

**Federal Court of Appeal**



**Cour d'appel fédérale**

**Date: 20230608**

**Docket: 23-A-26**

**Citation: 2023 FCA 129**

**Present: LOCKE J.A.**

**BETWEEN:**

**DAKOTA PLAINS WAHPETON OYATE  
as represented by EVANGELINE TOWLE, in her capacity as  
Hereditary Chief of Dakota Plains Wahpeton Oyate,  
CRAIG BLACKSMITH and ALVIN SMOKE, in their capacity as  
Representatives of Dakota Plains Wahpeton Oyate Council  
members**

**Applicants**

**and**

**DONALD RAYMOND SMOKE**

**Respondent**

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on June 8, 2023.

**REASONS FOR ORDER BY:**

**LOCKE J.A.**

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**members**

**Applicants**

**and**

**DONALD RAYMOND SMOKE**

**Respondent**

**REASONS FOR ORDER**

**LOCKE J.A.**

[1] Just as they did before the Federal Court, the prospective appellants describe themselves  
as

Dakota Plains Wahpeton Oyate, as represented by Evangeline Towle, in her  
capacity as Hereditary Chief of Dakota Plains Wahpeton Oyate, Craig Blacksmith

and Alvin Smoke, in their capacity as Representatives of Dakota Plains Wahpeton Oyate Council members

[2] The nature of the dispute underlying the proposed appeal concerns conflicting claims to be the Hereditary Chief of Dakota Plains Wahpeton Oyate First Nation. I will refer to the parties, respectively, as the prospective appellants and the prospective respondent. The Federal Court found in favour of the prospective respondent, Donald Raymond Smoke, in a decision by Justice Ann Marie McDonald dated December 15, 2022, which was given the neutral citation 2022 FC 1743 (the Merits Decision).

[3] The prospective appellants seek to commence an appeal of the Merits Decision (and possibly also a later decision on costs dated February 23, 2023, which was given the neutral citation 2023 FC 261 (the Costs Decision)).

[4] Paragraph 27(2)(b) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, provides for a deadline of 30 days to appeal the Federal Court decisions in issue here. Accordingly, the deadlines were January 14, 2023 (for the Merits Decision) and March 25, 2023 (for the Costs Decision). It appears that the prospective appellants were advised that the time for commencing an appeal did not count during the seasonal recess. The seasonal recess is defined in the *Federal Courts Rules*, S.O.R./98-106 (the *Rules*), as “the period beginning on December 21 in a year and ending on January 7 in the following year.” Stopping the count of days during the seasonal recess would move the deadline to February 1, 2023, which is apparently, when the prospective appellants attempted to file a notice of appeal. Unfortunately, for the prospective appellants, the provision in Rule 6(3) of the *Rules* that stops the count of days during the seasonal recess does

not apply to deadlines provided for in the *Federal Courts Act*, like the deadline to commence an appeal of the Merits Decision. By February 1, 2023, that deadline had passed.

[5] Accordingly, the prospective appellants now move for an extension of time to commence an appeal. The prospective appellants' motion record was filed on April 13, 2023. The prospective respondent's responding record contesting the motion was filed on April 24, 2023. The prospective appellants did not file a reply. As contemplated in Rule 369.2, I will decide this motion on the basis of the written representations, without an oral hearing.

[6] The test for an extension of time has been discussed many times in this Court, including in the following passage from *Canada (Attorney General) v. Larkman*, 2012 FCA 204 at paragraphs 61 and 62 (*Larkman*):

[61] The parties agree that the following questions are relevant to this Court's exercise of discretion to allow an extension of time:

- (1) Did the moving party have a continuing intention to pursue the [appeal]?
- (2) Is there some potential merit to the [appeal]?
- (3) Has the [respondent] been prejudiced from the delay?
- (4) Does the moving party have a reasonable explanation for the delay?

[62] These questions guide the Court in determining whether the granting of an extension of time is in the interests of justice. The importance of each question depends upon the circumstances of each case. Further, not all of these four questions need to be resolved in the moving party's favour. For example, "a compelling explanation for the delay may lead to a positive response even if the case against the judgment appears weak, and equally a strong case may counterbalance a less satisfactory justification for the delay". In certain cases, particularly in unusual cases, other questions may be relevant. The overriding consideration is that the interests of justice be served... [Citations omitted]

[7] The prospective respondent argues that all of the factors identified in *Larkman* go against the prospective appellants. I will address each of these factors in turn.

[8] On the first factor (continuing intention to pursue the appeal), it appears that at least Craig Blacksmith had such a continuing intention. He signed all of the motion materials on behalf of the prospective appellants. He has not provided much detail as to what he did on February 1, 2023 when he says he “submitted” his appeal. He also provides little detail as to what he did after that date. Nevertheless, the motion materials give every appearance that he always intended to commence an appeal of the Merits Decision. It appears that he had a deadline in mind (albeit an incorrect one) and attempted to respect it. There is no suggestion that, even after February 1, 2023, Mr. Blacksmith ever stopped intending to appeal the Merits Decision.

[9] The prospective respondent argues that, because the prospective appellants’ timeline on and after February 1, 2023 is in the written representations (rather than in Mr. Blacksmith’s affidavit), there is no formal evidence on the issue. This is technically true. In fact, it appears that all of the content of the prospective appellants’ written representations should have been included in the affidavit. Conversely, virtually all of the content of the affidavit should have been included in the written representations. However, at this preliminary stage, I am sympathetic to parties not represented by counsel who are trying to learn the Court’s procedures. I will consider the alleged timeline on and after February 1, 2023 as unsworn representations by the prospective appellants.

[10] The prospective respondent also cites evidence that Evangeline Towle indicated in late December 2022 and in early January 2023 that she did not intend to pursue an appeal of the Merits Decision. In my view, the continuing intention of Mr. Blacksmith is sufficient to find that the first factor in the present motion favours the prospective appellants. I reach no conclusion as to whether it is appropriate for Ms. Towle to be a party to the proposed appeal(s).

[11] On the second factor (potential merit), the prospective respondent argues that (i) Mr. Blacksmith does not have authorization to act for the prospective appellants, and (ii) Mr. Blacksmith has not met the burden of demonstrating some potential merit.

[12] With regard to the question of authorization, the prospective respondent notes that the authorization document cited by Mr. Blacksmith (which is found at page 62 of the motion record) indicates that it authorizes Mr. Blacksmith to speak on behalf of Ms. Towle and Alvin Smoke, not on behalf of Dakota Plains Wahpeton Oyate (the named party). I acknowledge the distinction that the prospective respondent aims to draw, but this may be no more than a simple issue of the wording of the style of cause and/or the authorization. I do not find this argument determinative on the issue of potential merit.

[13] With regard to the question of the burden of demonstrating some potential merit, the prospective respondent notes the absence of a draft notice of appeal or the decision under appeal. The decision under appeal is publicly available, so its absence in the motion materials is unimportant. As for a draft notice of appeal, I agree that it would be preferable for the prospective appellants to have submitted one. However, it was not necessary provided there is

some explanation of the proposed grounds of appeal sufficient to show some potential merit. As acknowledged by the prospective respondent, Mr. Blacksmith's affidavit sets out a number of "concerns". I understand these to be a general description of proposed grounds of appeal. These are:

- A. The prospective appellants had no way of knowing that their standing would be an issue.
- B. The Federal Court favoured the prospective respondent's evidence over that of the prospective appellants.
- C. The Costs Decision indicated that the prospective appellants had not shown a "genuine" governance dispute or support from other community members.
- D. The Merits Decision concluded that the prospective appellants had failed to establish the purported custom on which they rely.

[14] I agree that the prospective appellants' efforts to demonstrate that their proposed appeal(s) has(have) any merit are not strong. The above-mentioned "concerns" relate to issues they seek to raise, without devoting much attention to how the Federal Court is supposed to have erred. If the proposed appeal(s) is(are) to have any hope of success, the arguments as to how the Federal Court erred (based on the relevant standard of review) will have to be fleshed out.

[15] This factor does not favour the prospective appellants. That said, I see the nub of the arguments they wish to raise, and I am not prepared to conclude that none shows any potential merit. Moreover, as mentioned, I am mindful of the challenges facing the prospective appellants who are self-represented at present.

[16] On the third factor (prejudice), the prospective respondent's argument that granting the motion will cause it prejudice is really that he would be prejudiced by the appeal itself, not by the delay. It appears that the prospective respondent will not suffer any prejudice by the delay in commencing the appeal. This factor favours the prospective appellants.

[17] On the fourth factor (reasonable explanation for the delay), the prospective appellants have reasonably explained the delay from the January 14, 2023 deadlines to February 1, 2023. The error in the calculation of the initial deadline (based on the inappropriate consideration of the seasonal recess) is understandable. It appears that the prospective appellants learned only on February 6, 2023 that their appeal was late. Accordingly, it remains to consider whether the delay from that date to the April 13, 2023 filing of the present motion has been reasonably explained.

[18] Mr. Blacksmith has described a series of steps that he took during this period. As noted above, the prospective appellants have submitted argument in Mr. Blacksmith's affidavit and evidence in the written representations, and so the timeline of steps after February 6, 2023 is not in proper form to be treated as evidence. As indicated above, I will treat this timeline as unsworn



representations. In any case, I note that two of the steps identified by Mr. Blacksmith in the timeline were within the knowledge of the prospective respondent:

- A. On February 6 2023, the prospective respondent's solicitor advised Mr. Blacksmith that no appeal had been filed.
  
- B. On February 14, 2023, the prospective respondent claimed that the appeal was filed too late (this step also suggests that the prospective respondent was aware of the initial attempt to commence the appeal).

[19] I infer from the lack of contradictory evidence from the prospective respondent that these steps are accurate.

[20] The following subsequent steps in the alleged timeline are entirely believable in the circumstances of unrepresented parties who are not familiar with this Court's procedures:

- A. On February 15, 2023, Mr. Blacksmith contacted the Court Registry and was told that the appeal had been submitted late, and that a motion to extend the deadline would be required.
  
- B. On February 28, 2023, Mr. Blacksmith submitted a notice of motion.

C. On March 2, 2023, Mr. Blacksmith was informed that the submission “was improperly done”, and received sample motion materials and other documents from the Court Registry.

D. On March 14, 2023 and April 3, 2023, Mr. Blacksmith had further communications with the Court Registry corrections that were required to put his motion materials into proper form.

[21] While perhaps not representing a model of diligence and promptness, I am satisfied that the prospective appellants have reasonably explained the delay leading up to the filing of the present motion. This factor favours the prospective appellants.

[22] In conclusion, I will grant the motion for an extension of time. As indicated, the prospective appellants will have to clarify their arguments if they hope to be successful in their proposed appeal(s), but the weakness of their argument on the merits at this stage is not such that I would deny the present motion on that basis alone. In my view, the interests of justice favour granting the motion.

[23] Of course, any appeal that is commenced may be open to attack on the grounds raised in this motion, including whether the prospective appellants have standing. Moreover, the prospective appellants should bear in mind their potential for personal liability for costs if they are unsuccessful, as happened in the Federal Court.

"George R. Locke"

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J.A.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:**

23-A-26

**STYLE OF CAUSE:**

DAKOTA PLAINS WAHPETON  
OYATE, as represented by  
EVANGELINE TOWLE, in her  
capacity as Hereditary Chief of  
Dakota Plains Wahpeton Oyate,  
CRAIG BLACKSMITH and  
ALVIN SMOKE, in their capacity  
as Representatives of Dakota Plains  
Wahpeton Oyate Council members  
v. DONALD RAYMOND SMOKE

**MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES**

**REASONS FOR ORDER BY:**

LOCKE J.A.

**DATED:**

JUNE 8, 2023

**WRITTEN REPRESENTATIONS BY:**

Craig Blacksmith

FOR THE APPLICANTS  
(On his own behalf)

Devon C. Mazur  
Amanda Cheys

FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Myers LLP  
Winnipeg, Manitoba

FOR THE RESPONDENT