Federal Court  Cour fédérale

Date: 20150415

Docket: T-1170-14

Citation: 2015 FC 466

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Montréal, Quebec, April 15, 2015

PRESENT: The Honourable Mr. Justice Noël

BETWEEN:

PHILIPPE BEAUREGARD

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] Philippe Beauregard, the applicant, brought a motion under rule 51 of the *Federal Courts Rules*, SOR/98-106 [Rules] to set aside the decision of Prothonotary Richard Morneau [Prothonotary] dated January 7, 2015. The decision in question dismissed the application for judicial review for delay.

II. Facts

[2] The applicant is an officer in the Service de police de Lévis who was taking part in a forensic identification course given by the Canadian Police College [CPC].

[3] An administrative investigation was conducted by Royal Canadian Mounted Police officers following allegations that the applicant had contravened the CPC's *Code of Conduct* in August 2013.

[4] On August 20, 2013, when the investigation concluded, it was determined that the applicant had contravened the *Code of Conduct*. It was also decided that the applicant would, therefore, be dismissed.

[5] A dismissal letter was given to the applicant on August 30, 2013.

[6] The applicant appealed that decision. The CPC received a letter from counsel on September 23, 2013, asking that the applicant be readmitted to the forensic identification program.

[7] On April 9, 2014, in response to that letter, the Director General of the Canadian Police College [Director] replied that the applicant was the subject of an investigation where it was determined that he had contravened the *Code of Conduct*. The sanction imposed, dismissal, should not be changed. The Director also stated that if further investigation was necessary, it

would be conducted by the Service de police de Lévis given that the CPC had no legal power over the applicant. The applicant applied to the Court for judicial review of this decision.

[8] An application for judicial review was filed on May 9, 2014, and the applicant's affidavit with supporting material followed on June 9, 2014, and the applicant did not subsequently file a record in accordance with rule 309 of the Rules. The respondent filed his affidavit with supporting material on September 23, 2014.

[9] Given that 180 days had elapsed since the application for judicial review was filed, a notice of status review was issued by Justice Harrington on November 27, 2014. The notice of review stated that the applicant had 15 days to file his representations, which had to ". . . include a justification for the delay and a proposed timetable for the completion of the steps necessary to advance the proceeding in an expeditious manner." The notice added that the respondent would have seven days to respond.

[10] The applicant submitted his representations on December 11, 2014. The respondent submitted his representations on December 17, 2014. The applicant submitted a reply on December 23, 2014.

[11] Everything was given to the Prothonotary, who issued an order on January 7, 2015, concluding that the application for judicial review should be dismissed for delay. This is the order being appealed.

III. Impugned decision

[12] Prothonotary Morneau, taking into consideration counsel for the applicant's representations in chief and in reply, found that the respondent's arguments should prevail. He added that it was only in reply that the applicant sought to establish that he satisfied the criteria in *Baroud v Canada*, [1998] FCJ No 1729, 160 FTR 91 [*Baroud*] cited by the respondent. For the Prothonotary, this was not justifiable, and therefore the application for judicial review was dismissed for delay.

IV. Submissions of the parties

[13] Counsel for the applicant states in his written representations dated December 11, 2014, that the failure to comply with the 180-day time limit was his fault, not the fault of his client, Officer Beauregard. He argues that his client should not be penalized for his error. He submits that the Prothonotary did not take into account the timetable that was submitted in reply, thus creating a [TRANSLATION] "clear breach of the audi alteram partem rule" and that therefore he should have taken into consideration the short time period for resuming the proceeding.

[14] In response, the respondent argues that the applicant does not meet the *Baroud* criteria, which are (1) what are the reasons why the case has not moved forward faster and do they justify the delay that has occurred? and (2) what steps is the plaintiff now proposing to move the matter forward? Considering the admitted error by applicant's counsel in computing the 180-day time limit, the respondent submits that this demonstrates a [TRANSLATION] "lack of knowledge" of the Rules, that it was his responsibility to obtain the appropriate information to move the case

forward and that he was not diligent in monitoring the file. In support of his argument, he refers to a number of judgments that conclude that a lack of diligence or knowledge or a misunderstanding of the Rules do not constitute reasonable excuses for delay and that, therefore, the first *Baroud* criterion has not been made out.

[15] With respect to the timetable (second *Baroud* criterion), it was only filed in reply to the respondent's representations. He contends that the Prothonotary considered the timetable that was submitted in reply, contrary to what the applicant argued on appeal, but that the error in computing the 180 days did not excuse the applicant and that therefore the application for judicial review was dismissed and this appeal should also be dismissed.

V. Analysis

[16] According to rule 51 of the Rules and the jurisprudence, where the order under appeal is vital to the final issue of the application for judicial review as is the case here, the appellate judge exercises his or her discretion *de novo* (see *Canada v Aqua-Gem Investments Ltd*., [1993] 2 FCR 425, 1993 CanLII 2939 (FCA), at para 95 and *Merck & Co., Inc. v Apotex Inc.*, 2003 FCA 488 (CanLII), [2003] FCJ No 1925, at para 19).

[17] The Federal Courts' jurisprudence concerning rule 382 of the Federal Courts and the notice of status review is consistent. In response to this type of notice, the applicant must, as was explicitly stated in the notice of review issued November 27, 2014, provide a justification for the delay and include a timetable to advance the proceeding in an expeditious manner. Rule 382 as well as the *Baroud* decision, above, also expressly say this.

[18] In addition, the Federal Courts' jurisprudence states that errors, lack of knowledge or misunderstanding of the Rules are not necessarily grounds for justifying the delay (see *Netupsky v Canada (Customs and Revenue Agency)*, 2004 FCA 239 (CanLII) at para 18; *Cotirta v Missinnipi Airways*, 2012 FC 1262 CanLII) at para 13 (affirmed on appeal (*Cotirta v Missinippi Airways*, 2013 FCA 280 (CanLII)).

[19] I agree that the parties involved in a case and their counsel must get to know the Rules and update them based on the requirements of the proceeding selected. However, where a final decision results in terminating a proceeding that was validly initiated and taking away a party's right to present arguments, it seems to me that, in addition to the two *Baroud* criteria cited previously (reason for delay and proposed steps to move the matter forward), a Court must also consider whether the applicant showed an intention to proceed with the case, even if done awkwardly, but also whether everything can be corrected provided that the respondent will not suffer significant prejudice.

[20] On this issue, Justice Sharlow, in a Federal Court of Appeal decision, *Bernier v Canada (Minister of Human Resources Development)*, 2004 FCA 58, at paragraph 7, recognized that a failure to comply with the Rules need not be fatal provided that there is a good-faith intention to cure the failure and that the defendant will not suffer any substantial prejudice. In *Precision Drilling International v BBC Japan (Ship)*, 2004 FC 701, at paragraph 12 (CanLII), Justice Snider stated the following in this regard:

> Given the draconian effects of dismissing a claim for delay, I believe that it would be appropriate to focus on the overall interests of justice in the case and not to be overly concerned with minor omissions or procedural defects. The overarching concern should

> be whether the Plaintiffs recognize their responsibility to move this action along and are taking steps to do so. In my view, the *Baroud* questions are simply posed to address this concern and should not be applied in a manner that ignores this broader question. Thus, as I look at these two questions in the context of these particular facts, I would take a liberal approach to this analysis.

[21] Bearing in mind the statements mentioned above for both the Federal Court of Appeal and the Federal Court, I note in this case that applicant's counsel made an error in computing the timelines. Counsel's admission on this point was eloquent. In addition, the record shows that the applicant and his counsel always wanted the case to proceed. Counsel inappropriately filed a requisition for hearing, but in doing so he indicated that he wanted the proceeding to go ahead even though it had not reached that stage. Moreover, when he was properly informed, he filed a timetable in reply so that the case could proceed diligently. This was certainly not the way to adequately respond according to the Rules, but counsel for the applicant's actions inform us of the reason for the delay, and he proposes, awkwardly, a timetable in order for the proceeding to be heard. I also note that the respondent is not suggesting that he would suffer significant prejudice if the case were to proceed.

[22] It seems to me that in such circumstances the applicant should not suffer the fatal consequences that the interruption of a proceeding triggers. At the hearing, counsel for the applicant explained what happened in his submissions and accepted complete responsibility for the situation he created. This decision is not a way for the undersigned to excuse the errors made by applicant's counsel, but it seems that the interests of justice require me to find that the criteria in *Baroud*, above, were met, although belatedly, and that therefore the appeal should be allowed and a timetable will form part of this judgment.

[23] Costs in the cause.

JUDGMENT

THE COURT ORDERS AND ADJUDGES as follows:

1. The Prothonotary's decision is set aside;

2. This action shall proceed as a specially managed proceeding;

3. The applicant shall file his record on May 15, 2015, and the respondent shall file his on June 26, 2015;

4. Costs in the cause.

"Simon Noël"
Judge

Certified true translation
Mary Jo Egan, LLB

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1170-14
STYLE OF CAUSE:	PHILIPPE BEAUREGARD v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	MARCH 31, 2015
JUDGMENT AND REASONS:	SIMON NOËL J.
DATED:	APRIL 15, 2015

APPEARANCES:

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