Federal Court Cour fédérale

Date: 20220405

Docket: T-1748-21

Citation: 2022 FC 439

Ottawa, Ontario, April 5, 2022

PRESENT: The Honourable Madam Justice Rochester

BETWEEN:

DANIEL HANZ NICOLAS

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

ORDER AND REASONS

[1] This is a motion in writing pursuant to Rule 369 of the *Federal Courts Rules*, SOR/98-106 [*Rules*] to strike the Applicant's Application for Judicial Review [Application] of a decision by an officer of the Canada Revenue Agency [CRA] denying the Applicant's application for the Canada Recovery Caregiving Benefit [CRCB].

[2] The CRCB is one of the benefits contained within a package of measures introduced in 2020 by the federal government in response to the impacts of COVID-19 on Canadians. The

requirements to be entitled to the CRCB are contained in section 17 of the *Canada Recovery Benefits Act*, SC 2020, c 12, [Act]. In order to be eligible for the CRCB, an applicant must demonstrate, among other things, at least $5,000.00 of income from prescribed sources in 2019 or in the 12-months period preceding the day on which they make the application, for an application in 2020. For an application in 2021, the prescribed income period was 2019 or 2020 or in the 12-months period preceding the day on which they make the application. Given that the CRCB is a caregiver benefit, section 17 of the Act further requires an applicant to demonstrate that they have been unable to work or had to reduce their work by at least 50% due to (i) caring for a child under the age of 12 because their school or other facility was closed or the person who usually cared for them was unavailable for reasons related to COVID-19 or (ii) caring for a family member who required supervised care and that supervised care that was not in fact available for reasons related to COVID-19.

[3] For the reasons that follow, the Respondent's motion is granted and the Application is struck.

I. Background

[4] The following details are taken from the materials contained in the certified tribunal record [CTR] and the submissions of the parties. The CTR filed in the present matter was also appended to the Defendant's Motion Record.

[5] In 2020, the Applicant applied for CRCB and for the Canada Recovery Sickness Benefit [CRSB]. The eligibility requirements for the CRSB are found at section 10 of the Act. Subsequently, the Applicant applied for additional periods in 2020 and 2021.

[6] Following the Applicant's request for these benefits, the CRA followed up with the Applicant on numerous occasions requesting further information, notably documentation evidencing his revenue, his reduction in work, and his caregiving duties. Telephone calls with the officer took place on December 14, 2020; December 22, 2020; December 24, 2020; June 21, 2021; August 31, 2021; and September 1, 2021.

[7] According to the officer's notes, the Applicant refused to provide the requested documents and provided conflicting information over the course of the phone calls. In one call, the Applicant claimed to care for his daughter while in another he informed the officer that he did not actually have custody of his daughter. In one call, the Applicant claimed that he cares for his father due to a pre-COVID medical procedure and his father lives with him 24 hours a day, while in another call the Applicant stated his father and mother live together. In one call, the Applicant claimed to have worked and earned the prescribed minimum income, while in another call the Applicant admitted to have not worked since 2017. The Applicant had also informed the officer that his company had earned an excess of $5,000, but the 2019 return indicated that the company suffered a loss of $11,064. In a further call, when the officer again sought to assist him with suggestions as to documentation that could be utilized to demonstrate income, the Applicant stated that his company paid him $28,150 in cash, that the cash was not deposited in his bank account nor was it declared in tax returns or otherwise. The officer's notes indicate that, during a

number of calls, the Applicant had yelled at the officer, accused him of being part of a conspiracy against him, and refused to provide the necessary documentation and information.

[8] By way of letter dated September 3, 2021, the CRA informed the Applicant that he was not eligible for the CRCB because he was not employed or self-employed during the required periods prior his application [First Decision].

[9] In a separate letter, also dated September 3, 2021, the CRA informed the Applicant that he was not eligible for the CRSB for the same reason. The decision relating to the CRSB is not included in the present judicial review.

[10] The Applicant requested a review of the First Decision. On October 19, 2021, during a call, the CRA again requested further documents and the Applicant informed them that he had already provided them with sufficient documentation, his earnings were in cash and were not deposited in an account, and he accused the CRA of discrimination.

[11] By way of letter dated October 21, 2021, the CRA informed the Applicant that he was not eligible for the CRCB because (i) he had not earned at least $5,000 of income from employment or self-employment during the required periods prior to his application, and (ii) he had not cared for a child under 12 years old or any other family member who required supervised care due to that care being unavailable for reasons related to COVID-19 [Second Decision]. The Applicant therefore did not receive the CRCB.

[12] In a separate letter also dated October 21, 2021, the CRA informed the Applicant that he was not eligible for the CRSB because he had not earned at least $5,000 of income from employment or self-employment during the required periods prior to his application. Again, the refusal of the CRSB benefit is not the subject of this judicial review, however, the materials are contained in the CTR.

II. The Application for Judicial Review

[13] On November 22, 2021, the Applicant served and filed the present application for judicial review. The Applicant has not yet filed an application record. The entirety of the grounds for the judicial review in the Notice of Application are as follows:

> LES MOTIFS DE LA DEMANDE SONT LES SUIVANTS :
>
> 1. Contrairement à ce qui est déterminé dans la décision contestée, le demandeur a bel et bien gagné au moins 5 000 $ (avant impôts) de revenus d'emploi ou de travail indépendant en 2019, 2020, ou au cours des 12 mois précédant la date de la première demande du [*sic*] PCREPA;
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> 2. Par ailleurs, le demandeur satisfait aux autres conditions requises pour bénéficier de la PCREPA, notamment celles énoncées dans la Loi sur les Prestations canadiennes de relance [*sic*], LC 2020, c 12, art 17;
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> 3. La Cour fédérale a compétence en vertu, notamment, de l'article 18.1 de la Loi sur les cours fédérales [*sic*], LRC 1985, c F-7.

III. The Test on Motions to Strike Notice of Application for Judicial Review

[14] In *JP Morgan Asset Management (Canada) Inc. v Canada (National Revenue)*, 2013 FCA 250 [*JP Morgan*], the Federal Court of Appeal set out the practice and procedures for notices of application for judicial review and motions to strike them:

> D. Practice and procedure: notices of application for judicial review and motions to strike them
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> (1) Notices of application for judicial review: pleading requirements
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> > [38] In a notice of application for judicial review, an applicant must set out a "precise" statement of the relief sought and a "complete" and "concise" statement of the grounds intended to be argued: *Federal Courts Rules*, SOR/98-106, Rules 301(d) and (e).
> >
> > [39]A "complete" statement of grounds means all the legal bases and material facts that, if taken as true, will support granting the relief sought.
> >
> > [40] A "concise" statement of grounds must include the material facts necessary to show that the Court can and should grant the relief sought. It does not include the evidence by which those facts are to be proved.

[15] An applicant must set out, in the notice of application for judicial review, the grounds to be argued, meaning all the legal bases and material facts necessary to support the relief sought. The grounds stated should neither be bald nor a fishing expedition, and applicants who have evidence to support a ground are expected to state the ground with some particularity (*JP Morgan* at para 42). As per the Court of Appeal in *JP Morgan:*

> [43] Thus, for example, it is not enough to say that an administrative decision-maker "abused her discretion." The applicant must go further and say what the discretion was and how it was abused. For example, the applicant should plead that "the decision-maker fettered her discretion by blindly following the administrative policy on reconsiderations rather than considering all the circumstances, as section Y of statute X requires her to do."

[16] Simply stating, in a notice, that findings are erroneous without explaining why or offering particulars, counts for very little, if anything (*Canada (National Revenue) v McNally*, 2015 FCA 248, at para 17).

[17] Recently, Justice Stratas confirmed that the threshold for striking an application is the same as that for striking an action (*Wenham v Canada (Attorney General)*, 2018 FCA 199 at para 33 [*Wenham*]):

> [33] […] In motions to strike applications for judicial review, this Court uses the same threshold. It uses the "plain and obvious" threshold commonly used in motions to strike actions, sometimes also called the "doomed to fail" standard. Taking the facts pleaded as true, the Court examines whether the application:
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> > […] is "so clearly improper as to be bereft of any possibility of success": *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.*, 1994 CanLII 3529 (FCA), [1995] 1 F.C. 588 at page 600 (C.A.). There must be a "show stopper" or a "knockout punch" – an obvious, fatal flaw striking at the root of this Court's power to entertain the application: *Rahman v. Public Service Labour Relations Board*, 2013 FCA 117 at paragraph 7; *Donaldson v. Western Grain Storage By-Products*, 2012 FCA 286 at paragraph 6; *cf. Hunt v. Carey Canada Inc.,* 1990 CanLII 90 (SCC), [1990] 2 S.C.R. 959.
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> (*JP Morgan* at para 47.)

[18] In order to determine whether an application for judicial review discloses a cause of action, the Court must first focus on the notice of application itself to identify its essential character (*Wenham* at para 34).

[19] It is worthwhile to note that, as a general rule, affidavits are not admissible in the context of motions to strike applications for judicial review (*JP Morgan* at para 51). This applies to both parties. With respect to an applicant, the Court of Appeal in *JP Morgan* explains the justification as follows:

> [52]…As for an applicant responding to a motion to strike an application, the starting point is that in such a motion the facts alleged in the notice of application are taken to be true: Chrysler Canada Inc. v. Canada, 2008 FC 727 at paragraph 20, aff'd on appeal, 2008 FC 1049. This obviates the need for an affidavit supplying facts. Further, an applicant must state "complete" grounds in its notice of application. Both the Court and opposing parties are entitled to assume that the notice of application includes everything substantial that is required to grant the relief sought. An affidavit cannot be admitted to supplement or buttress the notice of application. [Emphasis added]

[20] Exceptions to this rule should only permitted in narrow circumstances, such as "where the justifications for the general rule of inadmissibility are not undercut, and the exception is in the interests of justice" (*JP Morgan* at para 53).

IV. Analysis

[21] The Respondent filed a motion to strike the Applicant's application for leave and judicial review on the basis that the Notice of Application includes no allegation as to how the CRA decision under review is unreasonable and that it contains no material facts pertaining to the decision. The Notice of Application simply states that the Applicant satisfies the Act's requirements for CRCB, contrary to the decision under review.

[22] It is unclear why the Applicant did not include material facts in his Notice of Application, given that the material facts would have be known to him and any documentation originating from him would have been in his possession when he filed his Notice of Application. The material facts potentially at issue in a matter such as this are those that relate to earnings in 2019 and/or 2020, any family members requiring supervised care that became unavailable for reasons related to COVID-19, and any impacts of providing supervised care for family members may have had on an individual's ability to work.

[23] The Applicant argues in response to the present motion that the criteria for inadmissibility for the Second Decision only became clear once the CTR was filed. The Second Decision, however, sets out the criteria that the Applicant failed to meet, namely:

> Vous ne rencontrez pas le critère suivant :
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> Vous n'avez pas gagné au moins 5 000 $ (avant impôts) de revenus d'emploi ou de revenus net de travail indépendant en 2019, en 2020, ou au cours des 12 mois avant la date de votre première demande.
>
> Vous ne vous occupiez pas de votre enfant de moins de 12 ans ou d'un membre de la famille, parce qu'ils n'ont pas pu fréquenter leur école, garderie ou établissement de soins, pour des raisons liées à la COVID-19. Ou, la personne qui prodiguait habituellement des soins n'était pas disponible pour des raisons liées à la COVID-19.

[24] Rather than providing the materials facts, let alone with any particularity, in the grounds of the Notice of Application, the Applicant simply copy-pasted a large portion of one of the grounds of inadmissibility for the CRCB contained in the Second Decision, which in itself is an excerpt of the Act:

> "… le demandeur a bel et bien gagné au moins 5 000 $ (avant impôts) de revenus d'emploi **ou** de travail indépendant en 2019, 2020, **ou** au cours des 12 mois précédant la date de la première demande du [*sic*] PCREPA" (emphasis added)

[25] The Applicant did not allege which of those requirements are applicable to him and thus the paragraph is left as an either / or statement.

[26] The Applicant then makes a bald statement that "[p]ar ailleurs, le demandeur satisfait aux autres conditions requises pour bénéficier de la PCREPA, notamment celles énoncées dans la Loi sur les Prestations canadiennes de relance [*sic*], LC 2020, c 12, art 17", without any explanation or particularization.

[27] Although the Applicant provides further explanation in his response to the Respondent's motion to strike, the Applicant cannot now cure the lack of grounds or material facts in his Notice of Application with an affidavit in a response to a motion to strike. An affidavit cannot be admitted to supplement or buttress a deficient notice of application (*JP Morgan* at para 52). I find that is precisely what the Applicant is seeking to accomplish with his affidavit dated February 10, 2022 included in his response to the Respondent's motion. Consequently, this affidavit is not admissible for the purposes of this motion to strike.

[28] I agree with the Respondent that everything alleged in the response to the motion to strike was either information in the Applicant's control, or discernible from his exchanges with the CRA or contained in the Second Decision. From the materials contained in the Defendant's Motion Record and the Applicant's response, it is clear that the Applicant did not have to wait

for the CTR to be filed in order to provide a complete and concise statement of the grounds intended to be argued in his Notice of Application. Moreover, the Applicant has been represented by counsel throughout.

[29] The “essential character” (*Wenham* at para 34) of the Applicant’s Notice of Application is a “bald” (*JP Morgan* at para 42) statement that the Applicant disagrees with the Second Decision, without any attempt at setting out a complete statement of the grounds as required by Rule 301(e) of the *Rules*. Not only are material facts not included, save for a statement that the Applicant earned over $5,000 as an employee **or** an independent contractor, the Applicant does not make a single allegation speaking to the reasonableness or lack thereof of the Second Decision.

[30] As noted in the introduction to this Judgment and Reasons, in order to be admissible for the CRCB, along with the income requirement, one must demonstrate that they were unable to work or had to reduce their work by at least 50% because they cared for a child under 12 due to reasons related to Covid-19 or, to cite subparagraph 17(1)(f)(ii) of the Act:

> (ii) they cared for a family member who requires supervised care because
>
> (A) the day program or facility that the family member normally attended was, for reasons related to COVID-19, unavailable or closed, available or open only at certain times or available or open only for certain persons,
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> (B) the family member could not attend the day program or facility because
>
>> (I) the family member contracted or might have contracted COVID-19,

> (II) the family member was in isolation on the advice of their employer, a medical practitioner, nurse practitioner, person in authority, government or public health authority for reasons related to COVID-19, or
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> (lll) the family member would, in the opinion of a medical practitioner or nurse practitioner, be at risk of having serious health complications if the family member contracted COVID-19, or
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> (C) the care services that are normally provided to the family member at their place of residence were not available for reasons related to COVID-19;

[31] In the Applicant's affidavit submitted with his response to the present motion to strike, the Applicant submitted that he ran errands for his parents and cared for them. There is no mention of supervised care and of the unavailability of care services due to the above reasons related to COVID-19. There is no mention of a child under 12. Even if the affidavit had been admissible, which, as per my reasons above, I find it is not, and even if the facts contained in the affidavit had been taken as true, the Application would still be bereft of any possibility of success.

[32] I find that the Notice of Application fails to meet the criteria as set out in Rule 301(e) of the *Rules*. I find, given the submissions and records before me, that it is appropriate to make use of this Court's plenary jurisdiction to strike the Applicant's Notice of Application for judicial review.

ORDER in T-1748-21

THIS COURT ORDERS that:

1. The Respondent's motion is granted;

2. This Application for Judicial Review is struck;

3. The whole with costs.

"Vanessa Rochester"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1748-21
STYLE OF CAUSE:	DANIEL HANZ NICOLAS v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	WRITTEN MOTION (R-369)
DATE OF HEARING:	FEBRUARY 22, 2022 (WRITTEN MOTION – R-369)
ORDER AND REASONS:	ROCHESTER J.
DATED:	APRIL 5, 2022

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