

QUEEN'S BENCH FOR SASKATCHEWAN

Citation: 2022 SKQB 180

Date: 2022 08 03
Docket: QBG 43 of 2022
Judicial Centre: Battleford

BETWEEN:

TERRY KASHUBA (O/A BOARD MEMBER OF THE ORGANIZED
HAMLET OF LONE ROCK)

APPLICANT

- and -

RURAL MUNICIPALITY OF WILTON #472

RESPONDENT

Appearing:

Terry Kashuba
Gerald B. Heinrichs
Ron Cherkewich

for the Organized Hamlet of Lone Rock
for the Rural Municipality of Wilton #472
Observing

FIAT
August 3, 2022

MESCHISHNICK J.

[1] The Applicant applies by way of Originating Application for judicial review to quash a resolution passed by the Respondent and for an order that Terry Kashuba have access to the Respondent's office to view documents pursuant to and as described in s. 177 of *The Municipalities Act*, SS 2005, c M-36.1 [Act].

[2] As I will explain these two items of relief are related.

[3] The resolution which the Applicant seeks to have quashed was passed May 20, 2021 [Resolution]. The Resolution removed Terry Kashuba as a member of

the board of the Organized Hamlet of Lone Rock [Lone Rock]. Coupled with this relief the Applicant, as explained in paragraph 16 of the Originating Application, seeks a declaration that Terry Kashuba is a board member in good standing of Lone Rock.

[4] The request for an order giving Terry Kashuba access to the Respondent's office relates to a dispute between Lone Rock and the Respondent that is being adjudicated by an appeal board under s. 77 of the *Act* [Appeal Board Action]. In the Appeal Board Action issues have arisen regarding document disclosure. In seeking the declaration that Terry Kashuba is a member of the board of Lone Rock it wants him to be able to attend at the Respondent's office to review and scan documents related to the Appeal Board Action.

[5] The Respondent applies to strike the application brought by the Applicant. In the event the application survives the application to strike it asks for an order for security for costs. It also asks for a declaration that the Applicant is a vexatious litigant.

[6] I directed that the application to strike the Applicant's Originating Application would be heard first and if it survived that challenge a further hearing would be convened to review the Originating Application to see if it was ready to be scheduled for hearing in accordance with Practice Directive 9 of *The Queen's Bench Rules*.

Preliminary Matters That Required Clarification

[7] At the outset of the hearing two matters were clarified. The first was a clarification as to who was making the application. Terry Kashuba clarified that this was not an application brought in his personal capacity for personal relief but rather an application brought on behalf of himself and the other two board members of Lone Rock.

[8] While the Applicant did not raise it, I have noted that the application to strike the Originating Notice is brought against "Terence Kashuba (also known as Terry Kashuba)". This is perhaps understandable since the Applicant in the Originating Application is shown as "Terry Kashuba (O/A Board Member of the Organized Hamlet of Lone Rock)". I have accepted that the application to strike is made against whomever the applicant turned out to be. I did so because the manner in which the Applicant in the Originating Application was shown was confusing. As well, there was no prejudice to the Applicant as the Respondent, in its affidavit materials and in its brief, argued the application should be struck on all possibilities. Those possibilities were that the Applicant was Terry Kashuba in his personal capacity, that the Applicant was the board of Lone Rock and that the Applicant was simply Lone Rock. In addition, the Applicant responded in its brief and during oral argument to these possibilities and all grounds advanced for striking the claim.

[9] The second matter that was clarified was the involvement of Mr. Cherkewich. He represents Terry Kashuba in other litigation with the Respondent by way of a Limited Legal Services Retainer Agreement under the Pro Bono Saskatchewan Panel Program. He told me that he has no retainer, limited or otherwise, to speak to the matters that have come before the court in this application.

Organized Hamlet v Board of an Organized Hamlet

[10] Before moving on with my analysis of this application I want to address the distinction, or perhaps the lack of one, between the "Organized Hamlet of Lone Rock" and the "Board of the Organized Hamlet of Lone Rock".

[11] Under the current *Act* an organized hamlet is created by ministerial order made pursuant to s. 61. Apparently, the Organized Hamlet of Lone Rock was created by ministerial order in 1957 under the legislation then in force. Once created the

responsibility of the governance of an organized hamlet is, as set out in and limited by the *Act*, passed to a three-member board to be elected in accordance with s. 68 of the *Act*.

[12] As will be seen in my review of some of the caselaw applicable to this application, some actions were started by an organized hamlet and others by the board of an organized hamlet, this being one such application.

[13] Obviously, an organized hamlet operates and takes actions as approved by its board. Except in limited circumstances, I do not see a material distinction between an organized hamlet and its board. One such circumstance is found in s. 77 of the *Act*. It is the provision which governs the resolution of dispute between “the council of a rural municipality and the *hamlet board of an organized hamlet* within the rural municipality [Emphasis added]”. But, even in this circumstance, since the hamlet board is responsible for the governance of and speaks on behalf of the organized hamlet, any dispute involving “the hamlet board of an organized hamlet” must, in essence, be a dispute between the organized hamlet and the municipality.

[14] I appreciate that there may be circumstances where the distinction between an organized hamlet and its board may be important. But I do not see that the commencement of a legal proceeding is one such circumstance. A legal proceeding by an organized hamlet must be approved by its board. A legal proceeding commenced by the board of an organized hamlet must be a proceeding on behalf of the organized hamlet.

[15] I am proceeding on the basis that this application is brought by the Organized Hamlet of Lone Rock. If I had not, I would have had to consider the Respondent’s objection that this application was not brought by a proper party or one recognized as capable of bringing a legal proceeding. If it were struck on that basis I

would have then had to consider the difficult question of whether the board members would be personally responsible for costs.

[16] I want to bring to the parties' attention another question that arises in this case. That is whether Terry Kashuba could represent the Applicant in a representative capacity or whether, in a proceeding before this Court, the Applicant must be represented by a lawyer.

[17] But since the Respondent did not raise this objection and the case has been argued I have decided that it is too late in the day for me to raise it. I will leave it for determination if another application is brought in this fashion and where the court will have the benefit of argument from the parties.

[18] Unless otherwise specified, "Lone Rock", in these reasons refers to both the Organized Hamlet of Lone Rock and the Board of the Organized Hamlet of Lone Rock.

The Relief Sought is Related

[19] An explanation of the relationship between the application to quash the resolution and the application to have access to the Respondent's office to review documents is needed to understand the nature of the application and, in turn, the application to strike it.

[20] As mentioned, the Respondent in May of 2021 passed a resolution removing Terry Kashuba as a member of the board of Lone Rock. This was done at a time when the Appeal Board Action was proceeding by way of case management. On January 20, 2022 the panel hearing the Appeal Board Action made an order regarding the Respondent's disclosure obligations. In responding to that order, the Respondent was making arrangements with the Chair of the Board of Lone Rock for the remaining

board members to attend at the Respondent's office to review documents. In an email dated February 11, 2022 counsel for the Respondent advised the Chair of the Board of Lone Rock:

The RM has asked us to remind you that it does not recognize Mr. Kashuba as having in any legal way a claim to be a member of the Hamlet Board, and accordingly to advise that Mr. Kashuba will not be permitted to attend Monday. You and Ms. Woods are most welcome.

[21] The Applicant describes the notification in this email as the "banishment decision".

[22] It is clear from the material filed that the reason Lone Rock wanted Terry Kashuba to attend at the Respondent's office was to review documents relevant to the Appeal Board Action. For example, Donna Woods, a member of the Lone Rock board, who swore an affidavit in support of this application said in it that the affidavit was filed:

- a. "... in support of this Application to Quash the Resolution of the RM purporting to remove him from the OHB and now banish him from accessing the municipal records to advance the OHB position in connection with the SMB proceedings."; (Affidavit of Donna Woods sworn February 23, 2022 at para. 7) and
- b. In support of "... a declaration the Terry Kashuba is a current and lawful board member of the OH of Lone Rock." (Affidavit of Donna Woods sworn February 23, 2022 at para. 8).

[23] In addition, the request to inspect documents under s. 77 of the *Act* provided to the Respondent by Lone Rock clearly references that the request was made pursuant to the disclosure order made in the Appeal Board Action.

[24] There is no indication in the evidence filed that Terry Kashuba has any reason to attend at the Respondent's office other than to review documents related to the Appeal Board Action.

[25] Furthermore, the application before me is made by Lone Rock. The only disclosed reason for Lone Rock wanting to have Terry Kashuba attend the Respondent's office to review documents would be to prepare for the Appeal Board Action.

[26] If Terry Kashuba had other reasons to want to attend at the Respondent's office, he would have to state those reasons and, more importantly, make application in his personal capacity.

Resolution of Disputes Between an Organized Hamlet and a Municipality

[27] An organized hamlet is an unusual creature. It is created by the *Act* and its functions and powers are set out in s. 68 to s. 78 of that legislation.

[28] Perhaps its most unique operating feature is that it sets a budget for expenditures but does not generate revenue by taxation or otherwise directly from the residents of the organized hamlet. It depends entirely on the municipality in which it is located to collect the tax revenue assessed by the municipality and any special levy requested by the hamlet and to pay the expenditures approved in the budget.

[29] Governance of an organized hamlet is also unique. In some instances, expenditures are controlled by the hamlet board through its budgeting process and in others, expenditures can only be made in consultation with the municipality. Services like sidewalks, streetlights and water and sewer within the hamlet are some examples. Special assessment to be levied against an organized hamlet's residents for some projects must be approved by the municipality.

[30] For other comments on the governance of organized hamlets see *Indian Point Golden Sands (Organized Hamlet) v Parkdale (Rural Municipality No. 498)*, 2002 SKQB 362, 224 Sask R 233 [*Parkdale*]; *Organized Hamlet of Candiack v Montmartre (Rural Municipality)*, 2008 SKQB 496, 328 Sask R 187 [*Candiack*] and *Heney v Rural Municipality of Wilton No. 472*, 2021 SKQB 19 [*Heney*].

[31] I provide this oversimplified summary of the relationship between an organized hamlet and the municipality in which it is located not as any definitive statement of the legal relationship but simply for the purposes of showing that the *Act* and the regulations made pursuant to the *Act* provide a statutory code controlling the relationship. It also provides some context for the manner in which disputes between an organized hamlet and a municipality are to be resolved.

[32] Consistent with this statutory code the *Act* specifies how disputes between an organized hamlet and the municipality will be determined:

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.

(3) If the appointed persons cannot agree on the third person to act as chairperson pursuant to subsection (2) within 30 days, the dispute may be submitted by any party to be resolved pursuant to section 392.

[33] When this section is read in conjunction with s. 358 a better understanding of the powers of an organized hamlet unfolds. That section provides:

358(1) Subject to subsections (2) and (3), 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 on the basis that:

- (a) the bylaw or resolution is illegal in substance or form;
 - (b) the proceedings before the passing of the bylaw or resolution do not comply with this or any other Act; or
 - (c) the manner of passing the bylaw or resolution does not comply with this or any other enactment.
- (2) An application pursuant to this section must be made to the court within six months after the bylaw or resolution is passed.
- (3) No application may be made pursuant to this section to quash a bylaw described in section 167.
- (4) A judge of the court may require an applicant to provide security for costs in an amount and manner established by the judge.
- (5) A judge of the court may quash the bylaw or resolution in whole or in part and may award costs for or against the municipality and determine the scale of costs.
- (6) If no application is made pursuant to subsection (1), the bylaw or resolution is binding, notwithstanding any lack of substance or form in the bylaw or resolution, in the proceedings before its passing or in the time or manner of its passing.

[34] It was the combined application of these two provisions which were found in the legislation that existed prior to the *Act* that was central to the ruling in *Parkdale*:

2 First of all, while a voter may apply under s.182 of *The Rural Municipality Act, 1989*, S.S. 1989-90, c.R-26.1 (the "Act") to quash a resolution or bylaw for illegality, a hamlet has no such standing. It is merely a creature of statute, where voters in a rural municipality may form a hamlet board under certain conditions as provided for by ss. 14-15 of the Act. The hamlet board receives monies from the municipal council to spend for purposes authorized by the Act within its hamlet. Any dispute arising between the hamlet board and the municipality is directed to an appeal board for resolution. This appeal is outlined in *The Organized Hamlet Regulations, 1990*, c.R.-26.1, Reg. 1. Thus, if the Hamlet has a dispute with the Municipality, it is required to seek its remedy under the Act and Regulations. It has no standing to bring an injunction application.

[35] In *Candiac*, Justice Mills was called upon to order a municipality to appoint a person to an appeal board. Because of the manner in which Justice Mills decided the case he did not have to decide if an organized hamlet had standing to bring an injunction application. He ruled that an organized hamlet had no jurisdiction over roads within the organized hamlet. That being so it could not take a dispute over vehicle weight restrictions on roads within the organized hamlet to an appeal board. He did however conclude that the observations made by Madam Justice Rothery in *Parkdale* were applicable under the current *Act*.

[36] *Parkdale* was also applied in *Heney*.

[37] In *Heney* there were three applicants seeking to set aside decisions of this Respondent by way of judicial review. One of the applicants was the Organized Hamlet of Lone Rock and not, as in this case, the board of Lone Rock.

[38] It appears that Madam Justice Hildebrandt saw that bringing the application before her in the name of the hamlet of Lone Rock was a tactical decision taken for the purpose of allowing the applicant to argue that the proceeding was not a duplication of the Appeal Board Action. She said:

23 Section 77 of *The Municipalities Act* outlines an appeal board process where “a dispute arises between the council of a rural municipality and the hamlet board of an organized hamlet”. Reeve Dow, at para. 21 of his affidavit, refers to this as a mediation process, which was underway prior to the originating application being launched. Nonetheless, it is the hamlet board and not the Hamlet which has standing in the process contemplated by s. 77. Thus, it appears as an attempt to side-step the mediation process by having others advance Hamlet interests in the context of this originating application.

[39] Notwithstanding, Madam Justice Hildebrandt accepted, at para. 27, “the view of the respondent” which is set out in para. 21 that the hamlet of Lone Rock did not have standing to bring the application.

[40] There is yet another authority confirming another aspect of *Parkdale*. It is the decision that Lone Rock does not have standing to bring an application to set aside a resolution under s. 358 of the *Act*. And, it is a decision that again involves essentially the same parties and the same subject matter.

[41] In QBG 239 of 2019 Terry Kashuba and Lloyd Ludwig, in their personal capacities, brought an application under s. 358 of the *Act* to quash resolutions of the Respondent setting a budget for Lone Rock and implementing a separate water and sewer billing system for the residents of Lone Rock. At the time Terry Kashuba was not a member of the board of Lone Rock. Lloyd Ludwig was the Chair of that board.

[42] In deciding the application in QBG 239 of 2019 Justice Zuk noted in a fiat dated March 6, 2020:

- a. In paragraph 1 that “The parties are involved in a series of legal battles. This application represents one of those skirmishes”;
- b. In paragraph 29 that the [Appeal Board Case] is first in time and has been initiated to address the precise issues raised by the applicants in the within proceeding. I recognize that the parties to the [Appeal Board Case] and the parties to the current application differ. However, in each case the respective applicants seek to overturn decisions made by [the Respondent] or the identical decisions made by [the Respondent].

[43] To avoid a multiplicity of proceedings Justice Zuk adjourned the application before him *sine die* pending completion of the Appeal Board Action. In doing so he noted at paras. 20 and 29 that the board of Lone Rock lacked standing to bring an application under s. 358 of the *Act*.

[44] The application before me is an application for judicial review brought by Lone Rock. It is an application which, in essence, is brought to overturn a resolution that prevents Terry Kashuba from attending at the Respondent's office to examine documents relating to the Appeal Board Action.

[45] There are cases like *Kane v Lac Pelletier (Rural Municipality)*, 2009 SKQB 348, 342 Sask R 113 and *Thorpe v Kindersley (Town)*, 2021 SKQB 211 [*Thorpe*] that have held that the applicants, in those cases, will not be restricted to s. 358 when challenging decisions of a municipality. The right to challenge such decisions by judicial review may be available. But, the most obvious distinction between those cases and this one is that the applicant in those cases was not an organized hamlet.

[46] As *Parkdale* noted, an organized hamlet was not authorized to bring an application under s. 358. But that was only a part of the analysis employed in holding that judicial review was not an action available to an organized hamlet. The other part was that it had a statutory remedy to resolve disputes under s. 77 of the *Act*. As Justice Robertson pointed out in *Thorpe* at para 29, relying on *Altus Group Limited v Estevan (City)*, 2021 SKCA 101 it was the absence of an adequate alternate remedy that played an important part in determining if judicial review is available in that case.

[47] Following *Parkdale* and the cases that have considered it, I find that Lone Rock has no standing to bring this application.

[48] There was an adequate alternate remedy, and it was perhaps the only appropriate remedy. The application to quash the resolution of the Respondent removing Terry Kashuba from the board of Lone Rock could have been brought by Terry Kashuba in his personal capacity.

[49] I further note that in the Appeal Board Action the matter of document disclosure has been addressed. The panel hearing the Appeal Board Action has already

made a ruling on disclosure. The Respondent has responded to the document disclosure requested by Lone Rock pursuant to the document disclosure order by identifying those documents it agrees to disclose and those that it does not. Copies of the documents that it agrees to disclose have been provided to Lone Rock in electronic format or by posting to the Respondent's website.

[50] From a practical perspective, I am left to wonder why there was any need by Lone Rock to have someone attend the office to examine the documents.

[51] Even if there remained some reason for Lone Rock to examine documents in the Respondent's office in order to prepare to present its case in the Appeal Board Action it had an adequate alternate remedy. It could have sent someone else.

[52] If Lone Rock has further concerns about disclosure, the appropriate remedy is to take it up in the Appeal Board Action.

[53] The Respondent's application to strike the Applicant's Originating Application is granted.

Security for Costs

[54] Since the matters raised in the Applicant's Originating Application will not be proceeding there is no need for an order that Lone Rock provide security for the costs of that application.

Vexatious Litigant

[55] I have accepted that the Originating Application is brought by Lone Rock. But, it appears to me that the Respondent's application for a vexatious litigant declaration is made against Terry Kashuba personally. In arguing that I should make a vexation litigant declaration, the Respondent relies almost entirely on a history of

litigation, comments and rulings made in other proceedings that involved Terry Kashuba personally. It also relies on a failure to pay costs that were ordered against Terry Kashuba personally.

[56] Even if a vexatious litigant law allows for a declaration against Lone Rock, I do not think, considering the evidence and argument presented, that such an order should be made against Lone Rock.

[57] With respect to the request that Terry Kashuba should be declared a vexatious litigant, I keep in mind that Terry Kashuba clarified at the outset of the hearing that this application was brought by Lone Rock and argument proceeded on that basis.

[58] I accept that Rule 11-28 of *The Queen's Bench Rules* does not explicitly require that an application to declare someone a vexatious litigant be brought in a proceeding initiated by that person. But, in my view, the preferable procedure is to bring such an application in an action brought by the person against whom the declaration is sought as it brings into focus the actions of that litigant.

[59] The focus of this proceeding, when it was clarified at the outset that it was brought by Lone Rock, was on the procedural limitations that control Lone Rock's ability to bring the application and on the relationship between the grounds of relief.

[60] As well, the possibility that this proceeding was brought by Terry Kashuba personally was a significant plank in building the case that Terry Kashuba was a vexatious litigant.

[61] In fairness to Terry Kashuba an application to have him declared a vexation litigant should be brought in an action where he is the litigant.

[62] The Respondent prepared its application not knowing precisely who the applicant was in the Originating Application. In fairness to the Respondent, it should have an opportunity to reconsider the vexatious litigant application now knowing that the Originating Application in this case will not be considered as a part of Terry Kashuba's litigation history.

[63] Without in any way commenting on the merits of an application to have Terry Kashuba declared a vexatious litigant and without prejudice to any such application that is brought in the future, I dismiss the application.

Costs

[64] However, I cannot help but observe that Terry Kashuba and Lone Rock have an extensive history of having taken legal proceedings against the Respondent all of which were taken after the Appeal Board Action was started and all of which generally raised issues that are a part of the Appeal Board Action. In each case those actions were struck or stayed on a variety of procedural grounds. In chronological order:

- a. In QBG 239 of 2019, Terry Kashuba and Lloyd Ludwig had their application under s. 358 of the *Act* adjourned *sine die* pending the outcome of the Appeal Board Action in order to avoid a multiplicity of proceedings raising similar or identical issues. The decision of Justice Zuk in that case was handed down March 6, 2020.
- b. In *Heney*, Lone Rock had its application for judicial review struck because it did not have standing to bring the application. The decision in that case was delivered on January 11, 2021.
- c. In a case not yet referred to in these reasons, *Terence and Tracey Kashuba v Rural Municipality of Wilton No. 472*, QBG 33 of 2021, Judicial Centre

of Battleford, Terry Kashuba had the whole of his claim struck on a variety of grounds. Tracey Kashuba, his spouse had the majority of her claim struck and the remainder stayed pending the outcome of the Appeal Board Case. Justice Bardai's decision in that case was delivered October 7, 2021. Leave to appeal this decision was dismissed on March 18, 2022, *Kashuba v Wilton (Rural Municipality)*, 2022 SKCA 37.

[65] After Lone Rock initiated the Appeal Board Action it thought it was appropriate to appoint Terry Kashuba's spouse, Tracey, as its representative on the appeal board. In an application made in QBG 228 of 2019 the Respondent successfully applied to have Tracey Kashuba disqualified from sitting on the appeal board because of reasonable apprehension of bias. Tracey Kashuba sought leave to appeal that decision but withdrew the application at the hearing. In dealing with the question of costs and who should pay the cost of the abandoned application Chief Justice Richards noted that because of the irrelevant issues raised and because the application was "entirely ill founded" that "there was an element of vexatiousness to the application", *Tracey Kashuba v Rural Municipality of Wilton No 472*, CACV 3620, September 30, 2020.

[66] I recount this litigation history to make these observations. Terry Kashuba, Lone Rock and its board members would have been well aware of:

- a. Section 77 and s. 358 of the *Act*, the rulings in *Parkdale* and *Heney* and the limitations they imposed on Lone Rock's ability to bring an application for judicial review;
- b. The restriction on bringing an application for judicial review when there is an adequate alternate remedy;
- c. The restriction on bringing a new proceeding that seeks the same remedy

that is being pursued, and more importantly, properly pursued in another proceeding.

[67] And yet, Lone Rock has once again brought an application asking for a remedy (judicial review) it has no standing to bring and a remedy (document disclosure) that is being dealt with in the Appeal Board Action.

[68] This leads me to wonder if there was not an improper or vexatious purpose in this application.

[69] In addition, I am concerned that Lone Rock and its board may be taking a carefree attitude towards litigation such as this when they are not exposed to personally being responsible for costs. Moreover, because of the manner in which an organized hamlet formulates its spending budgets and the Respondent collects revenue and pays Lone Rock's expenses, I am concerned that Lone Rock and its board does not feel any real exposure to have costs ordered against it.

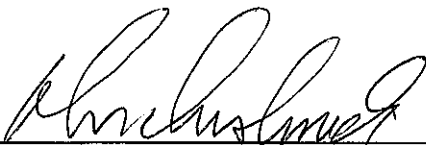
[70] Be that as it may, I am of the view that an order for costs above the usual tariff is in order in these circumstances even if the only result is the Lone Rock board must report a budget shortfall to its electorate.

[71] It was not necessary to consider the alternate relief of security for costs. The dismissal of its application for a vexatious litigant declaration was dismissed in fairness to both parties and is without prejudice to the Respondent renewing the application if it wishes to do so. The Respondent has been successful in obtaining the main relief sought in its application.

[72] Whether or not Lone Rock brought the Originating Application for an improper purpose there must be a meaningful consequence for continuing to bring applications that it knew or should have known would be struck for the same reasons

that previous proceedings have been struck or stayed.

[73] Lone Rock shall pay the Respondent costs in the amount of \$5,000.



J.
G.A. MESCHISHNICK