

Federal Court of Appeal



Cour d'appel fédérale

Date: 20230608

Docket: 23-A-33

Citation: 2023 FCA 134

Present: LOCKE J.A.

BETWEEN:

WILLIAM MCCOTTER

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on June 8, 2023.

REASONS FOR ORDER BY:

LOCKE J.A.

Federal Court of Appeal



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REASONS FOR ORDER

LOCKE J.A.

[1] William McCotter, a federal prison inmate, has been repeatedly denied parole. Before this Court, Mr. McCotter seeks an extension of time for filing an appeal of a Federal Court decision that dismissed his application for judicial review for mootness. The impugned decision, a January 20, 2021 decision of the Parole Board of Canada (PBC), had been superseded by a new decision dated January 25, 2022. Mr. McCotter also seeks a waiver of fees associated with his proposed appeal.

[2] The Attorney General of Canada (AGC) opposes the motion for an extension of time, and takes no position on the request for a waiver of fees.

[3] Before analysing the issues in these motions, I note that Mr. McCotter has made repeated attempts since July 2022 to commence his appeal and to file his motions. Mr. McCotter is not represented by counsel, and has been attempting to comply with the Court's requirements while subject to the restrictions that come with being incarcerated. A Direction dated March 6, 2023 by Justice Marianne Rivoalen indicated that consent of the AGC was necessary to properly serve his motion records on the AGC by fax. The AGC provided the required consent by letter dated March 28, 2023. The AGC also filed a responding motion record on April 18, 2023. Accordingly, it is now appropriate to accept the motion records for filing and to decide the present motions.

I. Motion for extension of time

[4] The AGC notes that the test for an extension of time is well-established and was articulated by this Court in *Canada (Attorney General) v. Hennelly*, (1999), 244 N.R. 399, [1999] F.C.J. No. 846 at paragraph 3:

The proper test 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.

[5] The AGC also correctly notes that the overriding consideration is that the interests of justice are served.

[6] The AGC bases his opposition to the motion for an extension of time on the second and third factors. He does not take issue with the first and fourth factors.

[7] With regard to the second factor (some merit), the AGC notes that Mr. McCotter has not demonstrated that the Federal Court erred in concluding that the underlying judicial review application was rendered moot by the subsequent PBC decision. The AGC acknowledges that, even where a matter is moot, a court has discretion to hear the case. The Federal Court addressed the question of discretion briefly, stating that “the record does not disclose any reason for hearing this application despite its mootness.”

[8] In deciding whether to exercise discretion to hear a case that is moot, a court should consider the factors discussed by the Supreme Court of Canada in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 at 358-363 (*Borowski*). The factors are (i) whether an adversarial context remains, (ii) the concern for judicial economy, and (iii) respect for the proper law-making function of the Court. Of course, for the purpose of the present motion for an extension of time, the focus is on whether Mr. McCotter has demonstrated some merit to his argument that the Federal Court should not have dismissed his judicial review application. The threshold for “some merit” is low.

[9] I accept that the subsequent PBC decision rendered the underlying judicial review application moot in that it eliminated the live controversy between the parties. However, considering the factors in *Borowski*, there is a genuine possibility that a court might exercise its jurisdiction to hear the application. In my view, Mr. McCotter deserves the opportunity to argue that the Federal Court erred in refusing to exercise its discretion in this regard.

[10] There clearly remains an adversarial context between the parties. Mr. McCotter continues to be denied parole and he remains incarcerated. He come before this Court because he seeks his liberty.

[11] With regard to judicial economy, it is relevant to consider (i) whether the court's decision will have some practical effect on the rights of the parties, (ii) whether the issues in dispute are of a recurring nature but brief duration, which may be evasive of review, and (iii) the public importance of resolving the debate between the parties. Many of the issues that Mr. McCotter seeks to raise relate not only to the impugned January 20, 2021 PBC decision, but also to other PBC decisions involving Mr. McCotter. Accordingly, it appears that a decision by the Federal Court could have some practical effect on Mr. McCotter's rights. In addition, given how this matter has come to this Court, the issues in dispute may be of a recurring nature but brief duration, and evasive of review. It is difficult at this stage to determine the public importance of resolving the debate between the parties, but the factor of judicial economy does not appear to be an obstacle to the exercise of discretion to hear the underlying judicial review application despite its mootness.

[12] The final of the factors identified in *Borowski*, respect for the proper law-making function of the Court, likewise does not appear to be an obstacle to the exercise of discretion.

[13] Based on the low threshold applicable to the question of merit on a motion for an extension of time, I accept that Mr. McCotter has met his burden here.

[14] I turn now to the other factor cited by the AGC for denying the motion for an extension of time: prejudice. The AGC argues that he is prejudiced by Mr. McCotter “continuing to litigate PBC and PBC Appeal Division decisions that are rendered moot by subsequent tribunal decisions.” In my view, the fact that Mr. McCotter’s efforts to seek judicial review of PBC decisions are repeatedly stymied because his applications are rendered moot by subsequent decisions is a stronger argument for granting an extension of time than for denying one. It would seem that one of the few ways of ensuring that the issues that Mr. McCotter seeks to raise can be heard is to exercise discretion to hear his arguments despite their mootness.

[15] In my view, all of the factors relevant to the motion for an extension of time favour Mr. McCotter. I will grant the motion for an extension of time.

II. Motion for waiver of fees

[16] As indicated above, the AGC does not oppose Mr. McCotter’s motion for a waiver of fees. In support of this motion, Mr. McCotter cites the following decisions: *Spatling v. Canada (Solicitor General)*, 2003 FCT 443 and *Fabrikant v. Canada*, 20147 FCA 89 (*Fabrikant*). Each

of these concerns a motion for a waiver of filing fees. In this case, that would be \$50 (see item 1(1)(e) of Tariff A of the *Federal Courts Rules*, S.O.R./98-106) (the *Rules*). However, Mr. McCotter's motion appears to go much further than the waiver of filing fees. Though his notice of motion is not clear on the point, the "Order Sought" section of his memorandum of fact and law extends to "any other tariff A or associated fee", and "funding for an attorney to aid in moving the Appeal of [the Federal Court's decision] forward without more delays."

[17] The question of ordering funding for counsel to represent a party is entirely different from waiving fees, and Mr. McCotter's submissions do not address that question. I will not order such funding based on Mr. McCotter's motion materials. Likewise, I will not order generally the waiver of all fees as Mr. McCotter seeks. The other fees that Mr. McCotter has in mind are not clearly identified, and I do not intend here to sign a blank cheque. That said, there is a \$20 fee associated with a notice of motion for an extension of time to commence a proceeding (see item 1(2)(a) of Tariff A). I will consider the waiver of that fee along with the waiver of the filing fee.

[18] *Fabrikant* is particularly useful in considering this issue. It emphasized that the waiver of fees is exceptional. As Mr. McCotter recognizes, waiver of fees is available only in "special circumstances": see Rule 55 of the Rules. The prospective appellant's right of access to the Court must be balanced against the need to charge fees for services rendered. *Fabrikant* also noted at paragraph 11 that "only particularized, credible evidence will suffice" to show special circumstances. In the same paragraph, *Fabrikant* stated that "[i]n general, parties seeking a waiver of fees must describe, with particularity, their financial situation, with specific reference to numbers setting out sources of funding, assets and expenses."

[19] In my view, Mr. McCotter has understood the requirements for a successful motion for waiver of fees. He has provided detailed information concerning his income, expenses, assets and net worth. I am satisfied that his financial resources are sufficiently limited to justify a waiver of the filing fee in the proposed appeal as well as the fee associated with a notice of motion for an extension of time to commence a proceeding. I will order said waiver.

"George R. Locke"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: 23-A-33

STYLE OF CAUSE: WILLIAM MCCOTTER v.
ATTORNEY GENERAL OF
CANADA

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY: LOCKE J.A.

DATED: JUNE 8, 2023

WRITTEN REPRESENTATIONS BY:

William McCotter FOR THE APPLICANT
(On his own behalf)

Jocelyne Mui FOR THE RESPONDENT

SOLICITORS OF RECORD:

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