Federal Court Cour fédérale

Date: July 12, 2013

Docket: T-1567-12

Citation: 2013 FC 775

Ottawa, Ontario, July 12, 2013

PRESENT: THE HONOURABLE MADAM JUSTICE SNIDER

BETWEEN:

THE HONOURABLE LORI DOUGLAS

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR ORDER AND ORDER
(Appeal of Prothonotary's Order of June 11, 2013)

[1] The Applicant in the underlying judicial review application is the Honourable Lori Douglas, Associate Chief Justice of the Family Division of the Manitoba Court of Queen's Bench (the Applicant or Douglas ACJ). Douglas ACJ is the subject of a complaint to the Canadian Judicial Council (CJC). In 2010, Mr. Alexander Chapman complained to the CJC, alleging discrimination and sexual harassment by the Applicant. A Review Panel of five judges, established pursuant to the CJC complaints process, investigated the complaint and referred the matter to a public Inquiry Committee established under the *Judges Act,* RSC 1985, c J-1 [*Judges Act*]. The purpose of the Inquiry Committee is to investigate the relevant matters and to report its

conclusions to the CJC regarding whether a recommendation should be made to remove a judge from office.

[2] For purposes of the Inquiry, the Committee engaged Mr. George Macintosh as Committee Counsel and appointed Mr. Guy Pratte (since replaced by Ms. Suzanne Côté) as Independent Counsel. The Inquiry Committee commenced its proceedings on May 19, 2012. During the evidentiary phase of the hearing, a number of matters arose which led the Applicant to bring an application for judicial review, seeking a number of remedies, including an order prohibiting the Inquiry Committee from continuing its proceedings. The proceedings have been adjourned since July 27, 2012, and are now the subject of an order staying the proceedings until final resolution of the application for judicial review (see 2013 FC 776).

[3] A number of parties have sought to intervene in the judicial review, including the Inquiry Committee and Independent Counsel. In an Order dated June 11, 2013 (the June 11, 2013 Order), Prothonotary Tabib considered and ruled on all of the intervention requests. Of particular relevance, Prothonotary Tabib refused the motion of the Inquiry Committee to intervene and permitted limited intervention by Independent Counsel.

[4] In the motions now before the Court, two parties – the Inquiry Committee and the Independent Counsel – seek to appeal the June 11, 2013 Order. Independent Counsel requests that I permit her to have additional intervention rights in the judicial review. The Inquiry Committee asks that it be permitted to intervene and make representations in both the stay motion brought by the Applicant and the judicial review.

[5] For the reasons which follow, I would dismiss the appeals of both parties.

Decision under Review

[6] In the June 11, 2013 Order, Prothonotary Tabib began her reasons with an overview of the requirements to be met by a proposed intervener under Rule 109 of the *Federal Courts Rules*, SOR/98-106 and in accordance with the factors set out in *Canadian Airlines International Ltd v Canada (Human Rights Commission)* (2000), [2010] 1 FCR 226, [2000] FCJ No 220 (CA). In her view:

> [T]he most important factor to consider in the present case is whether a proposed intervener has shown that it will bring to the Court [an] explanation, a position, an argument or a perspective that is not expected to be provided by one of the parties.

[7] Although the Prothonotary described this factor as "the most important", she also emphasized that the "institutional actors" were required to maintain a position of impartiality. In this context, she stated:

> For these reasons, none of them can be seen to forcefully advocate a position opposed to the Applicant, and each must therefore limit themselves to bringing to the Court such assistance as it can, in the public interest.
>
> . . .
>
> [N]one of them can reasonably present starkly different arguments of law or positions while still maintaining their impartiality.

[8] One issue raised before the Prothonotary (and before me on this appeal, particularly by the Inquiry Committee) is the issue of the prematurity of the judicial review, given that the

Inquiry Committee proceedings have not yet reached completion. On this particular question, the Prothonotary commented that this issue (amongst others) was one:

> . . . on which the Attorney General is well versed, and as well placed as the potential interveners to make submissions to the Court . . . As such, in the absence of indication that the Attorney General might not raise these issues, the proposed interventions are, at best, premature and should only be entertained if and when it appears that these matters are not, or not appropriately, addressed by the Attorney General or the Applicant herself.

[9] Having made these general comments applicable to all of the proposed interveners, Prothonotary Tabib separately addressed the submissions of each. Since only the Inquiry Committee and the Independent Counsel have appealed the June 11, 2013 Order, I will outline her reasons with respect to those parties only.

Independent Counsel

[10] Prothonotary Tabib made the following key findings with respect to Independent Counsel's motion to intervene, allowing intervention on two specific issues:

- Independent Counsel's perspective regarding the functions and roles of Independent Counsel and Committee Counsel, as well as the interplay between them, would be helpful to the Court on the merits and in the context of the motion to stay. The role of Independent Counsel is affected by Committee Counsel's participation in hearings and any instruction that Committee Counsel may provide to Independent Counsel. Independent Counsel properly spoke to this issue before the Inquiry Committee and its contribution on judicial review would not raise any problems of impartiality.

- Independent Counsel's perspective regarding her office's relationship with the CJC would be helpful in the context of the Rule 317 request based on privilege as well as the judicial review on the merits. Persons who are parties to a solicitor-client relationship are the best placed to speak to the nature of that relationship.

- Independent Counsel is required to carry out her functions in the public interest, but does not have an independent role to defend the public interest at large, as the Attorney General does. She is therefore no better placed than the Attorney General to address issues such as the balance of convenience on the stay motion, reasonable apprehension of bias or institutional bias arising from the alleged solicitor-client relationship between Independent Counsel and the CJC.

Inquiry Committee

[11] Prothonotary Tabib rejected the Inquiry Committee's motion to intervene for the following reasons:

- The Inquiry Committee is no better placed than the Attorney General to review and analyze the record before the Court.

- Allowing the Inquiry Committee to make arguments concerning its own jurisdiction and to question witnesses would effectively allow it to supplement the reasons it already gave in its comprehensive ruling under review.

- The Inquiry Committee is not in a better position than the Attorney General to make legal arguments about the availability of judicial review in Federal Court; for example, whether the Applicant's judicial review can address specific issues on which the Inquiry Committee has not yet ruled and whether judicial review of the Inquiry Committee's interlocutory ruling is premature.

- With respect to the balance of convenience on the motion to stay, the Inquiry Committee has not demonstrated that it would make any arguments beyond those which the Attorney General would be equally qualified to address.

- The Inquiry Committee is the Tribunal and its impartiality is directly at issue in this application. This increases the significance of the Court's role to ensure that the benefits of any intervention are not outweighed by the harm that would result if the Inquiry Committee is perceived to be defending its ruling or acting in an adversarial role vis-à-vis the Applicant.

Issues

[12] The appeals raise the following issues:

1. What is the applicable standard of review?

2. Should Independent Counsel succeed in her appeal and receive intervener status within the parameters she requests?

3. Should the Inquiry Committee succeed in its appeal and receive intervener status within the parameters it requests?

Standard of Review

[13] At the oral hearing of these appeals, there appeared to be no dispute as to the applicable standard of review of the Prothonotary's decision. Case law establishes that a party's status as an intervener is not a question vital to the final issue of the case (see, for example, *Saskatchewan Watershed Authority v Canada (Attorney General)*, 2011 FC 240 at para 11, [2011] FCJ No 361, aff'd 2012 FCA 169 at para 3, 434 NR 65).

[14] On this basis, I will review the Prothonotary's decision to determine whether it is "clearly wrong" because it is grounded in incorrect principles or a misapprehension of the facts. On this standard, the Prothonotary's exercise of discretion should receive deference, and should only be disturbed "to prevent undoubted injustices and to correct clear material errors" (*j2 Global Communications, Inc v Protus IP Solutions Inc*, 2009 FCA 41 at para 16, 387 NR 135).

The Attorney General

[15] Prior to addressing the particular arguments of Independent Counsel and the Inquiry Committee, it would be helpful to address the participation of the Attorney General in the proceedings thus far.

[16] The role of the Attorney General has been the subject of much discussion in this matter. By motion, the Attorney General requested that he be removed as Respondent to this application. On April 30, 2013, Prothonotary Tabib concluded that the Attorney General is the proper Respondent to this application (*Douglas v Attorney General of Canada*, 2013 FC 451, [2013] FCJ No 472). The Attorney General, by not appealing that ruling, has accepted that he is the Respondent in this application, a designation which carries with it certain rights and responsibilities.

[17] As a reluctant Respondent, the Attorney General has not been forthcoming on what positions he might take on any particular issue. In the Applicant's motion for a stay of the proceedings, the Attorney General advised that he would take no position. The Attorney General also consented to both appeals of the June 11, 2013 Order.

[18] It is important to note, in spite of this overwhelming silence to date, that we do not know what position the Attorney General may take in the public interest on the judicial review application on the merits. We cannot assume that, just because the Attorney General did not oppose the stay, that he will take no position on the judicial review. Indeed, I would view such

an abdication as irresponsible, totally contrary to the public interest and close to contemptuous of this Court. Moreover, the Attorney General's counsel will no doubt act properly as an officer of the Court if requested to address any legal issue that the Court may identify.

Independent Counsel

[19] Independent Counsel argues that the Attorney General has demonstrated that he will not advance the arguments that she wishes to advance, and Independent Counsel should be permitted to intervene to protect the public interest.

[20] In my view, Independent Counsel has not discharged her burden to demonstrate that the Prothonotary's order is clearly wrong.

[21] As a preliminary matter, I note that an appeal of an order of a Prothonotary is generally based on the record before the Prothonotary (see, for example, *Bennett v Canada (Attorney General)*, 2010 FC 1173 at para 22, [2010] FCJ No 1451). Independent Counsel's reliance on actions of the Attorney General taken with respect to the stay motion may not be appropriate, unless this new evidence was not available earlier, would serve the interests of justice, would assist the Court and would not seriously prejudice other parties (*Shaw v Canada*, 2010 FC 577 at para 9, [2010] FCJ No 684 [*Shaw*]). Even assuming these requirements are met, however, Independent Counsel's arguments cannot succeed.

[22] Prothonotary Tabib addressed the conduct of the Attorney General in her reasons. The Prothonotary concluded that, although Independent Counsel acts in the public interest, she has no independent role to defend the broader public interest as the Attorney General does, and is not better placed than him to do so. She considered the issue of the Attorney General's lack of participation thus far, concluding that:

> While the Attorney General has preferred at this time to refrain from expressing a position on the merits of this proceeding or on interlocutory motions until the arguments have been articulated in formal filings, the Court has no reason to believe that he will not raise the issues of concern to the proposed interveners, as the public interest may require.

[23] On the evidence before her, the Prothonotary did not err in concluding that the Attorney General will advance the arguments proposed by Independent Counsel with respect to bias as required by the public interest. Independent Counsel, in seeking to intervene, was required to discharge her burden to demonstrate that her intervention would be helpful to the Court (see, for example, *Warner-Lambert Canada Inc v Canada (Minister of Health)*, 2001 FCA 116 at para 11, 270 NR 314 [*Warner-Lambert*]). However, Independent Counsel did not advance any evidence that the Attorney General has been unwilling or unable to participate in this application in the public interest after Prothonotary Tabib confirmed that he is the appropriate Respondent. Independent Counsel also did not adduce any evidence demonstrating that the Attorney General will be unwilling or unable to participate in the future.

[24] Speculation regarding the Attorney General's lack of participation in interlocutory matters is insufficient to demonstrate that the Prothonotary fundamentally misapprehended the facts. There may be many reasons why the Attorney General has chosen not to participate in

these matters; for example, the Applicant advances the possibility that the Attorney General believed that the public interest was served by the submissions already before the Court. In my view, it was open to the Prothonotary to find that the inaction of the Attorney General at this stage of the proceedings is not determinative.

[25] It was also open to Prothonotary Tabib to take into account Independent Counsel's role as an impartial and independent participant in the Inquiry Committee proceedings. Independent Counsel herself cites s. 3(3) of the *Canadian Judicial Council Inquiries and Investigations By-laws*, SOR/2002-371, which clearly states her impartial role. In my view, the Prothonotary struck an appropriate balance in permitting intervention where Independent Counsel has expertise in light of her office, and refusing to permit intervention with respect to the allegations of bias themselves, since present Independent Counsel has no first-hand knowledge of these events.

[26] Finally, I distinguish the case of *Cosgrove v Canadian Judicial Council*, 2007 FCA 103, [2007] 4 FCR 714 [*Cosgrove*], relied upon by Independent Counsel. Although Independent Counsel was permitted to intervene in *Cosgrove*, that case dealt with general issues of the constitutionality of s. 63(1) of the *Judges Act* (*Cosgrove*, above at paras 1-4). The present case is much different in that it deals with fact-specific issues of bias, which would be more difficult for Independent Counsel to address effectively while still maintaining her role of impartiality.

[27] Therefore, I would dismiss Independent Counsel's appeal of the Prothonotary's Order.

Inquiry Committee

[28] The Inquiry Committee argues that the Prothonotary erred in four respects:

1. The Prothonotary should not have decided the motion to intervene without knowing what position, if any, the Attorney General intended to take in the motion to stay and in the application on the merits.

2. The Prothonotary erred in finding that there was no reason to believe that the Attorney General would not advance the jurisdictional arguments asserted by the Inquiry Committee, since the Attorney General has given every indication that he does not intend to participate. The Attorney General advanced the position that maintenance of public confidence in the judicial system required him to take no position with respect to the judicial inquiry process. Further, the Attorney General consented to all of the intervener motions. Finally, the Attorney General does not intend to participate in the motion to stay.

3. The Prothonotary erred in denying the Inquiry Committee and any other intervener the ability to make submissions on the prematurity of the application for judicial review. The Inquiry Committee serves an important public function and its proceedings have been paralyzed by this application for judicial review since it was filed last August. The continuation of the proceedings is dependent on the outcome of the stay motion, which is currently unopposed. In the absence of

exceptional circumstances, applications for judicial review, including those based on a reasonable apprehension of bias, should not be brought until the tribunal has completed its work. This is a significant issue that should be argued before the Court on the motion to stay.

4. The Prothonotary erred in law in finding that the Attorney General's role to advance the public interest would render submissions from proposed interveners duplicative. The Prothonotary could not make this assumption without knowledge of the Attorney's General approach. The Prothonotary appears to assume, without any basis, that the public interest is always the same and the position of the interveners would always overlap with that of the Attorney General.

[29] Having considered the arguments of the Inquiry Committee, I conclude that there is no merit, in this case, in permitting the intervention of the Inquiry Committee. Not only is the Prothonotary's decision not "clearly wrong", it was manifestly correct.

[30] I will address each of the Committee's four arguments below.

[31] As I opined above, the Inquiry Committee's reliance on actions of the Attorney General taken with respect to the stay motion are not appropriate, unless this new evidence was not available earlier, would serve the interests of justice, would assist the Court and would not seriously prejudice other parties (*Shaw*, above at para 9). Even assuming these requirements are met, however, the Inquiry Committee's arguments cannot succeed.

[32] In advancing its first and second arguments, the Inquiry Committee, in my view, has fundamentally misapprehended its burden of proof before the Prothonotary.

[33] The Prothonotary addressed the conduct of the Attorney General in her reasons. Prothonotary Tabib stated that the Attorney General could be expected to raise certain issues that the Inquiry Committee proposed to advance and was equally positioned to do so. She considered the issue of the Attorney General's lack of participation thus far.

[34] The Committee, in seeking to intervene, was required to discharge its burden that its intervention would be helpful to the Court (see, for example, *Warner-Lambert*, above at para 11). It is not appropriate for the Inquiry Committee to appeal the Prothonotary's Order on the basis that the Prothonotary should have, of her own accord, sought out the Attorney General's position, no matter how readily available.

[35] The Prothonotary did not misapprehend the facts in finding that the Attorney General may be expected to advance the arguments proposed by the Inquiry Committee, as the public interest requires. The Inquiry Committee did not advance any evidence that the Attorney General has been unwilling or unable to participate in this application in the public interest after he was confirmed to be the appropriate Respondent, or that he will be unwilling or unable to act in the future. The Inquiry Committee's speculation regarding the Attorney General's actions during the course of the proceedings thus far is insufficient for it to meet its burden. There may be many reasons why the Attorney General has chosen not to participate in interlocutory matters; for

example, as the Applicant asserts, it may be that the Attorney General has determined that the public interest has not yet required anything more than the contributions already made by other parties. It was therefore open to the Prothonotary not to find this factor decisive.

[36] The Inquiry Committee's third argument is that the Prothonotary erred in law in denying it the opportunity to raise the argument of prematurity on the motion to stay. This argument is unpersuasive, since it does not take into account the Committee's role as the tribunal.

[37] The Prothonotary took into account the role of the Inquiry Committee as the tribunal, against which arguments of bias have been asserted. The Prothonotary considered the Court's role in ensuring that the benefits of any intervention are not outweighed by the harm that would result if the Inquiry Committee is perceived to be defending its ruling or acting in an adversarial role. She also took into account that the Inquiry Committee wished to make arguments about the jurisdiction of the Federal Court and is not in a better position than the Attorney General to do so.

[38] First, it was open to the Prothonotary to place importance on the Inquiry Committee's impartiality.

[39] Leave is rarely given to tribunals to intervene in a judicial review (*Canada (Attorney General) v Georgian College of Applied Arts and Technology*, 2003 FCA 123 at para 2, [2003] FCJ No 394 [*Georgian College*]). Requests to intervene must be carefully evaluated against the

principles of finality and impartiality (*Quadrini v Canada (Revenue Agency)*, 2010 FCA 246 at para 16, [2012] 2 FCR 3).

[40] With respect to impartiality, a tribunal cannot be seen to take a side in the judicial review of its own decision or to advocate for its own interests (*Georgian College*, above at para 2; *Chrétien v Canada (Attorney General)*, 2005 FC 591 at para 21, 273 FTR 219 [*Chrétien*]). This concern is even more significant when the issues alleged on judicial review are those of bias (*Chrétien,* above at para 36; see also, *Ontario (Children's Lawyer) v Ontario (Information and Privacy Commissioner)* (2005), 75 OR (3d) 309 at para 40, 253 DLR (4th) 489).

[41] Given the facts of this case and the position taken by the Inquiry Committee in these intervention proceedings, it was open to the Prothonotary to conclude that concerns of impartiality outweigh the assistance that the Inquiry Committee may provide with respect to the issue of prematurity. If the Inquiry Committee was permitted to raise the issue of prematurity, it is, in essence, asking the Court to finally dispose of this application for judicial review and to allow the Committee to finish its work in a manner that the Committee deems appropriate. Contrary to the submissions of the Committee, this is not unconnected to the merits of the case and, in fact, places the Inquiry Committee in direct opposition to the Applicant.

[42] I challenge the Committee's position that its intervention on the issue of prematurity would not be directed to the merits of the allegations of bias. By arguing that the judicial review application is premature, the Committee seeks to avoid the Court's consideration of the

allegations of bias – at least at this stage. Quite simply, the Committee would be indirectly but deliberately challenging the merits of the application for judicial review.

[43] To permit such intervention would, in the words of the Federal Court of Appeal, "erode the tribunal's reputation for evenhandedness and decrease public confidence in the fairness of our system of administrative justice" (*Quadrini*, above at para 16). Given the Inquiry Committee's task to investigate complaints regarding judicial misconduct, it is essential that it maintain its appearance of impartiality. Therefore, it was entirely appropriate for Prothonotary Tabib to take this into account.

[44] Second, it was also open to the Prothonotary to find that the Inquiry Committee should not address jurisdictional arguments regarding the availability of judicial review based on the Inquiry's Committee's expertise. The Federal Court of Appeal has drawn a distinction between issues of a tribunal's own jurisdiction, which a tribunal may be able to speak to as an intervener under some circumstances, and the jurisdiction of the Federal Court, which is not appropriate subject matter for the tribunal to address (*Canadian Pacific Air Lines Ltd v CALPA*, [1988] 2 FC 493 at 498-499, 84 NR 81). This distinction is logical. A tribunal may have useful expertise relevant to its own jurisdiction and procedures, but would have no relevant expertise with respect to the jurisdiction of the Federal Court to entertain applications for judicial review (*Quadrini*, above at para 17). *Chretien*, relied upon by the Committee, is of no assistance to it; the jurisdiction that the Commissioner was permitted to address was the Commission's own, not that of the Federal Court (*Chrétien,* above at paras 38-40).

[45] Third, the Prothonotary did not misapprehend the facts in finding that the Inquiry Committee should not intervene in the stay motion with respect to issues of prematurity. She did not assume that the Attorney General would raise an argument of prematurity; the Prothonotary ruled that, "the Court has no reason to believe that he will not raise the issues of concern to the proposed interveners as the public interest may require". As asserted by the Applicant, for purposes of the stay motion, the Attorney General may have simply concluded that the public interest has not required his participation in the proceedings thus far. The Prothonotary's conclusion that the Attorney General, on this particular record, can be expected to act in his role as defender of the public interest does not demonstrate a material error.

[46] Fourth, although I am cognisant that the Court is not required to address the merits of the prematurity argument, I note that it may not be necessary for this argument to be made to further the public interest at the hearing of the stay motion. As the Applicant points out, if she will suffer irreparable harm through the continuation of the proceedings, this hardship demonstrates the necessity of hearing the allegations of bias on the merits before the completion of the administrative proceedings (see, for example, *Volochay v College of Massage Therapists of Ontario*, 2012 ONCA 541 at para 80, 111 OR (3d) 561; *Canada (Minister of Public Safety and Emergency Preparedness) v Kahlon*, 2005 FC 1000 at para 14, [2006] 3 FCR 493).

[47] For these reasons, I reject the Inquiry Committee third argument that the Prothonotary was clearly wrong in failing to grant intervener status with respect to issues of prematurity on the motion to stay.

[48] Finally, I disagree with the Inquiry Committee's fourth argument that the Prothonotary erred in assuming that there was one "monolithic" public interest. I find that this argument mischaracterizes the Prothonotary's decision.

[49] On the basis of the evidence placed before her, the Prothonotary did turn her mind to whether the public interest would always be equally well served by the perspective of the Attorney General and each of the proposed interveners. As I explained earlier, the Prothonotary had no obligation to determine the position of Attorney General and how it would differ from those of proposed interveners, since the burden is on the Inquiry Committee to demonstrate why its intervention would be helpful. Moreover, both Independent Counsel and the CJC were granted intervener status with respect to particular issues which they were uniquely positioned to address. The fact that the Prothonotary did not find that the Inquiry Committee in particular was in a position to assist the Court in this manner does not demonstrate that she relied on an assumption that the public interest is always the same.

[50] In sum, the Inquiry Committee has not demonstrated that the Prothonotary's Order is clearly wrong. On this basis, I would dismiss the Inquiry Committee's appeal.

Conclusion

[51] For the above reasons, the motions to appeal the June 11, 2013 Order of Prothonotary Tabib, brought by each of Independent Counsel and the Inquiry Committee, will be dismissed with costs.

ORDER

THIS COURT ORDERS AND ADJUDGES that:

1. the motion in appeal of the June 11, 2013 Order brought by Independent Counsel is dismissed, with costs to the Applicant; and

2. the motion in appeal of the June 11, 2013 Order brought by the Inquiry Committee is dismissed, with costs to the Applicant.

"Judith A. Snider"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1567-12
STYLE OF CAUSE:	THE HONOURABLE LORI DOUGLAS v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	JULY 2, 2013
REASONS FOR ORDER AND ORDER:	SNIDER J.
DATED:	JULY 12, 2013

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