Federal Court  Cour fédérale

Date: 20190530

Docket: T-2145-18

Citation: 2019 FC 763

Toronto, Ontario, May 30, 2019

PRESENT: Mr. Justice Diner

BETWEEN:

R.J. POTOMSKI

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Mr. Potomski, filed a motion before the Court dated February 28, 2019. For the reasons enunciated below, both the motion and the underlying application for judicial review are dismissed.

I. Context

[2] While this motion was originally filed in writing pursuant to Rule 369 of the *Federal Courts Rules*, SOR/98-106 [Rules], given a lack of clarity in the pleadings regarding numerous underlying proceedings from various venues spanning a period of several years raised in the motion materials, along with requests for a potpourri of relief sought in this motion (as detailed below), the February 28, 2019 Rule 369 motion was converted to an oral hearing set to be heard at a Special Sitting of the Federal Court on May 15, 2019, to ensure that the Court had a proper understanding of both the background to this motion, and the basis for the relief sought.

[3] Ultimately, the parties were heard on two occasions. First on May 15, 2019, a draft Statement of Facts [Draft Statement] was sent to the parties, which sought to clarify the nature, sequence and outcome of key events in both the background to, and underlying the relief sought, in this motion.

[4] On the morning of the hearing, upon receiving the Draft Statement, Mr. Potomski advised the Court that he would not have sufficient time to adequately review and comment on the Draft Statement due to its late sending.

[5] The parties were heard in the allotted time for the Special Sitting, during which time I agreed to adjourn the matter until May 23, 2019, to provide Mr. Potomski and counsel for the Respondent time to discuss the Draft Statement. The Parties stated that they would attempt to arrive at an agreement on the facts at issue. However, they were ultimately unable to come to an

agreement. On May 17, 2019, Mr. Potomski provided a Summary of Facts and Issues setting out his version of the background to the matter. Counsel for the Respondent provided his reply to the Court by way of letter dated May 21, 2019, stating that while he could not agree to Mr. Potomski's document, he agreed with the facts as set out in the Court's Draft Statement. Mr. Potomski followed up with further submissions on May 22, 2019 of a procedural nature.

[6] The five-year history that preceded this motion has been consistently – and in many instances needlessly – complicated by continuous correspondence and procedural challenges by the Applicant. At most points there appear to have been simple solutions, with multiple opportunities, to provide the basic eligibility information and documentation required by the government to prove qualification for the social security benefits which have now become the subject of this litigation. The Draft Statement was an attempt to clarify the complex history. Failing that, the following sets out – in the simplest way that I can fashion – the factual and procedural background to the current motion and application.

II. Factual and Procedural Background

[7] On May 23, 2019, by way of a Special Sitting, this Court held an oral hearing. Upon review of the parties' written materials both pre- and post-hearing, and having listened to their oral submissions, Mr. Potomski continues to seek benefits under Employment Insurance [EI] and Old Age Security [OAS] which are addressed respectively below.

A. *Application for EI*

[8] On June 27, 2014, Mr. Potomski applied for EI. The Canadian Employment Insurance Commission [Commission] instructed Mr. Potomski to attend an in-person interview in order to provide information in accordance with section 50(6) of the *Employment Insurance Act*, SC 1996, c 23 [the *EI Act*]. He was asked to complete a social insurance number [SIN] application, as his SIN was dormant. He was also asked to provide identification in person; it was noted that the date of birth on his application differed from the date of birth on his SIN.

[9] In July 2014, Mr. Potomski attended the interview but neither provided his identification nor proof of his residential address. Mr. Potomski also did not complete a SIN application. As a result, his claim for EI was incomplete and was cancelled.

[10] Mr. Potomski requested reconsideration. The Commission indicated that it could not reconsider his claim because it had not made a decision on the incomplete application.

(1) *Appeals to the Social Security Tribunal*

[11] Mr. Potomski then appealed to the Social Security Tribunal General Division [SST General Division]. The SST General Division ordered the Commission (as defined at paragraph 7) to render a decision on Mr. Potomski's request for reconsideration and recommended that the Commission clearly list and inform Mr. Potomski what information it required of him. As a result, the Commission sent a letter indicating the information they needed

in order to confirm Mr. Potomski's identity and SIN, and their requirement that Mr. Potomski attend an interview at the Commission.

[12] However, Mr. Potomski did not attend the interview. As a result, the Commission decided that Mr. Potomski was not entitled to EI on the basis that he had failed to comply with a requirement under section 50 of the *EI Act*. Mr. Potomski then appealed this refusal to the SST General Division. That appeal was summarily dismissed, as the SST General Division found that the appeal had no reasonable chance of success given that Mr. Potomski had failed to fulfill the requirement to attend an interview and provide information pursuant to section 50 of the *EI Act*.

[13] Mr. Potomski then appealed the SST General Division's summary dismissal to the SST Appeal Division [SST Appeal Division]. He also filed two motions before the SST Appeal Division on October 29, 2018 and November 19, 2018, respectively.

B. *Old Age Security Benefits*

[14] In a different application, Mr. Potomski applied and was originally approved for OAS benefits in December 2015.

[15] However, on December 16, 2016, Service Canada – Integrity Services Branch sent Mr. Potomski a letter explaining that more information was required pursuant to subsection 23(2) of the *Old Age Security Regulations*, CRC c 1246 [*OAS Regulations*]. The letter warned that

failure to complete the OAS questionnaire may result in a suspension of benefits. The same letter was again sent January 5, 2017.

[16] On January 25, 2017, rather than completing the questionnaire, Mr. Potomski filed an appeal with the SST General Division challenging the legal authority of the Minister of Employment and Social Development [Minister] to require information with respect to his residential address. Mr. Potomski asserted that he met the residency requirements for OAS and took issue with the letters from Service Canada – Integrity Services Branch, arguing that the initial decision to accept the information he had provided in his successful application for OAS in December 2015, had been reconsidered.

[17] Additionally, Mr. Potomski filed a motion before the SST General Division seeking several remedies including an interim order restraining the Minister from "taking any action as against the Appellant without leave of or final order of the Social Security Tribunal".

[18] On January 28, 2017, Mr. Potomski wrote a letter to the Minister stating that he was concerned about the "harassment" he had received in the past 18 months. He stated that his eligibility for OAS had been decided and then reconsidered, although there had been no change in his circumstances. He took the position that the Minister does not have the authority to investigate and re-determine his eligibility for OAS.

[19] On February 17, 2017, the Minister replied, stating yet again that Mr. Potomski was to complete and return the questionnaire, which again, included residency information. The letter

again indicated that failure to return the questionnaire might result in the suspension of his OAS and Guaranteed Income Supplement [GIS] benefits.

[20] On July 12, 2017, the Minister sent Mr. Potomski another letter, provided him additional time to complete the questionnaire, and reiterated that failure to do so might result in the suspension of his OAS and GIS benefits. However, Mr. Potomski's did not complete the questionnaire, and his OAS and GIS benefits were suspended in January 2018.

[21] In May 2018, Mr. Potomski requested reconsideration of the decision to suspend his OAS and GIS benefits. In response, the Minister informed him by letter that his benefits would continue to be suspended until the questionnaire was received, and his eligibility determined.

[22] In September 2018, Mr. Potomski again wrote to the Minister reiterating his request for reconsideration of the Minister's decision to suspend OAS and GIS benefits.

[23] On October 11, 2018, the Minister sent Mr. Potomski a letter indicating that it now considered the suspension of benefits to be a formal decision as it had completed its review of Mr. Potomski's file. The letter informed Mr. Potomski that he could submit a request for reconsideration pursuant to subsection 27.1(1) of the *Old Age Security Act*, RSC 1985, c O-9 [*OAS Act*].

[24] No subsequent request for reconsideration was received.

III. Applicant's Relief Sought in this Motion

[25] Mr. Potomski requests the following relief in his motion, which I quote:

> 1. Leave to abridge the time for serving and filing this motion, if required.
>
> 2. An interim order that matters before the Social Security Tribunal of Canada (SSTC) related to file nos. G13752, GE-16-3958, AD-18-460 and Notice of Appeal, dated June 13, 2018, be held in abeyance until such further order of this court.
>
> 3. Leave to amend the Notice of Application, issued December 17, 2018, as follows:
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> 4. To strike paragraph 3 under "The Applicant makes application for:"
>
> a. Strike the word "Alternatively" in paragraph 4 under "The Applicant makes application for:"
>
> b. An order that the SSTC is *functus officio* in matters related to the Applicant's Motions, dated October 29, 2018 and November 19, 2018.
>
> 5. Leave be granted to the Applicant to request that Section 24(2) be struck from the Social Security Tribunal Regulations, SOR/2013-60, as it denies rights given to the Applicant under the *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c 11, and allow the Applicant to make further submissions on the issue.
>
> 6. The SSTC submit the material requested in the Notice of Application, issued December 17, 2018.
>
> 7. The SSTC submit any and all material along with recordings related to SSTC File #GE-14-3752.
>
> 8. A payment to the Applicant in the amount of $120.00 to cover the cost of having the affidavits sworn related to this motion.

IV. Analysis

[26] I agree with the Respondent's position that the underlying application for judicial review is premature and the motion as a whole is both premature, and otherwise not properly before this Court.

A. *Application for judicial review*

[27] Mr. Potomski's underlying application for judicial review is premature because neither the SST General Division nor the SST Appeal Division have heard or decided Mr. Potomski's pending appeals or motions. The motion before the Court does not address or remedy this underlying and fundamental problem. There is simply no SST decision rendered by either Division to judicially review at this point. The same is true of pending motions before both Divisions. While I acknowledge that there was a previous SST General Division decision, and Mr. Potomski was successful in that challenge, it is a closed file and has no bearing upon the current application for judicial review.

B. *Motion*

[28] The motion that Mr. Potomski now brings before this Court to amend the underlying, premature application for judicial review is also thus premature: the amendments that Mr. Potomski is seeking in this motion fail to address the prematurity of his underlying application for judicial review.

[29] A "motion" is defined in Rule 2 of the Rules as "a request to the Court under, or to enforce, these Rules". A motion is a request that is made to the Court within the context of a proceeding; it is not itself a proceeding (*Gholipour v Canada (Attorney General)*, 2017 FCA 99 at para 8; *Vaughan v Canada*, 2000 CanLII 15069 at para 23).

[30] The application for judicial review brought by Mr. Potomski is itself a proceeding and is, therefore, not a motion. Other than Mr. Potomski's request to amend the premature application for judicial review, he fails to make a request in the context of his application for judicial review (e.g. a motion to reconsider an order (Rule 397) or a motion to set aside or vary an order (Rule 399)). Instead, he is improperly seeking to bring additional remedies to those sought in the application for judicial review, which is fundamentally flawed due to prematurity.

[31] At the May 23, 2019 hearing, the Court was able to distill certain key facts from the numerous and disparate submissions, including a series of entirely new submissions raised at the Special Sitting which were neither raised in the judicial review nor in the motion materials. While Mr. Potomski has sought and continues to seek different remedies through multiple fora, now including this Court, he has continued to refuse to provide basic information as required by the legislation pertaining to his requests for OAS and EI (e.g. section 23, *OAS Regulations*; sections 7, 50 the *EI Act*; section 17, *Employment Insurance Regulations*, SOR/96-332) primarily (but not exclusively) regarding his place of residence. Mr. Potomski has also failed to follow the proper procedures in order to challenge the various decisions stemming from his refusal to comply with the legislation (e.g. sections 28, 27.1, *OAS Act*; section 113, the *EI Act*).

[32] For example, with respect to his OAS benefits, Mr. Potomski has failed to first seek reconsideration of the Minister's October 11, 2018 formal decision to suspend his OAS benefits.

[33] With respect to his EI benefits, Mr. Potomski appealed the SST General Division's summary dismissal to the SST Appeal Division, filing motions before it on October 29, 2018 and November 19, 2018. Then, rather than waiting for a decision from the tribunal, filed the underlying application for judicial review at this Court.

[34] Mr. Potomski has chosen to refuse to (a) provide what is required of him in terms of information for both EI and OAS benefits, and (b) follow the statutorily mandated procedures, or at least await their conclusion, to challenge the negative decisions that have been made due to his non-compliance.

[35] Mr. Potomski also, with this motion, makes an argument regarding the unconstitutional validity of subsection 24(2) of the *Social Security Tribunal Regulations*, SOR/2013-60. This does not relate to the relief sought in his underlying application for judicial review, and was not raised before the SST General Division, as no hearing has been held and no decision has been made. It is thus also premature.

[36] Finally, I would be remiss in not making one final comment as an aside. While I am not in position to pronounce on the ultimate outcome of his benefits applications, it would appear that there is an easy way out of this procedural gridlock that Mr. Potomski has created for himself, and continues to exacerbate in the various venues. Had Mr. Potomski simply provided

the information required for eligibility purposes for his benefits (including his residential address), he may well have been receiving them by now. Instead, Mr. Potomski refuses to provide this basic information the government requires, despite every effort by numerous staff to assist and steer him in the right direction.

[37] Mr. Potomski has also refused to attend government interviews, despite several invitations, to explain himself and/or provide the missing information such that his benefits eligibility can be finally decided. And he continues to attempt to seek remedies without allowing sufficient time for those remedies to be resolved.

[38] Justice David Stratas of the Federal Court of Appeal had the following to say in *Canada (Border Services Agency) v CB Powell Limited*, 2010 FCA 61, which has often been cited since. I provide the key passages of *CB Powell*, with legal citations removed, for Mr. Potomski's benefit:

> [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 […].
>
> [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 […].
>
> [33] Courts across Canada have enforced the general principle of non-interference with ongoing administrative processes vigorously […].

[39] In continuing to challenge the effect rather than to address the cause of his issues, I fear that Mr. Potomski will continue down his vicious cycle of frustration on his part, while at the same time unnecessarily depleting the scarce resources of the bodies before which he brings his multiple challenges, including, now, this Court.

V. Conclusion

[40] As neither of the SST Divisions have heard or decided Mr. Potomski's ongoing appeals and associated motions, both the underlying application for judicial review and motion before the Court are improperly brought due to their prematurity. Both are accordingly dismissed.

JUDGEMENT in T-2145-18

THIS COURT'S JUDGMENT is that:

1. The Applicant's motion and the underlying application for judicial review are dismissed.

2. No costs are awarded.

"Alan S. Diner"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2145-18
STYLE OF CAUSE:	R.J. POTOMSKI v AGC

MOTION HELD BY TELECONFERENCE ON MAY 23, 2019 FROM TORONTO, ONTARIO, WINDSOR, ONTARIO AND GATINEAU, QUEBEC

JUDGMENT AND REASONS:	DINER J.
DATED:	MAY 30, 2019

APPEARANCES:

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Marcus Dirnberger	FOR THE RESPONDENT

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