Federal Court of Appeal  Cour d'appel fédérale

**Date: 20181015**

**Docket: A-211-17**

**Citation: 2018 FCA 187**

**CORAM:** **RENNIE J.A.**
**DE MONTIGNY J.A.**
**WOODS J.A.**

**BETWEEN:**

**MATTHEW G. YEAGER**

**Appellant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

Heard at Ottawa, Ontario, on September 4, 2018.

Judgment delivered at Ottawa, Ontario, on October 15, 2018.

REASONS FOR JUDGMENT BY: RENNIE J.A.

CONCURRED IN BY: DE MONTIGNY J.A.
WOODS J.A.

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## REASONS FOR JUDGMENT

**RENNIE J.A.**

[1] The appellant, Dr. Matthew G. Yeager, appeals from a decision of the Federal Court (2017 FC 577 *per* Gleeson J.), denying his application for judicial review of a decision by the Correctional Service of Canada (CSC) not to allow him to attend an event held in various federal prisons in Ontario during the week of June 20, 2016.

[2] The facts giving rise to the application for judicial review can be briefly summarized.

[3] The John Howard Society organizes an annual pre-release event or "fair" for inmates in several Ontario prisons. According to the warden of one participating prison, the fair is an "opportunity for offenders to meet with community halfway houses and other community support services in order to establish contact with potential support for their release." Prospective attendees must be approved by the CSC.

[4] The appellant is a criminologist and professor who last attended the fair in 2013. According to the appellant, he "provide[s] convicts with information about parole, parole preparation, representation at parole hearings, and collateral matters which impact upon release; disciplinary charges, segregation, classification, security scores, and ISO matters."

[5] In 2015, the appellant's application to participate in the pre-release fair was denied by the Institutional Heads on the basis that he presented a security concern and, with respect to one Institution, that the information the appellant would provide was not within the fair's purpose (the 2015 Decision).

[6] The appellant reapplied in 2016. He also filed an application for judicial review of the 2015 Decision as well as a motion seeking an interlocutory injunction granting him access to the premises of five Ontario prisons during the 2016 pre-release fair.

[7] The Federal Court (*per* Roy J.) dismissed the motion for an interlocutory injunction (*Madeley v. Canada (Public Safety and Emergency Preparedness)* 2016 FC 634). Relying on an

affidavit from Mr. Miguel Costa, a Senior Project Officer with the CSC, Justice Roy concluded that the purpose of the pre-release fair did not encompass the parole issues to which the appellant's services related. Soon thereafter, Mr. Costa denied the appellant's 2016 application on the basis that his services were inconsistent with the purpose of the fair (the 2016 Decision).

[8] The appellant then discontinued his application for judicial review of the 2015 Decision and filed a new application for judicial review of the 2016 Decision. This new application sought to set aside the 2016 Decision as well as an order of *mandamus* directing the CSC to accept his application to attend future pre-release fairs provided he complies with normal security measures.

[9] In denying the appellant's application for judicial review of the 2016 Decision, the Federal Court judge made four key findings: (1) judicial review of the 2016 Decision was moot because the 2016 pre-release fair was over; (2) exercise of the Court's discretion to hear the matter despite it being moot was not justified; (3) two affidavits submitted by the appellant were inadmissible pursuant to this Court's decision in *Assn. of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency*, 2012 FCA 22 at paragraphs 19-20, 428 N.R. 297 (*Assn. of Universities*); and (4) grant of *mandamus* was not warranted.

[10] On the question of mootness, the judge found that the fact-based nature of the decision under review rendered any decision of the Court of limited guidance to the parties moving forward, notwithstanding an ongoing adversarial relationship between the parties and concern over the timing of judicial review (at paras. 25-26). The judge was also not persuaded by

systemic procedural fairness concerns raised by the appellant since these concerns could not be supported by the record (at para. 27).

[11] Two affidavits submitted by the appellant to supplement the record were excluded on the basis that they were not before the decision-maker and none of the exceptions set out in *Assn. of Universities* applied. Additionally, the affidavit of Lisa Finateri (Finateri affidavit) contained evidence going to the merits of the matter and to the reasonableness of the decision under review. The affidavit of Dawn Moore (Moore affidavit), meanwhile, did not identify procedural defects nor was its contents confined to the affiant's personal knowledge, as required by sub-rule 81(1) of the *Federal Courts Rules*.

[12] The judge denied the request for an order of *mandamus* in the absence of a legal duty on the CSC or a clear legal right of the appellant to attend the pre-release fair, as required under the test set out in *Lukács v. Canada (Transportation Agency)*, 2016 FCA 202, at paragraph 29, 488 N.R. 395 (*Lukács*).

## I. Analysis

[13] The Federal Court judge identified the correct test for mootness, and his reasons would, in the ordinary course, survive challenge on appeal. However, at the hearing of this appeal counsel advised the Court that the appellant's request to attend the 2017 and 2018 events were also denied. This information was not before the Federal Court judge, and in our view, had it been, would have had an impact on the application of discretion with respect to mootness. I say that for two reasons.

[14] First, it is clear that while the 2016 matter is moot and that the Court could give no effective remedy in respect of that year, there remains an ongoing controversy between the parties. The dispute may be dormant, but based on the record before us there are live issues between the parties. While it is correct that there is currently no extant request to attend, there is an ongoing dispute between the parties which will, in all probability, reoccur in the spring of 2019. There are no economies or savings to be had, which is one of the objectives of mootness doctrine.

[15] The second consequence is that given the timing of the application and the decision, future applications for judicial review are also likely to be moot. The time between the request to attend and the event itself is at best 90 days, and in this case the decision of CSC rejecting the applicant's request to attend was received only two days prior to the event. Unless future decisions are made on a timelier basis, and the ensuing judicial review application is dealt with on a highly expedited basis, including the delivery of the decision, the question in dispute between the parties will be evasive of review.

[16] For these reasons, I would allow the appeal in respect of mootness.

[17] The appellant also challenges the finding of the judge that the two affidavits filed in support of the application were inadmissible. I would allow the appeal in this respect.

[18] I agree with the appellant that the judge erred in excluding the Moore affidavit on the basis that he did. Rule 81, which requires personal knowledge by affiants, does not apply in the case of experts (*Canada (Board of Internal Economy) v. Canada (Attorney General)*, 2017 FCA

43 at para. 17, 412 D.L.R. (4th) 336). The admissibility of expert evidence will turn on its relevance, necessity, the absence of an exclusionary rule and the proper qualification of the expert (see *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 at paras. 23-24, [2015] 2 S.C.R. 182). If admitted, these factors are also properly considered in the weight afforded to it. However, to the extent an affiant expresses a *legal* opinion or argument, the paragraphs are inadmissible and should be struck.

[19] The second ground for allowing the appeal in respect of the affidavits lies in the finding that the affidavits were deficient for failing to provide evidence relating to systemic concerns, such as bias. On this point, the respondent submits that the failure to make an express allegation of bias militates against admissibility.

[20] I can find no authority that such a statement is necessary. To the contrary, as noted in *Canada (Attorney General) v. Quadrini*, 2010 FCA 47 at paragraph 18, 399 N.R. 33, an affidavit is required "to adduce facts relevant to the dispute without gloss or explanation." In my view, an express allegation of bias or lack of procedural fairness would provide such gloss and would necessarily be beyond the personal knowledge of the affiant. Affiants are to set out the facts which are known to them, and it is for their counsel to contend that bias, actual or perceived, is established, or that the facts demonstrate a breach of procedural fairness.

[21] Finally, the judge found that the admissibility of the affidavits was affected because they had not been put before the decision-maker, in this case, the CSC official who was responsible for approving attendance at the event. This relates to the well-established principle that "[a]llegations of bias are most serious and must be raised clearly at the earliest possible time"

(*International Relief Fund for the Afflicted and Needy (Canada) v. Canada (National Revenue)*, 2013 FCA 178 at para. 19, 449 N.R. 95).

[22] The fact that the affidavits were not put before the CSC official is not a reason to deny their admissibility. The request to attend involves submitting a prescribed form. There is no requirement to file supplementary materials in support of the request to attend nor is there an opportunity to respond to a refusal. Indeed, it would be strange if an applicant in making a routine, administrative application should be required to anticipate rejection and bolster their application in advance with affidavits.

[23] In these circumstances, I would return the question of the affidavits to the judge for reconsideration on the basis of the correct legal test. In so doing, I wish to be clear that I am expressing no opinion whether, when considered in light of the tests, including *Assn. of Universities*, the affidavits are admissible in whole or in part, and, if admissible, what weight is to be given to them. These questions – admissibility and weight – are for the judge to determine.

[24] While not strictly necessary to do so, given that this matter will be returned to the applications judge, I will address the appellant's contention that the judge erred in refusing an order of *mandamus*. In my view, the judge made no error in his analysis or application of the relevant law.

[25] The appellant submits that the CSC bears a statutory obligation under section 5 of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 (CCRA) to involve itself in the educational programming of inmates, including parole education. The respondent argues that

irrespective of whether section 5 of the CCRA creates an obligation on the CSC in respect of educational programming this cannot be interpreted as creating a statutory duty that is owed to the appellant or providing a clear right of the appellant to attend the pre-release fair.

[26] The judge considered the import of section 5 of the CCRA insofar as it compels positive action by the CSC (at para. 41). He found that section 5 broadly defines the duties and responsibilities of the CSC, but that it could not be interpreted as imposing a duty to provide specific educational programming or to involve specific individuals in such programming. There exists no clear right of the appellant to participate in the pre-release fair nor is the CSC in anyway compelled to allow him to participate (at paras. 41-42). I see no error in the judge's analysis.

[27] I would therefore allow the appeal with costs and return the matter, including the question of the admissibility of the affidavits, to the judge for reconsideration based on these reasons.

"Donald J. Rennie"
J.A.

"I agree
Yves de Montigny J.A."

"I agree
Judith Woods J.A."

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**APPEAL FROM A JUDGMENT OF THE FEDERAL COURT DATED JUNE 13, 2017, NO. T-1146-16 (2017 FC 577)**

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|---|---|
| **DOCKET:** | A-211-17 |
| **STYLE OF CAUSE:** | MATTHEW G. YEAGER v. ATTORNEY GENERAL OF CANADA |
| **PLACE OF HEARING:** | OTTAWA, ONTARIO |
| **DATE OF HEARING:** | SEPTEMBER 4, 2018 |
| **REASONS FOR JUDGMENT BY:** | RENNIE J.A. |
| **CONCURRED IN BY:** | DE MONTINGY J.A.<br>WOODS J.A. |
| **DATED:** | OCTOBER 15, 2018 |

**APPEARANCES:**

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|---|---|
| Yavar Hameed | FOR THE APPELLANT |
| Kevin Palframan<br>Sean Stynes | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

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