COURT OF APPEAL FOR THE YUKON TERRITORY

Citation: ***Whitehorse (City) v. Darragh,***
2008 YKCA 19

Date: 20081231
Docket: 08-YU624

Between:

The City of Whitehorse

Appellant
(Petitioner)

And

Marianne Darragh

Respondent
(Respondent)

Before: The Honourable Mr. Justice Frankel
(In Chambers)

D.R. Bennett	Counsel for the Appellant
Z. Brown (via teleconference)	Counsel for the Respondent
Place and Date of Hearing:	Vancouver, British Columbia December 12, 2008
Place and Date of Judgment:	Vancouver, British Columbia December 31, 2008

Reasons for Judgment of the Honourable Mr. Justice Frankel:

Introduction

[1] The principal issue on this application is whether the City of Whitehorse should be required to hold a referendum to give effect to a petition seeking the creation of a public park, while the City's appeal on the question of whether such a referendum is lawful is pending in this Court.

[2] Marianne Darragh is the main proponent of the petition, and collected the majority of signatures. After Ms. Darragh submitted the petition to the City, it applied to the Supreme Court of the Yukon Territory for a declaration that the petition was invalid, as being outside the ambit of the petition / referendum provisions of the *Municipal Act*, R.S.Y. 2002, c. 154. The City named Ms. Darragh as the respondent on its application. Mr. Justice Veale dismissed that application, and awarded costs to Ms. Darragh: 2008 YKSC 80. The City also seeks a stay of that costs order.

[3] For the reasons that follow, I have concluded that the City should not be required to hold the referendum at this time. In my view it is appropriate to exempt Ms. Darragh's petition from the petition / referendum legislation until the City's appeal has been determined. However, the application to stay the costs order is dismissed.

Factual Background

[4] Ms. Darragh is a long-time resident of the McLean Lake area of Whitehorse who, along with a number of others, advocates for the creation of a park in a 500-

metre zone around the lake. At the present time, that land within the proposed park zone is designated as "Industrial – Service" under the City's Official Community Plan.

[5] With the exception of one titled residential property, the land within the proposed park zone is owned by the Crown. There are four quarries that operate on land leased from the Crown. In addition, there is on-going litigation with respect to the City's passage of Zoning Bylaw 2007-39, that allows for construction of a concrete batch plant on Crown land in the area: *McLean Lake Residents' Association v. Whitehorse (City)*, 2008 YKSC 46, 47 M.P.L.R. (4th) 225, on appeal, File No. 08-YU612. It should be noted that, by reason of s. 5 of the *Municipal Act*, "the Government of Yukon is bound by the bylaws of a municipality, except as otherwise established by the Commissioner in Executive Council by regulation". I was advised by both counsel that the Territorial Government generally respects the City's decisions concerning the use of Crown land within city limits.

[6] Section 153 of the *Municipal Act* provides that electors can petition a city council for a referendum:

> (a) to initiate a new bylaw or resolution; or
>
> (b) on a new bylaw or resolution or the amending or repealing of an existing bylaw or resolution; or
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> (c) on any matter within the jurisdiction of the council including capital projects; but
>
> (d) not on the operating budget bylaw, the capital budget bylaw or the general property taxation bylaw.

[7] By reason of s. 155 of the *Act*, if a petition is signed by at least 25% of the electors, then city council must introduce a bylaw to give effect to the request within eight weeks of receiving the petition. Once that bylaw is introduced, council must hold a referendum within 90 days. If the referendum is approved by a majority of the persons voting, then the bylaw immediately comes into force.

[8] In early 2008, Ms. Darragh and several other persons circulated a petition calling for the creation of a park in the McLean Lake area. That petition was signed by 2,654 electors, a number meeting the requirements of s. 155 of the *Act*. On June 11, 2008, Ms. Darragh submitted the petition to the City seeking to have the following questions put to all electors by way of referendum:

> 1. Should the City of Whitehorse amend *Official Community Plan Bylaw 2002-01* by amending *Section 5.3 Park Reserve* with the addition of the following third paragraph: "The land within a boundary of 500 metres from the High Water Mark of McLean Lake shall be added as McLean Lake Park to ensure that the McLean Lake area is preserved as a nature park for protection of its natural environment, and recreational activities"?
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> 2(a). Should the City of Whitehorse amend *Official Community Plan Bylaw* 2002-01 by adding a fourth policy to section 5.3: "The City of Whitehorse shall amend the Zoning Bylaw to create a 'McLean Lake Park Zone' with appropriate regulation to restrict the use of the land within a boundary of 500 metres from the High Water Mark of McLean Lake to recreational purposes and no other, and to protect its natural environment"?
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> 2(b). Should the City pursue the transfer of the ownership of the subject lands from the Yukon Government to the City?

[9] The City took the position that the petition / referendum process does not apply to amending the *Official Community Plan Bylaw* and that, therefore, it did not have jurisdiction to give effect to Ms. Darragh's petition. Ms. Darragh did not agree.

On July 16, 2008, the City, acting in accordance with s. 7 of the *Petition, Plebiscite, and Referendum Bylaw*, No. 2004-20, sought a declaration from the Supreme Court that the petition was invalid. That provision reads:

> If the petition question is for a bylaw outside of Council's jurisdiction or for a bylaw that may be invalid on other grounds such as being discriminatory, the reason shall be provided to the petition proponent in writing. Should the proponent still wish to proceed, the City may apply to the Court for a declaration that the petition is invalid on the ground that the bylaw it seeks would be invalid.

[10] On October 30, 2008, the chambers judge held that the petition's questions are within council's jurisdiction. He rejected the City's argument, based on various provisions of the *Municipal Act*, that the Legislative Assembly did not intend the petition / referendum process to apply when what is sought are changes to an official community plan. The chambers judge awarded Ms. Darragh costs on Scale C (i.e., for matters of more than ordinary difficulty). I was advised by counsel that Ms. Darragh has prepared a bill of costs for approximately $14,000.00. That bill is subject to taxation.

[11] On November 28, 2008, the City filed an application seeking an order that it "not be required to hold a referendum pending the outcome of [its] appeal and that proceedings on the costs aspect of the Order [under appeal] be stayed pending the disposition of this appeal". Counsel for the City advised me that his client intends to have the appeal heard during the week of May 25, 2009, when a division of the Court will next be sitting in Whitehorse.

Analysis

Jurisdiction to Make the Orders Sought

[12] The parties agree that I have jurisdiction to make the orders sought. This issue is briefly addressed in the City's memorandum of argument. At the hearing Ms. Darragh's counsel agreed with this submission and, therefore, the jurisdictional issue was not argued before me.

[13] The City's position is that a single judge of this Court has the power to exempt it from the petition / referendum legislation by reason of the combined effect of the *Court of Appeal Act*, R.S.Y. 2002, c. 47, and the *Court of Appeal Act*, R.S.B.C. 1960, c. 82. Section 1 of the Yukon statute provides that this Court "shall have the same powers, jurisdiction and authority in relation to matters arising in the Yukon possessed immediately before January 1, 1971 by the Court of Appeal for British Columbia in relation to matters arising in British Columbia in the exercise of its ordinary jurisdiction". On December 31, 1970, the 1960 *Court of Appeal Act* (B.C.) was in force. Section 12 of that statute read:

> In any cause or matter before the Court of Appeal, any direction incidental thereto not involving a decision of the appeal may be given by a single Judge of the Court of Appeal in Chambers, and a single judge of the Court of Appeal may at any time during vacation make an interim order to prevent prejudice to the claims of any parties pending an appeal, as he may think fit; but every such order made by a single Judge may be discharged or varied by the Court of Appeal.
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> [Emphasis added]

[14] The City relies on the words "make an interim order to prevent prejudice to the claims of any parties pending an appeal". It notes that these words are

substantially the same as s. 10(2)(b) of the current *Court of Appeal Act*, R.S.B.C. 1996, c. 77, which provide a judge with authority to "make an interim order to prevent prejudice to any person". It further notes that those words are intended to give a judge of the Court of Appeal for British Columbia the power to preserve the subject-matter of litigation pending an appeal, and have been said to include injunction-like orders "to ensure that the interests of the parties are not adversely affected by the time delays necessarily incidental to bringing the appeal on for hearing on a proper basis": *Caputo v. Workers' Compensation Board (British Columbia)* (1986), 10 B.C.L.R. (2d) 226 (C.A., Chambers) at 229; see also: *Bolton v. Forest Pest Management Institute* (1985), 66 B.C.L.R. 126 (C.A., Chambers) at 135.

[15] I agree with the City that the types of interim orders that can be made by a judge of the Court of Appeal for the Yukon Territory Court are the same as those that can be made by a judge of the Court of Appeal for British Columbia under s. 10(2)(b) of the current *Court of Appeal Act* (B.C.). I also agree with the City that an order can be made to exempt it from the requirement to pass the bylaw and hold the referendum sought by Ms. Darragh pending the determination of this appeal. Unfortunately, neither party addressed the effect, if any, of the words "at any time during vacation" in s. 12 of the 1960 *Court of Appeal* Act (B.C.). As those words are not reproduced in the City's memorandum of argument, and the issue of jurisdiction was not argued orally, they did not come to my attention until after the hearing.

[16] I have considered asking the parties for submissions on this point. However, on reflection I have decided this is not necessary. Assuming, without deciding, that

the words “at any time during vacation” place temporal limits of the ability of a single judge of this Court to make interim orders pending an appeal, such a limitation does not apply at this time. As Chief Justice Macdonald stated in *Andler v. Duke (No. 2)* (1931), 44 B.C.R. 201 (C.A., Chambers) at 202, “vacation” is when the Court of Appeal is not “in session”, i.e., a division of the Court is not sitting. Although this Court was “in session” when this matter came before me in chambers on December 12, 2008, it is not “in session” at the present time, and will not sit again until the week of January 5, 2009. This being so, I have jurisdiction today to make an interim order “to prevent prejudice to the claims of any parties pending an appeal”.

[17] In so far as the costs order is concerned, the power to stay that aspect of the judgment under appeal is specifically conferred by s. 13 of the *Court of Appeal Act* (Yukon):

> Execution of the judgment appealed from shall not be stayed except under order of the judge of the Supreme Court or the Court of Appeal, or a judge thereof, and on those terms that are just.

Should the Referendum Proceed While the Appeal is Outstanding?

[18] The parties agree that the test to be applied in determining whether to excuse the City from the requirements of the petition / referendum legislation is that set out in the judgment of Mr. Justice Sopinka and Mr. Justice Cory in *RJR – MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311. As summarized at page 334 of that decision, to obtain relief an applicant must demonstrate that (a) there is a serious question to be tried, (b) there will be irreparable harm if the relief sought is not granted, and (c) the balance of convenience favours granting the

relief sought. See also: *Yukon Medical Council v. Yukon (Information and Privacy Commissioner)*, 2001 YKCA 8 (Chambers) at para. 5.

[19] The threshold for determining whether there is a serious question to be tried is "a low one", as a court must be satisfied only that the issues being raised on appeal are neither frivolous nor vexatious; "a prolonged examination of the merits is generally neither necessary nor desirable": *RJR – MacDonald Inc.* at 337, 338.

[20] At the hearing both parties made extensive submissions regarding the merits of their respective positions on the interpretation of the petition / referendum legislation. I do not think it is appropriate for me to comment on the substance of those submissions, other than to say that I am satisfied that the City has an arguable case. That is all it is required to show: *Hutchingame v. Johnstone*, 2006 BCCA 353, 229 B.C.A.C. 48 at para. 10.

[21] Turning to irreparable harm, "'irreparable' refers to the nature of the harm suffered rather than its magnitude. It is harm that either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other": *RJR – MacDonald Inc.* at 341.

[22] The City submits that if it succeeds on the appeal, then it will have suffered irreparable harm by reason of the fact that it will have extended both time and taxpayers' money to hold a pointless referendum, neither of which will be recoverable. It estimates the cost of holding the referendum at $14,000.00. As well, it says that both time and money will undoubtedly be spent by those in the community who wish to advocate either for or against the creation of the park.

[23] In response, Ms. Darragh says that, even accepting the City's cost estimate, the amount is insignificant given that the City's annual revenue is in the range of $41 million. She notes some of the City's costs relate to updating the voters list, and points out that the list has to be updated in any event for a municipal election to be held in October 2009. Ms. Darragh also says that the City can avoid the cost of holding a referendum by proceeding directly to creating a park in the McLean Lake area.

[24] Notwithstanding that the amount involved would not be a major expense for the City, I am of the view that it is rightly concerned about the potential for unnecessary expenditure of public funds. This includes not only the actual money that would have to be spent to hold the referendum, but also the costs relating to the time City staff would have to devote to preparing for, and holding, the referendum. Ms. Darragh's suggestion that the City can avoid these costs by simply creating the park she wants is without merit. That the party seeking relief can avoid what might prove to be irreparable harm by foregoing its right to litigate is not something that, in my opinion, forms part of the irreparable-harm analysis. I, therefore, find that the City has satisfied this branch of the test.

[25] With respect to the balance of convenience, the following from *RJR – MacDonald Inc.* is germane (at 342):

> The third test to be applied in an application for interlocutory relief was described by Beetz J. in *Metropolitan Stores* at p. 129 as: "a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits". In light of the relatively low threshold of the first test and the difficulties in applying the test of irreparable harm in

> *Charter* cases, many interlocutory proceedings will be determined at this stage.

[26] The City says that that the inconvenience caused by a delay in holding the referendum has to be balanced against the interest that the public has in seeing that a statutory body acts within its jurisdiction. It draws a parallel between this case and the *Yukon Medical Council* case. In that matter, a stay was granted pending an appeal from a decision of the Supreme Court of the Yukon Territory upholding the jurisdiction of the Information and Privacy Commissioner to act on a request for information (i.e., to conduct an inquiry) with respect to the Medical Council. The effect of the stay was to preclude the Commissioner from moving forward with the inquiry until the question of his jurisdiction to do so could be determined on appeal. In granting that stay, Mr. Justice Vertes stated that it was in the public interest that the Commissioner's jurisdiction be "resolved definitively before the process set in motion by [the] access request is continued": para. 17.

[27] The City also says that although it seeks to be temporarily excused from abiding by the petition / referendum provisions of *Municipal Act*, it is asking for this relief only in connection with one particular petition. It is not asking to be generally excused from following those provisions. This being so, it says that this application is one seeking an "exemption" from the law, not a "suspension" of the law. Granting this application will, therefore, have minimal adverse impact on the public's interest in the continuing application of the law: see *RJR – MacDonald Inc.* at 346.

[28] Ms. Darragh, on the other hand, submits that that the public interest lies in compliance with the law as it is written, and that to grant this application would be

equivalent to granting the City final relief: see *Harper v. Canada (Attorney General)*, [2000] 2 S.C.R. 764, 2000 SCC 57 at paras. 7 - 9. She says that if this application is granted and the City's appeal is later dismissed, then the referendum will not likely be held until late 2009, or early 2010. She is concerned that by that time some of the land within the boundary of the proposed park may no longer be available. As well, Ms. Darragh expresses concern that the support for the park she has generated may wane if more time passes before the referendum is held.

[29] In my view, the City is correct when it says that what it seeks is an "exemption", as opposed to a "suspension", of the law. The order I am being asked to make will only affect one petition for a short time. Should the appeal be dismissed, then the electors will have their voices heard. This is not a situation in which granting an interim order can be equated to granting the final relief being sought. An interim order here will only maintain the *status quo*. I do not accept that delaying the referendum will have any appreciable effect on the interests and commitment of those who are either for or against the creation of the park. Further, any concerns regarding the possible loss of some of the proposed parkland can be addressed through conditions in my order.

[30] Having regard to all of the circumstances, and the interests of not only the parties to this action but all residents of Whitehorse, I am satisfied that the balance of convenience favours delaying the referendum – and the potential creation of a park if it passes – until this Court has had an opportunity to determine whether the petition / referendum process applies to amending the City's Official Community Plan.

What Conditions Are Appropriate?

[31] As mentioned above, Ms. Darragh is concerned that, by the time this appeal is decided, some of the proposed parkland may no longer be available. In particular, she is concerned that the City may have approved land uses in the area (i.e., zoning, subdivision, or development approvals) in addition to the concrete batch plant which is presently the subject of litigation. She says that if such approvals have been given, and are acted upon by the Territorial Government in the near future, then less land will be available for park use. She says that the question of whether there are other approvals outstanding is not fully addressed in the affidavits filed by the City.

[32] When I indicated at the hearing that the possibility of other land use approvals appeared to be a legitimate concern, each party took the position that it was the other's responsibility to adduce evidence in this regard, and left the matter for my consideration. Having done so, I have concluded that the onus falls on the City to allay Ms. Darragh's concerns. Accordingly, it will be a condition of my order that the City provide evidence as to whether there are any extant approvals that could reduce the amount of land available for the proposed park. If Ms. Darragh is of the view that such evidence adversely affects her interests, then she will be at liberty to apply to vary or set aside my order. It will also be a condition of my order that the City not issue any further approvals with respect to land use within the proposed park area until this appeal has been decided.

[33] Ms. Darragh also submits that any order in the City's favour should require it to give an undertaking as to damages. She says such an undertaking is usually required when an interlocutory injunction is granted, and this case should be no different. For example, she says that if the appeal is dismissed, then she should be indemnified for any costs incurred for advertising to revive interest in the referendum, and to reacquaint voters with the issues.

[34] In my view, an undertaking as to damages is not warranted. Advertising costs associated with encouraging voters to support the "yes" side will have to be incurred regardless of when the referendum is held. I do not see how it would be possible to ascertain which costs relate exclusively to "reviving interest" and "reacquainting voters". Further, I do not see any other form of damages as being realistic.

[35] Having regard to the circumstances, I have concluded that the City should be exempted from holding a referendum until this appeal has been decided. I, therefore, make the following order:

> Subject to the following conditions, the City of Whitehorse is exempt from the provisions of s. 155 of the *Municipal Act* with respect to the petition filed by Marianne Darragh requesting that Official Community Plan Bylaw 2002-01 be amended to create a "McLean Lake Park Zone".
>
> Conditions
>
> 1. The City shall provide the Government of Yukon with a copy of the reasons for judgment and formal order in this application, and shall ask that Government to refrain from acting upon any outstanding approvals that the City has given with respect to the use of Crown land within the proposed "McLean Lake Park Zone" as described in

> Ms. Darragh's petition, save and except Zoning Bylaw 2007-39.
>
> 2. The City shall not issue any zoning, subdivision, or development approvals with respect to land use within the proposed "McLean Lake Park Zone".
>
> 3. Within 14 days after the release of the reasons for judgment in this application the City shall provide Ms. Darragh's counsel with an affidavit disclosing any approvals it has granted with respect to the use of Crown land within the proposed "McLean Lake Park Zone" that have yet to be acted upon by the Government of Yukon.
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> 4. If Ms. Darragh is of the view that her interests are adversely affected by the information disclosed in the above mentioned affidavit, then she is at liberty to apply to vary or set aside this order, on two clear days notice to the City.
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> 5. The City shall make all reasonable efforts to have this appeal heard on or before May 29, 2009.
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> 6. If this appeal is not heard on or before June 30, 2009, then Ms. Darragh is at liberty to apply to vary or set aside this order, on two clear days notice to the City.
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> This order shall expire on the release by this Court of reasons for judgment on this appeal.

Should the Costs Order Be Stayed?

[36] The City submits that the costs order against it should be stayed pending the determination of this appeal because there is a risk that it will not be able to recover any monies paid to Ms. Darragh in the event the appeal is allowed. It says that since the costs order itself is under appeal, a stay is necessary to preserve the subject matter of the litigation.

[37] In response, Ms. Darragh submits that, as a successful litigant, she is entitled to the fruits of the judgment in her favour. She says that the City has not adduced any evidence to demonstrate that it would unable to recover any monies paid to her, should the costs order be reversed on appeal. To the contrary, Ms. Darragh deposes that she has resided in Whitehorse for over 30 years, owns residential property on which she pays taxes to the City, and has run a successful business in the City for 15 years.

[38] The factors to be considered on an application to stay a judgment pending appeal were conveniently summarized by Madam Justice Levine in *Peter Kiewit Sons Co. v. Perry*, 2006 BCCA 259, 226 B.C.A.C. 280 (Chambers):

> [12] On an application for a stay in this Court, the applicant must establish the same three matters as must be established on an application for an interim injunction: that there is a serious question to be tried; that the applicant would suffer irreparable harm if the stay was not granted; and that the balance of convenience favours a stay: see *Coburn v. Nagra*, 2001 BCCA 607 [96 B.C.L.R. (3d) 327] at para. 3. Other principles applied in this Court (summarized in *Roe, McNeill & Co. v. McNeill* (1994), 49 B.C.A.C. 247, quoted in *Coburn* at para. 11) include that a successful plaintiff is entitled to the fruits of his judgment and should not be deprived of them unless the interests of justice require that they be withheld; the court's power to grant a stay is discretionary and should only be exercised where it is necessary to preserve the subject matter of the litigation or to prevent irremediable damage or where there are other special circumstances; the court may weigh the interests of the parties, the balance of convenience and any prejudice that may arise; a first step is to consider whether the appeal is without merit or has no reasonable prospect of success.

[39] Having regard to these factors, I am not satisfied that it would be appropriate to deprive Ms. Darragh of the costs she has been awarded. It cannot be said that the City faces a serious risk of not being able to recover any monies that may have

to be repaid as a result of a successful appeal. Further, to deny Ms. Darragh her costs at this time could prejudice her ability to contest this appeal; an appeal that raises an issue with respect to public participation in the democratic process, important not only to Ms. Darragh and the others who signed the petition, but to all residents of Yukon.

Conclusion

[40] The application to exempt the City from holding a referendum with respect to the creation of the "McLean Lake Park Zone" is granted as set out in paragraph 35 above. The application to stay the costs order in Ms. Darragh's favour is dismissed.

[41] Costs of this application will be in the appeal.

"The Honourable Mr. Justice Frankel"