

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

**BORIS KOTELEWETZ, in his own  
capacity, and carrying on business as  
BAKER LAKE LODGE,**

Applicant

- and -

**HAMLET OF BAKER LAKE; KELVIN NG (in  
his capacity as Minister for Municipal and  
Community Affairs); and DONALD  
MORIN (in his capacity as the Minister for  
Public Works and Services and for the  
N.W.T. Housing Corporation)**

Respondents

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Application for an interlocutory injunction. Denied.

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

Heard at Yellowknife, Northwest Territories  
on August 21, 1995

Reasons filed: August 24, 1995

Counsel for the Applicant: Scott Duke

Counsel for the Hamlet of Baker Lake: Edward W. Gullberg

Counsel for the Government of the Northwest Territories: Luc Cadieux

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**REASONS FOR JUDGMENT**

The applicant has commenced proceedings for a declaration that a certain by-law enacted by the Hamlet of Baker Lake is invalid. On this application he seeks an interlocutory injunction restraining the respondents from proceeding with construction work on the land affected by the by-law. For the reasons that follow, the application is denied.

**Facts:**

2 The applicant owns and operates a tourism business in Baker Lake. Adjoining his property is an area that has for many years been designated as an "urban reserve". This designation is used to control development in areas that are affected by some type of environmental constraint. The Hamlet had long considered developing the area for residential housing. The environmental constraints, however, identified as severe snow drifting problems and poor soil drainage, impeded development. Several assessments

were carried out including a geotechnical study in late 1993. This study identified the area in question as one that could be developed although the cost of doing so will be higher due to the poor soil drainage conditions.

3 On August 18, 1994, the Hamlet enacted by-law number 81, the by-law in question in this action. This by-law was subsequently approved by the Minister of Municipal and Community Affairs. The purpose of the by-law was to amend the Hamlet's zoning by-law so as to redesignate the land from "urban reserve" to "residential".

4 Since passage of the by-law the N.W.T. Housing Corporation implemented plans for the construction of residential housing units on the land. Their construction is an attempt to alleviate what is viewed as a pressing and urgent need for new housing in Baker Lake. Significant money has already been expended in shipping material to Baker Lake and a contract has been awarded for the construction of foundation pads and survey and site work. Initially four houses are to be constructed. All that is planned to be done prior to winter setting in is the construction of the foundation pads. These pads have to settle for approximately one year prior to actual construction of the houses.

5 In addition, the territorial Department of Public Works, on August 8th of this year, issued a contract for road construction in the proposed development area. As it turned out, the applicant, through one of his companies, bid on this project. He was not successful. This project has just recently commenced since the available construction period prior to the onset of winter is very short.

It is these two construction projects that the applicant wanted to restrain until the validity of by-law number 81 has been determined by this court.

Principles:

7 The grant of an interlocutory injunction is discretionary. By the very nature of the application there is usually limited evidence before the court. Facts which are in dispute, or difficult questions of law, cannot be decided on these types of applications. All that must be left for the trial.

8 There is a well-known three-part test to apply when considering an application for an interlocutory injunction. The Supreme Court of Canada, in R. J. R. MacDonald Inc. v. Canada (Attorney-General), [1994] 1 S.C.R. 311 (at page 334), stated that the following exercise should be undertaken:

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 for the granting or refusal of the remedy pending a decision on the merits.

Serious Question to be Tried:

9 The applicant submitted that there are two serious questions to be tried: (1) Was by-law number 81 validly enacted? (2) Were the environmental concerns adequately addressed prior to passage of the by-law?

10 With respect to the enactment of the by-law, the applicant alleges that there was a failure to follow strictly the procedural requirements of s.25 of the *Planning Act*,

R.S.N.W.T. 1988, c.P-7. That Act requires certain steps, including a public hearing, to be held as part of the enactment of such a by-law. Applicant's counsel was unable, however, to point out any specific infraction of the mandatory requirements of that section.

11 There is no question that the Hamlet has the jurisdiction to pass by-law number 81. In addition, the statutory requirement of ministerial approval was satisfied (although counsel were unable to advise me as to the actual process by which the Minister decides to give or withhold approval). It is significant, however, that as far as the officials of the Department of Municipal and Community Affairs were concerned, environmental factors had been adequately addressed.

12 The major complaints respecting the enactment of the by-law are more in the nature of alleged defects of due process. The applicant alleges that Hamlet councillors were biased against him; that they gave insufficient consideration to the concerns raised by him and others; that the Hamlet councillors had a predisposition to favour passage of the by-law; and, that some councillors were in a conflict of interest since they were business competitors of his. He says that the public consultation process was a sham.

13 With respect to the environmental concerns, the applicant alleges that there was no consideration of them, or at least, they were inadequately considered. But, as pointed out by the Hamlet's counsel, there was no statutory obligation to address these concerns in a particular way. It may be relevant but it is not a condition precedent to enactment

of the by-law. The environmental concerns were ones initially raised by the Department and the Department is now no longer concerned.

14 In my opinion, the issue of how well, if at all, the environmental concerns were addressed is a highly subjective one. In the absence of some statutory requirement I cannot say that issue, by itself, is serious enough to be tried. The due process issues, however, are always serious. They may be unfounded but that is something to be decided at a trial.

Irreparable Harm:

15 Will the applicant suffer irreparable harm, harm that cannot be compensated for by damages, if this application is refused?

16 The applicant stated in his affidavit that the construction, currently in progress, would be an irrevocable step that could affect his property. He said that his property is "particularly vulnerable" to the environmental concerns previously identified, those being severe snow drifting and poor drainage resulting in heavy runoff, so that it would be subject to spring flooding. He offered no evidence in support of this claim, not even anecdotal evidence of any such occurrence in the past. His counsel argued that while his concerns may be somewhat speculative they have a foundation in earlier studies identifying these problems.

17 Counsel for the respondents both argued that the applicant's claim of potential harm is speculative. The government's counsel referred me to the requirement that the

applicant show a "high degree of probability that the harm will in fact occur": see Ominayak et al v. Norcen Energy Resources Ltd. (1985), 36 Alta. L.R. (2d) 137 (C.A.). He submitted that there is no evidence to meet this test. I agree.

18 The evidence is purely speculative. Furthermore, the applicant fails to consider the protective measures that were addressed in the geotechnical study of 1993. That study concluded that construction could proceed but consideration has to be given to certain drainage requirements. In addition, the Hamlet plans to construct snow fences to control drifting. I respectfully adopt a further comment from the Ominayak case (per Kerans J.A. at page 145):

We think that the courts should not forget that an interim injunction is emergent relief. The claimant seeks a remedy without proof of his claim. This inversion should only be considered in cases where the harm is of such seriousness and of such a nature that any redress available after trial would not be fair or reasonable.

19 Finally, I find there is a lack of proof that any harm to the plaintiff's property or business could not be compensated for in money damages.

Balance of Convenience:

20 While it is not strictly necessary for me to consider which party would suffer more than the other should the injunction be granted or denied, since I have already found that the applicant would not suffer irreparable harm from its denial, I think it is worthwhile to set out one observation.

21 The respondents are carrying out a public purpose in these construction activities, that being the provision of public housing. If construction is stopped, this season is

effectively lost and the availability of this housing may be pushed back by another year. In this case one must have regard to the inconvenience to the public of Baker Lake should this project be delayed. The public interest is a significant consideration in any balancing exercise: Copithorne v. Calgary Power Limited (1955), 17 W.W.R. 105 (Alta. C.A.); Smith et al v. Inner London Education Authority, [1978] 1 All E.R. 411 (C.A.).

Other Factors:

22 In this case there are some other special factors militating against issuance of an interlocutory injunction.

23 As previously noted, there is no question about the Hamlet's jurisdiction to pass the by-law. It is the manner in which they did it that is the cause of the applicant's discontent. So, even if the applicant is ultimately successful in this action, there is nothing to prevent the Hamlet from starting the process all over again so as to enact a similar by-law a second time. One may be tempted to ask what is the point of this litigation (although I recognize that every citizen, including the applicant, has a right to expect that public bodies, such as the Hamlet council, will abide by the law in carrying out their duties).

24 I was advised that the Hamlet is currently embarked on a comprehensive review of its zoning by-law. Public hearings are expected to be held in September. Under the proposed new by-law the land in question would be zoned "residential". Again these proceedings may be for naught.

25 I note as well that, although the by-law came into force in September of 1994, it was not until mid-June of 1995 that the applicant raised his concerns about the by-law in correspondence to the Minister of Municipal and Community Affairs. It was not until August 14th that these proceedings were commenced. It seems to me that this delay by the applicant serves as an indication that the risk to the applicant, of which he now complains, is not so significant as to warrant interim relief. More importantly, in this case it may be said as well that the delay in commencing this attack on the by-law's validity has been prejudicial to the respondents who have, since enactment of the by-law, made plans and spent money on the construction projects. The applicant could have, and should have, brought these proceedings sooner if he was so concerned.

26 Finally, it will be recalled that the applicant made an unsuccessful bid on the road construction project he now wanted to halt. This fact was not disclosed in his affidavit. It should have been. His counsel submitted that the bid was put in because the applicant thought the best way to influence the project was to be a part of it. Yet there was no explanation for the non-disclosure of this fact. One could conclude that this fact provides a motive for this application: an attempt to stop this project by a failed bidder. It would be speculation for me to conclude that but such speculation is the risk in non-disclosure.

27 The irony in the applicant's bid to do some of the construction work should be apparent to even himself. What if (one may ask rhetorically) he had been awarded this contract? Would he now be asking this court to stop the project? I doubt it.

Applicant's counsel advised me that the applicant does not oppose in principle the development of the land in question for housing; he merely wants the various environmental concerns adequately addressed. If that is the case then perhaps the upcoming public consultation for the new zoning by-law is a more appropriate forum to discuss those concerns than this courtroom.

29 An interlocutory injunction is an extraordinary remedy, to be granted on equitable terms, so all of these factors played a part in deciding against granting this application.

Disposition:

30 The application is dismissed. The respondents will have their costs of this application. Counsel may file written submissions to me should they be unable to agree on costs.

31 Counsel should be prepared to speak to the question of directions for the trial of this action at the regular chambers session of September 18, 1995.

  
J. Z. Vertes  
J.S.C.

Dated at Yellowknife, Northwest Territories  
this 24th day of August, 1995

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Counsel for the Hamlet of Baker Lake: Edward W. Gullberg

Counsel for the Government of the Northwest Territories: Luc Cadieux

CV 05949

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

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