Federal Court  Cour fédérale

Date: 20130430

Docket: T-1789-12

Ottawa, Ontario, April 30, 2013

PRESENT: Madam Prothonotary Mireille Tabib

BETWEEN:

ALEXANDER CHAPMAN

Applicant

and

THE ATTORNEY GENERAL OF CANADA, GUY PRATTE (INDEPENDENT COUNSEL TO THE CANADIAN JUDICIAL COUNCIL INQUIRY INTO THE CONDUCT OF THE HONOURABLE LORI DOUGLAS, THE CANADIAN JUDICIAL COUNCIL, AND THE HONOURABLE LORI DOUGLAS

Respondents

ORDER

UPON the motion of the Attorney General for an order removing him as a respondent to this application.

UPON considering the respective motion records of the Applicant, of the Attorney General and of the Canadian Judicial Council (the CJC"), and hearing the representations of counsel for these parties (the remaining parties taking no position on this motion).

This order should be read in conjunction with the reasons for order issued in *The Honourable Lori Douglas v Attorney General of Canada*, 2013 FC 451, heard concurrently with this motion.

Mr. Chapman named as respondents to this application, alongside the Attorney General, Independent Counsel, the CJC and Douglas, ACJ. These respondents have not suggested that they should not properly have been named as respondents pursuant to Rule 303(1). In the absence of submissions to the contrary, I have assumed for the purpose of this motion, but without determining the matter, that all of these other respondents, or any one of them, are properly named pursuant to Rule 303(1). On the basis of that assumption, the Attorney General could not have been named as a respondent pursuant to Rule 303(2), and his motion to be removed as respondent does not involve the application of Rule 303(3).

If there was any doubt that the other named respondents are persons required to be named pursuant to Rule 303(1), then the analysis conducted in *Douglas* in respect of the Attorney General's reliance on Rule 303(3) would be equally applicable here and would justify the Attorney General's motion being dismissed.

Starting, however, from the premise that the Attorney General was not named as default respondent in application of Rule 303(2), I must consider whether, pursuant to Rule 104(1)(a), the Court should remove him as respondent. Rule 104(1)(a) reads as follows:

"104. (1) At any time, the Court may	« 104. (1) La Cour peut, à tout moment, ordonner :
(*a*) order that a person	*a*) qu'une personne

who is not a proper or necessary party shall cease to be a party;"	constituée erronément comme partie ou une partie dont la présence n'est pas nécessaire au règlement des questions en litige soit mise hors de cause; »

The first step in the analysis is to determine whether the Attorney General is "a proper or necessary party" to the within application.

Mr. Chapman's application seeks, as principal relief, a declaration that the Independent Counsel must seek the leave of the Inquiry Committee in order to be removed from the record; an order quashing his decision to resign and the CJC's decision to accept the resignation; and an order requiring the Independent Counsel to resume his role or bring a motion before the Inquiry Committee to be removed from the record. In the alternative, Mr. Chapman seeks a declaration that the role of the Independent Counsel gives rise to a reasonable apprehension of institutional bias and a declaration that the mandate set out in section 3(3) of the CJC's *Inquiries and Investigations By-Laws* are *ultra vires* the *Judges Act* and contrary to section 7 of the *Charter*; or an order that the Inquiry Committee resume its hearing, with or without Independent Counsel.

Although the public interest is engaged by the orders sought in this application, indirectly engaging the Attorney General's role as defender of the public interest, the Attorney General is not a person "directly affected" by these orders. Nor is the Attorney General required to be named by the *Judges Act* or any other legislation pursuant to which the application is brought. The Attorney General was not, therefore, required to be named pursuant to Rule 303(1).

There are no other provisions in the *Federal Courts Act* or the *Federal Courts Rules* pursuant to which the Attorney General would be required to be named as a respondent.

Section 57 of the *Federal Courts Act* provides that where the constitutionality of an Act of Parliament or of a regulation made thereunder is in question, notice must be given to the Attorney General. Section 57 of the *Federal Courts Act* explicitly recognizes the Attorney General's interest in such matters, and provides that he has an automatic right to appear and be heard. However, it does not require that he be named as a party to the proceedings.

Likewise, Rule 110 of the *Federal Courts Rules* provides that the Attorney General should be given notice of any proceedings raising a question of general importance, implicitly recognizing the Attorney General's interest in such proceedings. Again, however, that rule does not require that that the Attorney General be named as respondent.

The Attorney General is therefore not a "necessary" party to this application, but is he a "proper" party within the meaning of Rule 104(1)(a)? I am not aware of any instance where the meaning of this term was considered. Is a proper party one who has a discernable interest in the proceeding, or only one who is permitted or required to named pursuant to the *Federal Courts Act* or the *Federal Courts Rules*?

As interesting as this question might be, I do not consider that it is necessary to resolve it in order to rule on this motion. As clearly indicated by the wording of Rule 104(1), an order to remove a person as a party is discretionary. Where the Court is satisfied that a person named as

party is not a proper or necessary party, it may, but is not required to, remove that person as a party. Accordingly, even if the Attorney General is not, depending on the interpretation given to that term, a "proper" party to this application, the Court may still decline to exercise its discretion to remove him as a party respondent.

Several factors should inform the exercise of this discretion in the present case:

First, this application does question the constitutional validity or applicability of the CJC's by-laws. Even though these by-laws do not require the approval of the Governor in Council, they nonetheless are "regulations made under an Act of Parliament", having been specifically authorized under the *Judges Act*. The application therefore triggers the requirement of section 57 of the *Federal Courts Act*, giving the Attorney General the automatic right to adduce evidence, be heard and institute an appeal in respect of the constitutional question. The application also, as mentioned, raises issues of general importance engaging the public interest, represented by the Attorney General.

Second, as determined in *Douglas,* the Attorney General's participation in proceedings arising from the Inquiry Committee process is neither precluded nor inconsistent with his dual role as Attorney General and Minister of Justice.

Third, this application arises out of the same proceeding as the *Douglas* matter and raises issues rooted in the same circumstances. The Attorney General will remain a party to *Douglas* litigation, and may, in his discretion, choose to participate therein as a full party. To the extent

the Attorney General were to participate in the *Douglas* matter, as is his right, it may be in the interest of justice to ensure that the position he may take therein is adequately reflected and presented in this application without the need for him to formally move to intervene.

Fourth, as mentioned in *Douglas*, keeping the Attorney General as a named respondent in this application does not impose on him an obligation to participate in the litigation, or define the extent or purpose of any participation he would choose to pursue. The continued presence of the Attorney General as a named respondent in this application is not, in any way, improper, prejudicial, inappropriate or determinative of any substantive or procedural issue. It may, further, serve the interest of justice by avoiding the need for a formal motion for leave to intervene.

Taking these factors in consideration, even if the Attorney General was not a "proper" respondent in this application, in the sense that there are no applicable provision requiring that he be named, I would in any event decline to exercise my discretion to remove him as a party respondent. For these reasons, I do not need to determine whether the Attorney General is a "proper" party to this application.

IT IS ORDERED THAT:

1. The Attorney General's motion is dismissed.

"Mireille Tabib"
Prothonotary