Federal Court  Cour fédérale

Date: 20151118

Docket: T-1342-15

Citation: 2015 FC 1286

Montréal, Quebec, November 18, 2015

PRESENT: The Honourable Madam Justice St-Louis

BETWEEN:

LOREN MURRAY PEARSON

Applicant

and

CANADA (ATTORNEY GENERAL)

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is a motion brought by the AGC to strike Mr. Pearson's Application for judicial review. Mr. Pearson brought an Application for judicial review pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 [the Act] with respect to a letter from the Department of National Defence and Canadian Forces Legal Advisor [DND/CF Legal Advisor] dated July 9,

2015 wherein counsel concluded there was no liability on the part of the Crown and that no compensation could be offered to Mr. Pearson in payment of arrears for salary and benefits.

II. Context

[1] On October 26, 2012, Mr. Pearson was released and ceased his military service. On May 23, 2013 the Governor in Council approved the Regular Forces officers releases made during the period from September 1, 2012 to December 31, 2012, and thus approved Mr. Pearson's release.

[2] On January 27, 2015, Mr. Pearson sent a letter to the DND/CF Legal Advisor claiming the amount of $70,000 in compensation as salary for the period from October 26, 2012 to May 23, 2013, thereby increasing his pension and retirement benefits, and he also claimed the applicable interest and legal costs. Mr. Pearson based his claim on article 15.03 of the *Queen's Regulations and Orders for the Canadian Forces* [QR&O].

[3] The DND/CF Legal Advisor is an office of the Department of National Defence which provides objective legal advice to the Department of National Defence and Canadian Armed Forces (Government of Canada, "National Defence and Canadian Forces Legal Advisor" (November 13 2015), online: <http://www.forces.gc.ca/en/about-org-structure/dnd-cf-legal-advisor.page>).

[4] On July 9, 2015, the DND/CF Legal Advisor sent a letter to Mr. Pearson, through his counsel, informing him that no compensation could be offered as there was no liability on the part of the Crown. The conclusion was based on article 208.31 of the QR&O.

[5] On August 13, 2015, Mr. Pearson filed an Application for judicial review of said letter before this Court.

[6] On October 14, 2015, the AGC brought a motion under Rule 221 of the *Federal Courts Rules*, SOR/98-106 [the Rules] to strike Mr. Pearson's Application for judicial review.

III. Issues

[7] The Court must decide if the AGC has met its burden to strike Mr. Pearson's application.

IV. Submissions of the Parties

A. *The AGC's Submissions*

[8] In essence, the AGC submits that the Federal Court does not have jurisdiction to hear Mr. Pearson's Application for judicial review since the decision he wants to review is not a final decision made by a federal board, commission or other tribunal.

(1) Test for a Motion to Strike

[9] The AGC submits that on a motion to strike, the test is whether it is plain and obvious and beyond doubt that the claim cannot be sustained in its current form (*Hunt v Carey Canada Inc.*, [1990] 2 SCR 959 at p 980 [*Hunt*]). Thus, this motion cannot succeed unless it is "plain and obvious and beyond doubt" that the Court is without jurisdiction (*Hodgson v Ermineskin Indian Band No 942*, [2000] FCJ No 313).

(2) The DND/CF Legal Advisor's Letter is Not a Final Decision

[10] The AGC submits that the Federal Court has already found that decisions from the DND/CF Legal Advisor are not final decisions affecting the rights of the Applicant (*Sandiford v Canada (Attorney General)*, 2009 FC 862 at para 29) [*Sandiford*], and as such, would thus not be subject to judicial review.

[11] The AGC submits that case law has established that the presence of an authority directly contrary to the position on which an application is based warrants granting a motion to strike and that the position of the Court in *Sandiford* is such an authority.

(3) The DND/CF Legal Advisor is not a Federal Board, Commission or Other Tribunal

[12] The AGC submits that section 18.1 of the Act provides that an application for judicial review may be made only in respect of decisions of a "federal board, commission or other tribunal" [Federal Board] as defined in section 2 of the Act, and that based on the definition in the Act and the case law, the DND/CF Legal Advisor is not a Federal Board.

[13] A Federal Board is defined at section 2 of the Act as:

Federal board, commission or other tribunal:	Office fédéral :
"federal board, commission or other tribunal" means any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown, other than the Tax Court of Canada or any of its judges, any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the *Constitution Act, 1867*.	« office fédéral » Conseil, bureau, commission ou autre organisme, ou personne ou groupe de personnes, ayant, exerçant ou censé exercer une compétence ou des pouvoirs prévus par une loi fédérale ou par une ordonnance prise en vertu d'une prérogative royale, à l'exclusion de la Cour canadienne de l'impôt et ses juges, d'un organisme constitué sous le régime d'une loi provinciale ou d'une personne ou d'un groupe de personnes nommées aux termes d'une loi provinciale ou de l'article 96 de la *Loi constitutionnelle de 1867*.

[14] The AGC submits that a Federal Board must thus have his power "conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown" and that the Court must determine what is (a) the source of the power and (b) the nature of the power (*Anisman v Canada (Border Services Agency)*, 2010 FCA 52 at paras 29-30).

(a) *Source of the Power*

[15] According to the AGC, the DND/CF Legal Advisor's decision was rendered pursuant to the *Directive on Claims and Ex Gratia Payments* [Directive on Claims] issued under the

authority of section 7 of the *Financial Administration Act*, RSC 1985, c F-11 and the source of its power is thus an Act of Parliament.

(b) *Nature of the Power*

[16] The AGC acknowledges that the powers of the DND/CF Legal Advisor are conferred by an Act of Parliament, but submits that the nature of this power is not one of a Federal Board, nor does it relate to administrative law.

[17] The Directive on Claims relates to civil litigation and defines "Claims" as follows:

> **Claim**
> Is a claim in tort or extracontractual claim for compensation to cover losses, expenditures or damages sustained by the Crown or a claimant. For purposes of this directive, claims also include requests or suggestions that the Crown make an *ex gratia* payment. Claims can be settled in or out of court.

[18] The AGC contends that the alleged decision at issue is a letter from a Department of Justice counsel informing Mr. Pearson of the Crown's position in relation to his claim. The powers exercised by the DND/CF Legal Advisor in the letter are not of the nature of a Federal Board's powers, nor are they of a public jurisdiction or character. The rejection of the claim for compensation is not an administrative decision that should be reviewed by the Court.

B. *Mr. Pearson's Submissions*

(1) Test for a Motion to Strike

[19] Mr. Pearson cites *Hunt* at para 36, to establish the test the applicant must meet for a motion to strike to succeed:

> "assuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the AGC to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect ranking with the others listed in Rule 19(24) of the British Columbia *Rules of Court* should the relevant portions of a plaintiff's statement of claim be struck out." (emphasis added by Mr. Pearson)

[20] Thus, Mr. Pearson agrees with the AGC that the test on a motion to strike is whether it is plain and obvious and beyond doubt that the claim cannot be sustained in its current form.

[21] Mr. Pearson submits also that the threshold is high for the AGC to succeed on a motion to strike and that even in cases where the application for a motion to strike is well founded, it is common for the result to be only an order permitting the defective pleadings to be amended, rather than struck.

(2) The DND/CF Legal Advisor's Letter is a Final Decision

[22] Mr. Pearson submits that the letter he received from the DND/CF Legal Advisor is a decision and represents an exhaustion of the internal administrative law channels available to him. Mr. Pearson submits that the decision is a conclusion after an evaluation of facts and law which pronounced a finding and offers arguments to support it.

[23] Mr. Pearson submits that administratively, the DND/CF Legal Advisor letter was a binding decision by the only entity that could affect corrections to salary, pension and other benefits.

[24] Mr. Pearson submits that no judicial hierarchy exists and thus he did not have to start an action in civil courts to have his judicial review. Mr. Pearson also submits that the availability of another judicial forum is immaterial to this Application.

[25] Mr. Pearson points out that the AGC's argument that DND/CF Legal Advisor's decisions are not subject to judicial review rests on an *obiter* of this Court in *Sandiford,* and that *Sandiford* has nothing in common with this Application. Furthermore, Mr. Pearson submits that the *obiter* does not bind the court and should not be considered.

(3) The DND/CF Legal Advisor is a Federal Board

[26] Mr. Pearson submits that the source of the Director of claims and civil litigation's decision is the Treasury Board Secretariat [TBS] compensation scheme, and as such is a Federal Board. The decision was made by interpreting TBS's policies. Mr. Pearson submits that the decision is final and biding with no level of administrative review other than this Court.

(4) Alternate Remedy

[27] If the motion to strike is granted, Mr. Pearson asks the Court to allow him to transform his application into an action.

V. Analysis

A. *State of the law*

(1) Test for a Motion to Strike

[28] The parties agree on the test for a motion to strike basing it on the *Hunt* decision. The latter decision concerned a motion to strike an *action*, unlike in the present case, where the motion to strike relates to an *application*.

[29] The Federal Court of Appeal restated the applicable test in the context of a motion to strike an application for judicial review in *Apotex Inc v Canada (Governor in Council)*, 2007 FCA 374 at para 16:

> [16] A motion to strike an application for judicial review is a judicial tool which should be used in very exceptional cases and should only succeed if the application for judicial review is so clearly improper as to be bereft of any chance of success. In the context of an action (as opposed to an application), the test for a motion to strike, as laid out by the Supreme Court of Canada for summary judgment in *Hunt v. Carey Canada Inc.* is whether it is "plain and obvious" that the pleadings disclose no reasonable cause of action. Without commenting on the appropriateness of applying a test for striking out an action to a motion to strike out an application, the language used in the *Hunt v. Carey* test is useful in framing the legal issues to be decided in this case.

[30] Thus the Court must decide if Mr. Pearson's Application for judicial review is so clearly improper as to be bereft of any chance of success.

(2) Nature of the Decision under Review

[31] The AGC submits that this Court has already found that decisions from the DND/CF Legal Advisor are not final decisions subject to a judicial review. The AGC bases its argument on Justice Kelen's *obiter* in *Sandiford*, mentioned at para 11 of the present decision.

[32] As the Supreme Court ruled in *R v Henry*, 2005 3 SCR 609 at para 57, not all *obiter* have the same weight :"The weight decreases as one moves from the dispositive *ratio decidendi* to a wider circle of analysis which is obviously intended for guidance and which should be accepted as authoritative."

[33] The Court does not feel bound by the *obiter* in *Sandiford* as it is satisfied it is distinguishable from the present case. In *Sandiford*, Justice Kelen was entertaining an action and not an application for judicial review. Furthermore, in *Sandiford*, the DND/CF Legal Advisor had declined to negotiate a settlement; in the present case, the DND/CF Legal Advisor declined liability in respect to Mr. Pearson's claim for compensation and denied him the said compensation.

[34] Thus, the Court concludes that it is not so clearly improper as to be bereft of any chance of success that the DND/CF Legal Advisor's letter is not a decision.

(3) DND/CF Legal Advisor as a Federal Board

[35] Mr. Pearson filed an Application for judicial review under section 18.1 of the Act which relies on the premise that the Application challenges a decision rendered by a Federal Board. In

order to determine if the DND/CF Legal Advisor is a Federal Board, the Federal Court of Appeal established a two-step test (*Innu Nation v Pokue*, 2014 FCA 271 at para 11).

[36] The first step consists of determining what jurisdiction or power is being exercised. The second is directed to the source or origin of the jurisdiction or power that is being exercised.

[37] In the present case, as per to the first step, the power exercised here relates to the assessment of a claim against the Crown and the further action to be taken as the result of this assessment.

[38] As per the second step, the source of the DND/CF Legal Advisor's power originates from the *Directive on Claims* issued under the *Financial Administration Act*, which is an Act of Parliament, as submitted by the AGC.

[39] Hence, it is not so clearly improper as to be bereft of any chance of success that the DND/CF Legal Advisor is not a Federal Board.

VI. Conclusion

[40] For all the reasons above, the respondent has not convinced the Court that it is not so clearly improper as to be bereft of any chance of success that Mr. Pearson's Application for judicial review will fail.

JUDGMENT

THIS COURT'S JUDGMENT is that the motion is dismissed with costs.

"Martine St-Louis"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1342-15
STYLE OF CAUSE:	LOREN MURRAY PEARSON v CANADA (ATTORNEY GENERAL)
PLACE OF HEARING:	OTTAWA, ONTARIO

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

JUDGMENT AND REASONS:	ST-LOUIS J.
DATED:	NOVEMBER 18, 2015

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