Federal Court  Cour fédérale

Date: 20240208

Docket: T-1392-23

Citation: 2024 FC 217

Ottawa, Ontario, February 8, 2024

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

PETER TAIT

Applicant

And

MIKE DUHEME, COMMISSIONER OF THE ROYAL CANADIAN MOUNTED POLICE AND THE ATTORNEY GENERAL OF CANADA AND MINISTER OF PUBLIC SAFETY AND TREASURY BOARD OF CANADA

Respondents

ORDER AND REASONS

I. Introduction

[1] The Applicant brings an application for judicial review of an "apparent decision" by the Royal Canadian Mounted Police (the "RCMP") to revoke the Applicant's Top Secret security clearance.

[2] Before the Court are two motions. The first is a motion for an order to strike the application for judicial review (the "motion to strike"). The second is a motion for leave to amend the underlying Notice of Application (the "motion to amend") pursuant to Rule 75 of the *Federal Courts Rules*, SOR/98-106 (the "Rules"). In addition, the parties seek leave to file further affidavits, and for the Court to make other consequential orders. The two motions were heard concurrently.

II. Background

A. *The Parties*

[3] Peter Tait (the "Applicant") was a municipal employee of the City of Richmond (the "City") who worked under the direction of the RCMP.

[4] Mike Duheme is the Commissioner of the RCMP. The Attorney General of Canada (hereon, the "Respondent") appears on his behalf, on its own behalf, and on behalf of the other respondents, the Minister of Public Safety and the Treasury Board of Canada.

B. *The Notice of Application*

[5] The Applicant was employed by the City as a criminal intelligence analyst supervisor out of the RCMP's Richmond Detachment between June 2020 and March 2023. He was required to obtain a Top Secret security clearance as a condition of employment. The Applicant has held the requisite security clearance since October 2006 until its "apparent revocation".

[6] The Applicant alleges that this apparent revocation occurred contrary to the procedural steps outlined in the Treasury Board's *Standard on Security Screening* (the "Security Screening Standards"), made pursuant to section 7 of the *Financial Administration Act*, RSC, 1985, c F-11.

[7] Specifically, the Applicant claims that, contrary to the Security Screening Standards, the RCMP failed to:

A. inform the Applicant of any concerns or adverse information that it held prior to the apparent revocation;

B. conduct a security interview with the Applicant prior to the Decision;

C. provide the Applicant with an opportunity to respond to any adverse information or concerns it may have prior to the apparent revocation;

D. directly communicate the apparent revocation to the Applicant in writing;

E. provide any reasons or information upon which the apparent revocation was based; and

F. inform the Applicant of his rights to redress.

[8] More generally, the Applicant says that the RCMP failed to provide procedural fairness in the process leading up to the apparent revocation.

[9] The Applicant seeks an order quashing "any decision of the Richmond Detachment to revoke and/or cancel the Applicant's Top Secret security clearance", an order to perform the procedural steps required under the Security Screening Standards, and costs.

C. *Alleged Facts Outside the Notice of Application*

[10] The parties rely on and cite various affidavits in their submissions. As I discuss in paragraphs 27 to 29, the evidence contained within these affidavits may be relied on with respect to some of the issues before me, but not with respect to others. It is therefore pertinent to delineate the facts alleged in the Notice of Application from those alleged in the affidavits.

[11] The affidavits add the following context. The Applicant's security clearance expired in June 2021. The Applicant applied to renew his security clearance on or around the expiry date (the "Renewal Request") and was able to continue his duties until a determination on the application was made. The Applicant continued his duties without issue until March 2023, when the RCMP informed the City that it (the RCMP) was "returning" the Applicant to the City for undisclosed reasons.

[12] The RCMP communication from March 2023 stated that it "will be requesting an administrative cancellation of his security clearance, effective" the date of the communication. The RCMP subsequently closed the Renewal Request and did not process it. The RCMP did not inform the Applicant directly of any decision with regards to his security clearance. The City of Richmond subsequently notified the Applicant that the RCMP had "revoked" his security clearance and that he is placed on leave.

D. *The Motion to Strike*

[13] The Respondent seeks an order to strike the Notice of Application without leave to amend. The Respondent's motion is based on various grounds, namely:

A. The RCMP did not revoke the Applicant's security clearance. The clearance expired and the RCMP closed the Renewal Request as a "clerical act". Consequently, there is no decision or order for the Court to review, and the Court lacks jurisdiction.

B. There is no reasonable cause of action and the application is bound to fail.

C. The application is premature, because the Applicant has not exhausted an existing internal administrative complaint process.

D. The application is late, having commenced past the 30-day limit imposed by the *Federal Courts Act*, RSC, 1985, c F-7 [*Federal Courts Act*].

[14] The Respondent's position is that no amendment to the Notice of Application can cure the application's deficiencies.

E. *The Motion to Amend*

[15] The Applicant seeks leave to amend the Notice of Application to (1) add the decision to close the Renewal Request as the decision under review, (2) add, as relief sought, an order

requiring the RCMP to reinitiate and complete the Renewal Request, in compliance with the relevant procedural requirements, and (3) make other consequential amendments.

F. *Leave to File Further Affidavits and Other Consequential Orders*

[16] In their respective motions, the parties each seek leave to file a further affidavit in support of the application, pursuant to Rule 312 of the Rules. The Respondent's request for leave is made in the alternative, supposing the motion to strike is dismissed.

[17] The Applicant also seeks an order extending the time for the cross-examination on the parties' affidavits to 30 days after the release of this decision, as well as an order "directing that the filing of the parties' records, and the filing of the hearing requisition in this proceeding shall be completed in accordance with the [Rules]".

III. Issues

[18] Should the Court grant the Respondent's motion to strike the Notice of Application?

[19] Should the Court grant the Applicant's motion to amend the Notice of Application?

[20] Should the Court grant leave to file further affidavits and make other consequential orders?

IV. Analysis

A. *Should the Court grant the Respondent's motion to strike the Notice of Application?*

[21] The Federal Court's power to strike a notice of application for judicial review rests on its plenary jurisdiction to review the conduct of federal administrative tribunals under section 18.1 of the *Federal Courts Act* (*JP Morgan Asset Management (Canada) Inc v Canada (National Revenue)*, 2013 FCA 250 [*JP Morgan*] at para 48).

[22] To grant a motion to strike a notice of application, the Court must be satisfied that the application is "so clearly improper as to be bereft of any possibility of success". There must be "an obvious and fatal flaw striking at the root of this Court's power to entertain the application" (*JP Morgan* at para 47). This is essentially the same standard as on a motion to strike an action – that is, whether it is "plain and obvious" that the proceeding will fail (*Wenham v Canada (Attorney General)*, 2018 FCA 199 [*Wenham*] at paras 32-33).

[23] The threshold that must be met by the moving party is high (*JP Morgan* at para 48). A motion to strike a notice of application should therefore be granted sparingly, and only in very clear cases, because the Court may not have all the relevant facts or have the benefit of submissions that distill the applicable legal framework (*Apotex Inc v Canada (Governor in Council)*, 2007 FCA 374 at para 13).

[24] In assessing the motion to strike a notice of application, the Court reads the notice of application "as generously as possible", and "with a view to understanding the real essence of the application" (*JP Morgan* at paras 49-50, *Dakota Plains First Nation v Smoke*, 2022 FC 911 [*Dakota Plains*] at para 7). The Court must achieve a "realistic appreciation" of the application's "essential character" (*JP Morgan* at para 50). For this, the facts alleged in the notice of application are accepted as true (*JP Morgan* at para 52).

(1) Admitting Evidence on a Motion to Strike an Application for Judicial Review

[25] Affidavits are generally inadmissible on a motion to strike a notice of application for judicial review. This is because (1) applications must be heard summarily and without delay, (2) affidavits are not necessary if the alleged facts are presumed to be true, and (3) if it is necessary to file an affidavit to demonstrate a flaw in the application, that flaw is not sufficiently obvious to justify granting a motion to strike (*JP Morgan* at para 52). Exceptions to this general rule are permitted if they further the interests of justice and do not undercut the above justifications (*JP Morgan* at para 53).

[26] This Court has previously held that, despite the general rule, evidence may be admitted where the motion to strike alleges that the application is moot. The Court cannot make such a determination in a factual vacuum, and failing to strike a moot application risks forcing the Court to proceed with a full hearing where there is no longer a live controversy (*Louie v Ts'kw'aylaxw First Nation*, 2018 CanLII 116818 (FC) at para 15, citing *Amnesty International Canada v Canadian Forces*, 2007 FC 1147 at paras 126-127).

[27] In my view, the same logic applies with respect to submissions on jurisdiction, prematurity, and filing delay. The Court may be asked to determine, respectively, whether there is a reviewable matter, whether an applicant could have sought an administrative appeal or review, and when the 30-day statutory limit on applications began or if the interests of justice permit a late application. Depending on the case, these issues may not be resolvable in a factual vacuum.

[28] Despite my findings on the admissibility of affidavit evidence on these issues, it is nevertheless noteworthy that the Respondent in this case chose to bring the motion to strike, and the affidavits therein, more than five months after the underlying application was first filed. One would expect that, in light of this delay, the affidavits and the motion would allege facts or issues that occurred *after* the application was filed. That was not the case. In fact, questions of jurisdiction, prematurity, and filing delay should be apparent early in the course of an application. It is therefore difficult to comprehend why the Respondent would challenge the application on these grounds so late – let alone by way of a motion to strike and with the assistance of affidavit evidence. The Respondent's approach frustrates the Court's obligation to resolve applications expeditiously, summarily, and "without delay" (*JP Morgan* at para 48, citing s 18.4 of the *Federal Courts Act*). This is not something the Court condones.

(2) The Existence of a Reviewable Decision over which to Exercise Jurisdiction

[29] The Applicant's security clearance was not revoked. It expired in June 2021. The RCMP closed the Renewal Request when the Applicant was returned to the City. Neither party disputes these alleged facts.

[30] The issue is whether closing the Renewal Request is a reviewable decision under section 18.1 of the *Federal Courts Act*. The Respondent argues that this is a "clerical act" that did not affect the Applicant's rights, not a decision reviewable under section 18.1 of the *Federal Courts Act*, nor one for which the Court may grant the requested relief. The Applicant replies that the language of section 18.1 is broad and that closing the Renewal Request was prejudicial to his rights.

[31] Section 18.1 of the *Federal Courts Act* is indeed broad. The Court's jurisdiction to judicially review federal decision-makers lies not only in discrete decisions or orders, but with respect to any matter or conduct that is public in nature, and for which relief is available under section 18.1. The bounds of this jurisdiction end only where a matter fails to affect legal rights, impose legal obligations, or cause prejudicial effects (*Democracy Watch v Canada (Attorney General)*, 2021 FCA 133 at para 29; *Key First Nation v Lavallee*, 2021 FCA 123 at paras 34-35).

[32] The Applicant's Notice of Application, read generously with a view to understand the real essence of the application, alleges that a positive action was taken by the RCMP with respect to the Applicant in the context of the Security Screening Standard, the result of which is the *effective* revocation of the Applicant's security clearance. The Applicant's Notice of Application states that he continued to perform his duties as if his security clearance was still in effect until March 2023, well past its expiry date. The evidence submitted by the Respondent suggests that it was only when the RCMP returned the Applicant to the City of Richmond that his clearance *effectively* ended. The Respondent's evidence also includes a letter from the RCMP to the City of Richmond, in

which the RCMP informed the City of the Applicant's return, and in which it stated that it "will be requesting an administrative cancellation of his security clearance" [emphasis added].

[33] The RCMP's alleged conduct, if true, would be prejudicial. The Notice of Application alleges that the Applicant was owed certain procedural rights and that the RCMP's conduct denied him those rights. The denial of those rights would *prima facie* suffice to establish prejudice. In addition, the Applicant's evidence is that he lost employment opportunities. This accords with the Respondent's evidence, which includes a letter from the City of Richmond to the Applicant stating that he will be placed on leave as a result of the RCMP's decision to "revoke" his clearance.

[34] Based on the above, it is not plain and obvious that closing the Renewal Request was a mere "clerical act" outside the Court's jurisdiction. The alleged facts, taken at their face, indicate that closing the Renewal Request was a positive action by the RCMP that had legal consequences for the Applicant, whether by effectively "cancelling" or "revoking" the Applicant's security clearance.

(3) Whether it is Plain and Obvious that the Application will Fail

[35] The Respondent says that, even if the Notice of Application discloses a reviewable matter within the Court's jurisdiction, the application is nevertheless doomed to fail. The Respondent argues that the RCMP was not legally bound by the Security Screening Standards, because those standards constitute a policy, not binding law. The Respondent further stresses that the RCMP has the discretion to return a municipal employee under its agreement with the City of Richmond, which requires no process before returning the employee.

[36] The Respondent's arguments require the Court to make determinations on the merits of the application. A motion to strike is not the appropriate stage to do so. Moreover, even though evidence may be admitted with respect to certain narrow issues on a motion to strike (such as jurisdiction, prematurity, and filing delay), it cannot be admitted to determine if the Notice of Application discloses no reasonable cause of action, except insofar as it puts a document cited by the Notice of Application before the Court for clarity (*JP Morgan* at para 54). Ultimately, the Court must assume that the facts alleged within the Notice of Application are true.

[37] The Notice of Application states that the RCMP's conduct amounts to an "apparent revocation", one that triggers binding procedural obligations, many of which codified in the Security Screening Standards, and with which the RCMP failed to comply. In addition, the text of the Security Screening Standards submitted by the Respondent makes various references to fairness more generally. I am therefore not satisfied from the Respondent's submissions that it is plain and obvious that the application will fail on those grounds.

[38] Even if I accept the Respondent's argument at this stage that the Security Screening Standards do not legally bind the RCMP, the Respondent must still contend with the common law duty of procedural fairness, as well as how non-binding standards inform that common law duty. The case law cited by the Applicant suggests that the Security Screening Standards at least informs the duty of procedural fairness owed to the Applicant (*Ibrahim v Canada (Attorney General)*, 2021 FC 1261 at para 30; *Plummer-Grolway v Canada (Attorney General)*, 2021 FC 444 at paras 35-36). The Respondent's submissions do not foreclose that possibility.

[39] It is not plain and obvious that the application will fail on the merits.

(4) Whether the Applicant is Out of Time

[40] The Respondent submits that, even if a reviewable decision exists, it was communicated to the Applicant on March 14, 2023. The Applicant therefore exceeded the 30-day "limitation period" set by section 18.1(2) of the *Federal Courts Act* by commencing the application several months after March 14, 2023.

[41] The Applicant replies that, according to the language of section 18.1(2), the 30-day limit commences after the decision in question is communicated "by the federal board, commission or other tribunal […] to the party directly affected by it". The Applicant says that the RCMP never informed him of the decision to close the Renewal Request. Any communication by the RCMP in that regard was directed to the City. The Applicant became aware of the closing of his Renewal Request only on or around September 13, 2023, when the Respondent filed an affidavit disclosing that fact.

[42] I agree with the Applicant's position. At worst, the RCMP never communicated with the Applicant regarding his security clearance or his Renewal Request, in which case the 30-day period set by section 18.1(2) did not commence. At best, the Applicant was informed on or around September 13, 2023. Since he filed his application on or around July 6, 2023, there was no delay beyond the 30-day limit. The application is therefore not outside the statutory deadline.

(5) Whether the Application is Premature

[43] The Respondent argues that the application is premature because the Applicant did not exhaust available administrative recourse mechanisms (*Viaguard Accu-Metrics Laboratory v Standards Council of Canada*, 2023 FCA 63 at para 5).

[44] In order to find that an application is premature on a motion to strike, the Court must be "certain" that (1) there is recourse elsewhere, now or later; (2) the recourse is adequate and effective; and (3) the circumstances pleaded are not the sort of unusual or exceptional circumstances recognized by the case law or analogous thereto (*JP Morgan* at para 92).

[45] The Respondent says that the Applicant may seek recourse from the National Security and Intelligence Review Agency, pursuant to the *National Security and Intelligence Review Agency Act*, SC 2019 c 13, s 2 [*NSIRA Act*], which has jurisdiction to determine if an individual's security clearance was revoked, whether the revocation was justified, and whether it negatively affected that individual's employment.

[46] The Applicant replies that he cannot seek recourse from the National Security and Intelligence Review Agency because no written decision exists for the Applicant to bring to that Agency for a review. The Applicant further adds that the Agency's powers are strictly investigative in nature, and that the outcome of an investigation can only yield a non-binding recommendation. If the Agency were to find that the Applicant was denied procedural fairness as he alleges, it cannot remit the matter to the RCMP to reconsider in a procedurally fair manner.

[47] While I agree that the language of the relevant provisions of the *NSIRA Act* suggest a written decision is required, it is not necessary for me to make that finding. The determinative issue here is whether I am "certain" that the recourse is adequate and effective. I am not. Specifically, I am not "certain" that the remedies available under the *NSIRA Act* would be adequate and effective to rectify the procedural unfairness that was allegedly suffered by the Applicant. Again, the Agency is empowered to investigate and make non-binding recommendations. It has no jurisdiction to order the RCMP to make orders as to procedural fairness.

[48] Therefore, the application should not be struck for prematurity at this stage.

(6) Conclusion on the Motion to Strike

[49] The motion to strike the Notice of Application is dismissed.

B. *Should the Court grant the Applicant's motion to amend the Notice of Application?*

[50] On a motion to amend, the Court must consider whether it is more consonant with the interests of justice that the amendment be permitted or that it be denied (*Janssen Inc v Abbvie Corporation*, 2014 FCA 242 [*Janssen*] at para 3). The Court may consider the following factors: (1) the timeliness of the motion to amend, (2) the extent to which the proposed amendments would delay the expeditious resolution of the matter, (3) the extent to which a position taken originally by one party has led another party to follow a course of action in the litigation which would be difficult or impossible to alter, and (4) whether the amendments sought will facilitate the Court's

consideration of the true substance of the dispute on its merits. No single factor predominates (*Janssen* at para 3).

[51] The Applicant says that each of the above factors support granting the motion. I agree. Firstly, the Applicant's motion is timely. The Applicant became aware that the decision at issue is the closing of the Renewal Request by way of an affidavit submitted by the Respondent in September 2023. The Applicant filed his motion material by December 2023. The timeline was reasonable considering the amount of material that needed to be prepared and filed. Moreover, the matter has not progressed to cross-examinations or disclosure issues.

[52] Secondly, the proposed amendments would not delay the expeditious resolution of the matter, but would in fact facilitate consideration of the true substance of the dispute. Both parties are in agreement that the Applicant's security clearance was not technically "revoked", but that his Renewal Request was closed on or around March 2023. The proposed amendments clarify that this is the matter for which the Applicant seeks judicial review. They also focus the alleged facts on the closing of the Renewal Request, thereby allowing the parties to focus their submissions on those specific allegations.

[53] Thirdly, the proposed amendments would not prejudice the Respondent. It was the Respondent who first argued that the application was in fact addressing the closing of the Renewal Request. While the parties may disagree as to whether the closing of the Renewal Request constitutes a reviewable decision, it is clear that they agree that it is the conduct complained of by

the Applicant. Far from prejudicing the Respondent, the proposed amendments would accord with the Respondent's position and narrow the gap that must be resolved between the parties.

[54] As with the motion to strike, the Respondent's position on the motion to amend is that the subject matter of the amendments is not within the Court's jurisdiction, or that it discloses no reasonable cause of action. The Respondent says the motion to amend must be dismissed on that basis. I do not agree with the Respondent for the same reasons I discussed on the motion to strike.

[55] The Respondent also argues that the proposed amendments would create inconsistent and contradictory pleadings in the Notice of Application. The Respondent specifically notes that the original portions of the Notice of Application allude to a revocation of the security clearance, where as the amended portions would speak of the closing of the Renewal Request.

[56] I see no such contradiction in the amendments. As I understand it at this stage, the Applicant is effectively arguing that the closing of the Renewal Request was the decision at issue, that that decision was unfair, that it amounts to a revocation or denial, and that the Renewal Request should be reopened and processed in a procedurally fair manner.

[57] The motion to amend the Notice of Application is therefore granted.

C. *Should the Court grant leave to file further affidavits and make other consequential orders?*

[58] Rule 312(a) of the Rules permits a party to file further affidavits on an application for judicial review with leave from the Court. The Court will grant leave where it is in the interests of

justice to do so (*Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 128 at para 11 [*Tsleil-Waututh*]). The evidence in question must be admissible and relevant to the application (*Forest Ethics Advocacy Association v National Energy Board*, 2014 FCA 88 at para 4). Beyond those threshold questions, and in order to determine if it is in the interests of justice to grant leave, the Court will consider (1) whether the evidence will assist the Court, (2) whether it will cause substantial or serious prejudice to the other party, and (3) whether the evidence was available when the party seeking leave filed the first affidavit (*Tsleil-Waututh* at para 11).

(1) The Applicant's Request for Leave

[59] The Applicant filed a new affidavit (the "Second Tait Affidavit") as part of his Motion Record. The Applicant seeks leave to also file this affidavit as part of his application for judicial review.

[60] The Second Tait Affidavit is relevant and admissible. The facts alleged in the affidavit are based on the Applicant's first hand knowledge. The affidavit clarifies what communications were received by the Applicant in relation to his security clearance, particularly in light of the Respondent's existing evidence. The affidavit does not contain improper or inadmissible evidence.

[61] The Second Tait Affidavit will assist the Court. It speaks directly to questions of procedural fairness, including whether the Applicant received notice of any decision or the substance thereof, whether he was able to pursue recourse, and the extent of the impact arising out of the Respondent's alleged conduct. These are all points at issue on the application.

[62] The Respondent has provided no objections to the filing of the Second Tait Affidavit. There are no submissions before me to indicate that substantial or serious prejudice would arise from admitting the affidavit. I agree with the Applicant that, in light of the early stage of this proceeding, prejudice is unlikely to arise from granting leave.

[63] The evidence within the Second Tait Affidavit responds to the Respondent's evidence from September 2023. The Applicant could not have provided such a response when he first filed his affidavit in July 2023.

[64] In light of the above, I find it is in the interests of justice to grant the Applicant's request for leave to file the Second Tait Affidavit. Leave is granted.

(2) The Respondent's Request for Leave

[65] The Respondent also seeks leave to file a further affidavit, but does not specify what affidavit will be filed, nor by whom. The Respondent also makes no submissions in support of granting such leave. Accordingly, leave is denied.

(3) Other Consequential Orders

[66] The time for cross-examination on the parties' affidavits is extended to 30 days after the release of the Court's orders on the motions.

[67] The filing of the parties' records, and the filing of the hearing requisition in this proceeding shall be completed in accordance with the *Federal Courts Rules*.

V. Conclusion

[68] The motion to strike the Notice of Application is dismissed.

[69] The motion to amend the Notice of Application is granted.

[70] The Applicant's request for leave to file the Second Tait Affidavit is granted.

[71] The Respondent's request for leave to file a further affidavit is dismissed.

[72] The Applicant is successful on both motions. Costs are awarded to the Applicant in the total amount of $3,000, as requested.

ORDER in T-1392-23

THIS COURT ORDERS that:

1. The motion to strike the Notice of Application is dismissed.

2. The motion to amend the Notice of Application is granted.

3. The Applicant's request for leave to file the Second Tait Affidavit is granted.

4. The Respondent's request for leave to file a further affidavit is dismissed.

5. Costs are awarded to the Applicant in the total amount of $3,000, as requested.

"Michael D. Manson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1392-23
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ORDER AND REASONS:	MANSON J.
DATED:	FEBRUARY 8, 2024

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