Federal Court  Cour fédérale

Date: 20180228

Docket: T-1625-15

Citation: 2018 FC 228

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, February 28, 2018

PRESENT: The Honourable Mr. Justice Martineau

SIMPLIFIED ACTION

BETWEEN:

RENÉ BARKLEY

Plaintiff

and

HER MAJESTY THE QUEEN

Defendant

ORDER AND REASONS

[1] The plaintiff, René Barkley, is seeking to have the Court order the continuation of the stay of proceedings that was previously ordered in this file, that an administrative judicial inquiry be held and that he be awarded interim costs. This motion was heard jointly with the motion that was filed in docket T-1699-12, which was determined in a separate order (*René Barkley v. Her Majesty the Queen*, 2018 FC 227 [*Barkley 2018 #1*]).

Procedural background

[2] The plaintiff is currently incarcerated at Port-Cartier Institution, a maximum-security penitentiary administered by the Correctional Service of Canada [the Service].

[3] Through this simplified action, the plaintiff is seeking a fine of $30,000 for various acts allegedly committed by the Service in connection with an incident that took place in November 2014. The plaintiff was first allegedly denied the right to call a lawyer, which apparently led to a dispute with the guards. They then allegedly kept the plaintiff in his cell and reportedly kept him in confinement for a number of days. He was also reportedly suspended from school and his job. The plaintiff is essentially arguing that the violation of his right to call a lawyer, his confinement and, lastly, his suspension are all illegal acts by the Service. To date, the Court has not yet heard the action in damages on the merits.

[4] In the meantime, on December 3, 2015, the plaintiff filed a motion to obtain an extension, to obtain access to a computer and printer in his cell, to obtain access to the case law of the federal courts and to have his electronic data transferred. On February 17, 2016, Justice St-Louis granted an extension of 60 days for each step in the proceedings, but dismissed the other remedies sought by the plaintiff. On May 24, 2016, the plaintiff filed a notice of appeal. On June 10, 2016, Justice Roy stayed the current proceedings until the plaintiff’s appeal was decided on the merits. On January 12, 2017, the Federal Court of Appeal dismissed his appeal.

Continuation of the stay of proceedings refused

[5] As a general rule, the best interests of justice require that any action or proceeding instituted before the Court proceed expeditiously, as prescribed by rule 3 of the *Federal Courts Rules*, SOR/98-106 [the Rules]. According to paragraph 50(b) of the *Federal Courts Act*, RSC, 1985, c F-7, a stay of proceedings may still be warranted when it is in the interests of justice. In such cases, the moving party has the burden of proving that continuing the action would cause prejudice or injustice and not simply inconvenience. The moving party must also show that the suspension would not be unfair to the other party (see, for example, *Compulife Software Inc. v. Compuoffice Software Inc.*, 143 FTR 19, [1997] FCJ No. 1772 (QL) (FCTD)).

[6] In exercising my judicial discretion, it would not be appropriate for the Court to once again stay the current proceedings.

[7] First, the plaintiff submits that the stay is necessary to settle a certain number of his cross-motions in the meantime. In his submissions dated February 12, 2018, he adds that the stay is necessary to allow him to file various internal grievances with the Service. On the contrary, the defendant submits that the stay of proceedings must not be continued and instead invites the Court to establish a new timetable according to the terms suggested in the timetable filed on January 26, 2018.

[8] I agree with the defendant. The problem is that the plaintiff has not demonstrated how he would suffer prejudice—and not simply an inconvenience—in the event that the proceedings continue normally.

Application for an administrative judicial inquiry refused

[9] The plaintiff is also seeking to have the Court order that an [TRANSLATION] "administrative judicial inquiry" be held. In this regard, he is seeking various alternative orders, particularly the filing of evidence that is required for the inquiry (Preventive Security file from the Service, briefing minutes from June 9, 2016), the examination of various persons, as well as any additional remedies that the Court deems appropriate.

[10] The request for an inquiry is based essentially on the following allegations:

- The Service violated the plaintiff's constitutional rights and breached its own directive regarding privileged telephone calls by preventing him from calling the court and by reducing his access to privileged legal communication with the goal of impeding the legal proceedings;

- The Service seized and destroyed some of the plaintiff's legal documents without legal permission, namely dozens of diskettes and CD-ROMs, along with documents that were in his cell; and

- The Service and counsel for the defendant breached and tried to prevent the plaintiff's constitutional rights from being respected and deliberately lied to the Federal Court of Appeal.

[11] The defendant reiterates the same arguments for dismissal as in T-1699-12, namely that the Federal Court does not have jurisdiction to order that such an inquiry be held. As for the unlawful seizure, the defendant states that those allegations by the plaintiff are baseless and have

no connection to this action. The defendant relies on the affidavit of Jérôme Vigneault, Acting Assistant Warden, Operations, at Port-Cartier Institution, who attests that only one seizure of diskettes took place, on July 13, 2016, for security reasons. That diskette contained information on another inmate and had been obtained illegally. It was returned to the plaintiff after being erased. Various documents from the Service were entered into evidence to corroborate this version of the facts.

[12] For the reasons stated in T-1699-12, this Court does not have jurisdiction to order that an administrative inquiry be held as the plaintiff is currently seeking (*Barkley 2018 #1* at paragraphs 17–19). The burden is on the plaintiff to prove that his constitutional rights were violated; the Court is not required to play the role of inquisitor. That being said, it must be kept in mind that the plaintiff will be served the list of relevant documents in the defendant's possession (rule 295) and will be permitted to serve a written examination for discovery (rule 296) as part of this simplified action.

Interim costs refused

[13] The plaintiff is also seeking an order for interim costs.

[14] In *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, the Supreme Court reiterated that the courts have an inherent jurisdiction—under rare and exceptional circumstances—to award costs to a party to the dispute before the final settlement of the matter and regardless of the outcome. That said, in *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2 at paragraph 36 [*Little Sisters*],

Chief Justice McLachlin reiterated that "though now permissible, public interest advance costs orders are to remain special and, as a result, exceptional. These orders must be granted with caution, as a last resort, in circumstances where the need for them is clearly established."

[15] In short, as stated in *Little Sisters* at paragraph 37, the party seeking such a provision must satisfy the court that three absolute requirements are met:

> 1. The party seeking interim costs genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial — in short, the litigation would be unable to proceed if the order were not made.
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> 2. The claim to be adjudicated is *prima facie* meritorious; that is, the claim is at least of sufficient merit that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means.
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> 3. The issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases.

[16] In exercising my discretion, I have chosen not to award interim costs in this case, even though I am prepared to accept that, *prima facie*, this action should be decided according to the second criterion in *Little Sisters*.

[17] That being said, we must also consider whether the plaintiff did everything that was necessary to demonstrate that he exhausted all other funding options (see *Little Sisters* at paragraph 68, citing *Okanagan* at paragraph 40). The plaintiff must show that he is financially unable by providing a detailed statement of his income and expenses and a complete financial statement, along with alternative sources of funding (see *Al Telbani v. Canada (Attorney*

General), 2012 FCA 188 at paragraphs 8–9). The plaintiff's bald statements are insufficient to prove this lack of financial ability (see *Metrolinx (Go Transit) v. Canadian Transportation Agency*, 2010 FCA 45 at paragraph 10). In this case, the plaintiff did not provide any evidence or statement that revealed his financial situation. No documents were provided regarding his assets, savings or other possible sources of funding. The only information that the Court has regards his "salary" of a gross sum of $52.50 for 14 days of work—leaving him a total of $20.50 after deductions. At the hearing, the plaintiff stated that 25% of his pay was deducted in order to pay costs of $3,308 ordered against him in the motion to strike in T-1699-12 (see *Barkley 2018 #1* at paragraphs 9–12). In my view, the significance of these deductions does not make the plaintiff, who is representing himself in this case, unable to proceed. The costs in T-1699-12 were validly imposed by the Court, and the plaintiff is fully responsible for paying them. However, this Court has the authority to exempt him, if necessary, from the payment of certain legal disbursements. Since I am not satisfied that the plaintiff did everything that was necessary to show that he has exhausted all options to be exempted from paying certain legal disbursements, I am also not satisfied that the first criterion in *Little Sisters* has been met in this case.

[18] Furthermore, this case does not, *prima facie*, appear to raise any questions of importance to the public that have not yet been decided by the courts. Instead, this is a claim that is very personal in nature, such that the third criterion in *Little Sisters* is not met here.

[19] Thus, I do not consider interim costs to be warranted in the circumstances.

New timetable and special management order

[20] Having considered the additional submissions from the parties, I am satisfied that an extension of 60 days for each step in the proceedings—in accordance with the new timetable set out in the following order—is appropriate in the circumstances. In doing so, I primarily considered the fact that the plaintiff is representing himself and that his incarceration causes various inconveniences for him. As for the internal grievances with the Service, the plaintiff is free to submit them independently and at the same time as these proceedings.

[21] In addition, both parties agree that it would be appropriate to order that the action continue as a specially managed proceeding. Therefore, it will be up to the judge or prothonotary assigned by the Chief Justice of the Court as case management judge to modify the timetable, if needed, to determine all of the issues before the trial and to prescribe any other appropriate measure so as to secure the just, most expeditious and least expensive resolution of the dispute.

[22] I am also aware of the numerous procedural obstacles and often disproportionate costs faced by inmates who want to exercise their rights before this Court. In this case, nothing is preventing the plaintiff from applying to the case management judge for exemption from certain legal disbursements.

[23] In particular, the plaintiff explained at the hearing that his biweekly net income of $20.50 was all that he had to cover the legal stamp, postal fees and purchases of paper and photocopies. However, all those costs stem from the procedural rules of this Court, which, for example, require the filing of documents in triplicate and payment of the stamp, or from internal procedures of the Service, according to which an inmate can obtain only paper versions of case

law upon request and upon payment of printing costs. In my view, this sheds light on a legal access problem for federal inmates, an issue of which the Court has certainly expressed an awareness in the past (see, for example, *Mapara v. Canada*, 2014 FC 538 at paragraph 42, aff'd. by 2015 FC 110). In addition, the 2015–2016 Report of the Correctional Investigator of Canada also insisted on the glaring lack of legal resources for inmates—shortcomings that were described as unacceptable (Canada, *2015–2016 Annual Report of the Office of the Correctional Investigator*, by Howard Sapers, Ottawa, Office of the Correctional Investigator, 2016).

[24] Thus, although it is not appropriate to award interim costs in this case, the Court must nevertheless ensure, in accordance with rule 3, the just, most expeditious and least expensive determination of the proceeding. In fact, the proceeding should not be an obstacle to exercising a right, especially for an inmate who may be in a delicate financial situation. This is also in keeping with what was unanimously expressed by the Supreme Court in *Hryniak v. Mauldin*, 2014 SCC 7 at paragraphs 1 and 28 [*Hryniak*]:

> [1] Ensuring access to justice is the greatest challenge to the rule of law in Canada today. Trials have become increasingly expensive and protracted. Most Canadians cannot afford to sue when they are wronged or defend themselves when they are sued, and cannot afford to go to trial. Without an effective and accessible means of enforcing rights, the rule of law is threatened.
>
> . . .
>
> [28] This requires a shift in culture. The principal goal remains the same: a fair process that results in a just adjudication of disputes. A fair and just process must permit a judge to find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts as found. However, that process is illusory unless it is also accessible — proportionate, timely and affordable. . . .
>
> [Emphasis added.]

[25] However, paragraph 385(1)(a) of the Rules grants the case management judge the power to "give any directions or make any orders that are necessary for the just, most expeditious and least expensive determination of the proceeding on its merits". That rule grants the judge broad powers, namely the authority to regulate the conduct of the parties or exempt them from the application of certain rules (see, for example, *Mazhero v. Fox*, 2014 FCA 219 at paragraphs 3 and 6, leave to appeal to the Supreme Court denied [*Mazhero*]). In that case, Justice Stratas thus used his case management powers to establish special rules that governed communication between the parties and the Court (see *Mazhero* at paragraph 11).

[26] With this in mind, we can easily imagine various procedural arrangements that the case management judge could grant in order to ensure a much more expeditious and less expensive determination for the plaintiff. Exempting him from paying for the stamp; allowing for the filing of a single copy of the proceedings; holding meetings by videoconference to settle issues quickly; exempting him from filing a book of authorities; or allowing the filing of documents by fax are only a few examples of measures that could be taken in order to respect the spirit of rule 3 and the principles that guided the Supreme Court in *Hryniak*.

Conclusion

[27] In conclusion, except as provided in the Court order, all the requests in the plaintiff's motion are denied. Given all the relevant factors, including the fact that the filing of the plaintiff's motion resulted in the establishment of a timetable and continuing the proceeding as a specially managed case, in exercising my discretion, it is not appropriate to award costs to the defendant.

JUDGMENT in T-1625-15

THE COURT ORDERS that:

1. Except as provided in this order, all the requests in the plaintiff's motion are denied;

2. The parties shall comply with the following timetable:

    a) Service and filing of the plaintiff's reply no later than June 11, 2018;

    b) Service of the documents list no later than September 10, 2018;

    c) Settlement discussion no later than October 9, 2018;

    d) Written examination for discovery no later than October 9, 2018;

    e) Reply to written examination for discovery no later than January 25, 2019;

    f) Submission of motions for rulings on the objections, if needed, no later than January 25, 2019;

    g) Service and filing of the requisition for a pre-trial conference accompanied by a pre-trial memorandum no later than February 27, 2019; and

    h) Service and filing by the party that did not file the requisition for a pre-trial conference of a pre-trial memorandum no later than May 28, 2019, or 90 days after the requisition for a pre-trial conference.

3. The plaintiff's simplified action shall continue as a specially managed proceeding;

4. It will be up to the judge or prothonotary assigned by the Chief Justice of the Court as case management judge to modify the timetable, if needed, to determine all of the issues before the trial and to prescribe any other appropriate measure, including any application for exemption from certain legal disbursements; and

5. The whole without costs.

"Luc Martineau"

Judge

Certified true translation
This 4th day of October 2019

Lionbridge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1625-15
STYLE OF CAUSE:	RENÉ BARKLEY v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	JANUARY 22, 2018
ORDER AND REASONS:	MARTINEAU J.
DATED:	FEBRUARY 28, 2018

APPEARANCES:

René Barkley	FOR THE PLAINTIFF (ON HIS OWN BEHALF)
Andrée-Renée Touchette	FOR THE DEFENDANT

SOLICITORS OF RECORD:

Attorney General of Canada	FOR THE DEFENDANT