SUPREME COURT OF YUKON

Citation: *R. v. Murphy,* 2014 YKSC 62

Date: 20141121
S.C. No. 08-01518A
Registry: Whitehorse

Between:

HER MAJESTY THE QUEEN

And

ALICIA ANN MURPHY

Publication Ban: Information contained in paragraphs 12, 16-18 has been redacted pursuant to s. 648 of the *Criminal Code*.

Before: Mr. Justice L.F. Gower

Appearances:

David McWhinnie — Counsel for Crown
Jennifer Cunningham — Counsel for the applicant

RULING
(*Rowbotham/Fisher* Applications)

INTRODUCTION

[1] The accused is charged with second-degree murder. She is applying for a conditional stay of proceedings until the Crown agrees to fund her chosen counsel, Jennifer Cunningham. This is known as a *Rowbotham* application, based on the case of the same name decided by the Ontario Court of Appeal in 1988: *R. v. Rowbotham*, (1988), 25 O.A.C. 321 (C.A.)). In the alternative, the accused applies for what is known

as a *Fisher* order, based on the case of *R. v. Fisher*, [1997] S.J. No. 530 (Q.B.), that Ms. Cunningham be appointed and funded by the Crown as her lawyer. Both applications are based on the premise that the accused will likely not receive a fair trial unless her chosen counsel represents her, and that this will constitute a breach of her constitutional right to a fair trial in accordance with the principles of fundamental justice, as provided in ss.7 and 11(d) of the *Charter of Rights and Freedoms.*

[2] In my view, the essential issue here is whether the accused has been provided with a genuine choice about the counsel she wishes to represent her on this very serious charge, for which she faces a sentence of life imprisonment if found guilty.

BACKGROUND

[3] The accused is charged that she committed the second degree murder of Evangeline Billy on June 22, 2008 in Whitehorse, Yukon. She was arrested on the charge on June 23, 2008, and was detained in custody pending her trial. The accused was tried before this Court sitting with a jury between October 13 and 27, 2009. The jury returned a verdict of guilty.

[4] The accused appealed her conviction. Ms. Cunningham represented her on the appeal. One of the grounds of appeal was that the accused received ineffective assistance from her two trial counsel, which related in turn to a further issue about the late disclosure of her alibi. On June 11, 2014, the appeal was allowed on another ground and a new trial was ordered.

[5] Within a week of the appeal being allowed, the accused returned to the Yukon from the federal penitentiary where she was serving her life sentence, and applied for legal aid for her new trial. She was told by a staff person with the Yukon Legal Services

Society (“Legal Aid”) that she would have to wait until after her bail hearing was completed to receive confirmation of her eligibility for legal aid.

[6] Ms. Cunningham represented the accused at her bail hearing and was successful in obtaining her release on July 3, 2014. As there is no evidence that Legal Aid funded Ms. Cunningham for the bail hearing, and no evidence that the accused had the financial means to retain counsel privately, I infer that Ms. Cunningham acted *pro bono* in that matter.

[7] After her release from jail, the accused met with Legal Aid employee, Phyllis Pritchard, and signed a form in which she indicated that she wanted Ms. Cunningham to continue to be her lawyer.

[8] On July 21, 2014, Ms. Pritchard informed the accused that Donald Campbell, of Kamloops, British Columbia, would be contacting her to work on her case, as the Director of Legal Aid had chosen Mr. Campbell to do some investigation by talking to her, the Crown and her original trial lawyers.

[9] On July 22, 2014, a case management conference was held before Justice Veale. At that time, Crown counsel informed the court that Mr. Campbell had informed him during the previous week that he had been appointed to represent the accused. Neither the accused nor Ms. Cunningham had been contacted by Mr. Campbell at that point, and they were unaware of his appointment by Legal Aid. At the case management conference, Ms. Cunningham asserted that she was counsel of record for the accused and that she would be pursuing the question of who would be representing the accused with Legal Aid.

[10] On July 31, 2014, the accused wrote to the Legal Aid Board of Directors requesting a review of the decision to appoint Mr. Campbell as her counsel, and again asking that Ms. Cunningham be so appointed.

[11] On September 9, 2014, the Board of Directors wrote to the accused upholding the Director's decision to appoint Mr. Campbell as her lawyer. The Board explained that this was primarily for two reasons. First, Mr. Campbell has almost 30 years of experience as a criminal defence lawyer and has specialized in defending murder charges. Second, that he had recently represented a young adult male charged with first-degree murder, at the request of Legal Aid, and that Legal Aid thought he "did excellent work" and "uses common sense when resolving matters". The Board further stated that Legal Aid "is not required to provide a client with their choice of counsel", and noted that Ms. Cunningham had not been appointed or authorized by Legal Aid to assist the accused in her new trial. The Board indicated that the Director had "followed standard practices" in assigning her with counsel. However, if the accused decided to refuse the Board's offer of counsel, then the accused was "free to hire [her] own counsel privately".

[12] [Redacted]

[13] The new trial is scheduled to take place between June 8 and July 3, 2015. I am the assigned trial judge.

[14] The accused filed an affidavit and testified on this application. Within this evidence, she makes a number of points:

1) She deposed that she wants counsel who will zealously defend her at her new trial. The accused says that she was concerned about the language used by the Board in support of Mr. Campbell, i.e. that he "uses common sense when

resolving matters". She deposed that she does not want to 'resolve' her matter, but rather intends to plead not guilty and to fully contest the allegations.

2) The accused was also concerned that Mr. Campbell had apparently identified himself to the Crown as her counsel, during the week prior to the case management conference on July 22, 2014, without having communicated with her in any way. In particular, she noted in her letter to the Board of July 31, 2014, that her lawyer informed her that she had been told by the Crown that it was preparing a plea position to provide to Mr. Campbell, when he had never tried to contact her or speak with her. This also adds to her suspicion that Legal Aid and Mr. Campbell may try to put pressure on her to enter into a plea bargain.

3) The accused said that she is "very mistrustful of the process" of assigning her a lawyer from British Columbia when she already has trusted counsel in Whitehorse. She notes in particular that she expects her counsel will be required to interview numerous witnesses in preparation for the trial, and that resident counsel will have an advantage in that regard.

4) She deposed that she has been "offered no choice of counsel at all", as she is not in a position to hire counsel privately.

5) The accused said that she did not trust her first trial lawyers and that, after that experience, she knows how very important it is to have a lawyer that she has confidence in. She further deposed that she trusts Ms. Cunningham and is very confident in her as her lawyer. She notes in particular that Ms. Cunningham was successful on her behalf on both the appeal and the bail hearing.

6) The accused said she does not want to be pressured to accept a lawyer who does not know her or her case, when she already has counsel who has worked with her for several years and is very familiar with her case. I note here that the time between the jury verdict and the outcome of the appeal was quite considerable.

ALLEGATIONS

[15] The Crown alleges that on June 22, 2008, the accused killed Ms. Billy by striking her in the head with a rock and then drowning her in the Yukon River. The Crown also alleges that the accused partially undressed the deceased to make it appear as if she had been sexually assaulted. The accused and the deceased were acquaintances. The Crown's case rests primarily on the evidence of the accused's sister, Tanya Murphy, and another acquaintance, Rae Lynne Gartner, both of whom are expected to testify that the accused admitted to killing the deceased and trying to stage a sexual assault.

[16] [Redacted]

[17] [Redacted]

[18] [Redacted]

[19] To date, the accused has served over five years in custody on this murder charge.

LAW

[20] In *Rowbotham*, the Ontario Court of Appeal put forward the general proposition that, where the appointment of counsel is essential to ensure that the accused has a fair trial, then the proceedings may be conditionally stayed until such counsel is appointed and the necessary funding arrangements have been put in place. In particular, the Court

stated, at p. 45:

> In our view, a trial judge confronted with an exceptional case where legal aid has been refused, and who is of the opinion that representation of the accused by counsel is essential to a fair trial, may, upon being satisfied that the accused lacks the means to employ counsel, stay the proceedings against the accused until the necessary funding of counsel is provided…

[21] In short, in order for an accused to obtain such a conditional stay, they must demonstrate that:

1) they have been denied legal aid;

2) they cannot afford to fund their own counsel;

3) the charge is serious; and

4) the charge is sufficiently complex that the accused would not have the capacity to deal with it effectively without counsel.

[22] The importance of the right of the accused to retain counsel of their choice was earlier stressed by the Ontario Court of Appeal in *R. v. Speid* (1983), 43 O.R. (2d) 596. At para. 5, the Court stated:

> 5 The right of an accused to retain counsel of his choice has long been recognized at common law as a fundamental right. It has been carried forth as a singular feature of the Legal Aid Plan in this province and has been inferentially entrenched in the Charter of Rights which guarantees everyone upon arrest or detention the right to retain and instruct counsel without delay [s. 10(b)]. However, although it is a fundamental right and one to be zealously protected by the court, it is not an absolute right and is subject to reasonable limitations. It was hoped that these limitations would be well known to the bar, but if not honoured, the court has jurisdiction to remove a solicitor from the record and restrain him from acting. (my emphasis)

[23] *Speid* was quoted with approval in *R. v. McCallen* (1999), 43 O.R. (3d) 56 (C.A.), where the Ontario Court of Appeal emphasized the importance of trust and confidence in the solicitor client relationship. While the Court also confirmed that the right to retain counsel of choice is not absolute, the subjective choice of the client must nevertheless be respected and protected. Because of the importance of this issue to the case at bar, I feel it is necessary to quote rather extensively from the thoughtful judgment of O'Connor J.A., who was speaking for the Court in that case. At paras. 34 through 40, O'Connor J.A. expanded upon the various facets of the solicitor-client relationship and the importance of the choice of counsel:

> 34 There are sound reasons why this right [to choose counsel] was considered to be a fundamental component of the criminal justice system well before the enactment of the Charter and why it was recognized as a right deserving of constitutional protection in the Charter. The solicitor-client relationship is anchored on the premise that clients should be able to have complete trust and confidence in the counsel who represent their interests. …
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> 35 In addition, the relationship of counsel and client requires clients, typically untrained in the law and lacking the skills of advocates, to entrust the management and conduct of their cases to the counsel who act on their behalf. There should be no room for doubt about counsel's loyalty and dedication to the client's case. It is human nature that the trust and confidence that are essential for the relationship to be effective will be promoted and more readily realized if clients have not only the right to retain counsel but to retain counsel of their choice.
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> 36 The reasons why clients may choose one lawyer rather than another may vary widely and will often turn on personal preferences or other factors that do not lend themselves to objective measurement. Professional reputation and competence will no doubt be important factors in the choice of counsel, but it would understate the full nature of the relationship to suggest that the choice be limited to those considerations. The very nature of the right is that the

subjective choice of the client must be respected and protected. Absent compelling reasons involving the public interest, the government and the courts need not be involved in decisions about which counsel clients may choose to act on their behalf.

37 In addition to constituting a valuable personal right to clients, s. 10(b) provides a right that is an important component in the objective perception of fairness of the criminal justice system. Criminal proceedings are adversarial in nature and pit the accused against the authority of the state. Without adequate safeguards the resulting contest may be unfairly weighted in favour of the state. The right to have the assistance of counsel is high on the list of those protections for accused persons which enable them to fully defend the charges brought against them. Including with this fundamental right to counsel, the additional right to choose one's own counsel enhances the objective perception of fairness because it avoids the spectre of state or court interference in a decision that quite properly should be the personal decision of the individual whose interests are at stake and whose interests the counsel will represent.

38 The corollary to this point, which is central to this case, is that the perception of fairness will be damaged, and in many cases severely so, if accused persons are improperly or unfairly denied the opportunity to be represented by the counsel they choose.

39 Although it may be said that in some cases there will not be any practical difference whether an accused is represented by one counsel rather than another, nevertheless, the intangible value to the accused and the symbolic value to the system of criminal justice of the s. 10(b) right are of fundamental importance and must be vindicated when breached.

40 Nevertheless, the right to retain counsel of choice is not an absolute right; it is obviously limited to those counsel who are competent to undertake the retainer and are willing to act. There are two further limitations on the right that are in issue on this appeal: the first is the requirement that counsel be available to represent the client within a reasonable period of time and the second is the requirement that counsel be free of any disqualifying conflict of interest. (my emphasis)

[24] The Ontario Court of Appeal continued with this theme in *R. v. Peterman* (2004), 70 O.R. (3d) 481, where Rosenberg J.A. was speaking for the Court and again approved of what was said about choice of counsel in *Speid*, as well as acknowledging the importance of *McCallen* on the topic. At paras. 26 through 30, Rosenberg J.A. wrote:

> 26 The Charter guarantees to a fair trial and fundamental justice mean that the state must provide funds so that an indigent accused can be represented by counsel where counsel is required to ensure that the accused person has a fair trial. Further, within reason, the court will protect an accused's right to choose his or her counsel. As this court said in *R. v. Speid* (1984), 43 O.R. (2d) 596 at 598:
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> > The right of an accused to retain counsel of his choice has long been recognized at common law as a fundamental right. It has been carried forth as a singular feature of the Legal Aid Plan in this province and has been inferentially entrenched in the Charter of Rights which guarantees everyone upon arrest or detention the right to retain and instruct counsel without delay. However, although it is a fundamental right and one to be zealously protected by the Court, it is not an absolute right and is subject to reasonable limitations.
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> 27 Absent compelling reasons, such as a disqualifying conflict of interest or incompetence, the courts will not interfere with an accused's choice of counsel. Further, the courts will avoid actions that result in accused persons being improperly or unfairly denied the opportunity to be represented by their counsel of choice. See *R. v. McCallen* (1999), 131 C.C.C. (3d) 518 (Ont. C.A.) at 531-32.
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> 28 However, the right of an accused person to be free of unreasonable state or judicial interference in his or her choice of counsel does not impose a positive obligation on the state to provide funds for counsel of choice. See *R. v. Prosper* (1994), 92 C.C.C. (3d) 353 (S.C.C.) at p. 374, *R. v. Rockwood* (1989), 49 C.C.C. (3d) 129 (N.S.C.A.), *R. v. Ho*, [2004] 2 W.W.R. 590 (B.C.C.A.), and *Attorney General of Quebec v. R.C.* (2003), 13 C.R. (6th) 1 (Que. C.A.).

> 29 There would appear to be two exceptions to this general proposition. First, in some unique situations it may be that an accused can establish that he or she can only obtain a fair trial if represented by a particular counsel. In those unusual circumstances, the court may be entitled to make an order to ensure that the accused is represented by that counsel. This was the case in *R. v. Fisher* and the genesis of the so-called Fisher order. But in making the order, Milliken J. recognized that he was faced with a unique case, and he suggested at para. 20 that the circumstances that led him to make the order might not occur in Saskatchewan "in another thirty years".
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> 30 Second, in unusual circumstances, the court may find that the accused simply cannot find competent counsel to represent him or her on conditions imposed by Legal Aid. One would expect those cases to be exceedingly rare. …

[25] One of the more recent cases from the Ontario Court of Appeal on *Rowbotham* applications is *R. v. Rushlow*, 2009 ONCA 461. That is another case where Rosenberg J.A. authored the judgment of the Court. At para. 17, he set out the quote from *Rowbotham* which I included above. Rosenberg J.A. then went on to make a number of important points relevant to the application before me:

1) In a *Rowbotham* application, the court is not engaged in a review of the decision of the legal aid authorities (paras. 18 and 25).
2) Although *Rowbotham* said that it will be the “exceptional case” where a conditional status granted, that does not mean that counsel is only required in exceptional cases. Rather, it is because of the pervasiveness of legal aid that courts will rarely find it necessary to appoint counsel. It is only in that sense that *Rowbotham* orders are exceptional (para. 19).

3) The case must be of “some complexity”, but need not pose unique challenges for the accused. Rather, it must be “sufficiently complex” that counsel is essential to ensure the accused receives a fair trial (para. 24).

4) Trial fairness in the context of a *Rowbotham* application includes both the ability to make full answer and defence and “the appearance of fairness” (para. 39).

[26] Rosenberg J.A.’s exact words on these points are as follows:

> 18 Whether the issue is financial ability or the necessity for counsel, the trial judge in considering whether to appoint counsel is not engaged in reviewing the decision of the legal aid authorities. As this court said in *R. v. Peterman* (2004), 70 O.R. (3d) 481 (C.A.) at para. 22:
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> > [W]hen a court makes a *Rowbothom* [as written] order, it is not conducting some kind of judicial review of decisions made by legal aid authorities. Rather, it is fulfilling its independent obligation to ensure that the accused receives a fair trial.
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> 19 In considering whether to appoint counsel the trial judge is required to consider the seriousness of the charges, the length and complexity of the proceedings and the accused's ability to participate effectively and defend the case. Because of the pervasiveness of legal aid, it will be the rare and exceptional case that the court will find it necessary to appoint counsel. This does not mean that counsel is only required in exceptional cases. Rather, it is the fact that legal aid is available for accused who cannot afford a lawyer that *Rowbothom* orders are exceptional.
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> …
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> 24 In my view, the trial judge applied too stringent a test. This court has never said that a *Rowbothom* order is limited to an extreme case where Legal Aid's decision is completely perverse and there is a substantial possibility of lengthy imprisonment. …Nor need the case be one posing "unique challenges". The authorities hold that the case must be of some complexity, but a requirement of unique challenges puts the threshold too high. It is enough that there is a probability of imprisonment and that the case is sufficiently

> complex that counsel is essential to ensure that the accused receives a fair trial.
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> …
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> 39 The purpose of the right to counsel in the context of a *Rowbothom* case is reflected in the nature of the test itself. Counsel is appointed because their assistance is essential for a fair trial. In my view, fair trial in this context embraces both the concept of the ability to make full answer and defence and the appearance of fairness. (my emphasis)

ANALYSIS

[27] There is no question that the charge of second degree murder is among the most serious in the *Criminal Code*, punishable by a mandatory term of life imprisonment. Further, the Crown does not dispute, for the purposes of this application, that the accused: (1) is unable to afford to pay for counsel on her own; and (2) requires counsel in order to make full answer and defence to the charge. However, Crown counsel submits that the application should fail because it is essentially a challenge to the merits of the Board's decision to uphold the Legal Aid Director's appointment of Mr. Campbell as the accused's defence counsel. Further, given that appointment, the accused cannot maintain that she has been denied legal aid funding. Finally, the Crown submits that the accused has no right to choice of counsel, where that counsel is to be state-funded.

[28] Ms. Cunningham agrees that there is no absolute right to state-funded counsel of choice, but maintains that there is nevertheless an entitlement to choose, subject to certain reasonable limitations. Those limitations include counsel being sufficiently competent to undertake the retainer, being willing and available to act, and being free of any disqualifying conflict of interest: see *McCallen*, at para. 40. Ms. Cunningham says none of these limits are at play in the case at bar.

[29] The governing legislation here is comprised of the *Legal Services Society Act*, R.S.Y. 2002, c. 135, the *Legal Aid Regulations,* C.O. 1976/286, and the *Legal Aid Regulations*, O.I.C. 1987/070 (the "*Regulations*"). My review of this legislation reveals very little pertaining to the question of choice of counsel. Indeed, it is only the 1987 *Regulations*, which seem to contain any potentially relevant provisions. In those *Regulations*, the Legal Services Society is responsible for establishing a "panel" of lawyers who "agree to give legal aid" (s. 3(1)(a)). Section 4 deals with applications by lawyers to be on the panel:

> 4.(1) A solicitor, resident in Yukon, may apply to the director to be on one or more panels.
>
> (2) A solicitor, in applying to be on a panel, shall provide the director with such information as the director may require.

[30] In the case at bar, Ms. Cunningham stated that both she and Mr. Campbell are members of the relevant panel. She raised no issue with the fact that Mr. Campbell is apparently not "resident in Yukon". Indeed, I take judicial notice of the fact that I have witnessed a number of non-resident defence counsel apparently acting on legal aid retainers over the past several years. Accordingly, I am assuming for the purposes of this application that residency is not at issue.

[31] An accused who wishes to obtain legal aid must submit an application form pursuant to s. 12 of the *Regulations*. If the application is accepted, the Director issues a "certificate" to the applicant (s. 23). Pursuant to s. 25, every certificate must state:

a) the date of its issue;

b) the effective date of the certificate;

c) the nature and extent of the services to be provided for the applicant;

d) the amount of the applicant's contributions, if any; and

e) all restrictions or limitations imposed by the Director.

[32] The only provision dealing with the selection of the lawyer who will be representing the applicant is s. 27, which is entitled "Delivery of certificate to applicant" and reads:

> 27. The director shall deliver or mail the certificate to the applicant or the solicitor on the panel who will be representing the applicant.

Nowhere in these *Regulations*, or elsewhere, was I able to discover any provision specifying how the director determines "who will be representing the applicant". I was similarly unable to discover any provision whatsoever touching on the question of choice of counsel by the applicant accused.

[33] Crown counsel argued that the accused's reasons for being distrustful of Mr. Campbell in particular and of the process leading to his appointment in general are vague and highly subjective. He implied that her reaction to Mr. Campbell's appointment is unreasonable. However, as O'Connor J.A. noted in *McCallen*, at para. 36, the reasons why a client may choose one lawyer over another will often turn on factors "that do not lend themselves to objective measurement" and that "the subjective choice of the client must be respected and protected".

[34] Further, the accused here claims to have been ineffectively assisted by her original trial counsel. She was also concerned about the fact that Mr. Campbell had allegedly represented himself to the Crown as her counsel without contacting her beforehand. In addition, the accused was anxious about communications taking place between the Crown and Mr. Campbell about a possible plea bargain, when she intends to

fully contest the murder charge. Finally, she is apprehensive about these things happening in the context of the Board's approval of Mr. Campbell as a lawyer who "uses common sense when resolving matters". Thus, viewed globally, these circumstances make the accused's concern about potentially being pressured into a plea deal objectively as well as subjectively understandable.

[35] Crown counsel also relies heavily on *R. v. Bruha*, 2002 NWTSC 58. In that decision, Vertes J. (also a deputy judge of this Court) was dealing with an application by the accused for the appointment and state funding of a particular defence lawyer, Mr. Brian Beresh, of Edmonton, Alberta. The accused had been committed to stand trial on a charge of manslaughter. He had been represented by Mr. Beresh at his bail hearing and his preliminary inquiry, however he had run out of funds and could not afford to pay further legal fees for the trial. The accused had been approved for legal aid in the Northwest Territories ("NWT") and there were experienced defence counsel willing to represent him on the basis of the legal aid tariff of fees. The accused did not want to be represented by anyone other than Mr. Beresh. Vertes J. denied the application, holding that the accused had not established that his constitutional right to a fair trial would be infringed if he was not represented by Mr. Beresh.

[36] Vertes J. began his analysis by examining the NWT *Legal Services Act*, which required an accused charged with an offence punishable by life imprisonment to "select any lawyer who is resident in the Territories" to act on their behalf. Thus, Vertes J. concluded, at para. 4, that:

> …The accused, while he has a choice of counsel, is limited to choosing counsel resident in the Northwest Territories….

[37] Vertes J. then observed that, although orders appointing counsel are not routine, a determination of whether it is essential to a fair trial to appoint counsel, or any particular counsel (a *Fisher* order), is made on a case-by-case basis. At para. 8, he wrote:

> …[C]ounsel agreed that an order appointing counsel is not to be made as a matter of routine. There must be significant circumstances that make such an order essential to a fair trial: see *R. v. Fisher*, [1997] S.J. No. 530 (Q.B.); and *R. v. Chan*, [2000] A.J. No. 1225 (Q.B.). The determination of whether representation by counsel (and any particular counsel) is essential must be made on a case-by-case consideration: see *Rain* (supra), at para. 67. (my emphasis)

[38] Vertes J. then moved on to the recognition that choice of counsel, when publicly funded, is not an absolute right. At para. 10, this was how he dealt with the principle:

> 10 There was a significant point on which counsel did not agree. Mr. Beresh contended that an accused enjoys a right not just to the effective assistance of counsel but also to a choice of counsel. In his written brief, Mr. Beresh relied on several foreign authorities to support this proposition. He conceded during oral argument, however, that Canadian authority does not go so far. Indeed, Canadian jurisprudence on the issue does not support the proposition that an accused has a constitutional right to publicly-funded counsel of his choice. At the most, an accused's right is to competent publicly-funded counsel [citations omitted]

Later, at para. 42, Vertes J. touched on this issue again, but from a slightly more expansive perspective:

> …In general, I respectfully agree with the comments of Rowe J. in *R. v. D.P.F.*, [2000] N.J. No. 110 (S.C.), at paras. 45-46:
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> > It is clear that an accused does not have an unfettered right to state-funded counsel of his choice. Nor does an accused have a right to unlimited funding for his counsel. What is equally clear is that the court has inherent jurisdiction to appoint counsel at public expense where that is important for a fair trial…. (my emphasis)

Of course, the corollary of this statement by Rowe J., as he then was, is that an accused does have a fettered or limited right to state-funded counsel of their choice. As noted above, this has been repeatedly confirmed in the line of cases from the Ontario Court of Appeal: *Speid*; *McCallen*; *Peterman*; and *Rushlow*.

[39] In *Bruha*, there was no issue with the availability and competence of members of the local bar willing to represent the accused. Further, Vertes J. recognized that the legislation did not require the accused to accept any particular counsel appointed by legal aid. He dealt with this issue at para. 25, as follows:

> …[A] careful reading of the *Legal Services Act* shows that the accused is not compelled to accept any particular lawyer appointed by legal aid. Section 40 entitles him to choose any lawyer resident in the Territories and willing to take on his case. It need not be one selected by the legal aid administrators. I conclude this from the distinction drawn in the statute as between the legal aid director "appointing" lawyers from a panel while an accused under s. 40 may select any lawyer without reference to the panel. But I took from the evidence that the accused has no particular complaint with the lawyer presently appointed by legal aid; he simply wants to be represented by Mr. Beresh and only Mr. Beresh. (my emphasis)

This is in distinction to the case at bar, where the accused is effectively being compelled to accept Mr. Campbell, since she needs a lawyer, but cannot afford one on her own.

[40] Vertes J. was also not persuaded that the case of Mr. Bruha was “unique and exceptional” (para. 29). However, in the case at bar, both counsel agreed that the present situation is unprecedented. I do not believe I have ever seen a situation where a non-resident defence counsel has been appointed to represent an accused who would rather retain a resident, competent and available defence counsel. Indeed, in this case,

the resident counsel also has significant previous experience with the accused and the allegations, having represented the accused successfully both on the appeal and a subsequent bail hearing. While I am cognizant that this application is not a judicial review of the reasonableness of Legal Aid's decision, I believe I can take into account the relative uniqueness of these circumstances.

[41] Another factor that was relevant to Vertes J. in *Bruha* was that no trial date had yet been set and the accused was not in pre-trial custody (para. 33). Thus, there was no impediment to new counsel having sufficient time to acquaint themselves with the accused. Once more, this is in distinction to the case at bar, where a trial date has been set. Although it is almost six months away, there is no evidence before me whether Mr. Campbell is available for those dates. If he is not, then a further adjournment would be required, which would work to the significant prejudice of the accused, who is once more in custody on remand.

[42] Thus, *Bruha* is distinguishable from the case at bar on several points. In my view, the most significant of these is the fact that the accused there had a genuine choice among experienced defence lawyers residing in the NWT. In the case at bar, the accused has been provided with no choice at all. The Board, in its letter of September 9, 2014, suggested that if the accused decided not to accept Legal Aid's offer, then she was "free to hire [her] own counsel privately". Again, I do not want to fall into the trap of reviewing Legal Aid's decision, but I cannot help observing that, in the present circumstances, the Board's suggestion here is simply unrealistic. It does not give rise to a genuine choice on the part of the accused.

[43] Further, Legal Aid's refusal to authorize Ms. Cunningham to act for the accused in this context can be viewed as a *de facto* denial of legal aid. If that is correct, then the accused has satisfied all of the criteria necessary for a *Rowbotham* order. Accordingly, I conclude that I am able to direct a conditional stay of proceedings on the charge of second degree murder, until the necessary funding of Ms. Cunningham is provided.

[44] In the alternative, if I am in error in making a *Rowbotham* order, for the reasons which follow, I find that this case is sufficiently unusual to justify a *Fisher* order appointing Ms. Cunningham in particular as the accused's counsel. I further direct that she be paid by the Crown, as was done by Richard J. in *R. v. Warren*, [1994] N.W.T.J. No. 93 (S.C.).

[45] In *Peterman*, the Ontario Court of Appeal recognized that one of the two exceptions to the general proposition that the state is not obliged to provide funds for counsel of choice is where an accused can establish that she is in a unique situation and can only obtain a fair trial if represented by a particular counsel (paras. 28 and 29). Further, in *Rushlow*, the Court specifically held that "fair trial" in this context embraces both the concept of making full answer and defence and "the appearance of fairness" (para. 39). In addition, the Court in *Rushlow* was satisfied on the facts of that appeal that there had been "a miscarriage of justice…, in that the failure to appoint counsel resulted in an appearance of unfairness". Finally, I note that the same Court stressed in its earlier decision in *McCallen* that the choice of counsel arising from s. 10(b) of the *Charter* "is an important component in the objective perception of fairness of the criminal justice system" (my emphasis).

[46] Once more, I do not wish to be seen as judicially reviewing Legal Aid's decision. Nevertheless, I cannot ignore its impact upon the accused. Ms. Murphy has been

denied choice of counsel by the sole appointment of Mr. Campbell. She is understandably mistrustful of Mr. Campbell and has a pre-existing solicitor-client relationship with Ms. Cunningham. Ms. Murphy has further been told that if she wishes to decline Mr. Campbell's representation, then she is free to hire her own counsel privately, which she cannot do. Nevertheless, the accused requires counsel to defend her on this charge of second degree murder, if she is to have a fair trial. Thus, she is practically unable to retain Ms. Cunningham, who appears to be well-placed to competently and effectively defend her, based on her previous and largely successful representation of the accused. The totality of the circumstances thus give rise to an appearance of unfairness which supports the making of a *Fisher* order.

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GOWER J.