Date: 2009 01 06
Docket: S-0001-CV-2008000234

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HARVEY WERNER

Applicant

- and -

TERRY MOLENKAMP
SENIOR ADMINISTRATION OFFICER
TOWN OF HAY RIVER

Respondent

Application for judicial review.

Heard at Hay River, NT on November 25, 2008.

Reasons filed: January 6, 2009

REASONS FOR JUDGMENT OF THE
HONOURABLE JUSTICE L.A. CHARBONNEAU

The Applicant appeared on his own behalf.
Counsel for the Respondent: John M. Hope, Q.C.

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REASONS FOR JUDGMENT

A) INTRODUCTION

[1] By Originating Notice, Harvey Werner asks this Court to review the actions taken by Terry Molenkamp, senior administrative officer of the Town of Hay River, in relation to a petition to put a proposed bylaw to the Hay River voters. Mr. Werner alleges that Ms. Molenkamp exceeded her authority in dealing with the petition.

[2] Ms. Molenkamp has filed a motion seeking to have the Originating Notice struck. Her primary position is that these proceedings are an abuse of the Court's process because this matter is now moot. Alternatively, she argues that she acted within her authority under the *Cities, Town and Villages Act,* S.N.W.T. 2003, c.22.

B) BACKGROUND

[3] In March 2008, the Town of Hay River received an application from a land owner for an amendment of the *Land Use Bylaw*. The purpose of the proposed bylaw was to change the zoning of a lot. The proposed bylaw was the subject of a

first reading on May 20; a public meeting on June 16; and a second reading on July 21.

[4] On August 8, the Town received a petition seeking to put the proposed bylaw to the voters. This petition process is set out in Section 81 of the *Act.* If at least 25% of the eligible voters in a municipality sign a petition that meets certain requirements, the bylaw that is the subject of the petition cannot be made unless it is approved by the voters.

[5] The *Act* provides that the senior administrative officer of a municipality is responsible for counting the number of people who have signed the petition to determine whether the number of signatures is sufficient to require putting the matter to the voters. It provides that in doing the count, the senior administrative officer must exclude petitioners in certain circumstances. One of those circumstances is where a petitioner is not an eligible voter.

[6] Ms. Molenkamp determined that a number of petitioners' names did not appear on the voters list. She advised the person who had filed the petition that those petitioners would have to swear a Statutory Declaration establishing their eligibility to vote. She asked that those Statutory Declarations be provided to her by September 5.

[7] On September 5, Ms. Molenkamp did a count of the number of petitioners. In dealing with those people whose names did not appear on the voters list, she counted the ones who had provided a Statutory Declaration and excluded those who had not. She excluded other petitioners for reasons that are not relevant to this application. The result of her count was that there was an insufficient number of petitioners to engage the process of putting the proposed bylaw to a vote. She advised the town council accordingly.

[8] On September 19, the Originating Notice was filed, challenging the appropriateness of Ms. Molankamp's handling of the petition count. Notwithstanding this, the town council continued with its process of considering the proposed bylaw. On September 29, the third and final reading of the bylaw was held at a special meeting of the council. The proposal for amendment was defeated.

C) POSITION OF THE PARTIES

[9] Mr. Werner argues that even if the proposed bylaw did not pass third reading and the matter is over and done with at this point, it is imperative that this Court clarify the scope of the powers of the senior administrative officer of a municipality when doing the count on this type of petition. He argues that Ms. Molenkamp's insistence on being provided Statutory Declarations from petitioners whose names were not on the voters list was an arbitrary decision, and one that exceeded the scope of her authority under the *Act.* He argues that the requirement is overly cumbersome and makes the petition process unworkable. He also argues that this issue will inevitably arise again, and that it is in the interests of justice to have the Court clarify it now, even if it is no longer of any consequence to the specific matter that gave rise to this litigation.

[10] Ms. Molenkamp has filed an Application to have the Originating Notice struck. She relies on the principle that courts do not ordinarily decide issues that are moot; she argues that this is such a case, because the bylaw that was the subject of the petition was defeated. She acknowledges that it may be useful to have the duties and powers of the senior administrative officer clarified, either by a legislative amendment, or in the context of other court proceedings, but argues that this is not the case to do it. She points out that some parties who may have an interest in the interpretation of the relevant provisions (such as other municipalities, or governmental departments responsible for the administration of municipal matters) are not involved in these proceedings. She argues that it would be ill advised to attempt to decide these issues within the scope of this particular case.

D) ANALYSIS

[11] In support of her application to have the Originating Notice struck, Ms. Molenkamp relies on Rule 129(1) of the *Rules of the Supreme Court of the Northwest Territories*, R-010-97:

> 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
>
> (...)

> (ii) it is scandalous, frivolous or vexatious, or
>
> (...)
>
> (iv) it is otherwise an abuse of the process of the Court.

[12] This Court has recently held that it can be an abuse of the Court's process, within the meaning of this Rule, to ask the Court to decide an issue that has become moot. *McMeekin* v. *Northwest Territories (Liquor Commission)* 2008 NWTSC 67, at para. 35. In the same case, the Court summarized the doctrine of mootness in the following way:

> 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 (S.C.C.)
>
> *McMeekin* v. *Northwest Territories (Liquor Commission)*, *supra*, at para. 34.

[13] The Originating Notice filed by Mr. Werner asks the Court to answer two substantive questions. The first is whether a petitioner's name can be removed from a petition filed pursuant to section 81 of the *Act* simply because that person's name does not appear on the voters list. The second is whether Ms. Molenkamp acted within the scope of her legal duty when she dealt with the petition. Ms. Molenkamp's application to strike the Originating Notice must be examined with respect to these two substantive issues.

1. Whether a petitioner's name can be removed from a petition filed pursuant to section 81 of the *Act* simply because the person's name does not appear on the voters list

[14] The evidence is not that Ms. Molenkamp excluded petitioners from the count simply because they were not on the voters list. The evidence is that she removed the names of people who were not on the voters list *and* who had not provided the Statutory Declaration establishing that they met the criteria to be eligible voters.

Ms. Molenkamp did not treat the voters list as the only means of establishing that a petitioner was an eligible voter. On the contrary, she recognized that a person could be an eligible voter even though his or her name did not appear on the voters list: when she did the September 5 count, she included the names of nine petitioners who were not on the voters list.

[15] Given this, the first issue raised in the Originating Notice is not engaged in this case. I find, therefore, that seeking adjudication on that issue is an abuse of the Court's process within the meaning of Rule 129.

2. Declaration as to whether Ms. Molenkamp acted within the scope of her legal duty when she dealt with the petition

[16] This second issue is engaged on the evidence. Ms. Molenkamp requested Statutory Declarations for those petitioners whose names were not on the voters list. Mr. Werner alleges that this was an unreasonable request that Ms. Molenkamp did not have any legal authority to make.

[17] The bylaw that was the subject of the petition is no longer up for consideration by the town council, as it was defeated. The subject matter of the petition, the very matter that could potentially be put to a vote, has disappeared. Resolving the question of whether Ms. Molenkamp exceeded the scope of her powers under to the *Act* will not have any practical effect as between the parties. The only purpose of examining this issue now would be to avoid a repetition of a similar controversy in the future.

[18] As I have already stated, the doctrine of mootness suggests that courts should not decide issues that are purely academic and of no practical consequences as between the parties, except in exceptional circumstances. The question is whether this is one of those exceptional cases.

[19] The two provisions of the *Act* that must be considered to put this issue in context are Subsection 81(5), which sets out requirements that must be met when a petition is filed, and section 82, which sets out the duties of the senior administrative officer who receives a petition:

81. (5) The petition must include in respect of each petitioner

> (a) the printed surname and printed given names or initials of the petitioner;
> (b) the petitioner's signature;
> (c) a declaration that the petitioner is, to the best of his or her knowledge, a voter in the municipality;
> (d) the date on which the petitioner signs the petition.

82. (1) The senior administrative officer is responsible for determining if the petition is sufficient to comply with section 81.

(2) When counting the number of petitioners on a petition, the senior administrative officer shall exclude any person

> (a) whose signature appears on a page of the petition that does not have the same purpose statement contained on the other pages of the petition;
> (b) whose printed name is not included or is incorrect;
> (c) whose signature is not dated;
> (d) who is not an eligible voter; or
> (e) who signed the petition more than 60 days before the date on which the petition was filed with the senior administrative officer.

[20] The petition presented to Ms. Molenkamp included wording whereby the persons signing the petition declared being, to the best of their knowledge, eligible voters. This meets the requirement provided for in Paragraph 81(5)(c). But Mr. Werner argues that this declaration should have also been sufficient to satisfy Ms. Molenkamp, at the stage of the petition count, that all the petitioners were eligible voters, as contemplated by Paragraph 82(2)(d).

[21] Although the *Act* makes it the senior administrative officer's duty to screen a petition according to certain criteria, it does not provide specific guidance as to how that senior administrative officer should proceed to satisfy himself or herself that a petitioner is an eligible voter. There is no reference to using the voters list; there is no reference to the use of Statutory Declarations. The *Act* leaves it to the senior administrative officers to decide how best to discharge their duty in this regard.

[22] Even assuming that those involved exercise this duty in good faith, the *Act* does leave open the possibility that inconsistent procedures or standards might be used from one municipality to the other. It also leaves open the possibility of

inconsistent approaches within the same municipality, if there is a change of senior administrative officer and the new one takes a view that differs from the view of his or her predecessor. I understand the concerns that Mr. Werner and others may have about this. I also understand from the submissions made on her behalf that Ms. Molenkamp acknowledges that some clarification in this area would be of assistance.

[23] The question is whether this clarification should come from this Court in the context of this litigation. I am not persuaded that it should. The responsibility for making legislation rests with the legislative branch of government, not the courts. Courts adjudicate on the basis of the existing law, based on the specific sets of circumstances of a specific case. By contrast, statutes are enacted and amended through a process that involves input from various sources, and consideration of not only specific problems but also of the broader context within which the legislation operates.

[24] Creating a framework for the exercise of a senior administrative officer's duties pursuant to Paragraph 82(2)(d) is not a task that the Court should lightly embark upon in a case where the issue has become moot. Indeed, one of the guiding principles in deciding whether to entertain a case that is moot is the need for courts to be sensitive to their role within our constitutional framework:

> The court must be sensitive to its role as the adjucative branch in our political framework. Pronouncing judgments in the absence of a dispute affecting the rights of the parties may be viewed as intruding into the role of the legislative branch.
>
> *Borowski* v. *Attorney General for Canada et al.*, [1989] 1 S.C.R. 342, at para. 40.

[25] It is true that if the issue is not resolved in this case, the same controversy may well arise again. But that is not, in and of itself, a reason for the Court to deal with an issue that has become moot:

> The mere fact (...) that a case raising the same point is likely to recur even frequently should not by itself be a reason for hearing an appeal which is moot. It is preferable to wait and determine the point in a genuine adversarial context unless the circumstances suggest that the dispute will have always disappeared before it is ultimately resolved.

Borowski v. *Attorney General for Canada et al.*, *supra*, at para. 36

[26] As this excerpt suggests, in some cases, it is sometimes necessary to deal with an important legal issue in the context of a moot case because that legal question will otherwise almost inevitably escape review by the courts. It can arise, for example, in the context of temporary injunctions in labour cases. In those cases, if a legal point is ever to be tested, it almost always has to be in a case where the issue has become moot. *Borowski* v. *Attorney General for Canada et al.*, *supra*, at para. 36.

[27] Mr. Werner makes an argument that is somewhat along those lines. He points out that in this case, the town council proceeded to the third reading of the proposed bylaw, knowing that the Originating Notice had been filed and that the process followed in handling the petition was being contested. I understand his argument to be that the town council can be expected to act in a similar way if the issue arises again, which in turn could mean that the appropriateness of the senior administrative officer's actions will never be reviewed by the courts.

[28] I do not find this argument persuasive. In my view, there are a number of ways where this issue could be dealt with in circumstances where it would not be moot. One example would be if the a bylaw that has been the subject of a petition were to be enacted by the town council before court proceedings reviewing the manner in which the petition was handled were completed. If the Court ultimately concluded that the bylaw should have been put to the voters, its validity could be called into question. The matter would then be far from moot.

[29] Another scenario where the issue of mootness would not arise would be if a town council, facing circumstances similar to those in this case, suspended its consideration of the bylaw until the controversy surrounding the petition process had been resolved by the Court. This would avoid the risk of having a bylaw enacted by town council, and later quashed by the Court. Depending on the nature of a bylaw and its effect on citizens of a municipality, having it enacted and later quashed could have significant consequences. One would expect that this is a factor that elected officials would take into consideration in deciding what course of action to take.

[30] I am not convinced that the issue that arose in this case is one that will necessarily always escape judicial review unless it is examined now. On balance, and having carefully considered Mr. Werner's arguments in this regard, I conclude that this is not one of those exceptional circumstances where the Court should resolve this dispute in the context of a moot case.

[31] For these reasons, Ms. Molenkamp's application to strike the Originating Notice is allowed.

[32] Under the circumstances, each party will bear its own costs.

L.A. Charbonneau
J.S.C.

Dated at Yellowknife, NT, this
6th day of January 2009

The Applicant appeared on his own behalf.
Counsel for the Respondent: John M. Hope, Q.C.

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