

**Federal Court of Appeal**



**Cour d'appel fédérale**

**Date: 20230209**

**Docket: A-306-21**

**Citation: 2023 FCA 32**

**CORAM: STRATAS J.A.  
WEBB J.A.  
MONAGHAN J.A.**

**BETWEEN:**

**JOHN V. KURGAN**

**Appellant**

**and**

**THE ATTORNEY GENERAL OF CANADA  
(PAROLE BOARD OF CANADA) and  
PHILIP JAMES BAKER**

**Respondents**

Heard by online video conference hosted by the Registry on February 9, 2023.

Judgment delivered from the Bench at Ottawa, Ontario, on February 9, 2023.

**REASONS FOR JUDGMENT OF THE COURT BY:**

**WEBB J.A.**

Federal Court of Appeal



Cour d'appel fédérale

Date: 20230209

Docket: A-306-21

Citation: 2023 FCA 32

**CORAM: STRATAS J.A.  
WEBB J.A.  
MONAGHAN J.A.**

**BETWEEN:**

**JOHN V. KURGAN**

**Appellant**

**and**

**THE ATTORNEY GENERAL OF CANADA  
(PAROLE BOARD OF CANADA) and  
PHILIP JAMES BAKER**

**Respondents**

**REASONS FOR JUDGMENT OF THE COURT**  
**(Delivered from the Bench at Ottawa, Ontario, on February 9, 2023).**

**WEBB J.A.**

[1] This is an appeal from a judgment of the Federal Court (2021 FC 1064, *per* Pentney J.) that dismissed Mr. Kurgan's application for judicial review of two decisions of the Parole Board of Canada (Parole Board) related to the release of Philip James Baker from prison. Mr. Kurgan was seeking to quash the Parole Board decisions and he was also seeking an order enjoining

Mr. Baker from making representations about Mr. Kurgan. Mr. Kurgan is not appealing the judgment dismissing his claim for an order in relation to Mr. Baker.

[2] In 2011, Mr. Baker pled guilty to wire fraud in the United States. He was sentenced to 20 years in prison. He was subsequently transferred to a Canadian prison. The first Parole Board decision granted Mr. Baker his release from prison in 2016 subject to certain conditions. The second decision amended the conditions of his release to allow Mr. Baker to travel to Germany to testify at his ex-wife's trial for money laundering. In both decisions the Parole Board stipulated that Mr. Baker was "[n]ot to associate with any person [he knows or has] reason to believe is involved in criminal activity including [his] co-accused persons Thomas J. Church and John V. Kurgan" (Federal Court reasons, at paragraph 5).

[3] In November 2017, following Mr. Baker's release from prison, two newspaper articles were published identifying Mr. Kurgan as a business partner of Mr. Baker. The articles also implicated Mr. Kurgan in certain matters relating to the fraud committed by Mr. Baker. The allegations against Mr. Kurgan were denied by his lawyer and this denial was included in the articles. In February 2018, the Royal Bank of Canada terminated Mr. Kurgan's employment as a commodities trader.

[4] In April 2019, Mr. Kurgan brought his application for judicial review of the decisions of the Parole Board. Prior to the hearing of this application, the Parole Board amended its reasons in both decisions to delete the reference to "co-accused".

[5] Mr. Kurgan's application for judicial review was brought on the basis that the decisions of the Parole Board should be set aside because the Parole Board acted "by reason of fraud or perjured evidence" (paragraph 18.1(4)(e) of the *Federal Courts Act*, R.S.C. 1985, c. F-7).

The Federal Court determined that the decisions which were the subject of the judicial review application were the amended decisions of the Parole Board that deleted the reference to "co-accused". The finding that the decisions under review are the amended decisions of the Parole Board is not challenged by Mr. Kurgan in his notice of appeal or his memorandum.

[6] The Federal Court found that Mr. Kurgan did not have standing to bring the applications for judicial review as he did not satisfy his burden to demonstrate that he is directly affected by the amended decisions of the Parole Board. The Federal Court referred to *Friends of the Canadian Wheat Board v. Canada (Attorney General)*, 2011 FCA 732 in which this Court stated, at paragraph 21:

For a person to be directly affected "the decision at issue must be one which directly affects the party's rights, imposes legal obligations on it, or prejudicially affects it directly"...

[7] The Federal Court identified the correct legal test to be applied to determine if Mr. Kurgan was directly affected by the amended decisions of the Parole Board. In detailed reasons, the Federal Court applied this test and found that Mr. Kurgan was not directly affected by the amended decisions of the Parole Board. Despite the submissions of Mr. Kurgan in this appeal, we find that the Federal Court did not make any palpable and overriding error in its findings of fact or mixed fact and law.

[8] Mr. Kurgan argued that the Federal Court did not consider his submissions concerning the activities of Mr. Baker after his release from prison in determining that Mr. Kurgan was not directly affected by the amended decisions. In our view, any harm that was caused by these activities is too remote to affect the determination of whether Mr. Kurgan was directly affected by the amended decisions of the Parole Board.

[9] As a result, we agree with the finding of the Federal Court that Mr. Kurgan was not directly affected by the amended decisions of the Parole Board, for substantially the same reasons as provided by the Federal Court. As a result, Mr. Kurgan did not have standing to bring the judicial review application.

[10] In this appeal, Mr. Kurgan raises a new issue. He alleges that he is a victim as defined in the *Canadian Victims Bill of Rights*, S.C. 2015, c. 13, s. 2 (the *CVBR*). This argument is raised in relation to certain rights that victims have under the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 and Mr. Kurgan's allegations that the Parole Board failed to respect his rights as a "victim".

[11] This argument was not raised in his application to the Federal Court for judicial review. His application for judicial review was based only on his claim that the Parole Board acted by reason of fraud or perjured evidence. Different bases for judicial review cannot normally be raised in an appeal from a judicial review application and we see no circumstances permitting Mr. Kurgan to do so in this case (*Quan v. Cusson*, 2009 SCC 62, [2009] 3 S.C.R. 712).

[12] To the extent that his arguments related to the *CVBR* are raised in support of his argument that he is directly affected by the amended decisions of the Parole Board, this argument is premised on Mr. Kurgan being a victim as defined in the *CVBR*. Mr. Baker was convicted of wire fraud in the United States. Mr. Kurgan does not allege that he is a direct victim of the wire fraud but rather, in paragraph 64 of his memorandum, Mr. Kurgan states:

...Further, John Kurgan advised the Board, by letter from his counsel dated 30 May, 2018, that he was a victim of Baker's hedge fund fraud, in that he was one of the people whose names Baker had fraudulently associated with the Lake Shore enterprise.

[13] The footnote reference to this letter identifies the relevant passage from this letter:

Most importantly, you will see at paragraph 12 of the Indictment that part of Baker's *modus operandi* was to use the names and identities of other people as being 'actively involved' with the Lake Shore enterprise when in fact they were not. My client was one of those people.

[14] This letter is dated after the initial decisions of the Parole Board were made. There is no indication that Mr. Kurgan raised the issue of whether he was a "victim" prior to the date of this letter. There is no indication that there was any finding by the Parole Board that Mr. Kurgan is a victim as defined in the *CVBR*. Since his claim is that the Parole Board should have respected his rights as a "victim" and that he is directly affected by the decisions of the Parole Board because these rights were not respected, Mr. Kurgan should have first raised with the Parole Board his claim that he is a victim as defined in the *CVBR*. It is too late now to raise this issue and ask this Court to make a finding that Mr. Kurgan is a victim as defined in the *CVBR*.

[15] In its memorandum, the Attorney General requests costs of this appeal and also costs in the Federal Court. In its judgment, the Federal Court did not grant costs. The Attorney General has not cross-appealed against the judgment and so we have no jurisdiction to accede to the Attorney General's request for costs in the Federal Court.

[16] The appeal will therefore be dismissed with costs.

“Wyman W. Webb”

---

J.A.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-306-21

**STYLE OF CAUSE:** JOHN V. KURGAN v.  
THE ATTORNEY GENERAL OF  
CANADA et al.

**PLACE OF HEARING:** HEARD BY ONLINE VIDEO  
CONFERENCE HOSTED BY  
THE REGISTRY

**DATE OF HEARING:** FEBRUARY 9, 2023

**REASONS FOR JUDGMENT OF THE COURT  
BY:** STRATAS J.A.  
WEBB J.A.  
MONAGHAN J.A.

**DELIVERED FROM THE BENCH BY:** WEBB J.A.

**APPEARANCES:**

Michael Meredith FOR THE APPELLANT

Eric Peterson FOR THE RESPONDENT,  
THE ATTORNEY GENERAL OF  
CANADA (PAROLE BOARD OF  
CANADA)

**SOLICITORS OF RECORD:**

Michael Meredith, Barrister FOR THE APPELLANT  
Toronto, Ontario

A. François Daigle FOR THE RESPONDENT,  
Deputy Attorney General of Canada THE ATTORNEY GENERAL OF  
CANADA (PAROLE BOARD OF  
CANADA)