Federal Court Cour fédérale

Date: 20150817

Docket: T-1722-14

Citation: 2015 FC 976

Ottawa, Ontario, August 17, 2015

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

GARY CURTIS

Applicant

and

BANK OF NOVA SCOTIA

Respondent

ORDER AND REASONS

[1] Andrew Pinto, the Applicant's former solicitor, moves for an order granting him leave to intervene in this application as an added party and permitting him to cross-examine the Applicant and make oral and written submissions.

[2] The nature of this application is described in an order of Madam Prothonotary Milczynski dated March 6, 2015, 2015 FC 283, as follows:

> [2] The within application for judicial review was commenced on August 7, 2014 in respect of an adjudicator's decision dated July 11, 2014 that found the Applicant had resigned his employment rather than having been constructively or otherwise dismissed, and that consequently there was no jurisdiction for the adjudicator to proceed further under the *Canada Labour Code*. The adjudicator also denied the Applicant's request to reopen the hearing, concluding that, contrary to the Applicant's post-hearing submissions, there was no evidence of the Applicant's counsel having been incompetent or acting contrary to the Applicant's interests or instructions.
>
> [3] The grounds for the application for judicial review relies upon various errors the Applicant submits were made by the adjudicator, including:
>
> - that the adjudicator misstated critical facts, such as whether the Applicant had been suspended with pay;
>
> - whether the Applicant had been the victim of discrimination and whether, having regard to the facts and surrounding circumstances of the case, his resignation could be seen as voluntary; and
>
> - whether the evidence of the Respondent's investigation of the Applicant was reliable.
>
> [4] The Applicant also submits that the adjudicator's ruling that the Applicant's Counsel was not ineffective or incompetent was fundamentally flawed and constituted an error of law and that in the circumstances, the refusal to reopen the hearing constituted a reviewable error.

[3] Andrew Pinto is the Applicant's former counsel who it is alleged was ineffective or incompetent. His request to be granted intervenor status is opposed by the Applicant.

[4] Andrew Pinto submits that he ought to be added as a party to this application because:

A. He has an interest in the outcome of the application;

B. His former client is alleging that he was ineffective or incompetent and he ought to be allowed to address those allegations;

C. The Federal Court protocol in immigration matters contemplates the right of an alleged incompetent former counsel to intervene; and

D. He will be able to assist the Court in the determination of the factual and legal issues raised in the application.

[5] Andrew Pinto submits that the test to be used is that set out by Justice Stratas in *Canada v Pictou Landing Band Council*, 2014 FCA 21. Justice Stratas acknowledged therein that "I am a single motions judge and my reasons do not bind my colleagues on this Court."

[6] Until a full panel of the Federal Court of Appeal adopts this new slightly revised approach, I prefer to rely on the test previously enunciated by a full panel of the Federal Court of Appeal in *Canadian Union of Public Employees v Canadian Airlines International Ltd*, [2000] FCJ No 220, at para 8:

1) Is the proposed intervener directly affected by the outcome?

2) Does there exist a justiciable issue and a veritable public interest?

3) Is there an apparent lack of any other reasonable or efficient means to submit the question of the Court?

4) Is the position of the proposed intervener adequately defended by one of the parties to the case?

> 5) Are the interests of justice better served by the intervention of the proposed third party?
>
> 6) Can the Court hear and decide the cause on its merits without the proposed intervener?

[7] In my view, Andrew Pinto, even if he meets the first three criteria (which I need not decide), fails to meet criteria 4, 5 and 6.

[8] The Respondent, the Bank of Nova Scotia, takes the position that the Adjudicator's decision was reasonable, and that includes his decision that Andrew Pinto was neither ineffective nor incompetent in his representation of the Applicant. The Applicant has agreed that the Bank may file an affidavit from Andrew Pinto regarding the facts relating to his representation of the Applicant. As such, all of the information that the proposed intervenor may offer to the Court will already be before it. In fact, the Court notes that he does not seek to file any information if he is granted intervenor status.

[9] Andrew Pinto submits that he cannot rely on the Bank of Nova Scotia to defend his interest and his reputation, as he would do as a party to the litigation. I am not convinced. If the Respondent to the application fails to so do, then it is quite likely that the application will succeed. Accordingly, it is in the best interest of the Respondent to do exactly what Andrew Pinto says he would do if granted status.

[10] Moreover, I am unconvinced that Andrew Pinto has any submission to advance or any questions to ask the Applicant on cross-examination, that cannot be advanced or asked by the

Bank of Nova Scotia. Clearly these two are co-operating as the Bank of Nova Scotia will be filing Mr. Pinto's affidavit in support of its position in the litigation.

[11] Aside from these observations, I am not persuaded that the judge hearing this application will be unable to decide the merits of the application without the direct involvement of Andrew Pinto. His agreed involvement through tendering an affidavit and offering himself to be cross-examined thereon puts all of the information before the Court. It is not clear what submissions he could possibly make that would not be redundant and duplicative of those to be made by the Bank of Nova Scotia.

[12] For these reasons the motion is dismissed.

[13] When each party to the motion was asked what costs they were seeking, counsel for Andrew Pinto responded that he was seeking $7000, and the Applicant responded that he was seeking $5000. Both are excessive in my view. The Applicant, even though self-represented is entitled to recover a reasonable amount for costs which, in my discretion, I fix at $750, inclusive of disbursements and taxes, to be paid forthwith by Andrew Pinto.

ORDER

THIS COURT ORDERS that the motion is dismissed, and the Applicant is entitled to his costs fixed at $750.00, payable forthwith by Andrew Pinto.

"Russel W. Zinn"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1722-14
STYLE OF CAUSE:	GARY CURTIS v BANK OF NOVA SCOTIA
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	AUGUST 11, 2015
ORDER AND REASONS:	ZINN J.
DATED:	AUGUST 17, 2015

APPEARANCES:

Gary Curtis	APPLICANT (ON HIS OWN BEHALF)
Tim Gleason	FOR THE PROPOSED INTERVENOR

SOLICITORS OF RECORD:

- Nil -	SELF REPRESENTED APPLICANT
Dewart Gleason LLP Barristers & Solicitors Toronto, Ontario	FOR THE PROPOSED INTERVENOR
Hicks Morley Hamilton Stewart Storie LLP Barristers & Solicitors Toronto, Ontario	FOR THE RESPONDENT