

Federal Court



Cour fédérale

Date: 20230706

Docket: 23-T-35

Citation: 2023 FC 926

Ottawa, Ontario, July 6, 2023

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

PETER LOUIS FRANCIS
OELIGISGAG FRANCIS

Applicants

and

CHIEF AND COUNCIL OF ACADIA FIRST NATION
KESPUWICK RESOURCES INC.

Respondents

ORDER AND REASONS

I. Overview

[1] The Applicants bring a motion for an Order to extend the time within which to file and serve the application for judicial review, pursuant to Rule 8 of the *Federal Courts Rules*, SOR/98-106 (the “Rules”).

[2] The Applicants submit that an extension of time would be in the interests of justice as per the decision in *Whitefish Lake First Nation v Grey*, 2019 FCA 275 (“*Whitefish Lake*”), and that the four relevant factors relevant to a request for an extension as enumerated in *Canada (Attorney General) v Hennelly*, (1999) 244 NR 399 (FCA) (“*Hennelly*”) are made out.

[3] For the reasons that follow, this motion is dismissed.

II. Facts

[4] The Applicants, Peter Louis Francis (Mr. “Francis Sr.”) and his son, Oeligisgag Francis (Mr. “Francis Jr.”) are Mi’kmaq and Band members of the Acadia First Nation (the “Nation”). They are lobster fishers in the Nation’s communal commercial lobster fishery.

[5] The commercial fishing licenses under which the Applicants fished were issued to the Nation under the Marshall Response Initiative (“MRI”), which was borne out of an agreement between the Government of Canada and the Nation and followed the Supreme Court of Canada’s decision in *R v Marshall*, [1999] 3 SCR 456.

[6] The Applicants were employees of Kespuwick Resources Incorporated (“Kespuwick Resources”), a corporate entity owned and operated by the Nation, which administers the Nation’s involvement in the commercial fishery, the moderate livelihood fishery, and the Nation’s food, social and ceremonial fishery.

[7] On July 8, 2021, Mr. Francis Sr. was dismissed as captain of the boat on which he worked, due to unacceptable performance. He was allegedly advised that he was welcome to apply to other upcoming crew positions. Mr. Francis Jr. was also dismissed from his employment as a crewmember and offered a crew position on another vessel for the 2021 lobster season.

[8] On June 27, 2022, almost a year following their dismissal, the Applicants' counsel delivered a demand letter to the Nation seeking "an amicable and non-confrontational settlement" to the dispute between the parties and alleging that the Applicants had been wrongfully dismissed, had experienced injury to dignity by way of the dismissal, and had experienced discrimination.

[9] In a letter dated July 26, 2022, the Respondents communicated their position that the Applicants' various claims lacked legal foundation.

[10] On August 30, 2022, the Applicants filed a Notice of Action and Statement of Claim in this Court. They seek declaratory relief related to alleged breaches of agreements between the Nation and the Government of Canada, breaches of the Nation's collective Aboriginal rights, and a prerogative writ of *certiorari*. Alternatively, they seek an order that the Respondents pay damages in the amount of \$1,200,000 for breach of their fiduciary duty.

III. Issue and Standard of Review

[11] The sole issue is whether the motion for an extension of time should be granted.

[12] The relevant factors for a request for an extension of time are enumerated in *Hennelly* as follows: 1) whether the applicant has demonstrated a continuing intention to pursue their application; 2) whether the application has some merit; 3) that no prejudice to the respondent arises from the delay; and 4) that there exists a reasonable explanation for the delay (at para 3).

[13] As per the decision of the Federal Court of Appeal (“FCA”) in *Whitefish Lake*, the factors outlined in *Hennelly* are not to be applied in a “rigid fashion” and “it is not always necessary that the party seeking the extension of time be able to satisfy all four factors” (at para 3). The FCA found that the overriding consideration in a motion for an extension is “whether it is in the interests of justice that the extension of time be granted” (at para 3).

IV. Analysis

[14] The Applicants primarily submit that an extension of time to file their application for judicial review is in the interests of justice, as per *Whitefish Lake*. They submit that the remedies sought and legal issues raised in the underlying challenge to their alleged wrongful dismissal concern the broader Aboriginal right to access commercial fisheries. The Applicants submit that their application for judicial review seeks certainty for all the Nation’s Band members to freely access their protected rights to fisheries as per the MRI.

[15] The Applicants further submit that this motion fulfills the factors outlined in *Hennelly*. They contend that they have a continuous intention to pursue the underlying application for judicial review, that there is clear merit to the application as further evidenced by the production of documents during the discovery process, that there is no prejudice to the Respondents by the

delay, and that most significantly; there is a reasonable explanation for the delay. The Applicants submit that the delay was caused by Mr. Francis Sr.'s understanding that he may have been rehired given his previous dismissal in 2016 and subsequent rehiring four months later, the Applicants' preferred an alternative dispute resolution process, and their inability to secure legal counsel.

[16] The Respondents submit that the Applicants' motion for an extension should be dismissed on the basis that they do not meet the test outlined in *Hennelly*, nor would an extension serve the interests of justice. The Respondents submit that a one-year delay in pursuing the application for judicial review is significant and has provided the basis for this Court to dismiss such a motion before, citing *Cossy v Canada Post Corporation*, 2021 FC 559 at paragraph 19. The Respondents note that there is no evidence of the Applicants raising the issue of a deadline in seeking judicial review, even after they retained their current counsel.

[17] The Respondents submit that none of the Applicants' explanations for the delay in pursuing this application for judicial review are reasonable. The Respondents note that Mr. Francis Sr. himself stated that his previous dismissal in 2016 was different from his dismissal in 2021. They also note that Mr. Francis Sr. was reinstated in 2016 because the captain who had been hired to replace him had to be removed and he requested reconsideration, which contradicts the Applicants' contention that he relied on his previous "arbitrary" reinstatement to believe that he might be reinstated again. The Respondents further submit that despite retaining their current counsel in May 2022, the Applicants did not immediately move to extend the time to commence

an application for judicial review of their alleged wrongful dismissals. Lastly, the Respondents submit that electing to pursue settlement does not excuse delay.

[18] The Respondents submit that they face prejudice arising from the Applicants' delay, which is clear on the face of the Applicants' motion record, which asks that this Court grant the motion for an extension to support the Applicants' legal strategy to push the Respondents into an alternative dispute resolution process, essentially seeking the Court to bolster their leverage.

[19] I do not agree with the Applicants that granting this motion for an extension to commence their application for judicial review is in the interests of justice. The most significant factor weighing against granting this motion is the lack of reasonable explanations for the significant delay in pursuing this application.

[20] I agree with the Respondents submissions that the Applicants previously had opportunities to move to extend the time to commence an application, even after retaining counsel in May 2022, but failed to do so. The Applicants only contacted a single lawyer before retaining their current counsel in May 2022, waited another three months before filing their Notice of Action, only made informal attempts to return to employment in the commercial fishery from July 2021 to October 2022, and do not appear to have raised the issue of the deadline for seeking judicial review at any point. All these factors weigh against the finding that the Applicants had a continued intention to pursue an application for judicial review and undermine the reasonableness for their explanations for the delay.

[21] I further agree with the Respondents' submission that the Applicants' proposed application for judicial review lacks the requisite merit. The Applicants have not clearly identified the grounds for judicial review in their submissions, particularly whether their previous employer, the corporate entity Kespuwick Resources, qualifies as a decision-maker within section 2(1) of the *Federal Courts Act*, RSC, 1985, c F-7. The Applicants have not shown how their previous employers' decision to dismiss them is justiciable by way of judicial review in this Court.

V. Conclusion

[22] The Applicants' motion to extend the time within which to file and serve the application for judicial review is dismissed. Although the Respondents seek costs for this motion, I do not find that a costs award is warranted in this case.

ORDER in 23-T-35

THIS COURT ORDERS that the Rule 8 motion for an extension of time is dismissed,
without costs.

“Shirzad A.”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: 23-T-35

STYLE OF CAUSE: PETER LOUIS FRANCIS AND OELIGISGAG
FRANCIS v CHIEF AND COUNCIL OF ACADIA
FIRST NATION AND KESPUWICK RESOURCES
INC.

PLACE OF HEARING: BY VIDEOCONFERENCE

DATE OF HEARING: JUNE 15, 2023

ORDER AND REASONS: AHMED J.

DATED: JULY 6, 2023

APPEARANCES:

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