Federal Court  Cour fédérale

Date: 20160211

Docket: T-1442-14

Citation: 2016 FC 187

Ottawa, Ontario, February 11, 2016

PRESENT: The Honourable Madam Justice Roussel

BETWEEN:

TIMOTHY MITCHEL NOME

Applicant

and

THE ATTORNEY GENERAL OF CANADA
and
THE COMMISSIONER OF CORRECTIONS

Respondents

JUDGMENT AND REASONS

[1] The Applicant, Timothy Mitchel Nome, is currently incarcerated at Millhaven Institution, a maximum-security facility located in Ontario, where he has remained in segregation since July 15, 2015. On June 18, 2014, he commenced this application for judicial review seeking relief in respect of an alleged refusal by Correctional Service of Canada [CSC], to provide him access to various health treatments and services.

[2] In a separate motion filed with the Court on September 15, 2015, the Applicant also sought relief under Rule 373 of the *Federal Courts Rules*, SOR/98-106, enjoining the Respondents from transferring him out of the Ontario region pending the determination of this application for judicial review.

[3] For the reasons set out below, the application for judicial review is dismissed. As a result, there is no need for this Court to dispose of the motion for interlocutory relief.

I. Background

[4] On January 27, 2011, while incarcerated at the Special Handling Unit of the Regional Reception Centre in Saint-Anne-des-Plaines, Québec, the Applicant was injured in an altercation with CSC officers. During this incident, the Applicant asserts that he suffered a broken nose, broken finger and two (2) chipped teeth.

[5] Since the incident in 2011, the Applicant has been transferred to four (4) different institutions, including: Kent Institution, British Columbia in March 2012; Mountain Institution, British Columbia in August 2012; Atlantic Institution, New Brunswick in January 2013; and his current location, Millhaven Institution, Ontario in October 2013.

[6] Throughout his incarceration, the Applicant has requested that CSC provide health treatment and services for his aforementioned injuries, including rhinoplasty to reconfigure his nose, replacement of the two (2) teeth with dental implants, surgery to his left hand fifth finger, and a new pair of eye glasses.

[7] On July 12, 2013, the Applicant submitted an offender complaint for being denied reasonable and timely access to healthcare (#V20R00005982). Claiming to have been scheduled for surgery in March 2012, before his transfer to Kent Institution, the Applicant requested that he be scheduled for surgery for repairs to his left hand fifth finger and a rhinoplasty procedure for his nose.

[8] In a response dated August 8, 2013, the Applicant's complaint was upheld in part by the Acting Chief of Health Services at Atlantic Institution. The Acting Chief found that there was indeed a delay in receiving services, but noted that the Applicant's medical needs had been addressed: his nose and left hand fifth finger had been x-rayed on July 31, 2013. The response also indicated that once the results of these x-rays were received, the Applicant would be referred, if required, to specialists.

[9] On August 22, 2013, the Applicant grieved this decision to the first level of the grievance process, maintaining that he was still being denied health treatment and services. He indicated that he may be transferred to Ontario and asked whether CSC would fly him back to the Atlantic region so that the surgeries could be done in a timely manner.

[10] In a response dated November 1, 2013, the first level grievance was upheld in part, again on the basis that there was an initial delay in having x-rays completed. With respect to the Applicant's request that he be flown back to the Atlantic region for treatment, the response indicated that this request was beyond the authority of CSC Health Services.

[11] On June 18, 2014, the Applicant commenced this application for judicial review.

[12] On September 6, 2015, the Applicant submitted a final level grievance with respect to the delays in obtaining his requested health treatment and services, namely, rhinoplasty surgery, surgery to his left hand fifth finger, dental implants, and proper fitting eye glasses. A final level grievance decision remains pending.

[13] On September 15, 2015, a Notice of Involuntary Transfer Recommendation was issued, recommending that the Applicant be transferred to Stony Mountain Institution, Manitoba. The Applicant was advised that the transfer was recommended to alleviate his segregation status and to provide him with a safe environment in which to reside, considering that attempts to integrate the Applicant into the prison population had been unsuccessful.

[14] The decision to transfer the Applicant from Millhaven Institution to Stony Mountain Institution was finalized on October 16, 2015, and communicated to the Applicant on October 28, 2015.

II. Issues to be determined

[15] Having considered the submissions of the parties, the following issues arise from this application for judicial review:

A. Has the Applicant exhausted his alternative remedies and if not, are there compelling circumstances such that this Court should entertain the application for judicial review?

B. Is the application for judicial review moot?

C. Did CSC reasonably address the Applicant's requests for health treatment and services? If not, what is the appropriate remedy?

III. Analysis

A. *Preliminary issue*

[16] Before addressing the above-noted issues, a preliminary issue arises as to what the underlying matter consists of and what relief is being sought by the Applicant. In his Notice of Application filed June 18, 2014, the Applicant indicates that he is seeking judicial review of the "decision of the [CSC] on or about June 10, 2014 continuing to deny him access to needed health service treatments that they had undertaken would be implemented many months ago". Specifically, he seeks the following:

A. an order in the nature of *certiorari* quashing the Respondent Commissioner's decision to continually refuse to provide the Applicant's needed evaluations and treatments;

B. an order declaring that the Respondents have acted contrary to section 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, Schedule B to the *Canada Act* 1982 (UK), 1982, c 11 [Charter];

C. an order declaring that the Respondents breached their obligations under the *Corrections and Conditional Release Act*, SC 1992, c 20 [CCRA] and in particular its health services obligations under sections 85 to 87 thereof, as well as its obligation to provide safe and healthful custody under section 70 thereof; and,

D. an order requiring the Respondents to provide the Applicant his health service evaluations and treatments immediately.

[17] In light of his pending transfer to Manitoba, the Applicant has included in his Memorandum of Fact and Law, filed November 27, 2015, request for relief which is appreciably different than the relief sought in the Notice of Application. The Applicant now seeks the following in his Memorandum of Fact and Law:

A. an order quashing the decision of the Warden, on October 15, 2015, to involuntarily transfer the Applicant to Stony Mountain Institution;

B. an order declaring that this decision violated the Applicant's rights under sections 86 and 87(a) the CCRA;

C. an order declaring that the decision violated the Applicant's rights under section 7 of the *Charter*; and

D. an order requiring the Respondents not to proceed with a transfer outside the Kingston area until the Applicant has accessed the health services and treatment which he currently seeks.

[18] While the Applicant's pending transfer to Stony Mountain Institution may be a relevant factor to consider in this matter, the Applicant has failed to challenge this decision through the proper channels. At the date of the hearing, counsel for the Applicant informed the Court that the Applicant had not grieved the transfer decision. The proper recourse for the Applicant is to challenge his pending transfer within the CCRA's internal grievance process and if unsatisfied, to seek judicial review of the final decision before this Court. If this Court were to grant the relief sought in the Applicant's Memorandum of Fact and Law, it would allow the Applicant to circumvent his obligation to exhaust his statutory remedies before bringing this matter before the Court. Moreover, the decision to transfer the Applicant out of the province to Stony Mountain Institution is based on factual and legal considerations which are beyond the scope of this application for judicial review. For these reasons, the relief sought and the issues to be adjudicated will remain as defined in the Notice of Application.

B. *Has the Applicant exhausted his alternative remedies, and if not, are there compelling circumstances such that this Court should entertain the application for judicial review?*

[19] It is trite law that the Court has the discretion to decline to exercise its jurisdiction to hear an application for judicial review where an adequate alternative avenue of relief remains available to an applicant (*C.B. Powell Ltd. v Canada (Border Services Agency)*, 2010 FCA 61 at paras 31-32, [2011] 2 FCR 332; *Froom v Canada (Minister of Justice)*, 2004 FCA 352 at para 12, [2005] 2 FCR 195).

[20] Under sections 90 and 91 of the CCRA, offenders are entitled to the fair and expeditious resolution of their grievances. The grievance procedure is set forth in sections 74 to 82 of the *Corrections and Conditional Release Regulations*, SOR/92-620 [CCRR].

[21] In *Giesbrecht v Canada*, 148 FTR 81, [1998] FCJ No 621 (QL), Justice Rothstein found that the grievance procedure set out in the CCRA and the CCRR affords an adequate alternative remedy to judicial review:

> [10] On its face, the legislative scheme providing for grievances is an adequate alternative remedy to judicial review. Grievances are to be handled expeditiously and time limits are provided in the Commissioner's Directives. There is no suggestion that the process is costly. If anything it is less costly than judicial review and more simple and straightforward. Through the grievance procedure an inmate may appeal a decision on the merits and an appeal tribunal may substitute its decision for that of the tribunal appealed from. Judicial review does not deal with the merits and a favourable result to an inmate would simply return the matter for redetermination to the tribunal appealed from.

[22] This Court has consistently recognized CSC's grievance process as an adequate alternative remedy and judicial review will generally only be appropriate after a final decision is rendered in the grievance process (*Robertson v Canada (Attorney General)*, 2015 FC 303 at para 33; *MacInnes v Mountain Institution*, 2014 FC 212 at para 17; *Leach v Warden of Fenbrook Institution*, 2004 FC 1570 at para 10; *Ewert v Canada (Attorney General)*, 2009 FC 971 at paras 31-32).

[23] The policy reasons for declining to hear a judicial review where an adequate alternative remedy exists were discussed by Justice Pelletier in *Marachelian v Attorney General of Canada*, [2001] 1 FCR 17 at para 10:

> The policy reasons for requiring applicants to exhaust their internal remedies are compelling. To hold otherwise is to undermine the legitimacy of alternate remedies by assigning them to a secondary position when there are many reasons why they should occupy a primary role in the resolution of disputes. In the context of correctional facilities, one could identify timeliness, familiarity with a unique environment, adequate procedural safeguards and economy as reasons for which internal remedies ought to be exhausted before approaching this Court.

[24] In addition, exhausting an internal remedy may eliminate the need for judicial review by resolving the substantive issue in favour of the griever. If not, when the matter ultimately proceeds to judicial review, a decision reached by a final decision-maker will provide the Court with the benefit of the decision-maker's expertise on the matter, as well as a complete record.

[25] That is not to say that there may be circumstances where a judge may be persuaded to exercise their discretionary jurisdiction to hear the application for judicial review despite the

availability of an alternative remedy. In *Gates v Canada (Attorney General)*, 2007 FC 1058, Justice Phelan allowed an application for judicial review where the temperature in a detention unit was repeatedly falling between O˚C and -12˚C, thus jeopardizing the Applicants' health. He found that the matter was therefore immediate and urgent, and the Applicants were not required to exhaust their remedies through the grievance process. While expressing hesitance in interfering with the CCRA grievance process, he provided guidance on when intervention by the Court is warranted:

> [26] In my view, the Court should not lightly interfere with the complaints process. There are strong policy and statutory reasons for requiring inmates to use this process. It is in cases of compelling circumstances, such as where there is actual physical or mental harm or clear inadequacy of the process that a departure from the complaints process would be justified (this is not an exhaustive list of the circumstances justifying departure from the usual process).

[26] Thus, the issue to be decided is whether there are compelling circumstances in this case which would justify departing from the general principle that the Court shall refuse to entertain an application for judicial review unless all adequate alternative remedies have been exhausted.

[27] When the Applicant initiated these proceedings in June 2014, he had not pursued his grievance beyond the first level. The Applicant maintains that he was not made aware of the first level grievance decision until September 2015, when he was finally allowed access to his documents which were stored following his transfer from Atlantic Institution.

[28] In an affidavit sworn August 21, 2015, the Applicant's parole officer at Millhaven Institution asserts that the Applicant received a response to his first level grievance on November

21, 2013. However, there is no indication in the record that the decision was communicated to the Applicant in November 2013. As the Applicant was transferred out of Atlantic Institution on October 22, 2013, it is not unreasonable to infer that the decision may not have been communicated to him, as he had already been transferred to Millhaven Institution when the decision was issued by Atlantic Institution in November 2013.

[29] While I accept that the Applicant may not have been provided a copy of the first level grievance decision when it was first issued, I am not persuaded that this constitutes compelling circumstances. In my view, the Applicant is in part responsible for the delay incurred before the final level grievance was initiated in failing to follow up with CSC authorities for a response. It appears from the material filed before the Court that the Applicant is no stranger to the grievance process at CSC. In addition to the several grievances lodged by the Applicant on a variety of issues, the Applicant has not shown any hesitation in making countless requests with CSC officials and in expressing his discontent with their responses.

[30] Moreover, in determining whether there are compelling circumstances in this case that would justify a departure from the general principle, it is important to consider the nature of the treatments and services requested by the Applicant, which I will now review.

(1) Rhinoplasty surgery

[31] The Applicant has requested rhinoplasty surgery to correct the shape of his nose. This issue was included in both his first level and final level grievances.

[32] On March 5, 2015, the Applicant underwent a septoplasty that he had requested to correct a deviated nasal septum. The surgery did not involve rhinoplasty. In reports dated December 4, 2014, and March 5, 2015, Dr. Qureshy, the surgeon who performed the operation, indicated that he explained to the Applicant that rhinoplasty would likely only allow the Applicant's glasses to sit more evenly on his nose. He opined that this was not a good reason to have the rhinoplasty surgery. He further indicated that the Applicant's nose was only very mildly deviated and that the rhinoplasty may not even address his main concern regarding how his glasses do not sit evenly on his nose. Dr. Qureshy wrote that he felt that it would be best to have the glasses fit the Applicant's nose as opposed to having the Applicant's nose fit the glasses. On the day of his septoplasty surgery, Dr. Qureshy again reiterated to the Applicant that rhinoplasty was not the answer but offered to seek another opinion from one of his colleagues.

[33] On October 26, 2015, the Applicant was seen by another specialist, Dr. Hollins, who advised the Applicant that his issue was essentially cosmetic. He further indicated that any surgical correction was likely to have a fairly limited chance of success and that it was questionable whether a rhinoplasty would be of benefit. He stated that he does not do cosmetic surgery but noted there were a couple of surgeons in Ottawa who could be considered for the procedure. He also added that if cosmetic rhinoplasty was not covered under the CSC plan, the Applicant would have to pay for the procedure. With respect to the Applicant's difficulty wearing glasses, he suggested that the Applicant be provided with glasses that have adjustable positioning of the nasal bridge pads.

[34] Pursuant to CSC's National Essential Health Service Framework dated July 23, 2015, surgical procedures solely for aesthetic reasons, including external nasal deviation (acquired or congenital), are not covered.

[35] The Applicant continues to request this treatment, and is willing to pay for it.

(2) Dental implants

[36] The Applicant requests the full replacement of two chipped teeth with implants. This request was not included in the August 2013 grievance. It was subsequently included in the September 2015 final level grievance.

[37] A review of the record indicates that the Applicant made requests to see a dentist about his chipped teeth on March 22, 2011, June 12, 2011, September 19, 2011 and September 26, 2011, while at the Special Handling Unit of the Regional Reception Centre in Saint-Anne-des Plaines, Quebec. He also appears to have requested on October 2, 2013, a meeting with the Chief of Health Care Services at Atlantic Institution to discuss several issues, including consulting the dentist.

[38] According to the Applicant's parole officer, the Applicant did not request to see a dentist since his transfer to Millhaven Institution (Affidavit dated October 5, 2015, para 4). His request was only submitted after the commencement of the application for judicial review. On July 10, 2014, the Applicant made an inquiry as to the cost of replacing two teeth with implants. He was advised on July 21, 2014, that the cost would be anywhere between $3000 to $6000, that the

procedure could not be done at any institution, and that it would have to be completed after the Applicant is released.

[39] On August 24, 2015, the institution dentist, Dr. Erwin, advised the Applicant that dental implants, dental implant related procedures and orthodontics do not fall under the National Essential Health Services Framework. All costs associated with consultations and treatment, including security escort costs and any overtime are to be borne by the inmate. He recommended that the Applicant's first consultation appointment be made with Dr. Nguyen, as she would coordinate the implant procedure. The Applicant was further advised that should he wish to proceed, Dr. Erwin would need to prepare the necessary consultation report and contact Dr. Nguyen's office to get an estimate for the consultation. Upon receipt, the Applicant would be notified of such costs and he could then complete and submit a form to healthcare to cover the costs.

[40] On October 26, 2015, a referral for consultation and report was made by Dr. Erwin to Dr. Nguyen requesting an appointment for initial assessment and asking that prior to booking the appointment, the cost of the appointment, including any radiographs, be provided. A note to the Applicant's dental record on October 26, 2015, indicates that the procedure is not medically necessary.

[41] Despite his request for implants, the Applicant has already been fitted with a dental bridge.

[42] Under the terms of CSC's National Essential Health Service Framework dated July 23, 2015, dental implants are not covered.

[43] The Applicant is willing to pay for the requested dental implants, although he expects to be compensated because, in his view, the injuries were caused by CSC staff.

(3) Finger surgery

[44] According to the Applicant, his left hand was injured during the January 27, 2011 use of force incident. He requests surgery to repair the tendons in his left hand fifth finger. This issue was included in the first and final level grievances. I note upon review of the record before the Court that August 9, 2010, the Applicant made a request for healthcare for a "BROKEN left pinkie finger @ joint".

[45] Notwithstanding how and when the injury occurred, the Applicant has had several x-rays taken of his left hand. According to the record, x-rays of the Applicant's left hand were interpreted January 27, 2011, May 9, 2011 and April 17, 2012, and none of them revealed a fracture. An x-ray of the Applicant's left hand was also requested on July 21, 2013; the results however do not form part of the record.

[46] Nevertheless, on September 11, 2015, the Applicant again received a referral for his left hand. On September 14, 2015, CSC staff at Millhaven Institution deferred the referral as the injury was not considered urgent or life threatening and could be followed up at the Applicant's receiving institution.

(4) Eye glasses

[47] The Applicant has requested a new pair of glasses that properly fit his nose. This issue was only included in his final level grievance. The Applicant is willing to pay for a new pair, again under the expectation that he will be compensated at a later date.

[48] The CSC maintains that the Applicant must wear glasses purchased through CSC contractors. On July 16, 2014, the Applicant was fitted with "CORCAN" glasses by Dr. Kogan, an optometrist. The Applicant requested glasses that better fit his face, but he was informed that he must reduce his personal effects in order to purchase another pair, as the glasses would exceed his $1500 personal effects limit.

[49] As stated earlier, the specialist who was consulted with respect to the value of performing rhinoplasty surgery indicated that the Applicant should be provided with glasses that have adjustable positioning of the nasal bridge pads to address his difficulty in wearing glasses. On October 28, 2015, the Applicant was listed with Dr. Kogan to obtain glasses that better fit his nose. CSC has also permitted the Applicant to pay for any further upgrades in accordance with CSC guidelines.

[50] While the Applicant has made a compelling argument that the health treatment and services he has requested over the years have not been forthcoming because he has been transferred to four different institutions since the January 27, 2011 incident and thus finds himself at the end of waitlists, resulting in further delay and inconvenience, the Respondents

have also demonstrated that several of the Applicant's requests have been accommodated in the last year in one form or another.

[51] The Court is faced with the difficult decision of determining whether the final grievance process should run its course, knowing that the Applicant is facing an imminent transfer out of the province. Had the Applicant initiated a grievance challenging his transfer to Manitoba, he might have succeeded in either preventing or delaying his transfer long enough to be able to access further treatment.

[52] The evidentiary record is also lacking with respect to the "essential" nature of the assessments and treatments requested by the Applicant. While section 86 of the CCRA provides that every inmate shall be provided with essential healthcare that shall conform to professionally accepted standards, the determination about which service is required for an inmate must rely on the judgment of the healthcare professionals. While the Applicant may not agree with the diagnoses provided by the professionals he has seen to date, this Court has not been provided with any evidence to dismiss their evaluations or recommended treatment. The Court has also not been provided with any evidence regarding professionally accepted standards in the general community or any evidence that the Applicant will suffer harm, let alone irreparable harm, if he is required to wait for further consultations.

[53] The Applicant's parole officer has indicated that when the Applicant is transferred from Millhaven Institution to Stony Mountain Institution, Millhaven Institution will first send a "Healthcare Transfer Summary" to the receiving institution in respect of the Applicant. The

purpose of this summary is to provide the receiving institution with advance notice of an inmate's health concerns. If the Applicant is successful on any of the matters he is grieving, I expect that the decision will be communicated to the receiving institution, which in turn will be required to act upon the matters identified.

[54] When the final level grievance decision is issued, the Applicant will be in a position to assess whether there are any outstanding issues with which he is in disagreement. If he chooses to pursue the matter, his application for judicial review will likely be more focussed both factually and legally, and the Court will then be in a better position to adjudicate whether he has been denied access to essential health services and whether his rights have been violated under the *Charter*.

[55] Given my finding that the application for judicial review is premature due to a failure to exhaust alternative remedies, it is not necessary for me to decide whether the application for judicial review is moot or whether the CSC reasonably addressed the Applicant's requests for treatment and health services.

[56] In addition, having dismissed and disposed of the application for judicial review, it is not necessary for me to rule on the Applicant's motion for an interlocutory injunction.

IV. Costs

[57] Both the Applicant and the Respondents seek costs. Considering that the Applicant's septoplasty surgery and subsequent referrals have all been conducted following the Applicant

initiating his application for judicial review, and considering the lack of clarity surrounding the communication of the first level grievance decision, I have decided, in the exercise of my discretion, that there shall be no costs.

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed and each party will bear their own costs.

"Sylvie E. Roussel"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1442-14
STYLE OF CAUSE:	TIMOTHY MITCHEL NOME v ATTORNEY GENERAL OF CANADA AND COMMISSIONER OF CORRECTIONS
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARINGS:	DECEMBER 9 AND 21, 2015
JUDGMENT AND REASONS:	ROUSSEL J.
DATED:	FEBRUARY 11, 2016

APPEARANCES:

J. Todd Sloan	FOR THE APPLICANT
Patrick Bendin	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

J. Todd Sloan Barrister and Solicitor Ottawa, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENTS