

Federal Court of Appeal



Cour d'appel fédérale

Date: 20220511

Docket: A-98-20

Citation: 2022 FCA 79

**CORAM: RIVOALEN J.A.
LOCKE J.A.
MONAGHAN J.A.**

BETWEEN:

KONSTANTINOS XANTHOPOULOS

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Vancouver, British Columbia, on May 11, 2022.
Judgment delivered from the Bench at Vancouver, British Columbia, on May 11, 2022.

REASONS FOR JUDGMENT OF THE COURT BY:

LOCKE J.A.

Federal Court of Appeal



Cour d'appel fédérale

Date: 20220511

Docket: A-98-20

Citation: 2022 FCA 79

**CORAM: RIVOALEN J.A.
LOCKE J.A.
MONAGHAN J.A.**

BETWEEN:

KONSTANTINOS XANTHOPOULOS

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT OF THE COURT

(Delivered from the Bench at Vancouver, British Columbia, on May 11, 2022).

LOCKE J.A.

[1] The appellant, Konstantinos Xanthopoulos, is a former officer with the Royal Canadian Mounted Police (RCMP). He resigned in 2019 after a ruling by the RCMP Conduct Board that he had contravened the RCMP's Code of Conduct, and that, in default of his resignation, it would recommend that he be discharged.

[2] The appellant filed an application in the Federal Court for judicial review of the Conduct Board's decision. The respondent, the Attorney General of Canada, moved to strike the application as premature because a statutory right of appeal from the Conduct Board's decision was available to the appellant. This motion was granted by Justice Roger R. Lafrenière (2020 FC 401) and the application for judicial review was struck. Justice Lafrenière (hereinafter the Motion Judge) also awarded costs in the amount of \$4,000. The appellant now appeals from this decision.

[3] As stated, this is an appeal of a decision striking an application for judicial review for prematurity. It is not a ruling on the merits of the application itself or the Conduct Board's decision. Accordingly, the applicable standard of review is the normal appellate standard as set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235: correctness on issues of law, and palpable and overriding error on issues of fact or of mixed fact and law in which there is no extricable issue of law. As stated in *Canada v. South Yukon Forest Corporation*, 2012 FCA 165 at para. 46:

“Palpable” means an error that is obvious. “Overriding” means an error that goes to the very core of the outcome of the case. When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall.

[4] At paragraph 16 of his reasons, the Motion Judge noted “the well-established principle that, absent exceptional circumstances, a party must exhaust all adequate remedial administrative processes before resorting to a judicial remedy.” In support of this principle, he cited *Forner v. Professional Institute of the Public Service of Canada*, 2016 FCA 35 at para. 13; and *Canada (Border Services Agency) v. C.B. Powell Limited*, 2010 FCA 61 at paras. 30-31. To these

authorities might now be added the recent decision in *Dugré v. Canada (Attorney General)*, 2021 FCA 8 at paras. 34-37. Paragraph 37 of *Dugré* described this principle as “next to absolute.”

[5] The appellant acknowledges that a statutory right of appeal from the Conduct Board’s decision exists. However, the appellant contends that the process is unfair and subject to excessive delays such that it is inadequate. He argues that the Motion Judge erred in failing to consider whether this contention establishes exceptional circumstances to excuse the issue of prematurity.

[6] The Motion Judge recognized the appellant’s criticism of the statutory appeal process but considered it “nothing more than a bald statement,” with no supporting facts asserted in the notice of application. The Motion Judge also considered evidence submitted by the appellant of the experiences of others with the statutory appeal process, but noted the absence of evidence relating those experiences to the appellant’s circumstances. The Motion Judge concluded that there were no exceptional circumstances that could overcome the respondent’s prematurity objection.

[7] The appellant argues that the Motion Judge erred in failing to treat contents of the application as true on the motion to strike. We see no error in the Motion Judge’s refusal to do so in view of a distinction between factual allegations and a bald statement. The appellant’s statement in the notice of application that the statutory appeal process is not an adequate remedy is a legal conclusion that is not supported by any factual allegations. It is hence a bald statement that need not be treated as true: see *Canada v. John Doe*, 2016 FCA 191 at para. 23. The

appellant has not persuaded us that he was denied procedural fairness by the Motion Judge's analysis on this point. Moreover, the notice of appeal, which should identify all grounds of appeal (see Rule 337 of the *Federal Courts Rules*, S.O.R./98-106), raises no allegation of denial of procedural fairness.

[8] The appellant also argues that the Motion Judge erred in failing to recognize that exceptional circumstances can overcome a prematurity objection. We disagree. The Motion Judge clearly recognized this exception in his description of the principle, as quoted above from paragraph 16 of his reasons. In addition, his analysis of the appellant's "bald statement" and the evidence he submitted was solely with regard to the question of whether exceptional circumstances existed by virtue of the inadequacy of the statutory appeal process.

[9] Further, the appellant argues that the evidence before the Motion Judge should have led him to find that exceptional circumstances exist in this case. The Motion Judge's application of this evidence to the question of exceptional circumstances is an issue of mixed fact and law. We are not persuaded that there is any palpable and overriding error in the Motion Judge's reasons on this issue that would justify our intervention.

[10] Still further, the appellant argues that he was improperly denied the assistance in this matter of an RCMP member familiar with the RCMP administrative process. There are several problems with this argument. First, the transcript to which the appellant refers is not in the appeal book, and hence is not on the record before this Court. Second, there is no mention of this issue in the notice of appeal. Third, Rule 119 of the *Federal Courts Rules* provides that "an individual

may act in person or be represented by a solicitor in a proceeding,” and the appellant has not persuaded us that special circumstances existed to override this rule and allow him to be represented by a lay person. Fourth, it was a separate decision of the Motion Judge that denied the appellant’s request to be represented by a lay person: 2019 FC 1609. That decision was not appealed.

[11] The final issue concerns the costs awarded by the Motion Judge. Based on a comparison with other costs awards, the appellant argues that the \$4,000 award was excessive. I should note first that most of the comparator cases cited by the appellant did not concern motions to strike for prematurity. On the question of costs, that is an important distinction. In addition, as recognized by the appellant, costs awards are discretionary. Per *MacFarlane v. Day & Ross Inc.*, 2014 FCA 199 at para. 5, “it is settled law that a trial judge is entitled to considerable discretion in setting costs and that a costs award will not easily be set aside on appeal.” It is also important to note that the costs award by the Motion Judge concerned several different matters: the respondent’s motion to strike (including the appellant’s voluminous responding motion record), the appellant’s motion to be represented by a lay person, and the underlying application for judicial review.

[12] The Motion Judge adequately explained his reasoning in determining costs. Even if the amount seems high, it was an amount that was open to the Motion Judge. We will not interfere with it.

[13] For the foregoing reasons, we will dismiss the present appeal. Given the amount of costs that have already been awarded, we will exercise our discretion not to award costs in the present appeal.

"George R. Locke"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-98-20

STYLE OF CAUSE: KONSTANTINOS
XANTHOPOULOS v.
ATTORNEY GENERAL OF
CANADA

PLACE OF HEARING: VANCOUVER, BRITISH
COLUMBIA

DATE OF HEARING: MAY 11, 2022

**REASONS FOR JUDGMENT OF THE COURT
BY:** RIVOALEN J.A.
LOCKE J.A.
MONAGHAN J.A.

DELIVERED FROM THE BENCH BY: LOCKE J.A.

APPEARANCES:

KONSTANTINOS XANTHOPOULOS FOR THE APPELLANT
(ON HIS OWN BEHALF)

Susanne Pereira FOR THE RESPONDENT
Courtenay Landsiedel

SOLICITORS OF RECORD:

A. François Daigle FOR THE RESPONDENT
Deputy Attorney General of Canada