Federal Court  Cour fédérale

Date: 20100601

Docket: T-2087-09

Citation: 2010 FC 596

[ENGLISH TRANSLATION]

Ottawa, Ontario, June 1, 2010

PRESENT: The Honourable Madam Justice Johanne Gauthier

BETWEEN:

ROBERT GRAVEL

Applicant

and

TELUS COMMUNICATIONS INC.

Respondent

REASONS FOR ORDER AND ORDER

IN LIGHT OF the written motion by the applicant, Robert Gravel, to strike in part the affidavits of Yves Sarault, Jean-Francois St-Germain and Roberto Depani adduced in evidence by Telus Communications Inc. (the respondent) in response to the applicant's application for judicial review, to strike some exhibits submitted in support of the affidavits of Yves Sarault and Roberto Depani, and to obtain an order allowing the filing of the applicant's amended affidavit, as well as the supplementary affidavits of Claude Gravel and Jacques Gagne;

HAVING READ the material filed by the two parties;

WHEREAS on February 10, 2010, Tremblay-Lamer J. allowed in part a motion by the respondent to strike several paragraphs of the applicant's affidavit, as well as the affidavits of

Mr. Gravel and Jacques Gagné, and that the Court of Appeal heard an appeal of this order by the applicant;

WHEREAS in light of this appeal, the respondent filed two motions to obtain a stay of proceedings in related docket T-2086-09, as well as this docket while awaiting the judgment of the Court of Appeal. On March 18, 2010, Mainville J. dismissed these motions;

WHEREAS at the Court's request and in light of the objection made under Rule 318 of the *Federal Courts Rules*, SOR/98-106, the parties are taking steps to obtain the certified record, which will allow the Court to determine the fate of exhibits 2, 5, and 6 of Mr. Sarault's affidavit and exhibits 1, 2, and 3 of Mr. Depani's affidavit. The Court understands that in spite of correspondence with the umpire, the certified record will not become available in short order. Taking into account that the adjudicator is not available on short notice, it is timely to resolve the other matters, which will allow the parties to take positions related to the above-mentioned appeal.

WHEREAS in the matter of *Canadian Tire Corp. v. P.S. Partsource Inc.*, 2001 FCA 8, 200 F.T.R. 94 the Federal Court of Appeal expresses the following caution to the litigants related to motions to strike affidavits:

> **18** Nonetheless, I would emphasize that motions to strike all or parts of affidavits are not to become routine at any level of this Court. This is especially the case where the question is one of relevancy. Only in exceptional cases where prejudice is demonstrated and the evidence is obviously irrelevant will such motions be justified. In the case of motions to strike based on hearsay, the motion should only be brought where the hearsay goes to a controversial issue, where the hearsay can be clearly shown and where prejudice by leaving the matter for disposition at trial can be demonstrated.

Moreover, caselaw has recognized that judicial reviews constitute summary proceedings that must be promptly heard on their merits. Therefore, the Court must exercise its discretionary power to strike paragraphs contained in affidavits with even greater reluctance, and only in cases where it is in the interests of justice to do so or when the fact of not striking an affidavit would create significant injury to a party or would adversely affect the smooth progress of the trial: *Armstrong v. Canada (P.G.)*, 2005 FC 1013, 141 A.C.W.S. (3d) 5 (*Armstrong*).

In this case, had it not been for Tremblay-Lamer J.'s decision, the Court would have dismissed the motion to strike, leaving it to the trial judge to decide these issues.

The affidavits of Mr. Saint-Germain, Mr. Depani and Mr. Sarault repeat the content of their statements made before the arbitration tribunal. Thus, the information contained in their affidavits corresponds to the summary of the evidence in the award. These three affiants are employees of the respondent and have personal knowledge of the facts surrounding the termination of Mr. Gravel's employment. However, as some paragraphs of the applicant's affidavit have been struck by Tremblay-Lamer J., it is in the interests of justice not to allow the applicant to submit evidence of the same nature.

First, paragraphs 28 and 32 of Robert Depani's affidavit must be struck because they contain arguments rather than statements of fact. Mr. Depani states therein that he does not recognize the authenticity of two exhibits submitted before the arbitration tribunal.

Second, paragraphs 61, 62, 63, 65, 67, 68 and 70 of Yves Sarault's affidavit must be struck. Paragraph 61 contains information that, in light of the umpire's decision, was not before the arbitration tribunal. As for paragraphs 62, 63, 65, 67, and 70, they constitute information of the same nature as that which was struck by Tremblay-Lamer J. in the applicant's affidavit. These refer to testimony given at the hearing before the umpire by a witness other than the affiant according to their own understanding. Thus, they constitute hearsay and must be struck. As regards paragraph 68, it must be struck because it is argumentative.

A brief discussion of paragraphs 75 to 98, under the section [TRANSLATION] "Progress of the Hearing", is relevant. The applicant alleges that some of these paragraphs should be struck because they contravene Rule 81 for one or more of the following reasons: i) they include or omit information that is not part of or which is contrary to the evidence already adduced at the hearing on the merits; ii) they express superfluous opinions and remarks that are not part of or are contrary to the evidence already adduced at the hearing on the merits; iii) they include remarks of an argumentative nature and are contrary to the evidence already adduced at the hearing on the merits.

And yet in fact, these paragraphs relate information related to duration and progress of the applicant's evidence, the umpire's behaviour during the hearing, and the umpire's conduct of the hearing. They also refer to the *subpoena duces tecum* granted to the applicant and provide details related to the requested documents. It is relevant to note that the applicant deals the same way with his version of the facts related to this material at paragraphs 1–8 and 23 of his affidavit; these paragraphs were not struck by Tremblay-Lamer J. In the interests of fairness, the paragraphs of Mr. Sarault's affidavit must not be struck.

Furthermore, paragraphs 82 and 83 must be struck in their entirety, while the following portion of paragraph 81 must be struck: [TRANSLATION] "particularly in intervening to a minimal degree as regards the relevance of issues raised during both examination-in-chief and cross-examination, showing evidence of flexibility and understanding towards him". Although they concern the progress of the trial, they reflect the affiant's opinion rather than containing factual allegations, in accordance with Rule 81(1).

Third, as concerns the affidavit of Jean-François Saint-Germain, it must be kept in its entirety. Mr. Saint-Germain held the position of Vice-President of Public and Parapublic Markets at the time of the termination of the applicant's employment. His affidavit mainly describes the situation at Telus during the period when the termination of the applicant's employment occurred, as well as the nature of the applicant's job. In light of a review of the award, Mr. Saint-Germain's affidavit is consistent with the statement made before the arbitration tribunal.

WHEREAS a party may, under Rule 312 and with the Court's leave, file supplementary affidavits in addition to those referred to in Rules 306 et 307. The applicant cannot make use of Rule 312 to split his action; he must submit his best evidence as soon as possible. In this regard, the Court must consider whether: a) the evidence serves the interests of justice; b) the evidence will assist the Court; c) the evidence will not cause serious injury to the adverse party; and d) does not concern documents that could have been transmitted at an earlier date and does not unduly delay the trial: *Mazhero v. Canada (Industrial Relations Board)*, 2002 FCA 295, 292 N.R. 187 at paragraph 5; *Atlantic Engraving Ltd. v. Lapointe Rosenstein*, 2002 FCA 503, 299 N.R. 244 at paragraphs 8–9. The power of the Court to allow the filing of supplementary documents must be exercised "with great circumspection".

The applicant's amended affidavit contains several paragraphs which, although they have undergone some minor changes, are otherwise identical to those that were struck by Tremblay-Lamer J.[1] These paragraphs suffer from the same failings as before, that is to say that they quote statements made by witnesses for the respondent before the umpire, that they constitute argumentation or they quote facts not admissible as evidence. In this regard, this motion by the applicant seems to constitute a disguised appeal of this latter decision. And yet it is evident that the Court, in this case, cannot intervene in order to modify, replace or indirectly thwart Tremblay-Lamer J.'s order.

Moreover, the applicant has not shown that the conditions of Rule 312 have been met. First, the applicant has provided no explanation for his failure to produce this material in a timely manner. Given the nature of the allegations contained in his amended affidavit, it appears that this information was available at the time that the applicant served his first affidavit in the record. In fact, a large part of the material concerns the evidence during the hearing before the umpire, the progress of the trial, the content of the testimony by representatives for the respondent or the applicant, the circumstances surrounding the termination of the applicant's employment or information about him. Second, the Court is not convinced that providing this amended affidavit will serve the interests of justice or assist the Court.

As for the affidavits of Claude Gravel and Jacques Gagné, dated March 25, 2010 and March 31, 2010, respectively, they are substantially identical to those which were struck by Tremblay-Lamer J.'s order. Several paragraphs are repeated in their entirety, except for the addition of words such as "when I was present", "when I was attending the hearing", "personally", "in my presence", "according to my statement" or even "before me". These changes do not have the effect of changing the substance or the content of these affidavits. In fact, they quote third-party statements made at the hearing and the personal opinions of the affiants related to the conduct of the trial, evidence adduced, the umpire's behaviour and the conduct of counsel for the respondent. Therefore, the order sought by the applicant seems aimed at re-adducing in evidence the affidavits that were struck in their entirety by Tremblay-Lamer J.

[1] See, for example, paragraphs 10.1, 16.1, 31.1, 33.1, 36.1, 65.1, 65.2, 66.1, 73.1, 73.2, 74.1-74.3, and 78.1 of the applicant's amended affidavit.

CONSIDING the absence of a certified record in this docket, it is impossible for the Court to comment at this stage on the issue of whether the following exhibits effectively correspond to the exhibits that were before the umpire: exhibits 2, 5 and 6 of Mr. Sarault's affidavit and exhibits 1, 2 and 3 of Mr. Depani's affidavit. The Court will determine this issue, if it still proves necessary, after receipt of the certified record.

WHEREAS it is settled law that admissible evidence in the framework of a judicial review is generally limited to the arbitration tribunal or the decision-maker's record. However, supplementary evidence may be admissible if it describes the proceedings as well as the evidence submitted to the decision-maker whose decision is the subject of the judicial review and raises an issue of procedural unfairness. [2]

As concerns exhibits 8 and 10 of Mr. Sarault's affidavit, these were not before the arbitration tribunal and thus constitute new evidence. Exhibit 8 is a table indicating the duration of the examination and cross-examination of each of the witnesses, as well as the time allotted by the umpire to conduct the trial. As for exhibit 10, it contains a list of documents requested and indicates whether these were filed before the tribunal. In light of the applicant's claims in his affidavit and in his notice of application related to the progress of the hearing, the transmission of documents, as well as evidence presented to the tribunal, it is appropriate to dismiss the applicant's motion in this regard. These exhibits contain general information that could prove useful to the trial judge. They are admissible as evidence and should not be struck. [3]

Considering the shared success and the fact that this motion results in a way from the one submitted by the respondent and which was addressed by Tremblay-Lamer J., no costs are awarded;

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[2] *Nametco Holdings Ltd. v. Canada (Minister of National Revenue)*, 2002 FCA 149, 113 A.C.W.S. (3d) 927, at para 2.

[3] *Armstrong*, at para 40.

ORDER

THE COURT ORDERS that:

1. The applicant's motion is allowed in part.
2. The order to strike some paragraphs of Mr. Jean-Francois St-Germain's affidavit is dismissed.
3. The following paragraphs of Mr. Roberto Depani's affidavit are struck: 28 and 32.
4. The following paragraphs of Mr. Yves Sarault's affidavit are struck: 61, 62, 63, 65, 67, 68, 70, 82, and 83, as well as the following portion of paragraph 81: "particularly in intervening to a minimal degree regarding the relevance of issues raised in both examination-in-chief and cross-examination, showing flexibility and understanding towards him".
5. The filing of the applicant's amended affidavit is not authorized.
6. The filing of the supporting affidavits of Mr. Claude Gravel and Mr. Jacques Gagné is not authorized.
7. The motion to strike exhibits 8 and 10 submitted in support of Mr. Yves Sarault's affidavit is dismissed.
8. The Court will decide on exhibits 2, 5 and 6 of Mr. Sarault's affidavit and exhibits 1, 2 and 3 of Mr. Depani's affidavit, if necessary, on receipt of the tribunal's certified record.

"Johanne Gauthier"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-2087-09

STYLE OF CAUSE: ROBERT GRAVEL V. TELUS COMMUNICATIONS INC.

WRITTEN MOTION CONSIDERED AT QUÉBEC CITY, QUEBEC UNDER RULE 369 ON APRIL 8, 2010

REASONS FOR ORDER

AND ORDER: GAUTHIER J.

DATED: JUNE 1, 2010

WRITTEN REPRESENTATIONS BY:

Robert Gravel	FOR THE APPLICANT (himself)
Jean-François Dolbec	FOR THE RESPONDENT
Pierre-Étienne Morand	

SOLICITORS OF RECORD:

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