Federal Court of Appeal

Cour d'appel fédérale

Date: 20161117

Docket: A-201-16

Citation: 2016 FCA 287

Present: **STRATAS J.A.**

BETWEEN:

ADE OLUMIDE

Appellant

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA, ATTORNEY GENERAL OF CANADA, COMMISSIONER OF CANADA ELECTIONS, ALLIANCE OF THE NORTH, ANIMAL ALLIANCE ENVIRONMENT VOTERS PARTY OF CANADA, BLOC QUÉBÉCOIS, CANADA PARTY, CANADIAN ACTION PARTY, CHRISTIAN HERITAGE PARTY OF CANADA, COMMUNIST PARTY OF CANADA, CONSERVATIVE PARTY OF CANADA, DEMOCRATIC ADVANCEMENT PARTY OF CANADA, FORCES ET DÉMOCRATIE, GREEN PARTY OF CANADA, LIBERAL PARTY OF CANADA, LIBERTARIAN PARTY OF CANADA, MARIJUANA PARTY, MARXIST-LENINIST PARTY OF CANADA, NEW DEMOCRATIC PARTY, PARTY FOR ACCOUNTABILITY, COMPETENCY AND TRANSPARENCY, PIRATE PARTY OF CANADA, PROGRESSIVE CANADIAN PARTY, RHINOCEROS PARTY, SENIORS PARTY OF CANADA, THE BRIDGE PARTY OF CANADA, UNITED PARTY OF CANADA, FIRST PEOPLES NATIONAL PARTY OF CANADA, NATURAL LAW PARTY OF CANADA, NEWFOUNDLAND AND LABRADOR FIRST PARTY, PEOPLE'S POLITICAL POWER PARTY OF CANADA, WORK LESS PARTY, WESTERN BLOCK PARTY

Respondents

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on November 17, 2016.

REASONS FOR ORDER BY: STRATAS J.A.

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REASONS FOR ORDER

STRATAS J.A.

[1] In this appeal, certain respondents have moved for an order declaring the appellant a vexatious litigant. Then the appellant purported to discontinue his appeal by filing an unconventional document.

[2] Three questions arise. Does the unconventional document discontinue the appeal? If it does, is the motion declaring the appellant a vexatious litigant still alive? In the circumstances of this case, can the Court answer these questions in a motion for directions under Rule 54?

[3] For the reasons below, I answer the three questions in the affirmative. Certain consequential matters follow and an order shall issue to give effect to those matters.

A. General background

[4] This is an appeal from the order dated June 9, 2016 of the Federal Court (*per* Bell J.) in file T-892-16. The Federal Court ordered that the application before it proceed as a specially-managed proceeding.

[5] Roughly three months into this appeal, the respondents, Her Majesty the Queen in Right of Canada and the Attorney General of Canada brought a motion under section 40 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 for an order declaring the appellant, Mr. Olumide, a vexatious

litigant. If granted, Mr. Olumide will be barred from instituting or continuing proceedings in this Court. Presently, there are five other proceedings launched by Mr. Olumide in this Court.

[6] Roughly a month-and-a-half later, this Court issued an order that, among other things, prevented the Registry from filing anything Mr. Olumide presents to it until he supplies proof that he has paid previous cost orders, totalling $800.

[7] Mr. Olumide presented that proof to the Registry, submitted a "Notice of Abandonment" of his appeal to the Registry, and the Registry filed the Notice.

B. The letter giving rise to this matter

[8] The respondents, Her Majesty the Queen in Right of Canada, the Attorney General of Canada and the Minister of National Revenue (collectively "Canada") have now written the Court a letter.

[9] One part of the letter is a report about the $800 costs payment Mr. Olumide made. He made the payment to the wrong entity. Now it appears that this mistake has been rectified. Thus, in my view, no objection can now be made to the Registry's filing of the "Notice of Abandonment." The filing does not offend the terms of the earlier court order.

[10] The other part of the letter asserts that the appeal is still alive. It also asserts that regardless of whether the appeal is alive, the motion to declare Mr. Olumide a vexatious litigant remains alive.

[11] Mr. Olumide responded to Canada's letter by confirming that he has rectified the error by directing the payment of the outstanding costs award to the proper entity. He also sent a copy of his bank draft to counsel for the respondent, copying the Court, and advised counsel that the draft would be "an exhibit in a criminal prosecution against you."

[12] Mr. Olumide did not respond to the assertions in the letter that the appeal and the vexatious litigant motion remain alive. He did not take the position that the Court should not deal with the letter. While he opposes the vexatious litigant motion, he has not ever taken the position that Canada cannot bring the motion.

[13] I construe Canada's letter as a motion seeking directions under Rule 54. It asks for directions as to the status of the appeal and the vexatious litigant motion.

C. Should the Court give directions?

[14] There are limits to the Court's power to give directions under Rule 54. Some of the limits are set out in *Bernard v. Canada (Revenue Agency)*, 2015 FCA 263, 479 N.R. 189 at paras. 37-47. On occasion, parties—even parties represented by counsel—seek directions on such matters as whether the right parties have been named as respondents, whether the Court has jurisdiction

over a particular matter, whether a rule exists that will allow them to do something, how a party should proceed against a document it considers improper, and so on.

[15] These things must be seen for what they truly are: requests by one party for free legal advice from the Court.

[16] We are not in that line of business. We are independent of the parties, completely impartial and neutral.

[17] The parties are to ascertain their own legal positions. Should there be a dispute, the parties can approach the Court by motion. The Court will then decide the motion.

[18] In *Bernard*, this Court put it this way (at paras. 39-41):

> …[I]t is not for this Court to give legal, tactical or practical advice to any party. Rule 54 is no substitute for reading the Rules and assessing on one's own how to use them.
>
> Gratuitously and informally, helpful Registry staff may try to assist with queries about the Rules, particularly queries from self-represented litigants. But it remains the responsibility of all parties, particularly represented parties, to work out procedural matters for themselves.
>
> The Rules provide answers to just about all the practical questions that arise in proceedings in the Federal Courts. Indeed, for those questions not directly addressed by the Rules, the so-called gap rule, Rule 4, may assist. Rule 55 even allows the Court on motion to vary or dispense with compliance with a Rule. Given these rules and many others, rare are the situations where a party must resort to Rule 54 rather than bringing a motion under one or more other rules.

[19] The proper use of Rule 54 is as follows:

> Rule 54 allows a party to move for directions concerning "the procedure to be followed under [the] Rules." Those words, the existence of other rules and procedural case law, and the role of this Court as an independent, impartial and neutral decision-maker inform us as to when directions may be sought and granted under Rule 54.
>
> A party should use Rule 54 as a last resort. In moving for directions under Rule 54, a party should identify with precision the ambiguity or uncertainty arising under the Rules and the facts of the case, the practical consequence and importance of the ambiguity or uncertainty, and why this Court's assistance is required by way of a Rule 54 motion rather than bringing a motion under another rule or working the matter out for itself.
>
> In the case of filings—an area where parties frequently seek directions—resort to Rule 54 is always unnecessary. Where ambiguity or uncertainty exists about a filing, a party should attempt to file and if the Registry refuses to allow the filing, the party can ask the Registry under Rule 72 to place the matter before a judge for a ruling.

(*Bernard*, above, at paras. 42-44.)

[20] Here, Canada did not follow the exact letter of the guidance given in *Bernard*. It did not identify with precision the ambiguity or uncertainty arising under the Rules and the facts of the case, the practical consequence and importance of the ambiguity or uncertainty, and why this Court's assistance is required by way of a Rule 54 motion.

[21] However, it did follow the spirit of the guidance given in *Bernard*. It presented enough information to set up two questions of a practical and important kind: is the appeal discontinued and what is the status of the vexatious litigant motion?

[22] In this Rule 54 motion, Canada is not asking the Court to do something inconsistent with its role as an independent, impartial and neutral arbiter. Determining whether proceedings still

exist is something that this Court must decide and it has a plenary power to decide it: *Apotex Inc. v. Allergan, Inc.*, 2016 FCA 155 at para. 14. And as a practical matter, in these unusual circumstances, Canada does not know whether it is obligated to take further steps in the appeal or in the vexatious litigant motion.

[23] For these reasons, the Rule 54 motion is properly before the Court and the Court will give the directions sought.

D. The "Notice of Abandonment"

[24] Mr. Olumide's "Notice of Abandonment" is irregular: the Rules do not provide for such a document. The document does not comply with the Rules.

[25] However, Rule 56 provides that non-compliance with the Rules "does not render…a step in a proceeding void, but instead constitutes an irregularity" which can be cured.

[26] What exactly is the "Notice of Abandonment"? Our task is to construe it in order to gain "a realistic appreciation" of its "essential character" by "reading it holistically and practically without fastening onto matters of form": *Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250, [2014] 2 F.C.R. 557 at para. 50. The essential character of this document is that it asserts that Mr. Olumide will no longer prosecute the proceeding but he does not admit the proceeding had no merit. In substance, it is a notice of discontinuance under Rule 166.

[27] The filing of a discontinuance is a unilateral act. One does not need the consent of opposing parties or leave from the Court to discontinue a proceeding, nor does one have to explain it: *Philipos v. Canada (Attorney General)*, 2016 FCA 79 at para. 8; *Mayne Pharma (Canada) Inc. v. Pfizer Canada Inc.*, 2007 FCA 1, 54 C.P.R. (4th) 353. When a discontinuance is filed, the proceeding ends and the court file is closed: *Philipos*, above.

[28] As mentioned above, the Registry properly filed the discontinuance. Therefore, the appeal in the case at bar has ended and the court file should be closed.

E. The status of motions within a discontinued proceeding

[29] A discontinuance ends the proceeding, but what of any pending motions in the proceeding? There are no authorities on point to answer this question. However, logic assists us.

[30] Once a proceeding has been ended by discontinuance, any motions aimed at settling disputes within the proceeding or advancing the proceeding serve no further purpose. At a minimum they are moot. I would go further and hold that such motions, so closely tied to the proceeding, necessarily end when the proceeding ends.

F. Has the vexatious litigant motion in this appeal ended?

[31] As in the case of Mr. Olumide's "Notice of Abandonment," this Court must construe the vexatious litigant motion that has been brought in order to gain a realistic appreciation of its essential character by reading it holistically and practically without fastening onto matters of form.

[32] The vexatious litigant motion is not aimed at settling disputes within the appeal or advancing the appeal. It is not the sort of motion that is so intimately tied to the appeal that it ends when the appeal ends.

[33] Further, the vexatious litigant motion is broader than the appeal. It goes beyond preventing Mr. Olumide from continuing this particular appeal. It also aims to prevent Mr. Olumide from continuing any other existing proceedings or starting any new proceedings in this Court without leave of the Court.

[34] This Court has ruled that vexatious litigant motions can be brought in the Federal Courts system either by way of motion within a proceeding or by application, as an independent proceeding in itself: *Coote v. Lawyers' Professional Indemnity Company*, 2014 FCA 98 at para. 12. Here it was brought as a motion. But in reality, it is indistinguishable from a stand-alone application.

[35] Indeed, section 40 of the *Federal Courts Act* confirms this. It provides that the relief is to be brought by application, not a motion. Such an application—neither an application for judicial

review nor an application for leave to appeal within the meaning of section 16 of the *Federal Courts Act*—and, thus, one that can be heard by a single judge, is an application within the meaning of Rule 300 that can be prosecuted as an independent, stand-alone proceeding under Part 5 of the Rules: *Canadian National Railway Company v. BNSF Railway Company et al.*, 2016 FCA 284.

[36] For these reasons, I conclude that the vexatious litigant motion—a matter that has the characteristics of an application concerning matters beyond the parameters of the discontinued litigation—still exists in some way even though the action has come to an end.

G. So what can and should be done?

[37] A matter still in existence cannot just sit out there, floating in the Court's Registry, without a court file. This Court is a superior court of record under section 4 of the *Federal Courts Act*. A file must be set up and the motion placed in it.

[38] The motion was started by notice of motion. But a notice of motion is not an originating document. A notice of application is.

[39] The present situation is irregular. What can and should be done to address the irregularity?

[40] Rule 57 provides that a matter does not end just because it turns out that it started with the wrong document: this is an irregularity that can be cured. This can be done by the Court on its own motion: Rule 47.

[41] Were it necessary to do so, I could also invoke Rules 4 and 55 and the plenary jurisdiction of the Court to regulate its own proceedings: *Canada (National Revenue) v. RBC Life Insurance Company*, 2013 FCA 50, [2013] 3 C.T.C. 126 at paras. 33-36; *Mazhero v. Fox*, 2014 FCA 219 at para. 4.

[42] In this case, it is appropriate to treat the notice of motion as a notice of application, cause the Registry to open a new file for the application, and allow materials previously filed on the motion to be filed in the new file. Doing this allows this matter, still existing, to continue from where it left off: no old materials need to be recast, redone and refiled. Doing this allows this Court, in the words of Rule 3, to bring this matter to a "determination…on its merits" in a way that is "just, most expeditious and least expensive." Doing this also implements the Supreme Court's recent commandment that courts should fashion practices and procedures and apply them in a way that furthers fairness, expedition, efficiency, the conservation of judicial resources, and the minimization of costs: *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R 87.

H. Consequential matters

[43] Of necessity, certain administrative matters must now be attended to. To this end, an order shall be made.

[44] The Registry will treat the notice of motion under section 40 of the *Federal Courts Act* as a notice of application. It will open a new file for the application.

[45] A copy of the notice of motion, now to be treated as a notice of application, will be obtained from the motion record previously filed in the appeal. The Registry will file it in the new file. Then it will advise the parties of the new file number.

[46] These reasons for order and the order will be filed in the new file.

[47] The style of cause for all future documents in the application will be as follows. The applicant will be the moving parties in the vexatious litigant motion, namely “Her Majesty the Queen in Right of Canada and the Attorney General of Canada.” The respondent will be “Ade Olumide.”

[48] The applicants in the new file shall pay the filing fee for a notice of application under Item 1(d) of Tariff A.

[49] The motion record, including the supporting affidavit and written representations, will be filed in the new file. This will be deemed to be the application record of the applicants under Rule 309 in the new file.

[50] In the appeal, Mr. Olumide did not respond to the vexatious litigant motion and the time for doing so has expired. However, given the fact that the vexatious litigant motion is now

continued as a separate application, out of fairness Mr. Olumide should be given another opportunity to respond to the application record.

[51] Within 20 days of this direction, Mr. Olumide may serve any affidavits under Rule 307 and the parties may conduct cross-examinations within twenty days thereafter under Rule 308. Mr. Olumide will file his responding record under Rule 310 within twenty days after the day in which the parties' cross-examinations are completed or within twenty days after the day on which the time for those cross-examinations is expired, whichever day is earlier. Thereafter, the applicants in the new file will file their requisition for hearing under Rule 314.

[52] An order will issue in accordance with the above.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-201-16
STYLE OF CAUSE:	ADE OLUMIDE v. HER MAJESTY THE QUEEN IN RIGHT OF CANADA, *ET AL.*

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	STRATAS J.A.
DATED:	NOVEMBER 17, 2016

WRITTEN REPRESENTATIONS BY:

Ade Olumide	ON HIS OWN BEHALF
Daniel Caron	FOR THE RESPONDENTS, HER MAJESTY THE QUEEN AND ATTORNEY GENERAL OF CANADA

SOLICITORS OF RECORD:

William F. Pentney Deputy Attorney General of Canada	FOR THE RESPONDENTS, HER MAJESTY THE QUEEN AND ATTORNEY GENERAL OF CANADA