

SUPREME COURT OF YUKON

Citation: *R. v. Nehass*, 2017 YKSC 49

Date: 20170929
S.C. No.: 12-01503C
Registry: Whitehorse

BETWEEN

HER MAJESTY THE QUEEN

AND

MICHAEL DAVID ARCHIE NEHASS

Before Mr. Justice R.S. Veale

Appearances:
Eric Marcoux
C. Anik Morrow

Counsel for the Crown
Counsel for the Defence

MEMORANDUM FOLLOWING A CROWN STAY

INTRODUCTION

[1] Michael Nehass was charged with assault, threatening to use a knife, uttering a death threat and forcible confinement. He turned himself into the RCMP on December 29, 2011.

[2] He entered pre-trial custody at the Whitehorse Correctional Centre (“WCC”) on December 30, 2011.

[3] His nearly six-year odyssey of incarceration as an Indigenous accused presumed innocent of these offences included escalating mental health concerns in the jail; a court finding he was unfit to stand trial; a finding by the Review Board that he was fit; a return to court after the Review Board to stand trial; a jury trial, followed by his conviction; a determination that he was unfit to be sentenced; a successful mistrial application; and a

Crown stay of proceedings at the hearing of an application for a judicial stay of proceedings.

[4] The significant and outstanding concern for the criminal justice system, society and Mr. Nehass is the fact that he remained unconnected with necessary mental health services, despite being found by doctors to be psychotic and delusional during the four years and eleven months he spent in pre-trial custody in the WCC.

[5] As noted, Mr. Nehass turned himself into the RCMP on these charges on December 29, 2011. He chose to delay his show cause hearing. He retained Bibhas Vaze as counsel in April 2012, and his preliminary inquiry was conducted on September 6, 2012. A trial date was set for May 2013, however Mr. Vaze applied to be removed from the record in February 2013, and a second counsel, David Tarnow, was retained that April necessitating an adjournment. Mr. Nehass' Supreme Court jury trial was rescheduled for five days in April 2014.

[6] While his Supreme Court matter was working its way through the system, Mr. Nehass was charged with a number of offences against WCC staff. It was in this context that a fitness assessment was ordered in January 2014. Although Mr. Nehass' fitness to stand trial had been raised as an issue before, an assessment was not ordered until after Mr. Tarnow withdrew as counsel in December 2013.

[7] The Supreme Court matter was held in abeyance until the Territorial Court resolved the issue of Mr. Nehass' fitness. The February 25, 2014 date set for the fitness hearing was adjourned so that Mr. Nehass could seek his own expert opinion. Shortly thereafter the April dates set for the Supreme Court trial were vacated.

[8] Mr. Nehass was unable to retain his own psychiatric expert and the fitness hearing began on April 11, 2014. A finding of unfit to stand trial was contested by

Mr. Nehass, but after two continuations, he was found unfit to stand trial by Judge Cozens of the Territorial Court (2014 YKTC 23).

[9] The Yukon Review Board met in late July or early August of 2014 to make a disposition. In a decision authored by then-Chair Darcy Tkachuk, Mr. Nehass was determined to be fit and returned to court. Mr. Vaze briefly returned as counsel of record in September, however he soon applied for removal, at which time an order was made appointing him as *amicus*. Guilty pleas were entered by Mr. Nehass for a number of charges proceeding in Territorial Court on November 27, 2014, and a *Gardiner* hearing, to hear evidence relating to his sentence, was set for February 16-17, 2015. The *Gardiner* hearing ultimately concluded on March 26, and Mr. Nehass was sentenced by the Territorial Court in a decision cited at 2015 YKTC 11.

[10] Mr. Nehass' Supreme Court matter was tried by a judge and jury beginning on May 11, 2015, and he was found guilty on May 22, 2015, of a number of counts including unlawful confinement and assault with a weapon. Mr. Nehass represented himself at trial, although Mr. Vaze assisted as *amicus*.

[11] In June 2015, the Crown gave notice that it was proceeding on a dangerous offender application. On August 18, 2015, a *Rowbotham* order was made appointing Sarah Rauch as counsel. Ms. Rauch had been selected by Mr. Nehass. Ms. Rauch prepared a *Charter* application on Mr. Nehass' behalf, seeking various remedies, including a judicial stay of proceedings. This application was argued over nine days between February and March 2016, and Ms. Rauch was discharged by Mr. Nehass partway through. Although the evidence was completed, there was no argument and a ruling was never made because of the Court's ultimate finding that Mr. Nehass was unfit.

[12] Throughout the summer of 2016, discussions were ongoing about representation for Mr. Nehass. Anik Morrow was appointed counsel on August 26 in a second *Rowbotham* order. While November dates were set for the dangerous offender application, the Crown, on November 10, 2016, filed an application to assess Mr. Nehass' fitness to participate in that proceeding. The application proceeded on November 22, 2016, unopposed (see reasons at 2016 YKSC 63). The Court ordered that Mr. Nehass be sent to Ontario Shores for an assessment with the consent of the Crown. Two reports found Mr. Nehass unfit to participate in the dangerous offender proceeding. Accordingly, the Court found him unfit to participate on January 25, 2017 (see 2017 YKSC 4). A mistrial was declared on February 15, 2017, in reasons indexed at 2017 YKSC 13.

[13] Counsel for Mr. Nehass applied for a judicial stay of proceedings following the declaration of mistrial. The Crown filed an application for an order that the issue of fitness of Mr. Nehass be tried pursuant to s. 672.23 of the *Criminal Code*. That application began on September 5, 2017. Counsel attempted to negotiate an agreement that would result in a judicial stay of proceedings, an arrangement for Mr. Nehass' certification under the Ontario *Mental Health Act*, and transfer and transportation to British Columbia for his treatment at a mental health facility closer to his family. Resolution discussions also included Mr. Nehass entering a peace bond under s. 810.2 of the *Criminal Code*. These discussions ended abruptly on September 8, 2017, when the Crown unilaterally entered a stay of proceedings before Mr. Nehass was returned to the Yukon.

[14] The Crown's stay left Mr. Nehass at Ontario Shores, a mental health facility in Ontario pursuant to an order of this Court made after the mistrial. Counsel for

Mr. Nehass immediately applied for a variation of that order to return Mr. Nehass to British Columbia to enter a mental health treatment facility.

[15] There are no longer proceedings before the Court. However, I am of the view that this Court has the inherent *parens patriae* jurisdiction to make an order to ensure the welfare of this 33-year-old Tahltan man.

[16] This memorandum will briefly address:

1. the experience of Mr. Nehass at the WCC and within the justice system generally;
2. the designation of WCC as a hospital despite its inability to provide mental health treatment for this incarcerated person;
3. the obligation of the Court to ensure that the rights and interests of a mentally ill person and society are considered following a Crown stay of proceedings or other disposition terminating a criminal proceeding.

[17] The purpose of this memorandum is not to set out a detailed history, but rather to highlight the events that took place and to bring them to the attention of the public.

[18] The Yukon is a small jurisdiction with a history of finding creative solutions with First Nations governments to ensure that *Gladue* principles are applied to Indigenous persons before, during and after sentencing.

The experience of Mr. Nehass at the WCC and within the justice system generally

[19] This summary is drawn from evidence provided in court in the context of the mistrial application heard on January 24 and 25, 2017. The evidence attached to the application for a judicial stay of proceedings and the written submissions prepared and filed by counsel for Mr. Nehass are extensive and comprehensive, but are not

addressed in this memorandum in any substantial way following the Crown's stay of proceedings.

[20] On December 30, 2011, Mr. Nehass was remanded to the WCC after being charged with his criminal offences. WCC knew Mr. Nehass and staff were aware of his history of mental illness.

[21] Dr. Heredia, the only resident psychiatrist at the facility, was familiar with Mr. Nehass. Dr. L. Stuart was the WCC's contracted general physician.

[22] While on remand, largely because of concerns about his behaviour, Mr. Nehass spent lengthy periods of time in either administrative or punitive segregation and isolated from other inmates.

[23] On December 10, 2013, Dr. Heredia documented the mental health deterioration of Mr. Nehass and recommended that he be transferred to a forensic mental health facility. Dr. Heredia reported that a bed was available at Brockville, an Ontario facility that the Yukon government has a transfer arrangement with. According to testimony of the Director of Corrections, a bed continued to be available at this facility in early 2017.

[24] Dr. Heredia testified that he did not know why a transfer did not proceed. He testified that long periods of segregation of psychotic persons without treatment are detrimental to that person's mental health.

[25] On January 6, 2014, Dr. Stuart stated in a letter to Dr. Heredia:

I feel it is medically, inappropriate and inhumane to continue holding (Mr. Nehass) at the Whitehorse Correctional Centre in segregation as he is suffering from a significant mental illness which needs treatment.

[26] The Director of Corrections also testified at the January 2017 hearing, giving evidence that she and others at WCC knew that Mr. Nehass was delusional and psychotic and that WCC could not adequately address his mental health needs.

[27] As indicated above, although Mr. Nehass' fitness was raised in the course of his proceedings and, indeed the Territorial Court made a finding that he was unfit to stand trial in 2014, at no time was he removed from WCC and sent to a psychiatric facility.

[28] The above observations should not be treated as a finding of fact. They are simply meant to demonstrate the situation of Mr. Nehass wherein the WCC professionals, the Crown, defence counsel and the court were all aware of his deteriorating mental health condition. This memorandum is not a finding of liability on the part of any person but simply recording the sad state of affairs where a mentally ill inmate remained in custody and segregation while a transfer to a mental health facility was considered as early as December 2013 but never acted on.

[29] However, it must also be remembered that, until the dangerous offender proceeding, Mr. Nehass had always opposed a declaration that he was unfit and instructed counsel to oppose such a declaration. At this hearing, during which he was certified in Ontario, Mr. Nehass participated by video conference from Ontario Shores, and appeared to fully grasp that a stay had been entered and there was no further criminal proceeding. He expressed his desire to return to the Yukon.

The Designation of WCC as a Hospital.

[30] Section 672.1(1) of the *Criminal Code* provides that the Minister of Health may designate hospitals in Yukon for the custody, treatment or assessment of an accused person. The Minister of Health designated WCC as a hospital, by Yukon Regulation M.O. 1993/011. While the designation of WCC as a hospital suggests that the WCC has

both the capacity and staff to manage and, if required, medically treat inmates who are mentally ill, that is manifestly not the case.

[31] In *D.J. v. Yukon (Review Board)*, 2000 YTSC 513, this Court made a *habeas corpus* order removing D.J. from WCC where he had been placed by the Yukon Review Board (“YRB”). The YRB ordered D.J. to be detained in custody at the WCC, after he was found not criminally responsible by reason of mental disorder in the Youth Court of the Yukon on March 1, 1995. The decision of the YRB made it abundantly clear that it did not consider WCC was a hospital capable of providing “any appropriate therapeutic treatment services worthy of the designation as a hospital”. Nevertheless, the YRB decided that in the absence of appropriate services and facilities, it had no option but to order the temporary placement of D.J. at the WCC.

[32] In a subsequent case, *R. v. Rathburn*, 2004 YKTC 24, Mr. Rathburn was in custody at the WCC on remand status suffering from severe psychotic episodes and paranoid delusions. The Territorial Court found that this breached Mr. Rathburn’s s. 7 *Charter Rights* and stated at para. 27:

It is important to note that the impropriety of using the Whitehorse Correctional Centre as a hospital was identified four years ago by the Supreme Court of this Territory. It appears that nothing has been done since that time to remedy the situation. The kindest explanation for this inaction would be that the Justice Department officials were asleep on their watch and did not read the D.J., *supra*, decision. Unlikely. Another explanation would be that they were aware of it, and with total indifference to the court and Parliament and the plight of the mentally ill and handicapped, chose to do nothing about it.

[33] Nothing has changed since these decisions. Calling a prison a hospital does not change the nature of the WCC from a penal environment to a therapeutic environment. Counsel for the Government of Yukon advised the Court that the medical experts agree

that the WCC is not an appropriate facility for Mr. Nehass. The Director of Corrections charged with the oversight of the WCC, confirmed in sworn evidence on January 25, 2017, that the WCC was designated as a hospital “but it is in no way, means, shape or form a hospital”. The Director acknowledged that Mr. Nehass had serious mental health problems that could not be addressed by the WCC. As there is no forensic facility or hospital in Yukon, the Director believed for a long time that Mr. Nehass needed to go out of Yukon for treatment. And yet, he was not transferred to an Ontario facility until the order of this Court on November 2016. I am not trying to lay blame for this at the feet of the WCC.

[34] I strongly recommend that the Yukon government revoke the designation of the WCC as a hospital.

The rights and interests of Mr. Nehass and the public at large

[35] The concern of this Court is that Mr. Nehass is no longer before the court on his stayed criminal charges. He is in the Ontario Shores facility in Ontario, where I am advised by his counsel that he has been certified under the Ontario *Mental Health Act*. While he is subject to that statute, Mr. Nehass is in Ontario as a result of an order of this Court on November 24, 2016. I am advised that there is no mechanism to move him closer to his home and his supports, which include his brother and his father, once the Crown had unilaterally entered a stay of proceeding. The authority for this Court to have jurisdiction over Mr. Nehass is based on its *parens patriae* jurisdiction, that is the need to protect those who cannot care for themselves. This jurisdiction is spelled out in *E. (Mrs.) v. Eve*, [1986] 2 S.C.R. 388, at paras. 72 – 76, as the care of mentally incompetent persons, founded on necessity, and the need to act for the protection for

those who cannot care for themselves. The jurisdiction is broad and its scope cannot be defined. It can apply to a situation of injury or apprehended injury.

CONCLUSION

[36] In the facts before me, including the certificate of involuntary admission under the Mental Health, R.S.O. 1990, c. M7, I hereby order:

1. The authorities at Ontario Shores Centre for Mental Health Sciences at 700 Gordon Street, Whitby, ON, L1N 5S9, to deliver Mr. Nehass to the RCMP or other qualified, authorized and contracted third parties;
2. The transport of Mr. Nehass from Ontario Shores Centre for Mental Health Sciences at 700 Gordon Street, Whitby, ON, L1N 5S9, to British Columbia and delivery of Mr. Nehass on September 18, 2017, to Dr. Paul Dagg of the Hillside Centre (Adult Program – East Wing, Pod 4) at 311 Columbia Street, Kamloops, BC, V2C 2T1;
3. The appropriate use of sedation of and physical Pinel restraints for Mr. Nehass by experienced, trained and authorized personnel when necessary and solely to maintain safe travel.

VEALE J.