

Federal Court



Cour fédérale

Date: 20110930

Docket: T-1332-10

Citation: 2011 FC 1125

Vancouver, British Columbia, September 30, 2011

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

**JONATHON DAVID HOLLAND
(AKA JONATHAN DAVID HOLLAND)
BY HIS LITIGATION GUARDIAN,
ZSUZSANNA HOLLAND AND THE SAID
ZSUZSANNA HOLLAND**

Applicants

and

CANADIAN HUMAN RIGHTS COMMISSION

Respondent

REASONS FOR ORDER AND ORDER

[1] Ms. Zsuzsanna Holland (Ms. Holland) in the underlying judicial review seeks an order that Charles Bryfogle (Mr. Bryfogle), Jonathon David Holland's (Mr. Holland) stepfather and non-lawyer, be appointed litigation guardian or, in the alternative, be granted the privilege of audience to represent Mr. Holland in the judicial review application pursuant to Rules 115 and 121 of the *Federal Courts Rules*, SOR/98-106 (the Rules).

[2] At the beginning of the hearing in Vancouver on September 27, 2011, Ms. Holland informed the Court and the respondent for the first time that she is now divorced from Mr. Bryfogle and as such does not want to pursue her motion that he be appointed as the legal representative for her son. She is now asking the Court to order the appointment of a lawyer to be paid by the federal government, or in the alternative that she be designated as the legal representative to her son due to his disability.

[3] For the reasons that follow, the motion shall be dismissed.

Brief Statement of Factual Background

[4] This matter has had a lengthy history in the British Columbia Supreme Court and in the British Columbia Court of Appeal and is now before the Federal Court.

[5] Very briefly, on June 24, 2010, Mr. Holland wrote to the Canadian Human Rights Commission (the respondent) and was informed that his inquiry was beyond the respondent's jurisdiction and thus, it would not be able to assist in resolving the matter. On August 2, 2010, Mr. Holland wrote to the respondent to express concern that it would not deal with the matters raised in his letter dated June 24, 2010. Mr. Holland filed a Notice of Application for Judicial Review in this Court on August 19, 2010.

[6] Ms. Holland and Mr. Holland were declared vexatious litigants by the British Columbia Supreme Court on April 11, 2010 (*Holland v Marshall*, [2010] BCJ No 2157 at para 11 [*Holland* 2010]). Justice Brown prohibited Ms. Holland and Mr. Holland, together or separately, and in any

name, from bringing or commencing proceedings in the British Columbia Supreme Court without leave of a justice of the court (*Holland* 2010 at para 12).

[7] Ms. Holland described herself as the litigation guardian of her son, Mr. Holland, who was born on April 18, 1987. On March 17, 2011, Justice Russell found that Ms. Holland was not and is still not the Court-appointed litigation guardian for Mr. Holland. Further, Justice Russell issued an order adjourning the judicial review hearing with the following conditions to be satisfied by the applicants:

- 1) This application is adjourned *sine die* in order to give the Applicants time to either find and appoint qualified counsel or to bring a motion before this Court to determine how and by whom Jonathon will be represented when this application is heard;
- 2) The Applicants will have 30 days from the date of this Order within which to either inform the Court in writing that qualified counsel has been appointed to represent Jonathon in this matter, or to serve and file their notice of motion record seeking a determination by the Court as to Jonathon's representation at the hearing of this application.

[8] As such, a motion was filed as ordered and set down to be heard at the General Sittings in Vancouver on May 2, 2011. On April 28, 2011, Justice Pinard adjourned the hearing and asked that the motion be set down at a special sitting.

[9] During this time, a Notice of Constitutional Question was filed by the applicants. On July 5, 2011, I directed that the only issue to be dealt with at the hearing on September 27 and 28, 2011, is to determine how and by whom Mr. Holland will be represented.

Issues

[10] The issues on this motion are as follows:

- a. Is Mr. Holland a person under legal disability?
- b. If so, should the Court designate a lawyer to be paid by the federal government to be the legal representative of Jonathan David Holland or in the alternative can Ms.Holland be appointed as his legal representative?

a. Is Mr. Holland a person under legal disability?

Applicants' Arguments

[11] The applicants contend that Mr. Holland has been deemed legally disabled by Dr. Miller, Dr. Bogyo, Dr. Kettner and the Province of British Columbia (Applicant's Motion Record, pp 16-28; pp 29-43; pp 45-6; pp 64-67). The applicants underscore that this Court has the authority to appoint a representative for Mr. Holland under Rule 115 and Rule121.

Respondent's Arguments

[12] The respondent contends that no sufficient evidence has been filed to support the claim that Mr. Holland is in need of a litigation guardian. The applicants submit a number of medical reports that were already found insufficient by the British Columbia courts. The respondent notes that the British Columbia Court of Appeal was very critical of Dr. Bogyo's report and conclusions in *Holland (Guardian ad litem of) v Marshall*, [2009] BCJ No 1294 at paras 31-37 [*Holland* 2009]. Further, the respondent asserts that Dr. Miller and Dr. Kettner's reports did not conclude Mr. Holland to be a person under a legal disability and unable to act on his own.

[13] Based on almost the same evidence adduced before this Court, the British Columbia courts have reached the same conclusion: Mr. Holland is not a person under legal disability (*Holland* 2009). The respondent declares that this Court should not reach a completely different conclusion when the evidence is almost identical.

[14] Further, the respondent submits that the Court should be careful in finding a person under a legal disability in the absence of clear and uncontroversial evidence supporting that conclusion when that person has not appeared before the Court. Accordingly, as found by the British Columbia Court of Appeal in *Holland* 2009, at para 49, Mr. Holland should be able to represent himself in court with some assistance.

Analysis

[15] Rule 115(1)(b) specifies that the Court may appoint one or more persons to represent a person under a legal disability. Rule 121 requires that a person for whom a representative is appointed must be represented by a solicitor. The central concern in this motion – whether Mr. Holland is in fact legally disabled – was addressed by Justice Neilson of the British Columbia Court of Appeal in *Holland* 2009, who was faced with almost the identical issue based on the same facts as in the present case (*Holland* 2009).

[16] In *Holland* 2009, Mr. Holland submitted an application for an order permitting Ms. Holland and Mr. Bryfogle to appear as his agents and designated representatives on his appeal, on the basis that he was a legally disabled person. Justice Neilson raised several concerns with respect to Dr. Bogyo's medical report in that it did not address the central question of whether Mr. Holland's

mental state seriously impaired his ability to react appropriately to his environment or to associate with others (*Holland 2009*, above at para 31). Accordingly, Justice Neilson concluded the following at para 37:

I am satisfied on the evidence that Mr. Holland does have ADHD, that he experienced difficulties in school, and that he has some ongoing problems with memory. I am not convinced, however, that he has a mental disorder that impairs his ability to react appropriately to his environment or to associate with others. Nor is he a person under disability within the meaning of R. 6 [emphasis added].

[17] Although, Dr. Miller's report dated July 7, 2011, was not filed in the Court of Appeal, Ms. Holland admits that the conclusion of that report was discussed and she was authorized to represent her son for that hearing.

[18] Dr. Miller's report (Applicant's Motion Record, p 19) states:

"The patient is likely to have some problems with respect to higher-order decision making and reasoning, and particularly if the material is of more verbal nature. If he is required to work through with the material, he will likely need additional time to comprehend and appreciate the content of information. If he is expected to arrive at the decision following reading or hearing more language-based information, it is recommended that he have assistance and/or guidance to ensure that he takes into account all important aspects of a situation to make informed decisions".

[19] I share the respondent's view, based on almost the same evidence adduced before this Court, that I am unable to reach a different conclusion than the British Columbia Court of Appeal (*Holland 2009*, at para 25-37). Accordingly, I cannot find Mr. Holland to be legally disabled.

- b. If so, should the Court designate a lawyer to be paid by the federal government to be the legal representative of Jonathan David Holland or in the alternative can Ms. Holland be appointed as his legal representative?*

Applicants' Arguments

[20] Ms. Holland argues that the federal government should pay for a lawyer for her son because the proceedings are complex and her son does not have the capacity to represent himself properly. She tried without success to obtain legal counsel for him.

[21] She contends that she is prepared to stand as interim litigation guardian or as representative for these proceedings. She also submits that based on the medical reports, a fair hearing cannot occur without representation since Mr. Holland is legally disabled (*Minister of Health and Community Services v G(J)*, [1999] 3 SCR 46).

[22] Ms. Holland cites *Peter v Canada (Attorney General)*, [2009] FCJ No 528; *Marsden v Canada (Minister of Human Resources and Skills Development Canada)*, [2006] FCJ No. 1571; *Re Weidenfeld*, [2007] OJ No 4485, for the proposition that the Court has the obligation to designate a lawyer paid by the government to represent a disabled person.

Respondent's Arguments

[23] The respondent recognizes that Ms. Holland has at heart the best interests of her son but opposes the remedies that she asked. First, none of the above-mentioned cases support an obligation for the Court to designate a lawyer paid by the government to represent Mr. Holland. Second, Ms. Holland should not be designated as the legal representative to her son because he is not a person under a legal disability, unable to act on his own.

[24] The respondent accepts that it is in the Court's discretion to name Ms. Holland as an agent to her son for the service and filing of proceedings. The respondent accepts also that Ms. Holland can assist her son but she cannot be appointed his legal representative.

Analysis

[25] The Court cannot grant the remedy asked by Ms. Holland since the Court is not satisfied that Mr. Holland is a person under disability.

[26] Rule 121 specifies that “[u]nless the Court in special circumstances orders otherwise, a party who is under a legal disability or who acts or seeks to act in a representative capacity, including any representative proceeding for a class proceeding, shall be represented by a solicitor”[emphasis added].

[27] Ms. Holland is not a lawyer. In her response to Justice Russell at the hearing on March 17, 2011, she admitted that she did not feel competent enough to represent her son and said that she would prefer counsel to do that (pages 21-22 of the transcript).

[28] Ms. Holland was declared a vexatious litigant by the British Columbia Supreme Court (*Holland* 2010).

[29] The Court is also not satisfied that Ms. Holland adduced sufficient evidence as to why it is impossible for her son to obtain legal representation.

[30] The Court is of the opinion that the issues and the facts in the case law cited by Ms. Holland are not the same as in the present case.

[31] The respondent did not seek costs.

ORDER

THIS COURT ORDERS that the motion be dismissed. No costs are awarded. In order to advance this file, the applicant, whether he intends to represent himself in the future or appoint a counsel shall do so by advising the registry no later than October 15, 2011. Thereafter, the other relevant Rules shall apply.

“Michel Beaudry”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-1332-10

STYLE OF CAUSE: JONATHON DAVID HOLLAND et al. v.
CANADIAN HUMAN RIGHTS COMMISSION

PLACE OF HEARING: Vancouver, British Columbia

DATE OF HEARING: September 27 and 28, 2011

REASONS FOR ORDER: BEAUDRY J.

DATED: September 30, 2011

APPEARANCES:

Zsuzsanna Holland FOR THE APPLICANTS
(Self-represented)

Samar Musallam FOR THE RESPONDENT

SOLICITORS OF RECORD:

n/a FOR THE APPLICANTS
(Self-represented)

Canadian Human Rights Commission FOR THE RESPONDENT
Ottawa, ON