Federal Court Cour fédérale

Date: 20130712

Docket: T-1567-12

Citation: 2013 FC 776

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
(Stay of Proceedings before a public Inquiry Committee)

[1] By motion brought to this Court pursuant to Rule 18.2 of the *Federal Courts Act*, RSC 1985, c F-7 [*Federal Courts Act*], the Honourable Lori Douglas, Associate Chief Justice of the Family Division of the Manitoba Court of Queen's Bench (the Applicant or Douglas ACJ) seeks a stay of proceedings before a public Inquiry Committee established under the *Judges Act*, RSC 1985, c J-1 [*Judges Act*], pending the determination of her application for judicial review.

[2] For the reasons below, I have determined that the motion should be granted and the Inquiry proceedings stayed.

Background

[3] The Applicant 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*. The purpose of the Inquiry Committee is to investigate the relevant matters and to provide a report to the CJC regarding whether a recommendation should be made to remove Douglas ACJ judge from office.

[4] 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. The Applicant seeks a number of remedies, including an order prohibiting the Inquiry Committee from continuing its proceedings. The proceedings have been adjourned since July 27, 2012, although the Inquiry Committee has served notice that it intends to resume the Inquiry in September 2013.

[5] In the underlying application for judicial review, commenced on August 20, 2012, the Applicant alleges that the Inquiry Committee conducted itself in a manner that gives rise to a reasonable apprehension of bias, through:

- The improper cross-examination by Committee Counsel of witnesses who provided evidence favourable to the Applicant;

- An attempt to interfere, through Committee Counsel, with Independent Counsel's questioning of Mr. Chapman, the person who made the complaint giving rise to the inquiry; and,

- The Committee's refusal to allow counsel for the Applicant to cross-examine Mr. Chapman about his credibility.

[6] The Applicant also raises an allegation of institutional bias, based on the refusal by the CJC to disclose communications regarding the resignation of the former Independent Counsel. The grounds of the refusal are that these communications are the subject of solicitor-client privilege.

[7] The Respondent in this matter, the Attorney General, did not make any submissions on this motion.

[8] In a motion heard on the same day as this motion, the Inquiry Committee sought to appeal a decision of Prothonotary Tabib in which the Prothonotary refused the request of the Committee to intervene in the application for judicial review. In part, the Inquiry Committee sought to make submissions in this motion for a stay. I have dismissed the Inquiry Committee's appeal and it was not permitted to make submissions in this motion for a stay (see 2013 FC 775).

Issues

[9] The overarching issue on this motion is whether this Court should exercise its discretion to stay the proceedings of the Inquiry Committee pending the determination of the application for judicial review in accordance with s. 18.2 of the *Federal Courts Act*.

[10] It is well established that, to obtain a stay, the Applicant must meet the tripartite test for an interlocutory stay articulated in *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311, 111 DLR (4th) 385 [*RJR-MacDonald*]. Thus, the issues before me are:

1. Does the underlying application for judicial review raise a serious issue;

2. Would the Applicant suffer irreparable harm if the Inquiry Committee's proceedings are permitted to continue; and,

3. Does the balance of convenience favour the Applicant?

Serious Issue

[11] The threshold to demonstrate a serious issue is low (*Rutigliano v Ontario (Provincial Police)*, 2010 ONSC 6805 at para 10, [2010] OJ No 5342 [*Rutigliano*]; *Ontario (Commissioner, Provincial Police) v MacDonald*, [2008] OJ No 5053 at para 13, 2008 CanLII 65758 [*MacDonald*]). It is not the role of the Court at this stage to determine the merits of the application beyond a preliminary assessment (*Rutigliano*, above at para 7). Although the strength of an allegation of bias is a relevant factor, even allegations that may be unsuccessful on the merits may meet the low threshold of serious issue (see, for example, *Rutigliano*, above at paras 7, 10-14).

[12] An allegation of a reasonable apprehension of bias is measured against the test set out by Justice de Grandpré in his dissenting opinion in *Committee for Justice and Liberty et al v National Energy Board et al*, [1978] 1 SCR 369 at 394, 68 DLR (3d) 716:

> The proper test to be applied in a matter of this type was correctly expressed by the Court of Appeal. As already seen by the quotation above, the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."

[13] Bias is a grave allegation, which must be supported by "material evidence demonstrating conduct that derogates from the standard" as opposed to "mere suspicion, pure conjecture,

insinuations or mere impressions of an applicant or his counsel" (*Arthur v Canada (Attorney General)*, 2001 FCA 223 at para 8, 283 NR 346).

[14] In this particular case, the allegations of bias relate to the allegedly adversarial conduct of Committee Counsel in examination of witnesses favourable to the Applicant, alleged limits placed on cross-examination of a witness adverse to the Applicant and alleged institutional bias based on the claim of solicitor-client privilege between Independent Counsel and the CJC.

[15] In my opinion, each of these allegations of bias would meet the low threshold of serious issue. Case law cited by the Applicant demonstrates that courts have identified a reasonable apprehension of bias where counsel for a tribunal, whose role is to give the tribunal legal advice and assist in preparing a decision, conducts cross-examination or interferes with the cross-examination performed by other counsel in a way that undermines the impartiality of the tribunal (see, for example, *Després v New Brunswick Lands Surveyors Association* (1992), 130 NBR (2d) 210, 8 Admin LR (2d) 136 at 138-141 (CA); *Golomb and College of Physicians and Surgeons of Ontario* (1976), 12 OR (2d) 73 at 87-92, 68 DLR (3d) 25 (Div Ct); *Brett v Ontario (Board of Directors of Physiotherapy)* (1991), 77 DLR (4th) 144 at 147-148, 48 OAC 24 (Div Ct)). Furthermore, there are clear statements in the CJC Policies regarding the impartial role of Independent Counsel and the fact that Independent Counsel is "not representing any client". These statements, upon a preliminary examination, may also raise a serious issue with respect to the assertion of solicitor-client privilege by the CJC.

[16] I cannot ignore the fact that the application for judicial review is being brought before the conclusion of the Inquiry Committee proceedings. Thus, there may be a defence to the allegations of bias; namely, that the judicial review application is premature. In other words, should the judicial review application be dismissed on the basis that the Inquiry Committee should be entitled to complete its proceedings prior to any application for judicial review?

[17] Allegations of bias are not exempt from the general principle that parties must await the conclusion of the administrative process before commencing judicial review (see, for example, *CB Powell Ltd v Canada (Border Services Agency)*, 2010 FCA 61 at paras 30-33, [2011] 2 FCR 332).

[18] However, judicial review of certain allegations of bias may be appropriate at an interlocutory stage if continuing the administrative proceedings leads to harm that "cannot be corrected" (*Canada (Minister of Public Safety and Emergency Preparedness) v Kahlon*, 2005 FC 1000 at para 14, [2006] 3 FCR 493) or where evidence of hardship or prejudice supports the hearing of the matter at the present time (*Volochay v College of Massage Therapists of Ontario*, 2012 ONCA 541 at para 80, 111 OR (3d) 561). In this case, as discussed in further detail below, the Applicant has provided evidence of irreparable harm to her professional reputation which would occur if the proceedings are permitted to continue.

[19] Furthermore, the Court may choose to decide a matter prior to the conclusion of the administrative proceedings if the relevant administrative process is expensive and publicly funded and guidance from the Court may result in savings of time and expense in the present

proceeding and other proceedings (see, for example, *Alberta (Information and Privacy Commissioner) v Alberta (Freedom of Information and Protection of Privacy Act Adjudicator)*, 2011 ABCA 36 at para 2, 38 Alta LR (5th) 1; *Toronto (City) v Home Depot Holdings Inc*, 2010 ONSC 6071 at paras 23-28, 272 OAC 81 (Div Ct)). In this case, the Applicant provides evidence of the significant expense of the proceedings and argues that clarification of the roles of Independent Counsel and Committee Counsel would be useful in this proceeding and in future proceedings.

[20] Since the standard for serious issue is fairly low, I would not refuse to find a serious issue on the basis that this application may ultimately be shown to be premature.

Irreparable Harm

[21] In my view, the Applicant has demonstrated that irreparable harm to her personal and professional reputation will result if the Court declines to grant a stay.

[22] Irreparable harm is harm that cannot be quantified in monetary terms or which cannot be remedied by damages (*RJR-MacDonald*, above at 341). The burden is on the Applicant to demonstrate that irreparable harm will occur.

[23] Although I agree that the Applicant will suffer irreparable harm, I do not believe that this is the case simply because she has alleged a reasonable apprehension of bias on judicial review. The Applicant points to the Ontario Divisional Court's statements in *MacDonald*, above at para

14, arguing that irreparable harm exists in this case because the allegations of bias have effectively deprived the tribunal of jurisdiction. In my view, this principle may be applied only with consideration of the underlying facts (see, for example, *Xanthoudakis v Ontario Securities Commission*, [2009] OJ No 1873 at para 29 (Div Ct)). Hence, the Court must consider the circumstances of this particular case and the harm demonstrated on this particular record.

[24] The Applicant alleges that her personal and professional reputation would suffer irreparable harm if the proceedings before the Inquiry Committee are permitted to continue. I observe that the good reputation of an individual is a significant interest closely connected to the concept of human dignity underlying all *Charter* rights (*Hill v Church of Scientology of Toronto*, [1995] 2 SCR 1130 at 1175, 1179, 126 DLR (4th) 129).

[25] The present case is similar to *Adriaanse et al v Malmo-Levine et al* (1998), 161 FTR 25 at paras 21-22, [1998] FCJ No 1912 (TD) [*Malmo-Levine*] and *Bennett v British Columbia (Superintendent of Brokers)* (1993), 77 BCLR (2d) 145, [1993] BCJ No 246 at para 17 (CA) [*Bennett*]. In *Malmo-Levine*, the Federal Court stayed a hearing investigating the misconduct of RCMP officers because of the allegations of bias made on judicial review and the harm to the reputations of the officers that would follow if a stay was not granted. In *Bennett*, the British Columbia Court of Appeal found irreparable harm where the applicants could be called on to testify and their credibility could be challenged in the context of a very public hearing before the Securities Commission, if the proceedings were allowed to continue (see also, *Via Rail Canada Inc v Cairns et al* (2000), 261 NR 24 at para 6, 26 Admin LR (3d) 52 (FCA)).

[26] The active questioning and interference by Committee Counsel relates to sensitive personal information which could harm the Applicant's reputation. Moreover, apparent cross-examination by Committee Counsel of two witnesses favourable to the Applicant on unnecessary but prejudicial matters may undermine not only the credibility of these witnesses but also the reputation of the Applicant as well.

[27] I emphasize that this case implicates the disclosure of intimate and personal information in the context of a public inquiry which has been the subject of significant publicity. In this respect, the present case parallels *Viswalingam v Fort Smith Health Centre Board of Management* (1992), 9 Admin LR (2d) 281, [1992] NWTJ No 196 (SC) [*Viswalingam*], rev'd on other grounds, 16 Admin LR (2d) 322, [1993] NWTJ No 14 (CA), in which the applicant was a physician who could be subject to "involuntary medical and psychiatric examinations" in the context of the hearing (*Viswalingam*, above at 297). The Applicant raises the possibility that very personal information may be revealed through witnesses and that she herself may have to testify. Hence, the sensitive nature of the personal information which may be disclosed if the proceedings are permitted to continue supports a finding of irreparable harm.

[28] Further, as noted in *Smoling v Canada (Minister of National Health and Welfare) et al* (1992), 56 FTR 297, 8 Admin LR (2d) 285 [*Smoling*], a person's professional reputation is deeply implicated in the context of proceedings where a person's livelihood may be at stake. In *Smoling*, Justice Rothstein, as he then was, identified irreparable harm in the context of a judicial review of proceedings against a doctor regarding prescriptions written for narcotics. Justice Rothstein stated that, "I am satisfied that Dr. Smoling may suffer grave and permanent

consequences to his professional career and that he has satisfied the irreparable harm test" (*Smoling*, above at para 19). In my opinion, this case raises a very similar issue, given the nature of the public inquiry, the nature of the evidence noted above and the consequences to the legal career of the Applicant if the hearing is permitted to continue.

[29] I am satisfied that the Applicant has demonstrated that it is more likely than not that further forced disclosure of personal information will continue if the proceedings resume. I acknowledge that harm has already occurred. However, the advancement of certain positions and questions by the Committee could lead to further harm. Since the Committee has expressed its opinion that its actions are appropriate through its rulings and the Applicant points to many existing examples of conduct that would lead to alleged harm, I would conclude that it is more likely than not that the harm would continue. In sum, I find that irreparable harm to the Applicant would result if a stay is not granted.

Balance of Convenience

[30] The Applicant argues that the balance of convenience favours the granting of a stay in this case. I agree.

[31] In cases involving a public body, the public interest is relevant to the evaluation of the balance of convenience. The integrity of the administration of justice will be undermined if the proper roles of Committee Counsel and Independent Counsel are not clarified prior to the re-commencement of the proceedings. Further, the continuation of the hearing under these

circumstances would amount to a waste of public resources; this is particularly true in light of the amount of money already spent and the fact that new Independent Counsel wishes all witnesses to testify again.

[32] Regulatory bodies have no vested interest in the outcome of any judicial review and CJC Policies and the *Judges Act* require the Inquiry Committee to comply with procedural fairness.

[33] In the circumstances, I do not find that the delay in resolving the underlying proceedings is determinative of the balance of convenience. I recognize that harm to the administration of justice may result from unreasonable delay of an inquiry into the behaviour of a judge. In this particular case, there has been a lengthy delay in resolving the application for judicial review, partly attributable to complicated procedural issues raised by a number of parties. With my expectation that there will be an ongoing cooperation by all parties, I am confident that the matter will be concluded in a reasonable length of time.

[34] Finally, staying these proceedings has a direct effect on the Applicant only and does not have wide-reaching consequences. If all else is equal, then the *status quo* should be preserved pending judicial review and the stay should be granted.

Conclusion

[35] Having satisfied all three elements of the tripartite test, the Applicant is entitled to a stay of the Inquiry Committee proceedings.

[36] In the circumstances, I am not prepared to order costs.

ORDER

THIS COURT ORDERS that

1. the motion of the Applicant is granted;

2. the proceedings of the Inquiry Committee are stayed until final determination of the Applicant's application for judicial review; and,

3. no costs are awarded.

"Judith A. Snider"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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