Federal Court  Cour fédérale

Date: 20240223

Docket: T-1952-22

Citation: 2024 FC 307

Ottawa, Ontario, February 23, 2024

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

NABIL BENHSAIEN

Applicant/
Responding Party

and

ATTORNEY GENERAL OF CANADA

Respondent/
Moving Party

ORDER AND REASONS

I. Overview

[1] The Respondent's motion, dated November 10, 2023, brought in writing pursuant to Rule 369 of the *Federal Courts Rules*, SOR/98-106 [the *Rules*], seeks an order:

A. striking out in its entirety, without leave to amend, the Applicant's Amended Notice of Application for Judicial Review [Application], filed on November 10, 2022; and

B. dismissing the Application.

[2] The Application relates to a decision of the Parole Board of Canada's Appeal Division [PBC-AD] to not release the Applicant from penitentiary before the expiration of his sentence. The Respondent brings this Motion on the basis that the Application is now moot.

[3] For the reasons that follow, the motion is granted.

II. Background

[4] The Applicant was convicted on multiple charges of assault with a weapon and aggravated assault. He was sentenced to five years and three months of incarceration and made subject to a ten-year Long-Term Supervision Order [LTSO]. The Applicant's sentence commenced on June 15, 2018. He was eligible to be released from penitentiary at the two-thirds point of his sentence, December 14, 2021, the Statutory Release Date [SRD].

[5] On March 16, 2021, the Correctional Service of Canada [CSC], in accordance with subparagraph 129(2)(a)(i) of the *Corrections and Conditional Release Act,* SC 1992, c 20 [*CCRA*], referred the Applicant's case to the Parole Board of Canada [PBC] to determine the Applicant's eligibility for release on the SRD. The CSC recommended that detention be ordered until completion of the Applicant's sentence according to law – i.e., until his Warrant Expiry Date [WED].

[6] On October 8, 2021, pursuant to paragraph 130(3)(a) of the *CCRA*, the PBC ordered the Applicant not be released before the WED. The Applicant appealed the decision to the PBC-AD.

[7] In a decision dated January 31, 2022, the PBC-AD affirmed the PBC's decision.

[8] On September 23, 2022, the Applicant filed an Application for Judicial Review of the PBC-AD's decision, pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7. An amended Notice of Application was filed on November 10, 2022. The Applicant seeks an Order setting aside the PBC-AD's decision to affirm the PBC's order to detain the Applicant and referring the matter back for redetermination in accordance with such directions the Court considers appropriate. The Applicant also seeks costs.

[9] The Applicant's sentence expired on September 14, 2023 (the WED).

[10] The Applicant's sentence having expired, the Respondent argues the Application is now moot and that the Court should not exercise its discretion to decide the Application notwithstanding its mootness.

III. Analysis

A. *Test for a motion to strike*

[11] The threshold for striking a Notice of Application for Judicial Review is high. This is the case for two reasons. First, the *Rules* do not include an express provision for a motion to strike in

the context of an application before the Court. Instead, the Court relies on its plenary jurisdiction to restrain the misuse or abuse of the Court's processes when striking an application. Second, applications are to proceed "without delay" and "in a summary way"; motions that raise matters more properly addressed in the course of a hearing on the merits are inconsistent with this objective (*JP Morgan Asset Management (Canada) Inc v Canada (National Revenue),* 2013 FCA 250 at para 48 [*JP Morgan*]; *Boland v Canada (Attorney General),* 2024 FC 11 at para 10 [*Boland*]).

[12] In deciding a motion to strike an application, a court will employ the same "plain and obvious" threshold – at times referred to as the "doomed to fail" standard – that is used in the context of striking an action (*Wenham v Canada (Attorney General),* 2018 FCA 199 at paras 32-33 [*Wenham*]; *Nicolas v Canada (Attorney General),* 2022 FC 439 at para 17; *Boland* at para 11). An application will only be struck by the Court where it is "so clearly improper as to be bereft of any possibility of success" (*JP Morgan* at para 47, citing *David Bull Laboratories (Canada) Inc v Pharmacia Inc*, 1994 CanLII 3529 (FCA) at 600; *Wenham* at para 33; *Boland* at para 11). The Application must suffer an obvious, fatal flaw striking at the root of this Court's power to entertain the application (*JP Morgan* at para 47, citing *Rahman v Public Service Labour Relations Board*, 2013 FCA 117 at para 7, *Donaldson v Western Grain Storage By-Products*, 2012 FCA 286 at para 6, and *Hunt v Carey Canada Inc*, 1990 CanLII 90 (SCC)).

[13] Mootness may satisfy this high threshold on a motion to strike an application (*Cardin v Canada (Attorney General),* 2017 FCA 150 at para 8 [*Cardin*]; *Lukács v Canada (Transportation Agency),* 2016 FCA 227 at para 6 [*Lukács*]; *Rebel News Network Ltd v Canada*

(Leaders' Debates Commission), 2020 FC 1181 at para 34 [*Rebel News Network*]; *Boland* at para 12).

B. *The Application is moot*

[14] A matter that does not involve a live controversy affecting the parties or their rights engages the doctrine of mootness (*Borowski v Canada (Attorney General),* 1989 CanLII 123 (SCC) at para 15 [*Borowski*]; *Cardin* at para 9; *Lukács* at para 7; *Rebel News Network* at para 35; *Boland* at para 13).

[15] As set out by the Federal Court of Appeal in *Cardin* at para 9, citing *Borowski* at para 16, assessing mootness involves a two-step analysis:

> First, the court must determine whether the concrete controversy between the parties has disappeared and the issues have become academic. If yes, the court must then decide whether it should exercise its discretion to hear the moot case.

[16] In this matter, the decision in issue, the January 31, 2022 decision of the PBC-AD, had the effect of continuing the Applicant's detention during the period between his SRD and his WED – between December 12, 2021 and September 14, 2023. Given that the Applicant's sentence expired on September 14, 2023, the Respondent argues that any success the Applicant might have in pursuing the Application would be of no practical effect or consequence, and as such, the Application is moot.

[17] The Applicant argues that the Application is not moot because (1) a later August 21, 2023 decision of the PBC imposing a special condition on his LTSO relies on the January 31, 2022

PBC-AD decision and striking this Application would hamper his ability to challenge the LTSO condition, and (2) the Application is required to provide the Applicant the "necessary basis" to pursue a lawsuit. The Applicant submits the Court should grant leave to amend the Notice of Application. Neither argument is persuasive.

[18] The August 21, 2023 decision of the PBC regarding the LTSO, which the Applicant argues relies upon the PBC-AD decision under review, does refer to the PBC's October 8, 2021 decision (the decision appealed from), but only to the extent of reporting the decision to detain the Applicant until his WED. It is clear upon reading the August 21, 2023 decision that the PBC undertook an assessment of the circumstances and independently concluded those circumstances warranted the imposition of a special condition. That the same underlying facts and circumstances were of relevance in addressing separate and distinct issues before the PBC does not link the decisions or in any way hamper the Applicant's ability to challenge the LTSO decision. As the Respondent correctly notes, any success the Applicant might have in the current Application would have absolutely no effect upon the PBC's August 21, 2023 decision, which would remain in force.

[19] Similarly, vague assertions of the possibility of a lawsuit are not sufficient to demonstrate the existence of a live issue as between the parties. The Supreme Court of Canada teaches that a pragmatic and practical approach is to be adopted by the courts in addressing claims of injury allegedly arising from government action and that there is no principled reason to not permit a party to pursue a chosen remedy directly (*Canada (Attorney General) v TeleZone Inc*, 2010 SCC 62 at paras 18-23).

[20] The live issue as between the parties disappeared upon the expiration of the Applicant's sentence on September 14, 2023. The Application is moot.

C. *The Court will not exercise its discretion to consider and decide the moot Application*

[21] Having found the matter to be moot, I have also considered whether the Court should nonetheless exercise its discretion to hear the Application. I have concluded that the Court should not.

[22] In assessing whether a matter that is moot should nonetheless be heard and decided, a court must consider three factors: (1) the presence or absence of an adversarial context, (2) the appropriateness of applying scarce judicial resources, and (3) the Court's sensitivity to its role relative to that of the legislative branch of government (*Rebel News Network* at para 35, citing *Democracy Watch v Canada (Attorney General)*, 2018 FCA 195 at para 13).

[23] In this instance, the first and second factors are determinative. While it is clear an issue of dispute remains as between the parties – the imposition of an LTSO special condition – the controversy arises out of a separate and distinct administrative decision that is not before the Court on this Application. Nor am I convinced that the Court's determination of this Application would have any practical impact on the ongoing relationship as between the parties or allow the resolution of an issue that has an impact beyond the parties. The procedural history also indicates that delay in bringing the Application is largely attributable to the Applicant.

[24] The allocation of judicial resources to consider and decide a moot matter in these circumstances is not appropriate.

D. *Leave to further amend the Notice Application will not be granted*

[25] The mootness of an application can be fatal where, as here, the Court has concluded it is not appropriate to consider and decide the moot proceeding. The flaw cannot be cured by way of a further amendment to the Application. Consequently, the Application is doomed to fail and will therefore be struck in its entirety without leave to amend.

IV. Conclusion

[26] The Respondent's motion is granted. The Amended Notice of Application is struck without leave to amend and the Application is dismissed.

[27] Having succeeded on the motion, the Respondent is entitled to costs. However, in written submissions, the Respondent advises costs are not sought on either this motion or in the underlying Application. Costs are therefore not awarded.

ORDER IN T-1952-22

THIS COURT ORDERS that:

1. This motion is granted.

2. The Amended Notice of Application for Judicial Review, filed on November 10, 2022, is struck out in its entirety without leave to amend.

3. The Application for Judicial Review is dismissed.

4. All without costs.

"Patrick Gleeson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1952-22
STYLE OF CAUSE:	NABIL BENHSAIEN v ATTORNEY GENERAL OF CANADA

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

ORDER AND REASONS:	GLEESON J.
DATED:	FEBRUARY 23, 2024

WRITTEN REPRESENTATIONS BY:

Nabil Benhsaien	FOR THE APPLICANT/ RESPONDING PARTY (ON HIS OWN BEHALF)
Vanessa Wynn-Williams	FOR THE RESPONDENT/ MOVING PARTY

SOLICITORS OF RECORD:

Attorney General of Canada Ottawa, ON	FOR THE RESPONDENT/ MOVING PARTY