No.

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE NEW BRUNSWICK COURT OF APPEAL)

BETWEEN:

NOEL AYANGMA

APPLICANT

and

UNIVERSITY OF MONCTON, CAMPUS OF MONCTON

RESPONDENT

# APPLICATION FOR LEAVE TO APPEAL

**NOEL AYANGMA, Applicant**
75 Cortland Street
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TO: THE REGISTRAR OF THIS COURT

AND TO: SACHA D. MORISSET
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# B

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**(ON APPEAL FROM THE NEW BRUNSWICK COURT OF APPEAL)**

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*Doc.*


| | | |
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No.

**IN THE SUPREME COURT OF CANADA**

**(ON APPEAL FROM THE PRINCE EDWARD COURT OF APPEAL)**

**BETWEEN:**

**NOEL AYANGMA**

**APPLICANT**

**and**

**UNIVERSITY OF MONCTON, CAMPUS OF MONCTON**

**RESPONDENT**

**NOTICE OF APPLICATION FOR LEAVE TO APPEAL**

**TAKE NOTICE** that the Applicant, Noël Ayangma hereby applies pursuant to section 40(1) of the ***Supreme Court*** *Act*, R.S.C. 1985, c. S-26, as amended, for an order granting him leave to appeal to the Supreme Court of Canada from the Judgment of the New Brunswick Court of Appeal (Case No. 22-19-CA), dated October 10th , 2019, which Judgment dismissed his appeal from the decision and judgment of the New Brunswick Queen's Bench, dated February 13th and 14th, 2019 respectively, which decision and judgment also upheld the decision of the Motions judge which dismissed the Applicant's motion for production and for recusal, and granted summary judgment in favor of the Respondent based on a the limitation period, found him vexatious and restricted his access to the New Brunswick Courts, based on either previous decisions made by another court in an another jurisdiction despite having been had been reversed and vacated by a higher court, on appeal and/or based a very limited proceedings rightfully conducted before the New Brunswick Courts taken against his former employer.

**AND FURTHER TAKE NOTICE** that the said Application for leave to appeal shall be made on the basis of the following important grounds:

**Ground#1:** **The conduct displayed by the Motions judge prior and throughout the four (4) proceedings he presided over (three (3) motions and one (1) application for judicial review), which proceedings involved the same parties, does give rise to bias or a reasonable apprehension of bias. This conduct suggests that the judge crossed the line was not impartial:**

a. *First,* when he appeared throughout the impugned proceedings, to be a participant in the arena rather than as an impartial and neutral adjudicator;

b. *Second,* when it not only discussed at length and/or opined not on matters not before him, at the time, but also when he went over the map made seriously personal and unwarranted attacks on the Applicant, disparaging him by way of innuendo, on matters which were never not before him nor raised by any of the parties appearing before him, notwithstanding the evidence to the contrary. For example:

i. when he suggested that the Applicant was fired because he did not have his doctorate and specifically when suggested that if he had one he has to put it on the floor even though a copy of the doctorate and the related transcript were before and/or referred to in various relevant materials including the Affidavits of Documents which formed the basis of Record before both the Motions judge and the Court of Appeal which documents supported the existence a doctorate degree;

ii. when he also suggested in an open court that the Applicant was fired, because he did not have a doctorate, even though this matter was not before him nor raised by any of the opposing parties, and despite the evidence before him to the contrary and evidence that the Applicant was no longer in the employ of the University at the time, because his contract having expired.

c. *Third,* when he failed to review the proceedings of October 5th, to ascertain the comments he made prior to the recusal motion on held on December 17th, 2018, and more importantly when he refused to recuse himself after asked to do so, based on his previous comments and prejudgment;

*d.* *Fourth,* when he addressed the Applicant in a disrespectful, demeaning and intimidating manner throughout the various proceedings he presided over and also when he repeatedly raised in a sarcastic manner the tone of his voice;

e. *Fifth,* when he condoned inappropriate comments made by an officer of the Court in an open court, indicating that the Applicant conduct was driven by hatred and suggested that the Applicant apologizes for insulting counsel for the respondent by insinuating without any evidence that the Applicant had accused counsel of collusion and that it was offensive, while at the same time, he failed to ask counsel for the Respondent to apologize for falsely characterizing the conduct of the Applicant as hateful;

f. *Sixth*, when he declared the Applicant's "vexatious litigant" and restricted his access to the Courts in New Brunswick without any shred of solid evidence, in fact when he reached this finding based on very limited proceedings conducted by the Applicant in New Brunswick and sadly so also, on the basis of two decisions from another court (Prince Edward Island) which decisions had been reversed and vacated on appeal by the Court of Appeal and or possibly because the Applicant had apparently dared challenge of his impartiality as a judge.

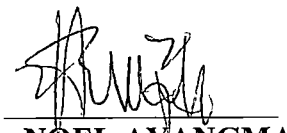
**Ground#2:** **The Motions judge erred in law in making the Prohibitory Order he made restricting the Applicant's access to the Courts in New Brunswick Under Rule 76.1.02(2)**

**Ground#3** **The Court of Appeal misapplied Rule 22 which governs summary judgment by departing from well-settled the general principles of law, including those general principles of law that it itself had set out, and in particular:**

a. *First* when it permitted the Motions judge's decision to grant summary judgment in favour of the Respondent based on the limitation period, to stand, despite having clearly established that the Respondent had failed to comply with Rule 31.03, notwithstanding the general rule which stipulates that a motion for summary judgment should, as a general rule, be dismissed with costs if the moving party fails to comply with Rule 31.03;

b. *Second*, when it also permitted the Motions judge's decision to stand based on the limitation period notwithstanding the general principle of law that stipulates that *"whenever a limitation provision is open to multiple reasonable interpretations, the one least inimical to the plaintiff must be favoured*"

DATED at the City of Charlottetown in the Province of Prince Edward Island this 25th day of November, 2019.



**NOEL AYANGMA**

**TO:** **THE REGISTRAR OF THIS COURT**

**AND TO:** **SACHA D. MORISSET**
Stewart McKelvey
C.P. 28051, Bureau 601, 644 rue Main, Moncton, NB E1C 9M1
Tel: (506) 853-1970
Counsel for the Respondent, University of Moncton, Moncton Campus
*smorisset@stewartmckelvey.com*

## NOTICE TO THE RESPONDENT

A respondent may serve and file a memorandum in reply to this application for leave within 30 clear days after service of the within application. If no reply is filed in that time, the Registrar will submit this application for leave to the Court for consideration pursuant to section 43 of the *Supreme Court Act.*

Dated this 25th day of November, 2019.

**NOEL AYANGMA,** Applicant
75 Cortland Street
Charlottetown, PE.
Tel:(902) 628-1333 or 628-7934
noelayngma@yahoo.ca

**TO:** **THE REGISTRAR OF THIS COURT**

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Tel: (506) 853-1970
Counsel for the Respondent, University of Moncton, Moncton Campus
*smorisset@stewartmckelvey.com*

**FORM 25B CERTIFICATE**

I, NOEL AYANGMA, hereby certify that:

1. This file sealed in the courts below

   **NO**

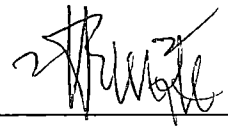
2. There is a ban on the publication of evidence or the names or identity of a party or a witness.

   **NO**

3. There is confidential information on the file that should not be accessible to the public by virtue of specific legislation.

   **NO**

**SIGNED BY**



NOEL AYANGMA

**Dated: November 25th, 2019**

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COUR DU BANC DE LA REINE DU NOUVEAU-BRUNSWICK

DIVISION DE PREMIÈRE INSTANCE

CIRCONSCRIPTION JUDICIAIRE DE MONCTON

**2019 NBBR 030**

***Date : 13-02-2019*** ***MC-386-2017***

COURT OF QUEEN'S BENCH
TRIAL DIVISION
MONCTON, N.B.
FILED/REGISTERED
FEB 14 2019
COUR DU BANC DE LA REINE
DIV. DE PREMIERE INSTANCE
MONCTON, N.-B.
DÉPOSÉ/ENREGISTRÉ

ENTRE :

**NOËL AMBADIANG AYANGMA,**

Demandeur,

- et -

**UNIVERSITÉ DE MONCTON, CAMPUS DE MONCTON,**

Défenderesse.

**DÉCISION**

MOTIFS DE LA DÉCISION : le juge Jean-Paul Ouellette

LIEU DE L'AUDIENCE : Moncton (Nouveau-Brunswick).

DATE DE L'AUDIENCE : le 17 décembre 2018

DATE DE LA DÉCISION : le 13 février 2019

COMPARUTIONS : Noël Ayangma, per se

Me Sacha D. Morisset pour l'Université de Moncton

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**OUELLETTE, J.**

Introduction

[1] Noël Ayangma a déposé un Avis de poursuite accompagné d'un Exposé de la demande le 29 mai 2017.

[2] L'Université de Moncton a déposé une motion sollicitant l'annulation de l'Exposé de la demande au motif qu'il est frivole et vexatoire, ne révèle aucune cause d'action, la Cour n'a pas compétence pour s'en saisir ou encore ne soulève pas aucune cause d'action.

[3] De plus, l'Université sollicite une ordonnance interdisant à Noël Ayangma d'introduire d'autres instances devant cette Cour sans en avoir préalablement obtenu l'autorisation d'un juge de la Cour du Banc de la Reine en vertu de la Règle 76.01 des *Règles de procédure* du Nouveau-Brunswick.

[4] M. Ayangma avait, préalablement au dépôt de la motion de l'Université, déposé une motion sollicitant de l'Université un affidavit de document signé et également un affidavit de document plus complet que l'ébauche déjà reçue.

Contexte factuel

[5] M. Ayangma a été un employé de l'Université à titre de Chargé de cours de 2010 au 31 août 2018. Il était un chargé de cours et un employé syndiqué et membre d'une unité de négociation. L'Université a rompu de façon définitive sa relation employeur-employé après avoir eu janvier 2018 suspendu M. Ayangma de ses fonctions avec rémunération pour permettre la tenue d'une enquête. Cette suspension et son congédiement font l'objet de nombreux griefs présentés

par M. Ayangma en vertu de la convention collective intervenue entre l'Université et l'Association des Bibliothécaires, Professeurs et Professeures de l'Université de Moncton dont M. Ayangma est partie de l'Unité II.

[6] L'objet de la présente action n'est pas relié au fait du congédiement de M. Ayangma, mais plutôt de sa mise en candidature à un autre poste de professeur qui a été comblé par un autre titulaire le 1er juillet 2014. Le poste en question avait été laissé vacant suite au départ d'un professeur en juin 2013. Ce poste a fait l'objet d'un contrat temporaire d'un an et ensuite pourvu par un contrat régulier pouvant mener à la permanence. M. Ayangma n'avait pas été retenu pour ni l'un ni l'autre des contrats.

[7] Le 3 mars 2014, M. Ayangma a été informé que sa candidature n'avait pas été retenue à l'étape départementale et après avoir poursuivi les étapes d'embauche d'un candidat qualifié, le poste a été comblé le 1 juillet 2014.

[8] Le 12 mai 2015 M. Ayangma a contesté les décision de l'Université par le dépôt de griefs alléguant l'abus d'autorité, l'intimidation, le manque d'éthique professionnelle, la diffamation et le refus de fournir un milieu de travail exempte de toute forme d'harcèlement et de discrimination.

[9] Le 27 mars 2015 M. Ayangma a été informé que son grief était rejeté par l'Université et le syndicat a retiré le sien.

[10] Une plainte a été déposée à la Commission des droits de la personne le 6 juillet 2015 dans laquelle M. Ayangma allègue de la discrimination dans l'attribution du contrat temporaire et du poste permanent. Le 22 décembre 2016, la Commission a émis un rapport de prolongation du délai pour le dépôt d'une plainte et un rapport sommaire de rejet recommandant à la Commission de

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rejeter non seulement la demande de prolongation de délai de M. Ayangma mais également sa plainte sur le fond. Le 2 mai 2017 la Commission a rejeté la plainte au complet.

[11] Le 29 mai 2017, M. Ayangma a signifié une requête en révision judiciaire dans laquelle il conteste la décision de la Commission qui a rejeté sa plainte, et un avis de poursuite accompagné d'un exposé de la demande dans le présent litige relatif à la décision de ne pas retenir sa candidature pour le poste de professeur mentionné précédemment.

[12] La requête devant la Cour du Banc de la Reine a été rejetée le 14 février 2018 et la Cour d'appel a confirmé cette décision rendue le 7 février dernier.

[13] L'Université soumet que la présente action est prescrite en vertu de la *Loi sur la prescription* que l'exposé de la demande est frivole, vexatoire et constitue un usage abusif de la procédure judiciaire et qu'elle devrait être radiée ne révélant aucune cause d'action. Enfin, l'Université demande une interdiction de M. Ayangma d'introduire d'autres instances sans l'autorisation préalable du tribunal. Le tribunal traitera de cette dernière question dans la deuxième partie de sa décision.

[14] En premier lieu, il est primordial de traiter de la validité de l'exposé de la demande bien que le tribunal ait entendu, à l'insistance de M. Ayangma, sa motion relative à l'affidavit de document. Pour les motifs qui suivent, cette motion n'a pas à être tranchée.

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Question en litige

*[15]* Le tribunal est d'avis que la seule question à trancher relative à l'exposé de la demande consiste à déterminer si l'action est prescrite en vertu de la *Loi sur la prescription*. Enfin, le tribunal est-il justifié de rendre une ordonnance en vertu de la Règle 76..1.02 relative à un plaideur quérulant.

Analyse et conclusion

**L'action est-il prescrit en vertu de la *Loi sur la prescription*?**

[16] La preuve par affidavit révèle que le 3 mars 2014, M. Ayangma a été informé que sa candidature avait été rejetée et que le 12 mai 2015, il a déposé un premier grief contestant les décisions de l'Université quant à l'octroi du poste. Il est incontestable qu'au plus tard le 12 mai 2015, M. Ayangma savait que le poste avait été comblé le 1er juillet 2014.

[17] La *Loi sur la prescription* prévoit à l'article 5 ce qui suit :

> **Délais de prescription ordinaires**
>
> **5(1) Sauf disposition contraire de la présente loi, toute réclamation se prescrit par celui des délais ci-dessous qui expire le premier :**
>
> **a) deux ans à compter du jour où sont découverts les faits y ayant donné naissance;**
>
> **b) quinze ans à compter du jour où a eu lieu l'acte ou l'omission sur lequel elle est fondée.**
>
> **5(2) Les faits ayant donné naissance à la réclamation sont découverts le jour où le réclamant a appris ou aurait dû normalement apprendre :**
>
> **a) que sont survenus les préjudices, les pertes ou les dommages;**
>
> **b) que les préjudices, les pertes ou les dommages ont été causés entièrement ou en partie par un acte ou une omission;**

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**c) que l'acte ou l'omission était le fait du défendeur.**

[18] L'avis de poursuite accompagné de l'exposé de la demande a été déposé le 29 mai 2017 alors que le délai de deux ans s'était écoulé.

[19] M. Ayangma a prétendu que le délai de prescription se voulait à compter de la date où la Commission des droits de la personne a rendu sa décision et de six ans ayant plaidé en l'espèce la violation de la *Charte*. M. Ayangma a déjà fait les mêmes arguments rapporté dans une décision de la Cour d'appel de l'Île-du-Prince-Edouard dans *Ayangma v. Canada Health Infoway* 2017 PECA 13. La Cour d'appel écrit :

> **53 The discoverability rule was stated in Kamloops (City) v. Nielsen, [1984] 2 S.C.R. 2, pp.36-41, and was applied in Central Trust Co. v. Rafuse, [1986] 2 S.C.R. 147, at para.77, and by this court in Kelly, supra, at para.21. A cause of action arises for the purpose of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence.**
>
> **54 Mr. Ayangma makes two submissions. First, he argues the discoverability rule should extend commencement of the limitation period to the date of the conclusion of all human rights panel and court proceedings in relation to that complaint. He relies upon the Court of Appeal direction in Ayangma v. Prince Edward Island Eastern School Board, 2000 PESCAD 12. In that case the appellant simultaneously filed complaints with the Human Rights Commission and commenced on action in court in relation to the same matters. The Court held that the (Actions should not proceed to trial ..." until the complaints were dealt with by the Human Rights Commission.**
>
> **55 The appellant has not correctly interpreted and applied that decision. It does not stand for the proposition that such actions do not need to be commenced before the expiry of the limitation period or that the limitation period for such actions does not begin until the complaint processes ended. This decision does not support the appellant's argument and does not relieve the appellant from his legal obligation to file**

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> **his statement of claim within the time requirement prescribed by the Statute of Limitations.**
>
> **56 The case at bar is distinguishable. Mr. Ayangma did not file his statement of claim until July 21, 2015 after the matters had been fully dealt with by the Human Rights Panel. The limitation period had already expired when he filed his statement of claim.**

[20] Le même principe s'applique en l'espèce et le délai de prescription de deux ans est de rigueur.

[21] Concernant le délai des prescription de 6 ans allégué par M. Ayangma, ayant sollicité un recours en vertu de la *Charte*, il ressort clairement que les demandes présentées en vertu de la *Charte* sont généralement soumises à des délais de prescription provinciaux d'application générale qui, en l'espèce, est de deux ans. (voir : *Coffey v. Fraser Valley* (Regional District) 2018 BCSC 959)

[22] Ayant déposé son action après la période déterminée, l'action est prescrite.

[23] Le tribunal est disposé d'accorder un jugement sommaire en vertu de la Règle 22.01 des *Règles de Cour* en faveur de l'Université car la poursuite ne soulève pas de véritable question en litige et est sans fondement. L'action est rejetée sans la nécessité de traiter des autres questions soulevées dans la motion à l'exception de ce qui suit.

**<u>Le tribunal est-il justifié de rendre une ordonnance en vertu de la Règle 70.1 des Règles de procédure traitant de plaideur querulent?</u>**

[24] L'Université sollicite une ordonnance interdisant à M. Ayangma d'introduire ou de continuer d'autres instances sans l'autorisation préalable. La Règle 76.1 des *Règles de procédure* prévoit que :

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**76.1.02 Ordonnance rendue par un juge de la Cour du Banc de la Reine**

**(1) Si un juge à la Cour du Banc de la Reine est convaincu, sur requête, qu'une personne a, de façon persistante et sans motif raisonnable, soit introduit des instances vexatoires devant la Cour du Banc de la Reine ou la Cour de petites créances, soit agi de manière vexatoire au cours d'une instance devant la Cour du Banc de la Reine ou de la Cour de petites créances, le juge peut rendre une ordonnance prévoyant les interdictions suivantes ou l'une d'elles :**

**a) interdisant à la personne d'introduire d'autres instances devant la Cour du Banc de la Reine ou la Cour des petites créances, à moins d'en avoir obtenu l'autorisation d'un juge de la Cour du Banc de la Reine;**

**b) interdisant à la personne de continuer une instance déjà introduite devant la Cour du Banc de la Reine ou la Cour des petites créances, à moins d'en avoir obtenu l'autorisation d'un juge de la Cour du Banc de la Reine.**

[25] Cette règle de procédure se veut un outil permettant au tribunal d'imposer des restrictions à un demandeur qui intente des instances vexatoires à répétition. Dans *Brooks c. Forces Policières de Fredericton et Autres*, 2017 NBBR 83 (CanLII), le juge Morrison devait traiter d'une plaideuse quérulente. Dans cette affaire, Mme Brooks affirmait que le procureur du Ministère publique avait engagé contre elle une poursuite malveillante. Lorsque cette poursuite a été terminée, Mme Brooks a entamé des poursuites à répétition à tous les niveaux de cour reliés à cette affaire de poursuite du Ministère.

[26] Faisant référence à Mme Brooks, le juge Morrison a écrit :

**[TRADUCTION]**
**Les tribunaux doivent demeurer ouverts aux personnes difficiles, récalcitrantes, agaçantes, déraisonnables, ridicules, irrationnelles, gaspilleuses et mal intentionnées. Celles-ci ne sont pas confinées aux blogues et aux publications sur des sites de nouvelles. Dans une certaine mesure, le système judiciaire peut devenir un micro ouvert pour les personnes en colère. Mais lorsqu'une personne se sert de procédures**

**judiciaires multiples comme d'un gourdin pur assouvir sa vengeance sur son adversaire, la cour doit l'arrêter.**

**[38] Si l'on donne à la demanderesse un accès illimité aux tribunaux, je n'ai aucun doute que les défendeurs et les autres personnes qu'elle considère comme lui ayant causé préjudice feront l'objet d'un harcèlement judiciaire incessant de la part de la demanderesse et devront dépenser davantage en termes de frais, de temps et d'énergie. De plus, je suis d'avis qu'il est dans le meilleur intérêt de la demanderesse que ce litige prenne fin. Dans les observations qu'elle a soumises à la Cour, Mme Brooks a indiqué qu'elle souffre de problèmes de santé mentale et que ce litige lui a causé du stress. Mme Brooks est intelligente et débrouillarde, elle s'exprime bien et elle a fait preuve de respect lorsqu'elle a comparu devant moi. Le fait de lui interdire de continuer de porter ces questions en litige lui permettra de concentrer ses latents et son énergie sur des choses dont elle pourrait bénéficier au lieu de les gaspiller dans une cause désespérée. Dans les circonstances, je suis obligé d'imposer des restrictions à la demanderesse. Par conséquent, j'accueille la motion des défendeurs de la force policière sollicitant le prononcé d'une ordonnance en application de la règle 76.1.02. La motion vise l'obtention de mesures réparatoires uniquement en ce qui concerne la présente instance introduite en vertu de la règle 76.1.02(1)(b). Toutefois, lorsqu'une requête est présentée et que la Cour est convaincue que la personne est une plaideuse quérulente constante, la règle donne à la Cour le pouvoir de prononcer une ordonnance en vertu des alinéas a) ou b) de la règle 76.1.02. Par conséquent, j'ordonne ce qui suit :**

**a) il est interdit à la demanderesse d'introduire d'autres instances devant la Cour du Banc de la Reine des petites créances, à moins d'en avoir obtenu l'autorisation d'u7n juge de la Cour du Banc de la Reine;**

**b) il est interdit à la demanderesse de continuer une instance déjà introduite devant la Cour du Banc de la Reine ou la Cour des petites créances, y compris la présente instance à moins d'en avoir obtenu l'autorisation d'un juge de la Cour du Banc de la Reine.**

[27] M. Ayangma a, se référant à la base de données de l'institut Canadien d'information juridique (CanLII) plus de cent décisions rapportées l'impliquant. Il existe 156 000,00$ en jugement impayé résultant de procédures judiciaires dont la majorité représente des dépens accordés contre lui.

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[28] En l'espèce, M. Ayangma a déposé la présente poursuite et dans un autre dossier relié à son congédiement il y a une requête en révision judiciaire qui a été rejetée qui traite de trois des onze griefs qui ont été déposés et rattachés à la même situation de faits.

[29] De plus, M. Ayangma a déposé une autre poursuite se fondant sur les mêmes faits que la requête en révision judiciaire mentionnée ci-haut, cette fois contre l'Université, le Vice-Recteur à l'administration et Ressources humaines l'auteur de la lettre de son congédiement, le Doyen de la faculté d'administration et le Chef de département. Dans cette action, il plaide un bris de la Charte de son droit de gagner sa vie dans toute province, diffamation, fraude et/ou fausse représentation négligente, complot délictueux, représailles et intimidation/harcèlement, abus d'autorité et abus de procédure résultant à son congédiement, bris de mauvaise foi ou bris à son obligation d'agir avec honnêteté dans leurs obligations contractuelles individuelles, bris à l'entente collective et conduite répréhensive ayant mené une investigation défectueuse et déguisé une suspension disciplinaire et j'en passe.

[30] Dans *Bossé c. Immeubles Robo Ltée*, 2018 CanLII 71340 (NB CA) [*Bossé*], le juge Baird de la Cour d'appel cite l'arrêt Brooks et a énuméré les critères considérés dans une motion pour plaideur quérulent :

> **[34] Voici les principaux indicateurs, en résumé, permettant de déclarer un plaideur quérulent :**
>
> **i) une tendance à porter à nouveau devant les tribunaux des questions pour lesquelles une décision a déjà été rendue;**
>
> **ii) l'entreprise d'actions ou de motions frivoles;**

iii) le fait de soutenir des allégations d'actes irréguliers sans fondement contre une partie opposée, des avocats, la cour ou des fonctionnaires administratifs;

iv) le refus de se plier aux règles et aux ordonnances de la cour;

v) le fait de tenir des propos scandaleux dans les actes de procédure ou devant la cour;

vi) l'incapacité ou le refus de payer les dépens des instances antérieures et l'incapacité de poursuivre le litige dans les délais prescrits.

Voir Tonner c. Lowry, 2016 CF 230 (CanLII); Lawyer's Professional Indemnity Co. c. Coote, 2013 CF 643 (CanLII), par. 25.

[35] Cette liste n'est pas exhaustive, et toutes ces caractéristiques n'ont pas à être présentes. Une norme objective sert à établir si un plaideur est ou non quérulent. Il ressort manifestement du grand nombre d'instances introduites par M. Bossé et ROBO que bien des caractéristiques mentionnées, sinon toutes, sont présentes en l'espèce.

[36] Un virage s'est opéré ces dernières années, en matière de litige, dans la conception des droits des plaideurs. Dans Hryniak c. Mauldin, 2014 CSC 7 (CanLII), [2014] 1 R.C.S. 87, la juge Karakatsanis conclut que « [...] le meilleur forum pour régler un litige n['est] pas toujours celui dont la procédure est la plus laborieuse » (par. 28). Elle ajoute : « [...] L'équilibre entre la procédure et l'accès à la justice qu'établit notre système de justice doit en venir à refléter la réalité contemporaine et à reconnaître que de nouveaux modèles de règlement des litiges peuvent être justes et équitables » (par. 2).

[37] Comme le juge Verville l'écrit dans Hok c. Alberta, 2016 ABQB 651 (CanLII), [2016] A.J. No. 1207 (QL) : [TRADUCTION] « Le "virage culturel" mentionné dans Hryniak s'étend au contrôle des personnes qui abusent de la procédure judiciaire [...] » (par. 29) (voir Hok c. Alberta, [2017] A.J. No. 152 (C.A.) (QL), Hok c. Alberta, [2017] C.S.C.R. n° 222, autorisation refusée). Je suis du même avis.

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> **[38] Dans l'arrêt Wong c. Giannacopoulos, 2011 ABCA 277 (CanLII), [2011] A.J. No. 1115, le juge Slatter tire la conclusion suivante :**
>
> **[TRADUCTION]**
> **La requérante soutient que l'ordonnance la déclarant plaideuse quérulente la prive du droit fondamental dont dispose tout citoyen canadien d'intenter une action en justice. Tel n'est pas toutefois l'effet véritable de l'ordonnance. La requérante peut toujours intenter une action légitime; elle est simplement soumise à une procédure d'examen préalable, qui vise à assurer que toute action envisagée est bien fondée en fait et en droit, et que le litige est poursuivi avec diligence. L'ordonnance la déclarant plaideuse quérulente ne cause pas un préjudice important à la requérante. [par. 8]**

[31] Il va sans dire que nous retrouvons en l'espèce beaucoup de similitude avec les faits et agissements de Mme Brooks et M. Bossé. L'Université s'est retrouvé plus souvent qu'autrement une partie aux nombreuses actions et requêtes déposées par M. Ayangma; des actions et requêtes qui sont frivoles et vexatoires. Il tient des propos scandaleux dans tous les actes de procédure, et devant la Cour. M. Ayangma n'hésite pas d'aucune façon d'accuser les avocats des parties adverses de complots, de malhonnêteté et manigances de toutes sortes.

[32] Comme le suggère notre Cour d'appel, il est de notre devoir de voir au contrôle des personnes qui abusent la procédure judiciaire en rendant une ordonnance d'interdiction après avoir déclaré le plaideur quérulent sans le priver du droit fondamental dont tous les citoyens disposent d'ester en justice. M. Ayangma pourra toujours intenter une action légitime ou la poursuivre, mais sujet à une procédure d'examen préalable qui vise à assurer que l'action ou la requête envisagée est bien fondée en fait et en droit et que le litige est poursuivie avec diligence.

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[33] Le tribunal n'a aucune difficulté à conclure que M. Ayangma est un plaideur quérulant qui abuse du système judiciaire et l'administration de la justice au Nouveau-Brunswick et ailleurs comme en a déjà conclu la Cour Supérieure de l'Île-du-Prince-Edouard.

[34] En l'espèce, nul doute qu'une telle déclaration sert l'intérêt publique en termes d'accès à la justice. La Cour dispose de ressources restreintes et doit s'acquitter de ses tâches de manière équitable pour tous les justiciables. M. Ayangma abuse de la procédure judiciaire au détriment des autres parties au litige, ainsi qu'à l'ensemble du système de justice.

[35] Le tribunal conclut que M. Ayangma est un plaideur quérulent et il lui est interdit d'introduire d'autres instances devant la Cour du Banc de la Reine du Nouveau-Brunswick, ou la Cour des petites créances sans en avoir obtenu préalablement l'autorisation d'un juge de cette Cour. Il va de soi que M. Ayangma devra obtenir une autorisation pour poursuivre toute action déjà déposée, l'arrêt de procédure pour l'ensemble de ces dossiers étant ainsi ordonné.

[36] M. Ayangma est tenu de verser à l'Université en guise de frais et dépens de la présente procédure un montant tout inclus de 5 000,00.

Décision rendue ce 13ième jour de février 2019, à Moncton au Nouveau-Brunswick.

L'Honorable Juge JEAN-PAUL OUELLETTE
Cour du Banc de la Reine du Nouveau-Brunswick
Circonscription judiciaire de Moncton

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Dossier de cour : MC-386-2017

DANS LA COUR DU BANC DE LA REINE DU NOUVEAU-BRUNSWICK

DIVISION DE PREMIÈRE INSTANCE

CIRCONSCRIPTION JUDICIAIRE DE MONCTON

ENTRE :

**NOEL AMBADIANG AYANGMA,**

Demandeur,

- et -

**UNIVERSITÉ DE MONCTON, CAMPUS DE MONCTON,**

Défenderesse.

**JUGEMENT CONSÉCUTIF À L'AUDIENCE**
**(FORMULE 60A)**

Considérant que l'audience de la présente motion a été conclue devant l'honorable juge Jean-Paul Ouellette le 17 décembre 2018.

Il est ordonné, conformément à la décision de la cour datée le 13 février 2019:

1. Que le demandeur paie à la défenderesse les frais et dépens qui sont établis au montant de 5 000,00$.

D'après les archives de la présente cour, l'adresse du demandeur est la suivante :

Noel Ayangma
75, rue Cortland
Charlottetown, IPE
C1E 1T4

FAIT à Moncton, Nouveau-Brunswick ce 14 jour de février 2019.

Chantal Pare
Greffière de la Cour du Banc de la Reine
Circonscription judiciaire de Moncton

**Adresse de la Cour :**
145, boul. Assomption
C. P. 5001
Moncton, N.B. E1C 8R2

COURT OF APPEAL OF
NEW BRUNSWICK

23

COUR D'APPEL DU
NOUVEAU-BRUNSWICK

22-19-CA

BETWEEN:

NOËL AYANGMA

APPELLANT

- and -

UNIVERSITÉ DE MONCTON, CAMPUS DE MONCTON

RESPONDENT

ENTRE:

NOËL AYANGMA

APPELANT

-et-

UNIVERSITÉ DE MONCTON, CAMPUS DE MONCTON

INTIMÉE

**AND**

COURT OF APPEAL OF N.B.
RECEIVED AND FILED
APR 26 2019
REÇU ET DÉPOSÉ
COUR D'APPEL DU N.-B.

**ET**

26-19-CA

BETWEEN:

NOËL AYANGMA

APPELLANT

- and -

UNIVERSITÉ DE MONCTON, CAMPUS DE MONCTON and ASSOCIATION DES BIBLIOTHÉCAIRES, PROFESSEURES ET PROFESSEURS DE L'UNIVERSITÉ DE MONCTON

RESPONDENTS

ENTRE:

NOËL AYANGMA

APPELANT

- et -

UNIVERSITÉ DE MONCTON, CAMPUS DE MONCTON et ASSOCIATION DES BIBLIOTHÉCAIRES, PROFESSEURES ET PROFESSEURS DE L'UNIVERSITÉ DE MONCTON

INTIMÉES

Motions heard by:
The Honourable Chief Justice Richard

Date of hearing:
April 23, 2019

Motions entendues par :
l'honorable juge en chef Richard

Date de l'audience :
le 23 avril 2019

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Date of decision:
April 26, 2019

Counsel at hearing:

For the appellant:
Mr. Ayangma appeared in person

For the respondent l'Université de Moncton:
Sacha D. Morisset

For the respondent l'Association des bibliothécaires, professeures et professeurs de l'Université de Moncton:
Joël Michaud and Dominic Caron

Date de la décision :
le 26 avril 2019

Avocats à l'audience :

Pour l'appelant :
M. Ayangma a comparu en personne

Pour l'intimée l'Université de Moncton :
Me Sacha D. Morisset

Pour l'intimée l'Association des bibliothécaires, professeures et professeurs de l'Université de Moncton :
Me Joël Michaud et Me Dominic Caron

DECISION

[1] Noël Ayangma has appealed two decisions – both dated February 13, 2019 – issued by a judge of the Court of Queen's Bench in two separate matters. The first concerns an action Mr. Ayangma commenced against the Université de Moncton (U de M), and the second an application for judicial review in the matter of a grievance, naming as respondents both the U de M and the Association bibliothécaires, professeures et professeurs de l'Université de Moncton (ABPPUM). In each matter costs were awarded against Mr. Ayangma: $5,000 to the U de M in the first matter and $2,000 each to the U de M and the ABPPUM in the second.

[2] Three motions were filed regarding these two appeals. In one, Mr. Ayangma seeks an extension of time to perfect his appeals, and, in the other two, the U de M and the ABPPUM seek security for costs.

[3] At the hearing of the motions, the time for Mr. Ayangma to perfect his appeals was extended and these have now been perfected. There was also a question raised at the hearing regarding whether the motion by the ABPPUM for security for costs had been filed within 15 days of it having been served with the Notice of Appeal, as required by Rule 58.10(1)(a). To the extent it was necessary, I extended the 15-day delay to the date of filing. Both extensions of time were unopposed.

[4] Remaining are the two motions for security for costs. The U de M and the ABPPUM claim having shown it is in the interests of justice that such security be ordered. They point to the fact Mr. Ayangma does not reside in New Brunswick, has no assets in this province and has not paid any of the costs previously awarded to them. Over and above the costs awarded in the matters currently on appeal, Mr. Ayangma had previously been ordered to pay the U de M a total of $13,000 and the ABPPUM $1,600, all of which remains unpaid.

[5] Mr. Ayangma argues that security for costs cannot be ordered in the matter of an appeal arising out of a judicial review application. He points to Rule 58.01, which speaks of plaintiffs and defendants, and not of applicants and respondents. In my view, this argument has no merit. Security for costs on appeal are governed by Rule 58.10, which is broad enough to include all appeals regardless of the nature of the underlying proceeding.

[6] A motion for security for costs under Rule 58.10 is governed by the principles Drapeau C.J.N.B. (as he then was) set out in *Dugas Estate (Bankrupt), Re* (2003), 261 N.B.R. (2d) 99, [2003] N.B.J. No. 230 (C.A.) (QL):

> In my view, an order for security for costs should only be issued when it is required in the interests of justice. It goes without saying that a key consideration in the exercise of the judicial discretion recognized by Rule 58.10(1)(b) is the apparent strength of the grounds of appeal. An appellant's financial means or lack thereof may also come into play. On that score, I note that judges have shown a great deal of reticence in granting orders for security for costs where the impecuniosity of the appellant is such that the likely consequence of the order will be a deemed abandonment of an apparently meritorious appeal. That said, an appellant's impecuniosity would not necessarily preclude an order under Rule 58.10(1)(b) if the appeal appears to have a very poor chance of success or is vexatious. [para. 9]

[7] In the affidavit he filed in response to the motions for security for costs, Mr. Ayangma describes himself as an impecunious litigant; however, he states having "consistently paid, to the best of his ability, costs awarded against him in the proceedings conducted before the Prince Edward Island Courts" and having satisfied "a large portion of costs awarded against [him] over the years of litigation." Moreover, beyond his bald assertion of being an impecunious litigant, Mr. Ayangma has not provided any detail of his financial situation let alone any supporting documentation.

[8] In the circumstances, I have not been satisfied that Mr. Ayangma qualifies as an impecunious litigant or that his financial situation would prevent him from pursuing

his appeals if he truly desires to do so. On his own admission, he has been able to satisfy some of the previous orders of costs made against him.

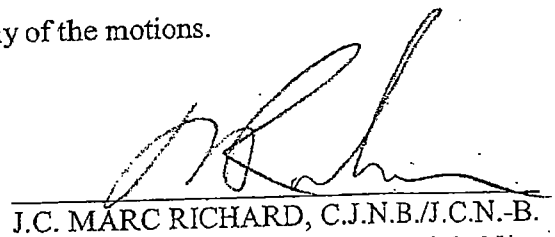
[9] In my view, it is in the interests of justice to require Mr. Ayangma to furnish security for costs in these matters. Both the U de M and the ABPPUM have been subjected to previous proceedings initiated by Mr. Ayangma for which awards of costs remain outstanding. In the circumstances, it would be unjust to require them to respond to Mr. Ayangma's two appeals without providing them some certainty that, in the event they are successful, at least a portion of the costs are secured.

[10] For these reasons, I order Mr. Ayangma to furnish as security for costs the following:

(1) the sum of $1,500 in matter 22-19-CA involving the U de M; and

(2) the sum of $3,000 in matter 26-19-CA involving both the U de M and the ABPPUM.

[11] These sums are to be deposited within 30 days of the date this order is issued, failing which in the case of either sum the corresponding appeal will be deemed to have been abandoned. Although not successful in the motions seeking security for costs, Mr. Ayangma was successful in his motion for an extension of time to perfect. As a result, I award no costs on any of the motions.



J.C. MARC RICHARD, C.J.N.B./J.C.N.-B.
Court of Appeal of New Brunswick / Cour d'appel du Nouveau-Brunswick

DÉCISION

[1] Noël Ayangma a interjeté appel de deux décisions – chacune datée du 13 février 2019 – rendues par un juge de la Cour du Banc de la Reine dans deux affaires distinctes. La première décision porte sur une action intentée par M. Ayangma à l'Université de Moncton (l'Université), et la seconde, dans laquelle l'Université et l'Association des bibliothécaires, professeures et professeurs de l'Université de Moncton (l'ABPPUM) sont toutes deux nommément désignées intimées, porte sur une requête en révision afférente à un grief. Dans chaque instance, M. Ayangma a été condamné aux dépens : un montant de 5 000 $ payable à l'Université dans la première instance et un montant de 2 000 $ payable à l'Université et de 2 000 $ payable à l'ABPPUM dans la seconde.

[2] Trois motions afférentes à ces deux appels ont été déposées. Dans l'une des motions, M. Ayangma sollicite la prolongation du délai de mise en état de ses appels et, dans les deux autres, l'Université et l'ABPPUM demandent l'imposition d'une sûreté en garantie des dépens.

[3] Lors de l'audition des motions, le délai dans lequel M. Ayangma devait mettre ses appels en état a été prolongé et ces appels sont maintenant en état. Lors de l'audience, on a aussi soulevé la question de savoir si la motion de l'ABPPUM demandant l'imposition d'une sûreté en garantie des dépens avait été déposée dans les quinze jours qui ont suivi la signification à elle de l'avis d'appel, conformément à la règle 58.10(1)a). Dans la mesure où cela était nécessaire, j'ai prolongé le délai de quinze jours jusqu'à la date du dépôt. Les deux prolongations de délai n'étaient pas contestées.

[4] Il reste à statuer sur les deux motions demandant l'imposition d'une sûreté en garantie des dépens. L'Université et l'ABPPUM affirment avoir établi que l'imposition d'une telle sûreté est dans l'intérêt de la justice. Elles soulignent le fait que M. Ayangma n'est pas domicilié au Nouveau-Brunswick, n'a pas d'éléments d'actif dans la province et n'a payé aucune part des dépens qui ont été auparavant adjugés en leur faveur. En plus des

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dépens adjugés dans les affaires faisant l'objet des appels ci-visés, M. Ayangma a été auparavant condamné à payer 13 000 $ au total à l'Université et 1 600 $ à l'ABPPUM, ces deux montants demeurant impayés.

[5] M. Ayangma soutient que l'imposition d'une sûreté en garantie des dépens ne peut être ordonnée dans le contexte d'un appel découlant d'une requête en révision. Il renvoie à la règle 58.01, qui parle du demandeur et du défendeur et non pas du requérant et de l'intimé. J'estime que cet argument est sans fondement. L'imposition en appel d'une sûreté en garantie des dépens est régie par la règle 58.10, qui a une portée suffisante pour s'étendre à tous les appels, peu importe la nature de l'instance sous-jacente.

[6] Les motions présentées en vertu de la règle 58.10 en vue de l'imposition d'une sûreté en garantie des dépens sont régies par les principes énoncés en ces termes par le juge Drapeau, juge en chef du Nouveau-Brunswick (tel était alors son titre), dans *Dugas Estate (Bankrupt), Re* (2003), 261 R.N.-B. (2e) 99, [2003] A.N.-B. n° 230 (C.A.N.-B.) (QL) :

> J'estime que l'on ne devrait rendre une ordonnance prescrivant une sûreté en garantie des dépens que lorsque cela est nécessaire dans l'intérêt de la justice. Il va sans dire qu'une des considérations essentielles dans l'exercice du pouvoir discrétionnaire conféré à la Cour par la règle 58.10(1)b) est le bien-fondé apparent des moyens d'appel. Les ressources financières ou l'absence de ressources financières de l'appelant peuvent également jouer un rôle. À cet égard, je souligne que les juges se sont montrés très réticents à accorder des ordonnances imposant une sûreté en garantie des dépens lorsque l'indigence de l'appelant est telle que la conséquence probable de l'ordonnance sera l'abandon présumé d'un appel apparemment bien fondé. Cela dit, l'indigence de l'appelant n'interdit pas nécessairement une ordonnance sous le régime de la règle 58.10(1)b) s'il y a très peu de chances que l'appel soit accueilli ou si l'appel est vexatoire. [Par. 9]

[7] Dans l'affidavit qu'il a déposé en réponse aux motions demandant l'imposition d'une sûreté en garantie des dépens, M. Ayangma dit être une partie indigente;

il affirme toutefois avoir [TRADUCTION] « toujours payé, du mieux qu'il pouvait, les dépens auxquels il était condamné dans le cadre des instances menées devant les tribunaux de l'Île-du-Prince-Édouard » et avoir acquitté [TRADUCTION] « une grande part des dépens adjugés contre [lui] pendant des années de litige ». En outre, au-delà d'affirmer sommairement être une partie indigente, M. Ayangma n'a donné aucun renseignement sur sa situation financière, et encore moins quelque document que ce soit à l'appui.

[8] Eu égard aux circonstances, on ne m'a pas convaincu que M. Ayangma peut être considéré comme une partie indigente ni que sa situation financière l'empêcherait de poursuivre ses appels s'il le souhaitait véritablement. De son propre aveu, il a pu exécuter quelques-unes des ordonnances d'adjudication des dépens prononcées auparavant contre lui.

[9] J'estime qu'il est dans l'intérêt de la justice de contraindre M. Ayangma à donner une sûreté en garantie des dépens dans les présentes affaires. L'Université et l'ABPPUM ont toutes deux fait l'objet de poursuites que M. Ayangma leur a intentées par le passé et à l'égard desquelles des ordonnances d'adjudication des dépens demeurent inexécutées. Eu égard aux circonstances, il serait injuste de les contraindre à répondre aux deux appels de M. Ayangma sans leur donner une certaine assurance de la garantie d'au moins une part des dépens si elles obtiennent gain de cause.

[10] Pour ces motifs, j'ordonne à M. Ayangma de donner les sûretés en garantie des dépens suivantes :

1. 1 500 $ dans le dossier n° 22-19-CA mettant en cause l'Université;
2. 3 000 $ dans le dossier n° 26-19-CA mettant en cause l'Université et l'ABPPUM.

[11] Ces montants doivent être déposés dans les trente jours qui suivent la date à laquelle la présente ordonnance est rendue; à défaut de quoi, s'agissant de l'un ou l'autre montant, l'appel correspondant sera réputé abandonné. Bien qu'il n'ait pas obtenu gain de cause quant aux motions demandant l'imposition d'une sûreté en garantie des dépens,

M. Ayangma a obtenu gain de cause quant à sa motion sollicitant la prolongation du délai de mise en état. Par conséquent, je n'adjuge aucuns dépens relativement à l'une quelconque des motions.

COURT OF APPEAL OF NEW BRUNSWICK

COUR D'APPEL DU NOUVEAU-BRUNSWICK

22-19-CA

NOËL AYANGMA

APPELLANT

- and -

UNIVERSITÉ DE MONCTON, MONCTON CAMPUS

RESPONDENT

Ayangma v. Université de Moncton, Moncton Campus, 2019 NBCA 72

CORAM:
The Honourable Chief Justice Richard
The Honourable Justice Quigg
The Honourable Justice Baird

Appeal from a decision of the Court of Queen's Bench:
February 13, 2019

History of case:

Decision under appeal:
2019 NBQB 30

Preliminary or incidental proceedings:
None

Appeal heard:
June 17, 2019

Judgment rendered:
October 10, 2019

Counsel at hearing:

Noël Ayangma, on his own behalf

For the respondent:
Sacha Denis Morisset

NOËL AYANGMA

APPELANT

- et -

UNIVERSITÉ DE MONCTON, CAMPUS DE MONCTON

INTIMÉE

Ayangma c. Université de Moncton, Campus de Moncton, 2019 NBCA 72

CORAM :
l'honorable juge en chef Richard
l'honorable juge Quigg
l'honorable juge Baird

Appel d'une décision de la Cour du Banc de la Reine :
le 13 février 2019

Historique de la cause :

Décision frappée d'appel :
2019 NBBR 30

Procédures préliminaires ou accessoires :
aucune

Appel entendu :
le 17 juin 2019

Jugement rendu :
le 10 octobre 2019

Avocats à l'audience :

Noël Ayangma, en son propre nom

Pour l'intimée :
Sacha Denis Morisset

COURT OF APPEAL OF N.B.
RECEIVED AND FILED
OCT 10 2019
REÇU ET DÉPOSÉ
COUR D'APPEL DU N.-B.

THE COURT

The appeal is dismissed with costs of $2,500.

LA COUR

L'appel est rejeté avec dépens qui sont fixés à 2 500 $.

The following is the judgment delivered by

THE COURT

I. Introduction

[1] Mr. Ayangma appeals a motion judge's decision which declared him to be a vexatious litigant and dismissed his civil action against the Université de Moncton on the basis it was statute barred. This is a companion decision to *Ayangma v. Université de Moncton, Moncton Campus et al.*, 2019 NBCA 73.

II. Background

[2] Mr. Ayangma was a part-time professor at the Université de Moncton ("Université"). He unsuccessfully applied for a permanent position and asserts the Université discriminated against him by hiring an individual, who, he states, does not possess the necessary qualifications as advertised in the competition. He subsequently filed a complaint with the New Brunswick Human Rights Commission in which he accused the Université of discriminatory conduct based on his race, colour and age. The Commission dismissed the complaint. An application for judicial review of the Commission's decision was dismissed by a judge of the Court of Queen's Bench. This decision was unsuccessfully appealed to this Court (see *Ayangma v. Université de Moncton, Moncton Campus*, 2019 NBCA 14, [2019] N.B.J. No. 28 (QL)).

[3] Following the dismissal of his human rights complaint, Mr. Ayangma initiated civil proceedings against the Université, in which he claimed damages for what he asserts was willful/negligent conduct by the Université, misrepresentation, bad faith and an alleged breach of the *Charter*. The Université defended the action.

[4] On February 20, 2018, Mr. Ayangma served and filed his affidavit of documents and served Notice, pursuant to Rule 31.03(1), on the Université, requiring it to

serve and file an affidavit of documents and to produce the documents in its possession and control.

[5] On May 1, 2018, the Université produced a draft affidavit of documents. Mr. Ayangma contended the draft affidavit of documents was not *Rules*-compliant. He filed a motion on May 10, 2018, in which he sought an order requiring the Université to file a *Rules*-compliant affidavit of documents. The motion was set down for hearing on October 5, 2018.

[6] On September 14, 2018, the Université filed a motion to strike the pleadings under Rule 22.01, and/or for summary judgment. It also sought to have Mr. Ayangma declared a vexatious litigant pursuant to Rule 76.1.04. Both motions were scheduled to be heard on October 5, 2018.

[7] At the outset of the hearing, the judge mentioned there was a further hearing before him on December 17, 2018, relating to a judicial review of an arbitrator's decision which involved Mr. Ayangma. Mr. Ayangma immediately raised concerns about the judge's ability to be neutral and impartial as a result of these extemporaneous comments.

[8] The motions were adjourned by consent to December 17, 2018, pending the issuance of reasons in a related appeal before this Court, as noted. Meanwhile, Mr. Ayangma filed a further motion in which he asked the motion judge to recuse himself. All motions were returnable December 17, 2018.

[9] On December 17, 2018, Mr. Ayangma's recusal motion was heard first and was dismissed by way of an oral decision. The motion judge then heard the remaining two motions and he rendered a written decision dated February 13, 2019.

[10] In the February 13 decision, the motion judge dismissed Mr. Ayangma's action by way of summary judgment under Rule 22. He did so upon finding the action

was statute-barred. Having made this determination, it was not necessary for the judge to rule on the Rule 31.03(1) issue. In his decision, originally issued in only the French language, the judge declared Mr. Ayangma to be a vexatious litigant.

## III. Grounds of Appeal

[11] Mr. Ayangma seeks a reversal of the motion judge's decision. His various grounds of appeal can be condensed to the following:

a) The motion judge's decision violated s. 24(1) of the *Official Languages Act*, S.N.B. 2002, c. O-0.5, as it was published in one official language;

b) The motion judge erred in law by granting summary judgment pursuant to Rule 22.01 because the Université failed to provide an affidavit of documents as required, despite having been served with notice pursuant to Rule 31.03, and the decision to grant summary judgment was made before deciding the issue of disclosure;

c) The motion judge erred in law when he determined Mr. Ayangma's action was statute barred pursuant to the *Limitation of Actions Act*, S.N.B. 2009, c. L-8.5;

d) The motion judge erred in law by restricting the appellant's right to access to the court when he declared him to be a vexatious litigant;

e) The motion judge was biased and should have recused himself.

## IV. Standard of Review

[12] For grounds of appeal that raise questions of law, the standard of review is correctness. For those that raise either a question of fact or mixed law and fact regarding

which there is no extricable error of law, the standard of review is palpable and overriding error.

## V. Analysis

### A. *Violation of the Official Languages Act*

[13] The judicial review decision was first published in the French language on February 13, 2019, and in the English language on March 8, 2019. Mr. Ayangma submits the decision should have been published in both official languages simultaneously, because the proceedings were conducted in both languages. This ground was not pursued before us. In his written submission, Mr. Ayangma did not contend the judge's failure to issue his decision first in one language only invalidated the decision, but he argued that "this type of conduct requires some strong condemnation or direction from this Court, so that it does not happen again."

[14] As a general rule, the final decision should have been published simultaneously in both official languages, unless it was determined by the judge that to do so would result in a delay, injustice or hardship, as contemplated in s. 24 of the *Act*. When such a determination is made, the decision can be published in one official language, and thereafter, at the earliest possible time, in the other language.

[15] As noted, in this case, the judge initially published his decision in the French language only. Had the judge made the determination to publish in one official language first, and later, in the other official language, on account of one or more of the factors set out in s. 24(2), he should have stated his reasons for doing so in his decision. He did not and we agree with Mr. Ayangma that he should have.

B. *Summary Judgment*

[16] Mr. Ayangma contends the motion judge should not have granted summary judgment because the respondent failed to produce a *Rules*-compliant affidavit of documents.

[17] In *Whelton v. Mercier et al.*, 2004 NBCA 83, 277 N.B.R. (2d) 251, Drapeau, C.J.N.B. (as he then was) for the Court stated as follows:

> The delivery of an affidavit compliant with Rule 31.03(4) should lead to the disclosure of every document related to a matter in issue. Armed with this affidavit, the adverse party can insist that documents of interest to him or her be produced. Through production of those documents, he or she can acquire a thorough understanding of the case. An Affidavit of Documents that complies with the *Rules of Court* is generally indispensable in uncovering the truth. This is particularly so in cases such as the present, where the answers to controversial questions lie deep within documents held exclusively by one party. In cases of this nature, motions for summary judgment should, as a general rule, be dismissed with costs if the moving party has not complied with the requirements of Rule 31. [para. 26]

[18] In the present case, the judge granted summary judgment to the Université despite its failure to comply with Rule 31. Generally, this should have served to dismiss its motion for summary judgment. Nevertheless, we conclude this was one of those exceptional cases in which the judge could grant judgment notwithstanding the Université's non-compliance. Thus, because the basis upon which summary judgment was granted – that the action is prescribed – is not dependent upon the disclosure of any documents. The limitation period was either met or it was not, and all information in this regard would necessarily have already been in the possession of Mr. Ayangma.

C. *Limitation of action*

[19] Mr. Ayangma filed grievances in which he alleged the Université violated the collective agreement between 2013-2015 and "more recently," May 12, 2015, by abusing its authority, "intimidation, lack of professional ethics, defamation, harassment and discrimination."

[20] In the grievance document, Mr. Ayangma raised serious allegations of harassment and discrimination against a professor. He writes:

> [TRANSLATION]
> Finally, I also maintain that I have been a victim of discrimination in employment, particularly with respect to the staffing of the position of professor of human resources management in the Department of Business Administration, filled in 2014, while Professor [V.K.] was both chair of the selection panel and Director of the Department of Business Administration. [para. 11]

[21] In para. 26 of his statement of claim, Mr. Ayangma acknowledged he applied for the advertised position on January 7, 2014, and did not get an interview. On May 28, 2015, he wrote to Mr. Terrance J. LeBlanc, the employer's representative for the Université, and asserted the successful candidate did not have the qualifications, as advertised in 2013, for the position in question; notably she did not have a PhD.

[22] The Court in *Dupuis v. City of Moncton*, 2005 NBCA 47, 284 N.B.R. (2d) 97, quoting *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147, [1986] S.C.J. No. 52 (QL), at p. 224, concluded:

> ... [A] cause of action arises for purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence. ...
> [para. 29]

See also *Kamloops v. Nielsen*, [1984] 2 S.C.R. 2, [1984] S.C.J. No. 29 (QL), at pp. 36-41.

[23] Section 5 of the *Limitation of Actions Act*, S.N.B. 2009, c. L-8.5 provides:

| | |
|---|---|
| **General limitation periods** | **Délais de prescription ordinaires** |
| **5**(1) Unless otherwise provided in this Act, no claim shall be brought after the earlier of | **5**(1) Sauf disposition contraire de la présente loi, toute réclamation se prescrit par celui des délais ci-dessous qui expire le premier : |
| (a) two years from the day on which the claim is discovered, and | a) deux ans à compter du jour où sont découverts les faits y ayant donné naissance; |
| (b) fifteen years from the day on which the act or omission on which the claim is based occurred. | b) quinze ans à compter du jour où a eu lieu l'acte ou l'omission sur lequel elle est fondée. |
| **5**(2) A claim is discovered on the day on which the claimant first knew or ought reasonably to have known | **5**(2) Les faits ayant donné naissance à la réclamation sont découverts le jour où le réclamant a appris ou aurait dû normalement apprendre : |
| (a) that the injury, loss or damage had occurred, | a) que sont survenus les préjudices, les pertes ou les dommages; |
| (b) that the injury, loss or damage was caused by or contributed to by an act or omission, and | b) que les préjudices, les pertes ou les dommages ont été causés entièrement ou en partie par un acte ou une omission; |
| (c) that the act or omission was that of the defendant. | c) que l'acte ou l'omission était le fait du défendeur. |

[24] In this case, the Université argues that Mr. Ayangma knew he was the unsuccessful candidate when he received notice from the Université by letter dated March 3, 2014.

[25] In his reasons, the motion judge determined that [TRANSLATION] "[t]here is no question Mr. Ayangma knew no later than May 12, 2015, that the position had been filled on July 1, 2014" (para. 16). He dismissed the civil action, finding it was statute barred. In doing so, he found Mr. Ayangma was advised on March 3, 2014, that

his application was rejected. Mr. Ayangma filed his grievance challenging the Université's decision on May 12, 2015. Mr. Ayangma's action was filed on May 29, 2017. These are findings of fact for which deference will be accorded in the absence of palpable and overriding error.

[26] In *Miramichi Lumber Products Inc. et al. v. Province of New Brunswick, as represented by the Department of Energy and Resource Development et al.*, 2019 NBCA 61, [2019] N.B.J. No. 202 (QL), Quigg J.A. writes:

> With respect to the conclusion of the application judge that the Application was time-barred, the jurisprudence consistently establishes that the question of whether a legal proceeding is time-barred is one of mixed fact and law which cannot be interfered with absent palpable and overriding error (*Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423, [1999] S.C.J. No. 60 (QL), at para. 28; *Longo v. MacLaren Art Centre*, 2014 ONCA 526, [2014] O.J. No. 3242 (QL), at paras. 38-39; *Crombie Property Holdings Limited v. McColl-Frontenac Inc. (Texaco Canada Limited)*, 2017 ONCA 16, [2017] O.J. No. 142 (QL), at para. 31 (leave to appeal to S.C.C. refused, [2017] S.C.C.A. No. 85); and *Fehr v. Sun Life Assurance Company of Canada*, 2018 ONCA 718, [2018] O.J. No. 4513 (QL), at para. 143). In *Longo*, Hourigan J.A. stated:
>
> > The question of whether a limitation period expired prior to the issuance of a statement of claim is a question of mixed fact and law. Thus, the issue for determination on this appeal is whether the motion judge made a palpable and overriding error in concluding that the claim was statute barred.
> >
> > A palpable and overriding error is an obvious error that is sufficiently significant to vitiate the challenged finding of fact. The appellant must show that the error goes to the root of the challenged finding of fact such that the fact cannot safely stand in the face of the error: *Waxman v. Waxman* (2004), 186 O.A.C. 201, at p. 267 (C.A.), leave to appeal refused, [2004] S.C.C.A. No. 291. [paras. 38-39]
>
> [para. 12]

[27] Mr. Ayangma argues the limitation period should be six years, on the basis he raised a *Charter* violation in his pleadings, and that the time for filing his civil action commenced when he received the decision of the Human Rights Commission. The motion judge correctly observed that the same argument was unsuccessfully raised by Mr. Ayangma in *Ayangma v. Canada Health Infoway*, 2017 PECA 13, [2017] P.E.I.J. No. 23 (QL). In that case, the court was faced with a similar set of facts and it concluded Mr. Ayangma's civil action was statute barred, as he did not file his claim until July 21, 2015, after the matters had been dealt with by the Human Rights Commission, and the two-year limitation period had expired. Similarly, in this case, the judge concluded that claims where *Charter* violations are raised, are subject to provincial periods of general application, which in New Brunswick is two years. See *Coffey v. Fraser Valley (Regional District)*, 2018 BCSC 959, [2018] B.C.J. No. 1113 (QL).

[28] The motion judge's conclusion is supported by the evidence. It is our view the motion judge did not err in law, nor did he make a palpable and overriding error which would allow for appellate intervention.

D. *Vexatious litigant order*

[29] The Université sought and was granted an order pursuant to Rule 76.1.04. An order made pursuant to this Rule prohibits a party from commencing any further proceedings in the Court of Queen's Bench or the Small Claims Court, or continuing a proceeding previously commenced in those courts, except with leave. In considering whether to make such an order, a judge may consider if a similar order has been made against that person by any other court, including a court outside New Brunswick, and a judge may also consider whether that person has persistently and without reasonable grounds commenced proceedings in any other court, including a court outside New Brunswick (Rule 76.1.02(2)).

[30] In *Bossé v. Caisse populaire acadienne Ltée*, [2018] N.B.J. No. 164 (QL) this Court discussed the above Rule in depth. It states:

In *Greene v. New Brunswick*, 2014 NBQB 168, 428 N.B.R. (2d) 204, Glennie J. established a framework for the analysis when a vexatious litigant order is sought in the Court of Queen's Bench. He wrote the following:

> Frivolous pleadings are those which are without substance or unarguable and can include any one or more of the following, as outlined in the Jacob Text at pages 222 - 223:
>
> Thus, a proceeding may be said to be frivolous when:
>
> a. a party is trifling with the court; or
> b. when to put it forward would be wasting the time of the court; or
> c. when it is not capable of reasoned argument; or
> d. it is without foundation; or
> e. where it cannot possibly succeed; or
> f. where the action is brought or the defence is raised only for annoyance; or
> g. to gain some fanciful advantage; or
> h. when it can really lead to no possible good. [para. 181]
>
> [para. 29]

[31] The conclusion whether a litigant is vexatious is determined by an objective standard. The primary characteristics which anchor a declaration of vexatious litigant include:

a) a propensity to relitigate matters that have already been heard;

b) unsubstantiated allegations of impropriety against the opposite party, legal counsel, the court and administrative officials;

c) the refusal to abide by rules and orders of the court, including the failure to pay costs.

[32] In this case, the motion judge carefully reviewed the history of the multiple judicial and quasi-judicial proceedings commenced by Mr. Ayangma in this province as well as in the Province of Prince Edward Island. He writes:

> [TRANSLATION]
> Mr. Ayangma is involved in more than 100 reported decisions found in the Canadian Legal Information Institute (CanLII) database. There are $156,000.00 in unpaid judgments resulting from legal proceedings, a majority of which represent costs awarded against him. [para. 27]

[33] He observes that Mr. Ayangma filed his civil action, and that there was also an unsuccessful application for judicial review, dealing with three of eleven grievances [TRANSLATION] "connected with the same factual situation." The judge adds that Mr. Ayangma filed another action based on the same facts as his application for judicial review, but against the Université, the Vice-President, Administration and Human Resources, the Dean of the Faculty of Business Administration and the Department Head. In that action, Mr. Ayangma raised allegations of libel, fraud and/or negligent misrepresentation, tortious conspiracy, reprisals, intimidation, harassment, abuse of authority and process, bad faith, breach of the duty of honest performance in their individual contractual duties, breach of the collective agreement, improper conduct resulting in a flawed investigation and constructive disciplinary suspension, and a *Charter* breach.

[34] The judge, applying the principles set out in *Bossé*, had [TRANSLATION] "no difficulty" finding that Mr. Ayangma [TRANSLATION] "abuses the legal system and administration of justice in New Brunswick and elsewhere" (para. 33). We discern no error in the application of the legal principles to the facts of this case, and we conclude the motion judge's decision on this issue was correct.

E. *Recusal*

[35] Mr. Ayangma raised several reasons why he felt the judge should have recused himself and why he was biased. They include allegations of conflict of interest

due to the fact the judge attended the Université as a student. He alleged the judge raised his voice during the hearing on October 5, 2018. He submitted that because the judge was seized with all the other legal proceedings, as noted, he was biased.

[36] In *Rose v. Her Majesty the Queen et al.*, 2015 NBCA 26, 435 N.B.R. (2d) 259, Larlee and Quigg, J.J.A. provide a succinct review of the applicable principles when a recusal order is sought (paras. 8-11). On the issue of judicial bias, they write:

> We begin with the ground alleging bias against the motion judge. In *Brooks v. The Law Society of New Brunswick et al.*, this Court describes what constitutes bias on the part of a judge who is asked to adjudicate. It is a serious allegation. There is a subjective and an objective component to the bias test when broad allegations are made: *R. v. S. (R.D.)*. With respect to the subjective component, the judge considers whether she or he can adjudicate impartially. If she or he cannot do so, that puts an end to the exercise. The objective component of the test is "reasonable apprehension of bias," the test usually applied. As this Court stated in *Dugas v. Gaudet et al.*, 2014 NBCA 7, 416 N.B.R. (2d) 389, to sustain an allegation of reasonable apprehension of bias, one must meet the following criteria: "[t]he grounds giving rise to the apprehension of bias must be sufficiently serious to rebut the presumption that the judge will abide by his or her oath of office and '[judge] a particular controversy fairly on the basis of its own circumstances' (see *United States v. Morgan*, 313 U.S. 409 (1941), at p. 421, excerpt quoted with approval in *R. v. S.(R.D.)*)" (para. 5).
>
> In an oral decision, the motion judge gave her reasons for not recusing herself. In so doing, she cited and applied the correct jurisprudence of the Supreme Court of Canada and this Court, and considered and weighed the appropriate factors. In our view, she made no reversible error in her application of the law relating to bias. Moreover, there is absolutely no evidence on the record to support the allegation of bias. [paras. 16-17]

[37] In *Bossé et al. v. Lavigne*, 2015 NBCA 54, 440 N.B.R. (2d) 118, the Court states there are two key principles underlying the recusal of a judge from a case: 1) partiality, and 2) reasonable fear of partiality. The presence of one of them is sufficient to

make a judge recuse himself or herself. The determination of recusal needs to be assessed by the judge and his or her reasoning will start with analyzing his or her own state of mind towards the case. This criterion is subjective. For a judge to conclude he or she is impartial, he or she must be disinterested in the outcome of the case and not be predisposed to a particular result. In other words, he or she is open-minded and will let the evidence and submissions speak for themselves, in order to determine the case. If the judge finds himself or herself to be partial, then the analysis ends there and recusal is appropriate. (para. 7)

[38] If the judge determines he or she is impartial on the subjective criterion, the reasoning continues to the objective criterion of the reasonable fear of partiality (or reasonable apprehension of bias). In determining whether or not there may be a reasonable fear of partiality, the judge must answer the following question: "[h]aving examined the situation in depth and viewing the matter 'realistically and practically,' would a reasonable and well-informed person conclude it is 'more likely than not that [the judge], whether consciously or unconsciously, would not decide fairly'?". The objective test must be taken from the perspective of: (1) a reasonable person; (2) that is well informed of the circumstances of the case; (3) where the apprehension of bias is reasonable; (4) following both a reasonable and practical examination of the situation; and (5) starting the analysis on a strong presumption of judicial impartiality and then determining whether it has been displaced. (para. 7)

[39] The judge dealt with Mr. Ayangma's recusal motion orally the morning of December 17, 2018. He dismissed the motion concluding he could fairly and impartially decide the issues before him. The judge began by reciting the complaints raised by Mr. Ayangma in his motion. In those complaints, Mr. Ayangma asserted the judge was in collusion with the Université because he had attended school there. He contended the judge had predetermined all matters that were before him, because he had referred to them in his extemporaneous comments.

[40] The judge reviewed the applicable jurisprudence, applying it to the motion. He concluded he had an open mind, and that there was no foundation established to support a claim of bias or a reasonable apprehension of bias. His analysis was comprehensive and fulsome. He found that a reasonable and well-informed person viewing the argument objectively, would not conclude that he was partial, or biased (see also *Ayangma v. Université de Moncton, Moncton Campus et al.*, 2019 NBCA 73). We find no error in the motion judge's analysis and this ground of appeal is dismissed.

## VI. Disposition

[41] The appeal is dismissed with costs of $2,500.

J.C. MARC RICHARD,
CHIEF JUSTICE OF NEW BRUNSWICK

KATHLEEN A. QUIGG, J.A.

BARBARA L. BAIRD, J.A.

Version française du jugement de la Cour rendu par

LA COUR

I. Introduction

[1] M. Ayangma interjette appel d'une décision dans laquelle le juge saisi de la motion l'a déclaré plaideur quérulent et a rejeté l'action civile qu'il avait intentée à l'Université de Moncton au motif qu'elle était prescrite. Il s'agit d'une décision parallèle à l'arrêt *Ayangma c. Université de Moncton, Campus de Moncton et autre*, 2019 NBCA 73.

II. Contexte

[2] M. Ayangma occupait un poste de professeur à temps partiel à l'Université de Moncton (l'Université). Il a présenté en vain sa candidature à un poste permanent et affirme que l'Université a fait preuve de discrimination envers lui en recrutant une personne qui, selon ses dires, ne possède pas les qualifications nécessaires qui étaient énoncées dans le concours. Il a par la suite déposé auprès de la Commission des droits de la personne du Nouveau-Brunswick une plainte dans laquelle il accusait l'Université de conduite discriminatoire fondée sur sa race, sa couleur et son âge. La Commission a rejeté la plainte. Une requête en révision judiciaire de la décision de la Commission a été rejetée par un juge de la Cour du Banc de la Reine. Cette décision a, sans succès, été portée en appel devant notre Cour (voir *Ayangma c. Université de Moncton, Campus de Moncton*, 2019 NBCA 14, [2019] A.N.-B. n° 28 (QL)).

[3] Après le rejet de sa plainte auprès de la Commission des droits de la personne, M. Ayangma a entamé contre l'Université une poursuite civile dans laquelle il réclamait des dommages-intérêts en réparation de ce qui constituait, selon ses dires, de la part de l'Université, une conduite délibérée et négligente, une assertion inexacte, de la

mauvaise foi et une violation alléguée de la *Charte*. L'Université a opposé une défense à l'action.

[4] Le 20 février 2018, M. Ayangma a signifié et déposé son affidavit des documents et signifié à l'Université, sous le régime de la règle 31.03(1), un avis dans lequel il lui demandait de signifier et de déposer un affidavit des documents et de produire les documents dont elle avait la possession et le contrôle.

[5] Le 1er mai 2018, l'Université a produit un projet d'affidavit des documents. M. Ayangma a fait valoir que ce projet d'affidavit n'était pas conforme aux *Règles de procédure*. Le 10 mai 2018, il a introduit une motion dans laquelle il demandait à la Cour d'ordonner à l'Université de déposer un affidavit des documents conforme aux *Règles*. L'audition de la motion a été fixée au 5 octobre 2018.

[6] Le 14 septembre 2018, l'Université a déposé une motion dans laquelle elle sollicitait la radiation des plaidoiries sous le régime de la règle 22.01 ou un jugement sommaire. Elle demandait également que M. Ayangma soit déclaré plaideur quérulent en vertu de la règle 76.1.04. Les deux motions devaient être entendues le 5 octobre 2018.

[7] Dès le début de l'audience, le juge a mentionné qu'une autre audience afférente à la révision judiciaire d'une décision arbitrale mettant en cause M. Ayangma devait se dérouler devant lui le 17 décembre 2018. M. Ayangma a immédiatement exprimé ses craintes au sujet de la capacité du juge de rester neutre et impartial en raison de ses observations impromptues.

[8] Du consentement des parties, l'audition des motions a été reportée au 17 décembre 2018, dans l'attente de la publication des motifs dans un appel connexe interjeté devant notre Cour, comme je l'ai indiqué plus haut. Entre-temps, M. Ayangma a déposé une nouvelle motion, dans laquelle il demandait au juge saisi de la motion de se récuser. Toutes les motions étaient présentables le 17 décembre 2018.

[9] Le 17 décembre 2018, la motion en récusation de M. Ayangma a été entendue en premier et a été rejetée séance tenante. Le juge saisi de la motion a ensuite entendu les deux autres motions; celles-ci ont été rejetées dans une décision écrite en date du 13 février 2019.

[10] Dans une décision datée du 13 février 2019, le juge saisi de la motion a accordé un jugement sommaire sur le fondement de la règle 22, rejetant ainsi l'action intentée par M. Ayangma. Il a fait ainsi au motif que l'action était prescrite. Ainsi, le juge n'a pas eu à statuer sur la question qui visait la règle 31.02(4). La décision, initialement rendue uniquement en français, déclarait M. Ayangma un plaideur quérulent.

III. Moyaens d'appel

[11] M. Ayangma demande l'infirmation de la décision du juge saisi de la motion. Ses différents moyens d'appel peuvent se résumer ainsi :

a) la décision du juge saisi de la motion a enfreint le par. 24(1) de la *Loi sur les langues officielles*, L.N.-B. 2002, ch. O-0.5, étant donné qu'elle n'a été publiée que dans une seule langue officielle;

b) le juge saisi de la motion a commis une erreur de droit en accordant un jugement sommaire sous le régime de la règle 22.01 étant donné que l'Université n'avait pas produit un affidavit des documents comme elle en avait l'obligation, alors même qu'elle avait reçu signification de l'avis prévu à la règle 31.03, et la décision de prononcer ce jugement sommaire a été rendue avant que la question de la divulgation ne soit tranchée;

c) le juge saisi de la motion a commis une erreur de droit en déterminant que l'action intentée par M. Ayangma était prescrite par la *Loi sur la prescription*, L.N.-B. 2009, ch. L-8.5;

d) le juge saisi de la motion a commis une erreur de droit en restreignant le droit de l'appelant de saisir la cour lorsqu'il a déclaré qu'il était un plaideur quérulent;

e) le juge saisi de la motion était partial et aurait dû se récuser.

## IV. Norme de contrôle

[12] S'agissant des moyens d'appel qui soulèvent des questions de droit, la norme de contrôle applicable est celle de la décision correcte. Pour ce qui est de ceux qui soulèvent soit une question de fait, soit une question mixte de droit et de fait au sujet de laquelle aucune erreur de droit isolable ne peut être décelée, la norme de contrôle applicable est celle de l'erreur manifeste et dominante.

## V. Analyse

### A. *Violation de la Loi sur les langues officielles*

[13] La décision portant sur le contrôle judiciaire a initialement été rendue en français le 13 février 2019, puis dans sa version anglaise le 8 mars 2019. M. Ayangma soutient que la décision aurait dû être publiée simultanément dans les deux langues officielles étant donné que l'instance s'est déroulée dans les deux langues. Ce moyen d'appel n'a pas été poursuivi devant nous. Dans son mémoire, M. Ayangma n'a pas affirmé que la décision du juge de rendre initialement sa décision dans une seule des deux langues officielles avait pour effet de l'invalider, mais il a fait valoir que [TRADUCTION] « ce type de conduite doit faire l'objet d'une condamnation ou de directives fermes de la part de la Cour afin d'éviter qu'elle ne se reproduise ».

[14] En règle générale, la décision définitive aurait dû être publiée simultanément dans les deux langues officielles, à moins que le juge n'ait déterminé que la publication d'une version bilingue entraînerait un retard qui serait préjudiciable à

l'intérêt public ou qui causerait une injustice ou un inconvénient grave, comme le prévoit l'art. 24 de la *Loi*. Lorsque le juge conclut dans ce sens, la décision peut être publiée dans une langue, et ensuite dans l'autre langue le plus rapidement possible.

[15] Comme nous l'avons indiqué, dans la présente instance, le juge a initialement publié sa décision uniquement en français. Si le juge avait décidé de la publier dans une langue officielle dans un premier temps, et ensuite dans l'autre langue officielle, en raison de l'un ou de plusieurs des facteurs énoncés au par. 24(2), il aurait dû exposer dans sa décision les motifs pour lesquels il avait agi de la sorte. Il ne l'a pas fait et nous convenons avec M. Ayangma qu'il aurait dû le faire.

B. *Jugement sommaire*

[16] M. Ayangma soutient que le juge saisi de la motion n'aurait pas dû rendre un jugement sommaire étant donné que l'Université n'avait pas produit un affidavit des documents conforme aux *Règles*.

[17] Dans l'arrêt *Whelton c. Mercier et al.*, 2004 NBCA 83, 277 R.N.-B. (2e) 251, le juge en chef Drapeau (tel était alors son titre) s'est exprimé en ces termes au nom de la Cour :

> La signification d'un affidavit fidèle à la règle 31.03(4) devrait aboutir à la divulgation de tous les documents relatifs aux questions en litige. Munie de cet affidavit, la partie adverse peut insister sur la production des documents qui l'intéressent et acquérir, suite à leur examen, une connaissance approfondie du dossier. Un affidavit des documents réglementaire est, en général, indispensable à la découverte de la vérité. Il en est ainsi tout particulièrement dans un litige, comme celui qui nous occupe, où la réponse à certaines questions controversées est embusquée dans les documents en la possession exclusive de l'une des parties. En règle générale, toute motion en jugement sommaire présentée dans le cadre d'un tel litige devrait être rejetée avec dépens lorsque l'auteur de la motion ne s'est pas plié aux exigences de la règle 31. [Par. 26]

[18] Dans la présente instance, le juge a prononcé un jugement sommaire en faveur de l'Université malgré le défaut de cette dernière de se conformer à la règle 31. En général, cela aurait dû suffire pour entraîner le rejet de sa motion en jugement sommaire. Néanmoins, nous concluons qu'il s'agissait de l'un de ces cas exceptionnels dans lesquels le juge pouvait rendre le jugement sollicité malgré le non-respect de la règle par l'Université. En effet, le fondement sur lequel le jugement sommaire a été rendu – le fait que l'action était prescrite – ne dépendait pas de la divulgation de documents, quels qu'ils soient. Le délai de prescription était échu ou il ne l'était pas, et toute l'information en la matière se trouvait déjà en la possession de M. Ayangma.

C. *Prescription*

[19] M. Ayangma avait déposé des griefs dans lesquels il alléguait que l'Université avait violé la convention collective entre 2013 et 2015 et [TRADUCTION] « plus récemment », le 12 mai 2015, en se rendant coupable d'abus de pouvoir, [TRADUCTION] « d'intimidation, de manque d'éthique professionnelle, de diffamation, de harcèlement et de discrimination ».

[20] Dans le grief, M. Ayangma a soulevé de graves allégations de harcèlement et de discrimination contre une professeure. Il a écrit ce qui suit :

> [TEXTE ORIGINAL]
> J'allègue enfin aussi être victime de discrimination en matière d'emploi et en particulier dans la dotation au département d'administration, du poste de Professeur de gestion des ressources humaines doté en 2014 pendant que la Professeure [V.K.] était à la fois présidente du jury de sélection et directrice du Département d'administration.
> [Par. 11]

[21] Au paragraphe 26 de l'exposé de sa demande, M. Ayangma a reconnu qu'il avait posé sa candidature au poste annoncé le 7 janvier 2014 et n'avait pas obtenu une entrevue. Le 28 mai 2015, il a écrit à Terrance J. LeBlanc, le représentant de l'employeur pour l'Université, affirmant que la candidate retenue ne possédait pas les

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qualifications dont faisait état l'annonce de 2013 concernant le poste en question, notamment parce qu'elle n'était pas titulaire d'un doctorat.

[22] Dans l'arrêt *Dupuis c. City of Moncton*, 2005 NBCA 47, 284 R.N.-B. (2e) 97, la Cour, citant l'arrêt *Central Trust Co. c. Rafuse*, [1986] 2 R.C.S. 147, [1986] A.C.S. n° 52 (QL), à la p. 224, a tiré la conclusion suivante :

> [Une] cause d'action prend naissance, aux fins de la prescription, lorsque les faits importants sur lesquels repose cette cause d'action ont été découverts par le demandeur ou auraient dû l'être s'il avait fait preuve de diligence raisonnable. [...]
>
> [Par. 29]

Voir également *Kamloops c. Nielsen*, [1984] 2 R.C.S. 2, [1984] A.C.S. n° 29 (QL), aux p. 36 à 41.

[23] Voici le texte de l'article 5 de la *Loi sur la prescription*, L.N.-B. 2009, ch. L-8.5 :

| | |
|---|---|
| **General limitation periods** | **Délais de prescription ordinaires** |
| **5**(1) Unless otherwise provided in this Act, no claim shall be brought after the earlier of | **5**(1) Sauf disposition contraire de la présente loi, toute réclamation se prescrit par celui des délais ci-dessous qui expire le premier : |
| (a) two years from the day on which the claim is discovered, and | a) deux ans à compter du jour où sont découverts les faits y ayant donné naissance; |
| (b) fifteen years from the day on which the act or omission on which the claim is based occurred. | b) quinze ans à compter du jour où a eu lieu l'acte ou l'omission sur lequel elle est fondée. |
| **5**(2) A claim is discovered on the day on which the claimant first knew or ought reasonably to have known | **5**(2) Les faits ayant donné naissance à la réclamation sont découverts le jour où le réclamant a appris ou aurait dû normalement apprendre : |
| (a) that the injury, loss or damage had | a) que sont survenus les préjudices, les |

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occurred,

pertes ou les dommages;

(b) that the injury, loss or damage was caused by or contributed to by an act or omission, and

b) que les préjudices, les pertes ou les dommages ont été causés entièrement ou en partie par un acte ou une omission;

(c) that the act or omission was that of the defendant.

c) que l'acte ou l'omission était le fait du défendeur.

[24] Dans la présente instance, l'Université fait valoir que M. Ayangma savait que sa candidature avait été rejetée lorsqu'il a reçu un avis à cet effet de l'Université dans une lettre datée du 3 mars 2014.

[25] Dans ses motifs, le juge saisi de la motion a tranché qu'« [i]l est incontestable qu'au plus tard le 12 mai 2015, M. Ayangma savait que le poste avait été comblé le 1er juillet 2014 » (par. 16). Il a donc rejeté l'action civile après avoir déterminé qu'elle était prescrite. Ce faisant, il a conclu que M. Ayangma avait été informé le 3 mars 2014 que sa candidature avait été rejetée. M. Ayangma a déposé le grief dans lequel il contestait la décision de l'Université le 12 mai 2015. L'action de M. Ayangma a été introduite le 29 mai 2017. Ce sont là des conclusions de fait qui commandent la déférence en l'absence d'une erreur manifeste et dominante.

[26] Dans l'arrêt *Miramichi Lumber Products Inc. et autre c. Province du Nouveau-Brunswick, représentée par le Ministère du développement de l'énergie et des ressources et autres*, 2019 NBCA 61, [2019] A.N.-B. n° 202 (QL), la juge d'appel Quigg a écrit ce qui suit :

> S'agissant de la conclusion du juge saisi de la requête selon laquelle la requête était prescrite, la jurisprudence établit de façon constante que la question de savoir si une procédure judiciaire est prescrite est une question mixte de droit et de fait au sujet de laquelle une cour ne devrait pas intervenir à moins qu'une erreur manifeste et dominante n'ait été commise (*Guarantee Co. of North America c. Gordon Capital Corp.*, [1999] 3 R.C.S. 423, [1999] A.C.S. n° 60 (QL), par. 28; *Longo c. MacLaren Art Centre*, 2014 ONCA 526, [2014] O.J. No. 3242 (QL), par. 38 et 39; *Crombie*

*Property Holdings Limited c. McColl-Frontenac Inc. (Texaco Canada Limited)*, 2017 ONCA 16, [2017] O.J. No. 142 (QL), par. 31 (autorisation de pourvoi à la Cour suprême du Canada refusée à [2017] C.S.C.R. n° 85); et *Fehr c. Sun Life Assurance Company of Canada*, 2018 ONCA 718, [2018] O.J. No. 4513 (QL), par. 143). Dans l'arrêt *Longo*, le juge d'appel Hourigan a dit :

> [TRADUCTION]
> La question de savoir si un délai de prescription a expiré avant le dépôt d'une déclaration est une question mixte de fait et de droit. En conséquence, la question à trancher dans le présent appel est celle de savoir si le juge saisi de la motion a commis une erreur manifeste et dominante en concluant que la demande était prescrite par la loi.
>
> Il est entendu qu'une erreur manifeste et dominante est une erreur évidente qui est suffisamment importante pour vicier la conclusion de fait qui est contestée. L'appelant doit démontrer que l'erreur touche au cœur même de la conclusion de fait qui est contestée et que, en conséquence de l'erreur, le fait ne peut être affirmé sans risque de se tromper : *Waxman c. Waxman* (2004), 186 O.A.C. 201, p. 267 (C.A.), autorisation de pourvoi refusée à [2004] C.S.C.R. n° 291. [Par. 38 à 39]
>
> [Par. 12]

[27] M. Ayangma affirme que le délai de prescription devrait être de six ans au motif qu'il a allégué la violation de la *Charte* dans ses plaidoiries et que le délai dans lequel il devait déposer son action civile a commencé à courir lorsqu'il a reçu la décision de la Commission des droits de la personne. C'est à bon droit que le juge saisi de la motion a fait observer que M. Ayangma avait en vain invoqué le même argument dans l'affaire *Ayangma c. Canada Health Infoway*, 2017 PECA 13, [2017] P.E.I.J. No. 23 (QL). Dans cette cause, la Cour examinait un ensemble de faits analogues aux faits de l'espèce et a conclu que l'action civile intentée par M. Ayangma était prescrite du fait que ce n'était que le 21 juillet 2015 qu'il avait déposé sa demande, soit après que la Commission des droits de la personne eut statué sur les affaires en cause, le délai de prescription de deux ans étant alors échu. De la même façon, en l'espèce, le juge a conclu que les demandes dans lesquelles sont soulevées des allégations de violation de la *Charte*

sont soumises au délai de prescription provincial ordinaire qui est de deux ans au Nouveau-Brunswick. Voir *Coffey c. Fraser Valley (Regional District)*, 2018 BCSC 959, [2018] B.C.J. No. 1113 (QL).

[28] La conclusion du juge saisi de la motion est étayée par la preuve. À notre avis, il n'a commis aucune erreur de droit, et il n'a pas non plus commis une erreur manifeste et dominante susceptible de permettre notre intervention en appel.

D. *Ordonnance déclarant le plaideur quérulent*

[29] L'Université a demandé et obtenu une ordonnance sous le régime de la règle 76.1.04. Une ordonnance rendue en vertu de cette règle interdit à une partie d'introduire d'autres instances devant la Cour du Banc de la Reine ou la Cour des petites créances, ou encore de continuer une instance déjà introduite devant ces tribunaux, à moins d'en avoir obtenu l'autorisation. Afin de déterminer s'il doit rendre une telle ordonnance, le juge peut tenir compte de toute ordonnance semblable rendue contre la personne en cause par tout autre tribunal, y compris un tribunal situé à l'extérieur du Nouveau-Brunswick, ainsi que des instances que cette personne a introduites de façon persistante et sans motif raisonnable devant tout autre tribunal, y compris un tribunal situé à l'extérieur du Nouveau-Brunswick (règle 76.1.02(2)).

[30] Dans l'affaire *Bossé c. Caisse populaire acadienne Ltée*, [2018] A.N.-B. n° 164 (QL), notre Cour a longuement traité de la règle susmentionnée. Elle a affirmé ce qui suit :

> Dans *Greene c. Province du Nouveau-Brunswick et autres*, 2014 NBBR 168, 428 R.N.-B. (2e) 204, le juge Glennie a offert un cadre pour l'analyse d'une demande, faite à la Cour du Banc de la Reine, d'une ordonnance déclarant un plaideur quérulent. Il a écrit ce qui suit :
>
> > [TRADUCTION]
> > Les plaidoiries frivoles sont celles qui sont sans substance ou indéfendables et il peut s'agir

notamment des cas suivants qui sont énumérés aux pages 222 et 223 du texte de Jacob :

Ainsi, on peut qualifier une plaidoirie de frivole :

a. lorsqu'une partie se joue de la Cour,
b. lorsqu'elle ferait perdre son temps à la Cour,
c. lorsqu'elle ne peut faire l'objet d'une argumentation raisonnée,
d. lorsqu'elle est dénuée de fondement,
e. lorsqu'elle est vouée à l'échec,
f. lorsque l'action est intentée ou la défense opposée dans l'unique but de contrarier,
g. lorsqu'elle a pour but d'obtenir un avantage fantaisiste,
h. lorsqu'elle ne peut vraiment apporter rien de bon. [Par. 181]

[Par. 29]

[31] Une norme objective sert à établir si un plaideur est ou non quérulent. Les principaux indicateurs permettant de déclarer un plaideur quérulent sont notamment les suivants :

a) une propension à remettre en litige des questions qui ont déjà été entendues;

b) le fait de soutenir des allégations d'actes irréguliers sans fondement contre une partie opposée, des avocats, la cour ou des fonctionnaires administratifs;

c) le refus de se plier aux règles et aux ordonnances judiciaires, notamment le refus de verser les dépens.

[32] Dans la présente instance, le juge saisi de la motion a soigneusement passé en revue l'historique des multiples procédures judiciaires et quasi judiciaires que M. Ayangma avait entamées dans notre province ainsi qu'à l'Île-du-Prince-Édouard. Il a écrit ce qui suit :

> [TEXTE ORIGINAL]
> M. Ayangma a, se référant à la base de données de l'institut Canadien d'information juridique (CanLII) plus de cent décisions rapportées l'impliquant. Il existe 156 000,00 $ en jugement impayé résultant de procédures judiciaires dont la majorité représente des dépens accordés contre lui.
>
> [Par. 27]

[33] Il fait ensuite observer que M. Ayangma a déposé la présente action civile et qu'il y a par ailleurs une requête en révision qui a été rejetée et qui traite de trois des onze griefs « rattachés à la même situation de faits. » Le juge ajoute que M. Ayangma a déposé une autre poursuite se fondant sur les mêmes faits que la requête en révision judiciaire, cette fois contre l'Université, le vice-recteur à l'administration et aux ressources humaines, le doyen de la faculté d'administration et le chef de département. Dans cette action, M. Ayangma a soulevé des allégations de diffamation, de fraude et d'assertion négligente et inexacte, de complot délictueux, de représailles, d'intimidation, de harcèlement, d'abus d'autorité et d'abus de procédure, de mauvaise foi, de manquement à leur obligation d'agir avec honnêteté dans leurs obligations contractuelles individuelles, de violation de la convention collective, d'inconduite ayant mené à une enquête déficiente et à une suspension disciplinaire déguisée, et de violation de la *Charte*.

[34] Appliquant les principes énoncés dans l'arrêt *Bossé*, le juge n'a eu « aucune difficulté » à conclure que M. Ayangma est un plaideur quérulant qui « abuse du système judiciaire et l'administration de la justice au Nouveau-Brunswick et ailleurs » (par. 33). Nous ne trouvons aucune erreur dans l'application des principes juridiques aux faits en cause et nous concluons que la décision rendue par le juge saisi de la motion sur cette question était correcte.

E. *Récusation*

[35] M. Ayangma a donné plusieurs raisons pour lesquelles il pensait que le juge était partial et aurait dû se récuser. Il a notamment affirmé qu'il y avait conflit d'intérêts parce que le juge avait fréquenté l'Université comme étudiant. Il a allégué que

le juge avait levé le ton pendant l'audience du 5 octobre 2018. Il a fait valoir que le juge, du fait qu'il était saisi de toutes les autres instances judiciaires, comme indiqué, était partial.

[36] Dans l'arrêt *Rose c. Sa Majesté la Reine et autres*, 2015 NBCA 26, 435 R.N.-B. (2e) 259, les juges d'appel Larlee et Quigg revoient succinctement les principes applicables lorsqu'une ordonnance de récusation est sollicitée (par. 8 à 11). Elles écrivent ce qui suit sur la question de la partialité du tribunal :

> Nous commençons par le moyen d'appel qui soutient que la juge saisie des motions était partiale. Dans *Brooks c. Barreau du Nouveau-Brunswick et autres*, notre Cour décrit ce qui constitue la partialité de la part d'un juge qui doit se prononcer sur une affaire. Il s'agit d'une allégation grave. Le critère applicable à la partialité dans les cas où des allégations générales sont faites comporte à la fois un élément subjectif et un élément objectif : *R. c. S. (R.D.)*. Pour ce qui est de l'élément subjectif, le juge considère s'il lui est possible d'instruire l'affaire de façon impartiale. S'il lui est impossible de le faire, il ne doit pas aller plus loin. L'élément objectif du critère est celui de la « crainte raisonnable de partialité », le critère habituellement appliqué. Comme notre Cour l'a déclaré dans *Dugas c. Gaudet et al.*, 2014 NBCA 7, 416 R.N.-B. (2e) 389, pour soutenir une allégation de crainte raisonnable de partialité, il incombe de remplir les critères suivants : « Les motifs qui sous-tendent la crainte de partialité doivent être d'une gravité telle qu'ils réfutent la forte présomption que le ou la juge respectera son serment d'office et "[tranchera] le litige équitablement à la lumière de ses circonstances propres" (voir *United States c. Morgan*, 313 U.S. 409 (1941), à la p. 421, passage cité avec approbation dans l'arrêt *R. c. S. (R.D.)*) » (par. 5).
>
> Dans une décision rendue oralement, la juge saisie des motions a motivé sa décision de ne pas se récuser. Elle a alors cité et appliqué la bonne jurisprudence de la Cour suprême du Canada et de notre Cour et a examiné et soupesé les facteurs appropriés. À notre sens, elle n'a commis dans son application du droit en matière de partialité aucune erreur susceptible de révision. En outre, absolument aucune preuve au dossier ne soutient l'allégation de partialité. [Par. 16 et 17]

[37] Dans l'arrêt *Bossé et autres c. Lavigne*, 2015 NBCA 54, 440 R.N.-B. (2e) 118, la Cour précise que deux principes clés sous-tendent la récusation d'un juge : 1) la partialité et 2) la crainte raisonnable de partialité. La présence de l'une ou de l'autre suffit pour amener un juge à se récuser. C'est au juge qu'il appartient de déterminer s'il doit se récuser et son raisonnement doit commencer par l'analyse de son propre état d'esprit au sujet de l'affaire en cause. Ce critère est subjectif. Pour conclure à son impartialité, le juge doit être désintéressé eu égard à l'issue de l'affaire et ne pas être prédisposé à un résultat particulier. Autrement dit, il doit avoir l'esprit ouvert et être susceptible d'être persuadé par la preuve et les arguments soumis afin de statuer sur l'affaire en cause. Si le juge conclut qu'il est partial, l'analyse prend alors fin et une récusation est appropriée. (par. 7)

[38] Si le juge détermine qu'il est impartial selon le critère subjectif, le raisonnement passe alors au critère objectif de la crainte raisonnable de partialité. Pour déterminer s'il peut exister une crainte raisonnable de partialité, le juge doit répondre à la question suivante : « [U]ne personne raisonnable et bien renseignée qui étudierait la situation en profondeur et de façon "pratique et réaliste" serait-elle d'avis que, "selon toute vraisemblance, le [ou la] juge, consciemment ou non, ne rendra pas une décision juste"? ». Les éléments du critère objectif sont les suivants : (1) le critère est considéré du point de vue d'une personne raisonnable; (2) celle-ci est bien renseignée des circonstances de l'affaire; (3) la crainte de partialité est raisonnable; (4) la situation fait l'objet d'un examen réaliste et pratique; et (5) l'analyse commence par une forte présomption d'impartialité judiciaire et vise à déterminer si celle-ci a été réfutée. (par. 7)

[39] Le juge a traité oralement de la motion en récusation de M. Ayangma dans la matinée du 17 décembre 2018. Il a rejeté la motion après avoir conclu qu'il pouvait trancher les questions dont il était saisi de façon juste et impartiale. Le juge a commencé par reprendre les différentes plaintes que M. Ayangma avait formulées dans sa motion. Dans ces plaintes, M. Ayangma accusait le juge de collusion avec l'Université parce qu'il avait étudié dans cet établissement. Il soutenait que le juge avait déjà pris une décision

sur toutes les affaires dont il était saisi étant donné qu'il les avait abordées dans ses observations impromptues.

[40] Le juge a ensuite passé en revue la jurisprudence applicable et l'a appliquée à la motion. Il a conclu qu'il avait l'esprit ouvert et qu'il n'existait aucun fondement à l'allégation de partialité ou de crainte raisonnable de partialité. Son analyse était exhaustive et approfondie. Il est arrivé à la conclusion qu'une personne raisonnable et bien informée qui examinerait l'argument avec objectivité ne conclurait pas qu'il est partial ou qu'il a un préjugé (voir également *Ayangma c. Université de Moncton, Campus de Moncton et autre*, 2019 NBCA 73). Nous ne voyons aucune erreur dans l'analyse du juge saisi de la motion et ce moyen d'appel est donc rejeté.

## VI. Dispositif

[41] L'appel est rejeté avec dépens qui sont fixés à 2 500 $.

# B

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# B

No.

**IN THE SUPREME COURT OF CANADA**
**(ON APPEAL FROM THE PRINCE EDWARD COURT OF APPEAL)**

**BETWEEN:**

**NOEL AYANGMA**

**APPLICANT**

**and**

**UNIVERSITY OF MONCTON, CAMPUS OF MONCTON**

**RESPONDENTS**

# MEMORANDUM OF FACT AND LAW

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**TO:** **THE REGISTRAR OF THIS COURT**

**AND TO:** **SACHA D. MORISSET**
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## PART I
## STATEMENT OF THE FACTS.

### A. INTRODUCTION

[1] The proposed appeal provides this Honourable Court, the opportunity to determine, revisit, and/or enhance the test for establishing bias-reasonable apprehension of bias and/or lack of impartiality and neutrality arising from the judge's conduct, and in particular, in situations such as here, where it is alleged that the judge not discussed, commented, opined and thereby prejudged a matter that was not before him at the time, but also refused to refuse him when the matter he had previously commented on later came before him to adjudicate upon.

[2] The central issue arising from the within proposed appeal which is an issue of general importance is whether it was possible for the Court of Appeal as a reviewing court, to properly exercise its jurisdiction as a reviewing court without the benefit of listening to the audio recording of the impugned proceedings to fully ascertain whether or not the tone of judge's voice, demeanor and/or the nature of the actual comments which are alleged to have given rise of bias or reasonable apprehension of bias or for that matter suggested lack of impartiality as it appears to have been the case here?

[3] A secondary issue which is also of general importance in the within proposed appeal is whether it was appropriate for the presiding judge to discuss and/or opined in the manner he did on matters not before him which matters involving the same parties, he later presided over despite having been urged to recuse himself, something that he categorically refused to do,

[4] A third issue which also of general importance in the within proposed appeal is whether prohibitory should be made restricting citizen's access to court on the basis of either very limited proceedings conduct in a specific jurisdiction or in combination of jurisdictions, <u>and more importantly on the basis of previous decisions from other jurisdictions that have been unanimously reversed and vacated by a superior court and therefore no longer binding as it appears to be the case here?</u>

[5] In short, this Honourable Court has before it, a perfect textbook case for abuse of process and miscarriage of justice which if permitted to stand would cloud the administration of justice. All this, therefore warrants the intervention of this Honourable Court if confidence in the administration of justice is to be restore so as to avoid a miscarriage of justice.

## B. BACKGROUND AND OVERVIEW

[6] The University of Moncton is the only Francophone/Acadian University in the Atlantic region and most of the Francophone lawyer and judges are not only Acadians, but most of them had previous ties with that the Respondent haven attended that institution.

[7] The Applicant was employed by the University de Moncton on a part-time basis, as professor from 2010 to 2018. During that period, he received specific contracts to teach specific subject (two per semester) providing he applies and submits a new application for employment to teach specific advertised courses together with a copy of the degrees, and is qualified to teach them.

[8] The Applicant obtained his doctorate degree in Business Administration in 1996, and the University did receive a in 2010, sworn copies of the Applicant's doctorate1 degree which the Motions judge questioned the existence on October 5th , 2018 and during the hearing of the application for judicial review and as well as of his Master's2 degree in Business Administration together with the official transcripts in 2010 prior to obtaining his first contract and the resulting doctorate bonus, and during the selection process to fill the position of Human Resources Professor.

[9] At all material times (2010-2018), there was no requirement to produce a doctoral dissertation or a thesis, but only a copy of the doctorate degree in order to either receive a doctorate bonus or even to obtain either a full-time or part-time contract with the Employer and there still no requirement to do that today.

[10] In 2014, the University of Moncton advertised a full-time position of Human Resource Management Professor and sought the applications from candidates with a doctorate degree in Business Administration or Industrial Relations3. It is clear from the selection posting that a thesis was not required.

[11] The Applicant applies for the positions as advertised. And though qualified for the position, his candidacy was rejected despite meeting all the minimum criteria for the position. The University ultimately selected and appointed an Acadian lady who only possessed at the time a bachelor degree in Psychology4 over the Appellant who possess a Master degree in Business Administration obtained from the same institution and a PhD from another institution as confirmed by the Minutes of the selection committee5.

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*1 Copy of the Appellant's Doctorate Degree in Business Administration the Official related transcript at p.D-1*
*2 Copy of the Appellant's Master's Degree in Business Administration at p.D-2*
*3Excerpt from the Appeal Book Posting of full-time position of HR Management Professor at p. at pp.D-3-4*
*4Excerpt from the Appeal Book Profile of Maillet showing her Bachelor in Psychology at the time at pp.D-5-9*
*5 Excerpt from the Appeal Book - Minutes of the selection process dated February 7, 2014 at pp.D-1011*

[12] The Minutes of the selection process obtained on December 18, 20186 not only indicates that the Applicant was not selected for the position because his PhD was in general management. , the letter itself also indicates that evidence which included both the successful candidate's profile and the grant of 5000, offered to the successful candidate indicate that she did even possess.

[13] The Applicant sought some explanation as to why he was overlooked and filed a grievance, denouncing the University's selection process, characterizing it as flawed, as soon as he became aware of the fact that the University had offered the successful candidate a grant of $5000 to complete her doctorate degree in psychology7, almost a year after she had been appointed. This is undisputed evidence that she was not qualified for the position as advertised, with her bachelor degree in psychology.

[14] Soon after he filed the Applicant filed his complaints denouncing the selection process conducted by the university of Moncton, he was not only targeted, but also subjected of irrelevant demands and bogus investigations aimed at covering the flawed selection process which resulted in the appoint of an individual who face on the face of the evidence not qualified for the position advertised. This grievance was eventually denied on June 30, 2015. And on the same day, following this rejection of his grievance, the Applicant filed a human rights complaint and which was also dismissed as being two to three days out of time, even posted outside the province where the Commission is located in New Brunswick.

[15] The Applicant sought judicial review of that decision of the Commission and it was dismissed and an appeal from that decision was also dismissed and application for Leave to Appeal is still pending before this Honourable Court.

[16] Following the dismissal of his human rights complaint, the Applicant initiated a civil proceedings against the Université, by way of a Statement of Claim filed on May 28, 20188. In his statement of claim he claimed damages for what he asserted to be willful/negligent conduct by the Université, misrepresentation, bad faith and breach of the *Charter*. On June 30. 2017, the Université defended the action9.

[17] On January 5th, 2018, the Respondent suspended10 the Applicant with pay pending an investigation after ten (10) years of teaching with excellent evaluations, over bogus allegations by few scrupulous students regarding his teaching style. The report of that investigation is yet to be released despite several demands.

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*6 Excerpt from the Appeal Book Respondent's letter dated December 18, 2018 responding to the complaint at pp.D-12-20*
*7 Grant of $5000 awarded by the University to Ms. Maillet complete her doctorate degree in psychology at pp.D-21-23*
*8 Statement of Claim at at pp.D-24-49*
*9 Statement of defence filed by the Université of Moncton defended the action at pp.D-50-53*
10 *Letter of suspension dated January 5th, 2018 suspending with pay pending the outcome of the investigation at p.D-54*

[18] On February 20, 2018, the Applicant served and filed his Affidavit of Documents and served Notice, pursuant to Rule 31.03(1), on the Université, requiring it to serve and file an affidavit of documents and to produce the documents in its possession and control.

[19] On May 1, 2018, the Université only produced only a draft affidavit of documents11. The Applicant contended the draft Affidavit of Documents was not *Rules*-compliant and requested a better Affidavit of Document, which the University refused to provide suggesting that it had other matters to deal with12 suggesting that the Applicant's request was not important

[20] The Applicant filed a series of grievances regarding his suspension with pay pending the outcome of the investigation and for the withdrawal of his doctorate bonus on the basis that he had refused to provide them with a copy of his doctorate dissertation and not the doctorate itself which was already in their possession and control having being previous submitted to the employer. These grievances were ultimately set down for May 10, 2018 and dismissed. Both a judicial review of the arbitrator's decision and appeal were also dismissed. These decisions are also the subject-matter of another Application for Leave to Appeal also before this Honourable Court.

[21] Following the arrogant and unacceptable response provided by counsel for the Respondent, for the Respondent's failure to comply with the rules requiring the filing of an Affidavit compliant and the production of documents, the Applicant filed a motion13 on May 10, 2018, in which he sought an order requiring the Université to file a *Rules*-compliant affidavit of documents.

[22] On September 14, 2018, which is almost 4 months, after receiving the Applicant's Affidavit of Documents and more than nine (15) months after the Université filed its statement of defence, the Respondent filed its motion for summary judgment14 rather than filing and serving its Affidavit of Documents. In the same motion, it also sought to have the Applicant declared a vexatious litigant pursuant to Rule 76.1.04

[23] All these motions –the Applicant's motion for production and the Respondent's motion for summary judgment were set down for hearing on October 5, 2018. These motions were all assigned to the same judge, Mr. Jean Paul Ouellette.

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*11 Draft-Affidavit filed the Respondent at pp.D-55-63*
*12 E-mail correspondent from the Université of Moncton at pp.D-64-67.*
*13 Motion filed by the Applicant seeking an Affidavit of Documents from the Respondent at pp.D-68-86*
*14 Respondent's motion for summary judgment dated September 14, 2018 at pp.D-87-93*

## C. Proceeding of October 5th, 2018

[24] At the outset of the hearing held by the Motions judge on October 5, 2018, justice Jean-Paul Ouellette openly discussed, opined and/or made inappropriate comments and/or opined on a matters that were neither before him at the time, nor on the docket of the day, which matters not involved the same parties, but also later came before him were adjudicated by him, on December 17, 2018.

[25] Soon after the motions were adjourned, the Applicant wrote to the Motions judge on October 24th, 201815, asking him to voluntarily recuse himself from hearing any of the matters before him based on the previous comments he made wherein he allegedly prejudged and/or predetermined the outcome of a the application for judicial of the arbitrator's decision. He refused to do so.

[26] As a result of his recusal to voluntarily recuse himself voluntarily, the Applicant then filed a recusal motion16, This motion was also scheduled to be heard together with the Applicant's application for judicial review of the decision of the arbitrator which he has previously discussed and commented on, set to be heard on December 17, 2018

## D. Proceeding of December 17, 2017 Related to the Recusal and Summary Judgment Motions

[27] On December 17th, 2018, Justice Jean-Paul Ouellette therefore had before him three motions: The Applicant's recusal motion and his motion for production and as well as the Respondent's motion for summary judgment. Not only by reasons of judgment dated February 13, 3019, Justice Ouellette dismissed the Applicants motions, and granted the Respondent summary judgment, but he also declared the Applicant vexatious and restricted his access to the courts in New Brunswick.

## E. Proceeding related to the Application for Judicial

[28] On December 18, 2018, Justice Ouellette the Application for judicial review on the matter he had previously commented and/or opined on and refused to recuse himself and also denied it on February 13th, 2019.

[29] Throughout the hearing of this Application, Justice Ouellette not only appeared to be unreceptive to the Applicant's arguments, but also appeared to be all over the map, making demeaning and disparaging comments in an open court. In utter attempt to undermine and intimidate. At times, he raised the tone of his voice and appeared to be angry the Applicant.

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15*Excerpt from the Appeal Book - Letter of recusal dated October 24th, 2018 at pp.D-94-97*
16 *Recusal Motion at pp.D-98-103*

## G. Hearing of the Appeals Related the Motions and the Application for Judicial Review

[30] The appeals on the dismissal of the recusal motion and the granting of summary judgment on behalf of the Respondent and as well as against the prohibitory order made against the Applicant, restricting his access to the courts, were all heard by teleconference for the Applicant and in person by the Respondents on June 17th, 2019. One of the central issues before the Court was the allegations of bias; reasonable apprehension of bias arising from the comments made by Justice Ouellette prior, during and after the hearing of the motions and application, the tone of his voice and as well what appeared on its face to be lack of impartiality and neutrality.

[31] During the hearing of the appeal, the Court of Appeal made an important key preliminary determination agreeing to listen to the audio recording of the proceedings presided by Justice Ouellette to ascertain not only the nature of the impugned comments made by Justice Ouellette, but also the both tone of the voice and demeanor because listening to the recording was both relevant and necessary to do justice in this particular case because a transcript of the proceedings alone would not be sufficient to fully adjudicate on the serious allegations of bias/reasonable apprehension of bias and lack of impartiality and neutrality levelled against Justice Ouellette.

## I. Judgment on the Appeal Related to the Motions

[32] On October 10, 2019, the Court of Appeal dismissed both the Applicant's appeal on his application and motions for recusal and for summary judgment and as well as for the declaration of vexatious, all of this with costs.

[33] Unfortunately, there is no shred of evidence in the entire appeal judgments on either the motions or the application for judicial review showing that the Court of Appeal did in fact listen to any of the audio recording of any of the proceedings it had agreed during the hearing to listen to. This is therefore the crux of the proposed appeal.

[34] If leave is granted in the present case as it should, this Honourable Court would have to opined on the issue of bias and apprehension of bias and lack of impartiality, and decide whether it was practically legally sound to adjudicate on these serious allegations of bias/reasonable apprehension of bias and lack of impartiality and neutrality which allegedly arose from the conduct of the judge which implicated the tone of the judge's voice and demeanor, as it was the case here, without the benefit of listening to the audio recording of the impugned proceed and in particular as here where the Court had before it no transcript of any of proceedings and no written decision on the recusal motion itself? And whether this case amounted to a miscarriage of justice warranting the intervention of this Court?

## PART II
## STATEMENT OF QUESTIONS IN THE ISSUES

[35] The within application for leave to appeal raises central issues of public importance, which issues are reproduced below. These issues include, but are not limited impartiality and neutrality of judges, and the decision making process to be used by judges when an allegation of bias and/or apprehension of bias, and/or lack of impartiality and neutrality is levelled against a presiding judge who is alleged to have crossed the line and gone over the map and overboard and made comments on a matter that was not only not before him and on matter he had absolutely no clue and repeatedly raised the tone of his voice to intimidate, disparage a party appearing before him, knowing well that the same matter would later on come before him.

**Issue#1:** **Did the conduct display by the Motions judge throughout the four (4) proceedings he presided over (three (3) motions and one (1) application), which proceedings involved the same parties, does give rise to bias or a reasonable apprehension of bias. Whether the Motions judge conducted himself in a manner that suggests that the crossed the line was partial?**

**Issue#2:** **Did the Motions judge err in law in making a Prohibitory Order restricting the Applicant's access to the Courts in New Brunswick Under Rule 76.1.02(2)?**

**Issue#3:** **Did the Court of Appeal misapply Rule 22 which governs summary judgment by departing from well-settled the general principles of law, including those general principles of law that it itself had set out?**

## PART III
## STATEMENT OF ARGUMENT

**Issue#1:** **Did the conduct display by the Motions judge throughout the four (4) proceedings he presided over (three (3) motions and one (1) application), which proceedings involved the same parties, does give rise to bias or a reasonable apprehension of bias. Whether the Motions judge conducted himself in a manner that suggests that the crossed the line was partial:**

**Bias or Reasonable Apprehension of Bias and/or Lack of Impartiality and Neutrality:**

**Comments made During the Proceeding of October 5th, 2018**

[36] The following are some relevant excerpts from the audio recording of the comments made the Motions judge. Mr. Jean Paul Ouellette on October 5th, 2018:

**Juge:** **C'est un peu où je voulais allez tout à l'heure mais vous ne n'avez pas donné l'opportunité**

A. Non mais Monsieur le juge...j'ai compris ce que vous avez dit

**Judge :** **Écoutez, moi là.**

A. Allez-y

**Juge :** **Si la prochaine que j'ouvre la bouche, que vous continuez à parler, vous allez continuer jusqu'au temps que vous ayez fini ou vous ayez manqué de souffre, parce que. Et puis ça fait trois fois ce matin que je me fais interrompre.**

**Puis j'essaye autant possible de ne pas le faire, puis mieux que ça je ne ferai plus. Restez sur le sujet et c'est ça qu'on va vous entendre dessus et si vous partez sur les tangentes – bon voyage! Lorsque je vous dirai que on a été très loin, et vous le dirai et vous reviendrez...**

...

**Juge :** **Bon écoutez là. Écoutez là. On ne ferait pas d'argument aujourd'hui.**

...

**L'Université se fait poursuivre dans une action qui est assez élaborez que j'ai de la misère à suivre ...le cœur semblerait l'existence d'un doctorat.**

...

**Ça semblerait le cœur du problème. Je vais vous dire que si vous ne la produisez pas, vous avez un problème...**

...

**Vous avez déjà un dossier que j'ai dans une autre filière, une contestation d'une décision d'un arbitre, ordonnant de produire votre doctorat que vous refusez de produire**

A : Non ce n'est pas le doctorat Mr. le Judge, on a jamais parler de production doctorat, parce que l'Université, ...

**Juge : Et la thèse Et beh écoutez**

...

**Je viens de vous dire que si à la fin de la journée, vous ne réussissez pas à prouver que vous avez une thèse de doctorat, vous avez une prise dans le dos. Vous avez déjà joué au baseball.**

....

**Juge :** **Oui beh écoutez, je vais vous faire un petit lien. Je n'ai pas entendu de cause et je n'ai pas encore pris de décision. Je vais faire un petit lien... A la fin de la journée, il pourrait avoir une raison pourquoi vous n'avez pas été embauche...**

[37] The Applicant submits it is clear from the statements/comments reproduced above a that Justice Ouellette had crossed the line in commenting on a matter that was not before him on October 5th, 2018. His comments not only clearly suggest a certain pre-disposition, both they are also suggestive and way of innuendo that the Applicant not only did not have his doctorate, but to prove that he had one, notwithstanding the evidence disclosed by the Record before the Court of the existence of such a doctorate. See Copy of the doctorate degree and transcript, Minute of the Selection process confirming the doctorate degree, and Draft Affidavit of Documents filed by the Respondent.

[38] The Applicant submits that because the issue of the existence of the doctorate degree was not before Justice Ouellette prior and during the hearing of the application, it should not have and was not necessary to be commented upon. Simply put, the only issues before the Court were standing and as well as the arbitrator's jurisdiction to hear a grievance and make some demands, including a demand to disclose a copy of the doctorate dissertation notwithstanding the nature of the sanction which was not only purely administrative in nature as indicated by the letter of suspension at p.D-54 of the Application - suspension with pay pending the outcome of an investigation, and the fact that the grievance was premature because the investigation was still going on at the time..

**Comments made During the Proceeding on the Recusal Motion heard on December 17, 2018**

[39] On December 17th, 2018, Justice Jean-Paul Ouellette had before him three motions: the recusal motion, the motion for production and the Respondent's motion for summary judgment and the Applications for judicial review. Some of the important grounds for the recusal motion were (a) the manner in which Justice Ouellette conducted himself on October 5th, 2018, including but not limited to the tone of his voice while addressing the Applicant, but also for commenting on a matter that was not on the docket for the day at the time, a matter which later on came back to him a matter which he ultimately also presided over.

[40] Prior to rendering his decision dismissing the recusal motion, and in addition to the comments previously made on October 5th, 2018. Justice Ouellette continue to make the following comments and personal attacks against the Applicant as demonstrated by the exchanges between him and Applicant of which, some were nasty, disparaging and unwarranted both on matters that was not before him and as well as on matters such as the existence of a doctorate degree which was not before him or for which he had no clue of the reality stating:

A. I didn't create these issues, but those issues were created by your lordship himself, ...I also made the same comments regarding discussing about the issue that is not before the Court. Rule 1.03 does not give the Court the right to go and discuss any issue that is not before the Court at the time. The Court can make comments on issues that is before him. He can take all the matters that had been given to him you know to start making comments of that nature. For me it is not a simple matter and I still maintain that your lordship should recuse himself. In case he does not recuse himself, I am ready to proceed.

**Judge: I do not have the transcript. I didn't go back to the transcript. But I will tell you what I take at it, and I will tell the consequence of what I did, and then I will leave and will go to my office and will draft my order and decide I am going to stay or not. The Affidavit of documents, I have not decided anything what, I didn't have even a signed Affidavit in front of me. So do you know what I could do this morning, without an Affidavit of Documents, – adjourn. tell them to go back and get an Affidavit signed and I will grant costs for $500 for not having their Affidavit signed ...and if at the end if I will to award costs, I will take into consideration that On October 5th, the University of Moncton did not have in front of me a signed Affidavit for the rest I would have got a clue of what I will do „,**

**But let me be clear, on October 5th, I did not decide anything and if the record which I don't have in front me which I didn't look at, expresses otherwise, it cannot be because I did not do that...**

**I knew on October 5th, what I will be hearing last Friday .... On October 5th, I had look at hat motion that will be hearing, <u>Ok, its sounds to me that when somebody is fired because he does not have his doctorate, that one way to kill that matter right away, is to say here is my doctorate The argument thereafter is of no value and I will not waste a minute to indicate to the University de Moncton, that this gentleman has his doctorate, there is a copy on the floor. So if you have one. I will not take two or three days or a month, to decide what is going to happen. So in you, all the documents that you had presented in front of me at the time, it seems like that that is an disuse that that you didn't want to present so</u> I told you in advance maybe you bring it forward, it will save a lot of time...then you will make a decision and then you will have a decision...**

[41] The Applicant submits that not only the listening of the audio recording of October 5th, 2018 by Justice Ouellette was appropriate, but it was necessary in the determination of the motion for recusal, and it did not occur admittedly, but also be the Court of Appeal to adjudicate of the ground of appeal alleging bias – reasonable apprehension of bias and lack of impartiality and neutrality. Had Justice Ouellette reviewed the comments he made prior to hearing the Recusal motion, he would have certainly recused himself and having refused to do so, it was necessary and

appropriate for the Court of Appeal, in order to do, to review the audio recording to ascertain whether Justice Ouellette should have recused himself, something that the Court of Appeal in arriving at its conclusions at para.40 of its judgment which conclusions were drawn in a vacuum and without listening to the audio recording of the impugned proceeding of October 5th, 2018 that "We see no in the motion judge's analysis" .

[42] The Applicant submits that not only contrary to the Court of Appeal's finding at para.40, a reasonable and well-informed person viewing the argument objectively and listening to the audio recording of the impugned proceedings: The October 5th, 2018 proceeding and as well as the recusal motion, would conclude that Justice Ouellette was not impartial and neutral and that he should have recused himself and not adjudicate on any the matters he was assigned to. Furthermore, had the Court of Appeal listened to the audio recording of the impugned proceedings, it would not have suggested that Justice Ouellette had an open mind either, and that there was no foundation established to support a claim of bias or a reasonable apprehension of bias.

**Comments made During the Proceeding related to the Application for Judicial**

[43] On December 18, 2018, Justice Ouellette ultimately proceeded with the hearing of the Application for judicial review on the matter he had previously commented and/or opined on. Throughout the hearing of this Application, Justice Ouellette not only continue maintained his personal attacks on the Applicant, but also appeared to be very unreceptive on the arguments as demonstrated by some of the relevant the excerpts extracted from the impugned proceeding reproduced below which though readily available to the Court of Appeal, was not listened

...

**Judge: May I ask you a question?**

**A. : Yes**

**Judge: If he does not have any jurisdiction, where do you go with your grievance?**

A: If I have no jurisdiction?

**Judge: No no, no, no, the arbitrator.**

A: Yes

**Judge: Where does that leave you?**

A: It leaves me to judicial review of his decision. That is why I am here, unless, unless the Court says that this is not the right forum and then, the Court makes its decision and then we are going to look for the right forum

**Judge: Which will be?**

A: What?

**Judge: Which will be what?**

A. I don't want to respond to that now, because I am here saying that this Court has jurisdiction

**Judge: Continue! Continue!**

If the Court says

**Judge:** **No; No No. No. You do not want to answer my question, continue, let's continue.**

A: Your lordship, there will be a point where, at one point in time, I found that I have been treated in the manner that suggests something is not going well and, I have been trying to do my best as a lay person appearing before the Court, and my perception of what is going on in the court, is that I am debating whether I should continue this application for judicial review, I don't need to be here and start crying for something that I strongly believe that happened and when they are asking me questions including questions to speculate on something that I say that I don't want to speculate. The Court is here to direct the parties including a lay person like me, I am not trained lawyer as my colleague here, and I need the guidance from the Court which based on what I see, I am not getting it, that frustrates me most that at one point in time, I just need to quit so that the decision will be made without me, that will be considered as contempt to the court. I try to do my best to answer the questions and sometimes the questions are not being properly before me sometimes the questions are questions that need speculation because they were not properly asked and the record will reflect that and that is why, sometime I hesitate to answer the questions. There is nowhere that I have refused to answer the question of a judge absolutely not. When a question is asked to me I want to make sure that I understand the question and I don't want to speculate because speculation is not accepted in the court of law. In this case I want the question to be straightforward and not asking me to speculate, so I am ready to answer the question of the Court if that question does not ask me to speculate because I do not want speculate. The Court stopped me here because there was no evidence on what I was saying and the Court considers that to be a speculation and my friend objected to it and I understood that, that I do not have to speculate. Now if the Court has a specific question I am going to answer

**Judge:** **Mr, Ayangma**

A. Yes, Sir

**Judge:** **At the end of the day, I will have to render a decision**

A. Obviously

**Judge:** **And I'm not sure that if I render a decision in the line that you are asking me to, will not put you in the box that you will have nowhere to go, that's not speculation that's a possibility. And I say to myself it does not make sense. So let's try to make sense. If the arbitrator does not have jurisdiction, you've been standing on your both legs explaining to me that the arbitrator does not have jurisdiction, great but where do you go...and I will tell you --- I think one the possibilities today is return this matter back to an arbitrator that's one of the things that I can do. If you are arguing and you are right, that he does not have jurisdiction, well where do I send you, and is speculation OK, you don't know eh**

...

A: ...This is a judicial review; your lordship has no other avenue if this matter is in my favor to send it to an arbitrator that is the expectation that I have under any judicial review...

**Judge:** **Your argument is that ...the arbitrator did not have jurisdiction, well, who do I send it to that would have jurisdiction, so that is why I am asking the question, so maybe what I am telling you is that, maybe he has jurisdiction and that's the debate**

A. ...The jurisdictional issue is a secondary issue, First of all

**Judge:** **No.**

A. Your lordship has to determine whether I have standing to bring this application that is the first issue that your lordship has to determine and that is what I am presenting. The second issue now even if .. I have standing is to determine whether or not the arbitrator has jurisdiction to hear something that is...

**Counsel: ...**

A: ...The issue, the main issue here is not that arbitrators do not have jurisdiction to heard grievances. The issue before the arbitrator was for him to determine whether he had jurisdiction to hear that. The main issue was because it was a suspension with pay. I think that is what I explained before

**Judge: OK what you just told me there. I DON'T-UNDERS-TAND – IT - DOESN'T -ADD -UP -IN MY BRAIN. When you tell me he do, it is not the question if he has jurisdiction, but he has to prove that he has jurisdiction, there seems to be a contradiction**

A: OK, and that is why I want to be bring the jurisprudence, the jurisprudence when there is a suspension with pay, the arbitrator before deciding any issue he has to decide whether it is disciplinary or whether it is administrative, if it is disciplinary, he would have jurisdiction and will deal with the issues, if it is administrative he is going to say that he does have jurisdiction because the employee, the employer has the right to suspense anybody with pay that is what the jurisprudence, I want to bring to the Court, that is why I was going through my presentation because it is cash 22

**Judge: Laughter ... I know that**

A. It is a catch 22, for the arbitrator, if the arbitrator says that he has jurisdiction he decides at the same time that the suspension was a discipline, if he says that he does not have jurisdiction, he has to decide that the suspension is administrative. That is what the case law dictates and I can take the lordship to the case law.

**Judge: Take it**

A. Cut-off

**Judge: OK let me, <u>I DON'T-UNDERSTAND ...AND IT I DON'T UNDERSTAND YOU HAVE A PROBLEM BECAUSE I HAVE TO UNDERSTAND...</u>**

A. ...120 can the suspension of the grievor be characterized....

**Judge: ....**

...

Counsel: ...Comme un officier the la cour qui s'est fait accusé constamment en cour pendant deux jours, je me devais, je me sentais obligé de répliquer à ça, à moins que vous ayez des question M. le juge, ce sont mes commentaires.

**Judge : Merci.**

A. The issue here, your Lordship, as I have already as just, my friend here talks about him being insulted and „. for two days, and I remember he saying that I HATE HIM, I do not hate him, I hate no body said that yesterday in this Court. I have nothing personal against either Mr. Michaud or Mr. Sacha. They are doing their work they are representing their parties and I am doing mine also because I am representing myself does not mean that after we go out I am not going to say hello to Mr. Michaud or to Mr. Misha, and again I don't see why he should say that I hate him, that was more than what he is pretending that I am saying about him, it could be my perception, I have the right to say my perception, but saying that I hate him, no I do not ...and it is not something that someone has to say about another person...

**Judge: ... seems to be offended,**

**A. Yes.**

**Judge: May be for reason to be accused of collusion, and so Michaud did not mention it, but ... and look if, I've seen them yesterday one passing his computer to another one, it is not the first time and it is not going to be last one. And I knew that they weren't looking at the movies.**

A. It is unusual,

**Judge: No. no, no, no no, you might think that it is unusual, but and for you to know it is not..**

A: But that is your opinion, your lordship is entitled to his opinion and I am entitled to mine,

**Judge: Yes, YOU HAVE NO RIGHT TO INSULT PEOPLE RIGHT AND LEFT ... AND COLLUSION, I THINK YOU SHOULD APOLOGIZE OR WILL NORT ASK THAT BECAUSE HE WAS INSULTED ...**

...

A. Your Lordship,..

**Judge: AND IT WAS RAISED AND PUT ON RECORD THAT HE WAS INSULTED... AND HE DID NOT ASK ME TO DO ANYTHING AND I WLL NOT**

A. If he believes or if it took it that that I insulted him, I apologize. That's not my intention to insult any human being... He used the word I hate him and there was no intervention for him to apologize to me for saying that I hate him...

[44] The Applicant submits that had the Court of Appeal listened to the audio recording of this proceeding prior to deciding the issue around bias or reasonable apprehension of bias or lack of impartiality and neutrality, it would have positively concluded that there was at the very least not only Justice Ouellette crossed the line, but also that his conduct gave rise to a reasonable apprehension and that he was partial. Had the Court of Appeal do no so, and it was required to do, he would have also concluded that Justice Ouellette:

a. appeared throughout the impugned proceedings, to be acting as a participant in the arena rather than being an impartial and neutral adjudicator;

b. did not only discuss at length and/or opined on matters not before him at the time, which matters later came before him and involved the same parties, but also when he went over the map;

c. also did discuss and/or opined and made seriously allegations attacking or disparaging the Applicant by way of innuendo on matter which never came before and never raised by any party appearing before him. For example, when he also suggested that the Applicant was fired because he did not have his doctorate, when in fact this was inaccurate, as the Applicant was never fired, nor separated from the employer based on the inaccurate assertion made by the Motions judge in an open court even though the alleged firing was never not in issue before the Motions judge nor raised by any of the parties either on the motions or the Application for judicial review he had;

d. ought to have recused himself after he was asked to do so, based on of his previous comments which clearly suggested that he had not only prejudged the matter before him, but also that he was all over the map discussing issue s that were not before him and were not even the subject-matter while requiring the Appellant to stick on the issue;

e. addressed the Applicant in a disrespectful, demeaning and intimidating manner, repeatedly raising the tone of voice when speaking with the Applicant in addition of levelling personal attacks on the him;

f. condoned inappropriate remarks made by an officer of the Court in an open court, which statement suggested that the Applicant hated him while at the same time suggested that the Applicant apologizes for alleging a potential collusion between counsel for the union and for the university who were sitting on the same time and were helping each other;

[45] The test is what would a reasonable, informed person think about what occurred in the present case. The objective is to protect public confidence in the legal system by ensuring not only the reality, but also the appearance of a fair adjudicative process. Impartiality and the absence of bias have developed as both legal and ethical requirements. Judges are required — and expected — to approach every case with impartiality and an open mind <u>this is not what occurred in the present case. The Applicant submits that meeting this important objective warrants the intervention of this Honourable Court.</u>

[46] The presumption of judicial impartiality, require that the judge's identity and experiences not close his or her mind to the evidence/issues at it appears to be the case here. Not only judges must strive for impartiality, they are not permitted to either discuss or opine on matters that are not before them, because they may be called upon to

adjudicate upon them at a later date as it occurred in the present case. Judges should not go over the map and opined on issues not before him or on issues that they have no clue whatsoever as demonstrated by some of the excerpts of the comments made by the judge during the impugned hearings. Nor are they permitted to conduct hearings in the manner that is marked by strife, belligerent behaviour, unwarranted personal attacks, or any other forms of disruptive and discourteous conduct which are antithetical to the peaceful and orderly resolution of disputes that unbiased judges would be striving to achieve as demonstrated by either the relevant excerpts reproduced above and/or the audio recording of the impugned proceedings.

[47] As the case law further suggests, the scale of a judge's task must not cause him/her to lose sight of the fact that the rules of natural justice must be observed and that his/her conduct during hearings and applications must, at all times, be irreproachable and objective. It goes without saying that the most basic courtesy and politeness are *de rigueur*" and this is not what occurred here as there is no place for intimidation, contempt, and offensive innuendo, nor for harshness or inappropriate language. As the Right Honourable Mr. Justice Fauteux wrote in the *Livre du magistrat* ["a book for judges"], "[TRANSLATION], "*the judge will ensure the climate necessary for the operation of justice by his moderation, his discipline and his courtesy in his relations with counsel, the parties and the witnesses." (The Right Honourable Gérald Fauteux, Le livre du magistrat, Minister of Supply and Services Canada, 1980, at page 49).* This is not what occurred here.

[48] There are limits to how far a judge can go. Whatever the valid reason for which a judge chooses to intervene, he or she must be tactful and show some deference in addressing the parties appearing before him, including lay litigant in formulating the questions that he or she would like to ask. As Lamer J. (as he then was) stated in ***R. v. Brouillard17***, 1985 CanLII 56 (SCC), [1985] 1 S.C.R. 39 at paragraph 25 (S.C.C.); (1985), 16 D.L.R. (4th) 447 (S.C.C.), at p.C-146 ". . . ***although the judge may and must intervene for justice to be done, he must nonetheless do so in such a way that justice is seen to be done. It is all a question of manner." And this is not what***

[49] The Applicant submits, it was practically impossible and still remains a mystery how the Court of Appeal could have addressed these serious allegations (a) and (b) raised and reproduced at para.26 of its judgment without listening to the audio recordings of the impugned proceedings and thus determine the issue of bias of reasonable apprehension of bias without the benefit of the audio recordings available to them, including the audio recording of the oral decision on the recusal motion itself?

[50] The case law clearly suggests that whenever this type of serious allegations is made against a decision-maker or a reviewing court, and in order to be fair and make justice to the party making the allegations, the Court must listen

17 *R. v. Brouillard*, 1985 CanLII 56 (SCC), [1985] 1 S.C.R. 39 at paragraph 25 at p.C-146 of the Application for Leave

to the audio recording of the impugned proceedings to ascertain the true nature of judge's conduct, or the exact comments made by the judge before deciding whether the contention that the judge was bias or that the matter, viewed through appropriate lens, raises a reasonable apprehension of bias or not.

[51] The Applicant submits this is exactly what the Federal Court suggested jn ***Guermache v. Minister of Citizenship and Immigration18***, 2004 FC 870 (CanLII) at pp.C-153-160and ***Quiroz Mendez v. the Minister of Citizenship and Immigration19 2011 FC 1150*** unlike ***Quiroz Mendez*** and ***Guernmache*** supra, pp.C-161--175and other cases on point, not only there was absolutely so shred of evidence of the alleged actual comments made by the presiding judge, before the Court of Appeal, but there is also no shred of evidence that any of the audio recordings of the impugned proceedings were listened to by any the Court of Appeal judges.

[52] If this true, then on what grounds the Court of Appeal could have suggested that *"the relevant jurisprudence was canvassed or that the questions were recorded and answered in a measured, concise, and comprehensive manner"*. Simply relying on the argument made by the Respondent is was not enough. This was clearly a reversible error requiring the intervention of this Court. In ***Quiroz Mendez at para.81***. at p.C-174, the Federal Court after listening to the audio recording, concluded at para.82 of its judgment, that there was a reasonable apprehension of bias existed and that against the presiding decision-maker and that he crossed the line stating:

> "listening three times to the relevant excerpts of the audio recording", and "can only conclude that the decision-maker lost control of his demeanour, raised his voice by shouting in an angry tone, which reflected that he lost his temper with the applicants'counsel". A reasonable observer in the hearing room would likely think that the presiding Member was angry at the applicants' counsel'

[53] It is clear from the excerpts of the proceedings and from listening to the impugned audio recordings that the Motions judge was not angry at the Applicant, but that he was also condescending, arrogant and intimating. As the case law on point suggests "<u>If a judge is angry and shouting at a lawyer", and/or attempts to undermine or demean a party appearing before it, or leveled the type of attacks leveled against the Applicant declaring him vexatious without any shred of evidence to support such a drastic, demeaning and condescending declaration, as it appears to be the case, a reasonable person would have a reasonable apprehension that the judge was biased against that lawyer's case, or in this case the Applicant was a lay litigant and acted on his behalf.</u>

[54] The Applicant submits that <u>the type of errors committed by the Court of Appeal are substantive errors which cannot and must not be overlooked nor condone as it creates an injustice akin to a miscarriage of justice and put the</u>

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*18 Guermache v. Minister of Citizenship and Immigration, 2004 FC 870 (CanLII)*
*19 Quiroz Mendez v. the Minister of Citizenship and Immigration 2011 FC 1150 at para.81*

administrative of justice into disruptive as it is clear that had the Court of Appeal listened to the audio recordings and to the exchanges between the judge and the Applicant, which exchanges the Applicant is also urges this Court to carefully listen to, it would have certainly been persuaded that the judge did not only have a closed mind, but that he was biased or that his overall conduct gave rise to a reasonable apprehension of bias and crossed the line from his role as an impartial adjudicator. See ***Farkas v. Canada (Minister of Citizenship and Immigration20)*, [2001] F.C.J. No. 356 at para. 8 (QL), 2001 FTC 190 (F.T.C.D)** ***Del Castillo v. Canada (Minister of Employment and Immigration21)*** **(1994), 79 F.T.R. 207 at para. 24** at p.C-177 of the Application for Leave to Appeal.

Conclusion:

[55] Hearings are the primary mechanism whereby disputes are resolved in a just, peaceful, and orderly way. Because hearing processes are one of the cornerstones of our constitutional democracy, it is essential if justice is to be done so as to maintain of a civilized society, the judges' conduct must be fair and not tainted by any biases or apprehended of biases. These hearings must be conducted where they are as here, are marked by strife, belligerent behaviour, and unwarranted personal attacks, levelled at a litigant who appears before the Court and faces intimidating and discourteous conduct from a judge. To allow this type of conduct to stand would not only be antithetical to the peaceful resolution of disputes whom impartial judges strive to achieve, but to the administration of justice

[56] The Applicant submits that it is quite clear and obvious from the excerpts of proceedings referred to above and the listening of the audio recording of the impugned proceeding which the Court of Appeal had agreed to listen to and failed to do so, that not only the motion judge crossed the line and had a close mind, but also that there was some foundation established in the present case to support a claim for bias or a reasonable apprehension of bias. Had the Court of Appeal exercise its appellate review power as it agreed to do, - listening to the audio recording of the proceedings, informing itself of the argument made by the Applicant, it would have concluded that Justice Ouellette not impartial. Anything less would not be undemocratic in addition to undermining the administration of justice.

[57] It therefore follows that if confidence in the administration of justice is to be restore it is necessary for the Honourable Court to grant leave giving it the opportunity to do so, so as to avoid a miscarriage of justice.

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*20Farkas v. Canada (Minister of Citizenship and Immigration), [2001] F.C.J. No. 356 at paragraph 8 (F.C.T.D.) (QL), 2001 FTC 190 (F.T.C.D)*
*21 Del Castillo v. Canada (Minister of Employment and Immigration) (1994), 79 F.T.R. 207 at paragraph 24 (F.C.T.D.),*

**Question#2:** **Did the Motions judge err in law in making a Prohibitory Order restricting the Applicant's access to the Courts in New Brunswick Under Rule 76.1.02(2)**

[58] The proceedings from which the Motions judge whose conduct is under attack resulted in the following decisions See ***Ayangma v Université de Moncton22***, 2019 NBQB 30, ***Ayangma v University of Moncton23,*** 2019 NBQB 31, ***Ayangma v Université de Moncton (Moncton Campus)***24, 2018 CanLII 74497 (NB CA) ***Ayangma v. Université de Moncton, Moncton Campus*****25, 2019 NBCA 14;** ***Ayangma v. Université de Moncton, Campus de Moncton26,*** 2019 NBCA 72 , ***Ayangma v. Université de Moncton, Moncton Campus27 et al.*****, 2019 NBCA 73** ***Ayangma v Université De Moncton, Campus De Moncton28,*** 2019 CanLII 36107 (NB CA).

[59] The Applicant submits that apart from the wo decisions made by Justice Ouellette himself, in See ***Ayangma v*** *Université de Moncton29*, 2019 NBQB 30, and ***Ayangma*** *v University of Moncton,* 2019 NBQB 31, none of the proceedings conducted either in the lower court or in the Court of Appeal were found to be either vexatious or an abuse of the process, and there is no shred of evidence suggesting any improper conduct in any of the decisions of the New Brunswick Courts apart from d, including the two decisions made by Justice Ouellette himself from apart from the suggestion that a previous cost award, that could establish or justify the prohibitory order or even the suggestion made by Justice that the Applicant abuses the legal system in New Brunswick.

[60] Furthermore, apart from what appears on its face to be a legitimate claim and application related to employment matters involving the employer decision not hire him, but a less qualified person, and alleged failure of the union to adequately represent in a grievance process before an arbitrator against his former employer, there was no other claim made by the Applicant on any other issues. The mere facts that the Applicant was involved in more than 100 proceedings in another jurisdiction and had previously been found vexatious in two occasions, which decisions had been vacated on appeal. Was clearly not a justification to declare him vexatious in New Brunswick on the basis of decisions reversed on appeal. To accept this decision-making process or finding to stand, would certainly undermine the administration of justice in Canada.

[61] Rule 76.1.02(2) is an extraordinary remedy which is to used only when all other attempts to control the actions of a litigant have failed, and this does not appear to be the case when one considers the very limited proceedings

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22***Ayangma*** *v Université de Moncton*, 2019 NBQB 30, at pp.C-1-8 of the Application for Leave to Appeal
23 ***Ayangma*** *v University of Moncton,* 2019 NBQB 31, at pp.C-9-17 of the Application for Leave to Appeal
24 ***Ayangma*** *v Université de Moncton (Moncton Campus)*, 2018 CanLII 74497 (NB CA) at pp.C-18-44 of the Application for Leave
25 ***Ayangma*** *v. Université de Moncton, Moncton Campus*, 2019 NBCA 14 at pp.C-45--66 of the Application for Leave to Appeal
26 ***Ayangma*** *v. Université de Moncton, Campus de Moncton,* 2019 NBCA 72 at pp.C-67--85 of the Application for Leave to Appeal
27 ***Ayangma*** *v. Université de Moncton, Moncton Campus et al.*, 2019 NBCA 73 at pp.C-86-93 of the Application for Leave to Appeal
28 ***Ayangma*** *v Université De Moncton, Campus De Moncton,* 2019 CanLII 36107 (NB CA) at pp.C-94-107of the Application for Leave

conducted by the Applicant before the New Brunswick courts which proceedings included and resulted in one action and one application for judicial review taken against the employer which action and application resulted in seven (7) written decisions referred to above and one unreported decision involving the same parties.

[62] Simply put, there was nothing before the New Brunswick Court from which the Motions judge would declared of the Applicant "vexatious" and restrict his access to the Court in New Brunswick. Nor was there any shred of evidence capable of suggesting that he had abused the legal system in New Brunswick and elsewhere and no shred of evidence to support the Motions judge's bold assertion that he had been found vexatious in Prince Edward Island. This does not only tantamount to an abuse of power of judge, but also a sad day in the administration of justice.

[63] Furthermore, the mere fact that the judge 's impartiality had been challenged and rightly so, was not sufficient and did not support the declaration, nor did that fact alone give the right to abuse his powers as a judge and deny the Applicant's access to court. One thing is certain, the judge's declaration was both illegitimate and overboard when he stated:

[64] The was simply no justification in law to rely and/or based such a draconic and restrictive order on a citizen on a basis of previous decisions made by another court, in another jurisdiction which decisions have been reversed and vacated on appeal, see. ***Ayangma v. The Attorney General (P.E.I.)30,*** *2004 PESCAD 11 and* ***Ayangma v. Canada Health Infoway31****, 2017 PECA 13* or dismissed at the lower court level see ***Prince Edward Island v. Ayangma****32, 1999 CanLII 4116 (PESCTD* is inexcusable and cannot be ignored as it adds to the suggestion that the Motions judge was bias and/or that his overall conduct not only gave rise to a reasonable apprehension of bias, but also demonstrated a lack of impartiality..

> **"Mr. Ayangma is a vexatious litigant who abuses the legal system and administration of justice in New Brunswick and elsewhere, as the Supreme Court ofPrince Edward Island has already concluded."**

[65] All of this is evidence that the presiding judge not only had a mind closed in approaching the matters before him, but also that he crossed the line and abused his jurisdiction as a judge up to the point of making serious allegations against the Applicant and/or commenting negatively on such an important issue without first making his homework as a judge would, which homework if done, would have indicated to him or any other decision-makers that the decisions relied upon had been reversed and vacated on appeal, and consequently could therefore no longer be relied upon support or be used or served as the basis of finding him "vexatious litigant" and a person who abuses the legal system and the administration of justice in New Brunswick and elsewhere with nothing to back it up.

[66] The mere fact the declaration arose mostly from the two decisions the declaring judge made is very questionable as there was no other decisions to rely upon to for the prohibitory declaration finding the Applicant "vexatious litigant" who abuse the

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30 ***Ayangma v. The Attorney General (P.E.I.),*** *2004 PESCAD 11 at pp.C94-107*
31 ***Ayangma v. Canada Health Infoway,*** *2017 PECA 13 at pp.C108-122*
32 *Prince Edward Island v. Ayangma, 1999 CanLII 4116 (PESCTD. at pp.C23-131*

system in New Brunswick. As previously argued, prior to the judge's decision, there have been no single decision in that jurisdiction which had suggested any abuse of process as all proceeding had been conducted in the manner that required an appreciation of a lay litigant appearing before the Court.

[67] The Court of Appeal in Prince Edward had unanimously held in ***Ayangma*** supra, stated the following when it reversed and vacated the decision of the Motions judge which erroneously as here declared the Applicant "vexatious litigant" the Court stated the following at paras.59-61 of its judgment:

> [59] Subsection 61(1) is an extraordinary remedy. It is to be used when all other attempts to control the actions of a litigant have failed. The case law cited above provides some compelling examples of where existing court remedies failed. In spite of courts striking out pleadings, ordering costs to be paid, rendering decisions against a litigant, the same litigant would come back again and again litigating the same matter either using the excessive litigation to attempt to force a party to pay compensation even though it had won at trial and appeal (as in Chavali), or using the litigation as a means of intimidating others from making claims against them (as in Mishra). In the circumstances faced by those courts, the remedies existing in the normal rules - striking out, security for costs orders, etc. - would not stop the actions. One party was even prepared to, and did, lie to the Court (in Mishra).
>
> [60] No similar extraordinary circumstances can be found in the instant case. While the 2002 action appears to be an attempt to re-litigate and is a cause for concern, it is not sufficient in the circumstances here - even given that there are outstanding cost awards - to justify an order pursuant to s-s.61(1). There is no indication that, when a pleading has been struck, Ayangma has ignored the resulting order and refiled on the same basis. While he may appeal the decision, except for that one action previously noted, he appears to accept the decisions of the court.
>
> [61] While the Attorney General here argues that the order under s-s.61(1) does not bar litigation, it simply requires leave to commence or continue litigation, there is obviously a serious restriction placed on a person subject to such an order. Normally, an allegation that a proceeding is vexatious and should be barred must be proven by the party making the allegation. The same would be true for the party seeking security of costs - the onus would be upon that party to prove that such security is necessary. On the other hand, once an order issues under s-s.61(1), the onus shifts to the party subject to that order to prove that his proceedings are not vexatious or in any other way an abuse of process and to prove that there are reasonable grounds for the proceedings. This is a significant alteration to the normal procedure and as such is an extraordinary remedy. Set out in the Supreme Court Act, separate and apart from the rules, it provides a final and ultimate remedy where the normal rules have not and most likely will not work in the future to control a person who has persistently abused the court process for his or her own aims. Cases such as Chavali and Mishra exemplify the type of situation requiring such a remedy.

[68] The Applicant submits that though it was apparent that the Motions judge's goal was to bring an end to any and all litigations in furtherance of the Applicant's claims against the University of Moncton and its union, and anything or anyone associated with these organizations, and while doing, so may have been reasonable, in other circumstances, it is clear that the prohibitory order under the present situation was clearly overbroad.

[69] The Applicant submits that this exactly what the Alberta Court of Appeal in *R.O. v D.F33.*, 2016 ABCA 170 (CanLII) suggested at paras.37-40 of its judgment, drew the distinction between a "vexatious proceeding" and a "vexatious litigant" at para.38, allowed the appeal from the lower court decision which decision declared a litigant appearing before it "vexatious" in doing so, the Court of Appeal, holding as follows

> [37] It is apparent from the reasons that the case management judge's goal was to bring to an end any and all litigation in furtherance of the appellant's fixation with the respondent, his family and anything or anyone associated with him. Doing so was reasonable but in our view the order was overbroad.

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***R.O. v D.F.***, 2016 ABCA 170 (CanLII)33 *at pp.C132-139*

[38] There is a difference between vexatious proceedings and vexatious litigants: *644036 Alberta Ltd v Morbank Financial Inc*, 2014 ABQB 681 (CanLII) at paras 51-97, 26 Alta LR (6th) 153. In that case the trial judge concluded that the litigation was "clearly an example of vexatious litigation. The question that remains, however, is whether the person behind this litigation should also be declared a vexatious litigant." She found the litigant to be vexatious also on the basis that he had instituted numerous proceedings against various defendants.

[39] There was insufficient evidence before the case management judge (or before us) to support a finding that the appellant has a history of "persistently" engaging in any of the prohibited actions in subsection 23(2) against anyone other than the respondent: see generally *Pawlus v Pope*, 2004 ABCA 396 (CanLII), 357 AR 347. Although the appellant was involved in other litigation, she was the defendant in those proceedings (a bankruptcy and a landlord tenant dispute).

[40] In our view paragraph one of the vexatious litigant order should be set aside and we do so. We substitute the following: Any litigation or steps in litigation against the respondent and those associated with him, including his family (immediate and extended) and his employer shall require leave of the Court of Queen's Bench.

**Issue#3 Did the Court of Appeal misapply Rule 22 which rule deals with summary judgment by departing from the well-settled the general principles of law, including those principles of law that it itself had set out.**

[70] The Applicant submits that the Court of Appeal erred in law and committed a reversible error

a. *First* when it permitted the Motions judge's decision granting summary judgment in favour of the Respondent based on the limitation period, to stand, despite having clearly established that the Respondent had failed to comply with Rule 31.03, notwithstanding te the principle of law or general rule that that stands for the proposition that a motion for summary judgment should, as a general rule, be dismissed with costs if the moving party fails to comply with Rule 31.03. This is not what occurred here;

b. *Second*, when it also permitted the Motions judge's decision to stand based on the limitation period notwithstanding the general principle of law that stands for the proposition that "whenever a limitation provision is open to multiple reasonable interpretations, (as here), the one least inimical to the plaintiff must be favoured"

[71] The first general principle of law was set by the New Brunswick Court of Appeal in ***Whelton v. Mercier et al34***. 2004 NBCA 83. While the Court of Appeal indicated at para.18 of its judgment that the case at bar *"..was one of the exceptional cases in which the judge could grant summary judgment notwithstanding the Université's non-compliance"*, this was not borne by any solid grounds because the issue of limitation provision was open to multiple reasonable interpretations, which would have triggered the discoverability rule – that when the cause of action alleging the Charter breach, misrepresentations and abuse of authority actually occurred, and whether the limitation period as disclosed by the pleadings was open the multiple interpretations

[72] This was of course an issue was an issue requiring trial, which should not have been determined on a summary judgment motion as it was clear from the Statement of claim that, the facts as pleaded disclosed several possible limitation periods. See Statement of Claim35 at paras.42, 46, 47, 50, 56, 68..10; 68.11, 68.12 at pp.8-33 This exactly what the New Brunswick Court of Appeal held in ***Dupuis v. City of Moncton36*** . 2005 NBCA 47 at para.20 when it dealt with the limitation of action defence as here:

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*34 **Whelton v, Mercier et al**. 2004 NBCA 83, 277 N.B.R (2d) 25 at pp.C180-204*

*36**Dupuis v. City of Moncton** . 2005 NBCA 47 at para.20 at pp.C205-215*

Limitation of Action Defence

[20] Whenever a limitation provision is open to multiple reasonable interpretations, the one least inimical to the plaintiff must be favoured: para. 173 *Kenmont Management Inc.* v. *Saint John Port Authority et al.* (2002), 2002 NBCA 11 (CanLII), 248 N.B.R. (2d) 1 (C.A.). However, in this case the interpretation that the motion judge gave to the limitation provision is the only interpretation that it can reasonably bear.

Overall Conclusions:

[73] The Applicant submits that because the listening of the audio recordings was both necessary and avoidable, to ascertain the comments made by the judge, it follows that the Court of Appeal erred in law and committed a reversible error in allowing the Motions judge decision on both the grounds of bias, reasonable apprehension of bias and lack of impartiality. In particular as here, where there was no written decision on the recusal motion or a transcript of any of the impugned proceedings available to the Court, to permit it properly addressed the serious allegations of bias-reasonable apprehension of bias and lack of impartiality levelled against the judge, and not listening to them rendered their job practically impossible as only the listening of the recording could shed some light on the both the judge's one of voice and the sarcasms around the Motions judge's comments. The errors committed by the Courts below are not only substantive ones, but they also vitiate all the proceedings before the judge as it obvious that jjudge was not completely *"disinterested"* in the outcome of the motions and application.

[74] Overall, this is not only a case that raises an issue of public importance –the lack of impartiality and neutrality of judge and abuse of process, but also a case that shows that various inconsistencies of the Court of Appeal's application of the law and the well-settled legal principles or the general rules including those established by the Court whose decision is being challenged. All of this therefore suggests that the Motions judge erred in law and failed to apply the correct legal test related to establishing bias, reasonable apprehension of bias and lack of impartiality and as well as the test declaring someone vexatious litigant, and so did the Court of Appeal in upholding the decisions Motions judge's findings, including declaring the Applicant vexatious based on both insufficient evidence and decisions which had been reversed and vacated on appeal. Had the Court of Appeal exercised its appellate review powers delicately and/or done its homework as a reviewing judge and listened to the audio recording of the impugned proceedings as it promised to do during the hearing of the appeal, it would have come to a different conclusion. It therefore follows that his overall conduct, viewed through the appropriate lens, will raise a reasonable apprehension of bias, that he abused his discretion.

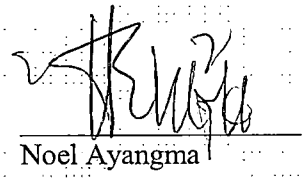
## PART IV
## SUBMISSIONS ON COSTS

[75] The Applicant seeks costs in this Application.

## PART V
## ORDER SOUGHT

[74] The Applicant asks that leave be granted so as to avoid any miscarriage of justice and restore trust in the administration of justice.

**ALL OF THIS IS RESPECTFULLY SUBMITTED** this 25th day of November 2019.



Noel Ayangma

**PART VI**

**AUTHORITIES**

## Authorities


1. *Ayangma v Université de Moncton, 2019 NBQB 30,* ..... *1-8*
2. *Ayangma v University of Moncton, 2019 NBQB 31,* ..... *9-17*
3. *Ayangma v. Université de Moncton, Moncton Campus, 2019 NBCA 14* ..... *18-44*
4. *Ayangma v. Université de Moncton, Campus de Moncton, 2019 NBCA 72* ..... *45-66*
5. *Ayangma v. Université de Moncton, Moncton Campus et al., 2019 NBCA 73* ..... *67-85*
6. *Ayangma v Université De Moncton, Campus De Moncton, 2019 CanLII 36107 (NB CA)* ..... *86-93*
7. ***Ayangma v. The Attorney General (P.E.I.),*** *2004 PESCAD 11* ..... *94-107*
8. ***Ayangma v. Canada Health Infoway,*** *2017 PECA 13* ..... 108-122
9. *Prince Edward Island v. Ayangma, 1999 CanLII 4116 (PESCTD* ..... 123-131
10. *R.O. v D.F.*, 2016 ABCA 170 (CanLII) ..... 132-139
11. *R. v. Brouillard*, 1985 CanLII 56 (SCC), [1985] 1 S.C.R. 39 at paragraph 25 ..... 140-152
12. *Guermache v. Minister of Citizenship and Immigration, 2004 FC 870 (CanLII)* ..... *153-609*
13. *Quiroz Mendez v. the Minister of Citizenship and Immigration 2011 FC at para.81* ..... *161-175*
14. *Farkas v. Canada (Minister of Citizenship and Immigration)*, [2001] F.C.J. No. 356 paragraph 8 (F.C.T.D.) (QL), 2001 FTC 190 (F.T.C.D ..... 176-179
15. *Whelton v, Mercier et al. 2004 NBCA 83, 277 N.B.R (2d) 251* ..... 180-204
16. *Dupuis v. City of Moncton . 2005 NBCA 47 at para.20* ..... *205-2015*

**RELEVANT DOCUMENTS REFFERED TO IN THE APPLICATION FOR LEAVE TO APPEAL WHICH DOCUMENTS WERE BEFORE THE COURTS BELOW**

*Doc.*


| | | |
|---|---|---|
| *1.* | *Copy of the Applicant's Doctorate Degree in Business Administration and the Official related transcript,,,* | *1* |
| *2.* | *Copy of the Applicant's Master's Degree in Business Administration and the Official related transcript……* | *2* |
| *3.* | *Excerpt from the Appeal Book Posting of full-time position of Human Resource Management ……* | *3-4* |
| *4.* | *Excerpt from the Appeal Book Profile of the successful candidate showing her Bachelor in Psychology ……* | *5-9* |
| *5.* | *Excerpt from the Appeal Book - Minutes of the selection process dated February 7, 2014……* | *10-11* |
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| *7.* | *Excerpt from the Appeal Book Grant of $5000 awarded by the University to Ms. Maillet ……* | *21-23* |
| *8.* | *Excerpt from the Appeal Book -Statement of Claim ……* | *24-49* |
| *9.* | *Excerpt from the Appeal Book Statement of defence ……* | *50-53* |
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| *14.* | *Excerpt from the Appeal Book Respondent's motion for summary judgment dated September 14, 2018……* | *87-93* |
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# D

**PART VI**

**AUTHORITIES**

## Authorities


1. *Ayangma v Université de Moncton, 2019 NBQB 30,* ..... *1-8*
2. *Ayangma v University of Moncton, 2019 NBQB 31,* ..... *9-17*
3. *Ayangma v. Université de Moncton, Moncton Campus, 2019 NBCA 14* ..... *18-44*
4. *Ayangma v. Université de Moncton, Campus de Moncton, 2019 NBCA 72* ..... *45-66*
5. *Ayangma v. Université de Moncton, Moncton Campus et al., 2019 NBCA 73* ..... *67-85*
6. *Ayangma v Université De Moncton, Campus De Moncton, 2019 CanLII 36107 (NB CA)* ..... *86-93*
7. ***Ayangma v. The Attorney General (P.E.I.),*** *2004 PESCAD 11* ..... *94-107*
8. ***Ayangma v. Canada Health Infoway,*** *2017 PECA 13* ..... 108-122
9. *Prince Edward Island v. Ayangma, 1999 CanLII 4116 (PESCTD* ..... 123-131
10. *R.O. v D.F.*, 2016 ABCA 170 (CanLII) ..... 132-139
11. *R. v. Brouillard*, 1985 CanLII 56 (SCC), [1985] 1 S.C.R. 39 at paragraph 25 ..... 140-152
12. *Guermache v. Minister of Citizenship and Immigration, 2004 FC 870 (CanLII)* ..... *153-609*
13. *Quiroz Mendez v. the Minister of Citizenship and Immigration 2011 FC at para.81* ..... *161-175*
14. *Farkas v. Canada (Minister of Citizenship and Immigration)*, [2001] F.C.J. No. 356 paragraph 8 (F.C.T.D.) (QL), 2001 FTC 190 (F.T.C.D. ..... 176-179
15. *Whelton v, Mercier et al. 2004 NBCA 83, 277 N.B.R (2d) 251* ..... 180-204
16. *Dupuis v. City of Moncton . 2005 NBCA 47 at para.20* ..... *205-2015*

CanLII

# Ayangma v Université de Moncton, 2019 NBQB 30 (CanLII)

Date: 2019-02-13

File number: MC-386-2017

Citation: Ayangma v Université de Moncton, 2019 NBQB 30 (CanLII), <http://canlii.ca/t/hxx8w>, retrieved on 2019-11-21

IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK
TRIAL DIVISION
JUDICIAL DISTRICT OF MONCTON

**2019 NBQB 030**

***Date: 13-02-2019*** ***MC-386-2017***

**BETWEEN:** **NOËL AMBADIANG AYANGMA,**

Plaintiff,

- and -

**UNIVERSITÉ DE MONCTON, MONCTON CAMPUS,**

Defendant.

**DECISION**

BEFORE: Mr. Justice Jean-Paul Ouellette

AT: Moncton, New Brunswick

DATE OF HEARING: December 17, 2018

DATE OF DECISION: February 13, 2019

APPEARANCES: Noël Ayangma, on his own behalf

Sacha D. Morisset, for the Université de Moncton

**[TRANSLATION]**
**OUELLETTE, J.**

Introduction

[1] Noël Ayangma filed a Notice of Action with Statement of Claim Attached on May 29, 2017.

[2] The Université de Moncton filed a motion seeking to have the Statement of Claim struck out on the grounds that it is frivolous and vexatious, it discloses no cause of action, the Court does not have jurisdiction to try the action, or it raises no cause of action.

[3] In addition, the Université seeks an order prohibiting Noël Ayangma from commencing any further proceeding in this Court except with leave of a judge of the Court of Queen's Bench pursuant to Rule 76.01 of the *Rules of Court* of New Brunswick.

[4] Before the Université's motion was filed, Mr. Ayangma had filed a motion seeking from the Université a signed affidavit of documents as well as a more complete affidavit of documents than the draft already received.

Factual Background

[5] Mr. Ayangma was employed by the Université as a lecturer from 2010 to August 31, 2018. He was a lecturer, unionized employee and member of a bargaining unit. The Université permanently terminated the employer-employee relationship after suspending Mr. Ayangma with pay in January 2018 so that an investigation could be conducted. This suspension and his dismissal are the subject of numerous grievances Mr. Ayangma has filed under the collective agreement between the Université and the Association des Bibliothécaires, Professeurs et Professeures de l'Université de Moncton, of which Mr. Ayangma is part of Unité II.

[6] The subject matter of this action is unconnected with the fact of Mr. Ayangma's dismissal, but has to do instead with his application for another faculty position, which was filled by another incumbent on July 1, 2014. The position in question had been left vacant following a professor's departure in June 2013. It was filled by means of a one-year temporary contract and then a regular contract with the potential to lead to a permanent position. Mr. Ayangma had not been selected for either contract.

[7] On March 3, 2014, Mr. Ayangma was informed that his application had not been selected at the departmental stage and after following the steps to hire a qualified candidate, the position was filled on July 1, 2014.

[8] On May 12, 2015, Mr. Ayangma challenged the Université's decisions by filing grievances claiming abuse of authority, intimidation, lack of professional ethics, libel, and failure to provide a workplace free from any form of harassment and discrimination.

[9] On March 27, 2015, Mr. Ayangma was informed that the Université dismissed his grievance and the union withdrew its own.

[10] On July 6, 2015, a complaint was filed with the Human Rights Commission in which Mr. Ayangma alleges discrimination in the awarding of the temporary contract and permanent position. On December 22, 2016, the Commission issued a report on the extension of the deadline for filing a complaint and a summary report of dismissal recommending that the Commission dismiss not only Mr. Ayangma's application for an extension of the deadline, but also his complaint on the merits. On May 2, 2017, the Commission dismissed the entire complaint.

[11] On May 29, 2017, Mr. Ayangma served an application for judicial review challenging the Commission's decision to dismiss his complaint, and a Notice of Action with Statement of Claim Attached in this proceeding regarding the decision not to select him for the above-mentioned faculty position.

[12] The application to the Court of Queen's Bench was dismissed on February 14, 2018, and the Court of Appeal upheld this decision issued this past February 7.

[13] The Université submits that this action is statute barred under the *Limitation of Actions Act*, that the Statement of Claim is frivolous, vexatious and an abuse of the process of the court, and that it should be struck out as it discloses no cause of action. Finally, the Université applies for an order prohibiting Mr. Ayangma from commencing any further proceeding without leave of the Court. The Court will deal with the latter issue in the second part of its decision.

[14] First and foremost, it is important to deal with the validity of the Statement of Claim, although the Court did hear Mr. Ayangma's motion on the affidavit of documents, at his insistence. For the reasons that follow, this motion has not been determined.

Issue

*[15]* In the Court's view, the only issue to be determined with respect to the Statement of Claim is whether the action is statute barred under the *Limitation of Actions Act.* Also, is the Court justified in making a vexatious litigant order under Rule 76.1.02?

Analysis and Disposition

**Is the action statute barred under the *Limitation of Actions Act*?**

[16] As the affidavit evidence reveals, on March 3, 2014, Mr. Ayangma was informed that his application had been rejected and on May 12, 2015, he filed an initial grievance challenging the Université's decisions with respect to awarding the position. There is no question that Mr. Ayangma knew no later than May 12, 2015, that the position had been filled on July 1, 2014.

[17] The *Limitation of Actions Act* provides, at s. 5:

> **General limitation periods**
>
> **5(1) Unless otherwise provided in this Act, no claim shall be brought after the earlier of**
>
> **(a) two years from the day on which the claim is discovered, and**
>
> **(b) fifteen years from the day on which the act or omission on which the claim is based occurred.**
>
> **5(2) A claim is discovered on the day on which the claimant first knew or ought reasonably to have known**
>
> **(a) that the injury, loss or damage had occurred,**
>
> **(b) that the injury, loss or damage was caused by or contributed to by an act or omission, and**
>
> **(c) that the act or omission was that of the defendant.**

[18] The Notice of Action with Statement of Claim Attached was filed on May 29, 2017, when the two-year period had already expired.

[19] Mr. Ayangma contended that the limitation period was meant to run from the date on which the Human Rights Commission issued its decision and to last six years since he raised a *Charter*

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violation in this case. Mr. Ayangma has made the same arguments before, as reported in a decision of the Prince Edward Island Court of Appeal in *Ayangma v. Canada Health Infoway* 2017 PECA 13 (CanLII). The Court of Appeal writes:

> **53 The discoverability rule was stated in Kamloops (City) v. Nielsen,** 1984 CanLII 21 (SCC), **[1984] 2 S.C.R. 2, pp.36-41, and was applied in Central Trust Co. v. Rafuse,** 1986 CanLII 29 (SCC), **[1986] 2 S.C.R. 147, at para.77, and by this court in Kelly, supra, at para.21. A cause of action arises for the purpose of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence.**
>
> **54 Mr. Ayangma makes two submissions. First, he argues the discoverability rule should extend commencement of the limitation period to the date of the conclusion of all human rights panel and court proceedings in relation to that complaint. He relies upon the Court of Appeal direction in Ayangma v. Prince Edward Island Eastern School Board, 2000 PESCAD 12 (CanLII). In that case the appellant simultaneously filed complaints with the Human Rights Commission and commenced on action in court in relation to the same matters. The Court held that the (Actions should not proceed to trial ..." until the complaints were dealt with by the Human Rights Commission.**
>
> **55 The appellant has not correctly interpreted and applied that decision. It does not stand for the proposition that such actions do not need to be commenced before the expiry of the limitation period or that the limitation period for such actions does not begin until the complaint processes ended. This decision does not support the appellant's argument and does not relieve the appellant from his legal obligation to file his statement of claim within the time requirement prescribed by the Statute of Limitations.**
>
> **56 The case at bar is distinguishable. Mr. Ayangma did not file his statement of claim until July 21, 2015 after the matters had been fully dealt with by the Human Rights Panel. The limitation period had already expired when he filed his statement of claim.**

[20] The same principle applies in this case and the two-year limitation period is imperative.

[21] With respect to the six-year limitation period asserted by Mr. Ayangma, having sought a remedy under the *Charter*, it is clear that claims brought under the *Charter* are generally subject to provincial limitation periods of general application which, in this case, is two years. (See: *Coffey v. Fraser Valley (Regional District)*, 2018 BCSC 959 (CanLII))

[22] Having filed his action after the determined period, the action is statute barred.

[23] The Court is prepared to grant summary judgment in favour of the Université under Rule 22.01 of the *Rules of Court* as the action raises no genuine issue and is without grounds. The action is dismissed and there is no need to deal with the other issues raised in the motion except for the following.

**Is the Court justified in making a vexatious litigant order under Rule 70.1 of the *Rules of Court*?**

[24] The Université seeks an order prohibiting Mr. Ayangma from commencing or continuing any further proceeding without leave. Rule 76.1 of the *Rules of Court* provides as follows:

> **76.1.02 Order made by a judge of the Court of Queen's Bench**

**(1) Where a judge of the Court of Queen's Bench is satisfied, on application, that a person has persistently and without reasonable grounds commenced vexatious proceedings in the Court of Queen's Bench or the Small Claims Court or has persistently and without reasonable grounds conducted a proceeding in a vexatious manner in the Court of Queen's Bench or the Small Claims Court, the judge may make an order containing either or both of the following prohibitions:**

**a) prohibiting the person from commencing any further proceeding in the Court of Queen's Bench or the Small Claims Court except with leave of a judge of the Court of Queen's Bench; and**

**b) prohibiting the person from continuing a proceeding previously commenced in the Court of Queen's Bench or the Small Claims Court except with leave of a judge of the Court of Queen's Bench.**

[25] This rule of court is a tool that allows the courts to restrain a plaintiff who repeatedly commences vexatious proceedings. In *Brooks v. Fredericton City Police Force et al*, 2017 NBQB 83 (CanLII), Morrison, J. had before him a vexatious litigant. In that case, Ms. Brooks maintained that the Crown prosecutor had launched a malicious prosecution against her. When the prosecution ended, Ms. Brooks repeatedly commenced proceedings at every level of court in relation to this case of prosecution by the Crown.

[26] Referring to Ms. Brooks, Morrison, J. wrote:

**The courts have to remain open to difficult, obstreperous, annoying, unreasonable, foolish, irrational, wasteful, and mean-spirited people. They are not restricted to internet blogs and postings on news websites. To some extent the legal system can become an open mike for the angry. But when a person crosses over into using multiple legal processes themselves as a cudgel to wreak vengeance on an opponent, the court is obliged to restrain them.**

**[38] If the plaintiff is permitted unrestricted access to the courts I have little doubt that the defendants and others whom she perceives have wronged her will be subjected to continuing legal harassment by the plaintiff and the expenditure of further costs, time and energy. Furthermore, I believe that terminating this litigation is also in the best interests of the plaintiff. In her submissions to the Court Ms. Brooks advised that she has mental health issues and that this litigation has been stressful for her. Ms. Brooks is intelligent, articulate and resourceful and has been respectful in her appearances before me. Prohibiting the plaintiff from further litigating these issues will allow her to focus her talents and energy on things that may be of benefit to her instead of squandering them on a hopeless cause. In the circumstances, I am obliged to restrain the plaintiff. Accordingly, the motion by the Police Defendants for an order pursuant to Rule 76.1.02 is granted. The motion seeks relief only with respect to the present proceeding under 76.1.02 (1) (b). However, when an application is brought and the Court is satisfied that the person is a persistent vexatious litigant the Rule gives the Court the authority to make an order under either or both of Rules 76.1.02 (a) and (b). Accordingly, it is hereby ordered that:**

**a) the plaintiff is prohibited from commencing any further proceeding in the Court of Queen's Bench or the Small Claims Court except with leave of a judge of the Court of Queen's Bench; and**

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**b) the plaintiff is prohibited from continuing a proceeding previously commenced in the Court of Queen's Bench or the Small Claims Court, including the present proceeding, except with leave of a judge of the Court of Queen's Bench.**

[27] Mr. Ayangma is involved in more than 100 reported decisions found in the Canadian Legal Information Institute (CanLII) database. There are $156,000.00 in unpaid judgments resulting from legal proceedings, a majority of which represents costs awarded against him.

[28] In this case, Mr. Ayangma filed this action, while in another matter related to his dismissal there is an application for judicial review, which has been dismissed, dealing with three of the 11 filed grievances connected with the same factual situation.

[29] In addition, Mr. Ayangma filed another action based on the same facts as the above-mentioned application for judicial review, this time against the Université, the Vice-President, Administration and Human Resources, the author of his letter of dismissal, the Dean of the Faculty of Business Administration and the Department Head. In this action, he raises a breach of his Charter right to pursue the gaining of a livelihood in any province, libel, fraud and/or negligent misrepresentation, tortuous conspiracy, reprisals and intimidation/harassment, abuse of authority and abuse of process resulting in his dismissal, bad faith breach or breach of the duty of honest performance in their individual contractual duties, breach of the collective agreement and improper conduct having led to a flawed investigation and constructive disciplinary suspension, and so on.

[30] In *Bossé v. Immeubles Robo Ltée*, 2018 CanLII 71340 (NB CA) [Bossé], Baird, J.A. of the Court of Appeal cites *Brooks* and lists the factors considered in a vexatious litigant motion:

> **[34] Primary characteristics which anchor a declaration of vexatious litigant are summarized here as:**
>
> **i) a propensity to re-litigate matters that have already been determined;**
>
> **ii) the initiation of frivolous actions or motion;**
>
> **iii) the making of unsubstantiated allegations of impropriety against the opposite party, legal counsel, the court, the administrative officials;**
>
> **iv) the refusal to abide by rules and orders of the court;**
>
> **v) the use of scandalous language in pleadings before the court;**
>
> **vi) the failure or refusal to pay costs in earlier proceedings and the failure to pursue litigation on a timely basis.**
>
> **See *Tonner v. Lowry*, 2016 FC 230 (CanLII); *Lawyer's Professional Indemnity Co. v. Coote*, 2013 FC 643 (CanLII), at para. 25.**
>
> **[35] The above does not constitute an exhaustive list, nor is it necessary that all of the above factors be present. The conclusion whether a litigant is vexatious is determined by an objective standard. Many, if not all, of the above are evident in the multiplicity of proceedings launched by Bossé and ROBO.**

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**[36] In recent years there has been a shift away from the litigant rights approach to litigation. In *Hryniak v. Mauldin*, 2014 SCC 7 (CanLII), [2014] 1 S.C.R. 87, Karakatsanis J. concludes: "the best forum for resolving a dispute is not always that with the most painstaking procedure" (para. 28). She adds: "...The balance between procedure and access struck by our justice system must come to reflect modern reality and recognize that new models of adjudication can be fair and just" (para. 2).**

**[37] As Verville J. writes in *Hok v. Alberta*, 2016 ABQB 651 (CanLII), [2016] A.J. No. 1207 (QL): "The *Hryniak* "culture shift" applies to control of persons who abuse court processes..." (para. 29) (see *Hok v. Alberta*, [2017] A.J. No. 152 (C.A.) (QL), *Hok v. Alberta*, [2017] S.C.C.A. No. 222, leave denied). I agree.**

**[38] In *Wong v. Giannacopoulos*, 2011 ABCA 277 (CanLII), [2011] A.J. No. 1115, Slatter J.A. concludes:**

**The applicant argues that the vexatious litigant order denies her the basic right of a Canadian citizen to commence a legal action. That is not the true effect of the order. The applicant can still commence any legitimate action; she is only subject to a screening procedure to make sure that any action she proposes is properly founded in fact and law, and will be diligently prosecuted. The vexatious litigant order does not substantially prejudice the applicant. [para. 8]**

[31] It goes without saying that this case is very similar to the facts and actions in the cases of Ms. Brooks and Mr. Bossé. The Université has found itself more often than not a party to the many actions and applications filed by Mr. Ayangma, actions and applications that are frivolous and vexatious. He uses scandalous language in all the pleadings and before the Court. Mr. Ayangma never hesitates to accuse opposing counsel of all sorts of conspiracies, dishonesty and scheming.

[32] As the Court of Appeal suggests, it is incumbent upon us to restrain people who abuse the process of the court by making a prohibition order after declaring the litigant vexatious without denying the litigant the basic right of any citizen to commence a legal action. Mr. Ayangma will still be able to commence or continue any legitimate action, but subject to a screening procedure to make sure that the action or application he proposes is properly founded in fact and law, and will be diligently prosecuted.

[33] The Court has no difficulty finding that Mr. Ayangma is a vexatious litigant who abuses the legal system and administration of justice in New Brunswick and elsewhere, as the Supreme Court of Prince Edward Island has already concluded.

[34] There is no doubt in this case that such a declaration serves the public interest in terms of access to justice. The Court has limited resources and must carry out its duties in a manner that is fair to all litigants. Mr. Ayangma is abusing the process of the court to the detriment of the other parties to the dispute, and of the justice system as a whole.

[35] The Court finds that Mr. Ayangma is a vexatious litigant and he is prohibited from commencing any further proceeding in the Court of Queen's Bench of New Brunswick or the Small Claims Court except with leave of a judge of this Court. It goes without saying that Mr. Ayangma will have to obtain leave to continue any action already filed, as a stay of proceedings is hereby ordered in all such matters.

[36] Mr. Ayangma is ordered to pay the Université the all-inclusive amount of $5,000.00 for the costs of this proceeding.

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Decision rendered this 13th day of February 2019 at Moncton, New Brunswick.

The Honourable Mr. Justice JEAN-PAUL OUELLETTE
Court of Queen's Bench of New Brunswick
Judicial District of Moncton

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CanLII

# Ayangma v University of Moncton, 2019 NBQB 31 (CanLII)

Date: 2019-02-13

File number: MM-78-2018

Citation: Ayangma v University of Moncton, 2019 NBQB 31 (CanLII), <http://canlii.ca/t/hxx8z>, retrieved on 2019-11-21

IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK
TRIAL DIVISION
JUDICIAL DISTRICT OF MONCTON

**2019 NBQB 031**

***Date:*** ***13/02/2019 MM-78-2018***

**BETWEEN:** **NOEL AYANGMA,**

**Applicant,**

**- and -**

**UNIVERSITY OF MONCTON, MONCTON CAMPUS**

**ASSOCIATION DES PROFESSEURS ET BIBLIOTHECAIRES OF THE UNIVERSITY OF MONCTON, MONCTON CAMPUS (ABPPUM),**

**Respondents.**

## DECISION

BEFORE: Mr. Justice Jean-Paul Ouellette

AT: Moncton, New Brunswick

DATES OF HEARING: December 17 & 18, 2018

DATE OF DECISION: February 13, 2019

APPEARANCES: Noël Ayangma, on his own behalf

Sachat Morisset, for the Université de Moncton

Joël Michaud, for the Association des professeurs et bibliothécaires de l'Université de Moncton, Moncton Campus (ABPPUM)

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[TRANSLATION]

OUELLETTE, J.

Introduction

[1] This application filed by Noël Ayangma is for the judicial review of a decision by arbitrator Cedric Haines, Q.C., to dismiss a grievance without dealing with the substantive issue. In this case, Mr. Ayangma refused to adduce his doctoral dissertation at the hearing that was to be held before the arbitrator on May 10, 2018, despite having been asked repeatedly to do so, ultimately via a summons to witness. Still refusing to do so after the arbitrator had allowed time and reiterated his demand that his order be obeyed, the grievance was dismissed.

[2] After considering the totality of the evidence and hearing the parties, the application should be dismissed for the reasons that follow.

Factual Background

[3] The Université de Moncton and the Association des Professeurs et Bibliothécaires de l'Université de Moncton (ABPPUM) are bound by a collective agreement of which Mr. Ayangma is a member of the bargaining unit.

[4] On January 5, 2018, while Mr. Ayangma was an employee of the Université de Moncton and a member of the Association des Professeurs et Bibliothécaires de l'Université de Moncton, he was suspended with pay as a [TRANSLATION] "part-time contract teaching professor also known as a lecturer" for the time required to make an application. The grounds invoked by the Université were Mr. Ayangma's failure to file the students' records for the 2017 spring/summer term, which had to be filed no later than September 15, 2017.

[5] In the same missive, the Université had received a series of complaints raising concerns about the quality of Mr. Ayangma's teaching. In addition, Mr. Ayangma was informed that he would no longer be paid his doctoral bonus because he had failed to produce a copy of his doctoral dissertation, which he had been asked several times to do.

[6] In this regard, Mr. Ayangma had previously provided the Université with a summary of his doctoral dissertation, which the Université had noted was similar to someone else's doctoral dissertation published online in 2007 with the same appendices attached to the documents provided by Mr. Ayangma, which, according to the Université, constituted misrepresentations. Unable to clarify the situation due to Mr. Ayangma's refusal to submit a copy of his doctoral dissertation to the Université despite its repeated requests, the Université found it necessary to withdraw the doctoral bonus at the same time as it issued his suspension.

On January 12, 2018, Mr. Ayangma filed three grievances. The first grievance reads as follows:

> [TRANSLATION]
>
> **1. The suspension imposed on the applicant in order to conduct an orderly investigation based on allegations already discussed and resolved with the dean is unfair, in addition to being a pretext, because it constitutes a constructive suspension arising from:**
>
> **2.1 a manifest abuse of authority leading to disciplinary action without just and sufficient cause, contrary to article 8.02.03 of the collective agreement;**
>
> **2.2 a lack of professional ethics on the part of the dean, Sébastien Deschenes and Gilles Roy, who attended the meeting on November 23, 2017, at which the grounds**

**set out in the suspension letter dated January 5, 2017, were discussed and resolved informally, contrary to articles 5.01, 5.02 and 5.04, 5.05 and 5.06 of the collective agreement;**

**2.3 a breach of the respondent's general duty of honesty, applicable to contractual performance;**

**2.4 reprisals against the grievor for having dared expose the employer's dubious and discriminatory hiring practices since 2013, contrary to articles 5.01 and 5.02 of the collective agreement.**

The second grievance reads as follows:

[TRANSLATION]
**Nature of grievance 2: Dual penalties and abuse of authority**

**(i) By withdrawing the contracts for the courses in the 2018 winter term offered to the grievor, which had been granted to him based on his doctorate; and**

**(ii) By withdrawing his doctoral bonus at the same time on the ground that he refused to provide a copy of his doctoral dissertation, notwithstanding the total lack of relevance and the repeated offers to consult the doctoral dissertation.**

**[Emphasis added]**

**2.2 The breach of articles 8.05; 8.06; 8.07;**

The following can be read in the third grievance:

[TRANSLATION]
**Nature of grievance 3: Abuse of authority - Refusal to afford him natural justice or the right to be heard before being found guilty - Manifest lack of professional ethics - Psychological harassment - Breach of the general duty of honesty applicable to contractual performance**

**2.1 Abuse of authority arising from cavalier treatment, based on erroneous and false information, by Vivi Koffi (department head) and Sébastien Deschenes (dean of the Faculty of Business Administration) of the assessment records for the courses taught by the grievor for the 2017 Spring/Summer term;**

**2.2 Bad faith and manifest lack of professional ethics on the part of Vivi Koffi (department head) and Sébastien Deschenes (dean of the Faculty of Business Administration) arising from (i) the unfair and cavalier treatment of the course records provided by the grievor during the 2017 Spring/Summer term; and (ii) the provision of completely erroneous and false information to the Vice-President of Human Resources in order to force the imposition of disciplinary action;**

**2.3 Persistent harassment and breach of the general duty of honesty applicable to contractual performance by the employer based on unsubstantiated and false allegations that the grievor failed to file his records for the 2017 Spring/Summer term by the deadline of September 15, 2017, although his records had actually been filed since 111:50 [*sic*] in the morning on June 30, 2017.**

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[10] According to the Association, these are not actually Mr. Ayangma's first three grievances, but rather grievances 7, 8 and 9, to which a tenth and eleventh have been added. Only the three indicated in the previous paragraphs are of concern to the Court.

[11] In his application, Mr. Ayangma contends that the arbitrator did not have jurisdiction, having failed to determine the nature of the penalty, whether "administrative" or "disciplinary". In addition, he seeks a declaration that independent intervenor status was not obtained, arguing that it was clear the Association was taking a position adverse to his interests and that their submissions were flawed from the outset. Finally, Mr. Ayangma seeks to set aside the arbitrator's decision to order the production of his doctoral dissertation without having first determined its relevance and necessity.

[12] In support of his application, Mr. Ayangma submitted, in his affidavit, the letter from the Université dated January 5, 2018, regarding the suspension to which he refers in this case, and the three grievances referred to an arbitrator at his request and at the request of the Association after the Université dismissed each of them, arguing that it had never breached any provisions of the collective agreement. Further documents are appended to the affidavit, including the Notice of Hearing and the Summons to Witness indicating to bring his doctoral dissertation to the hearing.

[13] Also appended to that affidavit, Mr. Ayangma adds the letter from counsel for the Association representing Mr. Ayangma informing him of their suggestion that he provide his doctoral dissertation to avoid any delay or adjournment of the hearing. It had been agreed with Mr. Ayangma that the Association proceed in accordance with s. 55.01 of the *Industrial Relations Act* to expedite the process and quickly get a hearing with an arbitrator.

[14] Prior to the hearing scheduled for May 10, 2018, the employer had requested a copy of Mr. Ayangma's doctoral dissertation in order to prepare for the hearing, submitting, after consulting and reviewing the grievances, that it appeared to them to be necessary that they be provided with it. Counsel for the Association informed Mr. Ayangma of the request, encouraging him to do so willingly.

[15] Following this request, Mr. Ayangma, in his letter dated May 2, 2018, appended to his affidavit, told his counsel that his position had not changed given that the Université had not established its relevance. Mr. Ayangma pointed out that his administrative suspension was not based on his refusal to provide his doctoral dissertation, but on other grounds and although the Université had "snuck" in the refusal to provide it with a copy of the dissertation in order to withdraw his doctoral bonus, the dissertation [TRANSLATION] "is not relevant to the resolution of the main dispute before the arbitrator, which is the administrative suspension and whether it constitutes a 'constructive disciplinary suspension'". Mr. Ayangma continues in this vein and it is clear in his letter that he will not produce his doctoral dissertation, stressing that it is a fishing expedition.

[16] Mr. Ayangma also adduced in evidence the affidavit of Aritho Amfoubalela, a friend who supports him, indicating that he is also at odds with the Université. Mr. Amfoubalela states that he is aware of the request to produce a copy of Mr. Ayangma's doctoral dissertation, that Mr. Ayangma will not produce it unless its relevance is established and that he will challenge the arbitrator's jurisdiction to hear the grievances that are of an administrative and non-disciplinary nature.

[17] In addition, Mr. Amfoubalela states that he attended the hearing on May 10, 2018, and recorded it for future reference even after the Association had expressed its disagreement and the arbitrator had ordered him to stop. He indicates that Mr. Ayangma raised the issue of the arbitrator's jurisdiction and the relevance of producing the doctoral dissertation, going against the Association given its refusal to do so on the pretext that Mr. Ayangma did not have standing and that the arbitrator was hearing only the Université and the Association.

[18] Mr. Amfoubalela submits that Mr. Ayangma was allowed to speak and to raise the issue of jurisdiction based on an administrative suspension versus a disciplinary suspension. Having heard

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the Association, which objected to Mr. Ayangma being a party to the hearing, and their support of his obligation to provide his doctoral dissertation, Mr. Ayangma contends that he could be heard as a party since the Association was taking a position contrary to his own.

[19] As Mr. Ayangma submitted at the hearing of this application and as reported in Mr. Amfoubalela's affidavit, Mr. Ayangma asserted that the arbitrator did not have jurisdiction to hear grievances of an administrative nature and that unless the relevance of producing his dissertation was established, he was not going to produce it.

[20] Under the circumstances, counsel for the Association submitted to the arbitrator that he could find Mr. Ayangma in contempt on the grounds of his refusal. The arbitrator decided otherwise, opting instead to give Mr. Ayangma the option and opportunity to provide the requested document within five days, failing which grievance three would be dismissed without further notice or additional order. To date, Mr. Ayangma persists in his position that the arbitrator did not have jurisdiction and the doctoral dissertation is irrelevant. He therefore has no intention of producing it.

[21] After this application was filed, the Université raised the issue as to whether Mr. Ayangma had standing. The Association, which was not a party to Mr. Ayangma's original application, was added as a party on consent of all the parties in order to make known its position on and duty to Mr. Ayangma.

Issue

[22] The only issue to be determined is whether Mr. Ayangma has the requisite standing to bring the application for judicial review.

Analysis and Disposition

[23] In an effort to identify and/or understand Mr. Ayangma's position, firstly, he wants his grievances to proceed to arbitration, but submits that the arbitrator should start by establishing his jurisdiction because the law is clear that the arbitrator may not hear a grievance dealing with an administrative rather than a disciplinary decision. Next, Mr. Ayangma argues that since the relevance of submitting his doctoral dissertation had not been established, the arbitrator could not issue a summons to witness and compel its production.

[24] Finally, as the Association has not acceded to his requests to demand or challenge the arbitrator's jurisdiction, or acquiesced and supported Mr. Ayangma's claim that his doctoral dissertation is irrelevant, the Association is acting contrary to his interests and therefore he should be allowed to represent himself and to bring this application for judicial review.

[25] Mr. Ayangma wrongly adduces some of this Court's decisions to the effect that there is a distinction to be made when it comes to challenging an administrative decision and a disciplinary decision before an arbitrator. These decisions relate specifically to systems such as the one that applies to the public service or that the enabling statute expressly sets out. That is not the case here.

[26] Mr. Ayangma tries desperately to persuade the Court that the decisions in *Tait v. Her Majesty the Queen* 2013 NBCA 71 (CanLII) and *Migneault v. New Brunswick* 2016 NBCA 52 (CanLII) are distinguishable in this case because the flagrant and contemptuous conduct of the Association is sufficient to give him standing to bring this application for judicial review. He submits that the evidence contained in his own affidavit and in the affidavit of Mr. Amfoubalela enables him to meet the exceptions laid out in the case law. Unfortunately, the Court cannot agree with such contentions.

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[27] Finally, there is no need for the Court to repeat the many allegations of bad faith, manifest abuse of authority, lack of professional ethics, breach of the general duty of honesty, reprisals, refusal to afford him natural justice, and psychological harassment, not to mention the personal attacks on the parties, their counsel and the employees of the Université, since they are all unsubstantiated and do not warrant any consideration by the Court save to take note of them for the purpose of making its findings.

[28] The Université took a position similar to that of the Association on the dismissal of this application for judicial review, leaving it to the Association to deal with the issue of Mr. Ayangma's representation in its grievance procedure.

[29] The collective agreement governing labour relations between the Université and the Association of which Mr. Ayangma is a part gives the Association alone the authority and standing to bring an application for judicial review. The Association is the only party to arbitration proceedings under the collective agreement and the *Industrial Relations Act*.

[30] Contrary to Mr. Ayangma's contention, the decisions in *Migneault v. New Brunswick* and *Tait v. Her Majesty the Queen* (*supra*) both support the Association. *Migneault*, dealing with whether a unionized employee can bring an application for judicial review, relies on *Tait* in upholding the rule of general application by which an employee lacks the requisite standing to bring an application for judicial review and its rationale. Richard, J.A., now the Chief Justice of the Court of Appeal, citing Robertson, J.A. in *Tait*, writes:

> **8.**
>
> **[...]**
>
> **While judicial review by the superior courts is an important principle, it cannot allow employees to jeopardize this expectation of stability in labour relations in a situation where there is union representation. Allowing an employee to take action against a decision made by his or her union, by applying for judicial review where he or she believes that the arbitration award was unreasonable, would offend the union's exclusive right of representation and the legislative intent regarding the finality of the arbitration process, and would jeopardize the effectiveness and speed of the arbitration process.**
>
> **[...]**
>
> **The law is clear. As a general rule, when a union unsuccessfully grieves the discipline or discharge of a member of the bargaining unit, and the Union decides not to seek judicial review of the unfavourable arbitral award, the member will be denied the requisite standing. This understanding of the law flows naturally from the realization that the union and employer are the parties to the collective agreement and that individual employees have no independent contractual status: see George W. Adams, *Canadian Labour Law*, 2nd ed., looseleaf (Aurora, Ont.: Canada Law Book, 1993), at 4.1660.**
>
> **The law recognizes three exceptions to the rule. They are conveniently set out in *Yee v. Trent University*, 2010 ONSC 3307, [2010] O.J. No. 2697 (QL):**
>
> **However, the case law has identified three exceptional situations in which an individual may have standing to pursue arbitration or judicial review: where the collective agreement confers a right on the individual to pursue a matter to**

**arbitration, where the union takes a position adverse in interest to the employee, and where the union's representation of the employee has been so deficient that the employee should be given a right to pursue judicial review (*Re Hoogendoorn and Greening Metal Products* (1967), 1967 CanLII 20 (SCC), 65 D.L.R. (2d) 641 (S.C.C.); *Singh v. Laurentian University*, [1991] O.J. No. 526 (Div. Ct.); *Yashin v. National Hockey League* (2000), 2000 CanLII 22620 (ON SC), 192 D.L.R. (4th) 747 (Ont. S.C.J.), at paras. 20-21). [para. 8]**

[31] As the Association submitted, none of these exceptions apply in this case. First, the collective agreement does not confer a right on the employee to pursue a matter to arbitration and labour relations between the Association and the Université are subject to the system set out in ss. 21 and 55 of the *Industrial Relations Act*, confirming that agent status is held exclusively by the Association. Mr. Ayangma is not a party to the collective agreement but rather is bound by it.

[32] In terms of the position taken by the Association, the Association has never taken a position contrary to Mr. Ayangma's interests, whatever he may say about it. In this case, Mr. Ayangma was asking the Association to challenge the jurisdiction of the arbitrator, who had, by summons, demanded that Mr. Ayangma produce his doctoral dissertation. In addition, Mr. Ayangma, as he has always contended, disputed the relevance of providing that document.

[33] As can be seen from grievances 2 and 3, Mr. Ayangma challenged the loss of his doctoral bonus on the ground that he refused to submit his doctoral dissertation to the Université. The Université rightly argued that the doctoral dissertation is a key element of several disputes with Mr. Ayangma.

[34] The Association reports in the affidavit supporting the dismissal of this application that it proceeded in accordance with s. 55.01 of the *Industrial Relations Act* at the request of Mr. Ayangma, who wanted to move quickly. After consulting, it was obvious that the doctoral dissertation was clearly relevant to grievance 2. Mr. Ayangma having refused, the Université got a summons from the arbitrator requiring the production of the dissertation.

[35] After that summons was issued, Mr. Ayangma indicated that he was going to attend the hearing with a copy of his doctoral dissertation for the sole purpose of proving its existence, but would not produce it for review before, during or after the hearing. His position was that the dissertation was irrelevant to the pending grievances. He invoked copyright and argued that [TRANSLATION] "no-one has the right to assess it after 20 years ...". Finally, he claimed that [TRANSLATION] "the doctoral dissertation is a personal document covered by copyright and remains the property of the author ...".

[36] After checking with Mr. Ayangma that there was no problem with his doctoral dissertation, specifically in terms of plagiarism or for any other reason that might justify the Association in objecting, the President of the Association urged Mr. Ayangma to produce the document so that the Association would be in a position to represent his interests in his grievances. Although Mr. Ayangma gave assurances that his dissertation was authentic, he still objected and continues to object to this day.

[37] At the hearing, the Association, unable to support a position as unreasonable as the one taken by Mr. Ayangma due to his refusal to submit a copy of his dissertation, had to face the fact that Mr. Ayangma was in contempt, having refused to comply with a clear direction from the arbitrator.

[38] Under the circumstances, the Université indicated that it was unable to continue defending this grievance and sought to have it dismissed.

[39] The arbitrator was then in the position of making a decision that was meant to be a final opportunity for Mr. Ayangma to produce his doctoral dissertation. The decision, although not lengthy,

supports a finding by this Court that the arbitrator had decided on the merits and on the relevance of providing the doctoral dissertation and gave Mr. Ayangma the next five days within which to comply. Failing that, the grievance would be dismissed without further delay or order. At the risk of repeating myself, Mr. Ayangma does not want to produce his doctoral dissertation.

[40] The Association has always been prepared to represent Mr. Ayangma's interests and has always wanted his grievances to be heard on the merits with the relevant evidence before the arbitrator.

[41] In terms of Mr. Ayangma's representation by the Association and its legal representative, it is clear that the Association was trying to achieve the best possible outcomes for Mr. Ayangma as expeditiously and inexpensively as possible, as it is entitled to do. There is no doubt that the Association's representation was fair and professional. It is important to remember that Mr. Ayangma's interests are at stake here and not his desire to support unsubstantiated allegations of impropriety such as the one relating to the arbitrator's jurisdiction, or to contend that the doctoral dissertation is irrelevant by using scandalous language such as collusion between the Université, the Association and even the Court.

[42] The circumstances of this case dictate that only the Association may act on behalf of Mr. Ayangma with standing to bring the application for judicial review. Although the approach may differ, the duty to represent an employee requires that the Association's representation be impartial, honest and prudent. There is no conflict of interest between the Association and Mr. Ayangma and the disagreement is on an issue of jurisdiction and evidentiary relevance. Mr. Ayangma's position is untenable.

[43] Under the circumstances, the standard of review for the arbitrator's decision is reasonableness. Reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process and with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law (see *Dunsmuir v. New Brunswick* 2008 SCC 9 (CanLII)).

[44] Deference in this Court requires a respectful attention to the reasons offered or which could be offered in support of a decision. In this case, it is clear that the production of a copy of the doctoral dissertation was undoubtedly relevant. Mr. Ayangma contended that the arbitrator did not have to establish a defined or specific period within which to submit the document. The arbitrator wanted to bring the grievance to a close and rightly decided otherwise. Mr. Ayangma's obstinacy further justifies bringing this proceeding to a definitive end.

[45] Mr. Ayangma's position that the arbitrator exceeded his jurisdiction by dealing with a grievance challenging an administrative suspension with pay is incomprehensible. Mr. Ayangma drafted the grievances himself. It would have been illogical for the Association to challenge the arbitral nature of its own grievances before the arbitrator and worse still to question the arbitrator's jurisdiction. The only two relevant issues for review were the decision to order the production of the document and the measure to address the refusal to produce it.

[46] The test for production was whether [TRANSLATION] "the document was arguably relevant" and whether the document in question was relevant to the issues. The conclusion that the doctoral dissertation was relevant to determining whether Mr. Ayangma was entitled to a doctoral bonus is obvious to everyone but Mr. Ayangma. The Court has nothing further to add.

[47] Mr. Ayangma was informed of the need to produce a copy of his doctoral dissertation as discussed with the Association's representative and the lawyers, was given adequate time to comply with these requests and was even served a summons by the arbitrator to produce it. He had the opportunity to comply and it was reasonable to expect that he would cooperate and provide the document related to his grievance.

[48] Mr. Ayangma's reasons for not submitting the document were incoherent, and it is clear that he did not want to comply with the request. His failure to cooperate leaves no doubt about his intentions. The arbitrator's decision is reasonable.

[49] The application is dismissed with costs in the amount of $4,000.00, which the Université and Association will share equally.

Decision rendered this 13th day of February 2019 at Moncton,
New Brunswick.

The Honourable Mr. Justice JEAN-PAUL OUELLETTE
Court of Queen's Bench of New Brunswick
Judicial District of Moncton

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CanLII

# Ayangma v. Université de Moncton, Moncton Campus, 2019 NBCA 14 (CanLII)

Date: 2019-02-07

File number: 19-18-CA

Other citation: [2019] NBJ No 28 (QL)

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COURT OF APPEAL OF NEW BRUNSWICK

COUR D'APPEL DU NOUVEAU-BRUNSWICK

19-18-CA

NOËL AYANGMA

APPELLANT

- and -

UNIVERSITÉ DE MONCTON, MONCTON CAMPUS

RESPONDENT

Ayangma v. Université de Moncton, Moncton Campus, 2019 NBCA 14

CORAM:
The Honourable Justice Quigg
The Honourable Justice Baird
The Honourable Justice LaVigne

Appeal from a decision of the Court of Queen's Bench:
February 14, 2018

History of Case:

Decision under appeal:
2018 NBQB 033

Preliminary or incidental proceedings:
N/A

NOËL AYANGMA

APPELANT

- et -

UNIVERSITÉ DE MONCTON, CAMPUS DE MONCTON

INTIMÉE

Ayangma c. Université de Moncton, Campus de Moncton, 2019 NBCA 14

CORAM :
l'honorable juge Quigg
l'honorable juge Baird
l'honorable juge LaVigne

Appel d'une décision de la Cour du Banc de la Reine :
le 14 février 2018

Historique de la cause :

Décision frappée d'appel :
2018 NBBR 033

Procédures préliminaires ou accessoires :

19

s.o.

Appeal heard:
October 11, 2018

Appel entendu :
le 11 octobre 2018

Judgment rendered:
February 7, 2019

Jugement rendu :
le 7 février 2019

Reasons for judgment:
The Honourable Justice LaVigne

Motifs de jugement :
l'honorable juge LaVigne

Concurred in by:
The Honourable Justice Quigg
The Honourable Justice Baird

Souscrivent aux motifs :
l'honorable juge Quigg
l'honorable juge Baird

Counsel at hearing:

Noël Ayangma, on his own behalf

For the respondent:
Sacha Denis Morisset

Avocats à l'audience :

Noël Ayangma, en son propre nom
Pour l'intimée :
Sacha Denis Morisset

THE COURT

The appeal is dismissed with costs in the amount of $3,000.

LA COUR

L'appel est rejeté avec dépens de 3000 $.

Le jugement de la Cour rendu par

LA JUGE LAVIGNE

I. Introduction

Les codes des droits de la personne interdisent aux employeurs de faire preuve de discrimination en matière d'emploi pour des motifs de distinction illicite reconnus; ils ne les obligent pas à employer la personne la plus qualifiée pour pourvoir un poste.

Le 6 juillet 2015, M. Noël Ayangma porte plainte à la Commission des droits de la personne du Nouveau-Brunswick (« Commission ») alléguant que l'Université de Moncton, campus de Moncton, a fait preuve à son endroit de discrimination en matière d'emploi lorsqu'elle a accordé un poste de professeur à M$^{me}$ S.M. à la Faculté d'administration – un poste temporaire à temps plein d'un an

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attribué au printemps 2013 et ensuite un poste régulier à temps plein attribué au printemps 2014. M. Ayangma est d'avis qu'il n'a pas été retenu pour pourvoir ces postes en raison de sa race (noire), son origine nationale (Camerounaise), son lieu d'origine (Cameroun), sa couleur (noire), et son âge (59-60 ans).

S'appuyant sur le rapport détaillé d'une enquêteuse, la Commission rejette la plainte. La Commission est d'avis qu'une partie de la plainte est tardive et ne présente pas de cause solide et défendable pouvant justifier une prorogation du délai. Pour les allégations de faits survenus le ou après le 6 juillet 2014, la Commission rejette ces allégations jugeant que l'information fournie n'est pas suffisante pour démontrer une cause solide et défendable de discrimination en matière d'emploi basée sur la race, l'origine nationale, le lieu d'origine, la couleur ou l'âge. Puisque la plainte a été rejetée à l'étape préliminaire, elle n'a pas été renvoyée pour être instruite par la Commission du travail et de l'emploi, comme le souhaite M. Ayangma.

Ce dernier demande une révision judiciaire de la décision de la Commission. Le juge saisi du contrôle judiciaire rejette la requête, concluant que la décision de la Commission est raisonnable et que M. Ayangma a bénéficié de l'équité procédurale. Il condamne M. Ayangma au paiement de dépens de 10 000 $, plus les débours admissibles. M. Ayangma se pourvoit en appel, demandant à notre Cour d'infirmer la décision du juge saisi de la requête et d'ordonner à la Commission de faire instruire la plainte par la Commission du travail et de l'emploi. Pour les motifs exposés ci-dessous, je rejetterais l'appel.

## II. Norme de contrôle

Siégeant en appel d'une décision d'un juge de la Cour du Banc de la Reine qui a rejeté une demande de contrôle judiciaire, notre Cour doit déterminer si le juge a choisi la norme de contrôle appropriée et s'il l'a appliquée correctement. Nous devons nous substituer au juge et nous concentrer sur la décision de la Commission (voir *Régie régionale de la santé A c. Dr Khider*, 2019 NBCA 5 (CanLII), au par. 10, et *Syndicat canadien de la fonction publique, Section locale 3515 c. Ville de Dieppe*, 2019 NBCA 11 (CanLII), au par. 5).

C'est à bon droit que le juge saisi du contrôle judiciaire a adopté la norme de la décision raisonnable pour contrôler la décision de la Commission. Le juge a également conclu que M. Ayangma avait « été traité de manière plus qu'équitable par la Commission » (par. 39), appliquant donc la norme de la décision correcte, comme il se doit, pour déterminer si l'équité procédurale a été respectée (voir *Commission des droits de la personne du Nouveau-Brunswick c. Province du Nouveau-Brunswick (Ministère du développement social)*, 2010 NBCA 40 (CanLII), 360 R.N.-B. (2e) 283).

## III. Questions à trancher

Pour trancher cet appel, je me pencherai sur la décision de la Commission et sur la question des dépens accordés par le juge saisi du contrôle judiciaire. Les moyens d'appel peuvent être ramenés à trois questions :

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(1) Y a-t-il eu manquement à l'équité procédurale?

(2) Était-il raisonnable pour la Commission de rejeter la plainte?

(3) Le juge saisi de la révision judiciaire a-t-il commis une erreur en accordant à l'Université des dépens de 10 000 $?

IV. Le contexte

M. Ayangma est chargé de cours à la Faculté d'administration de l'Université de Moncton, campus de Moncton, depuis 2010 et l'est encore au moment où la Commission mène son enquête. Il donne habituellement deux charges de cours par semestre à la Faculté d'administration; pour les sessions d'automne 2013 et hiver 2014, il n'a obtenu qu'une charge de cours. En tant que chargé de cours, il est membre d'une unité de négociation, soit l'Unité II de l'Association des bibliothécaires, professeures et professeurs de l'Université de Moncton (« ABPPUM »).

En juin 2013, à la suite de la démission d'un professeur de la Faculté d'administration, l'Université retient les services de M^me^ S.M. afin de pourvoir un poste de professeur en management pour l'année universitaire débutant le 1^er^ juillet 2013. Sous la clause d'urgence, la convention collective de l'Unité I de l'ABPPUM – applicable aux professeurs réguliers et temporaires – permet l'embauche d'un professeur de façon temporaire pour une année sans annonce publique. Ce contrat d'un an n'a pas été annoncé publiquement et n'a pas été offert à M. Ayangma.

En janvier 2014, l'Université affiche un poste de professeur(e) en gestion des ressources humaines menant à la permanence. Comme formation, l'affichage indique :

> [...] Formation : Les candidates et candidats à ce poste possèdent le doctorat en administration des affaires, en relations industrielles ou dans une discipline connexe avec spécialisation en ressources humaines, et font preuve d'excellentes qualités pédagogiques de préférence dans un contexte universitaire. [...]
>
> [C'est moi qui souligne.]

Dix candidats postulent pour l'emploi qui débute le 1^er^ juillet 2014, incluant M. Ayangma et M^me^ S.M. Après évaluation des dossiers, l'Assemblée départementale écarte six candidats incluant M. Ayangma, ayant conclu que ceux-ci n'avaient pas de spécialisation en gestion de ressources humaines. Deux candidates sont écartées, car elles ne détiennent pas le statut de résidente permanente. Finalement, deux candidates, incluant M^me^ S.M., sont invitées en entrevue. Le poste est attribué à M^me^ S.M.

M. Ayangma soutient qu'il était qualifié pour ces postes et que M^me^ S.M. ne l'était pas ou l'était moins, et qu'il n'a pas été retenu, car il est de race noire, originaire du Cameroun et qu'il est dans la soixantaine, tandis que M^me^ S.M. a été retenue, car elle est de race blanche, d'origine acadienne et plus jeune.

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3] M. Ayangma avance que ce n'est qu'en mai 2015 qu'il a découvert les faits importants sur lesquels repose sa plainte de discrimination. En mars 2015, il aurait découvert le profil universitaire de M$^{me}$ S.M., et, en mai 2015, il aurait appris qu'une employée de l'Université avait tenu des propos racistes. Le 12 mai 2015, M. Ayangma dépose un grief à l'encontre de l'Université, alléguant la discrimination raciale, l'abus d'autorité, l'intimidation, le manque d'éthique professionnelle, et la diffamation, mais plus tard l'ABPPUM retire le grief.

4] M$^{e}$ Pamela Schiavoni, une employée de la Commission, a examiné la plainte déposée par M. Ayangma. Le 22 décembre 2016, elle remet à la Commission un rapport de 66 pages intitulé « Rapport sur la demande de prolongation du délai pour le dépôt d'une plainte et Rapport sommaire de rejet », dans lequel elle résume les allégations de M. Ayangma comme suit :

> [...]
> a. la prétendue discrimination dans le cadre du processus d'attribution des charges de cours et dans le processus d'attribution d'un contrat temporaire à [S.M.] à l'automne 2013;
>
> b. la prétendue discrimination dans le processus d'attribution d'un poste de professeur à temps plein en GRH à l'hiver 2014, attribué à [S.M.]; et
>
> c. la prétendue discrimination dans l'application des méthodes de recrutement et d'embauche pour laquelle le plaignant prétend que les professeurs noirs et âgés sont exclus systématiquement:
>
> i. en déclarant ou embauchant des candidats non qualifiés et de façon arbitraire, soit parce qu'ils ou elles sont de race blanche, jeunes ou encore acadiennes, ou excluant les professeurs noirs qui appartiennent à un groupe désavantagé sous prétexte qu'il y a déjà trop de professeurs noirs à la Faculté; et
>
> ii. en excluant les candidatures des personnes plus âgées sous prétexte qu'à cause de leur âge, elles n'avaient aucun potentiel ou intérêt pour la recherche.
>
> [par. 14]

5] Puisque M. Ayangma a soumis une partie de sa plainte après l'expiration du délai prescrit d'un an prévu par la *Loi sur les droits de la personne*, L.R.N.-B. 2011, ch. 171, il a dû déposer une demande de prolongation du délai pour le dépôt d'une plainte relativement à certaines de ses allégations.

6] M$^{e}$ Schiavoni a enquêté et analysé les allégations formulées par M. Ayangma. En conclusion, elle recommande le rejet de la demande de prolongation du délai ainsi que le rejet de la plainte dans son intégralité:

> Il est recommandé que la Commission, conformément au paragraphe 19(2) de la *Loi*, rejette la plainte contre l'intimée à cette étape des procédures pour les allégations

relatives aux propos discriminatoires ayant eu lieu après le 6 juillet 2014 puisque l'information fournie n'est pas suffisante pour démontrer une cause solide et défendable basée sur la race, origine nationale, lieu d'origine, couleur et âge.

Pour les allégations ayant eu lieu avant le 6 juillet 2014, conformément au paragraphe 18 (2) de la *Loi* et à l'information contenue dans le présent rapport, il est recommandé à la Commission de ne pas accorder la prolongation du délai pour le dépôt de la plainte puisque le plaignant n'a pas satisfait l'ensemble des quatre (4) critères prévus à l'article 2 des Lignes directrices justifiant une prolongation dudit délai.

Finalement, il est recommandé que la Commission considère ce rapport, les observations des parties en réponse à ce rapport et un avis juridique de la conseillère juridique de la Commission pour déterminer si les circonstances justifient l'octroi d'une prolongation du délai pour le dépôt d'une plainte. [par. 244-246]

7] Le rapport stipule que si les membres de la Commission acceptent les recommandations, celles-ci et leur fondement deviennent leurs raisons à moins d'indication contraire. Il n'y a aucune indication contraire au dossier. Il est maintenant établi en droit que les commissions des droits de la personne peuvent s'appuyer sur le dossier de l'enquête et sur toute recommandation présentée par l'enquêteur lorsqu'elles décident si une plainte devrait être rejetée. Dans les cas où la commission fait siennes les recommandations d'un enquêteur, le rapport de l'enquêteur est réputé constituer les motifs de la commission : voir *Sketchley c. Canada (Procureur général)*, 2005 CAF 404 (CanLII), [2005] A.C.F. n° 2056 (QL), au par. 37; et *Smith c. Province du Nouveau-Brunswick (Ministère de la Sécurité publique) et Commission des droits de la personne du Nouveau-Brunswick*, 2012 NBCA 41 (CanLII), 397 R.N.-B. (2d) 1, au par. 14.

3] Suite à la réception du rapport, les deux parties font parvenir une réponse à la Commission et en plus, M. Ayangma lui fait parvenir une réplique. Le tout est considéré par les membres de la Commission lors d'une réunion le 28 avril 2017, et en date du 2 mai 2017 la Commission informe M. Ayangma qu'elle avait accepté les recommandations contenues dans le rapport et avait fermé le dossier.

V. Analyse

A. *Y a-t-il eu manquement à l'équité procédurale?*

9] Dans son avis de requête, parmi les motifs à discuter, M. Ayangma allègue un manquement aux principes de justice naturelle de la part de la Commission, mais aucun détail n'est donné pour appuyer ce moyen, à savoir qu'est-ce que la Commission a fait ou a omis de faire. L'avis d'appel ne fait pas mention d'un tel manquement et n'allègue pas que le juge saisi du contrôle judiciaire aurait commis une erreur en concluant que l'équité procédurale a été respectée. M. Ayangma n'argue pas que la Commission a manqué aux exigences de l'équité procédurale en menant une enquête fondamentalement défectueuse, en omettant d'examiner une preuve importante ou autrement (voir l'arrêt *Sketchley c. Canada (Procureur général)*). Il s'oppose principalement à ce que l'enquête prenne fin à cette étape; il veut que la Commission fasse passer l'enquête à l'étape suivante, afin de faire instruire la plainte par la Commission de travail et de l'emploi.

)] M. Ayangma n'a avancé aucun argument qui tend à établir une erreur judiciaire concernant un manquement à l'équité procédurale, et encore moins avancé un argument convaincant sur le point.

1] La plainte a fait l'objet d'une enquête quant à toutes les allégations soulevées par M. Ayangma. À mon avis, le dossier préparé par M$^{e}$ Schiavoni pour la Commission révèle qu'elle a mené une enquête rigoureuse et objective, qui ne contient pas d'importantes lacunes au niveau de l'équité procédurale. M. Ayangma a pu présenter sa position pleinement et équitablement.

2] Le juge saisi du contrôle judiciaire a conclu que le requérant avait eu droit à l'équité procédurale et je suis du même avis.

B. *Était-il raisonnable pour la Commission de rejeter la plainte?*

3] La *Loi sur les droits de la personne* est au centre de cette affaire. Toute référence à cette *Loi* renvoie aux dispositions telles qu'elles existaient au moment opportun. La *Loi* a subi quelques modifications depuis.

4] Les dispositions pertinentes de la *Loi* étaient ainsi rédigées :

| **Discrimination in employment** | **Discrimination en matière d'emploi** |
|---|---|
| **4**(1) No employer, employers' organization or other person acting on behalf of an employer shall, because of race, colour, religion, national origin, ancestry, place of origin, age, physical disability, mental disability, marital status, sexual orientation, sex, social condition or political belief or activity, | **4**(1) Aucun employeur, aucune organisation patronale ni aucune autre personne agissant pour le compte d'un employeur ne peut, pour des raisons de race, de couleur, de croyance, d'origine nationale, d'ascendance, de lieu d'origine, d'âge, d'incapacité physique, d'incapacité mentale, d'état matrimonial, d'orientation sexuelle, de sexe, de condition sociale ou de convictions ou activités politiques, selon le cas : |
| | *a*) soit refuser d'employer ou de continuer d'employer une personne; |

(*a*) refuse to employ or continue to employ any person, or

(*b*) discriminate against any person in respect of employment or any term or condition of employment.

*b*) soit faire preuve de discrimination envers une personne en matière d'emploi ou quant aux modalités ou aux conditions d'emploi.

**Complaints**

**17** A person claiming to be aggrieved because of an alleged violation of this *Act* may make a complaint in writing to the Commission in a form prescribed by the Commission.

**Plaintes**

**17** Toute personne qui se prétend lésée par suite d'une violation alléguée de la présente *loi* peut présenter une plainte par écrit à la Commission selon la formule prescrite par celle-ci.

**Time limit for making complaint**

**18**(1) Subject to subsection (2), a complaint shall be filed within one year after the alleged violation of the *Act*.

**18**(2) The Commission may extend the time for the filing of a complaint if, in the opinion of the Commission, the circumstances warrant it.

**Délai pour déposer une plainte**

**18**(1) Sous réserve du paragraphe (2), chaque plainte est déposée dans l'année qui suit la violation alléguée de la présente *loi*.

**18**(2) La Commission peut, lorsqu'elle est d'avis que les circonstances le commandent, prolonger le délai pour le dépôt d'une plainte.

**Complaint procedure**

**Procédure relative aux plaintes**

**19**(2) Si la Commission juge qu'une plainte est non fondée,

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elle peut la rejeter à toute étape de la procédure.

**19**(2) If the Commission is of the opinion that a complaint is without merit, the Commission may dismiss the complaint at any stage of the proceedings.

5] La conclusion du juge saisi du contrôle judiciaire quant au caractère raisonnable de la décision se trouve au paragraphe suivant :

> Plus précisément, après avoir examiné les faits tels qu'ils sont énoncés dans le dossier de la requête, notre Cour n'a eu aucune difficulté à conclure que toutes les interprétations, recommandations, conclusions et décisions qui y figurent et qui sont contestées par M. Ayangma, celuici étant d'avis qu'elles ne sauraient être considérées raisonnables, s'inscrivent au contraire dans ce que la Cour estime être un éventail de décisions et d'issues raisonnables, lorsqu'elles sont examinées à la lumière du droit administratif canadien. [par. 33]

1. Allégations d'actes ayant eu lieu le ou après le 6 juillet 2014.

5] La Commission a conclu que l'information fournie n'était pas suffisante pour démontrer une cause solide et défendable basée sur la race, l'origine nationale, le lieu d'origine, la couleur ou l'âge en matière d'emploi : des motifs illicites reconnus par la *Loi* (par. 4(1)).

7] La plainte de M. Ayangma est expliquée en grande partie par le fait qu'il est d'avis qu'une professeure et Directrice du Département d'administration de la Faculté d'administration, également de race noire, aurait dit, en avril 2015, qu'il y avait déjà trop de professeurs noirs à la Faculté. M. Ayangma n'a pas entendu ces propos, mais c'est à partir de cette appréciation des faits que M. Ayangma a remis en question le fait que M$^{me}$ S.M., plutôt que lui, avait été retenue pour pourvoir aux différents postes. Cette allégation a été enquêtée. Il n'y a aucune preuve que ces propos ont été prononcés, et ils ont été niés par la personne concernée.

3] Il y a également eu une allégation de discrimination provenant d'un autre professeur de race noire concernant des propos racistes qu'auraient été avancés par une professeure de race blanche. Il est allégué que cette dernière aurait dit qu'il y avait déjà trop d'étudiants étrangers et surtout de race noire à la Faculté. Très peu d'information a été soumise concernant l'auteure de ces propos ou les circonstances entourant ces propos. Le dossier ne contient aucune information concernant le nom ou le poste de l'auteure, ni à savoir quand les propos ont été tenus, ou comment ces commentaires auraient pu être discriminatoires envers M. Ayangma.

9] Ces allégations de faits sont alléguées avoir eu lieu le ou après le 6 juillet 2014; toutefois, l'enquêteuse devait également en tenir compte pour traiter de la demande de prolongation du délai concernant les allégations d'actes survenus avant le 6 juillet 2014.

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)] L'enquêteuse a conclu que ces allégations étaient non fondées. Il s'agissait d'une conclusion raisonnable selon l'information au dossier. Ayant écarté ces allégations de propos racistes, il ne restait plus grand-chose au dossier, sauf les différences évidentes entre M. Ayangma et M$^{me}$ S.M. : le premier étant de race noire et plus âgé, et la deuxième étant de race blanche et plus jeune. La Commission a conclu que ceci n'était pas suffisant pour démontrer qu'il existait une cause défendable de discrimination fondée sur un motif illicite.

2. Allégations d'actes ayant eu lieu avant le 6 juillet 2014 et demande de prolongation du délai

[] La Commission a conclu que M. Ayangma n'avait pas déposé sa plainte dans le délai prévu et a refusé de lui accorder une prolongation du délai.

2] La Commission statue sur toute plainte dont elle est saisie, à moins qu'elle estime la plainte irrecevable parce que celle-ci a été déposée après l'expiration d'un délai d'un an de la violation alléguée; toutefois, la Commission peut prolonger ce délai lorsqu'elle « est d'avis que les circonstances le commandent » (arts. 17 à 19 de la *Loi*).

3] Pour appliquer le par. 18(2), la Commission a établi une *Ligne directrice sur la prolongation du délai pour le dépôt d'une plainte* (« *Ligne directrice* »), avec des critères définis. Selon le par. 2.0 de la *Ligne directrice,* intitulé « Justification de l'exercice du pouvoir discrétionnaire conféré à la Commission par le par. 18(2) », une prolongation est réputée justifiée lorsque l'ensemble des quatre (4) critères suivants sont satisfaits:

| | |
|---|---|
| a) there is a strong arguable case, both in fact and law; | a) s'il existe une cause solide et défendable tant en fait qu'en droit; |
| b) there is evidence of a substantial loss or damage to the complainant and a clearly identifiable remedy; | b) s'il y a des éléments de preuve qui démontrent que le plaignant a subi des pertes ou des dommages importants et qu'il existe une mesure corrective clairement identifiable; |
| c) the complainant had a bona fide reason, as determined by the Commission, for not filing the complaint within the one year time limit; and | c) si le plaignant a, de l'avis de la Commission, des raisons légitimes pour ne pas avoir déposé la plainte dans le délai imparti d'un an; |
| | d) si l'intimé ne souffre pas de préjudice excessif à cause de la prolongation. |

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d) the respondent will not be unduly prejudiced by the extension.

4] La Commission a considéré les allégations d'actes ayant eu lieu avant le 6 juillet 2014 comme étant hors délai puisque la plainte n'a été déposée que le 6 juillet 2015. M. Ayangma conteste cette décision et conteste le refus de la Commission de lui accorder une prolongation du délai.

5] Selon M. Ayangma, la Commission a commis une erreur en ne traitant pas la question de la règle du moment où le préjudice aurait dû être découvert. Ce principe prévoit qu' « une cause d'action prend naissance, aux fins de la prescription, lorsque les faits importants sur lesquels repose cette cause d'action ont été découverts par le demandeur ou auraient dû l'être s'il avait fait preuve de diligence raisonnable » : *Central Trust Co. c. Rafuse*, 1986 CanLII 29 (SCC), [1986] 2 R.C.S. 147, [1986] A.C.S. n° 52 (QL), p. 224. Il est communément reconnu que le principe du moment où le préjudice aurait dû être découvert est un outil d'interprétation des lois sur la prescription : *Dupuis c. City of Moncton*, 2005 NBCA 47 (CanLII); 284 R.N.-B. (2e) 97, au par. 30.

5] L'Université soutient que l'article 18 de la *Loi* ainsi que la *Ligne directrice* établie par la Commission pour appliquer l'article 18 sont plus exigeants et écartent la règle du moment où le préjudice aurait dû être découvert.

7] La décision de la Commission quant au moment où le délai visé par l'article 18 de la *Loi* commence à courir ainsi que l'exercice du pouvoir discrétionnaire de la Commission de proroger le délai prescrit sont assujetties à la norme de la décision raisonnable : *Khanna c. Canada (Procureur général)*, 2008 CF 576 (CanLII), [2008] A.C.F. n° 733 (QL).

3] Les commissions des droits de la personne ont droit à la déférence lorsqu'elles interprètent et appliquent leur loi constitutive : *Canada (Commission canadienne des droits de la personne) c. Canada (Procureur général)*, 2018 CSC 31 (CanLII), [2018] A.C.S. n° 31 (QL), aux par. 27 et 29. La Cour suprême a également déclaré dans l'arrêt *Prassad c. Canada (Ministre de l'Emploi et de l'Immigration)*, 1989 CanLII 131 (SCC), [1989] 1 R.C.S. 560, [1989] A.C.S. n° 25 (QL), qu'en règle générale, les tribunaux administratifs sont considérés maîtres chez eux et que les tribunaux judiciaires doivent faire preuve de retenue envers eux lorsque ces derniers fixent leur propre procédure (par. 16). Voir également *O'Connell, en sa qualité de registraire des véhicules à moteur de la province du Nouveau-Brunswick c. Maxwell*, 2016 NBCA 37 (CanLII), 451 R.N.-B. (2e) 283, au par. 45. Il s'ensuit que la Commission n'était pas obligée d'appliquer le principe du moment où le préjudice aurait dû être découvert. Elle pouvait s'en tenir à sa *Loi* et sa *Ligne directrice*.

9] Toutefois, en analysant le critère 2c) de la *Ligne directrice*, l'enquêteuse a conclu que M. Ayangma avait des raisons légitimes pour ne pas avoir déposé la plainte concernant l'attribution du poste régulier dans le délai imparti. Il s'agissait d'un des quatre critères que M. Ayangma devait satisfaire. L'enquêteuse a analysé chaque critère. Elle a conclu que les critères b), c), et d) ont été satisfaits pour le poste régulier et les critères b) et d) pour le poste temporaire. M. Ayangma devait satisfaire aux quatre critères. En termes simples, il n'a pas fourni les informations lui permettant de satisfaire au critère énoncé au par. 2(a) de la *Ligne directrice*. Le test crucial qui n'a pas été satisfait est le critère qui exige l'existence d'une cause solide et

défendable; il s'agit d'un critère déterminant et conséquemment l'enquêteuse a recommandé à la Commission de ne pas accorder une prolongation du délai.

)] La *Loi* n'oblige pas l'Université à retenir la personne la plus qualifiée pour pourvoir un poste. Elle est en droit de choisir la personne qui, selon elle, répond le mieux aux besoins de l'institution, pourvu que le processus et les choix ne soient pas en violation des droits de la personne.

[] Dans le procès-verbal de l'Assemblée départementale qui a fait l'évaluation des dossiers des dix candidats, on peut y lire qu'elle a écarté six candidats incluant M. Ayangma, ayant conclu que ceux-ci n'avaient pas de spécialisation en gestion de ressources humaines. M. Ayangma soutient que l'Assemblée départementale a mal apprécié son dossier; il fait valoir que puisqu'il détient un doctorat en administration des affaires, il a une spécialisation en gestion de ressources humaines. La *Loi* n'a pas été adoptée dans le but de fournir aux employés potentiels une tribune pour faire entendre leurs griefs de travail. La Commission doit s'assurer qu'il y a une cause défendable de discrimination avant de renvoyer une plainte à la prochaine étape.

2] La décision de la Commission de rejeter la plainte de M. Ayangma visant les allégations ayant eu lieu avant le 6 juillet 2014 pour cause de retard, aux termes de l'article 18 de la *Loi*, n'était pas déraisonnable. La Commission a reconnu qu'elle avait le pouvoir discrétionnaire d'examiner une plainte déposée après le délai prévu d'un an et le rapport fait état que les critères ont été passés en revue pour déterminer s'il était justifié de le faire. Elle a jugé qu'il n'était pas justifié dans ce dossier de s'écarter de la règle d'un an établi dans la *Loi*. La décision de la Commission de souscrire à la recommandation formulée dans le rapport appartient aux issues possibles et acceptables pouvant se justifier au regard des faits pertinents et du droit.

3. Rejet de la plainte

3] Il faut faire preuve de retenue envers la décision de la Commission de renvoyer ou non la plainte à la Commission du travail et de l'emploi.

4] La Commission peut rejeter une plainte à toute étape de la procédure si elle la juge non fondée (par. 19(2)). La *Loi* confère à la Commission le mandat d'examiner la plainte au préalable et de décider si la poursuite de l'enquête est justifiée. L'emploi du terme « peut », au par. 19(2) de la *Loi* est une indication clé que la nature du pouvoir décisionnel est discrétionnaire. Il est clair qu'il s'agit à cette étape de triage, d'un pouvoir discrétionnaire de soit rejeter la plainte ou de la faire passer à la prochaine étape, et qu'il faut faire preuve de retenue envers la décision de la Commission (voir *Halifax (Regional Municipality) c. Nouvelle-Écosse (Human Rights Commission)*, 2012 CSC 10 (CanLII), [2012] 1 R.C.S. 364, au par. 21; *Commission des droits de la personne du Nouveau-Brunswick (Ministère du développement social)*, au par. 6; *Dupuis c. Canada (Procureur général)*, 2016 CF 1137 (CanLII), [2016] A.C.F. n° 1109, au par. 34; et *McDougal c. Nova Scotia (Human Rights Commission)*, 2016 NSSC 118 (CanLII), [2016] N.S.J. n° 167, au par. 31 et 45).

5] Les questions soumises à la Commission relevaient de son expertise.

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5] Me Schiavoni a tiré deux conclusions cruciales. Pour les actes survenus le ou après le 6 juillet 2014, elle a conclu que l'information au dossier n'était « pas suffisante pour démontrer une cause solide et défendable basée sur la race, origine nationale, lieu d'origine, couleur et âge » (par. 244 du rapport). Pour les actes survenus avant le 6 juillet 2014, elle a conclu que M. Ayangma n'avait « pas satisfait à [la] première partie du test » (par. 176 du rapport), c'est-à-dire au critère de l'existence « [d']une cause solide et défendable tant en fait qu'en droit »; un des quatre critères prévus au par. 2.0 de la *Ligne directrice*. Ces deux conclusions ont abouti à la conclusion que la plainte devait être rejetée.

7] Le juge d'appel Robertson, dans l'affaire *Commission des droits de la personne du Nouveau-Brunswick c. Province du Nouveau Brunswick (Ministère du développement social)*, nous enseigne qu'il faut faire preuve de retenue envers la décision de la Commission à cette étape préliminaire :

> [...] la norme de contrôle applicable est celle de la « raisonnabilité ». Dans le contexte de [TRADUCTION] « décisions destinées à filtrer les cas », cela se traduit par un critère préliminaire selon lequel la cour de révision doit avoir la conviction que les motifs ou le dossier qui sous-tendent la recommandation ou la décision sont raisonnablement fondés sur le plan du droit et des faits pour que la plainte de discrimination passe à l'étape décisionnelle. Bref, les motifs officiels ou le dossier doivent faire état d'une cause défendable. Corrélativement, une conclusion de discrimination à première vue n'est pas nécessaire. [par. 6]

3] La Commission ne doit pas se soustraire à son obligation de déterminer s'il existe une cause défendable de discrimination; c'est seulement après avoir fait cette détermination préliminaire que la Commission peut décider de faire instruire la plainte de discrimination par la Commission du travail et de l'emploi. Le rapport fournit des motifs soigneusement rédigés où l'enquêteuse a expliqué les raisons pour lesquelles M. Ayangma n'avait pas réussi à établir l'existence d'une cause défendable. La Commission a conclu que la présente affaire ne faisait pas état d'une cause défendable de discrimination au sens de l'art. 4 de la *Loi*.

9] Essentiellement, M. Ayangma demande à cette Cour de soupeser et d'apprécier à nouveau la preuve prise en compte par la Commission et de conclure que cette dernière doit faire instruire la plainte par la Commission du travail et de l'emploi, tout comme il l'a fait en première instance; ce qui n'est manifestement pas le rôle du juge saisi du contrôle judiciaire ni celui de la Cour d'appel.

0] Je suis d'avis que le juge saisi de la requête a bien cerné la norme de contrôle et qu'il l'a appliquée correctement. La décision de la Commission est conforme à la norme de raisonnabilité puisqu'elle est transparente, intelligible, justifiée et elle se situe dans la fourchette des résultats probables (voir *Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9 (CanLII), [2008] 1 R.C.S. 190, au par. 47). La cour de révision ne peut y substituer l'issue qui serait à son avis préférable et il n'est pas « dans les attributions de la cour de révision de soupeser à nouveau les éléments de preuve » pris en compte par le décideur (voir *Canada (Citoyenneté et Immigration) c. Khosa*, 2009 CSC 12 (CanLII), [2009] 1 R.C.S. 339, aux par. 59 et 61; et également *O'Connell, en sa qualité de registraire des véhicules à moteur de la province du Nouveau-Brunswick c. Maxwell*, au par. 44).

[1] Comme nous le rappelait récemment la Cour suprême du Canada, dans l'arrêt *Canada (Commission canadienne des droits de la personne) c. Canada (Procureur général)*, sous la plume du juge Gascon, « Fondamentalement, la norme de la raisonnabilité reconnaît qu'il peut légitimement y avoir de multiples issues possibles, même lorsque celles-ci ne correspondent pas à la solution optimale que la cour de révision aurait elle-même retenue » (par. 55).

[2] Dans l'arrêt *Attaran c. Canada (Procureur général)*, 2015 CAF 37 (CanLII), [2015] A.C.F. n° 100 (QL), la Cour d'appel fédérale a expliqué que si les conclusions de fait de la Commission sont raisonnables « la question est alors de savoir si la décision de rejeter la plainte [est] raisonnable, en ayant à l'esprit que la décision a clos l'affaire, ce qui pourrait rendre plus restreint l'éventail des issues possibles acceptables » (par. 14). J'estime que la décision est conforme à la norme de la décision raisonnable; en l'espèce, le rejet de la plainte était une conclusion raisonnable à tirer, même s'il s'agit d'une décision définitive qui empêche de poursuivre l'enquête ou l'examen de la plainte en vertu de la *Loi*.

[3] La décision de la Commission de rejeter la plainte de M. Ayangma appartient aux issues possibles acceptables pouvant se justifier au regard des faits et du droit. Je conviens avec le juge saisi du contrôle judiciaire que la décision de la Commission de rejeter la plainte doit être confirmée.

C. *Le juge saisi de la révision judiciaire a-t-il commis une erreur en accordant à l'Université des dépens de 10 000 $?*

[4] Puisque l'attribution des dépens relève du pouvoir discrétionnaire du juge, la jurisprudence de notre Cour démontre qu'il y a lieu de faire preuve de déférence envers les ordonnances de cette nature. La latitude dont jouit le juge d'un tribunal de première instance dans l'exercice de ce pouvoir discrétionnaire s'accompagne de certaines restrictions; toutefois, un tribunal d'appel n'interviendra pas à moins qu'il ne soit établi que le juge a commis une erreur de principe ou fixé des dépens trop élevés ou manifestement erronés (voir *Douthwright c. Duffy*, 2017 NBCA 60 (CanLII), [2017] A.N.-B. n° 308 (QL), au par. 10; *Béliveau c. Town of Sackville*, 2017 NBCA 26 (CanLII), [2017] A.N.-B. n° 133 (QL), aux par. 29 et 30).

[5] En l'espèce, le juge a accordé des dépens de 10 000 $. À première vue, ceux-ci peuvent sembler plutôt élevés. Dans la majorité des cas, l'audience d'une requête en révision judiciaire dure une demi-journée ou moins et les dépens accordés se situent entre 2 500 $ à 5 000 $. En l'espèce, la requête a nécessité trois jours. Le dossier de la requête est volumineux; on y retrouve près de 1 500 pages.

[6] C'est sans doute ce que le juge avait en tête lorsqu'il a fait les commentaires suivants :

> Même si, dans les présents motifs, notre Cour n'a pas jugé nécessaire de reproduire ou de citer des dizaines de pages de jurisprudence, elle ne peut faire abstraction du fait que

> l'intimée et son avocat ont dû manifestement consacrer beaucoup de temps, d'effort et d'énergie pour tenter de réfuter les multiples observations et arguments présentés par M. Ayangma et, ce faisant, l'intimée a sûrement engagé des dépenses considérables.
>
> Non seulement les dépens doivent-ils suivre l'issue de l'affaire, mais ils doivent aussi, dans la mesure où cela est raisonnable, prendre en considération ce que la partie ayant obtenu gain de cause a dû subir pour défendre ses intérêts.
>
> [par. 42-43]

7] Dans ce dossier, c'est le juge de première instance qui est le mieux placé pour évaluer les questions qui ont rapport aux dépens reliés à la révision judiciaire. Il a rendu une ordonnance discrétionnaire que je ne peux qualifier de manifestement erronée. Compte tenu de la norme de contrôle applicable, il n'y a pas lieu de modifier les dépens.

VI. Dispositif

3] Cet appel ne soulève aucun motif justifiant l'intervention de cette Cour. Je rejetterais l'appel avec dépens que je fixerais à 3 000 $.

English version of the judgment of the Court rendered by

LAVIGNE, J.A.

I. Introduction

Human rights codes and legislation prohibit employers from discriminating against persons in matters of employment on the basis of recognized prohibited grounds of discrimination; they do not require employers to hire the best qualified person to fill a position.

On July 6, 2015, Mr. Noël Ayangma filed a complaint with the New Brunswick Human Rights Commission (the "Commission") alleging that the Université de Moncton (Moncton Campus) ("l'Université") discriminated against him in a matter of employment when it awarded a position of professor to Ms. S.M. at the Faculty of Business Administration – a full-time temporary position of one year awarded in the spring of 2013, followed by a regular full-time position, in the spring of 2014.

According to Mr. Ayangma, he was not hired for these positions by reason of his race (black), his national origin (Cameroonian), his place of origin (Cameroon), the colour of his skin (black), and his age (59 to 60 years old).

Relying on the detailed report of a person designated to inquire into the complaint, the Commission dismissed it. The Commission was of the view that part of the complaint had not been submitted within the statutory time limit and that there was no strong arguable case for granting an extension. As for the allegations of fact regarding incidents occurring on or after July 6, 2014, the Commission determined that the information provided was insufficient to show a strong arguable case of discrimination in employment on the basis of race, national origin, place of origin, colour or age, and therefore it rejected those allegations. Given that the complaint was dismissed at the preliminary stage, it was not referred for a hearing by the Labour and Employment Board, as Mr. Ayangma wanted.

As a result, Mr. Ayangma made an application for judicial review of the Commission's decision. The reviewing judge dismissed the application, and concluded that the Commission's decision was reasonable and there had been no breach of the duty of procedural fairness owed to Mr. Ayangma. Mr. Ayangma was ordered to pay costs in the amount of $10,000, plus allowable disbursements. Mr. Ayangma launched an appeal requesting that this Court reverse the reviewing judge's decision and order the Commission to refer the complaint to the Labour and Employment Board for a hearing. For the reasons below, I would dismiss the appeal.

## II. Standard of review

On an appeal from a decision of a Justice of the Court of Queen's Bench dismissing an application for judicial review, our Court must determine if the reviewing judge identified the appropriate standard of review and applied it correctly. We must put ourselves in his or her shoes and focus on the Commission's decision (see *Regional Health Authority A v. Dr. Khider*, 2019 NBCA 5 (CanLII), at para. 10, and *Canadian Union of Public Employees, Local 3515 v. Dieppe (City)*, 2019 NBCA 11 (CanLII), at para. 5).

The reviewing judge was justified in applying the standard of reasonableness when considering the Commission's decision. He also concluded that Mr. Ayangma [TRANSLATION] "was treated by the Commission in a manner that was more than fair" (para. 39), thereby applying the correctness standard, as he should, to determine whether or not there was a breach of procedural fairness (see *New Brunswick Human Rights Commission v. Province of New Brunswick (Department of Social Development)*, 2010 NBCA 40 (CanLII), 360 N.B.R. (2d) 283).

## III. Issues

This appeal revolves around an examination of the Commission's decision and of the costs that were awarded by the reviewing judge. The grounds of appeal can be summarized in the following three questions:

a. Was there a breach of procedural fairness?

b. Was it reasonable for the Commission to dismiss the complaint?

c. Did the reviewing judge err in awarding costs of $10,000 to l'Université?

IV. Context

Mr. Ayangma had been a lecturer at the Faculty of Business Administration on the Moncton Campus of l'Université de Moncton since 2010 and he still held that position when the Commission inquired into his complaint. He usually taught two courses per semester at the Faculty, but in the Fall Session of 2013 and the Winter Session of 2014, he was only retained for one course. As a lecturer, he is a member of the bargaining unit, that is Unit II of the Association des bibliothécaires, des professeures et professeurs de l'Université de Moncton ("ABPPUM").

In June 2013, following the resignation of a professor at the Faculty of Business Administration, l'Université hired Ms. S.M. to fill a professor of management position for the academic year starting on July 1, 2013. There is a provision under the collective agreement for Unit I of the ABPPUM – which covers all regular and temporary professors – that provides for the hiring under urgent circumstances of a professor on a temporary basis for one year without having to publicly advertise the vacant position. This one-year contract was not publicly announced nor was it offered to Mr. Ayangma.

In January 2014, l'Université posted a vacancy for a professor of human resources management leading to a permanent position. The job posting indicated the following educational requirements:

> [TRANSLATION]
> [...] Education: Applicants for this position are required to hold a doctoral degree in business administration, in industrial relations or in a related field specializing in human resources, and demonstrate excellent teaching skills, preferably in a university setting. [...]
>
> [Underlining is mine.]

There were ten applicants for the job which was set to begin on July 1, 2014, including Mr. Ayangma and Ms. S.M. The departmental assembly conducted an evaluation of the applications and eliminated six applicants, including Mr. Ayangma, after concluding that the six did not possess the required specialization in human resources management. Two more applicants were eliminated because they did not hold permanent resident status. In the end, two applicants, including Ms. S.M., were called for an interview. The position was awarded to Ms. S.M.

Mr. Ayangma maintains that he was qualified for those positions and Ms. S.M. was not qualified or was less qualified than him, and that the position was not offered to him by reason of the fact he is black, a native of Cameroon and in his sixties, while Ms. S.M. was retained because she is white, of Acadian origin and younger.

3] Mr. Ayangma states that he only discovered, in May 2015, the material facts leading to his discrimination complaint. According to Mr. Ayangma, in March 2015, he discovered the academic profile of Ms. S.M., and in May 2015, he learned that a university employee had made racist comments. On May 12, 2015, Mr. Ayangma filed a grievance against l'Université alleging racial discrimination, abuse of authority, intimidation, lack of professional ethics and libel, but at a later date the ABPPUM withdrew the grievance.

4] Ms. Pamela Schiavoni, legal counsel and an employee of the Commission, inquired into the complaint filed by Mr. Ayangma. On December 22, 2016, she submitted a 66-page report to the Commission entitled "*Rapport sur la demande de prolongation du délai pour le dépôt d'une plainte et Rapport sommaire de rejet*" [TRANSLATION: Report on the request for an extension of the deadline for filing a complaint and summary report of dismissal]. In her report, she summarizes Mr. Ayangma's allegations as follows:

> [TRANSLATION]
> [...]
> a. the alleged discrimination in the process of awarding courses and a temporary contract to [S.M.] in the fall of 2013;
>
> b. the alleged discrimination in the process of awarding a full-time position of professor of human resources management to [S.M.] in the winter of 2014; and
>
> c. the alleged discrimination in the application of recruiting and hiring methods where professors who are black and older are systematically excluded, according to the complainant:
>
> i. by declaring [eligible] or arbitrarily hiring unqualified candidates, either because they are white, young or of Acadian origin, or by excluding professors who are black and who belong to an underprivileged group, under the pretext that the Faculty already has too many black professors; and
>
> ii. by excluding the applications of persons who are older, under the pretext that, by reason of their age, they have no interest or no potential for doing research.
>
> [para. 14]

5] Given that Mr. Ayangma submitted part of his complaint after the expiry of the one-year time limit provided for under the *Human Rights Act*, S.N.B. 2011, c. 171, he was required to file a request for an extension of the deadline to file a complaint regarding some of his allegations.

5] Ms. Schiavoni inquired into and examined the allegations raised by Mr. Ayangma. In the conclusion of her report, she recommended the refusal of the deadline extension and the dismissal of the complaint in its entirety:

> [TRANSLATION]
> Pursuant to subsection 19(2) of the *Act*, it is recommended that the Commission dismiss the complaint made against the respondent at this stage of the proceedings regarding the allegations of discriminatory comments made after July 6, 2014, in view of the fact that the information provided is insufficient to establish a strong arguable case based on race, national origin, place of origin, colour and age.

Regarding the allegations made before July 6, 2014, it is recommended, pursuant to subsection 18(2) of the *Act* and in view of the information contained in this report, that the Commission not extend the deadline for filing the complaint given that the complainant has failed to meet all four (4) criteria set out in section 2 of the Guideline as warranting an extension of time.

Finally, it is recommended that the Commission take into account this report, the submissions of the parties in response to the report and the legal advice of the Commission's legal counsel in order to decide if the circumstances warrant an extension of the time limit for filing a complaint. [paras. 244-246]

7] The report states that if the members of the Commission adopt the recommendations, these then become, along with the basis for making them, the Commission's reasons for decision, unless otherwise indicated. There is no indication otherwise in the file. It is now settled law that human rights commissions may rely on the record of inquiry and on any recommendation made by the person designated to inquire into the complaint when deciding whether or not to dismiss a complaint. When a commission adopts the recommendations made by the person designated to inquire into the complaint, the report of that person is purported to constitute the reasons for decision of the commission: see *Sketchley v. Canada (Attorney General) (F.C.A.)*, 2005 FCA 404 (CanLII), [2005] F.C.J. No. 2056 (QL), at para. 37; and *Smith v. Province of New Brunswick (Department of Public Safety) and New Brunswick Human Rights Commission*, 2012 NBCA 41 (CanLII), 397 N.B.R. (2d) 1, at para. 14.

3] After receiving the report, both parties provided answers to the Commission and, further, Mr. Ayangma provided a reply. At a meeting held on April 28, 2017, the members of the Commission examined all of the material and on May 2, 2017, the Commission informed Mr. Ayangma that it had accepted the recommendations contained in the report and that the file was now closed.

V. Analysis

A. *Was there a breach of procedural fairness?*

9] In his Notice of Application, among the grounds listed, Mr. Ayangma alleges the Commission violated the principles of natural justice, but he provides no detail in support of that allegation, such as a description of what it is that the Commission did or failed to do. The Notice of Appeal makes no mention of such a violation, nor does it allege that the reviewing judge erred in finding there was no breach of procedural fairness. Mr. Ayangma does not argue that the Commission failed to meet the requirements of procedural fairness by conducting a fundamentally flawed inquiry, by failing to consider material evidence, or by committing any other error (see *Sketchley v. Canada (Attorney General)*). His main point of contention is that the inquiry was terminated at this particular stage; he wants the Commission to proceed to the next stage of its inquiry and to have the complaint heard by the Labour and Employment Board.

)] Mr. Ayangma has not raised any argument that would tend to establish a judicial error relating to a breach of procedural fairness, much less an argument that could satisfy the Court in this regard.

[] The complaint was the subject of an inquiry and all the allegations raised by Mr. Ayangma were examined. In my view, the report prepared for the Commission by Ms. Schiavoni demonstrates that she conducted an in-depth and objective inquiry that revealed no material lack of procedural fairness. Mr. Ayangma was able to present his case in a full and fair manner.

2] The reviewing judge found the applicant was not denied procedural fairness and I share that point of view.

B. *Was it reasonable for the Commission to dismiss the complaint?*

3] The *Human Rights Act* is at the core of this matter. Any reference to the *Act* is a reference to the provisions as they existed at the relevant time. The *Act* has undergone a number of amendments since.

4] The relevant provisions of the *Act* are the following:

| **Discrimination in employment** | **Discrimination en matière d'emploi** |
|---|---|
| 4(1) No employer, employers' organization or other person acting on behalf of an employer shall, because of race, colour, religion, national origin, ancestry, place of origin, age, physical disability, mental disability, marital status, sexual orientation, sex, social condition or political belief or activity, | 4(1) Aucun employeur, aucune organisation patronale ni aucune autre personne agissant pour le compte d'un employeur ne peut, pour des raisons de race, de couleur, de croyance, d'origine nationale, d'ascendance, de lieu d'origine, d'âge, d'incapacité physique, d'incapacité mentale, d'état matrimonial, d'orientation sexuelle, de sexe, de condition sociale ou de convictions ou activités politiques, selon le cas : |
| (*a*) refuse to employ or continue to employ any person, or | *a*) soit refuser d'employer ou de continuer d'employer une personne; |

(*b*) discriminate against any person in respect of employment or any term or condition of employment.

*b*) soit faire preuve de discrimination envers une personne en matière d'emploi ou quant aux modalités ou aux conditions d'emploi.

**Complaints**

**17** A person claiming to be aggrieved because of an alleged violation of this *Act* may make a complaint in writing to the Commission in a form prescribed by the Commission.

**Plaintes**

**17** Toute personne qui se prétend lésée par suite d'une violation alléguée de la présente loi peut présenter une plainte par écrit à la Commission selon la formule prescrite par celle-ci.

**Time limit for making complaint**

**18**(1) Subject to subsection (2), a complaint shall be filed within one year after the alleged violation of the *Act*.

**18**(2) The Commission may extend the time for the filing of a complaint if, in the opinion of the Commission, the circumstances warrant it.

**Délai pour déposer une plainte**

**18**(1) Sous réserve du paragraphe (2), chaque plainte est déposée dans l'année qui suit la violation alléguée de la présente loi.

**18**(2) La Commission peut, lorsqu'elle est d'avis que les circonstances le commandent, prolonger le délai pour le dépôt d'une plainte.

**Complaint procedure**

**19**(2) If the Commission is of the opinion that a complaint is without merit, the Commission

**Procédure relative aux plaintes**

**19**(2) Si la Commission juge qu'une plainte est non fondée, elle peut la rejeter à toute étape de la procédure.

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may dismiss the complaint at any stage of the proceedings.

5] The reviewing judge's finding as to the reasonableness of the decision is found in the following paragraph:

> [TRANSLATION]
> More specifically, having examined the facts as set out in the application record, this Court has no difficulty in finding that all the interpretations, recommendations, findings and decisions found therein and that are disputed by Mr. Ayangma, who maintains that they cannot possibly be considered reasonable, are on the contrary within the range of what this Court considers reasonable decisions and outcomes, when viewed in light of our Canadian administrative law. [para. 33]

1. Allegations of incidents occurring on or after July 6, 2014

5] The Commission found that the information provided was insufficient to establish a strong arguable case for discrimination in employment based on race, national origin, place of origin, colour or age, all prohibited grounds of discrimination under the *Act* (s. 4(1)).

7] In large part, Mr. Ayangma's complaint is founded on his assertion that a professor and director of the administration department in the Faculty of Business Administration, also a black person, would have stated, in April 2015, that the Faculty already had too many black professors. Mr. Ayangma did not hear those comments, but this assessment by him of the facts is what prompted him to question the hiring of Ms. S.M. instead of himself to fill the different positions. That allegation was investigated. There is no evidence that those comments were made and they were denied by the person involved.

3] There was also an allegation of discrimination raised by another black professor concerning racial comments that were allegedly made by a white professor. It is alleged that the white professor said there were too many foreign students, especially foreign black students, at the Faculty. Very little information was submitted with regard to the author of those comments or the circumstances surrounding them. There is no information in the record concerning the name or the position held by the author of the comments, and nothing showing the time when the comments would have been made or how they could have amounted to discrimination against Mr. Ayangma.

)] Those alleged facts would have occurred on or after July 6, 2014; however, the person inquiring into the complaint also had to take them into consideration when dealing with the request for an extension of time concerning the allegations of incidents occurring before July 6, 2014.

)] The person designated to inquire into the complaint concluded that the foregoing allegations were without merit. Based on the information on record, that finding was reasonable. Once the allegations of racial comments were rejected, there was not much left to consider with regard to this file except the obvious differences between M. Ayangma and Ms. S.M.: he is an older black person, and she is

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a younger white person. The Commission concluded that these differences were not sufficient to show an arguable case for discrimination based on a prohibited ground.

2. Allegations of incidents occurring before July 6, 2014, and request for an extension of time

1] The Commission found that Mr. Ayangma had not filed his complaint within the statutory time limit and refused to grant him an extension of time.

2] The Commission makes a determination on every complaint submitted, unless it finds that the complaint is inadmissible for having been filed after the expiration of a one-year period from the date of the alleged violation; however, the Commission may extend the time limit where it is of the "opinion [...] the circumstances warrant it" (sections 17 to 19 of the *Act*).

3] For the purposes of s. 18(2), the Commission has established a *Guideline on Time Limit Extension for Complaint Initiation* (the "*Guideline*"), which contains the applicable criteria. Pursuant to s. 2.0 of the *Guideline*, entitled "Grounds for Exercise of Commission's Discretion under s. 18(2)", an extension of time is purported to be warranted when the following four (4) criteria are met:

| | |
|---|---|
| a) there is a strong arguable case, both in fact and law; | a) s'il existe une cause solide et défendable tant en fait qu'en droit; |
| b) there is evidence of a substantial loss or damage to the complainant and a clearly identifiable remedy; | b) s'il y a des éléments de preuve qui démontrent que le plaignant a subi des pertes ou des dommages importants et qu'il existe une mesure corrective clairement identifiable; |
| c) the complainant had a *bona fide* reason, as determined by the Commission, for not filing the complaint within the one year time limit; and | c) si le plaignant a, de l'avis de la Commission, des raisons légitimes pour ne pas avoir déposé la plainte dans le délai imparti d'un an; |
| d) the respondent will not be unduly prejudiced by the extension. | d) si la prolongation de délai ne porte pas indûment préjudice à l'intimé. |

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4] The Commission determined that the incidents alleged to have occurred before July 6, 2014, did not meet the time limit requirements, since the complaint was only filed on July 6, 2015. Mr. Ayangma disputes this decision and the refusal by the Commission to grant him an extension of time.

5] Mr. Ayangma maintains that the Commission erred by not taking into consideration the discoverability rule. This rule states that "a cause of action arises for purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence": *Central Trust Co. v. Rafuse*, 1986 CanLII 29 (SCC), [1986] 2 S.C.R. 147, [1986] S.C.J. No. 52 (QL), p. 224. The discoverability rule is commonly recognized as a tool for the interpretation of statutes of limitations: *Dupuis v. City of Moncton*, 2005 NBCA 47 (CanLII), 284 N.B.R. (2d) 97, at para. 30.

5] L'Université submits that s. 18 of the *Act* as well as the *Guideline* set out by the Commission for the application of s. 18 are more stringent and take precedence over the discoverability rule.

7] The decision of the Commission regarding when the time limit prescribed by s. 18 of the *Act* begins to run, as well as the exercise by the Commission of its discretion to extend the time limit, are subject to the standard of reasonableness: *Khanna v. Canada (Attorney General)*, 2008 FC 576 (CanLII), [2008] F.C.J. No. 733 (QL).

3] Deference is owed to human rights commissions in their interpretation and application of their home statute: *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31 (CanLII), [2018] S.C.J. No. 31 (QL), paras. 27 and 29. In *Prassad v. Canada (Minister of Employment and Immigration)*, 1989 CanLII 131 (SCC), [1989] 1 S.C.R. 560, [1989] S.C.J. No. 25 (QL), the Supreme Court also stated that, as a general rule, administrative tribunals are considered to be masters in their own house and a court of justice must exercise deference towards those tribunals when they are controlling their own procedures (para. 16). See also *O'Connell, as the Registrar of Motor Vehicles for the Province of New Brunswick v. Maxwell*, 2016 NBCA 37 (CanLII), 451 N.B.R. (2d) 283, at para. 45. It follows that the Commission was not required to apply the discoverability rule. It could rely on its home statute – the *Human Rights Act* – and on its *Guideline*.

9] That being said, in analyzing criterion 2c) of the *Guideline*, the person designated to inquire into the complaint determined that Mr. Ayangma had *bona fide* reasons for not filing his complaint regarding the applicant chosen to fill the regular position within the time limit. That was one of the four criteria that Mr. Ayangma had to meet. The person inquiring into the complaint examined each criterion. She concluded that criteria b), c) and d) had been met for the regular position and that criteria b) and d) had been met for the temporary position. Mr. Ayangma had to meet all four criteria. Simply put, he did not provide the information which was necessary to meet the criteria set out in s. 2(a) of the *Guideline*. The crucial test that has not been met is the criterion requiring the existence of a strong arguable case, which is a determinative criterion, and consequently, the person designated to inquire into the complaint recommended that the Commission refuse to grant an extension of time.

)] The *Act* does not require that l'Université retain the most qualified person to fill a position. It is entitled to choose the person who, in its view, best meets the needs of the institution, provided that the selection process and the selections made do not violate human rights.

1] The minutes of the meeting of the departmental assembly where the ten applications were assessed state that the assembly discarded six applicants, including Mr. Ayangma, after it determined that these applicants did not have the required specialization in human resources management. Mr. Ayangma maintains that the departmental assembly did not properly assess his application; he argues that since he has a doctorate in business administration, he does have the required specialization in human resources management. The *Act* is not intended to provide potential employees with a forum to have their labour grievances heard. The Commission must ensure that there is an arguable case for establishing discrimination before referring a complaint to the next stage of the proceedings.

2] The Commission's decision to dismiss Mr. Ayangma's complaint concerning the allegations of incidents occurring before July 6, 2014, on the basis that it was not filed within the time limit prescribed by s. 18 of the *Act*, meets the standard of reasonableness. The Commission recognized that it was within its discretion to examine a complaint that was filed after the expiration of the one-year time limit and, also, the report specifies that the criteria have been examined in order to determine whether or not it was warranted to do so. It decided that, in this case, it was not justified to deviate from the one-year time limit prescribed by the *Act*. The Commission's decision to accept the recommendation made in the report falls within the range of possible and acceptable outcomes which are defensible in respect of the relevant facts and the law.

3. Dismissal of the complaint

3] Deference is owed to the Commission in its decision to refer or not to refer a complaint to the Labour and Employment Board.

4] The Commission may dismiss a complaint at any stage of the proceedings if it determines that the complaint is without merit (s. 19(2)). The *Act* confers upon the Commission the power to inquire into a complaint to determine if pursuing the matter is warranted. The use of the word "may" in s. 19 (2) of the *Act* is a clear indication of the nature of the power to decide, which is discretionary. It is obvious that at this stage of the filtering process, the Commission has the discretion to dismiss the complaint or to refer it to the next step, and a court owes deference to the Commission's decision (see *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10 (CanLII), [2012] 1 S.C.R. 364, at para. 21; *Dupuis v. Canada (Attorney General)*, 2016 FC 1137 (CanLII), [2016] F.C.J. No. 1109, at para. 34; and *McDougall v. Nova Scotia (Human Rights Commission)*, 2016 NSSC 118 (CanLII), [2016] N.S.J. No. 167, at paras. 31 and 45).

5] The issues before the Commission fell within the scope of its expertise.

5] Ms. Schiavoni made two crucial findings. Concerning the incidents occurring on or after July 6, 2014, she concluded that the information on record was [TRANSLATION] "insufficient to establish a strong arguable case for discrimination based on race, national origin, place of origin, colour and age" (para. 244 of the report). Concerning the incidents that occurred before July 6, 2014, she concluded that Mr. Ayangma had [TRANSLATON] "failed to meet the first part of the test" (para. 176 of the report), that is the criterion establishing the existence of "a strong arguable case, both in fact and law", which is one of the four criteria set out in s. 2.0 of the *Guideline*. These two findings led to the conclusion that the complaint was to be dismissed.

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7] In *New Brunswick Human Rights Commission v. Province of New Brunswick (Department of Social Development)*, Justice Robertson of the Court of Appeal instructs us that deference is owed to the Commission's decision at this preliminary stage:

> [...] the applicable standard of review is "reasonableness". In the context of "filtering decisions", this translates into a threshold test in which the reviewing court must be satisfied the reasons or record underscoring the recommendation or decision outline a reasonable basis in law and fact for the discrimination complaint to move to the adjudicative stage. In short, the formal reasons or record must disclose an arguable case. Correlatively, a finding of *prima facie* discrimination is unnecessary. [para. 6]

3] The Commission cannot evade its obligation to determine whether or not there is an arguable case for discrimination, and it is only after having made that preliminary determination that the Commission may decide to refer the discrimination complaint to the Labour and Employment Board. The report provides well-written reasons in which the person designated to inquire into the complaint explains why Mr. Ayangma has not succeeded in showing the existence of an arguable case. The Commission concluded that this matter did not show an arguable case for discrimination within the meaning of s. 4 of the *Act*.

9] Essentially, just as he did in the court below, Mr. Ayangma is asking this Court to once again weigh the evidence considered by the Commission and to make the determination that the Commission must refer the complaint to the Labour and Employment Board. This, obviously, is not the role of a reviewing judge, nor of the Court of Appeal.

0] In my opinion, the reviewing judge correctly identified and applied the proper standard of review. The Commission's decision meets the standard of reasonableness given that it is transparent, intelligible, justified and well within the range of probable outcomes (see *Dunsmuir v. New Brunswick*, 2008 SCC 9 (CanLII), [2008] 1 S.C.R. 190, at para. 47). It is not open to the reviewing court to substitute its own view of a preferable outcome and it is not "the function of the reviewing court to reweigh the evidence" considered by the decision-maker (see *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 (CanLII), [2009] 1 S.C.R. 339, at paras. 59 and 61, and also *O'Connell, as the Registrar of Motor Vehicles for the Province of New Brunswick v. Maxwell*, at para. 44).

1] As stated recently by the Supreme Court of Canada in *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, per Gascon J.: "At its core, reasonableness review recognizes the legitimacy of multiple possible outcomes, even where they are not the court's preferred solution" (para. 55).

2] In *Attaran v. Canada (Attorney General)*, 2015 FCA 37 (CanLII), [2015] F.C.J. No. 100 (QL), the Federal Court of Appeal explained that if the findings of fact made by the Commission are reasonable "then the question will be whether the decision to dismiss the complaint was reasonable, bearing in mind that the decision resulted in a termination of the matter and therefore the range of possible, acceptable outcomes may be narrower" (para. 14). In my opinion, the decision rendered meets the standard of reasonableness; in this case, the dismissal of the complaint was a reasonable conclusion, even if it amounted to a final decision which prevents the continuation of the inquiry into the complaint under the *Act*.

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3] The Commission's decision to dismiss Mr. Ayangma's complaint falls within the range of possible and acceptable outcomes which are defensible in respect of the facts and the law. I agree with the reviewing judge that the decision of the Commission to dismiss the complaint must be affirmed.

C. *Did the reviewing judge err in awarding costs in the amount of $10,000 to l'Université?*

4] Given that the adjudication of costs falls within the discretion of the judge, the decisions rendered in our Court indicate that deference is owed with respect to orders of this nature. The amount of flexibility that a trial judge has in the exercise of this discretion is tempered by certain limitations; however, a court of appeal will not interfere unless it is established the judge erred in principle or that the amount of costs ordered is too high or patently wrong (see *Douthwright v. Duffy*, 2017 NBCA 60 (CanLII), [2017] N.B.J. No. 308 (QL), at para. 10; *Béliveau v. Town of Sackville*, 2017 NBCA 26 (CanLII), [2017] N.B.J. No. 133 (QL), at paras. 29 and 30).

5] In this matter, the judge awarded costs of $10,000. At first blush, these may seem rather high. In the majority of cases, the hearing of an application for judicial review takes half a day or less and the costs awarded are between $2,500 and $5,000. In this case, the application took three days. The application record was voluminous; it contained close to 1,500 pages.

6] No doubt the judge had this in mind when he made the following comments:

> [TRANSLATION]
> Although, in these reasons, our Court did not feel it necessary to cite dozens of pages of case law, it cannot overlook the fact that the respondent and its counsel obviously had to spend a lot of time, effort and energy in trying to refute the multiple submissions and arguments presented by Mr. Ayangma and in so doing the respondent surely must have incurred considerable expenditure.
>
> Not only must costs follow the event, but they must also, as far as reasonable, take into consideration what the successful party had to go through to defend its interests.
>
> [paras. 42-43]

7] In the present case, the application judge is in a better position to determine the issues relating to costs in the judicial review. He made a discretionary order which is not clearly wrong. Taking into account the applicable standard of review, there is no reason to change the amount of costs.

VI. Disposition

8] This appeal does not raise any ground which would justify intervention by this Court. I would dismiss the appeal with costs, which I would fix at $3,000.

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CanLII

# Ayangma v. Université de Moncton, Campus de Moncton, 2019 NBCA 72 (CanLII)

Date: 2019-10-10

File number: 22-19-CA

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COURT OF APPEAL OF NEW BRUNSWICK

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NOËL AYANGMA

-

APPELLANT

- and -

UNIVERSITÉ DE MONCTON, MONCTON CAMPUS

-

RESPONDENT

Ayangma v. Université de Moncton, Moncton Campus, 2019 NBCA 72

CORAM:
The Honourable Chief Justice Richard
The Honourable Justice Quigg
The Honourable Justice Baird

Appeal from a decision of the Court of Queen's Bench:
February 13, 2019

History of case:

Decision under appeal:
2019 NBQB 30 (CanLII)

Preliminary or incidental proceedings:
None

COUR D'APPEL DU NOUVEAU-BRUNSWICK

22-19-CA

NOËL AYANGMA

-

APPELANT

- et -

UNIVERSITÉ DE MONCTON, CAMPUS DE MONCTON

INTIMÉE

Ayangma c. Université de Moncton, Campus de Moncton, 2019 NBCA 72

CORAM :
l'honorable juge en chef Richard
l'honorable juge Quigg
l'honorable juge Baird

Appel d'une décision de la Cour du Banc de la Reine :
le 13 février 2019

Historique de la cause :

Décision frappée d'appel :
2019 NBBR 30 (CanLII)

Procédures préliminaires ou accessoires :
aucune

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Appeal heard:
June 17, 2019

Appel entendu :
le 17 juin 2019

Judgment rendered:
October 10, 2019

Jugement rendu :
le 10 octobre 2019

Counsel at hearing:

Noël Ayangma, on his own behalf

For the respondent:

Sacha Denis Morisset

Avocats à l'audience :

Noël Ayangma, en son propre nom

Pour l'intimée :
Sacha Denis Morisset

THE COURT

The appeal is dismissed with costs of $2,500.

LA COUR

L'appel est rejeté avec dépens qui sont fixés à 2 500 $.

The following is the judgment delivered by

THE COURT

I. Introduction

Mr. Ayangma appeals a motion judge's decision which declared him to be a vexatious litigant and dismissed his civil action against the Université de Moncton on the basis it was statute barred. This is a companion decision to *Ayangma v. Université de Moncton, Moncton Campus et al.*, 2019 NBCA 73 (CanLII).

II. Background

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Mr. Ayangma was a part-time professor at the Université de Moncton ("Université"). He unsuccessfully applied for a permanent position and asserts the Université discriminated against him by hiring an individual, who, he states, does not possess the necessary qualifications as advertised in the competition. He subsequently filed a complaint with the New Brunswick Human Rights Commission in which he accused the Université of discriminatory conduct based on his race, colour and age. The Commission dismissed the complaint. An application for judicial review of the Commission's decision was dismissed by a judge of the Court of Queen's Bench. This decision was unsuccessfully appealed to this Court (see *Ayangma v. Université de Moncton, Moncton Campus*, 2019 NBCA 14 (CanLII), [2019] N.B.J. No. 28 (QL)).

Following the dismissal of his human rights complaint, Mr. Ayangma initiated civil proceedings against the Université, in which he claimed damages for what he asserts was willful/negligent conduct by the Université, misrepresentation, bad faith and an alleged breach of the *Charter*. The Université defended the action.

On February 20, 2018, Mr. Ayangma served and filed his affidavit of documents and served Notice, pursuant to Rule 31.03(1), on the Université, requiring it to serve and file an affidavit of documents and to produce the documents in its possession and control.

On May 1, 2018, the Université produced a draft affidavit of documents. Mr. Ayangma contended the draft affidavit of documents was not *Rules*-compliant. He filed a motion on May 10, 2018, in which he sought an order requiring the Université to file a *Rules*-compliant affidavit of documents. The motion was set down for hearing on October 5, 2018.

On September 14, 2018, the Université filed a motion to strike the pleadings under Rule 22.01, and/or for summary judgment. It also sought to have Mr. Ayangma declared a vexatious litigant pursuant to Rule 76.1.04. Both motions were scheduled to be heard on October 5, 2018.

At the outset of the hearing, the judge mentioned there was a further hearing before him on December 17, 2018, relating to a judicial review of an arbitrator's decision which involved Mr. Ayangma. Mr. Ayangma immediately raised concerns about the judge's ability to be neutral and impartial as a result of these extemporaneous comments.

The motions were adjourned by consent to December 17, 2018, pending the issuance of reasons in a related appeal before this Court, as noted. Meanwhile, Mr. Ayangma filed a further motion in which he asked the motion judge to recuse himself. All motions were returnable December 17, 2018.

On December 17, 2018, Mr. Ayangma's recusal motion was heard first and was dismissed by way of an oral decision. The motion judge then heard the remaining two motions and he rendered a written decision dated February 13, 2019.

)] In the February 13 decision, the motion judge dismissed Mr. Ayangma's action by way of summary judgment under Rule 22. He did so upon finding the action was statute-barred. Having made this determination, it was not necessary for the judge to rule on the Rule 31.03(1) issue. In his decision, originally issued in only the French language, the judge declared Mr. Ayangma to be a vexatious litigant.

## III. Grounds of Appeal

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4] As a general rule, the final decision should have been published simultaneously in both official languages, unless it was determined by the judge that to do so would result in a delay, injustice or hardship, as contemplated in s. 24 of the *Act*. When such a determination is made, the decision can be published in one official language, and thereafter, at the earliest possible time, in the other language.

5] As noted, in this case, the judge initially published his decision in the French language only. Had the judge made the determination to publish in one official language first, and later, in the other official language, on account of one or more of the factors set out in s. 24(2), he should have stated his reasons for doing so in his decision. He did not and we agree with Mr. Ayangma that he should have.

B. *Summary Judgment*

6] Mr. Ayangma contends the motion judge should not have granted summary judgment because the respondent failed to produce a *Rules*-compliant affidavit of documents.

7] In *Whelton v. Mercier et al.*, 2004 NBCA 83 (CanLII), 277 N.B.R. (2d) 251, Drapeau, C.J.N.B. (as he then was) for the Court stated as follows:

> The delivery of an affidavit compliant with Rule 31.03(4) should lead to the disclosure of every document related to a matter in issue. Armed with this affidavit, the adverse party can insist that documents of interest to him or her be produced. Through production of those documents, he or she can acquire a thorough understanding of the case. An Affidavit of Documents that complies with the *Rules of Court* is generally indispensable in uncovering the truth. This is particularly so in cases such as the present, where the answers to controversial questions lie deep within documents held exclusively by one party. In cases of this nature, motions for summary judgment should, as a general rule, be dismissed with costs if the moving party has not complied with the requirements of Rule 31. [para. 26]

8] In the present case, the judge granted summary judgment to the Université despite its failure to comply with Rule 31. Generally, this should have served to dismiss its motion for summary judgment. Nevertheless, we conclude this was one of those exceptional cases in which the judge could grant judgment notwithstanding the Université's non-compliance. Thus, because the basis upon which summary judgment was granted – that the action is prescribed – is not dependent upon the disclosure of any documents. The limitation period was either met or it was not, and all information in this regard would necessarily have already been in the possession of Mr. Ayangma.

C. *Limitation of action*

9] Mr. Ayangma filed grievances in which he alleged the Université violated the collective agreement between 2013-2015 and "more recently," May 12, 2015, by abusing its authority, "intimidation, lack of professional ethics, defamation, harassment and discrimination."

0] In the grievance document, Mr. Ayangma raised serious allegations of harassment and discrimination against a professor. He writes:

> [TRANSLATION]
> Finally, I also maintain that I have been a victim of discrimination in employment, particularly with respect to the staffing of the position of professor of human resources management in the Department of Business Administration, filled in 2014, while Professor [V.K.] was both chair of the selection panel and Director of the Department of Business Administration. [para. 11]

1] In para. 26 of his statement of claim, Mr. Ayangma acknowledged he applied for the advertised position on January 7, 2014, and did not get an interview. On May 28, 2015, he wrote to Mr. Terrance J. LeBlanc, the employer's representative for the Université, and asserted the successful candidate did not have the qualifications, as advertised in 2013, for the position in question; notably she did not have a PhD.

2] The Court in *Dupuis v. City of Moncton*, 2005 NBCA 47 (CanLII), 284 N.B.R. (2d) 97, quoting *Central Trust Co. v. Rafuse*, 1986 CanLII 29 (SCC), [1986] 2 S.C.R. 147, [1986] S.C.J. No. 52 (QL), at p. 224, concluded:

> ... [A] cause of action arises for purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence. ...
>
> [para. 29]

See also *Kamloops v. Nielsen*, 1984 CanLII 21 (SCC), [1984] 2 S.C.R. 2, [1984] S.C.J. No. 29 (QL), at pp. 36-41.

3] Section 5 of the *Limitation of Actions Act*, S.N.B. 2009, c. L-8.5 provides:

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| General limitation periods | Délais de prescription ordinaires |
|---|---|
| 5(1) Unless otherwise provided in this Act, no claim shall be brought after the earlier of | 5(1) Sauf disposition contraire de la présente loi, toute réclamation se prescrit par celui des délais ci-dessous qui expire le premier : |
| (a) two years from the day on which the claim is discovered, and | a) deux ans à compter du jour où sont découverts les faits y ayant donné naissance; |
| (b) fifteen years from the day on which the act or omission on which the claim is based occurred. | b) quinze ans à compter du jour où a eu lieu l'acte ou l'omission sur lequel elle est fondée. |
| 5(2) A claim is discovered on the day on which the claimant first knew or ought reasonably to have known | 5(2) Les faits ayant donné naissance à la réclamation sont découverts le jour où le réclamant a appris ou aurait dû normalement apprendre : |
| (a) that the injury, loss or damage had occurred, | a) que sont survenus les préjudices, les pertes ou les dommages; |
| (b) that the injury, loss or damage was caused by or contributed to by an act or omission, and | b) que les préjudices, les pertes ou les dommages ont été causés entièrement ou en partie par un acte ou une omission; |
| (c) that the act or omission was that of the defendant. | c) que l'acte ou l'omission était le fait du défendeur. |

1] In this case, the Université argues that Mr. Ayangma knew he was the unsuccessful candidate when he received notice from the Université by letter dated March 3, 2014.

5] In his reasons, the motion judge determined that [TRANSLATION] "[t]here is no question Mr. Ayangma knew no later than May 12, 2015, that the position had been filled on July 1, 2014" (para. 16). He dismissed the civil action, finding it was statute barred. In doing so, he found Mr. Ayangma was advised on March 3, 2014, that his application was rejected. Mr. Ayangma filed his grievance challenging the Université's decision on May 12, 2015. Mr. Ayangma's action was filed on May 29, 2017. These are findings of fact for which deference will be accorded in the absence of palpable and overriding error.

6] In *Miramichi Lumber Products Inc. et al. v. Province of New Brunswick, as represented by the Department of Energy and Resource Development et al.*, 2019 NBCA 61 (CanLII), [2019] N.B.J. No. 202 (QL), Quigg J.A. writes:

> With respect to the conclusion of the application judge that the Application was time-barred, the jurisprudence consistently establishes that the question of whether a legal proceeding is time-barred is one of mixed fact and law which cannot be interfered with absent palpable and overriding error (*Guarantee Co. of North America v. Gordon Capital Corp.*, 1999 CanLII 664 (SCC), [1999] 3 S.C.R. 423, [1999] S.C.J. No. 60 (QL), at para. 28; *Longo v. MacLaren Art Centre*, 2014 ONCA 526 (CanLII), [2014] O.J. No. 3242 (QL), at paras. 38-39; *Crombie Property Holdings Limited v. McColl-Frontenac Inc. (Texaco Canada Limited)*, 2017 ONCA 16 (CanLII), [2017] O.J. No. 142 (QL), at para. 31 (leave to appeal to S.C.C. refused, [2017] S.C.C.A. No. 85); and *Fehr v. Sun Life Assurance Company of Canada*, 2018 ONCA 718 (CanLII), [2018] O.J. No. 4513 (QL), at para. 143). In *Longo*, Hourigan J.A. stated:
>
> > The question of whether a limitation period expired prior to the issuance of a statement of claim is a question of mixed fact and law. Thus, the issue for determination on this appeal is whether the motion judge made a palpable and overriding error in concluding that the claim was statute barred.
> >
> > A palpable and overriding error is an obvious error that is sufficiently significant to vitiate the challenged finding of fact. The appellant must show that the error goes to the root of the challenged finding of fact such that the fact cannot safely stand in the face of the error: *Waxman v. Waxman* (2004), 2004 CanLII 39040 (ON CA), 186 O.A.C. 201, at p. 267 (C.A.), leave to appeal refused, [2004] S.C.C.A. No. 291. [paras. 38-39]
>
> [para. 12]

7] Mr. Ayangma argues the limitation period should be six years, on the basis he raised a *Charter* violation in his pleadings, and that the time for filing his civil action commenced when he received the decision of the Human Rights Commission. The motion judge correctly observed that the same argument was unsuccessfully raised by Mr. Ayangma in *Ayangma v. Canada Health Infoway*, 2017 PECA 13 (CanLII), [2017] P.E.I.J. No. 23 (QL). In that case, the court was faced with a similar set of facts and it concluded Mr. Ayangma's civil action was statute barred, as he did not file his claim until July 21, 2015, after the matters had been dealt with by the Human Rights Commission, and the two-year limitation period had expired. Similarly, in this case, the judge concluded that claims where *Charter* violations are raised, are subject to provincial periods of general application, which in New Brunswick is two years. See *Coffey v. Fraser Valley (Regional District)*, 2018 BCSC 959 (CanLII), [2018] B.C.J. No. 1113 (QL).

3] The motion judge's conclusion is supported by the evidence. It is our view the motion judge did not err in law, nor did he make a palpable and overriding error which would allow for appellate intervention.

D. *Vexatious litigant order*

9] The Université sought and was granted an order pursuant to Rule 76.1.04. An order made pursuant to this Rule prohibits a party from commencing any further proceedings in the Court of Queen's Bench or the Small Claims Court, or continuing a proceeding previously commenced in those courts, except with leave. In considering whether to make such an order, a judge may consider if a similar order has been made against that person by any other court, including a court outside New Brunswick, and a judge may also consider whether that person has persistently and without reasonable grounds commenced proceedings in any other court, including a court outside New Brunswick (Rule 76.1.02(2)).

0] In *Bossé v. Caisse populaire acadienne Ltée*, [2018] N.B.J. No. 164 (QL) this Court discussed the above Rule in depth. It states:

> In *Greene v. New Brunswick*, 2014 NBQB 168 (CanLII), 428 N.B.R. (2d) 204, Glennie J. established a framework for the analysis when a vexatious litigant order is sought in the Court of Queen's Bench. He wrote the following:
>
> > Frivolous pleadings are those which are without substance or unarguable and can include any one or more of the following, as outlined in the Jacob Text at pages 222 - 223:
> >
> > Thus, a proceeding may be said to be frivolous when:
> >
> > a. a party is trifling with the court; or
> > b. when to put it forward would be wasting the time of the court; or
> > c. when it is not capable of reasoned argument; or
> > d. it is without foundation; or
> > e. where it cannot possibly succeed; or
> > f. where the action is brought or the defence is raised only for annoyance; or
> > g. to gain some fanciful advantage; or
> > h. when it can really lead to no possible good. [para. 181]
>
> [para. 29]

1] The conclusion whether a litigant is vexatious is determined by an objective standard. The primary characteristics which anchor a declaration of vexatious litigant include:

a) a propensity to relitigate matters that have already been heard;

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b) unsubstantiated allegations of impropriety against the opposite party, legal counsel, the court and administrative officials;

c) the refusal to abide by rules and orders of the court, including the failure to pay costs.

2] In this case, the motion judge carefully reviewed the history of the multiple judicial and quasi-judicial proceedings commenced by Mr. Ayangma in this province as well as in the Province of Prince Edward Island. He writes:

> [TRANSLATION]
> Mr. Ayangma is involved in more than 100 reported decisions found in the Canadian Legal Information Institute (CanLII) database. There are $156,000.00 in unpaid judgments resulting from legal proceedings, a majority of which represent costs awarded against him. [para. 27]

3] He observes that Mr. Ayangma filed his civil action, and that there was also an unsuccessful application for judicial review, dealing with three of eleven grievances [TRANSLATION] "connected with the same factual situation." The judge adds that Mr. Ayangma filed another action based on the same facts as his application for judicial review, but against the Université, the Vice-President, Administration and Human Resources, the Dean of the Faculty of Business Administration and the Department Head. In that action, Mr. Ayangma raised allegations of libel, fraud and/or negligent misrepresentation, tortious conspiracy, reprisals, intimidation, harassment, abuse of authority and process, bad faith, breach of the duty of honest performance in their individual contractual duties, breach of the collective agreement, improper conduct resulting in a flawed investigation and constructive disciplinary suspension, and a *Charter* breach.

4] The judge, applying the principles set out in *Bossé*, had [TRANSLATION] "no difficulty" finding that Mr. Ayangma [TRANSLATION] "abuses the legal system and administration of justice in New Brunswick and elsewhere" (para. 33). We discern no error in the application of the legal principles to the facts of this case, and we conclude the motion judge's decision on this issue was correct.

E. *Recusal*

5] Mr. Ayangma raised several reasons why he felt the judge should have recused himself and why he was biased. They include allegations of conflict of interest due to the fact the judge attended the Université as a student. He alleged the judge raised his voice during the hearing on October 5, 2018. He submitted that because the judge was seized with all the other legal proceedings, as noted, he was biased.

6] In *Rose v. Her Majesty the Queen et al.*, 2015 NBCA 26 (CanLII), 435 N.B.R. (2d) 259, Larlee and Quigg, J.J.A. provide a succinct review of the applicable principles when a recusal order is sought (paras. 8-11). On the issue of judicial bias, they write:

> We begin with the ground alleging bias against the motion judge. In *Brooks v. The Law Society of New Brunswick et al.*, this Court describes what constitutes bias on the part of a judge who is asked to adjudicate. It is a serious allegation. There is a subjective and an objective component to the bias test when broad allegations are made: *R. v. S. (R.D.)*. With respect to the subjective component, the judge considers whether she or he can adjudicate impartially. If she or he cannot do so, that puts an end to the exercise. The objective component of the test is "reasonable apprehension of bias," the test usually applied. As this Court stated in *Dugas v. Gaudet et al.*, 2014 NBCA 7 (CanLII), 416 N.B.R. (2d) 389, to sustain an allegation of reasonable apprehension of bias, one must meet the following criteria: "[t]he grounds giving rise to the apprehension of bias must be sufficiently serious to rebut the presumption that the judge will abide by his or her oath of office and '[judge] a particular controversy fairly on the basis of its own circumstances' (see *United States v. Morgan*, 313 U.S. 409 (1941), at p. 421, excerpt quoted with approval in *R. v. S.(R.D.)*)" (para. 5).
>
> In an oral decision, the motion judge gave her reasons for not recusing herself. In so doing, she cited and applied the correct jurisprudence of the Supreme Court of Canada and this Court, and considered and weighed the appropriate factors. In our view, she made no reversible error in her application of the law relating to bias. Moreover, there is absolutely no evidence on the record to support the allegation of bias. [paras. 16-17]

7] In *Bossé et al. v. Lavigne*, 2015 NBCA 54 (CanLII), 440 N.B.R. (2d) 118, the Court states there are two key principles underlying the recusal of a judge from a case: 1) partiality, and 2) reasonable fear of partiality. The presence of one of them is sufficient to make a judge recuse himself or herself. The determination of recusal needs to be assessed by the judge and his or her reasoning will start with analyzing his or her own state of mind towards the case. This criterion is subjective. For a judge to conclude he or she is impartial, he or she must be disinterested in the outcome of the case and not be predisposed to a particular result. In other words, he or she is open-minded and will let the evidence and submissions speak for themselves, in order to determine the case. If the judge finds himself or herself to be partial, then the analysis ends there and recusal is appropriate. (para. 7)

3] If the judge determines he or she is impartial on the subjective criterion, the reasoning continues to the objective criterion of the reasonable fear of partiality (or reasonable apprehension of bias). In determining whether or not there may be a reasonable fear of partiality, the judge must answer the following question: "[h]aving examined the situation in depth and viewing the matter 'realistically and practically,' would a reasonable and well-informed person conclude it is 'more likely than not that [the judge], whether consciously or unconsciously, would not decide fairly'?". The objective test must be taken from the perspective of: (1) a reasonable person; (2) that is well informed of the circumstances of the case; (3) where the apprehension of bias is reasonable; (4) following both a reasonable and practical examination of the situation; and (5) starting the analysis on a strong presumption of judicial impartiality and then determining whether it has been displaced. (para. 7)

9] The judge dealt with Mr. Ayangma's recusal motion orally the morning of December 17, 2018. He dismissed the motion concluding he could fairly and impartially decide the issues before him. The judge began by reciting the complaints raised by Mr. Ayangma in his motion. In those complaints, Mr. Ayangma asserted the judge was in collusion with the Université because he had attended school there. He contended the judge had predetermined all matters that were before him, because he had referred to them in his extemporaneous comments.

)] The judge reviewed the applicable jurisprudence, applying it to the motion. He concluded he had an open mind, and that there was no foundation established to support a claim of bias or a reasonable apprehension of bias. His analysis was comprehensive and fulsome. He found that a reasonable and well-informed person viewing the argument objectively, would not conclude that he was partial, or biased (see also *Ayangma v. Université de Moncton, Moncton Campus et al.*, 2019 NBCA 73 (CanLII)). We find no error in the motion judge's analysis and this ground of appeal is dismissed.

VI. Disposition

!] The appeal is dismissed with costs of $2,500.

Version française du jugement de la Cour rendu par

LA COUR

I. Introduction

| M. Ayangma interjette appel d'une décision dans laquelle le juge saisi de la motion l'a déclaré plaideur quérulent et a rejeté l'action civile qu'il avait intentée à l'Université de Moncton au motif qu'elle était prescrite. Il s'agit d'une décision parallèle à l'arrêt *Ayangma c. Université de Moncton, Campus de Moncton et autre*, 2019 NBCA 73 (CanLII).

II. Contexte

| M. Ayangma occupait un poste de professeur à temps partiel à l'Université de Moncton (l'Université). Il a présenté en vain sa candidature à un poste permanent et affirme que l'Université a fait preuve de discrimination envers lui en recrutant une personne qui, selon ses dires, ne possède pas les qualifications nécessaires qui étaient énoncées dans le concours. Il a par la suite déposé auprès de la Commission des droits de la personne du Nouveau-Brunswick une plainte dans laquelle il accusait l'Université de conduite discriminatoire fondée sur sa race, sa couleur et son âge. La Commission a rejeté la plainte. Une requête en révision judiciaire de la décision de la Commission a été rejetée par un juge de la Cour du Banc de

la Reine. Cette décision a, sans succès, été portée en appel devant notre Cour (voir *Ayangma c. Université de Moncton, Campus de Moncton*, 2019 NBCA 14 (CanLII), [2019] A.N.-B. n° 28 (QL)).

Après le rejet de sa plainte auprès de la Commission des droits de la personne, M. Ayangma a entamé contre l'Université une poursuite civile dans laquelle il réclamait des dommages-intérêts en réparation de ce qui constituait, selon ses dires, de la part de l'Université, une conduite délibérée et négligente, une assertion inexacte, de la mauvaise foi et une violation alléguée de la *Charte*. L'Université a opposé une défense à l'action.

Le 20 février 2018, M. Ayangma a signifié et déposé son affidavit des documents et signifié à l'Université, sous le régime de la règle 31.03(1), un avis dans lequel il lui demandait de signifier et de déposer un affidavit des documents et de produire les documents dont elle avait la possession et le contrôle.

Le 1er mai 2018, l'Université a produit un projet d'affidavit des documents. M. Ayangma a fait valoir que ce projet d'affidavit n'était pas conforme aux *Règles de procédure*. Le 10 mai 2018, il a introduit une motion dans laquelle il demandait à la Cour d'ordonner à l'Université de déposer un affidavit des documents conforme aux *Règles*. L'audition de la motion a été fixée au 5 octobre 2018.

Le 14 septembre 2018, l'Université a déposé une motion dans laquelle elle sollicitait la radiation des plaidoiries sous le régime de la règle 22.01 ou un jugement sommaire. Elle demandait également que M. Ayangma soit déclaré plaideur quérulent en vertu de la règle 76.1.04. Les deux motions devaient être entendues le 5 octobre 2018.

Dès le début de l'audience, le juge a mentionné qu'une autre audience afférente à la révision judiciaire d'une décision arbitrale mettant en cause M. Ayangma devait se dérouler devant lui le 17 décembre 2018. M. Ayangma a immédiatement exprimé ses craintes au sujet de la capacité du juge de rester neutre et impartial en raison de ses observations impromptues.

Du consentement des parties, l'audition des motions a été reportée au 17 décembre 2018, dans l'attente de la publication des motifs dans un appel connexe interjeté devant notre Cour, comme je l'ai indiqué plus haut. Entre-temps, M. Ayangma a déposé une nouvelle motion, dans laquelle il demandait au juge saisi de la motion de se récuser. Toutes les motions étaient présentables le 17 décembre 2018.

Le 17 décembre 2018, la motion en récusation de M. Ayangma a été entendue en premier et a été rejetée séance tenante. Le juge saisi de la motion a ensuite entendu les deux autres motions; celles-ci ont été rejetées dans une décision écrite en date du 13 février 2019.

)] Dans une décision datée du 13 février 2019, le juge saisi de la motion a accordé un jugement sommaire sur le fondement de la règle 22, rejetant ainsi l'action intentée par M. Ayangma. Il a fait ainsi au motif que l'action était prescrite. Ainsi, le juge n'a pas eu à statuer sur la question qui visait la règle

31.02(4). La décision, initialement rendue uniquement en français, déclarait M. Ayangma un plaideur quérulent.

III. Moyaens d'appel

1] M. Ayangma demande l'infirmation de la décision du juge saisi de la motion. Ses différents moyens d'appel peuvent se résumer ainsi :

a) la décision du juge saisi de la motion a enfreint le par. 24(1) de la *Loi sur les langues officielles*, L.N.-B. 2002, ch. O-0.5, étant donné qu'elle n'a été publiée que dans une seule langue officielle;

b) le juge saisi de la motion a commis une erreur de droit en accordant un jugement sommaire sous le régime de la règle 22.01 étant donné que l'Université n'avait pas produit un affidavit des documents comme elle en avait l'obligation, alors même qu'elle avait reçu signification de l'avis prévu à la règle 31.03, et la décision de prononcer ce jugement sommaire a été rendue avant que la question de la divulgation ne soit tranchée;

c) le juge saisi de la motion a commis une erreur de droit en déterminant que l'action intentée par M. Ayangma était prescrite par la *Loi sur la prescription*, L.N.-B. 2009, ch. L-8.5;

d) le juge saisi de la motion a commis une erreur de droit en restreignant le droit de l'appelant de saisir la cour lorsqu'il a déclaré qu'il était un plaideur quérulent;

e) le juge saisi de la motion était partial et aurait dû se récuser.

IV. Norme de contrôle

2] S'agissant des moyens d'appel qui soulèvent des questions de droit, la norme de contrôle applicable est celle de la décision correcte. Pour ce qui est de ceux qui soulèvent soit une question de fait, soit une question mixte de droit et de fait au sujet de laquelle aucune erreur de droit isolable ne peut être décelée, la norme de contrôle applicable est celle de l'erreur manifeste et dominante.

V. Analyse

A. *Violation de la Loi sur les langues officielles*

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3] La décision portant sur le contrôle judiciaire a initialement été rendue en français le 13 février 2019, puis dans sa version anglaise le 8 mars 2019. M. Ayangma soutient que la décision aurait dû être publiée simultanément dans les deux langues officielles étant donné que l'instance s'est déroulée dans les deux langues. Ce moyen d'appel n'a pas été poursuivi devant nous. Dans son mémoire, M. Ayangma n'a pas affirmé que la décision du juge de rendre initialement sa décision dans une seule des deux langues officielles avait pour effet de l'invalider, mais il a fait valoir que [TRADUCTION] « ce type de conduite doit faire l'objet d'une condamnation ou de directives fermes de la part de la Cour afin d'éviter qu'elle ne se reproduise ».

4] En règle générale, la décision définitive aurait dû être publiée simultanément dans les deux langues officielles, à moins que le juge n'ait déterminé que la publication d'une version bilingue entraînerait un retard qui serait préjudiciable à l'intérêt public ou qui causerait une injustice ou un inconvénient grave, comme le prévoit l'art. 24 de la *Loi*. Lorsque le juge conclut dans ce sens, la décision peut être publiée dans une langue, et ensuite dans l'autre langue le plus rapidement possible.

5] Comme nous l'avons indiqué, dans la présente instance, le juge a initialement publié sa décision uniquement en français. Si le juge avait décidé de la publier dans une langue officielle dans un premier temps, et ensuite dans l'autre langue officielle, en raison de l'un ou de plusieurs des facteurs énoncés au par. 24(2), il aurait dû exposer dans sa décision les motifs pour lesquels il avait agi de la sorte. Il ne l'a pas fait et nous convenons avec M. Ayangma qu'il aurait dû le faire.

B. *Jugement sommaire*

6] M. Ayangma soutient que le juge saisi de la motion n'aurait pas dû rendre un jugement sommaire étant donné que l'Université n'avait pas produit un affidavit des documents conforme aux *Règles*.

7] Dans l'arrêt *Whelton c. Mercier et al.*, 2004 NBCA 83 (CanLII), 277 R.N.-B. (2e) 251, le juge en chef Drapeau (tel était alors son titre) s'est exprimé en ces termes au nom de la Cour :

> La signification d'un affidavit fidèle à la règle 31.03(4) devrait aboutir à la divulgation de tous les documents relatifs aux questions en litige. Munie de cet affidavit, la partie adverse peut insister sur la production des documents qui l'intéressent et acquérir, suite à leur examen, une connaissance approfondie du dossier. Un affidavit des documents réglementaire est, en général, indispensable à la découverte de la vérité. Il en est ainsi tout particulièrement dans un litige, comme celui qui nous occupe, où la réponse à certaines questions controversées est embusquée dans les documents en la possession exclusive de l'une des parties. En règle générale, toute motion en jugement sommaire présentée dans le cadre d'un tel litige devrait être rejetée avec dépens lorsque l'auteur de la motion ne s'est pas plié aux exigences de la règle 31. [Par. 26]

8] Dans la présente instance, le juge a prononcé un jugement sommaire en faveur de l'Université malgré le défaut de cette dernière de se conformer à la règle 31. En général, cela aurait dû suffire pour entraîner le rejet de sa motion en jugement sommaire. Néanmoins, nous concluons qu'il s'agissait de l'un

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de ces cas exceptionnels dans lesquels le juge pouvait rendre le jugement sollicité malgré le non-respect de la règle par l'Université. En effet, le fondement sur lequel le jugement sommaire a été rendu – le fait que l'action était prescrite – ne dépendait pas de la divulgation de documents, quels qu'ils soient. Le délai de prescription était échu ou il ne l'était pas, et toute l'information en la matière se trouvait déjà en la possession de M. Ayangma.

C. *Prescription*

9] M. Ayangma avait déposé des griefs dans lesquels il alléguait que l'Université avait violé la convention collective entre 2013 et 2015 et [TRADUCTION] « plus récemment », le 12 mai 2015, en se rendant coupable d'abus de pouvoir, [TRADUCTION] « d'intimidation, de manque d'éthique professionnelle, de diffamation, de harcèlement et de discrimination ».

0] Dans le grief, M. Ayangma a soulevé de graves allégations de harcèlement et de discrimination contre une professeure. Il a écrit ce qui suit :

> [TEXTE ORIGINAL]
> J'allègue enfin aussi être victime de discrimination en matière d'emploi et en particulier dans la dotation au département d'administration, du poste de Professeur de gestion des ressources humaines doté en 2014 pendant que la Professeure [V.K.] était à la fois présidente du jury de sélection et directrice du Département d'administration.
>
> [Par. 11]

1] Au paragraphe 26 de l'exposé de sa demande, M. Ayangma a reconnu qu'il avait posé sa candidature au poste annoncé le 7 janvier 2014 et n'avait pas obtenu une entrevue. Le 28 mai 2015, il a écrit à Terrance J. LeBlanc, le représentant de l'employeur pour l'Université, affirmant que la candidate retenue ne possédait pas les qualifications dont faisait état l'annonce de 2013 concernant le poste en question, notamment parce qu'elle n'était pas titulaire d'un doctorat.

2] Dans l'arrêt *Dupuis c. City of Moncton*, 2005 NBCA 47 (CanLII), 284 R.N.-B. (2e) 97, la Cour, citant l'arrêt *Central Trust Co. c. Rafuse*, 1986 CanLII 29 (SCC), [1986] 2 R.C.S. 147, [1986] A.C.S. n° 52 (QL), à la p. 224, a tiré la conclusion suivante :

> [Une] cause d'action prend naissance, aux fins de la prescription, lorsque les faits importants sur lesquels repose cette cause d'action ont été découverts par le demandeur ou auraient dû l'être s'il avait fait preuve de diligence raisonnable. [...]
>
> [Par. 29]

Voir également *Kamloops c. Nielsen*, 1984 CanLII 21 (SCC), [1984] 2 R.C.S. 2, [1984] A.C.S. n° 29 (QL), aux p. 36 à 41.

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3] Voici le texte de l'article 5 de la *Loi sur la prescription*, L.N.-B. 2009, ch. L-8.5 :

| | |
|---|---|
| **General limitation periods** | **Délais de prescription ordinaires** |
| **5**(1) Unless otherwise provided in this Act, no claim shall be brought after the earlier of | **5**(1) Sauf disposition contraire de la présente loi, toute réclamation se prescrit par celui des délais ci-dessous qui expire le premier : |
| (a) two years from the day on which the claim is discovered, and | a) deux ans à compter du jour où sont découverts les faits y ayant donné naissance; |
| (b) fifteen years from the day on which the act or omission on which the claim is based occurred. | b) quinze ans à compter du jour où a eu lieu l'acte ou l'omission sur lequel elle est fondée. |
| **5**(2) A claim is discovered on the day on which the claimant first knew or ought reasonably to have known | **5**(2) Les faits ayant donné naissance à la réclamation sont découverts le jour où le réclamant a appris ou aurait dû normalement apprendre : |
| (a) that the injury, loss or damage had occurred, | a) que sont survenus les préjudices, les pertes ou les dommages; |
| (b) that the injury, loss or damage was caused by or contributed to by an act or omission, and | b) que les préjudices, les pertes ou les dommages ont été causés entièrement ou en partie par un acte ou une omission; |
| (c) that the act or omission was that of the defendant. | c) que l'acte ou l'omission était le fait du défendeur. |

4] Dans la présente instance, l'Université fait valoir que M. Ayangma savait que sa candidature avait été rejetée lorsqu'il a reçu un avis à cet effet de l'Université dans une lettre datée du 3 mars 2014.

5] Dans ses motifs, le juge saisi de la motion a tranché qu'« [i]l est incontestable qu'au plus tard le 12 mai 2015, M. Ayangma savait que le poste avait été comblé le 1er juillet 2014 » (par. 16). Il a donc rejeté l'action civile après avoir déterminé qu'elle était prescrite. Ce faisant, il a conclu que M. Ayangma avait été informé le 3 mars 2014 que sa candidature avait été rejetée. M. Ayangma a déposé le grief dans lequel il contestait la décision de l'Université le 12 mai 2015. L'action de M. Ayangma a été introduite le 29 mai 2017. Ce sont là des conclusions de fait qui commandent la déférence en l'absence d'une erreur manifeste et dominante.

6] Dans l'arrêt *Miramichi Lumber Products Inc. et autre c. Province du Nouveau-Brunswick, représentée par le Ministère du développement de l'énergie et des ressources et autres*, 2019 NBCA 61 (CanLII), [2019] A.N.-B. n° 202 (QL), la juge d'appel Quigg a écrit ce qui suit :

> S'agissant de la conclusion du juge saisi de la requête selon laquelle la requête était prescrite, la jurisprudence établit de façon constante que la question de savoir si une procédure judiciaire est prescrite est une question mixte de droit et de fait au sujet de laquelle une cour ne devrait pas intervenir à moins qu'une erreur manifeste et dominante n'ait été commise (*Guarantee Co. of North America c. Gordon Capital Corp.*, 1999 CanLII 664 (SCC), [1999] 3 R.C.S. 423, [1999] A.C.S. n° 60 (QL), par. 28; *Longo c. MacLaren Art Centre*, 2014 ONCA 526 (CanLII), [2014] O.J. No. 3242 (QL), par. 38 et 39; *Crombie Property Holdings Limited c. McColl-Frontenac Inc. (Texaco Canada Limited)*, 2017 ONCA 16 (CanLII), [2017] O.J. No. 142 (QL), par. 31 (autorisation de pourvoi à la Cour suprême du Canada refusée à [2017] C.S.C.R. n° 85); et *Fehr c. Sun Life Assurance Company of Canada*, 2018 ONCA 718 (CanLII), [2018] O.J. No. 4513 (QL), par. 143). Dans l'arrêt *Longo*, le juge d'appel Hourigan a dit :
>
> > [TRADUCTION]
> > La question de savoir si un délai de prescription a expiré avant le dépôt d'une déclaration est une question mixte de fait et de droit. En conséquence, la question à trancher dans le présent appel est celle de savoir si le juge saisi de la motion a commis une erreur manifeste et dominante en concluant que la demande était prescrite par la loi.
> >
> > Il est entendu qu'une erreur manifeste et dominante est une erreur évidente qui est suffisamment importante pour vicier la conclusion de fait qui est contestée. L'appelant doit démontrer que l'erreur touche au cœur même de la conclusion de fait qui est contestée et que, en conséquence de l'erreur, le fait ne peut être affirmé sans risque de se tromper : *Waxman c. Waxman* (2004), 2004 CanLII 39040 (ON CA), 186 O.A.C. 201, p. 267 (C.A.), autorisation de pourvoi refusée à [2004] C.S.C.R. n° 291. [Par. 38 à 39]
>
> [Par. 12]

7] M. Ayangma affirme que le délai de prescription devrait être de six ans au motif qu'il a allégué la violation de la *Charte* dans ses plaidoiries et que le délai dans lequel il devait déposer son action civile a commencé à courir lorsqu'il a reçu la décision de la Commission des droits de la personne. C'est à bon droit que le juge saisi de la motion a fait observer que M. Ayangma avait en vain invoqué le même argument dans l'affaire *Ayangma c. Canada Health Infoway*, 2017 PECA 13 (CanLII), [2017] P.E.I.J. No. 23 (QL). Dans cette cause, la Cour examinait un ensemble de faits analogues aux faits de l'espèce et a conclu que l'action civile intentée par M. Ayangma était prescrite du fait que ce n'était que le 21 juillet 2015 qu'il avait déposé sa demande, soit après que la Commission des droits de la personne eut statué sur les affaires en cause, le délai de prescription de deux ans étant alors échu. De la même façon, en l'espèce, le juge a conclu que les demandes dans lesquelles sont soulevées des allégations de violation de la *Charte* sont soumises au délai de prescription provincial ordinaire qui est de deux ans au Nouveau-Brunswick. Voir *Coffey c. Fraser Valley (Regional District)*, 2018 BCSC 959 (CanLII), [2018] B.C.J. No. 1113 (QL).

3] La conclusion du juge saisi de la motion est étayée par la preuve. À notre avis, il n'a commis aucune erreur de droit, et il n'a pas non plus commis une erreur manifeste et dominante susceptible de permettre notre intervention en appel.

D. *Ordonnance déclarant le plaideur quérulent*

)] L'Université a demandé et obtenu une ordonnance sous le régime de la règle 76.1.04. Une ordonnance rendue en vertu de cette règle interdit à une partie d'introduire d'autres instances devant la Cour du Banc de la Reine ou la Cour des petites créances, ou encore de continuer une instance déjà introduite devant ces tribunaux, à moins d'en avoir obtenu l'autorisation. Afin de déterminer s'il doit rendre une telle ordonnance, le juge peut tenir compte de toute ordonnance semblable rendue contre la personne en cause par tout autre tribunal, y compris un tribunal situé à l'extérieur du Nouveau-Brunswick, ainsi que des instances que cette personne a introduites de façon persistante et sans motif raisonnable devant tout autre tribunal, y compris un tribunal situé à l'extérieur du Nouveau-Brunswick (règle 76.1.02(2)).

)] Dans l'affaire *Bossé c. Caisse populaire acadienne Ltée*, [2018] A.N.-B. n$^{0}$ 164 (QL), notre Cour a longuement traité de la règle susmentionnée. Elle a affirmé ce qui suit :

> Dans *Greene c. Province du Nouveau-Brunswick et autres*, 2014 NBBR 168 (CanLII), 428 R.N.-B. (2$^{e}$) 204, le juge Glennie a offert un cadre pour l'analyse d'une demande, faite à la Cour du Banc de la Reine, d'une ordonnance déclarant un plaideur quérulent. Il a écrit ce qui suit :
>
> > [TRADUCTION]
> > Les plaidoiries frivoles sont celles qui sont sans substance ou indéfendables et il peut s'agir notamment des cas suivants qui sont énumérés aux pages 222 et 223 du texte de Jacob :
> >
> > Ainsi, on peut qualifier une plaidoirie de frivole :
> >
> > a. lorsqu'une partie se joue de la Cour,
> > b. lorsqu'elle ferait perdre son temps à la Cour,
> > c. lorsqu'elle ne peut faire l'objet d'une argumentation raisonnée,

d. lorsqu'elle est dénuée de fondement,
e. lorsqu'elle est vouée à l'échec,
f. lorsque l'action est intentée ou la défense opposée dans l'unique but de contrarier,
g. lorsqu'elle a pour but d'obtenir un avantage fantaisiste,
h. lorsqu'elle ne peut vraiment apporter rien de bon. [Par. 181]

[Par. 29]

1] Une norme objective sert à établir si un plaideur est ou non quérulent. Les principaux indicateurs permettant de déclarer un plaideur quérulent sont notamment les suivants :

a) une propension à remettre en litige des questions qui ont déjà été entendues;

b) le fait de soutenir des allégations d'actes irréguliers sans fondement contre une partie opposée, des avocats, la cour ou des fonctionnaires administratifs;

c) le refus de se plier aux règles et aux ordonnances judiciaires, notamment le refus de verser les dépens.

2] Dans la présente instance, le juge saisi de la motion a soigneusement passé en revue l'historique des multiples procédures judiciaires et quasi judiciaires que M. Ayangma avait entamées dans notre province ainsi qu'à l'Île-du-Prince-Édouard. Il a écrit ce qui suit :

> [TEXTE ORIGINAL]
> M. Ayangma a, se référant à la base de données de l'institut Canadien d'information juridique (CanLII) plus de cent décisions rapportées l'impliquant. Il existe 156 000,00 $ en jugement impayé résultant de procédures judiciaires dont la majorité représente des dépens accordés contre lui.
>
> [Par. 27]

3] Il fait ensuite observer que M. Ayangma a déposé la présente action civile et qu'il y a par ailleurs une requête en révision qui a été rejetée et qui traite de trois des onze griefs « rattachés à la même situation de faits. » Le juge ajoute que M. Ayangma a déposé une autre poursuite se fondant sur les mêmes faits que la requête en révision judiciaire, cette fois contre l'Université, le vice-recteur à l'administration et aux ressources humaines, le doyen de la faculté d'administration et le chef de département. Dans cette action, M. Ayangma a soulevé des allégations de diffamation, de fraude et d'assertion négligente et inexacte, de complot délictueux, de représailles, d'intimidation, de harcèlement, d'abus d'autorité et d'abus de procédure, de mauvaise foi, de manquement à leur obligation d'agir avec honnêteté dans leurs obligations contractuelles individuelles, de violation de la convention collective, d'inconduite ayant mené à une enquête déficiente et à une suspension disciplinaire déguisée, et de violation de la *Charte*.

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4] Appliquant les principes énoncés dans l'arrêt *Bossé*, le juge n'a eu « aucune difficulté » à conclure que M. Ayangma est un plaideur quérulant qui « abuse du système judiciaire et l'administration de la justice au Nouveau-Brunswick et ailleurs » (par. 33). Nous ne trouvons aucune erreur dans l'application des principes juridiques aux faits en cause et nous concluons que la décision rendue par le juge saisi de la motion sur cette question était correcte.

E. *Récusation*

5] M. Ayangma a donné plusieurs raisons pour lesquelles il pensait que le juge était partial et aurait dû se récuser. Il a notamment affirmé qu'il y avait conflit d'intérêts parce que le juge avait fréquenté l'Université comme étudiant. Il a allégué que le juge avait levé le ton pendant l'audience du 5 octobre 2018. Il a fait valoir que le juge, du fait qu'il était saisi de toutes les autres instances judiciaires, comme indiqué, était partial.

6] Dans l'arrêt *Rose c. Sa Majesté la Reine et autres*, 2015 NBCA 26 (CanLII), 435 R.N.-B. (2e) 259, les juges d'appel Larlee et Quigg revoient succinctement les principes applicables lorsqu'une ordonnance de récusation est sollicitée (par. 8 à 11). Elles écrivent ce qui suit sur la question de la partialité du tribunal :

> Nous commençons par le moyen d'appel qui soutient que la juge saisie des motions était partiale. Dans *Brooks c. Barreau du Nouveau-Brunswick et autres*, notre Cour décrit ce qui constitue la partialité de la part d'un juge qui doit se prononcer sur une affaire. Il s'agit d'une allégation grave. Le critère applicable à la partialité dans les cas où des allégations générales sont faites comporte à la fois un élément subjectif et un élément objectif : *R. c. S. (R.D.)*. Pour ce qui est de l'élément subjectif, le juge considère s'il lui est possible d'instruire l'affaire de façon impartiale. S'il lui est impossible de le faire, il ne doit pas aller plus loin. L'élément objectif du critère est celui de la « crainte raisonnable de partialité », le critère habituellement appliqué. Comme notre Cour l'a déclaré dans *Dugas c. Gaudet et al.*, 2014 NBCA 7 (CanLII), 416 R.N.-B. (2e) 389, pour soutenir une allégation de crainte raisonnable de partialité, il incombe de remplir les critères suivants : « Les motifs qui sous-tendent la crainte de partialité doivent être d'une gravité telle qu'ils réfutent la forte présomption que le ou la juge respectera son serment d'office et "[tranchera] le litige équitablement à la lumière de ses circonstances propres" (voir *United States c. Morgan*, 313 U.S. 409 (1941), à la p. 421, passage cité avec approbation dans l'arrêt *R. c. S. (R.D.)*) » (par. 5).
>
> Dans une décision rendue oralement, la juge saisie des motions a motivé sa décision de ne pas se récuser. Elle a alors cité et appliqué la bonne jurisprudence de la Cour suprême du Canada et de notre Cour et a examiné et soupesé les facteurs appropriés. À notre sens, elle n'a commis dans son application du droit en matière de partialité aucune erreur susceptible de révision. En outre, absolument aucune preuve au dossier ne soutient l'allégation de partialité. [Par. 16 et 17]

7] Dans l'arrêt *Bossé et autres c. Lavigne*, 2015 NBCA 54 (CanLII), 440 R.N.-B. (2e) 118, la Cour précise que deux principes clés sous-tendent la récusation d'un juge : 1) la partialité et 2) la crainte raisonnable de partialité. La présence de l'une ou de l'autre suffit pour amener un juge à se récuser. C'est au juge qu'il appartient de déterminer s'il doit se récuser et son raisonnement doit commencer par l'analyse de son

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propre état d'esprit au sujet de l'affaire en cause. Ce critère est subjectif. Pour conclure à son impartialité, le juge doit être désintéressé eu égard à l'issue de l'affaire et ne pas être prédisposé à un résultat particulier. Autrement dit, il doit avoir l'esprit ouvert et être susceptible d'être persuadé par la preuve et les arguments soumis afin de statuer sur l'affaire en cause. Si le juge conclut qu'il est partial, l'analyse prend alors fin et une récusation est appropriée. (par. 7)

3] Si le juge détermine qu'il est impartial selon le critère subjectif, le raisonnement passe alors au critère objectif de la crainte raisonnable de partialité. Pour déterminer s'il peut exister une crainte raisonnable de partialité, le juge doit répondre à la question suivante : « [U]ne personne raisonnable et bien renseignée qui étudierait la situation en profondeur et de façon "pratique et réaliste" serait-elle d'avis que, "selon toute vraisemblance, le [ou la] juge, consciemment ou non, ne rendra pas une décision juste"? ». Les éléments du critère objectif sont les suivants : (1) le critère est considéré du point de vue d'une personne raisonnable; (2) celle-ci est bien renseignée des circonstances de l'affaire; (3) la crainte de partialité est raisonnable; (4) la situation fait l'objet d'un examen réaliste et pratique; et (5) l'analyse commence par une forte présomption d'impartialité judiciaire et vise à déterminer si celle-ci a été réfutée. (par. 7)

)] Le juge a traité oralement de la motion en récusation de M. Ayangma dans la matinée du 17 décembre 2018. Il a rejeté la motion après avoir conclu qu'il pouvait trancher les questions dont il était saisi de façon juste et impartiale. Le juge a commencé par reprendre les différentes plaintes que M. Ayangma avait formulées dans sa motion. Dans ces plaintes, M. Ayangma accusait le juge de collusion avec l'Université parce qu'il avait étudié dans cet établissement. Il soutenait que le juge avait déjà pris une décision sur toutes les affaires dont il était saisi étant donné qu'il les avait abordées dans ses observations impromptues.

)] Le juge a ensuite passé en revue la jurisprudence applicable et l'a appliquée à la motion. Il a conclu qu'il avait l'esprit ouvert et qu'il n'existait aucun fondement à l'allégation de partialité ou de crainte raisonnable de partialité. Son analyse était exhaustive et approfondie. Il est arrivé à la conclusion qu'une personne raisonnable et bien informée qui examinerait l'argument avec objectivité ne conclurait pas qu'il est partial ou qu'il a un préjugé (voir également *Ayangma c. Université de Moncton, Campus de Moncton et autre*, 2019 NBCA 73 (CanLII)). Nous ne voyons aucune erreur dans l'analyse du juge saisi de la motion et ce moyen d'appel est donc rejeté.

## VI. Dispositif

[] L'appel est rejeté avec dépens qui sont fixés à 2 500 $.

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CanLII

# Ayangma v. Université de Moncton, Moncton Campus et al., 2019 NBCA 73 (CanLII)

Date: 2019-10-10

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COURT OF APPEAL OF NEW BRUNSWICK

-

NOËL AYANGMA

-

APPELLANT

- and -

UNIVERSITÉ DE MONCTON, MONCTON CAMPUS and ASSOCIATION DES BIBLIOTHÉCAIRES, PROFESSEURES ET PROFESSEURS DE L'UNIVERSITÉ DE MONCTON

-

RESPONDENTS

Ayangma v. Université de Moncton, Moncton Campus et al., 2019 NBCA 73

CORAM:
The Honourable Chief Justice Richard
The Honourable Justice Quigg
The Honourable Justice Baird

Appeal from a decision of the Court of Queen's Bench:
February 13, 2019

History of case:

Decision under appeal:

COUR D'APPEL DU NOUVEAU-BRUNSWICK

26-19-CA

-

NOËL AYANGMA

-

APPELANT

- et -

UNIVERSITÉ DE MONCTON, CAMPUS DE MONCTON et ASSOCIATION DES BIBLIOTHÉCAIRES, PROFESSEURES ET PROFESSEURS DE L'UNIVERSITÉ DE MONCTON

INTIMÉES

Ayangma c. Université de Moncton, Campus de Moncton et autre, 2019 NBCA 73

CORAM :
l'honorable juge en chef Richard
l'honorable juge Quigg
l'honorable juge Baird

Appel d'une décision de la Cour du Banc de la Reine :
le 13 février 2019

Historique de la cause :

Décision frappée d'appel :

Preliminary or incidental proceedings:
None

Procédures préliminaires ou accessoires :
aucune

Appeal heard:
June 17, 2019

Appel entendu :
le 17 juin 2019

Judgment rendered:
October 10, 2019

Jugement rendu :
le 10 octobre 2019

Counsel at hearing:

Noël Ayangma, on his own behalf

For the respondent, Université de Moncton:

Sacha Denis Morisset

For the respondent, Association des bibliothécaires, professeures et professeurs de l'Université de Moncton:
Joël Michaud

Avocats à l'audience :

Noël Ayangma, en son propre nom

Pour l'intimé Université de Moncton :
Sacha Denis Morisset

Pour l'intimée Association des bibliothécaires, professeures et professeurs de l'Université de Moncton :
Joël Michaud

THE COURT

The appeal is dismissed with costs of $2,500.

LA COUR

L'appel est rejeté avec dépens qui sont fixés à 2 500 $.

The following is the judgment delivered by

THE COURT

I. Introduction

1 Mr. Ayangma seeks to set aside a judge's decision which upheld an arbitrator's order to summarily dismiss his grievance without dealing with the substantive issues.

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II. Background

Mr. Ayangma was employed by the Université de Moncton ("Université") as a part-time professor from 2010 to 2018, and he was a member of a bargaining unit represented by the Association des bibliothécaires, professeures et professeurs de l'Université de Moncton ("Association"), which negotiated a collective agreement with the Université.

On January 5, 2018, the Université sent a letter to Mr. Ayangma advising him it had received a number of complaints from students, notably concerning the quality of his teaching. In the letter, the Université observed that part of Mr. Ayangma's remuneration package included a bonus because he possessed a PhD. It requested Mr. Ayangma to provide a copy of his dissertation. Instead, he provided a summary of his dissertation, which the Université asserted was similar to that of another PhD candidate. His bonus was withdrawn pending receipt of the full text. Finally, the Université concluded that Mr. Ayangma was in violation of articles 14.05 and 14.10 of the collective agreement as he failed to file the student evaluations for the spring term 2017 on time. As a result, the Université launched an investigation during which time Mr. Ayangma was suspended with pay. He was eventually terminated.

On January 12, 2018, Mr. Ayangma filed 11 grievances through his union, asserting the administrative suspension was in reality a disguised disciplinary suspension, was unfair, and the Université was in violation of more than 10 sections of the collective agreement.

Mr. Ayangma sought an order requiring the Université to cease what he labelled as psychological harassment, and he requested a letter of apology and sought damages. He argued the Université's demand that he produce a copy of his doctoral thesis was not justified and constituted an abuse of authority. He levelled complaints relating to a perceived violation of the rules of natural justice, a lack of professional ethics, psychological harassment, and a violation of the rules of good faith in contractual obligations. The Université replied to the grievances denying wrongdoing, or any violations of the collective agreement.

Pursuant to s. 55.01 of the *Industrial Relations Act*, R.S.N.B. 1973, c. I-4, an arbitrator was appointed to hear the grievances. At the request of the Université, prior to the hearing, the arbitrator issued a summons requiring Mr. Ayangma to produce his doctoral dissertation entitled, *The Effects of Workplace Ostracism – A Qualitative and Quantitative Research Based Study* (PhD Dissertation, California Coast University, 1996). The summons issued under s. 76(1)(a) of the *Act*.

The Association represented Mr. Ayangma, as a member of Unité II. Counsel for the Association was satisfied the production of the dissertation would not negatively affect Mr. Ayangma, as he was adamant he had not plagiarized his dissertation, an issue the Université had raised. It was on that basis the Association maintained the document should be produced at the arbitration hearing.

On the day of the hearing, May 10, 2018, Mr. Ayangma appeared without the dissertation and refused to produce it, arguing the Université had not established its relevance. He stated he would not

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produce the dissertation until its relevance was established. He complained that the Association was acting in an arbitrary and discriminatory manner, and in bad faith, when it refused to inquire on what basis the Université required a copy of his dissertation. The arbitrator allowed Mr. Ayangma to speak over the objections of the Association, although he was not given standing *per se*.

The arbitrator adjourned the hearing and ordered Mr. Ayangma to produce his dissertation to counsel for the Université no later than May 15, 2018, at 4:00 p.m. When Mr. Ayangma failed to comply, the arbitrator dismissed the grievance which related to the production of his dissertation, and adjourned the hearing with respect to the other grievances, *sine die*.

)] Mr. Ayangma filed an application seeking judicial review of the arbitrator's decision. The Association was added as a party so that it could address the issue of whether Mr. Ayangma had standing. The application judge summarized the issues before him. He writes:

> [TRANSLATION]
> In his application, Mr. Ayangma contends that the arbitrator did not have jurisdiction, having failed to determine the nature of the penalty, whether "administrative" or "disciplinary." In addition, he seeks a declaration that independent intervenor status was not obtained, arguing that it was clear the Association was taking a position adverse to his interests and that their submissions were flawed from the outset. Finally, Mr. Ayangma seeks to set aside the arbitrator's decision to order the production of his doctoral dissertation without having first determined its relevance and necessity.
> [para. 11]

1] The judge identified a preliminary question as follows: [TRANSLATION] "[t]he only issue to be determined is whether Mr. Ayangma has the requisite standing to bring the application for judicial review" (para. 22). Following a review of the pertinent jurisprudence with respect to standing, the judge concluded Mr. Ayangma was bound by ss. 21 and 55 of the *Industrial Relations Act*. The judge found "[t]he Association has always been prepared to represent Mr. Ayangma's interests and has always wanted his grievances to be heard on the merits with the relevant evidence before the arbitrator" (para. 40). He concluded, "[t]here is no conflict of interest between the Association and Mr. Ayangma and the disagreement is on an issue of jurisdiction and evidentiary relevance. Mr. Ayangma's position is untenable" (para. 42).

2] The judge determined the relevance of the dissertation was directly connected to whether Mr. Ayangma was entitled to a doctoral bonus. The judge found Mr. Ayangma's reasons for not submitting it were [TRANSLATION] "incoherent," and that his failure to cooperate left no doubt about his intentions. In dismissing the judicial review application, he found the arbitrator's decision was reasonable.

## III. Grounds of Appeal

3] Mr. Ayangma raises several grounds of appeal which are summarized as follows:

1) The application judge erred in law and acted contrary to s. 24(1) of the *Official Languages Act*, S.N.B. 2002, c. O-0.5, which requires that "[a]ny final decision, order or judgment of any court, including any reasons given therefor and summaries, shall be published in both official languages where (a) it determines a question of law of interest or importance to the general public, or (b) the proceedings leading to its issuance were conducted in whole or in part in both official languages";

2) The application judge erred in law: (1) by upholding the arbitrator's decision to dismiss the grievance because he refused to provide a copy of his doctoral dissertation to both the respondent and the Université de Moncton, which decision was made without first determining its relevance as required by law; and (2) by finding he did not have standing in the within proceeding and/or that the respondent was acting in the best interests of the appellant when he proposed that its member be found in contempt of the tribunal; and

3) The application judge abused his position as a judge in conducting himself in a manner that gives rise to bias and apprehension of bias, and undermines the administration of justice.

## IV. Standard of Review

4] The role of the Court of Appeal in a case such as this one is to "step into the shoes of the lower court (the judge on the application for judicial review) while focusing on the administrative decision" (*Canadian Union of Public Employees, Local 60 v. City of Edmundston*, 2016 NBCA 3 (CanLII), 445 N.B.R. (2d) 180, at para. 11). In short, an appellate court performs its own analysis to determine what the appropriate standard of review should be (*Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 (CanLII), [2012] 1 S.C.R. 23, at para. 247; *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 (CanLII), [2013] 2 S.C.R. 559, at paras. 45-47; *Her Majesty the Queen in Right of the Province of New Brunswick, as represented by the Minister of Education v. Kennedy et al.*, 2015 NBCA 58 (CanLII), [2015] N.B.J. No. 246 (QL), at para. 81; *O'Connell, as the Registrar of Motor Vehicles for the Province of New Brunswick v. Maxwell*, 2016 NBCA 37 (CanLII), 451 N.B.R. (2d) 283, at para. 21; and *Regional Health Authority A v. Dr. Khider*, 2019 NBCA 5 (CanLII), [2018] N.B.J. No. 338 (QL), at para. 10).

5] As stated in *Dunsmuir v. New Brunswick*, 2008 SCC 9 (CanLII), [2008] 1 S.C.R. 190, questions of fact, discretion, and policy were reviewable by the application judge on the standard of reasonableness (paras. 51 and 53). The same applied where legal questions cannot be separated from factual questions (para. 51).

6] On a pure question of law, a reviewing court owes deference to a Board's findings that involve the interpretation of its home statute, a closely related statute, and any contractual arrangements that fall within the scope of the Board's mandate (see *International Brotherhood of Electrical Workers, Local 1555 v. Dobbelsteyn et al.*, 2017 NBCA 2 (CanLII), [2017] N.B.J. No. 2 (QL), at para. 13). In the present case, the legal issues raised do not call for the interpretation of such statutes, so we agree with the appellant that the standard of review regarding those questions is correctness.

## V. Analysis

A. *Violation of the Official Languages Act*

7] We adopt the reasons on this same issue, as stated in *Ayangma v. Université de Moncton, Moncton Campus*, 2019 NBCA 72 (CanLII).

B. *Upholding the arbitrator's decision*

3] The application judge writes:

> [TRANSLATION]
> Mr. Ayangma's position that the arbitrator exceeded his jurisdiction by dealing with a grievance challenging an administrative suspension with pay is incomprehensible. Mr. Ayangma drafted the grievances himself. It would have been illogical for the Association to challenge the arbitral nature of its own grievances before the arbitrator and worse still to question the arbitrator's jurisdiction. The only two relevant issues for review were the decision to order the production of the document and the measure to address the refusal to produce it. [para. 45]

9] The Association submits that the answer to Mr. Ayangma's complaint in this regard is found in *CUPE, Local 60 v. City of Edmundston*. The issues of the relevancy of the dissertation and arbitral jurisdiction were not properly before the arbitrator because Mr. Ayangma refused to produce his dissertation, and he claimed the Association was not properly representing his interests when it supported the Université's request that he produce it. In our view, counsel for the Association was in the best position to place the above two issues before the arbitrator for determination. Mr. Ayangma refused to comply with the summons and took issue with the advice he was given by counsel for the Association. In refusing to produce his dissertation, the arbitrator could not adjudicate the grievance relating to the bonus suspension. The arbitrator correctly determined that Mr. Ayangma's interests were properly represented by the legal counsel appointed by the Association.

C. *The question of standing*

)] The Association has exclusive authority to represent members of the bargaining unit during arbitration proceedings (see *Migneault v. New Brunswick (Board of Management)*, 2016 NBCA 52 (CanLII), 452 N.B.R. (2d) 223, per Richard J.A. (as he then was); and *Tait v. Her Majesty the Queen in Right of the Province of New Brunswick, as represented by Board of Management on behalf of Ambulance NB*, 2013 NBCA 71 (CanLII), 412 N.B.R. (2d) 395, per Robertson J.A.). The principles are the same in this case. Mr. Ayangma was a member of a bargaining unit which falls under the jurisdiction of the *Industrial Relations Act*. The Court has spoken to the role of a union in grievance arbitration matters on several occasions.

[] In *Tait*, Robertson J.A. quoted from *Noël v. Société d'énergie de la Baie James*, 2001 SCC 39 (CanLII), [2001] 2 S.C.R. 207, at paras. 62-63:

> Given the day-to-day reality of managing collective agreements, the interpretation of arbitration awards, and the abundance of litigation in this area, a union cannot be placed under a duty to challenge each and every arbitration award at the behest of the employee in question on the ground of unreasonableness of the decision, even in dismissal cases. The rule is that the employer and the union are entitled to the stability that results from s. 101 L.C., which provides: "The arbitration award is without appeal, binds the parties and, where such is the case, any employee concerned...". Judicial review must therefore not be seen as a routine way of challenging awards or as a right of appeal. Accordingly, even in discipline and dismissal cases, the normal process provided by the Act ends with arbitration. That process represents the normal and exclusive method of resolving the conflicts that arise in the course of administering collective agreements, including disciplinary action. In fact, this Court gave strong support for the principle of exclusivity and finality in *Weber v. Ontario Hydro*, 1995 CanLII 108 (SCC), [1995] 2 S.C.R. 929, pp. 956-957 and 959, per McLachlin J. That approach is also intended to discourage challenges that are collateral to disputes which, as a general rule, will be definitively disposed of under the procedure for administering collective agreements. While judicial review by the superior courts is an important principle, it cannot allow employees to jeopardize this expectation of stability in labour relations in a situation where there is union representation. Allowing an employee to take action against a decision made by his or her union, by applying for judicial review where he or she believes that the arbitration award was unreasonable, would offend the union's exclusive right of representation and the legislative intent regarding the finality of the arbitration process, and would jeopardize the effectiveness and speed of the arbitration process.
>
> Recognition of this kind of right to challenge an arbitration award would necessarily offend the fundamental principles governing relations with the employer where there is a right of exclusive collective representation. In a case where the arbitration process has been carried out, in accordance with the collective agreement, the employer is entitled to expect that a grievance that has been disposed of by the arbitrator will, as a rule, be disposed of permanently, and that the arbitration process will not be exposed to challenges that are launched without any control being exercised by its union interlocutor. As a general rule, the proper performance by the employer of the duty to negotiate and apply collective agreements must carry with it an assurance of stability in terms of the conditions of employment in its company. [para. 3]
>
> [Emphasis is that of Robertson J.A.]

2] The above was quoted, with approval, by Richard J.A. (as he then was) in *Migneault*, at para. 8. These same principles are applicable here.

3] There are three exceptions to the above. They include:

a) a case where the collective agreement permits an employee to represent himself/herself;

b) a case where the union adopts a position against the interests of the employee; or

c) a case where the representation by the union is deficient.

See *Yee v. Trent University*, 2010 ONSC 3307, [2010] O.J. No. 2697 (QL), at para. 8.

4] The Association correctly argues the collective agreement does not permit an employee to represent himself/herself at an arbitration hearing unless he or she can bring themselves within one of the exceptions noted. It claims Mr. Ayangma cannot do so. The Association submits it did not adopt a position against the best interests of Mr. Ayangma, as discussed in *Singh v. Laurentian University*, [1991] O.J. No. 526 (Ct. J. (Gen. Div.)) (QL). In addition, the Association states that its representation of Mr. Ayangma was not deficient. In *3M Canada Inc. v. CAW-Canada, Local 27 (Chapman Grievance)*, [1997] O.L.A.A. No. 582 (QL), a grievor demanded standing on the basis the union had a conflict of interest and was not representing her adequately. The arbitrator recognized it was not unusual for grievors to challenge strategic decisions made by their unions, however, stated, "[...] [t]he law simply demands a careful, honest and even-handed exercise of the duty of representation as the exclusive bargaining agent for the employees" (para. 27).

5] In our view, a distinction can be drawn between those disputes where a grievor takes issue with his or her union representative concerning strategic decisions and those where true conflicts of interest arise. In our view, the judge correctly upheld the arbitrator's decision concerning Mr. Ayangma's representation on his own behalf before the tribunal. Mr. Ayangma did not bring a case forward to justify exceptional treatment to warrant standing. The judge did not exceed his jurisdiction on this issue. We discern no reviewable error and this ground of appeal is therefore dismissed.

D. *Recusal motion*

5] Mr. Ayangma raised allegations of bias and asked the judge to recuse himself. He submits the judge's conduct was intimidating and inappropriate. He states the judge:

a) commented on an issue that was not before him that day;

b) repeatedly raised his voice during the hearing in an [TRANSLATION] "attempt" to intimidate;

c) refused to recuse himself, even though a formal motion had been filed accusing him of bias and/or an apprehension of bias; and

d) ignored settled principles of law on the issue of disclosure and their relevancy.

7] During a previous hearing, the application judge commented that [TRANSLATION] "Mr. Ayangma is a vexatious litigant who abuses the legal system and administration of justice in New Brunswick and elsewhere, as the Supreme Court of Prince Edward Island has already concluded."

3] In *Rothesay Residents Association Inc. v. Rothesay Heritage Preservation & Review Board et al.*, 2006 NBCA 61 (CanLII), 299 N.B.R. (2d) 369, the Court writes:

> In brief, the reasonable apprehension of bias test is an objective one: what would an informed person, viewing the matter realistically, conclude? However, the party alleging bias must recognize that the threshold for finding a real or perceived bias is a high one. Such allegations are not to be made lightly. [para 18]

9] The starting point for the reasonable apprehension of bias test comes from de Grandpré J.'s dissent in *Committee for Justice and Liberty v. National Energy Board et al.*, 1976 CanLII 2 (SCC), [1978] 1 S.C.R. 369, [1976] S.C.J. No. 118 (QL). The test has been confirmed in *Wewaykum Indian Band v. Canada*, 2003 SCC 45 (CanLII), [2003] 2 S.C.R. 259, at para. 60. The state of mind of the "disinterested third person" in the reasonable apprehension of bias analysis "must be reasonable and not overly sensitive or scrupulous" (*Lapointe v. R.*, 2010 NBCA 63 (CanLII), 363 N.B.R. (2d) 129, at para. 15).

0] Comments made by a judge must be considered within the broader context of the entire proceeding or decision. In some cases, the context will demonstrate that such comments do not, in fact, contribute to real or perceived bias (*Lapointe*, at para. 18).

1] In *R.B. v. A.G.*, 2019 NBCA 53 (CanLII), [2019] N.B.J. No. 171 (QL), the Court observes that trial judges benefit from a presumption of integrity that includes presumed impartiality (para. 8). An allegation of a reasonable apprehension of bias questions the integrity of both the presiding judge and the administration of justice; therefore, the threshold to establish a reasonable apprehension of bias is high. It requires "a real likelihood or probability of bias [...] Mere suspicion is not enough" (para. 9).

2] *Brooks v. The Law Society of New Brunswick et al.*, 2015 NBCA 18 (CanLII), 433 N.B.R. (2d) 371, quotes from the Canadian Judicial Council's publication on judicial ethics stating that judges must "exercise their judicial functions independently and free of extraneous influence" (para. 4). Not only do judges have a legal duty to be impartial, they also have an ethical duty not to preside over matters they believe they would be unable to dispose of fairly. Additionally, they have an obligation to recuse themselves if "a reasonable, fair-minded and informed person would have a reasoned suspicion of conflict" (para 6). On the other hand, partiality has "both an attitudinal and [a] behavioural component. It refers to one who has certain preconceived biases, and who will allow those biases to affect his or her verdict [...]" (para 6). The reasonable fear of partiality is not only about the personal integrity of a judge, but also about the integrity of the entire administration of justice (para. 8). Bias, on the other hand, is a predisposition to a particular result (para. 6). The kind of bias that would be prejudicial is one that would not be objectively justifiable (para. 7). The threshold of bias is high. It must be more than a "mere suspicion" and, therefore, there must be a real likelihood of bias (para. 8).

3] In *Bossé et al. v. Lavigne*, 2015 NBCA 54 (CanLII), 440 N.B.R. (2d) 118, the Court states there are two key principles underlying the recusal of a judge from a case: 1) partiality, and 2) reasonable fear of partiality. The presence of one of them is sufficient to make a judge recuse himself or herself. The determination of recusal needs to be assessed by the judge and his or her reasoning will start with analyzing his or her own state of mind towards the case. This criterion is subjective. For a judge to conclude he or she is impartial, he or she must be disinterested in the outcome of the case as well as not being predisposed to a particular result. In other words, he or she is open-minded and will let the evidence and submissions speak for themselves, in order to determine the case. If the judge finds himself or herself to be partial, then the analysis ends there and recusal is appropriate (para. 7) .

4] If the judge determines he or she is impartial on the subjective criterion, the reasoning continues to the objective criterion of the reasonable fear of partiality (or reasonable apprehension of bias). In determining whether or not there may be a reasonable fear of partiality, the judge must examine five different factors and answer the following question: "[h]aving examined the situation in depth and viewing the matter 'realistically and practically', would a reasonable and well-informed person conclude it is 'more likely than not that [the judge], whether consciously or unconsciously, would not decide fairly'?". The objective test must be: (1) taken from the perspective of a reasonable person; (2) who is well informed of the circumstances of the case; (3) where the apprehension of bias is reasonable; (4) following both a reasonable and practical examination of the situation; and (5) starting the analysis on a strong presumption of judicial impartiality and then determining whether it has been displaced (para. 7).

5] The judge dismissed Mr. Ayangma's recusal motion orally on December 17, 2018. He canvassed the relevant jurisprudence. He asked himself the appropriate questions and recorded his answers in a measured, concise, and comprehensive manner. We see no evidence to support Mr. Ayangma's contention the judge was biased or that the matter, viewed through the appropriate lens, raises a reasonable apprehension of bias. This ground of appeal is therefore dismissed.

## VI. Disposition

5] The appeal is dismissed with costs of $2,500.

Version française du jugement de la Cour rendu par

LA COUR

## I. Introduction

M. Ayangma demande l'annulation d'une décision rendue par un juge qui confirmait l'ordonnance d'un arbitre rejetant sommairement son grief sans se prononcer sur les questions de fond.

## II. Contexte

M. Ayangma a été au service de l'Université de Moncton (l'Université) à titre de professeur à temps partiel de 2010 à 2018, et il était membre d'une unité de négociation représentée par l'Association des bibliothécaires, des professeures et des professeurs de l'Université de Moncton (l'Association) qui négociait une convention collective avec l'Université.

Le 5 janvier 2018, l'Université a envoyé à M. Ayangma une lettre dans laquelle elle l'informait qu'elle avait reçu un certain nombre de plaintes d'étudiants, dont des plaintes au sujet de la qualité de son enseignement. Dans sa lettre, l'Université faisait observer qu'une partie du régime salarial de M. Ayangma comprenait une prime étant donné qu'il était titulaire d'un doctorat. Elle demandait à M. Ayangma de lui remettre une copie de sa thèse. Au lieu de cela, il a présenté un résumé de sa thèse, thèse qui, selon les dires de l'Université, était analogue à celle d'un autre candidat au doctorat. L'Université lui a alors retiré sa prime en attendant de recevoir le texte complet de sa thèse. Finalement, l'Université a conclu que M. Ayangma avait enfreint les articles 14.05 et 14.10 de la convention collective pour avoir omis de déposer en temps voulu les évaluations des étudiants pour la session du printemps 2017. Par suite de cette décision, l'Université a alors lancé une enquête pendant laquelle M. Ayangma a été suspendu avec salaire. Il a fini par être congédié.

Le 12 janvier 2018, M. Ayangma a déposé, par l'entremise de son syndicat, onze griefs dans lesquels il affirmait que sa suspension administrative était en réalité une suspension disciplinaire déguisée, qu'elle était injuste et que l'Université avait violé plus de dix articles de la convention collective.

M. Ayangma a demandé à la Cour d'ordonner à l'Université de cesser ce qu'il a qualifié de harcèlement psychologique et de lui remettre une lettre d'excuse ainsi que de lui verser des dommages-intérêts. Il a soutenu que la mise en demeure de produire une copie de sa thèse de doctorat que lui a signifiée l'Université était injustifiée et constituait un abus de pouvoir. Il a formulé différentes plaintes dans lesquelles il s'estimait victime de violation des règles de justice naturelle, d'un manque d'éthique professionnelle, de harcèlement psychologique et de violation des principes de bonne foi dans les obligations contractuelles. L'Université a répondu aux griefs en niant avoir commis une faute quelconque ou violé la convention collective.

En vertu de l'article 55.01 de la *Loi sur les relations industrielles*, L.R.N.-B. 1973, ch. I-4, un arbitre a été nommé pour entendre les griefs. À la demande de l'Université, avant l'audience, l'arbitre a émis une citation imposant à M. Ayangma l'obligation de produire une copie de sa thèse de doctorat intitulée *The Effects of Workplace Ostracism – A Qualitative and Quantitative Research Based Study* (PhD Dissertation, California Coast University, 1996). Cette citation a été émise sous le régime de l'al. 76(1)a) de la *Loi*.

L'Association représentait M. Ayangma en sa qualité de membre de l'unité II. L'avocat de l'Association était persuadé que la production de la thèse n'aurait aucune conséquence négative pour M. Ayangma étant donné que ce dernier affirmait catégoriquement qu'il n'avait commis aucun plagiat dans sa thèse, une question que l'Université avait soulevée. C'est sur cette base que l'Association a soutenu que le document devait être produit lors de l'audience d'arbitrage.

Le jour de l'audience, soit le 10 mai 2018, M. Ayangma s'est présenté sans sa thèse et a refusé de la produire, faisant valoir que l'Université n'avait pas établi sa pertinence. Il a affirmé qu'il ne produirait la thèse en question que lorsque sa pertinence aurait été établie. Il s'est plaint de ce que l'Association agissait de manière arbitraire et discriminatoire et avait fait preuve de mauvaise foi en refusant de s'enquérir des raisons pour lesquelles l'Université avait besoin d'une copie de sa thèse. L'arbitre a autorisé M. Ayangma à prendre la parole malgré les objections de l'Association, et ce, même s'il n'avait obtenu qualité pour agir à proprement parler.

L'arbitre a alors ajourné l'audience et ordonné à M. Ayangma de remettre sa thèse à l'avocat de l'Université au plus tard le 15 mai 2018 à 16 h. Lorsque M. Ayangma a refusé d'obtempérer, l'arbitre a rejeté le grief relatif à la production de la thèse et ajourné *sine die* l'audience portant sur les autres griefs.

)] M. Ayangma a déposé une requête en révision judiciaire de la décision de l'arbitre. L'Association a été jointe comme partie afin de lui permettre d'intervenir sur la question de savoir si M. Ayangma avait qualité pour agir. Le juge saisi de la requête a résumé en ces termes les questions qui lui étaient soumises. Il a écrit ce qui suit :

> [TEXTE ORIGINAL]
> Dans sa requête M. Ayangma allègue que l'arbitre n'avait pas compétence ayant failli d'abord de déterminer la nature de la sanction qu'elle soit « administrative » ou « disciplinaire ». De plus, il réclame une déclaration qui n'a pas obtenu un statut d'intervenant indépendant alléguant qu'il était évident que l'Association prenait une position adverse à ses intérêts et que leurs représentations dès le début étaient déficientes. Enfin, M. Ayangma demande d'invalider la décision de l'arbitre d'ordonner la production de sa dissertation doctorale sans en avoir d'abord déterminer la pertinence et la nécessité. [Par. 11]

l] Le juge a formulé la question à trancher en ces termes : « La seule question a traité est est-ce que M. Ayangma a la qualité d'agir requise pour introduire la requête en révision judiciaire? » (par. 22). Après avoir passé en revue la jurisprudence pertinente en matière de qualité pour agir, le juge a déterminé que M. Ayangma était lié par les art. 21 et 55 de la *Loi sur les relations industrielles*. Il est arrivé à la conclusion que « [l]'Association a toujours été disposée à représenter les intérêts de M. Ayangma et a toujours voulu que ses griefs soient entendus sur le fond avec la preuve pertinente devant l'arbitre » (par. 40). Il a conclu : « Il n'y a aucun conflit d'intérêt entre l'Association et M. Ayangma et l[e] différen[d] [porte] sur une question de juridiction et de pertinence de la preuve. Cette position de M. Ayangma est intenable » (par. 42).

2] Le juge a déterminé que la pertinence de la thèse était directement liée à la question de savoir si M. Ayangma avait droit à une prime doctorale. Il a déterminé que M. Ayangma était

« incohérent » dans les motifs qu'il invoquait pour ne pas produire sa thèse et que son refus de coopérer ne laissait aucun doute au sujet de ses intentions. En rejetant la requête en révision judiciaire, il a conclu que la décision de l'arbitre était raisonnable.

III. Moyens d'appel

3] M. Ayangma soulève plusieurs moyens d'appel dont voici un résumé :

1) Le juge saisi de la requête a commis une erreur de droit et enfreint le par. 24(1) de la *Loi sur les langues officielles*, L.N.-B. 2002, ch. O-0.5, qui prescrit que « [l]es décisions ou ordonnances définitives des tribunaux, exposés des motifs et sommaires compris, sont publiés dans les deux langues officielles a) si le point de droit en litige présente de l'intérêt ou de l'importance pour le public; ou b) lorsque les procédures se sont déroulées, en tout ou en partie, dans les deux langues officielles »;

2) le juge saisi de la requête a commis une erreur de droit (1) en confirmant la décision de l'arbitre de rejeter le grief au motif qu'il avait refusé de remettre une copie de sa thèse de doctorat à l'intimée ainsi qu'à l'Université de Moncton, une décision qui avait été rendue sans que la pertinence de cette thèse ait été déterminée au préalable comme le prescrit la loi et (2) en concluant qu'il n'avait pas qualité pour agir dans le cadre de la procédure en cause et/ou que l'Association intimée agissait dans l'intérêt supérieur de l'appelant lorsqu'elle avait proposé que son membre soit déclaré coupable d'outrage au tribunal; et

3) le juge saisi de la requête a abusé de sa qualité de juge en adoptant une conduite de nature à susciter un doute quant à sa partialité ainsi qu'une crainte de partialité et à déconsidérer l'administration de la justice.

IV. Norme de contrôle

4] Le rôle de la Cour d'appel consiste à « se mettre à la place du tribunal d'instance inférieure (le juge saisi de la requête en révision judiciaire) tout en se concentrant sur la décision administrative » (*Syndicat canadien de la fonction publique, section locale 60 c. Ville d'Edmundston*, 2016 NBCA 3 (CanLII), 445 R.N.-B. (2e) 180, au par. 11). Bref, une cour d'appel effectue sa propre analyse afin de déterminer quelle devrait être la norme de contrôle applicable (*Merck Frosst Canada Ltée c. Canada (Santé)*, 2012 CSC 3 (CanLII), [2012] 1 R.C.S. 23, au par. 247; *Agraira c. Canada (Sécurité publique et Protection civile)*, 2013 CSC 36 (CanLII), [2013] 2 R.C.S. 559, aux par. 45 à 47; *Sa Majesté la Reine du chef du Nouveau-Brunswick, représentée par le ministre de l'Éducation c. Kennedy et autres*, 2015 NBCA 58 (CanLII), [2015] A.N.-B. n° 246 (QL), au par. 81; *O'Connell, en sa qualité de registraire des véhicules à moteur de la Province du Nouveau-Brunswick c. Maxwell*, 2016 NBCA 37 (CanLII), 451 R.N.-B. (2e) 283, au par. 21; et *Régie régionale de la santé A c. Dr Khider*, 2019 NBCA 5 (CanLII), [2018] A.N.-B. n° 338 (QL), au par. 10).

5] Comme il a été indiqué dans l'arrêt *Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9 (CanLII), [2008] 1 R.C.S. 190, les questions touchant aux faits, au pouvoir discrétionnaire et à la politique générale peuvent faire l'objet d'un contrôle par le juge saisi de la requête selon la norme de la raisonnabilité (par. 51 et 53). La même norme s'applique lorsque les questions de droit et les questions de fait ne peuvent être dissociées (par. 51).

5] S'il s'agit d'une pure question de droit, la cour de révision doit faire preuve de déférence à l'égard des conclusions auxquelles une commission est arrivée relativement à l'interprétation de sa loi constitutive, d'une loi étroitement liée et de tout arrangement contractuel relevant de son mandat (voir *Fraternité internationale des ouvriers en électricité, section locale 1555 c. Dobbelsteyn et autres*, 2017 NBCA 2 (CanLII), [2017] A.N.-B. n° 2 (QL), au par. 13). Dans la présente instance, les questions de droit soulevées ne nécessitent pas l'interprétation de telles lois de sorte que nous convenons avec l'appelant que la norme de contrôle applicable aux questions en cause est celle de la décision correcte.

V. Analyse

A. *Violation de la Loi sur les langues officielles*

7] Nous adoptons les motifs afférents à la même question qui sont exposés dans l'arrêt *Ayangma c. Université de Moncton, Campus de Moncton*, 2019 NBCA 72 (CanLII).

B. *Confirmation de la décision de l'arbitre*

3] Le juge saisi de la requête a écrit ce qui suit :

> [TEXTE ORIGINAL]
> La position de M. Ayangma voulant que l'arbitre aurait outrepassé sa compétence en traitant d'un grief contestant une suspension administrative avec traitement est incompréhensive. M. Ayangma a lui-même rédigé les griefs. Il aurait été illogique pour l'Association de contester le caractère arbitrale de ses propres griefs devant l'arbitre et, pire encore, de remettre en question la compétence de ce dernier. Les deux seules questions pertinentes dans la révision étaient la décision d'ordonne la production de document et la mesure pour remédier au refus de le produire. [Par. 45]

9] L'Association est d'avis que la réponse à la plainte que M. Ayangma a formulée à cet égard se trouve dans l'arrêt *Syndicat canadien de la fonction publique, section locale 60 c. Ville d'Edmundston*. L'arbitre n'était pas régulièrement saisi des questions de la pertinence de la thèse et de la compétence arbitrale parce que M. Ayangma avait refusé de produire sa thèse et allégué que l'Association n'avait pas convenablement défendu ses intérêts en appuyant la demande de production de l'Université. À

notre avis, l'avocat de l'Association était le mieux placé pour soumettre les deux questions susmentionnées à l'arbitre pour qu'il les tranche. M. Ayangma a refusé de se conformer à la citation et s'est élevé contre l'avis que lui a donné l'avocat de l'Association. Son refus de produire sa thèse a empêché l'arbitre de statuer sur le grief afférent à la suspension de la prime doctorale. C'est donc à bon droit que l'arbitre a déterminé que le conseiller juridique désigné par l'Association avait convenablement défendu les intérêts de M. Ayangma.

C. *Qualité pour agir*

)] L'Association jouit du pouvoir exclusif de représenter les membres liés par la convention collective lors d'une procédure d'arbitrage (voir les arrêts *Migneault c. Nouveau-Brunswick (Conseil de gestion)*, 2016 NBCA 52 (CanLII), 452 R.N.-B. (2e) 223, motifs du juge d'appel Richard (tel était alors son titre), et *Tait c. Sa Majesté la Reine du chef de la Province du Nouveau-Brunswick, représentée par le Conseil de gestion, pour Ambulance Nouveau-Brunswick*, 2013 NBCA 71 (CanLII), 412 R.N.-B. (2e) 395, motifs du juge d'appel Robertson). Les principes sont les mêmes en l'espèce. M. Ayangma était membre d'une unité de négociation qui est régie par la *Loi sur les relations industrielles*. C'est à plusieurs reprises que la Cour s'est prononcée sur le rôle que joue un syndicat dans l'arbitrage des griefs.

l] Dans l'arrêt *Tait*, le juge d'appel Robertson a cité les extraits suivants de l'arrêt *Noël c. Société d'énergie de la Baie James*, 2001 CSC 39 (CanLII), [2001] 2 R.C.S. 207, soit les par. 62 et 63 :

> Étant donné la réalité quotidienne des conventions collectives, l'interprétation des sentences arbitrales, ainsi que la richesse foisonnante du contentieux en cette matière, un syndicat ne saurait être placé dans l'obligation de contester au gré du salarié intéressé toutes et chacune des sentences arbitrales, même en matière de congédiement, pour le motif d'irrationalité de la décision. L'employeur et le syndicat ont en principe le droit de bénéficier de la stabilité découlant de l'art. 101 *C.t.* qui dispose que « [l]a sentence arbitrale est sans appel, lie les parties et, le cas échéant, tout salarié concerné… ». Le contrôle judiciaire ne doit pas être perçu comme un moyen de contestation normal ou comme un droit d'appel. Même en matière de mesure disciplinaire et de congédiement, le processus usuel prévu par la loi s'arrête donc à l'arbitrage. Cette procédure représente le mode normal et exclusif de règlement des conflits que provoque l'application des conventions collectives, y compris en matière disciplinaire. Notre Cour a d'ailleurs rappelé fortement ce principe d'exclusivité et de finalité dans l'arrêt *Weber c. Ontario Hydro*, 1995 CanLII 108 (SCC), [1995] 2 R.C.S. 929, p. 956-957 et 959, le juge McLachlin. Cette approche veut aussi décourager des contestations à caractère collatéral de litiges qui trouvent, en règle générale, leur règlement définitif dans le mécanisme d'application des conventions collectives. Le contrôle judiciaire par les cours supérieures est un principe important, mais il ne saurait permettre au salarié de remettre en cause cette expectative de stabilité des relations de travail dans un contexte de représentation syndicale. <u>Permettre au salarié d'agir à l'encontre de la décision de son syndicat en ayant recours au contrôle judiciaire lorsqu'il estime la sentence arbitrale irrationnelle serait une violation de l'exclusivité de la fonction de représentation du syndicat, de l'intention législative de finalité de la procédure arbitrale, et mettrait en péril l'efficacité et la rapidité de cette dernière.</u>
>
> La reconnaissance d'un tel droit à la contestation d'une décision arbitrale contredit nécessairement les principes fondamentaux gouvernant les rapports avec l'employeur

dans un contexte de représentation collective et exclusive. Dans un cas où la procédure d'arbitrage a été menée, conformément à la convention collective, l'employeur peut s'attendre à ce que le grief, tranché par l'arbitre, demeure en principe réglé et à ce que la procédure arbitrale ne soit pas exposée à des contestations déclenchées hors de tout contrôle de son interlocuteur syndical. En règle générale, l'exécution correcte de l'obligation de négocier et d'appliquer les conventions collectives doit s'accompagner pour l'employeur d'une stabilité effective des conditions de travail dans son entreprise. [Par. 3]

[Le soulignement est du juge d'appel Robertson.]

2] Les extraits qui précèdent ont été cités avec approbation par le juge d'appel Richard (tel était alors son titre) au par. 8 de l'arrêt *Migneault*. Ces mêmes principes s'appliquent en l'espèce.

3] Il existe trois exceptions à la règle susmentionnée. Il s'agit notamment des situations suivantes :

a. un cas dans lequel la convention collective permet à un salarié d'assurer sa propre représentation;

b. un cas dans lequel le syndicat adopte une position contraire aux intérêts du salarié;

c. un cas dans lequel la représentation assurée par le syndicat est déficiente.

Voir *Yee c. Trent University*, 2010 ONSC 3307, [2010] O.J. No. 2697 (QL), au par. 8.

4] L'Association fait valoir à bon droit que la convention collective ne permet pas à un salarié d'assurer sa propre représentation à une audience d'arbitrage à moins qu'il ne puisse prouver que sa situation relève de l'une des exceptions en question. Or, elle prétend que tel n'est pas le cas en l'espèce. L'Association soutient qu'elle n'a pas adopté une position contraire à l'intérêt supérieur de M. Ayangma comme il en est question dans *Singh c. Laurentian University*, [1991] O.J. No. 526 (C. Ont. (Div. gén.)) (QL). De plus, l'Association affirme que sa représentation de M. Ayangma n'était aucunement déficiente. Dans l'affaire *3M Canada Inc. c. CAW-Canada, Local 27 (Chapman Grievance)*, [1997] O.L.A.A. No. 582 (QL), une plaignante avait demandé la qualité pour agir au motif que le syndicat se trouvait en conflit d'intérêts et ne la représentait pas convenablement. L'arbitre a reconnu qu'il n'était pas inhabituel que des plaignants contestent des décisions stratégiques de leur syndicat, mais elle a cependant déclaré que [TRADUCTION] « [l] e droit exige simplement du syndicat qu'il exerce son devoir de représentation de façon attentive, honnête et impartiale en sa qualité d'agent négociateur exclusif des salariés » (par. 27).

5] À notre avis, il est possible d'établir une distinction entre les conflits dans lesquels un plaignant conteste les décisions stratégiques prises par son représentant syndical et ceux dans lesquels il existe un véritable conflit d'intérêts. Selon nous, c'est à bon droit que le juge a confirmé la décision

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que l'arbitre avait rendue relativement au fait que M. Ayangma avait décidé d'assurer sa propre représentation devant le tribunal. M. Ayangma n'a invoqué aucun argument pour justifier que la Cour lui confère la qualité pour agir sur le fondement d'un traitement exceptionnel. Le juge n'a pas outrepassé ses pouvoirs en ce qui concerne cette question. Nous ne trouvons aucune erreur susceptible de révision et ce moyen d'appel est donc rejeté.

D. *Motion en récusation*

5] M. Ayangma a soulevé des allégations de partialité et demandé au juge de se récuser. Il soutient que la conduite du juge était intimidante et inappropriée. Il affirme que le juge :

a. a fait des remarques sur une question dont il n'était pas saisi ce jour-là;

b. a levé le ton à plusieurs reprises pendant l'audience dans une « tentative » d'intimidation;

c. a refusé de se récuser alors même qu'avait été déposée une motion officielle l'accusant de partialité et faisant état d'une crainte de partialité;

d. n'a pas tenu compte des principes de droit établis sur la question de la divulgation et leur pertinence.

7] Au cours d'une audience antérieure, le juge saisi de la requête a fait observer que « M. Ayangma est un plaideur quérulant qui abuse du système judiciaire et l'administration de la justice au Nouveau-Brunswick et ailleurs comme en a déjà conclu la Cour supérieure de l'Île-du-Prince-Édouard ».

3] Dans l'arrêt *Rothesay Residents Association Inc. c. Rothesay Heritage Preservation & Review Board et al.*, 2006 NBCA 61 (CanLII), 299 R.N.-B. (2e) 369, la Cour s'est exprimée en ces termes :

> En résumé, le critère de la crainte raisonnable de partialité est un critère objectif : à quelle conclusion en arriverait une personne bien renseignée, qui étudierait la question en profondeur et de façon réaliste? Toutefois, la partie qui invoque la partialité doit savoir que la condition préalable à laquelle il faut satisfaire pour que l'on puisse conclure qu'il y a partialité apparente ou réelle est une condition stricte. Ce genre d'allégation ne doit pas être formulé à la légère.
>
> [Par. 18]

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9] Le critère permettant d'établir une crainte raisonnable de partialité tire son origine des motifs dissidents du juge de Grandpré dans l'arrêt *Committee for Justice and Liberty c. L'Office national de l'énergie*, 1976 CanLII 2 (SCC), [1978] 1 R.C.S. 369, [1976] A.C.S. n° 118 (QL). Ce critère a été confirmé dans l'arrêt *Bande indienne Wewaykum c. Canada*, 2003 CSC 45 (CanLII), [2003] 2 R.C.S. 259, au par. 60. L'état d'esprit du « tiers désintéressé » qui procède à l'analyse de la crainte raisonnable de partialité « doit être raisonnable et non excessivement tatillon ou scrupuleux » (*Lapointe c. R.*, 2010 NBCA 63 (CanLII), 363 R.N.-B. (2e) 129, au par. 15).

0] Les remarques faites par un juge doivent être examinées dans le contexte plus large de l'ensemble de l'instance ou de la décision. Dans certains cas, le contexte démontrera qu'en réalité les remarques en cause ne contribuent pas à une partialité réelle ou à une impression de partialité (*Lapointe*, au par. 18).

1] Dans l'arrêt *R.B. c. A.G.*, 2019 NBCA 53 (CanLII), [2019] A.N.-B. n° 171 (QL), la Cour observe que les juges de première instance jouissent d'une présomption d'intégrité qui englobe la notion d'impartialité (par. 8). Une allégation de crainte raisonnable de partialité met en doute l'intégrité tant du juge présidant le procès que de l'administration de la justice; par conséquent, le seuil à franchir pour établir une crainte raisonnable de partialité est élevé. Il est nécessaire que soit établie « une réelle probabilité de partialité [...] Un simple soupçon est insuffisant » (par. 9).

2] La Cour, dans l'arrêt *Brooks c. Barreau du Nouveau-Brunswick et autres*, 2015 NBCA 18 (CanLII), 433 R.N.-B. (2e) 371, cite des extraits de la publication du Conseil canadien de la magistrature qui traite de la déontologie judiciaire et qui précise que les juges doivent « exercer leurs fonctions de façon indépendante, à l'abri de toute influence extérieure » (par. 4). Non seulement les juges ont-ils l'obligation juridique d'être impartiaux, mais ils ont également l'obligation déontologique de ne pas juger les affaires sur lesquelles ils se sentent incapables de statuer de façon impartiale. En outre, ils ont l'obligation de se récuser si « une personne raisonnable, impartiale et bien renseignée aurait raison de soupçonner l'existence d'un conflit » (par. 6). D'un autre côté, la partialité « se dégage à la fois de l'état d'esprit et du comportement ». Elle évoque la personne qui a certaines idées préconçues et qui [...] laissera ces préjugés influencer son verdict » (par. 6). La crainte raisonnable de partialité met en cause non seulement l'intégrité personnelle du juge, mais aussi celle de l'administration de la justice toute entière (par. 8). Par ailleurs, la partialité dénote une prédisposition à un résultat particulier (par. 6). Le type de préjugé qui serait préjudiciable est celui qui ne serait pas objectivement justifiable (par. 7). Le seuil à franchir est élevé. Un « simple soupçon » est insuffisant et il faut donc établir une réelle probabilité de partialité (par. 8).

3] Dans l'arrêt *Bossé et autres c. Lavigne*, 2015 NBCA 54 (CanLII), 440 R.N.-B. (2e) 118, la Cour précise que deux principes clés sous-tendent la récusation d'un juge : 1) la partialité et 2) la crainte raisonnable de partialité. La présence de l'une ou de l'autre suffit pour amener un juge à se récuser. C'est au juge qu'il appartient de déterminer s'il doit se récuser et son raisonnement doit commencer par une analyse de son propre état d'esprit au sujet de l'affaire en cause. Ce critère est subjectif. Pour conclure à son impartialité, le juge doit être désintéressé eu égard à l'issue de l'affaire et ne pas être prédisposé à un résultat particulier. Autrement dit, il doit avoir l'esprit ouvert et être susceptible d'être persuadé par la preuve et les arguments soumis afin de statuer sur l'affaire en cause. Si le juge conclut qu'il est partial, l'analyse prend alors fin et une récusation est appropriée (par. 7).

4] Si le juge détermine qu'il est impartial selon le critère subjectif, le raisonnement passe alors au critère objectif de la crainte raisonnable de partialité. Pour déterminer s'il peut exister une crainte raisonnable de partialité, le juge doit examiner cinq facteurs et répondre à la question suivante : « [U]ne personne raisonnable et bien renseignée qui étudierait la situation en profondeur et de façon "pratique et réaliste" serait-elle d'avis que, "selon toute vraisemblance, le [ou la] juge, consciemment ou non, ne rendra pas une décision juste"? ». Les éléments du critère objectif sont les suivants : (1) le critère est considéré du point de vue d'une personne raisonnable; (2) celle-ci est bien renseignée des circonstances de l'affaire; (3) la crainte de partialité est raisonnable; (4) la situation fait l'objet d'un examen réaliste et pratique; et (5) l'analyse commence par une forte présomption d'impartialité judiciaire et vise à déterminer si celle-ci a été réfutée (par. 7).

5] Le juge a rejeté oralement la motion en récusation de M. Ayangma le 17 décembre 2018. Il a passé en revue la jurisprudence pertinente. Il s'est posé les questions appropriées et a consigné ses réponses de façon mesurée, concise et complète. Nous ne voyons aucune preuve qui étaye l'allégation de M. Ayangma selon laquelle le juge était partial ou selon laquelle l'affaire, considérée sous l'angle approprié, soulève une crainte raisonnable de partialité. Ce moyen d'appel est donc rejeté.

## VI. Dispositif

5] L'appel est rejeté avec dépens qui sont fixés à 2 500 $.

CanLII

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# Ayangma v Université De Moncton, Campus De Moncton, 2019 CanLII 36107 (NB CA)

Date: 2019-04-26

File number: 26-19-CA; 22-19-CA

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COURT OF APPEAL OF NEW BRUNSWICK

COUR D'APPEL DU NOUVEAU-BRUNSWICK

22-19-CA

BETWEEN:

NOËL AYANGMA

APPELLANT

- and -

UNIVERSITÉ DE MONCTON, CAMPUS DE MONCTON

RESPONDENT

ENTRE:

NOËL AYANGMA

APPELANT

-et-

UNIVERSITÉ DE MONCTON, CAMPUS DE MONCTON

INTIMÉE

**AND**

**ET**

26-19-CA

BETWEEN:

NOËL AYANGMA

APPELLANT

- and -

UNIVERSITÉ DE MONCTON, CAMPUS DE MONCTON and ASSOCIATION DES BIBLIOTHÉCAIRES, PROFESSEURES ET

ENTRE:

NOËL AYANGMA

APPELANT

- et -

UNIVERSITÉ DE MONCTON, CAMPUS DE MONCTON et ASSOCIATION DES BIBLIOTHÉCAIRES, PROFESSEURES ET

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PROFESSEURS DE L'UNIVERSITÉ DE MONCTON

RESPONDENTS

PROFESSEURS DE L'UNIVERSITÉ DE MONCTON

INTIMÉES

Motions heard by:
The Honourable Chief Justice Richard

Motions entendues par :
l'honorable juge en chef Richard

Date of hearing:
April 23, 2019

Date de l'audience :
le 23 avril 2019

Date of decision:
April 26, 2019

Date de la décision :
le 26 avril 2019

Counsel at hearing:

Avocats à l'audience :

For the appellant:
Mr. Ayangma appeared in person

Pour l'appelant :
M. Ayangma a comparu en personne

For the respondent l'Université de Moncton:
Sacha D. Morisset

Pour l'intimée l'Université de Moncton :
Me Sacha D. Morisset

For the respondent l'Association des bibliothécaires, professeures et professeurs de l'Université de Moncton:
Joël Michaud and Dominic Caron

Pour l'intimée l'Association des bibliothécaires, professeures et professeurs de l'Université de Moncton :
Me Joël Michaud et Me Dominic Caron

DECISION

Noël Ayangma has appealed two decisions – both dated February 13, 2019 – issued by a judge of the Court of Queen's Bench in two separate matters. The first concerns an action Mr. Ayangma commenced against the Université de Moncton (U de M), and the second an application for judicial review in the matter of a grievance, naming as respondents both the U de M and the Association bibliothécaires, professeures et professeurs de l'Université de Moncton (ABPPUM). In each matter costs were awarded against Mr. Ayangma: $5,000 to the U de M in the first matter and $2,000 each to the U de M and the ABPPUM in the second.

Three motions were filed regarding these two appeals. In one, Mr. Ayangma seeks an extension of time to perfect his appeals, and, in the other two, the U de M and the ABPPUM seek security for costs.

At the hearing of the motions, the time for Mr. Ayangma to perfect his appeals was extended and these have now been perfected. There was also a question raised at the hearing regarding whether the motion by the ABPPUM for security for costs had been filed within 15 days of it having been served with the Notice of Appeal, as required by Rule 58.10(1)(a). To the extent it was necessary, I extended the 15-day delay to the date of filing. Both extensions of time were unopposed.

Remaining are the two motions for security for costs. The U de M and the ABPPUM claim having shown it is in the interests of justice that such security be ordered. They point to the fact Mr. Ayangma does not reside in New Brunswick, has no assets in this province and has not paid any of the costs previously awarded to them. Over and above the costs awarded in the matters currently on appeal, Mr. Ayangma had previously been ordered to pay the U de M a total of $13,000 and the ABPPUM $1,600, all of which remains unpaid.

Mr. Ayangma argues that security for costs cannot be ordered in the matter of an appeal arising out of a judicial review application. He points to Rule 58.01, which speaks of plaintiffs and defendants, and not of applicants and respondents. In my view, this argument has no merit. Security for costs on appeal are governed by Rule 58.10, which is broad enough to include all appeals regardless of the nature of the underlying proceeding.

A motion for security for costs under Rule 58.10 is governed by the principles Drapeau C.J.N.B. (as he then was) set out in *Dugas Estate (Bankrupt), Re* (2003), 2003 CanLII 48296 (NB CA), 261 N.B.R. (2d) 99, [2003] N.B.J. No. 230 (C.A.) (QL):

> In my view, an order for security for costs should only be issued when it is required in the interests of justice. It goes without saying that a key consideration in the exercise of the judicial discretion recognized by Rule 58.10(1)(b) is the apparent strength of the grounds of appeal. An appellant's financial means or lack thereof may also come into play. On that score, I note that judges have shown a great deal of reticence in granting orders for security for costs where the impecuniosity of the appellant is such that the likely consequence of the order will be a deemed abandonment of an apparently meritorious appeal. That said, an appellant's impecuniosity would not necessarily preclude an order under Rule 58.10(1)(b) if the appeal appears to have a very poor chance of success or is vexatious. [para. 9]

In the affidavit he filed in response to the motions for security for costs, Mr. Ayangma describes himself as an impecunious litigant; however, he states having "consistently paid, to the best of his ability, costs awarded against him in the proceedings conducted before the Prince Edward Island Courts" and having satisfied "a large portion of costs awarded against [him] over the years of litigation." Moreover, beyond his bald assertion of being an impecunious litigant, Mr. Ayangma has not provided any detail of his financial situation let alone any supporting documentation.

In the circumstances, I have not been satisfied that Mr. Ayangma qualifies as an impecunious litigant or that his financial situation would prevent him from pursuing his appeals if he truly desires to do so. On his own admission, he has been able to satisfy some of the previous orders of costs made against him.

In my view, it is in the interests of justice to require Mr. Ayangma to furnish security for costs in these matters. Both the U de M and the ABPPUM have been subjected to previous proceedings initiated by Mr. Ayangma for which awards of costs remain outstanding. In the circumstances, it would be unjust to require them to respond to Mr. Ayangma's two appeals without providing them some certainty that, in the event they are successful, at least a portion of the costs are secured.

For these reasons, I order Mr. Ayangma to furnish as security for costs the following:

(1) the sum of $1,500 in matter 22-19-CA involving the U de M; and

(2) the sum of $3,000 in matter 26-19-CA involving both the U de M and the ABPPUM.

These sums are to be deposited within 30 days of the date this order is issued, failing which in the case of either sum the corresponding appeal will be deemed to have been abandoned. Although not successful in the motions seeking security for costs, Mr. Ayangma was successful in his motion for an extension of time to perfect. As a result, I award no costs on any of the motions.

## DÉCISION

Noël Ayangma a interjeté appel de deux décisions – chacune datée du 13 février 2019 – rendues par un juge de la Cour du Banc de la Reine dans deux affaires distinctes. La première décision porte sur une action intentée par M. Ayangma à l'Université de Moncton (l'Université), et la seconde, dans laquelle l'Université et l'Association des bibliothécaires, professeures et professeurs de l'Université de Moncton (l'ABPPUM) sont toutes deux nommément désignées intimées, porte sur une requête en révision afférente à un grief. Dans chaque instance, M. Ayangma a été condamné aux dépens : un montant de 5 000 $ payable à l'Université dans la première instance et un montant de 2 000 $ payable à l'Université et de 2 000 $ payable à l'ABPPUM dans la seconde.

Trois motions afférentes à ces deux appels ont été déposées. Dans l'une des motions, M. Ayangma sollicite la prolongation du délai de mise en état de ses appels et, dans les deux autres, l'Université et l'ABPPUM demandent l'imposition d'une sûreté en garantie des dépens.

Lors de l'audition des motions, le délai dans lequel M. Ayangma devait mettre ses appels en état a été prolongé et ces appels sont maintenant en état. Lors de l'audience, on a aussi soulevé la question de savoir si la motion de l'ABPPUM demandant l'imposition d'une sûreté en garantie des dépens avait été déposée dans les quinze jours qui ont suivi la signification à elle de l'avis d'appel, conformément à la règle 58.10(1)a). Dans la mesure où cela était nécessaire, j'ai prolongé le délai de quinze jours jusqu'à la date du dépôt. Les deux prolongations de délai n'étaient pas contestées.

Il reste à statuer sur les deux motions demandant l'imposition d'une sûreté en garantie des dépens. L'Université et l'ABPPUM affirment avoir établi que l'imposition d'une telle sûreté est dans l'intérêt de la justice. Elles soulignent le fait que M. Ayangma n'est pas domicilié au Nouveau-Brunswick, n'a pas d'éléments d'actif dans la province et n'a payé aucune part des dépens qui ont été auparavant adjugés en leur faveur. En plus des dépens adjugés dans les affaires faisant l'objet des appels ci-visés, M. Ayangma a été auparavant condamné à payer 13 000 $ au total à l'Université et 1 600 $ à l'ABPPUM, ces deux montants demeurant impayés.

M. Ayangma soutient que l'imposition d'une sûreté en garantie des dépens ne peut être ordonnée dans le contexte d'un appel découlant d'une requête en révision. Il renvoie à la règle 58.01, qui parle du demandeur et du défendeur et non pas du requérant et de l'intimé. J'estime que cet argument est sans fondement. L'imposition en appel d'une sûreté en garantie des dépens est régie par la règle 58.10, qui a une portée suffisante pour s'étendre à tous les appels, peu importe la nature de l'instance sous-jacente.

Les motions présentées en vertu de la règle 58.10 en vue de l'imposition d'une sûreté en garantie des dépens sont régies par les principes énoncés en ces termes par le juge Drapeau, juge en chef du Nouveau-Brunswick (tel était alors son titre), dans *Dugas Estate (Bankrupt), Re* (2003), 2003 CanLII 48296 (NB CA), 261 R.N.-B. (2e) 99, [2003] A.N.-B. n° 230 (C.A.N.-B.) (QL) :

> J'estime que l'on ne devrait rendre une ordonnance prescrivant une sûreté en garantie des dépens que lorsque cela est nécessaire dans l'intérêt de la justice. Il va sans dire qu'une des considérations essentielles dans l'exercice du pouvoir discrétionnaire conféré à la Cour par la règle 58.10(1)b) est le bien-fondé apparent des moyens d'appel. Les ressources financières ou l'absence de ressources financières de l'appelant peuvent également jouer un rôle. À cet égard, je souligne que les juges se sont montrés très réticents à accorder des ordonnances imposant une sûreté en garantie des dépens lorsque l'indigence de l'appelant est telle que la conséquence probable de l'ordonnance sera l'abandon présumé d'un appel apparemment bien fondé. Cela dit, l'indigence de l'appelant n'interdit pas nécessairement une ordonnance sous le régime de la règle 58.10 (1)b) s'il y a très peu de chances que l'appel soit accueilli ou si l'appel est vexatoire. [Par. 9]

Dans l'affidavit qu'il a déposé en réponse aux motions demandant l'imposition d'une sûreté en garantie des dépens, M. Ayangma dit être une partie indigente; il affirme toutefois avoir [TRADUCTION] « toujours payé, du mieux qu'il pouvait, les dépens auxquels il était condamné dans le cadre des instances menées devant les tribunaux de l'Île-du-Prince-Édouard » et avoir acquitté [TRADUCTION] « une grande part des dépens adjugés contre [lui] pendant des années de litige ». En outre, au-delà d'affirmer sommairement être une partie indigente, M. Ayangma n'a donné aucun renseignement sur sa situation financière, et encore moins quelque document que ce soit à l'appui.

Eu égard aux circonstances, on ne m'a pas convaincu que M. Ayangma peut être considéré comme une partie indigente ni que sa situation financière l'empêcherait de poursuivre ses appels s'il le souhaitait véritablement. De son propre aveu, il a pu exécuter quelques-unes des ordonnances d'adjudication des dépens prononcées auparavant contre lui.

J'estime qu'il est dans l'intérêt de la justice de contraindre M. Ayangma à donner une sûreté en garantie des dépens dans les présentes affaires. L'Université et l'ABPPUM ont toutes deux fait l'objet de poursuites que M. Ayangma leur a intentées par le passé et à l'égard desquelles des ordonnances d'adjudication des dépens demeurent inexécutées. Eu égard aux circonstances, il serait injuste de les contraindre à répondre aux deux appels de M. Ayangma sans leur donner une certaine assurance de la garantie d'au moins une part des dépens si elles obtiennent gain de cause.

Pour ces motifs, j'ordonne à M. Ayangma de donner les sûretés en garantie des dépens suivantes :

1. 1 500 $ dans le dossier n° 22-19-CA mettant en cause l'Université;

2. 3 000 $ dans le dossier n° 26-19-CA mettant en cause l'Université et l'ABPPUM.

Ces montants doivent être déposés dans les trente jours qui suivent la date à laquelle la présente ordonnance est rendue; à défaut de quoi, s'agissant de l'un ou l'autre montant, l'appel correspondant sera réputé abandonné. Bien qu'il n'ait pas obtenu gain de cause quant aux motions demandant l'imposition d'une sûreté en garantie des dépens, M. Ayangma a obtenu gain de cause quant à sa motion sollicitant la prolongation du délai de mise en état. Par conséquent, je n'adjuge aucuns dépens relativement à l'une quelconque des motions.

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CanLII

# Ayangma v Université de Moncton (Moncton Campus), 2018 CanLII 74497 (NB CA)

Date: 2018-08-07

File number: 19-18-CA

Citation: Ayangma v Université de Moncton (Moncton Campus), 2018 CanLII 74497 (NB CA), <http://canlii.ca/t/htfd0>, retrieved on 2019-11-21

COURT OF APPEAL OF NEW BRUNSWICK

COUR D'APPEL DU NOUVEAU-BRUNSWICK

19-18-CA

BETWEEN:

NOËL AYANGMA

APPELLANT

- and -

UNIVERSITÉ DE MONCTON, CAMPUS DE MONCTON CAMPUS

RESPONDENT

ENTRE:

NOËL AYANGMA

APPELANT

-et-

UNIVERSITÉ DE MONCTON, CAMPUS DE MONCTON CAMPUS

INTIMÉE

Motion heard by:
The Honourable Justice Quigg

Motion entendue par :
l'honorable juge Quigg

Date of hearing:
August 7, 2018

Date de l'audience :
le 7 août 2018

Date of decision:
August 7, 2018

Date de la décision :
le 7 août 2018

Counsel at hearing:

Noël Ayangma on his own behalf

For the respondent:
Sacha Denis Morisset

Avocats à l'audience :

Noël Ayangma, en son propre nom

Pour l'intimée :
Sacha Denis Morisset

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DECISION
(Orally)

The motion for an extension of time to perfect the appeal is allowed without costs. The appeal shall be perfected on or before August 8, 2018.

DÉCISION
(oralement)

La requête en prorogation du délai pour la mise en état de l'appel est accueillie sans dépens. L'appel doit être mis en état au plus tard le 8 août 2018.

CanLII

# Ayangma v. The Attorney General (P.E.I.), 2004 PESCAD 11 (CanLII)

Date: 2004-07-29

File number: S1-AD-1006

Citation: Ayangma v. The Attorney General (P.E.I.), 2004 PESCAD 11 (CanLII), <http://canlii.ca/t/1hbz3>, retrieved on 2019-11-13

Editor's Note: Erratum released August 3, 2004. Original judgment has been corrected, with text of erratum appended.

PROVINCE OF PRINCE EDWARD ISLAND

IN THE SUPREME COURT - APPEAL DIVISION

Citation: Ayangma v. The Attorney General (P.E.I.) 2004 PESCAD 11 Date: 20040623

Docket: S1-AD-1006

Registry: Charlottetown

BETWEEN:

**NOËL AYANGMA**

APPELLANT

AND:

THE ATTORNEY GENERAL OF PRINCE EDWARD ISLAND

RESPONDENT

Before: The Honourable Chief Justice G.E. Mitchell

The Honourable Mr. Justice J.A. McQuaid

The Honourable Madam Justice L.K. Webber

Appearances:

Noël Ayangma, for the Appellant

Roger B. Langille, Q.C. Counsel for the Respondent

Place and Date of Hearing Charlottetown, Prince Edward Island

April 6, 2004

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Place and Date of Judgment Charlottetown, Prince Edward Island

June 23, 2004

Written Reasons by:

The Honourable Madam Justice L.K. Webber

Concurred in by:

The Honourable Chief Justice G.E. Mitchell

The Honourable Mr. Justice J.A. McQuaid

APPEAL -

An appeal with respect to an order under s.61(1) of the Supreme Court Act was allowed. A finding that proceedings are vexatious or taken in a vexatious manner is an extraordinary remedy to be utilized when the other powers of the court have failed to control a litigant. Such a failure of alternative remedies was not established in this case.

Authorities Cited:

CASES CONSIDERED: Law Society of Upper Canada v. Chavali, [1998] O.J. No. 5890 (Ont.Gen.Div.); Mishra v. Ottawa (City), [1997] O.J. No. 4352, (Ont. Gen.Div.); Re Lang Michener et al. v. Fabian et al. (1987), 1987 CanLII 172 (ON SC), 37 D.L.R. (4th) 685 (Ont. H.Ct. of Justice); Ayangma v. The P.E.I. Human Rights Commission and The Eastern School Board, 2003 PESCTD 95 (CanLII) (PESCTD); Canada v. Aqua-Gem Investments Ltd. (C.A.), 1993 CanLII 2939 (FCA), [1993] 2 F.C. 425 (F.C.A.); Housen v. Nikolaisen, 2002 SCC 33 (CanLII), [2002] S.C.R. 235; R. v. R.D.S., 1997 CanLII 324 (SCC), [1997] 3 S.C.R. 484 (SCC); MacKinnon v. MacKinnon & Ors., 2000 PESCTD 87 (CanLII); Arsenault-Cameron v. Prince Edward Island, 1999 CanLII 641 (SCC), [1999] 3 S.C.R. 851 (SCC)

STATUTES CONSIDERED: Supreme Court Act, R.S.P.E.I. 1988, Cap. S-10, s.61, s-s.61(1); Human Rights Act, R.S.P.E.I. 1988, Cap. H-12

RULES CONSIDERED: Prince Edward Island Rules of Civil Procedure, Rule 20, Rule 25.11, Rule 37.16, Rule 56

Reasons for judgment:

WEBBER J.A.:

[1] Noël Ayangma (Ayangma) appeals the order pursuant to s.61 of the Supreme Court Act, R.S.P.E.I. 1988, Cap. S-10, that no further proceedings be initiated or continued by him except with leave of a judge of the Supreme Court of Prince Edward Island.

[2] The decision in issue follows a number of years of litigation by Ayangma and results from an application by the Attorney General of Prince Edward Island (the Attorney General). A prior application, taken by the Government of Prince Edward Island in 1998, was unsuccessful.

DECISION

[3] I would allow the appeal.

ANALYSIS

The Law

[4] Section 61 of our Supreme Court Act states:

61.(1) Where a judge of the Supreme Court is satisfied, on application, that a person has persistently and without reasonable grounds

(a) instituted vexatious proceedings in any court; or

(b) conducted a proceeding in any court in a vexatious manner, the judge may order that

(c) no further proceeding be instituted by the person in any court; or

(d) a proceeding previously instituted by the person in any court not be continued,

except by leave of a judge of the Supreme Court.

(2) An application under subsection (1) shall be made only on notice to the Attorney General, and the Attorney General is entitled to be heard on the application.

(3) Where a person against whom an order under subsection (1) has been made seeks leave to institute or continue a proceeding, he shall do so by way of an application in the Supreme Court.

(4) Where an application for leave is made under subsection (3),

(a) leave shall be granted only if the court is satisfied that the proceeding sought to be instituted or continued is not an abuse of process and that there are reasonable grounds for the proceeding;

(b) the person making the application for leave may seek the rescission of the order made under subsection (1) but may not seek any other relief on the application;

(c) the court may rescind the order made under subsection (1);

(d) the Attorney General is entitled to be heard on the application; and

(e) no appeal lies from refusal to grant relief to the applicant.

(5) Nothing in this section limits the authority of a court to stay or dismiss a proceeding as an abuse of process or on any other ground.

[5] Except for a reference to the Superior Court of Justice in place of our reference to the Supreme Court, and except for Ontario's appeal of subsection (2), this provision is virtually identical to s.140 of the Ontario Courts of Justice Act, R.S.O. 1990, c. C-43. That is the provision utilized in the case of Law Society of Upper Canada v. Chavali, [1998] O.J. No. 5890. The respondents in that case were a married couple, and corporations they owned or controlled (collectively referred to as the Chavalis). The Chavalis, who had amassed a substantial real estate portfolio, claimed their lawyer and their accountant defrauded them, causing them their financial problems. The Chavalis started a multiplicity of actions, "often being four or five against the same person." Numerous actions were taken against the mortgagee of the properties and personally against the lawyer who acted for the mortgagee, and several actions against the people who bought a residential property through a power of sale by mortgage. Four actions were taken against the court-appointed manager/receiver/trustee in respect of construction liens. These are only some of the Chavalis' actions.

[6] The Chavali decision also noted a "plethora of motions" and contraventions of undertakings. During a six-week period six actions were dismissed but "A near identical sixty-six page statement of claim to one of these dismissed actions was commenced..." less than a month later. That action was then stayed as a patent abuse of the court's process. Further actions were commenced raising substantially the same issues as those that were previously dismissed. The Chavalis were found to have misrepresented facts to the Court. They brought court proceedings against more than twenty solicitors "being either their own solicitors or solicitors who have represented parties whom the Chavalis have sued in respect of the loss of their real estate." The court found that the Chavalis had instituted vexatious proceedings and conducted proceedings in a vexatious manner.

[7] Cumming J. further stated:

[23] The multiplicity and nature of the actions give rise to the conclusion that the actions are instituted and conducted for the improper purpose of harassing and oppressing the defendants.

[8] The case of Mishra v. Ottawa (City), [1997] O.J. No. 4352, dealt with a similar application to have Mishra subject to a vexatious proceedings order. In his decision, Sedgwick J. noted that:

¶ 40 During the decade from 1988 to 1997, Mishra and/or Centretown and/or 587855 Ontario (two Ontario corporations which he controlled, one of which no longer exists) have initiated more than 20 legal proceedings by statement of claim (as plaintiff) or by counterclaim or third party claim (as defendant) in the Ontario Court (General Division). None of these proceedings has gone to trial.

Eight of them have been dismissed by court order. Five of them have been appealed to the Ontario Court of Appeal. No appeal has succeeded. Applications have been made for leave to appeal two of them to the Supreme Court of Canada. In neither case was leave granted by that Court.

[9] It was noted that Mishra sued Ministers of the Crown, federally and provincially, judges, the city of Ottawa (at least 13 times), the Mayor of Ottawa, named employees, police officers, municipal officers and the City's legal counsel - numerous times. Sedgwick J. stated:

¶ 44 There is obviously nothing inherently wrong in holding public officials accountable at every level of government. However, a reading of the pleadings prepared by Mishra indicates that the relationship between the officials and the actions of which he complains is tenuous and without foundation in law.

¶ 45 Law firms and individual lawyers have been sued 24 times, generally, concurrently with their clients who are Mishra's targets - governments, financial institutions and others who are, in his view, engaged in manifold but not manifest conspiracies to injure his business enterprises.

[10] There was also evidence in that case that Mishra commenced the actions merely to irritate the defendants. The evidence suggested that Mishra believed his method of commencing actions would make people think twice before they took action against him. In all these circumstances, Sedgwick J. found Mishra abused the process of the court by persistently bringing vexatious proceedings. To maintain the integrity of the court and the proper administration of justice, an order would issue pursuant to s-s.140(1) of the Courts of Justice Act (virtually the same as our s-s.61(1) of the Supreme Court Act).

[11] In the case of Re Lang Michener et al. v. Fabian et al. (1987), 1987 CanLII 172 (ON SC), 37 D.L.R. (4th) 685 (Ont. H.Ct. of Justice), an unsuccessful plaintiff (Fabian) in a motor vehicle personal injury action subsequently sued the doctor who testified for the defendant at the trial. This was struck as disclosing no reasonable cause of action, and his appeal of this case was dismissed. He then sued the doctor again, three solicitors in the law firm that acted for the defendant, and the defendant's insurer. These were all struck out and the appeals were dismissed. Then Fabian, as an officer and principal of a company, acted for that company against "Janin." After these cases worked their way through the court, but not to Fabian's satisfaction, Fabian and the company commenced further actions against Janin, its former solicitor and its present solicitor, respectively - as a result of Janin's conduct of its defence in the main action. The former law firm got the statement of claim struck as disclosing no cause of action. The action against Janin was ultimately stayed by the time of the proceeding regarding vexatious litigation. The action against Fabian's solicitors were admitted to involve matters previously raised in a matter already decided and appealed. Fabian also told Janin's solicitor he would drop the matter against the solicitors if Janin made a favourable settlement for the original action. The court noted that Fabian on several occasions attempted to note pleadings closed without notice, had taken interlocutory applications and appeals without notice and had made numerous allegations of bad faith and bias. Henry J. concluded that Fabian had instituted frivolous proceedings and conducted proceedings in a vexatious manner.

[12] Henry J. extracted certain principles from his review of the case law dealing with applications to have proceedings declared vexatious. These principles have often been cited since and are the following:

(a) the bringing of one or more actions to determine an issue which has already been determined by a court of competent jurisdiction constitutes a vexatious proceeding;

(b) where it is obvious that an action cannot succeed, or if the action would lead to no possible good, or if no reasonable person can reasonably expect to obtain relief, the action is vexatious;

(c) vexatious actions include those brought for an improper purpose, including the harassment and oppression of other parties by multifarious proceedings brought for purposes other than the assertion of legitimate rights;

(d) it is a general characteristic of vexatious proceedings that grounds and issues raised tend to be rolled forward into subsequent actions and repeated and supplemented, often with actions brought against the lawyers who have acted for or against the litigant in earlier proceedings;

(e) in determining whether proceedings are vexatious, the court must look at the whole history of the matter and not just whether there was originally a good cause of action;

(f) the failure of the person instituting the proceedings to pay the costs of unsuccessful proceedings is one factor to be considered in determining whether proceedings are vexatious;

(g) the respondent's conduct in persistently taking unsuccessful appeals from judicial decisions can be considered vexatious conduct of legal proceedings.

[13] This detailed review of the cases has been carried out to show, by some examples, the types of proceedings resulting in s-s.61(1)-type orders. The proceedings instituted by of Ayangma can be compared and contrasted with these.

AYANGMA'S ACTIONS

[14] The Attorney General bases its argument of vexatious litigation upon a list of 46 proceedings it says Ayangma has been involved in since 1998. This list was incorporated by the trial judge into his reasons as Schedule 2. In turn, Ayangma groups the proceedings into Categories A through I (nine groups, one group being Federal Court proceedings).

[15] Unless they involve the same parties or the same issues as were raised in this court, I cannot accept that proceedings in another court are relevant to a s-s.61(1) application. The Attorney General's attempt to incorporate these issues into its application highlights one rather unique aspect of this proceeding. Usually, a party or parties who feel(s) they have been unreasonably subject to vexatious litigation would file an application and notify the Attorney General who then has the right to appear as well. If such a procedure is utilized then the facts going toward the issue of vexatious proceeding or proceedings taken in a vexatious manner can be attested to by the parties who are the

applicants. This obviously is not possible where the actions complained of have been taken in another court.

[16] As well, in the instant case, the Attorney General alone has made this application even though it is not a party to any of the proceedings complained about. For this reason, Ayangma has challenged the Attorney General's standing to make this application. He points out that the Attorney General's interest stems from its being the insurer for several of the litigants - the Department of Education, the Eastern School Board, and the French School Board. However, the Attorney General is in a unique position because of the requirement in s-s.61(2) that it be notified of any such proceeding and giving it a right to be heard in any such proceeding. The statute appears to give the Attorney General special standing apart from any personal interest in an action. At the same time, however, this point highlights the fact that unlike other cases of this type, the court does not have before it individual parties who claim that proceedings have been taken against them in a vexatious manner.

[17] A proper analysis requires that each party be considered separately to determine whether or not proceedings against that party have been vexatious or carried out in a vexatious manner. Where there are multiple parties involved in an event that results in litigation, then the proceedings involving all of those parties need to be considered. As well, numerous actions against numerous different parties can be considered. However, those different analyses may give rise to different concerns.

[18] Therefore, while the totality of all the different proceedings can be considered in the final determination of whether or not Ayangma has instituted vexatious proceedings, it is important to remember that just because the Government of Prince Edward Island and its agencies have been involved in multiple proceedings does not mean that an unreasonable number of proceedings has taken place.

[19] I also note that Ayangma raised the issue of apprehension of bias by the trial judge. However, he failed to provide the evidentiary foundation to support this allegation. See: R. v. R.D.S., 1997 CanLII 324 (SCC), [1997] 3 S.C.R. 484; MacKinnon v. MacKinnon & Ors., **2000 PESCTD 87 (CanLII); and Arsenault-Cameron v. Prince Edward Island**, 1999 CanLII 641 (SCC), [1999] 3 S.C.R. 851. This ground of appeal therefore fails.

[20] Overall, excluding federal court matters, all but the small claim for a refund of an Air France ticket - which I consider irrelevant to this proceeding - arise out of three attempts by Ayangma to obtain employment in Prince Edward Island. One was with the Department of Education; one with the French School Board; and one with the Eastern School Board. Since Ayangma's primary argument in each case is that he was discriminated against primarily because of race (but also raising colour, creed, age and nationality), proceedings had to involve the Prince Edward Island Human Rights Commission before they involved the court. Some court decisions found the Human Rights Commission proceedings to be flawed and required them to be redone. The "redoing" then became the subject of further court proceedings. Costs were awarded against Ayangma on some occasions and for him on others. Some costs have been paid, some have not. Both sides brought interlocutory motions, although Ayangma brought the most. He has been persistent in pursuing his claims of discrimination. The issue is whether or not he has taken vexatious proceedings or taken proceedings in a vexatious manner.

[21] More specifically, the proceedings taken include the following.

a. Race Relations Consultant

[22] In 1998 Ayangma filed a statement of claim (GSC-15787) against the Government of Prince Edward Island and others alleging discrimination in hiring, and seeking damages. A defendant's motion resulted in the claims against all defendants other than the government being dismissed. The Prothonotary's costs awards in favour of the struck defendants were unsuccessfully appealed by

Ayangma. There were a number of steps to these assessments and appeals because there were several parties involved and some were dealt with separately.

[23] In 2002 Ayangma applied for judicial review with respect to the same decision he attacked in GSC-15787 regarding the race relations consultant position. The application was dismissed for a number of reasons including "collateral attack on prior proceedings" and "cause of action estoppel." Costs were awarded against Ayangma on a solicitor-client basis. There was no appeal.

[24] By my calculations, this matter involved 11 proceedings, including claims, applications, motions and appeals.

b. The Eastern School Board

[25] Ayangma filed a complaint with the P.E.I. Human Rights Commission on August 17, 1998. This matter is summarized by Cheverie J. in Ayangma v. The P.E.I. Human Rights Commission and The Eastern School Board, 2003 PESCTD 95 (CanLII):

[2] He alleged that between March, 1988 and June, 1998, the Board discriminated against him in the matter of employment on the basis of race, colour, age, and ethnic/national origin. For reasons not relevant to the present case, Ayangma's complaint was referred to the New Brunswick Human Rights Commission for action. Mr. Carl White, a Human Rights Officer with the New Brunswick Human Rights Commission was assigned the case and submitted his report on October 4, 1999. On December 3, 1999, the Commission assigned carriage of the complaint to Janet Christian-Campbell pursuant to s. 1(1)(h.1) of the ***Act***. She gathered additional information and on July 13, 2000, she dismissed Ayangma's complaint on the basis that it was without merit. Ayangma then requested a review of that decision by the Chairperson of the Commission and the Chairperson confirmed the dismissal of the complaint on December 19, 2000.

[3] Ayangma then launched his first judicial review application on these facts on January 16, 2001. On July 30, 2001, Jenkins J. of this court found there was a reasonable apprehension of bias in the Commission's process; granted the application for judicial review; and ordered the matter back to Carl White to complete his function by either:

(1)confirming that his investigation and attempt to effect settlement of the complaint is done, and reporting to the Chairperson of the Commission that the parties are unable to settle the complaint; or (2) completing the investigation and settlement roles and, should he consider it appropriate to do so, making a decision under s-s. 22(4) and reporting to the parties and/or the Chairperson as may be applicable regarding his decision on the complaint. (See Ayangma v. Prince Edward Island (Human Rights Commission), 2001 PESCTD 71 (CanLII) at para. 67.)

In keeping with this direction, the matter was remitted to Carl White on August 6, 2001.

[4] On November 18, 2002, White issued a Notice of Dismissal recommending the complaint be dismissed and not proceed to a Board of Inquiry. Between August 6, 2001 and November 18, 2002, Ayangma commenced another application seeking a variety of relief against the New Brunswick Human Rights Commission and/or Carl White, and Jenkins J. denied the application on December

14, 2001. Ayangma appealed that decision and the Appeal Division of this Court dismissed his appeal in June, 2002.

[5] On November 29, 2002, Ayangma repeated the process he initiated after his complaint was dismissed the first time - i.e. he requested the Chairperson review Carl White's decision of November 18, 2002 and appoint a Board of Inquiry to hear the complaint. On January 29, 2003, the Chairperson concurred with the decision of the Executive Director Delegate, Carl White, that the complaint should be dismissed on the basis that it is without merit. It is that decision which is the subject of this second judicial review arising out of Ayangma's initial complaint of August 17, 1998.

[26] That judicial review was dismissed by the trial judge and is now on appeal. With respect to the same matter there was also a claim for damages filed by Ayangma in 1999, which the defendants made a successful motion to dismiss. However, on appeal the action was reinstated with respect to the Charter claim. That Charter claim remains outstanding. The Court of Appeal had stated that Ayangma's claims under the Human Rights Act, R.S.P.E.I. 1988, Cap. H-12, should be pursued to completion prior to continuing with the Charter claim.

[27] In addition, after the decision of Jenkins J. in 2001 and before the decision was rendered by the Human Rights Commission in response to that decision, Ayangma took actions against the Eastern School Board, the Human Rights Commission, Ruth DeMone and Sherry Gillis (the latter two being solicitors for the Attorney General insurer, acting for the School Board), for contempt as a result of certain actions taken by/on behalf of the School Board after Jenkins J.'s decision. This action was dismissed and Ayangma's appeal was dismissed. However, the award by the trial judge of costs payable to Ayangma by the School Board was upheld on appeal. The trial judge had stated that the actions taken on behalf of the Board gave rise to special circumstances justifying the costs award.

[28] By my count, this matter has involved 9 court proceedings.

c. The French School Board

[29] Ayangma filed a complaint in 1998 with the P.E.I. Human Rights Commission alleging discrimination by the French School Board. That complaint was dismissed and in 2001 Ayangma applied for judicial review of that decision. That application was dismissed but his appeal of the dismissal was successful, finding that the Human Rights Commission erred in the manner in which it proceeded. The court ordered that a panel of the Human Rights Commission be struck to hear the complaint. Ayangma was awarded his costs throughout. Ayangma appealed this decision to the Supreme Court of Canada but his application for extension of time to file was dismissed and an application for reconsideration was dismissed.

[30] The Human Rights Commission panel dismissed Ayangma's complaint. He then filed a judicial review application of that decision. In June of 2003 Ayangma was ordered to pay $4,035. within 30 days as security for costs of the French School Board, before that matter could proceed. These costs were paid as required. Ultimately, his judicial review application was dismissed by the trial judge. Ayangma has filed an appeal of that decision.

[31] There was also a claim for damages filed by Ayangma in 1999, which the defendants made a successful motion to dismiss. However, on appeal the action was reinstated with respect to the Charter claim. This Charter claim remains outstanding for the same reason as the outstanding Charter claim against the Eastern School Board.

[32] An action was filed by Ayangma against the French School Board, PEITF and Minister of Education for judicial review of a section of the School Act. The respondents filed a motion for dismissal but the matter was discontinued by Ayangma before the hearing.

[33] By my calculation, this matter has involved 10 proceedings.

d. S1-GS-19369 Eastern School Board, Human Rights Commission et al.

[34] Ayangma filed an application for contempt, injunction and mandamus order against the Eastern School Board, the P.E.I. Human Rights Commission, the New Brunswick Human Rights Commission and Carl White. The matter is still before the court. Nothing has occurred since October of 2002 when Ayangma was advised he needed to file proof of service on the New Brunswick Human Rights Commission and Carl White.

e. GSC-17048 James Wyatt

[35] Ayangma sued James Wyatt, as executive director of the Human Rights Commission, for damages. The statement of claim was struck out for disclosing no cause of action. There was no appeal.

f. Vexatious Litigation Action 1998

[36] The Government of Prince Edward Island took an action against Ayangma seeking an order under s-s.61(1) of the Supreme Court Act stating that Ayangma could no longer pursue a matter without prior leave of the court. This action was dismissed.

[37] After the dismissal Ayangma sued the government for damages for the tort of libel and slander. An order for summary judgment dismissing the claim was granted. Costs were awarded against Ayangma. An appeal was filed but later discontinued. An interim procedural issue was decided against Ayangma by the Prothonotary but that decision was reversed on appeal.

[38] Ayangma also sued the CBC for damages for libel and slander as a result of its coverage of the 1998 vexatious litigation proceedings. The statement of claim was struck for not disclosing any cause of action. Costs were against Ayangma. There was no appeal.

[39] By my calculations this has involved seven proceedings.

g. GSC-16512 NAV Canada

[40] Ayangma sued NAV Canada for defamation for comments made during a Canadian Human Rights Commission investigation. He won $1,500. damages. He appealed the damages and NAV Canada cross-appealed the finding of defamation. The cross-appeal was allowed with costs to NAV Canada throughout. Ayangma's application for leave to appeal to the Supreme Court of Canada was dismissed, as was his application for reconsideration. This involved five proceedings.

h. S1-GS-18907 Government of P.E.I. and Human Rights Commission

[41] Ayangma applied for a variation or setting aside of a garnishment related to costs he owed and applied for damages for the respondent's actions. The motion and application were dismissed. Costs were awarded to the defendants.

i. S1-SC-24020 Air France

[42] Ayangma sued Air France for a refund of an airline ticket fee. The claim was dismissed with costs against Ayangma. There has been no appeal.

[43] While this detailed review of Ayangma's court proceedings shows a persistent litigant, the issue is whether or not it shows vexatious proceedings or proceedings taken in a vexatious manner.

[44] With respect to the findings of the trial judge on this matter, this court has the power to intervene to reverse the findings of the trial judge where the trial judge acted on some wrong principle, disregarded material evidence or made a palpable and overriding error in the assessment of the evidence. See: Canada v. Aqua-Gem Investments Ltd. (C.A.), 1993 CanLII 2939 (FCA), [1993] 2 F.C. 425 (F.C.A.); Housen v. Nikolaisen, 2002 SCC 33 (CanLII), [2002] S.C.R. 235. With all due respect, I find the trial judge erred by misapprehending the legal issues involved and proceeded on incorrect principles when analysing the evidence before him.

[45] Subsection 61(1) exists to give the court extraordinary power in those extraordinary situations in which the normal rules seem unable to reasonably control a litigant. A litigant who sues everyone, sues about everything, and is undeterred by court orders is often the subject of such an order.

[46] Overall, there is not here evidence of someone who repeatedly brings actions to determine an issue that has already been determined. One action, the 2002 judicial review application regarding the race relations consultant position, has that flavour and causes some concern. Some actions, eg. S1-GS-19369, are questionable. However, for the most part, Ayangma has been doggedly pursuing the claims he believes in but not to the extent of appealing everything foolishly. A number of his attempts were successful; sometimes that success meant that the Human Rights Commission had to start over or go back and reconsider a matter, and that subsequent decision was subject to further scrutiny.

[47] Could it be said that it was obvious Ayangma's actions would not succeed, or could lead to no possible good, or no reasonable person could expect to obtain relief? Given the mixed results he has had, such a conclusion is not obvious.

[48] Have these actions been brought for an improper purpose, including harassment and oppression of other parties? There is no evidence of anything other than a sincere desire by Ayangma to right the wrongs he perceives have been done to him. Unfortunately, his dogged pursuit of these rights, especially given some successes that have required the Human Rights Commission to reconsider or redo matters, may make parties such as the Human Rights Commission feel harassed. However, there is no indication that Ayangma is bringing these actions for any collateral purposes such as those noted in Mishra, supra. Rather, he is attempting to redress grievances through the processes available to him in the courts.

[49] Except for the one action noted earlier, which was dismissed as an attempt to re-try a matter already decided, these have not been actions that are "rolled forward" as noted in Re Lang Michener. Sometimes new matters have come about because of certain court decisions and how parties reacted. This is what gave rise to Ayangma's contempt actions. As for those, while all actions were dismissed, the circumstances involving the school board were such that costs were awarded to Ayangma in spite of the dismissal of his action. This serves to reinforce a finding that this was not a totally frivolous action on his part.

[50] Certainly Ayangma has been persistent in his appeals of decisions but they have not all been unsuccessful and he has not appealed all decisions. Again, this suggests both some merit to his actions and some assessment by him of whether or not appeal is appropriate.

[51] As for failure to pay costs, this is an issue that must be considered; however, that issue must be considered in the context of this whole matter. The fact that there are substantial unpaid costs could suggest that the parties to these cases have not used the procedures available to them to ensure outstanding costs are paid before new actions are taken. Last summer the French School Board did ask for security for costs and that security was granted. Ayangma paid the security required. As for the Attorney General's argument that costs awards never fully compensate a party, in the context of a s-s.61(1) application this might suggest that litigation can be classified as

vexatious simply because the costs awarded in previous claims have not fully compensated successful parties. I do not believe the intent of that legislation is to bar litigants for such a reason.

[52] There are in the Rules of Court procedures available to ensure parties do not have to deal with claims that may prejudice or delay a fair trial, are scandalous, frivolous or vexatious, or are an abuse of the process of the court (e.g. striking out a pleading or other document, Rule 25.11). There are summary judgment proceedings (Rule 20) available to defendants as well as plaintiffs. There is even a rule (37.16) that allows a judge on motion by a party to, by order, prohibit another party from making further motions without leave. This requires an assessment by the judge that the party to be subject to the order is attempting to delay or add costs to the proceeding, or abuse the process of the court by a multiplicity of frivolous or vexatious motions.

[53] Cost orders are also available, including security for costs (Rule 56), where a plaintiff has a judgment or order against him for costs that have not been paid, or where there is good reason to believe that an action is frivolous or vexatious and the plaintiff has insufficient assets in P.E.I. to pay the costs of the defendant or respondent. If there are grounds for security to be ordered, then the proceedings will not continue until the security ordered has been posted.

[54] What motions have been used in the instant case? In 1998 on the original race relations action, a motion was made to dismiss the statement of claim and the claims against all the defendants except the government of Prince Edward Island were struck. Then in 1999 a motion was brought to dismiss Ayangma's claims against the Eastern School Board, Ricky Hood, the French School Board and Gabriel Arsenault. This was successful but on appeal the Charter claim was reinstated. In 2001 a motion was made to strike out Ayangma's claim against James Wyatt, executive director of the P.E.I. Human Rights Commission. This was successful.

[55] Motions were also made in the defamation actions against the Government of Prince Edward Island (1999) and the CBC (2000) regarding the 1998 vexatious litigation application made by the Government. These motions resulted in those claims being dismissed or struck out.

[56] Motions for summary judgment were filed by both sides in the NAV Canada (2000) dispute, with Ayangma winning the original motion but losing on appeal. Then in 2002 the Department of Education, Advisory Committee on Race Relations, and Human Rights Commission succeeded in having Ayangma's application for judicial review struck out as relating to matters already heard and decided. A motion to dismiss Ayangma's claim in 2002 for judicial review of sections of the School Act apparently did not proceed because Ayangma discontinued the motion.

[57] Then in 2003, a few months prior to the decision on appeal in the instant case, the French School Board succeeded in obtaining an order for security for costs against Ayangma. The order required the security to be paid within 30 days and this was done.

[58] There are two ways of looking at those motions. One is that a fairly large number of motions has been required in the last six years. The other way of looking at them is that the rules have worked to ensure that only proceedings with some merit have been allowed to be carried through to a full hearing, and where costs have been raised as a concern, security has been ordered.

[59] Subsection 61(1) is an extraordinary remedy. It is to be used when all other attempts to control the actions of a litigant have failed. The case law cited above provides some compelling examples of where existing court remedies failed. In spite of courts striking out pleadings, ordering costs to be paid, rendering decisions against a litigant, the same litigant would come back again and again litigating the same matter either using the excessive litigation to attempt to force a party to pay compensation even though it had won at trial and appeal (as in Chavali), or using the litigation as a means of intimidating others from making claims against them (as in Mishra). In the circumstances faced by those courts, the remedies existing in the normal rules - striking out, security for costs orders, etc. - would not stop the actions. One party was even prepared to, and did, lie to the Court (in Mishra).

[60] No similar extraordinary circumstances can be found in the instant case. While the 2002 action appears to be an attempt to re-litigate and is a cause for concern, it is not sufficient in the circumstances here - even given that there are outstanding cost awards - to justify an order pursuant to s-s.61(1). There is no indication that, when a pleading has been struck, Ayangma has ignored the resulting order and refiled on the same basis. While he may appeal the decision, except for that one action previously noted, he appears to accept the decisions of the court.

[61] While the Attorney General here argues that the order under s-s.61(1) does not bar litigation, it simply requires leave to commence or continue litigation, there is obviously a serious restriction placed on a person subject to such an order. Normally, an allegation that a proceeding is vexatious and should be barred must be proven by the party making the allegation. The same would be true for the party seeking security of costs - the onus would be upon that party to prove that such security is necessary. On the other hand, once an order issues under s-s.61(1), the onus shifts to the party subject to that order to prove that his proceedings are not vexatious or in any other way an abuse of process and to prove that there are reasonable grounds for the proceedings. This is a significant alteration to the normal procedure and as such is an extraordinary remedy. Set out in the Supreme Court Act, separate and apart from the rules, it provides a final and ultimate remedy where the normal rules have not and most likely will not work in the future to control a person who has persistently abused the court process for his or her own aims. Cases such as Chavali and Mishra exemplify the type of situation requiring such a remedy.

[62] There may be occasions when the number of proceedings taken may alone give rise to a claim of vexatious litigation, but courts must make such assessments very carefully. If procedures are available for use by litigants to advance their cause, we should not be quick to label the use of those procedures "vexatious."

[63] In the cases referenced from other courts, the litigant not only sued everyone many times but also sued the lawyers for the parties who succeeded against them. That has not happened in the instant case. There is on file one action against two government lawyers but that related to specific actions that Ayangma argued breached a court order. While he was not successful in his claim, the court awarded him costs because the circumstances - what had taken place - gave rise to some questions that made his concerns understandable.

[64] As well, other cases have pointed to the clear use of the courts by these litigants to intimidate others, rather than to legitimately seek a remedy from those sued. Again, there is no clear parallel to the instant case. Those litigants also persisted in filing essentially the same claims over and over, ignoring court orders, and even at times lying to the court to get orders in their favour. Again, the actions of Ayangma are quite different. For the most part, he has respected court orders, discontinued actions when told they were problematic, and resisted appealing all orders. While there may be fear that his passion for his cause may result in indiscriminate lawsuits against everyone he encounters, that is not an accurate description of his proceedings to date. The proceedings are numerous but for the most part, they represent his use of available procedures to advance his three main complaints - one against the French School Board, one against the Eastern School Board and one against the Department of Education.

[65] While some motions may have been unwise and have had little likelihood of success, Ayangma appears to have been doing his best to advance his case, using procedures available. While legal counsel might have advised against some proceedings, a client may decide to have his lawyer engage in proceedings even against his lawyer's advice. The fact they are unlikely to succeed does not in and of itself make proceedings vexatious.

[66] Ayangma's vigorous and persistent and even prolix fight against the wrongs he perceives were done to him in these employment situations has taxed the resources of the court and of the parties. However, there are cases that can require new court rooms and months, if not years, of hearings and that alone does not mean that they are vexatious or being instituted vexatiously.

[67] The Rules of Court have been successfully used to restrain and redirect Ayangma's actions. He has not persisted in spite of orders to the contrary. Overall, I can find neither vexatious litigation nor proceedings taken in a vexatious manner. With all respect to the trial judge, I believe he misinterpreted the law regarding a s-s.61(1) application, placing too much emphasis on the number of court applications and insufficient emphasis on the purpose of those proceedings and whether or not the Rules of Court were working to contain possible excesses in litigation.

[68] The appeal is therefore allowed. Ayangma will have his costs throughout. He is to file a Bill of Costs and serve a copy on the respondent within 15 days of the date of this decision. The respondent will have 10 days from the date the Bill of Costs is filed and served to file a written response with the Court. Ayangma will then have five days to file and serve a written reply if he chooses to reply.

_____

The Honourable Madam Justice L.K. Webber

I AGREE: _____

The Honourable Chief Justice G.E. Mitchell

I AGREE: _____

The Honourable Mr. Justice J.A. McQuaid

**PROVINCE OF PRINCE EDWARD ISLAND**
**IN THE SUPREME COURT - APPEAL DIVISION**

Citation: Ayangma v. The Attorney General (P.E.I.) 2004 PESCAD 11 Date: 20040729
Docket: S1-AD-1006
Registry: Charlottetown

**BETWEEN:**

**NOËL AYANGMA**

**APPELLANT**

**AND:**

**THE ATTORNEY GENERAL OF PRINCE EDWARD ISLAND**

**RESPONDENT**

Before: The Honourable Chief Justice G.E. Mitchell
The Honourable Mr. Justice J.A. McQuaid
The Honourable Madam Justice L.K. Webber

Appearances:
Noël Ayangma, for the Appellant

Roger B. Langille, Q.C. Counsel for the Respondent

CanLII

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# Ayangma v Canada Health Infoway, 2017 PECA 13 (CanLII)

Date: 2017-06-30

File number: S1-CA-1332

Other citation: [2017] PEIJ No 23 (QL)

Citation: Ayangma v Canada Health Infoway, 2017 PECA 13 (CanLII), <http://canlii.ca/t/h4kzw>, retrieved on 2019-11-13

**PROVINCE OF PRINCE EDWARD ISLAND**
**PRINCE EDWARD ISLAND COURT OF APPEAL**

Citation: ***Ayangma v. Canada Health Infoway***, 2017 PECA 13
Date: 20170630

Docket: S1-CA-1332

Registry: Charlottetown

**BETWEEN:**

**NOËL AYANGMA**

**APPELLANT**

**AND:**

**CANADA HEALTH INFOWAY**

**RESPONDENT**

Before: Chief Justice David H. Jenkins
Justice Michele M. Murphy
Justice John K. Mitchell

Appearances:
Noël Ayangma, appellant, on his own behalf,

Jonathan M. Coady, counsel for the Respondent

Place and Date of Hearing
Charlottetown, Prince Edward Island

April 27, 2017

Place and Date of Judgment
Charlottetown, Prince Edward Island

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June 30, 2017

***Written Reasons by:***
Justice Michele M. Murphy

***Concurred in by:***
Chief Justice David H. Jenkins
Justice John K. Mitchell

***APPEALS - Civil procedure and practice - Motion to strike statement of claim -***

Appeal from decision of motions judge striking out statement of claim on the ground that the claims are beyond the applicable limitations period.

Appeal dismissed.

Authorities Cited:
***CASES CONSIDERED:*** ***Kelly v. Canada (Attorney General)***, 2010 PECA 17 (CanLII); ***Vail v. Prince Edward Island (Worker's Compensation Board)***, 2012 PECA 18 (CanLII); ***Friends of Old Man River Society v. Canada (Minister of Transport)***, 1992 CanLII 110 (SCC), [1992] 1 S.C.R. 3 (SCC); ***Housen v. Nikolaisen***, 2002 SCC 33 (CanLII); ***R. v. S. (R.D.)***, 1997 CanLII 324 (SCC), [1997] 3 S.C.R. 484; ***Committee for Justice and Liberty v. Canada (National Energy Board)***, 1976 CanLII 2 (SCC), [1978] 1 S.C.R. 369 (SCC); ***Prince Edward Island (Workers' Compensation Board) v. Cormier***, 2011 PECA 1 (CanLII); ***Cojocaru v. British Columbia Women's Hospital and Health Centre***, 2013 SCC 30 (CanLII), [2013] 2 S.C.R. 357; ***R. v. Teskey***, 2007 SCC 25 (CanLII); ***R. v. Curragh Inc.***, 1997 CanLII 381 (SCC), [1997] 1 S.C.R. 537; ***Palkowski v. Ivancic***, 2009 ONCA 705 (CanLII); ***Ayangma v. Prince Edward Island Eastern School Board***, 2000 PESCAD 12 (CanLII); ***Lanigan v. PEITF***, 2017 PECA 3 (CanLII); ***R. v. Sheppard***, 2002 SCC 26 (CanLII); ***Hill v. Hamilton-Wentworth Regional Police Services Board***, 2007 SCC 41 (CanLII); ***Kingstreet Investments Ltd. v. New Brunswick (Finance)***, 2007 SCC 1 (CanLII); ***Ravndahl v. Saskatchewan***, 2009 SCC 7 (CanLII); ***Kamloops (City) v. Nielsen***, 1984 CanLII 21 (SCC), [1984] 2 S.C.R. 2, applied in ***Central Trust Co. v. Rafuse***, 1986 CanLII 29 (SCC), [1986] 2 S.C.R. 147; ***Operation Dismantle Inc. v. Canada***, 1985 CanLII 74 (SCC), [1985] 1 S.C.R. 441; ***Rofe v. Kay Aviation b.v.***, 2001 PESCAD 7 (CanLII); ***Beardsley v. Ontario***, 2001 CanLII 8621 (ON CA), 57 O.R. (3d) 1, [2001] OJ No. 4574 (ONCA); ***Metropolitan Toronto Condominium Corp. No. 1352 v. Newport Beach Development Inc.***, 2012 ONCA 850 (CanLII); ***Bhamjee v. Forsdick and others (No.2)***, [2003] EWCA CIV. 113; and ***Nursing & Midwifery Council v. Harrold***, [2015] EWHC 2254 (Q.B.); ***Productions Pixcom Inc. v. Fabrikant***, 2005 QCCA 703 (CanLII); ***R.D. v. D.F.***, 2016 ABCA 170 (CanLII) (Alberta Court of Appeal); ***Hamilton v. Open Window Bakery Ltd.***, 2004 SCC 9 (CanLII); ***Young v. Young***, 1993 CanLII 34 (SCC), [1993] 4 S.C.R. 3; ***Ayangma v. PSAC and PEIHRC***, 2014 PECA 15 (CanLII).

***STATUTES CONSIDERED:*** ***Canadian Charter of Rights and Freedoms***, s.52 of the ***Constitution Act, 1982***, s.15, s-s.15(1); ***Statute of Limitations***, R.S.P.E.I. 1988, Cap. s-7, s-s.2(1)(g); ***Judicature Act***, R.S.P.E.I. 1988, Cap. J.2-1, s-s.21(2), s.42.

***TEXT CONSIDERED:*** Orkin: Mark M.: **Law of Costs (2nd Ed.)**, (Canada Law Book Inc.).

***RULES CONSIDERED:*** ***Prince Edward Island Rules of Civil Procedure***, Rule 21.01(1)(a).

Reasons for judgment:

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**MURPHY J.A.:**

[1] This is an appeal from a decision of a motions judge and order of the Supreme Court that granted a motion to strike a statement of claim and restrained the appellant from taking further proceedings against the respondent arising out of the same subject matter.

**The proceeding, previous human rights complaint, motion to strike, and appeal**

[2] Mr. Ayangma is a 61-year-old black citizen of Canada and a resident of the province since 1987, who was born in Cameroon, Africa. He holds a Masters in Business Administration (MBA) and a PhD, also a Master's Certificate in Project Management (MCPM).

[3] Infoway is a not-for-profit corporation created by the Canadian Provincial Territorial and Federal First Ministers to foster and accelerate the development and use of a pan-Canadian electronic health record network. In 2005 Infoway advertised and recruited for the senior position of Program Director Telehealth. A recruiting firm found Mr. Ayangma's resume online and contacted him. Mr. Ayangma applied for the position and was interviewed. John Burns, at the time Infoway's Senior Vice-President for Program Management, concluded quickly that Mr. Ayangma was not qualified for the position as he did not have the necessary experience or appreciation of the job or the management of risks skills required for the role. Burns disqualified Mr. Ayangma from further consideration. On his direction Infoway assessed another candidate, a Caucasian man, and offered him the position.

[4] Mr. Ayangma pursued a human rights complaint. On May 2, 2006, Mr. Ayangma filed a complaint with the Human Rights Commission. He alleged discrimination in the matter of employment on the basis of his color, race and ethnic or national origin, and systemic discrimination in Infoway's hiring practices.

[5] In 2012 a Human Rights Commission Panel (the "Panel") rendered a decision dismissing the complaint. It found no evidence to support the claim of discrimination. The Panel made some critical observations about Infoway regarding its hiring process. However, the Panel found that as the process was flawed and inconsistent for all applicants, it did not indicate Mr. Ayangma specifically had been discriminated against.

[6] Mr. Ayangma sought judicial review of the Panel decision. The reviewing judge dismissed the application, finding the analysis and conclusion of the Panel was reasonable.

[7] Mr. Ayangma appealed from the dismissal of his application for judicial review. In 2014 this Court dismissed his appeal, finding that the fact scenario was quite straightforward and at the center was the fact as found by the Panel that the employer, Infoway, decided Mr. Ayangma was not qualified for the position. Following this finding, everything else, including Mr. Ayangma's allegation of the flawed selection process, was inconsequential.

[8] Mr. Ayangma applied unsuccessfully for leave to appeal to the Supreme Court of Canada.

[9] Mr. Ayangma commenced the proceeding which is the subject of this appeal by filing a statement of claim on July 21, 2015 against the respondent (Infoway). He claimed damages resulting from a breach of

the appellant's rights under the Charter. He alleges Infoway discriminated against him in the matter of employment on the basis of his color and ethnic or national origin. He pleads the same facts that gave rise to his complaint to the Human Rights Commission and also constitute his Charter claim.

[10] Mr. Ayangma's Statement of Claim also asserts that Infoway fraudulently misrepresented the selection process by altering a two-page document containing interview notes with the successful candidate.

[11] Infoway made a motion to strike the statement of claim, which was heard on September 30, 2015. Six months later, on March 30, 2016, the motions judge rendered reasons for judgment in which he struck out the statement of claim and restrained the appellant from taking further proceedings arising out of the same subject matter. He awarded costs of the motion on a substantial indemnity basis to Infoway which he fixed in the amount of $44,166.70.

[12] The appellant appealed from this decision.

**Grounds of Appeal**

[13] I have distilled the issues on appeal to be:

1) whether the actions and words of the motions judge, the reasons for judgment, the delay in the issuance of the reasons for judgment, and the decision to fix costs against the appellant on a substantial indemnity basis and to make such a large award of costs, give rise to a reasonable apprehension of bias;

2) whether the reasons for judgment are sufficient;

3) whether the motions judge erred
(i) in dismissing the action on the basis that the limitation period had expired; and
(ii) in failing to find that the date of discoverability postponed the commencement of running of the limitation period;

4) whether the motions judge made an error by making an order to restrain the appellant from commencing further proceedings against the respondent for matters related to the subject of this proceeding.

5) whether the motions judge erred in awarding costs on a substantial indemnity basis and in fixing the amount of costs.

**Disposition**

[14] For the reasons which follow, I would dismiss the appeal on the substantive grounds 1 - 3, and allow the appeal on ground 4 regarding the restraint on future proceedings and ground 5 regarding costs. The appellant has not shown cogent evidence raising a reasonable apprehension of bias, and in my opinion the decision of the motions judge regarding operation of the limitation period was correct.

**Standard of Review**

[15] The principles governing appellate review in a motion to strike a statement of claim and dismiss an action are well established. They were stated in ***Friends of Old Man River Society v. Canada (Minister of Transport)***, 1992 CanLII 110 (SCC), [1992] 1 S.C.R. 3 (SCC), at para.104, and applied by this Court in many

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cases, including ***Vail v. Prince Edward Island (Worker's Compensation Board)***, 2012 PECA 18 (CanLII), at para.12, and in ***Kelly v. Canada (Attorney General)***, 2010 PECA 17 (CanLII), at para.12. Deference is employed. An appellate court does not have free rein to substitute its own exercise of discretion merely because it would have exercised the original discretion in a different way. However, if there has been a wrongful exercise of discretion because it was based upon an incorrect principle, a misapprehension of a legal issue, or where no weight or insufficient weight has been given to relevant considerations, then the reversal of a discretionary order may be justified. Regarding matters of law, the standard of review of correctness applies and where there is an error of law, this court has a duty to intervene and is free to replace the opinion of the trial judge with its own (***Housen v. Nikolaisen***, 2002 SCC 33 (CanLII), at paras. 1 and 7).

**Ground 1: Reasonable apprehension of bias**

[16] The appellant asserts reasonable apprehension of bias based on the actions and words of the motions judge. He alludes to the judge's conduct both prior to and during the motion hearing, his statements in the reasons for judgment, the delay in issuance of the reasons for judgment, and his decision to fix costs at an extraordinarily large amount.

**The law**

[17] The rule against bias is a fundamental element of procedural fairness. In determining whether a decision maker has adhered to the principles of procedural fairness, the Supreme Court of Canada provided guidance in ***R. v. S. (R.D.)***, 1997 CanLII 324 (SCC), [1997] 3 S.C.R. 484. If actual or apprehended bias arises from a judge's words or conduct, then the judge has exceeded his jurisdiction. Where such a concern is manifested before or during a decision-making process, it can and should be addressed by a motion to the presiding judge for disqualification. If the apprehension arises from the content of the decision being appealed from, then the concern can be addressed on appellate review of the judge's decision.

[18] The test to be applied for reasonable apprehension of bias was set out by de Grandpré J. in ***Committee for Justice and Liberty v. Canada (National Energy Board)***, 1976 CanLII 2 (SCC), [1978] 1 S.C.R. 369 (SCC), at para.394:

> ... the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information .... [T]hat test is '*what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.*'
>
> [19] This Court has applied the test in many cases, including ***Prince Edward Island (Workers' Compensation Board) v. Cormier***, 2011 PECA 1 (CanLII). In ***Cormier***, a statement made by the tribunal Chair was found to have demonstrated a reasonable apprehension of bias such that a reasonable person would conclude from the statement that the tribunal would not decide the case fairly. Any decision made by the tribunal would be thereby tainted. Consequently, the tribunal had exceeded its jurisdiction, and the decision was accordingly declared void.

[20] In ***Cojocaru v. British Columbia Women's Hospital and Health Centre***, 2013 SCC 30 (CanLII), [2013] 2 S.C.R. 357, Chief Justice McLachlin discussed the presumption of judicial impartiality and why it is a

starting point for any inquiry into bias. Quoting Charron J. in ***R. v. Teskey***, 2007 SCC 25 (CanLII), at para.19, she stated:

Trial judges benefit from a presumption of integrity, which in turn encompasses the notion of impartiality ... Hence, the reasons proffered by the trial judge in support of his decision are presumed to reflect the reasoning that led him to his decision.

The threshold for rebutting the presumption of judicial integrity and impartiality is high. The onus is on the person challenging the judgment to rebut the presumption "*with cogent evidence which shows that a reasonable person apprised of all the relevant circumstances would conclude that the judge failed to come to grips with the issues and decide them impartially and independently*" (***Cojocaru***, at paras.18-22).

**The appellant's allegations of bias**

[21] Mr. Ayangma makes two submissions regarding the motions judge's conduct – (i) his pre-decision statements and actions; and (ii) in his decision on the motion.

- *Pre-decision statements and actions*

[22] He argues that the past conduct of the motions judge, including "*his pattern of systematically dismissing the appellant's actions*" gives rise to a reasonable apprehension of bias. Included in this submission is the contention there is institutional bias on the part of the Supreme Court. He tendered a number of letters he had written to the Chief Justice of the Supreme Court over the years claiming bias on the part of judges. He also claims his motion was prejudged.

[23] Mr. Ayangma is raising concerns about the motion judge's pre-hearing conduct before this court without having raised them before the motions judge. This manner of proceeding is out of order. Mr. Ayangma did not make the allegations of reasonable apprehension of bias relating to his pre-hearing concerns before the motions judge. In ***R. v. Curragh Inc.***, 1997 CanLII 381 (SCC), [1997] 1 S.C.R. 537, the Supreme Court of Canada directed that allegations of bias should be brought forward as soon as reasonably possible. ***Palkowski v. Ivancic***, 2009 ONCA 705 (CanLII), advises if a party believes the trial judge is exhibiting bias there is an obligation to raise the issue with the judge at the time. At that point a record will become available and the judge will make a ruling, both of which would be available for a court of appeal to review. An appeal court is in a disadvantaged position when it is faced with an incomplete record – a complete record would include a response from the motions judge on his position on the allegation of bias. As well, in raising such concerns the first time in this appeal, the Court of Appeal is being asked to condone the conduct of a party who waited for the outcome of a motion and then, when unsuccessful on the merits, alleged bias for the first time on appeal. ***Palkowski*** suggests that appeal courts must exercise great caution when the ground is raised for the first time on appeal.

[24] In ***Ayangma v. Prince Edward Island Eastern School Board***, 2000 PESCAD 12 (CanLII), at para.13, the Court of Appeal concluded that an issue of bias which was not properly brought before the motions judge would not be entertained.

[25] The allegations of bias relating to Mr. Ayangma's pre-hearing concerns before the motions judge never having been raised before the judge are not properly before this court. In these circumstances, in my view, this court should not entertain Mr. Ayangma's allegations of the motions judge's track record of systematically dismissing his actions and his contention of institutional bias.

- *Statements and actions in decisions*

[26] The appellant also refers to the motion judge's statements and actions in his reasons for judgment. He submits that the following comments give rise to a reasonable apprehension of bias:

i) "*all the appellant's losses and then sought leave to appeal to the Supreme Court of Canada*" (para.8 of reasons);

ii) "... *Mr. Ayangma's past record of taking cases again and again to the Court of Appeal and then to the Supreme Court of Canada*" (para.13 of costs decision);

iii) "*Mr. Ayangma's multi-year, consistently-unsuccessful claim against Infoway*" (underlining contained in para.17 of reasons).

[27] He also submits that the following actions of the motions judge indicate bias:

i) he "*botched his decision*" by "*conducting a one-sided hearing and completely ignoring the evidence before him and by making findings of fact and law in total disregard of the materials before him and the applicable laws*" and by "*cutting and pasting*" or incorporating an excessive amount of submissions of Infoway and adopting them in his reasons for judgment;

ii) delaying issuing reasons for judgment for six months;

iii) awarding an exceptionally high award of costs in excess of $44,000., which was over twice the amount originally sought by Infoway.

[28] In order to assess whether these statements and actions exhibited by the reasons of the motions judge give rise to a reasonable apprehension of bias, I reviewed the motion record, transcript of the motion, and reasons for judgment. I am of the view that while these statements and actions do raise concern, when considered in the context of the motion and the proceeding, they do not rise to the level of clear evidence of prejudgment required to sustain a reasonable apprehension of bias. The transcript of evidence reveals that the motions judge was engaged in the arguments of both the applicant and the respondent. He made inquiries of both parties regarding the facts and the law. He did not intervene or interrupt the appellant or treat Mr. Ayangma inappropriately. He appeared to be concerned whether Mr. Ayangma had all the documents before him upon which he was relying. Apparently, the documents submitted by Mr. Ayangma contained omissions and were assembled out of order. The motions judge exhibited patience in getting the complete record before the court.

[29] In my view, the comments made by the motions judge would not leave a reasonable observer with the impression that the judge was predisposed to decide in favour of Infoway. Mr. Ayangma is a frequent litigator, and although the motions judge's comments regarding Mr. Ayangma's "*multi-year, consistently-unsuccessful*" claims and Mr. Ayangma's tendency to appeal decisions are not temperate, the judge was explaining the history of the litigation and his explanation, while somewhat distracting from the issue on the motion, was factual.

[30] Mr. Ayangma argued that the motions judge "*botched*" his decision by not properly explaining the identity or purpose of Infoway. Although the motions judge did not properly identify the purpose and role of the respondent this error does not in any way suggest partiality or bias.

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[31] He also argued that by copying and pasting the submissions of Infoway he failed to turn his mind to the issues. The Supreme Court of Canada in ***Cojocaru*** (at para.34) focused on this issue. The Supreme Court acknowledged that with the advent of electronic filing, judicial business has been expedited. Submissions help "*the judge get the decision right, facilitate the task of judgment writing and speed the judicial process.*" The concern about copying in the judicial context is not about giving someone else credit for their work but is about whether the judge has assessed the issues and arguments comprehensively and impartially. Although the practice of copying is discouraged, the Supreme Court advised that in itself this does not rebut the presumption of judicial impartiality and integrity. In ***Cojocaru*** the court reviewed the law in England, various Commonwealth countries, the U.S., and Canada. It concluded that copying in reasons for judgment is not, in itself, grounds for setting the decision aside. However, if it would lead a reasonable person to conclude that the trial judge has not put his mind to the issues and made an independent decision based on the evidence and the law, the presumption of judicial integrity is rebutted and the decision may be set aside (para.49).

[32] The motions judge set out the nature of the claim, the grounds for the motion, and gave an extensive history of the matter. He then proceeded to copy into his reasons the grounds of the motion, the Rule, the overview of the test on a motion to strike pleadings, and the submissions on the limitation period from Infoway's motion record.

[33] The Supreme Court of Canada in ***Cojocaru*** advised that the process of casting reasons for judgment in the judge's own words helps to ensure that the judge has independently considered the matter.

[34] Notwithstanding the lack of originality and extensive copying employed by the judge in this case, I am of the view that the motions judge was engaged in the matter and was apprised of the issues. The reasons of the motions judge, although containing extensive copying, suggest that he was persuaded by the submissions of Infoway. I would conclude that extensive copying in this case does not indicate or raise a reasonable apprehension of bias.

[35] The appellant submitted that the delay of six months in issuing reasons also gives rise to an apprehension of bias. While the needs of justice would be better served by the issuance of reasons at an earlier date, I do not agree that a reasonable person would conclude from the delay that the motions judge was biased. Delay in delivering reasons should be avoided; it does not displace the presumption of judicial integrity as long as one is satisfied the judge put his mind to the issues.

[36] The appellant's final submission is that the motions judge showed his partiality when he levied costs against him on a substantial indemnity basis and in an extraordinarily high amount which he claims were 2.2 times greater than the amount originally requested by Infoway. The motion judge's reasons for judgment on costs are published in ***Ayangma v. Canada Health Infoway et al.***, 2016 PESC 34.

[37] The motion record filed by Infoway included a draft order where costs were requested to be awarded on a substantial indemnity basis and fixed at $20,000. Subsequent to the motion Infoway filed a detailed bill of costs for this motion totalling over $44,000. The bill of costs also contained entries related to a motion for an extension of time where costs were awarded in the cause. Infoway was put to the expense of filing a motion to extend time to file its defence pending the hearing of the motion to strike. Mr. Ayangma's response to the bill of costs was short and did not contain any argument or explanation.

[38] The matter was complex as it involved several issues including s.15 of the Charter, limitation period and the doctrine of discoverability, allegations of fraudulent misrepresentation, whether a pleading is frivolous or vexatious, and injunctive relief. Infoway's motion record canvassed all these issues.

[39] Another reason that could be attributed to the motions judge's high award of costs is that Infoway claimed the appellant's proceedings were accusatory and inflammatory. It referenced the following words in the statement of claim – wilful conduct, sham, deceive, mislead, altered, deliberate and fraudulent misrepresentation. Mr. Ayangma referred to assertions of forging a document, falsification, criminal offence, perjurer. In the face of this language and the Human Rights Panel having found the witness to be credible and forthright, and his testimony to be consistent and reasonable, Infoway suggested that in light of the stronger and more inflammatory the language, the more skepticism should be applied by the court. Armed with these arguments, Infoway suggested to the motions judge that costs were the only tool the court had to express its disapproval with this type of litigious behaviour.

[40] Considering the submissions of Infoway, including the complexity of the matter, the detailed bill of costs submissions and those related to the accusatory and inflammatory allegations of Mr. Ayangma, I find that a reasonable informed observer would not find that the motions judge assessment of costs would suggest a reasonable apprehension of bias.

[41] I am satisfied that the full reasons for judgment indicate that the statements and actions of the motions judge do not cumulatively show bias. The decision-making process was not fundamentally unfair. The motions judge put his mind to the facts, the argument and the issues. He decided them impartially and the judgment cannot be set aside on the basis of reasonable apprehension of bias.

**GROUND 2: Sufficiency of reasons**

[42] The appellant submits the reasons are deficient, and that they are inadequate to permit proper review on appeal. In ***R. v. Sheppard***, 2002 SCC 26 (CanLII), at para.24, the requirement of reasons is tied to their purpose and purpose varies with the context. The appellant suggests that the motions judge approached the motion as if he was determining a summary judgment motion. He also suggests that because the motions judge *"cut and pasted the submission of the applicant his reasons lack independent thought and thus are deficient"*. My review of the reasons for judgment demonstrate that the motions judge knew that he was deciding a motion to strike under Rule 21. He does not refer to a motion for summary judgment under Rule 20 or employ the test for summary judgment.

[43] The question upon reviewing the decision is whether the evidence presented by the party challenging the judgment convinces the court that the judge did not perform his sworn duty to review and consider the evidence with an open mind (***Cojocaru***, citing ***Teskey***, at para.29). In this case the appellant failed to meet that threshold.

[44] In ***Hill v. Hamilton-Wentworth Regional Police Services Board***, 2007 SCC 41 (CanLII), at para.101, McLachlin C.J.C. stated that in determining the adequacy of reasons they should be considered in the context of the record before the court, and where the record discloses all that is required to be known to permit appellate review, less detailed reasons may be acceptable. When one considers the record, it is evident why the motions judge reached the conclusion he did.

[45] The decision contains a lot of copying. This spawns a question of whether the motions judge understood the issue and was formulating his own reasons. I am satisfied he did. The motions judge cited the applicable rule (Rule 21.01(1)(a)) and appropriate caselaw, and followed with an analysis on the limitation issue. In my opinion, his reasons are sufficient to show how and why he made his decision, and therefore sufficient for appellate review. The claim that the reasons were not sufficient therefore fails.

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**GROUND 3: Limitation period**

**i) Did the motions judge err in dismissing the action because the limitation period had expired?**

[46] This ground of appeal addresses the heart of Infoway's motion to strike Mr. Ayangma's claim. The appellant's human rights complaint against Infoway alleging discrimination was dismissed. The judicial review and appeal process ended on January 19, 2015 when the Supreme Court of Canada dismissed the application for leave to appeal. Subsequently, on July 21, 2015 the appellant filed the statement of claim which is the subject matter of this appeal. His claim against Infoway alleges discrimination contrary to s.15(1) of the Charter. The appellant claims that the hiring of the successful candidate on July 7, 2005 was discriminatory and contravened his rights under s.15(1) of the Charter.

[47] Rule 21.01(1)(a) permits a party to move before a judge on a preliminary motion for the determination of a question of law raised by a pleading in an action where the pleading might dispose of all or part of the action. The determination of the applicable limitation period is such a question of law.

[48] The motions judge dealt with the appellant's cause of action under his heading "*Claim made out of Time*". His only reasons regarding this central issue were a four-paragraph excerpt from the "Defendant's Factum" which he reproduced. He then stated his conclusion, which was that Infoway was correct in its assertion that the Plaintiff's claim was made out of time, and is therefore statute barred, "*and I so find.*"

[49] In my view, notwithstanding it is a wholesale adoption of the defendant's brief, which should be discouraged, the decision of the motion's judge is correct. It incorporates the jurisprudence on limitation periods in a motion to strike under Rule 21.01(1)(a) in ***Vail, supra***, at paras.30-38, and ***Kelly, supra***, at paras.18-23.

[50] In my opinion, in the present case the limitation period is determinative.

[51] A claim must be commenced within six years from the date that the cause of action arose (***Statute of Limitations***, R.S.P.E.I. 1988, Cap. s-7, s-s. 2(1)(g)). Two Supreme Court of Canada cases have settled the previous uncertainty on the question of applicability of general statutory limitations to Charter claims for *in personam* remedies. Where the cause of action arose outside the limitation period, it was held to be statute barred (***Kingstreet Investments Ltd. v. New Brunswick (Finance)***, 2007 SCC 1 (CanLII), paras.59-61; ***Ravndahl v. Saskatchewan***, 2009 SCC 7 (CanLII), at para.17; applied by this Court in ***Kelly, supra***.)

[52] The appellant's statement of claim pleads that his cause of action arose on July 7, 2005. Since the six-year limitation period set out in s.2(1)(g) of the ***Statute of Limitations*** is applicable, the appellant's claims commenced over ten years later, on July 21, 2015, are out of time and statute barred.

**ii) Did the motions judge err in failing to find that the date of discoverability postponed the commencement of running of the limitation period?**

[53] The discoverability rule was stated in ***Kamloops (City) v. Nielsen***, 1984 CanLII 21 (SCC), [1984] 2 S.C.R. 2, pp.36-41, and was applied in ***Central Trust Co. v. Rafuse***, 1986 CanLII 29 (SCC), [1986] 2 S.C.R. 147, at para.77, and by this court in ***Kelly, supra***, at para.21. A cause of action arises for the purpose of a

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limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence.

[54] Mr. Ayangma makes two submissions. First, he argues the discoverability rule should extend commencement of the limitation period to the date of the conclusion of all human rights panel and court proceedings in relation to that complaint. He relies upon the Court of Appeal direction in ***Ayangma v. Prince Edward Island Eastern School Board***, 2000 PESCAD 12 (CanLII). In that case the appellant simultaneously filed complaints with the Human Rights Commission and commenced on action in court in relation to the same matters. The Court held that the "*Actions should not proceed to trial ...*" until the complaints were dealt with by the Human Rights Commission.

[55] The appellant has not correctly interpreted and applied that decision. It does not stand for the proposition that such actions do not need to be commenced before the expiry of the limitation period or that the limitation period for such actions does not begin until the complaint processes ended. This decision does not support the appellant's argument and does not relieve the appellant from his legal obligation to file his statement of claim within the time requirement prescribed by the ***Statute of Limitations***.

[56] The case at bar is distinguishable. Mr. Ayangma did not file his statement of claim until July 21, 2015 after the matters had been fully dealt with by the Human Rights Panel. The limitation period had already expired when he filed his statement of claim.

[57] Mr. Ayangma's second assertion is that due to his allegation of fraudulent misrepresentation the discoverability rule extends the time for commencing the action until after he had obtained certain disclosures from the Human Rights Commission. He submits this is a separate and distinct claim from his claim pursuant to the Charter. He asserts the motions judge erred because, as a matter of law, all the facts as pleaded ought to have been taken as proven, and he was required to accept the pleadings as contained in the statement of claim as proven. Mr. Ayangma says the motions judge erred by finding that his pleading about the alteration of interview notes was a "*dated and unproven assertion*".

[58] This argument fails for two reasons. First, the appellant is attempting to argue that the pleading of fraud is a separate and distinct cause of action, while it is really in the nature of evidence that is cloaked in his actual cause of action grounded in discrimination. Second, the statement of claim did not plead the discovery of new material facts or the fraudulent concealment of such facts. The claims made by the appellant are generalized and accusatory in nature. Allegations based on assumptions and speculation cannot be taken as true. It would be improper to accept the allegation as true (***Operation Dismantle Inc. v. Canada***, 1985 CanLII 74 (SCC), [1985] 1 S.C.R. 441, para.27). Where the plaintiff does not have the facts in his possession and there is nothing in the pleading to show that the facts even exist, the claim should be dismissed (***Rofe v. Kay Aviation b.v.***, 2001 PESCAD 7 (CanLII), para.41). The claims made by the appellant of "*alter*", "*cover-up*", or "*fraud*" are bald allegations without material facts which cannot be used by the appellant to obtain an extension of the limitation period.

[59] I do not agree with the appellant's argument and reliance on ***Beardsley v. Ontario***, 2001 CanLII 8621 (ON CA), 57 O.R. (3d) 1; [2001] OJ No. 4574 (ONCA). He interprets the reasoning as stating that the claim should not have been struck prior to Infoway having filed its statement of defence. ***Beardsley*** stands for the proposition that a claim can be struck on the basis of the expiry of a limitation period prior to the delivery of a statement of defence if it is obvious from the statement of claim that "*no additional facts could be asserted that would alter the conclusion that a limitation period had expired*" (para.21). ***Metropolitan Toronto Condominium Corp. No. 1352 v. Newport Beach Development Inc.***, 2012 ONCA 850 (CanLII), at para.116,

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advises that only in the rarest of cases should a motion to strike be entertained based on a limitation defence where the defendant has yet to deliver a statement of defence. In my view, this is one of those rare cases as it is obvious from the pleadings in the statement of claim that no additional facts could be asserted that would alter the conclusion that the limitation period had expired.

**GROUND 4: Did the motions judge err by restraining the appellant from commencing any proceeding or taking any step in any form against Infoway for matters related to the subject of this proceeding?**

[60] The motions judge ordered the following injunction against the appellant:

2. THIS COURT FURTHER ORDERS that:

(a) For a period of two (2) years from the date of this order, the Plaintiff is forbidden (whether personally or through any agent or other intermediary) from commencing any proceeding or taking any step in any form (including any new proceeding or step) in the PEI Supreme Court and in the PEI Human Rights Commission against the Defendant, its former or current, directors, officers, employees, agents, or representatives concerning any matters involving, relating to, touching upon, or which led to the following proceedings:

(i) PEI Human Rights Commission (HRC No. 1380-06);

(ii) PEI Supreme Court (S1-GS-24999);

(iii) PEI Court of Appeal (S1-CA-1270);

(iv) Supreme Court of Canada (Leave to Appeal No. 36088);

without permission obtained in accordance with paragraph 2(b) below.

(b) If the Plaintiff wishes to apply for permission to take any proceedings or step as described in paragraph 2(a) above, then application for such permission must be made in writing to a PEI Supreme Court Justice in Chambers, and the application will be dealt with on paper alone;

(c) The Plaintiff is not to apply for permission in accordance with the procedure set out in paragraph 2(b) above without first giving notice in writing to the Defendant fourteen (14) clear working days before any such application, of the nature of the application, and the grounds thereof together with a copy of the proceeding or step to be taken. The Defendant may reply to such notice in writing (there being no obligation to do so) within ten (10) clear working days. Its response shall be served on the Plaintiff and filed with the court and shall be considered on any application made by the Plaintiff under 2(b) above;

(d) If any Statement of Claim, Notice of Application, Notice of Motion or any other form of document which is within the scope of this order is served on or given to the Defendant or any other person identified in paragraph 2(a) hereof without permission having first been obtained, the Defendant or that person shall not be required to appear and respond and the purported proceeding shall stand dismissed and struck out without having been heard;

(e) Any breach of this order by the Plaintiff shall be a contempt of court.

[61] The appellant argued that in order to grant this type of injunctive relief the court would first have to find that the appellant "*was either vexatious or has consistently conducted his litigation in a manner that was frivolous and vexatious*".

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[62] Two UK Court of Appeal decisions, ***Bhamjee v. Forsdick and others (No.2)***, [2003] EWCA Civ 113, and ***Nursing & Midwifery Council v. Harrold***, [2015] EWHC 2254 (Q.B.), set out the common law authority of UK courts to restrain a litigant from proceeding. In ***Bhamjee*** the court stated that it is well settled that any court may make such an order in the exercise of its inherent jurisdiction to protect its process from abuse (p.11, para.26). So long as the very essence of a litigant's right to access the court is not extinguished, a court has a right to regulate its processes as it thinks fit so long as its remedies are proportionate to the identified abuse (p.13, para.33). In ***Nursing & Midwifery, supra***, the restraint was extended to tribunal proceedings (p.3, para.12).

[63] The Quebec Court of Appeal in ***Productions Pixcom Inc. v. Fabrikant***, 2005 QCCA 703 (CanLII), application for leave to appeal to Supreme Court of Canada dismissed, also recognized the court has an inherent jurisdiction to control its process. At para.22, Dalphond J.A. writing for the Court, stated:

For other courts or tribunals which are not so empowered, the Superior Court may enjoin a vexatious litigant from introducing proceedings and order the proper official to refuse to receive such proceedings without some prior authorization. In such case, one can speak of an injunctive remedy.

[64] In determining whether to make an order of restraint against proceedings, the Court in ***R.D. v. D.F.***, 2016 ABCA 170 (CanLII), was mindful of the difference between vexatious proceedings and vexatious litigants. The Court stated the entire history of the matter must be reviewed to determine if there is a principled basis to make an order. That basis is demonstrated where the litigation history demonstrates a need to have litigation activities restricted to prevent future abuses of court processes.

[65] The ***Judicature Act***, R.S.P.E.I. 1988, Cap. J-2.1, s.42, provides the court with jurisdiction to grant injunctive relief, and as mentioned there is recognized authority for this type of remedy in the abovenoted authorities. However, I am of the view that this additional remedy was not required in this case. Striking of the statement of claim was fatal to Mr. Ayangma's action. His case was at an end once that order was made. There is no need to create a prospective bar to his further access to the court or any tribunal as a consequence of him commencing this proceeding. The appellant is not prevented from filing any legitimate action or complaint.

**GROUND 5: Costs on the motion**

[66] On appeal Infoway provided its consent for leave to appeal and to vary the award from the substantial indemnity rate to a partial indemnity rate. I would grant leave to appeal to vary the costs award.

[67] In ***Hamilton v. Open Window Bakery Ltd.***, 2004 SCC 9 (CanLII), the Supreme Court of Canada, following ***Young v. Young***, 1993 CanLII 34 (SCC), [1993] 4 S.C.R. 3, at para.134, held that solicitor and client costs "*are generally awarded only where there has been reprehensible, scandalous, or outrageous conduct on the part of one of the parties.*" This reasoning was applied by this court in ***Lanigan v. PEITF***, 2017 PECA 3 (CanLII), paras.95-98. In the case before us the motions judge did not refer to any reprehensible, scandalous, or outrageous conduct on behalf of the appellant.

[68] The exercise of a court's discretion as to costs should be interfered with on appeal only in limited circumstances (***Orkin: The Law of Costs***, (2nd edition) 8-8 §801). More specifically, in ***Hamilton, supra***, at p.313, the Supreme Court of Canada stated "*A court should set aside a costs award on appeal only if the trial judge has made an error in principle or if the costs award is plainly wrong.*"

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[69] In this case, I am of the opinion that the award of costs made by the motions judge in the amount of $44,000. is plainly wrong. Not only is it 2.2 times greater than the draft order initially submitted to the motions judge, it is also twice the amount awarded to the French Language School Board and English Language School Board in a motion to strike which was heard immediately following Infoway's motion.

[70] The amount is inordinately high when one considers the factors in discretion outlined in Rule 57 including: the motion being at a preliminary stage in which no evidence is permitted; a statement of defence not having been delivered; previous awards on a motion to strike; and the amount of costs that an unsuccessful party could reasonably expect to pay.

[71] In formulating a costs award, I must be mindful of the admonition given by this court in ***Ayangma v. PSAC and PEIHRC***, 2014 PECA 15 (CanLII), where Mr. Ayangma was cautioned about making bald allegations of criminal wrongdoing. In that case, to express the court's disapproval of such tactics and to deter those who come before the courts from making such allegations, this Court awarded costs against Mr. Ayangma on a higher than partial indemnity scale.

[72] Infoway acknowledged that costs should be awarded on a partial indemnity basis and suggested the amount of approximately $30,000., inclusive of taxes and disbursements. Counsel referred to that sum as the "*high water mark.*"

[73] In the circumstances of this case, I would first fix costs of the motion on a partial indemnity basis in the amount of $12,500., and then I would increase this amount by $2,500. to account for the allegations of fraud, for a total award of costs of $15,000. plus HST. Infoway should also be reimbursed for its disbursements in the amount of $1,370.50 plus HST, as applicable. The total award of costs is $18,811.

**Costs on appeal**

[74] Even with Mr. Ayangma's success on two grounds, Infoway was successful in having the Supreme Court order to strike the statement of claim upheld. I would award Infoway its costs on the appeal.

[75] Infoway submitted a bill of costs indicating fees of $8,257. plus disbursements and applicable taxes for a total bill is $9,984. The factum filed by Infoway consisted of a thorough examination of all issues and grounds of appeal, and was helpful to the court. On the other hand, the documents filed by the appellant consisted of the following:

i) an appeal book which contained nearly 400 pages;
ii) a factum that was one hundred and forty-five pages in length;
iii) a book of authorities containing forty cases which were not highlighted;
iv) a supplementary appeal book and authorities which included twelve additional cases and nearly 100 pages of documents filed before the motions judge;
v) on the date of the hearing of the appeal the appellant filed an 82-page document including one case to assist in his oral presentation.

Some of these documents consisted of information that was not before the motions judge and were not required.

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[76] In determining the amount of costs on appeal, I have again considered the factors in Rule 57. Although the appellant succeeded on two grounds of appeal, I would award Infoway its costs on appeal as submitted. I would fix the costs on appeal as legal fees $8,257. plus HST of $1,238.55 and disbursements including HST of $488.52 for a total of $9,984.07.

**Conclusion**

[77] For the foregoing reasons, I would deny all grounds of appeal on the substantive issues. I would allow the grounds of appeal regarding costs on the motion and restraint from further proceedings. I would award Infoway its costs on the appeal.

_____
Justice Michele M. Murphy

I AGREE: _____
Chief Justice David H. Jenkins

I AGREE: _____
Justice John K. Mitchell

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# Prince Edward Island v. Ayangma, 1999 CanLII 4116 (PE SCTD)

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Date: 19990318
Docket: GSC-17052
Registry: Charlottetown

**PROVINCE OF PRINCE EDWARD ISLAND**
**IN THE SUPREME COURT - TRIAL DIVISION**

BETWEEN:

**THE GOVERNMENT OF PRINCE EDWARD ISLAND**

APPLICANT

AND:

**NOËL AYANGMA**

RESPONDENT

Before: The Honourable Justice David H. Jenkins
(In Chambers)

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|---|---|---|
| Ruth DeMone | - | Solicitor for Applicant |
| Noël Ayangma | - | for Self |

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| Place and Date of Application | - | Charlottetown, Prince Edward Island<br>December 8, 1998 |
| Place and Date of Judgment | - | Charlottetown, Prince Edward Island<br>March 18, 1999 |

GSC-17052

**THE GOVERNMENT OF PRINCE EDWARD ISLAND**

124 Applicant

and

**NOËL AYANGMA**

Respondent

Supreme Court of Prince Edward Island - Trial Division
Before: Jenkins J.
(In Chambers)
Heard: December 8, 1998
Judgment: March 18, 1999
(9 pages)

**SUPREME COURT PRACTICE: Section 61(1) of the *Supreme Court Act* - *vexatious proceedings.***

Section 61(1) of the ***Supreme Court Act*** authorizes a judge, upon being satisfied that a person has persistently and without reasonable grounds (i) instituted vexatious proceedings in any court or (ii) conducted a proceeding in any court in a vexatious manner, to order that no further proceeding be instituted by the person in any court except by leave of a judge of the Supreme Court.

Upon application the Court found it was shown that the Plaintiff had instituted one proceeding in the Federal Court of Canada that was apparently vexatious regarding one defendant, but that the three other proceedings which the Plaintiff had instituted in the Supreme Court were not shown to have been either without reasonable grounds or vexatious. The Court held it was not satisfied by the application of the presence of any of the statutory prerequisites for the exercise of discretion to make a prohibitory order. The Applicant failed to show that the Respondent as Plaintiff had acted persistently, or without reasonable grounds, either by (i) instituting vexatious proceedings or (ii) conducting a proceeding in a vexatious manner. The application was dismissed.

**CASES CONSIDERED**: ***Mascan Corp. v. French*** (1988), 1988 CanLII 5747 (ON CA), 49 D.L.R. (4th) 434 (Ont. C.A.); ***Hnidan v. Smith***, [1992] B.C.J. No. 1324 (B.C.S.C.); ***Re Lang Michener and Fabian*** (1987), 1987 CanLII 172 (ON SC), 37 D.L.R. (4th) 685 (Ont. H.C.J.); ***Johnson v. The Law Society of Prince Edward Island***, [1988] 2 P.E.I.R. B28 (P.E.I.S.C.A.D.).



**TEXTS CONSIDERED**: Homestead& Gale, ***Ontario Judicature Act & Rules of Practice***, Vol. 1.; Dukelow & Nuse, ***The Dictionary of Canadian Law***; Sullivan, ***Driedger on the Construction of Statutes*** (3rd ed.).

**STATUTES CONSIDERED**: ***Supreme Court Act***, R.S.P.E.I. 1988, Ch. S-10, s. 61; ***Canadian Charter of Rights and Freedoms, being Part I of the Constitution Act, 1982***, s. 15; ***Human Rights Act***, R.S.P.E.I. 1988 c. H-12, s-ss. 6(4)(a) and (b); ***Rules of Court, Province of Prince Edward Island 1996***; ***Prince Edward Island Rules of Civil Procedure***.

Ruth DeMone - Solicitor for Applicant
Noël Ayangma - for Self

Place and Date of Application - Charlottetown, Prince Edward Island

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December 8, 1998

Place and Date of Judgment - Charlottetown, Prince Edward Island
March 18, 1999

**Jenkins J.:**

[1] The Applicant ("Government") asks the Court to order that no further proceedings be instituted in any court by the Respondent ("Mr. Ayangma") except by leave of a judge of the Supreme Court.

[2] The Government submits that Mr. Ayangma has persistently and without reasonable grounds instituted vexatious proceedings in the Supreme Court of Prince Edward Island and in the Federal Court of Canada; has conducted proceedings in this Court in a vexatious manner; and has demonstrated an intention to continue to institute vexatious proceedings without reasonable grounds in this Court.

[3] Mr. Ayangma refutes the Government position. He characterizes an application under s. 61 as a very extreme step for the Government to take. He responds, with explanation, that none of the various court proceedings which he has brought are vexatious or unreasonable.

[4] The Government has standing to bring this application for an order that no further proceedings be instituted in this Court. The Supreme Court of Prince Edward Island is the superior court of record having general jurisdiction in this Province. The Government's standing is obtained from it being a defendant in an action initiated by Mr. Ayangma, i.e. GSC-15787.

[5] The Government claims as well to be able to speak on behalf of all present and prospective defendants in the various proceedings initiated by Mr. Ayangma. Those defendants are for GSC-17048 James Wyatt, for GSC-17004 the Eastern School Board and an employee of that Board, and for GSC-17005 the French School Board and an employee of that Board. In my opinion, the Government cannot represent those other defendants outside GSC-15787. Those defendants are separate legal entities, bodies corporate and persons, and they are defendants on different proceedings than the proceeding in which the Government is a defendant. As a litigant, the Government has no special standing before the Court. It has no greater right to have restrictions imposed on a plaintiff than any other person claiming the burden of being subject to vexatious proceedings.

[6] In this application, the Government refers to a Federal Court action, but does not seek any relief regarding Mr. Ayangma's action pending or any action which he may commence in the Federal Court of Canada. Any such consideration would in any event be beyond the jurisdiction of this Court, which is territorially limited to boundaries of Prince Edward Island. Reference to the Federal Court proceeding is relevant though for consideration on this application of whether Mr. Ayangma is pursuing vexatious proceedings.

**Legislation**

[7] Section 61 of the ***Supreme Court Act***, R.S.P.E.I. 1988, Ch. S-10 authorizes the Court to make an order as requested in certain circumstances:

61. (1) Where a judge of the Supreme Court is satisfied, on application, that a person has persistently and without reasonable grounds

(a) instituted vexatious proceedings in any court; or

(b) conducted a proceeding in any court in a vexatious manner,

the judge may order that

(c) no further proceeding be instituted by the person in any court; or

(d) a proceeding previously instituted by the person in any court not be continued,

except by leave of a judge of the Supreme Court.

**Interpretation of legislative intent**

[8] The parties advised the Court that there are no previous cases in this jurisdiction in which s. 61 has been judicially considered.

[9] Guidance toward interpretation the legislative intention by s. 61 can be obtained from Ontario jurisprudence under similar legislation. The synopsis contained in Homestead & Gale, ***Ontario Judicature Act & Rules of Practice***, Vol. 1, pp. 139-140, is helpful regarding the legal meaning of "*vexatious*" and the authority of a court, both inherent and statutory, faced with vexatious proceedings:

**56. Vexatious Proceedings Act]**—Actions or proceedings which are absolutely groundless are frivolous and vexatious. A stay of such proceedings may be granted, not as a substitute for an injunction, but under the inherent jurisdiction of the court to control its own procedure and prevent abuse of its process: [authorities cited]. But, although this power is inherent and is certainly not diminished by anything in statute or rule, it must be carefully and sparingly exercised: [authorities cited].

This power to stay a manifestly vexatious suit which is plainly an abuse of process of the court seems to be inherent in the jurisdiction of every court of justice to protect itself from abuse of its own procedure, ...; the introduction of provisions in the rules for dealing with such abuses does not curtail but extends the court's inherent power: [authorities cited]...

....

Where a matter has been finally and conclusively determined between the parties to an action..., the bringing of a second action for the same cause is vexatious...[authorities cited].

But where, in a second action, an alternative claim was put forward..., it was held that the action, as regards that claim, should not have been summarily dismissed [authority cited].

....

It would be to permit an abuse of process to allow a defendant to be harassed by an action which, being without foundation, cannot succeed: ***Chaffers v. Goldsmid*** [1894] 1 Q.B. 186.

....

If there is an apparent cause of action, the court will not interfere to prevent the plaintiff from having it investigated in the usual way: ***Ross v. Edwards*** (1893) 15 P.R. 150...

The court will not decide a doubtful point of law or fact upon an application to stay proceedings as vexatious under its inherent jurisdiction...

....

**56. Vexatious Proceedings Act]**—This Act provides machinery for preventing persons who have habitually and persistently and without any reasonable ground instituted vexatious legal proceedings from instituting any further proceedings without leave of the court. See ***Re Chaffers*** (1897) 13 T.L.R. 363, and ***I.R.C. v. Soul***, The Times, Oct. 29, 1964, Div. Ct. (defendant instituted twelve different proceedings against the Inland Revenue Dept.; or its officials)...

Where a person has been declared a vexatious litigant, leave to bring proceedings should be granted sparingly and only when there is a case of real substance: ***Becker v. Teale*** [1971] 1 W.L.R. 1475, [1971] 3 All E.R. 715 (C.A.).

The meaning of "vexatious", "legal proceedings" and "instituted" in the context of applications under the Vexatious Proceedings Act, R.S.O. 1970, c. 481 were judicially considered in ***Foy v. Foy*** (1979) (***sub nom. Foy v. Foy (No. 2)***) 1979 CanLII 1631 (ON CA), 26 O.R. (2d) 220, 12 C.P.C. 188, 102 D.L.R. (3d) 342, motion for leave to appeal to S.C.C. dismissed 31 N.R. 120, 102 D.L.R. (3d) 342n (Ont. C.A.).

[10] Both the genesis and current state of the Ontario legislation is more fully understood upon consideration of the following passage from ***Mascan Corp. v. French*** (1988), 1988 CanLII 5747 (ON CA), 49 D.L.R. (4th) 434 (Ont. C.A.) at p. 439:

...This section [***Courts of Justice Act***, s. 150(1)] replaced the ***Vexatious Proceedings Act***, R.S.O. 1980, c. 523, which was repealed by s. 218 of the ***Courts of Justice Act, 1984***. Section 1(1) of the ***Vexatious Proceedings Act*** was directed at any person who "habitually and persistently and without any reasonable ground instituted vexatious legal proceedings in the Supreme Court or in any other court against the same person...". This court held in ***Foy v. Foy (No. 2)*** (1979), 1979 CanLII 1631 (ON CA), 26 O.R. (2d) 220, 102 D.L.R. (3d) 342, 12 C.P.C. 188, that the ***Vexatious Proceedings Act*** applied only to proceedings which had been commenced by writ of summons, originating notice or otherwise by the person complained against and did not include interlocutory applications or appeals in other proceedings. In my opinion, the legislature by adding in s. 150(1)(b), as a ground for a prohibitory order, the conduct of "a proceeding in any court in a vexatious manner" clearly intended to overcome the problem created by the ***Foy*** decision. Where an application is properly framed, it is now possible for a decision to be made on a realistic appraisal of all proceedings whether original, interlocutory or by way of appeal undertaken against the applicant for a prohibitory order.

This analysis reveals two matters of interpretation which are of interest for the present case:

- The original legislation was directed against vexatious proceedings **against the same person**.
- Language "*in any court*" refers to courts, and not other tribunals, and only courts within jurisdiction of the court making the prohibitory order.

[11] The dictionary definition of "*vexatious*" includes: "*legal actions instituted without sufficient grounds in order to cause annoyance to the defendant*". ***The Dictionary of Canadian Law*** does not define "*vexatious*", but does define "*vexatious proceeding*" as "*A proceeding in which the party bringing it wishes only to embarrass or annoy the other party*". The adverb "*persistently*" is based on the adjective "*persistent*", the lay

dictionary definition of which includes "*(i) persisting, especially in spite of opposition; persevering. (ii) lasting or enduring. (iii) constantly repeated; continued*".

[12] Regarding s. 61, the Legislature has chosen to require that the judge be satisfied that the offending person has ***persistently*** instituted proceedings both (i) "***without reasonable grounds***", and (ii) ***that either the proceedings be vexatious or be conducted in a vexatious manner***. It is a fundamental rule of legislative interpretation that meaning is to be given to all language included in the statute. It is presumed that the legislature avoids superfluous or meaningless words. Every word in a statute is presumed to make sense and to have a specific role to play in advancing the legislative purpose: Sullivan, ***Driedger on the Construction of Statutes*** (3rd ed.), p. 159. This implies that for consideration of s. 61, "*vexatious*" means something more or different than "*without reasonable grounds*". In ***Mascan Corp. v. French***, supra, it was noted that categories of vexation are never closed; and that the word "*vexatious*" has not been clearly defined. It is noted there that in many of the reported decisions, legal proceedings have been held to be vexatious because they were instituted without any reasonable ground, and as a result those proceedings were found to constitute an abuse of the process of the court. An example of such proceedings is the bringing of one or more actions to determine an issue which has already been determined by a court. In any event, whether an action is vexatious is a matter to be determined by objective rather than subjective standards.

[13] ***Hnidan v. Smith***, [1992] B.C.J. No. 1324 (B.C.S.C.) dealt with an application under legislation which employs quite different language for a similar purpose. That legislation would be invoked where a person instituted vexatious legal proceedings within the British Columbia courts against either the same or different persons. That case adopted the principles discussed in ***Re Lang Michener and Fabian*** (1987), 1987 CanLII 172 (ON SC), 37 D.L.R. (4th) 685 (Ont. H.C.J.) and then concluded that a prohibitory order is a drastic measure that should only be made in the clearest of cases; however, while it is a jurisdiction to be exercised with great caution, an opposite party should not be deprived of its benefit where there is no other way to bring reason into proceedings, for a court on failing then to act becomes but a paper tiger.

[14] Consideration of this jurisprudence, dictionary definitions, and rules of legislative interpretation, assists me to these conclusions regarding the intention of the Legislature regarding s. 61. In my opinion, it is intended that before a judge may exercise his or her discretion to issue a prohibitory order under s. 61, he or she must first be satisfied regarding the presence of each of the elements of persistence; proceedings without reasonable grounds; and vexatious activity. The judge must be satisfied that impugned activity of the plaintiff litigant has been: (i) persistent, **and** (ii) without reasonable grounds. The impugned activity may be **either** the institution of vexatious proceedings, **or** the conduct of any proceeding in a vexatious manner. The judge is to consider all the material accompanying the application, which should enable the judge to look at the whole history and relationship of the matters under litigation and not just whether or not there was originally a good cause of action. The plaintiff's vexatious proceedings need be before a court, but not necessarily be against the same person. Beyond interpretation of the language itself, in my view the statement in ***Hnidan v. Smith***, supra, indicates the appropriate cautious approach to be taken by the Court to an application to restrict the access of another person to the Court.

**The application**

[15] On consideration of all the evidence and material before me, I conclude that s. 61 should not be invoked on this application. I am not satisfied regarding the presence of any of the prerequisites to the exercise of my discretion to make a prohibitory order.

[16] The Applicant has not shown that the Respondent has either ***persistently*** instituted ***vexatious*** proceedings or ***persistently*** conducted proceedings in a ***vexatious manner***. Nor has the Applicant satisfied me

that most of the proceedings cited by the Applicant have been brought by the Respondent ***without reasonable grounds.***

[17] The Applicant cites as its evidence of vexatious proceedings four court proceedings initiated by the Respondent since his action GSC-15787 was struck out in part on a pre-trial motion. However, the Application fails to recognize or appreciate that three of those four proceedings, being those instituted in the Supreme Court, pursue and pertain to claims over different matters than the Race Relations Consultant position with Government that is the subject matter of the claim in GSC-15787. None of those proceedings are shown on this application to be either vexatious or to have been instituted without reasonable grounds. The Applicant has also failed to demonstrate that the Respondent has conducted the proceeding in GSC-15787 in a vexatious manner.

[18] The Respondent's Federal Court action against Her Majesty the Queen in right of Canada and Claire Arsenault does appear vexatious vis a vis Clair Arsenault. In a pre-trial motion to strike out the statement of claim in GSC-15787, Matheson J. determined that the persons who were voluntary members of the Advisory Committee on Race Relations to advise on filling the position of Race Relations Consultant for the Department of Education were, taking Respondent's case at its strongest and assuming that these persons were performing a function which could be ascribed to Government, at best acting as delegated decision-makers fulfilling a government purpose. Hence, any liability would be attributed to the Government and not them in their personal capacity. Accordingly, Matheson J. held those persons to be not proper defendants in that action. She also held that the Government was the proper defendant on that action. In the subsequent Federal Court action, the Respondent again sues Claire Arsenault, plus the Government of Canada. This is a fresh action apparently over the same issue as in GSC-15787.

[19] The Federal Court action may also become classified as an abuse of process, on which basis it may as well appear as unreasonable. It is a second proceeding over apparently the same subject matter, the Race Relations position, instituted in a different court, albeit with one new defendant. I wish to avoid treading within the jurisdiction of the Federal Court; however, for the purpose of determination of this application it needs to be stated that I anticipate the Federal Court may well be inclined to view the Federal Court action as an abuse of its process and stay that proceeding pending disposition by this Court of GSC-15787.

[20] The remaining assertions by the Applicant of vexatious proceedings or conducting proceedings in a vexatious manner are not borne out by the application.

[21] The action GSC-17004 is against the Eastern School Board and Ricky Hood. The action GSC-17005 is against the French School Board and Gabriel Arsenault. In both cases the defendants are different from the defendants in GSC-15787. The school boards are statutory corporations; they are separate legal entities from Government. In both cases the subject matter of the proceeding is different too. In the school board actions, the Respondent claims the defendants denied him teaching positions over a period of years. In both proceedings he alleges breach of his s. 15 equality rights under the ***Charter***. It is consistent with the ruling of Matheson J. in GSC-15787 that such a claim discloses a reasonable cause of action, at least against the corporate defendant, and that the Supreme Court is the proper forum.

[22] The statements of claim in the school board actions also assert discrimination, and Matheson J. ruled in GSC-15787 that there is no longer such a common law cause of action. However, that deficiency can be dealt with on a pre-trial motion, and its disposition would not involve such a drastic measure as a prohibitory order under s. 61. In any event, the present application does not in any event show that there is no basis for a s. 15 ***Charter*** claim.

[23] I also note as a postscript on this application that the Applicant did not assert any legislative prohibition against the pursuit of parallel proceedings before the Human Rights Commission and the Court for the particular subject matter of the claims in GSC-17004 and 17005. I have not found such a prohibition. (The relief sought by the Respondent is not a s. 6(4)(a) or (b) ***Human Rights Act***, R.S.P.E.I. 1988 c. H-12 remedy.) In any event, should that be a ground of objection it could be adequately addressed within those proceedings by a less onerous procedure than a prohibition order under s. 61.

[24] The action GSC-17048 against James Wyatt is not shown at this stage to be vexatious or to be without reasonable grounds. The Respondent's claim alleges deceit and acting outside his authority as Executive Director of the Human Rights Commission. Those are allegations regarding a different matter than those which the Respondent brought against the Government and Committee members in GSC-15787. They are of a nature which the case law advises should alert the court that the action may be vexatious, but that is not shown yet. Looking forward, even if the action GSC-17048 should be dismissed at trial or struck out in a pre-trial proceeding, by comparison it would fit into the middle stages on the spectrum of the many actions pursued by ***Fabian*** in ***Re Lang Michener and Fabian***, supra, saga, so that an application based only on this action would seem premature.

[25] The Applicant's assertions that the Respondent has to date conducted GSC-15787 in a vexatious manner are not demonstrated in this application.

[26] Regarding the Respondent's refusal to set aside his notices of examination for discovery in November, 1997, the ruling of the motions judge, DesRoches J., does not contain reasons and does not in any way suggest any inappropriate conduct by the Respondent. Indeed, the associated correspondence between the parties indicates disagreement regarding the obligation of the Applicant as defendant to carry out various pre-trial procedures within the time prescribed by the ***Rules of Court***, following a management conference in which all involved were aware of the pending motion by the Applicant to strike out the Respondent's statement of claim. Now, in hindsight, knowing that Matheson J. hearing the motion to strike, did strike out the statement of claim against the Human Rights Commission and the individual defendants, she also allowed the action to proceed against the Government regarding alleged s. 15 ***Charter*** violations. This implies the Respondent was not necessarily unreasonable as plaintiff in wanting to pursue the proceeding with dispatch.

[27] Secondly, submitting a Government witness, Eldon Rogerson, to questions, even repeatedly, in the face of objections that they went beyond the allegations in GSC-15787 appears as an event for which measured alternative relief could have been obtained upon motion to the Court.

[28] Section 61 is meant to govern future proceedings. The Applicant does not seek relief regarding the pending actions. There is no indication before this Court that the Respondent intends to bring any further proceedings in any court within this jurisdiction regarding the Race Relations position with the Department of Education. The Respondent has not yet been shown to have instituted or conducted proceedings in a manner which would invoke the exercise of judicial discretion under s. 61.

[29] Should it be considered that the prerequisites are present, so that the threshold for the exercise of discretion whether to grant an order is reached, then I state here provisionally that I would consider a s. 61 prohibitory order to be an excessive response to the Respondent's activities so far as presented to the Court on this application. The Court approaches an application to limit the access of another person to the Court as a drastic measure, to be considered with caution. The Court can, of course, take steps to control its process, and to avoid an abuse of its process. The Court's authority in that regard can be invoked to prevent vexatious proceedings by an application from an interested person under s. 61 of the ***Supreme Court Act***.

[30] It is understandable that the Government, whose Legal Services division of the Office of the Attorney General appears to represent many or most of the defendants in the proceedings mentioned in this application, would be frustrated, and inconvenienced, by Mr. Ayangma's numerous court proceedings which he is pursuing without legal counsel. But it is his right as an individual to pursue actions in the court. If the proceedings or pleadings are defective, or show no genuine issue for trial, then these proceedings can be truncated by interlocutory motions. Should they become vexatious, then it remains open to an interested party to bring a fresh application under s. 61 for a prohibitory order.

[31] For the present, the parties named as Defendants in GSC-15787, 17004, 17005, and 17048 can seek relief where appropriate by seeking pre-trial rulings so that the Respondent's actions are pursued only where there is a cause of action and always in accordance with the ***Rules of Civil Procedure***. That was the approach followed in the application to strike pleadings in GSC-15787 with apparently satisfactory results. The ruling of Matheson J. on that motion contains a comprehensive response regarding the law and facts, from which the parties have proceeded onward.

[32] The application is denied.

**Costs**

[33] The Respondent shall have his costs on the application, to be assessed by the Prothonotary. As the Respondent is a lay litigant acting without counsel, assessed costs are limited to out-of-pocket expenses, including disbursements and taxes, in accordance with ***Johnson v. The Law Society of Prince Edward Island***, [1988] 2 P.E.I.R. B28 (P.E.I.S.C.A.D.).

March 18, 1999

Justice David H. Jenkins

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CanLII

# R.O. v D.F., 2016 ABCA 170 (CanLII)

Date: 2016-05-26

File number: 1401-0145-AC

Other citations: 36 Alta LR (6th) 282 — 87 CPC (7th) 1

Citation: R.O. v D.F., 2016 ABCA 170 (CanLII), <http://canlii.ca/t/grtgs>, retrieved on 2019-11-13

**In the Court of Appeal of Alberta**

**Citation: R.O. v D.F., 2016 ABCA 170**

**Date:** 20160526
**Docket:** 1401-0145-AC
**Registry:** Calgary

**Between:**

**R.O.**

Appellant
(Applicant)

- and -

**D.F.**

Respondent
(Defendant)

**Corrected judgment:** A corrigendum was issued on June 7, 2017; the corrections have been made to the text and the corrigendum is appended to this judgment.

**RESTRICTED COURT ACCESS ORDER**

By restricted Court Access Order dated November 4, 2013 by The Honourable Mr. Justice J.T. McCarthy (a) all documents filed shall be kept confidential and sealed by the Clerk of the Court. No persons other than the parties (and their respective successors and assigns), their counsel, and Court personnel shall be given access to documents in this action; (b) any documents filed in this action shall refer to the Plaintiff as R.O. and the Defendant as D.F., and may not include any information that is likely to disclose the identity of either of the parties; (c) The identity of the parties and any

information that could disclose their identity shall not be broadcast, published, communicated, or disseminated in any way, whether directly or indirectly by the plaintiff, the defendant (or their respective counsel), or any other individual including the media.

**NOTE:** This judgment is intended to comply with the restriction so that it may be published.

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**The Court:**

**The Honourable Mr. Justice Peter Costigan**
**The Honourable Madam Justice Marina Paperny**
**The Honourable Madam Justice Patricia Rowbotham**

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**Memorandum of Judgment**

Appeal from the Orders by
The Honourable Mr. Justice B.A. Millar
Dated the 18th day of June, 2014
Filed on the 19th day of June, 2014
(Docket: 1301 06765)

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**Memorandum of Judgment**

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**The Court:**

## I. Introduction

[1] This appeal is from two June 18, 2014 orders of a case management judge. The first declared the appellant a vexatious litigant and the second held her in civil contempt of court for failing to comply with two restricted court access orders.

[2] The appellant also brings three applications asking us to admit new evidence.

[3] We dismiss the new evidence applications and the appeal in relation to the finding of contempt. We allow, in part, the appeal of the vexatious litigant order.

## II. Facts

[4] The appellant met the respondent on a dating website and they started dating in February 2012. After the relationship ended in August 2012, the appellant sued the respondent. She claimed that he failed to disclose that he had the herpes simplex virus and infected her with it, committing sexual assault and battery. She alleges that she now suffers complex post-traumatic stress disorder and cognitive dysfunction because of his disregard for his actions, lack of remorse and on-going harassment. She claims significant damages.

[5] Because of the nature of the allegations, two orders (one interim in June 2013 and one final in November 2013) were granted banning identification of the parties, and sealing the statement of claim and some additional documents ("the restricted court access orders"). The relevant portion of the November 2013 restricted court access orders provides:

The identity of the parties and any information that could disclose their identity should not be broadcast, published, communicated, or disseminated in any way, whether directly or indirectly by the Plaintiff, the Defendant (or their respective counsel), or any other individual including the media.

[6] The respondent subsequently learned of online postings alleging that he had infected a prostitute with herpes, used prostitutes and that his wife (who he married after his relationship with the appellant had ended) was a prostitute with gang affiliations. Some of the postings identified him by name and included his photograph, and identified his employer. The respondent filed a counterclaim alleging defamation. He obtained an Anton Piller order to search and seize evidence linking the appellant with the online defamation. The search was supervised by a lawyer who consulted with the parties regarding the parameters of the search.

[7] The search of the appellant's computer, cellular telephone, email and other accounts led to a comprehensive forensic analysis and report by MNP LLP (MNP Report). The MNP Report linked the appellant's computer to the online defamatory statements. The respondent applied to have the appellant found in civil contempt for breaching the restricted court access orders. At a case management meeting prior to the contempt application, the case management judge directed the respondent to apply to have the appellant declared a vexatious litigant.

[8] The record before the case management judge included over 2,000 pages of evidence from numerous affidavits, cross-examination of the appellant, and the MNP Report. On June 18, 2014, he declared the appellant a vexatious litigant. He granted the second order finding the appellant in contempt of court for failing to comply with the restricted court access orders; struck her statement of claim; restrained her from contacting the respondent or disclosing his identity or that of his wife, children and employer; and directed the appellant to pay costs of $217,000.

## III. Analysis

### *a. New Evidence Applications*

#### *i. The Basis for the Order of Civil Contempt*

[9] A finding of contempt requires that a person knowingly breached a court order. Rule 10.52(3) of the *Alberta Rules of Court*, Alta Reg 124/2010 sets out the requirements. Given the seriousness of a finding of contempt, the burden of proof is beyond a reasonable doubt: *Serhan (Estate of) v Bjornson*, 2001 ABCA 294 (CanLII) at para 11, 303 AR 17.

[10] In support of his contempt application the respondent relied primarily upon the MNP Report. Among other things, MNP was hired to report on the electronic media seized at the appellant's residence pursuant to the Anton Piller order. The report is detailed and technical but the essence is this: 18 deleted communications between the appellant and another person who advertised him/herself as "the UK's 88th most influential Twitter user" were recovered from the appellant's computer and the appellant's account transferred funds via PayPal to this person. The content of the resulting tweets need not be set out in detail but they identify the respondent, his employer and intimate that he improperly used corporate funds to engage prostitutes and in the course of doing so infected them with herpes. Several detailed articles were posted which encouraged the reader to contact the respondent's employer's board of directors to "let them know of your disgust." In response to concerns about whether the appellant's identity could be determined, the other person wrote: "you don't have to worry about anything. ... Your anonymity is safe with me." The other person wrote the appellant that the defamatory posts were "taken down for containing defamatory and offensive content. Nevertheless, if as you say everything is true ... word will spread automatically...".

[11] The appellant's position before the case management judge was that although this communication emanated from her computer, she was not the source of the information. She maintained that her computer had

been hacked and she was a victim of cyber terrorists. She also suggested that it was the respondent who had hacked into her computer, initiated the tweets and essentially framed her. She swore affidavits to that effect and made submissions to the case management judge.

[12] The case management judge found that the evidence adduced by the appellant in the court below did not raise a reasonable doubt that she was responsible for the online comments. The appellant submits that the new evidence, if admitted, is sufficient to raise that reasonable doubt.

*ii.* *Admissibility of the New Evidence*

[13] The appellant filed three applications to adduce new evidence: one in July 2015 while self-represented; another in September 2015 in response to direction from this Court (*RO v DF*, 2015 ABCA 267 (CanLII)) which purports to correct shortcomings in her July application; and a third in March 2016 with the assistance of counsel.

[14] The admission of new evidence is governed by *Alberta Rules of Court*, r 14.45 and *R v Palmer*, 1979 CanLII 8 (SCC), [1980] 1 SCR 759. "[C]ontempt proceedings are subject to the standard principles that allow parties to reopen findings in exceptional circumstances to permit consideration of fresh evidence or new facts that were not before the court at the first hearing": *Carey v Laiken*, 2015 SCC 17 (CanLII) at para 62; [2015] 2 SCR 79.

[15] The *Palmer* criteria are as follows. First, the evidence should generally not be admitted if, by due diligence, it could have been adduced at the hearing. Second, the evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial. Third, the evidence must be credible in the sense that it is reasonably capable of belief. Finally, it must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result: at 775. *R v Angelillo*, 2006 SCC 55 (CanLII), [2006] 2 SCR 728 states that "[w]hat must guide the court of appeal in assessing the admissibility of fresh evidence [are] the interests of justice": para 12.

[16] *R v Lévesque*, 2000 SCC 47 (CanLII), [2000] 2 SCR 487 provides guidance on the admissibility, on appeal, of expert opinion reports. The Court held that "[b]efore admitting new opinion evidence on appeal, it may be necessary to determine the basis of that opinion and to establish whether the facts on which the opinion is based have been proven and are credible." The Supreme Court overturned the appeal court's decision to admit the new expert reports stating the "reports should not have been admitted in evidence, since their probative value was not such that they might have affected the result if they had been adduced at trial with the other evidence. The probative value of an expert opinion depends on the amount and quality of admissible evidence on which it relies".

[17] The bulk of the new evidence consists of the following: a 500-page report (including exhibits) prepared by Mario Amado Alves (Ph.D. in Computer Science) dated July 2015 (Amado Alves Report); the affidavit of Mario Amado Alves (translated from Portuguese and notarized) which sets out his credentials; the appellant's February 4, 2016 and March 21, 2016 affidavits in which she deposes she is unable to work as a result of multiple serious and ongoing health issues and her sole sources of income are Assured Income for the Severely Handicapped and a government housing subsidy; and the transcript of an examination of the respondent which contains an admission that he had hacked into his ex-wife's computer.

[18] The most significant item is the Amado Alves Report. The appellant submits that it was not available earlier because it was not until the conduct of the hackers or cyber terrorists reached a certain level that it became detectable. Further, she lacked the financial resources and technical expertise to assemble the puzzle. In effect, the appellant contends that the Amado Alves Report is an expert report that refutes the conclusions reached in the MNP Report which linked her to the online comments.

[19] A brief synopsis of the Amado Alves Report and its author follows. The author is a resident of Portugal; he deposes in his translated affidavit that the appellant advised him that she was unsuccessful in retaining anyone else for various reasons. He attests to his various accomplishments and publications, and more than 30 years of progressively more senior information technology expertise.

[20] As to Sr Amado Alves' report, he states that he examined the appellant's home computer and related technologies including internet router and iPhone. He summarized that he found "multiple cyber terrorist attacks, personal computer system breaches, online account breaches, personal website breaches, digital impersonation, data planting, online account compromises, theft and misuse of digital personal data, including forensic timeline event correlation, explaining the presence of malicious data as described in the MNP report findings". The bulk of his report (like the MNP Report) is extremely technical in nature.

[21] The Amado Alves Report concluded that the MNP's reported communications between the appellant and the other person were actually nefarious activities in a targeted cyberterrorism directed at the appellant, and were an attempt to disrupt her life and implicate her for serious crimes.

[22] We conclude that we are unable to admit the Almado Alves Report. It does not meet the *Palmer* criteria and no injustice would arise from our decision not to admit it. Leaving aside the issue of the report's credibility (which the respondent contests), there are two major obstacles to the admission of the report: the requirement of due diligence and its probative value. We are cognizant of the appellant's submissions that time and expense prevented her from obtaining the report earlier. However, she did not request an adjournment of the applications and indeed urged the court to proceed with these applications and others that she had filed. More importantly, the Amado Alves Report is not "new" evidence in the sense that its probative value is not high. Its only purpose is to corroborate or bolster the evidence upon which the appellant relied before the case management judge.

[23] In the court below, the appellant swore an affidavit in which she challenged the findings of the MNP Report. She deposed that at the various times attributed to the online messages, she was not using her computer. On one occasion she was at the respondent's lawyer's office for questioning. On two occasions she was in a courtroom. On another occasion, she was in Airdrie at a realtor's open house with no wifi access. She deposed that it was her belief that these must have been wifi hacks through an overseas proxy server. She further deposed that she had taken her computer to a "white hat hacker" who kept her computer for 30 hours and advised her that there had been multiple wireless attacks on her technology.

[24] She also deposed that as early as November, 2012 she had noted phishing on her computer and that she had reported this to the Calgary Police Service. She stated that the phishing had continued to escalate and that she had reported this to her former legal counsel, the supervising lawyer and MNP.

[25] In sum, there was evidence before the chambers judge which supported the appellant's position that she was not responsible for the online comments and they were the work of hackers. What she seeks to admit as "new" is evidence that reaches the same conclusion, albeit of a different quality.

[26] This court in *R v Soosay*, 2001 ABCA 287 (CanLII), 2001 CarswellAlta 1472 considered a similar situation. At issue was whether the accused, Soosay, should receive a sentence of a curative discharge. At the sentencing hearing, the accused testified to his efforts at rehabilitation and that he intended to continue treatment. Another witness corroborated the accused's testimony. On appeal, the accused tendered a report from a social worker, which also addressed the accused's alcoholism and made recommendations for treatment. In concluding that the social worker's report should not be admitted, the court commented that the proposed evidence, simply stated, was of a much better quality than the evidence offered up at trial on the issue of curative discharge, and that evidence of the kind and quality was available in the community at the time of the sentencing hearing. The court emphasized that the integrity of the trial process must be protected and the appellate process cannot be routinely used to augment the trial record: at para 14. See also *R v Levesque*. The Almado Alvez Report is an attempt to augment the record before the case management judge. It does not meet the requirements for the admission of new evidence.

[27] We reach the same conclusion with respect to the balance of the proposed new evidence, including the transcript of the questioning of the respondent. We note that the appellant's affidavit evidence deposed that the respondent had admitted to her that he had previously "hacked" into his ex-wife's computer. The questioning of the respondent on his affidavit occurred prior to the applications, but the appellant did not have the transcript. In other words, it was available. As with the Almado Alvarez Report, the transcript is merely

evidence of a different quality which purpose is to bolster the evidence proffered in the court below. It is not admissible.

[28] In conclusion, the applications to admit new evidence are dismissed.

### *b. Contempt Order*

[29] The standard of review of a contempt citation depends on whether the appeal involves a question of law or an exercise of discretion. If the error alleged is a legal error, the review is on the standard of correctness. If the error alleged concerns a judge's exercise of discretion, the standard of review is reasonableness. See generally, *Demb v Valhalla Group Ltd.*, 2015 ABCA 29 (CanLII) at paras 25-26, 593 AR 368.

[30] The appellant's main submission relates to the case management judge's reliance on the MNP Report. She contends that he erred in relying upon it because MNP failed to search for viruses or malware. However, these searches were not contemplated by the Anton Piller order or the protocol governing the MNP Report. Moreover, the hard drive was returned to the appellant who could have obtained a malware search. She could also have applied to the case management judge to direct that MNP conduct these searches. In any event, the appellant's theory of the case was that her computer had been hacked and she was the victim of cyber terrorism. She did not allege that the attack on her computer occurred through active malware or viruses. In short, the question of viruses or malware was not relevant to the issues before the case management judge. He was entitled to rely on the MNP Report which established that the origin of the impugned messages was the appellant's computer.

[31] On this record there was ample evidence for the case management judge to conclude that the appellant had knowingly breached the restrictive court access orders. It is not the role of this court to reweigh the evidence. The appellant has not demonstrated any reviewable error in the case management judge's decision.

[32] The appellant also challenges the penalties imposed by the case management judge; in particular, the striking of the statement of claim. This is a harsh penalty but this was a very serious breach of a clear court order. The actions of the appellant had the potential to cause serious harm to the respondent, his family and his employer. The imposition of the penalty was a reasonable exercise of the case management judge's discretion.

### *c. Vexatious Litigant Order*

[33] The decision to declare someone a vexatious litigant is discretionary and the standard of review of a vexatious litigant order is reasonableness *Liu v Matrikon Inc.*, 2010 ABCA 383 (CanLII) at para 16, 493 AR 378.

[34] Paragraphs one and two of the June 18, 2014 vexatious litigant order provide:

1. The [appellant] is declared a vexatious litigant pursuant to Section 23.1 of the *Judicature Act*, RSA 2000, c J-2, and is hereafter prohibited from instituting and further proceedings, or instituting proceedings on behalf of any other person, or continuing any proceeding which she has already instituted without leave of the Court in which the proceeding is to be initiated or continued.

2. This Order shall be binding upon the Provincial Court of Alberta, the Court of Queen's Bench of Alberta and the Alberta Court of Appeal.

[35] In his reasons for granting the order the case management judge's primary focus was on this litigation. He observed that *in the context of her action against the respondent*, the appellant breached restricted court access orders for which she was found in civil contempt twice; she filed four applications and eight affidavits seeking many types of interlocutory orders; she has attempted to relitigate matters already decided causing confusion, delay and expense to the respondent and wasting court time; she failed to pay costs as ordered; made threats to sue others associated with the respondent; and advanced far flung conspiracy

theories. All of this was "designed to wear down the defendant, force him to incur significant costs associated with defending this action".

[36] The relevant provisions the *Judicature Act* are as follows:

23(2) …, instituting vexatious proceedings or conducting a proceeding in a vexatious manner includes, without limitation, any one or more of the following:

(a) persistently bringing proceedings to determine an issue that has already been determined by a court of competent jurisdiction;

(b) persistently bringing proceedings that cannot succeed or that have no reasonable expectation of providing relief;

(c) persistently bringing proceedings for improper purposes;

(d) persistently using previously raised grounds and issues in subsequent proceedings inappropriately;

(e) persistently failing to pay the costs of unsuccessful proceedings on the part of the person who commenced those proceedings;

(f) persistently taking unsuccessful appeals from judicial decisions;

(g) persistently engaging in inappropriate courtroom behaviour.

[37] It is apparent from the reasons that the case management judge's goal was to bring to an end any and all litigation in furtherance of the appellant's fixation with the respondent, his family and anything or anyone associated with him. Doing so was reasonable but in our view the order was overbroad.

[38] There is a difference between vexatious proceedings and vexatious litigants: *644036 Alberta Ltd v Morbank Financial Inc*, 2014 ABQB 681 (CanLII) at paras 51-97, 26 Alta LR (6th) 153. In that case the trial judge concluded that the litigation was "clearly an example of vexatious litigation. The question that remains, however, is whether the person behind this litigation should also be declared a vexatious litigant." She found the litigant to be vexatious also on the basis that he had instituted numerous proceedings against various defendants.

[39] There was insufficient evidence before the case management judge (or before us) to support a finding that the appellant has a history of "persistently" engaging in any of the prohibited actions in subsection 23(2) against anyone other than the respondent: see generally *Pawlus v Pope*, 2004 ABCA 396 (CanLII), 357 AR 347. Although the appellant was involved in other litigation, she was the defendant in those proceedings (a bankruptcy and a landlord tenant dispute).

[40] In our view paragraph one of the vexatious litigant order should be set aside and we do so. We substitute the following: Any litigation or steps in litigation against the respondent and those associated with him, including his family (immediate and extended) and his employer shall require leave of the Court of Queen's Bench.

## IV. Conclusion

[41] We dismiss the applications to admit new evidence and the appeal of the contempt order.

[42] We allow, in part, the appeal of the vexatious litigant order and direct that it be varied as described in paragraph 40.

Appeal heard on May 12, 2016

Memorandum filed at Calgary, Alberta
this 26th day of May, 2016

As authorized by: Costigan J.A.

As authorized by: Paperny J.A.

Rowbotham J.A.

**Appearances:**

G. Zinner
for the Appellant

J.D. Murphy/ S. Fader
for the Respondent

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**Corrigendum of the Memorandum of Judgment**

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The information on the Restricted Court Access Order was added to the front page.

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CanLII

# Brouillard Also Known As Chatel v. The Queen, [1985] 1 SCR 39, 1985 CanLII 56 (SCC)


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| Date: | 1985-02-21 |
| File number: | 17372 |
| Other citations: | 16 DLR (4th) 447 — 57 NR 168 — 17 CCC (3d) 193 — 44 CR (3d) 124 — 13 WCB 445 — [1985] SCJ No 3 (QL) — [1985] ACS no 3 — [1985] RDJ 38 |
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Brouillard Also Known As Chatel *v.* The Queen, [1985] 1 S.C.R. 39

**Jean-Pierre Brouillard also known as Pierre Chatel** *Appellant*;

and

**Her Majesty The Queen** *Respondent.*

File No.: 17372.

1984: October 4; 1985: February 21.

Present: Beetz, McIntyre, Chouinard, Lamer and Le Dain JJ.

on appeal from the court of appeal for quebec

*Criminal law -- Trial -- Function of judge -- Examination of witnesses -- Right of judge to intervene -- Limits of right to intervene -- Doubt as to impartiality of judge -- New trial ordered.*

Appellant was charged with extortion and convicted by a judge of the Court of Sessions of the Peace. At trial, the judge took an active part in questioning the accused and another witness for the defence, interrupting counsel and the witnesses on several occasions and asking many questions himself. On appeal, appellant complained of the judge's conduct, saying that he had been biased, and argued that he had not been able to make full answer and defence. He further alleged that the trial judge had committed errors of law and fact. The Court of Appeal dismissed his appeal and affirmed the conviction. This appeal was based on essentially the same grounds.

*Held*: The appeal should be allowed and a new trial ordered.

Having regard to the evidence presented at the trial, the conviction by the trial judge is not unreasonable and is not based on an error of law or fact. The issue was essentially one of credibility and the trial judge chose to believe the complainant. It is in the interests of justice, however, that a new trial be held. Though the trial judge has a right, and often a duty, if justice is in fact to be done, to question witnesses, interrupt them and if necessary call them to order, he must do so within certain limits and in such a way that justice is seen to be done. In the case at bar, the trial judge went beyond the limits. By his many interventions and questions during

the testimony of the accused and of another defence witness, the trial judge gave the impression of assisting counsel for the prosecution. By his conduct the trial judge raised some doubt as to his impartiality, which only a new trial can erase.

**Cases Cited**

*R. v. Sussex Justices; Ex parte McCarthy*, [1924] 1 K.B. 256, applied; *R. v. Darlyn* (1946), 1946 CanLII 248 (BC CA), 88 C.C.C. 269, approved; *Jones v. National Coal Board*, [1957] 2 All E.R. 155; *R. v. Torbiak and Campbell* (1974), 26 C.R.N.S. 108; *Yuill v. Yuill*, [1945] 1 All E.R. 183; *R. v. Bateman* (1946), 31 Cr. App. R. 106, referred to.

**Authors Cited**

Fauteux, Gérald. *Le livre du magistrat*, Ministre des Approvisionnements et Services Canada, Ottawa, 1980.

APPEAL from a judgment of the Quebec Court of Appeal[1], dismissing appellant's appeal from his conviction for extortion by a judge of the Court of Sessions of the Peace. Appeal allowed and a new trial ordered.

[1] C.A. Mtl., No. 500-10-000066-819, October 22, 1982.

*Pierre Chatel*, for himself.

*Réginald Michiels*, for the respondent.

English version of the judgment of the Court delivered by

1. LAMER J.--Appellant was charged with extortion and convicted by a judge of the Court of Sessions of the Peace. His appeal to the Quebec Court of Appeal was dismissed. He appealed to this Court with its leave. In my view, his appeal should be allowed and a new trial ordered.

Facts

2. Appellant and the complainant, Mrs. Madeleine Lebel, have known each other since May 1977. They did business together and were partners in two companies. On July 3, 1979, appellant visited the complainant at her home and demanded the sum of $6,000 from her. According to the complainant and one of her daughters, he threatened her. This led to a charge of extortion, worded as follows:

[TRANSLATION] At Montréal, district of Montréal, on or about July 3, 1979, Jean Pierre Brouillard, without reasonable justification or excuse, with intent to extort, attempted to induce Madeleine Lebel by threats, accusations, or violence to do something, to wit: to give him the sum of $6,000, thereby committing an indictable offence under section 305(1) of the Criminal Code.

Judgments

*At Trial*

3. In an oral judgment the Sessions judge, expressing certain reservations concerning the credibility of the accused and of another defence witness, the complainant's other daughter, said that he believed the complainant and her witnesses and was convinced beyond a reasonable doubt of the accused's guilt.

4. The relevant passages of his judgment read as follows:

> [TRANSLATION] So there was not only the mother who said she was threatened, there was another witness, the girl, and I cannot doubt the girl's testimony, because she testified honestly that she did not wish to get involved in these matters . . .
>
> ...
>
> The mother, her testimony . . . was corroborated by the testimony of the girl Michèle . . .
>
> As for the other girl, there were contradictions in the answers she gave the Court . . .
>
> ...
>
> The testimony of Mr. Chatel, well, I'll tell you sincerely, it was evasive. He was asked direct questions, and replied with a series of answers that had no bearing on the questions he was asked. He tried to fabricate, that's the word, fabricate, in any case, he tried to tell us all sorts of stories which, in my opinion, don't stand up.

5. The judge's decision is thus clearly based on the credibility he gave the witnesses.

*On Appeal*

6. In the Court of Appeal the accused Brouillard complained of errors of law and of fact on the part of the trial judge and maintained that he should have been acquitted. He also complained of the judge's conduct, saying that he had been biased, and argued that he had not been able to make full answer and defence.

7. The Court of Appeal's decision is succinct:

> [TRANSLATION] THE COURT, ruling on appellant's appeal from a judgment rendered by a judge of the Court of Sessions of the Peace, district of Montréal, on January 29, 1981, convicting him of attempted extortion;
>
> After reviewing the record, hearing argument and deliberating;
>
> WHEREAS even though this Court cannot sanction all the said judge's interventions during the trial, it was not established before us that either through these interventions or otherwise, appellant was deprived of his right to make full answer and defence;
>
> WHEREAS it was not established either that the said judge erred in law or incorrectly assessed the evidence;
>
> WHEREAS this Court should therefore not intervene in the said judgment;
>
> DISMISSES the appeal.

8. Appellant relied on essentially the same grounds of appeal in this Court. He also requested leave to present additional evidence. We shall dispose of this request first.

9. I have read the material submitted by appellant and I am of the view that this evidence, which he sought to present at trial as well, is not relevant to the case; consequently I would deny this request.

10. With regard to his allegations of errors of law and of fact, I share the Court of Appeal's opinion and am of the view that they are unfounded. The judge's conclusion is not unreasonable having regard to all the evidence and is not based on an error of law in interpreting the provision under which the accused was charged or an error respecting the law of evidence or procedure. The issue was one of credibility and the judge chose to believe the complainant. Had he entertained a reasonable doubt in favour of the accused, a verdict of acquittal would not have been at all unreasonable either.

11. There remains the question of the judge's conduct and alleged bias.

12. The role of a trial judge is sometimes very demanding, owing to the nature of the case and the conduct of the litigants (parties). Like anyone, a judge may occasionally lose patience. He may then step down from his judge's bench and assume the role of counsel. When this happens, and, *a fortiori*, when this happens to the detriment of an accused, it is important that a new trial be ordered, even when the verdict of guilty is not unreasonable having regard to the evidence, and the judge has not erred with respect to the law applicable to the case and has not incorrectly assessed the facts.

13. The reason for this is well-known. It is one of the most fundamental principles of our case law, the best known formulation of which is to be found in Lord Hewart's judgment in *R. v. Sussex Justices; Ex parte McCarthy*, [1924] 1 K.B. 256, at p. 259:

...[it] is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.

14. In the case at bar I am certainly not convinced that the judge was biased. On the contrary, I am inclined to believe that he meant to be impartial. I am thus of the view that the accused was not prevented from presenting his defence, calling all relevant witnesses and adducing all relevant evidence, although not without difficulty. However, I am obliged to conclude that, by his conduct, the trial judge allowed there to be some doubt on this subject, which only a new trial can erase. In this regard I am, with respect, in complete disagreement with the Court of Appeal in that I am not of the view that it is sufficient for justice to have been done to dispose of this appeal.

15. Before discussing the judge's conduct, we should mention certain rules arising out of the principle put forward by Lord Hewart, as well as their limits. This is not intended to be exhaustive. There are numerous decisions and substantial legal opinion on the subject. It would perhaps be sufficient to refer to the remarks of the late Chief Justice Fauteux in *Le livre du magistrat** (1980), which sets out the precepts that should govern a judge's conduct.

*A separate English version, *A Book for Judges* (1980), was written by the Hon. J. O. Wilson.

16. We shall mention here his remarks that are relevant to the case at bar.

17. First of all, it is clear that judges are no longer required to be as passive as they once were; to be what I call sphinx judges. We now not only accept that a judge may intervene in the adversarial debate, but also believe that it is sometimes essential for him to do so for justice in fact to be done. Thus a judge may and sometimes must ask witnesses questions, interrupt them in their testimony and if necessary call them to order.

18. One of the decisions most often cited in support of this rule is *Jones v. National Coal Board*, [1957] 2 All E.R. 155 (C.A.) Lord Denning stated the following, at pp. 158-59:

> No one can doubt that the judge, in intervening as he did, was actuated by the best motives. He was anxious to understand the details of this complicated case, and asked questions to get them clear in his mind. He was anxious that the witnesses should not be harassed unduly in cross-examination, and intervened to protect them when he thought necessary. He was anxious to investigate all the various criticisms that had been made against the board, and to see whether they were well founded or not. Hence he took them up himself with the witnesses from time to time. He was anxious that the case should not be dragged on too long, and intimated clearly when he thought that a point had been sufficiently explored. All those are worthy motives on which judges daily intervene in the conduct of cases and have done for centuries.
>
> Nevertheless, we are quite clear that the interventions, taken together, were far more than they should have been. In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries. Even in England, however, a judge is not a mere umpire to answer the question "How's that?" His object above all is to find out the truth, and to do justice according to the law; . . .

19. More recently, in Canada, in *R. v. Torbiak and Campbell* (1974), 26 C.R.N.S. 108, which involved a problem similar to the one in the case at bar, the Ontario Court of Appeal stated the following, at pp. 109-10:

> The proper conduct of a trial judge is circumscribed by two considerations. On the one hand his position is one of great power and prestige which gives his every word an especial significance. The position of established neutrality requires that the trial judge should confine himself as much as possible to his own responsibilities and leave to counsel and members of the jury their respective functions. On the other hand his responsibility for the conduct of the trial may well require him to ask questions which ought to be asked and have not been asked on account of the failure of counsel, and so compel him to interject himself into the examination of witnesses to a degree which he might not otherwise choose.
>
> Since the limits of the allowable conduct are not absolute, but relative to the facts and circumstances of the particular trial within which they are to be observed, every alleged departure during a trial from the accepted standards of judicial conduct must be examined with respect to its effect on the fairness of the trial.

20. Another illustration of the precept is to be found in the remarks of Lord Greene, M.R., in *Yuill v. Yuill*, [1945] 1 All E.R. 183 (C.A.), at p. 185:

> It is, of course, always proper for a judge--and it is his duty--to put questions with a view to elucidating an obscure answer or when he thinks that the witness has misunderstood a question put to him by counsel. If there are matters which the judge considers have not been sufficiently cleared up or questions which

he himself thinks ought to have been put, he can, of course, take steps to see that the deficiency is made good. It is, I think, generally more convenient to do this when counsel has finished his questions or is passing to a new subject. It must always be borne in mind that the judge does not know what is in counsel's brief and has not the same facilities as counsel for an effective examination-in-chief or cross-examination. In cross-examination, for instance, experienced counsel will see just as clearly as the judge that, for example, a particular question will be a crucial one. But it is for counsel to decide at what stage he will put the question, and the whole strength of the cross-examination may be destroyed if the judge, in his desire to get to what seems to him to be the crucial point, himself intervenes and prematurely puts the question himself.

21. Finally, I cite with approval the judgment to which the respondent Crown referred us in *R. v. Darlyn* (1946), 1946 CanLII 248 (BC CA), 88 C.C.C. 269, where Bird J.A. wrote the following on behalf of the British Columbia Court of Appeal (at p. 277):

> The nature and extent of a Judge's participation in the examination of a witness is no doubt a matter within his discretion, a discretion which must be exercised judicially. I conceive it to be the function of the Judge to keep the scales of justice in even balance between the Crown and the accused. There can be no doubt in my opinion that a Judge has not only the right, but also the duty to put questions to a witness in order to clarify an obscure answer or to resolve possible misunderstanding of any question by a witness, even to remedy an omission of counsel, by putting questions which the Judge thinks ought to have been asked in order to bring out or explain relevant matters.

22. In short, everyone agrees that a judge has a right and, where necessary, a duty to ask questions, but also that there are certain definite limits on this right. On this point respondent cited the remarks of Humphreys J. in *R. v. Bateman* (1946), 31 Cr. App. R. 106, where he stated:

> Judges are entitled, if they form the opinion that a witness <u>is not trying to help the Court</u>, to do what counsel cannot do, and say: "You behave yourself and tell me the truth". It is sometimes very useful to be able to say that. Sometimes it pulls a witness together and makes him say what is the truth, but, of course, it must not be done until the witness has given some indication that he or she is not trying to tell the truth.

(Emphasis added.)

23. The judge may on occasion call to order a witness who is obviously trying to avoid testifying, who "is not trying to help the Court". In *Bateman* a witness said she was not able to recall dates or times accurately. The appellate judges, at pp. 110-11, disapproved in the following terms, of the reprimand the Commissioner presiding at the trial had given her:

> For some reason the Commissioner, who was presiding at the trial, formed the opinion that the witness could give much more satisfactory evidence if she liked, and he cross-examined her and treated her as if she were a thoroughly disreputable liar. It must not be forgotten by those who preside at criminal trials that witnesses, whether called for the prosecution or the defence, are entitled to be treated with courtesy and politeness unless and until they show some symptom of refusing to assist the Court by giving evidence promptly and properly. With all due respect to the Commissioner, it is not the duty of any presiding Judge, as soon as a witness says: "I cannot tell you with accuracy what time something happened", to say: "Oh, yes, you can. You be careful", or anything designed to force the witness to say something which she really cannot say. The result was that when that cross-examination was taken up to some extent by counsel for the prosecution, this unfortunate woman was induced to give about seven or eight different times as being very probably the times when the appellant went there. Mr. Gordon, who

> appeared for the appellant, has told us that in the result--and this agrees with our own reading of the transcript--the witness showed herself to be the sort of women who, if sufficiently badgered, would say anything. It means, not that the woman was not trying to tell the truth, but that she was a person who could not fix times and whose evidence was valueless.

It was only further on that they added the remarks cited by the Crown, and then, by way of clarification, at pp. 111-12:

> The mere fact that a witness cannot fix a time is no reason for treating her in that way, and why it was thought necessary so to treat the witnesses in this case is a little difficult to understand.
>
> The observations which were made in *Gilson and Cohen* (1944), 29 Cr. App. R. 174, at p. 181, in which the Court adopted the language of a previous decision, *Cain* (1936), 25 Cr. App. R. 204, at p. 205, are apposite in this case. The observations were to this effect: "There is no question why the Judge should not from time to time interpose such questions as seem to him fair and proper. It was, however, undesirable that . . . the Judge should proceed, without giving much opportunity to counsel for the defence to interpose, and long before the time had arrived for cross-examination, to cross-examine (the witness) with some severity. The Court agrees with the contention that that was an unfortunate method of conducting the case. It is undesirable that during an examination-in-chief the Judge should appear to be not so much assisting the defence as throwing his weight on the side of the prosecution by cross-examining a prisoner." We would adopt those observations and apply them to any witness, whether called by the prosecution or the defence.

The remarks of Humphreys J. were cited out of context, and the *Bateman* decision as a whole seems somewhat contrary and even fatal to the Crown's position.

24. Finally, prudence and the resulting judicial restraint must be all the greater where the accused is a witness. He must be allowed to proceed, within limits, of course, but always bearing in mind that at the end of the day he is the only one who may be leaving the court in handcuffs.

25. In conclusion, although the judge may and must intervene for justice to be done, he must nonetheless do so in such a way that justice *is seen to be done*. It is all a question of manner.

26. In the case at bar, the least that can be said is that the judge was aware of his right to intervene. He asked the witness Dominique Gauthier, the complainant's daughter and the accused's girlfriend and witness, some sixty questions, almost as many as the Crown, and interrupted her more than ten times during her testimony.

27. During the accused's testimony the judge asked many more questions than the two counsel. In fact during the examination-in-chief he interrupted the examination being conducted by counsel for the defence almost twenty times, and cross-examined the accused. As a result he asked the accused, still during the examination-in-chief, twice as many questions as his own lawyer asked. Since his questions were more in the nature of a cross-examination, he thus clearly gave the impression of assisting the Crown by doing precisely what he would have had to prevent the Crown from doing if necessary. The accused was interrupted by the judge a total of over sixty times in his answers in chief and in cross-examination. Both the accused and the witness Gauthier were the object of sarcastic remarks.

28. By way of illustrating the general situation, I quote:

[TRANSLATION] THE COURT:

Q. Tell the truth Miss, tell what happened in this case, that document, what was it for, tell me the truth?

A. Well I've been telling the truth.

Q. Stop beating around the bush.

...

THE WITNESS:

No, no, no but can I explain myself?

THE COURT:

Ah! explain yourself. You better have, I better have very good explanations.

...

THE COURT:

Explain that to me. You know, I understand, I'm not intelligent, I've never studied law, I've never done any civil or whatever but in any case.

THE WITNESS:

If I told you that on the first of August '79 . . .

THE COURT:

Ah! tell me what you like but you need . . .

THE WITNESS:

But you are asking me questions.

THE COURT:

. . . you need to have an explanation, and a good one this time.

THE WITNESS:

If I told you that on the first of August '79, I didn't owe the company that sum of money.

THE COURT:

Ah! why didn't you tell the company to go to hell?

THE CROWN:

Q. What did you owe the company?

A. Well at that . . .

THE COURT:

When I don't owe anything, and a guy is trying to collect from me, do you know what I do? I tell the guy: get three lawyers, ten lawyers, do what you like, but come and collect from me if you can.

THE WITNESS:

That's right.

THE COURT:

Eh. You you're a president . . .

THE WITNESS:

That's right.

THE COURT:

. . . of marketing, you're a specialist in marketing and you write a letter to an individual saying he's going to be arrested and then after that he'll pay. Come on. Do you take me for an idiot? I'm not Mrs. Lebel. Just a minute. Do you take me for an imbecile?

THE WITNESS:

Not at all.

THE COURT:

No. And I'll tell you something. You'll be making a mistake if you take me for an imbecile.

THE WITNESS:

Not at all.

THE COURT:

Then continue with your evidence, and you're under oath.

THE WITNESS:

Yes, yes. I know.

THE COURT:

And I'm warning you, you're under oath.

THE WITNESS:

Eh! . . .

THE COURT:

You're going to speak properly.

THE WITNESS:

I shall file a document shortly.

THE COURT:

You can file all the documents you like, but when you're asked questions, you'll answer the questions. But don't take me for an idiot. That's not true. Because we're more or less the same age, I've lived as long as you. But I wasn't a president of marketing. I don't know for what company. In fact, at that time, I don't know what company you were with, you're working for your brother.

THE WITNESS:

I said . . .

THE COURT:

You'll tell the truth.

THE WITNESS:

I said I was a marketing consultant.

THE COURT:

What I want to know is the truth. I'll tell you something. Tell me the truth.

THE CROWN:

It would be much simpler for everyone.

THE COURT:

It's simple, the truth.

THE WITNESS:

I'm telling the truth.

THE COURT:

Yes.

THE CROWN:

Okay. We'll continue.

THE COURT:

But I don't believe you. So far. Change stories.

...

THE COURT:

One thing's certain, if a guy owed me forty thousand bucks ($40,000.00), I wouldn't lend him even six thousand (6,000); I don't know, I don't know.

THE WITNESS:

It's based, my Lord, on Mrs. Lebel's instalments and on the conversation I had with her, on July 3rd. I know, I was there.

THE COURT:

Yes. There were others who were there and they don't say the same thing as you.

THE WITNESS:

No, no, the others weren't there at the time . . .

THE COURT:

There were two others who were there, and they don't say the same thing as you.

...

THE COURT:

And then when I make out a cheque, or anyone intelligent here, you're more intelligent than us because you're in marketing, you know that, when I make out a personal cheque, I imagine I must know whether I'm the one paying or whether it's someone else. You're being asked a clear and straightforward question. Did you always make your payments to the company, what's it called?

THE WITNESS:

Minico.

THE COURT:

Minico?

THE WITNESS:

Perhaps . . .

THE COURT:

Was it you or was it someone else who made the payments?

THE WITNESS:

Well, I'll answer that.

THE COURT:

That's clear?

THE WITNESS:

Well . . .

THE COURT:

Yes or no?

THE WITNESS:

But I can't answer yes or no.

THE COURT:

No?

THE WITNESS:

No, no, but I'll tell you why.

THE CROWN:

These are words he doesn't know.

THE COURT:

No.

...

THE COURT:

Yes or no?

THE WITNESS:

Well it was done by both.

THE COURT:

Maybe yes, maybe no. Yes, well, okay.

...

THE COURT:

There's something I wonder about.

THE WITNESS:

Because I'm the one who had the contract.

THE COURT:

How is it that you weren't capable of making out a cheque?

29. In my view it is clearly in the interests of justice that a new trial be held.

30. In conclusion I would like to reiterate certain remarks I made at the beginning of my reasons. The task of a trial judge is not always an easy one. In trials involving relatives or people who have emotional ties, emotions run high and the judge's intervention is often required more than is usual. The danger the judge then runs, even if he is the best of judges, is that he will lose patience. Hence my sympathy (the undersigned has also been a trial judge in difficult circumstances) for trial judges in general and for the particular judge who presided over the Brouillard trial. However, this in no way relaxes the rule that justice must be seen to have been done.

31. I would therefore allow the appeal, set aside the judgment of the Court of Appeal and order a new trial.

32. Appellant is asking us to acquit him. In support of this request he raised at the hearing the fact that he has already served his probationary sentence. This is a factor which the judge presiding at the new trial would surely wish to take into account, should it prove necessary to decide on a sentence. It is also a factor which the Attorney General may take into account in exercising his discretionary powers as a prosecutor. As I have already mentioned, the verdict of guilty is not unreasonable, just as a verdict of acquittal would not have been at all unreasonable. The issue is one of credibility. This Court is intervening in this case only to order a new trial. The new trial judge and the Attorney General are in the final analysis the only ones, although in a different way, capable of taking this aspect of the situation into account.

*Appeal allowed and new trial ordered.*

*Pierre Chatel for himself, Montréal.*

*Solicitor for the respondent: Réginald Michiels, Montréal.*

CanLII

# Guermache v. Canada (Minister of Citizenship and Immigration), 2004 FC 870 (CanLII)

Date: 2004-06-16

File number: IMM-9067-03

Other citations: 257 FTR 272 — 21 Admin LR (4th) 37 — [2004] FCJ No 1058 (QL)

Citation: Guermache v. Canada (Minister of Citizenship and Immigration), 2004 FC 870 (CanLII), <http://canlii.ca/t/1j2dt>, retrieved on 2019-11-13

Date : 20040616

Docket: IMM-9067-03

Citation: 2004 FC 870

OTTAWA, ONTARIO, THE 16th DAY OF JUNE 2004

Present : THE HONOURABLE MR. JUSTICE LUC MARTINEAU

BETWEEN:

GUERMACHE, ABDEL-SALAM

Applicant

- and -

MINISTER OF CITIZENSHIP

AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] Laurier Thibault (the member) of the Immigration and Refugee Board, Refugee Protection Division (the Board), determined that the applicant, Abdel-Salam Guermache, a citizen of Algeria, is not a "Convention refugee" nor a "person in need of protection". The applicant has made an application for judicial review to this Court in accordance with subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act).

[2] The Board dismissed the applicant's refugee claim on the basis that he was not credible. After reviewing the impugned decision and considering the evidence in the record, the applicant has not persuaded me that the decision was based on an error of law or that the adverse finding of credibility was patently unreasonable. Accepting the respondent's arguments, I do not find any basis for the Court's intervention in this respect.

[3] However, the applicant also alleges that the member's conduct at the hearing was such that it raises a reasonable apprehension of bias for an informed person, viewing the matter realistically and

practically, and having thought the matter through (*Committee for Justice and Liberty v. Canada (National Energy Board)*, 1976 CanLII 2 (SCC), [1978] 1 S.C.R. 369 (S.C.C.); (1976), 68 D.L.R. (3d) 716 (S.C.C.)). The applicant alleges, *inter alia*, that the member created a very tense atmosphere during the hearing, to the point that it affected his testimony.

[4] Members have a difficult but essential role to play. Because of their workload, the stress is enormous. Nevertheless, even if they may have heard the same "story" hundreds of times, the individuals are different, so that each application for protection deserves the same degree of care. We must bear in mind that Canada offers protection to those who have well-founded fear of persecution for reasons of race, religion, nationality, political opinion, or membership in a particular social group, as well as those in danger of torture or risk of cruel and unusual treatment or punishment. At the same time, in refugee matters, the objectives of the Act are, *inter alia*, to grant, as a fundamental expression of Canada's humanitarian ideals, fair consideration to those who come to Canada claiming persecution, and to establish fair and efficient procedures that will maintain the integrity of the Canadian refugee protection system, while upholding Canada's respect for the human rights and fundamental freedoms of all human beings (paragraphs 3(2)(*c*) and (*e*) of the Act). The members are therefore the first and, at this time, the last decision-making link (the provisions of the Act on the Refugee Appeal Division are not yet in force) to whom claimants can address their application for protection and be heard in Canada in the formal framework of an oral hearing before a quasi-judicial tribunal.

[5] With that in mind, the scale of the members' tasks must not cause them to lose sight of the fact that the rules of natural justice must be observed and that their conduct during hearings and applications for protection must, at all times, be irreproachable and objective. It goes without saying that the most basic courtesy and politeness are *de rigueur*. There is no place for intimidation, contempt, and offensive innuendo, nor for harshness or inappropriate language. As the Right Honourable Mr. Justice Fauteux wrote in the *Livre du magistrat* ["a book for judges"], "[TRANSLATION] The judge will ensure the climate necessary for the operation of justice by his moderation, his discipline and his courtesy in his relations with counsel, the parties and the witnesses." (The Right Honourable Gérald Fauteux, *Le livre du magistrat*, Minister of Supply and Services Canada, 1980, at page 49).

[6] Even though the member and the refugee claim officer can and should ask questions to clarify a claimant's statements, it is clear that there have to be certain limits. Without imposing a canon or an absolute rule, if "cross-examination" is allowed, it should normally take place after the claimant's "testimony". The neutral attitude that we expect from the member hearing the case strongly suggests that the member adhere to his or her own responsibilities as much as possible, and let the claimant's counsellor, the refugee claim officer and, if applicable, the Minister's representative, play their respective roles. In this respect, we should generally expect that the questions asked by these parties will enlighten the panel on the key aspects of the claimant's testimony, including the most flagrant shortcomings or contradictions in his testimony. On the other hand, his or her responsibility for conducting the hearing might oblige the member to ask questions that must be asked that were not because of a lapse by counsel. Again, I am not saying here that these are the only cases when the member can ask questions. Nevertheless, whatever the valid reason for which the member chooses to intervene, he or she must be tactful and show some deference in addressing the claimant and in formulating the questions that he or she would like to ask the claimant. As Lamer J. (as he then was) stated in *R. v. Brouillard*, 1985 CanLII 56 (SCC), [1985] 1 S.C.R. 39 at paragraph 25 (S.C.C.); (1985), 16 D.L.R. (4th) 447 (S.C.C.), ". . . although the judge may and must intervene for justice to be done, he must nonetheless do so in such a way that justice is seen to be done. It is all a question of manner."

[7] It must therefore be determined whether the member's "cross-examination" and his interference during the hearing creates an appearance of bias. The Federal Court of Appeal in *Sivaguru v. Canada (Minister of Employment and Immigration)*, [1992] 2 F.C. 374 (C.A.), [1992] F.C.J. No. 47 (C.A.) (QL), wrote at paragraphs 16 and 17:

An essential requirement for such a hearing, in my view, is that the Board act with impartiality. The impartiality required of judges, as it was explained by LeDain J. in *Valente v. The Queen et al.*, 1985 CanLII 25 (SCC), [1985] 2 S.C.R. 673, extends, it seems to me, to a Board member. At page 685, his Lordship stated:

Impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. The word "impartial" as Howland C.J.O. noted, connotes absence of bias, actual or perceived.

In three recent cases before this Court, decisions of the Board were challenged on the ground, inter alia, that the manner in which a member of the Board intervened in examining the claimant at the hearing was excessive and improper. I refer to *Mahendran v. Canada (Minister of Employment & Immigration)* (1991), 14 Imm. L.R. (2d) 30 (F.C.A.); *Yusuf v. Canada (Minister of Employment and Immigration)*, [1992] 1 F.C. 629 (C.A.); *Rajaratnam v. Canada (Minister of Employment and Immigration)* (Court File No. A-824-90, Stone J.A., judgment dated December 5, 1991 (not yet reported)). The challenge in two of these cases was rejected. In the third, *Yusuf*, at pages 637-638, Hugessen J.A. found:

In my opinion, these sexist, unwarranted and highly irrelevant observations by a member of the Refugee Division are capable of giving the impression that their originator was biased. The day is past when women who dared to penetrate the male sanctum of the courts of justice were all too often met with condescension, a tone of inherent superiority and insulting "compliments". A judge who indulges in that now loses his cloak of impartiality. The decision cannot stand.

This illustrates, I think, the sort of case in which the questioning may reveal bias, actual or perceived. The questioning by the Board member there indicated, as LeDain J. put it in *Valente*, "a state of mind or attitude of the tribunal in relation to the issues and the parties".

[17] For a "hearing" to be worthy of the description, the Board must at all times be willing to give the evidence adduced the dispassionate and impartial consideration it requires in order to arrive at the truth.

[Emphasis added.]

[8] At paragraphs 18, 19 and 20 in the decision *De Leon v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 852 (F.C.T.D.) (QL), IMM-6251-98, Pelletier J. (as he then was) pointed out:

[18] It is true that it is not the function of the tribunal or the officer to favour a claimant's testimony. The burden of proof is always on a claimant. Contradictions and discrepancies are important indications that a story is untrue. As it is not in a good position to check contradictions and inconsistencies the tribunal must rely entirely on the claimant in order to determine the truth about his situation. If a claimant does not seem trustworthy in certain details, the Refugee Division is justified in finding that he is not trustworthy in other aspects of his claim: but all this assumes that the Refugee Division respects the claimant and his testimony.

[19] It is also true that the refugee claims officer and the tribunal are entitled to cross-examine the plaintiff and, if circumstances require, that cross-examination may be hostile: but a search for the truth should not be confused with harassing the plaintiff. In the case at bar the tribunal found contradictions where none existed and, to arrive at those contradictions, did not have regard to the material before it within the meaning of s. 18.1 (4)(d) of the Federal Court Act, R.S.C. 1985, c. F-7. The decision must accordingly be set aside and the case referred back for re-hearing by a tribunal of different members.

[20] In view of the allegations which formed part of the application for judicial review it is very likely that the plaintiff left the hearing room feeling that his case was lost from the outset. In addition to being accused of contradictions where none existed, he also had to tolerate remarks which may have seemed insulting to him. The Refugee Division has a central part to play in carrying out Canada's refugee obligations. Persons who are designated to act as members or as refugee claims officers represent Canada to claimants. They must therefore behave in such a way as to preclude any suggestion that Canada is not willing to accept refugees, even though it reserves the right to make sure that they are acting in good faith. It is a task that calls for exemplary probity

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and integrity. The fact that there are shortcomings in the conduct of a hearing from time to time only emphasizes the importance of impartiality and openness of mind by those to whom this task is entrusted.

[Emphasis added.]

[9] Having reviewed the entire record with the foregoing principles in mind, I find that the rules of natural justice were not observed in this case. It is also my opinion that an informed person, viewing the matter realistically and practically, and having thought the matter through, would conclude that the member's conduct would create a reasonable apprehension of bias (*Committee for Justice and Liberty, supra*).

[10] It is clear in this case, from the outset, that the member was not at all interested in hearing the applicant's testimony. The procedure selected by the member was such that the applicant did not have the opportunity to present his "case" before an impartial decision-maker. In that respect, the hearing of May 15, 2003, was more like a police interrogation than a hearing before a tribunal, specialized though it may have been. From the beginning to the end of the hearing, the member questioned the applicant relentlessly on countless details, evidently with the goal of making him "crack". Not only did the applicant have to answer the questions asked by the refugee claim officer but, systematically, at the same time the applicant also had to answer to the best of his abilities the multitude of questions asked by the member himself. Obviously, he was looking for every pretext possible to make the applicant contradict himself. There is basis for me to find that it was a case of the applicant clearly trying to avoid or evade the questions asked. Quite to the contrary, the member was visibly impatient as soon as the applicant tried to complete his answers.

[11] We have the overall impression in this case that the refugee claim officer was nothing more than a "stand-by". The starring role of "grand inquisitor" was played by the member himself. As for the applicant's counsellor, she was relegated to the small and limited part that the member indeed wanted her to have. Undoubtedly for the sake of appearances, the member invited her or allowed her to ask a few questions from time to time, here and there. I say that because after the "all out" cross-examination by the member, which must have seemed interminable, and long tirades by member on peripheral aspects having no real relevance (except that they eloquently demonstrated the member's prejudices and biases), we might ask what more the applicant's counsellor could have done. It is clear here that no matter what the applicant's counsellor may have said or added, the applicant's "case" had been decided in advance by the member.

[12] In short, the gratuitous and uncalled for comments as well as the member's tone, impatience and aggressiveness at the hearing were unjustified. I have no basis to find that the member's numerous interventions were directly related to any evasive answer by the applicant or his failure to cooperate. They appear rather to be the result of the opinion that the member appeared to have of Algerian citizens who make refugee claims in Canada. For example, here are a few excerpts from the hearing transcript. To illustrate, the member's interventions or questions are underlined in the following text:

[TRANSLATION]

BY THE CHAIRPERSON (addressing the claimant)

. . .

- . . . Sir, the panel will not ask you to repeat everything that is in your Personal Information Form, assuming that you would repeat everything contained therein if you were to testify on the merits.

. . . I don't put anybody in jail, I don't condemn anyone to death, so rest assured, that's already settled.

. . .

Q. . . . You see, I speak quite loudly - not in an attempt to intimidate you, Sir, but so that you understand me . . .

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. . .

BY THE RCO (addressing the claimant)

. . .

Q. Okay. And what happened?

R. I came out to go take the bus, on my way, the distance . . . between the police station . . . the bus stop was . . . is a little bit far from . . . the police station. I was walking on my way and suddenly a car stopped, four people got out from . . . the vehicle, they came toward me, they insulted me, they hit me on the head, they told me that I was . . . what do you call it, a informant for the police.

Q. And these people, did you know them?

A. No.

Q. Had you seen them before?

A. No.

Q. Did they say anything to you other than that you were a police informant?

A. They said to me *"You must stop doing this work."*

Q. Did they . . .

A. *"And don't think that we'll . . .we'll leave you in peace, we'll get you."*

BY THE CHAIRPERSON (addressing the claimant)

Q. Why did . . . why didn't they kill you right away, Sir?

A. I don't know, maybe I was . . . I was lucky.

. . .

BY THE COUNSELLOR (addressing the Chairperson)

Q. And can I ask a question?

A. Yes, yes, yes.

BY THE COUNSELLOR (addressing the claimant)

Q. Why did you stay home?

BY THE CHAIRPERSON (addressing the counsellor)

- Excellent question.

. . .

BY THE CHAIRPERSON (addressing the claimant)

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. . .

Q. So, Sir, if you gave your passport to your brother on February 7, 8 or 10, 2002, to get a visa, can you explain to me how your brother gave this to someone, then, at some point, the visa was issued on January 28, 2002. So, if it's a genuine visa, then, there's like a problem, Sir. How can you give a passport to your brother without a visa on February 7, 8 or 10 and have a visa in your passport dated January 28, 2002?

. . .

BY THE CHAIRPERSON (addressing the claimant)

- Listen, Sir, it's because every time we confront you, now, every time we confront you, Sir, you adjust your testimony, there. Now: "I made a mistake" Why Sir? I have repeated it I don't know how many times, like this you . . . I have repeated it at least four times, Sir, you gave your passport to your brother on the 6th, 7th, 8th, I . . . I did it intentionally, Sir, I repeated it intentionally so that if there was a problem, you would react.

Not even, it's when I confront you that you tell me: "*No, there is a mistake, I think that I gave it to my brother on the 20th.*"

. . .

BY THE CHAIRPERSON (addressing the claimant)

Q. Sir, does . . . "internal asylum" ring a bell?

A. It means asking for protection.

BY THE COUNSELLOR (addressing the claimant)

- Not internal asylum.

BY THE CHAIRPERSON (addressing the claimant)

- That's right. Because you see, Sir, for the . . . for the Algerians, specifically the French government . . . also provided . . . to the application for . . . refugee status, under the *Convention*, it allowed people to ask for internal asylum in France at the prefecture level.

. . .

BY THE CHAIRPERSON (addressing the claimant)

. . .

- . . . Sir, because I am beginning to learn where passports are purchased. So, there is the Quick, the Salem, then there is . . . there are two others, there, but you, you don't know where?

A. I don't know France very well, it was the first time that I . . . I had been over there, but I know it was in a café in Barbès.

Q. Yes, but that's it, but you do not know, now . . . outdoors, is it . . . the roof was red, was it, outside?

. . .

BY THE COUNSELLOR (addressing the chairperson)

- What I am trying to explain to the panel is that it was beyond his . . . his control, he had to wait for the documents to be sent to him . . .

. . .

A. Of course, but listen, now, that's not a State secret, that, photocopies can be made of the forms, now . . .

- We are not allowed, Sir, not at all, not on your life. Since the . . .

. . .

[Emphasis added.]

[13] In conclusion, there was a miscarriage of justice. After carefully reviewing the exchanges during the hearing, I am persuaded not only that the chairperson crossed the line from his role as an impartial adjudicator, but also that his constant interference prevented the applicant from presenting his case (*Farkas v. Canada (Minister of Citizenship and Immigration)*, [2001] F.C.J. No. 356 at paragraph 8 (F.C.T.D.) (QL), 2001 FCT 190 (F.C.T.D.) (CanLII); *Del Castillo v. Canada (Minister of Employment and Immigration)* (1994), 79 F.T.R. 207 at paragraph 24 (F.C.T.D.), [1994] F.C.J. No. 538 (F.C.T.D.) (QL)). Accordingly, notwithstanding the adverse credibility findings with regard to the applicant, this Court must intervene in order to allow the applicant to present his refugee claim once again before an impartial adjudicator.

[14] No question of general importance was raised by counsel and none will be certified in this case.

ORDER

**THE COURT ORDERS** that the application for judicial review of the decision by the Immigration and Refugee Board dated October 29, 2003, be allowed and that the matter be referred before a differently constituted panel for rehearing.

"Luc Martineau"

Judge

Certified true translation

Kelley A. Harvey, BA, BCL, LLB

**FEDERAL COURT**

**SOLICITORS OF RECORD**

| | |
|---|---|
| **DOCKET:** | IMM-9067-03 |
| **STYLE OF CAUSE:** | GUERMACHE, ABDEL-SALAM v. MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | MONTRÉAL, QUEBEC |
| **DATE OF HEARING:** | MAY 18, 2004 |

REASONS FOR ORDER

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AND ORDER: THE HONOURABLE MR. JUSTICE MARTINEAU

**DATE OF REASONS:** JUNE 16, 2004

APPEARANCES:

RACHEL BENAROCH FOR THE APPLICANT

DIANE LEMERY FOR THE RESPONDENT

SOLICITORS OF RECORD:

RACHEL BENAROCH FOR THE APPLICANT

MONTRÉAL, QUEBEC

MORRIS ROSENBERG FOR THE RESPONDENT

DEPUTY ATTORNEY GENERAL OF CANADA

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CanLII

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# Quiroz Mendez v. Canada (Citizenship and Immigration), 2011 FC 1150 (CanLII)

Date: 2011-10-14

File number: IMM-791-11

Other citations: 398 FTR 139 — [2011] FCJ No 1429 (QL)

Citation: Quiroz Mendez v. Canada (Citizenship and Immigration), 2011 FC 1150 (CanLII), <http://canlii.ca/t/fnj5k>, retrieved on 2019-11-13

Federal Court Cour fédérale

**Date: 20111014**
**Docket: IMM-791-11**
**Citation: 2011 FC 1150**

**Ottawa, Ontario, this 14th day of October 2011**
**Present: The Honourable Mr. Justice Kelen**
**BETWEEN:**

**ROSA MARIA QUIROZ MENDEZ**
**VIRIDIANA GARCIA QUIROZ**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board), dated December 20, 2010, that the applicants are not Convention refugees or persons in need of protection pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), because the applicants have adequate state protection in Mexico.

**FACTS**

**Background**

[2] The applicants are a mother and daughter from Mexico: Rosa Maria Quiroz Mendez (the principal applicant), and Viridiana Garcia Quiroz (the minor applicant), who was a minor at the time she made her claim, which was based upon the principal applicant's claim. They arrived in Canada on May 21, 2009, and claimed refugee status on June 15, 2009.

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[3] The principal applicant was sexually abused by her father from ages 4-10. She married as early as possible to escape her traumatic home life. She married Alejandro Garcia Lugo (Alejandro) on September 6, 1980.

[4] The abuse continued in her new home: she was the victim of physical violence, forced sexual intercourse, and death threats from her husband over the course of their 24 years living as husband and wife. During that time, the principal applicant called the police on many occasions (approximately 50 times) to come and remove her husband, which the police did. However, each time she did not make a formal complaint. She states that she was afraid to make a complaint because her husband's brother was a federal police officer.

[5] In May 2004, after her husband beat her and terrorized her especially severely, the principal applicant made a formal complaint for the first time. Alejandro was arrested, but was released on bail less then twelve hours later. The principal applicant states that she received threats from her husband and his mother if she did not withdraw her complaint. Her husband's brother also offered her money to withdraw the complaint. In July 2004, she complied and withdrew the complaint.

[6] The principal applicant and her husband separated after the incident in May 2004, but she states that he continued to harass her, call her and threaten her. He would not sign divorce papers, but she received a divorce automatically after they were separated for two years, in August 2006.

[7] In 2009, Alejandro told the principal applicant's daughter – the minor applicant – that he was going to kill the principal applicant. They went to the police, but the principal applicant states that no protection was provided to them. The applicants left Mexico for Canada on May 21, 2009. They filed their claims for refugee protection on June 15, 2009.

**The first request for adjournment**

[8] On October 5, 2010, counsel for the applicants made an "urgent" request for adjournment of the hearing, scheduled for October 15, 2010. The request stated that the applicants had only retained counsel that day. It also stated that the principal applicant was not aware of the contents of her Personal Information Form (PIF): a community worker had completed the PIF and mistakenly directed the principal applicant to sign the declaration that she understood English. In fact, the principal applicant did not understand English, and the PIF was never translated to her.

[9] The request further stated that a lawyer was mistakenly listed as the principal applicant's counsel in the PIF, but in fact this lawyer had not worked on the PIF, but rather had only provided an opinion to Legal Aid on her behalf. Counsel requested the adjournment to correct errors and make additions to the applicants' PIF and narrative, and she provided several possible hearing dates.

[10] The request for adjournment was denied, and the hearing proceeded on October 15, 2010.

**The hearing**

[11] At the outset of the hearing, counsel made another request for adjournment. The Member asked whether the grounds were any different from the previous request, and counsel responded that there were new grounds.

[12] Counsel explained that she had discovered the day before that, through the Board's error, the applicants had never received the Board's disclosure package. The Board had at first claimed that it sent the disclosure package to the principal applicant and the lawyer listed as her counsel in the PIF; however, upon further inquiry, a staff member at the Board admitted that they had in fact not sent the disclosure package to the applicants.

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[13] Counsel argued that it violated natural justice to require the applicants to prepare for and participate in the hearing without having the Board's disclosure package.

[14] The Member stated that, according to his records, the disclosure package was sent to the applicants. Counsel repeated that this was what the Board told her initially as well, but they later confirmed that they did not send the package to the applicants.

[15] At that point in the hearing, the following exchange occurred, the audio recording of which was played for the Court:

> MEMBER: Well, counsel, my ... my file indicates otherwise. So did you manage to get a copy of the disclosure?
> COUNSEL: No, I called the lawyer but he ...
> MEMBER: Okay, well ...
> COUNSEL: ... did not respond.
> MEMBER: ... I am going to make you a copy and you can review them at break time ...
> COUNSEL: Well I ...
> MEMBER: ... and we are proceeding today counsel, I mean there is nothing more to hear on this matter.
> COUNSEL: Could I speak to the legal department or something, I think it is in violation of ...
> MEMBER: You can do so after the hearing.
> COUNSEL: ... natural justice.
> MEMBER: You can do so after the hearing.
> COUNSEL: I did not know ...
> MEMBER: [*Raised tone of voice, as evident from the audio recording*] Do you want a copy now or at break time?
> COUNSEL: I need to review it with my client and would need some time to sit with her ...
> MEMBER: [*Harsh tone of voice*] I am giving you five minutes and then we are starting, with or without you. Okay, counsel, five minutes. It is 1:11, at 1:16 we are back in here.
> COUNSEL: Okay.
> MEMBER: You can take it up with legal after the hearing.

[16] Shortly after the hearing resumed, counsel repeated her objection to the hearing proceeding that day. Counsel also stated that she had not expected the hearing to proceed and had not made arrangements with her babysitter, and therefore she had to leave that day at 4:00 p.m. to pick up her daughter.

[17] The Member questioned the principal applicant until 2:30, at which point the hearing recessed for fifteen minutes. When the hearing resumed, the Member informed the counsel that she could question the applicants until 3:30 and then use the final 30 minutes for submissions, or she could question the applicants until 4:00 and provide written submissions within two weeks.

[18] At 3:30, the Member interrupted to remind counsel that she could use the remaining 30 minutes either to keep questioning or make her submissions. The following exchange occurred between the Member and counsel, as recorded in the hearing transcripts:

> COUNSEL: Well, I am going to have to question the minor claimant too, I want to question her.
> MEMBER: Well, that is fine, you are going to have to fit it in half an hour.

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COUNSEL: And suppose I am not done?
MEMBER: Well...
COUNSEL: My client as come all the way from Mexico to tell her story...
MEMBER: That is fine, you have until 4:00 o'clock to finish questioning; I am telling you now...
COUNSEL: There is no need sir for you to shout at me and to raise your voice...
MEMBER: ...gear your questions, if you want a few minutes we will take a little break and you can formulate your questions so that they fit within half an hour. You have to leave at 4:00 o'clock so you fit them in until 4:00.
COUNSEL: Sir, I do not appreciate your tone of voice.
MEMBER: Okay, we are taking a five minute break.
COUNSEL: I did not come here to be shouted at...
MEMBER: I heard you.
COUNSEL: ...not to raise your voice at me in that offensive manner...
MEMBER: We are going to take a five minute break, when we return you are going to continue questioning; whether it is the principal claimant, the minor claimant, you decide, you are going to wrap up the questions at 4:00...
COUNSEL: Sir, I feel very threatened by you, okay...
MEMBER: ...and you are going to...
COUNSEL: ...I feel extremely threatened by you right now, I am leaving; I feel threatened by you.

(Underlining indicates a raised voice and intemperate tone.)

[19] At that point, counsel left the hearing room. The audio recording of this portion of the hearing was also played for the Court.

[20] In her affidavit, counsel for the applicants at the hearing stated that she is herself a victim of domestic violence, and she felt very afraid and threatened in the situation. After counsel left the hearing, the Member told the applicants that he was reserving his decision, and that he would direct their counsel to provide written submissions, as well as details on any areas of questioning she felt still needed to be done. He would then decide whether they needed to reconvene for further testimony.

[21] After the hearing, counsel for the applicants made a motion for the Member to recuse himself due to a reasonable apprehension of bias. As discussed below, the Member denied the motion for recusal in his reasons for the decision.

**Decision under review**

[22] In a decision dated December 20, 2010, the Board found that the applicants were neither Convention refugees nor persons in need of protection pursuant to sections 96 and 97 of the Act. The Board found that the determinative issue in the claim was the availability of state protection.

*Motion for recusal*

[23] Before analyzing the claims, the Board Member decided whether he must recuse himself because of a reasonable apprehension of bias. The Board summarized counsel's motion for recusal, and recounted the incident described above that occurred during the hearing.

[24] The Board stated the test for reasonable apprehension of bias, as formulated in *Committee for Justice and Liberty et al. v. National Energy Board et al.*, 1976 CanLII 2 (SCC), [1978] 1 S.C.R. 369 at 394:

> The proper test to be applied in a matter of this type was correctly expressed by the Court of Appeal. As already seen by the quotation above, the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."

[25] The Board stated that the determination of whether there is a reasonable apprehension of bias must take into account the presumption of impartiality, and therefore a real likelihood of bias must be demonstrated. The Board also stated that all members of the Refugee Protection Division take an oath of office in which they affirm that they will carry out their duties impartially and comply with the *Code of Conduct for Members*. This Code of Conduct also affirms that members will make decisions on the merits of each case and not be influenced by improper considerations.

[26] The Board found that the test for a reasonable apprehension of bias was not met. The Board relied in the decision in *The Minister of Citizenship &Immigration v. Cetin*, [2007] F.C.J. No. 1786, Docket IMM-5621-06. In that case, the Court found that there was no reasonable apprehension of bias, but rather that the Minister's counsel had provoked the Member after the Member insisted that the hearing be completed within a certain time period. The Court also found that the Minister's counsel had been prevented from fully presenting his case by his own poor decision to leave the hearing.

[27] The Board found that this decision recognized the Board's authority to be "firm and measured with counsel with respect to the conduct of a hearing." The Board found that, as in *Cetin*, it was counsel's decision to leave the hearing prematurely instead of finishing questioning the claimants. The Board also found that counsel was attempting to provoke the Member, again similar to *Cetin*, which justified a "stern" response.

[28] The Board also addressed whether the hearing was incomplete because counsel had not yet questioned the minor applicant. The Board maintained that it had not prevented counsel from completing her questioning of the claimants as she saw fit, but also stated that the minor applicant's claim was based on the principal applicant's claim, and that counsel had not presented any persuasive evidence that the minor applicant's testimony was critical to determining the claims. The Board concluded that it was unnecessary to examine the minor claimant.

[29] The Board found no reasonable apprehension of bias, and denied the motion for recusal.

*State protection*

[30] The Board recited the guiding principles in determining whether there is adequate state protection. The Board stated that, except in situations of complete state breakdown, the state is presumed to be capable of protecting its citizens. To rebut this presumption, the Board stated that the claimants must provide "clear and convincing" evidence of the state's inability to protect its citizens: *Canada (Attorney General) v. Ward*, 1993 CanLII 105 (SCC), [1993] 2 S.C.R. 689.

[31] The Board stated that claimants are required to approach the state for protection "in situations where state protection might be reasonably forthcoming": *Ward*, above. The Board went on that, in "the absence of a compelling explanation, a failure to pursue state protection opportunities within the home state will usually be fatal to a refugee claim, at least where the state is a functioning democracy with a willingness and the apparatus necessary to provide a measure of protection to its citizens." The Board concluded from the evidence before it

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that Mexico is a democracy, and therefore found that the claimants "must show that they have taken all reasonable steps in the circumstances to seek protection."

[32] The Board then reviewed the principal applicant's testimony regarding her efforts to seek state protection. It noted that the principal applicant called the police on many occasions, and each time she called they came and took her husband away, sometimes detaining him. On all but one occasion, the principal applicant did not file a complaint because she feared what her husband would do. On the one occasion she filed a formal complaint, she eventually withdrew it after her husband and his family threatened her and offered her money.

[33] The Board found that the principal applicant's failure to file complaints against her husband was unreasonable. The Board found that if the principal applicant had pursued a formal complaint, her husband would have been incarcerated. The Board noted that the principal applicant did not report her husband and his family's threats and bribes to the police, and that "no persuasive evidence was presented to indicate that the police would not take further action if the threats and bribes were also reported to them."

[34] The Board rejected the argument that the principal applicant was afraid to file a formal complaint because her husband's brother was a police officer: the Board found no persuasive evidence that this brother had any influence over police decisions, and given that the principal applicant's husband was aware each time she called the police, the fact that his brother was a police officer would have had little effect on the consequences of filing a complaint.

[35] The Board acknowledged that the documentary evidence indicated problems with regard to corruption in Mexico:

> [45] I would be remiss if I did not acknowledge and consider that there is information in the documentation to indicate that inefficiency, bribery and corruption remain issues in Mexican security forces at all levels, as well as within the public service sector. However, weighed against this is persuasive evidence that indicates that Mexico candidly acknowledges its past problems and is making serious efforts to rectify the corruption and impunity that exists.

[36] The Board reviewed the United States Department of State *Country Report on Human Rights Practices for 2009* for Mexico (DOS Report), and a 2007 report titled "A Profile of Police Forces in Mexico." The Board found that the preponderance of evidence suggested that, despite some problems with corruption, Mexico was able to protect victims of crime. He extensively reviewed efforts to combat police corruption, and the creation of new bodies to address organized crime and drug cartels.

[37] The Board then turned to the issue of domestic and gender-based violence in Mexico: "Mexico has had problems in the past in dealing with domestic violence and violence against women. However, there is persuasive evidence that indicates that Mexico candidly acknowledges its past problems and is making serious efforts to deal with these issues."

[38] The Board referred to the portion of the DOS Report entitled 'Women,' which stated that Mexico had enacted legislation prohibiting domestic violence and imposing detention and fines for violating that legislation. The Board stated there was federal legislation specifically addressing violence against women, and that many states have laws prohibiting domestic violence. The Board also noted the presence of women's shelters, a hotline for female victims of domestic abuse, and a National Institute for Women.

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[39] The Board acknowledged the evidence that victims fail to report abuse for a number of reasons, including "fear of reprisal by the perpetrator." The Board noted that the new legislation was in part focused on making victims more aware of the remedies available to them.

[40] The Board stated that it had considered the documentary evidence submitted by the applicants regarding state protection. It reviewed a few individual pieces of documentary evidence, but found that some of it was unsupported and therefore deserving of little weight.

[41] The Board stated at paragraph 63:

> . . . Counsel has also included many articles about domestic abuse and gender violence issues and cases from Mexico and around the world. I accept that many countries around the world struggle to deal effectively with these issues, however, many countries, such as Mexico, have enacted laws to combat domestic violence and violence against women and have put in place measures to ensure that the laws are enforced.

[42] The Board concluded that the applicants had failed to rebut the presumption of state protection, and that therefore their claims failed.

**LEGISLATION**

[43] Section 96 of the Act grants protection to Convention refugees:

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| **96.** A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion, | **96.** A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques : |
| (*a*) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or | *a*) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays; |
| (*b*) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country. | *b*) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner. |

[44] Section 97 of the Act grants protection to persons whose removal from Canada would subject them personally to a risk to their life, or of cruel and unusual punishment, or to a danger of torture:

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| **97.** (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual | **97.** (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée : |

residence, would subject them personally

(*a*) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or
(*b*) to a risk to their life or to a risk of cruel and unusual treatment or punishment if
(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,
(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,
(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and
(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

*a*) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'ar- ticle premier de la Convention contre la torture;
*b*) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :
(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,
(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,
(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,
(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

[45] Subsection 48(4) of the *Refugee Protection Division Rules*, SOR/2002-228, requires the Board to consider any relevant factors in deciding whether to grant an application to change the date or time of a proceeding:

**48.** (4) In deciding the application, the Division must consider any relevant factors, including

(*a*) in the case of a date and time that was fixed after the Division consulted or tried to consult the party, any exceptional circumstances for allowing the application;

(*b*) when the party made the application;

(*c*) the time the party has had to prepare for the proceeding;

(*d*) the efforts made by the party to be ready to start or continue the proceeding;

(*e*) in the case of a party who wants more time to obtain information in support of the party's arguments, the ability of the Division to proceed

**48.** (4) Pour statuer sur la demande, la Section prend en considération tout élément pertinent. Elle examine notamment :

*a*) dans le cas où elle a fixé la date et l'heure de la procédure après avoir consulté ou tenté de consulter la partie, toute circonstance exceptionnelle qui justifie le changement;

*b*) le moment auquel la demande a été faite;

*c*) le temps dont la partie a disposé pour se préparer;

*d*) les efforts qu'elle a faits pour être prête à commencer ou à poursuivre la procédure;

*e*) dans le cas où la partie a besoin d'un délai supplémentaire pour

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| in the absence of that information without causing an injustice; | obtenir des renseignements appuyant ses arguments, la possibilité d'aller de l'avant en l'absence de ces renseignements sans causer une injustice; |
| (*f*) whether the party has counsel; | *f*) si la partie est représentée; |
| (*g*) the knowledge and experience of any counsel who represents the party; | *g*) dans le cas où la partie est représentée, les connaissances et l'expérience de son conseil; |
| (*h*) any previous delays and the reasons for them; | *h*) tout report antérieur et sa justification; |
| (*i*) whether the date and time fixed were peremptory; | *i*) si la date et l'heure qui avaient été fixées étaient péremptoires; |
| (*j*) whether allowing the application would unreasonably delay the proceedings or likely cause an injustice; and | *j*) si le fait d'accueillir la demande ralentirait l'affaire de manière déraisonnable ou causerait vraisemblablement une injustice; |
| (*k*) the nature and complexity of the matter to be heard. | *k*) la nature et la complexité de l'affaire. |

[46] Rule 22 of the *Federal Courts Immigration and Refugee Protection Rules*, SOR/93-22, states that costs will only be awarded for special reasons:

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| **22.** No costs shall be awarded to or payable by any party in respect of an application for leave, an application for judicial review or an appeal under these Rules unless the Court, for special reasons, so orders. | **22.** Sauf ordonnance contraire rendue par un juge pour des raisons spéciales, la demande d'autorisation, la demande de contrôle judiciaire ou l'appel introduit en application des présentes règles ne donnent pas lieu à des dépens. |

**ISSUES**

[47] The applicants raise the following issues in their submissions:

a. That the Board erred in its analysis of whether there was a reasonable apprehension of bias by the Board Member hearing this case;
b. That the Board denied the applicants procedural fairness:
   i. By refusing to grant the applicants an adjournment following its failure to provide the applicants with disclosure;
   ii. By not allowing the applicants a reasonable opportunity to present their case by limiting their counsel's ability to question them;
c. That the Board selectively used the evidence, ignored the evidence and misconstrued the evidence resulting in a flawed state protection analysis.

[48] I would reframe the issues as follows:

a. Did the Board breach the principles of procedural fairness by refusing to grant an adjournment or by refusing to grant an additional hearing?
b. Did the Board's conduct give rise to a reasonable apprehension of bias?

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c. Was the Board's finding regarding state protection unreasonable?

**STANDARD OF REVIEW**

[49] In *Dunsmuir v. New Brunswick*, 2008 SCC 9 (CanLII), [2008] 1 S.C.R. 190, the Supreme Court of Canada held at paragraph 62 that the first step in conducting a standard of review analysis is to "ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of (deference) to be accorded with regard to a particular category of question": see also *Canada (M.C.I.) v. Khosa*, 2009 SCC 12 (CanLII), [2009] 1 S.C.R. 339, per Justice Binnie at para 53.

[50] The question of whether the applicants rebutted the presumption of state protection is a question of mixed fact and law, to be reviewed on a standard of reasonableness: see my decisions in *Monjaras v. Minister of Citizenship and Immigration*, 2010 FC 771 (CanLII) at para 15; and *Perez v. Minister of Citizenship and Immigration,* 2009 FC 1029 (CanLII) at para 25.

[51] In reviewing the Board's decision using a standard of reasonableness, the Court will consider "the existence of justification, transparency and intelligibility within the decision-making process" and "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir*, above, at paragraph 47; *Khosa*, above, at para 59.

[52] Questions of procedural fairness, including whether the Board's conduct gives rise to a reasonable apprehension of bias, are to be reviewed on a standard of correctness: *Dunsmuir*, above at paras 55 and 90; and *Khosa*, above at paragraph 43.

**ANALYSIS**

**Issue #1: Did the Board breach the principles of procedural fairness by refusing to grant an adjournment or by refusing to grant an additional hearing?**

*The adjournment request*

[53] The applicants submit that they were denied the ability to review the Board's disclosure before the hearing, and therefore they did not know the case to be met against them. Counsel informed the Board that the disclosure was not sent to the applicants in error, and the applicants submit that the Board's refusal of the adjournment in light of this information breached the principles of procedural fairness.

[54] The respondent submits that the Board's denial of the adjournment was reasonable, in light of the ample time the applicants had to retain and instruct counsel. The respondent further submits that the applicants have not demonstrated that they were denied a fair hearing as a result of being denied the adjournment, and therefore there was no breach of procedural fairness.

[55] The granting of adjournments or postponements is discretionary in nature and there is no presumption of entitlement: *Sierra v. Minister of Citizenship and Immigration*, 2009 FC 1048 (CanLII) at para 56. However, the Board is required to consider all relevant factors before reaching its decision. Subsection 48(4) of the *Refugee Protection Division Rules*, reproduced above, contains a non-exhaustive list of relevant factors in this determination.

[56] As I stated previously in *Modeste v. Minister of Citizenship and Immigration*, 2006 FC 1027 (CanLII), the Board must at least indicate that it has turned its mind to these factors before issuing a negative decision on a request for adjournment. As Madam Justice Carolyn Layden-Stevenson stated in *Ramadani v. Minister of Citizenship and Immigration,* 2005 FC 211 (CanLII) at paragraph 11:

> In my view, the RPD must, at a minimum, indicate that it has had regard to the relevant factors enumerated in *Siloch, supra*, before arriving at a negative decision. Its failure to do

so constitutes a reviewable error. I note that my colleagues Madam Justice Heneghan and Mr. Justice O'Keefe arrived at a similar conclusion in *Dias v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 84 (CanLII), [2003] F.C.J. No. 125, 2003 FC 84 and *Sandy v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 1770, 2004 FC 1468 (CanLII).

[57] Relying upon the hearing transcripts, the Court finds that the Board failed to consider the relevant factors before denying the adjournment. The Board stated that its records indicated that the applicants had in fact received disclosure. When counsel responded that she had received confirmation that the disclosure was never sent, the following exchange occurred:

> MEMBER: Well, counsel, my ... my file indicates otherwise. So did you manage to get a copy of the disclosure?
> COUNSEL: No, I called the lawyer but he ...
> MEMBER: Okay, well ...
> COUNSEL: ... did not respond.
> MEMBER: ... I am going to make you a copy and you can review them at break time ...
> COUNSEL: Well I ...
> MEMBER: ... and we are proceeding today counsel, I mean there is nothing more to hear on this matter.

[58] The Board gave no indication that it had considered any of the factors set out in subsection 48(4) of the *Refugee Protection Division Rules*. The Court finds that, had the Board considered those factors, at least some of the factors may have weighed in favour of granting the adjournment.

[59] The failure of the Board to send the disclosure package to the applicants would likely constitute "exceptional circumstances" for allowing an adjournment. The lack of disclosure also impacted the amount of time the applicants had to prepare for the hearing. Counsel emphasized that she had made efforts to obtain the Board's disclosure and prepare for the hearing, by contacting the Board and the lawyer mistakenly listed as counsel on the principal applicant's PIF.

[60] Thus, the denial of the application for adjournment in this case, without any analysis of the relevant factors, constitutes a reviewable error by the Board. On its face, the denial constitutes a breach of the rules of natural justice and the right to a fair hearing. It is not a fair hearing if counsel for the applicants was not able to properly prepare for the hearing, as stated by Justice Sean Harrington in *Anand v. Minister of Citizenship and Immigration*, 2004 FC 302 (CanLII) at paras 1 and 4:

> [1] Fundamental rights can never be sacrificed at the altar of administrative efficiency. . . .
>
> [4] Shortly before the scheduled hearing of his application his lawyer wrote to say he could no longer act. Mr. Anand appointed a new lawyer who asked for a postponement at the hearing as she was not fully prepared not only because of the freshness of the appointment but also because she was only able to obtain some of the documentation from his former lawyer a few days earlier. The Board refused to grant an adjournment

[61] The application for judicial review must therefore be granted, and the applicants' claims remitted to the Board for re-determination by a different panel.

*Request for additional hearing*

[62] While it is not necessary to address this issue in light of the Court's finding regarding the adjournment request, the Court finds that the refusal to grant additional hearing time did not constitute a breach of procedural fairness.

[63] When the hearing ended before counsel had completed her questioning of the applicants, the Board instructed counsel to make detailed written submissions on any remaining areas of questioning of the principal applicant, and proposed areas of questioning of the minor applicant, to allow the Board to determine whether to reconvene for additional testimony.

[64] Counsel's written submissions did not provide details on the relevant areas of questioning remaining, but simply stated the need for further questioning on the "core issues of state protection and IFA." The submissions also asserted that counsel "wishes to question the minor claimant, as well." However, no further details of the proposed questioning were provided.

[65] Thus, the Court finds that the Board afforded the applicants the opportunity to rectify any potential unfairness that may have resulted from insufficient time during the hearing. Based on the submissions provided by counsel, it was open to the Board to decide that no additional hearing time was necessary to ensure procedural fairness. The Court therefore finds no breach of procedural fairness in this aspect of the Board's decision.

**Issue #2: Did the Board's conduct give rise to a reasonable apprehension of bias?**

[66] The applicants submit that the Board's conduct gave rise to a reasonable apprehension of bias. While the applicants have framed their submissions in terms of the reasonableness of the Board's decision regarding reasonable apprehension of bias, the Court finds that the Board is entitled to no deference in its decision on this issue.

[67] The test for a reasonable apprehension of bias is not in dispute. The oft-cited articulation of the test comes from the dissenting opinion of Justice de Grandpré at page 394 of *Committee for Justice and Liberty et al.*, *supra*:

> The proper test to be applied in a matter of this type was correctly expressed by the Court of Appeal. As already seen by the quotation above, the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."

[68] Bias is a serious allegation, and therefore it cannot be based on conjecture, speculation or mere impression: *Arrachch v. Minister of Citizenship and Immigration,* 2006 FC 999 (CanLII); *Arthur v. Attorney General*, 2001 FCA 223 (CanLII), (2001), 283 N.R. 346. Given the presumption of impartiality on the part of the decision-maker, a real likelihood of bias must be demonstrated by the applicants: *Arsenault-Cameron v. Prince Edward Island,* 1999 CanLII 641 (SCC), [1999] 3 S.C.R. 851 at paragraph 2.

[69] The applicants submit that denying the request for adjournment raised a reasonable apprehension of bias. They argue that the Member disregarded counsel's explanations regarding the lack of disclosure, and cut

counsel off in her arguments for the adjournment. This conduct, the applicants submit, demonstrated that the Member had a closed mind to the applicants and their counsel.

[70] The applicants also submit that the Board's refusal to grant an additional hearing day gives rise to a reasonable apprehension of bias. Given that counsel had questioned the principal applicant for less than one hour, and given that there were two claimants in the case, the applicants submit that the Board's insistence on concluding the hearing that day demonstrated that it was not open to persuasion.

[71] The applicants further submit that the Member's conduct was intemperate during the hearing, which caused counsel to fear for her safety and leave the hearing room. The applicants submit that the Member shouted at counsel, and they direct the Court to the hearing transcript, and to the audio recording of the hearing. The applicants also rely on a sworn affidavit from their counsel at the hearing, which states that the Member shouted at her and acted aggressively towards her.

[72] The applicants point out that the Member left his chair during this incident. They submit that the Board's decision misconstrues this by stating that the hearing was about to recess, and that is why the Member had left his chair. The applicants submit that the hearing had not recessed.

[73] The applicants submit that when the totality of the circumstances are considered, an informed person, viewing the matter realistically and practically – and having thought the matter through, would think that the Member would more likely than not, not decide the claims fairly.

[74] The respondent submits that when viewed in context, the Member's reaction was not so out of proportion to counsel's behaviour as to raise a reasonable apprehension of bias. The respondent acknowledges that the Member raised his voice and spoke sternly, but submits it was in response to counsel's refusal to accept his rulings. The respondent further submits that the Board was entitled to rely on a Statement of Service stating the applicants received disclosure, and therefore the decision to deny the adjournment did not give rise to a reasonable apprehension of bias.

[75] The Court does not agree with all of the applicants' characterizations of what occurred during the hearing. It is clear that there was a disagreement between the Member and counsel regarding (a) whether to adjourn the hearing; and (b) whether to grant an additional hearing day for further questioning. Counsel for the applicants is partly to blame for this conflict: she did not expect the hearing to proceed, and therefore had not made arrangements to stay as long as necessary to complete the hearing. It was counsel's responsibility to be prepared to proceed if the request for adjournment was denied. Her failure to be prepared precipitated the incident at the end of the hearing.

[76] Furthermore, the hearing transcripts indicate that the Member had tried to initiate a recess when the applicants allege that he left his chair. He stated: "Okay, we are taking a five minute break." Thus, the Member's explanation that he was out of his chair because the hearing was about to recess is plausible.

[77] However, considering the totality of the circumstances, and even in light of the presumption of impartiality of the Board, the Court finds that there was a reasonable apprehension of bias in this case.

[78] In *Guermache v. Minister of Citizenship and Immigration*, 2004 FC 870 (CanLII), Justice Luc Martineau described the importance for a Board member to conduct the hearing in a proper manner:

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> [4] Members have a difficult but essential role to play. . . .
>
> [5] With that in mind, the scale of the members' tasks must not cause them to lose sight of the fact that the rules of natural justice must be observed and that their conduct during hearings and applications for protection must, at all times, be irreproachable and objective. It goes without saying that the most basic courtesy and politeness are *de rigueur*. There is no place for intimidation, contempt, and offensive innuendo, nor for harshness or inappropriate language. As the Right Honourable Mr. Justice Fauteux wrote in the *Livre du magistrat* ["a book for judges"], "[TRANSLATION] The judge will ensure the climate necessary for the operation of justice by his moderation, his discipline and his courtesy in his relations with counsel, the parties and the witnesses." (The Right Honourable Gérald Fauteux, *Le livre du magistrat*, Minister of Supply and Services Canada, 1980, at page 49).

[79] Thus, the presiding Member must conduct the hearing in an objective, moderate, irreproachable manner, with politeness and basic courtesy. The Court knows, as Justice Harrington said in *Anand*, above, at paragraph 13, that the Board has "a heavy workload and tight scheduling." Board members are under stress. In the case at bar, counsel for the applicants before the Board refused to accept the Board Member's procedural ruling that she complete her questioning by 4:00 p.m., which was the time she said she had to leave to pick up her child from the babysitter.

[80] The Board Member then raised his voice in an intemperate manner at the applicants' counsel. Counsel for the respondent before the Court described the Board Member as "shouting" at the applicants' counsel. The Board Member was very frustrated by her refusal to finish her questioning by 4:00 p.m., which was the deadline she imposed upon herself.

[81] Upon listening three times to the relevant excerpts of the audio recording, the Court can only conclude that the presiding Member lost control of his demeanour, raised his voice by shouting in an angry tone, which reflected that he lost his temper with the applicants' counsel. A reasonable observer in the hearing room would likely think that the presiding Member was angry at the applicants' counsel, and in a state of mind against the applicants. If a judge is angry and shouting at a lawyer, a reasonable person would have a reasonable apprehension that the judge was biased against that lawyer's case.

[82] Thus, the Court finds that a reasonable person informed of all these circumstances would conclude that the Board would more likely than not, not decide the matter fairly.

**Issue #3: Was the Board's finding regarding state protection unreasonable?**

[83] The Court will not need to decide this issue to determine the application for judicial review. However, the Court must note that the Board Member gave "very little weight" to the declaration of Dr. Alicia Elena Pérez Duarte y Norona, which stated that Mexican officials responsible for enforcing the laws against domestic and gender-based violence are negligent. In two judgments of this Court, decided subsequent to the Board's decision in this case, Justices Roger T. Hughes and Donald J. Rennie recognized Dr. Pérez Duarte y Norona as a credible expert and gave her evidence great weight: see *I.M.P.P. v. Minister of Citizenship and Immigration*, 2011 FC 712 (CanLII) at paras 9-11; and *Rodriguez v. Minister of Citizenship and Immigration*, 2011 FC 1017 (CanLII) at para 12.

**COSTS**

[84] The applicants submit that the "egregious conduct by the Board Member" justifies the awarding of costs on a solicitor and client basis. I stated the following regarding granting costs in immigration cases in *Yadav v. Minister of Citizenship and Immigration*, 2010 FC 140 (CanLII), at paragraph 39:

> In terms of costs, the threshold for "special reasons" within the meaning of Rule 22 is high. In other words, in immigration litigation there is a "no costs" regime. Special reasons may exist where the Minister's conduct is "unfair, oppressive, improper or actuated by bad faith." See: *Uppal v. Canada (MCI)*, [2005] F.C.J. No. 1390 (QL) at paragraph 8 (QL). There was no malicious intent on the part of respondent or on the part of the applicant in bringing this motion. . . .

[85] I do not find the Board's conduct in this case so egregious as to justify the granting of costs. The Board Member was provoked by counsel at the hearing.

**CONCLUSION**

[86] The Court finds that the Board's decision must be set aside because of the Board's failure to consider all the relevant factors in deciding whether to grant an adjournment, and because the Member's conduct gave rise to a reasonable apprehension of bias. Therefore, the judicial review is granted, and the applicants' claims will be sent back to the Board for re-determination by a different panel.

[87] No question is certified.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** the application for judicial review is granted, and the applicants' claims are referred back to the Immigration and Refugee Board for reconsideration by a different panel.

"Michael A. Kelen"
Judge

**FEDERAL COURT**

**NAME OF COUNSEL AND SOLICITORS OF RECORD**

| | |
|---|---|
| **DOCKET:** | IMM-791-11 |
| **STYLE OF CAUSE:** | ROSA MARIA QUIROZ MENDEZ, VIRIDIANA GARCIA QUIROZ v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | Toronto, Ontario |
| **DATE OF HEARING:** | September 27, 2011 |
| **REASONS FOR JUDGMENT AND JUDGMENT:** | Kelen J. |

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CanLII

# Farkas v. Canada (Minister of Citizenship and Immigration), 2001 FCT 190 (CanLII)


| | |
|---|---|
| Date: | 2001-03-12 |
| File number: | IMM-5890-99 |
| Other citation: | [2001] FCJ No 356 (QL) |
| Citation: | Farkas v. Canada (Minister of Citizenship and Immigration), 2001 FCT 190 (CanLII), <http://canlii.ca/t/pnf>, retrieved on 2019-11-13 |


**Date:** 20010312

**Docket:** IMM-5890-99

**Neutral citation:** 2001 FCT 190

**BETWEEN:**

**SZILVIA SCHENKERNE FARKAS, ZSOLT JANOS SCHENKER,**

**ANDRAS RICHARD SZTOJKA and SZILVIA SCHENKER**

Applicants

- and -

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

Respondent

**REASONS FOR ORDER**

**HENEGHAN J.**

**INTRODUCTION**

[1] Szilvia Schenkerne Farkas, Zsolt Janos Schenker, Andras Richard Sztojka and Szilvia Schenker (the "Applicants") seek judicial review of the decision of the Immigration and Refugee Board, Convention Refugee Determination Division (the "Board"), dated November 4, 1999. The Board determined that the Applicants were not Convention refugees.

**FACTS**

[2] Szilvia Schenkerne Farkas is the principal applicant. She is the common-law wife of Zsolt Janos Schenker, the mother of Szilvia Schenker and the step-mother of Andras Richard Sztojka. All the applicants live together as a *de facto* family.

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[3] The Applicants came to Canada in March, 1998, arriving in Toronto. Their claim for Convention refugee status was advanced in May 1998 on the grounds of nationality, specifically on the basis of being Roma and belonging to the "Rumungro" tribe, meaning Hungarian Gypsy. The principal Applicant and the male adult claimant testified before the Board about the bases for their fear of persecution in Hungary. Documentary evidence was also submitted to the Board.

[4] The Board concluded that the Applicants were not Convention refugees, on the ground that they had not met the burden to credibly establish that there was a serious possibility that they would face persecution in Hungary. The Board found that the Applicants' evidence lacked credibility.

[5] The Applicants raise several issues in this application for judicial review, including erroneous findings of facts, ignoring and failing to consider relevant evidence, selective consideration of the documentary evidence, failure to apply the proper test with respect to the well-foundedness of the Applicants' fear of further persecution in Hungary, alleged breach of natural justice by the Board in improperly relying on standardized "boiler plate" decisions for Hungarian Roma claimants, and the aggressive participation by a Board Member, Berzoor Popatia in the examination of the principal Applicant.

[6] The Respondent takes the position that the Board applied the proper test for determining whether the Applicants were Convention refugees, and properly made credibility findings which is the specific task assigned to the Board. Furthermore, the Respondent denies that the Board committed any breach of natural justice as alleged by the Applicants. With respect to the issue raised about the participation of one Board Member in the examination of the principal Applicant, the Respondent argues that such participation is appropriate as part of the fact-finding process and in any event, the Applicant did not raise any issue of bias against that Member during the hearing.

**ANALYSIS**

[7] Upon my review of the record and reasons, it appears that the Board did not act in accordance with the requirements of procedural fairness in the manner in which it conducted the hearing into the Applicants' claim.

[8] The persistent and aggressive questions of the principal Applicant by Board Member Berzoor Popatia, went too far. In my opinion, this Board Member crossed the line from her rôle as an impartial adjudicator to becoming a participant in the arena. In this regard, I refer to the exchanges between the Board Member and the principal Applicant at pages 480 to 485 of the transcript. The Board Member went further in her questions than simply seeking clarification of the female Applicant's answers.

[9] For that reason, the application for judicial review is allowed and the matter is remitted to the Board, for redetermination before a differently constituted panel.

[10] Although counsel for the Applicants submitted a question for certification, I am of the opinion no question should be certified in light of my disposition of the application.

"E. Heneghan"

J.F.C.C.

Toronto, Ontario

March 14, 2001

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**FEDERAL COURT OF CANADA**

**Names of Counsel and Solicitors of Record**

COURT NO: IMM-5890-99

STYLE OF CAUSE: SZILVIA SCHENKERNE FARKAS, ZSOLT JANOS SCHENKER, ANDRAS RICHARD SZTOJKA and SZILVIA SCHENKER

Applicants

- and -

THE MINISTER OF CITIZENSHIP

AND IMMIGRATION

Respondent

DATE OF HEARING: WEDNESDAY, OCTOBER 25, 2001

PLACE OF HEARING: TORONTO, ONTARIO

REASONS FOR ORDER BY: HENEGHAN J.

DATED: WEDNESDAY, MARCH 14, 2001

**APPEARANCES BY:** Mr. Rocco Galati

For the Applicants

Mr. Stephen H. Gold

For the Respondent

**SOLICITORS OF RECORD:** Galati, Rodrigues & Associates

Barristers & Solicitors

203-637 College St.

Toronto, Ontario

M6G 1B5

For the Applicants

Morris Rosenberg

Deputy Attorney General of Canada

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For the Respondent

**FEDERAL COURT OF CANADA**

**Date:** 20010314

**Docket:** IMM-5890-99-00

**Between:**

**SZILVIA SCHENKERNE FARKAS, ZSOLT JANOS SCHENKER, ANDRAS RICHARD SZTOJKA and SZILVIA SCHENKER**

Applicants

- and -

**THE MINISTER OF CITIZENSHIP**

**AND IMMIGRATION**

Respondent

**REASONS FOR ORDER**

CanLII

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# Whelton v. Mercier et al., 2004 NBCA 83 (CanLII)

Date: 2004-10-28

File number: 189/03/CA

Other citations: 277 NBR (2d) 251 — 246 DLR (4th) 110 — [2004] NBJ No 411 (QL)

Citation: Whelton v. Mercier et al., 2004 NBCA 83 (CanLII), <http://canlii.ca/t/1j10f>, retrieved on 2019-11-13

COURT OF APPEAL OF
NEW BRUNSWICK

189/03/CA

| | |
|---|---|
| JOHN WHELTON | JOHN WHELTON |
| (Plaintiff)<br>APPELLANT | (Demandeur)<br>APPELANT |
| - and - | - et - |
| PIERRE MERCIER, 2934752 CANADA INC., a corporation doing business in New Brunswick under the name and style of HIGHLAND TRANSPORT, and F.I.P.A. TRANSPORT LTÉE, a corporation | PIERRE MERCIER, 2934752 CANADA INC., une corporation faisant affaire au Nouveau-Brunswick sous l'appellation commerciale HIGHLAND TRANSPORT, et F.I.P.A. TRANSPORT LTÉE |
| (Defendants)<br>RESPONDENTS | (Défendeurs) INTIMÉS |
| - and - | - et - |
| ASSOCIATION DES JURISTES D'EXPRESSSION FRANÇAISE DU NOUVEAU-BRUNSWICK | ASSOCIATION DES JURISTES D'EXPRESSSION FRANÇAISE DU NOUVEAU-BRUNSWICK |
| INTERVENOR | INTERVENANTE |
| - and - | - et - |
| THE ATTORNEY GENERAL FOR NEW BRUNSWICK | PROCUREUR GÉNÉRAL DU NOUVEAU-BRUNSWICK |
| INTERVENOR | INTERVENANTE |

Whelton v. Mercier et al., 2004 NBCA 83

CORAM:
The Honourable Chief Justice Drapeau
The Honourable Justice Deschênes
The Honourable Justice Richard

Appeal from a decision of the Court of Queen's Bench:
November 24, 2003

Appeal heard:
May 13, 2004

Judgment rendered:
October 28, 2004

Reasons for judgment by:
The Honourable Chief Justice Drapeau

Concurred in by:
The Honourable Justice Deschênes
The Honourable Justice Richard

Counsel at hearing:

For the appellant:
Micheline Gleixner and Brigitte Sivret

For the respondent Highland Transport:
Monika L.M. Zauhar, Amanda J. Frenette
and Glen S. Gallant

For the Intervenor l'Association des juristes d'expression française du Nouveau-Brunswick:
Christian E. Michaud

For the Intervenor The Attorney General for
New Brunswick:
Gaétan Migneault

THE COURT

The appeal is allowed, with costs.

Whelton c. Mercier et al., 2004 NBCA 83

CORAM:
L'honorable juge en chef Drapeau
L'honorable juge Deschênes
L'honorable juge Richard

Appel d'une décision de la Cour du Banc de la Reine :
le 24 novembre 2003

Appel entendu :
le 13 mai 2004

Jugement rendu :
le 28 octobre 2004

Motifs de jugement :
L'honorable juge en chef Drapeau

Souscrivent aux motifs :
L'honorable juge Deschênes
L'honorable juge Richard

Avocats à l'audience :

Pour l'appelant :
Micheline Gleixner et Brigitte Sivret

Pour l'intimée Highland Transport :
Monika L.M. Zauhar, Amanda J. Frenette
et Glen S. Gallant

Pour l'intervenante l'Association des juristes d'expression française du Nouveau-Brunswick :
Christian E. Michaud

Pour l'intervenant le Procureur général du Nouveau-Brunswick :
Gaétan Migneault

LA COUR

L'appel est accueilli avec dépens.

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The following judgment was delivered by

DRAPEAU, C.J.N.B.

[1] This appeal raises three novel and particularly interesting questions of general importance. Two of these issues are procedural in nature. The other involves substantive law.

[2] The first procedural question requires an interpretation of Rule 39.05 of the Rules of Court ("Language of Proceeding"). The question is whether a respondent who intends to use at the hearing an official language other than the language specified in the Notice of Motion must, pursuant to Rule 39.05(1), notify the clerk accordingly, even if the respondent's choice of official language is revealed in his or her pleadings and the affidavits that he or she filed are drafted in that language. The second procedural question is whether summary judgment is available to a moving party who has possession or control of documents that relate to a matter in issue and has not delivered an Affidavit of Documents as required by a Notice Requiring Affidavit of Documents served in accordance with Rule 31.03. For the reasons that follow, I would answer the first question in the affirmative and the second question in the negative. As for the question of substantive law, it can be outlined as follows:

[3] Canadian businesses authorized to engage in interprovincial and international trucking frequently use leased "truck tractors" for the purpose of transporting goods for a fee. Just as frequently, the drivers of these vehicles are supplied by independent third parties. Under the terms of their operating licences, both Canadian and American, those businesses must register in their names any leased truck tractors. When the elements just mentioned are all present and one of these leased vehicles is involved in a traffic accident in New Brunswick, the following question arises: Is the trucking business answerable in tort for any damages caused by the driver's negligence? This is the question of substantive law to be decided.

[4] The appellant, John Whelton, is alleged to have suffered serious injuries on February 9, 2000, when the truck tractor in which he was a passenger struck a bridge near St. Anne in Madawaska County, New Brunswick. At the time, the truck tractor was registered under the names of the respondents, F.I.P.A. Transport Ltée and 2934752 Canada Inc. ("Highland Transport"). Highland Transport, an "extra-provincial truck undertaking" subject to the *Motor Vehicle Transport Act, 1987*, R.S.C. 1985 c. 29 (3rd Supp.), was using the vehicle under the terms of a lease agreement and in accordance with the operating licences referred to above. Based on information provided by the Registrar of Motor Vehicles of New Brunswick identifying Highland Transport as the owner of the truck tractor in question, Mr. Whelton commenced an action in tort against Highland Transport. It is axiomatic that, under s. 267(1) of the *Motor Vehicle Act*, R.S.N.B. 1973, c. M-17, only the "owner" of a motor vehicle involved in a traffic accident is vicariously liable for the driver's negligence.

[5] After concluding that it was not an owner of the truck tractor involved in the accident, a judge of the Court of Queen's Bench allowed Highland Transport's motion for summary judgment and dismissed the action against it. The judge was satisfied that the outcome following trial could be none other than the dismissal of the action against Highland Transport.

[6] With respect for the contrary view expressed by the motion judge, I hold that Highland Transport failed to discharge the burden cast upon it by Rule 22. In short, Highland Transport has not established that it would necessarily be exonerated at trial. In fact, the evidence in the record confirms that Highland Transport was an "owner" of the truck tractor in which Mr. Whelton was a passenger at the

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time of the accident. Moreover, even if that fact were not satisfactorily established, the dismissal of the action against Highland Transport would nonetheless be unwarranted because the uncontested facts trigger an exception to the common law rule that an employer-independent contractor relationship does not give rise to vicarious liability.

I. The decision under appeal

[7] As noted in my introductory remarks, Highland Transport brought a motion for summary judgment dismissing the action against it. In its Notice of Motion, Highland Transport advised that it intended to use the English language. For his part, Mr. Whelton had earlier indicated, more precisely in his Notice of Action, that he intended to proceed in the French language, and he sought to oppose Highland Transport's motion using affidavits drafted in that language. However, Mr. Whelton did not notify the clerk of his intention to proceed in French at the motion hearing. Since the clerk was not made aware of Mr. Whelton's intention to use an official language other than the language specified in the Notice of Motion, he did not take measures to ensure that an interpreter would be present at the hearing. Rule 39.05(1) provides that, "[o]n a motion or application, a party who intends to proceed in or present evidence in an official language other than the official language in which any other party intends to proceed or present evidence, shall so advise the clerk at least 7 days before the hearing" and Rule 39.05 (2) states that the clerk, on being advised pursuant to Rule 39.05(1), shall arrange to have an interpreter present at the hearing.

[8] The language of the proceeding was the subject of debate at the very outset of the hearing in the court below. The following exchange sheds light on Mr. Whelton's position and the motion judge's approach:

> **THE COURT**: [TRANSLATION] Appearances for the record.
>
> **MS. ZAUHAR**: [TRANSLATION] My Lord, I will be proceeding in English because our affidavit, the client is English, and the motion was drafted in English. [ORIGINAL] Solicitor Randy Bishop also is unilingual Anglophone. Monika Zauhar –
>
> **THE COURT**: [ORIGINAL] Do all the parties have a problem with that? [TRANSLATION] Does the plaintiff have any problems with that?
>
> **MS. GLEIXNER**: [TRANSLATION] Micheline Gleixner for, for the plaintiff. No. I received instructions for a trial in French, My Lord. So, I don't believe . . . [ORIGINAL] – I don't believe Mr. Bishop has any problem with the fact that we will be proceeding in French.
>
> **MR. BISHOP**: [ORIGINAL] My understanding, My Lord, is the proceeding was ta. . . . supposed to take place in English, but I think in this particular case, Miss Zauhar and ourselves are, are kind of on opposite sides. I'm on board with the plaintiff in terms of opposing the motion, but my understanding was it was supposed to take place in English.
>
> **THE COURT**: [ORIGINAL] I think this problem should have been resolved before we came here this morning. The presenter of the motion — Just a second, now.
>
> **MR. BISHOP**: [ORIGINAL] Page 4, My Lord.
>
> **MS. ZAUHAR**: [ORIGINAL] Tab 2 of the —

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**THE COURT**: [TRANSLATION] The motion was presented in English?

**MS. ZAUHAR**: [TRANSLATION] Yes.

**THE COURT**: [ORIGINAL] And the indication was that you would proceed in the English language.

**MS. ZAUHAR**: [ORIGINAL] Yes.

**THE COURT**: [ORIGINAL] So, if you proceed in French, you had to call for an interpreter. We don't have one here.

**MS. GLEIXNER**: [TRANSLATION] My Lord, our affidavit was filed in French, which, in my submission, established our intention —

**THE COURT**: [TRANSLATION] No, the motion was, the motion was presented in English. That is the language of the proceeding. The proceeding was commenced in English. If you wanted to proceed in French for the part consisting of your motion, you should have asked the clerk. It is your responsibility to bring an interpreter here. I don't know whether you were going to proceed in French or in English. I know you had a French affidavit. And you have every right to proceed in French if you wish. But since the motion was in English, unless you came to an agreement with your colleagues, you had to ensure there was an interpreter here.

**MS. GLEIXNER** : [TRANSLATION] O.K. According to —

**THE COURT**: [TRANSLATION] We will be proceeding in English this morning.

**MS. GLEIXNER**: [TRANSLATION] Very well, My Lord.

**THE COURT**: [TRANSLATION] Ms. Zauhar?

**MS. ZAUHAR**: [ORIGINAL] My Lord.

**THE COURT**: [ORIGINAL] Would you proceed with your motion?

[. . .]

[9] In his reasons for judgment, the judge provided the following summary of the facts and each party's position on the merits:

> [ORIGINAL] The facts in this matter which are gleaned from the pleadings and the various affidavits filed either in support of or in opposition to the motion are succinctly recited in the applicant's (Highland's) pre-hearing brief and are substantially agreed to by the respondent (plaintiff) Whelton. The defendant Mercier and F.I.P.A. Transport Ltée did not file an affidavit nor a pre-hearing brief. The facts are reproduced here from the applicant's brief as follows:
>
> > [ORIGINAL]
> > 1. On February 9, 2000, a motor vehicle accident occurred involving a 1998 Volvo TT truck, bearing license number PN6 772/ ON, being operated by the Defendant, Pierre Mercier, and in which vehicle the Plaintiff was a passenger. As a result of this accident, an action was commenced by the Plaintiff.

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2. The Defendant, 2934752 Canada Inc., a corporation doing business in New Brunswick under the name and style of HIGHLAND TRANSPORT, contends that it is not the legal owner of the motor vehicle in issue, as required pursuant to Section 267 Motor Vehicle Act, R.S.N.B. 1973, c.M-17, as amended (hereinafter referred to as "the Act.")

3. At the time of the accident, subject of this action, the Defendant, Pierre Mercier, was an employee of F.I.P.A. Transport Ltée, (hereinafter referred to as "F.I.P.A.") and was operating the vehicle for commercial/business purposes of transporting goods for the Defendant, HIGHLAND TRANSPORT.

4. The Defendant, F.I.P.A. has admitted in its Statement of Defence that it was the owner of said motor vehicle.

5. The Defendants, HIGHLAND TRANSPORT and F.I.P.A. signed an Independent Operator Agreement, dated November 4th, 1997 (hereinafter referred to as "the Agreement"), pursuant to which F.I.P.A. offered its motor vehicle and services as an independent owner operator to the Defendant, HIGHLAND TRANSPORT.

6. The Agreement allowed for the addition to the vehicle registration of the name of the Defendant, HIGHLAND TRANSPORT for licensing purposes only. The Agreement expressly provided that F.I.P.A. retained beneficial ownership of the said motor vehicle, notwithstanding the motor vehicle's registration.

7. Pursuant to federal and provincial licensing requirements, as well as American legislative requirements, the name of the Defendant, HIGHLAND TRANSPORT had to be added to the vehicle registration.

8. The Defendant, HIGHLAND TRANSPORT, did not purchase the said motor vehicle, and it was not intended for any title to the vehicle to vest in HIGHLAND TRANSPORT.

9. Financial responsibility for the vehicle in question, as well as for maintenance and operation costs, including but not limited to oil, fuel, tires, fines, licensing fees and permits, rested and continues to rest with the Defendant, F.I.P.A.

10. The Defendant, Pierre Mercier, driver of the truck in question at the time of the accident, and all other drivers of the vehicle are employees of the Defendant, F.I.P.A. and F.I.P.A. exercises control and authority over the said employees.

11. At all times material to this action, the keys to the vehicle in question were in the sole possession of the Defendant, F.I.P.A., and the vehicle was stored at the premises of the Defendant, F.I.P.A., when not in use on the road.

12. Pursuant to the Agreement, the Defendant, F.I.P.A., agreed to reimburse the Defendant, HIGHLAND TRANSPORT, the said insurance premiums paid by HIGHLAND TRANSPORT on a weekly basis at a rate of a stipulated percentage of F.I.P.A.'s weekly gross revenue.

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13. The sole purpose for the addition to the vehicle registration of the name of the Defendant, HIGHLAND TRANSPORT, was to satisfy applicable licensing requirements. In the trucking industry, such commercial arrangement is typical to intra-provincial hauling."

[ORIGINAL] The only additional facts referred to by the plaintiff-respondent are in reference to the owner operator contract between Highland and F.I.P.A. The plaintiff-respondent points out in particular that in accordance with the terms of the contract:

- Both Highland and F.I.P.A. are registered owners of the vehicle.

- Highland agrees to maintain liability insurance on the vehicle and F.I.P.A. agrees to indemnify Highland from any claims made and to reimburse the premiums paid by Highland through pay deductions.

- At all material time the defendant Pierre Mercier was an employee of F.I.P.A. and was the driver of the transport truck transporting goods for Highland.

Highland agrees that although it was a registered owner of the vehicle at the time of the accident it was so only by virtue of inter-provincial regulations, which command that commercial transport licenses must be in the name of the registered owner of the vehicle. Highland maintains that the pleadings and the other evidence indicate clearly that although it was a registered owner for a limited purpose, the sole legal or true owner of the vehicle at the time of the accident was F.I.P.A.

The distinction between a registered owner as opposed to a legal owner and the legal consequences of being one rather than the other is well established in the jurisprudence. See *Haydeck v. Pidoborozny*, 1972 CanLII 136 (SCC), [1972] S.C.R. 879; *LeLarge, Cameron and Cameron v. Blakney, Blakney and Gajowiak*, (1978), 23 N.B.R. (2d) 669, (N.B.C.A.); *Thériault v. Aubin and Ouellette* (1991), 1991 CanLII 2710 (NB CA), 121 N.B.R. (2d) 235 (N.B.C.A.). Hence, there have been circumstances where it was determined that the registered owner was not the true or legal owner of the vehicle. See also the definition of "owner" and "registered owner" in the New Brunswick *Motor Vehicle Act.*

Highland argues in the present case that it is not the legal owner since the evidence establishes clearly that all indicia of ownership point to F.I.P.A. as the legal owner and it also appears clear that F.I.P.A. retains the beneficial ownership of the vehicle. The fact remains however, that the vehicle is insured in Highland's name and the commercial transportation licenses without which F.I.P.A. cannot operate are also in the name of Highland. [...]

[10] The judge then articulated the following reasons for dismissing the action against Highland Transport:

[ORIGINAL] With respect, I am unable to conclude in the present case that the mere fact that the public transportation licenses were in Highland's name gave it such dominion and control over the vehicle as to deem it a true or legal owner in accordance with the provisions of the New Brunswick *Motor Vehicles Act.* All indicia of ownership in the present case point to F.I.P.A. It purchased the truck and exercised control over it [through] the defendant Mercier, its driver, and employee. It attended to and paid for all

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repairs to the vehicle. When it was not transporting goods for Highland, the truck remained in the possession of F.I.P.A. The contract between F.I.P.A. and Highland states clearly that beneficial ownership remains with F.I.P.A.

[...]

Having considered the pleadings and the other evidence which formed part of the record in the present case, I conclude that Highland was not the legal owner of the 1998 Volvo Tractor at all material (times) and hence no liability can attach to it under the provisions of the *Motor Vehicle Act* of New Brunswick. I therefore conclude that the plaintiff's action against 2934752 Canada Inc. doing business in New Brunswick under the name and style of Highland Transport Limited, has no merit and is ordered dismissed.

II. The grounds of the appeal

[11] In his Notice of Appeal, Mr. Whelton submits that the judge at first instance erred, *inter alia*, as follows:

[TRANSLATION]

1. The motion judge erred in law in refusing to allow John Whelton, the respondent in the motion, to use the official language of his choice, contrary to the provisions of the *Official Languages Act*, R.S.N.B. 1973, c. O-0.5, and in particular subsection 3(1) and sections 16, 17, 18 and 19 thereof, the *Canadian Charter of Rights and Freedoms* and in particular section 16.1 and subsection 19(2) thereof, and the *Insurance Act*, R.S.N.B. 1973, chap. I-12 and in particular section 20.2 thereof.

[. . .]

3. The motion judge erred in fact and in law in holding that the admissible evidence regarding the indicia of ownership and control of the motor vehicle was sufficient to establish that F.I.P.A. Transport Ltée was the sole owner.

[. . .]

6. The motion judge erred in law in holding that the action against Highland Transport is without basis.

[12] Mr. Whelton advanced an additional ground at the hearing of the appeal. He submitted that the motion judge should not have heard Highland Transport's motion until it produced an Affidavit of Documents. Rule 62.09(2) provides that, except with leave obtained on motion to the Court of Appeal or a judge thereof, an appellant shall not rely on a ground of appeal unless it is stated in the Notice of Appeal. In my view, the interests of justice compel us to grant Mr. Whelton's request under Rule 62.09 (2), and I would allow him to rely on the ground of appeal that I have just summarized.

III. The factual context

[13] The following facts are not in dispute.

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[14] The Respondent, 2934752 Canada Inc., is engaged in the business of trucking under the name and style of Highland Transport. It is an "extraprovincial truck undertaking" within the meaning of the *Motor Vehicle Transport Act, 1987*, and holds the operating licences required to transport goods commercially both in Canada and in the United States. Like many of its competitors, Highland Transport uses leased truck tractors along with drivers supplied by the lessors. The use of leased truck tractors is authorized under the operating licences only if the holder registers them in its name. This is why the lease agreement for the truck tractor involved in the accident that concerns us here provided for its registration in Highland Transport's name and the latter's identification as the owner in the registration certificate. It is common ground that Highland Transport would not have had the right to use the truck tractor for commercial purposes if it had not been registered in its name.

[15] At the request of Mr. Whelton's counsel, the Registrar of Motor Vehicles produced an accident report dated April 7, 2000. The report indicated that Mr. Mercier was the driver of the truck tractor involved in the February 9, 2000, accident — specifically, a 1998 Volvo TT bearing Ontario licence plates — and that Highland Transport was the vehicle's owner. Based on this information, Mr. Whelton commenced an action in tort against Mr. Mercier and Highland Transport. Shortly before the applicable two-year limitation period was to expire, Mr. Whelton learned that F.I.P.A. might be a co-owner of the truck tractor. He, therefore, quickly filed an Amended Notice of Action and Statement of Claim adding F.I.P.A. as a party to the action. In its Statement of Defence, Highland Transport denies being the "owner" of the truck tractor driven by Mr. Mercier. In its Statement of Defence, F.I.P.A. admits being the "owner". That said, it should be noted that Highland Transport signed the truck tractor's registration certificate as owner.

[16] At the time of the accident, Highland Transport was using the truck tractor in accordance with the terms of a lease agreement entered into with F.I.P.A. on November 4, 1997. The agreement is much more than a mere lease of a truck tractor. It is entitled "Independent Owner Operator Agreement" and its preamble reads as follows:

> [ORIGINAL] The Company is the holder of the necessary licences under the *Truck Transport Act* (Ontario), the *Motor Vehicle Transport Act 1987* (Canada) and the Interstate Commerce Commission to engage in the transport of goods as a common carrier.
>
> The Contractor is desirous of offering his services to the Company as an independent Owner Operator providing a vehicle or vehicles described in Schedule C and Drivers to enable the Company to carry on the aforesaid business.
>
> To this end, the parties agree to effect a transfer of the registration of the vehicles described in Schedule C for licensing purposes only. The Contractor retains beneficial ownership.
>
> In consideration of the sum of 1.00 receipt whereof the Contractor hereby acknowledges and the mutual covenants and conditions herein after contained the parties hereto agree as follows:

[17] The relevant clauses of the lease agreement are:

> [ORIGINAL]

1.01 The vehicle described in Schedule C and/or any additional or replacement vehicles are provided for the exclusive use of the Company and subject to the Company's approval,

1.02 The Contractor agrees, at his expense, to paint and keep painted said vehicular equipment in accordance with specifications of the Company,

1.03 The Contractor agrees, at his expense, to affix and keep affixed thereon any identification and insignia as specified by the Company,

1.04 The Contractor agrees, at his expense, to remove the aforesaid identification and insignia upon:

i) replacement of the vehicle,
ii) expiry of this agreement,
iii) termination of this agreement.

1.05 The Company agrees to transfer the registration of the vehicle upon:

i) replacement of the vehicle,
ii) expiry of this agreement,
iii) termination of this agreement.

[. . .]

3.01 The Contractor is obliged at his expense to provide competent qualified licensed drivers in each case subject to the approval of the Company.

3.02 Wherein the Contractor offers personal service, the contractor is obliged at his expense to provide both additional and alternate drivers who are competent, qualified and licensed, in each case subject to the approval of the Company.

3.03 The Contractor agrees that neither he nor his employees shall perform any duties in pursuance of the provisions of this agreement while partaking or while under the influence of alcohol or drugs.

[. . .]

6.01 The Company agrees to maintain insurance for the protection of the public in accordance with 49 C.F.R. # 1043 and 49 U.S.C. #10927. However, the Contractor hereby agrees that it will indemnify and save the Company harmless, through deduction of payment, for any and all claims, suits, losses, fines, thefts, damages, liabilities, costs, or other expenses arising out of, based upon, or incurred because of injury to any person or persons or damage to property sustained or which may be alleged to have been sustained as a result of the use of the equipment leased hereby during the term of the agreement by reason of any negligence or alleged negligence on the part of the Contractor, its agents, servants, or employees. The Contractor further agrees to furnish the Company a certificate of insurance naming the Company as additional insured. The Contractor agrees to obtain at his own expense bobtail and deadhead insurance. Insofar as damage to property is concerned, the Company shall furnish to the Contractor written explanation of itemization of the deductions computed before such deductions are made. Nothing contained in this Paragraph 6.01 shall be construed to in anywise limit the

liability of the Company to the public in connection with the use of said equipment under this agreement.

6.02 The Contractor agrees that the Company shall purchase appropriate insurance coverage on behalf of the Contractor. A premium will be deducted from the Operator's pay at a rate established by the Company and set down in Schedule "A". The Operator understands that such insurance coverage will automatically lapse upon the transfer of the registration of the vehicular equipment described in Schedule "C" from the Company to the Contractor and upon cancellation of this Agreement by either the Contractor or the Company.

[. . .]

7.01 The Contractor agrees not to transport goods or cargo by said vehicular equipment save in compliance with a bill of lading/written contract between the Company and the shipper of the goods or cargo.

[. . .]

9.01 The Company agrees to furnish and maintain chassis and semi trailers for use by the Contractor with the vehicular equipment described herein. The Contractor agrees to reimburse the Company for chassis or trailer equipment damaged, lost, or destroyed as a consequence of the Contractor's negligence or that of his Employees and Agents to the extent not covered by insurance.

[. . .]

14.01 The Company and the Contractor agree that the Contractor has the discretion to enter into Agreement of any duration with other carriers to transport goods and maximize profits provided vehicular equipment described in Schedule "C" and/or Company equipment are not utilized in the performance of such Agreements.

14.02 It is the intent of the parties hereto that the Contractor is an independent operator only, and neither the Contractor nor his employees and agents are employees of the Company.

[18] In December 2002, some six months after the motion for summary judgment was filed, Mr. Whelton served Highland Transport with a Notice Requiring Affidavit of Documents. Pursuant to Rule 31.03(2), Highland Transport was required, within 10 days of receiving this notice, to file and serve on every other party an Affidavit of Documents (Form 31B) that met the requirements of Rule 31.03(4). The decision under appeal was rendered even though Highland Transport had not produced such an affidavit.

## IV. The statutory context

[19] The full text of the legislative provisions referred to in these reasons can be found in Schedule A hereto.

## V. Analysis and decision

### A. *Language of proceeding*

[20] Counsel for both Mr. Mercier and F.I.P.A. was the only lawyer at the hearing in the court below who was not bilingual. Mr. Whelton submits that Rule 39.05 must be construed so as to impose on the parties who need translation the burden of taking measures to ensure that an interpreter can attend the hearing of a motion. Rule 39.05 reads as follows:

| | |
|---|---|
| **39.05 Language of Proceeding** | **39.05 Langue des procédures** |
| (1) On a motion or application, a party who intends to proceed in or present evidence in an official language other than the official language in which any other party intends to proceed or present evidence, shall so advise the clerk at least 7 days before the hearing. | (1) La partie qui, à l'occasion d'une motion ou demande, entend utiliser une langue officielle autre que celle qu'une autre partie entend utiliser ou présenter la preuve dans une langue officielle autre que celle dans laquelle une autre partie entend présenter sa preuve doit en aviser le greffier au moins 7 jours avant l'audience. |
| (2) On being advised pursuant to paragraph (1), the clerk shall arrange to have an interpreter present at the hearing. | (2) Le greffier qui a été avisé conformément au paragraphe (1), doit veiller à ce qu'un interprète soit présent à l'audience. |

[21] Rule 4.08(1) provides that the forms prescribed in the Appendix of Forms shall be used where applicable, with such variations as the circumstances of the particular proceedings require. Rule 37.01(a) states that a motion shall be made by "Notice of Motion" (Form 37A). Form 37A reads as folows:

| | |
|---|---|
| **APPENDIX OF FORMS**<br>**FORM 37A**<br>**NOTICE OF MOTION**<br>*(Court, Court File Number, Style of Proceeding)* | **FORMULAIRE**<br>**FORMULE 37A**<br>**AVIS DE MOTION**<br>*(Cour; No du dossier; Intitulé de l'instance)* |
| **NOTICE OF MOTION (FORM 37A)** | **AVIS DE MOTION (FORMULE 37A)** |
| TO:<br>The plaintiff *(or as may be)* will apply to the Court at . . . . . *(specific location)* . . . . . ., on the . . . . . day of . . . . . ., 19. . . . . at . . . . . a.m. (*or* p.m.) for an order that *(state the precise order sought and the grounds to be argued, including a reference to any statutory provision or rule to be relied on)*; | DESTINATAIRE:<br>Le demandeur *(ou selon le cas)* demandera à la Cour à . . . . . *(lieu précis)* . . . . . ., le . . . . . 19. . . . ., à . . . . . h . . . ., d'ordonner *(indiquer l'ordonnance demandée, les motifs à discuter et les renvois aux dispositions léglislatives ou règles qui seront invoquées)*; |
| Upon the hearing of the motion the following affidavits or other | A l'audition de la motion, les affidavits ou les autres preuves |

| | |
|---|---|
| documentary evidence will be presented: *(list the documentary evidence to be used at the hearing of the motion).* | littérales suivantes seront présentées: *(énumérer les preuves littérales qui seront utilisées lors de l'audition de la requête).* |
| You are advised that: | Sachez que: |
| (a) you are entitled to issue documents and present evidence at the hearing in English or French or both; | a) vous avez le droit d'émettre des documents et de présenter votre preuve à l'audience en français, en anglais ou dans les deux langues; |
| (b) the plaintiff *(or as may be)* intends to proceed in the . . . . . language; and | b) le demandeur *(ou selon le cas)* a l'intention d'utiliser la langue . . . . . .; et |
| (c) if you intend to proceed in the other official language, an interpreter may be required and you must so advise the clerk at least 5 days before the hearing. | c) si vous avez l'intention d'utiliser l'autre langue officielle, les services d'un interprète pourront être requis et vous devrez en aviser le greffier au moins 5 jours avant l'audience. |
| DATED at . . . . . ., this . . . . . day of . . . . . ., 19. . . . . | FAIT à . . . . . le . . . . . 19. . . . . |
| Solicitor for plaintiff *(or as may be)* | Avocat du demandeur *(ou selon le cas)* |

[22] The wording of both Rule 39.05(1) and Form 37A leaves no room for doubt: it is the responding party who must notify the clerk if he or she wishes to use an official language other than the one that the moving party has identified in the Notice of Motion. Moreover, the notice to the clerk contemplated in Rule 39.05(1) is distinct from any language-related notice that might be contained in a Notice of Action or Statement of Claim. If a plaintiff's obligations under Rule 39.05(1) were fulfilled merely by indicating his or her choice of official language in the Notice of Action or Statement of Claim, Rule 39.05(1) would be worded so as to apply only to applications. However, as we have seen, Rule 39.05(1) unambiguously states that motions come within its scope. In addition, it is clear from the wording of Rule 39.05(1) and Form 37A that a respondent's filing of affidavits drafted in a given official language does not constitute notice to the clerk within the meaning of Rule 39.05(1). Lastly, in my respectful view, nothing contained in the *Official Languages Act* (New Brunswick), the *Insurance Act* or the *Canadian Charter of Rights and Freedoms* supports a different interpretation of Rule 39.05(1).

[23] Since Mr. Whelton did not notify the clerk as required by Rule 39.05(1), he was not legally entitled to use a language other than English, the official language specified in Highland Transport's Notice of Motion. That said, what our Court stated in *Chiasson v. Chiasson* (1999), 222 N.B.R. (2d) 233 at paras. 4-5, bears repeating:

> In New Brunswick, the only province in Canada with two official languages, when a party indicates his wish to be heard in one official language and the judge's reaction is

> so hostile that the party ends up being heard in the other official language, the court's judgment cannot be allowed to stand. The right to use the official language of one's choosing is not a privilege; it is a fundamental right unrelated to trial fairness as such. See *R. v. Beaulac (J.V.)*, 1999 CanLII 684 (SCC), [1999] 1 S.C.R. 768, at pp. 799-800, paragraphs 45-47.
>
> In our view, judges ought to refrain from engaging in any conduct that might deter a person appearing or giving evidence in any proceeding before the court from being heard in the official language of his choice. In fact, it behooves judges to show the greatest of respect for that person's choice of official language.

[24] The judge who heard the motion for summary judgment in the instant case was not dealing with an urgent matter. A few weeks' adjournment would have enabled Mr. Whelton to comply with Rule 39.05(1). With the greatest respect, I am of the opinion that the motion judge erred in disregarding Mr. Whelton's wishes and in insisting that he employ the English language at the hearing. The judge should have raised the possibility of an adjournment and sought representations from the parties as to whether such a measure would be appropriate. Having said this, the judge's failure to hear the parties' representations on this issue is not mentioned as a ground in the Notice of Appeal (see Rule 62.09(2)) and it is preferable for all concerned that the appeal be disposed of for reasons susceptible of contributing to a fair resolution of the matter on its merits.

[25] Lastly, it should be noted that the intervener, l'Association des juristes d'expression française du Nouveau-Brunswick Inc., filed a submission in support of the proposition that Rule 39.05(1) fails to fulfil the provincial government's obligations under the *Canadian Charter of Rights and Freedoms* in relation to language rights. The Court refused to consider this issue because it was not raised and argued in the court below.

B. *Failure to file and serve an Affidavit of Documents*

[26] The delivery of an affidavit compliant with Rule 31.03(4) should lead to the disclosure of every document related to a matter in issue. Armed with this affidavit, the adverse party can insist that documents of interest to him or her be produced. Through production of those documents, he or she can acquire a thorough understanding of the case. An Affidavit of Documents that complies with the *Rules of Court* is generally indispensable in uncovering the truth. This is particularly so in cases such as the present, where the answers to controversial questions lie deep within documents held exclusively by one party. In cases of this nature, motions for summary judgment should, as a general rule, be dismissed with costs if the moving party has not complied with the requirements of Rule 31.

[27] Thus, Highland Transport's failure to produce an Affidavit of Documents should have led to the dismissal, with costs, of its motion for summary judgment. I hasten to emphasize that several documents that might have assisted Mr. Whelton in opposing the motion for summary judgment are absent from the record. I have the following documents in mind: (1) the operating licences and documents setting out the conditions that all applicants must meet in order to obtain those licences and which the licence holders must respect; (2) the documents that Highland Transport submitted to obtain and retain its licences; (3) the documents related to the purchase and financing of the truck tractor; (4) the documents that Highland Transport and F.I.P.A. exchanged before and after the signing of the "Independent Owner Operator Agreement" and which shed light on their commercial relationship; (5) the documents produced by Highland Transport and F.I.P.A. in connection with the truck tractor's registration; and (6) the documents relating to the truck tractor's insurance and its inclusion in Highland Transport's fleet for the purpose of liability insurance. There are undoubtedly several other documents related to the issue that Highland Transport put before the Court of Queen's Bench for its consideration.

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[28] While Highland Transport's failure to produce an Affidavit of Documents compliant with the dictates of Rule 31.03(4) is sufficient, on its own, to decide the appeal in Mr. Whelton's favour, Rule 22 calls for an approach designed to achieve a fair solution of the litigation on the merits. As the Court emphasized in *Cannon v. Lange et al.* (1998), 1998 CanLII 12248 (NB CA), 203 N.B.R. (2d) 121 at para. 16 (C.A.), Rule 22 confers "a wide discretionary power, the judicious use of which will allow the court to move the action forward in a swift and focused fashion." In fact, Rule 22.05(1) provides expressly that, where summary judgment is refused, the court may specify the material facts which are not in dispute. In my opinion, this would be particularly advisable in the present case for two reasons.

[29] First, there is every reason to believe that Highland Transport brought to the motion judge's attention every document that supports its entitlement to summary judgment. Second, the very evidence that Highland Transport adduced establishes conclusively that: (1) it is an "owner" within the meaning of s. 267(1) of the *Act* and, (2) in view of s. 267(1) and the common law principles that govern vicarious liability, it is liable for any negligence in the operation of the truck tractor involved in the accident that gave rise to the underlying action. Thus, the Court should stipulate that these issues are no longer in dispute and that the litigation must now focus on the resolution of other contested matters.

C. *Is Highland Transport an "owner" within the meaning of subsection 267(1)?*

[30] It is settled law that the meaning of phrases found in legislation depends largely on the context in which those phrases are used and that s. 267(1) must receive "such fair, large and liberal construction and interpretation as best ensures the attainment" of its object: see s. 17 of the *Interpretation Act*, R.S.N.B. 1973, c. I-13 and *Dionne v. Desjardins* (1999), 214 N.B.R. (2d) 380 at paras. 20-21 (C.A.). Traffic accident victims have clearly benefited the most from this approach: *Cummings v. Budget Car Rentals Toronto Ltd.* (1996), 1996 CanLII 1629 (ON CA), 29 O.R. (3d) 1 at 20 (C.A.). Of course, that interpretative approach cannot be applied in such a way that it brings about a distortion of the ordinary and grammatical meaning of the words used by the legislator.

[31] While the "beneficial owner" of a motor vehicle is uncontestably an "owner" within the meaning of s. 267(1), the legislator has not made the two terms synonymous. Section 1 of the *Act* defines the word "owner" using much broader wording than "beneficial owner." Specifically, the provision employs the expression "legal owner." It seems clear to me that if the legislator had intended to confine the scope of s. 267(1) to the beneficial owner of a motor vehicle, it would have worded the provision, or the definition of the word "owner", in a way designed to achieve that result. It would certainly not have employed the phrase "legal owner" to define the word "owner."

[32] Both at first instance and on appeal, Highland Transport relied heavily on the fact that F.I.P.A. conceded, in its Statement of Defence, that it is the owner of the truck tractor involved in the accident. However, this admission cannot bind Mr. Whelton, nor does it rule out the possibility that another party is also an "owner." Indeed, it is entirely possible for a motor vehicle to have more than one "owner": *Lelarge, Cameron and Cameron v. Blakney, Blakney and Gajowiak* (1978), 23 N.B.R. (2d) 669 at para. 11 (C.A.), *Hayduk v. Pidoborozny*, 1972 CanLII 136 (SCC), [1972] S.C.R. 879 at para. 14, *Prowse v. Sullivan* (1997), 1997 CanLII 12093 (ON SC), 32 O.R. (3d) 91 at para. 21 (Gen. Div.), and *Gillard (David R.) Ltd. v. Cormier* (2000), 2000 CanLII 10684 (NB CA), 230 N.B.R. (2d) 1 (C.A.).

[33] In the case at bar, the truck tractor was registered in Highland Transport's name at its request and Highland Transport signed the registration certificate as the owner. Without the registration in its name, Highland Transport's use of the truck tractor driven by Mr. Mercier to transport goods would not have been authorized by its operating licences. In all likelihood, the very reason that interprovincial and international trucking regulators insist that all vehicles employed in trucking under their control be registered in the names of the operating licencees is so that the latter can be held vicariously liable for the drivers' negligent operation. Thus, the facts of this case bear no resemblance to those in *Lelarge v. Blakney* and *Thériault v. Aubin and Ouellette* (1991), 1991 CanLII 2710 (NB CA), 121 N.B.R. (2d) 235 (C.A.), where the Court held that the registered owner of a passenger car is not necessarily its "owner" within the meaning of section 267(1). In both cases, the Court came to that conclusion because s. 1 of the *Act* draws a distinction between an "owner" and a "registered owner."

[34] Mr. Whelton challenges the correctness of that conclusion. He submits that the way in which the wording of its relevant provisions has evolved suggests that the *Act* imposes obligations on the "registered owner" of a motor vehicle (as opposed to the "owner") in order to avoid debates over the identity of the beneficial owner in prosecutions for breaches of those obligations. He contends that the distinction between an "owner" and a "registered owner" was not created so that a person who has agreed to register a vehicle in his or her name can deny ownership for s. 267(1) purposes whenever it is convenient for him or her to do so. That argument appeals to me. After all, one of the cornerstones of the scheme implemented by the provisions of the *Act* that govern registration is the proposition that the "registered owner" of a motor vehicle is an "owner" of that vehicle: see sections 17-49 and 67-70. That said, the present appeal can be decided without reconsidering the correctness of the Court's legal conclusion in *Lelarge v. Blakney* and *Thériault v. Aubin and Ouellette*. In fact, the outcome in *Lelarge v. Blakney* and *Thériault v. Aubin and Ouellette* can be explained by the fact that the registered owner in each case had no indicia of ownership other than the registration of the vehicle in his name.

[35] Assuming for the sake of argument that a person who voluntarily registers a vehicle in his or her name is not precluded from contending that he or she is not an "owner" for s. 267(1) purposes, the question at issue here can be determined by applying the test adopted in *McEwan v. Iles et al.* (1981), 1981 CanLII 2857 (ON SC), 128 D.L.R. (3d) 447 at 452-53 (Ont.Co. Ct.), a test to which this Court referred in *Thériault v. Aubin and Ouellette* without approving or rejecting it categorically. According to this test, the registered owner is an "owner", and therefore vicariously liable for the driver's negligence, if he or she has any indicia of title beyond the registration of the motor vehicle in his or her name. In the case at bar, Highland Transport is not only a registered owner of the truck tractor involved in the February 9, 2000, accident, it also has several indicia of title. Suffice it to mention the following:

1) It declares in the registration certificate that it is the owner of the truck tractor.

2) It has the exclusive use of the truck tractor (clauses 1.01, 7.01, 9.01 and 14.01 of the Independent Owner Operator Agreement).

3) It determines the exterior appearance of the truck tractor (clauses 1.02 and 1.03).

4) It may turn down drivers that F.I.P.A. provides (clauses 3.01 and 3.02).

5) It imposes standards of conduct on the drivers (clause 3.03).

6) It insures the truck tractor itself and acknowledges its liability to the public for any damage resulting from its use (clause 6.01).

[36] I conclude the analysis of this issue by noting that the relationship between Highland Transport and the truck tractor involved in the accident of February 9, 2000 is at least as strong as the relationship between the trucking company and the truck tractor involved in *Edler v. Boyes Transport Ltd. et al.* (1974), 1974 CanLII 764 (ON SC), 6 O.R. (2d) 72 (H.C.). In that case, the trucking company was held vicariously liable for the driver's negligence pursuant to the Ontario legislative provision that, at the time, was the counterpart of s. 267(1) of the *Act*.

D. *The vicarious liability of extraprovincial truck undertakings*

[37] Mr. Whelton submits that the motion judge erred in law when he found that the relationship between Highland Transport on the one hand, and F.I.P.A. or Mr. Mercier on the other, was an employer-independent contractor relationship. He submits that one should look beyond the wording of the Independent Owner Operator Agreement, which characterizes the relationship in that manner, and consider the true effect of the provisions of the contract as a whole. Mr. Whelton argues that this points to an employer-employee relationship and cites the following authorities in support of this argument: *Dave Livingstone Trucking Ltd. v. Canada (M.N.R.)*, [2004] T.C.J. No. 112 (QL), *F.G. Lister Transportation Inc. v. Canada (M.N.R.)*, [1998] T.C.J. No. 558 (QL), *Merit Transport Inc. v. Canada (M.N.R.)*, [2003] T.C.J. No. 383 (QL) and *Rempel v. Canada (M.N.R.)*, [2002] T.C.J. No. 211 (QL).

[38] In addition, once the Court raised the issue, Mr. Whelton submitted that Highland Transport's liability in tort could be triggered even if its relationship with Mr. Mercier and F.I.P.A. was one of employer-independent contractor. If Highland Transport was using the truck tractor for the commercial purposes authorized by the previously mentioned operating licences, this would be sufficient, he argues, to trigger liability.

[39] The law on the subject is clear: only very exceptional circumstances will permit the imposition of vicarious liability for an independent contractor's negligence. Justice Major, writing for the Court in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59 (CanLII), [2001] 2 S.C.R. 983, points to Professor Atiyah's observations in *Vicarious Liability in the Law of Torts*, London, Butterworths, 1967, at pp. 327-49, for insight into the nature of those exceptional circumstances. One finds the following at p. 347:

> There is one particular respect in which the concepts of agency appear to have been often relied on, both in cases of independent contractors, and in cases of persons actually dealt with as agents. Where a person has some special right, deriving from statute, or from contract, or from some legal relationship, to do something, which other people are not entitled to do (as e.g., to enter on someone's land, or to dig up the highway, etc.) the courts have often felt that the person having this right must remain responsible for the proper exercise of it, if he delegates the work to another. The delegate, in a case of this kind, would himself be doing an unlawful act were it not for the authority which has been given to him by his employer, and the courts seem to have thought it not unreasonable that in such a case the employer ought to remain liable for the improper performance of the work. In such cases the delegate *must* be treated as the employer's agent, for if he were not his agent, he would not be able to shelter under the employer's immunity, and the performance of the work would be altogether wrongful. Although it cannot be said that this has ever been recognised as a general legal principle, some notion of this kind seems to have played a part in quite a number of cases, e.g., cases in which the defendant has exercised a statutory power to enter the plaintiff's land, cases in which a person employs a contractor to execute works on the highway, and in cases in which a landlord instructs a bailiff to levy distress on his tenant.

[Footnotes are omitted.]

[40] Let us assume, for the sake of this discussion, that the relationship between Highland Transport on the one hand, and F.I.P.A. or Mr. Mercier on the other, is one of employer-independent contractor. If the circumstances required us to hold that Highland Transport was not an "owner" of the truck tractor involved in the accident of February 9, 2000, Highland Transport would nonetheless be liable for Mr. Mercier's negligence because the record discloses circumstances that trigger the exception described above. Indeed, the operating licences held by Highland Transport gave neither F.I.P.A. nor Mr. Mercier the right to haul goods. Absent a delegation of this right by Highland Transport, the activity that Mr. Mercier and F.I.P.A. were engaged in at the time of the accident would have been unlawful. One must also be mindful of the remarkable degree of control that Highland Transport was entitled to exercise over the truck tractor under the terms of the "Independent Owner Operator Agreement." I would spotlight the following: Highland Transport enjoyed the exclusive use of the truck tractor, dictated its external appearance and had a veto in the driver selection process. Lastly, s. 4(1) of the *Extra-Provincial Truck Undertaking Licensing Regulations*, SOR/88-46 ("the *Regulations*") implicitly recognizes that an extra-provincial truck undertaking is vicariously liable for the negligence of the driver of any vehicle that the undertaking uses for authorized commercial purposes.

[41] Indeed, s. 4(1) of the *Regulations* requires an extra-provincial truck undertaking to take out a minimum of $1,000,000 in liability insurance per "motor vehicle" and s. 2 defines a "motor vehicle" as a "motor vehicle, other than a bus, <u>used in</u> an extra-provincial truck undertaking." [Underlining is mine.] Clearly, Highland Transport need not be an "owner" of a vehicle within the meaning of s. 267(1) of the *Act* to trigger the obligation in s. 4(1). Just as importantly, s. 4(1) requires the undertaking itself to obtain insurance; it does not merely require the undertaking to ensure that any vehicle it uses be insured. Clearly, Parliament's wording reflects a very broad conception of the vicarious liability of extra-provincial undertakings — one that is triggered when the vehicle involved in a traffic accident was "used" by the undertaking.

[42] In fact, s. 4(1) of the *Regulations*, at least insofar as its essential characteristics are concerned, is comparable in scope to the corresponding American provisions. Those provisions are mentioned in clause 6.01 of the lease agreement between Highland Transport and F.I.P.A. Under that clause, Highland Transport [ORIGINAL] "agrees to maintain insurance for the protection of the public in accordance with 49 C.F.R. 1043 and 49 U.S.C. 10927" and recognizes that "[n]othing contained in this paragraph 6.01 shall be construed to in anywise limit the liability of the Company to the public in connection with the use of said equipment under this agreement."

[43] C.F.R. is the acronym for *Code of Federal Regulations*, which is the codification of the general and permanent regulations published in the *American Federal Register* by the executive departments and agencies of the American Federal Government. It is divided into 50 titles that represent broad areas subject to Federal regulation. Title 49 deals with transportation. 49 C.F.R. 1043 was enacted pursuant to the authority of the *Motor Carrier Safety Act*, 49 U.S.C. 10927. The pertinent part of 49 U.S.C. 10927 reads as follows:

> 10927(a)(1) The Commission may issue a certificate under section 10922 or 10530 or a permit under section 10923 only if the carrier (including a motor private carrier and a foreign motor private carrier) applying for such certificate files with the Commission a bond, insurance policy, or other type of security approved by the Commission in an amount not less than such amount as the Secretary of Transportation prescribes pursuant to, or as is required by, section 30 of the Motor Carrier Act of 1980, section 18 of the Bus Regulatory Reform Act of 1982 and the laws of the State or States in which the

carrier is operating to the extent applicable. The security must be sufficient to pay, not more than the amount of the security, for each final judgment against the carrier for bodily injury to, or death of, an individual resulting from the negligent operation, maintenance, or use of motor vehicles under the certificate or permit, or for loss or damage to property (except property referred to in paragraph (3) of this subsection) or both. A certificate or permit remains in effect only as long as the carrier satisfies the requirements of this paragraph.

(2) A motor carrier and a foreign motor private carrier and foreign motor carrier (as defined under section 10530(a)) operating in the United States when providing transportation between places in a foreign country or between a place in one foreign country and a place in another foreign country shall comply with the requirements of sections 10329 and 10330 that apply to a motor carrier providing transportation subject to the jurisdiction of the Commission under subchapter 11 of chapter 108 of this title. To protect the public, the Commission may require any such motor carrier to file the type of security that a motor carrier is required to file under paragraph (1) of this subsection.

[44] American case law suggests that these provisions were enacted in order to put an end to "the unregulated use of non-owned vehicles that threatened both public safety and the vitality of the trucking industry" (*Integral Ins. Co. v. Fulbright Trucking*, 930 F.2d 258, (2nd Cir. 1991) at 261), to ensure "motor carriers operating tractors or trailers as lessees under leasing arrangements . . . assume total responsibility for the operation of their rented vehicles, including obtaining adequate insurance" (*Hartford Accident& Indem Co. v. American Red Ball Transit Co.*, 262 Kan. 570 at p. 578 (Sup. Ct. 1997)), to prevent "licensed interstate motor carriers from avoiding liability for the negligence of the operator of the equipment by claiming that the operator was an independent contractor" (*Pierre v. Providence Wash. Ins. Co.*, 286 A.D. 2d 139, at p. 142 (N.Y. Sup. Ct. App. Div. 2001), "to protect members of the public from motor carriers' attempts to escape liability for the negligence of drivers by claiming their drivers were independent contractors" (*Perry v. Harco Nat'l Ins. Co.*, 129 F.3d 1072 (9th Cir. 1997) at p. 1074) and to ensure "that a financially responsible party will be available to compensate third parties injured in a collision with an Interstate Commerce Commission carrier" (*Maryland Cas. Co. v. City Delivery Service, Inc.*, 817 F. Supp. 525 (M.D. Pa. 1993), at p. 530). See also *Hartford Accident & Indem. Co. v. American Red Ball Transit Co.*, *Consumers County Mut. Ins. Co. v. PW & Sons Trucking Inc.*, 306 F. 3d 362 (5th Cir., 2002), *Canal Ins. Co. v. First General Ins. Co.*, 889 F.2d 604 (5th Cir. 1989), *Empire Fire & Marine Ins. v. Guaranty Nat. Ins.*, 868 F.2d 357 (10th Cir. 1989) and *Prestige Cas. Co. v. Michigan Mut. Ins. Co.*, 99 F.3d 1340 (6th Cir. 1996), at pp. 1342-43.

[45] The operation of large commercial trucks on highways and roads presents certain unique dangers to the traveling public that are not a consideration where ordinary passenger vehicles are concerned. First, a traffic accident involving a commercial truck can be much more catastrophic than an ordinary car accident. A typical commercial truck will weigh several times more than the average passenger automobile. Because of this size disparity, and due to the basic laws of physics, any collision between a commercial truck and another vehicle is likely to result in very serious, even fatal, injuries. Then, there is the risk of jackknifing: large big-rig vehicles are prone to jackknifing under certain conditions, especially during sudden braking and turning. Finally, turning can also be the cause of accidents. Commercial vehicles are very long, and can be difficult to turn. It is often necessary for the driver of a commercial vehicle to use two lanes of traffic to make a right turn, in order to avoid running the rear wheels into parked vehicles or over a sidewalk.

[46] Thus, it is not surprising that interprovincial and international trucking regulators have perceived the need to establish a scheme that seeks to reduce traffic accidents involving vehicles used by

operating licence holders, and to make the latter liable for damages that third parties suffer by reason of the drivers' negligence.

VI. Conclusion and disposition

[47] The motion judge committed reversible error in granting summary judgment dismissing Mr. Whelton's action against Highland Transport. That outcome was not appropriate having regard to: (1) Highland Transport's failure to deliver, as required by Rule 31.03(2), an Affidavit of Documents compliant with Rule 31.02(4) and (2) Highland Transport's vicarious liability for any damages suffered by Mr. Whelton that are traceable to the negligence of the driver of the truck tractor in which Mr. Whelton was a passenger.

[48] For these reasons, the Court allowed the appeal at the hearing and set aside the summary judgment rendered at first instance. I would bring the present proceedings to a close by drawing attention to para. 29 of these reasons, which specifies the material facts that are no longer in dispute, and by ordering that Highland Transport pay costs throughout. I would set the costs of the motion at $1,000 and order their immediate payment. As for the costs of the appeal, I would set them at $3,000. Needless to say, those costs are also payable forthwith.

**APPENDIX A**

A. *Rules of Court of New Brunswick*

| | |
|---|---|
| 22.01(3) After he has filed and served his Statement of Defence and before the action is set down for trial, a defendant may apply for summary judgment against the plaintiff on the ground that there is no merit to the action, or to one or more claims therein, or to part of any such claim. | 22.01(3) Après avoir déposé et signifié l'exposé de sa défense, le défendeur peut, avant la mise au rôle de l'action, demander un jugement sommaire contre le demandeur au motif que l'action est sans fondement ou qu'une ou plusieurs des demandes ne sont pas fondées ou encore qu'une partie d'une de ces demandes ne l'est pas. |
| [...] | [...] |
| 22.04(1) Where, on a motion for judgment, the applicant satisfies the court that | 22.04(1) Si, sur une motion pour jugement, le requérant démontre de façon satisfaisante à la cour |
| (a) there is no defence or merit to a claim or part thereof, and | a) qu'il n'existe aucune défense ni fondement à la demande ou à une partie de la demande et |
| (b) the applicant is entitled to judgment, | b) qu'il a le droit d'obtenir un jugement, |
| the court may grant judgment. | la cour peut rendre jugement. |
| (2) Where the plaintiff satisfies the court that the only defence is | |

to the amount claimed, the court may direct a trial of that issue.

(2) Si le demandeur démontre à la cour que la défense porte uniquement sur le montant de la réclamation, la cour peut prescrire que cette question soit instruite.

[...]

[...]

22.05 (1) Where summary judgment is refused, or is granted in part only, and a trial is necessary, the court may order that the action be set down for trial in the normal course or within a specified time and may specify the material facts which are not in dispute and may define the remaining issues where they are not sufficiently defined in the pleadings.

22.05 (1) Lorsque le jugement sommaire est refusé en entier ou en partie et qu'un procès est rendu nécessaire, la cour peut ordonner la mise au rôle de l'action suivant la voie normale ou dans un délai spécifique. Elle peut préciser les faits déterminants qui ne sont pas en litige et identifier les questions qui restent en litige si elles ne sont pas suffisamment identifiées dans les plaidoiries.

[...]

[...]

31.02(3) Within 10 days after the close of pleadings, each party shall disclose by letter to all parties adverse in interest and shall produce for inspection, if requested, any insurance policy under which an insurer may be liable to satisfy part or all of any judgment which may be obtained in the action, or to indemnify or reimburse any party for money paid by him in satisfaction of the judgment, but information concerning such insurance policy shall not be admissible in evidence at the trial unless it is relevant to an issue in the action.

31.02(3) Dans les 10 jours de la clôture des plaidoiries, chaque partie doit divulguer par lettre à toutes les parties aux intérêts opposés et, sur demande, produire pour examen toute police d'assurance en vertu de laquelle un assureur peut être tenu d'exécuter partiellement ou totalement tout jugement qui pourrait être obtenu dans cette action ou être tenu d'indemniser ou de rembourser une partie pour les sommes qu'elle a dû payer en exécution du jugement. Cependant, aucun renseignement concernant cette police d'assurance ne sera admissible en preuve au procès à moins qu'il ne soit pertinent à une question en litige dans cette action.

[...]

[...]

31.03(1) A party may serve on any other party a Notice Requiring Affidavit of Documents (Form 31A).

31.03(1) Toute partie peut signifier à une autre partie un avis de production d'un affidavit des documents (formule 31A).

(2) Within 10 days after receipt of a Notice Requiring Affidavit of Documents a party shall file and serve on every other party an Affidavit of Documents (Form 31B).

(2) La partie qui reçoit un avis de production d'un affidavit des documents doit, dans les 10 jours, déposer et signifier à chaque autre partie un affidavit des documents (formule 31B).

[...]

[...]

(4) The Affidavit of Documents shall contain

(4) L'affidavit doit contenir

(a) a list and description of all documents which relate to a matter in issue in the action and which are in the possession or control of the party and for which he claims no privilege,

a) la liste et la description de tous les documents relatifs au litige dont la partie déposante a la possession ou le contrôle et sur lesquels elle ne revendique pas de privilège,

(b) a list and description of all documents which relate to a matter in issue in the action and which are in the possession or control of the party and for which he claims privilege and the grounds for such claim,

b) la liste et la description de tous les documents relatifs au litige dont la partie déposante a la possession ou le contrôle et sur lesquels elle revendique un privilège ainsi que les motifs de cette revendication,

(c) a list and description of all documents which relate to a matter in issue in the action, which the party has had, but no longer has, in his possession or control, giving their present whereabouts so far as he can say from his own knowledge, information or belief,

c) la liste et la description de tous les documents relatifs au litige dont la partie déposante a déjà eu la possession ou le contrôle, mais ne les a plus, avec une indication du lieu où ils se trouvent actuellement selon ce qu'elle sait, ce qu'elle a appris ou ce qu'elle croit.

(d) a list and description of all documents which relate to a matter in issue in the action which the deponent believes to be in the possession or control of a person not a party to the action and a description sufficient to identify the person,

d) la liste et la description de tous les documents relatifs au litige que le déposant croit être en la possession ou sous le contrôle d'une personne non partie à l'action, en plus d'une description suffisante à son identification,

(e) a statement by the deponent that he is not aware of any other document relating to a matter in issue in the action.

e) une déclaration dans laquelle le déposant affirme n'être au courant d'aucun autre document relatif au litige.

B. *Motor Vehicle Act*, R.S.N.B. 1973, c. M-17.

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"owner" means the legal owner of a vehicle unless the vehicle is the subject of a contract under the terms of which another person has possession and may acquire the legal title thereto, in which event while that person has possession against the legal owner, "owner" means that other person;

« propriétaire » désigne le propriétaire légal d'un véhicule, à moins que le véhicule ne soit l'objet d'un contrat aux termes duluel une autre personne en a la possession et peut en acquérir le titre légal de propriété; dans ce cas, « propriétaire » désigne cette autre personne qui en a la possession à l'encontre du propriétaire légal;

"registered owner" means a person in whose name a vehicle is registered, as in this Act provided;

« propriétaire immatriculé » désigne une personne au nom de laquelle un véhicule est immatriculé de la façon prévue dans la présente loi;

[...]

[...]

**267**(1) The owner of a motor vehicle, or farm tractor is liable as well as the driver thereof to an action for tort as a result of negligence in the operation of the motor vehicle or farm tractor unless the motor vehicle or farm tractor was at the time of the negligent operation thereof in the possession of some person other than the owner without the owner's consent.

**267**(1) Le propriétaire d'un véhicule à moteur ou d'un tracteur agricole est respon³a"le, d%même que son conducteur, dans une action pour délit civil résultant de négligence dans la conduite d'un véhicule à moteur ou tracteur agricole à moins que ce véhicule à moteur ou tracteur agricole n'ait été, au moment de la négligence, en la possession de quelqu'un d'autre que le propriétaire, sans le consentement de ce dernier.

C. *Extra-Provincial Truck Undertaking Licensing Regulations*, SOR/88-46

4. (1) The minimum liability insurance coverage that shall be held by an extra-provincial truck undertaking is

4. (1) L'entreprise de camionnage extra-provinciale doit être munie d'une assurance responsabilité minimum de :

(a) for each motor vehicle, for bodily injury to or the death of any person or for loss of or damage to property of others, other than cargo, the amount of one million dollars;

a) 1 000 000 $ par véhicule automobile, pour couvrir les blessures ou la mort d'une personne, ou la perte ou l'endommagement de biens appartenant à autrui, à l'exclusion du chargement;

b) 2 000 000 $ pour couvrir les blessures ou la mort d'une

(b) for each motor vehicle used for the transport of any dangerous goods

personne ou la perte ou l'endommagement de biens appartenant à autrui, à l'exclusion du chargement, à l'égard de chaque véhicule automobile utilisé pour le transport de marchandises dangereuses :

(i) that are set out in Column I of Schedule XII to the *Transportation of Dangerous Goods Regulations*, in the quantities referred to in section 7.18 of those Regulations, and

(i) d'une part, qui sont visées à la colonne I de l'annexe XII du *Règlement sur le transport des marchandises dangereuses*, selon les quantités indiquées à l'article 7.18 de ce règlement,

(ii) in respect of which an emergency response plan is required to be filed with the Director General of the Transport of Dangerous Goods Directorate, Department of Transport, pursuant to Part VII of the *Transportation of Dangerous Goods Regulations*, for bodily injury to or the death of any person or for loss of or damage to property of others, other than cargo, the amount of $2 million; and

(ii) d'autre part, pour lesquelles un plan d'intervention d'urgence doit être déposé auprès du directeur général de la Direction générale du transport des marchandises dangereuses du ministère des Transports, conformément à la partie VII du *Règlement sur le transport des marchandises dangereuses*; et

(c) subject to subsections (1.1) and (1.2), for each motor vehicle, for loss or damage to cargo

c) sous réserve des paragraphes (1.1) et (1.2), pour couvrir la perte du chargement d'un véhicule automobile ou les dommages causés au chargement:

(i) with respect to each motor vehicle, or combination of motor vehicles, having a maximum registered gross weight not exceeding 12 700 kg, the amount of $15,000 thousand,

(i) 15 000 $ par véhicule automobile, ou par groupe de véhicules automobiles, dont le poids brut maximum enregistré ne dépasse pas 12 700 kg,

(ii) with respect to each motor vehicle, or combination of motor vehicles, having a maximum registered gross weight exceeding 12 700 kg but not exceeding 21 000 kg, the amount of $20,000 thousand,

(ii) 20 000 $ par véhicule automobile, ou par groupe de véhicules automobiles, dont le poids brut maximum enregistré est supérieur à 12 700 kg sans dépasser 21 000 kg,

(iii) with respect to each motor vehicle, or combination of motor

(iii) 27 000 $ par véhicule automobile, ou par groupe de véhicules automobiles, dont le poids brut maximum enregistré

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vehicles, having a maximum registered gross weight exceeding 21 000 kg but not exceeding 37 000 kg, the amount of $27,000 thousand, and

(iv) with respect to each motor vehicle, or combination of motor vehicles, having a maximum registered gross weight exceeding 37 000 kg, the amount of $32,000 thousand.

est supérieur à 21 000 kg sans dépasser 37 000 kg,

(iv) 32 000 $ par véhicule automobile, ou par groupe de véhicules automobiles, dont le poids brut maximum enregistré est supérieur à 37 000 kg.

CanLII

# Dupuis v. City of Moncton, 2005 NBCA 47 (CanLII)

Date: 2005-04-21

File number: 133/04/CA

Other citations: 284 NBR (2d) 97 — [2005] NBJ No 165 (QL)

Citation: Dupuis v. City of Moncton, 2005 NBCA 47 (CanLII), <http://canlii.ca/t/1k6tq>, retrieved on 2019-11-13

COURT OF APPEAL OF NEW BRUNSWICK

133/04/CA

| | |
|---|---|
| SHARON DUPUIS | SHARON DUPUIS, |
| APPELLANT | APPELANTE, |
| - and - | - et - |
| THE CITY OF MONCTON | LA VILLE DE MONCTON, |
| RESPONDENT | INTIMÉE. |
| Dupuis v. City of Moncton, 2005 NBCA 47 | Dupuis c. City of Moncton, 2005 NBCA 47 |
| CORAM:<br>The Honourable Chief Justice Drapeau<br>The Honourable Justice Turnbull<br>The Honourable Justice Larlee | CORAM :<br>L'honorable juge en chef Drapeau<br>L'honorable juge Turnbull<br>L'honorable juge Larlee |
| Appeal from a decision of the Court of Queen's Bench:<br>August 13, 2004 | Appel d'une décision de la Cour du Banc de la Reine :<br>le 13 août 2004 |
| Appeal heard:<br>January 26, 2005 | Appel entendu :<br>le 26 janvier 2005 |
| Judgment rendered:<br>April 21, 2005 | Jugement rendu :<br>le 21 avril 2005 |
| Reasons for judgment by:<br>The Honourable Justice Larlee | Motifs de jugement :<br>L'honorable juge Larlee |
| Concurred in by:<br>The Honourable Chief Justice Drapeau<br>The Honourable Justice Turnbull | Souscrivent aux motifs :<br>L'honorable juge en chef Drapeau<br>L'honorable juge Turnbull |
| Counsel at hearing: | Avocats à l'audience : |

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For the appellant:
Ronald J. Ashfield, Q.C.

Pour l'appelante :
Ronald J. Ashfield, c.r.

For the respondent:
Eric LeDrew and
Mark McElman

Pour l'intimée :
Eric LeDrew et
Mark McElman

THE COURT

The appeal is dismissed. The cross-appeal is allowed with costs to the City of Moncton on the appeal, the cross-appeal and below, in the amounts of $1,200, $1,200 and $3,000 respectively for a total of $5,400.

LA COUR

Rejette l'appel, accueille l'appel reconventionnel et condamne l'appelante à payer à la Ville de Moncton des dépens de 1200 $, 1200 $ et 3000 $ afférents respectivement à l'appel, à l'appel reconventionnel et à la première instance, pour un total de 5400 $.

The judgment of the Court was delivered by

LARLEE, J.A.

[1] The appellant, Sharon Dupuis, brought an action against the City of Moncton for injuries she sustained in an accident at a crosswalk on Mountain Road in that City. On a motion for summary judgment, a judge of the Court of Queen's Bench determined that Ms. Dupuis' damages arose out of a motor vehicle accident. He then determined that her action was statute-barred pursuant to s. 5(1) of the *Limitation of Actions Act*, R.S.N.B. 1973, c. L-8, because Ms. Dupuis commenced the action against the City three and one-half years after the accident. The judge dismissed the action and granted summary judgment to the City of Moncton. That decision is reported at [2004] N.B.J. No. 312 (Q.B.) (QL). Ms. Dupuis appeals that decision. The City of Moncton has cross-appealed the motion judge's order as to costs. At the hearing, we dismissed the appeal with reasons to follow and reserved our decision with respect to the cross-appeal.

I. Background

[2] The facts are straightforward and not in dispute. It is important to set them out chronologically since a limitation period is in question. Ms. Dupuis alleges that she sustained severe personal injuries when she was struck by an automobile, owned and operated by Laura Thurston, on Mountain Road in the City of Moncton at approximately 10:45 p.m. on May 3, 2000. At the time of the accident Ms. Dupuis was crossing Mountain Road on foot in a crosswalk located at the intersection of Mountain Road and Birchmount Drive. She alleges that a traffic control device located at that intersection was displaying an illuminated white pedestrian "walk" sign indicating that she and her companion had the right-of-way.

[3] In a letter dated May 10, 2000, David Hawkins, a claims representative acting on behalf of Ms. Thurston's insurer, indicated to Ms. Dupuis' solicitor, Brian Murphy, that "our investigation is ongoing and liability will be an issue. To this end, we have put the of [sic] City of Moncton on formal Notice."

[4] On January 19, 2001, Ms. Dupuis' solicitor initiated legal proceedings against Ms. Thurston, alleging that the injuries that Ms. Dupuis sustained on May 3, 2000 arose from the negligent operation of the motor vehicle owned and driven by Ms. Thurston.

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[5] On June 5, 2001, Ms. Dupuis was interviewed at the office of her lawyer by representatives of Ms. Thurston. During the course of the interview, Ms. Dupuis was shown photographs of the accident scene, depicting the intersection and crosswalk, as well as the traffic control devices. In her written statement she commented, "I didn't notice the condition of the traffic control device."

[6] On May 10, 2002 Ms. Thurston filed her Statement of Defence in which she alleged that at the time of the collision she was operating her motor vehicle in a "safe, lawful and prudent manner, in an easterly direction along Mountain Road," and further that as her vehicle entered the intersection "she was facing a green traffic control device ... granting eastbound traffic the right of way". Further, in her Statement of Defence, Ms. Thurston alleged "that the accident was caused or, contributed to by the negligence of the City of Moncton ... for failing to install and/or maintain the traffic vehicle and/or pedestrian signals posted at the intersection ... in a proper and safe working condition."

[7] On May 13, 2002, Ms. Thurston issued a Notice of Third Party Claim against the City. The particulars of negligence contained in the Third Party Claim asserted that the defects in the installation of the traffic control devices located at the intersection in question permitted the display of a green light to Mountain Road traffic while at the same time permitting the display of an illuminated walk sign to pedestrians crossing Mountain Road.

[8] On July 5, 2002 the City filed a Third Party Defence, denying that it was negligent as alleged. The City further alleged that if its traffic control devices had been altered, which it did not admit, then the alteration had been occasioned without its negligence, nor reasonable discernment.

[9] On April.3 and 4, 2003 Ms. Dupuis conducted an Examination for Discovery in the action she commenced against Ms. Thurston. The discovery lead to undertakings as a result of which Ms. Dupuis' solicitor, Brian Murphy, who was the Mayor of Moncton, found out that the City of Moncton might be negligent and that he might be in a conflict of interest position. He transferred Ms. Dupuis' file to the law firm of Cantini Law Group.

[10] On January 22, 2004, Ms. Dupuis through her new solicitor, Joseph E. Cantini, initiated legal proceedings against the City. In her Statement of Claim Ms. Dupuis alleged that the injuries which she sustained on May 3, 2000 were caused by the negligence of the City, its employees and agents, in negligently designing, installing and/or maintaining traffic control devices at the intersection in question. In the particulars of negligence alleged by Ms. Dupuis against the City, Ms. Dupuis specifically alleged that the City was negligent in "omitting to utilize the manual and specifications for a uniform system of traffic control devices contrary to section 115 of the *Motor Vehicle Act*, R.S.N.B. 1973, c. M-17."

[11] On March 26, 2004, the City filed a Statement of Defence in which it asserted that Ms. Dupuis's action was barred by s. 5(1) of the *Limitation of Actions Act.*

[12] On June 15, 2004, the City initiated a notice of motion for summary judgment seeking the dismissal of Ms. Dupuis' claim on the ground that it is prescribed by the *Limitation of Actions Act.*

[13] The motion judge determined that Ms. Dupuis' cause of action against the City was prescribed by reason of s. 5(1) of the *Limitation of Actions Act.* The motion judge further found on the

basis of the affidavit evidence that Ms. Dupuis' cause of action against the City was discoverable no later than June 5, 2001.

[14] There are three issues in this case: the application of s. 5(1) of the *Limitation of Actions Act*, discoverability, and the motion judge's cost order.

II. Summary Judgment

[15] Lawyers have presented motions for summary judgment in accordance with Rule 22 in cases dealing with subjects as widely varied as third-party liability coverage, defamation, agreements of purchase and sale, and professional negligence. Recently in *Morrow v. Aviva Canada Inc.*, 2004 NBCA 100 (CanLII), [2004] N.B.J. No. 494 (C.A.) (QL), the moving party was successful in obtaining summary judgment in a case concerning advance payments in a wrongful dismissal case. The case at bar presents another interesting factual foundation where the defence is the limitation of action and the issue of discoverability. The question then arises if these defences can be used in these circumstances. The answer, of course, is in the affirmative.

[16] In *Morrow v. Aviva*, Chief Justice Drapeau reiterates that Rule 22 applies to all actions. Summary judgment can be granted in respect of all or part of a claim. He states at para.10 and 11:

> Summary judgment is appropriate whenever there is "no reason for doubt as to what the judgment of the court should be if the matter proceeds to trial": *Ripulone v. Pontecorvo* (1989), 104 N.B.R. (2d) 56 at para. 13 (C.A.) and *Cannon v. Lange et al.* (1998), 1998 CanLII 12248 (NB CA), 203 N.B.R. (2d) 121 (C.A.). That pivotal question stands to be determined on the basis of the issues as defined by the pleadings, any relevant admissions in the record and the admissible evidence. Our Court has repeatedly endorsed that elementary proposition, which responding parties ignore at their peril.
>
> In *Cannon v. Lange*, at para. 21, the Court noted that the judge hearing a motion for summary judgment "has an obligation to consider not only the pleadings, but also any admissible evidence, namely statements of fact within the personal knowledge of the deponents, presented by way of affidavits and of any cross-examination on those affidavits ...". The Court added the following related observations at para. 23:
>
>> Common sense should move the parties to put their best foot forward on a motion under rule 22. Such a course of conduct is particularly wise for a respondent, since he or she has the most to lose. As stated by the Ontario Court of Appeal in *1061590 Ontario Ltd. v. Ontario Jockey Club et al.* (1995), 1995 CanLII 1686 (ON CA), 77 O.A.C. 196; 21 O.R. (3d) 547 (C.A.) at 557 [O.R.] in a vernacular expression, the respondent "must lead trump or risk losing." It will rarely be sufficient for the respondent to promise that evidence, which is admissible pursuant to rule 39.01(4), will be produced at trial: absent a compelling explanation, the respondent is required to produce admissible evidence which will prevent a conclusion that the action or defence is bereft of merit. I have no doubt that, where the ends of justice require, the court will allow all appropriate accommodations including leave to file further affidavit evidence.

[17] Since Rule 22 applies to all cases, the motion judge had a duty to consider the pleadings and the evidence adduced by the parties on the motion for summary judgment in order to determine whether there remained an unresolved question of fact that required a trial: *Caissie v. Sénéchal*

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*Estate et al.* (2001), 2001 NBCA 35 (CanLII), 237 N.B.R. (2d) 232 (C.A.), *Cannon v. Lange et al.* (1998), 1998 CanLII 12248 (NB CA), 203 N.B.R. (2d) 121 (C.A.). See, as well, *Dubé v. Dionne et al.* (1998), 1998 CanLII 12207 (NB CA), 201 N.B.R. (2d) 387 (C.A.).

[18] The evidentiary record must include an affidavit by the moving party that complies with Rule 22.02. The record may also include other affidavits and *viva voce* evidence under Rule 39.02. Rule 22.04 gives the motion judge a discretion to dismiss an action where the judge is satisfied that there is no merit to the claim:

| | |
|---|---|
| 22.04 Disposition of Motion | 22.04 Décision sur la motion |
| *Where No Defence or Merit to Action* | *Action sans défense ou sans fondement* |
| (1) Where, on a motion for judgment, the applicant satisfies the court that | (1) Si, sur une motion pour jugement, le requérant démontre de façon satisfaisante à la cour |
| (a) there is no defence or merit to a claim or part thereof, and | a) qu'il n'existe aucune défense ni fondement à la demande ou à une partie de la demande et |
| (b) the applicant is entitled to judgment, | b) qu'il a le droit d'obtenir un jugement, |
| the court may grant judgment. | la cour peut rendre jugement. |
| *Where Only Defence is to the Amount Claimed* | *Défense portant uniquement sur le montant de la réclamation* |
| (2) Where the plaintiff satisfies the court that the only defence is to the amount claimed, the court may direct a trial of that issue. | (2) Si le demandeur démontre à la cour que la défense porte uniquement sur le montant de la réclamation, la cour peut prescrire que cette question soit instruite. |
| *Where Only Issue is a Question of Law* | *Question portant uniquement sur un point de droit* |
| (3) Where the court is satisfied that the only issue is a question of law, the court may determine that question and grant judgment accordingly. | (3) Lorsque la cour constate que la seule question en litige porte sur un point de droit, elle peut trancher cette question et rendre un jugement en conséquence. |
| *Where Only Claim is for an Accounting* | *Demande visant uniquement une reddition de comptes* |
| (4) Where the only claim is for an accounting and the defendant fails to satisfy the court that there is | (4) Lorsque la demande vise uniquement une reddition de comptes, la cour peut donner les directives nécessaires à cette fin à moins que le défendeur ne |

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| some preliminary issue to be tried, the court may give directions for an accounting. | démontre à la cour qu'une question préliminaire doit être jugée. |

[19] The motion judge in this case examined the pleadings. He also considered the affidavit of Maurice Surette, the Assistant Electrical Supervisor for the City of Moncton, with attachments; the affidavit of Sharon Dupuis with attachments, and the affidavit of Brian Murphy with attachments. After an examination of the record and hearing the argument on the motion, he was left with no doubt as to what the court's judgment would be if the matter proceeded to trial.

III. Limitation of Action Defence

[20] Whenever a limitation provision is open to multiple reasonable interpretations, the one least inimical to the plaintiff must be favoured: para. 173 *Kenmont Management Inc. v. Saint John Port Authority et al.* (2002), 2002 NBCA 11 (CanLII), 248 N.B.R. (2d) 1 (C.A.). However, in this case the interpretation that the motion judge gave to the limitation provision is the only interpretation that it can reasonably bear.

[21] Section 5(1) of the *Limitation of Actions Act* reads as follows:

| | |
|---|---|
| 5(1) No action for damages arising out of the operation, care, or control of a motor vehicle shall, where the cause of action arose on or after March 8, 1953, be commenced but within two years after the cause of action arose. [Emphasis added.] | 5(1) Toute action en dommages-intérêts résultant de la conduite, de la garde ou du contrôle d'un véhicule à moteur se prescrit par deux ans à compter de la naissance de la cause d'action, lorsque celle-ci a pris naissance le 8 mars 1953 ou après cette date. [Je souligne.] |

[22] The parties agree that *Heredi v. Fensom*, 2002 SCC 50 (CanLII), [2002] 2 S.C.R. 741 is the leading case on the subject. *Heredi* prescribes a contextual analysis to determine if an action arises out of the operation, care, or control of a motor vehicle. Paragraphs 34, 35 and 43 are pertinent:

> Thus, in order to determine whether an action is for "damages occasioned by a motor vehicle", and thus subject to the *Highway Traffic Act* limitation period, a substantive approach ought to be taken. The nature of the facts and the nature of the action ought to be considered together in order to make a determination as to the fundamental nature of the action. Are the damages sought to be recovered in the action, in their essence, damages that were occasioned by a motor vehicle? In light of the way in which the action is framed, and the facts giving rise to the damages claimed, is the action one that could be primarily classified as an action for damages occasioned by a motor vehicle? If the role of the motor vehicle in the causal chain is too insignificant, as in *Argue*, or if the causal chain is itself not the most illuminative way to characterize the claim, as in *Bruell* or as in *Clost*, the action ought not be regarded as subject to the limitation. If, on the

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other hand, the dominant feature of the damages is their relation to a motor vehicle accident, the limitation period ought to be applied.

In other words, the true intent of the statute is that "damages occasioned by a motor vehicle" requires that the presence of a motor vehicle be the dominant feature, or constitute the true nature, of the claim. Conversely, claims, whether framed in contract or in tort, where the presence of a motor vehicle is a fact ancillary to the essence of the action, ought not be regarded as within the scope of that phrase.

[...]

With respect to each claim, then, the dominant feature of the facts is that the damage here was caused by a motor vehicle. The presence of the vehicle was not in any way ancillary to the damage complained of. Instead, it was the very operation of the motor vehicle itself that, by the parties' mutual admission, centrally caused the damage. The alternative cause -- the placement of the plaintiff's crutches -- is so highly contingent on the context of the plaintiff's presence in a motor vehicle about to engage in motion, that I can find no distinction of significance there. In my view, therefore, the claims brought by the plaintiff are claims for "damages occasioned by a motor vehicle".

[23] It does not appear that there is any substantive difference between "damages occasioned by a motor vehicle" and "damages arising out of the operation, care, or control of a motor vehicle." The question to be asked is: are the damages to be recovered in their essence caused by a motor vehicle, or put another way can the action be primarily classified as a motor vehicle action?

[24] In *Karakas v. General Motors of Canada Ltd.*, 2004 CanLII 48168 (ON SC), [2004] O.J. 5231 (Sup.C.) the action involved a claim by the plaintiffs to recover damages for property loss due to a fire caused by allegedly defective wiring in a motor vehicle. The claim was issued more than two years after the fire and the defendant maintained that it was statute-barred by the two-year limitation period in the *Highway Traffic Act*, R.S.O. 1990, c. H. 8. At the time the *Act* barred claims for "damages occasioned by a motor vehicle" brought after the expiry of the limitation period. After conducting a substantive approach analysis, as dictated by *Heredi*, the motion judge found that one could not make a distinction between the motor vehicle and its wiring. Rouleau J. states at para. 20:

...This is not a case where something has been mounted on or added to the motor vehicle and this mounted or added equipment caused the damage. Although the motor vehicle was not in the course of conveying or travelling on the highway when the damage occurred, it is a component of that motor vehicle, a part of the motor vehicle integral to the conveyance function of the motor vehicle, that caused the damage. The plaintiffs cannot attribute the damage to anything other than the motor vehicle and the parts of the motor vehicle central to the conveyance function.

The trial judge concluded that the motor vehicle was not only the dominant, but also the only feature in the claim for damages. The very presence of the motor vehicle and the alleged defect in the motor vehicle are central to and the essence of the claim. The claim was thus one for damages occasioned by a motor vehicle and it was statute barred.

[25] The allegation at the root of this case is that a motor vehicle/pedestrian accident occurred due to the municipality's failure to live up to certain sections of the *Motor Vehicle Act* (s.115, 120 and 121). The traffic control device has no meaning unless it is considered in the context of

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controlling motor vehicles, that is, its very existence depends on motor vehicles being present. The purpose of the traffic control device is to protect pedestrians from motor vehicles as they cross the street.

[26] In my view, if one applies the substantive approach mandated in *Heredi* to the facts in the present case, it dictates a finding that the claim concerning the condition of the traffic control device in question is, fundamentally, a claim that the condition of the device increased the risk of a motor vehicle/pedestrian collision and that such a collision did in fact occur.

[27] I agree with the position taken by the City that the alleged negligence of the City did not unduly increase the risk of a slip and fall injury or any other reasonably foreseeable harm other than personal injuries as a result of a motor vehicle/pedestrian collision. Indeed, but for the presence of motor vehicle traffic on the road in question, the pedestrian signal would not even have been present.

[28] The purported negligence of the City essentially required the presence of a motor vehicle to become manifest. As a result, the motor vehicle is in no way ancillary to the appellant's claim. Simply put, the only way in which one would characterize this accident is to say it is a motor vehicle accident. One would never call it a traffic control device accident. Furthermore, the only way the City became involved was because there was a motor vehicle accident. Therefore, the limitation period found in s. 5(1) must apply.

IV. The Discoverability Principle

[29] The second issue that arose on the motion for summary judgment was the issue of discoverability. In *Central Trust Co. v. Rafuse*, 1986 CanLII 29 (SCC), [1986] 2 S.C.R. 147 at 224. Justice Le Dain described the discoverability principle in the following terms:

> ... [A] cause of action arises for purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence. ...

See also *Kamloops (City of) v. Nielsen et al.*, 1984 CanLII 21 (SCC), [1984] 2 S.C.R. 2 and *Zapfe v. Barnes* (2003), 2003 CanLII 52159 (ON CA), 66 O.R. (3d) 397 (C.A.).

[30] It is accepted that the discoverability rule is an interpretative tool for the construing of limitation statutes. Ms. Dupuis' counsel argued that the issue of discoverability precluded the court from granting summary judgment based on *Aguonie et al. v. Galion Solid Waste Materials Inc. et al.* (1998), 1998 CanLII 954 (ON CA), 38 O.R. (3d) 161 (C.A.). In that decision, the Court of Appeal of Ontario decided that the motion judge exceeded his role in determining a motion for summary judgment. In particular Ms. Dupuis relies on page 174 of *Aguonie* which reads as follows:

> *Ontario New Home Warranty Program v. 567292 Ontario Ltd.* (1990), 71 O.R. ... (H.C.J.), is a case which illustrates that, generally speaking, it is not appropriate for a motions judge, hearing a motion for summary judgment where the application of the discoverability rule is central to its resolution, to resolve this issue. At pp. 545-46 Philp J., after noting that the determination of when the cause of action arose for the purpose of the starting point of a limitation period depends on mixed fact and law, concluded: "I cannot answer the question of when the plaintiff knew or ought to have known that there were defects, or sufficient defects, for the limitation period to start running." Following the reasoning of Campbell J. in *Riviera Farms Ltd. v. Paegus Financial Corp.* (1988), 29 C.P.C. (2d) 217 at p. 221 (Ont. H.C.J.), he concluded that this was the job of the trial

judge. The commencement of the limitation period, as in this appeal, constituted a genuine issue for trial.

[31] If *Aguonie* stands for the proposition that the issue of discoverability is one that cannot be decided on a summary judgment motion, but must go to trial, then that is not the state of the law in New Brunswick. The issue of discoverability can be resolved under Rule 22 if there is no genuine issue as to the material facts. Perhaps the distinguishing point between *Aguonie* and the case at bar is that in the former, Borins J. was of the opinion that a trial judge, after hearing *viva voce* evidence would be in a better position to decide whether the judge should exercise his or her discretion to extend the limitation period. No such discretion exists in New Brunswick.

[32] There is evidence that this cause of action was discoverable by the exercise of due diligence not later than June 5, 2001. The motion judge considered the following evidence:

- Counsel that Ms. Dupuis hired was the Mayor of Moncton. He was aware of a possible claim against the city of Moncton because he was put on notice and informed of the possible basis of the claim by the letter dated May 10, 2000, within one week of the accident.
- The first action (*Dupuis v. Thurston*) was commenced after the city of Moncton had been put on notice and Ms. Dupuis' lawyer had been so advised.
- On June 5, 2001 Ms. Dupuis gave an interview to an adjuster and the matter of the pedestrian control device was discussed with her at that time.

[33] The motion judge found that Ms. Dupuis had presumed knowledge of the City's potential negligence on or about May 10, 2000 and actual knowledge at the latest on June 5, 2001. Consequentially, in his opinion, her action should have been commenced no later than June 5, 2003. She commenced it in January 2004.

[34] The evidence led the motion judge to the correct conclusion, that discoverability was not an answer to the motion for summary judgment.

V. Costs

[35] The City of Moncton has cross-appealed the motion judge's award of costs contending that he committed a reversible error in ordering that costs on the successful motion for summary judgment be in the cause of a different action before the court involving additional parties. The motion judge stated at paragraph 26:

> Summary Judgment is granted to the Defendant City of Moncton dismissing the action of Sharon Dupuis against the City of Moncton, M/C/0086/04 because Sharon Dupuis' claim is prescribed by the *Limitation of Actions Act* subsection 5(1). As there is a second action involving all parties, costs will be in the cause in that action.

The motion judge's cost order had the effect of ordering a judge in a separate action to resolve the question of costs on the motion that he heard.

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[36] Summary judgment was granted in this case. Rule 59.08 of the *Rules of Court* is applicable to the issue of costs payable upon a successful motion for summary judgment. It reads as follows:

| | |
|---|---|
| 59.08 Fixing and Assessing Costs | 59.08 Fixation et calcul des dépens |
| (1) Subject to Rules 59.01 and 59.02, on rendering a decision or making an order | (1) Sous réserve des règles 59.01 et 59.02, lorsque la cour rend une décision ou une ordonnance |
| (a) after trial of an action, | a) après un procès, |
| (b) on motion for judgment, | b) sur une motion pour jugement, |
| (c) disposing of a proceeding commenced by notice of application, or | c) ayant pour effet de conclure une instance introduite par avis de requête ou |
| (d) after hearing an appeal, | d) après audition d'un appel, |
| the court rendering the decision or making the order shall fix the costs relating to fees for solicitors' services in accordance with Tariff 'A' and direct by whom and to whom they are to be paid. | elle doit fixer les dépens afférents aux honoraires des avocats suivant le tarif 'A' et indiquer qui devra les supporter et à qui ils devront être payés. |

[37] The City argues that the motion judge lacked the discretion to ignore the provisions of Rule 59.08 and, instead, order the costs of the successful motion for summary judgment be in the cause of a separate action. It contends that this is an excess of discretion which constitutes a clear error of law that unjustly deprives the respondent of its costs on the successful motion for summary judgment.

[38] The respondent also submits that the error with respect to costs is manifest because the *Rules of Court* provides no basis on which to have the costs of an action assessed in some other separate action. The *Rules* provide for awards or refusals of costs within an action, but not to be provided for in another action.

[39] I accept the argument of the City that the motion judge has made a reversible error with respect to the cost order. There exists no discretion to involve a separate proceeding. Also, no claim exists by Ms. Dupuis against the City as third party in the separate action. As a result, the trial judge in that action would not be able to give effect to the motion judge's disposition that costs on the successful motion for summary judgment are in the cause of the separate action.

[40] The jurisprudence from this Court has consistently stated that costs follow the event. In *Acadia Marble, Tile & Terrazzo Ltd. v. Oromocto Property Developments Ltd.* (1998), 1998 CanLII 12226 (NB CA), 205 N.B.R. (2d) 358 Drapeau J.A. (as he then was) addressed the issue of the awarding of costs following an event. It is useful to cite paragraphs 34 and 35 of that decision:

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It is undoubtedly true that, where the trial judge has exercised his or her discretion as to costs, this court will not intervene unless it is satisfied that the exercise of discretion was manifestly wrong. See *Williams et al. v. Saint John (City), New Brunswick and Chubb Industries Ltd.* (1985), 1985 CanLII 126 (NB CA), 66 N.B.R. (2d) 10 ... (C.A.). In the present case however, the trial judge's decision is silent on the issue of the costs on the counterclaim. Further, there is nothing in the record to indicate that the trial judge applied her mind to the question. As a result, it cannot be said that we are being asked to interfere with the exercise of a discretionary power since none was exercised.

The general rule is that the successful party is entitled to costs. It is said that "costs follow the event." In *Distributeur Norbec Enrg. and Gagnon v. Daigle (Clarence) & Fils Ltée* (1984), 57 N.B.R. (2d) 269 ... this court expressed the rule as follows at p. 277:

> ... Normally, the party who recovers judgment is entitled to his costs, although there is no doubt that a judge may exercise his discretion by refusing to make such an award. However, this discretion must be exercised in accordance with the purposes of the law. ...

See also *MacLellan v. MacLellan*, [2001] N.B.R. (2d) (Supp.) No. 58 (C.A.), *Merrithew v. Dunphy's Poultry Farm Ltd.*, 2004 NBCA 25 (CanLII), [2004] N.B.J. No. 146 (C.A.) (QL) at para. 4, *Walsh v. Nicholls*, 2004 NBCA 59 (CanLII), [2004] N.B.J. No. 281 (C.A.) (QL) and *Francis v. Sappier*, 2004 NBCA 70 (CanLII), [2004] N.B.J. No. 452 (C.A.) (QL).

[41] There is no reason to derogate from that general rule here. I would therefore dismiss the appeal, allow the cross-appeal and award costs to the City of Moncton on the appeal, the cross-appeal and below, in the amounts of $1,200, $1,200 and $3,000 respectively for a total of $5,400.

M.E.L. LARLEE, J.A.

WE CONCUR:

J. ERNEST DRAPEAU,
CHIEF JUSTICE OF NEW BRUNSWICK

WALLACE S. TURNBULL, J.A.

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CALIFORNIA COAST
UNIVERSITY

AUG 14 2012

I certify this to be a true copy
Notary Public
[illegible]

*Be it known that*

**Noël Ambadiang Ayangma**

*having fulfilled the requirements and complied with the respecting conditions of our University, and by authority of the Bureau for Private Postsecondary and Vocational Education in accordance with the provisions of California Education and in recognition thereof is awarded the Degree of*

**Doctor of Philosophy in Business Administration**

*with all rights, honours and privileges pertaining thereto.*
*In witness whereof, the seal of University of California Coast and the signatures of the duly authorized officials are hereby affixed at Santa Ana, California, this 26th day of June, 1996.*

Barbara W. Postuma
**Registrar**

[illegible]
**President**

# CALIFORNIA COAST UNIVERSITY

700 North Main Street Santa Ana, Ca. 92701

## STUDENT TRANSCRIPT

| | | | |
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| NAME: (Last) AYANGMA, NOEL A. (First) (Middle) | Degree/Major DOCTOR OF PHILOSOPHY | (Area of Specialization) BUSINESS ADM | |
| ADDRESS: (Street Address) 25 ENGLAND CIRCLE | Date Enrolled 12/19/90 | Date Graduated 06/10/96 | Total Units 42 |
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|---|---|---|
| PRIOR DEGREES | UNIV OF MONCTON | MBA |

| COURSE NUMBER | COURSE DESCRIPTION | CREDIT CODE | UNITS | GRADE | DATE COMPLETED |
|---|---|---|---|---|---|
| [illegible] | HUMAN BEHAVIOR IN ORGANIZATIONS | CBX | 3 | A | 03/01/91 |
| [illegible] | INTERNATIONAL BUSINESS | CBX | 3 | A | 04/02/91 |
| [illegible] | MANAGERIAL ECONOMICS | CBX | 3 | B | 08/22/91 |
| [illegible] | MGT OF BUS. & PUBLIC ORGANIZATIONS | CBX | 3 | A | 02/18/92 |
| [illegible] | STRATEGIC MARKETING MANAGEMENT | CBX | 3 | A | 07/09/92 |
| [illegible] | STRATEGIC BUSINESS POLICY | CBX | 3 | B | 11/25/92 |
| [illegible] | BUSINESS CYCLE & FORECASTING | CBX | 3 | B | 11/27/92 |
| [illegible] | CORPORATE FINANCE | CBX | 3 | A | 05/10/93 |
| [illegible] | RESEARCH METHODS | CBE | 3 | A | 05/17/93 |
| [illegible] | THE PROPOSAL FOR THE DISSERTATION | CBE | 3 | A | 06/08/95 |
| [illegible] | DISSERTATION | CBE | 12 | A | 05/30/96 |

*** End of Transcript ***

Sanctioned by the Doctoral Review Committee in May 1996

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DESCRIPTION OF GRADES
A = Excellent B = Good
C = Average D = Poor
F = Failure

DESCRIPTION OF CREDIT CODES
CBX = Credit by Exam
CBT = Credit by Transfer
CBE = Credit by Experiential Learning

(REGISTRAR) (DATE)

I certify that this is a true copy of the student record. Not an official transcript without assignature.

3 Units are equivalent to 3 semester hours.

# Université de Moncton

*Attendu que*

## Noël Ambadiang Ayangma

*a satisfait à toutes les conditions et exigences de Notre université;*
*En vertu de l'autorité conférée par la Charte promulguée le 19 juin 1963,*
*Nous, Recteur, sur la recommandation du Sénat académique, lui décernons*

**La Maîtrise en Administration des Affaires (MBA)**

*avec tous les droits, honneurs et privilèges attachés à ce diplôme.*
*En foi de quoi, à ce document revêtu du sceau de Notre université, Nous apposons Notre signature, comme l'a fait le Secrétaire général, à Moncton, Nouveau-Brunswick,* le 21 mai 1988

Louis P. Blanchard
*Recteur*

Gilles Long
*Secrétaire général*

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Professeures et professeurs

## DÉTAILS DU POSTE

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| Titre du poste : | PROFESSEURE ou PROFESSEUR EN GESTION DES RESSOURCES HUMAINES (poste menant à la permanence d'emploi) |
| Campus : | Moncton |
| Type : | Contrat |
| Secteur : | Département d'administration, Faculté d'administration |
| Entrée en fonction : | Le 1er juillet 2014 |
| Fonction et information générale : | Information générale : Il s'agit d'un poste régulier menant à la permanence d'emploi à combler au rang d'adjoint à compter du 1er juillet 2014. Ce poste est rattaché au Département d'administration de la Faculté d'administration, qui est composée de deux départements, dont le Département de comptabilité (comptabilité, finance et systèmes d'information organisationnels) et le Département d'administration (management, marketing et gestion des opérations). Tous les cours sont offerts en français. La Faculté compte un corps professoral de 26 personnes et une population étudiante de plus de 700 étudiantes et étudiants à temps complet et d'environ 300 à temps partiel.<br><br>Particularité : L'Université de Moncton, fondée en 1963, est un établissement d'enseignement supérieur de langue française en milieu acadien. Avec ses trois campus situés à Edmundston, à Moncton et à Shippagan, elle offre des programmes d'études universitaires de baccalauréat, de maîtrise et de doctorat dans plusieurs disciplines. Près de 5000 étudiantes et étudiants provenant de partout au Canada et de l'étranger la fréquentent. Pour de plus amples renseignements sur l'Université et ses programmes d'études, vous êtes invités à consulter le site Internet www.umoncton.ca.<br><br>L'Université de Moncton souscrit à l'exigence d'équité en matière d'emploi. Conformément aux exigences relatives à l'immigration au Canada, ce concours s'adresse en priorité aux citoyennes et citoyens canadiens ainsi qu'aux personnes ayant obtenu le droit d'établissement au Canada.<br><br>Fonctions : Dans le cadre des fonctions universitaires d'enseignement, de recherche et de services à la collectivité, la personne qui occupera ce poste sera appelée à offrir des cours au niveau du baccalauréat et de la maîtrise, principalement dans le domaine de la gestion des ressources humaines. Cette personne devra aussi être active dans les activités du Département et de la Faculté, ainsi que dans des organismes propres à sa discipline. |
| Particularités : | Formation : Les candidates et candidats à ce poste possèdent le doctorat en administration des affaires, en relations industrielles ou dans une discipline connexe avec spécialisation en ressources humaines, et font preuve d'excellentes qualités pédagogiques de préférence dans un contexte universitaire. Enfin, la maîtrise de la langue française, tant à l'oral qu'à l'écrit, est essentielle.<br><br>Exceptionnellement, les candidatures de personnes sur le point d'obtenir le doctorat dans la discipline au cours de la prochaine année seront considérées. Dans ce cas, le dossier de la candidate ou du candidat doit comprendre une lettre de recommandation de la directrice ou du directeur de thèse faisant état du degré d'avancement des études doctorales et d'un échéancier pour l'obtention du doctorat.<br><br>Les personnes souhaitant postuler sont priées de faire parvenir un dossier complet incluant un curriculum vitae détaillé, une photocopie conforme à l'original des diplômes obtenus, tout document permettant d'évaluer les compétences en enseignement et le potentiel en recherche et, aux fins de référence, le nom et les coordonnées de trois personnes. Faire parvenir le tout à : M. Gaston LeBlanc, doyen, Faculté d'administration, Université de Moncton, Campus de Moncton, Moncton NB E1A 3E9. |
| Salaire : | Le traitement annuel est établi selon la formation et l'expérience. Les critères servant à établir le rang professoral et le traitement annuel sont régis par la convention collective. |
| Fermeture du concours : | Le 13 janvier 2014 |
| Personne ressource : | M. Gaston LeBlanc, doyen, Faculté d'administration |
| No. de téléphone : | (506) 858-4205 |
| Courriel : | gaston.leblanc@umoncton.ca |
| No. de télécopieur : | (506) 858-4693 |

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# Poste de professeur.e en gestion des ressources humaines (3)

**Jeannette Gaudet** <jeannette.gaudet@umoncton.ca> 01/13/14 at 1:53 PM
To noelayngma@yahoo.ca

Bonjour,

Nous accusons réception de votre lettre accompagnée de vos documents supportant votre candidature au poste régulier de professeure ou professeur en gestion des ressources humaines.

Vous trouverez en annexe une fiche d'auto identification que nous vous demandons de compléter et de nous retourner le plus tôt possible.

Le Comité de sélection devrait normalement se réunir après le 13 janvier 2014 pour faire l'étude des candidatures et nous vous informerons de l'évaluation faite de votre dossier.

Pour le doyen,

*Jeannette Gaudet*
*Secrétaire administrative, Bureau du doyen*
*Faculté d'administration*
*Téléphone : (506) 863-2082*
*Télécopieur : (506) 858-4093*

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**Noel Ayangma** Bonjour Jeannette, Comme convenu, vous trouverez 01/13/14 at 2:25 PM

**Jeannette Gaudet** Bonjour Noël, Merci, bien reçu. Jeannette Gaudet 01/13/14 at 2:30 PM

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Professeure at Université de Moncton
Moncton, New Brunswick, Canada | Human Resources

| | |
|---|---|
| Current | Université de Moncton, Morneau Shepell, Travailleur autonome |
| Previous | CHUS et travailleur autonome, CHUM (centre hospitalier de l'université de Montréal), Université de Moncton; Université de Sherbrooke; CRISO |
| Education | Université de Sherbrooke |


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## Experience

### Professeure
Université de Moncton
June 2013 – Present (2 years 4 months) | Faculté d'administration

Management, gestion des ressources humaines, changement organisationnel, outils de gestion
Coach GRH - Jeux du commerce

### Formatrice en milieu de travail
Morneau Shepell
April 2013 – Present (2 years 6 months) | New-Brunswick

Ateliers, conférences, séminaires
Gestion RH, management, bien-être au travail

### Conseillère RH et développement organisationnel
Travailleur autonome
January 2011 – Present (4 years 9 months) | Montreal, QC/Nouveau-Brunswick

### Coaching de gestion
CHUS et travailleur autonome
January 2010 – November 2012 (2 years 11 months) | Sherbrooke, Montréal (QC)

- Interventions de coaching de courte durée auprès de gestionnaires (4 à 7 rencontres)


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Continuum
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Étudiant(e) (Institut agro
vétérinaire Hassan II

**Tatyanna Cruz**
Assessora de Infraestru
2015

**Christian Landry**
Professeur temporaire de
l'Université de Moncton

**Francis Weil**
Professeur at Université de

**Charline Godin-Landry**
Acadie Nouvelle

**Alice Dostie**
Étudiant(e) (Université de

**Jeanne Godin**

- Assurer la mise à jour des descriptions de poste et les profils de compétences du secteur administratif

- Recommander des exigences de poste et des tests de sélection en fonction des compétences requises

- Conceptualiser et animer des activités de formation et d'information en fonction des besoins des gestionnaires

- Effectuer une recherche documentaire sur les différents tests psychométriques disponibles en contexte de sélection du personnel

- Assister aux entrevues de sélection des employés (entrevue, feedback)

- Préparer et animer des rencontres avec les employés du secteur administratif

**Conseillère psychologie organisationnelle (Diagnostic organisationnel)**
CHUS
January 2009 – April 2009 (4 months) | Sherbrooke (QC)

- Préparer des canevas d'entrevue aux fins de cueillette d'information

- Animer des entrevues semi structurées individuelles et de groupe

- Effectuer les analyses qualitatives et quantitatives nécessaires

- Identifier les problèmes organisationnels et recommander des pistes de solution

- Préparer et animer des retours d'information auprès des employés et des gestionnaires

- Rédiger un rapport faisant état des résultats de l'intervention

**Auxiliaire d'enseignement**
Université de Moncton
September 2007 – April 2008 (8 months) | Moncton (NB)

- Offrir du soutien aux étudiants par le biais de séances de dépannage individuelles ou de groupe

- Assurer une surveillance lors des périodes d'examen

- Corriger et afficher les résultats des examens et des travaux pratiques

## Skills

Job Analysis · Talent Management · 360 Feedback · Organizational... · Organizational... · Employee Surveys · HR Consulting · Change Management · Recruiting · Talent Acquisition · Training · Coaching · Fully bilingual English · Competency Based... · Exit Interviews · See 3+

## Education

**Université de Sherbrooke**
D.Ps., Psychologie du travail et des organisations
2008 – 2014

Activities and Societies: Actuellement en rédaction de thèse; Scolarité, stages et internat

complétés

**Université de Moncton**

Baccaulauréat, Psychology

2004 – 2008

Activities and Societies: - Auxiliaire d'enseignement et de recherche (2006-2008) - Présidente du conseil étudiant de l'école de psychologie (2007-2008) - Présidente du conseil étudiant de la faculté des sciences de la santé et des services communautaires (2007-2008) - Représentante de la Société canadienne de psychologie (2006-2008)

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#8

UNIVERSITÉ DE MONCTON
CAMPUS DE MONCTON

Faculté d'administration
Bureau du doyen

Le 17 mars 2014

Monsieur Neil Boucher
Vice-recteur à l'enseignement et à la recherche
Université de Moncton

**Objet : Recommandation de Stéphanie Maillet au poste régulier autorisé de professeure en gestion des ressources humaines au Département d'administration à compter du 1er juillet 2014**

Monsieur le Vice-recteur,

Dans le cadre du concours visant à pourvoir le poste de professeure ou professeur en gestion des ressources humaines au Département d'administration, la Faculté d'administration a reçu 10 candidatures. À cet égard, ci-joint le procès-verbal de la réunion extraordinaire du 7 février du Département d'administration montrant les noms et domaines de spécialisation de ces personnes. Comme vous pouvez le constater à la lecture du procès-verbal, six candidatures ont été mises de côté, car leur spécialisation n'est pas en gestion des ressources humaines. Pour les quatre candidatures retenues au niveau de l'étape de présélection, deux d'entre elles ont aussi été mises de côté, en raison du fait que ces personnes n'ont pas le statut de résidence permanente au Canada.

À sa réunion extraordinaire du 21 février 2014, le Département d'administration a reçu les candidates Stéphanie Maillet en entrevue. Suite aux entrevues et l'analyse comparative des dossiers, le département recommande d'offrir le poste à Stéphanie Maillet.

Ayant examiné les dossiers de candidature et assisté aux présentations faites au département par les deux candidates, présentations portant entre autres sur la simulation d'un enseignement en gestion des ressources humaines, je suis tout à fait en accord avec la recommandation du département.

En ce qui a trait à Stéphanie Maillet, elle a bien réussi son entrevue, surtout au niveau de la simulation d'un enseignement, et elle s'est nettement démarquée de la première candidate. À mon avis, elle répond mieux aux besoins de notre faculté sur le plan de la formation en gestion des ressources humaines. En effet, son domaine de spécialisation est en psychologie du travail dans les organisations et ses recherches portent sur la satisfaction au travail des employés dans les organisations. Pour ce qui est des études doctorales, elle terminera sous peu sa thèse par articles avec soutenance prévue au printemps ou à l'été au plus tard.

...2

18, avenue Antonine-Maillet
Pavillon Jean-Cadieux
Moncton (Nouveau-Brunswick)
E1A 3E9 CANADA

Téléphone : (506) 863-2082
Télécopieur : (506) 858-4093

gaston.leblanc@umoncton.ca
www.umoncton.ca/administration

#9



En ce moment, Stéphanie Maillet occupe un poste temporaire d'une année en gestion des ressources humaines au Département d'administration. Son enseignement est apprécié par ses étudiantes et étudiants et, pour ma part, je suis satisfait de son engagement envers la faculté.

Par ailleurs, je vous prie de noter que ma recommandation de la candidate tient compte du fait que l'embauche de Stéphanie Maillet dans ce poste constitue un engagement à long terme pour l'Université. Elle repose sur mon jugement du potentiel de la candidate pour l'enseignement, les activités de recherche et le développement de la faculté.

En terminant, c'est avec plaisir que je recommande d'accorder à Stéphanie Maillet un contrat régulier menant à la permanence d'emploi à titre de professeure en gestion des ressources humaines au Département d'administration à compter du 1er juillet 2014. Advenant que la candidate n'ait pas terminé son doctorat au 1er juillet 2014, je recommande l'octroi d'un contrat temporaire d'une année muni d'une clause de régularisation.

Vous trouverez ci-joint l'annonce du poste, les dossiers de candidature de Stéphanie Maillet et et les procès-verbaux des réunions extraordinaires du 7 février 2014 et 21 février 2014 du Département d'administration montrant la démarche suivie à l'étape départementale. J'inclus également les résultats de l'évaluation de l'enseignement faite par les étudiantes et étudiants pour les cours qu'elle a donnés à la session automne 2013 et le rapport d'équité en matière d'emploi préparé par Claude DesRochers, directeur du Département d'administration. Je vous prie de noter que ce poste est ciblé pour le groupe désigné « personnes handicapées ».

Dans l'attente de prendre connaissance de votre décision, je vous prie d'agréer, Monsieur le Vice-recteur, l'expression de mes sentiments distingués.

Le doyen,

Gaston LeBlanc

Gaston LeBlanc, D.Sc.G.

GL/jg
p. j.

10

**DÉPARTEMENT D'ADMINISTRATION**

**Procès-verbal de la réunion spéciale tenue le vendredi 7 février 2014 au local 240, Pavillon Jean-Cadieux**

Étaient présents : Alidou Ouedraogo, Brigitte Prud'homme, Claude DesRochers, Gilles Marcoux, Isabelle Brun, Izold Guihur, Mélanie Fournier, Nha Nguyen, Philippe Gauvin (représentant des étudiant.es), Vivi Koffi

Absences motivées : Hamadoun Sidibe, Lucie Ouellette, Salem Lakhal (congé sabbatique), Stéphanie Maillet.
Absences: Hamadoun Sidibé

## 1. Ouverture de l'assemblée

Le président ouvre l'assemblée à 13h25, constate le quorum et souhaite la bienvenue aux membres et nous informe qu'un seul point est à l'ordre du jour.

## 2. Poste de management (Liste préliminaire: entrevues de sélection)

Le président donne la parole à Gilles Marcoux, président du comité pédagogique de management. Prenant la parole, ce dernier mentionna les points suivants.
Les membres du comité pédagogique ont procédé à l'évaluation des dossiers de la manière suivante :

- vérifier si les candidats avaient une spécialisation en GRH
- Évaluer les dossiers retenus en tenant compte de la grille adoptée.

Après vérification, les 6 candidats que voici dans le tableau ont été écartés :

| Noms et prénoms | Diplômes et spécialisations |
|---|---|
| Ayangma, Noël A | • Doctorat en administration (*Doctor of Philosophy in Business Administration, 1996* California Coast University).<br>• Doctorat en management général.<br>• Pas de publication spécialisée en GRH |

Quatre candidates ayant une spécialisation en GRH ont été retenues. Après avoir procédé à l'évaluation de leurs dossiers, en tenant compte de la grille approuvée par l'assemblée départementale à cet effet, elles se classent comme suit :

| Noms et prénoms | Pointage | Rang |
|---|---|---|
| | | |
| | | |
| | | |
| Maillet, Stéphanie | 52/80 | |
| | | |

On constate que les 2 premières candidatures se démarquent nettement des 2 autres. Après discussion des membres du comité pédagogique de management, à savoir s'ils doivent proposer d'inviter les 2 premières en entrevue, ils sont arrivés à la conclusion qu'il faille inviter les 4 candidates afin de donner une chance à notre collègue Stéphanie Maillet. En effet, Stéphanie Maillet a été embauchée en juillet 2013 à la suite du départ non annoncé à temps d'un collègue en GRH. Elle est très bien appréciée des collègues et des étudiants. Elle s'est bien intégrée et a clairement exprimé son désir de travailler pour la Faculté. De plus selon la lettre de recommandation écrite par son directeur de thèse, elle terminera son doctorat au plus tard en juillet 2014.

Par ailleurs, après une vérification des dossiers, le comité a constaté que les candidates sont pas détentrices du statut de résidente permanente du Canada, conformément à ce qui est mentionné dans l'offre d'emploi à savoir : «Conformément aux exigences relatives à l'immigration au Canada, ce concours s'adresse en priorité aux citoyennes et citoyens canadiens ainsi qu'aux personnes ayant obtenu le droit d'établissement au Canada».

Il est proposé (et appuyé), après discussion, et étant donné que les candidates sont pas détentrices du statut de résidente permanente, de mettre de côté temporairement leurs dossiers et d'inviter en entrevue les candidates et Stéphanie Maillet.

***Proposition adoptée***

**3 Levée de l'assemblée**

Le président lève l'assemblée à 14h05.

**Claude DesRochers**
**Président**

**Vivi Koffi**
**Secrétaire**

12 [redacted]

STEWART McKELVEY

[illegible] 801-944 [illegible] Main Street, P.O. Box/C.P. 28051
[illegible] 506.853.1970 [illegible] 506.858.8454
[illegible]

Le 18 décembre 2015

Par courriel

Sacha D. Morisset
Ligne privée : 506.853.1942
Télécopieur privé : 506 858.8454
smorisset@stewartmckelvey.com

Paméla Schiavoni
Avocate
Commission des droits de la personne
200, rue Champlain, suite 320
Dieppe, N.-B. E1A 1P1

Chère Mme Schiavoni

**Objet :** **NOEL AMBADIANG AYANGMA c. UNIVERSITÉ DE MONCTON, CAMPUS DE MONCTON**
**Plainte alléguant de la discrimination en raison de la race, origine nationale, lieu d'origine, couleur, âge, dans le cadre de l'emploi, conformément à l'article 4 de la *Loi sur les droits de la personne du Nouveau-Brunswick***

Comme vous le savez, nous représentons l'Université de Moncton, campus de Moncton (« l'Université ») dans l'affaire mentionnée en rubrique. Veuillez accepter la présente comme l'objection de l'Université à la plainte de M. Ayangma au motif que la plainte ne fut pas déposée dans le délai d'un an prévu dans la *Loi sur les droits de la personne*

Dans sa plainte, M. Ayangma allègue que l'Université aurait agi de façon discriminatoire envers lui dans une série d'événements remontant au mois de septembre 2013.

Les traitements différentiels et discriminatoires allégués par M. Ayangma, tel que nous les comprenons, portent sur :

1. le processus d'attribution des charges de cours en 2013 et le processus d'attribution d'un contrat temporaire d'une durée d'un an à Mme Stéphanie Maillet qui, selon M. Ayangma, ne serait pas qualifiée pour ce poste alors que lui le serait,

2. le processus de dotation du poste de professeur à temps plein qui a abouti en 2014 à l'embauche de Mme Maillet comme professeure en gestion des ressources humaines, et,

3. généralement, dans l'application des méthodes de recrutement, d'embauche et de promotion.

Ces événements, selon lui, représenteraient de la discrimination en raison de sa race, son origine nationale, son lieu d'origine, sa couleur et son âge.

L'Université prend la position que la plainte de M. Ayangma doit être rejetée. D'abord, toutes les allégations qui prédatent le 6 juillet 2014, au moins, doivent être rejetées, car M. Ayangma n'a pas respecté les délais applicables pour déposer sa plainte dans l'année suivant la violation

alléguée de la *Loi sur les droits de la personne*. Il s'avère d'ailleurs que la totalité, ou encore la très grande majorité, des allégations de M. Ayangma portent sur de prétendues violations qui se seraient produites avant le 6 juillet 2014.

De plus, l'Université soutient que la plainte doit néanmoins être rejetée, car les faits de la présente affaire ne permettent pas de conclure à de la discrimination proscrite au sens de la *Loi sur les droits de la personne*.

**Enregistrements à l'insu de l'Université**

D'entrée de jeu, l'Université désire souligner que M. Ayangma a, à au moins deux (2) reprises, sans le consentement et à l'insu de l'Université, enregistré secrètement des conversations portant sur des griefs qu'il a déposés par l'entremise de son représentant syndical portant sur les mêmes allégations soulevées dans sa plainte.

Des extraits de ces enregistrements ont été insérés dans la plainte et les enregistrements ont été remis à la Commission, dans un premier temps, et à l'Université, par la suite.

Ce type de comportement est répréhensible et défavorise clairement un dialogue franc, permettant potentiellement d'arriver à une piste de solution dans ce dossier. Malgré les bonnes intentions de l'Université, il a été difficile d'arriver à une quelconque entente entre les parties, notamment compte tenu de tels agissements de la part de M. Ayangma.

**CONTEXTE FACTUEL**

Un contexte factuel est nécessaire pour bien comprendre cette affaire. Ainsi, les faits suivants sont importants :

(i) M. Ayangma est chargé de cours à l'Université depuis 2010 et a enseigné divers cours en administration des affaires. À ce titre, il est membre d'une unité de négociation, soit l'unité II de l'ABPPUM.

(ii) Suite à une démission survenue en juin 2013, l'Université a embauché Mme Stéphanie Maillet, le 1er juillet 2013, au poste de professeure temporaire en management à temps plein [Pièce 1]. Mme Maillet a enseigné cinq (5) cours en gestion des ressources humaines durant les sessions d'automne 2013 et d'hiver 2014. Ce poste a été comblé sous la clause d'urgence contenue à la Convention Collective applicable à l'unité I de l'ABPPUM [Pièce 2].

(iii) L'Université a ouvert un poste de professeur(e) en gestion des ressources humaines (poste menant à la permanence d'emploi) débutant le 1er juillet 2014. M. Ayangma, Mme Maillet et huit (8) autres candidats ont posé leur candidature pour ce poste. La fermeture du concours était prévue pour le 13 janvier 2014.

(iv) Le processus d'embauche s'est déroulé comme prévu par la Convention Collective en vigueur. Deux candidates ont été invitées en entrevue, dont Mme Maillet. Mme Maillet était en instance de thèse au moment du processus d'embauche et les codirecteurs de sa thèse de doctorat avaient confirmé au département d'administration en janvier 2014 qu'elle devrait terminer son programme d'étude en avril 2014 et devrait déposer sa thèse en mai 2014.

(v) Suite à une évaluation des dossiers des candidats suivant la procédure établie, Mme Maillet a été retenue pour le poste en question [Pièce 3].

(vi) M. Ayangma n'avait pas le profil recherché pour le poste soit en gestion des ressources humaines.

(vii) Le 3 mars 2014, l'Université a communiqué au plaignant que sa candidature n'avait pas été retenue à l'étape départementale [Pièce 4].

(viii) L'embauche de Mme Maillet était un fait connu dans la communauté universitaire. M Ayangma en avait connaissance avant le 6 juillet 2014

DÉLAI DE LA PLAINTE

Le paragraphe 18(1) de la *Loi sur les droits de la personne*, LRN-B 2011, c 171 (la « *Loi* »), prévoit que les plaintes doivent être présentées à la Commission des droits de la personne dans l'année suivant la violation alléguée de la *Loi*. La Commission, « lorsqu'elle est d'avis que les circonstances le commandent », peut, en vertu du paragraphe 18(2), prolonger ce délai. Les allégations qu'avance M. Ayangma dans sa plainte se situent entre l'année 2013 et le 1er juillet 2014. Or, sa plainte ne fut déposée auprès de la Commission que le 6 juillet 2015. Les plaintes de M. Ayangma sont donc irrecevables en raison du non-respect du délai de dépôt de la plainte.

Le 30 juillet 2012, la Commission a adopté les *Lignes directrices sur la prolongation du délai pour le dépôt d'une plainte* (les « Lignes directrices »), qui prévoient qu'une demande de prolongation doit répondre à quatre éléments pour justifier cet exercice de son pouvoir discrétionnaire :

- Il existe une cause solide et défendable, tant en fait qu'en droit;
- Le plaignant a des raisons légitimes pour ne pas avoir déposé la plainte dans le délai prévu;
- Des éléments de preuve démontrent que le plaignant a subi des pertes ou des dommages importants et qu'une mesure corrective est clairement identifiable;
- L'intimé ne souffre pas d'un préjudice excessif à cause de la prolongation.

La jurisprudence néo-brunswickoise concernant l'interprétation de l'article 18 et l'application des Lignes directrices est rare. Cependant, d'autres juridictions ont également des dispositions qui prévoient l'application de certains délais dans leurs lois sur les droits de la personne. En Ontario et en Colombie-Britannique, ces dispositions ont fait l'objet d'examens judiciaires. Même si ces décisions ne sont pas contraignantes pour les tribunaux néo-brunswickois, elles examinent des dispositions législatives similaires et nous sommes d'avis qu'elles sont persuasives et d'intérêt dans le cas de l'espèce.

**A. Une cause solide et défendable**

La position de l'Université est que M. Ayangma n'a pas une cause solide et défendable en matière de discrimination interdite par la *Loi sur les droits de la personne*.

Les allégations de discrimination de M. Ayangma peuvent être séparées en trois catégories : (1) la prétendue discrimination dans le cadre du processus d'attribution des charges de cours ainsi que la prétendue discrimination dans le processus d'attribution d'un contrat temporaire Mme Stéphanie Maillet, (2) la prétendue discrimination dans le processus d'attribution d'un poste de professeur à temps plein à Mme Maillet en gestion des ressources humaines, et (3) la prétendue discrimination dans l'application des méthodes de recrutement et d'embauche pour laquelle M. Ayangma prétend que les professeurs noirs et âgés sont exclus systématiquement.

1. La prétendue discrimination dans le cadre du processus d'attribution des charges de cours ainsi que la prétendue discrimination dans le processus d'attribution d'un contrat temporaire

Dans le cas de la première catégorie comme nous l'avons mentionné plus haut, Mme Stéphanie Maillet a été embauchée au poste de professeure temporaire en management à temps plein. Mme Maillet a enseigné cinq (5) cours en gestion des ressources humaines durant les sessions d'automne 2013 et d'hiver 2014.

Ce poste a été comblé sous la clause d'urgence de la Convention Collective applicable (voir son 14.03) pour l'Unité I de l'ABPPUM. Cet article prévoit qu'un poste lié à cette unité puisse être comblé de façon temporaire pour une année sans annonce publique. L'urgence était invoquée suite à la démission d'un professeur en gestion des ressources humaines, Naji Abdelhadi, en juin 2013. Cette procédure prévue à la Convention Collective n'est aucunement discriminatoire envers M. Ayangma ou qui que ce soit

D'ailleurs, bien que M. Ayangma allègue que Mme Maillet n'a pas les exigences de qualification requises pour l'enseignement (EQE) des cours de ce poste, seuls les membres de l'Unité II, soit les chargés de cours, doivent satisfaire à ces exigences, conformément à la Convention Collective applicable pour cette unité.

Les prétentions générales que M. Ayangma est qualifié et non Mme Maillet, et qu'il a été victime de discrimination seront également abordées dans la prochaine section.

2. La prétendue discrimination dans le processus d'attribution d'un poste de professeur à temps plein à Mme Maillet en gestion des ressources humaines

Dans le cas de la deuxième catégorie, M. Ayangma allègue qu'il a subi de la discrimination au niveau du processus d'attribution à Mme Maillet d'un poste de professeur à temps plein, poste menant à la permanence.

D'emblée, l'Université nie catégoriquement avoir adopté une attitude inappropriée envers l'un ou l'autre des candidats au poste de professeur à temps plein pour lequel M. Ayangma, Mme Maillet et huit (8) autres candidats ont postulé. De plus, rien dans la plainte ne démontre que M. Ayangma ait été traité différemment en raison des motifs de discrimination invoqués.

Seules deux candidates ont été retenues pour l'étape des entrevues départementales, dont Mme Maillet. Notons d'ailleurs que l'autre candidate n'était pas d'origine acadienne. Suite aux entrevues, le département a fait la recommandation de l'embauche de Mme Maillet. Tout ce processus a été suivi selon les procédures prévues à la convention collective.

Mme Maillet était, contrairement aux allégations de M. Ayangma, clairement qualifiée pour le poste. Lors de son embauche, elle était en instance de thèse au doctorat en psychologie

organisationnelle. Sa thèse portait sur le climat psychologique au travail et les intentions de quitter un emploi. Elle était donc sur le point d'obtenir le doctorat dans le domaine recherché, soit les ressources humaines, au cours de l'année suivant son embauche.

M. Ayangma mentionne le fait que Mme Maillet a reçu une bourse de 5 000$ afin de terminer ses études doctorales. L'Université soutient que ce fait n'est pas pertinent à la plainte de M. Ayangma puisqu'au moment d'embaucher Mme Maillet, elle avait fourni la documentation nécessaire pour démontrer que, vraisemblablement, elle était sur le point de terminer son doctorat dans l'année suivante, ce qui satisfaisait le critère défini dans l'annonce du poste

Notons d'ailleurs que, bien que M Ayangma soutienne détenir un doctorat en administration des affaires de la *California Coast University*, il s'avère que le doctorat qu'il détient provient d'une institution américaine d'éducation à distance qui n'a obtenu une accréditation nationale qu'en 2005. M. Ayangma est diplômé de cette institution en 1996, soit près de dix (10) ans avant cette accréditation. D'ailleurs, il semble que le diplôme obtenu par M. Ayangma n'a aucune concentration en gestion des ressources humaines. Seul un cours en comportement organisationnel aurait été suivi au cours de son doctorat. De plus, notons que les certificats mentionnés par M. Ayangma dans sa plainte, et placés aux annexes A et B, semble porter uniquement sur l'enseignement secondaire.

Bien que M Ayangma ait de l'expérience comme chargé de cours en tant que membre de l'Unité II de l'ABPPUM, il ne jouissait d'aucune ancienneté au département d'administration en tant que membre de l'Unité I. De plus bien que M. Ayangma ait obtenu, globalement, un rendement satisfaisant, il a aussi obtenu des évaluations non satisfaisantes sur certaines composantes lors des évaluations de l'assemblée départementale. M Ayangma a notamment remis son dossier pour l'évaluation départementale en retard au cours de ses années d'enseignement en tant que chargé de cours Malgré cela, le doyen de la faculté lui a accordé un rendement satisfaisant. Le doyen a même réprimandé la professeure Koffi suite à des commentaires qu'elle aurait formulés quant aux retards de M. Ayangma. Mme Koffi a présenté une lettre d'excuse à M. Ayangma le 2 juin 2015.

L'Université a donc utilisé le processus normal et prévu pour l'embauche. Certains candidats ont été favorisés lors du processus, mais uniquement sur la base de critères d'embauches définis et licites Aucune discrimination proscrite par la *Loi sur les droits de la personne* n'a donc eu lieu lors de ce processus.

3. La prétendue discrimination dans l'application des méthodes de recrutement et d'embauche pour laquelle M. Ayangma prétend que les professeurs noirs et âgés sont exclus systématiquement

Dans le cas de la troisième catégorie, M. Ayangma allègue une prétendue discrimination dans l'application des méthodes de recrutement et d'embauche pour laquelle M. Ayangma prétend que les professeurs de race noire et âgés sont exclus systématiquement. En l'absence de preuve concrète de la part de M. Ayangma et en considérant que plusieurs personnes de race noire enseignent à l'Université de Moncton et à la faculté d'administration des affaires, cette allégation semble tout simplement non-fondée

D'ailleurs, il semble plutôt évident que les allégations de M. Ayangma concernant les propos racistes et discriminatoires envers les professeurs de race noire sont fondées sur des propos pris hors contexte. En lisant attentivement les documents auxquels se réfère M. Ayangma (voir

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l'annexe U, page 13 de sa plainte), il est clair que c'est précisément le contraire qui est affirmé, soit que le commentaire signifie plutôt que le doyen de la faculté d'administration fait preuve d'une plus grande ouverture que ceux des autres universités canadiennes. Bref, ce commentaire était fait à l'égard de l'approche réceptive et inclusive de la faculté, et non l'inverse. Indépendamment, de tels commentaires n'ont jamais visé directement M. Ayangma.

Quant aux allégations de discrimination sur l'âge, l'Université répond encore une fois que M. Ayangma utilise des propos pris hors contexte afin de tenter de démontrer une prétendue discrimination. Bien que le dossier de recherche et le potentiel puissent être des critères d'embauche légitime dans le milieu universitaire et académique, le fait que Mme Maillet soit plus jeune que M. Ayangma n'a jamais été un motif de préférence quant à l'embauche.

**B. Des raisons légitimes**

Les Lignes directrices définissent « raisons légitimes » comme étant :

- Une incapacité mentale ou physique;
- L'exercice d'un droit d'appel ou de révision, de façon opportune et appropriée;
- Des discussions infructueuses avec l'intimé pour régler l'affaire; ou
- Toute autre raison valable telle que déterminée par la Commission.

Dans une décision de 2010, le British Columbia Human Rights Tribunal a rejeté une plainte qui alléguait de la discrimination relative à une grossesse et qui avait été déposée un an après le congédiement de la plaignante. La plaignante de *Zalys v Tafco Realty*, 2010 BCHRT 38 (des motifs additionnels sont retrouvés à 2010 BCHRT 44), avait donné quelques raisons pour justifier son retard, notamment :

- Elle ne savait pas qu'une plainte de discrimination était une option;
- Elle était stressée en raison de la perte de son emploi;
- C'était sa première grossesse et elle devait s'occuper de son nouveau-né;
- Elle avait changé de logement; et
- Elle prenait part à un programme de formation.

Le délai de prescription en Colombie-Britannique est de six mois. La Commission peut prolonger le délai lorsqu'il est dans l'intérêt public de le faire et qu'il n'y a pas de préjudice substantiel aux parties en raison du délai. En examinant s'il était dans l'intérêt public de prolonger le délai, le Tribunal considère un certain nombre de facteurs, dont la durée du délai, la raison du délai et l'intérêt public pour la plainte. Dans *Zalys*, le Tribunal a décidé qu'il n'était pas dans l'intérêt public de prolonger le délai parce que :

- Le délai de plus d'un an était substantiel;
- Ne pas savoir que l'on a le droit de faire une plainte n'excuse pas le retard;

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- Le Tribunal a eu et continuera à avoir des opportunités d'examiner des plaintes de discrimination au travail en raison de grossesses; et

- Des événements marquants de la vie peuvent changer les priorités d'une personne, mais ils ne sont pas uniques à cette personne. Ce genre d'événement est vécu par plusieurs autres qui sont capables de déposer leur plainte dans les délais prescrits.

Dans une autre décision récente de Colombie-Britannique, *Hartmann v Konecranes and others*, 2009 BCHRT 429, le retard encouru pour le dépôt de la plainte variait de deux mois à un an après le délai prescrit, en fonction des allégations spécifiques. Le Tribunal a déterminé que même un délai de deux mois était un délai substantiel. Lorsque tous les facteurs étaient pris en considération, le Tribunal a préféré rejeter la plainte.

Dans ce cas, les raisons du délai incluaient le fait que le plaignant avait été en prison pendant un certain temps, qu'il n'avait pas eu droit à des bénéfices de l'assurance-emploi, qu'un appel de cette dernière décision était en cours et qu'il avait eu des problèmes médicaux. Le Tribunal a statué qu'il s'était écoulé quatre mois entre la sortie de prison du plaignant, la fin de ses problèmes avec l'assurance-emploi, le dépôt d'une plainte relative aux normes d'emploi, l'obtention d'un avis juridique et le moment où il avait déposé sa plainte pour discrimination. Concernant ses problèmes médicaux, le Tribunal a conclu que le médecin du plaignant avait fait référence à une période de grande agitation mentale, mais n'avait pas offert son avis quant à savoir si ces problèmes médicaux avaient eu un impact sur sa capacité à déposer sa plainte dans les délais prescrits.

De façon similaire, dans *Imrie-Howlett v Peel District School Board*, 2009 HRTO 1339, le Tribunal de l'Ontario a également refusé d'accepter une plainte déposée en retard. La plaignante affirmait qu'elle n'était pas capable de déposer sa plainte dans les délais prescrits. Le Tribunal a statué que malgré le fait qu'elle souffrait de dépression et qu'elle était en traitement médical, elle était capable d'affirmer ses droits dans d'autres forums, ce qui suggérait qu'elle était capable de le faire dans le cadre de sa plainte pour discrimination. Le Tribunal avait également noté que la plaignante avait un emploi à temps partiel et qu'elle fonctionnait bien dans sa vie personnelle. Enfin, le Tribunal a souligné que l'ignorance de l'existence d'un délai de prescription ne constitue pas une raison légitime.

En l'espèce, le plaignant, M. Ayangma, ne semble pas avoir de contraintes particulières ou légitimes justifiant son retard. Bien qu'il s'agisse d'un délai relativement court, l'absence de justification joue en la défaveur du plaignant.

Il est clairement établi que l'ignorance du délai ou même de l'existence de la Commission ne constitue pas une excuse légitime. Ayant déjà formulé de nombreuses plaintes dans le passé – à plusieurs reprises et devant diverses instances – M. Ayangma ne saurait plaider l'ignorance en affirmant qu'il ne savait pas qu'une plainte de discrimination était une option. Qui plus est, dans les circonstances qui nous préoccupent, M. Ayangma n'est pas une personne sans instructions et sans ressources. Il est chargé de cours à l'université, a de nombreux diplômes et ne souffre d'aucun handicap. L'ignorance ne constitue pas une raison légitime.

D'ailleurs, soulignons que M. Ayangma était clairement capable de fonctionner dans sa vie personnelle et qu'il était en mesure de faire valoir ses droits dans bien d'autres forums. Il s'est représenté lui-même dans de nombreuses causes portant sur les droits de la personne et a

même offert ses services à de tierces parties comme représentant dans de telles causes. M. Ayangma ne saurait s'appuyer sur une quelconque ignorance des procédures en matière de droits de la personne. Une recherche rapide dans CanLii confirme l'existence de plus de 100 cas rapportés dans lesquels M. Ayangma était plaignant, se représentant lui-même, devant toutes les instances de l'appareil judiciaire canadien, incluant des demandes d'autorisation d'appel à la Cour suprême du Canada, qui furent rejetées.

Il est important de souligner qu'il n'est pas nécessaire d'avoir recours à un avocat pour déposer une plainte, que le personnel de la Commission peut appuyer les demandeurs dans la préparation de leur plainte, que le formulaire qui y est associé est clair et qu'il n'y a aucuns frais au dépôt d'une plainte. Tout est mis en place pour les plaignants puissent déposer leur plainte dans les délais prescrits et avec les appuis et ressources nécessaires. À tout événement, M. Ayangma s'est prévalu du système de plainte à de nombreuses reprises et était clairement au courant du fonctionnement de la Commission.

Il n'existe donc aucune raison légitime pouvant justifier le retard de M. Ayangma.

C. AUTRES MOTIFS

Les deux autres motifs identifiés dans les Lignes directrices sont :

- Des éléments de preuve démontrent que le plaignant a subi des pertes ou des dommages importants et qu'une mesure corrective est clairement identifiable;
- L'intimé ne souffre pas de préjudice excessif à cause de la prolongation.

L'Université réitère que M. Ayangma ne présente pas une cause solide et défendable. En référant à nouveau aux trois catégories de prétendue discrimination identifiée ci-haut, il est important de noter que rien ne permet de démontrer que M. Ayangma a subi des pertes ou encore des dommages importants ou encore d'identifier une mesure corrective clairement identifiable. D'ailleurs, M. Ayangma est, à ce jour, toujours employé par l'Université, en tant que chargé de cours. Il n'a donc pas subi de pertes ou de dommages importants à ce niveau.

En ce qui concerne le « préjudice excessif », l'expression dans le contexte des présentes lignes directrices signifie une perte réelle de position relative à la preuve résultant de la disparition d'un témoin, d'un document ou d'un autre élément de preuve. Certains évènements sur lesquels M. Ayangma fonde ses allégations remontent jusqu'en 2013. Le délai a causé un préjudice à l'Université, car il lui est désormais plus difficile de présenter une défense pleine et entière. Le délai d'un an était entièrement suffisant pour déposer la plainte et aucune raison légitime ne justifie le retard de M. Ayangma.

La demande de production de documents

Finalement, M. Ayangma demande, en se fondant sur la décision du Tribunal des droits de la personne de l'Ontario dans *Badoulary c Conseil des écoles catholiques du Centre-Est*, 2013 HRTO 360 CanLii, également à la Commission de demander à l'intimé la divulgation et la production des documents ayant trait aux qualifications de la candidate retenue, Mme Stéphanie Maillet, soit les documents qui ont été pris en compte pour décider de lui accorder un contrat en 2013, de lui offrir une entrevue, et de l'embaucher en 2014.

L'Université soutient que la Commission n'a pas le pouvoir d'ordonner la production de documents à cette étape de la procédure. Si, et seulement si, la Commission détermine que la plainte a potentiellement du mérite, une enquête s'en suivra et les documents pertinents seront révisés par les enquêteurs de la Commission

**CONCLUSION**

En somme, il est clair que M. Ayangma n a pas de raison légitime pour justifier son retard dans le dépôt de la plainte. Il ne démontre pas de handicap physique ou mental qui l'empêche de déposer la plainte et l'exercice de ses droits dans plus de cent différentes causes devant divers tribunaux administratifs et Cours de justice canadiennes souligne sa capacité à faire valoir ses droits dans les délais prescrits.

De plus, les allégations que M. Ayangma avance ne constituent pas une cause d'action solide et défendable, au contraire. L'Université a suivi les procédures normales et prescrites par la Convention Collective en vigueur en matière d'embauche et n'a fait preuve d'aucune discrimination proscrite par la *Loi sur les droits de la personne* envers M. Ayangma ou envers qui que ce soit dans son attribution de postes.

L'Université soutient que la Commission des droits de la personne doit rejeter la plainte de M. Ayangma, au motif qu'il n'a pas respecté le délai applicable et que celui-ci ne peut être prolongé. Globalement, en ce qui concerne la plainte, elle ne démontre pas de discrimination proscrite. L'Université soutient que la plainte est sans fondement et qu'elle doit être rejetée.

Veuillez agréer, Mme Schiavoni, l'expression de mes sentiments les meilleurs.

STEWART McKELVEY

Sacha D. Morisset
SDM/syl
p.j.

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Annexe



UNIVERSITÉ DE MONCTON

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# Stéphanie Maillet reçoit une bourse d'études doctorales de 5 000 $

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La Faculté d'administration de l'Université de Moncton a remis une bourse d'études d'une valeur de 5 000 $ à Stéphanie Maillet, professeure en gestion des ressources humaines au Département d'administration, dans le but de soutenir son projet d'études doctorales.

Stéphanie Maillet poursuit ses études doctorales à l'Université de Sherbrooke avec spécialisation en psychologie du travail et des organisations.

SUITE: http://bit.ly/1FSEhAN

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**Augustin Houngbedji** salut.J'ai reçu une admission(1e cycle) à l'université de Moncton (campus de Moncton ) à temps plein pour la rentrée académique 2015-2016.J'éprouve de difficulté financière pour les frais de scolarités et les frais de subsistances.En tant qu'étudiant étranger,pouvez-vous m'offrir vos possibilités dans le bus de m'aider à poursuite mes études.
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(Source: Université de Moncton ) Lundi 30 Mars 2015 Mélissa Roy reçoit la bourse d'excellence Frank H. Sobey d'une valeur de 15 000 $ Mélissa Roy, étudiante au Baccalauréat...

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Pièce "L" à l'appui de l'affidavit d'Edgar Robichaud affirmé solennellement devant moi à Moncton, Nouveau-Brunswick, ce 13 jour de septembre 2018.

Commissaire aux serments en ma qualité d'avocat

FILE No. MC 386-2017

COURT OF QUEEN'S BENCH OF NEW BRUNSWICK
TRIAL DIVISION
JUDICIAL DISTRICT OF MONCTON

BETWEEN

NOEL AYANGMA

PLAINTIFF

AND

UNIVERSITY OF MONCTON, MOCTON CAMPUS

DEFENDANT

NOTICE OF ACTION WITH STATEMENT OF CLAIM ATTACHED

TO: University of Moncton Campus of Moncton

LEGAL PROCEEDINGS HAVE BEEN COMMENCED AGAINST YOU.

IF YOU WISH TO DEFEND THESE PROCEEDINGS, either you or a New Brunswick lawyer acting on your behalf must prepare your Statement of Defence in the form prescribed by the Rules of Court and serve it on the plaintiff or the plaintiff's lawyer at the address shown below and, with proof of such service, file it in this Court Office together with the filing fee of $50,

(a) If you are served in New Brunswick, WITHIN 20 DAYS after service on you of this Notice of Action With Statement of Claim Attached, or

(b) If you are served elsewhere in Canada or in the United States of America, WITHIN 40 DAYS after such service, or

(c) If you are served anywhere else, WITHIN 60 DAYS after such service.

Dossier No. _____

COUR DU BANC DE LA REINE DU NOUVEAU BRUNSWICK
PREMIERE DIVISION
CIRCOMCRIPTION JUDICIARE DE MONCTON

NOEL AYANGMA

DEMANDEUR

ET

UNIVERSITÉ DE MONCTON, CAMPUS DE MOCTON

DEFENDRESSE

AVIS DE POURSUITE ACCOMPAGNÉ D'UN EXPOSÉ DE LA DEMANDE

A : Université de Moncton, Campus de Moncton

UNE POURSUITE JUDICIAIRE A ÉTÉ ENGAGÉE CONTRE VOUS.

SI VOUS DESIREZ PRÉSENTER UNE DÉFENCE DANS CETTE INSTANCE, vous-même ou un avocat du Nouveau-Brunswick chargé de vous représenter devrez rédiger un exposé de votre défense en la forme prescrite par les Règles de procédure, le signifier au demandeur ou à son avocat à l'adresse indiquée ci-dessous et le déposer au greffe de cette Cour avec un droit de dépôt de $50 et une preuve de sa signification :

a) DANS LES 20 JOURS de la signification qui vous sera faite du présent avis de poursuite accompagné d'un exposé de la demande, si elle vous est faite au Nouveau-Brunswick ou

b) DANS LES 40 JOURS de la signification, si elle vous est faite dans une autre région du Canada ou dans les États-Unis d'Amérique ou

c) DANS LES 60 JOURS de la signification, si elle vous est faite ailleurs.

COURT OF QUEENS BENCH
TRIAL DIVISION
EMBRICTON, N.B.
FILED/REGISTERED
MAY 29 2017

COUR DU BANC DE LA REINE
DIV DE PREMIÈRE INSTANCE
MONCTON, N.B.
DÉPOSÉ/ENREGISTRÉ

DOCUMENTS FOUNDING
13 MAI 2017
COUR DU BANC DE
MONCTON

25 4

IF YOU FAILED TO DO SO, you may be deemed to have admitted any claim made against you, and without further notice to you, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE.

YOU ARE ADVISED THAT :

(a) you are entitled to issue documents and present evidence in the proceeding in English or French or both;

(b) the plaintiff intends to proceed in the English. language; and

(c) your Statement of Defence must indicate the language in which you intend to proceed. Where the claim is for a liquidated demand or to recover a debt, with or without interest, insert the following notice:

IF YOU PAY THE PLAINTIFF or the plaintiff's lawyer the amount of the plaintiff's claim, together with the sum of $100 for the plaintiff's costs, within the time you are required to serve and file your Statement of Defence, further proceedings will be stayed or you may apply to the court to have the action dismissed.

THIS NOTICE is signed and sealed for the Court of Queen's Bench by Anne M. Richard ....., Clerk of the Court at Moncton ..... on the 29th day of May, 2017 ..... Court Seal (clerk) .....

(clerk) Court
Address of court office
Palais de Justice Moncton
145 Assumption Blvd.
P.O. Box 5001
Moncton NB E1C 8R3

DATED this 29th day of May 2017

TO: University of Moncton
118 Antonine Maillet Avenue
Moncton, New Brunswick
E1A 3E9

SI VOUS OMETTEZ DE LE FAIRE vous pourrez être réputé avoir admis toute demande formulée contre vous et, sans autre avis, JUGEMENT POURRA ÊTRE RENDU CONTRE VOUS EN VOTRE ABSENCE.

SACHEZ QUE :

a) vous avez le droit dans la présente instance, d'émettre des documents et de présenter votre preuve en français, en anglais ou dans les deux langues;

b) le demandeur a l'intention d'utiliser la langue ..... .....; et

c) l'exposé de votre défense doit indiquer la langue que vous avez l'intention d'utiliser. Si la demande a pour objet la perception d'une somme déterminée ou le recouvrement d'une créance avec ou sans intérêts, ajouter le paragraphe suivant :

Si, dans le délai accordé pour la signification et le dépôt de l'exposé de votre défense, VOUS PAYEZ AU DEMANDEUR ou à son avocat le montant qu'il réclame, plus $100 pour couvrir ses frais, il y aura suspension de l'instance ou vous pourrez demander à la cour de rejeter l'action.

CET AVIS est signé et scellé au nom de la Cour du Banc de la Reine par. ....., greffier de la Cour à ....., ce ..... 2017 ..... Sceau de ..... .....

la Cour (greffier)
Adresse du greffe
Moncton Law Courts
145 Blvd Assumption
P.O. Box 5001
Moncton NB E1C 8R3

Datée du.....jour de .....

A: Université de Moncton
118 Avenue Antonine Maillet
Moncton, Nouveau Brunswick
E1A 3E9

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CLAIM

[1] The Plaintiff claims damages including general, special and punitive damages against the Defendant, the University of Moncton (Moncton Campus), arising from (a) a series of willful and/or negligent misrepresentations and deceit by the Defendant arising from the series of breaches of various Articles of the Collective Agreement dealing with both the discrimination clause and the conduct of selection process, including Articles 4.04, 14.03, 14.16.10 (b) to the Defendant's willful and/or negligent misrepresentations arising from (i) the flawed and bad faith interpretation of the minimum criteria published (ii) the flawed interpretation of the successful candidate's qualifications for the position Human Resource Management Professor including her education, training and experience/expertise (iii) the flawed and bad faith assessment of the Plaintiff's qualifications including his education, training and experience/expertise as they relates to the minimum stated criteria published by the Defendant.

[2] The Plaintiff also claims against the Defendant, pursuant to s.24(1) of the Charter, the same type of heads of damages referred to at para.1 noted above for arising from the Defendant's deliberate/wilful failure not only to deny him the opportunity to pursue gaining employment as a full time professor in the province of New Brunswick contrary to section 6(2) of the Charter (Mobility Rights) but also for its refusal to recognize one of his areas of expertise.

[3] The Plaintiff also claims costs of the proceeding.

The Parties:

(a) The Plaintiff :

[4] The Plaintiff lives and has been living at all material times in Charlottetown, Prince Edward Island. He was also at all material times and is presently a "Chargé de cours" at the University of Moncton, Moncton Campus, Faculty of Administration in Department of Administration, teaching one or two courses per day and per semester since 2010.

[5] The Plaintiff is a Canadian Citizen and a person of colour who immigrated from Cameroon-Central Africa, in 1985, was at all material times 59 years old. He is now aged 63.

[6] The basis for the Plaintiff's treatment as a "Chargé de cours" is the PhD in Business Administration. In the course of education training, the Plaintiff took four (4) courses in human resource management: three (3) at the Masters' level MBA (Personnel Management, Industrial Management and Human Resource Management) an one at the PhD level (Organizational Behaviour).

[7] The Plaintiff states that he always had very good evaluations for all courses he had taught as a "Chargé de cours" since 2010 and that he had at all material times extensive pedagogical experience, close to 28 years, including at the university level gained as a "Chargé de cours" with the Defendant since 2010.

(b) The Defendant, the University of Moncton

[8] The Plaintiff states the Defendant operates in a unionized environment with two separate entities of the same union without a bridge between the two entities: one for permanent professors and librarians and the second one for the "Chargés de cours" and others.

[9] The Plaintiff further states that all material times he belonged to the second unit of the union.

[10] The Plaintiff states that the Defendant, the University of Moncton, was created in 1963. Since its creation, it has become the single most important centre for social, cultural and economic development of New Brunswick's Acadian population.

[11] The Plaintiff states that the Defendant was established under *The Université de Moncton Act*, and is an "employer" within the meaning of subsection 1(1) of the *Industrial Relations Act*, R.S.N.B. 1973, c. I-4.

[12] The Defendant has three constituent campuses in Moncton, Edmundston and Shippagan; it is Canada's largest campus amongst its three (3) campuses. It is also Canada's largest French-language university outside Quebec and has awarded more than 52,000 degrees.

[13] The Defendant offers 175 study programs, including 37 at the master's degree level and 7 at the doctorate level. Fields of studies include administration, arts, education engineering, forestry, law, nursing, nutrition, psychology, sciences, social work and many more with 30 research centers, chairs and institutes.

[14] The Defendant's student population originates mainly from New Brunswick but also from almost all countries of the "Francophonie international." The Defendant benefits from many exchange programs and institutional agreements supporting student mobility at the international level. Numerous international internships are made available to students every year.

[15] The Defendant is one of the few francophone universities in Canada that offer international students the opportunity to work and study at the masters level. With one of lowest faculty-student ratios in the country, exchanges between the professors and students and overall quality of learning are enhanced. The 5000 students enrolled at the Defendant University benefit from a personalized teaching style with quality that can only be provided in a medium-sized university.

(c) Filling on a temporally basis (one year contract) the Human Resource Management Professor Position in 2013.

[16] The Plaintiff states that as a result of the Human Resource Management Professor, Dr. Naji Abdelhadi's (PhD) departure in 2013, from the Department of Administration and the Faculty of Administration; the Defendant decided to fill on a temporally basis, the permanent position held by Dr. Naji Abdelhadi (PhD), pursuant to Article 14.05 of the Collective Agreement of the Unit I.

[17] The Plaintiff states that Article 14.05 allows the filling a position on a temporally basis, without following the normal process stipulated at Article 14.12 of the same Collective Agreement.

[18] The Plaintiff further states that though already in the employ of the Defendant and the Department of Administration, and meeting all the required qualifications to be appointed for that position at all material times of the filling of the impugned vacant position on a temporally basis, and a member of the Unit II of same Union, he was not approached nor considered for the vacant position.

[19] The Plaintiff states that the Defendant hired Ms. Stephanie Maillet, an individual that it knew or ought to have known, had only her Bachelor Degree in Psychology obtained in 2008 (i) was completely lacking in the required minimum education (PhD) to teach at the university level and as well as the required training (administration) to teach at the Faculty of Administration and the Department of Administration (ii) was also completely lacking in the required pedagogical experience teaching at the university level or elsewhere.

[20] The Plaintiff states that none of the facts mentioned above, including her status at the Faculty of Administration, were known to him before June 21st, 2015.

(d) Filling position of Professor, Human Resource Management (Permanent staffing)

[21] The Plaintiff states that on October 1st, 2013, just one month after the beginning of the semester, the then Dean, Mr. Gaston Leblanc, requested an authorization to fill the same position on a permanent basis.

[22] The Plaintiff states that in January 2014, the Defendant posted the same position to fill the position vacated by Dr. Naji Abeldahi (PhD) on a permanent basis. The Defendant set the dateline for applying for this position to be January 13th, 2013 and struck a selection committee composed of all professors of the Department of Administration, including Dr. Vivi Koffi.

[23] The Plaintiff submits that the minimum qualifications to teach in any department, except the Law School, are stated in Article 14.16.10 of the Collective agreement.

[24] The Plaintiff specifically states that the criteria set and published by the Defendant for the permanent human resource management position, included the following criteria: a PhD in Business Administration; a PhD in Industrial Relations or a PhD in a related field, with specialization in human resources with excellent pedagogical qualities preferably at the university level.

[25] The Plaintiff further states that while the Defendant could have also exceptionally considered candidates without a PhD, those candidates must have been at all material times in the process of obtaining a PhD in the domain within one year and that in this specific case, they must provide a recommendation from their thesis director indicating when the PhD would be in fact obtained.

[26] The Plaintiff states that following the announcement of the vacant position, referred to in paras.23. 24 and 25 of his Statement of Claim, he applied for this position by submitting on January 7th, 2014, a complete Dossier composed (i) a cover letter, a resume, certified copies of transcripts of his degrees and other documentation including teaching licenses showing his pedagogical experience.

[27] The Plaintiff states that on March 3rd, 2014, he was advised by the then Dean, Dr. Gaston Leblanc, that his candidacy for the position was not retained.

[28] The Plaintiff further states that upon receiving the letter, dated March 3rd 2014, he called the then Dean, Dr. Gaston Leblanc. The latter reassured him that his candidacy was not retained because the education and experience/expertise of those candidates retained and interviewed for the position were closely related to the position and that their training all was in the domain of human resource management. The Plaintiff believed him at the time.

[29] The Plaintiff states that it is only on or about March 27th, 2015, that he became aware about the information provided to him by the then Dean, Dr. Gaston Leblanc, was misleading and false.

[30] The Plaintiff states that the information he came across was from a publication depicting both the Dean, Dr. Gaston Leblanc, of the Faculty of Administration and the then Assistant Director of the Department of Administration, Dr. Vivi Koffi, also a member of the selection committee, struck to fill the position on a permanent basis and the author of the selection committee minutes, presenting a cheque in the amount of $5, 000 to Ms. Maillet for the purpose of completing her doctorate degree in psychology.

[31] The Plaintiff states that this announcement picked up his curiosity and raised some serious concerns and doubts about what may have occurred at all material times during the selection processes which led to appointments of Ms. Maillet both on a temporally basis in 2013 and as well as on a permanent basis in 2014.

[32] The Plaintiff states that following his discovery referred to at paras.29-31 of his Statement of Claim and having suspected foul play, he immediately requested to meet with the then Dean of the Faculty of Administration, Dr. Gaston Leblanc. This was to obtain further clarification as to the real reason for the rejection of his candidacy over that of candidate that obviously did not have a PhD at all material times of the filling of both positions on a temporally and permanent basis. Also, to a candidate who was pursuing doctorate studies in a domain (psychology) not related to the position being filled.

[33] The Plaintiff states that his meeting with the past Dean of the Faculty of Administration, Mr. Gaston Leblanc, took place on May 12th, 2015.

[34] The Plaintiff states he knew Dr. Gaston Leblanc as his professor of marketing in 1985-1986, before and after he became the Dean of the Faculty of Administration and had the greatest respect for him both as his professor and Dean. He believed him when he told him that his candidacy was rejected because the experience/expertise of those candidates retained for the interview were directly related to the position to be filled. The plaintiff was deeply disappointed with Mr. Gaston, and his positive opinion quickly changed after March 27th, 2015 when he found out that he was the person presenting the award of $5,000 to Ms. Maillet for the purpose of completing her doctorate in psychology.

[35] The Plaintiff further states the purpose of that meeting was to inquiry about the real reason for the rejection of his candidacy while retaining at the same time the candidacy of the candidate, Ms. Maillet. A person whom the Faculty or the Department of Administration knew or ought to have known, on the face of her educational and training backgrounds, that she met neither the minimum education criteria nor the stated required experience, and was thus not qualified for either the position filled on the temporally or on permanent basis.

[36] The Plaintiff states that he could no longer trust the Dean of the Department of Administration, charged with the initial screening of the candidates. This feeling was based on the unpleasant experience and the astonishing revelation of the fact that the candidate he had hired on two occasions and had previously indicated to him that she was the best candidate for the job, may not so be the best and/or was not even qualified to teach at the university level and let alone at the Faculty of Administration, because she was not in the domain. As a result of this mistrust, the entire May 2015 meeting was taped.

[37] The Plaintiff states that during the meeting of May 12th, 2015, with Dean, Dr. Gaston Leblanc, he not only continued to maintain that Ms. Maillet was the best candidate for the position and that her education background was in the domain, but he also stated among other things, that Ms. Stephanie Maillet possessed at all material times a PhD in Organizational Behaviours and that she was the best suited candidate as to the stated criteria for the position. He also suggested that there was not discrimination in the selection process and that he would not hire someone whose training was in psychology to teach a course in the Department of Administration such a "production" and that even if he is asked to invite such a candidate to an interview he would not do so.

[38] The Plaintiff states that Dean, Dr. Leblanc ironically did exactly what he had suggested he would not do, inviting Ms. Maillet, whom he knew or ought to have known had an education and training in psychology, with a simple Bachelor Degree in Psychology obtained in 2008 and not even a Masters' Degree or a PhD Degree, to teach management courses, at the Faculty of Administration and in the Department of Administration.

[39] The Plaintiff states that not satisfied with any of the explanations provided to him by the Dean, during the May 12th, 2015 meeting and having left with more questions/concerns than answers, regarding the rejection of his candidacy over that on Ms. Maillet, in the filling of the vacant position of Professor, Human Resource Management first in 2013 on a temporally basis and again in 2014 on a permanent basis, he filed, first level grievances, alleging both a breach of various sections of Collective Agreement and discrimination in both positions given to Ms. Maillet in 2013 and 2014.

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[40] The Plaintiff states that on May 27th, 2015, Dean Leblanc denied his grievances, indicating not only that the Defendant did not violate the Collective Agreement related to the "Chargées and Chargés de cours", but also because the Plaintiff grievances were not arbitral because the Plaintiff was not an employee as stipulated in Article 2.19 of the relevant Collective Agreement, and as such the Plaintiff was not bound by the Collective Agreement.

[41] The Plaintiff states that the next day being May 28th, 2015, he filed a second stage grievances.

[42] The Plaintiff further states that notwithstanding the filing of the second level grievances alleging a potential breach of the Collective Agreement and foul play in the selection process and interpretation of the minimum selection criteria; he continued to inquire about the real reasons as to why he was denied the opportunity to compete for the position, the vacant human resource management position. The conducting of in-depth searches on line and his endeavours to have all the record straight, led him to Ms. Stephanie Maillet's profile on or about June 21st, 2015.

5, 15(1)

[43] The Plaintiff states that upon a cursory review of Ms. Maillet's profile, it became apparent not only that she was not qualified for the position as suggested and maintained by the Defendant and in particular Dean, Dr. Gaston Leblanc, and that she clearly lacked a PhD at all material times, but also that her area of expertise (psychology) was not in the required domain, as indicated by Dr. Gaston Leblanc.

[44] The Plaintiff further states and astonishingly so, that the same profile showed that the basis of Ms. Maillet's appointments at all material times (in 2013 and in 2014), was contrary to the Defendant's bold assertion, a simple Bachelor Degree in Psychology and not even a Masters' degree, which Bachelor Degree she obtained from the University of Moncton in 2008.

[45] The Plaintiff states that on June 30th, 2015, the Defendant rejected in second level grievances.

[46] The Plaintiff further states that immediately following the rejection of his second level grievance on June 30th, 2015, he filed on the same day, a human rights complaint alleging discrimination on the basis of colour, race, age, national/ethnic, in both selection processes.

[47] The Plaintiff states that as part of the human rights process denying all the allegations, the Defendant disclosed on December 18th, 2015, additional information relevant to the filling of the position of Professor, Human Resource Management on a permanent basis. The additional information disclosed included both the Defendant's minutes of the screening process used to screen him out, dated February 7th, 2014 and Dean, Dr. Gaston Leblanc's recommendation, dated March 27th, 2014, recommending the appointment of Ms. Maillet, to the position of Professor, Human Resource Management on a permanent basis.

[48] The Plaintiff states that a review of the December 18th, 2014's letter revealed additional material facts indicating the process and the basis for the exclusion of his candidacy, which included the verification of whether the Plaintiff met the specialization in human resources and/or whether he had specialized publication.

[49] The Plaintiff further states that though the criteria referred to at para.48 of this Statement of Claim were not part of the criteria published by the Defendant as reproduced at paras.24-25 of this Statement of Claim, they were used to screen him out and not Ms. Maillet, who clearly met neither the stated minimum criteria nor the newly added criteria used to screen him out on February 7th, 2014.

[50] The Plaintiff states the letter of recommendation disclosed on December 18th, 2015 and dated March 27th, 2014, from the Dean of the Faculty of Administration, Dr. Gaston Leblanc, specifically indicated that Ms. Maillet did well in her interview, knowing well that it was inaccurate, based on her mediocre performance, scoring only 52/80 or 65%.

[51] The Plaintiff further states the Defendant, through Dr. Gaston Leblanc, also indicated that Ms. Maillet was by reason of her training in human resources, the best suited candidate for both the position and the Faculty's need.

[52] The Plaintiff states that in its response to his Human Rights Complaint December 18th, 2014, the Defendant also continued to claim that Ms. Maillet was qualified for the position and that her training was in the required domain and that her doctorate was in the required field, which is in human resource management; even though it knew or ought to have known at all material times of her appointments that her thesis was in psychology.

[53] The Plaintiff states that on December 22nd, 2016, the Commission finally released its Report in which it recommended pursuant to s.19(2) of the Act that his complaint of discrimination against the Defendant be dismissed with regard to any allegations relative to the alleged discriminatory words that occurred after July 1st, 2014. This was because the information was insufficient to demonstrate a solid arguable case based on his race, colour, national/ethnic origin and age in so as to permit an extension of time pursuant to s.18(2) of the *New Brunswick Human Rights Act*, and therefore recommended these allegations be dismissed as being time -barred on the basis that the Plaintiff allegations of discrimination made by the Plaintiff were time barred based on an arbitrary cut-off date of July 1st, 2014.

[54] The Plaintiff states that as a "Chargé de cours" teaching only one or two course per day and per semester at all material times, and because of the secrecy around the filling of the vacant position, he was unaware of the fact that the Defendant had offered the vacant position to a person whom it knew or ought to have known, did not meet any of the minimum education and training criteria stipulated at Article 14.16.10 in in the Collective Agreement and/or those set by the Faculty of Administration as stated at paras.24-25 of the Statement of Claim.

[55] The Plaintiff states that he only became first aware of some of the material facts which gave rise to his action against the Defendant as stated in paras.1-4 of his Statement of Claim, after he had discovered between March 27th, 2015 after review of the announcement made by the Defendant awarding Ms. Maillet the sum of $5000 for the purpose of completing her doctorate in psychology. Also, on June 21st, 2015, when he accessed Ms. Maillet's profile on line, showing that the basis of both her appointments on a temporally and permanent basis, was in fact a Bachelor Degree in Psychology obtained in 2008, from the University of Moncton, which is neither a PhD nor even a Masters' Degree.

[56] The Plaintiff states he became fully aware of all the material facts which led to his claim against the Defendant, including the refusal for to consider his candidacy for reasons other than the stated or published criteria or qualifications, after he received the Defendant's response to his human rights complaint against the Defendant dated December 18th ,2015. This response also included both the minutes prepared by the Department of Administration on February 7th, 2014 and the letter of recommendation dated March 27th, 2014, recommending the appointment of Ms. Maillet notwithstanding her complete lack of qualifications and her mediocre performance during the interview with a score of 65%.

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Allegations:

[57] The Plaintiff alleges that the Defendant denied him the opportunity to fill on a temporally basis the position of Professor, HRM Resource Management and the opportunity to compete for the same permanent position on a permanent basis, contrary to Article 4.04 of the Collective Agreement and s.6(2) of the s.6(2) of the Charter, and by so doing deprived him from his constitutional right (Mobility Rights) to pursue a gaining livelihood in the Province of New Brunswick contrary to s.6(2) of the Charter (Mobility Rights). 5.6

[58] The Plaintiff further alleges that in order to promote the candidacy of a candidate, Ms. Maillet, a young Acadien whom it knew or ought to have known was completely lacking in the minimum criteria for the position, the Defendant, engaged in a series of willful/false and/or negligent misrepresentations, including but not limited to willful/false and negligent misrepresentations arising from (i) its misrepresentations of the selection process and the published minimum criteria when it suggested that it was looking for those candidates with training in human resources and that those candidates with a PhD in Business Administration or in Industrial Relations did not possess that training (ii) its willful and/negligent misrepresentations of the qualifications of Ms. Maillet, including her education and training backgrounds by falsely suggesting that she had a Doctorate in Human Resources (Organizational Behaviours) when she did not; that her thesis was in the domain of Human Resources when in fact it was; that she had a PhD in Psychology when in fact she had a DPs which is not a PhD, (iii) the willful and negligent misrepresentations of the Plaintiff's education and training backgrounds and qualifications as they relate to the minimum stated criteria published. 5.15

a) Allegations Related to the Breaches of the Collective Agreement

[59] The Plaintiff alleges that the Defendant breached various Articles of the Collective Agreement dealing with both the discrimination clause and the conduct of selection process, including articles 4.04, 14.03, 14.16.10.

[60] The Plaintiff alleges that in considering the candidacy of Ms. Maillet, a young Acadian person, on the basis of her Bachelor Degree in Psychology obtained in 2008, and with absolutely no pedagogical experience including at the university level, to teach at the Faculty of Administration courses that she had neither taught or even taken herself in her Bachelor Degree in Psychology Program; while at the same ignoring the plaintiff's candidacy, notwithstanding his qualifications and training in business administration, with a PhD in Business Administration and extensive pedagogical experience, including at the university level and the fact that he was already in the employed, was clearly discriminatory and contrary to Article 4.04 of the Collective Agreement.

[61] The Plaintiff specifically alleges that even though Article 14.05 the Collective Agreement may have permitted an appointment without following the normal selection process provided pursuant to Article 14.12 of the Collective Agreement as it ought to have been the case in the filling of the position on a permanent basis, such appointments must also be made in accordance with both Articles 14.03 and 14.16.10 of the Collective Agreement, and that this did not occurred in the present case.

[62] The Plaintiff alleges that the Defendant wilfully/negligently failed to do so, as in the present case, when it deliberately and wilfully chose to appoint a candidate whom it knew or ought to have known, completely lacked all the minimum qualifications for the position, and thus a candidate it knew or ought to have known her appointments would not meet the requirements under Articles 14.03 and 14.16.10, was clearly contrary to the Collective Agreement.

[63] The Plaintiff further alleges that because of the Defendant's deliberate, wilful and/or negligent repeated breaches of the Collective agreement, he had suffered substantial damages, including special damages for loss of income and other heads of damages referred at para.1 of his Statement of Claim as a result of the Defendant's conduct and repeated breaches.

(b) Allegations Regarding the Allegations of Wilful/Negligent Misrepresentations

[64] The Plaintiff alleges that the Defendant wilfully and/or negligently misrepresented (i) the selection process including in the manner it interpreted the required minimum criteria it had published and had invited qualified candidates to apply (ii) the successful candidate's qualifications for the position Human Resource Management Professor including her education, training and experience/expertise (iii) the Plaintiff's qualifications including his education, training and experience/expertise, as they related to the minimum stated criteria published by the Defendant.

[65] The Plaintiff alleges that the Defendant has committed a series of false and wilful misrepresentations and conducted itself in the manner indicates bad faith in the appointments of Ms. Maillet first on a temporally basis in 2013 and subsequently in 2014, even though it knew or ought to have known that Ms. Maillet not only did not have a PhD at all material times, but also that her education and training was not in the required domain of the administration and/or industrial relations or human resource management.

[66] The Plaintiff further alleges that in appointing Ms. Maillet first on a temporally basis and subsequently on a permanent basis, the Defendant also knew or ought to have known the fact that the Doctorate in Psychology, Ms. Maillet was pursuing was not a PhD, nor a degree that could be considered to be in an area related to the position.

[67] The Plaintiff further alleges that the mere fact the Defendant knew or ought to have known that the candidate it was about to appoint, was appointed on the basis of a simple Bachelor Degree in Psychology and excluded the candidacy of the Plaintiff who in fact had a PhD in Business Administration and was thus, not only far better qualified than Ms. Maillet, but also met the minimum criteria for the positions, and thus met the profile and qualities of the candidate it was in fact looking for, clearly suggests that the Defendant acted in bad faith, causing substantial damages to the Plaintiff.

[68] The Plaintiff specifically states that the materials facts which gave rise to the Defendant's false/wilful/negligent misrepresentations occurred:

68.1 the first misrepresentation occurred when the Defendant decided to appoint Ms. Maillet on temporally basis in 2013, by completing ignoring Articles 4.04, 14.03 and 14.16.10 of the Collective Agreement;

68.2 the second misrepresentation occurred when the Defendant (the selection committee) decided to screen in Ms. Maillet on February 7th, 2014, for an interview notwithstanding her clear lack of qualifications and her failure to meet any of the minimum criteria that it itself set and published in January 2014. Even though it knew or ought to have known based on her Dossier that she was clearly not qualified for the position as there was nothing to support that she met any of the minimum criteria for the position advertised;

68.3. the third misrepresentation occurred when the selection committee recommended Ms. Maillet's to Dean, Dr. Gaston Leblanc, for the position after she had been screened in alongside other qualified candidates on February 7th, 2014 and interviewed for the position, even though it knew or ought to have known based on her Dossier that she was clearly not qualified for the position as there was nothing to support that she met any of the minimum criteria for the position advertised;

68.4 the fourth misrepresentation occurred when, the selection committee deliberately and wilfully screened out the Plaintiff on February 7th, 2014, on the basis of criteria not published in the posting. Even though it knew or ought to have known, based on his Dossier, that he was clearly qualified for the position and met all the minimum criteria for the position advertised and was thus better qualified than Ms. Maillet in the area of education and training and pedagogical experience, including experience teaching at the university level.

68.5 the fifth misrepresentation occurred when Dr. Gaston Leblanc also recommended Ms. Maillet's appointment to the VRER (Vice Recteur à l'enseignement à la recherche), Mr. Neil Boucher, on March 27th, 2014, even though it knew or ought to have known based on her Dossier that she was clearly not qualified for the position as there was nothing to support that she met any of the minimum criteria for the position advertised and when it suggested that the education criteria called for those candidate who had specialization in human resources and ignored those with PhD in Business Administration or in Industrial Relations;

68.6 the sixth misrepresentation occurred when Dr. Gaston Leblanc, the then Dean of the Faculty of Administration, suggested in his letter of recommendation dated March 27th, 2014, that Ms. Maillet did well in her interview when he knew or ought to have known based on the interview scoring of Ms. Maillet of 52/80 or 65% that it was a mediocre interview result;

68.7 the seventh misrepresentation occurred when Dr. Gaston Leblanc, Dean of the Faculty of Administration, suggested in his letter of recommendation dated March 27th, 2014, that Mr. Maillet with a Bachelor Degree in psychology, was better suited for the need of the Faculty in the area of human resources;

68.8 the eighth misrepresentation also occurred on May 12th, 2015, during the meeting between Dean Leblanc and the Plaintiff, when he stated that he would not hire someone with a degree in psychology to teach a course such as production and that even if he was asked to have such a person to an interview, he would refuse, knowing well that this exactly is what the Defendant did, with his approval, when not only the selection committee screened in Ms. Maillet on February 7th, 2014, interviewed her and recommended her to him, who in return recommended her to the "VRER" on March 27th, 2015;

68.9 the ninth misrepresentation occurred on May 12th, 2015 during the meeting between Dr. Gaston Leblanc and the Plaintiff, when the former continued to assert that Ms. Maillet (with her Bachelor Degree in Psychology) was the best suited candidate for the position, that her training was in the domain of human resources and that she had a PhD in Organizational Belaviours, when he knew or ought to have known that it was not true.

68.10 the tenth misrepresentation occurred when the "VRER" Mr. Neil Boucher accepted Dean Leblanc's recommendation and confirmed Ms. Maillet's appointment, effective July 1st, 2015;

68.11 the eleventh misrepresentation occurred on December 18th, 2015, when the Defendant, through counsel, suggested that Ms. Maillet was about to obtain a doctorate degree in the required field, which was in the human resources, when it knew or ought to have known that it was not;

68.12 the twelfth misrepresentation occurred on February 18th, 2017 when the Defendant through counsel repeated that:

> "... Notamment, Mme Maillet était sur le point d'obtenir un doctorat dans le domaine des ressources humaines, comme stipulé dans l'annonce du poste »

68.13 the thirteenth misrepresentation occurred when the Defendant suggested in the "liste des membres de l'Assemblee de la FESR" that Ms. Maillet possessed a PhD, when in fact it knew or ought to have known that Ms. Maillet's doctorate is not a PhD.

[69] The Plaintiff alleges overall as it relates to all the thirteen misrepresentations that the Defendant knew or ought to have known or was wilfully blind to the fact the Plaintiff, who was better qualified, would lose an opportunity to pursue gaining employment in the Province of New Brunswick and/or find himself in lengthy litigation with the Defendant over something, a process that was protected by the Collective Agreement.

[70] The Plaintiff alleges the Defendant acted in bad faith when it made additional series of deliberate and wilful misrepresentations during the May 12th, 2015 meeting with the then Dean and through counsel, in utter attempt to undermine his qualifications and elevate Ms. Maillet's total lack of qualifications.

[71] The Plaintiff also alleges that the Defendant acted in bad faith when it applied a double standard in its approach to screening candidates and when it conducted itself in a willful manner and in particular when it willfully screened out the Plaintiff's candidacy based on criteria not published in the posting and thereby failed to apply same standard to the successful a candidate whom it knew or ought to have known on the face of her Dossier and her profile, did not meet either any of stated and as well as unstated the criteria for the position with the intention of deceiving those susceptible to review its selection process and on which a reasonable person would and did rely to his detriment.

[72] The Plaintiff states that because of the Defendant's refusal to hire him first on a temporally basis and later on a permanent basis and to treat him differently and adversely by denying him his constitutional rights through a series of deliberate, false, negligent and/or willful misrepresentations, to pursue gaining livelihood in the Province of New Brunswick as a full time professor, a guaranteed under s.6(2) of the Charter, a right not to be deprived of on the basis of any prohibited grounds of discrimination, including on the basis of his race, colour, age and national/ethnic origin, he is entitled to the heads of damages claimed at paras.1-2 of his Statement of Claim.

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[73] The Plaintiff states that because he has suffered damages as a result of the Defendants' willful misrepresentations and its breaches of Collective Agreement which breaches and/or willful misrepresentations which were orchestrated and made recklessly or intentionally to deny him employment and at the same time hiring someone no better qualified, he is not only entitled to a *restitutio in integrum*, putting him where he would have been but for the Defendant's willful and deliberate violation of his constitutional rights, Collective Agreement and willful misrepresentations.

[74] The Plaintiff states that because of the Defendant' willful conduct including its series of willful/negligent misrepresentations of the facts arising from the selection process, he has also suffered damages in terms of the affront to his dignity and loss of opportunity arising for the Defendant's bad faith and willful refusal to hire him and therefore to afford him equal treatment and equal benefits of the law - the right to pursue gaining livelihood contrary to s.6(2) of the Charter (Mobility Rights), and as such he is well entitled to general, exemplary damages and special damages.

[75] The Plaintiff asks that this matter be tried in Moncton, New Brunswick.

Dated in Moncton, New Brunswick this 29th day of May, 2017.

interest the la justice

NOEL AYANGMA
75 Cortland Street
Charlottetown, PE C1E 1T4
Tel: (902) 367-1333
(902) 628-7934

TO: UNIVERSITY OF MONCTON
118 Antonine Maillet Avenue
Moncton, New Brunswick E1A 3E9

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Cause No.: M-C-386-2017

COUR DU BANC DE LA REINE DU NOUVEAU-BRUNSWICK
DIVISION DE PREMIÈRE INSTANCE
CIRCONSCRIPTION JUDICIAIRE DE MONCTON

E N T R E:

**NOEL AYANGMA,**

Demandeur,

- et –

**UNIVERSITÉ DE MONCTON, CAMPUS DE MONCTON**

Défenderesse.

## EXPOSÉ DE LA DÉFENSE
**(Formule 27A)**

1. La défenderesse, l'Université de Moncton (l'«Université»), admet les allégations contenues aux paragraphes 24, 25, 26, 27, 33, 41 et 45 de l'Exposé de la demande.

2. La défenderesse nie les allégations contenues aux paragraphes 1, 2, 4, 8, 18, 19, 20, 21, 22, 23, 29, 39, 40, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73 et 74 de l'Exposé de la demande, sauf dans la mesure où elles sont expressément et autrement ou partiellement admises ci-dessous.

3. La défenderesse n'a aucune connaissance des allégations contenues aux paragraphes 6, 7, 28, 30, 31, 32, 34, 35, 36, 37, 38, 42, 43, 44 et 46 de l'Exposé de la demande.

4. La défenderesse ne plaide pas les paragraphes 10, 11, 12, 13, 14, 15, 16 et 17 de l'Exposé de la demande.

5. En ce qui concerne les allégations contenues au paragraphe 5 de l'Exposé de la demande, la défenderesse admet qu'à tout moment pertinent, le demandeur avait l'âge cité. Cependant, la défenderesse n'a aucune connaissance de toute autre allégation contenue au paragraphe 5 de l'Exposé de la demande.

6. En ce qui concerne les allégations contenues au paragraphe 9 de l'Exposé de la demande, la défenderesse précise que le demandeur était employé de l'Université comme « Chargé de cours », emploi qui est régit par la convention collective conclue entre l'Université de Moncton et l'Association des bibliothécaires, professeures et professeurs de l'Université de Moncton (« ABPPUM ») pour une unité de négociation regroupant chargées et chargés de cours ainsi que des monitrices et moniteurs cliniques du Campus de Moncton de l'Université pour la période du 16 décembre 2009 au 31 décembre 2013 (ci-après « la convention collective de l'Unité II de l'ABPPUM »).

7. En ce qui concerne les allégations contenues au paragraphe 36 de l'Exposé de la demande, la défenderesse affirme que l'enregistrement de la réunion du 12 mai 2015 fut

entrepris par le demandeur de façon secrète, sans la connaissance ni le consentement de la défenderesse, et démontre une mauvaise foi de la part du demandeur.

8. En ce qui concerne les allégations contenues au paragraphe 39 de l'Exposé de la demande, la demanderesse admet que le demandeur a déposé un grief le 12 mai 2015, mais la défenderesse nie les autres allégations contenues dans ce paragraphe et précise que ce grief fut retiré par l'ABPPUM.

9. En ce qui concerne l'ensemble de l'Exposé de la demande, la défenderesse affirme ce qui suit :

(a) Le demandeur est employé de l'Université à titre de chargé de cours à l'Université depuis 2010 et a enseigné divers cours en administration des affaires. À ce titre, il est membre d'une unité de négociation, soit l'unité II de l'ABPPUM, et son emploi est régi par une convention collective.

(b) Suite à la démission d'un professeur régulier survenue en juin 2013, l'Université a fait l'embauche d'une remplaçante le 1er juillet 2013, pour pourvoir le poste à temps plein pour une période déterminée d'un an. La personne ainsi embauchée a enseigné cinq (5) cours en gestion des ressources humaines durant l'année académique 2013-2014.

(c) Le poste susmentionné fut ensuite l'objet d'un concours pour un poste pouvant mener à la permanence d'emploi débutant le 1er juillet 2014. Le demandeur et neuf (9) autres candidats ont soumis leur candidature pour ce poste. La fermeture du concours était prévue pour le 13 janvier 2014. Le poste en question fait partie d'une autre unité de négociation, soit l'Unité I de l'ABPPUM et est assujetti aux dispositions d'une convention collective distincte et régi par une convention collective conclue entre l'Université de Moncton et l'ABPPUM pour l'Unité I.

(d) Le processus d'embauche s'est déroulé comme prévu par la Convention collective en vigueur et applicable. Deux candidates ont été invitées en entrevue, dont Mme Stéphanie Maillet. Mme Maillet était en instance de thèse au moment du processus d'embauche et les codirecteurs de sa thèse de doctorat avaient confirmé à l'Université en janvier 2014 qu'elle devait terminer son programme d'étude en avril 2014 et devait déposer sa thèse en mai 2014.

(e) Suite à une évaluation des dossiers des candidats suivant la procédure établie, Mme Maillet a été retenue pour le poste en question.

(f) Le demandeur n'avait pas le profil recherché pour le poste, soit en gestion des ressources humaines

(g) Le 3 mars 2014, l'Université a informé le demandeur que sa candidature n'avait pas été retenue à l'étape départementale.

(h) Mme Maillet a officiellement débuté ses fonctions de professeure à temps plein le 1er juillet 2014. L'embauche de Mme Maillet était cependant un fait connu dans la communauté universitaire et le demandeur en avait connaissance avant le 6 juillet 2014.

(i) Le 12 mai 2015, le demandeur a déposé un grief contre la défenderesse alléguant, la discrimination basée sur la race, couleur, âge et origine nationale, et éthique et harcèlement racial, l'abus d'autorité, l'intimidation, le manque d'éthique professionnelle, et la diffamation, le tout en relation avec la décision de ne pas retenir la candidature du demandeur pour le poste de professeur susmentionné et l'offre de ce poste à Mme Maillet.

(j) Le grief susmentionné fut retiré par la suite par l'ABPPUM.

(k) Le 6 juillet 2015, M. Ayangma a déposé une plainte à la Commission des droits de la personne du Nouveau-Brunswick (la « Commission ») dans lequel il alléguait la discrimination en relation avec la décision de ne pas retenir la candidature du demandeur pour le poste de professeur susmentionné et l'offre de ce poste à Mme Maillet.

(l) La Commission a rejeté la plainte du demandeur le 2 mai 2017.

(m) Le 29 mai 2017, l'Université a reçu signification d'une requête en révision judiciaire (numéro de dossier de la Cour MM-68-17) par laquelle le demandeur conteste la décision de la Commission de rejeté sa plainte en relation avec la décision de ne pas retenir la candidature du demandeur pour le poste de professeur susmentionné et l'offre de ce poste à Mme Maillet.

(n) Le 29 mai 2017, l'Université a également reçu signification de l'Exposé de la demande à l'origine de la présente instance, qui est également en relation avec la décision de ne pas retenir la candidature du demandeur pour le poste de professeur susmentionné et l'offre de ce poste à Mme Maillet.

10. La défenderesse affirme que les allégations avancées par le demandeur dans l'Exposé de la demande, qui ne sont pas admises, mais spécifiquement niées, ont eu lieu plus de deux ans avant le dépôt de l'Exposé de la demande, et alors, cette action est prescrite en vertu de l'article 5 de la *Loi sur la prescription*, LN-B 2009, c L-8.5

11. En ce qui concerne l'ensemble de l'Exposé de la demande, la défenderesse affirme que l'Exposé de la demande est excessivement répétitif, contient de nombreuses allégations superflues, inappropriées ou inutiles et contient des conséquences juridiques sans plaider les faits déterminants motivant ces conséquences. De plus, l'Exposé de la demande plaide à nombreuses reprises des éléments de preuve et des arguments, mais omet d'exposer de façon concise les faits déterminants sur lesquels repose la demande et généralement ne se conforme pas aux règles de la plaidoirie, ce qui constitue un usage abusif de la procédure judiciaire.

12. De plus, l'Exposé de la demande ne révèle aucune cause d'action raisonnable, tant les allégations de violations d'une convention collective, d'assertions frauduleuses et/ou négligentes, de mauvaise foi et de violations de la *Charte canadienne des droits et libertés*.

13. La défenderesse affirme que l'Exposé de la demande est une action sans fondement, que toutes les demandes qu'il avance ne sont pas fondées, ni en fait ni en droit, et que l'Exposé de la demande est scandaleux, frivole et vexatoire et constitue un usage abusif de la procédure judiciaire.

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14. La défenderesse nie que le demandeur ait droit aux dommages et mesures de redressement demandés aux paragraphes 1, 2, 3, 72, 73 et 74 de l'Exposé de la demande ou à toute autre mesure et en exige la preuve.

15. La défenderesse demande donc le rejet de la présente action avec dépens.

16. La défenderesse a l'intention de procéder dans la langue française.

FAIT à Moncton, Nouveau-Brunswick, le 30e jour de juin 2017.

STEWART McKELVEY
Avocats pour la défenderesse,
Université de Moncton, Campus de Moncton

Par: Sacha D. Morisset

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UNIVERSITÉ DE MONCTON
EDMUNDSTON MONCTON SHIPPAGAN

Vice-rectorat à l'administration et aux ressources humaines

Le 5 janvier 2018

***PAR COURRIEL :*** noel.ambadiang.ayangma@umoncton.ca

***ORIGINALE PAR LA POSTE***

Monsieur Noël Ayangma
75, rue Cortland
Charlottetown, I.-P.-E C1E 1T4

**Objet : Avis de suspension administrative**

Monsieur Ayangma,

L'Université a récemment reçu une série d'informations qui soulèvent des inquiétudes quant à la qualité de votre enseignement à la session dernière et sa conformité à certains de nos règlements administratifs, ainsi que les directives en matière d'éthique professionnelle et de relations professionnelles. Étant donné la nature des allégations, l'Université doit faire enquête sur la situation.

En date d'aujourd'hui, vous êtes suspendu, avec rémunération, de vos fonctions afin de permettre une enquête ordonnée. Ainsi, vous n'enseignerez pas les cours qui vous avaient été attribués et qui devaient débuter la semaine prochaine.

Veuillez également noter que la rémunération qui vous sera versée n'inclura pas de prime doctorale. En effet, nous vous avons demandé à plusieurs reprises de nous fournir une copie de votre dissertation doctorale et vous avez, à date, refusé de nous remettre ce document.

Finalement, nous constatons que vous avez, à plusieurs reprises, omis de déposer vos dossiers aux fins d'évaluation dans les délais prévus à cet effet aux articles 14.05 et 14.10 et à l'Annexe « D » de la convention collective convenue entre l'Université de Moncton et l'Association des membres du personnel enseignant contractuel à temps partiel, dit « chargées et chargés de cours ». Plus récemment, vous avez omis de déposer votre dossier pour la session Printemps/Été 2017. Ce dossier devait être déposé au plus tard le 15 septembre 2017 et, à date, n'a toujours pas été déposé.

Nous vous communiquerons plus de détails concernant l'enquête au cours des prochaines semaines.

Veuillez agréer, Monsieur Ayangma, l'expression de mes sentiments distingués.

Le vice-recteur à l'administration
et aux ressources humaines

André Samson pour

ER/dl EDGAR ROBICHAUD, Ph. D.

c. c. M. André Samson, vice-recteur à l'enseignement et à la recherche
M. Sébastien Deschênes, doyen, Faculté d'administration
M. Jean-François Richard, vice-recteur adjoint à l'enseignement et aux affaires professorales
M. Terrance LeBlanc, directeur, Ressources humaines
Votre dossier officiel

18, avenue Antonine-Maillet
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E1A 3E9 CANADA

Téléphone : [illegible]
Télécopieur : [illegible]

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Cause No.: M-C-386-17

COUR DU BANC DE LA REINE DU NOUVEAU-BRUNSWICK
DIVISION DE PREMIÈRE INSTANCE
CIRCONSCRIPTION JUDICIAIRE DE MONCTON

ENTRE:

NOEL AYANGMA,

Demandeur,

- et –

UNIVERSITÉ DE MONCTON, CAMPUS DE MONCTON,

Défenderesse.

## AFFIDAVIT DES DOCUMENTS
## (FORMULE 31B)

Je, Edgar Robichaud, de la ville de Moncton, province du Nouveau-Brunswick, **DÉCLARE SOUS SERMENT**:

1. Je suis le Vice-Recteur à l'administration et aux ressources humaines de l'Université de Moncton, défenderesse dans l'action ci-haut précitée et j'ai une connaissance personnelle de la matière ci-déposée, sauf sous avis contraire.

2. Parmi l'ensemble des documents relatifs aux questions en litige dans la présente action dont la défenderesse a la possession ou le contrôle, la défenderesse ne s'oppose pas à la production de ceux qui sont énumérés à l'annexe « A » du présent affidavit.

3. Parmi l'ensemble des documents relatifs aux questions en litige dans la présente action dont la défenderesse a la possession ou le contrôle, la défenderesse s'oppose à la production de ceux qui sont énumérés à l'annexe « B » du présent affidavit, pour les motifs suivants:

   (a) Pour ce qui en est des documents B-1, la défenderesse s'oppose à la production de ces documents puisqu'ils sont des notes confidentielles et des matériaux préparés par ses avocats, Stewart McKelvey, dans le seul but de représenter la défenderesse et de l'aviser en vue du présent litige;

   (b) Concernant les documents compris sous la rubrique B-2, la défenderesse s'oppose à la production de ces documents puisqu'ils sont de la correspondance et des communications entre la défenderesse et Stewart McKelvey dans le but de donner des directives à ses avocats ou de l'informer du statut du dossier. Ceux-ci sont confidentiels et protégés par le privilège avocat-client.

5. La défenderesse a déjà eu en sa possession ou sous son contrôle les documents relatifs aux questions en litige dans la présente action et qui sont énumérés à l'annexe « C » du présent affidavit, mais ils ne sont plus en sa possession ou sous son contrôle.

6. La défenderesse croit que les documents relatifs aux questions en litige dans la présente action et qui sont énumérés à l'annexe « D » du présent affidavit sont dans la possession ou sous le contrôle des personnes dont les noms et adresses figurent à cette annexe.

7. La défenderesse n'a jamais eu en sa possession ou son contrôle et ne connais pas d'autres documents qui ont trait aux questions en litige dans la présente action, sauf les plaidoiries, les documents de procédure et les lettres d'accompagnement, ainsi que les documents mentionnés aux paragraphes 2, 3, 4, 5 et 6 ci-dessus.

FAIT SOUS SERMENT devant moi à la Ville de Moncton, province de Nouveau-Brunswick, ce _____ jour de mai 2018.

Sacha D. Morisset
Commissaire aux serments
en ma qualité d'avocat

Edgar Robichaud
Université de Moncton

CERTIFICAT DE L'AVOCAT

**JE CERTIFIE, PAR LES PRÉSENTES**, avoir expliqué au déposant l'obligation d'une divulgation de tous les documents pertinents. Je ne connais aucun document non divulgué dans l'affidavit ci-haut qui aurait dû l'être.

STEWART McKELVEY
Avocats de la défenderesse,
Université de Moncton
Par: Sacha D. Morisset

Sacha D. Morisset
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C.P. 28051
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ANNEXE « A »

| Onglet | Description | Date |
|---|---|---|
| 1 | Lettre de la Commission à Stewart McKelvey | 5 juillet 2017 |
| 2 | Formulaire de plainte en matière des droits de la personne | 30 juin 2015 (révisé le 26 août 2015) |
| 3 | A. Rapport de la Commission scolaire de l'IPE | 13 octobre 2009 |
| 4 | B. Certificat d'enseignement de l'IPE | 2 juillet 1995 |
| 5 | C. Certificat d'enseignement de Terre-Neuve et Labrador | 24 octobre 2007 |
| 6 | D. Liste de charges de cours (Ciic) | 26 juin 2015 |
| 7 | E. Profil de S. Maillet (LinkedIn) | 21 juin 2015 |
| 8 | F. Description des programmes d'études du 3e cycle au Département de psychologie de l'Université de Sherbrooke | 21 juin 2015 |
| 9 | G. Description du Doctorat professionnel en psychologie | 26 juin 2015 |
| 10 | H. Description du Doctorat en psychologie | 26 juin 2015 |
| 11 | I. Description de la Maitrise ès arts (psychologie) | 26 juin 2015 |
| 12 | J. Horaire des examens - automne 2013 | automne 2013 |
| 13 | K. Affichage de poste – ADRH3223 | 30 janvier 2015 |
| 14 | L. Horaire des examens – hiver 2014 | Hiver 2014 |
| 15 | M. Fiche d'évaluation du rendement – ADMN 1200 | Hiver 2012 |
| 16 | N. Résultats du questionnaire d'appréciation de l'enseignement –ADMN 1220 | Décembre 2012 |
| 17 | O. Affichage de poste – Professeur en gestion des ressources humaines | 11 mai 2015 |
| 18 | P. Échange de courriels entre N. Ayangma et le bureau du doyen de la Faculté d'administration, incluant<br>-fiche d'auto-identification (13 janvier 2014)<br>-Lettre de G. LeBlanc à N. Ayangma (3 mars 2014) | 13 janvier 2014 |
| 19 | Q. Fiche de S. Maillet et liste de cours offerts (21 juin 2015) | 25 juin 2015 |

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| 20 | R. Courriel de V. Koffi à N. Ayangma incluant la fiche d'évaluation du rendement (6 mai 2015) | 8 mai 2015 |
| 21 | S. Courriel de C. DesRochers à N. Ayanggma incluant la fiche d'évaluation du rendement | 23 septembre 2013 |
| 22 | T. Lettre de G. LeBlanc à N. Ayangma | 27 septembre 2013 |
| 23 | U. Lettre de V. Koffi à J. Boyd | 8 avril 2015 |
| 24 | V. Formulaire de grief | 12 mai 2015 |
| 25 | W. Article « Stéphanie Maillet reçoit une bourse d'études doctorales de 5 000 $ » (site de l'Université et site WN) et poste Facebook | 13 mai 2015 au 24 mai 2015 |
| 26 | X. Lettre de G. LeBlanc à N. Ayangma | 27 mai 2015 |
| 27 | Y. Lettre de N. Ayangma à T. LeBlanc | 28 mai 2015 |
| 28 | Z. Lettre de G. LeBlanc à N. Ayangma incluant<br>-courriel de V. Koffi à N. Ayanmga (2 juin 2015) et lettre de V. Koffi à N. Ayanmga (2 juin 2015)<br>-courriel de D. Arsenault à N. Ayangma (30 juin 2015) et lettre de T. LeBlanc à N. Ayangma (30 juin 2015)<br>-convention collective de l'Unité II (16 décembre 2009 au 31 décembre 2013) | 29 mai 2015 |
| 29 | Réponse de l'Université de Moncton | 18 décembre 2015 |
| 30 | A. Lettre de G. Leblanc à N. Boucher | 1 octobre 2013 |
| 31 | B. Convention collective de l'Unité 1 (1 juillet 2011 au 30 juin 2014) | 1 juillet 2011 au 30 juin 2014 |
| 32 | C. Lettre de G. LeBlanc à N. Boucher incluant le procès-verbal de la réunion du 7 février 2014 | 17 mars 2014 |
| 33 | D. Lettre de G. LeBlanc à N. Ayangma | 3 mars 2014 |
| 34 | Réplique de N. Ayangma | 12 janvier 2016 |
| 35 | 1. Liste de charges de cours (Clic) | 26 juin 2015 |
| 36 | 2. Offres d'emploi – chargé de cours :<br>-ADMN 4291 (5 juin 2015)<br>-ADMN 4214 (30 octobre 2014)<br>-ADMN 4291 (16 juin 2014)<br>-ADMN 1220 (16 juin 2014) | 16 juin 2014 au 5 juin 2015 |
| 37 | 3. Offre d'emploi – chargé de cours ADRH 6222 (3 novembre 2015) et liste de cours offerts par S. Maillet | 3 novembre 2015 au 1 septembre 2016 |

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| | (1 septembre 2016) | |
| 38 | 4. Offre d'emploi – Professeur temporaire en psychologie (16 octobre 2015) et offre d'emploi – professeur en psychologie (1 septembre 2016) | 16 octobre 2015 au 1 septembre 2016 |
| 39 | 5. Liste de cours | 2010-2015 |
| 40 | 6. Horaire des examens - automne 2013 | Automne 2013 |
| 41 | 7. Horaire des examens – hiver 2014 | Hiver 2014 |
| 42 | 8. Profil de S. Maillet (LinkedIn) | 21 septembre 2015 |
| 43 | 9. Courriel de L. Coulombe à N. Ayangma incluant l'horaire des examens – hiver 2014<br>liste partielle de cours de Doctorat en psychologie de l'Université de Sherbrooke | 25 juin 2015 |
| 44 | 10. Lettre de G. LeBlanc à N. Boucher | 1 octobre 2013 |
| 45 | 11. Détails du poste de professeur en gestion des ressources humaines et courriel de J. Gaudet à N. Ayangma avec fiche d'auto-identification (13 janvier 2014) | 1 juillet 2014 |
| 46 | 12. Relevé de notes – Maitrise en administration des affaires (Université de Moncton) | Mai 1988 |
| 47 | 13. Relevé de notes – Doctorat en administration des affaires | 12 mai 1998 |
| 48 | 14. Certificat d'enseignement de l'IPE | 2 juillet 1995 |
| 49 | 15. Certificat d'enseignement de Terre-Neuve et Labrador | 24 octobre 2007 |
| 50 | 16. Rapport de la Commission scolaire de l'IPE | 13 octobre 2009 |
| 51 | 17. Description du cheminement – Doctorat en psychologie de l'Université de Sherbrooke | 21 septembre 2015 |
| 52 | 18. Objectifs du programme – Doctorat professionnel en psychologie | 21 septembre 2015 |
| 53 | 19. Description du programme de Baccalauréat ès arts (spécialisation en psychologie) | Non datée |
| 54 | 20. Description du programme – Doctorat professionnel en psychologie | 26 juin 2015 |
| 55 | 21. Description du programme – Doctorat en psychologie et maitrise ès arts (psychologie) | 26 juin 2015 |
| 56 | 22. Procès-verbal de la réunion du 7 février 2014 | 7 février 2014 |
| 57 | 23. Lettre de G. LeBlanc à N. Boucher | 17 mars 2014 |

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| 58 | 24. Lettre de G. LeBlanc à N. Ayangma | 3 mars 2014 |
| 59 | 25. Courriel de V. Koffi à N. Ayangma | 8 mai 2015 |
| 60 | 26. Fiche d'évaluation du rendement – ADMN 4214 | 6 mai 2015 |
| 61 | 27. Fiche d'évaluation du rendement – ADMN 4291 et ADMN 1220 | 2013 |
| 62 | 28. Courriel de C. Desrochers à N. Ayanmga | 23 septembre 2013 |
| 63 | 29. Lettre de G. LeBlanc (non-adressé) | 27 septembre 2013 |
| 64 | 30. Fiche d'évaluation du rendement – ADMN 4291 | |
| 65 | 31. Lettre de V. Koffi à J. Boyd | 8 avril 2015 |
| 66 | 32. Formulaire de grief | 12 mai 2015 |
| 67 | 33. Extrait de la transcription de la réunion du 12 mai 2015 (fait par N. Ayanmga) | 12 mai 2015 |
| 68 | 34. Lettre de G. LeBlanc à N. Ayanmga | 27 mai 2015 |
| 69 | 35. Lettre de N. Ayanmga à T. LeBlanc | 28 mai 2015 |
| 70 | 36. Lettre de G. LeBlanc à N. Ayanmga | 29 mai 2015 |
| 71 | 37. Fiche d'évaluation – ADMN 4214 | 28 mai 2015 |
| 72 | 38. Courriel de V. Koffi à N. Ayanmga avec lettre de V. Koffi à N. Ayangma | 2 juin 2015 |
| 73 | 39. de la transcription de la réunion du 18 juin 2015 (fait par N. Ayanmga) | 18 juin 2015 |
| 74 | 40. Courriel de la Commission à N. Ayanmga | 26 juin 2015 |
| 75 | 41. Lettre de T. LeBlanc à N. Ayangma | 30 juin 2015 |
| 76 | 42. Lettre de T. Benjamin à N. Ayangma | 7 juillet 2015 |
| 77 | 43. Télécopie du Bureau for Private Postsecondary and Vocational Education à N. Ayanmga | 15 juillet 2002 |
| 78 | 44. Fiche d'information « Recognition of the University's Degrees » | Non datée |
| 79 | 45. Courriel de J. Gaudet à N. Ayangma | 13 janvier 2014 |
| 80 | 46. Convention collective de l'Unité 1 (1 juillet 2011 au 30 juin 2014) | 1 juillet 2011 au 30 juin 2014 |
| 81 | Rapport sommaire de rejet de la Commission | 22 décembre 2016 |
| 82 | Réponse au rapport sommaire de rejet (N. Ayangma) | 11 janvier 2017 |

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|---|---|---|
| 83 | Réponse au rapport sommaire de rejet (Université de Moncton) | 13 février 2017 |
| 84 | Courriel de N. Ayangma à la Commission | 20 février 2017 |
| 85 | Notes d'information pour les réponses au rapport sommaire de rejet (préparé par P. Schiavoni) | 28 avril 2017 |
| 86 | Lettre de la Commission à N. Ayangma | 2 mai 2017 |
| 87 | Minutes de la réunion de la Commission du 28 avril 2017 | 28 avril 2017 |

ANNEXE « B »

| | | |
|---|---|---|
| B-1 | dates variées | Documents étant des notes, courriels, memoranda et communications préparés par Stewart McKelvey dans le but d'aviser la défenderesse et de se préparer pour ce litige. |
| B-2 | dates variées | Correspondances, courriels et autres communications entre Stewart McKelvey et la défenderesse dans le but de donner des directives à Stewart McKelvey ou d'informer la défenderesse du statut du dossier. |

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**De :** Noel Ambadiang Ayangma
**Envoyé :** 1 mai 2018 13:55
**À :** Sacha D. Morisset
**Objet :** RE: Affidavit of Documents

Mr. Morisset,

I have received your client's draft AOD. While I understand that it is draft AOD, I need some clarifications as t its contents. Can you therefore kindly clarify the contents of item 45 of your client's AOD and in particular, need to know what is expected from:

" **Détails du poste de professeur en gestion des ressources humaines...)**"

As you may now be aware, I am mostly interested in the disclosure of all arguably relevant materials related to th processes and/or selection processes that led to the appointments of Ms. Stephanie Maillet in 2013, on temporarily basis and as well as to her appointment on a permanent basis in 2014.

Take note that I am specifically interested in the production and reception of copies of the following material which I believe to be arguably relevant:

1. The CV/resumé and other application materials provided by Ms. Maillet in the process (if any) which led to her appointment as HR professor in 2013, on a temporarily basis;;
2. All application materials of all four (4) individuals "screened in" for the competitions/selection process which led to the appointment of Stephanie Maillet in 2014. These will the complete selection file from the initial screening until the appointment and will include, but limited to:
    1. A copy of all Applicant's CVs/resumés and cover letters together with the attached materials including a copy of relevant degrees of all four (4) candidate "screened in";
    2. A copy of all application materials provided by the Plaintiff;
    3. A copy of the Minutes of February 7 and 21, 2018;
    4. A copy of the selection screening and/or evaluations guides,
    5. A copy of the letters or correspondence sent to all four (4) "screened-in" candidates informing them of the result of their application and as well as a copy of the letter sent to the Plaintiff for the same purpose;
    6. A copy of the letter from Ms. Maillet's Director of thesis indicating her DPs' thesis status;
    7. A copy of the letter of recommendation from the Dean Mr. Gaston Leblanc, recommending Ms. Stephanie Maillet for the HR professor's position;
    8. A copy of the letter of offer by UDM appointing Ms. Maillet to the position of HR Professor and her letter of acceptance
    9. A copy of any screening notes

Please advise whether the information referred to above are included in your draft AOD and if not why not.

Please also indicate when I should expect receiving copies of the materials contained in your client's draft AOD, including the documents I have specifically requested in this correspondence which are arguably relevant.

NA

**From:** Noel Ambadiang Ayangma [mailto:noel.ambadiang.a[redacted]moncton.ca]
**Sent:** Wednesday, May 02, 2018 9:49 AM
**To:** Sacha D. Morisset <smorisset@stewartmckelvey.com>
**Subject:** TR: Affidavit of Documents

Mr. Morisset, I need a response to my e-mail below by the end of day today. If not satisfied I will have no option but to have this matter determined by the Court. It is my intention to file my motion on by Maay 10, 2018.

Thank you.

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# RE: Affidavit of Documents

Sacha D. Morisset <smorisset@stewartmckelvey.com>

Répondre à tous

mer 05-02, 10:35
Noel Ambadiang Ayangma

Boîte de réception

Vous avez répondu le 2018-05-02 11:37

Mr. Ayangma,

I cannot respond to your request in the times you would prefer. I have multiple files for multiple clients.

---

STEWART McKELVEY
LAWYERS | AVOCATS

Sacha D. Morisset*
Partner / Associé
stewartmckelvey.com, Moncton
D: 506.853.1942
C: 506.870.0704
smorisset@stewartmckelvey.com
*Law Corporation / corporation professionnelle

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# Affidavit of Documents

Noel Ambadiang Ayangma

Répondre à tous

mer 05-0[illegible] 11 37

D. Morisse

Éléments envoyés

Mr. Morisset,

While I do understand that you are busy with multiple files, I must must move along my file and hope that I will not have to file my motion on May 10th.
NA

# 68

COURT FILE MC-386-17 No du dossier

IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK

COUR DU BANC DE LA REINE DU NOUVEAU BRUSWICK

TRIAL DIVISION

DIVISION : PREMIERE INSTANCE

JUDICIAL DISTRICT OF MONCTON

CIRCONSCRIPTION JUDICIAIRE DE MONCTON

COURT OF QUEEN'S BENCH
TRIAL DIVISION
MONCTON, N.B.
FILED/REGISTERED
MAY 10 2018
COUR DU BANC DE LA REINE
DIV. DE PREMIERE INSTANCE
MONCTON, N.-B.
DEPOSE/ENREGISTRE

NOEL AYANGMA

PLAINTIFF

v.

UNIVERSITY OF MONCTON, MONCTON CAMPUS

DEFENDANT

NOTICE OF MOTION
(FORM 37 A)

TO : TO :UNIVERSITY OF MONCTON
STEWART MCKELVEY
Blue Cross Centre
644 Main St, Moncton, NB E1C 1E2
Counsel for the Defendant
Tel: (506) 853 1942
Email smorisset@stewartmckelvey.com

1. The Plaintiff Noël Ayangma will apply to Court at Moncton on 5th day of October 2018 at 1:30 p.m. for an Order directing the Defendant:

1. to serve its Affidavit of Documents within 7 days of the order pursuant to the Rule of Court;

2. to produce pursuant to Rule of Court a copy of each document listed in Schedule A of its Affidavit of Documents within seven (7) days of the order including, but not limited the following relevant materials that are in its possession and control , the following relevant materials that are in its possession and control.

**CATEGORY A OF SPECIF REQUEST FOR DISCLOSURE AND PRODUCTION**

Regarding the Selection process which led to the appointment of Ms. Maillet on a permanent basis to the position of Professor Human Resource Management in 2014:

2.1 A copy of the posting of the position of HRM Professor posted in January 2014;

2.2 A copy of all complete Dossiers submitted to the University of Moncton, Faculty of Business Administration by all four (4) applicants "screened in" including the successful candidate Ms. Stephanie Maillet, as a result of the February 7, 2014's screening process, including, but not limited to all Applicant's CVs/resumés and cover letters together with the attached materials including a copy of all relevant degrees relied upon by all four (4) candidates "screened in" for the 2014's selection process conducted by the University of Moncton to fill the position of Human Resource Management Professor, which resulted in the appointment of Ms. Stephanie Maillet effective July 1st 2014;

2.3 A copy of the Complete dossier submitted by the Plaintiff for the same selection process including, but not limited to his CVs/resumé and cover letter together with the attached materials including a copy of all relevant degrees and other materials relied upon by the Plaintiff;

2.4 A copy of the Minutes of screening processes held on February 7 and 21, 2018;

2.5 A copy of the selection screening and/or evaluations tools or guides used in the selection process conducted between January-March 2014;

2.6 A copy of the letters or correspondence sent to the two candidate screened in, but not interviewed apparently because they did not meet the immigration eligibility criteria, informing them of the result of their applications;

2.7 A copy of the letter or correspondence sent to the third candidate whom though screened in, was not successful on the interview, informing him/her of the result of his/her application;

2.8 A copy of the letter sent to the Plaintiff on March 3, 204.for the same purpose informing him of the result of his application;

2.9 A copy of the letter and correspondence from Ms. Maillet's Director of thesis indicating her DPs' (Doctorate in Psychology) thesis status;

2.10 A copy of the unredacted letter of recommendation dated March 17th, 2014, from the Dean, Mr. Gaston Leblanc, addressed to vice-recteur Mr. Neil Boucher, recommending Ms. Stephanie Maillet for the permanent position of HRM Professor's including all attachment referred thereto such as the minutes of screening meetings of February 7 and 21, 2014, a copy of the appreciation of students for the courses taught by Ms. Stephanie Maillet for the Fall 2013;

2.11 A copy of the letter of offer or contract by University of Moncton, appointing Ms. Maillet to the position of HRM Professor;

2.12 A copy of Ms. Stephanie Maillet's letter or correspondence accepting her appointment as HRM Professor in 2014;

2.13 A copy of any other relevant correspondence including the screening notes of all participants named the Minutes

**CATEGORY B OF SPECIF REQUEST FOR DISCLOSURE AND PRODUCTION**

Regarding the process which led to the appointment of Ms. Maillet on a on temporarily basis to the position of Professor, Human Resource Management in 2013:

2.14 A copy of all complete Dossier submitted by Ms. Stephanie Maillet to the University of Moncton, Faculty of Business Administration in 2013, including, but not limited to her CVs/resumé and cover letter together with any attached materials provided to the University of Moncton, including a copy of all relevant degrees relied upon by her in 2013;

2.15 All relevant correspondence regarding her appointment in 2013, including her letter of appointment and contract;

2. The Grounds to be argued at the hearing are that:

2.1 The Defendant had indicated at para.31 (b) of its Affidavit filed with the Court in the matter MM-68-17, on July 4th 2017, its intention to strike the Plaintiff's Statement of Claim;

2.2 Until today's date the Defendant has not moved to strike the Plaintiff's Statement of Claim.

2.3 It is now more 8 months since the pleadings had been closed and more than 8 months since Defendant suggested its intention to bring a motion to strike the Plaintiff's Statement of Claim and yet nothing has occurred to date;

2.4 Rules 31.02(1) and 31.02(2) by serving the Defendant with both his Affidavit of Documents and a copy of each document listed in Schedule A f his Affidavit (Form 31A);

2.5 Rules 31.03 (1) - Though the Plaintiff has also complied with the rule by serving upon the Defendant, on February 20th, 2018, a Notice of Requiring Affidavit of Documents, the Defendant has failed to comply with Rules 31.03(2) or 31.03(4) which required it to within ten (10) days, after receipt of the Notice Requiring Affidavit of Documents, a party to file and serve on every party and Affidavit of Document and to list and describe all documents which relate to the matter in action and which are in the possession and control of the Defendant and for which it had not claimed privilege (Form 31 B)

2.6. Rule 79.06 (1) (a); (b) and c - The Defendant has failed to comply with these rules despite many demands to do so under unreasonable pretences.

3. Upon the hearing of the motion the following will be resented and relied upon::

3.1 Rules 39 and 79;

3.2 The Plaintiff's Affidavit;

You are advised that:

(a) you are entitled to issue documents and present evidence at the hearing in
English or French or both;

(b) the plaintiff (or as may be) intends to proceed in the . English language; and

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(c) if you intend to proceed in the other official language, an interpreter may be required and you must so advise the clerk at least 7 days before the hearing.

Dated at Moncton this 10th , day of May 2018.

NOEL AYANGMA, Plaintiff
75 Cortland St, Charlottetown, PE .
Tel : H: 902-566-3265
Cell: 902.628-7943
Email : noelayngma@yahoo.ca;

TO : UNIVERSITY OF MONCTON
STEWART MCKELVEY
Blue Cross Centre
644 Main St, Moncton, NB E1C 1E2
Counsel for the Defendant
Tel: (506) 853 1942
Email smorisset@stewartmckelvey.com

# 74

COURT FILE MC-386-17 No du dossier

IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK

COUR DU BANC DE LA REINE DU NOUVEAU BRUSWICK

TRIAL DIVISION
JUDICIAL DISTRICT OF MONCTON

DIVISION DE PREMIERE INSTANCE
CIRCONSCRIPTION JUDICIAIRE DE MONCTON

COURT OF QUEEN'S BENCH
TRIAL DIVISION
MONCTON, N.B.
FILED/REGISTERED
MAY 10 2018
COUR DU BANC DE LA REINE
DIV. DE PREMIERE INSTANCE
MONCTON, N.-B.
DEPOSE/ENREGISTRE

NOEL AYANGMA

PLAINTIFF

v.

UNIVERSITY OF MONCTON, MONCTON CAMPUS

DEFENDANT

## AFFIDAVIT OF NOEL AYANGMA FILED IN SUPPORT OF THE MOTION FOR COMPLIANCE WITH THE RULES AND FOR PRODUCTION OF RELEVANT DOCUMENTS

I, NOEL AYANGMA, of Charlottetown, in the Province of Prince Edward Island

MAKE OATH AND SAY AS FOLLOWS:

1. THAT I am the Plaintiff and the moving party in the proceedings and action MC-386-2017 and the within motion;

2. THAT at all material times I have been a "*chargé de cours*" and not a permanent employee with the Defendant

3. THAT in 2015, I not only filed a human rights complaint with the New Brunswick Human Rights Commission against the appointments of Stephanie Maillet in 2013, on a temporarily basis, and as well as, in 2014 on a permanent basis, but I also commenced an action in this Court by filing a Statement of Claim -MC-386-17 on May 29th, 2017. ***[Exhibit "A" - Statement of Claim attached to this my Affidavit].*** I have been the subject of retaliation, harassment and intimidation by the employer;

4. THAT the Defendant filed their Defence to my Claim on June 29th, 2017, denying all claims against it and asking that the claim against it be dismissed with costs ***[Exhibit "B" - Statement of Defence attached to this my Affidavit]***;

5. THAT I verily believe that though the issues before the New Brunswick Human Rights Commission and the Court may invoke with different legal principles or tests, they involve the same subject matter and material facts dealing with selection processes which led to the appointments of Ms. Stephanie Maillet;

6. THAT the Commission dismissed my complaint on the basis that it was filed out of time;

7. THAT I sought judicial review of the Commission's decision to dismiss my human rights complaint;

8. THAT soon after the Application for judicial review was filed, the Defendant applied for security for costs by filing a motion supported by an Affidavit. ***[Exhibits "C" Motion for Security for Costs and Exhibit "D" Affidavit in support of the motion ].*** This motion was dismissed on July 18th, 2017.

9. THAT following the dismissal of the Defendant's motion for security for costs, I was able to move on with my Application for judicial review on October 20th and 23rd, 2017;

10. THAT on February 14th, 2018, Justice Dionne ultimately dismissed my Application for judicial review with costs. ***[Exhibit "E" Decision dated February 14th, 2018 attached to this my Affidavit];***

11. THAT on February 20th, 2018, I appealed the decision referred at para.9 of this my Affidavit, to New Brunswick Court of Appeal by way of a Notice of Appeal- ***[Exhibits "F" and "G"- Notice of Appeal 19-18 CA and Appellant's Certificate dated February 20th, 2018 attached to this my Affidavit];***

12. THAT on the same day being February 20th, 2018, I served my Affidavit of Documents on the Defendant counsel together with a copy of all documents listed in Schedule A of my Affidavit of Documents and a Notice requiring the Defendant's Affidavit of Documents and I expected to receive the Defendant's Affidavit of Documents and a copy of all documents listed in the Defendant's Affidavit of Documents within 10 days and this did not occur;

13. THAT on March 13th, 2018 on about 1:42 PM, and having received no Affidavit of Documents as required by the Rules of Court, or a response from counsel for the Defendant, I wrote to the Defendant reminding it to provide its Affidavit of Documents and a copy of all materials listed in Schedule A of its Affidavit of Documents. In the same correspondence, I also informed counsel for the Defendant of my intention to move for summary judgment after receipt of its Affidavit of Documents. ***[Exhibit "H" - Correspondence dated March 13th, 2018 attached to this my Affidavit].***

14. THAT on the same day being March 13th, 2018, on about 13:46 PM, ***[Exhibit "I" - Correspondence dated March 13th, 2018],*** counsel for the Defendant responded to my correspondence of the same day indicating that:

> *"Vu la complexité du dossier, affidavit des documents mettra du temps à compléter".*

15. THAT Mr. Morisset's comment made in 2018 which comment was based on "*the complexity of the file*", was made, notwithstanding the fact that the review by him of the same materials had already begun in 2015 and the fact that the same the issue of production of the same documents have already been addressed by him on December 18th, 2015 *[Exhibits J" Letter dated November 30th 2015 attached to this my Affidavit]* and *"K" - Correspondence dated December 18th, 2015]*;

16. THAT two weeks later, on March 27th, 2018, and on about 16:01 PM, I re-contacted Defendant counsel and reminded him of the Defendant's non-compliance with the Rules of Court and demanded the Defendant's Affidavit of Documents and the production listed in Schedule A. *[Exhibit "L" - Correspondence dated March 27th 2018]*. In this correspondence I wrote:

> *Mr. Morisset,*
>
> *This is further to my correspondence of March 13th, 2018. I note that you have not complied with my request for the disclosure. Do I take it that you have ignored my request and move to have the Court direct you to comply with the Rules? If not, could you then please tell me if the Affidavit of document is on its way, and if not, when I should be expecting to receive your Affidavit of documents in the very near future?*
>
> *Yours truly,*
> *NA*

17. THAT on the same day being March 27th, 2018 and on about 16:02 PM, *[Exhibit "M" - Correspondence dated March 27th, 2018]*. Defendant counsel responded:

> *"It's being compiled. I cannot advise yet when it will be completed"*

18. THAT on April 10th, 2018, I re-contacted Defendant's counsel to further inquire about the service of the Defendant's Affidavit and the production of all documents that are in its possession and control and relevant to the issue before the Court;

19. THAT in that correspondence *[Exhibit "N" - Correspondence dated April 10th 2018]*, I said:

> *Mr. Morisset,*
>
> *It is now two weeks since I heard from you regarding the above noted subject-matter. Can you please provide me with an update regarding the compilation of your client's Affidavit of Documents.*
>
> *Thank you.*
> *Noel Ayangma*

20. THAT on April 17th, 2018, on about 9:24 AM, and because I did not receive a response from Defendant counsel, from my April 10th, 2018 correspondence, I re-contacted him to further inquire about the service of the Defendant's Affidavit of Documents and the production of all relevant documents that are in the possession and control of the Defendant which are connected with the impugned two appointments of Ms. Stephanie Maillet. In this correspondence, I said *[Exhibit "O" - Correspondence dated April 17th 2018]*:

> *Mr. Morisset,*
>
> *Because it is now appears based on your conduct not responding to my latest e-mail that you have decided to ignore my repeated requests for the service of your client's Affidavit of Documents a copy of the materials in the possession and control of your client, despite having informed me four (4) weeks ago that your client's Affidavit of Documents was being compiled, following your client's failure to comply with the rules take note that I will be filing a motion with the Court of an order directing your client to comply the rules of court not later than April 23rd, 2018.*
>
> *Yours truly*

21. THAT the same day being April 17th, 2018 on about 9:27 AM, *[Exhibit "P" - Correspondence dated April 10th 2018]*. Defendant counsel responded:

> *I have a draft AOD. I'm in collective bargaining for the next two weeks except Friday. My intention was to finalize my review and provide you a draft this Friday.*

22. THAT on April 27th, 2018, during a telephone conversation regarding the service of the Defendant's Affidavit, Defendant counsel advised me that he will provide me with a copy of the Defendant's Affidavit and that did not occur either.

23. THAT on May 1st, 2018, on about 11:07 AM and having not received the Defendant's Affidavit of Documents as promised, I re-contacted Defendant counsel and once again further inquired about the service of the Defendant's Affidavit of Documents and the production of all relevant documents in its possession and control. In this correspondence *[Exhibit "Q" - Correspondence dated May 1st 2018]*, I said:

> *Mr. Morisset,*
>
> *On Friday April 27th, as per our discussions, you promised to provide me with your client's Affidavit of Documents on Monday April 30th. Unfortunately I did not receive the Affidavit as indicated. When I called that day around 3:30, you were already gone for the day and/or the week. Can you please indicate if I should except your client's Affidavit of Documents today?*

24. THAT on the same day being May 1st, 2018, on about 11:08, *[Exhibit "R" - Correspondence dated May 1st 2018]*, Defendant counsel advised:

> *My assistant is emailing you the AOD in a few minutes*

25. THAT on the same day May 1st, 2018 on about 11:15 AM, I received an incomplete draft copy of the Defendant's Affidavit of Documents. *[Exhibit "S" - Correspondence dated May 1st, 2018 together with the Defendant's incomplete draft Affidavit of Documents]:*

26. THAT on day May 1st 2018, on about 13:55, I wrote to Defendant counsel not to clarify the contents of the Defendant's Affidavit of Documents, but also to inform him some specific arguably relevant documents were missing from the draft Affidavit of Documents and requested some clarifications. *[Exhibit "T" - Correspondence dated May 1st, 2018 together with the Defendant's incomplete draft Affidavit of Documents].* This correspondence reads as follows:

1. *The CV/resumé and other application materials provided by Ms. Maillet in the process (if any) which led to her appointment as HR professor in 2013, on a temporarily basis;*

2. *All application materials of all four (4) individuals "screened in" for the competitions/selection process which led to the appointment of Stephanie Maillet in 2014. These will include?? the complete selection file from the initial screening until the appointment and will include, but limited to:*

   1. *A copy of all Applicant's CVs/resumés and cover letters together with the attached materials including a copy of relevant degrees of all four (4) candidate "screened in";*

   2. *A copy of all application materials provided by the Plaintiff;*

   2. *A copy of the Minutes of February 7th and 21st, 2018;*

   4. *A copy of the selection screening and/or evaluations guides;*

   5. *A copy of the letters or correspondence sent to all four (4) "screened-in" candidates informing them of the result of their application and as well as a copy of the letter sent to the Plaintiff for the same purpose;*

   6. *A copy of the letter from Ms. Maillet's Director of thesis indicating her DPs' thesis status;*

7. *A copy of the letter of recommendation from the Dean Mr. Gaston Leblanc, recommending Ms. Stephanie Maillet for the HR professor's position;*

8. *A copy of the letter of offer by UDM appointing Ms. Maillet to the position of HR Professor and her letter of acceptance;*

9. *A copy of any screening notes*

*Please advise whether the information referred to above are included in your draft AOD and if not why not.*

*Please also indicate when I should expect receiving copies of the materials contained in your client's draft AOD, including the documents I have specifically requested in this correspondence which are arguably relevant.*

NA

27. THAT on May 2nd, 2018, I wrote to Defendant counsel requesting an answer to my May 1st, 2018's inquiries and concerns. In that correspondence, *[Exhibit "U" - Correspondence dated May 2nd 2018 together with the Defendant's incomplete draft Affidavit of Documents,* I said

> *Mr. Morisset, I need a response to my email below by the end of day today. If not satisfied I will have no option but to have this matter determined by the Court. It is my intention to file my motion on by May 10th, 2018*

28. THAT on the same day May 2nd, 2018, *[Exhibit "V" - Correspondence dated May 2nd 2018 together with the Defendant's incomplete draft Affidavit of Documents,* Defendant counsel responded:

> *Mr. Ayangma,*
> *I cannot respondent to your request in the time you would prefer.*
> *I have multiple clients.*

29. THAT on the same day, being May 2nd, 2018 on about 11:35 PM *[Exhibit "V" - Correspondence dated May 2nd 2018 together with the Defendant's incomplete draft Affidavit of Documents,* I replied:

> *Mr. Morisset,*
>
> *While I do understand that you are busy with multiple files, I must move along my file and hope that I will not have to file my motion on May 10th.*
> *NA*

30. THAT I am presently on suspension with pay pending the outcome of an investigation based on unfounded allegations brought against by the Defendant and certain students and falsely accused me of not providing my dossiers for the Spring/summer session and that the conduct of the Defendant delaying the disclosure and production of arguably relevant documents gathered as a result of flawed selection processes, is nothing but a continuation of the harassment and intimation tactics referred in para.28 of this my Affidavit. *[Exhibits "W-1" and "W-2" - Letter of suspension dated January 5th, 2018 and letter of apology]*

31. THAT I verily believe that since I filed the initial grievance in 2015 against the appointments of Ms. Stephanie Maillet and a human rights complaint before the New Brunswick Human Rights Commission and commenced an action against the Defendant also in 2017.

32. THAT, in addition to other proceedings referred to above, I also verily believe that I have been the target and the subject of a series of retaliatory, harassment and intimidation conduct, by initiating a bogus investigation *[Exhibits "W-1 - Letter of suspension dated January 5th, 2018 and [Exhibits "W-3" attached to this my Affidavit]* against me which investigation resulted in the filing of and a new action File No. MC - 160-18 filed on February 20th, 2018 *[Exhibit "X-1" attached to this my Affidavit]* and several additional grievances *[Exhibits "X-2", "X-3" and "X-4" - Grievances filed against the Defendant attached to this my Affidavit]* against the Defendant.

33. THAT on April 20th, 2018, the Union objected to the Defendant's demand finding it unreasonable. ***[Exhibit " X-5" attached to this my Affidavit]***

34. THAT on April 23rd, 2018, the Defendant threatened to impose further sanction upon me, if I do not provide all original copies of all exams I administered for the fall of 2017 despite the union's objection to its unreasonable demand and renew its threat on April 24th, 2018 ***[Exhibit "Y-1" and "Y-2" - Letters/Demands to provide all original copies of all exams marked by me during the Fall of 2017 dated April 24th, 2018 and Union's objection letter - Exhibit "X-5"]***;

35. THAT I verily believe that the request for disclosure and production of the documents listed in my motion for production is the same as the request for production I previously made in 2015 in the proceeding before the New Brunswick Human Rights Commission;

36. THAT I also verily believe based on the jurisprudence on point that not only the documents for which I am seeking the production are identical in both the proceeding before the New Brunswick Human Rights Commission and the proceeding before the Court, but they are arguably relevant and involve the same materials which formed the basis of my Affidavit of Documents and as such must be produced are requested;

37. THAT I verily believe that the Defendant has in its possession and control more than 1000 pages of documents that are arguably relevant to the issues before the Court.

38. THAT I also verily believe that this is not the first time I am seeking production of the documents listed in my motion. Already on October 16th, 2015, the Defendant sought an extension of time to respond to my human rights.

38.1. THAT by letter of the same day, October 16th, 2015, the New Brunswick Human Rights Commission extended the Defendant's time to respond to my Human Rights Complaint by November 30th, 2015 ***[Exhibit "Z-1" - Letter dated October 16th 2015 attached to this my Affidavit]***;

38.2 THAT on November 3rd, the New Brunswick Human Rights Commission granted the extension of time sought by the Defendant to respond to my Human Rights Complaint. *[Exhibit "Z-2" - Letter dated November 3rd, 2015 attached to this my Affidavit];*

38.3 THAT November 30th, 2015, counsel for the Defendant, Mr. Sacha Morisset sought further extension of time from the New Brunswick Human Rights Commission on the basis that he needed more time to review more than a 1000 pages of documents or more referred to in para.10.1 above noted. *[Exhibit "Z-3" - Letter dated December 14th, 2015 attached to this my Affidavit];*

38.4 THAT apart from the request for an extension of time to review more than 1000 pages of document related to issue at bar, this is not the first time the Plaintiff is seeking disclosure and production of the documents referred to in the motion for production.

38.5 THAT this request was initially made in 2015 in a related and identical subject-matter and was addressed by counsel for the Defendant on December 18th 2015 *See Exhibit "K" - Letter dated December 18th, 2015 attached to this my Affidavit].*

38.6 THAT in that correspondence, Defence counsel stated:

> *La demande de production de documents*
>
> *Finalement, M. Ayangma demande, en se fondant sur la décision du Tribunal des droits de la personne de l'Ontario dans Badoulary c Conseil des écoles catholiques du Centre-Est, 2013 HRTO 360 CanLii, également à la Commission de demander à l'intimé la divulgation et la production des documents ayant trait aux qualifications de la candidate retenue, Mme Stéphanie Maillet, soit les documents qui ont été pris en compte pour décider de lui accorder un contrat en 2013, de lui offrir une entrevue, et de l'embaucher en 2014. Paméla Schiavoni le 18 décembre 2015*

*L'Université soutient que la Commission n'a pas le pouvoir d'ordonner la production de documents à cette étape de la procédure. Si, et seulement si, la Commission détermine que la plainte a potentiellement du mérite, une enquête s'en suivra et les documents pertinents seront révisés par les enquêteurs de la Commission.*

38.7 THAT at that time, in its letter dated December 18th, 2015, ***[Exhibit "K" attached to this my Affidavit],*** the Defendant claimed that the Commission did not have the legal authority to direct the production at the screening stage of the complaint until such time after an investigation is lodged. ***[ Exhibit "C" Motion for Security for costs and Exhibit "D" Affidavit filed in support attached to this my Affidavit];***

39. THAT until today's date the Defendant has neither moved to strike the Plaintiff's Statement of Claim as indicated in its Statement of Claim or Motion for security of costs nor file its Affidavit of Documents;

40. THAT it is now more 8 months since the pleadings had been closed and more than 8 months since Defendant first suggested its intention to bring a motion to strike the Plaintiff's Statement of Claim;

41. THAT it is now more than 60 days since the Defendant was required to file and serve its Affidavit of Documents and to produce a copy of all documents referred to in its Affidavit of Documents as required by Rules 31.02(1) and 31.02(2) which required it to serve the Defendant with both his Affidavit of Documents and a copy of each document listed in Schedule A f his Affidavit (Form 31A) with 10 days and failed to do so, despite several demands from me;

42. THAT the Defendant has also failed to comply with Rule 79.06 (1) (a); (b) and c - despite many demands to do so based false pretences and delay tactics;

43. THAT I make this Affidavit in good faith and in strong opposition to the respondents' late, premature and prejudicial motion for security for costs.

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SWORN TO at Charlottetown, in the County of Queens, Prince Edward Island, this 7th day of May 2018.

Elizabeth Murray

A COMMISSIONER FOR TAKING OATHS

NOEL AYANGMA

46 87

Court File No. | N° du dossier :MM-68-17

IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF MONCTON

BETWEEN:

Applicant,

-and-

Respondent.

COURT OF QUEEN'S BENCH
TRIAL DIVISION
MONCTON, N.B.
FILED/REGISTERED
JUL 04 2017
COUR DU BANC DE LA REINE
DIV. DE PREMIÈRE INSTANCE
MONCTON, N.-B.
DÉPOSÉ/ENREGISTRÉ

DANS LA COUR DU BANC DE LA REINE DU NOUVEAU-BRUNSWICK

DIVISION DE PREMIÈRE INSTANCE

CIRCONSCRIPTION JUDICIAIRE DE MONCTON

ENTRE:

Noel Ayangma,

requérant,

et

Université de Moncton, campus de Moncton,

intimée.

## NOTICE OF MOTION (FORM 37A)

## AVIS DE MOTION (FORMULE 37A)

TO:

DESTINATAIRE:

Noel Ayangma, requérant
75, rue Cortland
Charlottetown, IPE C1E 1T4

Commission des droits de la personne du Nouveau-Brunswick
Place 1604
200, rue Champlain, bureau 320
Dieppe, NB E1A 1P1

The Respondent will apply to the Court at Moncton, New Brunswick on the ___ day of _____, 2017 at ____ p.m. for an Order that:

L'intimée présentera une motion à la Cour à Moncton, Nouveau-Brunswick, le 18 juillet 2017, à 9h30 pour obtenir les ordonnances suivantes :

(a) l'ajournement de l'audience de la requête en révision judiciaire prévue pour le 18 juillet 2017 :

(i) jusqu'au paiement de la sûreté en garantie des dépens sollicitée dans la présente motion en vertu de la règle 58.04 des *Règles de procédure*; et

(ii) au moins 60 jours suivant la production du dossier complet de la Commission, en vertu de la règle 37.10 et/ou de la règle 38.09 des *Règles de procédure*;

(b) la production du dossier complet qui fut considéré par la Commission des droits de la personne du Nouveau-Brunswick (ci-après la « Commission ») dans sa décision faisant l'objet de la requête en révision judiciaire du requérant, en vertu de la règle 69.10 des *Règles de procédure* du Nouveau-Brunswick;

(c) une sûreté en garantie des dépens en vertu de la règle 58.01 des *Règles de procédure*;

(d) l'abrégement du délai de signification de la présente motion en vertu de la règle 3.02 des *Règles de procédure* du Nouveau-Brunswick;

(e) les frais et dépens de cette motion; et

(f) toute autre mesure jugée équitable par cette Honorable Cour.

2. The grounds to be argued are that: Les motifs soulevés sont:

(a) Le 29 mai 2017, l'Université de Moncton (l'« Université) a été signifiée avec la présente instance, ainsi qu'une poursuite (dossier MC-386-2017) impliquant les mêmes parties et la même situation de fait;

(b) Le 19 juin 2017, les procureurs de l'Université ont reçu signification du dossier de la requête du requérant;

(c) Le dossier de la requête du requérant ne fournit pas à la Cour le dossier complet qui fut considéré par la Commission dans sa décision qui fait l'objet de la demande la requête en révision judiciaire du requérant;

(d) Il est nécessaire à l'exercice approprié du pouvoir de contrôle et de surveillance de la Cour d'avoir une copie complète et officielle du dossier de la Commission avant de procéder à l'audience de la requête;

(e) L'Université a également l'intention de s'objecter à l'admissibilité d'une partie importante de l'affidavit du requérant assermenté le 15 mai 2017, lequel fut déposé à l'appui de sa requête et présentera donc une motion visant à faire radier en tout ou en partie cet affidavit qui devrait être entendue avant l'audience de la requête afin de régulariser le dossier qui est proprement devant la Cour;

(f) L'Université doit déposer et signifier sous peu son exposé de la défense dans la cause MC-386-2017 et compte ensuite présenter une motion pour jugement sommaire et/ou pour faire radier son avis de poursuite;

(g) M. Ayangma est un résident de l'Île du Prince-Édouard et ne réside pas habituellement au Nouveau-Brunswick;

(h) Il existe plus de 160,000.00$ en jugements enregistrés contre M. Ayangma à l'île du Prince-Édouard qui demeure impayé et ces jugements sont, tous en en grande majorité, pour des dépens ordonnés contre le requérant à la suite de nombreuses procédures judiciaires qu'il a intenté devant divers tribunaux de cette juridiction;

(i) L'Université propose que la présente motion soit, au besoin, entendue par appel conférence.

3. La Requérante invoquera les Règles 1.02.1, 1.03(2), 1.08, 2.04, 4.05, 37, 38, 39, 58, 59 et 69 des *Règles de procédure* du Nouveau-Brunswick.

4. À l'audience de la motion, les affidavits ou les preuves littérales suivantes seront présentés:

(a) Affidavit d'Edgar Robichaud assermenté le 30 juin 2017.

You are advised that:

(a) you are entitled to issue documents and present evidence at the hearing in English or French or both;

(b) the Respondent intends to proceed in the French language; and

(c) if you intend to proceed in the other official language, an interpreter may be required and you must so advise the clerk at least 5 days before the hearing.

Sachez que :

(a) vous avez le droit d'émettre des documents et de présenter votre preuve à l'audience en français, en anglais ou dans les deux langues;

(b) l'intimée a l'intention d'utiliser la langue française; et

(c) si vous avez l'intention d'utiliser l'autre langue officielle, les services d'un interprète pourront être requis et vous devrez en aviser le greffier au moins 5 jours avant l'audience.

DATED at Moncton, this ___ day of _____, 2017.

FAIT à Moncton, N.-B., le 4 juillet 2017.

Stewart McKelvey
Avocats de l'intimée
Par: Sacha D. Morisset

Préparé par :

STEWART McKELVEY
Avocats - Notaires
644 rue Main; bureau 601
Moncton, N.-B. E1C 9R1

Téléphone : 506.853.1970
Télécopieur : 506.858.8454

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No de dossier: MM-68-17

COUR DU BANC DE LA REINE DU NOUVEAU-BRUNSWICK

DIVISION DE PREMIÈRE INSTANCE

CIRCONSCRIPTION JUDICIAIRE DE MONCTON

ENTRE:

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Noel Ayangma,

requérant,

-et -

Université de Moncton, campus de Moncton,

intimée.

## AFFIDAVIT

Je soussigné, **Edgar Robichaud**, de Moncton, comté Westmorland dans la province du Nouveau-Brunswick, **AFFIRME SOLENNELLEMENT** ce qui suit:

1. Je suis le vice-recteur à l'administration et aux ressources humaines de l'Université de Moncton (ci-après « l'Université »), l'intimée dans les présentes procédures. J'ai une connaissance personnelle de la matière ci-déposée, sauf sous avis contraire.

**Historique des procédures**

2. Le requérant, Noel Ayangma, est à l'emploi de l'Université à titre de chargé de cours à l'Université depuis 2010. Il a enseigné divers cours en administration des affaires depuis son embauche. En tant que chargé de cours, M. Ayangma est un employé syndiqué et est membre d'une unité de négociation, soit l'Unité II de l'Association des bibliothécaires, professeures et professeurs de l'Université de Moncton (ci-après « ABPPUM »).

3. L'Unité II de l'ABPPUM regroupe les chargées et chargés de cours ainsi que les monitrices et moniteurs cliniques du Campus de Moncton de l'Université de Moncton, alors que l'Unité I de l'ABPPUM, une unité distincte, regroupe les bibliothécaires, professeures, professeurs ainsi que les chercheures et chercheurs du Campus de Moncton de l'Université de Moncton.

4. En juin 2013, un professeur de la Faculté d'administration des affaires a pris sa retraite. L'Université a d'abord pourvu ce poste devenu vacant par un contrat temporaire d'un an. Ensuite, le poste fut pourvu par un contrat régulier pouvant mener à la permanence débutant le 1er juillet 2014. Le poste en question est visé par l'unité I de l'ABPPUM.

5. M. Ayangma a soumis sa candidature pour obtenir le poste susmentionné et celle-ci ne fut pas retenue, ni pour le contrat temporaire d'un an ni pour le contrat régulier.

6. M. Ayangma a d'abord contesté les décisions de l'Université quant à l'octroi du poste qu'il convoitait par l'entremise d'un grief daté du 12 mai 2015 lequel l'Université a refusé. Une copie du grief de M. Ayangma est ci-jointe à titre de **pièce « A »**.

7. Le grief susmentionné fut éventuellement retiré par le syndicat de M. Ayagma. Une copie de la lettre de l'ABPPUM à cet effet est ci-jointe à titre de **pièce « B »**.

8. Le 6 juillet 2015, M. Ayangma a déposé une plainte à la Commission des droits de la personne du Nouveau-Brunswick (la « Commission ») dans lequel il alléguait de la discrimination dans l'attribution du contrat temporaire et du poste permanent susmentionnés. Une copie de la plainte de M. Ayangma est ci-jointe à titre de **pièce « C »**.

9. L'Université s'est objectée à la plainte au motif qu'elle était non fondée et, de plus, qu'elle n'avait pas été déposée dans le délai d'un an prévu dans la *Loi sur les droits de la personne*.

10. Le 22 décembre 2016, le personnel de la Commission a émis un Rapport de prolongation du délai pour le dépôt d'une plainte et Rapport sommaire de rejet, dont une copie est ci-jointe à titre de **pièce « D »** recommandant à la Commission de rejeter non seulement la demande de prolongation de délai de M. Ayangma, mais également sa plainte au complet.

11. Le 2 mai 2017, la Commission a rendu sa décision de rejeter au complet la plainte de M. Ayangma. Une copie de la décision de la Commission est ci-jointe à titre de **pièce « E »**.

12. Je suis informé par Me Sacha D. Morisset, avocat de l'Université, et je crois véridique qu'entre le dépôt de la plainte le 6 juillet 2015 et la décision de la Commission le 2 mai 2017, M. Ayangma a déposé auprès de la Commission plusieurs correspondances et documents et que Me Morisset a également déposé plusieurs correspondances et documents auprès de la Commission pour le compte de l'Université.

**Procédures actuelles devant la Cour du Banc de la Reine**

13. Le 29 mai 2017, l'Université a reçu signification des documents suivants :

    (a) une requête en révision judiciaire (l'acte introductif de la présente instance) accompagnée d'un affidavit de 27 pages et plus de 20 pièces jointes visant la révision de la décision de la Commission de rejeter la plainte de M. Ayangma; et

    (b) un avis de poursuite accompagné d'un exposé de la demande intentée par M. Ayangma contre l'Université portant le numéro de dossier de la Cour MC-386-2017 (la « Poursuite ») dont une copie est ci-jointe à titre de **pièce « F »**.

14. La Poursuite, vraisemblablement, est fondée sur la même situation de faits qui est soulevée dans la plainte que M. Ayangma avait déposée à la Commission, soit la décision de l'Université de ne pas accorder à M. Ayangma le poste qu'il convoitait à la Faculté d'administration des affaires.

15. L'Université continue d'être représentée par Me Morisset.

16. Je suis informé par Me Morisset et je crois véridique qu'il a déposé le 9 juin 2017, un avis d'intention de présenter une défense dans la Poursuite pour le compte de l'Université.

17. L'Université a l'intention de déposer un exposé de la défense en réponse à la Poursuite et, ensuite, déposer une motion pour faire radier la Poursuite ou obtenir un jugement sommaire.

**Dossier de la Commission**

18. Me Morisset m'informe et je crois véridique que le 19 juin 2017, il a reçu le dossier de la requête préparé par M. Ayangma et que ce dossier de la requête est incomplet puisqu'il ne contient pas tous les documents qui ont été déposés par les parties auprès de la Commission et que la Commission aurait donc considérés en prenant sa décision.

19. Me Morisset m'informe et je crois véridique qu'il a en sa possession la majorité des documents déposés par les parties auprès de la Commission, mais qu'il est important, avant de procéder à l'audience de la requête en révision judiciaire, d'obtenir une copie officielle et complète du dossier qui fut effectivement considéré par la Commission en prenant sa décision.

20. Me Morisset m'informe et je crois véridique que, dans certains cas, la Commission peut également considérer, en prenant sa décision, des « notes d'information » préparées par son personnel, mais qui ne sont pas remises aux parties.

21. Me Morisset m'informe et je crois véridique que ces « notes d'information » puissent notamment expliquer pourquoi les enquêteurs de la Commission ont décidé ou non d'interroger certains témoins ou de poursuivre certaines pistes d'enquête proposées par les parties.

22. L'Université estime donc qu'il est impératif que la Cour obtienne un dossier complet et officiel de la Commission, incluant toute « note d'information », avant d'entreprendre la révision judiciaire de la décision de la Commission.

**Affidavit du requérant**

23. Maître Morisset m'informe et je crois véridique que l'affidavit du requérant soumis en appui de la requête contient des faits et arguments qui ne sont pas recevables en preuve dans le contexte d'une requête en révision judiciaire.

24. Par conséquent, l'Université a l'intention de présenter une motion demandant à la Cour de radier l'affidavit du requérant, en tout ou en partie.

**Historique litigieux du requérant**

25. Maître Morisset m'informe et je crois véridique qu'il y a plus de 100 décisions rapportées dans la base de données de l'Institut canadien d'information juridique (CanLII) impliquant le requérant comme partie.

26. Maître Morisset m'informe et je crois véridique qu'une recherche des jugements impayés par M. Ayangma a été complétée le 15 juin 2017 et qu'il existe plus de 160,000.00$ en jugements impayés par M. Ayangma résultant de procédures judiciaires, dont la majorité

des jugements sont pour des dépens. Une copie de cette recherche de jugements et sommaire est ci-jointe à titre de pièce « G ».

27. Maître Morisset m'informe et je crois véridique qu'une ordonnance de sûreté en garantie des dépens a été émise par la Cour du Banc de la Reine du Nouveau-Brunswick contre M. Ayangma le 31 mai 2016 dans *Ayangma c ABPPUM* (dossier MC-795-15). Une copie de l'ordonnance est ci-jointe à titre de pièce « H ».

28. À ma connaissance, M. Ayangma est un résident de l'île du Prince-Édouard et ne réside pas habituellement au Nouveau-Brunswick.

29. Me Morisset m'informe et je crois véridique que des recherches dans le registre des titres fonciers révèlent que M. Ayangma n'est propriétaire d'aucun bien-fonds au Nouveau-Brunswick.

30. Par conséquent, l'Université a déposé une motion demandant que M. Ayangma fournisse une sûreté en garantie des dépens contre le requérant avant que toute procédure contre l'Université ne continue.

**Sommaire**

31. En sommaire, l'Université demande à la Cour d'ajourner l'audience de la requête pour les raisons suivantes :

(a) il est important que les parties obtiennent une copie officielle et complète du dossier de la Commission avant de procéder à l'audience de la requête;

(b) l'Université a l'intention de présenter une motion pour faire radier, en tout ou en partie, l'affidavit de M. Ayangma qu'il a déposé en appui à sa requête;

(c) l'Université a présenté une motion pour une sûreté en garantie des dépens;

(d) il existe deux instances (la requête et la Poursuite) qui découlent des mêmes circonstances et l'Université a l'intention de présenter des motions afin de faire radier la Poursuite ; et

(e) il est dans l'intérêt d'obtenir une solution équitable des instances sur le fond, de la façon la moins coûteuse et la plus expéditive, que toutes ces questions soient résolues avant de procéder avec l'audience de la requête sur le fond.

AFFIRMÉ SOLENNELLEMENT DEVANT MOI à Moncton, comté de Westmorland et province du Nouveau-Brunswick ce 30 ième jour de juin 2017.

SACHA D. MORISSET
COMMISSAIRE AUX SERMENTS
EN MA QUALITÉ D'AVOCAT

Edgar Robichaud

453694 v2

#94

This is Exhibit A referred to in the affidavit of Noel Ayangma sworn/affirmed before me this 17th day of December, 2018

Sarah Hébert
A Commissioner of Oaths

Noel Ayangma
75 Cortland Street
Charlottetown, PE
CIE IT4
Tel902 628-7934
noeayngma@yahoo.ca

October 24th, 2018

The Honourable David D. Smith,
Chief Justice of the Court of Queen's Bench
of New Brunswick
C/O Micheline Gleixner
Palais de Justice Moncton Law Courts
145 Assumption Blvd.
P.O. Box 5001
Moncton NB EIC 8R3

*Re:* *Ayangma v. University of Moncton – Request for a Reassignment of Three (3) Matters Previously Assigned to the Honourable Justice Jean-Paul Ouellette of the Judicial District of Moncton to another Judge or other Judges of the same Judicial District.*

Dear Chief Justice,

I write to you first to express my concerns regarding the assignment to and acceptance by the Honourable Justice Jean-Paul Ouellete to hear and decide three matters involving the University of Moncton and to request that all these three (3) matters: two (2) motions and one application for judicial review scheduled to be heard by the Honourable Justice Jean-Paul Ouellette, on December 17-18, 2018, be reassigned to a different judge, preferably to a judge without a connection whatsoever with the University of Moncton.

The reasons for my concerns and for my request at this stage of the proceeding to have a different judge reassigned to my cases, are simply to permit the Honourable Justice Jean-Paul Ouellette to review his conduct and voluntary recuse himself from hearing any of the matters before him based on the grounds stated below and avoid to deal with a motion for recusal which I intend to make at the outset of any of the three hearings scheduled to be heard by him either on the same date or back to back.

A review the CD of proceeding of October 5th, 2018 would enable the Court to understand why I have raised my concerns at this stage and prior to the hearings of the motions and application set for December 17th and 18th, 2018.

Both my concerns and request are based on the following grounds:

(a) Potential collusion which may arise from any previous proximity between the Honourable Justice Jean-Paul Ouellette and the University of Moncton;

(b) Reasonable apprehension of bias which may arise from the Honourable Justice Jean-Paul Ouellette's conduct and/or the statements/comments he made during the hearing the motions schedule for on October 5, 2018 which motions were adjourned for the 17th of October to be heard together with my an application for judicial review initially set down for December 14th, 2018 and also adjourned for December 18th, 2018.

(a) Regarding the Potential Collusion:

The Honourable Justice Jean-Paul Ouellette is graduate of the University of Moncton. He received his Bachelor of Laws in 1984 and a Bachelor of Business Administration in 1977 from the University of Moncton.

It is my firm belief based on the approach taking by the Honourable Justice Jean-Paul Ouellette at the hearing he presided over on October 5th, 2018 and the comments/statements that he made during the that hearing, that he may not be impartial in the adjudication of the matters before him.

In addition, it would appear based on the review of the CD of the proceeding of October 5th, 2018, that the Honourable Justice Jean-Paul Ouellette may have already prejudged the matters and sided with the University before the issue raised in the application for judicial review had been argued before him.

Though I made a tactical decision to conduct my proceedings in English so as to avoid dealing with judges that have graduated from the University of Moncton and might side with it, on important issues involving the University, I always end up with a Francophone judge who had graduated from and may have a tie with the University of Moncton and it was the case with the application for judicial review recently decided by Mr. Justice Zoël Dionne who also received his Bachelor of Laws from the University of Moncton in 1982 , and a Bachelor of Arts in 1980 who heard and dismissed my application for judicial review against the Commission's decision to dismiss my complaint against the University of Moncton, and awarded $10, 000 in costs against me. This decision is now before the Court of Appeal.

(b) Reasonable Apprehension of Bias:

As a background information, I brought two matters to this Court against the University of Moncton.

1. The first matter was a motion brought for noncompliance by the University of Moncton with Rule 31 and failure to serve and file its Affidavit of Documents and produce all relevant materials related to the selection process under consideration. This motion was set down for October 5th, 2018 and assigned to the Honourable Justice Jean-Paul Ouellette.

2. The second mater related to an application for judicial review whereas I contested the arbitrator's jurisdiction to hear and determine a grievance which dealt with the employer's administrative suspension of me with pay pending the outcome of an investigation. This application which was initially set down for December 14th, 2018, was also assigned to the Honourable Justice Jean-Paul Ouellette.
3. On September 14, 2018, the University of Moncton filed a motion pursuant to various Rules and for various reliefs including, but not limited to the striking out of my the Statement of Claim (Rule.23) and for Summary Judgment (Rule 22). This motion was also set down for October 5th 2018 and assigned to the Honourable Justice Jean-Paul Ouellette.

3.1. During the hearing of the two motions set for October 5th, 2018, which motions were eventually adjourned to December 17th 2018, I also became aware through discussions in court that likewise the two motions before the Motions judge, the Honourable Justice Jean-Paul Ouellette, the application for judicial review I filed, was also assigned to the Honourable Justice Jean-Paul Ouellette.

3.2. During the hearing of the two motions, the Honourable Justice Jean-Paul Ouellette conducted himself in a manner that I believe raised serious concerns about his ability to maintain the required impartiality and neutrality in deciding any matter involving the University of Moncton.

3.3. During that hearing the Honourable Justice Jean-Paul Ouellette made certain comments/statements that would cast doubt in his ability as judge to remain impartial and neutral in his decision-making process or to properly adjudicate the matters before him.

3.4. Some of the comments made by the Honourable Justice Jean-Paul Ouellette in relation to my application for judicial even though not before him that day, and especially when he suggested I do have problem with my application because I have refused to provide a copy of my thesis to the University, even though this issue was clearly not before him at the time nor form the basis of my application for judicial review suggest that he had already formed an opinion on a matter that that will come before him in a later date.

3.5. In addition, and curiously so, the Honourable Justice Jean-Paul Ouellette also permitted the University of Moncton to cure or attempt to cure an omission that was fatal of its motion to strike or for summary judgment, by permitting it without determining the issue of noncompliance, that was before, to serve and file a draft Affidavit of Documents which he knew or ought to have known was not only incomplete, but also formed the basis of the my argument to dismiss the University's motion under Rule 22, even though there was no motion for an extension of time to file an Affidavit of Documents.

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It is my position that such conduct from a judge may very well, not only prejudice a party, but could also raise a reasonable apprehension of bias which cannot be cured.

It is therefore follows, in light of all of foregoing, and in order to avoid any appearance of impartiality and lack of neutrality, bias and/or unfairness and reasonable apprehension of bias, that the Honourable Justice Jean-Paul Ouellette voluntarily recuses himself from hearing any of three matters now before him and that the matters already assigned to him, be reassigned to another judge or other judges, preferably to a bilingual judge or several bilingual judges who absolutely no tie whatsoever with the University of Moncton.

Your, Truly,

Noel Ayangma

cc. The Honourable Justice Jean-Paul Ouellette

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COURT FILE MC-386-17 & MM-78-2018

No du dossier

IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK

COUR DU BANC DE LA REINE DU NOUVEAU BRUSWICK

TRIAL DIVISION

DIVISION : PREMIERE INSTANCE

JUDICIAL DISTRICT OF MONCTON

CIRCONSCRIPTION JUDICIAIRE DE MONCTON

NOEL AYANGMA

COURT OF QUEEN'S BENCH
TRIAL DIVISION
MONCTON, N.B.
FILED/REGISTERED
DEC 03 2018
COUR DU BANC DE LA REINE
DIV. DE PREMIERE INSTANCE
MONCTON, N.-B.
DÉPOSÉ/ENREGISTRÉ

PLAINTIFF/ APPLICANT

v.

UNIVERSITY OF MONCTON, MONCTON CAMPUS

DEFENDANT/ RESPONDENT

ASSOCIATION DES PROFESSEURS ET BIBLIOTHECAIRES DE L'UNIVERSITE DE MONCTON, CAMPUS DE MONCTON

RESPONDENT

NOTICE OF MOTION
(FORM 37A)

TO : UNIVERSITY OF MONCTON, MONCTON CAMPUS
STEWART MCKELVEY
Blue Cross Centre
644 Main St, Moncton, NB E1C 1E2
Counsel for the Defendant
Tel: (506) 853 1942
Email smorisset@stewartmckelvey.com

1. The Plaintiff/Applicant Noël Ayangma will apply to Court at Moncton on 17th day of December 2018 at 9:30 a.m. for an order of recusal, relieving the Honourable Justice Jean-Paul Ouellette from his responsibilities to hear and decide and/or preside over any of the three (3) following proceedings scheduled to be heard on December 17th and 18th, 2018:

   1.1. The Plaintiff's motion for an order directing the Defendant, the University of Moncton, Moncton Campus, in the File MC-386-2018, to serve and file its Affidavit of Documents and to produce all relevant materials that are in its possession and control, as per the Rules of Court, on the grounds set out in the Notice of Motion;

   1.2. The Applicant's Application for judicial review for an order, in the File MM-78, setting aside the Arbitrator's decision to deny his grievance, on the grounds set out in the Notice of Application;

   1.3. The Defendant's motion to strike or for summary judgment dismissing the Plaintiff's Statement of Claim, in the File MC-386-2017,

2. The Grounds to be argued at the hearing are that:

   2.1 The Plaintiff/Applicant foresees bias/reasonable apprehension of bias arising from any decision process to be used by the Honourable Justice Jean-Paul Ouellette based on both:

   (a) the proximity between the Honourable Justice Jean-Paul Ouellette and the Defendant/Respondent, the University of Moncton, Moncton Campus as detailed in the letter dated October 24th, 2018, addressed to both the Honorable Chief Justice Smith and the Honourable Justice Jean-Paul Ouellette, in which letter, the Plaintiff/Applicant requested that the Honourable Justice Jean-Paul Ouellette either voluntarily recuses himself from the files MC 386-2017 and MM 78-2018 or that he be excused or removed from these files;

   (b) the manner in which the Honourable Justice Jean-Paul Ouellette conducted himself and/or presided over the two (2) Motions that were before him on October 5th, 2018, which motions he adjourned for December 17th and 18th, 2018, as detailed in the letter dated October 24th, 2018, in which letter, the Plaintiff/Applicant requested that he either voluntarily recuses himself from the files MC 386-2017 and MM 78-2018 or that he be removed from these files.

   *See Affidavit "A" attached to this my Affidavit*

3. At the hearing of the motion, the following will be presented and relied upon:

   3.1 The Plaintiff/Applicant's Affidavit;

4. You are advised that:

   (a) you are entitled to issue documents and present evidence at the hearing in English or French or both;

   (b) the Plaintiff/Applicant intends to proceed in the English language; and

   (c) if you intend to proceed in the other official language, an interpreter may be required and you must so advise the clerk at least 7 days before the hearing.

Dated this 28th, day of December 2018.

NOEL AYANGMA, Plaintiff/Applicant
75 Cortland St, Charlottetown, PE .
Tel : H: 902-566-3265
Cell: 902.628-7943
Email : noelayngma@yahoo.ca;

TO : UNIVERSITY OF MONCTON
STEWART MCKELVEY
Blue Cross Centre
644 Main St, Moncton, NB E1C 1E2
Counsel for the Defendant/Respondent
Tel: (506) 853 1942
Email smorisset@stewartmckelvey.com

AND TO: JOEL MICHAUD
Pink Larkin
Fredericton, New Brunswick
Tel: 506 458 1989
Tel: 506 447 1467
Solicitor for the Respondent, ABPPUM

101 15

COURT FILES MC-386-2017
MM-78-2018

No du dossier

IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK

COUR DU BANC DE LA REINE DU NOUVEAU BRUSWICK

TRIAL DIVISION
JUDICIAL DISTRICT OF MONCTON

DIVISION : PREMIERE INSTANCE
CIRCONSCRIPTION JUDICIAIRE DE MONCTON

NOEL AYANGMA

PLAINTIFF/
APPLICANT

v.

UNIVERSITY OF MONCTON, MONCTON CAMPUS

DEFENDANT/
RESPONDENT

ASSOCIATION DES PROFESSEURS ET BIBLIOTHECAIRES DE L'UNIVERSITE DE MONCTON, CAMPUS DE MONCTON

RESPONDENT

AFFIDAVIT OF NOEL AYANGMA FILED IN SUPPORT OF THE MOTION FOR RECUSAL

I, NOEL AYANGMA, of Charlottetown, in the Province of Prince Edward Island

MAKE OATH AND SAY AS FOLLOWS:

1. THAT I am the Plaintiff in the proceedings and action MC-386-2017 and the moving party in the production and recusal motions to be heard on December 17th - 18th, 2018;

2. THAT I am also the Applicant in the Application for Judicial Review File # MM 78-2018 for an order setting aside the order of the Arbitrator, which order dismissed my grievance against the Respondent, the University of Moncton, Moncton Campus, which Application was also set down for hearing, on December 17th -18th, 2018;

3. THAT I am also the Responding Party in the Defendant's motion for an order for summary judgment and/or to strike my Statement of Claim in the File # MC 386-2017;

4. THAT I have serious concerns with the fact that all three (3) matters referred to above and in my Notice for Motion for recusal, have been assigned to the Honourable Justice Jean-Paul Ouellette, of whom I doubt his neutrality and impartiality.

5. THAT there seems to exists a close proximity between the Honourable Justice Jean-Paul Ouellette and the Defendant/Respondent, the University of Moncton, Campus of Moncton as detailed my letter dated October 24th, 2018 addressed to both the Honourable Chief Justice Smith and the Honourable Justice Jean-Paul Ouellette. ***See Exhibit-A attached to this my Affidavit;***

6. THAT having personally participated in a hearing presided over by the Honourable Justice Jean Paul Ouellette on October 5th, 2018 and based on the manner he approached the motion as detailed in my letter of October 24th, 2018, I have apprehended as a results, reasonable apprehension of bias from the manner in which the motions before him were dealt with, as detailed in the letter dated October 24th, 2018 attached to this my ***Affidavit as Exhibit-A;***

7. THAT based on the manner in which the October 5th, 2018's proceedings were conducted and/or presided over by the Honourable Justice Jean Paul Ouellette, I do not believe that justice will be served in shape and form if all three (3) matters referred to in my Notice of Motion are dealt with and/or decided upon by him, as I seriously doubt that of his impartiality and neutrality in addressing the issues before him;

8. THAT I verily believe that the only reasonable and honourable outcome and easiest way to avoid any charge of bias and to make justice to the parties, would be that the the Honourable Justice Jean-Paul Ouellette recuses himself, from the files MC 386-2017 and MM 78-2018 for the reasons set out in my letter dated October 24th, 2018, addressed to him, which letter has been referred to as ***Exhibit A attached to this my Affidavit;***

41. THAT I make this Affidavit in good faith and in strong opposition to have the Honourable Justice Jean-Paul Ouellette preside over the three (3) matters now before him, as I do verily believe that he cannot be neutral and impartial in any of his decision making processes, as I do also verily believe that he has already made his mind and has already predetermined the outcome of some of the issues now before him before hearing all of my evidence and arguments.

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SWORN TO at Charlottetown, in the )
County of Queens, Prince Edward Island, )
This 17th day of December 2018. )
)
)

Sarah Hébert
A COMMISSIONER FOR TAKING OATHS

NOEL AYANGMA
DL# 4738803

Sarah Elise Hébert
A Commissioner of oaths
My Commission Expires Dec. 31, 2020