Federal Court of Appeal | Cour d'appel fédérale

Court File No. A-1034-96

OTTAWA, ONTARIO, THIS 9TH DAY OF APRIL 1997

CORAM: THE HONOURABLE MR. JUSTICE HUGESSEN
THE HONOURABLE MR. JUSTICE STRAYER
THE HONOURABLE MR. JUSTICE MacGUIGAN

BETWEEN:

THE COUNCIL OF CANADIANS and JAMES MCGILLIVRAY

Appellants
(Applicants)

- and

DIRECTOR OF INVESTIGATION AND RESEARCH (Competition Act) and HOLLINGER INC.

Respondent

JUDGMENT

The appeal is dismissed with costs fixed in the lump sum of $1000.00 to Hollinger Inc. The order of the Trial Division is corrected by adding thereto:

> "The application for judicial review of James McGillivray is dismissed."

James K. Hugessen

Cour d'appel fédérale | Federal Court of Appeal

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CORAM: HUGESSEN J.A.
STRAYER J.A.
MacGUIGAN J.A.

BETWEEN:

THE COUNCIL OF CANADIANS and JAMES McGILLIVRAY

Appellants
(Applicants)

- and -

DIRECTOR OF INVESTIGATION AND RESEARCH (*Competition Act*) and HOLLINGER INC.

Respondents

Heard at Ottawa, Ontario, Wednesday, April 9, 1997.

Judgment rendered from the Bench, April 9, 1997.

REASONS FOR JUDGMENT OF THE COURT
DELIVERED BY: HUGESSEN J.A.

Cour d'appel fédérale | Federal Court of Appeal

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Ottawa, Ontario,
Wednesday, April 9, 1997)

HUGESSEN J.A.

We are not prepared to intervene in the exercise of discretion by the motions judge in refusing to grant an extension of time to the appellant The Council of Canadians (Council) and in holding that the appellant McGillivray's application for judicial review was out of time.

In the first place, we do not think that the judge considered an irrelevant factor when he asked himself if the Council had formed an intention to apply for judicial review within the time fixed by law. There is no immutable

check list of matters that must be reviewed whenever the grant of an extension of time is being considered; the most that can be said is that the Court will generally look at whether there is an adequate explanation for the failure to act timely and whether the applicant has an arguable case. The question that the judge put to himself was certainly relevant to the first of those matters.

In the second place, we are also not satisfied that the judge's alleged failure to take account of other considerations said to be relevant could have the effect of vitiating his decision. The case principally relied on by the appellants is this Court's decision in *Grewal v. M.E.I.*[1]. In that case, Thurlow C.J. said:

> Among the matters to be taken into account in resolving the first of these questions is whether the applicant intended within the 10-day period to bring the application and had that intention continuously thereafter. Any abandonment of that intention, any laxity or failure of the applicant to pursue it as diligently as could reasonably be expected of him could but militate strongly against his case for an extension. The length of the period for which an extension is required and whether any and what prejudice to an opposing party will result from an extension being granted are also relevant. But in the end, whether or not the explanation justifies the necessary extension must depend on the facts of the particular case and it would, in my opinion, be wrong to attempt to lay down rules which would fetter a discretionary power which Parliament has not fettered.
>
> [at pages 277-278]

In our view, that quotation may be compendiously summarized as a requirement that an applicant for an extension of time must display due diligence. Manifestly, the judge in the present case was not satisfied that the Council had met that test and we agree: it had knowledge of the impugned decision on 27 May 1996; it had a legal opinion as to how to attack it no later than July 19, 1996; it only decided to launch proceedings on September 6 and ultimately did so on September 18.

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[1] [1985] 2 F.C. 263

It is true that the judge failed to consider the merits of the Council's proposed application. In our view, he was not required to do so given his conclusion that the delay was not satisfactorily explained. It is, of course, the case that in some very limited and unusual circumstances, of which the *Grewal* case is an example, the overwhelming, indeed unanswerable, nature of the applicant's position in law will be a relevant factor in the consideration of the matter of due diligence. In this case, whatever else may be said about the merits of the Council's attack on the impugned decision, it is clearly not one which is beyond all possibility of dispute.

As regards the appellant McGillivray, we agree with the motions judge that his application for judicial review was out of time and had to be dismissed for that reason. [We note that through an oversight the judge failed to enter a formal order to that effect and we shall correct that in our judgment]. McGillivray did not apply to the Trial Division for an extension of time; assuming that the request for an extension which has now been incorporated into the appellants' factum were regularly before us, it is unsupported by any material and should be dismissed.

The appeal will be dismissed.

J.A.