

Legion (Branch 250) v. Hay River, 2005 NWTSC 71

Date: 2005 08 15

Docket: S-0001-CV2005000197

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

ROYAL CANADIAN LEGION (Branch 250)

Applicant

- and -

THE MUNICIPAL CORPORATION OF THE TOWN OF HAY RIVER

Respondent

MEMORANDUM OF JUDGMENT

[1] The Applicant Royal Canadian Legion brought this matter on before me pursuant to Rule 22(f), as “a proceeding for the determination of a question where there are no material facts in dispute and the rights of the parties depend on the construction of ... an enactment ... and for a declaration of the rights of the persons interested.” The Respondent Town of Hay River did not object to the matter being brought forward this way.

[2] The question the Applicant seeks to have answered has to do with the limits, if any, on its discretion to deal with lottery proceeds in the following circumstances.

[3] The Applicant has held a lottery licence administered by the Respondent. The Applicant deposits lottery proceeds into two separate funds. One of those funds is the “Building Fund”, which is for the benefit of the Applicant. The other is the “Community Fund”, which is for the benefit of worthy causes or organizations.

[4] On December 1, 2004, the Building Fund consisted of \$138,117.46, the proceeds of various lotteries. The Community Fund consisted of \$16,911.68. The Applicant transferred \$50,000.00 from the Building Fund to the Community Fund and then made a number of grants from the latter fund to community and charitable organizations.

[5] The Applicant's Originating Notice seeks an order:

1. Determining the requirements with respect to disbursement of lottery proceeds pursuant to the Lotteries Regulations, R.R.N.W.T. 1990, c. L-49 as incorporated in Bylaw 1653 "A" of the Municipal Corporation of the Town of Hay River and in particular section 25 of the Lotteries Regulations (section 27 of Bylaw 1653 "A");
2. Determining the method for correcting any error in transferring lottery proceeds into the Community Trust Fund.

[6] The relief sought as set out above struck me as imprecise and so I asked counsel to provide me with a draft of the order to focus the exact question posed in context. The draft order contains the following terms:

1. It is determined that it is in the discretion of the licence holder as to the percentage of lottery proceeds which may be applied to the building fund provided that it does not exceed fifty per cent of the proceeds.
2. That the transfer of funds from the building trust fund to the community trust fund was not a violation of section 25 of the *Lotteries Regulations*, R.R.N.W.T. 1990, c. L-49 as incorporated in section 27 of *Bylaw 1653 "A"* of the Municipal Corporation of the Town of Hay River.

[7] In my view, this Court should deal only with a specific situation and not attempt to anticipate every situation that might bring s. 27 of the Bylaw into play. The relief proposed in paragraph 1 of the draft order is therefore too wide. In my view, the only question this Court can or should answer is whether it was within the Applicant's discretion, under s. 27 of the Bylaw, to transfer \$50,000.00 out of the Building Fund into the Community Fund.

[8] It is helpful to bear in mind that except for certain exemptions, gambling is illegal in Canada. It is prohibited under Part VII of the *Criminal Code* pertaining to "Disorderly Houses, Gaming and Betting".

[9] One of the significant exemptions to the offences set out in Part VII is found in s. 207, which deals with permitted lotteries. In particular, relevant to this case, s. 207(1)(b) provides that it is lawful for a charitable or religious organization, under certain conditions, to conduct and manage a lottery scheme. One of the conditions is that the charitable or religious organization have a licence issued by the appropriate provincial authority.

[10] In the Northwest Territories, the *Lotteries Act*, R.S.N.W.T., 1988 c. L-11 provides that the Commissioner may make regulations delegating the authority to regulate and license lottery schemes to any community council. Pursuant to that power, the *Hay River Delegation Regulations*, R.R.N.W.T. 1997, R-013-97 delegate to the Town of Hay River the authority to regulate and license lottery schemes within the Town of Hay River. Those Regulations also say, in s. 2, that the territorial *Lotteries Regulations*, R.R.N.W.T. 1990, c. L-49 do not apply to the regulation and licensing of a lottery scheme within the Town of Hay River.

[11] Pursuant to the delegation of authority to it, the Hay River Town Council has enacted Bylaw No. 1653 for the establishment of lottery guidelines and regulations. As noted by my colleague, Vertes J., in *Soaring Eagle Friendship Centre v. Werner*, [1998] N.W.T.J. No. 51, Bylaw No. 1653 purports to adopt the territorial regulations, which the municipality cannot do in light of the *Hay River Delegation Regulations* referred to above which expressly state that the territorial regulations do not apply. Although the Town appears to have attempted to correct that situation in 2002 by including in Schedule “B” of the Bylaw provisions that are in substance largely the same as the territorial regulations, the Bylaw as written is not very clear as it still purports to adopt the territorial regulations in s. 3. Although counsel for the Applicant referred to the territorial regulations in his argument, in my view it is the Bylaw alone, and not the regulations, that applies.

[12] The Bylaw provides that no person or organization shall conduct a lottery scheme within the Town of Hay River unless they hold a lottery licence for that lottery scheme issued under the Bylaw. Under s. 7 of the Bylaw, the Town Council may, by resolution, establish “guidelines” to assist with the administration of the Bylaw. It is further provided that such guidelines shall become those additional terms or restrictions the Town may impose on any licence, in addition to those noted in Schedule “B” to the Bylaw. Section 7 also refers to Schedule “B” as the “Town of Hay River Lottery Licensing Bylaw 1653 Guidelines”, although Schedule “B” itself,

as replaced in 2002, is entitled “Town of Hay River Lottery Licence Regulations”. In any event, no argument was made to me that anything turns on whether there is a difference between guidelines and regulations. Despite the confusing wording of the Bylaw, I find that Schedule “B” contains the rules and regulations for the holding and licensing of lotteries in the Town of Hay River.

[13] Schedule “B” is made up of an interpretation section and six parts. Part I, entitled “General” and subtitled “Senior Administrative Officer”, provides that, subject to the regulations contained in the Schedule, the Senior Administrative Officer (“SAO”) of the Town may issue a licence to a charitable or religious organization to conduct and manage a lottery scheme. The form and timing of an application for a lottery licence is provided for, as is the material that must accompany an application for a second or subsequent licence. Section 8 of the Schedule specifies when the SAO shall refuse to issue a licence.

[14] Section 9 provides that certain listed terms are terms of every licence. These mandatory terms include the following: the proceeds of the lottery scheme shall be disbursed either in accordance with objects or purposes set out on the application form, or in a manner expressly authorized by the SAO [s. 9(1)(b)]; the proceeds from all lotteries shall be kept separate from all other funds with separate records being maintained and all financial aspects of the lottery shall be conducted in accordance with these regulations [s. 9(1)(d)]; a complete statement of account, showing the total receipts, expenses and profits and indicating when and how such profits will be spent for the charitable or religious objects or purposes set out in the application, shall be filed with the SAO in the specified manner and within the specified time [s. 9(1)(i)].

[15] Section 9(2) provides that the SAO may impose on any licence such additional terms or restrictions as he or she deems necessary. Section 11 provides a method for applying for amendment of a lottery licence, which must be done prior to the scheduled lottery. In addition to s. 9(1)(i) referred to above, there are other provisions relating to financial accounting, such as s. 23, which gives the SAO the power to require an independent audit in respect of a licence, the cost of same to be borne by the licence holder. The SAO may also require confiscation of a licence where he or she is of the opinion that a lottery is being operated contrary to the regulations.

[16] The next section of Part I is subtitled “Use of Lottery Funds” and contains s. 27, upon which the Applicant relies. Section 27 states:

27. Notwithstanding any other provision of these regulations,
- (a) a charitable organization may apply all of the proceeds of a lottery, after deductions for prizes and administrative expenses, to a community facility provided that the community facility is accessible to all members of the community;
 - (b) a service club may apply up to 50% of the proceeds of a lottery, after deductions for prizes and administrative expenses, to
 - (i) its building fund for the construction, repair, renovation or decoration of the service club building or to provide or replace capital items; or
 - (ii) the equipment of the service club, but a service club may not apply any of its proceeds to or in respect of any revenue producing equipment of facilities; and
 - (c) a licence holder shall not use any proceeds from a lottery for social events or activities other than those for children or senior citizens.

[17] Sections 28 and 29 deal with some restrictions on the permitted uses of lottery funds. The remaining Parts of Schedule “B” deal with specific types of lotteries, for example bingo lotteries.

[18] The Applicant’s position, as I understand it, is this. Section 27(b) allows it to apply up to 50 percent of the proceeds of a lottery, after the permitted deductions, to its Building Fund, notwithstanding any other provision of the Bylaw. Therefore, and notwithstanding the terms of any lottery licence which resulted in any of the funds held in the Building Fund, or the statement of account submitted in connection with any lottery, the Applicant has an absolute discretion with respect to the amount of lottery proceeds it maintains in its Building Fund from time to time, so long as that amount does not exceed 50 percent of its lottery proceeds. As a consequence of that, the Applicant says, it has the discretion to transfer money out of the Building Fund, as it did in the circumstances that led to this application.

[19] The Respondent’s position is that the Applicant can only deal with lottery funds in accordance with the conditions in its application to operate a lottery. Once the

Applicant has applied the proceeds in accordance with its licence, it cannot re-allocate the proceeds to some other fund.

[20] There is no evidence before me about the terms and conditions attached to the licence or licences for the lotteries from which the proceeds held in the Building and Community Funds resulted.

[21] Counsel did not refer to any case law on this issue, nor was I able to locate anything relevant. Therefore, it is simply a matter of interpretation of the Bylaw.

[22] Lotteries are strictly regulated by the scheme developed under the *Criminal Code*, the territorial *Lotteries Act*, the territorial regulations and the Bylaw. There is a presumption, the presumption of coherence, that regulatory provisions, and I include in that bylaws, are meant to work together with their own enabling legislation, other Acts and other regulations. In my view, this presumption of coherence requires that the “notwithstanding” clause in s. 27 of the Schedule be read in a way that fits in with the larger regulatory scheme that governs lotteries. In this regard, and using a purposive approach, the legislation I have referred to and the other terms of the Bylaw make it clear that the intent of the Town in its Bylaw is to ensure that the objects for which a lottery is held, and the purposes to which the lottery proceeds are to be put, are set out in the licence application and approved by the Town through its SAO, subject to any amendment also applied for and approved. Section 27 must be read and interpreted in that context.

[23] With the above in mind, I interpret s. 27(b) as conferring a discretion on a service club as to how it will allocate lottery proceeds, but only until such time as the lottery licence has been approved. So if an applicant service club says in its licence application that it will apply 49 percent of the proceeds of a proposed lottery, after the applicable deductions, to its building fund and 51 percent to a charitable object or purpose as defined in the Bylaw, it would not be open to the SAO to refuse to issue the licence under s. 8(a) of the Schedule, on the basis that an insufficient proportion of the gross proceeds will be paid to the charitable object.

[24] It would still be open to the SAO to withhold approval of the licence based on, for example, the proposed charitable object not falling within the definition in the Bylaw, but not simply because 49 or some lesser percent of the proceeds are to go to the Building Fund. To track the language of s. 27, notwithstanding that the SAO

objects to only 51 percent of the funds going to the specified charitable object while 49 percent goes to the Building Fund, that in itself is not a reason to refuse the licence because s. 27 allows the application of 49 percent of the proceeds to the Building Fund, notwithstanding the SAO's objection.

[25] However, having obtained a licence approving a certain application of proceeds, an applicant cannot, in my view, change that application of proceeds after the fact except by way of an approved amendment to the licence. If the interpretation of s. 27 urged by the Applicant is correct, it would follow that, having obtained a licence authorizing the application of 20 percent of the lottery proceeds to the Building Fund, the Applicant would have the discretion to change that to 30 percent or anything else up to 50 percent after the fact. That cannot be, as it would be wholly inconsistent with the strict financial accounting requirements in the rest of the Bylaw and the overall legislated regulation of lotteries.

[26] Accordingly, the answer to the question whether it was within the Applicant's discretion, under s. 27 of the Schedule to the Bylaw, to transfer \$50,000.00 out of the Building Fund into the Community Fund, is "no".

[27] The second question posed by the Applicant asks where the money to repay the Building Fund should come from. There is no mechanism in the Bylaw to provide for the reimbursement of monies improperly applied. Accordingly, there is no provision for me to interpret or on which to base a declaration as to the "rights" of the parties. In my view, this question does not come within the purview of Rule 22(f); it calls for legal or accounting advice, which is not my function. I therefore decline to answer it.

V.A. Schuler,
J.S.C.

Dated at Yellowknife, NT, this
15th day of August 2005

Counsel for the Applicant: Louis Walsh
Counsel for the Respondent: Michelle Staszuk

S-0001-CV2005000197

IN THE SUPREME COURT OF
THE NORTHWEST TERRITORIES

BETWEEN:

ROYAL CANADIAN LEGION (Branch 250)

Applicant

- and -

THE MUNICIPAL CORPORATION OF
THE TOWN OF HAY RIVER

Respondent

MEMORANDUM OF JUDGMENT OF
THE HONOURABLE JUSTICE V.A. SCHULER