Federal Court of Appeal | Cour d'appel fédérale

Date: 20230721

Docket: A-138-23

Citation: 2023 FCA 162

CORAM: **PELLETIER J.A.**
DE MONTIGNY J.A.
MONAGHAN J.A.

BETWEEN:

ANTON OLEYNIK

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on July 21, 2023.

REASONS FOR ORDER BY: MONAGHAN J.A.
CONCURRED IN BY: PELLETIER J.A.
DE MONTIGNY J.A.

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REASONS FOR ORDER

MONAGHAN J.A.

[1] In a notice of appeal issued on May 19, 2023, Anton Oleynik purports to appeal two decisions of the Federal Court, one dated March 3, 2023 (2023 FC 303 *per* Furlanetto J.) (the First Decision) and the second dated May 12, 2023 (2023 FC 674 *per* Furlanetto J.) (the Second Decision). The Second Decision addressed Dr. Oleynik's motion to have the First Decision reconsidered or varied.

[2] The Attorney General of Canada has brought a motion in writing for an order quashing the proceedings pursuant to section 52(*a*) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, and the Court's plenary powers, or for an order removing the notice of appeal from the Court file pursuant to Rule 74(1) of the *Federal Courts Rules*, S.O.R./98-106 (Rules).

[3] The Attorney General submits that Dr. Oleynik's notice of appeal is irregular and should not have been accepted by the Court for filing because it was filed too late to appeal the First Decision. The Attorney General says the reconsideration motion did not relieve Dr. Oleynik from timely filing a notice of appeal for the First Decision.

[4] As to the Second Decision, the Attorney General submits it is bereft of any chance of success and amounts to a collateral attack on the First Decision. Thus, says the Attorney General it should be quashed.

[5] Dr. Oleynik denies the notice of appeal is irregular and in any event points to Rule 56: "Non-compliance with any of these Rules does not render a proceeding…void, but instead constitutes an irregularity, which may be addressed under rules 58 to 60". Dr. Oleynik further submits his appeal of the First Decision is not late because it could not be appealed until the Second Decision was rendered. In the alternative, he seeks an extension of time to May 19, 2023, the date he filed the notice of appeal.

[6] As to the Second Decision, Dr. Oleynik submits that his appeal has merit and should not be quashed.

[7] I agree with the Attorney General that the notice of appeal is irregular. It purports to appeal two decisions, not one, and was filed too late to appeal the First Decision without an extension of time.

[8] I also agree with Dr. Oleynik that an irregular notice of appeal is not fatal because the Court has the discretion to cure the irregularity. However, in this case I would not exercise the discretion to do so. I agree that the appeal of the Second Decision is bereft of merit, that the appeal of the First Decision is late, and that it is not in the interests of justice to grant Dr. Oleynik an extension of time to appeal the First Decision.

[9] A brief summary of the background is perhaps useful here.

[10] Dr. Oleynik is a tenured professor at Memorial University of Newfoundland and Labrador (MUN). In November 2022, Dr. Oleynik commenced a judicial review application in the Federal Court and sought a mandamus order that Social Sciences and Humanities Research Council (SSHRC) process an application for a research grant that he states he applied for directly online through SSHRC.

[11] SSHRC and MUN were parties to an agreement under which MUN administered SSHRC grants awarded to persons affiliated with MUN (the Agreement). According to his application, the Agreement required MUN to confirm the eligibility of each applicant for a grant and to ensure decision makers regarding research and related activities avoid conflicts of interest (paras. 5 and 6 of the notice of application (NOA) reproduced in the First Decision at para. 8).

[12] However, Dr. Oleynik claimed that, when declining to confirm his eligibility, MUN's official responsible for doing so acted in a conflict of interest contrary to the Agreement (para. 6 of the NOA). He alleged that under the Agreement SSHRC had an option to ask MUN to take remedial action but that it declined to do so. His judicial review application sought an order that SSHRC process his grant application, notwithstanding that MUN had not confirmed his eligibility, and a review of SSHRC's refusal to ask MUN to take remedial action in light of the alleged breaches.

[13] In January 2023, the Attorney General brought a motion in writing before the Federal Court to have Dr. Oleynik's judicial review application dismissed on the basis that it was bereft of any possibility of success.

[14] In the First Decision, the Federal Court granted that motion and dismissed the application. It concluded that the high threshold to strike the judicial review application (articulated in *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc. (C.A.)*, [1995] 1 F.C. 588, 51 A.C.W.S. (3d) 799 (FCA) and *JP Morgan Asset Management (Canada) Inc. v. Canada (National Revenue)*, 2013 FCA 250) was met because the decision Dr. Oleynik sought to review was outside the Federal Court's jurisdiction.

[15] The Federal Court concluded that Dr. Oleynik did not establish that the Agreement gives rise to a public duty or to a duty to Dr. Oleynik who is not a party to the Agreement (First Decision at para. 11). It also concluded that the provision in the Agreement on which Dr. Oleynik relied does not create a representation that corrective measures will be taken when a

third party challenges MUN's determination of the third party's eligibility for a grant (First Decision at para. 12).

[16] The Federal Court agreed with the Attorney General that the judicial review application was in substance a complaint against MUN, over which the Federal Court has no judicial review jurisdiction. In particular, the Federal Court found (First Decision at para. 13):

> …the true nature of the application is a collateral attack on MUN's decision not to support the Application [for the grant]. However, MUN is not a federal board, commission, or other tribunal within the meaning of subsection 2(1) of the [*Federal Courts Act*] as the university is not a body "empowered by or under federal legislation or by an order made pursuant to a prerogative power of the federal Crown": *Anisman v Canada (Canada Border Services Agency)*, 2010 FCA 52 at para 30.

[17] Rather than appeal the First Decision, Dr. Oleynik brought a motion pursuant to Rules 397 and 399 to have that decision reconsidered or varied. The Federal Court addressed that motion at a hearing on April 24, 2023 and dismissed it in the Second Decision.

[18] Dr. Oleynik's notice of appeal seeks to appeal both decisions.

I. Analysis

A. *Does the appeal of the Second Decision have merit?*

[19] This Court has the power to quash an appeal that has no reasonable prospect of success and is manifestly doomed to fail: *Tétreault c. Boisbriand (Ville)*, 2023 CAF 159 at para. 8;

Martinez v. Canada, 2019 FCA 282 at para. 9; *Lessard-Gauvin c. Canada (Procureur général)*, 2013 CAF 147; *Yukon Conservation Society v. National Energy Board* (1978), [1979] 2 F.C. 14, 95 D.L.R. (3d) 655, at 18 (FCA), citing among others *National Life Assur. Co. Of Canada v. McCoubrey*, [1926] S.C.R. 277, [1926] 2 D.L.R. 550.

[20] In my view, Dr. Oleynik's appeal of the Second Decision has no reasonable prospect of success and therefore should be quashed.

[21] To the extent that Dr. Oleynik addresses the Second Decision in his notice of appeal, he raises the same arguments he advanced on the reconsideration motion.

[22] First, Dr. Oleynik alleges that the Federal Court erred by failing to strike an affidavit that he says the Federal Court relied on in making the First Decision. He says it would have been struck had cross-examination questions been before the Federal Court. Presumably, he is suggesting the Federal Court erred in the Second Decision by not varying the First Decision once he identified this alleged failure.

[23] I first observe that the reasons for the First Decision make no mention of the affidavit. Moreover, as the Federal Court explained in the Second Decision, "in line with the jurisprudence cited by the [Federal] Court, it focussed on the facts, assertions and relief claimed within the notice of application itself to discern the essence of the application" (Second Decision at para. 9). Accordingly, "it was not necessary for the Court to refer to the cross-examination on the Lowden

affidavit in its reasons as the Lowden affidavit was not material to the reasons given" (Second Decision at para. 10).

[24] I see no merit to an appeal based on an assertion that the Federal Court erred in the Second Decision by not varying the First Decision because of an alleged failure to strike an affidavit that had no bearing on the First Decision.

[25] Secondly, Dr. Oleynik submits that the Federal Court erred in publishing the First Decision before hearing his reconsideration motion because the First Decision contains information that he considers confidential. That it did so, he says, demonstrates the Federal Court had a closed mind when it heard the Second Decision in which he sought to have that information removed.

[26] The information Dr. Oleynik says is confidential is found in a single sentence in the First Decision that can only be described as background information; there is no suggestion it was a reason for the First Decision. In the Second Decision, the Federal Court confirmed that it was background and not a basis for the First Decision, and that in making the statement the Federal Court was not making any independent finding as to Dr. Oleynik's status at MUN.

[27] An appeal of the Second Decision on the basis that the Federal Court erred in not varying the First Decision because the reasons referenced information not germane to the decision has no prospect of success.

[28] Dr. Oleynik also claims that the Federal Court misunderstood his argument regarding the difference between striking his judicial review application and summarily dismissing the application. While it is unclear whether he advances this as a ground of appeal for the First Decision or the Second Decision, it is clear he advanced this argument before the Federal Court on the reconsideration motion. In my view, it was an argument that the Federal Court applied the wrong legal test in striking his judicial review application.

[29] I agree with the Federal Court that "Rule 397 is not meant to be an appeal in disguise, allowing [Dr. Oleynik] to re-argue an issue a second time in the hope that the Court will change its mind" (Second Decision at para. 5). A claim that the Federal Court applied the wrong legal test in the First Decision is a subject matter for appeal, not a reconsideration motion. Thus, to the extent this ground of appeal is advanced in respect of the Second Decision, it has no prospect of success.

[30] Because the appeal of the Second Decision has no prospect of success, it should be quashed.

B. *Is the notice of appeal late as it relates to the First Decision?*

[31] The Attorney General argues that Dr. Oleynik's Rule 397 motion before the Federal Court did not relieve him of the obligation to timely file a notice of appeal for the First Decision, citing *Pharmascience Inc. v. Canada (Minister of Health)*, 2003 FCA 333 and *Sivakumar v.*

Canada (Minister of Citizenship and Immigration) (1998), 150 F.T.R. 299, 81 A.C.W.S. (3d) 215 (FCTD). As a result, Dr. Oleynik's appeal of the First Decision is too late.

[32] I agree.

[33] In my view, bringing a Rule 399 motion similarly does not affect the timeline for instituting an appeal. Had Dr. Oleynik filed an appeal of the First Decision, the Federal Court nonetheless would have had the discretion to entertain his reconsideration motion: *Étienne v. Canada* (1993), 164 N.R. 318, 45 A.C.W.S. (3d) 813 at 318 (N.R.) (FCA); *Musqueam Indian Band v. Canada (Governor in Council)*, 2004 FC 931 at para. 22; *In re motion for reconsideration of the Court's Order in Peshdary v. AGC (2018)*, 2020 FC 137 at para. 12.

[34] Because filing the reconsideration motion before the Federal Court did not relieve Dr. Oleynik from the obligation to timely file an appeal of First Decision, his notice of appeal cannot be accepted as appealing the First Decision unless this Court grants him an extension of time.

C. *Should the Court grant an extension of time to appeal the First Decision?*

[35] In his responding motion record, Mr. Oleynik asks for an extension of time to May 19, 2023 – the date he filed the notice of appeal – to appeal the First Decision.

[36] A decision to grant an extension of time is discretionary: Rule 8. In exercising that discretion, the Court considers four factors derived from *Canada (Attorney General) v. Hennelly*, [1999] F.C.J. No. 846 (QL), 244 N.R. 399, (FCA). They are (i) whether there is a continuing intention to pursue the matter, (ii) whether there is some merit to the underlying claim, (iii) whether there is prejudice arising from the delay, and (iv) whether there is a reasonable explanation for the delay. However, no factor is determinative. Rather, they are intended to assist the Court in determining whether an extension of time is in the interests of justice between the parties: *Alberta v. Canada*, 2018 FCA 83 at para. 45. That is the heart of the matter.

[37] Dr. Oleynik does not address these factors in his motion materials. While I am prepared to accept that he had a continuing intention to pursue the matter, in my view, Dr. Oleynik has not established that an appeal of the First Decision has any merit.

[38] His principal ground of appeal is that the Federal Court should not have entertained the Attorney General's motion to strike but should have proceeded to the judicial review application so that he would have had an opportunity to reply. In other words, he argues the motion application should have been treated as a hearing of the judicial review application.

[39] There is no merit to this ground of appeal. The Attorney General was entitled to bring the motion to strike before the Federal Court and ask that it be addressed based on written submissions. Dr. Oleynik had an opportunity to reply to that motion in his responding record. The Federal Court acknowledged Dr. Oleynik asked that the motion be heard orally, but in its

discretion decided that was not necessary given “the nature of the motion (which is to be distinguished from a hearing on the merits)” (First Decision at para. 4).

[40] Once the motion was before the Federal Court, it had to determine whether to grant it or dismiss it. An appeal based on the assertion that the Federal Court should not have considered the motion because it is a different procedure than a judicial review application is without merit.

[41] Dr. Oleynik’s second ground of appeal for the First Decision is that the Federal Court erred in failing to conclude that SSHRC owed him a duty, and thereby erred in concluding it had no jurisdiction to consider his judicial review application. More specifically, he submits the Federal Court erred in concluding that SSHRC becoming signatory to the Agreement did not give rise to his reasonable expectation that the Agreement would be implemented and in failing to acknowledge that this is a public interest case because his proposed research was related to national defence.

[42] Not all conduct by a public body gives rise to a right to seek judicial review. The conduct must affect legal rights, impose legal obligations or be prejudicial: *Air Canada v. Toronto Port Authority*, 2011 FCA 347 at paras. 28-29. Dr. Oleynik is not party to the Agreement and he has not pointed to any right he has to enforce it. Moreover, even if MUN breached the Agreement as he alleges, he has not suggested how any action or inaction by SSHRC has affected his legal rights, has imposed legal obligations on him or been prejudicial. An appeal based on the grounds he has advanced has no merit.

[43] In my view, Dr. Oleynik has not established any merit to an appeal of the First Decision. Accordingly, it is not in the interests of justice to grant him an extension of time to appeal.

D. *Motion in writing*

[44] I will briefly address one additional matter raised by Dr. Oleynik.

[45] The Attorney General brought this motion in writing. Dr. Oleynik expresses the view that this motion should be heard orally, citing Rule 369. Although Rule 369 applied to the motion before the Federal Court, it does not apply to motions in this Court. Rule 369.2 is the correct rule. It states that, unless the Court orders otherwise, all motions in this Court are decided based on written representations.

[46] Rule 369.2 permits Dr. Oleynik to advance reasons why the motion should be heard orally. In his responding motion record, Dr. Oleynik offers three reasons: he will not be able to rebut the respondent's arguments and authorities in any reply it files to his responding motion record; it violates his right to be heard on factual matters; and the underlying issues have public importance.

[47] None of these reasons merits an oral hearing of the motion.

II. Conclusion

[48] Accordingly, I would grant the Attorney General's motion and quash the appeal. Both parties seek costs of this motion. In my discretion, I would award costs of $200 to the respondent.

"K.A. Siobhan Monaghan"
J.A.

"I agree.
J.D. Denis Pelletier J.A."

"I agree.
Yves de Montigny J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-138-23
STYLE OF CAUSE:	ANTON OLEYNIK v. ATTORNEY GENERAL OF CANADA

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	MONAGHAN J.A.
CONCURRED IN BY:	PELLETIER J.A. DE MONTIGNY J.A.
DATED:	JULY 21, 2023

WRITTEN REPRESENTATIONS BY:

Dr. Anton Oleynik	ON HIS OWN BEHALF
Mary Anne MacDonald	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Shalene Curtis-Micallef Deputy Attorney General of Canada	FOR THE RESPONDENT