Federal Court  Cour fédérale

Date: 20210819

Docket: T-1966-19

Citation: 2021 FC 849

[ENGLISH TRANSLATION]

Ottawa, Ontario, August 19, 2021

PRESENT: The Honourable Mr. Justice Bell

BETWEEN:

MICHEL THIBODEAU

Applicant

and

EDMONTON REGIONAL AIRPORTS AUTHORITY

Respondent

REASONS AND ORDER

I. FACTS

[1] On April 23, 2021, the respondent, the Edmonton Regional Airports Authority, filed a motion under paragraph 397(1)(b) of the *Federal Courts Rules*, SOR/98-106, to request that this Court reconsider the terms of Justice Roussel's order dated February 12, 2021, in *Thibodeau v*

Edmonton Regional Airport Authority, 2021 FC 146 (the Order). The respondent is seeking an order under paragraph 397(1)(b) of the Rules, which provides that the Court may reconsider the terms of an order, or under paragraph 399(2)(a) of the Rules, to vary the terms of the Order.

[2] Justice Roussel's Order and reasons order the applicant to respond in writing to the questions Mr. Thibodeau had been asked in cross-examination on an affidavit, which she identified as proper. However, Justice Roussel did not rule on the admissibility and relevance of questions 255 to 257 asked in this cross-examination as the content of these questions was the subject of an objection in *Thibodeau v St. John's International Airport Authority*, 2021 FC 259 (T-1023-19). Questions 255 to 257 relate to a transcript of an electronic recording of a conversation between Mr. Thibodeau and counsel for the St. John's Airport Authority. According to the respondent, this transcript demonstrates how Mr. Thibodeau is intimidating St. John's Airport in order to obtain compensation. Mr. Thibodeau objected to answering these questions, claiming that the conversation was recorded without his knowledge.

[3] Questions 255 to 257 asked in cross-examination on the applicant's affidavit read as follows:

> [TRANSLATION]

255-256	Confirm that you recall the call listed in Exhibit 6 (titled [TRANSLATION] "Transcript of Call with St. John's" and marked for identification).
257	Confirm that the highlighted passages in Exhibit 6 are statements you made to the St. John's counsel.

[4] On March 25, 2021, I rendered a decision in T-1023-19 in which I determined that, in this case, Mr. Thibodeau could have easily objected to the recording during his cross-examination or, afterwards, when he consulted with counsel.

[5] On March 31, 2021, counsel for the respondent and Mr. Thibodeau agreed that the respondent would submit a reply record by no later than April 12, 2021, 30 days after obtaining Mr. Thibodeau's answers, as this issue had not been mentioned in the Order.

[6] On April 6, 2021, the respondent learned of my decision in T-1023-19, above. In light of that decision, the respondent attempted to contact Mr. Thibodeau on April 8, 2021, without success. On April 12, 2021, the respondent proposed to Mr. Thibodeau that he answer questions 255 to 257 by April 13, 2021, and that it would submit its reply record on April 16, 2021. Mr. Thibodeau refused to answer the questions and to consent to an extension of time.

II. ISSUES

[7] The issues on this motion are as follows:

- Should the Court reconsider the terms of the Order under paragraph 397(1)(b) of the Rules?
- Alternatively, should the Court vary the terms of the Order under paragraph 399(2)(a) of the Rules?

In my opinion, the motion should be granted.

III. PARTIES' POSITIONS

A. *Respondent's position*

[8] The respondent argues that under paragraph 397(1)(b) of the Rules the Court may reconsider the terms of an order, ten days after it is made or within such other time as the Court may allow, where a matter that should have been dealt with has been overlooked or accidentally omitted. The respondent submits that the word "matter" as used in rule 397 refers to an element of the relief sought as opposed to an argument raised before the Court (*Lee v Canada (Minister of Citizenship and Immigration)*, 2003 FC 867 at para 4).

[9] The respondent argues that where a motion for reconsideration of an order is submitted after the 10-day deadline, as in this case, the applicant must provide a reasonable explanation for the delay, and must also establish an arguable case (*Wilson v Canada*, 2005 FC 1340 at para 24). The respondent argues that the delay is due to the pending decision in T-1023-19, which was issued on March 25, 2021, more than 10 days after the Order. Moreover, the respondent only reviewed the decision on April 6, 2021, and thereafter had a discussion with Mr. Thibodeau to resolve the disagreement regarding questions 255 to 257. The respondent submits that there is an arguable case, as the trial judge is entitled to be fully informed of the extent of Mr. Thibodeau's scheme.

[10] The respondent submits that under paragraph 399(2)(a) of the Rules the Court may, on motion, set aside or vary an order by reason of a matter that arose or was discovered subsequent to the making of the order.

[11] The respondent argues that the decision in T-1023-19 is a matter as the decision came after the Order was made and could not have been discovered earlier. In addition, the decision in T-1023-19 has a determining influence on the issue of the admissibility and relevance of questions 255 to 257, as the Order cites Mr. Thibodeau's objection to the transcript of the telephone conversation as the reason why the Court declined to rule on those questions. The respondent argues that the resolution of the objection to the transcript in T-1023-19 therefore allows this Court to rule on the admissibility and relevance of questions 255 to 257.

B. *Applicant's position*

[12] The applicant submits that paragraph 397(1)(b) of the Rules states that reconsideration of the Order is permitted only where a matter that should have been dealt with has been overlooked or accidentally omitted. He submits that the Court has already dealt with questions 255 to 257 in paragraph 49 of the Order. He claims that the Court has decided that he does not need to answer these questions, and therefore, this is not a matter that was overlooked or accidentally omitted.

[13] The applicant does not oppose reconsideration of the Order regarding the extension of time *nunc pro tunc* for the filing of the respondent's record. He suggests that the Court order the respondent to file its record within three days of the decision on this motion.

[14] Regarding paragraph 399(2)(a) of the Rules, the applicant submits that no new matter has arisen or been discovered subsequent to the making of the Order, and therefore there is no reason to vary the Order. The applicant submits that the Federal Court of Appeal dealt with the issue of a "matter" ("faits nouveaux" in French) in the context of rule 399 in *Siddiqui v Canada*

(*Citizenship and Immigration*), 2016 FCA 237 [*Siddiqui*]. The applicant argues that the Court of Appeal has made it clear that jurisprudence, whether existing prior to or after the decision at issue, does not constitute a "matter" within the meaning of paragraph 399(2)(a) of the Rules (*Siddiqui* at para 17). The applicant further argues that the Federal Court's jurisdiction to set aside its own judgments under rule 399 is rarely exercised because there is a significant public interest in the finality of judgments and the integrity of the judicial process (*Apotex Inc. v AB Hassle*, 2008 FCA 416 at para 17).

IV. ANALYSIS

A. *Reconsideration of the Order*

[15] Paragraph 397(1)(b) of the Rules allows the Court to reconsider the terms of an order where a matter that should have been dealt with has been overlooked or accidentally omitted. The rule is reproduced below:

Motion to reconsider	**Réexamen**
397 (1) Within 10 days after the making of an order, or within such other time as the Court may allow, a party may serve and file a notice of motion to request that the Court, as constituted at the time the order was made, reconsider its terms on the ground that	**397 (1)** Dans les 10 jours après qu'une ordonnance a été rendue ou dans tout autre délai accordé par la Cour, une partie peut signifier et déposer un avis de requête demandant à la Cour qui a rendu l'ordonnance, telle qu'elle était constituée à ce moment, d'en examiner de nouveau les termes, mais seulement pour l'une ou l'autre des raisons suivantes :
. . .	. . .

(b) a matter that should have been dealt with has been overlooked or accidentally omitted.	**b)** une question qui aurait dû être traitée a été oubliée ou omise involontairement.

[16] The issue before this Court is whether the Order issued on February 12, 2021, overlooked or accidentally omitted a matter that should have been dealt with, and therefore whether this Court should reconsider its terms.

[17] Regarding questions 255 to 257, Justice Roussel states the following at paragraph 49 of the Order:

> [49] Since the document is the subject of an objection in another file, the Court does not intend to rule on its admissibility or the relevance of questions 255 to 257.

[18] I am of the view that the Court did not overlook or accidentally omit the matter of the admissibility and relevance of questions 255 to 257 in its Order. It is clear that the Court addressed the issue in paragraphs 46 to 49 of its Order and decided not to rule on it because the document was the subject of an objection in T-1023-19. In my opinion, this does not constitute an oversight or accidental omission of a matter that should have been dealt with.

B. *Variance of the Order*

[19] Paragraph 399(2)(a) of the Rules allows this Court, on motion, to vary an order by reason of a matter that arose or was discovered subsequent to the making of the order:

Setting aside or variance	**Annulation**

399(2) On motion, the Court may set aside or vary an order	**399(2)** La Cour peut, sur requête, annuler ou modifier une ordonnance dans l'un ou l'autre des cas suivants :
(a) by reason of a matter that arose or was discovered subsequent to the making of the order;	**a)** des faits nouveaux sont survenus ou ont été découverts après que l'ordonnance a été rendue;

[20] The Court of Appeal's decision in *Ayangma v Canada*, 2003 FCA 382 [*Ayangma*], sets out the test for determining whether an order should be varied under paragraph 399(2)(a) of the Rules. The following three conditions must be satisfied:

1. the newly discovered information must be a "matter" [within] the meaning of the Rule;
2. the "matter" must not be one which was discoverable prior to the making of the order by the exercise of due diligence; and
3. the "matter" must be something which would have a determining influence on the decision in question.

I am of the opinion that the "matter" alleged by the respondent meets the second and third prongs of the test set out in *Ayangma*.

[21] At issue therefore is whether the decision in T-1023-19 can constitute a matter within the meaning of paragraph 399(2)(a) of the Rules. The applicant argues that jurisprudence, whether existing prior to or after the decision at issue, cannot constitute a "matter" within the meaning of paragraph 399(2)(a) of the Rules (*Siddiqui* at para. 17). During the oral arguments, the respondent claimed that *Siddiqui* is distinguishable because of the context. The respondent

submitted that jurisprudence issued after an order cannot constitute a "matter" because of the legal principle of *res judicata*. However, the respondent submits that Justice Roussel did not rule on the admissibility or relevance of questions 255 to 257 in the Order and it is therefore impossible to [TRANSLATION] "appeal" or overturn a decision that has not been made. Therefore, the principle of *res judicata* is not engaged. I agree with the respondent that since Justice Roussel did not make a decision in respect of questions 255 to 257 in her Order, the principle of *res judicata* cannot apply.

V. CONCLUSION

[22] It is my opinion that this motion should be granted.

ORDER

THE COURT ORDERS as follows:

1. The applicant will respond to questions 255 to 257 asked on cross-examination on the applicant's affidavit.
2. The respondent must submit its reply record within 10 days of receipt of the applicant's answers to the questions.
3. No costs.

"B. Richard Bell"
Judge

Certified true translation
Johanna Kratz

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1966-19
STYLE OF CAUSE:	MICHEL THIBODEAU v EDMONTON REGIONAL AIRPORTS AUTHORITY

DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

ORDER AND REASONS:	BELL J.
DATED:	AUGUST 19, 2021

APPEARANCES:

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