

FEDERAL COURT

BETWEEN:

MARCUS BRAUER

Applicant

and

HER MAJESTY THE QUEEN

Respondent

**APPLICANT'S WRITTEN SUBMISSIONS
MOTION IN WRITING**

Daniel Wallace
MCINNES COOPER
1300-1969 Upper Water Street
Halifax, NS B3J 2V1
Tel: (902) 425-6500
Fax: (902) 425-6350

Solicitor for the Applicant

Introduction

1. The Applicant, Marcus Brauer, has suffered a significant financial loss as result of a Treasury Board Secretariat (TBS) decision. Mr. Brauer seeks to judicially review that decision and brings this motion to extend the time to file his Notice of Application for Judicial Review.
2. Mr. Brauer respectfully submits that an extension of time would do justice between the parties as it would allow this significant issue to be determined on its merits.
3. The four commonly cited factors support the extension of time in the current case:
 - a. Mr. Brauer has had a continuing intention to legally challenge the TBS's decision.
 - b. Mr. Brauer's judicial review application has, at least, some merit.
 - c. Mr. Brauer has a reasonable explanation for the delay.
 - d. There is no reason to believe that the Respondent would be prejudiced by the delay.

Part I – Statement of Facts

4. Mr. Brauer has deposed and filed an affidavit in support of this motion. The statement of facts in these written submissions closely follows Mr. Brauer's affidavit.

Mr. Brauer's financial loss as a result of frequent Canadian Forces postings.

5. Mr. Brauer has served in the Canadian Forces since 1988 and continue to serve. During those 24 years, he has been posted to Sault Ste. Marie (ON), Ottawa (ON), St-Jean sur-Richelieu (QC), Petawawa (ON), Afghanistan, Borden (ON), Edmonton (AB) and Halifax (NS).
6. He is married to Juanita Brauer. They have 5 children, who currently range in age from 3 to 12.
7. In 2007, Mr. Brauer was stationed at CFB (Canadian Forces Base) Borden. He and his family lived in Angus, Ontario.
8. In 2007, Mr. Brauer was posted to CFB Edmonton. He was advised that if he did not move to Alberta that he would not be able to keep his rank as a major and likely be posted to CFB Edmonton as a Captain regardless.
9. They applied for rental accommodations, however due to a shortage in affordable housing there was a two year waiting list for private married quarters. Civilian rentals were more costly per month than a mortgage at the time and deemed unaffordable. The only viable option for Mr. and Ms. Brauer was to purchase one of the 12 available houses.
10. Mr. and Ms. Brauer purchased a modest family home in Bon Accord, Alberta for \$405,000 on June 5, 2007. Bon Accord is a town in Northern Alberta located 40 kilometres north of Edmonton. Bon Accord has a population of approximately 1,500 and has its own town council and mayor. Bon Accord is popular with Canadian Forces members because it is affordable and close to CFB Edmonton.
11. In 2010, Mr. Brauer was posted to CFB Halifax, Nova Scotia. He was advised by his career manager that if he did not move to Halifax that he would be posted to another location regardless.
12. On April 26, 2010, Mr. and Ms. Brauer listed their Bon Accord house with real estate agent Doug Donnelly's team, Royal LePage for the suggested list price of \$349,000.
13. The list price was reduced on May 4, 2010 to \$329,000.
14. Mr. and Ms. Brauer based their listing price on local media reports that the real estate market in Bon Accord had slumped in since 2008 based on the announcements that the

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proposed multi-billion dollar industrial projects (Fort Hills Energy Limited Partnership, Petro Canada Bitumen Upgrader, Fort Hills pipeline project, Suncor Fort Hills project, Hartland transmission projects) were on hold, potentially permanently.

15. They sold their house for \$305,141 based on the realtor's advice that they could not have sold our house for any more money.
16. This home equity loss of \$88,000 was financially devastating for Mr. and Ms. Brauer.

Mr. Brauer's application for Home Equity Assistance.

17. On May 10, 2010, Mr. Brauer applied for Home Equity Assistance under the Canadian Forces Integrated Relocation Program Directive (CF Relocation Directive).
18. Mr. Brauer provided significant evidence to support his application, including a report prepared by his realtor that home values in Bon Accord declined 23.11% between 2007 and 2010.
19. Home Equity Assistance provides a benefit of 100% of the loss in places designated as depressed market area by the Treasury Board Secretariat. If the place is not designated as a depressed market area, the benefit is 80% of the loss capped at a maximum of \$15,000.
20. A depressed market area is defined in the CF Relocation Directive as "a community where the housing market has dropped more than 20%." The CF Relocation Directive does not define the term "community".
21. On July 9, 2010, Mr. Brauer was approved for a \$15,000 payment, but his application to have Bon Accord designated as a depressed market area was denied. The Treasury Board noted that no locations in Canada qualified as a depressed market. This left \$73,000 of home equity out of pocket losses, not including other resulting costs such as increased CMHC mortgage insurance.
22. On July 13, 2010, Mr. Brauer filed a grievance with the Canadian Forces.
23. On his September 19, 2011 letter, the Chief of Defence Staff General W.J. Natynczyk noted that he did not have the authority to grant Mr. Brauer's request as that can only be done by the Treasury Board Secretariat. However, General Natynczyk directed the Director General Compensation and Benefits to prepare and transmit Mr. Brauer's HEA submission to the Treasury Board Secretariat for evaluation of depressed market status.
24. In February 2012, Mr. Brauer made a complaint to the National Defence and Canadian Forces Ombudsman. In its October 30, 2012 office, the Ombudsman's office issued its findings on this issue:

Your case highlights a number of fundamental weaknesses in the current HEA policy, which have been recognized by your chain of command, the

CDS and this Office. In your case these related to; the requirement for DCBA to forward your HEA application to TBS; the lengthy delays for TBS to review your application; and, the lack of a clear definition of “community” in the HEA policy.¹

25. In its July 17, 2012 letter, the TBS determined that Bon Accord, Alberta shall not be designated a depressed market area because it should be considered part of the “Edmonton metropolitan area”. The substantial portion of the letter is essentially a page. The Treasury Board Secretariat also apologized for the time that it took to make this determination.²

Mr. Brauer’s continuous efforts to challenge the TBS’s decision.

26. On September 6, 2012, Mr. Brauer applied for compensatory consideration under the TBS’s *Directive on Claims and Ex Gratia Payments*. On October 22, 2012, his claim was denied. On November 5, 2012, he appealed that denial. On November 27, 2012, his appeal was denied.
27. Beginning in October 2012, I have consulted with several different law firms seeking *pro bono* counsel to represent me in challenging the TBS’s decision. His financial circumstances have made it very difficult for me to retain counsel.
28. Mr. Brauer has publically advocated on this issue, through his Member of Parliament (Hon. Robert Chisholm) and the media. He has spoken about this issue on CBC Radio’s *The Current* and been quoted in a Canadian Press article.
29. Mr. Brauer has submitted and obtained Access to Information requests. He is still awaiting some responses to his Access to Information requests.
30. For a period of time, Mr. Brauer was not able to continue his attempts at applying for a judicial review alone as his mental health condition has deteriorated.
31. On May 2, 2013, Mr. Brauer retained Daniel Wallace, a lawyer at McInnes Cooper, to represent him in this judicial review application. This motion was filed on May 9, 2013.

¹ May 8, 2013 Affidavit of Marcus Brauer, Exhibit C.

² May 8, 2013 Affidavit of Marcus Brauer, Exhibit D.

Part II - Issues

32. The sole issue in this motion is whether Mr. Brauer should be granted an extension of time so that his judicial review application can be heard on its merits.

Part III - Submissions

This is an appropriate case to extend the time to file a Notice of Application.

The underlying test for an extension of time is to do justice between the parties.

33. Subsection 18.1(2) of the *Federal Courts Act* provides the Federal Court with the discretion to extend the 30 day time period to file a judicial review application:

18.1 (2) An application for judicial review in respect of a decision or an order of a federal board, commission or other tribunal shall be made within 30 days after the time the decision or order was first communicated by the federal board, commission or other tribunal to the office of the Deputy Attorney General of Canada or 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 end of those 30 days.

(2) Les demandes de contrôle judiciaire sont à présenter dans les trente jours qui suivent la première communication, par l'office fédéral, de sa décision ou de son ordonnance au bureau du sous-procureur général du Canada ou à la partie concernée, ou dans le délai supplémentaire qu'un juge de la Cour fédérale peut, avant ou après l'expiration de ces trente jours, fixer ou accorder.

34. In the often cited case of *Grewal v. Canada (Minister of Employment and Immigration)*, [1985] 2 F.C. 263 [Tab 1], the Federal Court of Appeal held the underlying consideration is to do justice between the parties:

The underlying consideration, however, which, as it seems to me, must be borne in mind in dealing with any application of this kind, is whether, in the circumstances presented, to do justice between the parties calls for the grant of the extension.

[Emphasis Added]

35. A request for an extension of time must be determined based on the facts of each case, with the Court considering (but not requiring) the four *Grewal* factors.
36. In *Strungmann v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 1229 [Tab 2], the Federal Court explained the *Grewal* decision and stated that an extension of time may be granted even if one of the criteria is not satisfied:

9 The test to be applied upon an application for an extension of time under paragraph 72(2)(c) of the IRPA is well set out in *Canada v Hennelly*, [1999] FCJ 846, (1999) 244 NR 399 (CA). The Court must

consider whether the applicant has shown: (1) a continuing intention to pursue the claim; (2) the claim has some merit; (3) no prejudice to the responding party arises from the delay; and, (4) a reasonable explanation for the delay exists. This has to be read also with the earlier decision of the Federal Court of Appeal in *Grewal v Canada (Minister of Employment and Immigration)*, [1985] 2 FC 263, 63 NR 106, which makes it clear that the underlying consideration when weighing these four factors is that justice be done between the parties, and that an extension of time may still be granted if one of the criteria is not satisfied (see *Canada (Minister of Human Resources Development) v Hogervorst*, 2007 FCA 41 at para 33, [2007] F.C.J. No. 37).

[Emphasis Added]

37. The four factors to be considered are addressed below. As discussed below, all four factors weigh towards granting an extension in the current case.

(1) A continuing intention to pursue the matter.

38. Mr. Brauer has demonstrated a clear continuing intention to pursue this matter.

39. He has doggedly pursued his claim through the TBS's *Directive on Claims and Ex Gratia Payments*, with the Ombudsman and through public advocacy with the media and his Member of Parliament.

40. Beginning in October 2012, Mr. Brauer has met with several law firms seeking to retain them. As discussed below, he was unable to retain counsel because of his financial circumstances.

(2) Mr. Brauer's claim has some merit.

41. Mr. Brauer's claim hinges on the TBS's interpretations of the terms "depressed market area" and "community" as those terms are defined in the Home Equity Assistance provisions of the Canadian Forces Integrated Relocation Program Directive.

42. In 2010, the TBS held that there were no depressed market areas in Canada.

43. The Home Equity Assistance provisions [Tab 3] provide the following:

Core benefit

- 80% of the loss, to a maximum of \$15,000; and
- 100% of the loss, in places designated as depressed market areas by Treasury Board Secretariat (TBS).

Depressed market, as established by Treasury Board Secretariat, is defined as a community where the housing market has dropped more than 20%.

44. Mr. Brauer presented evidence from his realtor that the housing market in his community of Bon Accord declined 23.11%. In his September 19, 2011 letter, the Chief of Defence Staff stated the following:

However, I find that you made a very good case for depressed market status and that it appears that your community of Bon Accord, which experienced a decline of 23.11%, presents precisely the type of depressed market situation contemplated in the HEA policy.

45. The Chief of Defence Staff continued by noting that the undefined term “community” has confused confusion and impacted a number of service members, including Mr. Brauer.
46. The three most important things in real estate are “location, location and location”. By failing to consider the particular circumstances in the community of Bon Accord that caused Mr. Brauer’s loss, the TBS has made an error that should be considered by this Honourable Court on judicial review.
47. The TBS decision does not provide any discussion or rationale for why Mr. Brauer’s community was not Bon Accord, but rather the Edmonton metropolitan area.
48. The TBS decision also does not cite or append any statistics to support its conclusion that Mr. Brauer’s community was not a depressed market area. There is simply a vague reference to “information collected from the media, the Provincial government, the Municipality and Statistics Canada”. It is not even clear what the “Municipality” is: is it Edmonton or Bon Accord?
49. Mr. Brauer’s judicial review application has at least some merit. The TBS’s decision has significant financial implications for Mr. Brauer and he should be entitled to challenge that decision on its merits.

(3) There is a reasonable explanation for the delay.

50. The delay in the current case was the result of Mr. Brauer taking alternative legal routes. In particular, Mr. Brauer pursued his claim through the TBS’s *Directive on Claims and Ex Gratia Payments*.
51. Mr. Brauer substantial loss resulting from his reposting and the TBS’s decision has been financially devastating to him and his family. As a result, he has had difficulty retaining counsel. Once he retained counsel, this motion to extend time was filed within a week.
52. In addition to his recent financial hardship, Mr. Brauer is suffering from mental health problems, which stem in part from the related stress.

53. It would be rather unjust if Mr. Brauer's impecuniosity and stress caused in part by the TBS's decision would render him unable to challenge that same decision.
54. It should also be noted that the TBS's decision does not provide Mr. Brauer with any information about his right to judicial review the decision and the timelines for doing so.
- (4) No prejudice to the responding party arises from the delay.**
55. There was no prejudice to the Respondent arising from the delay. There is no risk of spoilage of the record and there is no evidence that the Respondent acted in a certain manner due to the expiration of 30 day period.
56. The Respondent was well aware that Mr. Brauer disagreed with the decision.
57. Further, as the below timeline demonstrates, there have been a number of lengthy delays in the current case that were the result of the Respondent's actions. The Respondent's delay in making its decision demonstrates that the Respondent did view this matter as particularly time sensitive.
58. Mr. Brauer filed his grievance with the Canadian Forces on July 13, 2010.
59. On September 19, 2011 (14 months later), General Natynczyk partially allowed Mr. Brauer's grievance and directed that his file be transferred to the TBS.
60. On July 17, 2012 (24 months after the initial grievance), Mr. Brauer received a very brief letter from TBS denying his claim. The TBS politely acknowledged and apologized for the delay:


Finally, I would like to apologize for the time that it has taken for us to respond to this request. Steps have been taken to ensure that future requests will be treated on a timely basis.

Part IV – Order Sought

61. It is respectfully submitted that it would do justice between the parties to grant this extension and allow Mr. Brauer's judicial review application on its merits.
62. While the Applicant does not need to satisfy each of the above criteria in order for an extension of time to be granted, all four of the criteria indicate that this would be an appropriate order.

ALL OF WHICH is respectfully submitted,

DATED at Halifax, Nova Scotia, this 9th day of May 2013



Daniel Wallace
Counsel for Applicant