Date: 20060131

Docket: T-1542-05

Citation: 2006 FC 98

BETWEEN:

SANDY BAY OJIBWAY FIRST NATION

Applicant

and

ALLAN JOSEPH ROULETTE, STANLEY MOUSSEAU CATHERINE SPENCE, NORBERT BEAULIEU, BEVERLY WEST, SUSAN BEAULIEU, (ALLAN) CHARLES MOUSSEAU, ALLAN C. BEAULIEU, ANDREW BEAULIEU, FREDDIE D. STARR, LENORE SPENCE and PAUL S. TESKEY, AN ADJUDICATOR APPOINTED PURSUANT TO THE PROVISIONS OF THE *CANADA LABOUR CODE*, R.S.C. 1985, C. L-2, PART III, DIVISION XIV

Respondents

REASONS FOR ORDER

STRAYER D.J.

INTRODUCTION

[1] This is an application for judicial review of a decision taken by Paul S. Teskey, acting as an adjudicator under Part III of the *Canada Labour Code* (R.S.C. 1985, c. L-2) on August 10, 2005 in respect of a preliminary objection in a proceeding involving complaints brought by the respondents against the applicant for unjust dismissal. The preliminary objection was raised by

counsel for the applicant to prevent the law firm of Pollock & Company from acting as counsel for the respondents in respect of these complaints. The adjudicator dismissed this objection.

FACTS

[2] Pollock & Company had acted as legal counsel for the Chief and Council of the Sandy Bay Ojibway First Nation during the tenure of John Spence as Chief, from 1996 until September, 2003. In September, 2003 a new Chief was elected and Pollock & Company ceased to act as general counsel for the Band although it continued to act on an appeal already under way in respect of an election dispute.

[3] The respondents had been employed by the Band prior to the September, 2003 election but their employment was terminated after the change of Chief. They then retained Pollock & Company to represent them in taking complaints under the *Canada Labour Code* for unjust dismissal, the matter eventually coming before Mr. Teskey as adjudicator.

[4] At that time counsel for the applicant objected that Pollock & Company should not be allowed to represent the complainants due to conflict of interest, that firm having acted as general counsel for the applicant for seven years prior to the termination of its general retainer by the Band.

[5] Some time before the hearing originally scheduled to be heard by another adjudicator (who later recused himself), Pollock & Company discovered that they had advised the Band while still its general counsel as to an earlier dismissal of Joanne Roulette, who in the meantime had been re-hired and then dismissed again after the events of September, 2003. Pollock & Company thereupon ceased to act for Joanne Roulette in the *Canada Labour Code* proceedings.

[6] It appears from the applicant=s record in these proceedings that the only evidence it put before the adjudicator on its objection to Pollock & Company acting as counsel consisted of two affidavits. One affidavit was sworn by Dennis McIvor, Vice Chief, which simply stated that the law firm of Pollock & Company acted as Ageneral legal counsel@ for the Chief and Council from 1996 until September, 2003 and that the firm provided legal advice to the Chief and Council on employment matters. While there was some mention made of the Joanne Roulette situation Pollock & Company no longer represented her at the time of the adjudication. Mr. McIvor confirmed that the Chief and Council had not consented to the firm of Pollock & Company acting on behalf of the respondents. The other affidavit filed on behalf of the applicant was that of George Beaulieu, Co-Manager of the Sandy Bay Ojibway First Nation. He simply attested to the receipt on or about May 6, 2005 of a letter and an outstanding Statement of Account from Pollock & Company for $268.55, the AReminder Notice@ being headed ARE: LABOUR MATTERS@. There was no explanation as to the services to which this pertained or when they were rendered. No further enlightenment was provided on this point.

[7] The only evidence put before the adjudicator on behalf of the respondents on this objection was the affidavit of Harvey I. Pollock attesting to the fact that he and his firm had acted on behalf of Chief John Spence and his Council until the defeat of Chief Spence. He stated that he had provided advice in July, 1998 in respect of an employment matter involving Ms. Joanne Roulette, a matter unrelated to the present complaint of unjust dismissal. He asserted that neither he or any member of his firm had provided any advice concerning employment matters with respect to the other respondents nor had he or his firm received any confidential information concerning those individuals.

[8] The adjudicator reviewed leading jurisprudence on the subject of establishing conflicts of interest. He cited *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235 at para. 16, to the effect that in resolving such issues there are at least three competing values: maintenance of the high standards of the legal profession and the integrity of our system of justice; the principle that a litigant should not be deprived of his or her choice of counsel without good cause; and the desirability of permitting reasonable mobility in the legal profession. From the case of *Smallboy v. Roan* [2001] A.J. No. 1596, (confirmed [2002] A.J. No. 1461, leave to appeal refused [2002] S.C.C.A. No. 453), at paras. 52-55 he quoted, *inter alia*, the following:

> The former client has the threshold burden of showing that there is a sufficient relationship between a previous retainer and the current matter. If the threshold burden is met, there is a presumption that confidential information was imparted that could be used to the client=s disadvantage in the new retainer. The onus then shifts to the lawyer to rebut that presumption (paragraphs 52-53, citations omitted).
>
> While the retainers do not have to be factually related, the former client must show clear and cogent evidence that the retainers are sufficiently related; broad assertions are not enough. . . . It is not necessary to consider the second aspect of the *Martin v.*

> *Gray* test if it has not been shown that the lawyer is in possession of relevant, confidential information (paragraphs 54-55, citations omitted).

[9] Applying these principles, he reviewed the evidence and he found that the applicant had not met the burden of proving that Pollock & Company=s former retainer with the Band was sufficiently related to its current retainer with individual former employees of the Band. Against the broad assertion in the affidavit of Dennis McIvor that Pollock & Company had provided advice to the Chief in Council Aregarding employment related matters@ he had to weigh the specific assertion of Mr. Pollock in his affidavit that neither he nor his firm had ever provided any advice to the Band concerning employment matters with respect to the individuals he now represents, nor did his firm receive any confidential information concerning those persons. He therefore dismissed the objection to Pollock & Company acting for the respondents in the proceedings under the *Canada Labour Code*.

[10] The applicant herein seeks to have this decision of the adjudicator set aside on the basis that it is unreasonable or even patently unreasonable. The respondents have raised a preliminary objection that this is an interlocutory matter which ought not to be addressed on judicial review. I nevertheless heard the whole argument on the reviewability of the adjudicator=s decision.

ISSUES

[11] (1) Should the Court decline to review the adjudicator=s decision because it is an interlocutory decision?

(2) If the decision is to be reviewed, what is the standard of review?

(3) Should the adjudicator=s decision be set aside?

ANALYSIS

Should an Interlocutory Decision be Reviewed?

[12] Counsel for the respondents argued that a decision to permit counsel to represent a party is an interlocutory decision of which judicial review should not be sought. He relied principally on decisions of the Federal Court of Appeal in *Szczecka v. Canada (Minister of Employment and Immigration)* (1993), 25 Imm. L.R.(2d) 70 and *Ipsco Inc. v. Sollac, Aciers d=Usinor,* [1999] F.C.J. No. 910. In both cases the Court recognized that in Aspecial circumstances@ such a review might be sought.

[13] If it were necessary for me to so decide, I would be inclined to say there are special circumstances in this case. If review cannot be had at this stage of such a decision, then the party who lost on this preliminary issue would be obliged to see his former counsel, whom he seriously considers to be in conflict of interest by virtue of confidential and relevant information he would have from his prior retainer, proceed possibly to use such information in conducting the case against his former client. This is in contrast to the situation in the *Ipsco* case relied on by counsel for the respondents. In that case the Federal Court of Appeal did refuse to carry out judicial review of a preliminary decision disqualifying counsel. But the result of that refusal was that such counsel would not be engaged further in the process and thus any apprehended conflict would be avoided.

[14] However, having regard to my views of the merit of this application for judicial review, I will follow the example of the Federal Court of Appeal in *Szczecka* where, having pronounced that the decision in question was interlocutory in nature, nevertheless proceeded to consider the application for judicial review of that decision on its merits and dismissed it.

Standard of Review

[15] The applicant took various positions on the standard of review, suggesting at one point in oral argument that the standard might be correctness.

[16] The respondents relied principally on two decisions of the Federal Court of Appeal. The first was *Dynamex Canada Inc. v. Mamona*, 2003 FCA 248. In that case the Court held that, in reviewing a decision of a referee under Part III of the *Canada Labour Code*, the standard with respect to review of decisions as to common law principles determining the status of a person as an employee is correctness. This is because it involves a question of law of the kind normally considered by the courts. However, the decision of a referee applying such principles of law to the facts should be reviewable on the standard of reasonableness. It may be noted that the privative clause protecting the decision of a referee, namely subsections 251.12(6) and (7) of the *Labour Code*, which applied in *Dynamex* is essentially identical to section 243 of the *Canada Labour Code*, the privative clause protecting decisions of an adjudicator such as in the present case. This section provides as follows:

243.(1) Every order of an adjudicator appointed under subsection 242(1) is final and shall not be questioned or reviewed in any court.	243.(1) Les ordonnances de l=arbitre désigné en vertu du paragraphe 242(1) sont définitives et non susceptibles de recours judiciaires.
(2) No order shall be made, process entered or proceeding taken in any court, whether by way of injunction, *certiorari*, prohibition, *quo warranto* or otherwise, to question, review, prohibit or restrain an adjudicator in any proceedings of the adjudicator under section 242.	(2) Il n=est admis aucun recours ou décision judiciaire C notamment par voie d=injonction, de *certiorari*, de prohibition ou de *quo warranto* C visant à contester, réviser, empêcher ou limiter l=acrion d=un arbitre exercée dans le cadre de l=article 242.

This is a robust privative clause indeed. The respondents also relied on *H. & R. Transport Ltd. v. Baldrey*, 2005 FCA 151. In that case, as in the present, a decision of an adjudicator under Part III of the *Canada Labour Code* was in issue. The Court followed the decision in *Dynamex* and found that the standard of review of a decision applying the undisputed law to the facts is that of reasonableness.

[17] With respect I would come to the same conclusion in this case.

[18] Considering briefly the factors we are obliged to consider, I accept, in relation to the purpose of this legislation, that it is as Sharlow J.A. said in the *Dynamex* case at paragraph 32:

> . . .to facilitate the efficient resolution of disputes arising from its provisions . . . by providing tools to aid the settlement of disputes . . . and . . . recourse to designated officials.

In other words the designated officials should have considerable latitude.

[19] As to the nature of the question before the adjudicator in the decision under review here, in my view it involved the identification of the correct common law principles concerning impermissible conflicts of interests between a lawyer and his former client. As in the *Dynamex* case at paragraph 45 and in the *H. &. R. Transport Ltd.* case at paragraph 6, the Federal Court of Appeal has recognized that such decisions if under review would be subject to the standard of correctness because they are not matters within the special expertise of the Tribunal. Similarly in this case I would assume that, if the relevant common law principles concerning conflict of interest were in issue, the decision in that respect would be subject to the standard of correctness. However there is no dispute between the parties as to the correctness of the adjudicator=s interpretation of the common law rules in this respect. What is at issue is his application of those rules to the proceeding before him. The issue of conflicts of interest in the role of counsel is one in which the courts have equal if not superior expertise. It appears to me that consistently with what was said in *Dynamex* at paragraph 45 and in *H.& R. Transport Ltd.* at paragraph 6, the application of these rules to the facts of these proceedings gives rise to a mixed question of law and fact which should normally be reviewed on a standard of reasonableness.

Was there Reviewable Error?

[20] The adjudicator relied principally on the decision of the Supreme Court in *MacDonald Estate v. Martin, supra*, particularly a passage from the majority judgment written by Sopinka J.

The Court there stated that conflict of interest cases such as these require two questions to be answered:

> (1) Did the lawyer receive confidential information attributable to a solicitor-client relationship relevant to the matter at hand? (2) Is there a risk that it will be used to the prejudice of the client?

Sopinka J. explained that to meet requirement (1) the onus was on the client to show that the previous relationship was sufficiently related to the present retainer from which he seeks to remove the solicitor. However once that burden of proof is met the Court should infer that the conditional information was imparted unless the solicitor in question satisfies the Court that no information was imparted to him by his former client that could be relevant to the present case. He said in the latter case there would be a heavy onus on the solicitor to satisfy the Court.

[21] In his submission the applicant itself adopted the same passages in the *MacDonald Estate* case as representing the law. The adjudicator also made reference to the decision in *Smallboy v. Roan*, *supra*, para 8. Applying these principles, the adjudicator found that the applicant had not met the onus of proof upon it to demonstrate that the first retainer of Pollock & Company by the Band was sufficiently related to its present role as counsel concerning matters which have arisen since it ceased to be counsel for the Band.

[22] On the basis of the affidavit evidence which I have referred to above it appears to me that this was a reasonable conclusion open to the adjudicator.

[23] I will therefore dismiss the application for judicial review. While counsel for the applicant submitted that even if his client was unsuccessful no costs should be awarded. I can see

no reason why the normal practice should not apply that the successful party is entitled to costs. I shall so order.

DISPOSITION

[24] The application for judicial review will therefore be dismissed with costs.

(s) AB.L. Strayer@
Deputy Judge

FEDERAL COURT OF CANADA

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: T-1542-05

STYLE OF CAUSE: SANDY BAY OJIBWAY FIRST NATION v. ALLAN JOSEPH ROULETTE, NORBERT BEAULIEU, BEVERLY WEST, SUSAN BEAULIEU, (ALLAN) CHARLES MOUSSEAU, ALLAN C. BEAULIEU, ANDREW BEAULIEU, FREDDI D. STARR, LENORE SPENCE and PAUL S. TESKEY, AN ADJUDICATOR APPOINTED PURSUANT TO THE PROVISIONS OF THE *CANADA LABOUR CODE*, R.S.C. 1985, C. L-2, PART III, DIVISION XIV

PLACE OF HEARING: Winnipeg, Manitoba

DATE OF HEARING: January 10, 2006

REASONS FOR ORDER: Strayer D.J.

DATED: January 31, 2006

APPEARANCES:

Mr. Norman Boudreau Winnipeg, Manitoba	FOR THE APPLICANT
Mr. Derek Olson Winnipeg, Manitoba	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Booth Dennehy Winnipeg, Manitoba	FOR THE APPLICANT
Pollock & Company Winnipeg, Manitoba	FOR THE RESPONDENTS