Federal Court  Cour fédérale

Date: 20150130

Docket: T-925-11

Citation: 2015 FC 118

Ottawa, Ontario, January 30, 2015

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

JASON LEWIS

Applicant

and

DIANE OUELLET ACTING WARDEN OF PORT CARTIER INSTITUTION OF THE CORRECTIONAL SERVICE OF CANADA and THE ATTORNEY GENERAL OF CANADA

Respondents

ORDER AND REASONS

[1] The Applicant, a federal inmate, has brought a motion appealing a show cause order made on August 12, 2014, by Madam Prothonotary Aronovitch (the Show Cause Order) which reads as follows:

> Failing the service and filing of submissions by August 22, 2014 to show cause why the proceeding should not be dismissed for delay, the application shall be dismissed for delay and want of prosecution.

[2] The proceeding in question is a judicial review application filed by the Applicant in May 2011 against the decision by the Port Cartier Institution authorities to keep him in administrative segregation (the Application). According to the record before me, the Applicant's segregation status was first relieved at Port Cartier in August 2011 when he was transferred to the Archambault Institution in Ste-Anne-des-Plaines, Québec. Later that year, the Applicant was transferred to the Edmonton Institution where he was integrated into that penitentiary's general population.

[3] As the Applicant failed to abide by the Show Cause Order, his Application is, by the effect of the said order, dismissed. At the time the Show Cause Order was made, Madam Prothonotary Aronovitch had been case managing this matter since March 6, 2012, except for the period from September 2013 to January 2014.

[4] In the event that the appeal against the Show Cause Order is granted, the Applicant seeks orders extending the time to file **"**show cause**"** submissions as well as his requisition for hearing.

[5] As is well established, orders of Prothonotaries ought not be disturbed unless the questions raised in the motion are vital to the final issue in the case or if 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 (*Merck & co. v Apotex Inc*, 2003 FCA 488, [2004] 2 FCR 459). Since the Show Cause Order put an end to the Application, the Applicant's appeal is to be reviewed *de novo* (*Merck*, above at para 18; *Winnipeg Enterprises Corp v Fieldturf (IP) Inc*., 2007 FCA 95). However, in so doing, I must be mindful of the fact that

Prothonotaries are to be afforded ample scope in the exercise of their discretion in managing cases because of their intimate knowledge of the litigation and its dynamics (*j2 Global Communications Inc. v. Protus IP Solutions Inc.*, 2009 FCA 41; *Constant v Canada*, 2012 FCA 89).

[6] Paragraph 18.4(1) of the *Federal Courts Act* provides that judicial review applications before this Court "shall be heard and determined without delay and in a summary way". This case has been anything but that. It has, rather, a long and arduous procedural history which can be summarized as follows:

a. The Application was filed in May 2011, which is more than three years ago.

b. In June 2011, the Respondents consented to an extension of time under Rule 7 of the *Federal Courts Rules* (the Rules) to allow the Applicant to serve and file his affidavit and record pursuant to Rules 306 and 309.

c. On January 18, 2012 a Notice of Status Review pursuant to Rule 380(2)(a) was issued as 180 days had elapsed since the issuance of the Application without supporting documents having been filed.

d. On January 25, 2012 the Applicant responded in writing to the Notice of Status Review, claiming that the delay in perfecting his Application record was due mainly to the fact he was not provided with the Certified Tribunal Record (CTR) by the Respondents.

e. In his response to the Notice of Status Review the Applicant undertook to file his affidavit within 30 days of being provided with the CTR and requested that his Application be managed as a Specially Managed Proceedings under Rule 383.

f. On February 6, 2012 the Respondents consented to the Application being managed as a Specially Managed Proceedings while noting that the fact the CTR had not been communicated to the Applicant was not the sole reason for his failure to comply with the Rules and that his recent transfers "have had an important impact on the merits of his judicial review and its proceedings".

g. On February 23, 2012 Madam Prothonotary Tabib ordered that the Application be continued as a Specially Managed Proceedings and set up a timetable providing, *inter alia*, for service and filing of the Applicant's affidavits no later than 45 days following service of the CTR.

h. On March 6, 2012 Madam Prothonotary Aronovitch was assigned as Case Management Judge in this matter and on April 30, 2012, the Applicant was provided with the CTR.

i. On May 7, 2012 the Registry received a Rule 369 Motion Record from the Applicant, dated March 3, 2012, requesting an extension of the time to seek permission to file a memorandum of fact and law exceeding 30 pages, seeking additional documentation under Rule 317 and challenging the steps taken by the Respondents in the proceedings as non-compliant with the Rules.

j. On July 13, 2012 a case management conference was held at the request of the Respondents; as a result of that conference a new procedural timetable was agreed upon by the parties and endorsed by Madam Prothonotary Aronovitch in an order dated July 27, 2012. According to that new timetable the Respondents were to serve and file their affidavit(s) by September 30, 2102, provided the Applicant did not seek, in the meantime, direction on redacted information from the Supplemental CTR which was served and filed by the Respondents on July 30, 2012.

k. The case management order issued on July 27, 2012 provided that all further steps in the proceedings were to be taken in accordance with the Rules.

l. On August 7, 2012 the Applicant sought directions from Madam Prothonotary Aronovitch; (1) to have the pages in the Supplemental CTR numbered; and (2) to be allowed to file a memorandum of fact and law of 41 pages in length.

m. On September 14, 2012, Madam Prothonotary Aronovitch dismissed the first request for direction but granted the second request, allowing both parties to file factums of 41 pages in length.

n. As per the case management order dated July 27, 2012, the Respondents served and filed their affidavits by September 30, 2012.

o. On October 10, 2102, the Applicant sought to proceed with the written cross-examination on the affidavits provided by the Respondents and brought a motion seeking an extension of time to file various pleadings.

p. On December 12, 2012 a case management conference was held at the request of the Respondents resulting in a timetable regarding the completion of the written cross-examination and the filing of any supplemental evidence by the Applicant, being agreed upon by the parties and endorsed by Madam Prothonotary Aronovitch in a case management order dated December 19, 2019. According to that timetable, the Respondents were to provide a status report on the proceedings as well as a proposed timetable for the next steps in the Application by March 1, 2013.

q. On February 28, 2013 the Respondents provided a status report indicating that the written cross-examination had been completed and that they had not been served by the Applicant with any supplemental evidence, as per the December 19, 2012 case management order. The Respondents proposed, as a new timetable for the next steps in the Application, that the Applicant file his record pursuant to Rule 309 by April 30, 2013; that they file theirs, in accordance with Rule 310, by May 30, 2013; and that a requisition for a hearing be served and filed by June 30, 2013.

r. On March 21, 2013 Madam Prothonotary Aronovitch endorsed the Respondents' proposed timetable but in order to take into account the Applicant's request for an extension of time to file supplemental evidence, the endorsement order allowed the Applicant to serve the said supplemental evidence by April 15, 2013; the Applicant's deadline of April 30, 2013 for filing his record remained.

s. On April 26, 2013 the Applicant sought a further extension of time to file his supplemental evidence and his record. A case management conference was held on

June 13, 2013 to deal with that request and an ensuing case management order was issued on July 8, 2013.

t. According to the July 8, 2013 case management order, the parties were given until July 31, 2013 to attempt to resolve the question of the necessity to adduce supplementary evidence and, in case of a failure to reach an agreement on this issue, until August 5, 2013 to advise the Court whether they wished to proceed by way of a motion to adduce supplementary evidence to be argued at the hearing on the merits by the hearing judge or to enter a consent order allowing the supplementary evidence to be filed while reserving the right of the Respondents to impugn the contents of that evidence at the hearing of the Application.

u. On July 30, 2013 the Respondents informed Madam Prothonotary Aronovitch that the parties had resolved the question of the necessity to adduce supplementary evidence and considered it prudent that a further case management conference be convened and new timelines set for the hearing of the Application.

v. By order dated August 20, 2013, Madam Prothonotary Aronovitch set new timelines for the hearing of the Application. The Applicant was to serve and file his record by September 16, 2013 and the Respondents were to serve and file theirs by October 4, 2013.

w. The Respondents served and filed their record on October 3, 2013 and did not object, on October 7, 2103, to the Applicant's late filing of his record.

x. On December 5, 2103 Justice Michael Manson, who had temporarily replaced Madam Prothonotary Aronovitch as case management judge in the file, issued the following direction in connection with the late filing of the Applicant's requisition for a hearing:

> The timeframe for filing the Requisition for Hearing has passed (10 days after receipt of the Respondent's Application Record in accordance with the Rules). The Requisition for Hearing may not be accepted for filing. It will be necessary for the Applicant to seek leave of the Court for the filing of the Requisition by way of a motion. The materials submitted for filing are to be returned to the Applicant. The motion for Leave to file the Requisition for Hearing is to be served and filed by January 15, 2014.

y. On January 16, 2014 Madam Prothonotary Tabib issued a subsequent direction providing that the Applicant's motion record to extend the time for filing a requisition for hearing would be accepted for filing if proof of service was filed by January 31, 2014. Madam Prothonotary Tabib also directed that, should the Applicant fail to file proof of service by January 31, 2014; (1) the motion record would be returned to him; (2) he would then be in default of filing a requisition for hearing; and (3) the matter could be subject to interim notice of status review or the Respondents could move to dismiss the Application for delay.

z. In March 2014, Madam Prothonotary Aronovitch resumed conduct of case management of this file.

aa. On August 12, 2014 as the Applicant had not yet filed proof of service of his motion record to extend the time for filing a requisition for hearing as per Madam

Prothonotary Tabib's direction of January 16, 2014, Madam Prothonotary Aronovitch issued the Show Cause Order.

bb. On August 21, 2014 the Applicant filed a motion for an extension of time to serve and file a requisition for hearing. Given the pending Show Cause Order the motion was not accepted for filing.

cc. On September 25, 2014 the Applicant attempted to file a motion record seeking; (1) to appeal the Show Cause Order; (2) an extension of time to file show cause submissions; and (3) an extension of time to file a requisition for hearing. On October 29, 2014 Madam Prothonotary Aronovitch issued the following direction regarding the motion materials the Applicant attempted to file on August 21 and September 25, 2014:

> Re: Request for Direction as to whether the applicant's motion to extend time for the filing of a requisition for hearing may be accepted for filing:
>
> A status review order to show cause was issued on August 12, 2014. The applicant did not file his show cause submissions as ordered by the Court and instead has attempted to file the above noted motion. The practice of the Court is not to deal with interlocutory matters while a status review is pending. Moreover this motion may be overtaken as a similar motion is sought to be filed and is the subject matter of the below Direction. That said, the motion may be accepted for filing subject to further direction of the Court once the status review is dealt with and determined by the Court.
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> Re: Request for Direction as to whether the motion record dated September 25, 2014 may be accepted for filing:
>
> This motion in writing (1) to appeal the Court's order of August 12, 2014 (status review), (2) to extend time to file show cause submissions on status review and (3) for an extension of time to

> file the applicant's requisition for hearing. The motion record is to be accepted for filing under reserve of any objection by the respondent as to timelines and compliance with procedural and evidentiary rules. The time for the respondent to serve and file its responding motion record will run from the date of this Direction. The deadline for the service and filing of the applicant's reply, if any, will be as per the Federal Court Rules. The motion when perfected is to be placed before a judge for determination.

[7] The Applicant claims that the Show Cause Order should be quashed on the ground that Madam Prothonotary Aronovitch misapprehended the fact that he is a self-represented litigant having to use the Inmate Request Process for every step needed in the preparation of his case such as photocopying, faxing, printing, computer access or access to a Commissioner of Oaths. He contends that a 10-day delay to file and serve submissions to show cause as to why the Application should not be dismissed was, in such circumstances, an impossible timeline for him to meet, especially given the fact he was transferred from the Saskatchewan Institution to the Edmonton Institution for four days during that 10-day period.

[8] He also claims that Justice Manson misapprehended his ability to serve and file his requisition for a hearing within the 10-day delay provided by the Rules, resulting in the said requisition being rejected in December of 2013. He also contends that his inability from that date to proceed with seeking a hearing date, due to numerous transfers, was misapprehended by both Prothonotaries Tabib and Aronovitch.

[9] The issue before me is whether this was an appropriate case for the issuance of a show cause order in the nature of the one issued by Madam Prothonotary Aronovitch. In my view, it was.

[10] This case took more than two years to reach the stage of the filing of the requisition for hearing, a period over which the Applicant fully accommodated, procedurally, by both the Court and the Respondents, as evidenced by the procedural history of this case.

[11] When the Show Cause Order was issued, on August 12, 2014:

a. Nine (9) months had elapsed since the Applicant was put on notice by Justice Manson that he needed to seek leave to file his requisition for hearing as he had failed to do so in the prescribed time following the filing of the Respondents record on October 3, 2013; and

b. Eight (8) months had passed since he was given the opportunity by Madam Prothonotary Tabib to perfect his motion record to seek leave to file his requisition for hearing by filing proof of service by January 31, 2014 and put on notice that failure to do so would amount to default in filing the said requisition for hearing and would subject him either to interim notice of status review or to a motion from the Respondents to dismiss the Application for delay.

[12] In such context Madam Prothonotary Aronovitch was amply justified to seek, from the Applicant, submissions as to why the Application should not be dismissed for delay and to make it a peremptory order, dismissing the Application upon failure on the part of the Applicant to provide such submissions within the timeframe specified therein.

[13] Indeed, it was not the first time the Applicant had failed to comply with a requirement of the Rules or of a case management order. Allowing him eight months to perfect his record seeking relief from the default to file a requisition for hearing, something which needed to be done by mid-October 2013, was amply sufficient in the circumstances (*Angloflor v Canada Maritime Ltd*, 2002 FCT 1230, 228 FTR 66, at para 26-27; *Inmates Of Mountain Prison v R*, [1998] FCJ No. 1064, at para 7-8).

[14] The Applicant's contention that it was impossible for him to provide these submissions within the 10-day timeframe as per the Show Cause Order is seriously undermined by the fact he was able to react to the said Order within that timeframe by filing a motion for an extension of time to serve and file a requisition for hearing.

[15] Unfortunately for him, the Applicant did not provide the Court with what was required under the Show Cause Order. Furthermore, he did not provide any reasonable explanation as to why he was able to produce a motion for extension of time within the required timeframe but not the show cause submissions. Although he is a self-represented inmate litigant and lacks legal expertise, the Applicant is nevertheless required to follow the Rules and orders of the Court (*Kalevar v Liberal Party of Canada*, 2001 FCT 1261, [2001] FCJ No. 1721 (QL), at para 24; *Cotirta v Missinipi Airways*, 2012 FC 1262, at para 13, confirmed in 2013 FCA 280). This is especially so in a context where both the Court and the Respondents were alive and sensitive to the limitations associated with his status as a self-represented inmate litigant. The Court provided him with every possible opportunity to perfect his record.

[16] I agree with the Respondents that the Applicant chose to disregard the directions of the Court in filing a belated and unrelated motion for extension of time instead of filing the necessary show case submissions while being clearly put on notice that failure to provide such submissions would be fatal to the Application.

[17] In my view, the Show Cause Order was a valid course of action in the circumstances of this case, as was the dismissal of the Application resulting from the Applicant's failure to abide by the said Order.

[18] In any event, I find that the Applicant has provided no reasonable explanation for the delay in filing and serving his motion for leave to file a requisition for a hearing, as he was directed to do by Justice Manson on December 5, 2013 and a month later by Madam Prothonotary Tabib. In particular, he has not shown that his failure to do so was due to circumstances beyond his control. In that regard, he failed to show that his transfers to different penitentiary institutions were due to circumstances beyond his control or that these transfers prevented him from being able to proceed with such filing and service for the whole period extending from December 2103 to August 2014.

[19] The general objectives of the Rules are to move cases through the system in a timely, orderly and efficient manner (*Petro Canada v Canada (Attorney General)*, 2004 FC 1478, at para 3; *Hardy Estate v Canada (Attorney General),* 2012 FC 548). The Applicant, who was primarily responsible for carriage of his case (*Baroud v Canada (Minister of Citizenship and Immigration)* (1998), 160 FTR 91, [1998] FCJ No 1729 (QL); *Pelletier v Canada (Attorney*

General), 2010 FCA 189, at para 14), was given every opportunity, including case management, to perfect it and bring it to a stage where a hearing date could be scheduled. Despite the clear message the Applicant was given by Justice Manson and Prothonotary Tabib that he had failed to abide by the Rules and that something needed to be done in this regard, his case remained at a standstill for months.

[20] One must abide by the Rules and orders of this Court and case management is not a licence to circumvent that important principle. Furthermore, a case management judge is not simply a referee who must sit passively while a party carries on as it pleases (*Hardy Estate*, above).

[21] This case is now far off Parliament's intent that it "be heard and determined without delay and in a summary way" (section 18.1 of the *Federal Courts Act*) and one may wonder whether there is still a live controversy and a concrete dispute between the parties as the administrative segregation which forms the basis of the Application, ended a long time ago. As is well established, issues in contention may be of a short duration resulting in an absence of a live controversy by the time of judicial or appellate review (*Borowski v Canada (Attorney General)*, [1989] 1 SCR 342). This seems to be the case here.

[22] For these reasons I see no basis to interfere with the Show Cause Order. As a result, the Applicant's appeal is dismissed and the dismissal of the Application, confirmed.

ORDER

THIS COURT ORDERS that:

1. The applicant's appeal against the order of Madam Prothonotary Aronovitch, dated August 12, 2014, is dismissed.

2. The applicant's judicial review application is, as a result, dismissed.

"René LeBlanc"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-925-11
STYLE OF CAUSE:	JASON LEWIS V DIANE OUELLET ACTING WARDEN OF PORT CARTIER INSTITUTION OF THE CORRECTIONAL SERVICE OF CANADA, AND THE ATTORNEY GENERAL OF CANADA
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DATE OF HEARING:	JANUARY 13, 2015 **(IN WRITING)**
ORDER AND REASONS:	LEBLANC J.
DATED:	JANUARY 30, 2015

IN WRITING:

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