

Federal Court



Cour fédérale

Date: 20180829

Dockets: T-733-15

T-2110-15

T-423-17

T-409-18

Ottawa, Ontario, August 29, 2018

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

THE HONOURABLE MICHEL GIROUARD

Applicant (Respondent)

and

THE ATTORNEY GENERAL OF CANADA

Respondent (Respondent)

and

THE CANADIAN JUDICIAL COUNCIL

Moving Party

and

THE ATTORNEY GENERAL OF QUEBEC

Third Party

ORDER

Given the particular circumstances of the proceedings in these files, and in the interest of ensuring an efficient process, the Attorney General of Canada (AGC) has proposed that the objection of the Canadian Judicial Council (CJC) to the request for the production of documents in accordance with section 317 of the *Federal Courts Rules*, SOR/98-106 (Rules), as well as the alternative application for a stay pursuant to paragraph 398(1)(a) of the Rules be dealt with at the same time as the CJC's other motion. This other motion seeks a declaration that the CJC is not subject to the Court's jurisdiction for the purposes of an application for judicial review under section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 (FCA);

Accordingly, by order dated May 3, 2018, the Court granted party status to the CJC in order for it to be able to make the appropriate submissions on the issue of whether the Court has jurisdiction over it, and to allow the Court to determine its challenge to the obligation to produce materials requested by the applicant, the Honourable Justice Michel Girouard, for the purposes of the applications for judicial review filed in four (4) files and for the alternative stay application;

With this order, the Court will make the appropriate determinations with regard to the CJC's objection to its obligation to produce materials and to the stay application, taking into account the parties' written submissions as was noted at the start of the hearing on the jurisdiction issue on June 27, 2018;

CONSIDERING THAT the Court has on this date issued its reasons and order on the issue of the Court's jurisdiction, thus finding that the Federal Court does indeed have jurisdiction to make decisions on the applications for judicial review pursuant to section 18.1 of the FCA involving the CJC and its constituent bodies;

WHEREAS Justice Girouard, in his applications for judicial review pursuant to section 317 of the Rules, has requested the production of the following material:

1. All of the documents submitted to the CJC for the purposes of reviewing the report of the Inquiry Committee (IC) (category 1);
2. The minutes and records of all CJC meetings related to the study of the IC's report (category 2);
3. IC emails related to the review and written correspondence (category 3);
4. All emails or correspondence related to the ongoing inquiry involving the CJC or IC and that are not set out in this application (category 4);

UPON NOTING THAT in judicial review application T-733-15, the CJC and its IC filed the docket under section 317 of the Rules;

CONSIDERING THAT the CJC in its primary submissions and reply objected to all requests for the production of documents in the other files on the following grounds:

1. The documents in category 1 are public documents and therefore do not meet the requirements under section 317 of the Rules;
2. The documents included in category 2 do not exist;
3. As for category 3, Justice Girouard has not demonstrated the relevance or usefulness of the documents requested for the purposes of judicial review, and that the documents in this category were produced by members of the CJC

[TRANSLATION] “in their deliberations” (see affidavit of Josée Gauthier, Registry Officer of the CJC, May 31, 2018 [affidavit of Josée Gauthier] at para 5);

4. With respect to the requested documents under category 4, it is a [TRANSLATION] “fishing expedition” unwarranted by the claims made, and [TRANSLATION] “if there are any documents included in category 4, these would have been produced by the members of the Council and the members of the Inquiry Committee in their deliberations” (see CJC’s memorandum; affidavit of Josée Gauthier at para 6);

CONSIDERING THAT the CJC itself added in its submissions another (fifth) category of documents, namely, those subject to this application that exist and are not public and that are of no relevance or usefulness in resolving this application for judicial review (see the CJC’s Notice of Motion at para 18(e));

CONSIDERING THAT Justice Girouard in response notes that:

1. The CJC, in the affidavit of Josée Gauthier, hints that there are documents included in categories 3 and 4 that may exist, but that in any event are protected by the deliberative privilege of both the CJC and IC;
2. The CJC is not the party that should be deciding whether or not a document is relevant, as this is the Court’s responsibility;
3. The CJC, in justifying its refusal to produce over one hundred (100) documents on the ground that these are publicly available and therefore accessible to Justice Girouard, does not identify which of these were used or referenced by the CJC in making its decision;

4. The CJC did not inform the Court whether there were documents or other materials submitted to the CJC or documents collected and recorded by or for the CJC during its deliberations;
5. The CJC, while aware of the relevant documents relied on in support of the dissent of three (3) chief justices who found that the CJC “violated Justice Girouard’s right to procedural fairness”, submitted no document that could demonstrate the concerns to that effect expressed by the dissenting judges, or even a list of documents having been filed with the CJC indicating whether these were in French or English;

CONSIDERING THAT the AGC submitted the following arguments:

1. The summary nature of an application for judicial review is such that section 317 of the Rules plays a limited role allowing an applicant to obtain relevant documents or materials that are not in its possession and that if a decision maker objects to the production of a document, it submits all of this to the Court in order that the Court may determine the issue;
2. If the CJC invokes deliberative secrecy to justify the non-production of the documents sought, it is appropriate that Justice Girouard should explain the factual basis underlying his request for production so that the Court may by order identify means to protect deliberative secrecy until a decision is made;

CONSIDERING THAT an application for judicial review is a summary proceeding that requires, at the outset, that the decision maker’s record be adduced so as to allow the parties to

submit their respective arguments, but which does not require the filing of all of the documents used by the decision maker (see *Access Information Agency Inc. v Canada (Attorney General)*, 2007 FCA 224 at paras 20-21; *Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 128 [*Tseil*]);

CONSIDERING THAT the public documents already in Justice Girouard's possession do not need to be produced (*Tsleil* at para 106), but that, as is the case here, where there are many public documents, the decision maker must at least identify, among the multitude of documents, those that were used by the decision maker;

CONSIDERING the sacrosanct aspect of deliberative secrecy, for both the judiciary and for the judicial review of federal boards, commissions or other tribunals (at times to a lesser extent depending on the particular circumstances of the case), such secrecy being a key component of the principle of judicial independence (see *Mackeigan v Hickman*, [1989] 2 SCR 796 at pp 830-31; *Tremblay v Quebec (Commission des affaires sociales)*, [1992] 1 SCR 952 at pp 965-66; *Ellis-Don Ltd v Ontario (Labour Relations Board)*, 2001 SCC 4 at para 52; *Commission scolaire de Laval v Syndicat de l'enseignement de la région de Laval*, 2016 SCC 8 at para 58);

CONSIDERING THAT the minimum required is that the Court be able to weigh, in accordance with *Dunsmuir v New Brunswick*, 2008 SCC 9, the reasonableness of the decision, which is "concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and

law” (*Dunsmuir* at para 47), and that to this end the record produced allows for such an assessment;

CONSIDERING THAT in this case, Justice Girouard simply does not know what materials the CJC had before it when it made its decision (except obviously the inquiry report and judge’s comments) and that in this regard, the CJC, being the sole custodian of this knowledge, should be as forthcoming as possible in the circumstances;

CONSIDERING THAT the report and the recommendation submitted to the Minister of Justice [Minister] in February 2018 noted that internal counsel had examined and summarized the evidence for the IC and later, for the CJC;

CONSIDERING THAT the affidavit of the Registry Officer states that there are no minutes or records of CJC meetings but that the Court and the parties are entitled to know whether there are other means of recording said meetings;

CONSIDERING THAT the *Judges Act*, RSC 1985, c J-1 [JA], s 65(1), stipulates that the CJC shall report its conclusions and submit a record of the inquiry or investigation to the Minister (“le dossier” in French) and that, at the very least, except on the basis of privilege, the report and record (“dossier” in French) should be filed with the Court and served on the parties;

CONSIDERING the CJC’s minority report that found a breach of the right to a fair hearing, it must notify Justice Girouard, the parties and the Court about all of the documents filed with the CJC and the IC and indicate on a list the title of the documents, the number of pages, and what is written in French, English, or in both languages; otherwise it will simply be

impossible to conceptualize the potential arguments and thus enable the parties and the Court to assess the situation;

AND CONSIDERING THAT Justice Girouard's request for the production of documents in category 4 is simply not specific, in addition to being vague in nature;

THE COURT will dispose of the foregoing points at the very end, after having dealt with the CJC's application for a stay of the order to produce documents pending the finalization of an appeal from this judgment on jurisdiction;

WHEREAS the CJC contends that the application for a stay under paragraph 398(1)(a) of the Rules is based on the following grounds:

1. The question of this Court's jurisdiction to grant remedies under section 18 of the FCA against the CJC and IC(s) [TRANSLATION] "is a serious matter in that it deals more broadly with the Council's role in Canada's constitutional order";
2. There is also a serious question associated with the disclosure of documents, in that it compromises the independence of the CJC as a superior court;
3. There is also harm resulting from the disclosure of documents protected by deliberative secrecy;
4. In the case of the CJC, a public body, the burden of demonstrating irreparable harm is less onerous;
5. The balance of convenience [TRANSLATION] "strongly" favours issuing a stay, given that the disclosure of documents subject to deliberative secrecy is quite simply

irremediable once produced, while the production of documents can always wait without creating any real inconvenience;

UPON NOTING THAT the CJC argues that the analysis in accordance with the criteria set out in *RJR – Macdonald Inc. v Canada (Attorney General)*, [1994] 1 SCR 311, must show in a cumulative manner: (1) the existence of a serious issue; (2) that there will be irreparable harm if the stay is not granted; and (3) that the balance of convenience, taking into account the public interest, favours granting the stay;

WHEREAS Justice Girouard limited himself to arguing that the application for a stay is premature and unfounded;

WHEREAS the AGC, in response, submits that an application for judicial review is a summary proceeding that should be heard without delay, suggesting that the Court has all the appropriate means at its disposal to protect deliberative secrecy as needed, and that it can secure a solution that is just and as expeditious and inexpensive as possible;

WHEREAS on May 4, 2017, the Court dismissed an application to stay the inquiry process made by Justice Girouard (*Girouard v Canada (Attorney General)*, 2017 FC 449);

TAKING INTO CONSIDERATION all of the above, the applicable case law in similar cases, and the particular circumstances related to the matter of jurisdiction, the Court, exercising its own discretion, makes the following determinations:

CONSIDERING the serious issue raised by the CJC, it is undeniable that the matter of the Court's jurisdiction with regard to the CJC is a serious one, but that its level of seriousness is diminished, given that this issue was dealt with at great length in *Douglas v Canada (Attorney*

General), 2014 FC 299, that an appeal was filed by the CJC, which it discontinued without even having sought leave of the Court of Appeal to hear the matter, and that over three (3) years have elapsed since then;

CONSIDERING the serious issue related to deliberative secrecy, the order to produce documents and the list of documents as it is worded hereinafter does not disclose the contents subject to deliberative secrecy, but if this were ever the case, the production would be done by means of a sealed envelope, all of which would eventually be subject to review by this Court only;

CONSIDERING that the irreparable harm alleged by the CJC is non-existent, the order for the production of documents does not have the effect of causing harm, but is rather intended to serve as an informative record of the decision maker, thereby enabling the parties to present their arguments and the Court to assume its role as a reviewing court;

CONSIDERING the balance of convenience, which favours continuing with the proceedings expeditiously, and to that end, the Court agrees with the Chief Justice of Canada Chair of the CJC, the Right Honourable Richard Wagner, as reported in the publication *The Lawyer's Daily* on June 22, 2018, when he opined that the proceedings regarding Justice Girouard's conduct were taking far too long, the initial complaint having been filed on November 30, 2012 (Cristin Schmitz, "Chief Justice Wagner calls for judicial discipline reforms as Ottawa drags heels on removing sidelined judge" *The Lawyer's Daily* (22 June 2018) online: <www.thelawyersdaily.ca/articles/6806>);

AND CONSIDERING that it is important for justice to be done as expeditiously and economically as possible, while respecting the rights of the parties;

NOW THEREFORE, the Court orders as follows:

1. The Court dismisses the application to stay the order to produce documents and lists of documents;
2. The CJC, within twenty (20) days of this order, must serve and file with the Court certified copies of the report and its conclusions, including the record (“dossier” in French) submitted to the Minister, all of which as required under subsection 65(1) of the JA;
3. The CJC, within twenty (20) days of this order, must serve and file a certified list of all of the public documents referred to by the CJC during the review of the IC’s report;
4. The CJC, within twenty (20) days of this order, must serve and file a certified list of all documents submitted to the CJC, including a summary of each document, the number of pages, and the language of the document (French/English or bilingual), as well as indicate whether privilege is claimed, where applicable;
5. As required, where applicable, any challenge based on deliberative secrecy or another privilege shall be referred to the Court, but, at the appropriate time, the documents related to the challenge will be transmitted to the Court registry in a sealed envelope to be opened only by the Court as needed;
6. Following the filing of the foregoing, where necessary, the Court will determine the questions to be raised by the parties;

7. It is appropriate to proceed expeditiously and diligently so as to ensure that these files can proceed, and to that end, the Court asks the parties to file a detailed joint timetable within thirty (30) days of this order in order for the current matters to be heard in short order;
8. This applies to all the files with such modifications as the circumstances of each of them may require;
9. The present order is enforceable notwithstanding appeal except where the Court of Appeal rules otherwise;
10. Without costs.

“Simon Noël”

Judge