

Federal Court



Cour fédérale

Date: 20230531

Docket: T-354-21

Citation: 2023 FC 761

Toronto, Ontario, May 31, 2023

PRESENT: Mr. Justice Diner

BETWEEN:

ROGER BENNETT

Plaintiff

and

**MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS**

Defendant

JUDGMENT AND REASONS

[1] Mr. Bennett has brought this Motion pursuant to Rule 51 of the *Federal Court Rules*, SOR/ 98-106 [*Rules*], appealing an Order of the Case Management Judge [CMJ] Associate Judge Coughlan, dated February 21, 2023 [Order], dismissing Mr. Bennett's action for delay and failure to comply with the Court's prior orders and directions. For the reasons outlined below, this Motion is dismissed.

I. Background

[2] Mr. Bennett commenced this action more than two years ago on February 22, 2021, by filing a Statement of Claim in Federal Court. The Minister of Public Safety and Emergency Preparedness [Minister] filed a Statement of Defence on April 8, 2021, after both Parties agreed to an extension of time under Rule 7 of the *Rules* for the service and filing of the Statement of Defence.

[3] After the filing of the Statement of Defence by the Minister, little headway was made to move this proceeding forward. Mr. Bennett became self-represented for a portion of the period during which this litigation took place: he advised of a number of attempts to retain counsel from approximately June 2021 to May 2022, filing a Notice of Intention to Act in Person on April 20, 2022.

[4] On April 19, 2022, after more than a year since the filing of the Statement of Claim, Chief Justice Crampton ordered the proceeding be specially managed and required Mr. Bennett to file a proposed timeline within 20 days of the date of his order, for the completion of the steps necessary to advance the proceeding in an expeditious manner.

[5] On May 2, 2022, the Minister filed a copy of the timetable, on consent of the Applicant. On May 16, 2022, the CMJ issued an order setting out the timeline for the next steps [May 16, 2022 Order]. On that same date, Counsel for the Minister was contacted by lawyer

Daniel Hildebrand who indicated that he was retained on a limited scope retainer to assist the Applicant with complying with the timetable agreed to by the Parties.

[6] On June 27, 2022, the CMJ held a Case Management Conference [CMC] via Zoom, attended by Mr. Bennett and Counsel for the Minister. At this CMC, Mr. Bennett advised the Court of his intention to amend his Statement of Claim to add *Charter* breaches.

[7] After missing two deadlines in the timetable the Parties had agreed to, the Minister sought another CMC, which took place on November 4, 2022. At that time, the CMJ issued an order setting a deadline of November 25, 2022 for Mr. Bennett to bring a motion for leave to amend his Statement of Claim.

[8] On November 29, 2022, noting that the motion for leave to amend the Statement of Claim had not been filed, the Court Registry contacted the Parties to inquire as to Mr. Bennett's intention to file the motion. Mr. Bennett responded on the same day that he would not be filing a motion to amend his Statement of Claim since the deadline had passed, unless he could get an extension of time. On December 1, 2022, the Court Registry replied, advising Mr. Bennett that he would have to bring a motion to seek an extension of time. Mr. Bennett did not respond to the Court Registry's email dated December 1, 2022, and never filed any motion seeking an extension of time.

[9] On December 7, 2022, as a result of Mr. Bennett's non-compliance with the November 4, 2022 order, the CMJ issued a direction, asking Mr. Bennett to provide a timetable for all steps

leading to the Requisition of a Pre-trial Hearing by no later than December 19, 2022, failing which a Status Review would be conducted leading to dismissal of the action. Mr. Bennett neither responded to the December 7, 2022 Direction, and nor filed any timetable as directed.

[10] On January 5, 2023, the CMJ issued a Show Cause Order, requiring (i) Mr. Bennett to show, by written submissions, to be served and filed by January 30, 2023, why the action should not be dismissed for failure to comply with the Court's December 7, 2022 Direction; (ii) the Minister to serve and file written submissions within 10 days after being served with Mr. Bennett's submissions; and (iii) Mr. Bennett to serve and file written submissions in reply, if any, within 4 days after being served with the Minister's submissions.

[11] On January 30, 2023, Counsel for Mr. Bennett filed written submissions to show cause. On February 9, 2023, the Minister filed respondent submissions, including the Affidavit of Ms. Anita Koop, a legal assistant at the Department of Justice Canada [Koop Affidavit].

[12] On February 10, 2023, the Minister filed with the Court, copying Applicant's Counsel, additional written submissions with respect to the Koop Affidavit. On that same date, the Court directed the Koop Affidavit be accepted for filing. A memo to file was entered into the Record by the Court Registry indicating, "[t]he Affidavit of Anite [sic] Koop sworn on 07-Feb-2023 shall be accepted for filing at direction of the court placed on file."

II. The Decision under Review

[13] The CMJ observed that the burden on status review lies with the party in default, noting however, that proceedings should only be dismissed on status review in exceptional circumstances, and where no other remedy would suffice. She found Mr. Bennett's justifications for the failure to move his case forward were "wholly unsatisfactory", his explanations were "simply lacking in substance", and his justifications provided were "simply not supported by the evidentiary record", and in fact, were "largely refuted by the record".

[14] The CMJ then went on to note that the Koop affidavit disclosed "multiple and repeated failures by the Plaintiff to respond to deadlines initially agreed upon by the parties and issued as Orders of this Court". She provided specific examples of failures to move the proceeding along including his failure to bring the motion to amend his Statement of Claim, leading directly to "unnecessary and unwarranted delay".

[15] In addition, the CMJ did not accept that the delays and failure to adhere to the Court's orders and direction resulted from a lack of legal counsel, in that he was consulting with counsel for much of the proceeding, and even if that were not the case, Mr. Bennett had a positive obligation to acquaint himself with the *Rules* and to move his case forward, which he failed to do. She noted that while the Minister assisted in moving the matter forward, that responsibility rested with the Plaintiff.

[16] The CMJ then addressed the second question on status review, namely the measures Mr. Bennett proposed to move the case forward. She wrote:

The Plaintiff proposes a timetable that he says will set “clear and deliverable checkpoints”. Effectively, the newly proposed timetable extends by several months the timelines set out in my May 16, 2022 Order. The proposed timetable does not address steps beyond the conclusion of examinations for discovery.

[17] She found his proposal to be “woefully inadequate”, noting that the proposal was “nothing more than a thinly veiled attempt to seek an extension of time to the deadlines set earlier without the benefit of either a motion properly supported by evidence or the consent of the Defendant”.

[18] The CMJ concluded that she was unpersuaded the proposed timetable provides any evidence that Mr. Bennett recognized his responsibility to the Court to proceed diligently to complete the remaining steps in the proceeding, and that it is not in the interest of justice to permit the action to proceed. She dismissed the action for delay and failure to comply with orders and direction of the Court.

III. Preliminary Issue

[19] The Minister submits that the Affidavit of Roger Bennett, sworn on May 4, 2023 and contained within Mr. Bennett’s Motion Record [Bennett Affidavit], is fresh evidence and should be disregarded by this Court since it was not before Associate Judge Coughlan on Status Review, relying on *David Suzuki Foundation v Canada (Health)*, 2018 FC 379 at para 17 [*Suzuki*].

Generally, only material that was before the Associate Judge can be considered on appeal.

[20] However, under Rule 351 of the *Rules*, in special circumstances, the Court may grant leave to a party to present evidence on a question of fact. The Court in *Suzuki* at paragraphs 15-19 noted that new evidence may be admissible in circumstances where it could not have been made available earlier, will serve the interests of justice, may assist the Court and does not seriously prejudice the other side, citing *Carten v Canada*, 2010 FC 857 at para 23, and *Mazhero v Canada (Industrial Relations Board)*, 2002 FCA 295 at para 5.

[21] In this case, given Mr. Bennett's allegations of a breach of procedural fairness, I find that considering the Bennett Affidavit serves the interests of justice, may assist the Court, and does not seriously prejudice the Minister.

[22] Although I will consider the Bennett Affidavit, I have decided to give it little weight since, as pointed out by the Minister, it is largely a reiteration and elaboration of the facts which were already established by the Koop Affidavit. In addition, the Bennett Affidavit also contains various instances of information that is contradicted by its very own Exhibits, as well as by other documents in the Record, including the Koop Affidavit and the Order. The Minister correctly points out three such examples at paragraph 36 of their factum:

- At paragraph 32 of the Bennett Affidavit, Mr. Bennett claims that the Minister sent their affidavit of documents to a lawyer that was no longer representing Mr. Bennett. This is contradicted by Exhibit "D" to the Bennett Affidavit, which are email communications between Mr. Bennett and Counsel for the Minister, revealing that Counsel for the Minister explained to Mr. Bennett that a copy of their executed affidavit of documents

were sent to his former counsel on May 31, 2021, and a copy of their executed supplemental affidavit of documents was provided to Mr. Bennett on June 14, 2021;

- At paragraph 38 of the Bennett Affidavit, Mr. Bennett claims that his former counsel, Mr. Hildebrand was hired on a limited scope to assist Mr. Bennett only with the preparation of his affidavit of documents and “perfecting whatever disclosure [he] needed to make.” This is contradicted by Exhibit “F” to the Bennett Affidavit, an email dated May 16, 2022 between Mr. Hildebrand and Counsel for the Minister, in which Mr. Hildebrand explains that he was retained “to assist [Mr. Bennett] in complying with the timetable laid out in [Counsel for the Minister’s] email to him of April 22, 2022 and amended April 29, 2022.” Thus, Mr. Hildebrand was not simply retained to assist with document production;
- At paragraph 62 of the Bennett Affidavit, Mr. Bennett claims that Associate Judge Coughlan’s decisions dismissed his action and awarded costs to the Minister “on an elevated basis” when the Order indicates that Associate Judge Coughlan was “not prepared to order costs on an elevated scale” and awarded a lump sum, inclusive of tax and disbursements, of \$2,000.00.

[23] Lastly, I note that the Bennett Affidavit introduces newly disclosed evidence regarding Mr. Bennett’s diminished cognitive abilities due to cardiovascular issues, which could – and should – have been raised earlier in the proceedings and not on this appeal for the first time.

IV. Issues and Standard of Review

[24] Mr. Bennett submits the Court should allow this Motion and dismiss Associate Judge Coughlan's Order, because there was a breach of procedural fairness with regard to the Court's acceptance of the Koop Affidavit.

[25] Mr. Bennett also argues Associate Judge Coughlan committed a palpable and overriding error by dismissing Mr. Bennett's action for delay and non-compliance when (i) the delay was reasonable; and (ii) Mr. Bennett provided a reasonable explanation for the non-compliance, namely that he was self-represented until February 2023, and that he suffers from diminished cognitive abilities related to cardiovascular issues.

[26] Questions of procedural fairness are to be reviewed by asking whether the process leading to the decision was fair in all the circumstances (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paras 54-55).

[27] Appeals of discretionary decisions of an Associate Judge on Status Review are entitled to deference (*Hospira Healthcare Corporation v Kennedy Institute of Rheumatology*, 2016 FCA 215 at para 103 [*Hospira*]). This Court may only interfere with such a decision if the Associate Judge made an error of law, or a palpable and overriding error regarding a question of fact, or mixed fact and law (*Hospira* at paras 66-69, citing *Housen v Nikolaisen*, [2002] 2 SCR 235 at paras 19-37). Indeed, the palpable and overriding error standard has been described as highly

deferential (for instance, see *Lessard-Gauvin v Canada (Attorney General)*, 2020 FC 730 at para 43, citing numerous Federal Court of Appeal decisions).

V. Analysis

[28] I do not agree with Mr. Bennett that there was a breach of procedural fairness, nor do I find that Associate Judge Coughlan made any palpable or overriding error that would justify this Court interfering with the Order, for the reasons explained below.

A. *There were no breaches of procedural fairness*

[29] Mr. Bennett submits there was a breach of procedural fairness with regard to the Court's acceptance of the Koop Affidavit. He relies on *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*] to argue that the finality of this decision, which would determine Mr. Bennett's ability to pursue his legal interests, points to a higher level of procedural fairness owed to Mr. Bennett. He submits that given this higher level of procedural fairness, the Court should have informed him that it was going to consider the Koop Affidavit for the Order.

[30] I disagree. A higher level of procedural fairness did not impose on the Court a positive obligation to inform Mr. Bennett of its decision to accept the Koop Affidavit. I note that Mr. Bennett cites no authority – beyond the principles in *Baker* – in support of this allegation. Mr. Bennett was aware the Minister sought direction from the Court with regard to the

acceptance of the Koop Affidavit, since Applicant's Counsel was copied on the Minister's additional submissions dated February 10, 2023.

[31] At that time, Mr. Bennett could have filed a reply objecting to the Koop Affidavit, or tendered his own affidavit. Mr. Bennett failed to take either of these steps. As explained by Associate Judge Coughlan in her Order, “[w]hile an affidavit is generally not required to support submissions on status review, where there is a discrepancy in the factual record, an affidavit is advisable.”

[32] When the Court accepted the Koop Affidavit for filing, a memo to file was entered into the public Record by the Court Registry indicating, “[t]he Affidavit of Anite [*sic*] Koop sworn on 07-Feb-2023 shall be accepted for filing at direction of the court placed on file.” This was appropriate and sufficient notice to inform Mr. Bennett that the Koop Affidavit had been accepted for filing. There was thus no breach of procedural fairness. I note that Mr. Bennett was represented during the Status Review, including at the time the Koop Affidavit was filed and then accepted for filing by the Court.

B. *The CMJ made no palpable and overriding error*

[33] Mr. Bennett further submits that Associate Judge Coughlan committed a palpable and overriding error by dismissing Mr. Bennett's action for delay and non-compliance, because the delay was reasonable, given that he was (i) self-represented until February 2023, and (ii) suffers from diminished cognitive abilities related to cardiovascular issues.

[34] Mr. Bennett relies on *Baroud v Canada*, 1998 CanLII 8819 (FC) [*Baroud*] and *Multibond Inc v Duracoat Powder Manufacturing Inc.*, 1999 CanLII 8948 (FC) [*Duracoat*]. In both cases, the Court dismissed the actions for delay. Mr. Bennett argues that, contrary to the plaintiffs in *Baroud* and *Duracoat*, he has demonstrated efforts to move his action along, as well as provided a reasonable explanation for the delay.

[35] This position is not borne out by the evidence in the Record, which shows that Mr. Bennett has repeatedly failed to follow Court orders and directions, including failing to submit a proposed timetable and missing deadlines set out by a timetable he had consented to. As noted by Associate Judge Coughlan in her Order, Mr. Bennett has not demonstrated that “[he] recognizes his responsibility to the Court to proceed diligently to complete the remaining steps in the proceeding.”

[36] Further, I am not persuaded by Mr. Bennett’s argument that the delays and non-compliance resulted from the two reasons that he argued, namely (a) a lack of legal counsel, and his status as a self-represented litigant, and (b) his diminished cognitive abilities that arose from his cardiovascular issues.

[37] With respect to his representation, although Mr. Bennett filed a Notice of Intention to Act in Person in April 2022, he retained the services of counsel Mr. Hildebrand from May 2022 until September 2022 on a limited scope retainer. Mr. Bennett received legal advice from September 2022 to February 2023 from his current counsel, Mr. McDonald, who he had also retained on a

limited scope basis. Then, Mr. Bennett retained Mr. McDonald to act for him on a regular basis, after having filed a Notice of Appointment of Solicitor on February 2, 2023.

[38] Considering the totality of the circumstances, I find that Associate Judge Coughlan did not commit any error in concluding that “it is clear that from May 2022 until present, the [Applicant] was consulting with counsel.” Although there were times that Mr. Bennett had counsel on a limited scope basis, he was represented through much of the proceeding, including at the outset when he filed his Statement of Claim, and for the underlying Status Review.

[39] The CMJ determined that even if there were periods that he was acting alone and not consulting with counsel (such as from May 2022 until February 2023), Mr. Bennett had a positive obligation to acquaint himself with the *Rules* to move his case forward. In finding that he failed to do so, she neither committed any error in fact nor law. As noted in *Johnson v Canadian Tennis Association*, 2022 FC 776 at para 45, while self-represented parties may benefit from some flexibility from the Court in the name of access to justice, this is not equivalent to exempting them from the *Rules*, with which they must still comply (see also *Brauer v Canada*, 2021 FCA 198 at para 8; *Fitzpatrick v Codiac Regional RCMP Force, District 12*, 2019 FC 1040 at para 19).

[40] Lastly, with respect to Mr. Bennett’s submission that he suffered from diminished cognitive abilities due to cardiovascular issues, as I noted earlier, I assign little weight to the Bennett Affidavit. In that Affidavit, these cognitive issues were raised for the first time in the proceeding. I note that there was ample opportunity to raise medical issues relating to any

cognitive impairment through the course of the litigation, including during the various case conferences, and ultimately, at the Status Review.

[41] Thus, I find that it is now too late to be raising new medical grounds, particularly when Mr. Bennett was being advised by a number of different lawyers through the course of the litigation. Neither Mr. Bennett, during the times when he provided submissions and input to the proceeding, nor any of his previous lawyers, raised this medical condition at any point during the two-year period over which the litigation ran its course. In doing so, Mr. Bennett failed in his onus to put his best foot forward at his Status Review, and in the steps that led up to it.

[42] Ultimately, Associate Judges are afforded ample scope in the exercise of their discretion when managing cases (*J2 Global Communications Inc. v Protus IP Solutions*, 2009 FCA 41 at para 16). This includes their discretion to dismiss an action pursuant to their order for a Status Review under Rule 385(2) (*Dhillon v Bernier*, 2019 FC 1194 at paras 23-24).

VI. Costs

[43] The Minister requested costs. Considering Mr. Bennett's financial hardship, and the various other circumstances he raised during this appeal, I exercise my discretion not to award costs pursuant to Rules 400(1) and 400(3) of the *Rules*.

VII. Conclusion

[44] The CMJ is in the best position to decide whether it is in the interest of justice to allow a matter to proceed on Status Review. In this case, the CMJ decided that it was not, only after having grappled with the relevant issues and evidence required. In coming to her decision to dismiss due to delays and non-compliance, she made no errors. This Motion is accordingly dismissed. No costs are awarded.

JUDGMENT in file T-354-21

THIS COURT'S JUDGMENT is that:

1. The Motion is dismissed.
2. There is no award as to costs.

"Alan S. Diner"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-354-21

STYLE OF CAUSE: ROGER BENNETT v MINISTER OF PUBLIC SAFETY
AND EMERGENCY PREPAREDNESS

PLACE OF HEARING: HELD BY VIDEOCONFERENCE

DATE OF HEARING: MAY 16, 2023

JUDGMENT AND REASONS: DINER J.

DATED: MAY XX, 2023

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