

Federal Court of Appeal



Cour d'appel fédérale

Date: 20151123

Docket: A-549-14

Citation: 2015 FCA 260

**CORAM: PELLETIER J.A.
STRATAS J.A.
DE MONTIGNY J.A.**

BETWEEN:

RACHEL EXETER

Appellant

and

**ATTORNEY GENERAL OF CANADA
(Deputy Head, Statistics Canada)**

Respondent

Heard at Ottawa, Ontario, on November 4, 2015.

Judgment delivered at Ottawa, Ontario, on November 23, 2015.

REASONS FOR JUDGMENT BY:

PELLETIER J.A.

CONCURRED IN BY:

**STRATAS J.A.
DE MONTIGNY J.A.**

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REASONS FOR JUDGMENT

PELLETIER J.A.

[1] Ms. Exeter appeals from the order of the Federal Court (unreported) dismissing her appeal from Prothonotary Aronovitch's decision (also unreported) allowing the Attorney General's motion for security for costs in the amount of \$2,000.

[2] Ms. Exeter has been a frequent litigant in this Court and in the Federal Court. In the course of her litigation career, she has often had costs awarded against her and occasionally has had costs awarded to her. The Attorney General brought an application for security for costs, supported by an affidavit showing that Ms. Exeter has outstanding costs awards in other cases which have not been satisfied. Ms. Exeter filed her own affidavit in which she challenged the affidavit filed by the Attorney General and asked to be relieved from the obligation to provide security for costs because she is impecunious.

[3] The Prothonotary considered the evidence of the unsatisfied costs awards as well as the evidence of impecuniosity and ordered that security for costs be posted in the amount of \$2,000 rather than \$8,120 sought by the Attorney General. On appeal to the Federal Court, the Federal Court Judge noted the evidence of unsatisfied costs awards as well as the Prothonotary's decision with respect to impecuniosity and held that, given the standard of review of a prothonotary's decision by a Federal Court Judge, there was no basis to interfere with the prothonotary's decision.

[4] Ms. Exeter now appeals to this Court. In the days prior to the hearing of the appeal, Ms. Exeter wrote to the Chief Justice, objecting to the presence of Mr. Justice Stratas on the panel, alleging that, on the basis of a decision of this Court which he wrote and which was concurred in by the other members of the panel, there was a reasonable apprehension of bias on his part. As is the normal practice, Mr. Justice Stratas responded to Ms. Exeter's allegations, treating them as an informal motion for recusal. In his decision, reported at 2015 FCA 238, he held that no

reasonable, fully informed person, thinking the matter through, would conclude that he would not decide the matter fairly.

[5] Ms. Exeter then wrote to the Chief Justice again, asking that the matter be adjourned while she appealed Mr. Justice Stratas' decision to the Supreme Court of Canada. The Chief Justice asked me, as the presiding member of the panel, to respond to Ms. Exeter's request for an adjournment. I issued a direction explaining why an adjournment would not be granted.

[6] At the opening of the hearing of the appeal, Ms. Exeter renewed her request for an adjournment and indicated that if the adjournment was refused, she would not participate further in the appeal. The adjournment was refused. Counsel for the Attorney General, in response to a question from the panel, indicated that she had nothing to add to her memorandum of fact and law. As a result, the appeal will be decided on the record.

[7] The affidavit evidence of Josée Carrière establishes that a number of cost awards against Ms. Exeter remain unsatisfied. Ms. Exeter challenges this, saying that the affidavit does not take into account orders by Madam Justice Sharlow awarding her costs in the total amount of \$1,500 in this Court, such costs to be set off against costs owed by Ms. Exeter in other proceedings. It is true that the Attorney General's affidavit evidence is incomplete but the total of the outstanding costs awards disclosed in the Carrière affidavit exceeds the amount of costs which Ms. Exeter is entitled to set off.

[8] Ms. Exeter also challenges the conclusion that the costs awards mentioned in the affidavit are unsatisfied since, with respect to some of those awards, writs of seizure and sale have been registered against her real property. The fact that enforcement measures have been undertaken does not mean that the costs awards have been paid. They remain unpaid until the property is sold and the writs are discharged. The Prothonotary made no error in finding that the requirements of Rule 416(1)(f) had been satisfied.

[9] Ms. Exeter also challenges the prothonotary's conclusion that her evidence of impecuniosity was "lacking in detail and insufficient for that purpose". In her affidavit, Ms. Exeter showed an annual income of \$13,227 and monthly expenses of \$1,380, excluding food, insurance (home and auto), transportation, property taxes and "miscellaneous". The difficulty with this evidence is that Ms. Exeter's monthly expenses (\$1,380) exceed her monthly income ($\$13,227 / 12 = \$1,102$) by more than \$275 ($\$1,380 - \$1,102 = \278) before accounting for her food and other necessities. Clearly, Ms. Exeter either has other income or her statement of expenses is incorrect. The fact that counsel for the Attorney General did not cross-examine Ms. Exeter on her affidavit is not an admission as to the truth of the contents of the affidavit: *Zheng v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1311, [2007] F.C.J. No. 1686 at paragraph 13. The Prothonotary made no error in concluding that Ms. Exeter's evidence of impecuniosity was insufficient to satisfy Rule 417.

[10] Ms. Exeter also challenges the adequacy of the Federal Court judge's reasons, alleging that they do not permit the reader to understand why she reached the conclusion she did. I disagree. The reasons meet the test for adequacy set out in a number of Supreme Court cases,

recently summarized by this Court in *Canada v. Long Plain First Nation*, 2015 FCA 177 at para. 143.

[11] In these circumstances, it is not necessary to deal with the merits of Ms. Exeter's claim before the Federal Court. The Federal Court judge did not err in declining to do so.

[12] Ms. Exeter also argues that the question of security for costs is *res judicata* given that a motion for security for costs made by the Attorney general in 2012 was dismissed with costs to Ms. Exeter. That motion was for security for costs in relation to proceedings in the Court of Appeal. Assuming for the sake of argument that the doctrine of *res judicata* applies to the dismissal of an application for security for costs in different proceedings before different courts, the burden of showing that there has been no material change in her circumstances since 2012 falls on Ms. Exeter. She has not done so and, as a result, the argument as to *res judicata* fails.

[13] Ms. Exeter raises a number of other arguments relating to the *Charter of Rights and Freedoms* and her right of access to justice. This appeal does not raise a *Charter* issue. The order under appeal does not raise any equality issues nor does it result in any deprivation of life, liberty or security of the person. As for Ms. Exeter's right of access to justice, the order under appeal arises from the fact that she has exercised this right on numerous previous occasions without discharging the obligations she has incurred as a result.

[14] Finally, Ms. Exeter alleges that counsel for the Attorney General has not complied with the *Federal Court Rules* SOR/98-106 in unilaterally altering the style of cause to remove the

reference to the Deputy Head, Statistics Canada. I agree with Ms. Exeter on this point. The Rules are clear that the style of cause can only be changed by order: see Rule 76. That said, this non-compliance with the Rules does not affect the issue of security for costs. If the Attorney General wishes to amend the style of cause, she may, should the need arise, bring a motion for that relief.

[15] For these reasons, I would dismiss Ms. Exeter's appeal and confirm the order as to security for costs in the amount of \$2,000 in relation to proceedings in Federal Court file no.T-482-13. I would also award costs of \$500 in favour of the Attorney General in this Court. Having regard to the number of outstanding cost awards against Ms. Exeter, I would also order that these costs are payable forthwith and that no further notices of appeal with respect to interlocutory matters in file no.T-482-13 be accepted for filing unless Ms. Exeter provides written confirmation that these costs have been paid.

"J.D. Denis Pelletier"

J.A.

"I agree
Stratas J.A."

"I agree
De Montigny J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-549-14

**(APPEAL FROM THE ORDER OF THE HONOURABLE MADAME JUSTICE
MARTINE ST-LOUIS DATED DECEMBER 4, 2014, NO T-482-13.**

DOCKET: A-549-14
STYLE OF CAUSE: RACHEL EXETER v. ATTORNEY
GENERAL OF CANADA, (Deputy
Head, Statistics Canada)
PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: NOVEMBER 4, 2015

REASONS FOR JUDGMENT BY: PELLETIER J.A.

CONCURRED IN BY: STRATAS J.A.
DE MONTIGNY J.A.

DATED: NOVEMBER 23, 2015

APPEARANCES:

Rachel Exeter ON HER OWN BEHALF

Helene Robertson FOR THE RESPONDENT

SOLICITORS OF RECORD:

On her own behalf FOR THE APPELLANT
RACHEL EXETER

William F. Pentney FOR THE RESPONDENT
Deputy Attorney General of Canada