Federal Court of Canada
Trial Division

Section de première instance de
la Cour fédérale du Canada

1-31-97 HLSSING

T-96-96

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BETWEEN:

GAÉTAN DELISLE,

Applicant,

AND

ATTORNEY GENERAL OF CANADA,

Respondent,

AND

CURT G. ALLEN, Assistant Commissioner,
Director of Personnel, Royal Canadian Mounted Police,

Mis-en-cause.

REASONS FOR ORDER

RICHARD MORNEAU,
PROTHONOTARY:

INTRODUCTION

The Court has before it a motion by the Attorney General of Canada for an order dismissing the present application for judicial review on the ground that it has now been established that the applicant will never file an application record to support it.

What is therefore in issue is the impact that the absence of an applicant's application record has on the disposition of an application for judicial review. In my view, this issue is not expressly dealt with by Rules 1600 *et seq.* of the *Federal Court Rules* (the Rules).

THE FACTS

The essential facts that should be noted are simple.

On January 12, 1996, the applicant filed an originating notice of motion with the Registry of this Court under section 18.1 of the *Federal Court Act*.

On June 6, 1996, the respondent notified the applicant that he would be requesting the dismissal of the application for judicial review because the applicant's application record had not been filed within the time set out in the Rules.

After receiving that letter, the applicant made a motion on June 17, 1996 for an order extending the time for him to file his application record in support of his application for judicial review.

The same day, this Court dismissed the motion for an extension of time on the ground that there were no valid reasons in the case to justify the applicant's delay of more than three months in filing his application record under Rule 1606.

However, it appears that none of the parties at the hearing on June 17, 1996 specifically requested the Court to determine what would happen to the application for judicial review if the applicant's motion for an extension of time were dismissed. It should also be noted that the June 17 order has not been appealed and that the applicant has not attempted to make any motion to this Court under Rule 1619 or 1620 to prevent the possible disposition now being sought by the respondent in his motion to strike.

ANALYSIS

The notice of motion under consideration refers only to Rule 419. Counsel for the respondent quickly accepted the argument that this rule alone cannot be used against another motion, such as the applicant's application for judicial review (in this regard, see Strayer J.A.'s comments in *Bull (David) Laboratories (Canada) Inc. v. Pharmacia Inc. et al.* (1994), 176 N.R. 48, and the judgments in *Merck Frosst Canada Inc. et al. v. Minister of National Health and Welfare et al.* (1994), 58 C.P.R. (3d) 245, and *Glaxo Wellcome Inc. et al. v. Minister of National Health and Welfare et al.*, an unreported judgment of this Court on September 6, 1996, file No. T-793-96). After discussion with the Court, counsel for the respondent requested that the motion also be considered in light of Rules 5 and 1617. In my view, such additional reliance on Rules 5 and 1617 should be allowed here and now

because, when all is said and done, the applicant has known since June 6, 1996 that the respondent would seek to have his application struck out if he did not file an application record. He therefore cannot claim to be surprised by the remedy being sought by the respondent. In addition, his position in the case is "frozen". It is clear that if the respondent's motion were dismissed because he has relied only on Rule 419, he could very likely bring a similar motion shortly thereafter based on Rules 5 and 1617 as well, without the applicant being able to do anything in the meantime to change his position vis-à-vis his application record.

That said, the issue that arises from a consideration of the body of the respondent's motion is whether the certainty that no applicant's application record will be filed inevitably leads to the result that the applicant's application for judicial review must be dismissed

Based on this Court's judgments and the scheme of Rules 1600 to 1620, it seems to me that once an applicant in a specific situation has been denied permission under Rule 1619 to disregard the requirement of filing an application record under Rule 1606, the applicant's application for judicial review will in general be struck out

According to both the Rules and this Court's judgments, it would seem that the filing of an applicant's application record under Rule 1606 is a crucial step. This step appears to be a *sine qua non* for taking or carrying on with the other steps needed to perfect an application for judicial review. As regards the Rules, it is clear from Rule 1607(1) that the respondent's application record cannot be filed until after the applicant's application record That rule reads as follows·

> 1607 (1) The respondent shall, within 30 days after the day of service of the applicant's application record,
>
> (*a*) file the number of copies of its application record required under Rule 1609(2); and
>
> (b) serve a copy of its application record on all other parties

As long as there is no applicant's application record, there is no need for the respondent to file an application record. This was evidently the conclusion reached by Teitelbaum J. of this Court when, in a given case, the Registry of this Court sought directions from him with regard to the fact that an applicant had filed his application record with the Court after the time limit set out in Rule 1606. Teitelbaum J 's directions read in part as follows·

> There being, in my opinion, no valid reason given by Applicant's counsel for his late filing, the Applicant's record cannot be filed into the record and thus the Commission need not reply.
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> (emphasis added)

(Those directions are reproduced in the reasons for order of Reed J. in *Bellefeuille v. Commercial Transport (Northern) Ltd.*, an unreported judgment of February 25, 1993, file No. T-1380-92, at pp. 3-4. We will have an opportunity to return to another decision by Reed J. involving the same parties, which is reported at [1995] 1 F.C. 237 (*Bellefeuille*).)

In *Attorney General of Canada v. Transport Beloeil St-Hilaire Inc. et al.* (an unreported judgment of this Court (Tremblay-Lamer J.) on March 27, 1996, file No. T-385-95), the Court, in footnote 2 on p. 4, imposed the following sanction for the respondents' failure to file an application record:

> Since the respondents did not file a record in accordance with the *Federal Court Rules*, they were unable to make arguments at the hearing before this Court

At this point, it is appropriate to return to *Bellefeuille*, since in that case this Court had to consider how an application for judicial review should be dealt with when the applicant is denied leave to file an application record under Rule 1606.

In her initial decision on February 25, 1993, Reed J.—like Pinard J. in this case on June 17, 1996—dismissed Mr. Bellefeuille's motion for an extension of the time set out in Rule 1606 At the same time, and on her own initiative, the judge also struck out Mr. Bellefeuille's application for judicial review under Rule 1617.

On appeal, the Federal Court of Appeal affirmed Reed J.'s decision to deny an extension of the time set out in Rule 1606, but criticized her for striking out the application for judicial review on her own initiative, without giving Mr. Bellefeuille any notice that this was on the agenda.

The Court therefore had to reconsider the question of striking out the application under Rule 1617 after the applicant was given notice in the form of an order.

The applicant took the opportunity to make a motion to have his case heard on the merits without having to file an application record under Rule 1606.

On that motion, the Court summarized the arguments made by counsel for Mr. Bellefeuille and disposed of the question as follows:

> His third argument is that all the evidence required for the hearing of the application is before the Court and has been since July 7, 1992. The only step which was not taken in a timely fashion was the filing of the application record This, he notes, is a document compiled for the convenience of the Court and is not essential It is argued that the absence of such a document should not prevent the Court dealing with his client's application on the merits.
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> . . .
>
> I agree that the filing of an application record is a matter of convenience for the Court. It is also, however, an integral procedural step It includes the evidence on which the applicant intends to rely, together with a memorandum of argument. It is not merely a collation of all materials that have been filed The application record should serve to define the issues and narrow the focus of the application It is in response to the applicant's application record that the respondent prepares and files its application record. There is no doubt that the Court can waive compliance with the requirement that an application record be produced Rule 1619 so provides

Reed J. ultimately dismissed Mr Bellefeuille's motion to proceed without an application record and found that, in the circumstances, the delay he had caused was significant and could not reasonably be explained She therefore struck out his application for judicial review under Rule 1617.

In the circumstances of the case at bar, should the application be struck out under the same rule, with the additional support of Rules 5 and 419 as required? I believe so.

The applicant in this case was certainly given the ten (10) days notice of striking out required by Rule 1617(2). The striking out of his application for judicial review has been in question since June 6, 1996, when counsel for the respondent wrote to his counsel. The motion to strike itself was served on September 4, 1996 and was not presented until September 16, 1996. The ten (10) days notice required by Rule 1617(2) can be found between September 4 and 16, 1996 alone. Of course, the notice of motion does not expressly refer to Rule 1617, but the remedy sought therein is the same as that provided for in Rule 1617.

Like the Court in *Bellefeuille*, therefore, I conclude that in this case the delay censured by Pinard J. is now inevitably and clearly significant and I accordingly intend to allow the respondent's motion to strike.

At the end of his submissions, counsel for the applicant also referred to Rule 1620 in order to have me, if I understand correctly, refer everything to a judge of this Court for the ultimate purpose of keeping this case alive. It must be understood here that his argument was that this case is connected with other cases to be heard in early November 1996. I am declining to pursue this option because I feel that the request was made much too late and that the applicant has had plenty of time since this Court's decision on June 17, 1996 to take action under Rule 1620, with the appropriate justification.

For these reasons, the respondent's motion to strike out the applicant's application for judicial review will be allowed

Richard Morneau
Prothonotary

Montréal, Quebec
September 23, 1996

Certified true translation

A. Poirier

Federal Court of Canada

Court No. T-96-96

BETWEEN:

GAÉTAN DELISLE.

Applicant,

— and —

ATTORNEY GENERAL OF CANADA,
Respondent,

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CURT G ALLEN, Assistant Commissioner, Director of Personnel, Royal Canadian Mounted Police,

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REASONS FOR ORDER

FEDERAL COURT OF CANADA

NAMES OF COUNSEL AND SOLICITORS OF RECORD

COURT FILE NO.:	T-96-96
STYLE OF CAUSE:	GAÉTAN DELISLE, Applicant, AND ATTORNEY GENERAL OF CANADA, Respondent, AND CURT G. ALLEN, Assistant Commissioner, Director of Personnel, Royal Canadian Mounted Police, Mis-en-cause
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	September 16, 1996
REASONS FOR ORDER BY:	Richard Morneau, Prothonotary
DATE OF REASONS FOR ORDER:	September 23, 1996

APPEARANCES:

James Duggan	for the Applicant
Nadine Perron	for the Respondent and the Mis-en-cause

SOLICITORS OF RECORD:

James Duggan Montréal, Quebec	for the Applicant
George Thomson Deputy Attorney General of Canada Montréal, Quebec	for the Respondent and the Mis-en-cause

THE FEDERAL COURT OF CANADA

LA COUR FÉDÉRALE DU CANADA

Court No.: T-96-96

No. de la cause:

Let the attached certified translation of the following document in this cause be utilized to comply with Section 20 of the **Official Languages Act.**

Je requiers que la traduction ci-annexée du document suivant telle que certifiée par le traducteur soit utilisée pour satisfaire aux exigences de l'article 20 de la **Loi sur les langues officielles.**

REASONS FOR ORDER

January 14, 1997

DATE

Richard Morneau

Prothonotary Protonotaire

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