

CANADA / JUDGMENT

Moreau v. Thunder Bay Port Authority

2024 FC 1783

COURT

Federal Court

DECIDED

7 November 2024

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Date: 20241107

Docket: T-1401-24

Citation: 2024 FC 1783

Ottawa, Ontario, November 7, 2024

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

MICHAEL MOREAU

Applicant

and

THUNDER BAY PORT AUTHORITY

Respondent

ORDER

UPON THE MOTION of the Applicant Michael Moreau for an order pursuant to s 97(b) of the Federal Courts Rules compelling the Respondent's affiant, Christopher Heikkinen, to answer written questions in the cross-examination on his affidavit;

AND UPON reading the materials filed;

AND CONSIDERING the following:

On April 9, 2024, Mr. Moreau submitted a complaint to the Commissioner of Official Languages in which he alleged that the Respondent Thunder Bay Port Authority [Port Authority] improperly failed to specify the language profile of the position of Chief Executive Officer [CEO] in a press release announcing Mr. Heikkinen's appointment. The Commissioner's delegate refused to investigate the complaint, holding that it "does not involve a contravention of a provision of the Act or of any other federal act or regulation relating to the status or use of the two official languages."

On June 3, 2024, Mr. Moreau commenced an application [Application] under s 77 of the Official Languages Act, RSC, 1985, c 31 [OLA]. He claims that the Port Authority breached s 91 of the OLA by determining that the position of CEO did not require a language profile or was English essential.

On July 16, 2024, Mr. Moreau filed an affidavit in support of his Application. On September 4, 2024, the Port Authority filed the affidavit of Mr. Heikkinen. On September 11, 2024, Mr. Moreau cross-examined Mr. Heikkinen on his affidavit with questions in writing.

On September 25, 2024, Mr. Heikkinen provided his answers to questions 1 to 37, but refused to answer questions 38 to 49 on the ground that they were irrelevant. The questions Mr. Heikkinen refused to answer were as follows (translated by the Port Authority):

Is the normal chain of command suspended in case of fire or other emergencies?

Which position is responsible for responding appropriately in an emergency to ensure the health and safety of all employees and other individuals in the building for which the TBPA is responsible?

Which position is responsible for coordinating, preparing, and implementing an emergency and evacuation plan for the building in both official languages?

Which position must provide instructions in both official languages to ensure effective emergency response in the building?

In the event of activating on-site shelter procedures if the building needs to be secured due to an external situation, which position is responsible in both languages for:

Coordinating notification to building occupants that procedures must be initiated?

Keeping building occupants informed with regular updates throughout the event?

In the event of an evacuation, which position is responsible in both official languages for:

Communicating information to occupants (e.g., get ready, evacuate via the nearest stairwell) using the voice communication system, if applicable?

Directing occupants to stairwell exits and ensuring that the entire floor, including conference rooms and restrooms, is evacuated?

If entry is not possible, calling out to confirm that no one remains?

Accompanying and directing occupants away from the building and staying with them until emergency services give the all-clear?

In the case of a hostage situation, which position is responsible in both official languages for working with authorities to determine if the building should be evacuated or if containment procedures should be put in place?

In the case of a bomb threat, which position is responsible for understanding the content and scope of the allegations in both official languages?

In the case of a suspicious package, which position is responsible in both official languages for providing details to authorities or ordering and coordinating the evacuation of the building?

In the case of an explosion or earthquake, which position is responsible in both official languages for instructing employees and visitors to get down, take cover under a hard surface such as a desk (if available), and stay away from windows?

In the case of a protest or occupation, which position is responsible in both official languages for intervening during demonstrations or other incidents to protect employees, property, clients, and the general public?

In the case of an elevator entrapment, which position is responsible for resolving the situation in compliance with both official languages?

According to Mr. Moreau, the questions Mr. Heikkinen refused to answer concern the Port Authority's obligations under the Canada Labour Code, RSC, 1985, c L-2, the Maritime Occupational Health and Safety Regulations SOR/2010-120, and the Canada Occupational Health and Safety Regulations SOR/86-304. The preamble to the OLA states that "all legal obligations related to the [OLA] apply at all times, including during emergencies". Mr. Moreau says that the answers to the questions are relevant to the Application, because they relate to the Port Authority's obligations regarding the health and safety of the public, and demonstrate that the Port Authority failed to account for emergency management when establishing the language profile of the CEO's position.

Mr. Moreau asserts that the jurisprudence interpreting s 79 of the OLA confirms Parliament's intention to exempt these proceedings from the traditional rules of evidence (citing *Thibodeau v Halifax International Airport Authority*, 2018 FC 223 at para 19). An application under s 77 of the OLA is a *sui generis* proceeding similar to an action (*Forum des maires de la Péninsule acadienne v Canada* (Food Inspection Agency), 2004 FCA 263 at para 15). Accordingly, Mr. Moreau says that the Court should be willing to enlarge the scope of permissible questions in a manner similar to a civil action (citing *Jim Shot Both Sides v Canada*, 2021 FC 281 at para 7).

The Port Authority replies that cross-examination on an affidavit is not an examination for discovery. It is a narrowly-defined process that permits a party to cross-examine an affiant on matters that relate to the principal issues in the proceeding (citing *Thibodeau v Halifax International Airport Authority*, 2019 FC 1149 [Thibodeau] at para 29; *Swing Paints Ltd v Minwax Co, Inc*, [1984] 2 FC 521 [Swing Paints] at p 531).

In *Thibodeau*, which also involved a proceeding under s 77 of the OLA, Justice Yvan Roy emphasized that cross examination on an affidavit is not an examination for discovery (at para 29). The test to be applied in this motion is the usual one for the permissible scope of cross-examination on an affidavit.

Affiants should submit to cross-examination on matters in their affidavit and on collateral questions which arise from their answers (*Ottawa Athletic Club Inc (Ottawa Athletic Club) v Athletic Club Group Inc*, 2014 FC 672 at para 132; *CBS Canada Holdings Co v Canada*, 2017 FCA 65 at para 29). An affiant 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" (*Swing Paints* at p 531, cited with approval in *Thibodeau* at para 28).

The principal issue in this Application is whether the Port Authority's determination that the position of CEO did not require proficiency in both official languages contravened the OLA. In his affidavit, Mr. Heikkinen describes his powers, duties and functions as CEO, based upon his personal experience and that of his predecessor. He states that the position of CEO does not require proficiency in French, and notes that the Port Authority provides French language services to the public via third parties where required.

There is nothing in Mr. Heikkinen's affidavit to suggest that the CEO is personally responsible for providing direction in both official languages in the emergency situations described in the questions he refused to answer. Providing answers to these questions will not help to resolve the principal issue raised by the Application.

The questions Mr. Heikkinen refused to answer appear to be directed towards the organizational structure of the Port Authority, rather than the powers, duties and functions of the CEO's position. It is well established that cross-examination of an affiant cannot be used as a fishing expedition (*Governor and Company of The Bank of Scotland v Nel (The)*, 1998 CanLII 8628 (FC) at para 8; *Air Passenger Rights v Canada* (Attorney General), 2022 FCA 132 at para 48).

THIS COURT ORDERS that the motion for an order to compel answers to questions refused on cross-examination is dismissed with costs in the all-inclusive amount of \$500.

“Simon Fothergill”

Judge

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