Federal Court  Cour fédérale

Date: 20190712

Docket: T-1967-18

Citation: 2019 FC 924

Ottawa, Ontario, July 12, 2019

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

ELIZABETH BERNARD

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] Ms. Bernard asks the Court to review and set aside the decision of the Attorney General of Canada dated October 24, 2018, consenting to the bringing of an application by the Public Service Alliance of Canada [PSAC] under section 40 of the *Federal Courts Act*, RSC 1985, c F-7, to declare Ms. Bernard a vexatious litigant.

[2] Ms. Bernard commenced an application for judicial review in the Federal Court of Appeal [*Bernard v Bonnie Gale Baun, Attorney General of Canada and Public Service Alliance*

of Canada, Court File A-264-18], challenging a decision of the Public Service Labour Relations and Employment Board [PSLREB] dismissing the grievance of Ms. Baun [the FCA Application]. In this application, the Attorney General asserted that Ms. Bernard has no standing and was not affected by the decision under review in the FCA Application. Moreover it was said that Ms. Baun had brought her own application to review the PSLREB decision (FCA Court File A-319-18).

[3] Vexatious litigant proceedings are governed by section 40 of the *Federal Courts Act*. In this application before this Court, the most relevant provisions are subsections 1 and 2, which read as follows:

40 (1) If the Federal Court of Appeal or the Federal Court is satisfied, on application, that a person has persistently instituted vexatious proceedings or has conducted a proceeding in a vexatious manner, it may order that no further proceedings be instituted by the person in that court or that a proceeding previously instituted by the person in that court not be continued, except by leave of that court.	40 (1) La Cour d'appel fédérale ou la Cour fédérale, selon le cas, peut, si elle est convaincue par suite d'une requête qu'une personne a de façon persistante introduit des instances vexatoires devant elle ou y a agi de façon vexatoire au cours d'une instance, lui interdire d'engager d'autres instances devant elle ou de continuer devant elle une instance déjà engagée, sauf avec son autorisation.
(2) An application under subsection (1) may be made only with the consent of the Attorney General of Canada, who is entitled to be heard on the application and on any application made under subsection (3).	(2) La présentation de la requête visée au paragraphe (1) nécessite le consentement du procureur général du Canada, lequel a le droit d'être entendu à cette occasion de même que lors de toute contestation portant sur l'objet de la requête.

[4] By letter dated October 16, 2018, to the Attorney General, and referencing an earlier telephone conversation, PSAC asked for the Attorney General's consent under section 40 to the proposed vexatious litigant application. Attached was a draft notice of motion and an affidavit in support of the application for a declaration that Ms. Bernard is a vexatious litigant. PSAC did not copy Ms. Bernard on its request.

[5] The Attorney General on October 24, 2018, gave consent to the vexatious litigant application. Ms. Bernard was not copied on that correspondence, nor was she previously informed by the Attorney General of the request made by PSAC. Ms. Bernard attests that she first learned of the request to the Attorney General and the consent on October 31, 2018. She says that she was "blindsided" by the section 40 application.

[6] In the matter before this Court, Ms. Bernard submits that her right to procedural fairness was violated as the Attorney General failed to advise her of the request for consent made by PSAC and failed to ensure that she had the opportunity to make submissions to the Attorney General. Alternatively, she submits that if the *Federal Courts Act* permits the Attorney General to provide consent under subsection 40(2) of the Act, without notice to the affected person, then it is inoperable as it is inconsistent with the *Canadian Bill of Rights*, SC 1960, c 44.

[7] The Attorney General submits that the "decision" under review, the consent under subsection 40(2) of the Act, "does not affect the rights or legal interests" of Ms. Bernard and is therefore not justiciable. It therefore does not engage rights of procedural fairness under either the common law or under the *Canadian Bill of Rights*.

[8] Prior to the hearing of this application, the Court was informed that the Federal Court of Appeal by Order dated May 13, 2019, had ruled on the motion of PSAC in the FCA Application and had declared Ms. Bernard a vexatious litigant: 2019 FCA 144. At the hearing of this application, Ms. Bernard informed this Court that she had been unsuccessful in her motion to hold the vexatious litigant motion of PSAC in the FCA Application in abeyance pending the result of this application. That motion was decided by Gleason J.A. on March 11, 2019. The relevant preamble to her Order reads as follows:

> AND UPON determining that the PSAC's section 40 motion should not be stayed because the interests of justice do not favour the requested stay and rather mandate that the application [to] have Ms. Bernard declared a vexatious litigant be determined on an expeditious basis.

[9] The Attorney General made a brief submission that due to the Order of the Federal Court of Appeal, this application was moot. I reject that suggestion. It would be strange and unfair if a decision of the Federal Court of Appeal, made on the basis of the consent that is being challenged in this Court, could effectively decide that very issue, namely whether the consent is valid.

[10] Should this Court decide in favour of Ms. Bernard, the validity of its vexatious litigant Order may be questioned. For that reason alone, I would have thought that it would have been preferable to hold the motion before it in abeyance pending the decision of this Court. In light of the determination I make in this application, the steps taken by the Federal Court of Appeal are ultimately of no consequence.

[11] It is common ground between the parties that the role played by the Attorney General, pursuant to subsection 40(2) of the Act, is that of gatekeeper. The requirement that the moving party must first have obtained the consent of the Attorney General, in the words of Ms. Bernard, "protects the integrity of the federal court system and prevents litigants from arbitrarily and unfairly bullying their opponents by using section 40 as a litigation tactic."

[12] Ms. Bernard submits that "as a matter of natural justice and procedural fairness" the Attorney General should have informed her of the consent that had been requested and provided her with an opportunity to make submissions "instead of simply rubberstamping PSAC's request." However, I agree with the submissions of the Attorney General that "the draft motion provided sufficient information and evidence to show that the Applicant demonstrated at least some of the characteristics of a vexatious litigant." As such, I reject the characterization that the consent was merely a rubberstamp exercise.

[13] In *Air Canada v Toronto Port Authority*, 2011 FCA 347 at paragraphs 28 and 29, the Federal Court of Appeal observed that not every action taken by a federal authority constitutes conduct triggering a right to review the conduct under the Federal Courts Act:

> The jurisprudence recognizes many situations where, by its nature or substance, an administrative body's conduct does not trigger rights to bring a judicial review.
>
> One such situation is where the conduct attacked in an application for judicial review fails to affect legal rights, impose legal obligations, or cause prejudicial effects: *Irving Shipbuilding Inc. v. Canada (Attorney General)*, 2009 FCA 116, [2010] 2 F.C.R. 488; *Democracy Watch v. Conflict of Interest and Ethics Commission*, 2009 FCA 15, (2009), 86 Admin. L.R. (4th) 149. [emphasis added]

[14] In my view, the consent of the Attorney General falls squarely within the above-described exception to reviewable conduct of federal decision-makers and it is not justiciable. Although the consent of the Attorney General is a precondition to any application for a vexatious litigant determination, I am not persuaded that the consent itself affects the legal rights of Ms. Bernard or imposes and legal obligations on her, or causes her any prejudicial effect. It is the ultimate decision of the Federal Court of Appeal on the vexatious litigant application of PSAC that may have those consequences. There is no dispute that Ms. Bernard received procedural fairness with regards to that decision.

[15] Accordingly, this application must be dismissed.

[16] The Respondent asked for $2100.00 in costs; however, in my discretion and considering the issue before the Court, I award the Attorney General $500.00 in costs.

JUDGMENT IN T-1967-18

THIS COURT'S JUDGMENT is that this application is dismissed with costs awarded to the Attorney General of $500.00.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1967-18
STYLE OF CAUSE:	ELIZABETH BERNARD v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	JULY 3, 2019
JUDGMENT AND REASONS:	ZINN J.
DATED:	JULY 12, 2019

APPEARANCES:

Elizabeth Bernard	FOR THE APPLICANT (ON HER OWN BEHALF)
Helene Robertson	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT