Date: 20080717

Docket: A-71-08

Citation: 2008 FCA 242

Present: **SHARLOW J.A.**

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Applicant

and

MARY LACEY

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on July 17, 2008.

REASONS FOR ORDER BY: SHARLOW J.A.

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REASONS FOR ORDER

SHARLOW J.A.

[1] The applicant wishes to challenge a decision of the Umpire in CUB 69381, which was issued on November 13, 2007. The application for judicial review was filed on February 20, 2008, pursuant to an order of this Court dated February 13, 2008 granting an extension of time. The extension was required because the applicant had misunderstood the rules applicable to determining the limitation period as determined by the combined operation of sections 18.1(2) and 28(2) of the *Federal Courts Act*, R.S.C. 1985, c. F-7. The applicant now moves for an extension of time for filing the applicant's record. The respondent has not responded to the motion.

[2] An order granting or refusing an extension of time is discretionary. The applicable principles are summarized in the leading case, *Canada (Attorney General) v. Hennelly* (1999), 244 N.R. 299, [1999] F.C.J. No. 846 (QL) (F.C.A.). The underlying consideration is that justice must be done between the parties. The factors to be considered are:

(a) whether there has been a continuing intention to pursue the appeal;

(b) whether the appeal has some merit;

(c) whether any prejudice arises from the delay; and

(d) whether there is a reasonable explanation for the delay.

[3] In this case, the applicant has demonstrated a continuing intention to pursue the appeal, and the delay has been explained. There is no basis for concluding that the respondent would be prejudiced by the delay.

[4] The issue in this case relates solely to the second factor. I am satisfied that the grounds for the application raise an arguable point. However, I am not satisfied that the application, as presently constituted, would provide this Court with any foundation for considering the merits of the application. I reach that conclusion because the applicant is apparently proposing to argue this appeal solely on the basis of a record that contains no applicant's affidavit.

[5] In an application for judicial review, the function of the applicant's affidavit is to provide the Court with sworn evidence authenticating the documents upon which the applicant's argument depends. The applicant in this case apparently believes that this function will be served by the

certified record transmitted to the Registry pursuant to Rule 318 of the *Federal Courts Rules*, SOR/98-106. However, that belief is not well founded.

[6] There is no provision of the *Federal Courts Rules* that permits the certified record, as such, to be included in the applicant's record or the respondent's record. Rather, Rule 309(2)(*d*) requires the applicant's record to include "each supporting affidavit and documentary exhibit", a reference to the supporting affidavits and documentary exhibits that the applicant is required by Rule 306 to file. (The corresponding provisions applicable to the respondent are Rules 310(2)(*b*) and Rule 307.)

[7] The correct way to include the certified record in the applicant's record is to append it as an exhibit to an affidavit filed under Rule 306. (Similarly, a respondent may include the certified record as an exhibit to an affidavit filed under Rule 307.) Of course, in many cases it will not be necessary to append the entire record, only the documents upon which the applicant or the respondent, as the case may be, intends to rely.

[8] In this case, the applicant proposes to file an applicant's record that contains (1) the notice of application for judicial review, (2) the decision sought to be reviewed, (3) the "certified copy of the appeal docket" (which I take to mean the certified record provided by the Office of the Umpire pursuant to Rule 318), (4) the applicant's memorandum of fact and law, and (5) a list of authorities.

[9] As explained above, the third item is not part of the permitted contents of the applicant's record because it is not appended as an exhibit to an affidavit submitted by the applicant pursuant to

Rule 306. Therefore, if the applicant is permitted to file the application record in its present form, the applicant's argument at the hearing of the application would have no factual foundation. For that reason, it would be unlikely to succeed.

[10] It is possible that the panel hearing the application would grant leave to permit the applicant to refer to the parts of the applicant's record that were improperly included. However, it cannot be certain at this stage that leave would be granted.

[11] For these reasons, the applicant's motion for an extension of time to file the applicant's record will be dismissed.

"K. Sharlow"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-71-08
STYLE OF CAUSE:	The Attorney General of Canada v. Mary Lacey

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	SHARLOW J.A.
DATED:	July 17, 2008

WRITTEN REPRESENTATIONS BY:

Darlene Lamey	FOR THE APPLICANT
Katherine O'Brien	FOR THE RESPONDENT

SOLICITORS OF RECORD:

John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE APPLICANT
O'Brien & Associates St. John's, NL	FOR THE RESPONDENT