

Federal Court



Cour fédérale

Date: 20110519

Docket: T-255-10

Citation: 2011 FC 575

Ottawa, Ontario, May 19, 2011

PRESENT: The Honourable Mr. Justice Crampton

BETWEEN:

RICHARD SODERSTROM

Applicant

and

**ATTORNEY GENERAL OF CANADA
(CANADA REVENUE AGENCY)**

Respondent

REASONS FOR ORDER AND ORDER

[1] This appeal concerns the relatively straightforward issue of whether the Applicant's response to a Notice of Status Review provided sufficient information to warrant the exercise of the Court's discretion to continue these proceedings, as contemplated by Rule 382.1 of the *Federal Courts Rules*, SOR/98-106.

[2] For the reasons discussed below, I have concluded that the information provided by the Applicant in response to the Notice of Status Review was not sufficient to warrant the exercise of

the Court's discretion in his favour. In my view, the Applicant did not take reasonable steps to inform himself of what he needed to do to advance, in an expeditious manner, the proceeding that he initiated. As a result of his failure to take such steps, he was unable to provide (i) an adequate justification for his delay in advancing the proceedings, or (ii) an adequate proposed timetable to advance that proceeding in an expeditious manner.

[3] Accordingly, this appeal will be dismissed.

I. Background

[4] On February 23, 2010, the Applicant filed a Notice of Application for judicial review of a Notice of Assessment issued by the Canada Revenue Agency (CRA) in respect of his 2008 taxation year.

[5] It is common ground between the parties that no further steps were taken by the Applicant to advance his application until after he received a Notice of Status Review on December 16, 2010.

[6] The Notice of Status Review, issued by Chief Justice Lutfy, notified the Applicant that more than 180 days had elapsed since the issuance of his Notice of Application and that no requisition for a hearing date had been filed. In addition, it advised the Applicant that he was required to serve and file, within 15 days of the date of that notice, representations stating the reasons why the proceeding should not be dismissed for delay. More specifically, the Applicant was informed that those "representations shall include a justification for the delay and a proposed timetable for the completion of the steps necessary to advance the proceeding in an expeditious manner."

[7] On December 23, 2010, the Applicant provided his response. The substantive part of that response was as follows:

All of the documents and facts that I wish to have before the court are contained either in my application or in the documents filed subsequently by CRA.

I have nothing more to add. I was unaware that there was any further requirement from me, knowing that all the documents had been filed. I was waiting patiently for notification of a day for the hearing.

The documents, rules, policies and procedures on the court web site are far from clear to me. I received no notice (until now) that further action on my part was required.

I sincerely apologize for any delay that my ignorance has caused. I respectfully request that this case proceed to have a hearing before a judge as soon as possible and I will cooperate in every way for this to happen.

I have no time table. I am prepared to have a hearing without delay. However, I will be out of country from mid-February until the second week in March, 2011.

According to the "Notice of Status Review", I conclude that I am supposed to file "a requisition for a hearing date." In conversations today with staff at the Federal Court I understand that there are other requirements to be fulfilled before I can formally request a hearing date. However, I do not understand what those requirements are. Please inform me in plain language what further forms I need "to serve and file". I respectfully request a hearing date.

[8] On February 17, 2011, Prothonotary Tabib issued an order dismissing the Applicant's application for judicial review of the CRA's above-mentioned Notice of Assessment, on the basis that he had "failed to provide a justification for the failure to move the case forward and [had] failed to propose any measure to move the case forward."

II. The Applicable Standard of Review

[9] The test applicable on an appeal of a discretionary order issued by a prothonotary is whether: (i) the questions raised in the motion are vital to the final issue of the case; or (ii) the order “is clearly wrong, in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of the facts” (*Merck & Co Inc v Apotex Inc*, 2003 FCA 488, [2004] 2 FCR 459, at 478).

[10] More recently, the Federal Court of Appeal has stated that discretionary decisions of prothonotaries should stand unless intervention is warranted “to prevent undoubted injustices and to correct clear material errors” (*j2 Global Communications, Inc v Protus IP Solutions Inc*, 2009 FCA 41, at para 16). However, the latter statement appears to have been made solely with respect to the second prong of the test set forth above, as the Court in that case agreed with the motions judge that the issue that had been raised was not vital to the final issue of the case (*j2 Global Communications*, above, at para 15). Based on a more recent decision of the Federal Court of Appeal, it is clear that this Court is still obliged to conduct a *de novo* review of a prothonotary’s decision in respect of a question that is vital to the final issue in the case (*Apotex Inc v Bristol-Myers Squibb Company*, 2011 FCA 34, at paras 6 and 9).

[11] It is common ground between the parties that the dismissal of the Applicant’s application on grounds of delay raises an issue vital to the final issue in the within proceeding.

[12] I am therefore obliged to conduct a *de novo* review of Prothonotary Tabib’s decision (*Multibond Inc v Duracoat Powder Manufacturing Inc*, [1999] FCJ No 1698, at para 21 (TD)), notwithstanding that I am attracted to the view that deference should be given to determinations

made by a prothonotary, even where they raise a question vital to the final issue of the case (*Apotex Inc v Bristol-Myers Squibb Company*, above, at paras 8 and 9).

III. Analysis

[13] Rule 382.1(2) addresses the discretion available to a judge or a prothonotary who conducts a status review of a proceeding. That provision states:

<i>Federal Courts Rules, SOR/98-106</i>	<i>Règles des Cours fédérales, DORS/98-106</i>
Review by the Court	Examen de la Cour
382.1(2) A judge or prothonotary shall conduct a status review and may	382.1(2) Un juge ou un protonotaire procède à l'examen de l'état de l'instance et peut :
(a) if he or she is not satisfied that the proceeding should continue, dismiss the proceeding; or	(a) s'il n'est pas convaincu que l'instance doit se poursuivre, la rejeter;
(b) if he or she is satisfied that the proceeding should continue, order that it continue as a specially managed proceeding and may make an order under rule 385.	(b) s'il est convaincu que l'instance doit se poursuivre, ordonner qu'elle se poursuive à titre d'instance à gestion spéciale et rendre toute ordonnance prévue à la règle 385.

[14] Pursuant to Rule 382(1), and as set forth in the Notice of Status Review that was issued to the Applicant, the recipient of such a notice is required to provide (i) a justification for the delay that prompted the issuance of the notice, and (ii) a proposed timetable for the completion of the steps necessary to advance the proceeding in an expeditious manner.

[15] Based on the inadequate response that the Applicant provided to the Notice of Status Review, I am not satisfied that it would be in the interest of the due administration of justice that this proceeding should continue (*Bahrani v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 701, at para 8 (TD)).

[16] As reflected at paragraph 7 above, the Applicant's explanation for his delay in advancing his application was that he "was unaware that there was any further requirement from [him], knowing that all the documents had been filed."

[17] Likewise, in his written representations in support of the present motion to overturn Prothonotary Tabib's Order, the Applicant conceded that nothing had been done to advance his application for over a year and simply explained that he "had no reason to believe that [he] was holding things up and therefore had no reason to seek out the necessary information on how to proceed."

[18] As to his failure to provide a proposed timetable for the completion of the steps necessary to advance the proceeding in an expeditious manner, the Applicant stated in his response to the Notice of Status Review that he had "no time table" and was "prepared to have a hearing without delay." He added that he understood from the Notice of Status Review and from his discussions with staff at the Federal Court there were other requirements, however, he stated that he did "not understand what those requirements are." He further added that "[t]he documents, rules, policies and procedures on the court [*sic*] web site are far from clear to me, knowing that all documents had been filed."

[19] The Court is cognizant of, and sympathetic to, the position in which self represented litigants find themselves with respect to the Court's procedural requirements. In recognition of this, and to facilitate access to the judicial system for self represented litigants, the Court has made substantial information available on its website to assist self represented litigants to understand, and to deal with, a broad range of procedural matters.

[20] On the home page of the Court's website, there is a prominent link to such information near the top, left hand side, of the page. When one clicks on that link, one is immediately brought to a page that provides prominent links to detailed information about, among other things, the process for filing an application for judicial review and what Court Registry staff can and cannot do for self represented litigants.

[21] The information regarding the process for filing an application identifies the various documents that must be filed, briefly describes the various procedures to be followed, provides cross references to the applicable Rules, and identifies the applicable timelines. At the top of that same page, a convenient link to the Rules is provided. That link takes the website visitor directly to a helpful table of contents that, among other things, readily identifies the provisions applicable to status reviews.

[22] The information that is provided on the website regarding what Court Registry staff can and cannot do is also quite detailed. Among other things, self represented litigants are informed on the website that Court Registry staff can:

- tell them what forms they may need to use;
- provide copies of Court forms and provide information to help fill out some of the forms;
- briefly explain and answer questions about how the Court works and about the Court's practices and procedures; and
- check forms and other court papers for completeness.

[23] Given all of the information that is readily available to anyone who takes the time to visit the Court's website, I agree with the Respondent's position that the Applicant did not make reasonable efforts to ascertain what he needed to do to advance his application and to better position himself to describe the steps necessary to advance the proceeding in an expeditious manner. In view of all of the information available on the Court's website to assist self represented litigants, the Applicant could not simply state that he was unaware that anything further was required of him or that he had no timetable and was "prepared to have a hearing without delay." He was obliged to go further. "Mere declarations of good intent and of the desire to proceed are clearly not enough" (*Baroud v Canada*, [1998] FCJ No 1729, at para 5 (TD)).

[24] For example, with respect to the justification for his delay in moving forward his application, the Applicant should have attempted to explain why he was unable to advance his application notwithstanding any reasonable efforts that he may have made to inform himself of, and to deal with, the applicable procedural requirements. If, as he claimed, the information on the Court's website was unclear or otherwise unhelpful to him, and if he was not able to obtain the type of assistance from the Court's Registry staff that is explained on the website, he should have

explained why such information or assistance was unhelpful, notwithstanding his reasonable efforts to obtain same. Given the information and offer of assistance provided on the Court's website, I can only conclude from his failure to provide such an explanation or to move his case forward that he did not make such a reasonable effort.

[25] Similarly, with respect to the proposed timetable that he was required to provide in response to the Notice of Status Review, the Applicant should have explained why he could do no more than simply state that he had no such timetable and that he was prepared to have a hearing without delay. In this regard, he should have specifically addressed the documents and procedures identified on the Court's website. On the particular facts of this case, the Applicant could have done this by, for example, stating that he had no additional affidavits to file, that he would not be seeking to cross examine the Respondent on any of the documents that the Respondent had provided to him, that he would be serving and filing his Applicant's record on or before a certain date, and that he would be submitting his requisition for a hearing on or before a subsequent date. Unfortunately, he failed to do any of this, or to provide a reasonable explanation for such failure, notwithstanding the information that was available to him on the Court's website and through the Registry staff. He cannot now claim that it would be in the interest of the administration of justice for the Court to exercise its discretion to allow the proceeding that he initiated to be continued (*Multibond*, above, at para 23; *Netupsky v Canada*, 2004 FCA 239, at paras 15 to 19).

[26] As Prothonotary Tabib noted in her aforementioned Order, this Court has consistently held that a party's lack of legal training or understanding of the Rules does not constitute a reasonable justification for delay (*Mischena v Canada (Attorney General)*, 2004 FC 1515, at para 5; *Scheuneman v Her Majesty the Queen*, 2003 FCT 37, at para 4). In my view, this is particularly the

case such as the case at bar where much, if not all, of the information that was required to provide an adequate response to the Notice for Status Review was readily available on the Court's website.

[27] As Prothonotary Tabib also noted, even if the Applicant's lack of knowledge could have constituted a reasonable justification for his delay in advancing the proceeding, the Notice of Status Review provided an opportunity for him to obtain readily available information to educate himself as to what he was required to do and then present an adequate proposed timetable setting out the steps necessary to advance the proceeding in an expeditious manner. His failure to avail himself of that opportunity, or to adequately explain why he was unable to provide an adequate proposed timetable notwithstanding the information available to him on the Court's website and through Registry staff, is fatal to this appeal.

[28] The fact that the Respondent may not be harmed if the within application were allowed to proceed is of no assistance to the Applicant on this motion, as "the Rules clearly and unequivocally place the burden on the [Applicant] to satisfy the Court that the proceeding should continue despite the delay" (*Multibond*, above, at para 12).

IV. Conclusion

[29] This appeal is dismissed with costs.

ORDER

THIS COURT ORDERS that this application for judicial review is dismissed with costs.

“Paul S. Crampton”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-255-10

STYLE OF CAUSE: RICHARD SODERSTROM v ATTORNEY
GENERAL OF CANADA (CANADA REVENUE
AGENCY)

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: May 17, 2011

**REASONS FOR ORDER
AND ORDER** CRAMPTON J.

DATED: May 19, 2011

APPEARANCES:

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