

SUPREME COURT OF YUKON

Citation: *R. v. Carr*, 2021 YKSC 14

Date: 20210224
S.C. No. 20-01503
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 Justice E.M. Campbell

Appearances:

Kimberly Sova and
Kelly McGill
Noel Sinclair

Counsel for the Government of Yukon
Counsel for the Public Prosecution Service of
Canada

Mark Wallace

Counsel for Mr. Buchan and The Yukon Review
Board

RULING
(Preliminary issue of mootness)

INTRODUCTION

[1] The preliminary question before me in this matter is whether the Court should exercise its discretion to hear the Government of Yukon’s (“Yukon”) application for a writ of *certiorari* to quash some of the terms of a Yukon Review Board (“YRB”) order for lack of jurisdiction and/or on the basis that the YRB acted contrary to the rules of natural justice, when that order is no longer in force and effect.

FACTS

[2] On April 27, 2020, Mr. Carr was charged with aggravated assault (s. 268 of the *Criminal Code*), mischief under \$5,000 (s. 430(4) of the *Criminal Code*) and failing to abide by the conditions of his release (s. 145(4)(a) of the *Criminal Code*). He had his first appearance on these charges in court the same day, and was remanded to custody at the Whitehorse Correctional Centre (“WCC”).

[3] On June 30, 2020, Chisholm C.J.T.C. found Mr. Carr unfit to stand trial on his outstanding charges. At the time, Mr. Carr was on consent remand at WCC. Chisholm J. also ordered that Mr. Carr’s matters be remitted to the YRB for a disposition hearing to be held within 45 days.

[4] On July 29, 2020, the YRB held a hearing and determined that, at the time of its hearing, Mr. Carr was fit to stand trial. Consequently, the YRB returned Mr. Carr’s matters to the Territorial Court of Yukon.

[5] As the YRB also had reasonable grounds to believe that Mr. Carr would become unfit to stand trial if released, it ordered that Mr. Carr be temporarily detained at the Whitehorse General Hospital (“WGH”) pending the imminent return of his matters before the Territorial Court of Yukon.

[6] The YRB also ordered Yukon to consult with WGH to assess Mr. Carr's actual public safety risk while placed at WGH, and, if considered necessary, to provide security support personnel to the hospital commensurate with the degree of risk posed by Mr. Carr from time to time.

[7] At the request of Yukon, the YRB ordered that Mr. Carr's placement at WGH not take effect until noon on August 3, 2020, to give Yukon time to make the necessary arrangements to transfer Mr. Carr from WCC to WGH.

[8] Mr. Carr and his counsel attended the YRB hearing. Counsel for Yukon and counsel for the Public Prosecution Service of Canada ("PPSC") were present as well. However, no representative of the WGH participated in the hearing.

[9] On July 31, 2020, Yukon filed its application for a writ of *certiorari* to quash the terms of the YRB's order requiring it to consult with WGH and provide security personnel to WGH, as deemed necessary, while Mr. Carr was held at the hospital; and to develop a plan for Mr. Carr. Yukon also sought a suspension of the terms at issue pending a decision on its application.

[10] On August 3, 2020, Duncan J., as she then was, issued an interim interim order suspending the transfer of Mr. Carr from WCC to WGH. In addition, she ordered on an interim interim basis, the suspension of para. 5 of the order, which compelled Yukon to consult with WGH on security issues, resulting from Mr. Carr being held at WGH, and to provide security support personnel, as needed, to WGH, pending her decision on Yukon's interim application.

[11] On August 7, 2020, Duncan J. issued her decision granting an interim order confirming the suspension of Mr. Carr's transfer to WGH, as well as para. 5 of the

YRB's order until the court rendered its decision on Yukon's application for a writ of *certiorari*.

[12] The Territorial Court of Yukon's file reveals that Mr. Carr was back before the Territorial Court on September 3, 2020, to fix a date for trial. Mr. Carr's matters ultimately proceeded to a hearing before the Territorial Court on November 16, 2020. Mr. Carr consented to his remand at WCC during that period of time.

[13] On November 16, 2020, Mr. Carr appeared before Morin J., who, upon being satisfied that:

- (1) Mr. Carr had committed the acts forming the basis of the offence of assault causing bodily harm (s. 267(b) of the *Criminal Code*); and
- (2) at the time, Mr. Carr was suffering from mental disorder, so as to be exempt from criminal responsibility by virtue of s. 16(1) of the *Criminal Code*;

found him to be not criminally responsible on account of mental disorder, and remitted his matter to the YRB for a disposition hearing.

[14] In addition, Morin J. ordered that Mr. Carr be assessed, and that a report on the degree of risk posed by Mr. Carr to the safety of the public be prepared in order to assist the YRB in formulating an appropriate disposition for him. Morin J. also ordered that Mr. Carr be detained pending the completion and delivery of the risk assessment report. Morin J.'s order was to remain in force for a period of no longer than 30 days.

[15] Mr. Carr was back before the Territorial Court of Yukon on November 26 and December 11, 2020. It appears, from the record, that Mr. Carr was detained pursuant to

Morin J.'s order of November 16th until the risk assessment was filed with the Court. He then consented to his remand at WCC until his YRB hearing on December 21, 2020.

[16] When I heard the parties' submissions on the issue of mootness, on December 17, 2020, the YRB had yet to hold a disposition hearing for Mr. Carr. However, counsel advised that they expected Mr. Carr would be subject to a non-custodial disposition, which would not trigger the issues that brought the parties before the Court.

POSITIONS OF THE PARTIES

[17] Yukon acknowledges that the issues raised in its application as they pertain to Mr. Carr's matter are moot.

[18] However, Yukon submits that the Court should exercise its residual discretion to hear this matter, as:

- (1) a decision would have a practical effect on Yukon and the YRB;
- (2) the matter will go unreviewed if the application is not heard;
- (3) the issue of jurisdiction is an issue of public importance;
- (4) the principle of judicial economy favours hearing the application; and
- (5) the Court would not be stepping outside its traditional role if it decided to hear the application.

[19] The PPSC supports Yukon's position. It submits that the application should proceed to a hearing considering the number of recent cases where adherence to the principles of natural justice have become an issue for parties appearing before the YRB. It also raises the issue of the YRB ordering the placement of accused persons at WGH instead of at WCC without giving notice to the parties, and affording them the opportunity to make submissions or call evidence on this specific issue. The PPSC also

contends that hearing this application despite being moot is the most efficient use of judicial resources, as the outcome of this proceeding will not disrupt Mr. Carr's anticipated non-custodial disposition, and will prevent interrupting or delaying the course of another mental health proceeding in which the same issues may arise again and necessitate an urgent resolution.

[20] Mr. Carr, the YRB and the Yukon Hospital Corporation (for WGH) all indicated in advance of the hearing that they did not intend to take a position on the issue of mootness. Counsel for the YRB and counsel for the Yukon Hospital Corporation attended the hearing, as observers, whereas counsel for Mr. Carr did not.

[21] However, at the hearing, counsel for the YRB indicated that he had been instructed to bring to the attention of the Court, and the other parties, that pursuant to s. 672.82 of the *Criminal Code*, a party to a review board hearing may request the review board to hold a hearing to review any of its dispositions at any time.

ANALYSIS

[22] Yukon's main point of contention with the YRB order is that it directed Yukon not only to consult with WGH on security issues resulting from Mr. Carr being placed at WGH, but also to potentially incur expenses and have to reallocate resources in order to provide security support personnel to WGH, as needed, while Mr. Carr was being detained at WGH. Yukon also takes issue with the YRB's alleged lack of adherence to the principles of natural justice.

[23] However, Yukon confirmed at the hearing that it is not seeking a review of the YRB's decision to temporarily transfer Mr. Carr from WCC to WGH pending the return of his matters before the Territorial Court of Yukon.

[24] As previously stated, Yukon concedes that its application is moot in relation to Mr. Carr's matter. Indeed, the order that compelled Yukon to consult with WGH and to provide security personnel, as needed, while Mr. Carr was detained at WGH has lapsed and is no longer at issue in Mr. Carr's case. However, Yukon asks this Court to exercise its discretion to hear its application despite its mootness.

[25] Generally, courts have declined to hear matters that are moot, i.e. when their decisions will not resolve a live controversy between the parties. Nevertheless, courts have exercised their discretion to depart from that general rule in certain circumstances (*Mental Health Centre Penetanguishene v. R.*, 2010 ONCA 197, at paras. 35 and 36).

[26] In *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, the Supreme Court of Canada reviewed the factors to consider when determining whether to hear a case that has become moot. Those factors are:

- a) a remaining adversarial context or relationship;
- b) the case is an appropriate use of judicial resources; and
- c) the court would be acting within its proper adjudicative role and not intruding on the legislative branch.

(See also: *Evers v. British Columbia (Adult Forensic Psychiatric Services)*, 2009 BCCA 560, at para. 27).

[27] In *Borowski*, the Supreme Court of Canada also noted that those factors should not be assessed in a mechanical way:

[42] In exercising its discretion in an appeal which is moot, the court should consider the extent to which each of the three basic rationalia for enforcement of the mootness doctrine is present. This is not to suggest that it is a mechanical process. The principles identified above may not all support the same conclusion. The presence of one or two

of the factors may be overborne by the absence of the third, and vice versa.

A) Is there a remaining adversarial context or relationship?

[28] I agree with Yukon and the PPSC that an adversarial context remains. Mr. Carr's case is not unique. Security and safety concerns related to the detention of an accused person at WGH or the transfer of an accused person from WCC to WGH, pursuant to a review board disposition, are likely to arise again.

[29] In addition, while Mr. Carr is unlikely to participate in the hearing of this application, as the outcome would have no impact on his current disposition and no practical effects on his rights or interests, Yukon's application would not be left unopposed.

[30] The YRB has indicated its interest in participating in the hearing of the application if it proceeds on its merits. Yukon and the PPSC are not opposed to the YRB being granted status to intervene in this matter, similar in scope to the status it was granted in *R. v. Carlyle*, 2018 YKSC 45, with respect to its jurisdiction and its general practice and procedure.

[31] The Yukon Hospital Corporation, whose interests were also affected by the terms of the YRB's order at issue, has also shown an interest in Yukon's application.

[32] As such, I find that the first factor is met.

B) Is the case an appropriate use of judicial resources?

[33] Yukon refers to three recent cases (*H. P.* on May 31, 2019, *C. C.* on October 4, 2019; and *J. C.* on November 7, 2019), where the YRB ordered terms that precluded housing or detaining the accused person at WCC or the Adult Resource Centre. The YRB included those terms on its own motion, without notice to the parties of its intention

to do so, and without affording them an opportunity to make submissions or call evidence on that issue.

[34] I acknowledge that the placement of accused persons at WCC, which is a designated hospital for the purpose of *Part XX.1* of the *Criminal Code*, while subject to a YRB's disposition, has been a contentious, ongoing issue before the YRB over the past few years. However, in this case, Yukon is not challenging Mr. Carr's placement at WGH. Instead, Yukon disputes the specific terms of the order that compelled it to consult with the WGH, and, to potentially allocate or reallocate financial and human resources by providing security personnel to WGH, if necessary. There does not appear to be any prior case where the YRB imposed similar terms on Yukon and WGH.

[35] Nonetheless, I recognize that underlying the issue of placement of accused persons at WGH, is Yukon's and PPSC's broader concern that the YRB is making orders that affect their rights and/or interests without being given proper notice that the YRB is contemplating making such an order and/or being provided with an opportunity to make submissions and call evidence. According to Yukon and the PPSC, parties to YRB hearings are confronted with the YRB acting on its own motion, without first seeking input from the parties on a recurring basis, and Mr. Carr's case is yet another example of the YRB acting contrary to the principles of natural justice.

[36] However, I note that on May 14, 2020, following discussions between the YRB and a number of parties regularly involved in its hearings, the YRB committed to providing notice and conducting a full hearing, where the parties would be at liberty to call evidence and make submissions, on the issue of placement of accused persons at WCC. In my view, this demonstrates that the YRB is open and willing to address the

parties' concerns regarding the issue of proper notice and opportunity to make submissions and call evidence on matters that affect their rights and interests, when their concerns are brought directly to the attention of the YRB. This, in turn, ensures that issues are argued fully before the YRB, and a complete record gathered and available, prior to any resort to the courts.

[37] The transcript of Mr. Carr's hearing before the YRB reveals that the YRB did not alert the parties to the fact that it was considering making an order compelling Yukon to consult with WGH regarding Mr. Carr's placement and provide security personnel, as needed, nor did it invite submissions from counsel on that issue prior to making the order. However, I note that Mr. Carr's fitness status was unclear for all involved at the beginning of the hearing, and that the YRB responded quickly to his positively evolving presentation. In addition, I note that no one present at the hearing, including counsel for Yukon, raised any issue with respect to the terms of the YRB's order at issue after the oral order was made. The only concern Yukon expressed at the time related to the possibility that WGH might not accept Mr. Carr despite the order from the YRB. As such, counsel for Yukon expressly requested that the terms relating to Mr. Carr's placement at WGH not come into effect right away to allow Yukon to organize and facilitate his transfer from WCC to WGH. The YRB assented to Yukon's request and ordered that Mr. Carr's placement only come into effect at noon on August 3, 2020. In the meantime, Mr. Carr was to remain in custody at WCC, in its capacity as a designated hospital facility. Counsel for Yukon also indicated to the YRB that Yukon would bring the matter back before the YRB, if Mr. Carr's transfer to WGH became an issue.

[38] In addition, acknowledging that no representative from WGH was present at the hearing, the YRB specifically stated in its order that WGH may request the YRB to hold a hearing if it wished to make submissions regarding the placement of Mr. Carr at its institution. It is therefore clear that the YRB was open to re-evaluating its decision to place Mr. Carr at WGH.

[39] However, neither Yukon nor the Yukon Hospital Corporation requested a further hearing before the YRB. Instead, on July 31, 2020, Yukon filed its application for a writ of *certiorari* in this Court.

[40] While Yukon was acting within its available legal avenues when it filed its application, it nonetheless did so prior to availing itself of the possibility of fully arguing its case before the YRB, even though the YRB clearly left open that possibility when making its order on July 29, 2020.

[41] As such, this Court is being asked to rule on an issue without the benefit of a full and complete record, as well as reasons from the YRB on the issue of jurisdiction, which would have allowed the Court to understand, assess and review the factual and historical context in which the order was made, the parties' constraints and the implications of the order for them, as well as their concerns with the terms of the order at issue.

[42] Building a record at the review level to substantiate submissions that could have been made before the decision-maker is, in my view, less than desirable and not a very efficient use of judicial resources.

[43] Obviously, it would have been a different situation had the YRB been resistant to the idea of reassessing the terms of its order in the event the parties wished to bring the

matter back before it; or if the order had been made after a full hearing on the issue. I note that s. 672.82 of the *Criminal Code* clearly grants to the YRB the discretionary power to hold a hearing to review any of its dispositions, at any time, of its own motion or at the request of the accused or any other party, even after an appeal of its disposition is filed. Having said that, this discretionary power to review its own dispositions should not be seen by the YRB as an open invitation to act first, without proper notice, and to ask for forgiveness later. I need not say more on this issue for the purpose of this application, because, as previously noted, in this case, even counsel for Yukon alluded to the possibility of bringing the matter back before the YRB, if the transfer of Mr. Carr became an issue with WGH.

[44] In addition, I am not completely in agreement with Yukon's submission that this type of order can easily evade review, as the specific terms at issue in this application are not necessarily tied to interim orders or orders of short duration. On the other hand, I agree that PPSC's argument that this application should be heard despite its mootness, as it will allow the debate to take place without disrupting or interrupting an ongoing mental health proceeding to the detriment of the accused person subject to the disputed YRB order, has merit. However, I am also of the view that this argument carries less weight in relation to the specific terms at issue in this case. While the filing of Yukon's application for a writ of *certiorari* ultimately had the effect of suspending Mr. Carr's transfer to WGH, it clearly did not have the effect of interrupting Mr. Carr's proceedings before the Territorial Court of Yukon nor the YRB.

[45] As such, the concerns raised by Yukon and PPSC are not sufficient to override the fact that the parties did not seize upon the opportunity to fully argue the matter

before the YRB prior to seeking a review of its decision; and to allay the Court's concerns regarding the lack of a proper record to conduct its review.

[46] I find that this factor is not met.

C) The court would be acting within its proper adjudicative role and not intruding on the legislative branch.

[47] I am of the view that this factor does not raise much concern in this case, and is not an impediment to this Court hearing Yukon's application.

[48] Courts rule on issues of jurisdiction on a regular basis. In addition, Yukon is only seeking a declaration of a general nature that the YRB acted in contravention of the principles of natural justice. Yukon is not seeking a remedy that directs the YRB to implement those principles in a specific manner. As such, the circumstances of this case differ from the case of *R. v. Lamothe*, 2020 YKSC 36, where at para. 34, Duncan J. determined that ordering the YRB to issue its reasons contemporaneously to its orders "would be straying into the legislative function Parliament granted to the Review Boards and the Lieutenant-Governor-in-Council or equivalent" pursuant to s. 672.44 of the *Criminal Code*.

CONCLUSION

[49] Overall, the concerns I have regarding the appropriate use of judicial resources are sufficiently important, compared to the other factors at play in this case, to refuse to exercise the Court's discretion to hear this moot application, especially in a situation where there is an absence of a proper record to place before the Court.

[50] As a result, Yukon's application for an order in the form of a writ of *certiorari* is dismissed for mootness.

CAMPBELL J.