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Lawyers, Clients, Parties and the Right to Counsel

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Cases Considered:

R. v. Karmis, 2008 ABQB 525

The right to counsel is a revered constitutional right in Canada, but casting aside the understandings of this right that derive from American television shows, what does it really mean? Does it include, for example, the right to retain counsel of one's own choosing? What if the proposed lawyer was present at the scene of the alleged crime, although not an actual witness to the events? This was the scenario in *R. v. Karmis*, where a man accused of assault causing bodily harm sought to hire a lawyer who happened to be present at the party where the alleged events occurred.

Alex Karmis was charged with assault causing bodily harm for an incident alleged to have taken place at a Christmas party in December 2005. Richard Gariepy, a lawyer and friend of Karmis, was also at the party, and was retained by Karmis to represent him in relation to the charge. During pre-trial discussions with the Crown, Gariepy disclosed that he had been present at the party, and said that while he had not witnessed the alleged incident, he had observed the complainant to be intoxicated. In May 2007, the Crown sought an adjournment of the trial, and Alberta Provincial Court Judge Reilly recommended that the Law Society should review the question of Gariepy's ability to act for Karmis.

The case next came before Alberta Provincial Court Judge McIlhargey on August 14, 2007. Gariepy advised that the Law Society had recommended only that Karmis seek independent legal advice. The Crown then made a motion to have Gariepy removed as trial counsel, alleging a conflict of interest. No notice had been given of this motion, but after a brief adjournment Judge McIlhargey proceeded to hear the Crown's application. The Crown argued that the test for removal of counsel was "whether there is a possibility of real mischief associated with the representation of the accused by the solicitor", which it said was a "low threshold" (at para. 5). Applying this test, the Crown alleged that there was potential conflict of interest in that "Gariepy could have personal knowledge that might counter that of a testifying witness and that he might say something to a witness arising out of his own personal knowledge of the incident that could give rise to a mistrial" (at para. 5). Judge McIlhargey accepted the Crown's argument, ruling that because Gariepy was a potential witness at trial, there was a potential conflict of interest disqualifying him from representing the accused.

Karmis appealed Judge McIlhargey's decision to the Alberta Court of Queen's Bench, and also brought an application for relief under the *Canadian Charter of Rights of Freedoms* (the *Charter*). Justice Alan Macleod first had to consider the basis for his review of the Provincial Court decision. Section 830 of the *Criminal Code*, R.S.C. 1985, c. C-46, provides that appeals are available for a "final order or determination of a summary conviction court." Justice Macleod reviewed the relevant case law, and held that the decision to remove counsel was not one that could be appealed by the accused, as it was an interlocutory and not "final" decision. On the other hand, Justice Macleod found that he did have the jurisdiction to entertain an application for *Charter* relief under s. 24, which provides that "Anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances."

Justice Macleod cited the Supreme Court's decision in *R. v. Mills*, [1986] 1 S.C.R. 863, as authority for the proposition that trial courts and superior courts have concurrent jurisdiction to entertain *Charter* applications under s. 24, thereby rejecting the Crown's argument that the right to counsel issue should be decided at a post-trial appeal. According to Justice Macleod, "the remedy of post-trial appeal from the decision of the Provincial Court Judge rings hollow. By that time, regardless of whether a conviction or acquittal has been entered, the interference with a constitutionally protected right is complete" (at para. 31).

This is an important aspect of the court's ruling. If an appeal is unavailable for interim or interlocutory orders made by the provincial court, and those matters have a *Charter* component to them, it may be important for the accused to have recourse to a *Charter* remedy before the trial is heard. While courts need to be alive to the concern about prolonging trials with interlocutory matters, it must also be realized that sometimes waiting until the completion of the trial will render the *Charter* issue moot.

This was recognized by Justice Beverly McLachlin of the Supreme Court of Canada (as she then was) in her concurring judgment in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835. Although the majority in *Dagenais* avoided the issue, Justice McLachlin found that interim court orders such as the imposition of a publication ban in a criminal prosecution could be subject to *Charter* applications. She distinguished the *Dolphin Delivery* case (*RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573), in which the Supreme Court held that court orders made in the context of an action between private parties were not subject to the Charter. According to Justice McLachlin (at p. 944):

The question of what court orders attract the *Charter* is a large question, the answer to which is best determined on a case-to-case basis. … Court orders in the criminal sphere which affect *Charter* rights or the ability to enforce them are themselves subject to the Charter. This much, at a minimum, is required if *Charter* rights are to be meaningful.

Section 10(b) of the *Charter* provides that: "Everyone has the right on arrest or detention… to retain and instruct counsel without delay and to be informed of that right." Section 7 of the *Charter* has been found to include the right to make full answer and defence (see for example *R.*

v. Swain, [1991] 1 S.C.R. 933), and also protects the right to counsel. In *Karmis*, Justice Macleod held that the *Charter* protected right to counsel includes the right to select and retain counsel of one's own choice. Further, "the issue is not one of competence alone" (at para. 29). Quoting from the reasons of O'Connor J.A. in *R. v. McCallen*, [1999] O.J. No. 202 (C.A.):

Although it may be said that in some cases there will not be any practical difference whether an accused is represented by one counsel rather than another, nevertheless, the intangible value to the accused and the symbolic value to the system of criminal justice of the s.10(b) *Charter* right are of fundamental importance and must be vindicated when breached.

While recognizing that the right to choose counsel is not absolute, Justice Macleod stated that "disqualification is not an order that should be made in the absence of very compelling reasons" (at para. 29). Citing another Ontario case, *R. v. Widdifield*, [1995] O.J. No. 2383 (C.A.), the test was said to be "whether there was any "realistic risk" of a conflict of interests developing" (at para. 33).

Applying this test, Justice Macleod considered the case of *R. v. Parmar* (1991),126 A.R. 47 (Q.B.) where Wachowich J. had said in obiter "that a lawyer who witnessed and indeed played a role in breaking up the very fight that was the subject of the charge may have deviated from good practice in proceeding to represent the accused" (at para. 34). Justice Macleod easily distinguished those facts from the ones before him in *Karmis*. He noted that Gariepy had not witnessed the incident in question, and while he had observed the state of intoxication of the complainant, he planned to call five defence witnesses who would attest to that matter. The Crown's assertion of a realistic risk that Gariepy might have to testify at trial or might say something based on his personal knowledge during the trial was found to be "speculative at best" (at para. 36). According to Justice Macleod, "competent counsel know how to deal with these situations without causing a mistrial" (ibid.).

In conclusion, Justice Macleod found that the Provincial Court Judge erred by "effectively applying a presumption that, as a "potential witness," counsel for the accused must be disqualified, and failing entirely to consider Mr. Karmis' rights under the *Charter*" (at para. 38). Karmis was thus entitled to be represented by Gariepy, his counsel of choice.

As a *Charter* matter, the focus in this case was, as one would expect, on the accused as the person asserting *Charter* rights. From a *Charter* perspective, it seems that the mix of lawyers, clients and parties is not a fatal one. However, apart from whether an accused person has the right to be represented by counsel of his choice, is it prudent, and indeed ethical for a lawyer in Gariepy's circumstances to do so? I will leave it for others to comment on that aspect of this case.