

Federal Court



Cour fédérale

Date: 20130913

Docket: T-1567-12

Ottawa, Ontario, September 13, 2013

PRESENT: Madam Prothonotary Mireille Tabib

BETWEEN:

THE HONOURABLE LORI DOUGLAS

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

and

**CANADIAN JUDICIAL COUNCIL
AND
INDEPENDENT COUNSEL TO THE
INQUIRY COMMITTEE REGARDING
THE HONOURABLE LORI DOUGLAS**

Interveners

ORDER

UPON the Applicant's motion for:

- (a) An order requiring the Canadian Judicial Council ("CJC") to produce the resignation letter of Guy Pratte and all related documents;

- (b) An order requiring Mr. Pratte to provide evidence under oath in relation to this motion, either by way of affidavit or out-of-court examinations;
- (c) The costs of this motion; and
- (d) Such further and other relief as this Court may deem just.

UPON considering the motion record of the Applicant, the motion record and supplementary motion record of the Intervener, the CJC, the motion record of the Intervener, the Independent Counsel to the Inquiry Committee (“Independent Counsel”), and the transcript of the cross-examination on affidavit of Norman Sabourin;

UPON noting that the Respondent Attorney General did not file a motion record and did not appear to make representations at the hearing, although counsel for the Attorney General made herself available to make submissions should the Court so request;

UPON hearing the representations of counsel for the Applicant and the Interveners.

AND UPON the Applicant having withdrawn her request for the relief sought at subparagraph (b) of her notice of motion (requiring Mr. Pratte to provide evidence by way of affidavit or out-of-court examination).

This motion arises from the Applicant’s request, made to the CJC pursuant to Rule 317 of the *Federal Courts Rules*, for communication of the resignation letter of Mr. Guy Pratte,

formerly the Independent Counsel to the Inquiry Committee regarding the Honourable Lori Douglas, and related correspondence. While the CJC has not denied the existence of the documents sought, it has objected to producing them.

The CJC's position and argument:

The CJC argues that the only “decision” on which the present judicial review is engaged is the decision of the Inquiry Committee dismissing the Applicant’s motion to recuse itself. Since the correspondence at issue was exchanged only between Mr. Pratte and Mr. Sabourin, acting on behalf of Chief Justice Wittman in his capacity as Vice-Chair of the Judicial Conduct Committee, and since the CJC’s structure separates and insulates the mandates of the Vice-Chair and of the Inquiry Committee, the correspondence was not and is not in the possession of the relevant decision-maker. Rule 317 does not allow for production of documents from other bodies than the decision-maker whose decision is at issue.

The CJC specifically denies that the notice of application properly seeks judicial review of the CJC’s assertion of a solicitor-client relationship with Mr. Pratte or of a privilege over the correspondence, such that a “decision” of the CJC would be at issue. The communications can therefore not be considered “the record” of the decision for the purposes of Rule 317. The CJC submits that the notice of application cannot be construed as seeking review of the CJC’s decisions or actions relating to Mr. Pratte, as the relief was not sought within 30 days of the CJC’s assertion of privilege and would be contrary to Rule 302 of the *Federal Courts Rules*, whereby applications should be limited to a single order.

The CJC concedes that, through an amendment authorized in May 2013, the Notice of Application now also raises a ground of institutional bias arising out of the CJC's assertion of solicitor-client privilege over its communications with Mr. Pratte. However, it argues that to the extent institutional bias is raised in support of a relief of declaration and prohibition of the entire disciplinary process, the communications are still not amenable to production under Rule 317, for the reasons that follow. First, the CJC argues that Rule 317 does not apply where there is no "order" or "decision" under review. As is the case for proceedings in *mandamus*, there is no "decision" involved in an application for a declaration or a prohibition. Second, the CJC argues that the communications themselves are, in any event, irrelevant to the argument of institutional bias, as the notice of allegation alleges that it is the assertion of the solicitor-client relationship which gives rise to an appearance of institutional bias. The CJC being on record as having asserted this privilege, the factual basis for the Applicant's argument of institutional bias is established and the contents of the communications are irrelevant.

Of course, the CJC submits that even if the Court should find that the communications are relevant and amenable to disclosure pursuant to Rule 317, they are, in fact, privileged and therefore exempt from disclosure. The CJC further asserts that the institutional bias argument is improperly and prematurely brought before this Court because it was not raised before the Inquiry Committee. The CJC intends to raise this argument as a preliminary issue on the merits of the application. It therefore urges the Court to refrain from determining the issue of privilege on this motion, so as not to risk compromising the privilege on an issue that may not properly be before the Court.

The Independent Counsel's position and argument:

The Independent Counsel's arguments and position on the motion are in line with those of the CJC.

The Applicant's position and argument:

For her part, the Applicant argues that the CJC's refusal to provide her with Mr. Pratte's resignation letter on the basis of solicitor-client privilege is a decision within the meaning of Rule 317, as is the CJC's decision to assert the existence of a solicitor-client relationship between itself and Mr. Pratte, and that her application seeks to review these decisions. As such, the communications fall squarely within the ambit of Rule 317, as the decision-maker is the CJC and as the communications are clearly within its possession.

Beyond construing the application as seeking review of the decision to assert solicitor-client privilege, the Applicant also argues that her application seeks an order prohibiting the proceedings against her on the basis, *inter alia*, of a reasonable apprehension of institutional bias arising from the assertion of a solicitor-client relationship with Independent Counsel. Accordingly, the identification of the decision-making body in this case cannot be limited to the Inquiry Committee, since the CJC is the federal body responsible for overseeing the Inquiry Committee's conduct and is the tribunal that will ultimately review the Inquiry Committee's report.

With respect to the relevance of the contents of the communications – as opposed to the mere fact that the CJC has asserted privilege over them – the Applicant maintains that the

contents of the communications are indeed relevant to the determination of this application, for the reasons that follow. First, the Applicant alleges that Mr. Pratte was aware and bound by the rules of professional conduct prohibiting him from abandoning a case in the middle of a hearing without serious reasons. Improper interference by the CJC in Mr. Pratte's conduct as Independent Counsel would constitute extraordinary circumstances under which he would have felt that he could no longer fulfill his duties to act impartially and in accordance with his best judgment of the public interest. The only event known to have occurred prior to Mr. Pratte's resignation was his filing of a judicial review application challenging the Inquiry Committee's conduct. The fact that he resigned one week after filing his application leads to the inference that the CJC attempted to interfere with Mr. Pratte's conduct and compromised his independence by "instructing" him to withdraw his application for judicial review, causing Mr. Pratte to resign. Improper interference by the CJC in the manner in which Independent Counsel discharges his mandate would give rise to a reasonable apprehension of institutional bias. The Applicant submits that the communications surrounding Mr. Pratte's resignation are essential for the Court to determine whether that inference is justified. Second, the Applicant argues that the contents of the communications are themselves necessary to the determination of whether or not a solicitor-client relationship existed between Mr. Pratte and the CJC, and whether the CJC's assertion of the privilege is justified. If such a relationship exists, the entire CJC enquiry process is flawed and vitiates the Applicant's right to procedural fairness. If the relationship between the CJC and Independent Counsel is not one of solicitor-client, then the CJC's assertion of privilege is unfounded and not only is the Applicant entitled to request and obtain a copy of the communications, but the CJC's improper assertion of privilege and attempts to "suppress" the correspondence would give rise to a reasonable apprehension of bias.

The Applicant finally submits on this motion that the CJC has not established the existence of the privilege claimed and that to the extent the Court finds the communications to be relevant and amenable to disclosure under Rule 317, the Court should order their production.

Analysis – Rule 317 and relevance:

The scope of a judicial review application and the relevance of documents for the purposes of Rule 317 must be assessed having regard to the notice of application, the nature of judicial review, and the grounds of judicial review invoked by the Applicant in the notice of application and in the affidavits filed by the Applicant. (*Gagliano v Canada (Commission of Inquiry into the Sponsorship Program)*, 2006 FC 720 at para 49 and *Canada (Human Rights Commission) v Pathak*, [1995] 2 FC 455 (FCA) at para 10).

It is unarguable that the application, as originally filed on August 20, 2012, sought to review only the Inquiry Committee's ruling and decision not to recuse itself, and that the communications between Mr. Pratte and the CJC, which postdate the Inquiry Committee's ruling and did not involve it in any way, are not relevant to the review of the Inquiry Committee's ruling.

However, immediately upon the CJC's refusal to disclose Mr. Pratte's resignation letter and its assertion of a solicitor-client relationship, the Applicant communicated in writing to the CJC its position challenging the existence of such a relationship and of the CJC's right to claim privilege over the communications. The Applicant's communications to the CJC further asserted her inference that the CJC attempted to influence Mr. Pratte to withdraw his judicial review

application, that those attempts were improper and had caused Mr. Pratte's resignation, giving rise to a reasonable apprehension of bias. The Applicant indicated her intention to amend her application to raise these new issues at least as early as October 3, 2012 and communicated a proposed amended pleading to that effect on October 12, 2012. Given the Attorney General's motion to withdraw as a respondent and Mr. Chapman's motion to be made a respondent, the Court directed that the Applicant's motion to amend be deferred to after the determination of these motions, and the Applicant's motion to amend was formally brought and granted in May 2013.

The Fresh as Amended Notice of Application does not seek any specific relief with respect to the CJC's refusal to disclose Mr. Pratte's resignation letter or related communications, although it seeks an order prohibiting the continuation of the Inquiry Committee proceedings and "such other relief as seems just". The Fresh as Amended Notice of Application also does not expressly allege that the CJC's assertion of a solicitor-client relationship and of privilege is unfounded. However, the Amended Notice of Application does directly allege:

- That the duty of fairness owed to her requires that the Independent Counsel be "free from influence from any party or body" (paragraph 9);
- That the Independent Counsel's resignation and the reasons therefore "are related to (...) [his] application for judicial review" (paragraph 18);
- That the CJC has refused to disclose the communications between itself and the Independent Counsel and has asserted a solicitor-client relationship with him (paragraphs 19 and 20).

The notice of application expressly asserts that the CJC's refusal to disclose the communications and its assertion of a solicitor-client relationship, in and of themselves, constitute interference with the Independent Counsel's independence and give rise to a reasonable apprehension of institutional bias. This, together with the absence of express allegations that the refusal to disclose or the assertion of privilege are unfounded, could support the CJC's argument that the sole ground for the allegation of institutional bias at issue is the CJC's assertion of the privilege. If the Court accepts that the judicial review is so limited, the contents of the communications would not be relevant to the determination of the judicial review.

The Court, however, on a preliminary motion such as this, should be careful that it does not, through an unduly narrow reading of a notice of allegation, prevent the Applicant from asserting and the Court from considering all arguments and relief that fairly arise from the notice of application and the grounds raised therein, provided that they present a reasonably arguable case.

The Applicant's arguments, as briefly outlined above and more fully developed in the Applicant's motion record, as to whether a solicitor-client relationship can or did properly arise and whether privilege can properly be claimed in the present case, as to whether an inference can be drawn from the circumstances that the CJC instructed Mr. Pratte to discontinue his judicial review, and whether such instructions, if given, would be inappropriate and give rise to a reasonable apprehension of institutional bias, raise serious, arguable issues that are rationally connected to and arise from the facts alleged and the grounds raised in the Notice of Application.

Further, it appears from the Applicant's written representations on this motion that a factual basis for these arguments can be found in the affidavits of Sarah Whitmore already filed by the Applicant on the merits of the Application.

As a result, taking into account all of the above circumstances, I am satisfied that this application implicitly includes within its scope the judicial review of the CJC's assertion that a solicitor-client relationship exists between itself and the Independent Counsel, and that it should be construed as such for the purposes of Rule 317.

The CJC's argument that this interpretation offends the strictures of Rule 302, limiting applications for judicial review to a single order, is not retained. Rule 302 gives the Court discretion to allow an application to proceed in respect of more than one decision. The Court's order granting leave to amend the Notice of Application must be taken as including the authorization to proceed with respect to the CJC's decision. With respect to the CJC's argument that the application, as regards the CJC's assertion of privilege, was not brought within the deadlines specified in section 18.1 of the *Federal Courts Act*, I am of the view that it is not plain and obvious that the application must necessarily fail on that ground. Unless the matter is beyond doubt, this argument is not determinative, at this stage, of the proper scope of the application for the purposes of Rule 317. Rather, the determination of this argument should properly be left to the Judge on the merits.

As I have found that the scope of the application includes a review of the CJC's assertion that a solicitor-client relationship exists between itself and the Independent Counsel, the

communications between the CJC and the Independent Counsel properly constitute the record of that decision, and are amenable to disclosure pursuant to Rule 317, subject the CJC's objection based on privilege, which will be discussed below.

Even if I am wrong in this, and that the CJC's assertion of a solicitor-client relationship with the Independent Counsel is not properly a "decision" within the meaning of Rule 317 or that the legality or correctness of that assertion is not directly at issue in this application, I remain of the view that the communications between the CJC and the Independent Counsel are relevant to the issues raised this judicial review, and that the interest of justice requires that the Judge seized of the merits of this application have access to the communications exchanged between the CJC and Mr. Pratte.

As the arguments made before me and the analysis carried out by the Federal Court of Appeal in *Slansky v Canada (Attorney General)* 2013 FCA 199 demonstrate, the determination of whether a solicitor-client relationship is formed between the CJC and lawyers retained or appointed by it pursuant to its By-Laws and policies on judicial conduct cannot be resolved solely by interpreting these By-Laws and policies. The contents of the communications between the CJC and counsel are an essential element to that determination.

I do not accept the CJC's suggestion that if this application were to proceed solely on the issue that the CJC's assertion of a solicitor client relationship in and of itself gives rise to a reasonable apprehension of institutional bias, the Court would not have to consider or determine whether the CJC's assertion of the relationship is justified in the circumstances of this case. In

determining whether a reasonable person, in possession of all relevant facts, would perceive bias from the CJC's "mere" assertion that a solicitor-client relationship exists between itself and the Independent Counsel, the Court may well need to consider whether that perception is affected or can depend on whether or not the assertion was justified and appropriate, on the purpose and scope for which that relationship could validly be formed, and on whether or not the relationship between the CJC and Independent Counsel in this case conformed to what may be appropriate. This analysis, if the Judge seized of the merits considers it relevant, would necessarily be done in an entirely abstract and theoretical manner if the actual communications between the CJC and Mr. Pratte were not placed before the Court. Putting the actual communications before the Court would ensure that, to the extent the Court finds it necessary, there is before it a full factual record, rather than speculations and hypothesis. Given the seriousness and importance of these issues, it is of paramount importance that the Court have before it all of the elements it may need to make its determination.

The Applicant's argument that the circumstances permit the inference that Mr. Pratte's resignation was provoked by the CJC's interference is also squarely raised in the Notice of Application. Contrary to the CJC's submissions, this allegation is not based on mere speculation and cannot be dismissed as a fishing expedition. It is a serious allegation, based on specific facts and proceeding from a clear and cogent rationale. Whether or not the Applicant's reasoning is persuasive and her inference is sound will be a matter for the merits – if the Court determines that the issue can properly be raised before the Court without having first been put before the Inquiry Committee – but at this stage, I am satisfied that it is reasonably arguable. The Court on the merits could, of course, make a determination on whether or not the CJC interfered with the

Independent Counsel on the basis of the inference alone. However, only the communications themselves could positively establish whether or not this was in fact the case. Unless it is clear that these communications properly benefit from the protection of privilege, it would, in my view, be harmful to the public's confidence in the administration of justice if these very serious allegations were resolved on the basis of inferences rather than direct evidence.

Perhaps in recognition of the relevance of these concerns, counsel for the CJC assured the Court at the hearing that, whatever the ruling on this motion, the sealed envelope containing the communications between the CJC and Mr. Pratte would be made available to the Judge hearing the merits of the application should he/she determine that the issue of institutional bias is properly before the Court. Given this late concession by the CJC, the issue of whether the communications will be included because they are amenable to a Rule 317 request for production or because of the CJC's voluntary production is almost academic.

Analysis – Privilege

As is amply demonstrated by the above discussion, I am of the view that the question of whether or not the existence of a solicitor-client relationship between the CJC and the Independent Counsel was properly asserted by the CJC is directly, or at least implicitly, raised in this application. The privilege claimed by the CJC over its communications with Mr. Pratte is dependant upon the determination that such a relationship did exist between them. There is no issue of waiver at play in this matter. To rule on the existence of privilege on this motion would therefore involve making a determination that properly belongs to the Judge on the merits.

The Applicant urged that the Court can make its ruling on the basis of the record before it, without affecting the Court's ultimate determination on the full record of the application. It remains, however, that should I determine that the CJC has failed to establish the privilege and order the documents to be disclosed, the privilege will have been lost. To guard against this, it would be necessary to suspend the effect of my decision until all avenues of appeal have been exhausted. Given the importance of the issue, it has to be expected that appeals would indeed be pursued. This would inevitably delay the hearing of the application on the merits, currently expected to take place at the end of November, 2103. Madam Justice Snider, in her reasons delivered on July 12, 2013 on the Applicant's motion to stay the Inquiry Committee's proceedings pending the resolution of this application (2013 FC 776), specifically found that unreasonable delays in an inquiry into the behaviour of a Judge is of a nature to cause harm to the administration of justice.

Further, given the position taken by the CJC and the Independent Counsel as to the absolute and all-encompassing nature of the privilege and the CJC's resulting objections on the cross-examination of Mr. Sabourin, I very much doubt that the record that would be put before the Court on the merits of the application would be more complete, on the issue of privilege, than the record before me on this motion. While the Judge on the merits of the application would not be bound by any decision I might make on this motion, and could, even on an identical record, properly reach a different conclusion, the possibility of inconsistent judgements being made on the same issue and the same record, even if it can be explained by the distinction between interlocutory and final decisions, would also risk causing harm to the administration of justice.

I am, finally, satisfied that the communications between the CJC and Mr. Pratte largely speak for themselves, and that counsel for the Applicant can, as she has before me, make relevant, helpful and effective arguments to the Court on the merits of the application as to the existence of a solicitor-client relationship without the benefit of have seen the communications.

I therefore conclude that while the communications between Mr. Pratte and the CJC, as contained in the sealed envelope filed by the CJC on this motion, properly constitute the record relevant to the judicial review of the CJC's assertion of a solicitor-client relationship and should in any event be put before the Court as relevant to the determination of the issues of institutional bias raised in this application, they are to be filed under confidential seal and not disclosed to the public or to the Applicant pending the determination of the Court on the merits of the application.

THIS COURT ORDERS that:

1. The CJC's objections to the Applicant's request for disclosure of on the basis of lack of relevance is dismissed;
2. The CJC's objection to the communication to the Applicant of the resignation letter of Guy Pratte and related documents on the basis of solicitor-client privilege is referred to the determination of the Court on the merits;
3. The documents attached as Exhibits AA to EE to Norman Sabourin's affidavit affirmed August 14, 2013 shall form part of the record before the Court on the

merits of this Application, but shall remain sealed and be treated confidentially until further order of this Court.

“Mireille Tabib”

Prothonotary