

Cour fédérale



Federal Court

Date: 20210325

Docket: T-1023-19

Citation: 2021 FC 259

[TRANSLATION]

Ottawa, Ontario, March 25, 2021

PRESENT: The Honourable M. Justice Bell

ENTRE:

MICHEL THIBODEAU

Plaintiff

and

**ST. JOHN'S INTERNATIONAL AIRPORT
AUTHORITY**

Defendant

and

OFFICE OF THE COMMISSIONNER OF OFFICIAL LANGUAGES

Intervener

ORDERS AND REASONS

I. Background

[1] The Plaintiff, Michel Thibodeau (Mr. Thibodeau), brings a motion pursuant to Rule 369 of the *Federal Courts Rules*, SOR/98-106, (the “Rules”) in which he seeks permission to file a

reply factum. Mr. Thibodeau wishes to address the four (4) issues raised by the Defendant, the St. John's International Airport Authority (SJIAA), in their factum, as well as the inadmissibility of evidence of an audio recording, allegedly obtained without his knowledge. The SJIAA opposes the granting of the motion.

[2] The following history will assist in putting the current motion in context. On June 21, 2019, Mr. Thibodeau applied to the Court for a remedy under para. 77(1) of the *Official Languages Act*, R.S.C., 1985, c. 31 [the Act]. He claims that the SJIAA did not respect its obligation under the Act and consequently violated his language rights. On January 17, 2020, Mr. Thibodeau filed his record, including his memorandum of fact and law, which consists of 30 pages. Mr. Thibodeau was self-represented when he filed his record. The SJIAA filed their record on February 4, 2020. On March 6, 2020, the Commissioner of Official Languages (the Commissioner) brought a motion in which he sought permission to intervene on four (4) distinct questions. On July 23, 2020, the Court Registry received a notice of appointment of solicitor on behalf of Mr. Thibodeau. On August 27, 2020, I rendered the decision *Thibodeau v. St. John's International Airport Authority*, 2020 FC 858 [*Thibodeau*], in which I permitted the Commissioner to intervene on two (2) of the four (4) questions. The Commissioner filed his factum on September 25, 2020. Mr. Thibodeau filed a motion seeking leave to file a reply factum on December 18, 2020.

II. Issues

[3] There are three (3) issues before the Court:

- (i) What is the applicable test for granting leave to file a reply factum?

(ii) Has the Plaintiff met the test?

(iii) The amount of costs, if any, which should be awarded on the motion?

III. Test to grant leave to file a reply factum

[4] The parties disagree on which Rule applies to the granting of leave to file a reply factum and consequently, the test that should be applied. Mr. Thibodeau contends that Rule 312(c) of the Rules is the appropriate Rule and should be applied in a flexible and liberal manner which would permit him to file the Reply factum. Rule 312(c) states that, with leave of the Court, a party may file a supplementary record. The SJIAA contends that the purpose of Rule 312 is to permit a party to file additional factual evidence and not to introduce additional legal arguments (see: Federal Courts Practices citing *Bayer AG v Apotex*, [1998] F.C.J. 1593 at paras. 34-37, aff'd 2001 FCA 263). The SJIAA says Rule 55 is the applicable Rule and that it requires the moving party to show special circumstances. Rule 55 reads as follows:

55 In special circumstances, in a proceeding, the Court may vary a rule or dispense with compliance with a rule.

55 Dans des circonstances spéciales, la Cour peut, dans une instance, modifier une règle ou exempter une partie ou une personne de son application.

[5] I agree with the SJIAA that, given the silence of the Rules on the issue of a Reply factum, Rule 55 is the means by which the Plaintiff may seek to file same. Accordingly, Mr. Thibodeau must establish that special circumstances exist, in order to file a Reply factum.

[6] The current state of the jurisprudence instructs that where a written reply is not contemplated by the Rules, it is expected that argument in reply will be made orally at a hearing (*Deigan v. Canada (Treasury Board)*, [2000] F.C.J. 134 at para 2 (FCA)). The SJIAA submits that the special circumstances test is described as establishing a “high threshold” before a court will authorize a reply factum (*Bell Canada v 7262591* (26 October 2016), Docket A-51-16, Justice Boivin, at page 2). I agree. The test to be met is therefore one of special circumstances which meet a high threshold.

IV. Special Circumstances to file reply factum

A. *The Plaintiff's Position*

[7] Mr. Thibodeau relies on para 13 of *Thibodeau*, where I stated: “[...] Given that he is now represented there is no need for the Commissioner to intervene on this question of damages. [...]”. Mr. Thibodeau contends that now that he is represented, he is in a better position to address the issue of damages contemplated in subsection 77(4) of the Act. This, according to him, can be accomplished by a reply factum. Mr. Thibodeau further contends that oral arguments are not sufficient to address the important and complex legal issues regarding the protection of linguistic rights.

[8] Mr. Thibodeau also pleads that it is in the best interests of justice that he be afforded the opportunity to present legal arguments regarding the admissibility of an audio recording. Mr. Thibodeau submits that during his cross-examination, counsel for SJIAA played a recording of a conversation between himself (counsel) and Mr. Thibodeau, about which Mr. Thibodeau alleges he was unaware at the time of the recording. Mr. Thibodeau relies on Rules 7.2-1 and 7.2-3 of

the Law Society of Ontario's *Rules of Professional Conduct* (LSO Rules). Rule 7.2-1 states that a "lawyer shall be courteous, civil, and act in good faith with all person with whom the lawyer has dealings in the course of their practice". Rule 7.2-3 states a "lawyer shall not use any device to record a conversation between the lawyer and a client or another legal practitioner, even if lawful, without first informing the other person of the intention to do so".

B. *The Defendant's Position*

[9] The SJIAA says that Mr. Thibodeau has not shown any special circumstances to warrant a reply factum. The SJIAA contends that Mr. Thibodeau is an experienced self-represented litigant and very much aware of the court processes and rules. The SJIAA submits that Mr. Thibodeau, when unrepresented, brought before this court, both a motion under Rule 55 and Rule 312, and could have brought this motion without the assistance of counsel. Moreover, Mr. Thibodeau has been involved in dozens of reported cases, and successful in many as a self-represented litigant. Some of these were alluded to by me in *Thibodeau* at paragraphs 12 and 13 and need not be repeated here.

[10] The SJIAA correctly points out that Mr. Thibodeau's motion is silent on the proposed contents of the reply factum and that they have no way of knowing what additional issues he might raise. The SJIAA correctly points out that it did not raise any new issues in its memorandum of fact and law in response. The SJIAA says that paragraph 13 of *Thibodeau* cannot be considered as an invitation to submit additional legal arguments.

[11] Finally, the SJIAA says it first became aware of the objection to the December 2020 recording, upon the filing of this motion. The SJIAA notes that Mr. Thibodeau did not object to the use of that evidence when he was under cross-examination, nor did his lawyers object to it when they took on his case. The SJIAA further argues that Rule 7.2-3 of the LSO Rules was not violated as that Rule requires prior notice before creating an audio recording for conversations between a lawyer and two (2) classes of persons: the lawyer's own client or another legal practitioner. The SJIAA contends Mr. Thibodeau does not fall within either of these categories.

C. *Analysis*

[12] The evidence demonstrates that Mr. Thibodeau is a very experienced self-represented litigant, aware of court processes and has been successful in the past when writing legal arguments on similar issues. Moreover, the "new" issues allegedly raised by the SJIAA are not in fact new issues. Mr. Thibodeau has indirectly addressed them in his memorandum of fact and law.

[13] With regard to the recording, Mr. Thibodeau could easily have objected at the time of his cross-examination, and, if not then, at the time he obtained legal counsel. Mr. Thibodeau's concern about the alleged conduct of counsel for the SJIAA is a matter for the Law Society of Ontario and not a matter for the courts. This is particularly so given the number of years Mr. Thibodeau waited to bring his objection and the potential impact upon SJIAA's choice of counsel.

V. Costs

[14] The SJIAA requests the motion be dismissed with elevated costs, in the total amount of \$2,650.00. It requests costs at the upper end of Column V (11 units at \$150 per unit, for a total of \$1,650) plus a lump sum amount of \$1,000 to cover costs of Mr. Thibodeau's repeated requests for case management conferences. The SJIAA submits that the total cost award is appropriate given Mr. Thibodeau's improper, vexatious and unnecessary litigation steps. Mr. Thibodeau objects to any award of costs.

[15] I am of the view the late allegation of misconduct against SJIAA counsel is an unwarranted attack, designed to further disrupt the flow of the litigation process. Mr. Thibodeau is exceedingly familiar with court processes. If he had any complaint regarding the conduct of SJIAA counsel, it should have been made long ago and not at this late stage of the court processes. I am also of the view that Mr. Thibodeau, being an experienced litigant, clearly understands the potential opportunity open to him, should a court permit a reply factum in the circumstances. It is incumbent upon the courts not to tolerate abuses of their procedures, nor should the courts permit a party to gain an advantage by sitting on his or her hands, while waiting to bring last minute motions of this sort.

[16] In the circumstances, I agree with the SJIAA. Mr. Thibodeau made several requests for case management conferences for purposes of seeking permission to file a reply factum. He knew, or ought to have known, throughout, that a motion was required. His tactics wasted court time and incurred unnecessary costs on the part of the SJIAA.

ORDER IN T-1023-19

THIS COURT ODERS that the Plaintiff's motion for permission to file a reply factum is dismissed with costs payable by the Plaintiff to the Defendant in the amount of \$2,650.00.

"B. Richard Bell"

Judge

ANNEX

Federal Court Rules, SOR/98-106

Varying rule and dispensing with compliance

55 In special circumstances, in a proceeding, the Court may vary a rule or dispense with compliance with a rule.

Additional Steps

312 With leave of the Court, a party may

[...]

(c) file a supplementary record.

Law Society of Ontario, Rules of Professional Conduct

Courtesy and Good Faith

7.2-1 A lawyer shall be courteous, civil, and act in good faith with all persons with whom the lawyer has dealings in the course of their practice.

7.2-3 A lawyer shall not use any device to record a conversation between the lawyer and a client or another legal practitioner, even if lawful, without first informing the other person of the intention to do so.

Règles des cours fédérales, DORS/98-106

Modification de règles et exemption d'application

55 Dans des circonstances spéciales, la Cour peut, dans une instance, modifier une règle ou exempter une partie ou une personne de son application.

Dossier complémentaire

312 Une partie peut, avec l'autorisation de la Cour :

[...]

e) déposer un dossier complémentaire.

Barreau de l'Ontario, Code de déontologie

Courtoisie et bonne foi

7.2-1 L'avocat fait preuve de courtoisie, de politesse et de bonne foi dans tous ses rapports avec les personnes avec lesquelles il entre en contact dans le cadre de ses activités professionnelles.

7.2-3 L'avocat ne doit utiliser aucun appareil pour enregistrer une conversation avec des clients ou d'autres praticiens juridiques sans en avoir d'abord prévenu les personnes intéressées, alors même que l'enregistrement serait en soi légal.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1023-19

STYLE OF CAUSE: MICHEL THIBODEAU v ADMINISTRATION DE
L'AÉROPORT INTERNATIONAL DE ST. JOHN'S

DEALT WITH IN WRITING WITHOUT APPEARANCE OF THE PARTIES

ORDER AND REASONS: BELL J.

DATED: MARCH 25, 2021

IN WRITING:

Ronald F. Caza
Marie-Pier Dupont

FOR THE PLAINTIFF

Michael Shortt
Amy Tang

FOR THE DEFENDANT

Élie Ducharme
Geneviève Tremblay-Tardif

FOR THE INTERVENER

SOLICITORS OF RECORD:

Caza Saikaley s.r.l./LLP
Ottawa (Ontario)

FOR THE PLAINTIFF

Fasken Martineau DuMoulin
S.E.N.C.R.L., s.r.l.
Montréal (Québec)

FOR THE DEFENDANT

Office of the Commissioner of
Official Languages

FOR THE INTERVENER