Federal Court  Cour fédérale

Date: 20230217

Docket: T-2504-22

Citation: 2023 FC 224

Edmonton, Alberta, February 17, 2023

PRESENT: Madam Associate Judge Catherine A. Coughlan

BETWEEN:

JUANITA WOOD

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

ORDER AND REASONS

I. Overview

[1] The Attorney General of Canada (AGC), brings this motion pursuant to Rule 369 of the *Federal Courts Rules* [*Rules*] seeking an order to strike the Notice of Application (Application) filed by the self-represented Applicant, Juanita Wood, on the grounds that this Court lacks jurisdiction. In the underlying Application, Ms. Wood seeks judicial review of a decision of the Director of Public Prosecutions (DPP) to stay five private informations brought by her for private prosecutions. Relying on this Court's decision in *SNC-Lavalin Group Inc v Canada*

(Public Prosecution Service), 2019 FC 282 [*SNC-Lavalin*], the AGC argues that a prosecutor exercising his discretion is not a "federal board, commission or other tribunal" within the meaning of section 2 of the *Federal Courts Act* [*Act*]. Accordingly, the AGC says the Application must be struck, without leave to amend because it is plain and obvious that the Application has no prospect of success.

[2] In response, Ms. Wood, relies on two decisions of the Yukon Supreme Court to assert that the Federal Court has exclusive jurisdiction to determine an application to quash the AGC's decision to direct a stay. She argues that the Yukon decisions, which are factually on "all fours" with her own Application, stand for the proposition that when a Crown prosecutor enters a stay of a private information, they are acting as a "federal board, commission or other tribunal" within the meaning of section 18(1) of the *Federal Courts Act*: *Joe v Canada (Attorney General*), 2008 YKSC 68 [*Joe*]; *Knol v Canada (Attorney General)*, 2013 YKSC 121 [*Knol*].

[3] For the reasons that follow, I am not persuaded that the decisions of the Yukon Supreme Court reflect the current state of the law and I decline to follow that line of authority. In the result, I find that the Application must be struck as it has no reasonable prospect of success in the context of the law and jurisprudence that binds this Court.

II. The Law

[4] The AGC moves to strike under Rule 221 of the *Rules*. That rule, which is found in Part 4 of the *Rules* only applies to actions and has no application to proceedings under Part 5 of the *Rules.* While the *Rules* do not provide for motions to strike applications for judicial review, that jurisdiction is found in the Court's plenary jurisdiction to restrain the misuse or abuse of the

Court's processes. The Court will strike a notice of application for judicial review where it is "so clearly improper as to be bereft of any possibility of success": *David Bull Laboratories (Canada) Inc v Pharmacia Inc*, [1995] 1 FC 588 (CA) at page 600; JP *Morgan Assessment Management (Canada) Inc v Canada (National Revenue)*, [2014] 2 FCR 557 at paras 47-48. It has long been held that a notice of application that is beyond the jurisdiction of the Court is clearly one bereft of any possibility of success.

[5] The Federal Court has jurisdiction to determine applications for judicial review from federal boards, commissions or other tribunals: Section 18 of the *Act*. Under section 2 of the *Act*, a federal board, commission or other tribunal means the following:

> any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made under a prerogative of the Crown, other than the Tax Court of Canada or any of its judges or associate judges, any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the *Constitution Act, 1867*.
>
> autre organisme, ou personne ou groupe de personnes, ayant, exerçant ou censé exercer une compétence ou des pouvoirs prévus par une loi fédérale ou par une ordonnance prise en vertu d'une prérogative royale, à l'exclusion de la Cour canadienne de l'impôt et ses juges et juges adjoints, d'un organisme constitué sous le régime d'une loi provinciale ou d'une personne ou d'un groupe de personnes nommées aux termes d'une loi provinciale ou de l'article 96 de la *Loi constitutionnelle de 1867*.

[6] As correctly noted by the AGC in its written representations, for this Court to have jurisdiction over the Application:

(a) there must be a statutory grant of jurisdiction by the federal Parliament;

(b) there must be an existing body of federal law which is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction; and

(c) the law on which the case is based must be "a law of Canada" as the phrase is used in section 101 of the *Constitution Act, 1867*. *ITO – Int'l Terminal Operators v Miida Electronics*, [1986] 1 SCR 752.

III. Issue

[7] The sole issue on this motion is whether this Court has jurisdiction to hear the application for judicial review.

IV. Positions of the Parties

[8] Ms. Wood's seeks an order of *mandamus*, compelling the DPP to continue with the pre-enquete hearing in respect of her private informations. Her Application alleges that the stay of proceedings by the DPP represents an abuse of process, "amounting to flagrant impropriety" by the Crown.

[9] Relying on the Yukon Supreme Court in *Knol*, she argues that the Federal Court has exclusive jurisdiction to hear and determine her Application because the AGC, when exercising its discretion to enter a stay, was acting as a "federal board, commission or other tribunal" within the meaning of section 2 of the *Act*. Indeed, Ms. Wood cites paragraph 15 of *Knol*, where Gower J. concludes:

> I am satisfied that the Crown prosecutor, Mr. Sinclair, was acting as counsel for the Attorney General when he directed a stay of the private indictment on July 3, 2013, and therefore fell within the definition of "federal board, commission or other tribunal" in

> s.18(1)(a) of the *Act*. In doing so, I am further satisfied that he was, pursuant to s.2 of the *Act*, "exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament", i.e. s. 579(1) of the *Code*. Accordingly, s. 1 8(1) (a) of the *Act* applies, giving the Federal Court "exclusive original jurisdiction" to deal with Mr. Knol's application to quash the Attorney General's decision to direct the stay.

[10] Ms. Wood argues that her case is on all fours with *Knol* and thus the Federal Court has exclusive jurisdiction to hear her Application. She rejects the AGC's reliance on *SNC-Lavalin* in which Justice Kane concluded that the Attorney General is not a "federal board, commission or other tribunal" for the purposes of section 2 of the *Act*. Ms. Wood attempts to distinguish that case on the basis that it does not concern the Attorney General nor section 579 of the *Criminal Code* [*Code*].

[11] The AGC argues that Ms. Wood's reliance *Knol* and *Joe* is misplaced and fails to address the current state of the law and its history of development. The AGC argues that the Yukon line of decisions has been displaced by Supreme Court of Canada (SCC) jurisprudence that clarifies that jurisdiction is to be determined not by the nature of the body exercising the authority but by the source of the authority being exercised.

[12] Here, the AGC argues that the source of the prosecutorial discretion to stay the private informations, is the common law and the Constitution and not an Act of Parliament nor an order made pursuant to a prerogative power of the Crown. In the result, the AGC argues, the Federal Court lacks jurisdiction to hear the Application and to the extent that an application for judicial review is available, the Supreme Court of Yukon is the appropriate Court.

V. Analysis

[13] I begin my analysis by noting there is no dispute between the parties that the DPP has the discretion to stay private prosecutions: *Krieger v Law Society of Alberta*, 2002 SCC 65, [2002] 3 SCR 372 at para 46. Further, and as noted by the AGC, acts of prosecutorial discretion are entitled to considerable deference but are not immune from judicial oversight. Within the core of prosecutorial discretion, decisions are reviewable only for abuse of process: *R v Anderson*, 2014 SCC 41, [2014] 2 SCR 167 [*Anderson*] at para 48; *R v Glegg*, 2021 ONCA 100 at paras 31, 40-41.

[14] In the *Knol* and *Joe* line of authority, the AGC successfully argued before the Supreme Court of Yukon that the Federal Court and not the Yukon Court had exclusive jurisdiction to hear applications relating to the use of powers conferred under the *Code*, i.e. the staying of charges under section 579 of the *Code*.

[15] In the present matter, the AGC changes course and urges this Court to consider as binding precedent three decisions that it says alters the legal landscape with respect to this Court's jurisdiction.

[16] In a 2010 decision, the Federal Court of Appeal instructs that the test to determine whether a body or person falls within the section 2 definition of "federal board, commission or other tribunal" is as follows:

> The operative words of the s. 2 definition of "federal board, commission or other tribunal" state that such a body or person has, exercises or purports to exercise jurisdiction or powers "conferred by or under an Act of Parliament or by or under an Order made pursuant to a prerogative of the Crown…". Thus, a two-step enquiry must be made in order to determine whether a body or person is a

> "federal board, commission or other tribunal". First, it must be determined what jurisdiction or power the body or person seeks to exercise. Second, it must be determined what is the source or the origin of the jurisdiction or power which the body or person seeks to exercise: *Anisman v Canada (Border Services Agency)* 2010 FCA 52 at para 29[*Anisman*].

[17] In *Anisman*, the Federal Court of Appeal concluded that the Canada Border Services Agency (CBSA) was not acting as a "federal board, commission or other tribunal" when it was collecting provincial alcohol fees on behalf of the Liquor Board of Ontario. Rather, the Federal Court of Appeal explains that the source of the authority to collect the fees was the provincial legislation - Ontario *Liquor Control Act*. As there was no federal legislation or orders made pursuant to a prerogative power of the federal Crown, the CBSA was not acting as a "federal board, commission or other tribunal." The Federal Court thus had no jurisdiction to entertain an application for judicial review.

[18] In *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40, [2018] 2 SCR 765 [*Mikisew*], the SCC considered the *Anisman* source-based test for jurisdiction. A majority of that Court endorsed the source-based test of jurisdiction or powers being exercised as the "principal determinant of whether a decision-maker falls within the definition of a 'federal board, commission or other tribunal'" *Mikisew* at paras 106-109.

[19] In 2019, the Federal Court, in *SNC-Lavalin*, considered the source of a prosecutor's discretion. In that case, Kane J. rejected the applicants' submission that the prosecutor, in exercising discretion is exercising powers conferred by the *Director of Public Prosecutions Act* or the *Code*. Rather, Kane J. observed that prosecutorial discretion is derived from the common law and the Constitution. At paragraph 171, Kane J. concluded:

> The same reasoning applies in the present case. The prosecutor is not exercising powers conferred by the *DPP Act* or the *Criminal Code*. The DPP is exercising prosecutorial discretion which is derived from the common law and the constitution. Therefore, the DPP is not a federal board, commission or other tribunal for the purpose of the decision at issue. The DPP could fall within the section 2 definition with respect to other decisions made that are not derived from common law powers, for example, decisions made as an employer.

[20] I do not accept Ms. Wood's submission that *SNC-Lavalin* is distinguishable. Ms. Wood's arguments that *SNC-Lavalin* dealt with the Public Prosecution Service rather than the Attorney General and did not deal with a stay under section 579 of the *Code* have no merit. The AGC's reply submissions correctly note that the Director of Public Prosecutions acts under and on behalf of the Attorney General of Canada. Further, as the SCC found in *Anderson* at paragraph 44, "'prosecutorial discretion' is an expansive term that covers 'all decisions regarding the nature and extent of the prosecution and the Attorney General's participation in it.'"

[21] Based on the foregoing, I am satisfied that the prosecutor exercising his discretion to stay Ms. Wood's private informations did so pursuant to the common law and the Constitution. In so doing, the DPP was not acting as a federal board, commission or other tribunal necessary to clothe this Court with jurisdiction.

[22] In view of my conclusion with respect to jurisdiction, it is unnecessary for me to address whether an order of *mandamus* would be available as a remedy and I decline to do so.

[23] The Respondent seeks its costs of this motion. As the successful party, the Respondent is entitled to costs which are hereby fixed at $500.00 inclusive of tax and disbursements.

ORDER in T-2504-22

THIS COURT ORDERS that:

1. The motion is allowed.

2. The Application is dismissed.

3. Costs to the Respondent from the Applicant are fixed at $500.00 inclusive of tax and disbursements.

"Catherine A. Coughlan"
Associate Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2504-22
STYLE OF CAUSE:	JUANITA WOOD v ATTORNEY GENERAL OF CANADA

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

ORDER AND REASONS:	COUGHLAN A.J.
DATED:	FEBRUARY 17, 2023

WRITTEN REPRESENTATIONS BY:

Juanita Wood	FOR THE APPLICANT (ON HER OWN BEHALF)
William Lu	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Attorney General of Canada Whitehorse, Yukon Territory	FOR THE RESPONDENT