

Federal Court of Appeal



Cour d'appel fédérale

Date: 20160119

Docket: A-399-14

Citation: 2016 FCA 14

**CORAM: NOËL C.J.
NEAR J.A.
SCOTT J.A.**

BETWEEN:

KEVIN CHARLES MACKINNON

Appellant

and

**WARDEN OF BOWDEN INSTITUTION,
CORRECTIONAL SERVICE OF CANADA,
ATTORNEY GENERAL OF CANADA**

Respondents

Heard at Edmonton, Alberta, on January 19, 2016.
Judgment delivered from the Bench at Edmonton, Alberta, on January 19, 2016.

REASONS FOR JUDGMENT OF THE COURT BY:

SCOTT J.A.

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REASONS FOR JUDGMENT OF THE COURT

(Delivered from the Bench at Edmonton, Alberta, on January 19, 2016).

SCOTT J.A.

[1] A Judge of the Federal Court (the Judge), reviewing the application for judicial review filed by Mr. Kevin Charles Mackinnon (appellant) on status review pursuant to rule 382.1 of the *Federal Courts Rules*, SOR/98-106 (Rules), dismissed the application on grounds that it was futile and moot.

[2] In reaching his conclusion to dismiss the application, the Judge considered the following factors:

- a) Annis J. of the Federal Court had dismissed the appellant's motion for an injunction to prevent his involuntary transfer to another penitentiary institution because there was no serious question to be tried;
- b) Prothonotary Lafrenière had dismissed the appellant's motion for an extension of time to file the affidavit in support of his application for judicial review because the appellant had failed to show an arguable case;
- c) Prothonotary Lafrenière's decision was never appealed;
- d) The appellant failed to take any steps to advance his application for judicial review between February 26, 2014 and the Notice of Status Review issued on July 4, 2014;
- e) The appellant failed to grieve his involuntary transfer from Bowden, a condition precedent to the filing of his application for judicial review;
- f) The appellant having been transferred twice to other penitentiaries since filing his application, the matter was moot.

[3] In this appeal the appellant is challenging the Judge's decision for the following reasons:

- i. The Judge incorrectly attributed delays solely to the appellant, ignoring the respondents' actions that caused the majority of them;
- ii. The Judge failed to address the issue of whether the respondents were in contravention of sections 27 and 28(1)(b) of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 (CCRA) thereby breaching procedural fairness;
- iii. The Judge erred when stating that the appellant never grieved his transfer from Bowden;
- iv. The Judge erred in determining that the application was moot because the appellant had been transferred.

[4] There is only one issue in this application: Did the Judge give sufficient weight to all the relevant circumstances when making his discretionary decision upon status review to dismiss the appellant's application for judicial review?

[5] We are of the opinion that this appeal must fail for the following reasons.

[6] The Judge did not err when he considered whether the underlying application for judicial review had any merit. Generally, it is a pre-condition for judicial review of a decision to transfer an inmate from one institution to another that the inmate grieves his transfer, prior to bringing an application for judicial review. The appellant having failed to grieve his transfer prior to filing his application for judicial review, there was no grievance decision to review (Affidavit of Nancy Shore, paragraphs 9 to 12), (*Giesbrecht v The Queen*, 1998 F.C.J. 621, 148 F.T.R. 81 at paragraphs 13 and 14, *Condo v. Canada (Attorney General)*, 2003 FCA 99, 239 F.T.R. 158 at paragraph 5, *Reda v. Canada (Attorney General)*, 2012 FC 79, 404 F.T.R. 85, at paragraphs 13, 23, and 29)

[7] The Judge did not misguide himself with respect to the delays. It was open to the Judge on the evidence before him to conclude that the appellant was primarily responsible for the delays in this matter.

[8] It was also open to the Judge to conclude that the application could not succeed as there was no supporting evidence and the issue of a breach of sections 27 and 28 of the CCRA was never properly introduced in the notice for application of judicial review.

[9] Consequently this appeal is dismissed with costs set at \$200.

“A.F. Scott”

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-399-14

STYLE OF CAUSE: KEVIN CHARLES MACKINNON
v. WARDEN OF BOWDEN
INSTITUTION, CORRECTIONAL
SERVICE OF CANADA,
ATTORNEY GENERAL OF
CANADA

PLACE OF HEARING: EDMONTON, ALBERTA

DATE OF HEARING: JANUARY 19, 2016

REASONS FOR JUDGMENT OF THE COURT BY: NOËL C.J.
NEAR J.A.
SCOTT J.A.

DELIVERED FROM THE BENCH BY: SCOTT J.A.

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