

Federal Court of Appeal



Cour d'appel fédérale

Date: 20201130

Docket: A-465-19

Citation: 2020 FCA 204

Present: LEBLANC J.A.

BETWEEN:

**GAMBLER FIRST NATION, GAMBLER
FIRST NATION ELECTION COMMITTEE,
GORDON LEDOUX, CHARLENE TANNER
and CURTIS DUCHARME**

Appellants

and

**DAVID LEDOUX, KELLIE LEDOUX and
LOUIE TANNER**

Respondents

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on November 30, 2020.

REASONS FOR ORDER BY:

LEBLANC J.A.

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REASONS FOR ORDER

LEBLANC J.A.

[1] Before the Court is a motion in writing from the appellants for an extension of time to bring forward a motion pursuant to rule 343(3) of the *Federal Courts Rules*, SOR/98-106 (the Rules) for an order settling the contents of the appeal book (the Rule 343 Motion).

[2] This motion for extension of time is being submitted in the wake of reasons for order issued on August 13, 2020 by Justice Denis Pelletier of this Court (*Gambler First Nation et al. v. David Leroux et al.*, 2020 FCA 132) (the August Order). Justice Pelletier was seized of the Rule 343 Motion, which was filed on June 24, 2020. At that time, the appellants were also seeking, under rule 351, leave to file new evidence. Both requests were considered by Justice Pelletier. The rule 351 request was denied. For its part, the Rule 343 Motion was adjourned to allow the appellants to seek an extension of time to file it, since by not having been filed in the prescribed time, said Motion could not be considered without leave from the Court (August Order at para. 9).

[3] The underlying appeal to this motion for an extension of time is an appeal of a decision of the Federal Court rendered on November 19, 2019 (*Ledoux v. Gambler First Nation*, 2019 FC 1465, 312 A.C.W.S. (3d) 452). The notice of appeal was filed on December 16, 2019. As determined by Justice Pelletier, the parties, as permitted by rule 343(1), had until February 1, 2020 to reach an agreement as to the contents of the appeal book (August Order at para. 5). Since no such agreement was reached, the appellants, pursuant to rule 343(3), were required to file a motion to settle the contents of the appeal book. They had until February 11, 2020 to file such motion, but failed to do so (August Order at para. 7).

[4] As indicated previously, it is only on June 24, 2020, that the Rule 343 Motion was filed. However, that filing was made in the midst of the suspension of the Rules' filing deadlines due to the pandemic, which was first promulgated by the Chief Justice on March 19, 2020 with retroactive effect to March 16, 2019. This is why, as noted by Justice Pelletier, said suspension

“does not count in terms of the extent to which [the appellants are] late in bringing [their] motion, though [the appellants] did file [their] motion on June 24, 2020 which is approximately one month before this file was “selected” so as to recommence the running time” (August Order at para. 6).

[5] The appellants’ entitlement to the extension of time they are seeking must therefore be assessed against the fact that they were required – but failed – to file the Rule 343 Motion between February 11 and March 16, 2020. Such entitlement generally depends on the consideration of four factors set out in this Court’s jurisprudence. Pursuant to those factors, the appellants, in order to succeed, must show (i) a continuing intention to pursue their appeal; (ii) that the appeal has some merit; (iii) that no prejudice to the respondents arises from the delay; and (iv) that a reasonable explanation for the delay exists (*Canada (Attorney General) v. Hennelly*, 244 N.R. 399, 1999 CanLII 8190 (F.C.A.)) (*Hennelly*).

[6] It is however also well established that the four-part test in *Hennelly* does not constitute an exhaustive list of questions or factors that may be relevant in any given case, nor is the failure to fulfil one of the criteria necessarily determinative. The importance of each factor will depend upon the circumstances of each case. More fundamentally, the overriding consideration in the end is that the interests of justice be served (*Canada (Attorney General) v. Larkman*, 2012 FCA 204, [2012] 4 C.N.L.R. 87 at para. 62; *Grewal v. Minister of Employment and Immigration*, [1985] 2 F.C. 263, 63 N.R. 106 at 277-279 (F.C.A.); *Alberta v. Canada*, 2018 FCA 83, 425 D.L.R. (4th) 366 at para. 45).

[7] Here, I am satisfied that the appellants have manifested a continuing intention to pursue the appeal. The respondents' own responding material shows that counsel for both parties had been in contact at least until March 5, 2020 regarding the contents of the appeal book, with the appellants' desire to file new evidence having been the main point of contention between the parties at that stage. That material also shows that the appellants served on the respondents the Rule 343 Motion as well as their rule 351 request on March 19, 2020 (respondents' Memorandum of Fact and Law at paras. 3-15; affidavit of David Leroux, affirmed on May 8, 2020 at para. 9). At that date, as we have seen, the Rules' filing deadlines were suspended.

[8] Contrary to the respondents' contention, I do not perceive a lack of effort on the part of the appellants in trying to settle the contents of the appeal book and in moving the underlying appeal forward, at least not to the point where it could reasonably be determined that they failed to display a continuing intention to pursue the appeal.

[9] I am not satisfied either that this appeal is devoid of any merit as evidenced by Justice Pelletier's order, also dated August 13, 2020, dismissing a motion from the respondents seeking to have the notice of appeal struck on various grounds, including abuse of process (*Gambler First Nation et al. v. David Leroux et al.*, 2020 FCA 131). In that order, Justice Pelletier determined, at para. 4, that the ground of appeal alleging that the Federal Court's decision was unsupported by the facts and contrary to law was a legitimate one, particularly in light of the fact that "the law of judicial review had been recast by the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, which emphasizes a

reviewing Court's obligation to focus on the reasons given by the tribunal whose decision is being reviewed.”

[10] The respondents also claim that the extension of time sought by the appellants should be denied because the Rule 343 Motion itself is without merit, the appellants having failed to include critical documents that were before the Federal Court. This argument misses the point. First, the very nature of a rule 343 motion is to settle the disagreements as to the contents of the appeal book that prevented the parties from reaching an agreement on said contents. Hence, some documents may appear critical to one party but not to the other. Rule 343 provides that such disagreements are to be settled by the Court.

[11] Second, as per rule 343(2), the appeal book should not include a document unless it is required to dispose of an issue on appeal. This aims to discourage parties from including material in the appeal book that is not useful, even if that material was before the court below (*Shire Canada Inc. v. Apotex Inc.*, 2011 FCA 10, 414 N.R. 270 at para. 14). Again, the parties may disagree as to whether such material is useful to dispose of an issue on appeal and it is for the Court to adjudicate such disputes. Here, however, apart from the issue regarding the new evidence the appellants sought to include in the appeal book, which has been resolved by Justice Pelletier in the August Order, I see no such disagreement. Indeed, in their Memorandum of Fact and Law, at para. 39, the appellants indicate that they would be “unopposed” to the inclusion in the appeal book of “each or any interim motion, affidavit or decision on the record before the lower Court” that the respondents “would like to include”.

[12] The respondent contends that the time the appellants have taken to bring the Rule 343 Motion has delayed the entire appeal to their detriment and that of the Gambler First Nation. In all fairness, this appeal has been delayed for the most part due to the extraordinary circumstances related to the COVID-19 pandemic. The delay in bringing forward the Rule 343 Motion has played, in these circumstances, a minimal role. With respect to the alleged prejudice to the Gambler First Nation, I note that each party pretends to be speaking on its behalf and, as is often the case in matters that, like this one, involve governance disputes, each bitterly criticizes the other in the name of the community. In such a peculiar context, there is simply no basis for concluding that the appellants' delay in bringing the Rule 343 Motion has caused prejudice to the Gambler First Nation, as contented by the respondents.

[13] Finally, though the appellants could have acted with more celerity in filing the Rule 343 Motion, I am not prepared to deny the extension of time they are seeking on that sole basis. As I mentioned earlier, the importance of each *Hennelly* factor depends upon the circumstances of each case, and the failure to fulfil one of them will not necessarily be fatal, the paramount consideration being that the interests of justice be served.

[14] Here, I am satisfied that those interests will be best served by granting the extension of time sought by the appellants.

[15] Having so decided, I will now deal with the merits of the Rule 343 Motion, which was, as it needed to be, submitted in writing under rule 369, and is now ready for disposition.

[16] The appellants submit that the contents of the appeal book should be “the generally required content ... pursuant to [rules] 344(1) and (1.1)”, including:

- The Notice of Application, filed on August 13, 2018;
- The Amended Notice of Application, filed on November 22, 2018;
- The Affidavit of David Leroux, sworn on September 10, 2018;
- The Affidavit of Kellie Leroux, sworn on September 10, 2018;
- The Affidavit of Louie Tanner, sworn on September 10, 2018;
- The Affidavit of Amanda Louison, sworn on September 11, 2018;
- The Affidavit of Donna McGillivray, sworn on April 28, 2019;
- The transcript of the proceedings before the Federal Court held on November 14, 2019.

[17] The respondents claim that this list is incomplete as it fails to include some other documents that were before the Federal Court. Those other documents are:

- The impugned decision (that of the Gambler First Nation Election Committee), dated July 14, 2018;
- The Amended Notice of Application dated August 8, 2018;
- “Acknowledgment and Receipt of Dana Turner, dated August 21, 2018”;
- Supplementary affidavit of Amanda Louison, sworn on September 11, 2018;
- Affidavit of Stephanie Hamilton-Tanner, sworn on May 7, 2019;
- Order and Reasons of Justice Pentney, dated March 27, 2019;
- Memorandum of Fact and Law of the applicants (respondents before this Court), dated July 2, 2019;
- Memorandum of Fact and Law of the respondents (appellants before this Court), undated.

[18] The respondents do not specify in their written submissions why those other documents are required to dispose of an issue on appeal. Moreover, it is usual practice, except in exceptional circumstances, not to include in the appeal book memoranda of fact and law filed with the court below, as the disposition of an appeal depends not on those submissions, but on the evidence and

the applicable legal principles (*McBride v. Canada (Minister of National Defence)*, 2008 FCA 111, 166 A.C.W.S. (3d) 7 at para. 3). The respondents provided no explanation as to the existence of exceptional circumstances that would require a departure from this usual practice, nor is there any explanation as to how the document titled “Acknowledgment and Receipt of Dana Turner, dated August 21, 2018” would assist the Court is disposing of an issue on appeal.

[19] That said, I am prepared to adopt a flexible approach and include in the appeal book the evidence and interim order, which, according to the respondents, were part of the record before the Federal Court but not included in the appellants’ proposed list of documents. As I indicated previously, the appellants are, in any event, unopposed to the inclusion of these additional documents in the appeal book.

[20] I therefore determine that the appeal book should contain:

- The decision of the Gambler First Nation Election Committee, dated July 14, 2018;
- The Notice of Application, filed on August 13, 2018;
- The Amended Notice of Application, filed on November 5, 2018;
- The Affidavit of David Leroux, sworn on September 10, 2018;

- The Affidavit of Kellie Leroux, sworn on September 10, 2018;
- The Affidavit of Louie Tanner, sworn on September 10, 2018;
- The Affidavit of Amanda Louison, sworn on September 11, 2018;
- The Supplementary affidavit of Amanda Louison, sworn on September 11, 2018;
- The Affidavit of Donna McGillivray, sworn on April 28, 2019;
- The Affidavit of Stephanie Hamilton-Tanner, sworn on May 7, 2019;
- The Order and Reasons of Justice Pentney, dated March 27, 2019; and
- The transcript of the proceedings held before the Federal Court on November 14, 2019.

[21] In sum, the appellants' request for an extension of time to file their motion pursuant to rule 343(3) for an order settling the contents of the appeal book will be granted. Said motion will also be granted in the manner set out in these reasons for order. The appeal book will have to be prepared by the appellants accordingly in the manner prescribed by rule 344 and it will have to be served and filed within the 30-day timeline set out in rule 345. The *Christmas recess*, as defined in rule 2, is to be included in the computation of this timeline.

[22] Both parties claim their costs but I am of the view that in the particular circumstances of this case, an award of costs in favour of either party is not warranted.

“René LeBlanc”

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:

A-465-19

STYLE OF CAUSE:

GAMBLER FIRST NATION,
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ELECTION COMMITTEE,
GORDON LEDOUX, CHARLENE
TANNER and CURTIS
DUCHARME v. DAVID
LEDOUX, KELLIE LEDOUX and
LOUIE TANNER

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:

LEBLANC J.A.

DATED:

NOVEMBER 30, 2020

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