

Federal Court



Cour fédérale

**Date: 20200323**

**Docket: T-522-19**

**Citation: 2020 FC 401**

**Ottawa, Ontario, March 23, 2020**

**PRESENT: The Honourable Mr. Justice Lafrenière**

**BETWEEN:**

**KONSTANTINOS XANTHOPOULOS**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

**ORDER AND REASONS**

[1] The Respondent, the Attorney General of Canada, brings this motion in writing seeking to strike out the underlying application for judicial review of the decision of the Royal Canadian Mounted Police [RCMP] Conduct Board [Conduct Board], dated March 21, 2019, discharging the Applicant, Konstantinos Xanthopoulos, from the police force. The Respondent brings this motion on the ground that it is premature as the Applicant has not exhausted the remedies available to him under the *Royal Canadian Mounted Police Act*, RSC 1985, c R-10 [RCMP Act].

[2] For the reasons that follow, the Respondent's motion is granted.

I. Background

[3] The following facts are not in dispute.

[4] The Applicant was employed as a Constable by the RCMP at the Surrey Detachment between 2014 and 2019. He was required to conduct himself in accordance with the RCMP Code of Conduct set out in the Schedule to the *Royal Canadian Mounted Police Regulations, 2014*, SOR/2014-281 [Code of Conduct].

[5] The Applicant was alleged to have contravened the Code of Conduct on three separate occasions between 2016 and 2017.

[6] After an investigation, the Applicant appeared at a hearing before the Conduct Board in March 2019.

[7] On March 21, 2019, after finding that the Applicant had contravened two of the three allegations, the Conduct Board directed the Applicant to resign, and in default of resigning within 14 days, recommend the Applicant be discharged. Pursuant to subsection 25(2) of the *Commissioner's Standing Orders (Conduct)*, SOR/2014-291, the Conduct Board's oral decision took immediate effect. Supplementary written reasons were later rendered on April 25, 2019.

[8] The Applicant had a statutory right of appeal from the Conduct Board's oral decision pursuant to section 45.11 of the RCMP Act and in accordance with Part 2 of the *Commissioner's Standing Orders (Grievances and Appeals)*, SOR/2014-289. There is no indication that he exercised his right of appeal.

[9] On March 25, 2019, the Applicant commenced the underlying proceeding. Numerous grounds are raised in the Notice of Application, including allegations of procedural unfairness in the RCMP's investigation and decision-making, erroneous fact-finding, and inadequacy of the appeal through the RCMP's internal administrative process.

## II. Respondent's Motion to Strike

[10] On November 19, 2019, less than one month before the hearing of the application, the Respondent brought the present motion to strike.

[11] Instead of responding to the motion, the Applicant countered with a motion of his own seeking an order for the production of documents from the RCMP (disclosure motion). The Applicant claimed those documents were "essential" to proving his internal right of appeal was too slow to afford fair and adequate recourse, and to responding to the Respondent's motion to strike. The Applicant's motion was received by the Registry, but not filed, pending submissions of the parties at the commencement of the hearing of the application.

[12] At the hearing on December 11, 2019, the parties agreed that the disclosure motion should proceed before the motion to strike, and that the motion should be disposed of in writing

in accordance with Rule 369 of the *Federal Courts Rules*, SOR/98-106. The Applicant was ordered to respond to the Respondent's motion to strike within 14 days of receipt of any records ordered to be disclosed by the Court or dismissal of the disclosure motion.

[13] The Applicant's motion for disclosure was dismissed by Mr. Justice Robert Barnes on February 25, 2020: *Xanthopoulos v Canada (Attorney General)*, 2020 FC 297 [*Xanthopoulos*].

[14] The Applicant filed a motion record exceeding 1,500 pages in length in response to the motion to strike on March 9, 2020. The Respondent filed brief written representations in reply on March 12, 2020.

### III. Analysis

[15] The only issue to be determined on this motion is whether the application for judicial review should be struck because it is premature.

[16] The Respondent submits that the Applicant's application offends the well-established principle that, absent exceptional circumstances, a party must exhaust all adequate remedial administrative processes before resorting to a judicial remedy: see *Forner v Professional Institute of the Public Service of Canada*, 2016 FCA 35 at para 13 [*Forner*]; see *Canada (Border Services Agency) v CB Powell Limited*, 2010 FCA 61 [*CB Powell*] at paras 30-31.

[17] The Applicant concedes that an internal recourse system exists within the RCMP. However, he claims that the system is excessively slow and cumbersome, and "in fact broken."

[18] The Applicant argues that the facts alleged in the application for judicial review— and in particular the statement at paragraph 8(a) of the Notice of Application, that “the appeal process available to the applicant under the *Commissioner’s Standing Orders (Grievance and Appeals)* is not an adequate alternative remedy to the judicial review proceedings [*sic*]”—must be taken as true for the purposes of the motion to strike. According to the Applicant, the onus was on the Respondent to establish that these “facts” are *prima facie* untrue. I disagree.

[19] The Applicant’s allegation that the appeal process is inadequate is nothing more than a bald statement. There are no facts asserted in the Notice of Application that go to the efficacy or adequacy of the appeal process. In fact, the Applicant’s allegations focus solely on the proceedings before the Conduct Board.

[20] The Applicant relies on the affidavits of Corporal Ryan Letnes and Constable Andy Yung in opposing the Respondent’s motion to strike. The two affiants express their frustration in obtaining timely and complete disclosure of documents and bemoan the delays they themselves experienced in the grievance process. However, no mention is made of the Applicant’s circumstances.

[21] While the average timeframe for dealing with appeals may very well be long or even excessive in some cases, the Applicant has adduced no evidence that his appeal will suffer the same fate. As stated by Justice Barnes in *Xanthopoulos* at paragraph 5: “[t]he Court should not be asked to presume that an appeal would have been flawed or that Mr. Xanthopoulos could not have done anything to advance his case to a timely conclusion.”

[22] The general rule that applications for judicial review can be brought only after the administrative decision-maker has made its final decision articulated in *Forner* and *CB Powell* exists for good reason. If courts short-circuit administrative decision-making, they risk depriving reviewing courts of a full record bearing on the issue, an inefficient multiplicity of proceedings, and compromising comprehensive legislative regimes: see *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10 [*Halifax*] at para 36; see *Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc*, 2013 FCA 250 [*JP Morgan*] at paras 85-86.

[23] As recognized by the Federal Court of Appeal in *CB Powell* at paragraph 33, there may be exceptional circumstances where this Court will entertain an application for judicial review of an administrative decision made at the outset of administrative proceedings or over the course of administrative proceedings. However, as stated in *JP Morgan* at paragraph 101:

It is a tool of last resort, available only when a cognizable administrative law claim exists, all other routes of redress now or later are foreclosed, ineffective or inadequate, and the Federal Court has the power to grant the relief sought.

[24] This Applicant has a statutory right of appeal from the Conduct Board's decision. After the appeal is referred to the RCMP External Review Committee under section 45.15 of the RCMP Act, section 45.16 allows the Commissioner of the RCMP [Commissioner] to dispose of the appeal with respect to the Conduct Board's findings and/or the conduct measure imposed. The Commissioner has broad powers in respect of the appeal and the decision on appeal is final. There is simply no evidence before me that the Applicant's right of appeal was foreclosed at the

time he brought the underlying application or would be ineffective or inadequate in the event he exercised his right.

[25] In the circumstances, I am satisfied that the prematurity objection is made out and there are no exceptional circumstances warranting the hearing of this application for judicial review at this time.

[26] Being substantially in agreement with the Respondent's submissions, I conclude that the application for judicial review should be struck out on the grounds that it is clearly premature.

#### IV. Costs

[27] The Respondent seeks his costs, fixed in the amount of \$4,000.00, in relation to the motion to strike, the Applicant's motion for leave to be represented by Corporal Letnes, which was dismissed at the hearing, and the underlying application for judicial review.

[28] While the Respondent may be criticized for his delay in bringing the motion to strike, it remains that the Applicant elected to oppose the present motion, thereby requiring the Respondent to incur additional costs to reply to the voluminous responding motion record filed by the Applicant. The general rule is that a successful party is entitled to his or her costs on a motion, and in this case, the Respondent enjoyed complete success on his motion to strike and in opposing the Applicant's motion for leave to be represented by a layperson.

[29] Given the amount of work involved and the result of the said motions, I conclude that the amount requested by the Respondent is justified.

V. Conclusion

[30] For these reasons, the Respondent's motion is granted, with costs.



**ORDER IN T-522-19**

**THIS COURT ORDERS that:**

1. The Notice of Application dated March 21, 2019 is struck, without leave to amend.
2. The application for judicial review is dismissed.
3. The Applicant shall pay costs to the Respondent, hereby fixed in the amount of \$4,000.00, inclusive of disbursements and taxes.

“Roger R. Lafrenière”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-522-19

**STYLE OF CAUSE:** KONSTANTINOS XANTHOPOULOS v ATTORNEY  
GENERAL OF CANADA

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

**ORDER AND REASONS:** LAFRENIÈRE J.

**DATED:** MARCH 23, 2020

**WRITTEN REPRESENTATIONS BY:**

Konstantinos Xanthopoulos

FOR THE APPLICANT  
(ON HIS OWN BEHALF)

Susanne Pereira  
Courtenay Landseidel

FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Attorney General of Canada  
Vancouver, British Columbia

FOR THE RESPONDENT