Federal Court of Appeal Cour d'appel fédérale

Date: 20140410

Docket: A-228-13

Citation: 2014 FCA 98

CORAM: **PELLETIER J.A.**
GAUTHIER J.A.
NEAR J.A.

BETWEEN:

ANTHONY COOTE

Appellant

and

LAWYERS' PROFESSIONAL INDEMNITY COMPANY (LAWPRO) et al.

Respondent

Heard at Toronto, Ontario, on April 2, 2014.

Judgment delivered at Ottawa, Ontario, on April 10, 2014

REASONS FOR JUDGMENT BY: PELLETIER J.A.

CONCURRED IN BY: GAUTHIER J.A.
NEAR J.A.

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REASONS FOR JUDGMENT

PELLETIER J.A.

[1] Mr. Coote appeals from the decision of Mr. Justice Hughes of the Federal Court declaring him to be a vexatious litigant, as provided in section 40 of the *Federal Courts Act*, R.S.C. 1985 c.

F-7 (the Act). The motion to have Mr. Coote declared a vexatious litigant was brought by the Lawyers' Professional Indemnity Company (Lawpro).

[2] At paragraph 31 of his reasons, reported as *Lawyers' Professional Indemnity Company v. Coote*, 2013 FC 643, [2013] F.C.J. No. 720 (Reasons), Hughes J. set out Mr. Coote's litigation history in the Federal Court. It is extensive, considering the relatively short period during which Mr. Coote has been a litigant in that court.

[3] Mr. Coote raises a large number of grounds in his notice of appeal which he supplements with other grounds in his memorandum of fact and law. The grounds raised in the notice of appeal and my disposition of those grounds are as follow.

[4] Mr. Coote says he was not properly served with Lawpro's notice of motion. Rule 147 of the *Federal Court Rules*, SOR/98-106 (Rules) provides that service can be validated if the Court is satisfied that a document came to the attention of the party. In this case, Hughes J. noted that Mr. Coote was able to respond to Lawpro's motion and therefore validated service. This ground of appeal fails.

[5] Mr. Coote alleges procedural irregularities involving the filing of a record in response to a responding record, as well as the fact that Prothonotary Aalto, sitting alone, heard and granted a motion to quash. If the filing of record in response to a responding record had an effect on the proceedings, it is not apparent from the record. A bare procedural defect without evidence of prejudice confers no rights. As for the allegation with respect to Prothonotary Aalto, members of

the Federal Court do not sit in panels; the Court of Appeal sits in panels. Prothonotary Aalto must necessarily sit alone. These grounds have no merit.

[6] In paragraphs 3-5, 7-11 of the notice of appeal, Mr. Coote alleges in various ways that Hughes J. was biased and acted in bad faith. Were any evidence tendered in support of these allegations, they would merit scrutiny. However, the appeal book contains mostly pleadings, memoranda of fact and law, and decisions of various decision makers, none of which throw any light upon the allegations made in the notice of appeal and repeated in greater detail in Mr. Coote's memorandum of fact and law. None of this is evidence. The few other documents, generally correspondence in one form or another, are not relevant to the issue of bias and bad faith. None of this is capable of leading an informed person, viewing the matter realistically and practically, and having thought the matter through, to conclude that it was more likely than not that Hughes J. would not decide the matter fairly. This ground of appeal fails.

[7] Paragraph 6 of the notice of appeal reads as follows:

> “As a person of color, stated earlier that Charter of Rights are not remedies that can be sought in the federal court, while ignoring more than 99% of the pleadings”.

[8] It is not clear what is being alleged. The Federal Court has jurisdiction to grant remedies under the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, *1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c.11 (*Charter*), but only on a proper record. Hughes J. dismissed Mr. Coote’s *Charter* arguments on the basis that no evidence had been presented to support a *Charter* argument. *Charter* litigation requires a solid evidentiary

foundation: see *Dunmore v. Ontario* (Attorney General), 2001 SCC 94, [2001] 3 S.C.R. 1016 at paragraph 25. The record before Hughes J. did not provide such a foundation. It was not necessary for Hughes J. to refer to all elements of the record in coming to this conclusion.

[9] In addition, Mr. Coote raises other issues in his memorandum of fact and law.

[10] Mr. Coote challenges the evidence of the consent of the Attorney General to Lawpro's motion to have him declared a vexatious litigant. That evidence is a document, signed by the Assistant Deputy Attorney General, Litigation, entitled Consent of the Attorney General. In that document, the Attorney General, by the hand of the Assistant Deputy Attorney General, gives his consent to the bringing of an application under section 40 of the Act. Mr. Coote challenges this on the basis that only the Attorney General in person can consent to the bringing an application under section 40. Since the document is not signed by the Attorney General himself, he says that it does not satisfy the consent requirement in section 40.

[11] I agree with Hughes J. that the doctrine of implied consent, as developed at common law and codified at section 24 of the *Interpretation Act*, R.S.C. 1985 c. I-21 is applicable here so that the Minister's consent can be given by a departmental officer who acts in a capacity appropriate to the giving of consent. Prima facie, the Assistant Deputy Attorney General, Litigation, is such an officer. This ground is also without merit.

[12] Mr. Coote also argues that this proceeding is flawed because it was commenced by notice of motion and not by application. Along the same lines, he points to the lack of the court seal on

Lawpro's notice of motion as evidence of non-compliance with the Rules. Section 40 must be interpreted in the context in which the application contemplated in that section is brought. It is possible for an application under section 40 to be brought independently of any pending litigation. In such a case, the application must be commenced by an originating document. In such a case, the originating document is a notice of application, which must bear a court seal: see Rule 63. However, it is also possible to bring an application under section 40 within the framework of an existing action and, in that case, the proceeding is commenced by notice of motion. A notice of motion is not issued by Registry and therefore does not bear the Court's seal.

[13] In his memorandum of fact and law, Mr. Coote repeats in various ways his allegations of bias and bad faith against Hughes J. As noted earlier, there is no evidence in the record that could sustain a finding of reasonable apprehension of bias or bad faith.

[14] Before us, Mr. Coote also claimed that his right to procedural fairness was breached when Hughes J. limited the time available to hear his arguments to one hour considering that Boivin J. ordered that one day be set aside to hear Mr. Coote's argument on the *Charter* and Lawpro's motion to have him declared a vexatious litigant. The recorded entries in file no T-312-13 show that the hearing before Hughes J. was 3 hours and 30 minutes in duration. In any event, any limitation on the time for oral argument is mitigated by the fact that the Court has at its disposition the parties' memoranda of fact and law.

[15] This leaves the issue of the merits of Hughes J's decision declaring Mr. Coote a vexatious litigant. An order declaring a person a vexatious litigant is a discretionary order: see *Forrest v.*

Canada, 2008 FCA 397 at paragraph 3, see also *Liu v. Matrikon Inc.,* 2010 ABCA 383, [2010] A.J. No. 1441 (C.A.). The standard of review of a discretionary decision is whether there is an error of law or principle, or a failure to exercise the discretion judicially: *Elders Grain Co. v. M/V Ralph Misener,* [2005] F.C.J. No. 612, [2005] 3 F.C. 367 (C.A.) at paragraph 13; AB *Hassle v. Apotex Inc.* (C.A.), [2006] 4 F.C.R. 513 at paragraph 27.

[16] While the Reasons given by Hughes J. are not crystal clear, they do set out the applicable jurisprudence and the relevant facts. Given the disposition of Lawpro's motion, we can conclude that he found that, upon applying the relevant principles to the material before him, it was established that Mr. Coote was a vexatious litigant. I have not been persuaded that, in coming to this conclusion, he erred in law or principle or that he failed to exercise his discretion judicially. The record supports his conclusion that, in the relatively brief period in which he has been a litigant before the Federal Courts, Mr. Coote has shown himself to be a vexatious litigant.

[17] Hughes heard another motion at the same time as he heard Lawpro's motion to have Mr. Coote declared a vexatious litigant. In that motion, Mr. Coote asked that an order by Manson J. dismissing an appeal from a decision by Prothonotary Aalto be set aside or varied. He also asked that an order by Boivin J. consolidating Mr. Coote's *Charter* argument with Lawpro's motion be set aside or varied. To the extent that these motions asked one Federal Court judge to sit in appeal from another Federal Court judge's decision, Hughes J. was correct to dismiss them. Beyond that, I have already dealt with the argument that Prothonotary Aalto could not, sitting alone, quash a proceeding. As for the order by Boivin J., it is not apparent from the material before me that that order is in issue in this appeal.

[18] I would therefore dismiss the appeal with costs.

"J.D. Denis Pelletier"

J.A.

“I agree
Johanne Gauthier J.A.”

“I agree
D.G. Near J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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CONCURRED IN BY:	GAUTHIER J.A. NEAR J.A.
DATED:	APRIL 10, 2014

APPEARANCES:

Anthony Coote	FOR THE APPELLANT ON HIS OWN BEHALF
Faren H. Bogach	FOR THE RESPONDENT LAWYERS' PROFESSIONAL INDEMNITY COMPANY (LAWPRO) ET AL.

SOLICITORS OF RECORD:

Anthony Coote Brampton, ON	FOR THE APPELLANT ON HIS OWN BEHALF
WeirFoulds LLP Toronto, ON	FOR THE RESPONDENT LAWYERS' PROFESSIONAL INDEMNITY COMPANY (LAWPRO) ET AL.