

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN

902906 N.W.T. LTD.

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

MEMORANDUM OF JUDGMENT

A) INTRODUCTION AND PROCEDURAL BACKGROUND

[1] On February 20, 2013, the Appellant corporation was found guilty of an offence contrary to Bylaw 855 of the Town of Fort Smith (the Town), for having failed to comply with an order requiring the removal of barrels from a property situated in the Town. The trial proceeded *ex-parte*.

[2] Armando Berton is a resident of the Town. He was originally a co-accused on the charge, but at the start of the trial, the charge against him was withdrawn as the Town wished to proceed only against the Appellant.

[3] On April 12, 2013, Mr. Berton filed and signed a Notice of Appeal, challenging both the conviction and the sentence imposed, and listing several grounds of appeal.

[4] The Notice of Appeal was served on the Respondent on September 6, 2013. *Affidavit of Adam Vivian sworn October 9, 2014*, Paragraph 5.

[5] The practice of this Court is to have, on a regular basis, a Chambers session to call matters that are on the general pending criminal list. This is commonly referred to as List Scheduling. This appeal was spoken to a number of times at List Scheduling after the Notice of Appeal was filed.

[6] On most of the List Scheduling sessions, Mr. Berton appeared and made representations. The first two times (May 10, 2013 and September 6, 2013), the Respondent did not appear. Presumably, this was because the Respondent had not yet been served.

[7] On November 22, 2013, both the Respondent's counsel and Mr. Berton appeared. There was a discussion about various applications that might be made. The Court invited the parties to file their respective applications and to submit their availabilities for a hearing. One of the matters that was specifically brought to Mr. Berton's attention was that the Notice of Appeal had been filed late and that an application for extension of time would have to be made.

[8] On January 20, 2014, the registry received a document from Mr. Berton entitled "Request for extension of time (an attachment to notice of appeal)". On January 24, 2014 the registry sent him a detailed letter explaining why this document could not be filed as presented, giving him information about the procedure that he needed to follow, and attaching the forms that he could use to prepare an application.

[9] The matter was spoken to at List Scheduling on February 28, 2014, April 12, 2014, and September 5, 2014. Each time the presiding Judge advised Mr. Berton of the steps that needed to be taken to advance the appeal.

[10] On October 9, 2014, the Town filed this Motion. It seeks to have the appeal dismissed on various grounds, or, in the alternative, an order giving the Appellant directions for prosecuting the appeal. The hearing of the Motion proceeded November 4, 2014.

## B) ANALYSIS

[11] The Respondent raises a number of procedural concerns about this matter.

[12] The first relates to who is named as a Respondent in the Notice of Appeal. The style of cause names “Her Majesty the Queen” as the Respondent. That is not correct: this prosecution was taken under the Town’s bylaw and the prosecuting agency is the Town itself. As such, the Town should be named as the Respondent.

[13] Clearly, this is a defect, but it is something that can be cured by an amendment without there being any real prejudice to the Town. It is not, in the circumstances of this case, a reason to dismiss the appeal.

[14] The second procedural concern relates to Mr. Berton’s purported representation of the Appellant corporation. SubRule 7(2) of the *Rules of the Supreme Court of the Northwest Territories*, R-10-96 provides that unless otherwise ordered by the Court, a party that is a corporation must be represented by a solicitor. Mr. Berton has never applied for leave to represent the Respondent corporation.

[15] In addition, in the Notice of Appeal, his Affidavit filed September 4, 2014, and in the representations he made to the Court at the hearing of this motion, Mr. Berton has repeatedly stated that he has nothing to do with the Respondent corporation and cannot speak on its behalf. That being so, it is somewhat problematic and contradictory for him to purport to take any action on that same corporation’s behalf on this appeal.

[16] The third procedural issue relates to the late filing and service of the Notice of Appeal. Summary conviction appeals are governed by Part 17 of the *Criminal Procedure Rules of the Supreme Court of the Northwest Territories*, SI-98-78 (the *Criminal Procedure Rules*). Rule 110 provides the timelines that are applicable for filing such appeals:

110. (1) An appellant shall give notice of appeal

(a) where the appeal is from conviction or against sentence or both, within 30 days after the day on which the sentence was passed; or

(b) in any other case, within 30 days after the day on which the adjudication under appeal was made.

(2) The appeal court or a judge of the appeal court may extend the time within which notice of appeal may be given.

(3) An application to extend time shall be made on notice to the respondent

[17] Rule 112 states that when an accused appeals, the Notice of Appeal must be served, within the time frame set out in Rule 110, by delivering a copy to the office of the prosecutor who has carriage of the proceeding.

[18] The Notice of Appeal was not filed or served within the timelines required by the *Criminal Procedure Rules*. Mr. Berton was advised on a number of occasions that an essential step in this matter was for the Appellant to file an application seeking an extension of the time to file and serve the Notice of Appeal. To date, a proper application seeking an extension of time to file and serve the Notice of Appeal has not been made. Mr. Berton said at the hearing that he is not a lawyer and that he has been confused about the things he needed to do to advance the case.

[19] At various point during these proceedings, it was suggested to Mr. Berton that he should seek legal advice on this matter. He has said he cannot afford to hire a lawyer. Unfortunately, litigants sometimes find themselves in this position.

[20] The Court recognizes that it can be challenging for self-represented individuals to navigate through the various procedural and substantive rules that govern legal matters. Judges and registry staff do what they can to explain these processes, but they can only go so far, as it is improper for the Court or the Court's staff to give any litigant legal advice. Here, the notes and correspondence on the Court's file suggest that every effort was made to explain to Mr. Berton what he needed to do to move this matter along.

[21] The second and third concerns raised by the Respondent, while procedural in nature, are serious ones, especially when taken in combination. In effect, no one lawfully entitled to represent the Appellant corporation has ever taken any step to advance this appeal. In addition, the Notice of Appeal was filed and served outside the time limits prescribed by the *Criminal Procedure Rules*, and no steps have been taken to remedy this. Given how long this matter has been pending, the fact that these issues have not been addressed is of concern.

[22] The Respondent has also made submissions about the factors that would have to be considered by the Court if the Appellant did file an application to extend the time to file the appeal. The likelihood of success of such an application is a relevant consideration in deciding whether the Appellant should be given additional time to attempt to perfect this appeal.

[23] The decision to grant an extension of time to file an appeal is a discretionary one. It is not governed by absolute rules, but the factors that are generally considered are whether the party seeking the extension has shown an intention to appeal within the time period, whether that party has explained the delay in filing the appeal, and whether there is merit to the proposed appeal. *R. v. Fairbairn*, 2011 NWTSC 22, Paragraph 7; *R. v. Tambour* [1999] N.W.T.J. No.78, Paragraph 7.

[24] The Respondent does not dispute that there are indications that the Appellant had an intention to appeal early on in the process. It notes, however, that there is no evidence that explains the delay in filing the Notice of Appeal, nor any evidence that explains why so much time passed before the Respondent was served with it. The Respondent also argues that this appeal has no reasonable chance of success.

[25] Overall, the things included in the Notice of Appeal can be interpreted as raising two main issues as far as the conviction appeal is concerned. The first is the Trial Judge's decision to allow the trial to proceed *ex-parte*. The second is a multi-faceted challenge of factual findings made by the Trial Judge.

[26] On the first issue, a review of the trial record confirms that service was in order on this matter. A special one-day sitting of the Territorial Court in Fort Smith had been scheduled for the trial. The morning of the trial, Mr. Berton did not attend. Another person came to Court and asked for an adjournment of the trial on his behalf. The Town opposed the adjournment request. The Trial Judge dismissed the adjournment application and eventually granted the Town leave to proceed *ex-parte*.

[27] Decisions about adjournment applications and requests to proceed *ex-parte* involve the exercise of discretion by the trial court. Such decisions are entitled to deference on appeal. On the whole of the circumstances disclosed by the record, including the transcript of the proceedings, there is no basis to conclude that the Trial Judge exercised his discretion arbitrarily or unreasonably.

[28] A Trial Judge is also entitled to considerable deference on his or her findings of facts. The trial record shows that the Town filed various certified documents as exhibits that drew the link between the property where the barrels were located and the Appellant corporation. Mr. Berton has made submissions to the effect that this corporation no longer existed at the relevant time, and that it did not own the property in question. He has on a number of occasions described this matter as a "case of mistaken identity". But those assertions are not supported by any evidence and are directly contradicted by evidence that the Town adduced at the trial. On the materials before the Court, it is difficult to see how this appeal could have any chance of success.

[29] I conclude that two of the three factors to be considered on an application to extend the time for filing an appeal militate strongly against granting such an extension. Were such an application to be filed, in my view, it would have little chance of success.

[30] This, in turn, is relevant to the issue of whether this appeal should now be dismissed for want of prosecution. SubRule 123(6) of the *Criminal Procedural Rules* provides that:

123. (...)

(6) At any time after four months from the day on which a notice of appeal has been filed, the appeal court may, on the application of a party or on its own motion, dismiss the appeal for want of prosecution.

[31] The events that gave rise to this matter date back three years. The trial proceeded almost two years ago, and the appeal has now been pending for one year and nine months. It has already resulted in costs for the Respondent, who has been required to have counsel attend several times at List Scheduling and has now incurred the costs of this Motion. In my view, it would be unfair, at this point, to allow this matter to continue any further.

[32] Pursuant to SubRule 123(6) of the *Criminal Procedural Rules*, and for the reasons outlined above, the Respondent's motion is granted and this appeal is hereby dismissed.

L.A. Charbonneau  
J.S.C.

Dated at Yellowknife, NT, this  
26th day of January 2015

Counsel for the Respondent: Edward W. Gullberg  
Armando Berton appeared personally

**S-1-CR 2013-000039**

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