

Federal Court



Cour fédérale

Date: 20160909

Docket: T-1053-16

Citation: 2016 FC 1031

Ottawa, Ontario, September 9, 2016

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

BALRAJ SHOAN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

ORDER AND REASONS

[1] The Governor in Council terminated Balraj Shoan's appointment as a Commissioner of the Canadian Radio-television and Telecommunications Commission for cause. Mr. Shoan has brought an application for judicial review challenging the decision to terminate his appointment. He has also brought a motion seeking to stay the Governor in Council's decision, and to reinstate him in his position as a Commissioner of the CRTC pending the determination of his application for judicial review.

[2] For the reasons that follow, I have concluded that although Mr. Shoan has established that his application for judicial review raises a serious issue, he has failed to demonstrate with clear and non-speculative evidence that he will suffer irreparable harm between now and the time that his application for judicial review is finally disposed of if the stay is not granted. I am further satisfied that the balance of convenience favours the respondent. Consequently, Mr. Shoan's motion will be dismissed.

I. Background

[3] The following brief summary of the facts should serve to put Mr. Shoan's motion into context.

[4] The Governor in Council appointed Mr. Shoan to serve as a full-time Commissioner of the CRTC for a term of five years, effective July 3, 2013. Mr. Shoan held office "on good behaviour", with the result that he could only be removed from his position for cause. This is reflected in subsection 3(2) of the *Canadian Radio-television and Telecommunications Commission Act*, R.S.C., 1985, c. C-22, which provides that a member of the Commission may be removed "at any time by the Governor in Council for cause".

[5] Concerns subsequently developed with respect to Mr. Shoan's conduct, and the Minister of Canadian Heritage wrote to him on February 26, 2016, advising him of the Minister's concerns regarding his capacity to serve as a Commissioner of the CRTC.

[6] The Minister's concerns fell into five categories. The first related to Mr. Shoan's public disparagement of the CRTC and its Chairperson, and his allegedly unfounded accusations of unethical conduct or conflicts of interest on the part of the CRTC Chairperson and CRTC staff.

[7] The second category of concerns related to Mr. Shoan having allegedly disclosed confidential information, including information that was subject to solicitor-client privilege, in proceedings that Mr. Shoan had commenced in this Court and in the Federal Court of Appeal.

[8] The third category of concerns arose as a result of Mr. Shoan's allegedly inappropriate *ex parte* meetings with stakeholders involved in proceedings pending before the CRTC.

[9] The Minister was also concerned about the effect that Mr. Shoan's actions were having on the internal operations of the CRTC. By way of example, the Minister noted that Mr. Shoan had made allegedly unfounded accusations of unethical conduct or conflicts of interest on the part of the CRTC Chairperson and CRTC staff as a basis for not respecting internal processes designed to permit the CRTC to comply with its obligations under the *Access to Information Act*, R.S.C., 1985, c. A-1.

[10] Finally, the Minister noted that an independent third-party investigation into a complaint received from a CRTC staff member alleging that she had been harassed by Mr. Shoan had determined that the allegations of harassment were well-founded, and corrective measures were imposed on Mr. Shoan.

[11] The Minister concluded that, when taken together, these events called into question Mr. Shoan's capacity to continue to serve as a Commissioner of the CRTC. Mr. Shoan was invited to provide whatever submissions that he wished to have taken into account before a decision was made with respect to his future. Through his counsel, Mr. Shoan provided a detailed response to the allegations set out in the Minister's letter.

[12] Mr. Shoan also sought judicial review of the findings of the harassment investigation, and his application was heard by Justice Zinn on June 21, 2016. Justice Zinn took his decision under reserve following the hearing.

[13] Mr. Shoan's response to the Minister's concerns was evidently determined to be unsatisfactory. After concluding that his actions were fundamentally incompatible with his position, and that he no longer enjoyed the confidence of the Governor in Council to be a Commissioner of the CRTC, on June 23, 2016, the Governor in Council terminated Mr. Shoan's appointment for cause, effective the following day. It is Mr. Shoan's application for judicial review of that decision that underlies this motion.

[14] Shortly before the motion to stay the termination of Mr. Shoan's appointment was to be heard, Justice Zinn rendered his decision with respect to the judicial review of the findings of the harassment investigation. In a decision that was very critical of the process followed by the investigator, Justice Zinn found that Mr. Shoan had been denied procedural fairness in the investigation process, as the investigator had approached the investigation with a closed mind.

[15] Consequently, Mr. Shoan's application for judicial review was granted, and both the investigation report and the corrective measures imposed on Mr. Shoan by the CRTC Chairperson were set aside.

[16] Mr. Shoan's motion for a stay then proceeded before me on September 6, 2016.

II. Should a Stay be Granted in this Case?

[17] Mr. Shoan's motion seeks a stay of the Governor in Council's decision to terminate his appointment, and asks that he be reinstated in his position as a CRTC Commissioner pending the determination of his application for judicial review.

[18] The parties agree that in determining whether Mr. Shoan is entitled to the interlocutory injunctive relief that he seeks, the test to be applied is that established by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, [1994] S.C.J. No. 17.

[19] That is, Mr. Shoan must establish that:

- 1) There is a serious issue to be tried in the underlying application for judicial review;
- 2) Irreparable harm will result if the injunction is not granted; and
- 3) The balance of convenience favours the granting of the injunction.

[20] Given that the *RJR-MacDonald* test is conjunctive, Mr. Shoan has to satisfy all three elements of the test before he will be entitled to relief: *Abbvie Corp. v. Janssen Inc.*, 2014 FCA 112 at para. 14, [2014] F.C.J. No. 471.

III. Serious Issue

[21] In most cases, for an applicant to establish the existence of a serious issue in a proceeding, the applicant need only show that the application is neither frivolous nor vexatious, and a prolonged examination of the merits is generally neither necessary nor desirable: *RJR-*

MacDonald, above at para. 50. Mr. Shoan says that this is the standard that should be applied here.

[22] In contrast, the respondent submits that a more extensive review of the merits of Mr. Shoan's case is required here, given the nature of the relief sought. Amongst other things, the respondent submits that if the Court were to stay the decision of the Governor in Council, it would have the practical effect of granting Mr. Shoan the relief that he is seeking in his application for judicial review – namely reinstatement to his position as a Commissioner of the CRTC.

[23] I agree with the respondent that the nature of the mandatory relief being sought by Mr. Shoan in this case is such that the elevated standard should apply for the establishment of a serious issue: *Gould v. Canada (Attorney General)*, [1984] 1 F.C. 1133, [1984] F.C.J. No. 82 (FCA), (aff'd [1984] 2 S.C.R. 124); *Wang v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 148, [2001] 3 F.C. 682.

[24] That said, I am satisfied that Mr. Shoan has nevertheless satisfied the serious issue component of the *RJR-MacDonald* test.

[25] It is apparent from the February 26, 2016 letter to Mr. Shoan from the Minister of Canadian Heritage that the Minister had a number of different concerns with respect to Mr. Shoan's conduct, several of which were completely unrelated to the allegations of harassment that had been made against him. An example of this would be Mr. Shoan's allegedly inappropriate meetings with CRTC stakeholders.

[26] It is, however, clear from a review of the Minister's letter that the findings of the harassment investigation were a major concern for the Minister, and that they played a material role in the decision to terminate Mr. Shoan's appointment. Indeed, it is acknowledged in the respondent's memorandum of fact and law that concerns identified in the Minister's February 26, 2016 letter "built upon earlier concerns about Shoan's actions that were found to have constituted harassment towards a CRTC employee".

[27] The report of the harassment investigation has now been set aside as a result of Justice Zinn's determination that Mr. Shoan was denied procedural fairness and natural justice in the investigation process as the investigator approached her task with a closed mind, and the outcome of the investigation had been pre-determined: *Shoan v. Canada (Attorney General)*, 2016 FC 1003 at para. 54.

[28] Justice Zinn further found that the investigator had exceeded her mandate in a manner that was unfair to Mr. Shoan: see, for example, *Shoan*, above at paras. 70, 82, 85 and 92. He also determined that the investigator failed to critically and impartially analyze some, if not most of the email chains that were the subject of the harassment complaint: *Shoan*, above at para. 98. Justice Zinn further found that the investigator's interpretation of the language used by Mr. Shoan in the emails was unreasonable: *Shoan*, above at paras. 109 and 130. Also of concern to Justice Zinn was the fact that the CRTC Chairperson acted as both a witness to events complained of, and as the final decision-maker: at para. 79.

[29] These findings raise a serious issue as to whether it was appropriate to rely on the findings of the investigation report as a basis for concluding that Mr. Shoan's actions were

fundamentally incompatible with his position as Commissioner, and for terminating his appointment for cause.

[30] Justice Zinn’s finding that there was no need for a confidentiality order protecting the identity of the complainant in the harassment case also raises a serious issue with respect to the Minister’s allegation that by filing documents with this Court in relation to his application for judicial review of the investigation report, Mr. Shoan “unnecessarily and unacceptably included personal information about an individual who had brought forward a harassment complaint against [him]”: see the Minister’s February 26, 2016 letter to Mr. Shoan, and *Shoan*, above at paras. 148-149.

[31] To be clear: it is not for me at this stage of the proceeding to offer an opinion as to whether Mr. Shoan’s arguments regarding the significance of Justice Zinn’s decision will ultimately succeed. Suffice it to say that I am satisfied that Justice Zinn’s findings raise a serious issue as to whether it was appropriate to rely on the findings of the investigation report as a basis for terminating Mr. Shoan’s appointment.

IV. Irreparable Harm

[32] Having satisfied the serious issue component of the *RJR-MacDonald* test, the next question is whether Mr. Shoan has provided clear and non-speculative evidence that he will suffer irreparable harm between now and the time that his application for judicial review is finally disposed of, unless he is reinstated into his position as a CRTC Commissioner.

[33] “Irreparable harm” refers to the nature of the harm, rather than its magnitude. It is harm that either cannot be quantified in monetary terms, or which cannot be cured, typically because one party cannot collect damages from the other party: *RJR-MacDonald*, above at para 59.

[34] The Federal Court of Appeal has confirmed that a party cannot satisfy the irreparable harm component of the test for a stay by relying on mere assertions of harm. *Choson Kallah Fund of Toronto v. Canada (National Revenue)*, 2008 FCA 311, at paras. 5 and 8, [2008] F.C.J. No. 1576 (leave to appeal denied: [2008] S.C.C.A. No. 528 (S.C.C.)).

[35] There must instead “be evidence at a convincing level of particularity that demonstrates a real probability that unavoidable irreparable harm will result unless a stay is granted”: *Gateway City Church v. Canada (National Revenue)*, 2013 FCA 126, at para. 16, [2013] F.C.J. No. 514, citing *Glooscap Heritage Society v. Minister of National Revenue*, 2012 FCA 255 at para. 31, [2012] F.C.J. No. 1661.

[36] That said, the Court may draw inferences that logically flow from evidence when there can be no evidence of irreparable harm that has already occurred: *Ciba-Geigy Canada Ltd. v. Novopharm Ltd.*, [1994] F.C.J. No. 1120 at para. 119, [1984] 83 F.T.R. 161.

[37] Mr. Shoan submits that he will suffer irreparable harm in this case as his termination for cause will send the message to the public that his actions as a CRTC Commissioner lacked independence, were dubious and cannot be trusted. This will have a damaging effect on his reputation on a “going-forward” basis, especially in light of the significant national media coverage of his termination. This will render it unlikely that he will be able to secure

employment in his field of expertise in the future, given the nature and implications of his termination.

[38] According to Mr. Shoan, the longer that he is removed from his position, the greater the risk is to his legitimacy as a decision-maker with the CRTC. This will have a negative impact on him as a decision-maker, and will impair his ability to engage with stakeholders. It will, moreover, cause harm to the CRTC as an institution. Mr. Shoan also says that his termination will have a chilling effect on others, dissuading them from bringing forward legitimate complaints in the future.

[39] This last point concerning the alleged harm to the CRTC and the “chilling effect” on others may be quickly disposed of, as it is only harm suffered by the moving party that qualifies as “irreparable harm” under this branch of the *RJR-MacDonald* test: *RJR-MacDonald*, above at para. 58.

[40] Insofar as Mr. Shoan’s assertions of reputational harm are concerned, I agree with the respondent that, to a large extent, the damage has already been done. As Mr. Shoan himself acknowledges in his affidavit, there has been significant media coverage of his disagreements with the way that the CRTC is being run, and of the termination of his appointment for cause by the Governor in Council.

[41] Ordering that Mr. Shoan be reinstated to his position at the CRTC pending the hearing of his application for judicial review of his termination would do nothing to restore the Governor in Council’s trust in him. The harm to Mr. Shoan’s reputation resulting from the Governor in Council’s loss of confidence in his ability to discharge his responsibilities as a Commissioner of

the CRTC would, moreover, not be undone if he is reinstated to his position pending the hearing of his application for judicial review.

[42] I am also not persuaded that any harm that Mr. Shoan may have sustained to his reputation is “irreparable” as that term is used in the jurisprudence. Should Mr. Shoan’s application for judicial review ultimately succeed, it would be open to him to commence an action for damages, both in relation to his lost income, and with respect to the harm that he says that he has sustained to his reputation and career prospects: *Weatherill v. Canada (Attorney General)*, [1998] F.C.J. No. 58 at para. 30, 143 F.T.R. 302.

[43] Having failed to satisfy the “irreparable harm” component of the *RJR-MacDonald* test, it follows that Mr. Shoan’s motion for a stay will be dismissed. In the interests of completeness, however, I will also deal briefly with the issue of the balance of convenience.

V. Balance of Convenience

[44] At the third stage of the *RJR-MacDonald* test, an assessment must be made as to which of the parties will suffer greater harm from the granting or refusal of the remedy, pending a decision on the merits.

[45] The Supreme Court has held that it is open to either party to tip the scales of convenience in its favour by demonstrating to the Court a compelling public interest in granting or refusing the relief sought: *RJR-MacDonald*, above at paras. 62 and 66.

[46] Although he has not brought a motion to expedite the hearing of his application for judicial review, Mr. Shoan submits that it is reasonable to expect his application to move forward quickly. He argues that the balance of convenience overwhelmingly favours granting an

injunction to maintain the *status quo* as it existed prior to the termination of his appointment.

This is especially so, Mr. Shoan says, given that no concerns have ever been raised by the Minister with respect to his ability to do his job.

[47] I accept that the termination of his appointment and the associated loss of income have undoubtedly caused harm to Mr. Shoan, although, as noted earlier, I have not found that harm to be irreparable in nature.

[48] I do not, however, accept Mr. Shoan's assertion that the Minister has never raised any concerns with respect to his ability to do his job. For example, the Minister has alleged that Mr. Shoan held an inappropriate *ex parte* meeting with stakeholders involved in a proceeding that was pending before the CRTC, which led a party to the proceeding to raise concerns as to a potential apprehension of bias on the part of Mr. Shoan. The same party also requested his recusal from the proceeding. This directly calls Mr. Shoan's judgment into question, and with it, his ability to do his job.

[49] There is, moreover, a strong public interest in preserving integrity of, and public confidence in the CRTC. This would be undermined if Mr. Shoan were reinstated to his position as a CRTC Commissioner prior to the determination of his application for judicial review challenging the termination of his appointment for cause.

[50] There is also a public interest in enforcing an Order in Council, which enjoys a presumption of validity. If a stay were granted to Mr. Shoan, the Governor in Council would be prevented from exercising its statutory and prerogative powers: *Weatherill*, above at para. 31.

[51] Finally, there is a strong public interest in ensuring the effective functioning and well-being of the CRTC. Without making any finding as to who is at fault, it is clear that the relationship between Mr. Shoan and the CRTC Chairperson and certain other staff members has become very difficult. Reinstating Mr. Shoan to his position on an interim basis would undoubtedly have a negative impact on the collegiality required for the effective operation of the CRTC.

[52] As a consequence, I have concluded that the balance of convenience favours giving effect to the Order in Council revoking Mr. Shoan's appointment to the CRTC until such time as his application for judicial review challenging that decision can be heard.

VI. Conclusion

[53] For the reasons given, Mr. Shoan's motion to stay the Order in Council terminating his appointment to the CRTC is dismissed. The costs of this motion shall be in the cause.

ORDER

THIS COURT ORDERS that:

1. The motion is dismissed; and
2. The costs of the motion shall be in the cause.

"Anne L. Mactavish"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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