QBG 228 of 2019 . JCB

The Rural Municipality of Wilton No. 472 v Tracy Kashuba, and the Lone Rock Organized Hamlet Board (Donna Woods, Lloyd Ludwig, Melissa Heney, and Candace Blain)

Gerald Heinrichs for The Rural Municipality of Wilton No. 472 (applicant)

FIAT - March 6, 2020 . ZUK J.

Introduction

[1] The applicant the Rural Municipality of Wilton No. 472 [R.M.] and the Lone Rock Organized Hamlet Board [Hamlet Board] are involved in a series of legal battles. This one is initiated by the R.M. in which it seeks the removal of Tracy Kashuba as the Hamlet Board's nominee to sit on an Appeal Board to hear a dispute between the R.M. and the Hamlet Board.

[2] The Hamlet Board responds with its application striking the R.M.'s originating application as an abuse of process and for an order directing that the Appeal Board be constituted and begin the hearing process within 30 days failing which the R.M. be bound to negotiate with the Hamlet Board on all outstanding issues.

[3] The Hamlet Board consists of Donna Woods, Lloyd Ludwig, Melissa Heney and Candace Blain. The Hamlet Board represents the Hamlet of Lone Rock. The Hamlet is located within the Rural Municipality of Wilton No. 472. The Hamlet Board took exception to a number of decisions made by the R.M. that the Hamlet Board believed would have a negative affect on the residents of Lone Rock. The Hamlet Board availed itself of a dispute mechanism process within *The Municipalities Act*, SS 2005, c M-36.1 [*Act*] and referred the following issues to an Appeal Board "Water, sewer, expenditures and land purchase".

[4] Pursuant to s. 77 of the *Act*, issues arising between an R.M. and a Hamlet Board may be referred to a three-person appeal board who shall adjudicate issues referred to the board for decision. The R.M. and the Hamlet Board each appoint one person and the two appointed persons shall then agree on the appointment of a third person who acts as chairperson. Section 77 of the *Act* is reproduced as follows:

> 77(1) If a dispute arises between the council of a rural municipality and the hamlet board of an organized hamlet within the rural municipality, the council and the hamlet board shall refer that matter to an appeal board appointed in accordance with subsection (2).
>
> (2) The council and the hamlet board shall each appoint a person to an appeal board, and the persons so appointed shall agree on the appointment of a third person to act as chairperson of the appeal board.

[5] Lone Rock initially appointed Terry Kashuba as its nominee to the Appeal Board, however he stepped aside following concerns expressed by the R.M. to the Hamlet Board. The Hamlet Board then appointed Tracy Kashuba, the spouse of Terry Kashuba, as its replacement nominee on the Appeal Board. She was appointed on December 13, 2018.

[6] On June 6, 2019, prior to the two nominees agreeing to the third person necessary to constitute the Appeal Board, the Hamlet Board sent notice to the R.M. that the Hamlet Board was claiming damages against the R.M. on behalf of named residents living within Lone Rock in the amount of $700,000 per household. Included in the list of claimants was Tracy Kashuba and her husband Terry Kashuba.

[7] On July 15, 2019 the R.M. notified the Hamlet Board that it considered Tracy Kashuba to be in a conflict of interest arising from her participation in the claim against the R.M. for $700,000 in compensation from the R.M. The R.M. asked the Hamlet Board to name another nominee to the Appeal Board.

[8] The Hamlet Board denied that Tracy Kashuba had a conflict of interest alleging that the issues that had been referred to the Appeal Board were separate and distinct from the issues giving rise to the damages claim.

[9] The R.M., unsatisfied with the Hamlet Board's refusal to revoke its appointment of Tracy Kashuba to the Appeal Board, commenced an application seeking her removal.

[10] The Hamlet Board countered with a notice of application to strike the R.M.'s originating application as an abuse of process and the Hamlet Board seeks an order directing that the Appeal Board be fully constituted and begin the hearing process within 30 days.

The Relief Requested by the Parties

[11] The R.M. seeks the following relief:

1. Pursuant to the court's inherent jurisdiction and Rule 3-49, an order of judicial relief as against the Respondents and related to the aforesaid circumstances including but not limited to:

   a. A declaratory order that there is a reasonable apprehension of bias by and with Tracy Kashuba and disqualifying and removing her from being on the appeal board; and/ or

   b. An order prohibiting Tracy Kashuba from being on the appeal board; and/or

   c. An order of certiorari quashing the appointment of Tracy Kashuba to the appeal board, by the hamlet council; and/or

   d. Such other judicial review relief as the court may allow;

2. Solicitor-client costs against the Lone Rock Organized Hamlet Board and Tracy Kashuba, or either of them, jointly and severally, and payable forthwith.

[12] Tracy Kashuba and the Hamlet Board seeks the following relief:

1. An order striking out the originating application as it is a frivolous abuse of processes as the Rural Municipality of Wilton (herin referred as RM of Wilton) can forgo any Appeal Board process by Good Faith negotiations with the Lone Rock Organized Hamlet Board which would delete any need for the Appeal Boards existence. RM of Wilton is of same conflict they allege in their claim.

2. An order removing Merchant Law Group and Gerald Heinrichs from acting for the RM of Wilton due to conflict of interest.

3. An order directing the RM of Wilton to complete the assembly and hearing process of the Appeal Board within 30 days or be bound to negotiations with Lone Rock Organized Hamlet Board on all outstanding issues forthwith.

4. Costs of this Application.

5. Such further and other relief as this Honourable Court may allow.

The Law

[13] The Appeal Board is established pursuant to s. 77 of the *Act*:

> 77(1) If a dispute arises between the council of a rural municipality and the hamlet board of an organized hamlet within the rural municipality, the council and the hamlet board shall refer that matter to an appeal board appointed in accordance with subsection (2).
>
> (2) The council and the hamlet board shall each appoint a person to an appeal board, and the persons so appointed shall agree on the appointment of a third person to act as chairperson of the appeal board.

[14] *The Municipalities Regulations*, RRS c M-36.1 Reg 1 [*Regulations*] contains provisions with respect to an appeal board:

> **Appeal board**
>
> **35** No person who is a member of the hamlet board or who is a member of council for the rural municipality in which the organized hamlet is located shall be appointed to or sit as a member of the appeal board appointed pursuant to section 77 of the Act.
>
> **Duties of appeal board**
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> **36** If the council of a rural municipality or the hamlet board with which it has a dispute refers the dispute to the appeal board, the appeal board shall:
>
> (a) appoint a time and a place for hearing the dispute;
>
> (b) give at least seven days' notice to the council and the hamlet board of the time and place appointed pursuant to clause (a);
>
> (c) allow the council and the hamlet board to:
>
> (i) present oral or written evidence;
>
> (ii) cross-examine witnesses; and
>
> (iii) rebut evidence submitted by the party adverse in interest;

> (d) render its decisions with respect to the dispute, in writing; and
>
> (e) apportion the costs of the hearing and the appeal board between the council and the hamlet board in any manner that the appeal board considers appropriate.
>
> **Decision binding**
>
> **37** The decision of the appeal board is binding on the council of the rural municipality and the hamlet board.

[15] Section 35 of the *Regulations* prohibits a member of a Hamlet Board or a council member of the Rural Municipality being appointed to the Appeal Board. This provision is aimed squarely at preventing a potential conflict of interest arising from one of the parties appointing one of its own members to the Appeal Board.

[16] Section 36 of the *Regulations* directs the Appeal Board to allow the R.M. and the Hamlet Board to call oral or written evidence, cross-examine witnesses and provide rebuttal evidence. The Appeal Board is directed to render a decision with respect to the dispute and requires that the decision be rendered in writing.

[17] Pursuant to s. 37 of the *Regulations*, the decision of the Appeal Board is binding on the council of the Rural Municipality and on the Hamlet Board.

[18] The *Act*, in conjunction with the *Regulations*, establishes a tribunal to adjudicate disputes between a rural municipality and a hamlet contained within the rural municipality. The Appeal Board must hear evidence and render a written decision on the issues referred to the Appeal Board. Notably, the decision of the Appeal Board is final and binding. The *Act* creates an appeal board process which must be independent and operate in a *quasi-judicial* manner to arrive at a binding decision.

The R.M.'s Position

[19] The R.M. states that Ms. Kashuba cannot be an adjudicator in a matter involving the R.M. and the Hamlet Board when, at the same time, she is a litigant or claimant against the R.M. Simply stated, the R.M. alleges that Ms. Kashuba cannot sit on a Appeal Board adjudicating a dispute between the R.M. and the Hamlet Board as she has appointed the Hamlet Board to represent her in a personal $700,000 claim against the R.M.

[20] The Appeal Board is being constituted for the purpose of hearing the following issues referred by the Hamlet Board; water, sewer, expenditures and land purchase.

[21] Ms. Kashuba has appointed the Hamlet Board to pursue damages and compensation against the R.M. in the amount of $700,000 for:

> property devaluation through conversation and manipulation by Wilton council and administration. Intentional infliction of mental suffering. Creating a monopolized system to the detriment of residents benefiting the rural municipality. Malicious imminent ongoing and future harm and actions in bad faith negating the responsibilities of their office and position duty of care.

[22] The R.M. alleges that Ms. Kashuba has, through the Hamlet Board claim, exhibited a harsh and preconceived notion about the R.M. and its council. The R.M. contends that it cannot expect a fair hearing from Ms. Kashuba as her accusations are hostile and, at a minimum, create the appearance of bias, conflict or personal self-interest.

[23] The R.M. relies on *Milne v Joint Chiropractic Professional Review Committee*, 1992 97 Sask R 299 (SK CA) where the court explained the test for removal based on bias as follows: "It is not necessary for the appellant to demonstrate that the chairman was actually biased. The test is reasonable apprehension of bias."

[24] The test for reasonable apprehension of bias was set out by the Federal Court in *Canada (Minister of Citizenship and Immigration v Ion*, 1999 CanLII 9005 (FC) where the test was set out as follows:

> The seminal case on the question of whether a decision-maker decided a case unfairly is *Committee for Justice and Liberty v Canada* (N.E.B.), [1978] 1 SCR 369 where the Supreme Court of Canada articulated the test for reasonable apprehension of bias as to whether or not an informed person, viewing the matter realistically and practically and having thought the matter through, would think it more likely than not that the decision-maker would unconsciously or consciously decide an issue unfairly.

[25] The Saskatchewan Court of Appeal, in *Pasiechnyk v Procrane Inc.* (1992), 97 Sask R 286 established the test for apprehension of bias as follows:

> Tribunals whose function is largely adjudicative, as is the case here, are under extensive duties of fairness, including the duty not to

> prejudge or be seen to have prejudged a matter before them. No "reasonably informed bystander" should be able to "reasonably perceive bias" on the part of such a tribunal. That is the test.

[26] The R.M. alleges that Ms. Kashuba cannot be, or appear to be, fair and unbiased as a member of the Appeal Board given her personal damages claim against the R.M. Additionally, the R.M. alleges that Ms. Kashuba would be, or have the appearance of being, biased or unfair against the R.M. based on the strong language contained in her personal claim against the R.M. The R.M. points to such language as "malicious", "actions in bad faith", "infliction of mental suffering", and "conversation and manipulation" in relation to actions of the R.M. and its council as evidence of biased.

[27] The R.M. seeks an order removing Ms. Kashuba from the Appeal Board or a declaratory order prohibiting the Hamlet Board from appointing Ms. Kashuba to the Appeal Board.

The Position of Tracy Kashuba and the Hamlet Board

[28] Ms. Kashuba and the Hamlet Board deny that Ms. Kashuba is biased or that she has the perception of being biased. Ms. Kashuba and the Hamlet Board rely on the decision of the Saskatchewan Court of Appeal in *Yorkton (City) v Yorkton Professional Fire Fighters Assn. Local 1527*, 2001 SKCA 128 (CanLII) [*Yorkton Fire Fighters*] in support of that proposition.

[29] In *Yorkton Fire Fighters*, an issue regarding the appointment of representatives from the City and the Firefighters Associations was referred to a Board of Arbitration. Each party was entitled to nominate "one representative" to the arbitration panel. Both representatives were then tasked with the duty of selecting the chairperson of the Arbitration Board.

[30] The City objected to the Firefighters association nominee. The nominee, Mr. Ritchie, was a retired firefighter from British Columbia who was also an officer of the International Firefighters Association. The Yorkton Firefighter's Association held an affiliation with the International Firefighters Association and the City objected to his nomination stating that he had a conflict of interest. The matter proceeded to a chamber application at the Court of Queen's Bench where the court granted an order prohibiting Mr. Ritchie from sitting on the board of arbitration.

[31] The Court of Appeal set aside the chamber decision on the basis that the facts did not give rise to a reasonable apprehension of bias.

[32] The *Yorkton Fire Fighter's* case was decided in the context of an Arbitration Board being appointed to determine a contractual dispute. The Court concluded that the Arbitration Board did not perform *quasi-judicial* functions as nominees are normally inclined to favour the parties that have nominated them.

[33] Ms. Kashuba and the Hamlet Board contend that the Appeal Board, as constituted pursuant to s. 77 of the *Act*, does not perform *quasi-judicial* functions and Ms. Kashuba's appointment to the Appeal Board should be allowed to stand.

Analysis

[34] The argument presented by each party essentially come down to one issue, namely, procedural fairness. What constitutes procedural fairness will vary depending on the nature of the administration decision maker and the context in which the decision is made.

[35] This issue was recently canvassed by the Saskatchewan Court of Appeal in *101115379 Saskatchewan Ltd. v Saskatchewan (Financial and Consumer Affairs Authority)*, 2019 SKCA 31 [*101115379 Saskatchewan Ltd.*] where the court considered the issue of procedural fairness in relation to administrative decision makers. The court stated at paras. 76-78:

> [76] Administrative decision-makers have a duty of procedural fairness and natural justice. This was recognized by the Supreme Court of Canada in *Dunsmuir v New Brunswick*, [2008] 1 SCR 190, where Bastarache and LeBel JJ., writing for the majority, stated:
>
> > [79] Procedural fairness is a cornerstone of modern Canadian administrative law. Public decision makers are required to act fairly in coming to decisions that affect the rights, privileges or interests of an individual. ...
>
> [77] Given the vast number of administrative decision-makers that exist and the many different ways their decisions are made, what constitutes procedural fairness will vary depending on the nature of the administrative decision-maker and the context in which the decision is made. This was discussed by the Supreme Court of Canada in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*]. Justice L'Heureux-Dubé, writing for the majority in *Baker*, set out a non-exhaustive list of factors to be considered in determining the degree of procedural fairness required of an administrative decision-maker:
>
> > (a) the nature of the decision being made and the process followed in making it (the closer an administrative process

> resembles a judicial process the higher the duty of procedural fairness) (at para 23);
>
> (b) the nature of the statutory scheme and the terms of the statute pursuant to which the body operates (at para 24);
>
> (c) the importance of the decision to the persons affected (at para 25);
>
> (d) the legitimate expectations of the person challenging the decision (at para 26); and
>
> (e) the choices of procedure made by the administrative decision-maker, particularly where the enabling statute gives the decision-maker the ability to choose the process or when the agency has an expertise in determining what procedures are appropriate in the circumstance (at para 27).
>
> [78] In my view, all the *Baker* factors weigh in favour of a high degree of procedural fairness in this case. The process involved closely resembles a judicial process. The *Securities Act* gives hearing panels many of the same rights a court has when hearing a civil action including the right to subpoena witnesses and force their attendance through contempt proceedings (s. 9(4) and (5) of the *Securities Act*). The decision in this case had a significant financial impact on the appellants and affected Ms. Pastuch's ability to trade securities. The *Securities Act* generally sets out how hearings are to be conducted but a panel has the ability to choose how it receives evidence and runs the hearing. The general expectation of persons facing allegations of breaching the *Securities Act* or its *Regulations* is one of procedural fairness.

[36] In my view, an analysis of the facts in the present case conducted under an analysis as set out in *101115379 Saskatchewan Ltd.* establishes that a high degree of procedural fairness is required by an Appeal Board pursuant to s. 77 of the *Act*.

[37] The Appeal Board has significant decision-making authority pursuant to s. 77(1), disputes arising between a Rural Municipality and a Hamlet Board shall be referred to an Appeal Board.

[38] Pursuant to s. 36 of the *Municipalities Regulations*, the Appeal Board has the following powers and duties:

a) the power to set hearing dates;

b) the power to accept oral or written evidence;

c) the power to grant parties the right of cross-examination;

d) the authority to render a written decision;

e) the power to apportion costs.

[39] Pursuant to s. 37 of the *Municipalities Regulations*, the decision of the Appeal Board is binding on the council of the Municipality and the Hamlet Board.

[40] In effect, the Appeal Board operates in a manner close to that of a judicial process. The *Act* has provided the Appeal Board with exclusive authority to hear and adjudicate disputes between the Rural Municipality and the Hamlet Board. The Appeal Board has authority to make decisions of significant importance to the residents of the Rural Municipality and the Hamlet. All of these factors are indicative of requiring the administrative decision-makers sitting on an Appeal Board to act with a high duty of procedural fairness and natural justice.

[41] The R.M. alleges that, in the context of an administrative body owing a high degree of procedural fairness and natural justice, the appointment of Tracy Kashuba gives rise to actual bias or an apprehension of bias. The bias is alleged to arise from Ms. Kashuba's participation as a claimant seeking $700,000 in damages from the R.M.

[42] In *101115379 Saskatchewan Ltd.*, the court set out the test for reasonable apprehension of bias at paras. 195-198 as follows:

> [195] There is a presumption that judges will act impartially. In *Wewaykum* [*Wewaykum Indian Band v Canada*, [2003] 2 SCR 259], the majority described that presumption in these terms:
>
> > [59] Viewed in this light, "[i]mpartiality is the fundamental qualification of a judge and the core attribute of the judiciary" (Canadian Judicial Council, *Ethical Principles for Judges* (1998), at p. 30). It is the key to our judicial process, and must be presumed. As was noted by L'Heureux-Dubé J. and McLachlin J. (as she then was) in *S. (R.D.)*, *supra* [*R v S. (R.D.)*, [1997] 3 SCR 484, at para. 32, **the presumption of impartiality carries considerable weight, and the law should not carelessly evoke the possibility of bias in a judge, whose authority depends upon that presumption.** Thus, while the requirement of judicial impartiality is a stringent one, the burden is on the party arguing for disqualification to establish that the circumstances justify a finding that the judge must be disqualified.
>
> (Emphasis added)

> [196] The presumption of impartiality has been applied to members of administrative tribunals (*S.(R.D.)* at para 32). However, the presumption can be rebutted by establishing bias or a reasonable apprehension of bias. The burden of proof in rebutting the presumption lies with the party making the allegation (*Wewaykum* at para 59; and *S.(R.D.)* at para 114).
>
> [197] A party alleging actual bias must establish the decision-maker brought or would bring prejudice into consideration as a matter of fact (*Wewaykum* at para 62; and *S.(R.D.)* at paras 103–108). This is difficult to establish because it depends on what is in the mind of the adjudicator. For that reason, most often the allegation is one of a reasonable apprehension of bias as opposed to actual bias (*Newfoundland Telephone Co.* [*Newfoundland Telephone Co. v Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 SCR 623] at para 22; and *S.(R.D.)* at para 109).
>
> [198] The test for reasonable apprehension of bias was set out by de Grandpré J. in his dissent in *Committee for Justice and Liberty v National Energy Board*, 1976 CanLII 2 (SCC), [1978] 1 SCR 369 at 394 [*Committee for Justice and Liberty*]:
>
> > [T]he apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. ... [T]hat test is "**what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude.** Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."
>
> [Emphasis added]

[43] I am satisfied that the R.M. has provided sufficient evidence to establish a reasonable apprehension of bias. Although the issues referred to the Appeal Board may differ from the issues in the claim for $700,000 in which Ms. Kashuba is a participant, a reasonable and right-minded person, applying themselves to the question and obtaining the required information, would think it is more likely than not that Tracy Kashuba, whether consciously or unconsciously, would not decide fairly. To put it more colloquially, a right-minded person, having considered the facts, would conclude that it is more likely than not that Tracey Kashuba, whether knowingly or unknowingly, would not decide the appeal matter fairly given that she is claiming $700,000 in damages from the R.M. on an unrelated matter. The circumstances, in my view, create a classic example of apprehension of bias. Accordingly, Tracy Kashuba is prohibiting from sitting on the Appeal Board as a representative of the Lone Rock organized Hamlet Board.

The Application to Strike the R.M.'s Originating Application as a Frivolous Abuse of Process

[44] The Hamlet Board alleges that the Appeal Board process would not be necessary if the R.M. simply negotiated in good faith with the Hamlet Board. Notwithstanding the benefits of a negotiated settlement, it was the Hamlet Board that initiated the process pursuant to s. 77 of the *Act* leading to the creation of the Appeal Board. The parties may negotiate outside of the Appeal Board process, however the failure to successfully resolve the issues through an alternative dispute resolution process does not preclude a litigant from seeking redress from the court. In the present case the Hamlet Board was insistent that Tracy Kashuba remain as their nominee to the Appeal Board. That position resulted in the R.M. proceeding by originating notice for an application to remove Ms. Kashuba from the Appeal Board. The R.M. had every right to bring its application.

[45] The Hamlet Board further argued that the originating notice ought to be struck on other grounds. The Hamlet Board contends that the R.M. is challenging the Hamlet Board's right to maintain a civil action against the R.M. in QBG 301 of 2018. I fail to see how that proceeding has any relevance to the within application to remove Tracy Kashuba from the Appeal Board. While it is possible that the R.M. may eventually be successful in having the Hamlet Board's representative claim on behalf of the Hamlet's residence against the R.M's struck, at present the claim remains outstanding and Ms. Kashuba maintains her personal claim against the R.M. for payment of damages in the amount of $700,000. It is her status as a claimant against the R.M. that her led to her removal from the Appeal Board. The R.M.'s application to strike the Hamlet Board's claim in QB 301 of 2018 is irrelevant to the present application.

[46] Accordingly, the Hamlet Board's application to strike the R.M.'s originating notice is without merit and is dismissed.

The Hamlet Board's request for an order removing Merchant Law Group and Gerald Heinrichs from acting for the R.M. due to conflict of interest

[47] This claim was abandoned by the Hamlet Board at chambers.

The Hamlet Board request directing the R.M. to complete the Appeal Board hearing process within 30 days or, be bound to negotiations with the Hamlet Board

[48] There is no basis on which this relief should be granted. The Appeal Board process has been stymied by the dispute regarding the R.M.'s nominee to the Appeal Board. I have directed that Ms. Kashuba be removed from the Appeal Board. The Hamlet Board must appoint another nominee to the board. Presumably the two nominees will reach agreement on the third Appeal Board member which will allow the Appeal Board process to proceed expeditiously. There is no basis in law, at this stage, to make any order directing that the Appeal Board process be completed within 30 days or any other period of time. The Hamlet Board's application is dismissed.

Costs

[49] Both the R.M. and the Hamlet Board seek costs of the application. The R.M. has been successful in its application and has also been successful in respect of the applications made by the Hamlet Board. The R.M. seeks costs in the amount of $7,500 jointly and severally against the individual respondents.

[50] The respondents take the position that costs ought not to be awarded and have relied on the following decisions:

a) *Catalyst Paper Corp. v North Cowichan (District)*, 2012 SCC 2 (CanLII), [2012] 1 SCR 5;

b) *Kaiser v R.M. of Baildon No. 131*, 2018 SKQB 292 (CanLII) [*Kaiser*]; and

c) *Rural Municipality of Edenwold No. 158 v Murray*, 2017 SKQB 15 (CanLII).

[51] The only decision which may have any relevance to the within application is the *Kaiser* decision. The costs issue in *Kaiser* was whether solicitor and client costs ought to have been awarded against the unsuccessful party. The R.M. seeks costs of $7,500 relying on Rule 11-1(4) where a court may consider a party's denial or refusal to admit anything that should have been admitted. Further, the R.M. suggests that the trend of recent case authorities establishes that the court utilize costs as a method of winnowing out unmeritorious cases in the litigation process. The R.M. suggests that a significant award of costs would discourage the continuance of doubtful cases or defences.

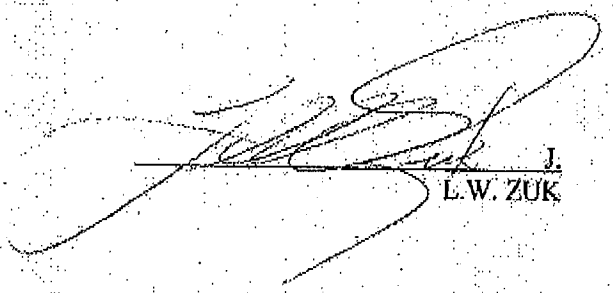
[52] In the present case, Ms. Kashuba and the Hamlet Board are the unsuccessful parties, however their conduct has not been egregious. Although they were unsuccessful in maintaining Ms. Kashuba on the Appeal Board, their position did not lack merit.

[53] Their application to strike the originating notice, remove Merchant Law Group and Gerald Heinrichs from acting on behalf of the R.M. and application for an order directing the R.M. of Wilton to complete the assembly and Appeal Board process within 30 days are also unsuccessful. The application to remove Merchant Law Group and Gerald Heinrichs was abandoned at chambers. I have dismissed the other two applications for the reasons stated herein. Although the application did not have a strong factual or legal basis, I do not find that the applications to have been frivolous or completely devoid of merit.

[54] Accordingly, I see no reason to deviate from the usual practice of awarding costs in favor of the R.M. on a party and party basis. Accordingly, the R.M. shall have taxed costs of its application on Column one. The R.M. shall also have party and party costs taxed on Column one on the unsuccessful notice of application commenced by Ms. Kashuba and the Hamlet Board.

[55] The R.M. shall also have costs in respect of its successful applications to strike portions of the affidavits of Tracy Kashuba and Donna Woods in the amount of $200.

[56] Tracy Kashuba shall be personally responsible for 20 percent of the costs and the Hamlet Board shall be responsible for the remaining 80 percent. All costs shall be payable within 30 days of taxation.



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QBG 239 of 2019 – JCB

Terence Kashuba and Lloyd Ludwig v The Rural Municipality of Wilton No. 472

Gerald Heinrichs for The Rural Municipality of Wilton No. 472 (respondent)

FIAT – March 6, 2020 – ZUK J.

Introduction

[1] Terence Kashuba [Mr. Kashuba] and Lloyd Ludwig [Mr. Ludwig] [applicants] are residents of the Hamlet of Lone Rock which is situate within the Rural Municipality of Wilton No. 472 [the R.M.]. The parties are involved in a series of legal battles. This application represents one of those skirmishes.

[2] The applicants seek a number of remedies, as follows:

1) An order pursuant to s. 358 of *The Municipalities Act*, SS 2005, c M-36.1 [*Act*], quashing or setting aside resolutions, bylaws or decisions made by the R.M. regarding:

a. The operating budget for the organized Hamlet of Lone Rock;

b. The utility billing submitted by the R.M. to the residents of Lone Rock.

2) An order setting aside resolutions, bylaws or decisions made by the R.M. to implement a separate water and sewer billing for residents of Lone Rock pursuant to s. 23(3) of the *Act* as the decisions were made without consultation, notification and were made in bad faith;

3) Directions regarding the scope of the petition regarding Lone Rock and specifically whether s. 132(2) of the *Act* requires signing by the greater of 15 percent of the population or 25 voters of the Municipality refers to voters within the organized Hamlet of Lone Rock or to the entire R.M.;

4) Directions regarding who has responsibility over enforcement of the duties and maintaining legislative requirements of the *Act* and regulations.

[3] The R.M. countered with its own application seeking:

a) An order validating service on the applicants;

b) An order pursuant to s. 358(4) of the *Act* or Rule 4-22 of *The Queen's Bench Rules* directing the applicants to post no less than $7,500 as security for costs;

c) An order striking portions of the affidavits filed in support of the application;

d) An order striking out the applicant's originating application as being duplicitous and/or an abusive process as an appeal board has been initiated by the Hamlet of Lone Rock pursuant to s. 77 of the *Act* relating to "water, sewer, expenditures and land purchase" which are the same matters as raised in the originating application;

e) Solicitor/client costs due to unreasonable and unfounded allegations made against the R.M. in bad faith.

Background

[4] The applicants depose that Lone Rock has seen a decline in the services provided by the R.M. in the last five years and that the relationship between the R.M. and the organized Hamlet has deteriorated over the corresponding period. More specifically, the applicants allege that the R.M. Reeve, Mr. Glen Dow, announced a termination of water and sewer services to Lone Rock during a Town Hall meeting held August 21, 2018. The applicants believed that the R.M. would be terminating water and sewer services over a two-year period.

[5] In response to the announcement, the residents of Lone Rock met on September 4, 2018 and signed a petition requesting that the R.M. provide a financial audit regarding the finances and expenses pertaining to the Hamlet of Lone Rock. The petition contains 25 signatures all reportedly residents of the Hamlet of Lone Rock. The R.M., relying on s. 140.1(4) of the *Act*, denied that the petition was valid as the petition did not contain the signature of a number of voters equal to one third of the population of the municipality. The applicants rely on s. 132(2) of the *Act* and contend that the petition is valid as it contains the signature of 25 residents which exceeds 15 percent of the population of the Hamlet of Lone Rock.

[6] In November 2018 the Hamlet Board submitted its proposed budget to the R.M. Later that month the Hamlet Board requested the formation of an appeal

board pursuant to s. 77 of the *Act* to address disputes respecting "water, sewer, expenditures and land purchases."

[7] On December 6, 2018 the Hamlet Board submitted an amended budget to the R.M. On January 18, 2019 the R.M. submitted its proposed 2019 budget for Lone Rock to the Hamlet Board. The R.M. and the Hamlet Board agreed to a meeting in February to discuss the proposed Lone Rock budget. The meeting was cancelled. The R.M. alleges it was due to bad weather, an explanation not accepted by the applicants.

[8] On March 3, 2019 the Hamlet Board submitted a third proposed budget to the R.M. On March 21 the R.M. passed a resolution approving a 2019 Lone Rock budget which is significantly different than the proposed budget submitted by the Hamlet Board and is made without consultation with the Hamlet Board.

[9] On April 4, 2019 mediation was proposed resulting in a mediation agreement signed between the R.M. and the Hamlet Board on May 15, 2019. Mediation sessions were held on May 6 and June 6, 2019 but no settlement was reached.

[10] On June 11, 2019 the Hamlet Board sent a resolution to the R.M. requesting a return to annual water and sewer billing for the residents of Lone Rock. On June 27 the R.M. passed the Lone Rock Utility Charge Bylaw which established monthly water and sewer billing. Also on June 27 the R.M. passes a resolution adopting an amended 2019 Lone Rock budget. The R.M. had considered the previous Lone Rock budget proposals, however the R.M. did not approve or adopt the proposed budgets. The R.M. had considered the Lone Rock resolution seeking the utility bills be annual rather than monthly. However, the R.M. decided to proceed with monthly utility bills which it had began mailing out in March 2019.

[11] On July 16, 2019 the R.M. declined a Hamlet Board request to return to a monthly water and sewer billing. The applicants, unhappy with the position taken by the R.M. on the budget and utility billing issues, filed an Originating Application on August 28, 2019 seeking to quash the R.M.'s resolution passed June 27, 2019 respecting the 2019 Lone Rock budget and to quash the Lone Rock Utility Charge Bylaw passed on June 27, 2019.

[12] On September 13, 2019 the Saskatchewan Municipal Board approved the R.M. water and sewer rates pursuant to s. 23(3) of the *Act*.

[13] On October 1, 2019 the R.M. filed its Notice of Application seeking security for costs and requesting that the applicants Originating Application be struck out as being duplicitous and/or an abuse of process as the issues raised in the applicants Originating Notice are matters currently before the Appeal Board.

[14] It is with that basic evidentiary background that I consider the various applications.

The R.M.'s application to strike the originating application as an abuse of process or being duplicitous

[15] The R.M. contends that the applicants have initiated their application pursuant to s. 358 of the *Act* seeking the very same relief as claimed by the Hamlet Board through the Appeal Board process. The R.M. contends that the Appeal Board will be hearing and adjudicating on the issues raised by the applicants in the within proceeding, namely "water, sewer, expenditures and land purchases.". Accordingly, the R.M. contends that the application made by Mr. Ludwig and Mr. Kashuba is either an abuse of process or duplicitous. The R.M. points out that Mr. Ludwig, is the Chairman of the Hamlet Board for the Hamlet of Lone Rock.

[16] The R.M. relies on s. 29 of *The Queen's Bench Act, 1998*, SS 1998, c Q-1.01 which addresses avoiding multiplicity of actions. Section 29 is reproduced as follows:

> Multiplicity of proceedings avoided
>
> 29(1) The court shall grant to the parties to an action or matter all remedies to which the parties appear to be entitled with respect to any legal or equitable claims that they have properly brought forward so that:
>
> (a) all issues in controversy between the parties are determined as completely and finally as possible; and
>
> (b) a multiplicity of legal proceedings concerning the issues is avoided.
>
> (2) Relief pursuant to subsection (1) may be granted either absolutely or on any terms and conditions that a judge considers appropriate.

[17] The R.M. further relies on *Continental Auctions Ltd. v Midway Machine (1973)*, [1979] S.J. No. 179 (QB) where the court stated at para 3:

> 3 Accordingly, I must consider that the first action has not been effectively discontinued and we are faced with a situation where there are two suits claiming similar relief out of the same set of circumstances and in my opinion this constitutes an abuse of the process of the court. In *Earl Poulett v. Viscount Hill* (1893) 1 Ch 277 at 282, Kay, L.J., said:
>
> > "When an action has been brought by which the plaintiff can recover everything to which he is entitled, he ought not to bring another."
>
> This statement is applicable to the situation prevailing here and in my respectful opinion the second action ought not to have been commenced and accordingly the statement of claim is struck out as prayed by the defendant. The defendant will will have its costs of this application.

[18] The R.M. also relies on *Re MacDonald and Law Society of Manitoba*, 1975 CanLII 1138 (MB QB) where the court declined to hear a case involving parallel proceedings between the same parties where the court stated:

> This application is asking for an extraordinary equitable remedy and it would be undesirable to entertain it at a time when there is another action pending before this same Court, dealing with matters arising out of the same set of facts, in which the affected parties are represented. I, therefore, dismiss this application, but reserve to the application the right to re-apply when the other action has been disposed of.

[19] The cases cited by the R.M. can be distinguished on the basis that the applicants in the present case are not the parties involved in the Appeal Board process. The Appeal Board is a creature of statute commenced by a request made by a Hamlet Board pursuant to s. 77 of the *Act*. In that instance the parties to the process are the R.M. and the Hamlet Board. In the present situation, the applicants are individuals within the definition of s. 358 of the *Act*. Section 358 provides that "... any voter of a municipality, any owner or occupant of property or a business within the municipality or the minister may apply to the court to quash a bylaw or resolution in whole or in part ...".

[20] In essence, the parties in each action are different. The within application is made by two residents of Lone Rock, albeit one of the applicants is the

Chair of the Organized Hamlet Board. Mr. Kashuba is not on the Hamlet Board although he has been significantly involved with the activities of the Hamlet Board notwithstanding that he is not an elected board member. Although there is significant overlap between the actions of the applicants acting in their personal capacity and their involvement in the Organized Hamlet Board, there is not sufficient evidence to establish that the applicants are acting as proxies for the Hamlet Board. Accordingly, I do not find that the applicants are *de facto* representatives of the Hamlet Board making a collateral application to quash decisions of the R.M. That the Organized Hamlet Board would, in its own right lack the standing to make such an application.

[21] I do not find the application pursuant to s. 358 of the *Act* to be either an abuse of process or duplicitous.

Should the within application be stayed pending the decision of the Appeal Board

[22] Under the circumstances, I accept that s. 29 of the *Queen's Bench Act* is intended to avoid multiplicity of proceedings. The appeal process is first in time and has been instituted to address the precise issues raised by the applicants in the within proceeding. I recognize that the parties to the Appeal Board process and the parties in the current application differ. However, in each case the respective applicants seek to overturn decisions made by R.M. or the identical decisions made by the R.M. Accordingly, the application by Mr. Ludwig and Mr. Kushuba pursuant to s. 358 is adjourned *sine die* pending a completion of the Appeal Board process.

The R.M.'s application for security for costs

[23] The R.M. provides for an order directing the applicants to pay $7,500 as security for costs pursuant to either s. 358(4) of the *Act* or pursuant to Rule 4-22 of the Rules of Court. The affidavit of Darren Elder filed in support of the R.M.'s application simply states that the R.M. will incur legal expenses in excess of $7,500 to respond to the application to quash R.M. resolutions, bylaws or decisions.

[24] Section 358(4) states as follows "A judge of the court may require an applicant to provide security for costs in an amount and manner established by the judge." This provision provides little guidance to the court regarding the circumstances under which an order for security for costs be granted. Rule 4-22 and 4-24 is reproduced as follows:

> **4-22**(1) Subject to the express provisions of any enactment and notwithstanding any other rule, the Court:

> (a) has discretion respecting security for costs; and
>
> (b) may order security for costs against any party to a proceeding, including a party who is ordinarily resident in Saskatchewan.
>
> (2) The Court has discretion to determine the amount and form of security for costs.
>
> **4-24** The Court may order a party to provide security for payment of a costs award if the Court considers it just and reasonable to do so, taking into account all of the following:
>
> (a) whether it is likely the applicant for the order will be able to enforce an order or judgment against assets in Saskatchewan;
>
> (b) the ability of the respondent to the application to pay the costs award;
>
> (c) the merits of the action in which the application is filed;
>
> (d) whether an order to give security for payment of a costs award would unduly prejudice the respondent's ability to continue the action;
>
> (e) any other matter the Court considers appropriate

[25] A review of the relevant case authority respecting Rule 4-24 suggests that an order for costs is generally made in one of two circumstances. The first situation warranting an order for costs is the ability of an unsuccessful litigant to pay an order for costs. The second is where an applicant can establish that there is a good reason for the court to believe that the pleadings or position taken by a litigant is without merit. However, even where a litigant is impecunious, the court is reluctant to order costs where the claim has merit. The R.M.'s evidence does not establish that the applicants are impecunious or lacks merit.

[26] Although s. 358(4) is silent with respect to the circumstances under which costs will be ordered, I see no reason not to adopt principles applicable to a Rule 4-22 application to the application under the *Act*. An application for security for costs is not the appropriate remedy where a party alleges that a claim is without merit. An application to strike, as the R.M. has done in this case, is the appropriate remedy. The R.M. has provided no evidence that the applicants are impecunious or otherwise unable to satisfy an order for costs. The evidence is to the contrary, namely the applicants are property owners within the R.M. and an award of costs would be enforceable against them. Accordingly, the R.M.'s application for an order for security for costs is dismissed.

The application to set aside a separate water and sewer billing for residents of Lone Rock pursuant to s. 23(3) of *The Municipalities Act*

[27] For the same reasons stated in respect of the application pursuant to s. 358 of the *Act*, the application pursuant to s. 23(3) of the *Act* is adjourned *sine die* pending completion of the Appeal Board process.

The application for directions regarding scope of the petition and the application as to who has responsibility over enforcement of the *Municipalities Act* and regulations

[28] The request respecting who has responsibility over enforcement of the duties and maintaining legislative requirements of the *Act* or *Regulations* is so broad is to be meaningless. Accordingly, the application is dismissed.

[29] The application respecting the provision of s. 132(2) of the *Act* is also not properly before the court. The applicants did not apply for an order declaring the petition to be valid. Rather, the application is focused on seeking the court's interpretation of s. 132(2). In the absence of any request for a specific relief regarding the court's rule on the validity of the petition, it is inappropriate for the court to make any ruling in the abstract. As stated by the Alberta Court of Appeal in *Griffiths McBurney & Partners v Ernst & Young YBM Inc.*, 2000 ABCA 284 the court stated at para 46 as follows:

> [46] Another circumstance in which the court should decline to provide directions is when the receiver is effectively using the court as a legal adviser. That circumstance is present here. The Receiver has its own counsel to whom it can turn for legal advice and should not turn to the court for such advice.

[30] Accordingly, the application for the court to comment on the scope of the petition is dismissed.

Costs

[31] The R.M. successfully applied to strike portions of the affidavits filed in support of the application. The R.M. shall have costs against the applicants, jointly and severally, in the amount of $200 payable forthwith.

[32] The R.M. was unsuccessful in its application for security for costs and was partly successful in its request to have the applications made by the applicants struck. Accordingly, each party shall bear their own costs to date.

J.
L.W. ZUK