

Date: 20071221

Docket: T-1188-06

Citation: 2007 FC 1363

Ottawa, Ontario, December 21, 2007

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

BRIAN AIRTH et al

Applicants

and

THE MINISTER OF NATIONAL REVENUE

Respondent

REASONS FOR ORDER AND ORDER
(Motion to Convert)

[1] The Applicant applied to convert this judicial review into a Simplified Action to which the Respondent was opposed.

[2] I have earlier this week indicated to the parties that the motion was allowed only in part.

[3] The parties have known since July that this case was set down peremptorily for hearing to commence February 18, 2008 and the Applicant has brought this motion at a late date.

[4] I am not convinced that all the issues in this case need to be resolved through the procedures of an action even the modified procedures of a Simplified Action. The Court is well able to understand complex organizational structures and the operation of these structures through the use of affidavits and cross-examination and the documents in the proceedings.

[5] The Court is not persuaded that the Applicants' concern is that it is fairer to the reputation of the Respondent's witnesses that this matter proceed as an action. The Respondent resists this contention and it does not seem logical that the Applicants should be asserting the interests of the Respondent and its officials.

[6] The only area in which cross-examination of the witnesses at a hearing would be of assistance to the Court is in respect of the purpose of the RFIs, the Respondent's credibility of and inferences to be drawn from the witnesses' explanations and conduct. In this regard, these issues are somewhat similar to those facing the Court in *Agustawestland International Ltd. v. Canada (Minister of Public Works and Government Services)*, 2005 FC 1640 (see in paragraphs 20 and 21 thereof).

[7] A similar point was made by Prothonotary Milczynski in *Jazz Air LP v. Toronto Port Authority*, 2006 FC 705 at paragraph 12:

To properly adjudicate the allegations of criminal conspiracy and to determine the subjective intentions and knowledge of the parties, the Court should have the opportunity to assess the credibility of witnesses. I agree with the submissions of the Deluce Parties, that *viva voce* evidence will be essential and that these issues cannot be properly determined on affidavit evidence, or in a summary proceeding.

[8] The Court is advised that cross-examinations of the witnesses took one week to complete and that much of the time was spent on documentary issues which should not arise in the hearing of this matter.

[9] By following this modified procedure as outlined later, the Court should also be able to accommodate the problem of obtaining the testimony of Sgt. Butler who is alleged to be an important witness but who has not been available due to personal circumstances.

[10] Therefore, the motion to convert is allowed only in part to the extent outlined in these Reasons, in particular to permit cross-examination at the hearing of this matter. There is no necessity to formally convert this matter to an action at this stage.

[11] Moreover, the matters related to the constitutional issues are already the subject of an Order dated December 19, 2007.

[12] The Applicants have not indicated that they intended to seek leave to file any further affidavit evidence. The Respondent has indicated that it may file evidence as a result of the Amended Application.

[13] For purpose of the conduct of the non-constitutional question aspect of this matter, the procedures necessary shall be as follows:

- (a) The style of cause shall not be amended.
- (b) Subject to further Court Order, the affidavits previously produced shall constitute the evidence of the party.
- (c) The cross-examinations and any other admissions shall constitute the discovery of the particular witness or party (as the case may be).
- (d) At the time of filing the Applicants' Record (January 14, 2008), the Applicants shall serve and file a Statement of Claim which shall include the particulars ordered in respect of the Amended Application (see Reasons dated December 18, 2007). The Statement of Claim shall not seek remedies or allege material facts other than those contained in the latest Amended Application as permitted.
- (e) On or before January 23, 2008, the Respondent shall serve and file a Statement of Defence which shall include any material facts upon which the Defendant relies in respect of s. 1 of the *Charter of Rights and Freedoms*.
- (f) On or before January 30, 2008, the Applicants shall serve and file a Reply and List of Documents to be relied upon at the hearing.

(g) On or before February 11, 2008, the Respondent shall file its similar List of Documents.

[14] The hearing shall be conducted as a judicial review subject to the cross-examination of any affiant in this matter.

[15] Therefore, it is ordered that the motion is granted in part as set forth in the Reasons. Costs shall be in the cause.

ORDER

THIS COURT ORDERS that the motion is granted in part as set forth in the Reasons.

Costs shall be in the cause.

“Michael L. Phelan”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1188-06

STYLE OF CAUSE: BRIAN AIRTH et al
and
THE MINISTER OF NATIONAL REVENUE

PLACE OF HEARING: Vancouver, British Columbia

DATE OF HEARING: December 13, 2007

REASONS FOR ORDER: Phelan J.

DATED: December 21, 2007

APPEARANCES:

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