

Federal Court



Cour fédérale

Date: 20220613

Docket: T-73-22

Citation: 2022 FC 880

Ottawa, Ontario, June 13, 2022

PRESENT: Prothonotary Benoit M. Duchesne

BETWEEN:

SOPREMA INC.

Plaintiff

and

**ATTORNEY GENERAL OF CANADA
and
OWEN CORNING CANADA LP**

Defendants

REASONS AND ORDER

[1] The Plaintiff Soprema Inc. (hereinafter, “Soprema”) has brought a motion in writing filed on April 13, 2022, for an Order pursuant to Rule 8 of the *Federal Courts Rules*, SOR/98-106 extending the time for it to deliver its responding record opposing the Defendant Owen Corning Canada LP’s (hereinafter, “OCC”) motion to strike its Notice of Application. OCC opposes Soprema’s motion on the basis that Soprema’s explanations provided to justify its delay are insufficient. The Attorney General of Canada agrees with OCC’s grounds of opposition and

argues that Soprema has not met the requirements for an extension of time as set out in *Canada (Attorney General) v. Hennelly*, [1999] 167 FTR 158 (FCA); 1999 CanLII 8190 (FCA).

[2] For the reasons that follow, Soprema's motion for an extension of time to deliver its responding materials to OCC's motion to strike is dismissed.

I. **The Facts**

[3] Soprema and OCC are business competitors. OCC has been issued a permit by Environment and Climate Change Canada ("ECCC") that expires on June 30, 2022.

[4] On January 12, 2022, Soprema filed a Notice of Application for Judicial Review to challenge the permit issued to OCC.

[5] On February 10, 2022, OCC filed a motion to strike Soprema's pleading on the basis that this Court's decision in file number T-475-21, *Soprema Inc. v. Attorney General of Canada et al.*, 2021 FC 732, applied and was dispositive of Soprema's Application for Judicial Review. In *Soprema Inc. v. Attorney General of Canada et al.*, 2021 FC 732, Madam Justice St-Louis struck Soprema's Notice of Application for Judicial Review to challenge a permit issued by ECCC to another of Soprema's competitors, 3313045 Nova Scotia Company, on the basis that Soprema had neither a direct nor public interest standing to challenge the permit issued, and its Notice of Application failed to allege material facts that could lead to the Application being granted. OCC pleads in its Notice of Motion that the same reasoning applies in this case with the result that Soprema's Notice of Application for Judicial Review is so clearly improper as to be bereft of any

possibility of success. Soprema had appealed from Justice St-Louis's decision. The Federal Court of Appeal in reasons released on June 3, 2022 (*Soprema Inc. c. Canada (Procureur Général)*, 2022 CAF 103) dismissed Soprema's appeal.

[6] The evidence filed by Soprema on this motion seeks to explain Soprema's delay in delivering responding motion material.

[7] OCC filed its served motion record on February 10, 2022. The motion was served as being returnable before the Court for hearing at the March 1, 2022, general sitting in Montréal.

[8] Soprema's evidence is that the lawyers for OCC and its lawyers discussed the motion on February 24, 2022, and agreed to have the motion proceed in writing pursuant to Rule 369 of the *Rules* rather than orally. A letter was filed with the Court on February 25, 2022, confirming this agreement as between the parties. The letter did not set out any other agreement as between the parties with respect to the time for the delivery of Soprema's responding record.

[9] Soprema's evidence is also that during this same February 24, 2022, discussion, OCC and Soprema had agreed that Soprema was not required to deliver its responding record during the 2022 spring break, and that the lawyers for the parties would later agree on the date by which Soprema's responding materials would be required. There are no documentary exhibits confirming these discussions and purported agreements between the lawyers for the parties. There is also no evidence of any follow up discussions between the lawyers after the February 24, 2022, discussion.

[10] Soprema's evidence is that its lawyers considered that the 10 day time period for the delivery of its responding record as provided for in Rule 369(2) of the *Rules* applied to the pending motion to strike once the parties agreed to proceed in writing. There is no indication in Soprema's evidence as to when the 10 days was to begin to run, when it was to end, and whether there were any other discussions with respect to extensions of time between the parties. There is also no evidence of any discussed timetable applicable to the motion. The inference to be drawn from the evidence is that Soprema's lawyers knew that Soprema's responding record was due for service and filing within 10 days of February 24, 2022, that is, by March 7, 2022, unless steps were taken to extend the time prescribed by the *Rules*.

[11] Although not appearing in Soprema's affidavit filed in support of its motion, the Court record shows that the court registry contacted Soprema's lawyers on March 15, 2022, to inquire about next steps in the matter. Soprema's lawyers are reported to have informed the registry on that date that they would be filing a motion for an extension of time to file Soprema's responding record to the OCC motion to strike.

[12] As time passed without any filing being made by Soprema in connection with the OCC motion to strike, the court registry wrote to Soprema's lawyers on March 30, 2022, to ascertain whether they intended to respond to OCC's motion to strike. Soprema's lawyers informed the court registry via email on March 31, 2022, that they intended to file a motion for an extension of time to serve and file Soprema's responding record.

[13] This motion was filed on April 13, 2022, approximately 2 weeks after the Court's second inquiry with Soprema about its intention to respond to OCC's motion to strike, 29 days after the Court's first inquiry with Soprema's lawyers with respect to the same, 48 days after the January 24, 2022, conversation between the lawyers about converting OCC's motion to a motion in writing, and 48 days after the date on which Soprema's lawyers knew that they had 10 days within which to deliver a responding record opposing OCC's motion in writing pursuant to Rule 369(2) of the *Rules*.

[14] Aside from the foregoing, Soprema's evidence to justify its delay and request for an extension of time is that its lawyers were on holiday, in preparation, in examinations, at court or outside of Montréal from March 12 to April 10, 2022.

II. **Issues and the Law**

[15] The leading cases on extensions of time set out the principles to be applied and the factors to be considered in exercising my discretion to extend the time for the service and filing of responding materials as requested by Soprema.

[16] In *Canada (Attorney General) v. Hennelly*, 1999 CanLII 8190 (FCA), at paragraph 3, the Federal Court of Appeal held that the proper test to apply on a motion for an extension of time 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.

[17] In *Canada (Attorney General) v. Larkman*, 2012 FCA 204, at paragraph 62, the Federal Court of Appeal noted that a failure to give a positive response to any of the four *Hennelly* questions is not necessarily determinative of whether the requested extension of time is justified or warranted.

[18] In *Canada v. Tran*, 2008 FC 297 (CanLII), at paragraphs 24 to 28, this Court held that, appreciating that it may take some time to prepare and organize a request for an extension of time once the requirement for an extension of time is known, it will be difficult to justify a request for an extension of time when more than 30 days pass after the requirement for the extension of time is known. In such a case, a specific and reasonable explanation will be required.

[19] In *Alberta v Canada*, 2018 FCA 83, at paragraph 45, the Federal Court of Appeal noted that the overriding consideration on a request for an extension of time is to ensure that justice is done between the parties.

[20] There is scant if any evidence on this motion of a continuing intention by Soprema to respond to OCC's motion to strike. At best, Soprema avers to having a discussion about OCC's motion to strike with OCC's lawyers on February 24, 2022, and acknowledging that it had 10 days to deliver its responding record to comply with Rule 369(2). There is no evidence that Soprema took any steps to discuss timelines or the date upon which it should deliver its responding record to OCC following the February 24, 2022, discussion. Whether the intended Soprema response to the motion to strike has any merit cannot be known because no evidence

has been filed to suggest what its response might be or consist of. The only evidence of prejudice in the record is limited to OCC's statement that continuing to expend resources to defend itself against proceedings Soprema commences and fails to advance in a timely manner is prejudicial to OCC.

[21] I do not find the evidence tendered by Soprema to address the first three *Hennelly* factors to be persuasive.

[22] Soprema's explanation for part of its delay in delivering its responding record is that its lawyers were occupied on other matters, both professional and personal, between March 12 and April 10, 2022. The inference to be drawn from Soprema's evidence is that during those 29 days, Soprema's lawyers could not find the time to seek an extension of time in a timely manner despite after having informed the Court that they would do so on two separate occasions during that time period. Although some allowance may be made from time to time due to the crush of practice and its effects on proceedings that are not immediately urgent, making representations to the Court that some action will be taken only to fail to follow through on those representations in a timely manner is a factor that weighs against granting an extension of time to deliver responding materials.

[23] Even if I were to accept Soprema's evidence that its lawyers being busy constitutes a reasonable explanation for the absence of action between March 12 and April 10, 2022, which I do not, there remains no explanation offered for Soprema's inaction between February 10 and February 24.

[24] Allowing for an additional delay in the delivery of Soprema's responding record during the 2022 spring break as agreed upon by the parties, there is no reasonable explanation in the evidence for the delay in serving and filing Soprema's responding material between March 7 and March 12, 2022 or afterward other than that the parties had agreed on February 24, 2022 to discuss the responding record delivery date at some later time and that lawyers were busy. Although parties regularly discuss extensions of time for various steps to be taken in a proceeding and should be encouraged to do so when time becomes an issue, the time for the delivery of a responding record in the context of a motion in writing remains determined by Rule 369(2). It is not subject to extension solely by the parties' discussions or understandings other than through Rule 7. The Court must be kept informed and an extension of time must be approved by the Court. Soprema knew that the February 25, 2022, letter to the Court that confirmed that the motion to strike would be argued in writing required that its responding materials were to be served and filed within 10 days, and that the Court could proceed to decide the motion at the expiry of those 10 days unless Soprema sought an extension of time or filed all parties' consent for an extension of time pursuant to Rule 7. Soprema did not seek any extension of time during that time period.

[25] Soprema did not offer a specific and reasonable explanation as to why it did not seek an extension of time until April 13, 2022 when it knew or could not ignore that an extension of time would be required after March 7, 2022. In my view, *Canada v. Tran* applies. The evidence on this motion does not allow for a finding that an extension of time for Soprema to deliver its responding record to OCC's motion to strike is justified. Soprema has not persuaded me that justice would be done between the parties if I extended the time for it to deliver its responding

record to OCC's motion to strike, particularly so when OCC's permit at the heart of the matter is to expire on June 30, 2022.

THIS COURT ORDERS that

1. The Plaintiff and moving party Soprema Inc.'s motion for an extension of time to serve and file its responding record to the Defendant Owens Corning Canada LP motion to strike is dismissed.
2. No costs are awarded on this motion as no party has sought their costs.

“Benoit D. Duchesne”

Prothonotary

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-73-22

STYLE OF CAUSE: SOPREMA INC. v ATTORNEY GENERAL OF
CANADA and OWEN CORNING CANADA LP

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

DATE OF HEARING: JUNE 13, 2022

**REASONS FOR JUDGMENT
AND JUDGMENT:** PROTHONOTARY B.M. DUCHESNE

DATED: JUNE 13, 2022

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