Federal Court of Appeal

Cour d'appel fédérale

Date: 20201209

Docket: 20-A-12

Citation: 2020 FCA 211

Present: **STRATAS 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 December 9, 2020.

REASONS FOR ORDER BY: STRATAS J.A.

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REASONS FOR ORDER

STRATAS J.A.

[1] Ms. Bernard is a vexatious litigant: *Bernard v. Canada (Attorney General),* 2019 FCA 144 and *Bernard v. Canada (Professional Institute of the Public Service)*, 2019 FCA 236, applying section 40 of the *Federal Courts Act*, R.S.C. 1985, c. F-7.

[2] Recently, she complained to the Federal Public Sector Labour Relations and Employment Board that the respondent unfairly represented her. The respondent did not let her participate in a ratification vote. The Board dismissed her complaint: 2020 FPSLREB 11. Ms. Bernard now wants to start an application for judicial review of the Board's dismissal.

[3] Under the terms of the vexatious litigant order made against her and under subsection 40(3) of the Act, Ms. Bernard first must obtain leave from this Court to start her application. Subsection 40(4) sets out the criteria for leave.

[4] Vexatious litigants almost never apply for leave. As a result, this Court has never discussed the criteria for leave, aside from some brief, passing observations in a couple of cases.

[5] Much can be gathered from the ordinary meaning of the text of subsection 40(4). It provides that the Court must be satisfied of two things before it can grant leave: "the proceeding is not an abuse of process" and "there are reasonable grounds for the proceeding".

[6] Even where the Court is satisfied the two are met, leave does not have to be granted. Subsection 40(4) provides that the Court "may grant leave", not "shall grant leave". The Court has a residual discretion not to grant leave.

[7] Vexatious litigants bear the burden of proving that leave should be granted on a balance of probabilities: *Hainsworth v. Canada (Attorney General)*, 2011 ONSC 2642 at para. 11. In discharging that burden, they must provide evidence in a supporting affidavit.

A. The two requirements

(1) The proceeding is not an abuse of process

[8] "Abuse of process" can take many forms: *National Bank Financial Ltd. v. Barthe Estate*, 2015 NSCA 47, 359 N.S.R. (2d) 258 at paras. 214-215; *Intact Insurance Company v. Federated Insurance Company of Canada*, 2017 ONCA 73, 134 O.R. (3d) 241 at para. 20. Examples include relitigating issues and starting litigation to injure someone or pursue a personal vendetta rather than seeking genuinely needed remedies.

[9] Pursuing personal vendettas is often the signature move of vexatious litigants. Thus, on occasion, this Court has suggested that a vexatious litigant must show a *bona fide* reason for starting a new proceeding: *Canada v. Olumide*, 2017 FCA 42, [2018] 2 F.C.R. 328 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.

[10] A proceeding started for a *bona fide* reason can still be prosecuted abusively. Thus, before granting leave, the Court needs an assurance that the vexatious litigant will prosecute the proceeding in an acceptable way. The vexatious litigant's affidavit should address this.

[11] The Court will be more inclined to grant leave where the affidavit promises—with credibility-enhancing particularity—any or all of the following: a litigation plan, representation by a trustworthy agent or counsel, access to and reliance upon legal advice as the proceeding

progresses, and compliance with the Rules, orders and directions of the Court. This is a non-exhaustive list.

[12] The willingness of vexatious litigants to obey the Rules, orders and directions of the Court is key. In many cases, the ungovernability of these litigants led to the finding of vexatiousness in the first place. The supporting affidavit should address this. One way is to describe with particularity what the vexatious litigant will do under the Rules to get the proposed proceeding ready for hearing, including offering a proposed schedule.

[13] Continuing non-compliance with previous orders of the Court, such as outstanding cost awards, could lead the Court to conclude that the vexatious litigant will not comply with Rules, orders and directions of the Court. To address this, vexatious litigants should offer reasons for any non-compliance and a plan to remedy it. However, great care must be taken if the non-compliance is due to poverty or impecuniosity. Those under economic pressure or without financial means should not be barred from accessing the Court to assert a viable claim for that reason alone.

(2) Reasonable grounds for the proceeding

[14] The Court must examine the basis for the proposed proceeding to assess its viability. There must be reasonable grounds on the facts and the law to suggest that the vexatious litigant's case has some chance of success. Cases where the vexatious litigant's walk down the pathway to success will be difficult but not impossible meet this requirement.

[15] In other words, the proposed proceeding should not be doomed to fail: for guidance on that standard, see *Wenham v. Canada (Attorney General)*, 2018 FCA 199, 429 D.L.R. (4th) 166 at paras. 22-33 (applying relevant Supreme Court authority); *Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250, [2014] 2 F.C.R. 557.

[16] In considering whether a proposed proceeding is doomed to fail, the Court must consider the standard of review: *Apotex Inc. v. Allergan Inc.*, 2020 FCA 208 at paras. 9-10; *Hébert v. Wenham*, 2020 FCA 186 at paras. 11-14; *Raincoast Conservation Foundation v. Canada (Attorney General)*, 2019 FCA 224 at para. 16. Where, as here, the proposed proceeding is a judicial review of an administrative decision, the standard of review is reasonableness, and the administrative decision is relatively unconstrained within the meaning of *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1, the vexatious litigant faces a high hurdle. In that sort of judicial review, the vexatious litigant must point to a significant flaw that strikes at the heart of the administrative decision.

[17] It is not enough for vexatious litigants to offer bald allegations or speculations in support of their cases. Instead, they must set out in their supporting affidavit a reasonable factual and legal basis for the proceeding. The affidavit should include a draft notice of application or draft statement of claim and describe or even append the key supporting evidence. The more detailed the affidavit is, the better. But it is not necessary for vexatious litigants to come anywhere close to proving their cases: this is not a summary judgment motion. To grant leave, the Court only has to be satisfied there is some arguable substance behind the proceeding.

[18] Some vexatious litigants may repeatedly and unsuccessfully try to get leave to start various new proceedings. In that circumstance, yet another attempt to seek leave might be met with understandable scepticism on the part of the Court. But that would be wrong. The Court must remain open-minded. Vexatious litigants who have cried wolf too often in the past might actually come across a wolf one day and might genuinely need help.

[19] In this Court, motions under subsection 40(4) are determined on the basis of written materials. Sometimes a vexatious litigant's materials fall short of the mark because the vexatious litigant lacks the capacity to litigate effectively. The Court should be alert for this. Sometimes the Court might direct the vexatious litigant to seek advice or assistance. Sometimes the Court might give the vexatious litigant an opportunity to cure deficient materials.

B. The residual discretion

[20] The two requirements under subsection 40(4) of the Act must both be met. If one or both are not, that is the end of the matter; there is no discretion to grant leave.

[21] But if both requirements are met, subsection 40(4) provides that the Court "may", not "shall", grant leave. The Court has a residual discretion.

[22] It would be unwise at this time to try to define the content of this discretion in detail. Over time, the facts of future cases will define the proper content and scope of the discretion.

The discretion will be very much governed by the overall purpose of subsection 40(4), discussed below.

[23] It may be that this discretion allows the Court to grant leave on certain conditions and to revoke leave if certain terms are not met. One possible term is that the vexatious litigant propose an acceptable schedule or a litigation plan. Another possible term is that the vexatious litigant be represented by counsel.

C. Access to justice

[24] Some might think that subsection 40(4) should be interpreted in a manner that facilitates the vexatious litigant's access to justice. But that is too simplistic a view of subsection 40(4) and ignores the plain meaning of its text.

[25] It is no part of the Court's task to take abstract principles valued highly by many, such as access to justice, and force subsection 40(4) to conform with them: *Hillier v. Canada (Attorney General)*, 2019 FCA 44, 431 D.L.R. (4th) 556. The Court's job is to discern the authentic meaning of legislative provisions, not amend them: *Williams v. Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 252, [2018] 4 F.C.R. 174.

[26] Further, access to justice is a vague concept that takes on different meanings depending on the context. In the particular context of a leave motion brought under subsection 40(4) of the Act, we are dealing with vexatious litigants who have been proven to be harmful to the court

system, other parties, and other cases—in other words, litigants that frustrate access to justice. See *Olumide* at paras. 17-34.

[27] In light of this, the question under subsection 40(4) is whether the regulation of the vexatious litigant's access to court should be loosened just enough to permit a particular proceeding to be advanced and, if so, whether additional measures should be taken to ensure the proceeding is prosecuted responsibly and efficiently without harm to others.

[28] The Court must keep this understanding of access to justice front of mind as it applies subsection 40(4) to a particular case.

D. Applying subsection 40(4) to this case

[29] The Court will deny leave.

[30] The requirement of "reasonable grounds for the proceeding" has not been met. For one thing, Ms. Bernard's supporting affidavit does not include a draft notice of application for judicial review or a particularized description of the grounds and evidence in support of her application for judicial review.

[31] But of greater concern is that her proposed application for judicial review is doomed to fail.

[32] Ms. Bernard complained to the Board that the respondent did not allow her to participate in a ratification vote. The Board found that as a “Rand member” of the union, akin to a non-union member in this context, Ms. Bernard does not have a legal right to participate in ratification votes.

[33] In this case, the Board did nothing more than apply settled law to facts that are not contentious. The Board’s decision is consistent with many of its previous decisions and the decisions of many labour boards across Canada too. No labour board decisions to the contrary have been presented and none are known to the Court.

[34] In her proposed proceeding, Ms. Bernard has to overcome the reasonableness standard of review in a circumstance where the Board had a relatively unconstrained decision to make. As explained above, this is a high bar for her to get over.

[35] She has fallen way short. Nothing remotely arguable has been offered in support of a finding that the Board’s decision is unreasonable. For example, her interpretation of the relevant legislation is contrary to multiple decisions of the Board and no one suggests that they are unreasonable.

[36] Therefore, Ms. Bernard has not satisfied the requirement in subsection 40(4) of the Act that there are reasonable grounds for her proposed proceeding.

[37] The respondent submits that Ms. Bernard's proposed proceeding is an abuse of process. It says the proposed proceeding is the latest step in an ongoing campaign, prompted by anti-union animus, to injure the respondent. The respondent offers evidence in support. Given the Court's finding that there are no reasonable grounds for the proceeding, this submission need not be considered.

E. Disposition

[38] The motion for leave will be dismissed with costs. The respondent has not sought enhanced costs or costs on a different scale. Therefore, costs will be awarded at the normal level, at the midpoint of column III of Tariff B.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	20-A-12
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.
DATED:	DECEMBER 9, 2020

WRITTEN REPRESENTATIONS BY:

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