

Federal Court of Appeal



Cour d'appel fédérale

Date: 20140911

**Dockets: A-147-11
A-186-11**

Citation: 2014 FCA 200

Present: SHARLOW J.A.

Docket: A-147-11

BETWEEN:

FRANCIS MAZHERO

Appellant

and

ANDREW FOX, JACQUES ROBERGE AND NEIL SHARKEY

Respondents

Docket: A-186-11

BETWEEN:

FRANCIS MAZHERO

Appellant

and

ANDREW FOX, JACQUES ROBERGE AND NEIL SHARKEY

Respondents

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on September 11, 2014.

REASONS FOR ORDER BY:

SHARLOW J.A.

Federal Court of Appeal



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REASONS FOR ORDER

SHARLOW J.A.

[1] On July 9, 2014, I issued an order on my own motion requiring Mr. Mazhero to show cause why this consolidated appeal should not be dismissed for delay. No progress had been made after August 19, 2011 to have the appeal made ready for a hearing. The lack of progress is

attributable to a number of directions and orders that precluded Mr. Mazhero from taking any steps in this matter until he had paid certain costs.

[2] I was unable to determine from the file the amount of costs owed under these orders, or whether any steps had been taken to assess the costs or enforce the orders. Therefore, I gave all parties an opportunity to make submissions.

[3] Submissions have been received from Mr. Mazhero and from the respondent Justice Sharkey, and I have considered them. The other respondents have filed no submissions, and the time for doing so has expired. Having considered those submissions, I have concluded for the following reasons that the appeal should be permitted to continue even though Mr. Mazhero has not paid any of the costs he was ordered to pay.

[4] It is useful first to provide a short procedural history. I propose to do so without commenting on, or even describing, the underlying issues that led Mr. Mazhero to commence the action that has led to the appeal, because the merits of the underlying action are not relevant to the issues in the appeal.

[5] On July 5, 2010, Mr. Mazhero commenced an action in the Federal Court (T-1067-10) against Justice Sharkey of the Nunavut Court of Justice and two Crown prosecutors, Andrew Fox and Jacques Benoit Roberge. On March 30, 2011, Justice Tremblay-Lamer of the Federal Court made an order in that action under section 40 of the *Federal Courts Act*, R.S.C. 1985, c. F-7,

barring Mr. Mazhero from continuing that action or instituting any new proceeding in the Federal Court without leave. Mr. Mazhero exercised his right to appeal that order (A-147-11).

[6] On April 20, 2011, Mr. Mazhero filed motions in the Federal Court which, although somewhat ambiguous, were interpreted as motions to rescind the section 40 order. The motions were dismissed by Justice S. Noël on April 28, 2011. On May 5, 2011, Mr. Mazhero appealed the dismissal (A-186-11).

[7] A number of motions were made in the two appeals that in due course were considered by Justice Trudel. On August 19, 2011, Justice Trudel made the following orders on those motions:

- (a) an order dismissing with costs Mr. Mazhero's motion for an expedited hearing, denying other relief without costs, and prohibiting the Registry from accepting any further documents from Mr. Mazhero until the costs are paid;
- (b) an order dismissing with costs Mr. Mazhero's motion to vacate proceedings taken under subsection 40(1) of the *Federal Courts Act*, and prohibiting the Registry from accepting any further documents from Mr. Mazhero until the costs are paid;
- (c) an order dismissing with costs the motion of Mr. Mazhero for leave to commence a private prosecution against Justice Tremblay-Lamer, and prohibiting the Registry from accepting any further documents from Mr. Mazhero until the costs are paid;

- (d) an order granting the motion of the respondents Mr. Fox and Mr. Roberge, with the consent of the respondent Justice Sharkey, to consolidate A-147-11 and A-186-11, with A-147-11 as the lead file;
- (e) an order dismissing with costs the motion of Mr. Mazhero to strike out all documents filed by the respondent Justice Sharkey, and prohibiting the Registry from accepting any further documents from Mr. Mazhero until the costs are paid;
- (f) an order dismissing several motions of Mr. Mazhero for an order allowing his appeals and for other relief, ordering costs payable to the respondents Mr. Fox and Mr. Roberge with respect to one of the motions, and prohibiting the Registry from accepting any further documents from Mr. Mazhero until the costs are paid;
- (g) an order dismissing the motion of Mr. Mazhero for leave to commence a private prosecution against Prothonotary Aronovitch and counsel for the respondents Mr. Fox and Mr. Roberge;
- (h) an order dismissing the motion of Mr. Mazhero for leave to commence a private prosecution against Prothonotary Morneau; and
- (i) an order dismissing with costs the motion of Mr. Mazhero for leave to commence a private prosecution against the respondent Justice Sharkey.

[8] On August 30, 2011, Mr. Mazhero submitted motions to set aside the orders of Justice Trudel. On September 8, 2011, Justice M. Noël directed a stay of those motions until all costs ordered by Justice Trudel are paid. Those motions remain outstanding.

[9] It appears that a number of documents the Court had sent to Mr. Mazhero were returned unclaimed. On August 30, 2012, Chief Justice Blais directed that until Mr. Mazhero complies with the orders to pay costs, any document that the Court sends to Mr. Mazhero that is returned unclaimed, not collected or refused is to be destroyed forthwith.

[10] It appears that in September of 2012, Mr. Mazhero attempted to file a motion to set aside the direction of Chief Justice Blais. The Registry, mindful of the orders of Justice Trudel that required the payment of costs and prohibiting the Registry from receiving documents from Mr. Mazhero until the costs are paid, refused to accept the documents. They were returned to Mr. Mazhero. Delivery was refused and the documents were destroyed pursuant to the direction of Chief Justice Blais.

[11] None of the orders of Justice Trudel fixed the amount of costs required to be paid, and according to the recorded entries for these appeals, no respondent has taken steps to have the costs assessed. Only one respondent, Justice Sharkey, filed submissions in response to Mr. Mazhero's submissions on the show cause order. It appears that he decided not to pursue any claims against Mr. Mazhero for costs. I infer from the silence of the other two respondents that they too have no interest in pursuing any claims for costs against Mr. Mazhero.

[12] That leaves Mr. Mazhero in an impossible position. He cannot pursue the two appeals that he was entitled to commence, because the other parties have not taken the steps required to permit him to file documents. At the same time Mr. Mazhero is left with no means by which he can seek an order requiring them to perfect their claims or formally abandon them.

[13] The status of the consolidated appeal is this:

- (a) there are outstanding motions to set aside the orders of Justice Trudel to which the respondents have not filed a response because the motions were not accepted for filing;
- (b) the contents of the appeal book in A-147-11 have been settled by the order of Justice Evans dated May 26, 2011, but it will be necessary to determine whether the same order should apply to the consolidated appeal; and
- (c) it will be necessary to establish a timetable for the remaining steps required to be taken to have this matter made ready for hearing:
 - i) the preparation and filing of appeal books,
 - ii) the filing of Mr. Mazhero's memorandum of fact and law,
 - iii) the filing of the respondents' memoranda of fact and law, and
 - iv) the filing of a requisition for hearing.

[14] All of these matters will have to be dealt with against the background of Mr. Mazhero's practice of submitting documents at such a pace that they accumulate faster than they can be dealt with. In that regard, I note that Mr. Mazhero has already submitted the following documents, in addition to his submissions in response to the show cause motion (filed July 21, 2014) and his reply (filed August 29, 2014):

- (a) a letter to me dated July 18, 2014 and received by the Registry on July 21, 2014 that begins with an accusation that my show cause order was an attempt to "scuttle" his appeals (I have not read any further);
- (b) a motion record dated July 22, 2014 seeking among other things an order that the respondent Justice Sharkey be charged with a criminal offence;
- (c) a motion record dated August 13, 2014 (not yet filed) seeking to set aside my show cause order of July 9, 2014, as well as a "reply" dated August 29, 2014 which was filed on that date;
- (d) a letter addressed to me dated September 4, 2014 and received by the Registry on September 9, 2014 asking me to set aside the show cause order; and
- (e) a letter addressed to me dated September 9, 2014 asking me to direct the Federal Court to provide electronic copies of certain documents in T-1067-10.

[15] In the order that accompanies these reasons, I will direct that any of the documents listed above that have not yet been filed should be filed as of the date on which they were received. I

do so in the hope that this will facilitate the steps required to be taken to have these appeals made ready for a hearing.

[16] I propose to make an order permitting these appeals to be continued, but under strict procedural limitations that I hope will deter Mr. Mazhero from submitting any further documents until the motions now pending have been dealt with. To that end, I will make an order on my own motion pursuant to Rule 384 that these appeals will continue as a specially managed proceeding.

[17] I do not propose to comment on the points raised by Mr. Mazhero in any of the documents mentioned above, except some of the points in his submissions in response to the show cause motion (filed July 21, 2014) and his reply (filed August 29, 2014). With respect to those documents I comment as follows.

[18] Mr. Mazhero argues that Justice Trudel lacked the jurisdiction to make the orders she made on August 19, 2011. Unless and until those orders are set aside or varied, they must be respected. In the order that I will now make, I will vary them only to the extent of removing the provision that prohibits the Registry from filing documents submitted by Mr. Mazhero before he has paid the costs as required by those orders. For all other purposes, the orders stand and must be respected. That includes the consolidation order, which for present purposes must be considered valid. Mr. Mazhero's motion to set them aside (submitted August 30, 2011) will be considered in the course of case management.

[19] Mr. Mazhero is concerned that many of the steps taken in this matter have been done by means of a direction rather than an order. I share his concern. In my view, where a party or the Registry is being compelled to take certain action or to refrain from taking a certain action, an order should be made unless the *Federal Courts Rules* specifically contemplate a direction (for example, Rule 72 dealing with the right of the Registry to seek a direction as to the filing of irregular documents). By exception, a direction is appropriate where it is required to guide the parties or the Registry in matters of procedure, or to deal with a matter to which the parties have consented or that for other reasons may reasonably be considered not to be controversial. A direction should never be used in place of an order where it is reasonable to consider that a party may wish to appeal.

[20] Having said that, it remains the case that any direction of a judge of this Court or the Federal Court must be respected unless it is set aside or varied. In the order that accompanies these reasons I will terminate the stay directed by Justice Noël on September 11, 2011 and the subsequent direction of Chief Justice Blais that until Mr. Mazhero pays the costs ordered by Justice Trudel, any document sent to Mr. Mazhero by the Registry that is returned unclaimed, not collected or refused is to be destroyed forthwith.

[21] However, my order will permit the destruction of any documents that the Registry sends to Mr. Mazhero that are returned unclaimed, not collected or refused, provided they are sent to Mr. Mazhero's current address as reflected in the Court file. If Mr. Mazhero does not wish to receive documents properly sent to him, I see no reason to require the Registry to retain them.

[22] Mr. Mazhero has asserted in his submissions a claim for damages, various declarations and costs. Such claims are not appropriate in a submission on a show cause order, and will not be considered.

“K. Sharlow”

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS:

A-147-11 ET A-186-11

STYLE OF CAUSE :

FRANCIS MAZHERO v.
ANDREW FOX, JACQUES
ROBERGE AND NEIL SHARKEY

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:

SHARLOW J.A.

DATED:

SEPTEMBER 11, 2014

WRITTEN REPRESENTATIONS BY:

FRANCIS MAZHERO

FOR THE APPELLANT, ON HIS OWN
BEHALF

RONALD D. LUNAU

FOR THE RESPONDENT NEIL
SHARKEY

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FOR THE RESPONDENT NEIL
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