Federal Court  Cour fédérale

Date: 20170405

Docket: T-1122-16

Citation: 2017 FC 343

[ENGLISH TRANSLATION]

Montréal, Quebec, April 5, 2017

PRESENT: The Honourable Madam Justice St-Louis

BETWEEN:

LE CONSEIL DES INNUS DE PESSAMIT

Plaintiff (Respondent)

and

YAN RIVERIN

Defendant (Appellant)

JUDGMENT AND REASONS

I. Introduction

[1] Mr. Yan Riverin filed an appeal of the order made by Prothonotary Morneau [the Prothonotary] on February 7, 2017, rejecting his motion to attack irregularity.

[2] This proceeding is part of the larger effort of the application for judicial review submitted by the Conseil des Innus de Pessamit [the Conseil] to contest the arbitration award that invalidated Mr. Yan Riverin's termination.

[3] As part of this application for judicial review, on December 6, 2016, the Prothonotary issued an order that stipulated the timeline that the parties had to observe. In particular, this order stipulated that the Conseil had to serve and file its application record under rule 309 of the *Federal Court Rules*, SOR/98-106 [the *Rules*] on or before January 16, 2017, which the Conseil failed to do.

[4] On January 17, 2017, Mr. Riverin submitted a motion to attack irregularity under rules 58 and 59, asking that the Conseil's notice of application for judicial review be dismissed and the proceeding be set aside.

[5] In response to this motion to attack irregularity, the Conseil asked the Prothonotary to be relieved of its failure for not serving and filing its application record by no later than January 16, 2017.

[6] On February 7, 2017, the Prothonotary dismissed Mr. Riverin's motion to attack irregularity and, invoking rules 3 and 53(2), allowed the Conseil to file its application record under rule 309. The Prothonotary also indicated that if this record had not already been served by the Conseil, it should be served on or before February 13, 2017, and that the timeline in rule 310 for serving and filing the respondent's record should start on February 15, 2017.

[7] As a result, Mr. Riverin filed an appeal of the Prothonotary's decision, essentially arguing (1) that he ruled *ultra petita*; and (2) that his decision was unfair.

[8] In short, the Court was not convinced that the Prothonotary made an incorrect decision, or that he made a palpable and overriding error, and will therefore dismiss the appeal.

II. Position of the parties

[9] Mr. Riverin submitted two arguments before this Court. First, he argues that the Prothonotary ruled *ultra petita*, as no application for extension of time was validly submitted to him by the parties. Indeed, the Prothonotary cannot extend the deadline in the absence of an application for that purpose, and the application that the Conseil made in its motion record to the motion to attack irregularity does not constitute such a motion for extension of time. In particular, Mr. Riverin referred to rule 47 and *Nowoselsky v. Canada (Treasury Board)*, 2004 FCA 418 [*Nowoselsky*].

[10] Rule 47 stipulates:

> 47(1) Unless otherwise provided by these Rules, if these Rules grant a discretionary power to the Court, a judge or prothonotary has jurisdiction to exercise that power on his or her own initiative or on motion.
>
> (2) Where these Rules provide that powers of the Court are to be exercised on motion, they may be exercised only on the bringing of a motion.

[11] Whereas paragraph 7 of *Nowoselsky* provides:

> 7 Rule 8(1) provides that the Court may, on motion, extend or abridge a period provide by the Rules or fixed by an order. Rule 47(2) says that where the Rules provide that the powers of the Court are to be exercised on motion, they shall only be exercised on motion. The effect of these two Rules is that the Court cannot overcome the absence of a motion seeking an extension of time by acting on its own motion. The Motions Judge could not proceed in the absence of a Notice of Motion seeking an extension of time.

[12] Second, Mr. Riverin submits that the Prothonotary's decision is unfair, since Mr. Riverin had taken for granted throughout the proceedings that timelines had to be respected, whereas the Conseil was able to plead the occurrence of a controllable event to obtain an extension of time, referring here to *Chin v. Canada (Minister of Employment and Immigration)*, [1993] FCJ 1033.

[13] The Conseil responds that the Prothonotary did not rule *ultra petita* because (1) rules 3 and 53(2) allow him to decide as he did; and (2) the Prothonotary did not extend the timelines, but solely authorized the filing of the applicant's record, as it had already been produced at the registry.

[14] Rules 3 and 53(2) provide the following, respectively:

> 3 These Rules shall be interpreted and applied so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits.
>
> 53(2) Where these Rules provide that the Court may make an order of a specified nature, the Court may make any other order that it deems just.

III. Standard of review for the Prothonotary's decision

[15] Mr. Riverin's arguments raise the following two questions:

1. Did the Prothonotary rule *ultra petita*?
2. Is the Prothonotary's decision unfair?

[16] The parties did not explicitly refer to the applicable standard of review for the issues in dispute, but the Court must nevertheless confirm it.

[17] The Federal Court of Appeal recently determined that our Court must review discretionary decisions by a prothonotary, in accordance with the standard developed by the Supreme Court of Canada in *Housen v. Nikolaisen*, 2002 SCC 33. Thus, "with respect to factual conclusions reached by a trial judge, the applicable standard was that of palpable and overriding error. It also stated that with respect to questions of law and questions of mixed fact and law, where there was an extricable legal principle at issue, the applicable standard was that of correctness" (*Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215 at para 66).

[18] Thus, the question of determining whether the Prothonotary ruled *ultra petita* constitutes a question of law that requires the application of the standard of correctness. Furthermore, the question of determining whether the Prothonotary's decision is fair or not constitutes a question of mixed fact and law that results in the application of the standard of palpable and overriding error. In this regard, the Federal Court of Appeal, in *Manitoba v. Canada*, 2015 FCA 57, echoed what was stated in *Canada v. South Yukon Forest Corporation*, 2012 FCA 165, at para 46, to describe the nature of a palpable and overriding error in these terms:

> Palpable and overriding error is a highly deferential standard of review. "Palpable" means an error that is obvious. "Overriding"

> means an error that goes to the very core of the outcome of the case. When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall. [References omitted.]

IV. Analysis

A. *Question 1: Did the Prothonotary rule* ultra petita*?*

[19] Mr. Riverin refers to rule 8(1), which stipulates that "On motion, the Court may extend or abridge a period provided by these Rules or fixed by an order" (emphasis added), to argue that [translation] "the Prothonotary's decision was *ultra petita*". Mr. Riverin invokes the argument of *ultra petita* to argue that the Prothonotary decided beyond what was asked of him, since the application for extension of time submitted by the Conseil was invalid and the situation was therefore akin to one in which no application for extension was submitted.

[20] Mr. Riverin refers to *Nowoselsky*, *supra*. However, in *Mazhero v. Fox*, 2011 FC 392, Tremblay-Lamer J. rather distinguished that decision from the situation in dispute as follows:

> 9 The respondent points to the Federal Court of Appeal's decision in *Nowoselsky v. Canada (Treasury Board)*, 2004 FCA 418, 329 NR 238 (*Nowoselsky*) for the proposition that a request for extension of time can only be brought under the FCR by way of a motion. It is true that the Federal Court of Appeal indicated in *Nowoselsky* that the effects of Rules 8(1) and 47(2) of the FCR is that: "The Court cannot overcome the absence of a motion seeking an extension of time by acting on its own motion". However, the current matter is distinguishable. In *Nowoselsky*, the applicant failed, altogether, to request an extension of time for filing his appeal. In the current matter, although the applicants did not submit a formal Notice of Motion requesting an extension of the deadline set out in Prothonotary Aronovitch's September 17th Order, they did provide a written request, a copy of which was provided to the respondent.

[21] In the case at hand, and in accordance with the aforementioned jurisprudence, the Prothonotary granted the extension of time not on his own initiative, but rather in response to an application by Conseil for that purpose, an application that was in the motion record to the motion to attack irregularity.

[22] In addition, rule 59(b) expressly provides that, when the Court finds that a party has not complied with a motion submitted under rule 58, it may "grant any amendments required to address the irregularity".

[23] Thus, although the Conseil did not submit a motion for extension of time in due form, it nevertheless requested the extension of time so that it could file its application record. The Prothonotary did not err in considering the Conseil's application, his decision was not incorrect, and therefore the Court will dismiss this argument.

B. *Question 2: Is the Prothonotary's decision unfair?*

[24] The Court must then decide if the Prothonotary's decision is unfair, as Mr. Riverin claims. As previously indicated, the applicable standard of review in the case at hand is that of palpable and overriding error.

[25] The Prothonotary accepted the Conseil's explanation that its lateness and failure to file its application record by January 16, 2017, was due to an administrative error. An administrative assistant at its attorneys' office who was dealing with personal problems recorded the deadline as January 23 instead of January 16, 2017.

[26] The Prothonotary considered that it would have been in the interest of justice and the progress of this case for Mr. Riverin's attorneys to grant the Conseil more time to request an extension of time. The Prothonotary noted the fact that it was the Conseil's second failure to comply with a deadline, and described the remedies sought by Mr. Riverin as being "severe" and "far too drastic" for a motion to attack irregularity.

[27] Although rule 59(c) provides for the Court's power to set aside a proceeding, rule 59(b) provides the Court with discretionary power to grant the amendments required to address the irregularity. The Prothonotary could therefore determine that the Conseil's motion record contained explanations that were plausible and reasonable enough for him to allow the Conseil to file its application record (*CP Ships Trucking Ltd v. Kuntze*, 2006 FC 215 at para 9; 2006 FC 1174 at para 90).

[28] The Court cannot conclude that this determination is marred by a palpable and overriding error, nor that it is unfair.

JUDGMENT

THE COURT ADJUDGES that:

1. The appeal is dismissed;

2. All without costs.

"Martine St-Louis"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1122-16
STYLE OF CAUSE:	LE CONSEIL DES INNUS DE PESSAMIT v. YAN RIVERIN

MOTION IN WRITING CONSIDERED AT MONTRÉAL, QUEBEC, PURSUANT TO RULE 369 OF THE *FEDERAL COURT RULES*

JUDGMENT AND REASONS:	ST-LOUIS J.
DATED:	APRIL 5, 2017

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