Federal Court Cour fédérale

Date: 20120504

Docket: T-1300-11

Citation: 2012 FC 548

Vancouver, British Columbia, May 4, 2012

PRESENT: Roger R. Lafrenière, Esquire
Case Management Judge

BETWEEN:

THE ESTATE, WIDOW AND CHILDREN
OF MORDRED HARDY

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA

Defendant

REASONS FOR ORDER AND ORDER

[1] A case management judge is not simply a referee who must sit passively while a party carries on as it pleases. It would undermine the administration of justice if a case management judge had no power to intervene at an appropriate time and, after hearing submissions, make directions necessary to ensure that the matter proceeds in an orderly, efficient and expeditious manner. As was stated by Mr. Justice S.R. Romilly of the Supreme Court of British Columbia in *R v Adam et al*, 2006 BCSC 1405, this power should not be seen "as a limited one resting solely on the Court's power to intervene to prevent an abuse of its process. Rather, the power is founded on the Court's inherent jurisdiction to control its own process."

[2] By Reasons for Order and Order dated February 16, 2012, Mr. Justice Sean Harrington granted Mr. Karl Hardy leave to represent the other parties of interest as applicants in T-1299-11 and plaintiffs in T-1300-11: *Hardy Estate v Canada (Attorney General)*, 2012 FC 220. The background of the two proceedings is succinctly summarized by Mr. Justice Harrington as follows:

> [1] Helena Audry, the widow of the late Mordred Hardy, is 91 years of age. She gets around with the aid of a walker. She is the principal claimant, and perhaps the only claimant, in these two proceedings against the Crown. She has the right to represent herself. However, she has asked her son, Karl Hardy, who is not a lawyer, to act in her stead. The Crown moved for a stay of proceedings pending the appointment of a solicitor. Prothonotary Lafrenière granted the motion. This is the appeal therefrom.
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> [2] It all began in 1943. Mordred Hardy was serving in the Royal Canadian Navy on board of the HMCS Kamloops. In March of that year, there was a training accident during a depth charge drill. Mr. Hardy was injured and was hospitalized. A few months later he was discharged not because of his physical injury, but on the grounds of schizophrenia. This has been a bone of contention with the family for the past 69 years.
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> [3] It is alleged that soon after his discharge he applied for a disability pension because of his physical injury, and again applied in 1975. However, it was only in 1997 that he was finally awarded a disability pension based on a degenerative disk disease caused by the depth charge blast. Mr. Hardy died in 1999. Mrs. Hardy is entitled to a pension as a surviving spouse in accordance with section 45 of the *Pension Act*.

[4] In 2010, the Entitlement Review Panel varied the initial decision by granting entitlement effective 27 November 1994, three years prior to the Minister's decision and an additional award of 24 months. The panel determined that Mr. Hardy had made an application for a pension in 1975 and that he asked for help in order to complete the form. No one answered him. The additional two years were granted in accordance with section 39(2) of the Act as the panel was of the opinion the pension should have been awarded earlier but was not "by reasons of delays in securing service or other records or other administrative difficulties beyond the control of the applicant." As pointed out in *Mackenzie v Canada (Attorney General)*, 2007 FC 481, 311 FTR 157, this is a very harsh provision. The decision of the Entitlement Review Panel was upheld in 2011 by the Veterans Review and Appeal Board Canada. The next step is a judicial review of that decision. Although the only beneficiary of the pension is Mrs. Hardy, the style of cause of the application for judicial review in court docket T-1299-11 reads: "The Estate and Survivors of Mordred Hardy, Veteran".

[5] In addition, an action for damages was taken under court docket T-1300-11 by: "The Estate, Widow and Children of Mordred Hardy". The pleadings are replete with very strong language. For instance, in anticipation of time bar arguments, it is alleged that: "It would be awarding perjury, obstruction, fraud and liability avoidance initiated and perpetuated by the government, continuously, from 1943."

[6] The Attorney General moved for a stay of proceedings until a solicitor was appointed to represent the applicants/plaintiffs. Reliance was placed on rule 112 of the *Federal Courts Rules* which provides that unless the Court orders otherwise, beneficiaries of an estate or trust are bound by an order against the estate or trust, and rule 121 which provides that unless the Court orders otherwise in special circumstances, a person who seeks to act in a representative capacity shall be represented by a solicitor. The Attorney General also stated that he intended to move to have the action under T-1300-11 struck, and failing that, sought additional time to file a statement of defence until after the judicial review under T-1299-11 had been decided.

[3] Mr. Justice Harrington referred to the case management judge the matter of the timing the intended motions by the Attorney General of Canada (Crown) to strike, to obtain particulars, or for a stay of T-1300-11 pending the determination of T-1299-11. In the interim, the Crown was relieved from the requirement to serve and file his motion record in T-1299-11 and his statement of defence in T-1300-11.

[4] In response to the Court's directions issued on April 3, 2012, requiring the parties to identify the outstanding motions and to propose a timetable for responding motion records, Mr. Hardy submitted two letters, both referring to a potential motion for recusal if the outstanding motions do not go forward.

[5] By Reasons for Order and Order dated April 10, 2012, the Plaintiffs were directed to serve and file their motion for recusal, if any, by April 20, 2012, failing which the allegations would be deemed abandoned: *Hardy Estate v Canada* (Attorney General), 2012 FC 406. The Plaintiffs elected to take no action.

[6] A case management conference was held with Mr. Hardy and counsel for the Attorney General in Calgary on May 1, 2012. The parties confirmed that the following motions remained outstanding:

T-1299-11

(a) Motion in writing by the Applicants dated September 7, 2011 pursuant to Rule 105(a) of the *Federal Courts Rules* for an order to consolidate T-1299-11 and T-1300-11;

(b) Motion in writing by the Applicants dated September 7, 2011 for leave pursuant to Rule 237(3) to obtain alternate written examination in T-1299-11 and T-1300-11; and

(c) Motion in writing dated September 27, 2011 on behalf the Attorney General of Canada for an order: (i) providing directions to the parties with respect to the Applicants' motions described above, (ii) providing an interim direction suspending and/or extending Canada's time to respond to the said motions; and (iii) appointing a case management judge to manage the proceedings in T-1299-11 and T-1300-11 concurrently as specially managed proceedings.

T-1300-11

(a) Motion in writing by the Plaintiffs dated September 7, 2011 pursuant to Rule 105(a) of the *Federal Courts Rules* for an order to consolidate T-1299-11 and T-1300-11;

(b) Motion in writing by the Plaintiffs dated September 7, 2011 for leave pursuant to Rule 237(3) to obtain alternate written examination in T-1299-11 and T-1300-11; and

(c) Motion in writing by the Plaintiffs dated September 11, 2011 for summary judgment in the matter of the Statement of Claim under Court File No. 1300-11 per *Federal Courts Rules* 202 and 204;

[7] At the case management conference, Mr. Hardy submitted that the Crown was in blatant and repeated violation of the *Federal Courts Rules*. He pointed out that the Crown: (a) had failed to serve and file motion records in response to the Plaintiffs/Applicants' motions within 10 days as required by Rule 369(2), (b) had failed to serve and file a statement of defence within the time provided by Rule 204, and (c) did not comply with Rule 307 by serving and filing the Crown's supporting affidavits and documentary exhibits. Mr. Hardy complained that the Crown instead brought groundless motions, which he described as a "cascading boondoggle", in an attempt to stall and frustrate the proceedings.

[8] Crown counsel conceded that the proceedings had gotten off on the wrong foot. She acknowledged as well that the Plaintiffs/Applicants' motions had not been responded to in a timely manner. She maintained, however, that the Crown had acted reasonably throughout. In the face of motions that were viewed as procedurally defective, the Crown brought a motion to stay T-1299-11 pending the appointment of a solicitor by the Applicants, and also sought relief in respect of timelines for the filing of a statement of defence in T-1300-11.

[9] After hearing the submissions of the parties, I encouraged Mr. Hardy and Crown counsel to meet to discuss how best to proceed with the two matters. When the case management conference reconvened after a short break, Mr. Hardy reported that the parties had reached an impasse. He indicated an adjournment for a few days would be required in order to canvass his family members whether they would agree to stay the action in T-1300-11 pending the outcome of the application for judicial review in T-1299-11.

[10] The case management conference was adjourned on the understanding that Mr. Hardy would submit a letter by May 8, 2012 to advise whether the Plaintiffs would consent to stay of the action in T-1300-11, proceed with the application for judicial review, and withdraw and then replace the affidavit filed in support of the application. In the event consent to stay of proceedings was not forthcoming, Mr. Hardy agreed to propose a course of action to move the two proceedings forward.

[11] By letter to the Registry dated May 3, 2012, Mr. Hardy appears to have resiled from his commitment to the Court. His letter is silent regarding the feasibility of staying the action. Moreover, rather than put forward a reasonable proposal for the orderly hearing of the outstanding motions, Mr. Hardy simply rehashes submissions previously made to the Court. He also gives notice of his intention to file up to a dozen new motions depending on the outcome of the existing motions.

[12] Another letter was received from Mr. Hardy on May 4, 2012. Mr. Hardy writes that "after further thought", it seems obvious that the Crown cannot mount a defence to either proceeding. He suggests that there are only two appropriate actions that the Court should consider. With respect to the application in T-1299-11, he submits that the matter should be referred to a judge for immediate judgment. As for the action in T-1300-11, Mr. Hardy submits that the proceeding should be ordered to immediate settlement negotiations, and if the negotiations are unsuccessful, proceed to summary judgment or summary trial.

[13] The Applicants in T-1299-11 ignore the fact that default judgment is not available in proceedings commenced by way of application. The Plaintiffs in T-1300-11 also ignore the fact that Mr. Justice Harrington has explicitly dispensed the Crown from serving and filing a statement of defence pending further order or directions of the Court. Further, they remain willfully blind to the fundamentally different natures of the disparate proceedings, which are governed by completely different rules.

[14] A party that is represented by a lay person must play by the same rules as everyone else. Mr. Justice Harrington expressed great reservations when he granted Mr. Hardy leave to represent his mother in these proceedings. He indicated that he feared that Mr. Hardy would not adequately represent his mother, would use the courtroom as a bully pulpit, and would be aggravating, "as he lacks the manners and skill of a trained barrister." I share the same concerns.

[15] Mr. Hardy hides behind his pen and closes his eyes to the serious procedural deficiencies in the material filed on behalf of his family members. The time has come for the Court to intervene firmly to prevent the two proceedings from becoming unduly complicated and completely unmanageable.

[16] To begin with, I consider it just and appropriate to direct that no further motions, other than an appeal of this Order, will be accepted for filing without leave of the Court.

[17] The next logical step would be to dispose of the outstanding motions presently before the Court. In its motion dated September 27, 2011, the Crown requested an extension of time to respond to the Plaintiffs/Applicants' motions for consolidation of the two proceedings and the Plaintiffs' motion for summary judgment in T-1300-11. Mr. Hardy responded by letter dated October 17, 2011 that the Crown's motion should be disregarded, and that the cases be consolidated and moved to summary judgment.

[18] The facts and issues raised in the application for judicial review and the action are convoluted and complex. Further, by filing a joint motion record, the Plaintiffs/Applicants have conflated or confused the two separate and procedurally different proceedings. In the circumstances, in order to properly dispose of the Plaintiffs/Applicants' outstanding motions, the Court would benefit from the Crown's submissions. An extension of time will accordingly be granted to the Crown to serve and file a separate responding motion record in each proceeding.

ORDER

THIS COURT ORDERS that:

1. No further motions, except for an appeal of this Order, shall be received or filed by the Registry unless the Plaintiffs first obtain leave of the Court.

2. The Defendant is granted an extension of time to May 25, 2012 to serve and file a motion record in response to the Plaintiffs' motions dated September 7, 2011.

3. Unless the Court orders or directs otherwise, the Plaintiffs' motions shall be disposed of in writing.

"Roger R. Lafrenière"

Case Management Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1300-11
STYLE OF CAUSE:	THE ESTATE, WIDOW AND CHILDREN OF MORDRED HARDY v. THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	CALGARY, ALBERTA
DATE OF HEARING:	MAY 1, 2012
REASONS FOR ORDER AND ORDER:	LAFRENIÈRE P.
DATED:	MAY 4, 2012

APPEARANCES:

Karl S. Hardy	FOR THE PLAINTIFFS (ON HIS OWN BEHALF)
Janell Koch	FOR THE DEFENDANT

SOLICITORS OF RECORD:

N/A	FOR THE PLAINTIFFS
Myles J. Kirvan Deputy Attorney General of Canada Edmonton, Alberta	FOR THE DEFENDANT