Federal Court of Appeal | Cour d'appel fédérale

Date: 20170306

Docket: A-431-16

Citation: 2017 FCA 42

PRESENT: STRATAS J.A.

BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT OF CANADA and THE ATTORNEY GENERAL OF CANADA

Applicants

and

ADE OLUMIDE

Respondent

Heard at Ottawa, Ontario, on March 2, 2017.

Judgment delivered at Ottawa, Ontario, on March 6, 2017.

REASONS FOR JUDGMENT BY: STRATAS J.A.

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REASONS FOR JUDGMENT

STRATAS J.A.

[1] The applicants apply for an order declaring the respondent a vexatious litigant under section 40 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 and related relief.

A. Procedural history

[2] This matter originally arose in a different proceeding involving these parties and others (file A-201-16). In that proceeding, the applicants brought a motion for relief under section 40. Relief under section 40 can be brought by way of motion: *Coote v. Lawyers' Professional Indemnity Company*, 2014 FCA 98 at para. 12.

[3] However, in response to the motion, the respondent discontinued the proceeding. Soon afterward, this Court held that the motion for relief under section 40 was not discontinued and could be converted to a stand-alone application for relief under section 40, with the motion material converted to application material: *Olumide v. Canada et al.*, 2016 FCA 287. This was done. This application (file A-431-16) has proceeded on an expedited basis in accordance with a court-ordered schedule. On the authority of *Coote v. Lawyers' Professional Indemnity Company*, 2013 FCA 143, other matters involving the respondent have been stayed pending this Court's determination of the application.

[4] The respondent has chosen not to file any material on the application.

B. The composition of the Court for this application

[5] This application is being heard and determined by a single justice designated by the Chief Justice. A single justice can determine an application under section 40. In the case of final determinations of applications for leave to appeal, applications for judicial review, appeals and

references, the Court must be comprised of no less than three justices. This includes motions that result in final determinations. See *Federal Courts Act*, section 16; *Rock-St Laurent v. Canada (Citizenship and Immigration)*, 2012 FCA 192; 434 N.R. 144.

[6] In the past, I have heard other matters involving the respondent. In one such matter (file 16-A-38), the respondent alleged that I was biased and should recuse myself. My order disposing of that matter contained certain recitals dealing with the respondent's allegation of bias:

> **AND WHEREAS** in some of the materials filed with the Court, [the respondent] has made statements suggesting that Justice Stratas is predisposed against his position;
>
> **AND WHEREAS**, in response, Justice Stratas considered whether he should recuse himself and determined that he should not for the following reasons:
>
> > The Chief Justice appointed me to deal with the latest motions in various proceedings brought by [the respondent] before the Court. I had no input into that decision. Having been appointed, I cannot recuse myself absent good legal cause.
> >
> > The law is clear that good legal cause exists if I were biased in fact against [the respondent] or his case or were otherwise unable to decide the present matter fairly. Further, good legal cause exists if the legal test for apparent bias is made out. That test is whether a reasonable, fully-informed person, thinking the matter through, would conclude that it is more likely than not that I, whether consciously or unconsciously, would not decide the present appeal fairly: *Committee for Justice and Liberty et al. v. National Energy Board et al.*, [1978] 1 S.C.R. 369 at page 394.
> >
> > On the issue of actual bias or unfairness, I confirm that I have approached and will continue to approach the present matter and any future matters involving [the respondent] with an open mind, reading his submissions and materials with an open mind. I assure [the respondent] that I have never had any ill-will or other negative sentiment against him or any of his proceedings and that remains the case today.

> On the issue of apparent bias, I find that the test is not made out. The reasonable, fully-informed person, thinking the matter through, would conclude that I am capable of deciding matters involving [the respondent] fairly and with an open mind.
>
> **AND WHEREAS** [the respondent] has made adverse statements and complaints about this Court and the judges in it and if that were alone a sufficient basis for recusal, all his proceedings would remain in limbo, unable to be determined; the common law doctrine of necessity applies in this instance;

[7] In this application, I do not have an allegation of bias before me. However, I wish to repeat and rely on the recitals I made in my previous order, quoted above. I have approached this application with the open-mindedness, independence and impartiality a judge must have.

C. The hearing of the application

[8] As is its usual practice, this Court issued an order setting the time, place and duration of the hearing. It arranged for delivery of this order to the respondent.

[9] At the time set for the hearing, the respondent was not present. The registrar opened the Court. The Court began by saying that its paramount concern at that moment was procedural fairness to the respondent. Just in case the respondent was late or lost in the building, the Court adjourned the hearing for a half hour. It asked the usher to search and call for the respondent on all floors in the building where there are courtrooms.

[10] During the adjournment, the respondent appeared in the courtroom set for the hearing and sat in the audience area. Just before the Court reopened, the respondent left. The registrar

and usher advised the Court that the respondent knew that the application was going to be heard and that within moments the hearing was going to begin in this courtroom. When the Court reopened, counsel for the applicants, an officer of the Court, confirmed this.

[11] Satisfied that the requirements of procedural fairness were met, the Court invited the applicants to make submissions. The applicants offered only a few minutes of submissions. They also presented a supplementary book of authorities consisting of orders and directions that have been issued since they filed their motion material and an updated list of the proceedings the respondent has brought in the Federal Courts. As this material consists merely of information about proceedings in this Court—information of which the Court can take judicial notice—and otherwise uncontroversial information, the Court permitted its filing.

D. Section 40 of the *Federal Courts Act*, its proper interpretation, and proceedings to declare a person a vexatious litigant

[12] There have been very few applications and motions brought in this Court under section 40 of the *Federal Courts Act*. And in those applications and motions, this Court has not said much about the interpretation and application of section 40.

[13] In my view, this has created some uncertainty. This uncertainty has had the likely effect of inhibiting parties from seeking relief under section 40 and delaying until success seems assured. This is unfortunate. Section 40 is an important tool to be used in appropriate circumstances in a timely way.

[14] Section 40 provides as follows:

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.

[15] Like all statutory provisions, section 40 must be interpreted in accordance with its text, context and purpose: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; 154 D.L.R. (4th) 193; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559. Further, we must give section 40 "such fair, large and liberal construction and interpretation as best ensures the attainment of its objects": *Interpretation Act*, R.S.C. 1985, c. I-21, s. 12.

[16] Section 40 is similar to the vexatious litigant provisions that are found in the statutes governing courts in other jurisdictions. Thus, much of their case law assists. An excellent summary of some of it appears in *Canada v. Olympia Interiors Ltd.*, 2001 FCT 859, 209 F.T.R. 182, aff'd, 2004 FCA 195, 323 N.R. 191. The Federal Court's discussion in *Olumide v. Canada*, 2016 FC 1106 is also useful.

[17] Section 40 reflects the fact that the Federal Courts are community property that exists to serve everyone, not a private resource that can commandeered in damaging ways to advance the interests of one.

[18] As community property, courts allow unrestricted access by default: anyone with standing can start a proceeding. But those who misuse unrestricted access in a damaging way must be restrained. In this way, courts are no different from other community properties like public parks, libraries, community halls and museums.

[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.

[20] This isn't just a zero-sum game where a single vexatious litigant injures a single innocent litigant. A single vexatious litigant gobbles up scarce judicial and registry resources, injuring tens or more innocent litigants. The injury shows itself in many ways: to name a few, a reduced ability on the part of the registry to assist well-intentioned but needy self-represented litigants, a reduced ability of the court to manage proceedings needing management, and delays for all litigants in getting hearings, directions, orders, judgments and reasons.

[21] On occasion, innocent parties, some of whom have few resources, find themselves on the receiving end of unmeritorious proceedings brought by a vexatious litigant. They may be

hurt most of all. True, the proceedings most likely will be struck on a motion, but probably only after the vexatious litigant brings multiple motions within the motion and even other motions too. In the meantime, the innocent party might be dragged before other courts in new proceedings, with even more motions, and motions within motions, and maybe even more.

[22] Section 40 is aimed at litigants who bring one or more proceedings that, whether intended or not, further improper purposes, such as inflicting damage or wreaking retribution upon the parties or the Court. Section 40 is also aimed at ungovernable litigants: those who flout procedural rules, ignore orders and directions of the Court, and relitigate previously-decided proceedings and motions.

[23] Section 40 exists alongside other express, implied or necessarily incidental powers the Federal Courts have to regulate litigants and their proceedings. These are found in the *Federal Courts Act* and the *Federal Courts Rules*, SOR/86-106. Other powers emanate from the Federal Courts' plenary jurisdiction to regulate their proceedings: *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626; 157 D.L.R. (4th) 385. All of these powers are specific to particular proceedings before the Courts.

[24] This sheds light on the role of section 40. Where a litigant's misbehaviour is specific to a particular proceeding and isolated in its harm and unlikely to be repeated, the usual powers to regulate litigants and their proceedings will suffice. But where a litigant's misbehaviour is likely to recur in multiple proceedings or actually recurs in later proceedings and where the

purposes of section 40 are implicated by the nature or quality of the litigant's conduct, section 40 remedies become live.

[25] A litigant's misbehaviour in just a single proceeding can result in section 40 remedies. The express text of section 40 makes this clear: it provides that where a party "has conducted a [single] proceeding in a vexatious manner," the Court "may order that no further proceedings be instituted by the person in that court": *Campbell v. Canada*, 2005 FCA 49 at para. 19.

[26] On occasion, some courts, including this Court, have characterized section 40 as being a drastic, last-resort option. It has been called a "most extraordinary" power that "must be exercised sparingly and with the greatest of care" because an individual is "entitled to access the courts": *Olympia Interiors* (F.C.A.), above at para. 6.

[27] But in characterizing section 40, care must be taken not to exaggerate it. A declaration that a litigant is vexatious does not bar the litigant's access to the courts. Rather, it only regulates the litigant's access to the courts: the litigant need only get leave before starting or continuing a proceeding.

[28] In 2000, our Court put this well:

> 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 any 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.

(*Canada (Attorney General) v. Mishra*, [2000] F.C.A. no 1734, 101 A.C.W.S. (3d) 72.)

[29] Seen in this way, section 40 is not so drastic. A litigant can still access the courts by bringing a proceeding but only if the Court grants leave. Faced with a request for leave, the Court must act judicially and promptly, considering the legal standards, the evidence filed in support of the granting of leave, and the purposes of section 40. The Court could well grant leave to a vexatious litigant who has a *bona fide* reason to assert a claim that is not frivolous and vexatious within the meaning of the case law on pleadings.

[30] What is "vexatious" for the purposes of section 40?

[31] Vexatiousness is a concept that draws its meaning mainly from the purposes of section 40. Where regulation of the litigant's continued access to the courts under section 40 is supported by the purposes of section 40, relief should be granted. Put another way, where continued unrestricted access of a litigant to the courts undermines the purposes of section 40, relief should be granted. In my view, all of this Court's cases on section 40 are consistent with this principle.

[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: see, *e.g.*, *Olympia Interiors* (F.C. and F.C.A.), above.

[34] Some cases identify certain "hallmarks" of vexatious litigants or certain badges of vexatiousness: see, for example, *Olumide v. Canada*, 2016 FC 1106 at paras. 9-10, where the Federal Court granted relief under section 40 against the respondent; and see paragraph 32 above. As long as the purposes of section 40 are kept front of mind and the hallmarks or badges are taken only as non-binding *indicia* of vexatiousness, they can be quite useful.

[35] A word of two needs to be said about proving vexatiousness. Often the record offered in support of section 40 applications is laborious to assemble and voluminous to present. It needn't always be so.

[36] Again, the issue is whether the litigant should be subject to an additional level of regulation, not whether the litigant's access to court should be forever barred. This invites focused, well-chosen evidence, not an encyclopedia of every last detail about the litigant's litigation history. In some cases, the requirement of vexatiousness can be proven by an affidavit

that provides only the most relevant information, court decisions that describe the litigant's intentions and conduct, and selected pleadings and documents that demonstrate vexatiousness.

[37] Some prosecuting these applications forget that other courts' findings of vexatiousness under similarly-worded provisions can be imported into later applications against the same litigant and can be given much weight: *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77. The wheel needn't be reinvented.

[38] Even where other courts have declared the respondent to be a vexatious litigant, the applicant must file evidence of the respondent's vexatious behaviour in this Court bearing in mind the comments in paragraph 36, above. As a legal matter, the applicant bears the legal burden of proving vexatiousness on the balance of probabilities. But as a practical matter, due to the weight that can attach to other courts' findings, a respondent might have to offer highly credible evidence in order to resist the application.

[39] Finally, a few words about the reasons for judgment in vexatious litigant applications. In matters such as this, sometimes reasons for judgment describe litigants, their conduct, and their attitudes in lurid ways that might amuse the more sophomoric among us. Happily, I have never seen that approach taken in the Federal Courts. There, the reasons have been restrained and appropriate, clinical in tone and minimalist in approach. This is as it should be. Courts should treat all litigants—even vexatious ones—with dignity and respect. To the court, the litigant may deserve to be declared a vexatious litigant. But to others, the litigant may be an employee or volunteer, a friend or acquaintance, an aunt or uncle, a parent or child—and a good one too. No

one deserves to be tarred and feathered and paraded through the town square, least of all by courts.

[40] Often little need be said in support of a finding of vexatiousness: see the summary of law on adequacy of reasons in *Canada v. Long Plain First Nation*, 2015 FCA 177, 388 D.L.R. (4th) 209 at para. 143, citing *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3; *R. v. Dinardo*, 2008 SCC 24, [2008] 1 S.C.R. 788; *R. v. Walker*, 2008 SCC 34, [2008] 2 S.C.R. 245; *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869; *Hill v. Hamilton-Wentworth Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129. In assessing adequacy, appellate courts review the reasons offered against the record and the submissions made: *R.E.M.* at paras. 35 and 55. If the record contains detail, the reasons need only summarize or say a few things. Frequently in cases such as these, less is more.

E. This case

[41] Through her delegated authority, the Attorney General of Canada has consented to this application, as is required by subsection 40(2) of the *Federal Courts Act*.

[42] On the merits of the application, the starting point is that both the Federal Court and the Ontario Superior Court of Justice have declared the applicant to be a vexatious litigant: *Olumide v. Canada*, 2016 FC 1106; order of the Ontario Superior Court of Justice, dated October 17, 2016. In these circumstances, the findings of these Courts can be considered and can be given much weight: *C.U.P.E.*, above. Further, the record shows vexatious behaviour on

the part of the respondent in other courts that mirrors his behaviour in this Court: see, most recently, the summary of conduct in *Olumide v Her Majesty the Queen in Right of Ontario*, 2017 ONSC 1201. In response, the respondent has not offered any evidence.

[43] The granting of this application is strongly supported by the purposes of section 40. In roughly three years, the respondent has brought at least 47 matters in various courts. In this Court, he has brought 18, most of which have been dismissed summarily. As for those not dismissed, the pleadings, motions and affidavits contain many scandalous and irrelevant allegations and it is not possible to see any merit in them. The respondent flouts directions and orders of this Court.

F. Postscript

[44] In the Federal Courts system, the applicants in this case are often respondents to proceedings. In some of them, they face litigants who exhibit vexatiousness. Too often though, the applicants do not start vexatious litigant applications for months, if not years, even many years. In the meantime, much damage to many is done.

[45] To reiterate, section 40 aims in part to further access to justice by those seeking the resources of the Court in a proper way. All participants in litigation—courts, parties, rule-makers and governments—must have a pro-access attitude and act upon it: *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87. And as community property, courts deserve to be protected for the benefit of all.

[46] Uncertainty in the jurisprudence might have excused the applicants' delays in the past. Now the uncertainty is gone.

[47] None of these observations are directed at counsel for the applicants who, once the motion for relief under section 40 was brought, prosecuted this matter efficiently and professionally.

G. Disposition

[48] The application is granted. The respondent shall be declared a vexatious litigant. He shall not institute new proceedings, whether acting for himself or having his interests represented by another individual in this Court, except by leave of this Court. All proceedings instituted by the respondent in this Court and currently before this Court shall be stayed. The stay shall not be lifted and the proceedings shall not continue unless leave is granted by this Court. The Registry shall neither accept nor file any document of any kind from the respondent unless it is a fully-compliant motion record filed under Rule 369 seeking leave to institute and/or continue proceedings in this Court. The Registry shall file a copy of the Court's judgment and these reasons in all affected files and shall send a copy of same to the parties in those files.

[49] The applicants request $2,240 in costs for this motion. This is more than reasonable. A judgment shall issue in accordance with the preceding paragraph, with costs to the applicants in the amount of $2,240.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-431-16
AN APPLICATION UNDER SECTION 40 OF THE *FEDERAL COURTS ACT*, R.S.C. 1985, c. F-7	
STYLE OF CAUSE:	HER MAJESTY THE QUEEN IN RIGHT OF CANADA *ET AL.* V. ADE OLUMIDE
PLACE OF HEARING:	OTTAWA, ONTARIO
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REASONS FOR JUDGMENT BY:	STRATAS J.A.
DATED:	MARCH 6, 2017

APPEARANCES:

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