

PRACTICE

PRIVILEGE

Appeal from Federal Court (F.C.) decision (2018 FC 1184) determining respondent, Canadian Judicial Council (Council), not required to provide 10 documents to appellant because documents protected by solicitor-client privilege, deliberative secrecy, public interest privilege — Appellant had requested documents under *Federal Courts Rules*, SOR/98-106, r. 317 — Appellant, appointed judge of Quebec Superior Court in 2010, subject of two inquiries before Council, inquiry committees — Council adopting inquiry committee's findings that appellant guilty of misconduct, recommending his removal from office because appellant incapacitated or disabled from due execution of office of judge — Appellant filing multiple applications for judicial review of inquiry committees' decisions, Council's decision to recommend appellant's removal from office — In motion filed by Council to strike applications for judicial review, F.C. ordering Council to serve certified list [TRANSLATION] "of all of the public documents that the decision-maker had in order to make the decision", [TRANSLATION] "list of all documents that the decision-maker had in order to make the decision" — Council invoking solicitor-client privilege, deliberative secrecy or public interest privilege in respect of numerous documents — To determine validity of privileges claimed by Council, F.C. proceeding with three steps: review "valid reasons" presented by appellant, review Council's confidential affidavit, examine documents if first two steps unsatisfactory — F.C. confirming, for most part, privileges claimed by Council — Concluding appellant's arguments meeting "valid reasons" test; therefore, solicitor-client privilege, deliberative secrecy applied to some documents — Finding no need to proceed to third step, to examine documents themselves (except for one) — Appellant arguing F.C. erring in failing to read all documents subject of Council's claim for privilege — Whether procedure followed by F.C. appropriate in circumstances, offending fundamental principle of open, accessible court proceedings, whether F.C. correctly applying privileges claimed to documents at issue — F.C. erring in applying process F.C. developed for determining whether disputed documents privileged — Rr. 317, 318 not specifying procedure to follow when party objecting to providing document — At most, r. 318(3) specifying F.C. "may give directions to the parties and to a tribunal as to the procedure", which F.C. did in setting out three-step approach — F.C. must try to craft remedy to reconcile meaningful review of administrative decisions, procedural fairness, protection of any legitimate confidentiality interests — Procedure established by F.C. entirely consistent with state of law, judge not committing reviewable error with three-step approach — Appropriate to establish documents themselves would be reviewed only if F.C. unable to decide on claimed privileges solely on basis of parties' representations — Question, rather, whether reasonable for F.C. to have found no need to read documents (except one) in circumstances — F.C. should have read documents before making decision, given facts, particular circumstances — Draconian consequences of Council's recommendation on appellant imposing utmost respect for principles of procedural fairness — F.C. could not have been satisfied with secondary evidence instead of examining documents subject of claim for privilege — Review of documents unlikely delaying unduly proceedings or otherwise causing prejudice to parties — Having carefully reviewed documents at issue in appeal, Court satisfied documents consistent in all respects with Council's representations before F.C., documents indeed protected by privileges claimed — Therefore, appeal dismissed despite error by F.C. in applying process developed by F.C. — Error inconsequential — Appeal dismissed.

GIROUARD V. CANADIAN JUDICIAL COUNCIL (A-394-18, 2019 FCA 252, de Montigny J.A., reasons for judgment dated October 11, 2019, 15 pp.)