Date: 19980616
Docket: CV06522

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

THE COURT:

THE HONOURABLE MR. JUSTICE HOWARD L. IRVING

BETWEEN:

CITY OF YELLOWKNIFE PROPERTY
OWNERS ASSOCIATION

Applicant

- and -

THE MUNICIPAL CORPORATION OF THE
CITY OF YELLOWKNIFE

Respondent

**REASONS FOR DECISION OF THE
HONOURABLE MR. JUSTICE IRVING**

COUNSEL:

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For the Applicant

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For the Respondent

REASONS FOR DECISION OF THE
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[1] In this action, the Applicant, City of Yellowknife Property Owners Association, sought a Declaration, and other relief, that the Municipal Council of the Respondent, The Municipal Corporation of the City of Yellowknife, had improperly held council meetings, not in public, contrary to ss. 21 and 22 of the ***Cities, Towns and Villages Act***, R.S. N.W.T. 1988, Chap. C-8, which provide:

> "21. Subject to section 22, every council shall hold its regular, special and committee meetings in public.
>
> 22. (1) No person shall be excluded from any meeting of a council or a committee of council except for improper conduct.
>
> (2) A council or a committee of council may, by resolution, authorize its meeting to be closed to the public where
>
> (a) it is of the opinion that to do so is in the public interest; and
>
> (b) the resolution is made by at least 2/3 of the council members present.
>
> (3) A council has no power, at a meeting that is closed to the public, to make a by-law or a resolution other than a resolution to revert to a public meeting.

[2] The question here in dispute is whether certain private and confidential meetings of aldermen and members of the city administration which were described as "Aldermen's Briefings", were council meetings which offended ss. 21 and 22 ***(supra)*** because they were not held in public. These aldermen's briefings were held regularly on a weekly basis with the aldermen and the city's Senior Administrative Officer, Mr. Douglas Lagore, and other senior members of the city administration in a basement boardroom.

[3] The Applicant contends that these briefing meetings were in fact council meetings. The Respondent city contends that these aldermen's briefing meetings were not council meetings, but were simply an opportunity for the administration to update city council on actions taken by the administration.

[4] The evidence adduced before me includes three Affidavits, and cross-examinations upon them, of Mr. Lagore, the city's Senior Administrative Officer, of Richard Peplow, an alderman for one three year term from November 1994, and of Mayor D. Lovell.

[5] Both Mr. Peplow and Mr. Lagore also gave oral evidence before me.

[6] Counsel provided me with all of the agendas for the aldermen's briefings from November 1994 which outlined the matters expected to be discussed at the briefing; these agendas included explanatory back-up material, some of it voluminous, in relation to each of the items included in the agenda. I was also provided with the Minutes marked "confidential" of the aldermen's briefing meetings from November 1994.

[7] By order made in these proceedings on September 12, 1996, it was provided:

> "3. The City's application for an Order pursuant to Rule 305, granting instructions settling the issues of fact to be tried in this action is granted as follows:
>
> (a) The decisions subject to review in these proceedings are fixed to those decisions allegedly made in the six month period immediately prior to

the date of
commencement of
these proceedings;"

These proceedings in fact commenced on the 18th day of January 1996.

[8] Mr. Lovell was the Mayor of Yellowknife at all material times and continues in that office today. Section 39 of the ***Cities Towns and Villages Act (supra)*** describes that the Mayor is the "Senior Executive Officer of the Municipal Corporation".

[9] Mr. Douglas Lagore has been the Senior Administrative Officer of Yellowknife for approximately eleven years. His extensive duties are set out in ss. 47 and 48 of the ***Act***. In his evidence, Mr. Lagore explained the aldermen's briefing sessions here in dispute were his idea. He said that normally these would last perhaps an hour or so and he would prepare the agendas. While an alderman was always free to see him at any time to obtain information relevant to city operations, he preferred to update the aldermen as a group, because he had found that when he discussed civic matters with aldermen separately, on occasions it was suggested that his updating of one alderman might be inconsistent with what he told another. Therefore he developed the idea of the briefing sessions where all aldermen could attend and hear his report on ongoing city matters, and ask such questions of him as they wished. These briefing sessions were to be informal and were not thought by him to constitute council meetings, nor did he intend them to include voting on any matter; he felt that the briefing sessions should not become a platform for debates on issues, although he realized that civic issues would be discussed.

[10] By the time Mr. Peplow became an Alderman in November 1994, these briefing sessions had been an established practice of the city over many years.

[11] Mr. Lagore clearly regarded these briefing sessions as his meetings. He prepared the Notice of the Aldermen's Briefing Meetings and Agenda which was delivered to each alderman well in advance of the meeting. The Mayor would act as Chairman; Mr. Lagore felt that he did the bulk of the speaking (he said that at council meetings he spoke very little). Minutes of the briefing sessions were taken by the city clerk, although Mr. Lagore felt that the use of the word "Minutes" was a misnomer because in his view the only reason to keep minutes was to enable him later to demonstrate, if needed, that some subject or other had indeed come up at one of the briefing sessions. The briefing sessions were not open to the public and Mr. Lagore felt that the resulting informality made them more collegial. Indeed, to keep them informal and to discourage debate, he attempted to arrange the seating so that administration personnel would intermix with the aldermen. The minutes were not

distributed to the council members, nor apparently were they reviewed by Mr. Lagore. He felt them to be confidential.

[12] For his part, Mr. Peplow saw the briefing sessions as something else. He said that he "had a hard time" accepting the term "briefing sessions" which he thought were secret meetings. He felt that the background materials provided at the briefing sessions were incomplete or misleading in contrast to those provided at regular council meetings. He said that he did not realize this for the first eight or nine months of his term and felt that bad decisions were reached at the briefing sessions because of the inadequate or misleading background material provided. He said that debates did occur at the briefing sessions and that some votes were taken. He said that many opinions were expressed at the briefing sessions which were not advanced at the council meetings and he came to the conclusion that aldermen developed opinions at the briefing sessions which he found were rarely changed afterwards. He concluded that few of the matters discussed at the briefing sessions were confidential and resented that he was not permitted to tell members of the public about the discussions at the briefing sessions. He explained that frequently decisions were taken at the briefing sessions by informal votes, sometimes by a show of hands, sometimes by a straw vote (what this was was unexplained), and more often by "eye contact" where Mayor Lovell would look at each alderman to see if he objected. Mr. Peplow stated that a considerable number of matters decided at the briefing sessions were not later ratified at council meetings (he substantially qualified this statement in cross-examination), and felt that debates on issues at the council meetings were minimal in contrast to the earlier debates when the matters were considered at the briefing sessions.

[13] While Mr. Lagore viewed the briefing sessions as his opportunity to update council on civic matters, he conceded in his evidence that the briefing sessions developed into something beyond such simple informal meetings. For example, he explained that in addition to his updating the aldermen, briefing sessions enabled him to receive directions from council about many issues and also to consider confidential matters which might otherwise require an in camera council meeting pursuant to s. 22(2) ***(supra)*** which permitted a council meeting could be closed to the public. However, since s. 22(2) ***(supra)*** required an enabling resolution before council could meet in camera, Mr. Lagore felt that the debate over the resolution to go in camera often made public disclosure over much of the issue for which in camera discussion was sought. Therefore he included these confidential issues in the agendas for the briefing sessions and thus by-passed any need to resort to s. 22(2) ***(supra)***.

[14] As an example of the utility of the briefing sessions, and of directions which he might receive from them, he referred to an issue about the relocation the city was seeking of the Ski Club, its premises, facilities and trails. The Ski Club had adopted the position that if the city relocated its facilities, the city should pay the costs of doing

so which the Ski Club estimated in the neighbourhood of $500,000. For his part, Mr. Lagore felt this sum was excessive (he had estimated the cost at $100,000 or so), but felt it wise to obtain council approval about the financial parameters of these negotiations. Mr. Lagore thought that were it not the opportunity provided by the briefing sessions to obtain council's direction in these negotiations, that council would have had to meet in camera pursuant to s. 22(2) ***(supra)***. Thus, as I gathered from the evidence, most, if not all, of confidential matters were dealt with at briefing sessions rather than resorting to the more cumbersome proceeding of meetings in camera via s. 22(2) ***(supra)***.

[15] A review of the Agenda and the Minutes of the briefing sessions is helpful. Nearly every agenda item used the words "Administration would like to review the attached Memorandum (or correspondence, or draft bylaws, etc) with Council" [emphasis added]. Obviously Mr. Lagore in preparing the agenda expected that the administration would be discussing the various agenda items for the briefing meetings with the council meeting informally.

[16] The Notices of the briefing meetings, together with the agenda and the accompanying explanatory material (sometimes voluminous) were delivered to the aldermen some days prior to the meeting. A review of the minutes of the briefing meetings is instructive. In the sixth month period preceding the commencement of these proceedings (July 18, 1995 - January 18, 1996) 23 such meetings were held, normally at noon on each Monday in the city's downstairs boardroom. The minutes are replete with the phrases "Aldermen agreed" or "Council agreed". These minutes support Mr. Peplow's evidence that the briefing meetings were intended and did develop consensus on the issues facing the city.

[17] On some occasions the minutes disclosed a voting procedure as having taken place. For example, at the briefing meeting on December 5, 1994, the minutes regarding item 1 record: "It was agreed by Council (the Mayor broke the tie) that one administrative staff will attend". The minutes for the January 30, 1995 briefing meeting relating to item 4 - 1995 Borrowing Bylaws, included "After a straw vote, it was agreed that the garage expansion would be funding from Block Funding".

[18] Additionally, the minutes disclose many decisions were taken by council and directions given to the administration during the six month period, and the minutes also disclose that at seven meetings during that period confidential matters were discussed such as those relating to union negotiations and negotiations to resolve various disputes (such as the Ragged Ass Road problems which came up from time to time), which, but for the convenience provided by the briefing meeting, would have required resort to s. 22(2) ***(supra)*** for an in camera council meeting for such contentious issues.

[19] In summary, the briefing meetings were structured meetings chaired by the Mayor which served many purposes including providing Mr. Lagore the opportunity to update council with information on civic affairs, but also provided the opportunity for aldermen to discuss (Mr. Lagore's word) or debate (Mr. Peplow's word) civic matters and give administration appropriate directions. Additionally, of course, the briefing sessions provided council with the opportunity to discuss confidential items without being required by s. 22(2) ***(supra)*** to pass a resolution permitting an in camera meeting.

[20] Therefore one must answer whether these briefing sessions were meetings of council as referred to in ss. 21 and 22 of the ***Act***.

[21] The parties referred me to a number of legal decisions, particularly to several from the Ontario courts which are germane.

[22] In the case of ***Southam Inc. v. Regional Municipality of Hamilton-Wentworth***, (1988) 40 M.P.L.R. 1 (Ont. C.A.) where a committee of the Municipal Council agreed to meet in camera at its next regularly scheduled meeting, with staff, to review past, present and future objectives as well as the committee's terms of reference. A by-law of the municipality provided, ***inter alia***, that the public may not be excluded from any meeting of a standing committee except by resolution of the committee to consider any individual items on the agenda as may be decided by the committee. The Applicant newspaper sought to attend the meeting but was required to leave. The Applicant then sought a declaration that the committee exceeded its jurisdiction in holding the meeting in camera. The majority of the Court of Appeal held that the meeting in camera exceeded the jurisdiction of the Commission. Grange, J.A. stated at p. 6 & 7:

> "Upon these facts, I have no difficulty in finding that what took place on September 26 was a meeting of the Economic Development Committee. The by-law gives no definition of "meeting" but *Black's Law Dictionary*, 5th ed. (St. Paul: West, 1979), at p. 886 reflects common parlance when it defines
>
> > '….an assembling of a number of persons for the purpose of discussing and

> acting upon some matter or matters in which they have a common interest….'

In the context of a statutory committee, *"meeting" should be interpreted as any gathering to which all members of the committee are invited to discuss matters within their jurisdiction. And that is precisely what was being done on that occasion. No matter how the meeting might be disguised by the use of terms such as "workshop", or the failure to make a formal report, the committee members were meeting to discuss matters within their jurisdiction. What the committee was trying to do was to have a meeting in camera, something expressly forbidden under the by-law*.

The majority of the Divisional Court, in rejecting the appellant's application for judicial review, relied upon the decision of this Court in *Vanderkloet v. Leeds & Grenville County Bd. of Education* (1985), 51 O.R. (2d) 577, 30 M.P.L.R. 230, 21 Admin. L.R. 36, 20 D.L.R. (4TH) 738, 11 O.A.C. 145 (C.A.) [leave to appeal to S.C.C. refused (1986), 54 O.R. (2d) 352 (note), 65 N.R. 159 (note), 15 O.A.C. 238 (note) (S.C.C.)]. There, the *Education Act*, R.S.O. 1980, R.S.O. c. 129 required all meeting of a board to be open to the public but the respondent board nonetheless decided in camera to reorganize the schools in the district. The decision was confirmed later at a public meeting and the resolutions to that effect were upheld by the Court of Appeal. In the course of his reasons for the Court, Dubin, J.A. said at pp. 586-587 [O.R., pp. 242-243 M.P.L.R.]:

> ‘With respect, I do not think that the requirement that the meetings of the Board should be open to the public precludes informal discussions among board members, either alone or with the assistance of their staff. Nor does the statute require that the Board prepare an agenda to be distributed to the public in advance of a board meeting. In acting as they did, I do not think that the Board violated any of the statutory provisions governing their conduct, and were not required to make public any staff reports prepared for their assistance and guidance.’
>
> Furthermore, even if there was a duty of procedural fairness in this case, I do not think that the Board acted unfairly. Assuming that there were some grounds for complaint about the procedure adopted at its first meeting, I think what transpired following the first meeting remedied any deficiency.”

And at p. 9:

> "….I do not think that *Vanderkloet* stands for the proposition that a committee, bound to hold its meetings in public, can convert a scheduled meeting into an informal discussion and thus avoid the necessity of public disclosure. In *Vanderkloet* the major issue was whether the reorganization effected amounted to a school closing, in which event the board would have acted contrary to statutory guidelines. The Court held that there was no school closing and no breach of the guidelines had occurred. The subsidiary issue was whether there had been a breach of procedural fairness and it was in that context that the dicta of Dubin, J.A., supra, were made. It is not the decisions made that concern us here. It is the meeting and whether it was regularly held. There is no doubt that members of a committee, meeting informally, can discuss questions within the jurisdiction of the committee privately, *but when all members are summoned to a regularly scheduled meeting and there attempt to proceed in camera, they are defeating the intent and purpose of council's by-law which governs their procedure*."
>
> [My emphasis italicized]

[23] In the case of ***Southam v. Ottawa*** (1991) 10 M.P.R. (2d) 76, a newspaper was refused admittance to an in camera retreat of the City Council where all members of the council and staff were invited to attend. The newspaper sought judicial review arguing that the meeting ought to have been open to the public. The Ontario Divisional Court agreed, holding at p. 82:

> "The respondents then suggested that the fact that the Calabogie events were not substitutes for regularly scheduled meetings was pivotal. However, it would appear that this is rather a question of looking at the essence of the events. Clearly, it is not a

> question of whether all or any of the ritual trappings of a formal meeting of council are observed: for example, the prayer to commence the meeting or the seating of councillors at a U-shaped table. Neither should it depend entirely on whether the meeting takes place commencing at 2:30 p.m. on the first and third Wednesday of a month or is in substitution for such a Wednesday meeting. *The key would appear to be whether the councillors are requested to (or do in fact attend without summons) attend a function at which matters which would ordinarily form the basis of council's business are dealt with in such a way as to move them materially along the way in the overall spectrum of a council decision. In other words, is the public being deprived of the opportunity to observe a material part of the decision-making process?*
>
> [My emphasis italicized]

[24] Applying these cases, it is clear that briefing sessions held in Yellowknife were meetings within the jurisdiction of council (the test applied in the ***Southam Inc. v. Regional Municipality of Hamilton-Wentworth (supra)*** case) and that they dealt with matters which form the basis of the council's business and were dealt with in such a way as to move them materially along in the overall spectrum of the council's decision (the test applied in the ***Southam-Ottawa (supra)*** decision).

[25] I therefore conclude that the briefing sessions here in dispute were wide-ranging and went far beyond updating aldermen about administration activities; these dealt with many matters within the jurisdiction of council where decisions were made and instructions given by the council to the administration, and where confidential issues were dealt with without the necessity of an in camera resolution required by s. 22(2) ***(supra)***. Thus I conclude the briefing sessions were council meetings within the provisions of s. 21 ***(supra)***, which were required, subject to s. 22(2) ***(supra)***, to be held in public.

[26] The Applicants are entitled to a Declaration to that effect.

JUDGMENT DATED at YELLOWKNIFE, NORTHWEST TERRITORIES
this 16th Day of June, 1998

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IRVING, J.
DEPUTY JUDGE

CV 06522

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