PROVINCIAL COURT OF NOVA SCOTIA

Citation, *Canadian Broadcasting Corporation v. Canada (Border Services Agency)*, 2021 NSPC 40

Date: 2021-09-13
Registry: Port Hawkesbury

Between:

Canadian Broadcasting Corporation, Canadian Television Network, Global News, The Canadian Press, Globe and Mail, Post Media, Halifax Examiner and SaltWire,

(CBC Law Department, Bell Canada, Global News, Halifax Examiner Inc., SaltWire Network, The Globe and Mail, Toronto Star Newspapers Limited)

v.

Her Majesty the Queen in the Right of Canada (Canada Border Services Agency)

And

Her Majesty the Queen in the Right of Nova Scotia (Royal Canadian Mounted Police)

Judge:	The Honourable Judge Laurel Halfpenny MacQuarrie
Heard:	Written Submissions
Decision	Oral – September 13, 2021 Written – September 29, 2021
Counsel:	Mark Covan and Scott Millar, for the Federal Crown Shauna MacDonald and Mark Heerema, for the Provincial Crown David G. Coles, Q.C. for the Applicants

On September 13th, I gave an oral decision on the issues of *functus* and an adjournment request. This is the written decision.

[1] As of June 14th, this matter was proceeding along its course with the Court set to release decisions on the *Canadian Victims Bill of Rights*, S.C .2015, c. 13, s.2, fair trial rights and solicitor/client issues.

[2] As a result of the *Sherman Estate v. Donovan* decision, 2021 SCC 25, the Court received a letter on June 15th from David Coles, Q.C. indicating he had a change in instructions from his clients regarding “Lists 5, 6, 7, 8, 12 and 13” going forward and he wished to make further submission on “privacy” issues.

[3] We returned to Court on June 16th. The possibility of revisiting the *merits* decision of March 16th arose and whether I am *functus* to hear further submissions in relation to it, should a material change in circumstances be shown by the Applicants.

[4] Mr. Coles’ position “at that time”, was the Court was *functus*.

[5] The Crown sought time to respond.

[6] On June 23rd, we were back in Court with the Crown opining that the Court was not *functus*. The Crown subsequently provided written argument. Mr. Coles was to file a brief and the Court would hear submissions on September 13th and deliver a decision on September 16th.

[7] However, on July 15th, Mr. Coles wrote the Court and Crown advising the Applicants do not "now" contest the Crown's position that the Court is not *functus.* That correspondence also advised of a pending Supreme Court of Canada decision, argued on March 17, 2021, and which addressed among other things, the issue of *functus*, in both statutory and inherent jurisdiction courts (*Canadian Broadcasting Corporation v. Her Majesty the Queen*, et al. SCC file 38992)

[8] Mr. Coles requested that the *functus* issue be adjourned until the Supreme Court of Canada released that decision. He however, wished to continue with the remaining 16 ITOs and related documents, plus the reserved decisions and provide further argument to the Court in light of *Sherman, supra*.

[9] By letter dated July 26th, the Crown replied as follows:

> 1. The Court should not adjourn the functus officio determination pending the Supreme Court of Canada release.
>
> 2. That if the Court decided to indeed wait and adjourn proceedings, then all aspects of the unsealing application should be adjourned.

One reason being the other issues besides *functus* that were argued in that Supreme Court of Canada case, namely third-party rights and notice.

[10] On August 9th Mr. Coles sent his position, at the request of the Court, on the *functus* question. He advised:

> My Applicant clients offer 'no contest' in respect of the Crowns' position that you are not functus.

> That said, should the Supreme Court of Canada's decision in SCC File No. 38992 contradict the Crowns' brief, in whole or in part, my Applicant clients reserve the right to amend/alter their position before your Honour as appropriate.

ISSUES:

1. Will the Court adjourn some or all, of these proceedings?
2. Is the Court *functus officio* regarding the *merits* decision of March 16, 2021?

ADJOURNMENT

[11] This Court has decided it will not be adjourning the proceedings at this juncture. This is a discretionary decision and one which I have spent considerable time deciding. It is the generally accepted practice, or rule, that Courts should not adjourn proceedings pending release of higher Court decisions. Of course, there are times when such is deviated from, and matters are suspended. This does not fall into that category, this matter is not one of those instances. The Supreme Court of Canada, as far as I am aware, has no time requirements in which to release decisions and therefore, we have no idea how long such a wait will be. We can speculate, but that does not assist the Court.

[12] Public interest and the administration of justice dictate that this Court continue where such is possible. The issue of *functus* before the Supreme Court of Canada is a procedural one and as suggested by the Crown, and with which I agree, one which the position of the Applicants is not tied to. The same is true regarding the third-party interests and notice issues in that case. Further, and this is an important point in my

determination of the adjournment request, as stated by the Nova Scotia Court of Appeal in *Canada v. Baker,* [1994] NSJ No.135, “It was the obligation of Judge Campbell to apply the law as it existed.’ *(see para. 9).*

[13] The upshot of not doing such is to delay proceedings in Courts such as this one, pending appeals to Superior Courts. In essence, the justice system as we know it, would grind to a halt. Coupled with that is the fairly recent decision in *Jordan* [2016] 1 S.C.R. 631, which, although decided in a different context, is applicable to the overall administration of justice. Courts must get on with the business at hand expeditiously, and not themselves become part of the delay. As an aside but also a consideration, is the fact that a Judicial Review is awaiting this Court’s completion of these matters.

JURISDICTION

[14] The second matter before me is that of the Court’s jurisdiction. That is the *functus officio* issue regarding the March 16th *merits* decision.

[15] Counsel for the Crown and the Applicants agree this Court is not *functus* as it relates to that decision should a material change in circumstances exist as a result of the decision in *Sherman Estate v. Donovan, supra.*

[16] Counsel are also seeking to make additional submissions to the Court as it relates to its reserved decisions because of *Sherman*, *supra.*

[17] Notwithstanding the agreement of counsel on the issue of jurisdiction, this is not something that can be simply agreed to, but rather the Court must accept such itself. That is, I must be satisfied that I have jurisdiction to proceed. I do, and I so find.

[18] The *Noftall* decision, 2018 NLCA 63 from the Newfoundland Court of Appeal, is a case on point I believe. The trial judge had heard and decided a section 11(b) *Charter* breach application. This was a so-called drug case. The trial judge dismissed the application based on unreasonable delay as per the parameters of *Jordan, supra*. Prior to being sentenced however, the Supreme Court of Canada decision in *R. v. Cody*, 2017 SCC 31, [2017] 1 S.C.R. 659 came down, which was another section 11(b) case. The Judge who heard the section 11(b) in the first instance, concluded he had jurisdiction to hear a reconsideration of the section 11(b) because of *Cody, supra*. He did, and once again, denied the application.

[19] It was appealed to the Newfoundland Court of Appeal which held that the Judge had jurisdiction as the case had not finally been disposed of. That is, sentencing had not taken place. It relied on *R. v. Head,* 1986 2 SCR. 684 as authority.

[20] Tied to this is the argument made by the Crown in its written submissions of July 21st, that the very nature of section 487.3(4) applications as this one is, allows for such. The applications before the Court are not complete. There are outstanding decisions to be given and section 487.3(4) allows for variation orders, of which many have been issued in this case. The fact that a *merits* decision was rendered in March of this year, does not, in the Crown's submission, and in this Court's opinion, preclude it from being

revisited should the Applicants establish a material change in circumstances. The Crown referenced *R. v. Daniels,* (1997), 103 OAC 369 and the *Baltovich* case also out of the Ontario Court. *(see 2000 131 OAC 29).*

[21] I refer to the Crown's written brief of July 21, 2021:

> An application for a termination or variation of an existing order under s. 487.3(4), must proceed on the basis that there has been a material change in circumstance (see *R. v. R.V.,* 2019 SCC 41). In the context of successive applications for bail pending appeal, the Ontario Court of Appeal has determined that such applications may be brought pursuant to s. 679, of the [Code], where there has been a material change in circumstances after the initial application. (see *R. v. Daniels* 1997 103 OAC 369). The Court further explained in *R. v. Baltovich*, (see 2000 131 OAC 29), that the material change must relate to one or more of the statutory factors under s. 679(3) (eg. whether the appeal is frivolous, whether the appellant will surrender into custody, etc.).
>
> This reasoning is easily applied to the unsealing context. For example, if one of the 16 individuals whose identify is protected by the March 16 decision were to step forward and state that they wanted their information contained within the ITO's to be made public - a material change in circumstance - the Applicants would undoubtedly seek that variation and the Crown would likely consent to such an order under s. 487.3(4). It would not be procedurally or substantively correct to seek judicial review.

[22] I accept and adopt that reasoning.

[23] I also accept the argument that in the interests of expediency and consistency, both being administration of law considerations, that I have jurisdiction to determine if there is a material change in circumstance regarding the *merits* decision. Such will also be argued on current reserve decisions as well as a *merits* decision yet to be argued, again, from the same applications.

[24] Whatever the determination of *Sherman, supra,* is to be, the application should be and must be, in the best interest of the administration of justice and it must be consistent.

Laurel Halfpenny MacQuarrie

J.P.C.