Federal Court  Cour fédérale

Date: 20200212

Docket: T-1921-18

Citation: 2020 FC 239

Vancouver, British Columbia, February 12, 2020

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

BRYAN RALSTON LATHAM

Applicant

and

HER MAJESTY THE QUEEN AND THE ATTORNEY GENERAL OF CANADA

Respondents

ORDER AND REASONS

[1] Mr. Latham is an offender currently incarcerated at Bowden Institution in the Province of Alberta.

[2] In September 2018, the Parole Board of Canada Appeal Division issued a decision [the Decision] denying Mr. Latham's appeal of a decision of the Parole Board of Canada on April 19, 2018, revoking his previously suspended day parole.

[3] Mr. Latham commenced an application for *habeas corpus* in the Alberta Court of Queen's Bench and an application for judicial review in this Court in respect of the Decision.

[4] By letter dated November 20, 2018, the Alberta Court of Queen's Bench invited Mr. Latham to discontinue either his *habeas corpus* application or the application for judicial review in order to avoid the possibility that either matter could be considered an abuse of process. This Court on November 27, 2018, granted the request of Mr. Latham to place the judicial review application in abeyance while he pursued his *habeas corpus* application.

[5] Mr. Latham was unsuccessful in his *habeas corpus* application. On January 21, 2019, the Court of Queen's Bench issued reasons finding the Decision to be both reasonable and reached in a procedurally fair manner. The Alberta Court of Appeal denied leave to appeal that decision.

[6] On January 24, 2019, Mr. Latham wrote to this Court stating that he wished to "continue this judicial review without changing the thing." In response, the Respondents took the position that the continuation of the within application constituted an abuse of process.

[7] The Respondents filed a motion to strike this application as an abuse of process on the principal basis that the Alberta Court of Queen's Bench had already determined that the Decision under review was both reasonable and made in a procedurally fair manner.

[8] In an Order dated April 8, 2019, and subsequently amended on April 12, 2019, the Prothonotary granted the motion and struck the Notice of Application with costs. She found that

the application was an attempt to relitigate the legality of the Decision, which the Alberta Court of Queen's Bench had already determined.

[9] By Notice of Motion filed November 28, 2019, Mr. Latham sought an extension of time to bring an appeal of the Order of the Prothonotary, and if granted he appealed that decision.

[10] The Respondents observe that Mr. Latham's appeal is well out of time as Rule 51 of the *Federal Courts Rules* provides the appeal of a Prothonotary's Order must be served and filed within 10 days after the date on which the Order was issued. The Respondents acknowledge, however, that the Court has jurisdiction under Rule 55 to consider appeals filed outside that period should it decide to do so; however, "the moving party must demonstrate special circumstances justifying the issuance of such an order:" *Haque v Canada (Citizenship and Immigration)*, [1998] FCJ No 1623, 157 FTR 51, at paragraph 26.

[11] In his Notice of Motion, Mr. Latham accounts for the significant delay, stating that the "extra time it has taken to produce this motion as a result of the applicant's age and medical condition, that he is an inmate with limited resources, the excessive lock downs over the past few months, and the holidays of the CSC staff have taken in the past few months, which makes it impossible to even get access to a computer and printer during those times." He further states that he has had issues with the computer and improperly working floppy disks.

[12] I acknowledge the unusual difficulties inmates have when making or responding to applications in this Court. Therefore, and notwithstanding the serious delay here, the Court shall

grant the extension of time to file this appeal, noting as well that the Respondents did not raise any objection to the extension being granted.

[13] The Respondents do object to the filing of the affidavit of Mr. Latham and the materials attached thereto as Exhibits. They submit that the material provided was not before the Prothonotary, although it was available (Exhibits A-K), or is irrelevant to a determination whether the application for judicial review should be struck (Exhibits L-U). I agree with the Respondents that Exhibits L-U are irrelevant to the issue of whether the application should be struck and they will not be considered. I also agree that Exhibits A-K, while of marginal relevance, were not before the Prothonotary and are therefore generally not admissible on this appeal. However, in light of my determination of the submission that the Prothonotary made her Order without jurisdiction, I will consider Exhibits A-K when I consider the Respondents' motion to dismiss, afresh.

[14] Mr. Latham submits that the Prothonotary did not have jurisdiction to issue judgement in that the matter relates to his liberty. Rule 50(1)(f) of the *Federal Courts Rules* provides that a "prothonotary may hear, and make any necessary orders relating to, any motion under these Rules, other than a motion…relating to the liberty of a person."

[15] This provision does not appear to have been previously considered by this Court; however, it is noted that Justice Gibson in *Froom v Canada (Minister of Justice)*, 2002 FCT 1278 (CanLII), [2003] 3 FC 268 noted that it could be argued that a motion to strike an application for judicial review of a decision of the Minister of Justice regarding extradition was

in relation to applicant's liberty since he was seeking to strike the authority under which he had been incarcerated and remained conditionally at large.

[16] It is my view, on a broad interpretation, that Rule 50(1)(f) can be said to oust the jurisdiction of the Prothonotary on the motion to strike an application to review a decision revoking parole. It relates to the applicant's liberty because if the application fails then he will remain in custody. Indeed the Respondents in their memorandum describe the similarity between the Alberta *habeas corpus* application and this application, suggesting as much:

> While *habeas corpus* and judicial review serve different purposes, the burdens differ, and the remedies available in each differ, it is now the case that the two processes are functionally similar *(Khela v Mission Institution*, 2014 SCC 24 at para 37). Indeed the grounds on which a decision to deprive a person of a portion of his liberty may be ruled unlawful in an application for *habeas corpus* – lack of jurisdiction, breach of procedural fairness, or unreasonableness – are the same by which an applicant may seek judicial review

[17] Accordingly, I find that the Prothonotary lacked jurisdiction to consider the Respondents' motion to strike the application for judicial review as an abuse of process. The motion ought to have been considered by a judge of this Court. Having read the materials, I shall issue a decision on the motion.

[18] The relevant facts are set out above and in the Prothonotary's Order.

[19] Jurisdiction to strike an application as an abuse of process lies as a part of the Court's inherent jurisdiction to control its own process, and is to be exercised sparingly. The doctrine of abuse of process has been applied to preclude litigation in circumstances where allowing the

litigation to proceed offends the principles of judicial economy, consistency of decision-making, finality, and the administration of justice. It is particularly applied where a litigant attempts to relitigate an issue or matter that has already been determined, either in the same court or in another. The Supreme Court of Canada made the following observations in *Toronto (City) v C.U.P.E., Local 79*, [2003] 3 SCR 77, 2003 SCC 63 at paragraphs 51 and 52:

> Rather than focus on the motive or status of the parties, the doctrine of abuse of process concentrates on the integrity of the adjudicative process. Three preliminary observations are useful in that respect. First, there can be no assumption that relitigation will yield a more accurate result than the original proceeding. Second, if the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resources as well as an unnecessary expense for the parties and possibly an additional hardship for some witnesses. Finally, if the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue, the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality.
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> In contrast, proper review by way of appeal increases confidence in the ultimate result and affirms both the authority of the process as well as the finality of the result. It is therefore apparent that from the system's point of view, relitigation carries serious detrimental effects and should be avoided unless the circumstances dictate that relitigation is in fact necessary to enhance the credibility and the effectiveness of the adjudicative process as a whole. There may be instances where relitigation will enhance, rather than impeach, the integrity of the judicial system, for example: (1) when the first proceeding is tainted by fraud or dishonesty; (2) when fresh, new evidence, previously unavailable, conclusively impeaches the original results; or (3) when fairness dictates that the original result should not be binding in the new context.

[20] Notwithstanding Mr. Latham's assertion that there are facts in this application that differ or are in addition to those before the Alberta courts, he raises no fact that could not have been raised earlier or, in my assessment, that might have materially affected the result in those courts.

[21] In this application, he challenges the very Decision that he challenged by way of *habeas corpus* in the Alberta courts. In this Court, as in the Alberta courts, he submits that the Decision was reached in a procedurally unfair manner and is unreasonable. I am satisfied that what is being attempted here is the relitigation of the very issues that were litigated between these same parties before the Alberta courts.

[22] This is not a situation where "relitigation will enhance, rather than impeach, the integrity of the judicial system." This is a situation where relitigation offends the judicial system, offends its finality, and must be avoided.

[23] For these reasons, the motion of the Respondents to strike the application as an abuse of process is granted, and the application is dismissed.

ORDER IN T-1921-18

THIS COURT'S ORDER is that:

1. The Court extends the time for the Applicant to bring this appeal;

2. The appeal is allowed and the Order of the Prothonotary dated April 8, 2019, and subsequently amended on April 12, 2019, is set aside;

3. The Respondents' motion to strike the application as an abuse of process is granted, the application for judicial review is struck, without leave to amend, and the application is dismissed; and

4. As success has been divided, each party shall bear its own costs.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1921-18
STYLE OF CAUSE:	BRYAN RALSTON LATHAM v HER MAJESTY THE QUEEN AND THE ATTORNEY GENERAL OF CANADA

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

ORDER AND REASONS:	ZINN J.
DATED:	FEBRUARY 12, 2020

WRITTEN REPRESENTATIONS BY:

Bryan R. Latham	FOR THE APPLICANT ON HIS OWN BEHALF
Robert Drummond	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Nil	SELF-REPRESENTED APPLICANT
Attorney General of Canada Department of Justice - Prairie Region Edmonton, Alberta	FOR THE RESPONDENTS