COURT OF APPEAL FOR THE YUKON TERRITORY

Citation: ***R. v. Kereliuk***
2007 YKCA 2

Date: 20070529
Docket: 05-YU540

Between:

Regina

Appellant

And

William Steve Kereliuk

Respondent

ORAL REASONS FOR JUDGMENT

Before: The Honourable Chief Justice Finch
The Honourable Madam Justice Huddart
The Honourable Mr. Justice Low

D. McWhinnie — Counsel for the Appellant

K. Parkkari — Counsel for the Respondent

Place and Date of Judgment: Whitehorse, Yukon
May 29, 2007

Oral Reasons by:
The Honourable Madam Justice Huddart

Concurred in by:
The Honourable Chief Justice Finch
The Honourable Mr. Justice Low

Reasons for Judgment of the Honourable Madam Justice Huddart:

[1] The Crown seeks leave to extend the time for service of the notice of appeal to 6 May 2006. The respondent opposes the application on the basis that the Crown has not established a bona fide intent to appeal because it did not exercise due diligence in its attempts to locate him.

[2] There is a well-established principle in this Court that time limits are not strictly enforced if there is evidence of a timely intention to appeal (***R.* v. *Tessier***, [1994] B.C.J. No. 527 (C.A.), particularly if that intention is known to the respondent, either expressly or impliedly, the respondent would not be unduly prejudiced, there is merit in the appeal, and it is in the interest of justice that an extension be granted. These are the factors that determine whether the applicant has established the special circumstances required for leave to extend time for doing an act (***R*. v. *Smith***, [1990] B.C.J. No. 2933 (C.A.)).

[3] In my view, the Crown has established special circumstances that justify the order it seeks. There is evidence that suggests the respondent knew of the Crown's intention to appeal. There is no evidence of prejudice to him. The appeal has merit.

[4] On 12 May 2005, Ruddy T.C.J. acquitted the respondent on a count of breaking and entering a dwelling place and committing sexual assault therein, and a count of sexual assault *simpliciter*. The Crown filed a notice of appeal in this Court on 9 June 2005. The same day it faxed a copy of that notice to the RCMP

detachment at Teslin for service on the respondent before 11 June 2005. From that detachment, it was forwarded to the RCMP detachment office at Fort Nelson, British Columbia, because, in September 2004, during the investigation of the offence, the respondent had provided the RCMP officer in Teslin with a Fort Nelson address verified by his driver's licence.

[5] On 11 June that detachment returned the notice because the address did not exist. At another address purportedly related to the respondent, the officer found only an uninhabited shack listed for sale. The phone number the respondent had provided was no longer in service; the employer's name he had provided ("Westcan Tel") was unknown in Fort Nelson.

[6] Then, on 11 August 2005, the respondent's trial counsel (who represents him on this application and represented him at the trial) enquired of a legal assistant at the Whitehorse office of the Department of Justice (now the Public Prosecution Service of Canada) to confirm an appeal had been filed. Upon being advised it had been, he indicated he would inform his former client of the appeal. On 30 August 2005, after receipt of the transcripts of the trial, the Department of Justice forwarded a copy of the Notice of Appeal to Mr. Parkkari, asking him to advise whether he might be in a position to accept service on the respondent's behalf. He advised it might be possible in the future. In late 2005 or early 2006, he advised he no longer thought it possible. Meanwhile, the appeal was set for hearing.

[7] When counsel for the appellant spoke to this Court's list for the May 2006

sitting on 13 March 2006, in the context of seeking instructions for substitutional service or late service, the Clerk of the Court provided her with a possible phone number for the respondent, a number she had apparently received from Mr. Parkkari. The Fort Nelson Detachment of the RCMP served the respondent personally on 6 May 2006. On 15 June 2006, copies of the Appeal Book and Transcript were served on him. Courtesy copies were provided to Mr. Parkkari on 28 June 2006.

[8] In circumstances where the appellant relied on information provided to a member of the RCMP investigating a crime, and that information proved to be unreliable, if not false, the respondent cannot complain about some delay in service of a copy of the notice of appeal. Mr. Parkkari's phone call to the local office of the Department of Justice to confirm an appeal had been filed is evidence he knew (and thus that his client knew) the Crown was considering an appeal. After that conversation, it was not unreasonable for the Crown to assume Mr. Parkkari had advised the respondent of the filing of the notice of appeal and to await the receipt of transcripts before contacting Mr. Parkkari again, then to send a copy of the notice of appeal to him, with the prospect he would receive instructions to accept service. Nor am I persuaded there was any lack of diligence after the calling of the list.

[9] The unexplained apparent inactivity between Mr. McWhinnie's conversation with Mr. Parkkari and the calling of the list on 13 March 2006 is troubling, but

insufficiently so to set aside the other factors that weigh in favour of leave being granted. In my view, the order sought will serve the interests of justice.

[10] I would grant the order requested and allow the appeal to be heard.

[11] FINCH C.J.Y.T.: I agree.

[12] LOW J.A.: I agree.

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The Honourable Madam Justice Huddart