

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

5142 NWT LTD., AFM HOLDINGS LTD., CARTER INDUSTRIES LTD.,  
G&L WORKWEAR LTD., GODWIN STORES LTD., HAY RIVER DISPOSALS  
(1985) LTD., JAMESON HOLDINGS LTD., operating as JAMESON'S TRUE  
VALUE HARDWARE, SCOTT'S ELECTRICAL SERVICES LTD.,  
STAN DEAN & SONS LTD. and TERRITORIAL QUICK PRINT INC.

Applicants

-and-

THE MUNICIPAL CORPORATION OF THE TOWN OF HAY RIVER,  
GREG McMEEKIN and HAY RIVER LIQUOR RETAILERS (1991) LTD.

Respondents

**MEMORANDUM OF JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL**

[1] Hay River Liquor Retailers (1991) Ltd. ("Hay River Liquor Retailers") obtained a development permit to add a retail liquor store to its existing liquor warehouse and recycling depot in an industrial area of Hay River. An appeal by Greg McMeekin to the Development Appeal Board was dismissed with written reasons dated February 6, 2007. The Applicants seek leave to appeal the Board's decision to this Court pursuant to s. 51 of the *Planning Act*, R.S.N.W.T. 1988, c. P-7.

**Background**

[2] Hay River Liquor Retailers applied for a development permit for the construction of a retail liquor store on land in an area of the Town of Hay River zoned for Service Highway Commercial use. The land was already being used for a liquor warehouse and recycling depot. Hay River's Zoning and Building Bylaw No. 1812 (the "Zoning Bylaw") identifies a retail store in that area as a discretionary use.

[3] The development permit was approved by the Town's Development Officer, subject to a number of conditions. The issuance of the permit was appealed to the Development Appeal Board by the Respondent Greg McMeekin. Mr. McMeekin raised three issues in his letter of appeal: the proposed development was for a retail outlet and did not have any commercial or industrial applications; there were safety and health issues arising from the recycling depot at the location; and there were safety concerns arising from the absence of proper sidewalks, lighting and access to the proposed development.

[4] The Development Appeal Board heard Mr. McMeekin's appeal on January 17, 2007. Mr. McMeekin spoke to the appeal and five other individuals also spoke in support of it, although none had filed their own appeal. The Board also had before it written materials, including a letter from counsel for the Applicant Jameson Holdings Ltd.

[5] The Board issued its decision dismissing the appeal on February 6, 2007. The Applicants now apply for leave to appeal that decision. Mr. McMeekin has not sought leave to appeal and, although named as a Respondent to this application, has sent correspondence to the Court indicating that he wants nothing to do with the appeal.

[6] Although a number of grounds of appeal are set out in the originating notice filed by the Applicants, in argument their counsel indicated that only the following two grounds would be pursued:

- a. the Board erred in law and/or jurisdiction in failing to provide full reasons for denying the appeal or in providing reasons that were inadequate;
- b. the Board did not correctly interpret, apply or comply with the General Plan (Bylaw No. 1811) and Zoning Bylaw.

[7] The Respondents Town of Hay River and Hay River Liquor Retailers have raised a preliminary issue, that being whether the Applicants have standing on this application.

### Statutory Provisions

[8] The relevant provisions of the *Planning Act* are as follows (I have included provisions dealing with appeals to the Board, referred to in the *Act* as the “appeal board”):

23.(1) A person claiming to be affected by a decision of a development officer or a council made under a zoning by-law may appeal to the appeal board by serving written notice of appeal to the appeal board ...

(3) An appeal board shall

(a) hold a hearing within 30 days after the receipt by it of a notice of appeal;

(b) ensure that reasonable notice of the hearing is given to the appellant and all persons who, in the opinion of the appeal board, may be affected; and

(c) consider each appeal having due regard to the circumstances and merits of the case and to the purpose, scope and intent of a general plan that is under preparation or is adopted and to the zoning by-law that is in force.

(4) Where an appeal is heard, the appeal board shall hear the development officer and any other persons that it considers necessary for a full and proper hearing.

...

(6) A decision of an appeal board is final and binding on all parties subject only to appeal under section 51.

...

50. In the conduct of hearings under section 23, an appeal board is not bound by the technical rules of evidence, but shall

...

(b) provide every person concerned with the opportunity to be heard, to submit evidence and to hear the evidence of and cross-examine others; and

...

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.

...

52. On the hearing of an appeal by the Supreme Court,

(a) the party who made the order or decision appealed from and any other party affected is entitled to be represented by counsel or otherwise and to be heard on the argument;

....

### Standing

[9] The Town and Hay River Liquor Retailers take the position that the Applicants do not have standing because they were witnesses, not appellants before the Board or, alternatively, because they have not put before this Court any evidence that they have any greater interest in the appeal than any other citizen.

[10] The Applicants take the position that the right of appeal to this Court is a wide one that can be exercised by any person interested in the challenged decision. They say there is evidence before the Court to substantiate their claim to be persons affected.

[11] Section 51 of the *Act*, which provides that “an appeal on a question of jurisdiction or on a question of law lies” to this Court from a decision of the Board, does not say to whom the right of appeal is given. It is therefore necessary to examine the other provisions of the *Act* to determine whether any limitation was intended on

that right of appeal: *Re Day & Ross Ltd. and Jumbo Motor Express Ltd.* (1972), 27 D.L.R. (3d) 115 (N.B.C.A.).

[12] The provisions relating to appeals to the Board suggest an intent to grant the right to appeal to a fairly wide group of people: s. 23(1) gives that right to a person “claiming to be affected”. Sections 51(2)(b) and ( c ) and 52(a) provide that on applications for leave to appeal and on appeals in this Court, a “party affected” is entitled to be heard; this suggests to me a somewhat more restricted group than those who simply claim to be affected. In other words, there is a more objective aspect to the determination of whether the party is affected. If a party affected can be heard on an appeal to this Court, it would seem logical that a party affected also be permitted to appeal, even if that party did not file an appeal with the Board, and subject to the requirement for leave.

[13] Section 10 of the *Interpretation Act*, R.S.N.W.T. 1988, c. I-8 as amended provides that, “Every enactment shall be construed as being remedial and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects”. The object of the appeal provisions in the *Planning Act* is to allow those affected by a decision to be heard on an appeal. Where an appellant at the Board level declines to proceed further, as Mr. McMeekin did in this case, it would not accord with s. 10 to exclude others who are affected from appealing the decision only because they did not file an appeal to the Board. The only way they can be heard is if one or more is allowed to appeal to this Court.

[14] Counsel for Hay River Liquor Retailers characterized those who spoke at the Board hearing as witnesses. Although the Board itself seems to have considered their submissions as “evidence”, the transcript indicates that they were not examined or cross-examined as witnesses, but were heard as to their reasons for opposing the development permit. I would not characterize them as witnesses in the usual sense of persons who provide evidence but do not necessarily have an interest in the outcome of the proceeding. In my view, they are better described as persons who objected to the development permit or supporters of Mr. McMeekin’s appeal. However, that in itself is not determinative; the issue is whether they can be considered persons affected.

[15] The argument was also made that if Mr. McMeekin had withdrawn or abandoned his appeal before the Board hearing, there would have been no appeal extant and nothing upon which those who had supported the appeal could be heard. I

need not deal with that, however, since that is not the situation before me. The issue before me is simply whether the Applicants should be granted standing at this point for purposes of an appeal in this Court.

[16] On this issue, the Court can also look to its inherent jurisdiction. In *Société des Acadiens du Nouveau-Brunswick Inc. v. Assn. of Parents for Fairness in Education, Grand Falls District 50 Branch*, [1986] 1 S.C.R. 549, Wilson J., with whom the rest of the panel concurred on this point, held that as a result of New Brunswick's *Judicature Act* granting the New Brunswick Court of Appeal the jurisdiction exercised by the High Court of Chancery in England, and the practice of the High Court of Chancery to grant leave to appeal to a non-party in a proper case, the New Brunswick Court of Appeal also had that jurisdiction.

[17] In the Northwest Territories, the *Judicature Act*, R.S.N.W.T.1988, c. J-1, s. 9(a) provides that this Court has the jurisdiction that on July 15, 1870, was in England vested in the High Court of Chancery. Based on the analysis of Wilson J., I conclude that when this Court sits on an appeal under the *Planning Act*, it has the jurisdiction to grant leave to appeal to a non-party in a proper case. Therefore, the fact that the Applicants were not parties to the appeal before the Board in the sense that they did not file an appeal, does not preclude them from obtaining leave to appeal in this Court.

[18] Although I conclude, based on the provisions of the *Planning Act* and in the exercise of this Court's inherent jurisdiction, that a person who did not appeal to the Board can be granted standing to appeal to this Court, the issue remains whether the Applicants should be granted standing in this case.

[19] Since Mr. McMeekin has elected not to appeal, unless the Applicants (or one of them) are granted standing and leave to appeal, the position they advocate will not be heard and considered. In my view, whether they should be granted standing involves consideration of two factors: whether they can be said to be adversely affected by the Board's decision and whether they have a reasonably arguable case. I do not accede to the argument made by counsel for the Applicants that the fact that the *Planning Act* grants a statutory right of appeal means the door is wide open; that right of appeal is circumscribed by the requirement to obtain leave of the Court so the right of appeal itself does not lower the bar for obtaining standing.

[20] The essence of the Applicants' position on the merits of the appeal is that the Board failed to take into account directions in the General Plan that the Town ensure that the downtown core remain as the major retail, service and office focus of the community, that the Town continue to protect the vitality of the downtown core for those purposes and that the Town continue to promote infilling of the downtown core before expansion (s. 4.2 of the General Plan). The argument is that the decision to allow development of retail stores outside the downtown core adversely affects the downtown core and the orderly development of the Town. The Applicants also say that the C2 - Highway Service Commercial zone where the development permit allows the retail liquor store to be located, is, under s. 6.10 of the Zoning Bylaw, for highway and service oriented commercial uses which are more appropriately located there than in any other commercial or industrial zone. They say that a liquor store does not fall within that description.

[21] To be granted standing, the Applicants must first show that they are each adversely affected by the Board's decision. The affidavit relied on by the Applicants states:

2. Each of the Applicants in this action are businesses that operate and are located in the Town of Hay River, Northwest Territories. Most of the Applicants own land within the Town of Hay River's municipal boundaries and, as such, are ratepayers of the Town of Hay River. Many of the Applicants' businesses are located in the downtown core of the Town of Hay River.

[22] Since the above paragraph is not specific about which Applicants own land and which have businesses in the downtown core, the only common factor is that all operate and are located somewhere in the Town of Hay River.

[23] Apart from that paragraph, the evidence consists of what was said by persons who spoke at the Board hearing and the written material that was before the Board. Included in that material is a petition in support of Mr. McMeekin's appeal and against the development permit. The petition does not set out what interest each of the signatories has in the issue or how they are affected, so it does not provide any direct evidence relevant to the issue of standing. Indeed, the Applicants have provided such sparse evidence on the contested issue of standing that the Court is left to pick through the transcript of the Board hearing and draw such inferences and conclusions as it can about the connection between people who spoke at the Board hearing and the

Applicants before the Court, and the effect each claims the Board's decision has on them.

[24] Other than the paragraph in the affidavit referred to above, and some addresses in the petition, I can find no evidence relating to the Applicants 5142 NWT Ltd., G & L Workwear Ltd., Scott's Electrical Services Ltd., Hay River Disposals (1985) Ltd. or Stan Dean & Sons Ltd. In my view the fact that they are businesses that are located and operate in the Town of Hay River is not enough to show that they are adversely affected by the Board's decision; they have not shown that they are affected any more than any other citizen of Hay River, which is insufficient to justify a grant of standing: *Alberta Liquor Store Assn. v. Alberta (Gaming and Liquor Commission)*, [2006] A.J. No. 1597 (Q.B.). In the circumstances, I am not prepared to assume that every citizen of Hay River is adversely affected by the Board's decision.

[25] The mere fact that some of the remaining Applicants addressed the Board at its hearing is not of much assistance. There is no absolute rule that standing before a tribunal permits standing before the court: *Alberta Liquor Store Assn.* It would, however, have been helpful for the Board to have addressed on the record exactly how each of the persons who spoke claimed to be affected by the development at issue.

[26] The only evidence about the Applicant Territorial Quick Print Inc. is that it provided the Board with a letter of objection to the development permit. That letter contains some arguments against the permit, but does not say what the company's interest is in the issue. Therefore, it has not established grounds for standing.

[27] The affidavit of Sandra Lester relied on by the Applicants indicates that Ms. Lester is the principal of AFM Holdings Ltd., which is also one of the Applicants. In the affidavit, Ms. Lester says that she was at the Board hearing. At the hearing, she did not refer to AFM Holdings Ltd. but told the Board that she owns an industrial lot and an apartment building downtown. It may be that the owner of those properties is actually AFM Holdings Ltd. and not Ms. Lester, but that is not clear on the material before me, which provides no basis for a finding that AFM Holdings Ltd. is adversely affected.

[28] The Applicant Carter Industries Ltd. is located in the industrial area and was represented at the hearing before the Board. The concern it raised before the Board was that with increased traffic because of the liquor store, inexperienced drivers would



be in an area otherwise frequented by trucks and trailers. It is not clear from the record what adverse effect it is alleged Carter Industries Ltd. would suffer.

[29] As to the Applicant Godwin Stores Ltd., the petition that I have referred to above shows that three people, among them Bernie Langille, gave their local address as Godwin Stores. At the Board hearing, Mr. Langille referred to himself as “an owner in the Godwin Mall” and said he rents space downtown to prospective retailers. Although it would have been preferable if the connection had been set out clearly in the material, I will draw an inference that Godwin Stores, Godwin Mall and Godwin Stores Ltd. are closely connected and that Mr. Langille acted in a representative capacity for the corporate entity. The concerns he raised at the Board hearing were preservation of the downtown core for retail businesses and preservation of the industrial area for industrial purposes, from which I infer a concern for the ability of Godwin Stores Ltd. to attract retailers to downtown space if space is also available in the industrial part of town.

[30] The remaining Applicant is Jameson Holdings Ltd., operating as Jameson’s True Value Hardware. At the Board hearing, Kandis Jameson made submissions but did not say who she represented. She did refer to the Board having a letter from her, which presumably is the letter from counsel for the Applicants, in which he states that he represents Jameson Holdings Ltd. and raises issues about preservation of the downtown core and adherence to the General Plan. So I will infer that she was representing Jameson Holdings Ltd. There is nothing in the letter that states what the particular interest of Jameson Holdings Ltd. is in these issues, so for that I have to look to Ms. Jameson’s submissions before the Board, in which she implies that her hardware store is located in the downtown area and says the warehouse for it is located in the industrial area. At the risk of reading too much into her words, I understand her submission to be in part that the need for warehouse space should not justify allowing retail businesses to locate in the industrial area contrary to the General Plan and with resulting deterioration of the downtown core.

[31] The threshold for standing in municipal matters is relatively low: *Yellowknife Property Owners Assn. v. Yellowknife (City)*, [1996] N.W.T.J. No. 82 (S.C.); *York Region Condominium Corp. No. 890 v. Toronto (City)*, [2005] O.J. No. 873 (Sup. Ct. Jus.). Although, as I have said, the evidence before me is sparse, I am satisfied that there is enough to indicate that Godwin Stores Ltd. (“Godwin”) and Jameson Holdings

Ltd. operating as Jameson's True Value Hardware ("Jameson") have businesses in the downtown core of Hay River and that their financial and related interests in the maintenance of the downtown core as the main location for retail business may be adversely affected by the Board permitting a busy retail outlet (the suggestion in the evidence is that the liquor store in question will be the only one in Hay River) in the industrial area. Although the evidence is indicative of potential, rather than actual, adverse effect, I will accept that as sufficient.

### Merits of the Appeal

[32] The next question on the standing issue is whether Godwin and Jameson have a reasonably arguable case. This question is also fundamental to the determination whether they should be granted leave to appeal, quite apart from the issue of standing. The burden on any party seeking leave to appeal is to demonstrate that the appeal raises a serious arguable point, which in turn requires the examination of five elements: whether the point of appeal is of significance to the practice, whether the point of appeal is of significance to the action, whether the appeal is *prima facie* meritorious, whether the appeal will unduly hinder the progress of the case, and what standard of review will apply if leave is granted: *North West Co. v. Fort Smith (Town)*, [2007] N.W.T.J. No. 6 (S.C.).

[33] Counsel for the Applicants has restricted the grounds of appeal to the following: (a) the Board erred in law and/or jurisdiction in failing to provide full reasons for denying the appeal or in providing reasons that were inadequate and (b) the Board did not correctly interpret, apply or comply with the General Plan (Bylaw No. 1811) and Zoning Bylaw.

[34] The issues raised by the grounds of appeal are significant to the practice and to the action in that they involve the duty of the Board, as any tribunal, to give reasons for its decisions and also the Board's obligations under the General Plan and Zoning Bylaw. Although an appeal will undoubtedly result in delay to the permit holder's plans, that is not the test. This is not a case where an appeal will unduly hinder the progress of the case itself.

[35] The real issues are whether the appeal is *prima facie* meritorious in the sense of raising a serious arguable point and what standard of review will be applied if leave is granted. The Town and Hay River Liquor Retailers say that there is no merit to the

appeal. The parties also differ somewhat on the standard of review. The latter is not determinative on the leave application, but identifying the standard that applies is helpful in determining whether the grounds of appeal have a reasonable chance of success: *Lor-al Springs Ltd. v. Ponoka (County) Subdivision and Development Appeal Board*, [2000] A.J. No. 1286 (C.A.).

[36] It has been held that as there is no privative clause for decisions of a development board and considering the makeup of the board and the fact that it is required to balance the interests of the municipality, the developer and those who speak for and against the development, the standard of review on a s. 51 appeal is reasonableness: *Boyd v. Yellowknife (City)*, [2004] N.W.T.J. No. 49 (S.C.).

[37] However, since an appeal under s. 51 is limited to questions of jurisdiction or of law, the standard of review on those issues should be correctness: *Lor-al Springs Ltd. v. Ponoka (County) Subdivision and Development Appeal Board*, [2000] A.J. No. 1286 (C.A.). The exception to this is that greater judicial deference should be given to the Board's interpretation of a statutory plan, in which case reasonableness is the standard.

[38] On the first ground of appeal, whether the Board gave sufficient reasons for its decision, which is a question of law, the standard of review is therefore correctness: *Lor-al Springs; North West Co.*

[39] Both of the cases cited speak about the importance of providing adequate reasons. Reasons have to be examined in the context of the decision made.

[40] In this case, the reasons given by the Board are fairly brief. The first ground in Mr. McMeekin's appeal was that the proposed location is zoned commercial/industrial, whereas the proposed development is retail. There was material before the Board about the General Plan's focus on keeping retail businesses in the downtown core.

[41] In its reasons, the Board stated that it had reviewed the written submissions filed and that it had had regard to the purpose, scope and intent of the General Plan and the Zoning Bylaw. It said that the Development Officer's decision to approve the permit was in accordance with existing policies, practices and the Zoning Bylaw and that it was properly issued under that Bylaw. The Board's reasons do not analyze or address the direction of the General Plan in regard to downtown retail business or say how it

resolved any conflict between that direction and the decision to approve the permit. Nor do the reasons say what policies or practices the decision is in accordance with. Arguably, the Board was simply stating that the Development Officer was right without saying why he was right.

[42] The reasons fail to address one of the main issues raised at the Board hearing, which was that the development permit did not follow the direction set by the General Plan and the Zoning Bylaw. If the Board erred about that issue, its failure to give reasons may have frustrated the Applicants' ability to assess possible grounds for appeal. Therefore, I find that this ground raises a serious arguable point.

[43] On the second ground of appeal, to the extent that this ground alleges that the Board failed to correctly interpret or apply the General Plan or the Zoning Bylaw, a deferential standard of review, i.e. reasonableness, is appropriate: *Treeshin v. Yellowknife (City)*, [1994] N.W.T.R. 237; [1994] N.W.T.J. No. 22 (S.C.). Considering that the development permit involved a discretionary use under the Zoning Bylaw, this issue is likely to be fact-intensive. Unless the interpretation is one that could not be made, a court on appeal would not interfere. Counsel for the Applicant submitted that the standard of review is correctness. However, I would distinguish the cases he relied on as they involved interpretation of mandatory requirements in a bylaw or statute rather than a discretionary decision: *Chrumka v. Calgary (City) Development Appeal Board*, [1981] A.J. No. 555 (C.A.); *Stantec Consulting Ltd. v. Edmonton (City)*, [2004] A.J. No. 781 (C.A.).

[44] However, to the extent that the second ground alleges that the Board failed to comply with a requirement of the General Plan or the Zoning Bylaw, this may give rise to an error in law or jurisdiction. Section 23(8) of the *Planning Act*, which says that no decision of an appeal board hearing an appeal from the approval of a development permit shall be incompatible with the general plan for the municipality, may also be relevant in this regard.

[45] I am satisfied that there is a serious arguable point arising from the second ground of appeal, especially in light of the first ground, i.e. the possible deficiency in the reasons given for the Board's decision.

## Conclusion

[46] In the result, the Applicants Godwin and Jameson are granted standing and leave to appeal the Board's decision on the following grounds:

1. Did the Development Appeal Board err in law or jurisdiction in failing to provide full or adequate reasons for its decision?
2. Did the Development Appeal Board err in law or in jurisdiction in failing to correctly interpret, apply or comply with the General Plan (Bylaw No. 1811) or the Zoning and Building Bylaw (Bylaw No. 1812)?

[47] For purposes of scheduling the appeal, counsel are to provide the clerk with their available dates in writing within 10 days of the filing of this decision. As it has not been suggested that any parties other than those already involved should be given notice, I make no direction as to notice pursuant to s. 51(4) of the *Planning Act*.

[48] Costs of this application will be left to the discretion of the judge who hears the appeal.

Dated this 20<sup>th</sup> day of July, 2007.

V.A. Schuler,  
J.S.C.

Heard at Yellowknife, NT on June 27, 2007

Counsel for the Applicants: Steven Cooper and Keith J. Macey  
Counsel for the Municipal Corporation of the Town of Hay River: Jonathan Rossall  
Counsel for Hay River Liquor Retailers (1991) Ltd.: Katherine Peterson, Q.C.  
Counsel for the Development Appeal Board: Cayley J. Thomas  
No one appearing for Greg McMeekin