

Federal Court



Cour fédérale

Date: 20210607

Docket: T-1256-20

Citation: 2021 FC 555

[ENGLISH TRANSLATION]

Ottawa, Ontario, June 7, 2021

PRESENT: The Honourable Mr. Justice McHaffie

BETWEEN:

JEAN-CLAUDE NADEAU

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

ORDER AND REASONS

I. Overview

[1] This is a motion submitted by the applicant in the context of his application for judicial review. The motion is effectively seeking the same order sought in the application, namely an order of “trusteeship” against the Parole Board of Canada, including its Appeal Division (together, the PBC).

[2] The applicant's application for judicial review is based on his continued detention and the PBC's refusal to expand his conditions of confinement. Most recently, on August 28, 2020, the PBC's Appeal Division dismissed the applicant's appeal of a PBC decision denying him day parole and parole. The application challenges this decision as well as other prior decisions. It asks, among other things, that this Court [TRANSLATION] "remove all control over the applicant's release from the sentence administration section of the PBC by placing that body in trusteeship".

[3] Similarly, this motion seeks an order placing the PBC under trusteeship as an interim measure pursuant to section 18.2 of the *Federal Courts Act*, RSC 1985, c F-7. The applicant claims that the Court must intervene because he has exhausted available remedies and that the Court's intervention is his last resort.

[4] For the following reasons, I deny the applicant's motion. The respondent has not requested costs, so none will be awarded.

II. Issue

[5] The issue raised by this motion is whether the interim orders requested by the applicant are appropriate in this case. Before deciding this question, the Court must address two procedural issues raised by the parties' arguments: (1) the response to the applicant's motion under Rule 317 of the *Federal Courts Rules*, SOR/98-106 and (2) the correspondence submitted in the respondent's record.

III. Analysis

A. *Procedural matters*

(1) The applicant's request under Rule 317

[6] In his [TRANSLATION] "Notice of Application and Trusteeship", the applicant requested that the respondent send him various categories of documents and forward certified copies of them to the Registry. This motion includes a request that the respondent forward to him [TRANSLATION] "the power it has given to decision making bodies, namely the PBC and the PBC Appeal Division, to ignore the 1982 Canadian Charter of Rights and Freedoms . . .". Considering this motion to be a request for documents under Rule 317, the respondent objects to it pursuant to Rule 318(2) of the *Federal Courts Rules*. That said, the respondent obtained from the PBC the documents deemed relevant to the applicant's request. The respondent submitted these documents, in digital format, to the Clerk of the Court on November 26, 2020, and sent them to the applicant.

[7] In his written submissions on this motion, the applicant claims that the documents provided by the respondent do not respond to [TRANSLATION] "the applicant's actual requests".

[8] In my opinion, the respondent's objection to the applicant's request under Rule 317 is not before the Court on the current motion. As noted by Prothonotary Steele in her November 29, 2020 directive, if the applicant does not accept the respondent's objection, the applicant may approach the Court to seek directions under Rule 318. This rule states that the Court may give parties directions on how to proceed in making submissions on such an objection. The issue of

production is important enough that the need for a formal motion on this issue should be addressed and determined by a prothonotary.

(2) The correspondence submitted by the respondent

[9] In his response record, the respondent has included documents relating to his objection to the applicant's motion under Rule 317. These include communications between the respondent and the applicant that are not in the Court file. On a motion, facts and evidence not in the Court file must be presented through an affidavit, as prescribed by Rule 363. Put another way, documents cannot simply be inserted into a response record, as the respondent has done.

[10] The respondent has submitted a request for a direction as to these documents, which has been delivered to me pursuant to Prothonotary Steele's direction of April 28, 2021. The respondent argues that it is in the interests of justice to consider these documents notwithstanding the *Federal Courts Rules*, and that no harm would result from their filing. On the other hand, the respondent provided no reason why the documents could not have been submitted with an affidavit. In the circumstances, I find that this correspondence has not been properly filed before the Court and I would not consider them on this motion.

[11] The respondent requests the opportunity to re-serve and refile an amended response record, in which the correspondence would be properly introduced as exhibits to an affidavit. I conclude that this is not necessary, given my conclusion above regarding the applicant's Rule 317 request. In my opinion, neither the current state of production of the documents nor the correspondence between the parties on this issue is determinative of the applicant's motion.

There would be no point in redoing the response record to address the evidentiary issue in these circumstances.

B. *Merits of the motion*

[12] As noted above, the applicant's motion seeks an order prior to the final determination of the judicial review application. This is permitted by section 18.2 of the *Federal Courts Act*:

18.2 On an application for judicial review, the Federal Court may make any interim orders that it considers appropriate pending the final disposition of the application.

18.2 La Cour fédérale peut, lorsqu'elle est saisie d'une demande de contrôle judiciaire, prendre les mesures provisoires qu'elle estime indiquées avant de rendre sa décision définitive.

[13] In particular, the applicant seeks an order of "trusteeship" regarding the PBC. As the Court understands it, he is asking this Court to place the PBC under some form of supervision or control, in order to take away that tribunal's exclusive right to [TRANSLATION] "detain the applicant".

[14] As the respondent pointed out, the order sought in this motion is of the same nature as that sought in the main application for judicial review. As with the current motion, the application for judicial review seeks an order of trusteeship to remove the powers of the PBC.

[15] Ordinarily, the merits of an application for judicial review must be determined at the hearing of that application, not in the context of a preliminary application. Where an applicant seeks an interim order of injunction or mandamus will effectively determine the underlying judicial review application, the Court must be satisfied that the applicant is "likely to prevail", or

even that there is a “strong *prima facie* case” or “strong likelihood” of ultimately succeeding: *Mansanto v Canada (Health)*, 2020 FC 1053 at para 56; *Travellers’ Rights v Canada (Transportation Agency)*, 2020 FCA 92 at para 19. Even though the applicant does not describe the order sought as an injunction or order of mandamus, I am of the opinion that the same principle applies, given that the applicant is effectively seeking a determination of his claim on this motion.

[16] I am not persuaded that the applicant has established a strong *prima facie* case or a strong likelihood of ultimate success. This Court has jurisdiction to declare a decision or act of the PBC invalid or unlawful: *Federal Courts Act*, s 18.1(3). It is much less clear, however, that it has jurisdiction to force “trusteeship” on an administrative tribunal established by an Act of Parliament or to take away its powers under that Act. Nor do I find that the applicant has demonstrated a strong likelihood of establishing that such an order is appropriate in this case, given the arguments against the tribunal’s decisions and actions. I will say no more because these are ultimately issues to be determined in the course of the review of the application for judicial review by the reviewing judge.

[17] I therefore deny the applicant’s motion.

[18] I note that the applicant refers to Rule 221 of the *Federal Courts Rules* and suggests that the test for dismissing an action at the preliminary stage is whether it is “plain and obvious” that the claim does not disclose a cause of action. However, this section and test do not apply because the respondent does not seek to strike the claim at this stage. In denying the applicant’s motion,

the Court does not dismiss the application for judicial review. The merits of the application will be determined upon the ultimate determination of the claim.

[19] I also note that the respondent has stated his consent to the applicant's motion record being treated as the applicant's record. It is clear that the applicant has put a great deal of effort and thought into his application record. On the other hand, the applicant has not requested that his application record be considered his applicant's record. Nor is it clear that the applicant's record would remain the same, depending on the outcome of any further orders regarding the documents requested under Rule 317, if such orders are made. I will therefore make no order in this regard.

IV. Conclusion

[20] I am not satisfied that it is appropriate to issue the order sought by the applicant as an interim measure. The motion is therefore denied.

[21] The respondent has not requested costs, and none are awarded.

ORDER in T-1256-20

THE COURT ORDERS as follows:

1. The applicant's motion for an order placing the Parole Board of Canada and its Appeal Division in trusteeship is denied.
2. Without costs.

"Nicholas McHaffie"

Judge

Certified true translation
Michael Palles, Reviser

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1256-20

STYLE OF CAUSE: JEAN-CLAUDE NADEAU v ATTORNEY
GENERAL OF CANADA

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

ORDER AND REASONS: MCHAFFIE J.

DATED: JUNE 7, 2021

WRITTEN REPRESENTATIONS:

Jean-Claude Nadeau

THE APPLICANT

Annie Laflamme

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Attorney General of Canada
Montréal, Quebec

FOR THE RESPONDENT