CITATION: HAZINEH v. McCALLION, 2012 ONSC 3833
COURT FILE NO.: CV-12-1130-00
DATE: 2012-09-04

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: ELIAS HAZINEH

Applicant

v.

HAZEL McCALLION

Respondent

BEFORE: Sproat J.

COUNSEL: Thomas A. Richardson, Monique Atherton
for the Responding Party/Applicant

Freya J. Kristjanson, Amanda Darrach
for the Moving Party/Respondent

HEARD: June 25, 2012

E N D O R S E M E N T

INTRODUCTION

[1] Elias Hazineh ("Hazineh"), has by notice of application, initiated a proceeding pursuant to the *Municipal Conflict of Interest Act,* R.S.O. 1990, c.M. 50 ("*MCIA*") to remove Hazel McCallion ("McCallion"), the Mayor of Mississauga, from office.

[2] To provide some context, the position of Hazineh is as follows:

(a) In 2007, the Region of Peel approved an increase to development charges subject to transitional measures that would "grandfather" projects which had met certain milestones.

(b) McCallion voted on the development charges by-law at meetings on September 6, 13 and October 14, 2007, and moved an amendment that extended the transition period.

(c) The transitional provisions, and in particular the amendment moved by McCallion, could benefit her son Peter McCallion, due to his interest in World Class Developments ("WCD"), a company that had proposed a major development and which could benefit from the transitional provisions.

[3] This motion is brought on behalf of McCallion seeking an order that the application be converted to an action, or that the trial of various issues be ordered. In other words, McCallion seeks an order requiring that all evidence be given by witnesses in court.

DOES THE MCIA REQUIRE A TRIAL IN ALL CASES?

[4] As submitted in McCallion's factum:

> The MCIA contemplates that although commenced by way of application, the matter will proceed as an action, to be tried and determined by a judge.

[5] In argument, Ms. Kristjanson submitted that the *MCIA* requires a trial unless the parties consent to the matter proceeding by application based upon affidavit evidence and cross-examination transcripts. Ms. Kristjanson placed considerable relevance upon the legislative history to which I now turn.

[6] The *MCIA*, S.O. 1972, ch. 142, provided that:

a) contraventions may be "tried and determined by a judge" (s. 3(2));

b) a ratepayer may apply to the judge by way of originating notice in the manner prescribed by the rules of court..." (s. 4(1));

c) the ratepayer shall set out the grounds in the Notice of Motion (s. 4(2)); and

d) an appeal lies to the Divisional Court in accordance with the rules of court and the Divisional Court may give any judgment that ought to have been pronounced (s. 6).

[7] The *MCIA* was revised in 1983. The provisions referred to above in (a), (b) and (c), which referred to the case being brought by way of originating notice, on grounds to be stated in the notice of motion, to be "tried and determined" by a judge, were unchanged. The appeal provision was, however, changed to provide the Divisional Court with the additional option (instead of giving the judgment that should have been pronounced), to "grant a new trial...and remit the case to the trial judge or another judge...".

[8] The only material change to the current version of the *MCIA* applicable to this proceeding, is that it refers to the proceeding being commenced by notice of application instead of originating notice.

[9] At the hearing of the motion I asked that counsel conduct further research to see if the legislative history, such as statements in the Legislature, shed any further light on the proper interpretation. Having reviewed written submissions, there is nothing in the legislative history that is helpful.

[10] The distinction between an action and an application to court is well known and understood. It would make no sense for the Legislature to use the well known expression “apply” if the intention was that a trial was always required.

[11] If the Legislature had intended that conflict of interest issues always be adjudicated at trial, that intent could easily have been stated. For example, the *Election Act*, R.S.O. 1990, c. E-6, provides, in s. 99(1), that the validity of an election “shall be tried and determined by an action commenced in the Superior Court of Justice.”

[12] While acknowledging that the *MCIA* is not frequently litigated, not one case, article or text was cited to support the interpretation that a trial is always required.

[13] A number of public policy considerations weigh in favour of giving the words of the *MCIA* their ordinary meaning, and allowing challenges to be heard on application, subject to the discretion of the judge to order the trial of an issue or convert the proceeding to an action. These include:

(a) an application is generally regarded as a more expeditious and less expensive proceeding than a trial;

(b) as reflected in the cases, and as a matter of common sense and experience, many cases do not involve issues of credibility or seriously contested facts. There would be no point in requiring such cases to proceed only by trial; and

(c) As aptly put by Wood J. in *Jaffary v. Greaves*, See note 2008 CanLII 36159 (Ont. S.C.) at para. 24:

> … the procedure was intended to be a summary one allowing quick access to the courts and equally speedy resolution. If private citizens are to undertake the work of policing municipal democracy, access to the courts must be available to them and not foreclosed either through lack of availability or prohibitive cost.

[14] In contrast, I see no public policy considerations that weigh in favour of an absolute rule requiring a trial.

[15] Counsel for McCallion referred to the potentially serious and important impact of a decision and submitted that it is critical that the process be transparent and that evidence be heard in court. I have three responses:

(a) as observed by MacPherson J., as he then was, in *Toronto (City of) v. Canadian National Railway Co.*, 1997 CanLII 4481 (O.N.C.A.), at para. 21:

> ...the rules provide for different types of litigation depending on the nature of the issues that need to be resolved. The application process is as much a 'day in court' as the trial process. The relevant question is not: how complex is this litigation? Rather the relevant question is: what is the nature of this litigation?

(b) the hearing will be transparent because all of the evidence considered will be on the public record; and

(c) should the interests of justice require that witnesses testify in court, that can, and will, be ordered.

[16] Set against what I regard as a crystal clear indication of legislative intent, the indicia of legislative intent relied upon by McCallion are, in my opinion, weak and inconclusive. These indicia are as follows:

(a) Section 8 refers to an alleged contravention being "tried and determined". The use of the word "tried" indicates a trial is required.

(b) Section 8 is preceded by the heading, "Action Where Contravention Alleged". The use of the word "Action" indicates a trial is required.

(c) While first referred to in reply submissions, McCallion argued that the appeal provision now refers to the Divisional Court having the power to order a "new trial" which presupposes a trial has taken place.

[17] As to (a), the reference to "tried" is equivocal. The *Canadian Oxford Dictionary* includes in its definition: "proven or tested by experience or examination". The judge deciding an application could be described as having "tried" the case. As to (b), s. 70 of the *Legislation Act*, 2006, S.O. 2006, c. 21, Sch. F, provides that headings are inserted for convenience only and do not form part of the statute. As to (c), the *MCIA* s. 10 appeal provision is similar to s. 134 of the *Courts of Justice Act,* R.S.O. 1990, c. 43 which provides that an appellate court may make any order that the court or tribunal appealed from could have made or "order a new trial". Section 134 of the *Courts of Justice Act* is of general application and would, therefore, apply to an appeal of a judgment rendered on an application. In the context of s. 134 a "new trial" must, therefore, be intended to include an order to re-hear an application.

[18] As stated by Professor Sullivan:

> Today, there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> Ruth Sullivan, Sullivan on Construction of Statutes, 5th ed. (Markham, Ont.: LexisNexis Canada Inc., 2008), at p. 1.

[19] Applying this principle, the *MCIA*, read in context and giving the words their ordinary meaning, contemplates the question of contravention being determined on an application without the necessity of trial. In my view, the scheme and object of the *MCIA* and the intention of the Legislature support this conclusion.

SHOULD THE APPLICATION BE CONVERTED TO AN ACTION AT THIS TIME?

[20] As a preliminary point, I note that even if I do not today order a trial (or the trial of issues) I may still require that certain witnesses give their evidence in court. In this regard, rule 38.1(1)(b) of the *Rules of Civil Procedure* R.R.O. 1990, Reg. 194 provides that I may order that the whole application or any issue proceed to trial. Rule 39.03(4) provides:

> With leave of a presiding judge or officer, a person may be examined at a hearing of a motion or application in the same manner as at a trial.

[21] In *Rare Charitable Research Reserve v. Chaplin,* 2006 CanLII 50901 (Ont. S.C.), at para. 28, Spies J. discussed the fact that an application judge can consider a mix of affidavit and oral evidence, as follows:

> I have grave doubts about the ability of the court to decide this matter entirely by way of application. Counsel for the Applicants conceded that it is likely that there will be a need for some viva voce evidence. The fact that some viva voce evidence is likely required is not fatal however, as that can be done in the context of an application. The applications judge could consider a mix of affidavit and

> viva voce evidence to determine credibility issues. There is more flexibility in the procedure for an application to stage issues for determination. Even if certain issues of fact need to be tried, the court can direct the trial of those discrete issues and the order in which those issues should be determined, without converting the entire application to an action.

[22] Counsel for McCallion did not take issue with the fact that the application judge can consider a mix of affidavit and oral evidence but submitted that this was exceptional.

[23] I now turn to whether I should now order a trial or the trial of issues. Both parties cite *Collins v. Canada* (2005), 76 O.R. (3d) 228 (Ont. S.C.), at para. 5 as to the factors relevant to whether an application should be converted to an action. These are:

1. Whether there are material facts in dispute;
2. The presence of complex issues requiring expert evidence and/or a weighing of the evidence;
3. Whether there is a need for the exchange of pleadings for discoveries; and
4. The importance and impact of the application and of the relief sought.

[24] The arguments focused on the first *Collins* factor, whether there are material facts in dispute. The application is supported by the affidavit of Hazineh and the affidavit of Carolyn Parrish ("Parrish"). In anticipation of bringing this motion, which if successful would mean affidavit evidence need not be filed, the only affidavit filed on behalf of McCallion is that of a law clerk. This affidavit simply reviews material filed by Hazineh, and the evidence at the City of

Mississauga Judicial Inquiry ("the Inquiry"), with a view to highlighting facts that may be in dispute.

[25] At paragraph 23 of the McCallion factum the following examples of material facts in dispute are provided:

(a) Whether the Mayor communicated with Mississauga city staff with respect to the development charges;

(i) Under the heading "Knowledge of the WCD Site Plan Application:" Ms. Parrish acknowledges that staff and the Mayor stated that the Mayor did not want to be briefed on the WCD project, but states that there was "no further explanation" as to why the Mayor declined to be briefed.

(ii) Mayor McCallion testified that she declined the briefing from Ms. Ball because of her understanding of her obligations around a conflict. The Mayor stated that this was an issue on which staff should not be briefing the Mayor.

(b) The extent of the Mayor's knowledge of the impact of the Development charges on WCD;

(i) At the inquiry, Peter McCallion testified that Mayor McCallion had no involvement with the development charges.

(ii) Mr. Hazineh alleges that she had knowledge and involvement.

(c) The extent of the Mayor's discussions with WCD and its principals;

(d) Whether at the time of the votes, there could have been an indirect pecuniary interest, given that City Planning Staff in September, 2007 were of the view that WCD had not made a qualifying site plan application. This view did not change until January, 2008, when City legal staff reached a different conclusion.

[26] I am not satisfied that when all of the evidence is filed, these will be areas of dispute.

(a) As to (a), Parrish stating there was "no further explanation" at the time, and the Mayor later offering an explanation, does not amount to a fact in dispute.

(b) As to (b), Hazineh does not claim any direct knowledge so that whether these are disputed facts will depend upon what admissible evidence there is before the court.

(c) As to (c), the extent of the Mayor's discussions with WCD, whether there are disputed facts and, if so, their significance to the matters before me, will only be known when the evidence is actually put before the court.

(d) As to (d), it appears to be a matter of documentary record that the view of staff changed. This paragraph appears to suggest an issue of law not a material fact in dispute.

[27] Further, and more importantly, I do not think that the court should, on a preliminary motion, be asked to review a 2600 page motion record, (much of it Inquiry transcripts and exhibits that are arguably completely inadmissible or inadmissible for the truth of their contents), and on that record attempt to predict what may turn out to be material facts in dispute.

[28] I expect that it will prove necessary for a number of witnesses to testify in court. That can only be determined when we have a reliable record containing the admissible evidence relied upon by the parties.

[29] The alternatives before me on this motion, however, are as follows:

(e) at this preliminary stage, with no substantive evidence filed on behalf of McCallion, to order a trial (or the trial of a series of issues which amounts to the same thing); or

(f) to order that affidavits be filed by both sides, together with cross-examinations transcripts, and transcripts of any additional witnesses examined under Rule 39.03 and on that basis make a decision as to the procedure to be followed.

[30] The advantages to (b), in my opinion, are as follows:

(a) it preserves the possibility of allowing Hazineh the more expeditious and less expensive mode of proceeding by application;

(b) all of the evidence would be in front of me so that I could make a fair and reliable determination of what material facts are in dispute;

(c) if all or part of the application is converted to an action the time spent on cross-examinations will not be lost as they will likely suffice in place of the examinations for discovery that would otherwise be required. Further, time spent on examining witnesses on the pending application will save time if their evidence at trial can be more focused or dispensed with entirely.

[31] With respect to the other *Collins* factors:

(a) This does not appear to be a case involving complex issues or expert evidence.

(b) There is no need for pleadings and discoveries as the notice of application, affidavits and cross-examination will serve the same function.

(c) There is considerable importance and impact to the application and the relief sought, namely the removal of a duly elected public official.

> The *MCIA*, however, contemplates this important matter being determined on application and, as MacPherson J. quoted above observed, the application process is as much a "day in court" as the trial process.

[32] I find myself at the same point as Spies J. in *Chaplin* at para.30, in which she stated:

> Having considered the matter, it is not clear to me that conversion of the entire application to an action is inevitable. The Applicants should be afforded every opportunity to advance their position that this case can be decided in whole or in part by way of application. That will likely be the most cost effective way of determining the issues and is the preferred route if it is feasible. Their right to do so cannot be properly determined in this case before all the affidavits are filed and all cross-examinations take place.

[33] The motion by McCallion to convert this proceeding to an action is dismissed without prejudice to either party making a motion respecting the appropriate procedure to follow when all of the evidence relied upon is before the court.

NEXT STEPS

[34] The Hazineh and Parrish affidavits contain extensive reference to testimony and exhibits at the Inquiry. While it was not the subject of argument, and no ruling was requested on the motion, I understood the preliminary view of Ms. Kristjanson (in fairness to her this was in response to a question during argument and she is free to consider her position further) to be that:

(a) evidence from the Inquiry could probably be relied upon by Hazineh in seeking to establish when certain facts came to his knowledge for the purpose of the limitation period in s. 9(1) of the *MCIA*;

(b) evidence of McCallion's testimony at the Inquiry is not admissible having regard to s. 9 of the *Public Inquiries Act;* and

(c) the evidence of other witnesses is not admissible as it is hearsay and given in a proceeding involving different parties conducted for a different purpose.

[35] Counsel should, therefore, consider whether there are issues between them as to the admissibility and relevance of the Inquiry evidence. If there are, then Counsel should consider whether such issues should be addressed on a preliminary motion.

[36] Many of the facts relied upon are not contentious, such as what transpired at various Council and other meetings and what written or email communications were exchanged among the interested parties. It would save the parties time and money, and assist me, if the parties were able to agree upon a chronology and attach documents that may be relevant. Witnesses could then reference these documents which might expedite their evidence and avoid the same document being included in multiple affidavits. I cannot order cooperation or agreement but certainly a failure to cooperate or agree relating to non-contentious matters could be significant as to costs.

[37] Subject to the foregoing counsel should discuss a schedule for the filing of further affidavits by the applicant and respondent, cross-examinations, and examination of additional witnesses. If counsel cannot agree on a schedule they may write to me with their proposed schedule and the reasons that support it. If an oral hearing is requested to address scheduling that can be arranged at 9:00 a.m. on a convenient day.

[38] It may make sense to schedule a one day hearing later this year, after cross-examinations have been completed, to address procedural matters including whether certain witnesses will give oral evidence. As to hearing dates, I have a fixed trial commencing January 7, 2013 for six weeks so my next availability would be commencing the week of March 11, 2013.

CONCLUSION

[39] The motion by McCallion is dismissed. Failing agreement on costs, Hazineh shall provide written cost submissions within fourteen days. McCallion shall respond within a further ten days. Any reply shall be submitted within a further five days.

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Sproat J.

DATE: September 4, 2012

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ENDORSEMENT

Sproat J.

DATE: September 4, 2012