Federal Court of Appeal  Cour d'appel fédérale

Date: 20160309

Docket: A-481-15

Citation: 2016 FCA 79

Present: STRATAS J.A.

BETWEEN:

NADER PHILIPOS

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on March 9, 2016.

REASONS FOR ORDER BY: STRATAS J.A.

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REASONS FOR ORDER

STRATAS J.A.

[1] The appellant moves for an order allowing him to resurrect and continue an appeal that he had discontinued. For the reasons that follow, I dismiss the motion.

A. Background

[2] The appellant was a ramp agent at the Calgary International Airport. He held a transportation security clearance that allowed him to enter restricted areas at the airport.

[3] Upon learning of certain facts, the Minister of Transport cancelled the appellant's security clearance. The appellant challenged the cancellation by way of judicial review in the Federal Court. By judgment dated November 6, 2015, the Federal Court (*per* Fothergill J.) dismissed the judicial review.

[4] The appellant appealed the Federal Court's judgment to this Court by filing a notice of appeal. But soon afterward he discontinued his appeal.

[5] The appellant now wants to resurrect his appeal and continue it in this Court. So he moves for leave to do so.

[6] The parties have cited to the Court only one decision in the Federal Courts system setting out the criteria governing this motion: *Marleau v. Canada (Attorney General)*, 2001 FCT 1208. *Marleau* suggests (at para. 5) that a proceeding can be resurrected if a "valid reason" is stated. It says nothing more. *Marleau* is not binding upon this Court.

[7] I have discovered two decisions of this Court, cited below, that dismissed motions to resurrect proceedings. In each, the motion was dismissed because the moving party's proceeding

was destined to fail. Neither decision sets out the general principles governing this sort of motion. In these reasons, I will develop some of the general principles.

B. Opening considerations

[8] A party may discontinue all or part of a proceeding in the Federal Courts, including an appeal to this Court, by filing a notice of discontinuance: *Federal Courts Rules*, SOR/98-106, Rule 165. This is a unilateral act. One does not need the consent of opposing parties or leave from the Court to discontinue a proceeding, nor does one have to explain it: *Mayne Pharma (Canada) Inc. v. Pfizer Canada Inc.*, 2007 FCA 1, 54 C.P.R. (4th) 353. Upon discontinuance, the court file is closed.

[9] The Rules do not expressly provide for the resurrection and continuance of a proceeding after discontinuance under Rule 165. However, discontinuance is different from dismissal in that theoretically a party can resurrect and continue a discontinued proceeding or start a new proceeding. By providing for discontinuance under Rule 165, impliedly the Rules permit a party to pursue those options.

[10] Here, the appellant has brought a motion seeking to resurrect and continue his appeal. He was correct to do so. When the appellant discontinued his appeal, the Court file was closed. Leave must be sought from the Court to reopen its file. The Federal Courts are armed with plenary powers that allow them to regulate the integrity of their own processes, including regulating the opening and closing of their own files: *Canada (Human Rights Commission) v.*

Canadian Liberty Net, [1998] 1 S.C.R. 626, 157 D.L.R. (4th) 385 at paras. 35-38; *Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250, [2014] 2 F.C.R. 557 at para. 92; *Canada (National Revenue) v. RBC Life Insurance Company*, 2013 FCA 50, 443 N.R. 378 at paras. 35-36; *Canada (National Revenue) v. McNally*, 2015 FCA 195 at paras. 8-9.

[11] Given that the *Federal Courts Rules* do not explicitly speak to the issue of granting leave to resurrect and continue a discontinued proceeding, where can we find the governing principles?

[12] Rule 4—frequently called the "gap rule"—provides that where the *Federal Courts Rules* do not speak to a procedure, we can look by analogy to other Rules. Here this is a fruitful avenue of inquiry. Discontinuance of a proceeding is just one of five things that can happen to proceedings under the *Federal Courts Rules*. By analogizing or comparing discontinuance with these things, a spectrum emerges. This spectrum sheds light on the principles that ought to govern the granting of leave to resurrect and continue a discontinued proceeding.

C. Discontinuance and other things that can happen to proceedings

[13] Five things can happen to proceedings once they are started:

- *Self-regulation.* Parties can pursue the steps open to them within the time permitted by the *Federal Courts Rules* to get their cases ready for hearing. The

parties have every expectation that their cases will proceed through to determination.

- *Court regulation*. At the behest of a party, the Court can schedule steps within the proceedings or the proceedings themselves, expediting or slowing them down: Rule 8. Proceedings can also be managed by the Court: Rules 383-384. Despite the involvement of the Court through scheduling or management, the parties still have every expectation that their cases will proceed through to determination.

- *Suspension*. Proceedings can be suspended through the issuance of a stay under s. 50 of the *Federal Courts Act*, R.S.C. 1985, c. F-7; *Mylan Pharmaceuticals ULC v. AstraZeneca Canada, Inc.*, 2011 FCA 312, 426 N.R. 167. A stay expires according to the terms set by the Court. Unless the stay is renewed or the proceeding is dismissed, the proceeding resumes after the expiration of a stay. While a stay is in place, the proceeding still subsists and so the parties must have every expectation that their cases will proceed through to determination.

- *Discontinuance*. This is more than suspension. Discontinuance terminates the proceeding and closes the court file. After the unilateral filing of a notice of discontinuance under Rule 165, parties need not take any further steps. Discontinuance is not a determination on the merits, so it does not trigger the bar against relitigation expressed by the doctrine of *res judicata*. Theoretically, a party may start a new proceeding concerning the same subject matter: *Audet v. Canada*,

2002 FCA 130, 289 N.R. 382; *The* "*Kronprinz*" (1887), 12 A.C. 256, 56 L.T. 345 (H.L.). And theoretically a party can resurrect and continue a discontinued proceeding, as the appellant seeks to do here. But unlike a stay, the unilateral filing of a notice of discontinuance tells everyone they can regard the proceeding as over.

- *Determination*. The Court may determine proceedings in certain interlocutory motions or upon hearing the merits of the application, action or appeal, as the case may be. The matter is then final, subject to an appeal to a higher court and subject to a brief, limited jurisdiction of the Court to fix slips or errors (Rule 397) or set aside or vary the order or judgment where there are markedly changed circumstances (Rule 398 and see, *e.g.*, *Del Zotto v. Canada (M.N.R.)*, [1996] 2 C.T.C 22, 195 N.R. 74 at paragraph 12 (F.C.A.)). A determination may also be set aside where there is a fundamental failure of natural justice or fraud (Rule 399). Following determination, the proceeding is over and the court file is closed. After the time for bringing any appeals has expired, later proceedings concerning the same subject matter will be struck according to the doctrine of *res judicata*.

[14] This spectrum shows that there is very little difference between discontinuance and determination. Both discontinuance and determination are terminations meant to be final. Both close the court file. Both engender expectations of finality.

[15] One difference, mentioned above, is the theoretical possibility that after discontinuance a new proceeding can be brought concerning the subject-matter of the discontinued proceeding. But that is not so realistic a possibility. An attempt to start a new proceeding may be met with, for example, a motion to strike based on the expiration of a statutory limitation period or an abuse of process (see, *e.g.*, *Lifeview Emergency Services Ltd. v. Alberta Ambulance Operators' Association* (1995), 101 F.T.R. 43 at para. 13), or the unavailability of an order granting an extension of time when an extension is needed, as in the case of applications for judicial review.

[16] These considerations underscore the point that discontinuances are not suspensions but rather terminations with consequences. This tells us much about the criteria that must be applied when a party seeks to resurrect and continue a discontinued proceeding.

D. The criteria for allowing a discontinued proceeding to be resurrected and continued

[17] Finality matters. Discontinuance is an economical procedure for terminating proceedings that are no longer in dispute or worthy of prosecution. If expectations of finality engendered by discontinuance are not enforced strictly and discontinuances can be easily reversed, there will be no economy. Opposing parties will have no choice but to continue to incur expenses, collect evidence and prepare arguments for hearing in case the proceeding resumes one day. Discontinuance would become nothing more than a form of suspending proceedings much akin to a stay.

[18] Determinations are not lightly reversed; the same should be so for discontinuances. Those who decide to unilaterally discontinue decide not to suspend their proceeding but to terminate it. They should be held to their decision. Only circumstances that strike at the root of the decision to discontinue can allow a discontinued proceeding to be resurrected and continued.

[19] The case law of other jurisdictions supports these observations and allows for the resurrection and continuation of discontinued proceedings only in exceptional circumstances: see, *e.g.*, *Daniele v. Johnson* (1999), 45 O.R. (3d) 498, 123 O.A.C. 186 at para. 21 (Div. Ct.); *Singh v. Street* (1990), 84 Sask. R. 161, [1990] 5 W.W.R. 518 at para. 14 (C.A.); *Yancey v. Neis*, 1999 ABCA 272, 73 Alta. L.R. (3d) 239 at para. 23. The British Columbia Court of Appeal, typical of courts across Canada, has suggested that a discontinued proceeding can almost never be resurrected:

> Because there should be an expectation of finality flowing from the filing of a notice of discontinuance or abandonment, such a step is a serious matter from which, in the absence of exceptional circumstances of a compelling nature, the court will not relieve the appellant.

(*Warford v. Zyweck*, 2002 BCCA 221, 1 B.C.L.R. (4th) 41 at para. 3; see also *Pacific Centre Ltd. v. Micro Base Development Corp.* (1990), 49 B.C.L.R. (2d) 218, 43 C.P.C. (2d) 302 at para. 19 (C.A.).)

[20] Only some fundamental event that strikes at the root of the decision to discontinue can warrant the resurrection and continuation of a discontinued proceeding. Examples include the procurement of discontinuance by fraud, mental incapacity of the party at the time of

discontinuance, or repudiation of a settlement agreement that required a proceeding to be discontinued.

[21] Even where a fundamental event of that sort has happened, we must be satisfied that the discontinued proceedings sought to be resurrected have some reasonable prospect of success. There is neither sense nor judicial economy in resurrecting a discontinued proceeding destined to fail. Twice we have refused to allow a discontinued proceeding to be resurrected because it did not have a reasonable prospect of success: *Teodorescu v. Canada*, [1993] F.C.J. No. 1124, 47 A.C.W.S. (3d) 389 at para. 14 (C.A.); *Ahmed v. Canada (Minister of Employment & Immigration)*, 1990 CarswellNat 1242, 19 A.C.W.S. (3d) 910 at para. 2 (F.C.A.). This requirement is akin to our insistence that a party seeking an extension of time to bring an appeal demonstrate that it has some reasonable prospect of success: *Canada (A.G.) v. Hennelly* (1999), 244 N.R. 399, 167 F.T.R. 158 (C.A.).

[22] Further, we must also consider the prejudice that may result if a discontinued proceeding is resurrected. For example, someone might have taken significant steps relying on a discontinuance, such as carrying out obligations under a trial judgment after the appeal from that judgment has been discontinued: *Warford v. Zyweck*, 2002 BCCA 221, 1 B.C.L.R. (4th) 41 at para. 7. Prejudice can also result from the destruction of files, the cessation of evidence collection or the disappearance of witnesses: *Williams v. Personal Insurance Co. of Canada*, 2004 NSSC 73, 222 N.S.R. (2d) 270 at paras. 15-20. In the case of applications for judicial reviews and appeals therefrom, the public interest requires prompt prosecution and determination: *Canada (Attorney General) v. Larkman*, 2012 FCA 204, 433 N.R. 184 at paras.

86-89; *Federal Courts Act*, above, s. 18.4. The categories of prejudice are not closed: other types of prejudice may cause the Court to exercise its discretion against allowing a party to resurrect a discontinued proceeding.

[23] I do not foreclose the possibility that other considerations might foreclose resurrection of a discontinued proceeding. The Federal Courts have a plenary power to manage their practices and procedures, police the conduct of proceedings, and prevent abuses of their processes. That power stands ready to be exercised judicially whenever called for.

E. Applying the criteria to this case

[24] The appellant's motion must be dismissed. He discontinued his appeal of his own volition. Thus, he must point to something that strikes at the root of his earlier decision to discontinue. He has not done so. Instead, he seems to have had merely a change of heart.

[25] The appellant submits that he discontinued his appeal without legal advice. The fact that he may have acted by mistake without appreciating the consequences of discontinuance is insufficient cause: *Adam v. Insurance Corp. of British Columbia* (1985), 66 B.C.L.R. 164, 2 C.P.C. (2d) 285 at paras. 24-26 (C.A.). The respondent was entitled to rely upon the discontinuance and the expectations of finality it engendered.

[26] The appellant has also failed to show that his appeal has a reasonable prospect of success. In his notice of appeal, the appellant advances two grounds of appeal:

(1) The Federal Court erred in refusing to admit evidence into the judicial review that was not before the Minister when he made his decision. This is destined to fail based on the well-settled law of this Court: *Delios v. Canada (Attorney General)*, 2015 FCA 117, 472 N.R. 171 at paras. 41-46; *Bernard v. Canada (Revenue Agency)*, 2015 FCA 263; *Association of Universities & Colleges of Canada v. Canadian Copyright Licensing Agency*, 2012 FCA 22, 428 N.R. 297 at paras. 18-26.

(2) The Federal Court had no jurisdiction to order the matter "back to Transport Canada for review." This is destined to fail because the Federal Court ordered no such thing. The Federal Court simply dismissed the appellant's application for judicial review.

[27] Although the notice of appeal does not raise any other grounds, even if this Court were to admit the new evidence and conduct reasonableness review of the decision of the Minister of Transport, this appeal would still be destined to fail.

[28] The Minister of Transport cancelled the appellant's security clearance upon learning that he had attempted to export two long guns on a trip to Sudan. The appellant says that he intended to hunt wildlife while on vacation in Sudan and was assured by Canadian authorities that he would be given an export permit for the guns. But the documentary evidence shows that he applied for an export permit only after he had exported the guns. As well, his application had no

chance of succeeding because of the prohibition against exporting guns to Sudan: *United Nations Sudan Regulations*, SOR/2004-197.

[29] The Minister of Transport began proceedings for cancellation of the appellant's security clearance on these facts—well-established and uncontested in the evidence—based on his loss of trust in the appellant's judgment, trustworthiness and reliability. In response, the appellant offered items that the Minister found were insufficient to regain his trust: the appellant's Sudanese passport, the appellant's Sudanese firearms license, a letter from U.S. Customs (which intercepted the guns) confirming that a sizable amount of cash and a pistol grip had been returned to him, and a release agreement between the appellant and U.S. authorities regarding the return of seized items.

[30] The Federal Court, noting the highly discretionary nature of security clearance cancellations, found the Minister's decision to be reasonable. The standard of review is the deferential standard of reasonableness and this Court has found that the Minister's margin of appreciation when granting and cancelling security clearances is high: *Canada (Minister of Transport, Infrastructure and Communities) v. Farwaha*, 2014 FCA 56, [2015] 2 F.C.R. 1006. In his motion, the appellant offers nothing whatsoever to suggest that this Court will disagree with the Federal Court's conclusion that the Minister's decision was reasonable.

[31] The new evidence that the Federal Court properly refused to admit consists of a copy of the appellant's Canadian firearms licence, an incomplete application for an export permit, and an

affidavit disclosing the origin of the cash seized by the U.S. authorities—matters that would not affect the outcome of reasonableness review.

[32] Therefore, the motion will be dismissed. Given the appellant's circumstances and the novelty of the issues in this motion, quite fairly the respondent has not asked for costs. So none will be awarded.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-481-15
STYLE OF CAUSE:	NADER PHILIPOS v. ATTORNEY GENERAL OF CANADA

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	STRATAS J.A.
DATED:	MARCH 9, 2016

WRITTEN REPRESENTATIONS BY:

Nader Philipos	ON HIS OWN BEHALF
James Elford	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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