Federal Court of Appeal | Cour d'appel fédérale

Date: 20110208

Docket: A-343-10

Citation: 2011 FCA 48

Present: **LAYDEN-STEVENSON J.A.**

BETWEEN:

JOHN FREDERICK CARTEN

and

KAREN AUDREY GIBBS

Appellants

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA, JEAN CHRÉTIEN, EDDIE GOLDENBERG, SERGIO MARCHI, LLOYD AXWORTHY, PIERRE PETTIGREW, JOHN MANLEY, BILL GRAHAM, JIM PETERSON, PAUL MARTIN, DAVID EMERSON, TIM MURPHY, HER MAJESTY THE QUEEN IN RIGHT OF BRITISH COLUMBIA, MICHAEL HARCOURT, GLEN CLARK, UJJAL DOSANJH, GORDON CAMPBELL, ATTORNEY GENERAL OF CANADA, ALLAN ROCK, ANNE McLELLAN, MARTIN CAUCHON, IRWIN COTLER, ATTORNEY GENERAL OF BRITISH COLUMBIA, COLIN GABLEMAN, GEOFF PLANT, WALLY OPPAL, CANADIAN JUDICIAL COUNCIL, JEANNIE THOMAS, NORMAN SABOURIN, ANTONIO LAMER (deceased), BEVERLEY McLACHLIN, ALLAN McEACHERN, PATRICK DOHM, DONALD BRENNER, BRYAN WILLIAMS, JEFFERY OLIPHANT, JOHN MORDEN, JOSEPH DAIGLE, THEMIS PROGRAM MANAGEMENT AND CONSULTING LTD., THE LAW SOCIETY OF BRITISH COLUMBIA, THE LAW SOCIETY OF ALBERTA, DAVID VICKERS (deceased), ROBERT EDWARDS (deceased, JOHN BOUCK (deceased), JAMES SHABBITS, HOWARD SKIPP, CYRIL ROSS LANDER, RALPH HUTCHINSON (deceased), MICHAEL HALFYARD, HARRY BOYLE, SID CLARK (deceased), ALLAN GOULD, ROBERT METZGER, BRIAN KLAVER, JOHN MAJOR, JOHN HORN, BARBARA ROMAINE, ADELE KENT, SAL LOVECCHIO,

DONALD WILKINS, ROY VICTOR DEYELL, TIMOTHY LEADEM, WILLIAM PEARCE, LISA SHENDROFF, ANN WILSON, RICHARD MEYERS, GILLIAN WALLACE, MAUREEN MALONEY, BRENDA EDWARDS, STEPHEN OWEN, DON CHIASSON, CRAIG JONES, JAMES MATTISON, McCARTHY TETRAULT L.L.P., HERMAN VAN OMMEN, STEVE KLINE, LANG MICHENER L.L.P., THE CORPORATION OF THE CITY OF VICTORIA, JOHN DOE AND JANE DOE

Respondents

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on February 08, 2011.

REASONS FOR ORDER BY: LAYDEN-STEVENSON J.A.

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Respondents

REASONS FOR ORDER

LAYDEN-STEVENSON J.A.

[1] These reasons address five motions pursuant to Rule 416(1) of the *Federal Courts Rules*, SOR/98-106 (the Rules). Various, but not all, respondents on the appeal (defendants in the underlying action) have moved for orders for security for costs. I will refer to them as respondents or defendants, interchangeably.

[2] The appeal is from the judgment of Gauthier J. of the Federal Court (the judge) dismissing an appeal from an order of Prothonotary Lafrenière (the prothonotary) with costs to each defendant in the lump sum amount of $750 (all inclusive): 2010 FC 857. The prothonotary struck out the appellants' statement of claim, without leave to amend, with costs payable to the defendants other than the defendant Themis Program Management and Consulting Ltd. (Themis): 2009 FC 1233.

[3] The appellants issued a statement of claim on January 21, 2008 naming Her Majesty the Queen in Right of Canada (the Federal Crown) as the primary defendant in relation to various alleged acts and omissions concerning the bulk water export policies of Canada and the Province of British Columbia. The statement of claim names a host of defendants alleged to be either officers,

employees, agents or sub-agents of the Federal Crown. As the prothonotary put it, the statement of claim alleges “widespread conspiracy and collusion among those in power, including past, present and deceased members of both the British Columbia and federal governments and the judiciary, to personally injure the appellants.”

[4] The motions before me are those of the respondent Themis, the respondent Lang Michener LLP (Lang Michener), the respondents Law Society of British Columbia, McCarthy Tetrault LLP (McCarthy Tetrault) and Herman Van Ommen, the respondent comprising what the prothonotary characterized as the British Columbia Crown (the BC Crown), that is, those individuals alleged to be acting for the BC Crown and the respondent comprising the Federal Crown defendants, that is those individuals alleged to be acting for the Federal Crown.

[5] Although the respondent judicial defendants and the respondent Law Society of Alberta have not moved for orders for security for costs, they applied to the Federal Court (along with the above-noted respondents except Themis) for orders striking the portions of the statements of claim relating to each of them, without leave to amend.

[6] The prothonotary ordered that: the statement of claim be struck out, without leave to amend; the action be dismissed with costs payable by the appellants to the defendants (other than Themis); the appellants’ motion for default judgment against the defendant Themis be dismissed; the motion of Themis for an extension of time to serve and file a statement of defence be dismissed. In cogent and comprehensive reasons, the prothonotary concluded that: the statement of claim discloses no

reasonable cause of action; the Court does not have jurisdiction over the defendants, except for the Federal Crown defendants; the allegations made by the appellants are scandalous, frivolous and vexatious; and the proceeding constitutes an abuse of the process of the Court.

[7] As stated earlier, the judge dismissed the appellants' appeal of the prothonotary's order with lump sum costs of $750 to each defendant. In equally cogent and comprehensive reasons, the judge reviewed the applicable principles of law. She then applied those principles to the matter before her and concluded it is clear and obvious that the appellants' claim fails against all non-Federal Crown defendants for want of jurisdiction. She also concluded that the claims against all defendants other than the Federal and BC Crown should also be dismissed as scandalous, frivolous or vexatious. With respect to the Federal Crown defendants, the judge concluded that the allegations linking the actions of those defendants to the Federal Crown on the basis of a *de facto* agency are not supported. Having carefully considered the very few allegations left to support the claim against the Federal Crown defendants, the judge concluded that the claim is purely speculative and hypothetical and ought to be dismissed without leave to amend.

[8] Further references in these reasons to the "defendants" or the "respondents" should be taken to refer to the moving parties. The respondents have established that the costs awarded by the judge remain unpaid, the appellants reside in British Columbia and have no assets. The respondents also maintain there is reason to believe that the action is frivolous and vexatious. Consequently, the prerequisites of Rule 416(1)(g) are met and the requested order should follow.

[9] The appellants "accept and do not dispute the allegation of impecuniosity." Rather, they contend that they have been denied a full and fair hearing on the merits of their case and that it is an inappropriate exercise of this Court's discretion to order them to pay security for costs. Moreover, Rule 3 provides that the Rules are to be interpreted and applied so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits. According to the appellants, granting the requested order would run afoul of this mandatory direction. The appellants urge the Court to deny the equitable relief sought by the respondents.

[10] Having reviewed the statement of claim, the notice of appeal and the appellants' submissions, and having carefully evaluated the positions of all concerned, I am of the view that the respondents' request ought to be granted. They have established a *prima facie* right to security for their costs. Although I have taken into account the respondents' right to indemnity, I have also considered that any security imposed should not be so oppressive as to prevent the continuation of a meritorious law suit.

[11] There is an obligation on the appellants to provide frank and full disclosure regarding impecuniosity. Bare assertions are insufficient; particularity is required: *Chaudry v. Canada (AG)*, 2009 FCA 237, 393 N.R. 67. There is no specificity here, but I attach little significance to this omission. In my view, the appellants' appeal is devoid of merit.

[12] The notice of appeal comprises some 16 pages. It contains allegations of error that are vague, imprecise, redundant and constitute mere opinion. I am satisfied that, distilled, the

contents of the notice of appeal give rise to the “allegations of error” discussed in the paragraphs that follow.

[13] The notice of appeal is replete with allegations that the judge’s decision should be overturned because the judge was biased against the appellants. The assertions go so far as to state that the judge did not write the reasons for judgment. This is an extremely serious allegation. There is a presumption of judicial impartiality which can be rebutted only by clear evidence that would convince a reasonable and informed person that the judge was unlikely to decide the matter fairly: *R. v. R.D.S.*, [1997] 3 S.C.R. 484. There is no basis in the notice of appeal to support such an allegation. Rather, the appellants attack the quality and content of the reasons for judgment. This, in turn, gives rise to another problem, that is, appeals are taken from judgments, not from the reasons for judgment: *Froom v. Canada* (*Minister of Justice*), [2005] 2 F.C.R. 195 (C.A.); *Devinat v. Canada (Immigration and Refugee Board)*, [2000] 2 F.C.R. 212 (C.A.). Moreover, as stated previously, the judge reviewed the applicable legal principles and provided comprehensive and detailed reasons.

[14] The appellants quarrel with the judge’s failure to admit new evidence. The judge considered the appellants’ request and determined that the interests of justice did not merit the admission of the proposed evidence, which she held was comprised of nothing more than scandalous and gratuitous allegations that could have no impact whatsoever on the merits of the appeal before her. The appellants’ contention does not disclose any error. The appellants also claim that the judge erred in law by relying on a “hearsay” statement to conclude that Mr. Carten has devoted himself almost

entirely to the dispute underlying the matter since 1996. Again, no error is disclosed by this allegation. The judge merely concluded, in the circumstances, that the appellants had ample time to formulate a theory of the case and put their best case forward. The judge's comment was immaterial to the result.

[15] The appellants assert that the judge impermissibly required them to prove the allegations in the statement of claim when such allegations should be presumed to be true. That is not correct. The judge required the appellants to plead a theory of their case supported by underlying facts to sustain the assertions of government control over elected officials and law firms.

[16] The appellants contend that the judge inappropriately considered the jurisdiction of the Federal Court as if each defendant had been sued independently of the Federal Crown when conspiracy was alleged. However, the judge did consider the alleged relationships between the individual non-Federal Crown defendants and the Federal Crown defendants to ascertain whether they could support a basis for Federal Court jurisdiction over the action. As for the assertion that the judge erred in finding that *de jure* federal control is required to found Federal Court jurisdiction, the judge noted that, in any event, the appellants had not pleaded facts upon which *de facto* control could be found and that the pleading failed on either test. Last, the appellants state, without more, that the judge incorrectly awarded costs against them. It is trite law that costs normally follow the event. The appellants offer no basis to justify any departure from the general rule.

[17] In my view, for these reasons, this appeal has no reasonable prospect of success and it is therefore frivolous and vexatious. This finding, coupled with the lack of sufficient assets to pay the costs of the respondent, if ordered to do so, dictates that the requested order be granted.

[18] Each of the respondents has provided a draft bill of costs based on Column III of Tariff B of the Rules. The bills of costs are similar in range. I have averaged the units, recognizing that this is not an exact science, and have reduced the disbursements for which particularity was not provided. In the end, I have concluded that each of the respondents should be entitled to $2,000. The order for security for costs therefore should specify the total amount of $10,000, including disbursements.

[19] The appellants have requested, if the respondents' request is granted, that they be given five years within which to comply with the order. Although some time is appropriate, five years is simply not practicable. The appellants should have six months to comply with the order for security for costs.

[20] None of the respondents requested costs of this motion, therefore, I would not award costs.

"Carolyn Layden-Stevenson"

J.A.