IN THE SUPREME COURT OF YUKON

Citation: *R. v. Cornell*, 2012 YKSC 57

Date: 20120712
Docket No.: S.C. No. 11-00594
11-00442
11-00455/A
11-00467
11-00467/A
11-00467/D
11-00702
Registry: Whitehorse

Between:

HER MAJESTY THE QUEEN

And

CHRISTOPHER CORNELL

Before: Mr. Justice R.S. Veale

Appearances:

Eric Marcoux — Counsel for the Crown
Christopher Cornell — Appearing on his own behalf

RULING

(*Rowbotham* application)

INTRODUCTION

[1] Christopher Cornell brings this application for state-funded counsel pursuant to s. 24(1) of the *Charter*, alleging that, without the appointment of counsel, his constitutional right to a fair trial in accordance with the principles of fundamental justice

under ss. 7 and 11(d) of the *Charter* will be violated. This type of application is known as a *Rowbotham* application (*R. v. Rowbotham* (1988), 25 O.A.C. 321 (C.A.)).

[2] The Crown is opposed to the application, primarily on the basis that the application is premature, as the next step in Mr. Cornell's matters will be a preliminary inquiry and his right to a fair trial is not yet engaged. Alternatively, the Crown takes the position that, because Mr. Cornell has declined the services of two lawyers provided by Yukon Legal Services Society ("YLSS"), he should be precluded from seeking this remedy. Crown says that Mr. Cornell is using this application to secure his counsel of choice and that it should not be permitted.

BACKGROUND

[3] Mr. Cornell is currently facing over twenty charges set out in five informations. The most serious set of allegations is contained on an information with nine counts, and on which Mr. Cornell is co-accused with a woman named Jessica Johnson. These allegations include the attempted murder of an RCMP officer. Jessica Johnson has retained counsel, the accused have elected to have a preliminary inquiry on these charges, and my understanding is that a date will be set as soon as Mr. Cornell's *Rowbotham* application is resolved. Mr. Cornell has been in custody since September 2011.

[4] Mr. Cornell provided the Court with some material in support of his application. He has sworn an affidavit, and has as well provided various letters and emails from YLSS, a letter from one counsel whose services he is not using, and an affidavit from another lawyer who has been assisting him on a *pro bono* basis. This latter lawyer has indicated

that he is willing to accept the retainer if Mr. Cornell's application is granted. Mr. Cornell was also cross-examined on his affidavit by Crown counsel.

[5] According to the material filed, YLSS initially assigned Mr. Cornell one of its senior staff lawyers. Sometime around March 2012, there was a breakdown in the solicitor-client relationship with this counsel, and YLSS advised Mr. Cornell that they could not appoint another staff lawyer because of potential and actual conflicts. YLSS approached other local lawyers about their willingness to accept a retainer in accordance with the Legal Aid Regulations, and one agreed to meet with Mr. Cornell. It appears that this relationship faltered at the outset, with Mr. Cornell voicing concern about the lawyer's decade-long hiatus from practice, and the lawyer refusing to "audition" for the case.

[6] Throughout this, it appears that Mr. Cornell has been able to forge a relationship with a lawyer resident in British Columbia. He testified that he believed he would be able to access a lawyer through B.C. legal aid, and that's when he began talking with David Tarnow. Although he made his best efforts to work with the lawyers provided by YLSS, including providing them with his disclosure, his evidence is that Mr. Tarnow has been the most responsive and has provided the most assistance, despite the fact that he is not formally retained. Mr. Tarnow filed an affidavit in these proceedings, indicating that he has been assisting Mr. Cornell during the times when he was obviously without counsel. He deposed that he was approached by YLSS about a retainer, and says that, while he is unwilling to work at the YLSS rate, he is willing to work for a rate similar to what he would be paid by Legal Services in B.C. on a similar serious case. Although it was not filed in these proceedings, I note that the *Legal Services Society Act (Schedules and Forms),* Y.C.O. 1976/286, sets the hourly rate for preparation for a murder defence at either $70

or $88 per hour, depending on experience, and caps the number of preparation hours at forty (40) for first- and second- degree murder. Without commenting on the rates themselves, I note parenthetically that I have grave doubts about whether counsel adhering to the cap on hours would be able to prepare a competent defence or guarantee a fair trial.

[7] Mr. Cornell told the Court that, although he has been provided with disclosure on a USB key, because of his security classification, he is only allowed to access a computer to view it during his one hour of personal time a day, and he also needs to use this hour to exercise his fresh air and shower privileges. He said he has read about half of his disclosure to date. He said he thought he had most of his disclosure but he wasn't sure. For example, he has not seen any material about break and enter and firearm theft allegations, although he thinks he is facing some related charges. He said that he has tried to speak with YLSS counsel and local counsel when he has questions about the disclosure, but that he often resorts to David Tarnow, as Mr. Tarnow is the only person that is available to speak and that returns his calls.

[8] Mr. Cornell also testified that he has no assets and no income, and that his family is unable to assist him financially.

ISSUES

[9] What Mr. Cornell is essentially seeking is a judicial stay of the proceedings against him if state-funded counsel is not provided. The principles governing the ability of a Court to grant this remedy were first set out in *Rowbotham, supra*, and have since been refined in Ontario and other jurisdictions.

[10] The fundamental issue in a *Rowbotham* application is whether there is a serious risk that the applicant will not receive a fair trial in the absence of state-funded counsel. In *R. v. Everitt*, 2008 YKSC 86, the most recent Yukon case to consider a *Rowbotham* application, Gower J. set out the elements the accused must demonstrate in order to be show that this risk exists. These are:

1. That he or she has been denied legal aid;
2. That he or she cannot afford to fund their own counsel;
3. That the charges are serious, and;
4. That the charges are sufficiently complex that the accused does not have the capacity to deal with them without counsel.

(citing *R. v. Newberry,* 2003 BCSC 1620, per Groberman J. (as he then was))

Each of these elements must be established by the applicant on a balance of probabilities.

[11] Crown counsel also provided me with *R. v. Malik,* 2003 BCSC 1439, which contains a helpful summary of the relevant principles at para. 22.

[12] As noted, the Crown is primarily opposing this application on the basis that Mr. Cornell's right to a fair trial is not yet implicated, and that, regardless of whether Mr. Cornell otherwise satisfies the *Rowbotham* test, the principles of fundamental justice do not require state-funded counsel at the stage of a preliminary inquiry. This then is a threshold issue that must be addressed. The Crown's alternative position is that Mr. Cornell has not been denied legal aid, but rather chose to fire the counsel that was provided. Counsel points out that the entitlement to counsel is not the right to counsel of

choice and suggests that Mr. Cornell is attempting to thwart the efforts of YLSS to provide him with a lawyer in order to secure the assistance of Mr. Tarnow specifically.

1. Is the assistance of counsel at a preliminary hearing essential to a fair trial?

[13] The Crown has presented a number of authorities that support its position that fundamental justice will not be denied and that there is not a significant risk that Mr. Cornell's fair trial rights will be impacted if he is required to represent himself at his preliminary inquiry.

[14] The most recent and persuasive authority is a chambers decision of Groberman J.A. in *R. v. Dunkers*, 2010 BCCA 601. In *Dunkers,* Groberman J.A. affirmed the decision of a Supreme Court judge denying the accused state-funded counsel at her preliminary inquiry for a charge of fraud over $5000. He found that at the stage of a preliminary inquiry "the threat to liberty or to the fairness of proceedings is quite limited" (para. 16) and determined that the applicant had failed to demonstrate the significant risk necessary for success.

[15] *Dunkers* appears to follow on the heels of two earlier decisions written by Groberman J.A. while he was still sitting as a trial judge. In *R. v. Nicolier*, 2001 BCSC 211, he denied an application for state-funded counsel at the preliminary inquiry for an accused charged with the sexual assault and sexual touching of his former step-daughter. In that case, the Court found that the issues were not complex and mostly revolved around credibility. Moreover, because of the nature of the charges, counsel had already been appointed to cross-examine the key witnesses at the request of the Crown, and this would ameliorate any potential prejudice to Mr. Nicolier. In *Newberry,* cited above, while Groberman J. accepted that there could be circumstances in which the

failure to have counsel at a preliminary inquiry could constitute a breach of an accused's *Charter* rights, he wrote that "the nature of the proceedings makes it less likely that [this failure] will result in fundamental justice being denied". Newberry was facing charges of conspiracy to export cannabis and conspiracy to traffic in cannabis with a number of co-accused, all of whom appeared to be represented. In considering the elements required for a successful *Rowbotham* application, Groberman J. found that Mr. Newberry's only potential detriment was that he may not be able to obtain satisfactory discovery of the evidence at the preliminary hearing, but considered that this was unlikely, given the presence of counsel for the co-accused. He also found that the complex evidentiary issues surrounding wiretaps and co-conspirators would not really arise until the trial of the matter.

[16] The issue of whether a *Rowbotham* relief is available at a preliminary inquiry appears to have been most thoroughly canvassed in a decision by Fuerst J. of the Ontario Superior Court of Justice. In *R. v. Valenti*, 2010 ONSC 2433, she denied the application of an accused charged in connection with various marijuana grow operations and facing serious charges including participation in a criminal organization, trafficking, and money laundering, among others. Disclosure was voluminous. After canvassing some relevant caselaw, she concluded as follows:

> [17] I conclude that while the availability of a *Rowbotham* order to an accused facing a preliminary hearing may not be foreclosed, it is a remedy that could be available in only exceptional circumstances. The limited powers of a preliminary hearing judge make it difficult to conclude that the conduct of the preliminary hearing will adversely affect the fairness of the accused person's trial in such a way or to such an extent that representation at the preliminary hearing is essential to a fair trial. Rulings that are within the power of the preliminary hearing judge to make, including those about the admissibility of evidence, do

> not bind the trial judge. Further, the preliminary hearing judge has no jurisdiction to hear and decide Charter applications.

[17] For his part, Mr. Cornell presented me with one case in which a *Rowbotham* application was granted at the stage of a preliminary inquiry (*R. v. James*, 2011 ONSC 5985). I accept Crown's contention that the circumstances of that case are readily distinguishable, however it seems to me that all of these cases turn on their very specific facts. In *James,* Ricchetti J. granted the accused's application on the basis that the evidence elicited at the preliminary inquiry could have a significant impact on the outcome of the trial and also on the basis that both the administration of justice and the efficiency of the trial would benefit from an earlier rather than later appointment of counsel.

[18] Although I do appreciate that the availability of a *Rowbotham* order to an accused facing a preliminary hearing is only available in "exceptional circumstances", I nevertheless conclude that Mr. Cornell has satisfied me that such circumstances exist here. Assuming that he has otherwise satisfied me on the legal aid and financial elements of the *Rowbotham* test, which I will address below, I find that in this unique context, Mr. Cornell faces a significant risk that his right to a fair trial will be jeopardized if he is forced to represent himself at his preliminary inquiry.

[19] I reach this conclusion for essentially two reasons. First, although Mr. Cornell strikes me as an articulate and intelligent individual that is capable of reviewing and understanding his disclosure, I am concerned about the very real time limits that have been placed on his ability to work with it. I accept from what he indicated in this Court and from the discussion evident in other transcripts, that he has been constrained in his ability to review his disclosure and that, despite the fact that these charges arose almost

ten months ago, he has read only half of what he has been provided with. While it is true, as Crown counsel points out, that the importance of a preliminary inquiry has been diminished in recent years, I also accept that it remains more than a mere formality, and that, in the words of Durno J. adopted in *James*, "[a] well-conducted and focused preliminary inquiry can play a vital role in assuring the right to make full answer and defence, and in trial fairness" (see para. 40 of *James*). A preliminary inquiry can only be well-conducted and focused if the accused has prepared by reviewing the Crown's case against him. In his present circumstances, Mr. Cornell seems unable to do so.

[20] Secondly, although the presence of counsel for Jessica Johnson at the preliminary inquiry could serve to ameliorate any prejudice that Mr. Cornell might encounter in the circumstances, it could also do the opposite. It is impossible to say at this stage whether any defences will be joint as opposed to cut-throat, in which each co-accused will attempt to deflect blame onto the other. If the latter approach is taken, again, there is the very real chance that Mr. Cornell could be prejudiced by his inability to counter damaging evidence elicited by counsel for his co-accused.

[21] Finally, and although it is not an consideration that goes to trial fairness, I am also of the opinion that requiring state-funded counsel at this stage of the process will not result in significant extra expense than if counsel was required later, after the preliminary hearing and before the trial, when Mr. Cornell would be certain to renew his application. It appears to me that counsel appointed later would have to review the same amount of disclosure and make many of the same tactical decisions as counsel appointed at this stage.

2. Has Mr. Cornell proven the elements required on a *Rowbotham* application, including the denial of legal aid?

[22] It should be evident from the foregoing that Mr. Cornell has satisfied me, on a balance of probabilities, of the last two elements of the *Rowbotham* test. Specifically, the charge of attempted murder of a peace officer is unquestionably a serious charge, and it carries with it the possibility of life imprisonment. In terms of complexity, although the Crown noted that we are only dealing with one of Mr. Cornell's five informations and a preliminary inquiry involving mostly civilian witnesses, there are going to be expert reports filed, a possibility that the experts be produced for cross-examination and the complicating factor of the represented co-accused. As noted, I have grave reservations about the accused's ability to deal with the charges, even at this stage, without counsel, given the restrictions on his ability to review his disclosure.

[23] I am also satisfied that Mr. Cornell is unable to fund his own counsel. He is currently incarcerated, and I accept that he has no assets to speak of. I also accept that his family is not in a position to help him financially. As noted by YLSS, he is financially eligible for legal aid. This was not seriously challenged by the Crown.

[24] The first element of the *Rowbotham* test is where the Crown submits Mr. Cornell has failed to meet his onus. Counsel says that this situation is analogous to the one considered by Gower J., sitting as a Court of Appeal judge in chambers in *R. v. Gagnon*, 2006 YKSC 52 (alternatively cited as 2006 YKCA 52). In *Gagnon*, the offender had discharged two legal aid lawyers during the course of a few distinct proceedings on fraud-related charges, and subsequently brought three *Rowbotham* applications and an application under s. 684. Relying on the case of *R. v. McCotter*, 2006 BCSC 301,

Gower J. found that an individual seeking a *Rowbotham* order in these circumstances had to establish, again on a balance of probabilities, that the termination of his earlier lawyers was reasonable. In the case of Mr. Gagnon, the termination was not reasonable, and Gower J. deemed him to have elected to proceed unrepresented.

[25] In contrast to the situation in *Gagnon*, I am satisfied here that Mr. Cornell acted reasonably in discharging his counsel. With respect to the first clinic lawyer, Mr. Cornell indicated that the choice to terminate the relationship was mutual, and this position appears to be supported in the letter issued by YLSS a short time later. At this point, there were no clinic lawyers not in a conflict and no other local lawyers, save one, willing to work at the governing tariff. Mr. Cornell attempted to work with this lawyer and provided him his disclosure, however his voiced reservations about the length of time the lawyer had been out-of-practice seems to have caused the lawyer to decline the retainer. I do not consider that Mr. Cornell discharged this lawyer, rather the lawyer seems to have discharged Mr. Cornell.

[26] While these findings are sufficient to dispose of the Crown's objection, I do want to address his point that Mr. Cornell is using this process to secure counsel of choice. I do not find that to be the case. I accept Mr. Cornell's evidence that he attempted to work with YLSS-appointed lawyers in good faith, while also trying to ensure that he had the information he needed to navigate his way through the court process. I accept that he found Mr. Tarnow while under the impression he could somehow access counsel through the B.C. legal aid system. The reality is that the Yukon criminal defence bar is a small bar and options are limited, especially when, as here, so many of the lawyers are in

conflict. There will be cases where securing a competent and available lawyer requires looking beyond the local bar, and, in my view, this is one of those cases.

[27] In the result, Mr. Cornell's application is granted. There will be a stay of proceeding pursuant to s. 24(1) of the *Charter of Rights and Freedom* on Information number 11-00455A until state funding counsel is appointed.

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Veale J.