

Federal Court of Appeal



Cour d'appel fédérale

Date: 20240513

**Dockets: 24-A-8
24-A-9**

Citation: 2024 FCA 93

Present: LEBLANC J.A.

Docket: 24-A-8

BETWEEN:

MIGUEL ANGEL MONTANO GUTIERREZ

Applicant

and

HIS MAJESTY THE KING

Respondent

Docket: 24-A-9

AND BETWEEN:

MIGUEL ANGEL MONTANO GUTIERREZ

Applicant

and

HIS MAJESTY THE KING

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on May 13, 2024.

REASONS FOR ORDER BY:

LEBLANC J.A.

Federal Court of Appeal



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REASONS FOR ORDER

LEBLANC J.A.

[1] The applicant seeks, through two distinct motions, an extension of time to appeal two Orders made by the Federal Court in file number T-1731-22.

[2] The first Order is an interlocutory Order (the Interlocutory Order) rendered on June 2, 2023 in the context of the status review of the applicant's underlying application for judicial review in the Federal Court (the Underlying Application) whereby he is challenging decisions of the Minister of National Revenue denying him certain benefits he claims to be entitled to. The Interlocutory Order permitted the Underlying Application to continue under a timetable that differed from the one proposed by the applicant. The proposed appeal of the Interlocutory Order has been assigned in this Court as file number 24-A-9.

[3] The second Order is an Order rendered on August 10, 2023, which dismissed the Underlying Application on the ground that the applicant had failed to comply with the Interlocutory Order and that it was not in the interests of justice to grant a further extension of time to allow him to perfect his application record (the Final Order). The proposed appeal of the Final Order has been assigned in this Court as file number 24-A-8.

[4] The authority to extend the time to bring an appeal before this Court is grounded in paragraph 27(2) of the *Federal Courts Act*, R.S.C., 1985, c. F-7 (the Act). The test for obtaining such an extension is well known. It requires the Court to consider whether: (i) the proposed appellant had a continuing intention to pursue the appeal; (ii) there is some merit to the proposed appeal; (iii) the proposed respondent has been prejudiced by the delay; and (iv) the proposed appellant has a reasonable explanation for the delay (*Canada (Attorney General) v. Hennelly*,

167 F.T.R. 158 (FCA)). It is well established as well that these factors (the *Hennelly* Factors) are intended to assist the Court in determining whether an extension of time is warranted in a given set of circumstances, none of them being determinative (*Alberta v. Canada*, 2018 FCA 83 at para. 45). As stated in *Canada (Attorney General) v. Larkman*, 2012 FCA 204 (*Larkman*), the overriding consideration in such matters “is that the interests of justice be served” (*Larkman* at para. 62).

[5] Here, the applicant makes essentially the same submissions in both instances. They can be summarized as follows: ongoing health and financial problems prevented him from acting in a timely fashion; nonetheless, the notice of appeal in each instance was filed within the prescribed time but unethical behaviour on the part of the Court’s Registry illegally delayed or withheld the proposed appeals.

[6] Because of the nature of the impugned Orders and the procedural background to each proposed appeal, the present motions for an extension of time requires a separate – and different – response.

A. *Court File 24-A-8*

[7] According to the record in this Court, the applicant did submit for filing a notice of appeal against the Final Order on September 5, 2023, that is, within the prescribed time. However, it could not be accepted for filing because the applicant did not pay the associated filing fee, as he was required to do pursuant to Rule 19 of the *Federal Courts Rules*, SOR/98-106 (the Rules). The notice of appeal was returned to him pending a decision on the proposed motion

for waiver of these fees. Such motion was filed by the applicant but rejected by Order of this Court dated December 19, 2023 (the December Order). According to the December Order, the notice of appeal previously submitted for filing was to be accepted by the Registry provided the applicant paid the filing fees no later than January 8, 2024. In such a scenario, the notice of appeal would have an effective filing date “on or after the day the filing fee is paid, but in no event later than January 9, 2024”.

[8] Contrary to what was the case for the proposed appeal of the Interlocutory Order, there was nothing in the December Order subjecting the filing of the notice of appeal to a successful motion for an extension of time.

[9] On January 23, 2024, the applicant submitted a new motion for a waiver of fees. That motion was granted by Order of this Court dated March 1, 2024 (the March Order) based on new evidence submitted by the applicant concerning his financial and health situations. However, the March Order provided that if the applicant wished to pursue an appeal of the Final Order, he would have to seek an extension of time by March 24, 2024. This is what the applicant did by filing the present motion within that timeline.

[10] There is certainly no evidence on record – and I want this to be clear – of any impropriety on the part of the Court’s Registry in handling both proposed appeals. The applicant’s allegations in that regard are simply unfounded. According to Rules 71, 71.1 and 72 of the Rules, documents that are sent to the Registry for the purpose of filing are first submitted for filing. One of the conditions for filing is the payment of the associated fee (Rule 71.1(1)(b)). A document

submitted for filing is either accepted for filing or referred to a judge or an associate-judge for directions when the Court's Administrator is of the opinion that the document is not in the form required by the Rules or that other conditions precedent to its filing have not been fulfilled. The non-payment of the associated fee would be one of these conditions. In other words, submitting a document for filing and the actual filing of the document are two different things under the Rules. Here, the Registry only did what the Rules required them to do.

[11] That said, I am of the view that an extension of time is warranted in light of the particular circumstances that led to the filing of the present motion insofar as it relates to the proposed appeal of the Final Order. The applicant has certainly shown a continuing intention to pursue this appeal and there is no evidence that the proposed respondent has suffered prejudice from the delay. As for the justification for the delay, one could say that it only became clear on March 1, 2024, that an extension of time would be required to enable the applicant to pursue this appeal. There is, therefore, in my view, a reasonable explanation for the delay, especially when one considers that the applicant submitted a notice of appeal for filing within the prescribed time. This is so as well, when one considers that the December Order made no reference to the requirement to seek an extension of time in order to enable the applicant to pursue his appeal of the Final Order; quite the opposite.

[12] The proposed respondent insists that the proposed appeal of the Final Order is devoid of any merit. As the Court stated in *Larkman*, quoting from *Grewal v. Canada (Minister of Employment & Immigration)*, [1985] 2 F.C. 263 (C.A.), "a compelling explanation for the delay may lead to a positive response even if the case against the judgment appears weak" (*Larkman* at para. 62).

[13] This is the case here. In view of the particular circumstances outlined above, I believe that the interests of justice would be better served by permitting the applicant to pursue his appeal of the Final Order.

B. *Court File 24-A-9*

[14] I am unable to reach the same conclusion with respect to the proposed appeal of the Interlocutory Order. The proposed respondent claims that the doctrine of issue estoppel precludes the applicant from re-litigating this issue as the March Order rejected a similar request on the ground that the applicant's record did not address the *Hennelly* Factors "to the extent necessary to show that the interests of justice will be served by granting the extension".

[15] However, I do not need to decide that argument because even considering the more detailed submissions offered by the applicant on this issue in the present motion, I conclude that the interests of justice will not be served by granting the extension with respect to the Interlocutory Order.

[16] Contrary to what is the case of the notice of appeal respecting the Final Order, the notice of appeal regarding the Interlocutory Order was not submitted for filing within the prescribed time. According to paragraph 27(2)(a) of the Act, the notice of appeal respecting the Interlocutory Order had to be filed within 10 days after the pronouncement of the Order, that is no later than June 12, 2023. The applicant only submitted his notice of appeal for filing on August 30, 2023, which is more than two and a half months past that deadline. Contrary to the applicant's assertion, the "July/August" rule applicable to the computation of the appeal period

for judgments other than interlocutory decisions is irrelevant here for two reasons. First, pursuant to paragraph 27(2) of the Act, it does not apply to interlocutory decisions. Second, even if applicable to such decisions, it would not have assisted the applicant because the delay for appealing the Interlocutory Order expired in June.

[17] Therefore, in such context, I am not satisfied that the applicant has shown a continuing intention to pursue the appeal of the Interlocutory Order, nor that he has provided a reasonable explanation for the delay between June 12 and August 30, 2023. Neither has he shown that there is any merit to his proposed appeal of the Interlocutory Order which permitted him to pursue the Underlying Application. This proposed appeal has all the looks of an afterthought, prompted by the Final Order denying the applicant's requests at the time, including changes to the procedural timetable set out in the Interlocutory Order.

[18] Finally, Rule 352, relied on by the applicant "if necessary", is irrelevant as it applies to appeals that can only be commenced with leave of the Court, which is not the case here. Rule 352 leave applications are not to be conflated with motions for an extension of time. They are not the same.

[19] For all these reasons, the motion for an extension of time respecting the proposed appeal of the Interlocutory Order will be dismissed, whereas the one respecting the proposed appeal of the Final Order will be granted.

[20] I note that the March Order waived the fees payable for the filing of a notice of appeal of the Final Order, provided an extension of time was granted, which is the case now. The March Order also ordered that the notice of appeal that was submitted for filing by the applicant be returned to him. In these circumstances, the applicant will have ten (10) days from the date of the Order to be released simultaneously with these reasons in file number 24-A-8, that is until, but no later than, May 23, 2024, to submit his notice of appeal for filing. This will be reflected in said Order.

[21] Neither party sought their costs. None will be awarded.

[22] A copy of these reasons for order will be filed in file number 24-A-9 as reasons therein.

"René LeBlanc"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: 24-A-8

STYLE OF CAUSE: MIGUEL ANGEL MONTANO
GUTIERREZ v. HIS MAJESTY
THE KING

AND DOCKET: 24-A-9

STYLE OF CAUSE: MIGUEL ANGEL MONTANO
GUTIERREZ v. HIS MAJESTY
THE KING

**MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES
REASONS FOR ORDER BY:** LEBLANC J.A.

DATED: MAY 13, 2024

APPEARANCES:

Miguel Angel Montano Gutierrez FOR THE APPLICANT
(On his own behalf)

Jonathan Cooper FOR THE RESPONDENT

SOLICITORS OF RECORD:

Shalene Curtis-Micallef FOR THE RESPONDENT
Deputy Attorney General of Canada