Date: 20081020

Docket: T-21-03

Citation: 2008 FC 1182

Ottawa, Ontario, October 20, 2008

PRESENT: The Honourable Madam Justice Layden-Stevenson

BETWEEN:

HER MAJESTY THE QUEEN

Applicant

and

EMILE MARGUERITA MARCUS MENNES

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] On December 10, 2004, I issued an order that "no further proceedings may be instituted in this Court by [the respondent] Emile Marguerita Mennes except with leave of the Court and any existing proceedings brought by him should not proceed, except by leave of the Court".

[2] Mr. Mennes now seeks "rescission of the order *nunc pro tunc*" and costs to be paid personally by counsel for the Crown. The relief is requested on the stated ground that my order was "obtained by fraud, predicated on misrepresentations made by [counsel] at the hearing on October 5, 2004".

[3] Having reviewed and considered the documentation contained in the motion records including the memoranda of fact and law, the reply of Mr. Mennes and the transcripts of the hearing (October 5 and 6, November 30 and December 1, 2004), I conclude that there is no factual foundation to support the request. Consequently, the motion will be dismissed.

Background

[4] The contextual and chronological history of this matter is detailed in my Reasons for Order dated December 10, 2004 and need not be repeated here: *Canada v. Mennes*, 264 F.T.R. 44. Suffice it to say that the outcome of the 2004 hearing resulted in Mr. Mennes being characterized as a vexatious litigant. The consequences of that finding are those cited in the first paragraph of these reasons.

[5] On April 10, 2008, Mr. Mennes filed an application, pursuant to subsection 40(3) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 (the Act), seeking rescission of my order. The application and the filing fee were returned to Mr. Mennes along with a direction of Madam Prothonotary Tabib indicating that "the relief sought must be sought by way of motion in the proceeding in which the order was made". On August 13, 2008, Mr. Mennes filed the motion that is now before me. The registry sought directions regarding filing and on August 21, 2008, Madam Prothonotary Tabib directed that the motion be accepted for filing. She further directed that "the time within which the applicant may serve and file a motion record in response shall run from the date of this direction". The applicant's motion record was filed on August 29, 2008.

[6] Mr. Mennes contends that in 2004, over his objection, I relied on Crown counsel's erroneous representations in proceeding with the hearing of the Crown's application under subsection 40(1) of the Act. He asserts that because of the "fraud", Her Majesty the Queen was:

- put in breach of the fundamental terms of the Coronation Oath in Her duty, due and owed to the respondent *nunc pro tunc*;
- made party to a false matter; and
- wrested judgment, or caused judgement to be wrested, from the respondent in his cause in full opposition to Her section 40 application.

Further, Mr. Mennes claims that he was:

- denied natural justice;
- had his legitimate expectations in justice and orderly administration under the Act violated;
- had his common law and constitutional rights to access to the Court and his rights under section 7 of the Charter infringed or denied since February 14, 2004.

[7] As a result, Mr. Mennes alleges that my order is biased and he requests that it be declared void. Regarding his request for costs to be paid personally by Crown counsel, he suggests the amount of 3.9 thousand % of counsel's net income, plus interest, retroactive to October 5, 2004. He further states that his delay in bringing this motion is a result of the conditions of his detention. He maintains that his law books, personal notes and the like were withheld from him by corrections officers from 2004-2007 and that it is only because of an order of the Ontario Superior Court of Justice dated October 19, 2006 (wherein it was ordered that the Warden of Kingston Penitentiary provide Mr. Mennes access to all resources necessary to prepare, serve and file legal documents in a

related case) that he was in a position to address this matter. Last, Mr. Mennes requests that his motion be heard by video-conference or alternatively teleconference and that the time for reply, if needed by him, be extended.

[8] The motion materials were referred to my attention and on September 15, 2008, I issued a direction indicating, among other things, that in view of the completeness of the records and submissions, I was satisfied that the motion could be determined on the basis of the written material. I also directed, notwithstanding the absence of an articulated reason in support of the request for an extension of time within which to file a reply, that the respondent be granted an extension to September 22, 2008.

[9] Mr. Mennes served and filed his reply, as directed, and now requests (because the applicant, having denied any fraud, and "having now joined issue on the respondent's allegations of fraud") an order "for trial of the said issue of fraud".

The Legislative Provision

[10]

Federal Courts Act, R.S., 1985, c. F-7	*Loi sur les Cours fédérales* L.R., 1985, ch. F-7
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	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

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.

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.

(3) A person against whom a court has made an order under subsection (1) may apply to the court for rescission of the order or for leave to institute or continue a proceeding.

(3) Toute personne visée par une ordonnance rendue aux termes du paragraphe (1) peut, par requête au tribunal saisi de l'affaire, demander soit la levée de l'interdiction qui la frappe, soit l'autorisation d'engager ou de continuer une instance devant le tribunal.

(4) If an application is made to a court under subsection (3) for leave to institute or continue a proceeding, the court may grant leave if it is satisfied that the proceeding is not an abuse of process and that there are reasonable grounds for the proceeding.

(4) Sur présentation de la requête prévue au paragraphe (3), le tribunal saisi de l'affaire peut, s'il est convaincu que l'instance que l'on cherche à engager ou à continuer ne constitue pas un abus de procédure et est fondée sur des motifs valables, autoriser son introduction ou sa continuation.

(5) A decision of the court under subsection (4) is final and is not subject to appeal.

(5) La décision du tribunal rendue aux termes du paragraphe (4) est définitive et sans appel.

Discussion

[11] Notwithstanding the various allegations put forth by Mr. Mennes, the crux of this matter goes to my alleged refusal to adjourn the hearing of the Crown's subsection 40(1) application. Mr. Mennes is of the belief that, had I adjourned the matter to permit him to take the various steps he proposed, my order of December 10th would never have been issued. He claims that my rejection of his request to adjourn was predicated on the misrepresentations of Crown counsel. He opines that, but for those representations, the adjournment would have been granted. All other assertions are founded upon and relate back to my alleged failure to adjourn. Therefore, that is the issue which must be addressed. I find that Mr. Mennes's submission in this respect is misconceived and fatally flawed.

[12] The comments of Crown counsel (set out below) constitute the specifics of Mr. Mennes's allegation of fraud. I note that, although the content is identical, the pagination of the transcript Mr. Mennes references is different than the pagination of my transcript. Thus, while the impugned passage appears at page 14 of Mr. Mennes's copy of the transcript, it appears at page 22 of my copy. All further references to the transcript by me will be to the pages of the transcript in the court file. On Tuesday, October 5th of 2004, Crown counsel stated:

> Mr. Mennes has claimed that he wishes to cross-examine the Affidavits that the Attorney General filed and that he wants to submit his own Affidavits in defence of this proceeding.
>
> His time for that expired in February of 2003, and since that time he has not brought a motion to extend his time; he has not brought a motion to adjourn this proceeding. I have not received any motion materials or any letters from Mr. Mennes asking for any of these things, or even asking for a date for the hearing of his *ex parte* motions. (Transcript, October 5, 2004, page 22, lines 5-16).

[13] Mr. Mennes extracts twelve lines from counsel's comments, the whole of which are reproduced in a transcript from two days of hearing (comprising 209 pages for October 5th and 77 pages for October 6th) as the sole basis to support his allegation of fraud. Having reviewed the transcript in its entirety, it is clear to me that when the comments are placed in context, they refer to the failure of Mr. Mennes to adhere to appropriate and prescribed procedure.

[14] Moreover, even if this were not so, any issues arising from counsel's comment were fully canvassed elsewhere during that portion of the proceeding. Discussion with respect to cross-examination is contained at pages 67 and 68 of the October 5th transcript. The issue of the request for an extension of time is fully addressed at page 50 of the October 5th transcript (lines 6-16) and in the October 6th transcript at pages 18 (lines 13-15 and 21-25), 19 (line 1), 36 (lines 5-25), 37 (lines 8-25) and 40 (lines 10-23). An exploration regarding the requisition for hearing of the *ex parte* motions is contained in the October 6th transcript at pages 5 (lines 11-15), 10 (lines 18-25) and 11 (lines 1-3 and 17-23). My thorough review of the above-noted passages leads to the inescapable conclusion that I was neither deceived nor under any misapprehension as a result of the impugned comment. The allegation of "fraud" is not sustainable.

[15] More significantly, Mr. Mennes was granted an adjournment (October 6th transcript, line 5). Notably, at the outset of the hearing on October 5th, Mr. Mennes (without prior notice) requested that the matter be adjourned. Following submissions from both parties, I declined to grant his request. My ruling is found at page 72 (line 21) through page 77 (line 17) of the October 5th transcript and is summarized again in the October 6th transcript at pages 19 (lines 21-25) and 20 (lines 1-11). Following my ruling, the Crown presented its case. At the conclusion of the Crown's

case, Mr. Mennes asked that I reconsider my ruling (refusing an adjournment) to enable him to properly respond to the Crown's case. After hearing and considering lengthy submissions from both parties, I granted Mr. Mennes his request, albeit on specific conditions. The arguments and submissions in this respect comprise nearly all of the 77 pages of the October 6th transcript.

[16] The particulars of my order granting the adjournment are found at pages 75 (line 15) through 76 (line 14) of the October 6th transcript. I ordered the matter adjourned to November 30th and December 1st, 2004, at Peterborough (the location requested by Mr. Mennes) for a duration of one and one-half days. The adjournment was granted over the objection of the Crown and was subject to the following conditions:

1. The purpose of the adjournment is to enable the respondent to prepare his response to the arguments and submissions of the applicant, delineated in the applicant's memorandum of fact and law and oral argument, in relation to this application;
2. The respondent's submissions are to be limited to the issues argued in relation to this application;
3. The Court will not entertain collateral issues or collateral motions;
4. The respondent will prepare a written consolidation of his responsive arguments, not to exceed 30 pages in length;
5. The respondent will serve and file the written consolidation referred to in paragraph 4 on or before November 15th, 2004;
6. Arguments that extend beyond the issues raised in this application will not be entertained.

[17] In short, the hearing was adjourned as requested by Mr. Mennes. Subsequently, in accordance with my order, Mr. Mennes served and filed his submissions and the hearing proceeded as scheduled. Mr. Mennes responded to the Crown's application on November 30th and December 1st. The transcript regarding this portion of the proceeding comprises 314 pages. Of those, 276 are devoted to Mr. Mennes's response to the application. Indeed, upon completing his submissions, Mr. Mennes commented, "I thank the Court for the opportunity to be heard in a real way for the very first time" (December 1st transcript, page 276, lines 7-9).

[18] For the foregoing reasons, I conclude that Mr. Mennes's allegation lacks a factual foundation. His motion is misconceived and fatally flawed. Consequently, it will be dismissed.

[19] Before concluding, I wish to address Mr. Mennes's allegation that he has been deprived of access to the Court. That is not so. The only distinction between Mr. Mennes and any other litigant is, due to my order of December 10, 2004, Mr. Mennes must demonstrate, at the outset, that any proceeding he initiates is not an abuse of process and that there exist reasonable grounds for the proceeding.

[20] The Crown did not request costs and none will be awarded.

JUDGMENT

The motion is dismissed.

"Carolyn Layden-Stevenson"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	T-21-03
STYLE OF CAUSE:	HER MAJESTY THE QUEEN v. EMILE MARGUERITA MARCUS MENNES

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR JUDGMENT AND JUDGMENT:	Layden-Stevenson J.
DATED:	October 20, 2008

APPEARANCES:

Shain Widdifield	FOR THE APPLICANT
Emile Mennes	FOR THE RESPONDENT

SOLICITORS OF RECORD:

John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE APPLICANT
Emile Mennes	FOR THE RESPONDENT