

COURT OF APPEAL FOR THE YUKON TERRITORY

Citation: *Bemis v. Government of Yukon, City of
Whitehorse, et al*
2009 YKCA 7

Date: 20090529
Docket: CA08-YU617

Between:

GARY BEMIS

Appellant
(Petitioner)

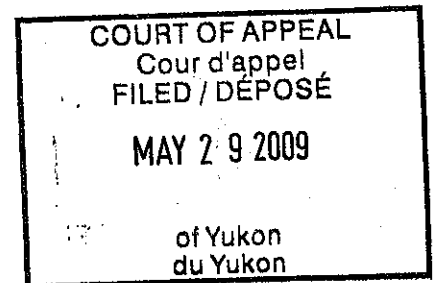
And

**GOVERNMENT OF YUKON, DEPARTMENT OF ENERGY MINES &
RESOURCES (LANDS BRANCH), LINDA ANDERSON,
YUKON MUNICIPAL BOARD, CITY OF WHITEHORSE**

Respondents
(Respondents)

Before: The Honourable Mr. Justice Donald
The Honourable Mr. Justice Frankel
The Honourable Madam Justice Smith

Oral Reasons for Judgment



Gary Bemis

Appearing on his own behalf

Mike Winstanley

Counsel for the Respondents
Government of Yukon and
Department of Energy Mines &
Resources (Lands Branch)

Lori Lavoie

Counsel for the Respondent City of
Whitehorse

Place and Date:

Whitehorse, Yukon Territory
May 29, 2009

[1] **DONALD J.A.:** This is an appeal from the order of Mr. Justice Gower pronounced 26 August 2008.

[2] The problem in this case is that the judge declared a conflict of interest regarding the respondent, Linda Anderson, and said that he could not hear the case on the merits. Linda Anderson and the appellant have competing claims for a parcel of land. Notwithstanding the judge's declaration of a conflict, he heard the parties on case management issues and resolved, over the objections of the appellant, to set down for hearing as a threshold issue whether the appellant had an interest in the disputed land sufficient to ground his petition for judicial review.

[3] Briefly, the relevant background is that in 1987 the appellant applied for title over some land near MacLean Lake in the City of Whitehorse on an application pursuant to the Government of Yukon Squatter Policy. On the material before us, it seems that the application is still outstanding.

[4] In 2007, Linda Anderson applied to the Government of Yukon, Department of Energy, Mines and Resources, Lands Branch, for permission to extend her lot, which adjoins the land claimed by the appellant, by about 0.16 hectares. This overlaps the appellant's parcel and gives rise to the dispute. The Lands Branch gave its approval and the matter was then brought to the City for formal subdivision approval. Ultimately, City Council gave its approval. The appellant was given notice at all stages of the process, beginning with the Lands Branch and ending with the Council approval. The appellant sought to appeal the decision to the Yukon

Municipal Board, but the Board declined jurisdiction on the ground that the relevant legislation restricts the right of an appeal only to persons having an interest in the land in question.

[5] The appellant's petition seeks judicial review of the decisions taken by the Lands Branch and the City. It also asks for a declaration that the Yukon Municipal Board has jurisdiction to entertain the appeal from the grant of subdivision, a form of *mandamus*.

[6] The matter went before the judge on 26 August 2008 as an application for an interlocutory injunction preventing the registration of Linda Anderson's land extension pending the outcome of the petition. Ms. Anderson was unable to appear. The judge declared his conflict of interest but agreed to deal with case management issues. The other respondents wanted the matter to be done in stages, the first of which was to address a threshold issue of standing. They submitted that if, as a preliminary issue, the appellant was unable to establish his standing by way of demonstrating a legal interest in the disputed land, much time and effort could be saved. The appellant took a different view of the matter and submitted that the only sensible way to approach the issues was to decide first in order whether the Board was correct in its reading of the relevant legislation on the question of who could bring an appeal from the subdivision decision. If the Board did have jurisdiction, then the question of his right to the land could be dealt with there rather than in court. The judge ruled against the appellant and in favour of the respondents.

[7] This, in my respectful opinion, was an adjudication that should not have taken place after the judge declared a conflict of interest. While the order was procedural in nature, it was a decision on a disputed question and so the disqualification of the judge applied as well to that as to a full hearing on the merits. I think the judge should have avoided making any significant procedural direction, especially one that could be taken to imply that the argument against the appellant's standing has sufficient cogency that it should be segregated from the other issues and heard first in time.

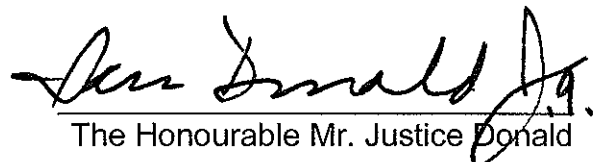
[8] Having determined that the judge ought not to have resolved a contested procedural matter of some significance, I turn to consider what remedy this Court should provide. I would set aside the term of the order segregating the threshold issue and I would direct that the petition be set down for hearing in its entirety. How the matter proceeds from that point will be in the discretion of the hearing judge.

[9] For these reasons, I would allow the appeal in the terms indicated.

[10] FRANKEL J.A.: I agree.

[11] SMITH J.A.: I agree.

[12] DONALD J.A.: The appeal is allowed accordingly. Thank you.


The Honourable Mr. Justice Donald