

CV 05904

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

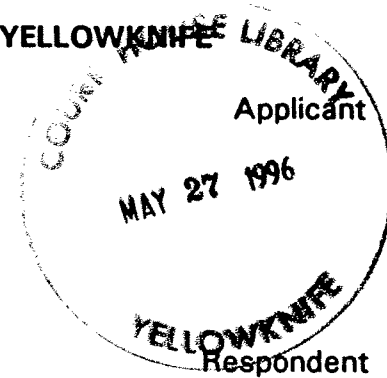
THE MUNICIPAL CORPORATION OF THE CITY OF YELLOWKNIFE

Applicant

- and -

ANTHONY FOLIOT

Respondent




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Application for interlocutory injunction. Dismissed.

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

Heard at Yellowknife, Northwest Territories  
on August 10 and September 7, 1995

Reasons filed: September 13, 1995

Counsel for the Applicant: Geoffery P. Wiest

Counsel for the Respondant: Austin F. Marshall

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REASONS FOR JUDGMENT

The City of Yellowknife seeks an interlocutory injunction to restrain the respondent from building a storage shed because he has not obtained, as required by the municipal by-laws, a development permit and a building permit. Considering the fact that the respondent's home, to which he intends to add this storage shed, is within the municipal boundaries of the City of Yellowknife, this seems like a straight-forward request. It is anything but that.

2 The respondent's home is a houseboat. It is located 120 feet offshore in Yellowknife Bay in Great Slave Lake. It stands on a floating deck supported by barrels and anchored to the lakebed. There are 17 other houseboats located in Yellowknife Bay used as residences. Some of them have been there for many years. I do not think there is any doubt that the municipality is using this case as a test of whether it has jurisdiction

over these residences. This is reflected by the scope of the relief sought by the municipality in these proceedings:

1. A Declaration that the Respondent's houseboat is assessable and liable to taxation pursuant to the *Property Assessment and Taxation Act*.
2. A Declaration that the Respondent's use of lands owned by the Queen in Right of Canada is assessable and liable to taxation pursuant to the *Property Assessment and Taxation Act*.
3. A Declaration that the City's jurisdiction to enforce its By-laws extends to the Respondent's houseboat construction project and generally to all houseboats located within City limits.
4. A Declaration that the Respondent has failed to comply with the City of Yellowknife Zoning By-Law No. 3424 on the basis that he did not obtain a development permit for construction work at this location.
5. A Declaration that the Respondent has failed to comply with the City of Yellowknife Building By-Law No.2300 on the basis that he did not obtain a building permit for construction work at this location.
6. An injunction prohibiting the Respondent, his servants, agents, or contractors from continuing construction at this location until such time as the lawful requirements of the City have been complied with on the grounds that:
  - (a) no development permit has been issued authorizing the construction at this location as is required under section 5 of the Zoning By-law of the City of Yellowknife; and

- (b) no building permit has been issued authorizing the construction at this location as is required under section 2.9.8.14 of the Building By-law of the City of Yellowknife.

3 On this application it is not up to me to decide whether the City is entitled to all of the relief it seeks. That must await full argument once all the facts and legal authorities have been canvassed by the parties. My job now is to decide simply whether an injunction should issue until the full argument can be made and a judgment on the merits can be issued. The test I must apply at this point is well-known and was most recently elucidated by the Supreme Court of Canada in R.J.R. MacDonald Inc. v. Canada (Attorney-General), [1994] 1 S.C.R. 311, at page 334:

First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits.

4 It should be noted that the federal government was given notice of these proceedings. Counsel from the Department of Justice informed the court that the government did not wish to participate since no relief is sought as against the Government of Canada.

5 Serious Question To Be Tried:

I must make a preliminary assessment of the merits of the case. That does not mean deciding whether the applicant has a strong chance of success, merely that there is a serious issue to be tried. The threshold is very low.

6 There is no dispute that the waters of Yellowknife Bay come under the jurisdiction of the Government of Canada. The municipality's case rests on the proposition that, since the federal government has not exercised authority over the respondent's houseboat, the municipality can exert its regulatory authority over the respondent's use of the houseboat. This argument raises complex issues regarding the constitutional division of powers as between the federal government and provincial or municipal governments.

7 The *Constitution Act*, 1867, s.91(10), grants jurisdiction over "navigation and shipping" to the federal government. The extent of this power is described by Prof. Peter W. Hogg in his *Constitutional Law of Canada* (3rd ed., 1992), at pages 22-19 and 22-20:

The federal power over navigation and shipping in s.91(10) confers federal legislative competence over navigable waters, works of navigation, harbours, and a far-reaching body of maritime or admiralty law, which includes laws regarding rules of navigation, liability for maritime accidents, liability for loss or delay of a ship's cargo, marine insurance, the sale, purchase and ownership of ships, the construction, repair and maintenance of ships, and pilotage and towage.

Federal power over navigation and shipping is not confined to undertakings engaged in interprovincial or international shipping; it applies to vessels engaged in local shipping, and to pleasure boats as well as commercial vessels. Nor is it confined to the high seas, or even to tidal waters: it extends up navigable rivers as well. All waterways are "part of the same navigational network" and must be subject to the "uniform legal regime" of Canadian maritime law. All boats share that system of waterways, and they must obey the same federal "rules of the road" and be subject to the same federal regime of tortious liability. The legislative authority over navigation and shipping that is conferred on the federal Parliament by s.91(10) is, therefore, much more extensive than the authority over other forms of transportation and communication, where s.92(10)(a) is the sole source of authority. (citations omitted)

8 The municipality, as a creature of territorial legislation, derives its authority to enact by-laws regulating land use and development through the provisions of the *Planning Act*,

R.S.N.W.T. 1988, c. P-7. Generally speaking, courts have recognized "overlapping" or "concurrent" fields of jurisdiction in some instances with the result that both authorities, the federal government and a municipality, are permitted to legislate in a particular field. While both legislative bodies may exercise concurrent jurisdiction in overlapping fields, where there is conflict, in the sense that compliance with one law involves breaching the other, the federal power must prevail and the competing enactment is suspended and inoperative: *Johannesson v. Rural Municipality of West St. Paul*, [1952] 1 S.C.R. 292; *Hamilton Harbour Commissioners v. City of Hamilton* (1979), 21 O.R. (2d) 459 (C.A.); *British Columbia v. Van Gool*, [1987] 4 W.W.R. 373 (B.C.C.A.).

9

The respondent contends that there are indications that the federal government does exercise some regulatory control. The respondent's houseboat has been issued a "vessel licence" under the *Canada Shipping Act*, R.S.C. 1985, c. S-9. Neither counsel were able, however, to delineate the regulatory effect that such a licence carries. I was told that both parties are still making enquiries of federal officials to determine the extent of federal activities in Yellowknife Bay. Respondent's counsel also pointed out what may be indicia of a federal intent to exercise jurisdiction over houseboats as part of its broad authority over navigation and shipping. First, the *Public Harbours and Port Facilities Act*, R.S.C. 1985, c. P-29, defines "vessel" as including a "floating home". Second, the *Navigable Waters Protection Act*, R.S.C. 1985, c. N-22, provides for the regulation of "works", which by its definition includes any structure that may interfere with navigation, by the federal Minister of Transport. Again, however, counsel were unable, at this preliminary stage, to delineate the extent of regulatory control these enactments entail or the actual controls, if any, in place for Yellowknife Bay.

10 The jurisdictional issues are certainly not free of doubt. The municipality has a legitimate concern over the extension of its public regulatory powers. The respondent has a similar concern about being subjected to possibly overlapping or conflicting controls. The application is not frivolous or vexatious. It raises serious questions for trial.

Irreparable Harm:

11 Would the municipality, if an injunction is not granted, suffer irreparable harm?

12 This criterion was explained in the R.J.R. MacDonald case (at page 341):

At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.

"Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other.

13 The municipality says that the "harm" it will suffer, should the applicant proceed with his construction, is two-fold: first, it will be unable to fulfill its obligation to protect the public's safety because this construction will have been carried out without any regulation; and, second, the municipality cannot regulate it after it is constructed. The municipality is prepared to give an undertaking to compensate the respondent for any damages he may suffer as a result of the issuance of this injunction.

14

The respondent, on the other hand, says that this is a minor construction that could be moved if need be outside of the city limits. To put things in perspective, I will briefly describe the proposed construction.

15

The respondent's houseboat is a two-storey structure. A few months ago he built a platform, measuring 12 feet by 16 feet, resting on barrels and adjacent to the residence. He now wants to build a storage shed on this platform. He wants to have it built before the onset of winter so he can store various things in it.

16

I am not convinced that the municipality would suffer harm if this construction is not stopped. The size of the structure is relatively small. It is located away from other structures. It is not to be used for anything other than storage. The municipality has not historically regulated activities in the bay.

17

I do not discount the municipality's public responsibilities in my consideration of this criterion. As a general proposition, when a public authority is prevented from exercising its statutory powers, then the "public interest", of which that authority is the guardian, suffers harm. But in this case, the very question of the municipality's jurisdiction is in issue. The public interest, if any, is much less likely to be detrimentally affected where, as here, the inability of the municipality to enforce its by-laws affects only a small number of people, for example, houseboat owners generally and this respondent in particular. The ability of the municipality to enforce its by-laws elsewhere throughout its area is unaffected. The validity of its by-laws are unquestioned. Therefore I conclude that any harm, by not issuing an injunction, would be merely theoretical.

**Balance of Convenience:**

18           The municipality wants to extend its reach to an area that up to now has been free of municipal regulation. The legal issues are complex and it is far from certain as to how the jurisdictional issue will be resolved. It is much too complex to predict the outcome at this stage, especially without further elaboration of facts and law. If the municipality is unsuccessful, then it really has not "lost" anything since it has never exercised its authority in this manner before.

19           The respondent, on the other hand, has been living in his houseboat since 1993. All he is building is a storage shed. It seems to me, having regard to the complex legal issues raised by this application, that an injunction, which after all is an extraordinary remedy, is a measure disproportionate to the activity undertaken. It would be far more inconvenient, as a practical matter, for the respondent if he cannot build his storage shed. I am satisfied that this criterion lies in the respondent's favour.

20           For the foregoing reasons, the application for an interlocutory injunction is dismissed. Costs will be left to be determined by the trial judge.



J. Z. Vertes  
J.S.C.

Dated at Yellowknife, Northwest Territories  
this 13th day of September, 1995

Counsel for the Applicant: Geoffery P. Wiest

Counsel for the Respondent: Austin F. Marshall

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**Reasons for Judgment of the  
Honourable Mr. Justice J. Z. Vertes**

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