

Federal Court



Cour fédérale

Date: 20180906

Docket: 18-T-49

Citation: 2018 FC 892

Toronto, Ontario, September 6, 2018

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

**DUN-RITE PLASTICS & CUSTOM
FABRICATION INC.**

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

ORDER AND REASONS

[1] The Applicant seeks an Order extending the time to bring an application for judicial review of the decision of the Minister of National Revenue to deny interest and penalty relief. The application was required to be made within 30 days of the communication of the decision to the applicant.

[2] The decision sought to be reviewed was made on November 21, 2016, and communicated to the applicant soon thereafter. The applicant attests that within 30 days of receiving the decision, an attempt was made to file an application to review that decision, but failed as the Application for Judicial Review was not complete, and was thus not valid. The applicant became aware of this in April 2017, when so advised by its accountant.

[3] The applicant filed an Application for Judicial Review on May 30, 2017, but was informed by the Court on the next day that it had to bring a motion seeking an Order extending the time for the application. In its reply submissions, the applicant describes that upon receiving this information it “promptly retained LoPresti Law to file the motion.” The motion was filed by that firm in this Court on August 27, 2018, some 15 months later.

[4] The affidavit of an employee of LoPresti Law attests that “LoPresti Law was delayed in filing this motion due to other deadlines and files.”

[5] The parties agree that any order of the sort requested is discretionary and, as stated by the Federal Court of Appeal in *Canada (Attorney General) v Hennelly*, [1999] FCJ No 846 at para 3:

The proper test is whether the applicant has demonstrated

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; and
4. that a reasonable explanation for the delay exists.

[6] The Applicant submits that the Federal Court of Appeal in *Canada (Attorney General) v Larkman*, 2015 FCA 204 at para 62 instructed that these four criteria are intended to guide the Court “in determining whether the granting of an extension of time is in the interests of justice.”

Moreover, it points out that the Court of Appeal observed that “not all of these four questions need be resolved in the moving party’s favour.”

[7] On the facts before the Court, I am satisfied that the Applicant has shown that it had a continuing intention to pursue the application.

[8] No direct evidence as to the merit of the proposed application was provided by the applicant or its sole shareholder and director; rather the applicant provided an affidavit of an employee of its law firm and upon that evidence submits as follows:

The decision letter erroneously stated that a balance was knowingly allowed to accrue however Mr. Williams, the Corporation’s sole shareholder and director, did not become aware of any arrears until 2013. Mr. Williams took prompt action on behalf of the Corporation to pay down the arrears. The Applicant further alleges that proper consideration was not given to the extent of Ms. Williams’ health condition and this lack of consideration constitutes a fettering of discretion.

[9] The respondent relies on the decision of the Federal Court of Appeal in *Viridi v Minister of National Revenue*, 2006 FCA 38 at paras 2 & 3, wherein the Court of Appeal stated:

As the moving party, the appellant bore the burden of establishing the elements necessary for an extension of time. Generally speaking, this must be done by affidavit evidence sworn by the moving party himself that can be subject to cross-examination.

In the case at bar, the appellant did not see fit to swear his own affidavit. Instead, he asks the Court to find that he had a reasonable explanation for his delay, a continuing intention to seek judicial review and an arguable case solely on the basis of an affidavit sworn by his lawyer's secretary. This failure to provide his own evidence to the Court was, in this case, fatal to his motion.

[10] While a Court may be prepared to assign weight to an affidavit sworn by an employee of the law firm in motions such as this where the delay is slight and the merit of the application more or less obvious, it is my view that where there is a lengthy delay and questionable merit on the face of the record, the applicant or a senior officer of the applicant must swear the affidavit in support so that the evidence may be challenged by means of cross-examination. As in *Viridi*, the failure to file an affidavit here, results in the Court being unable to ascertain whether there is any merit to the proposed application. Thus, the second element of the test does not weigh in favour of granting the extension.

[11] The respondent has not resisted this motion on the basis of prejudice, and so I am prepared to accept that there is none to the respondent if the extension is granted.

[12] The exceptional delay by counsel for the applicant in bringing this motion is of real concern. In its reply memorandum, the applicant and its counsel “acknowledge that workload and scheduling issues do not constitute a compelling explanation for the delay.” In my view, the offered explanation for a delay of this magnitude cannot be said to be reasonable.

[13] Therefore, it is my finding that the applicant has failed to meet at least two of the four criteria, and accordingly, I will not exercise my discretion to make an order extending the time for the filing of the proposed Application for Judicial Review.

[14] As no request was made by the Minister in his memorandum for costs, none are awarded.

ORDER IN 18-T-49

THIS COURT ORDERS that the motion for an order extending the time in which to bring an Application for Judicial Review is dismissed, without costs.

“Russel W. Zinn”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: 18-T-49

STYLE OF CAUSE: DUN-RITE PLASTICS & CUSTOM FABRICATION
INC. v ATTORNEY GENERAL OF CANADA

CONSIDERED AT TORONTO, ONTARIO PURSUANT TO RULE 369

ORDER AND REASONS BY: ZINN J.

DATED: SEPTEMBER 6, 2018

WRITTEN REPRESENTATIONS BY:

Brandon Rooney

FOR THE APPLICANT

Hasan Junaid

FOR THE RESPONDENT

SOLICITORS OF RECORD:

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FOR THE RESPONDENT