Federal Court  Cour fédérale

Date: 20190531

Docket: T-848-18

Citation: 2019 FC 765

Ottawa, Ontario, May 31, 2019

PRESENT: Mr. Justice Simon Fothergill

BETWEEN:

JOSEPH STEPHEN ROOKE

Plaintiff

and

CANADA
THE MINISTER OF HEALTH
THE MINISTER OF THE DEPARTMENT OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT

Defendants

JUDGMENT AND REASONS

I. Overview

[1] Joseph Stephen Rooke seeks to appeal an order of Prothonotary Mireille Tabib dated March 4, 2019 (*Rooke v Canada (Attorney General)*, 2019 FC 730). Mr. Rooke, who is self-

represented, applied to have an action for unpaid dental expenses certified as a class proceeding with himself as the representative plaintiff. Prothonotary Tabib refused, holding that a litigant may commence a proposed class proceeding only if he is represented by a lawyer or if the Court, in special circumstances, orders otherwise. She also refused his request for reimbursement of the filing fee he paid to commence the action, and his demand that she recuse herself on the ground of alleged bias.

[2] For the reasons that follow, Mr. Rooke's appeal and his application for an extension of time in which to commence the appeal are both dismissed with costs.

II. Background

[3] In August 2017, Mr. Rooke attempted to file an originating document titled "Proposed Class Proceeding". The Court rejected the document under Rule 121 of the *Federal Courts Rules*, SOR/98-106 [Rules], which provides as follows:

121 Unless the Court in special circumstances orders otherwise, a party who is under a legal disability or who acts or seeks to act in a representative capacity, including in a representative proceeding or a class proceeding, shall be represented by a solicitor.	**121** La partie qui n'a pas la capacité d'ester en justice ou qui agit ou demande à agir en qualité de représentant, notamment dans une instance par représentation ou dans un recours collectif, se fait représenter par un avocat à moins que la Cour, en raison de circonstances particulières, n'en ordonne autrement.

[4] In September 2017, Mr. Rooke attempted to file a motion for certification of a class proceeding. He also asked that the $150.00 filing fee be waived. Because there was no

underlying action, Justice Richard Southcott issued a direction advising Mr. Rooke that he could initiate an action by filing a statement of claim. He also noted that Mr. Rooke could submit a letter requesting waiver of the applicable filing fee supported by a rationale.

[5] Mr. Rooke attempted to file a statement of claim accompanied by a letter requesting waiver of the filing fee. Prothonotary Tabib declined to waive the filing fee by order dated December 4, 2017. Mr. Rooke appealed the order. Justice Alan Diner dismissed the appeal on February 23, 2018 (*Rooke v Canada (Attorney General)*, 2018 FC 204 [*Rooke*]), confirming Prothonotary Tabib's finding that Mr. Rooke had provided insufficient information regarding his financial circumstances.

[6] In May 2018, Mr. Rooke filed a statement of claim and paid the applicable filing fee. The statement of claim did not identify the action as a proposed class proceeding. In October 2018, Prothonotary Tabib was assigned as Case Management Judge.

[7] On November 1, 2018, Mr. Rooke attempted to file a motion for certification of his action as a class proceeding. The following day, Prothonotary Tabib directed that the motion not be accepted for filing because it did not comply with Rule 121.

[8] On January 8, 2019, Mr. Rooke brought a motion for reconsideration of Prothonotary Tabib's direction. He asked that his action be certified as a class proceeding, and also sought reimbursement of the filing fee and the recusal of Prothonotary Tabib. The motion was dismissed on March 4, 2019.

III. Decision under Appeal

[9] Prothonotary Tabib held that the requirement in Rule 121 that a representative plaintiff be represented by a solicitor arises as soon as a proposed class proceeding is commenced. She noted that the Court must ensure the rights of all potential class members are not prejudiced at any stage of the proceeding by the conduct of the proposed representative plaintiff.

[10] Prothonotary Tabib held that Mr. Rooke had paid the filing fee voluntarily, and there was no procedure under the Rules to reverse this. She noted that Mr. Rooke could have requested a waiver of the fee when he filed the statement of claim. She was not persuaded by his argument that the financial disclosure requirements were contrary to the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

[11] Prothonotary Tabib also refused Mr. Rooke's demand that she recuse herself on the ground of alleged bias. She noted that Mr. Rooke had offered no evidence that would cause a reasonable person, viewing the matter realistically and practically, to doubt her impartiality.

[12] Mr. Rooke also asserted that all judges and prothonotaries of the Court must be biased due to their adherence to irrational religious beliefs, as confirmed by their oaths of office. Prothonotary Tabib found this assertion to be unsupported by evidence. Furthermore, if all judges and prothonotaries were tainted by their oaths of office, then the Rule of Necessity would prevent her from recusing herself because no judge or prothonotary would be able to take her

place (citing *Reference re Remuneration of Judges of the Provincial Court (PEI)*, [1998] 1 SCR 3).

[13] Prothonotary Tabib concluded that she had no jurisdiction to hear a certification motion, and that Mr. Rooke had failed to obtain the Court's permission under Rule 121 to proceed as a representative plaintiff without a solicitor. She therefore dismissed the motion with costs.

IV. Issues

[14] This appeal raises the following issues:

A. What is the standard of review?

B. Should Prothonotary Tabib's order be upheld?

C. Should Mr. Rooke be granted an extension of time in which to bring this appeal?

V. Analysis

A. *What is the standard of review?*

[15] A discretionary order of a prothonotary is subject to review against the standards articulated by the Supreme Court of Canada in *Housen v Nikolaisen*, 2002 SCC 33 (*Hospira*

Healthcare Corporation v Kennedy Institute of Rheumatology, 2016 FCA 215 at para 2 [*Hospira*]). Questions of law are subject to the standard of correctness, while findings of fact or mixed fact and law will be revisited only where there is palpable and overriding error (*Hospira* at paras 68, 82).

B. *Should Prothonotary Tabib's order be upheld?*

[16] Mr. Rooke says the requirement in Rule 121 that a representative plaintiff in a class action must be represented by a solicitor arises only when the matter is certified as a class proceeding. He has cited no jurisprudence or principle to support this argument.

[17] The plain language of Rule 121 makes it clear that someone who wishes to act in a representative capacity must be represented by a lawyer or satisfy the Court of special circumstances to justify proceeding without counsel. The rationale for the Rule is equally clear. If someone chooses to act on his or her own behalf without the benefit of legal counsel, then only that person's rights and interests are implicated. However, if someone proposes to act in a representative capacity without the benefit of counsel, then there is a risk that he or she may jeopardize the rights and interests of others. There is no guarantee that self-represented persons have the capacity or resources to effectively represent others in a proposed class action. Nor do they carry insurance against claims of professional negligence.

[18] There can be no question that the rights of potential class members are engaged prior to the certification of a class action. Decisions regarding important matters such as causes of action,

the framing of common issues and compliance with limitations periods are made long before a certification motion is heard.

[19] In *Logan v Canada (Health)*, 2003 CanLII 20308 (ONSC), Justice Warren Winkler (as he then was) observed that a proposed class proceeding "originates from the time of the issuance of the claim or notice of action. It is not an individual action that metamorphosises to a class proceeding when certified." As Prothonotary Tabib found, "a proposed class action is therefore a representative proceeding that requires the protection afforded by legal counsel from the very beginning, because it has the potential of engaging the rights of the proposed class members as soon as it is filed, and before it is certified" (citing *Fenn v Ontario,* 2004 CanLII 28170 (ONSC)).

[20] Mr. Rooke objects to this Court's reliance on cases decided under the Ontario equivalent of Rule 121, and notes that the Ontario rule does not authorize a court to consider whether special circumstances may permit a party to act in a representative capacity without a solicitor. While the Ontario rule appears to be more restrictive than its federal counterpart, the underlying principle is the same. The requirement for representation by a solicitor arises at the outset, because the rights of others may be affected from the outset.

[21] Prothonotary Tabib's interpretation and application of Rule 121 were therefore correct. Rule 121 is intended to protect the rights of potential class members by requiring a representative plaintiff to have legal counsel. Mr. Rooke has offered no explanation for his refusal to seek this Court's permission to pursue a proposed class proceeding as a self-represented litigant.

[22] Prothonotary Tabib's finding that the Rules do not contemplate the reimbursement of a filing fee was also correct. While I do not foreclose the possibility that the Court may, in exceptional circumstances, have a power to order the return of a filing fee pursuant to its inherent jurisdiction to govern its own process, in this case Mr. Rooke neglected to request a waiver of the filing fee and provided an insufficient rationale for its subsequent reimbursement.

[23] Mr. Rooke's argument that the filing fee is unconstitutional lacks a proper evidentiary foundation. He did not request a waiver of the filing fee, and he was not required to disclose information regarding his personal finances in a manner that could potentially engage the *Charter*. As Prothonotary Tabib found, Mr. Rooke placed insufficient evidence before the Court to justify a waiver of the filing fee. Nor did he appeal Justice Diner's decision to uphold the previous denial of his request that the fee be waived.

[24] Finally, Mr. Rooke's assertion that Prothonotary Tabib should have recused herself on the ground of bias is wholly without merit. The test for bias is whether an informed person, viewing the matter realistically and practically, and having thought the matter through, would think it more likely than not that the decision-maker, whether consciously or unconsciously, would not decide fairly (*Committee for Justice and Liberty v National Energy Board*, [1978] 1 SCR 369 at para 394). The threshold for a finding of real or perceived bias is high. An allegation of reasonable apprehension of bias calls into question not only the personal integrity of the decision-maker, but the integrity of the administration of justice generally. Allegations of bias are serious, and should not be made lightly (*R v S (RD)*, [1997] 3 SCR 484 at para 113). Mr. Rooke's dissatisfaction with Prothonotary Tabib's procedural rulings, none of which have been

successfully challenged, falls far short of the cogent evidence necessary to support a finding of bias (*Poczkodi v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 956 at para 51).

[25] Mr. Rooke's suggestion that all judges and prothonotaries are tainted by their oaths of office is equally without merit. It is unclear how this argument pertains to an allegation of real or perceived bias. Furthermore, freedom of religion and conscience, including for members of the Court, is guaranteed under s 2(a) of the *Charter*.

C. *Should Mr. Rooke be granted an extension of time in which to bring this appeal?*

[26] Under Rule 51(2), Mr. Rooke had 10 days in which to appeal Prothonotary Tabib's order of March 4, 2019. He commenced this appeal on April 15, 2019, one month late.

[27] A party seeking an extension of time must demonstrate that he had a continuing intention to pursue the proceeding, the proceeding has some merit, no prejudice arises from the delay, and there is a reasonable explanation for the delay (*Canada (Attorney General) v Hennelly*, 1999 CanLII 8190 (FCA) at para 3). The Defendants do not dispute Mr. Rooke's continuing intention to pursue the appeal, nor do they claim to have suffered prejudice. They do, however, maintain that the appeal is without merit, and that Mr. Rooke has not provided a reasonable explanation for the delay.

[28] Mr. Rooke says he was unable to commence the appeal within 10 days because he was waiting for an audio recording of the case management conference that took place on November

15, 2018. He has not explained why he needed this recording in order to commence the appeal. He also says that he started a new job shortly before the order was issued. However, a decision to prioritize one aspect of one's life over others will not generally serve as a sufficient justification for delay in legal proceedings (*Abi-Mansour v Canada (Passport)*, 2015 FC 363 at para 29). Mr. Rooke alluded to long-standing mental health issues, but he provided no evidence in support.

[29] More fundamentally, Mr. Rooke's appeal is devoid of merit. I therefore decline to extend the time in which to bring this appeal.

VI. Conclusion

[30] Mr. Rooke's application for an extension of time in which to appeal the order of Prothonotary Tabib dated March 4, 2019 and his appeal of that order are both dismissed.

[31] The Defendants seek costs in the amount of $250.00. Mr. Rooke says he is impecunious, and should be excused costs.

[32] Justice Diner said the following regarding Mr. Rooke's liability for costs in *Rooke* at paragraphs 27 and 28:

> The Defendants seek their costs, and understandably so. However, having considered all of the circumstances, including the difficult situation in which Mr. Rooke finds himself, I make no order as to costs — this time.
>
> I warn Mr. Rooke so that he clearly understands going forward, he bears the full risk of cost orders being made against him in the future, whether in the context of interlocutory or procedural

> matters like this motion, or with respect to the determination of any action. Costs are an inevitable risk of litigation, and even self-represented litigants, like Mr. Rooke, always run that risk.

[33] Mr. Rooke has chosen to disregard Justice Diner's admonition, and has persevered with a meritless appeal of a valid procedural order. He has needlessly complicated an ordinary claim for unpaid dental expenses with a groundless assertion of the *Charter* and a gratuitous allegation of bias. He has repeatedly demonstrated a lack of respect for the efficient use of judicial and other public resources in his conduct of this litigation.

[34] The Defendants' request for costs in the amount of $250.00 is a very modest contribution to the public costs actually incurred, and is granted.

JUDGMENT

THIS COURT'S JUDGMENT is that the appeal and the application for an extension of time in which to commence the appeal are both dismissed with costs in the amount of $250.00, payable forthwith and in any event of the cause.

"Simon Fothergill"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-848-18
STYLE OF CAUSE:	JOSEPH STEPHEN ROOKE v CANADA, THE MINISTER OF HEALTH, THE MINISTER OF THE DEPARTMENT OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	MAY 22, 2019
JUDGMENT AND REASONS:	FOTHERGILL J.
DATED:	MAY 31, 2019

APPEARANCES:

Joseph Stephen Rooke	FOR THE PLAINTIFF (SELF-REPRESENTED LITIGANT)
Kevin Palframan	FOR THE DEFENDANTS

SOLICITORS OF RECORD:

Deputy Attorney General of Canada Ottawa, Ontario	FOR THE DEFENDANTS