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CV 02154

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

ADOLF DUESTERHUS,

Applicant

- and -

CITY OF YELLOWKNIFE

Respondent

Application to quash a resolution of the respondent municipality.
Dismissed.

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE J.Z. VERTES

Heard at Yellowknife, January 22 and February 4, 1993.

Judgment filed: March 4, 1993

Counsel for Applicant: J.U. Bayly, Q.C.

Counsel for Respondent: G.P. Wiest

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REASONS FOR JUDGMENT

INTRODUCTION

1 The applicant seeks to quash a resolution of the Yellowknife City Council passed on June 13, 1988, requiring all waterfront leases to include a ten foot easement along the shoreline to guarantee public access to the water. He says the city councillors acted in "bad faith", by which he means, for purposes of this attack, that they acted unreasonably and arbitrarily.

BACKGROUND INFORMATION

2 As in many urban areas, some of the most preferred residential areas in the City of Yellowknife are located along a shoreline or overlook water. One of these areas contain the lots located along the west side of Morrison Drive on what is known as

Latham Island. The applicant's residence is located on one of these lots.

3 There are 31 lots located along this section in what are legally described as Blocks 6 and 7 according to a plan of survey registered in the Land Titles Office as number 68. The western boundaries of these lots, what I will refer to as the "backs" of the lots, border on a shoreline area that extends to the waters of Back Bay. This shoreline area varies in width as it runs alongside Blocks 6 and 7.

4 The shoreline area is generally an area of marsh with substantial willow growth. It is more or less in a natural state and is a bird and wildlife habitat. I have no doubt, based on the evidence, that the property owners regard this shoreline area as enhancing both the aesthetic and monetary value of their properties.

5 The shoreline area is under the administration of the Government of the Northwest Territories. It in turn leases this area to the City of Yellowknife. The City in turn has had a long-standing policy that, in the absence of any overriding public use, the shoreline area, divided into waterfront lots, would be sub-leased to owners of the adjacent residential lots. Some of the owners in Blocks 6 and 7 have in the past and currently hold such sub-leases which are usually for 5 year terms. The applicant does not have such a sub-lease.

6 It is not disputed that in the 1980's and up to the present the City has adopted various General Plans and other studies to serve as policy guides in its development plans. These documents have identified, as a general goal, the preservation of waterfront areas

for public use. This includes facilitating public access to waterfront areas. It is also not disputed, however, that there is nothing specific in these plans or studies relating to the shoreline areas of Blocks 6 and 7.

7 For various reasons and by various methods, which I will discuss later, City Council passed, on November 23, 1987, a resolution that "a 40 foot right-of-way be held at the time of renewal of all existing leases, and at the time of new lease applications for all Waterfront Leases adjacent to Blocks 6 and 7 on Latham Island." This led to quite a controversy. Then on June 13, 1988, City Council passed the resolution under attack:

> **That all waterfront leases include a new Section No. 1(g) which states that all waterfront leases shall include a 10 foot easement along the shoreline to guarantee access to the water for the general public.**

8 After passing the resolution in question, City Council, on June 27, 1988, referred the question of the establishment of a policy for waterfront leases to the City Development Committee. That process eventually resulted in the adoption, on September 26, 1988, of a "Waterfront Lease Policy" which stated in part:

> **In the absence of an overriding public use for the subject lands, the City may issue subleases on the vacant waterfront lots to:**
>
> **a) adjacent residents in residentially zoned areas for passive recreational uses, subject to a 3 metre (10') easement adjacent to the ordinary high water mark for public access.**

In the meantime, on September 12, 1988, City Council passed a motion to rescind the November 23, 1987, resolution calling for the reservation of a 40 foot right-of-way from all leases relating to Blocks 6 and 7.

9 These proceedings were commenced in February 1990. Numerous and voluminous affidavits have been filed; cross-examinations were conducted; and then I heard two days of additional testimony as well as legal arguments. It should be self-evident that these proceedings are something more than the "summary" type of proceedings envisaged by the statute.

10 Before I discuss the specific attack on the resolution in question, I must address a number of preliminary issues which were raised in argument before me.

SCOPE OF REVIEW

11 This application is brought pursuant to s.68 of the Cities, Towns and Villages Act, R.S.N.W.T. 1988, c.C-8:

> **68.(1) Any person**
> **(a) resident in the municipality, or**
> **(b) adversely affected by a resolution or by-law,**
> **may apply, by way of originating notice, to a judge of the Supreme Court for an order quashing a resolution or by-law of the municipal corporation.**

There is no limitation period either in this Act or any other statute proscribing the time within which such an application must be made.

12 Counsel for the applicant submits that the Northwest Territories statute provides for a broader scope to the review than that provided by similar statutes in other jurisdictions, or, indeed, the predecessor statute in this jurisdiction. The earlier Municipal Act, R.S.N.W.T. 1974, c.M-15, provided:

156.(1) A judge, upon application by any resident of a municipality or by any person interested in a by-law of the municipality, may quash the by-law in whole or in part, for illegality, and may award costs of the application according to the results thereof.

. . .

157.(1) No application shall be made to quash any by-law of the municipality after the expiration of two months following the final passing of the by-law.

13 The previous statute provided a procedure for quashing only by-laws. The present statute enables the court to quash by-laws and resolutions. In my view, however, there is no distinction in the legal standard to be applied whether one is reviewing a by-law or a resolution.

14 The present Act gives standing to anyone who is a resident. Unlike most other jurisdictions the applicant need not demonstrate a special interest in the by-law or resolution. In any event, there is no issue taken with the applicant's standing to bring this challenge.

15 The thrust of counsel's submission is that, unlike the earlier statute, there may now be a broader base for quashing a by-law or resolution than "illegality". I do not agree.

16 It has long been held that the sole ground upon which a court may quash a by-law or resolution is for "illegality": Re Howard and Toronto (1928), 61 O.L.R. 563 (C.A.). "Illegality", however, comes in many different forms. The term encompasses bad faith, the preference of a private interest over a public one, uncertainty and vagueness, acting

in excess of jurisdiction, and non-observance of statute. "Illegality", within one or more of its forms, is the legal standard that the applicant must establish to succeed on this application. Further, there is a presumption of validity which casts the burden on the applicant to establish the grounds for quashing this resolution: see I.M. Rogers, **The Law of Canadian Municipal Corporations** (2nd ed.), page 983, and authorities noted therein.

MUNICIPAL JURISDICTION

17 During the hearing an issue arose as to the municipality's jurisdiction over the shoreline area.

18 Prior to 1970, the area in question, as indeed all of Latham Island, was vested in the Crown in right of Canada. Blocks 6 and 7, the lots therein, and the shoreline area were all laid out pursuant to a survey conducted by the federal government in 1938 and 1939. That survey eventually became registered as plan number 68. On the survey the shoreline area adjacent to Blocks 6 and 7 is designated as "government reserve". By Order-in-Council dated July 8, 1970, the federal government transferred to the Northwest Territories the administration of all right, title and interest of Her Majesty in, among other parcels, the "whole of Latham Island".

19 The jurisdiction question arises because of section 13 of the Territorial Lands Act, R.S.C. 1985, c.T-7. That section provides that a strip of land 100 feet in width, measured from the ordinary high water mark, shall be deemed to be reserved to the

Crown in right of Canada out of every grant where the land extends to the shore of any navigable water, unless otherwise ordered by the Governor-in-Council. If this reservation applies, then the territorial government has no jurisdiction to lease the shoreline area (or at least that area extending 100 feet inland from the ordinary high water mark) to the City of Yellowknife and hence the City has no jurisdiction to designate an easement in this area.

20 In my opinion the City does have jurisdiction over the area in question.

21 The Order-in-Council is quite specific in its reference to the transfer including the "whole of Latham Island". Further, the Order-in-Council makes specific reference as well to reservations for mines and minerals, water beds, and water rights. These are all covered by sections 14, 15 and 16 of the Territorial Lands Act. The specific inclusion of these reservations leads me to conclude that the Order-in-Council encompasses the entire grant which is "otherwise" to the deemed reservations in the Act.

22 By virtue of the Order-in-Council the shoreline area became "Commissioner's lands" as designated by s.2(b) of the Commissioner's Land Act, R.S.N.W.T. 1988, c.C-11. The territorial government is therefore empowered to lease the land. Pursuant to its lease, the City of Yellowknife has the ability to sub-lease all or parts of the area and hence to impose conditions on such sub-leases that are not contrary to any conditions in its head lease with the government. There is nothing in the head lease to prevent the reservation of an easement by the city.

ORDINARY HIGH WATER MARK

23 Much of the evidence presented concerns the determination of the "ordinary high water mark". This appeared to be a matter of some controversy and was thought important in order to determine the location of the "shoreline" so as to ascertain where the easement would be located.

24 It is the applicant's position that the ordinary high water mark was established by the 1938-39 survey as depicted on plan number 68. He has also submitted evidence that the water line has extended further west. Therefore, if the proposed easement were taken from the 1938-39 line, it would not be along the "shoreline" but would be much closer to the backs of the lots in Blocks 6 and 7.

25 In 1988 the City commissioned a surveyor to determine the ordinary high water mark. This survey differed from the 1938-39 survey. The surveyor who conducted the 1988 survey testified that in his review of the notes to the 1938-39 survey he discovered that what was thought to represent the "ordinary high water mark" in fact represented the actual high water mark at the time of the survey. He further testified that it would be impossible to establish a definitive lakeshore boundary since it continually changes due to the increase or decrease of the water level from year to year.

26 In my opinion nothing of legal significance turns on the location of the ordinary high water mark. The area is within the City's jurisdiction. The matter of locating the

easement is a technical one that requires survey measurements of the shoreline as it exists at the time when, and if, locating the easement is important. It is not necessary to have a definitive location of the ordinary high water mark for the purposes intended by the City's resolution.

BAD FAITH

27 The applicant says that the City acted in "bad faith" because it acted unreasonably and arbitrarily in enacting the June 13, 1988, resolution. To put this argument into context, it is necessary to review the actions taken by City Council.

28 As noted previously, there has been, during the 1980's in particular, much debate about the use of waterfront lands and the development of recreational facilities in Yellowknife. What is beyond doubt, however, is that many of the planning documents prepared for the City identified the preservation of the waterfront as an objective. There were numerous studies that sought to analyze public opinion, in the course of which public meetings were held. I need only refer to the "Background Document for General Plan 1988" and the "Yellowknife Waterfront Development Study" of 1986.

29 The "General Plan" adopted by the City on December 12, 1988, incorporated the results of these studies. It stated as an "objective" for the waterfront; "To preserve the waterfront for the use of all residents and visitors to Yellowknife." It further stated that the policy of City Council shall be, among other things, to "negotiate with current lease

holders to permit public access to the waterfront where appropriate."

30 The controversy relating to this area in particular first arose by the City announcing its intention to close a road allowance running along Block 5. This road allowance, which is not shown on the 1938-39 survey, appears on the 1988 survey as "Watt Drive" and runs between Block 5 (which is to the south of Blocks 6 and 7) and a group of waterfront lots designated as Block "G". First reading of the closure bylaw was given on November 10, 1986.

31 Public hearings on the road closure were held in February, 1987, and again in October, 1987. At those meetings representations were heard from residents including some who were involved with a private organization called the "Yellowknife Yacht Club". These individuals argued for the preservation of the road allowance beside Block 5 so as to allow public access to the waterfront. As a result Council voted, on November 9, 1987, to keep the road allowance open. It further voted, at the same meeting, to research existing policies respecting waterfront land.

32 There was much made, in the written material and in parts of the oral testimony, as to the involvement of the Yacht Club. At one point the applicant made the suggestion that the desire to maintain public access was in reality a desire to give the Yacht Club a moorage. Hence, City Council was making its decisions with the aim of benefitting a "private" interest, not the "public" interest. As this hearing progressed, the applicant retreated from that position and, in my opinion, rightly so.

There is no evidence that the resolution under attack was passed with the aim of benefitting a particular private interest. I note, with specific reference to the Yacht Club, that they had made several proposals in 1986 and 1987 for a marina in the area referred to as Block "G". However, by the time the resolution under attack was passed in June of 1988, the Yacht Club had already stated its preference for a site on the other side of the city and Council had passed a motion to that effect.

What the intervention of the Yacht Club did do was to lead City Council into an erroneous assumption. At the City Council meeting of November 23, 1987, when considering a renewal for one of the Block 6 waterfront sub-leases, Council was advised by one of its committees that "in the past there had previously been a 40 foot right-of-way, which was a natural extension of Watt Drive which runs adjacent to Block 5, and that several property owners utilize the waterfront adjacent to Block 6, for access to their lots." This was erroneous because, as the evidence shows, there never was a right-of-way adjacent to Block 6 and extending from Watt Drive. However, this led to the resolution of Council to include a 40 foot right-of-way in the waterfront leases.

Not surprisingly, many of the residents of Blocks 6 and 7 expressed concern over this new condition and asked Council to review it further. A petition opposing the right-of-way was signed by a majority of the residents and presented to City Council. It was in these meetings that the City's Development Committee first spoke of the 40 foot right-of-way as not being intended for a roadway but "to ensure waterfront access for the general public". Up until then, specifically February 22, 1988, the right-of-way was

described as enabling the adjoining property owners to access their lots from the back. In changing its focus, so the applicant says, from accessibility to the backs of the lots to general public access, City Council has arbitrarily given a public purpose to something that the public had expressed no apparent desire or need for and one which was not even explicitly mentioned in the planning studies.

36 At the February 22 meeting of Council, there also arose for the first time a reference to a walkway. One of the city councillors asked that, in addition to further study of the lease policy, City administration also prepare a feasibility and cost study of constructing a walkway along the waterfront adjacent to Blocks 6 and 7. This motion was passed unanimously. I did not see or hear any evidence however that such a feasibility or cost study was ever carried out.

37 While the City Development Committee continued to consider the issue, several waterfront leases came up for renewal. These were deferred pending the committee's deliberations. On April 11, 1988, the committee was asked by Council to give consideration to the establishment of a 10 foot right-of-way along the shoreline adjacent to Blocks 6 and 7. On June 13, 1988, the committee reported to Council. In its report, the committee stated:

> **Committee noted that several five year waterfront leases on Latham Island have come up for renewal in recent months and the City has been seeking a method by which public access to the subject lands, in the form of a walkway, can be accommodated while still allowing for sub-leases to adjacent property owners.**

It recommended that the November 23, 1987, motion for a 40 foot right-of-way be rescinded and that waterfront leases be issued "in their current state" with no provision

for a walkway. These recommendations were defeated by Council.

38 At the same meeting of June 13, however, Council passed the resolution under attack. As previously noted, Council then referred back to the City Development Committee the establishment of a waterfront lease policy. Presentations were made to the committee and to Council by interested persons, including the applicant, in July and August, 1988. The eventual result was the passage of the "Waterfront Lease Policy", previously noted, on September 26, 1988.

39 It is apparent from the minutes of Council meetings and committee memoranda filed as evidence that many of the same arguments were made then as were made before me. It is also apparent that Council viewed their decision to restrict the easement to 10 feet as a concession to the concerns of the residents. The evidence before me also revealed that the City has no present plan to build a walkway along the shoreline adjacent to Blocks 6 and 7.

40 The applicant's argument can best be summarized as follows. If the City's rationale for passing the June 13, 1988, resolution was to provide "public access", which is admittedly a public purpose, then City Council did not think through how, why, or where it was going to achieve this purpose. That, says the applicant, is tantamount to having no purpose and hence is arbitrary and unreasonable. As the applicant's counsel phrased it, the City "lurched along" coming up with ad hoc excuses to achieve its policy ends. Furthermore, he argues that the principal aim of the resolution is the establishment

of a walkway and the easement was simply the mechanism to achieve it.

41 As both counsel acknowledged, I cannot second-guess Council's policy decisions. Whether I agree with the decision or not, whether I think it is or is not necessary or prudent, are all immaterial: **In Re Edmonton By-Law No. 1546** (1953), 10 W.W.R. (N.S.) 407 (Alta.C.A.). My review is confined to the question of "illegality".

42 In addition, in this case, there was no issue raised about procedural fairness. The documents reveal that the applicant and others exercised the opportunity to make representations to City Council on numerous occasions.

43 Applicant's counsel has referred me to the Ontario Divisional Court decision in **Re H.G. Winton Ltd. & Borough of North York** (1978), 20 O.R. (2d) 737. The court there stated that a municipal council will have acted in "bad faith" if it "acted unreasonably and arbitrarily and without the degree of fairness, openness, and impartiality required of a municipal government" (at page 744). I agree with that formulation of what constitutes "bad faith". But does it apply in this case when one looks at all of the circumstances? I think not.

44 First, one must keep in mind that the resolution's effect is to include a condition into a lease. There is no legal right of the adjacent property owners to a lease of the waterfront lots. It has been the practice of the City to grant such leases, absent an over-riding public interest. But there is no absolute entitlement either to the leases or as to the

contents of such leases.

45 The evidence before me was that the City imposed the new easement condition only upon the renewal of existing leases or the issuance of new leases. I can find no restriction on the City's power to change the terms once a lease has expired. The City's dominant position has always been explicit in the waterfront leases. They contain no express right of renewal for the lessee; they terminate on change of ownership; and, the City may cancel them at any time on 12 months' notice. These provisions were contained in waterfront leases issued before and after 1988.

46 Just as there is nothing in law that obliges the City to issue a lease there is nothing that obliges an adjacent property owner to obtain one. Several of the adjacent property owners, including the applicant, do not have leases. The lack of a lease does not seem to have impaired the enjoyment of their property or the monetary and aesthetic value provided by the proximity to the water.

47 I am inclined to agree with the applicant's counsel when he says that City Council did not think through how, why, or where it was going to achieve its policy aim of "public access". I am convinced that Council exhibited an haphazard approach. But I am satisfied that the steps that were taken were the result of a clearly stated policy objective, that of public access to the water, which has been identified for many years. Whether I agree with the policy is, as I have already stated, immaterial. It is equally immaterial whether I think there are better or more suitable ways to achieve that aim.

48 I have no doubt that this entire controversy started because of the erroneous assumptions made about a 40 foot right-of-way being a natural extension of Watt Drive. It was brought to a head because of the fact that several waterfront leases had come up for renewal. The focus of Council turned to the immediate question of what to do with these leases. Therefore, the debate concentrated on Blocks 6 and 7. The resolution for a 40 foot right-of-way addressed Blocks 6 and 7 specifically. The debate that led to the resolution of June 13, 1988, also centred on Blocks 6 and 7. However, the effect of that resolution is to make the requirement for a 10 foot easement one that applies to "all" waterfront leases. This was subsequently incorporated as part of the "Waterfront Lease Policy" that has effect throughout the City.

49 While Blocks 6 and 7 were singled out at the beginning of Council's deliberations, the outcome is one that has City-wide effect. It is not a case analogous to "spot-zoning" where specific properties or occupiers are singled out under the guise of municipal planning (as was the case in **Winton**).

50 I did not have any evidence of waterfront leases for other areas of the municipality. I assume they too contain a 10 foot reservation clause for the reasons I have just stated. If only those leases for the waterfront adjacent to Blocks 6 and 7 contain such a clause then it seems to me a good argument can be made that the resolution, and subsequent "Waterfront Lease Policy", are being implemented in a discriminatory manner.

51 It seems to me as well that the resolution under attack has now been made

superfluous by the adoption of the "Waterfront Lease Policy". Only the resolution is attacked by the applicant. Even if I were to strike it down, the resolution adopting the policy would still be in effect.

52 Was there an ulterior purpose to the resolution? The applicant says there is because its real purpose is to put in a walkway.

53 Applicant's counsel has referred me to the case of **Stevenson** v. **Surrey**, [1990] B.C.J. No. 1104 (B.C.C.A.). In that case a by-law authorizing the re-opening of a road was struck down because its real purpose was held to be the creation of a park. The court held that the park, and not the road, was the "principal" and the road, not the park, was the "accessory". Similarly, here the applicant says that the "principal" is the walkway and the "accessory" is the easement.

54 The **Stevenson** decision has to be viewed with care. In the later decision of **Kehler** v. **Surrey** (1992), 11 M.P.L.R. (2d) 148 (leave to appeal to S.C.C. refused on February 11, 1993), the British Columbia Court of Appeal held that the ratio of the **Stevenson** case is based on its own facts. It is, simply put, that a municipality may not, by the purported exercise of its road re-opening powers, acquire land dedicated for a road to use as a park. Hence, a municipality cannot have an ulterior purpose in enacting a by-law or passing a resolution. I agree with this statement.

55 In this case, however, I find no ulterior purpose. The purpose is quite explicit: "to

guarantee access to the water for the general public." That purpose is to be accomplished, as a first step, by reserving an easement in all waterfront leases. Whether a walkway is constructed, or whether access will have to be limited to a few designated locations because of natural conditions, or even if actual physical access is unfeasible, are questions to be left to another day. At this point the City merely wishes to preserve its options for the future.

56 If at some point in the future the City decides to build a walkway, then there may be technical questions concerning the location of the ordinary high water mark; then there may be environmental concerns about the habitat; then there may be questions about construction techniques. But those are not the issues before me. If the City does go ahead with such a plan then there will be opportunity for the public to make representations to committees, City Council, and to the Development Appeal Board.

57 Applicant's counsel also emphasized that the resolution includes the words "to guarantee" public access. He argues that this is significantly different than the "Waterfront Lease Policy" which does not use the word "guarantee". While there may be a distinction in the wording, it is a distinction without a difference. The word "guarantee" in the resolution simply serves to tie the resolution to the stated and well-known objective of public access identified in earlier planning documents.

58 While the research, planning and implementation of the stated purpose left much to be desired in terms of coherence and consistency, I am satisfied that the June 13,

1988, resolution was passed in good faith and for a lawful purpose.

CONCLUSION

59 For the foregoing reasons, the application to quash the June 13, 1988, resolution is dismissed.

60 Ordinarily, costs follow the event. I am aware, however, that in this case there are some contentious matters relating to costs. If the parties cannot agree on costs, they are at liberty to file written submissions to me. Such submissions are to be filed no later than March 31, 1993.

John Z. Vertes
J.S.C.

Counsel for the Applicant: J.U. Bayly, Q.C.
Counsel for the Respondent: G.P. Wiest

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