In the Court of Appeal of Alberta

Citation: Oleynik v University of Calgary, 2023 ABCA 265

Date: 20230925
Docket: 2301-0034AC
Registry: Calgary

Between:

Dr. Anton Oleynik

Appellant

- and -

The Governors of the University of Calgary and the Office of the Information and Privacy Commissioner

Respondents

The Court:

The Honourable Justice Frans Slatter
The Honourable Justice Jo'Anne Strekaf
The Honourable Justice William T. de Wit

Memorandum of Judgment

Appeal from the Order by
The Honourable Justice M.H. Hollins
Dated the 25th day of January, 2023
Filed on the 4th day of February, 2023
(2023 ABKB 43, Docket: 2201 04192)

Memorandum of Judgment

The Court:

[1] The appellant appeals an order that struck out an affidavit (and a related brief) that he had filed in support of a judicial review application challenging a decision of the Office of the Information and Privacy Commissioner: ***Oleynik v University of Calgary***, 2023 ABKB 43.

[2] The appellant's underlying grievance relates to an unsuccessful application for research funding: see ***Oleynik v Canada (Attorney General)***, 2020 FCA 5 at paras. 15-16, 441 DLR (4th) 744. Collateral to his challenge to the refused funding, he applied for the disclosure of documents from the University relating to some persons involved in the funding decision.

[3] The University produced some records but responded that it did not have any other records under its control. The appellant applied to the Privacy Commissioner who confirmed that the University had met its obligations under the statute: Order F2022-18. The appellant then brought a judicial review application challenging the Privacy Commissioner's decision.

[4] The Privacy Commissioner filed a Certified Record of its Proceedings as required by R. 3.18 and Form 9:

> 3.18(1) An originating applicant for judicial review who seeks an order to set aside a decision or act must include with the originating application a notice in Form 8, addressed to the person or body who made or possesses the record of proceedings on which the decision or act sought to be set aside is based, to send the record of proceedings to the court clerk named in the notice.
>
> (2) The notice must require the following to be sent or an explanation to be provided of why an item cannot be sent:
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> > (a) the written record, if any, of the decision or act that is the subject of the originating application for judicial review,
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> > (b) the reasons given for the decision or act, if any,
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> > (c) the document which started the proceeding,
> >
> > (d) the evidence and exhibits filed with the person or body, if any, and
> >
> > (e) anything else relevant to the decision or act in the possession of the person or body. . . .

As this rule clearly states, the Certified Record is only to include matters on which the challenged decision was based.

[5] The Privacy Commissioner, however, included in the Certified Record material that was not relied on by it. Specifically, the filed Certified Record included a copy of the appellant's originating application and affidavit. Since those documents did not exist at the time the challenged decision was made, they could not form part of the record on which that decision was based. Material such as the originating application and affidavit, received by the tribunal after the decision was made, is not a proper part of the Certified Record.

[6] The University brought a cross application, seeking to strike out the appellant's affidavit (and related brief) that he had filed in support of his judicial review application, on the basis that they did not comply with R. 3.22. Rule 3.22 limits the evidence that can be relied on in a judicial review application to set aside a decision of a tribunal. The University also applied to strike out those portions of the Certified Record that had incorrectly included the affidavit and brief. The chambers judge concluded that some of the evidence tendered by the appellant required permission of the Court, and that given the nature of the evidence permission would not be granted. She accordingly struck out the affidavit and the related brief, including the part of the Certified Record that reproduced those documents.

[7] As the chambers judge correctly noted, judicial review is a review of the tribunal's decision based on the record before the tribunal, not a fresh assessment of the issue by the reviewing court: ***J.K. v Gowrishankar***, 2019 ABCA 316 at para. 60; ***Oleynik v Memorial University of Newfoundland***, 2021 NLCA 56 at paras. 22-23. As a result, judicial review to set aside a decision of a tribunal is *prima facie* restricted to the record that was before the tribunal at the time it made its decision. Rule 3.22 confirms this fundamental assumption:

> 3.22 When making a decision about an originating application for judicial review, the Court may consider the following evidence only:
>
> > (a) the certified copy of the record of proceedings of the person or body that is the subject of the application, if any;
> >
> > (b) if questioning was permitted under rule 3.21 [*Limit on questioning*], a transcript of that questioning;
> >
> > (b.1) if the originating application is for relief other than an order in the nature of certiorari or an order to set aside a decision or act, an affidavit from any party to the application;
> >
> > (c) anything permitted by any other rule or by an enactment;
> >
> > (d) any other evidence permitted by the Court.

While R. 3.22(d) does enable the court to permit evidence supplementing the record that was before the tribunal, for example to demonstrate breaches of the rules of natural justice, an application to set aside a decision is generally limited to a review of the record.

[8] Rule 3.22, as originally drafted, contemplated applications for orders in the nature of *certiorari* quashing decisions of tribunals. The rule, however, covered other judicial review applications, such as applications for mandamus, *habeas corpus*, prohibition, *quo warranto*, declaration and injunction. Those types of applications are not always limited to a review of the record, and indeed for them there is no requirement to file a certified record under R. 3.18 and 3.19. In these other types of judicial review applications an applicant will normally have to file an affidavit, and R. 3.22(d) would require permission to do so. Since the court would almost invariably grant permission to file an affidavit in the circumstances, R. 3.22(b.1) was added in 2022 to eliminate the need to obtain permission before the judicial review application was heard.

[9] The appellant argues that his application falls under R. 3.22(b.1) because a) it is not an application to set aside the Commissioner's decision, and b) his application includes a fresh application to have the court determine if the respondent should disclose further documents "in the public interest".

[10] The relief requested in the Originating Application included:

> 22. An Order stating that responsive records shall be disclosed in the public interest, pursuant to Section 32 of the *FOIPP*, or
>
> 23. In the alternative, an Order in the nature of *certiorari* to quash or set aside Order F2022-18, remitting it to the other Adjudicator of the Office of the Information and Privacy Commissioner.

The applicant argues that the relief requested in para. 22 does not amount to an order in the nature of *certiorari* or to set aside the Commissioner's decision as referred to in R. 3.22(b.1). Since the Commissioner had ordered that the respondent University had met its disclosure obligations, any order requiring further disclosure (whether in the "public interest" or otherwise) would amount to an attempt to set aside that order. Requesting an order "stating" that disclosure is required does not change the essential nature of the relief requested. The application here does not fall under R. 3.22(b.1).

[11] Alternatively, the appellant argues that his application was, in part, to have the court consider afresh the application of the public interest exception to his request for documents. He argues, based on ***University of Alberta v Pylypiuk***, 2002 ABQB 22 at para. 26, that the Court will engage that issue directly without regard to the Commissioner's views, and that his affidavit was filed in support of that application, not to set aside the decision of the Commissioner. The ***Pylypiuk***, decision, however, was only discussing the standard of review to be applied and it has clearly been overruled by ***Minister of Citizenship and Immigration v Vavilov***, 2019 SCC 65, [2019] 4 SCR

653. Any argument about the failure of the Commissioner to consider the public interest exception amounts to an application to set aside the Commissioner's decision, not a standalone application.

[12] Some of the evidence in the appellant's affidavit arguably duplicated evidence that was properly on the record, but other parts of it was new evidence. As the chambers judge correctly ruled, the appellant could not unilaterally add that new material to the court record, but rather was required to apply for permission. The chambers judge did not err in striking the affidavit. Any reviewable error by the Privacy Commissioner, including any issue about whether documents should be disclosed "in the public interest", must be decided based on the record before the Commissioner.

[13] The appellant's affidavit was filed on April 7, 2022, prior to the filing of the Certified Record on June 20, 2022. The appellant initially argued that he filed his affidavit to mitigate delay in filing the Certified Record. He subsequently argued that he filed his affidavit to crystalize the content of hyperlinks in the Certified Record. His affidavit makes no mention of that, and until the Certified Record was filed he had no way of knowing whether it contained hyperlinks that required crystallization.

[14] The appellant argues that some or all of the evidence in his affidavit was in fact before the Privacy Commissioner at the time it made its decision. If that is so it will be found in the Certified Record, he can rely on it, and his affidavit would be redundant. However, material improperly included in the Certified Record, such as the copy of the appellant's originating application and his challenged affidavit, may not be referred to. As noted, those documents were obviously not before the Commissioner at the time its decision was made.

[15] In addition, the appellant argues that some of the material he filed with the Commissioner contained hyperlinks to evidence he relied on, and that the chambers judge overlooked that some of the evidence in his affidavit was not "new" but was found in those hyperlinks. If that is so, the Certified Record would reference those hyperlinks. How hyperlinks in a Certified Record should be dealt with can be left for another day.

[16] As the appellant points out, the contents of hyperlinks may vary over time. An applicant could apply to file an affidavit simply stating, without further comment, that the exhibits to the affidavit are printouts of the hyperlink as of the date the decision was made. As noted, his affidavit does not state that as its purpose.

[17] The appellant argues that he had to file his affidavit to support his argument that documents should be released "in the public interest", under s. 32 of the *Freedom of Information and Protection of Privacy Act*, RSA 2000, c. F-25. The Commissioner concluded that the respondent University had produced all the records under its control, not that it was not required to produce some documents for reasons, for example, of confidentiality or privacy. The applicability of the public interest exception in this context is unclear. In any event, as the appellant notes the

adjudicator did not consider the public interest, that omission is evident from the Certified Record, and if that was a reviewable error no affidavit is needed to prove it.

[18] There were also some issues surrounding the scheduling of the judicial review application. On Friday, June 3, 2022 the appellant gave the respondents until Monday to agree with proposed dates for the application. When they did not respond, he inaccurately advised the court that counsel had agreed on particular dates. Neither the *Rules* nor other court procedures give one litigant the authority to impose arbitrary deadlines on another, and then "deem" agreement if the deadline is not met. The procedure followed was unreasonable, and the chambers judge did not err in adjourning the application to a mutually convenient date. The invocation of R. 9.4(2)(c), and the costs award were also not unreasonable.

[19] Finally, the appellant argues that the chambers judge approached the application with a closed mind. Refusing to hear argument on an issue the judge believes is not relevant to the issues reflects a finding on relevance, not a closed mind. The fact that the judge may have misapprehended a piece of evidence or does not interpret the evidence as advocated by the applicant is also not evidence of a closed mind. The appellant's arguments about the fairness of the procedures are without merit.

[20] Finally, the Court discourages appeals like this of interlocutory procedural rulings: ***Robertson v Wasylyshen***, 2003 ABCA 279 at paras. 3-4, 28 Alta LR (4th) 226, 339 AR 169. The better practice is to proceed with the judicial review hearing, and then (if necessary) prosecute one appeal from the ultimate outcome. Any alleged interlocutory errors can be addressed at that time: R. 14.71; ***Guillevin International Co v Barry***, 2022 ABCA 144 at para. 15. That would include any issues about hyperlinks or the public interest exception. There is always the possibility that collateral issues, such as those relating to hyperlinks, would have no impact on the outcome anyway.

[21] The respondent University seeks solicitor and client or enhanced costs on the basis that the appellant's claim is frivolous and part of a pattern of abusive, vexatious and harassing behaviour. It argues that the appellant attempts to "weaponize privacy legislation" to increase the time, energy and legal expenses incurred by the University. The appellant has clearly engaged in an aggressive pattern of litigation of this kind: see Appendices A and B to ***Oleynik v Memorial University of Newfoundland***, 2023 NLSC 86, where solicitor and client costs were awarded.

[22] As noted, the appellant's underlying judicial review of some of the funding decisions has been dismissed by the Federal Court: *supra*, para. 2. The appellant argues that he is entitled to request documents under the privacy legislation without providing a reason why he wants the documentation. That is true, but no one is denying his right to access documents. He made a request for documents, the University complied, and the Privacy Commissioner confirmed that the University had met its statutory obligations. The appellant has challenged all of those decisions. The question is not whether he has the right to demand documents without providing an

explanation, but who should bear the expense of this unsuccessful litigation challenging the decisions that have been made.

[23] As noted, this is an appeal of an interlocutory decision which inevitably incurs costs that are disproportionate to the underlying issues. The appellant has acted in a high-handed manner, purporting to impose deadlines on the parties and then "deeming" their agreement if they do not respond in time. He cannot argue that he was unaware of the rules respecting judicial review, because he has raised here an issue that was already decided against him: *supra*, para. 7. This appeal is part of a pattern of excessive litigation disproportionate to the issues, and enhanced costs are justified.

[24] Since no amount of money is involved the presumptive column for assessed costs is Column 1. In the circumstance the University is entitled to enhanced costs based on triple Column 1, which we fix at $10,000 (which is inclusive of disbursement) plus GST of $500. Those costs are payable forthwith. Costs will not be granted to or against the Privacy Commissioner.

[25] The appellant has failed to show any reviewable error, and the appeal is dismissed. Counsel for the University may prepare the order, and R. 9.4(2)(c) is invoked.

Appeal heard on September 11, 2023

Memorandum filed at Calgary, Alberta
this 25th day of September, 2023

Slatter J.A.

Strekaf J.A.

de Wit J.A.

Appearances:

Appellant, Dr. Anton Oleynik

M.D. Ford, K.C. (no appearance)
J. Ward
for the Respondent the Governors of the University of Calgary

J.A. Harker
for the Respondent the Office of the Information and Privacy Commissioner of Alberta