CITATION: Lesage v The Attorney General of Canada, 2023 ONSC 6444
COURT FILE NO.: CV-23-832-0000
DATE: 2022 11 15

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
Michael Lesage	)	Self-represented
Applicant	)	
	)	
- and -	)	
	)	
The Attorney General of Canada and	)	[redacted]
The Attorney General of Ontario	)	General of Ontario
	)	
	)	No one appearing
	)	for The Attorney General of Canada
Respondents	)	
	)	
	)	**HEARD:** October 23, 2023 (in person)

REASONS FOR DECISION

C. Chang J.

[1] The applicant brings this application for various declarations respecting certain information related to civil proceedings before the Superior Court of Justice and an order in the nature of *mandamus* requiring the respondent to deliver that information to him. Specifically, he seeks statistical data respecting the number of civil proceedings that were disposed of by trial in 2015 onward in six court locations (Toronto, Newmarket, Durham, Hamilton, Brampton and Milton) and broken down by jury and non-jury trials. He also seeks the underlying court file numbers for those civil proceedings.

[2] The respondent, The Attorney General of Ontario, (the "respondent") opposes the application on the basis that the applicant has no right to the information from it and that the requested order in the nature of *mandamus* is outside this court's jurisdiction in this type of proceeding.

[3] Although the applicant also commenced this proceeding against the Attorney General of Canada, he abandoned the application as against it well before the hearing.

PRELIMINARY ISSUES

[4] Firstly, despite the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 and the rules of evidence, counsel are still of the view that documents to be used on motions and applications can simply be uploaded to CaseLines without being properly exhibited to affidavits.

[5] In the case-at-bar, various charts of disputed undertakings, refusals and questions taken under advisement, as well as correspondence between counsel, are apparently of such high and special character as to not require their proper anchoring in the evidence. When I raised this impropriety with counsel, all that I received in response (other than perfunctory apologies) was the equivalent of a verbal shrug of the shoulders.

[6] Given the parties' abject and inexplicable failure to comply with either the applicable *Rules of Civil Procedure* or the applicable rules of evidence in this respect, I have not considered in my decision any of the undertakings allegedly given, the questions allegedly taken under advisement or refused, whether any of those undertakings or questions remain outstanding and what, if any, consequences may result.

[7] Furthermore, and in any event, this court is now years into its long overdue digital age, which includes the ubiquity of CaseLines. There continue to be countless resources (many of which are accessible completely free of charge) to which counsel can – and, most certainly, should – turn respecting the court's procedural requirements and the applicable digital regime (see: *The Senac Group Inc. v Samuda*, 2023 ONSC 3438, at paras. 8 and 10). All counsel – including those involved in this application – would be well advised to both acquaint themselves with and follow those requirements.

[8] Secondly, following the commencement of the hearing and toward the end of his oral submissions, the applicant requested an order transferring this application to the Divisional Court to be continued there as an application for judicial review. The applicant did not provide the respondent with any notice of his intention to make that request and neither served nor filed any materials in support of it. The respondent opposed the request.

[9] I will deal with this request as part of my reasons for judgment.

FACTS

[10] The facts relevant to this application are undisputed and can be summarized as follows:

a. the applicant is a lawyer licensee of the Law Society of Ontario;

b. in February 2022, he made nine specific requests for information related to civil proceedings in this court;

c. on June 6, 2022, the respondent advised the applicant that the court approved the release of information respecting seven of the applicant's nine requests, but refused his requests for the following (collectively the "Refused Information"):

   i. statistical data respecting the number of civil proceedings that were disposed of by trial in Toronto, Newmarket, Durham, Hamilton, Brampton and Milton from 2015 to 2018 and from 2020 onward,

   ii. statistical data respecting how many of those trials were by jury vs. non-jury, and

   iii. the underlying court file numbers;

d. the Refused Information is under the exclusive custody and control of the Superior Court of Justice of Ontario;

e. the respondent, through its Court Services Division, is responsible for, among other things, the care and maintenance of court files and court documents on behalf of the court and, through the Analytics and Evidence Branch of its Corporate Service Management Division, assists the court with aggregate, bulk or statistical court data;

f. the arrangements between the court and the respondent respecting court records, documents and data provide that the court maintains jurisdiction, custody and control of those records, documents and data and access to them is subject to judicial direction;

g. there is currently no protocol in place respecting the aggregation, organization and delivery to the public of court-derived statistical information;

h. the applicant admits that there is no evidence that any documentation containing any of the Refused Information exists;

i. the applicant commenced this application by notice of application issued April 5, 2023;

j. prior to his February 2022 request, the applicant requested similar information from the court for one specific calendar year (i.e., 2019);

k. the court granted that previous request, but made the release of that information subject to conditions, including that the information "not be reused for any other purpose without seeking further approval"; and

l. the applicant violated those conditions by publishing the provided information on his website.

ISSUES

[11] The issues to be determined in this application are as follows:

1. Is the applicant entitled to the declaratory relief sought in the notice of application?

2. Is the applicant entitled to the requested order in the nature of *mandamus*?

3. Should the applicant be granted an order transferring this application to the Divisional Court?

ANALYSIS

Issue #1: Is the applicant entitled to the declaratory relief sought in the notice of application?

Parties' Positions

[12] The applicant submits that the open court principle mandates that the respondent provide to him the Refused Information. Indeed, says the applicant, the entirety of the database in the "FRANK" system (which is used to manage records and information in this court) is subject to the open court principle and should be provided to the public.

[13] The respondent submits that the decision-making authority respecting the Refused Information rests exclusively with the court, which retains sole custody and control over it. The court having refused the applicant's request for delivery to him of the Refused Information, the respondent must, it argues, abide by that refusal. The respondent also submits that there is a fundamental difference between what the applicant seeks on this application (i.e., the delivery of bulk information and data) and the available procedure for public access to court documents, including as prescribed by s. 137(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. Finally, the respondent submits that the open court principle must be viewed through the lens of judicial independence and the intersection of those two principles must be "policed" by the court with great caution. This is particularly so where the issue involves the Ministry of the Attorney General, which, in our Province, is responsible for providing judicial infrastructure and support to this court, regularly appears in this court as the Crown's chief legal officer and drafts statutory law that is interpreted and applied by this court.

Law

[14] Section 97 of the *Courts of Justice Act* provides as follows:

> ***97*** *The Court of Appeal and the Superior Court of Justice, exclusive of the Small Claims Court, may make binding declarations of right, whether or not any consequential relief is or could be claimed.*

[15] The court's jurisdiction to grant declaratory relief "is only to be used when the declaration will have an effect on an existing dispute between the parties [and] is not to be given as an opinion on a hypothetical set of facts, or as an academic exercise to settle what may happen in the future" (see: 1*472292 Ontario Inc. (Rosen Express) v Northbridge General Insurance Company*, 2019 ONCA 753, at para. 22). Declaratory relief must be determinative of parties' rights and "courts do not have jurisdiction to simply declare facts, detached from the rights of the parties" (see: *Rosen Express*, at para. 30).

[16] The leading authority on the open court principle is the decision of the Supreme Court of Canada in *Sherman Estate v Donovan*, 2021 SCC 25, in which the court reiterated a number of legal principles, including, without limitation, the following at paras. 1-3:

a. the open court principle is constitutionally protected as part of the right of freedom of expression and "represents a central feature of a liberal democracy";

b. there is a strong presumption in favour of open courts;

c. inconvenience or embarrassment to participants in the justice system resultant from public scrutiny "is not, as a general matter, enough to overturn" this strong presumption; and

d. exceptional circumstances may arise "where competing interests justify a restriction of the open court principle",

[17] Subsections 135(1) and (2) of the *Courts of Justice Act* provide as follows:

> ***135*** *(1) Subject to subsection (2) and rules of court, all court hearings shall be open to the public.*
>
> *(2) The court may order the public to be excluded from a hearing where the possibility of serious harm or injustice to any person justifies a departure from the general principle that court hearings should be open to the public.*

[18] Section 137 of the *Courts of Justice Act* provides as follows:

> ***137*** *(1) On payment of the prescribed fee, a person is entitled to see any document filed in a civil proceeding in a court, unless an Act or an order of the court provides otherwise.*
>
> *(2) A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.*
>
> *(3) On payment of the prescribed fee, a person is entitled to see any list maintained by a court of civil proceedings commenced or judgments entered.*
>
> *(4) On payment of the prescribed fee, a person is entitled to a copy of any document the person is entitled to see.*

Decision

[19] I find that the applicant is not entitled to the declaratory relief sought in the notice of application.

[20] Given my reasons below respecting issue #2 and 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.

[21] Absent the requested order in the nature of *mandamus*, the requested declarations would have no effect on the existing dispute between the parties. Therefore, making them would constitute nothing more than purposelessly opining on hypothetical facts or indulging in a purely academic exercise. The declarations would be detached from the rights of the parties and in no way determinative of them.

[22] Therefore, the application for declaratory relief should be dismissed.

Open Court Principle

[23] However, even were I to find the requested declarations to be determinative of the parties' rights, I would still decline to make them.

[24] There is no question of the importance of the open court principle and its central role in ensuring fairness and accountability in the administration of justice and in maintaining the public's faith in and respect for the rule of law. However, in my view, the transparency that is fundamental to and imbues the open court principle does not extend to the Refused Information.

[25] As set out in *Sherman Estate*, at para. 1, the open court principle ensures that, as a "general rule, the public can attend hearings and consult court files and the press…is free

to inquire and comment on the workings of the court". In addition, pursuant to ss. 135 and 137 of the *Courts of Justice Act*, unless the court orders otherwise, any member of the public may attend any court hearing and, on payment of the prescribed fees, may view and copy any court document.

[26] In the case-at-bar, the applicant's complaint is not that he has been denied the ability to attend a court hearing or to view or copy a court document. Instead, he complains that the respondent has failed to aggregate, sort and categorize bulk data for the purposes of generating one or more reports that can then be provided to him. There is, as argued by the respondent, a fundamental difference between what the applicant is entitled to and what he seeks. Not only do I agree with the respondent, but I would go further to find that the applicant's demand is a bridge too far.

[27] The applicant did not direct me to any statutory or jurisprudential authority that stands for the proposition that the open court principle provides for an obligation to generate court documents in the manner suggested by the applicant. My own legal research has also yielded none. In my view, that is because the open court principle is not and was never intended to be limitless in the scope of its application. That scope currently includes the public's right to attend hearings and access court documents and the press's right to "inquire and comment on the workings of the courts". That scope currently does not extend, as suggested by the applicant, to requiring the aggregation, sorting and categorization of bulk data in order for reports to be generated for the purposes of being made available to the public or the press.

[28] Given my findings above respecting the open court principle, I need not address the respondent's caution about how its unique position in the administration of justice impacts the proper intersection of the open court principle and judicial independence and I decline to do so.

Respondent Lacks Authority to Decide

[29] In addition, even were I inclined to find the applicant's request to be within the scope of the open court principle, I accept the respondent's argument that the decision to provide the Refused Information is solely the court's to make.

[30] Supervisory 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 (see: *Ontario (Ministry of the Attorney General) v Ontario (Information and Privacy Commissioner)*, 2011 ONSC 172, at para. 31). Indeed, such information is constitutionally protected and the principle of judicial independence requires that the judiciary maintain control over it (see: *Ontario*, at para. 31). Another person's limited ability to use, maintain, care for, dispose of or

disseminate that information in no way displaces the court's exclusive authority over it (see: *Ontario*, at para. 43).

[31] The respondent in the case-at-bar has no authority to determine what, if anything, is to be done with the Refused Information. That authority properly rests exclusively with the court. The court having made its decision respecting the Refused Information, that is the end of the matter.

Issue #2: Is the applicant entitled to the requested order in the nature of *mandamus*?

Parties' Positions

[32] Despite his claim for an order in the nature of *mandamus* requiring the respondent to deliver to him the Refused Information, he completely failed to direct any of his written or oral submissions to the question of whether that claimed relief is appropriate.

[33] The respondent submits that this court "does not have jurisdiction to grant *mandamus*", which jurisdiction lies exclusively with the Divisional Court. The respondent further argues that, even if this court has such jurisdiction, there is no legal duty on the respondent to provide the Refused Information to the applicant.

Law

[34] Sections 5(1), (2), 6(1) to (3) and 7 of the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1 provide as follows:

> ***5*** *(1) Unless another Act provides otherwise, an application for judicial review shall be made no later than 30 days after the date the decision or matter for which judicial review is being sought was made or occurred, subject to subsection (2).*
>
> *(2) The court may, on such terms as it considers proper, extend the time for making an application for judicial review if it is satisfied that there are apparent grounds for relief and that no substantial prejudice or hardship will result to any person affected by reason of the delay.*
>
> ***6*** *(1) Subject to subsection (2), an application for judicial review shall be made to the Divisional Court.*
>
> *(2) An application for judicial review may be made to the Superior Court of Justice with leave of a judge thereof, which may be granted at the hearing of the application, where it is made to appear to the judge that the case is one of urgency and that the delay required for an application to the Divisional Court is likely to involve a failure of justice.*

> *(3) Where a judge refuses leave for an application under subsection (2), he or she may order that the application be transferred to the Divisional Court.*
>
> ***7** An application for an order in the nature of mandamus, prohibition or certiorari shall be deemed to be an application for judicial review and shall be made, treated and disposed of as if it were an application for judicial review.*

[35] In Ontario, the proper procedure for challenging the decisions of public administrative bodies is by way of applications for judicial review, which, absent urgency, must be made to the Divisional Court (see: *J.N. v Durham Regional Police Service*, 2012 ONCA 428, at para. 16). Where the substance of a party's claim is for judicial review of the administrative decision of a public statutory body, an application under the *Rules of Civil Procedure* is not available, as a court "must have jurisdiction independent of rule 14.05 before it can consider the appropriate vehicle for bringing the matter forward" (see: *J.N.*, at para. 16).

[36] Recourse should not be had to s. 6(2) of the *Judicial Review Procedure Act* except in truly exigent circumstances, which "cannot be met in most cases" (see: *Sobczyk v Ontario*, 2021 ONSC 7030, at para. 4).

[37] The applicable test for an order in the nature of *mandamus* sets out the following seven prerequisites, the failure to meet any of which is fatal to the application:

a. there must be a public duty to act;

b. the duty must be owed to the applicant;

c. there must be a clear right to expect performance of the duty, specifically:

   i. the applicant must satisfy all the conditions precedent giving rise to the duty, and

   ii. the applicant must have made a demand that the duty be performed, and the decision maker must have failed to comply with the demand either expressly or impliedly by, for example, failing to respond to the demand within a reasonable time;

d. the applicant must have no other remedy available to him or her;

e. the order sought must be of some practical value of effect;

f. there must be no equitable bar to the court granting *mandamus*; and

g. the balance of convenience must favour the granting of *mandamus*,

(see: *Zaki v Director*, 2017 ONSC 1324, at paras. 46 and 48).

Decision

[38] I find that the applicant is not entitled to the requested order in the nature of *mandamus*.

[39] Section 7 of the *Judicial Review Procedure Act* clearly and expressly provides that applications for orders in the nature of *mandamus* are deemed to be applications for judicial review. As clearly set out by the Court of Appeal for Ontario in *J.N.*, applications for judicial review are to be made to the Divisional Court pursuant to the *Judicial Review Procedure Act* and not the *Rules of Civil Procedure* (see: *J.N.*, at para. 16).

[40] The applicant has failed to properly commence this application in Divisional Court and has failed to properly frame the issues or plead this matter as an application for judicial review. Even if he had commenced this application in the correct court and properly pleaded it, he did so 274 days beyond the limitation period prescribed by s. 5(1) of the *Judicial Review Procedure Act*. On these bases alone, I would dismiss the applicant's request for an order in the nature of *mandamus*.

[41] However, and more importantly, the application must, in any event, fail pursuant to the applicable test. As set out in *Zaki*, the failure to meet any of the seven prerequisites for an order in the nature of *mandamus* is fatal to the application. In the case-at-bar, the application fails at the first prerequisite: the existence of a public duty to act. Not only is the respondent under no duty to act respecting delivery of the Refused Information, but, as outlined above, it has no authority to take any such action. That authority resides exclusively with the court.

Issue #3: Should the applicant be granted an order transferring this application to the Divisional Court?

Parties' Positions

[42] As outlined above, it wasn't until well into his oral submissions that the applicant requested an order pursuant to s. 6(3) of the *Judicial Review Procedure Act* transferring this application to the Divisional Court to proceed there as an application for judicial review.

[43] The respondent opposed that request on the basis that it would suffer significant prejudice resultant from the fact that it made strategic decisions in this application based on the manner in which the applicant pleaded it. To permit the applicant to – at the end of the race – completely change the nature of his case would be unfair and highly prejudicial to the respondent.

Decision

[44] I find that the applicant should not be granted an order transferring this application to the Divisional Court, so that it can proceed there as an application for judicial review.

[45] In my view, the applicant's failure to provide any notice whatsoever of his request for this relief, the improper timing of it (i.e., well after the application hearing had commenced) and the lack of any motion materials or other proper evidentiary foundation are all fatal to his request.

[46] In addition, and in any event, there is also no legal basis for the motion.

[47] As outlined above, the proper procedure in Ontario to challenge decisions of public administrative bodies is by way of applications for judicial review to the Divisional Court. Furthermore, as outlined in *J.N.*, unless the Superior Court of Justice has jurisdiction independent of rule 14.05 of the *Rules of Civil Procedure* to determine a matter in which judicial review is actually or effectively sought, it cannot "consider the appropriate vehicle for bringing the matter forward" (see: *J.N.*, at para. 16).

[48] In my view, this means that, where an application that should properly have been brought in the Divisional Court seeking judicial review is instead brought in the Superior Court of Justice, the latter lacks jurisdiction to, among other things transfer it to the Divisional Court pursuant to s. 6(3) of the *Judicial Review Procedure Act*. I therefore have no jurisdiction to grant the requested order transferring this application to the Division Court.

[49] However, if I am incorrect in that conclusion and I do have jurisdiction to make the requested transfer order, I would still decline to make it.

[50] The language of s. 6(3) of the *Judicial Review Procedure Act* is permissive, which reposes in the court the discretion to make the applicable order or not.

[51] In exercising that discretion, I would deny the requested transfer to the Divisional Court. In my view, the fact that the application has not been pleaded as one seeking judicial review, the 274-day expiry of the limitation period prescribed by s. 5(1) of the *Judicial Review Procedure Act*, the applicant's almost flippant approach to this proceeding, the complete lack of merit in his claim for an order in the nature of *mandamus* and the complete lack of any notice to the respondent of the requested transfer order all weigh strongly against making such an order.

Summary and Conclusion

[52] For the reasons outlined above, I find that the applicant is not entitled to the declaratory relief sought or the order sought in the nature of *mandamus*. The requested

declarations would serve no practical purpose and, in any event, the open court principle does not apply to the Refused Information. In addition, the applicant failed to commence his application in the correct court or within the prescribed limitation period, failed to properly plead his application and failed to meet the test for *mandamus*.

[53] I also find that the requested order transferring this application to the Divisional Court should not be made. As outlined above, this court has no jurisdiction to make that order and, even if it did, the facts militate strongly against making it. The applicant's request for this relief should therefore be denied.

[54] This application should therefore be dismissed.

COSTS

[55] The respondent was successful in opposing this application and is therefore presumptively entitled to costs.

[56] I urge the parties to resolve the issue of costs and, upon such resolution, to advise me accordingly as directed below. If they are unable to resolve the issue of costs, the parties are to make their respective written costs submissions as directed below.

DISPOSITION

[57] I therefore make the following orders:

a. the applicant's request for an order transferring this application to the Divisional Court is denied;

b. this application is dismissed;

c. if the parties are able to resolve the issue of costs, they are to advise me accordingly through the Milton Administration Office by no later than November 22, 2023;

d. if the parties are unable to resolve the issue of costs by the above deadline, they are to exchange their respective written costs submissions (limited to two double-spaced pages each plus proper bills of costs and any relevant offers to settle) and send same to me through the Milton Administration Office as follows:

    i. the respondent's submissions by no later than November 29, 2023,

    ii. the applicant's submissions by no later than December 6, 2023, and

iii. there shall be no reply.

C. Chang J.

Released: November 15, 2023

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ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

Michael Lesage

Applicant

- and -

The Attorney General of Canada and
The Attorney General of Ontario

Respondents

REASONS FOR DECISION

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