SUPREME COURT OF YUKON

Citation: *Knol v. Canada (Attorney General)*, 2013 YKSC 121

Date: 20131204
S.C. No. 13-AP014
Registry: Whitehorse

Between:

LUCAS KNOL

Applicant

And

ATTORNEY GENERAL OF CANADA and TAMARACK INC.

Respondents

Before: Mr. Justice L.F. Gower

Appearances:

Lucas Knol	Appearing for himself
Suzanne Duncan and Geneviève Chabot	Counsel for the Respondent, Attorney General of Canada

REASONS FOR JUDGMENT

INTRODUCTION

[1] The Attorney General of Canada ("AGC") is applying to dismiss a judicial review application by Mr. Knol relating to his private prosecution of Tamarack Inc. ("Tamarack"). In the judicial review, Mr. Knol seeks to quash the Crown-entered stay of that private prosecution, in which he alleges that Tamarack defrauded him in relation to a mining claim. The AGC primarily submits that, pursuant to s. 18(1)(a) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, (the "*Act*") the Federal Court has exclusive jurisdiction to hear Mr. Knol's judicial review application. Alternatively, should this Court find that it has

jurisdiction to hear Mr. Knol's application, the AGC submits that it ought to decline jurisdiction in favour of the Federal Court, on the basis that the Federal Court is the more convenient forum.

[2] Mr. Knol submits that the leading case in this area, *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, ("*TeleZone*") grants concurrent jurisdiction to this Court to hear the judicial review.

BACKGROUND

[3] Mr. Knol swore a private information on August 4, 2011 alleging that:

> "…on or about the 18th day of April 2008, Tamarack Inc. did by deceit, falsehood or other fraudulent means defraud Lucas Knol of property, to wit: a mining claim in Dawson City, Yukon Territory, described as Dodger 5, contrary to section 380 (1) of the Criminal Code."

This charge was indictable and within the jurisdiction of the Supreme Court because of the presumed value of the property. Tamarack elected to be tried by a Supreme Court judge alone and the matter was set for a preliminary inquiry.

[4] The preliminary inquiry was held on September 10, 2012 and a Deputy Territorial Court Judge discharged Tamarack. Mr. Knol applied to this Court for judicial review of that discharge. On April 19, 2013, I granted Mr. Knol's application for *certiorari* and remitted the matter back to the Territorial Court together with an order of *mandamus* requiring that Tamarack be committed to stand trial. The committal was ordered on May 24, 2013. On June 3, 2013, Mr. Knol filed his indictment on this charge. On July 3, 2013, Noel Sinclair, counsel for the AGC, directed the clerk to make an entry on the record that the proceedings were to be stayed.

[5] On August 5, 2013, Mr. Knol filed a further application for judicial review seeking an order:

> "1. to quash the notice of stay by the Attorney General of July 3, 2013 by order of certiorari.
> 2. the accused to stand trial as charged by order of mandamus [as written]…"

[6] On October 4, 2013, on the grounds indicated above, the AGC filed its application to dismiss Mr. Knol's application for judicial review. The AGC's application was heard on November 13, 2013.

ANALYSIS

[7] Section 18(1)(a) of the *Act* provides:

> "18. (1) Subject to section 28, the Federal Court has exclusive original jurisdiction
> (a) to issue an injunction, writ of certiorari, writ of prohibition, writ of mandamus or writ of quo warranto, or grant declaratory relief, against any federal board, commission or other tribunal;…"

[8] There is no question that Mr. Knol is asking for relief in the nature of *certiorari* and *mandamus* in his application to quash the AGC's stay of proceeding. The next question is whether Mr. Sinclair, acting as counsel for the AGC, falls within the definition of "any federal board, commission or other tribunal" in s. 18(1)(a).

[9] Section 2 of the *Act* contains the following definition:

> ""Federal board, commission or other tribunal" means any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown…"

[10] The AGC is exclusively responsible for the prosecution of criminal offences in the Yukon Territory. Section 2 of the *Criminal Code*, R.S.C. 1985, c. C-46, (the "*Code*") contains the following definition:

> " "Attorney General"
> …
> (b) with respect to the Yukon Territory … in respect of a … contravention of, any Act of Parliament …means the Attorney General of Canada and includes his or her lawful deputy…"

[11] Federal Crown prosecutors are appointed and perform their duties pursuant to two Acts of Parliament: the *Department of Justice Act*, R.S.C. 1985, c. J-2, section 5; and the *Director of Public Prosecutions Act*, S.C. 2006, c. 9, s. 121, section 3(3). In particular, s.3(1) of the latter *Act* authorizes the Attorney General to appoint a Director of Public Prosecutions who, pursuant to subsection (3) "under and on behalf of the Attorney General,":

> "(a) initiates and conducts prosecutions on behalf of the Crown …; [and]
> …
> (f) exercises the authority of the Attorney General respecting private prosecutions, including to intervene and assume the conduct of - or direct the stay of - such prosecutions; …"

[12] The discretion to stay prosecutions is specifically provided for in s. 579(1) of the *Code*, which reads:

> "The Attorney General or counsel instructed by him for that purpose may, at any time after any proceedings in relation to an accused or a defendant are commenced and before judgment, direct the clerk or other proper officer of the court to make an entry on the record that the proceedings are stayed by his direction, and such entry shall be made forthwith thereafter, whereupon the proceedings shall be stayed accordingly and any recognizance relating to the proceedings is vacated."

[13] The jurisprudence also clearly establishes the power of the Attorney General to stay private prosecutions: see *Krieger v. Law Society of Alberta*, 2002 SCC 65.

[14] In *TeleZone*, cited above, Binnie J, speaking for the Supreme Court, at para. 3, pointed out that the wording “federal board, commission or other tribunal” in s.2(1) of the *Federal Courts Act* is extremely broad and encompasses most federal actors, both institutional and individual:

> “[3] The definition of "federal board, commission or other tribunal" in the Act is sweeping. It means "any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown" (s. 2), with certain exceptions, not relevant here, e.g., decisions of Tax Court judges. The federal decision makers that are included run the gamut from the Prime Minister and major boards and agencies to the local border guard and customs official and everybody in between….”

[15] I am satisfied that the Crown prosecutor, Mr. Sinclair, was acting as counsel for the Attorney General when he directed a stay of the private indictment on July 3, 2013, and therefore fell within the definition of “federal board, commission or other tribunal” in s. 18(1)(a) of the *Act*. In doing so, I am further satisfied that he was, pursuant to s. 2 of the *Act*, “exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament”, i.e. s. 579(1) of the *Code*. Accordingly, s 18(1)(a) of the *Act* applies, giving the Federal Court “exclusive original jurisdiction” to deal with Mr. Knol’s application to quash the Attorney General’s decision to direct the stay. Thus, Mr. Knol’s application for judicial review is not one which can be pursued in this Court.

[16] I find support for my decision here in *Joe v. Canada (A.G.)*, 2008 YKSC 68. Although that case predated *TeleZone*, it is otherwise on all fours with the case at bar. After Mr. Joe swore a private information against two RCMP officers, the Attorney General intervened and directed a stay of proceedings. Mr. Joe sought to have the stay quashed and the criminal proceedings resumed by way of an application for judicial review filed in this Court. The Attorney General made a preliminary motion to strike Mr. Joe's application on the basis that an application of that kind was within the exclusive jurisdiction of the Federal Court pursuant to s. 18(1) of the *Federal Courts Act*. Deputy Justice Groberman, as he then was, agreed and struck Mr. Joe's application. At para. 9, he stated:

> "The current proceedings are proceedings in the nature of *certiorari* to quash the decision of the Attorney General of Canada to direct a stay of proceedings. In directing a stay, the Attorney General was exercising powers conferred under the Criminal Code. A plain reading of the statutory provisions supports the position put forward by the applicant. The Attorney General was a "federal board, commission or other tribunal", and is subject to judicial review only in the Federal Court."

[17] Mr. Knol's submits that *TeleZone* grants concurrent jurisdiction to both this Court and the Federal Court. In the circumstances of this case, that submission is misguided.

[18] In *TeleZone*, the plaintiff was seeking damages against the Federal Crown in the Ontario Superior Court of Justice for breach of contract, negligence and unjust enrichment. It alleged that the damages arose from a decision of Industry Canada to not grant it a cell phone service licence. The Attorney General of Canada challenged the jurisdiction of the Ontario Superior Court on the ground that the claim constituted a collateral attack on Industry Canada's decision and therefore, pursuant to s.18 of the *Act*,

was within the exclusive jurisdiction of the Federal Court. The Supreme Court in *TeleZone* held that where a claimant seeks compensation and damages for a decision made by a "federal board, commission or other tribunal", but does not seek to quash or otherwise invalidate the decision itself, then s. 17(1) of the *Federal Courts Act* applies, which grants the Federal Court and provincial superior courts "concurrent original jurisdiction in all cases in which relief is claimed against the Crown". However, where a claimant seeks only relief in any one of the four forms listed in s. 18(1)(a), including *certiorari* and *mandamus*, then the Federal Court has exclusive jurisdiction.

[19] At para. 47, Binnie J stated:

> "An application for judicial review under the *Federal Courts Act* combines an allegation that a federal authority has acted contrary to the substantive principles of public law, along with a claim for one of the kinds of relief listed in s. 18(1) [*certiorari*, prohibition, *mandamus* or *quo warranto*]. It is only this procedure that is in the exclusive jurisdiction of the Federal Court. As the Court recently observed in *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, "[t]he genesis of the *Federal Courts Act* lies in Parliament's decision in 1971 to remove from the superior courts of the provinces the jurisdiction over prerogative writs, declarations, and injunctions against federal boards, commissions and other tribunals" (para. 34). Section 18 does *not* say that a dispute over the lawfulness of exercise of statutory authority cannot be assessed in the course of a trial governed by the *Crown Liability and Proceedings Act* brought in the provincial superior court or pursuant to s. 17 of the *Federal Courts Act* itself." (my emphasis)

Later, at para. 79, Binnie J. clarified that TeleZone was not attempting to nullify or set aside the decision by Industry Canada, but only to seek the damages flowing from it:

> "79 TeleZone is not attempting to nullify or set aside the Minister's order. Its case is that the Minister, in deciding not to issue a licence to TeleZone, acted in breach of his

> contractual and equitable duties or in breach of a duty of care. <u>TeleZone does not say that the Minister's decision should be quashed.</u> On the contrary, TeleZone's causes of action in contract, tort and equity are predicated on the finality of that decision excluding TeleZone from participation in the telecommunications market, thereby (it says) causing it financial loss. <u>Nor does TeleZone seek to deprive the Minister's decision of any legal effect.</u> It does not challenge the licences issued to its competitors. It does not seek to undo what was done. It complains about what was *not* done, namely fulfilment by Industry Canada of its alleged contractual and equitable duties and its duty of care towards TeleZone itself." (my emphasis)

[20] In the case at bar, Mr. Knol's application for judicial review is <u>solely</u> focused on quashing, by *certiorari*, the Attorney General's stay, and restoring, by *mandamus*, the committal to stand trial. Therefore, it falls squarely within s. 18(1)(a) of the *Act*.

[21] Having concluded that this Court has no jurisdiction to hear Mr. Knol's application, it is unnecessary for me to deal with the alternative argument by the AGC that, in any event, the Federal Court is the more convenient forum.

POSTSCRIPT

[22] Mr. Knol has the option of bringing his judicial review application in the Federal Court. Should he do so, he will have to apply to extend the 30 day limitation period in s. 18.1(2) of the *Federal Courts Act*, which reads:

> "An application for judicial review in respect of a decision or an order of a federal board, commission or other tribunal shall be made within 30 days after the time the decision or order was first communicated by the federal board, commission or other tribunal to the office of the Deputy Attorney General of Canada or to the party directly affected by it, or within any further time that a judge of the Federal Court may fix or allow before or after the end of those 30 days."

[23] Counsel for the AGC in this hearing has fairly indicated that, should Mr. Knol make such an application for an extension of time, the AGC would neither consent nor oppose, but would only make representations to the Federal Court on the factual record.

[24] In this regard, Mr. Knol asserted in his written submissions that he has already filed a notice of application for judicial review in the Federal Court. He says he did so by faxing his application to the Vancouver Registry on August 2, 2013. Mr. Knol further asserts that on August 7, 2013, he received a letter from Registry Officer, Sandra McPherson, informing him that she was directed by Mr. Justice Harrington not to accept his notice of application for filing. The ACG's counsel has asked Mr. Knol to provide a copy of Ms. McPherson's letter, however he has failed to do so.

[25] In an affidavit filed by the ACG in the within application, a paralegal employed by the Federal Department of Justice in Whitehorse, Yukon, has deposed that counsel for the ACG spoke with Ms. McPherson and another Registry Officer in the Vancouver Registry and was informed that there is no record in that Registry of either an application filed by Mr. Knol in August 2013, or a direction by Mr. Justice Harrington not to accept his application. Counsel was also informed that there is no record of a letter sent to Mr. Knol advising him of this alleged direction.

[26] Further, the deponent in the affidavit filed by the AGC stated that one of Mr. Knol's reasons for not providing a copy of Ms. McPherson's letter (confirmed by a copy of his email) is that he questioned its relevance. However, Mr. Knol himself raised the very issue of the Federal Court's refusal to file his notice of application in his written submissions on this application relating to the issue of the most convenient forum.

Although it is not necessary for the purposes of the present decision, I agree with the AGC's counsel that there is simply no evidence at this time that Mr. Knol has been refused an opportunity to file in the Federal Court. Further, it remains a mystery why he has not provided proof of such a refusal, if indeed it exists.

COSTS

[27] At the hearing, I indicated to the parties that I view this application as a criminal proceeding under Part XXVI of the *Code*, and that accordingly an order of costs would not be appropriate: see *Knol v. Tamarack Inc.*, 2013 YKSC 47. Both parties agreed and neither has sought costs.

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Gower J.