

Federal Court



Cour fédérale

Date: 20201125

Docket: 20-T-44

Citation: 2020 FC 1088

Toronto, Ontario, November 25, 2020

PRESENT: Mr Justice Little

BETWEEN:

ALBERT MUCKLE

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

ORDER AND REASONS

[1] This is a motion under subsection 18.1(2) of the *Federal Courts Act* for an extension of time and leave to file an application for judicial review.

[2] The moving party and proposed applicant is Mr Albert Muckle, a self-represented inmate currently residing in the Stony Mountain Institution in Manitoba. By Notice of Motion filed on November 6, 2020, Mr Muckle requested an extension of time to apply for judicial review of a

decision to transfer him from the Saskatchewan Penitentiary to Stony Mountain Institution on December 17, 2019.

[3] The respondent Attorney General of Canada (“AGC”) opposed the motion. The AGC submitted that Correctional Service of Canada has confirmed that Mr. Muckle was not involuntarily transferred from the Saskatchewan Penitentiary to Stony Mountain Institution on December 17, 2019. Rather, he resided at Saskatchewan Penitentiary from December 13, 2019 until May 7, 2020, at which time he was involuntarily transferred from Saskatchewan Penitentiary to Stony Mountain Institution. The decision to do so is already the subject of an application for judicial review in Federal Court file number T-556-20. Accordingly, the AGC submits that there is no decision that may be the subject of a judicial review and the motion should therefore be dismissed.

I. **Legal Requirements**

[4] 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.”

[5] 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. The importance of each of these four questions depends upon the circumstances of each case. The overriding consideration is that the interests of justice be served: *Larkman*, at para. 63; *Thompson*, at para 9.

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

[7] Mr Muckle's Notice of Motion acknowledged the four questions set out above by stating (at paras 1 to 4) that he had a sufficient reason for the delay in filing, he intended at all material times to bring an application, he has a reasonable chance of success and that the respondent will not be prejudiced.

II. **Should An Extension of Time Be Granted?**

The Passage of Time

[8] Mr Muckle alleges that he was transferred involuntarily from Saskatchewan Penitentiary to Stoney Mountain Institution on December 17, 2019. Although he did not state when he learned of the decision to transfer him, he explained that he attempted to file an application for judicial review of that decision with the Registry of the Court, on a date not specified but presumably within 30 days of learning that he would be transferred. He advised that his Notice of Application was sent back to him because he failed to include the filing fee. He also advised that there was no filing fee included because Correctional Service Canada did not understand the proper payee for a cheque.

[9] Mr. Muckle filed a copy of a letter dated February 11, 2020, authored by a finance analyst at Saskatchewan Penitentiary (on letterhead of Correctional Service Canada, Prairie Region) to the Federal Court Registry in Winnipeg. The letter provided payment of a filing fee (the letter did not refer to the matter to which the fee related). That letter explained that the delay in payment to that date was a result of “institutional procedures” and was “outside of Mr. Muckle’s immediate control”.

[10] With respect to the first and fourth questions set out above, based on his explanation and the February 11, 2020 letter from the finance analyst at Saskatchewan Penitentiary, Mr. Muckle appears to have had an initial intention to file an application for judicial review during the period between learning of the decision to transfer him involuntarily (presumably earlier in December

2019) until mid-February 2020. Despite the omission of specific dates for some events in his materials filed on this motion, Mr Muckle has also provided an explanation for the delay from the expiry of the statutory 30-day period (sometime in January 2020) until the payment of the filing fee issue in mid-February 2020.

[11] However, an explanation for the delay between mid-February 2020 and the filing of this motion is not as clear. Mr. Markel's Notice of Motion is dated October 26, 2020 and it was filed on November 6, 2020.

[12] During that period of more than 8 months, of course, the COVID-19 pandemic occurred. This Court suspended the running of time under statutes, including the 30-day period in subs. 18.1(2) of the *Federal Courts Act* (the "Suspension Period"). The Court allowed the Suspension Period to expire in the four provinces of Western Canada on June 15, 2020. Therefore, the statutory time for filing under subs. 18.1(2) began to run again as of June 15, 2020.

[13] The Suspension Period did not apply to the filing of Mr Muckle's application. By the time the Suspension Period began, the 30-day period for him to file under subs. 18.1(2) had already expired, a month or so earlier. There is no specific explanation for why the present motion was not filed during this one-month period prior to March 13, 2020.

[14] Although the Suspension Period did not apply to the running of the 30-day period for Mr Muckle to file an application for judicial review, the Court has recognized that there may have been challenges in preparing and filing applications for judicial review during the period from

March 13 to June 15, 2020 due to the pandemic: see *Cob Roller Farms Ltd. v. 9072-3636 Québec Inc. (Écocert Canada)*, 2020 FC 806, at paras 53-54.

[15] However, Mr Muckle did not refer to any such challenges. In fact, while the Suspension Period was in effect, Mr. Muckle was able to commence a different application for judicial review in relation to his involuntary transfer on May 7, 2020 from Saskatchewan Penitentiary to Stony Mountain Institution. He filed his pleading in Federal Court file number T-556-20 on May 20, 2020 in relation to the transfer decision of which he had received notice (according to that pleading) on April 15, 2020 and again on April 21, 2020.

[16] Mr Muckle's written submissions on this motion stated that he received his application "back" from the Court Registry office on October 6, 2020 advising that he had not applied for an extension of time to file the application. He filed his Notice of Motion on November 6, 2020.

[17] In this matter, therefore, the applicant's motion materials provided some evidence of a continuing intention to file an application for judicial review. The applicant's written representations implicitly seem to suggest that he may not have been aware until October 6, 2020 that he had to file the present motion for an extension of time. He did so a month later.

[18] Overall, the delays after the expiry of the 30-day period in the *Federal Courts Act* are considerable and not explained in full. They appear to be related in part to the applicant being self-represented and possibly unaware of the applicable rules related to filing and extensions of time. As such, the Court should allow some flexibility, while observing that both self-represented

litigants and parties represented by legal counsel are required to comply with the *Federal Courts Act* and the *Federal Courts Rules*.

[19] In all the circumstances, these considerations weigh somewhat against extending the time to file under subs. 18.1(2) of the *Federal Courts Act* and against granting leave to file the application.

Some Potential Merit in the Proposed Application

[20] Turning now to the second question set out above, the Court must consider whether there is some potential merit in the proposed application for judicial review. There are three points.

[21] First, as noted already, the AGC filed an affidavit advising that the applicant was not actually transferred on December 17, 2019 as he alleges and that he resided at Saskatchewan Penitentiary from December 13, 2019 until May 7, 2020. The respondent submitted that, without a decision to review, there can be no potential merit in a judicial review application, citing *Peguis First Nation v. Canada (Attorney General)*, 2013 FC 276, at para 17, aff'd 2014 FCA 7. To the same effect is *The Association of Manitoba Municipalities v. Manitoba*, 2014 MBQB 64, at para 46-53. In his reply representations, Mr. Muckle stated that this is untrue and he has supporting documents in his possession to prove it. He did not file or describe the contents of those documents. The applicant also did not refer to the date on which he was advised of the decision to transfer him involuntarily or file copies of any documents implementing that decision.

[22] It may be noted that the letter dated February 11, 2020, addressed to the Federal Court Registry enclosing a filing fee on his behalf, is on the letterhead of Correctional Service Canada at the Saskatchewan Penitentiary. That is consistent with Mr Muckle residing there at that time. Mr Muckle did not allege that he was transferred from Saskatchewan Penitentiary to Stony Mountain Institution in December 2019, then back to Saskatchewan Penitentiary sometime before the February 11 letter, then back again to Stony Mountain Institution on May 7, 2020.

[23] On this motion, the Court cannot conclusively resolve the question of whether there was a “decision” that may be challenged by judicial review. On the evidence filed, there is doubt that he was involuntarily transferred from Saskatchewan Penitentiary to Stony Mountain Institution on December 17, 2019 and therefore doubt that there was a decision before December 17 to transfer Mr. Muckle involuntarily. The doubt as to the existence of a decision to review weighs against extending the time to file when considering the potential merits of the proposed proceeding.

[24] Second, the Court notes the limited range of remedies available on a judicial review application and the applicant’s current residence at Stony Mountain Institution. The existence of a judicial review application concerning the later May 7, 2020 involuntary transfer from the Saskatchewan Penitentiary to Stony Mountain Institution also militates against granting an extension of time to file an application for judicial review in respect of an alleged earlier decision to do so.

[25] Third, Mr. Muckle claimed in his written representations to have “more than sufficient evidence to show Charter violations that took place with [his] involuntary transfer” on December 17, 2019. However, he has not filed or otherwise referred to any of that alleged evidence on this motion, nor made any submissions with respect to the nature of his evidence. Nor has the applicant provided any specific allegations to support a breach of his rights or freedoms under the *Canadian Charter of Rights and Freedoms*. The materials do not refer to any specific section of the *Charter*, or to any events or facts that would give rise to a potential breach of it during his alleged involuntary transfer in December 2019. The Court is therefore unable to conclude from the materials filed by the applicant that there is any potential merit in the proposed application.

[26] The applicant has alleged breaches of his *Charter* rights in the other proceeding that relates to his involuntary transfer between the same two institutions in May 2020. But he did not do so on this motion. Although the applicant prepared a Notice of Application with his position on the proposed judicial review, he did not file it on this motion. He made reference to documents in reply (an “Involuntary Transfer Warrant, Assessment for Decision and a copy of the document Exhibit” used for both his alleged involuntary transfer on December 17, 2019 and the involuntary transfer that occurred on May 7, 2020) but did not file them on this motion.

[27] On the material filed, the absence of any basis for challenging the alleged involuntary transfer also weighs against granting an extension of time and leave to apply to file an application for judicial review.

Prejudice to the Respondent

[28] On the third question, the AGC did not allege any specific prejudice, and there appears to be none apart from the time and resources required to defend the application. Usually, the time and resources to defend a legal proceeding are not pertinent to a motion to extend the time for filing. If those considerations were relevant, that kind of prejudice would arise on every motion under subs. 18.1(2) and would weigh against the applying party. In this case, however, it could have some relevance because there is doubt, as a matter of fact, as to whether there was a decision that may be judicially reviewed by the Court. Having said that, there is a risk of double-counting the effect of the possible absence of a decision for the Court to review.

[29] The evidence related to the third factor, prejudice to the respondent, weighs at most slightly against granting the motion. The Court will consider this factor to be neutral.

Overall Interests of Justice

[30] In all the circumstances described above, and considering the evidence and submissions in relation to the four factors on the present record, the Court is not satisfied that it is in the interests of justice to extend the time and grant leave to file an application for judicial review. While the applicant partially explained the long delays and the respondent did not point to any specific prejudice caused by the delays, the doubt as to whether there is a “decision” to challenge by way of judicial review, the existence of the other judicial review application, and the absence of any specific allegations or any demonstrable merit in the proposed proceeding on the present

record, lead the Court to conclude that it should not exercise its discretion to permit the proposed application for judicial review to be filed.

III. **Conclusion**

[31] The applicant, who is not represented by legal counsel, has made attempts to seek judicial review of an involuntary transfer that allegedly occurred in December 2019. He claims to have “more than sufficient evidence to show” violations of his rights under the *Canadian Charter of Rights and Freedoms*. This decision only concerns an extension of time to file a judicial review application. It does not prevent the applicant from taking other legal steps to assert a breach of his constitutional rights.

[32] The applicant’s motion is therefore dismissed. The AGC did not request costs.

ORDER in 20-T-44

THE COURT ORDERS that the applicant's motion for an extension of time and leave to file an application for judicial review, made under subsection 18.1(2) of the *Federal Courts Act*, is dismissed without costs.

“AD Little”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: 20-T-44

STYLE OF CAUSE: CONSTABLE PAUL LACOURSIERE v NCMS OF
THE RCMP (CONDUCT AUTHORITY)

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

ORDER AND REASONS: LITTLE J.

DATED: NOVEMBER 25, 2020

WRITTEN REPRESENTATIONS BY:

Albert Muckle FOR THE APPLICANT
(SELF-REPRESENTED)

Brenna Dixon FOR THE RESPONDENT

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