COURT OF APPEAL FOR THE YUKON TERRITORY

Citation: ***Whitehorse (City) v. Darragh***

Citation number: 2009 YKCA 10
No.: YU0624

The City of Whitehorse

v.

Marianne Darragh

JUDGES:	Donald J.A. Frankel J.A. D. Smith J.A.
JUDGMENT GIVEN BY:	D. Smith J.A.
JUDGMENT RELEASED:	August 21, 2009
NUMBER OF PAGES:	16
WRITTEN/ORAL:	Written
APPEALED FROM:	Veale J.

SUMMARY:

Appeal by the City of Whitehorse from an order dismissing its application for a declaration that a petition for referendum was invalid as outside the City's jurisdiction under Yukon's *Municipal Act* (the *Act*) allowed. The petition requested a public vote on a proposed amendment to the City's Official Community Plan (OCP) that would designate an area surrounding Mclean Lake as "Park Reserve". The *Act* contains a complete code for the adoption or amendment of planning, land use and development bylaws that does not include the plebiscite provisions of the *Act*.

COURT OF APPEAL FOR THE YUKON TERRITORY

Citation: *Whitehorse (City) v. Darragh*, 2009 YKCA 10

Date: 20090821
Docket: YU0624

Between:

The City of Whitehorse

Appellant
(Petitioner)

And

Marianne Darragh

Respondent
(Respondent)

Before: The Honourable Mr. Justice Donald
The Honourable Mr. Justice Frankel
The Honourable Madam Justice D. Smith

On appeal from the Supreme Court of the Yukon Territory (Chambers), October 30, 2008: *Whitehorse (City) v. Darragh*, 2008 YKSC 80 (Docket No. S.C. No. 08-A0053)

Counsel for the Appellant:	D.R. Bennett
Counsel for the Respondent:	Z. Brown
Place and Date of Hearing:	Whitehorse, Yukon May 26, 2009
Place and Date of Judgment:	Vancouver, British Columbia August 21, 2009

Written Reasons by:
The Honourable Madam Justice D. Smith

Concurred in by:
The Honourable Mr. Justice Donald
The Honourable Mr. Justice Frankel

Reasons for Judgment of the Honourable Madam Justice D. Smith:

I. Overview

[1] The City of Whitehorse appeals an order of the Yukon Supreme Court pronounced in chambers on October 30, 2008 (the "Order"). The Order dismissed the City's application for a declaration that a petition for referendum submitted by the respondent, Marianne Darragh, was invalid as being outside the jurisdiction of the City under the *Municipal Act,* R.S.Y. 2002, c. 154 [*Act*]. The petition for referendum requested a public vote on a proposed amendment to the City's *Official Community Plan Bylaw* 2002-01 (the "OCP") that would designate the area immediately surrounding McLean Lake as a "Park Reserve", and for a direction that the City acquire ownership of that land from the Yukon Government.

[2] McLean Lake is a popular fishing and recreational site situated within the City's boundaries. The development of the area has been the subject of some controversy amongst a number of its residents. The area surrounding the lake is designated in the OCP as a combination of natural open space, greenbelt, environmental protection, natural resource and industrial service. Its zoning status is for recreation and gravel quarrying. The City's plans for the future development and rezoning of the area have triggered a passionate response from the McLean Lake Residents' Association which seeks to protect the area's natural environment. See *McLean Lake Residents' Association v. City of Whitehorse and Yukon Government (Department of Energy, Mines and Resources),* 2007 YKSC 44, 38 M.P.L.R. (4th) 246; and *McLean Lake Residents' Association v. City of Whitehorse,* 2008 YKSC 46, 47 M.P.L.R. (4th) 225.

[3] The City claims that in dismissing its application, the chambers judge erred in two respects:

(i) by interpreting the *Act* as authorizing a referendum procedure to amend the OCP; and

(ii) in failing to find that the petition questions, which seek a bylaw that confiscates territorial lands for a public purpose, were beyond the jurisdiction of the City.

II. Background

A. Facts

[4] The respondent is a resident of Whitehorse and an eligible voter. On February 26, 2008, she issued a Notice of Petition to the City for a referendum to amend *Section 5.3 Park Reserve* of the OCP. The proposed referendum offered the following questions:

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

[5] The City advised the respondent that the OCP could not be amended by referendum but offered to undertake a legal review of that issue. The respondent received legal advice that she was entitled to proceed with the petition and did not have to wait for a legal review by the City. The City continued to oppose the petition for referendum on jurisdictional grounds. To that end, it issued a news release stating that the petition was invalid. In response, the respondent advised the City that she would continue to collect signatures for her petition. On June 11, 2008, she presented the City with a petition containing 2,654 signatures. Thereafter, the City applied to the Yukon Supreme Court for a declaration that the respondent's petition

for referendum was invalid as being outside the jurisdiction of the City pursuant to the Part 7 of the *Act*. It was the City's position that any amendments to the OCP had to follow the mandatory procedure set out in Part 7 of the *Act*.

B. The statutory provisions

(i) Bylaws

[6] The *Act* provides three procedures for enacting bylaws.

[7] Section 218 sets out the ordinary procedure for adopting and amending bylaws. The procedure requires three distinct and separate readings with no more than two readings to take place at any one meeting.

[8] The second procedure for the enactment of a plebiscite or referendum bylaw under Part 3 of the *Act*, requires the City, upon receipt of a petition for referendum, to prepare a bylaw that must be put to a referendum after the first two readings. A majority vote in the referendum brings the proposed bylaw immediately into effect.

[9] The third procedure provides for the adoption of, or amendment to, an OCP or land use bylaw under Part 7 of the *Act*. The procedure is mandatory and comprehensive; it requires three readings, with a public hearing before the second reading and approval by the appropriate Minister of the Yukon government before the third reading.

(ii) The preamble

[10] The preamble to the *Act* sets out a number of broad statements upon which the respondent relies to support her position that the legislature intended to permit a public vote on proposed amendments to the OCP. In particular, she underscores the following provisions:

> WHEREAS this Act was developed in a spirit of partnership, mutual respect, and trust between the Government of the Yukon and the Association of Yukon Communities;

> AND WHEREAS it is desirable to establish a framework for local government which provides for the development of safe, healthy, and orderly communities founded on the following principles:
>
> That the Government of the Yukon recognizes municipalities as a responsible and accountable level of government;
>
> That Yukon municipal governments are created by the Government of the Yukon and are responsible and accountable to the citizens they serve and to the Government of the Yukon;
>
> That the primary responsibilities of Yukon municipal governments are services to property and good government to their residents and taxpayers;
>
> That public participation is fundamental to good local government;

[11] The City, in turn, relies upon the following statement in the preamble as reflective of the need for the orderly planning, use and development of land:

> The local governments have a significant responsibility for furthering compatible human activities and land uses.

(iii) Plebiscite bylaws

[12] Under the heading "Elections", Division 16 of Part 3 the *Act* provides for plebiscite bylaws. Section 152(1) states that "[a] plebiscite or referendum bylaw shall be for a distinct purpose and shall only be valid to the extent that it falls entirely within the jurisdiction of the municipality". Section 152(2) provides that "a plebiscite or referendum bylaw shall not group together two or more purposes, but may include purposes incidental to the main purpose."

[13] A plebiscite or referendum bylaw may initiate, amend or repeal a bylaw on "any matter within the jurisdiction of the council" (s. 150(1)). A petition for referendum that is signed by 25% of the eligible electors within the City is binding on council. Upon receipt of a valid petition for referendum, council may pass a bylaw in accordance with the petition or, within eight weeks, introduce a bylaw in accordance with the petition and submit it to a referendum vote within 90 days thereafter. Under this procedure, the role of the council is purely administrative; it has no discretionary power to vary the petition.

[14] There are express statutory exceptions for the enactment of certain bylaws by a public vote, including the operating budget bylaw, the capital budget bylaw and the general property taxation bylaw. There is no express statutory exception for bylaws to adopt or amend the OCP.

(iv) The OCP

[15] The OCP is a document that outlines the community's broad objectives relating to land use. Its purpose is to provide guidance to the City in its decisions on residential and commercial development, industrial activity, transportation infrastructure, and environmental considerations. It also outlines where future development should occur. The requirements of an OCP have been codified in s. 279 of the *Act*:

> (1) An official community plan must address (a) the future development and use of land in the municipality; (b) the provision of municipal services and facilities;(c) environmental matters in the municipality,(d) the development of utility and transportation systems; (e) and provisions for the regular review of the official community plan and zoning bylaw with each review to be held within a reasonable period.
>
> (2) An official community plan may address any other matter the council considers necessary.

[16] Under the heading "Planning, Land Use, and Development", Division 1 of Part 7 of the *Act* includes provisions for the adoption, amendment and content of the OCP. The purpose of the OCP is set out in s. 277 of the *Act*:

> The purpose of this Part and the bylaws under this Part are to provide a means whereby official community plans and related matters may be prepared and adopted to
>
> (a) achieve the safe, healthy, and orderly development and use of land and patterns of human activities in municipalities;
>
> (b) maintain and improve the quality, compatibility, and use of the physical and natural environment in which the patterns of human activities are situated in municipalities; and
>
> (c) consider the use and development of land and other resources in adjacent areas

> without infringing on the rights of individuals, except to the extent that is necessary for the overall greater public interest.

[17] The effect of the OCP is described in s. 283:

> (1) Council shall not enact any provision or carry out any development contrary to or at variance with the official community plan.
>
> (2) No person shall carry out any development that is contrary to or at variance with an official community plan.
>
> (3) Despite subsection (2), council is not empowered to impair the rights and privileges to which an owner of land is otherwise lawfully entitled.
>
> (4) The adoption of an official community plan shall not commit the council or any other person, association, organisation, or any department or agency of other governments to undertake any of the projects outlined in the official community plan.
>
> (5) The adoption of an official community plan does not authorize council to proceed with the undertaking of any project except in accordance with the procedures and restrictions under this or any other relevant Act.

[18] A bylaw to adopt or amend an OCP is subject to a mandatory procedure set out in Part 7 of the *Act.* That procedure includes public notice of the proposed OCP or amendment (s. 280); a public hearing before the second reading of the proposed OCP or amendment in order "to hear and consider all submissions" (s. 281); and approval by the Minister, or Ministerial referral back to council with recommendations for modification, before third reading (s. 282).

[19] Section 285 of the *Act* provides that "[a]n official community plan may be amended, but any such amendment shall be made in accordance with the procedure and subject to the same approvals as established in this Division for the preparation and adoption of an official community plan." [Emphasis added]

(v) Zoning bylaws

[20] A zoning bylaw gives effect to the broad objectives set out in the OCP. It is enacted after the adoption or amendment to the OCP and must be consistent with the OCP's provisions.

[21] Division 2 of Part 7 of the *Act* includes provisions for the adoption, and content of a zoning bylaw. Section 288 requires that council adopt or amend a zoning bylaw applicable to the land affected by the OCP within two years of the adoption of, or amendment to, the OCP.

[22] Section 289(1) authorizes a zoning bylaw to "prohibit, regulate, and control the use and development of land and buildings in a municipality"; s. 289(2) requires any zoning bylaw or amendment to conform to the OCP.

[23] In 2002, the City passed a bylaw adopting the OCP (Bylaw 2002-01). In 2006, the City adopted a comprehensive zoning bylaw (Bylaw 2006-01). The zoning bylaw prohibits any development without a permit issued by the City.

III. The Reasons for Judgment

[24] The chambers judge accepted the respondent's position that the OCP could be amended by a petition for referendum. In particular, he rejected the City's position that the OCP could only be amended by the mandatory procedure set out in Part 7 of the *Act,* stating:

> [29] Whitehorse passed a comprehensive Zoning Bylaw in 2006 (2006-01). The above statutory requirements indicate the imperative that a citizen be able to amend the OCP in order to amend the City's Zoning Bylaw. If an amendment to the OCP cannot be petitioned for, an elector will not be permitted to amend any consequential bylaws by referendum either. The result would be that a citizen would have to follow the OCP amending procedure and succeed before having the right to proceed to a bylaw referendum. That interpretation would permit the City to control the OCP amending process.

[25] He began his analysis by referencing the statutory provisions that set out the purposes of the OCP (s. 277), the effect of the OCP (s. 283), and the zoning bylaw by which the objectives and policies of the OCP are carried out (ss. 282(1), 288 and 289(2)). In attempting to give effect to the principle that "public participation is fundamental to good local government" and in applying principles of statutory interpretation, including the presumption of coherence, the presumption of overlap,

and the doctrine of implied exclusion, he determined that the distinct procedures in Part 3 and Part 7 of the *Act* could be homogenized or read together so as to ensure compliance with both sets of requirements. Construed in that manner, he found there to be no conflict between the procedure for enacting a referendum bylaw and the procedure for adopting or amending the OCP bylaw, and concluded that the City had jurisdiction to comply with both procedures.

[26] To that end, at para. 41 of his reasons he proposed the following nine-step procedure for the City to address the respondent's petition for referendum:

1. An elector need only give notice that a petition will be filed for a referendum by submitting it to the Director of Administrative Services (s. 153(2)).
2. Once notice is submitted, the 90-day period for obtaining signatures begins (s.153(3)).
3. Section 7 of the Bylaw 2004-20 permits the City to advise a proponent that it objects to the bylaw on grounds such as discrimination or being outside the jurisdiction of the City, but it cannot stop a proponent proceeding without a court declaration of invalidity.
4. While bylaw 2004-20 does not specify the timing of an application for a declaration of invalidity, the city must bring its application in a timely manner so that it can comply with its statutory obligations once the petition has the required number of signatures in the 90-day period.
5. Once the petition has the required number of signatures, Council must give first reading to the amending bylaw within eight weeks of presentation of the signed petition (s. 155(1) of the *Act*).
6. Council must publish notice of amendments and the public hearing for two weeks, and then wait at least 21 days before holding a public hearing (ss. 280, 281 of the *Act*).
7. Council gives a second reading of the bylaw after the public hearing. Bylaw 2004-20 indicates that the second reading must be within eight weeks of the presentation of the petition (s. 15). Section 15 is inconsistent with s. 155 of the *Act* and of no effect via s. 264 of the *Act*, when applied to an OCP amendment referendum. Thus, the notification and public hearing, a five-week process to set up, can take place outside the first eight-week period but in the second 90-day period.
8. The referendum must be held within 90 days of the first reading of the bylaw (s. 155 of the *Act*).

9. As a third reading is not required, the bylaw should indicate that it comes into force on approval of the Minister (s. 155(4) of the *Act*). If approved in the referendum, the bylaw may then be submitted to the Minister for approval outside the 90-day period.

IV. The Parties' Positions

[27] It is common ground that the standard of review for questions of statutory interpretation is correctness: *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33 at para. 8.

[28] The City contends that, properly construed, the *Act* intended that all development, land use and planning bylaws, including OCP bylaws and their amendments, to be implemented through the procedure set out in Part 7 of the *Act* rather than by the ad hoc procedure allowed for in the referendum provisions of Part 3 of the *Act*. In support of its position, the City relies on the purposes of the OCP as stated in s. 277 of the *Act*.

[29] The respondent asserts that the *Act* introduced a new philosophy to municipal governance, which replaced the historical dependence on Ministerial oversight of the City's decisions. This new approach to municipal governance, the respondent submits, is enshrined by the preamble's statement about the "fundamental" importance of public participation in local government. The respondent further relies on the absence of any limitation in the *Act* restricting public involvement in land use issues and the omission of any express exception for OCP bylaws in the plebiscite provisions of the *Act*. Further, she submits, the procedure for public voting indicates the legislature's confidence that voters will make the right decision.

V. Analysis

A. The principles of statutory interpretation

[30] It is settled law that the correct approach to statutory interpretation requires that "the words of an Act are to be read in their entire context and in their

grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.": *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42. This approach is buttressed by s. 12 of the *Interpretation* Act, R.S.C. 1985, c. I-21, which provides that every enactment "is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects."

[31] Applying a contextual and purposive approach to statutory interpretation further gives rise to "the principle of interpretation that presumes a harmony, coherence, and consistency between statutes dealing with the same subject matter": *Bell ExpressVu* at 27, citing *R. v. Ulybel Enterprises Ltd.*, [2001] 2 S.C.R. 867, 2001 SCC 56 at para. 52. The purpose of the presumption of legislative coherence is to ensure an internally rational and consistent framework: Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Ontario: LexisNexus Canada, 2008) at p. 325. The presumption of coherence applies equally to provisions within a statute as to those within the same statute book. See *Lévis (City) v. Fraternité des policiersde Lévis Inc.*, [2007] 1 S.C.R. 591, 2007 SCC 14 at paras. 89-90.

[32] To ensure coherence between statutory provisions, there is the presumption of overlap. Overlap occurs where two or more provisions apply without conflict to the same facts. When overlap occurs, a court must determine if it is reasonable to infer that one provision was meant to apply to the other. The presumption of overlap, however, is rebuttable by evidence that one provision is intended to be an exhaustive account of the applicable law: *Sullivan* at p. 327.

[33] Where there is a finding of conflict between statutory provisions, "a court must apply the principles of interpretation that give precedence to one law over the other": *Lévis* at para. 90. An express statutory provision may infer an intention to exclude the conflicting provision. An implied exclusion, or "to express one thing is to exclude another", may also be inferred where a provision is silent on a matter that might be expected to be included: *Sullivan* at pp. 183-186.

[34] Principles of statutory interpretation are not rules of law; they are merely aids to provide guidance in determining legislative intent. In the circumstances of this case, the chambers judge had to resort to the principles of statutory interpretation in order to determine whether the mandatory provisions in Part 7 of the *Act* reflect an intention to establish a complete code for amending the OCP, or whether the scope of the plebiscite provisions in Part 3 of the *Act* was intended to apply to all forms of bylaws.

B. Application of the principles of statutory interpretation to the *Act*

[35] It is my view that, properly construed, the procedures in each of Part 3 and Part 7 of the *Act* can be read harmoniously and without conflict if the procedure for amending the OCP as outlined in Part 7 of the *Act* is interpreted as constituting a complete code for the amendment or adoption of bylaws involving planning, land use and development. While there is a presumption of overlap between the two procedures, in my view, the mandatory provisions of Part 7 effectively rebut that presumption and reflect the legislature's intention to create an exhaustive procedure for the adoption or amendment of OCP and land use bylaws.

[36] With respect, the attempt to harmonize the two procedures through the creation of a proposed nine-step process creates, in my view, an unnatural fit that was never contemplated by the legislature. It also appears to create conflict by imposing positive obligations on the City when the City's role is properly understood as being purely administrative, and by establishing time constraints for those obligations that appear to be impracticable, if not impossible, to meet. If Part 7 of the *Act* is construed as exhaustive, conflict is avoided and the internal coherence of the *Act* is maintained.

[37] The purpose of Part 7, the "orderly development and use of land ... in municipalities ... without infringing on the rights of individuals, except to the extent that is necessary for the overall greater public interest," differs from the more ad hoc nature of referendums. Planning is a dynamic process. Planning legislation necessarily has multiple objectives, including the regulation of the development of

land, the prevention of conflicts with individual property owners, the avoidance of the consequences associated with ad hoc decision making, the facilitation of the orderly resolution of competing policy issues, and the allocation of scarce resources for the benefit of sustainable and predictable long-range community development. In this case, competing territorial interests over heritage resources and environmental concerns also require co-ordinated policy responses.

[38] I am also not persuaded that the principle of implied exclusion, as expressed by the maxim "*expressio unius est exclusio alterius*", is applicable to exemptions listed in s. 153 of the *Act*: *Jones v. A.G. of New Brunswick,* [1975] 2 S.C.R. 182 at 195.

[39] As previously noted, s. 153 authorizes an eligible voter to initiate, amend, or repeal a bylaw by referendum with the exception of operating budget, capital budget or general property taxation bylaws. However, the exempted bylaws are enacted by the ordinary procedure set out in s. 218 of the *Act*. OCP bylaws are not subject to that procedure.

[40] Historically, there has been a cautionary approach taken to the application of the maxim. Chief Justice Laskin in *Jones* described the maxim as providing "at the most merely a guide to interpretation; it does not pre-ordain conclusions" (at 195-196). Pierre-André Côté, in *The Interpretation of Legislation in Canada,* 3rd ed. (Scarborough: Carswell, 2000) at pp. 337 and 339 also observed:

> *A contrario* [reasoning], especially in the form *expressio unius est exclusio alterius,* is widely used. But of all the interpretive arguments, it is among those which must be used with the utmost caution. The courts have often declared it an unreliable tool, and, as we shall see, it is frequently rejected.
>
> ***
>
> Since it is only a guide to the legislature's intent, *a contrario* reasoning should certainly be set aside if other indications reveal that its consequences go against the statute's purpose, are manifestly absurd, or lead to incoherence and injustice that could not represent the will of Parliament.

[41] In this case, I do not consider the omission of the OCP from the exemption provisions of s. 153(d), as providing a basis from it can be inferred that the

legislature intended for OCP to be amended by referendum. The distinct procedure in Part 7 of the *Act* for the adoption and amendment of the OCP would suggest otherwise. The consequence of merging the mandatory provisions of Part 7 with the referendum provisions of Part 3, in my view creates a "manifestly absurd" result that is incoherent and arguably unjust to those with interests in conflict with the proposed amendment.

[42] Furthermore, while the preamble of the *Act* codifies the objective of public participation in local governance, it does not enshrine direct public voting as the "fundamental" principle of public participation. The *Act* contemplates public participation in alternate forms, including public hearings where everyone's views and submissions may be heard. The important role of the public hearing, and its attendant requirement of procedural fairness which includes disclosure of public reports and other documents relevant to the proposed bylaw, was noted by Madam Justice Rowles, for the Court, in *Pitt Polder Preservation Society v. Pitt Meadows (District)*, 2000 BCCA 415:

> [45] A public hearing on land use and zoning bylaws serves at least two important functions: it provides an opportunity for those whose interests might be affected by such a decision to make their views known to the decision-maker and it gives the decision-maker the benefit of public examination and discussion of the issues surrounding the adoption or rejection of the proposed bylaw.

[43] Lastly, courts in Alberta and Saskatchewan, when faced with similar provisions in their respective local government acts have declined to interpret provisions for referendum bylaws as applying to the enactment of planning and land use bylaws. While the legislation in those jurisdictions was not identical to the relevant provisions in the *Act*, similar reasoning was applied to conclude that, given the purpose and objectives of planning, land use and development bylaws, the specific procedures for the adoption or amending of those bylaws could not be overridden by the referendum provisions in another statute. See *Pevach v. La Ronge (Town of)* (1996), 148 Sask. R. 319 (C.A.); *Sillito v. Sturgeon No. 90*

(Municipal District), [1990] A.J. No. 208 (C.A.); *Burnoco Rock Products Ltd. v. Rocky No. 44 (Municipal District)* (1995), 30 M.P.L.R. (2d) 71 (A.B.C.A.).

[44] Since then, the legislatures of those provinces have amended their legislation to expressly exclude planning and land use bylaws from the referendum procedure.

VI. Conclusion

[45] In my view, the *Act* contemplates that amendments to the OCP must be initiated by the council. This interpretation is consistent with the overall planning function of the OCP. The adoption of an OCP is a collective process that focuses on the broadly-based interests of the community as a whole. It does not involve planning by individually-based interests that are more narrowly focused.

[46] In the result, I agree with the appellant that the *Act* does not permit the City to amend the OCP by a petition for referendum. In view of this conclusion, I find it unnecessary to address the second ground of appeal.

[47] I would allow the appeal, set aside the order below, and grant the declaration sought by the City.

VII. Costs

[48] The respondent seeks indemnification for her costs through an order for special costs based on a characterization of the action as public interest litigation. She submits that the action, in seeking a determination on the scope of Part 3 of the *Act*, amounted to a test case that went beyond the private interests of the litigants. The City submits that costs should follow the event.

[49] Public interest litigation is an established exception to the general rule that costs follow the event. In *British Columbia (Minister of Forests) v. Okanagan Indian Band,* [2003] 3 S.C.R. 371, 2003 SCC 71, Mr. Justice LeBel, speaking for the majority, allowed "that in highly exceptional cases involving matters of public importance the individual litigant who loses on the merits may not only be relieved of

the harsh consequence of paying the other side's costs, but may actually have its own costs ordered to be paid by a successful intervenor or party" (para. 30).

[50] In this case, the petition was initiated by the City. In the first instance before the chambers judge, and on appeal, Ms. Darragh has been the respondent. Although she has some private interest in the litigation as a property owner and resident of the McLean Lake area, her position in this appeal was representative of a larger group of Whitehorse residents who also signed the petition for referendum. Given the extent of the litigation to date, the issue raised appears to be a matter of some public import, even though it might not reach the threshold of a "highly exceptional case". In such circumstances, I would order that each party bear their own costs of the appeal.

"D. Smith J.A."
per S. Dickson J.A.
The Honourable Madam Justice D. Smith

I AGREE:

The Honourable Mr. Justice Donald

I AGREE:

The Honourable Mr. Justice Frankel