SUPREME COURT OF YUKON

Citation: *R. v. Carr,* 2020 YKSC 33

Date: 20200807
S.C. No. 20-01503
YRB No. 20-0002-U
Registry: Whitehorse

BETWEEN:

HER MAJESTY THE QUEEN

(Respondent)

AND

CHANGA MORRIS CARR

(Respondent)

AND

GOVERNMENT OF YUKON (HEALTH AND SOCIAL SERVICES)

(Applicant)

AND

MR. RICHARD BUCHAN, CHAIRPERSON OF THE YUKON REVIEW BOARD
and THE YUKON REVIEW BOARD

(Respondents)

Before Madam Justice S.M. Duncan

Appearances:

Karen Wenckebach	Counsel for Government of Yukon
Amy Porteous	Counsel for the Director of Public Prosecutions
Mark Wallace	Counsel for Richard Buchan and the Yukon Review Board
Lynn MacDiarmid	Counsel and Agent for Changa Morris Carr (present only on August 7)
Allison Foord (by telephone)	Counsel for Yukon Hospital Corporation

RULING ON APPLICATION FOR SUSPENSION OF ORDER OF YUKON REVIEW BOARD

[1] DUNCAN J. (Oral): This is an interim application by the Government of Yukon for a suspension or stay — and I will use those words interchangeably — of part of the order of the Yukon Review Board dated July 29, 2020. Specifically, the stay is sought of para. 5, that directs the Government of Yukon to consult with the Whitehorse General Hospital to assess the accused's actual public safety risk while placed at the hospital and, if considered necessary, to provide security support personnel to Whitehorse General Hospital commensurate with the degree of risk posed by the accused from time to time. The underlying application is an application for a writ of *certiorari* pursuant to s. 774 of the *Criminal Code*.

[2] The hearing for this stay was held on an urgent basis on Monday, August 3rd, 2020 and it ended one hour before the order to place the accused, Mr. Carr, at Whitehorse General Hospital was to occur, so I granted an interim interim order to suspend the placement of Mr. Carr at Whitehorse General Hospital and to suspend para. 5 of the order, pending my decision in this matter.

[3] Present at the hearing on August 3rd, were counsel for the Government of Yukon, counsel for the Public Prosecution Service of Canada, and counsel for the Yukon Review Board. Counsel for Mr. Carr was not present, although they were served and were aware of the hearing. Counsel for Yukon Hospital Corporation/Whitehorse General Hospital was also present by telephone. The only written materials filed were from the Government of Yukon, as the other parties and Whitehorse General Hospital had received notice of this application only over the weekend or first thing in the morning on August 3rd and did not have time to prepare materials.

[4] The first question is: Is this Court the proper forum or should this matter be heard by the Court of Appeal?

[5] The second related question is: Does this Court have jurisdiction to hear and decide this matter?

[6] If the answer to the first two questions is yes, the third question is: Does the three-part test for a stay, as set out by the Supreme Court of Canada in *RJR - Macdonald Inc. v. Canada*, ("*RJR-Macdonald*") [1994] 1 S.C.R. 311, apply here and has it been met?

[7] I will first briefly review the background to this matter and then address each of these questions.

[8] Mr. Changa Carr was charged on April 27, 2020 with aggravated assault and mischief, allegedly committed on April 23 and 24, 2020. He was eventually detained at Whitehorse Correctional Centre on consent remand, where he still is today.

[9] On May 1, 2020, the Yukon Territorial Court made an order for a fitness and criminal responsibility assessment and report to be done for Mr. Carr, pursuant to s. 672.11 of the *Criminal Code*.

[10] Dr. Lohrasbe, a qualified psychiatrist with expertise in medico-legal psychiatry, prepared the assessment report dated June 4, 2020. Assessing fitness to stand trial and psychiatric status relevant to mental state is a regular part of Dr. Lohrasbe's practice. His finding was that Mr. Carr was unfit to stand trial, but he also wrote that:

> It is likely that his mental state will improve in the coming days and weeks, assuming continued treatment with appropriate medications, and fitness is likely to be restored parallel to the anticipated improvement in his overall mental state.

[11] The Territorial Court found that Mr. Carr was unfit to stand trial and declined to make a disposition. The Court then referred Mr. Carr to the Yukon Review Board for a disposition hearing, pursuant to s. 672.47.

[12] The Yukon Review Board held a hearing, pursuant to s. 672.47, on July 29, 2020 to determine if Mr. Carr was unfit to stand trial. Present and represented at the hearing were Mr. Carr, Government of Yukon, and Public Prosecution Service of Canada. Whitehorse General Hospital was not present at the hearing, nor were they invited to attend.

[13] After reviewing the record and hearing evidence and submissions and observing Mr. Carr, the Yukon Review Board found that Mr. Carr was fit to stand trial, pursuant to s. 672.48. However, the Board noted that Mr. Carr's state was "fragile" and he "could be vulnerable to decompensation or relapse". The reasons for his fragility as stated by the Board in its oral reasons were, first, the early stage of his receiving anti-psychotic medication, which can take a while to have full effect; and second, the continuing fluctuation of his condition and mental effectiveness, as noted by Dr. Lohrasbe and the Mental Wellness Services team.

[14] The Yukon Review Board did not want Mr. Carr to be in a non-therapeutic environment. As a result, the Board determined that the best disposition was to commit Mr. Carr to a short-term custodial disposition at Whitehorse General Hospital with other conditions, pursuant to s. 672.49 of the *Criminal Code*. This section provides for an order for continued detention in the hospital where the Board believes on reasonable grounds that the accused may become unfit if released.

[15] The Yukon Review Board indicated in its oral reasons that this was a short-term plan, taking into account Mr. Carr's liberty interests in the least restrictive way, in a manner consistent with public safety.

[16] In its order, the Board also invited Whitehorse General Hospital to request the Board to hold a hearing to review the placement of the accused at the Hospital if they had concerns.

[17] The written reasons of the Board are not yet issued.

[18] The first question - forum. Although the Yukon Review Board held a disposition hearing, pursuant to sections 672.47 and 672.5, and referred in oral reasons to making a disposition under s. 672.49, it is unclear whether this was a disposition as defined in s. 672.1. It does not appear to be an order granted under s. 672.54. It was a finding of fitness and an order of continued detention in the hospital, specifically the Whitehorse General Hospital, under s. 672.49, until the time of trial.

[19] It is clear that the finding of fitness is not being challenged by the Government of Yukon. In fact, this matter cannot be appealed according to the case of *R. v. Paré*, [2001] O.J. No. 4168, a 2001 decision of the Ontario Court of Appeal.

[20] The order for continued detention in Whitehorse General Hospital instead of Whitehorse Correctional Centre and for the Government of Yukon to consult with Whitehorse General Hospital and provide security personnel if necessary is being challenged by the Government of Yukon.

[21] Continued detention in a hospital under s. 672.49 allows the Yukon Review Board to ensure that an accused who presents as and is determined to be fit does not decompensate before trial. It is an interim order used most often where an accused's

mental state is fluctuating; he or she is not fully stable and recovered; and is in danger of deteriorating in a non-therapeutic environment or with external stressors.

[22] If this order were being appealed, it would have to be to the Court of Appeal under s. 672.72. The *Criminal Code* also provides a statutory basis for the Court of Appeal to exercise discretion on an application to suspend a disposition being appealed, once an appeal is initiated.

[23] But this is not an appeal. The basis for the challenge to this part of the order by the Government of Yukon is the alleged failure of the Yukon Review Board to comply with the rules of procedural fairness. Before issuing the order, the Government of Yukon says that the Yukon Review Board gave no indication to the Government of Yukon that they were contemplating the remedy that they gave, so that the Government of Yukon was unable to make any submissions or provide any evidence related to Mr. Carr's hospital placement or to the order to provide security if necessary.

[24] Whitehorse General Hospital was not present at the hearing nor had they been invited to attend before the order was made, so they were also unable to provide any information or make any submissions on this issue.

[25] The other basis for the application by the Government of Yukon for *certiorari* is that there is no authority, either explicitly or implicitly, in the *Criminal Code* to require the Government of Yukon to provide security services to Whitehorse General Hospital.

[26] Counsel for the Government of Yukon and the Yukon Review Board agreed that this Court is the proper forum to hear an application for writ of *certiorari*, pursuant to s. 774 of the *Criminal Code*. Those sections provide the superior court with the ability to issue an extraordinary remedy such as *certiorari*. Under this section, *certiorari* is

generally available for alleged jurisdictional errors, such as a breach of procedural fairness or the principles of natural justice or where a provincial or territorial court or tribunal has acted in excess of statutory jurisdiction.

[27] Based on the Government of Yukon's explanation of the allegations that form the basis of their application, I find that this Court is the appropriate forum to determine *certiorari,* based on the *Criminal Code* and the inherent jurisdiction of this Court.

[28] The second related question of whether this Court has jurisdiction to decide on the suspension of the order pending the final determination of the application for writ of *certiorari* is not addressed in the *Criminal Code*.

[29] In the absence of a statutory basis, the Court can look to the common law. The common law, through the Supreme Court of Canada decision in *RJR - Macdonald* and the cases following it, sets out the test for a stay of an order pending final determination of the underlying issue. The principles are applicable in this case and provide jurisdiction for this Court to determine the issue.

[30] The test that is set out by the Supreme Court of Canada has three parts:

(i) Is there a serious issue to be tried?

(ii) Would the applicant — in this case, the Government of Yukon — suffer irreparable harm if the order is not stayed?

(iii) Which party is favoured by the balance of convenience?

(i) Serious issue

[31] Meeting this part of the test is a low threshold. It requires a preliminary assessment of the merits of the case and a finding that the matter at issue in the application is not frivolous or vexatious. In other words, it is not plain and obvious that it

will not succeed. Here, the questions of procedural fairness and the excess of statutory jurisdiction are not frivolous and vexatious. The Yukon Review Board is a public authority and it has a duty of procedural fairness when it makes administrative decisions. The Government of Yukon and Yukon Hospital Corporation (Whitehorse General Hospital) are persons for the purpose of this application for *certiorari*, whose interests are affected by this exercise of discretion by the Board. That principle is set out in the case of *Chaudry (Re)*, 2015 ONCA 317, a 2015 decision of the Ontario Court of Appeal, at para. 114.

[32] Without making a finding as to whether there was a breach of fairness by the Board in not seeking submissions from the Government of Yukon or Whitehorse General Hospital on the matter at issue, or on whether the *Criminal Code* does not permit the Yukon Review Board to order the Government of Yukon to provide security to Whitehorse General Hospital if necessary, I am of the view that the consideration of these questions in this context does meet the test of serious issue to be determined. On a preliminary assessment, there is merit to both claims by the Government of Yukon. They are clearly arguable questions and they are not brought for an improper purpose or to harass or annoy.

[33] As noted by counsel for the Government of Yukon, a stay of this order is the same remedy that is being sought in the underlying application for *certiorari*. The Supreme Court of Canada in *RJR - Macdonald* said that this is an exception to the general approach that the merits are not to be scrutinized at this stage, that is, where the grant or refusal of a stay will have the practical effect of ending the action.

[34] Here, the Government of Yukon says that, even if the order for a stay is granted, they will still want to proceed to the merits of the hearing because of the concern that this circumstance may occur again in the future, and in order to have guidance from the Court about the obligations of the Government of Yukon, Whitehorse General Hospital in this kind of situation and how the process should unfold.

[35] I believe that this distinction applies here and, as a result, I decline to do a more extensive review of the merits.

[36] However, I note that there may be an argument of mootness, given that the trial date is set for September 3, 2020. If this matter cannot be heard before that date, there may be an argument of mootness, depending on what happens.

(ii) Irreparable harm to Government of Yukon

[37] Would the applicant, Government of Yukon, suffer irreparable harm if the stay is not granted? (Harm suffered by the respondent is considered at the third stage of this test, the balance of convenience stage.)

[38] Irreparable harm means that the harm to the Government of Yukon cannot be remedied if the eventual decision on the merits does not accord with the result of this interlocutory application. Irreparable harm is harm that cannot be quantified in monetary terms or it cannot be cured because one party cannot collect damages from the others. It refers to the nature of the harm and not its magnitude.

[39] In this case, the Government of Yukon says that if it were required to provide security to Whitehorse General Hospital, it would incur extensive costs that it would be unable to collect or recoup. The Government of Yukon says it would have to provide corrections officers for this purpose, as no one else is trained. The Government of

Yukon said that a contract for security personnel would not be possible to implement on short notice and proper training may not be possible. I also note the issue that we discussed at the outset of this hearing today: that Mr. Carr is on consent remand and so Whitehorse correctional officers would have to be with him in order to maintain jurisdiction.

[40] The length of Mr. Carr's continued detention is unknown, although his trial date is now set for September 3, 2020, so there is a little more certainty now than there was on Monday. The Government of Yukon says that Whitehorse Correctional Centre would also suffer during this time from the loss of corrections officers from its facility to Whitehorse General Hospital.

[41] It is not yet clear on the facts whether it would be necessary for the Government of Yukon to provide security to Whitehorse General Hospital because consultation has not yet happened and an assessment of the risks Mr. Carr may or may not pose at Whitehorse General Hospital has not been done.

[42] The Yukon Review Board order is, in effect, conditional on security being required by the Government of Yukon. If the condition is not met then irreparable harm will not occur. If the condition is met, then the Government of Yukon says that irreparable harm to the Government of Yukon will occur in terms of costs that are not able to be recouped either from the Yukon Review Board, Mr. Carr, or Whitehorse General Hospital, absent an agreement which does not exist, assuming that the Yukon Review Board order is quashed in the end but the stay that is being requested now is not granted.

[43] I do agree that if the Government of Yukon is required to provide security to Whitehorse General Hospital and especially in the situation where the Yukon Review Board order is ultimately quashed, that irreparable harm, in terms of unrecoupable costs, will have occurred.

[44] There was no case law provided on the issue — and perhaps none exists — of whether irreparable harm can still be considered to occur even if it is not necessary to implement the full order because the condition is not fulfilled.

[45] However, in my view, the Court at this stage must consider and assume that the full order will be implemented for the purpose of this application. If it is not considered and the stay is not granted, but the condition is met and the Government of Yukon must provide security before the final determination is made, then irreparable harm will have occurred.

[46] As a result, I find that the second part of the test has also been met.

(iii) Balance of convenience

[47] This requires an assessment of who will suffer greater harm by granting or refusing the stay. It is not required to assess actual harm; instead, an assessment of the potential for harm to the respondent against the potential for harm to the applicant must be done. Public interest is to be considered in this part of the analysis.

[48] If there is a suspension of the order, then Mr. Carr will remain in Whitehorse Correctional Centre, where he has been since May 2020. It was there that he first became fit, albeit in a fragile sense. He is in the general population at Whitehorse Correctional Centre. Counsel advises that he is taking a computer course and other

programs that he wants to continue which may be interrupted if he has to move to Whitehorse General Hospital.

[49] Mr. Carr said at the Yukon Review Board hearing, and his counsel confirmed today, that he does not mind staying at Whitehorse Correctional Centre. He is being seen by a psychiatrist and other health professionals at Whitehorse Correctional Centre and is receiving medications. There was no identifiable potential harm to Mr. Carr of staying at the Whitehorse Correctional Centre.

[50] The potential harm to Mr. Carr moving to Whitehorse General Hospital is that he could have more restrictions on his liberty, depending on whether he has to remain in a secure room in the secure medical unit and depending on other people staying in that secure medical unit and the Hospital's assessment of his risk.

[51] There is also potential harm to him if he is unable to carry on with his Yukon University course and other programming.

[52] As noted, the Crown advised at this hearing today that the date of his return to the Territorial Court has been moved from September 25 to September 3 in order for his underlying charges to be dealt with.

[53] The potential harm to the Government of Yukon and the public interest, in my view, of requiring the Government of Yukon to provide security to Whitehorse General Hospital in this case is that it may not be the most efficient or effective use of public resources to do this on a case-by-case basis, especially when there is very little time, such as in this case, to arrange it. It is preferable to have a process, protocol, or agreement in place similar to that which is in place for individuals coming from hospitals

outside of the Territory for hearings, a process that everyone is familiar with, understands, and can implement.

[54] Proper risk assessments, determination of capacity of the Hospital, ensuring appropriate security to comply with the least restrictive, onerous measures, balanced with public safety, are all factors that need to be taken into account in the implementation of this kind of order.

[55] In my view, it requires an agreed upon system or process or agreements in place to determine the information required and who is doing what in order to ensure the most efficient and effective use of resources. This has not yet occurred.

[56] In my view, the balance of convenience does weigh in favour of the Government of Yukon. There is greater harm to it and to the public interest if the suspension is not granted.

[57] In sum, although I will grant the suspension, I want to add that I do not see the courts as the ideal venue in which to resolve this kind of issue. The expertise of the Board in the areas of the supervision and treatment, detention, assessment, and discharge of accused with mental health issues, in the context of balancing the safety of the public with the rights of the accused, should be deferred to by courts.

[58] I agree with counsel from the Yukon Review Board that para. 8 of the order inviting Whitehorse General Hospital to request a review to make submissions on this issue provides an avenue for discussions of the issues raised in this application to be done at the Yukon Review Board.

[59] I note that Whitehorse General Hospital has not requested that this be done — perhaps it is because of this court process that was already in progress before the order

was released in writing — but I see that a discussion at the Yukon Review Board among the Government of Yukon, Whitehorse General Hospital, counsel for Mr. Carr, and the Crown as a way of resolving the concerns raised in this application.

[60] In my view, it is unfortunate that this did not occur before the order was made, as we may not have been here this week.

[61] As counsel for Whitehorse General Hospital described at the hearing on Monday, August 3rd, in some detail, it appears that these kinds of discussions have been held with respect to individuals coming into the Yukon from detention outside, culminating in an agreement among the Yukon Review Board, Government of Yukon, and the Whitehorse General Hospital about the logistics and process. It sounds as though it is working. Ideally, the same discussion should occur to address the scenario raised by this situation.

[62] Even though this application has come here and I have ruled that this Court does have jurisdiction and I have granted the suspension, I do encourage the parties to have further discussions to resolve this matter by way of a protocol or a process to be applied not only in this case but in future similar cases.

[63] The order can go basically the same as the interim interim order was. I do not think there needs to be any change, unless counsel think there should be a change.

[64] That is my decision.

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DUNCAN J.