Federal Court of Appeal | Cour d'appel fédérale

Date: 20251201

Docket: A-265-25

Citation: 2025 FCA 213

Present: **LEBLANC J.A.**

BETWEEN:

RIDWAN ABDULAZIZ

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on December 1, 2025.

REASONS FOR ORDER BY: LEBLANC J.A.

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REASONS FOR ORDER

LEBLANC J.A.

[1] The applicant challenges a decision of the Federal Public Sector Labour Relations and Employment Board (the Board), dated July 3, 2025, dismissing a grievance he had made pursuant to section 208 of the *Federal Public Sector Labour Relations Act*, SC 2003, c. 22, s. 2, in relation to the termination of his employment with the Department of Employment and Social Development Canada as a result of his reliability status being revoked by the Department's Chief Security Officer.

[2] In support of his application for judicial review, the applicant, pursuant to Rule 306 of the *Federal Courts Rules*, SOR/98-106 (the Rules), signed a 35-paragraph affidavit (the Affidavit), which he served on the respondent on September 15, 2025.

[3] Before the Court is a motion from the Attorney General of Canada (the Attorney General), made on behalf of the respondent and dated October 21, 2025 (the Motion), seeking (i) an Order striking all but 6 paragraphs of the Affidavit, that is: paragraphs 1 to 13, 18 to 28, 29, 30 and 32 to 34 (the Impugned paragraphs), and (ii) an Order extending the time to file the respondent's affidavits.

[4] The applicant opposes the former request but consents to the latter.

I. The Request for an Order striking the Impugned paragraphs

[5] The Attorney General basically seeks an advanced ruling on the admissibility of the Impugned paragraphs. It claims that these paragraphs either contain excerpts of an unofficial transcript and are therefore unreliable or are replete with allegations and arguments that are not relevant to the underlying judicial review proceeding and are otherwise unwarranted.

[6] In particular, the Attorney General contends that paragraphs 1 to 13 of the Affidavit are not relevant as they are unnecessary considering the comprehensive nature of the Board's reasons for decision. As for paragraphs 18 to 28 of the Affidavit, the Attorney General submits that they are inappropriate as they attempt to assert facts not contained in the Board's reasons for

decision and that they are highly unreliable as they are based on excerpts of an unofficial transcript. Regarding paragraphs 29 and 30, it says they should likewise be struck as they do not represent the testimonies at the hearing. Finally, the Attorney General claims that paragraphs 32 to 34 of the Affidavit are irrelevant and unwarranted as they restate the Board's reasons for decision with an argumentative twist.

[7] The Attorney General asserts that the Impugned paragraphs offend Rule 81(1) of the Rules, which provides that affidavits shall be confined to facts within the personal knowledge of the deponent. The Attorney General further asserts that the Impugned paragraphs do not fall within the exceptions to the general rule, reaffirmed in *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 (*Access Copyright*), that the evidentiary record before the reviewing court on judicial review is restricted to the evidentiary record that was before the administrative decision-maker (*Access Copyright* at para. 20).

[8] The applicant disagrees. He submits that the Impugned paragraphs either provide background information relevant to the issues raised in the underlying judicial review proceeding and, therefore, fall squarely within the exceptions to that general rule set out in *Access Copyright*, or provide his recollection of *viva voce* evidence heard by the Board in a context where, as a matter of policy, the Board does not make video or audio recordings – or prepare minutes – of its hearings.

[9] As this Court stated in *Access Copyright*:

> [11] Whether the Court should provide an advance [admissibility] ruling [on judicial review] is a matter of discretion. This discretion is constrained by the instruction in subsection 18.4(1) of the Federal Courts Act, R.S.C. 1985, c. F-7, that applications for judicial review be "heard and determined without delay and in a summary way." As a result, the Court will only exercise its discretion to provide an advance admissibility ruling where it is clearly warranted. Those embarking upon an interlocutory foray to this Court to seek such a ruling will not often find a welcome mat when they arrive.

[10] Here, in my view, striking the remaining Impugned paragraphs on an advance ruling is not clearly warranted.

[11] First, it is important to underscore that the Court's discretion to strike an affidavit in the context of judicial review proceedings is to be exercised sparingly and only in exceptional circumstances, that is where it is in the interest of justice to do so. The reason for such an approach, as echoed in *Access Copyright*, resides in the fact that "applications for judicial review must quickly proceed on the merits, and the procedural impacts of the nature of a motion to strike are to delay unduly and, more often than not, needlessly, a decision on the merits": *Canada* (*Board of Internal Economy) v. Canada (Attorney General)*, 2017 FCA 43 at para. 29 (*BIE*), citing *Gravel v. Telus Communications Inc.*, 2011 FCA 14 at para. 5.

[12] In such context, striking an affidavit could be in the interest of justice where, for example, "a party would be materially prejudiced or where not striking an affidavit or portions of an affidavit would impair the orderly hearing of the application" (*BIE* at para. 29, citing *Armstrong v. Canada (Attorney General)*, 2005 FC 1013 at para. 40). Instead of striking, it is

often best to leave it to the judge (or the panel of judges in the case of a judicial review proceeding within this Court's jurisdiction) who will hear the underlying application to assess the weight, if any, the affidavit – or portions of it – should be given in a given case (see, for example, *Rainy River First Nations v. Bombay*, 2022 FC 1434).

[13] Here, paragraphs 1 to 13 of the Affidavit qualify, in my view, as general background information that might assist the Court in understanding the issues relevant to the underlying judicial review. As cautioned in *Access Copyright*, I do not find - and the Attorney General does not assert - that these paragraphs "provide evidence relevant to the merits of the matter decided by the administrative decision-maker, invading the role of the latter as fact-finder and merits-decider" (*Access Copyright* at para. 20). The Attorney General does not assert either that it is materially prejudiced by these paragraphs or that not striking them would impair the orderly hearing of the underlying application.

[14] Ultimately, it will be up to the panel hearing the underlying judicial review application to determine what weight, if any, to ascribe to these paragraphs.

[15] The concern raised by the Attorney General regarding paragraphs 18 to 30 arises in a context where, as a matter of policy, there is no audio recording or transcript of the hearings held by the Board. As the applicant rightly points out, it has been long recognized in the case law that such a practice, which is not uncommon, means that affidavit evidence of the *viva voce* evidence heard by the administrative decision-maker may be necessary to put the reviewing court in a

position to determine the issues raised in the underlying application, whether they be related to procedural fairness concerns or to the reasonableness of some of the factual findings.

[16] In *Canadian Union of Public Employees, Local 301 v. Montreal (City)*, [1997] 1 S.C.R. 793 (*CUPE*), the Supreme Court held that in determining whether a ground of review could be denied in the absence of a transcript, it was appropriate "to refer to the other means before the Court of learning what went on at the hearing" (*CUPE* at para. 83). In that case, affidavit evidence on alleged factual inconsistencies had been filed by both parties. According to the Supreme Court, this provided the reviewing court an adequate evidentiary basis for its decision (*CUPE* at para. 84; see also: *Garcia v. Canada (Attorney General)*, 2001 FCA 200, referring to *CUPE*).

[17] As this Court stated in *Deigan v. Canada* (1996), 206 NR 195 (FCA), it is quite proper for a party, in the absence of a transcript, "to give his version of the evidence at the hearing" (see also: *Kandiah v. Canada (Minister of Employment and Immigration)* (F.C.A.), [1992] F.C.J. No. 321; *Colistro v. BMO Bank of Montreal*, 2008 FCA 154 at para. 4; *Reinhardt v. Canada (Attorney General)*, 2016 FCA 158 at paras. 16-24; *Wang v. Canada (Citizenship and Immigration)*, 2011 FC 812 at para. 8; *Nweke v. Canada (Citizenship and Immigration*), 2017 FC 242 at paras. 34-36; *Singh v. Canada (Senate*), 2022 FC 840 at paras. 49-53).

[18] Here, according to paragraph 18 of the Affidavit, this group of the Impugned paragraphs (19 to 30) is aimed at providing examples of evidence that the applicant claims not to be reflected in the Board's reasons for decision. Apart from paragraphs 19, 26 and 29, in all the

other paragraphs, the applicant gives his account of various aspects of his testimony before the Board. In paragraphs 19 and 26, the applicant asserts that the respondent led no evidence at the hearing regarding what he considers to be important aspects of the case. Paragraph 29 is the only paragraph where the applicant gives an account of a testimony other than his on a very specific point.

[19] Again, in the absence of a transcript, it is proper for the applicant "to give his version of the evidence at the hearing". Nothing, as evidenced in *CUPE*, prohibits the Attorney General from responding to the applicant's evidence on what went on at the hearing. In that sense, the Attorney General is not materially prejudiced by the Affidavit. What went on at the hearing, including the *viva voce* evidence heard by the Board, is very much part of the evidentiary record it had before it when the impugned decision was made. This is without a doubt relevant to the reviewing task our Court is called upon to perform in this case.

[20] In such context, any characterization of the Affidavit as an "unofficial transcript" is misguided as is the submission that the applicant is the author of his own misfortune for not having proactively requested that the Board record the hearing or generate a transcript of its proceedings.

[21] Finally, paragraphs 32 to 34 contain statements on the Board's reasons for decision that can be characterized as argumentative. As the Attorney General points out, Rule 81(1) of the Rules requires affidavits to be confined to facts without argument. That said, I am not persuaded that an advance ruling on the admissibility of these statements, which are at best general in

nature, is warranted in these circumstances. As the Court stated in *Coldwater First Nation v. Canada (Attorney General)*, 2019 FCA 292, at paragraph 22, the panel who will hear the present matter "can be trusted to ignore any improper argumentation".

[22] For all these reasons, the Attorney General's request for an Order striking the Impugned paragraphs is dismissed.

II. The Request for an extension of time

[23] As indicated, the applicant consents to the Attorney General's request to extend the time to serve its affidavits pursuant to Rule 307 of the Rules and I see no reason not to grant that request.

[24] As a result, the Attorney General will be granted an extension of 20 days from the date of the Order to be issued simultaneously to these Reasons, to, pursuant to Rule 307, serve its affidavits on the applicant and file proof of service of said affidavits.

[25] As neither party seeks costs, none will be awarded.

"René LeBlanc"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-265-25
STYLE OF CAUSE:	RIDWAN ABDULAZIZ v. ATTORNEY GENERAL OF CANADA

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	LEBLANC J.A.
DATED:	DECEMBER 1, 2025

WRITTEN REPRESENTATIONS BY:

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