Date: 20080725

Docket: T-1374-07

Citation: 2008 FC 912

Vancouver, British Columbia, July 25, 2008

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

GWASSLAAM, also known as
GEORGE PHILLIP DANIELS
on his own behalf and on behalf of all of
the Members of the House of Gwasslaam

Applicants

and

MINISTER OF FISHERIES AND OCEANS

Respondent

REASONS FOR ORDER AND ORDER

[1] The present motion is an appeal from a decision of Prothonotary Lafrenière, dated June 25, 2008 (Decision), dismissing the Applicant's motion for leave to file an additional affidavit in the Applicant's present judicial review application (Application) pursuant to Rule 312(a) of the *Federal Courts Rules*, SOR/98-106.

[2] The Application is based on a claim to an Aboriginal fishing right. A primary argument made before the Prothonotary by Counsel for the Applicant is that the evidence clarifies the state of the oral history which supports this claim. It is apparent in the Prothonotary's reasons for decision that the oral history argument in aid of admission of the affidavit was not addressed. As a result, for the reasons which follow, I find that the Prothonotary exercised his discretion based on a wrong principle. As a result, I will decide the contested evidentiary issue *de novo* (see MacGuigan J.A. in *Canada v. Aqua-Gem Investment Ltd*., [1993] 2 F.C. 425, [1993] F.C.J. No. 103 (C.A.) (QL) at paras. 65-66).

[3] The procedural history leading to the contested evidentiary history gives important context to disposing of the present appeal.

[4] The Application contains allegations that certain actions taken by the Minister of Fisheries and Oceans infringe the Applicant's Aboriginal right to fish. The Applicant originally brought a motion for an expedited hearing and filed affidavits as part of this motion. The Applicant later abandoned this motion but, on April 7, 2008, by order, the affidavits in support of the motion were deemed to have been filed in the Application. One of these affidavits is affirmed by Gwasslaam, to which two books are exhibited: a book containing Aboriginal oral histories and a book containing archaeological information (the book evidence).

[5] The Respondent filed a motion on May 13, 2008, in part, to strike the Application on the basis that it has no chance of success due to the lack of evidence of the Aboriginal claim upon

which it is based. While the motion to strike was dismissed by Prothonotary Lafrenière on May 22, 2008, a primary argument made by Counsel for the Respondent fuelled the tendering of the additional affidavit. Counsel for the Respondent argued that the book evidence was not properly before the Court and, therefore, did not provide an evidentiary basis upon which the Applicant could possibly succeed on judicial review. To respond to this argument, which has the potential to be made in the course of the hearing of the Application, Counsel for the Applicant subsequently sought leave to file an additional affidavit under Rule 312(a):

312. With leave of the Court, a party may (*a*) file affidavits additional to those provided for in rules 306 and 307; (*b*) conduct cross-examinations on affidavits additional to those provided for in rule 308; or (*c*) file a supplementary record.	312. Une partie peut, avec l'autorisation de la Cour : a) déposer des affidavits complémentaires en plus de ceux visés aux règles 306 et 307; b) effectuer des contre-interrogatoires au sujet des affidavits en plus de ceux visés à la règle 308; c) déposer un dossier complémentaire.

[6] The Prothonotary dismissed the Applicant's motion on June 26, 2008, for the following reasons:

> In deciding whether leave to file a further affidavit should be granted, the Court must take into account the relevance of the proposed affidavit, any prejudice to the opposing party, whether the additional evidence would be of assistance to the Court, and the overall interest of justice. The Court must also consider whether the supplemental material was available, and could have been adduced, at an earlier date.
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> The Applicant's request to file additional evidence is said to be prompted by the Respondent's motion to dismiss the proceeding.

> Counsel submits that, upon reflection, the Applicant is concerned about perceived deficiencies in his evidence as identified by the Respondent. The Applicant has, however, adduced no evidence on this motion to explain why the evidence contained in the draft affidavit of Robert Good could not have been adduced earlier, or why his motion for leave to adduce further evidence could not have been brought earlier. The Applicant had more than sufficient time to consider his position. In fact, he had two previous opportunities to request leave from the Court. And, yet counsel for the Applicant represented to the Court on April 7, 2008 at the hearing of the Applicant's motion for leave to file his affidavit evidence under Rule 306 that the Applicant did not intend to file any other affidavit in support of the application for judicial review. Moreover, at the hearing of the Respondent's motion to dismiss on May 22, the Applicant maintained that the affidavit evidence filed in support of the application for judicial review was sufficient.
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> Being substantially in agreement with paragraphs 15, 16, 17, 26, 27, 28, 29, 30 and 31 of the written representations file on behalf of the Respondent, I do not consider it in the interests of justice to grant the relief requested by the Applicant.
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> (Decision, p. 2)

[7] The paragraphs incorporated by reference from the Respondent's written representations state the argument that the Applicant's motion to file the additional affidavit should not be granted because: the Applicant is not able to provide a satisfactory reason for the delay in filing the affidavit; the book evidence was available when the Applicant's affidavit evidence was originally admitted; and the additional affidavit is simply a "beefed-up" version of the Applicant's original affidavit evidence.

[8] The Applicant argues that the decision under appeal is made in error as the Prothonotary failed to apply the correct principle when assessing the test for leave under Rule 312. In particular, the Applicant argues that the Prothonotary erred by not considering the nature of the evidence

respecting Aboriginal oral history in the additional affidavit, and failed to take relevant considerations into account when applying the test under Rule 312. I agree with these arguments.

[9] The parties agree that the correct test to apply under Rule 312 is stated in *Atlantic Engraving Ltd. v. Lapointe Rosenstein*, 2002 FCA 503, [2002] F.C.J. No 1782 (F.C.A.) (QL) at paras. 8-9 [*Atlantic Engraving*]:

> By exception, rule 312 allows a party, with leave of the Court, to file additional affidavits. Under that rule, the Court may allow the filing of additional affidavits if the following requirements are met:
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> i) The evidence to be adduced will serve the interests of justice;
> ii) The evidence will assist the Court;
> iii) The evidence will not cause substantial or serious prejudice to the other side (see *Eli Lilly and Co. v. Apotex Inc*. (1997), 76 C.P.R. (3d) 15 (T.D.); *Robert Mondavi Winery v. Spagnol's Wine & Beer Making Supplies Ltd.* (2001), 10 C.P.R. (4th) 331 (T.D.)).
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> Further, an applicant, in seeking leave to file additional material, must show that the evidence sought to be adduced was not available prior to the cross-examination of the opponent's affidavits. Rule 312 is not there to allow a party to split its case and a party must put its best case forward at the first opportunity (see *Salton Appliances (1985) Corp. v. Salton Inc.* (2000), 181 F.T.R. 146, 4 C.P.R. (4th) 491 (T.D.); *Inverhuron & District Ratepayers Assn. v. Canada (Min. of Environment)* (2000), 180 F.T.R. 314 (T.D.)).

In the present case, no response to the Application had yet been served and filed by the Respondent at the time the Applicant applied for admission of the additional affidavit, and since cross examination was yet to occur, a factor with respect to admission is whether the additional affidavit evidence was available and could have been adduced at the time the original affidavits were

submitted (see e.g. *Pfizer Canada Inc. v. Canada (Minister of Health)*, 2006 FC 984, [2006] F.C.J. No. 1243). It is important to note, however, that the purpose behind considering this factor is to ensure that there is no unwarranted delay in proceeding with a judicial review application because it is considered to be a summary proceeding requiring expeditious processing (*Mazhero v. Canada (Industrial Relations Board)* 2002 FCA 295, [2002] F.C.J. No. 1112 (QL) at para. 5).

[10] The Prothonotary's reasons for decision do not exhibit consideration of all the *Atlantic Engraving* factors. Indeed, the Decision focuses exclusively on the fact that the material in the proposed affidavit was available at the time the original Application affidavits were filed; the Prothonotary does not address the reasons advanced by the Applicant for tendering the additional affidavit, namely, to address the Aboriginal oral history evidentiary issues raised by the Respondent on the strike motion. In addition, there is no indication that the Prothonotary considered the following important factors: the assistance that the additional affidavit could provide to the judge deciding the Aboriginal oral history evidence issue on judicial review; the lack of prejudice that the admission of the additional affidavit would have on the Respondent; and the overall interests of justice given that the additional affidavit evidence concerned is oral history of a claimed Aboriginal right. Indeed, the Prothonotary does not address whether an unwarranted delay would exist if the additional affidavit was admitted. For these reasons, I find that the Prothonotary's exercise of discretion was based on a wrong principle.

[11] In my opinion, in determining the admission of the additional affidavit *de novo*, I find that on a consideration of the *Atlantic Engraving* factors, the additional affidavit should be admitted.

[12] With respect to the factors of delay and prejudice to the Respondent, a fact that leads to a neutral conclusion on both factors is that, at the time the additional affidavit was tendered, the Respondent had not yet filed a response to the Application. As a result, it is not possible to say that at that time a delay would be caused by the filing of an additional affidavit because the process of judicial review had just begun. It is also not possible to say that the Respondent would suffer prejudice by the filing of the additional affidavit because it was only being tendered to meet the Respondent's own argument on the stay motion, and, therefore, does not raise a new issue to the detriment of the Respondent.

[13] In keeping with the flexible approach to be taken with respect to oral history evidence as expressed by the Supreme Court of Canada in *Mitchell v. Canada (Minister of National Revenue)*, [2001] 1 S.C.R. 911, in my opinion, it is certainly in the interests of justice that available evidence with respect to the state of the oral history underlying the Aboriginal claim at the heart of the Application should be available to aid the judge deciding the Application. Of course, the judge hearing the Application is at liberty to decide the relevance and weight to be given to all the evidence tendered.

ORDER

THIS COURT ORDERS that:

1) The appeal is granted, and the additional affidavit is admitted as evidence on the Application.

2) The costs of the present appeal are awarded in the cause.

"Douglas R. Campbell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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PLACE OF HEARING:	Vancouver, BC
DATE OF HEARING:	July 22, 2008
REASONS FOR ORDER AND ORDER:	CAMPBELL J.
DATED:	July 25, 2008

APPEARANCES:

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