Federal Court  Cour fédérale

Date: 20210125

Docket: T-1078-20

Citation: 2021 FC 81

Ottawa, Ontario, January 25, 2021

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

CLINTON MAHONEY

Applicant

and

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

Respondents

ORDER AND REASONS

I. Overview

[1] This decision addresses a motion by the Respondent, dated September 25, 2020, seeking an Order striking out the Applicant's application for judicial review of a decision of the Appeal Division of the Parole Board of Canada [the Appeal Division] dated August 17, 2020 [the Decision].

[2] As explained in greater detail below, the Respondent's motion is dismissed, as I am not satisfied that the Applicant's application for judicial review stands no chance of success.

II. **Background**

[3] The Applicant, Mr. Clinton Mahoney, is an inmate serving a life sentence in the federal penitentiary system, having been convicted of manslaughter and first-degree murder. On May 8, 2020, the Parole Board of Canada [the Board] issued a decision denying him day parole and/or full parole. Mr. Mahoney appealed that decision, and it is the resulting Decision from the Appeal Division, denying that appeal, that is the subject of this application for judicial review.

[4] The Applicant also has a history of pursuing litigation in this Court, by way of both actions and application, seeking remedies resulting from allegations against the Correctional Service of Canada [CSC] and/or the Board. As explained in the Respondent's written representations in support of this motion, as of the time the motion was filed, the Applicant was the subject of another motion brought by the Respondent, in the context of other Federal Court proceedings, seeking to have him declared a vexatious litigant and seeking to strike out certain actions commenced in 2019.

[5] While that motion had not yet been decided when the present motion was filed, I note from the Court's files that, on October 16, 2020, Justice Grammond issued an Order and Reasons (reported at *Mahoney v The Queen*, 2020 FC 975), granting the relief requested by the Respondent and declaring the Applicant a vexatious litigant pursuant to section 40 of the *Federal Courts Act*, RSC 1985, c F-7 [the Vexatious Litigant Order]. That Order provides that the

Applicant may not commence proceedings of any kind before the Federal Court without the authorization of the Court. It also strikes out his statements of claim in two actions (Court file numbers T-1692-19 and T-1628-19).

[6] However, the Vexatious Litigant Order also provides that it does not affect the proceedings in the present application for judicial review. Justice Grammond notes in paragraph 44 that, when the Respondent filed its vexatious litigant motion, the present application had not yet been commenced. Justice Grammond further notes that a declaration that a person is a vexatious litigant does not necessarily terminate all litigation initiated by the person, although the Respondent was at liberty to bring a motion to strike the present application.

[7] This motion, seeking to strike the present application, was actually filed in advance of the October 1, 2020 hearing before Justice Grammond. The Respondent filed its motion in writing under Rule 369 of the *Federal Court Rules*, SOR/98-106, and the Applicant has filed a motion record including written representations in response.

III. **Issue**

[8] As articulated by the Respondent, the sole issue raised in this motion is whether the application for judicial review should be struck on the ground that it stands no chance of success.

IV. **Analysis**

[9] The Respondent argues that the Applicant's application is fatally flawed, because he requests remedies which this Court does not have jurisdiction to grant in an application for judicial review and that have no link to the Decision under review in the present application. The Respondent notes in particular that, in challenging the Appeal Division's Decision, the Applicant is asking the Court to conclude that his *Charter* rights were violated by CSC because of events that occurred five years ago. The Respondent refers to the Applicant's statement that, back in 2015, CSC treated him incorrectly in reclassifying him as maximum security and transferring him to a maximum-security facility.

[10] The first substantive paragraph of the Applicant's Notice of Application, which identifies the Decision under review and seeks various forms of relief, reads as follows:

> On August 17, 2020 the Parole Board of Canada (PBC) appeal Division rendered a decision affirming the Parole Board of Canada's May 8th 2020 decision on the applicant's risk to reoffend and to Deny Day and full parole. Decision was received by applicant by mail on August 18, 2020. The applicant makes application for:
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> A. Declare invalid, unlawful, quash, set aside and refer back for determination the PBC appeal Divisions Decision with Directions prohibiting the appeal Division from relying on;
>
> i. The May 8 2020 PBC Decision or findings
>
> B. An order prohibiting or restraining the Parole Board of Canada from relying on or basing its decision on any of the Correctional Service Canada's (CSC) information, documentation, or reports that directly or indirectly relied on, or was influenced by the Charter Rights violations of the applicant, and negligent and unlawful conduct of

Correctional Service Canada which are addressed in the grounds of this application.

C. A Declaration that the applicant's Charter Rights have been violated Sections 7, 9, 11(g)(d)(h), 12

D. Any other order the Court may see fit.

[11] The Respondent notes that the Applicant not only contests the Decision but also asks the Court to conclude that CSC has violated his *Charter* rights and to order the Board to stop using CSC's information. The Respondent argues that the Court can only return the Decision to the Board for redetermination if it concludes that an error in fact or law was committed by the Board. The Respondent asserts the Court does not have the jurisdiction to declare a violation of the Applicant's *Charter* rights by CSC nor to order the Board to stop considering information provided by CSC. Noting as well the Applicant's references to his security classification and transfer that occurred more than five years ago and that the Respondent argues have no link to the Decision under review, the Respondent submits there is clearly no link between the remedies sought by the Applicant and the Decision denying him parole.

[12] As I interpret his written representations in response to this motion, Mr. Mahoney argues that the Court has jurisdiction to determine that the Decision resulted from erroneous findings, breaches of principles of fundamental justice, or conduct constituting *Charter* violations, on the part of either the CSC or the Board (including its Appeal Division).

[13] As the Respondent submits, relying on *David Bull Laboratories (Canada) Inc v Pharmacia Inc*, [1995] 1 FC 588 (FCA) [*David Bull*], the Court is empowered to strike a notice of application that is so clearly improper as to be bereft of any possibility of success (see para

15). I take the Respondent's point that, following the paragraph in the Notice of Application cited above, which sets out the relief requested, much of the remainder of the document references allegations of misconduct by CSC. I also note that, although not expressly asserting a claim therefor, the Notice of Application references various categories of injury or loss allegedly suffered by the Applicant. To the extent that the Applicant may intend, through this application for judicial review, to seek damages or other relief resulting directly from alleged past misconduct by CSC, clearly his application is bound to fail. An application for judicial review is not the appropriate procedure for claiming damages, and the Decision under review in the present application is that of the Appeal Division, not CSC.

[14] However, as I read the Notice of Application (and, in particular, the first substantive paragraph quoted earlier in these Reasons), it is directed principally at seeking to set aside the Decision by the Appeal Division and refer that matter back to the Appeal Division for redetermination. The Applicant argues that the Appeal Division erred in relying on findings made by the Board in the decision that was under appeal, and he asserts that the decision to deny him parole turned, among other things, on erroneous findings of fact, in particular in reliance on information provided by the CSC.

[15] I make no comment on the likelihood of the Applicant succeeding in establishing his allegations of error on the part of the Appeal Division, other than that to conclude that allegations of this sort fall squarely within the jurisdiction of this Court sitting in judicial review of the decision of an administrative tribunal. The Respondent's arguments in seeking to strike this application focus on the remedies sought by the Applicant and the Respondent's position

that such remedies are unavailable and unconnected with the Decision under review. In some respects, the Respondent's position may have merit. For instance, the Court is unlikely to conclude that the Board or its Appeal Division should conduct its work without recourse to information provided by CSC. However, it would be well within the Court's jurisdiction, applying the appropriate standard of review, to conclude that the Appeal Division erred, or failed to identify an error by the Board, in connection with a finding of fact in reliance on CSC information. In the event of such a conclusion, the Court could quash the relevant decision and send it back for redetermination, potentially with the benefit of directions flowing from the nature of the error.

[16] In short, while the Notice of Application may in some respects seek relief that is unavailable, I cannot conclude that the application is bereft of any possibility of success. As the Applicant notes, again in reliance on *David Bull* (at para 15), cases in which it is appropriate to strike an application in a summary manner must be very exceptional and cannot include cases where there is simply a debatable issue as to the adequacy of the allegations.

[17] I also decline to engage in a process of identifying and striking particular portions of the remedies requested, which may fall outside the jurisdiction engaged by this application, while leaving other portions intact. As the Applicant submits, the Federal Court of Appeal has urged caution on a motion to strike when only a portion of a notice of application is impugned (see *876947 Ontario Limited (RPR Environmental) v Canada (Attorney General)*, 2013 FCA 156 at para 10). Moreover, the Respondent has not sought partial relief of this nature.

[18] It is therefore my decision to dismiss the Respondent's motion. The Respondent sought no costs in the event that it was successful in this motion. The Applicant does seek costs in the amount of $300.00. While the Applicant has prevailed in responding to this motion, costs are in the discretion of the Court and, in my view, costs of this motion are best addressed once the outcome of the overall application is known. Costs shall therefore be in the cause.

ORDER IN T-1078-20

THIS COURT ORDERS that:

1. The Respondent's motion to strike the Applicant's application for judicial review is dismissed.

2. Costs of this motion shall be in the cause.

"Richard F. Southcott"
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 CORRECTIONAL SERVICE CANADA

MOTION HEARD IN WRITING UNDER *FEDERAL COURT RULES* 369 AT OTTAWA, ONTARIO

ORDER AND REASONS:	SOUTHCOTT J.
DATED:	JANUARY 25, 2021

SOLICITORS OF RECORD:

Attorney General of Canada Montreal, Quebec	FOR THE RESPONDENTS