Federal Court of Appeal  Cour d'appel fédérale

Date: 20180813

Docket: A-363-16

Citation: 2018 FCA 151

[ENGLISH TRANSLATION]

CORAM: **GAUTHIER J.A.**
BOIVIN J.A.
DE MONTIGNY J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

and

SYLVAIN LAFRENIÈRE

Respondent

Heard at Quebec City, Quebec, on June 22, 2018.

Judgment delivered at Ottawa, Ontario, on August 13, 2018.

REASONS FOR JUDGMENT BY: DE MONTIGNY J.A.

CONCURRED IN BY: GAUTHIER J.A.
BOIVIN J.A.

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REASONS FOR JUDGMENT

DE MONTIGNY J.A.

[1] The Attorney General of Canada (AGC or the appellant) appeals from the decision rendered by the Honourable Justice St-Louis (the judge) on July 7, 2016 (*Lafrenière v. Canada (Director General Canadian Forces Grievance Authority)*, 2016 FC 767). The judge allowed the application for judicial review filed by Sylvain Lafrenière (Mr. Lafrenière or the respondent) of the decision rendered on June 29, 2015, by Colonel J.R.F. Malo in his capacity as Chief of the Defence Staff (CDS) and the final authority (FA). The FA acknowledged that there were some

breaches of procedural fairness in the manner in which Mr. Lafrenière's case was handled but refused to transfer his request for financial compensation to the Director of Claims and Civil Litigation (DCCL) and refused to order that a letter of apology be produced and signed by senior management in the military.

[2] The respondent filed a cross-appeal. He asked this Court to dismiss the main appeal and render the decision that the FA should have rendered, i.e. order the AGC to pay damages in the amount of $400,000, punitive damages of $100,000 and compel Mr. Lafrenière's superiors to give him a letter of apology. Alternatively, Mr. Lafrenière filed a motion for severance so that the case could be transferred to the DCCL to have his request for compensation reviewed. As an alternative to the motion for severance, Mr. Lafrenière sought to have his application for judicial review converted into an action pursuant to subsection 18.4(2) of the *Federal Courts Act*, R.S.C. 1985, c. F-7.

[3] For the reasons that follow, I would allow the cross-appeal, convert the application for judicial review into an action and remit the matter to the Federal Court for disposition in accordance with these reasons. Consequently, it is not necessary to decide on the main appeal.

I. Facts

[4] The respondent was a member of the Canadian Armed Forces (CAF) from 1997 to 2012, when he was released for medical reasons. As of June 8, 2007, after suffering a knee injury, Mr. Lafrenière had permanent medical employment limitations. He therefore availed himself of the retention program to prepare him for his transition to civilian life. His application was

approved, and he was transferred for a period of three years to the "Army News" unit, where he held a position as a journalist and where his work was appreciated.

[5] In July 2009, allegations of inappropriate conduct were made against Mr. Lafrenière. He was accused of having produced a DVD using the army's facilities without having received the necessary authorizations, of having sold the DVDs for the purpose of making a personal profit and of having used copyrighted material. On September 8, 2009, he was relieved of his duties as a journalist and was reassigned. He was not told why he was being transferred. The same day, the military police launched an investigation into the allegations of inappropriate conduct. The respondent was only informed of this on October 22, 2009, when he received a letter from the commanding officer of his division dated October 9, 2009, informing him that his change in position was a preventive administrative measure.

[6] On October 5, 2010, still having received no explanation for the transfer, Mr. Lafrenière filed a grievance. He requested that he be provided, in writing, with the reasons why (1) he was removed from his position as a journalist; (2) he was under military investigation; and (3) he had still not been questioned as part of the military police investigation that had been ongoing for over a year (FA's decision at page 4; Committee's recommendation at page 3).

[7] In March 2012, Mr. Lafrenière was informed that the military police investigation had been completed and that the allegations against him had been deemed unfounded. On November 19, 2012, Mr. Lafrenière was released from the armed forces for medical reasons.

II. Procedural history

[8] On July 22, 2013, two and a half years after the grievance was filed, Brigadier-General Jean-Marc Lanthier (the Initial Authority) allowed Mr. Lafrenière's grievance and answered his three questions. Mr. Lafrenière nevertheless challenged the decision on the ground that it failed to respond adequately to his grievance. He took the opportunity to amend his grievance, adding facts and requesting remedies, including a letter of apology, $400,000 for moral, physical and psychological damages and $100,000 as punitive damages.

[9] The matter was submitted to the Military Grievances External Review Committee (the Committee), which found serious breaches of procedural fairness, including the fact that the respondent was not notified of the actions of which he was accused before he was removed from his position as a journalist, that he did not have the opportunity to be heard and that the commanding officer's letter dated October 9, 2009, only confirmed a decision already made and did not reveal all the grounds on which the decision was based. With respect to appropriate remedies, the Committee found that it could not recommend financial compensation because the CDS did not have the authority to grant it. The Committee nevertheless suggested that it be formally recognized that the respondent's right to procedural fairness was breached and that the case be transferred to the DCCL so that the DCCL could assess the possibility of financially compensating him.

[10] Mr. Lafrenière submitted his grievance to the FA, whose decision, rendered on June 29, 2015, was subject to judicial review before the Federal Court, now on appeal to this Court.

III. Impugned decisions

A. *The FA's decision*

[11] Having examined the respondent's grievance *de novo*, the FA held that there was no need to grant Mr. Lafrenière relief, finding that the Committee exaggerated the respondent's right to procedural fairness. According to the FA, there is no legal duty of procedural fairness when a chain of command imposes an administrative measure such as removing a member of the CAF from his or her specific duties. The duty of procedural fairness comes into play only in the case of release from the armed forces. Given the allegations against the respondent, the chain of command was also entitled to impose disciplinary measures. The measure imposed was not harsh: the respondent was removed from his position as a journalist, but was transferred elsewhere and remained in the armed forces.

[12] The FA nevertheless felt that the chain of command should have handled the matter more diligently and compassionately. In particular, the chain of command should have facilitated the sharing of information and ensured that the respondent could express his point of view, which would have allowed the grievance to be resolved more quickly. The FA acknowledged that taking two and a half years to conduct an investigation is unacceptable and that, although it has no authority over the military police, the chain of command should have ensured better follow-up in that regard. However, the appropriate mechanism for challenging how long it took the military police to complete the investigation would have been to file a complaint with the Military Police Complaints Commission of Canada, instead of filing a grievance.

[13] As for the relief sought, the FA refused to order an apology because such an apology would not be genuine and could be considered a violation of freedom of expression. It also refused to award financial compensation since the remedies for the grounds given in support of the request for compensation were either procedural, provided for by other mechanisms (such as the *Canadian Forces Members and Veterans Re-establishment and Compensation Act*, S.C. 2005, c. 21 and the *Pension Act*, R.S.C. 1985, c. P-6), or they were not the responsibility of the CAF. The evidence in the record on the damages suffered was also considered insufficient.

B. *The Federal Court decision*

[14] Although numerous issues were raised by the parties, the Federal Court found that the mere fact that the FA failed to deal with one of the requests made by Mr. Lafrenière in his grievance, that is, the request for financial compensation, was fatal and renders the FA's decision unreasonable. The Court therefore quashed the FA's decision and referred the case back to the FA for redetermination.

[15] The Federal Court indicated that the decision in *Canada v. Bernath*, 2007 FCA 400, 290 D.L.R. (4th) 357, no longer reflects the state of the law on the FA's capacity to award financial compensation. The legislative landscape has changed, and the CDS now has the authority to award financial relief of up to $100,000, as recognized in a more recent Federal Court decision (*Chua v. Canada (Attorney General)*, 2014 FC 285 at paragraph 13, 239 A.C.W.S. (3d) 374).

[16] Moreover, since Mr. Lafrenière did not exhaust all other forms of remedy, the Federal Court refused to convert his application into an action.

IV. Issues

[17] The appeal essentially deals with the reasonableness of the FA's decision and, more particularly, whether the FA erred in not ruling on the FA's authority to award financial compensation, as was found by the Federal Court. The cross-appeal challenges the Federal Court's decision to refuse to convert Mr. Lafrenière's application for judicial review into an action.

[18] For the reasons that follow, I am of the view that this case may be decided on the sole basis of the cross-appeal. The question of the reasonableness of the FA's decision thus becomes moot because it will be up to the Federal Court to examine this issue in its analysis of the constituent elements of the remedy in damages (and in particular the fault), which will come before it when the application for judicial review is converted into an action. At the hearing, the parties agreed that if this Court grants the application for conversion, the reasonableness of the FA's decision no longer needs to be addressed.

V. Analysis

[19] Section 18.4 of the *Federal Courts Act* stipulates that the Federal Court may direct that an application for judicial review be converted into an action:

Hearings in summary way	**Procédure sommaire d'audition**
18.4 (1) Subject to subsection (2), an	18.4 (1) Sous réserve du paragraphe

application or reference to the Federal Court under any of sections 18.1 to 18.3 shall be heard and determined without delay and in a summary way.	(2), la Cour fédérale statue à bref délai et selon une procédure sommaire sur les demandes et les renvois qui lui sont présentés dans le cadre des articles 18.1 à 18.3.
Exception	**Exception**
(2) The Federal Court may, if it considers it appropriate, direct that an application for judicial review be treated and proceeded with as an action.	(2) Elle peut, si elle l'estime indiqué, ordonner qu'une demande de contrôle judiciaire soit instruite comme s'il s'agissait d'une action.

[20] On reading this provision, it seems clear that the decision to convert an application for judicial review into an action is discretionary (see *Slansky v. Canada (Attorney General)*, 2013 FCA 199 at paragraphs 59 and 63, 364 D.L.R. (4th) 112; *Drapeau v. Canada (Minister of National Defence)* (1995), 179 N.R. 398 at paragraph 1 (FCA); *Association des crabiers acadiens Inc. v. Canada (Attorney General)*, 2009 FCA 357 at paragraph 35, 402 N.R. 123 (*Association des crabiers acadiens*)). This decision is subject to the standards of appellate review, as set out by the Supreme Court in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. This Court will therefore intervene if the Federal Court has erred in identifying the legal principles applicable to the conversion. If no such error has been committed, this Court will only intervene if the Federal Court has made a palpable and overriding error in applying those principles or in assessing the facts.

[21] In my opinion, the Federal Court erred in law in refusing to convert the application for judicial review into an action. The judge came to this conclusion on the sole ground that Mr. Lafrenière first had to exhaust his grievance recourse before he could bring an action. In the only paragraph of her reasons on this issue, the judge wrote the following:

> [69] However, since Mr. Lafrenière did not exhaust all other forms of remedy, the Court cannot consider the opportunity to proceed with the request as an action (*Chua*, at paragraph 13, and *Moodie v. Canada*, 2008 FC 1233, at paragraph 41, confirmed by *Moodie v. Canada (National Defence)*, 2010 FCA 6).

[22] The state of the law on conversion, however, has evolved in recent years. In 2005, in *Canada v. Grenier*, 2005 FCA 348, 344 N.R. 102, this Court confirmed the trend in the case law that an application for judicial review and an action in damages should be considered as two mutually exclusive remedies. The Court explained that the respondent was precluded from bringing an action in damages until he had exhausted his internal remedies, that is, until he had applied for judicial review of the administrative decision at issue. The action in damages he had brought was considered an indirect challenge of the administrative decision. The two decisions that the judge relied on in support of her denial of the application for conversion, *Chua v. Canada (Attorney General)*, 2014 FC 285 at paragraph 13 and *Moodie v. Canada*, 2008 FC 1233 at paragraph 41, 336 F.T.R. 269, aff'd 2010 FCA 6, 399 N.R. 14, follow this trend in the case law.

[23] However, the Supreme Court overturned this narrow interpretation of subsection 18.4(2) of the *Federal Courts Act* in *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, 327 D.L.R. (4th) 527 (*TeleZone*). Keeping in mind concerns about access to justice, it unanimously refused to require an applicant seeking compensation for losses suffered as a result of an administrative decision to first file an application for judicial review. The Court stated the following at paragraph 19:

> If a claimant seeks to set aside the order of a federal decision maker, it will have to proceed by judicial review, as the *Grenier* court held. However, if the claimant is content to let the order stand and instead seeks compensation for alleged losses (as here), there is no principled reason why it should be forced to detour to the

> Federal Court for the extra step of a judicial review application (itself sometimes a costly undertaking) when that is not the relief it seeks. Access to justice requires that the claimant be permitted to pursue its chosen remedy directly and, to the greatest extent possible, without procedural detours.

[24] Consequently, since 2010, there is no longer an obligation to exhaust internal remedies before bringing an action in damages. This Court's decision in *Meggeson v. Canada (Attorney General)*, 2012 FCA 175, 434 N.R. 52 (*Meggeson*) applied the Supreme Court's decision in *TeleZone* and gave it effect in the context of conversion. In that case, which shares many similarities with the case at bar, the Federal Court of Appeal indicated at paragraph 37 that a broad and liberal approach to subsection 18.4(2) is preferred:

> . . . a broad approach to the treatment of applications as actions pursuant to subsection 18.4(2) of the *Federal Courts Act* is appropriate in order to promote and facilitate access to justice and avoid unnecessary costs, delays and uncertainties for the litigants who are seeking various types of relief against the federal Crown.

[25] Of course, this does not mean that all applications for conversion will be allowed. As the Court stated in *Slansky v. Canada (Attorney General)*, 2013 FCA 199 (at paragraphs 56 and 60) and *Tlseil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 128 (at paragraph 104), the situations where conversion is allowed are exceptional, in short, most rare. In this case, the Federal Court erred in limiting itself to the factor of having to exhaust all remedies (set aside in *TeleZone*), rather than considering all the tests set out in *Association des crabiers acadiens*. In that case, this Court held that an application for judicial review can be treated and proceeded with as an action where it is necessary to address the inadequacies of the remedies granted through judicial review. The Court held that conversion is also possible in the following circumstances:

(a) when an application for judicial review does not provide appropriate procedural safeguards where declaratory relief is sought (*Haig v. Canada*, [1992] 3 F.C. 611 (F.C.A.)),

(b) when the facts allowing the Court to make a decision cannot be satisfactorily established through mere affidavit evidence (*Macinnis v. Canada*, [1994] 2 F.C. 464 (F.C.A.)),

(c) when it is desirable to facilitate access to justice and avoid unnecessary cost and delay (*Drapeau v. Canada (Minister of National Defence)*, [1995] F.C.J. No. 536 (F.C.A.)) and

(d) when it is necessary to address the remedial inadequacies of judicial review, such as the award of damages (*Hinton v. Canada*, [2009] 1 F.C.R. 476).

Association des Crabiers Acadiens, at paragraph 39

[26] The application of these tests would have led the judge to find that Mr. Lafrenière's application for conversion was entirely justified. While the first test does not apply in this case because Mr. Lafrenière is not disputing the legality of the decision made by the armed forces but is instead raising the extra-contractual liability of the state, I find that the three other tests clearly militate in favour of conversion.

[27] First, Mr. Lafrenière cannot prove the damages that he claims to have suffered through mere affidavit evidence. Medical expertise and actuarial evidence will undoubtedly be relevant. Since the appellant could challenge the existence and the quantification of the damages as well as their causal link with the alleged faults, examinations and cross-examinations will be necessary.

[28] Second, there are a number of remedial inadequacies in the application for judicial review. In this case, Mr. Lafrenière seeks $400,000 in financial compensation and $100,000 as punitive damages. A court of law cannot award damages in an application for judicial review. It can only grant remedies of an administrative nature such as reintegration in the case of loss of employment or the transfer of an employee. If the FA were to decide to transfer the case to the

DCCL and the DCCL were to order financial compensation, the allowable maximum would be $100,000, whereas Mr. Lafrenière is seeking $400,000. The application for judicial review therefore does not provide adequate remedies for the respondent, and only an action in damages would make the relief being claimed by Mr. Lafrenière possible.

[29] Finally, access to justice considerations strongly support conversion. The grievance procedure was initiated eight years ago, and the events in question date back more than nine years. This case was botched. It could have been resolved much more quickly had the chain of command been more diligent, met with Mr. Lafrenière from the beginning and allowed him to provide his version of the events.

[30] If the conversion were denied and the judge's decision upheld, the case would be remitted to the FA for a decision on the appropriateness of an *ex gratia* payment. The FA could then request another report from the Committee before making its decision. If the Committee were to find that it would not be appropriate to have the case transferred to the DCCL for the granting of an *ex gratia* payment, a possibility that cannot be ruled out, Mr. Lafrenière would be compelled to again apply to the Federal Court for judicial review of the decision. There could be even more delays if an appeal were to be filed with this Court.

[31] According to the judge's reasoning, it is not until this potential second judicial review that Mr. Lafrenière could seek and obtain the conversion into an action. Needless to say, such a procedure could lead to additional delays before the conflict is resolved. The respondent alone pays the extrajudicial fees of his counsel, and a multiplicity of proceedings and delays will

inevitably lead to added cost. Moreover, the limitation period for bringing an action in damages has now expired because the cause of action took place in September 2009 and the damage was confirmed in July 2012 at the latest, with the filing of the medical reports on the psychological consequences suffered by the respondent. Conversion is therefore the only remedy that would allow Mr. Lafrenière to obtain compensation if the constituent elements of extra-contractual liability are established.

[32] Courts must provide litigants with an efficient and accessible way to resolve their disputes. Access to justice is a pillar of Canadian democracy. It aims to ensure the rule of law, equality before the law and the peaceful resolution of disputes. Nine years to resolve a relatively minor case resulting primarily from a lack of communication is abusive and is detrimental to the repute of the administration of justice and the rule of law. Conversion into an action is not a perfect remedy. It will not allow for an immediate determination of the damages to which Mr. Lafrenière could be entitled if the fault of the appellant were established. Nevertheless, it is the quickest and most efficient way to provide the respondent with relief. It is not just a question of access to justice; it is also a question of judicial economy. Continuing this already exceedingly long and costly to and fro between the Committee, the FA, the DCCL, the Federal Court and this Court would not serve the interests of Mr. Lafrenière or the CAF. It is important to choose the quickest, most efficient procedure to end a nine-year conflict. The interests of justice therefore demands that the cross-appeal be allowed and that the application be converted into an action.

[33] It goes without saying that if Mr. Lafrenière were to fail in his action in damages, it would still be open to him to make a request for an *ex gratia* payment to the DCCL directly.

Such requests do not have to be submitted through the FA. Of course, Mr. Lafrenière should comply with all of the requirements of the *Queen's Regulations and Orders for the Canadian Forces* (QR&O) and the orders in council in this regard, in particular the conditions arising from the *Canadian Forces Grievance Process Ex Gratia Payments Order* (Order in Council 2012-0861). Since a decision by the DCCL is purely discretionary, it would not be reviewable.

VI. Conclusion

[34] For these reasons, I would allow the cross-appeal, set aside the judgment of the Federal Court and order that Mr. Lafrenière's application for judicial review be treated and proceeded with as an action pursuant to subsection 18.4(2) of the *Federal Courts Act*. The respondent will have 30 days from the date of this judgment to serve and file his statement of claim. The time limits set out in the *Federal Courts Rules*, SOR/98-106, will apply in the subsequent stages. With costs to the respondent in the amount of $2,000.

"Yves de Montigny"
J.A.

"I agree.
Johanne Gauthier, J.A."

"I agree.
Richard Boivin, J.A."

Certified true translation
Janine Anderson, Revisor

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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