Federal Court of Appeal  Cour d'appel fédérale

Date: 20211020

Docket: A-93-20

Citation: 2021 FCA 203

[ENGLISH TRANSLATION]

CORAM: **GAUTHIER J.A.**
LOCKE J.A.
LEBLANC J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

and

BENOÎT DESROSIERS

Respondent

Heard by online videoconference organized by the registry on October 20, 2021.

Judgment delivered from the bench at Ottawa, Ontario, on October 20, 2021.

REASONS FOR JUDGMENT OF THE COURT BY: LOCKE J.A.

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REASONS FOR JUDGMENT OF THE COURT
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LOCKE J.A.

[1] The appellant acknowledges that this appeal is moot. The decision under appeal quashed the decision that established the escape risk rating of the respondent, an inmate who is serving a life sentence, as "moderate." The respondent's escape risk has since been reassessed as "low."

[2] The appellant is asking this Court to exercise its discretion to hear this appeal despite its mootness. In this respect, the appellant submits the following:

A. The respondent's grievance against a previous decision by the Warden of Archambault Institution (Julie Cobb) was allowed in part (with respect to the escape risk) by the Assistant Commissioner, Policy, of the Correctional Service of Canada (Larry Motiuk). Mr. Motiuk's decision ordered that a memorandum in which the respondent's escape risk is reassessed be prepared and placed in the respondent's file;

B. This memorandum was prepared, and the respondent's escape risk rating was reassessed as "moderate." That same day, Ms. Cobb approved that reassessment;

C. The respondent did not file any grievance against that second decision by Ms. Cobb;

D. The notice of application filed with the Federal Court in this case against Mr. Motiuk's decision made no mention of the memorandum or of Ms. Cobb's second decision;

E. The Federal Court decided to consider the memorandum to be part of Mr. Motiuk's decision and found that the memorandum (i) does not correct the error that he identified, and (ii) renders Mr. Motiuk's decision unreasonable;

F. The Federal Court erred in its decision. It should have limited its analysis to Mr. Motiuk's decision and not considered the memorandum because the respondent could have filed another grievance against Ms. Cobb's second decision approving the reassessment in the memorandum. The respondent therefore did not exhaust his administrative remedies set out in the *Corrections and Conditional Release Regulations*, S.O.R./92-620 (the Regulations);

G. The Federal Court's decision [TRANSLATION] "has a direct impact on the respect, predictability and proper functioning of the administrative review process in place and could be transferable to other federal administrative schemes that include an analogous grievance procedure"; and

H. In the circumstances described above, he never had the opportunity to make the arguments described in points F and G before the Federal Court because the validity of Ms. Cobb's second decision was not at issue.

[3] The tests relevant to this Court's exercise of discretion to hear an appeal are discussed in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, at 358 to 363 (*Borowski*). These

tests are: (i) an adversarial relationship, (ii) judicial economy, and (iii) the Court's proper law-making function. It is not necessary for all of the tests to be met.

[4] The first test is not met. No adversarial relationship exists, and the respondent did not even appear.

[5] As for the second test, it is relevant to consider whether the special circumstances of the case make it worthwhile to apply scarce judicial resources to resolve a moot case. In our view, that test is not met in this case.

[6] A decision by this Court will have no practical effect on the rights of the parties. Furthermore, although the facts can often change quickly in correctional matters, we are not satisfied that this Court must examine the decision under appeal despite the mootness of this case. In this respect, I note, as counsel for the appellant noted herself at the hearing, the doubly moot nature of this case given that the decision in which the respondent's escape risk was reassessed as "low" was rendered well before the Federal Court made its decision in this case.

[7] As counsel acknowledged, this case would very likely not be before this Court if that information had been brought to the Federal Court's attention, as it should have been. As the Supreme Court reiterated in *Borowski*, the mere fact that a case raising the same point is likely to recur, even frequently, should not by itself be a reason for hearing an appeal if the underlying matter has become moot and it has not been shown that the point the appellant wishes to submit to the Court will have always disappeared before it is ultimately resolved.

[8] In light of all these circumstances, it is preferable to decide this issue in an adversarial context. Moreover, the appellant did not convince us that this issue is of such importance that it is in the public interest to decide it now, despite the mootness of the case. In short, the appellant did not convince us that this issue is likely to evade judicial review. The fact that a similar issue may arise under another federal administrative scheme, as the appellant acknowledges, reinforces that conclusion.

[9] The third test is in the appellant's favour because a decision by this Court in this case is not likely to intrude into the role of the legislative branch. However, because the other tests are not in the appellant's favour, we are of the view that the circumstances do not warrant hearing this appeal.

[10] Despite that conclusion, we want to note that we do not agree with paragraph 23 of the Federal Court's decision, in which the Federal Court found that the memorandum subsequent to Mr. Motiuk's decision should be considered to be part of that decision.

[11] For these reasons, we will dismiss this appeal without costs.

"George R. Locke"

J.A.

Certified true translation
Melissa Paquette, Jurilinguist

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-93-20
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REASONS FOR JUDGMENT OF THE COURT BY:	GAUTHIER J.A. LOCKE J.A. LEBLANC J.A.
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APPEARANCES:

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