Federal Court of Appeal  Cour d'appel fédérale

Date: 20191011

Docket: A-394-18

Citation: 2019 FCA 252

[ENGLISH TRANSLATION]

CORAM: **NADON J.A.**
DE MONTIGNY J.A.
LOCKE J.A.

BETWEEN:

THE HONOURABLE MICHEL GIROUARD

Appellant

and

THE CANADIAN JUDICIAL COUNCIL
and
THE ATTORNEY GENERAL OF CANADA

Respondents

and

THE ATTORNEY GENERAL OF QUEBEC

Third Party

Heard at Quebec City, Quebec, on September 30, 2019.

Judgment delivered at Ottawa, Ontario, on October 11, 2019.

REASONS FOR JUDGMENT BY: DE MONTIGNY J.A.

CONCURRED IN BY: NADON J.A.
LOCKE J.A.

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REASONS FOR JUDGMENT

DE MONTIGNY J.A.

[1] The Honourable Justice Michel Girouard (the appellant) is appealing a judgment of the Federal Court (the Court) dated November 26, 2018, in which it was determined that the Canadian Judicial Council (the respondent or the Council) was not required to provide

10 documents to the appellant because they were protected by solicitor-client privilege, by deliberative secrecy and by public interest privilege. The appellant had requested the documents under Rule 317 of the *Federal Courts Rules*, which provides that a party may request from a tribunal material relevant to its application for judicial review.

[2] The request by the appellant arose in the broader context of his application for judicial review of the respondent's recommendation on February 20, 2018, that the appellant be removed from office. That application was heard before the Federal Court on May 22, 2019, but at the time of this writing the decision had not yet been rendered. The Council also contested the jurisdiction of the Federal Court and of this Court on the ground that it did not constitute a "federal board, commission or other tribunal" within the meaning of the *Federal Courts Act*; that claim was rejected by the two courts and an application for leave to appeal the decision of this Court is presently pending before the Supreme Court.

[3] This appeal raises important questions about the procedure to follow to determine whether a document is indeed privileged, at least in the context of a request for documents pursuant to Rule 317. The appellant also raises a number of arguments in support of his claim that the Court erred in its application of the privileges claimed in respect of the documents at issue.

I. The facts

[4] The appellant, appointed a judge of the Quebec Superior Court in 2010, has been the subject of two inquiries before the Council and its inquiry committees. At the end of the second

inquiry, in 2017, the Council (the majority of the members) adopted the findings of the inquiry committee, according to which the appellant was guilty of misconduct, and recommended that he be removed from office on the ground that he had become incapacitated or disabled from the due execution of the office of judge. The appellant filed multiple applications for judicial review of the decisions rendered by the inquiry committees, as well as of the Council's decision to recommend his removal from office, raising, *inter alia*, breaches of procedural fairness. The appellant subsequently discontinued several of his applications, while others were consolidated into one Federal Court file (T-409-18).

[5] As previously mentioned, the Council filed a motion to strike these applications for judicial review, alleging that the Federal Court lacked jurisdiction. On the same day that Justice Noël dismissed the motion (2018 FC 865), he ordered the Council, in a separate order, to serve, within 20 days, a "certified list of all of the public documents [provided to] the CJC during the review of the [inquiry committee]'s report", as well as 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": Appeal Book, p. 447 (AB).

[6] The Council complied with the order, but following an exchange of correspondence between the parties, Justice Noël saw fit to clarify his initial order with a new order dated September 26, 2018, in which he ordered the Council to file two other lists of documents by October 1, that is, [translation] "a list of all of the public documents that the decision-maker had in order to make the decision", and a [translation] "list of all documents that the decision-maker

had in order to make the decision". Each document had to be described by a title and be accompanied by an [translation] "explanation accurately describing the document, the number of pages and the language of the document (English, French or bilingual)": AB, p. 310.

[7] The Council once again complied with the order, while invoking solicitor-client privilege and/or deliberative secrecy and/or public interest privilege in respect of over 70 documents (the appellant ultimately sought only 12 of those documents). This was followed by an exchange of letters and emails between the parties, during which counsel expressed divergent viewpoints on a certain number of subjects, notably with respect to the scope of the privileges claimed. Given these disagreements and the parties' inability to agree on a process to resolve them, Justice Noël issued another order on October 25, 2018, in which he established that the Court would proceed with three steps in order to determine the validity of the privileges claimed by the Council for the 10 documents in issue (the Council waived privilege for two of the documents requested by the appellant). The three steps may be summarized as follows:

(1) The Court will review the "valid reasons" presented by the appellant to justify the lifting of one or more of the privileges, and will determine whether they warrant proceeding to the second step;

(2) In the event that the Court is satisfied that the reasons presented are valid, it will review the Council's confidential affidavit and confidential representations;

> (3) If the Court is not satisfied with the explanations provided and considers itself unable to make the appropriate determinations solely on the basis of the representations of the parties, it will examine the confidential documents (or some of them) before making its decision.

[8] Following that order, the Federal Court received the Council's representations, a confidential affidavit from the Council's executive director and senior general counsel, the Council's confidential representations, a response from the appellant to the Council's redacted representations and the redacted affidavit of its executive director, as well as brief letters from the Attorney General of Canada and the Attorney General of Quebec informing the Court that the privileges issue would be left to the courts to decide and that no comments would be made. The Council also filed with the Federal Court 12 sealed envelopes, each containing a document that was in dispute at the time.

II. The impugned decision

[9] In a detailed decision rendered on November 26, 2018, the Federal Court followed the process that it had itself established in its previous order and confirmed, for the most part, the privileges claimed by the Council.

[10] After having examined the grounds raised by the appellant in his application for judicial review, his representations and the representations of the Council, and taking into account the dissent of some of the Council members, the Court concluded that the appellant's arguments met

the “valid reasons” test since they raised legitimate and important concerns. It therefore went on to the second step of the approach that it had adopted.

[11] In this regard, the Court first set out the basis for the three privileges claimed and their justification in the specific context of the responsibilities that the Council assumes in relation to the conduct of judges. It then applied the privileges to the documents in dispute, after having indicated that it did not consider it necessary to go on to the third step and examine the documents themselves (except for one of them) to make its decision. The Court stated the following in this regard:

> [21] I have read Mr. Sabourin’s confidential affidavit as well as the confidential submissions of the [Council]’s counsel. I found them to be very useful. I have a good understanding of the contents of the documents and, aside from document (7), it will not be necessary for me to proceed to the third step. For the nine (9) other documents, I believe that the information provided by the [Council] is sufficient for me to make the appropriate determinations. Mere curiosity is not a justification to consult these documents.

[12] On the basis of the information made available to it by the Council, the Court concluded that solicitor-client privilege and deliberative secrecy applied to documents (1) and (3), that documents (4), (5), (6), (8), (9) and (10) were protected by deliberative secrecy, and that the public interest privilege protected document (2).

[13] Finally, the Court felt it necessary to look at document (7) because a reading of the description of that document provided by the Council in its confidential representations and in the confidential affidavit did not allow the Court to reassure the applicant as to whether he had indeed received all of the documents submitted to the members of the Council. After reading the document, the Court concluded that there was no need to disclose the document to the extent that

the links made available to the decision-makers were protected by deliberative secrecy; the same document also allowed the Court to confirm to the applicant that the Council had included, in the lists that it provided, all of the documents to which the members had access when making their decision.

III. Issues

[14] The appellant essentially raises two issues before this Court. First, he argues that the procedure followed by the Federal Court, particularly its decision to not consult the documents at issue (with the exception of document (7)) before ruling on the application of the privileges, was not appropriate in the circumstances and offends the fundamental principle of open and accessible court proceedings. He also claims that the Federal Court did not correctly apply the privileges claimed to the documents at issue.

IV. Analysis

[15] There is no doubt that the issue of whether a document is protected by privilege gives rise to considerations of mixed fact and law and that the determination of a trial judge in this regard is entitled to deference on appeal. In the absence of an extricable error in principle, the standard of palpable and overriding error applies: see *Redhead Equipment v. Canada (Attorney General)*, 2016 SKCA 115, at paragraph 21; *R v. Ragnanan*, 2014 MBCA 1, at paragraph 37; *Goodswimmer v. Canada (Attorney General)*, 2015 ABCA 253, at paragraph 8; *Sable Offshore Energy Project v. Ameron International Corporation*, 2015 NSCA 8, at paragraph 43; *Revcon Oilfield Constructors Incorporated v. Canada (National Revenue)*, 2017 FCA 22, at paragraph 2. To the extent that the appellant himself admits that the Federal

Court correctly set out the applicable rule for each of the privileges claimed and does not allege any error of law in this regard, it therefore seems clear to me that this Court should show deference in the review of its conclusions.

[16] However, the identification of the principles applicable to the determination by the Federal Court of the procedure to follow to decide whether a document is privileged is a different matter. This is a question that is strictly legal and that does not involve any factual considerations, and as such, it must be assessed rigorously and on the standard of correctness. Conversely, the application of this method to the contested documents may be likened to a question of mixed fact and law subject to the standard of palpable and overriding error.

[17] Rules 317 and 318 do not specify the procedure to be followed when a party objects to providing a document. Rule 317 specifies at most that a party may request “material relevant to an application that is in the possession of a tribunal whose order is the subject of the application and not in the possession of the party”. It goes without saying, as the Federal Court aptly noted, that this Rule does not require the tribunal to submit all of the documents in its possession, but only the “relevant” documents that the applicant is not in possession of. As for Rule 318, it provides that a tribunal or party may object to a request under Rule 317 by informing all parties, in writing, of the reasons for the objection. Rule 318 is silent on the steps to take in such a case; at most, subsection 318(3) specifies that the Court “may give directions to the parties and to a tribunal as to the procedure for making submissions with respect to an objection under subsection (2)”.

[18] That is exactly what the Federal Court did in its order of October 25, 2018. *A priori*, the Court seems to enjoy considerable discretion in this respect. As my colleague Justice Stratas wrote in *Lukács v Canada (Transportation Agency)*, 2016 FCA 103 (*Lukács*), the Court must try to craft a remedy that reconciles, as much as possible, three objectives: (1) meaningful review of administrative decisions, which the reviewing court will be unable to engage in without being satisfied that the record before it is sufficient to proceed with the review, (2) procedural fairness; and (3) the protection of any legitimate confidentiality interests while ensuring that court proceedings are as open as possible (*Lukács* at paragraph 15).

[19] Counsel for the appellant argue that the Federal Court erred by failing to read all of the documents in respect of which the Council claimed a privilege. In their view, it would have been [TRANSLATION] "much more preferable" if the Court had reviewed the documents before it made its decision, in the interest of procedural fairness.

[20] Counsel for the Council rely on the considerable remedial flexibility the Court enjoys when an administrative decision-maker objects to providing documents on the basis of privilege. In their opinion, the Court was able to be satisfied that any particular document fell within a category of privileged documents without having to review the documents at issue, by reading an affidavit that described the nature and content of each of the documents.

[21] Somewhat surprisingly, there is little case law on this issue. Although the Attorney General of Canada did not want to take a position on the merits of the case, the Attorney General of Canada still drew the Court's attention to a Supreme Court decision that is highly relevant to

the procedure to follow for verifying the existence of a privilege. In the judgment, reported as *M.(A.) v. Ryan*, [1997] 1 S.C.R. 157, 143 DLR (4th) 1 (*Ryan*), the Court made the following pronouncements: (1) the judge hearing the case may examine every document, but he or she is not required to do so; (2) he or she may proceed on affidavit material indicating the nature and relevance of the information, but (3) where necessary to the proper determination of the claim for privilege, it might be necessary for the Court to examine the documents. In short, where the judge is satisfied that the rights of the parties can be balanced without proceeding with such a review, the judge need not examine every document and failure to do so does not constitute an error of law. Given the importance of this issue for the purposes of this appeal, I find it appropriate to reproduce paragraph 39 of the decision in its entirety:

> In order to determine whether privilege should be accorded to a particular document or class of documents and, if so, what conditions should attach, the judge must consider the circumstances of the privilege alleged, the documents, and the case. While it is not essential in a civil case such as this that the judge examine every document, the court may do so if necessary to the inquiry. On the other hand, a judge does not necessarily err by proceeding on affidavit material indicating the nature of the information and its expected relevance without inspecting each document individually. The requirement that the court minutely examine numerous or lengthy documents may prove time-consuming, expensive and delay the resolution of the litigation. Where necessary to the proper determination of the claim for privilege, it must be undertaken. But I would not lay down an absolute rule that as a matter of law, the judge must personally inspect every document at issue in every case. Where the judge is satisfied on reasonable grounds that the interests at stake can properly be balanced without individual examination of each document, failure to do so does not constitute error of law.

[22] That decision is still the leading case and this Court has not hesitated to consult documents in respect of which a privilege was claimed when such a review seemed necessary to determine whether privilege truly applied. In *Slansky v. Canada (Attorney General)*, 2013 FCA 199, [2015] 1 F.C.R. 81, for example, three judges of this Court (as well as the trial judge) read

the report that the Council alleged to be protected by solicitor-client privilege and public interest privilege before they made their decision. Similarly, in *Canada (Information Commissioner) v. Canada (Minister of Environment)*, 187 DLR (4th) 127, [2000] FCJ No 480 (QL), the Court established that it had to examine the material in which solicitor-client privilege was claimed to see if the privilege was properly invoked. And in *1185740 Ontario Ltd v. Minister of National Revenue* [1999] F.C.J. No. 1432, 247 N.R. 287, this Court set aside a Federal Court decision on the ground that the Federal Court should have examined the statements for which privilege was invoked to determine whether they were privileged or whether the privilege had been waived. The case law of the Federal Court and of other courts of appeal is to the same effect: see, for example, *Stevens v. Conservative Party of Canada*, 2004 FC 396; *Calgary (Police Service) v. Alberta (Information and Privacy Commissioner)*, 2018 ABCA 114, 30 Admin LR (6th) 45; *Blood Tribe v. Canada*, 2010 ABCA 112, 317 DLR (4th) 634.

[23] By way of analogy, it is worth noting that the Federal Court and this Court have adopted a similar approach in the context of the *Canada Evidence Act*, R.S.C. 1985, c. C-5. In *Wang v. Canada (Public Safety and Emergency Preparedness)*, 2016 FC 493, for example, the Federal Court examined the documents that the Attorney General wanted to protect to determine whether they were indeed protected by the public interest privilege under section 37 of the *Canada Evidence Act*. Similarly, this Court decided, in *Ribic v. Canada (Attorney General)*, 2003 FCA 246, [2005] 1 FCR 33, that a Federal Court judge who is seized with an application for an order regarding the disclosure of sensitive information under section 38.04 of the *Canada Evidence Act* must first review the documents to determine whether they are relevant to an accused in a criminal trial.

[24] In my view, the procedure established by the Federal Court in the present case was entirely consistent with the state of the law and the judge did not commit a reviewable error by proceeding as he did with the three-step approach. It was entirely appropriate, and consistent with the case law, to establish that the documents themselves would be reviewed only if the Court were to consider itself unable to decide on the claimed privileges solely on the basis of the parties' representations. It is also important to point out that the order dated October 25, 2018, in which the process was developed, is not on appeal before us.

[25] The question that arises is rather whether it was reasonable for the Federal Court to find that it did not have to read the documents (except for one) under the circumstances. I have come to the conclusion, not without some hesitation, that the judge should have read the documents before he made his decision, given the facts and the particular circumstances of this case.

[26] It seems to me that the draconian consequences that the Council's recommendation would have on the appellant, if it is followed by the Minister and ultimately by the two Houses of Parliament and the Governor General, impose the utmost respect for the principles of procedural fairness. In addition, the appellant's application for judicial review of the Council's decision states precisely that the process was vitiated by a number of breaches of procedural fairness. In this context, and with respect, I fail to see how the judge could have been satisfied with secondary evidence (the parties' representations and Mr. Sabourin's affidavit) instead of examining the documents that were the subject of the claim for privilege. This is not about questioning the good faith of either party; it is about ensuring not only that justice was done, but also that it is seen to have been done.

[27] I would add in closing that the review of the documents was not likely to unduly delay the proceedings or otherwise be prejudicial to the parties. The 10 documents at issue are only a few pages each, and it would not have taken a lot of time to read them. This is therefore not the situation in *Ryan*, where the examination of the documents would have been expensive and time-consuming and would have delayed the resolution of the litigation.

[28] Further to a direction of the Court issued on October 7, 2019, inviting the parties to make representations on the appropriate remedy in the event of a finding that the Federal Court erred by not reading the documents, the appellant and the Attorney General of Canada asked us to review these documents ourselves, whereas the respondent asked us to give that task to the Federal Court. After careful consideration, we came to the conclusion that it was in the interests of justice to open the sealed envelopes and look at the documents ourselves to ensure that the descriptions of the documents in the Council's representations and in its executive director's affidavit accurately reflect their content. Subparagraph 52(b)(i) of the *Federal Courts Act* enables this Court to proceed this way to the extent that it authorizes this Court to give the judgment that the Federal Court should have given.

[29] After a careful review of the documents at issue in this appeal, I am satisfied that they are in all respects consistent with the Council's representations before the Federal Court and that they are indeed protected by the privileges claimed. They do not constitute new evidence, do not concern the merits of the issue that had to be decided by the members of the Council, and contain no representations to which the appellant should have been able to respond.

[30] That being said, I am therefore of the opinion that the appeal should be dismissed despite the error committed by the Federal Court in the application of the process that it had developed for determining whether or not the disputed documents were privileged. This error proved to be inconsequential and I am therefore of the opinion, like the trial judge, that the claimed privileges applied and justified the Council's decision to not produce the documents.

[31] For all of these reasons, I would dismiss the appeal. Since the respondent did not claim costs, none shall be awarded.

"Yves de Montigny"

J.A.

"I agree.
M. Nadon J.A."

"I agree.
George R. Locke J.A."

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE SIMON NOËL DATED NOVEMBER 26, 2018, DOCKET NO. T-409-18.

DOCKET:	A-394-18
STYLE OF CAUSE:	THE HONOURABLE MICHEL GIROUARD v. THE CANADIAN JUDICIAL COUNCIL AND THE ATTORNEY GENERAL OF CANADA AND THE ATTORNEY GENERAL OF QUEBEC
PLACE OF HEARING:	QUEBEC CITY, QUEBEC
DATE OF HEARING:	SEPTEMBER 30, 2019
REASONS FOR JUDGMENT BY:	DE MONTIGNY J.A.
CONCURRED IN BY:	NADON J.A. LOCKE J.A.
DATED:	OCTOBER 11, 2019

APPEARANCES:

Bâtonnier Gérald R. Tremblay, Ad. E. Lisa-Anne Moisan	FOR THE APPELLANT
Bâtonnier Louis Masson, Ad. E.	
Alyssa Tomkins Gabriel Poliquin James Plotkin	FOR THE RESPONDENT THE CANADIAN JUDICIAL COUNCIL
Pascale-Catherine Guay Lindy Rouillard-Labbé	FOR THE RESPONDENT THE ATTORNEY GENERAL OF CANADA

SOLICITORS OF RECORD:

McCarthy Tétrault Montreal, Quebec Joli-Coeur Lacasse Quebec City, Quebec	FOR THE APPELLANT THE HONOURABLE MICHEL GIROUARD
Caza Saikaley S.R.L./LLP Ottawa, Ontario	FOR THE RESPONDENT THE CANADIAN JUDICIAL COUNCIL
Nathalie G. Drouin Deputy Attorney General of Canada	FOR THE RESPONDENT THE ATTORNEY GENERAL OF CANADA
Bernard Roy (Justice Québec) Ministère de la Justice du Québec Montreal, Quebec	FOR THE THIRD PARTY THE ATTORNEY GENERAL OF QUEBEC