Federal Court of Appeal | Cour d'appel fédérale

Date: 20160203

Docket: A-512-15

Citation: 2016 FCA 35

Coram: **NADON J.A.**
STRATAS J.A.
RYER J.A.

BETWEEN:

MAGDALENA FORNER

Applicant

and

THE PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on February 3, 2016.

REASONS FOR ORDER BY: STRATAS J.A.

CONCURRED IN BY: NADON J.A.
RYER J.A.

Federal Court of Appeal  Cour d'appel fédérale

Date: 20160203

Docket: A-512-15

Citation: 2016 FCA 35

Coram: **NADON J.A.**
STRATAS J.A.
RYER J.A.

BETWEEN:

MAGDALENA FORNER

Applicant

and

THE PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA

Respondent

REASONS FOR ORDER

STRATAS J.A.

[1] Before the Court is an application for judicial review. The respondent moves to strike it out on the ground that it is premature.

[2] The applicant has not responded to the motion. However, motions such as this are not granted by default. The Court must be satisfied that the application should be struck out on the basis of the material before it and the applicable law.

A. Background and the application for judicial review

[3] The applicant has submitted a complaint to the Public Service Labour Relations and Employment Board. She alleges that her former bargaining agent, the respondent, breached its duty to represent her fairly.

[4] In response, the Board asked the applicant to provide more particulars concerning her complaint. It asked her to fill out a "Request for Particulars" form. The applicant responded by endorsing "see attached documents" at various places on the form. She submitted the form along with a box of documents.

[5] The Board decided to reject her submission and returned the box of documents to her. It asked her again to submit the particulars concerning her complaint using the "Request for Particulars" form.

[6] Rather than complying with the Board's decision, the applicant immediately launched this application for judicial review, seeking to set it aside.

B. The respondent's submissions on the motion to strike

[7] The respondent submits that we should strike the application for judicial review on the ground that it is premature. It relies upon our jurisprudence suggesting that applications for judicial review of interlocutory decisions by administrators will often be struck. The respondent

adds that although motions to strike applications should rarely be entertained (citing *David Bull Laboratories (Can.) Inc. v. Pharmacia Inc.*, [1995] 1 F.C. 588 (C.A.)), the motion to strike should be granted in the circumstances of this case.

C. Analysis

[8] I agree with the respondent's submissions and would strike the application for judicial review.

[9] Currently, the leading case in this Court on motions to strike applications for judicial review is *Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250, [2014] 2 F.C.R. 557. At paragraphs 47-48, this Court set out the test for striking an application for judicial review:

> [47] 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": *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.*, [1995] 1 F.C. 588 at page 600 (C.A.). 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: *Rahman v. Public Service Labour Relations Board*, 2013 FCA 117 at paragraph 7; *Donaldson v. Western Grain Storage By-Products*, 2012 FCA 286 at paragraph 6; *cf. Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959.
>
> [48] There are two justifications for such a high threshold. First, the Federal Courts' jurisdiction to strike a notice of application is founded not in the Rules but in the Courts' plenary jurisdiction to restrain the misuse or abuse of courts' processes: *David Bull*, *supra* at page 600; *Canada (National Revenue) v. RBC Life Insurance Company*, 2013 FCA 50. Second, applications for judicial review must be brought quickly and must proceed "without delay" and "in a summary way": *Federal Courts Act*, [R.S.C. 1985, c. F-7], subsection 18.1(2) and section 18.2. An unmeritorious motion – one that raises matters that should be advanced at the hearing on the merits – frustrates that objective.

[10] In a decision postdating *JP Morgan*, the Supreme Court has emphasized the need for modern litigation to proceed to resolution faster and more simply: *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87. This underscores the important role that motions to strike can play in removing clearly unmeritorious cases from the court system. This case is a good example.

[11] This threshold for a motion to strike is met here. The applicant challenges a decision made by the Board right at the outset of its administrative proceedings. Its administrative proceedings are far from completed. The respondent's objection that the application for judicial review is premature is, in the circumstances of this case, a "show stopper." In these circumstances, it is clear that this Court cannot entertain the application for judicial review.

[12] Applications for judicial review of decisions made at the outset of administrative proceedings or during administrative proceedings normally do not lie.

[13] The general rule is that applications for judicial review can be brought only after the administrative decision-maker has made its final decision. At that time, administrative decisions made at the outset of administrative proceedings or during administrative proceedings can be the subject of challenge along with the final decision.

[14] The relevant law on point and the rationale for it is as follows:

> [30] The normal rule is that parties can proceed to the court system only after all adequate remedial recourses in the administrative process have been exhausted. The importance of this rule in Canadian administrative law is well-demonstrated by the large number of decisions of the Supreme Court of Canada on point: [citations omitted]

> [31] Administrative law judgments and textbooks describe this rule in many ways: the doctrine of exhaustion, the doctrine of adequate alternative remedies, the doctrine against fragmentation or bifurcation of administrative proceedings, the rule against interlocutory judicial reviews and the objection against premature judicial reviews. All of these express the same concept: absent exceptional circumstances, parties cannot proceed to the court system until the administrative process has run its course. This means that, absent exceptional circumstances, those who are dissatisfied with some matter arising in the ongoing administrative process must pursue all effective remedies that are available within that process; only when the administrative process has finished or when the administrative process affords no effective remedy can they proceed to court. Put another way, absent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted.
>
> [32] This prevents fragmentation of the administrative process and piecemeal court proceedings, eliminates the large costs and delays associated with premature forays to court and avoids the waste associated with hearing an interlocutory judicial review when the applicant for judicial review may succeed at the end of the administrative process anyway…

(*Canada (Border Services Agency) v. C.B. Powell Limited*, 2010 FCA 61, [2011] 2 F.C.R. 332 at paragraphs 30-32; see also *Wilson v. Atomic Energy of Canada Limited*, 2015 FCA 17, 467 N.R. 201 at paragraphs 30-32.)

[15] As *C.B. Powell* recognizes (at paragraph 33), there are exceptional circumstances where this Court will entertain an application for judicial review of an administrative decision made at the outset of administrative proceedings or during administrative proceedings: for a more complete explanation of what qualifies as exceptional circumstances, see *Wilson*, above at paragraph 33. Many of these exceptional circumstances mirror those where prohibition lies.

[16] On the record before us in this case, the prematurity objection is made out and there are no exceptional circumstances warranting the hearing of this application for judicial review at this time.

[17] After the Board has finally decided upon the applicant's complaint, she may launch an application for judicial review advancing the grounds she raises in this application and any other relevant, admissible grounds.

D. Proposed disposition

[18] Accordingly, I would grant the motion and strike out the application for judicial review. The applicant does not seek its costs and so none shall be granted.

"David Stratas"

J.A.

"I agree
M. Nadon J.A."

"I agree
C. Michael Ryer J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-512-15
STYLE OF CAUSE:	MAGDALENA FORNER v. THE PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	STRATAS J.A.
CONCURRED IN BY:	NADON J.A. RYER J.A.
DATED:	FEBRUARY 3, 2016

WRITTEN REPRESENTATIONS BY:

Steven Welchner	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Welchner Law Office Professional Corporation Ottawa, Ontario	FOR THE RESPONDENT