Federal Court  Cour fédérale

Date: 20220107

Docket: T-1843-19

Citation: 2022 FC 16

Ottawa, Ontario, January 7, 2022

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

VIAGUARD ACCU-METRICS LABORATORY

Applicant

and

STANDARDS COUNCIL OF CANADA

Respondent

ORDER AND REASONS

I. Nature of the Matter

[1] The Respondent, Standards Council of Canada [SCC], brings a motion for:

(a) an order pursuant to Rule 221 of the *Federal Courts Rules*, (SOR/98-106) [*Rules*] striking the Notice of Application filed by the Applicant, Viaguard Accu-metrics Laboratory [Viaguard], on November 12, 2019;

(b) costs of this motion; and

(c) such further and other relief as this Honourable Court may deem just.

II. Background

[2] On May 26, 2014, Viaguard entered into a Licence Agreement and an Accreditation Agreement with the SCC. The Licence Agreement granted Viaguard a licence to display the SCC's accreditation mark to indicate that Viaguard is accredited by the SCC. The Accreditation Agreement incorporates by reference several documents including the SCC's "Policy for the Suspension and Withdrawal of Accreditation and the Resolution of Complaints and Appeals" [Appeals Policy].

[3] Section 7.1.6 of the Appeals Policy provides that if, following an appeal to the SCC, an organization remains unsatisfied with the SCC's decision, it may file a complaint against the SCC with the International Accreditation Forum [IAF] or the International Laboratory Accreditation Corporation [ILAC]. In this particular matter, the only relevant body is ILAC.

[4] ILAC's Complaints Procedure provides that if a complaint is made against an accreditation body (in this case, the SCC), the complaint must be submitted to the relevant Regional Cooperation Body. In this case, the relevant Regional Cooperation Body is the Asia Pacific Accreditation Cooperation [APAC] and the Inter American Accreditation Cooperation [IAAC]. Both APAC and IAAC have procedures for handling complaints against a Regional Cooperation Body like the SCC. The procedures of both APAC and IAAC provide for

independent investigation and the completion of a final report, which may include recommendations and corrective actions. The SCC would then need to comply with the outcomes of either body in relation to any complaints filed against it.

[5] On September 15, 2017, the SCC suspended Viaguard's accreditation. Viaguard appealed the suspension to the SCC's Governing Council. The SCC's Governing Council dismissed the appeal on December 6, 2017 [the 2017 Decision]. Viaguard did not appeal the 2017 Decision in accordance with the Appeals Policy.

[6] Viaguard sought judicial review of the 2017 Decision. On June 5, 2018, the Federal Court struck the application on the grounds that Viaguard had failed to exhaust available adequate alternative remedies by not following ILAC's procedures as set out in the Appeals Policy and the Accreditation Agreement [2018 FC Order].

[7] Viaguard took no further action except to apply for reinstatement with the SCC on February 12, 2018. On January 23, 2019, Viaguard's President asked ILAC whether, upon receiving a complaint, ILAC could order the reversal of the suspension. ILAC replied on January 30, 2019 that it does not reverse the decisions of accreditation bodies and it referred Viaguard to the Appeals Policy.

[8] Prior to issuing its decision on Viaguard's reinstatement, the SCC became aware of inaccurate and misleading claims by Viaguard regarding SCC accreditation. The SCC brought these to Viaguard's attention and Viaguard responded.

[9] On June 14, 2019, the SCC refused Viaguard's reinstatement [2019 Reinstatement Decision].

[10] On July 25, 2019, Viaguard advised the SCC of its intent to appeal the 2019 Reinstatement Decision. On October 11, 2019, the SCC's Governing Body, acting on the recommendation of the assigned action officer, dismissed Viaguard's appeal [2019 Appeal Decision].

[11] Viaguard may have attempted to file a complaint directly with ILAC on October 24, 2019 but ILAC advised Viaguard that it should first file a complaint with the relevant Regional Cooperative Body (either APAC or IAAC). Viaguard has not filed a complaint with either APAC or IAAC.

[12] On November 12, 2019, Viaguard commenced this application for judicial review challenging the 2019 Reinstatement Decision and the 2019 Appeal Decision.

[13] The SCC has moved for an order pursuant to Rule 221 of the *Rules* striking the Notice of Application on the grounds that Viaguard has not exhausted all adequate administrative remedies available and that the application is barred as a consequence of issue estoppel and *res judicata*.

III. Issues

[14] The issues are:

1) Should the Notice of Application be struck on the basis that it is premature, in that Viaguard has not exhausted all adequate administrative remedies available?

2) Is the issue of prematurity subject to issue estoppel and *res judicata*?

IV. Analysis

A. *Should the Notice of Application be struck on the basis that it is premature, in that Viaguard has not exhausted all adequate administrative remedies available?*

(1) The Test for a Motion to Strike

[15] The parties agree that this Court has jurisdiction to strike a notice of application for judicial review on a preliminary motion (*Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc*, 2013 FCA 250 at para 48). The parties also agree that motions to strike play an important role in removing unmeritorious cases from the court system and allow for modern litigation to proceed to resolution more efficiently (*Forner v Professional Institute of the Public Service of Canada*, 2016 FCA 35 at para 10 citing *Hryniak v Mauldin*, 2014 SCC 7).

[16] The Chief Justice in *Watts v Canada (Revenue Agency)*, 2019 FC 1321 [*Watts*] summarized the test to be applied on a motion to strike at paragraphs 14 and 15:

> A motion to strike an application in this Court will only be granted where it is "plain and obvious" that the application is "bereft of any possibility of success," assuming the facts alleged in the application are true: *Windsor (City) v Canadian Transit Co*, 2016 SCC 54, [2016] 2 SCR 617, at paras 24 and 72; *Canada (Minister of National Revenue) v JP Morgan Asset Management (Canada) Inc*, 2013 FCA 250, at paras 47 and 52 [*JP Morgan*]; *Chrysler Canada Inc v Canada*, 2008 FC 727, aff'd 2008 FC 1049, at para 20.

> In considering such motions, the initiating pleadings should be read as generously as possible, in a manner that accommodates any inadequacies in the allegations that are merely the result of drafting deficiencies: *Operation Dismantle Inc v Canada*, [1985] 1 SCR 441, at para 14; *Amnesty International Canada v Canada (Minister of National Defence)*, 2007 FC 1147 at para 33; *Toyota Tsusho America Inc v Canada (Border Services Agency)*, 2010 FC 78 at para 13, aff'd 2010 FCA 262.

[17] The parties agree that this is the applicable test. Below, I apply these principles to the circumstances before me.

(2) Adequate Alternative Administrative Remedies

[18] The SCC submits that all adequate recourse in the administrative process must be exhausted before a party can seek judicial review (*Canada Border Services Agency) v CB Powell Limited*, 2010 FCA 61 at paras 30-31).

[19] Viaguard submits that it has already exhausted all of the contractual administrative effective remedies because the complaint process to a Regional Cooperative Body is neither applicable, nor would it be effective. It further submits that no right of appeal exists in the ILAC procedure.

[20] Viaguard also submits that the 2018 FC Order dealt with a suspension of its accreditation arising from alleged breaches of the Accreditation Agreement and was based on the premise that Viaguard had failed to pursue an appeal to ILAC. By contrast, in the present matter, Viaguard points to a January 30, 2019 email where ILAC responded to Viaguard's President. ILAC wrote, "ILAC does not get involved in reversing decisions associated with suspensions of accredited

facilities.” Therefore, Viaguard argues that the 2018 FC Order is not determinative of the present matter due to a different factual matrix.

[21] I disagree with Viaguard. In Viaguard’s written submissions responding to this motion it acknowledged that it had not filed a complaint, as was communicated by the Chief Executive Officer of the SCC. Viaguard states that it is seeking judicial review because a final decision from the SCC is not an effective remedy. In my view, this is simply Viaguard’s own belief. Viaguard has not tested the complaint process to ILAC as set out in the Appeals Policy. There is a process to be followed based on the Licence Agreement and the Accreditation Agreement, which may lead to an effective remedy. Without availing itself of that process one cannot determine if the process will lead to an effective remedy. Viaguard must first exercise its rights under those processes before seeking to challenge such processes before this Court.

B. *Is the issue of prematurity subject to issue estoppel and* res judicata*?*

(1) Issue Estoppel and *Res Judicata*

[22] Neither party cited any authority for whether the issue of prematurity is subject to issue estoppel. I find that, whether or not there is an adequate alternate remedy, the issue of prematurity is still subject to issue estoppel or *res judicata* if the same factual matrix exists in a separate proceeding. This is the circumstance in the present matter. The factual matrix in the 2018 FC Order is the same as the current application for judicial review.

[23] The parties agree that the appropriate test for the application of the principles for *res judicata* and issue estoppel was enunciated by the Chief Justice in *Watts* at paragraphs 17-19:

> The doctrine of *res judicata* is premised on the principle that a litigant "is only entitled to one bite at the cherry": *Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44, [2001] 2 SCR 46, at para 18 [*Danyluk*]. Put differently, once an issue has been decided, it "should not generally be re-litigated to the benefit of the losing party and the harassment of the winner": *Danyluk*, above.
>
> There are two steps to the Court's approach to the issue estoppel form of *res judicata*. In the first, the Court determines whether the following three preconditions to the application of the doctrine are met:
>
> > i. the same issue must have been previously decided;
> >
> > ii. the prior decision that is said to create the estoppel must have been final; and
> >
> > iii. the parties to the prior decision (or their representatives) must be the same as the parties to the proceedings in which the doctrine of issue estoppel is being raised.
>
> *Danyluk*, above at para 25.
>
> In the second step, the Court assesses whether to exercise its discretion to apply issue estoppel.

[24] Viaguard submits that the three conditions are not satisfied because, even though the parties are the same, the facts giving rise to the cause of action are different and the same question has not been decided by the 2018 FC Order. Viaguard submits that ILAC's procedures through the Regional Cooperative Bodies have denied it natural justice and procedural fairness and that, because of ILAC's January 30, 2019 email, the effect of any complaint to ILAC would be entirely nugatory and not an effective remedy. As a result, there is no issue estoppel and the Notice of Application is not premature and should not be struck.

[25] Accordingly, Viaguard submits that the filing of a complaint with ILAC fails to meet the standard that the remedy is "adequate in all circumstances to address the applicant's grievance" (*Strickland v Canada (Attorney General)*, 2015 SCC 37 at para 42).

[26] The SCC submits that doctrines of *res judicata*, issue estoppel, and abuse of process "bar arguments being advanced in a later, second proceeding when they were raised and decided in a first proceeding or could have been raised in that first proceeding" (*Raincoast Conservation Foundation v Canada (Attorney General)*, 2019 FCA 224 at para 24).

[27] The SCC also submits that *res judicata* includes the doctrine of issue estoppel, which precludes the re-litigation of the same issue between the same parties, even though the issue arises in the context of a different cause of action (*Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44 at para 24 [*Danyluk*]).

[28] I find that the matter is subject to issue estoppel and/or *res judicata*. In assessing the first pre-condition under the first step, the issue in this matter has already been decided in the 2018 FC Order. Viaguard submits that a complaint to ILAC would, at most, only address whether the SCC followed its own procedures in refusing to re-accredit Viaguard. At the same time, Viaguard states that those procedures failed to afford it natural justice and procedural fairness.

[29] In my view, Viaguard has not sufficiently demonstrated that its rights to procedural fairness and natural justice have been breached. The Court would require evidence of those breaches by the misapplication of the Appeals Policy or in some other manner in how its appeal

or complaint was dealt with. However, in this case, there was no appeal or complaint brought by Viaguard in accordance with the Appeals Policy. The 2018 FC Order, which was not appealed, confirmed that such process was to be followed. It was not.

[30] As for the second pre-condition, I agree with the SCC that the 2018 FC Order is a final order, which was not appealed. The 2018 FC Order addressed the process to be followed under the Appeals Policy. The findings in the 2018 Order were clear. I find that the second pre-condition is satisfied in the present matter.

[31] Finally, the third pre-condition is also satisfied since the parties are the same.

[32] Turning to the second step, the exercise of this Court's jurisdiction, it is incumbent on the Court to consider whether there is anything about the circumstances of this case that would give rise to an injustice if I were to apply the doctrine in the SCC's favour (*Watts* at para 33, citing *Danyluk* at 63-67). In my view, no such injustice would arise by precluding Viaguard from raising the same issue that was addressed in the 2018 FC Order. Viaguard had an opportunity to appeal the 2018 FC Order but it chose not to. Viaguard has not identified anything about the circumstances that gave rise to this application that suggests the possibility of an injustice resulting from the application of the doctrine of *res judicata*.

V. Conclusion

[33] For all of the above reasons, the motion is granted. I find that it is plain and obvious that Viaguard's application is bereft of any possibility of success. Accordingly, Viaguard's application shall be struck in its entirety.

[34] At the conclusion of the hearing, I granted the parties an opportunity to make written submissions on costs.

[35] Justice Sébastien Grammond summarized the principles surrounding the awarding of costs in *Whalen v Fort McMurray No 468 First Nation*, 2019 FC 1119 [*Whalen*]. There, he relied on *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71 in setting out the following principles related to the awarding of costs at paragraphs 3-5:

> The first and more traditional goal of costs awards is the indemnification of the successful party. […]
>
> Thus, costs awards provide incentives to make rational use of scarce judicial resources. […] Likewise, costs awards are thought to discourage frivolous or vexatious lawsuits, because litigants who bring such lawsuits know they will have to indemnify the defendant.
>
> Thirdly, costs awards have the potential of facilitating access to justice.

[36] In addition to these principles, Rules 400-422 of the *Rules* also apply. Rule 400(1) provides that the trial judge has full discretion on awarding costs. This discretion is to be exercised judicially. As well, the default mechanism for assessing costs is a tariff (*Whalen* at para 8).

[37] Other tools a Court has at its disposal are “solicitor and client costs”, used typically to sanction a party’s wrongful conduct in a proceeding, as well as lump sum awards, pursuant to Rule 400(4) of the *Rules* (*Whalen* at paras 10-11).

[38] In *Eurocopter v Bell Helicopter Textron Canada Ltée*, 2012 FC 842 [*Eurocopter*], Justice Luc Martineau stated: “the exercise of costs assessment involves an inescapable risk of arbitrariness and roughness on the part of the Court” (at para 9). This Order and Reasons is my attempt to be fair and not to create arbitrariness by applying the legal principles that guide the exercise of my discretion.

[39] The Court’s discretion to award costs is based on Rule 400. Rule 400(3) sets out several factors that the Court may take into account in awarding costs: (a) the result of the proceeding; (b) any conduct of a party that tended to shorten or unnecessarily lengthen the duration of the proceeding; and (c) whether any step in the proceeding was improper, vexatious, or unnecessary. Rule 400(6) also grants the Court discretion to award costs on a solicitor-client basis.

[40] After reviewing the parties’ submissions, I am not persuaded that there has been reprehensible conduct on Viaguard’s part to award solicitor-client costs. I am however, granting lump sum costs to SCC for a certain amount of its actual costs (*Sport Maska Inc v Bauer Hockey Ltd*, 2019 FCA 204 at para 50). Accordingly, in exercising my discretion under Rule 400 and guided by applicable principles, I award lump sum costs to SCC in the amount of $10,000.00.

ORDER in T-1843-19

THIS COURT ORDERS that:

1. The motion is granted. Viaguard's application is struck in its entirety.
2. Costs of the motion, hereby fixed in the amount of $10,000.00, inclusive of disbursements and taxes, shall be paid by Viaguard to the SCC.

"Paul Favel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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