Date: 20081023

Docket: A-366-08

Citation: 2008 FCA 323

Present: PELLETIER J.A.

BETWEEN:

KERSHAW NANAVATY

Appellant

and

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on October 23, 2008.

REASONS FOR ORDER BY: PELLETIER J.A.

Date: 20081023

Docket: A-366-08

Citation: 2008 FCA 323

Present: PELLETIER J.A.

BETWEEN:

KERSHAW NANAVATY

Appellant

and

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR ORDER

PELLETIER J.A.

[1] This is a motion for an order settling the contents of the appeal book in an appeal of an order dismissing an application for an extension of time to commence an application for judicial review.

[2] This motion is made necessary by the appellant/applicant's insistence that materials which were not before the motions judge ought to be included in the appeal book. Counsel for the applicant alleges that the material was not before the motions judge because the registry staff unlawfully refused to accept it for filing. Counsel goes on to say that the material in question addresses the issue of the merit of the underlying application and is thus relevant to the disposition of the appeal.

[3] The applicant was found, in administrative proceedings, to have failed to declare goods when importing them into Canada. He seeks to challenge that finding and to recover the amount forfeit as a result of the failure to declare. Notwithstanding the terms of sections 131 and 133 of the *Customs Act* R.S.C. 1985, c. 1 (2nd Supp.), as well as the clear indications as to the procedure to be followed in the Minister's delegate's letter dated February 21, 2008, counsel attempted both to challenge the finding that there was a contravention and to recover the amount forfeit to obtain the release of the goods by way of action in the Federal Court. When the Crown pleaded in its statement of defence that the amount forfeit could only be recovered by way of an application for judicial review, counsel for the applicant attempted to launch an application for judicial review, after the time for doing so had expired. The sequence of events is described in the affidavit of Korrie Dang, the Legal Assistant of Mr. Winstanley, counsel for the appellant:

> (e) On May 26, 2008, he [Mr. Winstanley] personally attended at the Registry of the Federal Court in Vancouver, B.C. with the necessary Notice of Application for judicial review supported by the affidavit of Mr. Nanavaty, sworn on May 22, 2008, and a Notice of Motion for an extension of time to file this application, supported by his affidavit, likewise sworn May 22, 2008.
>
> (f) On that date, he attempted to file both the Notice of Application and its supporting affidavit and the Notice of Motion and its supporting affidavit; however, he was informed by the Registry staff that could not be done unless and until the relief sought by the Notice of Motion had been successfully applied for. In the result, only the Notice of Motion and his affidavit were accepted for filing by the Registry staff on May 22, 2008.

[4] The motions judge rejected the application for an extension of time on several related grounds. The judge noted that since the affidavit in support of the motion for an extension of time was that of counsel appearing on the motion and not that of the applicant, "the Court has not been provided with a full picture from the applicant's perspective of all factors relevant to the

consideration of an extension of time." The Court relied on jurisprudence of this Court to the effect that the affidavit in support of a motion for an extension of time should be sworn by the applicant, who is subject to cross-examination.

[5] The Court noted that counsel for the applicant was aware of the distinction between an action to challenge the finding of a contravention of the Act and an application for judicial review to set aside the decision to retain the funds paid, and forfeit, to obtain the release of the goods. The motions judge concluded:

> 8. Because the Applicant has failed to file his own affidavit, the Court cannot tell whether the failure to file in time was the result of counsel's error, counsel's own views regarding the irrationality of the statutory scheme, or how the actions of counsel relate to the Applicant's own actions, motives and instructions to counsel.

[6] On that basis, the motions judge dismissed the application for an extension of time to file an application for judicial review.

[7] On this motion to settle the contents of the appeal book, counsel argues that, but for the registry staff's unlawful interpretation of the Rules, the Notice of Application and supporting affidavit would have been before the motions judge, and should therefore be put before the Court of Appeal.

[8] Counsel's argument appears in paragraphs 6 to 8 of the appellant's Memorandum, which are reproduced below:

> 6. If one examines this Notice of Motion (Exhibit “B” to the Affidavit of Korrie Dang …) one will see that it was given the file number “08-T-23”. Apparently, this numbering signifies that this is “only a preliminary file, not an actual proceeding."
>
> 7. It is Appellant’s position that this practice has no basis whatsoever in the Rules; and, in fact, is improper. Rules 62 and 63 make it clear that a proceeding such as Appellant counsel was attempting to file on May 26, 2008 can only be commenced by a notice of application. The proceeding before this appeal court was commenced by a notice of motion. Calling a proceeding commenced by a notice of motion a “preliminary filing” does not make it so. This piece of administrative legerdemain does not transform a notice of motion into a notice of application, because a notice of motion is not and cannot be an “originating process” under the Rules. In short, there is simply no basis for this Registry practice.
>
> 8. Had the Registry staff followed Rules 62 and 63 (and the practice in the Supreme Court of British Columbia), they would have accepted for filing the notice of application for judicial review and supporting affidavit of the Appellant; and then, within that proceeding, they would have accepted for filing the application for the extension of time.

[9] Counsel’s attack on the registry staff’s practice fails to refer to subsection 18.1(2) of the *Federal Courts Act* R.S.C. 1985, c. F-7 which provides as follows:

18.1 (2) An application for judicial review in respect of a decision or an order of a federal board, commission or other tribunal shall be made within 30 days after the time the decision or order was first communicated by the federal board, commission or other tribunal to the office of the Deputy Attorney General of Canada or to the party directly affected by it, or within any further time that a judge of the Federal Court may fix or allow before or after the end of those 30 days.	18.1 (2) Les demandes de contrôle judiciaire sont à présenter dans les trente jours qui suivent la première communication, par l'office fédéral, de sa décision ou de son ordonnance au bureau du sous-procureur général du Canada ou à la partie concernée, ou dans le délai supplémentaire qu'un juge de la Cour fédérale peut, avant ou après l'expiration de ces trente jours, fixer ou accorder.

[10] An application for judicial review *shall* be made within 30 days after the time the decision was first communicated to the party directly affected by it, in this case, the appellant. If it must be

filed within 30 days and it is not, then something else must happen before it can be filed. That "something else" is the motion for an extension of time. Unless and until an applicant is authorized to file a notice of application outside the statutory period, it cannot be filed. To do so, notwithstanding counsel's magisterial pronouncements, would be a breach of the Act.

[11] Rules 62 and 63 deal with actions, applications and appeals which is a non-exclusive list of proceedings, as is made clear by Rule 63(2). Motions are dealt with in Part 7 of the Rules. There is no requirement that a motion can only be brought within a proceeding commenced by an originating document, which is apparently the basis of counsel's argument. Without claiming to be knowledgeable about British Columbia's *Supreme Court Rules*, I note that motions are dealt with under Rule 44 dealing with Interlocutory Applications which appears consistent with counsel's view of the matter. As it turns out, the Federal Court Rules are not structured in the same way.

[12] Consequently, counsel's argument that the registry's practice with respect to motions for extension of time to commence a proceeding is ill-considered. The appellant's application for judicial review is initiated by the filing of a notice of application, which is the originating document. If a notice of application has not been filed within the time provided in the Act, then an extension of time must be obtained. The motion seeking an extension of time does not initiate the application for judicial review. If granted, it allows the applicant to file his notice of application; if refused, there is no application for judicial review.

[13] Counsel’s attempt to bolster his argument by reference to “administrative legerdemain” suggesting, as it does, trickery or deceptiveness, is offensive and an affront to the integrity of the registry staff.

[14] Consequently, the contents of the appeal book should be as described in paragraph 10 of the respondent’s Memorandum of Fact and Law. The respondent is entitled to its costs in any event of the cause.

"J.D. Denis Pelletier"
J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-366-08
STYLE OF CAUSE:	*Kershaw Nanavaty v. Minister of Public Safety and Emergency Preparedness*

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	PELLETIER J.A.
DATED:	October 23, 2008

WRITTEN REPRESENTATIONS BY:

Andrew J. Winstanley	FOR THE APPELLANT
Liliane Bantourakis	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Andrew J. Winstanley Vancouver, British Columbia	FOR THE APPELLANT
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT