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Access to Justice and Representation by Agents

By Jennifer Koshan

Cases Considered:

R. v. Frick, 2010 ABPC 280

Cutbacks to legal aid are a harsh reality in Alberta and the rest of Canada. As noted on the website of Legal Aid Alberta (LAA), "as of April 6, 2010, LAA's eligibility guidelines for full representation by a lawyer have decreased by 30%". This is due in part to the fact that in this province at present, legal aid funding is highly dependent upon Alberta Law Foundation revenue, and this revenue has been adversely affected by the economic downturn. It is also due to government cuts to Legal Aid. Legal Aid has developed a bandaid of sorts through Legal Services Centres, which "provide clients access to legal information, referral and brief services (in family, criminal, civil and immigration matters) with legal advice in immigration and non-family civil matters." However, these centres exist only in Calgary and Edmonton, deal only with certain legal matters at present, and perhaps most importantly, do not provide full legal representation. Attempts by lawyers such as Dugald Christie and the Canadian Bar Association to bring constitutional claims asserting rights to representation by paid legal counsel in certain circumstances have not been successful. In such a climate, it is not surprising that other actors – such as agents – have stepped into the fray to provide legal services. A recent Alberta Provincial Court case, *R. v. Frick*, shows that there are legislative and constitutional limits to the role that agents can play in filling the gaps in legal aid.

The Facts

Bradley Frick was charged with offences related to impaired driving. He sought the assistance of Student Legal Services of Edmonton (SLS), a student run legal clinic at the University of Alberta law school. Associate Chief Judge J.K. Wheatley had glowing things to say about SLS: "Student Legal Services has been appearing before this court for approximately forty years. The organization provides an exemplary service to both accused persons and to the court." (at para. 9). While SLS agreed to appear as agent for Frick and set a trial date for his matter, it withdrew from his case because of the accused's failure to maintain contact with his caseworker. Frick was referred by Duty Counsel to Nadia Kelm, an agent who agreed to represent him for a fee that is not disclosed in the case. We can assume that her fees were likely less than the $5000 - $7500 that Frick was quoted by two different law firms as the cost of representing him. According to the Court, Kelm had been working as a professional legal agent since 1997, with a "significant portion" of her work devoted to impaired driving offences (at para. 13). But the Crown objected that Kelm was not legally permitted to appear on behalf of Frick.

The Law

Sections 800 and 802 of the *Criminal Code*, RSC 1985, c. C-46, generally allow for the appearance of agents in summary conviction criminal matters. However, s. 802.1 of the *Code* restricts agents to appearing in matters where the accused "is liable to" imprisonment that does not exceed 6 months, unless the agent is authorized to appear "under a program approved by the lieutenant governor in council of the province." Under s. 255 of the *Criminal Code*, the maximum penalty for impaired driving offences prosecuted by way of summary conviction is 18 months imprisonment.

Alberta Order in Council 334/2003 provides that the agents approved to provide legal services for defendants whose matters fall within s. 802.1 of the *Criminal Code* are: articling students, and law students / court workers with Student Legal Services, Student Legal Assistance (University of Calgary's student run legal clinic), Calgary Legal Guidance, and the Criminal Court Worker Program. Agents in the position of Kelm are not included amongst the approved programs.

The Issues

The accused, represented by K. Wakefield, Q.C. at this hearing, raised several issues with respect to the governing legal provisions. First, he argued that s. 802.1 of the *Criminal Code* was *ultra vires* the federal government, or that Parliament had improperly delegated the approval of agents to the provinces. Second, he argued that as a matter of statutory interpretation Kelm should not be precluded from appearing as his agent. Third, he argued that s. 802.1 violated his rights under ss. 7, 10 and 15 of the *Canadian Charter of Rights and Freedoms*.

The Decision

Wheatley A.C.J. commenced his reasons with a critique of the current state of legal services in Alberta:

> For an accused without the means to pay for a lawyer, the current situation in Alberta is troublesome. ... [M]any people who would have previously qualified for legal representation through Legal Aid are forced to look elsewhere for assistance. In the past, accused persons … who were not eligible for Legal Aid could often find assistance from Student Legal Services. … However, Student Legal Services has recently had to close its doors, albeit temporarily, due to the increased number of people utilizing its services and the fact that its human resources are stretched beyond their capacity. … It is clear that for those who cannot afford a lawyer, finding effective legal assistance is becoming increasingly difficult. However, despite growing concerns in this province about access to justice and concerns expressed by judges across the country about unregulated professional agents, the Province of Alberta has declined to regulate agents in any meaningful way. This is regrettable. (paras. 19-21)

In spite of these concerns, Judge Wheatley dismissed all of the accused's legal arguments as unfounded.

First, s. 802.1 of the *Criminal Code* was found to be *intra vires* the federal government. Judge Wheatley characterized s. 802.1 as relating to criminal procedure, a matter properly classified under the federal government's criminal law powers under s. 91(27) of the *Constitution Act*

1867. The accused had argued that s. 802.1 should be characterized as relating to the administration of justice, a power belonging to the provinces under s. 92(14) of the *Constitution Act 1867*. Judge Wheatley cited the case of *R. v. Lemonides* (1997), 151 DLR (4th) 546 at para. 27, where the Ontario Court of Justice noted the "delicate balance between federal and provincial powers" when determining the "dividing line between criminal procedure and the regulation of the practice of the legal profession". Judge Wheatley followed the reasoning in *Lemonides*, where the Court held that deciding which categories of persons may appear on behalf of accused persons, and in what capacity, was a matter of criminal procedure that fell on the federal government's side of the line. Judge Wheatley contrasted this power with that of determining the qualifications of people falling within the different categories of those entitled to appear under s.802.1, which falls on the province's side of the line under s. 92(14) of the *Constitution Act 1867*.

The Court also rejected the alternative argument that the federal government had improperly delegated its powers to determine who could appear as agents under s. 802.1 of the *Code* to the province. In support, the Court cited *R. v. Furtney*, [1991] 3 SCR 89, where the Supreme Court held that it is open to the federal government to incorporate provincial legislation by reference and to create limits in its own legislation to accommodate provincial laws, provided that the provincial law is *intra vires.* Applying that reasoning to the facts of the case before him, Judge Wheatley held that "Parliament is not attempting to govern the qualifications of those appearing, that power correctly remains with the province. Instead, Parliament is indicating that, as a matter of procedure, these are more serious matters and demand that the province turn its attention to who is qualified to appear on these particular offences." (at para. 27).

The accused's second main argument, based on statutory interpretation, was also dismissed. There were two aspects to this argument. First, it was argued that the *Provincial Offences Procedure Act*, RSA 2000, c. P-34 and the *Alberta Rules of Court*, Alta. Reg. 390/1968 should be interpreted so as to constitute an "authorized program" under s. 802.1 of the *Criminal Code*. This argument was quickly dismissed. Although both the *Provincial Offences Procedure Act* and the *Alberta Rules of Court* allow agents to appear relatively broadly in matters covered by each piece of legislation, Judge Wheatley held (at paras. 31-33) that the provincial legislation applied to provincial matters only, and not to *Criminal Code* offences such as those faced by the accused. Furthermore, if the provincial provisions did apply, they would be in conflict with s.802.1 of the *Code*, and the latter would prevail under the paramountcy doctrine.

The second statutory interpretation argument focused on the wording of s.802.1 of the *Criminal Code*. That section provides as follows:

> … a defendant may not appear or examine or cross-examine witnesses by agent if he or she is liable, on summary conviction, to imprisonment for a term of more than six months, unless the defendant is a corporation or the agent is authorized to do so under a program approved by the lieutenant governor in council of the province.

The Crown had said that it would not be seeking a custodial sentence if the accused was convicted. The accused argued that he was therefore not "liable to" imprisonment for more than 6 months. Here again there was case authority contrary to his position. In *R. v. Robinson*, [1951] SCR 522, the Supreme Court held that "liable" meant the maximum sentence that could be imposed. Although this case was decided in a different context, Judge Wheatley found that it was applicable to the case at hand, and that Kelm was not entitled to appear on behalf of the accused

as he was "liable to" a maximum sentence of 18 months under s. 255 of the *Criminal Code* (at paras. 38-40).

The third set of arguments focused on whether the inability of Kelm to appear on behalf of the accused violated his rights under the *Charter*, particularly his rights under s.10(b), s.7 and s.15(1). Section 10(b) guarantees the right "to retain and instruct counsel without delay and to be informed of that right." The accused argued that "counsel" should be interpreted to include agents, relying on a Federal Court of Appeal decision, *Olavarria v. Canada* (1973) 41 DLR (3d) 472. Judge Wheatley distinguished *Olavarria* on the basis that it dealt with the meaning of "counsel" under immigration regulations. He held that a contextual approach to interpretation should be taken, and noted that the accused had not put forward any cases where "counsel" was interpreted to include "agent" under the *Charter*. Further, "counsel" is defined under the *Criminal Code* to mean "barrister or solicitor." The right to counsel in criminal matters was thus seen to be restricted to the right to a lawyer (at paras. 44-47).

Under section 7 of the *Charter*, the accused argued that s. 802.1 of the *Criminal Code*, as interpreted by the Court, violated his "right to life, liberty and security of the person, and the right not to be deprived thereof except in accordance with the principles of fundamental justice." Judge Wheatley held that this argument depended on a finding that "representation by an agent is a principle of fundamental justice" (at para. 48), and found that no such principle existed. A principle of fundamental justice is one "about which there is significant societal consensus that it is fundamental to the way in which the legal system ought fairly to operate, and it must be identified with sufficient precision to yield a management standard against which to measure deprivations of life, liberty or security of the person" (*R. v. Malmo-Levine*, 2003 SCC 74, [2003] 3 SCR 571 at para. 113). Judge Wheatley found that the accused had not met the onus of proving that representation by an agent met this test. In particular, "the case law before the court does not support the suggestion that there is a consensus in society that representation by agents is vital to our notion of justice. Instead, the cases before the court overwhelmingly reflect a concern about the negative impact that unregulated agents may have on an accused" (at para. 52, citing *R. v. Kubinski*, 2006 ABPC 172; *R. v. Romanowicz*, 178 DLR (4th) 466; and *R. v. Wolkins*, 2005 NSCA 2).

Moreover, representation by agent (or counsel for that matter) was not seen to be required in order for the accused to receive a fair trial, another aspect of s.7 of the *Charter*. Judge Wheatley focused here on the obligation of courts to ensure that an accused person receives a fair trial, regardless of whether he or she is represented by counsel, an agent, or is self-represented. He stated that it was only in the "exceptional circumstances" where a trial judge could not ensure trial fairness that a court should order state-funded counsel (at para. 59, citing *R. v. Rowbotham* (1988), 41 CCC (3d) 1, [1988] OJ No. 271 (C.A.) and *R. v. Rain*, 1998 ABCA 315, (1998), 130 CCC (3d) 167). According to Judge Wheatley, "the presumption must be that a trial judge will do everything in the scope of his or her authority to ensure that the accused person receives a fair trial", and there was no evidence to suggest that the trial judge in this case could not fulfill this duty (at para. 60).

The final argument was based on the accused's equality rights under s. 15(1) of the *Charter*. The Aboriginal Court Worker Program, which is recognized under Alberta Order in Council 334/2003 as an authorized program allowing agents to appear for accused persons under s. 802.1 of the *Criminal Code*, was said to discriminate against non-Aboriginal accused persons. Judge Wheatley followed the governing case of *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483, and held that this Program did draw a distinction between Aboriginal and non-Aboriginal accused

persons in terms of the availability of agents. Again following *Kapp*, this distinction was said to be based upon the enumerated ground of race (at para. 70). However, the Aboriginal Court Worker Program was seen to meet the requirements of s. 15(2) of the *Charter*, which protects affirmative action programs. Judge Wheatley found the Program's objective was to ameliorate the conditions of a disadvantaged group, namely Aboriginal persons, who are over-represented in, inequitably treated by, and lacking in equal access to the criminal justice system (at para. 71). Based on *Kapp*, the finding of an ameliorative program meant that there was no discrimination under s. 15(1) of the *Charter* in the lesser availability of agents to non-Aboriginal accused persons such as Frick.

Overall, none of the accused's *Charter* arguments were found to have merit, there were no *Charter* violations established, and the Court found it unnecessary to consider s. 1 of the *Charter*, the reasonable limits provision.

Commentary

I think Judge Wheatley came to the correct decision on the federalism and statutory interpretation aspects of the case in light of the governing precedents, although he omits reference to relevant case law that would have buttressed his decision.

On the division of powers issue, the accused had argued that the Court should follow *Law Society (British Columbia) v. Mangat* (1997), 149 DLR (4th) 736 (B.C.S.C.), where provisions authorizing the appearance of agents under the *Immigration Act*, RSC 1976-77, c. 52 were at issue. The B.C. Supreme Court found (at para. 62) that those provisions of the *Immigration Act* were *ultra vires* the federal government "insofar as they authorize the practice of law." Judge Wheatley stated that he did not find the decision persuasive, and distinguished it on the basis that it dealt with the *Immigration Act* rather than the *Criminal Code* (at para. 26). He did not refer to the fact that *Mangat* was eventually heard by the Supreme Court of Canada, where the Court held that both the federal government (under the *Immigration Act*) and the provincial government (under the *Legal Profession Act*) had overlapping powers to regulate the appearance and qualification of agents in immigration matters, which should operate concurrently unless there was a conflict (in which case the federal provisions would be paramount). The Supreme Court ruling in *Mangat* would have supported Judge Wheatley's decision had it been cited. Although it dealt with a different context -- immigration rather than criminal matters – those contexts are analogous when it comes to the respective powers of the federal and provincial governments to regulate who may appear on behalf of the parties.

Judge Wheatley's ruling on s.7 of the *Charter* also omits reference to a key ruling under this section, and in this case the omission may have been to the detriment of the accused. In *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, the Supreme Court held that a fair trial may, in some circumstances, require representation by state funded counsel. If the state seeks to violate a person's life, liberty or security of the person via criminal or civil proceedings (e.g. child welfare proceedings), then the right to a fair trial is engaged. A fair trial may require representation by state funded counsel, depending upon the seriousness of the interests at stake, the complexity of the proceedings, and the capacity of the party asserting s. 7 rights.

If these circumstances -- a serious interest, complex proceedings, and the inability of the party to self-represent -- are present, it seems wholly inadequate for a person whose s.7 rights are at issue to have to rely on the trial judge to protect their right to a fair trial, as implied in Judge

Wheatley's ruling. It may be that Judge Wheatley meant to recognize this point when he stated that there are "exceptional circumstances" when "a trial judge cannot ensure trial fairness" (at para. 59). And it may be that the accused in this case did not prove that these "exceptional circumstances" existed in his case. But it is difficult to see how serious interest, complex proceedings, and the inability of the party to self-represent would be exceptional – in fact, these circumstances are the norm in criminal proceedings as well as child welfare matters (see the concurring reasons of Justices L'Heureux-Dubé, Gonthier and McLachlin in *G. (J.)* at para. 125 in support of this point, although the majority in *G. (J.)* thought that such cases would be "rare" (at para. 102)).

The implications of this argument are far-reaching, as it would support the right to state funded counsel in a much broader range of circumstances than those currently recognized in the case law (see e.g. *Rowbotham* and *Rain*, above). It would not, however, be as broad a right as the Supreme Court rejected in *British Columbia (Attorney General) v. Christie*, [2007] 1 S.C.R. 873, 2007 SCC 21. In that case, the Court held that the rule of law does not support a broad right to counsel in all court or tribunal proceedings where legal rights and obligations are at stake. Nor is this broad right what the accused was actually claiming in *Frick*. We must recall that what the accused was seeking here was the right to *representation* in order to have a fair trial, and given that legal aid was unavailable, he was seeking representation by an agent. My point is that if the state's failure to fund legal counsel can amount to a violation of the principles of fundamental justice in some circumstances, then the state's prohibition on representation by an agent should also be seen as a potential violation of those principles.

If the prohibition on representation by agents was found to violate s. 7, the government would still have an opportunity to justify the prohibition as a reasonable limit under s. 1 of the *Charter*. This is where the governments' objectives in limiting the services provided by agents become relevant, along with the means they used to achieve those objectives (see *R. v. Oakes*, [1986] 1 S.C.R. 103). The federal government has a reasonable interest in ensuring that serious criminal matters are handled by those who are qualified to do so, and the provinces have a reasonable interest in setting out and enforcing those qualifications. The problem is that there is an entire category of persons who is excluded from representing accused persons in serious criminal matters, namely agents who do not fall within one of the exceptions in Alberta Order in Council (334/2003). This exclusion is arguably overbroad to the extent that it is not tied to some measure of competence or certification. But because agents are unregulated in Alberta, there are no such measures. This is in contrast to the situation in some other provinces, such as Ontario, where the province has regulated legal agents such as paralegals since 2007 (see *Frick* at para. 21).

The issue of representation by agents in Alberta is being studied currently by a joint Steering Committee on Access to Justice, which has the mandate to review the Alternate Delivery of Legal Services. The Steering Committee has membership from the Law Society of Alberta, Alberta Justice, the Alberta Courts, Canadian Bar Association (Alberta branch) and Legal Aid Alberta. According to the Steering Committee's website, "[c]itizen protection, the unclear definition of the practice of law and the lack of information on the delivery of legal services were among several issues identified in [the] first phase" of the project. The second phase of the project, now underway, is "explor[ing] the issues identified thorough a survey of the public and lawyers on the alternate delivery of legal services." Further, "the task force will begin preparing an "industry profile" of non-lawyers already providing legal services." This is important work towards the regulation of agents in this province. More fundamentally though, the *Frick* case raises questions about access to justice that go beyond the issue of whether accused persons should be entitled to appear by agent in certain circumstances.

How should we, as a profession and as a society, ensure adequate funding for legal aid? If priorities must be made in terms of how the available funding is allocated, what kinds of matters should have priority? And if legal aid funding is not available, how can we best ensure that accused persons and others receive a fair trial or hearing?