Citation: *Norcope Enterprises Ltd. v. Gonder*, 2025 YKSM 1

Date: 20250213
Docket: 23-S0081
Registry: Whitehorse

SMALL CLAIMS COURT OF YUKON
Before Her Honour Judge Cairns

NORCOPE ENTERPRISES LTD.

Plaintiff

v.

RAY GONDER

Defendant

Appearances:
Luke S. Faught — Counsel for the Plaintiff
Ray Gonder — Appearing on his own behalf

REASONS FOR JUDGMENT

Overview

[1] Norcope Enterprises Ltd. ("Norcope") is pursuing a claim against Ray Gonder ("Ray") in the Small Claims Court of Yukon. By way of procedural background, the action started in the Supreme Court of Yukon and, pursuant to s. 10 of the *Small Claims Court Act*, RSY 2002, c. 204, with the consent of all parties, the action was transferred to the Small Claims Court. The trial was heard on January 21, 2025.

[2] Norcope was represented in these proceedings by legal counsel. Ray was self-represented. The president of Norcope is Doug Gonder ("Doug"). Ray and Doug are brothers.

[3] As several of the witnesses in this action share the same last name, I will refer to each of them by first name and no disrespect is intended in doing so.

[4] The dispute between Ray and Norcope centres on a 1997 Caterpillar 426C backhoe (the "Backhoe") purchased by Norcope in 2009 for $18,800. The Backhoe has been parked on Ray's property since approximately May 2018. This dispute arose in 2023 when Doug's son, Kyle, texted Ray requesting to pick up the Backhoe so that he could use it for a septic installation. In response, Ray texted that the Backhoe was staying put. When Doug followed up to inform Ray that Norcope's mechanics would be coming to Ray's property to retrieve the Backhoe, Ray refused to allow access.

[5] Subsequently, Norcope started an action seeking the return of the Backhoe. Norcope's position is that the Backhoe was loaned to Ray and that he was allowed to keep it on his property and use it as needed. In response, Ray argues that the Backhoe was given to him and cannot now be taken back. Ray filed a Counterclaim seeking payment of storage fees from Norcope for the period both the Backhoe and a Vanguard Road Sweeper (the "Sweeper") have been on his property. The storage fees are only sought if the Court finds that the Backhoe was not gifted to him.

[6] While these are the legal issues before the Court, an unresolved dispute between the brothers over their late mother's estate pervaded the proceedings, leading to emotional exchanges at times.

Evidence

[7] In accordance with the *Small Claims Court Act*, the rules of evidence are relaxed in Small Claims Court. This allows cases to be heard in a summary way while still ensuring trial fairness:

> 3 Hearing and determination of issues
>
> Subject to this Act and any other Act, the Small Claims Court shall hear and determine in a summary way all questions of law and fact and may make any order that is considered just.
>
> …
>
> 7 Evidence
>
> (1) Subject to subsections (2), (3), and (4), the Small Claims Court may admit as evidence at a hearing any oral testimony and any document or other thing relevant to the subject matter of the proceeding and may act on that evidence, but the court may exclude anything unduly repetitious.
>
> (2) Evidence under subsection (1) may be admitted as evidence whether or not
>
> (a) given or proven under oath or affirmation; or
>
> (b) admissible as evidence in any other court.
>
> (3) Nothing is admissible at a hearing
>
> (a) that would be inadmissible because of any privilege under the law of evidence; or
>
> (b) that is inadmissible under any other Act.
>
> (4) Subsection (1) is subject to the provisions of any Act expressly limiting the extent to which or the purposes for which any oral testimony, documents, or things may be admitted or used in evidence in any proceedings.
>
> (5) If the presiding judge is satisfied as to its authenticity, a copy of a document or any other thing may be admitted as evidence at a hearing.

[8] While the *Small Claims Court Act* allows a relaxed approach to evidence, I remain mindful that the evidence may only be admitted as long as it is relevant and not prohibited by any other Act *(Mainer v. Jepsen*, 2013 YKSC 112, at para. 31) .

[9] Both Doug and Ray provided oral testimony in relation to both the Claim and Counterclaim. Additional witnesses were Kyle Gonder for Norcope and Randy Ries for Ray. Documentary evidence was filed by both parties, including text exchanges, letters, photographs and invoices. While I have reviewed all the filed materials, some of the documentary materials filed by Ray were irrelevant to this proceeding. Letters signed by Adam Sternberg and Dev Hurlbert vilifying Doug in unrelated disputes were filed by Ray; however, neither Mr. Sternberg nor Mr. Hurlbert testified, nor was the information relevant to this proceeding. It is hearsay and neither necessary nor reliable. I give it no weight. Similarly, an undated photograph showing a person alleged to be Doug kicking a dog is unfortunate but entirely irrelevant. Finally, Ray filed a copy of a cheque register showing dated entries (2005, 2012) for cheques issued to Norcope. This information does not assist in determining the issues before me and I give it no weight.

[10] Kyle Gonder – Doug's son and Ray's nephew – testified for Norcope. He has been employed by Norcope for 12 years and is currently a Superintendent. Kyle said he communicated with his Uncle Ray in July 2023 in relation to work he was planning to do. He asked his father if he could use a piece of equipment, and his father suggested that he use the Backhoe at his uncle's yard. On July 11, 2023, Kyle contacted Ray by text message. A copy of the text exchange between Kyle and Ray was filed as an exhibit:

> Kyle: Howdy, do you mind if I get that rubber tire backhoe out of your yard in the next couple days? Was going to try and use it to dig up my septic tank.
>
> Ray: Hi Kyle, your dad and me are not in a good place, lots of things happened your not aware of facts, i never wanted to drag you into this bs, call me anytime for chat, backhoe stays put, what about my share of gold coins in moms safe? call anytime, and your allways welcome at my yard, beef aint with you.

[11] Kyle said he told his father about the exchange later that day or the next and had no further communication with Ray about the Backhoe.

[12] Doug testified after Kyle. He is president of Norcope, a company he started in the early 1980s. Providing a Bill of Sale, Doug said that Norcope acquired the Backhoe in 2009 from Washington State and that it had been in Ray's rental yard since about 2018. Prior to that, the Backhoe had been stored in a Norcope yard. Doug's evidence was that the Backhoe was loaned to Ray, that Ray could keep the Backhoe on his property, and that he was welcome to use it until Norcope needed it back. He said Ray was not charged to use it and that Ray could use the Backhoe as needed if he fueled it up and serviced it.

[13] Doug denied that Ray had offered to return the Backhoe. He confirmed that Ray did bring the Backhoe to assist him on one occasion, after which the Backhoe went back to Ray's yard. Doug said there had been no discussion about Ray keeping it at that time.

[14] Doug said that the brothers' relationship had been fine until 2023. He explained that their mother had passed away and that disagreement arose in relation to her estate, in particular related to gold coins and other valuables. Doug said that he only

learned of Ray's concern in relation to their mother's estate after he tried to recover the Backhoe in 2023. He denies having the items from his mother's estate that Ray accuses him of having.

[15] Doug communicated with Ray by text on July 12, 2023, the day after Kyle and Ray texted about the Backhoe. Ray texted in response the next day. A copy of these texts were filed as exhibits:

> Doug: This friday july 14th 1.30 mechanics will be moving norcope's Cat 426 off your lot, you borrowed this machine to be returned which you have yet to do. Were expecting full access with full co-operation.
>
> Ray: doug, you, and any of your associates are not permitted on my property, anyone tresspasses, you will be charged, Your sweeper, and backhoe, are impounded under the storage act for unpaid storage fees, when your account is paid in full on both machines, they will be released to you. A screenshot invoice coming.. If you would like another option with minimal costs to take care of this account, have a neutral third party contact me, do not contact me again directly.

[16] The invoice referred to in Ray's text was filed as an exhibit. The invoice, dated July 12, 2023, is from McCrae Self Storage to Norcope. The description is "Account Summary for Stored Items". With respect to the Sweeper, the invoice is for 180 months at $300 per month for a total of $54,000. For the Backhoe, the invoice is 60 months at $300 per month for a total of $18,000. The total amount due, including taxes, is $75,600.

[17] With respect to the Counterclaim, Doug said Norcope owns the Sweeper and that it is a parts-machine with no value. Doug's evidence was that Ray offered to park the Sweeper in his yard, a location that had formerly been their father's property. Doug

said that Ray had been given the property through their father's estate, and he had received nothing. He said storing the Sweeper on the property for him was a gesture of Ray's. Doug testified that, prior to receiving the invoice for storage fees dated July 12, 2023, there had been no discussion between them about compensation for storing the Sweeper, there had been no prior invoices, and he had never been asked to move it.

[18] During cross-examination, Doug agreed that, during the five years the Backhoe had been on Ray's property, he had not reached out to ask for the machine, saying there had been no need to. He did not waver in his evidence that Ray had been allowed to keep the Backhoe on his property to use, but that it had not been given to him.

[19] Doug was also cross-examined in relation to a 2022 text exchange between Ray and Doug's wife, Brenda. A copy of this text exchange was filed as an exhibit. The subject of the exchange is in relation to a joint RBC bank account, the contents of which were to be shared between the brothers as part of their late mother's estate. During cross-examination, Ray suggested to Doug that, if Doug had wanted the Backhoe returned, this communication would have been a good time to raise it. Doug's response was that the text concerned an estate issue. I note that Doug was neither the sender nor recipient of the texts; as such, I give no weight to the absence of a discussion about the Backhoe during this exchange between Ray and Brenda. I find this text exchange irrelevant to the issues before me.

[20] Randy Ries, a former Norcope employee, testified for Ray. While he did not remember where or when, he confirmed what he had written in a letter filed as an

exhibit, namely, that he had heard Doug say that the Backhoe was given to Ray. As a former longtime Norcope employee, he made clear he was dissatisfied with his treatment by Doug, particularly in relation to his retirement from Norcope. While he and Doug had evidently been friends at one time, even travelling to Las Vegas together, he described Doug as a liar and said the work environment at Norcope was toxic. During cross-examination, he confirmed his strong negative views of Doug's character.

[21] Ray testified on his own behalf. Ray's evidence was that he borrowed the Backhoe with Doug's permission in 2018. Being interested in buying it, he asked Doug if he wanted to sell it. Doug's response was to tell him not to worry about it and to keep it. On another occasion, Ray says he asked again about the Backhoe and Doug told him to keep it since he had three of them. Ray denied that Doug had ever said Ray would need to return the Backhoe if Doug ever needed it. Ray also expressed his view that, if it was not a gift, Doug should not have told Ray to keep it. Ray testified that he offered to return it, and, on three occasions, Doug gave him the "greenlight" to take the Backhoe back to his yard even after he was done with it. The Backhoe has been on his property for seven years.

[22] Ray went on to provide background information about the brothers' relationship, explaining that he had helped Doug out many times over the years with his labour, gifts, and financial support. He described a lifetime of helping Doug out and being an asset to Doug's company. This evidence was offered to explain why Doug might have given Ray the Backhoe.

[23] Ray also relied on a letter from Wade Clark that was filed as an exhibit:

> My name is Wade Clark, owner of Clark Transport. In 2008, my company attended Ray Gonder's storage yard in McCrae. We removed scrap cars and scrap steel. During the cleaning I asked Ray if he wanted the old road sweeper removed. Ray responded, "No, it is being stored for a customer."

[24] Ray's intent in relying on the letter was to provide corroboration for his testimony that he was storing the Sweeper for a customer and, as such, that fees would be payable. I note that Mr. Clark did not attend the trial to give testimony and that the letter refers to an exchange that occurred in 2008. I give no weight to this exhibit.

Issue – has the tort of conversion been committed?

[25] Norcope argues that Ray committed the tort of conversion when he refused to allow Norcope access to his property to retrieve the Backhoe. The remedy sought by Norcope is the return of the Backhoe.

[26] The tort of conversion involves the "wrongful interference with the goods of another, such as taking, using or destroying these goods in a manner inconsistent with the owner's right of possession" (*Boma Manufacturing Ltd. v. Canadian Imperial Bank of Commerce*, [1996] 3 S.C.R. 727, at para. 31). Conversion involves interference with a plaintiff's property through it being handled, disposed of, or destroyed.

[27] Detinue is a companion tort to conversion. The tort of detinue more applicable on the facts before me. Whereas conversion is a single wrongful assertion of dominion over personal property, detinue is the continuous wrongful detention of personal

property (*2105582 Ontario Ltd. (Performance Plus Golf Academy) v. 375445 Ontario Limited (Hydeaway Golf Club)*, 2017 ONCA 980, at para. 62).

[28] The difference between these torts affects the remedies available and has been described as follows in *685946 B.C. Ltd. v. 0773907 B.C. Ltd.*, 2024 BCSC 997, at para. 93:

> While the torts are very closely related, they have an essential difference in the principles behind their respective remedies. As noted, a conversion claim involves the interfering with a plaintiff's right to property through its being handled, disposed of, or destroyed, whereas detinue involves the failure or refusal to deliver the property to the plaintiff after it has been requested. In other words, detinue is primarily rooted in a claim for the return of the specific good, whereas conversion is largely a claim for the value of the asset which has since been handled, disposed of, or destroyed. …

[29] In this case, given the evidence before me and the remedy sought, it is more appropriate to consider whether the tort of detinue, rather than conversion, has been committed. I see no prejudice to Ray in my consideration of detinue instead of conversion given that he was aware of the facts underlying the Claim as well as the remedy sought. His defence of gift, discussed below, is equally applicable to either tort.

[30] The elements of detinue are that the property is specific personal property, the plaintiff has a possessory interest in the property, and the defendant has refused to return the property. An essential component of a claim in detinue is evidence of a proper demand and a failure or refusal to deliver the property without lawful excuse after such a demand (*Oh v. City of Coquitlam*, 2018 BCSC 986, at para. 40).

[31] I find that Norcope made a demand for the Backhoe and Ray refused to return it. If Ray does not have a lawful excuse for returning the Backhoe, the tort of detinue will be made out.

Issue – was the Backhoe gifted to Ray?

[32] In defending against the Claim, Ray argues that the Backhoe was irrevocably gifted to him and thus Norcope had no legal authority to take it back. Both parties filed case law describing the elements that make up a legally binding gift. If the Backhoe was given to Ray, he has a lawful excuse for refusing to return it.

[33] The onus of proving the Backhoe was a gift is on the defendant, Ray. The standard for proving the Backhoe was gifted from Norcope to Ray is the civil standard of a balance of probabilities (*McKendry v. McKendry*, 2017 BCCA 48, at para. 33). This has been described as leaving "no reasonable room for doubt as to the donor's intentions" (*McTaggart v. Boffo et al.*,(1976) 10 O.R. (2d) 733, at para. 19).

[34] In *Robia v. Benoit,* 2017 CanLII 74361 (NL PC), the law of gifts is described as follows:

> 15 A gift is a gratuitous transfer of property in which the donor retains no interest and expects no remuneration.

[35] Similarly, in *McKendry*:

> 31 A gift is a gratuitous transfer made without consideration. Two requirements must be met for an *inter vivos* gift to be legally binding: the donor must have intended to make a gift and must have delivered the subject matter to the donee. The intention of the donor at the time of the transfer is the governing consideration. In addition, the donor must have done everything necessary, according to the nature of the property, to

> transfer it to the donee and render the settlement legally binding on him or her. …

[36] At para. 16 of *Robia*, the Court referred to *Texeira v. Markgraf Estate,* 2017 ONCA 819, for the three elements required to make a legally valid gift:

> …
>
> (1) an intention to make a gift on the part of the donor, without consideration or expectation of remuneration;
>
> (2) an acceptance of the gift by the donee; and
>
> (3) a sufficient act of delivery or transfer of the property to complete the transaction: …

[37] Further, once made, a gift cannot be revoked unless an express power of revocation is preserved (*Young v. Young*, 1958 CanLII 277 (BC CA), at para. 8).

[38] To determine if the Backhoe was a gift, Doug's intention must be considered. I accept Doug's evidence that he did not intend to give the Backhoe to Ray but that he allowed his brother to use the Backhoe and store it on his property so that he could use it as needed. This evidence is consistent with testimony from both Doug and Ray about how their relationship functioned historically. While I considered Mr. Ries' evidence that he heard Doug say he had given the Backhoe to Ray, I am unable to place much weight on this testimony. Mr. Ries did not know where or when he heard this statement, nor the precise language used. It was argued by counsel for Norcope that Mr. Ries had demonstrated animus towards Doug and his evidence should be disregarded on that basis. Given how little weight I attach to Mr. Ries' evidence for other reasons, I need not address that submission.

[39] I accept Ray's evidence that, at one time, he offered to buy the Backhoe and had also offered to return it to Doug; however, Ray's evidence that Doug told him to keep it, even on several occasions, is not sufficient to establish that the Backhoe was a gift rather than a loan. Ray's evidence is equally consistent with the Backhoe being on loan to him.

[40] More importantly, the language Ray used in his text to Doug on July 13, 2023, is inconsistent with his argument that the Backhoe was a gift. This inconsistency has the effect of undermining Ray's position. Ray did not claim ownership of the Backhoe in response to Doug's text that Norcope's mechanics are coming to remove it. Instead, Ray said that the Sweeper and Backhoe were impounded under the Storage Act for unpaid storage fees. As an aside, I note there is no Storage Act in the Yukon statute book. However, if the Backhoe had been given to Ray as he argues, it would be nonsensical for him to say it had been impounded. Simply put, why would Ray impound the Backhoe if he thought he owned it? Ray also said that once fees are paid in full, the machines will be released to Doug. I find that the proposal to release the Backhoe to Doug upon payment of storage fees is an explicit acknowledgement by Ray that Doug was the owner of the Backhoe.

[41] By the end of the trial, Ray's evidence left no doubt that he feels that he has helped his brother out many times over the years and that he is entitled to the Backhoe as thanks and acknowledgement for those services. However, Ray's evidence did not satisfy me on a balance of probabilities of Doug's intention to gift the Backhoe to him. I find that the Backhoe belongs to Norcope and was loaned, not gifted, to Ray. Ray has not established that he has a lawful excuse for refusing to return it to Norcope.

[42] After considering the evidence, I find that the tort of detinue has been made out. The Backhoe is property owned by Norcope. Doug, on behalf of Norcope, made a demand for its return and Ray refused to return it without lawful excuse.

Issue - Is Ray entitled to storage fees for both the Backhoe and Sweeper?

Backhoe

[43] Given that I have found that the Backhoe was loaned to Ray, I dismiss Ray's counterclaim for storage fees in relation to the Backhoe.

Sweeper

[44] Ray's Counterclaim for storage fees in relation to the Sweeper relies on the invoice he provided to Norcope. The timing of the invoice is suspicious. There is no dispute that the invoice of July 12, 2023, was the first in 15 years since the Sweeper had been in Ray's yard. I cannot ignore the fact that this invoice for storage fees was issued right after the brothers had a heated text exchange triggered by Kyle's request to take the Backhoe.

[45] Counsel for Norcope argued that the invoice had been fabricated and issued as leverage to work out the brothers' dispute over their late mother's estate. The repeated references by Ray to his late mother's "gold coins", coupled with Ray's efforts during the trial to denigrate his brother by calling him a liar, among other things, supports the argument that the real dispute between the brothers is in relation to their late mother's estate, not the Sweeper or the Backhoe.

[46] Ray admitted that there was no contract regarding payment for storage of the Sweeper. This is consistent with Doug's evidence that there had never been a discussion about compensation for storage of the Sweeper. Ray's evidence was that he had received an oral command not to destroy it and, further, that Doug said he would take care of Ray down the road.

[47] This is certainly plausible. However, even if Doug made the vague statement about "taking care of Ray down the road", it is an insufficient foothold for an agreement to pay storage fees going back 15 years.

[48] Taking into consideration the suspicious timing of the invoice, together with both parties' acknowledgement that there had never been an agreement about compensation to store the Sweeper, I am not satisfied on a balance of probabilities that storage fees should be awarded to Ray.

[49] I dismiss the counterclaim for storage fees for the Sweeper.

Conclusion

[50] Norcope seeks the return of the Backhoe. I grant that remedy on the following conditions:

1. Upon giving 72 hours' written notice to Ray, Norcope shall be allowed access to Ray's yard to remove the Backhoe. Written notice may be provided by text or email.

2. If the Backhoe is not removed from Ray's yard by May 1, 2025, Ray may charge daily storage fees. Any such fees shall be paid in full before the Backhoe may be removed by Norcope after that date.

[51] During the trial, Ray gave evidence about wanting the Sweeper removed. He testified that he has no need of the Sweeper, that he views it as an eyesore, and that he was storing it for Doug. I make the following order:

1. Upon giving 72 hours' written notice to Ray, Norcope shall be allowed access to Ray's yard to remove the Sweeper. Written notice may be provided by text or email.

2. If the Sweeper is not removed from Ray's yard by May 1, 2025, Ray may charge daily storage fees. Any such fees shall be paid in full before the Sweeper may be removed by Norcope after that date.

[52] With respect to the $500 counsel fee sought by Norcope, I find that success has been somewhat divided. As a result, Norcope will not be granted counsel fees.

[53] Each party with bear their own costs.

_____

CAIRNS T.C.J.