

CITATION: Hannan v. Scouts Canada, 2024 ONSC 5361
COURT FILE NO.: CV-24-95566
DATE: 2024 09 27

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Wayne Hannan, Applicant

AND:

Scouts Canada, Respondent

BEFORE: The Honourable Mr. Justice Calum MacLeod

COUNSEL: Sean Grassie & David P. Taylor, for the Applicant

Craig Stehr, for the Respondent

HEARD: May 6, 2024

DECISION AND REASONS

INTRODUCTION

[1] The Applicant is 86 years old and until the events in question, was a member of Scouts Canada. He has been involved with the organization in a leadership role as a “Scouter” since 1958 and most recently, was a Scouter for the 115th Sea Scout Troop located in Ottawa. In November of 2023, his annual application to renew his volunteer status was denied by the Group Commissioner. He was notified that he would no longer be permitted to serve as a Scouter with the 115th.

[2] Scouts Canada is a not-for-profit corporation established by Act of Parliament. It is volunteer driven and administered. It is governed by by-laws, policies, procedures and rules including an Appointment of Scouters Procedure, Volunteer Screening Procedure and Disciplinary Management Procedures for volunteers. The Applicant contends that his removal as Scouter is in

breach of these rules and regulations and he seeks to have the Court intervene by ordering Scouts Canada to adhere to its stated policies.

[3] There is little doubt that viewed objectively, the Applicant has been treated shabbily and denied any semblance of due process. If the disciplinary management procedure applies to his situation, it was not followed. The critical question, however, is whether or not this issue is justiciable. Should the Court assume jurisdiction and intervene in the internal affairs of a private public service organization? If so, what is the appropriate remedy?

[4] To answer these questions, it is necessary to consider the structure and organization of Scouts Canada and the nature of its relationship with the volunteers on which it depends to carry out its mission. I have concluded that the relationship is contractual in nature and that if the basis for not renewing membership is alleged to be unacceptable conduct on the part of the member, the member has the right to assume that the organization will follow its stated policies. While courts are generally reluctant to encourage resort to the courts by disgruntled members of voluntary associations, in this case a legal remedy is appropriate. The Court has granted a declaration, a mandatory order and a costs award.

BACKGROUND

[5] Scouting was founded in England in 1907 based on the ideas of Robert Baden-Powell. His concept of training boys in bushcraft, outdoor skills and self reliance while also promoting patriotism, loyalty, honour, friendship and charity proved so popular that it rapidly became a movement that spread around the world. Today there are scout movements in over 200 countries. Scouts are known for their motto, “Be Prepared”, for acting honourably and for doing good deeds. Stereotypical phrases such as “good scout” and “scouts honour” entered the popular lexicon in the 20th Century and are found in various dictionaries.

[6] The Boy Scouts of Canada was incorporated by a Federal Act of Parliament in 1914 and was continued under its current name of Scouts Canada by the *Scouts Canada Act* in 2007.¹ Currently, Scouts Canada claims to be the country's leading co-ed youth organization serving more than 42,000 youth utilizing more than 13,000 volunteers. Over the years, legions of young Canadians learned skills such as camping, hiking, canoeing, survival, map reading and leadership through involvement with scouting. Legions of adult volunteers have made this possible.

[7] Like many organizations founded in the Victorian era, Scouts Canada has been seeking to modernize itself and to retain its relevance in the 21st Century. One such step was the transition from "Boy Scouts" to "Scouts" but it is also reflected in an increasing online presence, changes to policies and in its advertising. In addition, as an organization dealing with young, impressionable and sometimes vulnerable boys and girls, Scouts Canada has adopted rigorous volunteer screening mechanisms, codes of conduct and other safeguards to ensure the safety of the young people it is designed to serve.

[8] Scouts Canada is a volunteer organization from top to bottom. It has a very small professional staff headed by a full time Executive Commissioner and CEO but all services and operations are delivered by volunteers and the organization is ultimately governed by a volunteer Board of Governors. The fundamental purpose of the organization is to support the objectives of the Scouting movement in Canada and to provide opportunity to youth who enroll in the Scouting programs. There are Scouting programs for different age groups (currently known as Beavers, Cubs, Scouts, Venturers and Rovers).

[9] "Scouts", with which the Applicant was involved, are youth aged 11 -14 and are organized into "Troops". Troops are supervised and guided by volunteer Scouters led in turn by a Scouter in Charge (Skipper in the case of Sea Scouts). Sea Scouts focus on canoeing, boating and other naval skills but otherwise operate in the same manner as other Scout troops.

¹ *An Act Respecting Scouts Canada*, S.C. 2007, C. 38 continues the corporation established by S.C. 1914, c. 130. See the preamble to the 2007 Act for legislative history and intent.

[10] Scouts Canada is divided into 20 “Regional Councils” with the Councils subdivided into “Groups” and with each Group responsible for the Troops in its area. As described above, the Applicant was a Scouter with the 115th Troop of Sea Scouts. The 115th is part of the “Hog’s Back Scouting Group” and the “Voyageur Regional Council”. Each Group is led by a volunteer Group Commissioner supported by a Group Committee. The Group Commissioner is responsible for appointment of Scouters within the Group and for approving annual renewals of those appointments.

[11] As mentioned, the Applicant has been a Scouter since 1958. At various times during this period, he held other leadership roles within the organization, and he has been recognized and honoured for his contributions. Now that he is a widower and retired from his career in the public service, his volunteer work with the Scouts continues to be a passion for him, his major source of social interaction, and, in the joy he obtains from teaching skills to youth, a continued source of pride and satisfaction. This is not solely for his own benefit. “Scouter Wayne” is considered by other Scouters, Scouts and parents to play an important role. In particular, he is valued for his deep knowledge of scouting, his contribution to the ceremonies and traditions of the Sea Scouts, and also it appears for his obsession with safety and safety protocols.

[12] The Applicant has been a Scouter with the 115th since 2001 when the Troop he was previously involved with (the 26th) ceased operation. He fulfilled that role with the 115th until November 8th, 2023 when he received a letter from Group Commissioner, Candice Armstrong advising him that she had decided not to renew his “membership as 115th Sea Scout Troop Scouter for the 2023/24 Scouting Year.”

[13] The letter purported to be a “follow up to previous conversations starting in December of 2022.” It also stated that the decision was “due to safety concerns and resistance to program adaptation”. The Applicant deposes that he found this shocking and also deeply unfair because he had no idea what the safety concerns were, in what way he was resistant to program adaptation and he attests that he had never had any conversation about his performance as a Scouter with the Group Commissioner or anyone else at the Group level. It was also a shock to the Skipper of the

115th who deposes that he is not aware of any such incidents and that no such incidents were ever raised with him by the Group Commissioner.

[14] After announcing that he would not be renewed as a Scouter with the 115th, the letter went on to state that “this decision does not affect your membership within Scouts Canada” and suggested that he was welcome and encouraged to seek out other volunteer opportunities within the organization at any level.

[15] According to the Applicant, not only was this letter false when it referred to conversations and concerns, it was also misleading. Despite what the letter says about membership, the by-laws of Scouts Canada are very clear in defining “member”. When a member ceases to be a volunteer, the member also ceases to be a “member”. An “inactive” volunteer is not a member under the by-law. Moreover, a volunteer who wishes to change assignments, to another Troop for example, is screened and “interviewed to determine their continued suitability as a volunteer”. The policies in force do not make transfer to another Troop or another volunteer role automatic.

[16] For Scouters and indeed all volunteers, Scouts Canada has a rigorous screening process. To be accepted as a Scouter in the first place, the prospective volunteer must complete registration, screening and training requirements in order to be appointed by the Group Commissioner. The screening check includes reference checks (at least 5 references), a criminal records check, and agreement to adhere to the scouting code of conduct and the “scout law”. For renewals, annual reapplication is required including written agreement to be bound by the Code of Conduct. An updated criminal records check must be submitted every three years.

[17] According to the “Appointment of Scouters Standards”, “all appointments are annual” with reappointment being based on “satisfactory performance and adherence to the Code of Conduct”. The Code includes a promise that the volunteer’s behaviour will at all times reflect the values of the organization and the Scout Promise and Law. Group Commissioners, according to the standards, may not renew an appointment if “the Scouter fails to carry out their responsibilities satisfactorily”. The Standards go on to state that “Discipline and performance management is conducted as per the Discipline and Performance Management Procedure.”

[18] It will be obvious from this brief summary that Scouts Canada is highly organized and internally regulated. They by-laws of the corporation govern membership, voting and the power of the Board to enact policies. The organization adheres to the basic principles of the Scout Law and to a Code of Conduct that all volunteers must commit to on an annual basis. There are policies and regulations dealing with appointment of volunteers, roles and responsibilities and discipline. Volunteers agree to be bound by all of these and they are accessible in print and on the Scouts Canada web site.

[19] Of particular importance to the present issue, is the policy regarding support, performance management and discipline. This policy (approved by the board of Governors in 2018) states that, except in cases where the behaviour of a volunteer justifies immediate suspension, under “The Temporary Suspension and Termination Procedure”, the “Discipline and Performance Management Procedure” will apply.

[20] The policy contains the following under the heading “Our Commitment”:

In Scouts Canada, we believe all Scouters and members deserve to be treated fairly and receive performance coaching and support to be successful in their role. We also believe that performance or behaviours inconsistent with our Scouts Canada values, role expectations and Code of Conduct must be intervened on appropriately and resolved in a timely manner. In rare circumstances, individuals will be reassigned to different roles, suspended for investigation or terminated depending on the severity of the non-compliance.

[21] The policy then provides for regular performance feedback and in the case of violation of the Code of Conduct or sub-par behaviour or expectations, provides the Group Commissioner with the discretion to offer coaching or provide a written reprimand. In all cases, “a record of all efforts undertaken to provide guidance to a Scouter should be maintained” and “when a reprimand is issued, it must be in writing and recorded in a ScoutsSafe form”. If repeated coaching, training and support are unsuccessful, the Commissioner is supposed to “explore with the Scouter reassignment to a different role”. If the Commissioner believes that one or more official warnings for repeated violation of the Code warrants termination of membership, the policy provides for

referral of the matter to the “Key 3”² and then to the Safe Scouting Department. The National Review Board is then to consider the matter and issue a written decision. There is also a procedure for appealing.

[22] There is, in other words, a sophisticated policy for supporting Scouters in their volunteer role and for progressive discipline. There is also a “Progressive Discipline Guideline” and there are tools such as the Performance Coaching Checklist, Progressive Discipline Checklist and Incident Management Procedure Flowchart. These policies are reminiscent of policies found in the employment context but are specifically addressed to management of volunteers.

[23] All of these policies are designed to recruit, train and retain skilled volunteers. In exchange for submitting to the screening and training and for dedicating their time to scouting, volunteers are told that Scouts Canada will support them in their role and encourage their growth and development. The policies also ensure that volunteers are accountable and the children who enroll as Scouts are led safely by properly trained and supervised adult volunteers. In its literature, Scouts Canada recognizes its dependence on volunteers. It also recognizes the significant commitment it requires from its volunteers and the need for renewal and retention. It has volunteer recruitment material with slogans such as “Unlock a Kid’s True Potential by Realizing Your Own”.

[24] Scouts Canada acknowledges that it has these policies and promotes them in its literature and on its web site. The Respondent argues, however, that the discipline and suspension policies do not apply to this situation because the Group Commissioner has complete discretion in renewing volunteer Scouters. The Respondent argues that the policies on termination and discipline do not apply to annual renewals. The Respondent argues that it must have complete discretion in deciding who it will accept as a volunteer. To the extent that this relationship may be viewed as contractual, the Respondent categorizes this as at most an annual term contract in which the volunteer offers to serve and Scouts Canada is free to accept or reject that offer as it sees fit.

² The Key 3 at various levels in Scouts Canada consist of an adult volunteer, youth volunteer and a member of the Scouts Canada staff. “

[25] In addition, the Respondent continues to assert that the Applicant's membership in Scouts Canada has not actually been terminated. His volunteer role as Scouter in the 115th has not been renewed so he is temporarily "inactive" but they argue that he could, apply for another volunteer role but has not done so. The Applicant did actually write to apply for a different Scouter role with the 115th Venturer Troop but he was advised that the role he was inquiring about was not currently required. Nevertheless, Scouts Canada states that there might be other roles available to him.

[26] Most importantly, for purposes of this Court proceeding, the Respondent argues that none of its policies or procedures for volunteers create a legally binding relationship and certainly not a long term contract between the organization and the member. It is submitted that, although all volunteers (including the Group Commissioner) agree to be bound by the Code of Conduct and to follow the policies, this is not a legal obligation and does not give a Scouter a right of action simply because the organization declines to renew him as a volunteer. It is submitted that the Court has no jurisdiction to intervene or to grant a remedy to the Applicant.

[27] The issues can be summarized as follows:

- a. Does the Court have jurisdiction, or should it assume jurisdiction in these circumstances?
- b. Even if the Court has jurisdiction, did Scouts Canada breach its policies when it declined to renew the Applicant as a volunteer?
- c. Subsumed in the former question is the question of whether declining to renew a Scouter in these circumstances is "discipline" covered by the policies.
- d. A further issue which is raised by the Respondent's position that the Applicant had in fact breached the Code of Conduct is whether there is any substance to that assertion. In other words, even if the policies and procedures should have been used, was the termination or non-renewal justified?
- e. Finally, if the Court assumes jurisdiction and concludes that Scouts Canada failed to treat the Applicant fairly and in accordance with the policies and procedures, he had a right to expect, what is the appropriate remedy for a "wrongfully dismissed" volunteer?

[28] To some degree these questions overlap.

ANALYSIS

Jurisdiction

[29] However aggrieved the Applicant may be, the threshold question is whether his treatment by Scouts Canada is a justiciable issue. This is not automatic. The Supreme Court of Canada has urged restraint in assuming jurisdiction over the internal workings of voluntary associations. Jurisprudence establishes that a matter is justiciable if the Court has jurisdiction and if the subject matter of the dispute is in the opinion of the Court one that is suitable for judicial determination. These are not identical questions. If the Court has no jurisdiction, then it may not intervene at all but if the matter is non-justiciable, it means that the Court declines to determine the matter because it lacks the institutional capacity and legitimacy to do so.³

[30] The Supreme Court of Canada has reviewed the law in this area on at least two occasions in recent years. In 2018 in the *Highwood* decision, noted above, the Supreme Court determined that unfairness or lack of due process was not itself a cause of action. Nor is a private entity that is not exercising a statutory power of decision amenable to “judicial review”. *Highwood* concerned the case of a member of a Jehovah’s Witness congregation who claimed that he had been unfairly subjected to “disfellowship”. The Court emphasized that incorporation by statute does not make the organization an agent of government open to administrative law remedies. Just because an organization acts unfairly or contrary to its own policies is not in itself sufficient. The aggrieved individual must have legal rights in order to bring the matter to court and obtain a legal remedy in vindication of those rights.⁴

[31] In 2021, the Supreme Court was faced with a similar situation concerning members of a church congregation expelled for heresy. In that case the members of the congregation were not members of the church corporation and although there were by-laws and rules, the expelled

³ See *Highwood Congregation of Jehovah’s Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26, [2018] 1 S.C.R. 750 at paras. 32 – 36. The courts are particularly cautious in matters of religious dogma for example.

⁴ *Highwood, supra*.

congregants were unaware of them .⁵ In *Aga*, the Court underscored once again that there was jurisdiction to intervene in the decisions of voluntary associations only where a legal right is at issue.

[32] The mere existence of by-laws and rules does not make breach of the rules justiciable unless those internal processes can be viewed as contractual in nature. Legal rights which could ground jurisdiction include private rights in property, contract, tort or unjust enrichment and statutory causes of action. The Court maintains that natural justice is not a source of jurisdiction, but where a pre-existing legal right is at issue, natural justice may be relevant to whether that right was violated. In *Aga*, the only candidate for a legal right was contract and the Supreme Court found that the evidence in the *Aga* case was insufficient to prove intent to enter into legally binding contractual relations when becoming a member of the congregation.

[33] At the other extreme from voluntary religious organizations are voluntary associations that provide a service or status necessary to carry on a trade or occupation. In an earlier decision concerning the Montreal Real Estate Board, the Supreme Court Found that the relationship between the corporation and its members was contractual and justiciable.⁶ In *Senez*, notwithstanding that the Board was a voluntary association with no statutory mandate, it did control the Multiple Listing Service (MLS). In addition, it was a condition of his employment that the plaintiff, *Senez*, be a member of the Board in good standing. The Court found that the mutual agreement to be bound by and to apply the by-laws and rules was contractual in nature. In addition to *Senez*, in both *Highwood* and *Aga*, the Supreme Court cites various cases in which courts have found that by-laws, rules and procedures were contractual in nature, and which justified the assumption of jurisdiction. The point of *Aga* is that by-laws and rules by themselves are not enough. A finding of contractual intention is also required.

⁵ *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga*, 2021 SCC 22, [2021] 1 S.C.R. 868

⁶ *Senez v. Montreal Real Estate Board*, [1980] 2 SCR 555

[34] Even when the Court assumes jurisdiction, restraint remains necessary. The Court will not adjudicate questions of religious dogma.⁷ A Court is not likely to second guess the judgment of a voluntary association concerning the type of character it requires or what leadership skills it recognizes as important. The leading Ontario case summarizing the law in this area is a decision of the Court of Appeal from earlier this year. In *Bertrand*, the Court approved the following summary⁸:

If a significant private law right or interest is involved; for example if a member of the association has been expelled or lost his or her membership status, been deprived of his or her membership privileges, or his or her ability to pursue vocations and avocations associated with the association, the court does not review the merits of the association's conduct or decision but reviews whether the purported expulsion or loss of membership or of membership privileges was carried out according to the applicable rules of the association and with the principles of natural justice (procedural fairness), and without mala fides. Thus, where there is jurisdiction as a matter of contract and a significant right or interest is engaged, the court may determine: (a) whether the voluntary group or unincorporated association acted in accordance with its rules; (b) whether it acted in accordance with the principles of natural justice; and (c) whether the association's decision was come to bona fide. [Citations omitted.]

[35] Just because an organization is a voluntary organization or a private entity with a religious or a philanthropic objective does not insulate it from application of the rule of law. But breach of internal rules and regulations or other process defects do not in and of itself create a significant legal right. These will be recognized as legal rights if the agreement to follow the internal rules is found to be contractual or if some other legal right is at stake. As referenced above, in *Aga* the court listed “private rights in property, contract, tort or unjust enrichment and statutory causes of action” as possible sources of important legal rights. The list is not exhaustive. Tort liability could include misrepresentation and detrimental reliance, for example.

⁷ *Highwood & Aga, supra*. See also *Huo v. Mississauga Chinese Christian Church*, 2022 ONSC 3107 @ paras 14 - 16

⁸ *Bertrand v. Academic Medical Organization of Southwestern Ontario*, 2024 ONCA 319 @ para 15 citing *Karahalios v. Conservative Party of Canada*, 2020 ONSC 3145, at para. 183

[36] Scouts Canada is not a religious organization although it is a registered charity and expects its members to adhere to a core set of ethics. It is a corporation and the Applicant is or was a member of the corporation. Moreover, unlike the situation in *Aga*, the Applicant was very much aware of the by-laws, the policies and in particular the Code of Conduct which he annually agreed to be bound by. The volunteers and staff members of the organization similarly agreed to be bound by the Code and those policies. The entire culture of Scouts Canada is premised on obeying the Scout Law⁹ and adhering to the Code of Conduct. There is no doubt that members expect to adhere to the codes and policies themselves and expect that their relationship with the organization will be governed by those policies. This is significantly different from the situation of either of the two church organizations considered by the Supreme Court.

[37] While the Applicant's livelihood did not depend on his membership, it is hard to argue that his many years of service, his support for scouting and his dedication to the objectives of the organization were not every bit as important to him.

[38] Scouts Canada argues that if there was a contractual relationship, it was only a one-year term contract. The Respondent categorizes the Applicant as the offeror and the Respondent as the offeree. In that analysis, the volunteer offers to provide volunteer services annually and Scouts Canada may accept or refuse. If the offer is refused, then there is no contract.

[39] With respect, that is an overly simplistic analysis and does not accurately describe the nature of the relationship. Scouts Canada requires volunteers. It induces individuals to volunteer or to continue volunteering through its literature, advertising and its policies. It promises volunteers important and rewarding opportunities to promote the skills, traditions and values of scouting to Canada's youth. It promises the volunteers will be supported in those roles through its policies of training, coaching and progressive discipline. It also promises to treat volunteers fairly

⁹ The Scout Law as used in Canada: A Scout is helpful and trustworthy, Kind and cheerful, Considerate and clean, and wise in the use of all resources. The Scout Promise as used in Canada: On my honour; I promise that I will do my best; To do my duty to God and the King (or To Respect My Country and My Beliefs); To help other people at all times; and to carry out the spirit of the Scout Law.

by documenting concerns and providing internal routes of appeal if discipline is imposed or if volunteers are removed from their roles for disciplinary reasons.

[40] It is possible to view this as a network of contractual relationships. Canadian contract law contains myriad examples of intersecting contracts. Offers to lease for example will typically require that the parties execute a formal lease agreement but the acceptance of the offer may form a binding contract regardless of whether the formal lease agreement is ever negotiated. In bidding cases, the famous “Contract A” and “Contract B” analysis imposes obligations at the bidding stage even if no construction contract is ultimately awarded.¹⁰ The existence of collateral contracts is also recognized in Canadian law.¹¹ I cite these examples not to make an equivalency with commercial contracts between sophisticated parties but simply to make the point that it is not necessary to find only one example of offer and acceptance and to limit the contractual obligations to that one strand of a complex relationship.

[41] It is true that volunteers must reapply each year. There are undoubtedly cases where the role the volunteer undertook in one year is no longer necessary in the next or where the organization for legitimate reasons chooses to restructure its manner of delivering service. This happened to the Applicant, for example when the 26th Sea Scout Troop was discontinued. It was at that point that he first applied to be a Scouter in the 115th and was accepted.

[42] The policies in place, however, infer that where non-renewal is based on concerns that the volunteer is not performing the role adequately or has breached the Code of Conduct, the discipline policies will be followed. The Appointment of Scouter policy creates the impression that providing the role is still required, and the volunteer submits the necessary screening documents, unless the volunteer has failed to perform the role appropriately, renewal will normally be granted. Once accepted as a volunteer and agreeing to adhere to the requirements of the organization, the volunteer is entitled to assume the policies that govern the organization will be applied consistently

¹⁰ *R. v. Ron Engineering & Construction (Eastern) Ltd.*, [1981] 1 SCR 111

¹¹ See Fridman, *The Law of Contracts in Canada*, sixth edition, Carswell, 2011, c. 14

and fairly. This includes a term that annual renewal will ordinarily be granted if all screening requirements are met and the volunteer has not been made aware of performance concerns.

[43] This is bolstered by the past practice. There is often a significant delay between the date of reapplication and the date of approval. If there is no basis for discipline or correction, Scouters who wish to do so are permitted to continue in the role even though the reapplication has not been processed. During that time, their status is shown as “pending approval” status but it actually continues uninterrupted. This is evident from the date of the letter which was well into the 2023 – 2024 scouting season. The Scouting year begins on September 1st and ends on August 31st but formal renewals often take place after September. The letter was sent and received in November after the summer and fall canoeing season had already been completed. The Applicants application for renewal had been submitted in April.

[44] Given, the structure of the organization, the commitment by all members at all levels to live by the Code of Conduct, Scout Law and the well publicized policies and procedures for volunteers, I conclude that the relationship of the members to the organization is contractual in nature and the Applicant was entitled to rely upon those policies and rules.

[45] A finding that the relationship is contractual and assumption of jurisdiction is warranted in this case. To summarize, the relationship has at least the following characteristics:

- a. Scouts Canada is incorporated and all volunteers and staff are members of the corporation.
- b. Membership in the corporation is dependent on volunteer status according to the by-laws. Acceptance as a Scouter is also acceptance as a member and termination as a Scouter is also termination of membership.
- c. The structure of the organization is formalized along legal lines. All volunteers at all levels of the organization commit themselves to the Scout Law and to be bound by the Code of Conduct.

- d. Volunteers are recruited and induced to continue as volunteers by a number of well publicized policies and procedures promising to support volunteers in their roles and describing a fair, comprehensive and open process to address performance concerns and impose discipline if necessary.
- e. Membership in Scouts Canada is not simply passive membership as might be the case with a social club or a church congregation but demands a significant ongoing commitment on the part of the volunteer.
- f. The structures developed by Scouts Canada for the support and supervision of volunteers are legal structures similar to work place policies. In their formality and structure they appear contractual in nature and not merely aspirational.
- g. Nothing in the annual screening and renewal process or in the policies themselves suggests that they are not intended to be binding on the volunteers (at all levels) and on the organization or suggests that Scouts Canada reserves the right to act arbitrarily and without regard to its approved processes.

[46] The Court therefore has jurisdiction. Moreover, the question of what policies applied and whether they were followed is justiciable. The court is not being asked to measure incorporeal and aspirational values such as kindness or benevolence but concrete issues such as breach of policies, and procedural fairness. These are questions within the core competence of a Court and precisely the kind of disputes normally before the Court in employment cases or other breach of contract actions.

The issue of misconduct and the affidavit evidence

[47] Before returning to the policies themselves, I first want to deal with the assertion that the Applicant was in any way in breach of the Code of Conduct. For the reasons that follow, I find that on the evidence before the Court no such breach occurred. I can only conclude that the allegation in the letter about verbal warnings, safety concerns and failure to adapt to the changing needs of the organization are without substance. It is then particularly shocking that the

Respondent attempted to further besmirch the reputation of an individual that has devoted much of his life to Scouting by repeating and further exaggerating that claim in the form of inadmissible affidavit evidence.

[48] Despite arguing that the Court should not involve itself in this matter, the Respondent filed a responding affidavit in which it repeats and amplifies the performance issues stated in the termination letter. Rather than conceding that the letter was inaccurate, in other words, the Respondent essentially “doubled down” on the allegations. The affidavit filed in response to the Application contains additional allegations against the Applicant which on the evidence before the Court are baseless and without foundation. From an evidentiary point of view, the responding affidavit is both deeply unfair to an elderly and long serving volunteer but also demonstrates an improper litigation strategy bordering on abuse of process. The evidence dealing with these concerns is quite simply inadmissible.

[49] Rather than an affidavit from the Group Commissioner who wrote the letter or anyone else with firsthand knowledge of interactions with the Applicant, Scouts Canada proffered an affidavit of Stacy Adair, Director of Finance and Business Services who lives in Dartmouth, Nova Scotia. Ms. Adair deposed that the decision not to renew the Applicant as Scouter was based on safety concerns and also because of a pattern of failing to work constructively with the Group Commissioner after she was appointed in 2022. The affidavit alleges the Applicant was disrespectful and obstructive towards Ms. Armstrong and towards the Scouting Relationship Manager, Jeff Williams. The affidavit states that the Applicant berated youth participants in violation of the Code of Conduct. The affidavit states that these concerns were raised orally with the Applicant on previous occasions.

[50] As discussed earlier, these allegations are denied by the Applicant.¹² In his own affidavit he denies that there is any substance to these assertions and he denies that they had ever previously

¹² He acknowledges he does not own a computer or use email but there is nothing to suggest that Scouts Canada has imposed a requirement of computer literacy or use of emails as a condition of volunteering.

been brought to his attention. The Applicant also provided an affidavit from the Skipper of the 115th and from two parents of Scouts in the Troop. These affidavits indicate that the Applicant is extremely safety conscious, is a valued Scout leader and that “Scouter Wayne” continued to make important contributions to the 115th until he was removed.

[51] All the supporting affidavits profess shock at the decision. One parent deposes that the canoeing season will not be the same without Scouter Wayne and both express concern that the decision has not been transparent or in accordance with the values of Scouting. A group of Venturers who were former Sea Scouts submitted a petition for Scouter Wayne’s reinstatement. While affidavits of support by themselves might not be conclusive in the face of other evidence, this is the only firsthand evidence there is. If this issue is properly before the Court then the only conclusion the Court could reach would be that the incidents did not occur as described and that the letter and the affidavit make assertions that are without foundation in fact.

[52] Ms. Adair is an employee of Scouts Canada and she has no firsthand knowledge of the Applicant or the circumstances described in her affidavit. All of her evidence about misconduct or communication or warnings was hearsay as she admitted when cross examined. There is not a single document, note or record produced by Scouts Canada to substantiate these concerns despite the policies referred to above that require documentation of admonitions, warnings, or coaching support. Even if I admitted Ms. Adair’s sworn testimony under some exception to the hearsay rule, I could not give it any weight at all.

[53] *Rule 39.01* allows for limited use of hearsay evidence in affidavits. In an Application such as this, a witness may only give evidence based on information and belief in relation to “facts that are non-contentious” and then only if the source of the information and the fact of the belief are set out in the affidavit. Since the evidence put forward by Ms. Adair does not fall into that limited category, the evidence relayed to Ms. Adair by others without so much as a supporting document is inadmissible hearsay.

[54] Even if admitted, however, the evidence in relation to the conversations, warnings or incidents of which Ms. Adair had no firsthand knowledge would carry no weight. The Respondent

could easily have obtained affidavits from Ms. Armstrong, the Group Commissioner or from any of the individuals who are said to have had firsthand knowledge. It chose not to do so and so there was no one with firsthand knowledge of the allegations who could be examined or cross-examined under oath. As counsel is very well aware, except in unusual circumstances, evidence of what someone was told by someone else (let alone third hand information) is not admissible for the truth of its contents. There is therefore no evidence whatsoever before the Court to substantiate the assertion that the Applicant in any way fell below the standards expected of a Scouter.

[55] The only evidence before the Court that might explain what was behind the letter is evidence in the Applicant's own affidavit as well as in the evidence of the Skipper of the 115th. It appears that the Applicant was amongst a group of Scouters who were unhappy with the manner in which the previous Group Commissioner was replaced with Ms. Armstrong in 2022. The previous long serving commissioner was not reappointed to her position in circumstances which appear similar to those of the Applicant. The Applicant was vocal about the unfairness of simply dumping a long serving volunteer at the meeting where it was announced. One of the witnesses speculated that the two events were related and was concerned that it reflected a decision to get rid of older volunteers.

[56] Although this incident is also referenced in the affidavit of Ms. Adair, there is no evidence proving the assertion that the Applicant's opposition to removal of the previous Commissioner included disrespectful language towards Ms. Armstrong personally. Being vocal at a meeting, without more, could not be the basis for concluding that the Applicant was disrespectful or in breach of the Code of Conduct. There is no evidence that he was admonished or cautioned and no evidence of negative interactions with Ms. Armstrong in subsequent years. In fact, it appears from the evidence that the Group Commissioner was not involved in the weekly activities of the 115th in any direct fashion. There is no evidence that the Applicant interacted directly with the Group Commissioner at all. He was not the lead Scouter but even the lead Scouter is mystified by the allegation.

[57] The point of the above is simply to record that the Respondent put the conduct of the Applicant in issue in the termination letter and in the Affidavit filed in opposition to this litigation. The evidence put forward on this point by the Respondent is incapable of proving any misconduct by the Applicant while the evidence put forward by the Applicant supports a finding that no such misconduct existed. Equally importantly, the Applicant was never warned, admonished or coached and certainly not in writing.

[58] It follows that for purposes of this hearing, the Court is forced to the conclusion that the letter directed to the Applicant was untrue and misleading when it relied on safety concerns and failure to adapt as justification. This was then compounded by filing affidavit evidence by a deponent who swore that undocumented concerns outside her personal knowledge were true.

Interpretation of the Documents and Application of the Policies

[59] None of this may matter if the decision of the Group Commissioner is in her sole discretion and is not open to challenge. To reach this conclusion it would be necessary to find that the Group Commissioner is empowered to act arbitrarily and all of the policies of the organization for supporting volunteers in their roles, progressive discipline and written warnings, internal appeals and confirmation by the Key 3, Safe Scouting Department and National Review Board only apply during the year leading up to a renewal application. It would also be necessary to find that the words in the Appointment of Scouters Policy to the effect that renewal will be based on satisfactory performance of duties and adherence to the Code of Conduct are essentially meaningless.

[60] That cannot be the intention of these documents. The “Appointment of Scouters Standards” suggests that unless there is cause for removal as a Scouter, or the Scouter fails to complete the formal application by signing the undertaking and if required, submitting a criminal records or vulnerable sector check, renewal will ordinarily be granted in the absence of failure to carry out responsibilities satisfactorily. Past practice also supports this interpretation.

[61] As mentioned earlier, I recognize that there may be structural and other reasons that could result in particular volunteer roles being altered or eliminated. From time to time an organization

such as Scouts Canada may need to reorganize its structure, eliminate or alter volunteer roles or shut down open or evolve Troops or other groups. No doubt the organization needs flexibility to do so, and volunteers have no right to demand the continuation of a particular role or position in such circumstances. That is not what happened here.

[62] Where the Group Commissioner purports not to renew a volunteer for breaches of the Code of Conduct or for unsatisfactory performance, the decision appears disciplinary. The volunteer has the right to assume that the policies all volunteers, including the decision maker, have agreed to be bound by, should apply. The Applicant was entitled to assume that if there were issues, performance concerns or safety violations, they would be brought to his attention and documented. He was entitled to assume he would be supported or formally admonished and not that he would be faced with undocumented, vague and unsupported concerns giving rise to sudden termination of his volunteer role.

[63] Even if there was a legitimate basis for concern about the Applicant's performance, however, there was no pretense of following the progressive discipline policy or even the temporary suspension policy. The Applicant was given no opportunity to respond to written warnings, to adapt his behaviour, to benefit from coaching or to respond to specific allegations. He was not given access to the internal routes of reviewing a disciplinary decision or to the internal routes of appeal which the policies promise to provide.

[64] I conclude that the refusal to renew the Applicant as a Scouter for alleged cause was wrongful termination of the Applicant's volunteer status and therefore his membership in Scouts Canada. If there were performance concerns or reason to believe the Applicant had breached the Code of Conduct then the applicable policies should have been followed and the Applicant should have been allowed to challenge those assertions in the manner set out in the policies.

Remedy

[65] This brings me to the question of the appropriate remedy. The Applicant had originally sought a temporary injunction staying the suspension and permitting him to continue as a Scouter

for at least the balance of the summer and fall canoeing season. I declined to make that order and instead ordered an expedited hearing of the Application.

[66] The Applicant is entitled to Declaratory Relief. In this case I would grant a declaration that the progressive discipline and appointment of scouters policies applied to this situation. I would further grant a Declaration that the assertion that the Applicant failed to meet performance standards or breached the Code of Conduct is unfounded and without merit.

[67] The Applicant would be entitled to damages for breach of contract. As this was not an employment contract for monetary reward, however, there is no pecuniary loss associated with the breach. He should however be entitled to recover his costs on a full indemnity basis.

[68] The Applicant sought reinstatement. There are two reasons why that is not appropriate. Firstly, although it is not an absolute rule, specific performance of employment contracts is not generally available.¹³ This is not an employment contract as such but the principle that parties that do not want to work together should not be forced to do so still carries some weight. More significantly, the refusal to renew was for the 2023 – 2024 scouting season which is now over. We are now into the 2024 – 2025 scouting season which would require a further commitment by the Applicant and vetting by the Respondent. Retroactive reinstatement is not available and ordering that he be enrolled for the current year, bypassing the normal screening mechanism would not be appropriate.

[69] What other remedies might be available? There are suggestions in the affidavits that age discrimination was at work. Section 46.1 of the *Ontario Human Rights Code* might have been the basis for additional damages or for restitution remedies¹⁴, but the Applicant did not base his argument on ageism or ask for that remedy. Furthermore, the section does not permit a free standing discrimination action and if the case is primarily one for age discrimination, it would properly be the province of the Human Rights Tribunal. If this matter had been brought as an

¹³ See *Filice v. Complex Services Inc.*, 2018 ONCA 625 @ para 50

¹⁴ *Human Rights Code*, RSO 1990, c. H.19 as amended

action and if employment law principles applied, then the Court might consider *Wallace* damages (damages for bad faith conduct or unfair dealing in the course of a wrongful dismissal) or punitive damages.¹⁵ This was not an action, however, and these damages were not sought. It is not monetary relief that interests the Applicant.

[70] In my view declaratory relief is the most appropriate response. I would grant a limited mandatory order that if the Applicant wishes to volunteer for the current season, his application be reviewed appropriately and expeditiously and unless there are valid demonstrable reasons for non-renewal, his renewal be granted.

SUMMARY & CONCLUSION

[71] In summary, the Court has jurisdiction to entertain this application and finds that Scouts Canada owed a duty of procedural fairness to the Applicant in accordance with the relevant procedures and policies governing the relationship between Scouts Canada and its volunteer Scouters.

[72] In the circumstances of this case, reinstatement is not available and there are no pecuniary damages. Given the findings of fact, the relief sought by the Applicant and the summary nature of an Application, declaratory relief and a mandatory order together with legal costs is the appropriate remedy.

[73] A judgment may issue as follows:

- a. There will be a Declaration in the form set out at paragraph 1 (b) of the Notice of Application.
- b. There will be a further Declaration that the Respondent has failed to show any basis for asserting that there were performance issues or breaches of the Scouts Canada Code of Conduct on the part of the Applicant. Accordingly, the Court finds that the termination of membership was arbitrary, discriminatory and made for an improper purpose as requested in paragraph 1 (c) of the Notice of Application.

¹⁵ *Kaey's v. Honda Canada Inc.*, 2008 SCC 39, [2008] 2 S.C.R. 362

- c. There will be a Declaration that the Applicant was entitled to the benefit of The Temporary Suspension and Termination Procedure, the Discipline and Performance Management Procedure and the Appointment of Scouters Standards.
- d. There will be an Order directing that if the Applicant wishes to reapply to be a Scouter for the 115th Sea Scout Troop or any other volunteer position within Scouts Canada then subject to the normal screening procedures, his application shall be processed in good faith in accordance with this decision and in an expeditious manner.
- e. The Respondent shall pay costs to the Applicant on a substantial indemnity scale fixed in the amount of \$50,372.00 as set out in the Applicant's costs outline.

Mr. Justice Calum MacLeod

Date: September 27, 2024