

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

ROGER WALLACE WARREN



Application by accused person for appointment of state-funded defence counsel.
Granted.

Application heard: June 30, 1994

Reasons filed: July 14, 1994

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE J.E. RICHARD

- Counsel for accused: Glen Orris, Q.C.
Gillian Boothroyd
- Counsel for H.M.T.Q. (Canada): B. Webber
- Counsel for Legal Services Board: G. Nearing
- Counsel for G.N.W.T.: E. Stewart

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REASONS FOR JUDGMENT

1 On September 18, 1992, there was an underground explosion at the Giant gold mine in Yellowknife. Nine miners lost their lives. The applicant, Roger Warren, is charged in the Indictment with first degree murder in connection with each of those nine deaths. If convicted of any one of these charges, the mandatory sentence is life imprisonment. Mr. Warren applies to the Court for an order that the Court appoint counsel for his trial (in particular the counsel that he has privately retained up to the present time with respect to those charges) and that the state pay the cost of counsel's services. For the reasons which follow, in my view, this is an exceptional case and the Court ought to grant Mr. Warren's request.

2 In the four month period preceding the explosion, the mine's management and its unionized employees were engaged in a bitter labour dispute. The dispute continued after the explosion and in a sense continues today. In the initial months of the

strike there were many instances of violence and many allegations of breaches of the law. Numerous hearings and trials - jury and non-jury - have been held in this Court and in the Territorial Court in the past twenty-six months with respect to criminal charges, contempt-of-court citations and requests for injunctive relief. A number of criminal trials have yet to be held.

3 It is not an overstatement to say that the strike, and the explosion, have had a significant impact on this community and many of its citizens - even beyond those directly involved, i.e. the management and employees of the Giant mine, the replacement workers, the special security personnel employed at the mine, police officers, etc.

4 Over one year after the explosion occurred, on October 16, 1993, the police arrested and charged Mr. Warren with the murder of the nine miners. Mr. Warren clearly needed counsel. He wished to have Glen Orris, Q.C. of Vancouver, British Columbia, as his counsel.

5 Mr. Warren applied for legal aid. The legal aid representative advised him that although he met the financial criteria for legal aid and was entitled to his choice of counsel, he had to make that choice from among a list of lawyers who were residents of the Northwest Territories. In this advice the legal aid representative was no doubt relying on the provisions of s.40 of the *Legal Services Act*:

s.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.

Mr. Warren was not denied legal aid. He was, however, reluctant to choose his counsel from the list of lawyers provided to him. His reasons are stated in his affidavit filed on this application:

...

3. My arrest followed 13 months of what was to my knowledge an intense investigation by the Royal Canadian Mounted Police and other police agencies of many members of the Canadian Association of Smelter and Allied Workers Union. I am a member of that Union. In addition other members of the community in Yellowknife were also investigated.

4. For approximately five months prior to the September 18, 1992 blast, and until December, 1993, the aforesaid Union and the Company operating the Giant Gold Mine by Yellowknife, were embroiled in a bitter labour dispute which involved many allegations of breaches of the law. I am aware that throughout this, many of the lawyers in Yellowknife and the adjoining areas of the Northwest Territories, acted for either the Company, the Union or individual members of the Union.

5. On October 18, 1993 I applied for Legal Aid coverage to fund my defence of these charges. I was advised by the Legal Services Board of the N.W.T. that I was financially eligible for Legal Aid and was approved for that coverage. I requested that Glen Orris, Q.C. of Vancouver, British Columbia be appointed as my counsel.

6. The Legal Aid representative told me that I had to choose a lawyer from a list of lawyers presented to me whom I believed regularly practised in the Northwest Territories. Mr. Orris' name was not on that list and I reiterated my request that he and no one else should be my counsel. I stated that in view of the seriousness of these charges and my firm belief that in my opinion all the local lawyers, or other lawyers practising in the Northwest Territories would be compromised in their ability to act for me. My feelings in that regard are based upon the obviously intense sentiment locally, regarding the ongoing labour dispute, the death of the nine miners, and lawyers' possible conflicts in acting for related parties connected with the labour dispute and the parties involved.,

7. The Legal Services Board of N.W.T. have advised me that notwithstanding my concerns, they have refused my application to appoint Mr. Orris. As a result of that decision I was

required at great personal expense for my family to hire Mr. Orris privately to conduct the preliminary inquiry. This preliminary inquiry was held in February, 1994. Because of that commitment, my wife and I have now exhausted all personal resources and as a consequence I am unable to privately fund my defence.

8. I require Mr. Orris to act on my behalf because I have confidence in him and his ability to best present my case. I do not have confidence in any lawyers locally or those practising in the Northwest Territories to be able to properly represent me because of the nature of this case and for the reasons stated above.

7 In consideration of all of the circumstances, it is my view that Mr. Warren's subjective concerns (in October 1993 and subsequently) expressed in his affidavit about retaining a local lawyer were legitimate and reasonable.

8 Although there are today approximately 100 lawyers resident in the Northwest Territories, only a small fraction of that number practise criminal law on a regular basis. Among that smaller number there are indeed competent counsel capable of conducting the defence in a major criminal trial such as the one Mr. Warren faces. However, in view of the special circumstances of the major impact of the strike/explosion on this community, and the real possibility or probability of many members of the criminal defence bar being in a position of conflict of interest or otherwise unwilling to act, I do not find it unreasonable that Mr. Warren did not in fact exhaust the list by contacting each and every member of the criminal defence bar.

9 Mr. Warren thus retained Mr. Orris as his defence counsel on a private retainer to represent him with respect to these murder charges. Mr. Orris and his assistant, Ms. Gillian Boothroyd, represented Mr. Warren at the preliminary inquiry which took place in February 1994. Mr. Warren and his family have now exhausted their

personal funds; this is confirmed by the fact that the Legal Services Board has ruled that he indeed meets the financial criteria.

10 Mr. Warren requested the Legal Services Board to review its Executive Director's decision to deny his application to have Mr. Orris approved as his legal aid counsel notwithstanding s.40 of the Act. By letter of March 1, 1994 (after the preliminary inquiry), the Board advised Mr. Warren that it was upholding the Executive Director's decision.

11 An accused person does not have a constitutional right to counsel of his or her choice. *R. v. Robinson* (1989) 51 C.C.C. (3d) 452 (Alta. C.A.). However, the Court has inherent jurisdiction to appoint counsel to represent an accused person in certain (special) circumstances and to direct the state to fund the services of that counsel. See *R. v. Rowbotham* (1988) 41 C.C.C. (3d) 1 wherein the Ontario Court of Appeal stated, at pp. 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 within 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.

(emphasis in original)

12 In the present case the accused Roger Warren wishes to be represented by counsel at his trial. He is unable to pay for counsel. By virtue of the nature of the charges and the complexity of the upcoming trial, his representation by counsel is essential to a fair trial. Because of the special circumstances that I have already referred to and the provisions of s.40 of the *Act* enacted by the legislature, in my view Mr. Warren's "case" (i.e. this specific application for state funded counsel) does not come within the territorial legal aid plan. The criteria described in *Rowbotham* for an exercise of the Court's inherent jurisdiction are present here.

13 In deciding to exercise this inherent jurisdiction by appointing Mr. Orris and his assistant, Ms. Gillian Boothroyd, as defence counsel for Roger Warren, I am also mindful of the fact that it is now mid-July and Mr. Warren's trial is scheduled to commence on September 6th, approximately seven weeks from now. I am advised by counsel that the Crown intends to call upwards of fifty witnesses. The trial is scheduled to last two to three months and special court time has been set aside for that purpose. A special jury panel of several hundred persons has already been summoned for this case.

14 Mr. Orris and Ms. Boothroyd represented Mr. Warren at the preliminary inquiry, are willing to continue with that representation, and are ready to proceed with the trial as scheduled. The state, through the aegis of the legal aid plan, would be funding Mr. Warren's defence at trial in any event, or in the ordinary course of events. To appoint

other counsel at this point, or to require Mr. Warren to choose other counsel from among the small number of resident lawyers who might be available and willing to act in that capacity, would undoubtedly lead to a delay or postponement of the trial. That would not be in the interests of justice.

15 Before concluding these reasons, I wish to address the specific form of relief originally requested by Mr. Warren.

16 In the Notice of Motion filed on Mr. Warren's behalf, he requested the following:

1. An Order that the Legal Services Board of the Northwest Territories pay sufficient funds to cover the legal fees and expenses of Glen Orris, Q.C. and Gillian Boothroyd, counsel on behalf of the Applicant herein;

2. An Order that Section 40 of the Legal Services Act of the Northwest Territories is void and of no force and effect in that it contravenes Section 7, 10(b) and 11(d) of the Canadian Charter of Rights and Freedoms;

3. In the alternative, and Order that the Northwest Territorial Government pay sufficient legal fees and expenses to Glen Orris, Q.C. and Gillian Boothroyd for the defence of the Applicant herein; or

4. An Order that the Federal Government of Canada pay sufficient funds to cover legal fees and disbursements for Glen Orris, Q.C. and Gillian Boothroyd to adequately defend the Applicant.

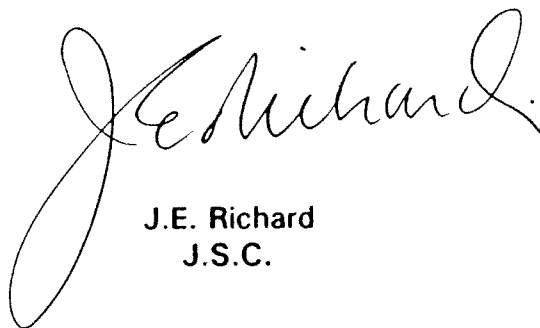
17 As to para (1), the Legal Services Board submitted that in making its decisions it was exercising an original jurisdiction granted by statute, and that there could only be judicial interference by this Court via one of the prerogative remedies. Following

this submission, Mr. Warren's counsel asked that this aspect of his application be adjourned *sine die*.

18 As to para (2), I am not satisfied on the material presented on this application that any of Mr. Warren's charter rights have been breached.

19 As it is the Attorney General of Canada that is responsible for criminal prosecutions in the Northwest Territories, in my view it is that office that should pay the costs of court-appointed defence counsel, rather than the Government of the Northwest Territories.

20 Accordingly, I hereby appoint Glen Orris, Q.C. and his assistant, Ms. Gillian Boothroyd, as defence counsel for Roger Warren with respect to the charges in the Indictment and I direct that the Attorney General of Canada be responsible for payment of all necessary fees and disbursements, including travel and accommodation disbursements, of defence counsel, effective today. Such fees and disbursements will be paid on the basis of the tariff which has been established by the Legal Services Board of the Northwest Territories.



J.E. Richard
J.S.C.

Yellowknife, Northwest Territories
July 14, 1994

CR 02518

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