Federal Court  Cour fédérale

Date: 20210816

Docket: T-1324-20

Ottawa, Ontario, August 16, 2021

PRESENT: The Honourable Madam Justice Mandy Aylen

BETWEEN:

DEMOCRACY WATCH AND DUFF CONACHER

Applicants

and

THE ATTORNEY GENERAL OF CANADA

Respondent

ORDER

[1] In the underlying application for judicial review, the Applicants seek a declaration that the federal judicial appointment and judicial promotion systems are unconstitutional. The Applicants assert that the Attorney General of Canada's discretionary and ultimately political role in the systems creates and perpetuates actual bias or the reasonable apprehension of bias, thereby violating section 96 of the *Constitution Act, 1867*, sections 7, 11(d) and 24(1) of the *Canadian Charter of Rights and Freedoms* and the principles of fundamental justice, including the unwritten constitutional principles of judicial independence and the rule of law.

[2] By way of additional relief, the Applicants seek directions from the Court with respect to what changes to the systems are necessary to make them compliant with the *Constitution Act, 1867*, the *Canadian Charter of Rights and Freedoms* and/or the aforementioned principles of fundamental justice.

[3] In support of the application, the Applicants rely on the affidavit of Duff Conacher sworn December 17, 2020 [Conacher Affidavit]. The Respondent has served its supporting affidavit and the Respondent's affiant was briefly cross-examined in writing. Based on the evidence before the Court, it would appear that the Respondent did not elect to cross-examine Mr. Conacher on his affidavit and the time for completion of any such cross-examination has expired. The next step in this application is the service and filing of the Applicants' application record.

[4] There are presently two motions before the Court. On the first motion, the Respondent seeks an order striking the following portions of the Conacher Affidavit:

A. Paragraphs 13 to 20, the first sentence of paragraph 21 (the first clause), paragraphs 23 to 27, paragraphs 30 to 31 and Exhibits D, E, F, G, H, I, J, N, O, P, Q, R, S, T, U, V, W, Z, AA and BB on the basis that this evidence constitutes impermissible hearsay; and

B. Paragraphs 19 to 20, paragraphs 24 to 27, the first two sentences of paragraph 28, paragraphs 29 to 31 and Exhibits H, I, J, P, Q, R, S, T, U, V, W, Y, Z, AA and BB on the basis that this evidence constitutes impermissible opinion evidence.

[5] The Applicants oppose the motion, asserting that the impugned evidence does not constitute hearsay. In the alternative, if the Court finds that any of the impugned evidence

constitutes hearsay, it falls within recognized exceptions to the admissibility of hearsay. Further, the Applicants assert that the impugned evidence does not constitute improper opinion evidence, as it provides Mr. Conacher's perception regarding his confidence in the independence and impartiality of the judiciary, which is the central issue in this application. Accordingly, the Applicants assert that none of the impugned evidence should be struck.

[6] On the second motion, the Applicants seek an order, pursuant to Rule 312 of the *Federal Courts Rules*, granting the Applicants leave to rely upon a proposed supplemental affidavit from Mr. Conacher, in the form included in the Applicants' motion record [Supplemental Conacher Affidavit].

[7] The Respondent opposes the motion, asserting that the Supplemental Conacher Affidavit contains hearsay evidence that is neither necessary nor reliable. Even if the evidence were admissible, the Respondent asserts that the Applicants have not adequately explained why this evidence could not have been adduced before the Respondent delivered their responding evidence. Further, the Respondent asserts that as the Supplemental Conacher Affidavit attaches confidential documents from unknown and unverified sources that include personal information about third parties not before the Court, its admission is prejudicial both to the Respondent and the interests of justice.

[8] The Respondent has requested that, for purpose of this motion and in the event that leave is granted to the Applicants to rely on the Supplemental Conacher Affidavit, the Court treat as confidential certain portions of the Supplemental Conacher Affidavit, as those portions contain personal information of third parties that apparently was provided to a reporter by an unknown third party and then subsequently provided to the Applicants without the consent or knowledge of

any of the affected individuals. The Respondent asserts that the redaction of the names of third parties who are not before this Court properly balances the privacy interests of individuals not before this Court with the open court principle.

Analysis

(a) Motion to Strike the Conacher Affidavit

[9] The first issue for the Court's determination is whether the motion to strike the impugned portions of the Conacher Affidavit should be decided now or whether it should be left for determination by the hearing judge.

[10] Subsection 18.4(1) of the *Federal Courts Act* provides that applications for judicial review are to be "heard and determined without delay and in a summary way". Any interlocutory motions brought by parties have the potential to unduly and unnecessarily delay their determination. That is not to say that interlocutory motions cannot be brought. However, parties should carefully consider whether the issues sought to be raised on such interlocutory motions should properly be raised with the hearing judge. Parties should be mindful that "those embarking upon an interlocutory foray to this Court to seek such a ruling will not often find a welcome mat when they arrive" [see *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 11].

[11] Whether to provide an advance ruling on the Conacher Affidavit is a matter of discretion and the Court will make such an advance ruling only in exceptional circumstances. In *Coldwater First Nation v Canada (Attorney General)*, 2019 FCA 292, Justice Stratas considered the issue of whether motions to strike evidence should be heard in advance of the hearing of an application or

whether the motion should be referred to the hearing panel. He noted that it was a matter of discretion for the judge hearing the motion and that the following recognized factors govern the exercise of that discretion on any interlocutory motion (including a motion to strike affidavit evidence):

- Is interlocutory determination consistent with the objectives of Rule 3 of the *Federal Courts Rules*, previous court orders, and subsection 18.1(4) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 which requires that applications for judicial review be "heard and determined without delay and in a summary way"? See *Amgen Canada Inc. v. Apotex Inc.*, 2016 FCA 196, 487 N.R. 202 at para. 8. This consideration has led this Court to say that "[t]hose embarking upon an interlocutory foray to this Court ... will not often find a welcome mat when they arrive": *Association of Universities* at para. 11; see also *Gravel v. TELUS Communications Inc.*, 2011 FCA 14 at para. 5. This concern can be alleviated where the proceedings are unlikely to suffer delay because of the presence of case-management or a strict scheduling order.

- Would interlocutory determination allow the proceeding and the hearing to proceed in a more timely, orderly and organized way? See *Collins* at para. 6; *McConnell v. Canada (Canadian Human Rights Commission)*, 2004 FC 817, aff'd 2005 FCA 389. Would an interlocutory determination help the parties make their memoranda focused and effective? See *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 128 (*Tsleil-Waututh No. 1*) at para. 23. Sometimes interlocutory determinations usefully clear away issues that might divert the parties and the hearing panel from the real merits of the case.

- Is the result of the motion relatively clear cut or obvious? If so, this favours determining it before the hearing. But if reasonable minds might differ, the motion should be left to the panel: *Collins* at para. 6; *Canadian Tire Corp. Ltd. v. P.S. Partsource Inc.*, 2001 FCA 8, 267 N.R. 135; *McKesson Canada Corporation v. Canada*, 2014 FCA 290, 466 N.R. 185 at para. 9; Gitxaala Nation v. Canada, 2015 FCA 27 (*Gitxaala Nation No. 1*) at para. 12.

- Do the circumstances favour immediate determination of the motions? Is time of the essence? See *Amgen* at para. 9.

- Do the motions raise novel issues? Are the motions, and in particular the representations, incomplete such that an oral hearing of the motions by the panel would be desirable? See *Gitxaala Nation No. 1* at paras. 9-12; *Amgen* at para. 10.

- What type of motion is it? Is a motion of this type usually or commonly determined at a certain time? See, *e.g., Janssen Inc. v. Teva Canada Limited*, 2015 FCA 36; *Tsleil-Waututh Nation No. 1* at para. 22.

- Does judicial economy favour hearing the motion before the hearing? See Amgen at para. 11.

- What are the parties' wishes?

[12] Justice Stratas held that, in *Coldwater*, most of the factors favoured immediate determination of the motions, finding that the outcome was clear-cut, determining the motions would allow the respondents to draft their memoranda knowing what parts of their evidence will be before the Court and with the evidentiary issues out of the way, the hearing panel could concentrate on the merits of the applications.

[13] In the Federal Court of Appeal's 2017 decision in *Canada (Board of Internal Economy) v. Canada (Attorney General)*, 2017 FCA 43, in considering whether the question of admissibility of an affidavit should be deferred to the judge who will hear the application on the merits, the Federal Court of Appeal stated:

> It is well-established, as noted by both the Prothonotary and the Judge, that the discretion to strike an affidavit or part of it should be exercised sparingly and only in exceptional circumstances. In *Armstrong*, for example, upon which the Prothonotary relied extensively, the Court stated that the discretion to strike an affidavit should be exercised only "where it is in the interest of justice to do so, for example or in cases where a party would be materially prejudiced where not striking an affidavit or portions of an affidavit

> would impair the orderly hearing of the application" (at para. 40). This approach was reiterated by this Court in *Gravel* (at para. 5) in the following terms:
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> > [...] In the first decision, the judge hearing the case acknowledged that it has been established in the case law of this Court that on judicial review, motions to strike all or part of an affidavit should only be brought in exceptional circumstances, especially when the element to be struck out is related to the relevancy of the evidence: see *Canadian Tire Corp. Ltd. v. P.S. Partsource Inc.*, 2001 FCA 8. The reason is quite simple: applications for judicial review must quickly proceed on the merits, and the procedural impacts of the nature of a motion to strike are to delay unduly and, more often than not, needlessly, a decision on the merits. [emphasis added]

[14] In their written representations, the Respondent states that they sought to bring this motion at the outset of the hearing of the application (consistent with the Court's general direction to avoid preliminary motions) but that the Applicants requested that the motion be heard at a preliminary stage of the proceeding. The Respondent asserts that given the Applicants' request and the fact that significant portions of the affidavit are at issue, a preliminary determination is in the interests of justice. The Applicants made no submissions on this preliminary issue.

[15] While the Applicants may prefer to have the admissibility of the impugned portions of the Conacher Affidavit determined at an early stage of the proceeding, I am not satisfied that the parties have established that exceptional circumstances exist so as to warrant making a determination at this stage of the proceeding. While the Court agreed to hear the motion at a preliminary stage of the proceeding, that does not relieve the parties of their obligation to satisfy the Court that the requested relief should be granted. No attempt was made by any of the parties to address the impact on the orderly hearing of the application if the determination was left to the hearing judge or of any specific prejudice that the parties would suffer if the issue was deferred.

To the contrary, the admissibility of the impugned portions of the Conacher Affidavit has not impeded the cross-examinations and the parties are ready to deliver their respective application records. In the circumstances, I am not satisfied that the Respondent has met their burden of demonstrating that exceptional circumstances exist warranting the determination of the admissibility of the impugned evidence at this stage of the proceeding.

[16] Accordingly, the Respondent's motion to strike the impugned portions of the Conacher Affidavit is dismissed, without prejudice to the right of the Respondent to move to strike the evidence at the hearing of the application.

(b) Motion for leave to rely on the Supplemental Conacher Affidavit

[17] Pursuant to Rule 312(a) of the *Federal Courts Rules*, a party may, with leave of the Court, file additional affidavits to those provided for in Rules 306 and 307. To obtain leave pursuant to Rule 312(a), a party must satisfy two preliminary requirements: (i) the evidence must be admissible on the application for judicial review; and (ii) the evidence must be relevant to an issue that is properly before the reviewing court [see *Connolly v Canada (Attorney General)*, 2014 FCA 294 at para 6; *Forest Ethics Advocacy Association v National Energy Board*, 2014 FCA 88 at para 4].

[18] Assuming that the moving party meets the two preliminary requirements, the moving party must then convince the Court that it should exercise its discretion in favour of granting leave. In determining whether the granting of an order under Rule 312 is in the interests of justice, the Court should be guided by the following three questions: (i) was the evidence sought to be adduced available when the party filed its affidavits under Rule 306 or 308 (as the case may be) or could it have been available with the exercise of due diligence? (ii) will the evidence assist the Court, in the sense that it is relevant to an issue to be determined and sufficiently probative that it could

affect the result? and (iii) will the evidence cause substantial or serious prejudice to the other party? [see *Connolly, supra* at para 6; *Forest Ethics, supra* at para 6]

[19] This Court has recognized that the factors or questions detailed in *Connolly* are not exhaustive and the jurisprudence does not prescribe how they are to be weighed by the Court. As each decision is discretionary and fact-specific, there may be other factors that the Court may consider. Overall, in exercising its discretion, the Court must always be mindful of the general principle in Rule 3 that the *Rules* must be interpreted and applied so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits [see *Callaghan v Canada (Chief Electoral Office),* 2008 FC 1080 at paras 26-27].

[20] As is clear from the submissions of the parties, the issue of whether the Supplemental Conacher Affidavit should properly be before the Court is inextricably linked to the Respondent's motion to strike portions of the Conacher Affidavit, as the Supplemental Conacher Affidavit includes evidence of a similar nature to that at issue on the motion to strike and similar arguments are made by the parties regarding whether the evidence constitutes impermissible hearsay and whether exceptions to the hearsay rule apply. As I have determined that the motion to strike should not be determined by way of an advance ruling, I will not pre-determine that issue for the hearing judge by ruling as to the admissibility of the Supplemental Conacher Affidavit.

[21] In the circumstances, I find that it is appropriate to permit the Applicants to rely on the Supplemental Conacher Affidavit, without prejudice to the right of the Respondent to raise objections as to its admissibility at the hearing of this application.

[22] In proceeding in this manner, I am satisfied that no material prejudice arises to the Respondent by provisionally allowing the Applicants to rely on the Supplemental Conacher Affidavit, as the Respondent's right to contest the admissibility of the evidence is preserved, confidentiality protections will be afforded to certain third party information (as detailed below), the Respondent will be given the opportunity to respond to the Supplemental Conacher Affidavit (if they so elect) and the Respondent will have an opportunity to cross-examine Mr. Conacher on this additional evidence (if they so elect).

[23] The Respondent has requested that, in the event that the Court grants the Applicants leave to rely on the Supplemental Conacher Affidavit, that the Court issue a confidentiality order that requires that the names of certain third parties and other information be redacted from the Supplemental Conacher Affidavit, as proposed in Exhibit F to the confidential affidavit of Diane Dyke sworn June 11, 2021.

[24] The Court notes that the Applicants have already redacted the names of a number of third parties from the exhibits to the Supplemental Conacher Affidavit. However, the Respondents seek the following additional redactions:

A. The name of a candidate at paragraph 3(e) of the affidavit;

B. Personal information regarding three candidates in Exhibit "B";

C. The name of one candidate in Exhibit "C"; and

D. Exhibit "F" in its entirety.

[25] The Applicants have consented to the proposed redaction to paragraph 3(e) and to Exhibit B, but oppose the proposed redactions to Exhibits C and F.

[26] There is no dispute as between the parties as to the applicable legal principles on a request for a confidentiality order pursuant to Rule 151, as set out by the Supreme Court of Canada in *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41.

[27] In their response to the motion to strike, the Applicants admit that they are not asserting that any specific judge appointed or promoted through the systems lacked independence or impartiality. Rather, the Applicants acknowledge that this application is focused on the operation of the systems as a whole. On that basis, I fail to see how the identity of any specific judicial candidate is relevant to the application and thus would need to appear in the public record. While there is a public interest in open courts, I agree with the Respondent that the additional information sought to be treated as confidential is of minimal public interest. Moreover, I agree with the Respondent as to the basis for maintaining the confidentiality of this additional information, as set out in their written representations.

[28] I reject the arguments made by the Applicants in opposition to the confidentiality order, which in significant measure conflate issues of admissibility and confidentiality. Designating information as confidential for the purpose of this application does not impact the Applicants' ability to rely on that information in the application (subject, of course, to the hearing judge's admissibility determinations).

[29] Accordingly, the Respondent's request for a confidentiality order in relation to the additional personal information shall be granted.

[30] With respect to the issue of costs of the motions, in light of my determinations, I am satisfied that the costs of the motions should be in the cause.

THIS COURT ORDERS that:

1. The Respondent's motion to strike the impugned portions of the affidavit of Duff Conacher sworn December 17, 2020 is dismissed, without prejudice to the right of the Respondent to move to strike this evidence at the hearing of the application.

2. The Applicants' motion for leave to rely on the proposed Supplemental Conacher Affidavit is granted, without prejudice to the right of the Respondent to raise objections as to its admissibility at the hearing of this application for judicial review and subject to the following:

    a. In addition to the redactions already made by the Applicants, the following additional information shall be treated as confidential: (i) the name of the candidate at paragraph 3(e); (ii) the personal information about three candidates in Exhibit B; (iii) the name of the one candidate in Exhibit C; and (iv) all of Exhibit F [Confidential Information].

3. Whenever a party seeks to file with the Court documents or portions thereof, including affidavits, exhibits, transcripts or motion materials which contain or discuss Confidential Information as defined in paragraph 2(a) of this Order, in a manner that would reveal its content, the Confidential Information shall be segregated from the other information and documentation being submitted for filing and shall be submitted to the Court in sealed envelopes identifying this proceeding and including the following legend:

***DEMOCRACY WATCH ET AL* v. *ATTORNEY GENERAL OF CANADA* -**
Federal Court File No. T-1324-20
CONFIDENTIAL INFORMATION PURSUANT
TO THE ORDER DATED AUGUST 16, 2021

4. Confidential Information that exists in a form that cannot be marked in a visible fashion shall be specifically identified as such by the producing party when produced in correspondence. Confidential Information in the form of electronic documents shall have the confidentiality designation reflected in the file name.

5. Where it is not reasonably practical to segregate Confidential Information from non-confidential information, the parties may file an entire document or volume in a sealed envelope, provided that a public version of the document or volume from which the Confidential Information has been redacted is also filed on the public record.

6. The terms and conditions of use of Confidential Information and the maintenance of the confidentiality thereof during any hearing of this proceeding and any subsequent reasons for judgment thereon, shall be matters in the discretion of the Court seized of the matter.

7. Any Confidential Information filed with the Court in accordance with this Order shall be treated as confidential by the Registry of the Court and shall not be available to anyone other than the parties and appropriate Court personnel.

8. The Applicants shall serve, and file proof of service of, a public and confidential version of the Supplemental Conacher Affidavit, within seven days of the date of this Order.

9. The parties shall confer regarding the timetable for the delivery of any evidence from the Respondent in response to the Supplemental Conacher Affidavit and the completion of

further cross-examinations (on the Supplemental Conacher Affidavit and any responding evidence from the Respondent) and shall, by no later than 10 days from the date of this Order, provide the Court with a status update and any jointly-proposed timetable.

10. Costs of the motions shall be in the cause.

"Mandy Aylen"
Judge