

Docket Nos: 4811-999-00-75033057, 4863-999-00-83120554-00

Citation: *City of Toronto v. Hill*, 2007 ONCJ 253

**ONTARIO COURT OF JUSTICE
(TORONTO REGION)**

MURRAY HILL

Appellant

- and -

CITY OF TORONTO

Respondent

PLACIDAS ANTONYPILLAI

Applicant

- and -

CITY OF TORONTO

Respondent

REASONS FOR JUDGMENT

Heard: 23 May 2007; Released 7 June 2007

Agent for Appellant Murray Hill: Ms. Jodi Burness
Prosecutor for Respondent City of Toronto: Ms. Amanda Cahill
Agent for Applicant Placidas Antonypillai: Mr. Weldon Jones
Prosecutor for Respondent City of Toronto: Mr. Faizal Walani

Libman J.: -

Introduction

[1] The issue in these provincial offences appeal cases brought under s.135 of the *Provincial Offences Act*, R.S.O. 1990, c.P.33, concerns the test that should apply when a paralegal agent on appeal asserts that the paralegal agent at trial acted contrary to the

appellant's instructions, so as to have amounted to professional incompetence or otherwise contributed to a miscarriage of justice.

[2] In the case of the appellant Hill, a paralegal agent at trial entered a guilty plea to a charge of following too closely, contrary to the *Highway Traffic Act*, R.S.O. 1990, c.H.8, in lieu of the original charge of careless driving arising from a motor vehicle accident. The agent at trial stated on the record that he had authorization from the appellant, who was not present, to do so. On appeal, it is asserted that the trial agent had no such permission, contrary to his express statement. The agent at trial has not been made aware of these allegations, nor has an affidavit been obtained from him to permit the trial agent to provide an explanation for his actions. Indeed, the paralegal agent on appeal did not appear to argue the matter after the case was adjourned to permit further materials to be filed in support of the appellant's position.

[3] The applicant Antonypillai seeks an extension of time to appeal his conviction for the *Highway Traffic Act* offence of failing to stop for a red light. The conviction was entered on 18 April 2006 when neither the applicant, nor anyone on his behalf, appeared for trial. Nearly one year later, on 12 March 2007, the applicant states in his affidavit that his agent, who is not named, "did not appear at court". The paralegal agent on appeal has since been able to ascertain the identity of the trial agent, and has provided a synopsis in writing of his conversation with him. However, there is no affidavit from the trial agent, nor any materials from him evidencing a retainer or authorization to appear.

[4] The nature of the allegations being made in these provincial offences appeals cases, which are by no means isolated occurrences but rather all too common grounds of appeal, raise an important public issue involving the due administration of justice under the *Provincial Offences Act*. In my respectful opinion, allegations made by a paralegal agent on appeal that a paralegal agent at trial has not acted properly, so as to amount to professional incompetence or to have otherwise contributed to a miscarriage of justice, must be made only after careful consideration. More particularly, such allegations should only be brought forward after the appeal agent has satisfied himself or herself, by means of personal investigations or inquiries, that there is some factual foundation for the allegation, apart from the instructions of the appellant. There must also be afforded to the trial agent a fair opportunity to respond, specifically by providing notice to the trial agent of the allegations being made before the appeal court, and ensuring that a record of this response is placed before the appeal court, so that a proper assessment of the allegations may be made by the judge on appeal.

[5] I consider that such a procedure or protocol, which places on the paralegal agent on appeal the obligation to investigate and furnish the paralegal trial agent with an opportunity to respond, and thus the appeal court with a proper basis to evaluate such allegations, reflects the need to ensure fairness, openness and transparency in the provincial offences court, which is so aptly regarded as the "people's court" given the pervasive nature of public welfare/regulatory offences. At the same time, it is in keeping with the new responsibilities of ethical behaviour now mandated by the Law Society of Upper Canada for paralegal practitioners, which include the required standard of a

“competent paralegal”, pursuant to the *Paralegal Rules of Conduct* following the coming into force of the relevant part of the *Access to Justice Act, 2006*, S.O. 2006, c.21, on 1 May 2007.¹

[6] Given the absence of proper notice to the paralegal trial agents by the paralegal agents on appeal in the cases at bar, as well as the lack of proper supporting materials in furtherance of the allegations being made of professional incompetence or a miscarriage of justice, I would dismiss the appeal in Hill, and deny the motion for extension of time to appeal in Antonypillai.

Facts in Murray Hill Appeal

[7] The appellant Hill’s case came before Justice of the Peace D. Robinson on 17 May 2004. Prior to arraignment, the following exchange took place:

Ms. Quadrini: Calling number 9, Murray Hill.

Mr. Hurley: Good afternoon, Your Worship, for the record, my name is Hurley, initial M. I’m appearing as agent for Mr. Hill, he is aware of my status as agent. Some housekeeping, I do have an authorization, which I’d like to file with the Court for your perusal.

Clerk of the Court: Can you spell your last name, sir?

The Court: Thank you.

Mr. Hurley: H-U-R-L-E-Y, initial M.

Clerk of the Court: Thank you.

The Court: Ms. Quadrini.

Ms. Quadrini: Thank you. I’m anticipating a plea, Your Worship, seeking arraignment.

Mr. Hurley: That is correct, Your Worship, to Follow Too Close. Prepared to waive reading and enter a guilty plea to the amended certificate.

Ms. Quadrini: Asking if the agent has authorization to enter that plea, Your Worship?

Mr. Hurley: I do, Your Worship.

Ms. Quadrini: Thank you, that is on consent.

The Court: All right, thank you.

[8] Following the reading in of the facts which were stated as being accurate by the trial agent, a conviction was registered for the following too closely offence. Whereas the original careless driving offence involved a collision with the back of another vehicle, and was punishable by a set fine of \$265., the set fine of \$90. was imposed for the amended offence, with 90 days to pay.

[9] The appellant’s notice of appeal alleges that “Mr. Michael Hurley failed to follow instructions of defendant.” It is further asserted that the appellant’s agent “... entered a guilty plea without the consent or authority of the defendant.” An affidavit from the

¹ The legislation was given Royal Assent on 19 October 2006. The Paralegal Rules of Conduct were approved at the March, 2007 convocation of the Law Society of Upper Canada.

appellant acknowledges that he signed an “Authorization Form” which authorized the trial agent to act on his behalf, but that he did not receive a copy of this document. According to the Appellant’s affidavit, at no time has he spoken to or corresponded with Mr. Hurley, as it was his employer who arranged Mr. Hurley’s retainer. Neither has he spoken to him subsequently, although the Appellant claims to have attempted to do so. The appeal was listed for 18 April 2007 at which time Ms. Burness appeared for the appellant. It was adjourned to 23 May 2007 for further argument and to permit the trial agent to be contacted. However, neither Ms. Burness nor her client appeared on this date.

Facts in Placidas Antonypillai Application for Extension of Time to Appeal

[10] The applicant Antonypillai was charged with failing to stop for a red light on 30 April 2005. He filed a Notice of Intention to Appear on 12 May 2005 and was given a trial date of 18 April 2006. However, no one appeared for trial at that time, including the applicant, and a conviction was imposed. The set fine of \$155. was levied with 15 days to pay.

[11] On 12 March 2007 the applicant swore an affidavit in support of his application for an extension of time to file an appeal. His explanation for not attending at trial is “ ... agent did not appear at court”. The motion itself was listed for argument on 19 April 2007 at which time Mr. Jones appeared on behalf of the applicant. It was subsequently adjourned to 23 May 2007 to allow the agent on appeal to look into the matter further. On the 23 May return date, both Mr. Jones and the applicant attended court. Mr. Jones provided in advance a summary of his dealings with the applicant and the paralegal agent with whom his client claims to have retained. Although not in affidavit form, it indicates that the applicant paid a “substantial retainer” to one Ariaratnam and signed a contract with him. However, neither the applicant nor this paralegal agent have kept their receipts, and the file has been handed over to another paralegal agent “whose card [Ariaratnam] had misplaced for the time being” and is thus no longer available for review.

Provincial Offences Act Procedure for Appearance by Agent

[12] Section 2 of the *Provincial Offences Act* states that the purpose of the Act is to replace the summary conviction procedure for the prosecution of provincial offences with a procedure that reflects the distinction between provincial offences and criminal offences. This distinction between “criminal offences” and quasi-criminal or regulatory offences, that is, “provincial offences” has also been recognized by the Supreme Court of Canada in its seminal decision *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299.

[13] In *R. v. Jamieson* (1981), 64 C.C.C. (2d) 550 (C.A. [in Chambers]), MacKinnon A.C.J.O. observed that the *Provincial Offences Act* was intended to establish a “speedy, efficient and convenient method” of dealing with offences under Acts of the Legislature, and under Regulations or by-laws made under the authority of an Act of the Legislature, and that the courts that hear these matters are given a wide discretion as to how they may proceed.

[14] The “underlying philosophy” of the legislation has also been described as being to encourage persons to represent themselves personally at trial: *R. v. Wells* (2003), 38 M.V.R. (4th) 93, [2003] O.J. No. 2025 (QL) at para. 34 (C.J.). At the same time, courts must be mindful that many such defendants, in the words of Nadeau J., are “frequently uncomfortable and occasionally awed in courtrooms”: *R. v. Hill*, [1987] O.J. No. 1935 (Q.L.) (Prov.Ct.).

[15] A defendant may appear in the provincial offences court in person or by counsel or agent: s.50(1). Section 82 provides that a defendant may act by counsel or agent. The defendant’s ability to appear by counsel or agent is subject to an order of the court compelling the defendant to appear in person: s.51. Conversely, a defendant corporation is required to appear and act by counsel or agent: s.50(2).

[16] In the case where proceedings are initiated by certificate of offence under Part I of the Act, as occurred for both the appellant Hill and applicant Antonypillai, there is a \$500. limit on the fine amount, and imprisonment is not available: s.12(1).

[17] The ability to appear, *inter alia*, by way of agent may thus be viewed as being found in a Part of the Act which establishes a “simple expeditious procedure for dealing fairly” with provincial offences, and limits the applicable penalty. This procedure, as stated in *R. v. Carson* (1983), 41 O.R. (2d), 34 C.R. (3d) 86, 4 C.C.C. (3d) 476 at 479 (C.A.) was designed to “alleviate inconvenience, costs and hardship” to those charged with provincial offences and to “remedy an over-taxed court system.”

[18] It thus follows that agents play an important role in facilitating access to the provincial offences court. To state the obvious, as most citizens in this province encounter the administration of justice through the lens of the *Provincial Offences Act*, representation by a paralegal agent may constitute the means by which such persons see and experience the justice system: see *R. v. Morden*, [2000] O.J. No. 873 at para. 20 (QL) (C.J.). It is no coincidence that the recently enacted legislation in this province making paralegal practitioners a regulated profession for the first time under the auspices of the Law Society is aptly called the *Access to Justice Act*, 2006.

The Test for Alleging Professional Incompetence or Miscarriage of Justice by a Paralegal Agent

[19] The issue as to the competency of representation by paralegal agents in this province is hardly a novel one: see *R. v. Romanowicz* (1999), 45 O.R. (3d) 506, 26 C.R. (5th) 246, 138 C.C.C. (3d) 225 (C.A.); *R. v. Morden*, *supra*. In the context of practice by paralegal agents in the provincial offences court, it strikes at the heart of public confidence and access to the administration of justice in a court which hears matters ranging from by-law infractions and minor traffic charges to complex and intricate public welfare/regulatory offences concerning the environment, workplace safety, securities and motor vehicle regulation, to give but a few examples.

[20] With respect to the quality of representation by agents generally under the *Provincial Offences Act*, it has been held that by choosing to be represented by a non-lawyer, a defendant cannot insist on the right to effective assistance of counsel: *R. v. Romanowicz* [C.C.C.] 237-238. However, there may still be instances where the conduct of an agent may be considered in matters under the Act. It is clear that a court hearing an appeal under s.135 has the power to allow an appeal if a miscarriage of justice has occurred due to an agent's conduct; specifically s.138 provides that an appeal court may direct a new trial where "it is necessary to do so to satisfy the ends of justice" A similar power exists for appeals under Part III where there has been a miscarriage of justice: s.120(1)(a)(iii). Where "unauthorized acts" of the agent cannot be attributed fairly to the defendant, it has been held that some relief should be available where such unauthorized acts give rise to a miscarriage of justice: *R. v. Wolkins* (2005), 229 N.S.R. (2d) 222, 192 C.C.C. (3d) 378, [2005] N.S.J. No. 2 (QL) at para. 77 (C.A.). See further *R. v. Romanowicz* [C.C.C.] 238.

[21] The onus upon the appellant in a *Provincial Offences Act* appeal is similar to that of a defendant in a summary conviction appeal where the appellant alleges that he or she was not competently represented: the appellant must show that the conduct of the agent was such that a new trial is required in order to satisfy the ends of justice: *Romanowicz* [C.C.C.] 238.

[22] The issue of competent representation in the courts of this province is not limited to only non-lawyers. An accused who is represented at trial is entitled to effective representation by his or her counsel: see, for example, *R. v. G.D.B.*, [2000] 1 S.C.R. 520 at 530-531; *R. v. Joannis* (1995), 85 O.A.C. 186, 44 C.R. (4th) 364, 102 C.C.C. (3d) 35 at 56-57 (C.A.), leave to appeal dismissed, [1996] S.C.C.A. No. 347 (QL); *R. v. Archer* (2005), 34 C.R. (6th) 271, 202 C.C.C. (3d) 60, [2005] O.J. No. 4348 (QL) at para. 118 (C.A.).

[23] The Court of Appeal for Ontario has issued a "procedural protocol" concerning allegations of incompetence of trial counsel in criminal cases, effective 1 May 2000. This protocol applies with respect to the procedure to be followed in any appeal before the Court of Appeal for Ontario where the appellant proposes to allege that his or her counsel at trial conducted himself or herself in a manner that amounted to professional incompetence or otherwise contributed to a miscarriage of justice.

[24] The procedural protocol put in place by the Court of Appeal consists of several measures, including the assignment of Crown counsel to respond to appeals involving such allegations, and a case management judge. At the heart of the procedure is the obligation to investigate by the appeal lawyer any such allegations, while providing trial counsel with a fair opportunity to respond.

[25] As I consider that the Court of Appeal for Ontario procedural protocol respecting allegations of incompetence of trial counsel in criminal cases provides a most helpful model for dealing with similar allegations in the provincial offences court, I will set out

those provisions which have the most direct bearing on such cases. These include the following:

3. *Obligation to Investigate – Fair Opportunity to Respond*: Before any appeal counsel draws any final conclusion as to whether or not to make an allegation, on appeal, that trial counsel performed in a manner that amounted to professional incompetence, or otherwise contributed to a miscarriage of justice: (a) Appeal counsel should satisfy him or herself, by means of personal investigations or inquiries, that there is some factual foundation for this allegation apart from the instructions of the appellant. See: *R. v. Elliott* (1975), 28 C.C.C. (2d) 546 (Ont. C.A.) at p.549. Appeal counsel should make these investigations or inquiries as soon as possible. (b) Appeal counsel should also provide trial counsel with informal notice of the general nature of the potential allegations concerning the professional performance of trial counsel, and should give trial counsel a reasonable opportunity to respond to those potential allegations. In this way, trial counsel will have a fair opportunity to respond to the potential allegations before they are made in any public forum.

4. *Notice of Allegations to Trial Counsel*: Whenever appeal counsel decides to publicly assert by means of filing with the Court some public document such as a Notice of Appeal or Supplementary Notice of Appeal or Appellant's Factum that contains an assertion that trial counsel performed in a manner that amounted to professional incompetence or otherwise contributed to a miscarriage of justice, appeal counsel must first provide trial counsel with a copy of that document, and any other subsequent document that contains any further details of that assertion. In this way trial counsel will be fully appraised, in a timely way, of all of the allegations being made with respect to his or her professional performance in his or her representation of the appellant at trial.

5. *Transfer of Trial File to Appeal Counsel*: Trial counsel shall (a) upon receipt of a written request by appeal counsel and a written direction of the appellant; or (b) upon receipt of any public document that contains an allegation of professional incompetence by trial counsel in his or her representation of the appellant, or an allegation that the conduct of trial counsel otherwise contributed to a miscarriage of justice, whichever event is earlier, forthwith transfer the entire file to appeal counsel. In the event that trial counsel wishes to raise any objection to so transferring the file, trial counsel may bring an application, as soon as possible, before the case management judge.

6. *Access to the Trial File by Trial Counsel*: If trial counsel wants to keep a copy of all, or any portion, of the trial file before transferring this file to appeal counsel, trial counsel may (at his or her own expense) make copies of whatever documents he or she wishes from the file. In addition, if trial counsel wants access to the file in connection with the appellant's case after it has been transferred to appeal counsel, appeal counsel must facilitate this access to the entirety of that file in a

timely way, and must permit trial counsel to make copies (at his or her own expense) of whatever documents he or she wishes from the file.

12. Materials Filed by the Appellant: Appeal counsel shall file any and all materials in support of an allegation of professional incompetence, or an allegation that the conduct of trial counsel otherwise contributed to a miscarriage of justice, with the Court as soon as possible, no later than any deadline established by the case management Judge, and before the appeal is listed for argument. These supporting materials may include any necessary transcript of the trial proceedings, an affidavit from the appellant, an affidavit from trial counsel, an affidavit from any other witness who had the opportunity to observe the relevant events, or any other relevant documentation.

13. Compliance With The Criminal Appeal Rules: The procedure described in the Protocol does not relieve appeal counsel of the obligation of perfecting the appeal in accordance with Rule 18 of the Criminal Appeal Rules.

15. The Examination of Trial Counsel: Whether or not an affidavit from trial counsel has been filed by any party in connection with the allegation that the conduct of trial counsel amounted to professional incompetence or otherwise contributed to a miscarriage of justice, if any party wishes to compel the appearance of trial counsel at an Office of the Special Examiner for purposes of: (a) cross-examining trial counsel on his or her affidavit; or (b) examining trial counsel, in the absence of an affidavit, upon the issue of his or her professional performance in connection with the case, any party may bring an application to the Court, on notice to trial counsel and the opposing party, for an order compelling the appearance of trial counsel for purposes of such examination. If the opposing party and trial counsel agree to the proposed order, the order may be made, on consent, without any court appearance. It is recognized that trial counsel has a duty to object to answer any question that would elicit privileged information. Every effort should be made to resolve all potential privilege issues before trial counsel is examined. If trial counsel objects to answering a question based on a claim of solicitor-client privilege and the parties to the appeal cannot agree on whether counsel is obliged to answer the question, trial counsel will not be required to answer that question until the privilege claim is determined either after consultation with the case management Judge or by order of the Court.

18. Compliance with Procedural Rules: Where a party is having difficulty securing compliance with any of the Rules of the Protocol, the party at any time may seek a conference call with the case management Judge to resolve the issue.

19. Judicial Variations of Procedural Rules: This Protocol outlines the Rules that generally govern the procedure to be followed with respect to any appeal before the Court of Appeal for Ontario where the appellant proposes to allege that his or her counsel at trial conducted him or herself in a manner that amounted to professional incompetence or otherwise contributed to a miscarriage of justice.

Where a party is of the view, however, that the circumstances of the individual case are such that one or more of the Rules outlined in this Protocol should not apply, that party may bring an application, upon notice to the opposing party, to the case management Judge for an order making any necessary modification to the Rules of the Protocol.

[26] The above paragraphs represent only a portion of the Procedural Protocol in the Court of Appeal. I have refrained from setting out that portion of the Protocol dealing with issues such as access to the trial file by the Crown, meetings with the Case Management Judge, and treatment of the sealed materials including resolution of issues of privilege. It may be that in future cases these provisions will be considered appropriate for provincial offences appeals. However, the prosecutors' office in the cases at bar, exhibiting its customary fairness, did not seek access to the file of the paralegal agent at trial, or make any submissions in support of such access. It may be otherwise where the ability of the prosecutor to respond to an allegation of ineffective representation requires examination of the trial file itself, in which case access to the trial file by the prosecutor may well be warranted, subject to the determination of any issues touching on privilege, assuming that such privilege is found to exist.

[27] Distilling the Procedural Protocol in the Court of Appeal for Ontario to its application to appeals in respect of provincial offences before the Ontario Court of Justice, I am of the respectful opinion that the following procedure or protocol should apply where allegations of professional incompetence or otherwise are said to have contributed to a miscarriage of justice due to the conduct of a paralegal agent in the court :

1. *Application of Protocol:* This Protocol shall apply with respect to the procedure to be followed in any provincial offences appeal before the Ontario Court of Justice where the appellant proposes to allege that his or her paralegal agent at trial conducted himself or herself in a manner that amounted to professional incompetence or otherwise contributed to a miscarriage of justice.²
2. *Obligation to Investigate – Fair Opportunity to Respond:* Before any paralegal agent on appeal draws any final conclusion as to whether or not to make an allegation that the paralegal trial agent performed in a manner that amounted to professional incompetence, or otherwise contributed to a miscarriage of justice, the paralegal agent on appeal should satisfy himself or herself, by means of personal investigations or inquiries, that there is some factual foundation for this allegation apart from the instructions of the

² I consider that this Procedural Protocol should apply to *any* provincial offences appeal before the Ontario Court of Justice since appeals under Part II (parking infractions) are treated in the same manner as appeals under Part I, as these two cases are, and in the case of appeals under Part III (information), the appellant stands in even greater jeopardy of an increased penalty being imposed by virtue of the general penalty of \$5,000. under s.61 and the possibility of imprisonment. The issue does not arise in this case whether any difference would be warranted had the appellant been represented by *counsel* at trial or appeal as opposed to a paralegal practitioner, although it should be noted that the recent duties and ethical standards imposed by the Law Society on paralegals are virtually identical to those in place for lawyers.

appellant. The appeal agent should make these investigations or inquiries as soon as possible. The appeal agent should also provide the trial agent with informal notice of the general nature of the potential allegations concerning the professional performance of the trial agent, and should give the trial agent a reasonable opportunity to respond to those potential allegations. In this way, the paralegal agent at trial will have a fair opportunity to respond to the potential allegations before they are made in any public forum.

3. *Notice of Allegations to Trial Agent:* Whenever the paralegal agent on appeal decides to publicly assert by means of filing with the Ontario Court of Justice some public document such as a Notice of Appeal or Application to Extend Time to Appeal that contains an assertion that the trial agent performed in a manner that amounted to professional incompetence or otherwise contributed to a miscarriage of justice, the paralegal agent on appeal must first provide the trial agent with a copy of that document, and any other subsequent document that contains any further details of that assertion. In this way, the trial agent will be fully apprised, in a timely way, of all of the allegations being made with respect to his or her professional performance in his or her representation of the appellant at trial.
3. *Transfer of Trial File to Appeal Agent:* The trial agent shall upon receipt of a written request by the appeal agent and a written direction of the appellant, or upon receipt of any public document that contains an allegation of professional incompetence by the paralegal agent at trial in his or her representation of the appellant, or an allegation that the conduct of the trial agent otherwise contributed to a miscarriage of justice, whichever event is earlier, forthwith transfer the entire file to the appeal agent. In the event that the trial agent wishes to raise any objection to so transferring the file, the trial agent may bring an application, as soon as possible, before the provincial offences appeal Judge.
4. *Access to the Trial File by Trial Agent:* If the trial agent wants to keep a copy of all, or any portion, of the trial file before transferring this file to the trial agent, the trial agent may (at his or her own expense) make copies of whatever documents he or she wishes from the file. In addition, if the trial agent wants access to the file in connection with the appellant's case after it has been transferred to the appeal agent, the appeal agent must facilitate this access to the entirety of that file in a timely manner, and must permit the trial agent to make copies (at his or her own expense) of whatever documents he or she wishes from the file.
5. *Materials Filed by the Appellant:* The paralegal agent on appeal shall file any and all materials in support of an allegation of professional incompetence, or an allegation that the conduct of the trial agent otherwise contributed to a miscarriage of justice, with the provincial offences appeal court as soon as possible, and before the appeal is scheduled to be heard. These supporting

materials may include any necessary transcript of the trial proceedings, an affidavit from the appellant, an affidavit from the trial agent, an affidavit from any other witness who had an opportunity to observe the relevant events, or any other relevant documentation.

6. *The Examination of the Trial Agent:* Whether or not an affidavit from the paralegal agent at trial has been filed by any party in connection with the allegation that the conduct of the trial agent amounted to professional incompetence or otherwise contributed to a miscarriage of justice, if any party wishes to compel the appearance of the trial agent before the provincial offences appeal court for purposes of cross-examining the trial agent on his or her affidavit, or examining the trial agent, in the absence of an affidavit, upon the issue of his or her professional performance in connection with the case, any party may bring an application to a judge of the provincial offences appeal court, on notice to the trial agent and the opposing party, for an order compelling the appearance of the trial agent for purposes of such examination.
7. *Compliance with Provincial Offences Appeal Rules:* The procedure described in this Protocol does not relieve the appeal agent of the obligation of perfecting the appeal in accordance with the applicable rules governing appeals under Parts I and II or Part III of the *Provincial Offences Act*.
8. *Compliance with Procedural Rules:* Where a party is having difficulty securing compliance with any of the Rules of this Protocol, the party at any time may seek directions from a judge of the provincial offences appeal court.
9. *Judicial Variations of Procedural Rules:* This Protocol outlines the Rules that generally govern the procedure to be followed with respect to any provincial offences appeal before the Ontario Court of Justice where the appellant proposes to establish that his or her paralegal agent at trial conducted himself or herself in a manner that amounted to professional incompetence or otherwise contributed to a miscarriage of justice. Where a party is of the view, however, that the circumstances of the individual cases are such that one or more of the Rules outlined in this Protocol should not apply, that party may bring an application, upon notice to the opposing party, to a judge of the provincial offences appeal court for an order making any necessary modification to the Rules of the Protocol.

Concluding Observations

[28] I want to address lastly why I consider that it is essential that a Procedural Protocol respecting allegations of professional incompetence or conduct which otherwise contributed to a miscarriage of justice by paralegal agents at trial in the provincial offences court should be put in place in the Ontario Court of Justice at this time. While Mr. Jones, on behalf of the applicant Antonypillai, acknowledged, to his credit, the need for “raising standards”, others might resist the crafting of formalities into the provincial

offences court, and argue that such standards are best addressed by the regulator, which has seen fit to impose *Paralegal Rules of Conduct*, or by a court with broader powers of appeal or supervisory jurisdiction. Indeed, my views are not binding on other members of this Court. Neither do they purport to bear the imprimatur of the Court as a whole.

[29] The Ontario Court of Justice occupies a special place as both a trial and appeal court under the *Provincial Offences Act*. As such it has the first hand experience of seeing the effects over the years of unscrupulous conduct by those paralegal practitioners who seek to take advantage of citizens in this province who may only experience the justice system in the context of the provincial offences court. Allegations of professional incompetence or conduct which contributes to a miscarriage of justice by a trial agent strike at the foundation of public confidence in the administration of justice in the provincial offences court, and there is a pressing need to ensure that such allegations are not brought forward unless there is a proper basis for doing so.

[30] Moreover, to import formalities from the criminal law into the provincial offences court so as to mandate procedural protection and fairness may be viewed, in my respectful opinion, as a natural product of the recent trend wherein the line has become blurred between “true crimes” and “minor offences”. That is, the penalties for provincial offences, whether monetary or otherwise, have become not uncommonly much greater than their criminal counterparts. In other such cases, it is the consequence of civil or administrative penalties that leaves its mark. Hence, courts hearing *Provincial Offences Act* cases have determined that procedural protections such as a modified guilty plea inquiry is appropriate in the provincial offences court (*R. v. Shields*, [2002] O.J. No. 4867 (QL) (C.J.)), that *Criminal Code* sentencing principles have application to sentencing for provincial offences (*R. v. Wells* (2003), 38 M.V.R. (4th) 93, [2003] O.J. No. 2025 (QL) (C.J.)), and the test for admission of “fresh evidence” under the *Criminal Code* should govern such applications when brought under the *Provincial Offences Act* (*R. v. 1275729 Ontario Inc.* (2005), 203 C.C.C. (3d) 501, 25 M.V.R. (5th) 157, [2005] O.J. No. 5515 (QL) (C.A.)).

[31] It is consistent with these developments that a Procedural Protocol dealing with allegations of professional incompetence and miscarriage of justice by paralegal practitioners likewise be situated within the provincial offences regime. To put it shortly, a miscarriage of justice or professional incompetence is no less so in any court in this province. The provincial offences court is a court of competent jurisdiction for the purpose of awarding relief under the *Charter of Rights and Freedoms*: *R. v. 974649 Ontario Inc.*, [2001] 3 S.C.R. 575. It should be no less competent under the *Provincial Offences Act* to protect against miscarriage of justice or professional incompetence, particularly where the basis for the allegations concerns the very conduct before it.

[32] The recently enacted *Paralegal Rules of Conduct* mandated by the Law Society on paralegal practitioners particularly support, in my view, the imposition of such a Procedural Protocol, considering the nature of the duties and ethical responsibilities which have now been placed on agents, and that these are based on those which apply to lawyers. For example, rule 2.01 imposes a requirement of integrity and civility on

paralegals in connection with the provision of legal services which are made available to the public. The required standard when performing services undertaken on a client's behalf is that of a "competent paralegal": rule 3.01(1). A paralegal is to be "honest and candid" when advising clients (rule 3.02(1)) and is expected to treat tribunals and other licensees with "candour, fairness, courtesy and respect." (rule 4.01(1)). Under rule 6.01(1), paralegals are to "encourage public respect for, and try to improve, the administration of justice" and according to rule 6.01(2) paralegals are to "take care not to weaken or destroy public confidence in legal institutions or authorities by making irresponsible allegations or comments".

[33] It follows, in my respectful opinion, that while by choosing to be represented by a non-lawyer, a defendant cannot insist on the right to the effective assistance of counsel, the defendant is entitled to the effective assistance of a paralegal practitioner where he or she chooses to be so represented. This inevitably flows from the new regime of paralegal regulation, under the auspices of the Law Society, where the "standard of a competent paralegal" is expressly set out for the first time in this jurisdiction.

[34] The *Romanowicz* [C.C.C.] 238 decision makes it clear that a "competent lawyer standard" is not to be grafted on to paralegal practitioners; education and professional training requirements between the respective groups remain distinct regardless of similarities in ethical obligations. However, the statutory enactment under rule 3.01(1) of a "competent paralegal" standard is a significant development, especially given the court's holding in *Romanowicz* that the lack of paralegal regulation was a basis for finding that there was no right to effective assistance from paralegals. I see nothing inconsistent in the recognition of a new standard of competence expected in respect of paralegals, which is less than that expected of counsel, but which nonetheless entitles the defendant to effective assistance which is commensurate with the training and licensing requirements that will govern this new class of paralegal practitioners.

[35] I note further in this regard that the procedure followed by the paralegal agent at trial acting on behalf of the appellant Hill, as evidenced by the transcript of proceedings, appears to comport with the duties under rule 4.01(8) of the *Paralegal Rules of Conduct* respecting guilty pleas. This rule is cast in virtually identical terms as that which pertains to lawyers. With respect to the applicant Antonypillai, there being no evidence of any authorization or retainer to act to the contrary, it was open to the applicant to fail to respond to the offence notice, and choose to be deemed to not wish to dispute the charge. In this case, the justice was required to examine the certificate of offence and determine under s.9 of the *Provincial Offences Act* if it was "complete and regular on its face" in which case a conviction would be imposed, or to quash it in the event of a finding to the contrary. In either instance, there is no basis for considering that the standard of a competent paralegal has not been met.

[36] Finally, the recent line of cases holding that there is a requirement for provincial offences court to give reasoned decisions impacts on this area of the law: see for example *R. v. Cameron* (2006), 207 O.A.C. 340, 38 C.R. (6th) 212, 29 M.V.R. (5th) 1 (C.A.). The vast majority of public welfare/regulatory offence cases involve strict liability

prosecutions. It is for the defendant to establish, in such cases, the requisite standard of care or due diligence. Just as it is important for the presiding justice to give adequate reasons setting out where the defendant has fallen short of this standard and the reasons for defences being rejected, the paralegal agent at trial plays an important role in marshalling this evidence and attempting to establish, on the balance of probability, that the defendant exercised reasonable care or was duly diligent: see *R. v Goebel* (2003), 338 A.R. 201, [2003] 9 W.W.R. 279, [2003] A.J. No. 591 (QL) at para. 13 (Q.B.).

[37] Where there is no good reason to doubt the propriety of the actions of the paralegal agent at trial in attempting to set out the relevant standard of care or otherwise defend a public welfare/regulatory offence prosecution, including the entering of a guilty plea or choosing not to contest the matter in court at all, the appeal court should be chary of playing “Monday morning quarterback” and “second guess” decisions made at trial at the behest of the paralegal agent on appeal: see *R. v. Lomage* (1991), 2 O.R. (3d) 621, 44 O.A.C. 131, [1991] O.J. No. 362 (QL) at para. 17 (C.A.). A trial “is a trial”, as Montgomery J. observed in *R. v. Mei*, [1996] O.J. No. 3833 (QL) at para. 6 (Prov.Div.), it is not “a trial run”. Hindsight bias should play no role in the assessment of a “competent paralegal” in the provincial offences appeal court.

[38] For these reasons, it is my respectful opinion that it is appropriate to impose a Procedural Protocol respecting allegations of professional incompetence or conduct which has otherwise contributed to a miscarriage of justice, by paralegal agents in the provincial offences court.

Conclusion

[39] There is a complete absence of merit in these appeals with respect to the allegations being made of professional incompetence or conduct by the paralegal agents at trial which are said to have contributed to a miscarriage of justice. For these reasons, I dismiss the appeal in Hill, and deny the motion for extension of time to file an appeal in Antonypillai.

Date: 7 June 2007

R. Libman J.

.