

Federal Court



Cour fédérale

Date: 20100218

Docket: 09-T-52

Citation: 2010 FC 176

Montréal, Quebec, February 18, 2010

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

LOUIS-PHILIPPE ROCHON

Moving Party

and

THE MINISTER OF JUSTICE OF CANADA

and

THE CRIMINAL CONVICTION REVIEW GROUP

Respondents

REASONS FOR ORDER AND ORDER

[1] By this motion, Louis-Philippe Rochon (the moving party) is seeking an extension of time to file an application for judicial review (*mandamus* and *certiorari*) in order to have set aside a decision dismissing his application for review of his criminal conviction made by the Minister of Justice (the Minister or the respondent).

Facts and procedural background

[2] The moving party is currently incarcerated as a result of a criminal conviction. On February 6, 2004, he submitted an application under Part XXI.1 of the *Criminal Code*, R.S.C., 1985, c. C-46 (the Code) to the Minister of Justice in order to have his criminal conviction reviewed. The Code confers on the Minister the power to review a conviction to determine if a miscarriage of justice has been committed. The Criminal Conviction Review Group (CCRG) is responsible for reviewing applications, conducting investigations and making recommendations to the Minister.

[3] On March 28, 2007, the Minister made a decision to dismiss the application for review at the preliminary assessment stage. Despite this initial dismissal, the moving party had one year to submit additional evidence and information to have the preliminary decision changed (see SOR/2002-416, s. 4).

[4] Following this initial dismissal, the moving party and his counsel, Mr. Asselin (former counsel), undertook several steps with the CCRG to obtain clarification about the decision and requested the documents consulted by the CCRG that were referred to in the decision. On December 3, 2007, the CCRG advised the moving party to enquire at the Access to Information and Privacy Office (the Office) to obtain the requested documents and information.

[5] On January 9, 2008, the former counsel filed an access to information request with the Office. On January 17, 2008, through the lawyer handling the application for review of a co-accused, the moving party learned that the new CCRG policy regarding access to information

and disclosure requests is to not communicate the information directly to the moving party or to the moving party's representative; from now on, the moving party must go through the access to information process.

[6] Finally, on April 14, 2008, the application was definitively dismissed as the one-year period had expired and no additional evidence was submitted.

[7] Meanwhile, the moving party spoke with Projet Innocence Québec and retained the services of another counsel, who is currently the solicitor of record. On December 11, 2008, he obtained, through his counsel, the disclosure of information from the Office. Dissatisfied with this information, he filed an access to information request on March 26, 2009, with the Commission d'accès à l'information du Québec and with the Service de police de la Ville de Montréal. The latter rejected his request on June 19, 2009.

[8] On April 8, 2009, the Commission d'accès à l'information du Québec refused the moving party's request and suggested that he proceed through the federal access to information agencies, as the CCRG is a federal agency. The counsel then filed a request with the federal agency on May 26, 2009. On this same date, she also sent a request for disclosure of information to the Royal Canadian Mounted Police (RCMP). On June 15, 2009, the Office of the Privacy Commissioner of Canada responded that it was not able to assist the moving party in his efforts because the request was not subject to its jurisdiction. On June 29, 2009, counsel said she received a call from the RCMP access to information informing her that it was a special request and would require a

considerable amount of time to handle it. Counsel stated that she never received any other information from the RCMP.

[9] In his affidavit, the moving party stated that he still intended to challenge the decision. He also said that, following the dismissal at the preliminary assessment stage, he wanted to proceed by way of *mandamus* before the Superior Court of Quebec, in order to obtain the requested documents and be able to present new evidence. However, he decided to suspend the filing of his *mandamus* application and to proceed by way of access to information mechanisms, as there was at that time a similar case before the Superior Court of Quebec (affidavit of Louis-Philippe Rochon, paras. 36 to 39). The case of *Bilodeau v. Canada (Ministre de la Justice)*, 2009 QCCA 746, J.E. 2009-827, was on appeal to the Court of Appeal of Quebec when the moving party obtained disclosure from the Office.

[10] Finally, on April 21, 2009, the Court of Appeal of Quebec made its decision and confirmed that only the Federal Court has jurisdiction to hear cases concerning decisions made by the Minister. The Supreme Court of Canada dismissed the application for leave to appeal on October 8, 2009 ([2009] S.C.C.A. No. 254). On October 20, 2009, the moving party filed this motion for an extension of time.

Relevant legislation

[11] *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

[12] In light of the importance of the issue, the scope of the documents and the case law to produce, Justice Pinard of our Court ordered that the motion be heard in the presence of the parties. I therefore had the benefit of hearing the oral arguments before making this decision.

[13] The case law teaches us that there are four things to consider when deciding whether a motion for an extension of time is to be granted or dismissed: there must be a continuing intention on the part of the moving party to bring his or her application; there must be an arguable case; there must be a reasonable explanation for the delay and the extension of time must not cause any

prejudice to the other party (*Grewal v. Canada (Minister of Employment and Immigration)*, [1985] 2 F.C. 263 (C.A.)). These criteria are flexible and must be applied in such a way that justice is done. It follows that an extension may be granted even if one of the criteria has not been satisfied (*Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41, [2007] F.C.J. No. 37 (QL) at paragraph 33).

Continuing intention

[14] The moving party stated that he always intended to challenge the dismissal of his application for review. He claimed that the steps undertaken with the CCRG and subsequently through various access to information agencies to obtain the documents referred to in the decision show this intention. I therefore accept that the facts demonstrate that the moving party intended to challenge the Minister's decision, but, unfortunately, as we will see further on, he did not provide a reasonable explanation for the delay in doing so.

Arguable case

[15] The moving party essentially alleged that the Minister's decision was based on evidence that was not disclosed to him. He stressed that he cannot really challenge the merits of the decision because he does not have access to the documents in question. Even though he did not argue it clearly, I am willing to accept that this argument could be raised as a breach of procedural fairness. Without deciding on the merits of the Minister's decision or the lack thereof, I do not believe that the merits of this 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 paragraph 24).

Prejudice

[16] I am not satisfied that the respondent will experience significant prejudice if the motion for an extension of time is granted.

Reasonable explanation

[17] I do not believe that the moving party satisfied this criterion. In fact, he stated that he always intended to challenge the decision to dismiss his application for review. He also said that, following the dismissal at the preliminary assessment stage, he wanted to proceed by way of *mandamus* before the Superior Court of Quebec, in order to obtain the requested documents and be able to present new evidence. However, he decided to wait until the final judgment in *Bilodeau*.

[18] I have difficulty with this argument because, if we consider the dates of the events, we find that the initial dismissal of the moving party's application for review is dated March 28, 2007, and the final confirmation is dated April 14, 2008. On January 4, 2008, the respondent brought a motion to dismiss in *Bilodeau*. The Superior Court made its decision on March 18, 2008, that is, before the final dismissal of the moving party's application for review. The decision of the Court of Appeal of Quebec is dated April 21, 2009. The moving party waited 18 months, namely, from April 14, 2008, to October 20, 2009, before filing his motion with the Federal Court.

[19] I also find that the moving party never sought judicial review of the administrative decisions on the access to the documents that he wished to obtain.

[20] In dockets 09-T-53 and 09-T-60, the moving parties commenced legal proceedings before the Superior Court of Quebec. In this case, the moving party did no such thing. He could have at least attempted to obtain consent from the respondent to have his case suspended until there was a final determination in *Bilodeau*. I therefore consider that the explanation given by the moving party to justify his delay in filing an application for judicial review is unreasonable, in light of the circumstances.

[21] Nor can I assume that it was an error on the part of one of his counsels, as there is no allegation or evidence to that effect.

[22] Although I recognize that the criteria in *Grewal* are flexible, I am of the opinion that the lack of a reasonable explanation for the extension prevails and, unfortunately for the moving party, his motion for an extension to challenge the final decision of April 14, 2008, is dismissed.

[23] As for the moving party's motion with regard to an extension of time for a *mandamus* application in order to force the respondent to provide him with the documents, I find that the moving party could have filed a complaint with the Information Commissioner under section 30 of the *Access to Information Act*, if he was dissatisfied with the respondent's response of December 3, 2007. He could have applied for a review under section 41 of the same Act, following a negative decision from the Commissioner.

ORDER

THE COURT ORDERS that the moving party's motion for an extension of time be dismissed. Without costs.

"Michel Beaudry"

Judge

Certified true translation
Susan Deichert, Reviser

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: 09-T-52

STYLE OF CAUSE: **LOUIS-PHILIPPE ROCHON v.
THE MINISTER OF JUSTICE OF CANADA
AND THE CRIMINAL CONVICTION REVIEW
GROUP**

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: February 16, 2010

**REASONS FOR ORDER
AND ORDER:** Beaudry J.

DATED: February 18, 2010

APPEARANCES:

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