COURT OF APPEAL FOR YUKON

Citation: *R. v. Murphy*, 2013 YKCA 09

Date: 20130611
C.A. No. 09-YU646
Registry: Whitehorse

Between:

HER MAJESTY THE QUEEN

Respondent

And

ALICIA ANN MURPHY

Appellant

Before: Mr. Justice L. F. Gower

Appearances:

Jennifer Cunningham	Counsel for the Appellant
Keith Parkkari	Counsel for the Respondent
Nils Clarke	On behalf of Yukon Legal Services Society

REASONS FOR JUDGMENT

[1] This is an application under s. 684 of the *Criminal Code* for the appointment and payment of counsel for the appellant. The appellant was convicted of second-degree murder on October 27, 2009, and was sentenced to imprisonment for life. She filed a notice of appeal on November 30, 2009.

[2] I understand there were then some delays in obtaining Legal Aid approval for the appeal, as well as in receiving transcripts and an appeal book. The Clerk's Notes on this appeal indicate that as of February 25, 2010, private defence counsel, Jennifer

Cunningham, had been assigned to prepare an opinion for Legal Aid (the "Yukon Legal Services Society" or "YLSS") on the merits of the appeal.

[3] As I understand it, Ms. Cunningham eventually began acting as counsel of record for the appellant. However, because of uncertainty regarding the funding issue, she has for the most part been acting on a *pro bono* basis to date. That is to her credit and is in the finest traditions of the bar.

[4] As of March 2, 2011, Ms. Cunningham indicated a potential application to adduce fresh evidence. As of September 14, 2012, Ms. Cunningham was still perfecting the fresh evidence application. On January 21, 2013, Ms. Cunningham filed a notice of application for leave to introduce fresh evidence which raised the issue of ineffective assistance of counsel at the appellant's trial. The s. 684 application was filed at the same time.

[5] The initial s. 684 application was addressed before me on February 19, 2013, but was dismissed because the appellant had not established that she had not been granted legal aid. However, I then indicated to Ms. Cunningham that she could renew the application at a future time.

[6] Ms. Cunningham did so on April 19, 2013, however the application was adjourned until June 4th in order to allow Ms. Cunningham to obtain further information about YLSS.

[7] At her trial, the appellant was represented by two counsel who are staff lawyers with YLSS. The ineffective assistance of counsel issue involves an allegation by the appellant that her trial counsel failed to investigate and disclose the details of an alibi available to her the night the deceased died. Each of the former defence counsel have now filed affidavits in essence deposing that the alibi was not pursued because the

appellant did not specifically provide instructions to that effect until the trial was underway. Accordingly, the appellant deposes that the details of the alibi were not disclosed to the Crown until mid-trial. Ms. Cunningham intends to cross-examine each of the former defence counsel on their affidavits in preparation for the hearing of this appeal.

[8] In a letter dated November 6, 2012, the YLSS Executive Director, Nils Clarke, wrote:

> "…YLSS agrees that our organization could be perceived to be in a conflict with respect to this file in light of the approach appeal counsel will be taking."

[9] However, the YLSS board of directors subsequently changed their position on the conflict issue. In his letter of April 18, 2013, Mr. Clarke wrote:

> "The Yukon Legal Services Society ("YLSS") Board of Directors has had an opportunity to meet and has made the decision that they will not prejudge themselves to be in a conflict with regard to the administration of a budget for Ms. Murphy's appeal. They are prepared to strike a High Cost Case Committee ("HCCC"), which would consist of three YLSS Board Members and one member of the Legal Aid Ontario Big Case Management program."

In the same letter, Mr. Clark indicated that he anticipated that Ms. Murphy would be eligible for legal aid coverage should she re-apply for assistance.

[10] Ms. Cunningham submits that the potential for a conflict of interest arises from the fact that the appellant's trial counsel are both employees of YLSS, and that, because she is a private lawyer, she will have to seek approval of a budget for the appeal from YLSS. Ms. Cunningham argues that both of the appellant's trial counsel are now in an adversarial position *vis-à-vis* the appellant. Therefore, she does not want to be put in the position of having to divulge information which would otherwise be subject to litigation

privilege, e.g. appeal strategy, to the YLSS board members on the High Cost Case Committee (the "HCC Committee") for the purpose of justifying the appeal budget. Further, Ms. Cunningham anticipates that, because of the additional time and resources which will be necessary to argue the ineffective assistance of counsel issue, the cost of this appeal could be approximately double that of an average second-degree murder appeal. Finally, Ms. Cunningham submitted that the YLSS board members involved in reviewing and monitoring the appeal budget might be perceived as wanting to protect both their employees and their organization.

[11] Ms. Cunningham notes that when *amicus curiae* (*"amicus"*) are appointed in the Yukon, the practice is that the federal Crown's office will pay the fees and disbursements of the *amicus,* but that, to avoid any conflict of interest, the budget review and approval is conducted by Yukon Government. That avoids the potential problem of having the Crown approve, for example, whether or not a certain *Charter* application should be made, a particular expert called, or additional time required to prepare for the examination of witnesses by the *amicus.* Thus, argues Ms. Cunningham, the prospect of YLSS overseeing the budget in this appeal is analogous to the Crown overseeing the budget of an *amicus* in a criminal trial. She submits that in both cases the overseer would be "adverse in interest" to either the appellant or the accused, as the case may be.

[12] At the hearing of the s. 684 application on June 4, 2013, Mr. Clarke appeared to answer any questions from counsel or the Court. I canvassed with him whether YLSS was prepared to consider a process similar to the approval of *amicus* budgets for this appeal. Perhaps not surprisingly, and for what I expect are sound fiscal reasons, he indicated that it was not.

[13] Section 684 of the *Code* reads as follows:

> "684. (1) A court of appeal or a judge of that court may, at any time, assign counsel to act on behalf of an accused who is a party to an appeal or to proceedings preliminary or incidental to an appeal where, in the opinion of the court or judge, it appears desirable in the interests of justice that the accused should have legal assistance and where it appears that the accused has not sufficient means to obtain that assistance.
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> Counsel fees and disbursements
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> (2) Where counsel is assigned pursuant to subsection (1) and legal aid is not granted to the accused pursuant to a provincial legal aid program, the fees and disbursements of counsel shall be paid by the Attorney General who is the appellant or respondent, as the case may be, in the appeal.
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> Taxation of fees and disbursements
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> (3) Where subsection (2) applies and counsel and the Attorney General cannot agree on fees or disbursements of counsel, the Attorney General or the counsel may apply to the registrar of the court of appeal and the registrar may tax the disputed fees and disbursements"

[14] The Crown does not dispute that "it appears desirable in the interests of justice" that the appellant should have counsel for the appeal. Nor does Crown counsel challenge the assertions that the appellant does not have sufficient means to obtain legal assistance for her appeal, that the appeal is not without merit, or that the appellant cannot effectively present the appeal without the assistance of a lawyer: see *R. v. Bernardo* (1997), 105 O.A.C. 244.

[15] If counsel is appointed under s. 684(1) and legal aid is not granted, then pursuant to s. 684(2) the federal Crown must fund the appeal.

[16] However, Crown counsel cautioned that the Court of Appeal is a court of statutory (and not inherent) jurisdiction, and that, sitting as a judge of the Court of Appeal on this application, my jurisdiction is limited to what s. 684 allows. I accept that submission.

[17] In *R. v. Roussin*, 2011 MBCA 67, MacInnes J.A. reviewed several judicial authorities on the overall scheme under s. 684. In particular, the specific issue before him was the meaning of the words "and legal aid is not granted to the accused pursuant to a provincial legal aid program" in s. 684(2). MacInnes J.A. further refined the issue by asking whether, following an order under s. 684(1), the provincial [or territorial] legal aid authority is entitled to consider afresh whether to grant legal aid under s. 684(2).

[18] One of the cases considered by MacInnes J.A. was *R. v. Johal* (1998), 127 C.C.C. (3d) 273 (B.C.C.A.), in which McEachern,C.J.B.C. said, at paras. 24 and 26:

> "… The scheme of the enactment… contemplates that the section will only operate when an accused is not granted legal aid and he or she cannot obtain legal assistance…
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> …
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> I do not think the scheme of s. 684 contemplates a judge assigning counsel after legal aid has already been offered and apparently rejected."

[19] Similarly, at paras. 34 and 35 of *Roussin*, MacInnes J.A. concludes that an appellant must first establish that they have been denied legal aid in order to have counsel appointed under s. 684(1). He also concluded that, following the appointment, the local legal aid program can make a further determination whether to fund the appeal:

> "34 In my opinion, the case law is clear that an accused must attempt to obtain counsel through legal aid before applying to the court for appointment of counsel under

> s. 684(1). And common sense would confirm that, if counsel is appointed through legal aid, a s. 684(1) order would not be granted (at least not to the extent of the legal services to be provided under the legal aid certificate). Thus, it follows that any applicant who succeeds in obtaining an order under s. 684(1) will first have been denied legal aid. That indeed was the case here.
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> 35 In my view, therefore, the failure to grant legal aid as referred to in s. 684(2) following the assignment of counsel under s. 684(1) must refer to a new denial, not to the denial(s) which, of necessity, proceeded [*sic*] the granting of the s. 684(1) order. To conclude otherwise would result in the reference to legal aid in s. 684(2) having no meaning, an interpretation that would be contrary to the presumption against tautology."

[20] Ms. Cunningham argued that *Roussin* is distinguishable because it does not examine the factual situation where it is, for reasons of conflict or otherwise, not appropriate for a legal aid program to be involved in the funding of an appeal. She pointed to two decisions from the Newfoundland Court of Appeal as examples of a situation where a conflict of interest could be a reason to not grant legal aid. In *R. v. Ryan*, 2007 NLCA 6, the Court of Appeal was dealing with an appeal from a denial of Ryan's application for state-funded representation by a specific lawyer for his trial. He was facing charges of second-degree murder and uttering a threat. The accused was dissatisfied with the legal aid staff lawyer originally appointed to represent him, and the Legal Aid Commission then offered the accused a choice between two alternate staff lawyers, both of whom resided outside of St. John's, where the trial was to take place. Ryan rejected that offer for three reasons: he did not want to be represented by a legal aid lawyer, he wanted a particular lawyer from private bar, and he did not want a lawyer located outside of St. John's. The Commission explained that a staff lawyer from St. John's could not be provided due to unspecified "conflict of interest issues." The trial

judge denied the application. Because this was an application for the appointment of counsel at trial, there is no reference in the reasons for judgment to s. 684 of the *Criminal Code*, however the relevant principles appear to be the same. In the result, the Court of Appeal concluded, at para. 7:

> "7 In this case, legal aid has been made available to the accused. Mr. Ryan has not provided any objectively valid reason for refusing the offer made by the Legal Aid Commission. Nothing put forward by Mr. Ryan indicates that he would not receive a fair trial if he were represented by one of the staff solicitors offered by the Legal Aid Commission. The case law supports the conclusion that, in those circumstances, the court will not make an order for counsel of Mr. Ryan's choice to be funded by the Attorney General or the Legal Aid Commission (see, for example: *R. v. William Ryan* (2005), 248 Nfld. & P.E.I.R. 162 (NLCA); *R. v. Howell (D.M.)* (1995), 146 N.S.R. (2d) 1 (NSCA), affirmed [1996] 3 S.C.R. 604; *R. v. Potts* (1995), 136 Nfld. & P.E.I.R. 178 (PEICA); *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1 (ONCA), at pages 65 to 66)."

[21] Ryan was convicted of second-degree murder. On his appeal, he applied again to have a private lawyer appointed to represent him, but this time did so under s. 684. In a decision cited at 2007 NLCA 49, Mercer J.A., referred to s. 684(1) and, like the Manitoba Court of Appeal in *R. v. Roussin*, made a determination that subsection (1) requires the appellant to demonstrate the legal aid has been refused. At para. 3, Mercer J.A. stated:

> "3 That provision was discussed in *R. v. Smith*, 2001 NFCA 38, 156 C.C.C. (3d) 461. Speaking for the Court, Marshall J.A. noted that the assignment of counsel under s. 684 is discretionary and that, as a general rule, an appellant seeking such order must demonstrate that legal aid has been refused, and that the appeal is not frivolous. Thus, in *R. v. Genge (G.W.)* (1992), 101 Nfld. & P.E.I.R. 269 (NLCA), the Court declined to assign counsel where the appellant had failed to apply for legal aid. See also *S.J.T. v. United States of America*, 2003 NLCA 14, 223 Nfld. & P.E.I.R. 108 at para. 3."

[22] Although Ryan again argued that his refusal to accept legal aid counsel was because they were in an unspecified “conflict of interest”, this was rejected by Mercer J.A., who concluded at para. 6, like the earlier panel:

> “… Again, there is no objectively valid reason why the appellant could not seek legal assistance from the Legal Aid Commission. In these circumstances, the appellant having failed to establish that appropriate legal assistance is not otherwise available, it would not be appropriate to appoint counsel pursuant to s. 684(1) of the *Criminal Code*.”

[23] What I understand Ms. Cunningham draws from these *Ryan* decisions is that if the appellant has an “objectively valid reason” for not seeking legal aid, then she has established that appropriate legal assistance is not otherwise available, and counsel should be appointed and paid by the federal Crown pursuant to s. 684(2).

[24] Ms. Cunningham further submitted that, due to the perceived or actual conflict of interest “it is not appropriate that Legal Aid be granted”, and that this constitutes an objectively valid reason for refusing legal aid in the circumstances. The basis for this argument seems to be twofold: first, there is a perception that the YLSS board members on the HCC Committee would want to protect their employees (i.e. the two trial counsel) and their organization; and second, that Ms. Cunningham will be restricted from providing a complete justification for the budget because the board members are adverse in interest and should not be privy to information from the appellant which is subject to litigation privilege.

[25] I cannot agree with the argument that the YLSS board members would necessarily be inclined or be perceived to be inclined to act to protect their staff lawyers. Although

the argument was not well fleshed out, it seems to turn on the potential for a reasonable apprehension of bias. The test for such an apprehension is set out in *Wewaykum Indian Band v. Canada,* 2003 SCC 45, and applies to tribunals as well as to courts:

> [60] In Canadian law, one standard has now emerged as the criterion for disqualification. The criterion, as expressed by de Grandpré J. in Committee for Justice and Liberty v. National Energy Board, supra, at p. 394, is the reasonable apprehension of bias:
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> > ... the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."

[26] In my respectful view, Ms. Cunningham is simply presuming that the board members involved would be inclined to favour their own, as opposed to making their best efforts to ensure that the appellant has a fair and just appeal. There is no evidence before me to support the supposition that a reasonable person fully informed of the circumstances, including the provisions of the *Legal Services Society Act*, R.S.Y. 2002, c. 135 (the "*Act*"), would think it more likely than not that the board members might be biased in favour of their staff counsel. I note for example that pursuant to s. 30(1) of the *Act*, YLSS is not liable for anything done or omitted to be done by a lawyer in the provision of services to an applicant under the *Act.* Therefore, there is no reason for the board members to fear that their interests would be adversely affected by any

wrongdoing by staff lawyers. There is also no reason to presume that the board members would bring to the budget review process anything but their professional best judgment and objectivity. One can reasonably assume that they would have an interest in achieving a just result for the appellant, just as they would have an interest in ensuring that their staff lawyers are conducting trials effectively. The obligation of the board members is to YLSS and not to its individual employees.

[27] The underlying assumption in Ms. Cunningham's argument seems to be that, if the staff lawyers are found to have performed below standard, that somehow that would reflect badly on YLSS. I can accept, for the sake of argument, that it is conceivable that the reputation of YLSS might suffer if its lawyers are found to have been ineffective. However, it seems equally probable that YLSS board members would have an interest in, and indeed an obligation to, root out and expose such a failure, with a view to ensuring that their staff lawyers are acting according to a reasonable standard of care.

[28] In short, the appellant has not persuaded me on a balance of probabilities that there is a reasonable apprehension that the YLSS board members on the HCC Committee would be biased in favour of their staff lawyers, or otherwise would be unduly protective of YLSS, to an extent that would give rise to a perceived or actual conflict of interest.

[29] The second point argued by Ms. Cunningham relating to the appropriateness of legal aid funding for this appeal is that she would be put in the impossible position of having to justify her budget to the HCC Committee, without relaying any information subject to litigation privilege. This assertion is premised on the assumption that the YLSS board members on the Committee will be adverse in interest to the appellant. In my

view, this assumption is unfounded largely for the reasons I just gave above. There is no reason to suppose that the interests of the YLSS Board are necessarily congruent with those of the staff lawyers, as the board's ultimate obligation is to the Society and not its staff. While I accept that the staff lawyers are adverse in interest to the appellant in the context of this proposed appeal, I reject the assertion YLSS or its board members are similarly situated.

[30] Further, I note that s. 29(1) of the *Act* provides that:

> "All information and communications in the possession of the society relating to an applicant for legal aid and their affairs is privileged to the same extent that privilege would attach to information and communications in the possession of a lawyer."

The concern implicit in Ms. Cunningham's submissions on this point is that privileged information might somehow be shared with the staff lawyers and impair her ability to effectively cross-examine them on their affidavits. However, as I read s. 29(1), the board members receiving such privileged information are themselves bound to respect that privilege, which would prevent them from relaying the information to the staff lawyers. Accordingly, Ms. Cunningham's concern here is somewhat unfounded.

[31] In summary, I disagree with Ms. Cunningham's conclusion that it is not appropriate that legal aid be granted to the appellant in this case. Further, since legal aid is potentially available to the appellant, she has not satisfied me that an order for appointment of counsel under s. 684(1) of the *Criminal Code* is necessary.

[32] Further, even if I were to find that the test under s. 684(1) were satisfied, the appellant would still, on the evidence before me, be caught by s. 684(2). That provides that funding by the federal Attorney General will only be required if "legal aid is not

granted to the accused pursuant to a provincial legal aid program". That is not the case at this stage of the proceedings. On the contrary, the YLSS Executive Director has indicated that he anticipates the appellant "will be eligible for coverage should she re-apply for assistance." Thus, it seems to me that so long as YLSS remains willing to fund this appeal, the appellant cannot succeed on a s. 684 application.

[33] Should Ms. Cunningham pursue legal aid funding, she will have to deal with the HCC Committee on the appeal budget. Ms. Cunningham may choose to limit the nature of the justification she puts forward for the budget because she does not want to disclose privileged information, although for the reasons set out above, that may be unnecessary. In any event, it may turn out to be the case that Ms. Cunningham finds the ultimate result of the budget review and approval process is unsatisfactory, because it constrains her ability to make a fair and effective argument at the hearing of the appeal, i.e. if the budget approved is significantly less than the one put forward. However, if that should happen, it seems to me that Ms. Cunningham would have a much stronger argument that legal aid has not been "granted" to the appellant for the appeal. In that event, the appellant could apply again under s. 684.

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Gower J.