Federal Court  Cour fédérale

Date: 20200922

Docket: T-1318-19

Citation: 2020 FC 922

[ENGLISH TRANSLATION]

Ottawa, Ontario, September 22, 2020

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

MARTIN LAJEUNESSE

Applicant-Plaintiff

and

THE ATTORNEY GENERAL OF CANADA

Respondent-Defendant

and

THE CANADIAN JUDICIAL COUNCIL

Respondent-Defendant

JUDGMENT AND REASONS

[1] Martin Lajeunesse is seeking judicial review of the decision of the Canadian Judicial Council [CJC] to not proceed with an inquiry into three judges of the Superior Court of Quebec following a complaint from the applicant.

[2] The application for judicial review is made pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7. The Federal Court has jurisdiction to hear applications for judicial review of CJC decisions (*Canada (Judicial Council) v Girouard*, 2019 FCA 148, [2019] 3 FCR 503). For the reasons set out below, this application for judicial review should be dismissed.

I. The complaint

[3] The applicant filed a complaint against three judges of the Superior Court of Quebec in a letter dated May 14, 2019, to the Chairperson of the CJC, the Chief Justice of Canada.

[4] The entire matter stems from the unfortunate financial setbacks experienced by Mr. Lajeunesse and the companies he controlled. We are told that the crisis in the forestry industry in 2009 created a requirement for financial assistance, which was obtained. Investissement Québec agreed to participate in the funding plan to help these companies with a loan of up to $800,000. Mr. Lajeunesse's participation was in the order of $150,000. There was a first disbursement by Investissement Québec in 2009, but the one scheduled for March 2010 was not made. The applicant claimed wrongdoing on the part of Investissement Québec leading to the loss of confidence of financial partners and the bankruptcy of companies controlled by the applicant.

[5] In March 2011, Investissement Québec sought a suretyship from the applicant. The applicant decided to sue Investissement Québec. The complaint to the CJC states that [TRANSLATION] "in January 2013, our client obtained authorization from the Superior Court to sue Investissement Québec under section 38 of the *Bankruptcy and Insolvency Act* for the benefit of GPM Ripe Inc. and all its creditors".

[6] The complaint relates to the fact that two coordinating judges and the first judge assigned to hold a trial expected to last 28 days were unable to hold the trial in the District of Saint-François. The following is the chronology of events:

- October 7, 2015: the joint declaration is filed. This is the joint declaration for the entire file. The document includes 20 pages setting out the various exhibits to be used in the trial, including expert opinions, and providing the list of witnesses;
- October 17, 2016: the then-coordinating judge for the District of Saint-François asks the lawyers for the parties about their availability to hold a 28-day trial during the 2017–18 judicial year. The evidence speaks to the difficulty experienced by the lawyers in October and November 2016 in agreeing upon mutual availability. On November 18, 2016, Investissement Québec's lawyer confirms mutual availability from April 2 to June 8, 2018. Four days later, the coordinating judge notifies the lawyers that the assignments for the judicial year in question have been filled. He then requests their availability for the following judicial year, 2018–19;
- September 2017: a new coordinating judge schedules the trial from May 1 to June 7, 2019;
- August 1, 2018: a judge from the District of Saint-François is assigned to hear the case;

- September 13, 2018: Investissement Québec files a motion for a [TRANSLATION] "splitting of the proceedings";
- October 22, 2018: hearing before the judge responsible for the proceedings on the motion to split the proceedings. The judge informs the parties that she knows one of the witnesses to be heard at the trial, a lawyer practising in Sherbrooke: she proposes that this witness be heard out of court. This proposal is refused by counsel for the applicant;
- November 30, 2018: the coordinating judge notifies the parties that the lack of agreement on how to admit the witness's testimony means that the trial will have to be heard by another judge. At the suggestion of the lawyer for Investissement Québec that the trial be held in Montréal, and that of the lawyer for the applicant that a judge sitting in Montréal come to Sherbrooke (seat of the District of Saint-François) to hear the trial, the coordinating judge responds that he hopes a Superior Court judge will be appointed shortly. The proceedings are not adjourned;
- March 15, 2019: the coordinating judge informs the parties that the hoped-for appointment has not been made. It is not yet known when that will happen. The coordinating judge does not postpone the trial, but does suggest that a postponement may be necessary;
- April 9, 2019: the trial scheduled to begin in May is postponed. The coordinating judge adds that it is unrealistic to expect the sudden availability of a judge from another district given the limited judicial resources.

Without providing further explanation or precision as to the grievance, the applicant files a complaint against the three judges.

II. The decision

[7] In a letter signed by its Executive Director and General Counsel, the CJC communicated its decision on July 18, 2019. The letter indicated that the complaint had been assigned to the Vice-Chairperson of the Judicial Conduct Committee, who is also the Chief Justice of the Court of Queen's Bench of Manitoba.

[8] The mandate of the CJC with respect to judicial conduct is derived from the *Judges Act*, RSC 1985, c J-1, and involves determining whether there are grounds to recommend that a judge be removed from office. The grounds that may lead to such a recommendation are: (a) age or infirmity; (b) having been guilty of misconduct; (c) having failed in the due execution of that office; (d) having been placed, by his or her conduct or otherwise, in a position incompatible with the due execution of that office (*Judges Act*, s 65).

[9] With regard to the specific complaint that had been filed, the Vice-Chairperson of the Judicial Conduct Committee noted that judicial delays are often due to the high number of cases that must be heard by an insufficient number of judges. The conduct of the trial judge who had recused herself was above reproach. With respect to the two coordinating judges, the decision states that [TRANSLATION] "the issue of judicial delay in a case is beyond the control of the coordinating judge assigned, and furthermore, is not a matter of judicial conduct, but one of a purely administrative nature". Ultimately, the complaint did not require further consideration. It is this decision that is the subject of the application for judicial review.

III. Standard of review

[10] The applicant does not discuss in either his application for judicial review or his memorandum of fact and law the standard of review that should apply to his application for judicial review. This is a crucial point, however, given that the standard of reasonableness commands judicial deference, which is not the case for the standard of correctness. The Attorney General of Canada argues that the standard of reasonableness should prevail. In support of his argument, he cites the decision in *Girouard v Canada (Attorney General)*, 2019 FC 1282, at paras 70 and 71.

[11] Since the memoranda were prepared, the law on this question has been settled through the decisions in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], and *Girouard v Canada (Attorney General) and Quebec (Attorney General)*, 2020 FCA 129. The latter decision upheld the decision of this Court that is cited by the Attorney General in support of his claim on the standard of review.

[12] *Vavilov* confirms the "presumption that reasonableness is the applicable standard whenever a court reviews administrative decisions" (para 16). In *Girouard* (2020 FCA), the Court of Appeal agreed with this Court's decision (para 38). The standard of reasonableness is therefore the standard that must prevail.

[13] It follows that it is up to the applicant to show that the decision under review is unreasonable (*Vavilov* at para 100). The reviewing court does not seek to substitute its opinion for that of the decision maker; indeed, "reasonableness review finds its starting point in judicial restraint and respects the distinct role of administrative decision makers" (*Vavilov* at para 75).

The reviewing court must ensure that it understands the decision in order to determine whether it is reasonable as a whole. The reviewing court "asks whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision: *Dunsmuir*, at paras. 47 and 74; *Catalyst*, at para. 13" (*Vavilov* at para 99).

[14] *Vavilov* also states that serious shortcomings must be demonstrated (para 100). There are at least two types of what are referred to as fundamental flaws that could lead a reviewing court to intervene because a decision will be seen as having failed to meet the standard of review: a failure of rationality internal to the reasoning process, and a decision that is untenable in light of the relevant factual and legal constraints that bear on it.

IV. Arguments and discussion

[15] The starting point will therefore be the decision rendered. The Court can only conduct a judicial review of the decision that was made. The decision is a function of the complaint that was actually filed, nothing more. Put another way, the decision responds to the complaint.

[16] Obviously, an understanding is required as to the reasoning of the Vice-Chairperson of the Judicial Conduct Committee. This reasoning exclusively addresses the complaint of May 14, 2019. That complaint sets out the framework of the grievance against the three judges: it describes on the first three pages the involvement of each judge in the context of the various stages: (1) the first coordinating judge who in the fall of 2016, inquired about the availability of the lawyers, and who one month after the initial request, indicated that he could no longer

schedule a 28-day trial for the 2017–2018 judicial year; (2) the second coordinating judge who in September 2017, scheduled the trial from May 1 to June 7, 2019, on a priority basis, as stated in the complaint; (3) a judge of the District of Saint-François was assigned to hear the trial in the summer of 2018; a motion to split the proceedings was heard in the fall (October 22, 2018), causing the judge to note her acquaintance with one of the anticipated witnesses, which resulted in her proposing an alternative means of receiving the witness's testimony; this proposal being refused, the designated judge recused herself from the proceedings.

[17] With the trial set to begin six months later, the coordinating judge announced the alternative on November 30, 2018: the assignments of the recused trial judge had been exchanged with those of a [TRANSLATION] "judge whose appointment is expected shortly" (applicant's record, p. 50). The appointment was not made, and the coordinating judge so notified the parties on March 15, 2019. The writing was already on the wall. Three weeks later (April 9) the trial was postponed. The complaint was subsequently filed on May 14, 2019.

[18] Those are the facts put forward by the applicant. He then refers to the website of the Canadian Judicial Council. As to any explanation that might link the facts presented and the complaint against three judges, the lawyer for the applicant states that his [TRANSLATION] "client believed in the Canadian justice system and its independence. Our client does not accept that individuals who have taken on the weighty responsibility of being judges should allow themselves to behave in this manner." This is followed by a passage from the CJC website highlighting the fact that judicial decisions must be made independently and impartially, free from outside influence. High standards of conduct enhance public confidence in their integrity,

impartiality and good judgment. Without further explanation, the applicant filed a complaint against the three Superior Court judges.

[19] The decision for which judicial review is being sought observed that the applicant was complaining that his long-awaited case had not been heard. It is therefore on this basis that the case was dealt with. As for the trial judge who recused herself, [TRANSLATION] "her conduct was above reproach" (decision of July 18, 2019). As for the coordinating judges, the Vice-Chairperson of the Judicial Conduct Committee noted the high number of cases that often must be heard by [TRANSLATION] "an insufficient number of judges to assign them to". In addition, [TRANSLATION] "the issue of judicial delay in a case is beyond the control of the coordinating judge assigned, and furthermore, is not a matter of judicial conduct, but one of a purely administrative nature". It is understood that administrative problems are not among those that the CJC can deal with. As a result, the matter does not require further consideration.

[20] This is the entire context of the complaint that Mr. Lajeunesse brought before the Canadian Judicial Council. The CJC may "investigate any complaint or allegation made in respect of a judge of a superior court" (subsection 63(2) of the *Judges Act*). There are several steps in the investigation process. In this case, the process was concluded at the level of the Vice-Chairperson of the Judicial Conduct Committee, who carried out the mandate entrusted to him.

[21] The role of the Vice-Chairperson of the Judicial Conduct Committee in the process is specifically provided for in the *Canadian Judicial Council Inquiries and Investigations By-laws*, 2015, SOR/2015-203 [By-laws], which read as follows:

Establishment of Judicial Conduct Review Panel	**Constitution du comité d'examen de la conduite judiciaire**
2 (1) The Chairperson or Vice-Chairperson of the Judicial Conduct Committee, established by the Council in order to consider complaints or allegations made in respect of a judge of a superior court may, if they determine that a complaint or allegation on its face might be serious enough to warrant the removal of the judge, establish a Judicial Conduct Review Panel to decide whether an Inquiry Committee should be constituted in accordance with subsection 63(3) of the Act.	2 (1) Le président ou le vice-président du comité sur la conduite des juges constitué par le Conseil afin d'examiner les plaintes ou accusations relatives à des juges de juridiction supérieure peut, s'il décide qu'à première vue une plainte ou une accusation pourrait s'avérer suffisamment grave pour justifier la révocation d'un juge, constituer un comité d'examen de la conduite judiciaire qui sera chargé de décider s'il y a lieu de constituer un comité d'enquête en vertu du paragraphe 63(3) de la Loi.

[Emphasis added.]

[22] Evidently, one of the roles of the Vice-Chairperson of the Judicial Conduct Committee is to screen complaints (*Cosgrove v Canadian Judicial Council*, 2007 FCA 103, [2007] 4 FCR 714 [*Cosgrove*] at paras 2 and 69–73). A complaint or accusation must be serious enough to warrant removal from office. It is perhaps not surprising that the majority of complaints are dismissed summarily, as noted in *Cosgrove* (para 74). Only those that could be serious enough to warrant removal from office continue on to a process involving the constitution of a review panel. It is important to bear in mind that security of tenure is one of the three core characteristics of judicial independence, along with financial security and administrative independence (*British Columbia (Attorney General) v Provincial Court Judges' Association of British Columbia*, 2020 SCC 20 [*Provincial Court Judges' Association of British Columbia*] at para 31). A complaint that could

lead to an inquiry obviously affects this concept of security of tenure. Screening is clearly important. If on its face, a complaint might warrant removal, the Vice-Chairperson can have the process continue by establishing a Judicial Conduct Review Panel. But the complaint must be of that calibre. If not, the process can be stopped. The By-laws provide for an initial screening to ensure that not just any complaint will be the subject of a full inquiry.

[23] In this case, the complaint is not explicit, or even implicit, with regard to the alleged grounds for recommending the removal of the three judges.

[24] In order for a complaint to be referred to a Judicial Conduct Review Panel, it is sufficient for the Vice-Chairperson of the Judicial Conduct Committee to decide that on its face the complaint could be serious enough to warrant removing a judge from office. As noted above, subsection 65(2) of the *Judges Act* sets out the grounds on which removal may be recommended:

- age or infirmity;
- having been guilty of misconduct;
- having failed in the due execution of that office; or
- having been placed, by his conduct or otherwise, in a position incompatible with the due execution of that office.

The Vice-Chairperson does not conduct an exhaustive study: this is precluded by the words “on its face.” Rather, the Vice-Chairperson seeks to determine whether the complaint is clearly serious enough to warrant removal from office. If the complaint does not meet any of the grounds for removal from office, the Vice-Chairperson may stop the process at that point. That is what he did here. He concluded that court delays are beyond the control of these judges, and that matters of an administrative nature are not related to judicial conduct. If it were unreasonable for the Vice-Chairperson to have found that on its face the complaint did not meet any of the

grounds, in other words, that it might lead to the removal of a judge, the reviewing court could intervene to allow the process to continue. But the decision must still be unreasonable.

[25] The complaint before the Vice-Chairperson of the Judicial Conduct Committee in his screening role related to the length of time it took to schedule a 28-day trial. It is only in an affidavit subsequent to the decision for which judicial review is being sought that the applicant begins to make allegations of a different nature.

[26] In this affidavit of October 28, 2019, the applicant makes statements regarding the lawyer who was to testify at trial and because of whom the trial judge thought it necessary to recuse herself. Some of these statements concern the lawyer's alleged conflicts of interest, while others refer to the possibility that the lawyer (or his firm) had influence over judges sitting in Sherbrooke, the possibility that the lawyer (or his firm) had sufficient influence to delay a trial, and the possibility that the lawyer (or his firm) had influence over past or future judicial appointments, even to the point of being able to delay the appointment of judges and thereby delay the trial at which the lawyer was to testify. No facts or evidence are presented to support these possibilities.

[27] Not only were these allegations not before the Vice-Chairperson of the Judicial Conduct Committee, but they are not validly before this reviewing court. In *Provincial Court Judges' Association of British Columbia*, above, the Supreme Court of Canada recently quoted with approval *Delios v Canada (Attorney General)*, 2015 FCA 117, 100 Admin LR (5th) 301 [*Delios*], as to what constitutes the record on judicial review: "In the usual context of judicial

review, the record generally consists of the evidence that was before the decision-maker" (para 52). There are only a few limited exceptions to this rule. It is paragraph 42 of *Delios* that is cited with approval. I reproduce it here:

> [42] Accordingly, as a general rule, the evidentiary record before the Federal Court on judicial review is restricted to the evidentiary record that was before the administrative decision-maker. In other words, as a general rule, evidence that was not before the administrative decision-maker and that goes to the merits of the matter before the Board is not admissible on judicial review. As a result, most affidavits filed on judicial review only attach the record that was before the administrative decision-maker, without commentary. This is proper. See generally *Connolly v. Canada (Attorney General)*, 2014 FCA 294, 466 N.R. 44 at paragraph 7, citing *Access Copyright*, above at paragraphs 19-20.

[28] The reviewing court cannot consider the type of affidavits that were submitted to the Court after the decision under review had been rendered. The applicant's affidavit goes far beyond what is permitted. Here is what the Court of Appeal stated in *Delios* in this regard:

> [45] The "general background" exception applies to 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. In judicial reviews of complex administrative decisions where there is procedural and factual complexity and a record comprised of hundreds or thousands of documents, reviewing courts find it useful to receive an affidavit that briefly reviews in a neutral and uncontroversial way the procedures that took place below and the categories of evidence that the parties placed before the administrator. As long as the affidavit does not engage in spin or advocacy – that is the role of the memorandum of fact and law – it is admissible as an exception to the general rule.
>
> [46] But "[c]are must be taken to ensure that the affidavit does not go further and provide evidence relevant to the merits of the matter decided by the administrative decision-maker, invading the role of the latter as fact-finder and merits-decider": *Access Copyright*, above at paragraph 20(a).
>
> [Emphasis added]

Here, the case is not complex; the affidavit does not provide a neutral and uncontroversial review of the evidence presented to the decision maker. Rather, it is the substance of the evidence itself that changes, literally transforming it into something that the decision maker was not in a position to consider and decide upon.

[29] Judicial review can only relate to the complaint that was the subject of the determination by the decision maker, in this case the Vice-Chairperson of the Judicial Conduct Committee. The new allegations were not part of the record and are not eligible for judicial review. The principles applicable to the admissibility of fresh evidence in judicial review proceedings were set out in *Bernard v Canada (Revenue Agency)*, 2015 FCA 263, 479 NR 189. Thus, the record before the reviewing court will be the record that was before the first decision maker: evidence that was not brought to the attention of the CJC is not admissible on judicial review (see *Judicial Review of Administrative Action in Canada*, Donald J.M. Brown and the Honourable John Evans, Thomson Reuters, Carswell, loose-leaf, para 6: 5300).

[30] In this case, the record before the Vice-Chairperson dealt only with the delay in hearing a trial and a vague allegation about the independence of the Canadian justice system. Furthermore, the allegations made after the decision was rendered are themselves mere supposition based on nothing more than the possibility that a lawyer might have considerable influence, without any concrete basis for that supposition. In any event, these latter allegations cannot be considered on judicial review.

[31] The applicant appears to believe that any allegation made against a Superior Court judge should be investigated. So-called serious and legitimate concerns should oblige the CJC to take up the complaint in order to conduct a serious and thorough investigation (applicant's memorandum of fact and law, para 13).

[32] Clearly, if this were the case, it would render meaningless the mandate to screen complaints that is conferred on the Vice-Chairperson of the Judicial Conduct Committee under the By-laws. Not every complaint need move on to the next step in the process, namely referral to a Judicial Conduct Review Panel, which may subsequently lead to the establishment of an Inquiry Committee under subsection 63(3) of the *Judges Act*. The Federal Court of Appeal's description of the role of the Vice-Chairperson in *Cosgrove* confirms its importance:

> [71] At the second level, the complaint is referred to the Chairperson (or the Vice-Chairperson) of the Judicial Conduct Committee. The Chairperson may dispose of the complaint summarily if it is outside the mandate of the Council (for example, a complaint that seeks a review of a judge's decision rather than a judge's conduct), or if it is trivial, vexatious, made for an improper purpose, manifestly without substance, or does not warrant further consideration. If the complaint is not dismissed summarily, the Chairperson may seek additional information from the complainant, the judge or the judge's chief justice. The complaint may be dismissed, resolved on the basis of remedial measures, or referred to a panel. If it is referred to a panel, it progresses to the third level.

[33] The framework erected by the applicant is built exclusively on assumptions pertaining to a proposition that provides no explanation whatsoever for that framework and was presented subsequent to the decision under review, without the decision maker even having had the opportunity to consider the speculation. Assuming that suspicions and speculation were sufficient within the meaning of subsection 2(1) of the By-laws, which is far from having been

established, the decision maker would still have to have been seized of the matter. That was not the case.

[34] This is a judicial review of a decision that dealt with a specific complaint to the CJC. The complaint is circumscribed. The judicial review itself is limited to the decision maker's decision regarding a specific complaint. Since it was not open to the applicant to change the substance of his complaint by adding allegations after the decision was made, the Court can only defer to the complaint as formulated and submitted to the CJC when dealing with an application for judicial review of that decision.

[35] The burden is on the applicant to demonstrate that the decision in this case is not reasonable. Instead, the applicant has attempted to focus judicial review on an issue other than that raised in his complaint to the CJC. He sought to introduce into evidence new allegations, of a speculative nature, that were not contained in his complaint, in an effort to repeat his claim that the actions and omissions of three judges were [TRANSLATION] "intended to discourage or deter the litigant Martin Lajeunesse, and ultimately to protect [the lawyer] or his firm or former firm" (memorandum of fact and law, paras 28 and 33). As such, the applicant did not in any way challenge the decision of the Vice-Chairperson of the Judicial Conduct Committee. Rather, he based his memorandum and argument before the reviewing court on a claim that had not been before the decision maker, based on allegations that did not arise until after the decision was rendered. The failure to show that the decision was unreasonable, on the basis of the complaint filed and the record that existed in support of that complaint, is enough for the Court to dismiss this case in its entirety.

[36] I would add that the decision itself appears to be justified, transparent and intelligible. It is based on an internally coherent chain of analysis and justified in relation to the facts and law that constrain it. It is not for the reviewing court to seek to impose its opinion. The Vice-Chairperson concluded that the delays in question were beyond the control of the coordinating judges given limited judicial resources. Moreover, this was not a matter of judicial conduct, but one of a purely administrative nature. It has not been demonstrated how these findings are unreasonable, which is the burden that was on the applicant. The same is true of the decision of the first trial judge to recuse herself after discovering that she knew one of the multiple witnesses to be heard at trial. She would likely have been criticized had she not done so.

[37] In my view, the Attorney General is correct to note that the reason for the complaint was the delay in scheduling a lengthy trial. This is on its face an administrative problem; as presented, it has not been shown that this is a complaint that could lead to a determination of incapacity or disability from the due execution of the office of judge by reason of any of the grounds set out in subsection 65(2) of the *Judges Act*. It is not apparent from the record before the decision maker how the administrative decisions could have been tainted by bias, or even the appearance of bias.

V. Conclusion

[38] One can understand the frustration of an individual who would have liked his trial to take place in a more expeditious manner. In fact, everyone wants this. The Supreme Court of Canada very recently reiterated its concern with regard to affordable and timely access to civil justice (*Atlantic Lottery Corp Inc v Babstock*, 2020 SCC 19), promoting a broader use of motions to

strike (*Hryniak v Mauldin*, 2014 SCC 7, [2014] 1 SCR 87). Access to civil justice is generally a concern in all courts. In this case, the decision of the CJC is understandable given that on its face, a complaint resulting from the limited resources available to judges responsible for assignments, which is an administrative matter, could not lead to removal from office.

[39] The application for judicial review must therefore be dismissed. The additional evidence that the applicant sought to introduce, after the decision had been rendered for which judicial review was being sought, was inadmissible under the normal rules of administrative law. It changes the very nature of the complaint that was before the Vice-Chairperson of the Judicial Conduct Committee.

[40] The applicant attempted to focus the debate on this new evidence that had not been before the decision maker, when his burden was rather to show that the decision based on the complaint as filed was unreasonable. This demonstration was not made; it was not even attempted.

[41] It follows that the application for judicial review is dismissed. The Attorney General has asked for his costs. He is entitled to them.

JUDGMENT in T-1318-19

THE COURT'S JUDGMENT is as follows:

1. The application for judicial review of the decision of the Canadian Judicial Council is dismissed**.**

2. Costs are awarded in favour of the respondent-defendant, the Attorney General of Canada.

"Yvan Roy"
Judge

Certified true translation

Johanna Kratz

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1318-19
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