In the Court of Appeal of the Northwest Territories

Citation: North West Company v. Fort Smith (Town of), 2006 NWTCA 04

Date: 2006 07 31
Docket: A-1-AP-2005000036
Registry: Yellowknife, N.W.T.

Between:

THE NORTH WEST COMPANY

Appellant

- and -

MUNICIPAL CORPORATION OF THE TOWN OF FORT SMITH, MARIE SWANSON, GLEN FREUND, ROGER RAWLYK, WILLIAM TORDIFF and JOHN MINUTE

Respondents

The Court:

The Honourable Madam Justice Adelle Fruman
The Honourable Mr. Justice Ronald S. Veale
The Honourable Mr. Justice Keith G. Ritter

Memorandum of Judgment
Delivered from the Bench

Appeal from the Order of
The Honourable Mr. Justice J.E. Richard
Dated the 3rd day of October, 2005
Filed the 1st day of November, 2005

Memorandum of Judgment
Delivered from the Bench

Fruman J.A. (for the court):

[1] The appellant, The North West Company,owns and operatesthe NorthernStore, a retail store located in the town of Fort Smith. In the spring of 2005, the store applied for a development permit to add a gas bar to its retail operations. The development application was approved by the town's development officer, subject to conditions outlined in the permit: A.B. 110.

[2] Section 23 of the *Planning Act*, R.S.N.W.T. 1988, c. P-7 permits persons claiming to be affected by a decision of a development officer to appeal to the development appeal board. The permit issued to the store provided that any appeals from the development officer's decision would render the permit null and void: A.B. 110.

[3] The board received written appeals from five individuals. The appeals were heard on June 13, 2005. The board issued its decision on June 15, 2005, allowing the appeal and refusing the permit: A.B. 119-20. On July 14, 2005, the store filed an application for leave to appeal the board's decision to the Supreme Court of the Northwest Territories, pursuant to s. 51 of the *Planning Act*: A.B. 1. The application was served on the town and four of the five individuals involved on August 15, 2005: A.B. 7-9.

[4] The leave application was heard on October 3, 2005, before a Supreme Court judge in chambers. Only the town and the store made submissions. According to the judge's reasons, the town raised a preliminary issue, arguing the store's leave application was out of time under the *Planning Act* because the town had not been served with the leave application within 30 days of the board's decision (A.B. 200/9-13). Nothing on the record indicates that the board alleged its service had been inadequate, or that the chambers judge decided that issue.

[5] The chambers judge held that s. 51(2) of the *Planning Act* required both filing and service of the leave application on the town within 30 days of the board's decision, applying the decision in ***Treeshin v. Yellowknife (City)***, [1994] N.W.T.R. 237 (S.C.). Accordingly, the judge decided the store's application for leave to appeal was out of time and dismissed it: A.B. 198-202. The store appeals.

Planning Act Provisions

[6] A number of *Planning Act* provisions are relevant. Section 51 provides for a limited right of appeal from a decision of a development appeal board to the Supreme Court of the Northwest Territories. The relevant subsections of that section provide:

(1) Subject to subsection (2), an appeal on a question of jurisdiction or on a question of law lies to the Supreme Court from a decision of an appeal board made under section 23 or an order of the Minister made under section 40.

(2) Leave to appeal must be obtained from a judge of the Supreme Court on

(a) application made within 30 days after the making of the order or decision sought to be appealed from;
(b) notices to the parties affected; and
(c) hearing such of the parties affected as appear and wish to be heard.

...

(4) On obtaining leave to appeal, the party appealing must, within 10 days after the appeal has been set down, give to the parties affectedby the appeal notice in writing that the case has been set down to be heard in appeal and the appeal shall be heard by the SupremeCourt as speedily as practicable.

(5) Where a decision of an authorized official of a council is the subject of an appeal, the council shall be the respondent at the hearing, notwithstanding that an appeal board may have been involved under section 23.

[7] Section 52(a) deals with the right to be heard:

52 On the hearing of an appeal by the Supreme Court,

(a) the party who made the order or decision appealed from and any other party affected is entitled to be represented by counsel or otherwise and to be heard on the argument;

[8] Section 53(2) deals with rules of practice:

(2) The Supreme Court may make rules of practicerespecting appeals under this Act and until those rules are made, the rules of practice applicable to appeals from a judge of the Supreme Court to the Court of Appeal apply.

The Supreme Court has not promulgated rules of practice respecting appeals under the *Planning Act*, but *Rules of the Court of Appeal Respecting Civil Appeals* have been established pursuant to the *Judicature Act*, R.S.N.W.T. 1988, c. J-1.

Analysis

[9] In holding that s. 51(2) requires both filing and service of the leave application on the town within 30 days of the board's decision, the chambers judge relied on the decisionin ***Treeshin****, supra.* In ***Treeshin***, the applicant filed a leave application with the court and faxed a copy to the attention of the board's secretary 25 days after being informed of the board's decision. Formal service was completed 11 days later. At the leave application, the board took the position that the proceeding was a nullity because the application had to be filed and served on it within the 30-day period. The city of Yellowknife took no position on the issue. The judge in that case held that the words "application made within 30 days" in s. 51(2)(a) meant that both filing and service were required on the board within the 30 days; however, formal service was not required and informal notice by fax sufficed.

[10] In the present case, it is the town and not the board claiming lack of service. In this appeal, the town relied on an alleged lack of service on the board to justify the chambers judge's decision. However, the chambers judge did not decide that issue and did not make fact findings concerning proper or improper service on the board. In fact, there is little evidence in the record concerning service on the board, and it appears that the board filed the record promptly and did not complain about service. Evidence about service or notice to the board could have been provided, had this been raised as an issue before the chambers judge. It is not appropriate for this court to consider the issue of service on the board in the absence of a complete evidentiary record and appropriate fact findings by the chambers judge.

[11] ***Treeshin*** decided that notice or informal service of the leave application was requiredon the board within 30 days of the board's decision; it did not decide whether that service requirement also applied to the city. The town concedes that the board and the town are separate entities under the *Planning Act* and that the same notification requirements do not necessarily apply to each of them. It must then be determined what status the town has in an appeal and what notice must be given to it. This involves interpreting the relevant provisions of the *Planning Act*.

[12] The Supreme Court of Canada has advocated a contextual approach to the interpretation of legislation. Legislation must be read in its entire context, and in its grammatical and ordinary sense, taking into account the scheme and object of the act in question, and the intention of the legislators. See E. A. Driedger, *Construction of Statutes*, (2nd ed. 1983) at 87; ***Rizzo & Rizzo Shoes Ltd. (Re),*** [1998] 1 S.C.R. 27 at para. 21; and ***Re Application under s. 83.28 of the Criminal Code,*** [2004] 2 S.C.R. 248 at para. 34.

[13] Section 52(a) of the *Planning Act* recognizes only two categories of participants with standing to be heard in an appeal: "the party who made the order or decision appealed from, and any other party affected." Section 51(5) provides that when the original decision was made by an authorized official of the town council (in this case, the town development officer), the town council

"shall be the respondent at the hearing, notwithstanding that an appeal board may have been involved." As s. 51(5) makes the town a respondent, and s. 52(a) distinguishes between the board and "other parties affected", for appeal purposes the town must fall into the category of a "party affected". This interpretation is consistent with the fact that, at the appeal stage, it is not the town's decision being appealed, nor is it necessarily adverse in interest to the applicant. The town may provide submissions if it chooses to do so. In this sense, it is no different than other parties affected.

[14] Section 51(2) makes specific reference to "parties affected". It stipulates that leave to appeal must be obtained on: (a) application made within 30 days after the making of the order or decision sought to be appealed from; (b) notices to the parties affected; and (c) hearing such of the parties affected as appear and wish to be heard. Having determined that the town is a "party affected", the question is within what time period must "notices to the parties affected" be given under s. 51(2)(b). Section 53(2) incorporates rules of practice applicable to appeals; however, the *Rules of the Court of Appeal Respecting Civil Appeals* do not include any provisions concerning notices to parties affected. Accordingly, only the provisions of the *Planning Act* provide guidance.

[15] Statutory provisions for service and notification are often succinct and notoriously difficult to interpret. Much depends on the wording and context of the particular statute. The general trend seems to be that if a statute is silent, a service requirement within a specific time period may be read in, but if the statute contains an express reference to notice, that provision will prevail.

[16] Section 51(2)(b) contains an express reference to notice. Section 51(2)(a) stipulates a 30-day deadline for making an application, but s. 51(2)(b) contains no similar requirement for notices to affected parties. The provisions are grouped in separate subclauses, separated by semi-colons. There is a presumption that language is used consistently and uniformly within a statute and, when different language is used, a different meaning is intended. Accordingly, the 30-day limitation in s. 51(2)(a) should not be read into s. 51(2)(b).

[17] This line of reasoning is consistent with a contextual approach. Section 10 of the *Interpretation Act*, R.S.N.W.T. 1988, c. I-8 dictates that an enactment "shall be construed as being remedial and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects." A contextual approach in this case demands an interpretation that is sensitive both to the right of appeal in s. 51(2), and the need to bring that appeal to the court expeditiously in order to avoid delays that tie up valuable real estate. While the *Planning Act* provides for a limited right of appeal in s. 51(2), it also outlines a 30-day deadline for filing the leave application. In addition, s. 51(4) stipulates that, if leave is obtained, the party appealing must give notice to the parties of the hearing date for the appeal proper within 10 days, with the appeal to be heard "as speedily as practicable." Filing the leave application is an important step; however, it is the hearing, and not the application, that brings the matter forward towards resolution in a meaningful way. As such, importing a 30-day requirement to serve the leave application on the parties affected does not significantly expedite the proceedings.

Disposition

[18] Pursuant to s. 51(2)(a) of the *Planning Act*, an application for leave to appeal must be made within 30 days of the board's decision. Section 51(2)(a) does not impose a requirement to serve the application on the town within the same 30-day period. However, the town and other parties affected must be given reasonable notice of the hearing, to ensure they have an opportunity to make representations.

[19] Here, the board's decision was issued on June 15, 2005. The store filed its leave application on July 14, 2005, within the 30-day deadline. The town and other interested parties were served on August 15, 2005, and the hearing took place on October 3, 2005. The town and other interested parties therefore received ample notice of the hearing.

[20] Accordingly, the appeal is allowed and the matter is remitted to the Supreme Court to hear the leave application on its merits.

[21] The store is entitled to its costs of this appeal.

Appeal heard on June 27, 2006

Memorandum filed at Yellowknife, N.W.T.
this day of , 2006

Fruman, J.A.

Appearances:

S. Kay and P. Smith
for the Appellant

T. Marriott
for the Respondents

A-1-AP 2005000036

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- and -

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MEMORANDUM OF JUDGMENT