Federal Court Cour fédérale

Date: 20241106

Docket: T-1537-21

Citation: 2024 FC 1768

Ottawa, Ontario, November 6, 2024

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

STEFAN PETRE AND SPSDD INC. AND LOADWINNER INC.

Applicants

and

ROYAL CANADIAN MOUNTED POLICE AND CANADA REVENUE AGENCY

Respondents

ORDER AND REASONS

I. Overview

[1] The Applicants, Stefan Petre, SPDD Inc., and Loadwinner Inc., seek an order to adduce fresh evidence and set aside a negative reconsideration decision dated February 26, 2024 (the "Reconsideration Decision"), in which Associate Judge Horne (the "Associate Judge") upheld the dismissal of their application for judicial review on the basis of delay (the "Dismissal Order"). In the alternative, the Applicants seek an extension of time to appeal the Dismissal

Order itself. The Applicants make this motion pursuant to subsection 51(1) of the *Federal Courts Rules*, SOR/98-106 (the "Rules").

[2] The Applicants submit that their fresh evidence satisfies the tests in *David Suzuki Foundation v Canada (Health)*, 2018 FC 379 ("*Suzuki*") and *Palmer v The Queen*, [1980] 1 SCR 759, 106 DLR (3d) 212 ("*Palmer*") for the admission of new evidence on rule 51 appeals. The Applicants submit that the Associate Judge erred in law by not considering section 399 of the Rules in its entirety in the Reconsideration Decision. In the alternative, the Applicants submit that the Associate Judge committed a palpable and overriding error by rendering the Dismissal Order in an evidentiary vacuum.

[3] I disagree. The Applicants' fresh evidence does not meet the tests in *Suzuki* and *Palmer*. I find no error in the Reconsideration Decision or the Dismissal Order. The Applicants' motion is dismissed.

II. **Facts**

A. *Background*

[4] The Applicants provide ground shipping services in Ontario and the United States. On October 28, 2022, the Applicants filed an application for judicial review concerning the seizure of a truck trailer by the RCMP.

[5] On October 5, 2023, the Associate Judge issued a direction setting a timetable for the proceeding. The timetable was proposed by the Applicants and stipulated that "[a]n applicant's record shall be served and filed by December 1, 2023." The Applicants missed the December 1, 2023 deadline.

[6] The Associate Judge directed the parties "to write to the Court by no later than December 7, 2023 with a status update." The Applicants did not provide a status update.

[7] The Associate Judge then issued a notice of status review stating "the Applicants are required to serve and file…representations stating the reasons why the proceeding should not be dismissed for delay." The deadline for the Applicants' representations was December 18, 2023. The Applicants did not respond to the notice of status review.

[8] On January 12, 2024, the Associate Judge dismissed the application for delay (the "Dismissal Order").

[9] On January 22, 2024, the Applicants filed a reconsideration motion pursuant to section 397 of the Rules. The Applicants stated that they missed the deadlines for the application record, status update, and status review because their counsel, Mr. Marwan Osseiran (the "Applicants' Counsel"), had been on medical and bereavement leave.

[10] On February 26, 2024, the Associate Judge dismissed the motion for reconsideration (the "Reconsideration Decision").

B. *Decision under Review*

[11] The Dismissal Order is short and summary in nature. In the Dismissal Order, the Associate Judge states that the purpose of a status review is for the applicants to explain a delay and propose steps to move the matter forward (*Canada v Stoney Band*, 2005 FCA 15 at para 37). The Associate Judge then simply notes that the Applicants failed to respond to the notice of status review and that the application was therefore dismissed.

[12] In contrast, the Reconsideration Decision contains a detailed explanation of the rationale for upholding the Dismissal Order. In the Reconsideration Decision, the Associate Judge states that the Dismissal Order exhausted the Court's jurisdiction over the underlying application for judicial review (*Janssen Inc v Abbvie Corporation*, 2014 FCA 176 at para 35; *Chandler v Alberta Association of Architects*, 1989 CanLII 41 (SCC) at 860). The Associate Judge identifies sections 397 and 399 of the Rules as exceptions to this general rule.

[13] The Associate Judge determined that section 397 of the Rules did not apply. Section 397 is applicable where "the Court, not a party, has overlooked or accidentally omitted" an issue (*Abbud v Canada (Citizenship and Immigration)*, 2007 FC 223 at para 10). Section 397 does not apply where an applicant seeks to validate, complete, or restate a plea (*Bell Helicopter Textron Canada Limitée v Eurocopter*, 2013 FCA 261 at para 15) or if "evidence has been disregarded or misunderstood" (*Kobek v Canada (Attorney General)*, 2009 FCA 220 at para 6). Since the Applicants "[did] not assert that the Court accidentally overlooked or omitted something," but

rather that the Applicants' Counsel had encountered "unsurmountable personal circumstances" requiring him to go on leave, relief pursuant to subsection 397 of the Rules was unavailable.

[14] The Associate Judge further found that section 399 of the Rules did not apply. The Associate Judge first noted that the Applicants did not rely on section 399 in their reconsideration motion. He nonetheless determined that relief would not be available under this rule. Section 399 of the Rules applies where "a matter…arose or was discovered subsequent to the making of the order." Since the Applicants did not demonstrate that they "were unable to respond…before the deadline…or before the [Dismissal Order] was made almost a month later," the Associate Judge found that subsection 399 did not apply.

III. **Issues and Standards of Review**

[15] The issues raised in this appeal are as follows:

1. Whether the Applicants' fresh evidence should be admitted;

2. Whether the Associate Judge erred in his application of section 399 of the Rules in the Reconsideration Decision, such that the Reconsideration Decision should be overturned and the Dismissal Order set aside; and

3. In the alternative, whether the Applicants should be granted an extension of time to appeal the Dismissal Order and whether the appeal should be granted, such that the Dismissal Order is set aside.

A. *Standards of Review*

[16] Pursuant to section 51 of the Rules, an order of an Associate Judge may be appealed by a motion to a judge of the Federal Court. The appellate standards of review are described in *Housen v Nikolaisen*, 2002 SCC 33 ("*Housen*"). Questions of extricable errors of law are reviewed on a standard of correctness, whereas questions of fact or mixed fact and law are reviewed on a standard of palpable and overriding error (*Housen* at paras 10, 33, 36).

[17] Discretionary orders made by Associate Judges warrant intervention if they contain extricable errors of law or palpable and overriding errors with regards to a question of fact or mixed fact and law (*Hospira Healthcare Corporation v Kennedy Institute of Rheumatology)*, 2016 FCA 215 at para 64).

[18] Correctness is a non-deferential standard of review. It allows a Court to substitute its own views for those of the original decision-maker (*Canada (Minister of Citizenship and Immigration v Vavilov*, 2019 SCC 65 at para 54). Palpable and overriding error, on the other hand, is a highly deferential standard of review (*Mahjoub v Canada (Citizenship and Immigration)*, 2017 FCA 157 at para 61). Justice Stratas of the Federal Court of Appeal held that "'palpable' means an error that is obvious. 'Overriding' means an error that goes to the very core of the outcome of the case. When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall" (*Canada v South Yukon Forest Corporation*, 2012 FCA 165 at para 46).

IV. **Analysis**

A. *The Applicants' Fresh Evidence is Not Admitted*

[19] In support of this motion, the Applicants filed fresh affidavit evidence by Stefan Petre and the Applicants' Counsel. The Applicants submit that these affidavits satisfy the tests in *Suzuki* and *Palmer* for the admission of new evidence on rule 51 appeals.

[20] The Respondents disagree, submitting that "the applicants did not exercise due diligence. The applicants and their counsel were aware of the Proposed Timetable and deadline to serve and file their record, knew or ought to have known that not meeting Court Directions had consequences, and much of the evidence in the Fresh Evidence Brief existed before" the reconsideration motion.

[21] I agree with the Respondents.

[22] I first note that the admissibility of affidavits is a question of law and is reviewed for its correctness (*Canada (Attorney General) v Iris Technologies Inc*, 2021 FCA 223 at para 20).

[23] The four-part test for the admission of new evidence is set out in *Suzuki* and *Palmer*. Per *Suzuki*, "[n]ew evidence may be admissible, "exceptionally" where: it could not have been made available earlier; it will serve the interests of justice; it will assist the Court; and, it will not seriously prejudice the other side" (at para 37; see also *Palmer* at 775). As noted by the Federal

Court of Appeal in *Canada v Canada (Canadian Council for Refugees)*, 2008 FCA 171 ("*CCFR*"), "[e]vidence which does not satisfy these three tests may still be admitted "if the interests of justice require it"" (at para 8, citing *Humanist Assn of Toronto v Canada*, 2002 FCA 322 at para 4 ("*Humanist Assn*")).

[24] The determinative issue in this proceeding is the first step of the *Suzuki* and *Palmer* tests, namely, whether the new evidence "could not have been made available earlier" (*Suzuki* at para 37) or "if, by due diligence, it could have been adduced at trial" (*Palmer* at 775). I find that the Applicants do not satisfy this requirement.

[25] The parties do not dispute that the fresh evidence was available prior to the Reconsideration Decision. Rather, the Applicants submit that they were not aware of the December 1 filing deadline, that their fresh evidence could not, by due diligence, have been adduced earlier, and that, in the alternative, the interests of justice require the admission of their fresh evidence. Respectfully, I disagree.

[26] The Applicants' submissions that they were unaware of the December 1 filing deadline is contradicted by the record. On this point, I find the Applicants are not being frank with the Court. The Applicants suggested the December 1 deadline. This deadline appears in the Applicants' proposed timetable, along with a certification that the Applicants will be "ready to proceed" in accordance with the deadlines proposed. I therefore find that the filing deadline was known or ought to have been known by the Applicants before the Applicants' Counsel went on leave.

[27] With respect to the new affidavit of the Stefan Petre, the Applicants do not explain why this affidavit could not, by due diligence, have been adduced earlier. The Court will not supply an explanation on the Applicants' behalf.

[28] As for the new affidavit of the Applicants' Counsel, I cannot accept the Applicants' submission that their counsel was "prevented from adducing" this "vital evidence on the reconsideration motion because he was also counsel on the motion." As the Respondents rightly point out, the Applicants' Counsel was the source of much of the information in the affidavit of NM, which was introduced at the reconsideration motion. In fact, NM notes several times in their affidavit that "[the Applicants' Counsel] advised [NM]" of the information reported in their affidavit. It follows that the details in the new affidavit of the Applicants' Counsel could have been included in the affidavit of NM.

[29] Moreover, I agree with the Respondents that this was not a situation where the Applicants could not, by due diligence, have alerted the Court that their counsel was on leave. In fact, in their reply submissions on the reconsideration motion, the Applicants state that their counsel notified the Respondents' counsel that they had experienced a medical emergency before December 7, 2023. The Applicants do not indicate that any such message was received by the Court, either in December 2023 or at any time prior to the Dismissal Order.

[30] Consequently, I do not find that "the interests of justice manifestly require the admission of the proposed fresh evidence," as the Applicants contend (*R v Tayo Tompouba*, 2024 SCC 16 at para 92; *CCFR* at para 8, citing *Humanist Assn* at para 4). This principle was largely

developed in the criminal law context and is not entirely applicable in the civil matter at issue here. As helpfully noted by the Respondents' counsel, the higher threshold for admitting new evidence in civil cases is affirmed by the Supreme Court of Canada in *Palmer*, which states that "the rules applicable to the introduction of new evidence…in civil cases should not be applied with the same force in criminal matters" since "it was not in the best interests of justice that evidence should be so admitted as a matter of course" (at 775). I find it is not a manifest requirement for this Court to admit the Applicants' fresh evidence in this matter simply because the foreseeable consequences of failing to bring this evidence in the past are now coming into effect.

[31] For these reasons, I find that the Applicants' motion to admit their fresh evidence is without merit. The fresh evidence of the Appellant does not meet the tests in *Suzuki* or *Palmer* for the admission of new evidence in rule 51 appeals. Admitting the fresh evidence is not a manifest requirement of justice. I do not admit the Applicants' fresh evidence on this motion.

B. *The Associate Judge Did not Err in his Application of Section 399 of the Rules in the Reconsideration Decision.*

[32] The Applicants submit that the Associate Judge committed a legal error in the Reconsideration Decision by failing to properly apply section 399 of the Rules. According to the Applicants, the Associate Judge misinterpreted subsection 399(2), which concerns matters that arise or are discovered subsequent to the making of an order, and entirely failed to apply subsection 399(1), which grants the Court discretion to reconsider an order made "in the absence of a party who failed to appear by accident or mistake."

[33] The Respondents submit that the Associate Judge did not err with respect to section 399 of the Rules. The Respondents submit that the Applicants' submissions on this issue are moot, as the Applicants did not rely on section 399 in the reconsideration motion. If this Court determines otherwise, the Respondents submit that the Applicants cannot succeed pursuant to subsections 399(1) or 399(2) of the Rules, as the Applicants' Counsel did not go on medical and bereavement leave by accident or mistake and the passing of the deadline for the application record does not constitute a new matter that arose after the Dismissal Order.

[34] I agree with the Respondents.

[35] Firstly, I find that the issue of the Associate Judge's interpretation of section 399 turns on whether his "discretion was "infected or tainted" by some misunderstanding of the law or legal principle" (*Mahjoub v Canada (Citizenship and Immigration)*, 2017 FCA 157 at para 74). This attracts the standard of correctness (*Worldspan Marine Inc v Sargeant III*, 2021 FCA 130 at para 48).

[36] Secondly, I agree that the Applicants' submissions on this issue are moot. The Applicants brought the reconsideration motion pursuant to section 397 of the Rules. The Associate Judge's comments on section 399 are therefore *obiter*. Since "an appeal lies from judgment and not the reasons for judgment," the Applicants' submissions on section 399 of the Rules must fail (*Saskatchewan (Energy and Resources) v Areva Resources Canada Inc*, 2013 SKCA 79 at para 107).

[37] Thirdly, I find that the Applicants mischaracterize both the evidence on the record and the meaning of section 399 of the Rules.

[38] The Applicants cannot succeed pursuant to subsection 399(1). Although the Applicants' Counsel certainly did not choose to experience a medical emergency or personal loss, it does not follow that all his subsequent actions were accidents or mistakes. He did not "accidentally" or "mistakenly" go on medical and bereavement leave. I agree with the Respondents that this does not constitute grounds for reconsideration pursuant to subsection 399(1) of the Rules.

[39] In any event, I find there is no *prima facie* case against the Dismissal Order. This alone is sufficient to dispose of the Applicants' submissions pursuant to subsection 399(1). The Applicants submit that a *prima facie* case exists, pointing to their active engagement in the proceeding prior to October 2023 and asserting that "missing the status review was a singular, anomalous mistake."

[40] However, the conduct at issue does not begin or end with missing the status review. The Applicants missed the filing deadline for their application record, failed to provide a status update, missed the notice of status review, and did not read or respond to messages from the Court for several weeks, despite the passing of several deadlines in the Applicants' proposed timetable. Taking into account this broader context, I find that the Applicants have not established a *prima facie* case against the Dismissal Order.

[41] Similarly, I find no error in the Associate Judge's interpretation of subsection 399(2) of the Rules. In their submissions for the present proceeding, the Applicants fail to identify any new matters that arose after the Dismissal Order. The Applicants refer to an email sent by the Applicants' Counsel on January 8, 2024 – four days prior to the Dismissal Order – in which he attempted to respond to the notice of status review. However, this email was explicitly considered by the Associate Judge in the Reconsideration Decision. The Associate Judge rightly observed that the notice from the Court stated in large typeface that "anything sent to this email-address, other than confirmation of receipt of a decision, will not be considered as having been received by the Registry" and that the Applicants neither brought this email as evidence nor filed proof of service. I do not find this to be convincing evidence of a *prima facie* case against the Dismissal Order.

[42] For these reasons, I find that the Associate Judge did not err in his treatment of section 399 of the Rules in the Reconsideration Decision. The Applicants did not rely on section 399 in their reconsideration motion and their submissions on this issue are therefore moot. In any event, the relief sought by the Applicants would not be granted, as the Applicants fail to establish an accident or mistake or any new matter that arose after the Dismissal Order. The appeal of the Reconsideration Decision is dismissed.

C. *An Extension of Time to Appeal the Dismissal Order is Not Granted.*

[43] If an appeal of the Reconsideration Decision is not granted, the Applicants seek an extension of time to appeal the Dismissal Order. The Applicants submit that the test for an

extension of time is met and the Dismissal Order ought to be overturned because it was rendered in an evidentiary vacuum and is contrary to the interests of justice.

[44] The Respondents submit that an appeal of the Dismissal Order should not be granted, as an appeal of the Dismissal Order is time-barred and the Applicants do not meet the test for an extension of time. If the Court determines otherwise, the Respondents submit that the Dismissal Order contains no reviewable error and therefore ought not to be reversed.

[45] I agree with the Respondents.

[46] I first note that the issue of the Dismissal Order concerns the exercise of the Associate Judge's discretion and his application of the legal standards to the facts as found. This attracts the standard of palpable and overriding error (*Fraser Point Holdings Ltd v Vision Marine Technologies Inc*, 2023 FC 738 at para 24).

[47] Turning to the issue of an extension of time, I do not agree with the Applicants that an extension is warranted. As stated at paragraph 3 of *Canada (Attorney General) v Hennelly*, 1999 CanLII 8190 (FCA) ("*Hennelly*")):

> The proper test [for an extension of time] is whether the applicant has demonstrated
>
> 1. a continuing intention to pursue his or her application;
>
> 2. that the application has some merit;
>
> 3. that no prejudice to the respondent arises from the delay; and

4. that a reasonable explanation for the delay exists.

[48] In determining whether to grant an extension of time, the "overriding consideration is "that the interests of justice be served" (*Attorney General (Canada) v Larkman*, 2012 FCA 204 at para 62; see also *Whitefish Lake First Nation v Grey*, 2019 FCA 275 at para 3).

[49] In the present proceeding, the determinative step in the *Hennelly* test is the reasonable explanation for the delay. I agree with the Respondents that the Applicants have not provided an adequate explanation.

[50] The Applicants filed this appeal more than six weeks after the deadline to do so had passed (Rules, s 51(2)). To explain this delay, the Applicants state that their counsel believed that a motion for reconsideration pursuant to section 397 of the Rules would have "address[ed] the [Applicants'] concerns and vindicate[d] their rights," based on information from the Registry and the Associate Justice. The Applicants assert that, once the Reconsideration Decision was issued "and it became clear that an appeal was necessary, the [Applicants] acted promptly" to bring the present motion.

[51] I first note that the Applicants' submissions about their reliance on information provided by the Registry and the Associate Justice is absurd and unsubstantiated. As aptly stated by the Respondents' counsel, this assertion is not only fundamentally incompatible with the role of the Court, but also contradicted by the Reconsideration Decision, in which the Associate Judge denied the very relief that, according to the Applicants, he recommended to their counsel.

[52] Furthermore, I agree with the Respondents that the error of counsel is not, in this case, a valid ground of appeal. As in *Ismael v Canada (Citizenship and Immigration),* 2018 FC 1191, "Counsel cannot rely on his own discovery of his failure to file the Application Record on time as a "new matter" to excuse his error….the jurisprudence has clearly established that ignorance of the law or the process is not an excuse" (at para 33).

[53] Given the Applicants' submission that this motion was filed late due to an error of their counsel, I agree with the Respondents that it is problematic for the Applicants' Counsel to still be retained on this matter. It is illogical for the Applicants to choose to continue to be represented by an individual who, in their submission, caused them to miss the deadline for bringing this motion by six weeks. The Applicants' submissions do not accord with their own conduct, and fall short of establishing a reasonable explanation for the delay.

[54] Even if an extension were granted, I find that the Dismissal Order would be affirmed on appeal. The Applicants submit that the Associate Judge rendered the Dismissal Order in an evidentiary vacuum. I disagree.

[55] I find no error in the Associate Judge "[taking] the [Applicants'] non-response to the status review to be completely determinative." He did so because the Applicants' non-response was indeed determinative. In status reviews, the onus is on the applicant to show cause why a proceeding should not be dismissed for delay. The Associate Judge cannot be expected to speculate as to why the Applicants failed to respond. Rather than rendering a decision in an evidentiary vacuum, the Associate Judge dismissed the application based on the matter's

procedural history, a history with which he was particularly familiar given his role as case management judge since September 2023.

[56] Moreover, I find that the interests of justice do not lie with the Applicants. The Respondents rightly submit that the Applicants were able to appeal the Dismissal Order at the time of the reconsideration motion, yet chose to wait for a negative outcome on the reconsideration motion prior to doing so. The Court is not obliged to accommodate successive motions, despite the preferences of the parties that it do so.

[57] For these reasons, I find no error in the Dismissal Order. The Applicants do not meet the test in *Hennelly* for an extension of time to file an appeal. Moreover, the Applicants would not succeed on appeal, as the Associate Judge did not err in dismissing the underlying application. The appeal of the Dismissal Order is dismissed.

V. **Costs**

[58] The Respondents seek costs in this matter.

[59] The Applicants submit that, if costs are awarded, they should be nominal, citing *Ladouceur v Banque de Montréal*, 2022 FC 440, in which $500 in costs were awarded, and *Alam v Canada (Attorney General)*, 2022 FC 833, in which $750 in costs were awarded. I agree.

[60] As this motion is dismissed, costs in the amount of $750 are awarded to the Respondents.

VI. **Conclusion**

[61] The Applicants' fresh evidence is not accepted for consideration. Neither the Reconsideration Decision nor Dismissal Order contain errors that warrant this Court's intervention. This motion is dismissed with costs.

ORDER in T-1537-21

THIS COURT ORDERS that:

1. This motion appealing the order of Associate Judge Horne dated February 26, 2024 is dismissed.

2. Costs are awarded to the Respondents in the amount of $750.

"Shirzad A."
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1537-21
STYLE OF CAUSE:	STEFAN PETRE AND SPSDD INC. AND LOADWINNER INC. v ROYAL CANADIAN MOUNTED POLICE AND CANADA REVENUE AGENCY
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	SEPTEMBER 13, 2024
ORDER AND REASONS:	AHMED J.
DATED:	NOVEMBER 6, 2024

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