

Date: 20060214

Docket: T-2014-04

Citation: 2006 FC 199

Halifax, Nova Scotia, February 14, 2006

PRESENT: The Honourable W. Andrew Mackay

BETWEEN:

T.C. RESTAURANTS LTD.

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR ORDER AND ORDER

[1] The two motions dealt with in these reasons and Order were heard together. Both actions are appeals from different decisions by Madam Prothonotary Tabib whereby

- 1) she denied, by Order dated July 6, 2005, the applicant's motions to extend time to serve and file its application record in a judicial review proceeding and to permit cross examination on affidavits, and for leave to file an additional affidavit in support of the applicant; and

- 2) she denied, by Order dated August 19, 2005, the applicant's request to allow its application for judicial review to proceed after service of notice of status review was issued, and she ordered that the application for judicial review be dismissed for delay.

The Background

[2] On October 14, 2004 a Director General of Parks Canada refused an application by the applicant for a variance from applicable regulations concerning parking requirements for building developments in Jasper, Alberta where the applicant corporation operated a business. On November 19, 2004 the applicant filed a notice of motion for judicial review of that decision, but subsequently the applicant failed to file its application record in timely fashion as required by the Court's Rules (i.e. Rules 306, 308, 309).

[3] A supplementary affidavit on behalf of the applicant, to the effect that the principal of the applicant corporation had been out of the country and had only recently returned, was tendered to the Court, on April 12, 2005, but filing was refused since it was out of time and leave for late filing had not been sought or granted. On May 20, 2005 the applicant sought to file its motion record and an application for an extension of time, a motion approved for filing, as of May 20, 2005, by a judge of the Court on May 25, 2005.

[4] Meanwhile, on May 20, 2005, the Court had issued a notice of status review in relation to the original notice of application for judicial review, the record for which had not been filed in accord with the Rules. The applicant responded to the notice of status review requesting that the matter proceed, as it professed it had always intended.

[5] On July 6, 2005, Prothonotary Tabib, considering the May 20, 2005 application to extend time to serve and file the application record, dismissed that application and denied leave to file the supplementary affidavit.

[6] On August 19, 2005, Prothonotary Tabib refused the applicant's request in relation to status review and dismissed the application for judicial review because of delay in moving the proceedings forward.

[7] Those two decisions are subjects of separate appeals dealt with in this statement of Reasons for Order and Order.

The Law

[8] The standard of review of discretionary orders of a Prothonotary is that the Court will intervene only when it concludes that the decision is clearly wrong in the sense that it is based on a wrong principle or upon a misapprehension of the facts, or the decision errs in dealing with a question vital to the final issue of the case. (*Canada v. Aqua Gem Investments Ltd.*, [1993] 2 F.C. 425, [1993] F.C.J. No. 103 (C.A.)(QL)).

[9] In this case, with respect to both decisions of the Prothonotary the applicant urges that each deals with a question vital to the final issue of the case in that both decisions effectively preclude the application for judicial review from proceeding. In that event the Court is urged to consider the issues raised on a *de novo* basis.

[10] The test for assessing an application for an extension of time to file a judicial review application is whether the applicant demonstrates

1. a continuing intention to pursue the application;
2. that the application has some merit;
3. that no prejudice to the respondent arises from delay; and
4. that a reasonable explanation exists for the delay

(see *Canada (Attorney General) v. Hennelly*, [1999] F.C.J. No. 846 (C.A.)(QL)).

[11] In relation to the decision concerning status review, the applicant is required to address two issues:

1. whether there is justification for failure to move the case forward; and
2. what measures it is proposed to take to advance the case.

(see *Netupsky v. Canada*, 2004 FCA 239, [2004] F.C.J. No. 1073 (C.A.)(QL)).

Analysis

[12] Accepting that the decisions of the Prothonotary here in question can be said to deal with issues vital to final disposition of the case and that this Court considers *de novo* the matters raised before the Prothonotary, in doing so I reach the same decisions as she did.

[13] In regard to the first decision, refusing an extension of time to file the application record and to cross examine on an affidavit, and leave to file an additional affidavit, the applicant urges that even if the principals of the corporation were out of the country and the application record was delayed they did intend from the beginning to pursue the matter, that the application has merit particularly in that their application for a variance in parking requirements had been recommended by a local committee, and that no prejudice would be caused to the respondent's interests. The test requires that there be a reasonable explanation for the delay, here of more than 60 days after the requirement for filing the application record under the Rules. The fact that the principals of the applicant corporation were out of the country for a time, or that information was sought by a request for access to information, do not, in the circumstances of this case constitute a reasonable explanation for the delay.

[14] Since I reach the same result as the Prothonotary did with respect to the motion for an extension of time, the appeal from her decision dated July 6, 2005 will be dismissed.

[15] In regard to the second decision of Prothonotary Tabib, rejecting the applicant's request for an extension of time and that it be permitted to proceed with its application for judicial review, the

applicant acknowledges the delay and failure to observe the Court's Rules with respect to timely filing. Nevertheless, it is urged that the applicant had consistently intended to proceed with the matter and that "any blunders, or defects of form or inadvertence" should not be permitted to impede the disposition of the case.

[16] In my opinion, no reasonable explanation or justification for failure to move the case forward is here offered by the applicant. Thus, I reach the same result as the Prothonotary did with respect to the request on status review, i.e. to deny the request and to dismiss the application for judicial review. The application for an extension of time, and to appeal from the decision of August 19, 2005 is thus dismissed.

ORDER

THIS COURT ORDERS that

The applications by the applicant corporation

- (1) to appeal the decision of the Prothonotary dated July 6, 2005, and
- (2) for an extension of time and to appeal the decision of the Prothonotary dated August 19, 2005,

are both dismissed.

"W. Andrew MacKay"
DEPUTY JUDGE

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: T-2014-04

STYLE OF CAUSE: T.C. RESTAURANTS LTD.
and
THE ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: Edmonton, Alberta

DATE OF HEARING: November 7, 2005

REASONS FOR ORDER: MACKAY D.J.

DATED: February 14, 2006

APPEARANCES:

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