Federal Court Cour fédérale

Date: 20231024

Docket: T-317-23

Citation: 2023 FC 1412

Ottawa, Ontario, October 24, 2023

PRESENT: Case Management Judge Benoit M. Duchesne

BETWEEN:

STEVEN BARROW

Applicant

and

HIS MAJESTY THE KING

Respondent

ORDER

[1] In this proceeding the Applicant seeks a writ of *mandamus* against the Director of Public Prosecutions pursuant to section 3(3)(a) of the *Director of Public Prosecutions Act* to require the Director of Public Prosecutions to initiate and conduct prosecutions against the Governor in Council, including all members of the Privy Council, along with all "servants of the crown" for violations of sections 4.1 and 4.1.1 of the *Crimes Against Humanity and War Crimes Act*, for violations of sections 269.1 (1) (Torture), and 423 (1) (Intimidation), of the *Criminal Code*, for committing terrorist activity as defined in the *Criminal Code*, and for committing torture as defined by the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment*

or Punishment. These alleged crimes are alleged to have been committed through the imposition of specific COVID-19 vaccination mandates and/or travel restrictions and conditions by the Government of Canada since or about March 25, 2020.

[2] The Respondent has brought a motion to strike the Applicant's application for judicial review on the basis that the application is bereft of any chance of success.

[3] I agree with the Respondent. For the reasons that follow, the Respondent's motion is granted and the Applicant's notice of application is struck without leave to amend.

I. THE LAW APPLICABLE TO A MOTION TO STRIKE

> The test applicable on a motion to strike an application for judicial review is set out in *Canada (National Revenue) v. JP Morgan Asset Management (Canada)* 2013 FCA 250 (*"JP Morgan"*). The Court wrote in that decision at paragraph 47 that:
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> "The Court will strike a notice of application for judicial review only where it is "so clearly improper as to be bereft of any possibility of success". There must be a "show stopper" or a "knockout punch" – an obvious, fatal flaw striking at the root of this Court's power to entertain the application."

[4] In determining whether the threshold is met by the moving party, the Court should consider that any of the following qualify as an obvious, fatal flaw warranting the striking out of a notice of application (*JP Morgan*, at para. 66; *Dakota Plains First Nation v. Smoke*, 2022 FC 911 (CanLII), at para. 6):

a) If the Notice of Application fails to state a cognizable administrative law claim which can be brought in the Federal Court;

b) If the Federal Court is not able to deal with the administrative law claim by virtue of the *Federal Courts Act* or some other legal principle; or,

c) If the Federal Court cannot grant the relief sought in the Notice of Application.

[5] Determining whether an application for judicial review is bereft of any possibility of success, or that it is doomed to fail (*Wenham v. Canada (Attorney General)*, 2018 FCA 199 (CanLII), at para. 33, *"Wenham*"), requires the Court to first read the application to get at its "real essence" and "essential character" by "reading it holistically and practically without fastening onto matters of form" (*JP Morgan* at paras. 49-50; *Wenham*, at para. 34). That means that the Court must go beyond how the applicant has framed her application and read the Notice of Application with a view to understanding its real essence and having a realistic appreciation of the application's essential character (*Leahy v. Canada (Citizenship and Immigration)*, 2020 FCA 145 (CanLII), at para. 4; *JP Morgan*, at paras. 49 and 50). The Court must look through and past sophisticated wordsmithing and clever drafting that may make an issue sound like an administrative law issue when it is nothing of the sort (*JP Morgan*, at para. 49).

[6] The facts pleaded in the notice of application are to be taken as true while reading the application broadly with a view to accommodating any inadequacies in the allegations. Accepting facts as pleaded in the notice of application as true for the purposes of the motion does not entail that characterisations of fact or speculations contained in the application should be considered as true.

[7] The principles of pleading contained in the *Federal Courts Rules* and in our jurisprudence require that the grounds alleged in the notice of application must be concise but not bald, complete, exhaustive and stated with particularity. The relevant facts in support of the grounds must also be included. The applicant should not, however, include all the evidence that will be submitted on the record, or list all the individuals who will produce sworn statements in support of the application.

[8] While clearly not all the evidence will be in the notice of application for judicial review, the grounds must all be stated at this preliminary stage (*JP Morgan*, at paras. 38 to 46; *Soprema Inc. v. Canada (Attorney General)*, 2021 FC 732 (CanLII), at paragraphs 37 to 39, affirmed 2022 FCA 103 (CanLII)). For example, if an applicant alleges that their right to procedural fairness has been violated, they must go beyond merely asserting their position. They must identify the facet of procedural fairness they say was violated and how it was violated. Similarly, an Applicant who alleges that a decision is incorrect in law must plead the law relied upon and how the decision is incorrect. If an Applicant pleads that a decision sought to be reviewed is unreasonable, then the application should include particulars of how and why the decision is unreasonable. A failure to adequately plead allegations that, if proven, could lead a court to exercise its discretion on judicial review, is fatal to an application for judicial review (*Soprema Inc. v. Canada (Attorney General)*, 2021 FC 732 (CanLII), at paras.37 to 40 and 44; affirmed *Soprema Inc. c. Canada (Procureur général)*, 2022 CAF 103 (CanLII).

[9] As a general rule, affidavit evidence is not admissible in support of a motion to strike an application for judicial review. The general rule against the admissibility of affidavit evidence is justified by several considerations as articulated in *JP Morgan* at paragraph 52 as follows:

> [51] As a general rule, affidavits are not admissible in support of motions to strike applications for judicial review.
>
> [52] This general rule is justified by several considerations:
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> • Affidavits have the potential to trigger cross-examinations and refused questions and, thus, can delay applications for judicial review. This is contrary to Parliament's requirement that applications for judicial review proceed "without delay" and be heard "in a summary way."
>
> • A respondent bringing a motion to strike a notice of application does not need to file an affidavit. In its motion, it must identify an obvious and fatal flaw in the notice of application, i.e., one apparent on the face of it. A flaw that can be shown only with the assistance of an affidavit is not obvious. A respondent's inability to file evidence does not normally prejudice it. It can file evidence later on the merits of the review, subject to certain limitations, and often the merits can be heard within a few months. If an application has no merit, it will be dismissed soon enough. And if there is some need for faster determination of the merits, a respondent can always move for an order expediting the application.
>
> • As for an applicant responding to a motion to strike an application, the starting point is that in such a motion the facts alleged in the notice of application are taken to be true*: Chrysler Canada Inc. v. Canada*, 2008 FC 727 at paragraph 20, aff'd on appeal, 2008 FC 1049. This obviates the need for an affidavit supplying facts. Further, an applicant must state "complete" grounds in its notice of application. Both the Court and opposing parties are entitled to assume that the notice of application includes everything substantial that is required to grant the relief sought. An affidavit cannot be

> admitted to supplement or buttress the notice of application.
>
> [53] Exceptions to the rule against admitting affidavits on motions to strike should be permitted only where the justifications for the general rule of inadmissibility are not undercut, and the exception is in the interests of justice.
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> [54] One such exception is where a document is referred to and incorporated by reference in a notice of application A party may file an affidavit merely appending the document, without more, for the assistance of the Court.

[10] Lastly, an application for judicial review must be limited to seeking the review of a single decision or order unless the Court orders otherwise (subsection 18.1(2) *Federal Courts Act*, R.S.C. 1985, c. F. 7; Rule 302, *Federal Courts Rules*). It follows that an application for judicial review that seeks the review of more than one decision is irregular and contrary to the *Rules*, but can be cured by an Order allowing for the review of more than one decision or order in the proceeding. Although such an Order pursuant to Rule 302 of the *Rules* is typically sought prior to the hearing of the application on its merits, its remains open to the Court to allow that more than one decision be determined in a single application for judicial review up to and including at the hearing of the proceeding.

II. THE NOTICE OF APPLICATION TO BE STRUCK

[11] The Applicant pleads that the Federal Government's measures enacted pursuant to the *Quarantine Act* and other legislation in the name of public health in connection with the COVID-19 pandemic should lead to the prosecution of the state actors involved in adopting them. To this end, he seeks the issue of an order of *mandamus* to compel the Director of Public Prosecutions to perform his duty pursuant to subsection 3(3) of the *Direction of Public Prosecutions Act,* SC 2006, c 9, s 121, to initiate and conduct a prosecution of the government actors involved in the enactment of the specific COVID-19 measures he cites in his notice of Application.

[12] The measures he cites in support of his request for a *mandamus* Order to compel the Director of Public Prosecutions to prosecute various named and generically named state actors are:

a) the March 25, 2020, the federal government Emergency Order under the *Quarantine Act* that requires any person entering Canada by air, sea or land to self-isolate for 14 days whether or not they have symptoms of COVID-19.

b) the November 2, 2020, announced that the use of ArriveCan app was mandatory as of November 21, 2020;

c) the October 6, 2021, the Prime Minister announcement that vaccination was mandatory for the federal workforce and federally regulated transportation sectors; and,

d) the November 30, 2021, announced that vaccination was required for travel within and out of Canada.

[13] The Applicant pleads that each of these measures were taken by the Governor in Council in violation of his *Charter* rights, and more particularly in violation of section 26 thereof. There are no material facts pleaded to establish how the Applicant's section 26 *Charter* rights have been violated, or when.

[14] He also pleads that regulatory amendments to the *Contraventions Act* were enacted to increase the flexibility for law enforcement agencies including the Royal Canadian Mounted Policy, as well as local and provincial police forces to issue tickets to individuals who did not

comply with orders under the *Quarantines Act*, the whole as a scheme to authorize the imposition of cruel and unusual treatment and punishment in violation of his paragraph 2(b) rights pursuant to the *Canadian Bill of Rights*, as well as the *Canadian Human Rights Act*. The regulatory amendments pleaded are not pleaded with any particularity that would permit the Court to identify the amendments that are pleaded, and not material facts are alleged with respect to how his rights as set out in the *Canadian Bill of Rights* or the *Canadian Human Rights Act* have been violated, or when.

[15] Lastly, the Applicant pleads that the Governor in Council declared war on those who were peacefully protesting the "Governor in Council" for the restoration of the rule of law in Canada by further persecuting and restricting the fundamental rights and freedoms recognized in the Canadian *Bill of Rights*. This is argument and opinion presented as a material fact. As such, the Court cannot take the argument or opinion into consideration on this motion.

III. THE MOTION MATERIALS BEFORE THE COURT

[16] The Respondent has served and filed a Motion Record that consists of its notice of motion and its written representations.

[17] In compliance with Rules 359(d), the Respondent identified and listed the Applicant's notice of application dated February 16, 2023, as a document it would use at the hearing of its motion to strike. The notice of application dated February 16, 2023, was not included in the Respondent's motion record as it should have been pursuant to Rule 364(2)(f). Considering that the document had been identified in the notice of motion and is part of the court record, the

Court will exercise its discretion pursuant to Rule 60 of the *Rules* to retrieve a copy of the notice of application from the Court record for the purposes of this motion.

[18] The Respondent should not consider that the Court exercising its discretion in this manner on this motion is the beginning of a potential practice by which the Court would retrieve documents from the Court file for consideration. Rather, the Court is exercising its discretion only because it would be a waste of time and resources to have the Respondent serve and file an amended motion record that contains the notice of application (*Sorribes c. Société Radio-Canada*, 2023 CF 978 (CanLII), at para. 7).

[19] The Applicant neither served nor filed a responding record. Rather, the Applicant filed a "Rule 60" letter dated May 29, 2023, in which he asked the Court to identify any gaps in the proof of his application and grant leave to him to remedy any issues. A subsequent attempt by the Applicant to file a motion record out of time was rejected by the direction of Associate Judge Cotter dated September 26, 2023. As this motion is not concerned with proof of the facts set out in the Applicant's notice of application, there is no basis upon which to invoke Rule 60 in the manner he has requested it to be invoked.

IV. ANALYSIS

[20] The Respondent argues that this Court does not have the jurisdiction to grant the relief sought by the Applicant. In essence, its argument is that the Director of Public Prosecutions, in considering whether to initiate or conduct a prosecution is not a "federal board, commission or other tribunal" within the meaning of sections 2 and 18 of the *Federal Courts Act*, such that this Court does not have the jurisdiction to review the Director of Public Prosecutions' decision to

initiate a prosecution or not except in the limited circumstance where abuse of process is alleged against the Director of Public Prosecutions. I agree with the Respondent with respect to prosecutorial discretion.

[21] Prosecutorial discretion lies at the heart of this proceeding. The Director of Public Prosecutions, under or on behalf of the Attorney General of Canada, has the duty and function of initiating and conducting a prosecution pursuant to paragraph 3(3)(a) of the *Director of Public Prosecutions Act.* The legislation as drafted does not remove or otherwise fetter the Director of Public Prosecutions' ability to exercise his discretion to initiate a prosecution or not.

[22] In *Krieger v. Law Society of Alberta*, 2002 SCC 65 (CanLII), [2002] 3 SCR 372, the Supreme Court of Canada wrote at paragraphs 45 to 47:

> [45] […] A decision of the Attorney General, or of his or her agents, within the authority delegated to him or her by the sovereign is not subject to interference by other arms of government. An exercise of prosecutorial discretion will, therefore, be treated with deference by the courts and by other members of the executive, as well as statutory bodies like provincial law societies.
>
> [46] Without being exhaustive, we believe the core elements of prosecutorial discretion encompass the following: (a) the discretion whether to bring the prosecution of a charge laid by police; (b) the discretion to enter a stay of proceedings in either a private or public prosecution, as codified in the *Criminal Code*, R.S.C. 1985, c. C-46, ss. 579 and 579.1; (c) the discretion to accept a guilty plea to a lesser charge; (d) the discretion to withdraw from criminal proceedings altogether: *R. v. Osborne* (1975), 1975 CanLII 1357 (NB CA), 25 C.C.C. (2d) 405 (N.B.C.A.); and (e) the discretion to take control of a private prosecution: *R. v. Osiowy* (1989), 1989 CanLII 4780 (SK CA), 50 C.C.C. (3d) 189 (Sask. C.A.). While there are other discretionary decisions, these are the core of the delegated sovereign authority peculiar to the office of the Attorney General.

> [47] Significantly, what is common to the various elements of prosecutorial discretion is that they involve the ultimate decisions as to whether a prosecution should be brought, continued or ceased, and what the prosecution ought to be for. Put differently, prosecutorial discretion refers to decisions regarding the nature and extent of the prosecution and the Attorney General's participation in it. Decisions that do not go to the nature and extent of the prosecution, i.e., the decisions that govern a Crown prosecutor's tactics or conduct before the court, do not fall within the scope of prosecutorial discretion. Rather, such decisions are governed by the inherent jurisdiction of the court to control its own processes once the Attorney General has elected to enter into that forum.

[23] These paragraphs are clear in setting out that until such time as the Attorney General or his delegate such as the Director of Public Prosecutions have initiated a prosecution, it is not open to this Court to interfere with its exercise of its discretion to initiate a prosecution or not.

[24] It is also clear that the Applicant has not pleaded the requirement elements for an order of *mandamus* to be considered (*Apotex Inc. v. Canada (Attorney General),* 1993 CanLII 3004 (FCA), [1994] 1 F.C. 742 (C.A.), aff'd 1994 CanLII 47 (SCC)). The absence of such pleaded elements is fatal to his application (*Soprema Inc. v. Canada (Attorney General)*, 2021 FC 732 (CanLII), at paragraphs 37 to 39, aff'd 2022 FCA 103 (CanLII).

[25] In light of my conclusions above, it is clear that the Applicant cannot save his notice of application by way of amendment as the very source of the relief he seeks is unavailable to him as a matter of law.

[26] I therefore grant the Respondent's motion and dismiss the Applicant's Notice of Application as it is bereft of any chance of success and is doomed to fail.

THIS COURT ORDERS that:

1. The Respondent's motion is granted.

2. The Applicant's notice of application and application are dismissed without leave to amend.

3. The parties are to confer and to try to agree with respect to the costs of this motion and of this proceeding. If the parties cannot agree, the Respondent shall have until **November 3, 2023**, to serve and file its written representations as to costs. Its representations shall be limited to 3 pages, double spaced, exclusive of schedules or authorities. The Applicant will then have until **November 17, 2023**, to serve and file his written representations as to costs in response that will also be limited to 3 pages, double spaced, exclusive of schedules or authorities. If no written representations as to costs are received by **November 3, 2023**, then this Order shall be without any award of costs.

"Benoit M. Duchesne"
Case Management Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-317-23
STYLE OF CAUSE:	STEVEN BARROW v HIS MAJESTY THE KING

MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES*

REASONS FOR JUDGMENT AND JUDGMENT:	B.D. DUCHESNE, AJ.
DATED:	OCTOBER 24, 2023

SOLICITORS OF RECORD:

Steven Barrow Ottawa, Ontario	FOR THE APPLICANT SELF-REPRESENTED
Amanda McGarry Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT