Federal Court of Appeal | Cour d'appel fédérale

Date: 20201001

Docket: A-239-19

Citation: 2020 FCA 154

CORAM: **DE MONTIGNY J.A.**
LASKIN J.A.
RIVOALEN J.A.

BETWEEN:

MARTHA COADY

Appellant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on October 1, 2020.

REASONS FOR ORDER BY: DE MONTIGNY J.A.
CONCURRED IN BY: LASKIN J.A.
RIVOALEN J.A.

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REASONS FOR ORDER

DE MONTIGNY J.A.

[1] On May 23, 2019, the Federal Court (*per* Justice O'Reilly) struck the appellant's application to quash a decision of the Office of the Information Commissioner (OIC) refusing to reopen or commence an investigation in respect of a complaint she had lodged with the OIC in 2010. In that same application, the appellant was also seeking access to information about an investigation conducted by the Royal Canadian Mounted Police (RCMP) into alleged public

corruption and money laundering from 1993 to 2003. The Federal Court found that the appellant's application was an abuse of process, and also declared the appellant a vexatious litigant under subsection 40(1) of the *Federal Courts Act*, R.S.C. 1985, c. F-7. On June 24, 2019, the appellant filed an appeal of that decision.

[2] On December 23, 2019, the Attorney General of Canada, on his own behalf and on behalf of the respondents, made a motion to the Court in writing pursuant to Rules 221(1)(c) and 369 of the *Federal Courts Rules*, S.O.R./98-106, for 1) an Order striking the appellant's appeal of Justice O'Reilly's decision in its entirety for being frivolous, vexatious, and otherwise an abuse of process, 2) an Order deeming the appellant a vexatious litigant requiring her to seek leave of this Court before she brings any future motion or appeal in this Court, and 3) an Order amending the style of cause to remove the two named respondents and replacing them with the Attorney General of Canada.

[3] Instead of filing a motion record in response to this motion, the appellant filed a "Cross-Motion Record" on January 21, 2020. In that cross-motion, the appellant seeks an Order extending the time for service and filing of the cross-motion record, an Order directing that the respondent's motion be heard in open court, and also an Order varying Justice Mactavish's November 14, 2019 Order dismissing her request for the deposit by the RCMP of an investigation file called "Project Anecdote" with the Registry.

[4] After having carefully examined the Motion Record of the respondent and the Cross-Motion Record of the appellant, I have come to the conclusion that the respondent's motion

ought to be granted and that the appellant's cross-motion must be dismissed. The following are my reasons to so conclude.

I. Background

[5] Ms. Coady has been seeking to obtain a copy of an archived RCMP investigation file, Project Anecdote, for more than ten years. She now requests for the first time, in the context of this appeal, a copy of another archived RCMP investigation file, Project Ambivalent. She claims that these files, the first of which relates to alleged money laundering, contain information relating to her ex-husband and mention her name. More particularly, she contends that the files contain exculpatory evidence with respect to allegations of professional misconduct that eventually led to her disbarment from the Law Society of Upper Canada (LSUC) in 2010.

[6] Over the years, the appellant has attempted on numerous occasions and in various legal fora to compel, alternatively, the LSUC, the RCMP, the OIC, and Library and Archives Canada (LAC) to provide her with a copy of Project Anecdote, to no avail. In its reasons, the Federal Court listed these proceedings brought before the LSUC, the Superior Court of Justice of Ontario, the Court of Appeal of Ontario, the Federal Court and this Court.

[7] In her most recent application before the Federal Court, Ms. Coady sought judicial review of a 2017 decision of the OIC refusing both to reopen a file it closed regarding her request for access to the Project Anecdote file, and to investigate her 2010 complaint regarding the file closing. In that application filed on August 28, 2017, the appellant sought *inter alia* an order under Rule 317 requiring LAC to deposit with the Federal Court registry a copy of a

tribunal record containing Project Anecdote. The Attorney General objected to that request, on the basis that Rule 317 only permits a party to request material relevant to an application that is in the possession of a tribunal whose order is the subject of the application. As Project Anecdote is a record of an RCMP investigation that has been moved to LAC and is therefore not in the possession of the OIC, he submitted that the request was impermissible.

[8] Having failed to perfect her application record within the timelines set out in the *Federal Courts Rules*, the appellant also brought a motion on October 2, 2017, to obtain from the OIC and LAC the same relief that she sought in the underlying application, that is, a copy of Project Anecdote. That motion was dismissed by Prothonotary Tabib on January 19, 2018 (T-1331-17). She found that the document sought would be of no relevance, to the extent that the underlying application could be interpreted as a judicial review of the investigation process conducted by the OIC. If, on the other hand, the revised application (now adding the RCMP as a respondent) had sought to review the RCMP's refusal of access pursuant to section 41 of the *Access to Information Act*, R.S.C. 1985, c. A-1, then the motion as directed against LAC would be ill-founded since Rule 317 only authorizes the transmission of material that is in the possession of the tribunal whose order is the subject of the application. Finally, the motion would be premature if it had been directed against the RCMP, since the underlying application was only modified to include a section 41 recourse against it a month earlier; as a result, the RCMP had not yet responded to a Rule 317 request for production. That decision was upheld by Justice Martineau of the Federal Court on March 7, 2018, and the appeal from that decision was dismissed by this Court on May 1, 2019 (*Coady v. Canada (Royal Mounted Police)*, 2019 FCA 102).

[9] In the meantime (on January 11, 2018), the Attorney General served the appellant with a motion seeking to have her revised application dismissed as an abuse of process and to have her declared a vexatious litigant. The revised application had been stayed pending the outcome of the Attorney General's vexatious litigant motion. The appellant reacted with a cross-motion seeking an order adjourning or dismissing the Attorney General's motion pending the disposition of her appeal from Justice Martineau's decision refusing the production of a copy of Project Anecdote.

[10] On April 24, 2018, the Federal Court (*per* Justice O'Reilly) dismissed the appellant's adjournment motion from the bench, and then heard the Attorney General's vexatious litigant motion. On May 23, 2019, the Federal Court struck out the appellant's revised application as an abuse of process and declared her to be vexatious. I shall return to that decision in my discussion of the respondent's motion that is now before this Court.

[11] On June 24, 2019, the appellant filed her appeal of Justice O'Reilly decision, and added in her Notice of Appeal a request of another archived RCMP investigation file (Project Ambivalent). She also served the Attorney General with a further motion a few months later, whereby she requested not only the Project Anecdote file, but yet another, previously unmentioned, archived RCMP investigation file (Project Affidavit). That motion was dismissed by this Court on November 14, 2019, because neither of these files were before the Federal Court when it rendered the judgment under appeal.

[12] As previously mentioned, this Court is now seized with a motion by the Attorney General to strike the appellant's appeal and to have the appellant declared a vexatious litigant. Also

before this Court is a cross-motion by the appellant seeking essentially that 1) the Attorney General's motion be heard in open court or, alternatively, be dismissed, and 2) that the November 14, 2019 Order of this Court be varied and that the Project Anecdote file be ordered to be deposited.

[13] By way of direction, my colleague Justice Webb advised the parties on July 10, 2020 that the motions would be decided on the basis of written representations.

II. Issues

[14] Two issues must be decided on the Attorney General's motion:

A. Should the appellant's appeal be struck out without leave to amend?

B. Should the appellant be declared a vexatious litigant by this Court?

III. Analysis

A. *Should the appellant's appeal be struck out without leave to amend?*

[15] It is well established at common law that judges have an inherent and residual discretion to prevent an abuse of the court's process. In *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, the Supreme Court reiterated that the doctrine allows a court to prevent the misuse of its procedure in a way that would bring the administration of justice into disrepute. It has been applied to preclude relitigation in circumstances where the strict requirements of issue estoppel are not met, but where allowing litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of

justice. Rule 221(1)(c) of the *Federal Courts Rules*, which allows this Court to strike out a pleading without leave to amend on the ground that it is "scandalous, frivolous, or vexatious", is an expression of that doctrine.

[16] The Attorney General submits, as he did before the Federal Court, that the appellant's quest to obtain a copy of RCMP investigation files was bound to fail for three reasons. First, the OIC, which is the tribunal whose decision was at issue in the underlying application, does not maintain custody or control over Project Anecdote. Indeed, it was not even statutorily capable of rendering a decision to refuse the appellant access to that file. As a matter of fact, the only decision that was the subject of the appellant's judicial review is an email from the OIC dated July 14, 2017, and there is no reference in that decision to Project Anecdote which would in turn permit access to the same by way of the certified tribunal record.

[17] Second, LAC has never received or refused a request from the appellant for a copy of the Project Anecdote file, even though it is the government institution that currently has possession of that document.

[18] Third, the RCMP did in fact refuse the appellant access to the Project Anecdote file in 2009, but the period for bringing an application for judicial review of that decision has long since expired. Moreover, the RCMP is no longer in possession or control of that file, since it has been transferred to LAC in 2010.

[19] Having carefully reviewed the record, and in the absence of any submissions by the appellant on the Attorney General's motion, I am inexorably led to the conclusion that her appeal is bound to fail and should be struck out in its entirety without leave to amend. Not only am I convinced that the Federal Court's reasons are unimpeachable and not vitiated by any reviewable error, but the same arguments as raised by the appellant in her October 2, 2017 motion have been dismissed in a decision of this Court already referred to at paragraph 8 of these reasons. As a result, the question of whether or not the Federal Court was required to review Project Anecdote as part of the appellant's underlying judicial review has already been decided, and the appellant's attempt via this appeal to relitigate the same request amounts to an abuse of process because the issue is *res judicata*.

B. ***Should the appellant be declared a vexatious litigant?***

[20] As previously mentioned, the respondent also asks that the appellant be declared a vexatious litigant pursuant to subsection 40(1) of the *Federal Courts Act*. As required by subsection 40(2) of this same Act, the Attorney General has consented to the bringing of that motion. It is important to stress that an order made under subsection 40(1) does not bar access to the Federal Court or the Federal Court of Appeal, but only restricts an individual's right to commence or continue proceedings in the Court having made that order without leave from that Court. It is an extraordinary remedy which must be used sparingly, with due regard for the importance of the principle of access to justice.

[21] In *Canada v. Olumide*, 2017 FCA 42 [*Olumide*] and *Canada (Attorney General) v. Fabrikant*, 2019 FCA 198, this Court (*per* Justice Stratas) surveyed the law with respect to

vexatious litigants and enunciated a number of principles that bear on the case at bar (see also *Canada (Procureur général) c. Yodjeu*, 2019 CAF 178). The vexatious litigant shares many of the characteristics underlying the concept of abuse of process, one of which is the propensity to relitigate matters that have already been determined against him or her: *Wilson v. Canada (Revenue Agency)*, 2006 FC 1535 at para. 30; *Foy v. Foy* (1979), 102 D.L.R. (3d) 342 (Ont. C.A.).

[22] It has been stressed more than once that the judicial system is a community property and a scarce resource, just like health and educational services. It falls upon courts and judges themselves to ensure the most efficient use of their limited capacity to deal with all sorts of litigants who come before them. As Justice Stratas aptly put it in *Olumide*:

> [19] The Federal Courts have finite resources that cannot be squandered. Every moment devoted to a vexatious litigant is a moment unavailable to a deserving litigant. The unrestricted access to courts by those whose access should be restricted affects the access of others who need and deserve it. Inaction on the former damages the latter.

[23] In that spirit, litigants who inundate the courts with meritless proceedings or motions, or who repeatedly seek to reassert claims and arguments that have already been determined, even through no ill-will, have to be restrained in their access to the courts. It is worth stressing that an order made under subsection 40(1) of the *Federal Courts Act* does not operate as a total bar on a litigant's access to the courts; it only regulates the litigant's access to the courts. It is a gate-keeping mechanism whereby the litigant is required to get leave before starting or continuing a proceeding.

[24] Vexatious litigants need not necessarily be acting in bad faith, and do not always mean harm to opposing parties. Sometimes, as in the case at bar, they pursue what in their mind is a legitimate objective and seek to redress what they perceive to be an injustice. This is no less detrimental to the justice system, however, if only because it encumbers the courts and the staff assisting them with meritless proceedings raising issues that have already been decided, and thereby preventing more deserving litigants to access the courts and to have their legal issues resolved.

[25] The record before me amply justifies a vexatious litigant order under subsection 40(1) of the *Federal Courts Act*. The manner in which Ms. Coady has sought to obtain a copy of Project Anecdote illustrates her vexatious behaviour, and the numerous proceedings she has brought in pursuit of that objective have all been unsuccessful. The affidavit of C. Patricia Bradley filed by the Attorney General in support of his motion is compelling and leaves no doubt in my mind. Here are its most salient aspects:

- Ms. Coady launched numerous overlapping actions that were either beyond the jurisdiction of the Ontario and Federal Courts, or were clearly no more than scandalous allegations. For example, on three different occasions (twice in 2008 and again in 2011) before three different judges, the appellant's requests for access to Project Anecdote were dismissed by the Federal Court: *Martha Coady v. The Director of Public Prosecutions et al.*, T-268-08 (February 26, 2008); *Coady v. Director of Public Prosecutions*, 2008 FC 1064, aff'd 2009 FCA 360; *Coady v. Director of Public Prosecutions*, 2011 FC 1009.
- She filed a number of frivolous motions that were struck out as meritless. For example, in her request for reconsideration of her failed appeal before the Superior Court of Justice

(Ontario Divisional Court), that Court dismissed the appellant's request because it "[was] without merit, and thus constitute[d] a proceeding that [was] frivolous, vexatious or an abuse of the court's process": *Coady v. Law Society of Upper Canada*, 2016 ONSC 7543 at para. 6 [*Law Society of Upper Canada*]. Similarly, the Federal Court struck out her 2017 application for judicial review as an abuse of process in its decision now under appeal: *Coady v. Canada (Attorney General)*, 2019 FC 723 at para. 31.

- She launched applications, actions, motions and appeals that were duplicative of her previous actions and appeals, as documented in the affidavit of C. Patricia Bradley. For example, the Superior Court of Justice (Ontario Divisional Court) noted in one of its endorsements that "Ms. Coady is not seeking other relief. She is seeking the same relief that she was denied on the original hearing. What Ms. Coady is actually trying to do is to reargue the case based on a different ground": *Law Society of Upper Canada*, at para. 3. See also: *Coady v. Scotiabank*, 2015 ONSC 6837 at para. 21. That pattern repeated itself in two motions on two separate appeals before this Court, where she also sought the production of Project Anecdote (affidavit of C. Patricia Bradley, at paras. 61 and 77). She brought two motions before this Court, in June and July of 2018, both of which requested production of Project Anecdote (affidavit of C. Patricia Bradley, at paras. 69 and 71). This Court also recently dismissed the appellant's motion for a copy of Project Anecdote and Project Affidavit in the Order issued by Justice Mactavish on November 14, 2019. Finally, the Ontario Court of Appeal dismissed another attempt by the appellant to obtain Project Anecdote by improper means, noting that "this latest request effectively renews Ms. Coady's previous, unsuccessful requests for disclosure/production, which were

disposed of by this Court and the Federal Court of Appeal" (affidavit of C. Patricia Bradley, at para. 44).

- She has repeatedly appealed interlocutory and final orders; none have been successful so far.

[26] I also note that Ms. Coady has failed to pay multiple costs awards made against her. For example, she has neglected to pay any of the $15,502.49 in costs awarded so far to the Attorney General, and she owes the LSUC over $257,000 in outstanding costs. Additionally, she has made unmeritorious and unfounded allegations of bad faith and bias against judges, counsel, and court officials.

[27] Also of significance is the appellant's tortuous, 10 year-long LSUC proceedings that led to her eventual disbarment. The LSUC Panel found that the appellant had been in breach of her professional obligations with seeming impunity, and went so far as stating that the evidence of misconduct was "staggering and almost without precedent" (*Law Society of Upper Canada v. Coady*, 2010 ONLSHP 4 at para. 24). The Panel also found that the appellant not only disobeyed court orders as to costs, but was also found to be a vexatious litigant on a number of occasions (at para. 28). Of particular relevance to the Attorney General's present motion is the LSUC's finding with respect to the appellant's gaming of both the courts and the LSUC disciplinary process (at para. 33):

> What is perhaps most remarkable and troubling about Ms. Coady's history with the Society is that she has used every tool at her disposal to obfuscate, prolong and divert the proceedings. Her professional misconduct in the courts of Ontario spans many years. She resisted the disciplinary processes of the Society in respect of that misconduct for many more years.

[28] Finally, the appellant has been declared a vexatious litigant against her first ex-husband and was thus prohibited from commencing any legal action or proceeding against him without leave of the Ontario Superior Court pursuant to section 140 of the Ontario's *Courts of Justice Act*, R.S.O. 1990, c. C.43 (*Coady v. Boyle*, [2003] O.J. No. 5161 at para. 97), a ruling later upheld by the Ontario Court of Appeal (*Coady v. Boyle*, 2005 CanLII 15456 (ONCA), [2005] O.J. No. 1857 at para. 15). And as noted earlier, the Federal Court has issued a vexatious litigant ruling against the appellant, pursuant to which Ms. Coady is not permitted to initiate or continue any proceedings, regardless of against whom they are brought, without leave of the Court.

[29] Needless to say, an order declaring a person to be a vexatious litigant must be based on the conduct of that person in the court making that order. That being said, other courts' findings of vexatiousness will carry much weight in section 40 motions before this Court, especially if these other courts' findings are based on similarly worded provisions: *Olumide*, at para. 37.

IV. The appellant's cross-motion

[30] As for the appellant's cross-motion, it is entirely without merit. Indeed, it is not properly responding to the Attorney General's vexatious litigant motion, but is rather seeking a new interlocutory motion whereby Ms. Coady attempts to obtain separate relief, as she herself noted in her January 17, 2020 letter to the Court.

[31] I see no compelling reasons to deviate from the practice of this Court to deal with interlocutory motions in writing. As this Court stated in *SNC-Lavalin v. Canada (Public Prosecution Service)*, 2019 FCA 108 at paragraph 14, the default for motions before this Court is

for them to be decided on the basis of written materials. The appellant has provided no evidence in her motion materials as to why an oral hearing is required in the present case. This Court has already denied the appellant an oral hearing on her last motion for similar relief in an Order issued by Justice Rennie on October 15, 2019, and I see no justification to order differently in the case at bar.

[32] As for the appellant's request to vary Justice Mactavish's November 14, 2019 Order dismissing her motion to obtain from the Commissioner of the RCMP and LAC the Project Anecdote and Project Affidavit files, it clearly does not meet the test for varying a court order under Rule 399(2)(a). This Court has established that three conditions must be satisfied before it will intervene to vary a previous order: 1) the newly discovered information must be a "matter" within the meaning of the Rule; 2) the matter must not be one that was discoverable prior to the making of the order by the exercise of due diligence; and 3) the matter must be something that would have had a determining influence on the decision in question (see *Ayangma v. Canada*, 2003 FCA 382 at para. 3).

[33] It is not entirely clear from the appellant's submission how the matter could not have been discovered prior to the making of Justice Mactavish's Order. In fact, the matter itself has yet to be clearly identified by the appellant. She seems to be claiming that counsel for the Attorney General breached their duty of candour by failing to disclose that an investigation had been ordered into possible breaches of section 67 of the *Access to Information Act* in a completely unrelated file, and by misrepresenting that no costs had been paid to the LSUC.

[34] Quite apart from the fact that this “new information” does not seem to meet the first two conditions set out above, it is clear that it would not have had a determining influence on Justice Mactavish’s Order. One of the reasons for dismissing the appellant’s request for the production of Project Anecdote was that neither that Project nor Project Affidavit were before Justice O’Reilly when he rendered his decision. Evidence regarding the scope of the appellant’s garnishment payments to the LSUC or concerning a completely unrelated investigation is unlikely to have had “a determining influence on the decision in question”. For that reason alone, the appellant’s “cross-motion” ought to be dismissed.

V. Conclusion

[35] For all of these reasons, the motion of the Attorney General should be granted. The appellant’s appeal should be struck out in its entirety for being frivolous, vexatious, and otherwise an abuse of process, without leave to amend. Moreover, the appellant is declared a vexatious litigant, and will henceforth require leave of this Court before she can bring any future application or appeal in this Court. The style of cause is amended under Rule 303(2) to remove the Commissioner of the RCMP and LAC as respondents and to replace them with the Attorney General of Canada. The appellant’s cross-motion should be dismissed. Finally, the appellant shall pay to the respondent costs in the amount of $1,500.00.

"Yves de Montigny"
J.A.

“I agree
J.B. Laskin J.A.”

“I agree
Marianne Rivoalen J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-239-19
STYLE OF CAUSE:	MARTHA COADY v. THE ATTORNEY GENERAL OF CANADA

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	DE MONTIGNY J.A.
CONCURRED IN BY:	LASKIN J.A. RIVOALEN J.A.
DATED:	OCTOBER 1, 2020

WRITTEN REPRESENTATIONS BY:

Martha Coady	FOR THE APPELLANT (ON HER OWN BEHALF)
Stephen Kurelek	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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