SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Hillman*, 2015 NSSC 359

Date: 20150722
Docket: Truro No. CR. 435273
Registry: Truro

Between:

Her Majesty The Queen

Versus

Andrew Douglas Hillman

Applicant

DECISION

Judge:	The Honourable Justice Jeffrey R. Hunt
Heard:	July 22, 2015, in Truro, Nova Scotia
Oral Decision:	July 22, 2015
Written Release:	December 15, 2015
Counsel:	Jill Hartlen/Linda Hupman, for the Attorney General Andrew Hillman, Applicant, self-represented

By the Court:

[1] This is an Application by Mr. Hillman seeking the right to be represented throughout this matter by Christopher Enns, a non-legally trained lay person. Mr. Hillman is charged with committing an indictable offence in violation of s.7(1) of the **Controlled Drugs and Substances Act**. He has elected to proceed by jury trial.

[2] This Application deals with all non-**Charter** based arguments relating to the lay representation question. Mr. Hillman acknowledged during the hearing that no **Charter** based arguments formed part of this hearing.

[3] The **Criminal Code of Canada** is silent on rules respecting lay representation in indictable matters. It expressly permits agents to have a role in certain summary matters. Section 800(2) provides, in part, as follows:

> A defendant may appear personally, or by counsel, or agent, but the summary conviction court may require the defendant to appear personally…

[4] As was stated by Justice Beveridge in **R. v. Cox,** 2013 NSCA 140:

> This permissive section only applies to summary conviction proceedings under Part 27 of the **Code**.

Section 802.1 puts limitations on the role of the agent even in summary matters. The agent may not examine or cross-examine witnesses if on summary conviction the accused person is liable to be imprisoned for more than six months.

[5] It is also clear that even in cases to which s. 800(2) has application, the Court has residual power to limit or forbid the appointment of a particular agent. There are numerous examples in case law of this power being exercised in appropriate circumstances to limit or forbid particular agents.

[6] The position of the Applicant is that the silence of the **Criminal Code** is determinative of the question before the Court today. In the absence of an express prohibition he asserts that lay representation must be an available option. He does accept that a Court still has the residual discretion to deny or limit lay representation based upon the particular circumstances of the case or presumably of the proposed agent.

[7] The Respondent's position can be succinctly summarized. They would say that the **Code** does not permit lay representation of accused persons facing indictable matters. They point to a series of cases which support this proposition, albeit it is acknowledged by the Crown, and is evident, that these are quotes and reference in cases which were decided largely in summary offence matters.

[8] As was noted by the Crown, there is actually a surprising lack of case law specifically dealing with lay representation applications in indictable matters.

[9] I have reviewed the case law and I have considered the positions and arguments put by both parties. In my view this matter is determined by a common sense reading of s.800(2) and s.800(2.1). Section 800(2.1) precludes representation by agents in summary matters where the accused is liable to a penalty of more than six months. This particular provision I conclude is critical to understanding Parliament's intention as it pertains to indictable offences. This section has received increased attention in recent years because of its interaction with the increased penalties available on a s.253 conviction. This offence is now liable to a penalty of 18 months incarceration – up from six months.

[10] Courts have consequently been required to address efforts to have agents continue to represent individuals charged with that offence. There was a history in certain provinces in Canada for non-lawyer lay persons to represent individuals charged with s.253 offences.

[11] A number of Courts have subsequently concluded that s. 802.1 now forbids such representation. I refer to such cases as **R. v. Laurie,** 2009 ONCJ 428; **R. v. Frick**, 2010 ABPC 280; and **R. v. D'Arcy**, 2015 ABPC 6.

[12] For Mr. Hillman to be correct the Court would have to conclude that Parliament intended to exclude or forbid lay representation for a certain class of summary conviction offences but was prepared to permit non-legally trained lay representation for (even more serious) indictable offences. With respect, this makes no logical sense. If Parliament had intended to change this they would have expressly legislated on the point. They have not. What they have done is limit lay representation to summary offences which attract no more than six months potential incarceration.

[13] Mr. Hillman has attempted to rely on the **Nova Scotia Civil Procedure Rules** and, specifically **Rule** 34.09. I find that this **Rule** has no application in this instance. The Federal Parliament has power over criminal procedure. This is a constitutionally assigned power. I find that Parliament's intention in this regard is clear and can be clearly understood from the application of the applicable **Code** provisions. I have also considered Mr. Hillman's arguments with respect to the **Interpretation Act** and also to the issue of '**McKenzie Friend'** representation as this applies in U.K. family law cases. I find that the **Interpretation Act** does not apply in the way Mr. Hillman would urge. I also conclude that **McKenzie Friends**, do not have a role here in our jurisdiction given the wording and operation of our **Criminal Code**.

[14] I deny the application for lay representation.

[15] I am aware that other Courts have concluded that Mr. Enns is not a suitable person to act as an agent. These include decisions by Judge Atwood and Judge Zimmer. I find that given my interpretation and application of the law, I do not have to go there in this decision. I believe that weighing the suitability of a particular agent would be phase two of an application for lay representation. If in phase one it were determined that a particular offence was one which allowed for lay representation, then phase two of that proceeding would be a consideration of the suitability of the proposed individual. We do not get to stage two in this circumstance.

[16] One final word to Mr. Hillman. And I know you have heard this from other Judges before me. Any indictable matter is serious and has to be taken seriously. Any Jury trial is very serious and has to be taken seriously. Because I have not said this to you before, I hope you will indulge me and let me say it to you directly. I think you must consider taking legal counsel. This would not exclude you from taking advice from others, but proper legal advice is an invaluable part of ensuring

that your best interests are protected. So, I am going to urge you one last time to consider that.

Justice Jeffrey R. Hunt

12/14/15