SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Boutilier*, 2020 NSSC 275

Date: 20201005
Docket: Halifax, No. 497164
Registry: Halifax

Between:

Craig Thomas Boutilier

Applicant

v.

Her Majesty the Queen and
The Honourable Judge Daniel A. MacRury

Respondent

JUDICIAL REVIEW DECISION

Restriction on Publication

By court order made under subsection 486.4(1) of the *Criminal Code*, information that may identify the person described in this decision as the complainant may not be published, broadcasted or transmitted in any manner.

Judge:	The Honourable Justice Kevin Coady
Heard:	August 6, 2020, in Halifax, Nova Scotia
Written Decision:	October 5, 2020
Counsel:	Ian Hutchison and Jennifer MacDonald, Counsel for the Applicant Erika Koresawa, Counsel for the Respondent

By the Court:

[1] The Applicant, Thomas Craig Boutilier, stands charged with sexual offences pursuant to sections 271, 151, 152 and 153(1) of the *Criminal Code of Canada*. These offences are alleged to have occurred between January 1, 2005 and April 2, 2017. The Crown proceeded by way of Indictment. The complainant turned 16 years of age on April 3, 2013. One count in the Indictment alleges sexual assault (s. 271) subsequent to the complainant's 16th birthday. Another count alleges sexual assault (s. 271) prior to the complainant's 16th birthday. The latter is at the heart of the issue before the Court.

[2] When the alleged offences occurred, a conviction under section 271 involving a complainant under the age of 16 years was subject to a maximum punishment of ten years' imprisonment if prosecuted by way of Indictment. On July 17, 2015 Parliament raised the maximum punishment under section 271 from ten years to 14 years when the complainant is under the age of 16 years and if prosecuted by way of Indictment.

[3] On September 19, 2019 Parliament amended section 535 of the *Criminal Code* to limit preliminary inquiries to offences for which the maximum punishment is 14 years' imprisonment or more. Section 11(1) of the *Canadian Charter of Rights and Freedoms* states:

> Any person charged with an offence has the right if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing to the benefit of the lesser punishment.

Consequently, if convicted, Mr. Boutilier's jeopardy is limited to ten years' imprisonment.

[4] On February 11, 2020 the Honourable Judge MacRury determined that Mr. Boutilier was not entitled to a preliminary inquiry and, as such, was ordered to go directly to trial in the Supreme Court of Nova Scotia. He found that Mr. Boutilier was not entitled to a Preliminary Inquiry because of the application of section 11(1) of the Charter which limited his jeopardy to a maximum term of ten years. Judge MacRury's reasons are as follows:

> Certainly, the Ontario Court of Appeal in **R. v. R.S.** basically set out the interpretation of 539, that prior to September 19th the accused would have been

> entitled to request a preliminary inquiry. Since September 19th the [*sic]*, a individual charged with the offence attracts 14 years' imprisonment, although in this case Mr. Boutilier's offence only attracts 10 years' imprisonment.
>
> Certainly, in the circumstances, it's my view that, looking at 538, it basically says that if you're liable for 14 years you get a preliminary inquiry and, if you are not, you do not get a preliminary inquiry. And the Ontario Court of Appeal made it very clear that if you had the right of preliminary inquiry before September 19th, if you haven't made that election, you do not have that right for 10-year offences. So in the circumstances, it's clear that Mr. Boutilier does not have a right to a preliminary inquiry because his liability is only 10 years, not 14 years. So, in the circumstances, his election is … He certainly has a right to elect Supreme Court with either a judge or judge and jury or a Provincial Court but he does not have the right to preliminary inquiry in this case. So that is my ruling.

[5] On March 4, 2020, Mr. Boutilier filed a Notice of Judicial Review challenging Judge MacRury's interpretation of section 535 of the *Criminal Code of Canada*. He requests an order in the nature of mandamus which would require "the Applicant's case be returned to the Provincial Court and that a Preliminary Inquiry take place."

Standard of Review

[6] Prerogative writs are extraordinary remedies concerned with a lower court's wrongful refusal or erroneous exercise of jurisdiction. In *R. v. MacDonald*, 2007 NSSC 255, Justice Murphy stated, at para. 17:

> Mandamus is a discretionary remedy available to compel an inferior court to exercise jurisdiction when it improperly refuses to do so. (Kipp v. Ontario (Attorney General), 1964 CanLII 20 (SCC), [1965] S.C.R. 57) Mandamus may compel a body to act, but a court issuing the remedy cannot require exercise of discretion in a particular way or dictate the result of a hearing.

Mandamus generally responds to a refusal to exercise jurisdiction. Its cousin, certiorari, generally responds to an excess of jurisdiction. Both attract the same standard of review.

[7] The Supreme Court of Canada in *R. v. Russell*, 2001 SCC 53, stated at para. 19:

> **19** The scope of review on certiorari is very limited. While at certain times in its history the writ of certiorari afforded more extensive review, today certiorari 'runs largely to jurisdictional review or surveillance by a superior court of statutory

> tribunals, the term 'jurisdiction' being given its narrow or technical sense': Skogman v. The Queen, [1984] 2 S.C.R. 93, at p. 99. Thus, review on certiorari does not permit a reviewing court to overturn a decision of the statutory tribunal merely because that tribunal committed an error of law or reached a conclusion different from that which the reviewing court would have reached. Rather certiorari permits review 'only where it is alleged that the tribunal has acted in excess of its assigned statutory jurisdiction or has acted in breach of the principles of natural justice which, by the authorities, is taken to be an excess of jurisdiction'.

The Applicant argues that Judge MacRury's interpretation of section 535 of the *Criminal Code* amounts to a refusal to exercise jurisdiction.

[8] The issue before the Court involves a question of statutory interpretation. Questions of statutory interpretation are questions of law and, as such, are reviewable on a standard of correctness. In *R. v. Carvery*, 2012 NSCA 107, Justice Beveridge stated at para. 31:

> 31 Ordinarily appellate courts show great deference to sentencing decisions (*R. v. L.M.*, 2008 SCC 31). But here, in deciding the issue of credit under s. 719 of the *Criminal Code*, the trial judge was engaged in an exercise of statutory interpretation, which as a question of law attracts a correctness standard of review (*Housen v. Nikolaisen*, 2002 SCC 33, at para. 8; *R. v. MacDonald*, 2012 NSCA 50, at para. 44).

Most rules and principles of statutory interpretation are judge-made; however, section 12 of the *Interpretation Act* (RSC-1985) provides some general guidance:

> Every enactment is deemed remedial and shall be given such fair, large and liberal construction and interpretation as best assures the attainment of its objects.

Remedial is an adjective and means an intention to correct something that is wrong or to improve a bad situation (Cambridge English Dictionary).

[9] The Supreme Court of Canada has given clear direction that the starting point for statutory interpretation is the "modern rule" as developed by Professor Driedger in his text *Driedger on the Construction of Statutes".* In *Re Pizzo & Pizzo Shoes Ltd.* [1998] 1 S.C.R. 27 Justice Iacobucci commented as follows, at para. 21:

> **21** Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, Statutory Interpretation (1997); Ruth Sullivan, Driedger on the Construction of Statutes (3rd ed. 1994) (hereinafter "Construction of

> Statutes"); Pierre-André Côté, The Interpretation of Legislation in Canada (2nd ed. 1991)), Elmer Driedger in Construction of Statutes (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

This preferred approach recognizes the important role that context must inevitably play when a Court construes the written words of a statute. Words, like people, take their color from their surroundings.

Applicant's Position

[10] The Applicant's view of the issue is as stated at paragraph 25 of his pretrial brief:

> The Applicant respectfully submits that the offence Mr. Boutilier is charged with carries a maximum penalty of 14 years, and that upon his election to be tried in the Supreme Court, Judge MacRury was obliged to schedule the inquiry upon his request. The Applicant submits that Judge MacRury committed a jurisdictional error in wrongfully refusing to do so.

Respondent's Position

[11] The Respondent's view of the issue is as stated at paragraph 7 of its prehearing brief:

> The Respondent further submits that Judge MacRury correctly interpreted section 535 and properly refused to exercise jurisdiction to hold a preliminary inquiry.

Analysis

[12] The critical question before the Court is whether section 11(1) of the Charter operates to limit the jurisdiction of the Provincial Court to conduct a preliminary inquiry on a charge that would otherwise be eligible for one. Mr. Boutilier argues that it was not Parliament's intention for the availability of preliminary inquiries to

be limited by section 11(1). There does not appear to be any reported decisions that address this issue.

[13] Mr. Boutilier further argues that to interpret section 11(1) so as to limit access to a preliminary inquiry would be inconsistent with both the purpose of preliminary inquiries and the Charter. He also submits that Parliament's intention was to reserve these inquiries for offences considered most serious – that is offences that attract a maximum sentence of 14 years' imprisonment. He argues that Judge MacRury's focus was erroneously on the offender and not the offence.

[14] Mr. Boutilier also submits that Judge MacRury erred in considering the Charter relief that would be available upon conviction under a *Criminal Code* provision concerned with the pretrial stage of the process. He argues that this approach offends the presumption of innocence. Specifically, that interpreting section 535 as a precluding a preliminary inquiry, where an accused may be subject to a lesser punishment upon conviction, presumes the accused is guilty. I am not persuaded by this argument and will say nothing more on this point.

[15] The primary purpose of a preliminary inquiry is to determine whether the Crown has sufficient evidence to warrant the accused to stand trial. There is also a level of discovery inherent in such a proceeding (*R. v. MacDonald*, 2007 NSSC 255). However, access to these functions is not a substantive right enjoyed by an accused. In *R. v. RS*, 2019, ONCA 906, Justice Doherty comments as follows, at paragraphs 63-67:

> **63** Although it is unnecessary for the resolution of this appeal given my finding that the appellants' right to seek and obtain a discharge at the end of a preliminary inquiry is a substantive right, I will address the appellants' argument that the retrospective application of the amendments also affects their substantive right to make full answer and defence.
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> **64** Traditionally, the preliminary inquiry has provided valuable assistance to an accused in making full answer and defence. The preliminary inquiry allows for discovery of the Crown's case, testing of that case, and permits counsel to lay the groundwork for arguments and defences that may be advanced at trial: see G.A. Martin, "Preliminary Hearings", Special Lectures of the Law Society of Upper Canada, 1955, at p. 1.
>
> **65** The right to make full answer and defence is a trial right. There is no right to make full answer and defence at the preliminary inquiry. The right to make full answer and defence at trial, however, also entitles the accused to full and timely disclosure of the Crown's case. It does not entitle the accused to any particular procedure to achieve that end. Nor does it require a procedure that maximizes the

> ability of the accused to make full answer and defence: see *R. v. Bjelland*, 2009 SCC 38, [2009] 2 S.C.R. 651, at paras. 32-37.
>
> **66** The right to confront witnesses and call evidence at a hearing prior to the trial proper, such as a preliminary inquiry, has never been an essential component of the criminal process in Canada. Most indictable offences are prosecuted and properly defended without a preliminary inquiry.
>
> **67** The assessment of whether an accused has had an adequate opportunity to make full answer and defence, and specifically to adequately prepare for trial, is a fact-specific inquiry. It is not answered by determining whether a particular procedure was or was not available to an accused. The question is whether, in the circumstances, the accused, based on the procedures that were available to him, had an adequate opportunity to meet the charges and prepare the defence. Judges faced with arguments that an accused did not have that opportunity, have broad powers, both in their inherent jurisdiction as trial judges and under s. 24(1) of the *Charter*, to make remedial orders that will ensure that the accused has the opportunity to properly make full answer and defence. The elimination of the right to a preliminary inquiry does not affect the right to make full answer and defence. It does not in any way diminish the nature and substance of that right.

The most serious criminal offences are those that attract a 14-year or greater maximum sentence of imprisonment. I am not persuaded that denying Mr. Boutilier a preliminary inquiry deprives him of a substantive right or impacts on his ability to make full answer and defence.

[16] It is helpful to review the purpose of Bill C-75. It was an Omnibus Bill aimed at modernizing the criminal justice system, reducing delays and ensuring the safety of Canadians. The Minister of Justice and Attorney General of Canada stated that, in limiting the availability of preliminary inquiries to only those persons charged with various serious offences, the legislation was meant to increase court efficiency and reduce burdens on witnesses and victims from having to testify twice.

[17] The above considerations are germane to the statutory interpretation issues before this Court; however, it all boils down to whether section 11(1) of the Charter operates to interpret section 535 of the *Criminal Code* in a way that denies Mr. Boutilier a preliminary inquiry which he would be entitled to on a literal reading of the amended section 535.

[18] I am satisfied that the intention of the amended section 535 was to address "14-year offences" and not individuals that will enjoy a benefit at sentencing as a

result of section 11(1). I believe this conclusion reflects a "fair, large and liberal interpretation" of section 535. I also believe it "assures the attainment of its objects". I also conclude that this interpretation is consistent with the principles of statutory interpretation as espoused by Professor Driedger.

[19] Consequently, I am of the respectful view that Judge MacRury erred in his interpretation of section 535. The standard of review of correctness requires me to grant Mr. Boutilier a preliminary inquiry. The relief sought is granted.

Coady, J.