SUPREME COURT OF YUKON

Citation: *R. v. McDiarmid*, 2015 YKSC 54

Date: 20151118
S.C. No.: 14-01511
Registry: Whitehorse

BETWEEN:

HER MAJESTY THE QUEEN

AND

MARK LEE MCDIARMID

Before the Honourable Mr. Justice M. David Gates

Appearances:

David A. McWhinnie	Counsel for the Crown
Mark McDiarmid	Appearing on his own behalf

REASONS FOR JUDGMENT

Summary and Overview

[1] Mark Lee McDiarmid, a self-represented litigant, is charged with two counts of threatening a justice system participant, Jennifer Cunningham, a court-appointed *amicus*; uttering threats; assaulting a peace officer; obstructing a peace officer; assault; and obstruction of justice. All of these offences are alleged to have taken place on February 7, 2014, at the courthouse in Whitehorse. These matters are set to proceed to trial with a jury commencing on January 4, 2016.

[2] In an application filed on October 30, 2015, Mr. McDiarmid seeks a preliminary inquiry. He says that his committal for trial by His Honour Judge M. Cozens of the Territorial Court of Yukon on September 9, 2014, should be set aside on the basis that Judge Cozens exceeded his jurisdiction in committing the Accused to trial without a preliminary inquiry.

[3] This application was heard by me on November 12, 2015. At the conclusion of oral argument, I reserved my decision. For the reasons that follow, the application is granted. The committal for trial dated September 9, 2014, is set aside and the matter is remitted back to the Territorial Court of Yukon for the purpose of conducting a preliminary inquiry. It follows that the trial dates set in the Supreme Court of Yukon for the week of January 4, 2016, are vacated.

Facts

[4] The Accused made a number of appearances on a multi-count information sworn on March 11, 2014, that is now the subject matter of the various counts in the indictment before me. Specifically, the Accused appeared in the Territorial Court of Yukon on March 12th, March 28th, April 11th, May 19th, June 6th, June 20th, July 4th, July 18th and September 9th. When the Accused appeared on July 18, 2014, the Court made a disclosure order and granted a further adjournment to September 9, 2014, so as to allow the Accused to view some videotaped evidence relied on by the Crown. On September 9, 2014, the matter was before Judge Cozens. A review of the transcript from the September 9th appearance reveals that an application by the Accused to amend the information was to be heard on that date, though this does not appear to

have actually taken place. It is clear, however, that the Accused was to make his election regarding his preferred mode of trial in conjunction with this court appearance.

[5] From the transcript, it is clear that the Accused was reluctant to elect on the current charges, as he had been during earlier appearances. In particular, he advised the Court that he faced significant limitations at the Whitehorse Correctional Centre in terms of access to a computer to review the Crown disclosure material and, more generally, to prepare for a jury trial in Dawson City scheduled for January and February, 2015. He also told the Court that he was preparing for an upcoming bail application in the Supreme Court of Yukon, and an appeal to the Court of Appeal of Yukon and/or the Federal Court on other related matters. During the course of the appearance, the Court engaged the Crown and the Accused in a brief discussion regarding possible *Rowbotham* and/or *Fisher* applications.

[6] At one point, the Court confirmed that the Accused was seeking to adjourn both his application to amend the information and his election on the within charges until after his bail hearing in Supreme Court of Yukon. The Accused repeatedly told the Court that he did not believe he could prepare for both his upcoming bail application and jury trial at the same time as he was preparing to deal with the within charges. While the Court attempted to explain to the Accused that the two matters would not proceed simultaneously, the Accused maintained his concern that he was being forced to deal with everything at once.

[7] The Crown took the position before Cozens TCJ that the matter had gone on long enough without the Accused having elected the mode of trial. As such, the Crown invited the Court to put the Accused to his election and to deem him to have elected trial

before a court composed of a judge and jury if he did not respond. The Crown then stated:

> … The matter can then, according to the usual practice direction, go before the court to fix a date for the preliminary inquiry.
>
> I can advise for Mr. McDiarmid's benefit primarily we anticipate a preliminary inquiry from the Crown's side would be something in the vicinity of half a day. We intend to call a single witness. We would likely play a relatively short video for the court and file, you know, one or two documents dealing with the status of the named victim; that is, you know, Ms. Cunningham as an amicus, you know, to establish her as a justice system participant, and that would be essentially the preliminary inquiry.

Transcript of September 9, 2014, Territorial Court of Yukon, p. 5, l. 40 – p. 6, l. 2

[8] Later in the proceedings, the Crown made further references to the preliminary inquiry, specifically:

> And so, with the greatest of respect, his point doesn't take away from the need to get on with the preliminary inquiry if there's going to be one. He has the option to waive it, of course, if he doesn't want to have a preliminary inquiry and get the matter set for trial relatively quickly. The Crown would be, in light of this information, [the Accused's stated desire to challenge the order appointing an Amicus relative to his then upcoming jury trial] remiss in not pointing out that if he intends to pursue that course, that's going to take some time, so the Crown ought not to rush him into the trial in the Supreme Court; that doesn't mean he shouldn't proceed with some appropriate expedition to get the preliminary inquiry done so that we can get him to that court and he can then advance the defence he seems to be setting up.

Transcript, p. 7, l. 37-46.

> Once the preliminary inquiry is over, he may take a different view of the whole thing and want to deal with it [the current charges] more expeditiously if there is Supreme Court time available, but that's his call once the preliminary inquiry has been held.

Transcript, p. 8, l. 36-39.

[9] At one point in the proceedings, the Court also made reference to the need to move the matter forward "towards preliminary inquiry dates" and that in the absence of an election by the Accused, "those are things we are unable to do, and trial time or preliminary inquiry time will be taken up by other matters in the interim."

Transcript, p. 10, l. 6-11

[10] The Court ultimately put the Accused to his election as follows:

> … So, Mr. McDiarmid, pursuant to s. 536(2), you have the option to elect to be tried by a Provincial Court judge without a jury and without having had a preliminary inquiry or you may elect to be tried by a judge without a jury or you may elect to be tried by a court composed of a judge and jury. If you do not elect now, you are deemed to have elected to be tried by a court composed of a judge and jury. If you elect to be tried by a judge without jury or a by a court composed of a judge and jury, or if you were deemed to have elected to be tried by a court composed of a judge and jury, <u>you will have a preliminary inquiry only if you or the prosecutor request one</u>. (emphasis added)
>
> So I'm putting you to your election. How do you elect to be tried?
>
> And unless you answer differently within the next 10 seconds or so I'm going to take your non-answer as being a choice on your part not to elect.
>
> Time having past, pursuant to s. 565, and to what I just said under s. 536, you were deemed to have elected to be tried by a court composed of a judge and jury. That will be unless – – well, Mr. McWhinnie, are you – – Mr. McDiarmid, I take it you are not going to make any comment with respect to whether you want a preliminary inquiry or not, correct?
>
> And I will take your silence of affirmation of that.
>
> Mr. McWhinnie, are you seeking to have a preliminary inquiry in this?
>
> Mr. McWhinnie: I understand the - - the provisions of s. 536(4) where a person does not elect when called upon and is deemed to - -
>
> The Court: Okay.

> Mr. McWhinnie - - be tried at an election by a judge and jury.
> The court should set a preliminary inquiry. (emphasis added)
> The Court: It seems upon the request of the accused or the prosecutor.
> Mr. McWhinnie: Yes, that's correct.
> The Court: Right? And so I guess Mr. McDiarmid is not requesting a preliminary inquiry. Are you? (emphasis added)
> Mr. McWhinnie: The Crown is not requesting a preliminary inquiry at this time.
> The Court: All right. Unless there is a request for a preliminary inquiry made, this matter will proceed to trial without a preliminary inquiry. This trial, as I undersand, is to occur at a date after the Supreme Court matters in Dawson, correct? That was - - I think the Crown indicated that - -
> Mr. McWhinnie: Yes.
> The Court: --they would not be seeking this trial to take place before the Supreme Court trial in Dawson?

Transcript, p. 12, l. 3-42

[11] The balance of the transcript contains a very brief discussion between the Court and the Crown regarding the date for the first appearance in the Supreme Court of Yukon and then shifts to a discussion involving the Accused relative to his upcoming bail hearing and whether he wished to appear in person or via video-conference. There was no further discussion regarding the preliminary inquiry.

[12] In the midst of the discussion between the Court and the Crown regarding a first appearance by the Accused in the Supreme Court of Yukon, the Accused intervened on two occasions as follows:

> Mr. McWhinnie: To the extent that Mr. McDiarmid has asked that a bail hearing on these matters –
> The Court: Mm-hmm.
> Mr. McWhinnie: - - in the Territorial Court be before the Supreme Court on October 9 - -
> The Court: Okay.
> Mr. McWhinnie: -- maybe it would be convenient to all that this matter be directed to be before the court at that time, and so - -
> The Court: All right.

> Mr. McWhinnie: - - if the Crown causes the appropriate documentation to be in the court, it will then be a Supreme Court matter before a Supreme Court judge for bail at that time.
> Mr. McDiarmid: Hold on - -
> The Court: What time and which courtroom is that in?
> Mr. McWhinnie: It's Supreme Court. I don't know what courtroom. It's 10 a.m. on the 9th of October.
> The Court: Okay.
> Mr. McDiarmid: Hold on. Hold on. Now, what - - what is he trying to set the date of the - -
> The Court: All we're doing is we need to put this date to a date – – to fix a date for trial. The speed with which this can be – – will be fixed for trial will have, to a large extent – – will be impacted to a large extent by whether you are in or out of custody. Regardless, this trial date is going to be set after the matters that you are dealing with in Dawson.

Transcript, p. 12, l. 43 – p. 13, l. 19

[13] The Crown filed an indictment in relation to this matter on October 8, 2014. The Accused made his first appearance in Supreme Court of Yukon on October 9, 2014.

[14] On December 29, 2014, the Accused sent a document to the Supreme Court of Yukon entitled "Letter of Re-Election to Supreme Court Judge and Jury with Preliminary Inquiry". In his letter, the Accused refers to the charges set out in the current indictment and states: "I now choose Re-election of mode of trial as of right, for 13-00777 Territorial Court file for charges…I ask for Re-election, as of right to re-elect to Supreme Court Judge and Jury with Preliminary Hearing under section 561 of the Criminal Code." At the end of the document, referring to his attached Re-Election letter dated December 15, 2012, entitled " Re-Election of Trial", he states: "Pages 1 and 2 of December 20th appearance which reads the Prosecution and Judge Cozens spoke of my re-election on the file to Supreme Court Judge and Jury with Preliminary Inquiry and agreed it was my right, as is the case here as well." (Emphasis added.)

[15] In various written communications with the Court since December 29, 2014, as well as during the course of various pre-trial conferences held in 2015, the Accused has consistently re-iterated his desire to have a preliminary inquiry.

The Law

[16] The relevant portions of s. 536 of the *Criminal Code* read as follows:

> 536(4) If an accused elects to be tried by a judge without a jury or by a court composed of a judge and jury or does not elect when put to the election or is deemed by paragraph 565(1)(b) to have elected to be tried by a court composed of a judge and jury or is charged with an offence listed in section 469, the justice shall, subject to section 577, on the request of the accused or the prosecutor made at that time or within the period fixed by rules of court made under section 482 or 482.1 or, if there are no such rules, by the justice, hold a preliminary inquiry into the charge.
>
> (4.1) If an accused elects to be tried by a judge without a jury or by a court composed of a judge and jury or does not elect when put to the election or is deemed under paragraph 565(1)(b) to have elected to be tried by a court composed of a judge and jury or is charged with an offence listed in section 469, the justice shall endorse on the information and, if the accused is in custody, on the warrant of remand, a statement showing
>
> (a) the nature of the election or deemed election of the accused or that the accused did not elect, as the case may be; and
>
> (b) whether the accused or the prosecutor has requested that a preliminary inquiry be held.
>
> (4.3) If no request for a preliminary inquiry is made under subsection (4), the justice shall fix the date for the trial or the date on which the accused must appear in the trial court to have the date fixed.
>
> 536.2 An election or a re-election by an accused in respect of a mode of trial may be made by submission of a document in writing without the personal appearance of the accused.

> 561 An accused who elects or is deemed to have elected a mode of trial other than trial by a provincial court judge may re-elect,
>
> (a) At any time before or after the completion of the preliminary inquiry, with the written consent of the prosecutor, to be tried by a provincial court judge;
>
> (b) At any time before the completion of the preliminary inquiry or before the fifteenth day following the completion of the preliminary inqury, as of right, another mode of trial other than trial by a provincial court judge; and
>
> (c) On or after the fifteenth day following the completion of the preliminary inquiry, any mode of trial with the written consent of the prosecutor.
>
> 565(1) Subject to subsection (1.1), if an accused is ordered to stand trial for an offence that, under this Part, may be tried by a judge without a jury, the accused shall, for the purposes of the provisions of this Part relating to election and re-election, be deemed to have elected to be tried by a court composed of a judge and jury if
>
> …
>
> (c) the accused does not elect when put to an election under section 536.

Position of the Parties

[17] The Crown fairly conceded during oral argument that there was some confusion during the September 9, 2014 court appearance regarding the question of whether or not there was going to be a preliminary inquiry. Specifically, the Crown concedes that he was unaware of the change in the law requiring the Crown or an accused to specifically request a preliminary inquiry (s. 536(2) C.C.) until this fact was brought to his attention by Judge Cozens immediately after the Accused was put to his election. Prior to that time, the Crown was operating under the assumption that a preliminary inquiry was a mandatory requirement in this instance in the absence of waiver by the

Accused. As such, he acknowledges that his submissions prior to the Accused being formally put to his election were premised on an understanding that there would be a preliminary inquiry in this instance. While conceding that his own misunderstanding of the process may well have contributed to confusion on the part of the Accused, the Crown says that the correct process was properly put to the Accused during the reading of the election and that he could not have been unaware that there would be no preliminary inquiry in the absence of a specific request.

[18] Further, the Crown says that this is not a case where the preliminary inquiry judge failed to do what he was required to do. Rather, this is a situation where the Accused failed to respond in circumstances that called for a response. The Crown also says that *certiorari* is a discretionary remedy that should not be granted in this instance. The Crown says that the Accused suffered no prejudice in that a preliminary inquiry would inevitably result in a committal for trial. Finally, the Crown says that in assessing any prejudice to the Accused, the Court should take into consideration that he failed to address the issue promptly in waiting for over a year to file a formal application.

[19] The position of the Accused, as I understand it, is two-fold. First, he says that Judge Cozens lost jurisdiction when he failed to properly consult him on the question of whether or not he wished to have a preliminary inquiry. Second, he says that, based on the discussions between the Court and the Crown on September 9th, as well as his prior experience in an earlier proceeding, he believed that he could re-elect at a later date (after September 9, 2014) to be tried by a court composed of a jury and jury with a preliminary inquiry.

Analysis

[20] The scope of review from the decisions taken by a judge sitting at a preliminary inquiry are very narrow and, as such, limited to issues relating to loss or exceeding jurisdiction, including breaches of natural justice.

[21] In *Forsythe v. The Queen*, [1980] 2 S.C.R. 268, Laskin CJC stated (at p. 272):

> ... in my opinion, the situations in which there can be a loss of jurisdiction in the course of a preliminary inquiry are few indeed. However, jurisdiction will be lost by a magistrate who fails to observe a mandatory provision of the Criminal Code: see Doyle v. the Queen, [1977] 1 S.C.R. 597. Canadian law recognizes that a denial of natural justice goes to jurisdiction: see Alliance des Professeurs catholiques de Montreal v. Labour Relations Board of Quebec, [1953] 2 S.C.R. 140.

[22] The decision of Laskin CJC was quoted with approval by Prowse J.A. in *R. v. Rao*, 2012 BCCA 275***,*** (at para. 83), referring to the decision of Rowles J.A. in *R. v. Lena*, 2001 BCCA 549. In *Rao*, the Court of Appeal, reversing the decision of the Supreme Court Judge, granted *certiorari* on the basis that the preliminary inquiry judge had exceeded her jurisdiction in refusing to allow the accused to call witnesses pursuant to s. 541(5) of the *Code*. In that instance, Prowse J.A. held, at para. 55, “that the scope of review on *certiorari* is limited to jurisdictional error, or breach of the principles of natural justice.”

[23] The Crown has also referred to the decision of the Ontario Court of Appeal in *R. v. Papadopoulos* (2005), 201 C.C.C.(3d) 363 (Ont. C.A.), leave to appeal refused (2005), 201 CCC (3d) vi (S.C.C.), in which the Court sets out the scope of review of a committal to trial following a preliminary inquiry. At para. 10, the Court stated:

> It is well settled that the scope of review of a committal flowing from a preliminary inquiry is extremely narrow. In this context, review is strictly limited to errors of a jurisdictional

> nature. The reviewing court may only interfere where there has been a loss or excess of jurisdiction.

[24] The Court of Appeal went on to discuss whether a breach of natural justice during the course of a preliminary inquiry resulted in a loss of jurisdiction. In that instance, it was alleged that there was a denial of natural justice when the committing judge deprived the appellants of the right to make arguments relative to evidence of alleged post-offence conduct, notwithstanding that the judge relied on this evidence in reaching his decision. The reviewing judge concluded that even though there had been jurisdictional error as a result of a breach of natural justice, an order in the nature of *certiorari* quashing the committal for trial was not an appropriate remedy in light of the fact that the applicants had suffered no prejudice.

[25] The Court of Appeal, upholding the decision of the Supreme Court judge, concluded that the reviewing judge had a discretion to refuse to quash the committal as the accused suffered no prejudice because the committal was inevitable. At para. 26, the Court concluded that the appropriate test was "whether the result would have necessarily been the same, notwithstanding the denial of natural justice."

[26] In this instance, I am satisfied that the Territorial Court Judge committed jurisdictional error when he failed to determine whether or not the Accused was requesting a preliminary inquiry. In the unique circumstances of this case, I find that he failed to make proper inquiries of the Accused on this critical question prior to rendering his decision committing the Accused to stand trial on the charges set out in the information.

[27] A review of the record reveals that there was no discussion with the Accused regarding a preliminary inquiry prior to him being put to his election. Rather, the focus of

his submissions related solely to the issue of whether or not he was prepared to make his election as to mode of trial at that time given the other outstanding matters that required his attention. He was never specifically asked if he wished to have a preliminary inquiry. It would appear from the record that the Territorial Court Judge assumed from his silence that he was not requesting a preliminary inquiry. Even then, the Territorial Court Judge expressed some doubt in this regard when he stated: "And so I guess Mr. McDiarmid is not requesting a preliminary inquiry."

[28] Prior to putting the Accused to his formal election, the discussion between the Territorial Court Judge and the Crown *presumed* that a preliminary inquiry would take place. As previously indicated, the Crown has very fairly conceded that he was unfamiliar with the 2004 amendments to the *Criminal Code*, specifically s. 536(4), and right up to the time when asked by the Territorial Court Judge whether the Crown was *requesting* a preliminary inquiry, was operating under the mistaken assumption that a preliminary inquiry was mandatory absent waiver on the part of an accused. This is significant, in my view, as the entire thrust of the Crown's submissions during the September 9th court appearance, save for his ultimate advice that the Crown was not seeking a preliminary inquiry, related to the timing and, indeed, the content of the preliminary inquiry that the Crown assumed would follow. At no time during these exchanges early on during the September 9th court appearance did the Territorial Court Judge intervene to correct the Crown's obvious misunderstanding as to the correct process.

[29] Under all of the circumstances, I am of the view that it was incumbent on the Territorial Court Judge to have made specific inquiries of the Accused to ascertain his

wishes in this regard. Before proceeding to commit the Accused to stand trial, he was obliged to satisfy himself whether the Accused was requesting a preliminary inquiry. As previously stated, the one comment Cozens TCJ referred to in the preceding paragraph clearly revealed his own uncertainty as to the Accused's wishes on this critical point. In such circumstances, it was not reasonable for him to have equated the Accused's silence with agreement to forgo a preliminary inquiry. I would simply add that the Accused's deemed election as a result of his non-response to the Court's formal words of election is, in my view, unassailable, though factually distinguishable from this matter, given the Accused's lengthy history with the court on the defence election issue.

[30] The Crown, relying on the decision of the Ontario Court of Appeal in *Papadopoulos*, urges me to deny the Accused the remedy of *certiorari* on the basis that committal for trial is a virtual foregone conclusion and that the Accused suffered no prejudice as a result of the denial of a preliminary inquiry. With respect, I am of the view that the situation under consideration in *Papadopoulos* is markedly different from the present situation. In *Papadopoulos*, the preliminary inquiry judge heard extensive evidence during a lengthy preliminary inquiry relative to a charge of first degree murder instituted against Papadopoulos and his co-accused. The alleged breach of natural justice cited in that matter revolved around the preliminary inquiry judge's failure to hear submissions on a legal issue that arose during the course of the inquiry. In determining that there was no prejudice to the accused, both the reviewing judge and the Court of Appeal were able to examine the evidence presented during the preliminary inquiry and assess the issue of prejudice on the basis of the evidence actually tendered during that hearing.

[31] In this instance, there is no such record to consider or review as there was no preliminary inquiry. What is before me is simply the submissions of the Crown that the *anticipated* evidence likely to be called by the Crown at a preliminary inquiry would result in committal. There is obviously no evidence before me as to whether or not the Accused would elect to address the court relative to the charges [s. 541(3)] or to call any witnesses at the preliminary inquiry [s. 541(5)]. Under the circumstances, it is not possible for me to assess the prejudice occasioned to the Accused as a result of his committal for trial without a preliminary inquiry. For the purposes of this application, I am prepared to assume that there was, indeed, some prejudice occasioned to him as a result of his inability to cross-examine the Crown witnesses and to call any additional witnesses he wished to call pursuant to s. 541(5). It follows that I do not accept the Crown's contention that I should deny the Accused the remedy of *certiorari* on the basis that he suffered no prejudice as a result of not having a preliminary inquiry where committal, according to the Crown, was inevitable.

[32] I also reject the Crown's argument that the Accused's alleged late filing of his formal application seeking the within relief should disentitle him to the remedy he seeks. The Accused's dissatisfaction with the fact that a preliminary inquiry did not take place has been known since December 2014. He has consistently maintained in his various communications with the court, including his representations during various pre-trial conferences, that he wants to have a preliminary inquiry. This is not a situation where the Crown is caught by surprise by an unexpected last-minute application. I also take into consideration that the Accused is self-representing and, as such, is obviously not as familiar with legal processes as legally trained counsel. While his formal application was

only forthcoming as of October 30, 2015, I note that this complies with my direction setting out the filing deadlines for all of the Accused's pre-trial applications relative to this matter. He has complied with that direction.

[33] The Crown has also referred to the decisions in *R. v. Seniuk*, 2007 SKQB 73; and *R. v. Isaacs,* 2015 NLPC 0814 00041. I have carefully considered both of these decisions and conclude that both are clearly distinguishable from the within matter and offer little if any assistance in the resolution of this case.

[34] In view of my conclusion that the committal for trial must be quashed and the matter remitted back to the Territorial Court for the purposes of holding a preliminary inquiry, it is not necessary for me to consider the Accused's alternative argument. Specifically, the Accused says that he believed that he could re-elect after September 9, 2014, to be tried by a court composed of a judge and jury with a preliminary inquiry. I would simply observe that the somewhat convoluted language of s. 536(2) of the *Code* provides some support for the Accused's admittedly mistaken view in this regard.

Conclusion

[35] *Certiorari* is a discretionary remedy available to a superior court as part of its general and inherent jurisdiction. In the context of a review of proceedings held in conjunction with a preliminary inquiry, it is a remedy to be used sparingly and only in narrow circumstances involving a loss or excess of jurisdiction.

[36] I am satisfied that this is a proper case to grant the remedy of *certiorari* in light of the failure on the part of the Territorial Court Judge to ascertain whether the Accused wished to have a preliminary inquiry. In my view, this amounted to a jurisdictional error.

[37] In the result, the committal for trial is quashed and the matter remitted back to the Territorial Court for the purposes of holding a preliminary inquiry. The scheduled trial date is, accordingly, vacated.

GATES J.