

Federal Court



Cour fédérale

Date: 20220606

Docket: T-24-19

Citation: 2022 FC 833

Ottawa, Ontario, June 6, 2022

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

TANZIRUL ALAM

**Applicant
(Appellant in Rule 51 proceeding)**

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Appellant, Mr. Tanzirul Alam (Mr. “Alam”), is self-represented in these proceedings. This case concerns his appeal under Rule 51 of the *Federal Court Rules*, SOR/98-106 (the “*Rules*”) to set aside the orders of Case Management Judge Ring (the “CMJ”), dated May 5, 2021 (the “May 5, 2021 Order”) and October 6, 2021 (the “October 6, 2021 Order”). The May 5, 2021 Order declared that Mr. Alam is deemed to have abandoned his Rule 373

Motion as he did not serve and file his complete Rule 373 motion record by the preemptory deadline. The October 6, 2021 Order dismissed Mr. Alam's motion for a reconsideration of the May 5, 2021 Order pursuant to Rules 397 of the *Rules*, as well as his motion to set aside or vary the May 5, 2021 Order pursuant to Rule 399 of the *Rules*.

[2] Mr. Alam submits the May 5, 2021 Order and the October 6, 2021 Order contain errors of law and/or errors of mixed fact and law. Alternatively, if this Court finds that there are no such errors, Mr. Alam argues that his Rule 373 proceeding for interim relief, deemed abandoned on May 5, 2021, must be restored based on the unusual circumstances of this case.

[3] For the reasons that follow, I find that the CMJ made no palpable and overriding error in dismissing Mr. Alam's motion under Rules 397 and 399 of the *Rules*. This appeal is dismissed.

II. Facts

A. *Relevant Background*

[4] Mr. Alam is currently an inmate at Matsqui Institution, a federal prison located in Abbotsford, British Columbia and operated by Correction Services of Canada ("CSC").

[5] On January 7, 2019, Mr. Alam filed an application for judicial review, challenging a November 12, 2018 decision of CSC related to his involuntary transfer from Bowden Institution in Alberta to Matsqui Institution.

[6] On September 18, 2019, Mr. Alam served and filed a notice of motion pursuant to Rule 373(1) of the *Rules* for interim relief, requesting that he be transferred back to Bowden Institution pending the Court's decision in his application for judicial review. Mr. Alam's motion record failed to include a memorandum of fact and law. Mr. Alam claims that due to reasons connected to the COVID-19 pandemic, there were a series of delays in filing the remainder of his motion record.

[7] By Order dated December 13, 2019, the Court dismissed Mr. Alam's motion for leave to file a supplementary affidavit on his Rule 373 Motion and required Mr. Alam to serve and file his motion record on the Rule 373 Motion by January 9, 2020, which he failed to do. Instead, Mr. Alam submitted an informal request on January 9, 2020 for an extension of time to January 24, 2020 for filing and serving the "remainder of a Rule 373 motion record." The Respondent opposed this request and Mr. Alam was directed to bring a formal motion for an extension of time by February 11, 2020. This Direction was subsequently varied by an Order dated February 3, 2020, which required Mr. Alam to serve and file his motion for an extension of time relating to the Rule 373 Motion by February 28, 2020, failing which he would be deemed to have abandoned the Rule 373 Motion.

[8] In an Order dated January 25, 2021 (the "Time Extension Order"), the CMJ considered the period of delay from January 9, 2020 to February 3, 2020 and determined that Mr. Alam had provided a reasonable explanation for the delay. In granting Mr. Alam the requested twelve (12) week extension of time to serve and file his complete motion record on the Rule 373 Motion, the CMJ noted:

[51] However, this case has had a lengthy history of delay and this pattern cannot continue indefinitely. Section 18.4(1) of the *Federal Courts Act* provides that an application for judicial review shall be heard and determined without delay and in a summary manner. Taking into account the procedural history of this case, I conclude that the new deadline for Mr. Alam to serve and file his complete motion record on the Rule 373 Motion shall be made on a peremptory basis subject to one specific exception. In other words, the deadline fixed by the Court shall be a final deadline, subject to the specific exception of any delay relating to the COVID-19 pandemic.

[52] In his reply submissions, Mr. Alam sought an extension of time of twelve (12) weeks to serve and file his complete motion record on the Rule 373 Motion. Mr. Alam shall be granted an extension of time of twelve weeks, as requested, but this deadline shall be fixed on a peremptory basis. The timetable for completion of the remaining steps in the Rule 373 Motion shall be as specified in this Order.

[Emphasis in original.]

[9] The Time Extension Order stipulates:

1. The Applicant, Mr. Alam, is granted an extension of time to April 19, 2021 to serve and file the Applicant's complete motion record on the Rule 373 Motion. This deadline is fixed on a peremptory basis, and is subject only to the specific exception of any delay relating to the COVID-19 pandemic.
2. In the event that the Applicant fails to comply with paragraph 1 of this Order, and the delay is not related to the COVID-19 pandemic, the Applicant shall be deemed to have abandoned the Rule 373 Motion.

[10] Mr. Alam failed to comply with paragraph 1 of the Time Extension Order and did not serve and file his complete Rule 373 motion record by April 19, 2021.

B. *Orders Subject to Appeal*

[11] In the May 5, 2021 Order, the CMJ declared that Mr. Alam is deemed to have abandoned his Rule 373 Motion. The May 5, 2021 Order states that Mr. Alam failed to serve and file his complete Rule 373 motion record within the time prescribed by the peremptory deadline fixed in the Time Extension Order, nor is there any record that Mr. Alam submitted any documents to the Court Registry between the date of the Time Extension Order and April 19, 2021 seeking a further extension of time related to the COVID-19 pandemic.

[12] Mr. Alam did not appeal the May 5, 2021 Order. Instead, on August 11, 2021, Mr. Alam brought a motion for reconsideration of the May 5, 2021 Order pursuant to Rule 397 of the *Rules* for an order to set aside or vary the May 5, 2021 Order pursuant to Rule 399 of the *Rules*. Mr. Alam requested an oral hearing, and the Court granted his request.

[13] Following a hearing held on October 1, 2021, the CMJ dismissed Mr. Alam's motion under Rules 397 and 399 in the October 6, 2021 Order.

[14] In his motion for reconsideration, Mr. Alam relied on several of the narrow exceptions set out in Rules 397 and 399 of the *Rules*. Under Rule 397(1)(b), Mr. Alam sought reconsideration on two grounds. First, Mr. Alam argued that, due to a faxing error committed by CSC, a letter dated April 23, 2021 informing the Court that he could not file his motion record on the Rule 373 Motion by the deadline because the institution's printer was out of ink was not sent to the Court on April 23, 2021. Mr. Alam submitted that the Court overlooked this matter. Second, Mr.

Alam argued that in making the May 5, 2021 Order the Court accidentally overlooked its prior Order dated April 1, 2019. Under Rule 399, Mr. Alam sought an order to set aside or vary the May 5, 2021 Order.

(1) Rule 397 of the *Rules*

[15] In the October 6, 2021 Order, the CMJ noted that under Rule 397 a party may bring a motion for reconsideration of an order “within 10 days after the making of an order, or within such other time as the Court may allow.” While Mr. Alam did not request an extension of time to bring the motion under Rule 397, which was filed 98 days after the May 5, 2021 Order, the CMJ took into account the considerations set out in *Canada (Attorney General) v Hennelly*, 1999 CanLII 8190 (FCA) (“*Hennelly*”) at paragraph 3 regarding the Court’s discretion to grant an informal motion for an extension of time as well as the particular difficulties Mr. Alam faces as a federal inmate. The CMJ noted that Mr. Alam brought three other judicial review proceedings in March and April 2021 and wrote:

The fact that Mr. Alam was able to file motion materials in these other legal proceedings during the 98-day period of delay in filing this motion illustrate that the COVID-19 pandemic did not impede his ability to access institutional computers and prepare and file court documents during that time. It was his choice to commence those other proceedings, and to prioritize his time and efforts on those matters, rather than to prepare and file his Rule 397 motion in this proceeding in a timely manner.

[16] The CMJ found that Mr. Alam’s delay in bringing his Rule 397 Motion was excessive, that his explanation for the lengthy delay was “wholly unsatisfactory” and that it was not in the

interests of justice to grant a 98-day extension for the Rule 397 Motion. Even if an extension of time was granted, the CMJ wrote that the motion would have been dismissed on its merits, as Rule 397(1)(b) cannot be used to re-argue a case in the hopes of a different outcome.

[17] The CMJ found that the matter of the April 23, 2021 letter was not overlooked or accidentally omitted by the Court because the letter was not before the Court when it made its May 5, 2021 Order. As such, this was not a matter of which the Court was aware or ought to have been aware. The CMJ found that the fact that the alleged faxing error was committed by a CSC official, an “intermediate party”, does not come within the exception in Rule 397(1)(b), as overlooking or accidental omissions must be made by the Court, not by a party (*Campbell River Harbour Authority v Acor (Vessel)*, 2010 FC 844 at para 16).

[18] Furthermore, the CMJ noted that the April 1, 2019 Order dealt with a separate matter: it granted Mr. Alam an extension of time to file his Rule 306 affidavit evidence in his underlying application for judicial review; it did not address the scheduling steps in Mr. Alam’s Rule 373 Motion.

[19] The CMJ wrote that in effect, Mr. Alam is asking the Court to reverse its May 5, 2021 Order, which the Court has no ability to do under the reconsideration power under Rule 397 (*Yeager v Day*, 2013 FCA 258 at para 9), nor do the alleged faxing error by CSC or the alleged disregard for the April 1, 2019 Order constitute clerical mistakes or errors that would engage Rule 397(2). Mr. Alam’s motion for reconsideration under Rule 397 was dismissed.

(2) Rule 399 of the *Rules*

[20] In assessing Mr. Alam's motion under Rule 399(1)(b), the CMJ compared Mr. Alam's case to this Court's decision in *Archibald v Canada (Attorney General)*, 2017 FC 674 ("*Archibald*"). The CMJ found that, as in *Archibald* (at paras 11-12), Mr. Alam's failure to meet the peremptory deadline for filing his complete motion record on the Rule 373 Motion was not the result of an excusable accident or mistake, but rather a manifestation of a general lack of diligence and a persistent pattern of failing to respect applicable deadlines. Thus, the first requirement of Rule 399(1)(b) had not been met, and even if it had, the CMJ noted that Mr. Alam had failed to establish a *prima facie* case that the May 5, 2021 Order should not have been made. As such, the CMJ concluded that Mr. Alam's motion under Rule 399(1)(b) must be dismissed.

[21] With respect to Mr. Alam's motion under Rule 399(2)(a), which authorizes the Court to vary or set aside an order "by reason of a matter that arose or was discovered subsequent to the making of the order", the CMJ found that Mr. Alam did not satisfy the three conditions required for the Court to intervene under Rule 399(2)(a) of the *Rules* (*Ayangma v Canada*, 2003 FCA 382 ("*Ayangma*") at para 3). In particular, the CMJ noted that the CSC faxing error and the contents of the April 23, 2021 letter "fall far short of demonstrating that the COVID-19 pandemic in itself explained or wholly justified his failure to file the complete motion record by the peremptory deadline of April 19, 2021."

[22] Mr. Alam alleges that he suffered from COVID-19-like symptoms, which prompted his decision to stay away from the library computers to prevent the spread of infection. However, the CMJ noted how Mr. Alam's own materials indicate that he received a negative COVID-19 diagnosis and was diagnosed with sinusitis, and that he was aware of his symptoms several months before the May 5, 2021 Order was made.

III. Preliminary Issues

A. Only October 6, 2021 Order Subject to Rule 51 Appeal

[23] Mr. Alam's submissions appeal both the May 5, 2021 Order and the October 6, 2021 Order. The Respondent submits that Mr. Alam's Rule 51 appeal should be confined to the October 6, 2021 Order, since Mr. Alam served the notice of motion on October 25, 2021, 173 days after the May 5, 2021 Order was issued. The Respondent contends that this delay is egregious.

[24] Rule 51 of the *Rules* governs appeals of Prothonotaries' Orders. Rule 51(2) requires that a notice of motion "be served and filed within 10 days after the day on which the order under appeal was made." I agree with the Respondent that while the outcome of Mr. Alam's Rule 51 appeal may impact the May 5, 2021 Order, this appeal is to be confined to the October 6, 2021 Order.

B. *New Evidence on Appeal & COVID-19*

[25] In his Rule 51 Motion, Mr. Alam provides two new pieces of evidence: 1) the Fresh Affidavit of Tanzirul Alam (the “Fresh Affidavit”) and 2) “Exhibit L”, attached to the Fresh Affidavit. Both the Fresh Affidavit and Exhibit L are submitted by Mr. Alam to demonstrate that his COVID-19-like symptoms prevented him from submitting his motion record on time.

[26] The Respondent submits that this new evidence should not be accepted in accordance with the general principle that new evidence should not be admitted in a Rule 51 motion (*Charles Augustus Steen III v Dr. Seuss Enterprises, L.P.*, 2017 FC 172 at para 16). The Respondent further argues that these pieces of evidence contradict other evidence in Mr. Alam’s motion record and are of minimal value to Mr. Alam as they are after-the-fact attempts to prove a matter that is not at issue.

[27] I agree with the Respondent. Mr. Alam’s Fresh Affidavit and accompanying exhibit will be disregarded in this appeal. Despite the lack of evidence that Mr. Alam contracted COVID-19, the October 6, 2021 Order notes that even if Mr. Alam did have COVID-19-like symptoms, his own evidence suggests that he was aware of these symptoms for several months before the May 5, 2021 Order and did not request an extension of time, and therefore the Rule 399(2) requirements are not met.

[28] I would also note that Mr. Alam’s Fresh Affidavit and his submissions contradict the earlier statements contained in his motion materials pertaining to the October 6, 2021 Order with

respect to the specific dates of his COVID-19 symptoms. In an informal letter to the Court dated May 15, 2021, Mr. Alam states that he first began to have COVID-19 symptoms in “February/March 2021” and that his health had improved by May 13, 2021. Mr. Alam states that he received a negative COVID-19 test before being examined by a doctor. The evidence includes a doctor’s note from April 13, 2021, diagnosing Mr. Alam with sinusitis, but not COVID-19. Yet in the Fresh Affidavit, Mr. Alam states that it took him six to seven months to obtain a negative COVID-19 test, which contradicts the evidence that suggests he received a negative test before April 13, 2021.

[29] Furthermore, Mr. Alam’s submissions state that he avoided accessing institutional computers because he was suffering from COVID-19 symptoms between March 17, 2021 and April 17, 2021. This also contradicts his previous statement that his symptoms developed in “February/March 2021”, the evidence which indicates he received a negative COVID-19 diagnosis before April 13, 2021, and the Fresh Affidavit that states that he did not access the institutional printer and computers until May 12 or 13, 2021.

IV. Issue and Standard of Review

[30] The sole issue in this case is whether this Court erred in dismissing Mr. Alam’s motion under Rules 397 and 399 of the *Rules*.

[31] The applicable standard of review for an appeal of a discretionary order of a Prothonotary is palpable and overriding error for questions of fact and questions of mixed fact and law, and correctness for questions of law and questions of mixed fact and law where there is an extricable

legal principle at issue (*Hospira Healthcare Corporation v Kennedy Institute of Rheumatology*, 2016 FCA 215 (“*Hospira*”) at paras 64, 66, citing *Housen v Nikolaisen*, 2002 SCC 33 at paras 17-37). In *Hospira*, the Federal Court of Appeal notes: “discretionary orders of prothonotaries should only be interfered with when such decisions are incorrect in law or are based on a palpable and overriding error in regard to the facts.” (at para 64).

[32] In my view, the CMJ did not commit an extricable error of law. As such, this Court should only interfere with the Order under appeal if it is found that there was a palpable and overriding error regarding a question of fact, or a question of mixed fact and law.

[33] In *Lill v Canada (Attorney General)*, 2020 FC 551, this Court noted that the Federal Court of Appeal has described a palpable and overriding error as “an error that is obvious, plainly seen and apparent, the effect of which is to vitiate the integrity of reasons” (at para 25, citing *Madison Pacific Properties Inc v Canada*, 2019 FCA 19 at para 26; *Maximova v Canada (Attorney General)*, 2017 FCA 230 at para 5).

V. Analysis

[34] As noted by the CMJ in the October 6, 2021 Order, once an order is made, it is final and must stand unless it is set aside on appeal, reconsidered or set aside within the narrow ambit of Rules 397 and 399 of the *Rules*.

[35] Rule 379 of the *Rules* provides:

Motion to reconsider

397 (1) Within 10 days after the making of an order, or within such other time as the Court may allow, a party may serve and file a notice of motion to request that the Court, as constituted at the time the order was made, reconsider its terms on the ground that

(a) the order does not accord with any reasons given for it; or

(b) a matter that should have been dealt with has been overlooked or accidentally omitted.

Mistakes

(2) Clerical mistakes, errors or omissions in an order may at any time be corrected by the Court.

Réexamen

397 (1) Dans les 10 jours après qu'une ordonnance a été rendue ou dans tout autre délai accordé par la Cour, une partie peut signifier et déposer un avis de requête demandant à la Cour qui a rendu l'ordonnance, telle qu'elle était constituée à ce moment, d'en examiner de nouveau les termes, mais seulement pour l'une ou l'autre des raisons suivantes :

a) l'ordonnance ne concorde pas avec les motifs qui, le cas échéant, ont été donnés pour la justifier;

b) une question qui aurait dû être traitée a été oubliée ou omise involontairement.

Erreurs

(2) Les fautes de transcription, les erreurs et les omissions contenues dans les ordonnances peuvent être corrigées à tout moment par la Cour.

[36] Rule 399 of the *Rules* provides:

Setting aside or variance

399 (1) On motion, the Court may set aside or vary an order that was made

(a) *ex parte*; or

Annulation sur preuve *prima facie*

399 (1) La Cour peut, sur requête, annuler ou modifier l'une des ordonnances suivantes, si la partie contre laquelle elle a été rendue présente une preuve *prima facie*

(b) in the absence of a party who failed to appear by accident or mistake or by reason of insufficient notice of the proceeding,

if the party against whom the order is made discloses a prima facie case why the order should not have been made.

Setting aside or variance

(2) On motion, the Court may set aside or vary an order

(a) by reason of a matter that arose or was discovered subsequent to the making of the order; or

(b) where the order was obtained by fraud

démontrant pourquoi elle n'aurait pas dû être rendue:

a) toute ordonnance rendue sur requête *ex parte*;

b) toute ordonnance rendue en l'absence d'une partie qui n'a pas comparu par suite d'un événement fortuit ou d'une erreur ou à cause d'un avis insuffisant de l'instance.

Annulation

(2) La Cour peut, sur requête, annuler ou modifier une ordonnance dans l'un ou l'autre des cas suivants:

a) des faits nouveaux sont survenus ou ont été découverts après que l'ordonnance a été rendue;

b) l'ordonnance a été obtenue par fraude.

[37] Mr. Alam's submissions on appeal outline 15 points. I note that many of these arguments are similar to those made in Mr. Alam's written and oral submissions before this Court when Mr. Alam brought his motion under Rules 397 and 399, and which were addressed in the October 6, 2021 Order. I will, however, address each point below.

[38] Overall, Mr. Alam maintains that he could not meet the peremptory deadline of April 19, 2021 to serve his complete motion record on the Rule 373 Motion for two reasons, which were directly related to the COVID-19 pandemic. First, Mr. Alam states that he was unable to print his outstanding motion materials because the Matsqui Institution's printer was out of ink and

there was a delay in refilling the printer due to supply shortages caused by the COVID-19 pandemic. Mr. Alam wrote a letter to the Court on April 23, 2021 addressing this issue yet claims that due to a faxing error committed by CSC staff, the Court did not receive this letter. Second, Mr. Alam states that he fell sick and was experiencing COVID-19-like symptoms. In accordance with health guidelines, he avoided crowded areas, including the institutional library where the computers used to prepare legal documents are located.

A. *Rule 397*

[39] Mr. Alam makes four points related to his Rule 397 Motion.

[40] First, Mr. Alam argues that in the May 5, 2021 Order, the Court overlooked the April 1, 2019 Order. Mr. Alam clarifies that his position is a request that the CMJ reconsider the May 5, 2021 Order to the extent that it is inconsistent with the April 1, 2019 Order. Second, Mr. Alam submits that he was deprived of procedural fairness when the Court failed to clearly outline that the May 5, 2021 Order was varying the April 1, 2019 Order. Mr. Alam argues that he should have been given the opportunity to make submissions in order to fully present his case, and that the Court could not “disturb the status quo” in the absence of a request to do so.

[41] As correctly noted by the CMJ in the October 6, 2021 Order, the April 1, 2019 Order dealt with a separate matter (granting Mr. Alam an extension of time to file his Rule 306 affidavit evidence in his underlying application for judicial review) and did not address the scheduling steps in Mr. Alam’s Rule 373 Motion. The May 5, 2021 Order enforced the deadline set in the Time Extension Order, which granted Mr. Alam the extension he sought in his

submissions. I do not find a breach of procedural fairness. I therefore dismiss both of these points of appeal because the matter at hand is unrelated to Mr. Alam's Rule 306 motion.

[42] Third, Mr. Alam submits that the Court erred in calculating the number of days in the requested time extension (98 days). Mr. Alam states that the correct period to be considered was between June 7, 2021 (when the Court directed Mr. Alam to file a Rule 397 motion) and July 30, 2021 (when Mr. Alam filed the Rule 397 motion), totalling 53 days – a period within which Mr. Alam was further affected by his limited access to computers. Mr. Alam further submits that the CMJ applied the wrong test for an extension of time and failed to give sufficient weight to the relevant facts and circumstances of his case.

[43] The Respondent submits that even if Mr. Alam's arguments were accepted, he still exceeded the 10-day deadline under Rule 397. While Mr. Alam's motion materials are dated July 30, 2021, they were served and filed between August 9 and August 11, 2021, and it was correct of the CMJ to find that a motion record is served and filed on the day it arrives, not the day it is dated. I agree.

[44] I also find that the CMJ accurately calculated the number of days in the requested time extension. Rule 397 clearly states that a party may bring a motion to request a reconsideration of an order within 10 days after an order is made. The CMJ's direction dated June 7, 2021 refused Mr. Alam's informal request to set aside the May 5, 2021 Order and to file the remainder of the motion record for the Rule 373 Motion past the deadline, and directed him to bring a formal motion regarding the relief sought according to the *Rules*. The time period to submit a Rule 397

Motion does not begin on the day when the Court issues a direction indicating to the party that they must bring a formal Rule 397 Motion, it begins within 10 days of the order that is the subject of the Rule 397 Motion for reconsideration.

[45] Additionally, I do not find that the CMJ erred by denying Mr. Alam's request for an extension of time to bring a reconsideration motion. In exercising the discretion afforded to the Court pursuant to *Hennelly*, the CMJ thoroughly considered Mr. Alam's circumstances and the challenges that come with being incarcerated.

[46] Fourth, Mr. Alam takes issue with the CMJ's finding in the October 6, 2021 Order that because he was able to file motion materials with this Court in three other judicial review proceedings during the 98-day period of delay, the COVID-19 pandemic did not impede his ability to prepare and file court documents during that period. The CMJ noted that it was Mr. Alam's choice to prioritize the other matters, rather than preparing and filing his Rule 397 Motion in a timely manner. Mr. Alam argues that this assessment erroneously required him to establish and maintain a "hierarchy" in his proceedings, which related to separate breaches of his *Charter* and statutory rights.

[47] The Respondent submits that the Court was required to consider Mr. Alam's justification for the delay before granting an extension (*Hennelly* at para 3) and that it was thus reasonable of the CMJ to consider Mr. Alam's prioritization of his other proceedings over meeting the deadline for this matter. I agree.

[48] As is rightly noted in the October 6, 2021 Order, Rule 397 of the *Rules* is meant to identify a discrepancy between a decision and the Court's reasons for that decision, or a matter which should have been dealt with but was overlooked or omitted. Rule 397 cannot be used to re-argue one's case in the hopes the Court will change its mind or to reverse what has been ordered (*Taker v Canada (Attorney General)*, 2012 FCA 83 at paras 3-4; *Bell Helicopter Textron Canada Limitée v Eurocopter*, 2013 FCA 261 at para 15). While I accept that Mr. Alam may have faced challenges related to prison lockdowns and restricted access to computers due to COVID-19 protocols, I find that the CMJ reasonably accounted for the particular difficulties he faces as a federal inmate in the October 6, 2021 Order. I also find that it was reasonable of the CMJ to consider how Mr. Alam was able to file motion materials for other proceedings with this Court during the 98-day period.

[49] Given the circumstances, and considering the extensive reasons provided in the October 6, 2021 Order, I do not find that the CMJ committed a palpable and overriding error in dismissing Mr. Alam's Rule 397 Motion.

B. *Rule 399*

(1) *Rule 399(1)(b)*

[50] Mr. Alam makes eight points related to his Rule 399(1)(b) Motion.

[51] First, Mr. Alam argues that the CMJ erroneously interpreted Rule 399(1)(b) of the *Rules* by requiring him to satisfy this Court that his failure to file a complete motion record was the

result of an excusable accident or mistake. Rather, Mr. Alam claims that he was required to satisfy the Court that he “failed to appear” before the Court to seek an extension, and the failure to appear itself was the excusable mistake or accident. Mr. Alam affirms that the CSC’s faxing error delayed his April 23, 2021 letter requesting an extension of time. As such, Mr. Alam states that Rule 399(1)(b) relates to the April 23, 2021 letter itself and not the complete motion record. Mr. Alam further contends that the result of the May 5, 2021 Order would have been different had the faxing error not occurred, and had he “appeared” before the Court by way of his April 23 letter, before the issuance of the May 5, 2021 Order.

[52] I agree with the Respondent’s submission that this point of appeal should be dismissed as it is based on a misapprehension that the Court failed to consider the faxing error in the October 6, 2021 Order. In the October 6, 2021 Order, the CMJ considered both the April 23, 2021 letter and Mr. Alam’s failure to file his complete motion record by the peremptory deadline as a “failure to appear” under Rule 399(1)(b). I further agree with the Respondent that even if the April 23, 2021 letter had been before the CMJ, the October 6, 2021 Order clearly outlines that this would not have affected the outcome of the May 5, 2021 Order.

[53] Second, Mr. Alam submits that the CMJ erred in applying *Archibald*, as his case is distinguishable. Mr. Alam notes that in *Archibald* the party was at fault because it failed to file materials, whereas in his case, he was ready to file the documents two days before the deadline, but a third party – CSC – failed to properly file his materials. Furthermore, unlike in *Archibald*, where the missed deadline was found to be part of a larger pattern, Mr. Alam submits that he has justified every delay. Finally, Mr. Alam stresses that the applicant in *Archibald* was a free

citizen with legal counsel, whereas he is incarcerated with no legal counsel and was made powerless with respect to the preparation and delivery of his materials.

[54] Third, Mr. Alam submits that the CMJ erred by finding that he did not satisfy the first criteria for Rule 399(1)(b). Mr. Alam asserts that this finding contradicts the Time Extension Order, and is not supported by the evidence, particularly the fact that he did not have sufficient computer access to prepare his legal documents.

[55] In response to the second and third points, the Respondent contends that the CMJ did not find that Mr. Alam justified all of his delays. In fact, the October 6, 2021 Order outlines Mr. Alam's extensive history of delays and extensions, including the fact that it took him a year and a half to prepare his motion materials for the Rule 373 Motion, demonstrating that he did in fact have a persistent pattern of delays. Furthermore, the Respondent maintains that Mr. Alam cannot argue that he did not have enough time to prepare his materials when the Time Extension Order granted him the exact amount of time he requested. The CMJ also accounted for Mr. Alam's unique circumstances, including any difficulties that resulted from his incarceration.

[56] I agree with the Respondent and find that the October 6, 2021 Order provides a detailed review of Mr. Alam's persistent pattern of failing to respect applicable deadlines, and reasonably concludes that this is due to his own lack of due diligence and prioritization of other legal matters, and not the result of an accident or mistake. In spite of Mr. Alam's circumstances and alleged third-party error, I do not find that the CMJ erred in relying on this Court's holding in *Archibald*, given how Mr. Alam showed a similar lack of diligence in the face of deadlines.

Furthermore, as was rightly noted by the CMJ, even if the requirement of Rule 399(1)(b) was met, Mr. Alam failed to establish a *prima facie* case that the May 5, 2021 Order should not have been made.

[57] Fourth, Mr. Alam submits that the CMJ miscalculated the period of time he had to file his motion materials. While the CMJ found that he was granted an 84-day extension until April 19, 2021, Mr. Alam maintains that he actually only had between 11 to 16 days, since he was required to avoid accessing the Matsqui Institution library because he was suffering from COVID-19-like symptoms between March 17, 2021 and April 17, 2021. Mr. Alam also notes that he only had access to the institution's three computers for a 90-minute window every ten days. Mr. Alam further challenges the CMJ's finding that he appeared to have spent most of the period between January 25, 2021 and April 19, 2021 on other proceedings before this Court and asserts that the nature of his other proceedings are intricately linked to this matter.

[58] The Respondent submits that even if Mr. Alam's re-calculation of the time period was accepted as correct, he did not explain how 11-16 days and 90 minutes of computer access were insufficient for him to prepare his Rule 373 Motion materials. Moreover, the Time Extension Order specifically notes that April 19, 2021 is a peremptory deadline; Mr. Alam chose to prioritize other proceedings rather than meeting it. I agree with the Respondent and find that it was correct of the CMJ to conclude that Mr. Alam lacked due diligence, given the peremptory deadline set in the Time Extension Order.

[59] In his fifth point, Mr. Alam takes issue with how the CMJ “admonished” him for “waiting until the “eleventh” hour to complete his motion materials on the Rule 373 Motion”. As correctly noted by the Respondent, there is no legal basis to this point. Mr. Alam failed to explain how this constitutes an error, or how this error would justify overturning the October 6, 2021 Order. I find it was reasonable of the CMJ to conclude that waiting until the last minute despite a peremptory deadline demonstrates a lack of due diligence.

[60] In his sixth point, Mr. Alam contends that the CMJ failed to consider that even if he had completed his Rule 373 Motion materials well before the April 19, 2021 deadline, he would still have been unable to file and serve his material in time because the printer at the Matsqui Institution had been out of ink for “a while”. He also submits that the CMJ failed to consider his ill-health as a factor for why his materials were not ready before April 17, 2021.

[61] The Respondent argues that this point is without merit since the timing during which Mr. Alam discovered the ink shortage is a consideration under Rule 399(1)(b). Mr. Alam’s ill-health between April 1, 2021 and April 17, 2021 and his inability to submit materials because the printer was out of ink are irrelevant to determine when he discovered the ink shortage. I agree. The CMJ was required to consider when Mr. Alam discovered the ink shortage and whether he acted with due diligence after this discovery. As noted by the CMJ in the October 6, 2021 Order, Mr. Alam was aware that the institutional printer had been out of ink “for awhile”. He was also aware of the peremptory deadline of April 19, 2021. Yet still, he waited until the last minute to notify the Court in his April 23, 2021 letter – four days after the expiration of the peremptory deadline. The CMJ committed no error in noting this.

[62] Mr. Alam's seventh point addresses the CMJ's finding that he lacked diligence by only sending a letter notifying the Court that the institution's printer had run out of ink following the expiry of the peremptory deadline. Mr. Alam states that historically it had only taken a few days to replace the printer ink cartridges and that it would therefore have been premature to request an extension on April 1, 2021. He further notes that the reason his explanatory letter was only sent to the Court on April 23, 2021 was because of the CSC faxing policy, which states that it can take up to thirteen (13) days to fax a document. As such, he initiated the process of sending the letter long before April 23, 2021, but dated the letter to correspond with the date it was faxed. Mr. Alam submits that pursuant to Rule 8(2) of the *Rules*, a motion for an extension of time may be brought before or after the end of the period sought to be extended.

[63] I agree with the Respondent's submissions on this point, which outline the following: It would not have been premature for Mr. Alam to request an extension of time before April 23, 2021, as he could have alerted the Court of the ink shortage, or that he had COVID-19 symptoms, and a motion for an extension of time could have been brought at a later date. Mr. Alam had a responsibility to inform the Court of any concerns that he may not be able to meet the April 19, 2021 deadline, particularly given the high standards of a peremptory deadline.

[64] Furthermore, while I agree with Mr. Alam that Rule 8(2) permits bringing a motion after the end of the period sought to be extended, it does not guarantee a right to be granted an extension. The October 6, 2021 Order clearly considered whether Mr. Alam's request was brought in a timely and diligent manner, and the CMJ made no palpable or overriding error in

assessing Mr. Alam's delay in submitting his Rule 373 Motion materials and finding that he lacked due diligence.

[65] Finally, Mr. Alam argues that the CMJ erred in finding that he failed to make a *prima facie* case. He maintains that the CMJ did not conduct a meaningful analysis of what constitutes a *prima facie* case, nor did the CMJ establish the standard to be met. Mr. Alam further submits that his *prima facie* case was established in his written submissions and accompanying evidence, and that it was thus unreasonable of the CMJ to find that a mere referral to his factual submissions was inadequate to establish a *prima facie* case.

[66] Once again, I agree with the Respondent's submissions on this final point. There is no requirement for the CMJ to explain the standard to be met in order for a case to be considered *prima facie* for the purpose of satisfying Rule 399(1)(b). Furthermore, it was reasonable of the CMJ to find that Mr. Alam only relied on a summary of facts in his written submissions to make a *prima facie* case, and failed to connect the facts of his situation with the law to demonstrate that there was in fact a *prima facie* case why the May 5, 2021 Order should not have been made. In any case, the faxing error that Mr. Alam claims sets out his *prima facie* case does not address why he missed the deadline, it simply explains further delays.

[67] Overall, I do not find that the CMJ's October 6, 2021 Order contains any palpable or overriding error in the assessment of Rule 399(1)(b) that warrants this Court's intervention.

(2) Rule 399(2)(a)

[68] Mr. Alam makes three points related to his Rule 399(2)(a) Motion.

[69] First, Mr. Alam submits that the CMJ erred by concluding that he did not meet the three conditions of the test set out in *Ayangma* required for the Court to intervene under Rule 399(2)(a). Mr. Alam argues that the April 23, 2021 letter was itself the matter within the meaning of Rule 399(2)(a) – not the content of the letter, and it was therefore sufficient to meet the requirement under Rule 399(2)(a). Mr. Alam asserts that if the April 23, 2021 letter had been before the Court, it would have prevented the CMJ from issuing the May 5, 2021 Order deeming the Rule 373 Motion abandoned because the April 23, 2021 letter addressed issues related to COVID-19. Mr. Alam further submits that he provided evidence to support his claim that he suffered from COVID-19-like symptoms, which was the best evidence available at the time, given CSC's slow diagnosis process. Finally, Mr. Alam maintains that regardless of his COVID-19 symptoms, he did not believe he needed to notify the Court of a potential delay because, had it not been for the printer ink issue and the faxing error, he would still have been able to meet the deadline.

[70] While Mr. Alam may disagree with the CMJ's analysis, I find that none of his arguments support the conclusion that the CMJ erred in her assessment of the evidence or in finding that he failed to meet the three conditions of the test in *Ayangma*. I would note that it would be meaningless to assess the April 23, 2021 letter itself without assessing its content – that is, that the time extension request resulted from the printer ink shortage. In the October 6, 2021 Order,

the CMJ considered both the letter and the time extension as matters under Rule 399(2)(a) and found that neither had a determinative impact on the May 5, 2021 Order because there is no evidence to substantiate that the printer was out of ink due to supply shortages created by COVID-19. During the October 1, 2021 hearing, the CMJ also clearly stated that while the May 5, 2021 Order may have been worded differently if the April 23, 2021 letter had been before the Court, it would not have had a determinative impact on the May 5, 2021 Order because Mr. Alam did not meet the necessary criteria. I therefore find that the CMJ correctly concluded that Mr. Alam did not substantiate his claim or demonstrate that the COVID-19 pandemic itself justified his failure to file the complete motion record by the peremptory deadline.

[71] Second, Mr. Alam submits that a refusal to restore his Rule 373 proceeding would lead to a miscarriage of justice as it is not in the interest of justice to refuse his interlocutory relief simply for missing a deadline. On this point, I would reiterate that while Mr. Alam has the right to seek interim relief, he is not automatically entitled to it. I agree with the Respondent's argument that it is not in the interest of justice to allow Mr. Alam to continue with his Rule 373 Motion, particularly given his pattern of substantial delay in preparing his motion materials, without substantive evidence to explain his lack of due diligence. I find that Mr. Alam was afforded ample opportunities to serve and file his Rule 373 Motion materials, including a generous 84-day extension, and careful consideration was given to his particular circumstances as an inmate and the technical challenges he faced. Mr. Alam is not entitled to an infinite number of chances to engage in a proceeding – this would result in a waste of the Court's resources and is not in the interest of justice.

[72] Mr. Alam's third and final point states that the CMJ erred by "shifting the analysis" under Rule 399(2)(a) from whether he failed to request a further extension of time to whether there was contributory negligence on his part when he failed to request an extension of time. I agree with the Respondent that Mr. Alam provided no basis for this argument. Mr. Alam failed to point out an error that would necessitate this Court's intervention.

[73] I am not satisfied that Mr. Alam has demonstrated that the CMJ made a palpable and overriding error in dismissing the Rule 399 Motion.

VI. Costs

[74] An award of costs in favour of the Respondent is appropriate in this case. Costs are fixed in the amount of \$750.00, to be paid by Mr. Alam to the Respondent.

VII. Conclusion

[75] For the above reasons, the Rule 51 motion to appeal the October 6, 2021 Order is dismissed. Mr. Alam has not demonstrated any palpable and overriding error in the October 6, 2021 Order that would warrant this Court's intervention. I also do not find any reason to restore Mr. Alam's Rule 373 proceeding for interim relief.

[76] Finally, I find it important to address that the CMJ, Prothonotary Ring, issued a sixteen-page Order on October 6, 2021, thoroughly detailing the reasons behind her dismissal of Mr. Alam's motions pursuant to Rules 397, 399(1)(b) and 399(2)(a). The October 6, 2021 Order

included an in-depth analysis of every issue raised by Mr. Alam and explained why the matter should be dismissed. The CMJ has been assigned to this particular matter since January 2021. She is thus very familiar with the facts of the case and Mr. Alam's particular circumstances as an incarcerated person.

[77] On several occasions, the CMJ exceptionally accommodated Mr. Alam to ensure that he would be able to present his matter before this Court. In the Time Extension Order, Mr. Alam was granted the significant 84-day extension that he requested, and the CMJ acknowledged the unusual difficulties he faces as an incarcerated person in preparing motion materials including restricted access to computers, printers and legal research materials. Even when Mr. Alam failed to respect the peremptory deadline of April 19, 2021 and filed a motion for reconsideration several days after the regular 10-day deadline, the CMJ continued to accommodate him by allowing him to move forward with his proceeding. For instance, while motions under Rules 397 or 399 are typically disposed of as motions in writing pursuant to Rule 369 of the *Rules*, the CMJ granted Mr. Alam's request for an oral hearing.

[78] Overall, Prothonotary Ring's attentive and courteous conduct towards Mr. Alam is commendable and deserves particular mention. This is especially true given her comprehensive reasons, which are both precise and clear.

JUDGMENT in T-24-19

THIS COURT'S JUDGMENT is that:

1. The Rule 51 motion to appeal the CMJ's October 6, 2021 Order is dismissed.
2. Costs are awarded to the Respondent, in the amount of \$750.00.

"Shirzad A."

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-24-19

STYLE OF CAUSE: TANZIRUL ALAM v THE ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: BY VIDEOCONFERENCE

DATE OF HEARING: FEBRUARY 24, 2022

JUDGMENT AND REASONS: AHMED J.

DATED: JUNE 6, 2022

APPEARANCES:

Tanzirul Alam
(On his own behalf)

FOR THE APPLICANT
(APPELLANT IN RULE 51 PROCEEDING)

Benjamin Bertram

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Attorney General of Canada
Vancouver, British Columbia

FOR THE RESPONDENT