On appeal from decisions rendered by Judicial Justices of the Peace on January 29, 2019 and March 19, 2019.

Date: 20201207
Docket: CR 19-01-37352
(Winnipeg Centre)
Indexed as: R. v. Airmaster Sales Ltd.
Cited as: 2020 MBQB 174

COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:	**APPEARANCES:**
HER MAJESTY THE QUEEN, respondent,	JONATHAN W. AVEY for the respondent
- and -	
AIRMASTER SALES LTD., (accused) appellant.	ADAM R. HODGE for the (accused) appellant
	Judgment delivered: December 7, 2020

PERLMUTTER A.C.J.Q.B.

INTRODUCTION

[1] The accused appeals its convictions, having been granted leave, with respect to two provincial offence notices for speeding. Part of this appeal relates to a decision by the Judicial Justice of the Peace (the "JJP") to bar Christian Sweryda from appearing as the accused's representative with respect to these matters pursuant to s. 53(2) of ***The Provincial Offences Act***, C.C.S.M. c. P160 (the "POA"), which states as follows:

> A justice may bar a person from appearing as a representative if the justice finds that the person is not able to properly represent or advise the person for whom they appear.

BACKGROUND

[2] On May 2, 2018 and August 20, 2018, the accused was issued photo enforcement tickets for speeding contrary to s. 95(1) of ***The Highway Traffic Act***, C.C.S.M. c. H60 (the "HTA"). To contest these tickets, Keith MacCharles, as "owner" of the accused, authorized Mr. Sweryda to appear as the accused's representative pursuant to s. 53(1) of the POA, which states as follows:

> A defendant may appear and act personally or by representative in any proceeding.

[3] Mr. Sweryda was not a lawyer and was not, under s. 40(1) of ***The Legal Profession Act***, C.C.S.M. c. L107 (the "LPA"), a person who may act as an agent on behalf of, or provide legal advice to, another person with respect to an offence under the HTA or ***The Drivers and Vehicles Act***, C.C.S.M. c. D104 (hereinafter, referred to as an "agent").

[4] On January 29, 2019, following argument, the JJP granted the Crown's motion to deny authorization for Mr. Sweryda to act, and stated:

> …[S]ection 53(1) was put in place so that a family member or close personal friend could assist a defendant in providing some emotional support or guidance to those unfamiliar with the court process. This may include a family member assisting someone with language barriers or perhaps in situations of photo enforcement tickets wherein the family member or friend was the driver of the vehicle and has taken responsibility as the driver at the time of the offence. This section allows for individuals to have assistance with their highway traffic matters that they may be unfamiliar with. It does not in fact give an individual *carte blanche* to act as a lawyer when they are not in fact a lawyer, or for that matter, have any level of professional responsibility or accountability.
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> *Transcript of Proceedings*, January 29, 2019, Page T22

…

> Mr. Sweryda is not a lawyer, he's not an agent, he's not bound by any professional responsibility or accountability. Yet his conduct in these matters resembles the conduct of a lawyer. Mr. Sweryda files motions, wishes to cross examine witnesses, and call expert evidence. This is well beyond the scope of the intention of section 53(1) of the *POA*. In my view, Mr. Sweryda's actions offend the purpose of that section of [*The*] *Provincial Offences Act*. Mr. Sweryda's using that section of [*The*] *Provincial Offences Act* to act as a lawyer for individuals without any standards or legal obligations…
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> *Transcript of Proceedings*, January 29, 2019, Pages T22 and T23

…

> Based on the analysis of the materials filed and the submissions before this Court, I'm exercising my discretion pursuant to section 53(2) of the *POA* and I'm barring Mr. Sweryda from represent – appearing as a representative on this matter. The Crown's motion to deny Mr. Sweryda to represent Airmaster Sales is granted.
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> *Transcript of Proceedings*, January 29, 2019, Pages T23 and T24

[5] Mr. MacCharles then requested an adjournment and the matter was rescheduled for March 19, 2019. On March 19, 2019, nobody appeared on behalf of the accused and pursuant to s. 19(2) of the POA, the JJP entered default convictions. On May 2, 2019, the accused applied to have the default convictions set aside and a new hearing date ordered. The JJP denied a new hearing.

PARTIES' POSITIONS

[6] It is the accused's position that when the JJP granted the Crown's motion to deny authorization for Mr. Sweryda to act as the accused's representative, she erred in her interpretation of a "representative" under s. 53 of the POA. It is the accused's position that this error contributed to the accused's convictions as well as amounts to a miscarriage of justice, such that the convictions must be quashed and new trials ordered.

[7] It is the Crown's position that the accused was not convicted because it was not represented by Mr. Sweryda, but because the accused did not attend its hearing. The accused does not allege an error in that decision, nor does the accused allege any error

in the decision denying its application to set aside the default convictions. As such, it is the Crown's position that the accused's appeal of the JJP's decision denying Mr. Sweryda authorization to act is moot. If I consider the accused's arguments regarding the JJP's decision to deny authorization for Mr. Sweryda to act, it is the Crown's position that the JJP correctly exercised her discretion to hold that Mr. Sweryda's conduct fell outside the scope of representation permitted by s. 53 of the POA.

ANALYSIS

Mootness

[8] I will deal first with the question of mootness. I would not characterize this appeal as moot. Mootness is not to be confused with a lack of merit or relevance. It is my view that the JJP's decision to bar Mr. Sweryda from appearing as the accused's representative is irrelevant in light of the accused being convicted by default for the accused's non-appearance on the scheduled trial date.

[9] The accused argues that had the JJP not erred in denying Mr. Sweryda's authorization to represent the accused, the matter would have proceeded on its merits on January 29, 2019, when both Mr. MacCharles and Mr. Sweryda were in attendance, and there would not have later been default convictions. That is, there is a causal connection between Mr. Sweryda not being permitted to represent the accused, the matter then being adjourned, and the accused not attending on the new scheduled date.

[10] However, I agree with the Crown's position that the basis for conviction was the accused's non-appearance at the hearing date where the default convictions were entered. As noted, the accused is not alleging an error in entering default convictions for

the accused's non-appearance or for the denial of the accused's application to set aside these default convictions. Rather, the accused's appeal is singularly focused on the interlocutory decision by the JJP to bar Mr. Sweryda from appearing as the accused's representative. This interlocutory decision did not form the basis for the accused's convictions.

[11] Accordingly, I would dismiss the appeal on this basis. Nevertheless, in the event that I am incorrect in this finding, I have considered below the merits of the JJP's decision to bar Mr. Sweryda from appearing as the accused's representative.

Standard of Review

[12] The interpretation of a statute is a question of law, reviewed for correctness. Where the interpretation was correct, the application of the law to the facts is an exercise in discretion that is entitled to deference. (***R. v. Ibrahim***, 2015 MBCA 62, para. 29.)

Mr. Sweryda as a Representative

[13] The JJP concluded that:

> As stated earlier, section 53 of the *POA* allows a family member or close personal friend to assist the defendant in providing some emotional support or guidance to those unfamiliar with the court process. [*The*] *Legal Professions Act* is the next step in addressing individuals who will go beyond that support and ensures those individuals or agents have checks and balances by way of being bonded and insured. The next step of assistance, in my view, would be by way of having a lawyer represent the defendant. These standards are put in place to protect the public. Mr. Sweryda's [over involvement] in these *HTA* matters amounts to the practice of law.
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> *Transcript of Proceedings*, January 29, 2019, Page T23

[14] It is the accused's position that the JJP erred in her interpretation of a "representative" under s. 53 of the POA when she barred Mr. Sweryda from appearing as the accused's representative.

[15] The term "representative" is not defined in either the POA or the LPA.

[16] Subsection 20(2) of the LPA provides under the heading "Unauthorized practice of law":

> Except as permitted by or under this Act or another Act, no person shall
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> (a) carry on the practice of law;
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> (b) appear as a lawyer before any court or before a justice of the peace;
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> (c) sue out any writ or process or solicit, commence, carry on or defend any action or proceeding before a court; or
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> (d) attempt to do any of the things mentioned in clauses (a) to (c).

[17] Part 5 of the LPA deals with representation in highway traffic matters, and includes in s. 40(1) under "Authority to act as agent or provide advice":

> A person who is not otherwise authorized to practise law in Manitoba may act as an agent on behalf of, or provide legal advice to, another person with respect to an offence under *The Highway Traffic Act* or *The Drivers and Vehicles Act* in the Provincial Court if
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> (a) the penalty for the offence on summary conviction does not include imprisonment, other than in default of payment of a fine;
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> (b) no report of bodily injury is made under subsection 155(4) of *The Highway Traffic Act* in respect of the event giving rise to the offence; and
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> (c) the person meets the requirements concerning insurance and bonding prescribed in the regulations.

[18] In ***R. v. Jorowski; R. v. Eisbrenner***, 2019 MBQB 114, albeit on the question of whether Mr. Sweryda, as a non-lawyer, could appear as a representative on the appeal of a provincial offence conviction to the Court of Queen's Bench, Justice Bond addressed many of the same arguments raised on the appeal in the case at hand. For the purposes of the present appeal, I find applicable the following conclusions arrived at by Justice Bond:

> **21** The broad permission apparently granted by section 53(1) of the ***POA*** must be read in light of the ***LPA*** and the restrictions it imposes on non-lawyers practising law and appearing in court: ***The Law Society of Manitoba v. Pollock***, 2007 MBQB 51 (CanLII) at paras. 93-95.
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> …
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> **24** Under section 40(1) of the ***LPA***, a non-lawyer may act as an agent on behalf of another person with respect to an offence under ***The Highway Traffic Act*** in the Provincial Court so long as the penalty for the offence does not include imprisonment and there is no report of bodily injury. Section 40(1) also requires that the agent meet the requirements concerning insurance and bonding prescribed in the regulations.
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> …
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> **36** I conclude that section 53(1) of the ***POA*** must be interpreted narrowly, allowing it to coexist with the ***LPA*** without conflict.

[19] In the case at hand, Mr. Sweryda was purporting to represent the accused with respect to an offence under the HTA in the Provincial Court. Of course, this is the very situation contemplated in s. 40(1) of the LPA. Except here, Mr. Sweryda does not meet the requirements of s. 40(1) of the LPA. As noted by Justice Bond in ***Jorowski***, to permit Mr. Sweryda to nevertheless represent the accused on the defence's interpretation of s. 53(1) of the POA would create a significant exception to the regulatory scheme under the LPA (para. 29). The LPA is a comprehensive scheme for the regulation of the authorized practice of law in Manitoba in the public interest and aimed at protecting the public (para. 22). I agree with Crown counsel that if the defence's position is accepted, s. 40(1) of the LPA would be meaningless and a representative would essentially, as the JJP wrote, have "*carte blanche*" to act as a lawyer when they are not in fact a lawyer.

[20] Apart from an agent under s. 40(1) of the LPA, accepting Justice Bond's analysis in ***Jorowski***, as I do, the only other exception to the unauthorized practice of law is for a non-lawyer "representative" to assist a defendant in a proceeding under the POA before the Provincial Court. It is my view that the nature and extent of this assistance is as

described by Justice Martin in ***The Law Society of Manitoba v. Kalo***, 2019 MBQB 60 (affirmed at 2019 MBCA 112). ***Kalo*** did not deal with s. 53 of the POA, but, in my view, those considerations discussed in ***Kalo*** regarding the extent to which a party may be represented by a non-lawyer also apply to s. 53 of the POA. These considerations are grounded in the proper administration of justice. It is my view that s. 53 of the POA is also grounded in the proper administration of justice and is intended to promote access to justice while protecting both a defendant and the broader administration of justice by ensuring that people who are not qualified to practice law or to provide legal advice do not do so. The scope of assistance that may be provided by such a representative is encapsulated in the following by Justice Martin in ***Kalo*** (para. 33):

> **33** On review of the ***Moss*** decision as a whole, it is clear that the limited interpretation of when a person assisting a self-represented individual will not violate s. 20 of the ***Act*** is as set out earlier: such a person will not be engaged in the unauthorized practice of law, will not violate s. 20, if they are lending a helping hand to a self-represented individual, without fee and on an isolated occasion. The nature and extent of the assistance will be determinative -- in other words, modest assistance, rarely given, with no expectation of compensation. Wannabe lawyers, "helping" others, do not fall within this very narrow exception.
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> [***Moss v. NN Life Insurance Co.***, 2004 MBCA 10, (CanLII)]

[21] In the case at hand, it is the very situation of the "wannabe lawyer" that the JJP was addressing. The JJP stated:

> Mr. Sweryda is not a lawyer, he's not an agent, he's not bound by any professional responsibility or accountability. Yet his conduct in these matters resembles the conduct of a lawyer. Mr. Sweryda files motions, wishes to cross examine witnesses, and call expert evidence. This is well beyond the scope of the intention of section 53(1) of the *POA*. In my view, Mr. Sweryda's actions offend the purpose of that section of [*The*] *Provincial Offences Act*....
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> *Transcript of Proceedings*, January 29, 2019, Pages T22 and T23
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> ...

> …He has drafted motions, has conduct of the proceedings to the point that he advises the defendants do not need to be present for these matters….
> *Transcript of Proceedings*, January 29, 2019, Page T23

[22] It is my view that the authority of a justice to bar a person from appearing as a representative under s. 53(2) of the POA is grounded in the court's jurisdiction to control its own process. This section empowers a justice to bar a person from appearing as a representative, who is not authorized to practice law under the LPA (s. 53(3)), if the nature and extent of the assistance that this person purports to provide exceeds the limitations discussed above, such that the justice finds that the person is not "able" to properly represent or advise the person for whom they appear. This would certainly extend to a person, who is not a lawyer or agent under s. 40(1) of the LPA[1], conducting himself or herself as a lawyer.

[23] As pointed out by Crown Counsel, similar concerns about Mr. Sweryda have arisen in other proceedings as discussed in ***R. v. Eisbrenner***, 2019 MBPC 3 (paras. 19-27; 80-86), which included the following conclusions by Krahn A.C.J. about Mr. Sweryda as a representative filing unmeritorious abuse of process motions (para. 107):

> I have reviewed in detail the transcripts, the many email exchanges between Mr. Sweryda, Ms. Eisbrenner and the Crown. I find there was a basis for the positions taken by the Crown. The fact those positions were in opposition of Mr. Sweryda's position does not amount to an abuse of process. There is no merit to a further challenge of the Crown's conduct amounting to an abuse of process. In my view, any further motions of similar style filed by Mr. Sweryda are beginning down the road of vexatious litigation. At the conclusion of oral submissions, I directed Mr. Sweryda to not file any further abuse of process motion in this case.

[1] In the present case, I am not addressing any limitations on the authority of a person to act as an agent or provide advice under Part 5 of the LPA.

[24] In summary, there are two situations where a person who is not a lawyer may appear in the Provincial Court as a representative under s. 53(1) of the POA:

1. When the representative is acting as an agent under s. 40(1) of the LPA; and
2. When the representative is providing modest assistance to a self-represented individual, without a fee, on an isolated occasion. This may include someone like a family member or friend assisting a defendant in providing some support or guidance where the defendant is unfamiliar with the court process. The permissible scope of this assistance depends on its nature and extent with the reference points discussed in ***Kalo***.

[25] Whatever the scope, it does not give an individual "*carte blanche*" to act as a lawyer when they are not in fact a lawyer. I find that the JJP correctly interpreted ss. 53(1) and 53(2) of the POA and that the JJP's application of these subsections to the facts of this case so as to bar Mr. Sweryda from appearing as a representative is entitled to deference.

CONCLUSION

[26] In conclusion, I would dismiss this appeal on the basis that the JJP's decision to bar Mr. Sweryda from appearing as the accused's representative is irrelevant to the convictions. In any event, I find that the JJP correctly interpreted ss. 53(1) and 53(2) of the POA and that the JJP's application of these subsections to the facts of this case so as to bar Mr. Sweryda from appearing as a representative is entitled to deference.

[27] Accordingly, the appeal is dismissed.

_____ A.C.J.Q.B.