COURT OF APPEAL FOR ONTARIO

CITATION: Lesage v. Ontario (Attorney General), 2024 ONCA 500
DATE: 20240621
DOCKET: COA-23-CV-1326

MacPherson, Paciocco and Wilson JJ.A.

BETWEEN

Michael Lesage

Applicant (Appellant)

and

The Attorney General of Canada and the Attorney General of Ontario*

Respondents (Respondent*)

Thomas Slade and Cory Giordano, for the appellant

Michael J. Sims and Byron Taylor-Conboy, for the respondent

Heard: June 13, 2024

On appeal from the order of Justice Charles C. Chang of the Superior Court of Justice, dated November 15, 2023, with reasons reported at 2023 ONSC 6444.

REASONS FOR DECISION

[1] The appellant, Michael Lesage, is a lawyer licensee of the Law Society of Ontario. The appeal he brings arises out of the denial, by the Superior Court of Justice, of a request he made for information relating to the progress of civil trials in Ontario to facilitate research he was doing. In addition to other information, he wanted to obtain the case numbers for each civil case disposed of by trial from 2015 onward in six Ontario court houses. To be clear, his request was not simply to view documentation that is filed at these court houses. He wanted the case numbers for matters disposed of by trial to be identified, compiled, and produced to him. His request made through the Ontario Ministry of the Attorney General ("MAG") and his request for reconsideration addressed to the Chief Justice of the Superior Court of Justice were both denied.

[2] In response to the Chief Justice's denials, Mr. Lesage applied for declarations relating to rights of inspection and production of civil court file numbers for cases that have gone to trial. He also sought an order in the nature of *mandamus* compelling the production of the requested information. Appropriately, he did not seek these orders against the Chief Justice of the Superior Court. Instead, he named the Attorney General of Ontario, the legal entity responsible for MAG, as respondent.[1]

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[1] The appellant also named the Attorney General of Canada as a respondent but abandoned the application as against it before the application was heard.

[3] The application judge denied Mr. Lesage's request for *mandamus* on jurisdictional and other grounds and denied the requested declarations that Mr. Lesage sought for three reasons: (1) granting the declaratory relief would serve no practical purpose; (2) the open court principle that Mr. Lesage relied upon to ground his application includes the ability of the public to view and copy court documents but does not extend to requiring the aggregation, sorting and categorization of bulk data, which is what Mr. Lesage was interested in; and (3) even if the open court principle did extend to the aggregation, sorting and categorization of bulk data, decisions relating to the access and disclosure of documentation generated by the judiciary rests exclusively with the court, and the court having made its decision to deny the request "is the end of the matter".

[4] Mr. Lesage does not appeal the denial of *mandamus*, but he does appeal the denial of the declarations. We would dismiss his appeal. In explaining our decision, it is unnecessary to address fully reasons (2) and (3) provided by the application judge. The application judge's first basis for dismissing the application – that he would not exercise discretion to make the requested declarations because no practical purpose would be served – is sufficient to dispose of the appeal.

[5] The place to begin is by recognizing that Superior Court justices are empowered to make declarations, not required to do so: *Courts of Justice Act*, R.S.O. 1990, c. C. 43, s. 97. They have "the broadest judicial discretion" in this

regard: *Strickland v. Canada (Attorney General)*, 2015 SCC 37, [2015] 2 S.C.R. 713, at para. 37, quoting *Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources)*, [1989] 2 S.C.R. 49, at p. 90. We do not accept Mr. Lesage's arguments that we should interfere with the application judge's discretionary decision in this case.

[6] In exercising his discretion to deny the requested declarations, the application judge relied on the legal proposition that declaratory relief "is only to be used when the declaration will have an effect on an existing dispute between the parties": *1472292 Ontario Inc. (Rosen Express) v. Northbridge General Insurance Company*, 2019 ONCA 753, at para. 22. Although he argued that the relevant case law applying this principle is distinguishable, Mr. Lesage does not take issue with the principle itself. He made two other submissions instead, neither of which we find persuasive.

[7] First, in his appeal factum he argues that it was unfair for the application judge to decide his application on the basis that the declarations would serve no practical purpose when this issue was not argued before him. We disagree. The onus was on Mr. Lesage to persuade the application judge to exercise his discretion by granting the requested declarations. Given that it is a central if not mandatory consideration in determining whether a declaration should be made, Mr. Lesage should have addressed the question of whether the declarations he sought would serve a practical purpose. He cannot now, having failed to do so,

argue that it was unfair for the application judge to dismiss his application on this basis.

[8] Second, Mr. Lesage argues that the application judge's conclusion that the declarations sought would serve no practical purpose was arrived at on the erroneous basis that his decision to deny *mandamus* deprived the declarations of their utility. He focuses on the application judge's comment that, "Given … my determination that the applicant is not entitled to the requested order in the nature of *mandamus*, I find that granting the requested declaratory relief would serve no practical purpose and I decline to do so". Although Mr. Lesage's argument evolved during oral submissions, his essential objection appears to be that the application judge failed to consider and/or recognize the impact of the declarations on their own, as binding judicial conclusions about the rights of the parties, even in the absence of mandamus.

[9] We do not agree. The application judge's reasons must be read in their entirety. When this is done, it is clear that the application judge considered the likely impact that the requested declarations themselves would have. In elaborating on his conclusion, he said specifically that "the requested declarations would have no effect on the existing dispute between the parties", observing that they "would be detached from the rights of the parties and in no way determinative of them." This conclusion is not only a reasoned one, but it is unassailable. Mr. Lesage does not contest the proposition accepted by the application judge that

the constitutionally protected principle of judicial independence requires that "control over access to and disclosure of any information or documentation created by or for the judiciary to carry out administrative tasks directly related to the judicial function, by necessity, rests with the judiciary", not with MAG. The parties before the application judge were Mr. Lesage and the Attorney General of Ontario, whose office is responsible for MAG. Simply put, MAG, the other party before the application judge, is not empowered to decide whether to identify, compile and produce the requested information. It is obvious in these circumstances that the requested declarations "would be detached from the rights of the parties" and "would have no effect on the existing dispute between the parties."

[10] Mr. Lesage argued before us that the declarations he sought were aimed not only at MAG but also at the Chief Justice of Ontario. He said he framed the application against the Attorney General of Ontario as a matter of pleading because the Chief Justice of the Superior Court and the Superior Court could not properly be made parties themselves. He submitted that it was and is his expectation that the requested declarations would influence the decision of the Court whether to make the requested disclosure.

[11] The application judge did not directly address the prospect that the declarations might influence the court, no doubt because the litigation proceeded as if directed at the Attorney General of Ontario. Nonetheless, it is evident that consideration of the potential impact of the declarations on the Office of the Chief

Justice would have changed nothing. The application judge's conclusion that the constitutionally protected principle of judicial independence requires that "control over access to and disclosure of any information or documentation created by or for the judiciary to carry out administrative tasks directly related to the judicial function, by necessity, rests with the judiciary" was uncontested. That conclusion undermines any realistic prospect that the declarations, if made, could or would assist Mr. Lesage in securing the compiled information he seeks. The Office of the Chief Justice is a judicial office, no doubt fully cognizant of the interests at stake. The Office of the Chief Justice was also aware of Mr. Lesage's proposed purpose, and his history relating to prior applications and of the practical implications of the request Mr. Lesage was making. In addition, and perhaps most importantly, its decision to deny the initial request and the request for reconsideration were arrived at as a matter of prerogative through the exercise of judicial independence. We are not persuaded in these circumstances that the declarations, if made, could realistically have inspired the Office of the Chief Justice to reconsider, and we are not persuaded that had the application judge considered this prospect, his decision may have been different.

[12] Moreover, and relatedly, the fact that the power to make this decision belonged to the court through the Office of the Chief Justice pursuant to the constitutionally protected principle of judicial independence is a powerful

consideration in support of the application judge's discretionary decision not to purport to weigh in on that decision by making the requested declarations.

[13] There is no basis for interfering with the application judge's discretionary conclusion that the requested declarations would serve no practical purpose and therefore should not be made. We deny this ground of appeal.

[14] Finally, during oral submissions before us, Mr. Lesage urged us not to defer to the application judge's discretion because he exercised it based on the legally erroneous premise that the open court principle does not require the aggregation, sorting and categorization of bulk data. Without in any way commenting on the correctness of the application judge's conclusions about the reach of the open court principle, we do not agree that the discretionary decision rested on or was influenced by the application judge's views about the scope of the open court principle. It is clear that his conclusions about the reach of the open court principle played no role in his decision that the declarations would serve no practical purpose. The application judge addressed the "practical purpose" issue before addressing the reach of the open court principle, and then said explicitly, by way of introduction to his discussion about the open court principle, "even were I to find the requested declarations to be determinative of the parties' rights, I would still decline to make them". It follows that even if the application judge had been wrong about the scope of the open court principle, which we need not decide, his conclusion in this regard did not taint his discretionary decision.

[15] The appeal is therefore dismissed. As agreed between the parties, costs are payable by Mr. Lesage to the Attorney General of Ontario in the amount of $5,000 inclusive of applicable taxes and disbursements.

"J.C. MacPherson J.A."
"David M. Paciocco J.A."
"D.A. Wilson J.A."