

Citation: *R. v. Bonnefoy*, 2012 YKTC 84

Date: 20120925
Docket: 11-00279
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON

Before: His Honour Judge Thompson

REGINA

v.

LINDA ALICE BONNEFOY

Appearances:

Noel Sinclair

Linda Alice Bonnefoy

Counsel for the Crown

Appearing on her own behalf

RULING ON APPLICATION

[1] This is my decision in *R. v. Bonnefoy*, specifically, the application by the accused for the appointment of counsel by the Court pursuant to what is commonly referred to as a *Rowbotham* application.

[2] Firstly, I will briefly deal with the evidence that I have considered and, in effect, give a decision under the *voir dire* which pertains to all material extraneous and additional to the Affidavit evidence of Ms. Bonnefoy. I also received the sworn testimony of Mr. Nils Clarke. The *voir dire* concerns a number of other materials which were not part of an Affidavit. In the end, I conclude that I am prepared to accept as evidence in this application only those four letters which were agreed to being received by the Crown and which have been received as exhibits. In the result, the evidence

admitted consists of the Affidavit material, the testimony of Mr. Clarke, and the four letters agreed to be admissible. The weight given to each piece of evidence is another matter. The letters considered in evidence are: two letters from Yukon Legal Services Society to Ms. Bonnefoy informing her that she has been denied further Legal Aid coverage and a third also from Yukon Legal Services Society to a Mr. David Eby, Executive Director of the British Columbia Civil Liberties Association, who had apparently intervened on behalf of Ms. Bonnefoy in her dealings with Legal Aid. The fourth letter is that of Ms. Melissa Atkinson to Ms. Bonnefoy which sets out at length the circumstances of her application to withdraw as counsel and also makes some reference to the question of complexity of Ms. Bonnefoy's case which I will refer to further in this decision.

[3] The circumstances of this case are that Ms. Bonnefoy is charged with two threats to cause bodily harm to Constables Faulkner and Morran, and also with causing a disturbance at the Gateway Lounge in Haines Junction, Yukon. All of these charges arose from events of July 14, 2011.

[4] Ms. Bonnefoy has been represented by two capable lawyers provided via the Legal Aid plan in Yukon. The first was Mr. Campbell who eventually withdrew from representing Ms. Bonnefoy and the second was Ms. Atkinson, who more recently withdrew as counsel on behalf of Ms. Bonnefoy.

[5] It is clear, particularly after testimony from Mr. Clarke that Ms. Bonnefoy has been denied further Legal Aid coverage. It is common ground that she cannot afford to fund her own legal counsel in connection with this trial.

[6] There are two further considerations according to the caselaw which must be addressed in determining whether or not this Court should stay proceedings and direct that she have counsel appointed to represent her in her trial. The first consideration is the seriousness of the charges themselves. The second is the complexity of these charges and whether or not the accused would have the capacity to deal with those complex issues without counsel.

[7] Regarding the seriousness of the charges, I have Mr. Sinclair's submission which is to the effect that these are somewhat routine summary conviction matters in which the actual penalty being sought is not of grave consequence to Ms. Bonnefoy.

[8] On the matter of complexity and seriousness of the charges I have Ms. Atkinson's letter to Ms. Bonnefoy which contains an opinion which this Court needs to consider. After all, Ms. Atkinson is the person who has had extensive involvement with the issues of this case from a defence perspective. She says she is of the strong opinion that Ms. Bonnefoy requires counsel, and moreover, in the last paragraph of page two, second sentence, she states "it is a complex case which involved a charter issue." It is the matter of the complexity upon which I need to review the circumstances further in making my decision.

[9] I wish to make a number of observations in passing regarding this case and cases of this kind in more of a general nature. Learned Crown counsel said that there seemed to be a rise in *Rowbotham* applications here in Yukon. The reason for this is difficult for the Court to determine.

[10] However, I did hear evidence and see reference in some of the caselaw to what amounts to a formal or informal “two-strike rule” with regard to having legal representation provided through Legal Aid. It also seems that there is a lack of private defence counsel in Yukon. Whether this relates to the remuneration available for this kind of work or otherwise, I do not know.

[11] I know that in this case Ms. Bonnefoy had two counsel appointed, both of whom were Legal Aid staff lawyers. Indeed, the fact that both were staff lawyers seems to give rise to some of Ms. Bonnefoy’s concerns about being effectively represented. Her history before the Courts also seems to inform her concerns about finding effective legal counsel. She also appears to be informed on the matter of conflicts based on an urban view of such matters which may or may not be applicable to Yukon.

[12] I will say that in the general sense I would be concerned about an inflexible rule limiting a client to two lawyers. There may be circumstances where further efforts to find counsel are required by those involved, particularly Legal Aid. This can be considered more of a general comment than something that is specific to this particular case.

[13] Addressing this case, the issue of seriousness of the charges can be determined, at least in part by what the Crown seeks by way of penalty if convicted. The seriousness of these charges does not elevate this case to one where the Court would stay proceedings for Ms. Bonnefoy to have counsel appointed despite the application of the “two-strike rule” by Legal Aid.

[14] But what about the matter of complexity of the issues and *Charter of Rights and Freedoms* considerations? Some of the issues Ms. Bonnefoy is concerned with could be addressed via other avenues and may not enter into the actual defence of the charges.

[15] Ms. Bonnefoy appears to be particularly sensitive to perceived conflicts that various lawyers may have. This reduces the list dramatically in terms of who she would willingly have represent her.

[16] However, it seemed to be other matters that led to the breakdown of the solicitor-client relationship between Ms. Atkinson and Ms. Bonnefoy. Ms. Atkinson details in page two of her letter in the second paragraph “While I do understand your demands and your concerns; you at most times tend to focus on other issues which are not part of this trial. At time you have become angry and frustrated with the process and have told me you are concerned about the inconsistencies. I have attempted to tell you that I have certain ethical obligations which I must abide by.” Ms. Atkinson also refers to an issue of trust between them and discusses how Ms. Bonnefoy apparently arrived at her office at a time when Ms. Atkinson was absent with a witness because she, Ms. Bonnefoy, felt she needed a witness in terms of her dealings with her own lawyer.

[17] Ms. Atkinson also states at page two, paragraph five, second line, “I have provided you with my legal advice and you have not accepted my advice. I have told you I cannot play the tape of Dave Joe. You also want me to submit your email correspondence at the start of the trial and I cannot do that as it is not admissible. It is

evident that there is no confidence in our solicitor client relationship. It has become apparent that I will not be able to meet your firm instructions and your expectations due to my own diligence in maintaining my own ethical obligations.”

[18] I have considered the entire letter and have read these parts into the record because it forms a strong basis for my decision. Ms. Bonnefoy, as I said a moment ago, is particularly sensitive to real and perceived conflicts, but moreover, she appears to be insistent on instructing counsel in matters upon which she is not entitled to instruct counsel. In the end, I must conclude that it would be very difficult to envision a situation where Ms. Bonnefoy will find legal counsel that can possibly satisfy her demands, particularly in view of her unwillingness to abide by the advice she is given by competent counsel. In fact, I clearly saw some evidence of this unruly approach in this application by Ms. Bonnefoy and an unwillingness to take direction in the course of pursuing her application.

[19] Justice must not only be done, but must appear to be done. Frankly, Ms. Bonnefoy may never believe that justice is being done in her case, particularly with her history before the Courts which she described at length during her submissions. But the test of whether justice appears to be done does not depend on Ms. Bonnefoy’s subjective opinion.

[20] In my respectful view, the test that I need to apply is: what would the ordinary, disinterested and reasonable person, perhaps on a Whitehorse Transit bus or commuting to work on Two-Mile Hill, think of the question of whether or not Ms. Bonnefoy is being fairly treated by the justice system? I am not satisfied that the

complexity of the issues here justifies this Court staying proceedings to have counsel appointed.

[21] However, there looms a certain public interest in the *Charter* issues as identified by Ms. Atkinson which may arise in this trial. Out of an abundance of caution and in order to see that justice appears to be done, I believe this application should be resolved by the appointment of *amicus curiae* to address the somewhat complex *Charter* issues that may arise at trial and to ensure that these issues are properly aired. Ms. Bonnefoy will be in charge of her own defence and it will be up to the presiding judge to oversee the conduct of that defence. The *amicus curiae* is independent and he or she will have to determine how to ensure that the *Charter* issues are properly put before the Court. Accordingly, I am ordering that there be *amicus curiae* appointed and accordingly order that there be a stay of proceedings pending the arrangement for *amicus curiae* to be put in place and brought up to speed in connection with this matter. I specifically base this ruling on the decision in *R. v. Imona-Russel*, (2011) 104 O.R. (3d) 721. That decision clearly grounds this Court's authority and jurisdiction to make the appointment of *amicus curiae*. Indeed I follow the reasoning of this decision in determining my jurisdiction to give effect to what I believe properly meets the ends of justice in this case.

THOMPSON, T.C.J.