

I. INTRODUCTION

- [1] Chris Bishop is a 22 year old man charged with three counts of first degree murder and two counts of attempted murder. The incident that led to these deaths is alleged to have occurred on January 6, 2007 in Cambridge Bay, Nunavut. Cambridge Bay is a small isolated community on the north coast of Canada with a population of about 1,500 people. The incident, the charges, and the ongoing delay in hearing the case continue to have a serious impact on the community.
- [2] Mr. Bishop has been approved for legal aid coverage on these charges by the Legal Services Board (LSB).
- [3] A senior Toronto lawyer has applied to the Court to be appointed as Counsel, either through the legal aid plan or outside of the legal aid plan, pursuant to *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1, [1989] 35 C.R.R. 207, 1988 CanLII 147 (ON C.A.). The material indicates this lawyer is willing to work at legal aid rates with additional reimbursement for accommodation, transportation and meals. Mr. Bishop has requested that this lawyer represents him on these serious charges.
- [4] The Executive Director of the LSB and the Crown oppose this appointment.
- [5] It is disappointing that with the extreme shortage of lawyers in Nunavut, the LSB has been unable to resolve this case without resorting to the Courts, even when at least two senior Nunavut lawyers have supported the appointment of the Toronto lawyer.
- [6] This judgement is difficult to write – the resident Judges are perhaps too aware of the extreme workload carried by resident lawyers and legal aid lawyers in Nunavut. Airing the growing pains of the Nunavut bar and the political machinations of the assignment of resident and non-resident lawyers to cases and circuits does not increase the reputation of the administration of justice in Nunavut. We are all aware that if a lawyer assigned to a circuit has a personal problem or family health crisis, the LSB falls into crisis. Few lawyers are available for emergency appointments to circuits and many of the lawyers appointed in those circumstances are not resident in Nunavut. As

much as possible, anonymity has been used in this judgement to deflect any suggestions or comments about individual lawyers. It is unfortunate and disappointing that common sense and recognition of the limited pool of Nunavut lawyers did not prevail to allow this matter to be resolved.

II. CHRONOLOGY RELATING TO THE STATUS OF COUNSEL

- [7] Mr. Bishop was arrested on January 6, 2007 and has been in custody since that date. A lawyer from the Iqaluit Maliiganik Tukisiiniakvik Legal Aid Clinic approached Mr. Bishop on January 19, 2007 to discuss his choice of counsel pursuant to the Nunavut Legal Aid Plan. A senior lawyer who lives and works part-time in Nunavut was appointed to act for Mr. Bishop on January 23, 2007. The matter was before the Court on February 8, 2007. The assigned lawyer was present and a date for a preliminary hearing was set for September 24, 2007 in Iqaluit. Three weeks were set aside for the preliminary inquiry. The matter was set to proceed in Iqaluit and not Cambridge Bay for a number of reasons.
- [8] On about January 29, 2007, Mr. Bishop spoke to a Toronto lawyer after Mr. Bishop's father had contacted the lawyer independently. In the discussions that took place around that time, the lawyer from Toronto supported the legal aid lawyers, recommending that Mr. Bishop continue to be represented by them.
- [9] In May, Mr. Bishop indicates in his affidavit that "no one was looking into his case" and he contacted the Toronto lawyer again, offering to pay his expenses to come to Iqaluit to interview him. The lawyer agreed to come and charge no fee other than expenses. He was obviously in touch with the existing assigned lawyers because he received disclosure from them to review before the interviews took place. He conducted an extensive interview which he later had transcribed and offered to make available to any lawyers who may be appointed to act on behalf of Mr. Bishop. Mr. Bishop is convinced that the Toronto lawyer would best represent his interests.
- [10] During the month of June 2007 there was significant contact between counsel previously appointed to act on behalf of Mr. Bishop and counsel from Toronto.

[11] According to the affidavit of the Executive Director of the LSB, on approximately June 15, 2007, a senior, ethical and highly-respected lawyer who held some authority with the LSB, confirmed and supported the change of counsel to the Toronto lawyer. Within a few weeks, the Executive Director of the LSB overruled the senior lawyer and Mr. Bishop was without a lawyer again.

[12] As a result of the issues surrounding this application, on September 13, 2007 the assigned lawyer withdrew from the record and the preliminary hearing was adjourned. The preliminary hearing has not been reset pending the appointment of counsel.

[13] Thereafter, the Executive Director of the LSB began to contact lawyers in Nunavut to see who might be willing to act for Mr. Bishop. As a result of various conversations, two senior lawyers spoke to Mr. Bishop. Neither of the lawyers wished to act for him, nor did he to wish to have them as counsel. As of the date of this application there is one private law firm with two partners resident in Nunavut prepared to take on Mr. Bishop's case. The Toronto lawyer continues to be prepared to act for Mr. Bishop under the legal aid rates.

III. ARGUMENTS

[14] The Toronto lawyer argues that Mr. Bishop needs a lawyer who is prepared to vigorously defend him. He argues the case is complicated in terms of presenting a self-defence argument. The possible consequences to Mr. Bishop upon conviction are significant in the extreme. The Toronto lawyer argues that he is only making this case to deal with a situation that was presented to him.

[15] Counsel for LSB argues that there is no statutory or common law authority for the Court to order that the LSB appoint or pay for a particular lawyer in any particular case. He argues that because legal aid has been approved for Mr. Bishop, the Rowbotham application is precluded.

[16] Counsel for the Regional Director of Public Prosecutions agrees.

IV. LEGISLATION, DEFINITIONS AND CASES

[17] The *Legal Services Act*, R.S.N.W.T. 1988, c. L-4, as duplicated for Nunavut by s. 29 of the *Nunavut Act*, S.C. 1993, c. 28 is the applicable legislation that deals with the provision of lawyers to indigent clients and sets out the parameters for running the legal aid program in Nunavut.

[18] Section 7 of the *Act* sets out the objects of the LSB:

“7. The objects of the Board are
(a) to ensure the provisions of legal services to all eligible persons;
(b) to ensure that the legal services provided and the various systems for providing those services are the best that circumstances permit; and
(c) to develop and co-ordinate territorial or local programs aimed at
(i) reducing and preventing the occurrence of legal problems, and
(ii) increasing knowledge of the law, legal processes and the administration of justice.
(iii) providing public education and outreach with respect to human rights.”

[19] The *Act* also sets out the requirements for counsel to join the panel of legal aid lawyers in Nunavut. These lawyers are eligible to be assigned to circuits and general cases. It is notable that there is no requirement that members of the legal aid panel reside in Nunavut. Section 34 states:

“34.(1) The Board may establish and maintain the number of panels of lawyers that the Board considers fit and may appoint lawyers to a panel.
(2) Any lawyer may apply for appointment to a panel who is
(a) in private practice;
(b) prepared to provide legal aid; and
(c) not under a contract of service or for services entered into with the Board or a regional committee under which the lawyer is required to provide legal aid in a specified region or area.”

[20] Section 40 of the *Act* sets out the choice of counsel provisions:

“40. Where an eligible person is charged with an offence, other than a prescribed offence, for which the maximum penalty is life imprisonment, the eligible person may for his or her defence select any lawyer who is resident in the Territories and prepared to act on behalf of the eligible person.”

- [21] The objects of the LSB focus on services provided to clients. The legislation should be read and interpreted in the context of the objects and direction provided in s. 7.
- [22] The *Act* came into force in Nunavut on April 1, 1999. It was not newly considered legislation relevant to the circumstances of Nunavut, but was mirrored legislation copied directly from the Northwest Territories and properly reflecting the status of the development of the bar in that territory. The particular circumstances of the Nunavut bar were not addressed when the legislation was adopted.
- [23] It is a regular occurrence that non-resident lawyers appear before the Court on circuits as legal aid duty counsel. It is an interesting anomaly that an out-of-territory lawyer can be a member of the Nunavut legal aid panel and assigned circuits, yet an individual charged with the most serious charges is limited to resident Nunavut counsel.
- [24] When a person is charged with an offence carrying a life sentence, they are entitled to their choice of counsel. To help understand the concept of choice of counsel, it is useful to look at definitions of “choice” in *The Oxford English Dictionary*, 2d ed.:

“choice ... **1. a.** The act of choosing; preferential determination between things proposed; selection, election. ... **2. a.** The power, right, or faculty of choosing; option. ... **4. a.** Abundance and variety to choose from; scope or field of choice.

...

choice ... **1.a.** Worthy of being chosen, select, exquisite, of picked quality of special excellence. **2.** Select with care and judgment; well-chosen, fit, appropriate.”

- [25] *The American Heritage Dictionary of the English Language* defines “choice”:

“choice ... n. **1.** The act of choosing; selection: election. **2.** The power, right, or liberty of choosing: option. **3.** The person or thing chosen **4. a.** A sufficient number or variety from which to choose. **b.** A supply chosen with care. **5.** That which is best or preferable above others; the best part. **6.** An alternative.”

[26] A number of cases have been filed and considered. This is not strictly a Rowbotham application. In *Rowbotham*, the Ontario Court of Appeal sets the parameters of its judgement at 65-66:

“The right to retain counsel, constitutionally secured by s. 10(b) of the Charter, and the right to have counsel provided at the expense of the state are not the same thing. The Charter does not *in terms* constitutionalize the right of an indigent accused to be provided with funded counsel. At the advent of the Charter, legal aid systems were in force in the provinces, possessing the administrative machinery and trained personnel for determining whether an applicant for legal assistance lacked the means to pay counsel. In our opinion, those who framed the Charter did not expressly constitutionalize the right of an indigent accused to be provided with counsel, because they considered that, generally speaking, the provincial legal aid systems were adequate to provide counsel for persons charged with serious crimes who lacked the means to employ counsel. However, *in cases not falling with provincial legal aid plans*, ss. 7 and 11(d) of the Charter, which guarantee an accused a fair trial in accordance with the principles of fundamental justice, require funded counsel to be provided if the accused wishes counsel, but cannot pay a lawyer, and representation of the accused by counsel is essential to a fair trial.

Indeed, the trial judge in the present case appears to have been of the opinion that in exceptional cases a trial judge might be empowered to appoint counsel for an indigent accused and order Legal Aid to compensate counsel. However, as previously noted, he dismissed Mrs. Kononow’s application on the ground that she had not satisfied him that she could not afford to retain counsel.” [emphasis in original]

[27] The Toronto lawyer is initially asking to be appointed by the LSB as the legal aid lawyer for Mr. Bishop. Mr. Bishop has been approved for legal aid coverage. *Rowbotham* dealt with the appointment of counsel when the defendant was not eligible for legal aid. *Rowbotham* sets out important criteria to be considered for state-appointed and funded counsel to be paid by the prosecuting authority.

[28] Courts in the Northwest Territories have been asked to deal with similar applications on a number of occasions. *R. v. Bruha*, 2002 NWTSC 58, [2002] N.W.T.J. No. 72 (QL), identifies a number of factors that are important to consider. In that case the lawyer was asking for a Rowbotham appointment whereby he would be appointed by the Court and would be paid a negotiated rate, not the rate provided by the LSB of the Northwest Territories. Justice Vertes invites judges who are considering similar applications to take into account certain factors:

- (i) indigence;
- (ii) denial or unavailability of legal aid;
- (iii) seriousness of the charge;
- (iv) complexity of the case; and
- (v) capacity of the accused to represent himself.

[29] In the *Bruha* case, the accused was eligible for legal aid and resident counsel were available and prepared to act for him. Out-of-jurisdiction counsel was therefore not appointed.

[30] *R. v. Warren*, [1994] N.W.T.J. No. 93 (S.C.) (QL), was a case where non-resident counsel was appointed and funded outside the parameters of the legal aid plan because the trial date was fast approaching, the case was well known in Yellowknife, and many local lawyers had been involved in the surrounding circumstances of the incident that was before the Court for trial. Any alternative arrangements would have resulted in significant delay.

[31] The case of *R. v. Gero*, [2002] O.J. No. 3409 (QL), 2002 CarswellOnt 5648 (Sup. Ct.), is instructive. No lawyers in a particular region of Ontario were prepared to work under legal aid rates. The prosecuting agency was required by the Court to pay for counsel selected by the accused. The charge was assault causing bodily harm and the accused if convicted would be incarcerated. The Ontario legal aid plan has different procedures than Nunavut.

[32] Returning to the case before the Court, this is not in the nature of the Rowbotham application because legal aid has been approved. The accused is clearly indigent. It also can be distinguished from other cases cited because the Toronto lawyer is content to take on this case at legal aid rates.

[33] There is no doubt that the trial will be complex, and the consequences significant in terms of Mr. Bishop's future. Self-defence is one of the most legally complicated issues before the courts. It is essential that Mr. Bishop have legal representation to ensure he has a fair trial.

[34] The issue facing the Court is whether or not the LSB has met its legal obligation to provide an indigent accused with proper choice for his counsel.

V. ANALYSIS

[35] It is fair in the circumstances of this case for the Court to take judicial notice of the fact that we do not have enough lawyers working in Nunavut to complete all the work that is required. The private practicing lawyers resident in Nunavut are dedicated, competent and desperately busy. Their calendars are booked solid. It is difficult to set dates for trials, meetings and in some cases difficult to get responses to requests for basic information because lawyers are on circuit and in court all too often. Occasionally there are not enough lawyers for the regular circuits and if any of the local lawyers have health or family problems, the legal aid system falls into crisis immediately.

[36] There are a number of lawyers who work for the Nunavut LSB. They are competent, enthusiast and young. There are perhaps six lawyers in private practice who work and live in Nunavut. There are lawyers from Nova Scotia, Yellowknife, Edmonton and Ontario who do the occasional circuit or do many circuits. The bar in Nunavut is just in the beginning stages of development. I was unable to find in the *Legal Services Act or Regulations* a definition of a resident Nunavut lawyer. There are many strongly held and contradictory opinions about who is a resident lawyer in Nunavut.

[37] Having regard to the dictionary definitions of “choice,” choice involves a selection or a preferential determination from many. It requires a variety or sufficient number from which to choose. The LSB therefore has an obligation to provide Mr. Bishop, or anyone else charged with an offence that falls within s. 40 of the *Legal Service Act*, a solid list containing alternatives and a reasonable number or variety of lawyers who are qualified and prepared to act as senior counsel on murder cases or other cases of a similarly serious nature. In this instance, the system that was used to provide Mr. Bishop with the information required to make a choice was haphazard and unsatisfactory. Having the Executive Director call around to various lawyers to find out if they might be willing to take the case is an inappropriate way to consider a choice of counsel appointment on any serious criminal charge. Clients who may not be sophisticated in the criminal process must be provided with the information that is needed to make a well-informed decision about their legal representation.

[38] This process is not about finding a lawyer who will take the case; it is about having a system in place to provide clients with information so they can make a choice as to who will represent them.

[39] The excerpt of *Rowbotham* quoted previously is instructive. It suggests that in exceptional cases a trial judge might be empowered to appoint counsel for an indigent accused and order legal aid to pay.

[40] Let us turn for a moment to the legislated object s. 7(b) sets out in the *Legal Services Act*:

“(b) to ensure that the legal services provided and the various systems for providing those services are the best that circumstances permit”

[41] The Board is directed in s. 8(b) to “make every endeavor to attain the objects of the Board.”

[42] It is an intriguing anomaly that out-of-jurisdiction lawyers may be accepted for the general legal aid panel but the LSB is prevented from looking outside the jurisdiction to prepare a proper choice of counsel list.

VI. CONCLUSION

[43] Reading the various sections together, invoking common sense and recognition of the state of the bar in Nunavut, the LSB has not and is not fulfilling its legislated mandate to provide indigent clients with a choice of counsel.

[44] The LSB has a duty to Mr. Bishop through its legislated objects. The LSB must provide Mr. Bishop with a choice of counsel prepared to act on his behalf. They have not done that to date. In June 2007 the Toronto lawyer was told by an agent of the LSB that he would be appointed counsel. Since then, LSB has backed out of that commitment and struggled to comply with its obligations. It is no longer reasonable to give the LSB time to comply with the *Legal Services Act* and require them to provide to Mr. Bishop a proper list of qualified and experienced senior counsel.

[45] The circumstances of the Nunavut bar, the LSB, and the delay leading up to this application all contribute to the finding that this is an exceptional case where the Court is compelled to require the LSB to pay for Mr. Bishop's lawyer.

[46] Mr. Bishop has requested and has faith in the Toronto lawyer. The Toronto lawyer is prepared to proceed; he has reviewed disclosure and interviewed the client. Toronto counsel has acted in good faith throughout these difficult proceedings. New counsel would have to start at the beginning and too much time has passed to permit any further delays. This matter must proceed with all due haste. The LSB shall appoint the Toronto lawyer at legal aid rates with compensation for airfare, meals and accommodation with a cap that, if not agreed, can be argued in front of me.

[47] This matter will proceed forthwith to preliminary hearing.

[48] There are some concerns that as a result of this decision accused persons in Nunavut will think they can hire any lawyer from across Canada to represent them in Nunavut. There are many advantages to having local Nunavut counsel appointed. Local lawyers are familiar with the judges, the communities, local juries, cultural issues and local court processes. Lawyers from outside the North may not be aware of the local practices. Once the LSB establishes a proper protocol for choice of counsel with an appropriate number of lawyers on the list, accused persons in Nunavut will have no basis for complaint and will be required to choose from the list provided.

Dated at the City of Iqaluit this 1st day of April, 2008

Justice B. Browne
Nunavut Court of Justice