargaining agreement and related documents also establish that they are relevant to the issue of whether there was an adequate alternative remedy available to Mr. Mackie through a grievance process, as the CHRC decision's reliance on subsection 41(1) of the *Canadian Human Rights Act*, RSC 1985, c H-6, would suggest was the case.

[20] Satisfaction of the two requirements identified above does not resolve the matter. VIA Rail must also convince the Court that it should exercise its discretion in favour of granting leave pursuant to Rule 312. The Court exercises its discretion on the basis of the evidence before it and on proper principles (*Forest Ethics Advocacy Association v. National Energy Board*, 2014 FCA 88 (CanLII), at para. 6). In exercising its Rule 312 discretion the Court's overriding consideration is whether the interests of justice will be served by permitting VIA Rail to file the six exhibits for consideration by the reviewing court. Generally, the following questions should be taken into account in considering how the Rule 312 discretion should be exercised (*Holy Alpha and Omega Church of Toronto v. Canada (Attorney General)*, 2009 FCA 101 (CanLII), at para. 2):

> 1. Was the evidence sought to be adduced available when the party filed its affidavits under Rule 306 or 308, as the case may be, or could it have been available with the exercise of due diligence?
>
> 2. Will the evidence assist the Court, in the sense that it is relevant to an issue to be determined and sufficiently probative that it could affect the result?

> 3. Will the evidence cause substantial or serious prejudice to the other party?

[21] Mr. Mackie seeks to strike or resist VIA Rail's motions on the basis that, among others, VIA Rail had the exhibits at issue at the time it had to deliver its affidavit and documentary material pursuant to Rule 307 prior to his service and filing of his application record, and they should have taken the necessary steps to file their exhibits then rather than now, after the time to do so has expired. There is much merit and common sense to Mr. Mackie's argument. His argument that VIA Rail ought to have been more proactive in assembling its materials in response to his Application for Judicial Review is compelling, but it does not in my view overcome the evidence in the record on these motions that support that leave ought to be granted for the six exhibits to be filed. It also does not prevail in light of the well established law that the record that was before the administrative decision-maker should be before the reviewing court to identify how and why the decision-maker's finding is defensible, or not, with respect to the facts and the law (*Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, at paras. 36-38; *Canada (Transport) v. Canadian Union of Public Employees*, 2017 FCA 164, at para. 32).

[22] There is no evidence in the record on these motions that VIA Rail had actual knowledge of the content of the CTR until such time as it received the application record from Mr. Mackie on April 20, 2022. The evidence in the record is that VIA Rail acted on April 21, 2022, to seek leave to include the six exhibits that had been omitted from the CTR. April 21, 2022 appears to be the earliest date on which VIA Rail had actual knowledge that the CTR as reproduced in Mr. Mackie's application record was incomplete due to its omission of the six exhibits.

[23] The exhibits omitted from the CTR were available to VIA Rail during the time it had to deliver its Rule 307 affidavits and documentary material. The exhibits could have been tendered as evidence at that time given their importance to the proceeding. The omitted exhibits are clearly relevant to the issues before the Court as they complete the March 24, 2020 written submissions that were before the CHRC at the time of its decision and produce the collective bargaining agreement that is alleged to provide the grievance procedure relied upon by the CHRC. They should be before the reviewing court when it considers the merits of Mr. Mackie's Application for Judicial Review. These exhibits have been in Mr. Mackie's possession since March 24, 2020 and their inclusion will not cause him prejudice beyond a not unreasonable delay in the completion of the responding record and of the next steps in this proceeding leading to the argument of the Application.

[24] It is my view that the interests of justice will be served by granting leave pursuant to Rule 312 to permit VIA Rail to adduce the six exhibits that had been attached to its March 24, 2020 submissions to the CHRC but were omitted from the CTR.

[25] Turning to VIA Rail's second motion, this one for an extension of time to serve and file its responding record, I find that an extension of time will be required due to leave being granted on the Rule 312 motion. Independently of the results of the Rule 312 motion, VIA Rail's motion materials filed in support of its motions explain and establish: (a) its continuing intent to respond in the application, (b) that the response it intends to argue has some merit based on the CHRC's reliance on the grievance procedure that has been omitted from the CTR but was part of the submissions before the CHRC at the time of its decision, (c) that Mr. Mackie suffers no prejudice

from an extension of time to permit VIA Rail to deliver its responding record including the six exhibits omitted form the CTR, and (d) the reasons for the extension of time sought (*Canada (Attorney General) v. Hennelly*, 1999 CanLII 8190 (FCA), at para. 3).

[26] Accordingly, the time for VIA Rail to deliver its Rule 310 responding record will be extended.

[27] Considering Justice Stratas' explanation in *Copyright Access*, *supra*, the six omitted exhibits cannot simply be included in VIA Rail's responding record but need to be adduced through a properly sworn affidavit. Mr. Mackie should have the right to cross-examine on that affidavit pursuant to Rule 308 should he choose to do so. The responding record should be delivered after the time for cross-examination has expired.

[28] Turning to Mr. Mackie's two motion, they are both in the nature of responding records as contemplated by Rule 369(2) and have been considered accordingly. Mr. Mackie's arguments pertaining to VIA Rail's diligence in tendering its evidence in the matter have some merit despite that they do not persuade given the interests of justice going forward in this proceeding. To the extent that Mr. Mackie's two motions are to be considered as motions in which he is the moving party, they are both to be dismissed, without costs.

[29] The Court would like to comment on the affidavits filed by the parties in connection with these motions. None of the affidavits followed the requirements of Rules 80 and 81 or Form 80. I have accepted the evidence they put forward as being acceptably tendered and filed because their

form and generic content are borrowed from articles 105 and 106 of the *Code of Civil Procedure*, CQLR c C-25.01 and the practice in the Province of Québec with respect to sworn statements that were formerly called “affidavits” in previous versions of the *Code of Civil Procedure*. Articles 105 and 106 of the *Code of Civil Procedure*, CQLR c C-25.01 are not part of the *Rules* and are not incorporated by reference. The parties should take the time to review this Court’s *Rules* and follow them going forward. It is not in the interests of justice to require the parties to reformat their affidavits in this case and on these motions when neither party has objected to the irregularities in the other party’s affidavits. Time marches forward for Mr. Mackie’s Application for Judicial Review and further delay for uncontested irregularities is unwarranted.

THIS COURT ORDERS that:

1. The Respondent VIA Rail's motion for leave pursuant to Rule 312 of the *Rules* is granted to permit VIA Rail to file an affidavit;
2. The Respondent VIA Rail's motion for an extension of time within which to serve and file its responding record is granted;
3. The Respondent VIA Rail may, within 10 days of this order, serve an affidavit appending the materials it says were part of its March 24, 2020, written submissions before the CHRC and were in its possession at the time of the decision under review;
4. The Applicant Mr. Mackie may, in accordance with Rule 308, cross-examine on the affidavit to be served by VIA Rail pursuant to this order within 20 days after the date of service of the said affidavit upon him;
5. The Applicant Mr. Mackie may, within 20 days of the time for or the completion of the cross-examination referred to above, serve and file a Supplementary Application Record containing materials as specified until Rule 309 that do not appear in his original Application Record and arise as result of this order;
6. The Respondent VIA Rail shall, within 30 days of its receipt of the Applicant's Supplementary Application Record or the expiry of the time thereof, serve and file its Rule 310 Responding Record;
7. Time thereafter shall run in accordance with the *Rules*; and,

8. As no costs were sought by either party, there will be no costs awarded on these motions.

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"Benoit M. Duchesne"

blank Prothonotary

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1879-21
STYLE OF CAUSE:	KARSON MACKIE v VIA RAIL CANADA INC.
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	IN WRITING
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DATED:	JUNE 10, 2022

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