Federal Court Cour fédérale

Date: 20201023

Docket: 20-T-34

Citation: 2020 FC 1001

Toronto, Ontario, October 23, 2020

PRESENT: Mr Justice A.D. Little

BETWEEN:

DENNIS CYR

Applicant

and

BATCHEWANA FIRST NATIONS OF OJIBWAYS, BATCHEWANA FIRST NATION HOUSING AUTHORITY

Respondents

ORDER AND REASONS

[1] The applicant seeks an extension of time and leave to file an application for judicial review, under subsection 18.1(2) of the *Federal Courts Act*, RSC 1985, c F-7. This motion was decided in writing under Rule 369 of the *Federal Courts Rules*, SOR/98-106, on the basis of the evidence and written submissions filed by the parties.

[2] The usual time for commencing an application for judicial review is within 30 days of the decision being challenged. After that, an applicant must seek an extension under the *Federal Courts Act.*

[3] In July 2020, the First Nation evicted Mr Cyr from his home of 17 years, for which he had paid in full under a rent-to-own program with the First Nation. The eviction was the culmination of events outlined below based on the evidence adduced on this motion. The applicant seeks an extension of time to set aside the decision to evict him. The respondents strongly opposed the extension of time. They submitted four affidavits to support their position, together with written submissions.

[4] The applicant's counsel in this matter requested that the Court decide this motion for an extension urgently as the applicant is currently experiencing homelessness and, having been evicted from his residence, his rights are being impacted each day that he is out of the home. In that regard, I note that this motion does not and cannot resolve those issues. Success on this motion does not provide the applicant with a right to re-enter or take possession of the premises, nor does it imply any substantive determination of his or the respondents' rights. This motion only deals with whether the applicant should be granted an <u>extension of time</u> to commence an application in this Court. In addition, I note that if a motion for an extension of time to file succeeds, it does not imply that the application for judicial review will succeed.

[5] For the reasons that follow, it is in the interests of justice to grant an extension of time and leave to file the proposed application. Leave is granted to enable the applicant to file an application for judicial review in this matter within the 14 days of this Order.

I. Events Leading to this Motion

[6] The applicant is Mr Dennis Cyr, who is a registered member of the respondent Batchewana First Nation of Ojibways. The other respondent is the Batchewana First Nation Housing Authority. I will refer to the respondents together as the "First Nation" unless the context requires otherwise.

[7] The evidence on this motion reveals the following events.

[8] The parties entered into a Sale Agreement dated December 27, 2002 for a single-family residence located at the civic address 68 August St. on the Batchewana First Nation near Sault Ste. Marie, Ontario (the "Sale Agreement"). The Sale Agreement provided for a rent-to-own payment for the home in monthly payments of $400 by Mr Cyr, totaling $72,000. Under the Sale Agreement, Mr Cyr as purchaser agreed in paragraph 3c to maintain the lands and premises in good condition and state of repair. Elsewhere in paragraph 3, Mr Cyr agreed (in para 3a) not to permit or permit any waste on the lands and (in para 3g) to abide by the rules and regulations generally in force from time to time regarding occupancy of residential properties in the neighbourhood. He also agreed to abide by the rules and regulations in a Schedule to the Sale Agreement. The Schedule included obligations to maintain the premises, including removal of garbage and regular yard care.

[9] The evidence on this motion indicates that on numerous occasions, Mr Cyr did not make the required monthly payments on time in accordance with the Sale Agreement. The First Nation sent many Notices of non-payment and related to amounts owed in arrears. However, those arrears situations appear to have stopped some years ago. Mr Cyr testified that by approximately June 2019, he was told by the First Nation (the exact person is unclear) that he had completed all payments required under the Sale Agreement.

[10] However, there were persistent problems with the condition of the home and its yard. The First Nation sent Mr Cyr as many as 30 formal Notices by letter, some of which are in the respondents' motion record, in relation to complaints about the condition of the yard. The Notices described garbage and lengthy grass as a health and safety concern that will attract animals such as rats and bears. The Notices also referred to violations of the Sale Agreement, specifically the paragraphs in section 3 already mentioned.

[11] The evidence on this motion indicates that the premises were in very poor condition internally and externally, although the applicant resisted attempts by the respondent Housing Authority to inspect the interior. On this motion, the respondents' affidavits all describe the very poor condition of the premises. Sgt Sayers of the Batchewana Police Service, for example, testified that he had observed the condition of the home personally on numerous occasions as a result of service calls to the residence. He described the home to be in "deplorable condition". He testified that the yard has been littered with old vehicles, garbage and rodents for a long time. The inside of the home was "terrible", as he had observed garbage piled inside the residence, animal feces, mould, holes in the drywall and various damage to the furniture and fixtures.

[12] Observations of the poor condition of the home or its yard were also contained in the affidavit of Ms Lambert, the Chief Executive Officer of the First Nation, at paragraph 7, and in the evidence of Ms Lesage, the Niigaaniin Manager of the First Nation, at paragraphs 7-8. In her affidavit, Ms Lesage testified that in March 2018, the Niigaaniin program assisted Mr Cyr with workers to help clean the residence. The workers were required to wear HAZMAT suits when they entered the premises. They attempted to remove garbage from the residence but were frustrated in their efforts by Mr Cyr and his then-girlfriend. Ms Lesage testified that for the safety of the workers, she advised them to discontinue their work.

[13] In her evidence, Ms Hewson, the Housing Assistant for the First Nation, described the ongoing poor condition of the premises, and noted numerous verbal and written complaints from community members (at paragraphs 16 to 19 of her affidavit). She advised that the applicant would attempt to clean up the yard and do “less than the bare minimum” to clean up. However, the applicant’s efforts were short-lived and, in her words, “the residence would revert back to a deplorable condition”. She referred to a years-long cycle in which the applicant was given a “number of opportunities to comply”.

[14] The eviction process began in July 2019. It is not clear whether there was a particular event that triggered the process, such as a specific complaint or a series of letters asking Mr Cyr to address issues at the premises. In the respondents’ Motion Record, there are several letters to Mr Cyr prior to July 2019 but the latest is from May 2017. The affidavits submitted by the respondents do not identify a trigger event, if any, other than in general terms about the continuing state and cycle of problems related to the condition of the premises. I note that the affidavits did not have

specific dates about the observations of the premises by the witnesses, other than the specific date of the attempt to clean the residence in March 2018. The evidence is of an ongoing and serious problem with the state of the residence and yard.

[15] By letter dated July 29, 2019, the First Nation served Mr Cyr with a Notice to Vacate the premises. It referred to Mr Cyr's failure to comply with paragraphs 3a, 3d and 3g of the Sale Agreement, including a failure to make a payment and failure to rectify breaches upon written notice by the First Nation.

[16] The July 29, 2019 Notice to Vacate advised Mr Cyr that there were "30 written notices in your file regarding the conditions of your yard. Your failure to comply and rectify the issue have resulted in this final notice". The Notice required Mr Cyr to bring the yard and home back to National Building Code standards no later than Thursday, August 29, 2019. Failure to do so would result in eviction on the next day, August 30, 2019.

[17] By letter dated September 10, 2019, the First Nation advised Mr Cyr that at a meeting on September 5, its Housing Authority Board granted him a 30-day extension to have the home and yard brought to a livable standard in accordance with Sale Agreement. It required him to have the yard and home brought back to National Building Code standards no later than October 10, 2019. The letter advised that on October 10, an infrastructure specialist would be attending the premises for an inspection.

[18] At some point around this time, Mr Cyr became ill and entered the hospital.

[19] In October 2019, the applicant's sister came to the First Nations office and advised that Mr Cyr was in hospital. She requested an appeal of his eviction. The applicant's sister subsequently appeared before the Chief and Council. She told them that Mr Cyr was in hospital because the mold in the basement of the premises had made him sick. He had pneumonia. His sister described the basement walls of the premises as "overrun with mold".

[20] The Chief and Council granted the requested appeal by unanimous motion on November 19, 2019. The motion passed by the Chief and Council approved providing an extension of six months to Mr Cyr, during which time "a plan of support is to be developed to ensure the Band member's needs are met as well as those of the Housing Authority Board". Ms Lambert testified that this extension was to allow Mr Cyr to bring his residence "up to code, as well as clean the yard".

[21] Mr Cyr testified that by late 2019, he requested documents associated with his property from the respondents. He testified that the respondents delivered documents that were "incomplete, inconsistent and/or not delivered in a manner that was appropriate for him to understand [their] nature …"

[22] In March 2020, police charged Mr Cyr with certain drug- and weapons-related criminal offences. During the execution of a search warrant at the premises, officers seized quantities of cocaine, crystal meth and fentanyl, as well as a loaded handgun.

[23] At the end of the six months' extension granted by the Chief and Council, nothing had been done to bring the residence "up to code" or to clean the yard.

[24] The First Nation served Mr Cyr with another Notice to Vacate dated May 20, 2020. The Notice describes the same breaches of the Sale Agreement as were in the Notices in 2019. The May 20, 2020 Notice required that Mr Cyr make arrangements to have the yard and home cleared of all personal belongings no later than May 29, 2020 (i.e., nine days later). The First Nation advised that on that day, the locks would be changed.

[25] I note that there was no mention of the criminal charges against Mr Cyr in this Notice to Vacate, nor did any witness mention them in relation to the decision to evict Mr Cyr. There also was no evidence from any of the witnesses about the plan of support contemplated by the November 2019 motion passed by the Chief and Council.

[26] Mr Cyr retained legal counsel at this time. The parties then signed an Extension Agreement dated May 29, 2020. That agreement provided that in consideration of the First Nation agreeing to a one-month extension to allow Mr Cyr to reside on the premises, Mr Cyr would vacate the premises on Monday, June 29, 2020 no later than 12:00 p.m. EST. The Extension Agreement stated that the First Nation agreed to the extension "in good faith" and "to allow Dennis Cyr this time to collect his belongings and get his affairs in order". It provided that "Dennis Cyr will vacate the premises on the above listed date and time amicably and on his own volition".

[27] Ms Lambert testified, at paragraph 13 of her affidavit, that the Extension Agreement would allow the applicant some time to collect his belongings and find alternative housing.

[28] The First Nation served a further Notice to Vacate by letter dated June 1, 2020, which attached a copy of the Extension Agreement, confirming to the applicant that he had agreed to vacate the premises by Monday, June 29, 2020. This Notice to Vacate was served by leaving it with Mr Cyr's son at the premises.

[29] On June 25, 2020, the applicant had a conversation with Sgt. Sayers at the Batchewana police station. Sgt. Sayers testified that he advised the applicant about the eviction notices and that the applicant would be trespassing if he did not vacate the residence at 68 August St. on June 29. Sgt. Sayers testified that the applicant verbally confirmed that he understood that the eviction notices required him to vacate the residence on June 29. The applicant also told Sgt. Sayers that he would chain himself to the house and that the police would have to remove him forcibly if they tried to evict him.

[30] Mr Cyr did not leave the premises on June 29, 2020, nor did the police attempt to remove him on that day.

[31] On July 8 or 9, 2020, personnel representing the First Nation attended the premises with law enforcement officers from the Ontario Provincial Police and the Batchewana Police. The evidence diverged at this point. Mr Cyr testified that when they arrived, he was in the bathroom, was not prepared to leave and was not dressed. He was removed from the premises against his will

and stood outside in plain view of the street, in his underwear. After half an hour, he was allowed back inside to put on clothing (with police present) and some personal effects before leaving. By contrast, Sgt Sayers testified that when he and a locksmith attempted to enter the premises, they could not because Mr Cyr held the front door shut. The police were able to push it open and were then able to remove him from the residence. The applicant's son left the premises without incident. Sgt Sayers did not refer to the applicant being undressed.

[32] After Mr Cyr was removed from the premises, staff of the respondents assisted him to find temporary housing.

[33] An inspector conducted a Conditional Assessment Inspection of the premises on August 25, 2020, and provided a report by letter dated September 2, 2020. The inspection found the building to be structurally sound, but referred to problems including damage done superficially to the some parts inside and severe damage to or the poor condition of certain interior features. There was debris and garbage in most rooms. The building could be salvaged but would most likely require a complete overhaul of its interior. It was, however, difficult to obtain a true assessment of the condition due to all the personal belongings obstructing the view of the interior. The inspector recommended that after the building was clear of the personal belongings and debris, another inspection occur to provide a true assessment of the condition of the building.

[34] Mr Cyr testified that since leaving the premises in July 2020, he made best efforts to try to find legal counsel. He had difficulty because nobody would take on his case. He is of limited financial means. He testified that his only method of communication is a pay-as-you-go phone

with no Internet or computer access. (The respondents noted that they have a private room with telephone available in their office for the use of community members, and that the applicant has used that phone in the past.)

[35] Mr Cyr first met with his current counsel on August 6, 2020 for a limited retainer, to request documents related to this matter from the respondents. Mr Cyr testified in his affidavit that he did not receive the June 1, 2020 Notice to Vacate until August 25, 2020, some time after his counsel's request for it on August 7, 2020.

[36] Mr Cyr retained his current lawyer and co-counsel as of August 24, 2020 to assist with this motion and his judicial review application. On September 4, 2020, his counsel attempted to file materials for a motion to extend the time to file a judicial review under the *Federal Courts Act,* subs. 18.1(2). There were technical problems with filing. The applicant's motion record was eventually filed about two weeks later. The respondents filed their materials in late September.

[37] The applicant then sought to introduce addition evidence in reply, to which the respondent objected. On October 9, 2020, a Prothonotary of this Court advised the parties that a motion would be necessary in order to file additional evidence in reply. The applicant did not commence such a motion for leave and also did not file responding submissions on this motion.

[38] On October 16, 2020, the applicant's counsel wrote to the Court requesting that this motion be determined with urgency. The same letter referred to some of the factors considered on a motion for an interlocutory injunction and also referred to a mandatory injunction. The applicant did not

however file a Notice of Motion for an interlocutory injunction or mandatory order. The respondent's counsel advised by letter dated October 19, 2020 that it opposed the applicant's "motion". In my view, the October 16 letter from applicant's counsel did not constitute a request for interlocutory relief such as an injunction or mandatory order.

II. The Motion to Extend Time under the *Federal Courts Act*, subs. 18.1(2)

The Legal Test

[39] Subsection 18.1(2) of the *Federal Courts Act* requires that an application for judicial review be made within 30 days after the time the decision or order was first communicated to the party directly affected by it, "or within any further time that a judge of the Federal Court may fix or allow before or after the expiration of those 30 days."

[40] The time to make an application begins to run at the moment when the applicant learns of the final decision that is to be challenged on judicial review: *Meeches v. Assiniboine*, 2017 FCA 123 (Scott JA), at para 40. Leave to file the Notice of Application is required or the application will be time-barred (*Meeches,* at para 41).

[41] Extensions of time under subs. 18.1(2) are discretionary and are granted when they are in the interests of justice. Where an application for judicial review is brought by one or more individual applicants, four questions guide the Court's inquiry in the exercise of its discretion:

> (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 respondent been prejudiced from the delay?
>
> (4) Does the moving party have a reasonable explanation for the delay?

See *Thompson v. Canada (Attorney General)*, 2018 FCA 212, at para 5; *Wenham v. Canada (Attorney General)*, 2018 FCA 199, at para 42; *Canada (Attorney General) v. Larkman*, 2012 FCA 204, at para. 61.

[42] The importance of each of these four questions depends upon the circumstances of each case. In addition, not all of these four questions need be resolved in the moving party's favour. Strength in one factor may make up for weakness in another. The overriding consideration is that the interests of justice be served: *Larkman*, at para 63; *Thompson*, at para 9.

III. **Positions of the Parties**

[43] The applicant submits that he had a continuing intention to pursue an application to this Court, he has an arguable case, there is no prejudice to the First Nation and there is a reasonable explanation for the delay in filing. The applicant's legal submissions referred to the decision of Justice Phelan to extend time in allegedly similar circumstances in *Cottrell v Chippewas of Roma Mnjukaning First Nation*, 2007 FC 269.

[44] The applicant's submissions claim that the decision to evict the applicant on July 8, 2020 (the eviction date in Mr Cyr's affidavit) was "contrary to administrative law principles" and the First Nation's "policy, procedure and practice". The submissions referred to the "demeaning and demoralizing manner in which he was forcibly removed from his home", claiming an infringement

of his *Charter* rights and his right to “notice, appeal and procedural fairness”. He alleged that the First Nation engaged in a “sustained and continued effort to enforce arbitrary and erroneous fines and eviction notices”. The applicant noted that he had “paid off” his home in June 2019, having made payments to the First Nation since 2002. I note that Ms Hewson’s affidavit confirmed that she was aware that Mr Cyr’s “balance was paid in full”, although she was not the one who confirmed that to him.

[45] Counsel for the applicant submitted that Mr Cyr did not understand the nature of the Extension Agreement. Mr Cyr testified that the First Nation demanded payment for an “unknown” amount of $130 in spring 2020, which turned out to be for cleanup of his yard. The applicant advised that due to time pressure imposed by the First Nation’s short deadline in May 2020, he did not have time to secure satisfactory independent legal advice before entering the Extension Agreement. He alleges that his lawyer at that time (not counsel on this motion) was not familiar with the First Nation’s policies and did not have time to review them. The applicant’s submissions relied upon a “legitimate expectation that a particular procedure would be followed” and referred to the respondents’ Rent-to-Own Housing Program Policy, at section 15 entitled “Termination of Occupancy/Eviction”.

[46] For their part, the respondents explained that the First Nation evicted the applicant from the premises due to repeated non-compliance with the Sale Agreement. The respondents submit that on this motion, the applicant has not demonstrated a continuing intention to pursue the application. Instead, they contend that the evidence confirms the opposite – that the applicant <u>consented</u> to the eviction in the Extension Agreement which he signed with the assistance of legal

counsel. The respondents submitted there is no arguable case for the applicant. They pointed to prejudice to the First Nation because there are approximately 200 members on a waiting list for housing. With a housing shortage, every house that is made available to community members is crucial.

[47] Further, the respondents noted that Mr Cyr has had more than ample time to rectify the health and safety concerns at the premises since he was notified of the eviction in July 2019. He failed to rectify the issues for nearly a year. The First Nation says further that Mr Cyr had plenty of time and opportunity to retain counsel and could have used the telephone and private room at its offices to do so.

IV. **Analysis**

[48] It is important to focus first on the decision that would be the subject of the proposed application for judicial review. The applicant referred to the respondents' decision to evict him on July 8, 2020. The respondents described the course of conduct from the July 29, 2019 notice to vacate through to the implementation of the eviction that finally occurred on July 9, 2020. As the parties' evidence differs on the date of July 8 or 9, I will refer to the "Eviction Date" below.

[49] In my view, the proper focus should be on the respondents' last substantive decision to evict Mr Cyr. The decision must have occurred immediately prior to the Notice to Vacate dated May 20, 2020. The decision and the resulting Notice occurred after the expiry of the six months' extension granted to the applicant by the Chief and Council following the applicant's appeal in November 2019. The applicant could, alternatively, seek to set aside the Notice to Vacate dated

June 1, 2020, but on the evidence, the substantive decision to evict the applicant which must have been made immediately prior to the May 20, 2020 Notice to Vacate. There is no evidence in any of the four affidavits filed by the respondents as to how that decision was made, apart from stating that nothing had been done to rectify the issues in the six months extension period.

[50] I also note that, on this motion, neither party raised an issue concerning this Court's jurisdiction under subs. 18(1) of the *Federal Courts Act* to hear and determine an application for judicial review concerning the decision to evict the applicant. See, for example, *Jimmie v. Council of the Squiala First Nation*, 2018 FC 190 (Crampton, CJ); *Kaquitts v. Council of the Chiniki First Nation*, 2019 FC 498 (Southcott, J).

[51] I turn now to the four factors used to assess whether an extension of time should be granted.

[52] *Continuing Intention to Pursue the Application*: It is not necessary that the applicant demonstrate an intention to pursue specifically a judicial review application in this Court in order to satisfy the first factor. For the purposes of an application under subsection 18.1(2), it is sufficient to show an intention to pursue available legal avenues and obtain a remedy: see *Cottrell*, at para 15 and the cases cited in *Cob Roller Farms v 9072-3636 Québec Inc. (Écocert Canada),* 2020 FC 806, at para 33.

[53] The evidence of the applicant's continuing intention to pursue his legal rights is mixed. Mr Cyr's intention immediately after May 20 is not expressly addressed in his affidavit. He entered into the Extension Agreement on May 29, in which he agreed to leave the premises a month later

amicably and of his own volition. That agreement suggests that as of May 29, he had no intention to challenge the notice to vacate dated May 20, 2020. I note however that Mr Cyr testified that his legal counsel in May was not familiar with the respondents' policies and procedures and did not have time to review the documents. While the applicant had received several prior Notices to Vacate and the extension of six months from November 2019, he testified also that he did not have all the documents he requested from the First Nation and that those he had were "confusing and incomplete". Having said that, language of the Extension Agreement is plain on its face that Mr Cyr agreed to leave willingly as of June 29, and the fact that Mr Cyr sought legal advice at the time in May suggests that he recognized the importance of the May 20 Notice to Vacate.

[54] Once advised by Sgt Sayers on June 25 that he must leave the premises, Mr Cyr told the officer that he would not leave and would chain himself to the house to prevent his removal. The applicant also testified that he has tried to retain counsel to pursue his legal rights since leaving the premises on the Eviction Date, met with counsel on August 6 and retained counsel for this motion as of August 24. His attempts to find legal counsel support a continuing intention since being removed from the premises on the Eviction Date.

[55] Overall, there appears to be an initial period after the May decision to evict him during which Mr Cyr did not have an intention to pursue a legal remedy, followed by a period starting in late June, or early July after the eviction was carried out, in which he continuously intended to pursue his rights. It may be that Mr Cyr changed his mind about leaving amicably after signing the Extension Agreement. Alternatively, it may be that at some point after May 20 – perhaps in May, or perhaps not until the June 25 conversation with Sgt Sayers – Mr Cyr realized that the

respondents were in fact serious about enforcing the Notice to Vacate. Or there may be some other explanation for what was going on.

[56] Because this factor requires the Court to consider evidence of continuous intention and the evidence reveals a period in which applicant appears to have had no intention to pursue the matter, I assess this evidence as a factor weighing against the applicant's request for an extension of time. Its weight is tempered by my conclusion on the next factor.

[57] *Some Potential Merit in the Applicant's Judicial Review Application*: The applicant contends that the respondent decided to evict him on the Eviction Date contrary to administrative law principles and the respondents' policy, procedure and/or practice. There are references in the applicant's written submissions to procedural fairness and legitimate expectations concerning procedures to be followed, but without elaboration. The only express reference in the applicant's submissions was to section 15 of the Rent-to-Own Housing Program Policy.

[58] In section 15.3 of that Policy, entitled Eviction Process, paragraph 15.3.1 provides as follows:

> Termination of occupancy/eviction will take place only after the 30 day notice to terminate occupancy has been delivered to the occupant and efforts have been made, and documented, by the housing department to meet with the occupant and counsel them on the consequences of failing to resolve the breach. Eviction action will be taken as a last resort in cases where the occupant has failed to resolve the breach of the rent to own agreement; this is an effort to provide every chance for settlement, as opposed to removing occupants from the unit.

[59] Section 15.3.2 provides that the "written notice to terminate occupancy will be issued the occupant 30 days before the date that the occupancy will be terminated", and sets out methods to do so.

[60] As noted above, the Notice to Vacate dated May 20, 2020 provided the applicant until May 29, 2020 – 9 days later – to vacate the premises, advising in the Notice that on that date, the locks would be changed, the residence would be boarded up and any attempt by the applicant to gain entrance would result in criminal charges against him. It was during this nine-day time period that the parties arrived at the Extension Agreement dated May 29, 2020.

[61] The case for the applicant is that the respondents made the decision to evict him immediately before the May 20, 2020 Notice to Vacate. That Notice, provided him with only 9 days until eviction rather than the 30 days expressly required by paragraphs 15.3.1 and 15.3.2 of the respondents' Policy. The applicant had a legal entitlement to (or may have had a legitimate expectation of) 30 days notice and to receive the associated counselling about the consequences of failing to resolve the matter during that 30 days, based on that Policy and on the respondents' course of conduct in providing him previously with 30 day written Notices.

[62] The respondents' answer is that the applicant entered the Extension Agreement following consultations with his legal counsel. The agreement made clear that he was to leave the premises amicably and voluntarily a month later. He had no right to legal counsel and offered no legal grounds or evidence to vitiate the Extension Agreement. In addition, the respondents served a further Notice to Vacate dated June 1, with effect on June 29 but not carried out until the Eviction

Date, 2020, which provided the applicant with 30 days notice before the eviction. Accordingly, any concerns about the absence of a 30 day period after the May 20 Notice to Vacate were cured by the period of time between June 1 and the Eviction Date.

[63] It may be noted that the evidence on this motion is clear that the applicant had paid off all amounts owing under the Sale Agreement. The reason for the Notice to Vacate was not non-payment of money; it was failure to abide by paragraphs 3a, 3d, 3g and the Schedule in the Sale Agreement relating to the condition of the premises for a long time. Absent those persistent problems, the applicant would presumably have had the right to have title to the premises transferred to him and a certificate of possession under section 2 of the Sale Agreement. However, when events of default occur, the terms of the Sale Agreement on their face gave the respondents considerable contractual options and little to the applicant.

[64] Neither party made any reference to any legal principles that govern the applicant's rights in relation to fully paid-for premises in these circumstances. The respondents' submissions were entirely premised on their compliance with all obligations of procedural fairness. Neither party referred to the extent of the procedural fairness obligations required in the circumstances by the principles in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817.

[65] In my view, there is some merit in the applicant's position. The nine days provided by the May 20, 2020 Notice to Vacate on its face did not provide 30 days required by the Policy or as had been provided in Notices before, and circumstances during that May time period may have affected his decision to enter the Extension Agreement, giving rise to a potential lack of procedural fairness

to the applicant in the eviction process. The strength or salience of that potential breach cannot be determined on this motion. It also may or may not have been resolved or cured by subsequent events. In addition, there was no explanation in the evidence on this motion as to the decision to evict itself, other than references in the Notice to Vacate dated May 20, 2020. The facts are underdeveloped at this stage. Put another way, on the evidence and submissions on this motion, I am not prepared to conclude that the respondents will necessarily succeed in their arguments that they provided procedural fairness to the applicant, despite the apparent strength of their position at this stage.

[66] Rather, on this preliminary view, there is at least some merit in the applicant's position – even if on the evidence currently before this Court, a higher legal threshold might not be met.

[67] There are two aspects of the evidence that I have not considered in this assessment of the potential merits of the proposed application. The first is the evidence of Mr Cyr's apparent defaults in making monthly payments under the Sale Agreement, many years ago. The second is that police charged Mr Cyr with criminal offences in March 2020 and seized drugs and a weapon at the premises. Although the evidence described the charges, they were not mentioned in the Notices to Vacate, nor as a reason to justify the decision to evict the applicant in any affidavit or in the written respondents' submissions. Accordingly, I did not consider them salient to assessing the strength of the merits of the proposed application for judicial review.

[68] This third factor supports granting the motion for an extension of time.

[69] *Prejudice to the Respondent from the Delay:* The respondents alleged prejudice because there is a housing shortage in their community. Over 200 members of the First Nation are waiting for housing. If the residence at 68 August St. were available and cleaned up to make it liveable for new residents, some people may have housing sooner than if this matter were to go to a full judicial review application on the merits.

[70] While I do not in any way minimize the housing issues faced by this community, in my view, the alleged prejudice is a neutral factor on the evidence before the Court, because: (i) considerable time has already passed since the respondents commenced the eviction process by Notice to Vacate dated July 29, 2020, and had passed between that date and May 20, 2020; (ii) health and safety concerns in the residence and its yard had existed for many years that were, in practical terms, tolerated by the respondents (in that they did not evict the applicant sooner); (iii) there is no evidence as to the length of time it will take to repair and clean up the premises, or the availability of local contractors to do so; and (iv) as Justice Phelan noted in *Cottrell*, at paragraphs 26-27, it assumes that the respondents are correct in their legal position on the eviction.

[71] *Reasonable Explanation for the Delay*: I am satisfied that the applicant has reasonably explained much of his delays in seeking legal relief, due to his limited financial means and difficulty in finding counsel after his departure from the premises in July, 2020.

[72] Given the number of “second chances” given to the applicant to rectify the health and safety concerns raised by respondents, he may not have immediately recognized that they were serious about the May 20 Notice to Vacate. However, this point goes both ways. The respondents gave

the applicant ample opportunity to rectify the situation – the best part of a year. The applicant was in hospital for part of that time but the Chief and Council unanimously granted an additional six months, throughout the winter months and into the spring, to permit the applicant to get the premises back to where they should be.

[73] In my view, this factor is neutral in exercising my discretion on granting an extension of time.

V. **Conclusion and Disposition**

[74] Considering all of the analysis above as a whole, in my view it is in the interests of justice to allow the applicant an extension of time to file his application for judicial review.

[75] Accordingly, leave to file an application for judicial review is granted, with costs in the cause. The application is to be filed within 14 days of this Order.

ORDER in 20-T-34

THE COURT ORDERS AS FOLLOWS:

1. The applicant's motion for an extension of time under subs. 18.1(2) of the *Federal Courts Act* is allowed.
2. The applicant is granted leave to file an application for judicial review within 14 days of this Order.
3. Costs in the cause.

"Andrew D. Little"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	20-T-34
STYLE OF CAUSE:	DENNIS CYR v BATCHEWANA FIRST NATION OF OJIBWAYS et al
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	IN WRITING
REASONS FOR JUDGMENT AND JUDGMENT:	A.D. LITTLE J.
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APPEARANCES:

	FOR THE APPLICANT
	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Naomi Sayers	FOR THE APPLICANT
Stacy R. Tijerina Attorney General of Canada	FOR THE RESPONDENTS