Federal Court Cour fédérale

Date: 20190909

Docket: T-1510-17

Citation: 2019 FC 1149

[ENGLISH TRANSLATION]

Ottawa, Ontario, September 9, 2019

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

MICHEL THIBODEAU

Applicant

and

HALIFAX INTERNATIONAL AIRPORT AUTHORITY

Respondent

and

COMMISSIONER OF OFFICIAL LANGUAGES OF CANADA

Intervener

ORDER AND REASONS

[1] Michel Thibodeau is the applicant in a proceeding brought under section 77 of the *Official Languages Act*, RSC, 1985, c 31 (4th Supp.) against the Halifax International Airport Authority (Halifax Airport). The Commissioner of Official Languages acted as intervener in this matter.

A. *Facts*

[2] After the application and response records were filed, the parties began looking into dates for the proceeding to be heard by this Court. By order of the Court Administrator dated June 7, 2019, the hearing was set for August 28, 2019, for a period of one day. However, a flurry of motions to add so-called "additional" affidavits began to arise at that time.

[3] Accordingly, on June 25, 2019, counsel for the respondent requested the filing of Catherine Huddleston's additional affidavit pursuant to rule 312 *of the Federal Courts Rules,* SOR/98-106.

[4] Through this affidavit, the respondent adduced in evidence the preliminary follow-up report on the recommendations of the Commissioner of Official Languages of May 2019. This follow-up report dealt with the recommendations that had been made in the final report of the August 2017 investigation into a complaint filed by Mr. Thibodeau against the Halifax International Airport Authority claiming that service in French was not available at the information counter at Halifax Stanfield International Airport. I should note at this point that the affiant highlighted the following comment made by the Commissioner of Official Languages:

“the Office of the Commissioner commends the HIAA for its outstanding efforts in response to this recommendation”. The recommendation was as follows:

> Recommendation 1: Develop an action plan, within six months of receiving the final investigation report, for recruiting volunteers who can provide service in French at the information counters at Halifax Stanfield International Airport, and implement as soon as possible.

[5] With the applicant’s consent, Justice Richard Mosley granted the motion to file the additional affidavit in an oral direction made on June 27, 2019.

[6] It appears that the applicant was in Halifax on June 25 and 26, 2019, and he states that, while passing through Halifax Airport, he noticed numerous violations of the *Official Languages* there. He therefore prepared a supplementary affidavit, which he refers to as being additional, which he intends to file if given leave to do so. This affidavit was sworn on July 15, 2019, and sets out a series of complaints that the applicant made to the Commissioner of Official Languages on July 11 and 12, 2012, after his visit to the Halifax Airport on June 25 and 26, 2019. The following is a list of the 16 complaints that were filed:

- Unilingual English service - Tartan Team - June 25, 2019;
- Unilingual English display - Tartan Team uniform;
- Unilingual English display - automated teller machines;
- Unilingual English signage - toilets;
- Predominantly English signage - garbage cans;
- Unilingual English signage - doors in the air terminal;
- Unilingual English display - banners;
- Predominantly English display - banners and posters;
- Unilingual English display - logo and slogan;

- Unilingual English service and signage - Firkin & Flyer restaurant;
- Unilingual English signage - Starbucks;
- Unilingual English signage - Tim Hortons;
- Predominantly English display - YHZ MKT restaurant;
- Predominantly English display - comments card;
- Unilingual English display - social media (Facebook, Instagram, Twitter);
- Unilingual English display - website

B. *Proceedings before the Court*

[7] In order to be able to file this new affidavit, which lists a series of complaints, the applicant brought a motion under rules 312 and 369 of the *Federal Courts Rules*. In support of this motion, he filed an affidavit on July 19, 2019, in which he states, among other things, that the new evidence in that additional affidavit was not previously available, presumably when he was trying to meet the requirements of rule 312. In his July 19 affidavit, the applicant complains of the respondent's refusal to consent to the filing of his affidavit, even though he himself had consented to the filing of the additional affidavit which had been requested by the respondent. Furthermore, in paragraph 14 of his affidavit, the applicant states what appears to be his reason for proposing so-called additional evidence:

> [TRANSLATION]
>
> 14. In docket T-1517-17, the Federal Court must examine the issue of the violation of language rights at Halifax International Airport, the recurrence of these violations over the years and the relevance of issuing a structural order in the face of these systemic violations.

This request submitted pursuant to rules 312 and 369 for the July 15, 2019 affidavit was filed on July 22, 2019, and has not yet been dealt with. The respondent elected to cross-examine Mr. Thibodeau on his July 15 and 19 affidavits.

[8] I note that Mr. Thibodeau filed another additional affidavit in early August, but that affidavit is not before the Court at this time. We are now dealing only with the affidavits of July 15 and 19, 2019.

C. *Cross-examination on the July 15 and 19 affidavits*

[9] Given the tangle of proceedings, it is worth recalling the stage we are at. The Court emphasized this at the beginning of the hearing of this motion. An application for a remedy under section 77 of the *Official Languages Act* is on the horizon. The August 28 hearing of the proceeding could not take place and must be adjourned to respond to the incidental motions that have emerged very late in the process, since the second half of July. Thus, the motion to add affidavits has been pending since July 22. This motion cannot be heard until the cross-examination issues have been resolved. Another motion to file another affidavit, this one made on August 2, 2019, following another visit to the Halifax Airport, this time on July 30, is pending and is not before this Court at this stage; the respondent intends to contest that other motion to file the so-called “additional” affidavit of August 2 and, to this end, states that it wishes to cross-examine Mr. Thibodeau.

[10] The respondent chose to cross-examine the affiant on his affidavits of July 15 and 19, and the affiant in turn chose not to answer some 31 questions. We are only at this point. The Court is not ruling on the filing of the affidavits, much less on the application for a remedy under section 77. This will only be done once the issues relating to refusals to answer questions on cross-examination have been resolved and, subsequently, once the objection to the filing of these affidavits has been resolved. The issue of the filing of the August 2 affidavit will follow once the cross-examination of the affiant has taken place.

[11] Accordingly, Mr. Thibodeau was cross-examined on August 9, 2019. The cross-examination lasted more than three hours, and the affiant refused to answer many of the questions put to him during that cross-examination. This resulted in the present motion under rule 97 of the *Federal Courts Rules* seeking a decision by this Court on whether to reject the affidavits that were prepared or, alternatively, to compel the affiant to answer the questions.

I have reproduced rule 97 of the *Federal Courts Rules* below:

Failure to attend or misconduct	**Défaut de comparaître ou inconduite**
97 Where a person fails to attend an oral examination or refuses to take an oath, answer a proper question, produce a document or other material required to be produced or comply with an order made under rule 96, the Court may	**97** Si une personne ne se présente pas à un interrogatoire oral ou si elle refuse de prêter serment, de répondre à une question légitime, de produire un document ou un élément matériel demandés ou de se conformer à une ordonnance rendue en application de la règle 96, la Cour peut :

(a) order the person to attend or re-attend, as the case may be, at his or her own expense;	**a)** ordonner à cette personne de subir l'interrogatoire ou un nouvel interrogatoire oral, selon le cas, à ses frais;
(b) order the person to answer a question that was improperly objected to and any proper question arising from the answer;	**b)** ordonner à cette personne de répondre à toute question à l'égard de laquelle une objection a été jugée injustifiée ainsi qu'à toute question légitime découlant de sa réponse;
(c) strike all or part of the person's evidence, including an affidavit made by the person;	**c)** ordonner la radiation de tout ou partie de la preuve de cette personne, y compris ses affidavits
(d) dismiss the proceeding or give judgment by default, as the case may be; or	**d)** ordonner que l'instance soit rejetée ou rendre jugement par défaut, selon le cas;
(e) order the person or the party on whose behalf the person is being examined to pay the costs of the examination.	**e)** ordonner que la personne ou la partie au nom de laquelle la personne est interrogée paie les frais de l'interrogatoire oral.

It appears to me that, in essence, what divides the parties is their divergent understandings of what constitutes relevance and of how expansive a cross-examination on affidavit may be. Mr. Thibodeau repeatedly refused to answer questions put to him, on the basis that the question was irrelevant since he was to be examined on affidavit. The respondent, for its part, submitted that its questions were legitimate and complained about the affiant's attitude.

[12] Thus, the Court must focus attention at this stage on the questions that were not answered on cross-examination, but to do so, the legitimacy of the questions will have to be assessed in

accordance with the rules applicable to the admission of additional affidavits under rule 312. This is how relevance can be assessed.

D. *Special rules that apply*

[13] There are two rules that need to be clarified. One is that cross-examination on affidavit is not as limited as the applicant claims. In *CBS Canada Holdings Co. v Canada,* 2017 FCA 65, the Federal Court of Appeal fully endorsed the assessment of the state of the law presented in *Ottawa Athletic Club Inc. (Ottawa Athletic Club) v Athletic Club Group Inc.* 2014 FC 672 [*Ottawa Athletic Club*]. The Court of Appeal cited this portion of paragraph 132 of the *Ottawa Athletic Club* decision:

> [132] . . . However, there seems to be a consensus that "[a]n affiant who swears to certain matters should not be protected from fair cross-examination on the very information he volunteers in his affidavit," and "should submit to cross-examination not only on matters set forth in his affidavit, but also to those collateral questions which arise from his answers" . . . .
>
> [Citations omitted.]

[14] The second principle to be recognized is that of the circumstances in which an additional affidavit may be admitted under rule 312. Authorization to allow an additional affidavit to be filed should be given with great caution (*Mazhero v Canada Industrial Relations Board,* 2002 FCA 295; *Recourse and Proceedings in the Federal Courts,* by Bernard Letarte et al. 2013, LexisNexis, under no. 5-101). This circumspection revolves around three main considerations that were set out in *Forest Ethics Advocacy Association v National Energy Board,* 2014 FCA 88:

> [6] In *Holy Alpha and Omega Church of Toronto v. Canada (Attorney General)*, 2009 FCA 101 at paragraph 2, this Court set

> out the principles that guide its discretion under Rule 312. It set out certain questions relevant to whether the granting of an order under Rule 312 is in the interests of justice:
>
> (a) 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?
>
> (b) 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?
>
> (c) Will the evidence cause substantial or serious prejudice to the other party?

[15] A fundamental concern appears to be that a party should not be allowed to use rule 312 to split its case since it is required to put its best case forward at the first opportunity (*Lapointe Rosenstein v Atlantic Engraving Ltd.* 2002 FCA 503, 23 CPR (4th) 5, at paras 9–10).

[16] Here, the respondent wants to cross-examine the applicant-affiant, who is trying to bring new complaints that are largely subsequent to the original complaint that gave rise to the section 77 remedy. The respondent will want to demonstrate that the affiant has not exercised the due diligence required to be able to rely on rule 312. It alleges that the applicant is seeking to split his case, which is prohibited.

[17] This, therefore, is the context in which we will examine the relevance of the questions that have been asked in order to ascertain whether they are legitimate or not. The admissibility of the affidavits is by no means at issue at this stage—only the obligation to answer legitimate questions according to the rules applicable to the filing of additional affidavits.

E. *Analysis*

[18] In my view, questions that tend to establish an element relevant to the dispute should be permitted. At this stage of the dispute between the parties, the respondent is entitled to seek to establish that the conditions for the use of rule 312 have not been met and the circumstances in which this “new evidence” was created. It could seek to do so by establishing that the applicant-affiant already had knowledge of the evidence, which was thus available. In doing so, the respondent would argue, the applicant was splitting his own case. Similarly, it could attempt to show that the “new evidence” is selective. It has already been indicated that if these affidavits are able to be filed at this stage of the litigation, it may require the respondent to request that a new record be filed in response because the goal posts have suddenly been moved.

[19] The respondent’s motion record contains a summary of the refusals to answer, which was very helpful at the hearing. It lists 31 refusals. The Court reviewed them during the hearing. With the exception of one question (Question 20), it is difficult to see how the questions would not be relevant to the legitimate purpose proposed by the respondent in asking them. This is because in most cases they deal with aspects of the prior availability of evidence that the applicant hopes to introduce after the motion records have been perfected and a date for the hearing of the section 77 application has been set. Other questions relating to the dates and times when the photographs the applicant wishes to introduce were taken, in addition to searching for the other photographs taken that the applicant does not wish to use, are directly relevant to the evidence itself that the applicant seeks to introduce. The questions can be grouped as follows:

- reasons for the trip to St. John’s and Halifax: questions 1 to 7;

- questions about what the witness already knew before going to Halifax: questions 8 and 9;
- the times and dates of all photos, both those that the applicant is seeking to produce and others taken on June 25 and 26, 2019: questions 10-11-28;
- complaint already filed with the Commissioner of Official Languages concerning garbage cans (# 2019-0032): questions 12 to 14;
- complaint regarding signs with the words “caution automatic door”: questions 15 and 16;
- complaint regarding English slogans (# 2018-1967) such as “Proud to serve the Stanfield Way”: questions 17 to 19;
- Internet searches to identify and presumably demonstrate the predominance of English (4 complaints): questions 21 to 24;
- complaint # 2016-1327: did the affiant receive the preliminary report: question 25;
- audit reports and annual reports of the Commissioner of Official Languages;
- did the affiant have other exchanges in French on June 25–26, 2019, in addition to the exchanges that he considers inadequate: question 29; and
- availability of evidence that he gathered on June 25 and 26, 2019: questions 30 and 31.

As for Question 20, the affiant should not be forced to answer it, given that it is not clear that it has a sufficient connection to the litigation that is related to the affidavit and is at variance with it, since the question asks how many complaints the applicant has made against the respondent.

This question veers into the realm of examination for discovery, which is not what cross-examination on affidavit is, nor is it what it should become.

[20] In all the other questions, the objections made by the affiant should be found to be inappropriate. The affiant repeatedly claimed that the question was either irrelevant or outside the scope of his affidavits. As noted, the questions are relevant to the admissibility of affidavits under rule 312, which has its own eligibility requirements. Moreover, it is far from irrelevant to establish the circumstances in which said "evidence" was gathered.

[21] At the hearing, Mr. Thibodeau argued that his refusal to answer questions about his previous complaints about the Halifax Airport was based on the confidentiality of the Commissioner's investigations. The Court therefore asked the parties to state their positions on this issue. The Court also invited the intervener, the Commissioner of Official Languages, to make submissions if he wished to do so. Counsel for the respondent stated that the scope of the intervention was limited and that it may not be appropriate to receive such submissions. The Court instead concluded that, if necessary, the scope of the intervention would be expanded, given that it was the Commissioner's investigation that was at issue. He has a direct interest in the matter. In addition, explicit provisions of the *Official Languages Act* referring to the Commissioner have been raised. I will quote those provisions:

Investigation to be conducted in private	**Secret des enquêtes**
60 (1) Every investigation by the Commissioner under this Act shall be conducted in private.	**60 (1)** Les enquêtes menées par le commissaire sont secrètes.

Opportunity to answer allegations and criticisms	**Droit de réponse**
(2) It is not necessary for the Commissioner to hold any hearing and no person is entitled as of right to be heard by the Commissioner, but if at any time during the course of an investigation it appears to the Commissioner that there may be sufficient grounds to make a report or recommendation that may adversely affect any individual or any federal institution, the Commissioner shall, before completing the investigation, take every reasonable measure to give to that individual or institution a full and ample opportunity to answer any adverse allegation or criticism, and to be assisted or represented by counsel for that purpose.	**(2)** Le commissaire n'est pas obligé de tenir d'audience, et nul n'est en droit d'exiger d'être entendu par lui. Toutefois, si au cours de l'enquête, il estime qu'il peut y avoir des motifs suffisants pour faire un rapport ou une recommandation susceptibles de nuire à un particulier ou à une institution fédérale, il prend, avant de clore l'enquête, les mesures indiquées pour leur donner toute possibilité de répondre aux critiques dont ils font l'objet et, à cette fin, de se faire représenter par un avocat.
. . .	[…]
Confidentiality	**Secret**
72 Subject to this Act, the Commissioner and every person acting on behalf or under the direction of the Commissioner shall not disclose any information that comes to their knowledge in the performance of their duties and functions under this Act**.**	**72** Sous réserve des autres dispositions de la présente loi, le commissaire et les personnes agissant en son nom ou sous son autorité sont tenus au secret en ce qui concerne les renseignements dont ils prennent connaissance dans l'exercice des attributions que leur confère la présente loi.

[22] The language of these two sections suggests that the duty of confidentiality contained therein applies to the Commissioner and his staff. It is the Commissioner's investigation that is

confidential, and the Commissioner and his staff are bound to maintain its confidentiality. This was undoubtedly created to ensure that a complainant would not fear disclosure by those investigating the complaint (*Lavigne v Canada* (*Office of the Commissioner of Official Languages*), 2002 SCC 53, [2002] 2 SCR 773).

[23] Mr. Thibodeau argued in his written submissions that *Rubin v Canada (Clerk of the Privy Council),* [1994] 2 FC 707 [*Rubin*], and *Lavigne v Canada Post Corporation,* 2009 FC 756 [*Lavigne*], supported his position. In fact, these two decisions are not relevant to the debate. They are of no assistance to the applicant.

[24] *Lavigne* concerned an attempt to force the Commissioner of Official Languages to file documents relating to complaints, and even to testify. The Court concluded that such obligations did not exist. In addition, the passages cited by the applicant deal with the duty of confidentiality owed to the Commissioner and his staff. No one is seeking to force the Commissioner and his staff to do anything in our case. *Rubin* was a proceeding under the *Access to Information Act*, RSC, 1985, c A-1, to obtain disclosure of the rate of pay of the Chairman of the Canada Council for the Arts. His request having been refused, Mr. Rubin made another complaint under the *Access to Information Act* and sought information regarding communications between the institution (the Privy Council) and the Information Commissioner during the course of the review of the refusal to disclose complaint. Put another way, Mr. Rubin wanted to obtain information exchanged between the institution and the Information Commissioner during the Commissioner's investigation. This was considered to be a very different statutory provision from the regime under review. This has nothing to do with the current situation where

Mr. Thibodeau himself, in seeking to file an additional affidavit, has put in play the complaints that he filed and that could reveal his prior knowledge of what he says was evidence that was not available prior to June 25 and 26, 2019.

[25] In my view, the applicant's use of this case law to avoid answering relevant questions in cross-examination on affidavit is not convincing because those cases deal with very different situations. I repeat: The conditions for the admissibility of new evidence are brought into play by the affiant, and a respondent is entitled to question an affiant about the existence of conditions prior to the filing of what is claimed to be new evidence.

[26] The Court fully agrees with the Commissioner's position, who chose to offer some observations, where he writes at paragraph 8 of his submissions:

> [TRANSLATION]
>
> 8. In the Commissioner's view, in interpreting subsection 60(1) and section 72 in light of section 73, it becomes clearer that the confidentiality of investigations relates to the management of information obtained by the Commissioner and his staff rather than to the parties, who are free to disclose information they consider appropriate in relation to their complaints.

[27] Thus, the usual rules of cross-examination on affidavit would apply, without any restrictions caused by a statutory duty of confidentiality. However, the questions relating to previous complaints that dealt with the same alleged violations listed as evidence not available on June 25 and 26 are entirely relevant to a motion to introduce additional evidence. These are questions that Mr. Thibodeau had to answer.

[28] Cross-examination is an important tool in our adversarial system: someone who testifies, whether in court or by affidavit, is not immune from inquisitorial questions. Such witnesses bring forward evidence that must be open to questioning. Where, in addition, there are rules of admissibility, such as in this case the prior availability of the same material and the rule against the splitting of one's own case, cross-examination should be permitted in that regard. Put another way, whoever provides evidence is subject to cross-examination. As Justice Muldoon said in *Swing Paints Ltd. v Minwax Co*. [1984] 2 FC 521, p 531, evasive testimony is not permitted. He went on to say:

> The person making the affidavit must submit himself to cross-examination not only on matters specifically set forth in his affidavit, but also to those collateral questions which arise from his answers. Indeed he should answer all questions, upon which he can be fairly expected to have knowledge, without being evasive, which relate to the principal issue in the proceeding upon which his affidavit touches if it does.

[29] Cross-examination can be abused, and the courts will intervene if necessary. Cross-examination on affidavit therefore is not, and should not become, an examination for discovery.

F. *Remedy sought*

[30] In this case, the cross-examination on affidavit will have to proceed, and 30 of the 31 unanswered questions will have to be answered. It will, of course, be possible to continue with collateral questions once the answers to the original questions have been given, following the questions related to the issue for which a refusal has been recorded.

[31] The respondent had initially requested that the penalty for refusing to answer be the striking out of the July 15 and 19 affidavits on which the cross-examination was conducted. The respondent wisely chose at the hearing not to insist on and not to request this remedy, which had every appearance of being disproportionate. Rather, the issue of the admissibility of these affidavits should be the subject of a hearing once the cross-examination has been completed and a perfected record including the cross-examination is before the Court. The July 22 motion to admit these affidavits is not being adjudicated before time.

[32] Also pending is another motion to admit another additional affidavit. As stated earlier, this affidavit dated August 2, 2019, followed another visit by the applicant to the Halifax Airport on July 30, 2019. The respondent stated an intention to cross-examine Mr. Thibodeau on this new affidavit. The Court expresses its hope that this order and its reasons will be helpful to the parties in this second cross-examination.

G. *Conclusion*

[33] The respondent requested that the continuation of the cross-examination be at the applicant’s expense. Instead, I have concluded that since this is the cross-examination initiated by the respondent, who now wishes to continue with it, it shall proceed at the respondent’s expense.

[34] Furthermore, the applicant-affiant refused to answer legitimate questions, thereby forcing the respondent to bring this motion while suspending its cross-examination. The respondent is entitled to its costs. It is proposed that they be set at $1,000. On the motion to strike paragraphs

from another affidavit, my colleague Justice Martineau ordered costs in favour of Mr. Thibodeau, who had successfully defeated the motion (2018 FC 223). Costs were fixed at $1,250. The amount of $1,000 seems fair in the circumstances.

ORDER in T-1510-17

THIS COURT'S ORDER is as follows:

1. The affiant, Mr. Michel Thibodeau, will have to answer the 30 questions identified as legitimate. It will be possible to ask collateral questions related to the question for which the refusal to answer has been recorded.

2. The continuation of the cross-examination will be at the expense of the party that initiated it, namely, the respondent.

3. Costs of $1,000.00, including disbursements and taxes, are ordered to be paid by the applicant to the respondent.

"Yvan Roy"
Judge

Certified true translation
Michael Palles

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1510-17
STYLE OF CAUSE:	MICHEL THIBODEAU v HALIFAX INTERNATIONAL AIRPORT AUTHORITY and COMMISSIONER OF OFFICIAL LANGUAGES OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
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DATED:	SEPTEMBER 9, 2019

APPEARANCES:

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Patrick Lévesque	FOR THE RESPONDENT
Élie Ducharme	FOR THE INTERVENER

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