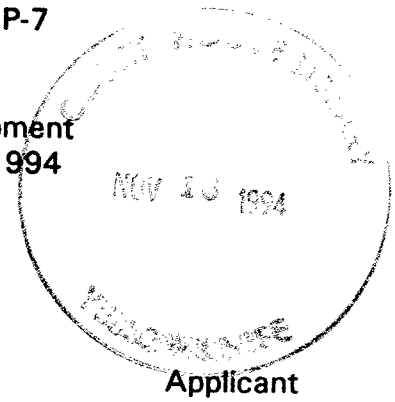
SC CV 94 011

CV 05158

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER of the Planning Act, being Chapter P-7 of the Revised Statutes of the Northwest Territories;

AND IN THE MATTER of the decision of the Development Appeal Board entered the 10th day of March, A.D. 1994



BETWEEN:

NIKOLAJ GAWRILOWICH TREESHIN

Applicant

- and -

THE MUNICIPAL CORPORATION OF THE CITY OF YELLOWKNIFE and THE DEVELOPMENT APPEAL BOARD established pursuant to s.4(4) of the City of Yellowknife Zoning By-Law No. 3424

Respondents

Application for leave to appeal pursuant to s.51 of the Planning Act, R.S.N.W.T. 1988, c.P-7. Granted.

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

Heard at Yellowknife, N.W.T.
May 12, 1994

Judgment filed: May 24, 1994

Counsel for the Applicant:	Alan C. Denroche
Counsel for the Respondent, Municipal Corporation of the City of Yellowknife:	Earl D. Johnson, Q.C.
Counsel for the Respondent, the Development Appeal Board:	Katherine R. Peterson, Q.C.

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REASONS FOR JUDGMENT

INTRODUCTION:

1 The applicant seeks leave to appeal, pursuant to s.51(2) of the Planning Act, R.S.N.W.T. 1988, c.P-7, a decision of the Development Appeal Board whereby a development permit was rescinded.

2 The respondent Board, which is a party to these proceedings by virtue of the status accorded to it by s.52(a) of the Act, raises a preliminary objection that this application for

leave is not brought within the time limit set by the Act. This issue is one that must be resolved since compliance with the statutory time limit is a condition precedent to the right of appeal. It is trite law to say that there is no power to extend or vary the time in which an appeal may be brought when the time limit is set by statute and the statute does not empower the court to extend the time.

3 For purpose of this application, I need not go into specific detail regarding the merits of the applicant's development proposal. It will suffice to set out the chronology of events and those facts underlying the application for leave.

FACTS:

4 On February 3, 1994, the municipality issued a development permit to the applicant for a proposed change of use for a property owned by him. On February 18, 1994, the Secretary to the respondent Board wrote to the applicant advising him that (a) the issuance of the permit had been appealed to the Board; (b) a public hearing will be held on March 10, 1994, to consider the appeal; and (c) all material in support of his position on the appeal must be filed by February 28, 1994. The appeal was taken by an adjoining landowner, Gorf Holdings Ltd.

5 The applicant says that the first he learned of the appeal was in a telephone call from the Board's secretary on March 9, 1994. He claims that he did not receive the letter

of February 18th until sometime after March 10th. He says that he did not know he could submit further information at the appeal hearing. He also says that representatives of Gorf Holdings, however, were allowed to submit further materials at the hearing, materials which the applicant claims raise issues that he had no opportunity to respond to at the hearing.

6 By a letter dated March 11, 1994, received by the applicant on March 16th, the Board informed him of its decision to rescind the development permit. The entire decision reads:

Decision:

After reviewing the submissions of the Appellant and hearing the evidence of other parties present at the Hearing, and after reviewing the written submissions filed with the Board; the Board, having due regard to the facts and circumstances, the merits of the Appellant's case and to the purpose, scope, and intent of the General Plan and the Zoning By-law, determined that the decision of the Development Officer of February 7, 1994 to issue Development Permit No. 94-032, be reversed.

The Board's reason for this decision are as follows:

1. **Section G.4.3.1. of the City of Yellowknife General Plan states that the policy of Council is "to continue to encourage the development of higher density housing (mixed use developments) within the immediately adjacent to the downtown."**

2. **The Board determined that Lot 26, Block 67 is immediately adjacent to the downtown.**

3. **Section G.5.1. of the City of Yellowknife General Plan states the following objective for the downtown (C.B.D. and C.B.D. Fringe):**

   "To focus commercial development on the downtown area."

4. Further, the Board determined that incorrect information was contained in the application and Section 6(4) of the Zoning By-law states that "any Development Permit issued on the basis of incorrect information contained in the application shall be invalid."

Signed this 11th day of March, A.D. 1994.

7 On April 8, 1994, the applicant filed an Originating Notice of Motion to this court seeking leave to appeal this decision. It was made returnable on May 2nd, 1994. A copy of this Originating Notice was transmitted by fax to the municipal offices, to bring to the attention of the Board's secretary, also on April 8th. The Board's counsel acknowledged this at the hearing.

8 On April 19th copies of the Originating Notice and the supporting affidavit were formally served on the municipality, the Board, and Gorf Holdings. On May 2nd counsel appeared in chambers in response to the motion at which time it was set over to May 12th for the hearing.

TIMELINESS OF APPLICATION:

9 The pertinent portions of the Planning Act are:

51. (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.

. . .

53. (1) The Supreme Court may fix the costs and fees to be taxed, allowed and paid on an appeal.

(2) The Supreme Court may make rules of practice respecting 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.

10 The respondent Board contends that the application for leave to appeal is not within the time limit specified in s.51(2) of the Act and therefore this application is a nullity. The Board's counsel argues that the proper interpretation of the phrase "on application made within 30 days of the making of the order or decision . . . " is that the application must be filed, served and returnable within that period. Alternatively, she says that at least the application must be filed and served. The applicant says that all that is required is for the application to be filed within the time period. The respondent municipality takes no position on this issue.

11 I am sure lay people would be truly amazed at the volume of litigation that has been spawned in attempts to interpret such innocuous words. But, admittedly, what should be straightforward is, thanks to the legislative drafter's manipulation of words, ambiguous and confusing.

12 The relevant dates for this inquiry are:

(a) March 11, 1994 - Decision of Board

(b) March 16, 1994 - Decision received by applicant

(c) April 8, 1994 - Application filed

(d) April 8, 1994 - Copy faxed to Board

(e) April 19, 1994 - Service on respondents

(f) May 2, 1994 - Return date

(g) May 12, 1994 - Hearing date

13 Everyone agrees that, in conformity with the decision in Orr v. Hutyra, [1992] N.W.T.R. 178 (S.C.), the 30-day time limit started on the date of receipt of the decision, March 16th. Therefore, the time expired on April 15th.

14 At first blush I would have said, having regard to the practice in this jurisdiction of filing before service of a pleading, that the key act would be to file the application in time. Otherwise, as applicant's counsel argued, if service was also required then one's appeal right could be defeated if the respondent were to evade service. But, says Board's counsel, there are procedures to obtain directions for alternative or substitutional service.

15 There are numerous cases to support the argument that filing is all that is required. Similarly there are cases to support both of the propositions advanced by counsel for the

Board. The important point to keep in mind, however, is that all cases are founded on their own particular statutes or rules and therefore it is difficult to make meaningful comparisons.

16 In Saskatchewan, the phrase "application to a judge ... made not later than ..." has been interpreted to mean that the essential requirement is to file in time: Patterson v. Board of Education of Saskatoon School Division No. 13 (1982), 132 D.L.R. (3d) 631 (Sask.Q.B.). Similarly, it has been held in British Columbia that the word "made" is used synonymously with "filed": Re Mary Jane Brown Estate, [1956] 19 W.W.R. 616 (B.C.S.C.). In England, the phrase "apply to the court within" means issuance of the process within the time limited therefor: Carmel Exporters (Sales) Ltd. v. Sea-Land Service Inc., [1981] 1 W.L.R. 1068 (Q.B.). Similar conclusions, that filing is sufficient, have been reached in R. v. M. (1971), 3 C.C.C. (2d) 76 (B.C.S.C.), Re Bramalea Ltd. et al (1979) 23 O.R. (2d) 509 (Co.Ct.), and Duthie v. Mandin et al, [1984] 6 W.W.R. 217 (Sask.Q.B.).

17 Another line of cases is typified by Houg Alberta Ltd. v. 417034 Alberta Ltd. (1991), 117 A.R. 196 (C.A.). In that case, a section of the Alberta Planning Act in wording similar to the Northwest Territories statute was interpreted as mandating filing, service, and at least an initial appearance. Côté J.A. said (at page 200): "In my view, in normal chambers practice, a motion is 'made' when the counsel for the applicant rises in chambers and presents his motion orally to the chambers judge." See also Bowen v.

Edmonton (1977), 2 Alta.L.R. (2d) 112 (C.A.).

18 I note that Côté J.A. speaks of only an initial appearance within the time limit. I think that this is at most all that could be required since there is no case that requires disposition within such a time limit. But I have difficulty accepting even this requirement. It seems to me that such a requirement would have to be dependent on local practice. What if counsel cannot obtain a return date within the time limit? It is conceivable for this to happen (especially outside of the larger urban centres).

19 Then there are a line of cases that require at least filing and service within the time period. The phrase "application made" has been so interpreted in Ontario: Janes v. Brown, [1955] 3 D.L.R. 221 (Ont.C.A.). See also Bearss v.Regina (1956), 18 W.W.R. 90 (Sask.C.A.) and Re Cessland Corp. Ltd. et al (1979), 100 D.L.R. (3d) 378 (Ont.H.C.J.).

20 The previously-noted case of Orr v. Hutyra from this jurisdiction did not address this point specifically. The judgment merely speaks of the application being filed within time. A review of the court record, however, reveals that the application in that case was also served within the time limit. This specific issue, therefore, did not arise in that case.

21 The Planning Act sets out the substantive right of appeal. Leave must first be obtained from a judge. Leave is obtained on "application made within 30 days", on

"notices to the parties affected", and on "hearing such of the parties affected as appear". By its arrangement the statute makes the 30-day time limit applicable only to the "making" of the application. The requirements of notice and hearing, in subclauses (b) and (c) of subsection 51(2), are substantive requirements. They are not procedural ones. In other words, the judge hearing the application is required to ensure that the affected parties are given notice and an opportunity to be heard, but, the questions of how to bring the application and when to serve it are procedural issues governed, unless the statute provides otherwise, by the normal procedural rules of the court. This is a point also made by Côté J.A. in the Houg case (at page 199).

22 When it comes to procedure the Act itself provides, in s.53(2), that "the rules of practice applicable to appeals from a judge of the Supreme Court to the Court of Appeal apply". On reflection I have concluded that this reference can only be to the "Rules of the Court of Appeal Respecting Civil Appeals" made under s.20 of the Judicature Act.

23 Those Rules provide guidance on the interpretation and application of the statutory requirements. While the Rules do not mention applications for leave to appeal specifically, they do set out filing and service requirements. Rule 6 requires that a notice of appeal be filed within 30 days of the decision being appealed. Rule 9 requires that the notice of appeal be served within the time limited for filing of the notice of appeal. This leads me to the conclusion that there must be at least filing and service.

24 In this case formal service was not effected until after the expiry of the time limit. But, there was informal notice given to these respondents by way of the faxed copy of the Originating Notice on April 8, 1994. I have concluded that this is sufficient service.

25 There is authority for the proposition that the essential facet of launching an appeal is giving notice to the other side. This was noted in Brooks et al v. Silin, [1941] 2 W.W.R. 52 (Alta.D.C.) at page 58:

> **A person "appeals" when he formally gives notice to the opposite party of his intention to appeal although he does not in fact comply with the condition precedent required to bring the appeal on for hearing: *Cooksley v. Toomaten Oota* (1901) 5 C.C.C. 26; "Words and Terms," *Widdifield*, p. 38. In *Cooksley v. Toomaten Oota, supra,* Bole, C.C.J. said at p. 27:**
>
> **"The meaning of appealing is giving notice to your adversary of your intention to appeal: *Ex parte Saffrey; In re Lambert* (1876) 5 Ch. D. 365, 46 L.J. Bk. 89 (approved in the Court of Appeal in *Christopher v. Croll* [1885] 16 Q.B.D. 66, 55 L.J.Q.B. 78, where the Court held an appeal *was brought* when notice of appeal was served)."**

See also Re Pachal's Beverages Ltd. (1972), 31 D.L.R. (3d) 620 (Sask.Q.B.) and Re Hoeppner, [1976] 4 W.W.R. 481 (B.C.S.C.).

26 Here there was notice to the respondents well within the time limit. This is similar to the situation in the Houg case where Côté J.A. held that a letter sent with information respecting the upcoming application for leave was adequate notice. In any event, if need be, I would hold that the transmission by fax was merely irregular service and allow it in

my general power to correct irregularities in procedure.

27 I therefore hold that this application has been brought within the required time limit.

LEAVE TO APPEAL:

28 Counsel for both respondents did not seriously question the merits of the leave application. Counsel for the municipality did bring to my attention the desirability of setting out the issues on appeal with specificity. He refers in this regard to Figol v. Edmonton, [1969] 71 W.W.R. 321 (Alta.C.A.) at page 333:

> **It seems, therefore, that leave to appeal should be granted only upon specific questions of law or jurisdiction which should be set out in the order granting leave, and this would eliminate the possibility of an appellant urging, in its application for leave to appeal, certain questions of law or jurisdiction to be determined and upon the appeal itself urging different or additional questions to those upon which the order for leave was granted. Therefore, as a matter of practice, it is my view that the order for leave to appeal should in each case specify those specific questions of law or jurisdiction upon which such leave is granted and that such a practice should be followed in future cases.**

29 The Planning Act limits an appeal to questions of jurisdiction or of law. An appeal court has no authority to rehear the case on the merits. If a decision turns on facts then it must be remitted to the Board if an appeal is successful on either jurisdictional or other issues of law.

30 In his Originating Notice, the applicant sets out a number of grounds. Among them were allegations that the Board erred in its interpretation of the General Plan and Zoning By-Law. These are the types of grounds that depend on facts and, unless the interpretation is one that could not be made, the appeal court has no jurisdiction to hear them.

31 The other grounds do raise jurisdictional (in the sense of "natural justice") issues and questions of law. Those grounds have been restated by me in the form of questions so as to state the issues more clearly:

1. Did the Development Appeal Board err in law or in jurisdiction in rendering a decision which failed to comply with Section 7(2)(i) of City of Yellowknife Zoning By-Law 3424, by:

   (a) failing to include all representations made at the hearing; and
   (b) failing to set forth full or sufficient reasons for the decision reached?

2. Did the Development Appeal Board err in law or in jurisdiction in denying the applicant his rights of natural justice and a fair hearing by:

   (a) failing to give the applicant an opportunity to correct any information deemed to be "incorrect";
   (b) accepting and/or considering written materials which materials were not filed in a timely manner as required by section 7(2)(a) of the City of Yellowknife By-Law 3424 or at all, thereby depriving the applicant of due process and the opportunity to make full answer; and
   (c) failing to ensure that the applicant received, or was fully aware of his right to receive, full disclosure of the particulars of the appeal made by Gorf Holdings Ltd. and of any materials filed in support of the appeal by Gorf Holdings Ltd., thereby depriving the applicant of due process and the opportunity to make a full answer?

32 While I make no comment as to the merits of these grounds, I am satisfied that they raise arguable questions of law and jurisdiction.

CONCLUSION:

33 Leave to appeal is granted on the questions set out above.

34 The applicant, in consultation with the respondents, is to obtain a date from the

clerk for the hearing of the appeal. The applicant is also to comply with the notice requirement of s.51(4) of the Planning Act and I further direct that notice of the appeal be served as well on Gorf Holdings Ltd. If they wish to appear on the appeal, they can make application to do so to the judge hearing the appeal.

35 The costs of this application will be left to the discretion of the judge hearing the appeal.

John Z. Vertes
J.S.C.

Counsel for the Applicant: Alan C. Denroche

Counsel for the Respondent, Municipal Corporation of the City of Yellowknife: Earl D. Johnson, Q.C.

Counsel for the Respondent, the Development Appeal Board: Katherine R. Peterson, Q.C.

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