

Federal Court



Cour fédérale

**Date: 20190304**

**Docket: T-848-18**

**Citation: 2019 FC 730**

**Ottawa, Ontario, March 4, 2019**

**PRESENT: Case Management Judge Mireille Tabib**

**BETWEEN:**

**JOSEPH STEPHEN ROOKE**

**Plaintiff**

**and**

**CANADA  
THE MINISTER OF HEALTH  
THE MINISTER OF THE DEPARTMENT OF INDIAN  
AFFAIRS AND NORTHERN DEVELOPMENT**

**Defendants**

**ORDER**

**UPON** the Plaintiff's motion, made in writing pursuant to Rule 369 of the *Federal Courts Rules* for:

1. reconsideration of the verbal direction of the Court that was issued by Case Management Judge Mireille Tabib, dated November 2, 2018, on behalf of the Court. The verbal direction denied the filing of the Plaintiff's motion to the Court that requested certification of the action as a class proceeding;

2. the recusal of Prothonotary Mireille Tabib as the Case Management Judge and the appointment of a new Case Management Judge who has no prior connection to this action;
3. an Order certifying the action as a class proceeding.
4. return of the Plaintiff's \$150 filing fee for the May 7, 2018 Statement of Claim pending the final outcome of the suit.

**CONSIDERING** the Plaintiff's motion record, the Defendants' responding motion record and the Plaintiff's written representations in reply.

### **BACKGROUND**

The Plaintiff filed his Statement of Claim as an ordinary action on May 7, 2018. The Defendants served and filed their Statement of Defence on July 6, 2018. By joint request, the action was designated as a specially managed proceeding on July 13, 2018. On August 20, 2018, before the undersigned was designated as Case Management Judge, the Plaintiff, being out of time to serve and file his Reply, had attempted to serve and file a motion for an extension of time to do so. The undersigned was designated as Case Management Judge on October 23, 2018. Rather than requiring the parties to go through the process of briefing the Plaintiff's formal motion to extend time, the undersigned instead directed, on October 29, 2018, that the Reply tendered for filing by the Plaintiff alongside his motion to extend time simply be accepted for filing, and requested that the parties provide their dates of availability for a case management telephone conference.

On October 31, 2018, the Plaintiff submitted for filing a motion that was described by the Registry as being “for the certification of this proceeding to be class proceeding, the appointment of the Plaintiff as a representative for the class and for the Court to waive the requirement that the Plaintiff be represented by a solicitor”. The Registry was of the view that this motion record did not comply with Rule 364 and accordingly, sought the undersigned’s direction as to whether it could be accepted for filing, in accordance with Rule 72.

On November 2, 2018, the Court issued the direction of which the Plaintiff now seeks reconsideration, as follows:

“A case management telephone conference will be held at 11 a.m. on November 15, 2018. The motion of the Plaintiff for certification of the action as a class proceeding may not be accepted for filing, as it is not in compliance with Rule 121, which requires a party “who acts or seeks to act in a representative capacity, including (...) in a class proceeding” to be represented by a solicitor.”

The Plaintiff, in receipt of that direction, informed the Registry that he wished the case management conference to be held in person and that he planned “to appeal the decision of the Court not to accept the Motion”. The case management conference was accordingly held in person in Ottawa on November 15, 2018. Mr. Rooke maintained at the case conference that he both wanted to challenge the direction of November 2, 2018 and to seek the recusal of the undersigned as Case Management Judge. As a direction is not appealable but may be reconsidered, and as it is preferable that a motion for recusal be considered on the basis of a full evidentiary basis, the Court issued a schedule whereby the Plaintiff could seek, in the same motion, the reconsideration of the direction of November 2, 2018, the recusal of the undersigned, “or any related matter”. The present motion was brought by the Plaintiff as a result.

The Plaintiff in his motion record sets out the chronology of the attempts he has made, prior to May 7, 2018, to commence a proceeding before this Court as a proposed class proceeding. These attempts were ultimately unsuccessful, and the Statement of Claim filed by the Plaintiff in May 2018 is not one that has somehow been authorized or permitted by the Court as a result of these attempts. The Statement of Claim stems from the Plaintiff's decision to file his claim as an ordinary action, and therefore, stands as separate and independent from his earlier attempts.

The Plaintiff's failed attempts at instituting a class action form the basis for his request for the undersigned's recusal, and will be considered in the context of that part of the motion, but they are not relevant to the reconsideration of the November 2, 2018 direction. In analysing the motion to reconsider the direction of November 2, 2018, only the proceedings specific to this action, as filed May 7, 2018, are relevant and will be considered.

### **MOTION TO RECONSIDER**

As the Court understands it, the Plaintiff is of the view that it was sufficient to overcome the requirement of Rule 121 for him to include a request that "the Court waive the requirement that the Applicant be represented by a solicitor" as part of his motion for certification. The Plaintiff appears to argue that the requirement, set out in Rule 121, that a person who acts or seeks to act in a representative capacity in a class proceeding must be represented by a solicitor unless the Court orders otherwise, is a matter that can and should form part of the factors to be considered by the Court in determining a motion for certification under Rule 334.16, rather than a prerequisite for bringing a motion for certification. Pursuant to the Plaintiff's argument, a plaintiff in a proposed class proceeding may both begin the proceeding and bring a motion for

certification contemplated by Rule 334.16 as an unrepresented litigant, without having to seek an order exempting him from the application of Rule 121, and simply defer that requirement to be dealt with as part of the certification motion.

The Court disagrees with the Plaintiff's submissions for the following reasons.

An individual is entitled to choose to forgo the services of a solicitor of record and to represent himself or herself in litigation. If the individual's lack of legal training and knowledge results in prejudice to his or her rights, the only person harmed is him or her. The *Federal Courts Rules* thus place no restrictions on the right of an individual to act on his or her own behalf. They do, however, place mandatory controls on those who purport to exercise rights that belong to others, for example, where an individual wishes to represent a corporation, partnership or association, or where a person wishes to act in a representative capacity. The aim of these controls is not to frustrate the rights of self-represented litigants but to protect the rights of the persons being represented.

The mechanism adopted by the Rules to protect represented persons is to require those who purport to represent them or to exercise their rights to act through a solicitor, unless they can demonstrate good reasons why this requirement should not apply and why they should get permission to represent the interests of others without the assistance of a solicitor. The involvement of a solicitor provides minimal guarantees that the interests of those represented by a nominal plaintiff will be protected: Solicitors can ensure that the representative plaintiff does not consider his or her interests to the exclusion of the claims of those he represents. Solicitors are members of a regulated profession and are presumed to have the competence needed to adequately represent and protect their clients' rights. If a solicitor does act negligently and to the

prejudice of its clients or the persons it represents, the professional liability insurance a solicitor is required to maintain is available to compensate the client or represented person for the losses suffered. These minimal guarantees are not available where the interests of a person are represented by a non-lawyer. A lay litigant who would purport to represent the interests of even one other person, let alone an entire class, would have to satisfy the Court that exceptional circumstances exist to withhold these protective measures from those to be represented. A motion for leave for a lay litigant to represent another person, or class of persons, must therefore be brought and determined at the very outset of any proceeding that may engage the rights of the represented person or class, to ensure that their rights are not prejudiced pending the determination of the motion.

When it comes to a class action proposed by a plaintiff (as is the case here) the Rules contemplate that the originating Statement of Claim must announce, at the time it is commenced, that it is filed on behalf of members of a class: Rule 334.12 (1) provides “A member of a class (...) may commence an action on behalf of the members (...) in which case the originating document shall be prefaced by the heading “Proposed Class Proceeding”. The Rules contemplate that the motion for certification is not to be determined at the very outset of the proceedings but only after pleadings are closed (see Rule 334.15 (2)). The Rules recognize the responsibility of the putative representative plaintiff and of the Court in insuring that potential class members’ rights are not prejudiced by the conduct of the proposed representative plaintiff at any time, including before the determination of a certification motion. In particular, Rule 334.3 provides that “a proceeding commenced by a member of a class of persons on behalf of that class may only be discontinued with the approval of a judge”. That provision applies to an action filed as a class proceeding even before a motion for certification has been made or determined. A proposed

class action is therefore a representative proceeding that requires the protection afforded by legal counsel from the very beginning, because it has the potential of engaging the rights of the proposed class members as soon it is filed, and before it is certified. A full discussion of the reasons for this conclusion can be found at paragraphs 13 to 19 of the Ontario Superior Court of Justice's decision in *Fenn v Ontario* 2004 CanLII 28170.

It follows that the Plaintiff cannot, without having first sought and been granted leave to dispense with the assistance of a solicitor, act as a proposed representative in a proposed class proceeding or take any step in a proposed class action. That includes filing a proposed class action, amending an existing action to become a proposed class proceeding or seeking to certify an ordinary action as a class proceeding. The Plaintiff's October 31, 2018 motion, purporting to seek the certification of his ordinary action as a class proceeding, could not be accepted for filing before the Plaintiff had first retained a solicitor of record or sought and obtained, independently, leave to proceed as a representative plaintiff without being represented by solicitor.

The Plaintiff would likely argue that obtaining leave to act as a representative plaintiff without being represented by a solicitor prior to filing an action is an impossible task, given his failed attempts at finding a path to do so prior to May 2018. Contrary to what the Plaintiff may believe, the *Federal Courts Rules* do contemplate that motions may be brought prior to the commencement of an underlying procedure: Rule 67(6) and Tariff A1(2)(b). These are exceptional processes and the correct procedural means to access them is complex and strewn with pitfalls, even for experienced counsel. They are not easily accessible to lay litigants and those unfamiliar with the Rules, and it is not surprising that the Plaintiff would, even with the best of intentions, have been unable to find his way to presenting the appropriate motion to the

Court. That a task is complex and difficult does not however make it impossible or unfair. If the complexity of the endeavour acts as a gatekeeper to keep out those insufficiently versed in the law and the legal process, it is not, as mentioned above, intended to frustrate self-represented litigants from asserting their rights, but to ensure the protection of the interests of the rights of others, in this case, the members of the class the Plaintiff seeks to represent.

## **RECUSAL**

The Plaintiff seeks the recusal of the undersigned as Case Management Judge based on his belief that the undersigned is biased against him as a Canadian status Indian, a self represented litigant, or both. That belief however is based exclusively on the results of the orders and directions pronounced by the undersigned in respect of proceedings involving the Plaintiff, which the Plaintiff construes as uniformly blocking all of his attempts to institute or pursue class proceedings. The Plaintiff's arguments on this motion consist of attempts to re-argue earlier motions and unsuccessful attempts at filing documents in an effort to demonstrate that the undersigned's rulings were clearly in error and must therefore have been dictated by inherent bias.

The Court agrees with and adopts the representations contained at paragraphs 21 to 24 of the Defendants' written representations as to the law applicable to motions for recusal and allegations of bias. The mere fact that a Judge or Prothonotary has ruled against a person does not rebut the strong presumption of judicial impartiality. That is particularly so where, as here, the rulings have not been appealed or, if appealed, have not been found to be ill-founded in fact or in law. A Court's decisions are presumed to be valid and lawful unless and until they are varied or reversed on appeal.



Other than attempting to mount a collateral attack on the correctness of earlier decisions, the Plaintiff makes reference to no specific events or conduct of the undersigned which, if considered by a reasonable person informed of the particularities of the case, viewing the matter realistically and practically, would give rise to a concern about the undersigned's impartiality on any grounds, including the Plaintiff's status as a Canadian status Indian or self-represented litigant.

The Plaintiff, in addition, argues that all Judges and Prothonotaries are biased due to their "religious beliefs" as these beliefs appear to be confirmed by the formulation of their oath of office. The Plaintiff's opinion may be sincerely held, but it is not supported on the record before me. Furthermore, if as the Plaintiff believes, all Judges and Prothonotaries are similarly biased, then the Rule of Necessity would apply to prevent the disqualification of the undersigned, because no impartial Judge or Prothonotary could take her place (*Reference re remuneration of Judges of the Provincial Court (P.E.I.)*, [1998] 1 SCR 3).

### **CERTIFICATION OF THE ACTION AS A CLASS ACTION**

The undersigned, as a Prothonotary, would have no jurisdiction to hear or determine the merits of that part of the Plaintiff's motion if it had been properly brought. However, as determined above, a motion for certification of this action as a class action cannot properly be brought, and cannot be considered by this Court or a Judge of this Court on its merits, unless and until the Plaintiff, as putative representative plaintiff, is either represented by a solicitor or authorized by an order of this Court to act in a representative capacity without a solicitor.

That part of the Plaintiff's motion seeking certification is therefore improper and is hereby stuck out without any determination being made as to its merits.

### **RETURN OF THE \$150 FILING FEE**

The Plaintiff's request for the return of the \$150 filing fee he paid when filing the present action appears primarily based on his belief that the requests he had made prior to filing the May 7, 2018 action, for a waiver of the filing fees for a proposed class action, should have been granted, and that he "had to" file the May 7, 2018 action as an ordinary action and by paying the required filing fee because of the Court's earlier erroneous rulings. The return of the fees he paid would therefore appear, on the Plaintiff's arguments, to put matters the way they should have been had the Court simply allowed his earlier attempts to file a class action and waived filing fees.

First, it is not appropriate for the Plaintiff to reargue the correctness of the Order made by Mr. Justice Diner in 2018 FC 204, in which he dismissed the Plaintiff's appeal of the undersigned's order rejecting the Plaintiff's request for a waiver of filing fees. Second, the Court dismissed the Plaintiff's earlier request because he had failed to bring sufficient evidence of impecuniosity. The Plaintiff could have again applied for a waiver of filing fees at the time he tendered his present Statement of Claim for filing, putting forward a better evidentiary record. He chose not to do so. There is no procedure in the Rules to undo what has already been voluntarily done. In any event, the Plaintiff placed no evidence before to Court on this motion to show that he even meets the requirements for a waiver of filing fees.

The Plaintiff finally argues that the process for seeking a waiver of filing fees is unconstitutional, because it permits the Court to require the disclosure of personal and financial information and thus contravenes a litigant's right to security of the person and constitutes an unreasonable search and seizure.

The Plaintiff does not suggest, and there is no reasonable ground to hold, that the Rules requiring the payment of filing fees are unconstitutional. What the Plaintiff argues is that it is unconstitutional to have a means-tested method for a person to apply for an exemption from a validly enacted fee. There is no merit to this argument. The Plaintiff was not required to apply for that exemption, and having chosen not to make a motion to be relieved of paying a filing fee, he was not required to reveal anything about his personal or financial situation.

### **COSTS**

The Plaintiff, as the unsuccessful party to a motion, should in the usual course be required to pay the Defendants' costs of opposing it. The motion was unnecessary to the accomplishment of any essential step in moving the Plaintiff's own claims forward to a resolution, and there is no justification for exempting the Plaintiff from the cost consequences of bringing an unsuccessful motion. The Defendant seeks a modest amount of \$250, far less than what would be payable under the customary middle of column III of Tariff B. The Court is satisfied that this is a reasonable request.

### **THIS COURT ORDERS that:**

1. The Plaintiff's motion for an Order certifying this action as a class proceeding is struck as having been improperly filed.

2. The motion of the Plaintiff is otherwise dismissed, with costs in the amount of \$250 payable by the Plaintiff the Defendants.

“Mireille Tabib”  
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Case Management Judge