

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT
Sachs, King and Doyle JJ.

BETWEEN:)
)
HAROLD JONKER) *James Manson, for the Applicant*
)
Applicant)
)
– and –)
)
THE TOWNSHIP OF WEST LINCOLN) *Thomas G. Hanrahan and Andrea Mannell,*
) *for the Respondent*
Respondent)
)
) **HEARD at Hamilton:** January 30, 2024

H. SACHS J.

Overview

- [1] The Applicant, Mr. Jonker, while serving as a Councillor of the Respondent, the Township of West Lincoln (the “Township”), participated in the January/February 2022 Freedom Convoy protest in Ottawa against government lockdowns and Covid-19 vaccine mandates. A complaint was made about his conduct and, upon investigation by the Township’s Integrity Commissioner, Mr. Jonker was found to have contravened two sections of the Township’s Code of Conduct for his actions during the protest.
- [2] Based on that finding (which it was legally obligated to accept as binding), The Township’s Council decided to reprimand Mr. Jonker and suspended his remuneration as a Council member for 30 days. He was also required to account for, and donate to a local charity, the value of any food or fuel that he received while participating in the Freedom Convoy (the “Decision”).
- [3] This an application to judicially review the Decision. A motion to add the Integrity Commissioner to this application was denied on March 27, 2023. That motion was brought more than four months after the expiry of the 30-day period set for bringing an

application for judicial review set out in the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1 (the “*JRPA*”).

- [4] The basis for Mr. Jonker’s challenge to the Decision is his allegation that the Council did not consider his s. 2 rights under the *Canadian Charter of Rights and Freedoms* when they made the Decision. In *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 SCR 395, and subsequent decisions – including, most recently, *Commission scolaire francophone des Territoires du Nord-Ouest v. Northwest Territories (Education, Culture and Employment)*, 2023 SCC 31 – the Supreme Court has made it clear that to survive review by a court a discretionary decision by an administrative tribunal must consider the *Charter* values that were relevant to the exercise of its discretion.
- [5] Mr. Jonker commenced his application to judicially review the Decision one day after the expiration of the 30-day period set out in the *JRPA*. He also moved retroactively for a one-day extension of time within which to commence his application.
- [6] For the reasons that follow, I would grant the motion for an extension of time, but dismiss the application on its merits. Mr. Jonker’s s. 2 *Charter* rights were relevant to the exercise of the Integrity’s Commissioner’s discretion, which was to make a finding on whether Mr. Jonker’s actions at the Freedom Convoy protest violated the Township’s code of conduct. The Township was bound by those findings. Any discussion of Mr. Jonker’s s. 2 *Charter* rights at the penalty phase would have amounted to an attempt to undermine the Integrity Commissioner’s conclusion that Mr. Jonker’s s.2 *Charter* rights did not excuse the misconduct at issue. In other words, Mr. Jonker’s s. 2 *Charter* rights were not relevant to the exercise of the Council’s discretion in dealing with penalty.

Factual Background

- [7] Mr. Jonker is a truck driver who also operates a trucking company. He served as an elected Councillor for the Township from 2018 to 2022. He participated in the Freedom Convoy Protest in Ottawa in late January and early February 2022, self-identifying as a leader and a spokesperson.
- [8] On February 6, 2022, the Mayor of Ottawa declared a state of emergency in Ottawa pursuant to the *Emergency Management and Civil Protection Act*, R.S.O. 1990, c. E.9. On February 14, 2022, the Federal Government invoked the *Emergencies Act*, R.S.C. 1985, c. 22 (4th Supp.) and declared a public emergency. Mr. Jonker’s participation in the protest continued after the invocation of the *Emergencies Act*.
- [9] Because of his participation, Mr. Jonker was the subject of a complaint filed under the Township’s Complaint Protocol and s. 223.4(1) of the *Municipal Act, 2001*, S.O. 2001, c. 25 (the “*Act*”), alleging that he had violated numerous provisions of the Township’s Code of Conduct for Members of Council and Local Board Members (the “*Code*”).

The Integrity Commissioner's Report

- [10] Pursuant to s. 223.3(1) of the *Act*, a municipality is authorized to appoint an Integrity Commissioner “who reports to council and who is responsible for performing in an independent manner” a number of functions assigned to it by the municipality. These functions include “the application of the code of conduct for members of council”. The Township appointed the law firm of Aird & Berlis LLP as its Integrity Commissioner.
- [11] Section 223.4 of the *Act* sets out the powers that the Integrity Commissioner has if they conduct an inquiry into a complaint “about whether a member of council... has contravened the code of conduct applicable to the member”. The Integrity Commissioner conducted such an inquiry and issued its report at the end of that inquiry.
- [12] In its Report the Integrity Commissioner identified their concern as follows:
54. Our concern does not lie with the Councillor’s participation in the peaceful component of the Demonstration, but with his participation as a leader and spokesperson for the Freedom Convoy organization, particularly after the federal public emergency declaration on February 14, 2022. His participation in and support of an illegal occupation was wholly inappropriate.
- [13] In its Report the Integrity Commissioner mentions Mr. Jonker’s s.2 *Charter* rights in the following way:
57. Our finding is not intended to derogate from the Councillor’s freedom of expression or right to demonstrate peacefully. The issue is that the Councillor remained a vocal representative of the Demonstration after it had been deemed to be unlawful, while at the same time continuing in his role as a member of Council. At that point, a clear conflict between the two roles emerged and the Councillor was no longer able to fulfill his duty of loyalty to the Township. The Councillor ought clearly to have known that the Demonstration was unlawful and that his participation in an illegal activity could not have promoted public confidence nor could it in any way be viewed as upholding the spirit and letter of the laws of Ontario and Canada as he is required under the Code.
- [14] The Report concluded that Mr. Jonker had contravened s. 4.1(g) of the Code, which required that Council Members “recognize that they are representatives of the Township and that they owe a duty of loyalty to the residents of the Township at all times.”
- [15] The Report also concluded that Mr. Jonker had violated s. 7.3 of the Code by receiving food and fuel during the Freedom Convoy protest. Central to this finding was the conclusion that Mr. Jonker’s role in the Freedom Convoy “was or could be perceived to be indirectly related to his role as a member of Council”. Thus, he was required to

account for any benefits he received, and he failed to respond to communications from the Commissioner about those benefits.

- [16] The Report concluded by providing Council with its recommendations on penalty.

[Mr. Jonker] has contravened both Sections 4.1(g) and 7.1 of the Code. Based on these violations of the Code, we recommend, on the grounds of general deterrence and in order to maintain public confidence with respect to the ethical framework put in place by the Council to govern its members, that Council denounce the actions of the Councillor by way of a formal reprimand and impose a suspension of his remuneration as a member of Council equal to thirty (30) days.

- [17] The Commissioner also recommended that certain remedial measures be imposed on Mr. Jonker in relation to the benefits he received.

The Council's Decision

- [18] Pursuant to s. 223.4(1)(5) of the *Act*, “if the Commissioner reports to the municipality that, in his or her opinion, the member has contravened the code of conduct”, Council “can impose either of the following penalties”, namely, “1. A reprimand. 2. Suspension of the remuneration paid to the member in respect of his or her services as a member of council...”
- [19] On July 18, 2022, Council received the Commissioner’s Report and issued its Decision to sanction Mr. Jonker. In particular, the Council denounced his actions; issued a formal reprimand, a 30-day pay suspension and directed Mr. Jonker to account for the benefits he received and donate the value of those benefits to a community centre.
- [20] Mr. Jonker complied with the penalty decision.

Issues Raised

- [21] There are two issues on this application. First, should Mr. Jonker be granted a retroactive extension to file his application? Second, if the extension is granted, should Council’s Decision be set aside?

The Motion for an Extension

- [22] Pursuant to s. 5(2) of the *JRPA*, this court has the discretion to grant the requested extension. In order to grant an extension, two mandatory conditions must be met (1) there must be apparent grounds for relief and (2) no substantial prejudice or hardship will result to any person affected by the delay. Other relevant considerations include the length of the delay and the explanation for that delay.

- [23] In this case the delay was one day. The explanation for the delay, which was not contradicted, was counsel error in counting the days. The other delays in perfecting the appeal have been satisfactorily explained and the Respondent could point to no prejudice, other than presumed prejudice, that would justify denying the extension. While, as explained below, I would dismiss the application on the merits, there were “apparent grounds” for relief. Thus, the requested extension is granted.

Should the Council’s Decision be set aside?

- [24] I accept Mr. Jonker’s submission that when making its decision on penalty (which was a discretionary decision), Council was required to consider all relevant *Charter* rights. Thus, the question becomes whether Mr. Jonker’s s. 2 *Charter* rights were relevant to Council’s decision on penalty.
- [25] To answer this question, it is important to highlight the structure of the *Act*. As set out above, it is the Integrity Commissioner who is given the power to determine whether a member of Council has violated the Municipality’s code of conduct. As Mr. Jonker concedes, Council is bound by the Integrity Commissioner’s findings with respect to whether there has been misconduct. If the Integrity Commissioner has made no finding of misconduct, Council has no further role. If the Integrity Commissioner makes a finding of misconduct, Council may make a decision as to which penalty to impose. In doing so it may consider any recommendations as to penalty made by the Integrity Commissioner and may accept, reject or modify those recommendations. In Mr. Jonker’s case, Council accepted the Integrity Commissioner’s recommendations as to penalty.
- [26] In his factum, Mr. Jonker submitted that Council’s decision on penalty must be set aside for two reasons:
- A. The Council did not attempt to apply the well-know *Doré* analysis and balance the limitation of Mr. Jonker’s *Charter* rights while considering whether to impose a penalty on Mr. Jonker; and
 - B. Even if Council did undertake such a balancing exercise, the Decision does not reflect a proportionate balance between Mr. Jonker’s *Charter* rights and the Code’s objectives.
- [27] According to Mr. Jonker, Council’s penalty decision “unquestionably limited Mr. Jonker’s *Charter* protection because it punished Mr. Jonker for his participation in a political protest.” There is no issue that the *Charter* rights at issue are Mr. Jonker’s s. 2 rights of freedom of expression, freedom of peaceful assembly and freedom of association.
- [28] I agree that Council’s decision had the effect of punishing Mr. Jonker for his participation in a political protest. However, the reason that Council decided to punish Mr. Jonker for

his participation in a political protest is that the Integrity Commissioner decided that Mr. Jonker's participation in that protest constituted misconduct.

- [29] The Integrity Commissioner made a distinction between what he called the "peaceful stage of the protest" (which was before the federal government invoked the *Emergencies Act*) and the stage where the "Demonstration was deemed to be unlawful" (after the government invoked the *Emergencies Act*). The Integrity Commissioner was clear that Mr. Jonker committed no misconduct during the peaceful stage, but that once the demonstration "was deemed unlawful" Mr. Jonker's s. 2 *Charter* rights no longer protected his conduct.
- [30] Mr. Jonker argued before us that the conclusion that the demonstration became "unlawful" after the *Emergencies Act* was invoked is unreasonable. Therefore, the conclusion that Mr. Jonker lost his s. 2 rights once that legislation was invoked is also unreasonable.
- [31] There may or may not be merit to this submission. However, what is clear is that it is a submission that goes to the issue of whether Mr. Jonker's participation in the protest constituted misconduct. To make the submission again before Council, as Mr. Jonker argues he should have been able to do, would be to question the Integrity Commissioner's finding as to whether his actions constituted misconduct under the code.
- [32] This brings me back to the structure of the *Municipal Act*, which is that Council is bound by the Integrity Commissioner's findings as to misconduct. Therefore, in exercising its jurisdiction as to penalty it cannot do so in such a way that would seek to set aside the Integrity Commissioner's findings on the question as to whether misconduct had occurred. Yet this is precisely what Mr. Jonker states the Council should have done. In effect, he is arguing that Council should have refused to punish him because his conduct was protected by s. 2 of the *Charter*. If this is true, his conduct cannot be considered misconduct.
- [33] This is not to say that Council does not have a duty to consider Mr. Jonker's *Charter* rights, if there are any rights that are relevant to its decision. However, in this case, Mr. Jonker's s. 2 *Charter* rights were relevant to the Integrity Commissioner's decision, not to Council's decision on penalty, which is the only decision that is the subject of this application for judicial review.

Conclusion

- [34] For these reasons, the application for judicial review is dismissed. The parties may make short written submissions on the question of costs. The Township shall forward its submission within 10 days of the release of these reasons, and Mr. Jonker shall have 10 days after that to respond.
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H. Sachs J.

I agree

King J.

I agree

Doyle J.

Released: February 28, 2024

CITATION: Jonker v. West Lincoln (The Township of), 2024 ONSC 1167
DIVISIONAL COURT FILE NO.: 22/144
DATE: 2024/02/28

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HAROLD JONKER

Applicant

– and –

THE TOWNSHIP OF WEST LINCOLN

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REASONS FOR JUDGMENT

H. Sachs J.

Released: February 28, 2024