

**Date: 20090128**

**Docket: A-390-08**

**Citation: 2009 FCA 25**

**CORAM: DÉCARY J.A.  
SHARLOW J.A.  
RYER J.A.**

**BETWEEN:**

**MINISTER OF FISHERIES AND OCEANS**

**Appellant**

**and**

**GWASSLAAM, ALSO KNOWN AS GEORGE PHILLIP DANIELS,  
ON HIS OWN BEHALF AND ON BEHALF OF  
ALL MEMBERS OF THE HOUSE OF GWASSLAAM**

**Respondent**

Heard at Vancouver, British Columbia, on January 28, 2009.

Judgment delivered from the Bench at Vancouver, British Columbia, on January 28, 2009.

**REASONS FOR JUDGMENT OF THE COURT BY:**

**DÉCARY J.A.**

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**Respondent**

**REASONS FOR JUDGMENT OF THE COURT**

**(Delivered from the Bench at Vancouver, British Columbia, on January 28, 2009)**

**DÉCARY J.A.**

[1] The respondent sought leave to file an additional affidavit pursuant to Rule 312(a) of the *Federal Courts Rules*. Leave was denied by Prothonotary Lafrenière, essentially on the grounds that the respondent did not provide a satisfactory reason for the delay, that the evidence was available when the respondent's affidavit evidence was originally admitted, that the additional affidavit evidence was simply a "beefed-up" version of his original affidavit evidence and as a result that it was not in the interests of justice to grant leave.

[2] The respondent appealed the Prothonotary's decision to a Judge of the Federal Court. The appeal was allowed (2008 FC 912), Campbell J. being of the view that the Prothonotary's reasons for the decision did not exhibit consideration of all the factors listed by our Court in *Atlantic Engraving Ltd. v. Lapointe Rosenstein*, 2002 FCA 503.

[3] In our view, the Motions Judge had no grounds to exercise *de novo* his discretion (*Canada v. Aqua-Gem Investments Ltd.*, [1993] 2 F.C. 425 (F.C.A), and restated in *Merck & Co. Inc. v. Apotex Inc.*, 2003 FCA 488, at para. 19). The Prothonotary did not act based upon a wrong principle. He correctly identified the factors and he was entitled to give greater weight to the fact that the additional affidavit was neither "reply" nor "fresh" evidence.

[4] We agree with the following comments of Justice Evans at paragraph 5 of his reasons in *Mazhero v. Canada (Industrial Relations Board)*, 2002 FCA 295, (2002), 292 N.R. 187 (F.C.A.):

[5] Applications for judicial review are summary proceedings that should be determined without undue delay. Consequently, the discretion of the Court to permit the filing of additional material should be exercised with great circumspection. Thus, in *Deigan v. Canada (Industry)*, [1999] F.C.J. No. 304 (Proth.), aff'd. [1999] F.C.J. No. 645 (T.D.), Prothonotary Hargrave said (at para. 3):

The new Federal Court Rules allow the filing of a supplementary affidavit and of a supplementary record, however such should only be allowed in limited instances and special circumstances, for to do otherwise would not be in the spirit of judicial review proceedings, which are designed to obtain quick relief through a summary procedure. While the general test for such supplementary material is whether the additional material will serve the interests of justice, will assist the Court and will not seriously prejudice the other side, it is also important that

any supplementary affidavit and supplementary record  
neither deal with material which could have been made  
available at an earlier date, nor unduly delay the  
proceedings

[5] The appeal will therefore be allowed.

[6] A cross-appeal was filed by the respondent to correct the order made by the Motions Judge. The appeal being allowed and the decision of the Motions Judge being set aside, the cross-appeal is moot.

[7] In the end, we will allow the appeal and dismiss the cross-appeal, set aside the decision of the Motions Judge and restore the Order of the Prothonotary.

[8] Costs in this Court and in the Federal Court will be in the cause.

"Robert Décary"

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J.A.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-390-08

**(APPEAL FROM AN ORDER OF THE FEDERAL COURT DATED JULY 25, 2008,  
T-1374-07, (2008 FC 912))**

**STYLE OF CAUSE:** Minister of Fisheries and Oceans v.  
Gwasslaam, also known as George  
Phillip Daniels, on his own behalf and  
on behalf of All Members of the  
House of Gwasslaam

**PLACE OF HEARING:** Vancouver, British Columbia

**DATE OF HEARING:** January 28, 2009

**REASONS FOR JUDGMENT OF THE COURT BY:** (DÉCARY, SHARLOW, RYER  
JJ.A.)

**DELIVERED FROM THE BENCH BY:** DÉCARY J.A.

**APPEARANCES:**

Steven C. Postman FOR THE APPELLANT

Richard J. Overstall FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

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