Federal Court of Appeal  Cour d'appel fédérale

Date: 20190208

Docket: A-123-18

Citation: 2019 FCA 28

Present: **STRATAS J.A.**

BETWEEN:

ZOLTAN ANDREW SIMON

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Edmonton, Alberta, on December 14, 2018.

Order delivered at Ottawa, Ontario, on February 8, 2019.

REASONS FOR ORDER BY: STRATAS J.A.

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REASONS FOR ORDER

STRATAS J.A.

[1] The Attorney General moves for an order declaring the appellant a vexatious litigant under section 40 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 and for related relief. He also moves for an order dismissing this appeal.

A. Preliminary issues

[2] The style of cause is irregular in form. The proper respondent is the "Attorney General of Canada," not "Attorney General of Canada (Representing the Minister of National Revenue, Both in Their Representative Capacity)." I have amended the style of cause. This amendment does not affect the merits of the two motions.

[3] The motions were assigned to a single judge of this Court. A single judge of this Court can determine a motion to declare a litigant vexatious: see, *e.g.*, *Canada v. Olumide*, 2017 FCA 42, [2018] 2 F.C.R. 328 at para. 5; *Keremelevski v. Ukrainian Orthodox Church of St. Mary*, 2018 FCA 218 at para. 6; *Federal Courts Act*, section 16. A single judge can also order that "a proceeding previously instituted by the person in [the Court] not be continued" unless leave is later sought and granted: *Federal Courts Act*, subsection 40(1). But a single judge cannot determine a motion to dismiss an appeal: *Federal Courts Act*, section 16; *Rock-St Laurent v. Canada (Citizenship and Immigration)*, 2012 FCA 192, 434 N.R. 144 at para. 30; *Keremelevski* at para. 5.

[4] Therefore, I cannot alone determine the motion to dismiss. But full submissions in writing have been made on it. I will direct that it will be treated as a motion in writing. I will adjourn it to a three-person panel of this Court.

[5] The following are my reasons on the motion to declare the appellant a vexatious litigant. I will grant the motion, make the declaration and order certain things related to the appellant's new status as a vexatious litigant.

B. Analysis

(1) Mandatory prerequisite satisfied

[6] Under subsection 40(2) of the *Federal Courts Act*, the consent of the Attorney General is required in order for a vexatious litigant motion to be brought. Subsection 40(2) does not provide that the consent be filed. But as a factual prerequisite going to the Court's very ability to proceed with the motion, it must be formally before the Court, *i.e.*, filed.

[7] This can be accomplished by including the consent in the affidavit filed in support of the motion, by filing it with the Court at the outset of the hearing if the motion is being heard orally, or by filing it separately. Here, the consent has been separately filed with the Court.

(2) Introduction to the analysis

[8] As explained in *Olumide*, the threshold for declaring a litigant vexatious is governed by the rationales for the declaration. *Olumide* also suggests that when the regulatory effect of a vexatious litigant declaration is needed, it should be granted. I wish to say more on these and other issues.

– I –

[9] In my view, the primary rationale supporting vexatious litigant declarations is that courts "are community property that exists to serve everyone" and "have finite resources that cannot be squandered": *Olumide* at paras. 17-19.

[10] Litigants have a right of access to this community property and the Court's resources: *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59, [2014] 3 S.C.R. 31. For most litigants, the usual regulatory measures in the Rules suffice. For some, tougher regulatory measures are needed: *Fabrikant v. Canada*, 2018 FCA 171; *Fabrikant v. Canada*, 2018 FCA 206; *Fabrikant v. Canada*, 2018 FCA 224. Further, in the cases of a select few, the nature and quality of their behaviour, the actual or likely recurrence of that behaviour in multiple proceedings, and the harm they cause to other litigants and the Court make a vexatious litigant declaration necessary: *Olumide* at para. 24.

– II –

[11] The consequences of a vexatious litigant declaration can be significant. But they should not be overstated: *Olumide* at para. 27. Litigants who are declared vexatious are not prohibited from accessing the Court. Rather, they are regulated when they attempt to access the Court. They must seek the Court's leave before starting any proceeding: *Federal Courts Act*, subsection 40(1).

[12] Leave will be granted if the issue raised in a proceeding is *bona fide* and not doomed to fail. If the Court grants leave, it can impose terms providing for court supervision or court management to ensure the proceeding progresses properly. See *Olumide* at para. 29.

– III –

[13] We must be careful not to confuse unrepresented litigants who need extra attention and assistance with those who are vexatious; vexatious litigants are just a sliver of the unrepresented litigants we see. Helping the unrepresented is part of the core mission of the Court: to make justice available to our whole populace, including all those with lesser capabilities and greater challenges. We accomplish that mission primarily through a dedicated, professional registry and timely Court orders and directions. Almost all unrepresented litigants who need extra attention and assistance are open to receiving it, receive it, and advance their cases to a determination on the merits. They do not need the extra layer of regulation supplied by a vexatious litigant declaration. But undeniably some do.

[14] Some litigants are simply ungovernable. They ignore all the rules, do not respond constructively to the considerable attention and assistance courts give to them, flout court orders, and persist in litigation doomed to fail—sometimes resurrecting it after it is struck, and then resurrecting it again and again.

[15] Other litigants are simply harmful. They force opposing parties to defend unmeritorious or duplicative litigation and drain the scarce and finite resources of the court by the quantity of

pointless litigation, the style or manner of their litigation, their motivations, intentions, attitudes and capabilities while litigating, or any combination of these things.

[16] At a certain point, enough is enough and practicality must prevail: the extra layer of regulation supplied by a vexatious litigant declaration is necessary, just and responsible. See generally *Olumide* at paras. 20-22 and 32-34.

– IV –

[17] The rationales behind vexatious litigant declarations, the consequences of making these declarations and the warning I have sounded about confusing unrepresented litigants with vexatious litigants all shed light on the proper threshold for vexatious litigant declarations.

[18] The threshold is best expressed by a question: does the litigant's ungovernability or harmfulness to the court system and its participants justify a leave-granting process for any new proceedings?

[19] This is nothing more than a more concrete exemplification of the test set out in *Olumide* at para. 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.

[20] The party seeking to impose this regulatory requirement upon a litigant bears the burden of adducing evidence to support it. But that burden can be met in many ways. Evidence that other jurisdictions have declared the litigant to be vexatious can lighten that burden considerably. If unanswered, that evidence will go a very long way towards establishing that the regulatory leave requirement should be imposed. See *Olumide* at paras. 37-38.

(3) Application of these principles to this case

[21] The Attorney General submits that a vexatious litigant declaration is required to regulate the appellant's use of court resources. To support this, the Attorney General cites the volume of proceedings initiated by the appellant, the frivolous nature of many of these proceedings, the repetition and similarities across the various proceedings, and the appellant's demonstrated tendency to appeal both interlocutory and final decisions automatically, regardless of merit.

[22] The burden inflicted upon the Attorney General and parties caught up in these proceedings has been massive and has lasted several years.

[23] Specifically, since 2007 the appellant has started more than twenty proceedings in various courts, including actions, applications for judicial review, appeals, applications for leave to the Supreme Court of Canada, and irrelevant and unmeritorious constitutional questions. All of these proceedings concern the same underlying facts: an immigration sponsorship debt accrued by the appellant in 2000 and the rejection of a subsequent sponsorship application in 2006. Frequently, arguments are repeated and issues are re-raised after final determinations have

been made. The appellant's pattern of litigation behaviour—described in the Attorney General's submissions and shown by the appellant's response and the record in this proceeding—exhibits many badges of vexatious behaviour: *Olumide* at para. 34.

[24] More can be said about the vexatious quality of the appellant's litigation but I need not say more: *Olumide* at paras. 39-40.

[25] The Attorney General cites the Supreme Court of British Columbia's vexatious litigant declaration against the appellant under the *Supreme Court Act*, R.S.B.C. 1996, c. 443, s. 18: *Simon v Canada (Attorney General)*, 2017 BCSC 1438 (leave to appeal denied, 2018 BCCA 54). That provision is essentially the same as section 40 of the *Federal Courts Act*. The British Columbia declaration deserves significant weight: *Olumide* at para. 37; *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77.

[26] In this case, the question before me is this: does the litigant's ungovernability or harmfulness to the court system and its participants justify a leave-granting process for any new proceedings? I answer the question in the affirmative.

C. A recent attempt to file a notice of appeal

[27] After the hearing of the Attorney General's motion for a declaration that the appellant is a vexatious litigant, the appellant presented a new notice of appeal to the Registry. The notice of appeal purports to appeal a direction dated October 30, 2018 of the Federal Court concerning

whether a new proceeding could be filed there. The Registry sent it to this Court for a ruling under Rule 72 regarding whether it can be filed.

[28] Directions of the Federal Court cannot be appealed: *Tajdin v. His Highness Prince Karim Aga Khan*, 2012 FCA 238; *Froom v. Canada*, 2003 FCA 141, 303 N.R. 362. In this case, I am satisfied that the direction in this case falls within the scope of that rule. Therefore, I direct that the notice of appeal not be filed.

[29] Even if the direction could be appealed, I would still direct that the notice of appeal not be filed. Now that the appellant has been declared to be a vexatious litigant, first he has to seek leave to start a new proceeding.

D. Disposition

[30] I will issue an order declaring the appellant a vexatious litigant, with costs to the Attorney General. The appellant 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 appellant in this Court and currently before this Court will be stayed. The stay shall not be lifted and the proceedings shall not continue unless leave is granted by this Court. The Registry shall file a copy of the Court's order and these reasons in all affected files and shall send a copy of same to the parties in those files. The notice of appeal recently presented by the appellant concerning the October 30, 2018 direction of the Federal Court shall

not be filed. The Attorney General's motion to dismiss this appeal will be referred to a panel of this Court for determination.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-123-18
MOTION DEALT WITH IN WRITING BY APPEARANCES OF PARTIES	
STYLE OF CAUSE:	ZOLTAN ANDREW SIMON v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	EDMONTON, ALBERTA
DATE OF HEARING:	DECEMBER 14, 2018
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DATED:	FEBRUARY 8, 2019

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