Federal Court

Cour fédérale

Date: 20100326

Docket: T-1034-09

Citation: 2010 FC 335

Ottawa, Ontario, March 26, 2010

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

MOHAMED OMARY

Applicant

and

**THE ATTORNEY GENERAL OF CANADA,
THE SECURITY INTELLIGENCE REVIEW COMMITTEE and
THE CANADIAN SECURITY INTELLIGENCE SERVICE**

Respondents

REASONS FOR ORDER AND ORDER

[1] This is an application for judicial review of a decision by the Security Intelligence Review Committee (SIRC) dated May 12, 2009, to stay the investigation of the complaint made by the applicant against the Canadian Security Intelligence Service (CSIS), pending the outcome of the proceedings brought by the applicant in the Superior Court of Québec against CSIS and the Royal Canadian Mounted Police. This decision was disclosed to the applicant by means of a letter dated

May 22, 2009, further to the recommendation made to SIRC by the Honourable Arthur T. Porter, who presided over the hearing in this regard on May 6, 2009.

I. Background

[2] The applicant forwarded a complaint and a formal demand to the Director of CSIS on May 9, 2008, regarding actions of CSIS employees. The applicant alleged that CSIS officers were involved in the breach of his rights following his detention in Morocco for a period of almost two years; he also alleged having been intimidated and threatened by a Moroccan secret service agent in Canada in 2005. Mr. Omary contended that these actions constitute wrongful acts on a civil basis, breaches of his constitutional rights guaranteed by sections 2, 6, 7, 9 and 12 of the *Canadian Charter of Rights and Freedoms* and criminal acts. He therefore demanded that CSIS investigate these actions, that it acknowledge its responsibility in his arrest in Morocco, and that it pay him compensation in the amount of one million dollars.

[3] On June 6, 2008, the Deputy Director of CSIS informed the applicant's counsel that this demand would not be acted upon.

[4] On June 16, 2008, the applicant made a complaint to SIRC, as he was authorized to do under section 41 of the *Canadian Security Intelligence Service Act*, R.S. 1985, c. C-23 (Act), which essentially reproduced the allegations contained in his formal demand. Mr. Omary asked SIRC to investigate the actions of CSIS in order to find it responsible for the alleged conduct, claimed the

amount of one million dollars and asked for the correction of any information harmful to his rights and his reputation.

[5] On June 30, 2008, SIRC invited the applicant to make his written submissions concerning SIRC's jurisdiction to proceed with this investigation. It also informed him that it did not have jurisdiction under subsection 52(1) of the Act to order monetary compensation and to require CSIS to take corrective measures.

[6] On October 30, 2008, at the respondent's request, SIRC asked the applicant for details concerning CSIS's alleged actions. The applicant replied to this letter on December 17, 2008. In it, he criticized CSIS for having:

> - exchanged information and/or made arrangements with a foreign intelligence service, the Moroccan DST, which led to the confiscation and retention of the complainant's passport, his arrest and his detention for nearly two years in Morocco for the purposes of obtaining his cooperation in Canada as an informer;
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> - participated in an interrogation of the complainant with the Moroccan DST in Morocco in 2003 for the purposes of obtaining his cooperation in Canada as an informer;
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> - contributed to the pressure, intimidation and threats directed at the complainant in order to, among other things, require him to reveal information about persons in Canada and to cooperate as an informer;
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> - intimidated/threatened the complainant by, among other things, being accompanied by a Moroccan DST agent in Canada during a meeting with the complainant in 2005 for the purposes of obtaining his cooperation in Canada as an informer;
>
> - participated in the violation of the complainant's constitutional rights.

Applicant's Record, p. 30

[7] On December 30, 2008, the applicant brought at the same time, in the Superior Court of Québec, an action in damages against the Attorney General of Canada, CSIS and the Royal Canadian Mounted Police. In this 254-paragraph proceeding, the applicant essentially reproduced the same allegations. He criticized the respondents for having created and/or contributed to the pressure, intimidation, threats and deprivations of liberty he was subjected to in Morocco and in Canada in order to, among other things, require him to reveal information about persons in Canada and to cooperate with CSIS as an informer in Canada. He also demanded monetary compensation of one million dollars under Quebec civil law and the Canadian Charter. This action is still pending.

[8] On February 13, 2009, SIRC informed the applicant and CSIS that a hearing would be held to determine whether, under paragraphs 41(1)(*a*) and (*b*) and subsection 41(2) of the Act, the complaint could be investigated, particularly given the legal proceeding brought by the applicant in the courts.

[9] On May 6, 2009, a hearing was held before one of the members of SIRC, the Honourable Arthur T. Porter, to determine SIRC's jurisdiction to investigate the applicant's complaint. The issues were whether the complaint before SIRC was frivolous or vexatious within the meaning of section 41 of the Act, given the civil action pending in Superior Court, and whether SIRC had jurisdiction to determine breaches of Charter rights. The respondent had also asked, in the

alternative, in the event that SIRC confirmed its jurisdiction, that the investigation be stayed pending the outcome of the civil action in Superior Court.

[10] On the recommendation of the Honourable Mr. Porter, SIRC found that the applicant's complaint was admissible and that it had jurisdiction to investigate it, but granted the stay of the investigation pending the Superior Court's final decision in the civil action. This decision was disclosed to the applicant in a letter dated May 22 as follows:

> [TRANSLATION]
> On behalf of SIRC, I hereby inform you that on May 12, 2009, further to the report submitted by the Honourable Arthur T. Porter, SIRC has determined that it has jurisdiction to investigate your client's complaint. However, in order to rule out any possibility that SIRC and the Superior Court of Québec arrive at contradictory conclusions, SIRC has decided to stay its investigation and to allow the Superior Court to make a definitive ruling on your client's motion instituting proceedings. Although the complaint and the motion instituting proceedings seek different remedies, there is considerable overlap between the questions of fact and the allegations raised against CSIS.
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> Exhibit E of the affidavit of Alain Desaulniers, Respondent's Record, p. 207.

II. <u>The impugned decision</u>

[11] In the reasons he signed in support of his recommendation to SIRC, the Honourable Mr. Porter first dealt with CSIS's argument that the applicant's complaint was inadmissible because it was trivial, frivolous, vexatious or made in bad faith within the meaning of paragraph 41(1)(*b*) of the Act, given the similar pending civil proceeding. This provision reads as follows:

Complaints	**Plaintes**
41. (1) Any person may make a	**41. (1)** Toute personne peut

complaint to the Review Committee with respect to any act or thing done by the Service and the Committee shall, subject to subsection (2), investigate the complaint if	porter plainte contre des activités du Service auprès du comité de surveillance; celui-ci, sous réserve du paragraphe (2), fait enquête à la condition de s'assurer au préalable de ce qui suit :
(b) the Committee is satisfied that the complaint is not trivial, frivolous, vexatious or made in bad faith.	**b)** d'autre part, la plainte n'est pas frivole, vexatoire, sans objet ou entachée de mauvaise foi.

[12] CSIS had claimed that authorizing the applicant to proceed at the same time in both fora could give rise to contradictory decisions and thereby bring the administration of justice into disrepute. In contrast, the applicant had argued that the complaint was neither frivolous nor vexatious, because it was not plain and obvious that it was without foundation and without any possibility of success.

[13] The Honourable Mr. Porter agreed with the applicant's arguments and rejected CSIS's claims. In his opinion, there was nothing to indicate that the complaint would not be allowed, that it would not lead to any valid results and that it had been filed for improper purposes. Moreover, the applicant was not seeking to argue issues that had already been determined. This was therefore a case that differed from *Khadr* v. *Canada (Minister of Foreign Affairs)*, 2004 FC 1145, [2004] F.C.J. No. 1391, since the two proceedings were not duplicative.

[14] However, the Honourable Mr. Porter found, after comparing the applicant's allegations in his letter to SIRC and in his motion instituting proceedings filed in Superior Court, that there was

considerable overlap between the two proceedings. Relying on the decision by Justice Allan Lutfy (as he then was) in *NFC Canada Ltd. v. Canada (Attorney General)* (1999), 87 A.C.W.S.(3d) 686, he found that it was preferable to stay the investigation of the complaint pending the results of the civil proceeding. The essential part of his reasons in this regard can be found in the following paragraph:

> [TRANSLATION]
> Given the considerable overlap between the allegations and the questions of fact raised in the complaint filed with SIRC and the amended motion instituting proceedings filed in the Superior Court of Québec, I believe that a stay of SIRC's investigation into the complaint would be the best solution in the circumstances. This would prevent the duplicity of proceedings and evidence. A stay of the investigation would also prevent contradictory judgments from being rendered regarding the allegations and questions of fact, which could bring the administration of justice into disrepute.

III. Issues

[15] This application essentially raises two issues:

A. Did the Security Intelligence Review Committee have the power to stay its investigation?

B. In the event that the Committee has such power, did it err in the exercise of its discretion?

IV. Analysis

[16] At the outset, it is important to specify that only the Attorney General of Canada may be designated as respondent in this proceeding, in accordance with Rules 303(1)(*a*) and (2) of the *Federal Courts Rules* (SOR/98-106). Consequently, SIRC and CSIS must be struck from the style of cause in this case.

[17] As regards the applicable standard of review, a distinction must be made between the first and second issue. Concerning the question of whether SIRC was empowered to suspend the investigation, it seems to me that the relevant standard is undoubtedly correctness. Regardless of whether this question is characterized as one of jurisdiction or as one of law, the result would be the same. If it is a question of jurisdiction, within the narrow sense intended by the Supreme Court in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 59, there is no doubt that the correctness standard must be applied. This seems to me to be the situation here, since SIRC was first required to determine whether it had jurisdiction to order a stay. But even supposing that this is a question of law, the same standard must apply given that it is a question of general interest that has nothing to do with the expertise of SIRC's members.

[18] The issue of whether SIRC was right to stay its investigation is another story. This is undeniably a question of mixed fact and law, given that it requires the application of legal precedents to the specific circumstances of this case. This type of question always calls for the application of the reasonableness standard.

A. Did the Security Intelligence Review Committee have the power to stay its investigation?

[19] The applicant claimed that the Act did not allow SIRC to stay the investigation of a complaint. Relying on sections 38 and 41 of the Act, he argued that the Committee has no choice but to dismiss the complaint or proceed with the investigation if the complaint is not trivial, frivolous, vexatious or made in bad faith.

[20] It does not appear to me that this argument can be accepted. While it is true that the Act, unlike the *Federal Courts Act* (R.S. 1985, c. F-7, s. 50) and the Quebec *Code of Civil Procedure*, R.S.Q., c. C-25 (arts. 271-273), does not explicitly provide that SIRC may suspend an investigation, section 39 confers on the Committee in very broad terms the power to determine its own procedure. This provision reads as follows:

Committee procedures	**Procédure**
39. (1) Subject to this Act, the Review Committee may determine the procedure to be followed in the performance of any of its duties or functions.	**39. (1)** Sous réserve des autres dispositions de la présente loi, le comité de surveillance peut déterminer la procédure à suivre dans l'exercice de ses fonctions.

[21] This provision, which is formulated in a very general way, must be interpreted in broad and liberal manner and clearly provides that SIRC is entitled to decide how to conduct its investigations. It is entirely consistent with the broad powers of administrative tribunals in procedural matters. Moreover, the Supreme Court has determined that an administrative tribunal has the inherent power to adjourn a proceeding:

> We are dealing here with the powers of an administrative tribunal in relation to its procedures. As a general rule, these tribunals are considered to be masters in their own house. In the absence of specific rules laid down by statute or regulation, they control their own procedures subject to the proviso that they comply with the rules of fairness and, where they exercise judicial or quasi-judicial functions, the rules of natural justice. Adjournment of their proceedings is very much in their discretion.
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> *Prassad v. Canada (Minister of Employment and Immigration)*, [1989] 1 S.C.R. 560, at para. 16

[22] It is true that in this matter, SIRC chose to stay the investigation rather than adjourn it. But this difference seems secondary to me. Not only is the result substantially the same in both cases, but also these are both procedural mechanisms that an administrative tribunal may use to manage its cases. These powers seem to me to be essential to the proper administration of justice and must therefore be part of the tools available to all administrative tribunals in managing its cases. I therefore have no hesitation in finding that SIRC was authorized to stay the investigation of the complaint filed by the applicant.

B. In the event that the Committee has such power, did it err in the exercise of its discretion?

[23] The applicant's counsel argued that SIRC should have applied the tests developed in the case law on stays of execution or suspension of proceedings, namely, the existence of a serious question, evidence of irreparable harm and the balance of inconvenience: *R.J.R.- Macdonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311; *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110. In response, counsel for the respondent argued that the applicant's proceeding amounted in fact to a *mandamus*, in that it basically required SIRC to conclude its investigation. Relying on the case law in this area, he therefore claimed that the applicant had to show that the *mandamus* was the only adequate remedy available, that he had a clear right to have the investigation continued, that the duty was not discretionary in nature and that his application to continue the investigation resulted in a refusal: *Karavos v. The City of Toronto*, [1948] O.W.N. 17 (Ont. C.A.), *J. M. O'Grady v. Baron George Whyte*, [1983] 1 F.C. 719; *Apotex Inc. v. Canada (Attorney General)*, [1994] 1 F.C. 742; [1993] F.C.J. No. 1098 (C.A.).

[24] These two approaches appear to me to be flawed for the following reasons. Even though I am willing to recognize that administrative tribunals have a certain amount of autonomy in managing their cases and proceedings, as the respondent has invited me to do, this discretion must be exercised judicially, that is, in compliance with the statutes or regulations governing them as well as with the purpose for which they were created. From this perspective, it matters little whether a tribunal chooses to formally suspend a proceeding or adjourn it *sine die*; form must not be elevated over substance. In both cases, the tribunal makes a decision, and the Court may be called upon to review its lawfulness. Each time that an application for judicial review is allowed, the administrative body is required to comply with the Court's decision; in the event that the stay of proceedings ordered by SIRC is set aside, the Committee will be obliged to proceed with its investigation without it being necessary for the applicant to seek a *mandamus* to compel the Committee to comply with the Court's decision.

[25] Nor am I satisfied that the tests developed in the case law on stays and injunctions apply here. We must not lose sight of the fact that the Committee's mandate is not to make decisions, but rather to make recommendations further to its investigations of the complaints submitted to it: see Act, s. 52. The objective of a stay of proceedings or an injunction is to maintain the status quo between the parties until each party's respective rights have been definitively determined. SIRC's investigation does not fall into this reasoning.

[26] Moreover, a stay application of the type examined by the Supreme Court in *RJR-MacDonald* and *Metropolitan Stores*, above, usually seeks to have a Court order an administrative

body, tribunal or public employee to suspend the processing of a file or the enforcement of a decision until the validity of the law or decision underlying the action has been determined. In this case, the Superior Court's jurisdiction in regard to the motion instituting proceedings filed by the applicant has not been called into question. Moreover, the respondents did not ask SIRC to stay its investigation until the Federal Court ruled on the issue of whether the risk of contradictory decisions should result in the postponement of the investigation. It is SIRC itself that made this decision, and this is the decision under review. The tests applicable to a stay application cannot guide this Court in its review of the decision made by the Committee to wait for the Superior Court's decision before processing the applicant's complaint.

[27] In short, I am of the opinion that we should instead review the reasons given by SIRC to stay its investigation in order to assess their reasonableness in light of its mandate and powers and the more general purpose of the Act. In this case, SIRC's reason for staying the investigation of the applicant's complaint is basically prompted by a concern to avoid duplicity of proceedings, with the resulting risk of contradictory judgments.

[28] It is worth repeating that SIRC, unlike the Superior Court, does not make judicial decisions and does not have the power to order the respondent to compensate the applicant or take any measure whatever. It is authorized only to make recommendations to the Minister to ensure that CSIS carries out its mandate in accordance with the laws governing it. Consequently, there is, properly speaking, no risk of contradictory "decisions", since only the Superior Court is authorized to make a decision that is enforceable on the parties. More fundamentally, the Committee's mission

is systemic and consists not in giving redress to an individual who may have been injured by the Service's actions, but rather in ensuring that such behaviour does not recur in future. Section 40 of the Act specifies that SIRC's mandate consists in "…ensuring that the activities of the Service are carried out in accordance with this Act, the regulations and directions issued by the Minister under subsection 6(2) and that the activities do not involve any unreasonable or unnecessary exercise by the Service of any of its powers…". Conversely, the Superior Court does not have the power to intervene in the management and operation of CSIS, and can only grant remedies on a case-by-case basis where evidence of a civil fault or damage has been established.

[29] This dichotomy between the respective roles of the Superior Court and SIRC merely illustrates a more general principle, namely, that the same facts may give rise to different causes of action. In this regard, the Supreme Court wrote the following in *Rocois Construction Inc. v. Québec Ready Mix Inc.*, [1990] 2 S.C.R. 440, at paras. 24-25:

> First, it is clear that a body of facts cannot in itself constitute a cause of action. It is the legal characterization given to it which makes it, in certain cases, a source of obligations. A fact taken by itself apart from any notion of legal obligations has no meaning in itself and cannot be a cause; it only becomes a legal fact when it is characterized in accordance with some rule of law. The same body of facts may well be characterized in a number of ways and give rise to completely separate causes. For example, the same act may be characterized as murder in one case and as civil fault in another.
>
> …
>
> As a general rule, the same body of facts can thus give rise to as many causes of action as there are legal characterizations on which a proceeding can be based.

[30] Thus, an employment contract may give rise to an administrative proceeding (grievance) and a civil action for wrongful dismissal (see *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] S.C.J. No. 46 at para. 54), a police officer may be the subject of a disciplinary complaint and criminal proceedings (*R. v. Wigglesworth*, [1987] 2 S.C.R. 541), and a sexual assault of a minor may give rise to criminal proceedings by the Attorney General and civil proceedings by the Director of Youth Protection.

[31] In fact, the case law teaches that a criminal proceeding does not automatically have the effect of staying civil proceedings concerning similar facts. In each case, it is up to the petitioner to show that his or her right to full answer and defence would be compromised if the civil proceeding were to continue before the criminal trial is completed: see, for example, *Falloncrest Financial Corp. v. Ontario* and *Nash v. Ontario*, [1995] O.J. No. 1931 (Ont. C.A.); *Kolomeir v. L.J. Forget et Co. Ltd.*, [1972] C.A. 422; [1971] J.Q. No. 19 (C.A.Q.).

[32] The same is true when the same facts are the source of a civil proceeding and a disciplinary complaint. The courts have recognized on many occasions that both proceedings may be heard at the same time, since they do not have the same purpose and do not give rise to the same conclusions. The following excerpt from a decision rendered by the Tribunal des professions du Québec clearly illustrates this principle:

> [TRANSLATION]
> 17. Contrary to what the petitioner is claiming, the complainant's proceedings, even if based on the same facts, are not likely to result in contradictory judgments because the purpose and scope of the proceedings are very different, with one potentially giving rise to,

> among other things, monetary compensation in favour of the respondent, and the other not.
>
> 18. In the civil case, it must be remembered that the Superior Court judge will re-establish the parties' rights by, among other things, a monetary award in favour of the complainant if the judge believes that she has demonstrated that she has been harmed because of the wrongful actions of the petitioner. However, the disciplinary committee will, for the same actions, impose the appropriate sanction or sanctions that are likely to protect the public in the future by dissuading the petitioner from starting again and the other members of the profession from taking similar actions. The purpose of the complainant's applications is therefore not the same and, consequently, the alleged facts, if proven, may be interpreted differently depending on the purpose or scope of the disputes between these same parties.
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> *Feldman v. Barreau*, 2004 QCTP 71, [2004] D.T.P.Q. No. 71
> See also: *Boulet v. Ingénieurs (Ordre professionnel des)*, 2005 QCTP 124, [2005] D.T.P.Q. No. 124

[33] The same logic must apply, *a fortiori*, when the body responsible for investigating does not make a decision, as in the case of a disciplinary committee, but can only make recommendations, as in SIRC's case. The latter must avoid making findings akin to legal liability on the part of CSIS, since that is not its mandate. This is a common characteristic of all commissions of inquiry. However, the Superior Court is required to decide the respondent's legal liability, and must determine whether fault, damage and a causal link have been proved.

[34] What is more, the evidence to be submitted to SIRC and the Superior Court will undoubtedly be different. Section 39 of the Act authorizes the Committee to have access to all relevant evidence; however, the evidence that the applicant may submit to the Superior Court will

be limited by the provisions of the *Canada Evidence Act* (R.S., 1985, c. C-5) and national security prerogatives.

[35] For all of the foregoing reasons, I am therefore of the opinion that this application for judicial review must be allowed. For the reasons given in the foregoing paragraphs, SIRC could not reasonably find that there was a risk of contradictory judgments in the event that it decided not to stay its investigation.

ORDER

THE COURT ORDERS that the application for judicial review be allowed, and that SIRC's decision to stay its investigation of the applicant's complaint against CSIS pending the Superior Court of Québec's final decision be set aside. With costs to the applicant.

"Yves de Montigny"
Judge

Certified true translation
Susan Deichert, LLB

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Mai Nguyen	FOR THE APPLICANT
Michelle Lavergne Marc Ribeiro	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Doyon & Associés Inc. 6337 St-Denis Montréal, Quebec H2S 2R8	FOR THE APPLICANT
John H. Sims, Q.C. Attorney General of Canada	FOR THE RESPONDENTS