Federal Court  Cour fédérale

Date: 20130611

Docket: T-1567-12

Ottawa, Ontario, June 11, 2013

PRESENT: Madam Prothonotary Mireille Tabib

BETWEEN:

THE HONOURABLE LORI DOUGLAS

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

ORDER

UPON the motions of the Canadian Judicial Council ("CJC"), of the Inquiry Committee of the CJC ("Inquiry Committee"), of the Independent Counsel to the Inquiry Committee ("the Independent Counsel") and of the Canadian Superior Courts Judges Association ("CSCJA") for leave to intervene in the present application including, in the case of the Inquiry Committee and of the Independent Counsel, for leave to intervene in the Applicant's motion to stay the proceedings of the Inquiry Committee pending determination of the present application;

UPON considering the motion records of the proposed interveners, including the supplementary record of the Inquiry Committee, the responding motion records of the Applicant,

the written representations in reply of the proposed interveners (other than the CSCJA), and the letter of the Attorney General indicating its consent to all motions;

Rule 109 of the *Federal Courts Rules* requires that a person wishing to intervene describe, in its motion, "how the proposed intervener wishes to participate in the proceeding and how that participation will assist the determination of a factual or legal issue related to the proceeding". The Applicant and the proposed interveners have also, quite properly, considered and made submissions on the six factors identified in *C.U.P.E. v Canadian Airlines International*, [2001] 1 FCR 226 as relevant to the exercise of the Court's discretion to allow interventions. I will not, however, discuss each factor extensively, because I am of the view that the most important factor to consider in the present case is whether a proposed intervener has shown that it will bring to the Court a explanation, a position, an argument or a perspective that is not expected to be provided by one of the parties.

All proposed interveners in this application, with the exception of the CSCJA, are institutional actors in the disciplinary process which gives rise to this application. All these institutional actors are required to maintain a position of impartiality in order to allow them to continue to carry out their functions in the event the disciplinary process continues during or following the conclusion of this application. All of them are required to carry out their respective roles and responsibilities in the public interest. 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.

Given the above, none of them can be said to be "directly affected by the outcome", all of them implicitly raise justiciable issues and a veritable public interest, and none of them can reasonably present starkly different arguments of law or positions while still maintaining their impartiality. The issues some of them have indicated they would raise, the arguments some of them have advised they would make, and the other issues and arguments that can be foreseen they would raise, are generally consistent with each other and not at all inconsistent with the arguments and issues the Attorney General could be expected to make and raise in his role as protector of the public interest and defender of the rule of law.

This case is also not like the case of *Canada (Revenue Agency) v Quadrini*, 2010 FCA 246, and other similar cases, where one of the parties is an individual without the resources to articulate appropriate legal submissions; all parties and proposed interveners are skilled jurists in their own right and represented by experienced and respected counsel.

Further, just because the proposed interveners may possess, by virtue of their functions, positions or mandate, a unique or different perspective on the broader subject matter of these proceedings, it does not follow that that perspective will necessarily translate into a different or unique submission of fact or law on the issues before the Court.

Accordingly, if all of the proposed interveners were permitted to intervene because they profess a unique perspective and a duty to act in the public interest, without having shown that they will bring to a hearing something that is in fact different from what the Court would otherwise have, the Court would likely be hearing the same submissions, merely repeated with

different intonations or emphasis by the proposed interveners. There is no benefit to the Court in knowing that a particular position or point of view is espoused by other actors or observers to a process; duplicative representations are, further, wasteful of the Court and the parties' time and not in the interest of justice.

Several proposed interveners have observed that it is difficult, and maybe premature, for would-be interveners to give much details as to the substance of the submissions they would propose to make if granted intervener status, given that the memoranda of fact and law of the Applicant and of the Attorney General have yet to be filed, and that they cannot know what issues might be raised by the Applicant's arguments and what position, if any, the Attorney General will take on these issues. The Independent Counsel further submits that interveners are not required to provide such details and that it would even be inappropriate for an intervener to express its position on the issues before being granted leave to do so. This last suggestion is not supported by the jurisprudence of this Court or by Rule 109. Rule 109 does require that proposed interveners describe, not only how they wish to participate, but also how their participation will assist the determination of issues related to the proceedings, and the jurisprudence invites the Court to consider whether the position to be advanced by interveners is adequately defended by one of the parties.

The prematurity argument is, however, apposite. As mentioned, the public interest which the proposed interveners state they must consider is also the concern of the Attorney General and many of the issues raised by the proposed interveners are issues that can be expected to properly be raised by the Attorney General, notwithstanding the Attorney General's earlier motion to be

removed as a Respondent. It must be remembered that that motion was not based on the Attorney General's unwillingness to act, but on his concern that his intervention would be, at law, inconsistent with his role as Minister of Justice, a concern which the Court has now determined to be unfounded. 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.

To the extent the proposed participation of the interveners go to issues of the statutory, regulatory and policy context of the judicial investigation and inquiry process, of the prematurity of judicial review, of the standard of review, of the principles of finality and impartiality and of judicial accountability, these are issues on which the Attorney General is well versed, and as well placed as the potential interveners to make submissions to the Court. The intervention of the institutional actors on these issues and principles, and how they apply to the facts of this case, could well be duplicative and unnecessary. 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. Only where the proposed interveners have shown that they can bring a particular position or point of view which another party is expected to be unable or unlikely to make, should the intervention be permitted at this stage.

With these observations in mind, I now turn to each of the proposed interveners' motion.

The Inquiry Committee:

The Inquiry Committee's motion materials specify that it wishes to intervene "by filing a memorandum of fact and law and participating fully in the oral hearings relating to this application" and to the motion to stay, but "limited to submissions explaining the evidentiary record and procedures followed by the Inquiry Committee and relating to jurisdictional issues, including the reviewabilty at this time of the Committee's Rulings". The Inquiry Committee also states that it "will not make submissions that expand upon the Rulings they have made and will not address the merits of the application without further order of the Court".

From this, it appears that the Inquiry Committee does not intend to file evidence or cross-examine on the evidence filed on the merits of the application – it has expressly stated its intention not to do so on the motion for a stay. Considering that the Applicant's evidence on the merits of the application has already been filed, any need to supplement or contest that evidence would have been apparent to the Inquiry Committee and should therefore have been addressed in its motion record and submissions. As there is no allusion to this possibility, I proceed on the basis that the Inquiry Committee's proposed participation would not include filing evidence or participating in cross-examinations on affidavits.

I turn first to the Inquiry Committee's desire to explain the record and its procedures. The Inquiry Committee broadly states that it can provide, or that the Court may require, an explanation of the context of the rulings it has made or of the record, and that it can assist the Court as to procedural matters such as the scope of the examination and reliance on the evidence elicited by the Committee Counsel. The Inquiry Committee however provides no details as to

what might be missing or unclear from the extensive record already constituted and put before the Court by the Applicant. With respect, it is also unclear how, without adducing evidence, the Inquiry Committee might be able to provide assistance to the Court on these issues, or how it can speak to these issues without supplementing the reasons it has already provided in its rulings, given that the propriety of the examination by Committee Counsel, the decision to prevent the Applicant's counsel from asking certain questions, the scope of the examination and reliance on the evidence elicited by Committee Counsel were considered and discussed in the Inquiry Committee's rulings.

To the extent the Inquiry Committee submits that some of the allegations made by the Applicant include matters for which no transcript exists, such as the alleged interference by Committee counsel in the cross-examination of Mr. Chapman, the Inquiry Committee cannot be in a position to clarify the record if it does not intend to adduce evidence. The communications to which the Inquiry Committee refers as contradicting the Applicant's allegations, although not in the transcript itself, are nevertheless in the record. It should not be presumed that the Attorney General will not, in the interest of assisting the Court, bring this evidence to the Court's attention. The Inquiry Committee is not better placed than the Attorney General to review and analyse the record that has been put before the Court.

The Inquiry Committee also asserts that it should be allowed to address jurisdictional issues. The first such issue is whether the Inquiry Committee has jurisdiction to instruct Committee Counsel to question witnesses. Whether it is characterized as an issue of law or a jurisdictional issue, it remains that the Inquiry Committee has already, in its rulings,

comprehensively addressed this issue. Allowing the Inquiry Committee to make further submissions on this issue before the Court would clearly be to allow the Inquiry Committee to supplement or expand upon the reasons already given.

The second jurisdictional issue asserted is "whether it is open to the Applicant to raise allegations of bias in this Court that have not been put to the Inquiry Committee for their consideration". If that question goes to jurisdiction at all, it goes to the jurisdiction of the Federal Court to entertain the allegations, and not to the jurisdiction of the Inquiry Committee to make a decision, since by the Inquiry Committee's own argument, it was not asked to make that decision. The Inquiry Committee is not in a better position then the Attorney General to make submissions as to the jurisdiction of this Court or as to the proper scope of the issues on judicial review.

The Inquiry Committee also proposes, if it is granted intervener status, to address the issue of the prematurity of the judicial review and the availability of judicial review for interlocutory rulings, both as part of the merits of the application and as part of the motion for a stay. As mentioned in the introductory remarks, such arguments are well within the areas in which the Attorney General can and does typically make representations to the Court, and there is no reason to believe at this time that the Attorney General cannot or will not make those submissions to the Court. The Inquiry Committee is not in a better position than the Attorney General to make that kind of submissions. The Inquiry Committee's motion to intervene is, in this regard, at best premature.

Finally, in the context of the motion for a stay, the Inquiry Committee proposes to speak to the balance of convenience. Unless the Inquiry Committee proposes to adduce evidence as to the practical consequences of a stay of its proceedings on its ability to complete its mandate in the event it is eventually allowed to proceed – and the Inquiry Committee has expressly stated that it did not intend to adduce evidence on the motion – the Inquiry Committee's submissions on this issue can only go to the broad public interest in allowing the Committee to complete its work, with the possibility that the resulting recommendations may make judicial review unnecessary. Again, these are well-known arguments based on jurisprudence and legal principles, in which the Attorney General is well-versed and fully qualified to discuss.

I would add that the fact that the Inquiry Committee is unquestionably the "Tribunal" whose decision and process is being reviewed here, that its impartiality is directly at issue and that it may, if the application is unsuccessful, be required to continue its work impartially, heightens the necessity for the Court to carefully balance the purpose, necessity or usefulness of its intervention against the harm that may be caused to the public perception of its impartiality if it is perceived to be defending its decisions or taking an adversarial position towards the Applicant. In the circumstances, the Inquiry Committee's motion for leave to intervene will be denied.

The Independent Counsel:

The Independent Counsel delineates precisely the issues on which she proposes to intervene, but unfortunately, provides no details of the position she would take on these issues

and it is unclear whether she also intends to adduce evidence. The Applicant submits that this alone is sufficient grounds to dismiss the motion.

In the case of the Independent Counsel, the combination of her position and functions and of the issues on which she proposes to intervene nevertheless allow the Court to foresee the usefulness of her participation on some issues.

The Independent Counsel seeks leave to file a motion record on the Applicant's motion for a stay and to make submissions at the hearing of that motion, but limited to the question of the balance of convenience; to make submissions with respect to the CJC's objection to the Applicant's request under Rule 317 for production of the exchanges between the CJC and the former Independent Counsel relating to his resignation; and "to file an application record and make submissions on the merits of the application."

It should be remembered that the question of the proper role of Commission Counsel is central to most of the issues in this application, and that the manner in which the Independent Counsel is to carry out her functions is directly impacted by the possible interplay between the respective roles and conduct of her office and that of the Commission Counsel. The predecessor to the current Independent Counsel further directly spoke to these issues in the course of the hearing of the Applicant's motion for recusal before the Inquiry Committee, which resulted in the ruling now under review.

While it is not known whether the new Independent Counsel will share her predecessor's views and position on these issues, the point of view of the Independent Counsel is both clearly relevant and of a nature to assist the Court in determining the issue of the proper limits to the Committee Counsel's participation in the Inquiry Committee's hearings. The Independent Counsel properly spoke to these issues before the Inquiry Committee without concerns having been raised that his perceived independence and impartiality might be at risk, and I cannot see how similar participation before the Court should now raise or magnify such concerns.

The Independent Counsel's role and conduct in the Inquiry Committee's proceeding is clearly affected by the manner in which the Committee Counsel might be permitted or directed to participate in those hearings or to provide direction or instructions to her. She is in a unique position to bring to the Court that perspective of the interplay between the two counsel, and I am satisfied that the Court would benefit from that perspective.

This conclusion applies to the Independent Counsel's intervention on the motion for a stay, as it concerns the balance of convenience, and on the merits of the application. The Independent Counsel will be allowed to participate in the proceedings herein to provide insight as to the respective functions and roles of the Committee Counsel and of the Independent Counsel, as to the relationship and interplay between them in the manner in which they carry out their roles including, on the motion for a stay, as to how these factors might affect the conduct of the inquiry pending the determination of this application, or after its determination if the Applicant is unsuccessful.

The Independent Counsel also occupies the office in respect of which the CJC has asserted that a solicitor-client relationship exists. The persons said to be parties to a solicitor-client relationship are clearly the only and best placed persons to speak to the nature of their relationship and to assist the Court in determining whether, for the purpose of a claim of solicitor-client privilege or as an element giving rise to an alleged institutional bias, the relationship is one of solicitor and client. The participation of the Independent Counsel in the determination of the CJC's objections to the Rule 317 request based on privilege, and on the merits of the application in respect of the nature and characterization of her office's relationship with the CJC, would therefore be appropriate and helpful.

While the Independent Counsel is required to carry out her functions before the Inquiry Committee in the public interest and that her participation in these proceedings should be informed by the same concerns, she has no independent role in defending or representing the public interest at large, or in judicial review proceedings arising out of the Inquiry Committee's process. That role, in judicial review proceedings, primarily belongs to the Attorney General. The Independent Counsel is not better placed than him to address the general issues of whether or not the balance of convenience or the public interest at large favours a stay of the Inquiry Committee's proceedings, of whether or not the rulings or conduct of the Inquiry Committee give rise to a reasonable apprehension of bias, or of whether or not the alleged solicitor-client relationship between her office and the CJC gives rise to apprehension of institutional bias. The participation of the Independent Counsel should therefore be strictly limited to the subject matter described above.

The CJC:

The CJC seeks an order granting it leave to "file a memorandum of fact and law and to participate fully in the oral hearings relating to the application". The CJC has elected not to seek intervener status on the motion for a stay.

More particularly, the CJC sees itself as having a particular interest and contribution to make in responding to the allegations of institutional bias based on the relationship between the Independent Counsel and the Vice-Chair of the CJC's Judicial Conduct Committee, in "explaining the record and its procedures and responding to procedural and jurisdictional errors alleged to have been committed by the Inquiry Committee", in "providing the statutory, regulatory and policy context" of the judicial disciplinary process and on making submissions as to whether the application is premature from an institutional perspective.

The written representations of the CJC do not allude to or refer to the possibility that it might lead evidence on the application. As was the case for the Inquiry Committee, the nature of the proposed submissions as described in the motion record, and the reference to filing a memorandum of fact and law and making oral submissions to the Court, lead to the inference that the CJC does not intend to file evidence on the merits of this application.

The CJC's submissions as to its desire to explain the record and speak to jurisdictional and procedural errors alleged to have been made are equally as vague as the Inquiry Committee's. The comments made in respect of the Inquiry Committee's motion as to those issues are equally applicable to the CJC's motion. The CJC's desire to intervene to provide the

statutory, regulatory and policy context of the disciplinary process in general or to argue as to the prematurity of the application also fall to be determined the same way as it was determined in the case of the Inquiry Committee. I am not persuaded that the CJC is in a better position to make such submissions as would be the Attorney General. The CJC's motion in that regard is premature.

The CJC is not the tribunal whose decision or conduct is at issue on this judicial review, and the principles requiring a tribunal's participation may not apply to it with the same force as they apply to the Inquiry Committee. However, the CJC is the body who will be called upon to review and deliberate upon the Inquiry Committee's report, and who may receive representations from the Applicant, including on the very issues raised in this application, if this Court finds, as the CJC urges, that the judicial review is premature. There is, consequently, reason to weigh carefully the benefits or usefulness of the CJC's participation against the risk that this participation may be perceived as going to the merits of issues that may eventually be argued before the CJC.

The CJC, finally, intends to respond to the allegations of institutional bias. The Applicant concedes that the CJC's participation on this issue would be useful and appropriate in that respect. The Applicant submits, however, that because the CJC's assertion of a solicitor-client relationship with the Independent Counsel contradicts its policies and previous positions taken before the Court, the CJC should only be permitted to intervene on condition that it provides evidence to explain its assertion of a solicitor-client relationship.

For the same reasons as given in respect of the Independent Counsel, I am of the view that the CJC is in a unique position to provide useful information and assistance to the Court on the issue of the nature and characterization of the relationship between the CJC and the Independent Counsel. Also, because the CJC is the institution whose independence is impugned by reason of its internal organization, structure and process, it is clear that the CJC's participation can be received without fear of damaging its perceived impartiality with respect to the Applicant herself, and that the CJC's participation would be of assistance to the Court. I am not, however, prepared to impose on the CJC's participation the conditions suggested by the Applicant, as I am not satisfied that the usefulness of the CJC's participation depends on its filing of the evidence requested by the Applicant.

The CJC will therefore be granted leave to participate in the application for the limited purpose of addressing the issue of the alleged institutional bias, and may also file evidence going to that issue. As the CJC is the body objecting to the communication of the exchanges between itself and the Independent Counsel, and will for that reason automatically have a right to participate in any proceeding to rule on that objection, it is not necessary for this order to specifically provide for the right to intervene in that aspect of the proceeding.

The CSCJA:

Although both the Applicant and the Attorney General have consented to the CSCJA's intervention, the Court is not bound by that consent and must still be satisfied that the proposed intervention will be of assistance to the Court and serve the interest of justice.

The CSCJA seeks to make written and oral submissions based on the record placed before the Court by the parties. Beyond stating that the interests represented by CSCJA transcend and may not be coextensive with the individual interests of the Applicant, and that it wishes to speak to "the nature and function of the investigative processes to balance the guarantee of judicial independence with judicial accountability", the CSCJA's motion record does not specify in what regard its submissions on these issues are in fact expected to differ from the Applicant's submissions. For that reason, the CSCJA's motion is, at best, premature and cannot be granted at this time.

THIS COURT ORDERS that:

1. The motion of the Inquiry Committee is dismissed, with costs in favour of the Applicant.

2. The motion of the Canadian Superior Court Judges' Association is dismissed.

3. The Independent Counsel is granted leave to intervene in this proceeding as follows:

    a) To serve and file a motion record, no later than June 14, 2013, to participate in cross-examinations and to make oral submission on the Applicant's motion for a stay of the Inquiry Committee's proceedings, limited to the respective functions and roles of the Committee Counsel and

the independent Counsel and the relationship and interplay between them in the manner in which they carry out their roles, including how these factors might affect the conduct of the inquiry pending the determination of this application, or after its determination if the Applicant is unsuccessful.

b) To file evidence and to make submissions in any proceeding to rule on the objection of the Canadian Judicial Council ("CJC") to the Applicant's request under Rule 317 for production of communications between Guy Pratte and the CJC relating to Mr. Pratte's resignation.

c) To serve evidence, participate in cross-examinations, serve and file an application record and make oral submissions on the merits of this application, limited to the respective functions and roles of the Committee Counsel and of the Independent Counsel and the relationship and interplay between them in the manner in which they carry out their roles, and to the nature and characterization of the relationship between the Independent Counsel and the CJC and/or the Vice-Chair of the Judicial Conduct Committee.

4. No costs are awarded in favour of or against the Independent Counsel in respect of its motion to intervene or of the Independent Counsel's participation in this application, as permitted by this order.

5. The Canadian Judicial Council is granted leave to intervene in this proceeding as follows:

   a) To serve evidence, participate in cross-examinations, serve and file an application record and make oral submissions on the merits of this application, limited to the issue of the nature and characterization of the relationship between the Independent Counsel and the CJC and/or the Vice-Chair of the Judicial Conduct Committee and whether that relationship and/or the assertion of a solicitor-client relationship between them gives rise to a reasonable apprehension of institutional bias against the Applicant.

6. The award of costs on the CJC's motion and for the participation of the CJC in the application shall be within the discretion of the Judge on the merits.

"Mireille Tabib"
Prothonotary