Court File No. DC-22-2731

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

B E T W E E N:

VICTOR LACHANCE and
KIRK ALBERT

Applicant/Responding Parties

and

SOLICITOR GENERAL OF ONTARIO and
ATTORNEY GENERAL OF ONTARIO

Respondents/Moving Parties

BOOK OF AUTHORITIES OF THE MOVING PARTIES

(Motion to dismiss returnable on March 21, 2023)

February 16, 2023

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Jeremiah v. Ontario (Human Rights Commission)

2008 CarswellOnt 4410, [2008] O.J. No. 3013, 174 A.C.W.S. (3d) 459, 83 Admin. L.R. (4th) 126

Jennifer Jeremiah, Applicant and Ontario Human Rights Commission, Toronto Police Services Board and Chief, Julian Fantino, Respondent

Ferrier, Pitt, Molloy JJ.

Heard: May 22, 2008

Judgment: July 11, 2008 *

Docket: 508/07

Proceedings: additional reasons at *Jeremiah v. Ontario (Human Rights Commission)* (2008), 2008 CarswellOnt 5458, Ferrier J., Molloy J., Pitt J. (Ont. Div. Ct.)

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Related Abridgment Classifications

Administrative law
XII Practice and procedure
XII.2 Judicial review
XII.2.c Time
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III.3 Race, ancestry or place of origin
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Headnote

Human rights --- What constitutes discrimination — Race, ancestry or place of origin — Denial of public services or facilities
Complainant was charged with uttering threat to cause bodily harm to her supervisor at work — Charge was later withdrawn — Complainant filed complaint with Ontario Human Rights Commission ("Commission") against police services board and

police chief — Complainant alleged she was criminally charged because of racial profiling and discrimination by police service — Complaint also alleged that police chief called press conference in order to deflect media attention from civil action brought by complainant and to perpetuate falsehoods about Black community in city — Commission decided not to deal with complaint because crux of complaint related to matters that occurred when criminal charges were laid and delay in filing complaint was not incurred in good faith — Commission also found that press conference did not constitute discriminatory act that extended timeline regarding criminal charge — Commission upheld its earlier decision upon reconsideration — Complainant brought application for judicial review — Application dismissed — Reasons Commission gave for its decision with regard to police chief's press conference were sufficient to support factual findings made by Commission, and those findings were reasonable in light of evidence — Commission's finding that press conference was not discriminatory act could reasonably be understood to mean that it was not act of discrimination covered by any provision of Human Rights Code and was therefore not within Commission's jurisdiction — In any event, Commission did not have jurisdiction to deal with subject matter of complaint — Even if words police chief was alleged to have uttered had been said, no right of complainant under Code was infringed — Commission's conclusion it was not discriminatory act was not only reasonable, but was correct in law.

Human rights --- Practice and procedure — Commissions and boards of inquiry — Jurisdiction — General principles

Complainant was charged with uttering threat to cause bodily harm to her supervisor at work — Charge was later withdrawn — Complainant filed complaint with Ontario Human Rights Commission ("Commission") against police services board and police chief — Complainant alleged she was criminally charged because of racial profiling and discrimination by police service — Complaint also alleged that police chief called press conference in order to deflect media attention from civil action brought by complainant and to perpetuate falsehoods about Black community in city — Commission decided not to deal with complaint because crux of complaint related to matters that occurred when criminal charges were laid and delay in filing complaint was not incurred in good faith — Commission also found that press conference did not constitute discriminatory act that extended time line regarding criminal charge — Commission upheld its earlier decision upon reconsideration — Complainant brought application for judicial review — Application dismissed — Reasons Commission gave for its decision with regard to police chief's press conference were sufficient to support factual findings made by Commission, and those findings were reasonable in light of evidence — Commission's finding that press conference was not discriminatory act could reasonably be understood to mean that it was not act of discrimination covered by any provision of Human Rights Code and was therefore not within Commission's jurisdiction — In any event, Commission did not have jurisdiction to deal with subject matter of complaint — Even if words police chief was alleged to have uttered had been said, no right of complainant under Code was infringed — Commission's conclusion it was not discriminatory act was not only reasonable, but was correct in law.

Human rights --- Practice and procedure — Commissions and boards of inquiry — Delay

In May 2002, complainant was charged with uttering threat to cause bodily harm to her supervisor at work — Charge was withdrawn in May 2003 — In August 2003, complainant filed a complaint with Ontario Human Rights Commission ("Commission") against police services board and police chief — It was alleged complainant was criminally charged because of discriminatory policy — Complaint also alleged that police chief called press conference in August 2003 in order to deflect media attention from civil action brought by complainant and to perpetuate falsehoods about Black community in city — Commission decided not to deal with complaint because crux of complaint related to matters that occurred when criminal charges were laid and delay in filing complaint was not incurred in good faith — Commission upheld its earlier decision upon reconsideration in 2006 — Complainant brought application for judicial review — Application dismissed — There was no reason to interfere with Commission's decision — Complainant provided no explanation for delay — Complainant's counsel focused entirely on position that, as question of law, human rights complaint had not crystallized and complaint could not be filed until criminal charges had been resolved — Commission did not accept this submission, and rightly so — As question of law, there was nothing to prevent complainant from filing her complaint right after charges were laid — Onus was on complainant to establish that delay was incurred in good faith — It was open to Commission to conclude from absence of explanation that there was no evidence delay was incurred in good faith.

Human rights --- Practice and procedure — Judicial review — Availability — General principles

Delay in applying — In May 2002, complainant was charged with uttering threat to cause bodily harm to her supervisor at work — Charge was withdrawn in May 2003 — In August 2003, complainant filed complaint with Ontario Human Rights Commission ("Commission") against police services board and police chief — It was alleged complainant was criminally charged because of discriminatory policy — Complaint also alleged that police chief called press conference in August 2003 in

order to deflect media attention from civil action brought by complainant and to perpetuate falsehoods about Black community in city — Commission decided not to deal with complaint because crux of complaint related to matters that occurred when criminal charges were laid and delay in filing complaint was not incurred in good faith — Commission upheld its earlier decision upon reconsideration in 2006 — Complainant brought application for judicial review — Application dismissed — There was delay of 18 months in bringing judicial review application — This delay was both inordinate and not adequately explained — This was compounded by fact that central issue in case was delay already incurred in filing complaint — It was now over six years since incident giving rise to complaint — Further delay of 18 months in applying for judicial review was simply unacceptable — It was also relevant to consider whether there would be any practical purpose in sending matter back to Commission — Given result of civil action, which was dismissed, it was highly unlikely that complainant could obtain any remedy from human rights tribunal — While this might not have been determinative on its own, when coupled with delay in bringing judicial review proceeding, this was not case in which judicial review remedy should be granted.

Administrative law --- Practice and procedure — Miscellaneous

In May 2002, complainant was charged with uttering threat to cause bodily harm to her supervisor at work — Charge was withdrawn in May 2003 — In August 2003, complainant filed complaint with Ontario Human Rights Commission ("Commission") against police services board and police chief — It was alleged complainant was criminally charged because of discriminatory policy — Complaint also alleged that police chief called press conference in August 2003 in order to deflect media attention from civil action brought by complainant and to perpetuate falsehoods about Black community in city — Commission decided not to deal with complaint because crux of complaint related to matters that occurred when criminal charges were laid and delay in filing complaint was not incurred in good faith — Commission upheld its earlier decision upon reconsideration in 2006 — Complainant brought application for judicial review — Application dismissed — There was delay of 18 months in bringing judicial review application — This delay was both inordinate and not adequately explained — This was compounded by fact that central issue in case was delay already incurred in filing complaint — It was now over six years since incident giving rise to complaint — Further delay of 18 months in applying for judicial review was simply unacceptable — It was also relevant to consider whether there would be any practical purpose in sending matter back to Commission — Given result of civil action, which was dismissed, it was highly unlikely that complainant could obtain any remedy from human rights tribunal — While this might not have been determinative on its own, when coupled with delay in bringing judicial review proceeding, this was not case in which judicial review remedy should be granted.

The complainant was involved in a dispute with her supervisor at work. In May 2002, the complainant was charged with uttering a threat to cause bodily harm to her supervisor. The charge was withdrawn in May 2003. The complainant alleged that she was criminally charged because of racial profiling and discrimination by the police service. In July 2003, the complainant brought a civil action against the police services board. In August 2003, she filed a complaint with the Ontario Human Rights Commission ("Commission") against the police services board and the police chief. The complaint alleged that the complainant was criminally charged because of a pattern and practice of discriminatory policy by members of the police service. The complaint also related to a press conference called by the police chief in August 2003. The complaint alleged that the police chief called the conference in order to deflect media attention from the civil action and to perpetuate falsehoods about the Black community in the city. The Commission decided not to deal with the complaint because the crux of the complaint related to matters that occurred when the criminal charges were laid and the delay in filing the complaint was not incurred in good faith. Upon reconsideration in 2006, the Commission upheld its earlier decision that there was no satisfactory explanation for the failure to file the complaint within 6 months of the original occurrence. The Commission also found that the press conference did not constitute a discriminatory act that extended the time line regarding the complainant's criminal charge of May 2002. The complainant's civil action was dismissed in June 2007. The complainant brought an application for judicial review of the Commission's decisions.

Held: The application was dismissed.

Per Molloy J. (Ferrier J. concurring): Although the Commission gave sparse reasons for its decision with regard to the police chief's press conference, they were sufficient in the circumstances. The sufficiency of reasons was not argued by the complainant as a basis for judicial review. The reasons were sufficient to support the factual findings made by the Commission, and those findings were reasonable in light of the evidence. The Commission's finding that the press conference was not a discriminatory act could reasonably be understood to mean that it was not an act of discrimination covered by any provision of the Human Rights Code and was therefore not within the Commission's jurisdiction. In any event, the Commission did not have jurisdiction

to deal with the subject matter of the complaint. Even if the words the police chief was alleged to have uttered had been said, no right of the complainant under the Code was infringed. The Commission's conclusion that it was not a discriminatory act was not only reasonable, but was correct in law.

There was no reason to interfere with the Commission's decision regarding delay in the filing of the complaint. The complainant provided no explanation for the delay. Her counsel focused entirely on his position that, as a question of law, her human rights complaint had not crystallized and a complaint could not be filed until the criminal charges against her had been resolved. The Commission did not accept this submission, and rightly so. As a question of law, there was nothing to prevent the complainant from filing her complaint right after the charges were laid. The onus was on the complainant to establish that her delay was incurred in good faith. The only position put forward by the complainant was that, as a question of law, there was no six month delay. It was open to the Commission to conclude from the absence of explanation that there was no evidence the delay was incurred in good faith. The Commission's determination was one of a number of reasonable options and was entitled to deference.

There was also delay of 18 months in bringing the judicial review application. This delay was both inordinate and not adequately explained. This was compounded by the fact that the central issue in the case was the delay already incurred in filing the complaint. It was now over six years since the incident giving rise to the complaint. The further delay of 18 months in applying for judicial review was simply unacceptable. It was also relevant to consider whether there would be any practical purpose in sending the matter back to the Commission. Given the result of the civil trial, it was highly unlikely that the complainant could obtain any remedy from a human rights tribunal. While this might not have been determinative on its own, when coupled with the delay in bringing this judicial review proceeding, this was not a case in which a judicial review remedy should be granted.

Per Pitt J. (dissenting in part): Although there was agreement with the disposition as stated by Molloy J., there was fundamental disagreement on the issue of good faith in respect of the delay. The complainant was wrong in law in her assertion that the limitation period commenced when the charge was withdrawn. However, it was utterly unreasonable to find that the failure to launch the complaint before the charge was withdrawn could be a basis for a finding of lack of good faith. It would be unusual for a complainant to file a human rights complaint against state actors in respect of a prosecution which the complainant claimed was instituted for improper motives, while the proceedings were still before the court. In any event, the Commission would almost certainly have postponed the initiation of proceedings in respect of this complaint pending the resolution of the criminal matter.

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Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

s. 15 — referred to

Human Rights Code, R.S.O. 1990, c. H.19

Generally — referred to

s. 34 — considered

s. 34(1)(b) — considered

s. 34(1)(c) — considered

s. 34(1)(d) — considered

s. 34(2) — considered

s. 37 — considered

Words and phrases considered

satisfied

[Per Molloy J. (Ferrier J. concurring):] Although counsel for the [applicant] repeatedly referred to s. 34(1)(d) [*Human Rights Code*, R.S.O. 1990, c. H.19] as a "limitation period", it is not truly a limitation period. What this provision does is provide the Commission with a limited discretion to elect not to proceed with an investigation of a case, thus effectively dismissing the complaint without an investigation or hearing. The opportunity to exercise that discretion to dismiss for delay only arises where the complaint is filed more than six months after the facts upon which the complaint is based. However, the discretion is removed if the Commission "is satisfied" that the delay was incurred in good faith and there is no substantial prejudice because of the delay.

It is worth noting that the language of the section is that the Commission must "be satisfied" that the delay was incurred in good faith. . . . this is a higher threshold than is contemplated by the term "it appears to the Commission" used elsewhere in the Code. I agree . . . that "appears" is akin to "seems" and "satisfied" is akin to "convinced" and further agree that the onus is on the complainant to convince the Commission that her delay was incurred in good faith.

***Molloy J.*:**

Introduction

1 The applicant, Jennifer Jeremiah, seeks judicial review of a decision by the Ontario Human Rights Commission ("the Commission") that it would not deal with her complaint of discrimination against the Toronto Police Services Board and Chief Julian Fantino. For the reasons set out below, the application is dismissed.

Background Facts

2 In mid-May, 2002, Ms Jeremiah was involved in a dispute with her supervisor at work. Her employer reported to the police that Ms Jeremiah told her supervisor, "I have a family and I have told them everything that you are doing and if anything should

happen to me they will be waiting for you." On May 21, 2002, Toronto Police charged Jennifer Jeremiah with the criminal offence of uttering a threat to cause bodily harm to her supervisor at work. That charge was withdrawn by the Crown on May 9, 2003, nearly a year after it was laid. At the time the charge was withdrawn, the Crown Attorney advised the Court that although the Crown believed there was a reasonable prospect of conviction, he was satisfied that it would be in the public interest to withdraw the charge due to various factors including Ms Jeremiah's age and lack of criminal record. Ms Jeremiah was represented by Mr. Ernest Guiste throughout the criminal proceedings.

3 Ms Jeremiah is an African-Canadian woman originally from Grenada. She alleges that she was criminally charged because of "racial profiling" and discrimination by the Toronto Police Service.

4 On July 17, 2003, (approximately two months after the charge was withdrawn), Ms Jeremiah commenced a civil action against the Toronto Police Services Board and others claiming significant monetary damages. Among the allegations underlying that claim is the assertion that the police had no reasonable and probable grounds for charging Ms Jeremiah and that in doing so they were improperly motivated by her race. Ms Jeremiah's solicitor of record in that action was Ernest Guiste.

5 On August 5, 2003, Mr. Guiste called a press conference to announce the civil action commenced by Ms Jeremiah.

6 On August 15, 2003, Ms Jeremiah filed a complaint against the Toronto Police Services Board and Chief Julian Fantino with the Ontario Human Rights Commission, alleging discrimination in the provision of services because of her race and colour. The complaint, which was drafted by Mr. Guiste, alleges that the discrimination occurred "on August 5, 2003 and ongoing". There are two aspects to the complaint: the first alleges that she was criminally charged "on account of a pattern and practice of discriminatory policing by members of the Toronto Police Service"; the second relates to a press conference called by Chief Julian Fantino on August 5, 2003. The complaint alleges that Chief Fantino called the conference in order to deflect media attention from her civil action, which had also been subject of a press conference earlier that same day, and also to perpetuate falsehoods about the Black community in Toronto.

7 On September 16, 2003, the respondents requested that the Commission exercise its discretion to "not deal with" the complaint pursuant to s. 34 of the *Ontario Human Rights Code*, R.S.O. 1990, c. H-19 ("the Code").

8 By decision dated March 17, 2004, the Commission decided to not deal with the complaint, pursuant to s. 34(1)(d) of the Code because the crux of the complaint related to matters that occurred when the criminal charges were laid on May 21, 2002 and the Commission was not satisfied that the delay in filing the complaint was incurred in good faith.

9 Ms Jeremiah sought reconsideration of that decision. By decision dated April 26, 2006, the Commission upheld its earlier decision that there was no satisfactory explanation for the failure to file the complaint within 6 months of the original occurrence and further found that the press conference held by Police Chief Fantino on August 5, 2003 "does not constitute a discriminatory act that extends the time-line regarding the complainant's criminal charge of May 2002".

10 Ms Jeremiah's civil action was heard before a jury in Toronto in June 2007. All of the questions put to the jury were answered in a manner unfavourable to Ms Jeremiah. In particular, the jury found that Ms Jeremiah had failed to prove that the police did not have reasonable and probable cause to arrest her on a charge of uttering a threat to cause bodily harm and also found that Ms Jeremiah's s.15 *Charter* right to equal protection and benefit of the law and to be free from discrimination on the basis of race or colour had not been infringed by the police. In accordance with the finding of the jury, Ms Jeremiah's action was dismissed in its entirety on June 18, 2007.

11 Ms Jeremiah commenced this application for judicial review of the Commission's decisions on October 23, 2007, which is 18 months after the Commission's reconsideration decision.

The Proceedings Before the Commission

12 The Commission's initial decision was based on s. 34(1)(d) of the Code. Its subsequent decision also involved ss. 34(1)(b) and 34(1) (c). Those provisions state:

34. (1) Where it appears to the Commission that,

(b) the subject-matter of the complaint is trivial, frivolous, vexatious or made in bad faith;

(c) the complaint is not within the jurisdiction of the Commission; or

(d) the facts upon which the complaint is based occurred more than six months before the complaint was filed, unless the Commission is satisfied that the delay was incurred in good faith and no substantial prejudice will result to any person affected by the delay,

the Commission may, in its discretion, decide to not deal with the complaint.

13 As required by s. 34(2) of the Code, the Commission advised Ms Jeremiah of its decision in writing, set out its reasons for the decision and advised her of the procedure for seeking reconsideration under s. 37 of the Code. Section 37 states:

37. (1) Within a period of fifteen days of the date of mailing the decision and reasons therefor mentioned in subsection 34 (2) or subsection 36 (2), or such longer period as the Commission may for special reasons allow, a complainant may request the Commission to reconsider its decision by filing an application for reconsideration containing a concise statement of the material facts upon which the application is based.

(2) Upon receipt of an application for reconsideration the Commission shall as soon as is practicable notify the person complained against of the application and afford the person an opportunity to make written submissions with respect thereto within such time as the Commission specifies.

(3) Every decision of the Commission on reconsideration together with the reasons therefor shall be recorded in writing and promptly communicated to the complainant and the person complained against and the decision shall be final.

14 Prior to this complaint being submitted to the Commission for a decision under s. 34 of the Code, Ms Jeremiah was provided with the Commission staff's Case Analysis and was given an opportunity to make written submissions to the Commission on the matter. The staff conclusion was that the complaint concerning the charges was filed over 14 months after the event and that the Police Chief's press conference was a separate event, not linked to the complaint about criminal charges being laid against Ms Jeremiah. The staff noted that Ms Jeremiah had been represented by the same legal counsel since May 2002 and the delay in filing the complaint could not, therefore, be said to be in good faith.

15 In response, Ms Jeremiah's legal counsel, Mr. Guiste, sent a written submission to the Commission taking the position that it was necessary for Ms Jeremiah to wait for her criminal charges to be resolved before filing the complaint, as the Commission would have no jurisdiction to deal with the complaint if she had been convicted. Further, he contended that the Commission would have no power to even investigate the complaint while the criminal charge was outstanding. Finally, he stated that "anyone who seriously believes that the thrust of this complaint focuses on the press conference of August 5th is either delusional or malicious". Other than the jurisdictional argument, Mr. Guiste did not address why the complaint was not filed within 6 months and did not deal with the issue of good faith.

16 The Commission's initial decision to "not deal with" the complaint is dated March 17, 2004. The decision states that the events that occurred on May 21, 2002 form the crux of the complaint, cites the 14 month delay in filing it, notes that "the complainant was represented by legal counsel during the period of May 21, 2002 to the present and could have pursued a complaint with the Commission" and concludes that "the Commission is not satisfied that the delay was incurred in good faith".

17 Ms Jeremiah sought reconsideration of the initial decision. Commission staff sent a Reconsideration Report dated January 3, 2006 to the parties and invited their written submissions in response. In the Report, Commission staff again concluded that the time for filing the complaint begins to run at the point when the complainant believes her rights have been infringed, which would have been on May 21, 2002 when she was criminally charged. Again, staff pointed to the fact that Ms Jeremiah was represented by counsel throughout and concluded that the delay was not in good faith. Staff recommended that the Commission

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uphold its earlier decision with respect to that aspect of the complaint dealing with discrimination in the laying of criminal charges. However, the Reconsideration Report went on to consider the August 2003 Police Chief's press conference, noted that this was a separate incident that occurred less than two weeks before the filing of the complaint, and recommended that the Commission modify its original decision to send just that aspect of the complaint involving the press conference for a full investigation.

18 Counsel for the respondents filed a written response to the Reconsideration Report supporting the staff recommendation that the Commission uphold its previous decision to not deal with the complaint alleging discrimination in the laying of the criminal charge because of the delay in filing the complaint. The respondents further requested that the Commission should also refuse to deal with that portion of the complaint dealing with the Police Chief's press conference pursuant to its powers under s. 34(1)(b) (because the subject matter was "trivial, frivolous and vexatious") and s. 34(1)(c) (because the complaint is outside the jurisdiction of the Commission). The respondents provided to the Commission a copy of the press release announcing the press conference, from which it is clear that the purpose of the press conference was to discuss the events of the previous long weekend which had been marked with extreme violence. The respondents also provided a transcript of the press conference which showed that although a reporter had asked Chief Fantino to comment on Ms Jeremiah's lawsuit, the Chief had commented only that these were merely accusations that had not yet been proven. The respondents argued that Ms Jeremiah's complaint with respect to the press conference appeared to be that it deflected media attention from her lawsuit, a situation over which the police force had no control. This, it was submitted, did not constitute discrimination in the provision of a service and was therefore outside the Commission's jurisdiction and was also "trivial and inconsequential". Finally, the respondents pointed to the timing of the filing of the complaint, within days of the commencement of a civil action covering the same subject matter, which it submitted made it vexatious.

19 After receipt of the respondents' submissions, Commission staff advised counsel for Ms Jeremiah that as a result of those submissions, staff would now be recommending to the Commission that the entire complaint should not be dealt with, pursuant to ss. 34(1)(b) and (d) of the Code. Mr. Guiste provided two written submissions to the Commission in response to the Reconsideration Report. The first was sent before receipt of the respondents' submission and essentially takes the same position as was taken before the Commission initially, *i.e.* that the time for filing the complaint could not arise until the criminal charges had been resolved. No other submissions were made with respect to good faith. The second submission followed the Commission's invitation to reply to the new position taken by staff with respect to the press conference aspect of the complaint following the respondents' submissions. In this submission, Mr. Guiste reiterated his earlier submission with respect to the delay issue, denied there was any evidence to support the argument that the complaint was trivial, frivolous or vexatious, and asserted that the ongoing civil action was not a bar to the complaint proceeding as separate and distinct issues were raised.

20 The Commission's decision under s. 37 of the Code is dated April 26, 2006. The Commission upheld its earlier decision. The Commission held that no reason had been established for the complainant failing to file her complaint within the six month time frame. With respect to the press conference in August 2005, the Commission held that the press conference had been called to address the violence from the weekend before and that Chief Fantino did not make specific comments about the complainant's lawsuit. The Commission stated that "the press conference held to address events in Toronto does not constitute a discriminatory act that extends the time-line regarding the complainant's criminal charge of May 2002."

Standard of Review

21 Until recently, it was well-established in the case law that the standard of review for decisions of the Commission under ss. 34 and 37 of the Code was that of "patent unreasonableness": *Losenno v. Ontario (Human Rights Commission)* (2005), 78 O.R. (3d) 161 (Ont. C.A.); *Gismondi v. Ontario (Human Rights Commission)*, [2003] O.J. No. 419 (Ont. Div. Ct.); *Razack v. Ontario (Human Rights Commission)*, [2007] O.J. No. 4360 (Ont. Div. Ct.). Recently, in *New Brunswick (Board of Management) v. Dunsmuir*, [2008] S.C.J. No. 9 (S.C.C.), the Supreme Court of Canada revised the law on applicable standards of review and reduced the previous three possible standards to only two: correctness and reasonableness. It cannot be said that by eliminating the patent unreasonableness test, the Supreme Court was sanctioning a move to a correctness standard for questions of fact or questions of mixed fact and law. The Supreme Court emphasized in *Dunsmuir* that in adapting the standards of review it was not seeking to move away from the long tradition of deference to administrative tribunals already established in the case law,

but merely to simplify the standard of review. That is particularly the case where the question before the tribunal is one of fact, discretion, or policy: *Dunsmuir* at para 53. Accordingly, the standard of review now applicable to almost all decisions of the Commission under ss. 34 and 37 of the Code is that of reasonableness.

22 In *Dunsmuir*, the Supreme Court held that a standard of correctness should be applied for true questions of jurisdiction. The Court cautioned against branding questions as jurisdictional unless the issue truly goes to the authority of the tribunal to make the inquiry. The correctness standard should be applied only to questions that are jurisdictional in the narrow sense, which the Court described as situations where "the tribunal must explicitly determine whether its statutory grant of power gives it authority to decide a particular matter": *Dunsmuir* at para 59. Where, under s. 34(1)(c), the Commission decides not to deal with a complaint because it is not within its jurisdiction, the Commission is required to be correct.

Issues and Position of the Parties

23 The applicant/complainant submits that the Commission erred in law in finding that her complaint was beyond the statutory limitation period. On this point, the complainant's position is essentially the same as that taken before the Commission, *i.e.* that the complaint could not be filed until the criminal charges had been resolved, that the Commission had no jurisdiction to even investigate a complaint while criminal charges were still pending, and that therefore the time for filing the complaint did not arise until May 3, 2003, when the criminal charge was withdrawn.

24 The applicant further argues that the Commission erred in law in deciding that the material facts alleged with respect to the Police Chief's press conference in August 5, 2003 were not an act of discrimination under the Code.

25 The respondents Toronto Police Services Board and Chief Julian Fantino submit that the Commission's decision is reasonable both with respect to when the "limitation period" begins to run and with respect to whether the allegations about the Chief's press conference can possibly give rise to a complaint under the Code. These respondents further submit that this Court ought not to grant the discretionary relief sought by the applicant by way of judicial review in light of the delay in bringing the judicial review application.

26 Counsel for the Ontario Human Rights Commission also submits that the Commission's decision was a reasonable one on both issues before it. In addition, the Commission argues that judicial review is a discretionary remedy that ought not to be exercised where the remedy would have no practical effect. The Commission points to the findings of the jury in Ms Jeremiah's civil action as determinative on this point and submits there would be no practical effect of requiring the Commission to investigate the same issue.

27 Thus, the following issues arise:

(a) the reasonableness (or correctness) of the Commission's decision to not deal with the portion of the complaint relating to the Police Chief's press conference;

(b) the reasonableness of the Commission's decision to not deal with the complaint on the laying of the criminal charge because of delay in filing the complaint;

(c) the effect of the applicant's delay in bringing this judicial review application on her entitlement to a remedy from this Court;

(d) the effect of the civil jury findings on whether this Court should grant a remedy on judicial review.

Analysis

(a) The Police Chief's Press Conference

28 In its initial decision dated March 17, 2004, the Commission made no reference to the press conference issue. In its reconsideration decision dated April 26, 2006, the Commission made factual findings that the press conference was called to

address the weekend of violence and that Chief Fantino made no specific comments about the complainant's lawsuit and then found that the press conference "does not constitute a discriminatory act that extends the time-line regarding the complainant's criminal charge of May 2002". The Commission then ruled that the complaint fell within the provisions of 34(1)(d) of the Code.

29 It is difficult to discern from the Commission's reasons what the basis was for its decision with respect to the press conference. Clearly the complaint was filed well within six months after the press conference. To the extent the complainant was alleging that the press conference was a separate discriminatory act, it clearly was not out of time and it was therefore not open to the Commission to dismiss it under s. 34(d) of the Code. The Commission had been asked by the respondents to not deal with this aspect of the complaint under ss. 34(1)(b) (trivial, frivolous and vexatious) and 34(1)(c) (no jurisdiction). It may be the case that in light of its factual findings the Commission concluded that the complaint was frivolous and trivial, although it certainly did not articulate that in its reasons. What is more likely is that the Commission concluded it had no jurisdiction, since it did state that the press conference "did not constitute a discriminatory act", even though the decision does not specifically refer to s. 34(1)(c).

30 It is regrettable that the Commission did not provide more fulsome reasons for its decision on this point. However, in my view, the reasons (sparse though they are) are sufficient in the circumstances of this case. First, the sufficiency of the reasons was not argued by the applicant as a basis for interfering with the Commission's decision on judicial review. Second, the reasons are sufficient to support the factual findings made by the Commission, and those findings are reasonable in light of the evidence. Third, the Commission's finding that the press conference was not a "discriminatory act" can reasonably be understood to mean that it was not an act of discrimination covered by any provision of the Code and was not therefore within the jurisdiction of the Commission. Such a finding, if correct, is fatal to this aspect of Ms Jerermiah's complaint. Fourth, in any event, the Commission did not have jurisdiction to deal with the subject matter of the complaint.

31 In my view, Ms Jeremiah's complaint about the Chief of Police's press conference, even if one accepts that those allegations could be proven, does not constitute subject-matter within the jurisdiction of the Commission. The Commission has jurisdiction over complaints of discrimination in a variety of circumstances including the provision of services, goods and facilities, occupancy of accommodation, contracts, employment and membership in vocational associations. Distracting the media from press coverage of a person's lawsuit, even if that allegation is supported by the facts (which the Commission found not to be the case), does not fall within any of the headings upon which the Commission's jurisdiction to investigate a complaint is founded.

32 It is clear from the evidence that Chief Police Fantino said nothing at the press conference about the merits of Ms Jeremiah's lawsuit, or about her personally. Even if the words he is alleged to have uttered had been said (which the Commission found not to be the case), there was no right of Ms Jeremiah under the Code that was infringed. The Commission's conclusion that it was not a "discriminatory act" was not only reasonable, it was correct in law.

33 Accordingly, there is no basis for interfering with the Commission's decision to not deal with that aspect of the complaint relating to the 2003 press conference.

(b) Delay in Filing the Complaint

34 The manner in which the Commission dealt with the issue of delay is more problematic. Essentially, in both its decisions the Commission found that there was no indication that the complainant could not have filed her complaint within the stipulated six month time-frame, while noting that she was represented by the same legal counsel throughout. In its first decision, the Commission stated that it was "not satisfied that the delay was incurred in good faith", but provided no explanation for how it arrived at that conclusion. In its reconsideration decision, the Commission did not refer at all to good faith, but stated that it remained of the view that the complaint fell within s. 34(1)(d), which can fairly be regarded as adopting the reasons previously stated.

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35 Again, it is regrettable that the Commission did not see fit to articulate the rationale underlying its conclusions, rather than simply stating its conclusions. However, again in the circumstances of this case, as more particularly described below, I do not see that as fatal to the decision.

36 Although counsel for the Ms Jeremiah repeatedly referred to s. 34(1)(d) as a "limitation period", it is not truly a limitation period. What this provision does is provide the Commission with a limited discretion to elect not to proceed with an investigation of a case, thus effectively dismissing the complaint without an investigation or hearing. The opportunity to exercise that discretion to dismiss for delay only arises where the complaint is filed more than six months after the facts upon which the complaint is based. However, the discretion is removed if the Commission "is satisfied" that the delay was incurred in good faith and there is no substantial prejudice because of the delay. Both aspects of this test must be met before the Commission's discretion is ousted: *i.e.* there must be a good faith explanation for the delay on the part of the complainant *and* no substantial prejudice to the respondent. If either aspect is not met, the Commission's discretion is maintained. (See *Bourne v. Ontario (Human Rights Commission)*, [1997] O.J. No. 5253 (Ont. Div. Ct.) at para 1; *Brome v. Ontario (Human Rights Commission)*, [1999] O.J. No. 760 (Ont. Div. Ct.) at paras 25-26.)

37 It is worth noting that the language of the section is that the Commission must "be satisfied" that the delay was incurred in good faith. As pointed out by Mr. Griffin for the Commission, this is a higher threshold than is contemplated by the term "it appears to the Commission" used elsewhere in the Code. I agree with his submission that "appears" is akin to "seems" and "satisfied" is akin to "convinced" and further agree that the onus is on the complainant to convince the Commission that her delay was incurred in good faith. This is a common sense interpretation of the legislative language and is consistent with the general principle that the burden should lie with the person who asserts a proposition. It is only the complainant who can explain her own reasons for the delay and it is only from those reasons that it can be determined whether the delay was in good faith.

38 It was made very clear to the complainant that the issue of her good faith in respect of the delay was critical to the decision to be made by the Commission. She was advised that Commission staff would be recommending that the Commission find the good faith requirement had not been met. Notwithstanding this, the complainant provided no explanation for her delay. Instead, her counsel focused entirely on his position that, as a question of law, her human rights complaint had not crystallized and a complaint could not be filed, until the criminal charges against her had been resolved.

39 While the Commission's reasons on this point could have been clearer, it is obvious that the Commission did not accept this submission. And quite rightly so. Ms Jeremiah's complaint was that she was criminally charged because of racial profiling by the police. She alleged that the police did not investigate before charging her with an offence and did not have reasonable and probable grounds to charge her. All of the facts necessary to support Ms Jeremiah's complaint had already occurred at the time the charge was laid against her. If those facts could be proven, she would still have had a viable complaint, regardless of the outcome of the criminal charge.

40 Mr. Guiste's submission that the Commission would have no jurisdiction to proceed with a complaint while the criminal charge was outstanding is simply wrong in law. The Commission could have elected to hold off on its investigation until after the criminal proceedings had concluded, or it could have proceeded. This would be a discretionary decision, not one going to jurisdiction.

41 Accordingly, as a question of law, there was nothing to prevent Ms Jeremiah from filing her complaint right after the charges were laid and the Commission's jurisdiction to consider the delay issue under s. 34 of the Code was clearly triggered when she failed to file her complaint within six months of that occurrence. That said, I have considerable sympathy for the reluctance of a person charged with a criminal offence to file a complaint against the police while those criminal proceedings are ongoing. An accused person is in a vulnerable position. The police and the Crown prosecutor have considerable discretion that can be exercised in favour of an accused person, or not. It is perfectly understandable that an accused person might prefer to avoid potentially antagonizing the police or prosecutors by making accusations of racism at a point in time when those persons may be making decisions about her case, or giving testimony against her in the case. It is also understandable that an accused person's primary focus would be on clearing herself of the criminal charges and that he or she might not have the energy or the

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resources to "fight the battle" on more than one front. It seems to me that the Commission could have been more alive to the possibility that the complainant might find it too intimidating to accuse the police of racial discrimination while the criminal charge was still hanging over her head.

42 However, the onus was on the complainant to establish that her delay was incurred in good faith. Whether there was a good faith reason for not filing the complaint earlier is a question of fact to be determined by the Commission based on the evidence before it. The only position put forward by Ms Jeremiah was that, as a question of law, there was no six month delay. It was open to the Commission to conclude from the absence of an explanation that there was no evidence the delay was incurred in good faith. It might also have been reasonable for the Commission to conclude that the mere fact that the criminal charges were still outstanding was a sufficient good faith explanation for the delay. I am not sure why the Commission was of the view that the fact Ms Jeremiah had the same legal counsel throughout was relevant to its decision on this point. However, in my view, another reasonable option open to the Commission would have been to conclude that Ms Jeremiah was relying on the advice of her counsel who it would appear believed, albeit incorrectly, that her complaint could not be filed until after her criminal charge had been resolved.

43 However, it is not for this Court to choose the most reasonable option available, or to substitute its discretion for that of the Commission. The Commission's determination is one of a number of reasonable options and is entitled to deference: *Dunsmuir* at para 47. Accordingly, I would not interfere with the Commission's decision on this point.

(c) Judicial Review is a Discretionary Remedy

44 The relief sought in this application by way of judicial review is discretionary. As such, this Court may, in its discretion, decline to provide a remedy in certain circumstances, including where there has been inordinate delay in commencing the judicial review proceeding or where an alternative remedy exists: *Canada (Anti-Dumping Tribunal), Re* (1975), 65 D.L.R. (3d) 354 (S.C.C.) at pp. 361 -2; (1975), [1976] 2 S.C.R. 739 (S.C.C.) at 749; *Harelkin v. University of Regina* (1979), 96 D.L.R. (3d) 14 (S.C.C.) at pp. 28 and 40. Likewise, where there would be no useful purpose served by granting the remedy sought, the Court may exercise its discretion to refuse the remedy: *Angus v. R.* (1990), 72 D.L.R. (4th) 672 (Fed. C.A.) at p. 697; *Jazairi v. Ontario (Human Rights Commission)*, [1999] O.J. No. 2474 (Ont. C.A.) at paras 40-44.

45 This Court has held that a delay in excess of six months in bringing a judicial review application may be grounds for refusing the remedy sought. In *O.P.S.E.U. v. Ontario (Ministry of Labour)*, [2001] O.L.R.B. Rep. 549 (Ont. Div. Ct.), Lederman, J. stated:

> It is noteworthy that no time limits for commencing an application for judicial review and for perfection are set out in the *Judicial Review Procedure Act*. Nonetheless, this Court has repeatedly recognized that in judicial review proceedings the applicant is under an obligation to commence and perfect the application in an expeditious fashion. Judicial review is an equitable and discretionary remedy and an obligation remains upon an applicant to bring the matter before the court without undue delay. Failure to do so has been held to be an independent basis for the denial of the application, regardless of the merits of the case.
>
> While each case must turn upon its own circumstances, this Court has held that delay on the part of an applicant of six or more months in the commencement of an application and/or twelve or more months in the perfection of an application could be serious enough to warrant the dismissal of the application.

46 The Commission issued its decision on April 26, 2006. Ms Jeremiah's application for judicial review was filed on October 23, 2007, a delay of 18 months. The only explanation provided for the delay is one sentence in Ms Jeremiah's affidavit in which she states, "I could not afford to initiate this application for some time until I had accumulated sufficient funds to retain counsel."

47 However, the fact is that Ms Jeremiah was represented by Mr. Guiste throughout this period of time. Her civil action was tried before a jury in June 2007 and dismissed. A notice of appeal to the Court of Appeal was filed within 30 days thereafter, and is yet to be heard. This judicial review proceeding was brought some six months after the civil action was dismissed. Significantly, although the same counsel was acting for Ms Jeremiah throughout, and although the Toronto Police Services

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Board was both a defendant in the civil action and a respondent in the human rights complaint, no mention whatsoever was made to the respondents or to the Commission that this judicial review application was even being contemplated.

48 In my view, the delay in bringing this judicial review application is both inordinate and not adequately explained. The difficulty with the delay is compounded by the fact that the central issue in the case is the delay already incurred in filing the complaint with the Commission in the first place. It is now over six years since the incident giving rise to the complaint. Given the delay that had already occurred, it was particularly incumbent on the complainant to move expeditiously to seek relied in this Court. A further delay of 18 months in doing so is simply unacceptable.

49 Furthermore, it is relevant to consider whether there would be any practical purpose in sending this matter back to the Commission. In *Jazairi v. Ontario (Human Rights Commission)*, Finlayson J.A. held, at para 44:

> The reasons I would advance for not granting judicial review in this case are closely related to the ground that the remedy would have no practical effect. On the facts of this case, there is no reason to believe that the appellant would be ultimately successful even if the Commission had jurisdiction over political opinions.

50 With respect to the complaint against the Chief of Police's press conference, there is no jurisdiction over the subject matter of the complaint and the Commission has already found that the complaint is not supported on its facts. If this aspect of the complaint was sent back to the Commission on judicial review, the same result would be inevitable.

51 With respect to the complaint about the alleged wrongful criminal charge against Ms Jeremiah, every factual aspect of that complaint was already the subject of a lengthy civil trial before a jury and every question put to the jury was answered in a manner contrary to Ms Jeremiah's allegations. Most of the issues of fact raised in the complaint have already been decided against her.

52 I do not propose to deal with whether the principles of *res judicata* or issue estoppel would prevent the re-litigation of these issues in the human rights tribunal forum, as those issues were not argued before us. I recognize the distinction between a civil action and a human rights complaint, and, in particular, that in order to establish a complaint of discrimination it is sufficient to demonstrate that a prohibited ground of discrimination was a factor in the conduct complained of; it is not necessary for it to be the only factor, or even the determining factor. However, for present purposes, the point is that Ms Jeremiah chose to proceed with her civil action rather than seeking judicial review of the Commission's decision in a timely way. Having been unsuccessful in the civil action, she now seeks to set aside the Commission's decision so that she can litigate the very same facts before a human rights tribunal. Given the result before the civil jury, it is highly unlikely that Ms Jeremiah can obtain any remedy from a human rights tribunal. While this might not be a determinative factor on its own, when coupled with the delay in bringing this judicial review proceeding, I am persuaded that this is not a case in which a judicial review remedy should be granted.

Conclusion

53 To summarize, the Commission acted reasonably in deciding to not proceed with Ms Jeremiah's complaint regarding the criminal charge against her because of delay. Further, the Commission acted reasonably in deciding to not proceed with the aspect of Ms Jeremiah's complaint relating to the press conference and was correct in finding that it lacked jurisdiction to deal with the subject matter of the press conference. Accordingly, the application for judicial review is dismissed. Even if there was any merit to the application for judicial review, as an exercise of discretion I would deny the relief sought from this Court because of the inordinate delay in bringing the application and because there would be no useful purpose served by granting the relief sought.

54 This application is dismissed. If costs cannot be agreed upon between counsel, brief written submissions may be forwarded to the Court within 30 days.

***Pitt J.* (dissenting in part):**

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55 I have had the opportunity to read the reasons for Judgment of Molloy J in which Ferrier J has concurred. I concur with the disposition but would not myself have given it such fulsome treatment.

56 I disagree fundamentally with my colleagues on one issue, although such disagreement does not affect my concurrence with the result. That is the issue of good faith in respect of the delay.

57 I agree with my colleagues that the applicant is wrong in law in her assertion that the "limitation period" commenced when the charge was withdrawn.

But in my view, it is utterly unreasonable to find that the failure to launch the complaint before the charge was withdrawn could be a basis for a finding of lack of good faith.

58 In my view, it would be an unusual complainant who would file a Human Rights complaint against state actors, in respect of a prosecution in which the complainant claims that the prosecution was instituted for improper motives, while the proceedings were still before the court.

59 Frankly, the assertion that the charge violated the *Code* is tantamount to a protestation of innocence and the initiation of the proceedings prior to the withdrawal of the complaint, would in effect be an attempt to seek a declaration of innocence while the charge is pending. While it may not be uncommon today to protest innocence while a charge is *sub judice*, it is quite another thing to initiate a proceeding for a declaration of innocence in a different forum, while the charge is pending.

60 While the applicant's submission that a civil malicious prosecution suit is identical to a complaint under the *Code*, is unfounded in law, in practical terms there is enough similarity between the two to understand why they are placed under the same rubric by the applicant

61 In any event, the Human Rights Commission would almost certainly have postponed the initiation of proceedings in respect of this complaint pending the resolution of the criminal matter.

Per Curiam:

For written reasons delivered application dismissed. If Costs not agreed, Counsel to file submissions within 30 days.

Application dismissed.

Footnotes

* Additional reasons on costs reported at *Jeremiah v. Ontario (Human Rights Commission)* (2008), 2008 CarswellOnt 5458 (Ont. Div. Ct.).

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2000 CarswellOnt 703
Ontario Superior Court of Justice (Divisional Court)

Ontario Provincial Conference of B.A.C. v. B.A.C.

2000 CarswellOnt 703, [2000] O.L.R.B. Rep. 417, [2000] O.J. No. 751, 132 O.A.C. 87, 2000 C.L.L.C. 220-018, 95 A.C.W.S. (3d) 495

In the Matter of the Judicial Review Procedure Act, R.S.O. 1990, c. J.1

In the Matter of a Decision of the Ontario Labour Relations Board, Chair, R.O. MacDowell, issued April 2, 1998, pursuant to the Labour Relations Act, 1995, S.O. 1995, c.1, Schedule A

International Union of Bricklayers and Allied Craftworkers and John T. Joyce, Applicants and Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftworkers, Jerry Coelho, Tom Oldham, Kerry Wilson, Danilo Buttazzone, Luigi Scodellaro, John Haggis, and the Ontario Labour Relations Board, Respondents

In the Matter of a Decision of the Ontario Labour Relations Board, Alterna te Chair, Robert Herman, issued April 28, 1998, pursuant to the Labour Relation s Act, 1995, c.1, Schedule A

International Union of Bricklayers and Allied Craftworkers and John T. Joyce, Applicants and Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftworkers, Jerry Coelho, Tom Oldham, Kerry Wilson, Danilo Buttazzoni, Luigi Scodellaro, John Haggis, Terrazzo, Tile and Marble Guild of Ontario Inc., Masonry Industry Employers' Council of Ontario and the Ontari Labour Relations Board, Respondents

Jennings J., MacFarland J., Southey J.

Heard: March 2, 2000
Judgment: March 9, 2000
Docket: Toronto 341/98, 342/98

Proceedings: Affirmed [1998] O.L.R.B. Rep. 285, 1998 CarswellOnt 3504 (Ont. L.R.B.); Affirmed [1998] O.L.R.B. Rep. 308, 1998 CarswellOnt 3505, 98 C.L.L.C. 220-063 (Ont. L.R.B.)

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Related Abridgment Classifications
Labour and employment law
I Labour law
  I.1 Labour relations boards
    I.1.c Powers
      I.1.c.x Interim orders
Labour and employment law
I Labour law
  I.1 Labour relations boards
    I.1.e Judicial review
      I.1.e.ii Availability of review
        I.1.e.ii.D Delay
Labour and employment law

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        I.5.c Certification
            I.5.c.i Status under legislation
                I.5.c.i.A Union
                    I.5.c.i.A.1 General principles
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I Labour law
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                I.5.c.i.A Union
                    I.5.c.i.A.2 Formal requirements
Labour and employment law
I Labour law
    I.5 Bargaining rights
        I.5.c Certification
            I.5.c.i Status under legislation
                I.5.c.i.A Union
                    I.5.c.i.A.4 Miscellaneous

Headnote

Labour law --- Labour relations boards — Judicial review — Availability of review — General

Labour law --- Labour relations boards — Powers — Interim orders

Labour law --- Bargaining rights — Certification — Status under legislation — Union — General

Labour law --- Bargaining rights — Certification — Status under legislation — Union — Formal requirements

Table of Authorities

Cases considered by *MacFarland J.*:

Dayco (Canada) Ltd. v. C.A.W., 14 Admin. L.R. (2d) 1, (sub nom. *Dayco (Canada) Ltd. v. CAW-Canada)* [1993] 2 S.C.R. 230, (sub nom. *Dayco (Canada) Ltd. v. C.A.W.-Canada)* 102 D.L.R. (4th) 609, (sub nom. *Dayco v. C.A.W.)* 93 C.L.L.C. 14,032, 63 O.A.C. 1, 152 N.R. 1, 13 O.R. (3d) 164 (note) (S.C.C.) — considered

Statutes considered:

Judicial Review Procedure Act, R.S.O. 1990, c. J.1

s. 6(2) — referred to

Labour Relations Act, 1995, S.O. 1995, c. 1, Sched. A

Generally — referred to

s. 76 — referred to

s. 87(2) — referred to

s. 147 — referred to

s. 149 — referred to

s. 153(5) — referred to

s. 154 — referred to

***MacFarland J.*:**

1 The applicants seek judicial review of two decisions of the Ontario Labour Relations Board (hereafter OLRB). The applications involve an internal trade union dispute in the construction industry in the context of the province-wide collective bargaining scheme mandated by the *Ontario Labour Relations Act* (hereafter OLRA).

2 As it is stated at paragraph 3 of the respondent OLRB's Factum:

> The dispute involves an American 'parent union', various union locals in Ontario who are affiliated with the American 'parent union', and a grouping of those Ontario local unions known as the 'Ontario Provincial Conference'. At the heart of the dispute is:
>
> - whether Ontario bricklayers should be represented in province-wide bargaining by a bargaining agency that include *both* the American parent union *and* the Ontario Provincial Conference (as had been the case since 1978) or
>
> - whether these workers should be represented by the Ontario Provincial Conference alone, without any formal legal role for the American parent union (as contended for by the Ontario Provincial Conference).

3 The specific applications before us had their genesis in two applications (one on behalf of the bricklayers and the other on behalf of the tilers) to the OLRB under s. 154 of the *OLRA* by the Ontario Provincial Conference (hereafter OPC) on December 18, 1997 to be certified as the exclusive bargaining agent in the industrial, commercial and institutional sectors of the construction industry in the Province of Ontario. At the same time, the OPC requested the Minister of Labour to alter the existing designations under section 153(5) of the *Act* by deleting the American parent (hereafter IU) as joint employee bargaining agency.

4 Since 1978 when the government of the day enacted the province-wide bargaining provisions of the *OLRA* for the sector of the construction industry known as the "industrial, commercial and institutional sector", the applicant IU and the OPC were the "employees bargaining agency" by designation of the Minister of Labour to represent the two groups (tilers and bricklayers) in provincial bargaining.

5 In January, 1998 the IU ordered the OPC to withdraw the certification applications and the request to the Minister. In response, the OPC filed an unfair labour practice complaint with the Board alleging that the IU's order was a threat that it would place the OPC in receivership if OPC did not comply.

6 In February, 1998 at the outset of the certification hearing before the OLRB, the IU argued that OPC had no status to bring the applications: The Board rejected the argument. When the hearing resumed, the IU announced that it had just placed the OPC in receivership and told the Board at the time that the primary reason for the receivership was to withdraw the OPC's applications for certification. The Board adjourned the applications to afford OPC the opportunity to seek interim relief.

7 The OPC filed an unfair labour practice complaint alleging violations of sections 76, 87(2) and 149 of the *OLRA* and for an interim order restricting the authority of the receiver appointed by the IU to run the affairs of the OPC and its Ontario locals and preventing the IU from aborting the certification applications and taking positions in bargaining which were opposed by the Ontario membership.

8 In his decision dated April 2, 1998, Vice-Chair MacDowell granted OPC's request, holding that it had met the test for interim relief. The Board directed the IU to cease and desist interfering with the OPC's certification application and directed that collective bargaining proceed in accordance with the OPC constitution, as it always had in the past, without interference from the IU.

9 Thereafter, the OPC's applications for certification proceeded and by its decision dated April 28, 1998, the Board certified the OPC as the exclusive bargaining agency of the brick and tile units.

10 In the last paragraph of the Board's April 2, 1998 decision, it is stated:

143. In accordance with the observations above, the Board will remain seized in case there is any difficulty implementing these interim orders, or in case any further order may be required; moreover, as is perhaps obvious, the panels hearing the "main applications" can vacate these interim orders and make such other orders as may be called for in the situation which then exists.

11 The applicants are the IU and its president. They seek judicial review of the Board's interim decision dated April 2, 1998 and of the decisions which granted OPC's application for certification. The applications were commenced by separate Notices of Application for Judicial Review dated June 10, 1998. The applications were not perfected until July, 1999 and came on for hearing before us, in the usual course, on March 2, 2000.

12 It is of significance that the applicants did not seek a stay of the Board's decisions either from the OLRB or from this Court. There was no request to the Board for any variation of the orders as Mr. MacDowell had specifically invited in the last paragraph of the April 2, 1998 decision and there was no request to this Court for an urgent hearing of the within applications.

13 As the result, collective bargaining proceeded in accordance with the orders of the Board and new collective agreements entered and ratified for the 1998 - 2001 round of bargaining. Many employees have been and continue to work under those collective agreements.

14 The events which have occurred in the ongoing dispute between the IU and the OPC since the MacDowell decision are summarized at paragraph 32 of the respondent OPC's Factum as follows:

a. on July 15, 1998, the board determined that, pursuant to section 150 of the Act, the Ontario membership was entitled to elect trustees to the Canadian pension plan, which provides retirement and disability benefits to local union officers and employees of local unions, but left it to the parties to try and determine whether the Ontario locals were entitled to appoint two or three of the five trustees (Shouldice Decision, *Respondents' Application Record*, Tab 1-A);

b. on October 19, 1998, the American parent revoked the charters of the OPC and eleven of its fourteen affiliated Ontario locals. (First Bloch Decision, p.5, *Respondents' Application Record*, Tab 1-C, p.35);

c. at the same time as it revoked the charters, the trustees of the pension plans, who were also the executive board members of the American parent, began to refuse to accept contributions to the Canadian plan on behalf of the plan members who were officers or employees of the OPC or local unions whose charters had been revoked. In addition, despite the Shouldice decision, the American parent also refused to allow any of the persons elected by the Ontario locals to take office as trustees of the Canadian plan (McKee Decision, para. 8, *Respondents' Application Record*, Tab 1-E, p.55);

d. in a convention held November 7, 1998, the OPC amended its constitution to reflect the fact that it no longer had status in the International Union and renamed itself the Brick and Allied Craft Union of Canada ("BACU"). The BACU has brought proceedings to have itself recognized in its new name or alternatively as the successor union of the OPC (McKee Decision, para. 5, *Respondents' Application Record*, Tab 1-E, p. 54);

e. in December 1998, before the OPC/BACU's complaint regarding the revocation of the charters was heard by the Board, the American parent filed two actions with the Ontario Court of Justice (General Division). In the first action, the American parent sought, *inter alia*, an order requiring the OPC/BACU to deliver all its monies, bank accounts, books, documents, records, assets and other property to the American parent. The second action claimed declaratory and injunctive relief in relation to trade marks and the passing off of services. By decision dated December 23, 1998, the Ontario General Division stayed the American parent's actions pending the outcome of Board proceedings and ordered the American parent to pay $50,000 in costs to the OPC/BACU and other respondents (Decision of Mr. Justice Sharpe, *Respondents' Application Record*, Tab 1-D);

f. by decision dated May 12, 1999, the Board held that the American parent failed to comply with its own constitution when it revoked the charters of the OPC and the eleven Ontario locals (First Bloch decision, *Respondents' Application Record*, Tab 1-C);

g. in a further decision dated July 19, 1999, the Board held that the American parent breached sections 147 and 149 of the Act in revoking the charters of the OPC and the Ontario locals without just cause. (Second Bloch decision, *Respondents' Application Record*, Tab 1-D);

h. in a separate decision released on July 19, 1999, the Board held that the Ontario locals were entitled to appoint three of the five trustees to the Canadian Pension Plan (McKee Decision, *Respondents' Application Record*, Tab 1-E)

15 All of these events occurred before the applicants perfected their applications for judicial review on July 23, 1999.

16 The Supreme Court of Canada has noted the harmful effect of delay in the resolution of labour relations matters. As Cory J. noted in *Dayco (Canada) Ltd. v. C.A.W.* (1993), 102 D.L.R. (4th) 609 (S.C.C.), at 660-61:

> Unresolved disputes fester and spread the infection of discontent. They cry out for resolution. Disputes in the field of labour relations are particularly sensitive. Work is an essential ingredient in the lives of most Canadians. Labour disputes deal with a wide variety of work-related problems. They pertain to wages and benefits, to working conditions, hours of work, overtime, job classification and seniority. Many of these issues are emotional and volatile. If these disputes are not resolved quickly and finally, they can lead to frustration, hostility and violence. Both the members of the work force and management have every right to expect that their differences will be, as they should, settled expeditiously. Further, the provision of goods and services in our complex society can be seriously disrupted by long-running labour disputes and strikes. Thus, society as a whole, as well as the parties, has an interest in their prompt resolution.

17 In our view, the delay in bringing these applications is essentially unexplained. It is no answer to say that the parties were involved in other proceedings before the Board between the time of the decisions, which are the subject of these judicial review applications and the time these applications were perfected. The effect of the Board's decisions was to permit collective bargaining to proceed and new agreements to be entered and ratified. In our view, in such circumstances where the applicants seek to challenge those decisions, it was incumbent upon them to promptly bring an application to stay the decisions pending judicial review or to seek an expedited hearing pursuant to Section 6(2) of the *Judicial Review Procedure Act*. They did neither and offer no credible explanation for their failure to do so other than to say in effect - "Well, other things were going on".

18 Judicial Review is an equitable and discretionary remedy and one which the court should refuse where there is unexplained delay - this particularly so in the time - sensitive labour relations area. In our view, if ever there was a case that called out for the Court to exercise its jurisdiction to dismiss a cause for delay, *this* is that case.

19 We are all of the view that the delay here is extreme and without justification, and in the circumstances, these applications for judicial review are dismissed.

Major Partner Wind Energy Corp. v. Ontario Power Authority

Ontario Judgments

Ontario Superior Court of Justice

Divisional Court - Toronto, Ontario

M.A. Sanderson, H.J. Wilton-Siegel and J.R. Sproat JJ.

Heard: November 9, 2015.

Judgment: December 14, 2015.

Divisional Court File No.: 207/14

[2015] O.J. No. 6643 | 2015 ONSC 6902

Between Major Partner Wind Energy Corp., Applicant, and Ontario Power Authority and Attorney General of Ontario, Respondents

(19 paras.)

Case Summary

Administrative law — Judicial review and statutory appeal — Practice and procedure — Application by Ontario Power Authority to dismiss for delay Major's application for judicial review allowed — In April 2014, after review process, Major brought application for judicial review of 2011 decision denying it renewable energy contract — Major was not pursuing internal appeal process before it brought application and there was no reason why it could not have pursued application for judicial review at same time — Major knew final decision had been made on its application by March 21, 2011, at the latest — There was at least three years of unjustified delay and some prejudice to Ontario Power and indirectly to public interest.

Application by the Ontario Power Authority to dismiss for delay Major Partner Wind Energy Corp's application for judicial review. In 2010, Major submitted an application to contract to generate renewable power. An error was made in the application regarding the location of the project. Ontario Power advised Major that there appeared to be a pending application for the project lands, which would make Major ineligible to submit an application. Major corrected the error in the description of the location of the project. Ontario Power advised Major that the application was rejected and that its security deposit would be refunded. Major complained and Ontario Power agreed to review the matter. As Major heard nothing more and its deposit was not returned, it assumed that its application was being considered. In February 2011, Major learned that it was not awarded the contract because there was already an application pending for the project lands. Its deposit was returned in March 2011. Thereafter, Major pursued redress by communicating with various Ontario Power officials, cabinet ministers and government officials. A review process was undertaken by the Minister of Energy, but in September 2013, Major was advised that the matter was closed. In April 2014, Major brought an application for judicial review of the decision. The application was perfected in April 2015. A hearing was scheduled for November 2015. Counsel explained that the delay in perfecting the application was that one of his son's had developed a degenerative disorder which consumed much of his time. At no time had Ontario Power indicated that the delay in perfecting the appeal was a problem.
HELD: Application allowed.

The application for judicial review was dismissed for delay. Major was not pursuing what amounted to an internal appeal process before it brought the application. In any event, there was no reason why Major could not have pursued a bureaucratic-political solution at the same time as the application for judicial review. Major knew that a final decision had been made on its application by March 21, 2011, at the latest, when its security deposit was refunded. As a result, there was at least three years of unjustified delay. There had been some prejudice to Ontario Power and indirectly to the public interest.

Counsel

Rocco Galati, for the Applicant.

Howard B. Borlack and *David Elmaleh*, for the Respondent, Ontario Power Authority.

No One Appearing for the Attorney General of Ontario.

ENDORSEMENT

The judgment of the Court was delivered by

J.R. SPROAT J.

1 The Ontario Power Authority ("OPA") moved before Sanderson J., sitting as a single judge of the Divisional Court, to dismiss this application for judicial review on account of delay. In her reasons released October 28, 2015 Sanderson J. found that the motion should be heard before the full panel on November 9, 2015. After hearing the motion to dismiss we advised that the application for judicial review was dismissed with reasons to follow.

2 For readers who want to fully understand the background to this judicial review application, the reasons of Sanderson J. set out the history in some detail. For present purposes the relevant facts are as follows:

(a) On June 4, 2010, the applicant Major Partner Wind Energy Corp. ("Major") submitted an application to the OP A, under the feed in tariff ("FIT") rules, for a FIT contract to develop a large wind farm project. Major made an error in the legal description of the project lands.

(b) On June 29, 2010 the OP A advised Major that there appeared to already be a pending application for the project lands in question, which would make Major ineligible to submit an application. On June 30, 2010 Major emailed the OP A, copying Major's legal counsel, to advise that it nevertheless wished the application to proceed. (Applications were prioritized in the approval process based on the time stamp of the application. June 4, 2010 was the last day on which applications could be submitted to be considered in the next round of approvals. This appears to explain why Major was reluctant to re-file).

(c) On August 13, 2010 the OP A advised Major of its intent to reject the application on the basis there was already a pending application on the subject lands. Counsel for Major undertook to, and did, correct the error in the legal description within days. On August 17, 2010 the OPA advised Major that its application was rejected and that its $500,000 security deposit would be refunded within ten days.

(d) On August 18, 2010 Major emailed Ms. Fisher, a Senior Project Advisor in the Ministry of Energy and Infrastructure, to. complain that the OPA was taking an unreasonable position regarding the error in the legal description of the lands. On August 24, 2010, Ms. Fisher responded that the OPA's application review team was looking into the matter and if Major did not hear from the team soon to let Ms. Fisher know.

(e) The OPA review team did not contact Major. Major did not contact Ms. Fisher. An OPA internal email evidences that the OPA requisitioned a cheque on August 17, 2010 to refund Major the $500,000 security deposit but through inadvertence it was not processed. Major contends, and for present purposes we accept, that since the OPA had not returned its security deposit Major understood that the OPA was proceeding to consider its application.

(f) On February 24, 2011 the OPA announced the successful applicants. Major inquired why it had not been offered a FIT contract. The OPA advised that the application had been rejected August 17, 2010 as discussed above. By letter dated March 4, 2011, then counsel for Major wrote to the OPA taking the position that Major's application, "... was not dealt with in a manner consistent with the FIT rules." The OPA refunded Major's $500,000 security deposit on March 21, 2011.

(g) From March 2011 to January 2014, Paul Boreham, the principal of Major, pursued redress by communicating with OPA officials, various cabinet ministers, the Premier, government officials by writing to all members of the Liberal caucus.

(h) On September 20, 2013 the Minister of Energy and Infrastructure responded to a letter sent by Mr. Boreham to the Premier advising that, for the reasons earlier provided by the OPA, the matter of Major's application was closed.

(i) In February, 2014, Major retained Mr. Galati and its application for judicial review was filed on April 30, 2014. We accept there was a reasonable explanation for the delay to April 22, 2015 when the application was perfected.

3 Paul Boreham is the sole director and shareholder of Major. He filed an affidavit. On cross-examination he agreed that as of March 4, 2011 he knew Major's application had been rejected. He also agreed that, on Major's direction, its lawyers advised the OPA in a letter of that date that, in their opinion, pursuant to the FIT rules Major should have been offered a FIT contract. It was suggested to him that he, therefore, then had all of the information necessary to bring a judicial review application. His answer was not responsive but it was instructive. Mr. Boreham stated:

> No, that wouldn't be my first preference. No real businessman goes to the lawyer seeking to attack the province. We asked for justice, that's all. Someone who put something into litigation right away, that's an American perspective, it's not a Canadian.

Simply put, Mr. Boreham opted to pursue a bureaucratic-political solution instead of litigation.

4 Mark Binnington, the Vice President of Major, filed a three paragraph affidavit describing himself as Mr. Boreham's "right hand" and concurring with the contents of his affidavit. On the cross-examination of Mr. Binnington, he was asked if Major had sued the law firm acting for it in making its application in June, 2010. Mr. Galati answered that Major had sued its law firm for negligence and that the action had been settled. Mr. Galati raised solicitor- client privilege and further details such as when the action was commenced, the particulars of the alleged negligence and the terms of settlement were not pursued. Mr. Binnington also indicated that until Mr. Galati was retained he was not aware of the availability of a judicial review application.

5 The position of the OPA is that by March 2011 at the latest, when its security deposit was refunded, Major knew that its application had been finally rejected by the OPA. The further delay of approximately 36 months before retaining counsel to bring a judicial review application was undue delay.

6 The position of Major is that its appeals for redress to members of the legislature, the cabinet and the Premier were analogous to pursuing an internal appeals procedure. As such, delay should only be calculated from September 20, 2013 being the date upon which the Minister of Energy and Infrastructure ("the Minister") advised that the matter of Major's application was "closed".

7 In Jeremiah v. Ontario (Human Rights Commission), [2008] O.J. No. 3013 (Div. Ct.), Molloy J., for the Court, stated at para. 45:

> This Court has held that a delay in excess of six months in bringing a judicial review application may be grounds for refusing the remedy sought. In OPSEU v. The Crown in Right of Ontario (Ministry of Labour), [2001] OLRB Rep. Mar./Apr. 549 (Div.Ct.), Lederman, J. stated:
>
>> It is noteworthy that no time limits for commencing an application for judicial review and for perfection are set out in the Judicial Review Procedure Act. Nonetheless, this Court has repeatedly recognized that in judicial review proceedings the applicant is under an obligation to commence and perfect the application in an expeditious fashion. Judicial review is an equitable and discretionary remedy and an obligation remains upon an applicant to bring the matter before the court without undue delay. Failure to do so has been held to be an independent basis for the denial of the application, regardless of the merits of the case.

> While each case must turn upon its own circumstances, this Court has held that delay on the part of an applicant of six or more months in the commencement of an application and/or twelve or more months in the perfection of an application could be serious enough to warrant the dismissal of the application.

8 In *Ransom v. Ontario* [2010] O.J. No. 2430 (Div. Ct.) the applicant had been terminated from his position as an instructor at the Ontario Police College. He wrote to his supervisor objecting to his dismissal and the employer agreed that its Assistant Deputy Minister would conduct a review. The review took approximately four months to complete. It was not until five years after termination that the applicant gave notice that he intended to seek judicial review. While the Court dismissed the application for delay, it found that requesting the internal review and then awaiting its outcome was reasonable.

9 As cited in the OPA Factum, many applications for judicial reviews have been dismissed based upon far shorter periods of delay:

(a) 11 months, in *Zhang v. The University of Western Ontario*; [2010] O.J. No. 5723 (Div. Ct.)

(b) 11 - 12 months *in Holmes v. White,* [2013] O.J. No. 2886 (Div. Ct.)

(c) 13 months in *Selkirk v. Schorr,* [1977] O.J. No. 2149 (Div. Ct.)

(d) 16 months in *York University Faculty Assn. v. York University,* [2002] O.J. No. 1665 (Div. Ct.)

(e) 21 months in *Balanyk v. Greater Niagara General Hospital,* 2002 CarswellOnt 1192, 161 O.A.C. 204 (Div. Ct.)

(f) 22 months in *David Green v. Ontario Human Rights Commission,* 2010 CarswellOnt 3309, 263 O.A.C. 270 (Div. Ct.)

(g) 29 months in *Gigliotti v. Conseil d'Administration dn College des Grands Lacs*, [2005] O.J. No. 2762 (Div. Ct.)

(h) 30 months in *United Food and Commercial Workers International Union v. Welling,* [1997] O.J. No. 2704

10 Mr. Galati argued that the three years that Major spent pursuing a political resolution was analogous to the internal review in *Ransom.* This was premised on his further submission that the Minister had the authority to intervene and direct the OPA to approve Major's application. Mr. Galati acknowledged that there was nothing in the *Energy Act* that expressly conferred such authority on the Minister. He argued, however, that it was implicit in the statutory framework that the Minister had this authority. As further support for this position he cited evidence from Mr. Boreham that he had "personal knowledge that, through Ministerial intervention" a specific project had been approved. What exactly this means is unclear. Mr. Boreham did not provide any detail of the alleged intervention and he was not cross-examined on this point.

11 I do not agree that Major was pursuing what amounted to an internal appeal process. First, the OPA was the decision-maker not the Minister. Indeed, while the Minister was originally named as a respondent, by the time this matter was heard the application against the Minister had been abandoned.

12 Secondly, there is no evidence the Minister in fact directed the OPA in relation to the other application other than the vague assertion by Mr. Boreham. Even assuming for the sake of argument the Minister had directed the OPA as to how to deal with a particular application, any such direction was not authorized by statute.

13 As discussed we know little about the legal advice Major received during this three year period of delay. Major presumably obtained legal advice and retained counsel to commence the solicitor's negligence action. What is clear is that by March 4, 2011 Major had an opinion from its then counsel that its application had not been dealt with in a manner consistent with the FIT rules. Further, Major had the ability to retain counsel throughout and at some point it opted to pursue a solicitor's negligence claim which it settled. On the record before us this is not, therefore, a case in which a lack of access to legal advice contributes to establishing a reasonable explanation for delay.

14 In any event, there was no reason why Major could not have pursued a bureaucratic- political solution at the same time as it proceeded with an application for judicial review.

15 Major knew that OPA had made a final decision to reject its application by, at the latest, March 21, 2011 when the OPA refunded its security deposit. We are, therefore, left with at least three full years of unjustified delay. I also accept that there has been some prejudice to the OPA and indirectly to the public interest. The FIT program has undergone a series of fundamental changes. In fact, projects of the size of the proposed Major project are no longer dealt with under the FIT rules and are instead subject to a request for proposals process with a cap on the aggregate capacity to be allocated. To require the OPA to reconsider Major's application, and potentially award Major a FIT contract on 2010 terms, would be unfair to other applicants who met the eligibility requirement at the time. As Major did not resubmit in the current round of applications it could be unfair, in particular to the applicants in that process, if Major took up part of the capacity that would otherwise be available.

16 The application for judicial review is therefore, dismissed for delay.

17 The OPA claims $21,435 on a partial indemnity basis. Mr. Galati does not take issue with the hourly rates or time spent. He does argue that the delay in bringing the motion, and the fact that the OPA was unsuccessful in having Sanderson J. dismiss the application, should result in no order as to costs.

18 The motion to dismiss could and should have been brought much earlier. The fact that it was only brought recently means that both parties had to expend considerable time and effort on the delay motion as well as the substantive issues. In addition, the OPA was not successful in its attempt to have the delay issue decided by a single judge.

19 I agree these factors should reduce but not eliminate the entitlement of the OPA to costs. I, therefore, award OPA costs in the amount of $10,000 plus H.S.T.

J.R. SPROAT J.
M.A. SANDERSON J.
H.J. WILTON-SIEGEL J.

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2011 ONSC 5594
Ontario Superior Court of Justice (Divisional Court)

Ransom v. Ontario

2011 CarswellOnt 11092, 2011 ONSC 5594, [2011] O.J. No. 6208, 208 A.C.W.S. (3d) 3, 96 C.C.E.L. (3d) 51

Douglas Ransom (Applicant) and Her Majesty the Queen in Right of Ontario; Ontario Police College; Ministry of Community Safety and Correctional Services (Formerly Ministry of Public Safety and Security); Director Rudy Gheysen; Assistant Deputy Minister Glenn Murray (Respondents)

Chapnik J., Hourigan J., Hoy J.

Heard: September 16, 2011
Judgment: September 30, 2011
Docket: 74/09

Proceedings: affirming *Ransom v. Ontario* (2010), 83 C.C.E.L. (3d) 136, 263 O.A.C. 240, 2010 ONSC 3156, 2010 CarswellOnt 3830 (Ont. S.C.J.)

Counsel: Applicant for himself
Omar Shaha for Respondent, Ministry of Attorney General

***Chapnik J.*:**

A. Introduction

1 The applicant/moving party moves to set aside or vary a decision of Molloy J. sitting as a single judge of this Court, dismissing his application on account of delay.

2 Pursuant to s. 21(5) of the *Courts of Justice Act*, R.S.O. 1990, c. 43, a panel of the Divisional Court may, on motion, set aside or vary the decision of a judge who hears and determines a motion.

B. Background

3 On March 3, 2003, the applicant was dismissed from his position as an instructor at the Ontario Police College ("the College") ostensibly for failure to meet the requirements of his position. The dismissal took place during his probationary period as an instructor, which had commenced approximately 10 months previously, on May 13, 2002. After an internal review, the decision to dismiss him was upheld on July 18, 2003.

4 The first indication that the applicant intended to bring an application for judicial review of those decisions was on December 3, 2008. The judicial review application was issued on February 20, 2009, and perfected on March 10, 2010. On April 29, 2010, the responding parties served a motion seeking to have the application dismissed for delay.

5 The motion was heard by Molloy J. on May 13, 2010. In an endorsement with written reasons released June 2, 2010, the motions judge granted the respondents' motion and dismissed the application for judicial review on account of delay.

C. Analysis

6 It is well-settled law that a decision as to whether or not to dismiss for delay is a question of mixed fact and law and falls within the discretion of the motions judge. Moreover, the decision attracts considerable deference and should not be disturbed

absent overriding and palpable error. See *Petrykowski v. 553562 Ontario Ltd.*, 2011 ONSC 1101 (Ont. Div. Ct.) at paras. 6 and 7; and *Valleycroft Textiles Inc. v. U.N.I.T.E., Local 219*, [2006] O.J. No. 2551 (Ont. Div. Ct.) at para. 44.

7 The principal issue is whether Molloy J. gave sufficient weight to all relevant considerations. In our view, she did so.

8 Molloy J. noted that the delay totalled over seven years from the date of the applicant's dismissal to the date of perfection of this application. She properly considered the length of the delay, whether there was a reasonable explanation for it and whether the responding parties suffered prejudice as a result of the delay.

9 The applicant made lengthy submissions both in writing and orally before this Court. In general, he was attempting to re-litigate his case, arguing matters that were before Molloy J. and inserting other matters that were prejudicial and wholly irrelevant to these proceedings and to the decision made by the motions judge.

10 We do not accept those submissions. In our view, the motions judge was correct when she described the delay as "excessive by any standard". The jurisprudence of this Court has held that a delay of six months or more in commencing an application and/or twelve months or more in perfecting it could warrant dismissing the application. See e.g. *Gigliotti c. Collège des Grands Lacs (Conseil d'administration)*, [2005] O.J. No. 2762 (Ont. Div. Ct.) at paras. 29-30; and *Bettes v. Boeing Canada / DeHavilland Division*, [2000] O.J. No. 5413 (Ont. Div. Ct.) at paras. 6 and 7.

11 In this case, the delay in filing has been more than five years, and the delay in perfecting the application was more than twelve months. The evidence and the jurisprudence support the motion judge's conclusion that the delay in this case was excessive.

12 As regards the applicant's explanations for the delay - his need to obtain additional information, his pre-occupation with other litigation and his ignorance of the law - after thoroughly canvassing all of these factors, she concluded that they do not amount to a reasonable explanation or excuse for the delay. The evidence and the jurisprudence support the motion judge's findings.

13 With respect to prejudice, the applicant argued that the motions judge erred in concluding as she did that there would be prejudice to the respondents where, in fact, no specific evidence of actual prejudice was adduced.

14 Molloy J. found that there was no specific evidence of actual prejudice; however, she held at paragraphs 18 to 21 of her reasons that prejudice could be inferred from (i) the length of the delay and (ii) the nature of the remedy sought:

> There has been no specific evidence of actual prejudice as a result of the delay. However, given the length of the delay and the nature of the remedy sought, a certain degree of prejudice is obvious.
>
> Mr. Ransom seeks reinstatement into his position as an instructor at the Ontario Police College. If his application is successful, that remedy would likely not take effect until 2011 at the earliest, eight years after his dismissal. A lot has changed in policing in eight years and Mr. Ransom has been removed from it for all these years. Further, there would be an obvious disruption of staff members who have been in place for many years since Mr. Ransom left.
>
> Finally, it is clear from much of the material filed by Mr. Ransom that he has been engaged for the past seven years in extensive and bitter disputes and litigation against the Police College and many of his former police colleagues. There is considerable acrimony between these parties and a smooth transition back into this workplace could not be expected.
>
> I am satisfied that there has been prejudice to the respondents as a result of the delay.

15 The jurisprudence supporting the motions judge's conclusion that in circumstances of significant delay on important matters, prejudice can be presumed to result. Specifically in the context of a workplace dispute, this Court has held that a delay of two years in seeking judicial review of a decision affecting the parameters of the relationship between the parties was sufficient to infer prejudice. See *Ontario Provincial Conference of B.A.C. v. B.A.C.*, [2003] O.J. No. 2044 (Ont. Div. Ct.), at para. 6. In the workplace, there is a particular concern over the acrimony that may result from drawn-out litigation, and the

timely resolution of disputes is essential. See e.g. *ibid.*; and *O.P.S.E.U. v. Ontario (Ministry of Labour)*, [2008] O.J. No. 4557 (Ont. Div. Ct.) at para. 5.

16 Moreover, as Molloy J. notes, in this case the remedy requested (reinstatement) would lead to further disruption in the workplace, as the applicant has been removed from the workplace for more than seven years. Disruption to the workplace and to other staff is a form of prejudice to the respondent that can be presumed from the length of the delay and the remedy requested. The evidence and the jurisprudence support Molloy J'.s conclusion on prejudice.

D. Conclusion

17 We find no misapprehension of the evidence and certainly no overriding or palpable error in the reasoning or the conclusion reached by the motions judge.

18 Accordingly, the applicant's motion is dismissed.

19 The respondents are entitled to their costs. The College is awarded costs in the all-inclusive sum of $1,000 as requested. The other respondents did not seek costs and we do not award any.

Motion dismissed.

Court File No.: DC-22-2831

VICTOR LACHANCE AND KIRK ALBERT v SOLICITOR GENERAL OF ONTARIO AND ATTORNEY GENERAL OF ONTARIO

Applicants/Responding Party — Respondents/Moving Parties

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

PROCEEDING COMMENCED AT OTTAWA

BOOK OF AUTHORITIES OF THE MOVING PARTIES
(for a Motion to Dismiss)

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