Federal Court  Cour fédérale

Date: 20141121

Docket: T-2301-14

Citation: 2014 FC 1115

Ottawa, Ontario, November 21, 2014

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

THE HONOURABLE LORI DOUGLAS

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

and

INDEPENDENT COUNSEL IN THE MATTER CONCERNING THE HONOURABLE LORI DOUGLAS

Intervener

ORDER AND REASONS

[1] This is a motion brought in the context of the proceedings undertaken by the Canadian Judicial Council (the CJC or Council) to investigate the conduct of the Honourable Lori Douglas, Associate Chief Justice of the Court of Queen's Bench of Manitoba (Douglas ACJ).

[2] Douglas ACJ has filed an application in this Court for judicial review of the Inquiry Committee's decision to admit certain photographs into evidence. In this motion she seeks an Order, pursuant to section 18.2 of the *Federal Courts Act*, RSC 1985, c F-7, to stay the decision of the Inquiry Committee to admit the photographs subject to confidentiality, sealing and non-disclosure orders.

[3] In a letter to the Court dated November 13, 2014, the Attorney General of Canada, named as Respondent in the application for judicial review and this motion, consented to the motion for a stay on the basis that it was in the public interest to maintain the *status quo* until the Federal Court has exercised its supervisory jurisdiction and the application is finally determined.

[4] Recognizing that it was also in the public interest for the inquiry to proceed with as little delay as possible, the Attorney General also submitted that if the stay is granted, the timelines for the judicial review application should be abridged and the hearing expedited. The Applicant agrees that the hearing of the application should be expedited.

[5] On November 18, 2014, the Independent Counsel to the Inquiry requested leave to intervene under Rule 109 of the *Federal Courts Rules*. The Applicant and the Respondent consented to the intervention of the Independent Counsel on the stay motion. The Independent Counsel was granted leave to submit a motion record and to appear at the hearing of the motion on November 20, 2014 to make oral submissions objecting to the motion.

[6] The Attorney General did not submit written representations or make oral submissions on the hearing of the stay motion but appeared through counsel and spoke to questions from the Court.

[7] For the reasons that follow, I stay the Inquiry Committee's ruling that the impugned photographs are admissible, pending determination of the underlying application for judicial review on the merits.

I. **Background**

[8] On March 13, 2014, the CJC appointed three members to the Inquiry Committee constituted to investigate allegations made against Douglas ACJ, following the resignation of the first Inquiry Committee). The members of the second Inquiry Committee are the Honourable François Rolland (who will serve as Chairperson), the Honourable Austin Cullen and Ms Christa Brothers QC.

[9] By judgment dated March 28, 2014, I disposed of an application brought by Douglas ACJ alleging a reasonable apprehension of bias on the part of the Council: *Douglas v Attorney General (Canada)*, 2014 FC 299 [*Douglas 2014*]. That decision is presently under appeal.

[10] Ms Suzanne Côté, who succeeded Mr Guy Pratte as Independent Counsel after he resigned, delivered a Notice of Allegations outlining three allegations against Douglas ACJ on March 31, 2014. The first allegation is that Douglas ACJ failed to disclose certain facts in her application for judicial appointment. The second allegation is that the photographs posted online

"could be seen as inherently contrary to the image and concept of integrity of the judiciary, such that the confidence of individuals appearing before the judge, or of the public in its justice system, could be undermined". The third allegation is that Douglas ACJ failed to disclose certain facts to Mr Pratte in the course of the proceedings involving the first Inquiry Committee.

[11] On October 1, 2014, Douglas ACJ filed a motion requesting that the Inquiry Committee (1) dismiss the allegations without resort to a formal evidentiary hearing and (2) declare the photographs inadmissible and return them to her. The Inquiry Committee heard the motion on October 27 and 28, 2014. It dismissed the motion from the bench.

[12] The Inquiry Committee delivered written reasons on November 4, 2014. It explained that it was inappropriate to decide the allegations on a summary basis and affirmed that it had jurisdiction to decide the third allegation, contrary to Douglas ACJ's contention. It also refused Douglas ACJ's request to declare the photographs inadmissible and to return them to her.

[13] The Inquiry Committee found that the photographs are relevant to the first and second allegations. It also found that admitting them into evidence would not be unduly prejudicial. It emphasized that it would protect Douglas ACJ's privacy to the fullest possible extent by issuing the necessary confidentiality, sealing and non-disclosure orders.

[14] The Inquiry Committee intends to hold a hearing to investigate the allegations beginning on November 24, 2014, for a duration of ten days.

[15] On November 6, 2014, Douglas ACJ filed an application for judicial review of the Inquiry Committee's decision.

[16] On November 10, 2014, Douglas ACJ filed a notice of motion seeking an Order staying the Inquiry Committee's ruling that the photographs are not inadmissible.

II. **Issue**

[17] The sole issue presently before the Court is whether it should stay the decision of the Inquiry Committee declaring that the photographs are not inadmissible in its proceedings, pending the determination of the underlying application for judicial review.

III. **The Law**

[18] The Supreme Court of Canada set out the tripartite test for interlocutory stays in *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311. At 334, the Court summarized the test as follows:

> First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits.

[19] Therefore, the moving party shoulders the burden of proving that three conditions are met: (1) there is a serious issue to be tried, (2) the moving party will suffer irreparable harm if the stay is not granted and (3) the balance of convenience favours the moving party.

[20] The Supreme Court reiterated this test in *Harper v Canada (Attorney General)*, 2000 SCC 57 at para 4.

A. *Serious Issue*

[21] At the first stage, the Court must determine whether the underlying application raises a serious issue. The threshold is low – the Court must only be satisfied that "the claim is not frivolous or vexatious": *RJR-MacDonald*, above, at 335. The Supreme Court explained the procedure which the motions judge must follow at 337-338:

> The threshold is a low one. The judge on the application must make a preliminary assessment of the merits of the case. […] Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable.
>
> [Emphasis added]

[22] However, the Supreme Court immediately observed that there are exceptions to the general approach. A higher standard applies "when the result of the interlocutory motion will in effect amount to a final determination of the action": *RJR-MacDonald*, above, at 338. The Court commented on the correct approach in these circumstances at 339:

> [A] more extensive review of the merits of the case must be undertaken. Then when the second and third stages of the test are considered and applied the anticipated result on the merits should be borne in mind.

[23] In *Wang v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 148 at para 11, Justice Pelletier explained the correct approach in such cases: "It is not that the tri-partite test

does not apply. It is that the test of serious issue becomes the likelihood of success on the underlying application".

B. *Irreparable Harm*

[24] The Supreme Court explained the second step as follows in *RJR-MacDonald*, above, at 341:

> At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.
>
> "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other.
>
> [Emphasis added]

[25] The case law holds that irreparable harm cannot be substantiated through speculation as to the potential outcome or effects of an administrative decision: *VIA Rail Canada Inc v Cairns* (2000), 26 Admin LR (3d) 52 (FCA) at para 4 [*VIA Rail*]; *Cognos Inc v Canada (Minister of Public Works and Government Services)*, 2002 FCT 882 at para 21; *Telecommunications Workers Union v Canadian Industrial Relations Board*, 2005 FCA 83 at para 8.

[26] The jurisprudence also recognizes that harm to the moving party's professional reputation might amount to irreparable harm: *Bennett v British Columbia (Superintendent of Brokers)* (1993), 77 BCLR (2d) 145 (BCCA) at paras 18-19; *Adriaanse v Malmo-Levine*, [1998] FCJ No 1912 (FCT) at paras 20-22; *Viswalingam v Fort Smith Health Centre* (1992), 36 ACWS (3d)

1008 (NWTSC) at paras 57, 61-62 [*Viswalingam*], rev'd for different reasons *Viswalingam v Forth Smith Health Centre* (1993), 46 ACWS (3d) 1138 (NWTCA).

[27] The case law also accepts that harm to the moving party's mental health might amount to irreparable harm: *Viches v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 389 at para 14.

[28] Harm which has already occurred does not justify a stay: *VIA Rail*, above, at para 6. However, the test is met if the moving party demonstrates that the harm will continue – or a different harm will occur – unless a stay is granted: *Viswalingam*, above, at paras 61-62.

C. *Balance of Convenience*

[29] In *RJR-MacDonald*, above, at 342, the Supreme Court elaborated upon the final stage as follows:

> The third test to be applied in an application for interlocutory relief was described by Beetz J. in *Metropolitan Stores* at p. 129 as: "a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits". In light of the relatively low threshold of the first test and the difficulties in applying the test of irreparable harm in *Charter* cases, many interlocutory proceedings will be determined at this stage.
>
> The factors which must be considered in assessing the "balance of inconvenience" are numerous and will vary in each individual case.
>
> [Emphasis added]

[30] Subsequently, courts have taken the public interest into account in a variety of public law cases which do not involve the *Charter*.

[31] In *Todd v Canada (Attorney General)*, 2005 FC 439 at 29, Justice Simon Noël articulated the public interest in holding a professional disciplinary hearing:

> Finally, the balance of convenience lies more with the public interest in seeing justice be done than with Mr. Todd's personal interests in not having this matter proceed. It is acknowledged that Mr. Todd will incur not only legal costs, but also personal costs in the way of stress, a potential adverse finding, and potential damage to his reputation, if the hearing is held as scheduled, while the Superintendent, on the other hand, arguably only risks losing its jurisdiction over the matter if this interim stay is granted. The balance of convenience, however, is more complex than this, and it seems logical that if there has been professional misconduct by Mr. Todd in his activities as a Trustee in bankruptcy, the public ought to be aware of this. Likewise, if his conduct has been blameless, then it is in the interest of all parties – Mr. Todd as well as the public he may serve in the future – for Mr. Todd's innocence to be known.

[32] There is some authority to the effect that the balance of convenience tilts in favour of the moving party where the requested stay would not affect the general operation of legislation. In *Viswalingam*, above, at para 66, the chambers judge stayed a disciplinary hearing against a physician because

> Only the proceedings against the plaintiff will be temporarily restrained. This case is not a test of the regulatory provisions of the *Medical Profession Act*. No other proceedings are affected. <u>The only person who is directly affected is the plaintiff.</u>
>
> [Emphasis added]

[33] These cases can be reconciled because this stage of the tripartite test constitutes a discretionary weighing exercise. The fact that a stay only directly affects one person weighs in favour of granting the stay, whereas the public interest in the prompt adjudication of professional misconduct weighs in the other direction.

IV. **Analysis**

[34] For the reasons that follow, I have concluded that a stay is appropriate under these circumstances. Nonetheless, I wish to be clear that I am not deciding whether Douglas ACJ will succeed in the underlying application. The Court will grant or dismiss that application upon further written and oral submissions and consideration of the matter.

A. *Serious Issue*

[35] In my view, this motion calls for the application of the usual "serious question" standard. Independent Counsel has not made a case that the elevated standard should apply and I am not satisfied that granting the stay "…will in effect amount to a final determination of the action": *RJR-MacDonald*, above, at 338. Ms Côté conceded during her oral submissions that the Committee could proceed with the hearing of evidence pending the outcome of the judicial review application. Her argument was essentially that in reaching a conclusion on the allegations, the Inquiry Committee members must view the photographs, but that could occur at a later stage of the inquiry proceedings. If a stay is granted, it is not a foregone conclusion that the Inquiry Committee will hold a hearing without the photographs in evidence and then issue its

report without having had the benefit of that evidence which it considers necessary for completing its task.

[36] I am satisfied that the Applicant meets the low threshold of the "serious question" test. She has raised serious issues about the relevance, probative value and prejudicial effects of the photographs. Without deciding the merits of her application for judicial review, I find that it is not frivolous or vexatious.

[37] Also, at this stage, I need not decide whether the underlying application is premature. The Court will answer that question when deciding the merits of the application. If there is a serious possibility that the Court will not deem the application premature, I should grant a stay"even if of the opinion that the plaintiff is unlikely to succeed at trial": *RJR-MacDonald*, above, at 337-338.

[38] In *Canada (Border Services Agency) v CB Powell Limited*, 2010 FCA 61 at paras 30-33, the Federal Court of Appeal affirmed the principle of judicial non-interference with administrative proceedings in the absence of exceptional circumstances. The principle is that individuals should not go to the courts until the administrative process is complete or they have exhausted all effective remedies within that process. As I explained in *Douglas 2014*, above, this principle is subject to limitations in exceptional circumstances.

[39] In my view, Douglas ACJ presents a serious case that her application may fall within such exceptional circumstances. She does not bring her application to prevent a negative decision

on the merits. Such applications are manifestly premature because they become moot if the tribunal ultimately sides with the applicant. Douglas ACJ challenges an interlocutory decision in order to pre-empt irreparable harm that will allegedly occur as the direct result of that interlocutory decision, irrespective of the Committee's final decision. She has no other effective remedy for avoiding this harm, she argues, since the Inquiry Committee dismissed her motion to have the photographs declared inadmissible. As such, the argument that the underlying application is not premature constitutes a serious issue to be tried.

[40] Contrary to the argument of the Independent Counsel, I do not consider that I am bound by my previous finding in *Douglas 2014*, at para 142, that I would have found the application in that matter premature but for certain exceptional circumstances. Nor will that finding bind the Court when it decides the underlying application. In *Douglas 2014*, the application concerned the relationship between the CJC and Independent Counsel. The harm which Douglas ACJ currently raises was not at issue.

B. *Irreparable Harm*

[41] I am also satisfied that the Applicant has established that she will suffer irreparable harm in the short term, in the absence of a stay.

[42] There is consistent authority to the effect that harm to an individual's personal or professional reputation amounts to irreparable harm. In a previous decision imposing a stay on the Inquiry Committee proceedings, *Douglas v Attorney General (Canada)*, 2013 FC 776 at paras 24-28, Justice Snider accepted that the disciplinary proceedings risked harming the

Applicant's reputation and dignity interests. While the issues in the application and motion before Justice Snider were different, I have reached a similar conclusion.

[43] The Applicant does not speculate as to harm which might arise if the Inquiry Committee ultimately renders a negative decision. She alleges that she will suffer harm as soon as the members of the Inquiry Committee view the pictures, and again when the quorum of the CJC may view them upon receiving the Committee's record and report. Within the context of these interlocutory proceedings, I can see no reason to cast doubt on Douglas ACJ's contention that she will suffer a blow to her dignity if her peers view the photographs.

[44] The Independent Counsel has argued that it is not a foregone conclusion that a full quorum of the CJC will view the photographs, since the CJC remains master of its own procedure. However, Douglas ACJ's supposition that a full quorum of the CJC (17 or more Chief Justices or Associate Chief Justices) will look at the photographs while exercising its functions is reasonable. The idea that the CJC might exercise its discretion to depart from the procedures prescribed in its policies is more theoretical than the harm which Douglas ACJ seeks to avoid. While the Inquiry Committee has provided assurances that it will issue various protective orders, it has not undertaken to recommend that the full quorum should not view the photographs.

[45] In any event, it is the nature of harm – not its magnitude – which must be "irreparable": *RJR-MacDonald*, above, at 341. The nature of the alleged harm which disclosure of the photographs will inflict upon Douglas ACJ's reputation and psychological state does not depend

on the exact number of people who will view the photographs. Whether the public interest in the proper administration of the judicial inquiry process outweighs that harm is not a question to be determined by the Court on this motion.

[46] The Independent Counsel points out that the photographs have been publicly available on the Internet at various times since 2002. The Applicant acknowledges that at least two of the photographs continue to be accessible on what has been characterized by others as "cyber-misogyny" sites. The Independent Counsel notes that, by her count, at least 11 members of the CJC have also already viewed the photographs. Because of their prior involvement in the matter, these members will not take part in any subsequent stages of the proceedings. There is no indication that any of the judges who sit on the Inquiry Committee or may become involved in these proceedings later on have already seen the pictures.

[47] In sum, the second step of the test is met. The case law accepts that the kind of harm the Applicant seeks to avoid is irreparable. Although she has endured analogous harm in the past, she should not be made to endure a novel disclosure of the photographs before the Court pronounces upon the merits of her application.

C. *Balance of Convenience*

[48] Upon weighing the competing relevant factors, I have concluded that the balance of convenience favours interlocutory relief.

[49] The public interest clearly calls for the expeditious resolution of disciplinary complaints, as stated by the Attorney General of Canada and the jurisprudence. The public has an interest in learning whether the person under scrutiny can continue to perform her judicial functions notwithstanding the allegations made against her.

[50] However, in this case there are countervailing public interest considerations favouring a stay. The Applicant points to the emerging social consensus in Canada that intimate images should not be disclosed or disseminated against the will of the persons they depict unless it is absolutely necessary. If the stay is refused and the Applicant subsequently succeeds on the merits of her application for judicial review, the Court will have condoned an unnecessary disclosure of such images. Such a result would be especially unfortunate in the context of disciplinary proceedings which implicate judicial independence.

[51] A stay would not affect the direct interests of any person other than Douglas ACJ. Furthermore, it would only affect the portion of the decision holding the photographs admissible. Its effect on the administrative proceedings would not be excessive, since the Inquiry Committee could continue its work in the absence of the photographs.

[52] The parties and the Independent Counsel favour an expedited hearing on the merits. Thus the underlying application may be decided within an acceptable period of time. The proceedings before the Inquiry Committee should not suffer an incommensurate delay as a result of my decision to grant a stay.

[53] On the one side lies the indisputably important public interest in efficient administrative action. On the other lies the public interest in preventing the unnecessary disclosure of intimate images, the irreparable harm faced by Douglas ACJ and the prospect of an expedited hearing on the merits. In my view, the balance tilts in favour of granting the stay so as to preserve the *status quo* until the Court disposes of the underlying application.

ORDER

THIS COURT ORDERS that

1. The motion is granted;
2. The Inquiry Committee's decision that the photographs are admissible is stayed until such time as the underlying application for judicial review is finally determined;
3. The underlying application for judicial review shall be heard on an expedited basis; and
4. No costs are awarded.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2301-14
STYLE OF CAUSE:	THE HONOURABLE LORI DOUGLAS and THE ATTORNEY GENERAL OF CANADA and INDEPENDENT COUNSEL IN THE MATTER CONCERNING THE HONOURABLE LORI DOUGLAS
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	NOVEMBER, 20, 2014
ORDER AND REASONS:	MOSLEY J.
DATED:	NOVEMBER 21, 2014

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