Federal Court  Cour fédérale

Date: 20170227

Docket: T-201-17

Citation: 2017 FC 240

BETWEEN:

THE HONOURABLE JUSTICE ROBIN CAMP

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR ORDER

ROBERTSON D. J.

[1] Shortly following a videoconference hearing, held on February 23, 2017, I issued an order dismissing the Applicant's motion to stay the deliberations and decision-making of the Canadian Judicial Council [Council] pending a final disposition of his application for judicial review. In that order, I indicated that reasons would follow. These are my reasons.

[2] In brief, the stay motion stems from the Council's refusal to convene a hearing for the purpose of allowing a judge to make oral representations prior to the Council deliberating on

whether to recommend to the Minister of Justice that the judge be removed from office. It is not difficult to show that the alleged breach of the duty of procedural fairness raises a serious issue. But it is also evident that the principle of judicial non-interference with ongoing administrative processes cannot be readily sidestepped [the Prematurity Issue]. At this stage, it is worth emphasizing a practical and obvious reality: this is an "end-of-the-line" case. The administrative process is complete, save for final argument and the decision of the Council.

[3] As to the plea of irreparable harm, the stay was said to be necessary to prevent "reputational damage" arising from a potential adverse decision of the Council. It was also argued that the right to seek judicial review of the Council's ultimate decision, if unfavourable to the judge, was not an adequate remedy. The original quorum of the Council was "tainted" and the need to resort to "substitute judges" to establish a second quorum was "a sub-optimal way to decide a matter of importance to the public." Correlatively, it was argued that, because of that irreparable harm, the balance of convenience favoured the judge and not the public interest in seeing judicial complaint proceedings brought to an expeditious conclusion. Within that adumbrated description of essentials, I concluded the motion should be dismissed.

[4] On May 2, 2016, the Applicant was given notice that an Inquiry Committee had been convened, under the provisions of the *Judges Act*, RSC 1985, c J-1 [the Act], to conduct an inquiry into whether Applicant's conduct, during the sexual assault trial of Alexander Wagar, amounted to misconduct and warranted removal from office. Mr. Wagar was acquitted of the offence. As is well known, at the time of the trial, the Applicant was a judge of the Provincial Court of Alberta. He was subsequently appointed to the Federal Court.

[5] On November 29, 2016, the Inquiry Committee submitted its report to the Council. The Committee made a finding of misconduct and was unanimous in the view that the Council should recommend, to the Minister of Justice, the Applicant's removal from office. Section 9 of the *Canadian Judicial Council Inquiries and Investigations By-laws*, SOR-2002-371 [By-laws], provides that a judge may make a written response to the Council regarding the report of the Inquiry Committee. The By-laws are silent as to whether oral submissions to the Council may be made by either the judge or counsel or both.

[6] On December 11 and 13, counsel for the Applicant wrote to the Executive Director of the Council requesting the opportunity to make oral submissions. On December 19, 2016, the Executive Director responded. The Applicant was informed that the Council would not hold a hearing for the purpose of receiving oral submissions, but that the Applicant could address the issue in his written representations. The Applicant did so.

[7] On January 31, 2017, Mr. Wagar was acquitted for a second time. On February 6, 2017, the Applicant asked the Council to reconsider his request to make oral submissions with respect to the significance of the second acquittal. On February 8, 2017, a majority of the Council denied the Applicant's request of February 6, 2017. Specifically, the majority held: (1) the record before Council was "unaltered" from that before the Inquiry Committee: (2) the Applicant had been fully and fairly heard by the Inquiry Committee and the Council; and (3) "the duty to act fairly does not encompass a right to be heard orally before Council, after having been heard orally at the public inquiry proceedings." While the dissenting opinion offers extensive reasons, it concluded that an oral hearing was "warranted" and could make a "difference." Both opinions

cited to the Supreme Court's decision in *Moreau-Bérubé v New Brunswick (Judicial Council)*, 2002 SCC 11 [*Moreau-Bérubé*] and, in particular, the following paragraph:

> The duty to comply with the rules of natural justice and to follow rules of procedural fairness extends to all administrative bodies acting under statutory authority. Within those rules exists the duty to act fairly, which includes affording to the parties the right to be heard, or the *audi alteram partem* rule. The nature and extent of this duty, in turn, 'is eminently variable and its content is to be decided in the specific context of each case.' Here, the scope of the right to be heard should be generously construed since the Judicial Council proceedings are similar to a regular judicial process; there is no appeal from the Council's decision; and the implications of the hearing for the respondent are very serious [para 75] [references to authorities omitted].

[8] On February 14, 2017, the Applicant filed for judicial review of the Council's decision to deny the Applicant and his counsel the opportunity to make oral submissions generally and, in particular, in regard to Mr. Wagar's second acquittal. In that application, the Applicant seeks various relief, including an order setting aside the decision denying the Applicant's request to make oral submissions, together with an order requiring the Council receive oral submissions. On the same date, counsel for the Applicant asked the Council to suspend its deliberations pending the outcome of the review application.

[9] On February 20, 2017, the Council advised the Applicant that it would not suspend its deliberations and that it intended to complete its deliberations without hearing oral representations. The Council also set a deadline, February 23, 2017, for written submissions. On February 21, 2017, the Applicant filed an "expedited" notice of motion for an order staying the deliberations and decision-making of the Council pending a "full and final" determination of the

Applicant's application for judicial review. The matter was heard by videoconference on February 23, 2017.

[10] The issue on every stay motion is whether the court should exercise its discretion to grant the order having regard to the tri-partite test set out in *RJR-MacDonald v Canada (Attorney General)*, [1994] 1 SCR 311: (1) there is a serious issue to be decided in the application for judicial review; (2) the applicant will suffer irreparable harm if the stay is not granted; and (3) the balance of convenience favours the applicant.

[11] While the Applicant framed the serious issue in several ways, all are inextricably tied to the Council's refusal to convene a hearing to permit oral submissions. Having regard to the divisive nature of the issue and having regard to the Supreme Court's direction in *Moreau-Bérubé*, one would have thought that the Respondent would have readily conceded this point. She did not. Instead, the Respondent maintained that, while the procedural fairness issue was neither frivolous nor vexatious, it was premature and, therefore, the review application did not raise a serious issue.

[12] With respect, the Respondent's argument remains flawed. First, the issue of procedural fairness is and remains a serious issue irrespective of whether it is one ripe for adjudication. Second, the argument does not recognize the "exceptional circumstances" exception to the principle of judicial non-interference with ongoing administrative processes. Finally, the argument avoids the relevant Federal Court jurisprudence dealing with the Prematurity Issue in the context of a stay motion.

[13] Of course, the Prematurity Issue could have been advanced through other procedural routes. In *Boulos v Canada (Attorney General)*, 2012 FC 292, the respondent's motion to strike the applicant's application for judicial review was granted on the basis it was "plain and obvious" the application challenging the decision not to grant an oral hearing was premature and should be dealt with only after the conclusion of the proceedings. And in *Garrick v Amnesty International Canada*, 2011 FC 1099 [*Garrick*] and *Esgenoopetitj (Burnt Church) First Nation v Canada (Human Resources and Skills Development*, 2010 FC 1195, the Prematurity Issue was left until the hearing of the application for judicial review. In those cases, the court affirmed what is now regarded as trite law. Interlocutory decisions of administrative decision-makers are not subject to judicial review until a final decision issues.

[14] On the hearing of the expedited motion, neither party had anticipated that I would focus on the Prematurity Issue. I did so because both parties had referred to some of the relevant jurisprudence in their respective submissions and the Respondent had raised the Prematurity Issue while the Applicant remained silent. I pursued the Issue because there are least three available avenues for disposing of it.

[15] The first two approaches are relatively straightforward. In *Torres v Canada (Public Safety and Emergency Preparedness)*, 2007 FC 1115 [*Torres*], the motion judge had held that the balance of convenience did not favour the applicant since the application for judicial review was premature and any procedural defect could be raised when reviewing the tribunal's final decision. In *Groupe Archambault v CMRRA/SODRAC Inc*, 2005 FCA 330, it was held that, if judicial review of an interlocutory decision was rarely warranted, then stays of such decisions

should be even rarer. Applying an earlier single motion judge precedent, it was held that unless special circumstances were established there was no need to turn to the tri-partite test set out in *RJR-MacDonald*. Nevertheless, for greater certainty, the motion judge held no irreparable harm would be suffered if the stay were refused. As to the earlier precedent, see *Szczecka v Canada (Minister of Employment and Immigration)* (1993), 116 DLR (4^{th}) 333 (FCA).

[16] The third approach to the treatment of the Prematurity Issue in the context of a stay motion is found in two relatively recent decisions of this Court. Those decisions respond to the normal rule that, absent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until the available effective remedies are exhausted: see *CB Powell Ltd v Canada (Border Services Agency)*, 2010 FCA 61 [*CB Powell*], at para 31, leave to appeal to SCC refused, 2011 SCCA No 267, cited with approval in *Halifax (Regional Municipality v Nova Scotia (Human Rights Commission)*, 2012 SCC 10, at paras 35–37 [*Halifax*].

[17] In *CB Powell*, *supra*, the Federal Court of Appeal observed that the exceptional circumstances category is indeed narrow. Of particular relevance to this motion is the following observation: “Concerns about procedural fairness or bias, the presence of an important legal or constitutional issue, or the fact that all parties have consented to early recourse to the courts are not exceptional circumstances allowing parties to bypass an administrative process, as long as that process allows the issues to be raised and an effective remedy to be granted” [para 33].

[18] The understanding that the category of exceptional circumstances is extremely narrow and does not allow room for procedural fairness issues is, at the very least, problematic. That said, the narrowness of the exception was earlier confirmed in *Garrick, supra*, para 51.

[19] Against this background, I turn to the relatively recent companion decisions of the Federal Court relevant to the Prematurity Issue. Both cases involved an Inquiry Committee that had been struck in regard to the conduct of the Honourable Lori Douglas. In both instances, the threshold standard of "serious issue" was applied to the question underlying the judicial review application and also to the possible existence of exceptional circumstances that would justify early recourse to the courts. In each case, the stay was granted on the basis that the Prematurity Issue would be dealt with on the application for judicial review, along with the serious issue raised in the underlying application.

[20] In *Douglas v Canada (Attorney General)*, 2013 FC 776 [*Douglas #1*] the motion judge was dealing with an allegation of bias on the part of the (first) Inquiry Committee. On the application for judicial review, the Prematurity Issue was revisited. The application judge ruled that the case fell within the "exceptional circumstances" exception and went on to decide the bias issue: see *Douglas v Attorney General (Canada)*, 2014 FC 299.

[21] In *Douglas v Canada (Attorney General)* 2014 FC 1115 [*Douglas #2*] the first Inquiry Committee had resigned and the motion judge was dealing with the second Committee's decision to admit into evidence certain intimate photographs. As in *Douglas #1*, the motion judge

in *Douglas #2* ruled that the applicant had raised a "serious issue" with respect to the application of the special circumstances exception. Importantly, the motion judge reasoned:

> [Douglas] does not bring her application to prevent a negative decision on the merits. Such applications are manifestly premature because they become moot if the tribunal sides with the applicant. [Douglas] challenges an interlocutory decision in order to pre-empt irreparable harm that will allegedly occur as the direct result of that interlocutory decision, irrespective of the Committee's final decision [para 39].

[22] As is apparent, the motion to stay in the present case is for the very purpose of preventing the Council issuing a decision that is contrary to the interests of the Applicant. Hence, the reasoning in *Douglas #2* supports a finding of "no serious issue" with respect to the presence of exceptional circumstances that would permit early recourse to the courts because of an alleged breach of the fairness duty.

[23] To this point, I have concluded that the alleged breach of the fairness duty constitutes a "serious issue" within the first step of the *RJR-MacDonald* framework. With respect to the Prematurity Issue, the Federal Court jurisprudence supports the understanding that the denial of an oral hearing does not constitute an exceptional circumstance warranting early recourse to the courts and, correlatively, does not constitute a "serious issue" to be dealt with on the application for judicial review. However, the analysis is incomplete to the extent that consideration has not been given to whether judicial review of the Council's recommendatory decision would qualify as an adequate remedy, in the event the Council is found to have breached the fairness duty. While the Applicant did not address that issue directly, he did argue that judicial review was not an effective remedy but under the heading of irreparable harm. In the circumstances, I am prepared to deal with the Prematurity Issue as a component of both the irreparable harm and

balance of convenience analysis. In short, I am following the approach adopted in *Torres, supra*, for the purpose of deciding this stay motion.

[24] The Applicant alleged he would suffer irreparable harm if the Council continues to deliberate and reaches a decision to recommend removal while his application for judicial review is pending. The Applicant further argued that a stay is necessary to prevent the "reputational damage" arising from an adverse decision of Council.

[25] In support of his argument, the Applicant cites *Adriaanse v Malmo-Levine,* [1998] FCJ No 1912 (QL)(TD) [*Adriaanse*]. That was a case in which a stay was granted to prevent lengthy disciplinary proceedings (125 witnesses) from proceeding after the applicants (39 RCMP officers) filed an application for judicial review. The application was filed after evidence was received supporting allegations of a reasonable apprehension of bias on the part of the Chairperson, who subsequently had denied the allegation. The hearing commenced on October 5, 1998, the Chairperson's denial was made on October 23 and the judicial review application filed on November 24, 1998. The motion for the stay was heard on November 25, 1998.

[26] In granting the stay, the motion judge in *Adriaanse* was persuaded the bias allegation raised a serious issue and that the applicants would suffer irreparable harm if the disciplinary tribunal were to ultimately issue an adverse report. In support of that decision, the motion judge relied on an earlier apprehension of bias case: *Bennett v British Columbia (Superintendent of Brokers)* (1993), 77 BCLR (2d) 145 (CA) [*Bennett*]. In both cases, it was held that there was no interest in "inflicting grave prejudice" on the applicants in circumstances where a hearing could

turn out to be void because of a reasonable apprehension of bias on the part of a tribunal member.

[27] In brief, both *Adriaanse* and *Bennett* support the understanding that potential harm to the Applicant's judicial reputation may amount to irreparable harm. However, those were start-of-the-line cases where substantial time and money would have been wasted had the tribunal hearings proceeded to completion and the judicial review application succeeded. And most certainly, it was arguable that those cases would have fallen within the "exceptional circumstances" category and, therefore, early recourse to the courts should have been available.

[28] Accepting the premise that facts make a difference, the present case is clearly distinguishable. This is an end-of-the-line case. The Inquiry Committee had completed its work and made a recommendation to the Council. In turn, the Council has received written representations and is deliberating on whether to make a recommendation for removal from office to the Minister of Justice. To the extent the Applicant has suffered damage to his reputation, it is because of the events that have already occurred as a result of the publicity surrounding the disciplinary proceedings leading up to this motion. This view is consistent with that expressed in *Canada (Immigration and Refugee Board) v Canada (Attorney General)*, 2010 FC 1064.

[29] The Applicant's argument with respect to future reputational damage is premised on unknowns. If he is removed from office and then reinstated, following a successful judicial review and Council rehearing, the original removal creates a risk the public will question his

authority and ability to hear future cases. So the Applicant's argument goes. The Respondent offers persuasive rejoinders.

[30] In *Canada (Attorney General) v Amnesty International Canada*, 2009 FC 426, it was held that a finding irreparable harm based on the applicant's "fears" as to what may happen in the future would require the court to engage in "speculation and conjecture." And in *Douglas #2*, it was held "that irreparable harm cannot be substantiated through speculation as to the potential outcome or effects of an administrative decision" [para 25]. Both decisions are in keeping with the Federal Court of Appeal's decision in *Canada v (Attorney General) v United States Steel Corp*, 2010 FCA 200:

> The jurisprudence of this Court holds that the party seeking the stay must adduce clear and non-speculative evidence that irreparable harm will follow if the motion for a stay is denied. It is not sufficient to demonstrate that irreparable harm is "likely" to be suffered. The alleged irreparable harm may not be simply based on assertions: *Syntex Inc. v. Novopharm Ltd.* (1991), 36 CPR (3d) 129; 126 NR 114 (FCA), leave to appeal refused 39 CPR (3d) v, 137 NR 391n; *Centre Ice Ltd. v. National Hockey League* (1994), 53 CPR (3d) 34 (F.C.A.*); Canada (Attorney General) v. Canada (Information Commissioner)*, 2001 FCA 25 (CanLII), 268 NR 328.

[31] The Applicant advances a further argument in support of a finding of irreparable harm. The argument rests on the premise that judicial review of the Council's ultimate decision, assuming it is contrary to the Applicant's interests, is not an adequate remedy.

[32] In his written submissions, and on the hearing of the motion, the Applicant urged that if the stay were not granted and the Council were to recommend his removal from office, a successful judicial review of that decision and the right to make oral submissions would not

provide him with a fair hearing as envisaged by the *Judges Act*. Conversely, the Applicant maintained that a stay would ensure he was "not deprived of the untainted and statutorily-intended decision-maker to which he was entitled." The Council would be in the position to reconstitute the original quorum, to receive oral argument, and to consider the same issue on the same evidence.

[33] In my view, there is no merit to the Applicant's "tainted tribunal" argument. Administrative tribunals are regularly called on to revisit issues in light of directions received from reviewing courts. The notion that decision-makers are automatically to be excluded from rehearing a matter because of possible bias has no foundation in law and, in this case, runs contrary to the judges' sworn obligation to uphold the rule of law.

[34] The Applicant's "tainted tribunal" argument also makes room for the possibility that the matter could be remitted to a differently constituted quorum of the Council. His objection to that option stems from the realization that there would be an insufficient number of Chief Justices to meet the quorum requirement (which presently stands at 17). In such circumstances, the Council would have to resort to section 59(4) of the *Judges Act*. That provision provides for each Chief Justice to appoint a "substitute" from his or her court. The Applicant describes this option as "a sub-optimal way to decide a matter of importance to the public and directly at odds with the Act's statutory intent."

[35] With respect, I disagree. Chief Justices are first among equals. The appointment of substitute members is clearly within the Act's intent and not contrary to it. And most certainly

there is no merit to the Applicant's contention that designates would be "under the administrative control of the properly eligible members." In conclusion, there is no merit to the contention that the failure to grant a stay would leave the Applicant with an inadequate remedy should the Council be found to have breached its fairness duty.

[36] Although I was not persuaded that the Applicant would suffer irreparable harm if the stay were refused, I readily turned to the balance of convenience factor outlined in *RJR-MacDonald*. Under that umbrella, I am required to determine which of the two parties will suffer the greatest harm from the refusal pending a determination of the merits of the underlying proceeding. Hence, I must balance the Applicant's interest with that of the public.

[37] The Applicant maintained that there is a significant public interest in ensuring that this "highly publicized case is capable of being finally decided by the untainted statutorily-intended quorum of the CJC that is currently deliberating." The Respondent countered by arguing the public interest favours the expeditious resolution of disciplinary proceedings and non-interference with the decision-making process of administrative tribunals. As stated in *Douglas #2*: "The public has an interest in learning whether the person under scrutiny can continue to perform [his] judicial functions notwithstanding the allegations made against [him]" [para 49].

[38] The Respondent also drew attention to the absence of a countervailing public interest consideration: one that outweighs the public interest in having this matter resolved. The reference to the countervailing public interest is a reference to the decision in *Douglas #2* where the motion judge wrote of the social consensus on not having intimate photos disseminated

against the will of the person the photos depict, unless "absolutely necessary" [para. 50]. I agree, no countervailing public interest comes into play in this case.

[39] In my view, the Respondent's argument prevails. As stated at the outset, and throughout these reasons, this is an end-of-the-line case where the decision-maker is presently deliberating on whether to recommend the removal of a judge from office. Admittedly, there is a serious issue as to whether the Council breached its fairness duty. But undoubtedly, the extensive written submissions to the Council address other issues arising from the Inquiry Committee's Report. The possibility of judicial review at this stage brings into play the possibility of fragmentation.

[40] To grant a stay would permit the fragmentation of issues. On the hearing of the judicial review application, the matter of prematurity would have to be dealt with. If that issue were resolved in favour of the Applicant, it would be incumbent to decide whether the Council breached its fairness duty. Either way that decision could be appealed further. Assuming the application judge found a breach of the fairness duty, the Council would be obligated to convene a hearing for the purpose of allowing oral representations. If the Council ultimately recommended removal from office, a second application for judicial review could be initiated on grounds never dealt with in the first application. The possibilities are endless. The problem, of course, is that the Council may not recommend removal, despite the alleged breach of the fairness duty.

[41] It is also significant that in *Halifax, supra*, the Supreme Court cautioned against the evils of fragmentation: "Early judicial intervention risks depriving the reviewing court of a full record

on the issue; allows for judicial imposition of a ‘correctness’ standard with respect to legal questions that, had they been decided by the tribunal, might be entitled to deference; encourages an inefficient multiplicity of proceedings in tribunals and courts; and may compromise carefully crafted, comprehensive legislative regimes” [para 36].

[42] In my view, the public interest in seeing disciplinary proceedings dealt with expeditiously is pressing. More so having regard to the objectives underscoring the principle of non-fragmentation. It is less costly and more efficient to wait for the Council’s final determination with respect to all the substantive issues raised and, if necessary, to have those issues determined in one forum on the basis of one record. The granting of a stay would have simply encouraged an “inefficient multiplicity of proceedings”: see *Halifax*, *supra*, at para 36 and *CB Powell*, *supra*, at para 32.

[43] For these reasons, I dismissed the motion to stay the deliberations and decision-making of the Canadian Judicial Council.

“Joseph T. Robertson”
Deputy Judge

Fredericton, New Brunswick

February 27, 2017

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Frank Addario and Megan Savard	FOR THE APPLICANT
Falguni Debnath	FOR THE RESPONDENT

SOLICITORS OF RECORD:

ADDARIO LAW GROUP LLP Toronto, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Department of Justice Toronto, Ontario	FOR THE RESPONDENT