SUPREME COURT OF YUKON

Citation: *R. v. Lamothe*, 2020 YKSC 36

Date: 20200825
S.C. No. 19-01506
Registry: Whitehorse

BETWEEN:

HER MAJESTY THE QUEEN

APPLICANT

AND

JEFFREY HARTLAND LAMOTHE

RESPONDENT

AND

THE YUKON REVIEW BOARD

DECISION-MAKER

Before Madam Justice S.M. Duncan

Appearances:

Paul Battin	Counsel for the Director of Public Prosecutions
Gregory Johannson	Counsel for Mr. Lamothe
Mark Wallace	Counsel for The Yukon Review Board
Karen Wenckebach	Counsel for the Government of Yukon

RULING
(Preliminary issues of jurisdiction and mootness)

INTRODUCTION

[1] This is a ruling on whether this Court should hear this Petition brought by the Director of Public Prosecutions (the "Crown"). The preliminary issues are: first, whether the petition is moot; and second, whether the Court has jurisdiction to consider the remedy sought.

[2] The only relief now sought by the Crown is a "declaration confirming that by neglecting to give Reasons for Judgment contemporaneous with the disposition, the Yukon Review Board has breached natural justice and procedural fairness".

[3] A third issue raised at case management and pursued here by the Crown is whether the Yukon Review Board ("YRB") should be granted standing in the hearing of this Petition. The YRB, who was represented by counsel at this preliminary hearing, stated that the issue of their standing should not be addressed at this time. There was no concern raised by the Crown about the YRB's ability to make submissions on the preliminary issues.

[4] I will not address here the issue of the YRB's standing to make representations at the hearing of the Petition on its merits, should it proceed, as it is premature.

BACKGROUND

[5] Jeffrey Lamothe was charged on October 27, 30 and November 1, 2018 with uttering a threat to cause death; assault; resisting arrest; and failing to comply with three aspects of his undertaking – no contact; keep the peace and be of good behaviour; not to go to Wykes Independent Store or to a specific residence, place of employment or education of an individual.

[6] The Territorial Court of Yukon ("Territorial Court") on November 5, 2018, ordered an Examination and Report to assess whether or not Mr. Lamothe was not criminally responsible at the time the offences were committed. The Report's findings were inconclusive because Mr. Lamothe refused to meet with the physician assessor, Dr. S. Lohrasbe.

[7] The Territorial Court then ordered an Assessment and Report to determine if Mr. Lamothe was fit to stand trial on January 16, 2019. Dr. D. Toguri, a qualified psychiatrist, provided his opinion on February 23, 2019 that Mr. Lamothe was fit to stand trial.

[8] The Territorial Court on March 29, 2019 again ordered an Assessment and Report to determine whether or not Mr. Lamothe was suffering from a mental condition at the time of the offence so as to exempt him from criminal responsibility. Dr. S. Lohrasbe, a psychiatrist experienced in medico-legal matters, filed his report on April 25, 2019, and on April 29, 2019, Mr. Lamothe was found not criminally responsible due to a mental disorder by the Territorial Court, pursuant to s. 672.34 of the *Criminal Code*, R.S.C.1985, c. C-46, (the "*Code*"). The Territorial Court declined to make a disposition and the matter was referred to the YRB for disposition.

[9] During this time, beginning on January 16, 2019, Mr. Lamothe was in custody at the Forensic Psychiatric Hospital in Coquitlam, British Columbia, by Court order.

[10] The YRB conducted a disposition review hearing on May 8 and June 7, 2019, pursuant to s. 672.47(1) of the *Code*.

[11] The YRB issued its Disposition in writing on June 13, 2019, which was that Mr. Lamothe did not pose a significant risk to the public. He was given an absolute

discharge, pursuant to s. 672.54 of the *Code*. No reasons were provided with the Disposition.

[12] On September 20, 2019, the Crown filed the within Petition for an order for *mandamus* or, in the alternative, *procedendo*, compelling the YRB to issue reasons for Disposition setting out why Mr. Lamothe was absolutely discharged on June 13, 2019; for a declaration confirming that by neglecting to give reasons contemporaneous with the Disposition, the YRB breached natural justice and procedural fairness; and costs.

[13] The YRB issued reasons for the Disposition on September 30, 2019.

[14] The Crown had 15 days from October 1, 2019, to appeal the Disposition, pursuant to s. 672.72(2). The Crown did not appeal.

[15] The first Case Management Conference in the litigation of this Petition was held on October 9, 2019.

ISSUES

Issue #1 – Is this Petition Moot?

Law

[16] The leading case on mootness is the decision of the Supreme Court of Canada in *Borowski v. Canada (Attorney General),* [1989] 1 S.C.R. 342 ("*Borowski*"). In that case, the Court set out a two-stage approach to deciding issues of mootness. First, is the case moot? Second, despite the mootness of the case, should the court still exercise its discretion to hear it?

[17] A court may decline to hear a case that raises only a hypothetical or an abstract question. A decision of the court must have the effect of resolving some controversy,

which affects or may affect the rights of the parties. The question to be asked is whether the tangible and concrete dispute has disappeared, making the issues academic.

[18] If there is no live controversy, then the court can still exercise its discretion to decide a moot issue if circumstances warrant.

[19] The Court in *Borowski* set out the following three considerations to guide the exercise of discretion in moot cases:

i. Whether, despite the disappearance of the concrete dispute, an adversarial context continues to exist, such that there remains an assurance that the case will be fully argued before the court;

ii. Whether judicial economy would be advanced in some way by hearing a case notwithstanding that the concrete dispute has been resolved; and

iii. Whether, in hearing a moot case, the court will be straying into the legislative sphere rather than acting as an adjudicative body.

Analysis

[20] Here, the case is moot. Mr. Lamothe was absolutely discharged by the YRB as of the date of Disposition. The fact that the reasons were not issued until several months later did not affect Mr. Lamothe. The decision was not appealed. Mr. Lamothe's rights will not be affected by the procedural matter at issue here. I note that Mr. Lamothe's counsel was present by telephone as an observer but he did not participate in the hearing.

[21] The Crown argued that the rights of complainants in the underlying criminal charges and the public at large are detrimentally affected by the YRB's failure to issue reasons contemporaneously with the Disposition. The argument is that the

complainants have a right to know the reasons why the accused has been absolutely discharged. Similarly, the public at large has the right to understand the YRB's decision. The Crown says it has the duty to protect the public from any further actions of Mr. Lamothe, and without reasons it is unable to make any risk assessment, or decision to appeal.

[22] These arguments are not persuasive on the facts of this case. The complainants did not appear at the YRB hearing. There is no evidence from them indicating the impact on them of the delay in the reasons. The reasons were issued on September 30; the Crown did not appeal.

[23] There is no longer any live controversy or concrete dispute, now that the reasons have been issued.

[24] The question to be determined in this case then is whether this Court should exercise its discretion to hear the Petition.

(i) Will the case be fully argued

[25] There is no assurance that this case will be fully argued before the Court. As noted, Mr. Lamothe's rights have not been affected by the timing of the issuance of the reasons. He is not participating except as an observer. The Government of Yukon, although present at the hearing, is not participating in the substantive argument either.

[26] The only remaining affected entity is the YRB. It did argue against the Crown's position on this preliminary hearing on jurisdiction and mootness. However, if this matter were heard on its merits, the Crown has indicated its opposition to the YRB having standing either as a party or an intervenor, on the basis that the tribunal should not be defending its own practices, actions, and decisions. The Crown relies on the decision of

this court in *R. v. Carlyle,* 2018 YKSC 45, ("*Carlyle* 2018"), where the YRB was not granted standing to make submissions about an allegation against them of a breach of the principles of natural justice. Assuming the Crown is successful in this argument, and the YRB is not granted standing on the issue of the YRB's breach of procedural fairness/natural justice, there will be no entity to oppose the Crown's arguments. The matter will not be fully argued before the Court. The first part of the test is not met.

(ii) Will judicial economy be advanced by hearing the dispute

[27] The Crown argues that the issuance of reasons after dispositions or orders are made, instead of contemporaneously with them, is a practice that is recurring and likely to be repeated. It would therefore be more efficient if this matter were adjudicated upon now, especially in the absence of any rules to govern the procedure of the YRB.

[28] The only other case on this point referenced by the Crown is *R. v. Carlyle*, 2019 YKSC 38 ("*Carlyle* 2019"). The Court referred to the release of YRB's reasons for its order that a hearing be held in Alberta instead of Whitehorse, approximately six weeks after the decision was communicated. No other examples were referenced.

[29] The existence of two cases where the reasons were not issued until some time after the decision hardly constitutes a recurring pattern. There is no evidence that this has become a practice of the YRB that would benefit from an adjudicative decision, assuming it is within the court's jurisdiction.

[30] The test of judicial economy is not met in this case.

(iii) Legislative v. adjudicative

[31] The Crown argues the relief requested does not require the Court to stray into the legislative sphere, because it is only asking for a declaration of a breach of

procedural fairness/natural justice, leaving the remedy to be completed by the YRB. However, the declaration sought is a finding that failure to issue reasons contemporaneously with the disposition is a breach. If granted, the only way to remedy the breach is to require the reasons to be issued contemporaneously with the disposition. In other words, the actual remedy sought is more than a declaration of breach. The Crown's written submissions confirm this position at para. 14:

> 14. … The practice can be corrected by this Court issuing a declaration, or a decision indicating the validity of the *mandamus* application, requiring the YRB to henceforth issue reasons simultaneously with the issuance of dispositions. (emphasis in original)

[32] Section 672.44(1) of the *Code* provides the Review Board the discretion to make its own rules of practice and procedure, subject to the approval of the Lieutenant-Governor-in-Council, or equivalent. Review Boards in other provinces have done so and have specifically addressed the timing of the issuance of reasons for disposition. Interestingly, in none of the rules of procedure and practice provided to the Court from other jurisdictions is there a requirement that the reasons for disposition be issued contemporaneously with the decision. Written reasons for disposition, or a transcript of oral reasons, must be issued within 45 days of the hearing, under the British Columbia Review Board, *Procedural Guidelines at Hearings* and the Nova Scotia Review Board, *Rules of Practice and Procedure*.

[33] At the hearing, counsel for the YRB advised that the YRB is currently developing a policy on the issue of timing of the release of reasons. The selection of a policy over a rule is related to the capacity of the YRB to develop rules at this time; the requirement for it to obtain approval from the Commissioner-in-Executive-Council of Yukon and the

delay that could entail; and the perceived need of the YRB to have this in place quickly, largely as a result of the recent Court of Appeal of Yukon decision in *R. v. Aguilera Jimenez*, 2020 YKCA 5. Although that case was a sentencing decision, where the wording in s. 726.2 of the *Code* is specifically directive, requiring reasons for sentence to be issued at the same time as a decision, the YRB has chosen to be guided by the decision.

[34] A grant of the judicial remedy sought by the Crown, requiring the YRB to issue reasons at the same time as a disposition or an order, would be straying into the legislative function Parliament granted to the Review Boards and the Lieutenant-Governor-in-Council or equivalent.

[35] Finally, the Crown urged this Court to follow the reasoning in the cases of *Kostiuk v. Manitoba*, 141 D.L.R. (4th) 308 ("*Kostiuk*") and *McCorkell v. Riverview Hospital*, 81 B.C.L.R. (2d) 273 ("*McCorkell*"). Both decisions address situations involving vulnerable people, in which the immediate dispute was resolved. The courts in both cases agreed nonetheless to decide the moot issues, where there could be other vulnerable individuals in future in the same circumstance, or where the individual in the case at bar could find himself in the same situation again.

[36] These cases are distinguishable. In *Kostiuk*, there was clearly an adverse effect on the vulnerable individual of the government's practice of requiring duplicate social assistance payments in the event of a reported loss or theft of the initial payments, to be recovered on a monthly basis. This practice was permitted by the Ministry's policy manual. Unlike the current case, the individual's rights in *Kostiuk* were detrimentally

affected by this practice, which was a recurring one, sanctioned by the policy manual, and likely to affect other individuals.

[37] In *McCorkell*, certain provisions of the British Columbia *Mental Health Act*, R.S.B.C. 1979, c. 256, dealing with involuntary committal and detention of mentally ill persons, were challenged under s. 7 and s. 9 of the *Charter*. Although at the time of hearing the plaintiff was no longer committed, the Court noted the matter was initiated as a test case on an important public interest issue. The short-term nature of involuntary detention meant that the constitutionality of the *Mental Health Act* might never be examined if the court had to wait for a live controversy to exist. The impugned legislative provisions would continue to apply to many other individuals in similar circumstances.

[38] Here, the litigation is not a constitutional challenge related to the liberty of mentally ill individuals. There is no evidence of a recurring pattern that may affect others in similar circumstances.

[39] The other cases relied on by the Crown - *Baker v. Canada (Minister of Citizenship and Immigration),* 1999 SCC 699; *R. v. Desmond*, 2020 NSCA 1; *R. v. Frisch*, 2013 YKCA 3; and *R. v. MacAdam*, 2017 PECA 7 - do not address the timing of the issuance of reasons for decisions. Instead they discuss the need for reasons to be given, and their sufficiency. Here, there is no dispute that reasons are necessary, and that they must be sufficient. The only narrow issue is the timing of the release of reasons, an issue not addressed in these other cases.

[40] For these reasons, the Court should not exercise discretion to hear this case.

Issue # 2 – Does this Court have jurisdiction to consider the declaratory relief sought

[41] Given my decision on mootness, it is not necessary to decide the jurisdictional argument. However, if it were necessary, I would find that the Court does not have jurisdiction to hear this matter. I make the following comments on the jurisdictional issue.

[42] The Crown concedes that the only outstanding issue to be decided in this Petition is a request for a "declaration confirming that by neglecting to give Reasons for Judgment contemporaneous with the Disposition, the Yukon Review Board has breached natural justice and procedural fairness."

[43] A declaration is not an available form of relief in this context for several reasons. First, in a case such as this, procedurally governed by the *Code,* a party can apply to this Court for a remedy set out in Part XXVI of the *Code*, Extraordinary Remedies. Declaratory relief is not included as one of those extraordinary remedies in s. 774.

[44] Second, even if declaratory relief were available under the *Code,* it cannot apply in the context of this case. The nature of declaratory relief is described by Sara Blake in *Administrative Law in Canada, Sixth Edition* (Toronto: Lexis Nexis Canada Inc. 2017), at p. 255, ss. 9.36 - 9.37:

> 9.36 … **Declaratory relief must be necessary to determine a party's rights with respect to an actual exercise of statutory power**. [*Big Thunder Windpark Inc. v. Ontario (Minister of the Environment)*, [2014] O.J. No. 2430 (Ont. Div. Ct.). **They are not made on matters of morality, wisdom or policy.** [*Dee v. Canada (Minister of Employment and Immigration)*, [1987] F.C.J. No. 1158 (F.C.T.D.)]. **A declaration may be refused if it would have no practical effect, if there is no one present in court with a true interest in presenting the opposing view** [*Solosky v. Canada*, [1979] S.C.J. No. 130], or if the question could more appropriately be raised in proceedings before a tribunal.

> 9.37 **A declaration of the court does not order anyone to do anything or to refrain from doing anything. It is not enforceable as a mandatory or compensatory order may be** but, given the respect for the court, a declaration of the court may be preferable to *mandamus*. (citations omitted) (emphasis added)

[45] Here, it is not necessary to determine a party's rights with respect to an exercise of statutory power. The timing of the issuance of reasons by the Review Board is not specifically set out in the *Code*. Mr. Lamothe's rights have not been affected. The declaratory relief requested is a matter properly dealt with by rule or policy. As noted in the mootness analysis above, there is no entity that has a true interest in providing an opposing view to the Crown's argument. A declaration cannot be used to order someone to do something.

[46] The remedy sought by the Crown in this case, requesting the Court to require the YRB to issue reasons contemporaneously with the disposition or order, is closer to *mandamus* than a declaration.

[47] *Mandamus* is included as one of the Extraordinary Remedies in the *Code*. However, *mandamus* is not available in this context either. Where the matter sought to be ordered is discretionary, as in this case, pursuant to s. 672.44(1) (*Carlyle* 2019 at paras. 178-79), *mandamus* cannot be used.

[48] There is also some doubt whether *mandamus* should be considered at the trial court level, where there is an appellate remedy available. Submissions were not made on this point and I only raise it as another possible obstacle to having this matter heard.

[49] The Crown also relies in its jurisdictional argument on s. 32 of the *Judicature Act,* R.S.Y. 2002, c. 128, which states that:

> [32] No action or proceeding is open to objection on the ground that a merely declaratory judgment or order is sought

> thereby, and the Court may make binding declarations of right whether any consequential relief is or can be claimed or not.

[50] The decision of this Court in *Carlyle* 2018 clarifies that all matters related to the YRB are to be treated as part of criminal proceedings, not civil proceedings. The *Judicature Act* refers to civil proceedings, not criminal. "Proceeding" is not defined in the *Judicature Act*, and there is no basis to conclude that it applies to criminal matters. The *Code* is a complete code that sets out the procedural rules and remedies available to be applied by this Court in criminal proceedings. The *Judicature Act* is not applicable in this context.

[51] The remaining Crown argument is that this Court has inherent jurisdiction to consider a declaration of this kind. Inherent jurisdiction is to be used cautiously, sparingly, and as a last resort. Inherent jurisdiction cannot be relied upon where its exercise would contravene a statutory provision. It is not an appropriate case in which to exercise inherent jurisdiction.

CONCLUSION

[52] My last observation is that while this matter is being dismissed for mootness, and, secondarily, if necessary, lack of jurisdiction, it is appropriate for the YRB to be addressing the underlying issue. Issuance of reasons for dispositions and orders in a timely way provides an expected measure of accountability and transparency by a public authority that exercises a significant responsibility over vulnerable individuals and whose decisions have consequential effects on a number of institutional entities. While this particular case may not have affected the rights of Mr. Lamothe, other fact situations can be envisioned where detrimental impacts may result from a delay in

reasons. The responsible approach is to implement a clear and transparent rule or policy so that all affected entities and the public understand why the YRB has made its disposition or order.

[53] The petition is dismissed for mootness. There is no longer a live controversy, and the circumstances do not exist for the Court to exercise discretion to hear a moot case. Further, the Court does not have jurisdiction to issue the relief sought.

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DUNCAN J.