Raymond v Binjari Community Government Council and Hagger [1999] NTSC 103

PARTIES:	RAYMOND, Barbara v BINJARI COMMUNITY GOVERNMENT COUNCIL AND HAGGER, Mark Edward
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	ELECTION TRIBUNAL OF THE NORTHERN TERRITORY
FILE NO:	ET 1 of 1999 (9919342)
DELIVERED:	1 October 1999
HEARING DATES:	9 September 1999
JUDGMENT OF:	MARTIN CJ

CATCHWORDS:

DISPUTED ELECTION COMMUNITY GOVERNMENT COUNCIL
Whether nomination of office holder invalid – whether proper notice of election provided by clerk of council

STATUTES – INTERPRETATION – NORTHERN TERRITORY ELECTORAL ACT
Validity of council election – jurisdiction – whether *Northern Territory Electoral Act* applies to community government council election – whether irregularities invalidated election result.

Northern Territory Electoral Act 1995 (NT) s 6(1), s 108(1), s 109(1)(a), s 109(1)(b), s 110, s 111(b), s 112(1)(e)
Local Government Act 1993 (NT) s 107, s 226
Binjari Community Council Government Scheme 1995 (NT)
Becker v Corporation of the City of Marion (1976) 8 ALR 421, applied

REPRESENTATION:

Counsel:

Appellant:	Mr G Cole
Respondent:	Mr M Carter, Cassandra Tys

Solicitors:

Appellant:	Graham Cole
Respondent:	Michael Whelan & Associates

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IN THE ELECTION TRIBUNAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN
9919342

Raymond v Binjari Community Government Council and Hagger [1999] NTSC 103
Election Tribunal No. ET 1 of 1999

BETWEEN:

BARBARA RAYMOND
Petitioner

AND:

BINJARI COMMUNITY GOVERNMENT COUNCIL
First Respondent

AND:

MARK EDWARD HAGGER
Second Respondent

CORAM: MARTIN CJ

REASONS FOR JUDGMENT

(Delivered 1 October 1999)

[1] These proceedings were initiated by the petitioner and others pursuant to s 108(1) of the *Northern Territory Electoral Act* ("the Electoral Act"). They concern the validity of the election of members of the council of the first respondent on 11 August 1999. The first respondent is a creature of Part V of the *Local Government Act*. That part enables his Honour the Administrator to approve a draft scheme which then becomes a community government scheme in respect of a defined community government area.

When approved the scheme has effect as a law of the Territory (s 108). The scheme known as the Binjari Community Government Scheme was approved on 31 May 1995. Inter alia, it established the Binjari Community Government Council consisting of seven members, regulates council meetings, provides for council's functions and powers and make provision for elections. Various functions are conferred upon the clerk of the council (see Division 7 of the *Local Government Act*). The scheme does not provide a means of resolving election disputes.

[2] A question arose as to the jurisdiction of the Tribunal to entertain the petition so it was put on behalf of the respondents that the council being established under the *Local Government Act*, any dispute regarding the election should be dealt with by the Local Government Tribunal established under that Act. The powers of that Tribunal are prescribed under s 226. They do not confer jurisdiction to deal with election disputes. This Tribunal has jurisdiction under the *Electoral Act* to resolve questions going to the validity of an "election", which, by definition in s 3 means an election of a member of a Legislative Assembly or, as the case requires, any election in respect of which assistance is given under s 6(1) of that Act. The Chief Electoral Officer is thereby empowered to provide goods or services to organisations to assist them with the preparation for, holding and determination of the results of, elections of any kind. The undisputed evidence of Mr Hagger, the acting clerk of the council, is that the council resolved to seek the support of the Northern Territory Electoral Office in

running the election. That was done and the Office provided an election timetable, nomination forms for candidates, election notices for display in the community, an electoral roll and forms for new enrollments. During the period prior to the election the office provided advice on particular matters relating to enrollment and later as to the declaration of the result of the election. It is not disputed that in the legal sense that assistance was provided by the Chief Electoral Officer. I am satisfied that the Electoral Tribunal has jurisdiction.

[3] The judges of the Supreme Court are empowered to make rules, inter alia, regulating the practice and procedure of the Tribunal. No rules have been made. The Tribunal proceeded with the consent of the parties to regulate the form and mode of the proceedings in the circumstances of this particular case (s 112 (1)(e)).

[4] The petition was served on the Chief Electoral Officer (s 109 (1)(a)) who appeared through counsel to inform the Tribunal that it was not intended to contest the petition. As the petition did not claim a seat on the council for a candidate who had not been returned as a member, service upon the candidate returned was irrelevant (s 109(1)(b)). However, it was directed that the respondents be joined in the proceedings both having an interest in upholding the validity of the election. As the petition sought an order that the election be declared invalid it was ordered that all persons said to have been elected be served with a copy of the petition, the affidavits in support and a letter from the solicitor for the petitioner advising them that if they

wished to contest the petition they should seek legal advice. That was done but none of those persons sought to be joined in the proceedings. The respondents were directed to file a reply to the petition using the requirements of s 109 as a model.

[5] Three persons named as petitioners withdrew from the proceedings. The petition alleged that two of them were recorded as members of the council but did not agree to be nominated and never wanted to be members. Production to the solicitors for the then petitioners of the files kept by the second respondent relating to the election included documents demonstrating that those two petitioners had been nominated and had accepted nomination. Other evidence showed that they had attended council meetings after the election. Another person named as a petitioner also indicated that he wished to discontinue at the commencement of the hearing but without giving any reason. The only remaining petitioner proceeded.

[6] The changes in circumstances which arose shortly prior to the hearing and the evidence during the hearing led to some of the issues joined between the petitioner and the respondents by way of the petition and reply being abandoned. As the parties were clear as to the issues that were joined between them and still to be determined, the Tribunal did not insist upon "pleadings" being formally amended. The issues ultimately falling to be decided are described later. The parties were represented by legal practitioners. That was by consent (s 121(1)). The parties consented to the filing of affidavits upon which they each would seek to rely at the hearing

(s 112(1)(d)). Directions were given that notice be given to any deponent who was required to attend for cross-examination. Service of all documents was directed to be effected by delivery to the office of the solicitors for the opposing party.

[7] The community government area is located near Katherine. Arrangements were made for the Tribunal to sit in the conference room at the court house in Katherine and for the Master to appoint an agent there to receive documents. It seems that the Parliament intended the Master to fulfil the functions of a registrar (s 108(3)(f) and s 109(2)). The parties and their legal representatives are to be congratulated for the manner in which they all co-operated with the Tribunal with a view to having the dispute quickly resolved. The interests of good government of the community required expedition, given the valuable services which are provided to it by the council.

[8] At face value the injunction in s 110 could be seen as putting an end to the proceedings in this case and effectively prohibiting proper enquiries being made by the Tribunal. It provides that proceedings on the petition shall not be proceeded with unless the requirements of s 108 (as to the petition) and s 109 (as to the reply) are complied with "in respect of the petition". It is a curious provision which those who could be adversely effected by orders sought by a petitioner could exploit so as to deny jurisdiction to the Tribunal. In this case it was ruled that s 109 did not apply. The Chief Electoral Officer did not intend to contest the petition and there was no-one

falling within s 109(1)(b). Since there was no-one served in accordance with s 109 who proposed to contest the petition the requirement for a reply under that provision did not apply. That being so s 110 had no application in this case as it spoke to a non-existent set of circumstances. As already mentioned the Tribunal relied on s 112(1)(e) to regulate the form and mode of its proceedings in this case. None of the parties objected.

[9] It is strongly recommended that those responsible closely examine the potential of s 110 to deny petitioners a hearing and determination of their complaints.

[10] By the close of evidence the issues joined and still on foot as between the petitioner and the respondents, going to the validity of the election, were narrowed to three. They were:

(1) whether an election notice had been prominently displayed at such places in the Community Government area as the clerk considered likely to reasonably ensure that all residents who were eligible to vote had notice of the election. (clause 16)

(2) whether the nomination of Mr Billy Moroney as a candidate was valid since he was not on the electoral roll at the time his nomination was handed to the clerk but was on the roll at the time nominations closed.

(3) whether it was necessary to go to the poll because there were seven positions to be filled and only seven nominations, or were there more than that number of nominations as at the close of nominations.

Notice of Election

[11] As to the notice, I accept the evidence of Mr Hagger that he was acting as the clerk to the council, ("acting" in the sense that his appointment required the Minister's confirmation). Under Part 4 of the scheme the clerk is to give notice of the election day (clause 16(1)). The content of the notice is prescribed by clause 17 and is designed to inform the community of the time and manner of the electoral process. Mr Hagger deposed that the notices were displayed on a glass window on the main access door to the council office, a glass window of the meeting room, clerk's office and waiting room at the office and above the ice cream refrigerators at the community store. The office and community store are in close proximity each to the other. It was not disputed that those areas were within the community government area (as defined). There is no evidence that there was any other public building in the community government area. Mr Hagger considered it likely that by displaying the notices there he would comply with clause 16. He said that most members of the community visit the council office and store at some time during the day. Mail and messages are collected from the office as well as social security payments and members of the community visit the store to purchase food and other supplies.

[12] The clerk's evidence as to the display of the notice was supported by Mrs Debra Aloisi, the finance manager of the council, Mr Bill Daw (senior), the store manager, and Mr Moroney. The petitioner was only able to say that she did not see the notices, which hardly refutes the evidence that they

were displayed. Even so, she suffered no injustice since her own evidence is that she sought to be nominated as a candidate but failed for reasons having nothing to do with the display of notice. Her major complaint is that things were not done as they had been. For example, there had been no newsletter or public meeting. There is no requirement in the scheme for either of these means of communication of the election. If she has any complaint at all it is with the members of the council who called the election, not with the clerk who followed the requirements of the scheme. Mrs Raymond also complains that many of the electors are illiterate and could not be expected to understand the notice. That may be so although it is to be expected that an election would be a matter of discussion in the community. In any event the scheme does not require other than written notice in the prescribed form. A complaint in that regard is with the scheme not the clerk.

[13] It was sought to support her evidence as to the display of the notice by relying upon that of Mr Michael Pearce, the Executive Officer of the Wardaman Aboriginal Corporation. He deposed that he spoke to people whom he says he identified to be persons with qualifications to be electors for the council. He deposed to having spoken to about 30 people, (10 of whom bore the surname of Raymond) whom he says confirmed that they had not seen a notice in respect of the election. Again that does not deny that notices were displayed as deposed to by others. The evidence is hearsay and although the Tribunal is not bound by the rules of evidence (s 111(b)) the

weight to be given to that material is less than that to be given to evidence admissible in accordance with the rules.

[14] The petitioner submits that even if the evidence of Mr Hagger and others as to the posting of the notices at the office and store is accepted, the clerk failed to take into account all relevant circumstances including the nature of the residents of the area and the area itself. It was estimated that there were about 117 voters enrolled and that about 20% of them were illiterate. The area is geographically divided into two parts approximately two kilometers apart with the population distributed between those two areas. The submission was that those circumstances required that more of the prescribed notices be displayed around the community and in the areas where people lived. Had the clerk made enquiry of Mrs Aloisi who had been in the job for some years, including during elections, he would have been informed as to community meetings and newsletters employed as a means of informing residents of the election. I have already indicated that the role of the Tribunal is to find whether or not there was compliance with clause 16 of the scheme. Anything beyond that is a matter for the council and the clerk at their discretion and not amenable to review by the Tribunal. As to illiteracy it seems to me that the scheme does not take that into account. It is assumed by the scheme that notice to people who can read and understand the notice in the English language is sufficient. It is noted that three members of the council whose election is sought to be invalidated are illiterate. Other attacks were made upon the effectiveness of the notice to

convey the information required by clause 17 but none of them are such as to satisfy the Tribunal. None of them are such as to satisfy the Tribunal that the notice as displayed did not meet the requirements of the scheme as to form. It is open to no fewer than 10 of the electors of the community government area to apply to the Minister to prepare a replacement or amendment to the scheme (*Local Government Act* s107).

[15] The clerk's powers under the scheme are limited by the scheme. He has a discretion as to the method of exercising the power in accordance with his opinion, that is, the power is subjective. That is not to say that the discretion is completely unfettered. His considerations are limited to the object defined by the scheme, that is, to prominently display the notice or notices at such place in the community government area as is likely to reasonably ensure that all residents who are eligible to vote have notice of election. Absolute certainty is not required of him. There is no evidence that displaying the notices as the clerk did was irrational or that he did not direct himself to the right question or that he was wrong to consider that the object of the display would not be achieved. I can find no error on Mr Hagger's part which would subject his actions to the type of remedy available by judicial review of administrative acts.

[16] There is no ground for granting any relief to the petitioner arising from the display of the electoral notice.

William Moroney's nomination

[17] The timetable for the election was :

1. Notice of the election was displayed on 7 July.

2. Enrollment for the election closed at noon on 4 August.

3. Nomination for election closed at noon on 11 August.

4. The polling day was fixed for 25 August.

[18] Relevantly clause 18 of the scheme provides:

> (1) A person who is eligible for nomination as a member of the council if he or she is enrolled (under clause 14).
>
> (2) A person who is enrolled (under clause 14) may, by lodging a written nomination with the clerk, nominate for election to the council another person or persons eligible for nomination under sub-clause (1).
>
> (3) The clerk is not to accept a nomination unless satisfied that
>
> (a) it sufficiently identifies the proposed candidate; and
>
> (b) the proposed candidate is eligible under sub-clause (1) to be nominated and has consented to the nomination.
>
> .....
>
> (6) Nominations of candidates for election shall close at 12 noon on the day occurring 14 days before election day as soon as practicable after nominations have closed, the clerk shall display a list showing the names of each candidate and a photograph of the candidate, in the same place as the election notice.

.....

19(1) Where at the close of nominations under clause 18(6) not more than seven persons have been nominated as candidates (disregarding any nomination that has lapsed) the clerk shall, by a notice displayed in the same places as the election notice, declare those persons to be members of the council.

(2) Where at the close of nominations there are more than seven persons as candidates, an election to decide among them shall be held on election day.

There follows detailed procedures in relation to the conduct of the ballot.

[19] Mr Moroney spoke to Mr Hagger on 13 July 1999 seeking to be enrolled. The enrollment application was completed and sent to the Electoral Office in Darwin prior to the close of the enrollment period. A nomination form for the election to council was also completed and delivered to Mr Hagger at the same time that is, prior to Mr Moroney's becoming enrolled. He was enrolled prior to the close of rolls but just when is not disclosed. He was declared elected to the council, as a consequence of there being seven positions to be filled and the same number of nominations having been made at the close of nominations. The only other candidate had withdrawn his consent to his nomination prior to the close of nominations (clause 18(5)). However the petitioner seeks a declaration that Mr Moroney was not duly elected because he was not eligible for nomination when the nomination form was lodged with the clerk, he not then being enrolled. Those facts are established.

[20] However, to be effective a nomination must be accepted by the clerk (see clause 18(3)) after his being satisfied that the proposed candidate is eligible to be nominated. There is no evidence as to what the clerk did when Mr Moroney's nomination form was handed to him on 13 July 1999. It is clear that he was then aware that the candidate was not enrolled but had applied to be enrolled. Mr Hagger's undisputed evidence is that on 9 August 1999 he assessed the validity of a particular nomination and discovered that the nominator of the candidate was not on the roll, he informed the candidate and a qualified person then nominated him. Mr Hagger goes on to say that he then reviewed all the nominations "to ensure that all nominees and nominators were eligible". He found no problems with any of them. By that stage Mr Moroney had been enrolled. It could be said that a nomination is not a nomination unless it complies with clause 18 and that is a decision for the clerk to make and until the decision is made the nomination is not accepted. On that basis Mr Moroney's nomination was valid at the time it was accepted.

[21] The nomination process as provided for in the scheme envisages the clerk performing a function to ensure that only those persons who are eligible for and have been properly nominated stand for election. He must determine how many candidates there are for the election at the close of nominations. If there are no more than seven persons so nominated the clerk is to declare them to be members of the council. Where there are more than seven persons nominated as candidates an election is to be held.

[22] The clerk is charged with the responsibility of accepting or rejecting nominations. The reference in clause 18 (3) on to the clerk not "accepting a nomination" unless he is satisfied he is required is clearly not a reference to the clerk simply receiving a nomination form when it is lodged (clause 18(2)). The word "accept" goes beyond that. It means an acceptance for the purpose of including the name of the person nominated in the calculation of the number of persons who have been nominated to be a member of the council (as to "acceptance" see *Becker v City of Marion* a decision of the Judicial Committee of the Privy Council reported at (1976) 8 ALR 421.

[23] On the evidence process of accepting nominations was not carried out until after Mr Moroney had been enrolled. The clerk has not been shown to have erred in accepting that nomination. The date on which the nomination form may have been signed or lodged with the clerk is immaterial. The effective date for these purposes is the date upon which the clerk made his determination to accept the nomination.

How many nominations were there at close of nominations

[24] There had been eight nominations but one withdrew prior to the close of nominations. The evidence is not contested. The issue seems to have been withdrawn by the petitioner prior to the close of the hearing.

Common law

[25] As a matter of interest to those who may be engaged in proceedings before the Tribunal I draw attention to the cases holding that the common law of

elections apply to various types of municipal elections in Australia. No reliance is placed upon it in this matter and I have not decided these issues by reference to that law but mention it for guidance only. As to the cases see for example *Bridge v Bowen* (1916) 21 CLR 583; *Crafter v Webster* (1980) 23 SASR 321; *Davison v Electoral Commission (NSW)* (1992) 74 LGRA 246; *Wasaga v Tahal* (1991) 33 FCR 438; *King v Electoral Commissioner* (1998) 72 SASR 172; *Fenlon v Radke* (1996) 2 Qd R 157.

[26] The petition is dismissed.

[27] As this is the first time a petition has come before the Tribunal it will hear the parties as to costs.