SUPREME COURT OF YUKON

Citation: *R v Scarizzi*, 2022 YKSC 24

Date: 20220211
S.C. No. 21-AP010
Registry: Whitehorse

BETWEEN:

REGINA

RESPONDENT

AND

MICHAEL SCARIZZI

APPELLANT

Before Justice E.M. Campbell

Counsel for the Respondent — David A. McWhinnie (by videoconference)

Counsel for the Appellant — David C. Tarnow (by videoconference)

This decision was delivered in the form of Oral Reasons on February 11, 2022. The Reasons have since been edited for transcription without changing the substance.

REASONS FOR DECISION

[1] CAMPBELL J. (Oral): The appellant, Michael Scarizzi, applies to have the one-year driving disqualification imposed on him, pursuant to s. 255 of the *Motor Vehicles Act*, RSY 2002, c 153, as amended ("the *Act*") upon his conviction for an impaired driving offence, stayed pending the determination of his conviction appeal.

[2] On October 29, 2021, Michael Scarizzi was convicted after trial of having, within two hours after ceasing to operate a conveyance, a blood alcohol concentration that is equal to or exceeds 80 mg of alcohol in 100ml of blood, contrary to s. 320.14(1)(b) of the *Criminal Code*, R.S.C., 1985, c. C-46 ("*Criminal Code*"). On the same date, he was sentenced to the minimum fine of $1,000 (s. 320.19(1)(b)) and the mandatory minimum driving prohibition of one year (320.24(2)(a)).

[3] On November 12, 2021, Mr. Scarizzi filed his notice of summary conviction appeal in the Supreme Court of Yukon.

[4] On November 18, 2021, Justice Wenckebach granted a stay pending appeal of Mr. Scarizzi's one-year driving prohibition and the $1,000 fine imposed by the sentencing judge. The stay was not opposed by the Federal Crown.

[5] On November 23, 2021, the Supervisor of Court Clerks wrote to the Yukon Motor Vehicles Branch to inform them of the stay pending appeal and to request that they remove the driving prohibition and fine imposed by the Territorial Court from their records in accordance with the order of the Court.

[6] On December 2, 2021, Mr. Scarizzi received a letter from the Registrar of Motor Vehicles informing him that he was, nonetheless, disqualified under s. 255 of the *Act* from holding a driver's licence for one year beginning on the date of his conviction.

[7] Mr. Scarizzi applies to this Court, pursuant to its inherent jurisdiction, for an order staying his disqualification under s. 255 of the *Act* pending a determination of his appeal of his conviction. Mr. Scarizzi does not challenge the constitutionality of the relevant provisions of the *Act*.

[8] The Government of Yukon ("Yukon") opposes Mr. Scarizzi's application. The Federal Crown, the respondent on Mr. Scarizzi's criminal appeal, is not taking part in this application.

[9] Mr. Scarizzi's appeal of his conviction is scheduled to be heard on June 8, 2022.

POSITIONS OF THE PARTIES

[10] Mr. Scarizzi submits that the Registrar of Motor Vehicles (the "Registrar") has wrongly decided that his appeal against conviction and the subsequent stay order granted by the Supreme Court of Yukon has no effect on the Registrar's authority to disqualify him from driving pursuant to s. 255 of the *Act* because of his criminal conviction.

[11] Mr. Scarizzi points out that s. 267 of the *Act* provides that the suspension of a licence under the *Act* does not apply pending appeal until the conviction is sustained on appeal or the appeal is abandoned or struck out.

[12] In addition, Mr. Scarizzi submits that the *Act* does not oust the Supreme Court of Yukon's jurisdiction to stay the driving disqualification imposed on him pursuant to s. 255 as a result of his criminal conviction, while his conviction is under appeal.

[13] Mr. Scarizzi further submits that the imposition of a driving disqualification upon conviction is a punishment. He submits that the stay order granted by the Supreme Court of Yukon in November with respect to the driving prohibition the Territorial Court imposed on him demonstrates that courts in Canada have chosen not to punish individuals until their legitimate avenues of appeal have been exhausted.

[14] Mr. Scarizzi submits that the driving disqualification imposed under s. 255 of the *Act* constitutes a punishment because it is imposed in furtherance of sentencing, it has

significant impact on an accused's liberty and security interests, and it significantly limits the lawful activities in which the accused can engage.

[15] Mr. Scarizzi submits that the loss of driving privileges in the Yukon is a serious punishment considering the rural nature of most of this territory. In addition, he submits that his ability to drive a motor vehicle for work is essential because his employment involves travel within the territory.

[16] In addition, Mr. Scarizzi submits that, in any event, this is an appropriate case for this Court to rely on its inherent powers to grant the relief he seeks because the Supreme Court of Yukon has already ruled that his criminal appeal is not frivolous and it is in the public interest to grant him a stay of the driving prohibition imposed by the Territorial Court pursuant to the *Criminal Code* pending appeal.

[17] Mr. Scarizzi acknowledges that he could make an application to the Driver Control Board ("the Board") to have his disqualification removed pursuant to s. 262(4) of the *Act*. However, Mr. Scarizzi submits that this legal avenue is wholly inappropriate in his case because he would not only have to agree to operating only a motor vehicle that is equipped with a properly functioning alcohol ignition interlock device but he would also have to obtain, maintain, and use it at his own expense. Mr. Scarizzi submits that he should not have to bear the costs associated with that program to have a disqualification, which arose solely as a result of his criminal conviction, removed from his record while his conviction is under appeal.

[18] Mr. Scarizzi contends that a stay is warranted in this case. Otherwise, if his criminal appeal is successful, he will have been punished for no reason.

[19] Finally, Mr. Scarizzi submits that the Court ought to use its inherent jurisdiction to issue a stay of his driving disqualification pending appeal to fulfill its function of administering justice in a regular, orderly, and effective manner.

[20] Yukon submits that Mr. Scarizzi's driving disqualification under the *Act* does not arise from an order of the Registrar or the Court, but from the operation of law. Counsel submits that a disqualification is a statutory consequence that arises when certain facts occur — in this case, Mr. Scarizzi's conviction. Yukon submits that, contrary to what Mr. Scarizzi contends, the Registrar does not have jurisdiction under the *Act* to stay or remove his disqualification pending a conviction appeal.

[21] Yukon points out that Mr. Scarizzi has chosen not to challenge the constitutionality of the *Ac*t, either in whole or in part, or to seek a constitutional exemption of its application. Yukon submits that, instead, Mr. Scarizzi has chosen to seize the Court with an application requesting that it rely on its inherent powers to provide relief against a statutory disqualification, when the statute already has a comprehensive set of principles that govern under what circumstances a disqualification may be imposed and under what circumstance and by whom it may be removed.

[22] Yukon submits that Mr. Scarizzi is equating a legal consequence with a punishment. Yukon submits that the Legislature determined that when certain circumstances are present a person's privileges to drive are disqualified. Yukon submits that the statutory disqualification is not part of the actual punishment process; it is simply a legal consequence arising out of certain facts — in this case, Mr. Scarizzi's conviction.

[23] Yukon submits that s. 267 of the *Act*, which provides for an automatic stay of a licence suspension pending appeal, does not apply to disqualifications. Yukon argues that the *Act* clearly distinguishes the situations that give rise to a disqualification from those that give rise to a licence suspension and the different statutory schemes that apply to them.

[24] Yukon submits that, nonetheless, Mr. Scarizzi is not without recourse pending his appeal. Yukon submits that the combined application of ss. 260 to 262 of the *Act* allows disqualified drivers, after a period of a minimum of three months, to apply to the Board for the removal of their disqualification subject to their adherence to the Interlock program.

[25] Yukon submits that, in Mr. Scarizzi's case, the minimum period of three months from his conviction would apply. Yukon submits that, as Mr. Scarizzi has been convicted more than three months ago, nothing prevents him from making that application to the Board.

[26] Yukon submits that appeals are creatures of statute and the powers of an appeal court are statutory. Yukon further submits that the use of the Court's inherent jurisdiction has to be tied to the Court's ability to carry out its jurisdiction.

[27] Yukon concedes that it is conceivable that, in certain specific circumstances, the Court's inherent jurisdiction could be used to suspend the automatic execution of a statute to overcome a gap or to respond to events at issue that compromise the Court's ability to render justice. However, Yukon submits that the Court's ability to hear Mr. Scarizzi's appeal is not impeded by whether he can drive a motor vehicle. In addition, Yukon submits that Mr. Scarizzi has another remedy under the *Act*.

[28] Yukon submits that this Court is being asked on a very bare record to conclude that an exception for Mr. Scarizzi should be carved out of the existing legislation simply because he has filed an appeal.

[29] Finally, Yukon submits that, based on the nature of the application and the lack of record before the Court, it is not an appropriate case for this Court to exercise its inherent jurisdiction.

ANALYSIS

[30] First, I will address the nature and scope of the application before me.

[31] Second, I will review the principles that guide the exercise of this Court's powers under its inherent jurisdiction.

[32] Third, I will apply those principles to Mr. Scarizzi's application in light of the statutory scheme under which his disqualification was issued.

The nature and scope of the application before the Court

[33] Mr. Scarizzi has filed an application for a stay of the automatic driving disqualification imposed on him pursuant to s. 255 of the *Act* as a result of his *Criminal Code* conviction. Mr. Scarizzi attributes his situation to the Registrar's decision to ignore the Supreme Court of Yukon's order to stay his *Criminal Code* driving prohibition pending appeal by denying him a stay of his statutory disqualification. However, a reading of the *Act* reveals that the Registrar has no decision-making power in relation to the imposition or removal of his disqualification.

[34] In addition, Mr. Scarizzi is not challenging the constitutionality of the *Act*, in whole or in part, nor is he applying for a constitutional exemption of the application of the *Act*.

Mr. Scarizzi relies solely on this Court's inherent jurisdiction as the basis for its authority to grant the relief he seeks.

The inherent jurisdiction of Superior Courts

[35] In *Ontario v. Criminal Lawyers' Association*, 2013 SCC 43, at paras. 20 to 23, Justice Karakatsanis described the inherent jurisdiction of superior courts as follows:

> [20] In his 1970 article, "The Inherent Jurisdiction of the Court" 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.
>
> [21] As noted by this Court in *R. v. Caron*, 2011 SCC 5, 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" 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".
>
> [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, 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. As Jacob notes: ". . . 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) [citations omitted]

[36] More recently, in *Endean v. British Columbia*, 2016 SCC 42, at paras. 23 and 24, the Supreme Court of Canada reiterated not only that inherent jurisdiction is central to the roles of superior courts, but that it should be used sparingly and with caution:

> [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".
>
> [24] The courts have recognized that, given the broad and loosely defined nature of these powers, they should be "exercised sparingly and with caution": [citations omitted]. ...

[37] Having reviewed the principles underlying the exercise of this Court's inherent jurisdiction, I now turn to the specific statutory provisions at play in this case.

Application of the principles guiding the exercise of this Court's inherent jurisdiction in the context of the Territorial legislation at issue.

[38] Section 255(2) of the *Act* provides for the automatic disqualification from driving of a person convicted of specified statutory and *Criminal Code* offences included in the statutory definition of "impaired driving offences" pursuant to s. 255(1). The offence for which Mr. Scarizzi was convicted, s. 320.14(1)b) of the *Criminal Code*, falls within that definition.

[39] Section 255(2) reads:

> If a person is convicted of an impaired driving offence they are disqualified from holding an operator's licence under this Act for the following period

> (a) on the first conviction, for one year;
>
> (b) on the second conviction, whether or not it is under the same provision as the first conviction, for three years;
>
> (c) on the third conviction, and each subsequent conviction, whether or not it is under the same provision as any of the previous convictions, indefinitely

[40] Therefore, as previously indicated, a disqualification under s. 255 is not discretionary; it is issued automatically upon conviction by the operation of law.

[41] Section 255(9) provides that, when a person is convicted in the Yukon, the sentencing judge may make an order increasing the statutory disqualification provided by s. 255. Section 255(9) reads as follows:

> Subject to subsection (1) and section 261, if a person is convicted in the Yukon of an offence referred to in subsection (1), the court may make an order increasing the term of their disqualification by any length of time the court considers appropriate.

[42] This section does not apply here as the sentencing judge did not make an order increasing the term of Mr. Scarizzi's statutory disqualification.

[43] Section 265 confirms the lack of jurisdiction of the Registrar with respect to the issuance or removal of disqualifications upon conviction and pending appeal. Section 265 deals with reissuance of licence, and it reads:

> (1) Except as provided by subsection (2), an operator's licence shall not be issued or reissued to a person disqualified from holding it under section 255 or 260 until the expiration of the disqualification.
>
> (2) A person's operator's licence is not automatically restored upon the expiration of a disqualification under this Part. The person must apply for, and meet the requirements for, a new operator's licence.

[44] However, s. 262 of the *Act* provides that an application may be made to the Board for the removal of a disqualification issued pursuant to s. 255 on the condition that the applicant agrees to operate only a motor vehicle that is equipped with a properly functioning alcohol ignition interlock device that they obtain, maintain, and use at their own expense.

> 262(4) Despite subsections (1), (2) and (3), if a person who has been disqualified under paragraph 255(2)(a), (b), or (c) from holding an operator's licence agrees in writing to comply with a requirement that they operate only a motor vehicle that is equipped with a properly functioning alcohol ignition interlock device that they obtain, maintain, and use at their own expense, then they may apply to the Board for an order that the disqualification be removed, and the Board may consider the application after the expiry of […]

[45] Whether a minimum waiting period of three months applies to Mr. Scarizzi's situation or not, considering the date of his conviction, it is at this point open to him to apply to the Board for the removal of his driving disqualification pending appeal, as his *Criminal Code* driving prohibition has already been stayed for the purpose of his appeal. However, to be eligible, Mr. Scarizzi would have to cover the costs of an interlock device on the vehicle he uses. Also, the Board's decision pursuant to s. 262 is subject to judicial review by this Court.

[46] Section 267 is the only provision of the *Act* that addresses the granting of a stay pending appeal. Section 267 provides that:

> If a person whose licence has been suspended enters an appeal against their conviction, the suspension does not apply until the conviction is sustained on appeal or the appeal is abandoned or struck out.

[47] No application is required pursuant to s. 267. The stay of the licence suspension is granted automatically upon the filing of an appeal against conviction. However, s. 267

is of little assistance to Mr. Scarizzi because the *Act* draws a clear distinction between the notions of disqualification and suspension.

[48] For example, s. 255 only deals with disqualification under the *Act*, whereas s. 252 only deals with suspension. Section 257 specifically addresses the roadside powers of a peace officer to either suspend an operator's licence or to disqualify the driver from driving. Section 259 specifically provides the review process for a roadside suspension and for a roadside disqualification under s. 257, whereas s. 262 only deals with the removal of disqualifications.

[49] From my review of the provisions at play in this case, the terms "suspension" and "disqualification" are not used interchangeably in the *Act*. Instead, they have a different meaning under the *Act* and are treated differently throughout the *Act*. As s. 267 refers to suspensions only, I am unable to find that the automatic stay pending appeal provision in cases of suspension applies to disqualifications.

[50] As a result, there is no provision in the *Act* that provides either for an automatic stay of a disqualification pending appeal or a statutory mechanism by which Mr. Scarizzi could apply to obtain a stay of his disqualification pending his conviction appeal.

[51] This observation could lead to the conclusion that the Legislature implicitly chose to remove the availability of a stay pending appeal for disqualifications under the *Act*. However, based on the limited record before me regarding the Legislature's intent, the limited case law, and limited submissions of counsel on that specific issue, I have insufficient information to conclude that the Legislature's silence automatically equates to a clear and expressed intent to preclude an application to the superior court for a stay of a driving disqualification pending a conviction appeal.

[52] Yukon relies on the decision of *R v Duncan*, 2020 ONSC 7849, to argue that where an order is issued automatically by operation of law, as opposed to a discretionary order, the Court cannot revert to its inherent jurisdiction as a legal basis to stay the automatic order — in this case the driving disqualification pending appeal.

[53] In *Duncan*, Justice Durno found that the Superior Court of Justice of Ontario had no inherent jurisdiction to stay the reporting and recording requirements under the Ontario Provincial Sex Offender Registry pending the applicant's appeal of his conviction for sexual assault. Much like this case, the ancillary orders (the DNA and *SOIRA* orders) issued by the trial judge pursuant to the *Criminal Code* had been stayed pending appeal with the consent of the Crown. In that case, the Crown also took the position that the Court did not have jurisdiction to stay the automatic requirements of the Ontario Provincial Sex Offender Registry. The legislation did not include any provision regarding stay of compliance pending an appeal.

[54] Justice Durno relied on a number of decisions across the country that drew a distinction between discretionary and automatic orders upon conviction to conclude that "where an automatic corollary consequence of a conviction occurs, the court has no jurisdiction to stay that consequence pending appeal." (at para. 53)

[55] While the decision in *Duncan* is grounded in an important body of case law, I am not persuaded that an order issued automatically upon conviction, pursuant to provincial or territorial legislation, is an absolute bar to the exercise of a superior court's inherent jurisdiction to grant a stay pending appeal in every case — and a complete answer to the applicant's request for a stay in this case.

[56] Even counsel for Yukon seemed to leave the door open to compelling circumstances where the Court would consider resorting to its inherent jurisdiction to grant a stay pending appeal of an automatic order issued upon conviction if that order compromised the Court's ability to render justice.

[57] Therefore, the question is whether this is one of those cases where it is appropriate for this Court to use its inherent powers, keeping in mind the Supreme Court of Canada's warning that the inherent powers of superior courts should be used sparingly and with caution and also keeping in mind that the Court's inherent powers:

> [26] … are limited by the separation of powers that exists among the various players in our constitutional order and by the particular institutional capacities that have evolved from that separation. (see *Ontario v Criminal Lawyers Association*, 2013 SCC 43)

[58] Mr. Scarizzi's main argument in support of a stay pending appeal is one of fairness. Mr. Scarizzi submits that the imposition of a driving disqualification under the *Act* is not merely a legal consequence of his conviction but a punishment. Mr. Scarizzi submits that he should not be punished until all his legitimate avenues of appeal have been exhausted because, if his appeal is successful, he will have been punished for something that he did not do.

[59] Mr. Scarizzi also submits that I should be satisfied that the use of this Court's inherent jurisdiction is warranted because the Supreme Court of Yukon has already granted a stay pending appeal of his *Criminal Code* driving prohibition, pursuant to s. 320.25 of the *Criminal Code*. I note that the Federal Crown did not oppose Mr. Scarizzi's application in that regard.

[60] Considering the nature of the application before me, I do not find Mr. Scarizzi's argument persuasive when there is a statutory remedy that would allow him to regain

his driving privileges. I note in passing that driving a motor vehicle in Canada is not a right but a privilege granted to a person who meets the requirements established by the provincial or territorial authority. (see for example *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para. 98)

[61] As stated earlier, Mr. Scarizzi may apply to the Board to remove his driving disqualification pending appeal if he agrees to operate only a motor vehicle that is equipped with a properly functioning alcohol ignition interlock device that he would have to obtain, maintain, and use at his own expense. I note that there is no evidence before me that the cost of obtaining, maintaining, and using the device is prohibitive for Mr. Scarizzi. In addition, the decision of the Board is subject to the Court's oversight through judicial review.

[62] I also note that there is no evidence, properly adduced before me on this application, substantiating the alleged impact of the statutory disqualification on Mr. Scarizzi's employment pending appeal and/or its impact on his ability to pursue his appeal.

[63] As a result, based on the record before me, I do not find that this is an appropriate case to exercise this Court's inherent jurisdiction. Therefore, Mr. Scarizzi's application for a stay of his statutory driving disqualification pending appeal is dismissed.

[64] Again, I note that the application before me did not involve a constitutional challenge to the Territorial legislation based on the absence of a statutory provision providing for a mechanism to be granted a stay pending appeal of disqualifications

imposed under the *Act* upon conviction. Whether that application would succeed is not for me to decide in this case.

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CAMPBELL J.