FEDERAL COURT

BETWEEN:

MARCUS BRAUER

APPLICANT

- and -

HER MAJESTY THE QUEEN

RESPONDENT

RESPONDENT'S WRITTEN REPRESENTATIONS

Overview

1. This is an application for an extension of time under Rule 8(1) of the *Federal Courts Rules*. The Applicant is seeking to challenge the decision of the Treasury Board Secretariat not to designate Bon Accord, Alberta as a "depressed market area" for 2010, the year in which he sold his home there at a loss. This decision was made in July 2012. The Applicant has waited for 10 months before challenging the decision in this court.

2. The Respondent opposes the motion for an extension. The length of the delay is very substantial and the decision of the Treasury Board Secretariat is clearly reasonable such that there is no arguable case to be raised on judicial review. This motion should be dismissed.

PART I - FACTS

3. The facts are set out in the affidavit filed by the Applicant and in its included exhibits. The Respondent highlights the most relevant facts below.

4. The Applicant is a long-serving member of the Canadian Forces (the "CF"), having joined in 1988 and serving continuously since that time. He is married and has a family of 5 children.

Affidavit of Marcus Brauer (the "Brauer Affidavit"), Applicant's Motion Record ("AMR"), Tab 2, paras 3, 5.

5. In 2007, the Applicant was stationed in Borden, Ontario, but was re-posted to Canadian Forces Base Edmonton, Alberta. As part of their move, he and his wife elected to purchase a home in Bon Accord, Alberta, a town 40 kilometres north of Edmonton.

Brauer Affidavit, AMR Tab 2, paras 6, 7, 9.

6. In June 2007, the Applicant paid $405,000 to purchase his home in Bon Accord.

Brauer Affidavit, AMR Tab 2, paragraph 9.

7. In 2010, the Applicant was re-posted to CFB Halifax, in Nova Scotia. This move necessitated the sale of the Bon Accord home. After consulting with his realtor, the Applicant listed his home for sale at $349,000, and then one week later reduced the asking price to $329,000.

Brauer Affidavit, AMR Tab 2, paras 10, 11.

8. The Applicant sold the Bon Accord home for $317,000, about two weeks after its first listing. The Applicant does not provide the date of the sale, but it must have been prior to May 10, 2010, when the Applicant first applied to the CF to be compensated for the difference between the purchase and sale prices of the home.

Brauer Affidavit, AMR Tab 2, paras 13, 16.

9. Because of the difference in what the Applicant had paid to buy the home in 2007 and what he accepted as a sale price in 2010, the Applicant and his family suffered an $88,000 loss on the real estate transaction.

Brauer Affidavit, AMR Tab 2, paragraph 14.

10. The Applicant applied to be reimbursed for the shortfall under the Home Equity Assistance portion of the Canadian Forces Integrated Relocation Program (the "CFIRP"). This is a policy which allows CF members to be reimbursed for some or all of the losses they suffer as a result of real estate transactions incurred as a result of CF deployments.

Brauer Affidavit, AMR Tab 2, paragraph 16.

11. In order to be compensated fully for the loss, the CFIRP requires that the Treasury Board Secretariat deem the community in which a member lived as a "depressed market area". Absent such a determination, the maximum a member can receive in Home Equity Assistance is $15,000.

Brauer Affidavit, AMR Tab 2, paragraph 17.
Home Equity Assistance policy, AMR Tab 3(3), page 87.

12. The CFIRP defines "depressed market area" as "a community where the housing market has dropped more than 20%". The term "community" is not defined. In 2010, Bon Accord, Alberta was not designated as a "depressed market area".

Brauer Affidavit, AMR Tab 2, paragraph 18.
Home Equity Assistance policy, AMR Tab 3(3), page 87.

13. The Applicant forwarded an opinion prepared by his realtor which showed through a simple calculation based on the average sale price of homes in Bon Accord in 2010, the average home price had dropped by 23.11% from the average in 2007. These numbers were based on the 6 homes that were sold in Bon Accord in 2010.

Brauer Affidavit, AMR Tab 2, paragraph 16.
Real Estate Information from Royal LePage, AMR Tab 2(A), page 12.

14. In July 2010, the Applicant received the maximum $15,000 payment, but was informed that full reimbursement was not possible because the Treasury Board Secretariat had not designated Bon Accord as a "depressed market area" and the CF did not have the authority to override the Secretariat.

Brauer Affidavit, AMR Tab 2, paragraph 18.

15. The Applicant immediately filed a grievance with the CF regarding that decision. In September 2011, his grievance was partially dismissed by the Chief of Defence Staff, who noted that he did not have the authority to override the Treasury Board Secretariat designation of Bon Accord as not constituting a "depressed market area". However, the grievance was partially upheld, as the Chief of Defence staff directed CF personnel to forward the Applicant's submissions on to the Treasury Board Secretariat for further determination of whether Bon Accord's designation for 2010 could be changed.

Brauer Affidavit, AMR Tab 2, paras 19 - 20.
Grievance Decision, AMR Tab 2(B).

16. On July 17, 2012, the Treasury Board Secretariat wrote to the CF representatives and concluded that Bon Accord, as part of the metropolitan Edmonton area, was not a "depressed market area" in 2010. This is the determination the Applicant now wishes to challenge (the "Decision").

Brauer Affidavit, AMR Tab 2, paragraph 22.
Treasury Board Decision, AMR Tab 2(D), pp. 37, 38.

17. The Applicant did not immediately seek judicial review. Instead, he applied for payment under a different Treasury Board policy and subsequently appealed that decision when it was denied.

Brauer Affidavit, AMR Tab 2, paragraph 23.

18. The Applicant retained his present counsel on May 2, 2013, and filed this motion in order to be permitted challenge the Decision on May 8, 2012. This is almost 10 months from the July 2012 date of the Decision.

Brauer Affidavit, AMR Tab 2, paragraph 30.

PART II - ISSUES

19. Should the Applicant be granted an extension of time to file his Notice of Application?

PART III – LAW AND ARGUMENT

20. Pursuant to section 18.1(2) of the *Federal Courts Act,* a person who wishes to file a judicial review of the decision of a Federal board, commission or tribunal has 30 days from the day on which the decision is transmitted to do so.

***Federal Courts Act,* RSC 1985 c. F-7, ss. 18.1(2)**

21. However, this Honourable Court has the authority to grant an extension of time pursuant to Rule 8 of the *Federal Courts Rules*. Rule 18.1(2) also provides the Court with the ability to extend the 30 day time period in which to file a Notice of Application for judicial review.

***Federal Courts Rules*, SOR/98-106, Rule 8**
***Federal Courts Act,* RSC 1985 c. F-7, ss. 18.1(2)**

22. The jurisprudence of this Court has held that a request for an extension of time may be granted if the Applicant can demonstrate:

i) A continuing intention to pursue the appeal;
ii) The appeal has some merit;
iii) No prejudice to the Respondent arises from the delay; and
iv) There is a reasonable explanation for the delay.

Not accurate

***Canada (Attorney General) v Hennelly*, [1999] F.C.J. No. 846 (FCA)**

23. The Applicant argues and the Respondent agrees that the underlying consideration in a motion for an extension of time is that justice must be done between the parties. This entails a balancing of the four factors and the factors are not conjunctive. An extension request may still be granted if one of the factors is not fully satisfied.

> ***Grewal v Canada (MCI)*, [1985] 2 FC 263 (FCA)**
> **Applicant's Written Submissions, AMR Tab 3, paragraph 36.**

24. In the present case, however, several of the factors mitigate against granting the extension of time. The delay in applying for judicial review in this case is very lengthy – almost ten times as long as is contemplated by the *Federal Courts Act*. There is no reasonable explanation for the delay, especially when it is apparent that the Applicant knew or ought to have been aware of the timelines imposed on him for judicial review. Further, the decision of the Treasury Board Secretariat is owed some deference by this Court and is clearly open and reasonable to it on the reasonableness standard. There is no merit to the underlying review the Applicant wishes to bring.

i) Continuing Intention to Pursue the Matter

25. The Respondent takes no issue with the Applicant's apparent intentions to pursue the matter. It is clear from his evidence that he has maintained a desire to deal with the issue of his equity loss since the event occurred.

ii) There is no merit to the claim

26. The decision of the Treasury Board Secretariat on whether or not to consider the Applicant's community as a "depressed market area" is owed a great deal of deference by this Court. The decision is highly factual, and involves the weighing of evidence of market activity, economic growth, demographic statistics, and employment statistics. The Supreme Court of Canada has held that "where the

question is one of fact, discretion or policy, deference will usually apply automatically".

Dunsmuir v New Brunswick, 2008 SCC 9 at para 53.

27. The CFIRP designates the Treasury Board Secretariat to decide the question of "depressed market area", and not the Canadian Forces itself. The Treasury Board Secretariat has expertise and experience in making determinations under the Directive regarding financial conditions in Canada. This expertise should attract deference.

***Dunsmuir, supra* at para 54.**

28. In order to fall within the realm of reasonableness, the decision of the Treasury Board Secretariat must be subject to an open and intelligible process, and must also fall within the "range of possible, acceptable outcomes which are defensible in respect of the facts and law". If it does so, this Court has no reason to intervene.

***Dunsmuir, supra* at para 47.**

29. Further, the reasons given by administrative agencies are not to be read hypercritically by the Court, and an agency is not required to refer to every piece of evidence they received and explain how it was dealt with. Statements that make it obvious that a decision-maker has adequately considered the evidence required to render their decision are sufficient.

***Cepeda-Gutierrez v Canada (MCI)*, [1998] 157 FTR 35 at para 16.**
***Hassan v Canada (MCI)*, (1992) 147 NR 317 (FCA).**

30. The Decision of the Treasury Board Secretariat clearly falls within the boundaries of reasonableness contemplated by the Supreme Court of Canada in *Dunsmuir*. The decision-maker clearly understood the argument advanced by the Applicant and reviewed the evidence provided by him.

31. It was not unreasonable for the Treasury Board Secretariat to assess the Applicant's community as the Edmonton Metropolitan Area. The term

"community" is not defined in the CFIRP and it is reasonable for the decision-maker not to have to rely on a small municipal breakdown in making determinations of economic depression. Small communities such as Bon Accord are not free standing, and it is not unreasonable to consider a town only 40 kilometres from a major urban centre as part of its suburban area. The Applicant himself recounts that the town is popular with CF members because of its proximity to the Canadian Forces Base in Edmonton.

Brauer Affidavit, AMR Tab 2, paragraph 9.

32. Additionally, it is apparent from the real estate opinion provided by the Applicant's realtor that it is nonsensical to consider only the data from distinct municipalities as evidence of market depression. According to the opinion, there were only six homes sold in the Bon Accord municipality in 2010. With a sample size that small, any variation in housing price for any reason at all could create a massive fluctuation in the differential average price of a home. It is eminently reasonable for the Treasury Board to consider the broader economic conditions and market data in a larger area in making determinations of depression.

Real Estate Information from Royal LePage, AMR Tab 2(A), page 12.

33. Further, the Applicant himself knew that Treasury Board Secretariat evaluated depressed market status based on larger areas and not on single small municipalities, and he knew that Bon Accord was considered by TBS as part of the Edmonton area, because this had been recounted to him by the Chief of Defence Staff in his grievance.

Grievance Decision, AMR Tab 2(B), pp. 28 - 29.

34. The Decision sets out the range of evidence and sources that it considered in making the holistic determination that Bon Accord was not a "depressed market area". It considered the real estate evidence presented by the Applicant, as well as a range of other sources of information about the housing and general economic market in the Greater Edmonton area including housing starts, unemployment

statistics and average home costs. The decision is clearly within the range of possible outcomes that are available on the facts and the law, and therefore there is no basis for this Court to intervene. The judicial review has no merit.

Treasury Board Decision, AMR Tab 2(D), pp. 37, 38.

iii) Prejudice to the Respondent

35. The Applicant argues that there is no prejudice to the Respondent if he is granted an extension of time and permitted to bring his challenge to the Treasury Board Secretariat's decision. However, there is potential prejudice to the Respondent if this claim is permitted to be advanced.

36. The prejudice arises because, if the Treasury Board's determination that Bon Accord was not a "depressed market area" in 2010 is re-opened now, in the summer of 2013, and what will be a year after that determination was made, there will be an unknown number of other people whose rights could conceivably be affected.

37. In the September 2011 grievance filed by the Applicant, the Chief of Defence Staff notes that the Applicant is just one of a number of CF families affected by equity losses from the economic downturn in the Edmonton area. If the Treasury Board's determination is overturned on judicial review and if Bon Accord is reassessed as a "depressed market area" for 2010, it is possible that other people will then make identical claims as the Applicant for full reimbursement.

Grievance Decision, AMR Tab 2(B), pp. 30.

38. However, because of significant lapse of time since the July 17, 2012 decision, the Treasury Board ought now to be in a position where it can safely presume that its determination is final and the Canadian Forces can budget accordingly with respect to its relocating members.

39. Had the judicial review been brought in a timely fashion, steps could have been taken to account for the possibility that both the Applicant's claim and other potential claims arising from a change in Bon Accord's designation could have been planned and budgeted for.

iv) There is no reasonable explanation for such a lengthy delay

40. This Court must consider the length of the delay when weighing the *Hennelly* factors. It is easier to overcome and explain a short delay than a lengthy one. In this case, the length of the delay is very significant. The *Federal Court Rules* provide an applicant ordinarily 30 days to bring a judicial review application. Here, the Applicant has delayed almost ten months, or ten times the permitted period.

41. This Court has held that at some stage, administrative decisions must become final. The longer the delay, the greater the weight of the presumption that the Respondent ought to be able to presume its decision is final and to rely on it. Certainly after ten months, the Respondent should be able to consider the matter concluded.

42. Further, this factor weighs even heavier in this case because the Applicant knew or ought to have known the timelines involved in the judicial review process. This is because when his grievance was dealt with by the Chief of Defence Staff the decision on his grievance set out the timelines for seeking judicial review in the Federal Court. The Applicant knew that in order to bring a challenge to a federal board, commission or tribunal he had 30 days to do so. His knowledge of this fact is important in weighing the relative injustice to the parties as this is not a case where the delay can be attributed to inexperience or ignorance.

Grievance Decision, AMR Tab 2(B), pp. 31.

43. The Applicant claims that his delay was the result of talking alternative legal measures, and in particular filing a claim for an *ex gratia* payment through a different Treasury Board policy.

Applicant's Written Submissions, AMR Tab 3, paragraph 50.
Brauer Affidavit, AMR Tab 2, paragraph 23.

44. There is no reason that the Applicant could not have advanced his judicial review in a timely fashion while still making his other claims. His claim under the Treasury Board *Directive on Claims and Ex Gratia Payments* is entirely separate and different from the judicial review claim. The judicial review focuses on the narrow issue of whether it is reasonable for the Treasury Board Secretariat to refuse to declare Bon Accord as a "depressed market area". This issue is not relevant to the *ex gratia* payment claim which is entirely discretionary. The claim related to the CFIRP and the *ex gratia* claim are legally distinct and there is no reason why the Applicant could not have pursued both at the same time.

45. While the Respondent recognizes that the Applicant suffered emotional stress from the financial loss associated with his re-posting, it is apparent from the evidence that he possessed the emotional wherewithal to continue to pursue his case in a timely fashion. He applied for compensation under the *ex gratia* payment scheme on September 6, 2012, less that two months after the July 17, 2012 decision. He continued advancing that claim through appeals in October 2012. If he was able to access and pursue this remedy, it is evident that he could have equally pursued his judicial review claim at that time.

Brauer Affidavit, AMR Tab 2, paragraph 23.

CONCLUSION

46. The Applicant suffered a significant equity loss when he sold his Alberta home after being re-posted to Nova Scotia. He disagrees with the determination made by Treasury Board Secretariat which makes full recovery of his loss not possible. However, he has waited over 10 months to bring that challenge, when he should

and could have brought it in a timely fashion. This is not short delay caused by inadvertence or ignorance, but a very significant one. Further, the decision of the Treasury Board Secretariat was reasonable and there is no merit to the Applicant's claims. This extension of time should not be granted and this motion should be dismissed.

PART IV- ORDER SOUGHT

47. The Respondent requests an Order dismissing this motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Halifax, Nova Scotia, this 21st day of May, 2013.

William F. Pentney
Deputy Attorney General of Canada

Per: _____

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