June 15, 2015

Agent Regulation: The Case of Emmerson Brando (AKA Arturo Nuosci, AKA Maverick Austin Maveric, AKA Landon Emmerson Brando)

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Case Commented On: *R v Hansen,* 2015 ABPC 118

On May 12, 2015, CBC news reported that Emmerson Brando – a well-known Calgary-based court agent – had an extensive criminal history (Meghan Grant, "Emmerson Brando's criminal past outlined in Calgary court memo" *CBC News* (12 May 2015) ("*CBC News"*). This was of great interest to the Calgary Bar owing to his regular appearances in court. Mr. Brando had served 90 days in Canadian jail and 33 months in U.S. prison for offences including fabricating evidence, fraud, identity theft, misuse of a social security number, and making a false statement in a passport application (CBC News). Upon completing his sentence in the United States, Mr. Brando was deported back to Canada, where he set up practice as an agent in Ontario. A few years ago, Mr. Brando moved his practice to Alberta where paralegals are not regulated (CBC News).

Once Mr. Brando's criminal history was uncovered, Chief Crown counsel Lloyd Robertson, Q.C., brought an objection to Mr. Brando being given leave to represent a client at an upcoming trial. The resulting decision, *R v Hansen,* 2015 ABPC 118, written by Judge Gaschler, provides a thorough analysis of Brando's criminal history and the way in which it affects the Court's willingness to grant him leave to appear as an agent. After a careful review of the circumstances, Judge Gaschler held that Mr. Brando's appearance would undermine the integrity of the justice system, and denied him leave to appear as an agent (at para 29).

This decision raises the question of agent regulation. In Alberta, court agents operate in a vaguely defined territory. The *Criminal Code of Canada*, RSC 1985, c C-46, authorizes defendants to appear via an agent on summary conviction matters (at ss 800 and 802). Unlike Ontario, however, Alberta court agents are not regulated. Given that agents are authorized to appear in Alberta courts, should the Law Society (or some other entity) be regulating who gets to call themselves a court agent? Doing so has obvious benefits, but some object that regulation creates unintended barriers to justice. This post examines the *Hansen* decision and considers the role of agent regulation in the future.

The Decision

Judge Gaschler's decision was guided by reference to the Ontario Court of Appeal decision *R v Romanowicz*, (1999) 45 OR (3d) 506. *Romanowicz* considered whether a trial judge can refuse to

permit an agent to represent an accused in summary conviction proceedings for concerns over competency or otherwise. The Court of Appeal held that a trial court can deny leave to an agent when participation in the proceedings "would either damage the fairness of those proceedings, impair the ability of the tribunal to perform its function or otherwise undermine the integrity of the process" (*Romanowicz* at para 61). Furthermore, that power "must be invoked whenever it is necessary to do so to protect the proper administration of justice" (*Romanowicz* at para 73).

While not an exhaustive list, the Court of Appeal found that the "administration of justice would suffer irreparable harm if an agent were allowed to appear [in situations involving] representation by an agent facing criminal charges involving interference with the administration of justice and representation by an agent whose background demonstrates pervasive dishonesty or blatant disrespect for the law" (*Romanowicz* at para 74).

However, the Court of Appeal emphasized that a criminal record or discreditable conduct does not automatically disqualify someone from representing an accused. Disqualification will only occur if the conduct pertains to situations in which "the agent's criminal record or other discreditable acts are such as to permit the conclusion that the agent cannot be relied upon to conduct a trial ethically and honourably" (*Romanowicz* at para 74).

In light of the *Romanowicz* ruling, it is clear that there are some concerns surrounding the types of offences on Mr. Brando's criminal record. In the *Hansen* decision, Judge Gaschler provided an overview of Mr. Brando's prior convictions (at paras 8-9). They are as follows:

- 1990 – Ontario: forgery and uttering a forged document
    - Six months on each charge concurrent
- 1995 – Ontario: fabricating evidence
    - 90 days intermittent and probation
- 1996 – Ontario: two counts of fraud over $1,000
    - Suspended sentence, probation for two years and restitution of $30,000
- 1998 – Ontario: two counts of fraud over $5,000
    - Two years less a day, conditional sentence order, three years probation, restitution on the first count of $40,183.73, and restitution on the second count of $15,228.21
- 1999 – Ontario: uttering threats
    - Suspended sentence and one year probation
- 2006 – United States: mail fraud, identity theft, false statement in an application for a US passport, three counts of bank fraud, and misuse of social security number
    - Global sentence of 60 months in prison, five years of supervision upon release, $800 special assessment, and $200,000 in restitution.

While reviewing Mr. Brando's criminal past, Judge Gaschler drew attention to a much more recent deception. On his website, Mr. Brando stated that he had served with the Royal Canadian Mounted Police for 25 years (at para 21). In reality, Mr. Brando had only served as a special constable for a few months (at para 22). Furthermore, this misleading information had only been removed from Mr. Brando's website one week earlier when the Crown informed him that it would be objecting to his appearance as a court agent (at para 22). With respect to this point, Judge Gaschler stated "[t]hat particular falsehood, it is clear, is a significant and material falsehood in the present. This demonstrates that Mr. Brando's dishonesty and falsehoods are not only in the past. Rehabilitation, which Mr. Brando claims, cannot in these circumstances be claimed to be complete" (at para 22).

Mr. Brando's recent falsehood and past offences led Judge Gaschler to find that the "total record of criminal convictions and disreputable conduct is of such a kind and character that pervasive dishonesty and blatant disregard for the law and the rights of others is abundantly demonstrated" (at para 25). As a result, he concluded that "[n]o representation by Mr. Brando could be heard without the overwhelming distraction and concern over Mr. Brando's veracity and reliability", and denied Mr. Brando leave to appear as an agent on behalf of his client (at para 29).

Commentary

According to ss 800 and 802 of the *Criminal Code*, an accused can appear by agent on summary conviction charges carrying a maximum sentence of six months. In Ontario, those who provide paralegal services are subject to regulation by the Law Society of Upper Canada (see *Law Society Act*, RSO 1990, c L8). Among those regulations is the requirement that the court agent be of good character (The Law Society of Upper Canada, *Licensing and Accreditation*, Toronto: LSUC, 2014). In order to determine whether a person is of good character, the Law Society has set out thirteen guidelines, and has indicated that other information may also be considered. The guidelines consider whether the person:

- has been found guilty of, or convicted of, any offence under any statute;
- is the subject of criminal proceedings;
- has had judgment rendered against him or her in an action involving fraud;
- has ever disobeyed any order of any court requiring the person to do any act or to abstain from doing any act; and
- has been sanctioned or had a penalty imposed upon him or her by a court, an administrative tribunal or a regulatory body (The Law Society of Upper Canada, *Licensing Process Policies – Paralegal*, Toronto: LSUC, 2014)

Clearly, Mr. Brando would have difficulties meeting the "good character" requirement in Ontario.

Court agents remain unregulated in Alberta. In 2012, the Law Society of Alberta issued a report regarding the Alternate Delivery of Legal Services as part of a provincial initiative to enhance access to justice (The Law Society of Alberta, *Alternate Delivery of Legal Services Final Report* (Alberta: Law Society of Alberta, February 2012)). That report concluded that agent regulation was unnecessary despite the fact that it may expose some Albertans to a risk of harm (at 21). In its view, there was insufficient evidence indicating that regulation would increase the availability of services (at 22), and may pose some barriers to justice. Persons dissatisfied with their agent operate in a "buyer beware" marketplace and may rely on the *Criminal Code* and consumer protection legislation (at 23). Admittedly, the Report had difficultly collecting data on the harms caused to Albertans through a lack of regulation (at 16).

Mr. Brando's case forces us to revisit important questions about this regulatory gap. There are arguments to be made both for and against the regulation of agents in Alberta.

As the Report notes, agent regulation will likely increase the amount of money it costs to be an agent, and thus, erect a barrier to justice. The resulting increase in fees may diminish the agent's ability to serve the lower income clientele that relies on their services. The potential financial requirements to become an agent can be estimated from those in Ontario. In Ontario, paralegals must write the Paralegal Licensing Examination and be of good character before they can become licensed (The Law Society of Upper Canada, *Licensing and Accreditation*, Toronto:

LSUC, 2014). The fee to write the paralegal exam in 2015 was $1,075.00, plus a $160.00 application fee, and a $165.00 fee for an application for a license (The Law Society of Upper Canada, *Become a Paralegal: 2015-16 Fees Schedule*, Toronto: LSUC, 2014). Financial assistance is not offered to offset the costs of writing the exam, and there are no bursaries, government loans, or grants available. Paralegals must also carry professional liability insurance (LSUC By-laws, By-law 6, Part II, section 12(1)), and pay annual fees set out in the Law Society By-Law 5. At the moment, the 2015 annual fee is up to $1,125.48 (The Law Society of Upper Canada, *Paying Your Law Society Fees*, Toronto: LSUC, 2014).

If Alberta were to implement regulation similar to that in Ontario, paralegals would also have to pay into the same compensation fund as lawyers. In Ontario, regulations dictate that an agent's clients have access to the Law Society's Compensation Fund if they lose money because of a paralegal's dishonesty. The compensation fund is paid for "exclusively by the lawyers and paralegals of Ontario, out of their own pockets", and has "paid out millions of dollars to help clients" since 1953, though paralegals have only been included since 2008 (The Law Society of Upper Canada, *Compensation Fund*, Toronto: LSUC, 2014). If paying out of their own pockets, it is likely agents will pass this expense along to the consumer through increased fees. However, is it not fair that clients should have access to a compensation fund, regardless of whether they are represented by a lawyer or agent? And is it not fair that, if agents are providing legal services, they be required to contribute to such a fund?

These increased costs will likely result in a fee increase for agent representation. As finances are one of the key reasons behind hiring an agent, this could negatively impact access to justice.

Access to justice concerns guided the conclusions in the Law Society of Alberta's Report. The Report found no evidence that regulation would increase availability of legal services, but did find evidence suggesting that regulation discouraged or reduced independent legal services activity (at 23).

However, while regulation may raise barriers to justice, it also has obvious benefits. The arguments in favour of agent regulation are focused on facilitating the proper administration of justice. Agent regulation could decrease costs associated with administering justice through a reduction of appeals, and mitigate the onerous burden placed on judges to perform their own method of agent regulation to ensure the rights of the accused are protected.

In considering the proper administration of justice, Judge Gaschler's decision was guided by his concern that an unscrupulous agent's statements and questionable evidence could lead to flimsy, or even incorrect, judicial decisions. These concerns, if borne out, could lead to false convictions and a wave of appeals. False convictions are the antithesis of the proper administration of justice. Aside from compromising this pillar of the justice system, these appeals would be costly, and would result in added strain to an already overloaded court system.

The lack of regulation also shifts the burden of ensuring the quality of agents onto judges. Judges who are faced with a court agent are placed in an awkward position – the accused has elected to appear via agent, but the competence and quality of that agent is unverified. In order to ensure the proper administration of justice, the rights of an accused must be protected. Those rights are protected by defense lawyers and the courts, and as a representative of the accused, an agent must also bear that responsibility. Without regulation, even apparently competent agents must be treated with caution. These extra precautions mean that judges are essentially required to act as though they are dealing with a self-represented litigant.

When dealing with agents, judges must be able to proceed under the basic premise that the agent is competent and trustworthy. Regulation can provide the foundation for this belief.

Regulation gives judges more certainty that the agents appearing before them are competent and trustworthy. Judges will face less of a burden ensuring that the rights of the accused are protected. However, this line of reasoning also raises an important question. If regulation diminishes some of the responsibility of the courts, who is ultimately responsible for protecting the rights of an accused: the agent, the regulatory authority or the court?

Concluding Thoughts

Despite potential costs concerns, we are of the view that Alberta ought to be regulating its agents in some way. Low and middle income Albertans are desperate for affordable legal assistance, and agents are increasingly filling this need. Given this reality, it is in the Law Society of Alberta's interest to make sure that agents meet certain criteria of integrity and competence.

Amongst many other concerns, the Law Society seeks to protect the public from the unauthorized or unethical practice of law. In failing to regulate agents, we are ignoring an area where these concerns are most prominent. Failing to regulate agents does not dissuade agents from advertising their services, or clients from seeking them out. It merely makes a client's choice of agent a hazardous occasion fraught with uncertainty.

The Law Society's Report was understandably concerned about access to justice. There is little doubt that access to justice is a significant concern, and if regulating agents, every opportunity should be taken to keep expenses low to keep them accessible to those who rely on agents. However, we disagree that the need to keep costs low justifies a complete void in regulation or oversight. Legal proceedings significantly impact people's lives. In choosing a representative, members of the public ought to have some measure of comfort that their agent is ethical and competent.

The Report took the view that disserved clients of non-lawyers have protection, because they can rely on consumer protection laws and *Criminal Code* provisions (at 16). This view proliferates one of the most serious problems identified in contemporary access to justice research – that of clustering legal problems (Ab Currie, *The Legal Problems of Everyday Life: The Nature, Extent and Consequences of Justiciable Problems Experienced by Canadians* (Ottawa: Department of Justice Canada, 2007) at 1; The Canadian Bar Association, *Reaching Equal Justice: An Invitation to Envision and Act* (Ottawa: The Canadian Bar Association, November 2013) at 16). By forcing the burden of policing unscrupulous agents on the (often low-income) clients they serve, we are effectively snowballing one legal problem into several. In our view, it seems more reasonable to try and prevent the practice of unscrupulous agents in the first place, before problems develop.

We note that authors of the Report had difficulty collecting data on harms caused by independent non-lawyer service delivery (at 16). In other words, the Report's conclusions were rendered without considering evidence of the harms caused by that failure. Based on that gap, we view its conclusions with caution.

Ensuring that agents have good character and have had enough training to pass an exam will help reduce the disparity between the quality of justice for the wealthy and the quality of justice for those with a lower income. Serious consideration should be given to implementing agent regulation in Alberta, and as it stands, the Alberta Law Society is the only feasible regulatory body.

The website of the Law Society of Alberta states that the objective of their Strategic Plan for 2010-2013 is "promoting access to high quality legal services" (The Law Society of Alberta, *Access to Justice – Alternate Delivery of Legal Services*, Alberta: Law Society of Alberta, 2010). We are concerned that the Report unduly focused on the access portion of this equation, with very little emphasis on the "high quality" requirement. With any luck, Judge Gaschler's decision will facilitate a conversation surrounding the regulation of agents in Alberta. While there are strong reasons to implement a regulatory system such as the one already in place in Ontario, the issues of access to justice must play a key role in any regulation considerations that may take place.

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