Federal Court Cour fédérale

Date: 20170609

Docket: T-1958-16

Citation: 2017 FC 563

[ENGLISH TRANSLATION]

Montréal, Quebec, June 9, 2017

PRESENT: The Honourable Madam Justice St-Louis

BETWEEN:

RICHARD TIMM

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] Richard Timm is appealing a decision of Prothonotary Morneau [the prothonotary] that granted the motion for security for costs filed by the Attorney General of Canada [AGC] and ordered Mr. Timm to provide security of $6640.00 on or before April 17, 2017, otherwise his

application for judicial review would be dismissed and the case suspended until said security was provided.

[2] This appeal is pursuant to the application for judicial review that Mr. Timm filed on September 30, 2016, to challenge the decision at Step Three made on July 26, 2016, by Senior Deputy Commissioner, Anne Kelly, in response to his grievance.

[3] In this grievance, Mr. Timm argued that he had been the victim of harassment and discrimination and that his physical and mental health had suffered as a result of the use of nightlights by Correctional Service of Canada [CSC] officers at the La Macaza institution where he was detained at the time. The Senior Deputy Commissioner upheld the grievance in part, but dismissed the allegation of discrimination, which she considered without merit because Mr. Timm did not base it on "any prohibited grounds of discrimination."

[4] Another grievance (this one collective) of which Mr. Timm is one of the signatories, has also been filed to challenge the same practice, and a decision at Step Three is awaited in this case.

[5] Moreover, as at January 5, 2017, Mr. Timm owed the AGC the sum of $32,394.55 in unpaid costs, and he was paying off his debt with $15.88 payments every two weeks.

[6] In this context, the AGC filed a motion for security for costs under Rules 416(1)(f) and (g) of the *Federal Courts Rules*, SOR/98-106 [Rules], calling for payment of a sum of $6640.00 and

the suspension of the current application for judicial review until this sum had been paid. The AGC then argued that Mr. Timm owed him unpaid costs, that his September 30, 2016, application for judicial review was frivolous or vexatious and that he did not have sufficient assets to pay the costs if he were ordered to do so.

[7] Mr. Timm objected to this motion, first, arguing that his application was not frivolous or vexatious, and second, citing Rule 417, arguing his impecuniosity and the merit of his application for judicial review. He also argued that the AGC's motion constituted an abuse of process seeking to prevent the prosecution of the case.

[8] As mentioned above, on March 17, 2017 the prothonotary granted the AGC's motion and ordered Mr. Timm to provide security of $6640.00 on or before April 17, 2017, otherwise his application for judicial review would be dismissed and the case suspended until said security was provided.

[9] For the reasons set forth below, the Court considers that the prothonotary did not commit a palpable and overriding error in finding that Mr. Timm did not prove his impecunious state and the merit of his application, and will therefore dismiss his appeal.

II. Impugned decision

[10] In his decision, the prothonotary first noted that Mr. Timm did owe the AGC the sum of $32,394.55 for unpaid costs, as at January 5, 2017, and found that the AGC met the requirements

set out in Rule 416(1)(f). Having made this finding, the prothonotary considered that he did not have to rule on the other ground raised by the AGC, which is stipulated in Rule 416(1)(g).

[11] The prothonotary then considered that Mr. Timm had not "demonstrated his impecunious state and the merits of his application by providing evidence that satisfied the requirements of case law" and therefore found that, in this case, there was no reason to deny the security solicited by the AGC pursuant to Rule 417.

[12] Finally, the prothonotary indicated that he did not view the AGC's motion as an abuse of process seeking to prevent prosecution of the case.

[13] Since the prothonotary found that Mr. Timm had not demonstrated his impecunious state and the merits of his application by providing evidence that satisfied the requirements of case law, it seems appropriate for the Court to detail the evidence submitted by the parties pursuant to the motion for security.

[14] To support his motion for security, the AGC filed an affidavit by Rosemary Onyeuwaoma, financial officer at the Correctional Service of Canada (CSC)'s Regional Comptroller's Office in Quebec, substantiating the amounts owed by Mr. Timm for costs; an affidavit by Claudia Lapolla, legal assistant at Justice Canada's Quebec Regional Office, supporting the decisions involving Mr. Timm and the estimated costs involved in the underlying judicial review; and an affidavit by Guy Poudrier, Deputy Warden of the La Macaza Institution,

detailing the changes to practices regarding the use of nightlights and work on installing individual [light] switches in the cells.

[15] In order to object to the AGC's motion for security and to cite the application of Rule 417, Mr. Timm filed an affidavit dated March 6, 2017, in which he made the following statements:

- He has been in detention since 1995;
- On February 12, 2016, he brought a motion to obtain Commissioner's Directive 566-4 allowing officers to turn on the nightlights in his cell at all hours of the night;
- In February 2016, he participated in a collective grievance, which was dismissed by the complaint and grievance coordinator. Following this dismissal, he filed an individual grievance, which he took to the Third Step. On August 30, 2016, he was informed that his third level grievance had been upheld in part;
- On September 30, 2016, the allegations of discrimination having been dismissed, he took this decision to judicial review;
- He receives a salary of $63.50 every two weeks;
- Because he has been in custody for more than 22 years and has never been release, he cannot obtain a loan from any financial institution;
- The only assets he has are in his inmate account and amount to $172.02.
- He is paying $15.88 every two weeks to reimburse the AGC for the unpaid costs and has been making these payments since 2013 from his inmate account;
- He has no contact with the members of his family, except for his biological mother;
- His contacts with his biological mother are very limited, and he cannot obtain any financial assistance from her.

[16] Mr. Timm attached the following documents to the affidavit:

- RT-1: Initial grievance dated February 26, 2016;
- RT-2: Third level grievance dated March 22, 2016;
- RT-3: Response to the final grievance dated July 26, 2016;
- RT-4: Notice of Application for judicial review dated September 30, 2016;
- RT-5: A bundle of the inmate's income statements, one for the period from February 1 to 15, 2017 showing a balance of $185.99 and a debt of $32,345.54, and the other from February 15 to March 1, 2017 showing a balance of $172.02 and a debt of $32,329.66.

III. Issues

[17] The Court must confirm the applicable standard of review and then examine whether the prothonotary erred in his decision regarding Rule 416(1)(g) and the one regarding Rule 417.

IV. Positions of the parties

A. *MR. TIMM'S POSITION*

(1) Standard of review

[18] Although his factum did not specify the applicable standard of review, Mr. Timm's counsel confirmed the application of the principles established in *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215 [*Hospira*] at the hearing.

[19] Mr. Timm argued that the AGC's motion constituted an abuse of process seeking to prevent his application for judicial review from being debated on its merits. According to him, the order issued by the prothonotary was harmful to him and was based on an erroneous finding of fact. More specifically, he claimed that (1) the application for judicial review procedure was

not frivolous or vexatious and therefore Rule 416(1)(g) did not apply; (2) Rule 417 allowed him to impede the motion because he satisfied the definition of impecuniosity provided by the case law of this Court; and (3) because his case had merit.

(2) Rule 416(1)(g): frivolous or vexatious application

[20] Mr. Timm first cited Rule 416(1)(g) and argued that the application for judicial review that he initiated was not frivolous or vexatious, despite the fact that the prothonotary did not rule on this issue.

[21] Mr. Timm alleged that he was qualified to file his individual grievance at the various levels and that he should be able to have his decision at Step Three reviewed. According to him, his individual appeal was unique and completely separate from the collective grievance.

[22] Mr. Timm also said that he has always acted in good faith in legal proceedings and continued to do so in this case.

(3) Rule 417: impecuniosity

[23] Mr. Timm referred to the following statement of the Federal Court of Appeal in *Sauve v. Canada*, 2012 FCA 287 [*Sauve*]: “fairness also requires that when it is clear that the effect of an order for security for costs would be to preclude an impecunious plaintiff from advancing an otherwise meritorious claim, security for costs in favour of the defendant should usually be denied” (at paragraph 7).

[24] Mr. Timm submitted that upholding the prothonotary's order would cause him harm because he would be deprived of the option to assert his rights. He again relied on the statements of the Federal Court of Appeal: "though security for costs is a tool in the furtherance of the efficient and orderly administration of justice, in determining if such security is required, courts must ensure not only that the justice system works efficiently, but also that it works fairly for all the parties involved" (*Sauve* at paragraph 7).

[25] Mr. Timm argued that the inmate statement of account that he filed with the prothonotary, which showed a balance of $172.02 on March 1, 2017, demonstrated his impecuniosity, all the more so since he had been incarcerated since 1995, and he said that he could not obtain a bank loan because he had never been released. He also reiterated that he could not consider the option of asking members of his family to provide him with financial assistance given that he did not have any contact with them, except for the tenuous contact with his biological mother.

[26] Mr. Timm submitted that access to justice should not depend on his financial capacity and that initiating a motion for security for costs bordered on using a back-door method to avoid a ruling on the merits.

[27] At the hearing, Mr. Timm's counsel added that impecuniosity should be considered in a special way because Mr. Timm had been in custody for 22 years, and his situation was quite different from that of other applicants referred to in other decisions of the Court. Mr. Timm's counsel admitted that the prosecutor's decision would not be erroneous if Mr. Timm were not an inmate. According to this position, the burden of proof required to demonstrate impecuniosity

should be contextualized in order to take into account the particular circumstances of Mr. Timm, who filed all the evidence he could, given his situation.

(4) Rule 417: merit of his application for judicial review

[28] Mr. Timm submitted that it would be unfair to prevent him from pursuing his application for judicial review since he was qualified to do so, especially in view of the fact that the third level grievance was upheld in part, forcefully demonstrating the merits of his challenge.

[29] Mr. Timm maintained that the actions of the CSC were inconsistent with the CSC's own directives and that his transfer from La Macaza to another institution did not alter the fact that he suffered discrimination for several months while he was incarcerated there.

[30] According to Mr. Timm, the issues raised in his case are of great importance for a federal inmate. He also submitted that his application for judicial review was almost certain not to fail (*Early Recovered Resources Inc. v. Gulf Log Salvage Co-Operative Assn.*, 2001 FCT 524 at paragraph 30 [*Early Recovered Resources*]) because it arose from discriminatory acts against him and that these same acts were made, knowingly and wilfully, in order to disrupt his quality of life.

B. *AGC's position*

(1) Standard of review

[31] Regarding the standard of review, at the hearing, the AGC also referred to the standard set in the Federal Court of Appeal's decision in *Hospira*.

[32] The AGC submitted that the prothonotary did not commit a palpable and overriding error in law or in assessing the facts that would warrant intervention by this Court.

[33] The AGC submitted that Mr. Timm did not specify which principle of law the prothonotary allegedly misapplied or which facts he would have palpably misapprehended. He also submitted that the April 18, 2017 affidavit, filed by Mr. Timm as part of this appeal, contained new evidence because the facts alleged at paragraphs 10, 11, 16 and 18 were not in the affidavit that he filed in response to the motion for security.

(2) Rule 416(1)(g): frivolous or vexatious application

[34] The AGC noted that the prothonotary did not deem it necessary to decide on the application of Rule 416(1)(g), and submitted that only the possible application of Rule 417 was in dispute.

(3) Rule 417: impecuniosity

[35] The AGC maintained that the prothonotary's decision was not erroneous. The Court's case law has repeatedly stated the factors to be considered in order to establish a state of impecuniosity.

[36] In this case, Mr. Timm did not satisfy these criteria. He did not prove that he attempted to borrow money, did not provide bank statements from outside the penitentiary, and did not explain why he was unable to retain any assets prior to his incarceration.

[37] As indicated above, the AGC also argued that the facts alleged in paragraphs 10, 11, 16 and 18 of Mr. Timm's affidavit were not before the prothonotary and can therefore not be considered by this Court, namely:

> 10. I do not own any property other than my personal belongings in my cell at the Federal Training Centre penitentiary;
>
> 11. I do not own any real estate and have no property;
>
> 16. I asked my biological mother for financial assistance, but she told me she did not have the means, given her low income;
>
> 18. I submit that the order issued on March 17, 2017, by Prothonotary Richard Morneau is causing and could cause me serious harm by preventing me from defending myself against the reprehensible acts of the CSC, as shown in exhibit RT-6 (Order dated March 17, 2017).

[38] According to case law, Mr. Timm had to ensure that he did not leave any important issues unanswered before the prothonotary, which he did not do.

[39] The AGC argued that the evidence of impecuniosity applies to everyone, even inmates, because they do not benefit from a presumption of impecuniosity under Rule 417.

(4) Rule 417: merit of the application for judicial review

[40] The AGC maintained that the prothonotary did not err. He argued that Mr. Timm's application for judicial review had expired because (1) the disputed practice regarding the use of nightlights no longer had any impact on Mr. Timm since he was transferred to the Federal Training Centre on April 7, 2016; and (2) the La Macaza institution had implemented measures that significantly modified the use of nightlights since the Applicant's grievance was originally filed. As a result, the situation described in the application no longer exists.

[41] The AGC submitted that Mr. Timm claimed to have been a victim of discrimination as a result of a practice that was applied equally to all La Macaza inmates, without, however, identifying any prohibited grounds of discrimination. The AGC stressed that Mr. Timm did not provide an explanation—either in his trial affidavit or in the affidavit supporting this appeal—regarding the importance or merit of his application for judicial review.

[42] Given that the test of Rule 417 is conjunctive, even if Mr. Timm had managed to prove his impecuniosity, he cannot rely on Rule 417 because he did not demonstrate the merits of his application for judicial review.

V. Analysis

A. *Standard of review*

[43] The Federal Court of Appeal recently determined that our Court must review a discretionary decision of a prothonotary in accordance with the standard developed by the Supreme Court of Canada in *Housen v. Nikolaisen*, 2002 SCC 33. Thus, "with respect to factual

conclusions reached by a trial judge, the applicable standard was that of palpable and overriding error. It also stated that with respect to questions of law and questions of mixed fact and law, where there was an extricable legal principle at issue, the applicable standard was that of correctness" (*Hospira* at paragraph 66).

[44] In this case, the Court is hearing an appeal of a discretionary decision of the prothonotary (*Swist v. Meg Energy Corp,* 2016 FCA 283 at paragraph 15 [*Swist*]). Thus, it is not for the Court to determine whether or not Mr. Timm is impecunious or whether his application for judicial review has merit. Rather, it must determine whether the prothonotary's findings in this regard are tainted by a palpable and overriding error.

[45] In this regard, the Federal Court of Appeal in *Manitoba v. Canada*, 2015 FCA 57 (at paragraph 9, citing *Canada v. South Yukon Forest Corporation,* 2012 FCA 165 at paragraph 46) recently pointed out the "high threshold" that has to be met to demonstrate "palpable and overriding" error:

> Palpable and overriding error is a highly deferential standard of review. "Palpable" means an error that is obvious. "Overriding" means an error that goes to the very core of the outcome of the case. When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall. [Citations omitted.]

B. *Rule 416(1)(g): frivolous or vexatious application*

[46] As mentioned above, the prothonotary did not find that the application for judicial review was frivolous or vexatious as Mr. Timm claimed. Instead, he determined that he did not have to rule on this allegation, because he had already decided on the application of Rule 416(1)(f).

[47] As the prothonotary indicated in his decision, the party that is citing Rule 416(1)(f) does not have to satisfy any requirements other than those contained in this paragraph, i.e. that "the defendant has an order against the plaintiff for costs in the same or another proceeding that remain unpaid in whole or in part" (see *Stubicar v. Canada (Deputy Prime Minister)*, 2015 FC 1034 at paragraph 9).

[48] Once this fact has been established, Rule 417 provides grounds for refusing to order the provision of security if the party citing the Rule proves its impecuniosity and if the Court is convinced of the merits of the case. It is a conjunctive test designed to prevent financial considerations from impeding access to justice (*Mapara v. Canada (Attorney General)*, 2016 FCA 305 at paragraphs 6–7 [*Mapara*]; *Nicholas v. Environmental Systems (International) Limited*, 2009 FC 1160 at paragraph 20 [*Nicholas*]).

C. *Rule 417: impecuniosity*

(1) Evidence of impecuniosity

[49] Before the prothonotary, Mr. Timm was required to prove, on a balance of probabilities, that he was impecunious (*Heli Tech Services (Canada) Ltd. v. Weyerhaeuser Company*, 2006 FC 1169 at paragraph 2 [*Heli Tech Services*]; *Fortyn v. Canada* (2000), 191 FTR 12 at paragraph 21 [*Fortyn*]). As to the evidence, "a high standard is expected; frank and full disclosure is required" (*Heli Tech Services* at paragraph 8; also see *Chaudhry v. Canada (Attorney General)*, 2009 FCA 237 at paragraph 10) so that there be no unanswered question (*Fraser v. Janes Family Foods Ltd.*, 2012 FCA 99 at paragraph 37 [*Fraser*]).

[50] As mentioned above, Rule 417 may be exercised at the Court's discretion (*Swist* at paragraph 15) "and requires the Court to balance a number of factors, including the strength of the evidence before the Court" (*Coombs v. Canada*, 2008 CF 837 at paragraph 4 [*Coombs*]). In this regard, a bald statement from the Applicant indicating that he is impecunious is insufficient (*Sauve* at paragraph 9; *Fortyn* at paragraph 21). The Applicant has to show that he does not have access to funding (*Fraser* at paragraph 38). As the Federal Court of Appeal indicated in *Sauve*, at paragraph 10:

> Material evidence must be submitted in order to sustain a claim of impecuniosity, including complete and clear financial information presented in a comprehensible format. Tax returns, bank statements, lists of assets, and (where possible) financial statements should be submitted. Evidence of the impracticability of borrowing from a third party to satisfy the security order should also be provided. The possibility of accessing family and community resources should be considered. No material issue should be left unanswered.

[51] Thus, an applicant who alleges that he has no source of income other than his Canada Pension and Old Age Security Pension and provides an affidavit to this effect, but does not attach exhibits showing his bank balances or any other financial data (*Coombs* at paragraph 11) has not demonstrated his impecuniosity. The Court will also hold an applicant at fault for failing to provide sufficient evidence that he cannot borrow money from family members, especially when he had already received such financial assistance in the past (*Mapara* at paragraph 13). It is appropriate to look at other sources of funds that may be available to the litigant including those held by close family members (*Nicholas* at paragraph 24). In *Mapara*, for example, the Court criticized the affidavits from the Respondent's family members because they were short on particulars that could have explained why they were no longer able to assist the Respondent.

[52] On the contrary, in *Leuthold v. Canadian Broadcasting Corporation*, 2013 FCA 95, the Federal Court of Appeal was convinced that the appellant was impecunious. Her affidavit and the supporting exhibits that she provided showed that her average yearly taxable income was less than $15,000.00 US and her assets were of limited value.

[53] Overall, the decision-maker who is called to apply Rule 417 must assess an applicant's overall financial situation (*Mapara* at paragraph 12).

(2) Evidence that Mr. Timm submitted to the prothonotary

[54] In the case before us, the prothonotary found that Mr. Timm did not prove his impecuniosity by providing evidence that satisfied the requirements of case law.

[55] We should bear in mind that to substantiate his impecuniosity, Mr. Timm limited the evidence that he filed with the prothonotary to his affidavit and the documents described at paragraphs 15 and 16 of this judgment.

(3) Finding on the evidence of impecuniosity

[56] The Court finds that the evidence filed with the prothonotary is laconic and specifically notes the absence of information regarding Mr. Timm's assets or lack of assets outside prison, the absence of an affidavit from his biological mother regarding her financial situation and her inability to lend money to Mr. Timm, as well as the absence of documents confirming that Mr. Timm could not borrow from [financial] institutions.

[57] Thus, given (1) the burden of proof that an individual must meet to prove his impecuniosity; (2) the factors set out in the case law regarding the burden of proof; (3) that the Court cannot create a special exemption for inmates that is not stipulated in the Rules; (4) documents that Mr. Timm filed with the prothonotary; and (5) the discretion conferred on the decision-maker, the Court cannot find that the prothonotary committed a palpable and overriding error in determining that the evidence produced was insufficient to prove a state of impecuniosity "to the extent required by case law."

[58] The Court could end its review here, because the test of Rule 417 is conjunctive. However, it seems appropriate to address the merits of Mr. Timm's application for judicial review.

D. *Rule 417: merit of the application for judicial review*

(1) Evidence of the merit of the application for judicial review

[59] With respect to the requirement that the application have merit, both parties referred to this Court's ruling in *Early Recovered Resources*, in which the criterion is discussed as follows at paragraph 30:

> As I noted earlier the Ontario test, as set out in Orkin, for allowing an impecunious corporate plaintiff to proceed without posting security for costs, is that the claim be one which the plaintiff establishes not merely as likely to succeed, but as almost certain not to fail. This seems a rather high standard, one which might mitigate against an unusual claim or a difficult claim which has merit. Yet a defendant, faced with the claim of an impecunious corporate plaintiff, a claim to which there may well be a good defence, ought to have some protection. [Our emphasis.]

(2) Evidence that Mr. Timm submitted to the prothonotary

[60] Mr. Timm limited his submissions to the prothonotary to the following five points: (1) he suffered harm as a result of the actions of the CSC officers; (2) it is clear that there is a real issue that deserves to be debated at a real trial since the third level grievance was upheld in part; (3) he is qualified to apply for a judicial review of said decision; (4) the issues that he raises are of great importance to a federal inmate and deserve special attention in that acts of harassment and discrimination by public officials are alleged; and (5) the outcome of his application could affect detention conditions in federal facilities. However, he did not provide any details.

(3) Finding on the merit of the application for judicial review

[61] The Court notes that Mr. Timm's arguments that he is nearly certain that his application will not fail are general in nature.

[62] Mr. Timm did not specify, either before the prothonotary or even on appeal, the prohibited ground of discrimination or the statutory provisions cited in support of his allegation of discrimination. Thus, the Court cannot find that the prothonotary committed a palpable and overriding error in determining that Mr. Timm had not proved the merits of his application for judicial review.

[63] Thus, this Court's intervention is not warranted in this case.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The appeal is dismissed;

2. Costs in the amount of $250,00 are awarded to the AGC.

"Martine St-Louis"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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