Federal Court  Cour fédérale

Date: 20251218

Docket: T-3365-24

Ottawa, Ontario, December 18, 2025

PRESENT: Madam Justice Gagné

BETWEEN:

INTERNATIONAL LONGSHORE AND WAREHOUSE UNION SHIP AND DOCK FOREMEN, LOCAL 514

Applicant

and

BRITISH COLUMBIA MARITIME EMPLOYERS ASSOCIATION AND THE ATTORNEY GENERAL OF CANADA

Respondents

ORDER AND REASONS

I. Background

[1] The Applicant, International Longshore and Warehouse Union Ship and Dock Foremen, Local 514 [the Union], makes this motion, pursuant to Rule 312 of the *Federal Courts Rules*, SOR 98/106, for an order admitting the affidavit of Wesley Lesosky.

[2] The Union is certified to represent foremen and certain other employees employed by companies operating in ports in British Columbia. They challenge before the Court a

November 12, 2024 directive made by the Minister of Labour and Seniors to the Canada Industrial Relations Board to: (i) order the British Columbia Maritime Employers Association [the Association] and all of its members, as well as all employees represented by the Union to resume and continue their operations and duties; (ii) assist the parties in reaching a settlement of the outstanding terms of their collective agreement by imposing final binding arbitration; and (iii) extend the term of the existing collective agreement until a new collective agreement is determined by the arbitrator. This directive was made pursuant to section 107 of the *Canadian Labour Code*, RSC, 1985, c L-2 [the Code].

[3] The Union alleges that the directive is inconsistent with rights and values protected by the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, as it had a disproportionate impact on the rights to strike and to bargain collectively, protected under section 2(d) of the *Charter*.

[4] The Union asserts that the requirements for the Court to admit the Lesosky affidavit outside the Rule 306 timeline are met: the evidence is relevant to the constitutional question raised in this application for judicial review, and it is in the interest of justice for the Lesosky affidavit to be before the Court.

[5] Mr. Lesosky is the President of the Air Canada Component of the Canadian Union of Public Employees [CUPE], the exclusive bargaining agent for 10,517 flight attendants and service directors at Air Canada and Air Canada Rouge. The CUPE has made a similar application for judicial review before this Court (file T-3029-25), challenging a similar directive

made to the Board in the labour dispute having opposed Air Canada to its flight attendants during the summer of 2025.

[6] Mr. Lesosky purports to testify on events that occurred subsequently to the Applicant's May 21, 2025 deadline for service of affidavits in this case. The Lesosky affidavit discusses Air Canada's expectations and behaviours in bargaining, as well as comments on the Minister's previous and recent uses of section 107 of the Code to order an end to strikes in other labour disputes, including:

> a. On August 12, 2025, Air Canada unilaterally declared an impasse and withdrew from the bargaining table. That same day, without copying CUPE, Air Canada wrote to the Minister and requested the application of section 107 to prevent a strike. Air Canada specifically stated that section 107 "has been effectively used in similar transportation disputes" and expressly referencing other recent disputes in which the Minister had issued directions under section 107 to end strikes or lockouts, including two instances in 2024: WestJet and in rail transportation.
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> b. On Saturday August 16, 2025, the Union initiated a strike and Air Canada initiated a lockout. The same day, the Minister issued a direction to Air Canada and its employees to resume operations and imposed final binding arbitration to settle a new collective agreement. On August 17, 2025, the Union issued a bulletin advising its members not to return to work until Air Canada returned to the bargaining table and reached a tentative agreement that their members could vote on.
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> c. On August 18, 2025, Air Canada approached the Union to return to the bargaining table. The same day, Air Canada's CEO stated that Air Canada made no effort to secure seats for passengers as he thought that the Minister's 107 directive would be enforced.
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> d. On August 19, 2025, the parties reached a tentative agreement which ended the strike/lockout.

[7] For the Union, this testimony is concrete evidence of the impact of the Minister's directive on the right to strike and the right to bargain collectively in a very similar situation.

I. Issues

[8] The sole issue to be determined is whether the Lesosky Affidavit meets the Court's test for admission outside of the regular timeline.

II. Analysis

[9] An applicant seeking to file additional affidavits must satisfy two preliminary requirements: 1) the evidence must be relevant to an issue that is properly before the Court; and 2) the evidence must be admissible on the application for judicial review (*Forest Ethics Advocacy Association v National Energy Board*, 2014 FCA 88 at para 4). If those requirements are satisfied, the Court will then determine whether it is in the interests of justice to exercise its discretion in favour of admitting the evidence. The Court makes this decision by considering the following factors, from *Rosenstein v Atlantic Engraving Ltd* 2002 FCA 503 at paragraph 8 (see also *Forest Ethics* at para 6, citing *Holy Alpha and Omega Church of Toronto v Canada (Attorney General)*, 2009 FCA 101 at para 2):

> a. Was the evidence available when the party filed its affidavits under Rule 306 or 307, as the case may be, or could it have been available with the exercise of due diligence?
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> b. Will the evidence assist the Court, in the sense that it is relevant to an issue to be determined and sufficiently probative that it could affect the result?
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> c. Will the evidence cause substantial or serious prejudice to the other party?

[10] The Court has discretion to weigh these factors and, in doing so, can grant leave even when one of the factors has not been satisfied (*Campbell v Electoral Canada*, 2008 FC 1080 at para 26).

A. *Relevance to the Constitutional Issue*

[11] As one of the grounds for reviewing the Minister's directive, the Applicant asserts that it is inconsistent with *Charter* rights and values. The Applicant's position is that the Minister's decision to order the Board to remove the right of workers represented by the Union to bargain collectively and to strike, as protected by section 2(d) of the *Charter*, and to substitute in place of those rights mandatory interest arbitration, had a significant impact on those rights and interests.

[12] In assessing this issue, the Court will need to determine whether the Minister's exercise of discretion has a "disproportionate impact" on the Applicant's *Charter* rights. Given the relevance of the impact of the Minister's directive on *Charter* protected rights and *Charter* values, both the Union and the Association have served expert reports that opine on the impact of the Minister's directive [the Hebdon Report and the Chaykowski Report, respectively], and the substitution of mandatory interest arbitration in place of a right to strike. The Hebdon Report and the Chaykowski Report diverge significantly in their assessment of this impact, including specifically on whether imposing binding interest arbitration is likely to have a "chilling and narcotic effect" on future collective bargaining.

[13] According to the Applicant, the Lesosky Affidavit provides evidence of the impact of the use of section 107 of the Code in the Air Canada labour dispute, a private sector labour dispute

like their own. While the Chaykowski Report opines that there is no evidence that *ad hoc* government intervention (such as under s. 107) in private sector labour disputes have a chilling effect on collective bargaining, the Lesosky affidavit provides an instance of just that. That is, the parties were unable to conclude a collective agreement given the prospect of a section 107 intervention that was being requested by Air Canada. The Applicant adds that the comments of Air Canada's CEO make clear that Air Canada was correctly anticipating there would be such an intervention ending the strike/lockout and referring the dispute to binding interest arbitration. It was only after it became apparent that the Minister's use of section 107 would not, in fact, end the strike, that Air Canada returned to the bargaining table and made concessions which resulted in the parties concluding a tentative collective agreement.

[14] I respectfully disagree with the Applicant.

[15] First, the Lesosky affidavit concerns different parties, with a different collective bargaining history, who were involved in an entirely different labour dispute. Professor Chaykowski does not conclude that imposing interest arbitration could never have a chilling or narcotic effect for parties in the private sector. He goes on to consider the specific bargaining history of these parties to conclude it did not have such an effect.

[16] Second, I agree with the Association that some important context appears to be missing from the Lesosky Affidavit: there is no context of prior rounds of negotiation, and there is no detailed context of the bargaining position differences between the parties in August, which led

to the breakdown in talks, the issuance of strike and lockout notice, and ultimately the Minister's intervention.

[17] But there is more. The Applicant's argument that the Lesosky affidavit falls under the constitutional exception to the general rule preventing a party to file evidence not before the decision maker on judicial review must also fail. The purpose of this exception is for the Court to have the proper factual foundation to decide the matter (*Native Council of Nova Scotia v Canada (Attorney General)*, 2011 FC 72 at para 20; see also *Kitkatla Band v British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31 at para 46-47). The factual foundation for the constitutional issue raised by the Union is its own labour dispute with the Association and the impact the Minister's intervention had on the Union and its members (see for example *Redeemer University College v Canada (Employment, Workforce Development and Labour)*, 2021 FC 686 at paras 19-20), not any other factual background.

[18] Finally, admitting the Lesosky affidavit would equate to a procedural "opening of a can of worms". There would necessarily be additional information that would need to be put before the Court for the Court to fully assess the impact of the Minister's intervention on the CUPE-Air Canada labour dispute. This Court will have that opportunity in file T-3029-25 (CUPE v AGC and Air Canada).

[19] As such, I agree with the Association that admitting the Lesosky affidavit would cause substantial and serious prejudice to both Respondents who have no knowledge of the events described therein. They could not properly test this evidence without involving additional fact

witnesses who are not involved in this Application and who may be quite reluctant to become involved due to the sensitivity of the information requested. This would put an undue burden on the Respondents and create a real unbalance between the parties.

III. Conclusion

[20] For the above reasons, I find the Lesosky affidavit not relevant to the issues before the Court, as well as inadmissible for not falling under any exception to the general rule preventing a party to an application for judicial review to file evidence that was not before the decision maker. Admitting the Lesosky affidavit would also cause both Respondents a significant prejudice and it would unnecessarily expand the scope and delay of these proceedings. The motion is therefore dismissed with costs to the Respondents.

ORDER IN T-3365-24

THIS COURT ORDERS that:

1. The Applicant’s motion is dismissed.

2. Costs are granted to both Respondents.

"Jocelyne Gagné"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-3365-24
STYLE OF CAUSE:	INTERNATIONAL LONGSHORE AND WAREHOUSE UNION SHIP AND DOCK FOREMEN, LOCAL 514 v BRITISH COLUMBIA MARITIME EMPLOYERS ASSOCIATION ET AL
MOTION IN WRITING PURSUANT TO RULES 312 AND 369 OF THE *FEDERAL COURTS RULES* CONSIDERED AT:	
ORDER AND REASONS:	GAGNÉ J.
DATED:	DECEMBER 18, 2025

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