Case Name:
R. v. D'Arcy

Between
Her Majesty the Queen, Respondent, and
Winston Matthew D'Arcy, Applicant (Accused)

[2015] A.J. No. 112

2015 ABPC 6

119 W.C.B. (2d) 35

2015 CarswellAlta 145

Docket: 121476295P1

Registry: Edmonton

Alberta Provincial Court

J.T. Henderson Prov. Ct. J.

Heard: December 23, 2014.
Judgment: January 23, 2015.

(93 paras.)

Criminal law -- Criminal Code offences -- Offences against person and reputation -- Motor vehicles -- Impaired driving or driving over the legal limit -- Application by accused for Charter remedy -- Court lacked jurisdiction to continue proceedings -- Accused charged with impaired driving, driving with blood alcohol over .08 -- Accused retained agent he believed was lawyer, and she appeared at Case Management Office, obtained adjournment, entered not guilty plea and set trial date -- Given maximum sentence of 18 months' imprisonment, agent prohibited by s. 802.1 from appearing -- As such, accused did not appear and adjournment, plea and trial date were nullities -- Court took no steps to maintain or regain jurisdiction over accused, so proceedings deemed dismissed for want of prosecution.

Criminal law -- Jurisdiction -- Loss of -- Over accused -- Application by accused for Charter remedy -- Court lacked jurisdiction to continue proceedings -- Accused charged with impaired driving, driving with blood alcohol over .08 -- Accused retained agent he

believed was lawyer, and she appeared at Case Management Office, obtained adjournment, entered not guilty plea and set trial date -- Given maximum sentence of 18 months' imprisonment, agent prohibited by s. 802.1 from appearing -- As such, accused did not appear and adjournment, plea and trial date were nullities -- Court took no steps to maintain or regain jurisdiction over accused, so proceedings deemed dismissed for want of prosecution.

Criminal law -- Compelling appearance, detention and release -- Failure to appear -- Application by accused for Charter remedy -- Court lacked jurisdiction to continue proceedings -- Accused charged with impaired driving, driving with blood alcohol over .08 -- Accused retained agent he believed was lawyer, and she appeared at Case Management Office, obtained adjournment, entered not guilty plea and set trial date -- Given maximum sentence of 18 months' imprisonment, agent prohibited by s. 802.1 from appearing -- As such, accused did not appear and adjournment, plea and trial date were nullities -- Court took no steps to maintain or regain jurisdiction over accused, so proceedings deemed dismissed for want of prosecution.

Legal profession -- Practice by unauthorized persons -- Paralegals and other agents -- Application by accused for Charter remedy -- Court lacked jurisdiction to continue proceedings -- Accused charged with impaired driving, driving with blood alcohol over .08 -- Accused retained agent he believed was lawyer, and she appeared at Case Management Office, obtained adjournment, entered not guilty plea and set trial date -- Given maximum sentence of 18 months' imprisonment, agent prohibited by s. 802.1 from appearing -- As such, accused did not appear and adjournment, plea and trial date were nullities -- Court took no steps to maintain or regain jurisdiction over accused, so proceedings deemed dismissed for want of prosecution.

Application by the accused for a stay of proceeding or to exclude evidence for s. 11(b) Charter violation. The accused was charged with impaired driving and driving with blood alcohol over .08. The accused was released with a requirement he attend Case Management Office. The information was sworn and Crown elected to proceed by summary conviction. The accused was referred to K, who advised him she could help and was a lawyer. K was not, in fact, a lawyer. K appeared at CMO as the accused's agent and adjourned the matter to obtain disclosure. K subsequently appeared as an agent and entered a not guilty plea and arranged a trial date. Throughout this time, the accused met with K several times to pay instalments on the retainer, but she put him off when he tried to discuss substantive matters. On the scheduled trial date, neither K nor the accused appeared, so a warrant was issued for the accused's arrest. The accused was arrested, and retained counsel, who appeared on his behalf at CMO, set a new trial date and brought this application. Submissions were invited in the effect of the agent's appearance, and the Crown argued her appearance at the CMO was not prohibited and the court had not lost jurisdiction or, if it had, it regained it by the accused's voluntary appearance and bringing of this application.

HELD: The court lacked jurisdiction over the accused so could not decide on the application or continue the proceedings. The accused attempted to discharge his

obligation to attend CMO by retaining K and having her appear on his behalf. K was not a lawyer. Ss. 800(2) and 802(2) of the Criminal Code permitted agents to appear on defendants' behalf on summary conviction matters, but this was limited by s. 802.1 if defendants were liable for a term of more than six months' imprisonment. K was not on a list of authorized persons and the charges in question carried a maximum sentence of 18 months' imprisonment, so K was prohibited from appearing for the accused. S. 802.1 became law at a time of increasing penalties for many summary conviction offences, and was designed to regulate who could represent defendants in serious matters. S. 802.1 provided an agent may not "appear" or "examine or cross-examine witnesses" This phrase was disjunctive and intended to provide a contrast between two distinct activities. Nothing suggested the denial of right for an agent to appear related only to appearances at trial. Ss. 800(2), 802(2) and 802.1 provided a complete code governing the use of agents in summary conviction proceedings, and nothing in any of the sections suggested the word "appear" was restricted to trial appearances. There was no ambiguity and, while the sections appeared under the "trial" heading of the Criminal Code, not all provisions in the trial section were restricted to matters taking place in trials proper, not was jeopardy to the defendant limited to trial. While the Crown alleged it had been the court's practice to allow agents to appear at the docket stage, this did not justify a continued lack of compliance with s. 802.1. K was not authorized to appear. As such, K's appearances constituted no appearances at all. The Justice of the Peace should have recognized this and remitted the matter to the courtroom for a determination of whether any steps had to be taken to maintain jurisdiction over the accused. As the accused did not appear at first instance, the adjournment was not effective and did not compel his further appearance, and the plea and trial date was a nullity. As the court took no steps to maintain jurisdiction over the accused, it lost jurisdiction. The court did not regain jurisdiction within three months pursuant to s. 485(2), so the proceedings were dismissed for want of prosecution under s. 485(3). More than one year later, the accused was arrested on a warrant and appeared at the CMO by an authorized agent, and then counsel brought the underlying application. These appearances did not amount to attornment to the court's jurisdiction, however; once the proceedings were deemed dismissed, they could not be revived by any action of the accused, Crown or court.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, R.S.C. 1985, App. II, No. 44, Schedule B, s. 11(b), s. 24(1), s. 24(2)

Criminal Code of Canada, R.S.C. 1985, c. C-46, s. 95, s. 96, s. 145(3), s. 153.1(1), s. 253(1)(b), s. 264.1(2)(b), s. 267, s. 269, s. 271, s. 279(2), s. 485(1), s. 485.1, s. 485(1.1), s. 485(2), s. 485(3), s. 733.1(1)(b), s. 798, s. 800(2), s. 802(2), s. 802.1, s. 803(1)

Counsel:

M. Hopkins, for the Respondent (Crown).

R. Ziv, for the Applicant (Accused).

Ruling

J.T. HENDERSON PROV. CT. J.:--

I. INTRODUCTION

1 Winston Matthew D'Arcy (the "Accused") was charged with impaired driving and with operating a motor vehicle with a blood alcohol level greater than that permitted by s. 253(1)(b) of the *Criminal Code of Canada*, R.S.C., 1985, c. C-46 (the "*Criminal Code*"). The date of the incident which gave rise to the charges was November 26, 2012.

2 On December 23, 2014, the trial commenced in a *voir dire* on the application of the Accused for a judicial stay pursuant to s. 24(1) of the *Canadian Charter of Rights and Freedoms*, 1982, R.S.C. 1985, App. II, No. 44, Schedule B (the "*Charter*") and, alternatively, for an order excluding evidence pursuant to s. 24(2) of the *Charter*. The primary position put forward by the Accused on December 23, 2014 was that his rights under s. 11(b) of the *Charter* had been violated because the actions of the Crown or, alternatively the Court, denied him the right to be tried within a reasonable time as guaranteed by s. 11(b) of the *Charter*.

3 The foundation of the Accused's argument was that he retained Nadia Kelm ("Kelm") to deal with his charges. The Accused submitted that Kelm held herself out to be a lawyer who could represent him. He paid Kelm a retainer by a series of installments which totalled approximately $3,600.00. Kelm obtained disclosure from the Crown and appeared for the Accused on three occasions before a Justice of the Peace at the Case Management Office (the "CMO"). On the third appearance at the CMO, Kelm entered a plea of "Not Guilty" and booked a one day trial to be held on September 18, 2013. The Accused was never made aware of the specific trial date and neither he nor Kelm appeared in Court on September 18, 2013. As a result, the Court granted the Crown's application for a warrant for the arrest of the Accused which was ultimately executed on June 29, 2014.

4 After hearing argument on December 23, 2014, I reserved my decision and planned to rule on the issues raised by the Accused in the *voir dire* early in the new year.

5 On January 2, 2015, I asked Counsel to make further submissions with respect to a number of issues including the legal effect of an agent's appearance at the CMO when they were not authorized to do so; whether Kelm's purported appearance at the CMO and entry of the plea could compel the Accused to appear at the first scheduled trial date; and whether the Court lost jurisdiction as a result of the purported appearance by Kelm at the CMO. Counsel for the Accused and the Crown have now provided written submissions dealing with these issues.

6 For the reasons which follow, I conclude that this Court has no jurisdiction over the

Accused in relation to this Information and, as a result, I am precluded from making a ruling on the *voir dire*. Furthermore, I am precluded from continuing with this trial. By the operation of s. 485(3) of the *Criminal Code* the charges against the Accused are deemed to be dismissed for want of prosecution.

II. FACTS AND EVIDENCE

7 The evidence presented to the Court on December 23, 2014, consisted of the *viva voce* testimony of the Accused along with documents and facts which were the subject of admissions by the Accused and the Crown. Kelm did not testify.

A. Proceedings Against the Accused

8 The Accused is a twenty-five year old man from British Columbia who came to Alberta to work as a car salesman. He was arrested in Edmonton on November 26, 2012, following an impaired driving investigation and was released later that day on a Promise to Appear which required that he attend at the CMO on December 27, 2012.

9 On December 11, 2012, the Information in these proceedings was sworn. Thereafter, the Crown elected to proceed by way of summary conviction.

B. Role of the CMO

10 The CMO is a very busy high volume centre which provides accused persons, counsel and agents with the opportunity to make required Court appearances at their convenience at any time between 8:15 a.m. to 2:00 p.m. on the day of the required appearance. The CMO handles appearances in the early intake process of criminal litigation during which accused persons typically retain counsel, obtain Crown disclosure and otherwise take the steps necessary to permit them to enter a plea and set the matter for trial. The CMO was created as part of the Court Case Management initiative in an attempt to cope with increasing volumes of criminal cases and to reduce the strain on otherwise overburdened docket courts, where accused persons would appear if it were not for the CMO.

11 The CMO has none of the trappings of a Courtroom. Instead it is simply a service counter in the public area of the main level of the Law Courts Building. Accused persons, their counsel or agent stand in line and then approach an available window at the counter to make the appearance. All appearances are *ex parte* and are very summary. The appearances are not audio or video recorded. Almost all appearances are for the purpose of seeking an adjournment to permit additional steps to be taken so that a trial date can be set. No appearances at the CMO are permitted after three months from the initial appearance. If a plea has not been entered and a trial date has not been set after three months, then all further appearances must be made in a Courtroom before a Judge.

12 The Justices of the Peace who sit at the CMO counter are very busy. They do not have the assistance of Court clerks nor do they have the assistance of the Crown. Any unusual issues or problems which arise at the CMO counter are referred to Courtroom 356

where submissions can be made by or on behalf of the accused person and also on behalf of the Crown. Where an accused person does not attend at the CMO as required, the Justice of the Peace refers the matter to Courtroom 356 where the Crown typically seeks a warrant for the arrest of the accused.

13 Justices of the Peace at the CMO undertake more than just a clerical function. As is the case with all judicial proceedings, they have an obligation to ensure that jurisdiction exists before they make any rulings, including granting adjournments or permitting an accused person to enter a plea or book a trial date.

C. Involvement of Kelm in Proceedings

14 Following his arrest, the Accused spoke with a colleague who worked in the automobile industry and was advised of a "lawyer" whose name was Nadia Kelm. On the basis of that referral, the Accused contacted Kelm by telephone. The Accused told Kelm about his impaired driving charges and said that he needed a lawyer. According to the evidence of the Accused, Kelm responded by saying that:

> "I can help"
>
> "I can get you off" although she offered no guarantees
>
> "I am a lawyer"

15 While Kelm did not testify on December 23, 2014, and thus I do not have the benefit of her version of the conversation, I find that the Accused genuinely thought that Kelm was a lawyer who could represent him in dealing with the present charges. This belief was mistaken but genuine.

16 During their initial telephone discussion, Kelm advised the Accused that a retainer of $5,500.00 was required in order to proceed with the case. In the weeks which followed, the Accused met with Kelm on a number of occasions for the purpose of making installment payments on the retainer. The first meeting took place on December 12, 2012, at a TD Bank in south Edmonton where the Accused made a payment to Kelm of $600.00 cash. The second meeting took place at another TD Bank branch on December 17, 2012, at which he gave Kelm a $500.00 cash payment. The Accused did not receive a receipt for either of those cash payments.

17 After receiving the first two installment payments Kelm took some steps on behalf of the Accused. The endorsements on the Court file show that she appeared on December 27, 2012, at the CMO as an "Agent" where she waived reading of the charges, reserved plea and adjourned the matter to January 24, 2013 "to obtain counsel" and "to obtain disclosure".

18 Also on December 27, 2012, Kelm submitted a request for Crown disclosure. The

File Activity Report (Exhibit V-3) created by the Crown's "JOIN" computer system indicates that the first set of Crown disclosure was picked up on January 24, 2013. The File Activity Report gives no indication as to who picked up this disclosure. The second set of Crown disclosure was picked up by Kelm on February 22, 2013, and further Crown disclosure was "picked up by C. Paterson (Agent) on March 22/2013". I was advised by counsel that C. Paterson is a lawyer in Ponoka, Alberta.

19 A further series of meetings took place between Kelm and the Accused on January 23, 2013, February 1, 2013 and March 4, 2013. Two of those meetings took place at a Tim Horton's restaurant and one took place at a Lebanese restaurant. All of the meetings had the same characteristics. They were arranged for the sole purpose of permitting the Accused to make installment payments on the $5,500.00 retainer. All of the payments were made by cash. No receipts were ever given. No substantive discussion took place regarding the merits of the defence to the charges, although the Accused specifically sought this type of information and asked to see the Crown disclosure himself. When he made this request Kelm "put him off" saying that they needed more time to discuss the situation.

20 On January 24, 2013, Kelm appeared for the second time as an "Agent" at the CMO. Once again, Kelm reserved plea and adjourned the matter "to obtain disclosure". I pause to note that this second CMO appearance took place one day after the January 23, 2013 meeting between the Accused and Kelm during which a further installment payment on the retainer was made.

21 The endorsements on the Court file show that on February 14, 2013, Kelm appeared for the third time as "Agent" at the CMO. On this appearance a plea of "Not Guilty" was entered on behalf of the Accused and a trial date of September 18, 2013 was arranged. I also pause to note that the February 14, 2013 CMO appearance was made two weeks after the February 1, 2013 meeting at which the Accused made a $1,000.00 cash payment to Kelm as part of the $5,500.00 retainer. As a result, Kelm entered the plea of "Not Guilty" and arranged for the trial date after she had received a total of $2,600.00 toward the $5,500.00 retainer.

22 On March 4, 2013, approximately two weeks after the trial date had been set, the Accused met with Kelm and made yet another $500.00 cash payment on account of the retainer.

23 One final meeting took place between Kelm and the Accused in June 2013 at the car dealership where the Accused worked. Once again, the Accused provided cash in the amount of $500.00 as part of the retainer. As was the case with all prior meetings, no receipt was provided and no discussions took place regarding the merits of the defence.

24 Kelm provided the Accused with no documentation to describe the terms of the retainer or what, if anything, she thought she could do to assist him with the present charges. Kelm provided no correspondence of any kind to the Accused, although she did provide him with her business card. None of their meetings took place in Kelm's office or in any private setting where legal issues or strategies could reasonably be expected to be

discussed. All of the meetings took place in public places: banks, restaurants, and a car dealership.

25 The Accused has not seen Kelm since their last meeting in June 2013.

26 In July and August 2013, the Accused and Kelm spoke on the telephone one or more times. These discussions specifically focused on the remaining payments to be made on the $5,500.00 retainer. During that time, the Accused was in the process of changing jobs and was not able to afford to pay further installments as part of the retainer and he specifically told Kelm that.

27 The Accused was aware that a trial date had been set by Kelm, although he had not been told the precise date of the trial. The Accused was also aware that Kelm was "attempting to push the date back", presumably so that the Accused could have some additional time to raise the money to pay the balance of the retainer. The amount which was outstanding at that time was approximately $1,900.00.

28 After July or August of 2013, the Accused never again heard from Kelm. The Accused did try to contact her by telephone but he could not reach her. He was under the impression that she may have been "overseas".

D. Failure to Appear on Trial Date

29 On the scheduled trial date, September 18, 2013, the Crown appeared with five witnesses ready to present its case. Neither the Accused nor Kelm appeared on the scheduled trial date. On the application of the Crown, the Court ordered that a warrant be issued for the arrest of the Accused.

30 On June 29, 2014, the Accused was in Medicine Hat and had some involvement with police during which the existence of the warrant for his arrest was discovered. As a result, the Accused was detained and held in custody overnight until he could appear before a Justice of the Peace, when he was released on a Recognizance.

31 After being arrested in Medicine Hat, the Accused retained counsel who appeared by agent at the CMO on July 18, 2014, and again on July 25, 2014, when the second trial date of February 6, 2015 was set. Counsel then brought the matter forward and scheduled December 23, 2014, as the date to apply for a judicial stay on the basis of an alleged s. 11(b) *Charter* breach.

E. Chronology of Events

32 By way of summary, a chronology of the significant events in relation to this matter are as follows:

DATE	EVENT
November 26, 2012	Date of alleged offence
December 11, 2012	Information sworn
December 12, 2012	Kelm retained – $600.00 cash retainer given to Kelm
December 17. 2012	Second installment of $500.00 given to Kelm
December 27, 2012	First appearance at CMO by Kelm for the Accused
December 27, 2012	Disclosure requested from Crown by Kelm
January 23, 2013	Third installment of $500.00 given to Kelm
January 24, 2013	Second appearance at CMO by Kelm for Accused
February 1, 2013	Fourth installment of $1,000.00 given to Kelm
February 14, 2013	Third appearance at CMO by Kelm for Accused – not guilty plea entered – trial date scheduled for September 18, 2013
March 4, 2013	Fifth installment of $500.00 given to Kelm
June 2013	Sixth installment of $500.00 given to Kelm
September 18, 2013	Trial date – non-appearance – warrant issued
June 29, 2014	Warrant executed – released on Recognizance
July 7, 2014	Counsel retained by Accused
July 18, 2014	First CMO appearance by agent for Counsel
July 25, 2014	Second CMO appearance by agent for Counsel – trial date scheduled for February 6, 2015
December 23, 2014	Evidence and argument in relation to s. 11(b)
February 6, 2015	Anticipated second trial date

III. ISSUES TO BE DECIDED

33 The issues which these Reasons deal with are as follows:

1. In what circumstances can an agent such as Nadia Kelm appear in the Provincial Court of Alberta (the "Court") on behalf of an accused person?

2. What is the legal effect of an appearance in Court by an agent who is not authorized to appear?

3. Does the Court have jurisdiction over the Accused in relation to this Information?

4. If jurisdiction was lost, did the Court regain jurisdiction when the Accused appeared through counsel at the CMO in July 2014 or when the Accused through counsel argued the s. 11(b) *Charter* application on December 23, 2014?

IV. DISCUSSION

1. Appearance by Kelm for Accused

a) Statutory Right of Agent to Appear

34 On the date of the alleged offence, the Accused was released from custody after he signed a Promise to Appear in the form prescribed by the *Criminal Code* as Form 10. The Promise to Appear constitutes an acknowledgment of the Accused's obligation to appear at the CMO on December 27, 2012, and is an acknowledgement that the Accused must "attend thereafter as required by the Court, in order to be dealt with according to law".

35 The Promise to Appear also contains a warning that a failure to attend in Court on the appointed date may result in criminal liability in accordance with s. 145(3) of the *Criminal Code*.

36 The Accused attempted to discharge his obligation to attend at the CMO on December 27, 2012, by retaining Kelm and having her appear on his behalf.

37 Kelm is well known to the Court in Edmonton as an agent who appears from time to time for accused persons to deal with some traffic offences and some summary conviction offences. I take Judicial Notice that she is not a lawyer and not a member of the Law Society of Alberta. In *R. v. Frick*, 2010 ABPC 280 ("*Frick*"), Kelm applied through counsel to challenge the constitutional validity of some of the provisions of the *Criminal Code* which

restrict her ability to appear in Court on summary conviction matters where the potential penalty exceeds six months incarceration. In that case Assistant Chief Judge Wheatley, as he then was, described Kelm at paragraph 13 as having been a professional legal agent since 1997. He described her evidence in the following way: "A significant portion of her business results from her appearances on impaired driving offences. She states that, with few exceptions, she has limited her impaired driving appearances to first offences".

38 When an accused person is required by a Promise to Appear (or an Appearance Notice or a Summons) to make an appearance in court in relation to an offence for which the Crown has elected to proceed by way of summary conviction, he or she must appear before the court personally unless they are permitted by the provisions of the *Criminal Code* to appear in some other way. The *Criminal Code* has two specific sub-sections which permit accused persons to appear on summary conviction matters by counsel or by agent. Those sections are as follows:

> **800(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. (emphasis added)
>
> ...
>
> **802(2)** The prosecutor or defendant, as the case may be, may examine and cross-examine witnesses personally or by counsel or agent. (emphasis added)

39 No other provisions of the *Criminal Code* permit an agent to appear before the court on a summary conviction matter.

40 The right of an agent to appear on behalf of an accused person on summary conviction matters on the authority of s. 800(2) or s. 802(2) is not unlimited. On the contrary, the right to appear is limited by s. 802.1 which provides that:

> **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. (emphasis added)

41 In Alberta, Order in Council 334/2003 identifies the specific programs and persons authorized to act as an agent for a defendant even though the penalty may exceed 6 months incarceration. The Order defines legal services as "appearing for a defendant or examining or cross-examining witnesses on behalf of a defendant" and defines a defendant as "a defendant referred to in section 802.1 of the *Criminal Code* (Canada) who on summary conviction is liable to imprisonment for a term of more than 6 months." Agents

such as Kelm are not included in the list of approved programs or persons.

42 As a result, Kelm is not authorized to appear before the court on behalf of defendants in summary conviction matters where the potential penalty is greater than six months incarceration, even in circumstances where the Crown is not seeking a penalty in excess of six months incarceration (see *Frick*, *supra*, at paragraph 4). The offences which the Accused was charged with on this Information both have maximum sentences of eighteen months incarceration where the Crown proceeds by summary conviction, as it did in this case.

b) Position of Crown -- Interpretation of Section 802.1

43 The Crown acknowledges that Kelm is prohibited by s. 802.1 from appearing for accused persons on summary conviction matters which have potential penalties in excess of six months. However, the Crown argues that the prohibition should only apply in relation to appearances at trial and that Kelm should not be prohibited from appearing in docket courts or at the CMO. This position is summarized in the Crown's Brief in the following way:

> It is respectfully submitted that 802.1 should be interpreted to mean that "a defendant may not appear [at trial] or examine or cross examine witnesses by agent ..." This interpretation would be consistent with Parliament's intent to preclude agents from both examining and cross examining at trial where the accused *has* appeared and also from appearing for the accused when the accused is not present at trial. It is respectfully submitted that the legislation is intended to prevent a defendant who attends his trial having someone else, who is not a lawyer, act as an agent while defendant is present to examine or cross examine witnesses. This interpretation is consistent with a disjunctive clause and is consistent with a long practice by which the Court allows agents to appear at docket courts on summary conviction matters.

44 The Crown notes that s. 802.1 appears in the *Criminal Code* under the heading "Trial" and argues that this supports the narrower interpretation which would only restrict the right of an agent to make appearances at trial but not restrict the right of an agent to appear in a docket court or the CMO. On this interpretation the Crown argues that Kelm was entitled to appear for the Accused at the CMO and that jurisdiction over the Accused was preserved.

c) Modern Approach to Statutory Interpretation

45 In *Rizzo & Rizzo Shoes Ltd*, *Re*, [1998] 1 SCR 27, Justice Iacobucci, writing for the Court, set out the modern approach to statutory interpretation at paragraph 21:

> Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, Statutory Interpretation (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter "

> *Construction of Statutes*"); Pierre-André Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

46 The Supreme Court has confirmed this modern approach to statutory interpretation in numerous decisions, most recently applying Driedger's Modern Principle in *Thibodeau v. Air Canada*, 2014 SCC 67 at paragraph 112. See also *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559 at paragraphs 26 and 27 where the Court noted the important role that context must inevitably play when a court construes the written words of a statute.

47 When interpreting a statute, headings are often analyzed to provide context to statutory provisions. In *R. v. Lohnes*, [1992] 1 SCR 167, the Supreme Court affirmed at paragraph 23 that "headings and preambles may be used as intrinsic aids in interpreting ambiguous statutes." In this regard the Supreme Court approved of the passage from *Construction of Statutes*, *supra*, (now in its sixth edition, published in 2014) where Sullivan notes at pages 463-464:

> When provisions are grouped together under a heading it is presumed that they are related to one another in some particular way, that there is a shared subject or object or a common feature to the provisions...
>
> As with the other descriptive components, the weight attached to a heading depends on the circumstances. In *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357 Estey J wrote:
>
> > The extent of the influence of a heading...will depend upon many factors including (but the list is not intended to be all-embracing) the degree of difficulty by reason or ambiguity or obscurity in construing the section; the length and complexity of the provision; the apparent homogeneity of the provisions appearing under the heading; the use of generic terminology in the heading; the presence or absence of a system of headings which appear to segregate the component elements of the [legislation] and the relationship of the terminology employed in the heading to the substance of the headlined provision.

48 Therefore headings can assist with the interpretation of a statutory provision.

However, the extent to which the heading will assist will be dependent on a number of factors including in particular, whether the statutory provision is itself ambiguous.

d) Legislative History of Section 802.1

49 When attempting to determine the intention of Parliament, it is useful to consider the historical context which existed when s. 802.1 was enacted in 2002, and later came into force on July 23, 2003. As noted by Judge LeGrandeur in *R. v. May*, 2008 ABPC 59 at paragraph 51:

> Section 802.1 came into being at a time shortly after Parliament had created a number of summary conviction offences with a maximum liability of imprisonment of 18 months as opposed to the historical six month maximum. These specific types of offences were considered more serious than other summary conviction matters and therefore liability for the same was enhanced.

50 In the decade leading up to the enactment of s. 802.1, Parliament changed several purely indictable offences to hybrid offences. Where the Crown proceeded summarily on these offences, the maximum penalty was imprisonment for *eighteen* months, as opposed to the six month maximum that was applicable to all other summary conviction offences. These offences included:

* 1994: threatening death/bodily harm (s. 264.1(2) (b)), assault with a weapon or causing bodily harm (s. 267), unlawfully causing bodily harm (s. 269) and sexual assault (s. 271): amended by SC 1994, c. 44, ss. 16 - 19

* 1995: failure to comply with probation order (s. 733.1(1)(b)): amended by SC 1995, c. 22, s. 6

* 1997: forcible confinement (s. 279(2)): amended by SC 1997, c. 18, s. 14

51 Additionally, in 1995, Parliament enacted several offences, in which there was a maximum penalty of imprisonment for one year where the Crown proceeded summarily. These offences related to firearms: possession of prohibited or restricted firearm with ammunition (s. 95), making automatic firearm (s. 102), and possession of weapon obtained by commission of offence (s. 96): enacted by SC 1995, c. 39, s. 139. In 1998, Parliament enacted the offence of sexual exploitation of a person with disability (s. 153.1(1)), which, where proceeding summarily, had a punishment of imprisonment for a term not exceeding eighteen months: SC 1998, c. 9, s. 2. See also *R. v. Romanowicz*, [1999] O.J. No. 3191 (Ont C.A.).

52 Therefore s. 802.1 became law at a time of increasing penalties for many summary

conviction offences. The section was designed to regulate those agents who could represent defendants in these serious summary conviction offences where the maximum penalty exceeded six months. Parliament created a scheme which was not a complete bar to agents appearing in relation to these types of summary conviction matters. Rather, s. 802.1 provided for the provinces to monitor the qualifications of agents by approving programs or agents that could represent defendants charged with these more serious summary offences. In Alberta, Order in Council 334/2003 identifies the specific programs and persons who are authorized to act as an agent for a defendant even where the potential sentence exceeds six months incarceration.

e) Application of Principles of Interpretation

53 The grammatical and ordinary meaning of the words contained in s. 802.1 is clear. An agent may not "appear" or "examine or cross examine witnesses". This phrase is disjunctive and is intended to provide contrast between two distinct activities that an agent may undertake in summary conviction proceedings. Nothing in the wording of s. 802.1 suggests that the denial of the right of an agent to "appear" relates only to appearances at trial. A grammatical and ordinary meaning of the words "appear or examine or cross examine" strongly suggests that s. 802.1 should restrict the right of agents to appear at all stages of summary conviction proceedings.

54 Together s. 800(2), s. 802(2) and s. 801.1 represent a complete code which governs the use of agents in summary conviction proceedings and provides the context within which s. 802.1 must be interpreted. These provisions are paramount to and displace any common law agency principles which might otherwise be applicable: Sullivan, *Construction of Statutes*, *supra*, at page 537; *R. v. Laurie*, 2009 ONCJ 428 at paragraph 18. By way of summary:

* Section 800(2) permits a person charged with a summary conviction office *to appear* in court personally, by counsel or by agent;

* Section 802(2) permits a person *to examine* or *to cross-examine* witnesses, personally, by counsel or by agent; and

* Section 802.1 provides that an agent may not *appear* or *examine* or *cross-examine* witnesses where the maximum punishment for the summary conviction offence is imprisonment for more than six months (unless the agent is authorized to do so under a program approved by the lieutenant governor in council of the province).

55 It is apparent that when s. 802.1 provides that an agent may not "*appear*" it is expressly restricting the right which was granted in s. 800(2) to "*appear*".

56 Similarly when s. 802.1 provides that an agent may not "examine or cross-examine" it is expressly restricting the right which was granted in s. 802(2).

57 In *Construction of Statutes*, *supra*, Sullivan notes at page 405 that, when comparing a provision to other provisions in the same legislation, it is assumed "that language is used consistently, that tautology is avoided, that the provisions of an Act all fit together to form a coherent and workable scheme." The Supreme Court in *Syndicat de la fonction publique du Quebec v. Quebec (Attorney General)*, 2010 SCC 28 has noted at paragraph 37 that there is a presumption that "a term generally retains the same meaning throughout a statute.": see also *R. v. Zeolkowski*, [1989] 1 SCR 1378 at paragraph 19.

58 If "appear" in s. 802.1 is interpreted narrowly, as the Crown suggests by reading in the words "at trial" to the section, then the principles of interpretation would suggest that the word "appear" should have the same meaning in s. 800(2). This would mean that s. 802(2) would permit appearances by an agent at trial but provide no authority for an agent to appear in a docket court or at the CMO. This is inconsistent with the plain language of s. 800(2) and would be an absurd result. As was noted by Justice Iacobucci in *Rizzo & Rizzo*, *supra*, at paragraph 27:

> It is a well-established principle of statutory interpretation that the legislature does not intend to produce absurd consequences. According to Côté, *supra*, an interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment (at pp. 378-80). Sullivan echoes these comments noting that a label of absurdity can be attached to interpretations which defeat the purpose of a statute or render some aspect of it pointless or futile (Sullivan, *Construction of Statutes*, *supra*, at p. 88).

59 Consequently, when s. 802.1 is considered in context with other relevant sections of the *Criminal Code*, it strongly suggests that the word "appear" must not be interpreted as meaning appearances only at trial and must refer to all appearances during summary conviction proceedings.

60 Furthermore, the general right in s. 800(2) for a defendant to appear by agent is restricted by s. 802.1. However, the restriction relates only to the type of offences (i.e. penalties greater than six months) and not to the stage of the summary conviction process during which the restriction operates. This suggests that the prohibition from appearing in s. 802.1 relates to all appearances in relation to the proceedings.

61 The Crown argues that s. 802.1 appears in the *Criminal Code* under the heading "Trial" and that this provides some context in which to consider the interpretation of the section. Specifically, the Crown argues that this supports the position that s. 802.1 should be interpreted as if the words "at trial" were added after the word "appear" so that the prohibition from appearing should be restricted to trial appearances.

62 As observed earlier in these Reasons, headings can in some circumstances provide assistance with statutory interpretation, particularly where there is an ambiguity. However, the heading "Trial" is not particularly helpful when interpreting s. 802.1. There is no

ambiguity on the face of the plain language of the section. Furthermore some provisions under the same heading relate to proceedings outside of the trial itself. For example, s. 803(1) refers to adjournments that the court may make "*before or during* the trial." (emphasis added)

63 Additionally, s. 801(3) discusses the procedure to be followed if the charge is not admitted by the accused, stating that "Where the defendant pleads not guilty ... the summary conviction court shall proceed with the trial..." A defendant's plea is almost always entered at the docket court stage before the trial, as it was in this case. This further suggests that while the provisions under "Trial" relate to the summary conviction trial of an accused, they do not necessarily only have application to the trial proper.

64 Furthermore, if the provisions under the heading "Trial" were interpreted as referring solely to the trial itself, then the right of an agent to appear in summary conviction proceedings, which arises from s. 800(2), would only be applicable at the trial as well. If this were correct, an accused could never appear in a docket court by agent. This would lead, as noted above, to an absurd result.

65 Therefore, while ss. 798 to 803 of the *Criminal Code* are found under the heading "Trial", not all of the provisions in those sections are restricted to matters that take place at the trial proper. There is no ambiguity on an ordinary reading of the section. As a result, the heading "Trial" does little, if anything, to assist in the proper interpretation of the words "appear or examine or cross-examine" in s. 802.1.

66 The purpose of s. 802.1 is to regulate agents who are permitted to represent defendants in summary conviction matters with enhanced penalties so as to minimize the risk of harm which can be caused by agents who are lacking in training or skill. Much of the risk to a defendant occurs at the trial proper. However, it is not correct to say that all docket appearances are simply routine and clerical functions involving no risk to the defendant. For example, a defendant is required to enter a plea in a docket court or at the CMO before a trial date can be confirmed. This is a substantive stage in the litigation and gives rise to consequences for the defendant. It puts the defendant in jeopardy and affects his or her rights: *R. v. Petersen*, [1982] 2 S.C.R. 493 at page 501. The jeopardy which arises in the docket court stage of criminal litigation argues against the narrow interpretation which the Crown proposes for s. 802.1.

67 The Crown suggests that the "court's practice has long been to allow agents to appear in such cases at the docket court stage of proceedings" and that this practice is consistent with the interpretation of s. 802.1 which it proposes. Any inconsistency of approach in the past does not justify a continued lack of compliance. In any event, with respect to the appearance of Kelm, the general approach in docket courts since the decision in *Frick*, *supra*, in 2010 has been to deny Kelm a right of audience at the docket court stage of summary conviction proceedings where enhanced penalties are engaged, such as impaired driving offences.

68 While not determinative in relation to the interpretation of s. 802.1, I note that in 2009 the Minister of Justice, during the 40th Parliament, 2nd session, introduced Bill C-31 which

proposed a number of amendments to the *Criminal Code* including an amendment to s. 802.1 which, if passed, would have given all agents the right to appear to "request an adjournment". The Bill died when Parliament was prorogued in December 2009. Thus the amendment was never made and s. 802.1 continues in its present form.

f) Conclusion -- Interpretation of Section 802.1

69 I conclude that it is not appropriate to read in the words "at trial" to qualify the word "appear" in s. 802.1 as advocated by the Crown. I conclude that on a proper interpretation of s. 802.1, agents who are not authorized by provincial regulations are prohibited from appearing on behalf of a defendant at any stage of summary conviction proceedings where the potential penalty exceeds six months in custody. As a result, I conclude that Kelm was not authorized to appear on behalf of the Accused in relation to these proceedings. She was not authorized to appear on behalf of the Accused at the CMO to seek adjournments on December 27, 2012, or on January 24, 2013. She was not authorized to appear at the CMO on February 14, 2013 to enter a plea and fix a trial date.

2. Consequences of Kelm's Purported Appearance at the CMO

70 Because Kelm was not authorized to appear on behalf of the Accused, her purported appearances were no appearances at all. Furthermore, since the Accused did not appear at the CMO on December 27, 2012 as required either personally, by counsel or by an agent authorized by s. 802.1 and Alberta Order in Council 334/2003, he did not appear as required by the Promise to Appear.

71 On December 27, 2012, the Justice of the Peace either failed to recognize that Kelm was not permitted to appear for the Accused or acquiesced in the appearance. As a result, the Justice of the Peace failed to recognize that the Accused had not appeared and did not refer the matter to Courtroom 356, where a representative of the Crown was available to make a decision as to whether it was necessary to take any steps to maintain jurisdiction over the Accused by, for example, seeking a warrant or alternatively seeking the Accused's appearance through a summons.

72 To summarize, the purported appearances at the CMO had a number of consequences, including:

* The purported first appearance on December 27, 2012 was not an actual appearance of the Accused.

* Because the Accused was not present on December 27, 2012, the adjournment to the next appearance on January 24, 2013, at the CMO was not effective and did not compel the Accused to appear.

* The purported appearance and entry of the "Not Guilty" plea by Kelm on February 14, 2013 was not effective and was a nullity.

* Remanding the Accused to the trial date of September 18, 2013 was ineffective, was a nullity and did not compel the attendance of the Accused.

3. Does the Court have Jurisdiction over the Accused

73 In most, but not all cases, where an accused person does not appear in Court as required and where no arrest warrant is granted, the Court will have lost jurisdiction over the accused person. The relevant provisions of the *Criminal Code* dealing with these jurisdictional issues are found in s. 485 and s. 485.1.

74 The potential loss of jurisdiction over the offence because of inaction by the Court or by a failure to comply with the provisions of the *Criminal Code* in relation to adjournments is governed by s. 485(1) which provides as follows:

> **485(1)** Jurisdiction over an offence is not lost by reason of the failure of any court, judge, provincial court judge or justice to act in the exercise of that jurisdiction at any particular time, or by reason of a failure to comply with any of the provisions of this Act respecting adjournments or remands.

75 In this case when the Justice of the Peace failed to recognize that Kelm could not appear or acquiesced in her appearance and when the matter was adjourned to January 24, 2013, there was a "failure to comply" with s. 802.1, specifically with respect to granting an adjournment on the application of an unauthorized agent. Because of s. 485(1), despite the error, jurisdiction was not lost over the offence and is not an issue in this case.

76 Jurisdiction over the Accused is dealt with in s. 485(1.1) which provides as follows:

> **485(1.1)** Jurisdiction over an accused is not lost by reason of the failure of the accused to appear personally, so long as subsection 515(2.2), paragraph 537(1)(*j*), (*j.1*) or (*k*), subsection 650(1.1) or (1.2), paragraph 650(2)(*b*) or 650.01(3) (*a*), subsection 683(2.1) or 688(2.1) or a rule of court made under section 482 or 482.1 applies.

77 The sub-section identifies certain specific circumstances in which jurisdiction over an accused are not lost despite the accused's failure to attend in Court as required. The sub-section is designed to accommodate modern appearance methods such as closed circuit television without a loss of jurisdiction. None of the specific circumstances identified in s. 485(1.1) are applicable in the present case.

78 The Accused was required to appear at the CMO on December 27, 2012. He failed to do so and the Court took no steps on that date to maintain jurisdiction. As a result, jurisdiction over the Accused was lost on December 27, 2012.

79 Even where jurisdiction over an accused is lost it can be regained if the requirements of s. 485(2) of the *Criminal Code* are met. The sub-section provides as follows:

> **485(2)** Where jurisdiction over an accused or a defendant is lost and has not been regained, a court, judge, provincial court judge or justice may, within three months after the loss of jurisdiction, issue a summons, or if it or he considers it necessary in the public interest, a warrant for the arrest of the accused or defendant.

80 As a result anytime within three months of losing jurisdiction over the accused the Court may regain jurisdiction by issuing a summons or a warrant. However, after three months the Court is no longer able to regain jurisdiction and, in accordance with s. 485(3) the proceedings are deemed to be dismissed for want of prosecution. The sub-section provides as follows:

> **485(3)** Where no summons or warrant is issued under subsection (2) within the period provided therein, the proceedings shall be deemed to be dismissed for want of prosecution and shall not be recommenced except in accordance with section 485.1.

81 Where there is a dismissal after a plea has been entered proceedings on new Informations raising the same allegations will be barred. In *Petersen*, *supra*, the Supreme Court said at page 501:

> ... once a plea is entered before a court of competent jurisdiction the accused is in jeopardy. Where that court proceeds to a determination, in the nature of an acquittal or dismissal, proceedings on new informations raising the same allegations will be barred: *Haynes v. Davis*, [1915] 1 K.B. 332; *R. v. Hatherley* (1971), 4 C.C.C. (2d) 242; *R. v. Blair and Karashowsky* (1975), 25 C.C.C. (2d) 47; *R. v. Day* (1980), 37 N.S.R. (2d) 193; and other authorities referred to in *Riddle*, *supra.*

82 However, in some circumstances where the proceedings have been dismissed for want of prosecution the Attorney General or the Deputy Attorney General may still direct that a new Information be laid in relation to the same circumstances in accordance with s. 485.1 which provides as follows:

> **485.1** Where an indictment in respect of a transaction is dismissed or deemed by any provision of this Act to be dismissed for want of prosecution, a new information shall not be laid and a new indictment shall not be preferred before any court in respect of the same transaction without
>
> > (*a*) the personal consent in writing of the Attorney General or Deputy Attorney General, in any prosecution conducted by the Attorney General or in which the Attorney General intervenes; or

> (*b*) the written order of a judge of that court, in any prosecution conducted by a prosecutor other than the Attorney General and in which the Attorney General does not intervene.

83 Whether s. 485.1 is available to the Attorney General in circumstances where a plea has been entered or where the plea has purportedly been entered, is an issue which I am not called on to answer in this case.

84 In the present case, jurisdiction over the Accused was lost on December 27, 2012. No action was taken by the Court to issue a summons or a warrant within three months as is permitted by s. 485(2) and as a result the proceedings were deemed to be dismissed on March 27, 2013. By the time of the first scheduled trial date on September 18, 2013, the proceedings were at an end and the Court had no jurisdiction to take any steps against the Accused.

4. Did the Court regain Jurisdiction when the Accused Appeared

85 More than one year after the proceedings were deemed to be dismissed, the Accused was arrested on a warrant which had been issued following his failure to appear at the September 18, 2013 trial date. He then appeared by an authorized agent at the CMO and by Counsel on December 23, 2014 to argue that a judicial stay should be granted on the basis of an alleged breach of his right to a trial within a reasonable time as guaranteed by s. 11(b) of the *Charter*.

86 Do the voluntary appearances at the CMO and in Court on December 23, 2014 amount to an attornment to the jurisdiction of the Court so as to once again give the Court jurisdiction over the Accused?

87 In *R. v. Kuemper*, 2007 ABPC 336, Judge Van de Veen considered a situation in which due to administrative error, 2 counts of a 3 count Information were not in Court on the appointed date for appearance and as a result the Court lost jurisdiction over the accused. The Crown then brought the charges back into Court within the statutorily prescribed three months set forth in s. 485(2). In that case no summons or warrant was issued to compel the appearance of the accused but, despite this, he voluntarily appeared by counsel. The Court concluded that it had regained jurisdiction by the voluntary appearance of the accused. As a result, during the three month period after jurisdiction is lost, and before the proceedings have been deemed to be dismissed, an accused can voluntarily appear and attorn to the jurisdiction of the Court.

88 In the recent case of *R. v. Ferreira*, 2014 ONCJ 617, the Crown unsuccessfully tried to argue that attornment resulted in the Court regaining jurisdiction despite the fact that more than three months had passed since the Court lost jurisdiction. At paragraphs 15 through 17 the Court said:

> Crown counsel argued that because Ms. Ferreira attorned to the

> jurisdiction, the Court regained jurisdiction over her. As there is no time limitation for regaining jurisdiction over the offence, by attending court in response to the summons the Court has lawfully regained jurisdiction over both the person and the offence and therefore the consent of the Attorney General or the Deputy Attorney General was not required. I respectfully disagree. Firstly, in my view, this interpretation is at odds with the plain reading of sections 485(3) and 485.1 of the Criminal Code. Section 485.1 clearly applies to all cases in which the charges are deemed to be dismissed for want of prosecution. Once a charge is deemed to be dismissed, the distinction between loss of jurisdiction over the offence or the person is no longer meaningful. The section does not include an exception for when a defendant has attorned to the jurisdiction. The only exception provided is where the consent of the Attorney General or the Deputy Attorney General is obtained.
>
> Secondly, in my view, the interpretation as advocated by the Crown would give no force and effect to the legislation. Having been summoned to Court, Ms. Ferreira, not being legally trained, attended court in response to the summons. If her mere attendance were to be sufficient to allow the proceedings to continue, then Parliament's rationale for creating a three-month limitation period, and the requirement of the consent of the Attorney General or Deputy Attorney General thereafter, would be difficult to discern. If the Crown's interpretation is correct, then once a person, whose charges were deemed to be dismissed, attended court pursuant to a Summons (as he or she is in most cases would unless given legal advice to not attend court) jurisdiction would always be regained making the consent of the Attorney General unnecessary.
>
> Thirdly, this Court must apply a purposive approach to the interpretation of the legislation. It seems likely that in requiring the consent of the Attorney General to re-initiate proceedings against someone where jurisdiction is lost for more than three months, Parliament has implemented a procedural protection to ensure that a) defendants do not have to worry indefinitely that an old Information will resurface; and, b) the state only prosecutes cases in which jurisdiction has been lost for an extended period of time but there remains sufficient public interest in the prosecution.

89 As a result, I conclude that the voluntary appearance at the CMO in July 2014, and appearing in Court to argue the s. 11(b) motion on December 23, 2014, did not amount to an attornment to the jurisdiction of the Court, so as to once again give the Court jurisdiction over the Accused.

90 Once the proceedings were deemed to be dismissed in accordance with s. 485(3) they could not be revived by any action by the Accused, the Crown or by the Court. The

only potential avenue to pursue charges arising from the circumstances described in the Information is for the Attorney General or the Deputy Attorney General to authorize the laying of a new Information.

V. CONCLUSION

91 The proceedings in relation to this matter were deemed to be dismissed for want of prosecution early in 2013.

92 The Court has no jurisdiction to entertain the issues raised in the Constitutional Notice which were argued on December 23, 2014.

93 The Court has no jurisdiction to continue with the present proceedings. By operation of law they were deemed to be dismissed.

Dated at the City of Edmonton, Alberta this 23rd day of January, 2015.

J.T. HENDERSON PROV. CT. J.