SUPREME COURT OF YUKON

Citation: *Cameron* v. *Yukon,* 2010 YKSC 58

Date: October 5, 2010
S.C. No.09-A0143
Registry: Whitehorse

Between:

**DEAN RICHARD CAMERON,
SENIOR PRESIDING JUSTICE OF THE PEACE**

Petitioner

And

YUKON (COMMISSIONER IN EXECUTIVE COUNCIL)

Respondent

Before: Madam Justice V.A. Schuler

Appearances:

Kimberley M. Eldred — Counsel for the Petitioner
Henry C. Wood, Q.C. — Counsel for the Respondent

REASONS FOR JUDGMENT

[1] This is an application for production of documents pursuant to Yukon Supreme Court Rule 54(19), which provides as follows: A party may request material relevant to an application that is in the possession of a decision-maker whose order is the subject of the application and not in the possession of the party, by filing with the registry a written request, identifying the material requested and serving a copy of the written request on the decision-maker.

[2] The applicant Petitioner is the Senior Presiding Justice of the Peace in the Yukon. His Petition seeks judicial review in respect of Order-in-Council 2008/170,

which rejected the recommendation of a Judicial Compensation Commission (the "JCC") regarding increases to his salary. His Petition alleges that the JCC was not independent, objective or effective, in part because, he alleges, it permitted and endorsed negotiations between the Yukon Government and the judiciary. He asks that the Order-in-Council be quashed for offending the principle of judicial independence. The Petition also seeks a declaration that the Order-in-Council is *ultra vires* the Respondent, a declaration that certain provisions of Yukon's *Territorial Court Act*, R.S.Y. 2002, c. 217 ("the Act") relating to the JCC are unconstitutional and other relief which I need not detail for purposes of this decision.

[3] The provisions of the Act regarding the JCC apply to both the Territorial Court Judges and the Senior Presiding Justice of the Peace (s. 58). In this case, the Territorial Court Judges and the Petitioner chose separate processes under the Act. The hearing before the JCC with respect to the Territorial Court Judges was adjourned when the JCC was advised that the Territorial Court Judges and the Government might be able to present a joint submission. Some months later a joint submission was presented, in which the salary increase in the first year of three years significantly exceeded what the Government had originally proposed. This joint submission was accepted by the JCC in its Report and Recommendations dated March 31, 2008.

[4] The Petitioner had a separate hearing before the same JCC, at which both he and the Government made their respective submissions. The JCC's recommendation with respect to increases to his salary, also found in its Report and Recommendations dated March 31, 2008, exceeded what the Government of Yukon had proposed. By way of Order-in-Council 2008/170, the Government rejected the recommendation with

respect to salary increases on the basis of s. 17(2) of the *Territorial Court Act*, which provides for an exception to the otherwise binding nature of the JCC's recommendations on judicial remuneration. That exception applies to the extent that the recommendations exceed the highest total value of judicial remuneration provided to justices of the peace in certain other jurisdictions, in which case the recommendations of the JCC are not binding on the Government.

[5] The Petitioner takes the position that the joint submission between the Territorial Court Judges and the Government suggests there were negotiations between them, contrary to the principles of judicial independence set out by the Supreme Court of Canada: *Provincial Court Judges' Assn. of New Brunswick v. New Brunswick (Minister of Justice)*, [2005] S.C.J. No. 47, 2005 SCC 44. He also alleges that the acceptance and endorsement of the joint submission by the JCC indicates that the JCC was not independent, objective and effective as required by the *New Brunswick* case. If the JCC process was thus flawed in relation to the Territorial Court Judges, the Petitioner says that extends also to the proceedings involving him. Consequently, the Order-in-Council offends the principle of judicial independence and should be quashed.

[6] In the *New Brunswick* case, the Supreme Court confirmed that the response of a government to a judicial compensation commission is subject to a limited form of judicial review in the superior courts. In addition to the two-stage analysis set out in *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, the Court set out a third stage of analysis for determining the rationality of a government's response, as follows: viewed globally, has the commission process been

respected and have the purposes of the commission - preserving judicial independence and depoliticizing the setting of judicial remuneration - been achieved?

[7] I understand the allegations in the Petition to be directed mainly to this third stage of the analysis.

[8] In oral submissions on this application, counsel for the Petitioner refined somewhat the written request that was submitted and described the materials sought under Rule 54(19) as the following: (i) documents that the Government used to formulate its submissions to the JCC in 2007 for both the Territorial Court Judges and the Petitioner; and (ii) documents that the Government used in the process of reaching the joint submission between itself and the Territorial Court Judges, more specifically documents that show communication between the Government and the Territorial Court Judges and documents indicating internal discussions about or making reference to such communications.

[9] Counsel for the Respondent objected that the Petitioner's request lacks specificity, but in my view, and subject to what I will say further on, as described above it is sufficiently specific.

[10] Submissions were made by counsel about who the decision-maker is in this case for purposes of Rule 54(19). In my view, the Respondent is clearly the decision-maker. The Order-in-Council that is the subject of the judicial review is an order of the Commissioner in Executive Council. Although the Petitioner made an argument that the Government's Director of Policy was the decision-maker based on certain matters set out in the Director's affidavit, in my view the affidavit contains no factual basis upon

which to find that individual did anything more than make recommendations and give advice to the Government.

[11] The main issue is whether the documents sought are relevant to the application for judicial review, as required by Rule 54(19). Documents that may have affected the making of the challenged decision by the decision-maker are obviously relevant. A document is also relevant if it may affect the decision the court will make on the application for judicial review: *Canada (Human Rights Commission)* v. *Pathak*, [1995] 2 F.C. 455 (C.A.), dealing with a similar Federal Court Rule. As the court's decision will deal only with the grounds of review set out in the pleadings, the relevance of the documents requested must be determined in relation to those grounds.

[12] In general, only materials available to the decision-maker at the time of rendering a decision are relevant. However, there are exceptions to that and materials that were not before the decision-maker may be considered relevant where it is alleged that the decision-maker breached procedural fairness or committed jurisdictional error: *Gagliano* v. *Canada (Commission of Inquiry into the Sponsorship Program and Advertising Activities - Gomery Commission),* [2006] F.C.J. No. 917, 2006 FC 720. Relevancy should still be determined by reference to the grounds for judicial review set out in the application and the Court still has a discretion whether to order production: *Gagliano*.

[13] The Petition in this case alleges that the JCC was not independent, objective and effective in that it permitted and endorsed negotiations between the Territorial Court Judges and the Government. The Respondent, however, says that in this regard the Petition focuses on the actions of the JCC as the decision-maker; that it alleges that the JCC permitted and endorsed negotiations and does not allege that the Territorial Court

Judges and the Government engaged in direct negotiations. The Respondent's position is that the Government was a party before the JCC and Rule 54(19) does not speak to production by parties, only by a decision-maker. To order production to the Petitioner of material in the possession of the Government as a party would amount to a far broader right of discovery than is contemplated by Rule 54(19).

[14] In my view, when the third stage of analysis - has the commission process been respected - is considered, the grounds of judicial review set out in the Petition clearly challenge the Order-in-Council on the basis that the JCC process was not respected. The Government is the decision-maker in this case: it rejected the JCC's recommendations regarding the Petitioner's salary increases and substituted its own decision. The actions of the JCC in the proceedings involving the Territorial Court Judges are not challenged on the basis that the JCC was the decision-maker, but on the basis that those actions are part of a flawed process that resulted in the Order-in-Council challenged by the Petitioner.

[15] The Petition also contains as a ground for review that if the underlying JCC process was flawed or not respected, the Order-in-Council is *ultra-vires*. Whether the issue is framed as one of jurisdiction or respect for the JCC process, this widens the scope of production to include documents that were not before the decision-maker, according to the principles in *Gagliano*. Thus, since the documents sought are in the possession of the Government, even if there is no evidence that they were in the possession of the Commissioner in Executive Council when the decision was made, the documents fall within the scope of Rule 54(19).

[16] In this context, the Respondent should not be allowed to rely on the distinction that although it was the decision-maker in the proceeding relating to the Petitioner, it was merely a party in the proceedings before the JCC. Ultimately, the question is whether the Respondent changed judicial remuneration on the basis of a flawed process. Material that was available to, or, broadly speaking, in the possession of the decision-maker, and that may provide evidence of the alleged flaw, should be part of the record producible under Rule 54(19).

[17] I have reviewed the cases that indicate that Federal Court Rule 317 (previously 1612) that is similar to Rule 54(19) is intended to ensure that the record that was before the decision-maker is before the Court and is not intended to facilitate discovery of all documents that may be in the possession of the decision-maker: *Canada (Attorney General)* v. *Canada (Information Commissioner)*, 135 F.T.R. 254 (F.C.T.D.); *McDougall* v. *Canada (Attorney General),* 2009 FC 1286; *Maax Bath Inc.* v. *Almag Aluminum Inc.,* 135 F.T.R. 254 (F.C.T.D.). However, what distinguishes the application for judicial review in this case from those in the cases cited is the unique context of this proceeding and the broad scope of the third stage of the analysis described in the *New Brunswick* case, that being whether the JCC process was respected.

[18] I bear in mind that at this stage the Court is dealing with production of material only and not admissibility of that material. I also bear in mind that the Respondent has filed some affidavit material denying that negotiations took place but no affidavit material that explains exactly how the joint submission was reached or why the Government agreed to it.

[19] I turn now to the documents requested. Based on the grounds in the Petition, the documents in the second part of the Petitioner's request under Rule 54(19), in other words those that may show negotiations between the Territorial Court Judges and the Government, are relevant. If they do reveal that negotiations took place, they are relevant to whether the JCC process was respected and whether the Order-in-Council is *ultra vires*. I therefore order production of any such documents, but with the proviso that since no submissions were made to me as to whether privilege may attach to any of the documents, an application may be brought to deal with that issue should it arise.

[20] In my view the documents sought in the first part of the Petitioner's request, being documents that the Government used to formulate its submissions to the JCC in 2007 for both the Territorial Court Judges and the Petitioner, have not been shown to be relevant. The submissions speak for themselves and the Petitioner has not established how going behind the submissions to the material used to formulate them would assist the reviewing Court on the issues raised in the Petition. Counsel for the Petitioner indicated that she is not seeking reports on economic issues but did not indicate what sort of information she anticipates might be produced or how it would be relevant to the Petitioner's position that negotiations took place or that the JCC process was not respected. She did argue that because this is constitutional litigation Rule 54(19) should be broadly interpreted, however that cannot mean in my view that the Rule should be interpreted as providing a right to discovery of all documents in the possession of the decision-maker; only documents relevant to the grounds for judicial review are producible. Accordingly, I decline to order production of those documents.

[21] Counsel for the Respondent expressed concern that a ruling in favour of the Petitioner could impact on whether the hearing scheduled for October 18 can proceed. If counsel wish to address this, they should contact the registry to make arrangements.

Schuler J.