SUPREME COURT OF YUKON

Citation: *Chief (Re)*, 2018 YKSC 27

Date: 20180518
S.C. No. 18-00081
Registry: Whitehorse

IN THE MATTER OF:

A Criminal Investigation pursuant to the *Criminal Code* against

Everett Chief

AND

An Application for an Assistance Order pursuant to

s. 487.02 of the *Criminal Code.*

Sealed pursuant to s. 487.3 of the *Criminal Code*, being an order of Mr. Justice L.F. Gower prohibiting access to, and the disclosure of, any information relating to the warrant, order or authorization. The sealing requirement was rescinded as per an *exparte* unsealing order filed on June 6, 2018.

Before: Mr. Justice L.F. Gower

Appearances:

Noel Sinclair	Counsel for the Public Prosecution Service of Canada
Constable John H. Gillis	Appearing on his own behalf
Lee Kirkpatrick	Counsel for the Government of Yukon

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an application for an assistance order pursuant to s. 487.02 of the *Criminal Code,* R.S.C. 1985, c. C-46 (the "*Code*"). The application is made by Constable John H. Gillis, of the Royal Canadian Mounted Police ("RCMP"). The purpose of the assistance order is to remove Everett Chief from the Whitehorse Correctional Centre ("WCC") and transfer him into the custody of the RCMP for a period

of up to 24 hours, during which time the RCMP intend to pursue an investigation relating to a double murder for which Mr. Chief is presently the prime suspect. Mr. Chief is currently a remand prisoner at WCC in relation to a charge of attempted murder and other matters. The RCMP has laid an information charging Mr. Chief with the murders of Wendy Carlick and Sarah MacIntosh in Whitehorse on or about April 10, 2017. The information was sworn on May 3, 2018 and a warrant for Mr. Chief's arrest on those charges was also issued on that date. At that time, Mr. Chief was already in custody on remand on the attempted murder and other charges.

[2] In particular, the RCMP want the opportunity to remove Mr. Chief from WCC, arrest him on the two murder charges, and then transport him to the RCMP detachment in downtown Whitehorse, where he will be placed in cells with undercover officers and where his conversations will be audio and video-recorded, pursuant to additional court authorizations. The RCMP also intends to pursue a post-arrest interview of Mr. Chief. Finally, pursuant to s. 503 of the *Code*, the RCMP will take Mr. Chief before a justice within 24 hours and then return him to WCC, where he will resume his remand custodial status.

[3] The application was heard before me *in camera* on May 10 and 14, 2018. Noel Sinclair, counsel for the Public Prosecution Service of Canada, appeared as a friend of the court to assist Constable Gillis. I required that notice be given to WCC, and Lee Kirkpatrick appeared as counsel for that institution on May 10th.

[4] The basis for the RCMP's application is the inherent jurisdiction of this Court, as there is no specific provision in the *Criminal Code* authorizing the issuance of an assistance order in these particular circumstances. WCC takes the position that they

have no authority to release Mr. Chief to the RCMP because his warrant of committal remanding him as a prisoner requires WCC to keep him at that particular prison until his warrant expiry date. The warrant, which follows Form 19 of the *Code*, requires that Mr. Chief be arrested on the attempted murder and other matters and then conveyed "to the Whitehorse Correctional Centre at Whitehorse, Yukon", following which the "keeper of the said prison" is to receive Mr. Chief into their custody "in the prison and keep him safely until the day when his remand expires". The warrant expiry date is presently May 16, 2018, although, in all likelihood, Mr. Chief will be further remanded back into custody until his charges are dealt with, or he is released on bail.

[5] The RCMP would prefer to deal with Mr. Chief sooner rather than later, because they have enlisted the services of out-of-territory members who will be acting in an undercover capacity. Accordingly, arrangements have been made for the undercover team to be present in Whitehorse for the investigative detention of Mr. Chief, and the matter is therefore time-sensitive.

[6] On the second day of the *in camera* hearing, on May 14, 2018, after reviewing some additional case law and other authorities over the intervening weekend, I indicated to Crown counsel that I had concluded that I did not have the inherent jurisdiction to grant the assistance order. I said that my written reasons would follow and these are those reasons.

[7] That said, on the same day I also indicated to counsel that I did think there were grounds for a general warrant under s. 487.01 of the *Code*, particularly for the use of video surveillance of Mr. Chief in police cells. Further, I suggested that the RCMP may wish to consider applying to me for an authorization to intercept Mr. Chief's

conversation, which they would require in any event, pursuant to s. 184.2 of the *Code*, which applies where one party has consented to the interception (presumably one or more of the undercover officers). Finally, I indicated that if the RCMP were to reapply for such orders and I were to issue them, then I would also have jurisdiction to consider granting an assistance order under s. 487.02, requiring WCC to provide assistance in order to "give effect to" the intercept authorization and general warrant. In this case, the assistance would be to transfer Mr. Chief temporarily into the RCMP custody for the period of investigative detention.

[8] Crown counsel and Constable Gillis indicated that they would be reapplying for these new orders the week of May 22, 2018.

[9] Thus, although the issue of the extent of this court's inherent jurisdiction may be somewhat moot in relation to this particular application for an assistance order, because there is very little case law in Canada on the issue, I thought it might be helpful to render these written reasons in any event.

ANALYSIS

[10] There is no issue here that the RCMP has several compelling reasons for wanting to investigate Mr. Chief at the RCMP detachment rather than at WCC where he is on remand. Constable Gillis has deposed that the post-arrest interview and undercover operation cannot be conducted at WCC for the following reasons:

a) RCMP are unable to equip the cells at WCC with the required recording equipment, without the knowledge of WCC staff;

b) WCC staff do not have the same security level or clearance as members of the RCMP;

c) Various police officers are required to complete an undercover operation, including: the undercover officers; cover officers; monitors; and other investigative members. Accordingly, the presence of this number of officers at WCC is not conducive to remaining covert;

d) Prisoners at WCC may be alerted to the fact that there is an ongoing undercover operation and warn Mr. Chief of same;

e) Prisoners may also recognize the undercover officers as police officers and therefore "blow" their cover; and

f) Based on a recent experience with a breach of security at WCC, the RCMP has a legitimate concern that information may be leaked by junior WCC staff to prisoners of the existence of the undercover operation.

[11] The inherent jurisdiction of superior courts has been described by the Supreme Court as "amorphous" (*Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, at para. 22) ("*Criminal Lawyers' Association*") and applicable in "an apparently inexhaustible variety of circumstances" (*R. v. Caron*, 2011 SCC 5, at para. 29) ("*Caron*"). Nevertheless, the Supreme Court has also warned that this inherent jurisdiction should "be exercised sparingly and with caution" (*Caron*, at para. 30).

[12] In *Criminal Lawyers' Association*, Karakatsanis J. said this about the inherent jurisdiction of superior courts:

> 20 In his 1970 article, "The Inherent Jurisdiction of the Court", 23 *Curr. Legal Probs.* 23, which has been cited by this Court on eight separate occasions, I. H. Jacob provided the following definition of inherent jurisdiction:
>
> > ... the inherent jurisdiction of the court may be defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as

> necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them. [p. 51]

21 As noted by this Court in *R. v. Caron*, 2011 SCC 5, [2011] 1 S.C.R. 78, at para. 24:

> These powers are derived "not from any statute or rule of law, but from the very nature of the court as a superior court of law" (Jacob, at p. 27) to enable "the judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner" (p. 28).

22 **In spite of its amorphous nature**, providing the foundation for powers as diverse as contempt of court, the stay of proceedings and judicial review, [page18] **the doctrine of inherent jurisdiction does not operate without limits**.

23 It has long been settled that the way in which superior courts exercise their powers may be structured by Parliament and the legislatures (see *MacMillan Bloedel*, at para. 78, *per* McLachlin J., dissenting on other grounds). As Jacob notes (at p. 24): "... the court may exercise its inherent jurisdiction even in respect of matters which are regulated by statute or by rule of court, **so long as it can do so without contravening** any statutory provision" (emphasis added) (see also *Caron*, at para. 32). (my bolding; underlining in original. Footnotes omitted.)

[13] The Ontario Court of Appeal in *Parsons v. Ontario*, 2015 ONCA 158, referred to the Supreme Court's statement in para. 23 of *Criminal Lawyers' Association* (at para. 71), and continued (at para. 73):

> 73. Thus, a superior court may exercise its inherent jurisdiction on matters regulated by statute but may not contravene any statutory provision. … (my emphasis)

[14] The Jacob article, cited with approval by the Supreme Court in *Criminal Lawyers' Association*, also includes the following statement, at page 24:

> … [T]he court may exercise its inherent jurisdiction even in respect of matters which are regulated by statute or by rule of court, so long as it can do so without contravening any statutory provision. … (my emphasis)

[15] The Supreme Court also invoked the Jacob article in *Caron*, as follows:

> 29 … In summary, Jacob states, "The inherent jurisdiction of the court may be invoked in an apparently inexhaustible variety of circumstances and may be exercised in different ways" (p. 23 (emphasis added)). I agree with this analysis.
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> …
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> 30 **Of course the very plenitude of this inherent jurisdiction requires that it be exercised sparingly and with caution**. … (my bolding; underlining in original)

[16] More recently, the Supreme Court has emphasized this theme of cautious application of inherent jurisdiction by superior courts in *Endean v. British Columbia*, 2016 SCC 42, where Cromwell J. wrote:

> 21 ….
>
> (2) Should the Courts Look First to Their Statutory Powers Before Turning to Consider Inherent Jurisdiction?
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> 22 The answer to this question is yes.
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> 23 The inherent powers of superior courts are central to the role of those courts, which form the backbone of our judicial system. Inherent jurisdiction derives from the very nature of the court as a superior court of law and may be defined as a "reserve or fund of powers" or a "residual source of powers", which a superior court "may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them": I. H. Jacob, "The Inherent Jurisdiction of the Court" (1970), 23 *Curr. Legal Probs.* 23, at p. 51, cited with approval in, e.g., *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43,

> [2013] 3 S.C.R. 3, at para. 20; *R. v. Caron*, 2011 SCC 5, [2011] 1 S.C.R. 78, at para. 24; and *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725, at paras. 29-31.
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> 24 The courts have recognized that, given the broad and loosely defined nature of these powers, they should be "exercised sparingly and with caution": *Caron*, at para. 30. It follows that courts should first determine the scope of express grants of statutory powers before dipping into this important but murky pool of residual authority that forms their inherent jurisdiction: see, e.g., *Century [page178] Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, at paras. 63-68. As The Honourable Georgina Jackson and Janis Sarra write, "[i]t is only where broad statutory authority is unavailable that inherent jurisdiction needs to be considered as a possible judicial tool to utilize in the circumstances": "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2007* (2008), 41, at p. 73. (my emphasis)

[17] Crown counsel concedes on this application that there is no section in the *Criminal Code* that appears to anticipate or address this precise situation. The closest is s. 527(7), which provides:

> On application by the prosecutor, a judge of a superior court of criminal jurisdiction may, if a prisoner or a person in the custody of a peace officer consents in writing, order the transfer of the prisoner or other person to the custody of a peace officer named in the order for a period specified in the order, where the judge is satisfied that the transfer is required for the purpose of assisting a peace officer acting in the execution of his or her duties. (my emphasis)

[18] Crown counsel submits that s. 527(7) is best understood to apply to inmates or prisoners who are cooperative with the police and willing to assist in an investigation, such as an informant or a witness. However, the RCMP obviously do not want to seek

Mr. Chief's consent in writing to his transfer to the detachment, nor would he be likely to give it.

[19] Crown counsel went on to state that it defies logic to suggest that Parliament intended that the authorities must first secure a suspect's consent before they are able to interview him or to conduct other lawful investigative techniques. The argument is that such an interpretation produces an absurdity - a person at large is not required to consent to their arrest, to police attempts to interview them or to other lawful investigative techniques at the time of arrest. Thus, he concludes that there is a gap in the *Criminal Code* in this regard, stating that a remand inmate should not be "shielded" from a post-arrest interview in police custody, given that the same person, if not in custody under a remand warrant, could be arrested and interviewed while in police custody.

[20] To clarify, the issue here is not whether Mr. Chief can be arrested at WCC. Clearly, he can be. Rather, the issue is whether he can be taken to the RCMP detachment for the post-arrest interview and undercover operation.

[21] The position that there is a legislative gap here has previously been articulated by the Canadian Association of Police Chiefs at their annual conference in 2006. In a resolution passed by the Association at that meeting, the members recognized that peace officers cannot remove inmates from federal correctional facilities without their consent. Accordingly, the Association proposed an amendment to the *Criminal Code* to allow for the apprehension and removal of prisoners for police interviewing and processing. This resolution was considered by the Nova Scotia Supreme Court in *R. v.*

Dechamp, 2017 NSSC 207, at para. 21, where the Court observed that, for reasons unknown, “Parliament did not act on this resolution.”

[22] *Dechamp* is a case very much on point, in my view. There, the Crown applied for an order authorizing the Correctional Service of Canada (“CSC”) to release Mr. Dechamp into police custody while he was serving as an inmate in a federal prison pursuant to a warrant of committal. There was reason to believe that Dechamp had committed murder and attempted murder while on parole earlier, however there were no criminal charges for those offences then outstanding against him. Police wanted to arrest Dechamp and transport him to a police station in New Brunswick for investigative detention for a period of up to 24 hours. The CSC took the position that it was under a legal obligation to imprison Dechamp until the end of his sentence and that a court order was required to authorize his release into police custody while the warrant of committal was still in effect.

[23] The police in *Dechamp*, similar to the case at bar, also provided several apparently valid reasons for not wanting to conduct their investigation at the federal prison.

[24] Also like the case at bar, because of the legislative gap, the basis for the Crown’s application was the inherent jurisdiction of the Nova Scotia Supreme Court. However, the Crown in *Dechamp* produced no jurisprudence directly supporting its application. Although it did refer to four such orders made by the Court of Queen’s Bench of Alberta between 2009 and 2014, Crown counsel only produced the bare orders, as there were no written reasons accompanying any of them.

[25] Duncan J. relied heavily on a case from the Nova Scotia Court of Appeal, *Lord v. Smith*, 2013 NSCA 34, which in turn also relied on the Jacob article on inherent jurisdiction, which I referred to above. At para. 23, Duncan J. quoted from *Lord*, as follows:

> 23 Farrar J.A. writing in *Lord v. Smith*, 2013 NSCA 34, reviewed various authorities that speak to the circumstances in which a superior court may find its jurisdiction in the application of the doctrine of inherent jurisdiction. He stated:
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> …
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> 29 **Despite its large scope and flexibility, inherent jurisdiction is not available for use in every situation**. As Chief Justice MacDonald in *Central Halifax, supra*, observed:
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> > ... [Inherent jurisdiction] remains a safety net that can prevent abuse in those **truly exceptional cases**. (para.44) **It must be exercised judicially and with caution**. It is typically limited to procedural matters. **It cannot effect changes in the substantive law, and it cannot be exercised so as to contravene a law.**
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> 30 William Charles in his article "Inherent Jurisdiction and its Application by Nova Scotia Courts: Metaphysical, Historical or Pragmatic?" (2010), 33 Dalhousie L.J. 63 enumerated this Court's observations on the topic of inherent jurisdiction, summarizing three of them as follows:
>
> > ... [Inherent jurisdiction] is primarily a procedural concept which the **courts must be cautious** in exercising and [which] should not be used to make changes in substantive law.
> >
> > Action taken pursuant to inherent jurisdiction requires an exercise of discretion. This discretion must always be exercised judicially.
> >
> > **A judge does not have an unfettered right to do what is thought to be fair as between the parties**. A court's resort to its inherent jurisdiction "must be employed within a framework of principles relevant to

> the matters in issue." [Footnotes Omitted] (p. 13) (my bolding; underlining in original)

[26] In the result, Duncan J. concluded in *Dechamp* that he was not prepared to invoke the court's inherent jurisdiction on the application, because to do so would be tantamount to a contravention of the expressed authority in s. 527(7) of the *Code*, which only authorizes the transfer of a prisoner upon obtaining that person's written consent:

> 24 In my view, inherent jurisdiction has no application to the circumstances in this case. The remedy sought in this application has nothing to do with the control of the court's process. The authority that the Crown seeks for the police is not related to a procedural issue arising between parties in the context of a case that is pending before the court. In fact, to invoke it in these circumstances would run directly contrary to the admonition of Chief Justice MacDonald in *Central Halifax* that it is not to be used to make changes in substantive law. That is what the Crown seeks -- that I supplement the existing law with respect to the transfer of prisoners, creating an exception that removes the requirement of the prisoner's consent to removal from the prison, a protection that is provided for in s. 527(7). With respect, that is a matter for Parliament to address, not the court.

[27] I agree with these remarks. Although, unlike in *Dechamp*, there are charges presently before the Court in the case at bar, that is not a distinguishing feature. There is still no procedural issue arising between the parties in that context. In my view, what the RCMP were originally attempting to do by applying for the assistance order solely on the basis of this Court's inherent jurisdiction, was to effect an "end run" around s. 527(7) of the *Code*. That said, I understand and appreciate that there is a public interest in the investigation and solving of crimes: *R. v. Sinclair,* 2010 SCC 35, at para. 63. Nevertheless, to the extent that there may be a legislative gap here, that is for Parliament to resolve, and not this Court. I am unpersuaded by Crown counsel's

argument that I could invoke my inherent jurisdiction to grant the order, simply because there is nothing in the *Code* that expressly says I cannot do so. That would seem to run contrary to the Supreme Court's repeated admonitions to exercise inherent jurisdiction sparingly and with caution.

[28] In any event, as there apparently appears to be an alternative way for the RCMP to obtain an assistance order (under s. 487.02), by applying for a general warrant (under s. 487.01) and an intercept authorization with the consent of one party (under s. 184.2), there is no longer any need for me to consider the potential application of the doctrine of inherent jurisdiction.

CONCLUSION

[29] The application of Constable Gillis in his information to obtain dated May 7, 2018 is dismissed.

[30] Because of the sensitive nature of the information contained in Constable Gillis' affidavit, as well as the memorandum of argument of Crown counsel, also dated May 7, 2018, as well as the draft orders, I am directing that all of those documents be sealed and kept on court file # 18-00081, which is the same court file containing the information alleging the double murder, as well as the warrant to arrest and Mr. Chief's remand warrant.

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GOWER J.