

CANADA / JUDGMENT

Watson v. Scouts Canada

2020 BCSC 41

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 41 Watson v. Scouts Canada

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Watson v. Scouts Canada,

2020 BCSC 41

Date: 20200114

Docket: S1811356

Registry: Vancouver

In the Matter of the Judicial Review Procedure Act, R.S.B.C. 1996, c. 241

Between:

Andrew Donald Watson, P. Eng

Petitioner

And

Scouts Canada

Respondent

Before: The Honourable Mr. Justice Skolrood

Reasons for Judgment

Counsel for the Petitioner:

J. Rai

Counsel for the Respondent:

E.E. Vanderburgh

Place and Date of Trial/Hearing:

Vancouver, B.C.

October 4, 2019

Place and Date of Judgment:

Vancouver, B.C.

January 14, 2020

Introduction

- [1] This is an application brought by the respondent Scouts Canada pursuant to R. 21-8 of the Supreme Court Civil Rules to strike out portions of the petition on the basis that this Court lacks jurisdiction.
- [2] The petition advances a claim for judicial review under the Judicial Review Procedure Act, R.S.B.C. 1996, c. 241 [JRPA], of a decision by Scouts Canada to terminate the membership of the respondent Andrew Donald Watson.
- [3] The central question on this application is whether the claims raised in the impugned paragraphs of the petition fall within the exclusive jurisdiction of the Federal Court pursuant to s. 18 of the Federal Courts Act, R.S.C. 1985, c. F-7 [FCA].

Background

- [4] It is not necessary to review in great detail the background facts to the judicial review application, however I will provide a brief overview.
- [5] Mr. Watson is a professional engineer who was involved with Scouts Canada for approximately 43 years. On November 2, 2017, Scouts Canada terminated his membership (the "Termination Decision"). This followed a temporary suspension issued on or about May 12, 2017, for conduct allegedly in violation of Scouts Canada's code of conduct and a subsequent review by Scouts Canada's national review committee. The reasons for the suspension and ultimate termination are not relevant to this application.
- [6] Scouts Canada is a corporation continued pursuant to a federal statute, An Act respecting Scouts Canada, S.C. 2007, c. 38 [Scouts Canada Act]. Under s. 7 of the Scouts Canada Act, Scouts Canada is empowered to pass bylaws governing a number of matters, including membership.

- [7] Pursuant to this power, Scouts Canada has enacted a bylaw setting out different categories of membership. Scouts Canada has also established a comprehensive set of policies and procedures governing the affairs of the organization, including the investigation and discipline of members.
- [8] Scouts Canada's termination of Mr. Watson's membership was purportedly done in accordance with the bylaw and its policies and procedures.
- [9] On October 22, 2018, the petition was filed seeking judicial review. Scouts Canada filed its response on December 7, 2018.
- [10] The matter proceeded to a hearing on April 4, 2019, but it was adjourned to permit Scouts Canada to raise the jurisdictional issue underlying its present application. Scouts Canada did not challenge this Court's jurisdiction in its response to petition, however on April 17, 2019, it filed a jurisdictional response.

Legal Framework

- [11] Section 2(2) of the JRPA is the key operative section in respect of Mr. Watson's application for judicial review:
- (2) On an application for judicial review, the court may grant any relief that the applicant would be entitled to in any one or more of the proceedings for:
- (a) relief in the nature of mandamus, prohibition or certiorari;
- (b) a declaration or injunction, or both, in relation to the exercise, refusal to exercise, or proposed or purported exercise, of a statutory power.
- [12] Scouts Canada relies on s. 18(1) of the FCA which states:
- 18 (1) Subject to section 28, the Federal Court has exclusive original jurisdiction
- (a) to issue an injunction, writ of certiorari, writ of prohibition, writ of mandamus or writ of quo warranto, or grant declaratory relief, against any federal board, commission or other tribunal; and
- (b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.
- [13] Section 28 of the FCA, which is referred to in s. 18, confers exclusive jurisdiction on the Federal Court of Appeal to hear judicial review applications in respect of certain enumerated tribunals. That section has no application here.
- [14] Section 2(1) of the FCA defines "federal board, commission or other tribunal" to mean:
- any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament

- [15] Both parties cite the decision of the Supreme Court of Canada in *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26. While this case is more applicable to the merits of Mr. Watson's judicial review application, the analysis also helps inform the jurisdictional issue.
- [16] Wall involved an application for judicial review of a decision of a congregation of Jehovah's Witnesses to expel a member. The Alberta Court of Queen's Bench and the Court of Appeal both held that the courts had jurisdiction to consider the application, but the Supreme Court of Canada disagreed.
- [17] In finding that judicial review was not available, Justice Rowe, speaking for the Court, said:
- [14] Not all decisions are amenable to judicial review under a superior court's supervisory jurisdiction. Judicial review is only available where there is an exercise of state authority and where that exercise is of a sufficiently public character. Even public bodies make some decisions that are private in nature -- such as renting premises and hiring staff -- and such decisions are not subject to judicial review: *Air Canada v. Toronto Port Authority*, 2011 FCA 347, [2013] 3 F.C.R. 605, at para. 52. In making these contractual decisions, the public body is not exercising "a power central to the administrative mandate given to it by Parliament", but is rather exercising a private power (*ibid.*). Such decisions do not involve concerns about the rule of law insofar as this refers to the exercise of delegated authority.
- [15] Further, while the private law remedies of declaration or injunction may be sought in an application for judicial review (see, for example, *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, s. 2(2)(b); *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1, s. 2(1)2; *Judicial Review Act*, R.S.P.E.I. 1988, c. J-3, ss. 2 and 3(3)), this does not make the reverse true. Public law remedies such as certiorari may not be granted in litigation relating to contractual or property rights between private parties: *Knox*, at para. 17. Certiorari is only available where the decision-making power at issue has a sufficiently public character: *D. J. M. Brown and J. M. Evans*, with the assistance of D. Fairlie, *Judicial Review of Administrative Action in Canada* (loose-leaf), at topic 1:2252.
- [20] In my view, these cases do not make judicial review available for private bodies. Courts have questioned how a private Act -- like that for the United Church of Canada -- that does not confer statutory authority can attract judicial review: see *Greaves v. United Church of God Canada*, 2003 BCSC 1365, 27 C.C.E.L. (3d) 46, at para. 29; *Setia*, at para. 36. The problem with the cases that rely on *Setia* is that they hold that where a decision has a broad public impact, the decision is of a sufficient public character and is therefore reviewable: *Graff*, at para. 18; *West Toronto United Football Club*, at para. 24. These cases fail to distinguish between "public" in a generic sense and "public" in a public law sense. In my view, a decision will be considered to be public where it involves questions about the rule of law and the limits of an administrative decision maker's exercise of power. Simply because a decision impacts a broad segment of the public does not mean that it is public in the administrative law sense of the term. Again, judicial review is about the legality of state decision making.

The Parties' Positions

- [18] It is common ground between the parties that if Scouts Canada falls within the definition of a "federal board, commission or other tribunal", then the Federal Court has exclusive jurisdiction to judicially review its decisions: see *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62 at para. 47; *Ehattesaht First Nation v. British Columbia (Agriculture and Lands)*, 2011 BCSC 658 at para. 23, leave to appeal ref'd 2011 BCCA 325.
- [19] Somewhat ironically, Scouts Canada takes the position that it is not in fact a "federal board, commission or other tribunal". In its response to the petition, Scouts Canada describes itself and the Termination Decision as follows, at para. 16:

Scouts Canada, its agents, employees, officers and volunteers have no statutory decision-making authority and do not act on behalf of the federal or any provincial government or any state-actor. The Decision is a private decision concerning membership in a voluntary association that is not reviewable by the courts, either by way of judicial review or in a private law action.

- [20] Scouts Canada does not dispute that if its characterization is correct, that it is a private, voluntary association, this Court has jurisdiction to determine whether the Termination Decision had a sufficiently public character to nonetheless render it subject to judicial review.
- [21] However, Scouts Canada submits that it is the manner in which Mr. Watson has framed the judicial review application that gives rise to the jurisdictional issue and its application to strike. Scouts Canada points in particular to the following paragraphs of the petition:
65. Scouts Canada is established by an act of [Parliament]. Its powers, including powers to enact bylaws concerning membership and discipline of its members, are conferred by the Scouts Canada Act. This Act operates as a statutory grant of authority and the decision to terminate the Petitioner's membership is a statutory decision subject to judicial review. However, even if Scouts Canada is considered a domestic tribunal, the nature of its decisions regarding investigation of complaints and discipline of its members have a sufficiently public character such that the termination decision is subject to judicial review.
- (As noted above, Scouts Canada acknowledges that the second ground raised in the last sentence of para. 65 is within this Court's jurisdiction to determine).
66. Scouts Canada is created by a federal statute, but judicial review is within the purview of the provincial superior courts, not the Federal Court as Scouts Canada is not a federal board, commission or tribunal [or] enumerated in s. 28 of the [FCA].
- 73.
- a. In *Wall*, the Court observed that incorporation by a private Act does not necessarily operate as a statutory grant of authority but held that a decision is sufficiently public in character, and therefore reviewable, if it involves "questions about the rule of law and the limits of an administrative decision maker's exercise of power". The decision to terminate the

Petitioner's membership in Scouts Canada, purportedly in accordance with bylaws enacted pursuant to the Scouts Canada Act, squarely puts in issue the legality of Scouts Canada's decision-making and raises questions regarding respect for and compliance with the rule of law.

- [22] Scouts Canada submits that on the face of the petition, in particular the first part of para. 65, Mr. Watson alleges that in making the Termination Decision, Scouts Canada was exercising a statutory power under a federal statute (the Scouts Canada Act) which brings the Termination Decision squarely within the ambit of s. 18 of the FCA.
- [23] However, this is not Mr. Watson's position. As reflected in part in para. 66 of the petition, reproduced above, although created by a federal statute, Mr. Watson argues Scouts Canada is not a "federal board, commission or other tribunal" and s. 18 of the FCA does not apply.
- [24] Mr. Watson cites *Cameron v. Albrich*, 2011 BCSC 549, where the court observed that not every exercise of a power conferred by a federal statute renders the decision-maker a "federal board, commission or other tribunal" (at paras. 46-48).
- [25] Mr. Watson also cites *Canadian Judicial Council v. Girouard*, 2019 FCA 148, where the court confirmed the two-part test for determining whether a body is a "federal board, commission or other tribunal" (at para. 34):
- a) What jurisdiction or power is the body seeking to exercise; and
 - b) What is the source or origin of that jurisdiction or power?
- [26] Mr. Watson submits that there needs to be a more thorough assessment of this test in order to determine whether Scouts Canada meets the definition of a "federal board, commission or other tribunal", something which is beyond the proper scope of this application to strike.
- [27] Mr. Watson submits further that the impugned paragraphs deal with the statutory framework within which the Termination Decision was made, which is relevant to determining whether Scouts Canada is a public decision-maker or if the activities in question have a sufficiently public character, to render the Termination Decision subject to judicial review.

Discussion

- [28] As I have noted, Scouts Canada's application to strike on jurisdictional grounds is based on a premise that both it and Mr. Watson reject, namely that it is a "federal board, commission or other tribunal".
- [29] Nonetheless, Scouts Canada submits that Mr. Watson has pleaded jurisdictional facts that, if true, establish that it meets the definition as such and falls within s. 18 of the FCA. Scouts Canada submits further that its application must be determined on the basis as the facts as pleaded.

- [30] The difficulty with this position is that the impugned paragraphs (65, 66 and 73(a)) all appear in the "Legal Basis" section of the petition rather than the "Factual Basis" section. Each of the paragraphs contains statements that are in the nature of legal arguments or conclusions rather than facts. In particular, para. 73(a) advances an argument that on its face is intended to bring the Termination Decision in line with the principles set out in Wall. I therefore do not agree with Scouts Canada that these paragraphs plead jurisdictional facts that bring the claim within the scope of s. 18 of the FCA.
- [31] While the language used in para. 65 does potentially give rise to a question about the applicability of s. 18 of the FCA, that paragraph must be read alongside para. 66 where it is alleged that Scouts Canada is not in fact a "federal board, commission or other tribunal".
- [32] Further, I agree with Mr. Watson that the statutory framework is relevant to determining the true character of Scouts Canada, i.e. public or private body, and the nature of the Termination Decision. Both the statutory framework in which a decision-maker operates and the nature of the decision itself must be considered when determining whether judicial review is available (see *Strauss v. North Fraser Pretrial Centre (Deputy Warden of Operations)*, 2019 BCCA 207 at para. 40).
- [33] As noted above at para. 20 and parenthetically at para. 21, Scouts Canada concedes that this Court has jurisdiction to hear that part of the petition that alleges the Termination Decision was sufficiently public in character as to attract judicial review under s. 2(2)(a) of the JRPA. Thus, even if the impugned paragraphs could be struck because of the exclusive jurisdiction of the Federal Court under s. 18 of the FCA (which I do not agree is warranted), they are relevant to issues that properly fall within this Court's jurisdiction.
- [34] Finally, if Scouts Canada succeeds on this application, with the result being that Mr. Watson must bring part of his judicial application in the Federal Court, it is quite possible that the Federal Court will decline jurisdiction on the ground that Scouts Canada is not in fact a "federal board, commission or other tribunal". That no doubt is the position that Scouts Canada would take which, if successful, would ultimately result in the parties returning back before this Court. Such a result would be inconsistent with the objective of securing a "just, speedy and inexpensive determination" of the petition: *Supreme Court Civil Rules*, R. 1-3(1).
- [35] The better approach, in my view, is for the proper characterization of Scouts Canada to be determined in this proceeding in a hearing on the merits of the petition.

Conclusion

- [36] Scouts Canada's application to strike portions of the petition is dismissed.
- [37] Costs will be in the cause.

"Skolrood J."

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