Federal Court  Cour fédérale

Date: 20220214

Docket: 21-T-19

Citation: 2022 FC 200

St. John's, Newfoundland and Labrador, February 14, 2022

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

HARLEY FRANK, COLIN FRANK, MEAGAN FRANK, ROBERT FRANK, ANNETTE RUSSELL-FRANK, KELLY FRANK, SHARON FRANK, RENITA FRANK, COLINDA FRANK, DANIEL FRANK (estate of), CINDY TAILFEATHERS

Applicants

and

CHIEF AND COUNCIL OF THE BLOOD BAND #148 and THE BLOOD TRIBE APPEALS TRIBUNAL and DARYL THREE PERSONS, SHELDON THREE PERSONS, EMERY ROY THREE PERSONS, WENDALL THREE PERSONS

Respondents

REASONS AND ORDER

I. INTRODUCTION

[1] By a Notice of Motion filed on June 9, 2021, Mr. Harley Frank**,** Colin Frank, Meagan Frank, Robert Frank, Annette Russell-Frank, Kelly Frank, Sharon Frank, Renita Frank, Colinda

Frank, the estate of Daniel Frank, and Cindy Tailfeathers (the "Applicants") seek an Order extending the time within which they can file an Application for Judicial Review of the decision made on October 15, 2020 by the Blood Tribe Appeals Tribunal (the "Appeals Tribunal"). The Notice of Motion was filed pursuant to Rule 369 of the *Federal Courts Rules*, S.O.R./98-106 (the "Rules") for consideration without personal appearance and upon the basis of the written materials, including written arguments.

[2] The Chief and Council of the Blood Band #148 (the "Council"), the Appeals Tribunal and Daryl Three Persons, Sheldon Three Persons, Emery Roy Three Persons, and Wendall Three Persons are named as the Respondents (the "Respondents").

[3] Only the Council filed a Motion Record, including written submissions, in response to the Applicants' Motion Record. The Applicants filed a brief Response to the Council's Motion Record.

II. BACKGROUND

[4] The following details are taken from the affidavits filed by the parties.

[5] The Applicants filed the affidavit of Mr. Harley Frank in support of their Motion. In that affidavit, sworn on May 21, 2021, Mr. Frank deposed, among other things, that because of the COVID-19 pandemic, he did not receive a timely response from Mr. Soup, the Band Manager, in his attempts to resolve the issues internally. Further, because of the pandemic, Band members were not able to access the Administration Offices.

[6] Mr. Frank further deposed that after previous counsel advised they would no longer assist, it took him from November 2020 to April 2021 to find and retain affordable counsel with the correct expertise.

[7] Mr. Frank also deposed that certain family issues “impacted” his ability to attend to filing an application for judicial review.

[8] In response, the Respondents filed the affidavit of Ms. Nadine Tailfeathers, sworn on June 9, 2021.

[9] Ms. Tailfeathers deposed that the Chief and Council are the elected representatives of the Band of the Blood Indians on the Blood Indian Reserve #148. The Blood Tribe is a Band established pursuant to the *Indian Act*, R.S.C. 1985, c. 1-5. It occupies and administers the Blood Reserve No. 148 and 148A in the province of Alberta, pursuant to the customs of the Blood Tribe and the provisions of the *Indian Act, supra*.

[10] As well, Ms. Tailfeathers deposed that no Blood Tribe member has a Certificate of Possession or Occupation. Blood Tribe members are not allotted lawful possession of land. She further deposed that the Kainai Land Use & Occupation Dispute Resolution Policy was created to assist in resolving land disputes. The Policy “is evidence of Council’s inherent authority to control its own proceedings and to make decisions with respect to the Reserve lands which have been set aside for the use and benefit of all Blood Tribe members.”

[11] Ms. Tailfeathers also deposed that there is no “internal process” to resolve such matters, and that none of the COVID-19 safety measures would prevent the Applicants from accessing the Administration Offices in one form or another. Further, she deposed that none of the safety measures would have prevented the Applicants from filing an application for judicial review.

[12] By a decision made on October 15, 2020, the Appeals Tribunal decided that the Applicants’ appeal of the Council’s decision of June 25, 2020 had no merit, and dismissed the appeal. The decision of June 25, 2020 dealt with a dispute between the Frank family and the Respondent Three Person family about land on the Blood Reserve. That dispute was the subject of an application for judicial review in cause number T-1092-18, relative to an earlier decision of the Appeals Tribunal.

[13] In a decision rendered on October 10, 2018, Justice Manson allowed the application and remitted the matter back to the Appeals Tribunal, with Directions. In allowing the application, Justice Manson said:

> 95 The Applicants were denied procedural fairness.
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> 96 Given my decision that the Appeal Tribunal's decision was procedurally unfair, it is not necessary to consider whether the decision was reasonable or not — it would be wrong to go on to speculate what the outcome would otherwise have been (*Ghanuom v. Canada (Minister of Citizenship & Immigration)*, 2011 FC 947 (F.C.) at para 5, citing *Cardinal v. Kent Institution*, [1985] 2 S.C.R. 643 (S.C.C.)).
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> 97 As I have found that the Applicants were denied procedural fairness, I will remit the matter to the Appeal Tribunal in accordance with certain directions outlined below.
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> 98 In reconsidering this matter, the Appeal Tribunal, Council, and the Panel all have a duty to act impartially. This duty requires

> not only an appearance of impartiality, but actual impartiality that is both meaningful and intelligible.
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> 99 The importance of impartiality is heightened by the role Council played in defending the Appeal Decision in this judicial review, which, as outlined above, exceeded the proper boundaries of an administrative tribunal participating in a judicial review of its own decision.
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> 100 Were it possible, I would remit this matter for reconsideration by a decision-maker consisting of individuals who took no part in the initial consideration of this matter. However, given the unique context of First Nations self-governance and the importance of respecting the Blood Tribe's governance procedures, that is not possible. Therefore, it is particularly important that the Appeal Tribunal, Council, and the Panel engage in a meaningful and impartial reconsideration.

[14] Pursuant to subsection 18.1(2) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, the time limit for seeking judicial review of a decision of a federal board, commission or other tribunal is thirty days after the date of the decision or after an applicant becomes aware of the decision.

[15] The Applicants included a draft Notice of Application for Judicial Review in their Motion materials. In that draft, they seek the following relief:

- An Order setting aside the decision of the Appeals Tribunal;
- An Order finding the Appeals Tribunal to be in Contempt of Court or alternatively, leave to bring a Motion pursuant to Rule 467 of the Rules requiring the Respondents to answer allegations of contempt;
- An interim injunction staying the enforcement of any actions flowing from the decision of the Appeals Tribunal;
- An Order allowing the introduction of new evidence that was not before the Appeals Tribunal
- Abridgment of time for prosecution of the Application for judicial review; and

- An Order for substitutional service.

[16] The prayer for relief relative to contempt proceedings relates to the Order of Justice Manson in cause number T-1092-18, referred to above.

III. SUBMISSIONS

[17] The Applicants included written submissions in their Motion Record. They purport to address the four elements for an extension of time. They submit that they had a continuing intention to seek judicial review of the decision of the Appeals Tribunal; that the proposed application has merit; that there is no prejudice to the Respondents from the delay; and that there is a reasonable explanation for the delay.

[18] The Council opposes the Applicants' Motion. It argues that the Applicants have failed to substantiate any of the factors for an extension of time. It submits, as well, that the draft notice of Application addresses two matters, that is judicial review of the decision of October 15, 2020 and contempt proceedings relative to the Order of Justice Manson in cause number T-1092-18. It refers to Rule 302 that provides that only one matter can be the subject of an application for judicial review. Finally, they plead that the interests of justice favour granting an extension of time.

IV. DISCUSSION AND DISPOSITION

[19] I will briefly address the four factors identified in *Canada (Attorney General) v. Larkman* (2012), 433 N.R. 184 (F.C.A.). I note that it is not necessary for a party to establish all four

factors of the *Larkman, supra* test and that the overriding consideration is that the interests of justice be served.

[20] I am not persuaded by the evidence of the Applicants that there was a continuing intention to seek judicial review of the Appeals Tribunal's decision of October 15, 2020. The evidence of the Applicants is set out in the affidavit of Mr. Frank. The within Notice of Motion was filed on June 9, 2021, nearly 9 months after the decision was made by the Appeals Tribunal.

[21] In *Muckle v. Canada (Attorney General)*, 2020 FC 1088, the Court dealt with a motion for an extension of time within the COVID-19 pandemic when the usual procedures of the Court were suspended. In dismissing the motion, the Court said the following at paragraphs 12, 13 and 18:

> 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.
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> 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.
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> …
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> 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*.

[22] In my opinion, the comments above apply in this case.

[23] In his affidavit, Mr. Frank refers to difficulties caused by the COVID-19 pandemic. He refers to efforts to resolve the matter internally, by contacting Mr. Soup, the Band Manager. He does not clearly and specifically refer to any intention to pursue judicial review, let alone a continuing intention to do so.

[24] The evidence of the Applicants does not clearly identify a reviewable error on the part of the Appeals Tribunal.

[25] Rather, in his affidavit, Mr. Frank speaks in general terms of the failure of the Respondents to "follow" the Directions of Justice Manson in the decision rendered in cause number T-1092-18 , and the failure of the Respondents to follow "their own laws and/or policy", including a failure to provide a copy of the record that was before the Appeals Tribunal, failure to conduct a *de novo* hearing, and disregarding land dispute policies that allegedly prohibit dealing with land disputes six months before an election, when the last election was held on November 29, 2020.

[26] These various allegations can be characterized as procedural fairness issues. Procedural fairness was the principal issue in the earlier proceeding before Justice Manson.

[27] However, in her affidavit, Ms. Tailfeathers answers these allegations. She deposed, among other things, that Mr. Frank was advised as to the materials that would be placed before the Appeals Tribunal. The decision of the Appeals Tribunal identifies what was before it.

[28] The decision provides that the Appeals Tribunal decided that no oral hearing was necessary and that it could proceed on the basis of the written submissions presented by Mr. Frank.

[29] As well, Ms. Tailfeathers deposed that Justice Manson had not ordered a *de novo* hearing before the Appeals Tribunal. Rather, Justice Manson provided a timeline for a *de novo* hearing before the Land Dispute Resolution Panel.

[30] I acknowledge the argument of the Council that the Applicants have not shown that the proposed Application for judicial review has potential merit.

[31] I agree with the position of the Council that granting an extension of time for the commencement of an application for judicial review will cause prejudice.

[32] According to the affidavit of Ms. Tailfeathers, after delivery of the decision of the Appeals Tribunal and the expiry of the time limit to bring an application for judicial review, steps were taken to release land proceeds to the Respondent Three Person family. She deposed that the Respondent Three Person family has used and occupied the land for some time.

[33] I agree that in the face of this evidence, there would indeed be prejudice at least to the Respondent Three Person family. There is presumptive prejudice when the finality of a decision can be disturbed upon a late application for judicial review. I refer to the decision in *Liu v. Canada (Attorney General)*, 2021 FC 365 at paragraph 47, as follows:

> 47 I acknowledge that the question of prejudice is not clear-cut. However, the Respondent, like any other party to litigation in the Federal Court, is entitled to rely on the finality of a decision. I refer to the Order of Justice Gauthier in *Curtis v. Bank of Nova Scotia*, 19-A-18 (unreported), where she said "the need for finality of court decisions is an important concept; time limits are not whimsical."

[34] Then, there is the question of a reasonable explanation for the delay.

[35] In my opinion, the evidence tendered by the Applicant fails to provide a reasonable explanation for the delay.

[36] In his affidavit, Mr. Frank attributes the delay to the consequences of the COVID-19 pandemic and personal family responsibilities. In light of the history of the dispute between members of the Frank family and members of the Respondent Three Person family, referenced in the decision of Justice Manson, it appears that the land allocation was important to Mr. Frank and the other applicants. In these circumstances, it is reasonable to expect that timely action would be taken to pursue an application for judicial review.

[37] The "interests of justice" do not operate in a vacuum. They are to be considered relative to the practice and procedure of the Court, as set out in the *Federal Courts Act*, R.S.C. 1985 c. F-7, and the Rules, not according to the personal agenda of a potential applicant.

[38] In these circumstances, the motion for an extension of time is dismissed, with costs to the Council.

[39] Considering the disposition of the Applicants' Motion, it is not necessary for me to address the objection raised about the attempt to deal with contempt proceedings.

ORDER IN 21-T-19

THIS COURT ORDERS that the Motion is dismissed with costs to the Council of the Blood Band #148, in the amount of $500.00 inclusive of HST and disbursements.

"E. Heneghan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	21-T-19
STYLE OF CAUSE:	HARLEY FRANK, COLIN FRANK, MEAGAN FRANK, ROBERT FRANK, ANNETTE RUSSELL-FRANK, KELLY FRANK, SHARON FRANK, RENITA FRANK, COLINDA FRANK, DANIEL FRANK (estate of), CINDY TAILFEATHERS v. CHIEF AND COUNCIL OF THE BLOOD BAND #148 and THE BLOOD TRIBE APPEALS TRIBUNAL and DARYL THREE PERSONS, SHELDON THREE PERSONS, EMERY ROY THREE PERSONS, WENDALL THREE PERSONS

MOTION IN WRITING CONSIDERED AT ST. JOHN'S, NEWFOUNDLAND AND LABRADOR PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES*

REASONS AND ORDER:	HENEGHAN, J
DATED:	FEBRUARY 14, 2022

WRITTEN REPRESENTATIONS BY:

Harley G. Frank	FOR THE APPLICANTS (SELF-REPRESENTED)
Joanne Crook Paul Reid	FOR THE RESPONDENTS (CHIEF AND COUNCIL OF THE BLOOD BAND #148)
N/A	FOR THE RESPONDENTS (DARYL THREE PERSONS, SHELDON THREE PERSONS, EMERY ROY THREE PERSONS, WENDALL THREE PERSONS)

SOLICITORS OF RECORD:

Walsh LLP Barristers and Solicitors Calgary, Alberta	FOR THE RESPONDENTS (CHIEF AND COUNCIL OF THE BLOOD BAND #148)