

Federal Court



Cour fédérale

Date: 20100601

Docket: T-2086-09

Citation: 2010 FC 595

[UNREVISED ENGLISH CERTIFIED 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

UPON the motion by Robert Gravel (the applicant) to strike some parts of certain paragraphs in Yves Sarault's, Jean-François St-Germain's and Shawn Hamill's affidavits, submitted as evidence by Telus Communication Inc. (the respondent) in response to the applicant's application for judicial review to strike certain documents submitted in support of those affidavits and to obtain an order granting the filing of the supplementary affidavits of the applicant and two other declarants, Claude Gravel and Jacques Gagné;

UPON REVIEW of the documentation submitted by both parties;

CONSIDERING that on February 2, 2010, the respondent served a motion in related case T-2087-09 to strike certain affidavits submitted as evidence by the applicant in part or in full. On February 12, 2010, Tremblay-Lamer J. partially allowed the respondent's motion to strike several paragraphs from Robert Gravel's, Claude Gravel's and Jacques Gagné's affidavits in their entirety. The applicant appealed this order;

CONSIDERING that the respondent, in light of this appeal, filed two motions to obtain a stay of proceedings in T-2087-09 as well as this case while awaiting a ruling by the Court of Appeal. On March 18, 2010, Mainville J. dismissed both these motions;

CONSIDERING that this motion is intimately linked to a similar motion brought by the applicant at the same time in T-2087-09 and that the Court partially allowed it;

CONSIDERING that upon the request of the Court and given the objection raised under Rule 318 of the *Federal Courts Rules*, SOR/98-106, the parties are to take steps to obtain the certified record that will allow the Court to make a final decision on the following exhibits: Exhibit 2 of Mr. Saint-Germain's affidavit, Exhibits 3 and 8 of Mr. Hamill's affidavit, and Exhibit 3 of Mr. Sarault's affidavit. The Court understands that despite correspondence with the arbitrator, the certified record will not be available soon. Given that the decision-maker is not available on short notice, it is appropriate to decide on other issues that will inform the parties position on the above-mentioned appeal. If upon receipt of the certified record, the parties are unable to agree on this matter, the Court will settle this issue;

CONSIDERING that the Federal Court of Appeal issued the following warning to litigants regarding motions to strike affidavits in *Canadian Tire Corp. Ltd. v. P.S. Partsource Inc.*, 2001 FCA 8, 200 FTR 94:

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.

Furthermore, case law recognizes that judicial reviews are summary proceedings that must be heard on the merits quickly. Consequently, the Court must exercise its discretion to strike paragraphs contained in certain affidavits even more sparingly and do so only in cases where it is in the interest of justice to do so or when not striking an affidavit would result in a party being materially prejudiced or would impair the orderly hearing of proceedings: *Armstrong v. Canada (Attorney General)*, 2005, FC 1013, 141 ACWS (3d) 5 (*Armstrong*).

In this case, if it were not for the decision rendered by Tremblay-Lamer J., the Court would have dismissed the motion to strike and left it up to the trial judge to decide on these issues.

Mr. Saint-Germain's, Mr. Hamill's and Mr. Sarault's affidavits generally reiterate what was stated in their testimony before the arbitration tribunal. The information contained in their affidavits is therefore consistent with the summation of the evidence in the arbitral decision in most cases. However, given that certain paragraphs of the applicant's affidavit were struck, it is in the interest of justice¹ to not allow the respondent to submit similar evidence into the Court record.

Mr. Saint-Germain was Vice President, Public & Para Public Markets upon termination of the applicant's employment. The facts included in his affidavit are consistent with the summary of his testimony in the arbitral decision. The applicant's motion to strike must be dismissed in relation to that affidavit.

Mr. Hamill held the position of Manager, Sales Incentive Management at the time in question. His affidavit includes several paragraphs containing information not included in the summary of his testimony in the arbitral decision, namely paragraphs 8, 9, 13, 14, 15, 16, 17, 18, 28, 29, 31 and 32. As a result, this evidence was not before the arbitrator and is therefore inadmissible for a judicial review. Furthermore, both the decision and his affidavit indicate that Mr. Hamill did

¹ *Armstrong*, para 40.

not have personal knowledge of the facts included in paragraphs 24, 25, 26, 48, 50, 51 and 53. In light of the arbitral decision, the information contained in those paragraphs seems instead to have been provided to the Court by witnesses other than the declarant. Those paragraphs consequently constitute hearsay and must be struck.

As for Mr. Sarault's affidavit, paragraphs 22, 26, 31 and 47 must be struck because they contain information that, in light of the arbitrator's decision, was not before the arbitration tribunal. Paragraphs 57 and 59 must also be struck because they refer to statements Mr. Hamill made before the arbitrator, and paragraphs 70 and 71 must be struck because they are argumentative. Finally, it is relevant to note that paragraphs 74 to 97, which relate to the proceedings, are identical to paragraphs 75 to 98 of Mr. Sarault's affidavit filed in T-2087-09. Consequently, without reiterating the analysis included in those paragraphs in the order issued at the same time in the above-mentioned case, paragraphs 81 and 82 must be struck, as well as the following portion of paragraph 80: [translation] "particularly playing little part in terms of the relevance of the questions asked during both the examination in chief and the cross-examination, showing him flexibility and understanding."

CONSIDERING that a party may, under Rule 312 and at the Court's discretion, file supplementary affidavits in addition to those stipulated in Rules 306 and 307. The applicant may not use Rule 312 to split his case; he must put his best case forward at the first opportunity. In this context, the Court must consider whether the evidence will: (a) serve the interests of justice; (b) assist the Court; (c) not seriously prejudice the other side; and (d) neither deal with material which could have been made available at an earlier date, nor unduly delay the proceedings: *Mazhero c. Canada (Industrial Relations Board)*, 2002 FCA 295, 292 N.R. 187 at para 5; *Rosenstein v. Atlantic Engraving Ltd.*, 2002 FCA 503, 299 N.R. 244 at para 8-9. The discretion of the Court to permit the filing of additional material should be exercised "with great circumspection."

In this case, the applicant has not shown that these conditions have been met. His supplementary affidavit does not include new facts; it instead includes information about his employment with the respondent and the circumstances surrounding the termination of that

employment, his professional qualifications, the evidence before the arbitrator, the disclosure of records, the proceedings and the alleged errors made by the arbitrator. This evidence was therefore available at an earlier date. Furthermore, the applicant's supplementary affidavit in this case is very similar to the supplementary affidavit that the applicant attempted to have submitted in related case T-2087-09. Given that the applicant's motion was dismissed in an order issued at the same time in that related case, the current motion must also be dismissed.

As for Claude Gravel's and Jacques Gagné's affidavits, dated March 25 and March 31, 2010 respectively, they are identical to those the applicant is attempting to have submitted in a similar motion in T-2087-09. As discussed in detail in the order issued in T-2087-09, they are substantially identical to those previously struck by the order of Tremblay-Lamer J. in T-2087-09. Given that the applicant's motion to submit identical affidavits in T-2087-09 was dismissed, the motion in this case must be dismissed for the same reasons.

CONSIDERING that it is well established that admissible evidence in a judicial review is generally limited to the Court record or decision-maker's file. Additional evidence may be admissible, however, if it describes the procedure and evidence presented to the decision-maker whose decision is under judicial review, and if it involves a breach of procedural fairness.²

As for Exhibits 18 and 20 of Mr. Sarault's affidavit, they were not before the arbitration tribunal and therefore constitute new evidence. Exhibit 18 is a table indicating the duration of examinations and cross-examinations of each witness, as well as the time allocated by the arbitrator to manage proceedings. It is identical to Exhibit 8 submitted in support of Mr. Sarault's affidavit in T-2087-09. As for Exhibit 20, it contains a list of requested documents and indicates whether they were submitted before the Court. It includes a page identical to Exhibit 10 submitted in support of Mr. Sarault's affidavit in T-2087-09, to which an additional page was added that contained the same information for other hearing dates. Given the applicant's allegations in his affidavit and his notice of application in relation to the proceedings of the hearing, the disclosure of records, as well as the

² *Nametco Holdings Ltd. v. Canada (Minister of National Revenue)*, 2002 FCA 149, 113 ACWS (3d) 927 at para 2.

evidence provided before the Court, there is reason to dismiss the applicant's corresponding motion. These documents contain general information that could be useful to the trial judge. They are admissible evidence and should not be struck.³ Given that the parties were mutually successful, no costs will be awarded for this motion.

ORDER

THE COURT'S JUDGMENT is that:

1. The applicant's motion is partially allowed.
2. The order to strike paragraphs from Jean-François Saint-Germain's affidavit is denied.
3. The following paragraphs of Shawn Hamill's affidavit are struck: 8, 9, 13, 14, 15, 16, 17, 18, 24, 25, 26, 28, 29, 31, 32, 48, 50, 51 and 53.
4. The following paragraphs of Yves Sarault's affidavit are struck; 22, 26, 31, 47, 57, 59, 70, 71, 81 and 82, along with the following portion of paragraph 80: [translation] "particularly playing little part in terms of the relevance of the questions asked during both the examination and the cross-examination, showing him flexibility and understanding."
5. The submission of the applicant's amended affidavit is not authorized.
6. The submission of Claude Gravel's and Jacques Gagné's supplementary affidavits is not authorized.
7. The motion to strike Exhibits 18 and 20, submitted in support of Yves Sarault's affidavit, is rejected.

³ *Armstrong*, para. 40.

8. The Court will decide on the motion relating to Exhibit 2 of Mr. Saint-Germain's affidavit, Exhibits 3 and 8 of Mr. Hamill's affidavit, as well as Exhibit 3 of Mr. Sarault's affidavit if necessary, upon receipt of the Certified Tribunal Record.

“Johanne Gauthier”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-2087-09

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

**MOTION IN WRITING CONSIDERED AT QUÉBEC, QUEBEC, PURSUANT TO
RULE 369 ON APRIL 8, 2010**

**REASONS FOR ORDER
AND ORDER BY:** GAUTHIER J.

DATED:JUNE 1, 2010

WRITTEN REPRESENTATIONS BY:

Robert Gravel

FOR THE APPLICANT
(representing himself)

Jean-François Dolbec
Pierre-Étienne Morand

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Robert Gravel
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FOR THE APPLICANT
(representing himself)

Heenan Blaikie Aubut
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FOR THE RESPONDENT