Federal Court Cour fédérale

Date: 20200429

Docket: T-491-20

Citation: 2020 FC 565

Ottawa, Ontario, April 29, 2020

PRESENT: Mr. Justice Sébastien Grammond

BETWEEN:

LESLIE JOHN MCCULLOCH

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

ORDER AND REASONS

[1] Mr. McCulloch, an inmate at Matsqui Institution, seeks an order expediting his application for judicial review of the Parole Board of Canada's [the Board] failure to render a decision within a reasonable time on his request for exceptional parole. That request is based on the risk of contracting COVID-19 while detained. He asks for a hearing of his application to take place within three weeks of the decision on this motion. The Attorney General agrees that Mr. McCulloch's application should be expedited. However, he asks for much more time – no less than 50 days – before the application is heard.

[2] I order that the matter be expedited and that a schedule of further procedural steps be set with a view to a hearing being held in approximately three weeks. There is no dispute that the matter is urgent. It is not, however, as complex as the Attorney General suggests and I am convinced that the timetable set in this order is fair to both parties.

I. Background

[3] Mr. McCulloch is serving an eight-year sentence for drug trafficking. He is currently detained at Matsqui Institution, a medium security institution in Abbotsford, British Columbia.

[4] On April 2, 2020, Mr. McCulloch, through his lawyer, applied to the Board for exceptional parole pursuant to section 121(1) of the *Corrections and Conditional Release Act*, SC 1992, c 20 [the Act]. That application was buttressed by a note from Mr. McCulloch's doctor, who confirms that Mr. McCulloch suffers from asthma and that COVID-19 "may be fatal in people with pre-existing lung conditions." For the purposes of this motion, it is not necessary to review the factual foundation and legal arguments in support of Mr. McCulloch's application to the Board.

[5] On April 9, 2020, the Board wrote to Mr. McCulloch's lawyer to acknowledge receipt of his submissions. On April 12, 2020, Mr. McCulloch's lawyer wrote to the Board to request a prompt answer to his April 2, 2020 letter. (While this is not clear from the evidence, the Board's April 9 letter was presumably delivered to Mr. McCulloch's lawyer after April 12.)

[6] On April 22, 2020, Mr. McCulloch brought an application for judicial review, asking this Court to order the Board "to make the decision that it has unreasonably delayed in making." The same day, Mr. McCulloch brought the present motion to expedite the proceeding.

II. Analysis

A. *Expediting an Application: General Principles*

[7] Expediting an application is a discretionary power, which finds its source in Rule 8 of the *Federal Courts Rules*, SOR/98-106. To understand the factors that guide the Court's exercise of this discretion, it is useful to step back and to consider the principle of access to justice.

[8] Access to justice has been recognized in various forms, as a corollary to the rule of law and the constitutional provisions regarding judicial power: *BCGEU v British Columbia (Attorney General)*, [1988] 2 SCR 214; *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, 2014 SCC 59, [2014] 3 SCR 31.

[9] Given the urgency of this matter, it is not possible to provide a comprehensive review of the requirements of access to justice. For our purposes, it is enough to highlight one aspect: meaningful access to justice entails that the courts must be able to provide an effective remedy to individuals who seek the vindication of their rights. In turn, to be effective, a remedy must be timely.

[10] Nonetheless, the judicial process must be fair. The parties must have sufficient time to marshal evidence and to prepare their legal arguments. In setting time limits for the various procedural steps leading up to a hearing on the merits, the *Federal Court Rules* seek to strike a balance between the requirements of fairness and celerity. In particular, applications for judicial review are subject to an accelerated process that allows the matter to "be heard and determined without delay and in a summary way:" *Federal Courts Act*, RSC 1985, c F-7, s 18.4(1).

[11] The balance struck by the *Rules* is adequate in most cases. Yet, the circumstances and the nature of the claim sometimes call for an earlier decision, without which access to justice would effectively be denied. One solution is to seek interim relief. For instance, this Court routinely hears motions for stay of removal from Canada on a few days' notice. A second solution is to expedite the hearing of the merits. Applications for judicial review of decisions releasing a person from detention, for example, are often expedited and heard on the merits "within days:" *Canada (Public Safety and Emergency Preparedness) v Asante*, 2019 FC 905 at paragraph 25.

[12] The Federal Court of Appeal and this Court have provided reasons on motions to expedite proceedings in the following cases: *Apotex Inc v Wellcome Foundation Ltd*, 1998 CanLII 7960 (FCA); *Canadian Wheat Board v Canada (Attorney General)*, 2007 FC 39 [*Canadian Wheat Board*]; *Conacher v Canada (Prime Minister)*, 2008 FC 1119 [*Conacher*]; *Trotter v Canada (Auditor General)*, 2011 FC 498 [*Trotter*]; *May v CBC/Radio Canada*, 2011 FCA 130 [*May*]. My review of these cases leads me to conclude that the discretion to expedite the hearing of a case is exercised according to two main sets of considerations: (1) whether an

expedited hearing is necessary to ensure the effectiveness of the remedy sought; and (2) whether it can be accomplished through a fair process.

[13] The first prong of the inquiry is geared towards a simple question – will the right that the applicants seeks to enforce be compromised by the passage of time? Although it arises in a somewhat different context, the question is akin to the concept of irreparable harm, which determines the availability of interim relief. The test is whether it will be too late to grant a remedy if the matter is heard according to the usual timelines. If so, the matter is urgent.

[14] Many litigants would appreciate to have a quick decision on their claims. Convenience to the applicant, however, is not enough to make a claim urgent. The courts have been sensitive to the fact that expediting one case may delay other cases: *Canadian Wheat Board*, at paragraph 13. The substance of the claim and the remedy sought must be analyzed to understand how they might be compromised by the passage of time.

[15] The conduct of the applicant may also be scrutinized. Where the applicant was aware of the situation complained of but waited before bringing an application, this may show that the matter is not really urgent: *May*, at paragraph 11. The impact of the proceeding on the public interest may also be taken into consideration: *Fond du Lac First Nation v Mercredi*, 2020 FCA 59 at paragraphs 7–8.

[16] The second prong of the inquiry focuses on the fairness of the process. Basically, the question is whether the respondent will be in a position to provide a meaningful defence to the

claim. A crucial factor is the complexity of the matter. For example, the Federal Court of Appeal and this Court have refused to expedite complex constitutional cases, noting that an adequate evidentiary record and carefully crafted legal submissions are often needed: *May*, at paragraph 16; *Trotter*, at paragraph 16. Moreover, the Court will not expedite a matter where it is apparent that the applicant acted in a manner calculated to deprive the respondent of the possibility of making a full answer: see, by analogy, *Beros v Canada (Citizenship and Immigration)*, 2019 FC 325.

B. *Application to Mr. McCulloch's Case*

[17] It is common ground between the parties that the matter should be expedited and I agree with them. Given their disagreement about the proper time frame, however, it is useful to state briefly why an effective remedy can only be provided by compressing the normal time limits. In doing so, I shall not be taken as expressing any view on the merits of the application.

[18] As I mentioned earlier, the first prong of the inquiry focuses on the nature of the claim and the remedy sought. Mr. McCulloch is not asking this Court to grant him exceptional parole. That decision will be made by the Board. Mr. McCulloch is merely seeking an order that the Board make a decision quickly.

[19] Thus, if too much time elapses before a decision is rendered on the merits of this application, Mr. McCulloch will have been deprived of what he seeks: a timely decision from the Board. Given what we know about the COVID-19 pandemic and its effect on persons with pre-existing medical conditions, I am of the view that Mr. McCulloch has a legitimate interest in

having this application heard within the time frame he proposes, rather than that suggested by the Attorney General. In other words, this is an urgent matter.

[20] The Attorney General, however, argues that it would be unfair to require him to be ready for a hearing in only three weeks from now. First, he argues that he will need to assemble and file a considerable volume of evidence in response to Mr. McCulloch's application. Second, he underscores the limitations flowing from the requirement to work from home during the COVID-19 pandemic. I am unable to agree with those submissions.

[21] The case is not unduly complex. It does not involve the substance of the decision to be made by the Board. The issue is simply whether the Board is taking an unreasonable time in responding to Mr. McCulloch's application for parole. There is case law on the issue. It cannot be compared to the difficult and novel constitutional questions raised in cases such as *Canadian Wheat Board*, *Trotter*, *Conacher* or *May*. The level of complexity of the case is not different from that of interlocutory matters that are commonly dealt with on a similar time frame.

[22] I recognize that the Attorney General will need to file evidence regarding the process followed by the Board and by the Correctional Service of Canada to decide Mr. McCulloch's application. The Attorney General's submissions on this motion, however, contain a detailed description of the evidence that he currently contemplates filing; the relevant policy documents were even filed with those submissions. I am of the view that it is possible to file that evidence according to the schedule set out in this order. I recognize that this will require counsel for the

Attorney General to work intensely on the case, but no less is required given the urgency of the matter.

[23] The schedule proposed by the Attorney General provides for a considerable amount of time between each procedural step. For example, the Attorney General proposes to file his record, which includes his memorandum of fact and law, 14 days after Mr. McCulloch's. When a matter is not urgent, providing sufficient time between each procedural step is appropriate, so that a party is not required to begin working on one step (for example, its memorandum of argument) before the step that logically precedes it (for example, the filing of evidence) is completed. In an urgent matter, however, these steps often have to be undertaken in parallel. In the Court's experience, sophisticated parties, such as the Attorney General of Canada, have shown their ability to work under compressed timelines when the nature of the case requires it.

[24] The Attorney General also seeks more time because of the COVID-19 pandemic. The only evidence with respect to the impacts of the current situation on the operations of the Department of Justice is found in the following paragraph of an affidavit sworn by a legal assistant with the Department:

> Lawyers and legal support staff of the British Columbia Regional Office of the DOJ are required to work remotely from home until further notice because of the current Covid-19 public health restrictions. In all litigation matters, DOJ staff are encouraged to avoid meeting in person with client officials, to commission affidavits by videoconference in accordance with court policies and directions, and to file court materials electronically.

[25] There is no doubt that the current restrictions have changed the work habits of a large number of public servants and have caused serious disruption in the normal operations of many

sectors of the public service and those of the judicial system. Employees confined at home with young children may not be in a position to work regular hours. Not all employees have the ability to transition seamlessly to remote work. There are technological challenges. While new, more efficient ways of working are likely to emerge, this may take some time.

[26] However, the current situation has led the Federal Court and other courts to cancel non-urgent hearings for a significant period. Thus, one would expect that the Department of Justice still has the capacity to prosecute a relatively small number of urgent cases despite the COVID-19 restrictions. The Attorney General did not submit evidence of any difficulty specific to this case.

[27] Accordingly, I am of the view that a fair determination of this matter is possible within the time frame suggested by Mr. McCulloch, which is reflected in this order. With respect to cross-examination on affidavits, the parties are encouraged to agree on expeditious manners to gather information that might be missing after the parties have exchanged their affidavits, including proceeding by videoconference or providing written answers to questions. If the parties encounter any difficulty in this regard, the undersigned remains available for a case management conference on short notice. The matter will be referred to the Office of the Judicial Administrator, who will set a hearing date.

ORDER in T-491-20

THIS COURT ORDERS that:

1. This matter is expedited.

2. The applicant will serve and file his affidavits on or before May 1, 2020.

3. The respondent will serve and file his affidavits on or before May 8, 2020.

4. Any cross-examination on affidavits shall be completed on May 12, 2020.

5. The applicant will serve and file his application record on or before May 14, 2020.

6. The respondent will serve and file his application record on or before May 19, 2020

7. The scheduling of this matter is forthwith referred to the Office of the Judicial Administrator for the setting of an expedited hearing date.

8. No order as to costs.

"Sébastien Grammond"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-491-20
STYLE OF CAUSE:	LESLIE JOHN MCCULLOCH v THE ATTORNEY GENERAL OF CANADA

MOTION CONSIDERED IN WRITING AT OTTAWA, ONTARIO

ORDER AND REASONS:	GRAMMOND J.
DATED:	APRIL 29, 2020

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