Federal Court  Cour fédérale

Date: 20200729

Docket: 20-T-27

Citation: 2020 FC 806

Toronto, Ontario, July 29, 2020

PRESENT: Mr. Justice A.D. Little

BETWEEN:

COB ROLLER FARMS LTD.

Applicant

and

9027-3636 QUÉBEC INC., carrying on business as ÉCOCERT CANADA

Respondent

CORRECTED ORDER AND REASONS

[1] In this motion, the applicant seeks an extension of time and leave to file an application for judicial review. The motion was decided in writing under Rule 369 of the *Federal Courts Rules* and subs. 18.1(2) of the *Federal Courts Act.*

[2] For the reasons that follow, it is in the interests of justice to grant an extension of time. Leave is granted to enable the applicant to file an application for judicial review in this matter within 10 days of this Order.

I. **Facts**

[3] The applicant Cob Roller Farms Ltd. ("Cob Roller") operates several farm sites in Ontario. The respondent 9027-3636 QUÉBEC INC., carrying on business as Écocert Canada ("Écocert") is accredited as a certification body for organic agriculture and is based in Quebec.

[4] The proposed Notice of Application concerns a decision by Écocert to revoke its organic product certification of Cob Roller.

[5] Cob Roller filed this motion on June 30, 2020, supported by an affidavit setting out its version of the material facts. Écocert filed a responding Motion Record that included an affidavit containing substantially the same chronology, with additional facts and its own perspective on the situation.

[6] I will set out the essential chronology for the purposes of this motion only and without attempting to include every nuance or capture every issue raised by the parties.

[7] Before 2019, Cob Roller was certified as an organic producer by an American company, which decided to discontinue its Canadian certification operations.

[8] Cob Roller applied to Écocert Canada for certification. Following an August 2019 inspection and audit, Écocert issued an Organic Product Certification to Cob Roller by Certification Decision dated October 7, 2019.

[9] After Écocert received a complaint in late November, it conducted an unannounced inspection of Cob Roller on December 11, 2019. In that inspection, Écocert identified certain areas of non-compliance with a manual. The affidavit filed by the applicant indicates that the inspector conducted the inspection without seeking any input from Cob Roller and without providing it with an opportunity to be heard.

[10] On December 19, Écocert sent to Cob Roller a document entitled "Notice of Ground for Cancellation". It refers to a "Random Inspection" on December 11. The Notice advised that the certification of certain products is "suspended" and then stated:

> According to clause 350(2) du SFCR, ÉCOCERT Canada notified you in writing of the grounds for the cancellation and was provided with an opportunity to be heard in respect of the cancellation.
>
> You can take advantage of the opportunity to be heard within thirty (30) days from the date of this notice.
>
> If we have no return from you by 2020-01-19, your certification will be cancelled at this date as per clause 350(3) of the part 13 of SFCR.

The reference to "SFCR" is to the *Safe Food for Canadians Regulations*, SOR/2018-108.

[11] The Notice then stated:

> IN THE CONTEXT OF THE OPPORTUNITY TO BE HEARD:
>
> You can take advantage of the appeal process within thirty (30) days from the date of the notice informing you of the decision.

[12] The Notice then has several pages of Audit Results under seven headings, one of which was an "Identified non-compliance" relating to "Untruthful / Misleading information".

[13] The parties disagree over the nature of the Notice as a "decision", including whether the Notice suspended, or cancelled, Cob Roller's organic certification.

[14] Cob Roller submitted a response on or about January 19, 2020, which Écocert apparently received on January 23. By letter that day, Écocert advised Cob Roller that it had received Cob Roller's "appeal of the notification of cancellation" and that the "appeal would be revised (sic) within 15 days. The result of this appeal will then be transmitted."

[15] By letter dated February 5 under the hearing "Result of appeal request", Écocert advised:

> This is to inform you of the result of your request to appeal the certification decision. Following the review of your file ÉCOCERT CANADA made the following decision:
>
> **Your appeal is denied**: the initial certification decision of ÉCOCERT CANADA is maintained. The denial is based on the following reasons:
>
> **FALSE OR MISLEADING STATEMENT**: […]

[Original bolding.] The letter then described certain alleged false or misleading statements. After setting out certain statutory provisions, the letter referred to an attached "notice of revocation" and stated: "Any complaints involving the provision of ÉCOCERT Canada may be directed to CAEQ", the latter being the *Comité d'accréditation en évaluation de la qualité*.

[16] On February 11, Cob Roller sent an email to Écocert providing additional explanations for the allegedly false or misleading statements, which added to its response provided on or about January 19.

[17] The next day, Écocert responded that the "certification process is close (sic) since the appeal has been denied" and that the certification contract was terminated.

[18] The affidavit filed by the applicant advises that on the same day, February 12, Cob Roller sent a complaint to the CAEQ. The CAEQ rejected it by correspondence dated April 9, 2020. Although Cob Roller did not file the complaint in its motion record, the ACEQ's correspondence dated April 9 refers to a complaint made on February 12, 2020.

[19] Between February 12 and April 9, 2020, this Court began to issue Practice Directions and Orders caused by the COVID-19 pandemic. The Orders provided for, among other things, the suspension of the running of all timelines, including the 30-day requirement under subs. 18.1(2) of the *Federal Courts Act*, effective on March 16, 2020. The start of the pandemic caused a significant impact on parties, legal counsel and the operations of the Federal Court. I will refer to the period during which the running of time was suspended as the "Suspension Period", as the Court's Orders did. The Suspension Period for Ontario and Quebec expired on June 29, 2020.

[20] In mid-April 2020, Cob Roller retained legal counsel, who wrote to Écocert by letter dated May 20, 2020 advising that Cob Roller intended to seek judicial review in the Federal Court of Écocert's decision to cancel the organic certification. Counsel's letter dated May 20

advised that the deadline to commence the application would have expired on March 6 and asked Écocert's consent to an extension or at least not oppose it.

[21] After a follow-up letter from Cob Roller's counsel dated May 28, counsel for Écocert responded by letter dated June 1, 2020. Counsel advised that Écocert did not admit at that point that the Federal Court has jurisdiction to hear the application for judicial review but that if it did, Écocert refused to consent to the extension of time and reserved all its rights.

[22] Cob Roller filed this motion on June 30, 2020. Écocert vigorously opposed it in a lengthy and detailed affidavit and written submissions. I will make reference to additional evidence and submissions as needed below.

II. **The Test**

[23] Subsection 18.1(2) of the *Federal Courts Act* requires that an application for judicial review be made within 30 days after the time the decision or order was first communicated to the party directly affected by it, "or within any further time that a judge of the Federal Court may fix or allow before or after the expiration of those 30 days."

[24] The time to make an application begins to run at the moment when the applicant learns of the final decision that is to be challenged on judicial review: *Meeches v. Assiniboine*, 2017 FCA 123, at para 40. As Justice Scott's decision in *Meeches* shows, leave to file the Notice of Application is required or the application will be time barred (at para 41). See also *The Key First*

Nation v. Lavallee, 2019 FC 1467 (Walker, J.) and *Save Halkett Bay Marine Park Society v. Canada (Environment)*, 2015 FC 302 (Crampton, CJ), cited by the respondent.

[25] Extensions of time under subs. 18.1(2) are discretionary and are granted when they are in the interests of justice. Where an application for judicial review is brought by one or more individual applicants, four questions guide the Court's inquiry in the exercise of its discretion:

(1) Did the moving party have a continuing intention to pursue the application?

(2) Is there some potential merit to the application?

(3) Has the respondent been prejudiced from the delay?

(4) Does the moving party have a reasonable explanation for the delay?

See the reasons for judgment of Justice Near in *Thompson v. Canada (Attorney General)*, 2018 FCA 212, at para 5; and of Justice Stratas in *Wenham v Canada (Attorney General)*, 2018 FCA 199, at para 42 and in *Canada (Attorney General) v. Larkman*, 2012 FCA 204, at para. 61.

[26] The importance of each of these four questions depends upon the circumstances of each case. In addition, not all of these four questions need be resolved in the moving party's favour. Strength in one factor may make up for weakness in another. The overriding consideration is that the interests of justice be served: *Larkman*, at para. 63; *Thompson*, at para 9.

[27] On this motion, both parties identified and focused their written submissions around these four factors

III. **Application of the Test**

[28] The parties agree that the time to file an application for judicial review expired on March 6, 2020, which is 30 days after Écocert's final decision communicated on February 5. They also agree that it was 10 additional days until the suspension of the running of time in this Court's Practice Directions and Orders.

A. *Continuing Intention*

[29] Cob Roller submits that it had a continuing intention to dispute the cancellation of its organic certification since the decision was first communicated. As I understand it, Cob Roller takes the position that Écocert made an initial decision in December and communicated it on December 19, and Cob Roller filed its materials for an "appeal" on January 19. After Écocert's "appeal" decision on February 5, Cob Roller continued to seek a reversal, by sending its further explanations by email to Écocert on February 11 (which were rejected because the appeal was completed). Cob Roller then continued to seek a reversal by sending its complaint to the CAEQ on February 12, which was rejected on April 9. It then immediately hired counsel, who proceeded to contact Écocert's counsel and file this motion.

[30] Écocert responds that Cob Roller did not disclose its intention to seek judicial review to Écocert until May 20, well after the expiry of the 30-day deadline under subs. 18.1(2). It also

alleges that Cob Roller was not diligent in its complaint process with the CAEQ because it delayed a month in providing information to the CAEQ, although there appears to be little to substantiate that claim in the record (at least not in the two sources cited in para 134 of the respondent's written representations). In any event, Écocert contends that there was nothing preventing the applicant from filing an application for judicial review within the required 30-day period in the statute.

[31] In my view, the evidence on this motion shows Cob Roller's intention to challenge the certification cancellation in any way it could. There is a daisy-chain of steps to challenge the certification cancellation, from the "appeal" on or about January 19, to its February 11 email, to its complaint to the CAEQ and its rejection, to hiring legal counsel and giving instructions to commence a judicial review application in this Court.

[32] The option to complain to the CAEQ came from Écocert itself, in its February 5 letter. It was also in Écocert's December 19, 2019 notice. In essence, until it heard from the CAEQ on April 9, 2020, Cob Roller believed it was taking all available appeal options, as it understood them. When its counsel subsequently raised the option of a judicial review application in this Court, Cob Roller decided to apply to this Court after considering its options over a weekend.

[33] I recognize that Cob Roller's intention for much of this period was to challenge the revocation of its certification in any way it believed it could, rather than to do so in particular by applying for judicial review in this Court. However, in my view, an intention to pursue available legal avenues to set aside the revocation is sufficient to show a continuing intention for present

purposes. See *Apv Canada Inc. v. Canada (Minister of National Revenue)*, 2001 FCT 737, at para 13 (Pelletier, J.); *Crowchild v Tsuu Tina Nation*, 2017 FC 861, at para 19 (Pentney, J.). The evidence does not support Écocert's submission that Cob Roller's actions show a desire to pursue "other options" than judicial review that it "considered preferable and more promising at the time".

[34] This first factor in the four-step approach described by Justice Stratas favours extending the time for filing an application for judicial review.

[35] I have considered some of Écocert's submissions on this first factor under factor four, below.

B. *Some Potential Merit in the Application*

[36] Cob Roller's proposed draft Notice of Application, and its submissions on this motion, focus on procedural fairness. On a judicial review application, the standard of review will be correctness. The reviewing court's obligation is to ensure that the process was procedurally fair: *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69, [2019] 1 FCR 121, esp. at para 49 and 54. The ultimate question is whether the party affected knew the case to meet and had a full and fair chance to respond: *Canadian Pacific Railway Company*, esp. at para 56; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, at para 22.

[37] Cob Roller's position is that the application is likely to succeed because the procedure adopted by Écocert was flawed and unfair. Cob Roller claims Écocert was not transparent with it

about the criteria it applied and applied those criteria unevenly, cancelling its certification for irrelevant reasons or "mere technicalities". It denies that its statements were false or misleading and says that the items on which Écocert based its certification cancellation have nothing to do with production or farming operations of organic crops. In addition, once Écocert made its decision to cancel (which I take to mean in its notice dated December 19, 2019), there was "no way that it was going to allow any appeal of the decision" and it unfairly "acted as judge in its own cause".

[38] For its part, Écocert responds that its procedure was fair and precise. It had no alternative than to cancel the certification under the mandatory provisions in paragraph 350(1)(*b*) and subs. 350(2) of the SFCR because of the violation of s. 15 of the *Safe Food for Canadians Act*, SC 2012, c. 24. In brief, s. 15 prohibits making a false or misleading statement to any person who is exercising powers or performing duties or functions under that Act, or providing him or her with false or misleading information. The affidavit filed by Écocert provided a detailed explanation of the importance of those provisions as they applied to the allegedly false or misleading statements made by Cob Roller (affidavit, para 30).

[39] Écocert's responding affidavit on this motion raised two new points for Cob Roller: that the unannounced inspection on December 11 followed a complaint in late November, and that in 2017, the Canada Food Inspection Agency had advised Écocert that a key employee of Cob Roller, who participated in the inspection and is the spouse of Cob Roller's affiant on this motion, had a fraudulent Organic Producer Certificate dated July 2016.

[40] In its reply submissions, Cob Roller argued that these new revelations make it more likely that the application will succeed. Cob Roller alleged that Écocert had an ulterior motive for cancelling the certification, and that it did not disclose either the complaint or the allegedly fraudulent certificate. It says there was nothing random about the December 11 inspection, that Cob Roller was targeted and that it never had any opportunity to address either undisclosed point. It also claims that the tone and content of the respondent's supporting affidavit shows that Écocert did not act impartially.

[41] In addition, the affidavit filed by Écocert on this motion has emphasized the active participation by the key employee and spouse in Écocert's annual and random inspections and that he answered most of the questions in the audits.

[42] Cob Roller further emphasizes the affiant's statement that the "only avenue of appeal from a decision of Écocert is a direct submission to Écocert itself". I note that that sentence in the affidavit goes on to refer to the right to be heard set out in subs. 350(2) of the SFCR. This point ties back to the disagreement between the parties as to the effect of the December 19, 2019 notice. The affidavit filed by Écocert also advised that "the review of an appeal brought by a party is analysed by a totally different panel of persons" within Écocert, and those persons have an "impartiality obligation". Such appeals have been successful in overturning the "initial decision" in 36% of cases in the past two years. Écocert submitted that in general, it is "common that the appeal of an office board's decision is made by the office board itself".

[43] In my view, there is some potential merit in the proposed application. Although on the face of the regulations, a breach of the prohibition in s. 15 of the *Safe Food for Canadians Act* triggers mandatory action under s. 350 of the SFCR, any conclusion of a breach presumably must be based on a fair process, including the right to be heard in subs 350(2). The applicant's draft Notice of Application and its submissions on this motion took something of a scatter-gun approach to its allegations, but essentially they argue that Cob Roller was targeted, a decision to cancel the certification was made in December 2019 without sufficient disclosure and without providing it with a meaningful opportunity to be heard, and that the internal "appeal" process that occurred in January/February was not a real or impartial appeal and was procedurally unfair.

[44] In its January 19, 2020 responses to Écocert's December 19, 2019 notice and audit results and in its email on February 11, Cob Roller appeared to confirm that there were errors in some of its prior statements, for example on the sizes of its farm sites; but those documents also go some ways to explaining the errors. I have considered that evidence alongside Écocert's explanations for the need for action provided in paragraph 30 of the affidavit filed by Écocert.

[45] In concluding that the proposed application meets the threshold of having some potential merit, I refer in particular to the contents of the December 19, January 23 and February 5 correspondence sent by Écocert, Cob Roller's two submissions, the non-disclosure allegation related to the allegedly fraudulent certificate and the active role of that employee/spouse in the audits and inspections, and the possibility that Cob Roller was not provided with a meaningful opportunity to be heard in December. I have also noted the suggestion that the late November complaint should have been disclosed to Cob Roller, on which it is reasonable to believe that

there will be legal and factual arguments both ways as to whether that was required and possibly when.

[46] I will say nothing more about the potential merits of the application, other than to say that these reasons are not intended to limit the scope of the issues to be litigated by either party, and to emphasize that nothing in these reasons should be interpreted as a comment on the strength of either side's position at this very early stage, or the potential outcome.

C. *Prejudice to the Respondent*

[47] The respondent claims it is prejudiced by the delay, having closed its file as the 30-day period in subs 18.1(2) had elapsed. Écocert also notes the importance of finality in decision-making, as the Court has noted in both *The Key First Nation* and in *Save Halkett Bay*, above.

[48] I note from the evidence that Écocert took the position in its correspondence with Cob Roller on February 12 that its file was in essence already closed due to the completion of the "appeal", well before the 30-day application period expired. In addition, it became aware of some details relating to the complaint to CAEQ after February 12 given its allegation on this motion that Cob Roller delayed by a month in providing information to that body. These facts diminish the strength of Écocert's submission that it would suffer prejudice due to Cob Roller's delay in filing the application due to the closure of its file.

[49] In the circumstances, this factor is neutral.

D. *Reasonable Explanation for the Delay*

[50] Cob Roller says its delay in filing was just 10 days and that any passage of time after the suspension of time running on March 16 should not be taken into account. It also contends that it was Écocert's own correspondence that advised Cob Roller that it could complain to CAEQ.

[51] Écocert submits there is no reasonable explanation for Cob Roller's delay and that even with the suspension of time due to the Court's Order caused by the pandemic, Cob Roller should have issued its pleading by April 5, 2020. It contends that as of April 4, the Court's Practice Direction and Order enabled motions to be heard under Rule 369 of the *Federal Courts Rules*. In addition, Écocert argues that not being aware of the possibility of an application for judicial review is no excuse for waiting, by its calculations, some 87 days to commence this motion. In addition, Écocert says that the complaint to the CAEQ is no explanation for the delay, as both the court application and the complaint could have proceeded at the same time.

[52] The Practice Direction and Order dated April 4, 2020 enabled motions in writing to be made, but only with the consent of both parties. There are many imponderables about what could or would have happened early in the COVID-19 pandemic, in this case less than three weeks into the Suspension Period. It cannot be known with any certainty whether Cob Roller and its counsel were in a position to prepare this motion and to seek consent to file it at that time, or whether Écocert and its counsel would have been able to respond or would have given consent to file it, given that everyone was dealing with the impact of the pandemic in its early stages. Nor do we

know whether the pandemic affected the timing of the CAEQ's decision communicated on April 9, 2020.

[53] I agree with the respondent that the proposed application for judicial review could, in theory, have been commenced while a complaint to the CAEQ was pending. In addition, the Court's Practice Directions and Order did not extend suspend the running of time for an already-expired deadline for the purposes of subs. 18.1(2) of the *Federal Courts Act*.

[54] However, I am reluctant to give significant weight to arguments about what the parties or their counsel in this case could, or should, have done during the Suspension Period and specifically to whether the applicant should have brought this motion on (or soon after) April 5, 2020. There was a ten-day delay period after the expiry of the 30-day period in subs. 18.1(2) of the *Federal Courts Act*, from March 6 to March 16 when the Court's operations were significantly curtailed. Of course, parties and legal counsel also felt the impact of the pandemic on their personal lives and on the operation of their businesses. The intent of the Suspension Period is stated in the Court's April 4, 2020 Practice Direction as follows: "[t]he intent is that a party will pick up from where things stood before the Suspension Period, as if the intervening period never existed." Although that intention stated at that point in the Practice Direction appears to relate to unexpired deadlines, in my view, the same consideration has substantial weight in relation to arguments about what could or should have been done by the parties during the Suspension Period, especially early on.

[55] Given the stakes involved with Cob Roller's certification, the respondent fairly observes that the applicant's lack of knowledge of its potential application to this Court does not excuse its delay. However, as already noted, the respondent's own communications on December 19, 2019 and February 5, 2020 advised Cob Roller about the option to complain to the CAEQ, which the applicant believed could result in Écocert's revocation decision being set aside. The CAEQ sent its decision on April 9, 2020.

[56] Cob Roller's counsel submitted that the applicant had an honest but mistaken belief, induced by Écocert, that it needed to make a complaint to CAEQ in order to exhaust its administrative remedies before commencing an application for judicial review. That is not quite correct, in that Cob Roller did not know it had a judicial review option when it complained to the CAEQ on February 12. But this submission does point in the direction of a reasonable explanation for a delay in commencing its application for judicial review.

[57] It took some time for the applicant to commence this motion after it retained counsel. That time was mostly during the second half of Suspension Period. Applicant's counsel provided some explanations and took some responsibility for the delays in commencing the motion after being retained, which I have taken into account, together with the contents of the correspondence between counsel described above.

[58] While there is a general interest in finality and enforceability of decisions, in my view there was a reasonable explanation for the applicant's delay, considering all the circumstances.

[59] This factor leans in favour of granting this motion.

IV. **Conclusion and Disposition**

[60] Returning to the overall question: is it in the interests of justice that the extension of time be granted and the application for judicial review be permitted to proceed?

[61] Taking the four factors into account on the evidence and submissions on this motion, in my view, it is in the interests of justice that the applicant be granted leave to make an application for judicial review in this matter. I would grant an extension of time under subs. 18.1(2) of the *Federal Courts Act* to enable the applicant to do so.

[62] The applicant did not seek a specific time after the Court's Order in which to file its application, but indicated in its initial submissions that it was ready to do so. I understand that there is no impediment to filing the application with the registry. The applicant will have ten (10) days to file. I am available if this period presents any difficulties.

ORDER in 20-T-27

THIS COURT ORDERS that:

1. The applicant is granted leave to file its application for judicial review in this matter within ten (10) days of the date of this Order.
2. The 30-day period in subs. 18.1(2) of the *Federal Courts Act* is extended until that date.
3. Costs in the cause.

"Andrew D. Little"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	20-T-27
STYLE OF CAUSE:	COB ROLLER FARMS LTD. v 9072-3636 QUÉBEC INC.

MOTION IN WRITING CONSIDERED AT TORONTO, ONTARIO PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES*.

ORDER AND REASONS:	LITTLE J.
DATED:	July 29, 2020

WRITTEN REPRESENTATIONS BY:

Dennis G. Crawford	FOR THE APPLICANT
Me Alexandre Manègre Me Marianne Lamontagne	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Dennis G. Crawford Monteith Ritsman Phillips Professional Corporation Stratford, Ontario	FOR THE APPLICANT
Me Alexandre Manègre Me Marianne Lamontagne Stein Monast L.L.P. Québec (Québec)	FOR THE RESPONDENT