Federal Court of Appeal  Cour d'appel fédérale

Date: 20200903

Docket: A-212-20

Citation: 2020 FCA 137

Present: **NOËL C.J.**

RE: SECTION 6 OF THE *TIME LIMITS AND OTHER PERIODS ACT (COVID-19)*, ENACTED BY *AN ACT RESPECTING FURTHER COVID-19 MEASURES*, S.C. 2020, C. 11, S. 11

and

AND RE: THE ATTORNEY GENERAL OF CANADA'S POSITION REGARDING SAME

Dealt with in writing without appearance of parties.

Direction under Rule 54 delivered at Ottawa, Ontario, on September 3, 2020.

DIRECTIONS AND REASONS BY: NOËL C.J.

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DIRECTION AND REASONS

NOËL C.J.

[1] In a letter dated September 1, 2020, the Attorney General of Canada has communicated to this Court, through the Canadian Judicial Council, its position concerning the meaning and application of section 6 of the *Time Limits and Other Periods Act (COVID-19)*, enacted by *An Act Respecting Further COVID-19 Measures*, S.C. 2020, c. 11, s. 11. As more fully explained below, this requires an immediate response as the Attorney General's position contradicts the premise on which the Court has been managing ongoing matters since the beginning of the pandemic and creates intolerable uncertainty.

[2] For that purpose, I direct that a file number be assigned to this matter.

[3] Section 6 provides as follows:

> **6.** (1) The following time limits are, if established by or under an Act of Parliament, suspended for the period that starts on March 13, 2020 and that ends on September 13, 2020 or on any earlier day fixed by order of the Governor in Council made on the recommendation of the Minister of Justice:
>
> > (a) any limitation or prescription period for commencing a proceeding before a court;
> >
> > (b) any time limit in relation to something that is to be done in a proceeding before a court; and
> >
> > (c) any time limit within which an application for leave to commence a proceeding or to do something in relation to a proceeding is to be made to a court.
>
> (2) The court may, by order, vary the suspension of a time limit as long as the commencement date of the suspension remains the same and the duration of the suspension does not exceed six months.
>
> (3) The court may make orders respecting the effects of a failure to meet a suspended time limit, including orders that cancel or vary those effects.
>
> (4) The Governor in Council may, by order made on the recommendation of the Minister of Justice, lift a suspension in circumstances specified in the order.

[4] The Attorney General's position is that section 6 suspends retroactively all "time limits…established by or under an Act of Parliament" during the March 13-September 13 period and that "orders and directives issued" by the courts, including this Court, concerning time limits or setting deadlines for procedural steps are ousted by section 6. For example, in the view of the Attorney General, an order of this Court expediting a specific proceeding for reasons of urgency or for public interest reasons would no longer be valid, with retroactive effect.

[5] The logic behind the Attorney General's position would make it applicable to this Court's Practice Direction, Notice to the Parties and the Profession: *Gradual Phase-out of Suspension Period: COVID-19*, dated June 11, 2020 which allowed certain proceedings to progress towards a hearing on the merits. According to the Attorney General's position, that Practice Direction, a later Practice Direction dated September 1, 2020 concerning time limits, and decisions made under them in specific cases are no longer valid, with retroactive effect.

[6] For the following reasons, it is necessary for this Court to provide clarity under Rule 54 as to the applicable time limits in pending proceedings before it.

[7] This Court has the power to provide directions under Rule 54 in response to a party's unilaterally asserted position: see, *e.g.*, *SNC-Lavalin Group Inc. v. Canada (Public Prosecution Service)*, 2019 FCA 108. This Court also has the jurisdiction to do so under its plenary power to regulate and address any threat to its practices and proceedings: *Fabrikant v. The Queen*, 2018 FCA 224 and cases cited therein.

[8] The issuance of a direction under Rule 54 and pursuant to the Court's plenary power is required in this case. Many judgments, orders and directions of this Court have set time limits. The Attorney General's position, if correct, would reverse them.

[9] The Attorney General's position purports to affect ongoing cases in which he, Her Majesty the Queen in Right of Canada and the Department of Justice are involved. The Department of Justice is almost always counsel of record for Her Majesty the Queen in Right of

Canada and the Attorney General of Canada. The Attorney General represents numerous federal boards, commissions or other tribunals that are parties to proceedings in this Court. A rough estimate is that the Department of Justice is involved in at least two-thirds of the proceedings in this Court. The Attorney General's position calls into question orders, directions, judgments and other actions made by this Court in specific files involving the Department of Justice. Further, it raises questions about the applicable timelines in all of the Court's other specific files.

[10] The uncertainty and confusion created by the position taken by the Attorney General affects the core administration of matters that come before the Court and many of its decisions. In order to clarify the situation for the benefit of all parties, the issuance of a direction under Rule 54 and supporting reasons are required.

[11] The Court directs that the Attorney General's position concerning the interpretation and effect of section 6, in so far as it extends to the time limits under the Rules and orders made thereunder, is incorrect in law and should not be followed. The *Federal Courts Rules*, S.O.R./98-106 and this Court's Practice Directions, judgments, orders and directions remain in full force and effect.

[12] At the outset, there is no doubt that section 6 does effectively amend the statutory time periods in federal legislation for starting proceedings in this Court: see, for example, subsection 27(2) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 (the time limit for bringing appeals) and sections 18.1(2) and 28 of the *Federal Courts Act* (the time limit for bringing an application for judicial review). By virtue of section 6, the time stated in these sections does not run between

March 13, 2020 and September 13, 2020. Thus, if a party had thirty days to appeal a judgment of the Federal Court to this Court and twenty days had elapsed by March 13, 2020, the deadline for appealing the judgment would be September 23, 2020. Under the terms of the sections in the preceding paragraph, the deadline is extendable by order of the Court.

[13] Section 6 also covers other provisions in any Act of Parliament that speak to the time limits with respect to steps to be taken or things to be done within proceedings. Such statutory provisions are rare. One example is the review by the Federal Courts of allegedly secret documents under the *Canada Evidence Act*, R.S.C. 1985, c. C-5 for which disclosure is sought in other legal proceedings: see, *e.g.,* subsections 37(4) and 37.1(2).

[14] But what is the meaning of "under an Act of Parliament" in section 6? Does it extend to the time limits under the Rules or under judgments, orders and directions that have been made by the Court? Does it extend to the Practice Directions made by this Court and, specifically, the lifting of the suspensions of the time periods under Rules, orders and directions made in accordance with the Practice Direction dated June 11, 2020?

[15] Section 6 does not say "time limits…established by or under an Act of Parliament, under legislation made under an Act of Parliament, under judgments, orders and directions made under legislation made under an Act of Parliament or under Practice Directions made by any Court". It simply says "under an Act". We must look to the purpose and context of section 6 to determine its authentic meaning: *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27, 154 D.L.R. (4th) 193; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559; and, for recent

applications in this Court, see *CIBC World Markets Inc. v. Canada*, 2019 FCA 147; *Williams v. Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 252, [2018] 4 F.C.R. 174; *Hillier v. Canada (Attorney General)*, 2019 FCA 44, 431 D.L.R. (4th) 556.

[16] Was Parliament's purpose to interfere with the *Federal Courts Rules* passed under the explicit, special and separate procedure in section 46 of the *Federal Courts Act*? Was its purpose to invalidate and alter the time limits set in all judgments, orders, directions, Practice Directions and Registry actions such as lifting the suspensions of time and allowing certain proceedings to progress under earlier Practice Directions? A good way of testing this is to look at the effects that section 6 would have if it bears the meaning that the Attorney General ascribes to it.

[17] These questions must be answered in the negative. Were it otherwise, confusion and potential harm—surely not desired by Parliament—would result. For example, orders requiring a proceeding to be prosecuted urgently on shortened time limits to further the public interest and to avert some harm or prejudice would be invalidated with retroactive effect. The invalidation of the Court order would often leave a vacuum in the regulation of the proceeding resulting in uncertainty, with prejudicial effect on the parties and the public interest. A proceeding that might be ready for hearing and decision in a week or so might, at the behest of a party desiring delay, have to be rewound by several months. To bring about that sort of result, section 6 would have to contain the clearest of legislative language. Section 6 does not use such language.

[18] The *Federal Courts Rules* are not made "under an act of parliament" in the usual way in which this term is understood. Rules are made by a statutory committee (*Federal Courts Act,*

subsection 45.1(1)) made up of a majority of judges in consultation with major stakeholders, including the Attorney General of Canada. The proper course for changing the Rules is through the Rules Committee. Had the Attorney General acted through the Rules Committee, the multitude of problems that his position creates would not have gone unnoticed.

[19] Beyond this, construing section 6 as allowing Parliament to unilaterally interfere with the management and governance of ongoing proceedings would invade a core judicial function—an especially intolerable invasion given the presence of the Attorney General's Deputy as counsel and other parties related to the Government of Canada in the majority of proceedings before this Court: see *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854, 140 D.L.R. (4th) 193 and the multitude of classic, binding Supreme Court of Canada authority approved therein. Where possible—and it is possible here—section 6 should be given a meaning that is respectful of judicial independence and obeys constitutional imperatives.

[20] Another important contextual consideration is that Court orders or directions, when made, are law until set aside. That rule is absolute: orders and directions have full legal effect unless they are specifically amended, ousted or invalidated by later specific court order or direction or by specific legislation (assuming such legislation is constitutional). Section 6 does not provide for a specific ouster, amendment or invalidation of court orders or orders in council that have already been made.

[21] It follows that the time limits under all Court orders and directions still stand and have not been ousted by section 6. As well, the Rules that set time limits still stand and have not been

ousted by section 6. Section 6 does not affect the Practice Directions made by this Court or actions taken by the Registry under those Practice Directions.

[22] In closing, I wish to emphasize that this Court has been concerned about the effect of the pandemic on its litigants and their matters and the capacity of the Registry to transact business during these challenging times. It has issued Practice Directions and other steps have been taken in a careful and sensitive way to permit access to justice but only in a manner that is fair and safe. Throughout, this Court has recognized that some parties need more time to complete certain steps, require a suspension of their matters or deserve an extension of time limits, and this Court has acted accordingly. Under the established legal tests in this Court, unavoidable, practical difficulties encountered by a party will always be a significant factor in favour of granting an extension of time or varying a court order: *Canada (Attorney General) v. Hennelly* (1999), 167 F.T.R. 158, 244 N.R. 399 (C.A.); *Canada (Attorney General) v. Larkman*, 2012 FCA 204, 433 N.R. 184. This Court has not hesitated to suspend matters on its own initiative when necessary. It remains able to do so at any time.

[23] For these reasons, the Court issues the Direction set out in paragraph 11 above.

"Marc Noël"

Chief Justice

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-212-20
STYLE OF CAUSE:	**IN RE RE: SECTION 6 OF THE *TIME LIMITS AND OTHER PERIODS ACT (COVID-19)*, ENACTED BY *AN ACT RESPECTING FURTHER COVID-19 MEASURES*, S.C. 2020, C. 11, S. 11** **AND RE: THE ATTORNEY GENERAL OF CANADA'S POSITION REGARDING SAME**

DIRECTION UNDER RULE 54 DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR DIRECTION BY:	NOËL C.J.
DATED:	SEPTEMBER 3, 2020