

COURT OF APPEAL

Citation: *McCully v. Osborne*, 2005 YKCA 0002

Date: 20050407
Docket: S.C. No. : 04-YU520
Registry: Whitehorse

BETWEEN:

MCCULLY CONTRACTING LTD.

Respondent

AND:

ART OSBORNE and 13183 YUKON INC.

Appellants

Before: Mr. Justice L.F. Gower

Appearances:
James R. Tucker
Art Osborne

Appearing for Respondent
Appearing on his own behalf

REASONS FOR DECISION DELIVERED FROM THE BENCH

[1] GOWER J. (Oral): Section 5(1) of the *Yukon Court of Appeal Rules, 1974*, entitles a single judge of this Court to dismiss an appeal for want of prosecution. That decision can be taken before a panel of three judges of this Court, if the appellants wish to take it further. I will come back to that and repeat that so it is clear to Mr. Osborne, who is also representing 13183 Yukon Inc.

[2] Under Rule 17(1), the appellants were obliged to file their appeal book not later than 60 days after the date on which the notice of appeal was filed. That has not been done, nor have the appellants made any application to extend that time period. Although

it becomes academic in view of the fact that they have not filed their appeal book, the appellants were also required by Rule 25(1) to deposit their factum within five weeks after complying with Rule 17(1). Clearly that has not been done either.

[3] Rule 32(1) says:

"If the time prescribed by Rule 25(1) has expired and the appellant has not deposited his factum, the respondent may move to dismiss the appeal."

And, of course, that is exactly what the respondent has applied for.

[4] The respondent lastly asks for costs for applying to have this appeal dismissed. That is provided for in Rule 49.

[5] I note, for the record, that the appellants were initially represented by Davis & Co. when the notice of appeal was filed on April 2, 2004. They continued to be represented by that firm when the amended notice of appeal was filed on April 30, 2004. Mr. Osborne then filed a notice of intention to act in person, on behalf of both appellants, on June 29, 2004.

[6] There is no evidence of the appellants taking any steps to pursue this appeal since June 29, 2004. The only thing that has been filed by Mr. Osborne since then was a notice of change of address for delivery on March 18, 2005.

[7] Mr. Tucker provided notice of his application to dismiss this appeal to Mr. Osborne on, I believe, it was Thursday, March 31, 2005. Is that correct, Mr. Tucker? When you faxed him the documents?

[8] MR. TUCKER: Yes, My Lord, there were several attempts prior to that.

[9] THE COURT: Yes, that was admittedly after 4:00 p.m., but even so when we spoke to this matter on Monday, April 4th, I indicated that I would adjourn it over until this Thursday, April 7th, at 2:00 p.m. to allow four clear days notice of the respondent's application to the appellants, as required by Rule 39 of the *Rules*. He has now had four clear days notice.

[10] In addition to that, when I spoke to this matter on April 4th, I clearly indicated a number of times to Mr. Osborne that the Court was looking for an explanation from him for the delay in pursuing this appeal and that that should be provided in the form of a sworn affidavit. Further, I specifically directed Mr. Osborne, if he was going to prepare such an affidavit, to have that sworn before a notary public. What Mr. Osborne provided to the Court is an unsworn and undated draft affidavit, which has not been accepted for filing because it is not in compliance with the *Rules*. Even if it had been accepted for filing, it contains no explanation whatsoever for the appellants' delay in pursuing this appeal.

[11] I emphasize again that the appellants have not made any application to extend the time for the filing of any of the documents that I have just referred to.

[12] I note that the respondent has filed the case of *Mazhero v. Yukon (Human Rights Commission)*, 2002 YKCA 5, a decision of Mr. Justice Vertes of this Court, where he said at paragraph 12:

"The respondent has represented himself throughout all of these proceedings, both in this Court and in the Supreme Court. Certainly it is his right to do so. Access to the courts is fundamental to our democratic society. Judges often adopt a very liberal and flexible approach when a litigant proceeds without counsel (particularly at the trial level). 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. . ."

[13] I cannot express those thoughts any more clearly or forcefully than did Mr. Justice Vertes and I certainly adopt them as being wholly applicable in this case.

[14] Mr. Tucker your motion is granted and you may have your costs on the motion. I direct that a copy of my reasons be mailed to Mr. Osborne at his new address for delivery. I also direct that Mr. Tucker prepare the formal order and that the appellants' approval as to form and content is not required.

GOWER J.