

994552 N.W.T. Ltd. v. HMTQ, 2005 NWTSC 26

S-1-CR-2004000140

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

994552 N.W.T. LTD.

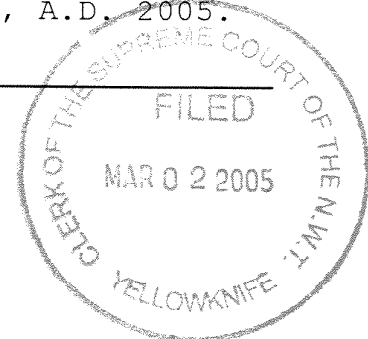
Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

Transcript of Decision on Appeal by the Honourable
Justice V.A. Schuler, sitting at Yellowknife, in the
Northwest Territories, on February 10th, A.D. 2005.



APPEARANCES:

Mr. L.M. Walsh: Counsel for the Appellant
Ms. L.M. Bouwmeester: Counsel for the Respondent
(Charge under s. 4.1.1 Building By-Law No. 3815)

1 THE COURT: Well, I appreciate that
2 counsel have put slightly different
3 interpretations on the evidence that was before
4 the Justice of the Peace. It may be that to some
5 extent the evidence wasn't fleshed out as much as
6 it could have been before the Justice of the
7 Peace, but I have to deal with what is in the
8 transcript and the questions that were asked and
9 the answers that were given.

10 It seems clear that the development permit
11 was, as Mr. Walsh says, basically ready to go
12 when an appeal was filed at the 11th hour and,
13 therefore, under the legislation the permit did
14 not go into effect; did not, in fact, issue. It
15 is clear from the transcript that the company
16 knew that and that they were warned by way of a
17 sort of informal field order that they should not
18 be working, but continued to work in any event.

19 So I suppose that maybe from the company's
20 point of view they figured they were going to get
21 the permit anyways, but certainly based on those
22 facts there was a flagrant disregard of the fact
23 that they did not, in fact, have the permit once
24 the appeal had been filed.

25 This, of course, is a sentence appeal. It
26 is not a conviction appeal. So I think that is
27 all I need to say about the facts.

1 The test on a sentence appeal is that unless
2 there has been an error in principle or the
3 sentence is demonstrably unfit, the sentence
4 should not be interfered with. Certainly, many
5 courts have said that a great deal of deference
6 is owed to the sentencing judge at the first
7 instance.

8 But, in my view, there are two areas of
9 concern. One is that the Justice of the Peace
10 imposed the maximum fine, \$10,000, in
11 circumstances where there was no prior record put
12 before the court and in circumstances where there
13 do not appear to have been factors that one might
14 call aggravating beyond the simple fact that the
15 lack of a permit was simply disregarded by this
16 company. In other words, there were not other
17 surrounding factors that aggravated that in
18 particular.

19 As the City's counsel has quite fairly
20 acknowledged, there were no safety concerns in
21 this case. The concern is really that a builder
22 obey the law and abide by the regulations that
23 are in place so that the public can have
24 confidence in those regulations.

25 So when I look at the transcript, it is
26 difficult, in my view, to know why the Justice of
27 the Peace felt that the maximum fine that was

1 available was appropriate in this case. I note
2 that on page 21 of the transcript the only thing
3 that is said about that is simply that it is an
4 ongoing offence; therefore \$10,000.

5 Now, certainly there was evidence that the
6 company did continue to work. In other words,
7 this was not a momentary picking up some work and
8 finishing it. It continued to work despite the
9 absence of the permit. That is a factor that can
10 be taken into account, but it certainly is not a
11 case where there was a charge for more than one
12 occasion. I don't know whether the Justice of
13 the Peace was thinking of that because of some of
14 the discussion that was had earlier with the
15 prosecutor about whether there would be a certain
16 amount per day for a continuing offence.

17 So it seems to me that, in my respectful
18 view, that is the first point on which there is
19 an error in principle, to impose the maximum fine
20 in a case where there is certainly no evidence
21 that this is the worst offence or the worst
22 offender, which is generally the circumstance for
23 which the maximum penalty is reserved.

24 The other point I take into account is that
25 the submission by the City at the time was that a
26 \$2,000 fine would be appropriate. That is what
27 the City was seeking. I want to be as precise as

1 possible. What the Constable who appeared for
2 the City said was: "In point of that fact,"
3 referring to the fact that the company did not
4 appear in court:

5 we would be seeking an increased
6 penalty, at your discretion, of
7 course, in the range of \$2,000.

8 So they were asking for a penalty in the range of
9 \$2,000, which is, obviously, significantly
10 different from the fine that was actually
11 imposed.

12 Despite the valient efforts of Ms.
13 Bouwmeester, I don't see that the \$2,000 range
14 that was suggested was in any way inadequate or
15 inappropriate in the circumstances of this case.
16 The other cases that have been referred to
17 involve different types of violations, different
18 punishment schemes, different maximums, and it is
19 difficult to compare precisely when the facts are
20 not the same and, in fact, it is not the same
21 legislation that is being considered in a case.

22 So, in my view, the Justice of the Peace
23 ought to have had regard to what was being
24 submitted by the City and, as I say, absent an
25 indication that that submission was really
26 inadequate, demonstrably inadequate in some way,
27 ought to have imposed a fine in that range.

1 As far as, then, concluding that there was
2 an error in principle that does entitle this
3 court to intervene, in my view the considerations
4 that are the most important are that the company
5 did continue despite the warning, if I can put it
6 that way, that was given to it that it was not to
7 continue because of the appeal and, therefore,
8 the fact that the development permit had not been
9 issued. The significance, in other words, the
10 scale of the project is a consideration. I am
11 not sure that it is to be given much more weight
12 than any other considerations.

13 I think to take into account as an
14 aggravating factor that the company did not
15 appear at the trial is problematic, because
16 certainly the general rule is that an accused is
17 not to be punished more severely because he or
18 she exercised their right to a trial. Now, in
19 this case it is a little bit different because
20 the company simply didn't appear, didn't make the
21 voluntary payment, and the trial proceeded ex
22 parte. But, in effect, that amounts to a not
23 guilty plea, and, even though the company didn't
24 participate in the trial, amounts to, I suppose,
25 exercising the right to have the allegations
26 proved in court. There is nothing that would
27 prevent an appeal in those circumstances. So I

1 think it would be an error for me to consider
2 that as an aggravating factor.

3 As far as it being a high profile
4 development in a relatively small community, I am
5 not sure that I have that evidence before me; in
6 other words, the extent to which the development
7 was one that had a high profile or attracted a
8 lot of community concern, and I don't want to
9 speculate about that. Certainly it wasn't a
10 small development. I have already said that.
11 Being an apartment building, it can't be
12 described that way. But I want to be careful
13 about taking into account facts that really are
14 not before me.

15 In any event, in my view, considering that
16 it was a first offence, there was no record
17 before the court, considering the circumstances
18 and the position that was taken by the City at
19 the trial, the appropriate fine would be one in
20 the amount of \$2,000, and that is what I am going
21 to substitute, then, for the fine that was
22 imposed.

23 I don't know whether anything has been done
24 about payment, Mr. Walsh.

25 MR. WALSH: I don't think so, Your Honour.

26 THE COURT: Because there was 30 days
27 given to pay. Now, that was back in November, so

1 I don't know.

2 MS. BOUWMEESTER: I can inform the Court that I
3 checked that prior to attending this morning and
4 the ticket was held back in abeyance pending the
5 outcome of the appeal. So no monies have yet
6 been paid.

7 THE COURT: So the --

8 MS. BOUWMEESTER: No monies have yet been paid.

9 THE COURT: No monies have yet been paid.

10 All right. So if I say 30 days to pay, then,
11 from this date, is that --

12 MR. WALSH: That would be fine, Your
13 Honour.

14 THE COURT: -- sufficient?

15 MS. BOUWMEESTER: Certainly.

16 THE COURT: All right. The appeal, then,
17 is allowed as indicated and that sentence
18 substituted.

19 MR. WALSH: Thank you, Your Honour.

20 MS. BOUWMEESTER: Thank you, Your Honour.

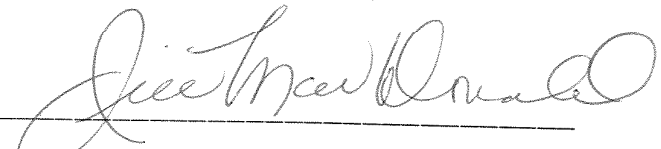
21 THE COURT: Thank you very much for your
22 materials, counsel. They were very interesting.
23 I probably learned a little bit more about
24 building permits than I ever have before. Thank
25 you.

26

27

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

Certified to be a true and accurate transcript pursuant to Rules 723 and 724 of the Supreme Court Rules.



Jill MacDonald, CSR(A), RPR
Court Reporter