Federal Court of Appeal | Cour d'appel fédérale

Date: 20190917

Docket: A-194-19

Citation: 2019 FCA 231

Present: **STRATAS J.A.**

BETWEEN:

OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION

Applicant

and

COUGAR HELICOPTERS INC.

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on September 17, 2019.

REASONS FOR ORDER BY: STRATAS J.A.

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REASONS FOR ORDER

STRATAS J.A.

[1] The applicant has applied for judicial review of a decision of the Canada Industrial Relations Board. In support of that application, it has filed two affidavits. One of these affidavits is unchallenged but the other has sparked some controversy.

[2] The respondent moves for an order striking out paragraphs 6, 7 and 16 and the last sentence of paragraph 8 of that affidavit.

[3] The respondent says that the factual information in those portions of the affidavit was not before the Board when it made its decision. The respondent invokes the general rule that only material that was before the Board can appear in the evidentiary record before this Court on judicial review. It relies on cases such as *Association of Universities & Colleges of Canada v. Canadian Copyright Licensing Agency*, 2012 FCA 22, 428 N.R. 297 and *Delios v. Canada (Attorney General)*, 2015 FCA 117, 100 Admin. L.R. (5th) 301.

[4] The respondent adds that in this case it is clear what the Board did and did not have before it because the Board produced all relevant material in response to a Rule 317 request. Rule 317 allows a party "to request material relevant to an application that is in the possession of a tribunal whose order is the subject of the application and not in the possession of the party". In response to the Rule 317 request, the Board produced responsive material under Rule 318. This material did not include the factual information set out in the impugned portions of the affidavit.

[5] The applicant opposes the respondent's motion. It submits that, notwithstanding what the Board produced under Rule 318, the factual information was nevertheless before the Board and, thus, can properly appear in the evidentiary record on judicial review.

[6] The applicant argues in the alternative that the impugned portions of the affidavit are admissible in this Court because they supply useful background or orienting information. This is a recognized exception to the general admissibility rule set out in paragraph 3, above.

[7] I reject the applicant's alternative argument. The impugned statements go beyond "non-argumentative orienting statements that assist the reviewing court in understanding the history and nature of the case that was before the administrative decision-maker": *Delios* at para 45. It is evidence of facts that the applicant says were before the Board.

[8] The applicant's primary argument—that the factual information in the impugned portions of the affidavit were before the Board—remains to be considered. On this, I make some legal observations.

[9] First, Rule 317 is a limited mechanism for obtaining "material" relevant to an application for judicial review. I emphasize "material". Rule 317 may be useful in gathering tangible "material", such as documents or transcripts that were examined and considered by the Board. The "material" will contain factual information; but not all the factual information that the Board considered is necessarily contained in the "material". Some factual information could have been known to the Board as a result of previous or related proceedings.

[10] This point was addressed in *Bell Canada v. 7262591 Canada Ltd. (Gusto TV)*, 2016 FCA 123, 17 Admin. L.R. (6th) 175. In *Gusto TV* (at para. 15), this Court recognized that information about previous or related proceedings involving the parties and known to the administrative

decision-maker "can form part of the data the administrative decision-maker drew upon in making its decision" and, thus, "can form part of the evidentiary record before the reviewing court". This sort of information might not be found in tangible "material" actually placed before the decision-maker. But, nevertheless, it might have formed part of the underlying factual basis for the decision.

[11] *Gusto TV* seems to support the applicant's position in this motion. The applicant suggests that the Board knew all or much of the factual information in the impugned paragraphs and took those facts into account in making its decision.

[12] Based on the evidence and submissions made by the parties to date, I cannot resolve this motion. It is not clear-cut. Thus, this motion is not one a single judge should decide: *Collins v. Canada*, 2014 FCA 240 at paras 6-7, and authorities cited therein.

[13] Thus, an order will issue adjourning the motion for consideration and determination by the hearing panel in the application for judicial review. The hearing panel can then determine as a factual matter what information the Board had before it when it made its decision. Once that is determined, the hearing panel will be able to go on to review the Board's decision.

[14] Within ten days of the Court's Order adjourning the motion, the applicant may file a revised memorandum of fact and law replacing the memorandum it has filed in order to provide submissions on this admissibility issue. The respondent may offer its responding submissions in

its responding memorandum. In its Order, the Court will also provide for the timing of the filing of the respondent's record and memorandum.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-194-19
STYLE OF CAUSE:	OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION v. COUGAR HELICOPTERS INC.

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	STRATAS J.A.
DATED:	SEPTEMBER 17, 2019

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