

Federal Court



Cour fédérale

Date: 20100819

Docket: T-907-10

Citation: 2010 FC 829

Ottawa, Ontario, August 19, 2010

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

MICHAEL AARON SPIDEL

Applicant

and

CANADA (ATTORNEY GENERAL)

Respondent

REASONS FOR ORDER AND ORDER

[1] The Applicant appeals the order granted by Prothonotary Roger R. Lafrenière on July 8, 2010 by a motion in writing dated July 12, 2010 under Rules 51 and 369 of the *Federal Courts Rules*. The Prothonotary granted the Respondent an extension of time to file a Notice of Appearance and directed each party bear their own costs.

[2] The Applicant also seeks a *de novo* review of the Respondent's motion dated June 25, 2010 for an extension of time to file a Notice of Appearance.

[3] The applicable test for appeals of a prothonotary is laid down in paragraph 17 of *R. v. Aqua-Gem Investments Ltd.*, [1993] 2 F.C. 425 (Fed. C.A.) as reformulated in *Merck & Co, Inc. v. Apotex Inc.*, [2004] 2 F.C.R. 459 (F.C.A.), namely that discretionary orders of prothonotaries ought not be disturbed unless:

- (a) the questions raised are vital to the final issue of the case, or
- (b) the orders are clearly wrong as based upon wrong principle or misapprehension of facts.

Where either of these factors exist, the reviewing court will exercise its discretion *de novo*.

[4] The Applicant argues the Prothonotary erred on both grounds. First, he argues that the matter raised in the Respondent's motion was a question vital to the final issue. Second, he submits that the Prothonotary erred in the applicable law having regard to Rule 410(2) and misapprehended the facts.

[5] The Applicant had filed a Notice of Application for judicial review of the third level grievance decision of the Commissioner of the Correctional Service of Canada on June 9, 2010. On June 25, 2010 the Respondent, the Attorney General of Canada, filed a Motion for an extension of time to file a Notice of Appearance. The Applicant opposed the Motion for an extension of time.

[6] The Respondent filed an affidavit in support of its motion for an extension explaining that the deadline was missed because key personnel was away in the intervening period following receipt of the Notice of Application. The Respondent received the Notice on June 10, 2010. The

legal assistant opened a file and sent it to the manager in charge of file assignments on June 12, a Friday. The manager was away the following week of June 14th and the legal assistant was away the next Monday, June 21. The file was assigned to counsel on Tuesday, June 22, one day after the June 21st deadline for filing a Notice of Appearance. Counsel immediately requested the Applicant's consent to an extension of time. The Applicant refused. On June 28, 2010 the Respondent, after seeking direction from the Court, filed a Motion for the extension of time which the Applicant opposed.

[7] The Prothonotary held that the Respondent had provided a reasonable explanation for the delay in serving and filing a Notice of Appearance. He found the Respondent had maintained a continued intention to oppose the application and there was no apparent prejudice to the Applicant. Given the short delay, the Prothonotary considered it in the interests of justice to grant the Respondent an extension of time.

[8] The Prothonotary noted the general rule was that the party applying for an extension of time should bear the costs of the motion and the Applicant should not be liable for costs incurred by the Respondent in moving for an extension of time. However, the Prothonotary noted the Applicant was seeking costs for unsuccessfully opposing the motion and the Applicant could have consented to the requested one day extension of time. In those circumstances the Prothonotary decided that each party should bear their own costs on the motion.

Vital to the Final Issue

[9] The Applicant submits that that the questions raised in the motion are vital to the final issue in the case and that deadlines “set in stone by the *Rules*” must be adhered to. He also submitted that the Respondent had not evinced an intention to oppose the judicial review application, and has in effect forfeited the opportunity to participate. In effect, the Applicant argues the approved extension was therefore relevant to the final issue.

[10] The *Rules* provide for flexibility in that a party is entitled to apply to the Court for an extension of time. The motion for an extension of time is a procedural matter and does not involve a question vital to a final issue in the Applicant’s application for judicial review. The Prothonotary’s Order granting the extension is not, in itself, determinative of the outcome in the Applicant’s judicial review application.

Wrong Principal or Misapprehension of the Facts:

[11] The Applicant submits the Prothonotary erred in accepting the Respondent’s explanation as reasonable when that explanation should instead be characterized as either gross negligence or mere inadvertence. I disagree. The Respondent offered an explanation for the delay, the absence of personnel at the crucial time, which does not give rise to either gross negligence or mere inadvertence. The Respondent’s prompt action in requesting the Applicant’s consent to an extension confirms a continuing intention to pursue opposition to the judicial review application.

Costs

[12] The Applicant submits the Prothonotary erred in law and jurisprudence by connecting the question of costs to consent. He relies on Rule 410(2) which states:

410 (2) Unless the Court orders otherwise, the costs of a motion for an extension of time shall be borne by the party bringing the motion.

The Applicant submits the Rule 410(2) should not be a precedent for linking the lack of consent to costs.

[13] Rule 410(2) allows the Court to award costs other than as against a party bringing the motion to an extension of time when circumstances warrant. In *Canadian Olympic Association v. Olymel, Société en Commandite*, 2001 FCT 105, the Court awarded costs to an applicant for an extension of time which had been unreasonably resisted by the opposing party.

[14] Here the Prothonotary noted the Applicant had refused to consent to an extension necessitating a successful application by the Respondent for an extension of time. In my view, by ordering each party to bear their own costs, the Prothonotary took into account the principle underpinning Rule 410(2) and the conduct of the Applicant in refusing to consent to a one day extension of time.

[15] The Applicant's appeal of the Prothonotary's Order is dismissed.

ORDER

THIS COURT ORDERS that:

1. The Applicant's motion appealing the decision of the Prothonotary's Order dated July 8, 2010 is dismissed.
2. Costs are awarded to the Respondent.

“Leonard S. Mandamin”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-907-10

STYLE OF CAUSE: MICHAEL AARON SPIDEL and CANADA
(ATTORNEY GENERAL)

PLACE OF HEARING: Motion in writing

**REASONS FOR ORDER
AND ORDER:** MANDAMIN, J.

DATED: AUGUST 19, 2010

SOLICITORS OF RECORD:

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FOR THE APPLICANT

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FOR THE RESPONDENT