SUPREME COURT OF NOVA SCOTIA

Citation: *Canadian National Railway v. Teamsters Canada Rail*, 2017 NSSC 10

Date: 20170110
Docket: *Halifax*, No. 449181
Registry: Halifax

Between:

Canadian National Railway

Applicant

v.

Teamsters Canada Rail Conference

and

Marilyn Silverman, Arbitrator

Respondents

LIBRARY HEADING

Judge:	The Honourable Justice Ann E. Smith
Heard:	December 20, 2016, in Halifax, Nova Scotia
Judge:	The Honourable Justice Ann E. Smith
Written Decision:	January 10, 2017
Subject:	Judicial Review – Admissibility of New Affidavit
Summary:	Affidavit contained legal submissions and argument made in both written and oral arguments of Applicant before Arbitrator. Content of Affidavit did not meet any of exceptions for introducing new affidavit evidence on judicial review.
Issues:	(1) Should affidavit not before arbitrator be included in record on judicial review?
Result:	Affidavit not included in record on judicial review.

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Written Decision:	January 10, 2017
Counsel:	Richard J. Charney and Rick Dunlop, for Applicant David Wallbridge, for Respondent (Teamsters Canada Rail Conference)

By the Court:

Introduction

[1] Canadian National Railway ("CN") moves pursuant to *Civil Procedure Rule 7.10* for an order that the Affidavit of Ms. Annick Daigle sworn May 24, 2016 (the "Daigle Affidavit") be included in the record on judicial review.

[2] CN has applied for judicial review of the decision of Arbitrator Marilyn Silverman dated February 8, 2016 (the "Decision"). Arbitrator Silverman upheld a grievance of the Teamsters Canada Rail Conference (the "Union") which determined that CN breached terms of the collective agreement between CN and the Union when it required Conductor Hubley to perform certain work at the Halifax Terminal.

[3] I note that there was a series of separate grievances arising out of the same set of facts. The parties agreed to one grievance arbitration to determine each of the separate grievances. The hearing took place on November 12, 2015. There is no transcript of the proceedings which were not recorded. The Daigle Affidavit was not before the Arbitrator.

[4] CN says that the Court has the discretion to admit affidavit evidence on judicial review. It relies upon the general background exception for the admission of affidavit evidence as articulated by the Federal Court of Appeal in *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 (*Access Copyright*).

[5] CN also relies upon the exception for the admission of affidavit evidence on review articulated in *Keeprite Workers' Independent Union v. Keeprite Products Ltd.* (1980), 29 OR (2d) 513 (Ont. C. A.). In *Keeprite* the Ontario Court of Appeal determined that affidavit evidence may be admitted on judicial review where a party alleges that there was no evidence before the decision-maker to support a material finding.

[6] CN says that the Daigle Affidavit should form part of the record because it explains a key document which was before the Arbitrator. It says that the reviewing Court must be provided the same explanation of this document which was provided

to the Arbitrator so that the Court may assess its argument that there was no evidence before the Arbitrator to support critical findings of fact.

[7] The Union says that the motion should be dismissed. It says that the Daigle Affidavit should be struck in its entirety as not meeting one of the recognized exceptions permitting evidence beyond the record in a judicial review proceeding. The Union also argues that the Daigle Affidavit contains evidence which already forms part of the record and, in any event, says that its contents are otherwise improper as containing argument.

Issue

[8] Should the Daigle Affidavit be included as part of the record?

Background

[9] The issue before the Arbitrator was whether CN required Conductor Hubley to perform work upon the arrival of his train in the Rockingham Yard of the Halifax Terminal, contrary to the provisions of the collective agreement between the parties.

[10] Specifically, the Union argued that after Conductor Hubley put his train away at the Rockingham Yard, he was required to bring cars around to the Halifax Intermodal Terminal (the "HIT"). The Union says that the additional work required of Conductor Hubley constituted the building of a train – work that it says belongs to yard service employees and not to conductors on conductor-only operations of the kind performed by Conductor Hubley.

[11] CN argued that its instructions to Conductor Hubley were permitted under an article of the collective agreement which permits switching (which CN says refers to the pushing or pulling of freight cars to either make up or break up a train, and/or to store those freight cars for movement later) at the "final terminal" to meet "the requirements of service." That argument was rejected by the Arbitrator.

[12] CN also argued at arbitration that the Halifax Terminal is a series of yards and intermodal terminals, that the Halifax Terminal was the "final destination" for Conductor Hubley's train and that what was required of him was to deposit certain segments of his train at different locations within the one terminal.

[13] Ms. Daigle, a CN manager of labour relations, represented CN at the arbitration. The parties agreed on a Joint Statement of Issue and made written, oral

and supplemental oral submissions. Exhibits were attached to each party's written submissions. One of CN's exhibits was a diagram of the Halifax Terminal (the "diagram"). A photograph of the diagram is included in the record produced by Arbitrator Silverman and is found in Volume 3 of the record at Tab E(1).

Law

[14] It is well established that admitting evidence beyond the record in a judicial review proceeding will only be permitted in exceptional circumstances. The general rule is that affidavit evidence which was not before the decision-maker below should not be used to supplement the record on review. There are a few exceptions to that general rule. This Court in *Sipekne'katik v. Nova Scotia (Minister of Environment)*, 2016 NSSC 260 (*Sipekne'katik*) recently confirmed that these exceptions apply only in "exceptional circumstances."

[15] In *Sipekne'katik* the Court dealt with an objection to the admission of affidavits filed by the appellant on appeal of a decision of the Minister of the Environment. After noting that the statutory appeal before him was very similar to a judicial review, the Court stated that "to admit evidence beyond the Record will only be done in exceptional circumstances." (para. 14) Relying on the decision of the New Brunswick Court of Appeal in *Mr. Shredding Waste Management Ltd. New Brunswick (Minister of Environment & Local Government)*, 2004 NBCA 69 (N.B.C.A.) (*Mr. Shredding*) the Court stated that the four categories that allow such exceptions are: (1) lack of jurisdiction; (2) reasonable apprehension of bias; (3) breach of procedural fairness and natural justice; and (4) fraud.

[16] Recent decisions of the Federal Court of Appeal in decisions such as *Access Copyright and Delios v. Canada (Attorney General)*, 2015 FCA 117 (Fed. C.A.) (*Delios*) have recognized an additional category of affidavit evidence that may be admissible on judicial review, which it has termed the "general background information" exception.

The "General Background Information" Exception for Admitting Affidavit Evidence

[17] In *Access Copyright* the Federal Court of Appeal grouped the recognized exceptions to the general rule against introducing affidavit evidence that was not before the decision-maker into two categories (alleged procedural defects, including bias and the *Keeprite* exception). The Court of Appeal added another exception

relating to the admission of general background information. The Court of Appeal stated as follows at paragraph 20:

> There are a few recognized exceptions to the general rule against this Court receiving evidence in an application for judicial review, and the list of exceptions may not be closed. These exceptions exist only in situations where the receipt of evidence by this Court is not inconsistent with the differing roles of the judicial review court and the administrative decision-maker (described in paragraphs 17 - 18, above). In fact, many of these exceptions tend to facilitate or advance the role of the judicial review court without offending the role of the administrative decision-maker. Three such exceptions are as follows:
>
> (a) Sometimes this Court will receive an affidavit that provides general background in circumstances where that information might assist it in understanding the issues relevant to the judicial review: (*case cites law omitted*). Care must be taken to ensure that the affidavit does not go further and 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. In this case, the applicants invoke this exception for much of the Juliano affidavit.
>
> (b) Sometimes affidavits are necessary to bring to the attention of the judicial review court procedural defects that cannot be found in the evidentiary record of the administrative decision-maker, so that the judicial review court can fulfil its role of reviewing for procedural fairness: e.g. *Keeprite Workers' Independent Union v. Keeprite Products Ltd.* (1980), 1980 CanLII 1877 (OCA), 29 OR 92d) 513 (CA). For example, if it were discovered that one of the parties was bribing an administrative decision-maker, evidence of the bribe could be placed before this Court in support of a bias argument.
>
> (c) Sometimes an affidavit is received on judicial review in order to highlight the complete absence of evidence before the administrative decision-maker when it made a particular finding: *Keeprite*, *supra*.

[18] It is noted that although the Court in *Sipekne'katik*, *supra*, does not specifically refer to the "general background information" exception articulated in *Access Copyright*, the Court nonetheless endorses the helpfulness of background affidavit evidence in the context of the particular situation before the Court:

> The Church and Lyons affidavits address Alton's involvement in the project and the consultation process. However, their affidavits are replete with information that is a repetition of the Record. There was a large volume of material filed on this application. Having a party provide background information from the Record to provide context to their evidence and to help focus on the relevance of their submissions is acceptable in this specific situation, considering the significance of the duty to consult in this case. (paragraph 60)

[19] The "general background information" exception applies only to neutral, non-argumentative statements that assist the reviewing court to understand the history and nature of a case. I refer to the decision of the Federal Court of Appeal in Delios, supra. In that case, the Court of Appeal stated:

> The "general background" exception applies to non-argumentative orienting statements that assist the reviewing court in understanding the history and nature of the case that was before the administrative decision-maker. In judicial reviews of complex administrative decisions where there is procedural and factual complexity and a record comprised of hundreds or thousands of documents, reviewing courts find it useful to receive an affidavit that briefly reviews in a neutral and uncontroversial way the procedures that took place below and the categories of evidence that the parties placed before the administrator. As long as the affidavit does not engage in spin or advocacy – a that that is the role of the memorandum of fact and law – it is admissible as an exception to the general rule. (paragraph 45)

The *Keeprite Exception* for Admitting Affidavit Evidence

[20] Several of the grounds of review set out in CN's Notice of Judicial Review allege that the Arbitrator made key findings "without any basis", "without any evidentiary basis" and "without any basis or explanation."

[21] As noted above, the admission of affidavit evidence to show that the decision-maker below made a factual finding incapable of being supported by the evidence is sometimes referred to as the "*Keeprite Exception.*"

[22] In *Keeprite* the employer argued that there was no evidence before an arbitrator to support a finding that the grievor had admitted throwing coffee in the face of another employee. Affidavit evidence was filed in an attempt to show that there was no evidence to support that finding. On the merits, the Court of Appeal concluded that there was evidence before the arbitrator capable of supporting his finding. Therefore, the Court of Appeal rejected the argument based on a complete absence of evidence. The following statements of Morden J.A. have often been quoted (page 8):

> Having just completed the exercise of examining, in this fashion, the evidence that was before the arbitrator I would express the view, which is in agreement with that of Pennell J., that the practice of admitting affidavits of this kind should be very exception, it being emphasized that they are admissible only to the extent that they show jurisdictional error. I would think that the occasions for the legitimate use of affidavit evidence to demonstrate the exacting jurisdictional test of a complete absence of evidence on an essential point would, indeed, be rare. (emphasis added)

[23] The use of such extrinsic affidavit evidence to demonstrate a complete absence of evidence on an essential point is rare and restricted. In *Asad v. Kinexus Bioinformatics Corp,* 2010 BCSC 33 (*Kinexus*) the British Columbia Supreme Court referred to the exceptional circumstances where such extrinsic evidence may be admitted and commented upon the required content of such evidence at paragraphs 1920:

> 19 The use of extrinsic evidence to demonstrate a factual error is seldom exercised. The admissibility of affidavit evidence in relation to an error of fact is restricted to rare circumstances where there is no evidence to support a material finding: (*cites omitted*).
>
> 20 The court will not admit evidence if the alleged error may be addressed on the record, or if the admission would invite the court to re-evaluate or re-weigh the evidence heard by the Tribunal. If the court determines that extrinsic evidence is both necessary and would not invite a re-weighing, affidavit material must be restricted to identifying the alleged factual errors and the evidence necessary to demonstrate the errors (*cites omitted*).

[24] Of course, even if the general background exception or the *Keeprite Exception* were to apply in principle, the content of the proposed affidavit must nonetheless meet the general requirements for all affidavits as established by Nova Scotia case law and as codified by the *Nova Scotia Civil Procedure Rules*. *Civil Procedure Rule 39.04(2)* provides that a judge must strike a part of an affidavit containing "information that is not admissible, such as an irrelevant statement or a submission or plea."

[25] The principle that affidavit evidence should be confined to facts within the personal knowledge of the affiant and should avoid inadmissible evidence has also been continuously confirmed by this Court since the 1993 decision in *Waverley (Village) v. Nova Scotia (Minister of Municipal Affairs)*, 1993 CanLII 3403. In *Waverley*, the Court stated that "An affidavit should not take on the flavour of a plea or a summation." (page 10)

The Daigle Affidavit

[26] I now review the contents of the Daigle Affidavit in more detail considering the relevant case law.

Paragraphs 1-3

[27] Paragraphs 1-3 of the Affidavit provide background information on the affiant. CN submits that this is background information which would be useful to the Court on judicial review. The Union says that it is unnecessary to have this information provided in the form of affidavit evidence, that it is information easily gleaned from the record, including from the decision of Arbitrator Silverman.

[28] I conclude that, as submitted by the Union, the contents of this paragraph are matters found in the record and there is no need to have them included in an affidavit.

Paragraphs 4

[29] In para. 4 Ms. Daigle states that in addition to CN's written submissions at the arbitration, she made additional oral submissions. She states, "This affidavit outlines those additional oral submissions."

[30] CN says that there is nothing controversial in this paragraph and nothing that prejudices the Union's case on review. The Union says that it is clear that the Affidavit is exactly what Ms. Daigle says it is – an attempt to put forth in the form of affidavit evidence, legal arguments and legal arguments which duplicate the arguments CN advanced at arbitration.

[31] By her own admission, Ms. Daigle has merely set forth in Affidavit form the same submissions she made before the Arbitrator. Submissions or arguments have no place in affidavits and on that basis alone, the Daigle Affidavit should not form part of the record on review. However, I will go on to refer to the contents of each of the remaining paragraphs to ensure that what Ms. Daigle says are submissions are in fact submissions.

Paragraph 5

[32] In this paragraph Ms. Daigle states that both parties used the diagram of the Halifax Terminal at the arbitration. She says that at the outset of the hearing, Mr. Normand Gagnon, CN General Manager, "explained that the diagram shows a map of the entire Halifax Terminal, which includes Rockingham Yard, Fairview Cove (Ceres) Yard, and HIT."

[33] Counsel for CN argues that para. 5 provides context and background to the matters described in para. 7 of the Affidavit. On the other hand, the Union's counsel argues that what the diagram purportedly shows was subject to disagreement between the parties and, in any event, is inadmissible evidence because it does not

meet the requirements established by the case-law for introduction of affidavit evidence on judicial review.

[34] The diagram referred to is part of the record. Counsel may make legal argument as to its meaning to the reviewing Court. I agree with the Union counsel's description of this paragraph as an attempt to interpret the evidence in the record. It is inadmissible as affidavit evidence on judicial review. In addition, this paragraph merely duplicates the same points made in CN's written submissions to the Arbitrator dated November 12, 2015. I refer to para. 50 of those submissions where the following is stated:

> The Company points out that Halifax Terminal is identified as a "series of yards" in the 4.16 Agreement. As such, Rockingham (RH yard), the RG yard, Fairview Cove, Halifax Ocean Terminal (HOT) and Halifax Intermodal Terminal (HIT) are all within the limits of Halifax Terminal.

Paragraph 6

[35] In this paragraph Ms. Daigle states, “In my submissions, Halifax Terminal was the final destination of Mr. Hubley's train. I also reiterated that, as explained by Mr. Gagnon, the Halifax Terminal is a series of yards.”

[36] As noted above, an issue before the Arbitrator concerned whether the Halifax Terminal as a whole was Conductor Hubley's final destination or whether the Rockingham Yard was the final destination of his train. This paragraph amounts to legal submission, a conclusion drawn home by the fact that the same matters are set out in CN's written submissions to the Arbitrator at paras. 50 and 54. The relevant portions of those paragraphs are as follows:

> 50. The Company points out that Halifax Terminal is identified as a "series of yards" in the 4.16 Agreement...
>
> 54. …..since the grievance is for work performed by Mr. Hubley in Halifax, Q120's final destination. There is no “building” of a train taking place because the train does not continue beyond that location. The train terminates in Halifax.

Paragraph 7

[37] Paragraph 7 provides:

> The two rows of coloured post-it notes across the top of the photograph at Tab (E)(1) illustrate how blocks of cars were arranged on the trains before and after

> CROA Award 4025, which was issued in 2012 (the 2012 Award). Each post-it represents a block of cars. The diagram shows how HIT cars, which used to arrive at the Halifax Terminal in several blocks, now arrive in one single block, thereby eliminating any marshalling by the inbound train crew.

[38] Paragraph 7 sets forth Ms. Daigle's explanation of the diagram. CN says that each of the other paragraphs in the Affidavit provide background and context for what is found in para. 7. It is the "crux" of the Affidavit. Counsel for CN argues that in order to present its case on judicial review, it is necessary that the Court hear the same explanation of the diagram as the Arbitrator heard. Counsel says that the Court should not have to speculate as to what the diagram means.

[39] The Union says that this paragraph presents argument which goes directly to the merits of the Decision, does not meet any of the recognized exceptions which would allow for such evidence to be included in a record on review and, in addition, contains material which is to a great extent already in the record.

[40] I find that this paragraph largely repeats CN's written submissions to the Arbitrator. The only aspect of the paragraph not found in the record is the reference to the "two rows of coloured post-it notes across the top of the" diagram. I refer to CN's written submissions to the Arbitrator at para. 105:

> 105. It must also be noted that prior to July 2011, when CROA 4025 was heard, Q120 reached Halifax with the HIT traffic scattered throughout the train (cars not grouped in one single block). The inbound crew was therefore required to build the HIT block of traffic before running around it and placing it at HIT.

[41] Looking at the diagram, the words "Halifax Yard" appear. One sees two rows of variously-coloured post-it notes. The first row of notes starts with a note with the words "CROA 4025" on the bottom. The row contains five other notes, with notes two and four coloured blue with "HIT" written on each. The first note in the second row has the words "Now (since after 4025)" written on the bottom. There are four other notes in this row, but only one blue "HIT" note. Counsel for the Union advised the Court that these notes represented the make-up of Conductor Hubley's train, an assertion not disputed by counsel for CN.

[42] I agree with the argument of the Union's counsel that the information contained within para. 7 is substantially found in the record. As counsel for the Union put it in oral submissions before me, the raw materials for CN to make its arguments on judicial review are all contained within the record.

[43] To the extent that the contents of this paragraph are not explicitly in the record, i.e. the references to post-it-notes, they are an attempt to interpret the record. An affidavit is not the place to make submissions to the Court as to what an exhibit means. The place to do so is in written and oral argument. On judicial review the Court is routinely called upon to interpret parts of the record in the absence of knowing what explanation, if any, was provided to the decision-maker below as to the meaning or import of the document. In any event, it is abundantly clear from CN's written submissions and a review of the diagram what it illustrates.

[44] In short, para. 7 constitutes legal submissions and an attempt to interpret the record.

Paragraph 8

[45] Paragraph 8 provides as follows:

> In my oral submission, I indicated that the 2012 Award concerned CN's previous practice of scattering cars destined HIT throughout the train. Following the 2012 Award, the HIT cars on Mr. Hubley's train were already grouped together to eliminate the marshalling required at the Halifax Terminal.

[46] Once again counsel for CN says that this paragraph helps to provide context and background to the diagram "explained" in para 7.

[47] I find that the content of this paragraph falls outside any of the recognized exceptions which permit evidence beyond the record in a judicial review proceeding. This paragraph is simply a repeat of oral submissions, as well as written submission advanced by CN. I refer to para. 105 of CN's written submissions to the Arbitrator:

> 105. It must also be noted that prior to July 2011, when CROA 4025 was heard, Q120 reached Halifax with the HIT traffic scattered throughout the train (cars not grouped in one single block). The inbound crew was therefore required to build the HIT block of traffic before running around it and placing it at HIT.

Paragraph 9

[48] This paragraph merely recites that Ms. Daigle swears the Affidavit in support of CN's application for judicial review. It is irrelevant.

Conclusion

[49] The Daigle Affidavit contains material already in the record (paras. 1-3) or submissions (paras. 4-8). The latter paragraphs largely duplicate CN's written submissions to the Arbitrator. Submissions do not constitute admissible evidence.

[50] Nor do the contents of the Affidavit constitute the kind of neutral, non-argumentative explanations permitted in affidavits by the "general background" exception accepted by the Federal Court of Appeal in decisions such as *Access Copyright*, *supra*, and *Delios*, *supra*.

[51] The contents of the Daigle Affidavit do not reference any alleged factual errors made by the Arbitrator. Rather, I find that the Daigle Affidavit attempts to do that which the Court in *Kinexus* cautioned against – invite a re-weighing of the evidence heard by the Arbitrator. The "*Keeprite Exception*" accordingly does not apply to the contents of the Daigle Affidavit.

[52] CN's motion to include the Daigle Affidavit as part of the record on judicial review is dismissed.

Costs

[53] Counsel for each party submitted that costs in the amount of $1000 (inclusive of HST and disbursements) are appropriate. I accept their submissions and order costs payable to the Union in the amount of $1000.

Smith, J.