Date: 2000-09-01

Docket: T-389-00

Citation: 193 FTR 59

Between:

BARRY WILLIAM STRYKIWSKY,

Applicant,

- and -

DAVID MILLS et al, in his capacity as Warden of

Stony Mountain Institution,

the **COMMISSIONER OF CORRECTIONS** and

the **CORRECTIONAL SERVICE OF CANADA**,

Respondents

REASONS FOR ORDER

Muldoon, J.

[1] These reasons concern a motion brought by the applicant in a main application for judicial review pursuant to rules 3 and 306 and subrule 8(1) of the *Federal Court Rules, 1998*, SOR/98-106 (the Rules). The applicant, that is, the moving party seeks an order granting him an extension of time beyond that which is set out in rule 306, for the filing of affidavit evidence.

Facts

[2] The moving party is currently an inmate of Warkworth prison. He is addicted to heroin and has been for many years, but would now like help in overcoming that addiction.

[3] In July of 1998, the Correctional Service of Canada introduced Phase I of a methadone regime with the aim of minimizing the adverse physical, psychological, social and criminal effects associated with using injectable "opioids", such as heroin. This would be accomplished by replacing a drug, such as heroin, with regular doses of methadone. The Phase I treatment was made available only to those entering federal prisons who were already

enrolled in a community methadone maintenance program. Only on an exceptional basis - when there was a dire need for immediate medical intervention, could an inmate who did not meet the criteria receive methadone. It was contemplated that Phase II, in which all inmates will be eligible to receive methadone, might be implemented in the future but this phase was not implemented as of the date of the hearing.

[4] Mr. Strykiwsky, the applicant, applied for the Phase I treatment on an exceptional basis but was turned down in a decision dated February 11, 2000. He filed a notice of application for judicial review on February 25 alleging that the ongoing refusal of the respondents to provide methadone maintenance treatment to himself and other federal inmates in need and wishing to receive it is contrary to section 86 of the *Corrections and Conditional Release Act*, S.C. 1992, Chap. 20 and a breach of sections 7, 12 and 15 of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, Chap. 11 (the *Charter*). He also alleged that the respondents acted unreasonably, fettered their discretion and ignored relevant considerations in refusing him treatment.

[5] Subsequently, the applicant filed a motion for interim relief requesting that he receive methadone treatment pending the resolution of his application for judicial review. An agreement was reached, however, between Mr. Strykiwsky and the respondents and a consent order was drawn up setting aside the original refusal to treat him on an exceptional basis and referring the matter back to the respondents. This consent order was promulgated by Mr. Justice Gibson and dated March 14, 2000. A controversy between the parties then arose in respect of whether this consent order meant that the judicial review was completed and directions were solicited from this Court. On May 30, the Court issued directions and granted leave to Mr. Stykiwsky to file the present motion to extend time for filing affidavit evidence. Mr. Strykiwsky now wishes to extend the time for the filing of three affidavits: one from Drs. Pearson and Gourlay and one from Mr. Wallace.

Legal issues

[6] There are five issues which must be resolved by the Court. As a preliminary issue, the Court must determine which test is applicable in deciding whether to allow the affidavits. The second issue which will be addressed by the Court concerns whether Mr. Strykiwsky's case is now moot in light of the March 14 order. The third issue is whether Mr. Strykiwsky can satisfy the Court as to his reasons for delay in filing the affidavits. The fourth issue will, upon resolution, determine whether the affidavits are admissible and relevant to the case at hand.

Proper Test

[7] In regard to the first issue, the applicant submits that the proper test for whether to extend time for filing affidavits has two parts. The first part looks at the reasons for the delay and the second part looks at whether the affidavits in question contain evidence which is relevant and admissible;*Mapei Inc. v. Flextile Ltd. et al.* (1995), 59 C.P.R. (3d) 211 at 213. At the hearing, counsel for Mr. Strykiwsky took up the gauntlet in respect of proving that his case is not moot. The respondents submit that, because the moving party's case is allegedly closed, the proper test in the circumstances is the four-part test applicable when a party seeks

to extend time to file an application record. This test requires that the moving party demonstrate (1) a continuing intention to pursue the appeal, (2) that there is some merit in the application for judicial review, (3) that no prejudice to the respondent will arise as a result of the delay and (4) that a reasonable explanation for the delay exists; *Bellefeuille v. Canadian Human Rights Commission et al.* (1993), 66 F.T.R. 1 at paragraph 10.

[8] While the respondents' submissions appear, at first glance, to have a certain logic inherent in them, this Court cannot, in the end, adhere to the reasoning behind them. Mr. Strykiwsky should, instead, merely face the two-step procedure along the lines his counsel envisioned at the hearing. First, he must prove to the Court's satisfaction that his case, in light of the March 14 order, is not moot. Assuming that the case is not moot and, in essence, still alive, there would be no reason why he then needs to do more than satisfy the *Mapei Inc.* test for filing late affidavits. This two-step process was invoked by Madam Justice Reed in *Bellefeuille* writing at paragraph 13:

> With respect to the present application, after a careful review of the file, I cannot conclude that the matter was res judicata as a result of Mr. Justice Teitelbaum's directions to the Registry.[...] At the same time, as stated, I have not come to a conclusion different from him [*sic*] on the merits with respect to whether a reasonable explanation has been given for the delay. It has not.

Reed J. was concerned with *res judicata* and applications as opposed to mootness and affidavits. This does not change the fact that determining whether a case is alive and determining whether to extend time limits, are two separate and unrelated issues, which this Court continues to keep distinct.

[9] In conclusion, therefore, Mr. Strykiwsky does not need to prove either an intention to pursue his application, or that there is some merit to his application. In respect of whether prejudice is relevant this Court notes *Aircraft Technical Publishers v. ATP Aero Training Products Inc.* (1998), 150 F.T.R. 230, wherein Prothonotary Hargrave considered the possibility that prejudice might be caused if a deadline for filing affidavits were extended. Because the respondents admit that there will be no prejudice in the circumstances, however, the issue does not need to be addressed. The Court also points to the decision of Mr. Justice Strayer, in *Maxim's Ltd. v. Maxim's Bakery Ltd.* (1990), 37 F.T.R. 199 (T.D.), wherein he wrote that one must weigh the reason for delay against the relevancy of the affidavits.

Moot Application

[10] In respect of whether the application for judicial review is now moot, the moving party asserts that it is not, despite his having commenced receiving the treatment in question. In particular, he notes that his application addresses the alleged right which he and every other inmate in Canada have to receive Phase II treatment, and that the respondents have not yet conceded that the right exists. The respondent submits that the case is moot, that the issues are *res judicata* and, in light of the March 14 order, that the Court is now *functus officio*. The last two submissions were extremely brief, however, and nothing can be safely decided on them.

[11] If the application is moot, the law is clear that the motion to extend time for filing should not be granted. In *Borowski v. Canada (A.G.)*, [1989] 1 S.C.R. 342, Sopinka J. wrote at paragraph 15:

The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision.

[12] In his notice of application the applicant sought two orders, *inter alia*:

1. declaring the Respondent Commissioner of Corrections and the Respondent Correctional Services of Canada are under a legal duty to implement the so-called Phase 2 methadone maintenance treatment program and that the said Respondents are lawfully obliged to provide methadone maintenance treatment to all federal inmates medically eligible and wishing to receive the treatment, and

2. declaring that the Respondents are under a legal duty to provide the Applicant Barry William Strykiwsky with essential health care, namely, methadone maintenance treatment and all related necessary health care services, and.

[13] As he alleges, the respondents have not yet conceded that they have a legal duty, or that the moving party has a right to Phase II treatment. The fact that the February 11 refusal was set aside on consent and the fact that the moving party has since received special dispensation to be provided with the treatment, therefore, while benefiting him for the time being, does not dispose of the questions put at issue in the notice of application nor answer the prayer for relief cited above. Dr. Pearson, in her affidavit at p.19, described the moving party's Phase II treatment program in the following way:

The only current means by which a federal inmate may be initiated on methadone is via the "exceptional circumstances" program. This program requires an inmate to obtain the recommendations of his/her parole officer, warden of the institution, Chief of Health Services, institutional physician and the Deputy Commissioner to all recommend the individual for MMT.[...]

In addition, the physician must state that the individual making the application is in *urgent medical need* of this treatment.

[14] While Mr. Strykiwsky has received substantial relief, he has not received the relief which is tied to the rights he seeks to establish before this Court. In particular, it should be noted that the Phase II treatment might conceivably be taken away from the moving party were he no longer in urgent medical need of it. The moving party is in a similar position to that of the applicants in *Pulp, Paper and Woodworkers of Canada, Local 8 et al. v. Canada (Minister of Agriculture)*, [1992] 1 F.C. 372. In that case, the applicants benefited from a company's voluntary withdrawal of a pesticide but remained exposed to its possible later use in the absence of an order quashing its registration by the government.

[15] Having concluded that the applicant's pleadings in respect of himself are still alive, the Court does not need to look at the state of the application for judicial review as it bears on the rest of Canada's inmates. Nor is it necessary to comment on whether it is possible in the circumstances for Mr. Strykiwsky to have public interest standing.

Delay

[16] Having concluded that the case is still alive and that the issues raised in it are not moot, the next issue concerns the reasons for the applicant's delay. He submits that, in respect of the affidavits of Drs. Pearson and Gourlay, the delay was caused by the doctors' numerous professional obligations and the complexity of the issue of methadone treatment. As for the report of Mr. Wallace, the moving party submits that his counsel did not become aware of it, and then could not obtain a copy of it, until June of 2000. The respondents submit that no explanation has been forthcoming as to why an extension of time was not sought earlier and as to why nothing was said by his counsel at the time when the respondents were telling him that the case was closed.

[17] The applicant is correct to point out that waiting to seek an extension of time until after a deadline has expired is acceptable. It is even, as noted by Mr. Justice Décary *in Munsingwear Inc. v. Prouvost S.A.*, [1992] 2 F.C. 541 (C.A.) at 547, de rigueur:

> The determination by the Court of the "intrinsic worth" of an affidavit assumes as a general rule, and this is the practice followed in the Trial Division and before the prothonotary, that this affidavit is attached to the notice of motion, which give the Court an opportunity to examine it and the opposing party an opportunity to object to its being filed.
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> [...]
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> Disregarding this general rule, Prouvost applied to the Court in advance [of the deadline] for an extension of time to file affidavits which it was not in a position to file at that point. I have serious doubts as to the validity of this procedure.

It should also be noted that rule 8(2) of the Rules does not require but permits the early filing of motion to extend time, that which 8(1) makes discretionary:

8.(1) On motion, the Court may extend or abridge a period provided by these Rules or fixed by an order.	8.(1) La Cour peut, sur requête, proroger ou abréger tout délai prévu par les présentes règles ou fixé par ordonnance.

[18] As a result, waiting to file a motion to extend time can be considered an acceptable practice if the Court agrees. The respondents are also correct, however, in noting that Mr. Strykiwsky should have alerted them to the fact that late affidavits were being necessitated. As Décary J.A. wrote at 548:

> The proper procedure would be for the party who finds it impossible to file his affidavits at the proper time to inform the opposing party of this and warn the latter that it will subsequently file an application for an extension of time when the affidavits are available. [See Indianapolis Colts, Inc. v. Forzani's Locker Room Ltd. et al (1987), 15 C.P.R. (3d) 283, at 285.]

[19] The requirement to warn the opposing party of forthcoming late filings does not appear, however, to be a rule which this Court has enforced by preventing the filings when no warning has issued. Indeed, the respondents submitted no examples of a party facing such a sanction. Having concluded thus, however, the Court cannot condone that counsel for the applicant remained silent for a period of over a month in respect of whether he considered the case still open and revealed nothing about the affidavit evidence he was quietly procuring. On May 30, 2000, Prothonotary Lafrenière did, however, on the applicant's motion, grant leave to move for a time extension under rule 306.

Relevancy

[20] In respect of the fourth issue, that is, whether the affidavits be admissible and relevant, the applicant met little opposition from the respondents. In particular, the respondents spent much of their time arguing over the merits of the moving party's affidavit evidence rather than the admissibility of the affidavits or their relevance to the issues raised in the notice of application for judicial review. Exception was taken, however, with Dr. Gourlay's affidavit on the ground that he lacks expertise in the field of institutional inmate environments.

[21] All three of the applicant's supporting affidavits address, in their own way, the need for a heroine-free environment within the prison environment if a prisoner is to have much of a chance of succeeding in his methadone treatment. In addition, Dr. Pearson questions, at pages 19 and 20 of exhibit "B" to her affidavit, the effectiveness of providing methadone treatment only on a dire-need basis:

> I find it shocking that a physician must determine level of need for an essential medical treatment. It is similar to suggesting to a physician that a chest infection may only be treated after a patient has slipped into respiratory failure and is about to succumb (Pearson's exhibit "B", pp. 19 and 20).

[22] Mr. Strykiwsky alleges that the above averments are relevant to his *Charter* arguments and, in particular, to his arguments that Phase II treatment must be

provided by the respondents to all inmates under paragraph 86(1)(a) of the *Corrections and Conditional Release Act*. In fact,paragraph 86(1)(a) provides:

86.(1) The Service shall provide every inmate with (a) essential health care; and	86.(1) Le Service veille à ce que chaque détenu reçoive les soins de santé essentiels [...]

The statements made in the three affidavits appear, however, to exhibit only a tenuous connection to any argument based on paragraph 86(1)(a) of the*Corrections and Conditional Release Act*. It is also to be noted that counsel for Mr. Strykiwsky did not even attempt to link the statements to his proposed sections 7, 12 and 15 *Charter* and administrative law arguments. Nevertheless, as counsel for the applicant suggested at the hearing of the matter, this is not the time or the place to engage in an analysis of the merits or precise value of the statements (Transcript: p. 120 and p. 130). In addition, the respondent, as noted above, chose not to take issue with the admissibility or relevance of the Pearson and Wallace affidavits. This Court will, therefore, albeit reluctantly and only for the limited purposes of this motion, accept that these two affidavits contain information which is both admissible and relevant to the moving party's case.

[23] As for the affidavit of Dr. Gourlay, counsel for Mr. Strykiwsky did not take issue in his reply with the respondents' contention that the doctor's expertise lies outside the area of institutional inmate environments and is, effectively, irrelevant. Accepting that the respondents' statement is accurate, this Court also concludes that the affidavit is irrelevant in with regard to the arguments based on paragraph 86(1)(a) of the *Corrections and Conditional Release Act*, sections 7, 12 and 15 of the *Charter*, and administrative law.

Conclusion

[24] The moving party's case is not moot. In addition, there are barely satisfactory reasons for the delay in filing the three affidavits. The Court is only satisfied, however, that the affidavits of Dr. Pearson and Mr. Wallace are admissible, relevant and that, weighed against the delay, they should be filed. While the time to file affidavits will be extended in order that these two affidavits may be filed, however, no such extension will be granted in respect of Dr. Gourlay's affidavit.

[25] The applicant, through counsel, has been far too nonchalant about the respondents' convenience. He achieved, in effect, a mixed victory, and his counsel did not advise the respondents of their intentions in a timely and courteous manner. That costs. A party like the applicant, brandishing a public-interest cause, ought not in the circumstances to be exempt from an adverse award of costs. Because the applicant was incarcerated, it is apparent that he ought not personally to be fixed with costs. Reference is made to Mark Gerald Mason's affidavit sworn on June 22, 2000. The respondents are awarded all party-and-party costs incurred after March 14, 2000, it being understood that the applicant will not be called upon to pay any of those costs personally.

[26] The applicant's solicitors shall, after consultation with the respondents' solicitors, draft the order to implement these reasons, for the Court's approval. [A suggested, possible draft will be forwarded to the respective counsel, for their consideration and commentaries.]

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Judge

OTTAWA, September 1, 2000