

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

WING TOON LEE

MEMORANDUM OF JUDGMENT

[1] The accused, Wing Toon Lee, is charged in a 24-count Indictment with offences of sexual assault, sexual interference, procuring, possession of child pornography, and drug trafficking. His trial, before a judge sitting without a jury, is scheduled to start on July 6, 1998.

[2] Mr. Lee is unrepresented. Up until a few weeks ago he was represented by counsel appointed through the Legal Aid plan. Mr. Lee discharged his counsel and that counsel was given leave to withdraw from the case. Mr. Lee is still eligible for legal aid coverage but, apparently, a canvas of all lawyers in the Northwest Territories who are on the criminal legal aid panel has resulted in no one willing to step forth to represent Mr. Lee. He has indicated his preference for some lawyers in particular but those lawyers have refused to represent him. It is not for me to speculate on the reasons why no one wishes to take on this case.

[3] Mr. Andrew Mahar, a barrister based in Yellowknife, is willing to undertake the role of *amicus curiae*. He is a skilled criminal defence lawyer who has had no previous involvement with this case. He is hereby appointed by this court as *amicus curiae* for this case subject to the directions stipulated at the conclusion of this Memorandum.

[4] As a matter of law, an accused person enjoys the constitutional right to a fair trial and to the effective assistance of counsel. An accused, if he cannot afford it, has the right to publicly-funded counsel, but not necessarily to counsel of his choice. The court may not force counsel on an accused who of course has the right to represent himself. There may, however, be limitations on that right to self-representation either by statute or by exercise of the court's jurisdiction to control its process. If an accused is unrepresented then there is a general obligation

on the trial judge to assist the accused in the conduct of his defence. That obligation becomes very difficult to fulfill where, as here, there is no jury and the trial judge must be the impartial arbiter who makes the final decision as to guilt or innocence.

[5] In *R v Warren* (CR 02518; July 14, 1994), Richard J. of this Court recognized the court's inherent jurisdiction to appoint counsel to represent an accused person and to direct the state to fund the services of that counsel. The word "direct" is used advisedly since, of course, the court cannot force the state to pay but, if the state does not pay, then the prosecution may be stayed as an abuse of process: *R v Savard* (1996), 106 C.C.C (3d) 130 (Y.T.C.A.). That is the effective control mechanism possessed by the court and it is guided by the broader public interest in ensuring that criminal trials are conducted in a fair manner.

[6] It seems to me that there are a number of obvious factors to consider in the appointment of counsel: the complexity of the case, the seriousness of the potential penalties faced by the accused, the accused's age and ability to understand the proceedings and to express himself, and the accused's familiarity with the trial process.

[7] In this case there are numerous serious charges which, if convictions are entered, could result in substantial jail terms. There will be significant legal issues concerning the search and seizure of evidence. The accused is a middle-aged Chinese-Canadian who will require the assistance of a Cantonese interpreter at the trial. There is nothing to indicate that he is at all familiar with the criminal process. In my opinion, these are all factors that convince me it is in the interests of justice to appoint counsel.

[8] There is a further factor. Many of the complainants who are likely to testify are young women, some under the age of 14. Section 486(2.3) of the Criminal Code states:

(2.3) In proceedings referred to in subsection (1.1), the accused shall not personally cross-examine a witness who at the time of the proceedings is under the age of fourteen years, unless the presiding judge, provincial court judge or justice is of the opinion that the proper administration of justice requires the accused to personally conduct the cross-examination and, where the accused is not personally conducting the cross-examination, the presiding judge, provincial court judge or justice shall appoint counsel for the purpose of conducting the cross-examination.

There is nothing before me to suggest that the proper administration of justice *requires* the accused to personally cross-examine the complainants. Indeed the appointment of counsel for this purpose is mandated in this case considering the nature of the charges and the communication limitations of the accused.

[9] I note that s.486(2.3) says that the court shall appoint counsel but it does not say who will pay counsel. Presumably someone will pay. Other sections of the Code that empower the appointment of counsel also refer to the costs of counsel being paid by the Attorney-General (see,

for example, s.672.24 and s.684). The same approach would, I assume, apply for appointments under s.486(2.3). After all, if the Attorney-General is prosecuting in the public interest, and it is in the public interest to have competent counsel available to carry out this cross-examination function, then it follows that it is in the public interest for the Attorney-General to pay the costs.

[10] The court cannot force unwilling counsel to represent a client directly. But a willing counsel can be appointed *amicus curiae*. Even where an accused has discharged counsel, the court has a discretion to permit willing counsel to act as *amicus curiae*: *R v S.(M.)* (1997), 111 C.C.C. (3d) 467 (B.C.C.A.).

[11] There are traditionally three situations in which the court appoints an *amicus*: (a) where there is a matter of public interest in which the court invites the Attorney-General or some other capable individual to intervene; (b) to prevent an injustice, for example, to make submissions on points of law that may have been overlooked; and (c) to represent the unrepresented (this last dates back to *Beard v Travers* (1749), 27 E.R. 1052). Generally, an *amicus curiae* is a barrister who assists the court, at the court's request, and is disinterested: *Canada v Aluminium Co. of Canada* (1987), 35 D.L.R. (4th) 495 (B.C.C.A.).

[12] In my opinion, counsel can be "disinterested" even though counsel may be taking on a more direct and active role in the case (such as the cross-examination of complainants). Counsel in such a role by necessity will have to consult with the accused so as to ascertain relevant lines of inquiry. But that does not need to result in that counsel being regarded as the accused's lawyer for all purposes. It is no different than counsel being appointed to argue points of law or fact on an accused's appeal. All of this is for the benefit of the court in the correct disposal of the case. And that is in the public interest as well as the accused's best interests.

[13] Crown counsel has acknowledged, quite properly in my opinion, the exceptional nature of these circumstances and the benefit of having counsel appointed. In addition, the Crown has accepted the responsibility to pay the costs of counsel. All of this is a reflection of the high degree of public responsibility exhibited by the prosecutorial authorities in this jurisdiction.

[14] I will therefore appoint Mr. Andrew Mahar as *amicus curiae* for this case. His responsibilities will include the submission of argument on points of law or fact that may benefit the accused and to carry out at trial the cross-examination of the complainants. He may consult with Mr. Lee to adequately inform himself. Such consultations are of course privileged but, in carrying out these tasks, it should be noted that Mr. Mahar is not Mr. Lee's lawyer. He is a "friend" of the court here to assist the court. Protecting the rights of the accused is inherently of assistance to the court.

[15] I direct that Mr. Mahar's fees be paid by the federal Department of Justice at the applicable hourly rate set by the legal aid plan. He is to be paid on that hourly basis without any cap or limitation whether it is preparation time, research, or trial time. In addition he will be

entitled to the assistance of second counsel but that will be limited to preparation and research. Second counsel will also be paid at the applicable hourly legal aid rate. In my opinion, second counsel is warranted to assist Mr. Maher in preparing for the trial in this short time-frame.

[16] Mr. Mahar is to submit his accounts for fees and disbursements (including the fees of second counsel) to the Department of Justice, an interim account by June 15th and a final account after the trial. The Department may tax the accounts. I designate the director of the legal aid plan as the taxing officer in this regard (since he has greater familiarity with the taxation of these kinds of accounts). Any further appeal as to the accounts will come to me.

[17] If further directions are required, counsel may speak to me.

[18] Dated this 7th day of May, 1998.

J. Z. Vertes  
J.S.C.

To: Loretta Colton  
Crown Counsel

Andrew Mahar

Wing Toon Lee  
c/o Yellowknife Correctional Centre

IN THE SUPREME COURT OF THE  
NORTHWEST TERRITORIES

---

BETWEEN:

HER MAJESTY THE QUEEN

- and -

WING TOON LEE

---

MEMORANDUM OF JUDGMENT OF THE  
HONOURABLE J. Z. VERTES

---