Federal Court  Cour fédérale

Date: 20210514

Docket: T-1512-20

Citation: 2021 FC 448

[ENGLISH TRANSLATION]

Ottawa, Ontario, May 14, 2021

PRESENT: The Honourable Mr. Justice McHaffie

BETWEEN:

THE HONOURABLE GÉRARD DUGRÉ

Applicant

and

THE CANADIAN JUDICIAL COUNCIL

Respondent

and

THE ATTORNEY GENERAL OF CANADA

Third Parties

JUDGMENT AND REASONS

I. Overview

[1] The Court has before it two motions in this judicial review application challenging an interlocutory decision of the Inquiry Committee of the Canadian Judicial Council. The first, filed by the Attorney General of Canada, seeks to strike out the application as premature, as this Court has done with five other applications arising from proceedings before the Council: *Dugré v Canada (Attorney General)*, 2019 FC 1604; *Dugré v Canada (Attorney General)*, 2020 FC 789, both affirmed by 2021 FCA 8. The second motion, filed by the applicant, seeks a stay of proceedings pending the final decision of the Supreme Court of Canada on the applicant's application for leave to appeal these other striking out orders.

[2] For the reasons that follow, I dismiss the application for a stay and grant the motion to strike. The application for judicial review is therefore struck out. In accordance with the Attorney General's request, no costs are awarded.

II. Issues

[3] In his response to the Attorney General's motion to strike, the applicant raised his intention to seek a stay of proceedings pending the Supreme Court's decision on his application for leave to appeal the Court of Appeal's decision in 2021 FCA 8. He argues that a decision on his application for leave to appeal may affect the Attorney General's motion to strike, and that this requires staying the application rather than striking it. Therefore, the applicant's motion to stay should be considered first, even though it was filed after the Attorney General's motion.

[4] The motions raise the following related issues:

A. Do the interests of justice require that the proceedings in this application be stayed pending the decision of the Supreme Court of Canada on the applicant's application for leave to appeal and, if granted, its decision in the appeal?

B. Does this application have no reasonable prospect of success because it is premature?

III. Analysis

A. *Interests of justice do not require stay of proceedings*

(1) Situation

[5] There are seven complaints before the Inquiry Committee of the Canadian Judicial Council about the applicant, who is a judge of the Quebec Superior Court. The first two were filed in 2018. On August 30, 2019, two Council Review Panels issued reports under the *Canadian Judicial Council Procedures for the Review of Complaints or Allegations About Federally Appointed Judges*, concluding that an Inquiry Committee was warranted in both cases. The applicant filed two applications for judicial review of these decisions. On December 13, 2019, Justice Martineau struck out these two applications as premature at the Attorney General's instance, following the principles of the Court of Appeal in *CB Powell*: *Dugré*, 2019 FC 1604 at paras 4 to 8, 13, 24, applying *Canada (Border Services Agency) v CB Powell Limited*, 2010 FCA 61 at paras 30 to 33.

[6] The third complaint was referred to the Inquiry Committee by Chief Justice Joyal, Vice-Chairperson of the Judicial Conduct Committee of the Council. The other four complaints were referred directly to the Inquiry Committee by the Executive Director of the Council. These references were the subject of two further applications for judicial review the applicant filed in 2019. A fifth application for judicial review was filed in 2020 challenging a Notice of Allegations issued by the Inquiry Committee regarding six of the complaints. On May 8, Justice Roy dismissed the applicant's motion to stay the proceedings of the Inquiry Committee (or the two Inquiry Committees with the same composition), pending the determination of the remaining three applications for judicial review: *Dugré v Canada (Attorney General)*, 2020 FC 602 at paras 1 to 3, 52. On July 24, 2020, Justice Roy struck out these last three applications for judicial review as premature, again at the instance of the Attorney General: *Dugré*, 2020 FC 789 at paras 5 to 13, 70.

[7] The applicant has appealed all three decisions of this Court. The Court of Appeal, on its own motion, ordered the parties to file written submissions on the issue of whether the appeals from the two striking out orders were doomed to fail. After considering these submissions, the Court of Appeal summarily terminated the appeals: *Dugré*, 2021 FCA 8 at paras 1 to 2, 11, 49 to 50. The applicant has filed an application with the Supreme Court of Canada for leave to appeal this decision of the Court of Appeal.

[8] Following this decision, the Attorney General asked the Court of Appeal to treat the appeals from Justice Roy's decision dismissing the stay application in the same manner (2020 FC 602). In response, the applicant requested that the latter appeals be held in abeyance until a

decision is rendered by the Supreme Court. The Court of Appeal dismissed the motion to stay and struck out the appeals: *Dugré v Canada (Attorney General)*, 2021 FCA 40 at paras 3, 6, 8 to 9.

[9] During this time, the applicant made five preliminary applications to the Inquiry Committee. The applicant's grounds sought the recusal of the members of the Inquiry Committee, the termination of the inquiry or its striking out in part, the splitting of the inquiry, a stay of the inquiry pending the Federal Court's decision on the applications for judicial review, and preliminary evidentiary matters. On November 17, 2020, the Inquiry Committee issued a decision that addressed most of the preliminary applications. The Inquiry Committee denied the stay, recusal, termination and severance applications. It granted in part the application regarding the evidence.

[10] This application for judicial review challenges the decision of the Inquiry Committee on these issues. It alleges that the Inquiry Committee misinterpreted the *Canadian Judicial Council Inquiries and Investigations By-laws, 2015*, SOR/2015-203, and erred in refusing to recognize that recusal is necessary, or to split the inquiry or to suspend it. The applicant argues that the Inquiry Committee's decision is unfair and unreasonable in several respects.

[11] As stated, the Attorney General is seeking to have this application for judicial review, like those before Justices Martineau and Roy and before the Court of Appeal, struck out as premature. The applicant requests that the Court not decide the issue of striking out at this time,

but rather stay the proceedings to allow the Supreme Court to determine the scope of the doctrine of prematurity when dealing with the application for leave to appeal.

(2) Power to stay proceedings

[12] Paragraph 50(1)(b) of the *Federal Courts Act*, RSC 1985, c F-7, gives this Court the discretion to stay proceedings in any case where "it is in the interest of justice". This paragraph gives the Court the power to stay the proceedings of another body, such as an administrative tribunal, or to stay its own proceedings. The Court of Appeal has recognized that these two situations are quite different in nature: *Mylan Pharmaceuticals ULC v Astrazeneca Canada inc*, 2011 FCA 312 at paras 3 to 5.

[13] The parties agree that the applicant's motion falls into the second category, a request that the Court stay its own proceedings for a limited time. In such proceedings, "broad discretionary considerations come to bear" in decisions, such as the public interest in the fair and expeditious conduct of the proceedings, the length of the requested stay, the reason for the request, the potential loss of judicial resources, the procedural status and the presence or absence of prejudice: *Mylan* at paras 5, 19; *Coote v Lawyers' Professional Indemnity Company*, 2013 FCA 143 at paras 12 to 14; *Clayton v Canada (Attorney General)*, 2018 FCA 1 at para 28; *Federal Courts Rules*, SOR/98-106, rule 3.

[14] The applicant argues that there is a public interest in avoiding conflicting judgments on the striking out issue. He argues that if this Court grants the Attorney General's motion, that decision could conflict with the Supreme Court's decision if the latter allows the applicant's

appeal. He also argues that there is a public interest in avoiding the waste of resources of the parties and the Court, such as the costs of appealing an order to strike out prior to the Supreme Court's decision and the costs of conflicting judgments. Conversely, the applicant argues that there will be no prejudice to the parties if the requested stay is granted.

[15] The Attorney General does not argue that he would be prejudiced if the stay is granted. Rather, he argues that it is not in the interests of justice to stay the application given the current state of the case law on premature judicial review applications. He cites this Court's decision in *Shehzad*, in which Justice Shore concluded that "the law is to be applied as decided by the Federal Court of Appeal, which stands until such time as the Supreme Court of Canada may decide otherwise": *Shehzad v Canada (Citizenship and Immigration)*, 2016 FC 79 at para 11.

[16] The Attorney General also points out that, as noted above, the Court of Appeal recently dismissed the applicant's motion to stay the appeals from Justice Roy's decision on the stay issue: *Dugré*, 2021 FCA 40. In doing so, Chief Justice Noël stated at paragraphs 6 and 7:

> I do not consider it to be in the interests of justice to stay the three appeals when regard is had to the fundamental problem that is caused by the multiple interlocutory proceedings brought by the appellant against the inquiry into his conduct . . . . In my view, the Supreme Court should have before it the full gamut of the interlocutory proceedings introduced by the appellant to date, at a time when the inquiry committee has yet to hold its first hearing day.
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> The procedural congestion, or even the paralysis of the administrative process, that these proceedings would likely cause if the appellant could introduce them at the time of his choice is at the heart of the principle of non-interference that was set out in *C.B. Powell*. This issue should be considered in its full light and context.
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> [Emphasis added; citations omitted.]

[17] In my opinion, the same considerations and principles apply to the present motion. If there is a potential waste of resources, it has arisen because the applicant has made another application for judicial review of another interlocutory decision of the Inquiry Committee: *CB Powell* at para 49. If that application is struck out, as I conclude below that it must be, it is because the application is doomed to fail. Mere reference to the possibility that a decision of the Supreme Court might overrule a decade of Court of Appeal jurisprudence cannot justify the requested stay. Despite the lack of prejudice in staying the proceedings, I conclude that the interests of justice do not require the requested stay, which would be for a period of at least several months.

[18] I note that in reaching this conclusion, I do not accept the Attorney General's argument that the Court of Appeal's decision in *Alexion* requires that the determination of a motion to strike cannot be stayed: *Alexion Pharmaceuticals Inc v Canada (Attorney General)*, 2017 FCA 241. In *Alexion*, Justice Laskin noted that it "would be desirable" for an objection based on prematurity to be raised at the earliest opportunity. However, Justice Laskin did not suggest that, once raised, such an objection could not be stayed in the event, albeit rare, that the interests of justice required it: *Alexion* at para 54.

[19] The applicant's motion to stay is therefore dismissed.

B. *Application for judicial review premature*

[20] Before striking out an application for judicial review, this Court must be satisfied, after a thorough examination of the essential nature of the application, that it is "bereft of any possibility

of success": *Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc*, 2013 FCA 250 at paras 47 to 50. This may include a premature application: *JP Morgan* at paras 84 to 85, 88, citing *CB Powell* at paras 28 to 33.

[21] This Court and the Court of Appeal have concluded that all of the applications for judicial review filed by the applicant to date are premature and should be struck out. There is no point in repeating the reasoning in the judgments of Justices Martineau and Roy at trial and Chief Justice Noël on appeal: *Dugré*, 2019 FC 1604 at paras 16 to 24; *Dugré*, 2020 FC 789 at paras 21 to 70; *Dugré*, 2021 FCA 8 at paras 34 to 50. In my opinion, these principles and conclusions apply equally to the present application.

[22] Chief Justice Noël clearly reiterated the applicable principles:

> . . . [A]n application for judicial review against an interlocutory administrative decision can be brought only in "exceptional circumstances." Such circumstances are very rare and require that the consequences of an interlocutory decision be so "immediate and radical" that they call into question the rule of law . . . .
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> [Emphasis added; citations omitted; *Dugré*, 2021 FCA 8 at para 35.]

[23] The applicant attempted to distinguish the current application from the five previously struck applications. He argued that Justices Martineau and Roy noted that the Inquiry Committee did not have the opportunity, in the previous applications, to rule on the preliminary issues. Now that the Inquiry Committee has rendered its decision on the applicant's preliminary grounds, he claimed that the decision is final or conclusive on these matters and that this application cannot be characterized as premature. I disagree, for two reasons.

[24] First, I do not read the decision of Justices Martineau and Roy as based primarily on the fact that the Inquiry Committee had not yet decided these issues. On the contrary, Justice Martineau noted that as a general rule, [TRANSLATION] "an applicant cannot obtain a judicial remedy until the administrative process has been completed and all effective remedies have been exhausted" [emphasis added]: *Dugré*, 2019 FC 1604 at para 13, citing *CB Powell* at paras 30 to 33. He also concluded that it is not appropriate to intervene [TRANSLATION] "until the process has at least passed through the fourth stage, that of the Inquiry Committees": *Dugré*, 2019 FC 1604 at para 23. Similarly, Justice Roy referred to the [TRANSLATION] "need to allow the process to be completed" and noted that "only exceptional circumstances can justify hearing a judicial review of an interlocutory decision": *Dugré*, 2020 FC 789 at paras 36, 55 to 57.

[25] Second, the fact that the decision of the Inquiry Committee on preliminary matters determines these issues does not make the decision "final" for the purposes of the rule against interlocutory judicial review. Justice Pelletier responded to this argument in *Black v Canada (Attorney General)*, 2013 FCA 201 at para 8:

> It is true that the adjudication board's decision is final in the sense that it has decided the issue and that it has no plans to revisit it. That said, the adjudication board's decision simply deals with a procedural matter that is not determinative of, the substantive issue between the parties, namely whether Sgt. Black has violated the Code of Conduct. It is therefore an interlocutory decision . . . .
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> [Emphasis added; citation omitted.]

[26] In this regard, I cannot accept the applicant's submission that striking out an application for judicial review as premature is limited to situations of [TRANSLATION] "hyper-prematurity" in the sense that [TRANSLATION] "there is no administrative decision yet upon which to exercise

judicial review" [emphasis added by the applicant]. To the contrary, the Court of Appeal has repeatedly applied the principles of *CB Powell* to interlocutory decisions over which the Court could, theoretically, exercise judicial review: see *Black* at paras 2 to 8; *Forner v Professional Institute of the Public Service of Canada*, 2016 FCA 35 at paras 6 to 8, 11 to 13, 16; *Greater Toronto Airports Authority v Canada (Transportation Agency)*, 2017 FCA 64 at paras 2, 21. As Justice Stratas stated in *Forner*, the general rule requires that "applications for judicial review can be brought only after the administrative decision-maker has made its final decision" [emphasis added]: *Forner* at para 13.

[27] The applicant further argues, with reference to *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10, among others, that the application of the doctrine of prematurity is exclusively within the discretion of the trial judge. I agree with the Attorney General that this argument was rejected by the Court of Appeal: *Dugré*, 2021 FCA 8 at paras 44 to 47.

[28] As Chief Justice Noël has noted, the limit on the availability of interlocutory remedies is "next to absolute": *Dugré*, 2021 FCA 8 at para 37. An application for judicial review of an interlocutory decision can only be made in rare "exceptional circumstances", where the consequences are so immediate and drastic as to call into question the rule of law: *Dugré*, 2021 FCA 8 at para 35.

[29] The applicant argues that the violation of procedural fairness and the abuses of right in the present case justify setting aside the doctrine of prematurity. I am bound by the decisions of

the Court of Appeal as to the circumstances in which the doctrine will not apply. I therefore take the applicant's arguments as arguments that the alleged violations of procedural fairness and of his rights bring this claim within the category of "exceptional circumstances". Having considered the allegations made in the notice of application for judicial review, I cannot conclude that they are of a nature that calls into question the rule of law.

[30] I note that the applicant's arguments in this regard are limited. They consist primarily of the proposition that the Court cannot grant a motion to strike on the ground of prematurity if the facts alleged demonstrate a violation of procedural fairness so serious as to constitute an abuse of right. On the other hand, the applicant does not demonstrate why, or how, the facts alleged demonstrate such a violation. It is not enough to allege that a violation is abusive. Such an allegation, as a conclusion of law or of mixed fact and law, must not be accepted as true.

[31] At its core, this application for judicial review is based on arguments that the Inquiry Committee's interpretation of subsection 5(1) of the *Canadian Judicial Council Inquiries By-Laws, 2015* is wrong and that it seriously and irreparably undermines the principles of procedural fairness and impartiality, particularly in the absence of independent counsel. Without commenting on the merits of these arguments, it is possible that they could succeed if they remain relevant at the end of the administrative process. This does not change the fact that they are premature. While some of the arguments raised in the notice of application are based on principles of the rule of law, such as judicial independence, they do not demonstrate that the Inquiry Committee's interlocutory decision has immediate and far-reaching consequences that call into question the rule of law.

[32] Having concluded that the exception to the general rule against interlocutory judicial review does not apply, the application for judicial review must be struck out as premature. Like other orders to this effect by this Court and the Court of Appeal, this does not affect the applicant's right to make submissions, and to challenge the decision of the Inquiry Committee, by way of judicial review once the administrative process is complete.

C. *A word on confidentiality*

[33] The notice of application was filed under cover of a letter requesting that the Court file be treated as confidential. The notice of application also included a request that the Court issue an order to that effect. The Attorney General objected to the manner in which the applicant made his request for confidentiality, which was in the form of a letter. The applicant confirmed to a registry officer that he would file in January 2021 either a motion for a confidentiality order or an explanation of the delay. No motion or explanation was filed. The other decisions of this Court and the Court of Appeal are not confidential in whole or in part. In the absence of a motion regarding confidentiality, the open court principle requires that neither this judgment nor the court record be treated as confidential.

IV. Conclusion

[34] For these reasons, the applicant's motion for a stay is dismissed, and the Attorney General's motion to strike is granted. The application for judicial review is struck out. The Attorney General has not requested costs, and none are awarded.

JUDGMENT in T-1512-20

THIS COURT'S JUDGMENT is as follows:

1. The applicant's motion for a stay is dismissed.
2. The respondent's motion to strike is granted. The notice of application for judicial review in this case is struck without leave to amend.
3. Without costs.

" Nicholas McHaffie "
Judge

Certified true translation
Michael Palles, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1512-20
STYLE OF CAUSE:	THE HONOURABLE GÉRARD DUGRÉ v THE ATTORNEY GENERAL OF CANADA

MOTIONS IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES*

JUDGMENT AND REASONS:	MCHAFFIE J.
DATED:	MAY 14, 2021

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