Date: 20100512

Docket: T-135-10

Citation: 2010 FC 520

Ottawa, Ontario, May 12, 2010

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

R. MAXINE COLLINS

Applicant

and

HONOURABLE PETER VAN LOAN
MINISTER OF PUBLIC SAFETY

Respondents

Docket: T-136-10

AND BETWEEN:

R. MAXINE COLLINS

Applicant

And

HONOURABLE JEAN-PIERRE BLACKBURN
MINISTER OF NATIONAL REVENUE

Respondent

REASONS FOR ORDER AND ORDER

[1] This is a motion appealing a Prothonotary's direction pursuant to Rule 51 of the *Federal Courts Rules*, SOR/2004-283.

[2] The direction reads as follows:

> The Applicant in these matters has endeavoured to e-file the Application Records. These are lengthy documents and the index in each refers to five affidavits. Two of the five affidavits are contained in the Application Records as e-filed, while three of the affidavits are referred to as having been filed in the Applicant's preliminary file being File No. 08-T-60. As the Applicant notes in correspondence to Registry, the three affidavits in the latter file were previously served and filed and the Respondent has not taken issue with the filing of these Application Records in this fashion. It is laudable that the Applicant refers to Rule 3 as the basis for not including the three affidavits from the preliminary file in these Application Records. While the Court compels parties to pursue litigation in accordance with Rule 3, the policies of Rule 3 give way to ensuring that the materials to be used at a hearing before the Court are properly organized in application records. It is not for the Registry or the Court to ferret through motion records in other proceedings to locate affidavits or materials that an applicant wishes to rely upon at a hearing. The onus is on the Applicant to prepare proper application Records as mandated by the Rules and to include the materials they wish to have before the Court on the hearing. Thus, as the Application Records as e-filed do not conform to Rule 309(2) they are not acceptable for filing.

[3] Rules 306 and 309 of the *Federal Courts Rules* state:

306. Within 30 days after issuance of a notice of application, an applicant shall serve and file its supporting affidavits and documentary exhibits.	306. Dans les 30 jours suivant la délivrance de l'avis de demande, le demandeur signifie et dépose les affidavits et les pièces documentaires qu'il entend utiliser à l'appui de la

	demande.
. . .	. . .
309.(1) An applicant shall, within 20 days after completion of all parties' cross-examinations or the expiration of the time for doing so, whichever is earlier,	309.(1) Dans les 20 jours suivant le contre-interrogatoire des auteurs des affidavits déposés par les parties ou dans les 20 jours suivant l’expiration du délai prévu pour sa tenue, selon celui de ces délais qui est antérieur à l’autre, le demandeur :
(a) serve the applicant's record; and	a) signifie son dossier;
(b) file	b) dépose :
(i) where the application is brought in the Federal Court, three copies of the applicant's record, and	(i) dans le cas d’une demande présentée à la Cour fédérale, trois copies de son dossier,
(ii) where the application is brought in the Federal Court of Appeal, five copies of the applicant's record.	(ii) dans le cas d’une demande présentée à la Cour d’appel fédérale, cinq copies de son dossier.
(2) An applicant's record shall contain, on consecutively numbered pages and in the following order,	(2) Le dossier du demandeur contient, sur des pages numérotées consécutivement, les documents suivants dans l’ordre indiqué ci-après :
(a) a table of contents giving the nature and date of each document in the record;	a) une table des matières indiquant la nature et la date de chaque document versé au dossier;
(b) the notice of application;	b) l’avis de demande;
(c) any order in respect of which the application is made and any reasons, including	c) le cas échéant, l’ordonnance qui fait l’objet de la demande ainsi que les motifs, y compris

dissenting reasons, given in respect of that order;	toute dissidence;
(d) each supporting affidavit and documentary exhibit;	d) les affidavits et les pièces documentaires à l'appui de la demande;
(e) the transcript of any cross-examination on affidavits that the applicant has conducted;	e) les transcriptions des contre-interrogatoires qu'il a fait subir aux auteurs d'affidavit;
(f) the portions of any transcript of oral evidence before a tribunal that are to be used by the applicant at the hearing;	f) les extraits de toute transcription des témoignages oraux recueillis par l'office fédéral qu'il entend utiliser à l'audition de la demande;
(g) a description of any physical exhibits to be used by the applicant at the hearing; and	g) une description des objets déposés comme pièces qu'il entend utiliser à l'audition;
(h) the applicant's memorandum of fact and law.	h) un mémoire des faits et du droit.

[4] The Federal Court of Appeal in *Merck & Co., Inc. v. Apotex Inc.*, [2004] 2 F.C.R. 459 stated as follows, concerning the standard of review to be applied to discretionary orders of prothonotaries at paragraphs 17 to 19:

> 17 This Court, in *Canada v. Aqua-Gem Investments Ltd.*, [1993] 2 F.C. 425 (C.A.), set out the standard of review to be applied to discretionary orders of prothonotaries in the following terms (MacGuigan J.A., at pages 462-463):
>
> > Following in particular Lord Wright in *Evans v. Bartlam*, [1937] A.C. 473 (H.L.) at page 484, and Lacourcière J.A. in *Stoicevski v. Casement* (1983), 43 O.R. (2d) 436 (Div. Ct.), discretionary orders of prothonotaries ought not to be disturbed on appeal to a judge unless:

> (a) they are clearly wrong, in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of the facts, or
>
> (b) they raise questions vital to the final issue of the case.
>
> Where such discretionary orders are clearly wrong in that the prothonotary has fallen into error of law (a concept in which I include a discretion based upon a wrong principle or upon a misapprehension of the facts), or where they raise questions vital to the final issue of the case, a judge ought to exercise his own discretion *de novo*.

18 MacGuigan J.A. went on, at pages 464-465, to explain that whether a question was vital to the final issue of the case was to be determined without regard to the actual answer given by the prothonotary:

> It seems to me that a decision which can thus be either interlocutory or final depending on how it is decided, even if interlocutory because of the result, must nevertheless be considered vital to the final resolution of the case. Another way of putting the matter would be to say that for the test as to relevance to the final issue of the case, the issue to be decided should be looked to <u>before</u> the question is answered by the prothonotary, whereas that as to whether it is interlocutory or final (which is purely a *pro forma* matter) should be put after the prothonotary's decision. Any other approach, is seems to me, would reduce the more substantial question of "vital to the issue of the case" to the merely procedural issue of interlocutory or final, and preserve all interlocutory rulings from attack (except in relation to errors of law).

This is why, I suspect, he uses the words "they (being the orders) <u>raise questions</u> vital to the final issue of the case", rather than "they (being the orders) <u>are</u> vital to the final issue of the case". The emphasis is put on the subject of the orders, not on their effect. In a case such as the present one, the question to be asked is whether

> the proposed amendments are vital in themselves, whether they be allowed or not. If they are vital, the judge must exercise his or her discretion *de novo*.
>
> 19 To avoid the confusion which we have seen from time to time arising from the wording used by MacGuigan J.A., I think it is appropriate to slightly reformulate the test for the standard of review. I will use the occasion to reverse the sequence of the propositions as originally set out, for the practical reason that a judge should logically determine first whether the questions are vital to the final issue: it is only when they are not that the judge effectively needs to engage in the process of determining whether the orders are clearly wrong. The test would now read: "Discretionary orders of prothonotaries ought not be disturbed on appeal to a judge unless: (a) the questions raised in the motion are vital to the final issue of the case, or (b) the orders are clearly wrong, in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of the facts."

[5] It would appear from a review of the Prothonotary’s decision that he was under the impression, after reviewing the information provided to him, three of the affidavits were not contained in the application record. However, a review of the records shows that all the affidavits were contained in the application record.

[6] In reality, what happened was the applicant neglected to file the other affidavits in the present applications as required by Federal Courts Rule 306. The applicant wanted to use the three affidavits filed in Court file 08-T-60. She placed all the affidavits in the application records for Court files T-135-10 and T-136-10 but did not refile the affidavits contained in Court file 08-T-60 in the present applications.

[7] I am of the view that the Prothonotary's direction was not vital to the final issue of the case. It deals with a procedural matter with respect to filing.

[8] I would note that the respondent did not take part in or take any position on this appeal. The respondent has not taken any objection to the applicant filing her application records in this manner. The applicant informed the respondent that she was placing these affidavits from the other file in her application records.

[9] I am of the view that the direction was clearly wrong in that it was based on a misapprehension of the facts, namely, that all of the affidavits were not in the applicant's application records.

[10] Although it is not before me, I must add that it is up to the Prothonotary or the Court to allow affidavits from another file (Court file 08-T-60) to be used in the present applications. As the respondents do not appear to be objecting, a Rule 369 motion could be made to include the affidavits in question, with the consent of the respondents. If no consent is obtained from the respondents, a Rule 369 motion to include the affidavits from Court file 08-T-60 could still be made.

[11] Accordingly, the motion (appeal) is allowed and the direction is set aside.

[12] Based on the facts of this case, I am not prepared to make an award of costs.

ORDER

[13] **IT IS ORDERED that** the motion (appeal) is allowed and the direction of April 23, 2010 is set aside and there shall be no order as to costs.

"John A. O'Keefe"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-135-10 and T-136-10
STYLE OF CAUSE:	R. MAXINE COLLINS - and - HONOURABLE PETER VAN LOAN MINISTER OF PUBLIC SAFETY R. MAXINE COLLINS - and – HONOURABLE JEAN-PIERRE BLACKBURN MINISTER OF NATIONAL REVENUE
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	May 3, 2010
REASONS FOR ORDER AND ORDER OF:	O'KEEFE J.
DATED:	May 12, 2010

APPEARANCES:

R. Maxine Collins	SELF-REPRESENTED FOR THE APPLICANT
No Appearance	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

R. Maxine Collins	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General of Canada	FOR THE RESPONDENTS