Federal Court Cour fédérale

Date: 20170322

Docket: T-2149-16

Citation: 2017 FC 298

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, March 22, 2017

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

MARTINE MCKENZIE

Applicant

and

CONSEIL DE LA NATION INNU MATIMEKUSH-LAC JOHN

Respondent

ORDER AND REASONS

[1] The Conseil de la Nation Innu Matimekush-Lac John [the Conseil] is moving to strike the application for judicial review filed by Martine McKenzie under the *Federal Courts Act*, RSC, 1985, c F-7 [the Act]. Ms. McKenzie challenged the appointment of a person to the position of policy secretary within the Conseil's governance. According to her, that appointment is marred by fundamental flaws that warrant this Court's intervention.

[2] According to the Conseil, the motion to strike should be allowed because the application for judicial review is moot, the applicant supposedly does not have the necessary standing, because this is an application in the nature of *mandamus*, for which the conditions cannot be met, and because the application was supposedly made out of time.

I. Preliminary issue

[3] From the outset, counsel for Ms. McKenzie opposed the filing of an affidavit in support of the motion to strike. That affidavit is from the person holding the policy secretary position, who alleges to have met Ms. McKenzie on October 27, 2016. Ms. McKenzie apparently knew at the time that the position was occupied. The circumstances surrounding the appointment remain unclear. However, the application for judicial review was not filed until December 10, 2016, which was apparently out of time (section 18.1 of the Act). The argument made by counsel for Ms. McKenzie is that the facts must be proven and, thus, the affidavit is supposedly not admissible at this stage. In support of this submission, he cites this Court's decision in *Amnesty International Canada v. Canadian Forces* 2007 FC 1147 and *Addison & Leyen Ltd. v. Canada*, 2006 FCA 107, of the Federal Court of Appeal.

[4] Neither of those decisions is of any assistance to the applicant. In fact, both of those cases involve motions to strike for which it was alleged, in one case, that an application for judicial review had no chance of success and, in the other case, that the action undertaken was also destined to fail. In both cases, what was at issue was the merit of the remedies sought. It is very typical, in those cases, for the facts alleged in the remedies to be demonstrated, since all that is required is to determine whether, with the facts being proven, the application or action itself has

any chance of success. That is not the case here. The motion to strike regarding the time limit for initiating the judicial review is very different from a strike because the cause of action itself has no chance of succeeding. In this case, the respondent is seeking to establish that the remedy is out of time, which has no relation to the merit of the application that has been filed. However, the moving party should again be allowed to present evidence demonstrating that the remedy is out of time and, in return, the respondent should be permitted to argue the contrary. The procedural issue is not the merit of the case.

[5] I would make an analogy to the state of the law regarding applications for judicial review. In those matters, the Federal Court judge must determine the lawfulness of the decision for which a review is being sought. Therefore, the case should be considered to be "frozen" at the time the decision was made (*Delios v. Canada*, 2015 FCA 117). However, as is well established, if the allegations concern violations of procedural fairness, that is, issues that are peripheral to the case's merit, the submission of additional evidence will be permitted. In our case, the issue of the time limit is extraneous to the merit of the application for judicial review. Supposing that a notice of motion for judicial review can be struck out, I have therefore concluded that the affidavit should not be withdrawn from the record.

II. The standard

[6] The striking out of a pleading in an action is governed by rule 221 of the *Federal Courts Rules*, SOR/98-106. The parties did not discuss before this Court on what basis the striking out of a notice of motion would be sought or what standard would be applicable. Therefore, the most elementary prudence is warranted.

[7] In *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.*, [1995] 1 FCR 588 [*David Bull Laboratories*], the Federal Court of Appeal was confronted with the issue of striking out a motion like the one in this case. It concluded that the rules do not provide for a motion to strike. If the Federal Court can have jurisdiction to determine such a preliminary motion, possibly based on its jurisdiction to determine the applicable procedure (rule 4), it should nevertheless do so only in <u>very exceptional</u> cases after concluding that "a notice of motion . . . is so clearly improper as to be bereft of any possibility of success." (*David Bull Laboratories*, page 600)

[8] Over the years, there have been motions to strike applications for judicial review, but their success seems to be rather mixed.

[9] Since the applicant did not dispute the possibility that the Court could hear the motion to strike a notice of motion, this Court will hear the motion to strike and apply the standard of "so clearly improper as to be bereft of any possibility of success." This is a strict standard that can allow a successful remedy only in very exceptional cases.

III. <u>Motion to strike</u>

[10] The respondent submits that the applicant does not have the necessary standing to attack the decision. As I stated at the hearing, everything depends on the definition given to standing to act in this case. The respondent alleges that the lack of standing is based on the fact that Ms. McKenzie was employed at the time the position was awarded to another person. Moreover, she is not seeking damages for any loss incurred.

[11] As for myself, I would have defined standing in a very different manner. Ms. McKenzie might have a standing in the position to be filled being advertised to a certain extent in order for her to find out about it. The fact that a person is employed elsewhere does not mean that this standing loses its value. Even though the position was to be awarded for a brief period, a person may want to occupy it so that, for example, he or she may have some advantage when the position is being filled on a permanent basis. In addition, it is irrelevant to suggest that she did not ask for the job for herself. That is not the issue. In this case, we understand that Ms. McKenzie is a member of the community and that she could benefit from the advertisement of a position that is open to the members of the community. The respondent argues that the applicant had to demonstrate a particular interest and that she would suffer personal prejudice, citing *Thorson v. Canada (Attorney General)*, 1975, 1 SCR 138. In my view, that is exactly what the applicant has done in this case.

[12] The respondent is attacking the application for judicial review, arguing that it is, at least partially, in the nature of *mandamus* and that the conditions for obtaining a *mandamus* have not been met. That is an issue that will be discussed and decided on the merits. In fact, the entire issue is to determine whether the remedy sought can be granted on the basis of facts that have been proven. That is the very essence of a decision on the merits. Not only must the issue of determining the conditions for obtaining a *mandamus* be subject to a decision on the merits, but it has in no way been demonstrated that the judicial review has no chance of success or that it was plain and obvious that no cause of action has been presented or that the entire case is frivolous or vexatious. If the applicant has any chance of success, she must not be deprived of a judgment (*Hunt v. Carey Canada Inc.*, [1990] 2 SCR 959).

[13] I also reject the argument that the application for judicial review was filed out of time. In my view, not only is it possible to extend the time (section 18.1 of the Act), but also, it was not convincingly established, at this stage, that the conversation alleged in the position-holder's affidavit could be determinative. We do not know either the context or the words that might have been said. Ms. McKenzie's affidavit states that the hiring supposedly took place between October and November 2016. Moreover, I admit that the applicant's statement that she learned on or around November 10, 2016, that the position had been filled may leave room for uncertainty, which is not necessary. Such uncertainty might suggest, even if it is only out of caution, a request to extend the time. Whatever the case may be, the factual framework is not sufficiently clear to conclude that the application was made out of time. It might have been, despite Ms. McKenzie's statement, but the terse affidavit from the position holder leaves room for great uncertainty that does not favour the respondent and is insufficient, since it does not constitute clear and convincing evidence that would allow for a conclusion in the respondent's favour.

[14] Lastly, the Conseil insists that the application for judicial review is moot. What makes matters more complex is the fact that the position holder, who was said to have been hired on a temporary three-month basis as of September 26, 2016, is still in the position. Counsel for the applicant informed the Court that a competition to fill the position was started at the end of the week of March 6, 2017. It does not appear clear to me that the application for judicial review regarding the award of that position to that person is moot at this stage. It may be that the remedy becomes moot at the time the application for judicial review is heard. Even if that might be the case, the Court could nevertheless hear the application, as has been recognized since the Supreme Court of Canada's decision in *Borowski v. Canada*, [1989] 1 SCR 342 [*Borowski*]. In

fact, *Borowski* established the framework for applying the doctrine of mootness. Mr. Borowski had initiated an action before the courts of Saskatchewan 11 years earlier, submitting that the provisions of the *Criminal Code* (section 251) regarding abortion infringed upon the rights of the fetus. Meanwhile, the Supreme Court had ruled that section 251 of the *Criminal Code* violated section 7 of the Charter. The result was that all disputes regarding section 251 of the *Criminal Code* were no longer applicable. That situation gave the Supreme Court the opportunity to elaborate on the issue of mootness and on the possibility of hearing the remedy regardless.

[15] When the case raises only one hypothetical or abstract issue, the courts may decide not to hear it "when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties" (page 353). The Court continued by stating that ". . . if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot" (page 353).

[16] As of March 16, 2017, the dispute between Ms. McKenzie and the Conseil is in no way moot. The person holding the disputed position, who was supposed to have the position for a period of only three months, is still in the position nearly six months after the reported hiring date. Depending on what happens following the public announcement that the position must be filled, the issue may become moot by the time the judicial review is heard by our Court. But that is certainly not guaranteed.

[17] Moreover, in *Borowski*, the Court stated that even if the case has become moot, it may nevertheless be decided through the exercise of a restricted discretion. However, the courts insist

that the dispute still be rooted in the adversary system. In fact, "[t]he requirement of an adversarial context is a fundamental tenet of our legal system and helps guarantee that issues are well and fully argued by parties who have a stake in the outcome" (pages 358–359). The Court recognizes that collateral consequences of the outcome of the original dispute, which no longer exists, may provide the necessary adversarial context. There may be collateral considerations that justify the hearing of a case, even though the "live controversy" no longer exists. Thus, it could be found that it would be useful to determine the rules governing the hiring of temporary staff or even that the hiring of the position holder was fatally flawed.

[18] In this case, it is not possible to predict how things will proceed. However, it would be up to the parties to debate before the judge hearing the judicial review the reason for pursuing the dispute based on the developments that occur between now and the day of the hearing. Even if the issue were to become moot, discretion could be exercised to hear the remedy regardless, as long as a true adversarial debate may take place and the resolution of the issue can be useful. What we know is that, to date, the issue is not moot because the person who was hired for a three-month period is still in the position six months later. We do not know whether that person will be considered for the permanent position. Therefore, we will need to see what the result of a search for the right candidate would have been after advertising the opening to fill the position on a more permanent basis.

[19] I therefore conclude that the application for judicial review must not be dismissed at this preliminary stage.

[20] It is the Conseil that filed the motion and sought its costs. Since the motion is dismissed, the Conseil is obviously not entitled to costs. Moreover, Ms. McKenzie did not seek costs in the event that she would be the successful party before the Court. Under these circumstances, no costs will be awarded.

IV. Extension of time for the motion to strike

[21] Another motion, filed in this same case, was heard. This motion was a [TRANSLATION] "motion to extend time limits" filed by the respondent.

[22] It appears that the respondent tried to serve two affidavits in support of its motion to strike Ms. McKenzie's application for judicial review. One of the affidavits was that of the position holder. The other comes from a resident of Matimekush-Lac John to try to establish the facts surrounding the hiring of the position holder. However, the two affidavits could not be filed before the Registry in Québec closed on February 8, 2017, which was the time limit for doing so. Thus, the motion record could not be filed before February 9. The respondent is seeking an extension of that time limit that expired on February 8.

[23] Instead of an extension by consent, as rule 7 expressly allows, counsel for the applicant chose not to oppose it, forcing the respondent to file a proper motion. Why consent was not granted has not been revealed.

[24] The Court ordered the extension of time from the bench, without costs, which allowed for the motion to strike to be heard.

V. Closing remarks

[25] I must remind the parties that, in matters of judicial review, expeditiousness is the rule: cases must be determined promptly (*Philipos v. Canada (Attorney General)*, 2016 FCA 79). I have not been convinced that it would not have been preferable to make the arguments that were made in this case during the judicial review hearing. The issues of necessary standing, mootness and the conditions to be met to obtain a *mandamus* are all issues that can be raised at the judicial review hearing. The issues of time limits, if they are raised, require more than the evidence submitted by affidavit in our case, which does not make it possible to determine the case on the basis of the "bereft of any possibility of success" standard. The parties would benefit from getting this case back on course to settle it as soon as possible, rather than seeking to be litigious.

[26] I will cite the following passage from *David Bull Laboratories*, which clearly illustrates the principle that objections to the originating notice should be decided at the hearing on the merits:

> In fact, the disposition of an originating notice proceeds in much the same way that an application to strike the notice of motion would proceed: on the basis of affidavit evidence and argument before a single judge of the Court. Thus, the direct and proper way to contest an originating notice of motion which the respondent thinks to be without merit is to appear and argue at the hearing of the motion itself. This case well illustrates the waste of resources and time in adding on to what is supposed to be a summary judicial review proceeding the process of an interlocutory motion to strike. This motion to strike has involved a hearing before a trial judge and over one half day before the Court of Appeal, the latter involving the filing of several hundred pages of material, all to no avail. The originating notice of motion itself can and will be dealt with definitively on its merits at a hearing before a judge of the Trial Division now fixed for January 17, 1995.
>
> (page 597)
>
> [Emphasis added]

ORDER

CONSEQUENTLY, THE COURT ORDERS that:

1. The motion to extend the time for filing the motion to strike is allowed, without costs;

2. Proceeding to decide on the respondent's motion to strike, the motion to strike the application for judicial review is dismissed, the whole without costs.

"Yvan Roy"
Judge

Certified true translation
This 2nd day of October 2019

Lionbridge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2149-16
STYLE OF CAUSE:	MARTINE MCKENZIE v. CONSEIL DE LA NATION INNU MATIMEKUSH-LAC JOHN
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