Court File: T-1450-15

FEDERAL COURT OF CANADA

BETWEEN:

Radu Hociung

Plaintiff

and

Minister of Public Safety and Emergency Preparedness
and
Canada Border Services Agency
and
Her Majesty the Queen in Right of Canada

Defendants

LETTER TO THE COURT
Re: Consideration by a different judge

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AND TO:

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March 26, 2020

Honourable Court,

Further to the Plaintiff's 1st request for a case management teleconference dated March 4th, 2020, and to the 2nd request dated March 12, the Plaintiff requests that the proceeding be reviewed by a different judge than Mr. Gleeson, and that the two outstanding motions (Summary Judgement and Amendment of Claims) be considered at the earliest opportunity by a judge other than Mr. Gleeson.

On March 2nd, Mr Gleeson issued an “Order” that the proceeding is stayed pending results of an Application for Leave to Appeal to the Supreme Court. There are numerous problems with his Order, such that the proceeding merits independent review. The problems with Mr. Gleeson's order are as follows:

1. The proceeding is not currently under case management, as the record shows.
2. Mr. Gleeson does not have authority to stay the proceeding under the Court Rules as he is not a Case Management Judge in this proceeding.
3. Appointment to the role of Case Management Judge is the sole authority of the Chief Justice, as per Rule 383. Mr. Gleeson does not have the authority to install himself as Case Management Judge, nor can he install someone else in that role.
4. In his “Additional Representations of the Defendant”, filed November 29, 2019, the Defendant made an informal request that the action in Federal Court be stayed pending the outcome of a presumed appeal to the Supreme Court.
5. In a letter dated January 24, 2020, Mr. Gleeson advised the defendant that he is willing

to stay the proceeding pursuant paragraph 50(1)(b) of the Federal Courts Act, and advised the defendant to serve and file a motion moving him as “the Court” to exercise the Court's discretion and stay the proceeding. The defendant declined to serve a motion, thus abandoning his informal request to stay the proceeding.

6. In order to move the Court to stay pursuant para 50(1)(b), the moving party would have to show a reason why a stay would be in the “interest of justice”, and the grounds should have been cited in any resulting order as reasons.

7. Neither party has brought a motion to stay the proceeding pursuant Rule 390, or any other rule. Only an informal request was made, and later abandoned by the defendant, when he was requested to formalize it with a motion.

8. The only party interested in a stay is Mr. Gleeson. The grounds for a stay do not come from either of the adversary parties, which should be assumed to do everything in their power and permitted by the law in order to win. Mr. Gleeson acts as an interested party, who has the advantage of being on the “inside”.

9. In his March 2, 2020 “Order”, Mr. Gleeson shows that he researched the Supreme Court Bulletin Of Proceedings, looking for evidence of an Application by the plaintiff. Neither adversary party in this action has chosen to supply this “proof” by way of formal motion, and to make the case for a stay. It is only Mr. Gleeson's own desire to stay the proceeding that he based his decision on.

10. In his “Order”, Mr. Gleeson cites as main grounds, the determining factor in his decision, that there is a “need to respect the pending process before the Supreme Court of Canada”. This is an unintelligible reason, and thus no reason at all, as it does not explain why “respect” or lack thereof would affect the outcome of the two motions

before this Court. It also does not explain how it is in the interest of justice to stay.

11. The “Order” runs contrary to the General Principle of the Federal Court, enunciated by Rule 3, ie, that the Rules are to be applied as to secure the “just, most expeditious and least expensive determination of every proceeding on its merits”. Certainly if it is more just to stay the proceeding, then it should be stayed, but absent a motion making this case, the Court should be guided by Rule 3, the General Principle.

12. In his “Order”, Mr Gleeson does not make reference to any Rules or Acts that grant him the authority to make such a stay order, nor is it clear from context that he does have the authority. He was moved by an informal request, his own research, and a “need to respect” the Supreme Court. It cannot be traced from an actual authority that he has the power to make the order, ie, it cannot be said that an Act of Parliament enables him to follow a Rule of the Court to make the Order. These are required elements of any legal order to establish a legal authority.

13. In a letter dated March 13, 2020 filed on the record as “Direction”, Mr. Gleeson references his own March 2, 2020 “Order” as the authority for the stay. In other words, his authority comes from none other than himself. His order amounts to a Dictate, rather than a lawful Order of the Court.

14. In his “Order”, Mr. Gleeson cites *Lee v. Canada (Correctional Service), 2017 FCA 228* para 7 and 8, as jurisprudence that grants him “plenary powers to manage their processes and proceeding”. Unfortunately, *Lee* is of no help here, since in that proceeding, the Court was moved by one of the parties motion to strike an appeal. It was not the Court's own initiative to strike the appeal. Furthermore, although the Court does have “plenary powers”, it must still provide intelligible, good reasons exercising its powers. In *Lee*, the reason was that there was no lower court decision to be appealed,

and without such a decision, there was nothing to appeal, thus a misuse of the Court's resources to allow the “non-appeal” to continue. Mr. Gleeson does not provide an intelligible, reasonable reason, but instead interprets the jurisprudence as allowing him unlimited power to do as he pleases, including to disregard all the Rules, and act as party in the proceeding.

15. Since the Federal Court of Appeal has set aside Mr. Gleeson's judgments on the two motion, he has engaged in negotiations and legal advise with the parties, disguised as “request for additional representations”, “Directions”, “Letters”, as the record shows, with the goal of delaying the proceeding. The reasons for setting aside the judgments was Mr. Gleeson's disrespect for the Rules of the Court, and he has continued to conduct himself without any regard to the Rules or the Code of Ethics.

Plenary Powers of the Court

The plaintiff does not dispute that the Court has plenary powers to manage the proceedings brought before it. However, it must do so with reason and only as allowed by its own rules. Rule 47(2) states that where the Rules provide that powers of the Court are to be exercised on motion, they may be exercised **only on the bringing of the motion**. Rule 47(1) states that the discretionary powers are to be exercised on a judge's own initiative, or on motion. Taken together, rules 47(1) and 47(2) mean that discretionary powers that are to be exercised on motion, they may only be exercised on motion, and not on the judge's own initiative.

Powers of the Court are routinely exercised, as they should be, and the following non-exhaustive list of examples demonstrate the principle of plenary powers to manage proceedings:

1. The Court has the power to strike claims, but it may only do so **on motion** as stated by rule 221(1). It would be clearly unjust for a judge to strike claims on his own initiative, or based on an informal request by a party.

2. The Court has the power to decide proceedings summarily, and thus avoid the trial route, but may only do so **on motion**, and the Motion Judge has the discretion to decide whether the matter is a candidate for summary judgment or not. A judge does not have the power to make summary judgments on his own initiative.

3. The court has the power to allow a party to amend pleadings, but does not have the power to amend them itself, nor to order a party to amend them on its own initiative. Amendments are governed by Rule 75, and may be made only **on motion**.

4. The Court has the power and discretion to grant extension of time, but must do so **on motion** (and for good reason), but does not have the power to extend the time on its own initiative. If it did, it could grant a party any arbitrary amount of time, ie, it could allow them to stall the proceeding indefinitely.

5. The Court has the power to order “at any time”, that a person who is not a necessary party shall cease to be a party (Rule 104(1)(a)). Does this mean a judge may excuse any party without a good reason, and of his own initiative? May someone like Mr. Gleeson order that the Minister or the plaintiff no longer be a party, rendering this action moot? The plaintiff submits that such an interpretation would be perverse. Instead, the joinder rules list powers that the Court does have, but must be initiated by a party, as part of the Amendments rules, eg Rule 75(1), whereby the court may allow amendments only **on motion**.

The plaintiff is unable to find in the Rules a power that a judge has to initiate a stay of proceedings.

“Plenary Powers” or Abuse of Process?

The idea that all that is required to stay a proceeding is some “evidence” of a pending proceeding in another court is absurd. It would allow a party who wants to stall indefinitely, to submit an Application for Leave with the Supreme Court, and request informally that the Federal Court wait for that outcome. Even if the Application was frivolous, and it failed, it would take about 6 months to be decided. The applicant could then re-submit it, to buy another 6-month delay. For a simple fee of $50 every 6 months, a party could re-apply indefinitely, and stop the Federal Court proceeding in its tracks, for ever. Not only may the Federal Court not initiate a stay, but to consider a stay, it must consider a motion to stay pursuant Rule 390. In other words, the moving party must demonstrate good reason why a stay would be in the interest of justice. If a judge decides on his own initiative and research to stay actions, then the Court is no longer a Court, but a glorified Circus. This is precisely what Mr. Gleeson has accomplished. Furthermore, when the judge conducts his own research instead of relying on evidence of facts brought before him before the adversary parties, is his own research properly “evidence” that he can justly rely upon? What would be the point of a court, if a party request a judge figure out on his own how to procure a desired outcome, and the “judge” dully obliges?

Mr. Gleeson is abusing his position in the Federal Court to control this proceeding and prevent it from advancing towards trial. He was already proven to act unjustly by the Federal Court of Appeal, which set aside both of his judgments on the same two motions, and

returning them to the Court for reconsideration. The Court of Appeal would not have intervened if Mr. Gleeson's judgments were just.

Mr. Gleeson has been the gatekeeper of this proceeding since the two motions were initially filed in February 2017. No other judge has touched these motions. Mr. Gleeson relies on the existing registrar practice that any new filing be forwarded to the same judge, probably in the interest of efficiency. This makes him the de facto gatekeeper.

Is Case Management necessary?

The two motions that are before this Court have been properly and timely served and filed, along with all the necessary responses and replies, and no further input is required from the parties or any other Court before they can be determined. While Mr. Gleeson would like to place the proceeding under Case Management, this is unjustified for the following reasons:

1. It is not the parties that are delaying the advancement, but Mr. Gleeson himself.
2. The parties are in compliance with the Rules of the Court within the timelines required by the Rules.
3. On a procedural basis, this action is as straight forward as it can be. There are only two parties, no intervener, no third parties, no expert witnesses, it is not a class action, and there no foreseen circumstances that may require fixing any periods for completion of steps. In short, there is nothing to manage. The ball is in the Court's court, and the parties are at this point waiting for the Court to decide the two motions, before continuing discovery and advancing to pre-trial conference and trial.

The plaintiff requests the Honourable Court:

1. Lift the stay of the proceeding on the basis that it is ill-ordered, not pursuant the Rules of the Court or any Act of Parliament, and,
2. Determine the Summary and Amendment motions without delay.

Sincerely,

Radu Hociung - Plaintiff