SUPREME COURT OF YUKON

Citation: *R v Nowazek*, 2015 YKSC 64

Date: 20151224
S.C. No. 15-01502
Registry: Whitehorse

Between:

HER MAJESTY THE QUEEN

And

BRIAN GEORGE NOWAZEK

Before Mr. Justice L.F. Gower

Appearances:
Susan E. Bogle — Counsel for the Crown
David C. Tarnow — Counsel for the Accused

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is a *Rowbotham* application, in which the accused, Brian Nowazek, seeks an order staying proceedings pursuant to s. 24(1) of the *Canadian Charter of Rights and Freedoms*, unless the Attorneys General of Canada and/or Yukon provide funding for legal counsel for him on his eight outstanding charges. The charges include accessing and possession of child pornography, possession of an explosive substance, and unlawful possession of several firearms. The evidence against the accused was ultimately obtained following a warrantless search of his home on July 16, 2014. The accused has elected trial by Supreme Court judge alone.

[2] The application is named after the case of *R v Rowbotham* (1988), 25 O.A.C. 321 (C.A.) in which 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 counsel is appointed and the necessary funding arrangements have been put in place. In order to obtain such a conditional stay, the accused bears the onus of demonstrating on a balance of probabilities that:

1) they have been denied legal aid;
2) they cannot afford to fund their own counsel;
3) the charges are serious; and
4) the charges are sufficiently complex such that the accused would not have the capacity to deal with them effectively without counsel.

[3] A *Rowbotham* order will only be made in exceptional cases (*Rowbotham*, p. 69) and the evidentiary burden on the applicant is a heavy one (*R v Black Pine Enterprises*, 2001 BCSC 1849, at para. 2; *Canada (Attorney General) v Seifert*, 2003 BCSC 351). Further, a "stay of proceedings is a last resort, only to be entered in the 'clearest of cases'": *R v Curragh Inc.*, [1997] 1 S.C.R. 537, para. 122. Lastly, the accused does not have an absolute right to state-funded counsel of choice: *R v Murphy*, 2015 YKCA 10, at para. 18.

[4] The accused has provided letters from Yukon Legal Aid confirming that he has been provided with staff lawyers on two separate occasions to represent him and on both occasions, he chose to discharge those lawyers. The accused also appealed Legal

Aid's decision not to provide him with further counsel, and that appeal was denied on November 19, 2015.

ISSUES

[5] The principal issue in this application centres on the denial of legal aid to the accused and the reasons for that; in particular, whether it was reasonable for the accused to discharge the legal aid counsel formerly appointed to represent him. The secondary issue relates to the capacity of the accused to defend himself. I will return to these shortly.

NON-ISSUES

[6] The Crown does not seriously contest the professed inability of the accused to afford his own counsel of choice. The accused has filed two affidavits deposing that he has pension income of $1500 per month, but expenses of about the same amount monthly relating to a total of approximately $33,900 in credit card debt. He also claims that he has to pay $85 per week for canteen food at the Whitehorse Correctional Centre ("WCC"), because he cannot eat with the other inmates due to fear for his personal safety. The accused also deposed that the total value of his personal belongings, including his 1999 motor vehicle, is about $2500. Finally, he claims to have less than $100 in savings and no ability to access credit.

[7] There is also no dispute that the charges facing the accused are serious, particularly because he has prior related convictions. In 1992, he was sentenced to 10 years in jail in the U.S.A. for one charge of attempting to commit molestation of a child and two charges of solicitation of sexual conduct with a minor: *R v Nowazek*, 2009 YKTC 51, at para. 10. Further, in 2009, in the Yukon, the accused was sentenced to a

jail term of 31 months, followed by a three-year probation order, for a single count of possession of child pornography and a number of firearms offences. Indeed, he claims that one of his former Legal Aid counsel informed him that, if convicted on the present charges, the Crown would be seeking to have him designated as a long-term offender.

ANALYSIS

1. Denial of Legal Aid

[8] As stated, the main issue on this application relates to the *Rowbotham* criterion of whether the accused has been denied legal aid. In particular, the question is whether it was reasonable for the accused to have discharged the legal aid counsel formerly appointed to represent him. If it was not, then the accused cannot maintain that legal aid has truly been denied: *R v Gagnon*, 2006 YKSC 52, at paras. 13, 15 and 22.

Discharge of Mr. Campbell

[9] The accused was arrested for the present charges on July 16, 2014. He initially spoke with his former defence counsel, Michael Reynolds, but could not afford to retain him privately. The accused testified that Mr. Reynolds advised him to apply for legal aid.

[10] The accused was then held in custody until his bail hearing on July 24, 2014, following which he was detained. At that time, he was represented by Legal Aid duty counsel, David Christie.

[11] The accused testified that he recalled making his application to legal aid during the second week of his incarceration, although he was not entirely certain of the dates or the timing. In any event, the fact that the accused was represented by duty counsel on July 24, 2014 would suggest that his application to legal aid had not yet been approved and he had not yet been assigned designated counsel.

[12] The accused had a further appearance in Territorial Court on July 30, 2014, at which time he was still represented by Legal Aid duty counsel, Robert Dick. Mr. Dick indicated to the Court that the accused had made an application to obtain counsel. There was no mention of Mr. Campbell. Again this suggests to me that his legal aid application he had not yet been approved.

[13] The accused further testified that about a week after he made his application, Legal Aid informed him that Malcolm Campbell had been designated as his defence counsel. I infer from the court record and the accused's evidence that this information was likely relayed to him on or after July 31, 2014.

[14] On August 13, 2014, the accused again appeared in Territorial Court. At that time he was represented by Legal Aid counsel, Kim Hawkins, who was acting as agent for Malcolm Campbell. She indicated to the court on the record that Mr. Campbell was seeking an adjournment for a period of one week in order to meet with the accused.

[15] On August 20, 2014, the court record indicates that Mr. Campbell appeared in Territorial Court with the accused. Mr. Campbell stated that the accused had retained private counsel, David Tarnow, who was seeking a further adjournment of two weeks (incidentally, Mr. Tarnow is also representing the accused on this *Rowbotham* application). Mr. Campbell was then removed as counsel of record, as the accused had no further need of his services. The accused said nothing on the record on that appearance, although after the adjournment was granted he had a brief conversation with Mr. Campbell off the record.

[16] As it turned out, the accused was unable to successfully retain Mr. Tarnow. Accordingly, he re-qualified for legal aid in March 2015, but ultimately discharged his new designated counsel in September 2015 - a matter which I will return to shortly.

[17] As noted, the accused filed two affidavits on this application. He also testified under oath. In his testimony, the accused stated that he was initially pleased to have been assigned Mr. Campbell as his counsel, because he heard that Mr. Campbell was one of the senior defence attorneys with the legal aid program. However, he deposed in his first affidavit that, following Mr. Campbell's designation as his defence counsel:

> Mr. Campbell… never did visit me or contact me over a period of approximately 6 weeks. I had tried to reach him by phone at least 6 times. I then indicated to Mr. Campbell that this was unacceptable and discharged him as counsel.

[18] The accused testified that during the appearance on August 20, 2014, he did not believe Mr. Campbell was even present. Rather, he said that he remembered going in front of a judge and saying that he would like to try and hire a private attorney because he was getting nowhere with Mr. Campbell or Legal Aid. He also once again confirmed that Mr. Campbell failed to get in touch with him over a period of 5 to 6 weeks, following his designation as defence counsel by Legal Aid.

[19] The court record clearly shows that the accused is mistaken when he testified that Mr. Campbell was not present in court on August 20, 2014, and that it was the accused who addressed the Court and not Mr. Campbell.

[20] Further, I conclude that the accused is also mistaken when he deposed that Mr. Campbell failed to contact him over a period of approximately six weeks. Rather, what the record suggests is that Mr. Campbell was likely designated to act as defence counsel for the accused sometime between July 31 and August 13, 2014, when Ms.

Hawkins appeared as Mr. Campbell's agent. Interestingly, on that same day Ms. Hawkins indicated to the court that Mr. Campbell wanted to meet with the accused over the following week. Nevertheless, the accused apparently determined, according to his own testimony, a few days prior to the appearance on August 20th, that he would be retaining Mr. Tarnow privately and would be discharging Mr. Campbell. That would mean that the time period between Mr. Campbell being designated as the accused's defence counsel, and the accused's decision to discharge Mr. Campbell could not have been more than three weeks in total, and was likely slightly less than that.

[21] I take judicial notice of the fact that one of the first tasks that defence counsel must perform when assigned to represent a particular client is to write to Crown counsel to request the disclosure of the particulars of the evidence against the accused in support of the charges. That request then has to be complied with and the received materials are generally reviewed by defence counsel before meeting with the client. That process can easily take a week or two.

[22] The accused's first affidavit and his testimony clearly suggest that his reason for discharging Mr. Campbell was Mr. Campbell's "unacceptable" conduct in failing to return his phone calls for a period of approximately six weeks. I have already determined that the accused must be mistaken in this regard, in that the period in which Mr. Campbell was retained could not have been longer than three weeks, and was probably less. I have further determined that during that time Mr. Campbell was likely in the process of obtaining Crown disclosure. He further indicated to the accused, through his agent, Kim Hawkins, on August 13, 2014, that he was intending to meet with him over the following

week. Nonetheless, the accused decided to discharge Mr. Campbell only a few days later.

[23] If the accused had the ability to privately retain Mr. Tarnow in the alternative, his decision to discharge Mr. Campbell would not necessarily have been an unreasonable one. However, the record clearly suggests that the accused did not have the financial ability to do so. There were a total of 13 further appearances between August 20, 2014 and March 27, 2015, when new Legal Aid counsel was appointed to represent him. Throughout that period, the accused was detained in custody and had not yet made his election on his mode of trial. The matter was simply in limbo with continual indications by the accused of his intention and hope of retaining Mr. Tarnow, all to no avail. That suggests to me that the accused ought to have been aware of the risk, at the time that he discharged Mr. Campbell, that he may not have been in a financial position to successfully retain Mr. Tarnow. Thus, I conclude that his decision to discharge Mr. Campbell was unreasonable in the circumstances.

[24] I also have other reasons for questioning the accused's credibility on whether his reason for discharging Mr. Campbell was truly related to his determination that Mr. Campbell's delay in contacting him was "unacceptable". The accused testified several times that he never met or talked to Mr. Campbell. This was clearly inconsistent with what he deposed to in his first affidavit and with the fact of the August 20 court appearance. After saying that he had tried to reach Mr. Campbell by phone at least six times, he continued to state under oath in his affidavit: "I then indicated to Mr. Campbell that this was unacceptable and discharged him as counsel". The accused has no satisfactory explanation for this inconsistency.

[25] Further, in his second affidavit, the accused acknowledged that there were some errors in his first affidavit regarding his financial situation. He clarified that his vehicle storage is actually $30 per month, and not $80, as he deposed in his first affidavit. He also clarified that his storage for personal articles is $80 per month and not $30. Finally, he said that the value of his personal property should have been $2000, and not $200, as he deposed in his first affidavit. When I questioned him about these discrepancies, the accused answered that he did not have his reading glasses when he swore his first affidavit, but that by squinting he could read "most of it". When I questioned him further about how he was able to swear that the entire affidavit was true when he had not read the entire affidavit, the accused responded that he trusted his lawyer, Mr. Tarnow, who prepared the affidavit. This suggests to me that the accused does not place a great deal of importance on the value of his oath.

[26] Finally, in his second affidavit the accused deposed that he has had no contact with his family for approximately 27 years. He made the statement in the context of claiming to have absolutely no family that he could call upon for financial assistance. However, the sentencing decision of Ruddy J. in 2009 for the accused's child pornography and firearms offences (2009 YKTC 51) includes the following comments about the accused's family:

> 14 While estranged from most of his siblings and his daughter from a previous relationship as a result of his offences, Mr. Nowazek retains the support of his elderly mother and his sister, Eleanor, who has filed a letter of support on his behalf indicating that, despite her abhorrence for the offences committed by her brother, she is willing to provide support, residency and supervision for Mr. Nowazek. (my emphasis)

[27] When I confronted the accused about this apparent inconsistency, he initially tried to explain by saying that his mother has since died two years ago. This does not explain his statement under oath that he has had no contact with his family for 27 years, when the reasons of Ruddy J. indicate that he had some type of contact with his mother and sister around the time of his sentencing in 2009. The accused then tried to further explain the apparent inconsistency by saying that he had a falling out with his sister after the sentencing and that his reference to "family" in his second affidavit was only with respect to his brothers in Manitoba. Again, this answer was rather nonsensical and does not explain the inconsistency under oath.

Discharge of Ms. Steele and Mr. Coffin

[28] If I am wrong in concluding that the decision of the accused to discharge Mr. Campbell was unreasonable, I would nevertheless find that his decision to discharge the subsequent legal aid defence counsel appointed to represent him in March 2015, Amy Steele and Gordon Coffin, was also unreasonable.

[29] The accused discharged Ms. Steele and Mr. Coffin on the first day scheduled for the commencement of his trial, September 2, 2015. I was the presiding judge. At that time, Ms. Steele was intending to make a *Charter* application to exclude all of the evidence ultimately obtained as a result of the warrantless search of the accused's home on July 16, 2014. As I understand it, if successful, the accused would likely have been acquitted. The notice of application was filed by Ms. Steele on the accused's behalf on July 30, 2015, followed by the filing of written submissions on August 21, 2015, as well as a book of documents and a book of authorities on August 24, 2015.

[30] The accused testified that Ms. Steele came to see him at WCC three times in preparation for his trial. He testified that he found Ms. Steele to be a very congenial young lady and he truly enjoyed talking to her.

[31] The accused also testified that Ms. Steele explained to him that she was working in conjunction with the most senior legal aid attorney, Gordon Coffin. Initially, this appeared to be appealing to the accused, but he testified that he later changed his mind and concluded that Mr. Coffin did not have a good reputation, based upon comments made from fellow inmates and staff at WCC. The accused said nothing about Mr. Coffin's reputation being an issue in either of his affidavits.

[32] The accused was concerned about the warrantless search of his home on July 16, 2014, which eventually resulted in the charges that he is presently facing. He also knew that Ms. Steele was preparing an application for his case and admitted in his testimony that he at least "had an idea" that the application related to the warrantless search. He also testified several times that he was not complaining about his lawyer's lack of work or the effort being put into his case. Indeed, he testified at one point: "It was not the fact that the work wasn't being done" that gave rise to his decision to discharge Ms. Steele and Mr. Coffin. Indeed, the accused testified that he thanked Ms. Steele "very much for her effort".

[33] Rather, the accused deposed in his first affidavit that he became concerned when Ms. Steele told him that she had been called to the bar for only one year and that she was too inexperienced for such a serious case. Although she was being assisted by Mr. Coffin, the accused was also concerned that he had not met Mr. Coffin until the day of the *Charter* application. In his testimony, the accused clarified that he came to the

conclusion that Ms. Steele was too inexperienced “a few days before” the commencement of the trial and that “it was very evident” that Ms. Steele and Mr. Coffin would not be able to put forward his case in the manner that he thought was necessary. However, the accused came to this conclusion without having reviewed the materials filed on his behalf by Ms. Steele, and, on at least on his evidence, without having any particular discussion with her about the nature of the *Charter* application.

[34] I reviewed the materials filed by Ms. Steele at the time they were filed, in anticipation of hearing the application. Without prejudging the merits of the application, I have no hesitancy in saying that Ms. Steele’s work was competent and professional.

[35] The accused also changed his mind about Mr. Coffin’s reputation without talking or meeting with him, and this was based solely upon comments he heard at the jail. As I noted in *Gagnon*, cited above, at para. 16, Mr. Coffin is a senior member of the Yukon’s criminal defence bar, with now close to 30 years of experience. Even if the accused had some reason to doubt Mr. Coffin’s abilities, he has no right to state-funded counsel of his choice, to the “best around”, or “Nobel level” counsel; rather he is entitled to competent counsel with necessary experience to ensure that his answer to the allegations is made available to the court: *R v Cai*, 2002 ABCA 299; *Seifert*, cited above; *R v Beauchamps* [*R.C. v Québec (Atty. Gen.)*], 2002 SCC 52. The accused is not entitled to a perfect trial, nor even removing all risk of an unfair trial: *Cai*.

[36] Further, when the accused discharged Ms. Steele and Mr. Coffin, he also had to have known that he did not have the financial resources to retain private counsel in the alternative. As stated above, he dithered around for several months unsuccessfully

attempting to retain Mr. Tarnow between the end of August 2014 and the end of March 2015, and there had been no improvement in his financial circumstances since then.

[37] The accused also had no reason to think that Legal Aid would designate yet another lawyer to represent him.

[38] Therefore, the decision to discharge Ms. Steele and Mr. Coffin was reckless and unreasonable.

2. Capacity to Defend Himself

[39] The accused holds a bachelor's degree in macro-economics from the University of Winnipeg as well as a degree in political science from the University of Manitoba. At one time he had plans to pursue a Master's degree in economics. In 1975, the accused he was employed with the New Democratic Party as an economic researcher. He is also a journeyman gunsmith, having completed a three-year training program from 1979 to 1982, in Colorado.

[40] The accused also has some experience with the criminal justice system in both the United States and the Yukon.

[41] The trial judge also has an obligation to assist an unrepresented accused: *Black Pine*, cited above. In *R v Keating* (1997), 159 N.S.R. (2d) 357, at para. 21, the Nova Scotia Court of Appeal touched on this point referring with approval to the Ontario Court of Appeal in *McGibbon*, as follows:

> 21 In addition, the trial judge should have considered the court's obligation to assist an unrepresented accused during trial and whether, in fulfilment of that obligation, his assistance would be adequate to address Mr. Keating's needs. In *R. v. Kennie* (1993), 121 N.S.R. (2d) 91 at p. 97, this Court approved the following comment by Griffiths, J.A. in *R. v. McGibbon* (1988), 45 C.C.C. (3d) 334 (Ont.C.A.) at p. 347:

> Consistent with the duty to ensure that the accused has a fair trial, the trial judge is required within reason to provide assistance to the unrepresented accused, to aid him in the proper conduct of his defence, and to guide him throughout the trial in such a way that his defence is brought out with its full force and effect. How far the trial judge should go in assisting the accused in such matters as the examination and cross-examination of witnesses must of necessity be a matter of discretion.

[42] While the *Charter* application may well be the accused's main defence, and while it is no doubt complex, the materials paired by Ms. Steele, and responded to by the Crown, are still on the court file and will be accessible to the trial judge. Therefore, the accused has a diminished need for counsel with respect to what appears to be the main issue in the case.

CONCLUSION

[43] This case is very similar to *Gagnon*, cited above. In that case, Mr. Gagnon had not been denied legal aid. Rather he had been approved and assigned not one but two counsel, and he fired them both unreasonably. Accordingly, I stated at para. 22:

> An accused who acts unreasonably or capriciously in firing lawyers provided to him or her by a legal aid plan, cannot be said to fall within the category of "exceptional" cases which *Robotham* was intended to address. In the same vein, if such an accused is acting unreasonably, it is difficult to see how the result - of being forced to proceed to trial without counsel - could be unfair or unjust. If the accused lacks the means to employ counsel because of his or her own blameworthy conduct, then there is no reason he or she should receive the benefit of yet further state-funded counsel.

Those comments are directly applicable to the case at bar.

[44] The application is denied.

[45] In the event that Mr. Nowazek does find himself facing a long-term offender application, I would urge Legal Aid to reconsider its position. Failing that, I expect that Mr. Nowazek may be in a position to file a further *Rowbotham* application in that context.

GOWER J.