Federal Court Cour fédérale

Date: 20231025

Docket: T-1389-23

Citation: 2023 FC 1417

[ENGLISH TRANSLATION]

Ottawa, Ontario, October 25, 2023

PRESENT: Mr. Associate Judge Benoit M. Duchesne

BETWEEN:

COMITÉ CHÔMAGE DE MONTRÉAL, ACTION CHÔMAGE DE QUÉBEC, CHÔMAGE ACTION - ABITIBI-TÉMISCAMINGUE NORD-DU-QUÉBEC, COMITÉ CHÔMAGE DU HAUT-RICHELIEU ET DU SUROÎT, MOUVEMENT ACTION CHÔMAGE - CHARLEVOIX, MOUVEMENT D'AIDE ET DE CONSULTATION SUR LE TRAVAIL

Applicants

and

EMPLOYMENT AND SOCIAL DEVELOPMENT CANADA

Respondent

ORDER

[1] Through a motion in writing under section 369 of the *Federal Courts Rules* (the Rules), the respondent is requesting that the Court dismiss the applicants' notice of application on the ground that the notice of application is doomed to fail (*JP Morgan Asset Management (Canada) Inc. v Canada (National Revenue)*, 2013 FCA 250 (CanLII), [2014] 2 FCR 557). The applicants

argue that their notice of application complies with legal requirements, is not doomed to fail, and that the motion to strike must be denied.

[2] For the reasons that follow, the respondent's motion is allowed, and the applicants' notice of application is dismissed without the possibility of amendment.

I. THE LAW APPLICABLE TO MOTIONS TO STRIKE NOTICES OF APPLICATION

[3] Justice Pentney clearly summarizes the law applicable to motions to strike a notice of application for judicial review at paragraphs 52 to 54 of *Regroupement des pêcheurs professionnels du sud de la Gaspésie v Listuguj Mi'gmaq First Nations*, 2023 FC 1206 (CanLII), as follows:

> [52] The leading decision on the test for motions to strike notices of application for judicial review in this Court is *JP Morgan Asset Management (Canada) Inc v Canada (National Revenue)*, 2013 FCA 250 [*JP Morgan*], where the Court of Appeal described the approach in the following way:
>
> > [47] The Court will strike a notice of application for judicial review only where it is "so clearly improper as to be bereft of any possibility of success" [footnote omitted]: *David Bull Laboratories (Canada) Inc. v Pharmacia Inc.*, 1994 CanLII 3529 (FCA), [1995] 1 FC 588 (CA), at page 600. There must be a "show stopper" or a "knockout punch"—an obvious, fatal flaw striking at the root of this Court's power to entertain the application: *Rahman v Public Service Labour Relations Board*, 2013 FCA 117, at paragraph 7; *Donaldson v Western Grain Storage By-Products*, 2012 FCA 286, at paragraph 6; *Hunt v Carey Canada Inc.*, 1990 CanLII 90 (SCC), [1990] 2 SCR 959.

> [48] There are two justifications for such a high threshold. First, the Federal Courts' jurisdiction to strike a notice of application is founded not in the rules but in the Courts' plenary jurisdiction to restrain the misuse or abuse of courts' processes: *David Bull*, above, at page 600; *Canada (National Revenue) v RBC Life Insurance Company*, 2013 FCA 50, 18 CCLI (5th) 263. Second, applications for judicial review must be brought quickly and must proceed "without delay" and "in a summary way": *Federal Courts Act*, above, subsection 18.1(2) and section 18.4. An unmeritorious motion—one that raises matters that should be advanced at the hearing on the merits—frustrates that objective.
>
> [53] In examining the notice of application for judicial review, the Court "must gain 'a realistic appreciation' of the application's 'essential character' by reading it holistically and practically without fastening onto matters of form…" (*JP Morgan* at para 50, citations omitted. See also: *Wenham v Canada (Attorney General)*, 2018 FCA 199 at paras 33–34; *Bernard v Canada (Attorney General)*, 2019 FCA 144 at para 33).
>
> [54] Affidavits are generally not admissible in support of motions to strike applications for judicial review, in large part because the flaw in the notice of application must be obvious and fatal. "A flaw that can be shown only with the assistance of an affidavit is not obvious" (*JP Morgan* at para 52). The facts alleged in a notice of application are taken to be true, assuming they are capable of proof in a court of law (*Turp v Canada (Foreign Affairs)*, 2018 FC 12 at para 20). Because an applicant is required to state the complete grounds in its notice of application, no affidavit is required to supplement its side of the matter. One exception to the bar on affidavits is that either side may file an affidavit which provides background information that is referred to and incorporated by reference in a notice of application (*JP Morgan* at para 54).

[4] Although the parties cite each of the decisions prior to *JP Morgan* in relation to the test that applies to a motion to strike a notice of application, they agree that case law requires that the notice of application be shown to be clearly improper to the point of having no chance of being allowed before the motion to strike is ordered. The Federal Court of Appeal's decision in

Wenham v Canada (Attorney General), 2018 FCA 199 ("*Wenham*") also confirms at para 33 that the applicable test, regardless of the words used to describe it, requires that it be plain and obvious that the notice of application is doomed to fail.

[5] At paragraph 36 of *Wenham*, the Federal Court of Appeal reminds us that an application for judicial review can be doomed to fail at any of the three stages of the application:

> [36] An application can be doomed to fail at any of the three stages:
>
> > I. *Preliminary objections*. An application not authorized under the *Federal Courts Act*, RSC, 1985, c. F-7, or not aimed at public law matters may be quashed at the outset: *JP Morgan* at para. 68; *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall*, 2018 SCC 26, [2018] 1 SCR 750; *Air Canada v Toronto Port Authority*, 2011 FCA 347, [2013] 3 FCR 605. Applications not brought on a timely basis may be barred: section 18.1(2) of the *Federal Courts Act*. Judicial reviews that are not justiciable may also be barred: *Hupacasath First Nation v Canada (Foreign Affairs and International Trade Canada)*, 2015 FCA 4. Other possible bars include res judicata, issue estoppel and abuse of process (*Danyluk v Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 SCR 460; *Toronto (City) v C.U.P.E.*, Local 79, 2003 SCC 63, [2003] 3 SCR 77), the existence of another available and adequate forum for relief (prematurity) (*Canada (Border Services Agency) v C.B. Powell Limited*, 2010 FCA 61, [2011] 2 FCR 332; *JP Morgan* at paras. 81-90) and mootness (*Borowski v Canada (Attorney General)*, 1989 CanLII 123 (SCC), [1989] 1 SCR 342).
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> > II. *The merits of the review*. Administrative decisions may suffer from substantive defects, procedural defects or both. Substantive defects are evaluated using the methodology in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190; procedural defects are evaluated largely by applying

> the factors in *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817. In certain circumstances, the application is doomed to fail at this stage right at the outset. For example, an application based on procedural defects that have been waived has no chance of success: *Irving Shipbuilding Inc. v Canada (Attorney General)*, 2009 FCA 116 (CanLII), [2010] 2 FCR 488, 2009 FCA 116.
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> III. *Relief.* In some cases, the relief sought is not available in law (*JP Morgan* at paras. 92-94) and so the application can be quashed in whole or in part on that basis.

[6] The written representations of the parties clearly demonstrate that this motion is one that raises a preliminary objection within the meaning of *Wenham*. A full understanding of what is sought and alleged in the notice of application is required.

II. THE NOTICE OF APPLICATION IN THIS CASE

[7] The applicants present their application as being an application for judicial review and an application for an interlocutory injunction. It is clear from reading the notice of application that the applicants are seeking declaratory relief that the applicants are entitled to obtain from the Employment Insurance Regional Enquiries Unit (hereinafter the REU) the information needed for the representation of the employment insurance applicants and beneficiaries who tasked them to obtain such information.

[8] The applicants allege that what is at issue here is the interpretation and/or application of section 33 of the *Department of Employment and Social Development Act*, SC 2005, c 34 (the Act). In fact, the applicants allege that there was a change in policy at the Department that

prevented the applicants from accessing information in the files of the individuals whom they represent before the Employment Insurance Board. Their right of access to information through section 33 of the Act has therefore been violated.

[9] The applicants allege that they do not know the date when there was a change in policy regarding access to information under section 33 of the Act, but they became aware through a letter dated June 5, 2023, from the Deputy Minister of Employment and Social Development, Jean-François Tremblay.

[10] Despite including unnumbered paragraphs contrary to the Rules, but which are referred to as paragraphs c., d., and e. under the heading [TRANSLATION] “At the stage of application for judicial review, the applicants will argue the following”, the applicants do not allege any other material facts to support their claim.

III. THE EVIDENCE ON RECORD FOR THIS MOTION

[11] The parties have filed their respective motion records for this motion.

[12] The respondent’s motion record contains the affidavit of Lauren Webster, which was affirmed on July 31, 2023. Ms. Webster’s affidavit is limited to the evidence that she has access to documents and information held by Call Centre Operations, Benefits and Integrated Services Branch of Service Canada - Employment and Social Development Canada, and that she has, by that very fact, personal knowledge of the application for judicial review filed by the applicants in this case. She filed two exhibits with her affidavit: a copy of a letter from June 5, 2023 that the

applicants pleaded, and a copy of the certified documents sent to the applicants in accordance with section 318 of the Rules.

[13] Since the letter from June 5, 2020, is pleaded by the applicants in their notice of application, it is admissible as evidence for this motion as a document incorporated by reference in the notice of application (*JP Morgan*, at para 54). The second exhibit attached to Ms. Webster's affidavit, however, is inadmissible, and I will not consider it on this motion.

[14] The applicants did not submit any affidavits, and therefore no admissible evidence, in support of their position on this motion.

IV ANALYSIS

[15] The statutory provision at issue here is section 33 of the Act. This provision falls under Part 4 of the Act, which is entitled "Protection of Personal Information", and reads as follows:

> **Availability of information — individuals and representatives**
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> 33 (1) In addition to an individual's right of access under section 12 of the *Privacy Act*, and subject to the exemptions and exclusions provided in that Act, information may be made available to the individual or their representative on their request in writing to the Minister.
>
> **Availability of information — individuals, representatives and members of Parliament**
>
> (2) On the conditions that the Minister considers advisable, and subject to the exemptions and exclusions provided in the *Privacy Act*, if the information is relevant to the making of an application or the receipt of a benefit or other assistance by the individual under a program, to a division of unadjusted pensionable earnings or an assignment of a retirement pension that affects the individual

> or to any other matter that affects the individual under a program, it may be made available to
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> (a) the individual;
>
> (b) the individual's representative; or
>
> (c) a member of Parliament who is inquiring on behalf of the individual.

[16] The information referred to in subsection 33(1) of the Act is defined in subsection 30(1) of the Act as "personal information as defined in section 3 of the Privacy Act, except that the portion of that definition between paragraphs (i) and (j) shall be read as 'but, for the purposes of this Part, does not include'".

[17] A reading of subsection 33(2) of the Act clearly shows that Parliament has given the Minister the power to set conditions for giving access to the information in question to an individual or his or her representative.

[18] The letter dated June 5, 2023, which is central to the notice of application, is a letter in response to a letter dated May 24, 2023, addressed to the members of the Canada Employment Insurance Commission information regarding information sent by the Regional Enquiries Unit – Third Party Service (REU-TPS).

[19] The letter explains that a review of regional procedures took place when designing national service for third parties regarding access to information in a broader sense. The letter reads as follows:

[TRANSLATION]
The REU-TPS was instituted nationally in April 2022. Before that, service to third-party organizations (TPOs) was provided regionally through a variety of delivery methods. Service to third parties is the responsibility of Service Canada and not the employment insurance administration.

When designing national service for third parties, a review of regional procedures was conducted. As part of this review, the Privacy Management Division, the Legal Services Unit and the Employment Insurance Benefits Processing Directorate were consulted regarding existing guidelines on disclosing information to third parties. These consultations confirmed that all processes, before and after the launch of the national third-party services, complied with the requirements for disclosing client information to third parties. Moreover, consultations held in May 2023 once again confirmed the information that regional unit officers are authorized to present to third-party organizations. This also confirms that the directives in place at both the regional and national levels were, and continue to be, compliant. Furthermore, the National Directorate of the REU-TPS can state that these directives have not been amended recently.

The mandate of the REU-TPS is to assist TPOs and their authorized staff to obtain information specific to employment insurance clients for individuals who have had difficulty receiving employment insurance benefits or who are experiencing financial difficulties and have exhausted all other options. After consent is received, either in writing or during a three-way call, REU officers can share aspects of the client's file with TPOs, as officers would do at the call centre with clients. The shared information can include the start date of the claim, the number of weeks of eligibility, the rate, the number of weeks paid and the duration of the claim.

If the TPOs request further information, they will be advised to contact the client and complete a formal Access to Information and Privacy request. It must also be noted that when transactions must be carried out in the file, the client will be contacted directly by the REU-TPS in order to confirm the information regarding the actions to be taken to resolve the issues in the file.

REU officers must comply with the *Privacy Act*, the *Department of Employment and Social Development Act*, and the guidelines on the information that can be shared. The role of REU officers is to support TPOs so that they can do their work as representatives. However, the sharing of information must comply with the policies

> and legislation that specify the conditions for sharing personal information.
>
> I hope this information will address your concerns.

[20] The applicants are seeking judicial review and a declaratory judgment on the legality of the alleged changes in the access to information procedure under section 33 of the Act described in the letter from June 5, 2023. According to the applicants' argument found in their notice of application, the interpretation of the Minister's obligations to the protection of personal information, as written in the letter from June 5, 2023, has no basis in law. The applicants also allege that the change in policy regarding access to information could have one or more future consequences, yet they did not allege material facts to support their arguments in this regard.

[21] A declaratory judgment can be made under section 18 of the *Federal Courts Act* against a governmental policy (*Fortune Dairy Products Limited v Canada (Attorney General)*, 2020 FC 540 (CanLII), at paras 82 to 85), but only when it is demonstrated, and necessarily alleged in the notice of application, that the policy was made in bad faith, for considerations extraneous to the legislative purpose, or if it is irrational, incomprehensible or an abuse of discretion (*Fortune Dairy Products Limited v Canada (Attorney General)*, 2020 FC 540 (CanLII), at para 105; *Malcolm v Canada (Fisheries and Oceans)*, 2014 FCA 130, at para 35). However, the applicants are not arguing any of these grounds in their notice of application.

[22] As this court teaches in *Soprema Inc. v Canada (Attorney General)*, 2021 FC 732 (CanLII) at paragraphs 37 to 39 and 44, affirmed in 2022 FCA 103 (CanLII), the failure to argue the minimum elements required to support an application for judicial review, and necessarily to support an application for declaratory judgment, and the failure to argue all the grounds in

support of the application at the notice of application stage, are fatal to the application. This is the case here. The applicants do not allege the elements required for the remedy being sought. The motion must therefore be granted, and the notice of application will be struck.

[23] The question that remains is whether the applicants should have some time to amend their notice of application in order to argue the missing elements. The applicants did not apply to amend their notice of application in their written representations. Having received no such application from the applicants, there is no need to grant an extension of time for the applicants to attempt to amend their notice of application.

[24] Given the contents of the applicants' written representations, it would be appropriate for the court to send a reminder to counsel for the parties that it is entirely irregular and inadmissible to argue facts in written representations that are not otherwise in evidence on a motion or alleged in the proceedings. Written representations are not vehicles for attempting to present material facts that may be useful to the court and that were otherwise omitted from the proceedings or evidentiary record. Proceeding in this manner only demonstrates either a lack of rigour in preparation or a misunderstanding of the procedural rules or applicable law.

THIS COURT ORDERS that:

1. The respondent's motion to strike is granted.
2. The applicants' notice of application is struck without the possibility of amendment.
3. The parties shall consult each other and attempt to settle the issue of costs of the motion and the proceedings. If the parties settle costs before **November 7, 2023**, they will be able to notify the Court by joint correspondence, and an order for

costs may be made in light of the settlement reached between the parties. If the parties cannot settle costs, the respondent will have until **November 7, 2023,** to serve and file written representations on costs up to a maximum of three (3) pages, plus appendices and caselaw, and the applicants will have until **November 21, 2023,** to serve and file written representations on costs up to a maximum of three (3) pages, schedules and case law in addition; failure to do so will result in no costs being awarded.

"Benoit M. Duchesne"
Associate Judge

Certified true translation
Francie Gow

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1389-22
STYLE OF CAUSE:	COMITÉ CHÔMAGE DE MONTRÉAL, ACTION CHÔMAGE DE QUÉBEC, CHÔMAGE ACTION - ABITIBI-TÉMISCAMINGUE NORD-DU-QUÉBEC, COMITÉ CHÔMAGE DU HAUT-RICHELIEU ET DU SUROÎT, MOUVEMENT ACTION CHÔMAGE - CHARLEVOIX, MOUVEMENT D'AIDE ET DE CONSULTATION SUR LE TRAVAIL v EMPLOYMENT AND SOCIAL DEVELOPMENT CANADA

MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO, PURSUANT TO SECTION 369 OF THE *FEDERAL COURTS RULES*

ORDER:	B.D. DUCHESNE, AJ
DATED:	OCTOBER 25, 2023

SOLICITORS OF RECORD:

Gabriel Pelletier Mark Phillips Montréal, Quebec	FOR THE APPLICANTS
Sarom Bahk Marilyn Ménard Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT