

Federal Court



Cour fédérale

Date: 20181126

**Dockets: T-733-15
T-2110-15
T-423-17
T-409-18**

Citation: 2018 FC 1184

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, November 26, 2018

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

THE HONOURABLE MICHEL GIROUARD

Applicant (Respondent)

and

THE ATTORNEY GENERAL OF CANADA

Respondent (Respondent)

and

THE CANADIAN JUDICIAL COUNCIL

Moving Party

and

THE ATTORNEY GENERAL OF QUEBEC

Third Party

JUDGMENT AND REASONS

[1] With a view to making the decisions required regarding the claims of privileged by the Canadian Judicial Council (“CJC”) with respect to the twelve (12) documents requested by the applicant, Justice Girouard (“the applicant”), pursuant to Rule 317 of the *Federal Courts Rules*, SOR/98-106, the Court, as manager of the cases involving the latter, issued an explicit order dated October 25, 2018, listing, among other things, the process the Court intended to follow in order to resolve the issue of the privileges claimed by the CJC for each of these documents.

[2] At issue are twelve (12) documents [now ten (10) documents, given that the CJC has waived invoking any privilege for two (2) of these] that the CJC claims are protected from disclosure under one (1), two (2) or three (3) of the following privileges: solicitor-client privilege, deliberative secrecy and public interest privilege.

[3] The documents can be split up according to two key dates, namely, the meeting of the adjudicating members of the CJC on December 12, 2017, and the decision regarding the CJC’s recommendation with respect to Justice Girouard, which was submitted to the Minister of Justice (“Minister”) on February 20, 2018. The ten (10) documents can therefore be separated based on two (2) distinct points in time: prior to the meeting on December 12, 2017 [eight (8) documents] and after the meeting, but before the communication of the decision [two (2) documents].

[4] A brief general overview of the documents sent prior to the December 12, 2017 meeting shows that they describe the deliberative process, namely the availability of CJC members to

deliberate, the logistical preparations for the meeting, the procedures to be followed during the meeting, the agenda for the meeting, and the documents that make up the record, as well as a judge's request to extend the deadline for filing written submissions and for translating the applicant's written submissions into English. The two (2) documents that followed the meeting on December 12, 2017, concern, among other things, a draft of the decision on the recommendation, but also a draft of dissent dealing with procedural fairness and meeting minutes of the Inquiry Committee written in French.

[5] The order dated October 25, 2018, provides that, for the purposes of this proceeding, the Court will proceed in three (3) steps to determine the validity of the privileges claimed by the CJC for the ten (10) documents:

1. It will consider the "serious grounds" submitted by the applicant and determine whether these warrant proceeding to the second step;
2. If the first step warrants proceeding to the second step, the Court will review the CJC's confidential affidavit and confidential submissions and only if necessary will it proceed with the next step;
3. If the second step warrants it, the Court will read all of the required confidential documents.

[6] In the event that the Court finds that certain documents should be disclosed to the other parties, the CJC has requested, by means of a letter dated October 30, 2018, that the Court grant

it a period of twenty-four (24) hours in order for it to decide whether or not to appeal such a decision.

[7] To facilitate making its decision, the Court received from the parties, as required under the said order, the following documents:

- a) The CJC's public submissions outlining the three (3) privileges claimed for the ten (10) documents, as well as the applicant's response in that regard;
- b) A confidential affidavit by Normand Sabourin, executive director and senior general counsel of the CJC, describing each of the twelve (12) documents, as well as his redacted affidavit that was communicated to the other parties;
- c) The confidential submissions of the CJC with regard to the privileges claimed for each of the twelve (12) documents and redacted submissions contained in the documents sent to the other parties, as well as a response from the applicant both with regard to these and the redacted affidavit of Mr. Sabourin;
- d) A letter from the Attorney General of Canada concerning the process to be followed for appointing an *amicus* if the Court was to decide to do so;
- e) A brief letter from the Attorney General of Canada indicating that she was relying on the Court's decision on the issue of privileges, as well as a letter from the Attorney General of Quebec stating that she had no comments to make on the matter;
- f) Twelve (12) sealed envelopes containing each of the documents in issue;

g) The applicant's submissions with respect to the documents sought as well as "serious grounds" to warrant their review by the Court and ultimate disclosure if necessary and the CJC's brief reply in that regard.

[8] Very briefly, the applicant is arguing for the review of the documents by the Court and their disclosure, while the CJC objects to this, relying on the privileges claimed to protect the ten (10) documents against any disclosure.

I. First step

[9] In order to properly assess the "serious grounds" put forth by Justice Girouard, I reviewed the reasons underlying the applications for judicial review filed by Justice Girouard. In addition, I read the applicant's submissions as well as the CJC's succinct, but clear, response. I also took into consideration the dissidence of some Chief Justices and Rule 317 of the *Federal Courts Rules*.

[10] With regard to Justice Girouard's submissions on this subject, I note that some of these raise arguments that will be dealt with at the hearings of the applications for judicial review. Nevertheless, I find that these contain "serious grounds" because they raise legitimate and important concerns.

[11] It is important at this juncture to point out that Rule 317, for the purposes of an application for judicial review, does not require the tribunal to submit all of the documents used for deliberative purposes. In fact, the Rule asks that the decision-maker provide the "relevant" (in

French: “*pertinents*”) documents that the applicant lacks. Given that it is only the decision-maker who knows all of the documents that are relevant to the deliberation, the decision-maker therefore has an obligation to see to it that these are provided to the applicant. If some of the documents are protected by privilege, the decision-maker must notify the Court in order for it to make a determination on the matter. Thus, the applicant has a right to be provided with all of the relevant documents used by the CJC in its deliberations that are not in his possession. In his application for judicial review, the applicant essentially requested all of the relevant documents (see order dated August 29, 2018).

[12] At the very end of this step, having taken into consideration the CJC’s response to the applicant’s submissions regarding the “serious grounds”, I have arrived at the conclusion that I must proceed to the second step. Procedural fairness compels me to. At this point it is important that a neutral third party goes further with the consideration of the contents of the documents so as to assure an observer that appropriate oversight was advanced.

II. Second step

[13] At this point, it would be appropriate to comment on the three (3) privileges claimed by the CJC in light of its submissions and those of the applicant on the matter.

A. *Solicitor-client privilege*

[14] Solicitor-client privilege is one of the most sacred privileges. For a body such as the CJC, the same type of privilege exists between the senior general counsel principal and the Council as

with any other counsel and their client. In fact, the Supreme Court of Canada confirmed that “Solicitor-client privilege has been held to arise when in-house government lawyers provide legal advice to their client, a government agency” (*Pritchard v Ontario Human Rights Commission*, [2004] 1 SCR 809 at para 19). Where counsel issues opinions as to the process to be followed and the procedure in question in a disciplinary matter, he or she must do so in confidence, in the knowledge that what is submitted to a group as knowledgeable as the CJC will be done on the basis of an undertaking of confidentiality. It is essential to the health of an institution that counsel may act in the knowledge that what is being submitted will remain protected. The only caveat being that the said privilege not be used to protect the indefensible. Hence the imposition of certain controls such as those advanced here to ensure the integrity of solicitor-client privilege.

B. *Deliberative secrecy*

[15] As a body having the ultimate power to decide, by recommendation to the Minister, the fate of a judge’s career, the CJC must take into consideration the Inquiry Committee’s report on the judge’s conduct, as well as the judge’s observations on the matter. To do so, the CJC needs to deliberate on the matter, provide an opportunity to its members to discuss it, consult the documentation and collectively make the appropriate determination.

[16] This requires the CJC to operate within a framework that allows for the free exchange of ideas and opinions in a climate of confidence and full confidentiality. It must also have all of the necessary work tools available to it, including the services of counsel and staff so as to have the

appropriate advice and necessary administrative support. (The *Judges Act*, RSC 1985, c. J-1 acknowledges this at paragraph 62.)

[17] In light of the foregoing, deliberative secrecy ensures that the CJC's deliberations will be genuine and that its members will be free to express their views without being subject to direct or indirect influences. Deliberations must be protected in order for members to feel free and at ease in exchanging ideas without fearing that their words may ultimately be made public.

[18] Deliberative secrecy is sacred for legal and quasi-legal organizations. Without such protection, decisions made would be at risk of being tainted. However, caution is to be exercised: it cannot be used as a shield to hide what should not be protected. Hence the need for various controls put forth to properly assess it as needed.

[19] Furthermore, as the parties have pointed out, it is not an ironclad privilege. As such, deliberative secrecy may be waived if the applicant raises "serious grounds" that would lead one to believe that the process followed failed to respect the rules of natural justice (*Tremblay v Québec (Commission des affaires sociales)*, [1992] 1 RCS 952 at p. 966).

C. *Public interest privilege*

[20] With respect to the public interest privilege, it is not as all-encompassing as the privileges discussed above. In general, it has its origins in the *Canada Evidence Act*, RSC 1985, c C-5 (see section 37) and in the particular case of the CJC, the concept is specifically included in subsection 63(5) of the *Judges Act*. It is applied on a case-by-case basis using various criteria

depending on the document and involves a reading of the contents as needed if only to ensure an enlightened and meaningful balancing of the public interest in protecting the document and the public in disclosing it.

[21] I have read Mr. Sabourin's confidential affidavit as well as the confidential submissions of the CJC's counsel. I found them to be very useful. I have a good understanding of the contents of the documents and, aside from document (7), it will not be necessary for me to proceed to the third step. For the nine (9) other documents, I believe that the information provided by the CJC is sufficient for me to make the appropriate determinations. Mere curiosity is not a justification to consult these documents.

D. *Application of privileges to documents*

(1) Solicitor-client privilege

[22] I find that documents (1) and (3), sent respectively at the end of August 2017 and at the end of October 2017, both contain legal advice on, among other things, the process to be followed during deliberations. Included therein is a draft agenda that would become final when document (7) was communicated the day before the meeting on December 12, 2017, for deliberation. The document also includes discussions as to the availability of judges and logistical details.

[23] It is clear that the legal advice provided by senior general counsel is protected by solicitor-client privilege. Given that he also holds the position of executive director, I also took

this dual role into consideration. This does not, however, diminish Mr. Sabourin's role as senior general counsel. For a group such as the CJC, that includes a large number of participants, a certain amount of planning, organizing and consultation is required to set the dates of the meetings as well as a draft agenda. Deliberations also need to be planned and organized in such a way as to ensure their success. One cannot have several individuals speaking at the same time. This requires a framework, identifying the topics to be addressed and establishing the order in which members are to speak. Although a meeting's agenda may seem innocuous at first glance, it can reveal much about the intellectual process of a decision made by a group of members such as the CJC. The logistics of such a meeting may also appear insignificant, but again, the order of speakers during deliberations and the request for the production of one document over another can reveal much about the deliberative process.

[24] For documents (1) and (3), not only is solicitor-client privilege justified, so too is deliberative secrecy. I would add that this kind of information is not necessarily relevant for the purposes of these proceedings.

[25] The applicant pointed out what he felt was [TRANSLATION] "a contradiction between the contents of paragraph 17 of the redacted affidavit and the title of document (3) as it appears in the list submitted in connection to this affidavit". A reading of the non-redacted version of the affidavit leads me to conclude that there is no contradiction between these documents.

(2) Deliberative secrecy

[26] Documents (4), (5), (6), and (8), which were sent between November 15, 2017, and December 11, 2017, namely, on the eve of the deliberations meeting on December 12, 2017, are protected by deliberative secrecy. As described above at paragraph 4, these contain information regarding, for example, exchanges dealing with the request for an extension from Justice Girouard, a document of Mr. Sabourin including the applicant's written submissions translated into English [the judge's written submissions in the two (2) languages are obviously not protected by deliberative secrecy], an email from Mr. Sabourin informing members of the deliberative process and final agenda. The Court had the benefit of reading the CJC's confidential submissions and confidential affidavit for these documents and is satisfied that the documents are covered by deliberative secrecy.

[27] A reading of the description of document (7) provided by the CJC in the confidential submissions and confidential affidavit do not enable the Court to reassure the applicant with respect to his valid concerns as to whether he received all of the documents submitted to the members of the CJC. Thus, despite this Court's finding that the links made available to the decision-makers are protected by deliberative secrecy, it was necessary, for this document only, to proceed to the third step, namely, to open the sealed document (7). (See para 33.)

[28] Documents (9) and (10) are respectively dated January 8, 2018, and February 20, 2018, namely, the day the decision of the recommendation was communicated. One of the documents contains an email exchange between members commenting on the eventual recommendation to the Minister and is referred to the staff for archiving. The other is an email from Mr. Sabourin to the members of the CJC that includes a draft of the majority decision and the dissenting opinion

to be communicated to the federal Minister of Justice. These documents are part of the deliberative process.

(3) Public interest privilege

[29] For document (2), which consists of an email exchange regarding the availability of members, the CJC ultimately ended up invoking public interest privilege. However, in spite of the fact that the case law grants judges the right to read this document, I find that the description of the document as provided by the CJC in the confidential submissions and confidential affidavit allows me to apply the Wigmore criteria in order to determine whether it is in the public interest to maintain the confidentiality of the document or to disclose it, without having to read it. The Wigmore criteria, as reiterated in *R v National Post*, [2010] 1 SCR 477 at paragraph 53, may be summarized as follows:

1. The documents must have been transmitted confidentially;
2. The confidence must be essential to the relationship in which the communication arises;
3. The relationship must be one that is sedulously fostered in the public interest;
4. The Court must consider whether in the instant case the public interest served by maintaining the confidentiality of the documents outweighs the public interest in getting at the truth.

[30] It is clear that criteria 1, 2 and 3 are met. As for the fourth criteria, I am of the view that it is in the public interest to maintain the confidentiality of document (2), given that its subject

matter (the members' availability for an upcoming meeting) is simply not relevant for the purposes of the arguments raised by the applicant in the proceedings that concern us. Therefore, I do not need to open this document and it will remain confidential because it is part of the logistical details required to organize a meeting for such a large number of participants and is not relevant for the purposes of this proceeding.

(4) Documents 11 and 12

[31] In Mr. Sabourin's confidential affidavit, the CJC waived deliberative secrecy for document (11). It is a translation of an excerpt from the minutes of a hearing of the Inquiry Committee. The pages of the excerpt were mistakenly identified in the list of public documents. Given that the applicant can infer which pages were translated from the information provided by the CJC, the Council agrees that there is no point in claiming that this document should be protected by deliberative secrecy and agrees to communicate it to the parties.

[32] Document (12) is a letter to the applicant's counsel from the CJC dated November 16, 2017. The letter made its way onto the list of confidential documents after having been mistakenly removed from the list of public documents. The CJC acknowledges that the document need not be protected and agrees that it should be communicated to the parties.

III. Third step

[33] As mentioned in paragraph 27, the Court deemed it necessary to view document (7). Upon reading it, I can confirm that the CJC had included in the lists provided to the applicant the

documents referred to which the members had access when making their decision, as required under the orders of August 29, 2018, and September 26, 2018. As such, there is no need to disclose this document.

[34] Upon reviewing the documents, the Court, taking into account the affidavit and confidential submissions, noted that some of the documents were not protected. Such was the case for the English transcript of the Inquiry Committee's hearing (document 11), the English text of the applicant's written submissions as well as the English report of the Inquiry Committee. These documents should be communicated to the parties if this has not already been done.

[35] Given the results of this proceeding, the Court finds that the parties have all of the elements to constitute the decision-maker's record and thus proceed to the next stages of the proceedings leading to a hearing date. To that end, it is in the interest of all parties that a timetable be finalized with hearing dates. A case management conference will be held in the days to follow.

JUDGMENT

FOR ALL OF THESE REASONS, THE COURT ORDERS AND DECLARES as follows:

1. Confirms the following privileges invoked by the CJC:

Documents 1 and 3 are protected by solicitor-client privilege and deliberative secrecy;

a) Document 2 is protected by public interest privilege;

a) Documents 4, 5, 6, 7, 8, 9 and 10 are protected by deliberative secrecy;

2. **HOWEVER, THE COURT ORDERS** the CJC to serve on the parties, within two (2) days of the present order:

a) document 11;

b) the English version of the applicant's submissions that was translated by the CJC and provided to the members;

c) the English version of the report by the second Inquiry Committee;

3. The present is enforceable notwithstanding appeal;

4. Without costs.

"Simon Noël"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS: T-733-15, T-2110-15, T-423-17 AND T-409-18

STYLE OF CAUSE: THE HONOURABLE MICHEL GIROUARD v THE
ATTORNEY GENERAL OF CANADA ET AL

FURTHER TO THE ORDER DATED OCTOBER 25, 2018

JUDGMENT AND REASONS: SIMON NOËL J.

DATED: NOVEMBER 26, 2018

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