Federal Court Cour fédérale

Date: 20100217

Docket: 09-T-60

Citation: 2010 FC 163

Montréal, Quebec, February 17, 2010

Present: The Honourable Mr. Justice Beaudry

BETWEEN:

MICHEL BILODEAU

Moving Party

and

MINISTER OF JUSTICE OF CANADA

Respondent

REASONS FOR ORDER AND ORDER

[1] This is a motion by Michel Bilodeau (the moving party) for an extension of time to file an application for judicial review to quash the decision of the Minister of Justice dated November 28, 2007.

Facts and procedural history

[2] On December 23, 1971, the moving party was convicted of non-capital murder and sentenced to life imprisonment. On February 21, 2001, he made an application for ministerial

review to the Minister of Justice under Part XXI.1 of the *Criminal Code*, R.S.C. 1985, c. C-46 (the Code) to have his criminal conviction reviewed. The Code gives the Minister the power to review a conviction to determine whether a miscarriage of justice has occurred. The Criminal Conviction Review Group (the CCRG) is responsible for reviewing and investigating the applications, and making recommendations to the Minister. The CCRG received the application for review on May 2, 2001.

[3] On November 17, 2005, in response to the CCRG's investigation reports, the moving party made submissions in support of his application. Two years later, on November 28, 2007, the Minister determined that there were no reasonable grounds for concluding that a miscarriage of justice had occurred and dismissed the application for review.

[4] On December 27, 2007, the moving party filed a motion for a writ of *certiorari* in the Superior Court of Québec to quash the Minister's decision. The respondent then filed a motion to dismiss on January 4, 2008. On March 18, 2008, the Superior Court granted the motion to dismiss and declined jurisdiction (*Bilodeau v. Canada (Minister of Justice)*, 2008 QCCS 1036, EYB 2008-131204). The moving party appealed that decision. On April 21, 2009, the Court of Appeal of Québec confirmed that the Federal Court alone has jurisdiction to hear disputes related to the Minister's decisions on conviction review applications (*Bilodeau v. Canada (Minister of Justice)*, 2009 QCCA 746, J.E. 2009-827). On October 8, 2009, the Supreme Court of Canada dismissed the application for leave ([2009] S.C.C.A. No. 254). On November 9, 2009, the moving party filed this motion.

Relevant legislation

[5] *Federal Courts Act*, R.S.C. 1985, c. F-7.

18.1 (1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.	18.1 (1) Une demande de contrôle judiciaire peut être présentée par le procureur général du Canada ou par quiconque est directement touché par l'objet de la demande.
(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.	(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.

Analysis

[6] Given the importance of the issue, and the sheer volume of the documents and case law to be produced, Justice de Montigny of this Court ordered that the motion be heard in the presence of the parties. I therefore had the benefit of hearing oral submissions before rendering this decision.

[7] According to the case law, four factors are to be considered in determining whether a motion for an extension of time must be granted or dismissed: there must have been a continuing intention on the part of the moving party to bring the application; the case must be arguable; there must be a reasonable explanation for the delay; and the extension of time must not cause any prejudice to the opposing party (*Grewal v. Canada (Minister of Employment and Immigration)*, [1985] 2 F.C. 263 (C.A.)). This test is flexible and must be geared to ensure that justice is done. Accordingly, an extension of time can still be granted even if one of the criteria is not satisfied (*Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41, [2007] F.C.J. No. 37 (QL) at para. 33).

Continuing intention to challenge the decision

[8] The moving party submits that it is clear from the steps he took in the Superior Court, Court of Appeal of Québec and Supreme Court of Canada that he has always intended to challenge the Minister's decision by applying for judicial review of the decision. I agree that the facts of this case, in particular the Quebec court proceedings and the fact that the moving party has always complied with the deadlines in those cases, show that there has always been a continuing intention to file the application.

Arguable case

[9] The moving party contends that the entire decision-making process leading to the Minister's refusal was tainted by irregularities that violate the rules of natural justice and his rights under the *Canadian Charter of Rights and Freedoms*, Part I of *The Constitutional Act,*

1982, Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. He also alleges that there were errors of law in the standard applied and errors in the assessment of the evidence.

[10] Without making any ruling on the merits of the decision, I am of the opinion that the moving party may make Charter arguments and invoke a breach of procedural fairness. It certainly cannot be said that "the merits of [his] case are so slight that it should be dismissed at this stage" (*Marshall v. Canada*, 2002 FCA 172, [2002] F.C.J. No. 669 (QL) at para. 24).

Reasonable explanation for the delay

[11] The moving party submits that the jurisdictional question of the Superior Court of Québec is genuinely significant and has some merit. He points out that he was within the time limit when he filed his motion before the Superior Court and that he acted quickly following the Supreme Court decision.

[12] The respondent notes that the moving party has been represented by counsel at all times. He submits that, despite the unequivocal jurisdiction indicated in the *Federal Courts Act*, the moving party chose to file an application before the Superior Court of Québec, without knowing whether that court had jurisdiction to consider his application. He also did not file an application for judicial review before the Federal Court to preserve his rights. Such failure or neglect in itself cannot be a ground for an extension of time.

[13] It should be noted first that no similar case had been ruled on prior to the decision in *Bilodeau*. Second, the decision of the Court of Appeal of Québec in that case involves a

significant dissenting opinion. It is true that it would have been preferable for the moving party to protect his rights before the Federal Court, but I do not think that it can be said that he did not act with diligence.

[14] The respondent rightly notes that a certain line of cases establishes that clients must bear the consequences of their lawyers' errors (see the summary of the lines of cases in *Muhammed v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 828, 237 F.T.R. 8). However, paragraph 21 of *Muhammed* states that it is important to retain the objective of *Grewal*, that is, that justice be done.

[15] The Supreme Court, in *Construction Gilles Paquette Ltée v. Entreprises Végo Ltée*, [1997] 2 S.C.R. 299 at para. 21, stated that "[the] party must not be deprived of his rights on account of an error of counsel where it is possible to rectify the consequences of such error without injustice to the opposing party". Therefore, even if it is accepted that the proceedings before the Superior Court and the Court of Appeal resulted from an error by counsel for the moving party, I do not believe that this is a determinative factor in this case.

[16] Rather, I am of the opinion that the interests of justice should prevail here.

Prejudice

[17] A fact that favours the application, or at least does not militate against it, is that no prejudice to the respondent results from the grant of the extension (*Grewal,* page 279). Here, the

respondent’s arguments have not satisfied me that he would be prejudiced should the motion be granted.

ORDER

THE COURT ORDERS that the motion for an extension of time be granted. The moving party shall serve and file his application for judicial review within 30 days of the date of this order, without costs.

"Michel Beaudry"
Judge

Certified true translation
Tu-Quynh Trinh

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	09-T-60
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APPEARANCES:

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