Federal Court of Appeal | Cour d'appel fédérale

Date: 20210514

Docket: A-182-20

Citation: 2021 FCA 94

[ENGLISH TRANSLATION]

CORAM: **DE MONTIGNY J.A.**
LOCKE J.A.
LEBLANC J.A.

BETWEEN:

DAVID LESSARD-GAUVIN

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Motion dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on May 14, 2021.

REASONS FOR ORDER BY: LOCKE J.A.

CONCURRED IN BY: DE MONTIGNY J.A.
LEBLANC J.A.

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REASONS FOR ORDER

LOCKE J.A.

[1] This motion by the respondent, the Attorney General of Canada, seeks (i) to declare the appellant, David Lessard-Gauvin, a vexatious litigant before the Federal Court of Appeal (with the consequences of such a declaration) and (ii) to dismiss this appeal without leave to amend on the grounds that it is vexatious and an abuse of process. Since the motion involves two separate aspects, a two-stage analysis of the motion will be conducted.

[2] As stated in *Bernard v. Baun*, 2019 FCA 144, 305 A.C.W.S. (3d) 757 (*Bernard*), at paras 3 and following, a single judge is needed to decide a motion for a declaration of vexatiousness. However, three judges are needed to render a decision dismissing an appeal. Therefore, instead of determining the motions separately, I propose that they be decided jointly by a panel of three judges, as was done by this Court in *Bernard*.

[3] The appellant is requesting a hearing to bolster his submissions and to ensure that said submissions are properly understood. However, the appellant has not identified any details in his submissions that could be misunderstood without a hearing. After carefully reading the 323 paragraphs of his memorandum, I fail to see how a hearing would further clarify his submissions.

[4] The appellant's written representations are so lengthy that it would be inexpedient to address all of his arguments. Therefore, even though I have considered all of them, I will discuss in these reasons only those that are, in my view, the most important.

I. Motion for a declaration of vexatiousness

A. *Legal principles*

[5] Section 40 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 sets out the basis of a motion for a vexatious litigant declaration. Subsection 40(1) describes the powers of the Federal Courts in regards to such motions:

Vexatious proceedings	**Poursuites vexatoires**
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.

[6] An order pursuant to section 40 is limited in its effect. In *Canada (Attorney General) v. Mishra*, [2000] F.C.J. No. 1734, 101 A.C.W.S. (3d) 72, at para. 16, this Court stated:

> . . . An order under subsection 40(1) does not put an end to a legal claim or the right to pursue a legal claim. Subsection 40(1) applies only to litigants who have used unrestricted access to the courts in a manner that is vexatious (as that term is understood in law), and the only legal effect of an order under subsection 40(1) is to ensure that the claims of such litigants are pursued in an orderly fashion, under a greater degree of Court supervision than applies to other litigants.

[7] The principles applicable to this motion are described in *Bernard, Canada v. Olumide*, 2017 FCA 42, [2018] 2 F.C.R. 328 (*Olumide*), and *Simon v. Canada (Attorney General)*, 2019 FCA 28, 301 A.C.W.S. (3d) 768 (*Simon*). In *Olumide*, with respect to vexatious conduct, Mr. Justice Stratas stated:

> [32] In defining "vexatious," it is best not to be precise. Vexatiousness comes in all shapes and sizes. Sometimes it is the number of meritless proceedings and motions or the reassertion of proceedings and motions that have already been determined. Sometimes it is the litigant's purpose, often revealed by the parties sued, the nature of the allegations against them and the language used. Sometimes it is the manner in which proceedings and motions are prosecuted, such as multiple, needless filings, prolix, incomprehensible or intemperate affidavits and submissions, and the harassment or victimization of opposing parties.

> [33] Many vexatious litigants pursue unacceptable purposes and litigate to cause harm. But some are different: some have good intentions and mean no harm. Nevertheless, they too can be declared vexatious if they litigate in a way that implicates section 40's purposes . . .

[8] The question used as a basis for concluding that a litigant's conduct is vexatious is provided in *Bernard* at paragraph 16, in reference to *Simon* at paragraph 26: "does the litigant's ungovernability or harmfulness to the court system and its participants justify a leave-granting process for any new proceedings?" Paragraph 16 of *Bernard* also explains, in reference to *Olumide* at paragraph 40, that lengthy reasons explaining a matter of vexatiousness are neither necessary nor desirable.

B. *The respondent's submissions*

[9] The respondent's motion is based on the following arguments, each relying on a number of allegations of misconduct by the appellant and making reference to the many proceedings that the appellant has brought before the Federal Courts since 2013:

- The appellant initiates frivolous litigation
    - The appellant files abusive proceedings that disclose no reasonable cause of action
    - The appellant files moot, pointless proceedings
- The appellant has been lectured by various courts
- The appellant has made scandalous allegations against opposing parties in Court
- The appellant relitigates matters that have already been decided against him, including

    - The matter of the Attorney General of Canada's proper role and the identity of his client
    - The financial assistance that the Court could provide to the appellant
    - The confidentiality of his financial and medical information
    - The receipt of technical assistance from the Court to prepare his proceedings
    - The right to the reporting of evidentiary or procedural deficiencies
- The appellant routinely and systematically appeals interlocutory and final decisions, and does so unsuccessfully
- The appellant disregards court orders and rules and shows disrespect for the Court
    - The appellant does not comply with court rules and orders
    - The appellant is disrespectful to the Court
- The appellant refuses to pay the outstanding costs awarded against him
- A similar order was issued by another court

[10] At first glance, the number and nature of the submissions made by the respondent in support of his motion, as well as the examples of misconduct provided, do, in my view, support the merits of his motion. I will therefore focus the reasons of this decision on the submissions that the appellant has made in response to the motion.

C. *Analysis of the appellant's submissions*

[11] The appellant claims that the motion for a declaration of vexatiousness cannot be granted unless the respondent proves the appellant's vexatious intent. I do not accept this argument as it

is contrary to paragraph 33 of *Olumide* (reproduced above). The appellant's intent is certainly relevant, but this motion does not require proof of vexatious intent in order to be granted.

[12] The appellant contends that only the evidence of his conduct before this Court can be considered in this motion and that his conduct before any other court is irrelevant. I disagree. Even though section 40 of the *Federal Courts Act* specifically refers to "the Federal Court of Appeal or the Federal Court" and deals with "vexatious proceedings", I do not see the need to exclude from the evidence the appellant's conduct before other courts or tribunals. In my view, such evidence could be relevant to the analysis of this motion.

[13] The appellant compares this motion to an employment-related disciplinary issue where the case law requires progressive discipline (less severe disciplinary measures before a dismissal is considered) and establishes that the Court has a duty to consider the employer's duty to accommodate. The appellant cites no authority to support this comparison, and I see no need to accept such an analogy, nor do I see any benefit from doing so.

[14] The appellant's written submissions deal extensively with issues related to access to justice. In addition, according to the appellant, there is an ideology within the Federal Courts that is unfavourable to him. He argues that an individual who has a different view of fundamental rights or justice must not be placed at an undue disadvantage by political views that differ from those of the Court. However, the political opinions of the appellant or of this Court and its judges are not relevant criteria for this motion. Instead, this motion will be decided based on the legal principles described above, and no political opinions will be considered.

[15] The appellant submits that a motion for a declaration of vexatiousness must be supported by a medical diagnosis and that the Court should therefore not declare a litigant vexatious in the absence of adequate medical proof. The appellant does not cite any legal sources to support this argument. I therefore reject it. The case law cited above sets out the relevant criteria for a motion pursuant to section 40 of the *Federal Courts Act*, and these criteria do not include medical evidence that supports a finding of vexatiousness.

[16] The appellant assures this Court that he does not have a mental illness and that his behaviour is not consistent with that of a vexatious individual. For example, he states that he is not aggressive or violent, that he is not a "freeman on the land", that he does not have esoteric or religious beliefs, that he does not belong to conspiracy theory groups and that he does not claim to have any abilities out of ordinary. These statements are relevant but not determinative.

[17] The appellant contends that he is an ordinary self-represented litigant and that this may explain why his behaviour has been interpreted as belligerent, inappropriate or arrogant. According to him, this may also explain his tenacity in certain proceedings. He submits that [TRANSLATION] "all pleadings filed by the appellant were filed in good faith and without malicious, vexatious or dilatory intent." In my view, we must first consider the examples of inappropriate behaviour alleged by the respondent before accepting these claims from the appellant.

[18] When the appellant's conduct is examined as a whole, and when we consider the many instances of inappropriate behaviour by the appellant that the respondent identified, it is difficult to come to any other conclusion than vexatiousness. The appellant attempted to attribute the

actions alleged against him by the respondent to his lack of familiarity with the processes of the Federal Courts and with the applicable substantive law. However, the appellant does not dispute the accuracy or occurrence of the behaviours identified by the respondent.

[19] Some of these behaviours could have been excused if they had been isolated cases. However, these behaviours occurred repeatedly, and the appellant still continues to behave inappropriately. For instance, the appellant tried to again raise a number of arguments that were rejected during earlier proceedings. Therefore, despite the appellant's explanations, I note that the record contains a number of examples of inappropriate behaviour that cannot be excused by his lack of familiarity with the Court's processes or with the substantive law.

[20] The appellant notes that a number of the examples of behaviours raised by the respondent occurred a number of years ago and have not been repeated since. This argument would be more convincing if it were not marred by the numerous other examples of the appellant's misconduct. In addition, it is difficult to conclude that the appellant has learned that he should not initiate inappropriate proceedings, because in 2019, he brought a contempt of court proceeding against a Department of Justice Canada employee a number of years after he had been informed of the inappropriateness of such a proceeding.

[21] In terms of the costs and the securities for outstanding costs, the appellant implied that he is unable to pay them. That said, the appellant has not provided any details on his financial situation, nor has he produced any supporting evidence. In addition, as I describe below, the appellant has conceded, during the proceedings with respect to the impugned decisions in this case, that he is not impecunious.

D. *Conclusion on the motion for a declaration of vexatiousness*

[22] Having considered the numerous examples of the appellant's inappropriate behaviour raised by the respondent, I am convinced that the motion for a declaration of vexatiousness should be granted. Otherwise, I am of the view that this Court can expect for the appellant's inappropriate conduct to persist. I am not persuaded that the appellant's explanations and arguments warrant the dismissal of this motion.

II. Motion for the preliminary dismissal of the appeal

[23] This appeal concerns the decision of Mr. Justice Denis Gascon of the Federal Court dated June 30, 2020 (2020 FC 730) dismissing the appellant's appeal of three orders by Prothonotary Mireille Tabib dated November 12, 2019. These orders granted the respondent's motions in three security for costs cases before the Federal Court (files T-1136-16, T-210-18 and T-766-18). For each of these orders, the prothonotary noted that the Court did not have to review the matters that the appellant had raised about the constitutional validity and the enforceability of the security for costs regime because the Federal Court of Appeal had already dealt with these matters between the parties through the orders dated October 17, 2019 in files A-312-18 and A-313-18. Therefore, the appellant could not raise these matters again. Prothonotary Tabib also noted that (i) the costs awarded to the respondent and against the appellant remained unpaid and that (ii) the appellant had admitted that he was not "truly" impecunious. Accordingly, Prothonotary Tabib concluded that she had the discretion to award security for costs. Gascon J. concurred.

A. *Legal principles*

[24] The law applicable to preliminary dismissals of proceedings was described by this Court in another case involving the appellant: *Lessard-Gauvin v. Canada (Attorney General)*, 2013 FCA 147, at para. 8:

> The standard for a preliminary dismissal of an appeal is high. This Court will only summarily dismiss an appeal if it is obvious that the basis of the appeal is such that the appeal has no reasonable chance of success and is clearly bound to fail: *Sellathurai v. Canada (Public Safety and Emergency Preparedness)*, 2011 FCA 1, 414 N.R. 278, 98 Imm. L. R. (3d) 165 at paras. 7-8; *Yukon Conservation Society v. National Energy Board*, [1979] 2 F.C. 14 (F.C.A.) at p. 18; *Arif v. Canada (Minister of Citizenship and Immigration)*, 2010 FCA 157, 405 N.R. 381, 321 D.L.R. (4th) 760 at para. 9.

[25] To determine whether this appeal has a reasonable chance of success, the standard of review for the impugned decision must be determined. In the case of an appeal of a Federal Court judge's decision regarding an appeal against a prothonotary's decision, *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215 indicates at paragraph 79 that the applicable standard of review is the one set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235: the standard of correctness for questions of law, and the standard of palpable and overriding error for questions of fact or questions of mixed fact and law in the absence of an extricable question of law. Furthermore, because the judge agreed with the prothonotary, this Court must look at the prothonotary's decision in order to determine whether the Federal Court judge erred in law or made a palpable and overriding error in refusing to intervene: *McCain Foods Limited v. J.R. Simplot Company*, 2021 FCA 4, [2021] F.C.J. No. 37, at para. 14; *Sikes v. EnCana Corporation*, 2017 FCA 37, [2017] F.C.J. No. 196 at para. 12.

[26] It should be noted that a declaration of vexatiousness pursuant to section 40 of the *Federal Courts Act* is not sufficient to dismiss an appeal.

B. *Analysis*

[27] The respondent submits that this appeal is a vexatious proceeding and an abuse of process because the appellant is attempting to relitigate matters that have already been decided by this Court in files A-312-18 and A-313-18. The respondent also argues that the other grounds of appeal disclose no reasonable cause of action.

[28] With respect to files A-312-18 and A-313-18, on October 17, 2019, Mr. Justice Marc Nadon ordered, in response to a motion by the respondent, that the appellant provide the securities for costs in each case. In these orders, Nadon J. noted that the appellant argued, in his written submissions, that the security for costs regime pursuant to rules 415 to 418 of the *Federal Courts Rules*, S.O.R./98-106 is unconstitutional.

[29] The granting of the security for costs motion, despite the appellant's argument about the constitutional invalidity of the relevant rules, clearly indicates that Nadon J. rejected the appellant's argument. The appellant contends that, in the absence of reasons in this regard, it is impossible to know what Nadon J. decided. He proposes that the judge may have decided not to address the issue. I do not accept this possibility because it was not open to the judge to ignore an argument that could have changed the outcome of the motion. It should be noted that the appellant applied to the Supreme Court of Canada for leave to appeal the orders of Nadon J. (file 39275), but this application was dismissed on January 28, 2021. Furthermore, files A-312-18 and A-313-18 have since been dismissed summarily by the orders dated August 19, 2020.

[30] Therefore, Prothonotary Tabib and Gascon J. were correct to conclude that the matter of the constitutional validity of the security for costs regime had already been decided. I am of the opinion that the appellant is behaving in a vexatious and abusive manner by trying to raise this matter again.

[31] The appellant also claims that he was not permitted to file expert evidence supporting the constitutional argument of his application. However, since the appellant was unable to raise the constitutional issue, expert evidence was not admissible.

[32] In terms of the other grounds of appeal, I have considered the arguments raised at paragraph 105 of the respondent's written submissions. I agree with the respondent that these grounds disclose no reasonable cause of action. The appellant's written submissions do not persuade me to conclude otherwise.

[33] The appellant's arguments concerning these other grounds of appeal are too numerous to all be addressed, but I note an example. The appellant argues that Prothonotary Tabib did not properly consider the handling of a defence to the security for costs motion. The appellant alleges that the rejection of his rule 417 argument was a matter of form rather than of substance. I disagree. As I indicated above, Prothonotary Tabib noted that the appellant admitted that he is not impecunious. Given that this quality is essential to a rule 417 defence, the prothonotary's reasoning was not based on a matter of form.

[34] For the above reasons, I am of the view that this appeal has no reasonable chance of success and is clearly bound to fail. The appeal must therefore be dismissed.

III. Conclusion

[35] I conclude that both aspects of the respondent's motion should be granted. The appellant should be declared a vexatious litigant, and this appeal should be dismissed without any possibility of amendment. I would also award the respondent costs on his motion in the amount of $1,200, all inclusive.

[36] In light of the outcome of this motion, it is not necessary to respond to the appellant's letter dated January 6, 2021 or to address the matter of the contents of the appeal book or the other relief sought in his motion record filed on September 21, 2020.

"George R. Locke"
J.A.

"I agree.
Yves de Montigny J.A."

"I agree.
René LeBlanc J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-182-20
STYLE OF CAUSE:	DAVID LESSARD-GAUVIN v. ATTORNEY GENERAL OF CANADA

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	LOCKE J.A.
CONCURRED IN BY:	DE MONTIGNY J.A. LEBLANC J.A.
DATED:	MAY 14, 2021

WRITTEN SUBMISSIONS:

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Marilou Bordeleau	FOR THE RESPONDENT

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