Federal Court of Appeal | Cour d'appel fédérale

**Date: 20141001**

**Dockets: A-147-11**
**A-186-11**

**Citation: 2014 FCA 219**

**Present: STRATAS J.A.**

**BETWEEN:**

**FRANCIS MAZHERO**

**Appellant**

**and**

**ANDREW FOX, JACQUES ROBERGE AND NEIL SHARKEY**

**Respondents**

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on October 1, 2014.

REASONS FOR ORDER BY: STRATAS J.A.

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## REASONS FOR ORDER

**STRATAS J.A.**

[1] On September 11, 2014, this Court ordered that these consolidated appeals may continue as a specially managed proceeding and designated me to act as the case management judge: *Mazhero v. Fox et al.*, 2014 FCA 200.

[2] I have very broad powers to progress these consolidated appeals from their currently chaotic state to a prompt hearing on the merits. In particular, Rule 385(1) of the *Federal Courts Rules*, SOR/98-106, gives me two sets of powers useful for this case. First, I may make any directions and orders "that are necessary for the just, most expeditious and least expensive determination of the proceeding on its merits." Second, I may "fix the period for completion of subsequent steps in the proceeding."

[3] Rule 385(1) sits alongside Rules 53 and 55. Under those Rules, I can vary any Rules in the *Federal Courts Rules*, dispense with compliance with them, make additional orders that are just, and attach terms to any orders.

[4] Rule 385(1) also sits alongside this Court's plenary jurisdiction to regulate its proceedings and restrain any abuses of its procedures: *Canada (National Revenue) v. RBC Life Insurance Company,* 2013 FCA 50 at paragraphs 33-36.

[5] At all times, these powers are to be exercised in accordance with procedural fairness. Procedural fairness is not what the parties think is fair, nor is it in the eye of the beholder. It is a well-defined concept rooted in the case law. In this case, the requirements of procedural fairness will not obstruct my task of bringing order to chaos.

[6] In exercising these powers, I am not restricted to dealing with matters passively, *i.e.*, deciding motions and other matters raised by the parties. Rather, I can take a more active posture, using my broad powers, sometimes on my own initiative, to regulate the parties'

conduct fairly with a view to progressing this file to a prompt hearing on the merits. A brief description of these appeals and their current status shows that I must be very active.

[7] Before me are two consolidated appeals:

- *File A-147-11*. An appeal from the Order of the Federal Court (*per* Justice Tremblay-Lamer) dated March 30, 2011 declaring the appellant to be a vexatious litigant under subsection 40(1) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, and related matters. The appellant launched this appeal on March 31, 2011.

- *File A-186-11*. An appeal from the Order of the Federal Court (*per* Justice Noël) dated April 28, 2011 in which the Federal Court refused the appellant leave to commence a proceeding. The appellant launched this appeal on May 5, 2011.

[8] The appeals have not progressed beyond the filing of the notice of appeal. In particular, the appellant has not pursued the next step in the appeals – the filing of the appeal books under Rule 343.

[9] Normally, that step takes no more than 60 days from the filing of the notice of appeal. But here we are – 1,279 days and 1,244 days respectively into the appeals – and that step remains to be done. The appeals have been frozen by numerous motions and letters requesting relief of various sorts, and also by some earlier orders of the Court.

[10] Using my broad powers of case management, I now set some mandatory rules to regulate these consolidated appeals until their completion. My aim is to progress them quickly to a hearing on their merits.

[11] First, I shall regulate how the parties are to communicate with the Court. Justice Sharlow has correctly observed that the appellant has been submitting letters and documents to the Court faster than the Court can deal with them: *Mazhero, supra* at paragraph 14. A number of these letters and documents do not have any legal merit and a few contain attacks on the *bona fides* and motivations of the Court. Yet, when filed, the Court must still deal with them, a task that fritters the Court's scarce resources away without moving the matter any closer to hearing.

[12] In this situation, the words of the Subcommittee on Global Review of the *Federal Courts Rules*, unanimously approved by the Federal Courts' Rules Committee, are apposite:

> The Federal Courts system can no longer be seen just as a tool for parties to litigation to advance their ends with few restraints. We can no longer see the rules only in terms of accommodating and regulating the interests of particular litigants in a case. They must be seen as regulating the rights of litigants across the system. Overuse of scarce judicial resources in one case can potentially deprive other cases of these resources and inflict damage on the public purse.
>
> While the Federal Courts system exists for the benefit of parties to litigation, something broader must not be forgotten: the Federal Courts system belongs to the community, is financed by the community, and must serve the community.

(Subcommittee on Global Review of the *Federal Courts Rules, Report* (2012), at page 24.)

[13] The *Federal Courts Rules* require the Court to be addressed by motion and by no other means – and in these circumstances, no relaxation of that requirement shall be permitted.

Therefore, I shall order that no party may address the Court by letter or document. The Court may only be addressed by formal motion under Rule 369. Any such motion must explicitly state a specific rule under the *Federal Courts Rules* as the basis for relief, otherwise the Registry shall reject it.

[14] To be clear, the Registry is not to accept any letter or other document sent to it by any party by any means, unless it is a compliant motion record, appeal book, memorandum of fact and law, or written submissions ordered by the Court. Under no circumstances will the Court address or react to any letter or other document.

[15] Next, I shall regulate how the Registry and the Court will act when a party files a compliant motion record. Upon the filing of a compliant motion record, the Registry shall immediately send the motion record to me. I shall promptly determine whether the motion has any merit on the basis of the evidence and written submissions in the moving party's motion record. If the motion has no merit, I shall dismiss it immediately.

[16] This is in accordance with this Court's normal hearing practice. When a party seeks relief, whether that be in a motion, application or appeal, and that party fails to show that relief is possible, the matter ends there – the motion, application, or appeal is dismissed without calling for submissions from the responding party.

[17] If a motion has potential merit or calls for response, I shall direct the respondent(s) to the motion to file a responding motion record. The time for filing that record under Rule 365 shall run from the date of the direction.

[18] Next, I wish to correct what may be a misunderstanding on the part of the appellant. Currently before the Court are a number of motions brought by the appellant to set aside earlier Orders of the Court. But what the appellant may not realize is that the Rules do not allow him an unqualified right to do that. Far from it.

[19] The general rule is that an order, once made, is final and binding. It can only be changed or set aside by appealing it. To that general rule are exceptions – narrow and specific ones – to the general rule. One is where an order does not accord with the reasons given for it, there is a typographical error, or a matter has been accidentally omitted from the order: Rule 397. Another is where the order was fraudulently obtained or a new matter has arisen: Rule 399. The requirement of a new matter is difficult to satisfy: *UHA Research Society v. Canada (Attorney General)*, 2014 FCA 134 at paragraph 9.

[20] In her reasons in *Mazhero*, *supra* at paragraphs 13(a) and 14, Justice Sharlow helpfully set out the motions filed by the appellant that are currently before the Court. Some of these have been asserted in letters. On this one last occasion, in the interests of efficiency, I shall regard the letters as asserting formal motions.

[21] The appellant's letters dated July 18, 2014 and September 4, 2014 and the motion record dated August 13, 2014, broadly challenge the validity of all or part of the Court's Order dated July 9, 2014. They do not raise valid grounds under Rules 397 or 399. The appellant's motions suggest that he is dissatisfied with the Order dated July 9, 2014. His recourse is to try to appeal it, not to bring the motions he has brought. Accordingly, all of these motions shall be dismissed.

[22] The appellant's motion to set aside the Orders of this Court dated August 19, 2011 is also dismissed. Contrary to the appellant's submission, the Court had the jurisdiction to make those Orders. As well, there are no grounds to revisit these Orders under Rules 397 and 399. If the appellant is dissatisfied with the Orders, he may try to appeal them. But no recourse exists under Rules 397 and 399.

[23] By letter dated September 9, 2014, the appellant seeks an order requiring the Federal Court to produce electronic copies of certain documents in T-1067-10. This Court does not have the jurisdiction to make such an order concerning Federal Court documents. This motion shall be dismissed.

[24] The appellant's motion dated July 22, 2014 seeking an order that the respondent Sharkey be charged with a criminal offence, and related relief, is dismissed. This Court lacks the jurisdiction to grant the relief sought. Further, this motion is entirely without legal merit. This motion echoes an earlier motion the appellant brought unsuccessfully in this Court. In that motion, the appellant sought leave to start a private prosecution against a Prothonotary and a lawyer.

[25] These particular motions cause concern. Is the appellant truly interested in appealing the merits of the Federal Court's judgments declaring him a vexatious litigant? Or, instead, is he interested in using the consolidated appeals as a forum to pursue improper collateral purposes? I address this concern below.

[26] I now turn to the remainder of the procedural steps in the consolidated appeals.

[27] Originally, there were two appeals: A-147-11 and A-186-11. On May 26, 2011, this Court set out the contents of the appeal book in A-147-11. On August 19, 2011, this Court ordered that the appeals be consolidated. Now it falls to the appellant to prepare one appeal book for the consolidated appeals (*i.e.*, both A-147-11 and A-186-11) that complies with Rule 344.

[28] In preparing his appeal book, the appellant should start with the May 26, 2011 Order that sets out the documents to be included in the A-147-11 appeal. He should consider whether there are additional documents relevant to A-186-11 that were before the Courts below and are necessary for the hearing of the consolidated appeals. Those should be included in the appeal book for the consolidated appeals. At a minimum, the reasons and judgment of the Federal Court under appeal in A-186-11 must be included.

[29] The contents of the appeal book for the consolidated appeals will be set by a later order of the Court. To this end, the Court needs submissions from the parties.

[30] The appellant shall file written submissions with this Court no later than October 21, 2014 setting out a proposed detailed index for the appeal book in the consolidated appeals. He shall list in the index each document with particularity. The respondents may respond by November 4, 2014, objecting (with reasons) to the appellant's index. If necessary, the respondents may offer their own index, with submissions as to why their index should be adopted. The appellant shall reply by November 12, 2014. The parties will have my decision on the contents of the appeal book by no later than November 24, 2014.

[31] Given the delay to date, the remaining procedural steps – the filing of the appeal book, the parties' memoranda and the hearing – must be scheduled by court order. The regrettable history of this matter and the public interest in prompt disposition of appeals require no less.

[32] By no later than October 21, 2014, the appellant shall file a three page written submission suggesting a timetable for remaining steps in the consolidated appeals, including availability for possible hearing dates in the February to April 2015 period and the preferred location for the hearing. By November 4, 2014, the respondents may respond in a three page written submission. By November 12, 2014, the appellant may reply in a two page written submission.

[33] The parties are on notice that the schedule ultimately set by the Court will be set out in a binding Court order. Absent truly exceptional circumstances, the schedule will be unchangeable. Any later motions will not affect the schedule.

[34] Lastly, if the orders I am making today are not obeyed, if a party brings multiple motions seeking relief this Court has no jurisdiction to give, if a party persists in moving to set aside every order without any basis, or if a party brings motions that are frivolous and vexatious, I will take decisive action in accordance with this Court's plenary power to redress an abuse of its processes.

[35] For example, if the appellant engages in that sort of conduct, I shall conclude that the consolidated appeals are nothing more than a tool to pursue improper purposes and I shall dismiss the consolidated appeals summarily as an abuse of process. As mentioned above, I do have concerns in this regard, but I hope I am wrong.

[36] If the appellant believes his appeals to be well-founded, he must now work in an orderly, diligent and single-minded way to get them ready for hearing soon so that this Court can consider them fairly on their merits.

[37] On a number of occasions, the respondents have been awarded costs. To quantify and collect these, the respondents will have to follow the procedures under the Rules. Until the costs are quantified and the appellant has had a reasonable time to pay and has defaulted, I have no basis for staying the consolidated appeals.

[38] An Order shall go in accordance with these reasons.

"David Stratas"

J.A.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

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|---|---|
| **DOCKET:** | A-147-11 AND A-186-11 |
| **STYLE OF CAUSE:** | FRANCIS MAZHERO v. ANDREW FOX, JACQUES ROBERGE AND NEIL SHARKEY |

**MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES**

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|---|---|
| **REASONS FOR ORDER BY:** | STRATAS J.A. |
| **DATED:** | OCTOBER 1, 2014 |

**WRITTEN REPRESENTATIONS BY:**

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|---|---|
| Francis Mazhero | ON HIS OWN BEHALF |
| Ronald D. Lunau | FOR THE RESPONDENT, NEIL SHARKEY |
| Donna Keats | FOR THE RESPONDENTS, ANDREW FOX AND JACQUES ROBERGE |

**SOLICITORS OF RECORD:**

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|---|---|
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