

IN THE COURT OF APPEAL OF MANITOBA

BETWEEN:

HER MAJESTY THE QUEEN)	M. Wasyliw
)	<i>for the Applicant</i>
)	
<i>Respondent</i>)	A. C. Bergen
)	<i>for the Respondent</i>
- and -)	
)	<i>Chambers motion heard:</i>
DEREK SHAWN FROESE)	May 2, 2019
)	
<i>(Accused) Applicant</i>)	<i>Decision pronounced:</i>
)	May 13, 2019

HAMILTON JA

[1] The accused seeks a review under section 680(1) of the *Criminal Code* (the *Code*).

[2] Pursuant to section 680(1), the chief justice, or acting chief justice, may direct a review of a judge’s decision made in certain circumstances. The Chief Justice designated me to act in his place on this application.

[3] The accused seeks a review of a decision made by a judge of the Court of Queen’s Bench (the judge) under section 261 (now section 320.25) of the *Code* (the stay decision).

[4] A Provincial Court judge convicted the accused of driving while over .08 and imposed a one-year driving prohibition. The accused filed a summary conviction appeal in the Court of Queen’s Bench and applied under

the former section 261 for a stay of the driving prohibition, pending the hearing of the summary conviction appeal. The judge denied the stay.

[5] The Crown raises the preliminary objection that this Court does not have the jurisdiction to entertain the application for review because the stay decision was not “made by a judge of the court of appeal”, as required by section 680(1).

Relevant Provisions of the Code

[6] The *Code* was amended on December 18, 2018 (see *An Act to amend the Criminal Code (offences relating to conveyances) and to make consequential amendments to other Acts*, SC 2018, c 21). This was after the commencement of the accused’s trial, but prior to his appeal to the Court of Queen’s Bench. I agree with counsel that the amendments that affected sections 261 and 680(1) are not substantive in nature and have no bearing on the outcome of my decision. Nonetheless, I think it is important to set out the changes.

[7] As a result of the amendments, section 680(1) reads as follows:

Review by court of appeal

680(1) A decision made by a judge under section 522 or subsection 524(4) or (5) or a decision made by a judge of the court of appeal under section 320.25 or 679 may, on the direction of the chief justice or acting chief justice of the court of appeal, be reviewed by that court and that court may, if it does not confirm the decision,

(a) vary the decision; or

(b) substitute such other decision as, in its opinion, should have been made.

[emphasis added]

[8] Prior to the amendments, section 680(1) read as follows:

Review by court of appeal

680(1) A decision made by a judge under section 522 or subsection 524(4) or (5) or a decision made by a judge of the court of appeal under section 261 or 679 may, on the direction of the chief justice or acting chief justice of the court of appeal, be reviewed by that court and that court may, if it does not confirm the decision,

(a) vary the decision; or

(b) substitute such other decision as, in its opinion, should have been made.

[9] Thus, the only change in section 680(1) reflects that section 261 was repealed, and replaced with section 320.25.

[10] Section 320.25(1) reads as follows:

Stay of order pending appeal

320.25(1) Subject to subsection (2), if an appeal is taken against a conviction or sentence for an offence under any of sections 320.13 to 320.18, a judge of the court to which the appeal is taken may direct that the prohibition order under section 320.24 arising out of the conviction shall, on any conditions that the judge imposes, be stayed pending the final disposition of the appeal or until otherwise ordered by that court.

[emphasis added]

[11] The former section 261(1) read as follows:

Stay of order pending appeal

261(1) Subject to subsection (1.1), if an appeal is taken against a conviction or discharge under section 730 for an offence committed under any of sections 220, 221, 236, 249 to 255 and 259, a judge of the court being appealed to may direct that any prohibition order under section 259 arising out of the conviction or discharge shall, on any conditions that the judge or court imposes, be stayed pending the final disposition of the appeal or until otherwise ordered by that court

[12] Given that the amendments are not substantive in nature, the balance of my reasons reflect the current wording of sections 320.25 and 680(1) (see section 34(2) of *An Act to amend the Criminal Code* for the applicable transitional provision).

The Parties' Positions

[13] The Crown argues that section 680(1) allows the chief justice, or acting chief justice, of a court of appeal to direct a review by the court of appeal in the following circumstances: 1) where an accused is charged with a section 469 offence (most often murder) and a superior court justice has made an order of release or detention under either sections 522 or 524; and 2) where a judge of the court of appeal has made a decision regarding the stay of a driving prohibition under section 320.25 or bail pending appeal under section 679.

[14] The Crown points out that the accused's summary conviction appeal is pending in the Court of Queen's Bench and not in the Court of Appeal. It acknowledges that the accused's request for a stay of the driving prohibition rightly went to "the court to which the appeal is taken" (at section 320.25(1)

of the *Code*). However, it says that these circumstances do not fall within the strict wording of section 680(1) because a summary conviction appeal court judge is not a judge of the court of appeal for the purposes of section 680(1).

[15] The accused argues that the judge was a judge of an appeal court given that a summary conviction appeal is pending in the Court of Queen's Bench under section 813 of the *Code*, and that for the purposes of section 813, section 812(1)(d) of the *Code* defines "appeal court" as the Court of Queen's Bench.

[16] He also argues that the application for review should be treated as a decision of first instance from the Court of Queen's Bench and not be subject to restrictions that apply to a second-level appeal. To do otherwise, he says, will cause injustice.

Decision

[17] I agree with the Crown that this Court does not have the jurisdiction under section 680(1) to review the stay decision. While it is a decision under section 320.25, it is not a decision "made by a judge of the court of appeal under section 320.25" (at section 680(1) of the *Code*).

[18] The accused relies on section 812(1)(d) that defines "appeal court" as the Court of Queen's Bench. Section 812(1)(d) is found in Part XXVII—Summary Convictions of the *Code*, which only applies to sections 813-828. Section 680(1) is found in Part XXI—Appeals—Indictable Offences. Under Part XXI, the "court of appeal" means the Court of Appeal. See sections 673 (under Part XXI) and 2 of the *Code* which read as follows:

Definitions

673 In this Part,

court of appeal means the court of appeal, as defined by the definition *court of appeal* in section 2, for the province or territory in which the trial of a person by indictment is held.

Definitions

2 In this Act,

...

court of appeal means, in all provinces, the Court of Appeal.

[19] In my view, this definition resolves this issue of jurisdiction. The review mechanism under section 680(1) is only available for a decision under section 320.25 if it is made by a judge of the court of appeal.

[20] In *R c Dubois*, 2003 CarswellQue 28 (CA), Robert JCQ identifies the four circumstances in which the chief justice, or acting chief justice, could order a review under section 680(1). The circumstances involve only decisions of a judge of the superior court under sections 522 and 524 (pre-trial bail orders), or of a judge of the court of appeal under sections 261 (now section 320.25) and 679. With respect to the former section 261, he wrote (at para 6):

c) Le cas d'une décision rendue en vertu de l'article 261.

Il s'agit en l'espèce d'une décision d'un juge de la Cour d'appel qui ordonne un sursis d'exécution d'une ordonnance d'interdiction de conduire rendue en vertu de l'article 259(1) ou (2).

[21] Also see *R v Oland*, 2017 SCC 17, in which Moldaver J similarly differentiates between orders made by a judge of the court of appeal and

certain orders made by superior court judges regarding pre-trial bail orders (at para 53):

In this case, s. 680(1) of the *Code* operates as a review mechanism for an order of a single judge of the Court of Appeal made under s. 679(3). I note, however, that the provision applies as well to certain pre-trial bail orders made by superior court judges for various offences, including murder.

Conclusion

[22] The Court of Appeal's jurisdiction is statutory. Section 680(1) does not confer jurisdiction on this Court to review a decision under section 320.25 (or the former section 261) made by a judge of the Court of Queen's Bench. Therefore, this Court has no jurisdiction to hear the accused's application for review of the stay decision.

[23] Accordingly, the application is dismissed.

Hamilton JA
