Federal Court Cour fédérale

Date: 20211015

Docket: T-659-19

Citation: 2021 FC 1084

Ottawa, Ontario, October 15, 2021

PRESENT: Mr. Justice Pentney

BETWEEN:

JOHN V. KURGAN

Applicant

and

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

Respondents

JUDGMENT AND REASONS

[1] The Applicant, Mr. Kurgan, challenges two decisions of the Parole Board of Canada (Parole Board or Board) that relate to Philip James Baker, the individual named Respondent. The Applicant says these decisions should be quashed because they were based on fraudulent or perjured evidence.

[2] This case is unusual in several respects. First, the Applicant was not the subject of, and did not otherwise participate in, the Parole Board proceeding, yet he brings this challenge to seek

to overturn the decisions. Second, the individual named Respondent, Mr. Baker (who was the subject of the Parole Board decisions), did not participate in this proceeding and the Attorney General's response to the Applicant's claims did not address the substance of the allegations of fraud and perjury. Third, the Applicant seeks relief under paragraph 18.1(4)(e) of the *Federal Courts Act*, RSC 1985, c F-7 [the *Act*], a provision that has never been dealt with in a substantive way by this Court or the Federal Court of Appeal in the fifty years since the establishment of the Federal Courts.

[3] For the reasons that follow, this application for judicial review is dismissed. This Court does not have jurisdiction to deal with the Applicant's claims against Mr. Baker in the context of an application for judicial review under section 18.1 of the *Act*, so that aspect of the claim must be dismissed. In regard to the impugned Parole Board decisions, the Applicant has not met his burden to demonstrate that he is "directly affected" by these decisions, and he therefore does not have standing to challenge them.

I. Background

[4] In 2011, Mr. Baker pleaded guilty to one count of wire fraud in the United States (US), based on his involvement in a large hedge fund fraud scheme. He was sentenced to 20 years in prison in the US. Following his conviction, and after spending several years in a US prison, he was transferred to Canada to complete his sentence.

[5] On November 23, 2016, the Parole Board granted Mr. Baker early release subject to specified conditions (the Release Decision). On August 8, 2017, the Parole Board issued a second decision, making changes to the original release conditions so that Mr. Baker could travel

to Germany at the request of the German government to testify at his ex-wife's trial for money laundering (the Conditions Decision). Both of these decisions (collectively, the Original Decisions) include several conditions regarding the terms of his release, including an "Avoid Certain Persons" clause. That provision states that Mr. Baker is "[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".

[6] The Release Decision states that the special conditions were seen as reasonable and necessary to manage the risks posed by releasing Mr. Baker and to foster his gradual reintegration into the community. In it, the Parole Board also explains the reasons for imposing the "Avoid Certain Persons" condition:

> Your offending involved a massive fraud in commodities futures trading. You committed the crime with accomplices, to whom you had a sense of loyalty. The whereabouts of your accomplices was not included in your transfer documentation from the US, and was listed as unknown.
>
> It will be important for your success on conditional release that you not associate with persons who are criminally active, including your co-accused. The usual non-association condition is imposed, to include them specifically.

[7] Following Mr. Baker's release from prison, the New York Times and the National Post newspapers published articles about his case, on November 18, 2017, and November 27, 2017, respectively. Both articles describe the fraud and the criminal sentence Mr. Baker received, and detail his efforts to obtain a transfer to Canada. These articles refer to the Applicant in detail, indicating that he had been a business partner with Mr. Baker and was implicated in certain matters relating to the fraud. Both articles also contain blanket denials from the Applicant's counsel.

[8] The newspaper articles also mention the Applicant's employment as a commodities trader at the Royal Bank of Canada (RBC). By letter dated February 8, 2018, RBC terminated the Applicant from his employment.

[9] On April 18, 2019, the Applicant launched this judicial review proceeding seeking to challenge the Original Decisions. The essence of the Applicant's argument is that in arriving at these decisions, the Parole Board placed substantial reliance on the narrative Mr. Baker conveyed to the Correctional Service of Canada (Corrections Canada), which the Applicant describes as fraudulent and unsworn. He argues that Corrections Canada did not independently confirm Mr. Baker's narrative. He also submits that the Original Decisions, which state that the Applicant was a "co-accused" and an "accomplice" of Mr. Baker who is "criminally active" and whose "whereabouts are unknown", propagate this false narrative.

[10] After the Applicant filed the Notice of Application, on July 17, 2019, the Parole Board issued amended versions of both decisions to correct what it described as an administrative error (the Corrected Decisions). The Corrected Decisions include the "Avoid Certain Persons" condition, but now direct Mr. Baker "[n]ot to associate with any person [he knows or has] reason to believe is involved in criminal activity including persons Thomas J. Church and John V. Kurgan". The qualifier "co-accused" no longer precedes the reference to the Applicant. In addition, the explanation for imposing the "Avoid Certain Persons" condition was amended to delete the reference "co-accused" but the remainder of the explanation (cited above) remains.

[11] The Applicant submitted a significant amount of documentation about the background to the fraud Mr. Baker committed, their business relationship, and the Applicant's participation in the investigation and related proceedings. It is not necessary at this stage to review all of this in

detail, although I will reference some of it below. The narrative the Applicant provides in this application certainly paints Mr. Baker in an unfavourable light, and provides useful context for the fraud conviction. It should be noted, however, that this narrative has not been tested by cross-examination, and some of it is not directly supported by any judicial findings from another court.

II. Issues

[12] The parties describe the issues in starkly different terms. The Applicant submits that two issues arise in this case:

A. Did the Parole Board act by reason of fraud or perjured evidence?

B. If the answer to "A" is yes, then is this an appropriate case to refer the Decisions back to the Parole Board?

[13] The Respondent argues that the matter raises the following issues:

A. Does the Parole Board have the jurisdiction to expunge or correct statements in a parole review decision beyond the correction of clerical errors, or has the doctrine of *functus officio* foreclosed it from doing so?

B. Do the Decisions at issue actually harm the Applicant's reputational interest?

C. Does the Applicant have standing to seek judicial review of the Decisions?

D. Does the Applicant meet the test for a writ of *mandamus* against the Board to expunge or correct the Decisions? In particular, did the Board owe a duty to the Applicant: (1) to verify information about him where that information is found in documents prepared by the US Postal Service and Department of Justice (DOJ), and/or (2) to allow the Applicant

to present information in the parole review for the sole purpose of defending the Applicant's reputational interest?

[14] In addition, the Respondent listed an alternative argument that characterized the Applicant's communications with the Board about the Decisions as a request to re-open the parole review, but it is not necessary to address this any further.

[15] In my view, there are two determinative issues in this case:

A. Does the Federal Court have jurisdiction in relation to the claim against Mr. Baker?
B. Does the Applicant have standing to challenge the Original or Corrected Decisions?

III. Analysis

A. *Does the Federal Court have jurisdiction in relation to the claim against Mr. Baker?*

[16] The Applicant named two parties as Respondents in this application: the Attorney General of Canada, on behalf of the Parole Board of Canada, and Mr. Baker, as an individual. In the Notice of Application, the Applicant seeks the following relief specifically in relation to Mr. Baker:

> An Order in the nature of a mandatory Order enjoining the Respondent Philip James Baker from making any representations about the Applicant, or referring to the Applicant, either directly or indirectly, whether verbally or through the provision of documents, to any media source wherever situate, or in any public forum or medium, including the internet.

[17] The Applicant also seeks costs of the application against Mr. Baker.

[18] The request for this relief against Mr. Baker stems from the Applicant's allegation that Mr. Baker procured his release from prison by misleading the Parole Board. It also reflects the Applicant's frustration with the media stories, which he says resulted in his termination by RBC. The Applicant draws this connection in his written Reply, which describes this ground of relief as follows: "[the Applicant] seeks an injunction preventing Phillip Baker from again referring to Mr. Kurgan in any further communications he may have with the media. It does not relate to the [Parole] Board in any way".

[19] This description of the relief sought neatly encapsulates two key dimensions of the jurisdiction issue. First, this is an application for judicial review, brought pursuant to paragraph 18.1(4)(e) of the *Act*, which provides that the Court may grant this discretionary relief "if it is satisfied that the federal board, commission or other tribunal… (e) acted, or failed to act, by reason of fraud or perjured evidence". Mr. Baker is named as a Respondent in his individual capacity, and he obviously is not part of any "federal board, commission or other tribunal".

[20] Second, as set out in his written Reply submissions, the Applicant requested this specific relief because "[Mr.] Baker should not be permitted to continue using [the Original Decisions] to diminish his culpability and further harass and damage [the Applicant] with what is manifestly a malicious and calculated vendetta". This brings into sharp relief what this ground of the Applicant's claim is all about, and underlines why it is not within the jurisdiction of this Court. In short, the Federal Court does not have jurisdiction over individuals where the cause of action is accurately described as defamation, libel, or fraud (*Harris v Canada (Attorney General)*, 2004 FC 1051 at para 22; *Humby v Canada (Attorney General)*, 2009 FC 1238 at paras 10, 17). That describes the nature of the claim against the individual Respondent in this case. Leaving aside

any other concerns about the nature and scope of the order that the Applicant requested against the individual Respondent, Mr. Baker, this Court has no jurisdiction to deal with it.

[21] The Applicant may well have other legal avenues to pursue his concerns about Mr. Baker and/or the media coverage of his story. However, an application for judicial review in this Court is not the proper vehicle to address these issues. The application in relation to the individual Respondent, Mr. Baker, is therefore dismissed.

B. *Does the Applicant have standing to challenge the Original or Corrected Decisions?*

(1) The positions of the parties

[22] As noted previously, the Applicant was not involved in Mr. Baker's Parole Board hearing; his only connection with it arises because the "Avoid Certain Persons" condition in the Decisions mentions him. The Respondent asserts that the Applicant lacks standing to bring this application, even more so now that the Parole Board has released the Corrected Decisions and has deleted the reference to the Applicant as Mr. Baker's "co-accused".

[23] The Respondent argues that the Applicant is not a person "directly affected" by the Decisions, as required to bring an application for judicial review under subsection 18.1(1) of the *Act*. The Respondent submits that the Corrected Decisions do not harm the Applicant's reputational interest because they do not make any assertions about the Applicant; rather, they simply provide that Mr. Baker abstain from any contact with him, without labelling the Applicant as his "co-accused".

[24] In support of their argument on standing, the Respondent relies on a line of authorities from the Ontario Court of Appeal that deal with requests by third parties to administrative proceedings to submit information or evidence and to make submissions to protect their reputational interests. These cases establish a rule against allowing strangers to a proceeding to defend their reputations.

[25] In *Hurd v Hewitt* (1994), 20 OR (3d) 639, 1994 CanLII 874 (CA), the Court dealt with a tenure decision by an arbitration panel at the University of Toronto. The professor seeking tenure had alleged that the Dean of Trinity College and other members of the tenure committee had met in secret to conspire against her. She alleged sexual discrimination, a violation of her academic freedom, and that the College and search committee had acted improperly and breached obligations owed to her. The arbitration panel sided with the professor without giving the Dean or other committee members an opportunity to respond to these allegations. The Dean and committee members then applied to the Court for a declaration that the arbitration panel had acted unfairly. The majority of the Court held there was no duty on the arbitration panel to notify non-parties and allow them to give evidence. The Court stated: “The practical consequence of any other conclusion would be chaotic. The tribunal cannot know at the outset what evidence may be relevant to the ultimate reasons. Every time an aspersion is cast at any person, the tribunal would have to assure itself that the person is warned and given an opportunity to respond”.

[26] This precedent was subsequently cited with approval in *Meridian Credit Union Limited v Baig*, 2016 ONCA 150. This case concerned a trial decision on a motion for summary judgment in which the judge made negative comments about the plaintiff’s former lawyers, without giving

them the opportunity to make submissions. The Court found that the former lawyers were not parties to the action (they had been granted intervener status) and that they were not directly affected by the order. Justice LaForme, writing for the Court, stated:

> [51] The interveners are no different than any other non-party witness. Their main complaint is that the motion judge's publicly available reasons could damage their reputation. The authorities they rely on do not support the right of a non-party witness in a civil action to notice, a chance to adduce evidence, and to make submissions whenever an adverse credibility finding may be made. Such procedural entitlements are significant, and would, in my view, impose a great burden on the courts and threaten the finality of decisions.

[27] This line of authority has also been applied by the Ontario Divisional Court (see *Cybulski v Ontario (Human Rights Tribunal)* (2005), 206 OAC 216, 2005 CanLII 45194 (ON SCDC) at para 7). In *Hay v Ontario (Human Rights Tribunal)*, 2014 ONSC 2858 [*Hay*] at para 133, the Divisional Court approved this rule once again, finding that the administrative decision did not "significantly or directly and necessarily" affect the non-party. That was because: (1) the non-party was not the subject matter of the decision; (2) the decision did not determine any of the rights or obligations of the non-party; and (3) the statements made about the non-party in the decision were not binding on any other court or adjudicator.

[28] The Respondent asserts that this line of authority should be applied to the instant case because it is a just and reasonable approach. The Respondent submits that analyzing the instant case using the framework from *Hay* supports their argument that the Applicant does not have standing to challenge the Decisions, as the Applicant does not fall into any of the three categories set out in the decision.

[29] In addition, the Respondent points to the scheme for parole review set out in the *Corrections and Conditional Release Act*, SC 1992, c 20 [the *Release Act*]. In particular, the Respondent notes that the legislation indicates that Parole Board decisions are not public. Paragraph 143(2)(b) of the *Release Act* states that the Board shall provide a copy of the decision and the reasons for decision to the offender, and that the offender is the only one with an unqualified, automatic right to receive a copy. Section 144.1 of the *Release Act* grants a similar right to a victim or other person who has been harmed by the offender, but with certain qualifications. In such a situation, the Board will only release the decision it if the statutory conditions for doing so are met, namely that: (1) disclosure will not jeopardize the safety of any person; (2) disclosure will not reveal the source of any confidential information; and (3) disclosure will not prevent the successful reintegration of the offender into society.

[30] Pursuant to subsection 144(2) of the *Release Act*, any other person requesting a copy of a decision must demonstrate that they have an interest in the case, and once again, the Board will not disclose any information that falls within the three categories outlined in the previous paragraph. Furthermore, subsections 140(14) and 140.2(3) of the *Release Act* provide that the information and documents discussed or referred to during a parole review hearing are not to be considered publicly available for the purpose of an access to information or privacy request only because an observer attended a panel hearing or a victim made a victim impact statement.

[31] The Respondent submits that the legislative scheme reflects Parliament's intent that parole reviews are to be essentially private in nature, with the focus of the review restricted to the issue of whether the offender is eligible for parole, and if so, on what conditions. The Board does not hear and assess evidence, but rather it receives information and its hearings are inquisitorial

in nature, without contending parties (*Mooring v Canada (National Parole Board)*, [1996] 1 SCR 75, 1996 CanLII 254 at para 26; *Fraser v Canada (Public Safety and Emergency Preparedness*, 2021 FC 821 at paras 84-85). Typically, in a parole review, much of the information the Board receives is unsworn. The Parole Board has no mandate to make any findings about anyone other than the offender, and its primary task is to assess whether releasing the offender will pose a risk to society.

[32] The Applicant contends that the Respondent should be barred from raising the issue of standing now, because they did not raise that issue at any earlier point in the proceeding. He says this Court implicitly accepted his standing in this matter when it granted his motion for access to the record before the Parole Board.

[33] In the alternative, the Applicant submits that he is directly and prejudicially affected by the Original Decisions. He points out that both Decisions refer to him by name as someone who is possibly "criminally active". He says that, in light of the description of the reason for which the no contact condition was imposed, any reasonable person reading those Decisions would understand him to be somehow involved in crime and/or an accomplice of Mr. Baker. The Applicant submits that the Original Decisions are "[o]fficial decisions of a Canadian federal agency describ[ing] him as criminal or potentially criminal" and that this directly and prejudicially affects him. He maintains that the Corrected Decisions do not correct the error.

[34] Pointing to the newspaper articles, the Applicant argues that the Original Decisions have caused him damage or have materially contributed to the cause of the damage to him, because Mr. Baker used (and may continue to use) them to support his fictitious narrative about his crimes and their business relationship. According to the Applicant, this is linked to the Original

Decisions because, "[b]y granting Baker's early release, the Board enabled Baker to conduct his defamatory, and ongoing, campaign of revenge against Mr. Kurgan…" The Applicant also notes that shortly after the publication of these articles, he lost his job and that RBC indicated he was being terminated because he posed a "reputational risk".

[35] In response to the line of Ontario authorities relied on by the Respondent, the Applicant submits that these decisions are simply not applicable, because they involved matters where there had been an adversarial hearing before a trier of fact, and where factual findings were made after a prescribed process was followed. In contrast, the statements of the Parole Board were based on fraudulent evidence, which was never confirmed or tested. In the Ontario cases, the courts were protecting the fact-finding process and ensuring the finality of a legitimate process. In this case, the Applicant urges this Court to remedy "Baker's corruption of the process".

(2) Discussion

[36] The test for standing to bring an application for judicial review in the Federal Court is set out in subsection 18.1(1) of the *Act*:

18.1 (1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.	**18.1 (1)** Une demande de contrôle judiciaire peut être présentée par le procureur général du Canada ou par quiconque est directement touché par l'objet de la demande.

[37] In order to have direct (sometimes called "personal") standing under this provision, a person must show that they fall within one of three categories, namely that the decision "directly affects the party's rights, imposes legal obligations on it, or prejudicially affects it directly" (*Friends of the Canadian Wheat Board v Canada (Attorney General)*, 2011 FCA 101 at para 21 [*Wheat Board*]; *League for Human Rights of B'Nai Brith Canada v Canada*, 2008 FC 732

[*League for Human Rights FC*] at para 24; *League for Human Rights of B'Nai Brith Canada v Odynsky*, 2010 FCA 307 [*League for Human Rights FCA*] at para 58).

[38] The Respondent argues that the question is whether the Applicant was "significantly or directly and necessarily" affected, but in my view, it is not necessary to invoke other legal standards because the test is clearly articulated in the statute, as interpreted by binding authority from the Federal Court of Appeal.

[39] While the concept of "public interest standing" is also recognized in Canadian law (see *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45), the Applicant makes no claim to be representing a wider public interest. He has launched this application in order to protect his personal interests.

[40] The "question of standing is not to be addressed in the abstract but in the context of the ground of review on which the applicant relies" (*Oceanex Inc v Canada (Transport)*, 2018 FC 250 at para 269; *Skibsted v Canada (Environment and Climate Change)*, 2021 FC 416 at para 29). In the instant case, this means that the Applicant's standing must be assessed in relation to the question of whether the Corrected Decisions are invalid because they were based on fraudulent or perjured evidence. This raises important and novel legal questions, but I find that the case turns on the much narrower issue of whether the Applicant was directly affected or not.

[41] The phrase "directly affected" is not to be given a restricted meaning (*General Motors of Canada Limited v Canada (National Revenue)*, 2013 FC 1219 [*General Motors*] at para 50). The key focus is whether the Applicant falls within one of the three categories the Federal Court of Appeal identified in *Wheat Board* and affirmed in *League for Human Rights FCA* because the

impugned decision directly affects a party's rights, imposes legal obligations, or prejudicially affects them directly. In this regard, I find the instant case to be somewhat comparable to the situation in *Ultima Foods Inc v Canada (Attorney General)*, 2012 FC 799. In that case, three dairy producers and processors sought to challenge a decision of the Minister of International Trade to grant an import licence to another company allowing it to import Greek yogurt. The respondents moved to strike the application on the basis that the applicants lacked standing.

[42] Justice Sandra Simpson found that the applicants did not have standing because the decision did not affect their legal rights or obligations. The applicants were not parties to the permits and they could continue to make Greek yogurt or apply for their own import permits (para 103). They could not demonstrate any direct prejudice through a loss of market share, and their concerns about such losses and about being placed at a competitive disadvantage were not supported in the record (paras 104-111). The applicants also failed to show how the granting of the permits would undermine the supply management system (paras 113-115). Absent any evidence of a direct impact on their rights or interests, the applicants were found to lack the necessary standing to bring an application for judicial review of the Minister's decision to grant the import permit.

[43] Turning first to the general questions raised by the Respondent's reliance on the Ontario line of authorities, I am not persuaded that there are no circumstances in which a third party to a proceeding might demonstrate that they have standing to bring a challenge in this Court (see, for example: *Morneault v Canada (Attorney General)*, [2001] 1 FC 30, 189 DLR (4th) 96 (FCA) at para 45). Judicial review is one of the bulwarks against abusive or arbitrary exercises of state authority, and it must retain the flexibility needed to ensure that it is available when it is truly

needed to allow the Court to fulfil its constitutional role (*Canada (Minister of Citizenship and Immigration) v Vavilov,* 2019 SCC 65 at para 82 [*Vavilov*], citing *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 27-28 and 48).

[44] To take an example building on the facts of the instant case, if the Applicant had come forward with a finding from another court that Mr. Baker had committed perjury in relation to the very narrative that the Parole Board relied on, the question of standing would be on a different footing. If neither the Attorney General nor the Parole Board acted of their own accord in the face of such evidence, it seems to me that the Applicant should be entitled to invoke the supervisory jurisdiction of this Court to address the issue.

[45] A finding that a decision with legal force was based on fraud or perjured evidence is particularly pernicious, striking at the heart of the administration of justice and the rule of law. Leaving such a decision intact would undermine public confidence in the administration of justice. This is why paragraph 18.1(4)(e) of the *Act* exists, and it should be available when it is needed, even if the case is brought by a third party to the proceeding.

[46] In such a situation, the case would be brought forward as a public interest matter, and so that test for standing would be applied. To the extent that the Ontario line of authority could be read to reject such a claim for standing – a point that I make no comment on – I would not follow it. The approach to standing set out by the Federal Court of Appeal is sufficient to resolve the issues in this case.

[47] Applying the Federal Court of Appeal's criteria to the instant case, I find that the Applicant does not have standing to challenge the Corrected Decisions based on the ground that they were obtained by perjury or fraud under paragraph 18.1(4)(e) of the *Act*.

[48] At the outset, it is important to recall that the issue of standing is to be assessed at the time of the hearing, and so it is the Corrected Decisions that are relevant. This is consistent with the principle that judicial review must take into account the practical realities of the situation at the time of the hearing (see, for example: *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 at 353, 1989 CanLII 123). Although the legal and factual basis of an application for judicial review is normally frozen as of the time of the decision, in the particular circumstance of this case, it would make no sense to assess the matter without taking into consideration the Corrected Decisions. The Corrected Decisions have replaced the Original Decisions, and any attempt – by Mr. Baker or anyone else – to rely on the earlier Decisions could easily be met with reference to the more recent ones. To take one obvious example, if the focus remained on the Original Decisions in this case, a decision overturning them and remitting the matter back to the Parole Board to remove the incorrect references to the Applicant as Mr. Baker's co-accused would have no practical effect (see *Vavilov* at para 142). The Applicant's standing, therefore, must be evaluated in relation to the Corrected Decisions.

[49] Turning to the criteria for standing in this Court, the Applicant does not fit within either of the first two categories for standing: he was not a party to the Parole Board proceeding and the Corrected Decisions did not directly affect his legal rights or obligations. The legislative framework for parole reviews conducted by the Parole Board establishes clear limits on who can participate in such proceedings, and in any event, the Applicant did not play a role in the parole

review. The Corrected Decisions do not affect the Applicant's rights, nor do they impose – directly or indirectly – any legal obligation upon him. He cannot, therefore, claim standing under either of these grounds.

[50] The Applicant's main argument is that he falls within the third category, namely that the Decisions directly, prejudicially affect him. He points to the newspaper articles and his subsequent termination as evidence of their negative effect.

[51] While I have no doubt that the newspaper coverage negatively impacted the Applicant, it is not possible on the evidence before me to find that the Decisions were a direct or substantially contributing factor in relation to these articles. There is also no evidence in the record that the decisions were a factor in RBC's decision to terminate the Applicant's employment. It bears repeating that the Decisions were not made public, but rather were provided to Mr. Baker because he was the offender subject to the terms set out in these Decisions.

[52] A review of the newspaper articles makes clear that the reporters relied on a variety of sources for their stories, some named and some unnamed. The Applicant says that these sources reflect the false narrative that Mr. Baker had concocted. In his affidavit, the Applicant states that he had a series of lengthy meetings with the reporter who wrote the National Post story in an effort to have an article published that told his side of the story. During one of these meetings, the Applicant indicates that the reporter asked him to comment on the Original Decisions that referred to him as a "co-accused" and "criminally active". He says that the reporter showed him page three of the Conditions Decision, saying that Mr. Baker had provided it to her. The Applicant's narrative then states:

> The reporter told me, and I verily believe that Baker had provided that document to her to substantiate his story about me being involved in his criminal activities. She advised me and I believe that she did not make reference to it in her article of November 25, 2018, because she did not find Baker credible, and doubted the veracity of the document.

[53] The Applicant notes that the newspaper article published in the National Post refers to another document, namely a report prepared by the US Commodity Futures Trading Commission's (CFTC) court-appointed Receiver in April 2010, as part of bankruptcy proceedings relating to winding up Mr. Baker's investment company (the Receiver Report). According to the Applicant, he objected through his counsel to the Receiver Report because it contains elements of Mr. Baker's false narrative. Specifically, the Applicant states that the Receiver Report described a business relationship between the Applicant and Mr. Baker, a proposition that he says is itself based on a single, inaccurate document. The Applicant filed an affidavit from Mr. Kingham, a US lawyer who represented him, in which the lawyer refers to the newspaper articles and notes that they both refer to documents that are alleged to reflect Mr. Baker's false narrative. These include the Receiver Report, as well as the plea agreement made between Mr. Baker and US prosecutors. Both documents reflect Mr. Baker's narrative that he worked with others, and, in particular, an "Individual A" who provided false information to investors as part of the scheme to defraud them. The newspaper articles cite an unidentified source who supposedly has knowledge of the case and who identifies the Applicant as "Individual A".

[54] The Kingham affidavit sets out the core elements of the Applicant's complaints: Mr. Baker wove a web of lies that falsely link the Applicant to the fraud, and these lies were never tested in any proceeding nor confirmed by any independent authorities. Mr. Kingham states that

he believes Mr. Baker has repeated his narrative to various authorities in Canada and the US, and that this has harmed the Applicant. He says: "the false story Mr. Baker espoused to the media, to the Receiver, and to the U.S. Attorney appears to be consistent with the false narrative that appears in the prison transfer documents and the two Parole Board Decisions, i.e. that [the Applicant] was an 'accomplice' and 'criminally active'".

[55] This is the crux of the Applicant's complaint, namely that the Original as well as the Corrected Decisions are based on a false narrative that the Applicant put forward and has perpetuated as his case has wound through the US and Canadian court and prison systems.

[56] According to the Applicant, Mr. Baker initiated his false narrative while he was under investigation by the CFTC. Mr. Baker advanced his narrative via his cooperation with the CFTC, and the Receiver crystallized elements of it in the Receiver Report. Mr. Baker later introduced the narrative to Canadian authorities through his US transfer documentation.

[57] The Applicant argues that the Canadian system then carried the false narrative forward, without any independent verification. First, Corrections Canada relied on Mr. Baker's self-reporting in preparing his Preliminary Assessment Report (PAR). The Applicant says that Mr. Baker's PAR lays out his false narrative in full and that Corrections Canada was required to confirm its contents, but they failed to do so. He notes, however, that the PAR includes cautionary language stating that it is based on Mr. Baker's self-reporting.

[58] The Applicant explains that next, the un-confirmed PAR was used to create additional official documents through Corrections Canada's use of an "evergreen" document system which permits documents to be "prepopulated" with content from previous documents (including the

PAR). Most of these later documents, the Applicant argues, do not contain a caution similar to the PAR's regarding the need to verify Mr. Baker's narrative. The Applicant argues that, Mr. Baker then used these "official" documents, including the PAR, to dupe the Parole Board. All of the documents based on the PAR and the PAR itself were before the Board during Mr. Baker's parole review hearing, and the Board then generated further official documents (the Original Decisions) based on the fraudulent narrative they contained. Finally, the Applicant says Mr. Baker then used the Original Decisions to dupe the journalists who wrote the newspaper articles, which caused RBC to terminate his employment. He claims, therefore, that the decisions under review have directly harmed him.

[59] The problem for the Applicant is that he is not described as a "co-accused" of Mr. Baker in the Corrected Decisions, and it is these decisions that are the focus of this judicial review. I am not persuaded by the Applicant's argument that any reasonable reader of the Corrected Decisions would conclude that he was somehow implicated in crime or that he was Mr. Baker's accomplice. At their highest, the relevant statements in those decisions could be reasonably interpreted to state that Mr. Baker has reason to believe that the Applicant is involved in crime and he should therefore not associate with him.

[60] Two additional matters undermine the Applicant's claim that the Original Decisions directly prejudice him, which support the view that his claim would not succeed even if those Decisions were the subject of this judicial review. First, as noted above, he states that when he met the National Post newspaper reporter who wrote the article about Mr. Baker, she showed him a copy of a Parole Board decision that identified him as a "co-accused" and "criminally active", but she did not rely on it because she did not find Mr. Baker to be credible and she

doubted whether the decisions were accurate. This directly refutes the Applicant's claim that the Original Decisions have harmed him because they were the basis for the negative reporting about his alleged involvement with Mr. Baker's fraudulent scheme. It similarly refutes his arguments that the Original Decisions resulted in his termination, which he says was caused by the newspaper articles.

[61] Second, the fact that Parole Board decisions are not made public must be taken into account in assessing the potential negative effects on the Applicant. He indicates that the Original Decisions are part of a pattern of falsehoods that the Applicant has managed to perpetrate. The Applicant asserts that Mr. Baker has piled these lies upon one another at the various stages of his transfer to Canada and his subsequent corrections and release process in this country. The Applicant notes, for example, that while certain documents generated by Corrections Canada early in the process contain express notations that the information they contain was based on Mr. Baker's own narrative, this wording was dropped from later documents, thus lending an air of credibility to Mr. Baker's falsehoods. The Applicant contends that the Parole Board has been a victim of this charade, and that it has unknowingly based its Decisions on fraud and perjured evidence. He asserts that these Decisions cannot be allowed to stand.

[62] The difficulty for the Applicant lies in establishing that these Decisions have directly harmed him or prejudiced his interests. This question is distinct from whether Mr. Baker's pattern of conduct, and the media reporting, have caused the Applicant harm. As stated earlier, the focus of this judicial review is on the Corrected Decisions. As also noted previously, the Corrected Decisions do not refer to the Applicant as a "co-accused" of Mr. Baker. Instead, they

state that Mr. Baker is not to associate with any person he knows or has reason to believe is involved in criminal activity, including the Applicant.

[63] In my view, a reasonable interpretation of the Corrected Decisions is that the "Avoid Certain Persons" condition is included to forbid Mr. Baker from associating with the Applicant because he either "knows or has reason to believe" that the Applicant is involved in criminal activity. This is not a pronouncement of the Parole Board on this point. As noted earlier, the Parole Board has no authority to make such findings; rather, it acts on information that it believes is relevant to assessing an individual's risk to society. In this regard, the actual wording of the Decisions is a particularly relevant consideration, and by issuing the Corrected Decisions, the Parole Board has significantly diminished any possible negative impact on the Applicant.

[64] It is also important that the Corrected Decisions are not posted on any publicly available website, or otherwise easily available to the public. The likelihood and severity of any potential impact on the Applicant's reputation are thus diminished in comparison with that which might follow from a wider distribution.

[65] For all of these reasons, I am not persuaded that in the particular circumstances of this case, the Applicant has demonstrated that he is a person "directly affected" by the Corrected Decisions.

IV. <u>Conclusion</u>

[66] I noted at the outset that this is a somewhat unusual case, and the discussion above confirms why that is so. A review of the evidence also confirms why the Applicant will likely be

frustrated by this outcome. Despite his assertion that he is a victim of Mr. Baker's web of deception, I am unable to give effect to his claims.

[67] First, this Court has no jurisdiction in relation to claims as between individuals relating to fraud, libel, or defamation. Therefore the claim against Mr. Baker cannot proceed.

[68] Second, the Applicant has not demonstrated that he is a person "directly affected" by the Corrected Decisions, and thus he does not have standing to pursue this aspect of his claim. While the Applicant vigorously asserts that he was not involved with Mr. Baker's fraud and he argues that he has been harmed – and fears that he will continue to be harmed – by Mr. Baker's use of a false narrative to ensnare him in his web of lies, this alone is not sufficient to give the Applicant standing to bring this particular proceeding. Although given in a different context, the following observations of Justice Eleanor Dawson in *League for Human Rights FC* (cited with approval in *General Motors* at para 51) are equally apt here:

> [25] In *Finlay v. Canada (Minister of Finance)*, 1986 CanLII 6 (SCC), [1986] 2 S.C.R. 607, an appeal from the Federal Court of Appeal, the Supreme Court of Canada quoted with approval at page 623 the following passage from *Australian Conservation Foundation Inc. v. Commonwealth of Australia* (1980), 28 A.L.R. 257, when considering the existence of direct standing:
>
> > A person is not interested within the meaning of the rule, unless he is likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle or winning a contest, if his action succeeds or to suffer some disadvantage, other than a sense of grievance or a debt for costs, if his action fails. [emphasis added]
>
> [26] Without doubt, the applicant and the family members it says it represents deeply care, and are genuinely concerned, about Mr. Odynsky's citizenship revocation process and his past service as a perimeter guard of the Seidlung at the Poniatowa labour camp in German-occupied Poland. However, that interest does not mean that the legal rights of the applicant, or those it represents, are

> legally impacted or prejudiced by the decision not to revoke Mr. Odynsky's citizenship. Rather, their interest exists in the sense of seeking to right a perceived wrong arising from, or to uphold a principle in respect of, the non-revocation of Mr. Odynsky's citizenship.
>
> [Emphasis added by Justice Dawson.]

[69] In the instant case, the Applicant's genuine interest in clearing his name and preventing Mr. Baker from continuing to spread lies about him does not, in and of itself, make him a person who is "directly affected" by the Corrected Decisions, and he has not established that he is so affected. While the Applicant may have other legal avenues to pursue, he does not have standing to pursue this application for judicial review.

[70] It may be small comfort to the Applicant, but the record is clear that the Parole Board has corrected its description of him, and the material he provided to the Board about Mr. Baker's false narrative is now part of the record and will be taken into account in any future consideration of Mr. Baker's case. Further, as noted earlier, if Mr. Baker or anyone else seeks to rely on the Original Decisions, the Applicant can take steps to protect his interests by pointing to the Corrected Decisions. This does not, however, change the conclusion on this case, namely that the Applicant lacks standing to challenge the Corrected Decisions.

[71] For these reasons, I must dismiss the application for judicial review.

[72] In exercise of my discretion under Rule 400 of the *Federal Courts Rules*, SOR 98-106 and considering the factors set out in that provision; in all of the circumstances of this case, I find that this is not a case for costs. Each party shall bear their own costs of this proceeding.

JUDGMENT in T-659-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. No costs are awarded. Each party shall bear its own costs of this proceeding.

"William F. Pentney"

Judge

<u>**FEDERAL COURT**</u>

<u>**SOLICITORS OF RECORD**</u>

DOCKET:	T-659-19
STYLE OF CAUSE:	JOHN V. KURGAN v ATTORNEY GENERAL OF CANADA ET AL
PLACE OF HEARING:	HEARD BY VIDEOCONFERENCE
DATE OF HEARING:	MARCH 1, 2021
JUDGMENT AND REASONS:	PENTNEY J.
DATED:	OCTOBER 15, 2021

<u>APPEARANCES</u>:

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Mr. Eric O. Peterson	FOR THE RESPONDENT

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