Federal Court  Cour fédérale

Date: 20191108

Docket: T-1318-19

Citation: 2019 FC 1405

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, November 8, 2019

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

MARTIN LAJEUNESSE

Plaintiff – Applicant

and

THE ATTORNEY GENERAL OF CANADA

Defendant – Respondent

and

CANADIAN JUDICIAL COUNCIL

Defendant – Respondent

ORDER AND REASONS

[1] The applicant filed a motion with the Court seeking [TRANSLATION] "recognition of the right to a hearing of the applicant's motion dated September 30, 2019, . . . and to question a witness at this hearing" [Motion].

[2] The Motion was filed in the context of an application for judicial review whereby the applicant is contesting a decision by the Canadian Judicial Council [Council], which declined to conduct a further review of a complaint that the applicant had filed with the Council against three judges of the Superior Court of Québec before which a legal dispute between the applicant and Investissement Québec has been pending for a number of years and for which a trial date has still not been scheduled for reasons that the applicant attributes to the conduct of these three judges.

[3] For its part, the motion dated September 30, which is closely linked to the Motion, seeks to contest the Council's response to the request for material that it had received from the applicant, pursuant to Rule 317 of the *Federal Courts Rules*, SOR/98-106 [Rules], and to compel the Attorney General, personally, to produce [TRANSLATION] "the full and complete record concerning the facts set out in the documents attached to the applicant's complaint to the Canadian Judicial Council . . ." and to provide a "specific response" to the questions set out in the Notice of Application for Judicial Review filed by the applicant. This motion [Main Motion] is scheduled to be heard at a general sitting for the hearing of motions in Québec on December 5, 2019.

[4] The first part of the Motion, specifically, the part seeking [TRANSLATION] "recognition of the right to a hearing of the applicant's motion dated September 30, 2019", was prompted by the Attorney General's objection, formulated in response to the Main Motion, to having the Main Motion decided orally and not in writing, pursuant to Rule 369. The Attorney General maintains that the Main Motion does not have any of the features that militate in favour of an oral hearing: it is not complex and does not require presentation of complex legal arguments; it does not raise any new issues of public interest; there is no evidence to suggest that an oral hearing would

facilitate the Court's task or that the applicant would be incapable of presenting the Main Motion adequately in writing; and there is no emergency requiring an oral hearing to be held in order to ensure a quick resolution of the motion.

[5] I cannot allow the Attorney General's objection. Under the Rules, the choice of the manner of presentation—oral or written—of a motion is left up to the parties (Letarte, Veilleux, LeBlanc and Rouillard-Labbé, *Recours et procédures devant les Cours fédérales*, Lexis Nexis, Montréal, 2013, at paras 7–2). As these authors noted, it is true that the Federal Court of Appeal's practice is to require motions filed in the course of a proceeding to be presented in writing, except in exceptional circumstances. This is understandable, given that there are less than 15 judges with subject-matter jurisdiction and national territorial jurisdiction.

[6] However, apart from a few exceptions, this practice does not exist in the Federal Court, the parties' choice being the rule, subject to the Court's discretion to order that a motion presented by a party solely on the basis of written representations, as allowed under Rule 369, be heard orally at the request of the opposing party. It is in this context that the factors invoked by the Attorney General apply and not in the opposite situation, as is the case here.

[7] Moreover, the case law cited by the Attorney General in support of his objection concerning the manner of presentation of the Main Motion relates only to cases where a party requested that a motion filed by the opposing party pursuant to Rule 369 be decided at an oral hearing (*Behnke v Canada (Department of External Affairs)*, 2000 CanLII 15883 (FC)); *Sterritt v Canada*, [1995] FCJ No 1102). I do not know of any case where the Court exercised its discretion such that an applicant who wanted to present a motion orally was compelled to present

it strictly on the basis of written representations. The Court must certainly be able to intervene in order to prevent abusive use of the Rules, but that is not the case here, at least not at this stage of the proceedings.

[8] I would note that the Court's work is organized such that general sittings for the hearing of motions are held regularly, from coast to coast, in Canada's major cities. Its work is also organized so that special sittings can be scheduled to allow for the hearing of motions that are likely to exceed two hours, thereby promoting the open court, and rightly so. I am not persuaded, in this context, that objections like the one raised by the Attorney General in this case should be encouraged.

[9] The Main Motion may therefore be heard orally on December 5, 2019.

[10] For the following reasons, the other part of the Motion concerning the summoning of a witness for the hearing of the Main Motion is dismissed.

[11] The applicant submits that the *viva voce* testimony of Hubert Pépin at the hearing of the Main Motion is necessary because he may have [TRANSLATION] "first-hand information" and may be able to enlighten the Court about the general allegations surrounding the application for judicial review filed by the applicant and the Main Motion. Claiming that Mr. Pépin's interests differ from his own and that Mr. Pépin [TRANSLATION] "seems opposed to [the applicant's] getting justice" before the Superior Court, the applicant fears that it will be impossible for him to get Mr. Pépin to swear an affidavit.

[12] More specifically, according to the allegations in the Motion, the interest in Mr. Pépin's testimony stems from the fact that it is [TRANSLATION] "possible" that he has influence among the judges of the Superior Court of Québec sitting in Sherbrooke and over their appointment, as well as over the scheduling of trial dates before the Superior Court. Also according to the Motion, it is even [TRANSLATION] "possible" that Mr. Pépin is using this influence to delay the appointment of a new Superior Court judge in this district, with the objective of delaying the trial opposing the applicant and Investissement Québec, for which Mr. Pépin is a named witness.

[13] Beyond the purely speculative nature of these allegations, the issue here is that none of this is suggested by the complaint filed by the applicant with the Council, in which Mr. Pépin is essentially depicted as a key player in the legal dispute between the applicant and Investissement Québec.

[14] At the hearing of the Motion, I understood from the applicant's representations that the Court currently has enough evidence before it to quash the Council's decision and that Mr. Pépin's testimony is being proposed in the event that the judge who will hear the Main Motion or even the merits of the case deems this testimony to be relevant.

[15] However, this is not the burden to be met to benefit from an exception to the rule that evidence concerning a motion presented in the course of proceedings should be provided via affidavit. In accordance with Rule 371, it is only in "special circumstances" ("circonstances particulières") that the Court will make an exception to this rule.

[16] The Court has held previously that this rule should be deviated from only in "exceptional" circumstances; moreover, it must be established that the testimony is essential or necessary for the resolution of the motion (*Glaxo Canada Inc v Canada (Minister of National Health and Welfare)* [1987] 11 FTR 132 at para 7; *Cyanamid Canada Inc v Canada (Minister of National Health and Welfare)*, [1992] FCJ No 144). For example, the presence of a witness was permitted in a case where the policies of a police service prohibited its officers from making affidavits in the context of civil cases (*Alcohol Countermeasure System Inc v Lion Laboratories Ltd* (1983), 77 CPR (2d) 83). An application under rule 371 was also allowed in a case of contempt of court where the judge presiding over the matter was confronted with several irreconcilable affidavits (*Apple Computer Inc v Mackintosh Computers Ltd*, [1988] 3 FC 277).

[17] Nothing here justifies a deviation from the rule concerning affidavit evidence. In particular, I fail to see—and the applicant was unable to explain—how Mr. Pépin's testimony could, in any way, contribute to resolving the Main Motion, which, I note, concerns, first, the adequacy of the material disclosed by the Council, in its capacity as a federal board, commission or other tribunal, within the meaning of section 2 of the *Federal Courts Act*, RSC 1985, c F-7, further to a request from the applicant under rule 317, and, second, the issue of whether the Attorney General is also required to disclose information to the applicant, if he has any, related to the application for judicial review initiated by the latter in light of the Council's decision not to investigate the complaint.

[18] I would add that the mere fear that Mr. Pépin would not be willing to swear an affidavit is not enough for the Court to authorize his testimony for the purposes of the Main Motion

(*Minister of National Revenue v Vennes*, 97 DTC 5159, at p 5). Mr. Pépin's actual refusal to swear this affidavit would have had to have been on the record.

[19] In short, the applicant has failed to persuade me that there are special circumstances that would justify summoning Mr. Pépin to appear as a witness at the hearing of the Main Motion. It seems to me, that, through this motion, the applicant is primarily, assuming that he be allowed to do so, seeking to improve on his complaint before the Council or even to improve the evidence supporting the merits of his application for judicial review. However, this is not a valid reason to justify *viva voce* testimony in the context of a motion filed in the course of a proceeding.

[20] In light of the mixed success of the Motion, the applicant and the Attorney General are responsible for their own costs. There will be no order as to costs for or against the Council.

ORDER in Docket T-1318-19

THE COURT ORDERS that:

1. The motion is allowed in part;

2. The Main Motion may be presented orally, at a general sitting;

3. The application seeking to order the appearance of Hubert Pépin at the hearing of the Main Motion so that he testify thereat is dismissed;

4. Without costs;

"René LeBlanc"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1318-19
STYLE OF CAUSE:	MARTIN LAJEUNESSE v THE ATTORNEY GENERAL OF CANADA and CANADIAN JUDICIAL COUNCIL
PLACE OF HEARING:	QUÉBEC, QUEBEC
DATE OF HEARING:	NOVEMBER 7, 2019
REASONS FOR ORDER AND ORDER:	LEBLANC J.
DATED:	NOVEMBER 8, 2019

APPEARANCES:

Gloriane Blais	FOR THE APPLICANT
Pascale-Catherine Guay	FOR THE RESPONDENT ATTORNEY GENERAL OF CANADA
Yvan Bujold	FOR THE RESPONDENT CANADIAN JUDICIAL COUNCIL

SOLICITORS OF RECORD:

Gloriane Blais Counsel Lac-Mégantic, Quebec	FOR THE APPLICANT
Attorney General of Canada Québec, Québec	FOR THE RESPONDENT ATTORNEY GENERAL OF CANADA
Cain Lamarre Counsel Québec, Quebec	FOR THE RESPONDENT CANADIAN JUDICIAL COUNCIL