Citation: *R. v. J.H.L.*, 2018 YKTC 47

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Docket: 18-00509
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Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before Her Honour Judge Ruddy

REGINA

v.

J.H.L.

Appearances:
Noel Sinclair — Counsel for the Crown
Gregory Johannson — Counsel and Agent for the Defence

RULING ON APPLICATION

[1] RUDDY J. (Oral): I am in a position to rule on the application that is before me. I will begin by giving just a little bit of background about how we got to this point.

[2] On November 5, 2018, following an application by the Crown which was opposed by J.H.L., I made an order pursuant to s. 672.11(b) of the *Criminal Code*, for an assessment of whether J.H.L. was, at the time of offences, suffering from a mental disorder so as to be exempt from criminal responsibility. I set the matter to return on December 5, 2018.

[3] Dr. Lohrasbe was retained shortly thereafter to complete the assessment. As Dr. Lohrasbe indicated, he would need an additional week to complete the assessment

because of his schedule. Crown and J.H.L.'s then counsel agreed that, as a result, compelling circumstances existed pursuant to s. 672.14(3) and the order should be in force for a total of 37 days, instead of 30 days.

[4] Dr. Lohrasbe indicated a concern about whether J.H.L. should be assessed in relation to fitness as well as criminal responsibility. This was raised at the court appearance previously scheduled for December 5, 2018. J.H.L. appeared with new counsel, who opposed the extension of the order to include an assessment of fitness. I adjourned the matter to December 6, 2018 to allow both counsel to speak to Dr. Lohrasbe in relation to the basis for his concern.

[5] On December 6, 2018, counsel advised that Dr. Lohrasbe's concern was related to J.H.L.'s refusal to engage with him and participate in the assessment process. I understand Dr. Lohrasbe's concerns with respect to fitness were allayed upon learning that counsel for J.H.L. was experiencing no difficulty in taking instructions.

[6] However, J.H.L.'s refusal to engage in the assessment process resulted in Dr. Lohrasbe having to glean information from other sources to complete the court-ordered assessment.

[7] Crown counsel provided Dr. Lohrasbe with contact information for a social worker who has been working with J.H.L. and who has attended several of J.H.L.'s court appearances. Indeed, she provided information to the Court during Crown's application for the assessment order. No objection was raised by J.H.L.'s previous counsel to the information being provided to the Court by the social worker at that time. However, upon learning of Dr. Lohrasbe's intention to speak to the social worker, counsel for

J.H.L. sent an email raising an objection on the basis that disclosure of any information by the social worker would be in breach of the *Access to Information and Protection of Privacy Act,* RSY 2002, C.1 ("*ATIPP Act*").

[8] As it appeared at that point that Dr. Lohrasbe had already spoken to the social worker about J.H.L., and had completed, but not sent, his assessment on December 7, 2018, I directed, with the agreement of counsel, that Dr. Lohrasbe send his completed report but that it be sealed on the file with access given only to the assigned Crown and counsel for J.H.L., pending full argument on this issue.

[9] On December 11, 2018, counsel for J.H.L. filed a formal application seeking the exclusion of any information contained in the assessment that was received from the social worker referenced in his original email and a second social worker. He argues that disclosure of the personal information by the two social workers without J.H.L.'s consent was in violation of the *ATIPP Act*, as it was not done in accordance with any of the enumerated exceptions in s. 36 of the *ATIPP Act*.

[10] He argues that disclosure of the information was therefore in breach of J.H.L.'s s. 8 *Charter* right to be secure from unreasonable search and seizure, and should be excluded pursuant to s. 24(2).

[11] I understand that Dr. Lohrasbe also obtained relevant information from medical, nursing, and Correctional staff at the Whitehorse Correctional Centre ("WCC"). Counsel is not seeking a ruling that any of the information obtained through WCC be inadmissible.

[12] Crown takes the position that the information is admissible. He argues that the *ATIPP Act* applies only to records reduced to some documentary format and, therefore, would not apply to information provided verbally, but that the *Health Information Privacy and Management Act,* SY 2013 c.16 (“*HIPM Act*”), does apply and authorizes disclosure of the information under a number of the exceptions provided for in s. 58 of the *HIPM Act* regarding disclosure of health information without consent.

[13] In assessing the arguments, I would say, at the outset, that it seems clear to me that the nature of the information that would be in the possession of both social workers would fit the definition of either personal information under the *ATIPP Act* or health information under the *HIPM Act*. Nor is it difficult for me to conclude that J.H.L. would have a proprietary interest in the information as suggested by the Supreme Court of Canada case of *McInerney v. MacDonald*, [1992] 2 S.C.R. 138.

[14] The real issue is whether the social workers had the lawful authority in these circumstances to disclose the information to Dr. Lohrasbe and, if not, whether any information gleaned from the social workers should be ruled inadmissible and excised from Dr. Lohrasbe's assessment.

[15] Counsel for the defendant frames the application as a breach of s. 8 of J.H.L.'s *Charte*r right to counsel to be secure against unreasonable search and seizure. There are questions in my mind about whether what occurred here can properly be framed as a s. 8 argument, but I have concluded that I can nonetheless rule today because my decision would be the same whether framed as a *Charter* argument or simply as an unlawful release of personal or health information argument.

[16] Counsel for the defendant has referenced several of the enumerated exceptions in s. 36 of the *ATIPP Act* and provided arguments as to why none apply to authorize the disclosure in this case. In addition, he has provided case law to support his position that a s. 36(n) disclosure in a situation where compelling circumstances exist that affect anyone's health or safety does not apply.

[17] The Crown has argued that the *ATIPP Act* does not apply, as the information relayed was not in the form of written or documentary records.

[18] In my view, it would make little sense to conclude that the *ATIPP Act* applies only to written records, leaving open the possibility that someone could take the position that while statute barred from disclosing a written record, he or she could nonetheless disclose verbally all of the information contained in that record.

[19] As Mr. K., the second social worker, had no direct interaction with J.H.L., for example, all of the information he provided in his interview would necessarily have come from the written records.

[20] With respect to Ms. A., the first social worker, it is less clear. J.H.L. has been a client of hers for the past three years, so I expect the information she provided would have come at least in part from the records she would keep in relation to her ongoing work with J.H.L. As I am not in a position to parse out what might have come from a written record and what might not have, I find to be safe, I must conclude that the *ATIPP Act* does apply.

[21] For the purposes of this decision, I will not address all of the enumerated exceptions in the *ATIPP Act* as, in my view, only two have any real application to the decision that I am making today, those being s. 36(c) and s. 36(e).

[22] It should be noted that the Crown argues that the exception relating to compelling circumstances affecting anyone's health or safety should also be considered, as the report discloses concerns in this regard. Crown urges me to review the assessment, which is currently sealed, to allow me to meaningfully assess whether s. 36(n) applies.

[23] Defence does not oppose my viewing the assessment, however, I am satisfied that I can rule on the application without considering the potential application of s. 36(n). Given the concerns with respect to the potentially negative impact of delay on J.H.L., in light of his mental health issues and his current custodial status and the interests of time, I am making the ruling in the absence of having read the report.

[24] Turning then to the two exceptions which are, in my view, applicable, with respect to s. 36(c), disclosure for a purpose consistent with the purpose for which the information was obtained, s. 37 defines a consistent purpose as one which has a reasonable and direct connection to the original purpose and is necessary for performing the statutory duties of the public body that uses the information or to whom the information is disclosed.

[25] Defence counsel argues that the purpose for which the information was obtained was to provide mental health care and treatment to Mr. Lamothe, a purpose which he says is irreconcilable with an assessment to determine criminal responsibility.

[26] It seems self-evident that the information in circumstances where an accused refuses to participate in an assessment can be said to be necessary for the performance of the Court's duties under the *Criminal Code*, albeit recognizing that the Court is not a public body as defined in the *ATIPP Act*.

[27] It would also seem to me that the purposes are not entirely irreconcilable. An assessment under the mental disorder provisions of the *Criminal Code* is intended to determine if a mental disorder affects either fitness or criminal responsibility in a manner which should cause the Court to order that the accused be dealt with not in the more punitive criminal law system, but in the Review Board system where his or her mental disorder can be appropriately addressed and treated.

[28] With respect to s. 36(e), disclosure for the purpose of complying with a subpoena, warrant or order made by a court, while the assessment order made did not expressly order these two social workers to disclose personal information, in my view, in circumstances where an accused refuses to participate in a court-ordered assessment, it is arguable that it is a necessary extension of the order that information be obtained from other sources, including public bodies involved in an individual’s mental health care.

[29] If I am wrong in my interpretation of either subsection, I am also satisfied that the *HIPM Act*, a copy of which was filed by the Crown, is also applicable to this application. It relates specifically to the privacy of personal health information.

[30] Section 58 of the *HIPM Act* provides a number of circumstances in which health care providers can disclose information without consent. Some of those exceptions are

similar in wording to those found in s. 36 of the *ATIPP Act*, so I see no need to address them specifically, as my views of their application would be the same.

[31] However, s. 58(v) of the *HIPM Act* allows for the disclosure of personal health information for the purpose of a proceeding in which the custodian of the information is, or is expected to be a witness, if the personal health information relates to a matter in issue in the proceeding. A plain reading of the section does not, in my view, limit it to civil proceedings as suggested by defence counsel. Nor am I concerned that, as argued, an after the fact use of the section to justify disclosure will lead to abuse of the section. Clearly, disclosure would only relate to health care professionals with information relevant to a s. 672 assessment.

[32] I have little difficulty in concluding that the social workers who have dealt with J.H.L. would likely be witnesses in proceedings relating to J.H.L.'s criminal responsibility, especially in circumstances where J.H.L. has refused to participate in the assessment process.

[33] Accordingly, I would conclude that the disclosure of personal information by the social workers relating to J.H.L.'s mental health history to Dr. Lohrasbe for the purposes of a court-ordered assessment into J.H.L.'s criminal responsibility is authorized by this section.

[34] While, as noted, I am not entirely convinced that this argument is properly framed as a *Charter* application seeking s. 24(2) relief, application of, in particular, s. 58(v) of the *HIPM Act,* would lead me to conclude that there has been no breach.

[35] However, the argument is framed, I would not find the information provided by the social workers to be inadmissible. If I am wrong in my conclusion that disclosure is authorized, either under ss. 36(c) or (e) of the *ATIPP Act* or by s. 58(v) of the *HIPM Act*, I would find that the information would nonetheless be admissible.

[36] More specifically, if I were applying the *Grant* test with respect to s. 24(2) of the *Charter*, I would find, as was conceded by defence counsel, that if there was a breach it was not a serious one. I would disagree with defence counsel's argument that the impact on J.H.L.'s *Charter*-protected rights would be at the extreme end, particularly as the information remains protected once in the hands of the Court and I would conclude that any impact would be outweighed by society's interests in adjudication on the merits as J.H.L.'s refusal to participate in the assessment, absent credible information from other sources like the two social workers, would preclude a full and fair assessment on the question of criminal responsibility.

[37] Even if disclosure fell short of a s. 8 *Charter* breach but amounted to an unlawful release of confidential information, I would nonetheless have found that the evidence should be admitted.

[38] Counsel for J.H.L. concedes that the Court could, had an application been made following J.H.L.'s refusal to participate in the assessment, have ordered the disclosure of personal information in the possession of the social workers, an order which I would have had little difficulty making.

[39] In such circumstances, I would conclude that admission of the information as referenced in the assessment completed by Dr. Lohrasbe would not bring the administration of justice into disrepute.

[40] This is my ruling on the application.

RUDDY T.C.J.