

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

GREG MCMEEKIN

Applicant

- and -

NORTHWEST TERRITORIES LIQUOR COMMISSION

Respondent

RULING ON RESPONDENT'S APPLICATION
TO STRIKE ORIGINATING NOTICE

[1] Two applications came before me in Chambers on August 1, 2008. The first is an Originating Notice filed by Mr. McMeekin, who is self-represented. The second is a notice of motion filed by the Respondent Northwest Territories Liquor Commission (the "Commission"), seeking an order striking out Mr. McMeekin's pleadings. This is my decision on the application to strike out.

Background

[2] Both parties filed affidavit evidence on their respective applications and without making any findings of fact, I will refer to some of that evidence in order to put this matter in context.

[3] In the fall of 2006, the Department of Finance of the Government of the Northwest Territories (the "GNWT"), which is responsible for the operation of the Commission, issued a Request for Proposals (the "RFP") for the operation of a retail liquor outlet in Hay River to replace an outlet operated by Hay River Liquor Retailers (1999) Ltd. ("Hay River Liquor Retailers") under an earlier contract with the Commission. Mr. McMeekin submitted a proposal which was ultimately

unsuccessful. Prior to the closing date of the RFP, he also wrote to the Commission alleging conflict of interest and violations of the conditions of the existing contract held by Hay River Liquor Retailers. He also objected to how the GNWT's Business Incentive Policy was being applied.

[4] The successful proponent was Hay River Liquor Retailers, a decision announced by the Commission on October 31, 2006. Issues then arose as to the zoning of the property where Hay River Liquor Retailers planned to operate the outlet. In *5142 NWT Ltd. et al. v. Town of Hay River et al.*, 2008 NWTSC 02, I granted an appeal from a decision of the Hay River Development Appeal Board which had approved a development permit sought by Hay River Liquor Retailers. Although the Board was directed to conduct a new hearing into the permit, no hearing was ever concluded. On July 2, 2008 Hay River Liquor Retailers withdrew its development permit application. The Commission says that no contract was concluded with Hay River Liquor Retailers arising from the RFP, although Mr. McMeekin's materials seem to dispute that. On July 9, 2008 the Commission announced to those who had submitted proposals in response to the RFP that it had cancelled the RFP.

The applications

[5] Mr. McMeekin's Originating Notice requests the following relief, which I have paraphrased somewhat for clarification:

1. review of the Commission's award of RFP number LC-RFP-2006-01 regarding a retail liquor outlet and warehouse space;
2. review of the method used to apply the Business Incentive Policy;
3. restitution in the form of 15 months of payments made to Hay River Liquor Retailers "while without bondage";
4. that the remaining term of the contract awarded, 8 years and 7 months, be awarded to Mr. McMeekin; and

5. the resignation of the Commission's General Manager and the Deputy Minister of Finance for mismanagement of the RFP.

[6] Although it does not claim it as relief, the Originating Notice also appears to ask that the Court find that the Commission violated the terms of the RFP in purporting to cancel it.

[7] The Originating Notice thus includes a blend of (i) request for judicial review of decisions made by the Commission and (ii) a claim for damages or restitution against the Commission as a result of what Mr. McMeekin alleges was done wrong in the management of the RFP.

[8] The Commission's notice of motion seeks an order striking the Originating Notice pursuant to Rule 129. In the alternative, it requests an adjournment to allow time for the filing of materials and cross-examination on Mr. McMeekin's affidavit and also that the Court give directions to the parties for the conduct of this litigation. The Commission's notice of motion also sets out as grounds for striking the Originating Notice that the relief sought by way of restitution and compensation should have been brought by statement of claim and not originating notice; that the relief sought by way of judicial review is improperly brought with respect to the required form and the time frame contemplated in Part 44 of the Rules of Court; that the relief sought by way of the resignation of certain individuals is not a remedy recognized by the Court; and that the application is moot as the RFP has been withdrawn.

Rule 129

[9] Although the Commission's notice of motion appears to bring the objections as to the form and timing of the Originating Notice under Rule 129, those are separate issues that do not fall under Rule 129, which is as follows:

- 129 (1) The Court may, at any stage of a proceeding, order that
- (a) any pleading in the action be struck out or amended, on the ground that
 - (i) it discloses no cause of action or defence, as the case may be,

- (ii) it is scandalous, frivolous or vexatious,
- (iii) it may prejudice, embarrass or delay the fair trial of the action, or
- (iv) it is otherwise an abuse of the process of the Court; and

(b) the action be stayed or dismissed or judgment be entered accordingly.

(2) No evidence is admissible on an application under subrule (1)(a)(i).

(3) This rule applies with such modifications as the circumstances require to an originating notice and a petition.

[10] There is case authority that questions whether one can move to strike out an originating notice as disclosing no cause of action: *C.U.P.E. et al. v. Health Region #4* (1997), 200 A.R. 175 (C.A.). That is not a bar in this case, however, because in argument the Commission specified that it relies on subrules 129(1)(a)(ii), frivolous or vexatious, and 129(1)(a)(iv), abuse of process.

[11] Because the Commission raised different objections to different aspects of the Originating Notice, I will deal separately with each item of relief sought in the Originating Notice.

The request for review of the Commission's award of the RFP

[12] A fair interpretation of this item of relief is that it is a request for judicial review of the awarding of the RFP.

[13] The Commission objects on the basis that the application is brought outside the time limit prescribed by Rule 596, which provides as follows:

596. (1) Unless otherwise provided by statute, where the relief sought in an application for judicial review is an order to set aside a decision or act, the originating notice shall be filed and served within 30 days after the decision or act to which it relates.

- (2) Unless an enactment otherwise provides, the Court may extend the time for bringing an application for judicial review before or after the expiration of the 30 day time limit set out in subrule (1).

[14] The decision to award the contract under the RFP to Hay River Liquor Retailers was made on October 31, 2006. Mr. McMeekin's Originating Notice was filed on July 18, 2008, long after the 30 day period in Rule 596 expired.

[15] In *Wilman v. Northwest Territories (Commissioner)*, [1997] N.W.T.J. No. 17 (S.C.), Richard J. said the following about the 30 day time period, explaining why it is important:

The 30-day requirement in Rule 596 is not to be lightly disregarded. It exists for valid reasons. One reason is that public authorities require effective and reliable administration and this, of course, includes finality in decision-making.

[16] Although Mr. McMeekin did not formally seek an extension of the 30 days pursuant to part (2) of Rule 596, he does offer in his affidavit an explanation for the delay in filing the Originating Notice. He says that he decided to put the community's interest in the zoning issue first, before his own personal interest in the claims he wishes to pursue. Now that the zoning issue has been resolved by Hay River Liquor Retailers withdrawing its development permit application, Mr. McMeekin has decided to go ahead with his claims.

[17] Although both the zoning issue and Mr. McMeekin's claims arise out of the RFP, the zoning issue is separate and distinct from Mr. McMeekin's claim that he should have been the successful proponent under the RFP. The decision to make the award under the RFP was the decision of the Commission. The decision to approve the development permit was made by the Development Officer for the Town of Hay River and upheld by the Development Appeal Board. There is no reason why challenges to the award and the development permit could not have proceeded at the same time. Even if Mr. McMeekin preferred to await the outcome of the challenge to the development permit, or, as he puts it, to put the community's interests first, that is not a reasonable excuse for waiting almost two years to file an application for judicial review of the October 31, 2006 decision when Rule 596 sets a time limit of 30 days. Accordingly, even if Mr. McMeekin had made a formal application for extension of time, there are insufficient grounds to grant such an extension.

[18] For the above reasons, the application for judicial review of the October 31, 2006 decision must be dismissed as being filed outside the time limit in Rule 596.

The request for review of the method used to apply the Business Incentive Policy

[19] The request for review of the method used to apply the Business Incentive Policy is a request for review of the application of that Policy in coming to the decision to award the RFP to Hay River Liquor Retailers. As the application of the Policy predates the decision of October 31, 2006, the request that it be reviewed is out of time for the same reasons referred to above. Therefore, this aspect of the Originating Notice must also be dismissed.

The request for the resignation of certain individuals

[20] In his Originating Notice, Mr. McMeekin seeks the resignation of the General Manager of the Commission and the Deputy Minister of Finance for alleged mismanagement of the RFP.

[21] The Commission contends that this aspect of Mr. McMeekin's application is frivolous and vexatious and should be struck out pursuant to Rule 129(1)(a)(ii). The term "frivolous and vexatious" is a term that includes cases where it is obvious that the action cannot succeed or is hopeless: *Excelsior Life Insurance Co. v. Zurich Investments Ltd.*, [1988] A.J. No. 421 (C.A.); *Carnegie v. Rasmussen Starr Ruddy et al.*, [1994] O.J. No. 1171 (Gen. Div.).

[22] Even if Mr. McMeekin could prove that the individuals in question did mismanage the RFP, an order compelling them to resign is not relief available on a judicial review application or by way of a civil suit. This aspect of Mr. McMeekin's application cannot succeed because the Court cannot do what he asks. It is therefore frivolous and vexatious and must be struck out. This does not mean that the way the RFP was managed is irrelevant to other claims that Mr. McMeekin may pursue, as set out below. It simply reflects that the Court cannot compel the individuals in question to resign.

Restitution in the form of 15 months of payments made to Hay River Liquor Retailers and that the remaining term of the contract awarded be awarded to Mr. McMeekin

[23] As I understand it, the main focus of the Commission's objection to these items of relief is that they are not claims that can be brought by way of originating notice and should instead have been brought by statement of claim.

[24] Rule 8 provides that an action may be commenced by originating notice where permitted by statute or by the rules. Rule 594(1) provides that an application for judicial review shall be commenced by originating notice. However, Rule 592(2) also says that on an application for judicial review, the Court may grant any relief that the applicant would be entitled to in a proceeding for one or more of the traditional prerogative remedies, including *certiorari*.

[25] In seeking to have certain decisions reviewed and by implication quashed, Mr. McMeekin's Originating Notice in effect seeks the traditional remedy of *certiorari*. However, he claims restitution and the award to him of a contract, relief that an applicant is not entitled to in a proceeding for *certiorari*. Therefore, although an originating notice is generally appropriate for an application for judicial review, it is generally not appropriate for claims for restitution or damages.

[26] Another problem with the use of an originating notice in this case is that it is not the type of case covered by Rule 22, which governs when an originating notice may be used to commence proceedings. The only subsections of Rule 22 which might apply are: (f), 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 a written instrument, an enactment or an order in council and for a declaration of the rights of the persons interested; or (o), an application or proceeding in respect of any other matter where it is unlikely that there will be any substantial dispute of fact.

[27] Here, however, substantial disputes of fact are anticipated, so neither subsection applies. There is, as just one example, a factual dispute about whether Mr. McMeekin met the requirements of the RFP and whether Hay River Liquor Retailers did not.

[28] There is no absolute bar to using the originating notice procedure in a case where there are disputed facts. However, as Vertes J. stated in *MacNeil v. McLeod-Norris*, [2004] N.W.T.J. No. 66, 2004 NWTSC 81, as a general rule where there are material facts in dispute, the case should proceed as a normal action, with pleadings and discoveries or trial.

[29] The claims for restitution and the award of the contract contemplated by the RFP to Mr. McMeekin are capable of being understood as a claim that there was unfairness in the RFP process and that Mr. McMeekin should have been the successful proponent and therefore seeks damages or restitution from the Liquor Commission for what he claims he would have earned under the contract he says he should have been awarded. Such claims are sometimes made in situations of tender calls and it may be doubtful that a claim could succeed in this case because of the stipulation in the RFP that “This is not a Request for Tenders or otherwise an offer”. However, even if this claim has merit, about which I make no finding at all, it does not lend itself to the summary procedure of originating notice and affidavits.

[30] In further clarification of the above, I have read the claim for restitution as a claim for damages against the Commission only as no other entity was named as a respondent to the Originating Notice.

[31] I will set out below the steps that are to be taken should Mr. McMeekin decide to continue with this part of his claim.

Request for review of the decision to cancel the RFP

[32] The Originating Notice also complains that the Commission violated the terms of the RFP by purporting to cancel it. Counsel for the Commission conceded that this part of the claim might be read as a request for judicial review of that decision.

[33] Judicial review of the decision to cancel would not, however, serve any purpose. Even if the Court were to rule that the Commission erred in cancelling the RFP, the only result of that would be that the Commission would be left to consider the proposals it had received and that were not withdrawn. The Commission’s affidavit evidence indicates that Mr. McMeekin’s proposal did not meet minimum requirements. That decision was made in 2006 and the time limit prescribed by Rule 596 for review of that decision has, as I have explained above, expired. Therefore, judicial review of the decision to cancel the RFP can result in no benefit to Mr. McMeekin because it will not result in a review of the decision that his proposal did not meet the minimum requirements. Even if that decision could be reviewed, it would not result in the Court ordering that Mr. McMeekin be awarded a contract for the operation of the liquor

outlet. It would still be up to the Commission to decide which proposal it wishes to accept.

[34] The doctrine of mootness, or finding that a matter is moot, applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the court's decision will have no practical effect on such rights, the court will decline to decide the case: *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342.

[35] For the reasons given above, the decision to cancel the RFP is moot as regards Mr. McMeekin because his proposal was found not to meet the minimum requirements in any event. The fact that a matter is moot is a reason for saying that it is an abuse of process under Rule 129(1)(a)(iv) to ask the Court to decide it.

[36] I find that Rule 129(1)(a)(iv) does apply and the request for judicial review of the decision to cancel the RFP must therefore be struck out.

[37] Finally, although no argument was made on the point, the Commission's case authorities filed on this application include *Socanav Inc. v. Northwest Territories (Commissioner)*, [1993] N.W.T.J. No. 85 (S.C.). That case holds that relief by way of *certiorari* (or judicial review) is not available to review government decision-making in the context of commercial contracts. In this case, the contract contemplated by the RFP is a commercial contract. For that reason as well, the remedy of judicial review is not available for decisions pertaining to the RFP.

Summary of decision

[38] The result of all this is that the only claim in the Originating Notice that can proceed is the claim for damages or restitution from the Commission. That claim should, however, be brought by statement of claim rather than originating notice. Therefore, if Mr. McMeekin decides to proceed with that claim, he will have 30 days from the date of these reasons to file a statement of claim setting out particulars of his claim. The statement of claim may be filed in the same court action that was commenced by the Originating Notice. The Commission will then have the time set

out in the Rules of Court to file its statement of defence. The case can proceed from there in the usual manner.

V.A. Schuler
J.S.C.

Dated at Yellowknife, NT, this
25 day of August 2008

The Applicant was self-represented
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William M. Rouse

S-0001-CV-2008000165

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