Federal Court  Cour fédérale

Date: 20170221

Docket: T-2007-16

Citation: 2017 FC 206

Montréal, Quebec, February 21, 2017

PRESENT: The Honourable Mr. Justice Locke

BETWEEN:

FRASER LEISHMAN
AND GRAY GREENWAY

Applicants

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA, as represented by THE MINISTER OF ENVIRONMENT AND CLIMATE CHANGE AND PARKS CANADA AGENCY

Respondents

JUDGMENT AND REASONS

[1] This decision concerns two motions in the present application. In the first motion, the applicants seek (i) an extension of the time to commence the application, (ii) an extension of deadlines for upcoming steps, (iii) an Order for production of various documents, and (iv) costs on a solicitor and own client basis. In the second motion, the respondents request that certain relief requested in the present application be struck. Though each of these motions is addressed

separately, they interrelate such that it is appropriate that both are addressed in the same decision.

[2] The present application seeks judicial review of a decision dated March 7, 2016, by the Superintendent of Waterton Lakes National Park, Ifan Thomas, regarding the location of a new Visitor Reception Centre and associated offices and parking (the new VRC) to be built in Waterton Lakes National Park. In essence, the applicants assert that the impugned decision (the Decision) should be set aside because the location of the new VRC was chosen (i) in contravention of the 2000 Waterton Community Plan (the Community Plan), and (ii) without providing an adequate opportunity for public participation. The present application also seeks an Order (i) prohibiting the respondents from taking certain steps in the development of the new VRC at the chosen location, (ii) declaring that the designated land use for the chosen location precludes the development of the new VRC, and (iii) enjoining the respondents from taking certain further steps in the development of the new VRC at the chosen location.

[3] The extension of the time to commence the application is necessary because the notice of application was filed on November 21, 2016 (more than eight months after the applicants learned of the Decision), whereas s 18.1(2) of the *Federal Courts Act*, RSC 1985, c F 7, provides that, unless the Court orders otherwise, such an application for judicial review should be commenced within 30 days after the impugned decision was first communicated to the party directly affected by it.

[4] The respondents' motion to strike arises because the applicants' requested relief of prohibition, declaration and injunction are not in the nature of a judicial review and are therefore not subject to the 30-day deadline contemplated in s 18.1(2) of the *Federal Courts Act*.

I. Preliminary Issue

[5] Because the motions before me seek interlocutory orders in the context of an application for judicial review, I must consider whether it is appropriate to exercise my discretion to decide the motions now or leave them to be decided by the panel hearing the application: *Bernard v Canada (Revenue Agency)*, 2015 FCA 263 at para 9 [*Bernard*]. Relevant factors are (i) whether a decision now would allow the hearing to proceed in a more timely and orderly fashion, and (ii) whether the result of the motion is relatively clear-cut or obvious: *Bernard* at para 11.

[6] I have heard no argument that I should not decide these motions now. For this reason, and because hearing these motions now may dispose of the entire matter, I am satisfied that doing so will result in a more timely and orderly disposition of this matter. Therefore, I exercise my discretion to decide these motions now.

II. First Motion: Applicants' request for deadline extensions and document production

[7] The key requests in the first motion are an extension of the time for commencing the present application, and an Order for production of various documents. I will address the request for an extension of the time first.

A. *Request for deadline extension*

[8] The test for considering a request for a deadline extension is provided by the Federal Court of Appeal (FCA) 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 Crown been prejudiced from the delay?
4. Does the moving party have a reasonable explanation for the delay?

[9] 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.

[10] The applicants offer a slightly different test for extension of time (from *Magnotta Winery Corp v Vintners Quality Alliance of Canada* (1999), 1 CPR (4th) 68 at para 26 (FCTD)). However, I prefer the test as set out in *Larkman* because it is more recent and comes from a higher court.

(1) Did the moving party have a continuing intention to pursue the application?

[11] The applicants have not explicitly stated, in the context of their motion, that they always intended to pursue the present application. Nor did they ever make such an intention clear to the respondents during the period between learning of the Decision and commencing the present application.

[12] The applicants argue that they proceeded diligently to challenge the Decision, making repeated requests for information and documents related thereto, and attempting other ways of having the Decision set aside. The applicants argue that their efforts were concerted and sustained, and they never slept on their rights. They also argue that:

> Prudent use of judicial resources suggest that members of the public should always seek alternative avenues for resolution prior to initiating expensive litigation steps and that it why this Court has the discretion to allow a party who has obviously not slept on his/her rights, to proceed to be heard – even in the face of missing a deadline.

[13] The respondents argue that the steps taken by the applicants following the Decision are not evidence of continuing intention to pursue the application, and that to conclude otherwise would permit parties to delay legal action indefinitely by simply requesting information over and over.

[14] I see merit in some of the submissions from both sides. Based on the applicants' behaviour after learning of the Decision, it does appear that they did not intend to accept the Decision. On the other hand, it appears that they knew the grounds for the application at least as early as April 17, 2016, when they wrote about this matter to Environment Minister Catherine McKenna (Minister McKenna). Though the applicants may have had some hope early on that they could resolve this dispute without legal action, that hope seems to have been lost months before the present application was commenced. The applicants' failure to commence proceedings earlier throws doubt on whether their intention to pursue the application was continuous, especially in the absence of an explicit statement in the evidence that it was.

[15] In my view, this factor favours neither party.

(2) Is there some potential merit to the application?

[16] As indicated above, there are two aspects to the applicants' case for judicial review:

1. The location chosen for the new VRC is impermissible because it violates the Community Plan.
2. The Decision was made without providing an adequate opportunity for public participation.

[17] I will consider the potential merit of each of these grounds separately. Of course, as observed in *Larkman* at para 75, my comments here are relevant only to my assessment of whether the present application has sufficient merit to warrant the granting of an extension of time. It would be for the applications judge to fully assess the substantive issues.

[18] With regard to violation of the Community Plan, the parties appear to agree that the location chosen for the new VRC is in a designated Recreational Reserve district. The Community Plan indicates that the purpose of such an area is to provide open space for recreational and cultural activities. It excludes any development that is not necessary to support recreational and cultural uses. The Community Plan defines various permitted uses for the different districts identified therein, including the Recreational Reserve district. The permitted uses that are defined in the Community Plan include the following that might correspond to the new VRC: "visitor services", "government services", "public library and cultural exhibit", and "institutional". The applicants note that, though some of these uses are indicated as permissible

in certain districts, none is indicated as permissible in the Recreational Reserve district where the new VRC is to be located.

[19] Turning now to the applicants' assertion that the Decision was made without providing an adequate opportunity for public participation, I note first that the applicants' interest in the present application appears to be as leaseholders and members of the Waterton Lakes Leaseholders Association (WLLA) who will be affected by the Decision. In their response, the respondents cite three separate dates prior to the date of the Decision on which Superintendent Thomas met with representatives of WLLA: September 15, November 13, and December 9, 2015. Though the applicants do not deny that these meetings took place, they suggest that the meetings were not intended to be truly consultative and that the Decision failed to address the concerns raised by the WLLA at those meetings. They also argue that meetings with that specific group cannot constitute adequate consultation with the public. I have difficulty finding merit in the applicants' argument of inadequate public consultation. Firstly, it relies heavily on exclusion of the public, without making the case that the applicants' own interests as members of the WLLA were not adequately considered. Secondly, the applicants' argument is lacking in detail as to whose interests (other than the WLLA) were not adequately considered, and what those interests were.

[20] In any case, it is my view that there is sufficient potential merit to the present application as it relates to failure to comply with the Community Plan to favour the applicants on this question.

(3) Has the Crown been prejudiced from the delay?

[21] The respondents argue that they and the public would be prejudiced if the requested deadline extension were granted because Canada entered into a contract in the amount of about $1.1 million for the design of the new VRC building, and that the work produced from this contract is location-dependent – a change in location would give rise to additional expenses. The respondents note that the contract in question is dated August 4, 2016, some five months after the date of the Decision, and more than three months before the present application was commenced.

[22] The applicants argue that the evidence does not establish that the whole amount of $1.1 million would be lost if the location of the new VRC had to be changed. Though there is no evidence as to the amount of additional expense for building design that would be incurred if the location of the new VRC had to be changed, there is no reason to doubt that the contract was entered into, and it seems reasonable to conclude that there would be some significant additional expense in the event of a location change. This would constitute prejudice to the respondents.

[23] In my view, the answer to this question favours dismissal of the present motion.

(4) Does the moving party have a reasonable explanation for the delay?

[24] There is no dispute that the Decision was made on March 7, 2016, and that the present application was commenced some eight and a half months later on November 21, 2016. The applicants argue that this delay was reasonable because, during the interim period, they were (i) seeking information (through *Access to Information* requests) about how the Decision was made in order to determine if legal action was appropriate, and (ii) taking reasonable steps to try to

resolve the dispute without the need for legal action. On the first point, the applicants argue that they were not aware of the grounds for their application until they obtained the requested information.

[25] The respondents argue that the applicants were able to articulate the grounds for their application in their letter to Minister McKenna dated April 17, 2016, and so they did not need to wait for the requested information. The respondents also argue that, even accepting the reasons the applicants cite for their delay, there remains no basis for the delay of more than two months from September 12, 2016 (when the last response to their Access to Information requests was received) to the commencement of the present application.

[26] I agree with the respondents that the applicants have not established a reasonable explanation for their delay in commencing legal proceedings. It appears that they had the information necessary to commence the present application as early as April 2016 and they do not appear to have learned anything after September 12, 2016, that would justify a further two-month delay. In my view, this factor favours dismissal of the present motion.

(5) Are the interests of justice served?

[27] 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.

[28] Though the applicants have established that there is some potential merit to their application, this is not determinative. The applicants' evidence is weak on the issue of a continuing intention to pursue the application and they have failed to make a case for (i) an absence of prejudice to the respondents, or (ii) a reasonable explanation for the delay. I see no indication that the applicants had any concern for respecting the deadline for commencing the present application until it was actually commenced.

[29] In my view, the interests of justice would not be served by granting the requested deadline extension.

B. *Request for production of documents*

[30] Because of my disposition of the applicants' request for an extension of the time for commencing the present application and the respondents' motion to strike (see below), it is not necessary for me to address the applicants' requests for production of documents and extension of deadlines for upcoming steps.

III. Second Motion: Respondents' motion to strike

[31] In the second motion before the Court, the respondents request that portions of the present application that challenge future decisions be struck. The respondents specifically identify the applicants' requests for prohibition and injunction in respect of further steps in the development of the new VRC, as well as declaration in respect of the chosen location. The respondents argue that it is premature for the Court to make such Orders before the administrative process has run its course, except in cases of a clear absence of jurisdiction.

[32] The applicants have not argued an absence of jurisdiction. Also, most of the applicants' arguments in response to the respondents' motion are focused on the alleged shortcomings in the March 7, 2016 Decision of Superintendent Thomas as the basis for the challenge to any subsequent decision that might be made. To the extent that the Decision is not properly put in issue (see discussion above concerning the applicants' motion), the basis for seeking prohibition, declaration and injunction is fatally undermined.

[33] The respondents acknowledge that a court will strike pleadings in judicial review matters only in the clearest of cases. I agree with the respondents that this case meets that high threshold. I do not see any reasonable basis for the applicants' claims for prohibition, declaration and injunction.

IV. Conclusions

[34] I have concluded that the applicants' motion for an extension of the deadline for commencing the present application should be dismissed, and the respondents' motion to strike

certain portions of the present application should be granted. This effectively removes all of the substantive requested relief from the present application. The applicants' other request for disclosure of documents without redaction is dependent on the substantive requested relief and is no longer relevant.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The applicants' motion is dismissed.

2. The respondents' motion is granted.

3. The present application for judicial review is struck.

4. The applicants shall pay the respondents' costs of the motions and of the application.

"George R. Locke"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2007-16
STYLE OF CAUSE:	FRASER LEISHMAN AND GRAY GREENWAY v HER MAJESTY THE QUEEN IN RIGHT OF CANADA, AS REPRESENTED BY THE MINISTER OF ENVIRONMENT AND CLIMATE CHANGE AND PARKS CANADA AGENCY

MOTIONS MADE IN WRITING CONSIDERED AT MONTRÉAL, QUEBEC PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES*.

JUDGMENT AND REASONS:	LOCKE J.
DATED:	FEBRUARY 21, 2017

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