Federal Court  Cour fédérale

Date: 20240103

Docket: T-1817-23

Citation: 2024 FC 11

Ottawa, Ontario, January 3, 2024

PRESENT: The Honourable Madam Justice Turley

BETWEEN:

BERNARD E. BOLAND

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS FOR JUDGMENT

I. Overview

[1] The Respondent brings a motion in writing pursuant to Rule 369 of the *Federal Courts Rules*, SOR/98-106 [*Rules*] to strike the Applicant's Notice of Application dated August 31, 2023 [the application] in its entirety without leave to amend on the basis that the application is now moot. The application relates to a deemed refusal by the Department of National Defence [DND] to disclose personal information requested by the Applicant under the *Privacy Act*, RSC 1985, c P-21.

[2] The Respondent's motion to strike is granted and the application is struck, without costs. Applying well-settled jurisprudence, the application is bereft of any chance of success based on mootness. Given that the DND disclosed documents to the Applicant subsequent to the filing of the application, there is no longer a live controversy for this Court to adjudicate.

II. Background

[3] On February 16, 2023, the Applicant made a request under the *Privacy Act* for record(s) that delegated the authority and authorized Mr. Kin Choi to be the Responsible Officer for the Applicant's harassment complaint against a former Deputy Minister of National Defence [*Privacy Act* request].

[4] The *Privacy Act* prescribes a thirty-day limit to respond to a request. That time limit may be extended by a maximum of thirty days: *Privacy Act*, ss 14-15. In accordance with subsection 16(3), a failure to provide access to the requested information within the prescribed time limit is a deemed refusal.

[5] Between February and May 2023, the DND advised the Applicant that despite best efforts, it was unable to provide an estimated completion date to respond to his *Privacy Act* request.

[6] On May 12, 2023, the Applicant filed a complaint with the Office of the Privacy Commissioner of Canada [OPC] concerning the DND's failure to respond to his *Privacy Act* request.

[7] The OPC issued an investigation report on July 30, 2023, finding that the Applicant's complaint was well-founded and that the DND's lack of response was considered a deemed refusal.

[8] The Applicant commenced the application on August 31, 2023 pursuant to section 41 of the *Privacy Act* seeking to compel the DND to comply with the *Privacy Act* and provide the information requested.

[9] On October 13, 2023, the DND responded to the Applicant's *Privacy Act* request and released "all available records" that had been located. The Applicant was advised that he could file a complaint with the OPC about any matter related to his request.

III. Analysis

A. *Test for a motion to strike*

[10] While the *Rules* do not contemplate a motion to strike in the context of applications, the Court has the plenary jurisdiction to strike an application to restrain the misuse or abuse of the court process: *Wenham v Canada (Attorney General)*, 2018 FCA 199 at para 33 [*Wenham*]; *JP Morgan Asset Management (Canada) Inc v Canada (National Revenue)*, 2013 FCA 250 at paras 47-48.

[11] In order to succeed on a motion to strike an application for judicial review, the moving party must demonstrate that the application is "so clearly improper as to be bereft of any possibility of success": *David Bull Laboratories (Canada) Inc v Pharmacia Inc*, 1994 CanLII 3529 (FCA),

[1995] 1 FC 588 (CA) at 600. In that respect, the threshold question is whether it is "plain and obvious" that the pleading discloses no reasonable cause of action or that the application is "doomed to fail": *Wenham* at para 33.

[12] The jurisprudence makes clear that an application may be doomed to fail and thus struck out on the basis of mootness: *Wenham* at para 36(I); *Cardin v Canada (Attorney General)*, 2017 FCA 150 at para 8; *Lukács v Canada (Transportation Agency)*, 2016 FCA 227 at para 6; *Adams v Canada (Parole Board)*, 2022 FC 273 at para 32 [*Adams*]; *1397280 Ontario Ltd v Canada (Employment and Social Development)*, 2020 FC 20 at para 11.

B. *Test for mootness*

[13] Mootness is assessed based on the two-part test set out in *Borowski v Canada (Attorney General)*, 1989 CanLII 123 (SCC), [1989] 1 SCR 342 [*Borowski*]. The first question is whether the proceeding is moot, particularly "whether a live controversy remains that affects or may affect the rights of the parties": *Democracy Watch v Canada (Attorney General)*, 2018 FCA 195 at para 10 [*Democracy Watch*].

[14] If there is no live controversy, then the second question arises: whether the court should exercise its discretion to nevertheless hear the matter: *Democracy Watch* at para 10.

[15] In deciding whether to hear a moot case, three factors guide the Court's exercise of discretion: (i) the absence or presence of an adversarial context; (ii) the concern for judicial economy; and (iii) the Court's proper law-making role: *Borowski* at 345, 346; *Hakizimana v*

Canada (Public Safety and Emergency Preparedness), 2022 FCA 33 at para 20 [*Hakizimana*]; *Democracy Watch* at para 13.

[16] The application of these factors is not "a mechanical process": *Borowski* at 345. Indeed, the extent to which each of the three factors is engaged depends on the circumstances of the case and one may outweigh the others: *Sinclair v Canada (Attorney General)*, 2023 FC 750 at para 18; *NNS Organics Limited v Canada (Health)*, 2020 FC 819 at para 40; *Canada (Public Safety and Emergency Preparedness) v Allen*, 2019 FC 932 at para 14 [*Allen*]. As emphasized by Justice Norris, "the ultimate question is what is in the interests of justice": *Allen* at para 14.

C. *The application is moot*

[17] I agree with the Respondent that the application is moot. Whether there remains a live controversy for the Court's adjudication is determined with reference to the nature of the underlying application. Here, the application concerns a "deemed refusal" by the DND to respond to the Applicant's *Privacy Act* request. However, since the filing of the application, the DND responded to the request and released records. There is therefore no longer a "live controversy" between the parties as it pertains to the deemed refusal.

[18] This Court has made clear that a deemed refusal application is moot if disclosure has been made, regardless of how complete or adequate it is: *Khoury v Canada (Employment and Social Development)*, 2022 FC 101 at paras 29-34 [*Khoury*]; *Iris Technologies Inc v Canada (National Revenue)*, 2022 FC 1404 at para 31 [*Iris Technologies*]; *Khan v Canada (Citizenship and*

Immigration), 2021 FC 995 at para 28; *Cumming v Canada (Royal Mounted Police)*, 2020 FC 271 at paras 27-32 [*Cumming*]; *Sheldon v Canada (Health)*, 2015 FC 1385 at paras 21-25 [*Sheldon*].

[19] In arguing that there is still a live controversy between the parties in the application, the Applicant misapprehends the relief that this Court may grant on a judicial review application challenging a deemed refusal. While the Applicant is not satisfied with the DND's response to his *Privacy Act* request, the adequacy of that response is not before the Court on the application.

[20] This does not mean that the Applicant is without recourse and has no ability to challenge the DND's response. The Applicant has the right to file a complaint with the OPC under the *Privacy Act*: *Khoury* at para 34; *Iris* at para 29; *Cumming* at para 31. This was made clear in the DND's October 2023 letter, as well as the OPC's July 2023 letter wherein the OPC informed the Applicant that he "must make a new complaint" if he is not satisfied with information provided by the DND.

[21] Absent an investigation by the OPC concerning the manner in which the DND responded to the *Privacy Act* request, however, "it is not open to the Court to review the nature and content of the response, however imperfect and incomplete the response may appear to be" to the Applicant: *Sheldon* at para 21.

[22] As articulated by Justice Fothergill, "a complaint to and a report from the OPC are prerequisites to this Court ruling upon the adequacy of a response to a request for access to personal information under the Privacy Act": *Khoury* at para 32. In this case, the OPC only determined in

its July 2023 investigation that the DND's lack of response was a deemed refusal. It has not considered the adequacy of the DND's subsequent disclosure of records. If the Applicant is not satisfied with the DND response, the proper recourse is to file a new complaint with the OPC.

[23] In light of the DND's disclosure of records on October 13, 2023, the application is moot. As aptly stated by Justice Gleeson, "the refusal to respond has been remedied" and "the controversy that gave rise to the section 41 application has been resolved": *Cumming* at para 32.

D. *Factors militate against the Court exercising its discretion to hear the moot application*

[24] Considering the relevant factors set out in *Borowski*, I am satisfied that the Court should not exercise its discretion and hear the moot application.

(1) No adversarial context remains

[25] The first factor concerns whether an adversarial context remains. In assessing this factor, the Supreme Court has held that "the appropriate adversarial context persists" where the "litigants have continued to argue their respective sides vigorously": *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62 at para 19. More recently, the Federal Court of Appeal has concluded that this factor is satisfied where, "both sides, represented by counsel, take opposing positions": *Canadian Union of Public Employees (Air Canada Component) v Air Canada*, 2021 FCA 67 at para 10.

[26] Although there are opposing parties prepared to advocate their respective positions before the Court, I agree with the Respondent that "there is no legally relevant adversarial context with respect to the issue for which relief is sought": Written Representations of the Attorney General of Canada at para 36. While the Applicant expresses a continuing interest in pursuing the application, the issue he wishes to pursue – the adequacy of the DND's response – is not the subject of the underlying application and thus not properly before this Court. As such, the necessary and proper adversarial context is lacking in the circumstances of this case.

[27] Significantly, in *Abel v Canada (Citizenship and Immigration)*, 2021 FCA 131 [*Abel*], Justice de Montigny (as he then was) held that the appellant's continued interest in pursuing his appeal was insufficient "to find that this dispute is adversarial in nature": *Abel* at para 16. More specifically, "the dispute has lost its adversarial nature" because the relief the Court could order would have no practical effect on the Appellant's rights: *Abel* at para 17. Similarly, in this case, the application no longer has an adversarial underpinning given that the DND responded to the Applicant's *Privacy Act* request. The Applicant has received the remedy the Court could have awarded on the application.

[28] Based on the foregoing, I find that the first factor does not favour hearing the application on its merits.

(2) Judicial economy militates against hearing the application

[29] The second factor relating to judicial economy strongly militates against hearing the application. The Federal Court of Appeal's recent conclusion underscores the particular

significance of this factor: “mootness in judicial reviews has assumed new prominence in light of the recent encouragement given to reviewing courts to avoid needless hearings”: *Public Service Alliance of Canada v Canada (Attorney General)*, 2021 FCA 90 at para 6.

[30] There is simply no practical utility in hearing the deemed refusal application on its merits and it would therefore be a waste of scarce judicial resources: *Hakizimana* at para 20. Indeed, the application is in its very early stages of litigation, with a potential preliminary motion concerning the Respondent’s objection to the Applicant’s Rule 317 request. Proceeding with this moot application is not an efficient use of the Court’s resources, especially given the preliminary stage of the application and the fact that a decision would have no practical effect on the Applicant’s rights: *Adams* at para 49.

[31] Furthermore, there are no issues of broad public importance at play that warrant the Court hearing the application: *Burlacu v Canada (Public Safety and Emergency Preparedness)*, 2022 FC 1290 at para 24 [*Burlacu*]; *Figueroa v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 1037 at para 12. A deemed refusal application is by its very nature factually specific.

(3) No question of general importance

[32] Third, the Court must consider whether it would be departing from its proper law-making role if it heard the application: *Borowski* at 363. In my view, this final factor is not engaged in the circumstances of this case because there is no question of general importance to be determined: *Burlacu* at para 25; *Coalspur Mines (Operations) Ltd v Canada (Environment and Climate Change)*, 2021 FC 759 at para 17; *Mirzaee v Canada (Citizenship and Immigration)*,

2020 FC 972 at para 37; *David Suzuki Foundation v Canada (Attorney General)*, 2019 FC 411 at para 126; *Collin v Canada (Attorney General)*, 2006 FC 544 at para 14.

E. *Conclusion*

[33] Having considered the relevant factors, the circumstances of this case do not warrant this Court exercising its discretion to hear the moot application. The application is therefore dismissed, without leave to amend. There is no award of costs.

JUDGMENT in T-1817-23

THIS COURT ORDERS that:

1. The Notice of Application is struck out, without leave to amend.

2. The application for judicial review is dismissed.

3. No costs are awarded.

"Anne M. Turley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1817-23
STYLE OF CAUSE:	BERNARD E. BOLAND v ATTORNEY GENERAL OF CANADA
MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES*	
JUDGMENT AND REASONS FOR JUDGMENT:	TURLEY J.
DATED:	JANUARY 3, 2024

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