Her Majesty the Queen v. Golyanik et al.

[Indexed as: R. v. Golyanik]

63 O.R. (3d) 276
[2003] O.J. No. 346
Docket No. M148/02

Ontario Superior Court of Justice
Trafford J.
February 7, 2003

Criminal law -- Counsel -- Designation of "counsel" pursuant to s. 650.01 of Criminal Code -- Section designed to improve efficient use of court resources by limiting presence of accused in indictable matters to significant proceedings within criminal trial process -- Appearance by designated counsel equivalent to accused's presence unless oral evidence being received -- Broad definition of "counsel" required in order to achieve objective of legislation -- Justice of Peace erring in refusing to accept designation as it referred to law firm, agents and students rather to single named counsel of record -- Term "counsel" in s. 650.01 including law firm and lawyers specifically named in designation as well as other lawyers and articling students authorized by law firm or named lawyer -- Criminal Code, R.S.C. 1985, c. C-46, s. 650.01.

Section 650.01 of the Criminal Code, which came into effect in July 2002, permits an accused to appoint "counsel" to appear on his or her behalf for any proceedings under the Code by filing a designation with the court. An appearance by the designated counsel is equivalent to the accused being present, except where oral evidence of a witness is taken, jurors are selected or a writ of habeas corpus is requested. The applicants were charged with various criminal offences. They executed a designation which named the lawyer who was expected

to be primarily responsible for the defence, his law firm, and their agents and students. When the lawyer appeared in court of behalf of the applicants, neither of whom was present, the justice of the peace refused to accept the designations because they referred to the law firm, agents and students. She interpreted s. 650.1 as contemplating the designation of one named lawyer who was counsel of record in the proceeding. Warrants were issued for the arrest of the applicants. The applicants brought an application to quash the warrants.

Held, the application should be granted.

Section 650.01 of the Code was introduced as part of a legislative scheme to permit an accused charged with an indictable offence to limit personal appearances before the court to the most significant proceedings in the criminal process, in order to reduce the number of defendants present in court on a given day, resulting in a more efficient use of court resources. The effectiveness of s. 650.01 as a means of achieving that objective depends on the interpretation of the term "counsel". "Counsel" should be interpreted as including law firms and lawyers specifically named in the designation, as well as other lawyers and articling students who are [page277] authorized by the law firm or named lawyer from time to time throughout the history of the proceedings to act as designated counsel. The inclusion of law firms in the definition arises from the plain meaning of the term "counsel" as well as the rules in s. 33(2) and (3) of the Interpretation Act, R.S.C. 1985, c. I-21, which provide that "words in the singular include the plural and words in the plural include the singular", and "where a word is defined, other parts of speech and grammatical forms of the same word have corresponding meanings". Since the definition of "counsel" in s. 2 of the Code refers to barristers and solicitors "in respect of . . . things [that they] are authorized to do", the term may, with permission of the client, include other lawyers and articling students who are specifically authorized by the designated counsel from time to time to act as designated counsel under s. 650.01 of the Code. Although the word "counsel" may be open to other interpretations, this interpretation is to be preferred because it accords with the

purpose of s. 650.01 and is compatible with the principles of statutory interpretation requiring an interpretation that is most favourable to a defendant and gives full recognition to rights guaranteed by the Canadian Charter of Rights and Freedoms. The designations filed in this case were valid.

Cases referred to

AlliedSignal Inc. v. Du Pont Canada Inc. (1998), 81 C.P.R. 129 (Fed. T.D.) (sub nom. AlliedSignal Inc. v. Dupont Canada Inc.); R. v. G. (B.), [1999] 2 S.C.R. 475, 174 D.L.R. (4th) 301, 240 N.R. 260, 63 C.R.R. (2d) 272, 135 C.C.C. (3d) 303, 24 C.R. (5th) 266 (sub nom. R. v. Grgoire); R. v. H. (J.) (2002), 161 C.C.C. (3d) 392, 155 O.A.C. 146, [2002] O.J. No. 268 (Quicklaw), 2002 CarswellOnt 156 (C.A.); R. v. LeClair, [1989] 1 S.C.R. 3, 31 O.A.C. 321, 91 N.R. 81, 37 C.R.R. 369, 46 C.C.C. (3d) 129, 67 C.R. (3d) 209 (sub nom. R. v. Ross); R. v. McCallen (1999), 43 O.R. (3d) 56, 59 C.R.R. (2d) 189, 131 C.C.C. (3d) 518, 22 C.R. (5th) 103 (C.A.); R. v. McIntosh, [1995] 1 S.C.R. 686, 21 O.R. (3d) 797n, 178 N.R. 161, 95 C.C.C. (3d) 481, 36 C.R. (4th) 171; R. v. Nova Scotia Pharmaceutical Society, [1992] 2 S.C.R. 606, 114 N.S.R. (2d) 91, 93 D.L.R. (4th) 36, 139 N.R. 241, 313 A.P.R. 91, 10 C.R.R. (2d) 34, 74 C.C.C. (3d) 289, 43 C.P.R. (3d) 1, 15 C.R. (4th) 1; Spur Oil Ltd. v. R., [1983] 1 F.C. 244 (T.D.)

Statutes referred to

Canadian Charter of Rights and Freedoms
Criminal Code, R.S.C. 1985, c. C-46, ss. 2 "counsel", 650.01
Interpretation Act, R.S.C. 1985, c. I-21, s. 33(2), (3)

Authorities referred to

Sullivan, R., Driedger on the Construction of Statutes, 3rd ed. (Toronto: Butterworths, 1994)

APPLICATION to quash arrest warrants.

Wendy Sabean, for the Crown.
Boris Bytensky, for applicants.

TRAFFORD J.: --

Introduction

[1] This is an application by the defence for prerogative relief in connection with the refusal of a justice of the peace to accept [page278] designations of counsel filed on behalf of the applicants under s. 650.01 of the Criminal Code, R.S.C. 1985, c. C-46 and the consequential issuance of warrants for their arrests. This application requires the court to interpret the term "counsel" as it is used in s. 650.01 of the Code. Before doing so, it is helpful to review the circumstances of the cases.

The Circumstances of the Cases

[2] Ali Zamiri and Illya Golyanik were charged under the Code on separate informations with sexual assault and uttering a death threat, in the case of Mr. Zamiri, and two counts of assault, in the case of Mr. Golyanik. The Crown has not yet formally elected on either information. They are, accordingly, all presently indictable offences. The proceedings against each of the defendants/applicants are in their preliminary stages. Neither have set a date for trial.

[3] Each of the applicants has retained the firm of Adler Bytensky, Barristers & Solicitors, to act as counsel for them. It is understood that Boris Bytensky will be the lawyer within the firm who is primarily responsible for the defence. Shortly after retaining the firm, both applicants executed a form entitled "Designation Pursuant to Section 650.01" which provided as follows:

I hereby designate Boris Bytensky and Adler, Bytensky, Barristers & Solicitors [and their respective agents and students] to act as my counsel in these proceedings and to appear in court on my behalf as may be necessary.

[4] Both of the forms were dated and signed on behalf of the firm by Mr. Bytensky. The address, telephone number and fax number of the firm were also provided on the form. Those forms were filed with the court.

[5] On November 13, 2002, Mr. Bytensky appeared on behalf of both applicants pursuant to the designations. Neither defendant appeared in court. Each matter was adjourned to November 25, 2002.

[6] On November 25, 2002, Mr. Bytensky again appeared in court on behalf of both defendants pursuant to the designations. Neither of them was present in court. It was anticipated that the proceedings on both matters would be of an administrative nature. However, on this occasion the presiding justice of the peace refused to accept the designations and issued discretionary warrants for the arrests of the defendants. They were not to be executed before a stipulated date. The date has been extended to permit the applications presently before this court. The learned justice of the peace refused to accept the designations because [page279] they refer to the law firm, agents and students, and did not expressly refer to an information by number or the charges against the defendants. It appeared to be her view that s. 650.01 of the Code contemplated the designation of one named lawyer who was counsel of record in the proceeding. By reason of the scope of the designations in these cases and their facial deficiencies, she regarded them as void.

[7] It is also helpful to make some observations about the practice of criminal law in Ontario, particularly in and around its larger cities, such as Toronto. Criminal law is practised by sole practitioners, small firms who practise criminal law exclusively and large full service firms. Each lawyer who practises criminal law may have several clients who are required to appear in court on the same day, in the same or different courthouses, within one or more jurisdictions. It is not necessarily practical or feasible for a lawyer to attend every court appearance for all clients personally. In order to provide an appropriate level of client service, it is common to

have articling students, associates, if any, partners, if any, other lawyers and, where permitted, non-lawyer agents attend on such proceedings. There are approximately 20 courthouses within one hour's drive of Toronto -- Toronto (7), Durham (3), Brampton, Newmarket, Hamilton, Oakville, Milton, Burlington, Guelph (2), Barrie and Orangeville. It is not practical to expect defence counsel to accurately predict at the outset of a retainer the identity of every lawyer or articling student who may be available and required to attend court on behalf of a client throughout the duration of the case until the end of trial. If legally permissible, efforts are made by the criminal defence bar to have clients miss as little time as possible from work, school or other commitments during the preliminary or administrative proceedings leading to trial.

The Interpretation of Section 650.01 of the Code

[8] Section 650.01 of the Code came into effect on July 23, 2002. The section was not mentioned in any reading, or debate, of Bill C-15 or Bill C-15A in the House of Commons or Senate. Nor was it referred to in the transcripts of the publicly available minutes of the proceedings of any Standing Committee or any publicly available report of any such committee. However, it was one of a series of amendments to the Code enacted to modernize the justice system and to facilitate an efficient and effective use of its resources. This section appeared to be part of a legislative scheme to permit a defendant charged with an indictable offence to limit personal appearances before the [page280] court to the most significant proceedings in the criminal process. This amendment was intended to reduce the number of defendants present in court on a given day. A more efficient use of court resources, including a reduction in court delays and backlogs, was expected to reduce direct and indirect costs to the administration of justice.

[9] Section 650.01 of the Code provides as follows:

> 650.01(1) Designation of counsel of record -- An accused may appoint counsel to represent the accused for any proceedings under this Act by filing a designation with the

court.

(2) Contents of designation -- The designation must contain the name and address of the counsel and be signed by the accused and the designated counsel.

(3) Effect of designation -- If a designation is filed,

(a) the accused may appear by the designated counsel without being present for any part of the proceedings, other than

(i) a part during which oral evidence of a witness is taken,

(ii) a part during which jurors are being selected, and

(iii) an application for a writ of habeas corpus;

(b) an appearance by the designated counsel is equivalent to the accused's being present, unless the court orders otherwise; and

(c) a plea of guilty may be made, and a sentence may be pronounced, only if the accused is present, unless the court orders otherwise.

(4) When court orders presence of accused -- If the court orders the accused to be present otherwise than by appearance by the designated counsel, the court may

(a) issue a summons to compel the presence of the accused and order that it be served by leaving a copy at the address contained in the designation; or

(b) issue a warrant to compel the presence of the accused.

[10] The term "counsel", as used in the section, is defined

in s. 2 of the Code as follows:

> "counsel" means a barrister or solicitor, in respect of the matters or things that barristers and solicitors, respectively, are authorized by the law of a province to do or perform in relation to legal proceedings.

[11] Section 650.01 permits a defendant to appoint "counsel" to appear on his/her behalf for any proceedings under the Code by filing a designation with the court. The designation must contain the name and address of the "counsel" and be signed by the defendant and the designated counsel. An appearance by the designated counsel is equivalent to the defendant being present. [page281] However, the court may order otherwise and compel the defendant to appear by issuing a summons or warrant. Certain proceedings are excepted from this regime, namely, those where oral evidence of a witness is taken, jurors are selected or a writ of habeas corpus is requested by the applicant.

[12] The effectiveness of this section as a means of achieving the intention of Parliament to modernize and render more efficient the administration of criminal justice depends on the interpretation of the term "counsel". The contemporary approach to the interpretation of statutes has been described in Driedger on the Construction of Statutes, 3rd ed. (Toronto: Butterworths, 1994) at p. 131:

> There is only one rule in modern interpretation, namely, courts are obliged to determine the meaning of legislation in its total context, having regard to the purpose of the legislation, the consequences of proposed interpretations, the presumptions and special rules of interpretation, as well as admissible external aids. In other words, the courts must consider and take into account all relevant and admissible indicators of legislative meaning. After taking these into account, the court must then adopt an interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, its compliance with the legislative text; (b) its efficacy, that is, its promotion of the legislative purpose; and (c) its

acceptability, that is, the outcome is reasonable and just.

[13] See also R. v. H. (J.) (2002), 155 O.A.C. 146, 161 C.C.C. (3d) 392, [2002] O.J. No. 268 (Quicklaw), 2002 CarswellOnt 156 (C.A.), at paras. 12 and 13. With that approach in mind, it is my view that the term "counsel" includes law firms and lawyers specifically named in the designation, as well as other lawyers and articling students who are authorized by the law firm or named lawyer from time-to-time throughout the history of the proceedings to act as a designated counsel. The inclusion of law firms in the definition arises from the plain meaning of the term "counsel" as well as the rules in ss. 33(2) and (3) of the Interpretation Act, R.S.C. 1985, c. I-21, as amended. They provide that "words in the singular include the plural and words in the plural include the singular" and "where a word is defined, other parts of speech and grammatical forms of the same word have corresponding meanings". See AlliedSignal Inc. v. Du Pont Canada Inc. (1998), 81 C.P.R. (3d) 129 (Fed. T.D.). See also Spur Oil Ltd. v. R., [1983] 1 F.C. 244 (T.D.), where it is recognized that "counsel" may refer to either a body of legal advisers or a single legal adviser. The proper interpretation of "counsel" includes both the singular and the plural form of a barrister and solicitor who is qualified to practise law in the province. As such, the section permits the defendant to appoint one or [page282] more barristers or solicitors to appear on his/her behalf and may include the designated counsel's law firm.

[14] Since the definition of "counsel" in s. 2 of the Code refers to barristers and solicitors "in respect of . . . things (that they) are authorized to do . . .", the term may, with permission of the client, also include other lawyers and articling students who are specifically authorized by the designated counsel from time to time to act as designated counsel under s. 650.01 of the Code. Although the word "counsel" may be open to other interpretations, this interpretation is to be preferred because it accords with the purpose of s. 650.01 and is compatible with the principles of statutory interpretation requiring an interpretation that is most favourable to a defendant and gives full recognition to rights guaranteed by the Canadian Charter of Rights and

Freedoms. Let me now elaborate upon this conclusion.

[15] This interpretation is a plausible one, given the legislative context of the provision and the apparent purpose of Parliament in enacting it. It tends to promote the legislative purpose as it creates an administration of criminal justice that is reasonable and just, given the need for a more efficient use of court resources and the value of minimizing the disruption of a defendant's life and livelihood arising from court appearances on indictable offences. Simply stated, lawyers routinely, in the practice of law, retain, employ or instruct other lawyers and articling students for limited purposes to assist in the performance of a retainer. Parliament has recognized this practice in the definition of "counsel" and provided for it under s. 650.01 of the Code. The use of other lawyers and articling students by a designated lawyer must be in accordance with any limits placed upon them by the Law Society of Upper Canada. For exchange, a disbarred or suspended lawyer may not be used by a designated lawyer under this section. Nor may a designated lawyer, on an indictable matter, use an articling student to appear before the court in any proceeding other than a remand.

[16] To eliminate from the term "counsel" such lawyers or articling students would be to adopt an interpretation less favourable to a defendant. Appearances in court by junior counsel and articling students are less costly for a defendant, where the counsel has been retained privately, and for Legal Aid Ontario, where the defence is funded by a legal aid certificate. Given the reality of practising criminal law, as described earlier in this judgment, this interpretation provides a measure of flexibility for the sole practitioner, especially where exigent circumstances arise unforeseeably on a day where an attendance in court is required on behalf of the client under s. 650.01 of the Code. It [page283] creates an administrative regime whereby the personal cost to the defendant, arising directly or indirectly from missing work, school or other obligations, will likely be reduced. This interpretation, to the extent it may be said to arise out of an ambiguous provision, is in accordance with the principle of statutory interpretation that the court should adopt the

meaning most favourable to the defendant. See R. v. McIntosh, [1995] 1 S.C.R. 686, 95 C.C.C. (3d) 481.

[17] A narrower interpretation may also unduly restrict the right to retain and instruct counsel of choice under para. 10(b) of the Charter. See R. v. LeClair, [1989] 1 S.C.R. 3, 46 C.C.C. (3d) 129 and R. v. McCallen (1999), 43 O.R. (3d) 56, 131 C.C.C. (3d) 518 (C.A.). The extra cost to, and personal inconveniences arising from court appearances by, a defendant which would arise if lawyers other than the named law firm and lawyer, and their employed articling students, could not appear as a designated counsel, in my view, would unduly interfere with the right to counsel of choice. A statutory regime limited to law firms and named lawyers would tend to move defendants from sole practitioners and small firms of choice to larger law firms. Such a consequence is to be avoided through an interpretation of the provision that is reasonably open to the court and is otherwise compatible with the right to counsel of choice. For an elaboration of this principle of statutory interpretation, see R. v. G. (B.), [1999] 2 S.C.R. 475, 135 C.C.C. (3d) 303 and R. v. Nova Scotia Pharmaceutical Society, [1992] 2 S.C.R. 606, 74 C.C.C. (3d) 289, at pp. 659-60 S.C.R., p. 326 C.C.C.

[18] Accordingly, the term "counsel" in s. 650.01 of the Code includes named law firms and named lawyers. It also includes articling students employed by the law firm or named lawyer, if the named lawyer or another lawyer with the law firm specifically instructs them to appear before the court on an administrative remand, and, further, if the designation signed by the defendant permits such use of articling students. If the client does not specifically permit such a use of articling students, they cannot be used as "counsel". Articling students may only be "counsel", insofar as the proceedings are indictable, on administrative remands. It also includes other lawyers who, from time to time, are specifically instructed by the named lawyer or another lawyer of the named law firm to appear for the defendant if the designation signed by the defendant includes, in general terms, permission to use to such lawyers. Better practice would also lead counsel to make an express reference to the information or indictment, by number

or date. It may also be helpful to specify the alleged offences and the date of the transaction leading to the charges. This may obviate [page284] the need for another designation if a new information or indictment was placed before the court.

[19] Therefore, as an example, a proper designation in this case, insofar as it is affected by the term "counsel", would have been drafted as follows:

> Under s. 650.01 of the Code, I, Illya Golyanik/Ali Zamiri hereby appoint:
>
> (a) the law firm of Adler Bytensky;
>
> (b) Boris Bytensky;
>
> (c) _____ , the articling student employed by Adler Bytensky, insofar as he/she is specifically instructed by a lawyer with the firm of Adler Bytensky to appear on an administrative remand; and
>
> (d) any other lawyer specifically instructed by Boris Bytensky or a lawyer with the firm of Adler Bytensky to act as his/her agent in this matter.
>
> to represent me in connection with proceedings on Information No. _____ alleging the offences of _____ on or about _____ , 2002.

Conclusion

[20] In conclusion, as the designations filed under s. 650.01 of the Code in these cases were valid insofar as they refer to the law firm of Adler Bytensky and Boris Bytensky, the appearance by Mr. Bytensky was equivalent to an appearance by each of the defendants on November 25, 2002. The learned justice of the peace erred, in law and jurisdictionally, in ruling that warrants for their arrest should be issued. There was no evidence before her to support such a decision. Accordingly, the warrants are quashed. These matters are

returned to the Ontario Court of Justice to be continued in their usual course.

Application granted.