

**CITATION:** R. v. Bilinski, 2013 ONSC 2824

COURT FILE NO.: 1247/11

**DATE:** 20130614

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**B E T W E E N:**

**HER MAJESTY THE QUEEN**

Respondent

**- and -**

**JANUSZ BILINSKI**

Appellant

)  
)  
) **PAUL RENWICK**, for the  
) Respondent/Crown  
)  
)

)  
) **MICHAEL W. CZUMA**, for the  
) Appellant  
)  
)  
)  
)

**REASONS FOR JUDGMENT**

[On appeal from the judgment of the Honourable J.E. Allen, dated June 20, 2011]

**DURNO J.**

## Background

[1] The appellant was charged with two counts of assault against his wife. He retained a licensed paralegal<sup>1</sup> to represent him at the trial. In his reasons for convicting and throughout the trial the trial judge was critical of the paralegal's representation of the appellant.

[2] Mr. Bilinski appeals contending he did not receive effective representation at trial. He contends, first, that the Law Society of Upper Canada (LSUC) becoming responsible for regulating paralegals has changed the law in Ontario. Now an accused person is entitled to the same level of representation by a licensed paralegal as he or she would receive from counsel. In the alternative, he argues there is a new "middle-ground" category of representation that must be provided by licensed paralegals. Applying, either test, he submits the appellant did not receive effective representation and a new trial must be ordered.

[3] The Crown contends that nothing has changed since the Court of Appeal's 1999 judgment in *R. v. Romanowicz* (2000), 45 O.R. (3d) 506 (C.A.), which held an accused person who chooses to be represented by a paralegal cannot expect the same level of representation as would be provided by a lawyer. Even if there is a lower standard for paralegals, the Crown submits that the appellant has not established any bases upon which a new trial should be ordered.

[4] For the following reasons, the appeal is dismissed.

## The Facts

[5] The appellant was charged with assaulting his wife Aleksandra Niemczyk on December 22 and 26, 2010. The Crown alleged he kicked her on December 22 causing a bruise to her leg and that he pushed his fists into her face on December 26 leaving marks on her face. At trial, the prosecution called the complainant and her daughter and also relied on an admission of fact regarding a police officer's observations of her injuries.

[6] Aleksandra Niemczyk testified that on December 22, while she was getting ready to start cooking for Christmas, the appellant was in the kitchen bothering her. He told her that she should not cook two large fish. She compromised and cooked one and one half, putting the other half in the fridge. Because of the fish smell, she opened the window. The appellant said she was causing damage to the house and was not paying the bills. She testified the appellant jumped towards her and kicked her in the right calf and "it didn't happen for the first." He kicked her once forcefully causing her to squat in pain. She thought he had broken her leg. He told her to get the fuck out of the house many times. When asked if she went to doctor for the deep bruise on her leg, the complainant said she did not because she could walk and "it didn't happen for the first time." Her daughter had taken her to her daughter's home after Christmas dinner because the atmosphere was unbearable at the dinner table.

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<sup>1</sup> While some of the cases relied upon refer to agents and the more recent cases and the LSUC regulate paralegals, for consistency I will refer to paralegals throughout the Reasons except when quoting from caselaw.

[7] She said that on December 26 the appellant shook her and brought both fists to her cheeks for a minute or two while telling her she was damaging the house by removing a hook from the wall. In examination-in-chief she said it was not the first time, it had happened before as well. She knew the best thing to do was to get loose from him.

[8] The complainant was cross-examined by the paralegal regarding her deteriorating relationship with her husband, including:

- when he asked her to sign papers regarding his property;
- that their marriage was unhappy before these incidents;
- that despite her evidence about previous assaults, that she had never before reported incidents to the police;
- that the appellant facilitated her coming to Canada and attaining status here;
- that she did not report the kick incident right away;
- how she and her daughter decided she would report the incidents to police;
- what she was seeking in the family law case;
- how the appellant was trying to protect his property interests for his family; and
- when asked about her conduct during the assaults she denied she had ever touched the appellant.

[9] The witness had been cross-examined on her knowledge of the appellant's properties, his attempts to get her to sign over her interests in the properties and her commencement of divorce proceedings. The cross-examination ended with the following question that the complainant denied:

Q: I would like to suggest that you fabricated this accusation in order to be able to get ahead financially at the time when you are feeling certain that you are losing ground?

[10] Jamila Niemczyk, the complainant's daughter, testified she saw a bruise on her mother's leg and marks on both her cheeks. She was cross-examined about how the complainant's relationship with the appellant changed due to the property dispute.

[11] It was agreed that Constable Andre of 11 Division saw a red mark on Aleksandra Niemczyk's left cheek and a bruise on her right leg on December 26.

[12] The appellant testified and was asked in examination-in-chief if anything happened on December 24. He said there were two little talks, one that his wife should not cook two large fish because they had plenty of other dishes. He did not say what the other little talk was about. There were no quarrels, no problems of any kind. His wife did cook the two fish and he knew from previous years that he had to eat the "left-overs" or throw them out. In cross-examination he also admitted he was angry because his wife would open the window for an hour at a time instead of ten minutes in the winter and they were losing heat. He was paying the bills, not his wife.

[13] Christmas Eve went really smoothly in a quite normal atmosphere. About 10:00 p.m. his wife said she was going to her daughters and he said that was okay. She stayed there for two nights.

[14] His wife called him to pick her up on Sunday, and he did so. Driving her home the ride was pretty smooth, there were no problems. When they got home his wife noticed two pieces of his clothing in a closet, she took them out and threw them on the floor asking why the “stinky things” were in the closet.

[15] At his suggestion they went to the kitchen where his wife removed a hook that had been there for years. He told her to stop and she started pushing him with her belly area, pushing him away. He made a fist gesture with his hand and showed the right hand open from top down because he wanted to scare her and make her stop pushing him. He said he was going to go for a car ride. When he went for the keys, she charged him and pushed him from behind, grabbed the keys and went to the bedroom. She changed her clothes and left the house by 11:00 o’clock. The appellant denied touching his wife at that time. He never touched anyone in his life and had never been in a fight. In cross-examination, he denied he pushed his fists into her cheeks. He heard nothing further from his wife. At 8:00 p.m. the police arrived and arrested him.

[16] The appellant, after recounting that he was shocked being arrested went on to talk about an incident in June when he called the police about a dispute over a closet they shared, damage caused to his car when he was in jail on these charges awaiting bail, and phone messages he received from “her mother” threatening to “bring him down” and “finish him.” The paralegal did not ask any questions that elicited the evidence just noted. It was the appellant talking, unprompted by questions. The trial judge then interjected:

|                |                                                                                                                                                                                 |
|----------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| The Court:     | That's enough. ... Okay. Look I don't know, are you just hearing this for the first time or you don't know anything about the rules of evidence? This is absolutely irrelevant. |
| Mr. Chojnacki: | I know but he's I don't want to stop him. He's talking on his own and he wants to say this ...                                                                                  |
| The Court:     | Well you're obviously                                                                                                                                                           |
| Mr. Chojnacki: | in person                                                                                                                                                                       |
| The Court:     | you didn't prepare him or didn't prepare him successfully.                                                                                                                      |
| Mr. Chojnacki: | Yeah                                                                                                                                                                            |
| The Court:     | But this is not admissible evidence                                                                                                                                             |

[17] The appellant said he did not cause any bruising to the complainant, that she had the bruises from her work. He agreed with the paralegal's second last question to him that he did not kick or assault his wife around Christmas. When he asked if had done so at any time in their marriage the Crown objected noting it was not relevant, not part of the case.

### **Reasons for Judgment**

[18] The trial judge commenced his reasons noting the caution that must be applied in allegations of domestic abuse where property issues are at stake. The quickest way to get exclusive possession was to make an allegation against the partner. His Honour addressed the Supreme Court of Canada judgment in *R. v. W.(D.)*, [1991] 1 S.C.R. 742, noted the difficulties assessing evidence given through a translator and continued:

It is equally difficult to assess it when the person acting as an advocate on behalf of Mr. Bilinski either doesn't understand his obligation to put the detail of what Mr. Bilinski is going to be saying to the complainant, particularly, about her charging at him and pushing him from behind, and so on, but that's what I'm dealing with.

[19] The trial judge found he did not believe the appellant's evidence. He rejected his evidence that things were going well on Christmas Eve even though his wife left and did not come back until Boxing Day. There was much more turmoil going on than the appellant's wife cooking too much fish and opening the window. There was no air of reality to the appellant's evidence about his wife pushing him on December 26<sup>th</sup>. Given his account was never suggested to his wife in cross-examination, his evidence was accorded diminished weight.

[20] More important to His Honour was the appellant's demeanor on the witness stand. He was visibly angry at a number of points and raised his voice. He was non-responsive to a number of questions, making speeches about unrelated matters, rather than giving straightforward and responsive answers. His evidence about how much fish to cook, the windows and the hook reflected a degree of control that was inconsistent with the trouble-free, pleasant environment he suggested. His Honour did not believe the appellant, nor did his evidence raise a reasonable doubt in his mind.

[21] Turning next to the complainant's evidence, His Honour again cautioned himself about the property issues at play but found her evidence did not strike him as the sort of thing one would make up if one were trying to set up someone, like the appellant, by concocting a false tale.

[22] His Honour concluded as follows:

The account of the argument over the fish with a kick, her description about that, the fact that she left the home for roughly 36 hours at what is supposed to be the most important family time of the year, her hesitation in complaining, the fact that she only did so with her daughter's advice, the description of this man getting angry with her because she removed a hook from the wall, his corroboration that he did raise his hands to her at that time so it corroborates it to at least that extent. But, most particularly, in all of this, I say first about that evidence that it is not the sort of thing that you make up. It has a ring of truth to it. And suspicious as I might be because of the financial concerns, I have admitted fact that she had a bruise, which would be consistent with the kick that she described, and that she had redness on her face, which would be consistent, again, with the second – well, second in time interaction that she describes.

If that evidence were merely corroborated by her daughter, who might be an eventual beneficiary in the family litigation, I might not be convinced by it, but it is borne out by the agreed fact that would have been testified to by the officer about the injuries.

Mr. Bilinski portrays himself as an angry, controlling man and his wife gives an account which I find very credible. Her account of the two assaults are corroborated with respect to the injuries. The idea that the injuries could have happened some other way or have been self-inflicted is not supported by any evidence whatsoever, and, in this context, to me, it all hangs together to the benefit of the prosecution.

There will be a finding of guilt on both counts.

[23] At the end of the proceedings, the following exchange occurred:

|                |                                                                                                                                                                                                                                          |
|----------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Mr. Chojnacki: | Thank you, Your Honour. And I learned from you that going to school does pay, and coincidentally I'm making a trip to New Haven, Connecticut and I wish someone ordered me to drop in to the law school, maybe pick up some good points. |
| The Court:     | I'm not going to get into that. Okay, thank you.                                                                                                                                                                                         |

### **The Fresh Evidence**

[24] The appellant and his former wife, Jadwiga Krolak, filed affidavits and testified in relation to the representation he received from John Chojnacki, a licensed paralegal. The appellant was held in custody for a bail hearing and while incarcerated another inmate recommended the paralegal to him. He went to see him with Ms. Krolak and gave him his account of the events. He asked Mr. Chojnacki if he was competent to represent him since he knew he was a paralegal and not a lawyer. The paralegal assured him that this was a small matter and that he would certainly win the case. He repeatedly said that there was insufficient evidence upon which to convict. While there was a lot of evidence the complainant had provoked him, there was no proof he struck his wife. The appellant was assured the case would end quickly. The paralegal spoke at length about his experience in this type of case and that Ms. Krolak could testify that he was a good man and had not assaulted her during their long marriage. Mr. Chojnacki asked if she could get someone else to testify about the appellant's good character.

[25] At their first meeting, the appellant told Mr. Chojnacki that there was a witness, Mr. Sun, who saw the first incident, but did not want to come to court. The paralegal did not seem very interested in the witness, was content to leave it at that and took no steps to subpoena the witness although the appellant believed he would assist his defence immeasurably since he was present throughout the holidays, rented a room from the appellant but there were shared kitchen and living room areas and he "was present through all the occurrences

that the complainant alleged,” according to the appellant’s affidavit. The appellant never mentioned the witness again to the paralegal. At that meeting the appellant gave the paralegal the two DVD statements his wife and daughter gave to the police.

[26] A few days before the trial, the appellant went to Mr. Chojnacki’s office to prepare for trial. The meeting lasted about one half hour. Since he had not seen them, the appellant wanted to look at the DVDs but the paralegal’s office machine was not working. The appellant never viewed them until after the trial. Mr. Chojnacki told the appellant he had watched them at his home. The appellant had never asked the paralegal for a transcript of the DVDs nor did he ever pay for transcripts.

[27] The paralegal asked the appellant about the family law proceeding initiated by the complainant but did not ask for the papers in relation to that case. The appellant said he was never prepared to give his evidence by the paralegal. He had told the paralegal that everything his wife and her daughter told the police was false. His wife made up the allegations to get the property she sought.

[28] He also testified that he told the paralegal about the family law documents, that he mentioned something about them. He also told him his wife was trying to get possession of the matrimonial home. He agreed in cross-examination that he was first given the family law documents on April 5, 2011. Accordingly, when he first saw the paralegal there were no family law

proceedings. He then said that he first met the paralegal on June 20 so that he had the papers before he met him.

[29] The appellant testified that he had spoken to the paralegal about testifying but that some matters were omitted. The only one he could remember was that he forgot to mention about the kick allegation and how his wife was standing. Since the bruise was on the front of her leg and he was behind her when she was allegedly kicked, the bruise did not support her account.

[30] He later recalled that he had never told the paralegal that his wife had pushed him in the second incident.<sup>2</sup> The first he would have heard it was when the appellant testified to it. However, at other points the appellant was uncertain whether he had told the paralegal about the push. Mr. Bilinski agreed that the paralegal told him that when he testified he had to tell the truth. He also admitted he did not “remember well” what he had discussed at the meeting with the paralegal.

[31] The appellant’s affidavit includes that he “thought he could obtain the same legal services as from a lawyer, except at a reduced rate” and that Mr. Chojnacki assured him he was fully competent to handle this type of case. He had conducted many cases of this type, and that he could fully, adequately and competently represent him. The appellant felt this was a “fairly simple case, in this [his] wife was not being truthful to the police, and had concocted her history

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<sup>2</sup> As is apparent from the cross-examination conducted by the paralegal at trial, the appellant must have told him about his wife pushing him.

in order to obtain an advantage for a property settlement from [him] upon separation, and to obtain exclusive possession of the home.”

[32] Jadwiga Krolak testified that the appellant’s first meeting with John Chojnacki lasted about one hour during which the appellant told him about the events “in some considerable detail.” The paralegal assured them it was a small matter and that he would certainly win the case. Before they went to the paralegal’s office, she had reviewed the disclosure with the appellant because he struggles with English, and she is more comfortable with English.

[33] Ms. Krolak was one of the two “character” witnesses called but all of the questions in examination-in-chief were ruled inadmissible. It was at that time that she saw the paralegal really did not know what he was doing.

[34] In submissions on the appeal, the Crown reviewed the two videotaped statements of the Crown’s witnesses and noted the complainant did use both fists to show how he made contact with her face, consistent with her trial evidence. In relation to the kicking incident, she told the officer that the appellant kicked her intentionally while she was opening the window. That was consistent with her trial evidence.

[35] In relation to Mr. Sun, the Crown notes that despite swearing an affidavit that Mr. Sun saw both incidents, he was only there for one incident. Mr. Sun owed the appellant money, still does and did not want to speak to the appellant regarding the incident. Mr. Sun did not respond to a letter the appellant sent him.

[36] The appellant was not a persuasive witness on the fresh evidence hearing. Even using an interpreter it took the Crown several attempts to get an answer that was responsive to the question. His memory was at least shown to be poor as he admitted he had a poor recollection of what he discussed with the paralegal. He testified that he did not testify that his wife had pushed him because the judge did not allow him to do so. He tried to tell his side of the story but the judge said he should answer all Mr. Chojnacki's questions. However, as is clear from the transcript, he did testify about his wife pushing him and he was never told that he should just answer the paralegal's question.

[37] Ms. Krolak was generally a credible and reliable witness whose evidence I accept. She confirmed that she had reviewed the disclosure with the appellant. Accordingly, contrary to his professed lack of knowledge about the Crown's case, it had been reviewed with him to the extent that he could tell the paralegal that his wife and her daughter were lying. It is also difficult to see how he would not have known about his wife's bruises, when he would have had the officer's notes in disclosure about seeing the bruise on her leg and marks on her face.

### **The Legislation**

[38] The applicable *Criminal Code*, provisions provide:

800. (1) Where the prosecutor and defendant appear for the trial, the summary conviction court shall proceed to hold the trial.

Counsel or agent

(2) A defendant may appear personally or by counsel or agent, but the summary conviction court may require the defendant to appear personally and may, if it thinks fit, issue a warrant in Form 7 for the arrest of the defendant and adjourn the trial to await his appearance pursuant thereto.

...

802.1 Despite subsections 800(2) and 802(2), a defendant may not appear or examine or cross-examine witnesses by agent if he or she is liable, on summary conviction, to imprisonment for a term of more than six months, unless the defendant is a corporation or the agent is authorized to do so under a program approved by the lieutenant governor in council of the province.

[39] Because assault under s. 266 has a maximum sentence of six months when prosecuted summarily, as occurred here, the appellant was entitled to be represented by an agent.

**The criteria to be established when an appellant alleges he or she was ineffectively represented at trial**

*Caselaw*

[40] An examination of the criteria for ineffective assistance of counsel and whether those criteria apply to paralegals or agents will place the arguments presented in context.

[41] The two leading cases dealing with ineffective assistance of counsel claims are the Supreme Court of Canada judgment in *R. v. G.D.B.*, [2000] 1 S.C.R. 520 and the Court of Appeal for Ontario judgment in *R. v. Joannis* (1996), 102 C.C.C. (3d) 35 (Ont. C.A.), leave to appeal to S.C.C. refused, [1997] 1 S.C.R. viii .

[42] In *G.D.B.*, after referring to *Joannis*, the Court held as follows:

**26** The approach to an ineffectiveness claim is explained in *Strickland v. Washington*, 466 U.S. 668 (1984), per O'Connor J. The reasons contain a performance component and a prejudice component. For an appeal to succeed, it must be established, first, that counsel's acts or omissions constituted incompetence and second, that a miscarriage of justice resulted.

**27** Incompetence is determined by a reasonableness standard. The analysis proceeds upon a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. The onus is on the appellant to establish the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The wisdom of hindsight has no place in this assessment.

**28** Miscarriages of justice may take many forms in this context. In some instances, counsel's performance may have resulted in procedural unfairness. In others, the reliability of the trial's result may have been compromised.

**29** In those cases where it is apparent that no prejudice has occurred, it will usually be undesirable for appellate courts to consider the performance component of the analysis. The object of an ineffectiveness claim is not to grade counsel's performance or professional conduct. The latter is left to the profession's self-governing body. If it is appropriate to dispose of an ineffectiveness claim on the ground of no prejudice having occurred, that is the course to follow (*Strickland, supra*, at p. 697).

[43] In *Joanisse*, Doherty J.A. set out the three criteria to be established by an appellant contending that she or he received ineffective assistance as follows: First, the appellant must establish the facts on which the claim of incompetence is based. Second, the appellant must establish that the representation provided by trial counsel was incompetent, and third, the appellant must establish that the incompetent representation resulted in a miscarriage of justice. He went on to explain that:

**70** The first component requiring that the appellant establish the facts on which the claim is based is consistent with the generally accepted rules governing pleadings. It is the appellant who is making the allegation and it is the appellant who, as between the appellant and the Crown, is in the better position to establish the underlying facts ...

**71** The second prong of this approach requires a measurement of counsel's performance against a competence standard. The standard developed by O'Connor J. in *Strickland v. Washington* has been adopted in this jurisdiction: *R. v. Silvini, supra*, at pp. 263-264; *R. v. Garofoli, supra*, at pp. 151-152; *R. v. Collier, supra*, at p. 573; see also *R. v. Strauss, supra*, at paras. 4-10; *R. v. Sarson* (1992), 77 C.C.C. (3d) 233 at 238-39 (N.S. C.A.); *R. v. Brigham* (1992), 79 C.C.C. (3d) 365, per Fish J.A. at 386-390 (Que. C.A.). The following extracts from the reasons of O'Connor J. capture the essential elements of the competence standard announced in *Strickland v. Washington, supra*:

... The defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the *Sixth Amendment*. ... [p. 2064]

... The proper measure of attorney performance remains simply reasonableness under prevailing professional norms. [p. 2065]

Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defence after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. [citations omitted] A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action

"might be considered sound trial strategy." [citations omitted] There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. [p. 2065]

Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. [p. 2066]

[44] In relation to the third branch, Doherty J.A. held:

**79** In articulating the test to be applied in cases where the unfairness said to flow from incompetent representation relates to the reliability of the verdict, this court has again looked to *Strickland v. Washington*, supra, for guidance. O'Connor J. rejected as too low a standard which would require reversal whenever it could be said that counsel's errors had "some conceivable effect on the outcome of the proceeding." She also rejected as too demanding a test which would require that the appellant show on the balance of probabilities that the result was affected by counsel's errors (at pp. 2067-2068). She settled on the following, at p. 2068:

The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

**80** This language has been referred to with approval in *R. v. Garofoli*, *supra*, at p. 152 and *R. v. Collier*, *supra*, at p. 573. I take Justice O'Connor to mean that the appellant must show that, had he received competent legal representation, there is a real probability that the appellant would not have been convicted of murder. A reasonable probability lies somewhere between a mere possibility and a likelihood.<sup>9</sup> A reasonable probability is established when the reviewing court is satisfied that because of counsel's incompetence, the verdict cannot be taken as a reliable assessment of the appellant's culpability.

[45] More recently in 1999, the Ontario Court of Appeal examined whether that standard applied to paralegals appearing in criminal courts in *Romanowicz*, where the Court wrote:

**27** Every accused is owed a fair trial. That right is guaranteed by s. 11(d) of the *Charter*. Representation by professionals trained in the law and bound by the ethics and obligations of their profession serves that right. In some cases, legal representation is essential to the securing of a fair trial and an accused who wants counsel must be provided with counsel: *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1 at 66 (Ont. C.A.). If an accused retains counsel, she is constitutionally entitled to competent representation by that counsel: *R. v. L.C.B.* (1996), 104 C.C.C. (3d) 353 at 367 (Ont. C.A.); *R. v. Joannis* (1995), 102 C.C.C. (3d) 35 at 56-58. The constitutional right to the effective assistance of counsel recognizes that counsel, by virtue of their professional training, will bring to their task an expertise which others, including the accused, do not possess. An accused who chooses to seek the assistance of legally trained counsel is entitled to assistance which reflects that expertise.

**28** An accused is also entitled to proceed without counsel. The accused may choose self-representation, or if the Crown has proceeded summarily, the accused may choose to be represented by an agent: *R. v. Vescio*, [1949] S.C.R. 139 at 142; *R. v. Littlejohn and Tirabasso* (1978), 41 C.C.C. (2d) 161 at 173 (Ont. C.A.). By choosing to proceed without counsel, an accused elects to forego the right to the effective assistance

of counsel. An accused cannot at the same time exercise the right to proceed without the assistance of counsel and yet demand the right to the effective assistance of counsel.

**29** If an accused chooses self-representation, he or she cannot be heard to complain that the conduct of the trial did not rise to the level of a competent counsel. We see no reason why the same conclusion would not follow when an accused chooses to be represented by an agent who is not a lawyer. Nor does the fact that the agent is paid create any presumption as to the agent's competence. Just as where an accused chooses self-representation, an accused who chooses to be represented by an agent who is not a lawyer has decided against exercising the right to effective assistance of counsel, and cannot be heard to contend that the agent's performance should be tested against the standard reserved to counsel trained in the law: *Harrison v. Canada*, [1998] A.J. No. 109 at paras. 15-17 (Alta. Q.B.).

**30** In holding that an accused who chooses to be represented by an agent and not a lawyer has no constitutional right to competent representation, we do not suggest that the accused's right to a fair trial is diminished. That right remains in full force and the absence of legally trained counsel puts an added obligation on the trial judge to protect that right: *R. v. McGibbon* (1988), 45 C.C.C. (3d) 334 at 347 (Ont. C.A.).

**31** Nor do we suggest that an accused who is represented by an agent who is not a lawyer is foreclosed from raising the conduct of that agent on appeal in support of a submission that the conviction constitutes a miscarriage of justice. Any such submission cannot, however, be made on the basis that the miscarriage arises because the agent failed to meet the competent lawyer standard. Rather, the accused must demonstrate that the agent's conduct, perhaps combined with other events, produced a miscarriage of justice.

...

**33** ... The appellant, following his agent's advice, did not testify. On appeal he argued that his defence of lack of intent could not hope to succeed absent his testimony and that the advice that he should not testify effectively doomed his case. This argument rests on the assumption that the appellant was entitled to competent legal advice and

an informed legal opinion on whether he should testify. For the reasons outlined above, that assumption is misplaced where the appellant has chosen to be represented by someone who is not a lawyer. The appellant, having decided he did not want a lawyer and wished to be represented by Mr. Carter, cannot be heard to complain that Mr. Carter in advising him not to testify did not exercise the judgment expected of a lawyer.

[46] The Court also cautioned trial judges that where an accused was represented by a paid agent, they would do well to inform the accused that the laws in Ontario do not require that persons receive any training or demonstrate any level of expertise before being allowed to take money in return for representing persons in criminal court. Trial judges were also encouraged to advise the accused that while the law expects certain minimum standards of competence from lawyers, there are no such standards for agents or paralegals. The exact details of the inquiry would be case specific. The Court did not support an inquiry as to the paralegal's competence.

[47] In 2004, the Court of Appeal examined another case in which ineffective representation by a paralegal was raised. In *R. v. Ricci*, [2004] O.J. No. 4161 (C.A.), leave to appeal to S.C.C. refused, [2004] S.C.C.A. No. 551, the Court concluded that the appellant had made an informed choice to have an agent represent him. By doing so, he could not expect the same level of representation he was entitled to expect from a lawyer. Further, there was no miscarriage of justice because the appellant presented no evidence that had he had experienced counsel, the result of the case "could possibly have been any different."

[48] In 2005, the Court of Appeal again examined the issue of ineffective assistance of counsel in *R. v. Archer* (2006), 202 C.C.C. (3d) 60 (Ont. C.A.). The Court held that a miscarriage of justice occurs when the appellate court is satisfied that counsel's ineffective representation undermined the appearance of the fairness of the trial or the reliability of the verdict. The Court continued:

A verdict is rendered unreliable where the appellant demonstrates that had counsel performed in a competent fashion there is a reasonable possibility that the verdict could have been different.

[49] The changed wording from reasonable probability in *Joanisse*, and reasonable possibility in *Archer* and *Ricci*, was reconciled by the Court of Appeal in *R. v. B.(L.C.)* (1996), 104 C.C.C.(3d) 353 (C.A.), where the Court held that the real possibility Martin J.A. spoke of in *R. v. Garofoli* (1988), 41 C.C.C. (3d) 97 (Ont. C.A.) when considering counsel's competence in the context of miscarriage of justice, can sensibly be viewed as synonymous with O'Connor J.'s prejudice standard of reasonable probability in *Strickland*.

[50] Returning to *Archer*, the Court, citing *G.D.B.*, found that an appellate court should first consider whether the alleged incompetence resulted in a miscarriage of justice. If the claim fails on that branch, there is no need to assess the adequacy of counsel's performance. That approach acknowledges that it is an appellate courts function to determine whether there has been a miscarriage of justice, not to grade counsel's performance.

## **The Law Society and Paralegals**

[51] In 2007, the LSUC commenced regulating paralegals. In doing so, the LSUC enacted the *Paralegal Rules of Conduct*<sup>3</sup>. Rule 3.01 provides that a paralegal shall perform any service undertaken on a client's behalf to the standard of a competent paralegal. The paralegal is not to undertake any task without being competent to handle it or being able to become competent without undue delay or expense to the client. If the paralegal discovers that he or she lacks the competence to complete the task, the paralegal shall either decline to act or obtain the client's consent to retain, consult or collaborate with another licensee who is competent and licenced to perform that task.

[52] Rule 3.01(4) defines a competent paralegal as one who has and applies the relevant skills, attributes, and values appropriate to each matter undertaken on behalf of a client. This includes knowing general legal principles and procedures and substantive law and procedures for the legal services that the paralegal provides; in addition, implementing, as each matter requires, the chosen course of action through the application of appropriate skills, including legal research, and the application of the law to the relevant facts. The full text of Rule 3.01 is appended to these Reasons as Schedule "A".

[53] Some paralegals had to apply for admission, while others, including Mr. Chojnacki, were "grandfathered." When the LSUC began to regulate paralegals, those with three years' full-time experience were permitted to apply

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<sup>3</sup> Online: Law Society of Upper Canada < [www.lsuc.on.ca/with.aspx?id=1072](http://www.lsuc.on.ca/with.aspx?id=1072) >

to be licensed with no educational requirements.<sup>4</sup> Although they were subject to all other licensing obligations, such as being of good character, carrying insurance and passing the licensing examination. From that process, 2,230 paralegal licenses were eventually issued under the grandfathering procedure.

[54] For those who were not grandfathered during the May 1 to October 31, 2007 window, the LSUC began the process of accrediting paralegal programs of study, with the objective of ensuring that all licensing candidates have graduated from approved educational programs that meet required standards.

[55] Standards are now in place for accredited programs, including 830 total hours of instruction in specified areas. As of January 2011, paralegals were required to complete 12 hours of eligible educational activities in every calendar year, including at least 3 hours of accredited professionalism-related content. The appellant's trial was in June 2011.

[56] The 2012 LSUC Report to the Attorney General concluded that despite extensive communications work, public awareness has not kept pace with the changes in the legal services market. Further work was required, particularly in explaining the services that lawyers and paralegals provide and the differences between them.

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<sup>4</sup> The issues addressed in this and the next paragraph are taken from the 2012 LSUC Report to the Attorney General, Ministry of the Attorney General of Ontario, *Report of Appointee's Five-Year Review of Paralegal Regulation in Ontario* (Ontario, November 2012) online: Ministry of the Attorney General <[www.attorneygeneral.jus.gov.on.ca/english/about/pubs/paralegal\\_review/Morris\\_five\\_year\\_review-ENG.pdf](http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/paralegal_review/Morris_five_year_review-ENG.pdf)> concerning paralegals.

[57] The January 2012 Ontario Bar Association “Five-Year Review of Paralegal Regulation”<sup>5</sup> notes at p. 6 that continuing education is “particularly crucial with those paralegals that were licensed as a result of the ‘grandfathering’ provisions, as they have never been required to receive education in, or been tested on, the substantive areas in which they may practice.”

## **The Arguments**

### **The Appellant**

[58] The appellant submits the paralegals representation was so deficient that it brings into question the reliability of the verdict. He contends that the LSUC’s assumption of the regulation of paralegals changed the law. As such, a person retaining a paralegal should now receive the same representation, as though he or she had retained counsel. As further support for this submission he contends the paralegal’s representations about having successfully defended similar cases enhances his right to effective representation of counsel.

[59] In the alternative, he contends there should be a new standard, in essence a middle-ground, in the quality of representation between counsel and the former test for agents. The new standard should be somewhat lower than for counsel. The effect of a lower standard would be that the paralegal would be permitted to make more mistakes than a lawyer. Finally, he contends the trial

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<sup>5</sup> Ontario Bar Association, *Five-Year Review of Paralegal Regulation* (2012) online: Ontario Bar Association <[www.oba.org/En/publicaffairs\\_en/PDF/OBA%20Submission-Paralegal%20Regulation%20Review-Jan%2031%202012-final2.pdf](http://www.oba.org/En/publicaffairs_en/PDF/OBA%20Submission-Paralegal%20Regulation%20Review-Jan%2031%202012-final2.pdf)>

judge here erred in failing to caution the appellant that he was not being represented by a lawyer, pursuant to *Romanowicz*.

[60] The appellant relies on the judgment in *Hill v. City of Toronto*, 2007 ONCJ 253, 221 C.C.C. (3d) 189, that considered the test to be applied when paralegals on appeal asserted that paralegals at trials in the *Provincial Offences Court* acted contrary to the appellant's instructions, in one case by pleading the client guilty without instructions to do so, and in the second by not attending the trial date. However, given that the trial paralegals had not been given notice and the lack of proper materials in support of the allegations, Libman J. dismissed the appeals. His Honour was dealing with proceedings under the *Provincial Offences Act* and not criminal prosecutions. My analysis does not address the appropriateness of a competent paralegal standard for cases under the *Provincial Offences Act*.

[61] His Honour found that notwithstanding that a defendant choosing to be represented by a paralegal cannot insist on the right to effective assistance of counsel, the LSUC's enactment of the *Paralegal Rules of Conduct*, now providing for standards of competence for paralegals, meant that a defendant was entitled to the effective assistance of a competent paralegal practitioner.

[62] Libman J. accepted that *Romanowicz* precluded grafting the competent lawyer standard onto paralegals, as education and professional training requirements between the two groups remain distinct, notwithstanding the similar ethical obligations.

[63] Because the lack of paralegal regulations was one of the reasons the Court of Appeal found there was no right to effective assistance from paralegals, His Honour found the new rules were a significant development supporting the recognition of a new standard of competence for paralegals. The standard would be less than expected of counsel but one that entitles the defendant to effective assistance commensurate with the training and licensing requirements that govern this new class of paralegal practitioner.

### **The Crown**

[64] The Crown argues the law has not changed since *Romanowicz*. There should be no new standard. In any event, Mr. Renwick submits the appellant has failed to establish there should be a new trial on any standard.

## Analysis

[65] For the following reasons, I am not persuaded that a person who retains a paralegal is now entitled to the effective assistance of counsel. Further, assuming the paralegal made the representations he is alleged to have made at the first interview, I am not persuaded those comments resulted in, or contributed to, the appellant being entitled to the effective representation of counsel.

[66] The differences between paralegals and counsel remain. No doubt paralegals are now regulated, and *some* have professional legal training outside of on-the-job training in court. There is now a LSUC rule setting out the standard for a competent paralegal. However, that does not remove the main differences identified in *Romanowicz*. Neither is there any support for the appellant's submission in *Hill*. There remains a clear distinction between the representation that an accused person is entitled to when they retain a lawyer versus when they retain a paralegal.

[67] The LSUC draws such a distinction. The LSUC's advice in regard to choosing the right legal professional includes that a lawyer's qualifications comprise a Bachelor of Laws or *juris* doctor degree, or equivalent. The lawyer must have successfully completed the LSUC's licensing process, including licensing exams, articles of clerkship, and an online professional responsibility and practice course. On the other hand, paralegals' qualifications include completion of an approved legal services program and the licensing process, which also involves less substantive licensing examinations.

[68] The appellant has provided no evidence that the LSUC or any other regulatory body has now assured the public that the representation level is the same. Indeed, the record supports a contrary conclusion. The case-specific evidence on this appeal supports that conclusion. The appellant knew he was not retaining a lawyer. He knew the agent had less legal training than a lawyer, and he knew the agent would charge less than a lawyer.

[69] The fact the LSUC now regulates paralegals does not change any of those factors. Indeed, the appellant never suggested that the fact the paralegal was licensed played any role in his decision. There is a constitutional right to effective representation by counsel. There is nothing to support the submission that there is a similar right where the appellant retained a paralegal. What the appellant seeks to do is to create a new, or expand an existing, constitutional right.

[70] That the paralegal told the appellant he had a lot of experience in similar cases, that he was competent to handle the case and that the appellant would be acquitted, as the appellant contends, does not increase the level of representation to which the appellant was entitled. First, assuming it was said, there is no evidence that the paralegal lied to or misled the appellant. Second, the appellant knew he was not retaining a lawyer, was retaining a person with less legal training and who would cost less. Third, the paralegal provided an opinion on the outcome of the case, not a guarantee.

[71] The second issue as to whether there should be a new standard where paralegals represent a person in criminal court is more problematic. Should the standard now be somewhere between that of counsel and no standards, where an accused represents him or herself or is represented by a paralegal, as indicated in *Romanowicz*?

[72] One of the appellant's submissions can be quickly disposed of. Assuming there should be a new middle ground test, it cannot simply be that the paralegal is entitled to make more mistakes than a lawyer. First, there is no set number of mistakes that lawyers can make before their conduct of the case reflects incompetence. Second, to succeed on an appeal, there still has to be a miscarriage of justice established. While at some point the number of errors may become a factor, any new test would have to nonetheless focus on the quality or results of the errors and not the quantity.

[73] There are several challenges to adopting a middle ground standard for paralegals in criminal court on this record. First, Libman J.'s proposed standard for appeals in cases under the *Provincial Offences Act* was that the defendant would be entitled to effective assistance commensurate with the training and licensing requirements that will govern this new class of paralegals. However, because the appellants' material was so deficient, His Honour had no need to examine the training and licensing requirements, nor the fact that there are two categories of paralegals: those who were grandfathered and those who were not.

[74] A brief examination of the requirements reveals there may be significant challenges in determining those requirements for, and the level of competence of, paralegals who were grandfathered. While they are clearly now regulated and a dissatisfied client has recourse to the LSUC, there was no requirement for any legal training.

[75] Even now, there is no assurance that a similarly situated paralegal would fulfill his or her yearly educational requirements by taking courses *that would assist in representing persons in criminal court*. At the time of this trial, the requirement for educational courses had not been in place for a year, so whether Mr. Chojnacki ever participated in any programs, and their nature, is unknown, since he provided no material in response to the appellant's allegations or any other aspect of this appeal.

[76] Libman J. relied upon paralegals' duties and ethical responsibilities as well as the standard of a competent paralegal imposed on paralegals because of the new rules. His Honour also relied on the Court of Appeal's finding that a lack of paralegal regulation was a basis for finding that there was no right to effective assistance from a paralegal in *Romanowicz*.

[77] In seven paragraphs, the Court of Appeal dealt with the issue of whether there is a constitutional right to effective assistance where an accused is represented by an agent who is not a lawyer. The Court refers to the *Charter's* s. 11(d) right to a fair trial being served by representation by "professionals trained in law and bound by the ethics and obligations of their profession", that the

constitutional right to the effective assistance of counsel recognizes that counsels' bespoke training enables them to bring to their task an expertise which others do not possess (at para. 27); that an accused who chooses to be represented by a paralegal cannot be heard to contend that the paralegal's performance should be tested against the standard reserved to counsel trained in the law (at para. 29); and that the right to a fair trial remains in full force, and the absence of legally trained counsel puts an added obligation on the trial judge to protect that right (at para. 30).

[78] While there is now a definition of a competent paralegal, the emphasis on counsel being trained in the law or professional training noted in the preceding paragraph reflects the importance the Court of Appeal placed on legal training. I am unable to conclude on this record, enhanced by the publically available information from the LSUC, what legal training, paralegals who were grandfathered received. I infer legal training is something more than on-the-job self-training by representing accused persons in criminal court on summary conviction matters.

[79] In addition, I am not persuaded that the LSUC providing a rule defining competent paralegals is determinative or of significant assistance in determining whether a paralegal's representation in criminal courts is deficient. The examination of counsel's performance is on a reasonableness standard. While it may have occurred, I am not aware of any appellate decision that has relied upon the LSUC's or any other law society's definition of competent counsel in determining whether an appellant has established the requisite criteria to

succeed on appeal. See: *G.D.B.* (reference to Alberta Rules relating to ethics), *Joanisse, Archer, R. v. McKellar* (1994), 10 O.R. (3d) 796, *R. v. Prebtani* 2008 ONCA 735, *R. v. McKoy* 2011 ONCA 41, *R. v. Szostak* 2012 ONCA 503, *R. v. R.P.* 2013 ONCA 53. Indeed, in *Joanisse*, Doherty J.A. stressed that the conduct of counsel is assessed on a reasonableness standard and rejected a list of “do’s and don’t” as the appropriate test.

[80] I am unable to find that the LSUC’s regulating of paralegals and/or the Rules for Paralegals, in particular those who were grandfathered, results in any middle-ground standard of representation. It may be that there is evidence which could support such a middle ground, particularly for paralegals who were not grandfathered, but it has not been presented into evidence, nor is it readily available to the public.

[81] If there is to be a new middle ground for criminal court, it would have to be determined whether there should now be a general presumption of paralegal competence that an appellant must displace.

[82] On this record, I am not persuaded that there should be a new test for paralegals that represent accused persons in criminal courts. Whether there should be a new standard is best determined on a full record, including all the requirements for those grandfathered and those who were not.

[83] In considering this ground of appeal where the representation at issue was provided by a paralegal, it is appropriate to consider the following factors:

- (i) Everyone is entitled to a fair trial whether they are represented by a lawyer, a paralegal, or him or herself;
- (ii) Where an accused retains counsel, she or he is constitutionally entitled to competent representation by counsel. There is no constitutional right to the effective representation by a competent paralegal;
- (iii) Where an accused chooses to proceed without counsel, he or she forgoes the right to the effective assistance of counsel. They cannot be heard to complain that the conduct of the trial did not rise to the level of competent counsel after making an informed decision they did not want to retain counsel;
- (iv) Where an appellant alleges his or her trial representation by a paralegal was deficient to the extent that a new trial is required, she or he must establish:
  - First, the facts upon which the claim is based, if they are disputed, on a balance of probabilities, and
  - Second, that the paralegal's conduct, perhaps combined with other events, produced a miscarriage of justice. The appellant must show that there is a real possibility that the incompetent representation produced an unfair trial, that a miscarriage of justice occurred because of the paralegal's representation. The test can also be described as the appellant establishing the reasonable possibility that the reliability of the judgment is compromised.
- (v) Whether the trial judge (or the justice setting the trial date for the reasons indicated below) cautioned the accused that by retaining a paralegal, he or she was giving up their right to the effective representation of counsel as indicated in *Romanowicz*.

## Was there a Miscarriage of Justice?

[84] As I read the appellate court judgments, the first step is to determine whether there has been a miscarriage of justice. If the answer to that question is no, there is no need to examine the paralegal's conduct.

[85] Having reviewed the entire transcript, I am not persuaded there was a miscarriage of justice caused by the paralegal's representation. While the trial judge was critical of the paralegal during the trial and in his Reasons, I am not persuaded there was prejudice, or that the trial was unfair or a miscarriage of justice. The cross-examination of the complainant reflected the defence position that the allegations were concocted to support her family law property claims. That was readily apparent to the trial judge who twice addressed the caution that was required in such cases in his Reasons.

[86] As discussed in more detail below, the appellant gave his evidence in relation to both incidents without any impediment from the paralegal or the Court. The trial judge examined the evidence and gave detailed reasons why he believed the complainant and rejected the appellant's evidence, and why his evidence did not leave His Honour in a state of reasonable doubt. The trial judge had the independent confirmatory evidence of the marks on the complainant's face and the bruise to her leg.

[87] Should I be in error in that finding, I turn next to the various alleged deficiencies in the paralegal's representation applying the factors noted above. In doing so, if I am wrong in relation to the standard to be expected of paralegals, to complete the record, I will examine the alleged deficiencies individually and

collectively applying counsels' standard as well as a lesser competent paralegal standard.

### **The Alleged Errors by the Paralegal**

[88] Mr. Czuma contends the paralegal provided ineffective assistance in the following ways:

[89] First, at the start of the trial, he asked if another charge of failing to comply with the release order on the assault charges could be dealt with at the same trial. The Crown said that she was content that the other charge be brought forward and tried at the same time, but was not consenting to an adjournment of the trial date. The paralegal then said:

I am not familiar with the disclosure. I haven't received it. I did not represent Mr. Bilinski in this matter that's very recent. And in that situation it would be, again, proper to get familiar and discuss the matter with the accused about the consequences. But, essentially, the background to these both cases and probably the facts will indicate that it would be proper that everything goes together but probably today is not the best time.

[90] The trial judge asked if the paralegal was ready for the assault allegations trial and was told that he was. His Honour noted that everyone was there, so the trial should proceed.

[91] The appellant contends the request inappropriately brought to the trial judge's attention that the appellant was alleged to have violated his release order. While I agree the request was inappropriate, unusual and would reflect ineffective assistance by counsel or by a paralegal, I am not persuaded it had any

impact on the trial. Nor am I persuaded the appellant has established on the requisite test that the error contributed to a miscarriage of justice. There were no details of the *allegation* indicated, and more importantly, there is nothing from which I could conclude that information was used in any way by the trial judge.

[92] Second, the appellant argues the paralegal should have subpoenaed his tenant, Mr. Sun, to the trial. He was present for one of the occasions where the appellant was found to have assaulted his wife, which would support the defence position advanced at trial. There are several problems with the appellant's argument. First, Mr. Sun never gave a statement about what he saw or did not see. He made it clear he did not want to go to court. When confronted in a store by the appellant's girlfriend, he told her he was friends of both the appellant and his wife and did not want to get involved. Since Mr. Sun had never told anyone what he saw, it is difficult to see how the failure to subpoena him reflected ineffective assistance. No doubt, he could have been subpoenaed to the trial, but not knowing what he was going to say, it is difficult to see how the failure to do so reflected incompetence by counsel or on any new standard. More importantly, it is impossible to find that the failure contributed to a miscarriage of justice in these circumstances.

[93] That conclusion is reinforced by the fact that the trial was completed many months before the appeal was argued, and to-date there is still no indication what Mr. Sun would say. While the Crown suggested he could have been subpoenaed to the fresh evidence portion of the appeal, I am not persuaded

that seeking leave to call a witness to see what, if anything, he would say about the offence qualifies as fresh evidence.

[94] Third, the appellant submits the paralegal failed to cross-examine the appellant's wife and daughter on inconsistencies between their videotaped statements and trial evidence. He argues his wife was very vague about the allegations in her video but far more detailed in her trial testimony. He says she vaguely answered her daughter about whether or not the appellant kicked her.

[95] While there were some inconsistencies between the statements and there could have been more cross-examination, I am not persuaded this establishes ineffective assistance of counsel applying a lower standard. That a lawyer would have cross-examined differently or more extensively is not the test. Nor am I persuaded this ground alone or in conjunction with the others establish there was a miscarriage of justice.

[96] The appellant's wife was not using an interpreter in the police interview but did at trial, which could account for some of the apparent inconsistencies. That the complainant told her daughter that she thought the appellant had kicked her should have been put in cross-examination. However, given the trial judge's findings of fact, I am not persuaded the appellant has met the required test.

[97] In addition, the appellant appears to be arguing that he was entitled to the type of representation that he would have received from competent

counsel. Again, that argument was laid to rest by the Court of Appeal in *Romanowicz*.

[98] In regards to the appellant's submission that the paralegal should have had transcripts made of the DVDs, there has never been any indication he would have been prepared to pay what I infer would have been the additional expense of doing so. Further, the appellant had never asked to see the DVDs until shortly before trial and did not ask to take them to watch when the paralegal said his machine was broken. In addition, the appellant picked up the DVDs and took them to the paralegal. He could have watched them before doing so.

[99] Fourth, the appellant submits the paralegal provided ineffective assistance when he failed to cross-examine the complainant in accordance with the rule in *Browne v. and Dunn* (1893), 6 R. 67 (H.L.). In his Reasons for Judgment, the trial judge noted the paralegal did not understand his obligation to put the detail of what the appellant was going to say, particularly about her charging at him and pushing him from behind. Later, His Honour noted the appellant's evidence that she charged at him and pushed him was never put to her in cross-examination "and has to be accorded some diminished weight."

[100] This alleged deficiency is problematic on two bases. First, the trial judge and the appellant misapprehended the evidence. His Honour found the paralegal never put what the appellant was going to say to the complainant. The appellant asserts the paralegal "failed entirely to confront the complainant with the appellant's version of the facts."

[101] In relation to the second incident, the appellant testified that his wife had pushed him after they were arguing about her removing the hook, and that later in the same incident when he went to get the car keys to go for a ride, she charged at him and pushed him from behind, grabbed the keys and went to the master bedroom. While the paralegal did not put to the complainant everything that the appellant was going to say, the gist of the defence evidence was that she had pushed him before and after he went for the keys.

[102] In cross-examination, Mr. Chojnacki asked:

Q: So from the way I hear from you is that throughout the incidents you remained nice and quiet, and, basically, you were only raising this question, why Jan is doing this to you. That's it?

A: No, no, I was trying. I was telling him, "You attend church every Sunday. Why are you behaving like that?" My doctor advised me, so I asked him, "Let's go to psychologist. Maybe psychologist will help us."

Q: Madam, I like to know if you are possibly pushing him away from you, whether you were using any gesturing or raised voice to him?

A: Never I push him. Never I touch him. He's so fast. He's so swift. Even two years ago he beat up our tenant. Tenant needed some stitches. He was at the emergency and he needed stitches and his whole face was swollen.

[103] Clearly, the paralegal asked the complainant whether it was possible that the complainant had pushed him, and she denied she had ever pushed him. While the defence position may not have been put to the complainant in detail, as noted below, all the details are not required. The complainant was asked if she had pushed the appellant and she denied it. I am not persuaded anything more was needed in relation to the defence assertion that she pushed him.

[104] The second problematic aspect is that there is an option to drawing an adverse inference from the failure to adhere to the rule. The Court of Appeal has addressed this issue in many cases, including *R. v. McNeill* (2000), 48 O.R. (3d) 212 (C.A.), where Moldaver J.A. wrote:

**44** The rule in *Browne v. Dunn* was succinctly stated by Labrosse J.A. in *R. v. Henderson, supra*, at p. 141:

This well-known rule stands for the proposition that if counsel is going to challenge the credibility of a witness by calling contradictory evidence, the witness must be given the chance to address the contradictory evidence in cross-examination while he or she is in the witness-box.

**45** In *R. v. Verney* (1997), 87 C.C.C. (3d) 363 at 376 (Ont. C.A.), Finlayson J.A. outlined the purpose and ambit of the rule:

*Browne v. Dunn* is a rule of fairness that prevents the "ambush" of a witness by not giving him an opportunity to state his position with respect to later evidence which contradicts him on an essential matter. It is not, however, an absolute rule and counsel must not feel obliged to slog through a witness's evidence-in-chief, putting him on notice of every detail that the defence does not accept. Defence counsel must be free to use his own judgment about how to cross-examine a hostile witness. Having the witness repeat in cross-examination, everything he said in chief, is rarely the tactic of choice. For a fuller discussion on this point, see *Palmer and Palmer v. The Queen* (1979), 50 C.C.C. (2d) 193 at pp. 209-10, [1980] 1 S.C.R. 759, 14 C.R. (3d) 22 (S.C.C.).

**46** While these decisions explain the rule and its underlying purpose, they do not address the options available to a party who feels aggrieved by the failure of his or her opponent to adhere to it. To that end, I offer these suggestions.

**47** In cases such as this, where the concern lies in a witness's inability to present his or her side of the story, it seems to me that the first option worth exploring is whether the witness is available for recall. If so, then assuming the trial judge is otherwise satisfied, after weighing the pros and cons, that recall is appropriate, the aggrieved party can either take up the opportunity or decline it. If the opportunity is declined, then, in my view, no special instruction to the jury is required beyond the normal instruction that the jury is entitled to believe all, part or none of a witness's evidence, regardless of whether the evidence is uncontradicted.

**48** The mechanics of when the witness should be recalled and by whom should be left to the discretion of the trial judge.

**49** In those cases where it is impossible or highly impracticable to have the witness recalled or where the trial judge otherwise determines that recall is inappropriate, it should be left to the trial judge to decide whether a special instruction should be given to the jury. If one is warranted, the jury should be told that in assessing the weight to be given to the uncontradicted evidence, they may properly take into account the fact that the opposing witness was not questioned about it. The jury should also be told that they may take this into account in assessing the credibility of the opposing witness.

[105] Even assuming there was a breach of the rule, while the trial judge could have given the appellant's evidence diminished weight, he was not required to do so. Justice Moldaver's first option, exploring whether the complainant was available to be recalled, should have been explored. That approach would have been more consistent with the "added obligation on the trial judge to protect the right to a fair trial" where a paralegal is acting on behalf of an accused person or the accused is self-represented than finding he had to give the appellant's evidence diminished weight. For these reasons, I am not persuaded this alleged deficiency has been established on any standard. It certainly did not cause or contribute to a miscarriage of justice based on the paralegal's representation.

[106] Fifth, the appellant submits the paralegal's raising of other incidents in which the appellant assaulted his wife reflects ineffective assistance. In his factum, the appellant asserts that these other incidents of assault had not been raised in examination-in-chief. I disagree. In the course of her examination-in-chief, at least three times the complainant included in her answers to the Crown's appropriate questions about the charges that this was not the "first time", or that

there had been other assaultive incidents. The paralegal did not raise the other incidents for the first time in cross-examination.

[107] The paralegal cross-examined the complainant directly about other incidents and, specifically, her decision not to contact police about those incidents. For example, in examination-in-chief, the complainant testified that this was not the first time that he had kicked her. The paralegal asked in cross-examination whether she had reported any of those incidents to the police. The question appears to have been limited to kicking incidents. The complainant said it was only once before and then proceeded to give non-responsive evidence regarding the appellant's first wife. The trial judge interjected and reminded her that she had been asked "if you had reported any of the previous assaults to the police?" Ms. Niemczyk said she did not report them because she was scared of the appellant. She continued, "Each time I was warning him, "One more time and I will report."

[108] The paralegal also asked the complainant's daughter if her mother had described other issues or problems in their marriage, eliciting the unfortunate response: "She called me many times, almost every day and she was crying over the phone and complaining of her husband attacking her verbally and also physically." That a lawyer or paralegal asked an ill-advised or one too many questions does not itself reflect ineffective assistance of counsel or on a reduce standard.

[109] Whether to ignore the unresponsive aspects of the complainant's examination-in-chief or to cross-examine to show there had been no complaints to the police (presumably to support the contention that the complainant was making it all up and only went to the police when the property issues emerged) was a tactical decision about which even experienced counsel might differ.

[110] In addition, assuming the paralegal's questioning reflected ineffective assistance of counsel or at a lower standard, there is nothing from which I could infer the trial judge acted upon the "other disreputable conduct." No details were given, nor was there any evidence about the number of incidents. Unless I could find His Honour relied on the other disreputable conduct, the error did not contribute to a miscarriage of justice.

[111] Sixth, the appellant submits the paralegal should have cross-examined the complainant on her family law application and affidavit, in which she said she was seeking half of all of the appellant's property while testifying at trial that she was only looking for her proportionate share for their four year marriage. The paralegal cross-examined the complainant as follows:

- Q: Madam, I asked you several questions. I heard your evidence before the court but I would like to ask you if the properties you somehow – affected you to the point that you, when you knew that you are losing your chance to gain the property you either created the whole situations in order to be able to have some ground that you can regain the property rights, in your view, or ..
- A: I didn't – I didn't own – I didn't want to own any of the real estate. I just wanted to be happy, like, marriage. I wanted him to be the same as he was towards me when we met first. For the first – for the first and second year I felt really good with him. He was caring person.

- Q: Madam, I would like to suggest that you fabricated this accusation in order to be able to get ahead financially at the time when you are feeling certain that you losing ground.
- A: This was not my plan to gain the assets. My husband said that he will buy a trailer, that he was without the wife for the past ten years, that we will be travelling, we will be happy and he will do anything for me to be happy. I don't want any assets. I, never said so.

[112] That completed the cross-examination. His Honour then asked if the complainant was claiming half of all of his property. She said she was not. She was only seeking what she was entitled to as a wife of four years: half of the gained profit of the value of all of his property. She did not know all the details and was only seeking what a wife was entitled to.

[113] The complainant's Application in Family Court, and her Financial Statement in support, were sworn on April 5, 2011. The trial date was set on February 11, and the trial held on June 20, 2011. Accordingly, the appellant's first interview with the paralegal was before the family law documents were given to him, so it is difficult to see how the paralegal had them at the time of the first interview.

[114] All the appellant says in his affidavit is that the documents were available, not that he told the paralegal about them at the second interview, that he brought them to the second meeting, or offered to provide them. It is difficult to see how the paralegal should have cross-examined on what he was never given.

[115] Moreover, the documents set out claims in relation to the various properties. Assuming the documents showed the complainant was seeking more than she admitted while testifying, it is difficult to see how any more specifics were required for the trial judge to understand the concern that he noted on two occasions in his Reasons; specifically, that the allegations were trumped up to assist in the family law issues. I am not persuaded the appellant has shown ineffective assistance applying any standard or that the failure contributed to a miscarriage of justice.

[116] Seventh, the appellant submits the paralegal provided ineffective assistance when he called what purported to be two character witnesses, who gave inadmissible propensity evidence. He further alleges that the paralegal made the error of calling one of these witnesses before the appellant, which was the subject of a negative comment by the trial judge.

[117] The paralegal's attempts to introduce character evidence reflected a lack of knowledge of the law in an area in which some counsel struggle. The error was not as serious as the appellant contends. The appellant misapprehended the exchange between the trial judge and the paralegal when he said he was going to call the character witnesses before the appellant because the witnesses could not stay at court.

[118] There is no legal or practical impediment to calling character witnesses before an accused testifies. The difficulty that His Honour alerted the paralegal to was where the witnesses were going to give evidence about specific

facts in the background of the appellant and his wife, in addition to general reputation evidence. It was that type of evidence that should be called after the accused has testified to avoid an adverse inference from the accused 'going to school' on the witnesses' evidence. What the trial judge was concerned about in relation to the order of witnesses was not character evidence.

[119] While the trial judge asked Crown Counsel to give the paralegal some assistance on what could be called by way of character evidence and although whatever message was delivered did not appear to have been understood and or accepted by the paralegal, I am not persuaded that the failure to call proper character evidence necessarily reflects the degree of incompetence of counsel or on a reduced standard that would result in or contribute to a miscarriage of justice. The appellant has produced no evidence that either witness or anyone else could have given admissible character evidence.

[120] I would also add that to the extent the trial judge and Crown Counsel gave input into what evidence could be called, the exchange that followed reflects a misunderstanding of character evidence, perhaps reflective of the difficulties encountered in this area of evidence.

[121] When the paralegal called the first 'character' witness, he asked if the person could tell the court something about the appellant's personality, and especially with respect to his behaviour towards his wife. Crown Counsel objected. The trial judge held that was not character evidence, but rather disposition evidence and, therefore, not admissible. The paralegal then asked the

witness (the appellant's first wife) if, according to her knowledge about the appellant, he was a violent person. The Crown again objected, and the trial judge agreed the paralegal was still asking about disposition. His Honour continued:

|                |                                                                                                                                                                                                                     |
|----------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| The Court      | ... there are very clear rules about what you can do and not do with character evidence, and, you know, he's not the kind – he's not a violent person I don't think is one of them. I stand to be corrected but ... |
| The Crown:     | no, it's ... what is his reputation in the community for honesty. That's my understanding of what, of what character evidence is.                                                                                   |
| The Court:     | This isn't a crime of dishonesty.                                                                                                                                                                                   |
| The Crown:     | No                                                                                                                                                                                                                  |
| The Court:     | So, I don't know how it helps me.                                                                                                                                                                                   |
| The Paralegal: | Well, in this case it would be very difficult to obtain any evidence from this witness, as well as another witness, that would be relevant to the charge before the court.                                          |
| The Court:     | Yeah.                                                                                                                                                                                                               |

[122] Based on what the paralegal was told at that point of the proceedings, he was given an inaccurate description of admissible character evidence. It is always open to an accused to introduce evidence of good character to render it unlikely that he or she committed the offence charged *and* to support the accused's credibility as witness in the proceedings.

[123] A lay witness may give evidence of the good character of the accused by testifying to the general reputation in the community for a relevant character trait or by giving specific acts of good conduct alleged to demonstrate a relevant

character trait: *Watt's Manual of Criminal Evidence* (Toronto: Carswell, 2012), at 31.01. See also: *R. v. Boles* (1979), 43 C.C.C. (3d) 414 (Ont. C.A.); *R. v. Dees* (1978), 40 C.C.C. (2d) 58 (Ont. C.A.); *R. v. S.(R.J.)(1985)*, 19 C.C.C. (3d) 115 (Ont. C.A.).

[124] When the second 'character' witness was called after the appellant, the paralegal asked if he had seen any problems between the appellant and his wife. The Crown again objected. The trial judge told the paralegal that he could not lead that type of evidence but could lead general evidence about the appellant's reputation for integrity in the community and his reputation for other things.

[125] His Honour was correct regarding the appellant's integrity or honesty. There was no further assistance given as to the other things. The paralegal asked the witness if he knew anything about the appellant's personality in the community, and he said that he had a very good opinion among friends.

[126] While the paralegal's handling of the character evidence reflected a lack of knowledge and incompetence on a counsel standard, I would not find it reflected ineffective assistance on any lesser standard. Neither am I persuaded that the problems with the character evidence caused or contributed to a miscarriage of justice.

[127] Eighth, the appellant submits that he was not properly prepared to testify and was not asked the right questions in examination-in-chief. I am not persuaded this alleged deficiency has any merit. The appellant was told he had to

tell the truth. He told the paralegal his account of the events. His defence was a denial the first incident happened and a denial he touched his wife on the second, although he admitted raising his fist. When he testified, he gave a full account of what he said happened on each date. There is no suggestion what it is he left out in his testimony. Indeed, his submission that he was somehow restricted by the questions is refuted by the transcript, which shows that the appellant launched into areas that had no relationship to the questions he was asked in examination-in-chief and in cross-examination.

[128] As the Court of Appeal noted in *R. v. W.E.B.* 2012 ONCA 776, [2012] O.J. No. 5309, extensive preparation was not required in advance where that appellant's defence was a simple denial of the allegations, coupled with the assertion that at least one of the complainants had a motive to lie to avoid debt collection action by the appellant. Here, the appellant gave a full account of his position. There was nothing surprising in the cross-examination and no suggestion that he should have been better prepared for his evidence. The trial judge knew his defence. That His Honour rejected it does not mean the appellant was not properly prepared.

[129] The appellant seeks to support this allegation by noting in his factum that during the course of his examination-in-chief, the paralegal made ``numerous mistakes which were commented on by the Court, indicating that the appellant had not been prepared for his trial." The appellant overstates the alleged errors by the paralegal and what the trial judge said.

[130] His Honour interjected twice during the examination-in-chief. Once, he reminded the appellant to assume he spoke no English. I infer the appellant, who had a Polish interpreter, was either answering in English or before the questions were translated. That interjection had no bearing on the representation of the paralegal. The second time, the trial judge made the comments noted earlier about the paralegal hearing the evidence for the first time, lack of or inefficient witness preparation and lack of knowledge of the rules of evidence.

[131] What appears to have been overlooked in this area is that the objectionable answers the appellant was giving were not responsive to the questions he was asked by the paralegal. The appellant was intent on telling his account and got into areas that went beyond what he was asked. He did the same thing in cross-examination, as did the complainant in her evidence. With respect to the appellant's examination-in-chief, it was one interjection only in which the paralegal was criticized. To the extent the appellant on appeal and the trial judge in court criticized the preparation of the appellant, the criticism could only have related to not "reigning in" the appellant and telling him to limit his answers to the questions. That is not something unheard of even with experienced and competent counsel. It does not reflect ineffective assistance on any standard and clearly did not contribute to a miscarriage of justice.

[132] In summary, while I am persuaded the paralegal provided some ineffective assistance at points in the trial, the appellant has failed to establish that there is a reasonable possibility those errors caused or contributed to a

miscarriage of justice. He has shown no reason to doubt the validity of the verdict. The trial judge heard the complainant and her daughter's evidence, as well as a full account by the appellant of what happened on the two dates. He recognized the caution that was warranted where family and property law issues were involved and considered the confirmatory evidence of the bruise and marks on the complainant's face as he was entitled to do.

[133] Subject to an examination of the areas in which the trial judge erred, I am not persuaded the appellant has established the criteria on any standard for ineffective assistance. I reach that conclusion considering the above-noted matters individually and collectively. The fact a lawyer would have done things differently is not the test to be applied.

### **The Other Issues**

[134] While the appeal was argued on the basis of ineffective assistance only, in the course of examining that issue, three areas have emerged that require addressing.

### **The Failure to Make Inquiries of the Appellant regarding being represented by a Paralegal**

[135] The appellant argues the trial judge contravened *Romanowicz* by failing to make inquiries of the appellant to ensure he was waiving his right to counsel at trial. While it would have been preferable for the inquiry to be conducted, the trial judge was not required to do so. It is also apparent from the fresh evidence application that the appellant was aware he was not getting the

same representation he would have been entitled to from a lawyer. While I am not persuaded His Honour erred in failing to give the caution, if he did, that error occasioned no substantial wrong or miscarriage of justice on these facts.

[136] While I appreciate that *Romanowicz* referred to the trial judge conducting the inquiry to determine that the accused has made an informed decision not to have counsel, provided the accused is present when the date is set and the judge or justice of the peace setting the date is aware that an agent has been retained for trial, it may be more beneficial to have the inquiry conducted when the trial date is set and noted on the information.

[137] To give the warning on the trial date could result in the accused seeking an adjournment to retain counsel. With witnesses subpoenaed and presumably in attendance, ready to proceed, it would not encourage efficient trial scheduling to set a trial date with the agent appearing and only raise the concerns on the trial date. From examining the information in this case, it appears the appellant was present, but that duty counsel spoke on his behalf when the trial date was set. Without the transcript from the date the trial was set, it is not apparent from the information that the justice of the peace was told a paralegal was retained.

### **Misapprehension of the evidence and error in relation to *Browne and Dunn***

[138] The trial judge gave “some diminished weight” to the appellant’s testimony because the paralegal did not cross-examine the complainant regarding the pushing and other details of his evidence. As noted earlier, His Honour erred

in finding there was no cross-examination on the complainant pushing the appellant, in finding there was a breach of the rule in *Browne v. Dunn*, in finding the appellant's evidence *had to be accorded some diminished weight*, and in failing to give the Crown the option of recalling the complainant.

[139] After considering the matter, I am not persuaded the error occasioned any substantial wrong or miscarriage of justice. The trial judge provided ample bases upon which he believed the complainant and similar bases upon which he rejected the appellant's evidence aside from giving "some diminished weight" to his evidence. His Honour's Reasons relied heavily on the corroborating evidence of the complainant's injuries. If the appellant's evidence were given some additional weight, it would not remove the independent evidence of injuries. The result would inevitably have been the same.

### **The Character Evidence**

[140] Finally, to the extent that the paralegal received inaccurate or incomplete advice regarding character evidence, he received correcting advice when calling the second witness, which included that he could call a witness regarding the appellant's general reputation for honesty. Given that the allegations facing the appellant occurred in a domestic context and the evidence of injuries, I am not persuaded the admission of character evidence would have affected the result. As noted earlier, the appellant has not shown what admissible evidence would have been available.

### **Conclusion**

[141] The appeal is dismissed.

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DURNO, J.

**Released:** June 14, 2013

**CITATION:** R. v. Bilinski, 2013 ONSC 2824  
COURT FILE NO.: 1247/11  
**DATE:** 20130614

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**B E T W E E N:**

Her Majesty the Queen

Respondent

- and -

Janusz Bilinski

Appellant

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**REASONS FOR JUDGMENT**

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[On appeal from the judgment of the  
Honourable J.E. Allen, dated June 20, 2011]

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DURNO, J.

**Released:** June 14, 2013

**CITATION:** R. v. Bilinski, 2013 ONSC 2824

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**SCHEDULE "A"**

**Paralegal Rules of Conduct**

**Rule 3 Duty to Clients**

**3.01 COMPETENCE**

**Required Standard**

3.01 (1) A paralegal shall perform any services undertaken on a client's behalf to the standard of a competent paralegal.

(2) A paralegal shall be alert to recognize any lack of competence for a particular task and the disservice that would be done to the client by undertaking that task and shall not undertake a matter without being competent to handle it or being able to become competent without undue delay or expense to the client.

(3) If a paralegal discovers that he or she lacks the competence to complete the task for which he or she has been retained, the paralegal shall either decline to act or obtain the client's consent to retain, consult or collaborate with another licensee who is competent and licensed to perform that task.

**Who is Competent**

(4) For the purposes of this rule, a competent paralegal is one who has and applies the relevant skills, attributes, and values appropriate to each matter undertaken on behalf of a client including,

- (a) knowing general legal principles and procedures and the substantive law and procedures for the legal services that the paralegal provides;
- (b) investigating facts, identifying issues, ascertaining client objectives, considering possible options, and developing and advising clients on appropriate courses of action;
- (c) implementing, as each matter requires, the chosen course of action through the application of appropriate skills, including,
  - (i) legal research,
  - (ii) analysis,
  - (iii) application of the law to the relevant facts,
  - (iv) writing and drafting,
  - (v) negotiation,
  - (vi) alternative dispute resolution,
  - (vii) advocacy, and

- (viii) problem-solving ability;
- (d) representing the client in a conscientious, diligent, and cost-effective manner;
- (e) communicating with the client at all stages of a matter in a timely and effective manner that is appropriate to the age and abilities of the client and engaging the services of an interpreter when necessary;
- (f) answering reasonable client requests in a timely and effective manner;
- (g) ensuring that all applicable deadlines are met;
- (h) managing one's practice effectively;
- (i) applying intellectual capacity, judgment, and deliberation to all functions;
- (j) pursuing appropriate training and development to maintain and enhance knowledge and skills;
- (k) adapting to changing requirements, standards, techniques and practices; and
- (l) complying in letter and in spirit with these Rules.