Date: 20061003

Docket: T-1469-05

Citation: 2006 FC 1174

BETWEEN:

CP SHIPS TRUCKING LTD.
(formerly known as
CAST TRANSPORT INC.)

Applicant

and

GUNTER M. KUNTZE
and
ENTREPRISE GUNTER M. KUNTZE & FILS INC.

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

Teitelbaum J.

[1] This is an application for judicial review from the decision of Prothonotary Morneau on February 17, 2006, granting the motion by the respondent Gunter M. Kuntze, setting aside the application for judicial review of the applicant CP Ships Trucking Ltd. and ruling that this also carried with it dismissal of the application in respect of the respondent "Entreprise Gunter M. Kuntze & Fils inc."

B. FACTS

[2] On August 25, 2005, the applicant filed a notice of an application for judicial review in the aforementioned matter and a series of exhibits in support of its application.

[3] On September 1, 2005, Gunter M. Kuntze (the respondent) appeared to contest the notice of application at bar.

[4] Under the *Federal Courts Rules*, the applicant had to file and serve the affidavits and documentary exhibits it intended to use in support of the application no later than on or about September 26, 2005.

[5] On October 13, 2005, the applicant filed a notice of motion to amend the style of cause of the application and strike out Michel A. Goulet as respondent.

[6] On October 14, 2005, the applicant filed another notice of motion, this time to stay the proceedings before the arbitrator Michel A. Goulet regarding the respondent's dismissal complaint.

[7] On October 24, 2005, the Court granted the applicant's motion to amend the style of cause and strike out the name of the arbitrator Michel A. Goulet as respondent.

[8] On October 24, 2005, the respondent served and filed affidavits and documentary exhibits on a conservatory basis. The respondent also served and filed its reply record contesting the motion to stay the proceedings. The respondent's reply record maintained that the motion record to stay the proceedings contained no affidavit, no list of documents and no evidence and, accordingly, that the motion was invalid, as well as making submissions on a conservatory basis on matters of substance.

[9] Also on October 24, 2005, the respondent served and filed a motion record asking the Court to set aside and dismiss the application for judicial review for failure to comply with the *Federal Courts Rules.*

[10] On November 25, 2005, the Court made an oral direction, which stated:

> [TRANSLATION]
>
> The applicant will have until November 30, 2005, to file a motion for an extension of time and to respond to the written motion by the respondent, Gunter M. Kuntze, who is seeking to set aside the application for judicial review.

[11] On November 29, 2005, the applicant filed a motion record seeking an extension of time to respond to the respondent's written motion asking the court to dismiss and set aside the applicant's application for judicial review.

[12] On November 30, 2005, this Court made a direction regarding the motion to stay the proceedings before the arbitrator Michel A. Goulet as follows:

> [TRANSLATION]
>
> The applicant's application to stay the hearing scheduled before the arbitrator Michel A. Goulet, pursuant to subsection 18.1 of the *Federal Courts Act*, c. F-7, is inadmissible *prima facie*, as it does not in any way comply with the Rules of the Court regarding motion records and documents.

[13] By reasons and order dated January 11, 2006, the Court authorized the applicant to file a reply record against the motion to set aside made by the respondent.

[14] On January 16, 2006, the applicant filed in the Court a reply record to the motion to set aside and dismiss the application for judicial review and a reply record to the motion to strike "Entreprise Gunter M. Kuntze & Fils inc." from the style of cause.

[15] On or about January 19, 2006, the respondent filed in Court two (2) written submissions in reply to the two (2) aforementioned motion records.

[16] On February 17, 2006, the Court granted the respondent's motion, set aside the applicant's application for judicial review, and ruled that this also carried with it dismissal of the application in respect of the respondent "Entreprise Gunter M. Kuntze & Fils inc."

C. APPLICABLE PROVISIONS

[17] The applicable provisions of the *Federal Courts Rules*, SOR/98-106 (the Rules), read as follows:

56. Non-compliance with any of these Rules does not render a proceeding, a step in a proceeding or an order void, but instead constitutes an irregularity, which may be addressed under rules 58 to 60.	**56.** L'inobservation d'une disposition des présentes règles n'entache pas de nullité l'instance, une mesure prise dans l'instance ou l'ordonnance en cause. Elle constitue une irrégularité régie par les règles 58 à 60.
57. An originating document shall not be set aside only on the ground that a different originating document should have been used.	**57.** La Cour n'annule pas un acte introductif d'instance au seul motif que l'instance aurait dû être introduite par un autre acte introductif d'instance.

58. (1) A party may by motion challenge any step taken by another party for non-compliance with these Rules.

58. (1) Une partie peut, par requête, contester toute mesure prise par une autre partie en invoquant l'inobservation d'une disposition des présentes règles.

59. Subject to rule 57, where, on a motion brought under rule 58, the Court finds that a party has not complied with these Rules, the Court may, by order,

59. Sous réserve de la règle 57, si la Cour, sur requête présentée en vertu de la règle 58, conclut à l'inobservation des présentes règles par une partie, elle peut, par ordonnance:

(*a*) dismiss the motion, where the motion was not brought within a sufficient time after the moving party became aware of the irregularity to avoid prejudice to the respondent in the motion;

a) rejeter la requête dans le cas où le requérant ne l'a pas présentée dans un délai suffisant — après avoir pris connaissance de l'irrégularité — pour éviter tout préjudice à l'intimé;

(*b*) grant any amendments required to address the irregularity; or

b) autoriser les modifications nécessaires pour corriger l'irrégularité;

(*c*) set aside the proceeding, in whole or in part.

c) annuler l'instance en tout ou en partie.

60. At any time before judgment is given in a proceeding, the Court may draw the attention of a party to any gap in the proof of its case or to any non-compliance with these Rules and permit the party to remedy it on such conditions as the Court considers just.

60. La Cour peut, à tout moment avant de rendre jugement dans une instance, signaler à une partie les lacunes que comporte sa preuve ou les règles qui n'ont pas été observées, le cas échéant, et lui permettre d'y remédier selon les modalités qu'elle juge équitables.

306. Within 30 days after issuance of a notice of application, an applicant shall serve and file its supporting affidavits and documentary exhibits.	**306.** Dans les 30 jours suivant la délivrance de l'avis de demande, le demandeur dépose et signifie les affidavits et les pièces documentaires qu'il entend utiliser à l'appui de la demande.

D. DECISION OF PROTHONOTARY MORNEAU

[18] In his decision dated February 17, 2006, Prothonotary Morneau granted the motion by the respondent Gunter M. Kuntze, setting aside the applicant's application for judicial review and ruling that this carried with it dismissal of the application in respect of the respondent "Entreprise Gunter M. Kuntze & Fils inc."

[19] The prothonotary concluded that the applicant had significantly departed from its Rule 306 deadline and that its reply record against the respondent's motion to set aside was not satisfactory:

- This case is based on hearsay evidence of one of the applicant's lawyers about the explanations given by the Registry even before the application for judicial review was filed; and
- In the written submissions in the applicant's motion record, a slightly different explanation was given from that contained in the affidavit submitted by the applicant.

E. ISSUE

1. Did the prothonotary err in setting aside the applicant's application for judicial review?

F. SUBMISSIONS

Applicant

Standard of review

[20] The applicant maintained that the principles that should guide this Court in considering the case at bar are those applied by Blais J. in *A. Lassonde Inc. v. Sun Pac Foods*, [2000] F.C.J.U. No. 806, para. 38:

> [38] The factors to be considered in reviewing a prothonotary's decision, as laid down by the Court in *Canada v. Aqua-Gem Investment Ltd*, [1993] 2 F.C. 425 state:
>
> . . . discretionary orders of prothonotaries ought not to be disturbed on appeal to a judge unless:
>
> a) they are clearly wrong, in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of the facts, or
>
> b) they raise questions vital to the final issue of the case.

Clear error

[21] In the applicant's submission, the respondent's motion asked the Court to set aside for the following reason:

> [TRANSLATION]
>
> THE APPLICANT did not comply with the *Federal Courts Rules* (1998), and in particular Rule 306, failing to serve and file supporting affidavits and documentary exhibits . . .

[22] However, the applicant maintained that Rule 56 indicates that non-compliance with any of these Rules does not render a proceeding, a step in a proceeding or an order void, but instead constitutes an irregularity, which may be addressed under Rules 58 to 60.

[23] In the applicant's submission, the objection made by the respondent in its motion to set aside about the documentary exhibits must be qualified, since they were served with the notice of application as indicated by Exhibits R-1 and R-2 (motion record, pages 5 and 6). The respondent is hardly likely to suffer any prejudice as a result of this irregularity. Accordingly, the objection actually made was that the affidavits and documentary exhibits were not served and filed within 30 days after issuance of the notice of application, as provided in Rule 306.

[24] According to the applicant, it was accepted both in the affidavits of Mr. Larose on November 23, 2005 and February 24, 2006 and in the applicant's reply record that a mistake had been made in good faith resulting from a misunderstanding of the rules of practice and that the mistake had led to the irregularity.

[25] The applicant maintained that the prothonotary made a clear error when he concluded that:

> The Court is more than reluctant to dismiss an application for judicial review because the applicant, owing to the omissions of its lawyers, did not file its section 306 affidavits on time. However, the motion record filed by the applicant in the present motion does not leave the Court with any other reasonable choice.

[26] In the applicant's submission, the prothonotary made a clear and vital error when he refused to acknowledge this good faith error and the applicant's obvious intent to correct the error, so as to authorize a correction of the irregularity pursuant to Rule 59(*b*).

[27] The applicant maintained that *Chin v. Canada*, cited by the prothonotary, should be distinguished in this regard. In *Chin*, [1993] F.C.J. No. 1033, para. 8, Reed J. dismissed an application for an extension of time as follows:

> On what grounds then do I grant an extension of time. I have already indicated that, in general, I am not receptive to requests which are based solely on the work load counsel has undertaken. When an application for an extension of time comes before me, I look for some reason for the delay which is beyond the control of counsel or the applicant, for example, illness or some other unexpected or unanticipated event.

[28] In the applicant's submission, the ground relied on by counsel in the case at bar has nothing to do with the workload of the counsel of record, but rather with the good faith error of counsel resulting from the misunderstanding of the rules of practice. As such, it is a ground which is beyond the applicant's control.

[29] The applicant maintained that the approach and position taken by Reed J. in *Chin, supra*, is a closed and too limiting position and that, in the absence of any prejudice to the opposite party, as is the case here, the rules should be interpreted and applied so as to allow the parties to assert their rights.

Misapprehension of the facts

[30] In the applicant's submission, the prothonotary indicated that the reply record did not contain "plausible and reasonable explanations" or that the "attempt at justification does not hold water". The prothonotary thus misapprehended the facts when he refused to believe the explanation of a good faith error by counsel.

[31] In the applicant's submission, even if this misapprehension were to be treated as a professional error, the fact remains that, by the affidavit of Nil Dufour, the applicant's representative, the applicant clearly set out the directions given to its counsel to correct the formal defects as quickly as possible.

[32] The applicant maintained that, in *Muhammed*, 2003 FC 828, in which the applicant's former counsel missed the deadline for filing the record, Prothonotary Hargrave described the duality between the rules in *Chin*, *supra*, and *Mathon*, (1998), 28 F.T.R. 217 (F.C.T.D.), making an order based on an application for an extension of time:

> [20] *Chin* and *Mathon* are difficult to reconcile. In *Chin* the focus is on the concept that client and counsel are one and the same, thus the client is dragged under by the weight of the incompetent counsel. In *Mathon*, the case of the missed filing date, the focus, by way of Supreme Court of Canada authority, is on the concept that a client "who has acted with care should not be required to bear the consequences of such an error or negligence" (page 229). This is all the more the situation where the client lost a right as a result.
>
> [21] In choosing between the two approaches it is fitting to turn to *Grewal* (*supra*) which requires me to balance the factors bearing on a time extension with the overall view of doing justice between the parties. I will follow the line of cases culminating in *Mathon*, for the present instance presents the clear and specific case referred to by Mr Justice Rothstein, as he then was, in *Drummond* (*supra*). Taking all of the circumstances into consideration, including the continuing intention to pursue the application; the merit of the application; the lack of any prejudice accruing to the Respondent by reason of delay; the explanation for the delay and particularly that it was former counsel who, by abandoning the Applicants after allowing time to run, deprived the Applicants of their right; and that to terminate this judicial review proceeding on the basis of the procedural negligence and/or incompetence of former counsel would constitute a windfall to the Crown, a time extension is appropriate. Costs shall be in the cause.

[33] The applicant maintained that, inasmuch as the prothonotary chose to consider the problem from the standpoint of the criteria applicable to an application for an extension of time, the line of cases followed in *Muhammed* reflects the principles which should have been followed in the case at bar. Consequently, the principle which should have been followed by the prothonotary in the case at bar is that developed by this Court in *Mathon*.

[34] Further, in the applicant's submission, the prothonotary misapprehended the facts by stating that the applicant had significantly failed to observe its Rule 306 deadline, when in reality it was a

delay of less than 30 days, as the affidavits and documentary exhibits should have been filed before September 26, 2005, and as the respondent served its motion to set aside on October 24, 2005.

[35] The applicant maintained that it was thus in its first reaction to the application to set aside that it asked this Court for leave to correct the irregularities noted.

[36] In the applicant's submission, the prothonotary described as hearsay the allegation contained in Mr. Larose's affidavit to the effect that the explanations given by the Federal Court Registry were misapprehended.

[37] The applicant maintained that this was not hearsay. The signatory of the affidavit was in a position to see for itself that its misunderstanding of the rules on filing affidavits and documentary exhibits did not correspond to the objections made and the irregularities noted by the respondent in its motion to set aside. The incorrect belief of counsel did not result from misinformation given by the Registry, nor was it the result of information sent by the Registry, but from a misunderstanding by counsel. Accordingly, the applicant must be given the benefit of those explanations, which are sincere and were made in good faith.

Order is of determinative importance

[38] In the applicant's submission, the said application concerns a serious and important issue about the conduct of its commercial affairs and the legal organization of its affairs.

[39] The applicant maintained that the principal issue was whether the arbitrator Michel A. Goulet erred in law in dismissing the applicant's preliminary exception to the effect that the corporate vehicle chosen by the respondents in their contractual relations with the applicant divested

the arbitrator of any jurisdiction over the complaint of an alleged illegal dismissal made by the respondent under the *Canada Labour Code*.

[40] In the applicant's submission, it is important and determinative for the parties that this issue be thoroughly considered and decided by this Court, especially as the applicant's position in law is sound and has a good chance of being accepted.

[41] The applicant further maintained that this Court's role is not limited to considering the reasons for the delay: it must also examine the existence of an arguable case. This is how Prothonotary Hargrave summed up the state of the law on this issue in *Lewis v. Canada,* 2001 FCT 676:

> The matter does not end with a consideration of delay for, as set out in both *Grewal* and in *Beilin* (*supra*), there is a matter of demonstrating an arguable case. Chief Justice Thurlow, in *Grewal* (*supra*) adopted, at pages 271-272, the view of Chief Justice Jackett in *Consumers' Association (Canada) v. Ontario Hydro* [No. 2], [1974] 1 F.C. 460 (F.C.A) at page 463, that the test for a time extension included a consideration of whether the proposed appeal is arguable. Mr. Justice Muldoon summed up this concept in a later case, *Aguiar v. Canada (Minister of Citizenship and Immigration)* (1996) 106 F.T.R. 304 at 306:
>
> > [6] Now, when filing within statutory time limits, an applicant's chances of success are not usually scrutinized as part of the exercise of the right to proceed. But, as the applicant's counsel submits and acknowledges, when seeking an exceptional extension beyond the prescribed time limit a salient consideration in moving the court to grant such extension is "whether or not there is a good case on the merits: see [jurisprudence cited]".

[42] In the applicant's submission, it is in the interests of the parties and of justice to reverse the order of February 17, 2006, and to authorize the applicant to correct the irregularities in its record.

Respondent

Standard of review

[43] The respondent maintained that the criteria applicable to an appeal of a prothonotary's order, set out in *Canada v. Aqua-Gem Investments Ltd.*, were modified slightly in *Merck & Co. v. Apotex Inc.*, 2003 FCA 488, paras. 17-19:

> This Court, in *Canada v. Aqua-Gem Investment Ltd.*, [1993] 2 F.C. 425 (F.C.A.), set out the standard of review to be applied to discretionary orders of prothonotaries in the following terms:
>
> > . . . Following in particular Lord Wright in *Evans v. Bartlam*, [1937] A.C. 473 (H.L.) at page 484, and Lacourcière J.A. in *Stoicevski v. Casement* (1983), 43 O.R. (2d) 436 (Div. Ct.), discretionary orders of prothonotaries ought not to be disturbed on appeal to a judge unless:
> >
> > (a) they are clearly wrong, in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of the facts, or
> >
> > (b) they raise questions vital to the final issue of the case.
> >
> > Where such discretionary orders are clearly wrong in that the prothonotary has fallen into error of law (a concept in which I include a discretion based upon a wrong principle or upon a misapprehension of the facts), or where they raise questions vital to the final issue of the case, a judge ought to exercise his own discretion *de novo*.
>
> MacGuigan J.A. went on, at pp. 464-465, to explain that whether a question was vital to the final issue of the case was to be determined without regard to the actual answer given by the prothonotary:
>
> > It seems to me that a decision which can thus be either interlocutory or final depending on how it is decided, even if interlocutory because of the result, must nevertheless be considered vital to the final resolution of the case. Another way of putting the matter would be to say that for the test as to relevance to the final issue of the case, the issue to be decided should be looked to before the question is answered by the prothonotary, whereas that as to whether it is interlocutory or final (which is purely a *pro forma* matter) should be put after the prothonotary's decision. Any other approach, it seems to me, would reduce the more substantial question of "vital to the issue of the case" to the merely procedural issue of

> interlocutory or final, and preserve all interlocutory rulings from attack (except in relation to errors of law).

This is why, I suspect, he uses the words "they (being the orders) raise questions vital to the final issue of the case", rather than "they (being the orders) are vital to the final issue of the case". The emphasis is put on the subject of the orders, not on their effect. In a case such as the present one, the question to be asked is whether the proposed amendments are vital in themselves, whether they be allowed or not. If they are vital, the judge must exercise his or her discretion *de novo*.

To avoid the confusion which we have seen from time to time arising from the wording used by MacGuigan J.A., I think it is appropriate to slightly reformulate the test for the standard of review. I will use the occasion to reverse the sequence of the propositions as originally set out, for the practical reason that a judge should logically determine first whether the questions are vital to the final issue: it is only when they are not that the judge effectively needs to engage in the process of determining whether the orders are clearly wrong. The test would now read:

> Discretionary orders of prothonotaries ought not to be disturbed on appeal to a judge unless:
>
> (a) the questions raised in the motion are vital to the final issue of the case, or
>
> (b) the orders are clearly wrong, in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of the facts.

Vital to final issue

[44] The respondent maintained that, put otherwise, the issue is whether the effect of non-compliance with the Rules is vital to the final issue of the case, namely, the application for judicial review of the arbitral award by Michel A. Goulet. In the respondent's submission, the effect of non-compliance with the Rules is not vital to the final issue of the case.

[45] The respondent maintained that, in *Merck & Co.*, *supra*, Décary J.A. stated:

> The test of "vitality", if I am allowed this expression, which was developed in *Aqua-Gem*, is a stringent one. The use of the word "vital" is significant. It gives effect to the intention of Parliament, as so ably described by Isaac C.J. at pages

> 454 and 455 of his minority reasons in *Aqua-Gem* (I pause here to note that the learned Chief Justice's analysis of the role of the prothonotaries in the Federal Court remains basically unchallenged in the majority opinion written by MacGuigan J.A.):
>
> > . . . such a standard [of review] is consistent with the parliamentary intention embodied in section 12 of the *[Federal Court] Act*, that the office of prothonotary is intended to promote "the efficient performance of the work of the Court".
> >
> > In my respectful view it cannot reasonably be said that a standard of review which subjects all impugned decisions of prothonotaries to hearings *de novo* regardless of the issues involved in the decision or whether they decide the substantive rights of the parties is consistent with the statutory objective. Such a standard conserves neither "judge power" nor "judge time". In every case, it would oblige the motions judge to re-hear the matter. Furthermore, it would reduce the office of a prothonotary to that of a preliminary "rest stop" along the procedural route to a motions judge. I do not think that Parliament could have intended this result.
>
> One should not, therefore, come too hastily to the conclusion that a question, however important it might be, is a vital one. Yet one should remain alert that a vital question not be reviewed *de novo* merely because of a natural propensity to defer to prothonotaries in procedural matters.
>
> In *Aqua-Gem*, at p. 464, MacGuigan J.A. distinguished on the one hand between "routine matters of pleadings", words used by Lord Wright in *Evans v. Bartham*, [1937] 2 All E.R. 646 (H.L.) at 653, and "a routine amendment to a pleading", words used by Lacourcière J.A. in *Stoicevski v.Casement* (1983), 43 O.R. (2d) 436 (Ont. C.A.) at 438, and, on the other hand, between "questions vital to the final issue of the case, i.e. to its final resolution".

[46] In the respondent's submission, therefore, the issue is whether non-compliance with the Rules is an issue in the principal application.

[47] The respondent maintained that the prothonotary's order did not rule on the substance of the parties' rights or on an issue that was vital to the final issue of the case. The only effect of the prothonotary's order was not to recognize the applicant's right to proceed with its application for judicial review pursuant to the Rules. In this regard, the prothonotary's order disposed of an issue

which was entirely incidental to the issues between the parties, namely, the application for judicial review. Consequently, the delay and the non-compliance with the Rules are not issues in the application for judicial review.

[48] In the respondent's submission, this Court must refrain from disposing of this issue *de novo*.

Clear error

[49] The respondent maintained that the prothonotary put the problem correctly as follows, applying the correct principle:

> [8] Respecting time limits when preparing an application for judicial review is important and cannot be considered a mere question of form.

[50] In the respondent's submission, this Court has stated several times that all litigants have a duty to comply with the Rules and that this duty weighs still more heavily on litigants who benefit from professional advice.

[51] The respondent maintained that non-compliance with substantive and fundamental rules in making an application for judicial review is fatal. Non-compliance with these substantive rules dealing with preparation of the record and submission of the evidence on the application cannot be the subject of a correction since the applicant's failure does not involve a breach in the form of a proceeding, but a breach affecting the substance of the application.

[52] The respondent maintained that, in *Sim v. Canada*, [1996] F.C.J. 773 (F.C.), the Federal Court stated the following:

> Rule 302(*a*) [now 56 *et seq.*] is a direction that a mere failure to follow a form or procedure set out in the Rules, that is a want of legal form, as opposed to a matter going to merit, ought not to defeat a litigant.

[53] In the respondent's submission, therefore, the prothonotary exercised his discretion by the correct principle.

[54] The respondent maintained that, as a matter of fact, Prothonotary Morneau attached no credibility to the explanations given by the signatory of the affidavit, Mr. Larose, in support of the reply record. The prothonotary was of the view that the evidence submitted in this reply record was based on hearsay, which was a more than reasonable conclusion, given that Mr. Larose's affidavit contained only unsupported statements based on what he thought were the facts, namely that the explanations given by another representative of his firm were misapprehended.

[55] The respondent further maintained that the suggestion that [TRANSLATION] "the explanations given at that time to the said representative (who went to the Court Registry) were misapprehended so that the notice of application and the reply record were confused" was simply not believed by the prothonotary, and rightly so, since on August 25, 2005, there was simply no question of a reply record.

[56] In the respondent's submission, the prothonotary was also right to contend that the reply record offered a slightly different explanation from the one contained in the affidavit. The affidavit indicated that the information provided had led the deponent to confuse the notice of application and the reply record. The reply record indicated that counsel wrongly believed, after obtaining information from the Court Registry, that the filing of documentary exhibits with the notice of application was sufficient and that the affidavits of the applicant's representatives only had to be filed for the hearing. The prothonotary was quite right to state that this attempt at justification did not hold water.

[57] The respondent maintained that the statement described in the reply record did not correspond to the facts because the documentary exhibits had never been filed with the notice of application.

[58] Further, in the respondent's submission, the explanation that the notice of application and the reply record were confused also does not hold water:

> [TRANSLATION]
>
> (a) Neither the rules concerning applications nor the rules concerning motions provide for the filing of affidavits on the day of the hearing. There can be no confusion about this: the rule does not exist.
>
> (b) The motion record, served and filed in accordance with Rule 364(1), contains the supporting affidavits and documents.

[59] The respondent maintained that the prothonotary was of the view that the explanations given by the applicant were largely insufficient and partly, if not entirely, untrustworthy. Consequently, the prothonotary exercised his discretion in accordance with a correct apprehension of the facts.

Further submissions by the respondent

[60] Additionally, the fact that the applicant's counsel had misunderstood the Rules was not beyond the applicant's control, within the meaning of *Chin v. Canada*. The opinion given by Reed J. indicated that a reason beyond the control of counsel or the applicant might be illness or some other unexpected or unanticipated event. Misunderstanding the Rules cannot under any circumstances be regarded as an unexpected or unanticipated event.

[61] In the respondent's submission, the applicant has not to date asked this Court by motion to extend the deadlines for the service and filing of its affidavits, its documentary exhibits or even its

memorandum. Nevertheless, this clearly is the first reaction counsel for the applicant should have had on receiving the motion to set aside the application for judicial review.

[62] The respondent maintained that this Court should not admit into evidence the affidavit of Hubert Larose dated February 27, 2006, in respect of the appeal from the prothonotary's decision: *Apotex Inc. v. The Wellcome Foundation Ltd.*, [2003] F.C.J. 1551.

[63] In the respondent's submission, this Court and the Federal Court of Appeal have already held that it is within the arbitrator's jurisdiction to rule on the meaning and scope of the expression "any person . . . who . . . considers the dismissal to be unjust" contained in subsection 240(1) of the *Canada Labour Code*. See, for example, *Dynamex Canada Inc.*, [2003] F.C.J. 907. Accordingly, the issue, implementation of the concept of "any person . . . who . . . considers the dismissal to be unjust" in light of the facts in evidence, is central to the specialized jurisdiction conferred by section 242 of the *Canada Labour Code*. Moreover, the arbitrator's decision is protected by the privative clause contained in section 243 of that Code.

[64] The respondent maintained that, in light of the weakness of the submissions put forward by the applicant in its notice of application, and consistent with the ruling of the Federal Court of Appeal in *Dynamex*, this Court should conclude that the applicant had not established the existence of an arguable case.

[65] The respondent asked the Court to dismiss the motion to appeal the prothonotary's order of February 17, 1006; affirm that order; grant the respondent's motion to dismiss and set aside the application for judicial review for non-compliance with the Rules; and dismiss the applicant's application for judicial review in respect of all respondents with costs.

G. ANALYSIS

Preliminary matters

[66] The respondent maintained that this Court should not admit into evidence the affidavit of Hubert Larose dated February 27, 2006, in the appeal from the prothonotary's decision: *Apotex Inc. v. The Wellcome Foundation Ltd.*, [2003] F.C.J. 1551, paras. 9 & 10.

[67] I do not agree. That affidavit is in support of the judicial review at bar.

Standard of review

[68] The applicant maintained that the principles by which this Court must be guided in considering the case at bar are those applied in *Canada v. Aqua-Gem Investments Ltd.* However, those tests were altered slightly in *Merck & Co. v. Apotex Inc.*, *supra*:

> This Court, in *Canada v. Aqua-Gem Investment Ltd.*, [1993] 2 F.C. 425 (F.C.A.), set out the standard of review to be applied to discretionary orders of prothonotaries in the following terms:
>
> > . . . Following in particular Lord Wright in *Evans v. Bartlam*, [1937] A.C. 473 (H.L.) at page 484, and Lacourcière J.A. in *Stoicevski v. Casement* (1983), 43 O.R. (2d) 436 (Div. Ct.), discretionary orders of prothonotaries ought not to be disturbed on appeal to a judge unless:
> >
> > (a) they are clearly wrong, in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of the facts, or
> >
> > (b) they raise questions vital to the final issue of the case.
> >
> > Where such discretionary orders are clearly wrong in that the prothonotary has fallen into error of law (a concept in which I include a discretion based upon a wrong principle or upon a misapprehension of the facts), or where they raise questions vital to the final issue of the case, a judge ought to exercise his own discretion *de novo*.

MacGuigan J.A. went on, at pp. 464-465, to explain that whether a question was vital to the final issue of the case was to be determined without regard to the actual answer given by the prothonotary:

> It seems to me that a decision which can thus be either interlocutory or final depending on how it is decided, even if interlocutory because of the result, must nevertheless be considered vital to the final resolution of the case. Another way of putting the matter would be to say that for the test as to relevance to the final issue of the case, the issue to be decided should be looked to before the question is answered by the prothonotary, whereas that as to whether it is interlocutory or final (which is purely a *pro forma* matter) should be put after the prothonotary's decision. Any other approach, it seems to me, would reduce the more substantial question of "vital to the issue of the case" to the merely procedural issue of interlocutory or final, and preserve all interlocutory rulings from attack (except in relation to errors of law).

This is why, I suspect, he uses the words "they (being the orders) raise questions vital to the final issue of the case", rather than "they (being the orders) are vital to the final issue of the case". The emphasis is put on the subject of the orders, not on their effect. In a case such as the present one, the question to be asked is whether the proposed amendments are vital in themselves, whether they be allowed or not. If they are vital, the judge must exercise his or her discretion *de novo*.

To avoid the confusion which we have seen from time to time arising from the wording used by MacGuigan J.A., I think it is appropriate to slightly reformulate the test for the standard of review. I will use the occasion to reverse the sequence of the propositions as originally set out, for the practical reason that a judge should logically determine first whether the questions are vital to the final issue: it is only when they are not that the judge effectively needs to engage in the process of determining whether the orders are clearly wrong. The test would now read:

> Discretionary orders of prothonotaries ought not to be disturbed on appeal to a judge unless:
>
> (a) the questions raised in the motion are vital to the final issue of the case, or
>
> (b) the orders are clearly wrong, in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of the facts.

Order is vital to issue

[69] In *Merck & Co., supra*, Décary J.A. stated:

> The test of "vitality", if I am allowed this expression, which was developed in *Aqua-Gem*, is a stringent one. The use of the word "vital" is significant. It gives effect to the intention of Parliament, as so ably described by Isaac C.J. at pages 454 and 455 of his minority reasons in *Aqua-Gem* (I pause here to note that the learned Chief Justice's analysis of the role of the prothonotaries in the Federal Court remains basically unchallenged in the majority opinion written by MacGuigan J.A.):
>
> > . . . such a standard [of review] is consistent with the parliamentary intention embodied in section 12 of the *[Federal Court] Act*, that the office of prothonotary is intended to promote "the efficient performance of the work of the Court".
> >
> > In my respectful view it cannot reasonably be said that a standard of review which subjects all impugned decisions of prothonotaries to hearings *de novo* regardless of the issues involved in the decision or whether they decide the substantive rights of the parties is consistent with the statutory objective. Such a standard conserves neither "judge power" nor "judge time". In every case, it would oblige the motions judge to re-hear the matter. Furthermore, it would reduce the office of a prothonotary to that of a preliminary "rest stop" along the procedural route to a motions judge. I do not think that Parliament could have intended this result.
>
> One should not, therefore, come too hastily to the conclusion that a question, however important it might be, is a vital one. Yet one should remain alert that a vital question not be reviewed *de novo* merely because of a natural propensity to defer to prothonotaries in procedural matters.
>
> In *Aqua-Gem*, at p. 464, MacGuigan J.A. distinguished on the one hand between "routine matters of pleadings", words used by Lord Wright in *Evans v. Bartham*, [1937] 2 All E.R. 646 (H.L.) at 653, and "a routine amendment to a pleading", words used by Lacourcière J.A. in *Stoicevski v.Casement* (1983), 43 O.R. (2d) 436 (Ont. C.A.) at 438, and, on the other hand, between "questions vital to the final issue of the case, i.e. to its final resolution".

[70] The respondent maintained that the prothonotary's order did not rule on the substance of the parties' rights or on an issue that was vital to the final issue of the case. The only effect of the prothonotary's order was not to recognize the applicant's right to proceed with its application for judicial review pursuant to the Rules. In this regard, the prothonotary's order disposed of an issue which was entirely incidental to the issues between the parties, namely, the application for judicial

review. Consequently, the delay and the non-compliance with the Rules are not issues in the application for judicial review.

[71] I do not agree with the respondent.

[72] In *Augier*, 2002 FCTD 1185, paras. 13 & 14, the prothonotary struck out the application for judicial review because it had not been made within the specified deadline. O'Keefe J. held:

> The Prothonotary in this motion was asked to grant an order striking out the applicant's notice of application. This was an issue vital to the final issue of the case . . .
>
> The Prothonotary correctly identified the crucial issue to be determined as to whether or not the applicant's application for judicial review was brought on a timely basis.

[73] In the case at bar, the order set aside the application for judicial review. As in *Augier*, the order was clearly vital to the final issue of the case. This Court must therefore exercise its discretion *de novo*.

Clear errors

[74] In my opinion, because the prothonotary's order concerned an issue vital to the final issue of the case, this Court must exercise its discretion *de novo*. Consequently, this Court must not dispose of the issue of clear errors.

[75] In the applicant's submission, the respondent's motion asked the Court to set aside for the following reason:

> [TRANSLATION]
>
> THE APPLICANT did not comply with the *Federal Court Rules* (1998), and in particular Rule 306, failing to serve and file supporting affidavits and documentary exhibits . . .

[76] However, the applicant maintained that Rule 56 indicates that non-compliance with any of these Rules does not render a proceeding, a step in a proceeding or an order void, but instead constitutes an irregularity, which may be addressed under Rules 58 to 60.

[77] The applicant maintained that *Chin*, cited by the prothonotary, should be distinguished in this regard. In *Chin*, *supra*, Reed J. dismissed an application for an extension of time as follows:

> On what grounds then do I grant an extension of time. I have already indicated that, in general, I am not receptive to requests which are based solely on the work load counsel has undertaken. When an application for an extension of time comes before me, I look for some reason for the delay which is beyond the control of counsel or the applicant, for example, illness or some other unexpected or unanticipated event.

[78] In the applicant's submission, the ground relied on by counsel in the case at bar has nothing to do with the workload of the counsel of record, but rather has to do with the good faith error of counsel resulting from misunderstanding of the rules of practice. As such, it is a ground which is beyond the applicant's control.

[79] The applicant maintained that in *Muhammed*, *supra*, in which the applicant's former counsel missed the deadline for filing the record, Prothonotary Hargrave described the duality between the principles in *Chin* and *Mathon*, *supra*, making an order based on an application for an extension of time:

> *Chin* and *Mathon* are difficult to reconcile. In *Chin* the focus is on the concept that client and counsel are one and the same, thus the client is dragged under by the weight of the incompetent counsel. In *Mathon*, the case of the missed filing date, the focus, by way of Supreme Court of Canada authority, is on the concept that a client "who has acted with care should not be required to bear the consequences of such an error or negligence" (page 229). This is all the more the situation where the client lost a right as a result.
>
> In choosing between the two approaches it is fitting to turn to *Grewal* (*supra*) which requires me to balance the factors bearing on a time extension with the overall view of doing justice between the parties. I will follow the line of cases culminating in *Mathon*, for the present instance presents the clear and specific case referred to by Mr Justice Rothstein, as he then was, in *Drummond* (*supra*). Taking all of the circumstances into consideration, including the continuing intention to pursue the application; the merit of the application; the lack of any prejudice accruing to the Respondent by reason of delay; the explanation for the delay and particularly that it was former counsel who, by abandoning the Applicants after allowing time to run, deprived the Applicants of their right; and that to terminate this judicial review proceeding on the basis of the procedural negligence and/or incompetence of former counsel would constitute a windfall to the Crown, a time extension is appropriate. Costs shall be in the cause.

[80] The applicant maintained, that inasmuch as the prothonotary chose to consider the problem from the standpoint of the criteria applicable to an application for an extension of time, the line of cases followed in *Muhammed* reflects the principles which should have been followed in the case at bar. Consequently, the principle which should have been followed by the prothonotary in the case at bar is that developed by this Court in *Mathon*.

[81] In my opinion, this Court must not determine whether the prothonotary erred in law by following *Chin* instead of *Mathon*, because this Court must exercise its discretion *de novo* in every case.

[82] In the applicant's submission, the prothonotary also characterized as hearsay the allegation contained in Mr. Larose's affidavit to the effect that the explanations provided by the Federal Court Registry were misunderstood. However, the signatory of the affidavit was at that time in a position

to see for itself that the understanding it had of the rules on filing affidavits and documentary exhibits did not correspond to the objections made and the irregularities noted by the respondent in its motion to set aside. That being so, the applicant must be given the benefit of those explanations, which are sincere and were made in good faith.

Exercise of discretion *de novo*

[83] Although the issue in the case at bar is not an application for an extension of time to file the applicant's affidavit, because the applicant is seeking this Court's leave to file an affidavit, I am of the opinion that the criteria applicable to an extension of time will be of assistance. The criteria are:

1. a continuing intention to pursue his or her application;
2. that the application has some merit;
3. that no prejudice to the respondent arises from the delay; and
4. that a reasonable explanation for the delay exists: *Canada (Attorney General) v. Hennelly*, [1999] F.C.J. No. 846 (F.C.A.).

[84] In my view, the applicant has demonstrated a continuing intention to pursue its application. It has filed:

- a notice of application on August 25, 2005;
- a motion on October 13, 2005 to amend the style of cause of the application and strike out Michel A. Goulet as respondent;
- a notice on October 14, 2005 to stay the proceedings before the arbitrator;
- a reply record on November 29, 2005 seeking an extension of time; and
- a motion record on January 16, 2006 to the motion to set aside the application for judicial review.

[85] Is the application well founded? The applicant maintained that the principal issue is whether the arbitrator Michel A. Goulet erred in law by dismissing the applicant's preliminary exception to the effect that the corporate vehicle chosen by the respondents in their contractual relations with the applicant divested the arbitrator of all jurisdiction over the complaint of an allegedly illegal dismissal made by the respondent under the *Canada Labour Code*.

[86] In the respondent's submission, the Federal Court of Appeal has already held that it is within the arbitrator's jurisdiction to rule on the meaning and scope of the expression "any person . . . who . . . considers the dismissal to be unjust" contained in subsection 240(1) of the *Canada Labour Code*. See, for example, *Dynamex Canada Inc.*, [2003] F.C.J. 907. Accordingly, the issue, implementation of the concept of "any person . . . who . . . considers the dismissal to be unjust" in light of the facts in evidence, is central to the specialized jurisdiction conferred by section 242 of the *Canada Labour Code*. Moreover, the arbitrator's decision is protected by the privative clause contained in section 243 of that Code. The respondent maintained that, in light of the weakness of the submissions put forward by the applicant in its notice of application, this Court should conclude that the applicant had not established the existence of an arguable case.

[87] However, in *Marshall v. Canada*, the judge indicated as follows: "I am not persuaded that the merits of her case are so slight that it should be dismissed at this stage": *Marshall v. Canada*, 2002 FCA 172, para. 24.

[88] In the case at bar, there is nothing in the record to show that the respondent would suffer any prejudice on account of the delay. Less than a month elapsed between the date on which the applicant was to file and serve the affidavits and the date on which the respondent filed its motion

record asking the Court to set aside the application for judicial review for non-compliance with the Rules. Further, the documents were served and filed in the Court on August 30, 2005, with the notice of application, and at that time the respondent was already in possession of the documents.

[89] There are two possible approaches to the explanation justifying the delay, that of *Chin* and that of *Mathon*:

> *Chin* and *Mathon* are difficult to reconcile. In *Chin* the focus is on the concept that client and counsel are one and the same, thus the client is dragged under by the weight of the incompetent counsel. In *Mathon*, the case of the missed filing date, the focus, by way of Supreme Court of Canada authority, is on the concept that a client "who has acted with care should not be required to bear the consequences of such an error or negligence" (page 229). This is all the more the situation where the client lost a right as a result.
>
> In choosing between the two approaches it is fitting to turn to *Grewal* (*supra*) which requires me to balance the factors bearing on a time extension with the overall view of doing justice between the parties. I will follow the line of cases culminating in *Mathon*, for the present instance presents the clear and specific case referred to by Mr Justice Rothstein, as he then was, in *Drummond* (*supra*). Taking all of the circumstances into consideration, including the continuing intention to pursue the application; the merit of the application; the lack of any prejudice accruing to the Respondent by reason of delay; the explanation for the delay and particularly that it was former counsel who, by abandoning the Applicants after allowing time to run, deprived the Applicants of their right; and that to terminate this judicial review proceeding on the basis of the procedural negligence and/or incompetence of former counsel would constitute a windfall to the Crown, a time extension is appropriate. Costs shall be in the cause.

[90] In my view, although the motion record filed by the applicant on January 16, 2006, was not extremely helpful, it provided enough information to balance the four *Grewal* factors. In balancing these factors, and in exercising the discretion under Rule 59 *de novo*, I am of the opinion that the Court should authorize the applicant to correct the irregularity. The latter must therefore file a motion record consistent with the Rules, including the affidavit of the applicant's representative and

any documentary exhibits relied on in the notice of application, within fifteen days of the date of these reasons.

[91] I award costs to the respondents in the amount of $1,500, as the issue results from the failure of counsel for the applicant to understand the *Federal Courts Rules*.

JUDGMENT

The application for judicial review is allowed. The applicant will file a motion record consistent with the Rules, including the affidavit of the applicant's representative and all documentary exhibits relied on in the notice of application, within 15 days of the date of these reasons.

I award costs to the respondents in the amount of $1,500 in view of the fact that the issue results from the failure of counsel for the applicant to understand the *Federal Court Rules*.

"Max M. Teitelbaum"
Judge

Certified true translation
Mavis Cavanaugh

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1469-05
STYLE OF CAUSE:	CP SHIPS TRUCKING LTD. (formerly known as CAST TRANSPORT INC.) v. GUNTER M. KUNTZE and ENTREPRISE GUNTER M. KUNTZE & FILS INC.
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	September 12, 2006
REASONS FOR JUDGMENT BY:	The Honourable Mr. Justice Teitelbaum
DATED:	October 3, 2006

APPEARANCES:

Benito Aloe Hubert Larose	FOR THE APPLICANT
Benoit Laurin	FOR THE RESPONDENTS

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