Federal Court  Cour fédérale

Date: 20160607

Docket: T-706-16

Citation: 2016 FC 634

Ottawa, Ontario, June 7, 2016

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

KEITH NIGEL MADELEY and MATHEW YEAGER

Applicants

and

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Defendant

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicants, Mr. Keith Madeley and Dr. Mathew Yeager, seek an interlocutory mandatory injunction, the purpose of which is to allow access by Dr. Yeager to the premises of five penitentiaries during a period between June 20 and 23, 2016.

[2] Mr. Madeley is an inmate at one of those institutions, Warkworth. As for the other institutions, they are designated as Millhaven, Bath, Joyceville and Collins Bay institutions. As

for the Joyceville and Collins Bay institution, access is sought for the medium and minimum security sections. In all seven institutions, which are all located in the province of Ontario, Dr. Yeager wishes to attend in person in order to meet with inmates at the annual John Howard Society (JHS) pre-release Fair.

[3] In essence, Dr. Yeager wishes to attend the fairs in order to provide information to inmates about parole eligibility, preparing for a hearing, preparing a release plan, considering if representation is required at parole hearings, institutional security level, institutional security officer issues, disciplinary issues and matters such as private family visits. (Affidavit in support of the application, para 23).

[4] The underlying proceeding in this case is a notice of application, pursuant to sections 18 and 18.1 of the *Federal Courts Act*, RSC, 1985, c F-7, for a "declaration regarding the legal right of Mr. Madeley to associate with and have access to Dr. Yeager as a professional visitor at Warkworth correctional institution and for an injunction for Correctional Service Canada to allow Dr. Yeager's access to Pre-release Fairs sponsored by the John Howard Society".

[5] The notice of application was filed with the Federal Court on May 4, 2016. In the present proceedings, the applicants seek the equivalent of the remedy sought in that they wish the Court to issue an interlocutory injunction mandating that Dr. Yeager be allowed to take part in this year's Pre-release Fairs.

[6] In essence, the applicants want the benefit of a declaration and injunction for this year, without a full record being available but one affidavit on behalf of the applicants and one affidavit on behalf of the respondent, and on the basis of the well-known criteria for an interlocutory injunction, not a full and complete declaration of the extent of their rights.

[7] Given that Dr. Yeager was denied access to the fairs of June 2015, it remained unexplained why proceedings were not launched much earlier that May 4, 2016, less than 2 months before the fairs are to take place. As a result, an interlocutory remedy is sought on the basis of a limited record.

I. The applicants

[8] On the occasion of the fair to be held at the Warkworth institution, Mr. Madeley would wish to meet with Dr. Yeager for the purpose of discussing, as I understand it, his parole hearing. I note that there is no affidavit filed by Mr. Madeley and that, at best, it would appear that Dr. Yeager is speaking on his behalf through his affidavit. Mr. Madeley is serving a life sentence without eligibility for parole before 25 years. Dr. Yeager indicated in his affidavit that Mr. Madeley is "just over one year away from parole eligibility". That may actually not be perfectly accurate, as we shall see later.

[9] As for Mr. Yeager, he presents himself as a criminologist. From his curriculum vitae, we find that he studied criminology at the University of California at Berkley where he majored in criminology. As for his Master's Degree, it was obtained at the State University of New York at Albany and it is presented as Mr. Yeager having majored in criminal justice. A further certificate

would have been obtained from the University of California at Los Angeles in drug and alcohol studies and he has a Ph.D. in sociology, from Carleton University, in Ottawa.

II. What is the Pre-release Fair

[10] The pre-release fairs taking place in Federal institutions in the province of Ontario in the month of June appear to be run by the JHS. The record is devoid of an affidavit being provided by a representative of the JHS that would have explained the nature of those events. Instead, the Court had to rely on the evidence offered by Mr. Miguel Costa, a Senior Project Officer with the Correctional Service of Canada (CSC). In his affidavit, Mr. Costa describes the pre-release fairs in the following fashion:

> 14. John Howard Society (JHS) pre-release Fair is an event to provide inmates who are soon to be released with the resources necessary for successful reintegration back into the community. Examples of the types of services, programs and supports which are offered include employment opportunities and information about accessing personal support programs in the community such as alcoholics anonymous.
>
> (Affidavit of Miguel Costa, para 14)

Mr. Costa asserts at paragraph 16 that the fairs are focused on services for inmates who are about to be released. It is not for possible service providers to offer services and the fairs are not meant to provide information about parole or how to prepare a Parole Board hearing. Although organized by the JHS, it is the CSC that is responsible for the content of the fair and insuring that all participants are authorized to participate. Thus, JHS does not approve fair participants and forwarding an application does not constitute an endorsement of the services offered by the applicant.

[11] In his affidavit, Dr. Yeager describes the fairs in a manner that is quite similar to that which is found in the Costa affidavit. However, at paragraph 23 of his affidavit he explained what constituted his contribution to the fairs he had attended in the past. It is clear that his participation was with respect to parole eligibility together with institutional security levels, institutional security officer issues, disciplinary issues and other related matters. As I pointed out at the hearing, if one accepts that the fairs are for the purpose of providing inmates with information about the types of services, programs and supports which are offered that include employment opportunities and information about accessing personal support programs in the community, this is not the kind of information that Dr. Yeager proposes to offer. That information would relate to pre-release issues; it is not directed at the availability of resources once the inmate has been released from the institution. Dr. Yeager wants to assist inmates in gaining release through the parole process. It is not that such an endeavour is objectionable. It is rather that his participation is not consistent with the framework of the fairs, as they were described to this Court. On the basis of the evidence presented to this Court, it is clear that Dr. Yeager wishes to participate to those fairs for a purpose different than the one associated with these events. The focus is post-release. Dr. Yeager's participation is focused on pre-release.

[12] I note that the fairs are not provided for in the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 (the Act), and its regulations or in the *Commissioner's Directives*. However, Mr. Costa testified that they assist in the rehabilitation and reintegration of people who have been incarcerated in Federal institutions into a community such that they will become law abiding citizens. That is certainly not inconsistent with the purpose of the correctional system which is spelled out at section 3 of Act:

3 The purpose of the federal correctional system is to contribute to the maintenance of a just, peaceful and safe society by	**3** Le système correctionnel vise à contribuer au maintien d'une société juste, vivant en paix et en sécurité, d'une part, en assurant l'exécution des peines par des mesures de garde et de surveillance sécuritaires et humaines, et d'autre part, en aidant au moyen de programmes appropriés dans les pénitenciers ou dans la collectivité, à la réadaptation des délinquants et à leur réinsertion sociale à titre de citoyens respectueux des lois.
(a) carrying out sentences imposed by courts through the safe and humane custody and supervision of offenders; and	
(b) assisting the rehabilitation of offenders and their reintegration into the community as law-abiding citizens through the provision of programs in penitentiaries and in the community.	

[13] I would not wish to be understood to suggest that assistance at parole hearings is prohibited. Far from it. Indeed, the Act provides for such assistance before the Parole Board:

140(7) Where a review by the Board includes a hearing at which the offender is present, the Board shall permit the offender to be assisted by a person of the offender's choice unless the Board would not permit the presence of that person as an observer pursuant to subsection (4).	**140(7)** Dans le cas d'une audience à laquelle assiste le délinquant, la Commission lui permet d'être assisté d'une personne de son choix, sauf si cette personne n'est pas admissible à titre d'observateur en raison de l'application du paragraphe (4).
8) A person referred to in subsection (7) is entitled	**(8)** La personne qui assiste le délinquant a le droit :
(a) to be present at the hearing at all times when the offender is present;	a) d'être présente à l'audience lorsque le délinquant l'est lui-même;
(b) to advise the offender throughout the hearing; and	b) de conseiller le délinquant au cours de l'audience;
(c) to address, on behalf of the	c) de s'adresser aux

offender, the members of the Board conducting the hearing at times they adjudge to be conducive to the effective conduct of the hearing.	commissaires au moment que ceux-ci choisissent en vue du bon déroulement de l'audience.

However, this does not suggest that someone who would be assisting an inmate at Board hearings has a right to take part in fairs the purpose of which is to prepare inmates for life after they have been released. As the evidence showed, the pre-release fair is not created so that issues related to the pre-release of an inmate can be discussed, but is rather an event that is taking place before the release so that inmates are made aware of services and programs available once they have been released.

III. Access denial in 2015

[14] Dr. Yeager stressed in his affidavit the fact that he was denied access to the fairs on 2015, after having attended in 2013. One reason given in a letter of June 29, 2015 was that access was denied by application of section 70 of the Act:

70 The Service shall take all reasonable steps to ensure that penitentiaries, the penitentiary environment, the living and working conditions of inmates and the working conditions of staff members are safe, healthful and free of practices that undermine a person's sense of personal dignity.	**70** Le Service prend toutes mesures utiles pour que le milieu de vie et de travail des détenus et les conditions de travail des agents soient sains, sécuritaires et exempts de pratiques portant atteinte à la dignité humaine.

The warden of the Warkworth Institution, where Mr. Madeley resides, wrote the same day to inform Dr. Yeager that his proposed participation in the Pre-release Fair "did not fall within the intent and purpose of our Pre-release Fair".

[15] Thus, Dr. Yeager was not granted access for two reasons. One related to security reasons and the other because the fairs have a purpose different than the intended participation at the fairs.

[16] The Costa affidavit provides the security reasons justifying, in the view of the respondent, the access denial; Dr. Yeager has been informed in writing of each of the security incidents:

- In 2003, Dr. Yeager attempted to enter the Kingston Penitentiary and Warkworth Penitentiary without prior approval;
- In February 2005, Dr. Yeager protested the searching of his briefcase upon entering the Collins Bay Institution. Once inside the institution, he told the group he was meeting with (Lifer's Awareness Group Meeting) that the staff member was "a Nazi who should be behind bars for violating human rights";
- Between 2011 and 2013, it appears that Dr. Yeager was corresponding with inmates, marking some of his correspondence "solicitor-client privilege". Since then and even very recently, he would still be referring to the correspondence as "Legal Correspondence Privileged".

[17] The Costa affidavit explains why these are troubling. In the environment of these institutions, the authority of staff cannot be undermined; inmates serving life sentences, we are told, "are particularly influential members of the inmate population" (affidavit of Miguel Costa,

para. 30). As for representing correspondence as being protected by privilege, this is seen as an attempt to circumvent security.

[18] I found troubling the fact that Dr. Yeager presents himself as a "legal counsel". A letter presented as an exhibit to Dr. Yeager's affidavit, from Mr. Madeley to his counsel in this case, refers to Dr. Yeager as "my legal counsel for my upcoming parole". As already pointed out, he marks his correspondence as "solicitor-client privilege" and "legal correspondence privileged". Dr. Yeager is not a member of the Upper Canada Law Society or, for that matter, any other bar association in this country. He does not claim to be legally trained. Indeed, he states in his affidavit, at para. 43, "that I do not serve as legal counsel". However, he goes on to state "but rather as an advocate who is authorized to provide legal advice and information on a very specialized area of correctional law, administration and prison rights." This statement is unsupported. It is disturbing in my view that someone acknowledges not being a lawyer, yet he asserts boldly that he is authorized to provide legal advice. No explanation is offered for such an unusual proposition.

[19] It is worth noting that Mr. Madeley has not been kept incommunicado. The Costa affidavit points out that since 2010, Mr. Madeley and Dr. Yeager have communicated by telephone 47 times. Furthermore, Dr. Yeager has never applied to visit Mr. Madeley. There was no explanation given for why Mr. Madeley and Dr. Yeager would have to speak at the Warkworth Fair since they speak on the phone and no attempt was made by Dr. Yeager to visit. Subsection 71(1) of the Act provides for visits:

71 (1) In order to promote relationships between inmates	**71 (1)** Dans les limites raisonnables fixées par

and the community, an inmate is entitled to have reasonable contact, including visits and correspondence, with family, friends and other persons from outside the penitentiary, subject to such reasonable limits as are prescribed for protecting the security of the penitentiary or the safety of persons.	règlement pour assurer la sécurité de quiconque ou du pénitencier, le Service reconnaît à chaque détenu le droit, afin de favoriser ses rapports avec la collectivité, d'entretenir, dans la mesure du possible, des relations, notamment par des visites ou de la correspondance, avec sa famille, ses amis ou d'autres personnes de l'extérieur du pénitencier.

Is not before this Court the refusal of a visit pursuant to subsection 71(1).Rather, this case is about access to fairs for the purpose of offering pre-release information as some sort of qualified professional.

IV. Preliminary issue

[20] The respondent in this case took issue with the use of an interlocutory mandatory injunction in order to provide access to the fairs. In the view of the respondent, the appropriate remedy would have been the issuance of a writ of mandamus. As is well known, mandamus has its own requirements that could make the issuance of a writ more of a challenge for an applicant than an interlocutory injunction.

[21] The respondent did not make a compellable argument that a mandatory injunction is prohibited where mandamus could lie.

[22] As is well known, an interlocutory injunction will not issue if the tri-partite test of *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 [*RJR-MacDonald Inc*], has not been satisfied:

1. There is a serious issue to be determined
2. Irreparable harm will be caused to the applicant
3. The balance of convenience, or inconvenience, favours the applicant.

In the case of a mandamus, Brown and Evans, in their Judicial Review of Administrative Action in Canada (Carswell, loose leaves) say that there exists "a clear legal right to have the thing sought by it done, and done in the manner and by the person sought to be coerced" (#1:300). The Federal Court of Appeal outlined the principle governing mandamus in *Apotex Inc v Canada (Attorney General)* (1993), [1994] 1 FC 742 (CA) [*Apotex Inc*]. Not only must there me a public legal duty to act, but there must be a clear right to the performance of the duty.

[23] If a serious issue is to be found once it is established that it is not vexatious or frivolous, as is generally the case for interlocutory injunctions, it can be argued that it constitutes a standard lower than for the issuance of mandamus, and therefore more advantageous for an applicant than the arguably more stringent "clear legal right."

[24] In his memorandum of facts and law, the applicants had taken the view that the vexatious and frivolous standard applied and that the serious issue prong of the test would be satisfied if the issue is not frivolous or vexatious.

[25] The respondent, if I understand the argument, protests that an interlocutory injunction is to preserve or restore the status quo. Thus, the argument goes, if the remedy is to request some action, the right proceeding must be a mandamus.

[26] The respondent's position leads in my view to the conclusion that interlocutory mandatory injunctions do not exist. That is not the state of the law. It is not because interlocutory mandatory injunctions are seldom granted that the remedy does not exist in law. It is rather that it is not easy to meet the tri-partite test for that kind of a remedy. Robert Sharpe, in his influential Injunctions and Specific Performance (4th Ed. Canada Law Book) speaks of "[e]specially difficult to obtain are interlocutory mandatory injunctions." (2.640). He refers to an old High Court of Justice of Ontario decision where Proudfoot J. states that "I think there is no doubt of the general proposition that the Court has the right to interfere by mandatory injunction or an interlocutory application. But where that is done the right must be very clear." (*Toronto Brewing and Malting Co v Blake*, (1882) 2 OR 175).

[27] Sharpe asserts that the very nature of the interlocutory mandatory injunction makes it difficult to satisfy the irreparable harm and balance of convenience branches of the test:

> As the defendant would be required on an interlocutory basis to take positive action, the potential inconvenience is usually substantial. It is a rare case, indeed, where the risk of harm to the defendant will be less significant than the risk to the plaintiff resulting from the court staying its hand until trial.
>
> (#2640)

Actually, the author is of the view, with authorities in support, that the serious issue prong is replaced by the requirement that there be shown a strong prima facie test:

> As noted above, the plaintiff will ordinarily be required to show a strong prima facie case, not just a serious question to be tried.
>
> (#2650)

[28] This is reminiscent of stay applications in immigration law where the interlocutory remedy, the stay of a removal order, is the same as the one sought in the underlying judicial review application challenging the refusal to stay the removal. In *Wang v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 148, [2001] 3 FC 682, Justice Pelletier, then of this Court, wrote:

> 10 The Supreme Court of Canada has held that the test of "serious issue to be tried" is simply that the issue being raised is one which is not frivolous. *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at para 44, [1994] S.C.J. No. 17. On the other hand, to succeed in the underlying judicial review, the applicant will have to show that the decision not to defer was subject to review for error of law, jurisdictional error, factual error made capriciously, or denial of natural justice. Federal Court Act, R.S.C. 1985 c. F-7 subsection 18.1(4). The result is that if the stay is granted, the relief sought will have been obtained on a finding that the question raised is not frivolous. If the stay is not granted and the matter proceeds to the application for judicial review, the applicant will have to demonstrate a substantive ground upon which the relief sought should be awarded. The structure of the process allows the applicant to obtain his/her relief on a lower standard on the interlocutory application, notwithstanding the fact that the relief is the same as that sought in the judicial review application. It is this congruence of the relief sought in the interlocutory and the final application which leads me to conclude that if the same relief is sought, it ought to be obtained on the same basis in both applications. I am therefore of the view that where a motion for a stay is made from a Removal Officer's refusal to defer removal, the judge hearing the motion ought not simply apply the "serious issue" test, but should go further and closely examine the merits of the underlying application.

This of course is consistent with the exception to the serious issue branch of test stated by the Supreme Court at page 338 in *RJR-MacDonald Inc*, above.

[29] To the extent an applicant can satisfy the test, even heightened on the serious issue to be determined, there would not appear to be a bar to the issuance of an interlocutory mandatory injunction, and especially since the respondent himself argues that it is clear that mandamus is unavailable on an interlocutory basis (para. 23, memorandum of facts and law; see also *Apotex Inc*, above). Evidently, the two remedies are not identical.

[30] The respondent is also concerned that, on an interlocutory injunction where the record is deficient, the merits of the case would be decided. It is not clear how that concern could prevent the issuance of an interlocutory injunction, be it the regular interlocutory injunction to maintain the status quo or the interlocutory mandatory injunction, as the concerns would have to apply generally to the remedy. After all the merits of the underlying case cannot be disposed of where the only finding is that the issue is neither vexatious nor frivolous or, in the case of an interlocutory mandatory injunction, a prima facie case must be presented. It is rather through the close examination of the irreparable harm and the balance of convenience that only deserving applications will succeed.

[31] The respondent did not convince the Court that the remedy does not exist. Conversely, as I will try to explain, the applicant has not convinced the Court either that the tri-partite test has been satisfied.

V. Analysis

[32] At the hearing of this case, counsel for the applicants conceded that in order to succeed, they must show a prima facie case that they have a serious issue to be determined. He also admitted that if successful, this would not constitute a decision on the merits and a declaration would still be required. I have chosen to consider the other two branches of test first. Even if I were to conclude that the likelihood of success is not positive, what some call the negative impression of the chances of ultimate success, and thus there is no serious issue, it would be more prudent to consider the other two factors rather than dismissing the application at the threshold.

[33] At the heart of the application is the notion that Dr. Yeager is "a qualified professional in the context of approved CSC pre-release programming." (Memorandum of facts and law, para. 36). There was therefore no reasonable or lawful basis to deny him access. What's more, the case is centered around the need for Mr. Madeley to meet with Dr. Yeager in anticipation of his seeking parole, a matter for which CSC has some responsibility.

[34] The applicants have strung together a series of propositions:

- The pre-release fairs provide an interface between specialists and inmates on matters of pre-release education and awareness.
- Dr. Yeager participated in past fairs and provided information to inmates on conditional release and inmate eligibility.
- Pursuant to section 5 of the Act, Dr. Yeager should be allowed to participate given his expertise on parole issues.

- Dr. Yeager is authorized as an advocate to provide legal advice and information on a very specialized area of correctional law.

[35] The factual foundation for the argument is that Dr. Yeager is a qualified professional authorized to provide legal advice in some matters of correction. In that capacity, he has been allowed to participate in pre-release fairs. The services he has to offer should be offered pursuant section 5 of the Act. The applicants regard those services as being consistent with the purpose of a pre-release fair. Accordingly, in their construct there is no reason to deny Dr. Yeager access in order to communicate with Mr. Madeley who would have some constitutional right to communicate with Dr. Yeager once he is at the Warkworth Institution.

[36] None of these propositions is accurate. The pre-release fairs do not encompass parole issues. It is true that Dr. Yeager has attended fairs in 2013, but the evidence before this Court is to the effect that he was denied in 2008 and 2015 and has not attended during other years since 2008. Indeed, he was denied in 2015 because, among other things, it was judged that his contribution is not consistent with a program whose purpose is to provide information and advice on the availability of services and programs post release. As the evidence before the Court tends to show, these are called pre-release fairs because of when the fairs take place, that is before release. The contention that the fairs are concerned with issues that occur before the release, such as parole or disciplinary issues is untenable on this record.

[37] Dr. Yeager is not legally trained. He claims to be a qualified professional but there is no evidence of his professional qualifications to offer legal advice. Furthermore, I asked on three

occasions at the hearing what a "clinical practice in criminology" meant. The questions remained unanswered. There is no doubt that he is highly educated in the scientific study of crime. There is little doubt that he would probably be ruled to be an expert on organized crime: he has published extensively in that area as well as about dangerous offenders. He may perhaps be of some assistance in helping to predict criminal recidivism, but here, Dr. Yeager wants to interact with Mr. Madeley in preparation for parole hearings many months away. Moreover, the purpose of the encounter is not even to advise on life after parole; indeed the field is occupied by the fairs themselves. Rather, the idea is to provide advice on the construction of a parole case in order to be successful. Mr. Madeley would have indicated in his letter to his counsel in their case that Dr. Yeager will assist him in the parole hearings (as he can do; subsection 140(7) of the Act).

[38] Finally, there was no solid argument made that Dr. Yeager, somehow, can use section 5 of the Act to insinuate that the respondent must let him take part in the fairs. Section 5 is similar to many other pieces of legislation at the federal level where Parliament defines the duties and responsibilities of its creatures, their legislative mandate. Moneys appropriated against the treasury can be spent only within the confines of the responsibilities given by Parliament to any given organisation. There is not indicia that can be found in section 5 that particular programs with prescribed designs must be created by the CSC. That Dr. Yeager would wish that the services he wants to offer be recognized by the CSC is one thing. It is quite another that they should be mandated by judicial fiat. The services that Dr. Yeager offers are not consistent with the fairs as established; section 5 of the Act is of no assistance to the applicants.

[39] Thus, the string of propositions is at best very weak. The case is made even weaker when one considers that the evidence in this record shows that the applicants have spoken together at least 47 times since 2010, that Dr. Yeager has never attempted to visit Mr. Madeley, in spite of the clear language of subsection 71(1) of the Act that "an inmate is entitled to have reasonable contact, including visits and correspondence, with family, friends and other persons from outside the penitentiary. . .", and that parole eligibility does not become an issue before April 2017 (day parole) and April 2020 (full parole).

[40] The question then becomes, what is the irreparable harm. Furthermore, where does the balance of convenience lie?

[41] It takes more that general assertions to establish irreparable harm. As Stratas J.A. put it in *Gateway City Church v Canada (Minister of National Revenue -M.N.R.)*, 2013 FCA 126, "[t]hey essentially prove nothing" (para 15). Justice Stratas had already written the year before about the requirements to establish irreparable harm. In *Glooscap Heritage Society v Canada (Minister of NationalRevenue - M.N.R.)*, 2012 FCA 255, he said

> 31 To establish irreparable harm, there must be evidence at a convincing level of particularity that demonstrates a real probability that unavoidable irreparable harm will result unless a stay is granted. Assumptions, speculations, hypotheticals and arguable assertions, unsupported by evidence, carry no weight. See *Dywidag Systems International, Canada, Ltd. v. Garford Pty Ltd.*, 2010 FCA 232 at paragraph 14; Stoney First Nation v. Shotclose, 2011 FCA 232 at paragraph 48; *Canada (Attorney General) v. Canada (Information Commissioner)*, 2001 FCA 25, 268 N.R. 328 at paragraph 12; *Laperrière v. D. & A. MacLeod Company Ltd.*, 2010 FCA 84 at paragraph 17.

It seems to me that the reason for the need to have convincing evidence is well exemplified I this case before the Court. As stated in *Shotclose v Stoney First Nation*, 2011 FCA 232.

> 48 . . . It is all too easy for those seeking a stay in a case like this to enumerate problems, call them serious, and then, when describing the harm that might result, to use broad, expressive terms that essentially just assert - not demonstrate to the Court's satisfaction - that the harm is irreparable.

[42] The requirements remain the same in cases where there are allegations of constitutional law violation. In *International Longshore and Warehouse Union, Canada v Canada (Attorney General)*, 2008 FCA 3, Chief Justice Richard wrote eloquently:

> 23 The Unions' allege that they face irreparable harm if they are not granted an interim constitutional exemption from the Regulations and an interim stay of the CIRB's order. However, they offer little or no evidence of exactly what that harm is or, more importantly, how it will actually impact their members, other than financially, which can be compensated through damages.
>
> . . .
>
> 26 The Unions allege unreasonable privacy invasion. This Court has made it clear that such bald allegations of unconstitutionality (including claims of privacy violations rooted in section 8 of the Charter) are not sufficient to establish irreparable harm under the tripartite *RJR-MacDonald* test (*Groupe Archambault Inc. v. CMRRA/SOCRAC Inc.*, [2005] F.C.J. No. 1718, 2005 FCA 330 at para. 16).

[43] As indicated earlier, Mr. Madeley did not offer evidence. It is alleged in this case that it is Mr. Madeley who suffers harm. *Stricto sensu*, there is no evidence of harm. Case closed. If there is harm, in the end, it is in not meeting Dr. Yeager at the fair to discuss his eventual parole hearing. Not only this is not irreparable harm, but one is hard pressed to find and articulate harm. There is certainly no irreparable harm if Mr. Madeley does not speak with Dr. Yeager about his

parole hearings at the fair. There is nothing magical about pre-release fairs dedicated to post-release issues, as opposed to pre-release concerns such as those relating to his parole case. Dr. Yeager can visit with Mr. Madeley; subject of course to limits that have to be reasonable, for the protection of the security of the penitentiary and the safety of persons. Irreparable harm, what harm? The burden on the applicants was not discharged. That would suffice to dismiss the application.

[44] It is even more so when examining the balance of convenience. Here, in order to accommodate an interlocutory mandatory injunction to allow Mr. Madeley to meet, at the pre-release fair at the Warkworth Institution, a person who has not visited him for the many years they evidently have been speaking together, the respondent would have to reconsider the security measures already organized.

[45] This is not an insignificant inconvenience. The evidence of Miguel Costa is unambiguous (affidavit, para. 38). Furthermore, the fairs that are created for one purpose, with one focus on services once release has been granted, are turned into having a quite different focus of how to be granted parole. The competing foci were one of the reasons for denying access to the fairs in June 2015, after access was granted in 2013. It is for good reasons that Robert Sharpe contended in his book that "[i]t is a rare case, indeed, where the risk of harm to the defendant will be less significant than the risk to the plaintiff resulting from the Court staying its hand until trial" (#2.640). The status quo is disturbed. The inconvenience suffered by the applicant Madeley is much less than what would be faced by the respondent.

[46] Having concluded as I did that two of the three branches of the tripartite test have not been satisfied by the applicants, it may not be necessary to address fully the serious issue to be determined branch, whether the test requires a strong prima facie case or that the applicants satisfy the Court that the issue is neither vexatious nor frivolous.

[47] However, for a reason that remains unknown, the applicants discussed their contention that the freedom of expression and the freedom of association, both guaranteed by the Charter of Rights and Freedoms, as informed by the values of paragraph 10(b) (the right to retain counsel upon arrest or detention), are engaged as part of their argument on irreparable harm. One would have thought that the serious issue alleged in the case is whether the freedom of expression and association is violated by not allowing the participation at a fair, the purpose of which is not consistent with the reason of the attendance (to address a topic different than what the fair is actually about).

[48] I will therefore comment on the alleged violation in view of the limited record before the Court.

[49] It should be self-evident that paragraph 10(b) is irrelevant. Although Dr. Yeager speaks of himself as "an advocate who is authorized to provide legal advice and information on a very specific area of the correctional law", the truth of the matter is that he is not a "counsel" (in French "avocat"). It is unknown who authorized him to provide legal advice. What is allowed by the law is for an inmate to be assisted at a parole hearing. Paragraph 10(b) guarantees the constitutional rights to retain and instruct legal counsel in case of arrest or detention.

[50] If the test is "prima facie case", the applicants have failed it. Their argument around freedom of expression and freedom of association was generic and never addressed squarely the issue. Actually, whatever focus was on freedom of expression, the issue of freedom of association was never alluded to at the hearing and, when asked, counsel for the applicants was content to rely on his written argument. There was in effect no argument in the memorandum of facts and law dealing with freedom of association. Freedom of association was treated together with freedom of expression. They are obviously different and one is not subsumed under the other. It is not for the Court to seek to divise an argument; it is for the parties to put their best foot forward.

[51] As for freedom of expression, the Court is still waiting for a compelling argument that the freedom of expression of Mr. Madeley is in any way compromised by the fact that Dr. Yeager may not be allowed to attend an event the purpose of which is not consistent with what Dr. Yeager has to offer.

[52] Much time and effort were dedicated to argue that inmates have a right to prepare for parole hearings and that they should not be denied access to relevant personnel and resources (memorandum of facts and law, para. 72). That is beside the point. The applicants must make a prima facie case that their freedom of expression is engaged, other than merely stating that such is the case. The likelihood of success on the basis of the record and the argument made is low. On the basis of the argument put forth, I would have had to conclude that the serious issue presented on the lower threshold did not show that their issue is not frivolous and vexatious. Once again, the burden is on the applicants to satisfy that their issue is neither vexatious nor

frivolous. The argument appears to be no higher that the government must produce Dr. Yeager when and where Mr. Madeley would like to have a conversation face to face. No authority was offered in support of such bold proposition and I know of none. Mr. Madeley is not prevented to express himself. It is rather that Dr. Yeager may not be attending an event he will be at because Dr. Yeager does not contribute to the event's purpose and raison d'être.

[53] What needs to be made clear is that I have to limit my conclusion to the case that has been made out. The applicants have a burden. On the basis of the record before this Court, they have not shown that the issue is beyond the frivolous and the vexatious. It may be that the issue could take a different colour with a fuller record. Hence, my decision does not dispose of the merits. As Sharpe puts it:

> On the other hand, the standard for an interlocutory mandatory injunction should not be equated with the test for summary judgment, as test that pertains to the final determination of the litigation: "The application is, instead, assessed by the strength of the applicant's case coupled with a consideration of the issues of irreparable harm and balance of convenience."
>
> (#2.650)

As can be seen, the case is weak and even weaker once irreparable harm and balance of convenience have been considered. As a whole, this case does not deserve to be granted the remedy of an interlocutory mandatory injunction.

[54] Whether the standard is "prima facie case" or "not frivolous or vexatious", the decision is not a reflexion on the merits of the case once the matter has been fully presented and argued.

[55] If, as I believe is the case, the issue is whether Dr. Yeager must be given access to a fair which does not relate to the reason why he would attend, which is to meet with Mr. Madeley because he will be there, the case put forth at this stage is deficient to the point of not being a serious issue to be determined. I add for good measure that the fair is to take place in a penitentiary setting. Once the justification offered by the applicants for the attendance of Dr. Yeager has been more fully examined and considered, it can be seen that he cannot show any entitlement to attend an event created for a particular purpose. When there is considered that the applicants have communicated with each other frequently and that no attempt has been made by one applicant to visit the other, one has to conclude that the argument, on this record, is particularly fragile. It does not suffice that an issue be raised; it must also be shown be an applicant that it is serious.

[56] In this case, the applicants have failed to satisfy the Court that irreparable harm would be suffered if the interlocutory mandatory injunction is not granted. The balance of convenience favours the respondent. That would be enough to dispose of the case. Nevertheless, the Court would also have concluded that the case as presented by the applicants does not rise to the level of a prima facie case. It is not sufficient to simply claim constitutional violations without explaining how, in the circumstances of the case, the Charter of Rights was violated. Mr. Madeley is not prevented from communicating with Dr. Yeager. It is rather that Dr. Yeager may not be allowed to attend a pre-release fair at which Mr. Madeley will be. The fair is organized for a purpose not consistent with the services Dr. Yeager wishes to offer. The basis of the applicants' remedy is that Dr. Yeager has somehow the right to attend. Such is not the case. As such, the issue presented is even frivolous and vexatious because it is based on an inexistent footing. There

is no right to communicate between the applicants at the pre-release fair because the presence of Dr. Yeager is not needed as his contribution is not consistent with the purpose of the fair.

[57] As a result, the application for an interlocutory mandatory injunction is dismissed. The respondent presented a bill of costs in draft that was incomplete. The applicants have suggested that a lump sum, all inclusive, of $3500 would be appropriate if they were successful. That would appear to be reasonable irrespective of who is successful. Accordingly, costs in favour of the respondent for a total of $3500 are awarded.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for an interlocutory mandatory injunction is dismissed. Costs in favour of the respondent for a total of $3500 are awarded.

"Yvan Roy"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-706-16
STYLE OF CAUSE:	KEITH NIGEL MADELEY ET AL. v MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	JUNE 1, 2016
REASONS FOR JUDGMENT AND JUDGMENT:	ROY J.
DATED:	JUNE 7, 2016

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