Federal Court  Cour fédérale

**Date: 20130531**

**Docket: T-1761-12**

**Citation: 2013 FC 584**

**Ottawa, Ontario, May 31, 2013**

**PRESENT: The Honourable Mr. Justice Hughes**

**BETWEEN:**

**BANK OF MONTREAL**

**Applicant**

**and**

**GIANNI SASSO**

**Respondent**

## REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review seeking to set aside an Order of an Adjudicator dated September 18, 2012, made during the course of a hearing by that Adjudicator, acting under the provisions of Division XIV – Part III of the Canada Labour code dealing with the production by the Applicant of certain documents in respect of which privilege was claimed.

[2] The hearing itself concerned a complaint by the Respondent Sasso that he had been unjustly dismissed by the Applicant Bank of Montreal (BMO). The history of the matter can be briefly stated. Santini, a customer of BMO or an affiliate Nesbitt Burns, asserted that his account had been

viewed by an employee of BMO named Rao, and that Rao had misappropriated funds from that account. Rao was Santini's brother-in-law. It was later alleged that Rao had defrauded other BMO clients of millions of dollars, whereupon BMO and Nesbitt Burns initiated proceedings against Rao.

[3] Santini brought an action against BMO in the course of which he alleged that he had told the Respondent Sasso about his suspicions respecting Rao's activity. BMO retained outside counsel, the Norton Rose firm; and in particular, a lawyer in that firm, Devereux, to conduct interviews, including an interview with Sasso and to provide legal advice. Notes were taken during that interview by a BMO security person. It was alleged that during that interview, Sasso admitted that Santini had disclosed to him his concerns respecting Rao's conduct. A BMO officer testified before the Adjudicator that Santini made this disclosure to Sasso and that Sasso did not advise his superiors about it. This formed the basis upon which Sasso was terminated.

[4] The Adjudicator commenced the hearing respecting Sasso's complaint. After some evidence had been heard, Sasso's counsel made a request that BMO produce certain documents, in particular:

> *1) Affidavits, discovery transcripts or statements from the (Santini) proceedings;*
>
> *2) The records of BMO's investigation into Sasso's alleged misconduct;*
>
> - *Specifically, notes and summaries (reports) of investigative interviews held, and*
>
> - *BMO internal correspondence pertaining directly to the decision to terminate Sasso for his alleged misconduct.*

[5] The Adjudicator gave an oral decision respecting the request for production. Subsequently, the Adjudicator gave written reasons for that decision. This decision is the subject of the present judicial review. The Order respecting production is set out at the end of these reasons and states:

> *32. For these reasons, I ordered BMO to deliver to Mr. Sasso the following documents at the hearing's continuation on September 12, 2012:*
>
> *a. Unredacted affidavits, discovery transcripts or statements from the two civil court proceedings. For clarity, production is ordered of only those affidavits, discovery transcripts or statements that pertain to BMO's allegation that Mr. Santini informed Mr. Sasso that he was concerned about Mr. Rao's misappropriation of funds and improper viewing of his bank accounts and that he failed to report those concerns.*
>
> *b. The investigative notes and summaries (reports) of Investigative Interviews held in the BMO investigation of Ms. Sasso's (sic) alleged Misconduct, including but not limited to those investigative notes or summaries (reports) of interviews held with Mr. Sasso and Ms. Fortino.*
>
> *Any additional BMO internal correspondence pertaining directly to the decision to terminate Mr. Sasso for his alleged misconduct, subject to redactions for solicitor-client privilege or legal advice privilege. BMO is directed to bring such internal communications without redactions to the hearing's continuation.*

[6] Shortly after the release of this decision, counsel for BMO sought clarification of certain parts of this Order, including what specific documents were ordered to be produced. The Adjudicator stated that the Order speaks for itself and that she had no intention of adding to the ruling.

[7] BMO now asks that this Court set aside that Order. It further asks that I review the documents myself and make an Order as to production and privilege, and that I make an Order as to waiver; a point that the Adjudicator, at paragraph 31 of her decision, specifically declined to deal with. As to these two latter points, I will not make an Order as to production; I view that as the Adjudicator's role, and I will not rule on waiver for the same reason.

[8] With respect to the Order itself, BMO does not take objection to what is ordered to be produced in paragraph number 1 (Santini litigation documents); it does object to what is ordered in paragraph number 2.

[9] The issues that are required for determination are:

1. Should the Court intervene in respect of this Order, which is an interlocutory Order made in the course of a hearing that is not yet finished?

2. If the Court should intervene, what is the standard of review?

3. Under the appropriate standard of review, should the decision be set aside and sent back for re-determination?

**ISSUE# 1: Should the Court intervene in respect of this Order, which is an interlocutory Order made in the course of a hearing that is not yet finished?**

[10] Counsel for BMO conceded that the case law demonstrates that, save for exceptional cases, a Court should not intervene by way of judicial review in interlocutory decisions made by a tribunal

during the course of its proceedings until a final determination has been reached. A good review of the law on this point has been given by Justice de Montigny of this Court recently in *Garrick v Amnesty International Canada*, 2011 FC 1099. I repeat what he wrote at paragraphs 46, 51 and 54:

> *46 It is trite law that interlocutory decisions of administrative bodies are not subject to judicial review until a final decision is issued. For a variety of reasons, this rule has been upheld both by this Court and the Federal Court of Appeal on numerous occasions. Firstly, the application may well be rendered moot and unnecessary by the ultimate outcome of the case, and the tribunal may change its original position once it reaches its final decision. Similarly, an application may be overtaken by events. The second application for judicial review in the current proceedings is a case in point.*
>
> . . .
>
> *51 I have not been persuaded by this line of reasoning, for a number of reasons. A review of the case law shows that the "exceptional circumstances" allowing the courts to intervene and to review interlocutory decisions have been quite narrowly defined. While exceptional circumstances may not be exhaustively defined, courts have held that such will exist when the impugned decision is dispositive of a substantive right of a party (Canada v Schnurer Estate, [1997] 2 FC 545 (FCA), 208 NR 339 (FCA)), raises a constitutional issue (AG of Quebec and Keable v AG of Canada et al, [1979] 1 SCR 218 [ Keable ]), or goes to the legality of the tribunal itself (Cannon v Canada, [1998] 2 FC 104 (FCTD), [1997] F.C.J. No. 1552 (QL) (FC)) . More recently, the Federal Court of Appeal has gone so far as to say that even those circumstances may not qualify as "exceptional", if there is an internal administrative remedy available:*
>
> . . .
>
> *54 The Court of Appeal has also held that a tribunal's interlocutory decisions on a question of law dealing with the admissibility or compellability of evidence does not constitute a jurisdictional question justifying immediate judicial review when the tribunal is vested with the authority to hear and determine all questions of law and fact, including questions of jurisdiction that arise in the course of proceedings: Bell Canada v Canadian Telephone Employees Association, 2001 FCA 139 at para 5, 105 ACWS (3d) 483 (FCA); Canada (Minister of Citizenship and Immigration) v Varela, 2003 FCA 42 at para 3, 238 FTR 200 (FCA).*

[11] The Federal Court of Appeal in *Zundel v Canada (Human Rights Commission)*, [2000] 4 FC 255, addressed the subject, where Sexton JA, for this Court, wrote at paragraph 10:

> *10 Are the applications for judicial review premature? As a general rule, absent jurisdictional issues, rulings made during the course of a tribunal's proceeding should not be challenged until the tribunal's proceedings have been completed. The rationale for this rule is that such applications for judicial review may ultimately be totally unnecessary: a complaining party may be successful in the end result, making the applications for judicial review of no value. Also, the unnecessary delays and expenses associated with such appeals can bring the administration of justice into disrepute. For example, in the proceedings at issue in this appeal, the Tribunal made some 53 rulings. If each and every one of the rulings was challenged by way of judicial review, the hearing would be delayed for an unconscionably long period. As this Court held in Anti-dumping Act (In re) and in re Danmor Shoe Co. Ltd.,7 "a right, vested in a party who is reluctant to have the tribunal finish its job, to have the Court review separately each position taken, or ruling made, by a tribunal in the course of a long hearing would, in effect, be a right vested in such a party to frustrate the work of the tribunal."*

[12] Counsel for BMO argues that the present circumstances are "exceptional"; and therefore, should be considered by the Court. The "exceptional" nature of the circumstances, it is argued, is that the Order would require BMO to disclose documents that it truly believes are subject to privilege.

[13] The near-absolute nature of solicitor-client privilege has been stated many times by the Court. Rothstein J, in the Supreme Court of Canada in *Goodis v Ontario (Ministry of Correctional Services)*, [2006] 2 SCR 32, wrote at paragraph 20 that solicitor-client privileged documents should be ordered to be disclosed only where absolutely necessary, and that absolute necessity is as restrictive a test that can be formulated short of absolute prohibition in every case.

[14] Justice Major, writing for the Supreme Court in *R v McClure*, [2001] 1 SCR 455, wrote at paragraph 61 that any impediment to open candid and confidential discussion between lawyers and their clients will be rare and reluctantly imposed.

[15] In *R v Gruenke*, [1991] 3 SCR 263, Lamer CJ for the majority wrote at paragraph 52 that, while the Court must seek the truth, through probative, trustworthy and relevant evidence, that search may be restricted where there are overriding social concerns or judicial policy such as privilege.

[16] I therefore find that, in exceptional circumstances such as those where a serious concern is raised that an interlocutory decision of a tribunal may require production of privileged documents, this Court may intervene so as to determine if such an Order was appropriate. The risk that a document that is truly the subject of privilege may be ordered to be disclosed, thereby defeating the purpose of privilege, is sufficient, in my view, to warrant this Court hearing the matter in the circumstances of this case.

**ISSUE#2: If the Court should intervene, what is the standard of review?**

[17] The parties are essentially agreed that I should review the decision in respect of the principles of law applied on the basis of correctness, and with respect to the factual determination on the basis of reasonableness.

**ISSUE# 3: Under the appropriate standard of review, should the decision be set aside and sent back for re-determination?**

[18] At issue are some thirty or so documents at issue. They were identified by BMO Counsel in its memorandum of argument filed with the Adjudicator. The evidence is that the Adjudicator did not look at any of these documents before making the decision under review.

[19] The Supreme Court has stated that where a claim for privilege has been raised, the documents should be examined by the decision-maker, or the decision-maker should be satisfied on reasonable grounds, as to the interests at stake. McLachlin J (as she then was) wrote for the majority in *A.M. v Ryan*, [1997] 1 SCR 157 at paragraph 39:

> *39 In order to determine whether privilege should be accorded to a particular document or class of documents and, if so, what conditions should attach, the judge must consider the circumstances of the privilege alleged, the documents, and the case. While it is not essential in a civil case such as this that the judge examine every document, the court may do so if necessary to the inquiry. On the other hand, a judge does not necessarily err by proceeding on affidavit material indicating the nature of the information and its expected relevance without inspecting each document individually. The requirement that the court minutely examine numerous or lengthy documents may prove time-consuming, expensive and delay the resolution of the litigation. Where necessary to the proper determination of the claim for privilege, it must be undertaken. But I would not lay down an absolute rule that as a matter of law, the judge must personally inspect every document at issue in every case. Where the judge is satisfied on reasonable grounds that the interests at stake can properly be balanced without individual examination of each document, failure to do so does not constitute error of law.*

[20] Given the relatively few documents at issue, it was a fundamental procedural error for the Adjudicator not to examine the documents before making a ruling. I am advised by Counsel for

BMO that a booklet containing copies of these documents had been offered to the Adjudicator for this purpose.

[21] The memorandum of argument filed by BMO with the Adjudicator raises privilege on two grounds; solicitor-client privilege, and litigation privilege. The decision of the Adjudicator deals only with the claim for litigation privilege. It does not deal with the claim for solicitor-client privilege, save as to say, at paragraph 2 of the Order that BMO may redact; but apparently, only from internal correspondence, portions of those documents relating to solicitor-client privilege or "legal advice privilege". The reasons do not clarify what is meant by "legal advice privilege".

[22] It is clear in reading the BMO memorandum of argument filed with the Adjudicator that solicitor-client privilege, as well as litigation privilege, was asserted with respect to internal correspondence as well as in respect of investigative notes and summaries (reports) of investigative interviews. The failure of the Adjudicator to address this assertion is an error that requires a re-determination.

[23] As to litigation privilege, Counsel for BMO raises two issues. One issue is that the Adjudicator made her decision before hearing the evidence of Devereux, the lawyer who conducted the interviews, and that such evidence would have informed her as to the nature and purposes of the interviews in question. The memorandum filed by BMO with the Adjudicator does not raise this as an issue. I am informed by Counsel that no objection in this respect; namely, wait for Devereux's evidence, was raised orally. I reject BMO's submission in this regard.

[24] The second issue raised by BMO is that the Adjudicator applied the wrong legal test in determining litigation privilege. BMO's Counsel argues that the Adjudicator, at paragraph 27 of her reasons, stated that the test for determining whether litigation privilege existed included a consideration as to whether there was a "reasonable expectation of forthcoming litigation"; whereas, the proper test was whether litigation was "in reasonable prospect". Counsel referred to the decision of the British Columbia Court of Appeal in *Hamalainen (Committee of) v Sippola*, [1991], 2 WWR 132, 62 BCLR (2d) 254, in this regard. Wood JA for the Court in that decision wrote at paragraph 22:

> *Even in cases where litigation is in reasonable prospect from the time a claim first arises, there is bound to be a preliminary period during which the parties are attempting to discover the cause of the accident on which it is based. At some point in the information gathering process the focus of such an inquiry will shift such that its dominant purpose will become that of preparing the party for whom it was conducted for the anticipated litigation. In other words, there is a continuum which begins with the incident giving rise to the claim and during which the focus of the inquiry changes. At what point the dominant purpose becomes that of furthering the course of litigation will necessarily fall to be determined by the facts peculiar to each case.*

[25] The differences between "reasonable expectation" and "reasonable prospect" may be slight and nuanced. Nevertheless, since I will be sending the matter back for re-determination, I ask that the Adjudicator have regard to a reasonable prospect of litigation.

[26] Counsel for BMO took further exception to the Adjudicator's Order requiring redaction of documents. He relied on the decision of Justice de Montigny of this Court in *Slansky v Canada (Attorney General)*, 2011 FC 1467, at paragraph 60:

> *60 The Prothonotary concluded at paragraph 30 of her decision that "it is possible to sever the "fact-gathering" investigative work product" prepared by counsel from the privileged legal advice contained in the Report (Slansky, above). She based her conclusion on the assumption that the "facts are separate and distinct from the advice given on legal issues that is privileged" (Slansky, above at para 30). Such an assumption is not only unwarranted and without any foundation in the jurisprudence, but it is completely at odds with the "as close to absolute as possible" protection to be afforded to the solicitor-client privilege. This is to say nothing of the practical difficulties one would encounter, in many instances, if an opinion had to be parsed to distinguish between its factual and legal components.*

[27] While in some cases redaction may be difficult, it is commonplace in many cases that come before this Court. I do not find as being sound any objection to the Order simply on the basis that it affords BMO the opportunity to redact privileged material from certain documents that it may produce.

**EVIDENCE**

[28] A short note about the evidence filed by BMO in support of this application. There were two affidavits; one, of a solicitor in the office of Counsel, who appeared before me. That solicitor appeared at the hearing and wished to be recorded as co-Counsel appearing for BMO. I would not allow that solicitor to appear as Counsel. Rule 82 of this Court prohibits a solicitor from serving both as an affiant and as Counsel without leave of the Court. I allowed the affidavit to remain in the record, but refused to enter the solicitor's name as one of the Counsel for BMO.

[29] The second affidavit filed by BMO is that of Devereux, whose name appears earlier in these Reasons. At paragraphs 3 and 6 of that affidavit, Devereux testifies as to the "dominant" and "secondary" purpose of certain interviews and communications. This was not evidence before the Adjudicator, and I had no regard to it in making my determination on this judicial review.

**CONCLUSION AND COSTS**

[30] In conclusion, I have heard and determined this judicial review notwithstanding that it involves an interlocutory decision of the Adjudicator. It raises fundamental issues as to privilege.

[31] I will set aside the Order of the Adjudicator of September 18, 2012 and require that the Adjudicator re-determine the matter, and , in particular:

i. review the documents themselves;

ii. consider the issue of solicitor-client privilege applicable to the documents; and

iii. consider the issue of litigation privilege on the basis of "reasonable prospect" of litigation

[32] Counsel for each of the parties, in requesting costs, did so on a basis common to the practice in Ontario courts in seeking a lump sum at a rather high level having regard to the levels usually

assessed in the Federal Court. They each asked for $10,000.00. I view this as too high, having regard to costs usually awarded in this Court in matters of this kind. I fix the costs at $5,000.00.

## JUDGMENT

**FOR THE REASONS PROVIDED:**

**THIS COURT'S JUDGMENT is that:**

1. The application is allowed;

2. The Adjudicator's Order of September 18, 2012 is set aside;

3. The Adjudicator shall re-determine the question of privilege respecting the documents at issue having regard to the Reasons herein; and

4. The Applicant is entitled to costs fixed in the sum of $5,000.00

"Roger T. Hughes"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

| | |
|---|---|
| **DOCKET:** | T-1761-12 |
| **STYLE OF CAUSE:** | BANK OF MONTREAL v GIANNI SASSO |
| **PLACE OF HEARING:** | Toronto, Ontario |
| **DATE OF HEARING:** | May 29, 2013 |
| **REASONS FOR JUDGMENT AND JUDGMENT:** | HUGHES J. |
| **DATED:** | May 31, 2013 |

**APPEARANCES:**

| | |
|---|---|
| Malcolm MacKillop | FOR THE APPLICANT |
| Danny Kastner | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

| | |
|---|---|
| Shields O'Donnell MacKillop LLP<br>Barristers & Solicitors<br>Toronto, Ontario | FOR THE APPLICANT |
| Paliare Roland<br>Barristers & Solicitors<br>Toronto, Ontario | FOR THE RESPONDENT |