Federal Court  Cour fédérale

Date: 20200427

Docket: 20-T-2

Citation: 2020 FC 557

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, April 27, 2020

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

THE HONOURABLE MICHEL GIROUARD

Moving Party

and

ATTORNEY GENERAL OF CANADA

Respondent

ORDER AND REASONS

(Section 18.1 of the *Federal Courts Act*
and Rules 300 et seq. of the *Federal Courts Rules*)

I. Overview

[1] By order dated February 13, 2020 (2020 FC 248), the Court stayed this motion for an extension of time to allow the Minister of Justice (Minister) to respond to the recommendations included in the report of the Judicial Compensation and Benefits Commission (Commission).

[2] On February 27, 2020, the Minister released the "Response of the Government of Canada to the Report of the Judicial Compensation and Benefits Commission on the matter of freezing pension entitlements for judges whose removal from office has been recommended by the Canadian Judicial Council".

[3] More specifically, in his response on the subject of the applicability of the new provisions to judges who had already been recommended for removal from office at the time of the provisions' entry into force, at paragraph 29 of this report, the Minister noted that "the Commission is concerned that it may be unfair to apply the proposed changes on the day they come into force to judges who are already subject to a recommendation for removal". Consequently, the Minister concluded as follows:

> The proposed amendments will therefore be implemented so as to apply only to judges whose removal is recommended on or after the day it comes into effect.

II. Parties' submissions

[4] Following the Minister's response, the moving party submitted an additional memorandum in which he asked this Court to:

i. take note of the ministerial interpretation to the effect that the response does not apply to him, and suspend the application for judicial review; or

ii. take note of the ministerial interpretation to the effect that the response does apply to him, and consequently allow the motion for an extension of time and authorize the filing of an application for judicial review.

[5] The respondent countered by submitting that the moving party has no legal interest in initiating an application for judicial review of both the Commission's report and the Minister's response. The respondent notes that the motion for an extension of time is inconceivable (i) because the moving party did not give reasonable explanations which could justify his delay; and (ii) because the application for judicial review is certain to fail because the Commission's report is for advisory purposes and is not a "decision" within the meaning of section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7.

III. Analysis

[6] Quite simply, the moving party is asking the Court, in the context of this motion for an extension of time, to interpret the Minister's response in order to determine whether the proposed amendments concern him. The Court referred above to certain excerpts from the Minister's response and does not intend to interpret what is explicitly written; this is not the role of the Court.

[7] Rather, the role of the Court in this matter is to make the appropriate determinations regarding the motion for an extension of time. To do this, we must evaluate four (4) factors:

1. Did the moving party have a continuing intention to challenge the Commission's report?
2. Is there some potential merit to the application?
3. Has the respondent been prejudiced by the delay?
4. Does the moving party have a reasonable explanation for his delay?

[8] Each of these factors must be assessed taking into account the interests of justice (see *Attorney General of Canada v Larkman*, 2012 FCA 204, at paras 61–62).

[9] Although the moving party explained in a reasonable manner the reason for the delay and demonstrated that he had a continued intention of challenging the Commission's report, I consider that his application, as such, ultimately does not disclose a basis on which it could have any chance of succeeding.

[10] The application for judicial review relates to a comment in the report which deals with the timing of the application of the proposed legislative amendment. More specifically, it raises the issue of whether that amendment would apply to any judge whose removal from office was recommended by the Canadian Judicial Council (Council) before Royal Assent to this legislative amendment (see paras 25 and 29 of the Commission's report).

[11] On this point, the Commission confines itself to stating that "it would be unfortunate if the making of the Request and the results of this report negatively affected those whom are already the object of deliberations and recommendations by the Canadian Judicial Council" (see para 29 of the report).

[12] The Commission's report is one step among others, as provided for in section 26 of the *Judges Act*, RSC, 1985, c J-1. The Minister's response followed the Commission's report and, as related above, specifically comments on paragraph 29 of the report. In this regard, the respondent took the trouble to cite the Minister's conclusion regarding paragraph 29 of the report, while largely emphasizing the last sentence of the Minister's response in this regard:

> [T]he Government is of the view that it would be appropriate to implement the proposed amendments so as to respect their spirit. The proposed amendments will therefore be implemented so as to apply to judges whose removal is recommended on or after the day it comes into effect.

[13] The respondent specifies that, for him, the Minister's response is clear and does not give rise to any difficulties with its interpretation (see para 13 of his supplementary brief).

[14] As part of the process set out in section 26 of the *Judges Act*, it is expected that the Commission's report will be tabled before each House of Parliament for study and that, following the Minister's decision, a bill implementing the Minister's response will be tabled.

[15] From all of this, it is noted that the moving party's application for judicial review relates to a comment contained in the Commission's report. We also see that the report is one step among others in the process proposed by section 26 of the *Judges Act*. But in addition, the respondent has explicitly stated before this Court that the Minister's response to the comment is [TRANSLATION] "clear" and that there is [TRANSLATION] "no difficulty in interpretation".

[16] Taking all of this into account, the application for judicial review is without merit, and it would therefore not be in the interests of justice to allow this motion for an extension of time. Consequently, I dismiss it without costs since no request to that effect has been made.

IV. Obiter

[17] As *obiter*, I must comment on the actions taken by the Council in this context. On March 2, 2020, in the days following the Minister's response, the Council issued a press release commenting on the Minister's response to the Commission's report:

> **Press Releases - Ottawa, March 2, 2020**
>
> ## Canadian Judicial Council Comments on Proposed Rules on Judicial Pensions Following a Finding of Misconduct
>
> The Minister of Justice's proposal to freeze the accumulation of pensionable time for judges accused of misconduct is a welcome and long overdue step in the right direction, the Canadian Judicial Council says.
>
> The Council has been calling for judicial conduct reform for over two years, urging that the process must be more efficient and less costly to Canadians. The Council's Chair, the Rt. Hon. Richard Wagner, singled this out as a priority in his welcome speech as Chief Justice in 2018. The Council has been working with the Department of Justice to strengthen the process for dealing with complaints against federally-appointed judges.
>
> In response to the Council's call for reform, the Minister of Justice had proposed legislation that would freeze the accumulation of pensionable time for judges as of the date the Canadian Judicial Council recommends the judge's removal from office. The goal of the legislation is to avoid the perception of a judge challenging a removal recommendation solely to receive an enhanced pension by prolonging the removal process. The overarching goal is to preserve confidence in the judiciary.
>
> Given the urgent nature of this proposed legislation, the Minister asked the Judicial Compensation and Benefits Commission to inquire into and report on it. The Commission did so and concluded that the proposal represented a reasonable measure. However, it expressed a concern about the potential effect on judges who may already be the subject of a removal recommendation.
>
> Based on this observation from the Commission, the Minister changed his proposed legislation to now capture only judges who are the subject of a removal recommendation on or after its enactment.

> The Council is concerned about this change, which means that the proposed rules would not apply to judges already subject to a removal recommendation. The Council sees no principled reason for this distinction. The Council is concerned that the rules as now proposed fall short of the pressing objective of eliminating any incentive for a judge whose removal has been recommended, but who has not yet been removed, to draw the process out. It is in the public interest that the risk of delay tactics at the expense of Canadians be fully eliminated.
>
> The Canadian Judicial Council therefore urges the Minister to proceed with his original proposal.
>
> (Canadian Judicial Council Comments on Proposed Rules on Judicial Pensions Following a Finding of Misconduct" (March 2, 2020), online: <https://cjc-ccm.ca/en/news/canadian-judicial-council-comments-proposed-rules-judicial-pensions-following-finding>.

[18] As reported, the Council agrees with certain aspects of the Minister's response but expresses its disagreement as to when the changes should take effect. The Council explains its disagreement with the Minister regarding the implementation and "urges the Minister to proceed with his initial proposal".

[19] It is nonetheless astonishing to see the Council, the body that issues conclusions for removal from office of judges for disciplinary reasons, interfering in a legislative advisory process set up by the *Judges Act*. Although it is the judicial investigative and decision-making body for complaints against judges, the Council nevertheless allowed itself to oppose the Minister's response to the Commission's recommendations concerning a legislative amendment affecting the consequences of a decision they had already made. It seems to me, *prima facie*, that there is an apparent conflict: the Council cannot wear two hats at the same time. Either it is a court deciding complaints against superior court judges or it is a lobbying body. It is clear to me

that these separate roles cannot be intertwined. That being said, beyond identifying this problem, if the Minister ever considers legislative changes to the *Judges Act*, it is not my role to tell him how to go about it.

[20] Furthermore, if the Council has a role to play in this regard despite the circumstances described above, it could have appeared before the Commission as did the Canadian Superior Court Judges Association, the prothonotaries of the Federal Court and Justice Girouard. There is a process under the *Judges Act*, and the use of press releases does not appear to be in accordance with this process put forward by Parliament in response to the decision of the Supreme Court of Canada in *Reference re Remuneration of Judges of the Provincial Court of P.E.I.*; *Reference regarding the Independence and Impartiality of Judges of the Provincial Court of P.E.I.*, [1997] 3 SCR 3. Attempting to influence the Minister outside the statutory process is not, in my view, within the powers of the judiciary.

[21] Having stated in *obiter* what I think could not go unsaid, given my decision of February 13, 2020, and the deliberation that followed, I stand by my comments.

ORDER

ON THE BASIS OF THE REASONS GIVEN ABOVE, I conclude as follows:

1. The motion for an extension of time to file a notice of application is dismissed.

"Simon Noël"

Judge

Certified true translation
This 11th day of June 2020.

Michael Palles, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	20-T-2
STYLE OF CAUSE:	THE HONOURABLE MICHEL GIROUARD v THE ATTORNEY GENERAL OF CANADA

MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO, PURSUANT TO RULES 359, 364 AND 369 OF THE *FEDERAL COURTS RULES*, SOR/98-106

ORDER AND REASONS:	NOËL J.
DATED:	April 27, 2020

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