

Court of Queen's Bench of Alberta

Citation: Ryley (Village) v Lee, 2021 ABQB 130



Date:
Docket: 2003 03439
Registry: Edmonton

Between:

The Village of Ryley

Applicant

- and -

Nikita Lee

Respondent

**Reasons for Decision
of the
Honourable Madam Justice S. Leonard**

I. Introduction

[1] This is an application by the Village of Ryley (the Village) for an order declaring that Nikita Lee, an elected Councillor for the Village, is disqualified from serving as a Councillor and that his position is therefore vacant.

[2] The Village's position is that following his election, Mr. Lee became disqualified from remaining on the Council due to his failure to pay Village taxes and utilities. The Village claims that the failure to pay taxes made him ineligible for nomination as a candidate under section 22 of the *Local Authorities Election Act*, RSA 2000, c L-21 (the *LAEA*).

[3] Mr. Lee argues that this Court does not have jurisdiction to hear this matter because the Village's application was not made within the *nomination period*, as contemplated in the *LAEA*. In the alternative, he argues that the *LAEA* only required him to remain eligible on *nomination day*. Mr. Lee's position is that his Village taxes were current on nomination day and he is therefore not subject to removal from Council.

[4] For the reasons that follow, I find Mr. Lee ceased to be qualified to remain a councillor of the Village of Ryley. It follows that there is now a position on council that is vacant. I decline to exercise the Court's equitable jurisdiction to dismiss the Village's application.

II. Background

[5] In the fall of 2017, Mr. Lee put his name forward as a candidate for election to the Village Council. On September 18, 2017, he completed and submitted a Nomination Paper and Candidate's Acceptance form. The Village election occurred on October 16, 2017, and Mr. Lee was elected as a Councillor. Mr. Lee maintained his position from the date of the election to the present.

[6] Mr. Lee owns two properties in the Village that are subject to taxation and Village utility bills. On the date Mr. Lee submitted his nomination papers, his accounts with the Village were up-to-date. The parties do not dispute that Mr. Lee subsequently became indebted to the Village for unpaid taxes and utilities. He did not pay any taxes or utilities between September 16, 2017 and November 18, 2019. As of January 4, 2018, Mr. Lee owed the Village taxes in the amount of \$300.18. He continued to accrue utility and tax obligations beyond this date. As of September 1, 2018, his debts to the Village exceeded \$500.

[7] On October 9, 2019, the Village became aware of the issue. At a meeting of the Village Council Committee of the Whole, held on November 5, 2019, Mr. Lee was advised of the outstanding accounts and told that this could disqualify him from continuing to serve as a Councillor. Mr. Lee requested more information as to the nature of his indebtedness.

[8] On November 8, 2019, the Village sent Mr. Lee the Tax Roll Transactions for his two properties detailing the extent of Mr. Lee's debt.

[9] On November 19, 2019, Mr. Lee paid the Village \$3,059.32, representing the total amount of his indebtedness. Later that day he attended the meeting of the Village Council and advised that he paid the full amount owing to the Village. The Village gave Mr. Lee an opportunity to address the reasons for his disqualification. Mr. Lee denied that he was disqualified. The Village then gave Mr. Lee an opportunity to resign his position. Mr. Lee refused to resign.

[10] Pursuant to section 175(2) of the *Municipal Government Act*, RSA 2000 c M-26 (the *MGA*), the Village resolved to apply to the Court of Queen's Bench for an Order determining whether Mr. Lee had ceased to be qualified to remain a councillor, or an order declaring Mr. Lee to be disqualified from council.

III. Legislation

A. Local Authorities Election Act

[11] The *LAEA* governs the conduct of elections in Alberta. Section 21(1) of the *LAEA* deals with the qualification of candidates for election. It provides as follows:

21(1) A person may be nominated as a candidate in any election under this Act if on nomination day the person

- a) is eligible to vote in that election,
- b) has been a resident of the local jurisdiction and the ward... for the 6 consecutive months immediately preceding nomination day, and
- c) is not otherwise ineligible or disqualified.

[12] Section 22(1) provides a list of circumstances in which a person is not eligible to be nominated as a candidate. Section 22(1)(c) and (d) are relevant to the issue of unpaid taxes and are relied upon by the Village in this application to assert Mr. Lee's ineligibility to continue as a Councillor. These subsections provide that a person is ineligible to be nominated if they are indebted to the municipality. These subsections are as follows:

22(1) A person is not eligible to be nominated as a candidate in any election under this Act if on nomination day

... ..

(c) The person is indebted to the municipality of which the person is an elector for taxes in default exceeding \$50, excluding from that amount

- (i) Any indebtedness for current taxes, and
- (ii) Any indebtedness for arrears of taxes for which the person has entered into a consolidation agreement with the municipality, unless the person is in default in the payment of any money due under the agreement;

(d) The person is indebted to the local jurisdiction for which the election is to be held for any debt exceeding \$500 and in default of more than 90 days;

B. Municipal Government Act

[13] The *LAEA* pertains only to elections. It does not address the subsequent disqualification of elected officials. Provisions dealing with the disqualification of elected councillors are found in Division 7 of the *MGA*.

[14] Section 174(1) of the *MGA* lists the circumstances in which a councillor might be disqualified from council. The subsections relevant to this application are as follows:

174(1) A councillor is disqualified from council if

(a) when the councillor was nominated, the councillor was not eligible for nomination as a candidate under the *Local Authorities Election Act*;

(b) The councillor ceases to be eligible for nomination as a candidate under the *Local Authorities Election Act*;

[15] Section 174(1) also lists a number of other circumstances in which a councillor might become disqualified from council. Section 175(1) directs a disqualified councillor to resign immediately. If this does not occur, the council can apply to the Court of Queen's Bench, pursuant to section 175(2), for an order determining whether the person has ceased to be qualified to remain a councillor or an order declaring the person to be disqualified from council.

[16] On an application pursuant to section 175, section 176(1) provides that the Court can:

- (a) declare the person to be disqualified and a position on council to be vacant,
- (b) declare the person able to remain a councillor, or
- (c) dismiss the application.

D. Analysis

A. Is the Village's application premature?

[17] Mr. Lee argues that the Village's application is premature. He argues that there is no continuing requirement to remain qualified for nomination and that an application pursuant to section 174 can only be brought by the Village during the *nomination period*.

[18] Mr. Lee argues that recent amendments to the *LAEA* define the *nomination period* and have removed any ambiguity as to the interpretation of this period.

[19] Section 1 of the *LAEA* defines the nomination period as the relevant period referred to in section 25(2). Section 25(2) provides:

25(2) A person may file a nomination to become a candidate

- (a) for a general election, within the period beginning on January 1 in a year in which a general election is to be held and ending at 12 noon on nomination day,

[20] Mr. Lee also points to section 28(1) of the *LAEA* in support of his argument. This subsection provides as follows:

Subject to subsection (1.2), nominations shall be submitted at the local jurisdiction office at any time during the nomination period.

[21] The next Village election is scheduled to occur in 2021. Mr. Lee states that the earliest a candidate could submit nominations for the next Village election is January 1, 2021. He says that the legislative intent of sections 25(2) and 28(1) of the *LAEA* was to clarify that qualification for nomination is not a continuing requirement outside of the relevant nomination period.

[22] I do not agree with this interpretation of the *LAEA*. The provisions of the *LAEA* dealing with the nominations and more specifically the nomination period, do nothing more than provide a time within which a nomination for election can be made. They do not curtail a council's

ability to apply to the Court of Queen's Bench pursuant to section 175 of the *MGA*. My finding is supported by section 175(3) of the *MGA* which imposes a time limit of three years within which an application such as this can be made. The application in this instance falls within the applicable time limit. As such, the Village's application is not premature.

B. Is eligibility for nomination a continuing obligation?

[23] Mr. Lee argues that eligibility for nomination is not a continuing obligation. His position is that councillors only need to be eligible during the nomination period or on nomination day. The Village argues that eligibility is a continuing requirement and that Mr. Lee's failure to pay his property taxes and utilities renders him ineligible to continue as a councillor.

[24] Mr. Lee points to two sections of the *LAEA* in support of the argument that a candidate must only be eligible for nomination on nomination day. Section 21(1), the Qualification of Candidates section, lists the requirements to be eligible for nomination. This section specifies that these requirements must be satisfied on *nomination day*. As "nomination day is 4 weeks before election day," pursuant to section 25(1) of the *LAEA*, Mr. Lee argues that he must only satisfy the requirements for nomination in time for the next nomination period.

[25] Mr. Lee mounts a similar argument with respect to the Ineligibility provision contained in section 22(1) of the *LAEA*. That section states that a person must not be indebted to the municipality for taxes exceeding \$50 or other debts exceeding \$500 on nomination day. On that basis, Mr. Lee argues that he is only required to be eligible in time for the future nomination period.

[26] I disagree with this proposition. As stated at the outset, the *LAEA* governs elections, including eligibility for elections. It does not deal with a situation in which an elected councillor ceases to be eligible for his position. For this, we must turn to the provisions of the *MGA*. Section 174(1)(b) says that a councillor is disqualified from council if he or she "ceases to be eligible for nomination as a candidate under the [*LAEA*]."

[27] To further support his position, Mr. Lee urges the Court to compare the provisions of the *LAEA/MGA* to the provisions of the *Metis Settlements Act*, RSA 2000, c M-14 (the *MSA*). He argues that whereas the *LAEA* does not require a councillor to remain debt-compliant, the *MSA* does. The relevant disqualification provision is contained in section 25(1) of the *MSA*:

A councillor is disqualified from remaining on the settlement if

(m) the councillor becomes indebted to any settlement for more than \$250, unless a written agreement has been entered into with the settlement to repay the debt and the councillor is not behind in payments under the agreement;

[28] Mr. Lee's argument is that this section does not refer to nomination day. In contrast, the disqualification provision contained in the *MGA* incorporates the eligibility provisions of the *LAEA*, which refers to nomination day. As such, he says that whereas the *MSA* requires continuing eligibility, the *LAEA* does not.

[29] I disagree with this proposition and find that eligibility is a continuing obligation under the *LAEA*. This is unaffected by the provisions of the *MSA*. The eligibility and disqualification provisions of the *MSA* are contained within the same act. The *MSA* does not rely on the *MGA* for this purpose. In contrast, the eligibility requirements for municipal council elections are

contained in the *LAEA* whereas the disqualification provisions for councillors are found in the *MGA*. Applying a plain reading to the relevant provisions, it appears that this may have been an attempt on the part of the legislature to simplify the provisions of section 174 (Reasons for Disqualification) by referring back to the eligibility requirements of the *LAEA*. However, it does not follow that this means the legislature intended to restrict disqualification to the candidate's eligibility on nomination day.

[30] Although there have been numerous amendments to the *LAEA* and the *MGA* over the years, the decision of this Court in *Edmonton (City) v Chichak*, 1990 CanLII 5489, 103 AR 205 (ABQB) (*Chichak*) remains relevant to the issue of whether or not eligibility is a continuing obligation. There, the court considered the phrase "ceases to be qualified" in the former section 29(1) of the *MGA*. The Court stated at para 11: "...Read as whole, I am persuaded that the intent of the Act is such that qualification for nomination is a continuing requirement; disqualification is not cured by the passage of time."

[31] In 1994, the wording, "ceases to be qualified" was replaced with the current wording now found in section 174(1) of the *MGA*: "ceases to be eligible for nomination". I am of the view that this change in wording did not change the intent of the section or the legislative scheme as a whole, and that the analysis in *Chichak* on this point is still good law.

[32] Further, this analysis is consistent with the plain reading of the remainder of the section which contains a number of reasons a councillor might be disqualified. Clearly, the reasons underlying the enumerated grounds in section 174 of the *MGA* for disqualification are ongoing requirements. For example, a person cannot be convicted of an offence and yet remain on council because the nomination period has not yet opened.

[33] The reasons for disqualification make it clear that the legislation is seeking to prevent situations of conflict of interest. Not only does section 22 of the *LAEA* deal with indebtedness to the municipality for taxes and other debts, it also contemplates ineligibility where a person is the auditor of the jurisdiction or an employee of the jurisdiction, for example. The risks associated with conflicts of interest were discussed in *Chichak* at para 37:

...The legislation establishing qualifications for nomination to a city council addresses the potential for conflict of interest and the risk of public perception of undue influence and unequal application of the law. The City Solicitor and other municipal officials are placed in a completely untenable position when called upon to collect tax arrears from a sitting alderman...

[34] The legislative scheme makes it clear that municipal councillors must remain eligible for nomination throughout their tenure. This ensures councillors are not in a conflict of interest with the municipality they are elected to serve. I find that Mr. Lee's failure to pay his taxes disqualified him from serving as a councillor pursuant to subsections 22(1)(c) and 22(1)(d) of the *LAEA*.

C. Despite Mr. Lee's ineligibility, should the Court nonetheless dismiss the Village's application?

[35] In oral argument, Mr. Lee contended that even if the court found that non-payment of taxes and utilities rendered him ineligible to serve as a councillor, the Court should nonetheless exercise its equitable jurisdiction to dismiss the Village's application on the basis that Mr. Lee's ineligibility was due to inadvertence or an error in judgment.

[36] The language of inadvertence and error in judgement comes from section 177 of the *MGA* which states:

A judge who hears an application under this Division and finds that the person is disqualified under section 174(1)(f), (h) or (i) may still dismiss the application if the judge is of the opinion that the disqualification arose inadvertently or by reason of a genuine error in judgment.

[37] Previous iterations of this section of the *MGA* did not limit the circumstances in which the court could exercise its discretion to relieve a councillor of his or her ineligibility. The current version of section 177 of the *MGA* came into effect in 1994. It limits the circumstances in which the court can exercise its jurisdiction to the following situations:

174(1)(f) situations in which a councillor becomes ineligible because he or she fails to vote on a matter when required to do so;

174(1)(h) situations in which the councillor has a pecuniary interest in an agreement that is not binding on the municipality; or

174(1)(i) situations in which the councillor uses information obtained through being on council to gain a pecuniary benefit.

[38] The legislation does not permit the court to dismiss an application on disqualification where the councillor was indebted to the municipality.

[39] However, the Village acknowledges that the Court retains equitable jurisdiction to grant the relief sought by Mr. Lee. In *Lac La Biche (County) v Bochkarev*, 2009 ABQB 400, a councillor was found ineligible to retain his position on council due to a pecuniary interest in a matter before council. In considering whether the Court could exercise its jurisdiction to dismiss the County's application despite the ineligibility, the Court stated at para 49:

...In equity, inadvertence and genuine error have always been grounds for relief by a judge from the strict interpretation of the common law. I hold that while I cannot rely on genuine error or inadvertence in and of themselves to dismiss the application where there is a contravention of section 172 of the *Act*, it is nevertheless something that can be taken into account in deciding whether to declare Councillor Bochkarev able to remain on Council instead of declaring his seat vacant...

[40] Mr. Lee says his failure to remain eligible to hold his seat is due to his inadvertence. He says that he did not understand that the law required him to pay his taxes in order to remain eligible for council. He says there is no evidence of bad faith and that disqualification would be unduly harsh.

[41] However, I find that Mr. Lee's failure to pay his taxes was not inadvertent. In *Chichak* at paras 15-25, the Court considered the meaning of "inadvertence" and "bona fide error in judgment." From this detailed review of the law, I distill the following:

- a) Inadvertence is accidental or unintentional. It occurs where a person is not properly attentive, inobservant or heedless;
- b) A bona fide error in judgment is an error that occurs in good faith or honestly. There is no fraud or collusion. It is a genuine error.

[42] Mr. Lee says that he misunderstood the law and that he did not know that he had to maintain his taxes in order to remain eligible for council. Ignorance of the law may come within the meaning of inadvertence in some circumstances: *Chichak* at para 26.

[43] In *Primeau v Jensen*, 1998 ABQB 385, the Court applied the *Chichak* reasoning to determine whether the respondent's conduct was inadvertent. There, the applicant applied for an order declaring that the respondent was disqualified from continuing as a councillor on the Elizabeth Metis Settlement Council because the respondent failed to file a disclosure statement on time. The respondent missed the deadline by three days because he failed to note the correct date in his calendar. The Court agreed inadvertence must be assessed based on the circumstances of the case and found at para 43 that the respondent acted inadvertently but "there was no evidence of corrupt intent or motive."

[44] In this case, Mr. Lee became indebted to the Village for taxes in default exceeding \$50 on January 4, 2018 (subsection 22(1)(c) of the *LAEA*). As of September 1, 2018, Mr. Lee was indebted in an amount greater than \$500 when his unpaid utilities and unpaid taxes were in default over 90 days (subsection 22(1)(d) of the *LAEA*). Mr. Lee did not pay his taxes and utilities for 22 months, until November 19, 2019, when he paid his outstanding balance.

[45] Mr. Lee was questioned under oath by the Village in anticipation of this application. He was asked a number of times to explain the inadvertence that caused him not to pay his taxes on time. On each occasion he declined to answer the question, stating that he did not pay the taxes on time for personal reasons. In the oral hearing of this matter, Mr. Lee provided a different account stating that he did not understand that a failure to pay his taxes would render him ineligible to continue as a councillor. Neither of these explanations could be considered inadvertence such as to engage the equitable jurisdiction of this Court.

[46] Mr. Lee did not provide evidence that he did not understand that as a resident of the Village he was required to pay municipal taxes. He acknowledged that tax assessment notices are sent out by the Village every summer. This is not a situation where the respondent mailed a cheque to the wrong address, overdrew his personal account and failed to meet the tax obligations, or mis-diarized the deadline to pay the taxes. Mr. Lee knew he had a balance owing to the Village and chose not to pay it.

[47] Mr. Lee argues that this application was brought by the Village as retaliation for Mr. Lee's attempt to demonstrate that the Mayor of the Village has an improper pecuniary interest in a matter that is before council. There is no evidence that the Village's application is retaliatory. The Village is acting in accordance with its obligations and has successfully brought an application pursuant to the provisions of the *LAEA* and the *MGA*.

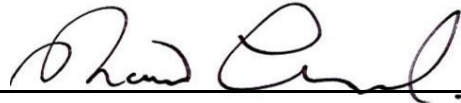
E. Conclusion

[48] Mr. Lee is an elected official in the Village of Ryley. He continued to occupy his position as a councillor for the Village over a period of 22 months while he remained indebted to the Village. This created a conflict of interest and at the very least, a perception that the law did not apply equally to Mr. Lee. I decline to exercise the Court's equitable jurisdiction to dismiss the Village's application. Mr. Lee is disqualified from being a councillor for the Village of Ryley. There is a vacant position on council.

[49] The Village is entitled to party-and-party costs pursuant to schedule C of the *Alberta Rules of Court*.

Heard on the 20th day of November, 2020.

Dated at the City of Edmonton, Alberta this 19th day of February, 2021.

A handwritten signature in black ink, appearing to read 'S. Leonard', written over a horizontal line.

S. Leonard
J.C.Q.B.A.

Appearances:

Edmund Picard
Alberta Counsel
for the Applicant

Nikita Lee
Self-Representative
for the Respondent