Federal Court  Cour fédérale

Date: 20130515

Docket: T-2186-10

Citation: 2013 FC 599

Toronto, Ontario, May 15, 2013

PRESENT: The Honourable Madam Justice Gleason

BETWEEN:

ANTHONY MOODIE

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR ORDER AND ORDER

[1] These Reasons for Order and Order follow my Order of March 15, 2013, in which I granted the applicant's motion for adjournment and made additional Orders, which will be further detailed in what follows.

[2] This file involves a relatively complex application for judicial review in respect of a decision made by the Chief of Defence Staff that the applicant claims negatively impacted his military career. The application was case-managed and, prior to the present motions, there had been two contested motions related to pre-hearing disclosure and the constitution of the record.

[3] On August 12, 2012, then counsel for the applicant filed a Requisition for Hearing in accordance with Rule 314 of the *Federal Courts Rules*, SOR/98-106 [the Rules]. Counsel for the respondent, with the consent of former counsel for the applicant, filed a letter with the Court on November 6, 2012, providing counsels' updated availability dates for a hearing. These dates included March 21, 2013. The applicant's judicial review application was accordingly set down for a one-day hearing on March 21, 2013 by Order of the Judicial Administrator made on November 20, 2012 at the specific direction of the Chief Justice, as in the normal course.

[4] On February 13, 2013, the applicant filed a Notice of Intention to Act in Person, on the advice of his former counsel (as is apparent from the materials filed in connection with the applicant's March 5, 2013 motion for an adjournment of the hearing in the judicial review application, discussed below).

[5] On March 5, 2013, the applicant made a motion in writing under Rule 369 of the Rules seeking an adjournment of the hearing of the application, scheduled for March 21, 2013, because he felt incapable of representing himself and had not been able to pay his former lawyer in full nor provide him a retainer to cover the fees that were likely to be incurred in connection with the one-day hearing. Since leaving the military, the applicant has been working as a substitute teacher, and his revenue stream was interrupted due to the teacher's strike in 2012.

[6] In connection with his motion for an adjournment, the applicant filed materials indicating that he had already paid his lawyer well over $10,000.00 and that his lawyer had advised him to file

a Notice of Intention to Act in Person and seek an adjournment. The applicant filed an email exchange between himself and his former lawyer in which counsel wrote as follows:

> I received a message from my assistant that following your review of your file it is your wish to continue to retain me to represent you but that you will not have the funds available in time to prepare for and attend the hearing on March 21st, and hence it is your intention to seek an adjournment so that you gather funds to re-retain me. If this is correct you must prepare a Notice of Intention to Act in Person (Form 124C) and serve and file it. When you have done this you can then bring a motion for an adjournment. You should do this as soon as possible as the Court will be more favorably disposed to your request if you do this well in advance of the hearing date. This is because the Court has set aside an entire day for the hearing your case [*sic*] and will not be pleased to waste it by you appearing on that day and telling them you are not ready to proceed.
>
> Please confirm that my understanding of the status of your matter is correct and that you will [*sic*] serving and filing a notice to appear in person.

[7] The respondent contested the applicant's motion for an adjournment, arguing it should be refused, or, in the alternative, if granted, that terms be imposed. These terms included:

(a) a four-month deadline for filing a new requisition for hearing, which, if missed, would result in the judicial review application being declared to have been abandoned;

(b) a bar preventing the applicant from filing any new evidence;

(c) that the rescheduled date be made pre-emptive to the applicant such that any further attempts to adjourn the hearing date would result in the application being dismissed; and

(d) that the applicant be ordered to pay $250 and costs forthwith, failing which the application would be dismissed.

[8] On March 15, 2013, I issued an Order granting the adjournment and requiring the parties as well as the applicant's former counsel to appear before me as soon as possible for purposes of determining whether I should set aside the applicant's Notice of Intention to Act in Person, rename his former lawyer as counsel of record, make an order under Rule 404 of the Rules for payment of costs by the applicant's former counsel and set terms for the future conduct of this matter.

[9] Due to scheduling difficulties for both former counsel and the Court, the matter came on for hearing on May 14, 2013, thereby effectively granting an approximate eight-week adjournment to the applicant.

[10] At the outset of the hearing, upon request of former counsel for the applicant, I provided direction regarding the conduct of the hearing and ruled that, through the materials the applicant had filed, he had waived solicitor-client privilege with respect to the circumstances that resulted in his filing the Notice of Intention to Act in Person and seeking an adjournment. I accordingly ruled that the applicant's former counsel was at liberty to discuss what had transpired between himself and the applicant on these issues in his defence. I also ruled that counsel for the applicant should initially proceed by way of submissions, but that if it became apparent that evidence from him was required I would adjourn the hearing to allow him to prepare an affidavit. This was not necessary as there was no dispute regarding what had occurred and the respondent took no position on the issues concerning the appropriateness of counsel's conduct.

[11] As I indicated to the parties at the conclusion of the hearing, I have decided to grant the applicant's adjournment request, albeit on terms. These include that the matter shall be rescheduled

on the first available date after October 4, 2013 (to accommodate counsel's religious observances and the applicant's need for additional time to either retain alternate counsel or make suitable financial arrangements with his former counsel). The hearing will be peremptory to the applicant such that he will not be entitled to seek a further adjournment in this matter for any reason other than serious illness of himself or counsel, should he retain a lawyer. Such illness shall be certified by a qualified physician.

[12] In the circumstances, I make no order as to costs and believe the costs of the adjournment should be in the cause. I do not believe the additional terms sought by the respondent regarding limiting further evidentiary filings by the applicant are warranted, given the positions of the parties regarding disclosure in this matter.

[13] I believe the conduct of former counsel for the applicant in this matter to be inappropriate under the Rules. In so holding I make no determination as to whether his conduct is consistent with his professional obligations as that issue is not before me and, indeed, is one for the Law Society of Upper Canada to determine.

[14] Under the Rules, where counsel wishes to remove him or herself from the record and cease acting for a party due to the non-payment of fees (or for any other reason), the appropriate course of action is to bring a motion under Rule 125 so the Court may determine whether it is appropriate that the solicitor be allowed to withdraw. Where such request is made on the eve of a hearing that has been long-scheduled and an adjournment is resisted by the other party, such a motion may well be

refused (see e.g. *Staltari v Canada (Attorney General)*, 2002 FCA 108; *Balog v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 11 at para 6, [2002] FCJ No 11).

[15] Here, the conduct of former counsel for the applicant deprived the Court of the opportunity to assess whether withdrawal should have been permitted. The reason such decisions fall to the Court is to prevent precisely what occurred in this case: an adjournment resulting from the applicant's plea that one must be granted because it is unfair that he be required to proceed without a lawyer in a complex matter of significant personal importance. As Justice Blais (as he then was) noted in *Sogi v Canada (Minister of Citizenship and Immigration)*, 2006 FC 613 at para 21, "A review of the available case-law reveals one constant feature: when a lawyer wishes to cease representation in a case, he must state the grounds for doing so, and those grounds must be reviewed by the Court." Thus, the course of conduct of former counsel for the applicant is not consistent with the Rules, appropriate or fair to the Court.

[16] Despite this, I have determined that I should not reinstate the applicant's former counsel as counsel of record because the adjournment I have granted should afford the applicant time to retain other counsel or make suitable arrangements with his former counsel to re-retain him, as, indeed, the materials before the Court indicate is his intention.

THIS COURT ORDERS that:

1. This matter shall be re-scheduled for a one-day hearing in Toronto on the first available date after October 4, 2013, but such scheduling shall not take pre-eminence over the

scheduling of other judicial review applications that have already been or are currently in the process of being scheduled;

2. The applicant and counsel for the respondent shall forthwith provide their availability to the Judicial Administrator for the balance of 2013 and for any other dates in 2014 that the Judicial Administrator may require;

3. In the event the applicant re-retains his former counsel or retains other counsel before the hearing date is re-scheduled, as soon as possible following the retainer, counsel for the applicant shall provide his or her availability to the Judicial Administrator for the same dates as described in paragraph 2 of this Order;

4. Once scheduled, the date for the hearing of the application in this matter shall be peremptory to the applicant and no further adjournments will be granted to the applicant except in circumstances where he or his lawyer are so ill they are unable to attend the scheduled hearing date and such illness is certified by a qualified physician; and

5. Costs of this motion for an adjournment shall be in the cause.

"Mary J.L. Gleason"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2186-10
STYLE OF CAUSE:	ANTHONY MOODIE V THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	May 14, 2013
REASONS FOR ORDER AND ORDER:	GLEASON J.
DATED:	May 15, 2013

APPEARANCES:

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Stewart Phillips	FOR THE RESPONDENT
Yehuda Levinson	

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