Federal Court  Cour fédérale

Date: 20230718

Docket: T-1944-22

Citation: 2023 FC 978

[ENGLISH TRANSLATION]

Ottawa, Ontario, July 18, 2023

PRESENT: Mr. Justice McHaffie

BETWEEN:

DARIO CÉSAR LUZURIAGA SORRIBES

Applicant

and

SOCIÉTÉ RADIO-CANADA / CANADIAN BROADCASTING CORPORATION

Respondent

ORDER AND REASONS

I. Overview

[1] The applicant, Dario César Luzuriaga Sorribes, is appealing the corrected order of Associate Judge Duchesne dated June 6, 2023 [June 6 Order]. In the June 6 Order, the Associate Judge dismissed Mr. Luzuriaga's motion in respect of written questions put to the deponent of an

affidavit served by the respondent, Société Radio-Canada/Canadian Broadcasting Corporation [CBC]. Mr. Luzuriaga requested that the June 6 Order be set aside and that the deponent be required to answer the questions.

[2] For the reasons that follow, Mr. Luzuriaga's motion for appeal is dismissed. He did not establish that the Associate Judge made an error that requires the Court's intervention in the June 6 Order.

II. Standard of review

[3] The discretionary decision of an Associate Judge must be reviewed by the Court in accordance with the usual standards of review on appeal, namely, the standard of correctness for questions of law and the standard of "palpable and overriding" error for questions of fact and questions of mixed law and fact: *Hospira Healthcare Corporation v Kennedy Trust for Rheumatology Research*, 2020 FCA 177 [*Hospira 2020*] at para 6, citing *Hospira Healthcare Corporation v Kennedy Institute of Rheumatology*, 2016 FCA 215.

[4] An Associate Judge's decision on whether to compel a party to answer questions during an examination is generally a question of mixed law and fact subject to the standard of palpable and overriding error: *Hospira 2020* at para 7. Mr. Luzuriaga does not claim that the Associate Judge erred in setting out the principles of law regarding the scope of a cross-examination on affidavit. Rather, he disputes the application of the law to the questions he asked the deponent in the circumstances of this application. Mr. Luzuriaga must therefore establish that the Associate Judge made a palpable and overriding error.

III. Preliminary remarks on motion record

A. *Motion record incomplete*

[5] A motion record contains "any other filed material that is necessary for the purposes of the motion": paragraph 364(2)(f), *Federal Courts Rules*, SOR/98-106 [Rules]. This requirement applies to the motion record on appeal under section 51 of the Rules. This means that appellants must put in their record any documents necessary to determine their appeal. In particular, they cannot presume that their original motion record would be before the Court during the appeal. It is neither the Court's nor the registry's duty or function to retrieve documents from the court file: *Ewert v Assistant Commissioner Policy and Programs*, 2022 CanLII 117825 (FC) at para 3.

[6] Mr. Luzuriaga's motion record does not contain many documents that are critical to the consideration of his appeal, including, at a minimum, the notice of application, which defines the issues and therefore the issue of relevance; the deponent's affidavit; the questions asked by Mr. Luzuriaga; the CBC's objections to the questions; and the deponent's answers to the questions. The Court would be able to dismiss the appeal on this basis: *Ewert* at paras 3–4.

[7] That said, in order to avoid any delay that might result from the need for an amended motion record, and recognizing that Mr. Luzuriaga is representing himself, the Court has retrieved the notice of application and the original motion record from the court file to ensure that all relevant documents are before the Court. In doing so, the Court (i) does not accept the relevance of all documents in the original motion record; and (ii) does not state that it will take such action in the future.

B. *Motion record includes inadmissible document*

[8] Mr. Luzuriaga's motion record includes an email sent on June 6, 2023, regarding his complaint to the Canadian Human Rights Commission against the CBC. The Court agrees with the CBC that this document is irrelevant to the appeal and is inadmissible.

[9] Generally, an appeal from an associate judge's order is based solely on the evidence that was before him or her: *Canjura v Canada (Attorney General)*, 2021 FC 1022 at para 12. Exceptionally, new evidence may be admitted if (1) it could not have been available earlier; (2) its admission will serve the interests of justice; (3) it will assist the Court; and (4) its admission will not cause serious prejudice to the other side: *Canjura* at para 12, citing *David Suzuki Foundation v Canada (Health)*, 2018 FC 379 to para 37.

[10] In this case, the email has the same date as the June 6 Order. The Court agrees that it could not have been available earlier. However, this email has no bearing on the appeal, which relates to the relevance of certain questions put to the deponent of an affidavit on cross-examination. Its admission would therefore not serve the interests of justice or assist the Court. The email is inadmissible.

IV. Analysis of appeal

A. *Analytical framework and principles*

[11] As noted, Mr. Luzuriaga does not dispute the principles relevant to the scope of a cross-examination on affidavit. These principles come from the decisions cited by the Associate Judge, such as *Thibodeau v Edmonton Regional Airport Authority*, 2021 FC 146 at paras 12–14; *CBS Canada Holdings Co v Canada*, 2017 FCA 65 at para 29; *Ottawa Athletic Club Inc (Ottawa Athletic Club) v Athletic Club Group Inc*, 2014 FC 672 at paras 130–133; *Merck Frosst Canada Inc v Canada (Minister of National Health and Welfare*), [1996] FCJ No 1038 at para 9. The Associate Judge set out these principles, and it is not necessary to repeat them. Suffice it to say, for the purposes of this appeal, that a question under cross-examination must be relevant to the issues. Deponents may refuse to answer a question that is not relevant and does not arise from the affidavit: *CBS* at para 29, citing *Ontario v Rothmans Inc*, 2011 ONSC 2504 at para 143 and *Ottawa Athletic Club* at para 132. They may also refuse to answer a question if the information requested is protected by solicitor-client privilege: *Williamson v Canada (Attorney General)*, 2004 FCA 432 at paras 4, 16–17.

[12] As noted by the Associate Judge, Mr. Luzuriaga's application is an application under subsection 41(1) of the *Access to Information Act*, RSC 1985 c A-1 [the "Act"]. To clarify, the Federal Court of Appeal recently noted that an application under section 44 of the Act (and therefore also an application under section 41) is not a application "for judicial review" but a *de novo* application, even though the terminology of judicial review is often used: *Canada (Health) v Preventous Collaborative Health*, 2022 FCA 153 at para 9, 12–15 *Lukács v Canada (Public Safety and Emergency Preparedness)*, 2023 FCA 55 at paras 1–2, 7; Act, s 44.1. Such an application is therefore not a judicial review of the Information Commissioner's report, even

though Mr. Luzuriaga described it in this way: *Preventous* at para 13. That said, nothing hinges on this distinction or characterization in this case.

[13] As an application under subsection 41(1), the only issue is whether the documents that are the subject of Mr. Luzuriaga's request for access under the Act are to be disclosed or whether they are subject, in whole or in part, to one of the exemptions under the Act, including those in sections 19 and 23 of the Act. It is important to emphasize in particular that this request does not relate to (i) Mr. Luzuriaga's discrimination complaint against the CBC; or (ii) his academic and professional qualifications or his suitability for the positions for which he applied. Although these issues form part of the context of Mr. Luzuriaga's request for access, they are not at issue in this application. Contrary to Mr. Luzuriaga's arguments, the fact that a question is described as relating to[TRANSLATION] "the context" does not make it relevant in determining whether section 19 or section 23 of the Act applies.

[14] Mr. Luzuriaga cites *Montana Band v Canada*, [2000] 1 FC 267 (FCTD); *Benisti Import-Export Inc v Modes TXT Carbon Inc*, 2002 FCT 179; and *Charkaoui (Re)*, 2008 FC 61. *Montana Band* confirms that a party is not required to answer irrelevant questions: *Montana Band* at para 32. *Benisti*, cited by Mr. Luzuriaga, concerns a motion to strike. The Court presumes that he wanted to cite *Benisti Import-Export Inc v Modes TXT Carbon Inc*, 2005 FC 1587, which dealt with, among other things, the relevance of the questions on examination. The latter merely applies the principles cited above. As for *Charkaoui*, it deals with the compellability of journalists as witnesses, the confidentiality of journalists' human sources, and the relevance of certain issues in a national security case. It is irrelevant in this case.

B. *Questions asked*

[15] Of the 19 written questions asked by Mr. Luzuriaga, 18 are at issue (all except question No 17, to which the deponent replied). The deponent also answered question 1, subject to an objection as to its relevance. She refused to answer questions 2 to 16, 18 and 19. All the objections raise the relevance of the question. The objections to questions 2 and 18 also raise solicitor-client privilege. The Associate Judge did not uphold the objections based on solicitor-client privilege but did uphold the objections based on relevance.

[16] In his written submissions filed in this application, Mr. Luzuriaga does not identify any palpable and overriding error in the Associate Judge's analysis. Instead, he cites and repeats his [TRANSLATION] "detailed arguments in the Applicant's motion record dated April 17, 2023", the one filed before the Associate Judge, and notes that he [TRANSLATION] "wishes to have such arguments reassessed by another judge of the Court". This does not justify setting aside an order of an Associate Judge.

[17] In any event, having considered Mr. Luzuriaga's arguments, the deponent's affidavit and the questions that were asked, the Court concludes that the Associate Judge did not make any errors, let alone one that could be considered palpable and overriding.

[18] Question 1: This question asks why the deponent described a list of nearly 100 positions as being [TRANSLATION] "more than 60". Although it relates to a statement in the affidavit, the question is trivial, unnecessary and irrelevant to the matter at issue, that is, whether section 19 or

section 23 of the Act applies to the documents requested by Mr. Luzuriaga. The Associate Judge was right to conclude that it does not have to be answered.

[19] Questions 2–9 and 15: These questions relate to the substance of Mr. Luzuriaga's complaint; the response and/or attitude of the CBC and the deponent regarding the complaint; and other complaints received by the CBC. They are irrelevant to the matter at issue, that is, whether section 19 or section 23 of the Act applies to the documents requested by Mr. Luzuriaga. The Associate Judge was right to conclude that they do not have to be answered.

[20] Questions 10 to 13 and 16: These questions relate to Mr. Luzuriaga's academic and professional qualifications and/or his suitability for the positions to which he applied. They are irrelevant to the matter at issue, that is, whether section 19 or section 23 of the Act applies to the documents requested by Mr. Luzuriaga. The Associate Judge was right to conclude that they do not have to be answered.

[21] Question 14: This question relates to hiring practices at the CBC, particularly the self-identification of applicants. It is irrelevant to the matter at issue, that is, whether section 19 or section 23 of the Act applies to the documents requested by Mr. Luzuriaga. The Associate Judge was right to conclude that it does not have to be answered.

[22] Question 18: This question, which includes five [TRANSLATION] "sub-questions", seeks details on the nature of the communications for which the CBC claims solicitor-client privilege. As Mr. Luzuriaga contends, and as the Associate Judge acknowledged, questions about the

circumstances surrounding a request for legal advice are not themselves prohibited by solicitor-client privilege. However, as stated by the Associate Judge, the deponent's affidavit already describes the circumstances that answer the questions. The question is therefore unnecessary and irrelevant to the matter at issue, that is, whether section 19 or section 23 of the Act applies to the documents requested by Mr. Luzuriaga. The Associate Judge was right to conclude that it does not have to be answered.

[23] Question 19: This question focuses on practices regarding recruitment from outside the CBC and Luzuriaga's perceptions of this. It is irrelevant to the matter at issue, that is, whether section 19 or section 23 of the Act applies to the documents requested by Mr. Luzuriaga. The Associate Judge was right to conclude that it does not have to be answered.

V. Conclusion

[24] For these reasons, Mr. Luzuriaga did not demonstrate that the Associate Judge made an error, let alone a palpable and overriding one. The appeal is dismissed.

[25] The CBC is claiming costs in the amount of $500, payable forthwith, citing subsections 401(1) and (2) of the Rules. In response, Mr. Luzuriaga notes that he is representing himself and suggests that the costs should not be payable immediately. The CBC's arguments certainly have some weight. It appears that Mr. Luzuriaga continues to try to use this application to advance his arguments of discrimination, even though the Court has explained that this application does not address this issue. That said, in all circumstances, the Court concludes that costs of $350, payable in any event of the cause, are fair and appropriate. For the sake of clarity,

this means that the CBC will be entitled to costs of $350 at the conclusion of the application, in any event of the cause. Again, for the sake of clarity, the Court confirms that the costs ordered by the Associate Judge, which were not contested by Mr. Luzuriaga, remain to be paid forthwith.

[26] Finally, Mr. Luzuriaga asks that the time for serving the applicant's record be extended by 40 days from the day on which the deponent answers all the questions asked. The CBC takes no position on this. Since the Court has not ordered that the deponent answer the questions, the Court does not grant a 40-day extension of time. Mr. Luzuriaga must serve and file the applicant's record under section 309 of the Rules within the next 14 days.

ORDER in T-1944-22

THIS COURT'S ORDER is as follows:

1. The applicant's motion for appeal is dismissed.
2. The applicant shall pay $350 to the respondent as costs for this appeal, in any event of the cause.
3. The applicant shall serve and file his applicant's record in accordance with section 309 of the Rules, within 14 days of the date of this order.

"Nicholas McHaffie"
Judge

Certified true translation
Michael Palles

FEDERAL COURT

SOLICITORS OF RECORD:

DOCKET:	T-1944-22
STYLE OF CAUSE:	DARIO CÉSAR LUZURIAGA SORRIBES v SOCIÉTÉ RADIO-CANADA / CANADIAN BROADCASTING CORPORATION

MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO, PURSUANT TO SECTION 369 OF THE *FEDERAL COURTS RULES*

ORDER AND REASONS:	MCHAFFIE J.
DATED:	JULY 18, 2023

WRITTEN REPRESENTATIONS BY:

DARIO CÉSAR LUZURIAGA SORRIBES	ON HIS OWN BEHALF
ELIZABETH CULLEN	FOR THE RESPONDENT

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