

# SUPREME COURT OF YUKON

Citation: *R v Smith*,  
2021 YKSC 35

Date: 20210702  
S.C. No. 20-AP016  
Registry: Whitehorse

REGINA

Respondent

v

SMITH, MOREY

Appellant

Before Chief Justice S.M. Duncan

Counsel for the Respondent

Kimberly Sova

Appearing on his own behalf

Morey Smith

## REASONS FOR DECISION

### Introduction

[1] The appellant Morey Smith applies for indigent status under Rule 11(3) of the *Summary Conviction Appeal Rules*, 2009 (the “*Rules*”) because he is unable to afford the cost of the trial transcript. Mr. Smith is required by s. 821(3) of the *Criminal Code*, R.S.C., 1985, c. C-46, and Rule 4(2) of the *Rules* to obtain and file a transcript of the evidence from the Territorial Court trial for the hearing of his appeal, unless the Court orders otherwise.

[2] The issues are a) whether Mr. Smith meets the test for indigent status; and b) if he is found to be indigent, who will pay for the cost of the trial transcript. The estimated cost is between \$2,400 and \$2,725 plus GST.

### **Background**

[3] Discussions were held in case management to determine if some parts of the transcript would not be necessary based on the grounds of the appeal. Mr. Smith advocated that the transcripts are not necessary at all and the Court could rely on the clerk's notes from trial. Counsel for the respondent advised that the issues raised by the grounds of appeal engage evidence that was provided throughout the trial.

[4] Clerk's notes are not evidence and not intended to be a substitute for evidence. They are not verbatim. A court clerk is not a court reporter. The clerk's notes are intended to be a helpful guide for the Court or participants in a hearing about what in general was discussed at what time during the proceeding.

[5] Based on the grounds of the appeal in this matter and the understanding that evidence related to these grounds was heard throughout the trial, it was determined in case management that the entire transcript of the trial will be needed for this appeal to proceed.

### **Indigent status**

[6] There is no test for indigent status set out in the *Rules*. Courts have interpreted its purpose as ensuring those with arguable cases, but inadequate finances, have access to justice (*Trautmann v Baker*, [1997] BCJ 452 (BCCA) at para. 4).

[7] A balance is to be struck between ensuring that a claim is sufficiently meritorious to justify a litigant not paying fees or costs of transcripts and ensuring that a person

without financial resources can pursue litigation. “Sufficiently meritorious” has been described as having some prospect of success (*Tan v Yukon*, 2005 YKSC 19). “Without financial resources” has been described as a person having so few resources that they may be considered needy (*Griffith v Canada (Royal Canadian Mounted Police)*, 2000 BCCA 371). At para. 3 of that case the Court referred to the leading case on the meaning of the word “indigent”- *National Sanitarium Association v the Town of Mattawa*, [1925] 2 D.L.R. 491 (ONCA) “a person is possessed of some means but such scanty means that he is needy or poor.”

#### *Limited Means*

[8] In this case, Mr. Smith advised that he is on a fixed income. He receives funds from Canada Pension Plan and Old Age Security. He is self-employed but does not earn much. His annual income from all sources amounts to \$12,000.

[9] Counsel for the respondent agrees that based on this information from Mr. Smith, it appears he is of limited means. She does not quarrel with his qualification for indigent status on that basis.

[10] I agree that Mr. Smith’s annual income, as reported to the Court, qualifies him as a person of limited means. He satisfies this part of the indigent status test.

#### *Meritorious Appeal*

[11] The revised grounds of appeal in this case are:

- a) failure to provide notice of trial;
- b) failure to have a properly sworn ticket;
- c) failure to adjourn to hear witnesses;
- d) amendment of ticket at trial; and

- e) section 40 of the *Forest Resources Act*, RSY 2008, c. 15, was not complied with, assuming the evidence at trial is sufficient to support this ground.

[12] Counsel for the respondent conceded orally during the case management conference that three of these grounds have some chance of success. In her written submissions she stated, albeit in the context of the argument that the effect of ordering the Government of Yukon to pay for the transcript is like ordering payment of interim costs, that most if not all grounds for appeal are not *prima facie* meritorious.

[13] It is difficult to determine at this early stage of the appeal, especially without the ability to review transcripts, whether or not Mr. Smith's appeal has merit. However, the grounds of the failure to adjourn the trial because of the unavailability of Mr. Smith's witnesses; the amendment of the ticket at trial; and the possibility that the statutory scheme was not properly followed (on the condition that this ground is borne out by the evidence at trial) appear to have some chance of success. Counsel for the respondent also identified these grounds at the case management conference as possibly having some merit.

[14] The other two grounds of the alleged failure to provide a notice of trial and the alleged failure to have a properly sworn ticket appear to have less merit. However, there is no indication in the case law that where there are multiple grounds of appeal, each ground must be assessed separately and found to have merit before indigent status can be granted. In any event, a full trial transcript is likely to be required to decide the three grounds of appeal identified to have some merit.

## **Conclusion**

[15] For these reasons, I will grant indigent status to Mr. Smith, for the purpose of the *Rules*. He will not be required to pay the costs of the trial transcript.

[16] There is no provision in the *Rules* or the *Criminal Code* for who pays for the costs of the transcript where an appellant is found to be indigent. Most of the cases reviewed show that the courts assumed the costs.

[17] In this case, the Court will assume the costs of the transcript. The circumstances in which a respondent, even if it is the Attorney General of Yukon, should be required to pay the costs of an indigent appellant's transcript, are limited and not warranted here.

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DUNCAN C.J.