Federal Court of Appeal  Cour d'appel fédérale

Date: 20141126

Docket: A-167-14

Ottawa, Ontario, November 26, 2014

Present: **GAUTHIER J.A.**

BETWEEN:

DR. GÁBOR LUKÁCS

Applicant

and

CANADIAN TRANSPORTATION AGENCY

Respondent

ORDER

UPON the applicant's motion made in writing for an order:

[1] requiring Ms. Simona Sasova to pay Lukács the costs of the September 15, 2014 continuation of her cross-examination on her affidavit sworn on May 20, 2014;

[2] requiring Ms. Sasova to re-attend, at her own expense or the expense of the Agency, for cross-examination on said affidavit:

(i) to answer questions 393-397 and further questions in the line of questioning to which counsel for the Agency objected on September 15, 2015 (p. 99, l. 6-8 of the transcript), and any follow-up questions;

(ii) to produce all emails sent by Mr. Paul Lynch to Expedia on July 28, 2014, including those that were allegedly sent in error, and answer questions in relation to them, including any follow-up questions;

(iii) to answer questions related to Exhibit No. A for identification and its content, including any follow-up questions; and

[3] setting a schedule for the remaining steps in this proceeding, and granting the applicant 30 days from the receipt of the transcripts of Ms. Sasova's re-attendance to serve and file the applicant's record,

[4] the whole with costs;

HAVING considered the material filed by the parties;

UPON noting that cross-examination of an affiant is not meant to be used as discovery of a party or as a means to test every detail of every document listed in a direction to attend. Applications for judicial review are meant to proceed expeditiously and in a summary fashion. Documents listed in a direction to attend are not usually provided in advance to the party conducting the cross-examination. Nevertheless, all questions relating thereto must be put to the

witness in the absence of a clear agreement to the contrary. The cross-examination of an affiant becomes evidence in the record as it is the equivalent of a cross-examination of a witness at a hearing.

UPON considering that the applicant invoked Rule 96(2) of the *Federal Courts Rules*, SOR/98-106 (the Rules) to adjourn the cross-examination on the basis that the affiant had failed to produce documents listed in the direction to attend. Such adjournment is meant to allow the party conducting the examination to bring a motion for directions. The parties may avoid the need to bring such a motion but to do so, they must clearly agree on under what terms the cross-examination will be continued. Here, it is evident that there was no such agreement as counsel for the respondent made it clear that the cross-examination could only be continued in respect of new documents produced after the adjournment, while the applicant did not agree to such restrictions. Thus, the cross-examination should not have resumed without an appropriate motion for directions. In the circumstances, the Court is not satisfied that a special order as to costs is warranted;

UPON considering that in this case, the description of the documents to be produced in the direction to attend did not include a specific time period. According to the applicant, this meant implicitly that the period was flexible and ended only on the date of the cross-examination. This view was not shared by the respondent's counsel. In my view, it is incumbent on the applicant to ensure that the direction to attend contains enough precision not to require interpretation. In this case, the Court is not satisfied that the direction to attend was precise enough to warrant ordering special costs against the affiant;

UPON further considering that on a motion to compel answers, the party conducting the cross-examination must ask on the record all the questions to be dealt with by the Court. This includes everything arising from the documentation except for those questions that could not be anticipated and that arise solely from the answers given. Questions 395-396 are not questions that require an answer as they are simply statements as to what is written in the document. This document speaks for itself. Question 397 is a pure question of law that may not be answered. That said, the witness answered questions on similar topics (see, for example, Questions 169, 187-190, 212, 236), and the relevant email dated March 11 was already available to the applicant at the time. Finally, Questions 393 and 394 are identical and the answer is evident from the document itself and the answer given to Question 392. None of these warrant re-attendance of the witness;

UPON determining that Exhibit No. A is an email sent by the applicant to the respondent's counsel on a without prejudice basis and in the context of settlement negotiations. It appears that the witness became aware of this email when asked by counsel for the respondent to explore the feasibility of such settlement (see answer to Question 470 and pages 275 to 277 of the applicant's motion record). This document is privileged and the reference to the fact that steps were taken by the witness to explore the feasibility of what was being negotiated is not sufficient to assume that the respondent waived the privilege attached to it nor is it sufficient to make the document relevant. Testing one's credibility is not a means to obtain the production in the record of privileged documents;

UPON considering all the arguments put forth in respect of the production of emails sent by Mr. Paul Lynch, including especially the applicant's reply, I am not persuaded that these documents are relevant and need to be produced;

THIS COURT ORDERS that the motion is dismissed. The applicant shall file his applicant's record within 30 days of the date of this order. All further steps shall be taken within the time limits set out in the Rules.

"Johanne Gauthier"

J.A.