IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *R.* v. *Dickson,* 2004 YKSC 37

Date: 20040528
Docket No.: 04-01500
Registry: Whitehorse

Between:

HER MAJESTY THE QUEEN

Applicant

And

GORDON WAYNE DICKSON

Respondent

Before: Mr. Justice L.F. Gower

Appearances:
David A. McWhinnie — For the Applicant
Gordon R. Coffin — For the Respondent

REASONS FOR JUDGMENT

INTRODUCTION

[1] The Crown asks me to quash the Order of His Honour Judge J. Faulkner, of the Territorial Court of Yukon, directing the Crown to pay costs of $500 to the accused, Gordon Wayne Dickson. Mr. Dickson was told to appear in that Court on two occasions prior to his first appearance “on the record”. On neither of those two occasions was Mr. Dickson’s name actually called.

ISSUES

[2] The grounds for this application are that the Territorial Court Judge lacked or exceeded his jurisdiction for two reasons. First, that he made his order without providing

the Crown an opportunity to present evidence or make submissions. In essence, the Crown's submission on this point is that the Territorial Court Judge failed to comply with one of the fundamental principles of natural justice - proceeding without notice to a party (the Crown). Consequently, the Crown says that the Territorial Court Judge failed to engage in a proper analysis of the relevant factors before making his decision on costs. The second reason for this application is that, in effect, the Judge awarded damages rather than costs. The Crown says the Territorial Court does not have jurisdiction to award damages in this context.

[3] As for the notice issue, defence counsel says the Crown did have an opportunity to address the Court and could have made additional submissions after Faulkner J.'s decision on costs. Also, the Court had all the necessary information before it to make its decision. On the second issue, defence counsel submits that I need not be overly concerned with the difference between costs and damages, since the Territorial Court was acting as "a court of competent jurisdiction" for the purposes of s. 24(1) of the *Charter*. As such, it had the jurisdiction to make the order it did, which was just and appropriate in the circumstances.

[4] The second issue is in the alternative to the first, as a decision on the natural justice question is potentially dispositive of this application.

FACTS

[5] The facts are relatively straightforward. On October 29, 2003, the accused was arrested and released on a Promise to Appear and an Undertaking Given to an Officer in Charge. This process alleged that Mr. Dickson had committed a common assault

contrary to s. 266 of the *Criminal Code*. The Promise to Appear specified that he was to attend Territorial Court on Wednesday, November 12, 2003, at 10:00 a.m. in Watson Lake.

[6] The Information alleging the assault was sworn on October 30, 2003. However, at that time the investigating R.C.M.P. officer failed to provide the clerk of the court with copies of the process documents. Consequently, Mr. Dickson's matter was not placed on the Territorial Court docket.

[7] On November 12, 2003, the accused attended Court, but as his matter was not on the docket, his name was not called. The R.C.M.P. then told the accused that he should appear in court on November 17th.

[8] The accused appeared a second time in Territorial Court on November 17, 2003. Once again, his matter was not on the docket and he was not dealt with by the Court.

[9] On November 18, 2003, the accused appeared a third time in Territorial Court and on this occasion he was represented by duty counsel. The Information was before the Court and Mr. Dickson made his first appearance upon the record. (Exactly how the Information came to be before the court on November 18th is not entirely clear, but is probably irrelevant, since Mr. Dickson appeared and attorned to the jurisdiction of the Court.)

[10] The Crown elected to proceed summarily on the assault charge. Consequently, the Territorial Court acted as "a court of competent jurisdiction" in the context of s. 24(1) of the *Charter*, in that it had jurisdiction over the person and the charge, as well as

jurisdiction to grant certain remedies under s. 24(1): *R.* v. *974649 Ontario Inc*., [2001] 3 S.C.R. 575 (referred to here as the *"Dunedin Construction"* case).

[11] During the appearance on November 18th, duty counsel sought to adjourn the matter to the next Territorial Court circuit for the entry of a plea. Of greater significance, duty counsel also complained to the Court about the fact that the accused had made two previous appearances for no apparent purpose. Crown counsel explained the investigating officer's role in the confusion and the status of Mr. Dickson's judicial interim release.

[12] After some dialogue with counsel about the procedural matters, Faulkner J. rendered his decision, which dealt with two problems: (1) Mr. Dickson's judicial interim release status under s. 523(2) of the *Criminal Code*, and (2) his previous fruitless court appearances. For the sake of completeness, I will set out Faulkner J.'s reasons in their entirety:

> It appears that there was an inexplicable and inexcusable degree of sloppiness in dealing with the paperwork attending Mr. Dickson's charges. The result has been that he's made several court appearances prior to today, to no effect other than to cause him time, trouble and inconvenience, and it has only been today that the charge has actually been available for Mr. Dickson to answer to.
>
> There are two issues now to be dealt with. The first issue is whether there is now any conditions on Mr. Dickson's release. The original undertaking had a number of conditions, abstinence from alcohol, a no-contact order, and so forth. I think it's doubtful that that order remains in force, given the history of the matter, but I'm satisfied that, pursuant to s. 523(2), I do have jurisdiction to make an appropriate order, and I'm going to direct that Mr. Dickson be released on an undertaking. The only condition that would appear to have any merit, from what I've been told to date, is that, since this

> was a spousal assault, it might be appropriate to have a no-contact order. So the conditions will simply be to keep the peace and be of good behaviour and to have no contact with Freda Nieman.
>
> Given the unnecessary delay to date and given that there will be some further delay in that Mr. Dickson is going to have to attend for the purpose of signing a new undertaking, which would have been totally unnecessary had the matter been promptly dealt with, I am of the view that there should be some penalty attached to the neglect which had been occasioned in this matter which, as I say, has caused a delay and, in my view, breached Mr. Dickson's *Charter* rights. Accordingly, in the circumstances, I'm going to direct that costs of $500 be awarded against the Crown in favour of Mr. Dickson and that, unless those costs are sooner paid, the matter will be stayed as of the next court appearance, which I fix for February 10th, 2004.

ANALYSIS

[13] It is immediately apparent from reviewing the transcript of the proceedings on November 18, 2003 that the issue of costs was not raised by either defence or Crown counsel. Although defence counsel complained about the two previous unnecessary appearances, he did not expressly make any application to the Court for a remedy. And in any event, when the Territorial Court Judge commented about the neglect of the Crown and directed the payment of costs, he did so without giving the Crown an opportunity to present any case in response. In essence, what the Territorial Court Judge did was analogous to a court citing someone in contempt of court and then finding them in contempt, without giving them an opportunity to be heard on the issue. In that respect, I find that the Territorial Court Judge exceeded his jurisdiction by failing to comply with the rules of natural justice in not providing the Crown with notice of the issue of costs and not allowing the Crown an opportunity to be heard. For that reason alone, I

grant the application and quash the order for costs, as well as the contingent stay of proceedings.

[14] A consequence of this notice issue is whether the Territorial Court Judge also exceeded his jurisdiction, by way of an error of law on the face of the record, in failing to engage in a proper analysis of whether costs were indeed payable by the Crown in these circumstances. Goodearle J. of the Ontario Court (General Division) in *R.* v. *Jedynack* (2001), 16 O.R. (3d) 612, at page 7 of the Quicklaw report, sets out a helpful list of four necessary conditions to support an award of costs against the Crown:

> 1) The acts, or failures to act, collectively amount to something well beyond inadvertent or careless failure to discharge a duty;
>
> 2) Rather the conduct would have to fall within the realm of recklessness, conscious indifference to duty, or whether conscious or otherwise, a marked and unacceptable departure from usual and reasonable standards of prosecution;
>
> 3) Such conduct must be seen to have resulted in an indisputable and clearly measurable infringement or denial of a right;
>
> 4) Where the costs order is intended to ensure compliance with an order or show disapproval of conduct which resulted in serious prejudice to the accused it should, as well, be founded in circumstances of clear and obvious compensatory need.

Those factors were applied by the Northwest Territories Supreme Court in *R.* v. *Dostaler* (1994), 91 C.C.C. (3d) 444. *Dunedin Construction* also held that the Crown "is not held to a standard of perfection".[1] However, Goodearle J. recognized that his suggested list was only intended to assist trial courts until such time as an appellate court enunciates

[1] At para 87 (Quicklaw report)

"the threshold that must be penetrated to warrant an award of costs against the Crown." [2] As it is not necessary for me to decide this particular sub-issue to dispose of this application, I am reluctant to say more about the threshold for an award of costs. It may well be that certain conduct by the state, even if merely careless or sloppy, could result in a costs award if, on balance, the inconvenience to the accused constitutes a serious interference with his or her right to fundamental justice and is deserving of the court's disapproval.

[15] The Territorial Court Judge did not engage in this type of analysis, or apparently in any analysis, other than coming to the conclusion that the accused had made several prior court appearances which had caused him trouble and inconvenience. While the latter comment is no doubt true, the two appearances in question were within a period of some 21 days from the date of his arrest and both were within a period of seven days from his first official appearance on the record. Further, the conduct of the investigating officer in failing to provide the process documents to the Court, upon the filing of the Information, may well have been nothing more than mere inadvertence or carelessness. We don't know because there was no inquiry into the matter. On its face, it does not appear to be a matter which would constitute "a marked and unacceptable departure from the usual and reasonable standards of prosecution". As a result, I would be inclined to conclude that the Territorial Court Judge erred in law by failing to analyze the circumstances and also by failing to give adequate reasons for his conclusion: see also *R.* v. *Sheppard*, [2002] 1 S.C.R. 869. It is not necessary to decide whether such errors are jurisdictional in nature, given my initial finding on the notice issue.

---

[2] At page 7 (Quicklaw report)

[16] The second and alternative issue is whether the Territorial Court Judge, in effect, made an order awarding damages against the Crown, rather than costs. Defence counsel relies heavily upon *Dunedin Construction* as authority for the proposition that s. 24(1) of the *Charter* should not be narrowly and technically interpreted, but rather should have a broad remedial mandate which provides a full, effective and meaningful remedy for *Charter* violations. In particular, the defence says constitutional rights should not be smothered in procedural delays and difficulties. Anything less than providing direct and easily available remedies "would undermine the role of s. 24(1) as a cornerstone upon which the rights and freedoms guaranteed by the *Charter* are founded, and a critical means by which they are realized and preserved."[3]

[17] However, *Dunedin Construction* was a case which acknowledged the jurisdiction of provincial/territorial courts to award costs. While the Supreme Court of Canada recognized that costs awards are "not without a compensatory element", the case does not purport to bestow jurisdiction on provincial/territorial courts to award damages as part of their general jurisdiction.

[18] The Alberta Court of Appeal in *R.* v. *Pang* (1994), 95 C.C.C. (3d) 60, effectively concluded that provincial/territorial courts do not have jurisdiction to award damages, relying on the judgment of Lamer J. (as he then was) in *R*. v. *Mills*, [1986] 1 S.C.R. 863. In *Pang*, Harradence J.A. delivered the judgment of the Court and said at page 9 of the Quicklaw report:

> On this issue of jurisdiction, it would seem if the Provincial Court were attempting to award damages rather than costs,

[3] *Dunedin Construction*, cited above, at para 20 (Quicklaw report)

> they probably would be unable to do so. A Provincial Court judge had no jurisdiction to award damages in a criminal case and the Charter likely cannot give him or her such jurisdiction. Similarly, if the Provincial Court judge never had the ability to award costs, or costs against the Crown, it would be difficult to see how the Charter suddenly could grant such jurisdiction. This is the point, Lamer J. (as he then was) makes in Mills, supra, at p. 526 where he states:
>
> > A court of competent jurisdiction is a court that has jurisdiction over the person and the subject-matter, as well as the jurisdiction to order, under the criminal or penal law the remedy sought pursuant to the Charter.
>
> The “criminal or penal law” is to be distinguished from “civil” remedies. This becomes more clear when one turns to comments made earlier in Mills, supra, at pp. 512-3:
>
> > As regards the first proposition, desirable as might be a system whereby a person could get from the judge he or she is before a plenitude of remedies, this approach has to be defeated by the fundamental differences as between the civil and criminal process. To illustrate the problem briefly, it will be difficult to afford the alleged violators, susceptible to pay damages or to be the object of some injunction, a fair hearing within the criminal justice process, whilst guaranteeing the accused all traditional safeguards. Furthermore, the criminal courts are not staffed and equipped to cope with such types of determinations. Our civil courts are, and I cannot find any compelling reason why they should not determine Charter issues for the purpose of granting remedies of a civil or administrative law nature.

[19] Chief Judge Lilles of the Territorial Court of Yukon opined in *R.* v. *Sevigny*, [2002] Y.J. No. 23, that the comments of the Alberta Court of Appeal on *Pang* must be read in light of the subsequent amendments to s. 738(1) of the *Criminal Code*. These authorize provincial/territorial courts to award restitution and compensation, as well as damages, to victims of crime. Lilles C.J.T.C. seems to have concluded that this new, albeit limited,

jurisdiction of provincial/territorial courts to award damages under the *Criminal Code* effectively enlarged the jurisdiction of those courts to grant similar remedies for *Charter* infringements under s. 24(1)[4]. However, at the end of his decision, Lilles C.J.T.C. awarded costs against the Crown and not damages. Therefore, his remarks about damages were not necessary for his conclusion.

[20] With great respect, I would not go so far as *Sevigny*. In my view, the comments of Lamer J. (as he then was) in *Mills*, quoted above, effectively foreclose the possibility that provincial/territorial courts have jurisdiction to award damages as a remedy for an infringement of s. 24(1) of the *Charter* by the Crown. Within its statutory small claims jurisdiction the Territorial Court may order damages "in any action for the payment of money [excluding questions of land, estate matters, and defamation] if the amount claimed does not exceed $5,000 exclusive of interest and costs". Having said that, the Territorial Court is not, generally speaking, equipped to cope with determinations of damages as a remedy under s. 24(1) of the *Charter*. This is particularly the case when the Territorial Court is sitting as a court of competent jurisdiction presiding over a criminal matter in which the alleged infringement of s. 24(1) arises. Theoretically, if the infringement of s. 24(1) was significant, the potential damages might also be significant and could easily exceed the small claims limit of $5,000.

[21] One can readily imagine the type of scenario alluded to in *Mills*, cited above, where a criminal matter is before the Territorial Court and significant damages for a *Charter* breach are claimed. What then is that Court to do? Must it shift gears and order the parties to engage in a process akin to that under the *Rules of Court* for civil matters

[4] *R*. v. *Sevigny*, cited above, at page 4 (Quicklaw report)

in this Court? If not, how does it ensure adequate opportunities for discovery and the presentation of evidence? It must also be kept in mind that damages are not simply "compensatory" in the sense of covering actual losses incurred. Rather, damages can be awarded on a more general basis for loss, as well as on a punitive or aggravated basis. How could the Territorial Court award such damages in the absence of a proper evidentiary foundation and full argument? What quickly emerges is the problematic vision of a full civil trial within an application by the accused before or (worse) during a criminal trial.

[22] Furthermore, there is no compelling policy reason for the Territorial Court to have jurisdiction to award damages for *Charter* breaches. *Dunedin Construction* makes it clear that the Territorial Court has jurisdiction to award costs for such breaches. And such awards include both compensatory and punitive elements: see *R.* v. *Dostaler*, cited above. Costs will potentially include out-of-pocket disbursements and thrown-away costs, as well as other reasonable expenses incurred, such as compensation for the estimated amount of lawyer's time required by the breach: see *Sevigny,* cited above.

[23] Finally on this point, because the Territorial Court Judge did not receive representations from counsel or engage in the type of costs analysis done in *Sevigny*, it is impossible to know the basis underlying the $500 quantum of costs ordered. The Territorial Court Judge referred to the award as a "penalty" which should be attached to the "neglect" of the authorities involved. Thus, there is a distinct danger that the award is effectively one of damages rather than costs. If it was for damages, then the Territorial Court Judge exceeded his jurisdiction. Once again, I don't have to decide this point because the order is quashed for my earlier reasons.

CONCLUSION

[24] I direct that the matter be remitted back to the Territorial Court for the next scheduled appearance, which I understand is on June 21, 2004, at 10:00 a.m. in Watson Lake. If the accused wishes to pursue a claim for a breach of his *Charter* rights, he may apply to that Court for an appropriate remedy under s. 24(1), providing it is not one of damages.

_____

Gower J.