Federal Court  Cour fédérale

Date: 20120216

Dockets: T-1299-11
T-1300-11

Citation: 2012 FC 220

Ottawa, Ontario, February 16, 2012

PRESENT: The Honourable Mr. Justice Harrington

Docket: T-1299-11

BETWEEN:

THE ESTATE AND SURVIVORS OF MORDRED HARDY, VETERAN

Appellants/ Applicants

and

THE ATTORNEY GENERAL OF CANADA

Respondent/ Respondent

Docket: T-1300-11

AND BETWEEN:

THE ESTATE, WIDOW AND CHILDREN OF MORDRED HARDY, VETERAN

Appellants/ Applicants

and

THE ATTORNEY GENERAL OF CANADA

Respondent/ Respondent

REASONS FOR ORDER AND ORDER

[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.

[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.

[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.

PROTHONOTARY LAFRENIÈRE'S DECISION

[7] Rules 119 and 121 of the *Federal Courts Rules* provide that an individual may represent himself or herself, or otherwise be represented by a solicitor. A person who purports to act in a representative capacity shall be represented by a solicitor. However, the Court may, in special circumstances, order otherwise.

[8] The Prothonotary took note of the two styles of cause, each of which indicates that there is more than one applicant or plaintiff, as the case may be. There was no evidence that a grant of probate or letters of administration had been issued in relation to the estate of Mordred Hardy. There was no evidence that Karl Hardy had been authorized by the Estate of Mordred Hardy, or the widow, children or survivors of Mordred Hardy to act on their behalf. Furthermore, the Court should be satisfied that the party is unable to pay for a lawyer.

[9] Other factors considered were whether the proposed representative would be a witness and had the ability to properly represent the party. The Prothonotary concluded by stating that he was substantially in agreement with the written representations filed on behalf of the Crown. The Attorney General had referred to the decision of Associate Senior Prothonotary Giles in *Bernard Estate v Canada*, 57 ACWS (3d) 928, [1995] FCJ No 1158 (QL), which dealt with an action commenced by Ms. Bernard personally and as Committee for the Estate of Edith Bernard, and

possibly as the Executor of the Estate of Victor Bernard. Prothonotary Giles relied on the old English case of *Wedderburn v Wedderburn* (1853), 17 Beav 158, to hold that all plaintiffs, in the circumstances, must speak with one voice. If the Committee must be represented by a solicitor, all the other parties were to be represented by the same solicitor.

[10] All motions had been in writing up to this point, including the motion records on the appeal of Prothonotary Lafrenière's order. However, Mr. Justice Lemieux determined that the underlying issues and evidence were so complex that the appeal could not adequately be presented in writing. Consequently, he wisely ordered that the hearing of the appeal take place at a special session of the Court in Calgary.

THE HEARING ON APPEAL

[11] It soon became evident that Mr. Hardy had no knowledge, whatsoever, of the case law which deals with appeals from orders of prothonotaries to a judge of the Federal Court. He made the point, however, that the Prothonotary made some serious errors in fact:

a. in fact, he had a power of attorney from his mother;
b. in fact, Mordred Hardy lived in Quebec and had, by notarial will, left his entire estate to his wife, Helena Audry. A notarial will need not be probated in Quebec.
c. he also stated that efforts to hire a lawyer had been fruitless.

[12] There was, indeed, a power of attorney in the overall record, but not in reply to the Crown's motion for a stay pending the appointment of a solicitor. Rather, it was found in support of a notice of motion for consolidation and a notice of motion for an alternate written examination.

[13] Crown counsel also helpfully pointed out she had a copy of the will, which had formed part of a reply record which the Prothonotary had not accepted for filing, as the rules of procedure had not been followed. Post-hearing I had to do the same.

[14] In the interests of justice, I invoked rule 351 of the *Federal Courts Rules* which, in special circumstances, permits new evidence in appeal and accepted copy of the will, as well as another power of attorney Mr. Hardy had, unsuccessfully, attempted to file.

[15] Mr. Hardy stated that he had approached several lawyers who would not act. A number of reasons were given. They were in a conflict of interest because they represented the Crown in other matters; the case was too complex; they were not experts in veterans' pension matters; and they would not act on a contingency basis. He was told that it would cost a good $100,000 to try these matters. Indeed, by simply looking at the pleadings, and the record produced by Veterans Affairs, $100,000 might be a serious underestimate.

APPEALS FROM PROTHONOTARIES ORDERS

[16] The order was clearly discretionary. I can only exercise my discretion, anew, if the question raised in the motion is vital to the final issue, or the order was clearly wrong in the sense that the

exercise of discretion was based on a wrong principle or a misapprehension of the facts (*Merck & Co v Apotex Inc*, 2003 FCA 488, [2004] 2 FCR 459; *Canada v Aqua-Gem Investments Ltd*, [1993] 2 FC 425, [1993] FCJ No 103 (QL), and *Z.I. Pompey Industrie v ECU-Line N.V.*, 2003 SCC 27, [2003] 1 SCR 450).

[17] In the particular circumstances of this case, I consider the decision to be vital. In fact, the proceedings are stayed forever unless an attorney is appointed. I also consider that the facts upon which Prothonotary Lafrenière exercised his discretion were not the true facts. If it were not for the Crown's help during argument in locating documents, and my allowing new evidence, it would not have been known that there is only claimant to the pension, that there is only one heir, and that probate was not required. The old English case of *Wedderburn*, above, which requires heirs to speak with one voice is not applicable, even assuming it is still good law. The style of cause in T-1299-11 is a complete misnomer and Mr. Hardy failed to bring his power of attorney and his late father's will to the attention of the Court in a timely and organized manner.

DISCRETION *DE NOVO*

[18] I fear that Mr. Hardy will not adequately represent his mother.

[19] I fear that Mr. Hardy will use the courtroom as a bully pulpit.

[20] I fear that Mr. Hardy will be aggravating, as he lacks the manners and skill of a trained barrister.

[21] But most of all, I fear that if Mr. Hardy does not represent his mother, no one will. Her voice shall be silenced. She shall be driven from the judgment seat without having the opportunity to make her case. As Mr. Justice Pigeon said in *Hamel v Brunelle*, [1977] 1 SCR 147, at page 156: "…que la procédure reste la servante de la justice et n'en devienne jamais la maîtresse." / "…that procedure be the servant of justice not its mistress." However, there are limits.

[22] Chief Justice McLachlin has pointed out, time and time again, that: "Access to justice is the greatest challenge facing the Canadian justice system." As she said to the Council of the Canadian Bar Association at the Canadian Legal Conference in Calgary, Alberta, on 11 August 2007:

> The cost of legal services limits access to justice for many Canadians. The wealthy, and large corporations who have the means to pay, have access to justice. So do the very poor, who, despite its deficiencies in some areas, have access to legal aid, at least for serious criminal charges where they face the possibility of imprisonment. Middle income Canadians are hard hit, and often left with very the difficult choices that if they want access to justice, they must put a second mortgage on their home, or use funds set aside for a child's education or for retirement. The price of justice should not be so dear.
>
> Self-represented litigants, some driven by cost, and some who simply prefer to represent themselves, place burdens on the courts and other parties to litigation. Judges must ensure that unrepresented litigants are treated fairly, while at the same time, not appearing partial to one of the parties.

[23] In the exercise of my discretion *de novo*, I shall grant the appeal.

[24] A motion for particulars will be welcome. Mr. Hardy has three siblings. However, it is not at all clear from the statement of claim in T-1300-11 what interests they are claiming. There is no indication that they have authorized Mr. Hardy to act on their behalf. In any event, if absolutely necessary, they are entitled to represent themselves.

[25] In his motion, the Attorney General sought ancillary relief as to timing. He suggested that the action in T-1300-11 be stayed until the outcome of the judicial review in T-1299-11. He also stated that he intended to seek particulars and to move to have T-1300-11 struck. Some of these conclusions are mutually exclusive. As the matters are under case management by Prothonotary Lafrenière, I think it best that scheduling of these issues be worked out with him. Until then, the Attorney General need not file his motion record in T-1299-11 and his statement of defence in T-1300-11.

[26] In the circumstances, Mr. Hardy does not deserve costs.

ORDER

FOR REASONS GIVEN;

THIS COURT ORDERS that

1. The appeal from the order of Prothonotary Lafrenière in court dockets T-1299-11 and T-1300-11 is granted.
2. Mr. Karl Hardy is authorized to represent the other parties of interest as applicants or plaintiffs, as the case may be.
3. Timing of the Attorney General's intended motions to strike, to obtain particulars, or for a stay of T-1300-11 pending the determination of T-1299-11 are referred to the case management judge, Prothonotary Lafrenière. Until then, the Attorney General need not file his motion record in T-1299-11 and his statement of defence in T-1300-11.
4. The whole without costs.

"Sean Harrington"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1299-11
STYLE OF CAUSE:	THE ESTATE AND SURVIVORS OF MORDRED HARDY, VETERAN v AGC
AND DOCKET:	T-1300-11
STYLE OF CAUSE:	THE ESTATE, WIDOW AND CHILDREN OF MORDRED HARDY, VETERAN v AGC
PLACE OF HEARING:	CALGARY, ALBERTA
DATE OF HEARING:	FEBRUARY 7, 2012
REASONS FOR ORDER AND ORDER:	HARRINGTON J.
DATED:	FEBRUARY 16, 2012

APPEARANCES:

Karl Hardy	FOR THE APPLICANTS/APPELLANTS (ON THEIR OWN BEHALF)
Janell Koch	FOR THE RESPONDENT

SOLICITORS OF RECORD:

None	FOR THE APPLICANTS/APPELLANTS (ON THEIR OWN BEHALF)
Myles J. Kirvan Deputy Attorney General of Canada Edmonton, Alberta	FOR THE RESPONDENT