IN THE COURT OF APPEAL

Citation: *Holmes* v. *Matkovich*, 2008 YKCA 02

Date: 20080204
C.A. 06-YU575
07-YU579
Registry: Whitehorse

Between:

KATHLEEN HELEN HOLMES

Respondent
(Petitioner)

And

VERNON CYRIL MATKOVICH

Appellant
(Respondent)

Before: Mr. Justice L.F. Gower

Appearances:

Debbie Hoffman — Counsel for the Respondent
Sharleen Dumont — Counsel for the Appellant

REASONS FOR JUDGMENT

INTRODUCTION

[1] The respondent, Ms. Holmes, has filed an application to a justice of this Court to dismiss each of two appeals, arising from orders issued in the same matter by the Supreme Court of Yukon, for non-compliance with the *Court of Appeal Rules*, *2005*. More specifically, counsel for Ms. Holmes submits that the appeals should be dismissed because the appellant, Mr. Matkovich, has not yet filed the Appeal Record, the

transcript, the Appeal Book or the factum within the timelines required by the *Rules* in either appeal.

[2] The first appeal, chronologically, is an interlocutory appeal, in which the notice of appeal was filed February 7, 2007. The notice of appeal in this matter simply indicates that it is an appeal from a chambers judgment of Mr. Justice Veale made January 8, 2007 and that it is a family law matter, but no further particulars or the grounds of appeal are provided.

[3] The notice of appeal in the second appeal was filed April 27, 2007 and is from the judgment of Veale J. on March 30, 2007, following the trial of this matter. This notice of appeal clearly sets out the various orders made by Veale J., which dealt with the issues of the division family assets, spousal support, child support and special costs, and further sets out the grounds of appeal. In this matter, which I will refer to as the "judgment appeal", the appellant has also filed a cross-application seeking to extend the time for the filing of his Appeal Record, which is the first of the filings required by the *Rules* after the notice of appeal.

ISSUE

[4] On each of the applications by the respondent and the cross-application by the appellant, the test is essentially the same:

1. Was there a good faith intention to appeal?
2. When was the respondent informed of the intention?
3. Would the respondent be unduly prejudiced by an extension of time?
4. Is there merit in the appeal?

5. Is it in the interest of justice that an extension be granted?

BACKGROUND

[5] The history of the proceedings in the Supreme Court is relevant to the good faith of the appellant and whether it is in the interest of justice to allow the extension of time.

[6] Ms. Holmes and Mr. Matkovich separated on or about December 3, 2005, and although the petition for divorce was not filed until July 17, 2006, Ms. Holmes' counsel made requests for the disclosure of detailed financial information from Mr. Matkovich beginning in January 2006.

[7] Receiving no answer from Mr. Matkovich, Ms. Holmes' counsel made an application to the Supreme Court on July 18, 2006, to compel the disclosure sought. At that time Veale J. ordered that Mr. Matkovich file his financial statement, setting out his personal, family and corporate assets and debts, and deliver a filed copy of that statement to Ms. Holmes' counsel by August 3, 2006. Mr. Matkovich failed to comply with the terms of that order.

[8] At a pre-trial conference on October 5, 2006, Mr. Matkovich remained in breach of the July 18, 2006 order and Veale J. gave him a further opportunity by ordering that he produce the specified information by October 20, 2006.

[9] Mr. Matkovich did file a financial statement on October 20, 2006, but it only addressed his personal employment income and did not include any information regarding his business and corporate assets, his placer mining claims, his mining equipment, his recreation equipment or his gun and ivory collections.

[10] On December 13, 2006, counsel for Ms. Holmes applied to have Mr. Matkovich's answer and counter-petition struck. Rather than proceeding in that fashion, Veale J. ordered that Mr. Matkovich be allowed a further opportunity to comply with the court's orders of July 18 and October 5, 2006, and gave him until January 5, 2007 to do the following:

1. Pay the legal fees and disbursements of Ms. Holmes for all matters following the hearing on July 18, 2006, to and including the date of the hearing on December 13, 2006.

2. File a complete financial statement, as required in the July 18, 2006 order, including, but not limited to, full disclosure of the revenue, assets and activities of 19651 Yukon Inc., and the placer claims owned directly or indirectly by Mr. Matkovich and any verbal or written arrangements with Klondike Star Mining Corporation and the value of such arrangements.

3. Provide his List of Documents and the documents themselves to Ms. Holmes' counsel.

Mr. Matkovich was further warned that failure to comply may result in a finding of contempt of court and having his answer and counter-petition struck. The matter was then adjourned to January 8, 2007.

[11] On that date, Veale J. noted that Mr. Matkovich had not paid the special costs of Ms. Holmes, as previously ordered. Further, the amended financial statement filed by Mr. Matkovich on January 5, 2007 was unsworn and contained the same information as in his previous financial statement, despite his own documentation confirming that he

had received dividend income from 19651 Yukon Inc. in the amount of $40,000. He failed to list his placer mining claims and their value in this statement and had not disclosed his arrangement with his partner in 19651 Yukon Inc. He also had not included a value of his ivory and gun collections nor the amount of a debt owed to his sister. He estimated the value of his stocks and bonds at $3,000, but without any further explanation.

[12] The list of documents provided by Mr. Matkovich on January 5, 2007 was the first production of documents by him since the demand for such production by Ms. Homes' counsel in January 2006. While it provided tax returns 2002 to 2004, it only included a draft return for 2005, without any T-4 information. No banking information for himself or 19651 Yukon Inc. was supplied. The information coming from the accountant for 19651 Yukon Inc. was only provided on a "draft basis", because of a stated lack of supporting information. It was also noted that the company had not reported any federal income tax, despite operating since 2001.

[13] Veale J. concluded on January 8, 2007 that Mr. Matkovich had not complied with the three previous orders for financial disclosure and that Ms. Holmes was deprived of her opportunity for a fair trial as a result. For those reasons he ruled:

> "… I find it appropriate to strike Mr. Matkovich's Answer and Counter-Petition and order that the trial proceed on an uncontested basis." (para. 31, Reasons for Judgment)

[14] At the hearing on December 13, 2006, Mr. Matkovich's counsel, Ms. Murrin, who advised throughout that she was never retained as trial counsel, informed the Court that trial counsel had been retained and that she expected to be in contact with that trial counsel the following day.

[15] At the hearing on January 8, 2007, trial counsel still had not been retained. Mr. Matkovich was noted to have been in Brazil and there was no evidence that he would be returning for the trial, which was then scheduled to commence on January 29, 2007.

[16] For reasons which are not clear from the affidavit material filed on these applications, the trial did not take place until March 29 and 30, 2007. Mr. Matkovich was not represented at the trial and no evidence was given on his behalf, although the financial information he had filed to that point was used and relied upon by Veale J.

JURISDICTION

[17] As was noted by Veale J. in *Versluce Estate* v. *Knol*, 2007 YKCA 13, at para. 7, there is no express power under the Yukon *Court of Appeal Act*, or the *Court of Appeal Rules, 2005*, to dismiss an appeal for non-compliance with the filing timelines under the Rules. Nevertheless, Veale J. ruled that this Court does have such authority by reference:

> "… There is no express power under the *Court of Appeal Act* or Rules to dismiss an appeal but it is my view that s.1 of the *Court of Appeal Act* provides "the same powers, jurisdiction and authority" in this Court as "possessed immediately before January 1, 1971, by the Court of Appeal for British Columbia". That would incorporate by reference the power to dismiss an appeal as abandoned for failure to comply with an order extending time for various filings based upon the following sections of the *Court of Appeal Act*, R.S.B.C. 1960, c. 82:
>
> > **Original Jurisdiction**
> > 8. The Court of Appeal further has and shall exercise such original jurisdiction as may be necessary or incidental to the hearing and determination of any appeal.

> **Further powers**
> 9. For all the purposes of and incidental to the hearing and determination of any matter within its jurisdiction, and the amendment, execution, and enforcement of any judgment or order, and for the purpose of every other authority expressly or impliedly given to the Court of Appeal by this Act, the Court of Appeal has the power, authority, and jurisdiction vested in the Supreme Court.
>
> [8] In addition, the Court of Appeal, although a statutory court without inherent jurisdiction, has the ancillary or implied jurisdiction to control its own process. See *United States of America* v. *Shulman*, 2001 SCC 21, at para. 33 and *United States of America* v. *Cobb*, 2001 SCC 19, at para. 37."

[18] Further, counsel for Ms. Holmes points out that, while there is no provision in Rules 19 or 20 (respecting the timelines for filing an Appeal Record and a transcript, respectively) for a judge to order "otherwise", that type of provision *is* found in Rule 21 (respecting the filing of a factum) and also in Rule 26 (respecting the filing of an Appeal Book). Thus, argued counsel, since Mr. Matkovich has failed to file *any* of these documents to date, then it should be open to me, as a justice of the Court of Appeal, to deny Mr. Matkovich the extension of time that he requires, as the preliminary step to the filing of his factum and his Appeal Book, and "otherwise" order that his appeals be dismissed.

[19] Technically, the notice of motion filed by Mr. Matkovich for an extension of time only seeks leave to file his "Appeal Record", in which case, there is no provision for a justice to "otherwise order" under the relevant rule, which is Rule 19. On the other hand, it is implicit in Mr. Matkovich's application for an extension of time that he will also require leave to file the transcript, and eventually his factum and Appeal Book in due course, in order to perfect this matter and have it ready for a hearing.

[20] In any event, I am satisfied pursuant to the reasons given by Veale J. in *Versluce Estate* v. *Knol,* that I have the jurisdiction to consider both the applications to dismiss and the application for an extension of time.

ANALYSIS

[21] In *Mazhero* v. *Yukon (Human Rights Commission)*, 2002 YKCA 05, Vertes J.A., was deciding an application to dismiss a number of appeals brought by a self-represented litigant under the former Yukon *Court of Appeal Rules (1974)*. At para. 12, he observed:

> "… A litigant is often excused for immaterial non-compliance with procedural rules. But that does not mean that the rules of procedure are not to be complied with at all. All litigation must be conducted in a manner that is fair to both sides. Procedural rules are intended to accomplish that aim. An appropriate balance must be struck to enable a personal litigant to proceed without prejudicing the other party's right to require that the rules of court be properly followed. Thus, while every court will take into account the lack of experience and professional training of the litigant, the litigant in turn must realize that implicit in the decision to act as his or her own counsel is the risk of the consequences that may flow from such lack of experience or training. This is particularly so where the litigant chooses to represent himself (as opposed to it being necessary due to an inability to obtain counsel)."

These comments are pertinent to the situation Mr. Matkovich now finds himself in, as he was unrepresented by trial counsel at all material times.

[22] The five part test relevant to an application to extend time in civil matters is stated in *Davies* v. *CIBC* (1987), 15 B.C.L.R. (2d) 256 (C.A.) and summarized as follows in *Wilson* v. *Newcomb* (1998), 111 B.C.A.C. 239, at para. 24:

> "On an application to extend the time for taking a step necessary in the prosecution of an appeal, the following questions, with the necessary modifications, will generally be considered: (1) was there a bona fide intention to appeal? (2) when were the respondents informed of the intention? (3) would the respondents be unduly prejudiced by an extension? (4) is there merit in the appeal? (5) is it in the interest of justice that an extension be granted? The fifth question is the most important as it encompasses the other four questions and states the decisive question."

[23] It is common for an application to dismiss an appeal as abandoned, or as non-compliant with the *Rules*, to be countered with an application by an appellant seeking an extension of time. The test in *Davies* v. *C.I.B.C.* has been described as "a compendious guide to both applications": *Verlaan* v. *VonDeichman*, 2006 BCCA 389.

[24] However, the exercise of discretion in the application of this test is less stringent where the extension sought is for filing an Appeal Record, or other subsequent required filings, as opposed to filing a notice of appeal: *Hydrofuels Inc.* v. *Moran* (1993), 25, B.C.A.C. 139, at para. 9.

The Judgment Appeal

[25] With respect to the first part of the five-part test, in the judgment appeal, the notice of appeal was filed within the 30 days allowed under the *Court of Appeal Act*. Although the trial concluded on March 30, 2007, the order confirming the trial judgment was not filed until May 28, 2007. Prior to that, Mr. Matkovich's appeal counsel, Mr. Albi, was in telephone contact with Ms. Holmes' counsel to discuss the appeal and a possible settlement thereof. That telephone conversation was followed by a letter from Mr. Albi to Ms. Holmes' counsel dated May 31, 2007, advising that Mr. Matkovich was in the process of having his accountant resolve certain tax issues, with a view to making a

formal offer of settlement. That letter also discussed certain aspects of the grounds of appeal, but indicated that Mr. Matkovich would prefer to negotiate a settlement, rather than engage in protracted litigation. Finally, and importantly, the letter concluded as follows:

> "If you [as written] client is not prepared to engage in a negotiation, please let us know. We will otherwise communicate with you further in due course."

[26] I say this is important because Mr. Matkovich's counsel on the application to extend time submitted that this was the reason Mr. Matkovich did not order an Appeal Record or a transcript, with a view to filing same within the timelines allowed under the *Rules*. He was, apparently, operating under the assumption that Ms. Holmes was prepared to negotiate the matter, rather than requiring him to pursue the appeal.

[27] However, on July 18, 2007, Ms. Holmes' counsel wrote to Mr. Albi complaining that they had not yet received the Appeal Record or the transcript and that they were holding Mr. Matkovich to the Court of Appeal's timelines.

[28] On July 20, 2007, Mr. Albi responded with a letter to Ms. Holmes' counsel stating:

> "In our letter of May 31, we asked that you advise us if your client was not prepared to engage in a negotiation. Having not heard from you, we did not order the Appeal Record or Transcript. Having received your correspondence of July 18, 2007 we will now do so. In the circumstances, we request your indulgence having regard to the Court of Appeal timelines."

The letter also provided some additional information on the status of Mr. Matkovich's dealings with his accountant and the difficulties that Mr. Matkovich was facing in obtaining information from his business partner in 19651 Yukon Inc.

[29] On July 27, 2007, Mr. Albi again wrote to Ms. Holmes' counsel providing a copy of correspondence from Mr. Matkovich's accountant, along with a financial statement for 19651 Yukon Inc.

[30] On October 3, 2007, Mr. Albi wrote to Ms. Holmes' counsel enclosing a copy of the Appeal Record and a draft consent order to allow him to file the document late. He also confirmed that he had recently received the transcript.

[31] On October 11, 2007, Ms. Holmes' counsel wrote to Mr. Albi advising that Ms. Holmes would not consent to the extension of the deadline for filing the Appeal Record (although the letter said "Appeal Book", this was obviously a technical error).

[32] On January 11, 2008, Ms. Holmes' counsel filed her application to dismiss each of the appeals for non-compliance with the *Rules*.

[33] On January 14, 2008, Mr. Albi filed his notice of application for leave to extend time on the judgment appeal. It is important to note that the affidavit of Mr. Matkovich filed in support of that application was sworn on December 3, 2007. Therefore, I am satisfied that Mr. Matkovich had formed a genuine intention to bring his application to extend time prior to receiving notice of Ms. Holmes' applications to dismiss.

[34] For these reasons, I am satisfied that Mr. Matkovich has met his onus in establishing a good faith intention to prosecute the judgment appeal.

[35] With respect to the second part of the five-part test, it is clear that Ms. Holmes was informed of Mr. Matkovich's intention to appeal the trial judgment as early as the telephone conversation between counsel on May 16, 2007, which was within the 30-day time limit for the filing of the notice of appeal.

[36] With respect to the third part of the test, while there is clearly prejudice to Ms. Holmes as a result of the delay, the existence of prejudice is not determinative of the matter: see *Greither* v. *Greither*, 2005 BCCA 339, at para. 20. Further, I find that it was not unreasonable for Mr. Albi to rely upon his letter of May 31, 2007, in expecting Ms. Holmes' counsel to let him know if she was no longer interested in negotiating a settlement of the appeal. That notification did not come until July 18, 2007, at which time Mr. Albi immediately took steps to order the Appeal Record and the transcript.

[37] There is no explanation on the record, or in the submissions of counsel on the applications before me, why the matter was not addressed before now, once Ms. Holmes' counsel had communicated in her letter of October 11, 2007 that she would not consent to the extension of time for filing the Appeal Record. I therefore treat the delay from October 11, 2007 to date as a neutral factor.

[38] Finally, there is merit in the submission by counsel for Mr. Matkovich that even if the Appeal Record and transcript had been filed within time, it is unlikely that the appeal itself would have been heard before the next sittings of the Court of Appeal in Whitehorse in May 2008. Therefore, in that sense, no time has been lost.

[39] With respect with the merits of the judgment appeal, the question here is whether the appeal is bound to fail, just as it is on the question of striking out an appeal as being vexatious, frivolous or entire without merit: see *Davies* v. *C.I.B.C.* at p. 262. I agree with

counsel for Ms. Holmes that Mr. Matkovich will have an uphill battle in some respects, because certain of the grounds of appeal arise from the evidence of Ms. Holmes as to the parties respective contributions to the acquisition and maintenance of the family home, which Mr. Matkovich says was “inaccurate, incomplete or false”. These are obviously issues of credibility which will be very difficult for Mr. Matkovich to argue successfully on appeal. It would seem that he is essentially seeking a new trial on such issues. However, I am unable to say that the appeal is bound to fail with respect to the tax and valuation issues which are addressed in Mr. Matkovich’s affidavit.

[40] The final part of the five-part test is to determine whether it is in the interest of justice that an extension be granted. I have already stated that the failure of Mr. Matkovich to make fulsome and timely pre-trial disclosure of his financial circumstances is relevant to this issue and is disturbing to say the least. Indeed, his current complaints about the inaccuracies in the trial judgment and the tax consequences to him are arguably due to his lack of diligence in getting the proper information before the court in the first place. The following quote by Binnie J. in *Leskun* v. *Leskun*, 2006 SCC 25, at para. 34, seems particularly pertinent:

> “In all of these circumstances, the appellant has a poor platform from which to launch an attack against the trial judge's conclusion regarding his assets and liabilities. As Fraser J. commented in *Cunha v. Cunha* (1994), 99 B.C.L.R. (2d) 93 (S.C.), at para. 9:
>
> > Non-disclosure of assets is the cancer of matrimonial property litigation. It discourages settlement or promotes settlement [as written] which are inadequate. It increases the time and expense of litigation. The prolonged stress of unnecessary battle may lead weary and drained women simply to give up and walk away with only a share of the assets they know about, taking with them

> the bitter aftertaste of a reasonably-based suspicion that justice was not done.
>
> If problems of calculation exist the appellant is largely the author of his own difficulties. I would not interfere on that basis." (my emphasis)

[41] On the other hand, the test on this application to extend time is not so much focused on the pre-trial history as it is with the status of the matter from the filing of the notice of appeal going forward. In that context, and taking into account my responses to the first four questions in the five-part test, I am unable to conclude that it would be contrary to the interest of justice to allow the appeal to proceed. As was noted in *Davies* v. *C.I.B.C.*, cited above, at p. 260:

> "The fifth [the interests of justice] question I think to be the most important as it encompasses the other four questions and states the decisive question. Here the interests of the parties are opposed. If the appeals go ahead the respondents will incur costs and risk. If they do not go ahead, the appellants will have lost the everything that they have built over many years. I have already expressed the view based on the limited material available that the appellants' arguments will probably not prevail, but if the time is not extended the opportunity to make the arguments will be gone." (my emphasis)

Once again, those comments seem applicable to the case at bar.

The Interlocutory Appeal

[42] With respect to the interlocutory appeal, nothing has been filed since the notice of appeal on February 7, 2007. Indeed, there has been no application for an extension of time on that appeal. Mr. Matkovich's counsel at the hearing before me explained that no Appeal Record regarding the interlocutory appeal had yet been prepared or filed, because it was apparently thought that the issue on that appeal had been "subsumed"

in the judgment appeal, but that there was still an intention to proceed with the interlocutory appeal. Be that as it may, there is nothing to substantiate such an intention, as nothing has been filed for almost one year. Moreover, the communications between Mr. Matkovich's counsel and Ms. Holmes in the intervening months have all been with respect to the judgment appeal. Thus, I conclude that the appellant has not met his onus on the first aspect of the five-part test, and I am not satisfied that he has demonstrated a good faith intention to appeal the chambers judgment.

[43] Further, there is no way to assess the merit of this appeal because the grounds have never been articulated.

[44] However, with respect, I question whether Veale J. had the authority to direct, in his order of January 8, 2007, after striking Mr. Matkovich's answer and counter petition, that the trial "proceed on an uncontested basis". Under Rule 24(b) of the Yukon *Divorce Rules, 1986*, "Where a respondent spouse wishes to … oppose any relief claimed" under the petition for divorce, that spouse must file an answer and counter petition. Arguably by then, if the answer and counter petition are struck, there is no longer a basis for opposing the relief claimed in the petition. However, that may not be the end of the matter.

[45] There is no provision in the *Divorce Rules* for filing an appearance to become a "party of record", as in the *Rules of Court* in the Supreme Court. There is provision for the filing of a "Request for Notice" under Rule 32 of the *Divorce Rules*, which is analogous to an appearance, but the *Divorce Rules* are unclear whether the filing of such a document by a respondent spouse makes that spouse a party of record.

[46] Rule 4 of the *Divorce Rules* states “Subject to these Rules, the [Divorce] Act and any enactment, the Rules of Court and Appendices thereto apply to proceedings and appeals under the Act.”

[47] Veale J.’s Memorandum of Judgment of December 13, 2006 stated that if the respondent failed to comply with the orders set out therein, he may “have his pleadings (comprised of his Answer and Counter Petition), struck and the trial proceed as though no Appearance has been filed” under Rule 2. Then, in his Reasons for Judgment following the hearing on January 8th, 2007, after striking the answer and counter petition, Veale J. ordered that the trial proceed “on an uncontested basis”. Although he quoted both Rules 2(2) and 2(5)(g) of the *Rules of Court* in those Reasons, Veale J. failed to specify which subrule he was relying on as authority for his order. Rule 2(2)(d) permits the court to strike out a statement of defence and grant judgment, but it says nothing about proceeding on an uncontested basis. However, Rule 2(5)(g) states that where there has been non-compliance with the *Rules* by a respondent “the court may order the proceeding to continue as if no appearance had been entered or no defence had been filed.”

[48] In *Ngo* v. *South Pacific Development Ltd.*, 2006 BCCA 182, Ryan J.A., delivering the judgment of the British Columbia Court of Appeal, held that the use of the disjunctive “or” in subrule 2(5)(g) provides for alternative outcomes, that is the court may order the proceeding to continue either as if no appearance had been entered or as if no defence had been filed. The difference is significant because an order that directs a proceeding to continue as if no defence had been filed still permits that party some form of representation at the trial in the event they wish to be represented. However, an order

that the proceeding continues as if no appearance had been entered means, as per the definition in Rule 1(8), that the party is no longer a “party of record”. At para. 19 of *Ngo*, Ryan J.A. stated:

> “Without the appearance, the defendant loses his or her status as a party. If the appearance remains in place, the defendant maintains his or her status as a party of record.”

[49] It appears that Veale J. was relying on Rule 2(5)(g) in making his order striking Mr. Matkovich’s answer and counter petition and ordering that the trial proceed on an uncontested basis. However, given what was said in *Ngo,* he may not have had the authority to do both. I also note in passing that I recently presided over a divorce trial in the Supreme Court, coincidently involving the same counsel as counsel for Ms. Holmes in this case, where the respondent spouse had failed to file an answer and counter petition and was nevertheless allowed to appear at the trial, cross-examine, present evidence and make submissions, all without objection from the petitioner: *P.B.* v. *R.J.P.*, 2007 YKSC 59.

[50] Having said all that, I only raise the question because, by ordering that the trial proceed on an “uncontested basis” Mr. Matkovich may have believed that he could not appear at the trial, or if he did, that he would be unable to contest any of the evidence or submissions by Ms. Holmes, so there would be little point in doing so. Any potential confusion here would have been made worse by the fact that Mr. Matkovich, at that point, was apparently unrepresented by trial counsel.

[51] Nevertheless, I must say that I have little sympathy for Mr. Matkovich having found himself in that situation. For some unexplained reason, he failed to retain trial counsel throughout the course of these proceedings. While he retained Ms. Murrin to

represent him sometime prior to the filing of his answer and counter petition on November 3, 2006, and while she represented Mr. Matkovich on each of the pre-trial disclosure hearings, she made it abundantly clear throughout that she would not be representing him at trial.

[52] In any event, given the pre-trial history, I would have expected a greater degree of diligence by Mr. Matkovich in striving to keep his interlocutory appeal on track, if he was serious about pursuing it. He has not done so. Accordingly, I conclude it would not be contrary to the interest of justice to dismiss this appeal for non-compliance with the *Rules*.

CONCLUSION

[53] In the result, I make the following orders:

1. The respondent's application to dismiss the judgment appeal is dismissed.

2. The respondent's application to dismiss the interlocutory appeal is granted.

3. The appellant's application seeking leave to file his Appeal Record is granted. I am advised by counsel that the Appeal Record and the transcript are presently ready for filing, therefore I further order that they be filed within 14 days of the date of this order, and more particularly by February 18, 2008.

4. The appellant must also file his factum and an Appeal Book within 30 days after filing the Appeal Record.

5. Any failure by the appellant to meet these timelines will result in his appeal being automatically dismissed, unless a justice or a panel of this Court orders otherwise.

[54] If these timelines are met, and there are no further complications, then it is my expectation that this matter should be ready for hearing during the Court of Appeal sittings in Whitehorse in May 2008.

[55] As success was divided, I make no order as to costs on the applications.

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GOWER J.