Court file: T-1450-15

FEDERAL COURT OF CANADA

BETWEEN:

Radu Hociung

Plaintiff

and

Minister of Public Safety and Emergency Preparedness

Defendant

REPLY TO DEFENDANT'S RESPONDING MOTION RECORD

Radu Hociung
246 Southwood Drive
Kitchener, Ontario
N2E 2B1
Tel: (519) 883-8454
Fax: (226) 336-8327
email: radu.cbsa@ohmi.org

TO:

The Registrar
Federal Court of Canada
180 Queen Street West
Suite 200
Toronto, Ontario
M5V 3L6

AND TO:

Eric Peterson, Counsel to the Defendant
DEPARTMENT OF JUSTICE
Ontario Regional Office
The Exchange Tower
130 King St. West
Suite 3400, Box 36
Toronto, Ontario

INDEX

TAB 1

T-1450-15

FEDERAL COURT OF CANADA

BETWEEN:

Radu Hociung

Plaintiff

and

Minister of Public Safety and Emergency Preparedness

Defendant

REPLY

(Plaintiff's Appeal of CMC on November 14, 2017)

1. With respect to the prothonotary's decision to suspend discovery and the proceedings pending outcome of the summary judgement motion, the defendant submits that no misuse of judicial discretion occurred. This is incorrect.
2. Federal Court Rule 50 limits prothonotaries' jurisdiction; 50(1)(c) does not allow prothonotaries to hear, nor make any orders relating to summary judgement motions.
3. At the November 14 CMC, the prothonotary's decision to suspend proceedings is clearly in relation to the potential outcome of the summary judgement motion, contrary to the jurisdiction he has from Rule 50, and thus the Court should intervene.

4. Regardless of the outcome of the summary judgement motion, including in case the Court disposes of all claims as they stand, the Statement of Claim may be amended to add new claims based on the discovery of the defendant. Therefore, discovery will necessarily continue, whether before or after the motion for summary judgement is decided. Discovery needs to be completed first, as that will determine whether further claims need to be added. If no new claims are added, the plaintiff will discontinue the proceeding, otherwise it needs to move to trial, but both of these paths depend on discovery being

completed.

5. The order to suspend the proceeding is incorrect with respect to Rule 385(1)(a), as suspending the discovery is not the most expeditious and least expensive path to determination of the proceeding. It adds unnecessary delay and cost. Discovery has been delayed more than 15 months at this point.

6. The questions in the discovery will still need to be answered as they stand now, even if they are rendered moot by the summary judgement. It's not mootness, but relevance to the Statement of Claim that dictates the requirement to answer. Even a moot, but relevant answer may lead to new causes of action or claims. In other words, whether discovery comes first, or summary judgement comes first, the final claims that will have been made in the action should be the same.

7. The defendant has failed in his previous motion to strike the statement of claim, therefore the questions remain relevant to the original Statement of Claim, and will not need to be restated or changed in light of the summary judgement motion outcome.

8. With respect to the decision to not cease management of the proceeding, the prothonotary stated as reason “it is difficult to accomplish”.

9. While the prothonotary does have judicial discretion, it is not absolute. His decisions must still be reasonable. In his response, the defendant pointed to *Bates Enterprises Ltd. v. Canada* (2002), 219 F.T.R. 176. In that case, Dawson J. reviewed the prothonotary's decision, quoting the following well articulated and intelligible decision, at para 3:

> “The matter of a reference for the determination of damages to be held after trial, if necessary, was proposed by the Plaintiffs and opposed by the Defendant. The contentious issue was the proper forum for the consideration of the matter of use of the funds wasted on pigs in elk farming. Because this issue will required expert valuation testimony the bifurcation order will be granted.”

10. Dawson J. Found that the decision under appeal was intelligible, and within jurisdiction and thus the prothonotary's discretion need not be questioned. He then outlined Rules 50 and 385, which is where the prothonotary's jurisdiction and discretion originates.

11. In the present decision, the prothonotary simply stated that ceasing case management “is difficult to accomplish”. This is not intelligible, and as per *Dunsmuir v. New Brunswick*, 2008 SCC 9 (CanLII) at paras 46-50, where a decision is based on reasons that do not allow a reviewing court to understand why it was made, it must be quashed and set aside. At para 50, *Dunsmuir* shows how discretion is limited by the requirement to make correct decisions, and override them when necessary:

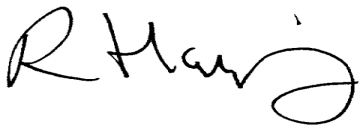
> “As important as it is that courts have a proper understanding of reasonableness review as a deferential standard, it is also without question that the standard of correctness must be maintained in respect of jurisdictional and some other questions of law. This promotes just decisions and avoids inconsistent and unauthorized application of law. When applying the correctness standard, a reviewing court will not show deference to the decision maker’s reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal’s decision was correct.”

12. In his response, at para 9, the defendant submits that the mere presence of motions should automatically force the Court to hold the action in abeyance. While this may be the defendant's desire, it is not supported by the Federal Court Rules. It is also an illogical argument, as it would mean that a party could repeatedly make vexatious motions in order to stall proceeding indefinitely. Indeed, his motion for summary judgement is virtually identical to his August 2016 motion to strike the statement of claim. It was unsuccessful then, and was filed while the defendant was in default of answering discovery. He is still in default, and has not answered discovery completely, and is refusing to do so. His hope is that he can continue to file this motion, or other vexatious motions like it and the action will thus never progress.

13. Further, if the presence of motions would automatically trigger abeyance of discovery, how would it be implemented in a non-managed case? Would there be an additional motion for abeyance? Would abeyance be implied, even though the Federal Court Rules don't mention it? Clearly a managed and an unmanaged case should be equally just, and thus, just because the case is managed, does not mean either party has an automatic expectation of that his discovery is extended or suspended by filing a motion.
14. It is clear that in this action, the presence of case management is acting as a proverbial deadweight, unjustly suspending progress, and that case management must be ended to allow discovery and the proceeding to proceed.

ALL OF WHICH IS RESPECFTFULLY SUBMITTED

DATE: November 29, 2017



_____

Radu Hociung
246 Southwood Drive
Kitchener, Ontario
N2E 2B1
Tel: (519) 883-8454
Fax: (226) 336-8327
email: radu.cbsa@ohmi.org

TO: Eric Peterson, Counsel to the Defendant
DEPARTMENT OF JUSTICE
Ontario Regional Office
The Exchange Tower
130 King St. West
Suite 3400, Box 36
Toronto, Ontario

AND TO: The Registrar
Federal Court of Canada
180 Queen Street West
Suite 200
Toronto, Ontario
M5V 3L6