Federal Court  Cour fédérale

Date: 20101022

Docket: T-105-10

Citation: 2010 FC 1038

Montréal, Quebec, October 22, 2010

PRESENT: Richard Morneau, Prothonotary

BETWEEN:

ROBERT LAVIGNE

Plaintiff

and

CANADIAN HUMAN RIGHTS COMMISSION
CANADA POST CORPORATION
CANADIAN UNION OF POSTAL WORKERS

Defendants

REASONS FOR ORDER AND ORDER

[1] This case involves determining a series of three motions in this docket as well as parallel motions in docket T-107-10.

[2] In these two dockets, the plaintiff essentially takes issue with the same two defendants, the Canada Post Corporation (the CPC) and the Canadian Union of Postal Workers (the Union).

[3] Two of the motions, one by the CPC and the other by the Union, are the same and seek to have the plaintiff give security under paragraphs 416(1)(*f*) and (*g*) of the *Federal Courts Rules* (the rules) for each defendant's costs (hereinafter at times, respectively, the CPC's motion or the Union's motion or, collectively, the defendants' motions for security).

[4] The plaintiff is essentially bringing the other motion in reference to rule 151 and, for all practical purposes, seeks an order that an out-of-court settlement offer and agreements of a similar nature signed by the parties in the past, i.e. in 2007 and 2008—and until now treated as confidential by the parties—lose this element of confidentiality and become part of the public domain (hereinafter at times, the plaintiff's motion to lift the confidentiality).

[5] These reasons for order are based primarily on the existing dynamic in this docket T-105-10. However, since the parties' approach is very similar with respect to the arguments raised and the remedies sought in their motions, the reasons and the order that follows the reasons will also apply *mutatis mutandis* to docket T-107-10.

[6] Paragraphs 416(1)(*f*) and (*g*) of the rules, which the defendants refer to, and rule 417, which the plaintiff appears to raise, read as follows:

416. (1) Where, on the motion of a defendant, it appears to the Court that . . . (*f*) the defendant has an order against the plaintiff for costs in the same or another	**416.** (1) Lorsque, par suite d'une requête du défendeur, il paraît évident à la Cour que l'une des situations visées aux alinéas *a*) à *h*) existe, elle peut ordonner au demandeur de fournir le cautionnement pour les dépens qui pourraient être adjugés au défendeur:

proceeding that remain unpaid in whole or in part,	…
(*g*) there is reason to believe that the action is frivolous and vexatious and the plaintiff would have insufficient assets in Canada available to pay the costs of the defendant, if ordered to do so, or	*f*) le défendeur a obtenu une ordonnance contre le demandeur pour les dépens afférents à la même instance ou à une autre instance et ces dépens demeurent impayés en totalité ou en partie;
. . .	*g*) il y a lieu de croire que l'action est frivole ou vexatoire et que le demandeur ne détient pas au Canada des actifs suffisants pour payer les dépens s'il lui est ordonné de le faire;
the Court may order the plaintiff to give security for the defendant's costs.	
. . .	…
417. The Court may refuse to order that security for costs be given under any of paragraphs 416(1)(*a*) to (*g*) if a plaintiff demonstrates impecuniosity and the Court is of the opinion that the case has merit.	**417.** La Cour peut refuser d'ordonner la fourniture d'un cautionnement pour les dépens dans les situations visées aux alinéas 416(1)*a*) à *g*) si le demandeur fait la preuve de son indigence et si elle est convaincue du bien-fondé de la cause.

Defendants' motions for security—essential background

[7] In terms of the context to be borne in mind, after reading and analyzing the parties' records and listening to their oral arguments, the Court is of the view that the following should be noted.

[8] There is no doubt that for many, many years (since at least 1994) the plaintiff—who, as the Court understands it, has always represented himself—has commenced numerous legal

proceedings against one defendant or the other, or sometimes possibly against both as is the case here, in this Court or other courts such as the Superior Court of Québec.

[9] In fact, in a decision dated July 24, 2009 (*Lavigne v. Canada Post Corporation*, 2009 FC 756 (*Lavigne 2009*), which was appealed in docket A-422-09 and dismissed on June 22, 2010, by the Federal Court of Appeal because of delay by the plaintiff), Mr. Justice de Montigny of this Court pointed out the following at paragraphs [47] and [52] of his decision, in which, *inter alia*, he granted the CPC's motion for security, with costs, and dismissed the plaintiff's motion for interim costs, with costs (for this motion, the plaintiff relied on the Supreme Court of Canada's decision in *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] 3 S.C.R. 371, paragraph 40):

> [47] Since 1994, the applicant has filed at least 19 judicial and quasi-judicial proceedings, nine of which have been against the respondent [the CPC].
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> . . .
>
> [52] On February 12, 2009, pursuant to a preliminary motion made by the respondent, Justice Kirkland Casgrain dismissed the applicant's action with costs, declared the applicant "to be a vexatious and quarrelsome litigant", and ordered the provisional execution of the judgment notwithstanding appeal. On April 20, 2009, the Québec Court of Appeal dismissed the applicant's motion to force the respondent to proceed in English and allowed in substantial part the respondent's motion to dismiss the applicant's appeal, thereby upholding Justice Casgrain's ruling that the applicant is a vexatious and quarrelsome litigant (see Court of Appeal docket no. 500-09-019410-091).

[10] As the Court understands, it was in part based on the foregoing that the CPC noted at paragraph 7 of its written representations that, in its opinion,

> [7] The Plaintiff is a very litigious individual and, pursuant to a motion filed by Canada Post Corporation before the Superior Court of Quebec, has been declared to be a vexatious and quarrelsome litigant by the Quebec Superior Court and by the Quebec Court of Appeal (leave to appeal denied by the Supreme Court of Canada).

Analysis

[11] As for the application of paragraph 416(1)(*f*) of the rules, it is undeniable, as each defendant has clearly shown, that in the legal proceedings instituted by the plaintiff against the defendants, he has accumulated a series of orders for costs against him since 2003 in this Court, the Superior Court of Québec, the Québec Court of Appeal and the Supreme Court of Canada totalling, based on the Court's calculation, $9,342.15 with respect to the CPC and $2.199.44 with respect to the Union.

[12] This was partly the situation at the time of the *Lavigne 2009* decision because at paragraphs [64] and [65] of its reasons the Court pointed out as follows the conditions for applying paragraph 416(1)(*f*) of the rules, the plaintiff's indebtedness for past costs and the forced enforcement measures the CPC had to take in the past to be paid, which were largely unsuccessful since the plaintiff refused to satisfy the orders willingly and since the plaintiff's patrimony is constantly shrinking:

> [64] In order to be entitled to an order for security for costs pursuant to paragraph 416(1)(*f*) of the *Federal Courts Rules*, "a defendant does not have to satisfy any other requirement than those specifically contained in that paragraph": *Ayangma* v. *Canada*, 2003 FC 1013, at para. 14. Indeed, it has been determined that a defendant is "prima facie entitled to security for costs" where there is an unpaid costs order in favour of the defendant: *Coombs* v. *Canada*, 2008 FC 894.

> [65] In the matter at hand, there is no doubt that the requirements of Rule 416(1)(*f*) of the *Federal Courts Rules* are fulfilled since two costs orders remain unsatisfied. Furthermore, the applicant has refused to willingly comply with the costs orders and has forced the respondent to incur further costs and institute garnishment proceedings in an attempt to obtain satisfaction of the debt. Now that the applicant has sold his house, the situation is even worse: the respondent will be unable to obtain a garnishment order to seize the rent payable by his tenant.

[13] Thus, given that the situation here is even worse and more pronounced than after the *Lavigne 2009* decision, there is no doubt that the requirements of paragraph 416(1)(*f*) have been satisfied.

[14] Moreover, as the Court understands it, the plaintiff is invoking rule 417 and is asking the Court to exempt him from providing any security for costs.

[15] We note that rule 417 reads as follows:

417. The Court may refuse to order that security for costs be given under any of paragraphs 416(1)(*a*) to (*g*) if a plaintiff demonstrates impecuniosity and the Court is of the opinion that the case has merit.	**417.** La Cour peut refuser d'ordonner la fourniture d'un cautionnement pour les dépens dans les situations visées aux alinéas 416(1)*a*) à *g*) si le demandeur fait la preuve de son indigence et si elle est convaincue du bien-fondé de la cause.

[16] Thus, not only does the rule provide that the exemption being sought is discretionary, it also requires, in addition to the plaintiff's impecuniosity, that the Court be of the opinion that the case has merit.

[17] As to the plaintiff's impecuniosity, in order to move the debate forward, we should consider that this condition has been met.

[18] However, as to whether the action has merit, the Court is far from convinced that the plaintiff has discharged his burden of proof in this regard for the following reasons.

[19] With respect to the burden of proof and the qualities an action must have to lead the Court to use its discretion under rule 417, my ex-colleague Hargrave had this to say in 2001 in *Early Recovered Resources Inc. v. Gulf Log Salvage Co-Operative Assn.,* 2001 FCT 524, at paragraphs 30 and 31:

> [30] As I noted earlier the Ontario test, as set out in *Orkin*, for allowing an impecunious corporate plaintiff to proceed without posting security for costs, is that the claim be one which the plaintiff establishes not merely as likely to succeed, but as almost certain not to fail. This seems a rather high standard, one which might mitigate against an unusual claim or a difficult claim which has merit. Yet a defendant, faced with the claim of an impecunious corporate plaintiff, a claim to which there may well be a good defence, ought to have some protection. I do not need to decide if the appropriate test is the high standard of certainty that the claim will not fail, for the Plaintiff falls short of satisfying the plain wording of Rule 417.
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> [31] The present case does not attract the benefit of Rule 417, that is the grounds for refusing security for costs and allowing the Plaintiff to proceed, for I have not been convinced by the Plaintiff that the case has merit. I am not convinced that the case is such as to make it deserving or worthy of consideration on the basis of substance, elements or grounds of a cause of action, which entitle the Plaintiff to have the matter enquired into by the Court under the relief provided in Rule 417.
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> [Emphasis added.]

[20] In 2005, the same colleague stated the following about a meritorious case in *Mark Doe v. Canada*, 2005 FC 537, at paragraph 41:

> [41] There is the question of just what is merit and a meritorious case. Justice Andrekson, of the Alberta Queen's Bench, considered the concept of merit in the context of costs, in *R. v. Leung* [1998] 2 W.W.R. 178 at 197:
>
> "Merit", according to the *Concise Oxford Dictionary* (8th ed. 1990) means, *inter alia*, deserving or worthy of consideration.
>
> I would further define merit as being the substantive considerations which are to be taken into account in making a decision and to concepts found in the *Shorter Oxford English Dictionary*, 2002, that to have merit is to have a quality of deserving well and that it is "A point of intrinsic quality, a commendable quality, an excellence, a good point.". From this it is clear that the case need not be determined, at this stage, in absolutes, but merely that it be well regarded, of commendable quality and of excellence, within the definition of merit.
>
> [Emphasis added.]

[21] In the specific situation that is before us in each docket, a review of the plaintiff's statements of claim and a consideration of the parties' motion records leads the Court, for the purposes of this motion, to strongly favour the CPC's analysis, to mention only one of the defendants, at paragraphs 37 to 60 of its written representations (see paragraphs 36 to 51 for docket T-107-10) and to find that the plaintiff's actions have little merit.

[22] Specifically, the Court would like to point out, if we take docket T-105-10, what is said at paragraphs 37, 38 and 67 of the written representations:

> 37. The various grounds invoked and the facts alleged by the Plaintiff in his Amended Statement of Claim to support his claims

> all stem from his medical condition, the termination of his employment relationship with the Defendant Canada Post Corporation or from the various unsuccessful recourses that the Plaintiff took or pursued against the Defendant after the parties entered into the 2008 SA.
>
> 38. The Plaintiff is clearly trying to litigate issues that have been legally and irrevocably settled in good faith by the Defendant which, in itself, constitutes a vexatious and quarrelsome conduct that is contrary to the interests of the judicial system.
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> . . .
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> 67. For the reasons set out above at paragraphs 37 to 60, the Defendant respectfully submits that the Plaintiff's claim cannot be considered as being "well regarded, of commendable quality and excellence." To the contrary, the Plaintiff's claim is frivolous and vexatious, which is hardly surprising since the Quebec courts have already declared the Plaintiff to be a vexatious and quarrelsome litigant at large.

[23] Thus, for the foregoing reasons, the Court is denying the plaintiff the benefit of or exemption from rule 417 and is of the view that, under paragraph 416(1)(*f*) of the rules, each of the defendants who requested it in this docket and in docket T-107-10 is entitled to security for its costs. The defendants' motions will therefore be granted with costs.

[24] Moreover, as Justice de Montigny stated at paragraph [67] of his reasons in *Lavigne 2009*, the costs awarded below should be given in stages under subsection 416(2) of the rules.

Plaintiff's motion to lift the confidentiality

[25] Although it refers to rule 151, the plaintiff's motion is ultimately asking this Court to make an order lifting the confidentiality that currently applies to three documents in this docket and one document in docket T-107-10.

[26] The documents in this docket T-105-10 are Exhibits G, H and M attached to the plaintiff's affidavit dated June 18, 2010, which he filed in response to the defendants' motions for security. The document in docket T-107-10 is Exhibit C attached to an affidavit of the plaintiff also dated June 18, 2010, and filed in the same context. In the case of the latter document, although the plaintiff acknowledges at the outset that the amount that appears in the document is confidential, he is asking that the rest of the document be considered non-confidential.

[27] Exhibits G and M in docket T-105-10 and C in docket T-107-10 are copies of out-of-court settlement agreements signed by the plaintiff in 2007 or 2008 on the one hand, and by one or the other defendant on the other hand (hereinafter the out-of-court settlement agreements). Exhibit H in docket T-105-10 reflects an offer to settle out of court made by the CPC but not accepted by the plaintiff in 2007 (hereinafter the offer to settle).

[28] After reviewing the parties' records and oral arguments, I do not see any valid reason raised by the plaintiff that would justify the Court lifting the confidentiality that the parties have already given for the time being to the out-of-court settlement agreements and the offer to settle.

[29] All the out-of-court settlement agreements contain a confidentiality clause and, apart from the existence of such a clause, it is in the interest of the administration of justice and the public interest that such agreements, as well as the offer to settle, remain confidential and not accessible by the public. The very nature of such documents and a well-known judicial practice are the reasons why this type of document is treated confidentially.

[30] Moreover, it was established that this is not the first time the plaintiff has sought to produce documents of this nature before a court, without success.

[31] Accordingly, there is no doubt in the Court's mind that this situation satisfies the two-step test laid down by the Supreme Court of Canada in *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522, at paragraph 53, for obtaining a confidentiality order under rule 151.

[32] Thus, the plaintiff's motion to lift the confidentiality will be dismissed with costs, and, as the defendants requested, the Court will issue a confidentiality order under rule 151 with respect to the out-of-court settlement agreements and the offer to settle.

ORDER

1. The defendants' motions for security are granted with costs, and the plaintiff's motion to lift the confidentiality is dismissed with costs.

2. The Court issues a confidentiality order under rule 151 with respect to the out-of-court settlement agreements and the offer to settle identified earlier at paragraphs [26] and [27].

3. As for the costs to be granted on the defendants' motions for security, the plaintiff's motion to lift the confidentiality and with respect to the defendants' long-term costs until the dispute is completely resolved, the Court considers that the following award should be made for both dockets T-105-10 and T-107-10 collectively:

   (a) Each of the defendants is entitled to costs in the amount of $1,500 for its motion for security for costs and for the dismissal of the plaintiff's motion to lift the confidentiality;

   (b) It is reasonable to believe that, with respect to the long-term costs until the dispute is completely resolved, each defendant will incur $15,000 in costs.

4. Consequently, for both dockets T-105-10 and T-107-10 collectively—but separately for each defendant, i.e. the CPC and the Union—the plaintiff shall,

pursuant to the rules within 30 days of this order, give the amount of $6,000 as security for costs, in order to cover the costs on the three motions under review as well as security for the defendants' long-term costs until—but not including—the examinations for discovery stage.

5. Given the preceding reasons and findings, it is not necessary for the purposes of the defendants' motions for security to rule on the application of paragraph 416(1)(*g*) of the rules.

6. Last, for greater certainty, subsection 416(3) of the rules applies.

7. Apart from what is set out above, the other reliefs sought by the parties are dismissed.

8. These reasons for order and order also apply *mutatis mutandis* to docket T-107-10 and a copy of them will be placed therein.

"Richard Morneau"

Prothonotary

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-105-10
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PLACE OF HEARING:	Montréal, Quebec
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REASONS FOR ORDER BY:	PROTHONOTARY MORNEAU
DATED:	October 22, 2010

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