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COURT OF APPEAL FOR THE YUKON TERRITORY

Citation: *Yukon Teachers' Association v. Yukon (Government)*, 2011 YKCA 4

Date: 20110303
Docket: YU0659

Between:

Yukon Teachers' Association

Respondent
(Plaintiff)

And

Government of Yukon

Appellant
(Defendant)

Before: The Honourable Madam Justice Huddart
The Honourable Mr. Justice Groberman
The Honourable Madam Justice Garson

On appeal from: Supreme Court of Yukon, 27 July 2010,
(*Yukon Teachers' Association v. Government of Yukon*, 2010 YKSC 40,
Whitehorse Registry No. 10-A0064)

Oral Reasons for Judgment

Counsel for the Appellant:	P.A. Csiszar
Counsel for the Respondent:	C.J. Foy
Place and Date of Hearing:	Vancouver, British Columbia March 1, 2011
Place and Date of Judgment:	Vancouver, British Columbia March 3, 2011

[1] **GROBERMAN J.A.**: This is an application by the Union to dismiss this appeal as moot.

Factual Background

[2] The background to the case is uncomplicated. Michael Girard, a teacher in Mayo, was in his probationary year when Denis Gauthier, a Superintendent of Schools, dismissed him from his employment effective June 30, 2010. Mr. Girard appealed to the Deputy Minister of Education, as he was entitled to do under the grievance procedure set out in s. 106(4) of the *Education Labour Relations Act*, R.S.Y. 2002, c. 62.

[3] The Yukon Teachers' Association applied, on Mr. Girard's behalf, to the Supreme Court of Yukon for an order suspending his dismissal pending the decision of the Deputy Minister on appeal. The application was heard on July 23, 2010, and the requested order was granted on July 27, 2010.

[4] Veale J. provided brief reasons for his decision. He held that he had jurisdiction to grant the order, relying on the proposition that the Supreme Court has inherent jurisdiction to grant interlocutory relief in administrative proceedings where the administrative tribunal itself lacks the power to grant such relief. In so doing, he cited the decision of the Supreme Court of Canada in *Brotherhood of Maintenance of Way Employees Canadian Pacific System Federation v. Canadian Pacific Ltd.*, [1996] 2 S.C.R. 495.

[5] Applying the test for an interlocutory injunction set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, he granted the order sought by the Association.

[6] The Government of Yukon launched an appeal of Veale J.'s decision. It wished to argue that *Brotherhood of Maintenance of Way Employees* has limited, if any, application in a labour relations context when the matter is specifically covered by a collective agreement and a legislated system of grievance resolution.

[7] Before the appeal could be heard, the Deputy Minister of Education decided Mr. Girard's case. She ordered that he be reinstated, and that his probationary period be extended. This effectively brought an end to the grievance, and terminated the interlocutory order.

[8] Notwithstanding that the issue of Mr. Girard's dismissal has been resolved and the interlocutory order has lapsed, the Government of Yukon wishes to continue its appeal in order to argue that the Yukon Supreme Court acted beyond its jurisdiction in granting the stay. The Union defends the appeal on the merits, but seeks, by way of a preliminary motion, to have the appeal dismissed as moot.

Is the Appeal Moot?

[9] The leading case on mootness is the decision of the Supreme Court of Canada in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342. In that case, the Court set out a two-stage approach to issues of mootness. At the first stage, a court must determine whether the case is moot. If it is, the court must proceed to the second stage to determine whether it should exercise its discretion to hear the case despite its being moot.

[10] In *Borowski*, Sopinka J., for the Court, described the first stage of the mootness analysis as a determination of "whether the required tangible and concrete dispute has disappeared and the issues have become academic." That is the situation in this appeal. Indeed, while in its written argument the appellant contended that the appeal is not moot, it did not press that position before this Court.

[11] The sole issue to be determined on this application is whether the Court should exercise its discretion to hear the appeal notwithstanding that it is moot.

Should the Court Exercise its Discretion to Hear a Moot Case?

[12] *Borowski* sets out three considerations that guide the exercise of discretion to hear moot cases:

1. Whether, despite the disappearance of the concrete dispute, an adversarial context continues to exist, such that there remains an assurance that the case will be fully argued before the court;

2. Whether judicial economy would be advanced, in some way, by hearing a case notwithstanding that the concrete dispute has been resolved;

3. Whether, in hearing a moot case, the court will be straying into the legislative sphere rather than acting as an adjudicative body.

[13] I am satisfied that the parties to this appeal are prepared to argue it fully, and that there is no concern with respect to the existence of a continued adversarial context.

[14] With respect to judicial economy, the appellant asserts that the issue raised by this case is likely to be of a recurrent nature, and that it will be efficient for the Court to determine it at this juncture.

[15] It is not clear to me that the Court should accept the proposition that the issue in this case is likely to be a recurrent one. On the contrary, in a healthy and efficient labour relations context, it seems to me that applications of the sort at issue on this appeal are likely to be exceptional.

[16] Further, it is not at all obvious that a decision in this case will serve to resolve future disputes. During the appellant's submissions on this application, it became clear that there are a number of subtly different bases upon which it contends that *Brotherhood of Maintenance of Way Employees* should not have been applied in this case. Some of the arguments, if accepted, would have broad application – perhaps making *Brotherhood of Maintenance of Way Employees* inapplicable to all issues arising under collective agreements – others are very narrow, and would have little application beyond the bounds of the current case.

[17] I am less troubled by the third consideration in respect of hearing moot cases. While the appellant does, to some degree, seek to have the court set out prescriptive rules rather than having it adjudicate on a dispute, I see little reason to characterize the request as an invitation for the court to enter into a legislative

sphere. This said, the manner in which the appellant wishes to present this case would isolate a single legal issue from its broader factual context, and might militate against the orderly and incremental development of the law.

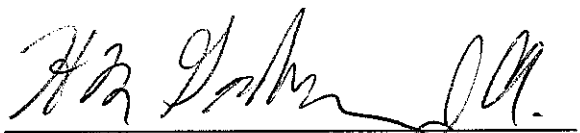
Conclusion

[18] While the court retains a residual discretion to hear and decide a case that is moot, I take the general rule to be that a court should refrain from doing so without good reason. In the case before us, I am not persuaded that considerations of judicial efficiency justify expending judicial resources on this appeal. In the result, I would dismiss the appeal on the grounds that it is moot.

[19] **HUDDART J.A.**: I agree.

[20] **GARSON J.A.**: I agree.

[21] **HUDDART J.A.**: The appeal is dismissed.



The Honourable Mr. Justice Groberman