IN THE SUPREME COURT OF YUKON

Citation: *Town of Faro v. Carpenter*, 2008 YKSC 25

Date: 20080411
S.C. No. 05-A0116
Registry: Whitehorse

Between:

Town of Faro

Petitioner

And

Les Carpenter

Respondent

And

Yukon Human Rights Commission

Respondent

Before: Madam Justice C. A. Kent

Appearances:

Gary W. Whittle	Counsel for the Town of Faro
Susan Roothman	Counsel for the Yukon Human Rights Commission
Les Carpenter	For Himself

REASONS FOR JUDGMENT

INTRODUCTION

[1] In early 2004, the Town of Faro was looking for a new Chief Administrator Officer

(CAO). A competition was held. In the first round, Mr. Carpenter did not apply although a friend of his had advised certain members of council that he was thinking of applying. An offer was made to the successful candidate at the end of that competition. That person declined the offer. As a result, there was a second competition. Mr. Carpenter applied for the position. Only one person, not Mr. Carpenter, was chosen to be interviewed in the second competition. However, just prior to the interview, the successful candidate from the first competition advised the Town that he wished to be re-considered. As a result, the Town decided to interview both the successful candidate from the first competition and the candidate from the second competition that they had already chosen to interview. After those interviews, the Town decided to offer the job to the successful candidate from round one. He accepted.

[2] Mr. Carpenter advised the Town, in writing, that he, in turn, had been told by friends that during the hiring process, one of the councillors had made disparaging remarks about natives and indicated that the Town would not be hiring a native as CAO.

[3] The councillor implicated was shown Mr. Carpenter's letter and denied that any such statements were made. Mr. Carpenter made a complaint to the Yukon Human Rights Commission alleging that the Town had breached sections 7(a) and 9(b) of the ***Yukon Human Rights Act*** , R.S.Y. 2002, c.116 by failing to give him an opportunity to compete for the position of CAO.

[4] After a preliminary investigation, the Commission decided that the complaint

warranted further investigation. In a letter to the Town dated July 9, 2004, the Commission explained to the Town that at this stage the Commission's role was neutral and that there would be an investigation and an attempt to settle the complaint. If no resolution was possible, the investigation would proceed and could result in a hearing by a board of adjudication. Through its counsel, the Town submitted a response to the complaint on August 30, 2004. On June 14, 2005, counsel for the Town wrote to the Commission requesting that rather than continuing with the investigation, a board of adjudication be convened to decide the complaint.

[5] An investigator completed a report to the Commission on July 8, 2005. Upon a review of that report and a response provided by counsel for the Town, the Commission decided not to dismiss the complaint but rather to refer the complaint for further investigation. As a result of that decision, the Town filed a petition seeking a declaration that the investigative report, the Director, the Commission and all the Commission's staff were biased, an order sealing the affidavits that had been filed in this process, a certiorari quashing the decision of the Commission to proceed with a determination of whether to appoint a board of adjudication, a certiorari quashing the decision of the Commission to continue to investigate the complaint, and a prohibition prohibiting the Commission from taking any further steps.

[6] The Town argues that the report by the investigator is biased. That report, having been considered by the Commission, taints the entire process so that the Town could never have a fair determination of the issues in this case.

[7] The investigative report, which is at the heart of this application, is a lengthy document which not only sets out the facts either as agreed upon or as the investigator found through the investigative process but also goes into issues of law in some detail. Although those explanations and conclusions of law go beyond the customary understanding of investigation, the Executive Director of the Commission described the investigator's role as being, in part, to analyze information about the complaint, interpret all relevant sections of the ***Human Rights Act***, research relevant case precedent for similar issues of fact and law and to develop an investigation plan and strategy to obtain evidence relevant to the complaint (Affidavit of Heather MacFadgen sworn December 16, 2005).

[8] The investigative report points out, among other things, that the Town had refused to turn over certain information or provide access to members of Council for interviews. It is correct that the Town had refused to provide copies of the resumes of the other candidates for the position, on the basis that it could not do so because the information was private and the Town did not have the consent of those applicants.

[9] In its response to the investigative report, the Town provided a detailed analysis of the report alleging that several statements and conclusions showed bias on the part of the investigator. The Town says that the manner in which the investigator described the Town's refusal to turn over information that the Town thought was private was biased, his summary of the evidence in agreement was inaccurate, he applied the wrong test in

defining the framework to be applied in determining whether or not there had been discrimination, he made submissions with respect to the state of the law, some of which were incorrect, some of which were irrelevant and some of which went beyond his role as investigator, there was conjecture, he purported to weigh evidence that had been gathered and he called into question the credibility of the councillor who had been alleged to have made the statements at the root of this complaint.

[10] As stated above, the Town argues that all of the complaints cited above result in a biased report and that report "has poisoned the well such that the Director, the Commission, and any board of adjudication have been irremediably tainted thereby".

Preliminary Issues

[11] Before dealing with the Town's application, I heard an application made by counsel for the Commission and Mr. Carpenter for an order appointing counsel for Mr. Carpenter. I denied that application. In my reasons, I also gave directions about the scope of submissions counsel for the Commission could make on the Town's application.

[12] At the commencement of the hearing of the Town's application, counsel for the Commission made a preliminary application that the Town's application is premature. The submission was that since the Commission had made no decision other than to send the matters back for further investigation, there was no basis for finding bias.

[13] I reject that submission. The Town's position is that the bias shown by the

investigator taints the entire process. If the Town is correct, then that is a matter which exists at the present time and would mean that nothing more could occur on this complaint. If there is bias, then the entire process must be halted. (***Great Atlantic & Pacific Co. of Canada v. Ontario (Minister of Citizenship)***), 1993 Carswell Ont. 1893 (Ont. Div. Ct.)

Analysis

[14] A complaint governed by the *Human Rights Act* must follow the procedure set out in the *Act*. By section 20, a person may make a complaint to the Commission. The Commission, after investigation, has the choice either to dismiss the complaint, try to settle the complaint on terms agreeable to all parties, or request that a board of adjudication decide the complaint (section 21).

[15] Section 22 establishes a panel of adjudicators to adjudicate complaints. The panel must consist of not less than three members. They are appointed by the Legislature for a term of three years. A board of adjudication is required to conduct its hearing in accordance with the principles of fundamental justice. It has the powers of a board appointed under the *Public Inquiries Act.*

[16] Assuming, without deciding, that the report of the investigator is biased in some respects, and assuming again without deciding that that biased report taints the Commission, I cannot agree that it goes so far as to taint a board of adjudication. Since no board of adjudication has been ordered, the only way that there could be a finding of

bias is if there is something in the structure of the complaint process that would mean that a biased investigative report results automatically in finding of bias by an as-yet unnamed board of adjudication.

[17] The test for reasonable apprehension of bias is well-established and was set out by de Grandprè J., in dissent, Martland and Judson JJ. concurring, in Committee for ***Justice and Liberty v. National Energy Board*** (1976), [1978] 1 S.C.R.369 at 394:

> [T]he apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically and having thought the matter through-conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.

[18] The party alleging bias bears the burden of proof. Further, as noted by the Supreme Court in ***Bell Canada v. Canadian Telephone Employees Assn***., [2003] 1 S.C.R. 884, 2003 SCC 36 at para. 24:

> ... a tribunal is presumed to have acted without bias, and the onus of establishing a reasonable apprehension of bias is on the party so alleging. Speculation is insufficient; the standard of proof is the civil

standard. See David Phillip Jones & Anne S. de Villars, Principles of Administrative Law, 3d ed. (Toronto: Carswell, 1999) at 401-402.

[19] Finally, the standard a tribunal will be held to was addressed in ***Bell Canada***. In that case, the Supreme Court noted at para. 22 that the degree of impartiality required is dependent upon the nature and function of the tribunal. A tribunal that is primarily adjudicative in nature will be required to possess a higher level of impartiality that a multi-function tribunal (***Bell Canada***, at para. 21; ***Canada Safeway Ltd. v. Alberta (Human Rights and Citizenship Commission)*** (2000), 86 Alta. L.R. (3d) 366, 2000 ABQB 897, aff'd 2003 ABCA 246, leave to appeal to S.C.C. refused, [2003] S.C.C.A. No. 448, at para. 69). However, a degree of flexibility is required and administrative tribunals should not be held to the same standard as a court ***Canadian Pacific Ltd. v. Matsqui Indian Band,*** [1995] 1 S.C.R. 3, at para. 82; 2474 - 3174 ***Quebec Inc. v. Quebec (Régies des permis d'alcool),*** [1996] 3 S.C.R. 919, at para. 45).

[20] A reasonable apprehension of bias will not arise simply because the Commission performs a variety of functions. In ***Bell Canada***, the Supreme Court held at para. 40, that the overlapping functions of the Canadian Human Rights Commission (CHRC) were not unusual and did not, by themselves, give rise to reasonable apprehension of bias. The CHRC had responsibility for formulating guidelines, investigating complaints and prosecuting those complaints before the Canadian Human Rights Tribunal. This structure served an important purpose from an efficiency and expertise perspective and did not interfere with the Tribunal's impartiality (para. 41).

[21] Similarly, in ***Régie***, Gonthier J. commented at para. 60 that "the decision to hold a hearing does not amount to a prior determination of the validity of the allegations." Thus, the fact that the Régie played a role in the investigation, summoning and adjudication of license infractions, did not in itself raise a reasonable apprehension of bias.

[22] However, impartiality will become an issue where the same person is involved in various stages of the complaint process. In, ***Régie***, the S.C.C. held at para. 60 that a reasonable apprehension of bias arose in respect of the liquor licensing and regulation regime because there was a possibility that the director could be involved in the all three stages of a particular case. Under the applicable legislation, the director could be involved in initiating complaints, determining whether a hearing should be held, constituting the hearing panel and even sitting on the panel. According to Gonthier J. at para. 60, some form of separation among the directors involved at the various stages was necessary to counter the appearance of impartiality.

[23] A similar conclusion was reached in ***Canada Safeway***. In that case the court considered whether a reasonable apprehension of bias arose in respect of the Alberta Human Rights Commission because the Chief Commissioner has the power to grant an appeal of the Director's decision, as well as appoint the hearing panel. The Court held at para. 85 that the impartiality requirement was met as long as the same person did not make the decision to hold a hearing and participate in deciding the merits of the complaint. As the Chief was barred from sitting on the panel in any case where he made

the decision to grant the appeal, no reasonable apprehension of bias arose. According to the court at para. 84, the Chief merely played a "gate-keeping" role; it was the panel members themselves, not the Chief, who heard the parties' submissions and decided the merits of the issue.

[24] In this case, a board of adjudication is certainly separate from the investigator and the Commission. A board of adjudication is not the same body who conducts the investigation and adjudicators are not appointed or accountable to the Commission. There is nothing that would allow me to find that a biased investigator or Commission presumptively creates a bias in a board of adjudication. Therefore, on the complaint of bias, the Town’s application is denied.

[25] Although the Town has also argued that there has been an unreasonable delay such that the complaint should be dismissed. I am guided by the decision of the Supreme Court of Canada in ***Blencoe v. British Columbia (Human Rights Commission)*** 2000 Carswell BC 1860. Although the court found institutional problems with the process, Bastarache, J. said:

> [t]here must be more that merely a lengthy delay for an abuse of process; the delay must have caused actual prejudice of such magnitude that the public's sense of decency and fairness is affected (para. 133).

[26] There is no evidence that that is the case here.

[27] I am also guided by the decision of Darichuk J. who ordered that a board of adjudication be struck to deal with a complaint rather than refer it back for further investigation. (***Trimble v. Yukon (Public Service Commission***), 2006 Carswell Yukon). That case involved an investigative report which the court found was deficient.

[28] Fundamental to this complaint is an issue of credibility. The statements were either made or not made. A board of adjudication is the best way to determine that question. That board could, pursuant to its powers, compel the protection of documents if the board determined that they were necessary to decide the question. The hearing would allow both sides to call as witnesses those people who each thought was relevant to decide the issues. A failure by either side to call certain witnesses would likely allow the board of adjudication to draw adverse inferences.

[29] In the result, the petitioner's application is denied. This matter shall proceed directly to a board of adjudication.

Madam Justice C.A. Kent