COURT OF APPEAL OF YUKON

Citation: *R. v. Smith*,
2023 YKCA 10

Date: 20231208
Docket: 22-YU889

Between:

Rex

Respondent

And

Morey Smith

Appellant

Before: The Honourable Mr. Justice Groberman
(In Chambers)

On appeal from: An order of the Supreme Court of Yukon, dated August 22, 2022 (*R. v. Smith*, 2022 YKSC 37, Whitehorse Docket 20-AP016).

Oral Reasons for Judgment

The Appellant, appearing in person (via videoconference):	M. Smith
Counsel for the Respondent (via videoconference):	K. Sova
Place and Date of Hearing:	Vancouver, British Columbia December 8, 2023
Place and Date of Judgment:	Vancouver, British Columbia December 8, 2023

Summary:

The appellant was convicted under the Forest Resources Act, S.Y. 2008, c. 15 of knowingly making a false or misleading statement to a forest officer. He appealed unsuccessfully to the summary convictions appeal court and seeks leave to appeal to the Court of Appeal. Held: Leave Application dismissed. The proposed appeal does not raise issues of law alone, nor are the issues of general importance.

[1] **GROBERMAN J.A.**: In March 2021, following a trial in Territorial Court, Mr. Smith was convicted of an offence under s. 39 of the *Forest Resources Act*, S.Y. 2008, c. 15 [*Act*], for knowingly making a false or misleading statement to a forest officer acting under the *Act*. He unsuccessfully appealed his conviction to Yukon Supreme Court, and now seeks leave to appeal to this Court.

[2] Mr. Smith held a cutting permit in an area east of Marshall Creek, in the vicinity of Haines Junction. Under the cutting permit, he was required to harvest a minimum of 5 m^3 from the cutting permit area each year.

[3] In August 2019, Mr. Smith provided his Annual Harvest Summary for the previous cutting year. It indicated that he had harvested no wood. On October 9, 2019, the forest officer sent a notice of non-compliance to Mr. Smith, requesting that he complete the required harvesting no later than December 16, 2019. On October 24, 2019, Mr. Smith submitted a revised Annual Harvest Summary that claimed that he had harvested 2.265 m^3 of wood in October 2018 and 2.735 m^3 of wood in December 2018. It is that document that was alleged to have been false.

[4] Forestry officers conducted inspections on October 31, 2019 and December 17, 2019. Their evidence was that they detected no signs of harvesting. They accepted that there was a possibility that non-merchantable wood had been removed without leaving behind any evidence, but they considered that possibility to be unlikely. The officers believed that they would have detected some sign of movement of wood if that had occurred.

[5] Mr. Smith gave evidence. He stated that prior to 2018, he had not been subject to a minimum harvest requirement, and that many of his reports indicated that no wood had been harvested. In 2018, when the minimum harvest applied, he

made amendment applications to have the minimum harvest waived, but the amendments were not approved. He said that he made a “clerical error” in submitting the first report in 2019 that showed no wood was harvested. He claimed that he corrected the error by filing the revised report. He did not claim to have cut any wood in the cutting permit area in 2018, but said that he gathered non-merchantable wood which he gave away or used himself.

[6] After considering all of the evidence, the judge concluded that the amended report was false, and that neither Mr. Smith’s testimony nor any other aspect of the case left him with a reasonable doubt as to Mr. Smith’s guilt.

[7] While the ordinary fine for the offence is $200 with a $30 surcharge, the judge reduced the amount to $100 with a $15 surcharge.

[8] Mr. Smith appealed the conviction to the Supreme Court of Yukon. His grounds of appeal were largely technical though there seem to have been some substantive issues, as well. The Supreme Court judge gave comprehensive reasons covering each ground. She dismissed the appeal.

[9] Mr. Smith filed an application for leave to appeal to this Court and applied to have counsel appointed on his behalf. The judgment rejecting the application for appointment of counsel is 2023 YKCA 4. In that judgment, DeWitt-Van Oosten J.A. provided a particularly detailed analysis of the proposed appeal, and commented on the prospects for success of the leave application. I do not intend to repeat what was said in that judgment, but do observe that it clearly set out the jurisdiction and procedures for the leave application and provided a detailed explanation of why the leave application in this case carried no reasonable prospect of success.

[10] This Court discussed the tests to be applied in granting leave to appeal in a summary conviction matter in *R. v. Winfield*, 2009 YKCA 9. Frankel J.A. summarized the requirements as follows:

> [13] To obtain leave to appeal from the decision of a summary conviction appeal court, the applicant must establish that (a) the ground of appeal involves a question of law alone, (b) the issue is one of importance, and

> (c) there is sufficient merit in the proposed appeal that it has a reasonable possibility of success. The overriding consideration in the exercise of the discretion to grant or refuse leave is the interests of justice: *R. v. Cai*, 2008 BCCA 332, 258 B.C.A.C. 235 at para. 26 (Chambers); *R. v. Gill*, 2008 BCCA 259 at para. 3 (Chambers).

[11] In *Winfield*, he quoted from the decision of Doherty J.A. in *R. v. R.(R.)*, 2008 ONCA 497:

> [27] The requirement that the applicant obtain leave to appeal in s. 839 provides the mechanism whereby this court can control its summary conviction appeal docket. Access to this court for a second appeal should be limited to those cases in which the applicant can demonstrate some exceptional circumstance justifying a further appeal.
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> …
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> [37] In summary, leave to appeal pursuant to s. 839 should be granted sparingly. There is no single litmus test that can identify all cases in which leave should be granted. There are, however, two key variables – the significance of the legal issues raised to the general administration of criminal justice, and the merits of the proposed grounds of appeal. On the one hand, if the issues have significance to the administration of justice beyond the particular case, then leave to appeal may be granted even if the merits are not particularly strong, though the grounds must at least be arguable. On the other hand, where the merits appear very strong, leave to appeal may be granted even if the issues have no general importance, especially if the convictions in issue are serious and the applicant is facing a significant deprivation of his or her liberty.

[12] Leave to appeal a summary conviction matter to this Court is granted sparingly.

[13] Mr. Smith's notice of appeal in this matter is not particularly clear in terms of alleged errors of law. The stated grounds of the proposed appeal are as follows:

> A. Infringement of Charter s. 11(d.) Presumption of [Innocence].
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> B. S.C. Justice Duncan Does Not Speak to Charge on S.C.A. Ticket No. 330401 or T.C. Judge Two (2) Reasons for Conviction. Rather Dismisses Appeal on Ancillary Elements on The Service of The S.C.A. Ticket.
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> C. Justice Duncan Reasons for Decision Page 3, Line/Paragraph 9, Quotes Trial Judge: "Mr. Smith may have harvested some wood ..." invokes The Balance of Probabilities Up to A Reasonable Doubt. Whenever the accused's liable to be convicted despite the existence of A Reasonable Doubt, Infringement of Charter s. 11(d) is Visible. "I do not question that Mr. Smith may have harvested".

[14] As I read this notice of appeal, and as Mr. Smith has explained to me in detail this morning, his main concern is with the presumption of innocence and s. 11(d) of the *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act* 1982 (UK), 1982, c. 11. He says that because the trial judge did not question that he may have harvested *some* wood, the conviction was based only on a balance of probabilities and not on the criminal standard.

[15] The grounds do not appear to be arguable. Chief Justice Duncan's decision carefully analyses each ground of appeal advanced by Mr. Smith before her. Her discussion of such technical matters as service and amendment of the charge were focused on arguments made to her. Her judgment cannot be criticized for dealing with the grounds that were advanced rather than broader grounds.

[16] As I understand it, Mr. Smith's main complaint is that the forest officers allowed that it was "possible" though highly unlikely that wood could have been removed from the cutting area without leaving evidence. The judge considered that, but also had surrounding circumstances to consider—particularly the fact that Mr. Smith had repeatedly sought to be exempt from the minimum harvesting requirement, and that he had already filed a report showing that no wood had been harvested. The judge concluded, based on all the evidence, that Mr. Smith's revised statement was a lie. He specifically stated that he had no reasonable doubt on that point. He did not, even arguably, act in violation of s. 11(d) of the *Charter*.

[17] The proposed appeal, then, does not raise any issue of law alone, let alone one of general importance. Accordingly, there is no jurisdiction in this Court to entertain an appeal. Even if there were jurisdiction, however, there would be no rationale for granting leave. There is no public interest to be served by hearing the

appeal. I note, as well, the minimal fine that was imposed, and accordingly the limited punitive effect of the judgment.

[18] I am dismissing the application for leave to appeal.

"The Honourable Mr. Justice Groberman"