

**Date: 20070125**

**Docket: A-220-06**

**Citation: 2007 FCA 23**

**CORAM: NOËL J.A.  
SHARLOW J.A.  
RYER J.A.**

**BETWEEN:**

**BANK OF MONTREAL**

**Appellant**

**and**

**DEBRA BROWN and  
THE ATTORNEY GENERAL OF CANADA**

**Respondents**

Heard at Calgary, Alberta, on January 25, 2007.

Judgment delivered from the Bench at Calgary, Alberta, on January 25, 2007.

**REASONS FOR JUDGMENT OF THE COURT BY:**

**NOËL J.A.**

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**BETWEEN:**

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**REASONS FOR JUDGMENT**

**(Delivered from the Bench at Calgary, Alberta on January 25, 2007)**

**NOËL J.A.**

[1] This is an appeal from an order of de Montigny J. of the Federal Court (2006 FC 503) (“the Application Judge”) dismissing an application for judicial review brought by the Bank of Montreal (“the Bank”) against the decision of labour adjudicator D. Bruce Hepburn, Q.C. upholding Debra Brown’s complaint filed pursuant to section 240 of the *Canada Labour Code*, R.S.C. 1985, c. L-2.

[2] The application for judicial review of the decision of the adjudicator was brought solely on grounds of procedural fairness. The Application Judge accepted the Bank's submission that the adjudicator's involvement in a law suit against the Bank gave rise to a reasonable apprehension of bias. However, he held that the Bank had waived the right to raise this objection on the facts of this case.

[3] In reaching this conclusion, the Application Judge did not believe the affidavit evidence produced by a Bank employee as to his state of knowledge of the conflict at the relevant time.

[4] The Bank recognizes that the Application Judge properly identified in his reasons the test for waiver as developed by the case law. However, it says that the Application Judge erred in rejecting the affidavit evidence produced by its employee by being not credible.

[5] The Bank further argues that the Application Judge erred in deciding an issue of credibility on the basis of affidavit evidence. According to the Bank, since the affidavit evidence produced was not contradicted by other evidence, credibility was not an issue. The Application Judge upon seeing that credibility had become an issue should have converted the proceedings into an action.

[6] Dealing first with this last argument, the Bank must have known before the judicial review application was heard that waiver would be an issue and that the respondent Brown was challenging the affidavit evidence of the Bank employee insofar as it alleged his lack of knowledge of the conflict.

[7] Nevertheless, the Bank proceeded by way of a judicial review application and did not seek to convert the proceeding into an action. In the circumstances, it was perfectly appropriate for the Application Judge to decide the issues before him on the basis of the material filed, including the issue surrounding the Bank's state of knowledge.

[8] The other ground of appeal is directed at the findings of fact made by the Application Judge. The Bank urges us to draw the appropriate inferences and conclude that the affidavit evidence which it produced is both credible and conclusive.

[9] Unfortunately from the Bank's perspective, it is not our role to second guess the Application Judge on the findings of fact that he made. So long as those findings were reasonably open to him, they are immune from appellate review. Such is the case in this instance.

[10] For these reasons, the appeal will be dismissed with costs in favour of both respondents.

"Marc Noël"

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J.A.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-220-06

**STYLE OF CAUSE:** *Bank of Montreal v.  
Debra Brown and  
The Attorney General of Canada*

**PLACE OF HEARING:** Calgary, Alberta

**DATE OF HEARING:** January 25, 2007

**REASONS FOR JUDGMENT OF THE COURT BY:** **NOEL J.A.  
SHARLOW J.A.  
RYER J.A.**

**DELIVERED FROM THE BENCH BY:** **NOEL J.A.**

**APPEARANCES:**

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DEBRA BROWN

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