IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF the *Cities, Towns and Villages Act.* R.S.N.W.T. 1988, c.C-8, as amended

BETWEEN:

YELLOWKNIFE PROPERTY OWNERS ASSOCIATION,

APPLICANT,

- AND -

THE MUNICIPAL CORPORATION OF THE CITY OF YELLOWKNIFE DAVID LOVELL, BLAKE LYONS, JO MACQUARRIE, TREVOR KASTEEL, MERLYN WILLIAMS, RUTH SPENCE, VI BECK and JOHN DALTON,

RESPONDENTS.

MEMORANDUM OF JUDGMENT
OF THE HONOURABLE ALLAN H. WACHOWICH
DEPUTY JUSTICE OF THE SUPREME COURT
OF THE NORTHWEST TERRITORIES

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[1] This is an application by the Respondent, The Municipal Corporation of the City of Yellowknife (the "City") for relief respecting an Originating Notice, filed by the Applicants, the City of Yellowknife Property Owners Association (the "Association") on January 18, 1996. That Originating Notice asks for, among other things, a declaration that certain meetings described as "briefing sessions" are deemed to be Council meetings for the purposes of the *Cities, Towns, and Villages Act*, R.S.N.W.T. 1988, c. C-8. Further relief sought includes a declaration that any decisions made at those meetings be declared a nullity and an Order that council members be prohibited from meeting to

discuss municipal concerns at anything other than a meeting in accordance with the Act.

[2] In response to the Originating Notice, the City makes this application requesting the following:

> 1. An Order pursuant to R. 129(1)(a) of the Supreme Court Rules of the Northwest Territories striking the paragraph of the Originating Notice that seeks "a declaration that the decisions made by the Municipal Corporation of the City of Yellowknife at such meetings are a nullity for failure to comply with the mandatory provisions of ss. 21 and 22 of the *Cities, Towns and Villages Act,*" on the grounds that the paragraph does not disclose a cause of action.
>
> 2. In the alternative, an Order that the Association does not have standing to obtain the relief sought under the same paragraph on the grounds that the Association is not a person particularly affected by the decisions (if any) passed by Council at the impugned meetings.
>
> 3. In the further alternative, an Order pursuant to Rule 305 granting directions settling the issues of fact to be tried in the action, including:
>
> > (i) an Order compelling the Association to provide full particulars of the decisions alleged to have been made at the impugned meetings; and
> > (ii) an Order limiting the decisions of Council subject to review to those made 6 months prior to the commencement of the action, or within such other time as the Court deems appropriate.
>
> 4. An Order pursuant to Rule 129(1)(a)(i) striking the section of the Originating Notice that seeks to prevent councillors from meeting to discuss issues of municipal concern outside of a duly constituted meeting under the Act, or, in the alternative, an Order pursuant to Rule 129(b) dismissing the action against the individual respondents on the grounds that there is no cause of action against them as individuals. In the further alternative, an Order pursuant to Rule 58(3) striking the individual respondents as parties to the action on the grounds that they are neither necessary nor appropriate parties to the action.

Each of these items will be dealt with in turn in the order counsel was asked to argue

them, starting with the issue of whether or not the Association has the necessary status to bring this action.

I. STATUS OF THE ASSOCIATION

[3] The City argues that the Association does not have a status by way of right to bring the application, and that their status is dependent on the discretion of the Court. In support, they cite the leading case of *Minister of Justice (Canada)* v. *Borowski,* [1981] 2 S.C.R. 575, and argue that it establishes the test for status that should be applied to the Association in this case:

> I interpret these cases as deciding that to establish status as a plaintiff in a suit seeking a declaration that legislation is invalid, if there is a serious issue as to invalidity, a person need only to show that he is affected by it directly or that he has a genuine interest as a citizen in the validity of the legislation and that there is no other reasonable and effective manner in which the issue may be brought before the Court (at 598).

In the City's submission, this means that as the Association has not been affected in a manner different than the general public, they must establish that no other reasonable or effective manner to bring the issue to Court exists. They argue that the Association can not establish this, as the individuals bearing the consequences of the decision are clearly more directly affected by the decision, and are therefore the more appropriate party to bring this challenge. While I accept the City's argument that there are others more directly affected by the decisions, I would infer that they are not in a position that makes it likely that they will bring this matter before the Court. It must be recognized that the key purpose of the Association's application is to protest the **procedure** by which these decisions were made, and, as a consequence, to have those decisions made under the impugned process declared a nullity. To state that those individuals

directly affected by the decision are a more reasonable or effective party to bring this action implies that they have knowledge as to the procedure used to make the decision. There is no evidence that this is in fact the case, and I do not accept that the Association are not at least as reasonable and effective a means as any other to bring this application, if not the most reasonable and effective means.

[4] However, even if I am wrong and the Association is not capable of meeting the test in *Borowski*, I accept the submission of the Association that the test set out in *Borowski* is not applicable in a case where the level of government being challenged is a municipality. That this is the case is supported by *Thorson* v. *Canada (A.G.)*, [1975] 1 S.C.R. 138, which confirms the rule in existence since the 1907 Supreme Court decision of *MacIlreith* v. *Hart*, 39 S.C.R. 657, that the threshold for standing in municipal matters is lower than for challenges against other levels of government. They further submit that this "lower threshold" common law rule has been incorporated into the section of the *Cities, Towns and Villages Act* that allows for an application to quash, which reads:

> s. 68(1) Any person
> (a) resident in the municipality, or
> (b) adversely affected by a resolution or by-law
> may apply, by way of Originating Notice, to a judge of the Supreme Court for an order quashing a resolution or by-law of the municipal corporation.

The "lower threshold" is thus met by establishing only that the challenger is adversely affected, as compared to directly or specially affected as required by *Borowski*.

The Association argues that they are in fact a "person" under this section, as the *Interpretation Act*, R.S.N.W.T. 1988, c. I-8, includes a corporation in the definition of person, and they are a duly incorporated society under the *Societies Act,* R.S.N.W.T.

1988, c. S-11. As the *Interpretation Act* does not specify what kind of a corporation may be included (it is not limited to a "business corporation," for example) I agree with the Association that they are entitled to the status of "person" under s. 68. This decision is supported by s. 4(2) of the *Societies Act*, which states:

> s. 4(2) On and after the date of issue of the certificate of incorporation of a society, the subscribers to the application and any other persons who become members of the society, are a corporation under the name mentioned in the certificate of incorporation **and have all the powers, rights and immunities vested by law in a corporation.** (emphasis added)

Because a corporation has status to apply under s. 68 of the *Cities, Towns and Villages Act*, it would be illogical to argue they cannot be adversely affected by a resolution or by-law merely by virtue of the fact that they are a group instead of a individual. I accept the Association's submission that the collective interests of the Association are affected by the matters complained of in the Originating Notice, and it is clear that if the allegations of the Association are true, the effect on both the Association and all citizens of the Municipality of Yellowknife would be adverse due to the Council's failure to adhere to the requirements of ss. 21 and 22 of the *Cities, Towns and Villages Act* in making decisions concerning that municipality.

II. CAUSE OF ACTION

[5] The second issue argued is whether the Originating Notice discloses a cause of action in paragraph 2, and, if not, whether the affidavit filed with the Originating Notice should be construed as "part of" the Originating Notice, thereby providing sufficient facts to disclose a cause of action. Paragraph 2 reads as follows:

> A Declaration that the decisions made by the said Municipal Corporation of the City of Yellowknife at such described meetings are a nullity for failure to comply with the mandatory

> provisions of s. 21 and 22 of the *Cities, Towns and Villages Act*, R.S.N.W.T. 1988, c. C-8, as amended.

Rule 23(2) of the Supreme Court Rules of the Northwest Territories requires that the Originating Notice contain a concise statement of the nature of the claim made, and of the relief sought, with sufficient particulars to identify the cause of action. Where a cause of action is not disclosed by the pleadings, the Court may strike the pleading under R. 129(1)(a)(i). The City submits that the Court may look only to the Originating Notice itself, and that paragraph 2 of the Association's Originating Notice discloses no cause of action and should therefore be struck. The Association contends that, viewed as a complete document, the Originating Notice sufficiently identifies the matters at issue for the City to meet the case against them, and that they cannot claim they are unable to identify the cause of action. In the alternative, they argue that the affidavit filed in support of the Originating Notice should be referred to when determining whether or not an Originating Notice should be struck. In support, they cite *Re Caines* [1978] 2 All E.R. 1 (Ch.), where Megarry V-C notes (at 3):

> Of course, unlike a statement of claim in an action begun by writ, most originating summonses are remarkably uninformative documents. They usually ask a series of questions, or state the various forms of relief sought, but most of them disclose little or nothing of what the case is about or what the plaintiff's contentions are.

and further:

> Most of the material that in an action by writ is provided by the statement of claim is, under an originating summons, normally provided by the affidavit in support of the originating summons.

The Association also urges that the Rule preventing the admission of evidence on an application to strike a pleading (R. 129(2)) is to be modified appropriately in the case of

an Originating Notice as required by R. 129(3):

> R. 129(3) This rule applies with such modifications as the circumstances require to an Originating Notice and a petition.

The Association submits that an appropriate modification is to consider the affidavit, which by R. 24 is required to be served "with" the Originating Notice, when determining whether a cause of action is disclosed. The City argues that there is no Canadian authority directly on point, though there are some decisions which say that any document referred to in a Statement of Claim may be considered. The City submits that these cases are not binding authority on the courts of the Northwest Territories, and should not be followed as they are contrary to the explicit requirement in R. 23 that an Originating Notice set out the grounds upon which an applicant seeks the relief claimed. The two cases they note are *Re Caines*, *infra*, in which the Chancery Court interpreted a British rule identical in substance to the Northwest Territories rule and allowed consideration of the affidavit, and *Harvie* v. *Calgary Regional Planning Commission* (1978), 8 Alta.L.R. (2d) 166 (C.A.) where Clement J.A. states, *obiter* (at 177-8):

> It may be said (although it was not argued) that the notice was defective in that it did not within itself plead a cause of action leading to the declaration claimed; instead, it incorporated by reference affidavits which were served on the commission with the notice, from which the cause of action could be made out. If it be so taken, the defect was an irregularity, and it is not suggested that the respondent was misled or disadvantaged. The point is raised as a technicality to defeat consideration of the substance and should not be sustained.

While I am mindful of the requirements in R. 23(2) regarding the contents of an Originating Notice, in my view, the approach taken by Clement J.A. is correct and should be followed. An Originating Notice is of a different species than a Statement of Claim, and the affidavit required to be served with the Notice is integral to the use of the Notice

to effectively initiate an action. This is recognized in the provision in R. 129(3), allowing the application of the rest of R. 129 to Originating Notices "with modifications as the circumstances require." As in *Harvie*, the City cannot argue that they were misled or disadvantaged as to the case being brought against them, and to allow the Notice to be struck on the basis that it must be looked at independently of the affidavit would allow a "technicality to defeat consideration of the substance." In holding that the affidavit comprises part of the Originating Notice, I am not deciding whether there is a cause of action disclosed on the face of the Notice itself, as it is unnecessary to my decision.

[6] Once it is determined that the affidavit can be looked to in an application to strike under R. 129, I must then consider whether the City meets the test for striking out pleadings. The Association notes that the remedy is rarely granted, and cite *Hunt* v. *Carey Can. Inc.*, (1990) 6 W.W.R. 385 (S.C.C.) in support, quoting with approval Chitty J. in *Peru "Republic"* v. *Peruvian Guano Co.* (1887), 36 Ch.D. 489:

> Under the new Rule, the pleading will not be struck out unless it is demurrable and something worse than demurrable. If, notwithstanding defects in the pleading, which would have been fatal on demurrer, the Ct sees that a substantial case is presented, the Court should, I think decline to strike out the pleading; but when the pleading discloses a case which the Court is satisfied will not succeed, then it should strike it out and put a summary end to the litigation (at 393).

A more modern statement of the test can be found in *Minnes* v. *Minnes* (1962), 39 W.W.R. 112 (B.C.C.A.) at 122-123:

> So long as the statement of claim, as it stands or as it may be amended, discloses some question fit to be tried by a judge or jury, the mere fact that the case is weak or not likely to succeed is no ground for striking it out.

The City does not challenge that the Association has a arguable case once the affidavit

is considered in the application to strike, and I am satisfied on the evidence before me that there is a question to be tried.

III. APPLICATION FOR DIRECTIONS UNDER R. 305

[7] In the event that the Originating Notice stands as filed, the City has asked for the following Orders pursuant to a request for directions under R. 305:

(i) an Order compelling the applicant to provide full particulars of each decision alleged to have been made under the impugned process; and
(ii) an Order limiting the decisions subject to review to those dating back 6 months from the date of the commencement of these proceedings, or another date the court deems appropriate.

I will address the second of these Orders first, as it will have a bearing on the nature and extent of particulars to be provided, if any.

(i) Limiting the Decisions Subject to Review

[8] The City submits that as there is no statutory limitation period defining the scope of the Association's attack, the Court should impose its own limitation period as an exercise of its discretionary power to control its own proceedings. This request is meritorious, as an unlimited attack on decisions of council could result at the least in serious administrative uncertainty, and at the most municipal chaos. The City suggests a date of 6 months, as that is consistent with the limitation period set out in Rules for proceedings commenced for a action in *certiorari*, and is longer that the time limit of one month which is currently available for application for judicial review. The Association makes no suggestion as to an appropriate time limit. It is apparent that the legislators have seen fit to limit the uncertainty associated with the attack of a decision of a municipal council to six months, and I fix that as the time period for which decisions rendered by council can be challenged. The six month period dates back from the date of commencement of these proceedings.

(ii) Provision of Particulars

[9] This six month time limitation helps to answer the concerns of the Association in the City's request for particulars of the impugned decisions made by council. The City is requesting that the Association be made to supply particulars of any and all decisions of council they seek to have declared a nullity in order to avoid surprise and identify the issues in dispute. The Association submits that the request for particulars is premature, as much of the information required to make their case is in the sole possession of the City, and they do not at present have all of the necessary evidence to provide the City with the particulars sought. I think the Association's concerns are alleviated to some extent by the fact that they are only entitled to challenge decisions made by council within 6 months of the date of filing the Originating Notice. I will order that they are required to supply particulars of the decisions to be challenged after the completion of any cross examinations on affidavits and discovery that is required.

IV. STRIKING THE INDIVIDUAL COUNCILLORS FROM THE ORIGINATING NOTICE

[10] The City also seeks the following Orders:

(i) an Order striking the words in paragraph 5 of the Originating Notice prohibiting individual council members "from meeting in any number to discuss matters of municipal concern, except at a meeting duly constituted pursuant to the provision of the *Cities, Towns and Villages Act*."
(ii) in the alternative, an Order pursuant to R. 129(b) dismissing the action against the individual councillors on the ground that there is no legal basis for the relief sought against them.

(i) The Prohibition on Meetings

[11] The City's submissions are based on the premise that the Court is only entitled to enforce compliance with a legislated procedure for a meeting that falls under the *Cities, Towns and Villages Act*, and that the Act does not require that all meetings of

two or more aldermen be held in a certain manner. As such, they argue that there is no cause of action that would permit the Association to obtain an order prohibiting the aldermen from meeting, provided that meeting is not a council meeting governed by the Act. They submit that the Act does not seek to regulate discussion between council members, but rather to prescribe a procedure for meetings of a council and its committees. In support, they cite a number of cases which have held that a legislative requirement for public meetings does not preclude informal discussions between council members, for example: *Vanderkloet* v. *Leeds and Granville County Board of Education* (1985), 30 M.P.L.R. 230 (Ont.C.A.); *Southam Inc.* v. *Economic Development Committee of the Regional Municipality of Hamilton Wentworth* (1988), 40 M.P.L.R. 1 (Ont.C.A.); *Southam Inc.* v. *Ottawa (City)* (1991), 10 M.P.L.R. 76 (Ont.C.A.).

[12] In response, the Association alleges than any order prohibiting *in camera* council meetings can and will be defeated by the actions of individual council members. They insist that the individual councillors must be prohibited from meeting formally to discuss municipal business for the express purpose of avoiding any order prohibiting the carrying out of "briefing sessions." I would remark only that this Court has no power to compel councillors not to meet and discuss municipal issues outside of the legislative requirements of the *Cities, Towns and Villages Act*. Therefore, this court can not control the procedure of any meeting that does not fall under that Act. Whether or not the alleged "briefing sessions" are meetings for the purposes of the Act remains to be determined, however this determination is not dependent on the inclusion of individual councillors in this action.

[13] As is noted by the City, it is not sufficient to allege that an individual council member participated in the council's wrong, rather, there must be allegations sufficient

to establish a cause of action against a particular individual (see *Region Plaza Inc.* v. *Hamilton-Wentworth (Regional Municipality)* (1990), 12 O.R. (3d) 750 (Ont.H.C.). I find that there is no cause of action as against the individual councillors, and order that the above noted portion of paragraph 5 be struck from the pleadings. As the only relief sought against the individual councillors relates to the order prohibiting their meeting, they will be struck from the pleadings pursuant to Rule 58(3), as they are neither necessary nor appropriate parties to this action.

[14] Since both parties have mixed success in this application, they will bear their own costs.

D.J.S.C.N.W.T.

DATED at Edmonton, Alberta,

this 28th day of October 1996.

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CV 06224

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MEMORANDUM OF DECISION