Federal Court  Cour fédérale

Date: 20151210

Docket: T-1686-15

Citation: 2015 FC 1375

Ottawa, Ontario, December 10, 2015

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

ANDRE L. NOEL

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

ORDER AND REASONS

[1] This is a motion in writing, filed by the Applicant, Andre Noel, on November 10, 2015 pursuant to Rule 369 of the *Federal Court Rules*, seeking relief framed by the Applicant as follows:

1. That the Order by Madam Prothonotary Tabib dated October 30, 2015 be immediately declared null and void and this case be continued in the Federal Court without further delay; and

2. That the Applicant obtain the acceptance of the Court to re-file 2 Motion Records originally filed on October 30 in Federal Court in Toronto and served on the Respondent the same day.

[2] I have considered the Applicant's Motion Record, the Respondent's Motion Record and the Applicant's Reply Motion Record and have concluded that the Order dated October 30, 2015 should be varied, but that this motion should otherwise be dismissed, for the following reasons.

I. Background

[3] The background to this motion is an ongoing matter which the Applicant has been pursuing before the Social Security Tribunal General Division [SST-GD] and Social Security Tribunal Appeals Division [SST-AD] related to the question of his entitlement to an Old Age Security [OAS] pension and a Guaranteed Income Supplement [GIS] under the *Old Age Security Act*, RSC 1985, c 0-9. On May 23, 2015, the SST-GD issued a decision on the merits of the Applicant's entitlement, which the Applicant subsequently appealed to the SST-AD. That appeal is still pending.

[4] In the course of this process, the SST-GD issued an interlocutory decision that the Applicant's hearing before it would be conducted by videoconference rather than in person. The hearing was originally scheduled to be conducted by teleconference but, after the Applicant requested an in-person hearing, the SST-GD changed the hearing format to video conference. The Applicant sought leave to appeal this interlocutory decision to the SST-AD and, on March 2, 2015, the SST-AD refused the request for leave. The Applicant filed an application for judicial

review of the SST-AD decision with the Federal Court of Appeal, which application was subsequently transferred to the Federal Court by Order of Justice Rennie dated September 30, 2015 [the Transfer Order] for jurisdictional reasons and is the underlying application within which the present motion was filed.

[5] The present motion represents an appeal of the Order of Prothonotary Tabib dated October 30, 2015 [the Stay Order] which stayed this application until 45 days following the expiration of all appeal and judicial review rights flowing from the May 23, 2015 decision of the SST-GD. The Stay Order was issued in a motion filed by the Respondent in the Federal Court of Appeal on August 27, 2015 and transferred to the Federal Court by the subsequent issuance of the Transfer Order. The Stay Order also provided the Respondent with an extension of time to file its application record for the judicial review to 20 days following the lifting of the stay. That relief was granted pursuant to a motion filed by the Respondent on September 30, 2015.

II. Applicant's Position

[6] The Applicant's motion materials indicate that he is seeking to set aside the stay on the basis that it represents an attempt by the SST-AD to put his case on hold, while the Applicant suffers injustice associated with the current status of his OAS and GIS entitlements. He also argues that the Stay Order has resulted in key evidence related to these issues being suppressed. In that respect, the Applicant refers to a Direction issued by Prothonotary Tabib on October 30, 2015, the same day as, but subsequent to, issuance of the Stay Order, related to filings that the Applicant attempted to make on that date. That Direction provides as follows:

> "The one page letter dated Oct. 30 may be placed on file but will not be acted upon, as the Court had already ruled on the motion when it was received, the Motion Record of 8 pages is moot, as the motion to which it relates had already been ruled upon when it was received. Return to the Applicant. The longer motion record may not be filed in view of the stay of proceedings ordered on October 30, 2015. Return to the Applicant."

[7] The Applicant argues that the Stay Order was premature, as the Applicant came into possession of the Respondent's Motion Record on October 20, 2015 and then served and attempted to file his Motion Records ten days later on October 30, 2015. The Applicant notes that the Respondent's Motion Record was left at his address on September 30, 2015, as evidenced by Canada Post's records. But he explains that he had been in the United States from September 17, 2015 returning to Canada on October 15, 2015 and then spending time in hospital, such that the Respondent's Motion Record came into his possession only on October 20, 2015.

III. Respondent's Position

[8] The Respondent's position is that the Stay Order was appropriate. The Respondent relies on the Federal Court of Appeal's decision in *C.B. Powell Ltd v Canada (Border Services Agency)*, 2010 FCA 61 [*C.B. Powell*], for the proposition that interlocutory decisions of administrative bodies are not generally reviewable except in the most exceptional of circumstances, and the decision of the Supreme Court of Canada in *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10 encouraging restraint in early judicial intervention in the proceedings of administrative tribunals, as such intervention risks depriving the reviewing court of a full record bearing on all issues.

[9] The Respondent argues that the Applicant's application for judicial review, which relates to the interlocutory decision by the SST-AD, is premature, as the Applicant has neither exhausted his statutory recourses in the underlying dispute nor established any exceptional circumstances that would justify departing from the general requirement for judicial restraint. The Applicant has an active appeal before the SST-AD of the SST-GD decision on the merits of his OAS and GIS entitlements. The Respondent submits that, if the SST-AD allows the Applicant's appeal, his application for judicial review may be rendered moot or unnecessary. Alternatively, if the SST-AD denies the Applicant's appeal, he may seek judicial review of that decision, and the Respondent argues that it will be more expeditious, less expensive and in the interests of justice to deal with the application challenging the interlocutory decision on form of hearing at that time rather than bifurcating the process.

IV. Analysis

A. *Standard of Review*

[10] The Federal Court of Appeal in *Merck & Co v Apotex Inc*, 2003 FCA 488 has formulated as follows at paragraph 19 the test for the standard of review by Federal Court judges of prothonotaries' decisions:

> Discretionary orders of prothonotaries ought not be disturbed on appeal to a judge unless:
>
> a) the questions raised in the motion are vital to the final issue of the case, or
>
> b) the orders are clearly wrong, in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of the facts.

[11] If the questions raised in the motion are vital to the final issue of the case, then the judge must exercise his or her discretion *de novo*.

B. *Stay of Proceedings*

[12] I do not regard the questions raised in this motion to be vital to the final issue of the case. The terms of the Stay Order provide that the stay will eventually be lifted, once the statutory remedies have been exhausted, and the Applicant will then be in a position to advance his application. I must therefore consider whether the exercise of discretion by the prothonotary was based on a wrong principle or upon a misapprehension of the facts. I find that in principle the decision to issue the Stay Order is consistent with the jurisprudence cited by the Respondent and referred to above. The Federal Court of Appeal in *C.B. Powell* confirmed that parties must exhaust their rights and remedies under administrative processes before pursuing any recourse to the courts. Justice Stratas, speaking for the Court, stated as follows at paragraph 31:

> [31] Administrative law judgments and textbooks describe this rule in many ways: the doctrine of exhaustion, the doctrine of adequate alternative remedies, the doctrine against fragmentation or bifurcation of administrative proceedings, the rule against interlocutory judicial reviews and the objection against premature judicial reviews. All of these express the same concept: absent exceptional circumstances, parties cannot proceed to the court system until the administrative process has run its course. This means that, absent exceptional circumstances, those who are dissatisfied with some matter arising in the ongoing administrative process must pursue all effective remedies that are available within that process; only when the administrative process has finished or when the administrative process affords no effective remedy can they proceed to court. Put another way, absent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted.

[13] On the subject of the exceptional circumstances in which the courts may depart from this rule, Justice Stratas explained as follows at paragraph 33:

> [33] Courts across Canada have enforced the general principle of non-interference with ongoing administrative processes vigorously. This is shown by the narrowness of the "exceptional circumstances" exception. Little need be said about this exception, as the parties in this appeal did not contend that there were any exceptional circumstances permitting early recourse to the courts. Suffice to say, the authorities show that very few circumstances qualify as "exceptional" and the threshold for exceptionality is high: see, generally, D.J.M. Brown and J.M. Evans, *Judicial Review of Administrative Action in Canada* (looseleaf) (Toronto: Canvasback Publishing, 2007) at 3:2200, 3:2300 and 3:4000 and David J. Mullan, *Administrative Law* (Toronto: Irwin Law, 2001) at pages 485-494. Exceptional circumstances are best illustrated by the very few modern cases where courts have granted prohibition or injunction against administrative decision-makers before or during their proceedings. Concerns about procedural fairness or bias, the presence of an important legal or constitutional issue, or the fact that all parties have consented to early recourse to the courts are not exceptional circumstances allowing parties to bypass an administrative process, as long as that process allows the issues to be raised and an effective remedy to be granted: see *Harelkin*, *supra*; *Okwuobi*, *supra* at paragraphs 38-55; *University of Toronto v. C.U.E.W, Local 2* (1988), 55 D.L.R. (4th) 128 (Ont. Div. Ct.). As I shall soon demonstrate, the presence of so-called jurisdictional issues is not an exceptional circumstance justifying early recourse to courts.

[14] The Stay Order represents an exercise of discretion that is consistent with the judicial restraint that the jurisprudence advocates. By staying the application for judicial review of the interlocutory decision on the form of hearing before the SST-GD, the administrative process represented by the Applicant's appeal to the SST-AD of the SST-GD's decision on the merits of his entitlements will be allowed to run its course without judicial interference. If the final outcome of that process results in the Applicant still having concerns about the form of the SST-GD hearing or other interlocutory decision made in the course of the appeal process, this can

then be the subject of judicial review, along with judicial review of the decision on the merits. I also find no exceptional circumstances in the present case that would justify departing from the applicable rule.

[15] However, there is one aspect of the Stay Order that should be varied. Paragraph 1 of the Stay Order provides: "The proceedings in this file are stayed to 45 days following the expiration of all appeal and judicial review rights flowing from the May 23, 2015 decision of the Social Security Tribunal – General Division" (my emphasis). I do not find it consistent with the principles underlying the applicable jurisprudence that the Applicant should be required to exhaust his rights to judicial review of the May 23, 2015 decision on the merits before being in a position to resurrect his application for judicial review of the interlocutory decision on the form of hearing. Indeed, this result would be inconsistent with the position taken in the Respondent's Written Representations on the present motion that, if the SST-AD denies the Applicant's appeal, he may seek judicial review of that decision, and it will be more expeditious, less expensive and in the interests of justice to deal with the application challenging the interlocutory decision on form of hearing at that time rather than bifurcating the process.

[16] My decision will accordingly vary the Stay Order such that it applies only to 45 days following the expiration of all appeal rights (not judicial review rights) flowing from the May 23, 2015 decision of the Social Security Tribunal – General Division.

C. *Motion Records Applicant Attempted to File on October 30, 2015*

[17] Prothonotary Tabib's decision not to accept the Applicant's Motion Records for filling on October 30, 2015 is contained in a Direction and is therefore not part of the Stay Order which is the subject of the Applicant's appeal. I nevertheless observe that I find no wrong principle or misapprehension of the facts underlying the Prothonotary's approach to this issue. The Stay Order had already been granted when the Applicant's request for filing of these Motion Records was received.

[18] Furthermore, the Respondent's Motion Record to which the Applicant was apparently responding is not a document that requires personal service. The effect of *Federal Court Rule* 143(3) is that service of this Motion Record on the Applicant was effective as of September 30, 2015, the day of delivery indicated on the Canada Post receipt, which the Applicant has attached to his affidavit in the present motion. The Respondent had filed an affidavit establishing this service upon the Applicant on September 30, 2015, such that under *Federal Court Rule* 369, the Prothonotary was entitled to decide the motion once the time for the Applicant to file a response had expired 10 days after such service.

[19] Importantly, I also note that the Stay Order reflects that the Prothonotary, in reaching her decision to order the stay, did consider a Motion Record of the Applicant in response to the Respondent's stay motion. The records of the Court Registry indicate that the Respondent's stay motion was filed on August 27, 2015, along with an Affidavit attesting to service of the Respondent's motion materials upon the Applicant on August 26, 2015. The Applicant then filed his Motion Record in response on September 8, 2015.

[20] The Motion Record of the Respondent, that the Applicant explains came into his possession only on October 20, 2015, did not relate to the Respondent's motion for a stay but rather to the second motion which was addressed by the Stay Order. This second motion sought an extension of time for the filing of the Respondent's Record in the judicial review application, to 20 days following the lifting of the stay. While the present appeal motion by the Applicant seeks that the entirety of the Stay Order be set aside, his arguments relate to the granting of the stay itself, not to the resulting extension of time for filing of the Respondent's application record.

[21] As such, the record before me indicates that the Prothonotary did have the benefit of the Applicant's Motion Record filed on September 8, 2015 in response to the Respondent's stay motion when she made her decision. While a review of the Applicant's Motion Record does not demonstrate it to be particularly responsive to the Respondent's stay motion, the Applicant did have the opportunity to provide his position on the stay, to be considered by the Prothonotary in deciding that motion.

D. *Costs*

[22] The Respondent's written representations on the present motion seek its dismissal without costs. As success on this motion is divided, in that I have varied the Stay Order in one respect which represents less of a constraint on the Applicant's judicial review rights, but have otherwise dismissed the motion, I agree that no award of costs against either party is appropriate.

ORDER

THIS COURT ORDERS that:

1. the Order of Madam Prothonotary Tabib dated October 30, 2015 is varied by deleting the words "and judicial review" from paragraph 1 of the Order;

2. the Applicant's motion is otherwise dismissed, without costs.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1686-15
STYLE OF CAUSE:	ANDRE L. NOEL v THE ATTORNEY GENERAL OF CANADA

MOTION IN WRITING CONSIDERED AT TORONTO, ONTARIO PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES*

ORDER AND REASONS:	SOUTHCOTT J.
DATED:	DECEMBER 10, 2015

APPEARANCES:

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