

COURT OF APPEAL OF YUKON

Citation: *R. v. Nowazek*,
2017 YKCA 17

Date: 20171121
Docket: 16-YU785

Between:

Regina

Appellant

And

Brian George Nowazek

Respondent

Before: The Honourable Madam Justice Bennett
The Honourable Madam Justice Charbonneau
The Honourable Madam Justice Dickson

On appeal from: an order of the Supreme Court of Yukon, dated
February 7, 2017 (*R. v. Nowazek*, 2017 YKSC 8, Whitehorse Docket No. 15-01502)

Oral Reasons for Judgment

Counsel for the Appellant:

L. Whyte

No one appearing on behalf of the
Respondent:

Appearing as *amicus curiae* (via
teleconference):

Bibhas Vaze

Place and Date of Hearing:

Whitehorse, Yukon Territory
November 21, 2017

Place and Date of Judgment:

Whitehorse, Yukon Territory
November 21, 2017

Summary:

The appellant Crown seeks direction with respect to proceeding with their appeal in the absence of the respondent, who breached the terms of a recognizance and is currently a fugitive. Held: Subject to the views of the division hearing the appeal, this appeal should proceed in the absence of the respondent, provided the Crown makes its best effort to serve him with the material and notice of hearing, and to file an affidavit speaking to that effort closer to the hearing date.

[1] **BENNETT J.A.:** In an oral judgment on August 1, 2016, Mr. Justice Ducharme acquitted Mr. Nowazek of child pornography and weapons-related charges, based on the exclusion of evidence obtained in the breach of his s. 8 *Charter* rights. Written reasons were published on February 7, 2017, and indexed as *R. v. Nowazek*, 2017 YKSC 8.

[2] The Crown seeks to appeal the order.

[3] On August 12, 2016, the Crown personally served Mr. Nowazek with the notice of appeal.

[4] Crown filed an affidavit of service in the Registry on August 23, 2016.

[5] Between the time of the oral judgment and the publishing of written reasons, Mr. Nowazek breached the terms of a recognizance and is currently a fugitive. He has not been arrested or located.

[6] The Crown has filed two affidavits setting out the efforts made to attempt to find him. It is clear that they have not been able to locate him. It is possible he has left the country.

[7] The Crown seeks a direction from this Court with respect to proceeding with their appeal in the absence of the respondent. An *amicus curiae* has been appointed to appear on this application and to appear on the appeal, should the matter proceed.

[8] In *R. v. Myerscough*, [2001] O.J. No. 2687 (C.A.), at para. 2, at the time of the hearing, the division permitted the Crown to argue an appeal from an acquittal in the

absence of the respondent or anyone on his behalf. At the first hearing date, the respondent was not present, although he had been personally served with the notice of appeal. The Court adjourned that hearing and directed the Crown to make its best efforts to serve the respondent with notice of the new hearing date. The respondent did not appear for the new hearing date, but the division was satisfied, based on an affidavit from an investigating officer, that the Crown had made its best efforts and that the respondent had notice of when the appeal would be argued.

[9] In *R. v. May*, 2009 BCCA 161 at para. 21, the Court heard an appeal from the dismissal of an application for an order under the *Sex Offender Information Registration Act*, S.C. 2004, c. 10, in the absence of the respondent or anyone on his behalf, on satisfaction that the Crown materials were personally served on the respondent. The Court allowed the appeal and directed the Crown to also personally serve the order resulting from the appeal on the respondent.

[10] We are all of the view that, subject to the views of the division hearing the appeal, this appeal should proceed in the absence of the respondent.

[11] Prior to that hearing, the Crown need make its best efforts to serve the respondent with the material and the notice of hearing and to file an affidavit speaking to that effort closer to the hearing date.

[12] As indicated, the division before which the appeal is set may wish to hear further submissions on whether it should proceed, as these reasons do not bind that division, in terms of whether to proceed with the appeal.

[13] **CHARBONNEAU J.A.:** I agree.

[14] **DICKSON J.A.:** I agree.

“The Honourable Madam Justice Bennett”