Citation: *R. v. Herzog*, 2003 YKTC 12

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Docket: T.C. 02-00256
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Judge Stuart

R e g i n a

v.

Alfred Herzog

Appearances:
David McWhinnie — Counsel for Crown
Edward Horembala — Counsel for Defence

REASONS FOR JUDGMENT

Introduction

[1] The accused, Mr. Herzog, has, since 1982, made several different applications for land or land use to the territorial government land offices. Some were successful, some not and some are still pending. Mr. Galbraith, an employee of the territorial government has been involved with some of Mr. Herzog's more recent applications. Mr. Galbraith's office is immediately adjacent to Mr. Henderson's office. The statements alleged to constitute threats were made on June 7, 2002 to Mr. Galbraith in his offices. Some of these statements were made immediately before and some immediately after the accused attended a meeting in the nearby office of Mr. Henderson.

[2] Before entering Mr. Henderson's office, the Crown submits that the following exchange took place:

Mr. Galbraith: "Hello"

The accused: "You're back here"

Mr. Galbraith: "Yes until March"

The accused: "You'd better ensure you last until March"

[3] After leaving Mr. Henderson's office, the Crown submits that the accused made the following statements to Mr. Galbraith:

"You should be careful and watch yourself"; and

"If you still have property on Lake Laberge, you should learn to walk on water".

Issues

1. Were the statements made?
2. Can what was said reasonably be viewed as a threat?
3. Did the accused intend to threaten Mr. Galbraith?

1. Were the Statements Made?

[4] The accused testified his comments were intended as idle chatter. Consequently, there was no reason for him to take any special note of what he said. Conversely, Mr. Galbraith, perceiving these statements as a threat, had a very special reason for remembering what was said. Mr. Galbraith's version was credible and believable. The Crown has established that the statements, as remembered by Mr. Galbraith, were uttered by the accused.

2. Can These Statements Be Reasonably Viewed As a Threat?

[5] The commonly quoted statement of Mr. Justice Cory in *R. v. McCraw* (1991), 66 C.C.C. (3d) 517 (S.C.C.) at 525 sets out the questions to address in determining if the words uttered can be reasonably viewed as a threat:

> The words which are said to constitute a threat must be looked at in light of various factors. They must be considered objectively and within the context of all the written words or conversation in which they occurred. As well, some thought must be given to the situation of the recipient of the threat.
>
> The question to be resolved may be put in the following way. Looked at objectively, in the context of all the words written or spoken and having regard to the person to whom they were

> directed, would the questioned words convey a threat of serious bodily harm to a reasonable person?

[6] In considering whether the words can be reasonably interpreted as a threat, the pre-charge conduct of both the recipient and accused can be considered (*R. v. Ryback* (1996), 105 C.C.C. (3d) 240 (B.C.C.A.) at para. 30 & 32).

[7] **Larger Context:** Land applications in the Yukon can be difficult. Emotions can escalate and harsh exchanges are common between applicants and government employees. Some exchanges in this case, at least since mid-2001 have been emotionally charged.

Version of Mr. Galbraith:

[8] July 27, 2001: When Mr. Galbraith drove into Mr. Herzog's yard to make inquiries about a complaint of unauthorized land use, he heard the accused say, "I won't shoot you yet". The accused was carrying a bow.

[9] November 23, 2001: Mr. Galbraith attended Mr. Herzog 's property to inquire about trail blockages. The very short exchange ended with being told by the accused to "… get the f--- off my land". Mr. Galbraith left without much more happening.

[10] December 3, 2001: The extent of hostility experienced from the accused on the November 23 visit prompted Mr. Galbraith to call for police backup when, on December 3, he served Mr. Herzog with notices about the next action the government would take. On this visit the exchange was civil.

[11] December 28, 2001: When Mr. Galbraith was clearing trail blockages near Mr. Herzog's property, Mr. Herzog approached and demanded they get off his land. A supervisor was called on a field phone. After a short exchange by phone between the supervisor and Mr. Herzog, he became reasonable and left the area.

[12] January 2, 2002: In the land offices, after a meeting between Mr. Henderson and Mr. Herzog, Mr. Galbraith initiated a conversation with Mr. Herzog. Mr. Galbraith described this meeting as his attempt to “smooth things over”. Mr. Galbraith testified that Mr. Herzog was “equitable and pleasant”. This meeting caused Mr. Galbraith to believe they could work things out together in an appropriate manner.

[13] Mr. Galbraith continues to respect many aspects of Mr. Herzog. He acknowledges he “likes him”. There were no further meetings and nothing happened between Mr. Herzog and Mr. Galbraith after their January “smooth over” conversation to cause Mr. Galbraith to believe the tenor of their relationship had changed.

Version of Mr. Herzog

[14] July 27, 2001: The accused acknowledges he was carrying a bow. He testified the bow was not strung and he was not carrying any arrows. On all of the evidence, the accused’s version about the state of the bow prevails. Mr. Herzog is actively involved in making and using bows. He was working on his bow when Mr. Galbraith arrived. He denies threatening Mr. Galbraith. He asserts he said, “This bow is not shootable yet”. The Crown’s evidence on this point is not sufficiently persuasive to establish Mr. Galbraith’s version of what was said. Even Mr. Galbraith could not be certain. The statements are significantly similar to have been misheard.

[15] November 23, 2001: No threats by word or gesture accompanied Mr. Herzog’s crude and uncivil demand to leave his premises. Having the police attend for the next visit may have been an appropriate measure of caution but it did not seem patently necessary in light of all that transpired on this visit.

[16] December 3, 2001: Nothing of any significance occurred. Because the police were present, it is not possible to conclude that this visit ought to have allayed Mr. Galbraith’s fears.

[17] December 28, 2001: While Mr. Galbraith anticipated trouble, little, if anything happened that might reinforce any fear he held about Mr. Herzog. Mr. Galbraith and Mr. Herzog had a civil conversation and with the help of a supervisor were able to resolve the differences that arose between them that day. Mr. Galbraith described Mr. Herzog as “agreeable”.

[18] January 2, 2002: Mr. Galbraith testified, “This was a good meeting”. He describes Mr. Herzog as “equitable and pleasant”. At the end of the meeting, Mr. Galbraith and Mr. Herzog shook hands.

Immediate Context

[19] June 7, 2002: This is the critical exchange. I accept Mr. Galbraith’s testimony about what was said. These statements need to be examined separately and collectively.

Before the meeting;

“You’d better ensure you last until March”

[20] Mr. Herzog asserted he was trying to make idle conversation and in trying to be “smart” did not intend any threat. He explained as the government renewal program was reducing jobs and moving around employees, thus Mr. Galbraith might need to take care to keep his job.

After the meeting;

“You’d better watch yourself”; and

“If you still have property on Lake Laberge you’d better learn how to walk on water”

[21] This, Mr. Herzog explains, is more a crude attempt to tease than make a threat. It was early June. The ice on Lake Laberge was soft and disappearing. The defence submits this was intended only as a flippant comment about the dangers of living by the water at that time of year. Either Mr. Herzog has a very bad sense of humour and timing

or a very clever way of explaining away comments that were initially intended as threats. Whatever Mr. Herzog might have intended his words must first be assessed in the context of the overall circumstances and in light of what he said at the time.

[22] **Recipient of Threat**: In discerning the nature of the remarks the particular circumstances of the recipient must be considered. Mr. Galbraith is a 30-year veteran in the often tense exchanges over land issues. He takes pride in his capacity to appreciate and work through the heated emotions that land issues often precipitate.

[23] While the evidence of the defence that he did not have any decision making power over the final outcome was not contested, he was definitely a player in the process. The statements could be construed by Mr. Galbraith as an attempt to ensure he would not do anything to oppose Mr. Herzog's land applications. There is no doubt that Mr. Galbraith was frightened. The question remains whether a reasonable person would feel frightened in the same circumstances.

[24] Given the sometimes stormy history of their interactions, their lack of any history of mutual teasing and the propensity of the accused for angry outbursts and aggressive behavior, a reasonable person working in a lands office would view the words used as a threat of serious bodily harm.

3. Did The Accused Intend to Issue A Threat?

[25] It is not enough that the words were reasonably interpreted as a threat. A conviction also requires proof beyond a reasonable doubt that the accused intended to make a threat.

[26] Mr. Herzog seems to wear his pugnacious, and crusty manner with pride. A manner that will often, as it has in this case, intensify his problems. His relations with government officials seem to reflect a belief that a forceful persistence that borders on intimidation is a successful strategy. The only success this strategy has yielded in this

instance is a serious criminal charge. However, bad judgment and an insensitive belligerent manner can only lead to a criminal offence if all the elements of the offence are made out.

[27] Several factors raised by the defence are relevant in determining whether the words expressed were intended as a threat:

> **Past History**: The pre-charge conduct of an accused is relevant to intent. Pre-charge conduct may be used to exculpate or inculpate (*R. v. Ryback, supra* at 33). Pre-charge conduct is particularly relevant in considering whether the accused was reckless (*R. v. Owimar,* [2002] B.C.J. No. 1651 (Prov. Ct.) at 41).
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> The last time, before June 7, that Mr. Herzog and Mr. Galbraith had any interaction was January 2. Since January, there is no evidence to suggest Mr. Galbraith had anything to do with any of Mr. Herzog's land applications or that Mr. Herzog might have believed Mr. Galbraith had anything to do with his applications. This last meeting in January was their only significant conversation. During this meeting, the exchange was civil. Mr. Galbraith believed the meeting had "smoothed things out". The meeting ended by shaking hands. Nothing in the immediate past history gives rise to any basis for the accused to bear any animus towards Mr. Galbraith.
>
> **Immediate Circumstances**: The meeting the accused had with Mr. Henderson on June 7 was described by Mr. Henderson as cordial. He testified that the tone of their meeting was polite when it began and while there was some heated discussion, the meeting ended politely. Mr. Galbraith testified that Mr. Herzog seemed "quite equitable and normal" when he exited from Mr. Henderson's office. Mr. Galbraith had no reason

at that time to fear him. He testified he was surprised by the remarks made by Mr. Herzog. There were no hostile gestures and nothing in the tone of his expressions that suggested anger. No one in the open office area testified that Mr. Herzog had expressed any loud or threatening words or exhibited any aggressive behavior. The immediate circumstances are more consistent with a misplaced and awkward attempt at humour than with the issuing of a threat.

Motive: While motive is not a necessary element of the offence, the presence or absence of motive is a relevant factor to consider in weighting all the evidence. There is no significant evidence to find that Mr. Galbraith had any influence over any of Mr. Herzog's applications. Rather, the evidence confirms Mr. Herzog's view that Mr. Galbraith was not a part of the decision making process. Mr. Herzog dealt directly with Mr. Galbraith's superiors. Threatening Mr. Galbraith could not advance his interests and could, if anything, only be detrimental.

The only relevant evidence of motive addresses Mr. Galbraith's conduct. In an e-mail later that day Mr. Galbraith wrote: "when Mr. Herzog threatens we respond with the RCMP ... I'd like to think that drives him crazy". This comment taints his otherwise fair and even-handed testimony. One could surmise that his even-handed testimony which often placed Mr. Herzog in a very favourable light, was part of an overall strategy to enhance his credibility as a witness and thereby lend more weight to the parts of his testimony that implicated Mr. Herzog. The better view is to regard his comment as an understandable angry reaction to believing he and his family had been threatened.

[28] **Summary**: In addressing the requisite criminal intent, the question is not whether

someone was threatened but whether the accused intended to threaten (*R. v. George,* [2002] Y.J. No. 2 (C.A.) at para. 51). The immediate past history, immediate circumstances, the meaning attached by the defence to the statements made, and all other evidence leave a reasonable doubt about any criminal intent. Mr. Herzog had no reason at the time to be angry with Mr. Galbraith, nor anything to gain from him. The words expressed were not proven to have been used as a threat to facilitate a goal sought by the accused (*R. v. McGraw, supra* at 524). The words were not uttered with the intent to be taken seriously.

Conclusion

[29] In the final analysis, the best view to take is that given by Mr. Herzog, “what I said was not to intimidate ... just to make a smart-ass remark”. This smart-ass remark was reasonably construed as a threat. Like most smart-ass remarks they are anything but smart as they often lead to trouble of some kind. While ill-advised to attempt making such smart-ass comments in the circumstances of June 7, the conduct of the accused cannot be seen as sufficiently reckless to attract criminal liability.

[30] Mr. Herzog’s words sufficiently connect to current events (government renewal efforts, ice melting on Lake Laberge) to plausibly support a bad attempt to be humorous. This “spin”, given in court to the meaning of these words, could easily have been missed by Mr. Galbraith.

[31] The accused is acquitted of the charge.

[32] This is my last case as a judge. Having the pleasure of trying this case with two

excellent and very professional counsel was a wonderful way to finish my service as a judge. I was in this case, as in many others, indebted to their high professional standards for sustaining my belief in the potential of the trial process to be an integral part of realizing justice in our communities.

Stuart T.C.J.