Federal Court  Cour fédérale

Date: 20210504

Docket: T-1078-20

Citation: 2021 FC 399

Ottawa, Ontario, May 4, 2021

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

CLINTON MAHONEY

Applicant

and

**HER MAJESTY THE QUEEN
AND PAROLE BOARD OF CANADA
(APPEAL DIVISION) AND CORRECIONAL
SERVICE CANADA**

Respondents

ORDER AND REASONS

I. Overview

[1] These reasons address a motion in writing filed by the Applicant, Mr. Clinton Mahoney, on March 22, 2021. He seeks an order directing that his application for judicial review of a decision of the Appeal Division of the Parole Board of Canada [the Appeal Division] dated August 17, 2020 be treated and proceeded with as an action.

[2] Mr. Mahoney is an inmate in the federal penitentiary system and is self-represented in this matter.

[3] On October 16, 2020, in two separate actions (T-1692-16 and T-1628-19) Justice Sébastien Grammond declared Mr. Mahoney a vexations litigant pursuant to section 40 of the *Federal Courts Act*, RSC 1985, c F-7 (*Mahoney v Her Majesty the Queen*, 2020 FC 975). That declaration does not affect the application for judicial review underpinning this motion.

II. Additional Relief

[4] Within his motion record Mr. Mahoney includes a document entitled Amended Notice of Application. This document is identified in the listing of documentary evidence to be relied upon on the motion. Mr. Mahoney does not seek to amend the Notice of Application and although the motion record includes an Amended Notice of Application, it does not include the originating Notice of Application.

[5] Mr. Mahoney does not address the Amended Notice of Application in either his written submissions on the motion or in his reply submissions. He does seek a direction or order that the Amended Notice of Application "be accepted for filing or filed as the official notice of Application."

[6] The Respondent opposes the Court's consideration of Mr. Mahoney's request that the Amended Notice be accepted for filing on the basis that he has not complied with Rule 75 of the *Federal Court Rules* and does not address the test for the amendment of a pleading set out in *Janssen Inc v Abbvie Corp*, 2014 FCA 242.

[7] I agree with the Respondent. The Amended Notice of Application is not properly before the Court. Mr. Mahoney may bring a motion in accordance with Rule 75 should he wish to pursue an amendment to his previously filed Notice of Application.

III. Analysis

A. *The Applicable Law*

[8] Subsection 18.4(2) of the *Federal Courts Act* provides the Federal Court the discretionary authority to convert an application for judicial review, allowing it to be treated and proceed as an action.

[9] A motion to convert an application for judicial review to an action must be justified by the party seeking the conversion (*Association des Crabiers Acadiens Inc c Canada (Procureur General)*, 2009 FCA 357 at para 35 [*Crabiers Acadiens*]). The discretion to convert is to be exercised in light of the distinct facts and circumstances of a particular matter and where the Court determines it is appropriate. The jurisprudence has identified a series of factors to assist the Court in the exercise of its discretion in this regard. The identified factors are to be weighed in light of all of the circumstances (*Crabiers Acadien* at para 37) and are summarized at para 39 of *Crabiers Acadien*:

> Therefore, conversion is possible (a) when an application for judicial review does not provide appropriate procedural safeguards where declaratory relief is sought (*Haig v. Canada*, [1992] 3 F.C. 611 (F.C.A.)), (b) when the facts allowing the Court to made a decision cannot be satisfactorily established through mere affidavit evidence (*Macinnis v. Canada*, [1994] 2 F.C. 464 (F.C.A.)), (c) when it is desirable to facilitate access to justice and avoid unnecessary cost and delay (*Drapeau v. Canada (Minister of*

> *National Defence)*, [1995] F.C.J. No. 536 (F.C.A.)) and (d) when it is necessary to address the remedial inadequacies of judicial review, such as the award of damages (*Hinton v. Canada*, [2009] 1 F.C.R. 476).

[10] An application for conversion is an exception to the general rule found at subsection 18.4(1) of the *Federal Courts Act*, which provides that an application shall be heard without delay and in a summary manner. A court should only grant a request for conversion in "exceptional circumstances"; situations where the Court's discretion will be exercised in favour of conversion are "most rare" (*Slansky v Canada (Attorney General)*, 2013 FCA 199 at para 56; *Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 128 at para 104).

B. *The circumstances do not warrant conversion*

[11] In his submissions, Mr. Mahoney relies upon access to justice considerations, the avoidance of unnecessary costs and delay, and the remedial inadequacies of the judicial review process. Specifically he submits that the challenge to the Appeal Division decision is largely based on the acts and conduct of Correctional Services of Canada [CSC]. Conversion, he submits, would avoid the duplicative costs of a separate proceeding against CSC—a proceeding that would involve the same evidence. It would also avoid the potential for inconsistent findings. Mr. Mahoney further submits that conversion will allow him to avoid the consequences of Justice Sébastien Grammond's Order of this Court declaring him a vexatious litigant, specifically the requirement that he may not commence proceedings before the Federal Court without the Court's authorization.

[12] There is little evidence underpinning the submissions advanced by Mr. Mahoney. I have relied on the Notice of Application to address the arguments advanced.

[13] The relief Mr. Mahoney seeks in pursuing judicial review of the Appeal Board decision includes quashing the decision and returning it to the Appeal Board for redetermination with specific direction preventing the Appeal Board from relying on certain evidence on redetermination. He also seeks a declaration that there has been a breach of the Applicant's rights under sections 7, 9, 11 and 12 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. Mr. Mahoney has not demonstrated that the relief he seeks on his Application against the Appeal Board is beyond the scope of the powers available to the Court on an application for judicial review (*Federal Courts Act*, s 18.1 (3)).

[14] The grounds detailed in Mr. Mahoney's Notice of Application include numerous allegations against CSC and CSC employees. However, relief is not sought against CSC, nor is relief available for the simple reason that CSC is not the decision maker. The Appeal Board is not responsible for the wrongs Mr. Mahoney alleges CSC has committed. More importantly, it is not evident that the alleged wrongs relating to CSC conduct are at all relevant, except perhaps peripherally, to a review of the impugned decision. Mr. Mahoney's bald assertion that any cause of action against CSC is intertwined with the grounds for the application for judicial review falls short of demonstrating that this is a circumstance warranting the exercise of the Court's discretion.

[15] There may well be some evidentiary overlap between the judicial review application and any action initiated against CSC, but it has not been demonstrated that this overlap warrants the exercise of the Court's discretion to convert the judicial review application. The suggestion of evidentiary overlap, the possibility that common issues may arise, and the speculative belief that inconsistent findings could result does not amount to an exceptional or rare circumstance warranting the exercise of discretion.

[16] Mr. Mahoney may pursue a separate action against CSC. The mere fact that this may prove difficult or inconvenient in light of the vexatious litigant order is not a basis upon which this Court may exercise its subsection 18.4(2) discretion.

IV. Conclusion

[17] The motion is dismissed, as is Mr. Mahoney's request that the Amended Notice of Application be filed.

[18] The Respondent requests that the Court issue direction regarding the completion of the remaining steps in this judicial review application. I am not prepared to issue direction in the absence of some input from the parties. The parties may file an agreed upon proposed timeline for the Court's consideration. If agreement cannot be reached, or is not practical, the parties shall individually file a proposed timeline.

[19] Although successful on the motion, the Respondent has not sought costs and none will be ordered.

ORDER IN T-1078-20

THIS COURT ORDERS that:

1. The motion is dismissed;

2. The Applicant's request that the Amended Notice of Application be filed is refused;

3. An agreed upon proposed timeline for the completion of the remaining steps in this judicial review application may be filed by the parties within 30 days of the date of this Order;

4. In the event agreement on a proposed timeline cannot be reached, or is not practical in the circumstances, the parties shall file individual proposed timelines for the completion of the remaining steps in this judicial review application within 30 days of the date of this Order;

5. There is no order as to costs.

"Patrick Gleeson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1078-20
STYLE OF CAUSE:	CLINTON MAHONEY v HER MAJESTY THE QUEEN, AND PAROLE BOARD OF CANADA (APPEAL DIVISION) AND CORRECIONAL SERVICE CANADA

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

ORDER AND REASONS:	GLEESON J.
DATED:	MAY 4, 2021

WRITTEN REPRESENTATIONS BY:

Clinton Mahoney	FOR THE APPLICANT (ON HIS OWN BEHALF)
Andrew Cosgrave	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Attorney General of Canada Edmonton, Alberta	FOR THE RESPONDENT