

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

THEODORE TSETTA

REASONS FOR DECISION
of the
HONOURABLE JUDGE B.E. SCHMALTZ

Heard at: Yellowknife, Northwest Territories

Date of Decision: January 15, 2016
Reasons Filed: February 11, 2016

Date of Application: January 15, 2016

Counsel for the Crown: Roger Shepard

Counsel for the Accused: Alan Regel

Ruling on Application for State-funded Counsel

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

THEODORE TSETTA

A. INTRODUCTION

[1] Theodore Tsetta is charged with illegally possessing caribou, contrary to section 52 of the *Wildlife Act*, RSNWT 1988, c.W-4, and amendments thereto. The charge arose from events on February 5, 2014, and Mr. Tsetta was served a Summary Offence Ticket Information on February 18, 2014, requiring him to appear in court on March 18, 2014.

[2] On January 15, 2016, I heard Mr. Tsetta's application to have state funded counsel appointed to assist him on this trial. I dismissed the application on that date, advising that written reasons would be filed in due course. The following are the reasons for my decision.

B. HISTORY

[3] As stated, Mr. Tsetta's first appearance on this matter was on March 18, 2014, and between that date and January 15, 2016, there were twenty court appearances. The matter was scheduled for trial on November 10, 2014; that trial date was cancelled and the matter was set for trial on December 10, 2014. On

October 14, 2014, the December 10 trial date was confirmed. On December 10, 2014, the trial did not proceed as Mr. Tsetta did not have counsel and the matter was adjourned. On February 24, 2015, the matter was set for trial on August 19, 2015, with an interim date of June 16, 2015, to confirm counsel. On June 16, 2015, the endorsement on the file indicates that the matter was adjourned to August 19, 2015, for trial. Then on August 18, 2015, the trial was again adjourned. On November 3, 2015, the matter was adjourned to February 3, 2016, for trial; on November 17, the February 3, 2016 trial date was confirmed.

[4] On January 4, 2016, Mr. Tsetta filed a Notice of Motion, returnable January 15, 2016, bringing an application to appoint Alan Regel as counsel both to bring the application, and as state funded counsel for Mr. Tsetta's trial.

C. EVIDENCE

[5] Mr. Tsetta filed two affidavits in support of this Application, one sworn November 25, 2016 (the November 25 Affidavit) and one sworn January 12, 2016 (the January 12 Affidavit); he also gave viva voce evidence when the Application was heard.

[6] At paragraph 36 of the November 25 Affidavit, Mr. Tsetta states: "I have made considerable efforts to try and obtain the assistance of counsel."

[7] At paragraph 43 of the November 25 Affidavit, Mr. Tsetta states:

I approached Legal Aid to assist me in my defence shortly after I was charged but was refused assistance on the basis that Legal Aid does not cover charges under the *Wildlife Act*. Because of that information I did not complete a formal application at the time.

Mr. Tsetta does not state who he spoke to at Legal Aid; Mr. Tsetta did not complete a formal application at that time, so it is not clear what he means by “refused assistance”.

[8] The evidence establishes that at some time before November 3, 2015, Mr. Tsetta applied for Legal Aid to assist him, and by letter dated November 3, 2015, his application was denied; Mr. Tsetta appealed the denial of Legal Aid, and on November 25, 2015, Mr. Tsetta was advised that his appeal was denied.

[9] At paragraph 57 of the January 12 Affidavit, Mr. Tsetta states that he was advised that a letter would be sent from Legal Aid confirming the denial and that when ‘Karen’ was back in the office on November 27, 2015, or November 30, 2015, she would explain the “other funding options” available to Mr. Tsetta.

[10] In paragraphs 60 to 63 of the January 12 Affidavit, Mr. Tsetta speaks of other efforts made to obtain funding, and that none was available to him. Mr. Tsetta does not advise who he spoke to at the other agencies, or provide any further evidence other than saying he was advised that “the programs are no longer available”. Further, there is no evidence that Mr. Tsetta followed up with, or spoke to ‘Karen’ at Legal Aid. Mr. Tsetta says that he asked for a letter confirming that funding from the other sources was not available, and that he was advised that a letter would be sent to him, but as of January 12, 2016, he had not received a letter. At paragraph 63 of the January 12 Affidavit, Mr. Tsetta states: “On December 22, 2016 [sic] I attended the offices in question but was unable to obtain a copy of the letters in question.” There is no evidence of who, if anyone, he spoke to at “the offices in question”, and no explanation as to why he was unable to obtain a copy of the letters.

[11] In the November 25 Affidavit Mr. Tsetta states: “I made inquiries of a number of the lawyers in Yellowknife and was unable to find anyone who was able

or willing to assist me...” He testified that he spoke to two lawyers in Yellowknife; he recalled one name, but could not recall the other. Mr. Tsetta also recalled making one telephone call to a lawyer in Alberta, but could not remember who that lawyer was.

[12] Mr. Tsetta states in the November 25 Affidavit that he does not have the ability, the resources, or the money to properly advance a defence to the charge¹.

[13] At paragraph 42 of the November 25 Affidavit Mr. Tsetta states his assets are: a 2008 Polaris snowmobile and sled, a \$9,000.00 “RRSP – locked in”, a 2015 Dodge van (leased), and work tools.

[14] With respect to the RRSP, in paragraph 68 of the January 12 Affidavit Mr. Tsetta states:

I attended the Bank to try to cash it in *for my Court appearance in September*. The Bank said the RRSP could not be cashed in *in time to supply a retainer for my Court appearance in September* so that I could provide Mr. Regel with a retainer ... (my emphasis).

There is no further information with respect to *when* the RRSP could be cashed in, and if it were, whether there would be penalties, and if so, how much the penalties would be.

[15] I infer that the RRSP could be cashed in as at paragraph 72 of the January 12 Affidavit Mr. Tsetta further states:

I am informed by Mr. Regel and do verily believe that the RRSP especially after the penalties for cashing it in early is taken into account would be far less than what is required to prepare a full answer and defence to the charge.

There is no foundation provided in the Affidavits or evidence as to what the foundation for Mr. Regel’s knowledge was.

¹ Paragraphs 35, 44, and 57 of the November 25 Affidavit

[16] Mr. Tsetta leased the 2015 Dodge van in late November or early December 2014. He testified that he leased the van as he was still employed at the time. When he leased the van, he put \$15,000.00 as a down payment, and committed himself to lease payments of \$667.00 per month. This would have been very close to the time that his matter was scheduled for trial on December 10, 2014. That trial date had to be adjourned as Mr. Tsetta had not retained counsel.

[17] In either April, May, or June 2014, Mr. Tsetta received a \$76,000.00 award from a wrongful dismissal case. At paragraph 40 of the November 25 Affidavit, Mr. Tsetta states:

I did receive in 2014, an award from which I netted approximately \$76,000. I had been dismissed about 2 years earlier and had incurred a number of expenses related to the case and borrowed money to make payments on my truck. The small amount that remained when the debts were paid was used up in living expenses in about 2 months.

[18] When asked about the debts that he had to pay back, Mr. Tsetta testified that the largest debt was to his father, which was approximately \$15,000.00. He also paid his wife back \$2,000.00, and had paid other people a total of \$10,000.00. There was no evidence as to what happened to the other \$49,000.00, other than the \$15,000 he had put down on the 2015 Dodge van in November or December that year.

[19] With respect to the house Mr. Tsetta lives in with his wife, at paragraph 56 of the November 25 Affidavit Mr. Tsetta states:

The house I live in is owned by my wife and her nephew. It was willed to them by my late mother-in-law when she passed away. I do not have any proprietary interest in the house and neither of them is prepared to mortgage their interest in the house so that I can fight the charge.

Mr. Tsetta testified that he did not believe there was a mortgage on the house.

There is no evidence that Mr. Tsetta spoke to his nephew about this subject, and no

foundation for the statement that his nephew is not prepared to mortgage his interest in the house. Mr. Tsetta testified that his wife did not want to talk about mortgaging the house.

[20] Mr. Tsetta had not applied for a loan or tried to borrow money from his father to cover his legal costs.

[21] In 2015, Mr. Tsetta earned income doing contract work with his First Nations. This income was not referred to in his affidavit.

[22] Mr. Tsetta testified that he did not file taxes, though he did receive T-4s. There were no copies of Mr. Tsetta's T-4s provided on this Application.

[23] At paragraph 87 of the January 12 Affidavit Mr. Tsetta states: "Had I been told a tag was required I would certainly have obtained one rather than go through being charged." In his evidence on the Application, Mr. Tsetta contradicted this statement, testifying that on the morning of February 5, 2014, before Mr. Tsetta hunted caribou that day, a Wildlife Officer attended the cabin he was at; Mr. Tsetta agreed that the Wildlife Officer told him that he needed tags in order to hunt caribou. Mr. Tsetta testified that he told the Wildlife Office "You must be crazy" as it would take Mr. Tsetta 8 hours to return to Yellowknife to get tags. Mr. Tsetta also testified that he had been told by two members of his band that tags were required in order to hunt caribou, and that tags were available from RWED.

D. THE LAW

[24] In *R. v. Rowbotham*, 1988, CanLII 147 (Ont. C.A.), para. 170, the Court held:

To sum up: where the trial judge finds that representation of an accused by counsel is essential to a fair trial, the accused, as previously indicated, has a constitutional right to be provided with counsel at the expense of the state if he or she lacks the means to employ one. Where the trial judge is satisfied that an accused lacks the means to employ counsel, and that counsel is necessary to ensure a fair trial for the accused, a stay of the proceedings until funded counsel is provided is an appropriate remedy under s. 24(1) of the *Charter* where the prosecution insists on proceeding with the trial in breach of the accused's *Charter* right to a fair trial.

[25] The Court in *Rowbotham* further stated (para. 151):

As a matter of common sense, an accused who is able to pay the costs of his or her defence is not entitled to take the position that he or she will not use personal funds, but still require Legal Aid to bear the cost of his or her defence. A person who has the means to pay the cost of his or her defence but refuses to retain counsel may properly be considered to have chosen to defend himself or herself.

[26] Whereas Mr. Tsetta has the right to a fair trial, “s. 7 of the Charter does not guarantee a general right to funded counsel, but requires the provision of paid counsel in order to guarantee a fair trial in serious and complex cases *where the accused is impecunious* and has been refused assistance by Legal Aid”: *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, [1999] 3 S.C.R. 46, at para. 36 (my emphasis)

[27] Therefore in order to succeed on a *Rowbotham* application, three criteria must be established: (1) the Applicant has sought the assistance of Legal Aid and been rejected, and all avenues of appeal have been exhausted; (2) the Applicant is indigent; and (3) that legal representation is essential to a fair trial.

[28] This being Mr. Tsetta's application, he must establish the above criteria on a balance of probabilities.

E. APPLICATION OF THE LAW TO THIS CASE

[29] The evidence establishes that in 2014, Mr. Tsetta worked for Dominion Mines for a number of months; in May, June or possibly July, Mr. Tsetta received an award from a legal action of \$76,000; Mr. Tsetta was receiving benefits from Workers Safety and Compensation Commission for some period of time, and at the time he swore his Affidavits in support of this Application he had an outstanding appeal in relation to Workers Compensation Claim. There is no evidence of how much money Mr. Tsetta earned from working, or received from the Workers Safety and Compensation Commission. Further, there is no evidence of what Mr. Tsetta's expenses are. His evidence was incomplete and vague with respect to his financial situation.

[30] Mr. Tsetta lives in a house he testified is owned by his wife and has no mortgage on it; there is no evidence as to the value of that house, or whether or not Mr. Tsetta is responsible for any expenses related to it.

[31] He testified that when he received the \$76,000.00 award in mid-2014 after he was charged with this offence, he paid his father back \$15,000.00 he had borrowed from him, he paid his wife back \$2,000.00 he had borrowed from her, and he paid back approximately \$10,000.00 that he had borrowed from other unnamed people. There is incomplete evidence of where the other \$49,000.00 is, or how it was spent, other than possibly for the down payment on a vehicle.

[32] The only expense Mr. Tsetta put before the court is the lease payment of \$667.00 per month for his 2015 Dodge Caravan. This is a financial obligation that he took on in December 2014, approximately 8 months after he had been charged with this offence. When he leased this vehicle he put \$15,000.00 down.

[33] Mr. Tsetta has a \$9,000.00 RRSP.

[34] The financial evidence on this application is severely lacking. Mr. Tsetta testified that he receives T-4s, but copies of these were not provided, and there was no reliable or complete information as to what his income was for 2014 or 2015. Mr. Tsetta testified that he owes Revenue Canada \$7,000.00 though there was no documentation to support this, nor was it referred to in either Affidavit filed in support of this Application.

[35] Mr. Tsetta's position on this application is comparable to that of the applicant in *R. v. Merchant*, [2014] O.J. No. 5390, where in dismissing the application for state funded counsel, the Court stated:

70 As to the question as to whether the applicant lacks the means to retain counsel, the evidence offered by the applicant gave rise to more questions than answers. Her testimony was vague, confusing and at times combative when being cross-examined on matters bearing directly on the outcome of this application.

71 Her testimony was far less than credible and reliable.

72 The evidence with respect to her financial circumstances dating back to the time she was charged was incomplete and vague. No detailed financial evidence truly particularizing her financial circumstances was offered by the applicant.

73 Evidence as to the applicant's efforts to save money, borrow money and obtain employment was inadequate. ...

74 The applicant has failed to demonstrate that she made a reasonable attempt to plan her financial affairs to enable her to retain counsel.

75 The applicant offered no evidence that she was destitute or indigent. The law does not require that the applicant become destitute but simply that the applicant have a financial plan from the time of her arrest to plan for the cost of defending the charge.

...

77 The applicant failed to make full, frank and complete disclosure of her financial circumstances.

...

80 The applicant further failed to act prudently and plan for the required defence costs for her trial since the time of her arrest. She has not made the planning for those trial costs a financial priority.

[36] Mr. Tsetta has not presented complete disclosure of his current financial situation, or his employment income since he was charged with this offence; he has not provided any detail of how or if he has exhausted the \$76,000.00 award he received since he was charged with this offence. He has not provided any evidence of efforts made to act prudently and plan for the costs of his trial.

[37] Mr. Tsetta's evidence on this application was often contradictory to the two affidavits he filed on this application:

- He swore in the January 12 Affidavit with respect to the \$76,000.00 he had received in April, May, or June, 2014, that the "small amount that remained when the debts were paid was used up in living expenses in about 2 months." He testified that the debts that he paid amounted to approximately \$27,000.00. He had \$15,000.00 to use as a down payment for a leased van in November or December 2014.
- He swore in the January 12 Affidavit that he had not worked since October 2014. He testified that he had done contract work with his First Nations in 2015.
- Unrelated to his financial situation, but certainly relevant to his credibility, at paragraph 87 of the January 12 Affidavit Mr. Tsetta states: "Had I been told a tag was required I would certainly have obtained one rather than go through being charged." In his evidence on the Application, Mr. Tsetta

testified that on the morning of February 5, 2014, *before* he had hunted the caribou, a Wildlife Officer told him that he needed tags in order to hunt caribou.

[38] I did not find Mr. Tsetta a careful witness on this Application.

F. CONCLUSION

[39] I am not satisfied that Mr. Tsetta does not or did not have the financial means to retain counsel to defend this charge. Mr. Tsetta did not make a reasonable effort or a reasonable plan to finance the cost of defending this charge. I find that Mr. Tsetta has taken the position that he is not willing to pay for his defence from his own funds, but must have a lawyer to assist him with his defence in order to have a fair trial, and therefore expects the state to fund his counsel. This position is not supportable in law. A person who has the means to pay the cost of his or her defence but refuses to retain counsel may properly be considered to have chosen to defend himself or herself.

[40] The application to have counsel appointed to bring this Application, and the application for state funded counsel are both dismissed.

B.E. Schmaltz
Territorial Court Judge

Dated at Yellowknife, Northwest
Territories, this 11th day of
February, 2016

**IN THE TERRITORIAL COURT OF THE
NORTHWEST TERRITORIES**

BETWEEN:

HER MAJESTY THE QUEEN

- and -

THEODORE TSETTA

REASONS FOR DECISION
of the
HONOURABLE JUDGE B.E. SCHMALTZ

Ruling on Application for State-funded Counsel