Federal Court Cour fédérale

Date: 20230131

Docket: IMM-2241-22

Citation No.: 2023 FC 143

Ottawa, Ontario, January 31, 2023

PRESENT: Associate Judge Benoit M. Duchesne

BETWEEN:

Malkeet Singh VIRK
Amadeep Kaur VIRK

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS AND ORDER

[1] On December 12, 2022, the Applicants brought a motion to revoke the deemed discontinuance of their Application for Leave and for Judicial Review ("ALJR") commenced under subsection 72(2) of the *Immigration and Refugee Protection Act* and for an Order accepting their Application Record which they argue was properly served and filed on April 11, 2022, for filing.

[2] The Applicants' ALJR was commenced on March 9, 2022. It was deemed discontinued by the Court on December 6, 2022, because it had not been perfected within the time provided by Rule 10 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22 (the *"FCCIRPR"*). The deemed discontinuance resulted from the automatic operation of the Court's administrative practice to deem unperfected ALJRs as discontinued as set out in the Court's December 6, 2022, Notice to the Profession titled "Deemed Discontinuance of Incomplete Applications for Leave and Judicial Review in Proceedings under the *Immigration and Refugee Protection Act*" (the "Deemed Discontinuance Practice").

[3] These reasons will consider the test applicable on a motion to revoke the deemed discontinuance arising from the operation of the Court's Deemed Discontinuance Practice, to reopen the proceeding, and to obtain an extension of time to perfect an ALJR. Although nothing turns on the amendment on this motion, the December 6, 2022, Deemed Discontinuance Practice was amended on December 22, 2022, to include and apply to ALJRs pursuant to the *Citizenship Act*.

[4] For the reasons that follow, the Applicants' motion is dismissed.

I. The Evidence before the Court

[5] The Applicants' evidence consists of two affidavits. The first is the affidavit of the Applicant Mr. Malkeet Singh Virk solemnly affirmed on December 12, 2022. The second is the affidavit Makhan Singh affirmed on December 12, 2022.

[6] Makhan Singh's affidavit is limited to the fact that he is fluent in the English and Punjabi languages, that he read the English language version of the Applicant's affidavit to the Applicant in Punjabi, and that the Applicant affirmed his affidavit after it had been translated and read to him.

[7] The Applicant Mr. Virk's evidence is that he and his spouse, the co-applicant Amandeep Kaur Virk, sought to retain a lawyer to represent them after they received an unfavourable decision from the Refugee Appeal Division on or about February 8, 2022. A translator and a paralegal working in Montreal suggested to him that it might be possible for them to retain Me Felipe Morales, a lawyer who practices in Montreal. Mr. Virk asked the translator to retain Me Morales on his and his spouse's behalf and to commence legal proceedings. The dates of these communications is not set out in the evidence.

[8] Mr. Virk called the translator again on March 9, 2022, to ensure that his and his spouse's proceeding had been filed. The translator told Mr. Virk that Me Morales was out of the country at the time but was due back in his office on March 14, 2022. Mr. Virk deposes that he insisted to the translator that his and his spouse's Notice of Application be prepared and filed. According to Mr. Virk, a Mr. David Barrios, whose qualifications are not deposed to, prepared and filed the Applicants' Notice of Application on March 9, 2022. Mr. Virk deposes that he was told by Mr. Barrios that he had "*put in the calendar the deadline to file would fall on April 9, 2022*."

[9] I observe that the 30-day time period within which the Applicants were to serve and file their Application Record pursuant to Rule 10 of the *FCCIRPR* expired on Friday, April 8, 2022,

and not on April 9, 2022, a Saturday. The Application Record filing date had apparently been miscalculated and diarized by Mr. Barrios.

[10] Mr. Virk says that he contacted Me Morales on or about March 15, 2022, and was assured by Me Morales that their Application Record would be filed by the filing deadline. Mr. Virk deposes more specifically that, “Mr. Morales explained that since his paralegal indicated the deadline for filing was April 9, 2022, the delay would be extended to April 11, 2022.” He says that Me Morales confirmed to him that their Application Record was filed on April 11, 2022. As far as next steps were concerned, Mr. Virk deposes further that, “Mr. Morales told me that the next step would be to receive a Response Memorandum, if necessary to file a reply and then a decision would be made by a judge whether we would be granted leave or not”.

[11] The Court record shows that Me Morales or someone in his office submitted the Application Record via e-filing on April 11, 2022. The Court record also shows that on April 13, 2022, the Registry verified the Court file to determine if the Application Record was filed in time, determined that it was filed one (1) day late, and that the Application Record was otherwise deficient in that it did not include bookmarks. One of the Court’s Registry Officers called Me Morales on April 13, 2022, to inform him that the Application Record was filed late and contained irregularities. The Registry Officer’s note in the Court record shows that Me Morales had confirmed to the Registry Officer during their April 13, 2022, telephone call that he would be sending an informal request for an extension of time to file the Application Record and would correct the irregularities in the record he or someone from his office had attempted to file.

[12] Although these facts regarding the Registry and the April 13, 2022, communications are not in Mr. Virk's affidavit, they are referred to in his Notice of Motion, albeit with a typographical error as to the month in which Me Morales' discussion with the Registry took place. The Notice of Motion alleges that, "The Applicant's [!sic] solicitors received communications from the Registry on or about November 13, 2022, that there had been a delay but thought the Record would be accepted after discussion with the Registry". There is no reference in the Court record to any communications between the Registry and Me Morales on November 13, 2022. This stated "thought" about how the Registry could accept the Virks' Application Record without a Court Order strains credulity and runs contrary to the Court's *Rules* and practice. As the Court record shows with respect to the April 13, 2022, telephone call between the Registry and Me Morales, Me Morales knew that a request for an extension of time was required in any event. As there is no affidavit evidence regarding any November 13, 2022, call involving the Registry and Me Morales, I accept that the facts reflected in the Court record regarding the April 13, 2022, interactions are accurate.

[13] Mr. Virk deposes that he and his spouse received a notice on or about November 25, 2022, that the Canada Border Services Agency (the "CBSA") was calling them to appear. He deposes that he told the CBSA that their case was in the Federal Court. He says he was then told by the CBSA that his statement about his case being before this Court was inaccurate. Mr. Virk says he then called his translator and was told that Me Morales was out of the country from November 26 to December 4, 2022. There is no evidence or allegation about what transpired between approximately November 25 or 26, 2022, and at least December 4, 2022.

[14] The Deemed Discontinuance Practice was published on December 6, 2022 and, in accordance with it, the Applicants' then unperfected ALJR was deemed discontinued. A copy of the Deemed Discontinuance Practice was registered in the Court file.

[15] Mr. Virk says that M[e] Morales, once back in Canada, informed him that he would prepare a motion to revoke the "deemed abandonment" and have the Application Record filing date extended because of the confusion as to the proper filing date. No evidence is provided as to precisely when this discussion may have taken place but logic would dictate that it would have to have been have after December 6, 2022, being the date on which the Deemed Discontinuance Practice was published and prior to this motion being filed on December 12, 2022.

[16] There is no evidence of when the suggested motion was prepared, whether any steps were taken to contact the Respondent to seek its consent to an extension of time prior to December 6, 2022, or why no motion was prepared or contemplated immediately after Mr. Virk's call to his translator go-between on or about November 25 or 26, 2022. What can be deduced, however, is that the motion before me was prepared at some point between December 6 and December 12, 2022.

II. **The Law Relied Upon by the Applicants.**

[17] The Applicants rely on Rules 4, 6 and 8 of the *Federal Courts Rules*, SOR/98-106 (the "Rules") in support of their motion.

[18] Rule 4 provides that on a motion, the Court may provide for any procedural matter not provided for in the *Rules* or in an Act of Parliament by analogy to the *Rules* or by reference to

the practice of the superior court of the province to which the subject matter of the proceeding most closely relates. The Applicants have neither identified a procedural matter that is not provided for in the *Rules*, nor have they suggested which provincial superior court rule should apply by analogy. Given these omissions, there appears to be no basis in the Motion Record for the Applicants' reliance on Rule 4 of the *Rules*.

[19] Rule 6 provides that the computation of time under the *Rules* or under an order of the Court is governed by sections 26 to 30 of the *Interpretation Act*. The Applicants argue in their written representations that "[a]n error in calculation of sections 26 to 30 of the Interpretation Act led the Applicants to believe they could file the Record on April 11, 2022, rather than April 8, 2022". I note here that through this argument the written representations reflect that at some point the Applicants realized that April 8, 2022, was their filing deadline, and not April 9, 2022. There is no affidavit evidence of how the error in calculating time occurred or when April 8, 2022, was acknowledged by the Applicants as the correct perfection deadline.

[20] Rule 8 provides that the Court may, on a motion, extend or abridge a period provided by the *Rules* or fixed by an Order of the Court, including after the time sought to be extended has expired. The discretion afforded to the Court with respect to motions for extensions of time pursuant to Rule 8 of the *Rules* is typically exercised after considering the well-known test applicable to motions for extensions of time set out in *Canada (Attorney General) v. Hennelly*, 1999 CanLII 8190 (FCA), at para. 3, that was further considered in *Canada (Attorney General) v. Larkman*, 2012 FCA 204, at paragraph 62 and in *Alberta v Canada*, 2018 FCA 83, at paragraph 45, among others.

[21] Pursuant to the *Hennelly* decision, the moving party seeking an extension of time must lead evidence to establish: 1) a continuing intention to pursue his or her application; 2) that their application has some merit; 3) that no prejudice to the Respondent on the motion arises from the delay; and, 4) that a reasonable explanation for the delay exists for the whole of the delay period in respect of the extension sought. As noted by the Federal Court of Appeal in *Alberta v Canada*, 2018 FCA 83, at paragraph 45, the four *Hennelly* questions are not an extensive list of questions or factors that may be relevant in any given case, and the failure to give a positive response to one of the four questions is not necessarily determinative. Nevertheless, the questions are helpful to determine whether the granting of an extension is in the interest of justice, because the overriding consideration or the real test is ultimately that justice be done between the parties.

[22] The Applicants' Motion Record does not contain any argument pertaining to Rule 8. There is also no argument as to whether or how the Court should exercise its discretion to extend the time in this case, only a humble request that the Court revoke the deemed abandonment.

[23] The Applicants' Motion Record contains no argument or written representations whatsoever on what factors the Court should consider in determining whether it should revoke the deemed discontinuance that operated through and as a result of the Court's Deemed Discontinuance Practice.

III. Revoking a Deemed Discontinuance

[24] The Deemed Discontinuance Practice was published on December 6, 2022, and reads as follows:

As of the date of this Notice, applications pursuant to the *Immigration and Refugee Protection Act* **that remain unperfected following the expiry of the timelines in Rule 10 shall be deemed to have been discontinued by the Applicant,** pursuant to Rule 165 of the *Federal Courts Rules*, without the need for formal notice by the Applicant or a Court Order. The Registry will provide notice to the parties by way of a recorded entry in the online docket on the Court website (Court Files).	À compter de la date du présent avis, dans les demandes en vertu de la *Loi sur l'immigration et la protection des réfugiés* qui demeurent **non complétées après l'expiration des délais prévus à la règle 10, le demandeur sera réputé s'être désisté de la demande** conformément à la règle 165 des *Règles des Cours fédérales*, sans qu'il ne soit nécessaire que le demandeur donne un avis officiel ou que la Cour rende une ordonnance. Le greffe avisera les parties par le biais d'une inscription enregistrée dans le plumitif en ligne sur le site Web de la Cour (Dossiers de la Cour).
If, pursuant to the new administrative practice described above, a proceeding is deemed to be discontinued in a file for which the Applicant intended to file a motion for an extension of time to perfect their record, a motion to revoke the deemed discontinuance, reopen the proceeding, and obtain an extension of time may instead be filed for consideration by the Court.	Si, conformément à la nouvelle pratique administrative décrite ci-dessus, une instance est considérée avoir fait l'objet d'un désistement dans un dossier pour lequel le demandeur avait l'intention de déposer une requête en prolongation de délai pour mettre son dossier en état, une requête en révocation du désistement réputé, en réouverture de l'instance et en prolongation de délai peut

	être déposée pour examen par la Cour.

[25] A defining feature of the Deemed Discontinuance Practice is that it signals that litigants who have failed to perfect their ALJR within the time set out in the *FCCIRPR* will be deemed to have discontinued their proceeding pursuant to Rule 165 of the *Rules*. This is a quicker process than that set out by Rule 14 of the *FCCIRPR* that provides that the Court may decide the ALJR after the expiry of the time for an applicant to perfect despite that no Application Record has been filed, and, as we will see, theoretically permits an applicant to commence their proceeding afresh despite the deemed discontinuance. Rule 165 of the *Rules* reads as follows :

165 A party may discontinue all or part of a proceeding by serving and filing a notice of discontinuance.	**165** Une partie peut se désister, en tout ou en partie, de l'instance en signifiant et en déposant un avis de désistement.

[26] A discussion with respect to revoking a discontinuance, deemed or otherwise, must consider the meaning and effect of the discontinuance of a proceeding. The leading case on this issue is *Philipos v. Canada (Attorney General)*, 2016 FCA 79 (CanLII), [2016] 4 FCR 268 (*"Philipos"*).

[27] In *Philipos*, the Federal Court of Appeal was concerned with a motion by which Mr. Philipos sought to resurrect and continue an appeal that he had discontinued through his lawyers. Stratas J.A.'s reasons in dismissing the motion are instructive as to the conceptual basis and the effects of a discontinuance and how those affect the manner in which Courts should approach motions by a discontinuing party to be relieved of its effects.

[28] A discontinuance pursuant to Rule 165 of the *Rules* is a unilateral act done without any other parties' consent or leave from the Court, and operates to close the Court file in the proceeding (*Philipos*, at para. 8). The service and filing of a Notice of Discontinuance by a litigant tells the other parties to the proceeding that the litigation will not be pursued; it signifies the formal end of the proceeding. As stated by Stratas J.A., "[…] discontinuances are not suspensions but rather terminations with consequences […]" (*Philipos*, at para.16). As the proceeding is at an end, the party against whom the action, application or appeal has been discontinued is entitled to its costs payable forthwith by the discontinuing party unless the Court has ordered otherwise or the parties have agreed otherwise (Rule 402).

[29] The *Rules* do not explicitly provide for the revocation of a discontinuance and the continuation of the proceeding that had been discontinued. As Stratas J.A. notes, however, by providing for a discontinuance pursuant to Rule 165, the *Rules* impliedly permit a party to resurrect its discontinued proceeding. Because a discontinuance is theoretically different from a dismissal in that there is no determination of the merits of the dispute that was the subject of the proceeding, it does not operate to give rise to *res judicata* or other bars against relitigation (*Philipos,* at para. 13). Theoretically, and subject to reasons such as the expiry of limitation periods and other bars to litigation arising by the passage of time and conduct, the discontinued litigant can commence proceedings afresh on the basis of the same material facts as those set out in the proceeding they discontinued (*Philipos,* at paras. 13 and 15). The principles articulated in *Philipos* at some length with respect to the circumstances in which the Court might reopen a proceeding after a discontinuance was filed were summarized by Justice Mosley in *Naboulsi v*

Canada (Citizenship and Immigration), 2018 FC 916 at paras 17 to 20, and by Justice Zinn in *Adegbite v. Canada (Citizenship and Immigration),* 2022 FC 145 (CanLII) as follows :

> First, a file can only be resurrected in the case of "some fundamental event that strikes at the root of the decision to discontinue." As an example, Justice Stratas referenced "repudiation of a settlement agreement that required a proceeding to be discontinued": *Philipos*, above, para 20.
>
> Second, the discontinued proceedings must have some reasonable prospect of success: *Philipos*, above, para 21.
>
> Third, the Court must consider the prejudice that may result if the proceeding is resurrected. Justice Stratas provides as examples a party taking significant steps relying on the discontinuance, the destruction of files, the cessation of evidence collection, and the disappearance of witnesses. Other forms of prejudice may warrant refusing to resurrect a proceeding: *Philipos*, above, para 22.
>
> Finally, Justice Stratas noted that other considerations may warrant refusing to resurrect a proceeding. This would include the Courts' power to manage practices and procedures, police the conduct of proceedings, and prevent abuses of process: *Philipos*, above, para 23.

[30] In *Sherwood v. Cinnabar Brown Holdings Ltd.*, 2021 BCCA 88, at paras. 9 to 17(CanLII), Fenlon J.A. considered the *Philipos* decision in the context of a motion to set aside a notice of discontinuance that had been filed by the appellant's lawyer after having concluded that their prospects of success on appeal were low. The motion was brought to set aside the notice of discontinuance because the new lawyers for the appellant were more confident than their predecessors that the appeal might have some chance of success. In her reasons, Fenlon J.A. wrote as follows:

> [11] In *Philipos*, Justice Stratas described such circumstances in general terms as "events that strike at the root of the decision to abandon the appeal." Such events include, for example:
>
> - Situations in which a party discontinues the wrong action or appeal;

- The lawyer misapprehended the client's instructions;

- The abandonment was procured by fraud;

- The party abandoning did not have mental capacity to take the step; and

- The abandonment was filed as part of a settlement that required that step, but, subsequently, the other party repudiated the settlement.

Philipos at paras. 20–21; *Neis v. Yancey*, 1999 ABCA 272 at para. 27.

[12] In short, there must be inadvertence, mistake, or misapprehension before this Court should exercise its discretion to set aside a notice of abandonment. **Strategic decisions to abandon an appeal to save costs or because of the view held about the likelihood of success do not amount to <u>exceptional circumstances</u>—they are, to the contrary, the ordinary reasons appeals are abandoned**. As Justice Esson concluded in *Adam and Adam v. Insurance Corporation of British Columbia et. al. (1985),* 1985 CanLII 584 (BC CA), 66 B.C.L.R. 164 at 171 (C.A.), after reviewing authorities to determine the basis upon which the discretionary power to set aside a notice of discontinuance of an action should be exercised:

... it is my view that where, as here, the grounds are simply a change of heart, based on some greater consideration of the law or the facts, as to the possibility of success, that is not enough.

[13] The next factor to be considered is the prejudice to the parties should the abandonment be set aside. Prejudice may include steps taken by the parties in reliance on the abandonment—such as carrying out obligations under a trial judgment after the appeal from that judgment has been discontinued: *Warford* at para. 7. It may also result from the destruction of evidence or the disappearance of a witness: *Williams v. The Personal Insurance Company of Canada*, 2004 NSSC 73 at paras. 15–20.

[14] The third factor is the merit of the appeal that the appellant seeks to resurrect, for if there is no merit to the proposed appeal, there is no point in reviving it.

[15] The ultimate question is whether it is in the interests of justice to set aside the abandonment, a question which subsumes the other considerations. (the emphasis is mine)

[31] *Philipos* and the decisions that follow it are concerned with a voluntary discontinuance having been filed by the prosecuting party. Because a Notice of Discontinuance requires a party to take a voluntary and positive act to prepare, serve and file, the litigant must be taken to have considered how and whether to prosecute their proceeding prior to causing its end. This voluntary aspect of a discontinuance and its correlative statement of litigation intent justifies the Court applying a strict test before determining that the party's declaration of conclusion and finality set out in the Notice of Discontinuance should be revoked. Statas J.A.'s reasons underscore why the revocation of an intentional discontinuance should only occur in exceptional circumstances. Those exceptional circumstances must be, as repeated by Fenlon J.A. in *Sherwood*, "a fundamental event that strikes at the root of the decision to discontinue. Examples include the procurement of a discontinuance by fraud, mental incapacity of the party at the time of the discontinuance, or repudiation of a settlement agreement that required a proceeding to be discontinued" (*Philipos* at para. 20).

[32] The threshold for revocation of a voluntary discontinuance, then, is the existence of an exceptional circumstance, the existence of a fundamental event that causes the reversal of the decision to discontinue.

[33] A deemed discontinuance as set out in the Deemed Discontinuance Practice operates a discontinuance and triggers the same effects as a voluntary discontinuance before there is any evidence that the discontinuing litigant took the considered and voluntary decision to end their proceeding by delivering a Notice of Discontinuance. The deemed discontinuance applies because of the litigant's failure to perfect their ALJR in a timely manner. Failing to perfect an

ALJR in a timely manner may be intentional in some circumstances or unintentional in other circumstances. Knowing whether the deemed discontinuance occurred because of an intent to discontinue or because of lack of intent to discontinue can only be determined by considering the evidence filed to revoke the deemed discontinuance.

[34] It follows that our Courts' decisions pertaining to the threshold to apply to relieve a party from its voluntary and intentional discontinuances pursuant to Rule 165 – the existence of exceptional circumstances, of a fundamental event affecting the decision to end the proceeding - must be considered and reformulated to take into account that a party's inaction has been substituted for its clear statement of an intent to discontinue.

[35] In my view, and subject to what follows later in these reasons, a party should only be relieved from the effects of a deemed discontinuance triggered by the litigant's inaction and the Deemed Discontinuance Practice in circumstances where they can establish that their inaction and failure to perfect their ALJR in a timely manner is the result of exceptional circumstances or fundamental event that affected their ability to perfect their ALJR when required notwithstanding that they were otherwise diligently taking the necessary steps to perfect their ALJR in time. Examples of such an exceptional circumstance or fundamental event would be the existence of a *bona fide* mistake or misapprehension that is separate and distinct from ignorance of the law, inadvertence or potential solicitor negligence. Applying this threshold of exceptional circumstances affecting an applicant's ability to perfect their ALJR while being otherwise diligent takes into account and reformulates the stringent test applicable to granting relief from an intentional discontinuance as stated in *Philipos* at para. 20 to an unintentional discontinuance

while not limiting the types of circumstances that could justify revoking the deemed discontinuance, subject to the overriding interests of justice.

IV- Applying the Deemed Discontinuance Practice

[36] The text of the Deemed Discontinuance Practice explains the reasons for its issue. The new administrative practice of deeming ALJRs as discontinued as a result of the passage of time past the ALJR perfection date arises in the specific context of a significant increase in the Court's ALJR caseload and a corresponding increase in unperfected ALJRs. Managing unperfected ALJRs as well as ALJR proceedings in which there are repeated requests for extensions of time divert the Court's limited administrative and judicial resources from adjudicating other proceedings in which the litigants have understood and taken to heart that ALJRs are meant to be readied, perfected and heard expeditiously. The FCCIRPR contemplate that absent extensions of time, the time from commencement to perfection of an ALJR is generally 30 days from the date of the tribunal's delivery of its written reasons to the applicant. The reality now is that the 30-day timeline is too often not complied with. Greater discipline must be brought to bear in all cases to ensure that resources are applied to adjudicate the merits of as may ALJRs as possible as expeditiously as possible.

[37] The Deemed Discontinuance Practice is one of several tools at the Court's disposal to adjust its operations and case management efforts to the times and realities it must contend with consistent with its plenary powers that allow it to regulate the integrity of its own processes, including regulating the opening and closing of its own files (*Philipos,* at para. 10).

[38] Keeping the foregoing in mind, and particularly considering the analysis of discontinuances and their effects in Philipos, I consider that the Deemed Discontinuance Practice signals to the profession that a primary question and threshold question should now be considered in the larger conceptual framework applied to requests for extensions of time as they pertain to AJLR proceedings that have exceeded the fixed timelines set out in the FCCIRPR.

[39] Philipos and Sherwood each hold that the test for the revocation of a discontinuance includes at least four considerations. Only the first consideration, the existence of exceptional circumstances justifying the revocation of the discontinuance, applies particularly to the discontinuance itself. The remaining considerations of whether prejudice arises to the parties should the discontinuance be set aside, whether the underlying application has a reasonable prospect of success, and the interests of justice are considerations already forming the core of the four Hennelly questions. These additional questions are treated in a single framework in Philipos because the court did not consider the revocation of a discontinuance and an extension of time as being two separate steps that might have some overlapping considerations. The Deemed Discontinuance Practice does. Also, the Federal Court of Appeal considered that a revocation could be justified when the application had a reasonable prospect of success, arguably a higher threshold than that required by the Hennelly questions.

[40] In my view, it is appropriate to recognize that there should be two steps involved in applying the Deemed Discontinuance Practice notwithstanding that there are overlapping considerations in their application. The first step is whether the deemed discontinuance should be revoked. This threshold inquiry is not an inquiry into the justification for delay or whether the

underlying application has a reasonable prospect of success, but a proper examination of what affected the ability of the application to perfect their ALJR in time. The second step is whether an extension of time should be granted to perfect the ALJR. This inquiry explicitly captures some of the Philipos and Sherwood factors while giving effect to the Court's long-standing requirement that a party justify their request for an extension of time. Separating the two steps provides a conceptual framework that recognizes that each test should be weighted individually.

[41] The result is two-step ALJR-specific conceptual framework that imposes greater discipline and respect for the time set out in the *FCCIRPR*.

[42] Considered in this manner the steps and questions to be considered on a motion to revoke a deemed discontinuance, to reopen the proceeding and obtain an extension of time pursuant to the Deemed Discontinuance Practice should be as follows:

1. Step 1: is there evidence in the Motion Record that the ALJR was not perfected in accordance with and within the time set out in Rule 10 of the *FCCIRPR* or an Order of the Court because of exceptional circumstances or of a fundamental event that affected the applicant's ability to perfect their ALJR in a timely manner despite acting diligently? If Step 1 is satisfied, Step 2 can be considered. If Step 1 is not satisfied, then there is no need consider Step 2.

2. Step 2: is there evidence in the Motion Record to satisfy the test for an extension of time?

[43] For each of these steps I would add the following observation. Bald statements in evidence are insufficient to address any of the questions at issue in the applicable steps and tests. The moving party cannot rest with merely telling the Court what happened; it must show what happened.

V. Applying the Test on this Motion

[44] The Applicants appear to have relied on their solicitor of record without any follow up with him in April 2022 to determine whether an extension of time to perfect their ALJR had been sought, granted or refused. This is not a case where the axiom that litigants ought not to be punished for the inadvertence or faults of their solicitors applies (*Barrette v. The Queen*, 1976 CanLII 180 (SCC), [1977] 2 SCR 121). Solicitor inadvertence, negligence, error or fault in the face of their client's diligence and effort to ensure that timelines are met is a different situation than is before the Court here. There is no evidence of diligence by the Applicants after having been informed by their solicitors that an extension of time to perfect their ALJR would be required. In addition, there is no evidence at all of any communications between the Applicants and their solicitor of record over the more than 7 months that passed after the represented ALJR perfection date to determine whether the proceeding was advancing or not. An interested and diligent client would be more vigilant and seek to be more informed about the fate of their proceeding even if the client may face communications issues with their solicitor.

[45] Considering the absence of the Applicants' diligence prior to their ALJR perfection date, there is no requirement to consider whether the combined effects of a paralegal's miscalculation of the time to perfect, a solicitor's reliance thereon, and/or solicitor's failure to act after being informed by the Registry that action was required to cure an attempted and refused filing, taken

together, constitute an exceptional circumstance or fundamental event that affected the Applicants' ability to perfect their ALJR in a timely manner. If I am incorrect in this regard, that our Court has had a protocol in place since March 7, 2014, setting out the procedure to be followed when an applicant alleges incompetence, negligence, or other conduct against his or her former legal counsel or other authorized representative, within the context of an ALJR underscores how unfortunately unexceptional a circumstance potential solicitor incompetence and negligence has become. The first step of the test is not satisfied in this case. There is no reason to revoke the deemed discontinuance.

[46] Finally, and if I am incorrect in my application of the test at the first step of the analysis, no evidence has been led to address the *Hennelly* factors more generally or to explain each period of the lengthy delay between the perfection date of April 8, 2022, and the date of the motion before me. There is no basis for an extension of time.

[47] Considering the whole of the evidence before me, I conclude that this motion should be dismissed.

THIS COURT ORDERS that

1. The Applicants' motion for the revocation of the deemed discontinuance of their application is dismissed.

"Benoit M. Duchesne"
Associate Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2241-22
STYLE OF CAUSE:	MALKEET SINGH VIRK and AMANDEEP KAUER VIRK v MINISTER OF CITIZENSHIP AND IMMIGRATION

MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES*

REASONS FOR JUDGMENT AND JUDGMENT:	ASSOCIATE JUDGE DUCHESNE
DATED:	JANUARY 31, 2023

SOLICITORS OF RECORD:

Me Filipe Morales Barrister & Solicitor Montréal, Québec	FOR THE APPLICANTS
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