Walker et al. v. Corporation of the City of Toronto[Indexed as: Walker v. Toronto (City)], 14 O.R. (3d) 91

Ontario Reports

Ontario Court (General Division),

Steele J.

June 4, 1993

Action No. RE 2743/93

14 O.R. (3d) 91 | *[1993] O.J. No. 1237*

Case Summary

Municipal law — Office-holders — Toronto Harbour Commissioners holding office at pleasure — Cause for their removal need not be shown — No notice or hearing required for their dismissal.

The applicants W and A were members of the Municipal Council of the City of Toronto (the "city") and were appointed by the council to be Toronto Harbour Commissioners. A difference of opinion arose between the applicants and the city, and the city wished to remove the applicants as Toronto Harbour Commissioners. The applicants applied for an injunction restraining the city from enacting any form of by-law removing the individual applicants as Toronto Harbour Commissioners.

Held, the application should be dismissed.

The office of Toronto Harbour Commissioner is held at pleasure, and the commissioners may be removed at will without cause being shown. Neither notice nor a hearing was required for the dismissal of the commissioners. If notice was required, the duty of fairness was minimal since the office was held at pleasure. No special meeting of city council had to be called to consider the removal of the individual applicants. The matter of removal could be heard by the city council at its next regular or other meeting of council. The individual applicants were members of the city council and had the right as such to speak at meetings. It could not be said at this time that they would not be given a meaningful opportunity to present their case.

Knight v. Indian Head School Division No. 19, *[1990] 1 S.C.R. 653*, *69 D.L.R. (4th) 489*, *30 C.C.E.L. 237*, *[1990] 3 W.W.R. 289*, *43 Admin. L.R. 157*, *83 Sask. R. 81*, *90 C.L.L.C. 14,010*, *106 N.R. 17*; Willson v. York (Municipality) *(1881), 46 U.C.Q.B. 289*, apld

Cheyney v. Inuvik (Town), *[1992] N.W.T.R. 383*, *11 M.P.L.R. (2d) 267* (S.C.); McColl v. Gravenhurst (Town) *(1991), 7 M.P.L.R. (2d) 151* (Ont. Div. Ct.); Wilson v. Nova Scotia (Civil Service Commission), *[1981] 1 S.C.R. 211*, *119 D.L.R. (3d) 1*, *43 N.S.R. (2d) 631*, 81 A.P.R. 631, *81 C.L.L.C. 14,109*, *35 N.R. 103*, distd

Other cases referred to

Nicholson v. Haldimand-Norfolk (Regional Municipality) Commissioners of Police, *[1979] 1 S.C.R. 311*, *88 D.L.R. (3d) 671*, *78 C.L.L.C. 14,181*, *23 N.R. 410*; R. v. American News Co., *[1957] O.R. 145*, *25 C.R. 374*, *118 C.C.C. 152* (C.A.); Ridge v. Baldwin, [1964] A.C. 40, [1963] 2 All E.R. 66 (H.L.)

Statutes referred to

Harbour Commissions Act, S.C. 1964-65, c. 32
Harbour Commissions Act, R.S.C. 1985, c. H-1, s. 8
Interpretation Act, *R.S.C. 1985, c. I-21, s. 23*(1)
Municipal Act, R.S.O. 1877, c. 48
Toronto Harbour Commissioners Act, 1911, S.C. 1911, c. 26, s. 7 [rep. and sub. 1986, c. 10, s. 10(1)]

Rules and regulations referred to

Rules of Civil Procedure, *R.R.O. 1990, Reg. 194*, rules 14.05(3) (d), (g), 38.11(1)

APPLICATION for an injunction restraining the City of Toronto from removing the applicants as harbour commissioners.

T.J. Dunne, Q.C., and R. Gotlib, for applicants.

Ian Binnie, Q.C., for respondent.

STEELE J.

This proceeding was brought by an application under rule 14.05(3)(d) and (g) of the Rules of Civil Procedure to determine the rights of the parties on the interpretation of the Toronto Harbour Commissioners Act, 1911, S.C. 1911, c. 26 (the "1911 Act"). Under rule 38.11(1) the judge may grant the relief sought or order the application or issues therein to proceed to trial. In my opinion the rules do not contemplate any interlocutory orders unless the matter is adjourned or a trial of an issue is directed.

The issues before me have been clearly argued and it is important to have an early resolution of the matter. While there may be some evidence that is not before me I believe that all of the relevant evidence necessary to come to a conclusion has been presented. I therefore see no need to direct a trial and will proceed to dispose of the application on a final basis.

The application is for relief under three principal heads:

(a) An injunction restraining the Respondent City of Toronto from enacting any form of bylaw removing the individual Applicants as Toronto Harbour Commissioners or accepting certain letters of resignation signed by these individuals on December 3, 1991;

(b) An injunction restraining the City from appointing certain individuals as Toronto Harbour Commissioners on various grounds associated with the position of these individuals as City public servants;

(c) A declaration that "the course of action" set out by Mayor Rowlands in reports dated May 6, 1993, May 25, 1993 and an Order Paper dated May 25, 1993 "is illegal and without jurisdiction".

Michael Walker ("Walker"), John Adams ("Adams") and Steve Ellis ("Ellis") are all members of the municipal council of the City of Toronto (the "city") and were appointed by the council on December 31, 1991 to be Toronto harbour

commissioners. The three city-appointed commissioners constitute a majority of the five commissioners on the Toronto Harbour Commission (the "T.H.C."). The other two commissioners are appointed by the Governor in Council.

There has been a federal government-initiated study of the entire Toronto watershed including the lands under the jurisdiction of the T.H.C. This study was conducted by the Honourable David Crombie. Subsequently the federal government retained Robert Macaulay, Q.C., to provide a framework analysis of the matters that would have to be addressed in the federal government-directed negotiations towards a memorandum of understanding ("M.O.U.") between the city the T.H.C. and the Federal Department of Transport. Mr. Macaulay reported in December 1992. The M.O.U. is to be negotiated by Mr. Crombie.

The T.H.C. was unhappy with the Macaulay report. The mayor of the city was also concerned and asked Mr. Crombie to have someone conduct an independent financial analysis of the T.H.C. which has been done. Both the Macaulay report and the financial analysis raise serious concerns about the financial viability of the T.H.C. The Minister of Transport has indicated his wish that a M.O.U. be reached as soon as possible and more recently that one be reached between the city and the federal government only while encouraging the T.H.C. to provide input to Mr. Crombie, but not be a party to the M.O.U.

In addition, in early 1992, TEDCO, a wholly-owned subsidiary corporation of the city, entered into an agreement with the T.H.C. for TEDCO to buy land from T.H.C. in exchange for an annual revenue subsidy from it. The amount has been arbitrated and found to be $6 million per annum. It appears that the city is unhappy with this amount. The purchase transaction is either to close by or be terminated on June 11, 1993. The city appears to wish to extend the time of closing and it may be that the T.H.C. would be insistent on terminating the agreement if it is not closed by the closing date.

I have set out these issues but feel that it is not for me to determine the merits thereof. I only say that there has been a disagreement and differing points of view relating to the M.O.U. and the TEDCO agreement. The problem is that the applicants believe that they are acting in the best interests of the T.H.C. It would appear that Mayor Rowlands believes that the city-appointed commissioners should act in a way representing the interests of the city. If she believes that the three city-appointed commissioners are agents of the city she is in error. The T.H.C. commissioners' responsibility is not only to the city but to the federal government and the public generally. The members thereof must act in the best interests of the T.H.C. regardless of who appointed them even if that interest is contrary to the wishes of those who appointed them. This principle applies whether the city appointees are members of the city council, members of the city staff or outsiders.

I have already set out the issues before the court and will deal only with those legal issues.

Is the office held at pleasure?

The principal issue is whether or not the commissioners held office "at pleasure" and can be dismissed at will or whether they can only be dismissed for cause. The 1911 Act provided as follows:

> 7(1) The Corporation shall consist of five commissioners, three of whom shall be appointed by the council of the city of Toronto, one by the Governor in Council, and one by the Governor in Council upon the recommendation of the Board of Trade of the city of Toronto.
>
> (2) The commissioners to be appointed by the city of Toronto shall be nominated to the council by the board of control; and no commissioner shall be appointed or selected by the council in the absence of such nomination without an affirmative vote of at least two-thirds of the members of the council present and voting, but the council may by a majority vote refer such nomination back to the board of control for re-consideration.
> (3) Each commissioner so appointed shall hold office for a term of three years subject to removal, and until his successor is appointed, and shall be eligible for re-appointment.

In 1986 s. 7 was repealed and re-enacted in exactly the same words as the 1911 Act except that s. 2 was deleted to recognize that the city no longer had a board of control.

In 1964 a general statute entitled Harbour Commissions Act, S.C. 1964-65, c. 32 [now R.S.C. 1985, c. H-1] was enacted (the "1964 Act") applicable to the creation of other harbour commissions in Canada. Section 8 of that Act reads as follows:

> 8. Each member of a Commission shall hold office during pleasure for a term not exceeding three years and at the expiration of that member's term of office may be re-appointed.

In addition, s. 23(1) of the Interpretation Act, R.S.C. 1985, c. I-21, provides as follows:

> 23(1) Every public officer appointed by or under the authority of an enactment or otherwise is deemed to have been appointed to hold office during pleasure only, unless it is otherwise expressed in the enactment, commission or instrument of appointment.

Counsel for the applicants submitted that the wording of the 1964 Act differs from the wording in the 1911 Act as amended and that Parliament must have meant that the 1911 wording as re-enacted in 1986 meant something different than the words in the 1964 Act. There is a general principle of law that if Parliament amends the wording of an Act it must be presumed that it intended a change in the meaning: see R. v. American News Co., [1957] O.R. 145 at p. 173, 118 C.C.C. 152 (C.A.). However, in the present case there is no amendment to the relevant clause of the 1911 Act and it cannot be presumed that the legislature intended a change in meaning.

In Willson v. York (Municipality), 46 U.C.Q.B. 289 at p. 299 (an 1881 decision of a panel of three members of the Queen's Bench) the court considered a provision of the then Ontario Municipal Act, R.S.O. 1877, c. 48, that provided "all officers appointed by the council shall hold office until removed by the council". It held that this meant the office was held during pleasure and that the holder thereof could be removed without notice or cause. By 1914 the Municipal Act had been amended to make it clear that such office was held during pleasure. I am of the opinion that the words of s. 7(2) of the 1986 Act which are the same as s-s. (3) of the 1911 Act mean that the office is held during pleasure. In my opinion the words are not words that are "otherwise expressed in the enactment" to take it out of the general provisions of s. 23(1) of the Interpretation Act.

In addition to the above points the applicants signed resignations as commissioners immediately before being appointed. These resignations have been withdrawn in the last month and cannot be accepted now. However, it indicates that upon their appointment they acknowledged that they did not have secure tenure. Also the city has had a standing resolution for some time to the effect that councillors may only remain as commissioners as long as they remain a member of council. This also indicates that cause need not be shown for removal.

For the above reasons I am of the opinion that the commissioners may be removed by the city council without cause being shown.

Requirement of notice of hearing

Since the decision Willson, supra, the law has changed with respect to notice and hearing regarding employees. Starting with Nicholson v. Haldimand-Norfolk (Regional Municipality) Commissioners of Police, [1979] 1 S.C.R. 311, 88 D.L.R. (3d) 671, even where an office-holder may be removed without cause procedural fairness requires an opportunity for him to be heard before being dismissed. In Knight v. Indian Head School Division No. 19, [1990] 1 S.C.R. 653, 69 D.L.R. (4th) 489, dealing with the dismissal of a senior employee at p. 683 S.C.R., p. 511 D.L.R., the Supreme Court of Canada held that where a person may be dismissed at pleasure the duty of fairness would be minimal, and at p. 684 S.C.R., p. 512 D.L.R. thereof the court held that if the employee had knowledge of the reasons for his dismissal and had an opportunity to be heard then procedural fairness would be satisfied even if there was no structured hearing in the judicial meaning of the word.

Counsel for the applicants referred me to several cases that he submitted showed that dismissal at pleasure was an anachronism and required a formal notice and a formal hearing. These cases were McColl v. Gravenhurst (Town) (1991), 7 M.P.L.R. (2d) 151 (Ont. Div. Ct.); Wilson v. Nova Scotia (Civil Service Commission), [1981] 1 S.C.R. 207, 119 D.L.R. (3d) 1; and Cheyney v. Inuvik (Town), [1992] N.W.T.R. 383, 11 M.P.L.R. (2d) 267 (S.C.). In my opinion all of these cases turned upon employment contracts that impinged upon the basic common law as set

out in Willson, supra, and are not applicable to the present case where the commissioners are not employees but pure office-holders.

The appointments by the Governor in Council and by the city to the T.H.C. stand on an equal basis and the procedure for removal should be the same. In my opinion the law as stated in Willson is still the law. The principal relating to pure office-holders as opposed to employees was restated in Ridge v. Baldwin, [1964] A.C. 40, [1963] 2 All E.R. 66 (H.L.), and referred to in Nicholson, supra. I am therefore of the opinion that neither notice nor hearing is required for the dismissal of the commissioners.

However, if I am in error in that conclusion and notice is required I agree with the statement referred to in Knight, supra, with respect to minimal duty. In applying that statement to the present case I must look at whether or not the applicants have knowledge of the reason for their removal and whether they will have an opportunity to be heard. Even in Nicholson there was no requirement of a hearing but only that they be given an opportunity to present in writing or otherwise their position. There need be no structured hearing in the judicial meaning of the word.

The applicants are members of both the city council and commissioners of T.H.C. There has been an ongoing dialogue and difference of opinion. They have seen all relevant documents of the city. They know that at least the mayor has lost confidence in them and know that it will be a matter of a vote of council as to whether the council has lost confidence in them. I do not believe that the council itself must hold a meeting to decide whether or not they will have a later meeting to decide whether to remove the applicants. To require this would mean two meetings at which the applicants would be present and entitled to vote. The one meeting to decide if they want to decide at a later meeting to decide to remove them. There is no necessity for council to spell out at one meeting the enumerated grounds upon which later considerations will be given for removal. I believe that the applicants have had knowledge for some time of the general reasons why there is dissatisfaction because they have had the public city records and correspondence from the mayor. This is sufficient notice of the allegations. They are different from employees or non-members of council who would not be privy to this information.

I am also satisfied that a special meeting need not be called to consider their removal. There is a procedural by-law of the council that gives them the right to speak as members of council. It is not clear how much time this will actually give them to state their position. It may be that council will waive this by-law to allow more time if needed. I cannot say at this time that the meeting will not afford them a meaningful opportunity to present their case. Some of the most eloquent statements and defences have been made in a very short period of time. If they feel that they have not been given a meaningful hearing they would have the right to reapply to the court. This later statement is only applicable if I am wrong in my principal conclusion and a hearing is required.

I believe that the matter of removal may be heard by the city council at its next regular or other meeting of council of which the applicants receive notice.

Section 7(1) of the 1911 Act as amended does not specify who the city may appoint to the commission. In the past the city has appointed persons who are not members of council. There is nothing in the wording of the Act to prevent the city from appointing some of its employees as commissioners. However, in so doing the city and the employee must recognize that when acting as a commissioner the employee must act in the best interests of the commission and not be the mere spokesperson or agent for the city. This may create difficulties and embarrassment to both the city and the employees. However, this is for the city and the employees to decide. It is not a legal matter that prevents the appointment of the employees.

For these reasons the application is dismissed.

If necessary written submissions with respect to costs may be made within 15 days.

Application dismissed.

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