

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
Marian Lippa and Lippa Legal Services	)	
	)	Anthony Moustacalis, for the Applicants
Applicants	)	
	)	
– and –	)	
	)	
Her Majesty the Queen	)	
	)	
Respondent	)	Jon Fuller, for the Respondent
	)	
– and –	)	
	)	
York Region Law Association	)	
	)	
Intervenor	)	Norman Panzica and Nathan Baker, for the Intervenor
	)	
– and –	)	
	)	
Criminal Lawyers' Association	)	
	)	Breese Davies, for the Intervenor
Intervenor	)	
	)	
	)	
	)	HEARD: March 26, 2013

REASONS FOR DECISION

FUERST J.:

Introduction

[1] Does a judicial officer exceed his or her jurisdiction in directing where legal professionals will sit in the courtroom, and the order in which cases will be called? These are the issues raised on this application by the applicants, a licensed paralegal and her firm.

Background

[2] In 2006, the *Law Society Act*, R.S.O. 1990, c. L.8 was amended to create two forms of licensee: a person licensed to practise law in Ontario as a barrister and solicitor [generally a

Class L1 licensee, or lawyer]; and a person licensed to provide legal services in Ontario [a Class P1 licensee, or licensed paralegal]. With some specific exceptions, no person other than a licensee is permitted to practise law or provide legal services in Ontario: see ss. 1 and 26.1.

[3] Licensed paralegals are members of a regulated profession. They have met the Law Society of Upper Canada's licensing requirements for paralegals. They are subject to regulatory requirements that closely parallel those applicable to lawyers, including adherence to rules of professional conduct. They are authorized under By-Law 4 to the *Law Society Act* to provide specified legal services, including to represent a party before a summary conviction court.

The Factual Basis of The Application

[4] Marian Lippa has worked as a paralegal since 1998. She became licensed as a paralegal by the Law Society of Upper Canada in 2008. She has her own firm, Lippa Legal Services.

[5] On June 10, 2010, Ms. Lippa appeared in a Newmarket courtroom as agent for counsel on two criminal cases. The presiding Justice of the Peace "reminded" her that agents were to remain behind the bar until their cases were called. The Justice of the Peace said that the area in front of the bar was reserved for lawyers and law students. The Justice of the Peace cited "the Law Society's protocol" and "safety reasons", and referred to it as a tradition that had existed for hundreds of years. The Justice of the Peace also referred to the Crown having an opportunity to call matters in order of protocol by "elder counsel" first.

[6] Ms. Lippa states in an affidavit that she was offended and embarrassed by these instructions. One of the accused persons with whom she appeared was worried that her case was prejudiced by what had occurred.

[7] On June 30, 2011, the same Justice of the Peace, who was again presiding over criminal matters in a Newmarket courtroom, announced once court opened that the area in front of the bar was reserved for lawyers. She said that it was "for safety reasons and in accordance with the principles that this court abides by." She told persons who were standing in the courtroom to find a seat or remain outside, and cited safety and fire code requirements. After an adjournment, she announced that agents and students could not come before the bar until called, unless there were available seats.

[8] A licensed paralegal employed by Ms. Lippa's firm was present in court on that date. Ms. Lippa was not in attendance.

[9] Ms. Lippa states in an affidavit that when she has to sit in the body of the court with her clients, they feel that they are not being defended as well as if they were represented by a lawyer. Further, when agent matters are called following counsel matters she, along with the other licensed paralegals who work for her, cannot attend as many set-date appearances on a given day as they otherwise would. This has had a significant impact on her business.

[10] Ms. Lippa states in a supplementary affidavit that some other courts in the Greater Toronto area have imposed similar requirements.

Issues and Remedy Sought

[11] Ms. Lipka seeks:

1. Orders in lieu of *certiorari* and *mandamus* quashing the orders of the Justice of the Peace preventing her and the licensed paralegals her business employs from sitting past the gate of the bar, and from having their matters called on a “first come, first served” basis, and compelling the Justice of the Peace to permit them to sit past the gate of the bar and directing that the list be called on a “first come first served basis” inclusive of all licensees, subject to common sense exceptions;
2. A declaration that the *Barristers Act* is not mandatory and is subject to the power of the court to control its own process;
3. Alternatively, an order striking down the *Barristers Act* as unconstitutional or in the alternative, an order that the *Act* be interpreted to reflect that paralegal licensees have equal status with lawyers in courts where both licensees are permitted to appear.

The Nature of the Application

[12] *Certiorari* permits review by a superior court of an inferior court’s decision only where it is alleged that there has been an excess of jurisdiction, or a breach of the principles of natural justice which is taken to be an excess of jurisdiction: *R. v. Russell*, 2001 SCC 53; *R. v. Dubois*, [1986] 1 S.C.R. 366.

[13] An order in lieu of *mandamus* may be granted to compel a court of limited jurisdiction to exercise a jurisdiction or discharge a duty, but not to compel the court to exercise the jurisdiction or discharge the duty in a particular way: *R. v. Vasarhelyi*, 2011 ONCA 397, at para. 51.

The Status of Licensed Paralegals

[14] Licensed paralegals play an important role in the delivery of cost-effective legal services to members of the public. Their status as legal service providers is deserving of respect.

[15] However, licensed paralegals are *not* barristers and solicitors. The fact that paralegals are regulated and licensed by the Law Society of Upper Canada and that they provide certain legal services to the public does not make them lawyers. They are not required to obtain a law degree, or to complete articles of clerkship, in order to become licensed. They are not required to write the same licensing examination as lawyers. They are not authorized to provide the broad scope of legal services performed by lawyers. Rather, By-Law 4 authorizes a paralegal licensee to provide only the legal services enumerated.

[16] One of those enumerated services is representation of a party before a summary conviction court. However, the authorization provided by the By-Law is limited by the provisions of the *Criminal Code*. Sections 800(2) and 802(2) of the *Code* permit a person charged with a summary conviction offence to appear in court and examine and cross-examine witnesses personally, by counsel or by agent. Section 802.1 prohibits an accused from appearing

or examining or cross-examining witnesses by agent where the maximum punishment for the summary conviction offence is imprisonment for 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. No such program exists in Ontario.

[17] Accordingly, the ability of licensed paralegals to act for accused persons in summary conviction matters is not co-extensive with that of lawyers.

[18] Further, s. 29 of the *Law Society Act* provides that every person who is licensed to practise law in Ontario as a barrister and solicitor is an officer of every court of record in Ontario. *Black's Law Dictionary*, 8th ed., defines "officer of the court" as "A person who is charged with upholding the law and administering the judicial system." Licensed paralegals are not included in s. 29.

Issue #1: Courtroom Seating

(a) The Positions of the Parties

[19] Mr. Moustacalis on behalf of the applicants concedes that judicial officers have the power to determine where individuals sit in the courtroom, but submits that natural justice requires that before a licensee is directed to sit in a particular place, she or he have the opportunity to make submissions on the matter.

[20] Mr. Fuller on behalf of the provincial Crown takes no position about where in the courtroom licensed paralegals should sit, but submits that because judicial officers have the power to control their own process and courtrooms, the Justice of the Peace did not exceed her jurisdiction in directing that only counsel could sit beyond the bar. Similarly, Ms. Davies on behalf of the Criminal Lawyers' Association takes no position on the issue of where paralegals should sit in the courtroom, but submits that the Justice of the Peace had the jurisdiction to control the process in her courtroom. Mr. Panzica and Mr. Baker on behalf of the York Region Law Association take the same position as Ms. Davies.

(b) Analysis

[21] It is apparent from the remarks made by the Justice of the Peace on both dates that she had concerns about traffic in the courtroom, and the need to preserve a limited number of seats in front of the bar for counsel appearing before her.

[22] It is common ground among the parties that a court of criminal jurisdiction has the power to control its own process in order to maintain the integrity of that process: *R. v. Felderhof* (2003), 68 O.R. (3d) 481 (C.A.); *R. v. Romanowicz* (1999), 45 O.R. (3d) 506 (C.A.). None of the parties suggested that this is inapplicable to a Justice of the Peace presiding over a remand or other criminal court.

[23] Determining where individuals sit in a courtroom, particularly a busy remand courtroom where individuals are coming and going as various cases are called to be spoken to, falls within the jurisdiction of a judicial officer to maintain order in the courtroom and the dignity of the proceedings. Natural justice does not require that the judicial officer hear from every individual

affected before making an order about who will sit where, any more than it requires a judicial officer to hear from every person affected before making an order that there be no talking when court is in session, or no consumption of beverages or chewing of gum, or that no individual address the court until his or her case is called, or that cell phones either be turned off or put in silent mode. To impose a duty on judicial officers to hear from persons affected by these kinds of decisions would grind the business of the courts to a halt. It is antagonistic to the ability of a judicial officer to control the process of the court.

[24] The Justice of the Peace did not exceed her jurisdiction or breach the principles of natural justice in ordering that only lawyers sit in front of the bar when court was in session. The application fails on this issue.

[25] In the absence of jurisdictional excess, it is not my role as a reviewing judge to direct other judicial officers about seating arrangements in their courtrooms. In light of the submissions I heard, I make the following comments for consideration only.

[26] It may well be appropriate, particularly in small or crowded courtrooms, to reserve the limited number of seats in front of the bar for lawyers who have been called to the bar and have the widest right of audience in the courts. Where that is done, however, some accommodation would be appropriate for licensed paralegals and articling students who attend court on behalf of counsel, so that they are not relegated to wait in courthouse hallways until their cases are called, and so that whomever calls the list will know that they are present and ready to proceed with their matters. For example, where seats in front of the bar are reserved for counsel, it might be appropriate to set aside additional seating immediately behind the bar for licensed paralegals and articling students.

Issue #2: The Order in Which Cases are Called

(a) The Positions of the Parties

[27] On behalf of the applicants, Mr. Moustacalis submits that with respect to the order in which cases are called, the *Barristers Act* is not mandatory because it has been overtaken by the power of the court to govern its own process, or alternatively that it must be interpreted in accordance with the amendment to the *Law Society Act* to refer to all licensees including paralegals. He contends that cases should be called on a “first come, first served” basis and that the Justice of the Peace exceeded her jurisdiction in requiring the Crown to do otherwise.

[28] On behalf of the provincial Crown, Mr. Fuller submits that while the *Barristers Act* gives precedence to the federal Crown followed by the provincial Crown to call the list, it does not require the Crown to give precedence to senior counsel. Rather, it gives the Crown discretion to call matters in the order it sees fit. While the Justice of the Peace should not have interfered with the Crown’s discretion to call the list, the Crown was not required to call cases on a “first come, first served basis” as the applicants contend. On behalf of the Criminal Lawyers’ Association, Ms. Davies submits that the Justice of the Peace had jurisdiction to control the process in her court. It was within her discretion to require that counsel speak to their matters in order of their seniority, before cases on which paralegals were appearing were called. Mr. Panzica and Mr. Baker on behalf of the York Region Law Association take the same position as Ms. Davies.

[29] Alternatively, Mr. Moustacalis submits that the *Barristers Act* is unconstitutional. It breaches s. 7 of the *Canadian Charter of Rights and Freedoms* in that it creates an order of precedence for the calling of cases that applies to lawyers and does not include paralegals, with the result that cases on which paralegals appear are held down. This, according to the affidavit material, has resulted in embarrassment to Ms. Lippa and caused her to lose business. According to the affidavit material, it also impacts adversely on access to justice of accused persons who would prefer to have a paralegal rather than a lawyer speak to their matter in court because it is less costly for them.

[30] On behalf of the provincial Crown, Mr. Fuller submits that there is a s. 7 breach only where an individual's life, liberty or security interests have been violated. Section 7 does not protect economic interests, and that is the interest that Ms. Lippa asserts has been violated. Her company has no standing to argue a s. 7 breach because the *Barristers Act* does not impose penal consequences on it. She has no standing to raise s. 7 in respect of her clients or accused persons at large. On behalf of the Criminal Lawyers' Association, Ms. Davies submits that s. 7 is not engaged by the order in issue. Mr. Panzica and Mr. Baker on behalf of the York Region Law Association take the same position as Ms. Davies.

(b) The *Barristers Act*, R.S.O. 1990, c. B.3

[31] The *Barristers Act* sets out in s. 3 an order of precedence of "members of the bar" in the courts of Ontario. That order is the Minister of Justice and Attorney General of Canada, followed by the Attorney General for Ontario, followed by Queen's Counsel according to seniority of appointment, and then followed by the remaining members of the bar in order of their call to the bar.

(c) Analysis

[32] It is not clear from the transcripts that the Justice of the Peace made an order that Crown counsel call the list in accordance with the *Barristers Act* on either date. On June 10, 2010, she referred to "the opportunity for the Crown to call matters in order of protocol by elder counsel matters first" when reminding Ms. Lippa that agents were to remain behind the bar until called. Crown counsel said that she was going by a list of people and the order in which they arrived, and that she did not know who was a lawyer and who was not. The Justice of the Peace referred to agents sitting at the front of the courtroom and said that "we've been asked now to make sure that these protocols are abided by." She did not explicitly refer to the *Barristers Act*, or explain what "protocols" were in play or who had asked that they be followed. She did not, as Ms. Lippa asserts in her affidavit, explicitly say that paralegals were not permitted to speak to matters ahead of counsel. On June 30, 2011, the Justice of the Peace reminded agents and students to fill out counsel slips so that their names could be called. She did not speak about the order in which cases would be called, contrary to Ms. Lippa's affidavit which relies on information received from one of her employees rather than her own experience.

[33] To the extent that the comments made by the Justice of the Peace on either date imply that she was directing Crown counsel to call the list in accordance with the *Barristers Act* and to call matters on which lawyers attended ahead of those on which paralegals appeared, she did not breach the principles of natural justice or otherwise exceed her jurisdiction.

[34] While the *Barristers Act* grants precedence to the federal Crown followed by the provincial Crown, it does not explicitly require either Crown to call its list of cases in accordance with the seniority at the bar of defending counsel. It establishes that after both federal and provincial Crowns have addressed their cases, Queen's Counsel will proceed with their matters in order of their seniority at the bar, followed by all remaining counsel in order of their call to the bar. Because the *Act* refers to "members of the bar", it necessarily excludes licensed paralegals from its application.

[35] The regime set out in the *Barristers Act* anticipates a mixed list, consisting of criminal and civil matters. Read this way, the *Act* has little direct application to present day criminal courts, which deal solely with criminal cases. To the extent it is suggested that federal or provincial Crown counsel should call the list in order of the seniority of defending counsel, this is not mandated by the *Act*, but is an application of it in spirit.

[36] Even if I am wrong in this interpretation of the *Barristers Act*, the statute does not prevent a judicial officer from controlling the process in his or her own court. I agree that in the criminal courts, generally Crown counsel should call the list, as he or she likely has greater knowledge of it than does the judicial officer. There may be times, however, when it is appropriate for the judicial officer to intervene to call forward matters on the list, for example when he or she wishes to clear the list of very short matters before turning to those that will need more court time. Similarly, where Crown counsel calls the list, it may be appropriate for the judicial officer to direct the manner in which the list is called, in the interest of effective management of the courtroom.

[37] Regardless of who calls the list or determines how it will be done, there are a variety of ways in which cases can be called in busy courtrooms, including by order on the docket; by date of arrest; alphabetically by surname of the accused; on a "first come, first served" basis; or by the seniority of the legal professional representing the accused person. No one method will necessarily be the most orderly or efficient for every courtroom in the province, nor is one necessarily "better" than another. However the list is called, not every case can be given priority, and inevitably some individuals will wait longer than others.

[38] I do not suggest that it is always appropriate to call matters on which lawyers attend ahead of those on which paralegals or even articling students appear. It was, however, open to the Justice of the Peace in this case to direct the Crown to call matters on which lawyers were appearing first, based on the seniority of counsel, with those matters on which licensed paralegals were attending to follow. As lawyers enjoy a wider audience than licensed paralegals in the criminal courts, such a direction was not arbitrary, discriminatory or unfair. The fact that it inconvenienced Ms. Lippa and caused her to feel slighted when her matters were held down does not mean that it was contrary to the principles of natural justice or otherwise an excess of jurisdiction on the part of the Justice of the Peace.

[39] I further find that there was no breach of s. 7 of the *Charter*. The order about the manner in which cases would be called in court did not impinge on Ms. Lippa's life, liberty or security of the person. It may have impinged on her economic interest, but that is not an interest protected by s. 7. In *Siemens v. Manitoba (Attorney General)*, 2003 SCC 3 the court held at para. 45, "The right to life, liberty and security of the person encompasses fundamental life choices, not pure

economic interests.” The court specifically found at para. 46 that the “ability to generate business revenue by one’s chosen means is not a right that is protected under s. 7”. Further, corporations and other artificial entities such as Lippa Legal Services are excluded from s. 7 protection, where they are not charged under a penal provision: *British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3, at para. 40; *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154, at paras. 21-26. Finally, Ms. Lippa did not seek and does not meet the three-pronged test to obtain public interest standing to raise the issue of the impact of the *Barristers Act* on the s. 7 rights of accused persons: *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, at paras. 36-37.

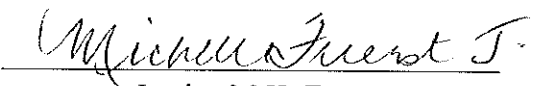
[40] The application fails on these grounds.

[41] In the absence of jurisdictional excess, it is not my role as a reviewing judge to direct judicial officers presiding over busy courts, particularly Justices of the Peace sitting in first appearance or remand courts, how to deal with their lists. Again, in light of the submissions I heard, I offer the following comments for consideration only.

[42] It may well be that a “first come, first served” approach to the calling of cases, applicable to all those who attend as legal professionals, whether as counsel, paralegal, or articling student, is efficient, and avoids conveying the unintended impression that some legal professionals are deserving of greater respect from judicial officers than others. It may well be that some uniformity of procedure can be achieved, at least in courtrooms within a geographic area. Whatever the procedure in any particular courthouse or courtroom, if information about the procedure were posted in a public area and available to all in attendance, it might provide sufficient explanation of the process and the rationale for it to avoid applications of this kind.

Conclusion

[43] The application is dismissed.


Justice M.K. Fuerst