Federal Court of Appeal | Cour d'appel fédérale

Date: 20170915

Docket: A-343-16

Citation: 2017 FCA 189

CORAM: **NADON J.A.**
DAWSON J.A.
WOODS J.A.

Docket: A-343-16

BETWEEN:

BROOK MAKARA

Appellant

and

ATTORNEY GENERAL CANADA (FOR CORRECTIONAL SERVICES CANADA)

Respondent

Heard at Ottawa, Ontario, on September 11, 2017.

Judgment delivered at Ottawa, Ontario, on September 15, 2017.

REASONS FOR JUDGMENT BY: DAWSON J.A.

Federal Court of Appeal  Cour d'appel fédérale

Date: 20170915

Docket: A-343-16

Citation: 2017 FCA 189

CORAM: **NADON J.A.**
DAWSON J.A.
WOODS J.A.

Docket:A-343-16

BETWEEN:

BROOK MAKARA

Appellant

and

ATTORNEY GENERAL CANADA (FOR CORRECTIONAL SERVICES CANADA)

Respondent

REASONS FOR JUDGMENT

DAWSON J.A.

[1] The appellant is an inmate in a federal penitentiary. He appeals from an order of the Federal Court which dismissed his motion to extend the time in which he could commence an application for judicial review of a decision which upheld only in part a third level offender

grievance the appellant had filed. The order under appeal was issued on August 31, 2016 in Court file 16-T-27.

[2] The facts giving rise to this appeal may be briefly stated. On April 22, 2015, the appellant filed a grievance alleging that a psychologist at the Donnacona Institution fabricated information about the appellant that portrayed the appellant to be an imminent threat to the community. The appellant alleged that this information was used to impose a residency condition on his statutory release.

[3] On January 5, 2016, the appellant filed an application for judicial review asserting that the Correctional Service Canada had unreasonably delayed dealing with his grievance.

[4] Thereafter, a decision was made on April 11, 2016, on the appellant's grievance. The decision upheld the grievance in part and ordered that corrections be made to the contested information in every document in the appellant's case management file.

[5] On April 15, 2016, counsel for the Attorney General wrote to the appellant advising that because a decision had been made on the appellant's grievance, a motion to strike the application would be brought if the appellant failed to discontinue his application for judicial review. The letter advised that the appellant was free to contest the decision of April 11, 2016 in a fresh notice of application for judicial review.

[6] On May 1, 2016, the appellant wrote to the registry of the Federal Court advising that he had “every intention of pursuing an application in this matter”. He asked that his letter “be kept on file to show due diligence” should his notice of application “be struck and a renewed application come after the expiration of the 30 days to file notice”.

[7] On May 17, 2016, a prothonotary of the Federal Court struck out the appellant’s notice of application with costs. By order dated July 4, 2016, a Judge of the Federal Court dismissed the appellant’s appeal from the order of the Prothonotary. On July 29, 2016, the appellant filed his motion seeking an order extending the time in which he could file a fresh notice of application.

[8] The recitals to the order under appeal show that the Judge found that the appellant knew of the requirement that the grievance decision be challenged within 30 days of its receipt. The Judge then found that the appellant had not provided a reasonable explanation for his delay in proceeding. The motion for an extension was dismissed on the basis that the appellant had not provided a reasonable explanation for his delay.

[9] On this appeal the appellant frames the issues to be:

> Did the motion judge err in refusing to grant an extension of time by failing to consider the Appellant’s failure to commence an application for judicial review within 30 days of an unreasonably delayed administrative decision while an application of a similar nature was already underway as a forgivable error on the part of a *pro se* applicant with no experience in Federal Court? Can the Court uphold the judgment to dismiss the Appellant’s cause on a relatively minor technicality when a live and very serious controversy has not been tried on merits?

[10] I begin my analysis by noting that the underlying consideration on a motion for an extension of time to commence an application for judicial review is whether the interests of justice require the extension. Factors to be considered when deciding whether to allow an extension of time include: whether the applicant intended to commence an application for judicial review within the period allowed for bringing the application and maintained a continuing intention to pursue the application; the existence of any prejudice to the opposing party; the applicant's explanation for the delay; and whether there is an arguable case for quashing the decision the applicant wishes to challenge on judicial review.

[11] Moving from the factors which were to guide the Federal Court, I note that notwithstanding the manner in which the appellant frames this appeal, in the Federal Court the appellant did not present evidence or expressly argue that the cause of the delay was his choice to pursue his original application. Rather, in his affidavit in support of the requested extension the appellant relied upon his letter of May 1, 2016, to the registry which stated his intent to pursue the matter. No other facts were put forward in support of the requested extension. His written submissions simply asserted that his May 1, 2016 letter showed due diligence and that his application was well-founded.

[12] It follows that the Federal Court committed no palpable and overriding error when it found that the appellant had failed to provide any reasonable explanation for the delay in commencing an application for judicial review of the third level offender grievance.

[13] There is a further basis for denying the requested extension. Subsection 18.1(3) of the *Federal Courts Act* sets out the powers of the Federal Court on judicial review. The Court may:

(*a*) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or	*a*) ordonner à l'office fédéral en cause d'accomplir tout acte qu'il a illégalement omis ou refusé d'accomplir ou dont il a retardé l'exécution de manière déraisonnable;
(*b*) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.	*b*) déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral.

[14] The relief sought by the appellant in his proposed notice of application was:

> 1) A declaration of acknowledgement the "observation" report registered in the CSC Offender Management System by Donnacona psychologist Annie Bujold on January 7, 2015, backdated to October 15, 2014, concerning an intervention in the Applicant's dossier on August 22, 2014, contained conclusively false information;
>
> 2) A declaration of acknowledgement said "observation" report addressed to all staff members in CSC/Parole Board Canada was deliberately falsified and with the intention of creating the impression that the Applicant was seemingly planning to cause serious harm to female staff members;
>
> 3) A declaration of acknowledgement the books referred to in said "observation" report are in fact medical textbooks and evangelical tracts which do not contain material that would fall under paras. 4(c), 5(c) and 6(b) of Commissioner's Directive 764 re *Access to Material and Live Entertainment* for federal offenders;
>
> 4) A lump sum payment from the Respondent to the [*sic*] amount of $20,000 to compensate the Applicant's time, attention and expenses resulting of this ordeal [*sic*].

[15] During oral argument the appellant acknowledged that the Federal Court was unable at law to grant the compensation he sought. He argued, however, that the Court had jurisdiction to make the three requested declarations.

[16] I respectfully disagree. Subsection 18.1(3) confines the Federal Court to considering the reasonableness of the third level grievance decision; the Court's jurisdiction does not extend to making declarations about third party conduct or the factual nature of a book. In any event, a declaration is "a judicial statement confirming or denying a legal right of the applicant": Lazar Sarna, *The Law of Declaratory Judgments*, 4th ed. (Toronto: Thomson Reuters 2016) at page 1. As Mr. Justice MacKay held in *Brychka v. Canada (Attorney General)*, [1998], F.C.J. No. 124, 141 F.T.R. 258 at paragraph 27, the Federal Court does not have jurisdiction to make declarations pertaining solely to findings of fact. The requested declarations are all findings of fact.

[17] As the Federal Court was, as a matter of law, unable to grant the requested relief, the appellant has not demonstrated that the proposed application was of sufficient merit to justify an extension of time. It follows that the interests of justice do not favour such an extension.

[18] Therefore, I would dismiss the appeal from the order of the Federal Court. This said, it is important to confirm that in dismissing the appeal this Court makes no finding as to whether the impugned information was fabricated or not – this issue is simply not before the Court. We are limited to reviewing the Federal Court's discretionary order refusing the extension.

[19] In my view, this is an appropriate case for costs to follow the event. I would award costs to the respondent in the amount of $400 inclusive of all disbursements and all taxes.

"Eleanor R. Dawson"

J.A.

"I agree.
M. Nadon J.A."

"I agree.
J. Woods J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-343-16
STYLE OF CAUSE:	BROOK MAKARA v. ATTORNEY GENERAL CANADA (FOR CORRECTIONAL SERVICES CANADA)
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	SEPTEMBER 11, 2017
REASONS FOR JUDGMENT BY:	DAWSON J.A.
DATED:	SEPTEMBER 15, 2017

APPEARANCES:

BROOK MAKARA	FOR THE APPELLANT
JOSHUA WILNER	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Nathalie G. Drouin Deputy Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT