

Federal Court of Appeal



Cour d'appel fédérale

Date: 20190920

Docket: A-181-18

Citation: 2019 FCA 236

**CORAM: NOËL C.J.
STRATAS J.A.
BOIVIN J.A.**

BETWEEN:

ELIZABETH BERNARD

Applicant

and

**PROFESSIONAL INSTITUTE OF THE
PUBLIC SERVICE OF CANADA**

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on September 20, 2019.

REASONS FOR ORDER BY:

STRATAS J.A.

CONCURRED IN BY:

**NOËL C.J.
BOIVIN J.A.**

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REASONS FOR ORDER

STRATAS J.A.

[1] On May 14, 2019, this Court declared the applicant to be a vexatious litigant under section 40 of the *Federal Courts Act*, R.S.C. 1985, c. F-7: *Bernard v. Canada (Attorney General)*, 2019 FCA 144.

[2] Under section 40, the Court can order that any or all of a vexatious litigant's proceedings in this Court be discontinued. In the application to declare the appellant a vexatious litigant, this issue did not arise: the party seeking to declare the applicant vexatious was a private litigant interested only in its file, not others.

[3] The present proceeding is an application for judicial review that the applicant brought before she was declared to be a vexatious litigant. She now seeks a hearing date.

[4] In response, this Court (*per* Noël C.J.) called for submissions on two questions:

1. Under these circumstances, does the Court have the authority under the Rules or its plenary jurisdiction to control its own processes to make an order discontinuing or quashing this matter, if appropriate?
2. If yes, should the matter be discontinued or quashed?

[5] The Court has received the parties' submissions and has read and considered them.

[6] The applicant submits that the only opportunity for the Court to order that proceedings be discontinued is at the time the section 40 order is made. She says it is now too late for the Court to order that her application be discontinued.

[7] The validity of this submission turns on the proper interpretation of section 40 of the *Federal Courts Act*. Like all sections, section 40 must be interpreted in light of its text, context and purpose: see e.g. *Williams v. Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 252, [2018] 4 F.C.R. 174 at paras. 41-52, citing relevant and authoritative jurisprudence from the Supreme Court.

[8] This analysis of the text, context and purpose of section 40 has already been conducted: *Canada v. Olumide*, 2017 FCA 42, [2018] 2 F.C.R. 328. From this analysis, it is obvious that section 40 permits the Court to discontinue a proceeding started by a vexatious litigant at any time, and not just at the time of the making of the vexatious litigant declaration. Were it otherwise, a vexatious litigant could continue his or her proceedings, no matter how many, wreaking the very harm and mischief that section 40 is intended to stop once and for all: see *Olumide* at paras. 17-21.

[9] Therefore, I conclude that the Court does have the authority under section 40 to discontinue under section 40 a vexatious litigant's proceeding whenever it is appropriate.

[10] Quite apart from the power to discontinue proceedings under section 40, the Court can quash proceedings in this Court at any time if they are doomed to fail owing to a fatal flaw or the absence of any merit: *Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250, [2014] 2. F.C.R. 557; *Lee v. Canada (Correctional Service)*, 2017 FCA 228. The basis for this is the Court's plenary power to regulate litigation before it.

[11] The test for whether a vexatious litigant's matter should be discontinued under section 40 is set out in *Canada (Attorney General) v. Fabrikant*, 2019 FCA 198 at para. 43: "... if the [party], as a vexatious litigant, sought leave to start [the matter in question], would the Court have granted leave?"

[12] The Court grants leave to a vexatious litigant to start a proceeding where the vexatious litigant has a *bona fide* reason to do so and the proceeding is not frivolous and vexatious or doomed to fail: *Olumide* at para. 29; *Bernard v. Canada (Attorney General)*, 2019 FCA 144 at para. 26; *Simon v. Canada (Attorney General)*, 2019 FCA 28 at para. 12.

[13] In this case, this vexatious litigant's application is doomed to fail. Thus, while the Court could order that this application be discontinued, it can go further and order that the application be quashed under the Court's plenary power.

[14] The vexatious litigant's application concerns three decisions of the Federal Public Sector Labour Relations and Employment Board. The decisions concern three individuals, none of whom are the applicant. Despite having no connection to those specific cases and, thus, having no standing, the applicant sought reconsideration by the Board of those decisions more than six years after they were first made. The Board decided against reconsideration. Now, in the application before this Court, she seeks judicial review of the Board's decision not to reconsider.

[15] On these facts, the applicant lacks standing of any sort to maintain this application: *Bernard v. Baun et al.*, 2019 FCA 144 at paras. 17-22. She is nothing more than a busybody and

interloper. Incidentally, the bringing of proceedings without any standing is something this vexatious litigant has done on previous occasions in this Court and, in part, led to her being declared to be a vexatious litigant. Quashing this application reinforces the effect of the vexatious litigant declaration.

[16] Therefore, I would quash this application with costs. The respondent asks for costs at the level of Column V of Tariff B. I would grant costs on that basis.

[17] I direct the Registry to conduct a search for any proceedings in this Court where the applicant is an appellant, applicant or moving party. If any are found, they should be referred to me for review under Rule 74.

"David Stratas"

J.A.

"I agree
Marc Noël C.J."

"I agree
Richard Boivin J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:

A-181-18

STYLE OF CAUSE:

ELIZABETH BERNARD v.
PROFESSIONAL INSTITUTE OF
THE PUBLIC SERVICE OF
CANADA

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:

STRATAS J.A.

CONCURRED IN BY:

NOËL C.J.
BOIVIN J.A.

DATED:

SEPTEMBER 20, 2019

WRITTEN REPRESENTATIONS BY:

Elizabeth Bernard

ON HER OWN BEHALF

Peter Engelmann

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Goldblatt Partners
Ottawa, Ontario

FOR THE RESPONDENT