Date: 20011031

NOVA SCOTIA COURT OF APPEAL
[Cite as: R. v. Wilson, 2001 NSCA 156]

CAC 173850

BETWEEN:

PAUL ALBERT WILSON

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

- and -

CAC 173380

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

- and -

SEVERAL SOLICITORS and
SEVERAL CLIENTS

Respondents

DECISION

Counsel: Paul Wilson in Person
Karen Bailey for Her Majesty the Queen
David Schermbrucker for the Attorney General of Canada
Edward Gores for the Attorney General of Nova Scotia
Tara Miller/Walter Yeadon for Nova Scotia Legal Aid

Applications Heard: October 9 and 12, 2001

Decision Delivered: October 31, 2001

BEFORE THE HONOURABLE JUSTICE ELIZABETH A. ROSCOE
IN CHAMBERS

ROSCOE, J.A.: (In Chambers)

[1] Mr. Paul Wilson has made two applications for the assignment of counsel pursuant to s. 684 of the **Criminal Code**. Mr. Wilson is the interested party in a Crown appeal from Kennedy, C.J. entitled **Attorney General of Canada v. Several Solicitors et. al.** (CAC 173380), and he is the appellant in an appeal from a decision of Hood, J. who dismissed his application pursuant to s. 462.34 of the **Criminal Code** for the return of property subject to a proceeds of crime restraint order for the payment of reasonable legal expenses (CAC 173850). By agreement of Mr. Wilson and the two Crown counsel appearing on the applications, the two applications for assignment of counsel were heard together.

[2] Counsel for Nova Scotia Legal Aid appeared at the commencement of the Chambers hearing and advised that Mr. Wilson's application for legal aid for the hearing before Justice Hood had been denied on the basis that they were not satisfied that he lacked the financial means to retain counsel, and that his appeal of that determination was denied. Although Mr. Wilson has not made a new application for legal aid for the two appeals, it was acknowledged by Mr. Wilson that his financial circumstances have not changed and conceded by all counsel present, including counsel for the Attorney General of Nova Scotia, that, in the circumstances, a new application was not required, as it was virtually certain that it would again be rejected on financial grounds.

[3] The evidence presented on the hearing of the applications included Mr. Wilson's extensive affidavit and **vive voce** evidence and, in response, the Crown presented the affidavits and **vive voce** evidence of Corporal Richard Shaw and Constable Steven Barker, both of the R.C.M.P., and Sean Neil a Chartered Accountant assigned to the Integrated Proceeds of Crime Unit of the R.C.M.P.

[4] Mr. Wilson is presently on remand and has been incarcerated since his deportation to Canada from Grenada in November, 2000. He had been in jail in Grenada from July, 2000 as a consequence of not paying a $300,000 fine as his sentence for a drug conviction. In Canada, he faces two charges of first degree murder, seven counts of cultivation and production of marijuana contrary to the **Narcotic Control Act** and the

Controlled Drugs and Substances Act, a charge of conspiring to traffic in cocaine and eleven charges of having possession of and using the proceeds of crime.

[5] The power to appoint counsel to represent a party to an appeal is set out in s. 684 of the **Criminal Code**:

> 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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> (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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> (3) Where subsection (2) applies and where 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.

[6] In **R. v. Grenkow**, Hallett J.A. (1994), 127 N.S.R. (2d) 355 (N.S.C.A.) summarized the test to be applied on such applications:

> [31] Before assigning counsel to an appellant on an application under s. 684 of the Code the chambers judge would have to be satisfied that (i) the appellant was refused legal aid for the appeal by Nova Scotia Legal Aid although qualified on financial grounds; (ii) the appeal has a reasonable chance of success; and, (iii) the appellant, due to the complexity of the appeal issues or the inability of the appellant to articulate the grounds, requires the assistance of counsel, in other words the appellant could not have a fair hearing of the appeal without the assistance of counsel. These would be minimum requirements; each application would turn on its facts.

[7] The first part of the **Grenkow** test is not applicable here because it is agreed that Mr. Wilson was or would have been refused legal aid for financial reasons. As to the second part of the test, I would agree with Freeman, J.A. in **R. v. Innocente** (1999), 178 N.S.R. (2d) 395 that:

> [10] . . . where Legal Aid has been denied without a review of the merits of the case, that the appellant only has to show that he has an arguable case. In that respect I agree with the following statement from **Bernardo** [(1997), 121 C.C.C. (3d) 123 (Ont. C.A.)] at para. 22:
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> > In deciding whether counsel should be appointed, it is appropriate to begin with an inquiry into the merits of the appeal. Appeals which are void of merit will not be helped by the appointment of counsel. The merits inquiry should not, however, go any further than a determination of whether the appeal is an arguable one. I would so limit the merits inquiry for two reasons. First, the assessment is often made on less than the entire record. Second, any assessment beyond the arguable case standard would be unfair to the appellant. An appellant who has only an arguable case is presumably more in need of counsel than an appellant who has a clearly strong appeal.

[8] Mr. Wilson submits that the issues raised in the two appeals are both arguable and complex, and therefore he requires legal assistance to advance persuasive arguments to the court. He also submits that although he does have assets which he values at approximately $66,000, those assets are not available for the purposes of retaining counsel because they may have been acquired partially with proceeds of crime or be tainted by or co-mingled with proceeds of crime. Mr. Wilson says that he would like to liquidate those assets to use for legal fees if the Crown would agree that they would not seize them. He has received letters from several lawyers, including counsel who acted for him on the s. 462.34 application before Hood, J., attached to his affidavit as exhibits, which indicate that they would not be prepared to accept any of his unrestrained assets as payment for their fees because of the possibility that the assets may be proceeds of crime. Mr. Wilson submits therefore that he does not have sufficient means to retain counsel. He made a similar argument, through counsel, to Justice Hood, who dealt with it as follows:

> 49 I conclude that s. 462.34(4) does nothing more than allow an applicant to have funds under restraint released to pay reasonable legal fees if that applicant has no other means or assets available. I do not interpret s. 462.34 so as to put an applicant who has had money or assets seized in a better position with respect to payment of legal fees than any other accused person whose assets are not subject to restraint.

> 50 In my view, to accept Mr. Wilson's submission would be to allow him a benefit that is not available to other accused persons. The result could be, as submitted by the Crown, that the restrained monies and assets, or a portion of them, would be used to fund his legal costs and, in the event of a conviction, be unavailable for forfeiture. Other funds not subject to restraint but which Paul Wilson says are alleged by the Crown to be either proceeds of crime or commingled with proceeds of crime would not be dissipated by his legal expenses. They could therefore continue to be available at the end of all legal proceedings for Mr. Wilson's own use.
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> 51 Although s. 462.34 (4) allows a court to release funds for, among other purposes, payment of reasonable legal fees, I conclude that the person to whom the funds are to be "available" within the meaning of that section is the applicant, not the person who might ultimately be the recipient. In this case, I am not satisfied that Paul Wilson does not have sufficient assets or means available to him to pay his reasonable legal expenses. It is between him and his counsel, as it would be for any other accused person, whether there is a problem with his counsel's acceptance of those funds from him.

[9] The Crown submits that both the s. 684 applications should be dismissed on the grounds that Mr. Wilson has not proven that he does not have sufficient means to retain counsel. On the **Several Solicitors** appeal in which Mr. Wilson is effectively the respondent, the Crown acknowledges that there is an arguable issue to be presented in opposition to its appeal. However, with respect to the s. 462.34 appeal, the Crown submits that there is no appeal from a decision under that section and therefore Mr. Wilson cannot meet the arguable issue threshold. An application to quash the appeal on that basis is scheduled to be heard by the panel at the same time as the appeal on January 14, 2002. In support of that application, the Crown will refer to **R. v. Derkson** (1999), 140 C.C.C. (3d) 184 (Sask. C.A.), and two decisions of the Quebec Court of Appeal: **R. c. Cantieri**, [1995] A.Q. no. 327 and **R. c. S.N.D.M. Enterprises Inc.**, [1995] A.Q. no. 328.

[10] The Crown argues that I should not accept Mr. Wilson’s testimony that he has disclosed all of his assets and that he has no other assets or funds available for payment of legal fees. With respect to Mr. Wilson’s argument that his unrestrained assets may be tainted, the Crown submits that he should

provide a list of those assets, including exact information as to where they can be located and consent to a restraining order pursuant to the proceeds of crime part of the **Code**. Mr. Wilson would then be free to make another s. 462.34 application. If the judge hearing that application is convinced that there are no other assets, an order releasing funds for the payment of legal fees could be made.

[11] The Crown may be correct in their argument that there is no appeal from a refusal to release funds pursuant to a s. 462.34 application, but I am prepared to assume, for the purposes of these applications, that there is an arguable issue on that point and that in both appeals, the issues are sufficiently complex that Mr. Wilson requires the assistance of counsel. The paramount issue on these applications is whether Mr. Wilson has the financial ability to retain counsel.

[12] This is not an application pursuant to s. 462.34. Accordingly, Mr. Wilson's assets worth in excess of $400,000 which are subject to the restraining orders are not considered to be available for the purposes of retaining counsel. His other unrestrained assets, and the values assigned to them by Mr. Wilson in his evidence either in this court, or before Justice Hood, include:

funds held in an account held by a lawyer in Antigua (converted from US $13,600):		$21,624
a cottage on leased land at Pace's Lake, NS:		15,000
a 1998 Suzuki 4x4 all terrain vehicle:		4,500
a 1968 El Camino motor vehicle:		10,000
1993 Skidoo:		3,000
jewellery:		6,000
property in Newfoundland:		1,400
Mexican bank account:		100
British Columbia bank accounts:		5,000
	Total:	$66,624

[13] Mr. Wilson refused to reveal the name of the lawyer holding the funds in Antigua. The Crown disputes the valuation of some of these assets, for example, the jewellery which was at one time appraised for a fraudulent insurance claim at $18,000. Whether the jewellery is worth $6,000 or $18,000 is immaterial at this point because counsel who acted for Mr. Wilson before Hood, J., has indicated in a letter to him, which is attached to his affidavit, that her fees for the two appeals and the Crown's application to quash would be less than $15,000. At this point therefore, the exact total valuation of the unrestrained assets is not material to the issue of whether Mr. Wilson has the means to retain counsel.

[14] In addition to the assets listed above, the Crown submits that Mr. Wilson has an interest in the proceeds of the sale of Reflections Cabaret, which are being paid by the new owners of the business to his mother at the rate of $5,555 per month. Mr. Wilson denies that he is the true owner of those monies or that he has any interest in them. He says that his mother was the sole owner of the bar and she has stated that she is not prepared to assist with the payment of his legal fees. Justice Hood made the following findings with respect to Reflections:

> ¶ 28 The Reflections Cabaret is another matter. Although it has now been sold, the terms of the promissory note (Exhibit "Z" to the Barker affidavit) provides for payments of $5,555.00 per month to Beverley Wilson commencing April 15, 1999 until the full sum of $200,000.00 has been paid. I do not accept Paul Wilson's testimony that Reflections Cabaret was not, and the promissory note arising from its sale are not, at least in part, his property.
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> ¶ 29 There are payments owed and being made on the promissory note. Paul Wilson has testified that, although full payments have not been made, some payments have been made to his mother. She, in turn, gave some of that money to Paul Wilson's (then) wife for her support and that of the two Wilson children.
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> ¶ 30 In addition, Paul Wilson testified about his involvement in the business when it was operating, including the hours he worked and the bonuses he received. In my view, these are evidence of more than the interest of an employee in the operation of a business. Furthermore, Paul Wilson testified about his involvement in the sale of the business. This, too, substantiates my view that Paul Wilson treated the property as his own, at least in part.
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> ¶ 31 For all these reasons, I am not satisfied that Paul Wilson does not

> have an interest in the promissory note in the amount of $200,000.00. [See [2001] N.S.J. No. 331.]

[15] Based on the documentary evidence presented by the Crown and Mr. Wilson's testimony before me, I would agree with the conclusions of Justice Hood that Mr. Wilson has a partial interest in the proceeds of the sale of the cabaret and should at least be entitled to claim that the funds are subject to a constructive trust for his benefit. However, given that Constable Barker testified that in his opinion those funds are proceeds of crime, even if his mother offered those funds for the purpose of retaining counsel, it seems unlikely that counsel would be prepared to risk having possession of those funds.

[16] The Crown submits that based on all the evidence that Mr. Wilson has led a life of crime over the past decade, has admitted to using aliases and falsifying documents, that I should not believe him when he says under oath that he has no other assets or funds to use to retain counsel. The catch is that if he did have other assets hidden away somewhere, according to the R.C.M.P. and the Crown, those funds also would likely be tainted as proceeds of crime, since Mr. Wilson has not really had any legitimate means of earning money in the last ten years.

[17] Despite his unsavoury past conduct, I accept Mr. Wilson's evidence that he does not have additional assets, other than his interest in the Reflections Cabaret proceeds and those listed in para. 12 above, presently available to him for the purposes of retaining counsel. I believe that if he did, he would have accessed those funds to help extricate himself from the atrocious conditions in the jail in Grenada by either hiring a lawyer to represent him or paying the fine.

[18] However, the fact that Mr. Wilson has in excess of $66,000 worth of assets is fatal to his application pursuant to s. 684. He cannot meet the insufficient means test.

[19] I agree with Crown counsel that it would be inappropriate for the court or for the Crown to somehow launder some of Mr. Wilson's assets so that they

could be available to retain counsel. If the assets are tainted, as it appears from the evidence they may be, they should all be restrained pursuant to the provisions of the proceeds of crime legislation. Mr. Wilson could then make another s. 462.34 application, which would have a better chance of success if the judge hearing it were satisfied that there were no other funds hidden away. Whether the currently unrestrained assets are in fact proceeds of crime or not, can be determined later using the appropriate provisions of the legislation. If they are not, presumably they will be returned to Mr. Wilson. In the meantime, if he relinquishes control over them by consenting to a restraining order, they might be available to fund his defences and appeals. Mr. Wilson cannot request the Attorney General to use taxpayers' money to fund his appeals while he has sufficient funds stashed away in an Antiguan account protected from seizure because he will not reveal its exact location.

[20] The applications by Mr. Wilson pursuant to s. 684 of the **Criminal Code** are dismissed on the basis that he has not met the burden of proving that he does not have sufficient means to retain counsel.

Roscoe, J.A.