# SUPREME COURT OF YUKON

Citation: *Joe v. Canada (A.G.)*, 2008 YKSC 68

Date: 20080918
S.C. No. 07-A0098
Registry: Whitehorse

BETWEEN:

**ARTHUR JOE**

**Respondent**

AND:

**CANADA (ATTORNEY GENERAL)**

**Applicant**

Before: Mr. Justice H.M. Groberman

Appearances:

Andre Roothman — Counsel for the Respondent
Anne McConville — Counsel for the Applicant

## REASONS FOR JUDGMENT

[1] This is a preliminary motion by the Attorney General of Canada to strike the proceeding on the basis that this Court lacks jurisdiction to grant the remedy sought by Mr. Joe. The Attorney General argues that the proceeding lies within the exclusive jurisdiction of the Federal Court. In this judgment, I will refer to the Attorney General of Canada as "the applicant" and Mr. Joe as "the respondent".

**Factual Background**

[2] The respondent alleges that he was assaulted by two members of the RCMP on May 10, 2003 while he was in police custody. On March 24, 2005, he laid an information against the two officers before a justice, and process was issued. An initial appearance date was set for May 18, 2005 in Territorial Court.

[3] On May 5, 2005, the respondent received a letter from counsel with the Federal Department of Justice, advising him that the Attorney General would be assuming conduct of the prosecution, and would be directing a stay of proceedings. Counsel on behalf of the Attorney General did direct a stay that same day, purporting to act under section 579 of the *Criminal Code*, R.S.C. 1985, c. C-46.

[4] The respondent contends that the direction of a stay of proceedings was flagrantly improper. He seeks to have the stay quashed, and to have the criminal proceedings resumed in the Territorial Court. The applicant says that such an order is within the exclusive jurisdiction of the Federal Court pursuant to section 18 of the *Federal Courts Act*, R.S.C. 1996, c. F-7, and seeks and order striking the current proceedings.

**Statutory Provisions**

[5] Section 579(1) of the *Criminal Code* is the section which allows the Attorney General to direct a stay of proceedings:

> 579. (1) 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.

[6] Section 2 of the *Criminal Code* contains the following definition:

> "Attorney General"
> ...
> (b) with respect to the Yukon Territory ... means the Attorney General of Canada and includes his or her lawful deputy ....

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

> 18.(1) … [T]he 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; and
>
> (b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.

[8] Section 2 of the *Federal Courts 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, other than the Tax Court of Canada or any of its judges, any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the *Constitution Act, 1867*.

## Analysis

[9] 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.

[10] This plain reading of the relevant statutes is supported by the case law. The Federal Court has assumed jurisdiction in cases in which complainants have attempted to quash stays of proceedings directed by the Attorney General of Canada: see, for example, *Labrador Métis Nation v. Canada (Attorney General)*, 2006 FCA 393, 277 D.L.R. ($4^{th}$) 60.

[11] The respondent argues that section 579 of the *Criminal Code* does not authorize the Attorney General to stay a private prosecution. He says, therefore, that the Attorney General did not "exercise jurisdiction or powers conferred by or under an Act of Parliament". He also says that the Crown's prerogative powers never extended to the staying of private prosecutions. In the result, he says, the Attorney General does not, for the purpose of this proceeding, come within the definition of a "federal board, commission or other tribunal."

[12] The first difficulty with the respondent's argument is that it does not fully address the definition of "federal board, commission or other tribunal" in the *Federal Court Act*. The definition speaks of "exercising or purporting to exercise" a statutory power or jurisdiction [emphasis added]. Thus, the mere fact that the Attorney General purported to act under section 579 of the *Criminal Code* suffices to bring this matter within the exclusive jurisdiction of the Federal Court, whether or not the powers he purported to exercise were, as a matter of law, within his statutory jurisdiction.

[13] In any event, the respondent's argument with respect to the interpretation of s. 579 of the *Criminal Code* is not sustainable. Section 579 expressly gives the Attorney General the power to direct a stay of "any proceedings in relation to an accused." It is impossible to interpret this language as being restricted to proceedings commenced by the Crown.

[14] Jurisprudence clearly establishes the power of the Attorney General to stay private prosecutions. Indeed, in *Krieger* v. *Law Society of Alberta*, [2002] 3 S.C.R. 372 at 394 (para. 46), the Supreme Court of Canada described "the discretion to stay proceedings in either a private of public prosecutions, as codified in the *Criminal Code*, R.S.C. 1985, c. C-46, ss. 579 and 579.1" as one of the core elements of prosecutorial discretion.

[15] In argument, the respondent placed considerable reliance on Bryce Tingle, "The Strange Case of the Crown Prerogative over Private Prosecutions or Who Killed Public Interest Law Enforcement" (1994), U.B.C. Law Rev. 309. In that article, Mr. Tingle argues that the cases which trace the Attorney General's power to stay prosecutions to the Crown prerogative are in error. He says that the Attorney General's common law powers to stay prosecutions by way of *nolle prosequi* were of dubious origins, and in any event, did not extend to private prosecutions. He concludes that "the power to stay is different in essential respects from the *nolle prosequi* power and deserves to be considered a purely statutory creation of the late 19th century."

[16] Mr. Tingle's article does not suggest that the Attorney General lacks power to stay private prosecutions; it merely argues that that power is purely statutory. Whatever the strengths and weaknesses of Mr. Tingle's thesis from a historical perspective, it

does not support the proposition that private prosecutions are insulated from the Attorney General's power to direct a stay.

[17] The respondent, finally, argues that the Attorney General, in exercising powers to stay a prosecution, is acting "independently" from the executive of government, and hence is not a "federal board, commission or other tribunal". In support of this proposition, the respondent cites *Ochapowace First Nation (Indian Band No. 71)* v. *Canada (Attorney General)*, 2007 FC 920, 316 F.T.R. 19.

[18] In *Ochapowace*, the applicant attempted to bring judicial review proceedings to force the R.C.M.P. to lay charges against two public authorities. The Federal Court dismissed the application on two grounds – firstly, on the basis that the decision was not subject to judicial review, and secondly, on the basis that the applicant had failed to show that prosecutorial discretion had been exercised with "flagrant impropriety". Only the first ground is relevant to the case at bar.

[19] With respect to the first ground, de Montigny J. said, at paras. 55-56:

> In a decision released May 29, 2007, my colleague Justice Tremblay-Lamer addressed the issue of the jurisdiction of this Court to entertain an application for judicial review in the course of a criminal investigation by the R.C.M.P. ….
>
> After reviewing the legislation and the case law on the subject, Justice Tremblay-Lamer came to the conclusion that the decision to initiate a criminal investigation cannot be properly characterized as a decision by a "federal board, commission or other tribunal". In her view, police officers are independent from the Crown when conducting criminal investigations, and their powers have their foundation in the common law. Being independent of the control of the executive, they cannot be assimilated to a "federal board, commission or other tribunal". I fully agree with this most compelling analysis of my colleague.

[20] While de Montigny J. does not name the case that he is referring to, it appears that he was referring to the decision of Tremblay-Lamer J. in *George* v. *Canada (Attorney General)*, 2007 FC 564, 2008 1 F.C.R. 752. While Tremblay-Lamer J. did, in that judgment, discuss the independence of the police, the determination that the R.C.M.P. is not a "federal commission, board or other tribunal" was based on the fact that the power of police officers to lay charges was neither statutory nor prerogative, but common law in nature. At paragraph 46 of her judgment, she said:

> While I recognize that the powers of peace officers are incorporated into the *RCMP Act*, nevertheless, it is well established that when peace officers conduct criminal investigations they are acting pursuant to powers which have their foundation in the common law independent of any Act of Parliament or Crown prerogative. In other words, the *RCMP Act* imports and clothes with statutory authority police powers, duties and privileges which remain largely defined by common law.

[21] Nothing in the *Royal Canadian Mounted Police Act*, R.S.C. 1985, c. R-10 affected the common law discretion of investigators (or, indeed, any other persons) to pursue or fail to pursue prosecutions. The discretion, then, was not one exercising "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". In exercising the discretion, therefore, the R.C.M.P. did not fall within the definition of "federal board, commission or other tribunal."

[22] The case at bar is readily distinguishable from *Ochapowace* and George. The powers at issue in those cases did not derive from either statutory enactments or from prerogatives of the Crown; rather, they were powers that all individuals possess at common law. No one could suggest that the power to stay proceedings is a power held

by all individuals – it is clearly a special power of the Attorney General that can only derive from statute or from the prerogative.

[23] In the result, I am of the view that exclusive jurisdiction in this matter lies with the Federal Court. In holding that the Federal Court has exclusive jurisdiction to deal with an application to quash a decision by the Attorney General of Canada to direct a stay, I do not, of course, suggest that the jurisdiction would be exercised in this case. I note that the Supreme Court of Canada has stated that great deference will be accorded a decision of an Attorney General to stay proceedings:

> In *Campbell v. Attorney-General of Ontario* (1987), 35 C.C.C. (3d) 480 (Ont. C.A.), it was held that an Attorney General's decision to stay proceedings would not be reviewed save in cases of "flagrant impropriety". See also *R. v. Power*, [1994] 1 S.C.R. 601; *Chartrand v. Quebec (Minister of Justice)* (1987), 59 C.R. (3d) 388 (Que. C.A.). Within the core of prosecutorial discretion, the courts cannot interfere except in such circumstances of flagrant impropriety or in actions for "malicious prosecution": *Nelles v. Ontario,* [1989] 2 S.C.R. 170. In all such cases, the actions of the Attorney General will be beyond the scope of his office as protected by constitutional principle, and the justification for such deference will have evaporated.
>
> *Krieger v. Law Society of Alberta*, *supra*, at p. 396 (para. 49)

[24] This matter, then, is not one which can be pursued in this court. If the respondent wishes to continue with his attempts to quash the staying of charges, he will have to initiate a proceeding in Federal Court. I note that counsel for the applicant has indicated that the Attorney General will not argue that the time that has elapsed since the petition in the present proceeding was filed should be counted against the respondent should the matter proceed in that court.

**Costs**

[25] The applicant seeks his costs of this proceeding. The proceeding is purportedly brought pursuant to Rule 10 of the Rules of Court. If I were convinced that the proceeding was properly characterized as a civil proceeding under that rule, I would award costs to the applicant.

[26] I am not, however, convinced that this case is properly so characterized. In my view, this proceeding should have been brought as an application for *certiorari* falling within part XXVI of the *Criminal Code*. The parties do not contend that the Rules of Court apply to such matters, and do not suggest that costs should be ordered in respect of them. I agree, and make no order for costs.

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GROBERMAN J.