

Federal Court



Cour fédérale

Date: 20210507

Docket: T-189-20

Citation: 2021 FC 415

Ottawa, Ontario, May 7, 2021

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

LAURENCE PASKEMIN

Applicant

and

**LORIE ANN WHITECALF, DARIUS ALBERT, ELDON ATCHEYNUM,
TOMMY WHITECALF, HAZEN PASKIMIN, RALPH FOX AND
OMER WHITE IN THEIR CAPACITY AS CHIEF AND COUNCIL OF
THE SWEETGRASS FIRST NATION AT THE RELEVANT TIME,
AARON LEDOUX, IN HIS CAPACITY AS PROJECT MANAGER OF THE CMHC
PROJECT FOR THE SWEETGRASS FIRST NATION AT THE RELEVANT TIME,
JANICE WILMA KENNEDY, EXECUTIVE ASSISTANT TO THE SWEETGRASS
FIRST NATION CHIEF AT THE RELEVANT TIME**

Respondents

ORDER AND REASONS

[1] This is a motion by the Applicant to extend time to serve and file his Application for Judicial Review [Application] from decisions made in 2016 and 2017 to the date he filed his Application on February 5, 2020.

[2] The Applicant was Chief of the Sweetgrass First Nation [First Nation] from November 30, 2017 until November 29, 2019. The Applicant had concerns about what his predecessor as Chief and councillors [Respondent Council] did in relation to Canada Mortgage and Housing Corporation [CMHC] housing projects [Program] during their two-year term on the Council of the First Nation [Council], which started in November 2015 and ended November 29, 2017. At the end of his two-year term in 2019, the Applicant ran against and was defeated by the same Chief that was in place in the Respondent Council.

[3] While the Applicant was Chief, he commissioned an audit of the Program at the First Nation. He says it was the Council's "intention to contract an accounting firm to perform a forensic audit of all programs but since the Band was in a negative financial position we could only afford for one program to be audited."

[4] An audit report titled "Sweetgrass First Nation – Housing Capital Project: Financial Review" was delivered by MNP LLP and was dated November 14, 2019 [Report]. The Report was delivered to the First Nation shortly before elections took place in November 2019. The Applicant alleges this Report showed irregularities in the Project and he seeks relief from this Court in that connection.

[5] The proposed Application complains of actions taken by the Respondents during the time they were involved with Council during their term, which ended November 30, 2017.

[6] Specifically the Notice of Application states the decision under review is that of the First Nation “in its non-compliance to address the issue of the investigation of the Canada Mortgage and Housing Corporation (CMHC) program” on the First Nation “for the year 2016-2017.”

[7] While the Applicant served and filed his Application on February 5, 2020, it appears an accompanying notice of motion to extend time was served, but not filed.

[8] The Applicant seeks the following Orders in his Application:

1. A declaration that the current Chief Lorie Ann Whitecalf and others who were current council members at the relevant term and time were in breach of fiduciary duty and as such the Respondents must be disgorged of the benefits that they received thereof;
2. A declaration from the Court suspending of the Current Chief and the respective Council members who breached their fiduciary duty at that relevant time as they are capable of repeating same or similar violations of their fiduciary duty now as current elected council;
3. A declaration prohibiting the currently elected Councilor and former executive assistant of the former Chief of the Sweetgrass First Nation Janice Wilma Kennedy from continuing as an elected councilor as she was aware of the breach of fiduciary duty regarding the CMHC program and she did nothing to stop the flow of payments to contractors;
4. A declaration that those who were not council at the relevant time and term who were not in breach would continue as elected leaders of the Sweetgrass First Nation;
5. A declaration that the administration of Sweetgrass First Nation have an independent oversight monitor, i.e. third-party manager;
6. A declaration that the other and all programs administered by the Sweetgrass First Nation be subject to the forensic audit to ensure transparency and accountability;
7. An order of mandamus requiring the Respondent Aaron Ledoux to provide any and all documentation relating to any and all Sweetgrass First Nations housing projects that he was responsible for the at the relevant time;

8. An order of prohibition preventing the current Chief and Council from making any further unilateral decisions without proper governance legislation such as the *Indian Band Council Procedure Regulations and Manual for the Administration of Band Moneys*;
9. Costs against the Respondents, jointly and severally;
10. Such further and other relief as this Honourable Court deems fit.

[9] Prothonotary Molgat has issued several directions in connection with this matter. Two in particular relate to the Applicant's delay in filing materials for extension of time.

[10] The first dated December 9, 2020 directed the Applicant to file a copy of his motion record to extend time by December 23, 2020. The Respondents were directed to confirm they had been served the motion record and attach a copy of it and file it in this Court. The motion record was filed on December 17, 2020 by the Respondent, not the Applicant.

[11] On January 25, 2021, the Applicant asked for more time to file his motion record and was given until February 8, 2021.

[12] On March 9, 2021, another direction was issued by Prothonotary Molgat because the Applicant was in default of the January 25, 2021 direction, concerning a case management meeting and update. It appears the Applicant did not file a copy of his motion record for an extension of time in accordance with the directions dated December 9, 2020 and January 25, 2021 because he was under the impression he needed to also file proof of service and he was have difficulties acquiring proof of service. On March 11, 2021, Prothonotary Molgat directed the Applicant to file his motion record and disposed of the requirement for proof of service.

[13] After a case management conference, Prothonotary Molgat directed on March 23, 2021, the Respondent file a complete copy of the Applicant's motion record served in February 2020, which the Respondent did. She also allowed the Applicant and Respondents to file supplementary motion materials.

[14] The law in this connection is set out by the Federal Court of Appeal in *Canada (Attorney General) v Hennelly*, 1999 CanLII 8190 (FCA) [McDonald JA] [*Hennelly*] which states the following:

- [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.

[15] In *Chan v Canada (Public Safety and Emergency Preparedness)*, 2013 FCA 130 [Evans JA], the Federal Court of Appeal stated:

[5] The Court's application of these criteria should be guided by a consideration of whether justice will be done between the parties by granting or refusing the requested extension of time: *Canada (Attorney General) v Pentney*, 2008 FC 96 (CanLII), [2008] 4 F.C.R. 265 (F.C.) at paras. 31 and following.

[16] It is important to remember the Applicant bears the burden of establishing the elements necessary for an extension of time, generally by way of sworn affidavit evidence (*Viridi v Canada (Minister of National Revenue)*, 2006 FCA 38 [Décary JA]).

[17] The Respondents opposes the motion on several grounds, the first being that any decision by the Respondent Council would have predated November 29, 2017, some 26 months before the Applicant's application and motion to extend time were brought. The Respondents submit the Applicant was in the position of Chief for two years and would have had knowledge of issues on the Project. The Respondent submits the Applicant has not offered any evidence of intention to bring the application since November 30, 2017 or any explanation for his delay in bringing this Application from the date he took office.

[18] In my respectful view, the Respondents' submission has merit. Upon review of the evidence, the Applicant took office on November 30, 2017. The Applicant states he had concerns regarding the financial affairs of Sweetgrass, and specifically had concerns over the Program, which is the subject of his Application. In fact, he says he ordered an audit of the Program. I agree with the Respondents that soon into his term as Chief in 2017 he would have been aware of decisions made by the Respondent Council with respect to the Program.

[19] That said, there is nothing in the record to indicate an intention to pursue an Application for Judicial Review with respect to the impugned decision from November 30, 2017, when he took office, until his Application was filed in February 2020. I agree the Applicant as Chief was seeking information as to what happened after he took office, but he took no steps to initiate judicial review from November 2017 to November 30, 2019 when he completed his term of office. Nor do I consider the Applicant's conduct from November 2017 to November 30, 2019 to be an adequate explanation of his delay from November 2017 (the last date of any alleged wrongdoing) until the date the Application was brought on February 5, 2020. The receipt of the

Report in November 2019 does not excuse the delay because, on the Applicant's own evidence, he was aware of the impugned decisions, which took place well before November 30, 2019 when he ceased to be Chief.

[20] While it is true there must be an end to litigation, it is also the case that a party must commence litigation in a timely manner, which and with respect, is not the case in this matter.

[21] In another submission, the Respondents submit neither Janice Wilma Kennedy nor Aaron Ledoux were a part of a Federal Board Commission or other Tribunal and as such are not subject to the jurisdiction of the Court pursuant to Sections 18 and 18.1 of the *Federal Courts Act* [Act]. In this, the Respondent is correct; the parties also agree that Mr. Ledoux has passed away. Without more, and there is none before the Court, neither are proper respondents.

[22] In my view, the motion to extend time does not meet the test in *Hennelly* and therefore will be dismissed.

[23] The Respondents seek costs in the amount of \$4,410.00 and filed a Bill of Costs based on Column III of Tariff B of the *Federal Courts Rules*, SOR/98-106 in support. There is no reason why costs should not follow the event. In my respectful view, a reasonable amount of costs in the circumstances is \$2,500, and the Court will so Order.

ORDER in T-189-20

THIS COURT'S ORDER is that:

1. The motion to extend time is dismissed.
2. The Applicant shall pay to the Respondents their costs in the amount of \$2,500.00.

“Henry S. Brown”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-189-20

STYLE OF CAUSE: LAURENCE PASKEMIN v LORIE ANN WHITECALF, DARIUS ALBERT, ELDON ATCHEYNUM, TOMMY WHITECALF, HAZEN PASKIMIN, RALPH FOX AND OMER WHITE IN THEIR CAPACITY AS CHIEF AND COUNCIL OF THE SWEETGRASS FIRST NATION AT THE RELEVANT TIME, AARON LEDOUX, IN HIS CAPACITY AS PROJECT MANAGER OF THE CMHC PROJECT FOR THE SWEETGRASS FIRST NATION AT THE RELEVANT TIME, JANICE WILMA KENNEDY, EXECUTIVE ASSISTANT TO THE SWEETGRASS FIRST NATION CHIEF AT THE RELEVANT TIME

MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES*

ORDER AND REASONS: BROWN J.

DATED: MAY 7, 2021

WRITTEN REPRESENTATIONS BY:

Laurence Paskemin

FOR THE APPLICANT
(ON HIS OWN BEHALF)

Christopher C. Boychuk

FOR THE RESPONDENTS

SOLICITORS OF RECORD:

MacDougall Gauley LLP
Barristers & Solicitors
Saskatoon, Sk

FOR THE RESPONDENTS