

SUPREME COURT OF NOVA SCOTIA

Citation: *Goldie v. Kings (County)*, 2021 NSSC 342

Date: 2021-12-15

Docket: Ken. No. 482489

Registry: Kentville

Between:

Margaret Ann Goldie, Brian Thomas Goldie, Central Valley Aircraft Incorporated,
Greenwood Flight Centre and GFC Aircraft Maintenance

Appellants

v.

Municipality of the County of Kings

Respondent

Judge: The Honourable Justice Gail L. Gatchalian

Written Respondent, November 5, 2021 and November 15, 2021

Submissions: Appellants, November 8, 2021

Counsel: Jonathan Cuming, for the Respondent

Margaret Ann Goldie, Self-Represented, for the Appellants

BY THE COURT:

Introduction

[1] I must decide whether the lawyer for the Respondent, the Municipality of the County of Kings, may appear as counsel for the Municipality and be a witness for the Municipality in the same proceedings. There is a common law rule against doing so, but violation of the rule does not necessarily mean that the lawyer will be removed as counsel. In this case, the proposed evidence of the lawyer for the Municipality relates to substantive issues and is controversial. I must consider both the purpose of the rule and the competing interests involved in determining whether the proper administration of justice requires removal of the Municipality's lawyer as counsel.

[2] This issue arises in the context of an appeal regarding access to information requests under s.494(1) of the *Municipal Government Act*, S.N.S. 1998, c.18 and a contempt motion filed by the Appellants, Margaret Ann Goldie, Brian Thomas Goldie, Central Valley Aircraft Incorporated, Greenwood Flight Centre and GFC Aircraft Maintenance ("the Goldies").

[3] In response to the contempt motion, the Municipality filed an affidavit of its counsel, Jonathan Cuming of Taylor MacLellan Cochrane. The Municipality also intends to rely on the affidavit of Mr. Cuming in the appeal. The Goldies plan to cross-examine Mr. Cuming. The Municipality says that another lawyer from Taylor MacLellan Cochrane will be present during Mr. Cuming's testimony.

[4] As the Goldies are representing themselves, I raised the issue of the appropriateness of Mr. Cuming acting as both counsel and witness. The parties agreed that I would determine this issue based on their written submissions.

[5] The Municipality argues that allowing Mr. Cuming to be both counsel and witness will not compromise the proper administration of justice. The Municipality relies on the importance of a party's right to be represented by counsel of its choice, the late stage of the proceedings, the delay and costs of retaining new counsel, and Mr. Cuming's extensive knowledge of the file.

[6] In determining whether Mr. Cuming should be permitted to act as both counsel and witness in this matter, I will consider:

1. The common law rule against a lawyer appearing as both counsel and witness in the same proceeding.
2. Whether the evidence at issue will be struck.
3. The significance of the proposed evidence to the ultimate issues in dispute.
4. The importance of a party's right to be represented by counsel of its choice.
5. The late stage of the proceedings, delay and costs of retaining new counsel.
6. Mr. Cuming's extensive knowledge of the file.

Rule Against Being Counsel and Witness in the Same Proceeding

[7] There is a common law rule against a lawyer appearing as both counsel and witness in the same proceeding: *Lavender-Smith v. Smith*, 2021 NBCA 34 at para.2.

[8] This common law rule is reflected in Rule 5.2-1 of the **Nova Scotia Barristers' Society Code of Professional Conduct**, which states that "[a] lawyer who appears as advocate must not testify or submit his or her own affidavit evidence before the tribunal unless permitted to do so by law, the tribunal, the rules of court or the rules of procedure of the tribunal, or unless the matter is purely formal or uncontroverted." The Commentary to the Rule provides that "[t]he lawyer who is a necessary witness should testify and entrust the conduct of the case to another lawyer." Rules of professional conduct governing lawyers are relevant, but not binding, on the court: *Brogan v. Bank of Montreal*, 2013 NSSC 76 at para.50.

[9] There are several reasons for the common law rule. A lawyer's role as a witness could conflict with the lawyer's duty to act in the client's best interests: *Lavender-Smith, supra* at para.10. The dual role also creates a conflict between a lawyer's obligations of objectivity and detachment, which lawyers owe to the court as officers of the court, and the lawyer's role as a witness, whose objectivity and credibility are subject to challenge: *Urquhart v. Allen Estate*, 1999 Carswell Ont 4126 (Ont. S.C.J.) at paras.27 and 28 and *Lavender-Smith, supra* at para.14. As well, public confidence in the administration of justice may be impaired if a lawyer were permitted to act as counsel and witness in the same proceeding: *Lavender-Smith, supra* at para.11. The predominant concern of the court in these circumstances is the preservation of the integrity of the justice system: *Brogan, supra* at para.59 and *Lavender-Smith, supra* at para.18.

[10] If Mr. Cuming were to act as counsel and be a witness in these proceedings, it would be a violation of the common law rule. The rule, however, is not absolute:

Lavender-Smith, supra at para.2. Where the proposed evidence does not pertain to formal or procedural matters and uncontested facts, the question is whether, considering both the purpose of the rule and the competing interests involved, the proper administration of justice requires the removal of Mr. Cuming as counsel: *Lavender-Smith, supra* at para.18 and *Brogan, supra* at para.35.

[11] A threshold issue is whether the evidence will be admitted: *Lavender-Smith, supra* at para.28. If the evidence is admissible, some of the factors to consider are those set out in the often-cited case of *Essa (Township) v. Guergis; Membery v. Hill*, [1993] O.J. No.2581 at para.48 (see also *Lavender-Smith, supra* at para.31 and *Brogan, supra* at para.52):

- a. the stage of the proceedings;
- b. the likelihood that the witness will be called;
- c. the good faith (or otherwise) of the party making the application;
- d. the significance of the evidence to be led;
- e. the impact of removing counsel on the party's right to be represented by counsel of choice;
- f. whether trial is by judge or jury;
- g. the likelihood of a real conflict arising or that the evidence will be "tainted";
- h. who will call the witness; and
- i. the connection or relationship between counsel, the prospective witness and the parties involved in the litigation.

Whether the Affidavit Evidence Will be Struck

[12] In an appeal under s.494(1) of the *Municipal Government Act*, the court may determine the matter de novo, may order access to records, and may make any other order that the court considers appropriate: ss.495(1) and 495(5). The Honourable Justice Gregory M. Warner ordered the Municipality to disclose records to the Goldies, subject to certain redactions. The Municipality retained Mr. Cuming not only to represent it in the appeal as counsel, but also to directly

review, redact and produce thousands of pages of documents on the Municipality's behalf.

[13] In the appeal, the Goldies allege that the Municipality has failed to disclose relevant documents and to produce unredacted documents despite those redactions having been disallowed by Warner J. In the contempt motion, the Goldies allege that this failure is contemptuous, that is, deliberate.

[14] In his affidavit, Mr. Cuming provides an explanation for why certain redactions remained in place despite the order of Warner J. Mr. Cuming explains that the documents were organized alphabetically when the redaction hearing occurred before Warner J., and that when the Municipality was subsequently directed to provide the documents in chronological order, some of the disallowed redactions were missed and not discovered until later.

[15] In his affidavit, Mr. Cuming also addresses the Goldies' complaint that they have not yet been provided with records for the year 2011, stating that email records from 2011 are archived and cannot be accessed.

[16] The answer to the threshold question is that the evidence at issue will not be struck. Mr. Cuming is the individual with the knowledge necessary to respond to the claims of the Goldies.

The Significance of the Proposed Evidence to the Ultimate Issues in Dispute

[17] Mr. Cuming's evidence relates directly to the merits of the contempt motion and the appeal. It is also controversial. In their cross-examination of Mr. Cuming, the Goldies will not be limited to the subjects addressed in Mr. Cuming's affidavit. It is reasonable to expect that they will challenge his credibility and objectivity. The Municipality acknowledges that the Goldies have been challenging Mr. Cuming's objectivity and credibility well before he swore the affidavit, and that the Goldies' submissions "are replete with innuendo and/or clear-cut accusations" about Mr. Cuming.

[18] The fourth factor from *Essa, supra* - the significance of the evidence to be led - weighs in favour of disqualifying Mr. Cuming from acting as counsel in these proceedings.

Right to Counsel of Choice

[19] Courts recognize the importance of a party's right to be represented by counsel of its choice. The Municipality's choice of Mr. Cuming as counsel should not be interfered with unless removal is required to preserve the integrity of the justice system: see *Brogan, supra* at paras.35-36 and *Harder v. Sartorio*, 2020 ABQB 404 at para.30.

The Late Stage of the Proceedings, Delay and Cost

[20] The proceedings are at a late stage. The original access to information requests were made in 2017. The notice of appeal was filed on November 19, 2018. The contempt hearing was scheduled to take place on November 16 and 17, 2021 and the appeal hearing was scheduled to take place on November 18, 2021. They were adjourned to deal with the issue of disqualification. If Mr. Cuming is removed as counsel, the Municipality will suffer prejudice in the form of delay and cost. The Municipality says that if Mr. Cuming cannot act as both counsel and witness, it will have to retain a new law firm to represent it. The delay and cost are likely to be significant, given the lengthy history of the proceedings and the volume of the record. The delay caused by a disqualification order will also negatively impact the Goldies.

Mr. Cuming's Extensive Knowledge of the File

[21] Mr. Cuming has extensive knowledge of the file. He has been involved since at least April 12, 2018, when he met with representatives of the Municipality, Ms. Goldie and representatives of the Office of the Privacy Commissioner regarding the Goldies' access to information requests. He has continued to represent the Municipality since the filing of the notice of appeal. Removing him as counsel will have a significant detrimental impact on the Municipality.

Conclusion Regarding Disqualification

[22] The impact on the Municipality's right to counsel of its choice, Mr. Cuming's extensive knowledge of the file, and the prejudice that the Municipality would suffer as a result of his removal, all weigh against disqualification. I am also concerned about the impact on the administration of justice of further delay, given that the appeal was filed three years ago. Because of the significance of these factors, I have very carefully considered whether I can permit Mr. Cuming to act as

both counsel and a witness without undue risk to the proper administration of justice.

[23] It is my conclusion that, in the circumstances of this case, despite the countervailing interests, Mr. Cuming's proposed dual role would create an unacceptable risk to the proper administration of justice and to public confidence in the integrity of the justice system. Mr. Cuming cannot fulfill his obligations of detachment and objectivity to the court and at the same time give evidence about substantive and controversial matters that are central to the proceedings. He will have to rely on his own evidence in his submissions, and will likely have to comment on his own credibility. The risk to the proper administration of justice is not, as argued by the Municipality, attenuated by Mr. Cuming's familiarity with the proceedings and the assistance that he can therefore provide to the court as counsel. I recognize the injury that a disqualification order will cause to the Municipality. However, the preservation of the integrity of the justice system must be my primary concern. In my view, a greater injury would be inflicted on the integrity of the justice system and public confidence in that system should I allow Mr. Cuming to continue as counsel.

Admissibility of the Affidavit Evidence

[24] In this decision, I have focussed on certain paragraphs of Mr. Cuming's affidavit. Other paragraphs concern the history of other access to information requests filed by the Goldies and the outcome of a Small Claims Court action filed by the Goldies against the Municipality. When the Municipality retains new counsel, it will have to address the relevance of these paragraphs.

Order

[25] I order that Jonathan Cuming of Taylor MacLellan Cochrane is disqualified from representing the Municipality of the County of Kings in the contempt motion and in the appeal. Mr. Cuming is to prepare the draft order for circulation and filing. Mr. Cuming may remain counsel of record long enough to sign the Order that results from this decision.

[26] There will be no costs awarded against the Municipality on the issue of disqualification of counsel, as the Goldies filed short written submissions that largely relied on material previously filed by them, and they did not incur legal fees in responding to the issue.

Gatchalian, J.