

FINANCIAL SERVICES TRIBUNAL

IN THE MATTER OF THE
FINANCIAL INSTITUTIONS ACT
R.S.B.C. 1996, c.141

BETWEEN:

NORTH YORK COMMUNITY CREDIT UNION
("NYCCU")

APPELLANT

AND:

THE SUPERINTENDENT OF FINANCIAL INSTITUTIONS

RESPONDENT

DECISION ON APPLICATION TO EXTEND TIME FOR FILING APPEAL

BEFORE:

J. STEWART CUNNINGHAM

CHAIR

SUBMISSIONS:

MICHAEL GIANACOPOULOS FOR NORTH YORK
COMMUNITY CREDIT UNION LTD.

RICHARD FERNYHOUGH FOR THE STAFF OF THE
SUPERINTENDENT OF
FINANCIAL INSTITUTIONS

DATE: FEBRUARY 22, 2008

SUMMARY

This decision concerns an Application for an Extension of Time to File an Appeal and an accompanying Notice of Appeal filed by **NORTH YORK COMMUNITY CREDIT UNION LTD. (“NYCCU”)** with the **FINANCIAL SERVICES TRIBUNAL (“FST”)** on January 14, 2008. NYCCU seeks an extension of time to file an appeal of an Order made by the **SUPERINTENDENT OF FINANCIAL INSTITUTIONS** on September 14, 2006. The Order indicated that NYCCU could appeal to the FST under section 242 (1) (a) of the *Financial Institutions Act*. Section 242.1 (7) of that *Act* provides that, *inter alia*, section 24 of the *Administrative Tribunals Act* applies to appeals conducted by the FST.

Section 24 of the *Administrative Tribunals Act* provides as follows:

24(1) A notice of appeal respecting a decision must be filed within 30 days of the decision being appealed, unless the tribunal’s enabling Act provides otherwise;

(2) Despite subsection (1), a tribunal may extend the time to file the notice of appeal, even if the time to file has expired, if satisfied that special circumstances exist.

NYCCU has applied for an extension of time to file its Notice of Appeal. The question that I must determine is whether “special circumstances” exist for the purposes of section 24 (2) of the *Administrative Tribunals Act* for extending the time for filing this appeal.

I have decided based on the unusual facts of this case, that special circumstances do exist to justify an extension of the time to file the notice of appeal.

BACKGROUND

On September 14, 2006, W. Alan Clark, the Superintendent of Financial Institutions, made the following Order:

THIS TRIBUNAL FINDS that:

1.) North York Community Credit Union Ltd. contravened an Order of the Superintendent of Financial Institutions to cease conducting unauthorized deposit business in British Columbia issued on October 27, 2005 pursuant to section 244 (2) (f) of the Act.

THEREFORE, THIS TRIBUNAL ORDERS that:

1.) North York Community Credit Union Ltd. pay an administrative penalty in the amount of \$50,000 pursuant to section 253.1 of the Act within (30) days of receiving notice of this Order;

2.) North York Community Credit Union Ltd. pay the costs of the investigation and hearing in this matter in the amount of \$14,735.36 pursuant to section 241.1 of the Act within (30) days of receiving notice of this Order.

Notwithstanding the existence of a statutory appeal to the FST, NYCCU appealed the Superintendent's Order to the British Columbia Supreme Court and concurrently filed a petition under the *Judicial Review Procedure Act* seeking redress on the basis that the Superintendent had failed to afford procedural fairness.

The Financial Institutions Commission ("FICOM") of British Columbia applied for an Order dismissing the appeal and petition on the basis that: NYCCU had not exhausted its statutory remedy (an appeal to the FST); and, there is no statutory right of appeal to the Court from a decision of the Superintendent. NYCCU opposed the application to dismiss on the basis of *Malik v. British Columbia (Financial Institutions Commission)*, [2006] B.C.J. No. 9999. In the *Malik* case, counsel for the appellant and FICOM agreed that there were two distinct avenues of appeal from a Removal Order under section 99 (2) issued by the Superintendent under authority delegated by the Commission. Referring to the common ground between the parties, the Court accepted that Mr. Malik was entitled to appeal to the FST under section 238 (2), or, alternatively, allowed to bring an appeal directly to the Court under section 242.4 of the *Financial Institutions Act* because the Commission had made an Order. The Court also concluded that nothing prevented Mr. Malik from initiating a judicial review in respect of the Superintendent's decision.

In *North York*, the Court noted that Wedge J. had accepted the representations of counsel regarding jurisdiction in *Malik*. The Court in *North York* declined to follow that approach. As a consequence, the Court held that NYCCU's judicial review was premature because it had not exhausted the appeal remedy available to it and allowed the Superintendent's application. However, the Court made the following observation:

Although lacking jurisdiction to compel the result, the circumstances, including the position taken by the Commission in *Malik*, are such that the FST should seriously consider allowing any application by the Credit Union to extend the time within which it may appeal from the Superintendent's decision.

Counsel for NYCCU made the following submission in support of the Application for An Extension of Time to File the Notice of Appeal:

The prior proceedings clearly demonstrate the continuous intention of the Credit Union to appeal the subject decision both on its merits and on procedural grounds. The sole reason for not bringing this appeal to the Financial Services Tribunal within the specified time limits is that appeal and judicial review proceedings were brought in the Supreme Court. These steps were taken pursuant to and in accordance with the Court's decision in *Malik v. British Columbia Financial Institutions Commission* [2006] B.C.J. No.9999. In *NYCCU v. FICOM*, the Supreme Court of British Columbia effectively overturns *Malik* and declares that decision to have been based on error of counsel for the Commission (see paras 27 and 28)...

It is respectfully submitted that if this extension is not granted, the Credit Union will have no other alternative and will lose the procedural and substantive rights granted to it under the Act. This [would] be particularly unfair given that it was Malik which expressly countenanced the court proceedings brought by the Credit Union. This decision has now been determined to be due to counsel [i.e., the Commission counsel] who "erred in stating that the decision of the Superintendent was the decision of the Commission". It would be particularly prejudiced given that the Credit Union has not yet been afforded its right to a hearing and having been deprived firstly before the Superintendent and secondly before the Court upon FICOM's dismissal motion. Moreover, the Commission did not indicate it would seek summary dismissal of the proceedings until September 2007, almost a year after the proceedings were brought.

We have been advised that the Staff of the Superintendent of Financial Institutions takes no position with respect to this application to seek an extension of time. There could not, in any event, be any prejudice to the Superintendent and/or FICOM if the extension were granted because directly or indirectly, the Commission and the Superintendent have continuously been kept apprised of these proceedings and of the grounds of the appeal.

Counsel for the Staff of the Superintendent of Financial Institutions provided the following response to the application:

"In its application to extend the time in which to file its notice of appeal, NYCCU states that "it is respectfully submitted that if this extension is not granted, the Credit Union will have no other alternative and will lose the procedural and substantive rights granted to it under the Act."

Although it would appear from this statement that NYCCU is now acceding to the exclusive jurisdiction of the FST to hear an appeal of the Superintendent's decision, NYCCU is concurrently appealing the decision of the court to dismiss both its application for judicial review and its appeal of the Superintendent's decision...FICOM has filed appearances in both actions.

Given that there is currently an appeal of the court's decision which may affect the jurisdiction of the FST to hear the appeal of NYCCU, and given that NYCCU obviously does not accept that the FST has exclusive jurisdiction in this matter, it is submitted that all proceedings before the FST should be stayed until NYCCU's appeal to the British Columbia Court of Appeal is finally dealt with. It is submitted that the stay should properly encompass NYCCU's application for an extension to file the notice of appeal.

Parallel proceedings in two different venues should be avoided because of the potential for conflicting decisions. A favourable decision to NYCCU in the appeal court would render any decision of the FST moot. In addition, valuable tribunal resources and time will have been wasted for no reason.

It is submitted that there would be no prejudice to NYCCU if the FST stayed the application to extend the time in which to file. Should the appeal court dismiss NYCCU's appeals, the FST can make a decision on NYCCU's application to extend based on the date that application was received by the FST, that being January 14, 2008. The staff of the Superintendent will respond to the application at that time. If the appeal court grants NYCCU's appeals, then presumably the appeal to the FST, and the application to extend the time in which to file the notice of appeal, will be abandoned.

Reasons

I am mindful of the considerable time that has elapsed since the issuance of the Superintendent's Order which is the subject of this application. NYCCU did not file its Application for an Extension of Time to File an Appeal until January 14, 2008 – more than two years after the issuance of the Superintendent's Order. In the ordinary course, the passage of more than two years would militate against the acceptance of an application to extend the time limit.

However, despite my concern regarding the length of time that has elapsed, I am satisfied that special circumstances exist to grant the extension of time under section 24 (2) of the *Administrative Tribunals Act* for the following reasons:

1. It is clear that NYCCU actively pursued a challenge of the Superintendent's Order during the last two years by filing a judicial review application and a statutory appeal with the Supreme Court. Although Pitfield J. held that the judicial review and appeal were premature because NYCCU was required to exhaust its statutory appeal to the FST, there was never any question that NYCCU's actions demonstrated a continuous intention to challenge the Order.
2. I accept that NYCCU in proceeding in the manner that it did was relying on the position taken by FICOM in *Malik supra* and the acceptance of that position by the Court. While Pitfield J. indicated in *North York Community Credit Union* that he lacked the jurisdiction to compel the FST to extend the appeal period, His Lordship suggested that the FST should seriously consider allowing the appeal to proceed in view of all the circumstances, including the position taken by FICOM in the *Malik* case.
3. The Superintendent has not opposed the application for an extension of the time to file and there is no evidence that he will be prejudiced as a result of the delay.
4. Finally, I am satisfied that the Notice of Appeal raises serious questions to be determined, and there is no evidence that the passage of time has diminished the importance of the appeal for NYCCU.

As there is currently an appeal of Pitfield J's Order in the Court of Appeal, counsel for the staff of the Superintendent of Financial Institutions has taken the position that the proceedings before the FST should be stayed pending the disposition of NYCCU's appeal to the Court of Appeal. Counsel maintained that parallel proceedings in two different venues should be avoided because of the potential for conflicting decisions. However, counsel for NYCCU subsequently indicated that if the application to extend time to file an appeal is granted, his client intends to withdraw the notices of appeal and abandon the appeals to the Court of Appeal.

In light of NYCCU's position, it does not appear to be necessary to deal with the request for a stay at this time, as the appeals to the Court of Appeal will be withdrawn. If that position changes and it becomes necessary to deal with the application for a stay, counsel should advise the Tribunal.

As Justice Pitfield indicated, the FST clearly has jurisdiction to hear this appeal, and I believe it should do so as expeditiously as possible. Consequently, I am granting the Application for an Extension of Time to File an Appeal and accepting the Notice of Appeal for filing.

DATED IN SURREY, BRITISH COLUMBIA, THE 22nd DAY OF FEBRUARY, 2008.

FOR THE FINANCIAL SERVICES TRIBUNAL

A handwritten signature in blue ink, consisting of the initials 'J.S.U.' followed by a stylized, cursive name that appears to be 'Cunningham'.

J.STEWART CUNNINGHAM
CHAIR