Indexed as:
Sandringham Place Inc. v. Ontario (Human Rights Commission)

Between
Sandringham Place Inc. et al., and
Ontario Human Rights Commission

[2001] O.J. No. 2733

202 D.L.R. (4th) 301

148 O.A.C. 280

36 Admin. L.R. (3d) 296

106 A.C.W.S. (3d) 902

Court File No. 682/00

Ontario Superior Court of Justice
Divisional Court

Maloney, B. Wright and Gillese JJ.

Heard: June 18, 2001.
Judgment: June 29, 2001.

(32 paras.)

Civil rights -- Discrimination -- Administrative law -- Judicial review, certiorari -- Grounds for granting certiorari -- Disregard or misinterpretation of a statute or law -- Manifestly unreasonable decisions -- Failure to consider or take something into account -- Failure to make findings required by statute -- Consideration of irrelevant matter.

Application by Sandringham Place for judicial review of a decision of the respondent Ontario Human Rights Commission to remit certain complaints to a Board of Inquiry. Sandringham was a real property developer. The purchaser of one of its properties entered into a lease with one of the complainants, the Brampton Children's Residential Services, whose intention was to operate a group home. A restrictive covenant on title to all the properties in the development provided that all houses were for the use of

one household only and were not to be used for any business. When the lessor refused to honour the lease on the basis of the restrictive covenant, human rights complaints were filed alleging discrimination on the basis of handicap and family status. Sandringham invited the Human Rights Commission to exercise its discretion not to deal with the complaints on the basis that they were filed more than six months after the acts complained of. The Commission decided not to exercise its discretion because the request arrived after the Commission had completed the exercise of its investigative powers. The Commission referred the complaints to a Board of Inquiry.

HELD: Application allowed. The Commission's decision was patently unreasonable. The Commission was required to consider whether the facts complained of occurred more than six months before filing of the complaints, whether the delay was incurred in good faith, and whether any substantial prejudice resulted from the delay. Instead of considering those matters, the Commission relied upon a consideration extraneous to the statutory purpose. It made its decision based upon the administrative consideration of what stage the investigation had reached. The decision was quashed and the matter remitted to a different member of the Commission.

Statutes, Regulations and Rules Cited:

Human Rights Code, R.S.O. 1990, c. H.19, ss. 34(1)(d), 36.

Counsel:

Paul H. Starkman, for the applicant.
Naomi Overend, for the respondent.

The judgment of the Court was delivered by Gillese J., concurred in by Maloney J. Separate dissenting reasons were delivered by B. Wright J.

1 **GILLESE J.** (endorsement):-- The Applicant, Sandringham Place Inc. ("Sandringham") brings an application for judicial review of a decision of the Ontario Human Rights Commission ("OHRC") dated August 31, 2000 ("the decision"). In the decision, the OHRC declined to exercise its discretion pursuant to clause 34(1)(d) of the Ontario Human Rights Code, R.S.O. 1990, c. H.19 ("the Code"). Had the Commission chosen to exercise its discretion, the result would have been a decision "to not deal with the complaints" that had been filed against Sandringham and others.

2 Sandringham seeks an order quashing a decision of the OHRC of October 2, 2000, that remitted the complaints to a Board of Inquiry pursuant

to s. 36 of the Code and an order prohibiting the OHRC from proceeding with the complaints. Alternatively, it requests an order quashing the decision and remitting the matter to a different member of the OHRC or some independent decision maker.

BACKGROUND IN BRIEF

3 Sandringham is the developer of a residential subdivision in Brampton, Ontario which includes the subject property of the complaint. Golden Maple Homes Inc. purchased the property from Sandringham and thereon constructed a home. Golden Maple Homes Inc. sold the property to Gilbert and Andre Duchamp ("the Duchamps"). The Duchamps entered into a two-year lease with the Brampton Children's Residential Services that was to commence September 1, 1994. It was intended that the property be used to operate a group home. The occupants of the home would be David MacFarlane and Brenda Mason, two directors with the Brampton Children's Residential Services, and six adolescent youths who had had difficulty in their early childhood development and displayed emotional and/or psychological disorders. Each director was to reside at the group home for three and a half days per week during which time they were to act as parents to the youths.

4 A restrictive covenant registered on title to all the properties in the development provided that the houses in the development were "for the use of one household only in each dwelling unit" and were not to be used for "business of any description". The Brampton Children's Residential Services, David MacDonald and Brenda Mason ("the complainants") were advised of the restrictive covenant in August of 1994. By letter of September 1, 1994, counsel for the Brampton Children's Residential Services advised that a City of Brampton by-law provided that "Group homes are permitted as of right in all residential zones which permit single family detached dwellings" and that the restrictive covenant was in breach of that by-law. The Duchamps refused to honour the lease agreement on the basis that they would not lease to a group home.

5 The complaints were filed with the OHRC in August of 1995; they allege discrimination on the basis of handicap and family status. In the one-year interval between notification of the restrictive covenant and the filing of the complaints, the complainants allege that they undertook a number of actions with respect to the subject property which include efforts to persuade the Duchamps to honour the lease agreement and requests for the return of the deposit they made at the time of execution of the lease. In a letter of July 14, 1995, the complainants, who were still without a property in which to house the group home, sent a letter to the Duchamps demanding that the lease be honoured. By letter dated July 27, 1995, Gilbert Duchamp responded that he would not permit the property to be used as a group

home under any circumstance and would lease only to a single-family unit. On August 29, 1995, the complaints were filed.

6 After the OHRC completed an investigation of the complaints, it prepared a case analysis that summarized its investigative findings. The case analysis was sent to the parties, including Sandringham, on June 20, 2000. Sandringham was advised that it could make submissions that would be part of the record before the OHRC when, pursuant to s. 36 of the Code, it decided whether to refer the complaints to a Board of Inquiry.

7 By letter dated July 31, 2000, Sandringham sent its submissions on the case analysis. In its submissions, it requested for the first time that the OHRC exercise its discretion under clause 34(1)(d).

8 Clause 34(1)(d) reads as follows:

> Where it appears to the Commission that, ...
>
> (e) 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.

9 The full text of the decision of the OHRC is as follows.

> Please be advised that the Commission has reached its decision concerning the respondent's request for application of s. 34 of the Code in the above-noted file.
>
> After a review of the file, the Commission decided that it would not exercise its discretion pursuant to s. 34(1) of the Code because the request arrived after the Commission had completed the exercise of its investigative powers pursuant to section 33 of the Code. In these circumstances, it would be inappropriate for the Commission to exercise its discretion to "not deal with" the complaint at this late date.

10 Thereafter, the Commission decided to refer the complaints to a Board of Inquiry. A pre-hearing has been held and the hearing before the Board of Inquiry is scheduled to begin in October of 2001.

A REVIEW OF THE DECISION

11 The OHRC submits that this court has no power to review the decision made pursuant to s. 34(1)(d).

12 I reject the notion that the decision is not reviewable. A decision not to do something is a decision, just as is a decision to do something. The decision not to deal with the complaint can only be made pursuant to express discretion invested in the OHRC by statute. It is to be exercised in accordance with the principles that govern the exercise of any statutorily conferred discretion.

13 In my view, the decision is patently unreasonable. There are three matters that clause 34(1)(d) expressly requires be considered in the exercise of such discretion. These are whether: the facts upon which the complaints are based occurred more than six months before the complaints were filed, the delay was incurred in good faith and substantial prejudice will result to any person affected by the delay.

14 Instead of considering these matters, the OHRC relied upon a consideration that was extraneous to the statutory purpose. It chose to not exercise its discretion because "it had completed its investigation" and therefore it would be "inappropriate for the Commission to exercise its discretion". It made a decision based on an administrative consideration, that being the point reached in the investigation of the complaints.

15 There is nothing in s. 34(1) that expressly permits such a consideration. Given the purpose of the section, there is no implied authorization for such a consideration. As the OHRC was neither expressly or impliedly authorized to take such a consideration into account when exercising its discretion and, by its own admission the consideration was determinative, the consideration amounts to a fetter on discretion. Put another way, the OHRC failed to take into account the relevant considerations set out in clause 34(1)(d) and took into account an irrelevant consideration, namely, the completion of its investigation. This is impermissible and has been since Roncarelli v. Duplessis, [1959] S.C.R. 121.

16 Counsel for the OHRC argues that the purpose of s. 34(1)(d) is to benefit the OHRC by giving it the power to remove complaints lacking in merit, thereby effecting increased efficiency. Because the section is for the benefit of the OHRC, she argues, the OHRC has the right to decide when and whether to consider the exercise of its discretion pursuant to section 34(1). I reject this argument. There are no words in the section to limit it in such a fashion. In the absence of words limiting the operation of the section, the OHRC must respond to a legitimate request that it consider the exercise of its discretion pursuant to s. 34(1).

RELIEF

17 For the reasons given, the decision is quashed and the matter is remitted to be heard by a different member of the OHRC.

18 It is appropriate at this point to raise a concern relating to procedural fairness. It appears that the OHRC had before it information relating to the exercise of its discretion which it did not share with Sandringham before making the decision. This information appears to have been relevant to the questions of whether a six month delay had occurred and whether delay had been incurred in good faith. As the information was not disclosed to Sandringham, Sandringham was unable to respond to it.

19 The OHRC is reminded that it has a duty of fairness in the exercise of discretion and that procedural fairness dictates that Sandringham knows the case it has to meet so that it can be properly heard. In other words, I reject the submission of the OHRC that because Sandringham knows the substance of the complaints, it has no obligation to disclose the considerations before it in relation to the exercise of its jurisdiction pursuant to s. 34(1). Contrary to the assertions of the OHRC that there were no facts unknown to Sandringham, Sandringham showed this court a number of pieces of information that it said it had never seen before these proceedings. Sandringham must be given sufficient information that it has a meaningful opportunity to make submissions in relation to the exercise of discretion pursuant to s. 34(1). To do otherwise amounts to a breach of the duty of procedural fairness owed by the OHRC in the exercise of its discretion pursuant to s. 34(1).

20 Given that the Board of Inquiry is scheduled to hear the complaint in October 2001, the relief granted could prove meaningless. Therefore, the hearing of the Board of Inquiry is stayed pending the OHRC determination pursuant to s. 34(1). I cannot resist making the observation that if the Board of Inquiry can be constituted so as to deal with the s. 34(1) determination at the outset, subject to its decision on that matter, the hearing could proceed without further delay.

21 Sandringham argues that the six-year delay since the complainants were notified of the restrictive covenant is so unreasonable that it constitutes an abuse of process that warrants the quashing of the hearing before the Board of Inquiry. I reject that request for the following reasons.

1. The error committed by the OHRC related to the exercise of discretion pursuant to s. 34(1)(d). No breach has been demonstrated or even argued in relation to the

decision made pursuant to s. 36 to order a Board of Inquiry hearing.

2. Quashing the hearing of the Board of Inquiry would end the complainants' right to have their matter heard by the OHRC. Counsel for the OHRC candidly admitted that any delay in the process is attributable to the OHRC, not the complainants. Sandringham chose to not name the complainants in these proceedings. In my view, it would be unfair to affect the complainants' rights without notice and an opportunity for them to be heard. This is particularly true when any delay is not attributable to them. Moreover, the matter in issue remains very much alive as counsel for the OHRC advises that, to date, no other premises for the group home have been located.
3. Such an order would be premature, however excessive the delay may appear, given that the OHRC has not yet considered the question of delay. Absent such a consideration, there is an inadequate record on which to adjudge the matter of delay. At this point, it is not possible to determine the extent of the prejudice, if any, its effect on the position of the parties and the ability of the Board of Inquiry to determine the issues, notwithstanding the delay.
4. Delay alone is insufficient to warrant the quashing of the Board of Inquiry hearing. In general, the delay must entail prejudice. Sandringham has not alleged any prejudice due to the delay nor has it alleged that the delay has impaired its ability to answer the complaints against it.

22 This court is required to balance the benefits and disadvantages associated with intervening in the Board of Inquiry hearing. In my view, delay absent evidence of substantial prejudice is not a fatal flaw akin to party status or bias in the decision-maker such that court intervention is warranted prior to completion of the matter before the tribunal. In reaching this conclusion I am guided by the position this court has taken on many other occasions when confronted with applications for judicial review based on delay. It has consistently held that proceedings before administrative tribunals should not be fragmented, that it is preferable to allow such matters to run their full course before the tribunal and then consider all legal issues arising from the proceedings, at their conclusion, against the backdrop of a full record.

23 The question of costs was not addressed at the hearing of this matter. As the applicant has been successful, it would normally be entitled to costs.

In light of the amount of material filed, importance of the issue and length of time in argument before this court, I would be inclined to fix costs in the amount of $4,000. However, if the parties are unable to agree on the matter of costs, written submissions shall be made on the matter within 30 days of the date of release of these reasons.

GILLESE J.
MALONEY J. -- I agree.

24 [1] B. WRIGHT J. (dissenting):-- I agree with Gillese J.'s decision with respect to the 34(1)(d) issue, although I query the efficacy of referring the matter back to the Commission to exercise its discretion whether or not to deal with the complaints when the Commission has already appointed a Board of Inquiry to hear the complaints.

25 [2] I am unable to agree with Gillese J.'s decision not to quash the appointment of the Board of Inquiry to hear the complaints.

26 [3] The complaints arose in August 1994, and were filed in August 1995. It will be over six years from the filing of the complaints to the date for a Board of Inquiry hearing in October 2001.

27 [4] This case involves a simple question whether the restrictive covenant which applied to the whole development prohibited the establishment of a group home.

28 [5] A delay of more than six years defies comprehension. A six-year delay is unfair to everyone involved.

29 [6] In Hancock v. Shreve, [1992] O.J. 2379, (Ont.Div.Ct.), Southey J., writing for this court, stated, "We are deeply concerned about the obvious danger of prejudice from the delay ...". That case was the same as the case before us with more than six years from the incidents of the complaints to a hearing by the Board of Inquiry.

30 [7] However, Southey J. reviewed other cases and came to this conclusion:

> It is the duty of the Board of Inquiry, not this Court, to decide in the first instance whether the complaint should be stayed or dismissed for delay.

31 [8] Apparently the Commission has not heeded this court's concern about delay. Almost a decade has passed since this court expressed its concern about delay on the part of the Commission. Nothing has changed. Another case comes to this court with a more than six-year delay. In my view the delay is unconscionable and patently unreasonable. The Commission has been deaf to the court's concerns. If the court continues to countenance such delays and simply passes the matters back to Boards of

Inquiry to consider the issue of delay, there is no guarantee that the Commission will heed another expression by this court of concerns about delays.

32 [9] I would allow the Judicial Review and quash the appointment of the Board of Inquiry with costs to the applicant.

B. WRIGHT J.

cp/d/qlala/qldah