Summary from the Council of Canadian Administrative Tribunals

In the Supreme Court of British Columbia

McKenzie v. Minister of Public Safety and Solicitor General et al., 2006 BCSC 1372

The decision of the Honourable Mr. Justice McEwan of the BC Supreme Court in McKenzie v. Minister of Public Safety, 2006 BCSC 1372, was released on September 08, 2006.

Mr. Justice McEwan finds, in the clearest possible language, that Mary McKenzie had a ten-year unblemished record and was completely innocent of any fault; sharply criticizes the BC government's treatment of her; and finds that the legislative provision on which the government relied as authorizing it to terminate any tribunal member at any time for "mere displeasure" (s.14.9(3) of the BC Public Sectors Employers Act) is not sufficiently clear and unequivocal to support a power as incompatible with the principles of natural justice as that.

Most importantly, on the constitutional issue Justice McEwan finds that, notwithstanding Ocean Port, the unwritten constitutional requirement of judicial independence identified in the judgment of Lamer C.J. in the PEI Provincial Judges Reference does apply to BC Residential Tenancy Arbitrators. Thus, Mr. Justice McEwan concludes, if a statutory provision were to in fact authorize, in clear and unequivocal terms, the mid-term termination of the appointments of Residential Tenancy Arbitrators for mere displeasure, the provision would be unconstitutional.

The Minister's decision rescinding Ms. McKenzie's appointment is quashed and Ms. McKenzie's appointment as a Residential Tenancy Arbitrator has been restored.

McKenzie v Ministry of Public Safety and Solicitor General et al.

Background

In 2004, a new director was appointed to run the Residential Tenancy Office. Following a Treasury Board Directive that stemmed from the Administrative Justice Project, the director introduced "limitations that would be placed on annual remuneration and the number of hearing days that arbitrators would be permitted to work. They would no longer be paid per case, but on a per client basis" (para. 37). The director considered that she "had the statutory power under the Act to implement change" (para. 38).

Mary E. McKenzie took issue with the changes that would affect the terms of her appointment and, as the decision outlines, corresponded with the director about the changes that would affect her, the history of her adjudicative practice and the accommodations that she had made for the ministry. The Ministry of Public Safety and Solicitor General rescinded her appointment under the *Residential Tenancy Act* and the *Manufactured Home Park Tenancy Act* without cause on April 14, 2005.

On August 12, 2005, the ministry set out their position through their counsel:

> Gary Martin and the Director of the Residential Tenancy Office ("RTO"), Mary Duffy, have lost confidence in Ms. McKenzie as a result of a number of exchanges between the Director and Ms. McKenzie and between staff of the RTO and Ms. McKenzie. These exchanges include Ms. McKenzie's disproportionate response concerning a matter of desk space in the Nanaimo office, her loud display of anger towards the current Director in a very public incident at the March 2004 arbitrators' conference, her ongoing complaints about matters to do with her contract and the availability, amount and scheduling of arbitrations. All of the foregoing exchanges have contributed to management's loss of confidence in Ms. McKenzie's willingness to be part of a positive work environment and her ability to support the fiscal and organizational changes that are being made within the RTO. (para. 52)

The judge wrote that Ms. Mckenzie had "an unblemished service record" (para. 40) and that she "was terminated simply for having the temerity to stand up for herself" (para. 60).

Stated Grounds for Rescinding of Appointment

The Ministry argued that s. 14.9(3) of the *Public Sector Employers Act* provided the authority for its decision:

> **Members of tribunals**
>
> **14.9** (1) Division 3 of this Part does not apply to

(a) the chief coroner and deputy chief coroner under the *Coroners Act*,

(b) the fire commissioner under the *Fire Services Act*,

(c) an arbitrator under the *Residential Tenancy Act*,

(d) a governor or director of the Workers' Compensation Board under the *Workers Compensation Act*, or

(e) a person who is a member of a tribunal designated in the Schedule, when the person is acting in his or her capacity as a member of the tribunal.

. . .

(3) The appointment of a person referred to in subsection (1) may be terminated without notice before the end of the term of their appointment on payment of the lesser of

(a) 12 months' compensation, or

(b) the compensation in an amount equal to the remuneration otherwise owing until the end of the term.

Argument Against Rescinding Appointment

"The Director's recommendation to terminate the Petitioner's appointment was contrary to s. 86.3 of the ***RTA*** and the interpretation of s. 14.9(3) of the ***PSEA*** found in **Re Farmer Construction Ltd.**, [22004] B.C.L.R.B.D. No 214 (QL), a decision of the British Columbia Labour Relations Board)" (para. 48).

Section 86.3 of the RTA read:

86(3) An individual is not eligible for appointment as an arbitrator unless

86(3)(a) he or she has successfully completed a merit based process established or approved by the director, or

86(3)(b) he or she has previously been appointed as an arbitrator under this Act.

Supreme Court of British Columbia Decision

The Supreme Court of BC decision, dated September 8, 2006, sided with Ms. McKenzie and ordered that "both the Minister's decision leading to that Order [Ministerial Order M 109] and the reconsideration ought to be set aside for lack of procedural fairness" (para. 154); declared that the Ministerial Order M 109 rescinding the appointment as an arbitrator under the ***RTA*** and ***MHPTA*** was "unlawful and of no force" (para. 156);

declared that "section 14.9(3) of the *Public Sector Employers Act* does not, properly understood, allow for mid-term termination of residential tenancy arbitrators" (para. 156); and, declared that "section 14.9(3) is of no force and effect in relation to the Petitioner's office as a residential tenancy arbitrator as violating a constitutionally protected principle of independence required in the circumstances" (para. 157).

Consequences of the Decision

Subsequent to the decision, along with other legislative amendments, two legislative provisions were repealed.

> Section 14.9(1)(c) of the *Public Sector Employers Act* (October 1, 2006 [BC Reg 234/06])
>
> Sections 86, 86.1-86.3 of the *Residential Tenancy Act* (October 1, 2006 [BC Reg 234/06])

Court of Appeal for British Columbia Decision

The Court of Appeal for BC decision, dated October 19, 2007, upheld the Supreme Court of BC decision and declared the appeal of issues relating to the repealed provisions moot.

Change from Arbitrators and Arbitration to the Director and Dispute Resolution

Significant amendments to the *Residential Tenancy Act* came into force on October 1, 2006 (BC Reg 234/06). Those amendments included a change from arbitrators and arbitration to the director and dispute resolution.

G:\X_RTO\RT_RTBDirectors\ACTS & LEGISLATION - 135\2006 amendments\RTAamend for Oct 06 updated Aug 29.doc.

The business case for the change is documented in record 140-20/RTA DRO 2005. That record identifies the problems with the arbitration system as including:

- High cost of appointed arbitrators
- Low productivity
- Arbitrators decide their own availability leading to scheduling difficulties and delays, and limiting government's ability to meet fluctuations in workload and time limits set in legislation
- Inconsistent decisions

s.13

s.13

Conclusion

Though the legislative changes introduced on October 1, 2006 closely followed the McKenzie decision (September 8, 2006), aside from the repeal of the provisions noted above, the two events were not directly related. The substantive legislative changes follow the Administrative Justice Project which looked to realize efficiencies, rather than this particular action against government.

s.13

The significance of the McKenzie decision is its protection of the constitutionally protected principle of independence and its defense of the independence and impartiality of quasi-judicial bodies.