Federal Court Cour fédérale

Date: 20250121

Docket: T-1098-24

Citation: 2025 FC 125

Vancouver, British Columbia, January 21, 2025

PRESENT: Madam Associate Judge Kathleen Ring

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

LILIANA KOSTIC

Respondent

ORDER

I. Overview

[1] The Respondent, Ms. Liliana Kostic, who is self-represented, has brought a motion to strike the application by the Attorney General of Canada [Canada] for a vexatious litigant declaration. She also seeks an Order striking Canada's Rule 306 affidavit and requiring Canada to produce a "proper affiant", leave to file additional evidence, and an order compelling *viva voce* witness testimony at the hearing of Canada's application.

[2] Canada submits that the motion should be dismissed because Ms. Kostic has not met the stringent test for the Court to take the exceptional step of striking this application. With regard to

the other relief sought by Ms. Kostic, Canada asserts that its affiant is proper and should not be substituted, that Ms. Kostic should not be permitted to file additional evidence, and that witness testimony is not required at the hearing of the application.

[3] Having considered the parties' motion records, and having heard their oral submissions at a hearing on November 5, 2024, I am not persuaded that this motion should be granted. For the reasons below, I dismiss Ms. Kostic's motion, with enhanced costs.

II. **Background**

General Background

[4] Ms. Kostic is no stranger to the Federal Courts. Since 2020, Ms. Kostic has personally commenced one action (T-680-20), two applications (T-348-21 and T-713-22), and two appeals (A-116-23 and A-272-23). She has also been involved in some manner in eight applications for judicial review commenced by other applicants (T-1344-20, T-1224-21, T-1850-21, T-714-22, T-2317-22, T-267-23, T-319-23, and T-320-23), and two appeals in the Federal Court of Appeal (A-115-22 and A-117-23).

[5] Most of these proceedings have been struck, dismissed, or removed from the Court record. In Court File Nos. T-680-20 and T-713-22, costs were awarded against Ms. Kostic, which have not been paid.

[6] Ms. Kostic also has a considerable history before the Alberta courts, with litigation in that jurisdiction dating back to 2007. The facts underlying this myriad of litigation stem from her engagement in 2004 as an advisor to the Piikani First Nation, regarding the investment of trust funds paid by Canada and Alberta under a settlement agreement, and the subsequent termination

of her engagement in 2006. The two initial actions arising from this situation have since grown to thirty actions in Alberta involving similar parties and issues, although Ms. Kostic is not a party in all of them: *Piikani Nation v Kostic*, 2018 ABCA 234 at paras 2 to 10; *Piikani Nation v Kostic*, 2024 ABKB 137 at para 8.

A. ***The Vexatious Litigant Application***

[7] On May 3, 2024, Canada brought the underlying application for an Order declaring Ms. Kostic to be a vexatious litigant, and imposing restrictions on her access to this Court, pursuant to section 40 of the *Federal Courts Act*, RSC 1985, c F-7 [*Act*] [the "Vexatious Litigant Application"].

[8] On May 22, 2024, Ms. Kostic brought a motion to stay the Vexatious Litigant Application. Justice Strickland heard the motion in July 2024, and dismissed it in a comprehensive ruling on August 8, 2024: *Canada v Kostic*, 2024 FC 1238.

[9] On May 28, 2024, Canada served its supporting affidavit under Rule 306 of the *Federal Courts Rules*, SOR/98-106 [*Rules*], being an affidavit of Leah Goulet affirmed on May 1, 2024 [the "First Goulet Affidavit"]. The First Goulet Affidavit attaches pleadings and orders filed in proceedings in the Alberta Court of King's Bench, a transcript of the hearing in this Court before Justice Strickland on the stay motion, as well as correspondence (mainly from Ms. Kostic) relating to six proceedings in this Court. Ms. Kostic elected not to cross-examine Ms. Goulet on her affidavit.

[10] According to Canada, on June 27, 2024, Ms. Kostic served a 2,699-page "reply" affidavit dated June 27, 2024 on Canada. Based on my review of the entries on the Court file, Ms. Kostic

did not file proof of service of this affidavit, as required by Rule 307 of the *Rules*. Canada did not cross-examine Ms. Kostic on her affidavit.

[11] On July 22, 2024, Canada served and filed the Applicant's Record.

[12] According to Canada, Ms. Kostic served a voluminous Respondent's Record upon Canada on August 12, 2024. The Respondent's Record included not only Ms. Kostic's affidavit dated June 27, 2024, but also additional affidavits that were not served within the deadline prescribed by Rule 307. Based on my review of the entries for this file on the Proceedings Management System, the Respondent's Record has not been accepted for filing to date.

[13] On August 19, 2024, Canada served and filed a Requisition for Hearing, which noted Ms. Kostic's purported unavailability for the hearing of Canada's Vexatious Litigant Application "until January 2025".

B. ***The Current Motion***

[14] On September 9, 2024, Ms. Kostic filed the present motion to strike Canada's Vexatious Litigant Application and for other relief. Her motion record is 1,822 pages in length and is difficult to follow. The 13-page Notice of Motion contains four separate – and differently worded – recitations of the relief sought (paras 4, 5, 6 to 15, and 19). Ms. Kostic's written submissions comprise 164 single-spaced paragraphs, and include wide-ranging assertions that are seemingly unconnected to the present motion, and relate instead to the merits of various proceedings that are or were before the courts.

[15] Based on a generous reading of Ms. Kostic's motion record, it appears that she is seeking the following Orders from the Court on this motion: (a) striking out the Vexatious Litigant

Application; (b) striking the First Goulet Affidavit and compelling Canada to produce a proper affiant, such as the Minister of Justice or its designated Officer, and allowing for time for the cross-examination of a "valid affiant"; (c) granting leave to Ms. Kostic to include additional evidence and affidavits in her Respondent's Record, and an extension of time for her to file her Respondent's Record with "complete and comprehensive Affidavits"; and (e) compelling witnesses and cross-examination or *viva voce* testimony "including Testimony from the Honourable CMJ King's Bench Justice": Kostic Notice of Motion, page 000003.

[16] On October 31, 2024, Canada filed its responding motion record, supported by a further affidavit of Ms. Goulet [the "Second Goulet Affidavit"]. The Second Goulet Affidavit attaches email correspondence between Canada's counsel and Ms. Kostic regarding the Crown affiant's availability for cross-examination.

[17] Also on October 31, 2024, the Court issued a Direction regarding the starting time for the hearing of the motion, and requiring the parties to "come prepared to discuss the information set out in the Requisition for Hearing filed on August 19, 2024".

[18] In her oral submissions, Ms. Kostic reframed her request to strike the Vexatious Litigant Application as alternative relief, suggesting that she sought to strike the application if a "fair hearing" was not afforded to her. To achieve "fairness" in this proceeding would, in Ms. Kostic's view, require that the Court permit her to file additional evidence and to adduce testimony of live witnesses at the hearing of the Vexatious Litigant Application. Ms. Kostic also challenged the First Goulet Affidavit on the basis of fairness.

III. **Issues**

[19] This motion raises several issues that I propose to address in the following order:

1) Should the Vexatious Litigant Application be struck?

2) If the Vexatious Litigant Application is not struck, then:

   a) Should the First Goulet Affidavit be struck and, if so, should an Order be made compelling Canada to select a different affiant to be made available for cross-examination?

   b) Should Ms. Kostic be permitted to file additional evidence as part of her Respondent's Record, and granted an extension of time to file her Respondent's Record?

   c) Should witness testimony be permitted at the hearing of Canada's application?

IV. **Preliminary Issue – Attempted Late Filing of Additional Affidavit by Ms. Kostic**

[20] At the commencement of the oral hearing of this motion, Ms. Kostic produced the Affidavit of Lori Vrebosch dated November 4, 2024, and sought leave of the Court to file it.

[21] The Court made an oral ruling rejecting the Affidavit for filing, and declining to consider it for the purposes of this motion. The effect of Ms. Kostic attempting to file the 33-page Vrebosch Affidavit at the commencement of the hearing prevented Canada from properly reviewing and responding to it. Ms. Kostic is well aware that the *Rules* do not contemplate the filing of reply affidavits on a motion, particularly at the eleventh hour, as she unsuccessfully attempted the same

tactic at the hearing of her stay motion a few months earlier: *Attorney General of Canada v Kostic*, 2024 FC 1238 at para 34.

V. **Analysis**

A. ***Should the Vexatious Litigant Application be struck?***

[22] Ms. Kostic submits that the Vexatious Litigant Application should be struck under Rule 221 of the *Rules*. She argues that her claims are all meritorious and not vexatious. Ms. Kostic also asserts that the Application is an abuse of process, and that "the vexatious claims by [Canada] are retaliatory, intended to intimidate, discredit and evade accountability for their misconduct": Kostic Written Representations, para 22, page 001786).

[23] Canada submits that the Vexatious Litigant Application should not be struck, as the Notice of Application does not disclose a fatal flaw warranting such an order.

[24] Motions to strike out an application are not governed by Rule 221 of the *Rules*, as relied upon by Ms. Kostic. Rule 221 deals with striking a pleading in a civil action. Instead, this Court has jurisdiction to strike a notice of application by virtue of its plenary jurisdiction to restrain the misuse or abuse of the Court's processes. The test on a motion to strike a notice of application for judicial review was articulated by the Supreme Court of Canada in *Iris Technologies Inc v Canada*, 2024 SCC 24 at para 26 [citations omitted]:

> [26] There is no dispute on the proper test to be applied on a motion to strike in this context. A court seized of a motion to strike assumes the allegations of fact set forth in the application to be true and an application for judicial review will be struck where it is bereft of any possibility of success. It is understood to be a high threshold and will only be granted in the "clearest of cases".

[25] The above-noted legal test is not confined to motions to strike an application for judicial review. The same test applies on a motion to strike any type of notice of application, including an application under section 40 of the *Act*: *College of Immigration and Citizenship Consultants v Sandhu*, 2024 FC 1438 at para 7.

[26] Both parties have tendered affidavit evidence on this motion. Ms. Kostic has submitted three affidavits of herself sworn on August 26, 2024, and September 5, 2024, respectively. Canada has submitted the First Goulet Affidavit and the Second Goulet Affidavit. Canada has also separately included copies of various Court Orders and Directions made in Court File Nos. T-680-20, T-1344-20, T-1224-21, T-319-23, T-320-23, T-1098-24, A-115-22 and A-272-23.

[27] The general rule is that affidavits are not admissible on a motion to strike out an application: *JP Morgan Asset Management (Canada) Inc. v Canada (National Revenue)*, 2013 FCA 250 at para 51. One exception to the general rule, relevant in this case, is where the moving party has added abuse of process as a supplementary ground: *Turp v Canada (Foreign Affairs)*, 2018 FC 12 at para 21. In these circumstances, the moving party may file documents to prove the alleged abuse, and the applicant may file any evidence to refute those allegations.

[28] The various Court Orders and Directions that Canada has separately included in its motion record (Tabs 3 to 10) can also be properly considered by the Court in disposing of the present motion as they are matters of public record found on the records of the Court: *Gaskin v Canada*, 2023 FC 1542 at para 10; *McMullen v Piikani First Nation*, 2023 FC 1531 at para 12.

[29] Turning first to the Notice of Application, Canada alleges that "Liliana Kostic has demonstrated a pattern of improper, abusive, and vexatious proceedings in this Court and other

Canadian courts", and that the "Attorney General of Canada consents to this application". If I assume the allegations of fact set forth in the Notice of Application to be true, as I am required to do, and I consider the Court Orders and Directions set out in Canada's motion record, I must conclude that the Vexatious Litigant Application is not obviously doomed to fail.

[30] To the contrary, based on the facts alleged in the Notice of Application, together with the Court Orders and Directions relating to Ms. Kostic's litigation conduct, I find that the issue raised by Canada on the Vexatious Litigant Application has a reasonable prospect of success, and should be determined by the Applications Judge. The Court Orders and Directions produced by Canada indicate that the Federal Courts have, amongst other things, rejected Ms. Kostic's repeated requests for stays of proceedings, characterized her pleadings as vexatious, scandalous, and high-handed, found her proceedings to be abusive, imposed controls on her ability to file documents, and awarded enhanced costs against her to address and deter her litigation behaviour: See, for example, *Kostic v Canada*, 2023 FC 306; *Kostic v Canada*, 2023 FC 508 *Kostic v Canada*, 2023 FC 1077; *Attorney General of Canada v Kostic*, 2024 FC 1238.

[31] Ms. Kostic's argument that her *claims* are meritorious and not vexatious misses the mark. Vexatious litigant proceedings are separate proceedings focused on the *conduct of the litigant*: *Canada v Nourhaghighi*, 2014 FC 254 at para 60.

[32] Finally, Ms. Kostic's unsubstantiated allegation that the Notice of Application should be struck as being abusive is wholly lacking in merit. Ms. Kostic does not particularize her assertions beyond bald allegations. There are no facts to suggest that Canada has commenced this application for an improper motive.

[33] Accordingly, Ms. Kostic's motion to strike out the application is dismissed.

B. ***Should Canada be required to select a different affiant and to make that individual available for cross-examination?***

[34] Ms. Kostic submits that the First Goulet Affidavit is "non-compliant" and should be struck out, and Canada should be compelled to select a different affiant, and to provide Ms. Kostic with the opportunity to cross-examine the new affiant. She contends that the First Goulet Affidavit is "hearsay" because Ms. Goulet could not have personal knowledge of the court proceedings that are attached to her affidavit. Ms. Kostic further contends that Ms. Goulet, as "some secretary" is not the "proper affiant" in this matter, and section 40(2) of the *Act* requires Canada to file an affidavit from the Attorney General of Canada himself.

[35] Ms. Kostic's attack on the First Goulet Affidavit lacks merit. Turning first to the choice of affiant, Canada's selection of Ms. Goulet as an affiant was not improper. A party to an application is generally entitled to select an affiant of their choosing, and that choice of affiant may only be displaced if the affiant is impermissible under the *Rules* (e.g. a solicitor's affidavit *per* Rule 82) or the *Canada Evidence Act* (e.g. affiant lacks capacity): *Tazehkand v Bank of Canada*, 2020 FC 1193 at para 95. None of the limited restrictions on the choice of affiant are engaged on this motion.

[36] Ms. Kostic's argument that section 40(2) of the *Act* requires an affidavit from the Attorney General of Canada himself is ill-founded. While the consent of the Attorney General of Canada must be filed on a section 40 application, that pre-requisite does not require the Attorney General of Canada to file a personal affidavit in support of the application. Here, the mandatory pre-requisite has been satisfied by Canada filing the "Consent of the Attorney General of Canada" at Tab 2 of their Applicant's Record. It would be wholly impracticable to require the Attorney General of Canada to personally affirm the circumstances giving rise to each vexatious litigant application brought in this Court.

[37] Ms. Kostic's contention that the First Goulet Affidavit is inadmissible as it includes hearsay and irrelevant information is also misplaced. The Affidavit contains information that is plainly relevant to the Vexatious Litigant Application. While hearsay evidence is presumptively inadmissible as a general rule of evidence, Rule 81(1) of the *Rules* expressly permits the admission of hearsay evidence on motions. Insofar as the First Goulet Affidavit contains various pleadings and Orders from legal proceedings in the Alberta Court of King's Bench, these are matters of public record. Ms. Kostic is free to request that the Court draw an adverse inference from the First Goulet Affidavit, pursuant to Rule 81(2) of the *Rules*, insofar as the Affidavit is made on information and belief.

[38] Ms. Kostic also submits that the First Goulet Affidavit was improper because the "lack of proper attachment of allegations" caught her "off guard" and denied her the opportunity to adequately respond. Ms. Kostic elaborated at the oral hearing by saying that Ms. Goulet was required to explain in her affidavit why each exhibit was relevant to the Vexatious Litigant Application.

[39] I reject this argument. Affidavits are expected to set out facts, not expressions of opinion or legal argument.

[40] If Ms. Kostic had questions or concerns about the First Goulet Affidavit, she could have cross-examined Ms. Goulet on her affidavit. Correspondence attached to the Second Goulet Affidavit reveals that Canada made Ms. Goulet available to Ms. Kostic for cross-examination. Ms. Kostic chose not to complete a cross-examination of Ms. Goulet, although she had ample opportunity to do so.

[41] Accordingly, I dismiss Ms. Kostic's motion for orders striking out the First Goulet Affidavit, compelling Canada to produce the Attorney General of Canada or his designated officer as the affiant, and allowing Ms. Kostic to cross-examine the new affiant.

C. ***Should Ms. Kostic be permitted to file additional evidence?***

[42] Ms. Kostic seeks leave to file additional evidence on the Vexatious Litigant Motion. She describes this new evidence in her Notice of Motion as "being in the form of 3 Affidavits, and exhibits, Order's decisions, Transcripts from recent King's Bench CM hearings, and subsequent Orders some outstanding due this month in preparation concerning (1) why Kostic is NOT Vexatious, (2) Kostic's Alberta Police Complaint, and (3) the whereabouts of the millions of Missing Piikani Assets": Kostic Notice of Motion, para 58, page 000009.

[43] At the oral hearing, Ms. Kostic further clarified that the evidence that she wishes to admit consists of an amended affidavit included in her motion record (starting at page 001359), a Police Complaint made in Alberta in 2021 or 2022, and transcripts from recent case management conferences in the Alberta Court of King's Bench. Ms. Kostic also referred to undertakings made in 2019 in an examination for discovery in one of her Alberta lawsuits, and responses received by her in July 2024, including damage and loss statements [collectively, the "Alberta Litigation Materials"].

[44] Canada submits that the interests of justice do not favour the late filing by Ms. Kostic of additional affidavits. Canada takes the position that the Court should limit Ms. Kostic to her affidavit sworn on June 27, 2024, which Canada acknowledges was served on time and is properly within the scope of the Court's consideration on this motion.

[45] Rule 307 provides that a respondent on an application (such as Ms. Kostic) must serve their affidavits within 30 days after service of the applicant's affidavits. By exception, Rule 312 of the *Rule*s allows a respondent, with leave of the Court, to file affidavits in addition to those filed under Rule 307. The discretion of the Court to permit the filing of additional material should be exercised with great circumspection, given that applications for judicial review are summary proceedings that should be determined without undue delay: *Canada (Fisheries and Oceans) v Gwasslaam*, 2009 FCA 25 at para. 4.

[46] To obtain leave pursuant to Rule 312(a), the moving party must, after satisfying two preliminary requirements, establish that admitting the additional affidavit evidence is in the interests of justice. The principles that guide the Court's discretion are (*Forest Ethics Advocacy Association v National Energy Board*, 2014 FCA 88 at paras 4-6 [*Forest Ethics*]):

A. Was the evidence sought to be adduced available when the party filed its affidavits under Rules 306 and 307, 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 and sufficiently probative that it could affect the result?
C. Will the evidence cause substantial or serious prejudice to the other party?

[47] The above-noted factors are not an exhaustive list. Given the discretionary nature of the decision, the Court may consider other factors that are specific to the circumstances of the case. Overall, in exercising its discretion, the Court must always be mindful of the general principle in Rule 3 that the *Rules* must be interpreted and applied so as to secure the just, most expeditious and

least expensive determination of every proceeding on its merits: *Campbell v Electoral Canada*, 2008 FC 1080 at paras 26-27.

[48] Rule 312 is not there to allow a party to split its case. A party must put its best foot forward at the first opportunity: *Rosenstein v Atlantic Engraving Ltd*, 2002 FCA 503 at para 9.

[49] Based on the materials before the Court, and for the reasons set out below, Ms. Kostic has not demonstrated that it is in the interests of justice to allow the proposed additional evidence to be filed under Rule 312.

[50] First, the nature and scope of the additional evidence being proposed by Ms. Kostic is uncertain. On the one hand, Ms. Kostic stated at the oral hearing that the evidence that she wishes to admit consists of an amended affidavit included at page 001359 in her motion record. That is the Affidavit of Liliana Kostic sworn on August 26, 2024 (154 paragraphs plus voluminous exhibits) [Kostic Amended Affidavit].

[51] The Kostic Amended Affidavit is one of three affidavits contained in Ms. Kostic's voluminous motion record. There is also an Affidavit of Liliana Kostic sworn on September 5, 2024 (40 paragraphs) starting on page 000016, and another Affidavit of Liliana Kostic also sworn on September 5, 2024 entitled "Part 2" (paragraphs 1 to 38, and then another paragraphs 1 to 19) starting on page 001343. All of these affidavits have a voluminous jumbled mixture of documentary evidence attached to them. In total, the affidavit evidence in the motion record spans over 1700 pages.

[52] It is unclear which of these affidavits are being filed as proposed additional evidence in the underlying Vexatious Litigant Application. Without having the proposed additional evidence

being clearly identified, and presented in an understandable fashion, the Court cannot properly evaluate whether it is in the interests of justice to allow it. The Rule 312 motion fails on this ground alone.

[53] Second, insofar as Ms. Kostic's proposed additional evidence is, in fact, the Kostic Amended Affidavit, that affidavit recounts Ms. Kostic's litigation history, and it interspersed with complaints about the conduct of Canada and other opposing parties in various proceedings. This evidence was known to Ms. Kostic prior to this motion and could have been adduced at an earlier date as part of her initial affidavit dated June 27, 2024.

[54] The Alberta Police Complaint that Ms. Kostic seeks to admit does not appear to be included in her motion record. In her oral submissions, Ms. Kostic stated that she had filed the police complaint in 2021 or 2022. She could not recall the exact date. Regardless of the precise date, evidence relating to the police complaint was available when Ms. Kostic served her initial affidavit dated June 27, 2024. It was incumbent on Ms. Kostic to put her best foot forward at the onset when she served her initial affidavit. In addition, Ms. Kostic has not established, either in her written or oral submissions, how the Alberta Police Complaint is relevant to this proceeding or how it will assist the Court.

[55] Ms. Kostic did not make clear precisely which case management transcripts from the Alberta Court of King's Bench she seeks to admit. The transcripts that are included in her motion record relate to Court proceedings that took place on September 4, 2012 (pages 001292-001318), February 24, 2022 (pages 000432-000451), June 11, 2024 (pages 001546-001647 and pages 001648-001764) and June 12, 2024 (pages 000027-000057 and pages 001449-001483). Ms. Kostic submits that the transcripts are relevant because they demonstrate that Justice Graesser of the

Alberta Court of King's Bench did not deal with certain legal issues in the proceedings before that Court. However, the focus of the Vexatious Litigant Application is on Ms. Kostic's litigation conduct, and not the disposition of substantive legal issues in litigation in which Ms. Kostic is involved. As such, I fail to see how the transcripts are either relevant or sufficiently probative that it could affect the result of the Application. Further, and in any event, given the dates of the Alberta Court of King's Bench proceedings in question, I find that the transcripts being adduced were either available when Ms. Kostic filed her initial affidavit dated June 27, 2024, or they could have been made available with the exercise of due diligence on her part.

[56] With respect to the proposed additional evidence that relates to "the whereabouts of the millions of Missing Piikani Assets" and the Alberta Litigation Materials, those materials are not before the Court, and therefore cannot be evaluated to determine their relevance or probative value on the Vexatious Litigant Application. Based on Ms. Kostic's submissions, these materials appear to relate to the merits of her claims before the Alberta courts. However, that is not the purpose of the Vexatious Litigant Application. Again, the Vexatious Litigant Application focusses on Ms. Kostic's litigation conduct. Moreover, the admissibility of the Alberta Litigation Materials is in question, insofar as it consists of responses to undertakings given on discovery, having regard to the implied undertaking rule.

[57] Canada submits that admitting the additional evidence will cause prejudice by delaying the hearing of the Vexatious Litigant Application and leaving the Court and Canada "exposed to Ms. Kostic's palpable vexatiousness".

[58] In the particular circumstances of this case, I conclude that admitting the voluminous and unwieldy additional evidence being proposed by Ms. Kostic, much of which appears to be

unrelated to the subject matter of the Vexatious Litigant Application, and thereby allowing Ms. Kostic to effectively split her case, will cause prejudice to Canada and would not be in the interests of justice. Justice Strickland made the following observations regarding Ms. Kostic's prior filings in this proceeding relating to her motion for a stay of the Vexatious Litigant Application (*Attorney General of Canada v Kostic*, 2024 FC 1238 at para 68):

> As the AGC describes in its submissions, to date Ms. Kostic has been prolific in her filings in this Court. These filings, like her motion in this matter, tend to be extremely lengthy and to include voluminous materials that are largely unrelated to the subject matter of the proceeding at hand. They tend to make broad allegations of wrongdoing by the responding parties, their counsel, the AGC, the Court and others. I would add that they also typically consume considerable resources of the generally multiple responding parties and of the Court. Ms. Kostic's conduct of this stay motion is representative of these concerns. Without some form of control over her filings, it is probable that this course of conduct will continue.
>
> [my emphasis]

[59] In conclusion, having considered and weighed the factors enunciated in *Forest Ethics*, as well as the particular circumstances of this case, and being mindful of the guiding principles set out in Rule 3 of the *Rules,* I conclude that it would not be in the interests of justice to allow Ms. Kostic to file the proposed additional evidence. Accordingly, Ms. Kostic's motion for leave to file additional evidence is denied.

D. ***Should witness testimony evidence be permitted at the hearing of the Vexatious Litigant Application?***

[60] Ms. Kostic seeks an Order for leave to compel witnesses to give *viva voce* testimony at the hearing of the Vexatious Litigant Application. The proposed witnesses include an Alberta Court of King's Bench Case Management Judge, Ms. Hanert (her former counsel), the Attorney General

of Canada or Minister of Justice, Dale McMullen, Councilor Iron Shirt, and "Elders": Kostic Written Representations at para 83, page 001797.

[61] As a general rule, an application brought under Part 5 of the *Rules* proceeds on a written record, and witnesses do not appear at the hearing. However, Rule 316 provides that the Court may, "in special circumstances", authorize a witness to testify in Court in relation to an issue of fact raised in an application. The onus is on the moving party (Ms. Kostic) to establish the existence of special circumstances.

[62] What constitutes "special circumstances" will depend on the facts of the particular case, but a departure from the usual practice of conducting an application based solely on documentary evidence will only be permitted in an "exceptional case" and the "clearest of circumstances". Contradictions in the documentary evidence or a desire that the Court be able to assess the demeanour of a witness do not in themselves justify an order under Rule 316: *Mackie v Via Rail Canada Inc*, 2023 FC 1148 at para 15 [*Mackie*].

[63] The moving party on a Rule 316 motion must demonstrate, amongst other things, that: (a) the proposed testimony is relevant and admissible evidence that is not already in the record, and it is essential or necessary for the resolution of the application; and (b) obtaining the evidence by affidavit or cross-examination will be impossible or inadequate, and not simply less preferable: *Mackie* at para 15.

[64] I am not satisfied that Ms. Kostic has met her onus to demonstrate that there are special circumstances justifying *viva voce* testimony at the hearing of the Vexatious Litigant Application. She has not established that any of the proposed witnesses offer evidence that is sufficiently

relevant and necessary to the issues in the application to meet the high standard of "special circumstances", or that it was impossible or inadequate to obtain that evidence by affidavit.

[65] Apart from the Alberta Court of King's Bench Case Management Judge, Ms. Kostic has not specifically addressed the need for the other proposed witnesses to appear in Court. As regards the Case Management Judge, she alleges that "the Honourable CMJ in King's Bench confirmed that AGC and others misled the Federal Court, supporting Kostic's claims of wrongful targeting": Kostic written representations, page 001782. Ms. Kostic has not shown that the proposed evidence is relevant or essential to the outcome of the Vexatious Litigant Application. The merits of her legal claims, including in the Alberta Court of King's Bench, and the allegedly "erroneous decisions" of the Federal Court are not at issue on the underlying application. The Vexatious Litigant Application is a separate proceeding focussed on Ms. Kostic's litigation conduct.

[66] Even if Ms. Kostic could demonstrate special circumstances, the Alberta Court of King's Bench Case Management Judge is not a compellable witness in the Vexatious Litigant Application. The principle of judicial immunity, an essential aspect of judicial independence, provides that judges are immune from compulsion to testify directly about judicial proceedings in which they have been involved: *MacKeigan v Hickman*, [1989] 2 SCR 796 at 831.

[67] Accordingly, I conclude that Ms. Kostic's motion for an order compelling witnesses to give *viva voce* testimony at the hearing of the Vexatious Litigant Application is denied.

VI. **Conclusion**

[68] For the foregoing reasons, I conclude that Ms. Kostic's motion is dismissed.

[69] Ms. Kostic seeks “advanced costs” on this motion, but does not identify a specific sum. She suggests that such an award is in the public interest, pointing to her “efforts to expose corruption and mismanagement” as justification for her request: Kostic Written Representations, para 123, page 001802.

[70] Canada seeks enhanced costs in this motion in the amount of $5,000. Canada submits that the amount provided under Column III at Tariff B of $1,000 would be inadequate, given the scale of Ms. Kostic’s motion record. Canada also points to the fact that Ms. Kostic’s representations were unnecessarily lengthened and used intemperate and heightened language throughout. Canada draws an analogy to the decision in *Johnson v Canadian Tennis Association*, 2024 FC 110, where this Court made awarded enhanced costs in the amount of $5,000 against a self-represented plaintiff who filed voluminous materials and made baseless allegations of misconduct, bad faith and impropriety.

[71] Rule 400 of the *Rules* grants the Court full discretionary power over the amount and allocation of costs. One of the objectives of costs is to sanction behaviour that increases the duration and expense of litigation, or is otherwise unreasonable or vexatious: *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71 at paragraph 25.

[72] This is Ms. Kostic’s second motion attempting to end or delay Canada’s Vexatious Litigant Application. She has not been successful on either attempt. She has filed voluminous and unwieldy motion materials on both motions. Her written and oral submissions are riddled with abusive and unsubstantiated allegations. The enhanced costs award sought by Canada is therefore appropriate in this instance. Costs are hereby fixed in the amount of $5,000, inclusive of disbursements and taxes, payable by Ms. Kostic to Canada.

[73] Finally, Canada requested that the Vexatious Litigant Application be set down for hearing, in accordance with Justice Strickland's ruling on the stay motion that "is in the public interest that the Vexatious Litigant Application proceed with due dispatch": *Canada v Kostic*, 2024 FC 1238 at para 81. By Order of the Chief Justice dated November 22, 2024, the hearing of the Vexatious Litigant Application has been scheduled to be heard on February 13, 2025.

THIS COURT ORDERS that:

1. Ms. Kostic's motion to strike out the Notice of Application and for other relief is dismissed.

2. Ms. Kostic is granted an extension of time to January 31, 2025 to serve and file an amended version of the Respondent's Record that she served upon Canada on August 12, 2024 but which was not accepted for filing.

3. The only affidavit that Ms. Kostic may include in the Amended Respondent's Record is her Affidavit sworn on June 27, 2024 and served on Canada that same day. The Amended Respondent's Record shall also include the version of Ms. Kostic's Memorandum of Fact and Law that was included in her Respondent's Record served on Canada on August 12, 2024.

4. Costs of the motion, hereby fixed in the amount of $5,000, inclusive of disbursements and taxes, shall be paid by Ms. Kostic to Canada in any event of the cause.

"Kathleen Ring"
Associate Judge