Federal Court  Cour fédérale

**Date: 20180228**

**Docket: T-1699-12**

**Citation: 2018 FC 227**

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

**Ottawa, Ontario, February 28, 2018**

**PRESENT: The Honourable Mr. Justice Martineau**

**SIMPLIFIED ACTION**

**BETWEEN:**

**RENÉ BARKLEY**

**Plaintiff**

**and**

**HER MAJESTY THE QUEEN**

**Defendant**

## ORDER AND REASONS

[1] This is a motion for reconsideration for which the plaintiff, René Barkley, seeks a "judicial administrative inquiry" concerning certain allegations against Correctional Service Canada [the Service] and two of the defendant's counsel, and at the same time, requests that the Court set aside Prothonotary Morneau's order to strike this simplified action.

[2] This motion was heard jointly with the motion that was filed in docket T-1625-15 and which is disposed by a separate order (*René Barkley v. Her Majesty the Queen*, 2018 FC 228 [*Barkley 2018 #2*]). For the reasons that follow, the plaintiff's motion for reconsideration is dismissed.

***Dangerous offender designation***

[3] The plaintiff is currently incarcerated in the maximum-security Port-Cartier Institution, which the Service manages. Over the past few decades, he has had various run-ins with the law and has been incarcerated on several occasions—generally for sexual offences.

[4] In fact, on November 12, 2003, the plaintiff was designated a dangerous offender and handed an indeterminate prison sentence by Mr. Justice Jean-Yves Tremblay of the Court of Quebec (see *R. v. RB*, 2003 CanLII 33102, 2003 CarswellQue 1270 (QCCQ) [*R. v. RB*] [2003 judgment]). The plaintiff, who refers to this case as [TRANSLATION] "the Chicoutimi file", had previously pleaded guilty to charges of robbery, break and enter in a dwelling house with intention to commit an indictable offence therein, threats of death or bodily harm, assault, forcible confinement, obstruction of justice, public mischief, and sexual assault causing bodily harm. The plaintiff did not appeal the sentence at the time.

[5] Nevertheless, in 2015, the plaintiff appealed to the Superior Court (Criminal and Penal Division) to obtain a writ of *mandamus* with *certiorari* in aid, in order to quash the 2003 judgment and obtain all documents that were used against him in the Chicoutimi file to declare him a dangerous offender. Mr. Justice Pronovost of the Superior Court noted that all his

applications were made with the objective of preparing an appeal of the decision declaring him a dangerous offender. He dismissed this motion on March 9, 2015, first stating that it would be difficult to obtain this type of order without extending the time to appeal, and concluding that the *mandamus* was not the appropriate remedy, given that there was no obligation on the part of the persons concerned to give him the requested documents (see *Barkley v. Wullaert*, 2015 QCCS 956 [*Wullaert*]). On June 11, 2015, his motion for an extension of time to appeal the *R. v. RB* decision declaring him a dangerous offender was dismissed by the Quebec Court of Appeal (see *Barkley v. R.*, 2015 QCCA 1134). Madam Justice Dutil found that the plaintiff had shown neither his intention to appeal within the required time, nor serious grounds of appeal.

[6] Moreover, on May 18 and September 9, 2016, the plaintiff filed two new motions with the Superior Court (Criminal and Penal Division)—one in *certiorari* against the 2003 judgment and one in *mandamus* to obtain the delivery of various documents and computerized material used in the Chicoutimi file. The two motions were once again dismissed on September 25, 2017, the Court emphasizing that it was in fact a disguised appeal of the sentence in *R. v. RB* (see *Barkley v. R.*, 2017 QCCS 5097 at paragraph 10 [*Barkley 2017 QCCS*]). In terms of the application in *certiorari*, the Superior Court found that the application was null and void since the Court of Appeal had refused to extend the time to appeal, and that the plaintiff's sentence was not illegal on its face—otherwise, the 2003 judgment could have been set aside. As for the *mandamus* remedy, the Court essentially reiterated Pronovost J.'s findings in *Wullaert*, stating that there is no legal duty to provide the requested documents, and noted that the plaintiff already had all these documents in his possession. The motions for leave to appeal these judgments were dismissed by the Court of Appeal on November 17, 2017; the Court had no jurisdiction, since the

judgment in *Barkley 2017 QCCS* was appealable as of right (see *Barkley v. R.*, 2017 QCCA 1830 [*Barkley 2017 QCCA*]). As a result, the plaintiff appealed this judgment.

***Material facts regarding the simplified action***

[7] Let us now address the facts directly associated with this case.

[8] On September 13, 2012, the plaintiff commenced a simplified action against the defendant claiming $50,000 in damages. He relied on various acts of negligence and other illegal acts that were reportedly committed between 2000 and 2003 by the Service's officers and the Parole Board (Appeal Division). In short, the plaintiff criticized the Service for referencing his escape from the Waterloo Institution in 1994 to declare him a dangerous offender, when he had been acquitted of the charge. He also criticized the Service for using an incriminating statement that he had reportedly made as part of the Montréal file in which he was convicted, in order to incriminate him in the Joliette file, in which there had been a stay of proceedings. Furthermore, the Service and the Parole Board forced him to follow a sex offender rehabilitation program. According to the plaintiff, the purpose of that program was allegedly to make him admit to his guilt and to gain incriminating information. More generally, the Service allegedly also disclosed information about him and reportedly interfered in judicial proceedings: after counsel for the Crown told him that there was no documentary evidence in the Joliette file, certain documents managed to resurface in the Chicoutimi file.

***Striking the simplified action***

[9] On November 16, 2012, the defendant filed a motion to dismiss and strike the action.

[10] On December 20, 2012, Prothonotary Morneau ordered the dismissal and striking of the plaintiff's action, without possibility of amendment, since it disclosed no reasonable cause of action and was scandalous, frivolous and vexatious. The Prothonotary relied on three findings: the statement of claim did not contain any material facts that would enable the defendant to prepare and file a defence; the statement was replete with incomprehensible allegations seeking to list the plaintiff's run-ins with the law; and the cause was time-barred because it related to events that took place between 2003 and 2009, i.e. beyond the three-year period stipulated in article 2915 of the *Civil Code of Quebec*, CQLR c CCQ-1991.

[11] The plaintiff appealed. Conducting a *de novo* review, Mr. Justice de Montigny dismissed the appeal and confirmed the validity of the striking order in a decision dated January 14, 2014. To summarize, de Montigny J. found that the remedies sought by the plaintiff fell outside the parameters of a simplified action. Furthermore, the action did not rely on any material facts and did not disclose any cause of action, even if the alleged facts were assumed to be true, and, moreover, the action was frivolous and vexatious. First of all, only the Parole Board can impose release conditions, not the Service. The plaintiff's allegations on this matter were also speculative: it was uncertain whether he followed the sex offender rehabilitation program, whether he truly revealed incriminating information and whether it was used against him. Secondly, the Service needed to keep the information relating to the escape up to date; even

though he did not receive a sentence for that escape, the plaintiff did indeed escape and remained at large for a month-and-a-half, which he does not deny. Mentioning this in his file does not constitute a reversal of his acquittal. De Montigny J. found that the plaintiff did not succeed in establishing fault on the Service's part. Lastly, the Prothonotary was also right to conclude that the remedy was time-barred.

[12] The plaintiff did not appeal the order dismissing his appeal. It is therefore a final judgment that has the force of *res judicata* for all legal purposes.

***Current motion for reconsideration***

[13] More than two-and-a-half years later, on August 22, 2017, the plaintiff filed this motion for reconsideration.

[14] In support of his application for reconsideration, the plaintiff claims that the Attorney General of Canada and the Service deliberately lied to the Court. He claims that they knew that the Service had committed irregularities in 2003 in the Chicoutimi file: they had allegedly obtained certain documents illegally, provided destroyed documents to a witness to manipulate the outcome, etc. Moreover, the Superior Court (Criminal and Penal Division) allowed the Chicoutimi file to be re-opened in 2016 by agreeing to consider new evidence, which supposedly constituted a [TRANSLATION] «drastic about-face». The plaintiff disputes the striking out of his action due to the prescription. The time limit to file an action for damages should have started to accrue the moment he found out about the situation—which was far later, since the Service had all the evidence. The plaintiff also claims that the Service took judicial documents from him to

use in the proceedings with the purpose of manipulating the outcome. Lastly, he alleges that the Service seized and withheld various pieces of evidence on a CD-ROM for several weeks that had been sent through priority mail. As compensation, the plaintiff is seeking an inquiry into the defendant's counsel; granting of costs; provision of equipment and stationery required for his motion for reconsideration; the filing of evidence required for the requested judicial administrative inquiry; the examination of individuals in relation to the inquiry; any further relief depending on the findings of the inquiry; the payment of postage fees; and inquiry oversight by independent counsel.

[15] The defendant first submits that her counsel's behaviour has been irreproachable. Moreover, the Federal Court does not have the jurisdiction to order the judicial administrative inquiry requested by the plaintiff, and the conditions for the test from *ITO-Int'l Terminal Operators v. Miida Electronics*, [1986] 1 SCR 752 at page 766, 28 DLR (4th) 641 [*ITO* cited with SCR] are not met in this case.

[16] Furthermore, the Court should not order the re-opening of this file. Rule 399 of the *Federal Courts Rules*, SOR/98-106 [the Rules] does allow the Court, in certain specific and exceptional circumstances, to set aside or vary an order when a matter has arisen or been discovered after it was issued. To do this, the plaintiff must satisfy the three conditions stated in *Ayangma v. Canada*, 2003 FCA 382 at paragraph 3 [*Ayangma*], i.e.: (1) the existence of new facts (the matter); (2) the matter must not be one which was discoverable prior to the making of the order by the exercise of due diligence; and (3) the matter must be something which would have a determining influence on the decision in question. These criteria are not met in this case.

***Judicial administrative inquiry refused***

[17] I agree with the defendant that the Federal Court does not have the general power to order an inquiry into the actions that the Service and the defendant's counsel may have committed in 2003 or at another date in the Chicoutimi file. In fact, the Federal Court only has the jurisdiction granted it by law (see, generally, *ITO*). In this case, as the defendant emphasizes, no law seems to grant such jurisdiction to the Federal Court, specifically in the context of a motion. In addition, the plaintiff's claims do not invoke any principle of law to support the application, nor any specific statutory basis establishing that jurisdiction. According to the *Inquiries Act*, RSC 1985, c I-11, it is rather up to the Governor in Council to cause inquiry to be made into the public business of Canada or a Department (see *Chaudhry v. Canada*, 2008 FCA 417 at paragraph 12 [*Chaudhry*]).

[18] It is still important to remember that the Federal Court still has the power necessary to fully and effectively exercise its own jurisdiction (see, generally, *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 SCR 626, 157 DLR (4th) 385; also see Bernard Letarte et al, *Recours et procédures devant les Cours fédérales*, Montréal, LexisNexis, 2013 at page 12 [Letarte]). This includes the power to control the integrity of its own procedures and to penalize abuses, [TRANSLATION] «including […] overseeing the conduct of counsel» (Letarte at page 12, citing *R. v. Cunningham*, 2010 SCC 10; also see *Canada (National Revenue) v. RBC Life Insurance Company*, 2013 FCA 50 at paragraph 36; *Lee v. Canada (Correctional Service)*, 2017 FCA 228 at paragraphs 13–15). Without the power to order an inquiry, the Court still benefits from a certain flexibility to penalize potential misconduct by counsel. However, there is

no basis to resort to such a power in this case, in the absence of any concrete or credible evidence to this effect.

[19] It is also unnecessary to review the other orders sought in the motion, which involve a potential inquiry: submitting evidence, conducting examinations, granting additional compensation, etc.

***Re-opening of file denied***

[20] Subsection 399(2) of the Rules allows the Court to set aside its orders in certain specific and exceptional cases, therefore making an exception to the rule of the finality of judgments:

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| 399(2) On motion, the Court may set aside or vary an order | 399(2) La Cour peut, sur requête, annuler ou modifier une ordonnance dans l'un ou l'autre des cas suivants : |
| (a) by reason of a matter that arose or was discovered subsequent to the making of the order; or | a) des faits nouveaux sont survenus ou ont été découverts après que l'ordonnance a été rendue; |
| (b) where the order was obtained by fraud. | b) l'ordonnance a été obtenue par fraude. |

[21] In this case, the plaintiff has not demonstrated to the satisfaction of the Court that this situation falls into either of the two categories described above. On the one hand, the plaintiff has not shown that there is a new matter that could have an impact on the result of the motion to strike. On the other hand, all allegations of fraud made against the defendant's counsel are without any basis, since they are not supported by the evidence and are entirely gratuitous.

[22] In the *Ayangma* case at paragraph 3, the Federal Court of Appeal established three conditions that the plaintiff had to satisfy before the Court would intervene under paragraph 399(2(*a*)):

> 1 - the newly discovered information must be a "matter" with the meaning of the Rule;
>
> 2 - the "matter" must not be one which was discoverable prior to the making of the order by the exercise of due diligence; and
>
> 3 - the "matter" must be something which would have a determining influence on the decision in question.

[23] As mentioned above, Prothonotary Morneau struck out the plaintiff's statement because it provided no material facts that would allow the defendant to prepare and file a defence; it was replete with incomprehensible allegations seeking to list the plaintiff's run-ins with the law; and the action was time-barred. This decision was upheld on appeal by a *de novo* review of the facts on file by de Montigny J.

[24] For a reconsideration of the file to be granted, the plaintiff must prove that there is a new matter related to these findings. From the outset, it appears that the plaintiff has not specifically made the connection between his new allegations of fact and the requirement to re-open the file. The plaintiff has not clearly explained which is the new matter cited. Most of the general allegations formulated by the plaintiff are rather associated with the Service's problematic behaviour that has nothing to do with what the plaintiff claimed against the Crown in his statement on September 13, 2012.

[25] In fact, this motion has no connection with the allegations related to his escape or the condition to participate in a rehabilitation program. The only element that could constitute a new matter seems to be his claim that the Superior Court allegedly re-opened the Chicoutimi file. *Prima facie*, this could be relevant, since the plaintiff claimed in his September 2012 statement that the Service interfered in this file before the courts. A verification of the judgments rendered in this case does show that the Superior Court of Quebec examined a motion from the plaintiff seeking to obtain all the documents and a reconsideration of the Judge's decision in the Chicoutimi file (see *Barkley 2017 QCCS*; also see *R v. RB*). However, this motion was dismissed by the Superior Court, and the motion for leave to appeal was also dismissed by the Quebec Court of Appeal (see *Barkley 2017 QCCS*; *Barkley 2017 QCCA*). Therefore, this cannot be called a «drastic about-face», as the plaintiff puts it. Thus, although the hearing of this motion itself can potentially constitute a new matter, since it occurred after the hearing of the motion to strike, I am of the view that this has no effect on the decision to strike the plaintiff's statement, since the Superior Court did not find any issues in terms of the Chicoutimi file.

[26] Furthermore, the plaintiff did not prove that the striking order from Prothonotary Morneau, which was affirmed by de Montigny J., was obtained by fraud. The Federal Court of Appeal established that, in order to succeed under paragraph 399(2)(*b*), the party must satisfactorily establish that a false representation has in fact been made and that the false representation was made either knowingly, without an honest belief in its truth, or recklessly, careless of whether it be true or false (see *Pfizer Canada Inc. v. Canada (Health)*, 2011 FCA 215 at paragraph 20 (leave to appeal to the Supreme Court denied) [*Pfizer*]). The fraud alleged must be proven on a balance of probabilities (see *Pfizer* at paragraph 21). In this case, although the

plaintiff's motion contains serious allegations that the defendant's counsel lied to the Court and deliberately concealed relevant information during the hearing of the motion to strike, and that the Service stole documents from him and seized his mail, he did not present any concrete or credible evidence to support his arguments. No document was submitted by the plaintiff beyond his written submissions, a brief affidavit and a copy of the Correctional Service's directives.

[27] For the foregoing reasons, the plaintiff's motion for reconsideration is dismissed. Consequently, there is no need to consider the application for stay filed by the plaintiff in his answer on February 8, 2018.

***The matter of costs***

[28] Given the outcome, the defendant is entitled to costs.

[29] Subsection 400(1) of the Rules gives the Court full discretionary power in awarding costs. In exercising this discretion, I must determine an amount that is fair and equitable, while taking into account the threefold objective of costs, i.e. providing compensation, promoting settlement and deterring abusive behaviour (see, for example, *Air Canada v. Thibodeau*, 2007 FCA 115 at paragraph 24). Costs should not serve as a punishment of the party ordered to pay them. In various cases involving inmates, the judges have often been sensitive to the limited ability of those complainants to pay (see, for example, *Johnson v. Canada (Attorney General)*, 2008 FC 1357 at paragraph 106; *Johnson v. Canada (Correctional Service)*, 2017 FC 370 at paragraph 35).

[30] In this case, the defendant claims costs for a total amount of $442.50, pursuant to her bill of costs filed on January 26, 2018. During the hearing on January 22, 2018, the plaintiff reminded the Court of his limited means. In fact, he stated he only receives a net income of approximately $20 every 15 days, after various deductions from his salary, including a 25% levy serving to pay the $3,308 in costs he was ordered to pay as part of the motion to strike. He specifically proposed the suspension of costs until his release.

[31] Costs in the amount of $400 seem reasonable to me in these circumstances. Given the plaintiff's specific situation, it will be up to the defendant to determine whether or not to suspend the collection of the costs awarded by the Court today.

**JUDGMENT in T-1699-12**

**THE COURT ORDERS that** the motion for reconsideration be dismissed. The defendant is entitled to costs in the amount of $400.

"Luc Martineau"
Judge

Certified true translation
This 11th day of October 2019

Lionbridge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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|---|---|
| **DOCKET:** | T-1699-12 |
| **STYLE OF CAUSE:** | RENÉ BARKLEY v. HER MAJESTY THE QUEEN |
| **PLACE OF HEARING:** | MONTRÉAL, QUEBEC |
| **DATE OF HEARING:** | JANUARY 22, 2018 |
| **ORDER AND REASONS:** | MARTINEAU J. |
| **DATED:** | FEBRUARY 28, 2018 |

**APPEARANCES:**

| | |
|---|---|
| René Barkley | FOR THE PLAINTIFF (ON HIS OWN BEHALF) |
| Andrée-Renée Touchette | FOR THE DEFENDANT |

**SOLICITORS OF RECORD:**

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| Attorney General of Canada | FOR THE DEFENDANT |