Date: 20070913

Docket: A-73-07

Citation: 2007 FCA 286

CORAM: **NOËL J.A.**
NADON J.A.
PELLETIER J.A.

BETWEEN:

GODWIN SMITH

Appellant

and

CANADIAN RAILWAY OFFICE OF ARBITRATION
and
THE CANADIAN BROTHERHOOD OF RAILWAY, TRANSPORT AND GENERAL WORKERS
and
VIA RAIL CANADA INC.

Respondents

Heard at Winnipeg, Manitoba, on September 11, 2007.

Judgment delivered at Winnipeg, Manitoba, on September 13, 2007.

REASONS FOR JUDGMENT BY:	NADON J.A.
CONCURRED IN BY:	NOËL J.A. PELLETIER J.A.

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REASONS FOR JUDGMENT

NADON J.A.

[1] This is an appeal from an Order of Madam Justice Mactavish, dated January 5, 2007 (in Court file 06-T-07), whereby she declined to exercise her discretion to extend the appellant's time for bringing an application for judicial review of two decisions rendered by an arbitrator on January 10, 1989.

[2] The appellant worked for the respondent, VIA Rail Canada Inc., from 1978 until he was dismissed in 1987 following two incidents related to sexual harassment and consuming intoxicants (cases no. 1865 and no.1866).

[3] On January 10, 1989, arbitrator Michel G. Picher of the Canadian Railways Office of Arbitration dismissed labour grievances brought by the appellant's union in respect of the aforementioned incidents, in cases no. 1865 and 1866.

[4] On September 14, 2006, almost 18 years after the arbitrator's decisions, the appellant applied to the Federal Court for an order extending the time for bringing an application for judicial review of those decisions.

[5] On January 5, 2007, as I indicated at the outset of these Reasons, Mactavish J. dismissed the appellant's motion for an extension of time.

[6] On February 5, 2007, the appellant filed the present appeal seeking an order setting aside Mactavish J.'s order and allowing him to commence a judicial review application of the arbitrator's decisions.

[7] In dismissing the appellant's motion for an extension of time, Mactavish J. applied the test set out in *Grewal v. Canada (Minister of Employment and Immigration)*, [1985] 2 F.C. 263, and adopted by this Court in *Canada (A.G.) v. Hennelly*, [1999] F.C.A. 846, which requires an applicant seeking an extension of time to show the following:

1. a continuing intention to pursue his or her application;
2. that the application has some merit;
3. that no prejudice to the respondent arises from the delay;
4. that a reasonable explanation for the delay exists.

[8] In Mactavish J.'s opinion, the first and fourth criteria were not met. At pages 2 and 3 of her Order, she writes:

> Mr. Smith has offered no reasonable explanation for the 17 year delay in bringing is application for judicial review. While his affidavit does discuss his efforts to pursue this matter, there are lengthy gaps in his narrative, some of which encompass several years, with no explanation as to what, if anything, he did to pursue this matter in the intervening period.
>
> . . .
>
> As a result, I decline to exercise my discretion to extend the time for bringing an application for judicial review, and the motion is dismissed.

[9] In his 93-page Memorandum of Fact and Law, the appellant makes numerous submissions, many of which bear to relevance to the issue of whether or not Mactavish J. made a reviewable error. In essence, however, he says that the judge exercised her discretion arbitrarily and capriciously in failing to address the merits of his application for judicial review to the effect that the arbitrator had violated his fundamental rights. He further says that the issue of delay is of no relevance because his fundamental rights pertaining to natural justice were violated. Finally, he adds that, in any event, the requirements of the test have been met.

[10] The sole issue in this appeal is whether the judge erred in dismissing the appellant's motion.

[11] It is trite law that this Court will not interfere with the discretionary decisions of the Federal Court unless the judge erred in law, misapprehended the facts or failed to consider relevant facts.

[12] In my view, Mactavish J. made no such error. Furthermore, there can be no doubt that the factual record clearly supports the judge's conclusion that the appellant failed to show that he had a continuing intention to pursue his judicial review application or that he had a reasonable explanation for the delay in bringing his application.

[13] One final comment. In a case like the present one, where the delay in bringing the application for judicial review is very lengthy, the requirement that an applicant must show that the other side will not suffer prejudice by reason of delay becomes highly significant. Indeed it is difficult to conceive why, after 17 years, the unrebutted presumption of prejudice would not suffice to deny the application.

[14] I would therefore dismiss the appeal with costs.

"M. Nadon"
J.A.

“I agree
"Marc Noël"
J.A.

“I agree
J.D. Denis Pelletier”
J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-73-07
(APPEAL FROM AN ORDER OF THE FEDERAL COURT DATED JANUARY 5, 2007 DOCKET NO. 06-T-07)	
STYLE OF CAUSE:	GODWIN SMITH v. CANADIAN RAILWAY OFFICE OF ARBITRATION, and THE CANADIAN BROTHERHOOD OF RAILWAY, TRANSPORT AND GENERAL WORKERS, and VIA RAIL CANADA INC.
PLACE OF HEARING:	Winnipeg, Manitoba
DATE OF HEARING:	September 11, 2007
REASONS FOR JUDGMENT:	NADON J.A
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CONCURRED IN BY:	NOËL J.A. PELLETIER J.A.
DATED:	September 13, 2007

APPEARANCES:

Goodwin Smith Winnipeg, MB	ON HIS OWN BEHALF /APPELLANT
Marianne Plamondon Montreal, QC	FOR THE RESPONDENT VIA RAIL INC.

SOLICITORS OF RECORD:

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