Mandamus: A Compelling Remedy?

Mario D. Bellissimo

Introduction

A cross-examination of a visa officer in the context of a mandamus proceeding or any immigration related federal court matter is uncommon. In planning the conference this year we thought it would be interesting to offer attendees a rare opportunity to observe a real cross examination. Although the dates and names have been changed for reasons of confidentiality, the transcript is real. The background of the case is such that the applicant was seeking a work permit and temporary resident permit (for reasons of past criminality) as a dependent to join his partner in Canada who was also on a work permit and engaging in lawful employment in Canada. The applicants in this matter were of the view that the processing time of the conjoined applications was unreasonable. Thus they sought leave at the Federal Court of Canada for mandamus. The law the applicants relied upon in advancing the matter, the strategy, and the results will be explored below. But first, what is mandamus?

What is Mandamus?

A writ of mandamus or simply ***mandamus***, which means "we command" in Latin, is the name of one of the prerogative writs in the common law, and is issued by a superior court to compel a lower court or a government officer to perform mandatory or purely ministerial duties correctly.[1] Mandamus is a judicial remedy which is in the form of an order from a superior court to any government, subordinate court, corporation or public authority to do or forbear from doing some specific act which that body is obliged under law to do or refrain from doing, as the case may be, and which is in the nature of public duty and in certain cases of a statutory duty. It cannot be issued to compel an authority to do something against statutory provision.

The applicant pleading for a writ of mandamus to be enforced must demonstrate that s/he has a legal right to compel the respondent to do or refrain from doing the specific act. The duty sought to be enforced must have two qualities:

1. It must be a duty of public nature; and

2. The duty must be imperative and should not be discretionary.

For the court to issue a writ a mandamus a number of conditions must be satisfied. Mr. Justice Kelen writing in *Dragan v. Canada (MCI)*[2] reviewed the criteria set down by the Federal Court in *Apotex Inc. v. Canada (Attorney General)*[3]

(1) There must be a public legal duty to act.

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1 Bryan A Garner, Black's Law Dictionary, p. 980, 8th Ed., St. Paul , USA , 2004
2 Ibid.
3 1993 CanLII 3004 (F.C.A.)

(2) The duty must be owed to the applicant.

(3) There is a clear right to the performance of that duty, in particular:

(a) the applicant has satisfied all conditions precedent giving rise to the duty;

(b) there was

(i) a prior demand for performance of the duty;
(ii) a reasonable time to comply with the demand unless refused outright; and
(iii) a subsequent refusal which can be either expressed or implied, e.g. unreasonable delay.

(4) No other adequate remedy is available to the applicant.

(5) The order sought will be of some practical value or effect.

(6) The Court in the exercise of discretion finds no equitable bar to the relief sought.

(7) On a "balance of convenience" an order in the nature of mandamus should issue.

What follows is a brief analysis of each of these steps, as they apply to mandamus applications in the immigration context. Generally, mandamus applications arise in immigration to compel an officer to make a decision on an application which has been pending for an "unreasonable", at least in the applicant's view, amount of time. If successful, the Court will order that a decision on the application in question be communicated to the application within a certain period of time from the date of the order. There are cases, as discussed below in which the Court will not issue such an order, but rather will retain jurisdiction over the case, and essentially monitor the processing to ensure that no further delays arise. As well, the issue of costs is often relevant in these types of applications, and costs are often awarded on a party to party basis.

Legal Duty to Act/ Duty Owed to the Applicant

It has been established[4] that a duty is owed to immigration applicants by the Minister by virtue of section 11(1) of IRPA which states that where an applicant, before entering Canada, applies to an officer for a visa or for any other document required by the regulations, the visa or document shall be issued if, following an examination, the officer

4 Vaziri v. Canada (M.C.I.), [2006] F.C.J. No. 1458, par. 41

is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.[5]

In general, this part of the test for mandamus is not contested by the Minister. It is well established that the Minister has a duty to act, by either issuing or refusing the document for which the application has been made. In this case, the Minister did not dispute its duty.

Clear Right to the Performance of that Duty/ Unreasonable Delay

Under this part of the test, applicants must first demonstrate that they have submitted a complete application, including payment of processing fees and whatever supporting documents are necessary for that particular application. This should be relatively straightforward, as a copy of the application will have been attached as an exhibit to the applicant's affidavit and will form part of the applicant's application record. Thus, assuming the application submitted was complete, the applicant will be found to have satisfied the conditions precedent which gives rise to the Minister's duty to act.

Secondly, applicants must show that they have made a prior demand for the performance of that duty. Thus, it is crucial that counsel write to the office which is responsible for processing the application in question and demand that the application be finalized within a certain period of time, failing which an application for mandamus will be brought before the Federal Court. In practice, it may be advisable to initially send one or two letters with a softer tone before sending the final demand letter putting the officer on notice that a mandamus application will be commenced if a decision is not received by the given date.

In the final demand letter it is important that counsel sets out the specific amount of time since the application was submitted, and also sets out a specific "deadline" after which mandamus will be initiated. This is related to the next part of the test, i.e. that the officer must be given a reasonable time to comply with the demand unless it is refused outright. In practice, it is advisable to give the officer notice of between 20 to 30 days from the date of the final demand letter before commencing the mandamus application.

In the vast majority of cases in the immigration context where mandamus is sought, the issue of whether to grant mandamus effectively concerns the clear right to the performance of the duty, or more accurately, the reasonableness of the delay during which no such performance has occurred.[6] Although the Courts have not set down a definitive period as to what constitutes delay in terms of time, the yardstick generally is one of reasonableness. In the oft referred quote from *Bhatnager*, Mr. Justice Strayer stated:

> **…mandamus can issue to require that some decision be made. Normally this would arise where there has been a specific**

5 Immigration and Refugee Protection Act, S.C. 2001, c. 27, s.11
6 Abdolkhaleghi v. Canada (M.C.I.), 2005 FC 729

> **refusal to make a decision, but it may also happen where there has been a long delay in the making of a decision without adequate explanation. I believe that to be the case here.**[7]

Mr. Justice Kelen considered the issue of delay in *Dragan noting* several cases where delay has been found. Mr. Justice Kelen cautions that the issue of delay must be considered on a case-by-case basis, with jurisprudence providing guidance for what the court considers unreasonable. In this regard he surmised:

> **Neglect to perform the duty or unreasonable delay in performing it may be deemed an implied refusal to perform. There are multiple precedents where mandamus has been granted against the Minister by this Court as a result of unreasonable processing delays in … immigration or citizenship matters.**
>
> **…**
>
> **What period of time would be considered too long to process an immigration file? In *Bhatnager*, supra, the delay was four and a half years; in *Dee*, supra, and in *Bouhaik*, supra, about four years; in *Conille*, supra, and in *Platonov*, supra, about three years. All those delays were considered unreasonable on the facts. The holdings did not, in the words of Strayer J. in *Bhatnager*, supra, at page 317, "fix any uniform length of time as being the limit of what is reasonable." Justice MacKay in *Platonov*, supra, also expressly cautioned against such an approach at paragraph 10:**
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> > **Each case turns upon its own facts, and I am not persuaded that the jurisprudence in relation to this matter is particularly helpful, except to outline some parameters within which the Court has issued an order in the nature of mandamus where it has found there has been unusual delay which is not reasonably explained.**
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> **The particular effects of the delay and the particular prejudice it may cause have to be considered.**[8]

This general principle is reiterated in *Mohamed*[9]:

> **I agree with the observation of my colleague MacKay, J. in Platonov v. Canada (Minister of Citizenship and Immigration), [2000] F.C.J. No. 1438, IMM-4446-99 (September 12, 2000)**

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7 Bhatnager v. Canada (M.E.I.) et al., [1985] 2 F.C. 315 (T.D.)
8 Dragan, supra at paras. 54-56
9 Mohamed v. Canada (M.C.I.), (2000) 195 F.T.R. 137

> **(T.D.) that each application for mandamus turns upon its own facts. Therefore prior jurisprudence is not particularly helpful except for the purpose of outlining the parameters within which the Court has issued an order in the nature of mandamus where it has found an unusual delay, which has not been reasonably explained.**

In addition to the criteria set down in *Dragan* and *Apotex,* the Federal Court in *Conille*[10] reasoned that before the delay in question will be considered unreasonable, three conditions must be satisfied:

> **From the reasons of the Court, it appears that three requirements must be met if a delay is to be considered unreasonable:**
>
> **(1) the delay in question has been longer than the nature of the process required, prima facie;**
>
> **(2) the applicant and his counsel are not responsible for the delay; and**
>
> **(3) the authority responsible for the delay has not provided satisfactory justification.**

Thus, when contemplating whether to commence a mandamus application, counsel should make reference to the processing times listed on the CIC website.[11] Unreasonable delay can only be determined in comparison to average processing times. In submissions, counsel should focus on the normal processing times and how much the processing time in question has exceeded the average, what the applicant has done to ensure that his/her application is complete and well documented, and reasons why the applicant feels that the officer's explanation for the delay is unsatisfactory. All of the aforementioned steps were completed in the case at bar before commencing leave.

In this respect, the Courts have refused to accept departmental backlogs, or staff shortages as reasonable explanations, nor do they tend to look to the system as a whole. Rather, each case is assessed on its own facts. As stated in *Hanano*[12]:

> **There is no basis upon which to find that the delay is systemic. There is no evidence except for the chronology of events and the visa officer's statement that the work was "on-going". I agree that the application was in motion, but it was not going anywhere. There was no progress being made and Mr. Hanano was caught in a cycle….Therefore, quite simply, is no evidence**

10 Conille v. Canada (M.C.I.), [1999] 2 F.C. 33
11 http://www.cic.gc.ca/english/information/times/index.asp
12 Hanano, supra

> **before me that provides justification for the excessive delay in rendering a decision in relation to this application.**

This sentiment is also expressed in *Dragan*[13]:

> **…there is ample precedent to grant mandamus for the assessment of visa applications where the excuse for the delay is the enormous workload faced by the Immigration Department, and where the delay may result in a substantive detriment to the applicant.**

Similarly, in *Singh*[14] the Court reasoned:

> **It matters not whether the delays lie within the Minister's office, or with CSIS. The Minister had a duty to act with reasonable diligence, taking into account that resources may be limited. That duty is not satisfied simply by a delegation to CSIS, which falls within the purview of another Minister. The delegate in turn might exercise reasonable diligence. No one is suggesting that Mr. Singh was entitled to an instant decision. Queues are a fact of life, but at this point in time, the delays are simply unacceptable.**

In contrast there are decisions in which the Court accepted systemic delays as a reasonable explanation. In *Singh*[15] the Court determined that the Minister cannot be held responsible for systemic delays as was found to be the case in that matter:

> **It would appear to me that the applicant's application is being duly processed, given that although his application for permanent residence was filed in June, 1995, it has only been eight months since Security Review received the CSIS report. In my opinion, this does not place the Minister's actions outside of the timeframe in subsection 46.04(6) of the Act, which imposes a duty to decide on the application "as soon as possible". It seems to me that the delay in this instance is merely a systemic one, and there is no evidence of unreasonable delay. I would thus follow Justice Muldoon's reasoning in *Carrion v. Canada (M.E.I.)*, reflex, [1989] 2 F.C. 584 (F.C.T.D.), wherein he held that systemic delays cannot be attributed to the respondent Minister**

The question arises as to whether a background or security check constitutes a justifiable explanation for the delay. As with the other prongs of the test, this is a

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13 Dragan, supra
14 Singh v. Canada (M.C.I.), 2005 FC 544
15 Singh v. Canada (M.C.I.), [1998] F.C.J. No. 585

determination which can only be made with reference to the specific facts of the case. In *Kalachnikov*[16], Mr. Justice Snider made the following finding in the context of an application for permanent residence:

> **I disagree with the Respondent that "background checks are pending" is an adequate explanation for this delay. Those background checks have been pending since October 1999 and the Respondent has not provided the Applicant with any information to explain why these checks have taken more than three years. In addition, Dawson J. rejected a similar explanation in *Mohamed*, supra.**

This reasoning is also fund in the 2005 decision in Singh[17], cited above, in which the Court found that the Minister's duty to act "is not satisfied simply by a delegation to CSIS".

In contrast, in *Seyoboka*,[18] the Court found that the delay was justified where it was for the purpose of security checks:

> **In my opinion, considering the facts presented by the applicant since his initial permanent residence application, the respondent is justified in completing its security check. When it is a matter of security, the Court must not issue an order of mandamus having the effect of an aborted or abbreviated investigation (Bouhaik v. Minister of Citizenship and Immigration, [2001] F.C.J. No. 155 (QL)).**

What is clear from the above cited case law is that every case will be determined on its facts and that it is impossible to define what constitutes an unreasonable delay or a an acceptable justification for such delay. Counsel must tailor the arguments to the facts of the case at hand, with particular attention paid to what the applicant has been doing to move his case along, and what the respondent has failed to do to perform their duty.

No Other Adequate Remedy is Available to the Applicant

In the immigration context, this prong of the test is easily satisfied - an immigration/visa officer is the only person in a position to grant the remedy that the applicant is requesting - namely, the issuance of a visa or other immigration document. In the case of *Vaziri*[19], however, in which the applicant was seeking a writ of mandamus to compel the officer to process an application to sponsor his father under the family class, the Court found that another remedy was available to the applicant. Specifically, Madame Justice Snider found that through the use of Temporary Resident Visa's (TRVs),

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16 Kalachnikov v. Canada (M.C.I.), (2003) FCT 777
17 At footnote 14.
18 Seyoboka v. Canada (M.C.I), 2005 FC 1290
19 Vaziri v. Canada (M.C.I.), 2006 FC 1159

the father and son had at least one other way of being united. The Court found that while the PR applications are being assessed, TRVs may provide interim relief.

Madame Justice Snider supported her decision with reference to other decisions of the Federal Court in which the Court held that temporary resident status, or its analogue under the repealed *Immigration Act*, can fulfill the objective of *IRPA* to reunite families. The Court acknowledges that the applicants live with uncertainty while the PR applications are being resolved, and that TRVs do not provide the same security or rights as permanent resident status, but nevertheless concluded that the use of TRVs is an alternative that is adequate – albeit not perfect.

In the case before us, family reunification of common law partners was a live issue and the applicants had no other legal avenue because neither applicant was a permanent resident of Canada and the main applicant was on a Canadian work permit for two years. Thus the request was specific with a delineated time line in which the relief would be meaningful to the applicants.

The Order Sought will be of Some Practical Value or Effect

Again, this is rarely an issue in a mandamus application in the immigration context. Generally speaking, given that the order will compel the officer to process the application question within a given time frame, the practical effect of the order is obvious. However, an exception to this was also seen in the case of *Vaziri*[20] In that case, the Court found that the delay complained of by the applicant was no longer active. While the Court acknowledged that there was a lengthy delay at stage one of the sponsorship, which took place at CPC Mississauga, there was no indication that the second stage of processing the permanent residence application was being delayed in any way. The Court found, therefore, that there would be little practical effect of an order of *mandamus*.

It is worth noting that in the case of *Vaziri*[21] Madame Justice Snider certified the following questions:

> **<u>Question #1</u>**
>
> **In the absence of the Governor in Council having enacted relevant regulations and given the Minister of Citizenship and Immigration's responsibility for the administration of *IRPA*, does the Minister of Citizenship and Immigration have authority to:**
>
> **(a) set annual target ranges for the total number of immigrants to Canada?**

20 Ibid
21 Ibid, at para. 69

> **(b) determine how the annual target range will be distributed among the three immigrant classes (economic, refugee and family class)?**
>
> **(c) distinguish between members of the same class, by processing spouses, partners and children, in priority to parents and grandparents?**
>
> **Question #2**
>
> **Given the answers to Question #1, have the Applicants established an entitlement to the discretionary and equitable remedy of *mandamus*, given all the circumstances of this case?**

The Federal Court of Appeal declined to answer either of these questions, finding that the issue was moot[22]. At the time of appeal, the Minister had already issued the requested visa to the applicant's father, thus rendering the appeal moot. Thus, the Court has yet to answer the question of the legality of the Minister's priority policy, as set out in the certified question cited above. This question remains open and can be raised again in a similar situation in which the mootness issue does not apply and further, the amendments to the *Immigration and Refugee Protection Act* (IRPA) pursuant to Bill C-50 a new dimension has been added to the legal issues at play.

In the Exercise of Discretion there is No Equitable Bar to the Relief Sought.

Under this prong of the test, the Court is looking to determine if the applicant has been responsible for the delay and/or has compromised their cause in any other way. The applicant must come to the Court "with clean hands", in order to satisfy the Court that there is no equitable bar to an order of mandamus.[23] This however does not mean an applicant as in the case at bar with a criminal history cannot seek relief. To the contrary an applicant with a criminal history that has sought relief on the basis of section 24 of the IRPA has a right to have that application decided in a reasonable period of time.

Balance of Convenience

Not completely dissimilar to stay cases, mandamus further requires the Applicant to show that the balance of convenience favours the Applicant. This last prong of the test is closely related to the "clean hands" question discussed above. This issue relates to the prejudice that the applicant suffers as a result of the delay. The issue was framed as follows in *Dragan:*

22 Vaziri v. Canada (M.C.I.), 2007 FCA 150
23 Dragan, supra, at para. 47

> **I am satisfied that the balance of convenience lies with the applicants since their rights to a visa may be severely prejudiced by the delay.**

Costs

Rule 22 of the Federal Court *Immigration and Refugee Protection Regulations* provides:

> **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.**

The Federal Court has considered undue delay in processing a claim to be a special reason which would justify costs[24]. Solicitor-client costs are generally not granted in these types of cases except if there has been very inappropriate conduct on the part of one of the parties that should be highlighted. However, costs are often awarded on a party to party basis, because by definition mandamus is only granted where the Minister's delay has been unreasonable and unjustified. Some cases where costs have been awarded are *Abdolkhaleghi*, (supra at footnote 6), *Keybakhi*[25], *Shapovalov*[26] *and Singh* (supra at footnote 15).

Having said that, in *Uppal*[27], the Court noted that Federal Court jurisprudence is to the effect that a finding that an order of mandamus is warranted is not, by itself, sufficient to justify the award of costs. (See, for example, *Kalachnikov v. Canada (Minister of Citizenship and Immigration)* 2003 FCT 777 (CanLII), (2003), 236 F.T.R. 142 (T.D.).

Each request for costs will turn upon the particular circumstances of the case.

Recent Decisions:

Voropaev v. Canada (M.C.I.) 2008 FC 994

Issues: a) criminal checks vs. security checks; b) reliability of processing times posted on CIC website

"As to whether that delay has been longer than the nature of the process prima facie requires, the applicants conflate the investigation of criminality concerns with the issue

24 Platonov, supra., Dragan, supra
25 Keybakhi v. Canada (M.C.I.) 2006 FC 535
26 Shapovalov v. Canada (M.C.I.) 2005 FC 753
27 Uppal v. Canada (M.C.I.), [2005] F.C.J. No. 1390

of a security clearance. While there may be some factual overlap, security checks per se cannot be equated to simple consideration of an applicant's criminal record.

To the extent the applicants rely upon advice on the CIC website about normal processing times, the website warns that the times given are "estimated processing times only." The website further warns that the processing times are for first-stage approval only, that not all cases receive first-stage of approval at the case processing center in Vegreville, Alberta, and that some files may be transferred to a local CIC office, which may add further delays to the overall processing time. The applicants have been advised that their application has been transferred to the Etobicoke CIC office."

Zaib v. Canada (M.C.I.), 2008 FC 687

Issue: The Courts' willingness to retain jurisdiction where writ of mandamus not granted

I would therefore adopt the solution espoused by my colleague Justice Kelen in Rousseau v. Canada (Minister of Citizenship and Immigration), 2004 FC 602 (CanLII), 2004 FC 602, at paragraph 8, 252 F.T.R. 309:

> *[8] Since the respondent has recently taken action on this file so that the purpose of the mandamus action has been accomplished, no writ of mandamus is appropriate at this time. However, the Court will retain jurisdiction and invite the parties to make further submissions in two months if the Minister has not taken action by that time frame. In two months, the Court will render its order either granting the writ of mandamus or dismissing the action.*

In the case at bar, the Court will retain jurisdiction and invite the parties to make further submissions if the respondent has not taken action within three months following this decision.

Practical Tips:

1. Ensure that the initial visa application was completed in full, including payment of processing fees. Ensure that all correspondence or requests from the visa office were complied with in a timely manner;

2. Maintain a "tickler system" to alert you to cases that have been in process for an unreasonable amount of time. While it is difficult to determine what amounts to an unreasonable period of time, general parameters can be set, so that, for example, if four years have passed on an H&C application, it would be appropriate to send a letter to the officer requesting a decision.

3. Write to the officer to request a decision. It is good practice to send one or two preliminary letters setting out the average processing time and the time

that the application in question has been in process, and requesting that a decision be made forthwith. If no reply is received, or if the reply received fails to address the issue, counsel should send a letter demanding a decision by a given date (generally, 20 to 30 days from the date of the letter should be adequate), failing which a mandamus application will be commenced.

4. During the mandamus proceeding often times the file begins to move as a further defense to the application filed. Ensure you are amenable to correspondence on the file in furtherance of potential settlement which occurs on many occasions.

5. When preparing the Applicant's Application Record it is often useful to include an affidavit from a clerk or assistant who was involved in the processing of the application. The assistant can attest to the fact that all requests were complied with in a timely fashion to demonstrate that the delay is in no part due to the fault of the applicant. The affiant can also attest to any phone conversations that may have taken place with respect to the processing of the application.

CROSS EXAMINATION

Rule 12(2) of the *Federal Courts Immigration and Refugee Protection Rules*, SOR/2002-232 (FCIRPR), provides that cross-examination on affidavits filed in connection with an application for leave and for judicial review may be conducted only after leave to proceed with the application for judicial review is granted, absent special reasons.

Where leave is granted, the Federal Court Order will include the time limits within which cross-examinations, if any, on affidavits are to be completed. The option to cross examine an officer on his or her affidavit is exercised quite infrequently by immigration counsel. However, in the appropriate circumstances, an effective cross examination can be the decisive factor in succeeding on a judicial review application.

The following case law highlights some of the issues that arise with respect to cross examinations on affidavits, and contain useful guidelines for counsel conducting such examinations.

Syed v. Canada (M.C.I.), 2008 FC 164

Issue: Request to cross-examine an officer on an affidavit sworn outside of the context of a Federal Court proceeding

This case is interesting in that involves a request to cross-examine an officer's affidavit, outside of the judicial review context. In this case an oral hearing was conducted on a PRRA application, at which the exact circumstances of the Applicant’s entry into Pakistan in 2000 became a live issue. On her own motion, apparently in order to bring clarity to circumstances, the PRRA Officer requested and obtained affidavits from the

CBSA agents who accompanied the Applicant. These affidavits were sent to Counsel for the Applicant for comment. Counsel for the Applicant responded with rebuttal evidence, and, in addition, made a request to cross-examine the CBSA officers on their affidavits, as the CBSA officer were trying to undermine the credibility of the Applicant's statements.

Mr. Justice Campbell found that there was no evidence on the Tribunal Record that the Officer provided a response to this request. The cross-examination did not take place. The Court agreed that the failure of the Officer to respond to counsel's request constituted a breach of due process.

Hinton v. Canada (M.C.I.), 2008 FC 1343

Issue: Action vs. Application - the right to cross-examine on affidavits

This decision is important with respect to cross examination on affidavits in that Mr. Justice Harrington distinguished between the procedures in an action as opposed to an application for judicial review. In denying the Minister's request to cross-examine affidavits from Richard Kurland, an immigration lawyer involved in the case, the Court stated (at para 15):

> **If these matters were to continue as applications for judicial review, which they are not, the Minister would have the absolute right to cross-examine Mr. Kurland. However, one of the great advantages of an action, as I stated both in *Momi* and in Hinton no. 1, is that evidence is not adduced by affidavits and cross-examinations thereon, but rather by a full production of documents, an examination for discovery and *viva voce* evidence at trial.**

Torres Victoria v. Canada (M.C.I.), 2008 FC 1343

Issue: Procedure to follow when affiant refuses to produce documents requested during cross-examination

This case contains extremely important directions from the Court as to how to proceed when the affiant being cross-examined is not forthcoming with the information or documentation requested. In this case, the affidavit of Roger Payette, CIC Citizenship Case Analyst, was served and filed by the Minister in February 2005. The applicant cross-examined Mr. Payette in March 2005. During the cross-examination, the respondent objected to requests for production of certain documents on the grounds that they contained privileged communications.

In his affidavit, Mr. Payette stated that his office had received seven communications from CSIS about the applicant. Under cross-examination, he denied knowing what

concerns CSIS may have had regarding the applicant. The respondent had disclosed only four of the seven communications.

Mr. Payette also stated in his affidavit that he had requested updates from the Security Review Branch, CBSA five times in the year 2004. Only one of those requests was disclosed by the respondent. The respondent claimed privilege for the other four requests. During cross-examination Mr. Payette could not say whether he had received any response to his requests in 2004 because he had not brought the file to the cross-examination. Respondent's counsel objected to producing the records on the ground that the cross-examination was not an examination for discovery and that the records may be privileged under sections 37 or 38 of the *Canada Evidence Act* R.S.C, c. E-10.

The applicant's filed a motion in September 2005 citing Rules 96, 97, 317, 318 and 359 of the *Federal Courts Rules, 1998* in support of a request for direction from the Court with respect to production of the undisclosed CSIS communications referred to in the affidavit of Roger Payette of February 18, 2005. These communications were listed in the direction to attend for cross-examination served on the respondent and were the subject of refusals on the ground of privilege at the March 18, 2005 cross-examination of Mr. Payette.

Mr. Justice Mosley refused the applicant's motion for production. The reasons for the refusal are of vital importance for any counsel conducting cross examination on an affidavit. At paragraphs 16-18 of his decision Mr. Justice Mosley states:

> **But assuming for the present purposes that Rule 317 does apply to material in the possession of the respondent relating to the unprocessed citizenship application, it is not intended, in my view, to be used to obtain information that a party refused to bring to a cross-examination in response to a direction to attend, or to obtain answers to questions for which privilege has been claimed in the course of the cross-examination.**
>
> **The applicant's motion was filed five months after the cross-examination in which production of the documents was initially sought and to which the respondent objected on the ground of privilege. <u>The proper course of action for the applicant to have taken when these issues arose during Mr. Payette's cross-examination was to adjourn to seek direction from the Court, as per Rule 97 of the *Federal Court Rules, 1998*.</u> The applicant did not do that but instead completed the questioning. Questions taken under advisement at the cross-examination were answered by the respondent on March 23, 2005. No further effort was made, it seems, to**

> **obtain the undisclosed communications until this motion was filed.**
>
> **I agree with the applicant that the evidence given by Mr. Payette on cross-examination regarding the nature of the concerns that CSIS may have regarding the applicant was exceedingly vague. It would have been more helpful to the Court in these proceedings had Mr. Payette attended the cross-examination with the file in his possession and in a position to provide counsel with clear and specific answers, subject to any claims of privilege. His failure to do so suggests a conscious strategy to limit the amount of information the applicant could gain from the cross-examination. Nonetheless, the proper remedy for the applicant would have been to deal with the issue at that time, not almost six months later.**

Silver v. Imax Corporation, 2008 CanLII 21905 (ON S.C.)

Issue: Test for when a question is proper on cross-examination on an affidavit. The Court provided the following guidelines with respect to this issue:

> **[12] Typically, the test for whether a question should be answered in an examination for discovery is whether the information to be elicited has a semblance of relevance to the issues in the action. The same test is applicable to cross-examinations of deponents in motions. In such cross-examinations, a deponent may be asked questions not only about the facts deposed in his or her affidavit, but also questions within his or her knowledge which are relevant to any issue on the motion. Master Macleod in Caputo v. Imperial Tobacco Limited., (2002) 25 C.P.C. (5th) 78 (affd). On appeal at 33 C.P.C. (5th) 214 put the rules succinctly as follows:**
>
> *** If you put it in, you admit its relevance and can be cross-examined on it at least within the four corners of the affidavit;**
>
> *** You can't avoid cross-examination on a relevant issue by leaving it out;**
>
> *** You can't get the right to cross-examine on an irrelevant issue by putting it in your affidavit; and**

*** You can be cross-examined on the truth of facts deposed or answers given but not on irrelevant issues directed solely at credibility.**

Law Society of Upper Canada v. Canada (M.C.I.), 2006 FC 1042

Issue: Right to cross-examine on affidavits filed in leave applications

In this case the Respondent CSIC took the position that an affidavit which was filed for the leave application and for no other purpose, and therefore was not subject to cross-examination at the judicial review stage. CSIC argued that there is no provision for the cross-examination of persons other than those affiants relied upon for the application for judicial review.

The Court rejected this argument noting that Rule 16 of the FCIRPR specifically provides that any documents filed in connection with an application for leave will form part of the record for consideration by the judge hearing the application for judicial review. The Court also found CSIC's position to be inconsistent with Rule 15 of the FCIRPR which contemplates that the parties may decide not to file additional affidavits after an application for leave is granted. The use of the word "further" suggests that any evidence filed after the application for leave is granted is in addition to, and not in substitution of, the evidence filed in connection with the application for leave.

Thus, the Court concluded that the affidavit in question forms part of the record for the application for judicial review and that the applicant had a *prima facie* right to cross-examine the deponent.

Practice Tips

1. In the immigration context as we are often cross-examining persons over the telephone ensure at the commencement of the cross what notes the officer has in front of him/her, did anyone assist with the preparation of the notes, what materials are before the officer and if anyone else is in the room.

2. Cross-examination on affidavit is best reserved for cases in which the affiant attests to information which is not supported by any documentary evidence. This may be the case where the affiant attests to having taken certain steps towards processing an application for which no evidence exists, or where the affiant attests to having personal knowledge of a particular aspect of processing based on his or her own experience.

3. Where an officer attests to knowledge of matters based on his or her own experience, it is advisable to question the officer about his or her experience with the department. This may serve to weaken or invalidate their evidence which was based on their own personal experience.

4. If the affiant is unable or unwilling to provide answers or to produce requested documents, the applicant should adjourn the cross examination and seek direction from the Court, as per Rule 97 of the *Federal Court Rules*.

5. Where a client's budget is limited a cross examination in writing, although not as effective, is a viable option and better than no cross examination at all on certain files.

Case at Bar

In this case, the matter was resolved by way of settlement largely in part because the cross-examination effectively established that the delay was unreasonable. Applicant's counsel in this case adopted the strategy of using the Officer's affidavits as a means to explore the timelines and assertions deposed to by the Officer to uncover what if any specific steps the officer undertook to process the applications. The use of open ended questioning across various aspects of the applications was followed by an either/or questioning technique to limit the potential for generalized or vague responses.

In the end, the applicant was successful in the relief that was being sought without having to proceed to a full hearing. Respondent's counsel was proactive and cooperative in working towards a meaningful resolution. In the end, the case is an excellent example of employing litigation tools to affect a remedy that was not forthcoming. Mandamus in this writer's opinion remains a very powerful option when used in contemplation of the aforementioned principles stated above. So, mandamus yes - it is a compelling remedy in many ways!