Federal Court of Appeal | Cour d'appel fédérale

Date: 20190514

Docket: A-264-18

Citation: 2019 FCA 144

CORAM: **NOËL C.J.**
STRATAS J.A.
LOCKE J.A.

BETWEEN:

ELIZABETH BERNARD

Applicant

and

BONNIE GALE BAUN, ATTORNEY GENERAL OF CANADA and PUBLIC SERVICE ALLIANCE OF CANADA

Respondents

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on May 14, 2019.

REASONS FOR ORDER BY: STRATAS J.A.

CONCURRED IN BY: NOËL C.J.
LOCKE J.A.

Federal Court of Appeal  Cour d'appel fédérale

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REASONS FOR ORDER

STRATAS J.A.

[1] The respondent, Public Service Alliance of Canada, moves for an order that the applicant is a vexatious litigant under section 40 of the *Federal Courts Act*, R.S.C. 1985, c. F-7. It also moves for an order dismissing the application for judicial review on a summary basis on the ground that the applicant lacks standing.

[2] For the following reasons, I would grant both orders.

Court composition for these motions

[3] Vexatious litigant applications or vexatious litigant motions under section 40 of the *Federal Courts Act* can be heard and determined by one judge: *Federal Courts Act*, section 16; *Canada v. Olumide*, 2017 FCA 42, [2018] 2 F.C.R. 328 at para. 5 (*Olumide No. 2*); *Simon v. Canada (Attorney General)*, 2019 FCA 28 at para. 3; *Keremelevski v. Ukrainian Orthodox Church of St. Mary*, 2018 FCA 218 at para. 6.

[4] A single judge can also order, as part of the vexatious litigant application or motion, that "a proceeding previously instituted by the person in [the Court] not be continued" unless leave is later sought and granted: *Federal Courts Act*, subsection 40(1). An order that a proceeding not be continued is not a dismissal: see *Philipos v. Canada (Attorney General)*, 2017 FCA 117 on the difference between discontinuance and dismissal.

[5] But a single judge cannot determine a motion to dismiss an appeal: *Federal Courts Act*, section 16; *Rock-St Laurent v. Canada (Citizenship and Immigration)*, 2012 FCA 192, 434 N.R. 144 at para. 30; *Keremelevski* at para. 5.

[6] In this case, we have a motion for a vexatious litigant order that can be heard by one judge and a motion to dismiss the application that must be heard by three judges. One option is for the Court to divide the motions and have the vexatious litigant motion heard by one judge

and the motion to dismiss the application for judicial review heard by three judges. This option was pursued in *Keremelevski,* above. The other option is to place both motions in front of three judges. This option has been pursued here.

Preliminary issues

[7] The applicant submits that a vexatious litigant order can only be obtained by way of application, not a motion, as has been done here. She notes that the text of section 40 is quite explicit—it says "application."

[8] Many cases in this Court have granted relief under section 40 by way of motion. Some examples include *Olumide No. 2* and *Simon*, both above and *Nelson v. Canada*, 2003 FCA 127, 301 N.R. 359. This Court has recently approved of parties proceeding by way of motion instead of application: *Coote v. Lawyers' Professional Indemnity Company*, 2014 FCA 98 at para. 12. The two have been seen as identical and interchangeable: *Olumide v. Canada*, 2016 FCA 287 at paras. 34 and 42.

[9] The applicant specifically argues that *Nelson* is wrongly decided. She points to what she says are the severe consequences of making a vexatious litigant order against someone.

[10] I am not persuaded that these authorities are manifestly wrong within the meaning of *Miller v. Canada (Attorney General)*, 2002 FCA 370, 220 D.L.R. (4th) 149. In terms of procedure, both motions and applications for a vexatious litigant order allow the party against

whom a vexatious litigant order is sought to adduce all admissible evidence and make full submissions. Both motions and applications for a vexatious litigant order can be decided by a single judge. In both, the applicant may apply for more time to adduce evidence and make submissions if that is required. Thus, in all meaningful procedural aspects, motions for vexatious litigant orders are at least as fair as applications.

[11] Further, the Public Service Alliance of Canada's decision to seek a vexatious litigant order by way of motion within an existing proceeding rather than a separate application has not prejudiced the applicant in any way. She has had a full opportunity to know the case against her and to respond to it. Indeed, although the Public Service Alliance of Canada proceeded by way of motion, the applicant ended up having five months to respond, a much longer time than that usually given to those responding to applications.

[12] The applicant also submits that the Public Service Alliance of Canada's decision to proceed by way of motion rather than application took away her right to have an oral hearing. She suggests that this Court must hear all applications orally. I reject the submission.

[13] Section 16 of the *Federal Courts Act* provides, among other things, that appeals, "applications" ("demandes") for judicial review, and references are to be "heard" ("entendus"); for these, there is a right to an oral hearing. Applications under section 40 of the *Federal Courts Act* are not covered by section 16 of the Act and, thus, the oral hearing requirement in that section does not apply. Indeed, the equally authoritative French language version of section 40 speaks not of "demandes" ("applications") but of "requêtes" ("motions") which, incidentally also

confirms the view, above, that section 40 matters can be brought by way of motion. As is well-known, there is no right to an oral hearing of motions ("requêtes"): *SNC-Lavalin Group Inc. v. Canada (Public Prosecution Service)*, 2019 FCA 108, citing this Court's order dated April 29, 2019 in *Lessard-Gauvin v. Canada (Attorney General)*, file A-312-18; see also *Nelson*, above at para. 23 and *Jones v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 279, 272 D.L.R. (4th) 274 at paras. 12-14. Thus, the Public Service Alliance of Canada's decision to proceed by way of motion rather than application has not deprived the applicant to an oral hearing: she was never entitled to one even if an application had been brought.

[14] In the alternative, the applicant also requests an oral hearing of this motion. The Court has discretion not to order one: *Fotinov v. Royal Bank of Canada*, 2014 FCA 70. Here, the applicant's request for an oral hearing is denied. She has offered no specific reason why an oral hearing should be ordered other than the fact that the motion is important to her. Upon reviewing the material filed in this motion, no questions occurred to the Court. The material is straight-forward and clear and, like many of the motions we hear, can be dealt with efficiently and expeditiously in writing. This exercise of discretion is consistent with the mandate in Rule 3 that we exercise our discretion to further "the just, most expeditious and least expensive determination of every proceeding on its merits."

The vexatious litigant motion

[15] The law governing vexatious litigant motions is set out in *Olumide No. 2*, as recently explained and elaborated upon in *Simon*.

[16] The test is whether the extra layer of regulation afforded by a vexatious litigant order is necessary and consistent with the purposes underlying the vexatious litigant provision, section 40 of the *Federal Courts Act*: *Olumide No. 2* at para. 31. In discussing this test in *Simon* at para. 26, this Court reduced the test to a concrete question: "does the litigant's ungovernability or harmfulness to the court system and its participants justify a leave-granting process for any new proceedings?" On the record before us, this question must be answered in the affirmative. Lengthy reasons explaining this result are neither necessary nor desirable: *Olumide No. 2* at paras. 39-40.

[17] Since July 2015, the applicant has filed nine applications for judicial review involving ten different responding parties, including three bargaining agents, three individual respondents and four branches of the federal government. All of the applications that have been determined have been dismissed.

[18] A pattern has emerged: the applicant often starts proceedings in which she has no standing. She does so despite advice she has received from this Court and from the Federal Public Sector Labour Relations and Employment Board. This has happened twice in the last two years: *Bernard v. Close*, 2017 FCA 52; *Bernard v. Public Service Alliance of Canada*, 2017 FCA 142. The application presently before this Court represents the third time. This does not include proceedings where the applicant has sought to intervene in others' proceedings, proceedings in which she does not have a legally cognizable interest: Tyner Affidavit at para. 10; Order in A-394-16.

[19] This pattern is enhanced by the applicant's substantially similar conduct before the Federal Public Sector Labour Relations and Employment Board. This conduct tends to corroborate the view that the applicant is the sort of litigant requiring a leave-granting process for any new proceedings she brings.

[20] The applicant has repeatedly asked the Board to reconsider decisions to which she was not a party despite being repeatedly advised that she does not have standing: *Bernard v. Professional Institute of the Public Service of Canada*, 2018 FPSLREB 47 at paras. 18-21.

[21] In another matter, the Board has imposed restrictions on the applicant to prevent conduct, including relitigation, that it described as "vexatious": *Bernard v. Canada Revenue Agency*, 2017 PSLREB 46.

[22] This pattern of conduct in the face of administrative and judicial decisions confirms that the applicant will not refrain in the future from trying to start or enter litigation in which she has no interest. On the record before me, if the vexatious litigant motion is not granted, she will doubtlessly continue her conduct. She presently proceeds in defiance of attempts to regulate her. In this aspect, she is ungovernable.

[23] It is not necessary for a party seeking to have a litigant declared vexatious to establish that no other means are available to regulate the litigant. Vexatious litigant orders are made when they are necessary. This being said, nonetheless I am satisfied that the only regulatory tool

available to the Court to protect itself and the litigants before it is a vexatious litigant order against the applicant. This is a clear case.

[24] The applicant's conduct is harmful. By starting or trying to enter proceedings in which she has no interest, she drags third parties into litigation or steps in litigation that never would have had to be undertaken but for her conduct. Innocent parties are forced to incur unnecessary litigation costs or see their litigation delayed. All the concerns about "mere busybodies" entering into litigation, aired in the jurisprudence of the Supreme Court on standing, are here, magnified many times by the applicant's repetition of her behaviour: see *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 S.C.R. 524 at paras. 26-27*; Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607; *Hy and Zel's Inc. v. Ontario (Attorney General); Paul Magder Furs Ltd. v. Ontario (Attorney General)*, [1993] 3 S.C.R. 675; *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236.

[25] The applicant submits that a vexatious litigant order should not be made against her because it is "an extraordinary remedy that alters a person's right to the presumptive access to the courts." I disagree. In *Olumide No. 2* at para. 29, this Court explained that vexatious litigant orders are not as drastic as the applicant contends. They do not bar access to the courts: instead, they regulate it. They are designed to protect the Court, its scarce resources, and the parties before it while maintaining the litigant's right to legitimate and necessary access to the Court: *Olumide No. 2* at paras. 17-22.

[26] To be sure, a litigant declared vexatious can still access the courts by bringing a proceeding but only if the Court grants leave. Faced with a request for leave, the Court must act judicially and promptly, considering the applicable legal standards, the evidence filed in support of the granting of leave, and the purposes of the vexatious litigant provision. The Court could well grant leave to a vexatious litigant who has a *bona fide* reason to assert a claim that is not frivolous and vexatious within the meaning of the case law on pleadings. Seen in this way, vexatious litigant orders are far from drastic.

[27] The applicant also submits that motions to declare a person vexatious should not be used as a litigation tactic. As a general proposition, that is true. But that proposition does not apply here. This motion has been brought in good faith and has been prosecuted professionally and with very good cause.

[28] Finally, the applicant complains that vexatious litigant orders are only made against self-represented parties like her. She complains that persistence and robust advocacy are praised in the legal profession but are labelled as "vexatious" when practised by self-represented parties.

[29] This Court addressed this concern in *Simon*, above, using words fully apposite to the applicant's case (at paras. 13-16):

> We must be careful not to confuse unrepresented litigants who need extra attention and assistance with those who are vexatious; vexatious litigants are just a sliver of the unrepresented litigants we see. Helping the unrepresented is part of the core mission of the Court: to make justice available to our whole populace, including all those with lesser capabilities and greater challenges. We accomplish that mission primarily through a dedicated, professional registry and timely Court

> orders and directions. Almost all unrepresented litigants who need extra attention and assistance are open to receiving it, receive it, and advance their cases to a determination on the merits. They do not need the extra layer of regulation supplied by a vexatious litigant declaration. But undeniably some do.
>
> Some litigants are simply ungovernable. They ignore all the rules, do not respond constructively to the considerable attention and assistance courts give to them, flout court orders, and persist in litigation doomed to fail—sometimes resurrecting it after it is struck, and then resurrecting it again and again.
>
> Other litigants are simply harmful. They force opposing parties to defend unmeritorious or duplicative litigation and drain the scarce and finite resources of the court by the quantity of pointless litigation, the style or manner of their litigation, their motivations, intentions, attitudes and capabilities while litigating, or any combination of these things.
>
> At a certain point, enough is enough and practicality must prevail: the extra layer of regulation supplied by a vexatious litigant declaration is necessary, just and responsible. See generally *Olumide* [*No. 2*] at paras. 20-22 and 32-34.

[30] As I have mentioned, the applicant's conduct warrants a vexatious litigant order. Her status as a self-represented litigant has nothing to do with this conclusion. I would add that the applicant is different from some self-represented litigants we encounter: she has a facility with our procedures and has litigation capability. But the serious concerns about the applicant's governability and the causing of harm, described above, remain. In fact, her facility and capability can increase the prospect of harm to others and the Court and, thus, can increase the need for the regulation supplied by a vexatious litigant order. She is not like some others who, through lack of facility and capacity incidentally and haphazardly cause harm as they thrash about in the litigation process.

[31] There is a mandatory prerequisite to the making of a vexatious litigant order under section 40. Under subsection 40(2) of the Act, the Attorney General must consent to the bringing

of the motion to declare the applicant vexatious. This prerequisite has been satisfied here: the Attorney General has given his consent.

[32] I conclude that the applicant's ungovernability and harmfulness to the court system and its participants justify a leave-granting process for any new proceedings. I would grant the motion for a vexatious litigant order against the applicant.

Motion to dismiss the application

[33] Interlocutory motions to dismiss proceedings before the Court may be made: *Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250, [2014] 2 F.C.R. 557; *Lee v. Canada (Correctional Service)*, 2017 FCA 228; *CanWest Mediaworks Inc. v. Canada (Minister of Health)*, 2008 FCA 207 at para. 10; *Forner v. Professional Institute of the Public Service of Canada*, 2016 FCA 35; *Fabrikant v. Canada*, 2018 FCA 171. In such motions, the Court looks for a fatal flaw striking at the root of the proceeding—a "show-stopper"—or some other circumstance that suggests that the proceeding is doomed to fail.

[34] This approach reflects this Court's view that "unnecessary and unmeritorious cases should be rooted out and quashed as early as possible": *Fabrikant v. Canada*, 2018 FCA 224 at para. 26. To this end, many tools have recently been developed, repurposed or given new vitality: *Ibid*. at para. 26.

[35] In her application for judicial review, the applicant alleges that a decision of the Federal Public Sector Labour Relations and Employment Board was made by a panel that was not constituted in accordance with law. The administrative decision had nothing to do with the applicant. The applicant was not a party before the Board. The decision dismissed complaints made by the respondent, Ms. Baun. Ms. Baun has started her own application for judicial review against the decision.

[36] The applicant has filed her affidavit in support of her application. She offers no evidence suggesting that the Board's decision affected her legal rights, imposed legal obligations upon her or prejudicially affected her in some way. She falls well short of the test for direct standing in applications for judicial review: *League for Human Rights of B'Nai Brith Canada v. Odynsky*, 2010 FCA 307, [2012] 2 F.C.R. 312.

[37] The applicant also lacks public interest standing under the test in *Downtown Eastside*, above. The evidence does not establish that the applicant has a real stake or genuine interest in the matter. Nor does the evidence show that her application is a reasonable and effective way to bring the issue of the validity of the administrative decision before the Court; indeed, the application of the directly affected person, Ms. Baun, places the issue before the Court and ensures that the administrative decision is not immune from review.

[38] *Close*, above, is directly on point and binding. In *Close*, this Court dismissed the applicant's attempt to litigate another party's case for want of public interest standing or any type of standing whatsoever. In *Close*, this Court observed (at para. 9) that "[t]here are potentially

tens of thousands similarly situated to the applicant who would also have standing if we were to grant standing to this applicant." Nothing in the applicant's affidavit suggests that the same is not true here.

[39] Therefore, in my view, the application for judicial review suffers from a fatal flaw—it is doomed to fail. The applicant does not have the standing necessary to maintain the application.

Proposed disposition

[40] I would declare the applicant a vexatious litigant, with costs to the respondent, Public Service Alliance of Canada. I would also order that the applicant shall not institute new proceedings or attempt to intervene in others' proceedings, whether acting for herself or having her interests represented by another individual in this Court, except by leave of this Court. I would also dismiss the application for judicial review with costs.

"David Stratas"

J.A.

"I agree
Marc Noël C.J."

"I agree
George R. Locke J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-264-18
STYLE OF CAUSE:	ELIZABETH BERNARD v. BONNIE GALE BAUN, ATTORNEY GENERAL OF CANADA and PUBLIC SERVICE ALLIANCE OF CANADA

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	STRATAS J.A.
CONCURRED IN BY:	NOËL C.J. LOCKE J.A.
DATED:	MAY 14, 2019

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