Federal Court  Cour fédérale

Date: 20170602

Docket: 17-T-20

Citation: 2017 FC 544

Ottawa, Ontario, June 2, 2017

PRESENT: The Honourable Mr. Justice Locke

BETWEEN:

BRUCE ARCHIBALD
AND GÉRARD ÉTIENNE

Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] This decision concerns a motion in writing under Rule 369 of the *Federal Courts Rules*, SOR/98-106 [the *Rules*], seeking an extension of the deadline for commencing an application for judicial review of a January 10, 2017 decision by the Public Security Integrity Commissioner (the Commissioner) finding that allegations of gross mismanagement against the applicants were founded.

I. Facts

[2] The applicants are Bruce Archibald, former President of the Canadian Food Inspection Agency (CFIA), and Gérard Étienne, then Vice President of Human Resources of CFIA.

[3] The applicants were advised in March 2016 of the Commissioner's intention to investigate the allegations against them. In August 2016 the applicants received a preliminary investigation report from the Commissioner finding that the applicants had committed gross mismanagement. The applicants responded to the preliminary investigation report and provided names of witnesses who should be interviewed.

[4] The applicants claim that, when they received the Commissioner's January 10, 2017 decision confirming the finding of gross mismanagement, they received assurances from the current CFIA President, as well as its Executive Director, Values, Integrity and Conflict Resolution, that the matter would be dealt with internally and that the Commissioner's report on the matter would not contain their names. However, when the Commissioner's report was tabled before Parliament in February 2017 it did identify the applicants. They were also identified in a related press release.

[5] The applicants' claim that they initially decided not to seek judicial review of the Commissioner's decision based on the understanding that their names would not be publicly associated with it. They argue that, once they learned that their understanding was incorrect, they acted diligently to bring the present motion.

[6] For its part, the respondent disputes some aspects of the applicants' description of their discussions with representatives of the CFIA. The respondent also argues that any belief the

applicants may have had that their identities would not be made known to the public was unreasonable.

II. Preliminary Issue

[7] The applicants' motion record was filed on March 10, 2017. The respondent's motion record was duly filed on March 29, 2017. Rule 369 of the *Rules* provides that the moving party in a motion in writing may serve and file written representations in reply within four days after receiving the respondent's record. The *Rules* do not provide for the filing of any supplementary affidavit by the moving party at the reply stage. In this case, the applicants brought a second motion, this one for an order (i) permitting them to file a supplementary affidavit, and (ii) extending the deadline for filing the reply representations. With no opposition to this second motion by the respondent, I allowed the requested permission and deadline extension. The applicants were therefore entitled to file the proposed supplementary affidavit and their reply representations within seven days thereafter.

[8] For reasons that are not clear to me, the applicants failed to file either the supplementary affidavit or the reply representations within the revised period allowed. Accordingly, the applicants' original motion for an extension of the deadline to commence a judicial review application will be considered on the basis of the parties' respective motion records.

III. Analysis

[9] The test applicable to a request for a deadline extension was provided by the Federal Court of Appeal in *Canada (Attorney General) v Larkman*, 2012 FCA 204 at paras 61-62 [*Larkman*]. The following questions are relevant:

1. Did the moving party have a continuing intention to pursue the application?
2. Is there some potential merit to the application?
3. Has the opposing party been prejudiced from the delay?
4. Does the moving party have a reasonable explanation for the delay?

[10] It is not necessary that all four questions be answered in favour of the moving party. The overriding consideration is whether the interests of justice are served.

[11] The respondent argues that three of these questions work against the applicants. Specifically, the respondent argues that the applicants' have failed to show any of the following: (i) a reasonable explanation for the delay, (ii) a continuing intention to pursue the application, or (iii) some potential merit to the application. I address each of these issues in the paragraphs below.

A. *Does the moving party have a reasonable explanation for the delay?*

[12] The applicants argue that they always had concerns about the fairness of the Commissioner's finding of gross mismanagement, but they decided not to pursue judicial review on the strength of the assurances they received from CFIA representatives that their identities would not be made public in association with the Commissioner's report. The applicants also

argue that they took action diligently once they learned that their identities had indeed been made public.

[13] The respondent argues that any reliance by the applicants on discussions with CFIA staff was unreasonable and insufficient to excuse their delay in seeking judicial review. Firstly, the respondent argues that the applicants knew or should have known that their names would be made public in association with the Commissioner's finding of gross mismanagement. Each of the CFIA representatives whose assurances are cited by the applicants submitted affidavits clarifying their discussions with the applicants and establishing that they did not amount to clear assurances of the kind alleged by the applicants. One of the affidavits also indicates that the applicant Mr. Étienne was told on February 1, 2017, that the Commissioner's report would be tabled in Parliament and that he was named in the report. Also, the respondent argues that a minimum of diligence by the applicants would have revealed to them that the Commissioner publishes his findings and has named individuals in the past.

[14] A second basis for the respondent's argument that the applicants have not excused their delay in seeking judicial review is that they rely on representations by CFIA staff who obviously do not bind the Commissioner whose decision is in issue. The statute by which the Commissioner is governed provides that findings of wrongdoing are submitted to Parliament and that names of individuals may be disclosed. The respondent argues that any reliance by the applicants on their discussions with CFIA representatives was unreasonable.

[15] I agree with the respondent that the applicants have failed to establish a reasonable excuse for their delay in seeking judicial review. Though it is possible that the applicants initially had a good faith belief that their names would not be made public in association with the

Commissioner's report, it was not reasonable for them to form that belief, even if it was in good faith, based on their discussions with CFIA representatives.

[16] This factor favours dismissing the applicants' motion.

B. *Did the moving party have a continuing intention to pursue the application?*

[17] The respondent notes that, by the applicants' own admission, they made a deliberate decision not to pursue judicial review, and they cannot therefore show the required continuing intention.

[18] The applicants cite the fact that the decision not to pursue judicial review was based on their already-mentioned good faith belief that their names would not be publicly associated with the Commissioner's report.

[19] Despite my conclusion above that the applicants' belief was unreasonable, I accept that it may indeed have been in good faith. I have some sympathy for a potential applicant who, in deciding not to commence legal proceedings, has relied on certain information that turned out later to be incorrect. I would have that sympathy even if that reliance was not reasonable. Whereas the question as to whether the applicants had a reasonable explanation for their delay in commencing legal proceedings requires an objective assessment of the facts, the present question as to whether the applicants had a continuing intention to pursue legal proceedings requires a subjective assessment of the facts.

[20] I am satisfied that the applicants' intention to pursue their application may well have been continuing. This factor slightly favours granting the applicants' motion.

C. *Is there some potential merit to the application?*

[21] The entirety of the applicants' submission concerning potential merit is found in a single paragraph in their written representations. They assert that their application has merit, and they identify certain arguments that they intend to make. However, the applicants do not go beyond mere assertions to provide details of their proposed arguments in sufficient detail to allow me to conclude that they have some merit. This is clearly insufficient.

[22] This factor must operate against the applicants.

D. *Interests of justice*

[23] As indicated above, the overriding consideration in a motion to extend a deadline is whether the interests of justice are served. As stated by the FCA in *Larkman* at para 86, "the Federal Court and this Court have underscored the importance of the thirty day deadline in subsection 18.1(2) of the *Federal Courts Act*" and "[m]any authorities suggest that unexplained periods of delay, even short ones, can justify the refusal of an extension of time". The FCA continued at para 87 of *Larkman*:

> The need for finality and certainty underlies the thirty day deadline. When the thirty day deadline expires and no judicial review has been launched against a decision or order, parties ought to be able to proceed on the basis that the decision or order will stand. Finality and certainty must form part of our assessment of the interests of justice.

[24] The respondent acknowledges that the delay in commencing legal proceedings in this matter does not cause it prejudice. This favours granting the applicants' motion, as does the applicants' apparent continuing intention to pursue legal proceedings.

[25] On the other hand, the failure of the applicants to establish either a reasonable explanation for the delay in commencing legal proceedings or some potential merit therein favours dismissing the motion.

[26] Even though the delay was short, I am concerned about the applicants' weak commitment to their case as demonstrated by the unreasonable delay and the absence of detail on their position on the merits. I conclude that the applicants have failed to establish that the interests of justice will be served by granting the requested deadline extension.

JUDGMENT in 17-T-20

THIS COURT'S JUDGMENT is that the applicants' motion to extend the deadline for commencing an application for judicial review is dismissed.

"George R. Locke"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	17-T-20
STYLE OF CAUSE:	BRUCE ARCHIBALD AND GÉRARD ÉTIENNE v ATTORNEY GENERAL OF CANADA

MOTION MADE IN WRITING PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES* (SOR/98-106) CONSIDERED AT OTTAWA, ONTARIO.

JUDGMENT AND REASONS:	LOCKE J.
DATED:	JUNE 2, 2017

APPEARANCES:

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