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COMMON LAW McKENZIE FRIEND - THE LAY ADVOCATE

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Common Law McKenzie Friend

This article endeavours to cast a glimmer of light on the subject of the "McKenzie Friend" and the rules attached to the role of this person in the judicial system in Canada, and British Columbia in particular.

In Shakespeare's play, Henry IV at Act 3, Scene 1, in response to Hotspurs plea for clarity, Glendower says:

> I can speak English, lord, as well as you;
> For I was train'd up in the English court;
> Where, being but young, I framed to the harp
> Many an English ditty lovely well
> And gave the tongue a helpful ornament,
> A virtue that was never seen in you.

Shakespeare highlights the oratory skill of a trained barrister when compared to a lay person. Pupillage in courtroom advocacy is sometimes termed, devilling[i], and the barrister who trains the pupil is termed a devilmaster. It is understandable that the verb devilling should be attached to the study of the complex interplay between the rules of court, the rules of evidence, the rules of advocacy, and the rule of law applied to the facts at hand. Anyone who has spent an afternoon observing the battle between two skilled barristers recognizes that courtroom advocacy is a skill that few possess, and that bedevils most.

The right of audience of a self represented litigant (also referred to as a litigant in person) before common law courts is well understood[ii]. In British Columbia this right can be found in a number of places, but is clearly articulated at s15 of the *Legal Profession Act* 1998 (S.B.C.) (the "Act"). However, the Act articulates in mandatory terms, that no agent may act on behalf of the litigant other than prescribed by statute. The court has the discretion to grant the privilege of audience to a person not prescribed in the Act, but as articulated by McIntyre J.A. at 304 in *Venrose Holdings Ltd. v. Pacific Press Ltd.* (1978), 7 B.C.L.R. 298, cited

in *R v Dick* [2002] BCCA 27, this discretion shall be granted "rarely and with caution". The tests to be applied by the Court in the exercise of this rarely used discretion are narrowly prescribed by principles clearly established in the common law.

THE LEGISLATION

The current legislative foundation in British Columbia for the privilege of audience before the courts has been prescribed by the *Legal Profession Act 1998* (S.B.C.) as follows:

> Authority to practise law
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> 15 (1) No person, other than a practicing lawyer, is permitted to engage in the practice of law, except
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> (a) a person who is an individual party to a proceeding acting without counsel solely on his or her own behalf,
>
> (b) as permitted by the *Court Agent Act*,
>
> (c) an articled student, to the extent permitted by the benchers,
>
> (d) an individual or articled student referred to in section 12 of the *Legal Services Society Act*, to the extent permitted under that Act,
>
> (e) a lawyer of another jurisdiction permitted to practise law in British Columbia under section 16 (2) (a), to the extent permitted under that section, and
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> (f) a practitioner of foreign law holding a permit under section 17 (1) (a), to the extent permitted under that section.
>
> (2) A person who is employed by a practising lawyer, a law firm, a law corporation or the government and who acts under the

supervision of a practising lawyer does not contravene subsection (1).

(3) A person must not do any act described in paragraphs (a) to (g) of the definition of "practice of law" in section 1 (1), even though the act is not performed for or in the expectation of a fee, gain or reward, direct or indirect, from the person for whom the acts are performed, if

(a) the person is a member or former member of the society who is suspended or has been disbarred, or who, as a result of disciplinary proceedings, has resigned from membership in the society or otherwise ceased to be a member as a result of disciplinary proceedings, or

(b) the person is suspended or prohibited for disciplinary reasons from practising law in another jurisdiction.

(4) A person must not falsely represent himself, herself or any other person as being

(a) a lawyer,

(b) an articled student, a student-at-law or a law clerk, or

(c) a person referred to in subsection (1) (e) or (f).

(5) Except as permitted in subsection (1), a person must not commence, prosecute or defend a proceeding in any court, in the person's own name or in the name of another person.

(6) The benchers may make rules prohibiting lawyers from facilitating or participating in the practice of law by persons who are not authorized to practise law. (emphasis added)

The first of two statutory qualifications to the Act is the *Court Agent Act* 1996 (RSBC) which applies to geographical locations where qualified legal advocates are not readily available. At s.3 the *Court Agent Act* (supra.) states as follows:

Application of Act

3 This Act has no application

(a) within the limits of any municipality in which 2 or more members of the Law Society of British Columbia are in actual practice of the profession of a barrister or solicitor, or

(b) to any court where there are 2 or more members of the Law Society of British Columbia in actual practice of the profession of a barrister or solicitor whose places of business are within 8 km of the place where the court sits.

The second qualification to the Act is the *Legal Services Society Act* 2002 (SBC) which at s.12 states:

Persons providing legal services

12 Despite the *Legal Profession Act*, the society or a funded agency may employ, with or without remuneration, an individual who is not a lawyer or an articled student to provide services that would ordinarily be provided by a lawyer so long as the individual is supervised by a lawyer, but the individual may not appear as counsel in a court except with leave of the court.

No other statutory authority can be found which would widen the ambit of those who may represent a litigant in a court of law. There is therefore no statutory basis for the privilege of audience being granted to a lay advocate other than the self-represented litigant.[iii] Any exceptions to the policy prescribed by statute should therefore be discretions prescribed by the common law.

McIntyre J.A. in *Venrose Holdings Ltd. v. Pacific Press Ltd.* (supra.) broadened the statutory policy prescribing rights or privileges of audience as follows:

> "I must, however, go further than that. For reasons that are indicated in *Tritonia Ltd. v. Equity & Law Life [Assurance] Society*, [1943] A.C. 584 at 586, [1943] 2 All E.R. 401, and in *Rondel v. Worsley*, [1967] 1 Q.B. 443, [1966] 3 All E.R. 657, affirmed [1969] 1 A.C. 191, [1967] 3 All E.R. 993 (H.L.), the courts as masters of their own proceedings must retain a discretion whether to hear from time to time in the course of the dispatch of their business such persons other than barristers as they may consider should be heard in the interests of justice. **The court in its discretion may grant a privilege of audience to such persons in any case where it deems it necessary or proper and deny it in other cases. This, no doubt, is a power which should be exercised rarely and with caution**, and it is one the courts will be zealous to preserve." (emphasis added)

McKENZIE FRIEND

It is helpful to explain the background to the terminology employed throughout much of the common law in respect of persons who apply to the court for the privilege of assisting a self-represented litigant. The Manitoba Court of Appeal unanimously ruled in the *Law Society of Manitoba v Pollock* 2007 MBQB 51 that when a person applies for and gains a privilege to assist a self-represented litigant that person is known in the common law as a McKenzie Friend. Monnin CJOB, speaking on behalf of the court states at pp. 121 – 123:

> "… Mr. Pollock wishes the Court to consider his ability to act as a "McKenzie Friend" notwithstanding the provisions of the [Legal Profession] **Act**. A "McKenzie Friend" refers to a practice developed in England arising from a case entitled *McKenzie v. McKenzie* (1971), P. 33. The Court, referring to a self represented litigant, acknowledged the ability of such a litigant to have with him a "friend" who could take notes, make suggestions and give advice. In a later case this was explained as being for the purposes of allowing the self represented litigant to better "himself" present his case.

> It should be noted, however, that the McKenzie Friend doctrine was used in England primarily for proceedings in Family Court, not in criminal or civil matters. Secondly, the role of the McKenzie Friend was limited to assisting the litigant and giving advice to the litigant, not advancing argument, cross examining or performing any other functions that counsel usually do. The ability to have a McKenzie Friend appointed is left to the discretion of the Court on a case by case basis. Finally, my understanding of the **McKenzie Friend Doctrine** is that fees are not involved.
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> It would not be my view that the appointment of Mr. Pollock as a McKenzie Friend on occasion would constitute the practice of law. However, if he held himself out to be available as a McKenzie Friend to all and sundry, or proposed to charge a fee for his services, then I believe different considerations would apply. If, on an occasional basis, Mr. Pollock was to seek the permission of the Court to assist **an individual** as a McKenzie Friend, this may not constitute the unauthorized practice of law." (emphasis added)

In *R. v Bow County Court Ex p. Pelling (No.1)* [1999] 1 W.L.R. 1807, Lord Woolf, then Master of the Rolls, speaking on behalf of Otton, J., and Walker L.J., remarked that the status of a McKenzie Friend was first recognised in *Collier* v. *Hicks* (1831) 2 B. & Ad. 663, where Lord Tenterden C.J. in dictum said, at p. 669:

> "Any person, whether he be a professional man or not, may attend as a friend of either party; may take notes; may quietly make suggestions; and give advice; but no one can demand to take part in the proceedings as an advocate, contrary to the regulations of the court as settled by the discretion of the justices."

In *McKenzie v McKenzie* [1970] 3 W.L.R. 472, Davies, Sachs, and Karminski L.JJ unanimously applied the dictum of Lord Tenterden C.J. from *Collier v Hicks*

(supra.) In *McKenzie v McKenzie* (supra.) the UK Court of Appeal overturned the decision of the lower court who had denied the self-represented litigant the assistance of a McKenzie Friend, as the term has been known through most of the common law since that time, but prescribed that the McKenzie Friend be limited in his role to that first determined in *Collier v Hicks* (supra.) by Lord Tenterden C.J.

In an article titled *Litigants in Person: Part I*,[iv] the authors note the McKenzie Friend Doctrine is the position adopted by almost all common law courts including most Provinces of Canada.

Carrothers J. in *Law Society of British Columbia v. Lawrie* [1991] 6 W.W.R. 619 (B.C.C.A.), at para. 13 states as follows:

> The preliminary attack of the appellants on these statutory provisions as made first to Shaw J. and again on this appeal, was the submission that a popular public opinion prevails, which will be reinforced should the appellants not succeed here, to the effect that the objective of these particular statutes and of the Law Society is to protect and preserve some kind of monopoly for lawyers. This familiar and ill-conceived form of antipathy is intended to discredit the Law Society and the legal profession and favour the appellants' cause. The reality of this situation is obvious. I agree with and adopt the explanation which Shaw J. gave in his first reasons for judgment, supra, at p. 252, as follows:
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> > The Barristers and Solicitors Act provides for qualifications to practise law, the discipline of lawyers (including disbarment), insurance, trust account rules and funds for client compensation. The primary purpose of this is to provide protection, as far as possible, for the general public who pay for legal services: A.G. Can. v. Law Soc. of B.C.; Jabour v. Law Soc. of B.C., [1982] 2 S.C.R. 307, 37 B.C.L.R. 145, [1982] 5 W.W.R. 289, 19 B.L.R. 234, 66 C.P.R. (2d) 1, 137 D.L.R. (3d) 1, 43 N.R. 451, Estey J. at pp.

> 312-13. This protection of the public lies at the heart of the restrictions upon non-lawyers practising law: Great West Life Assur. Co. v. Royal Anne Hotel Co. (1986), 6 B.C.L.R. (2d) 175, 31 D.L.R. (4th) 37 (C.A.), Esson J.A., at p. 188. [21] Part 3 of the **Act** deals with the authority to practise law. Pursuant to s.20(2), there is a prohibition against the practise of law by someone who is not a member of the Law Society.

In *R v Dick* [2002] BCCA 27 the British Columbia Court of Appeal noted at para. 6 as follows:

> The Crown raised a preliminary objection to Mr. Lindsay's appearing and brought to our attention several reasons why, in the Crown's submission, Mr. Lindsay should not be accorded the privilege of audience. We use the word "privilege" advisedly, there being clear authority for the proposition that, subject to statutory provisions otherwise, it lies within a court's discretion to permit or not to permit a person who is not a lawyer, to represent a litigant in court. In particular we note the judgment of Lord Denning in *Engineers' and Managers' Association v. Advisory, Conciliation and Arbitration Service et al. (No. 1)*, [1979] 3 All E.R. 223 (C.A.) at 225, the decision of the Privy Council in *O'Toole v. Scott et al.*, [1965] 2 All E.R. 240 at 247; the comments of this Court in *Venrose Holdings Ltd. v. Pacific Press Ltd.* (1978), 7 B.C.L.R. 298 at 304, where it was said that the discretionary power to grant a privilege of audience to other persons should be exercised "rarely and with caution"; and the decision of Esson J. (as he then was) in *B.C. Telephone Co. v. Rueben*, [1982] 5 W.W.R. 428 (B.C.S.C.), at 434.
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> There are strong public policy reasons for the rule that persons other than licensed practitioners should not represent a litigant, the most significant of which is that disputes should be managed cost efficiently. The court has the responsibility to ensure that persons appearing before it are either properly

represented and (in the case of criminal law) defended, or are granted their right to speak to the court directly; in order to maintain the rule of law and the integrity of the court generally. As was said by the Ontario Court of Appeal in *R. v. Romanowicz* (1999), 138 C.C.C. (3d) 225:

> The power to refuse audience to an agent must be invoked whenever it is necessary to do so to protect the proper administration of justice. The proper administration of justice requires that the accused's constitutional rights, particularly the right to a fair trial, be protected. It also requires the fair treatment of other participants in the process (e.g. witnesses) and that the proceedings be conducted in a manner that will command the respect of the community.
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> It is impossible to catalogue all of the circumstances in which representation by a particular agent would imperil the administration of justice and properly call for an order disqualifying that agent. Obviously, representation by agents lacking the ability to competently represent an accused endangers all aspects of the proper administration of justice, particularly the accused's right to a fair trial. Other examples where the administration of justice would suffer irreparable harm if an agent were allowed to appear are found in the material filed on this appeal. They include representation by an agent facing criminal charges involving interference with the administration of justice and representation by an agent whose background demonstrates pervasive dishonesty or a blatant disrespect for the law. Representation by persons who have convictions for crimes of dishonesty or who have otherwise demonstrated a lack of good character can only bring the administration of justice into disrepute in the eyes of reasonable members of the public. This is so even if those agents have the requisite forensic ability. [paras.73-74]

While the court may elect to grant the privilege of audience to any agent of a litigant, that privilege is rarely granted, and the reasons for refraining from granting that privilege, range from bringing the court in to disrepute, to the prejudice in cost both to the court system and to the opponent.

UNITED KINDOM PRACTICE DIRECTIONS

In the United Kingdom, because of inconsistencies in the application of the common law discretion that may be accorded to a McKenzie Friend, Lord Neuberger of Abbotsbury, Master of the Rolls, issued a *Practice Note (McKenzie Friends: Civil and Family Courts)* [2010] 1WLR to clarify *the Practice Direction (Family Division: President's Guidance: McKenzie Friends)* [2008] 1 W.L.R. 2757 previously issued by Sir Mark Potter, President of the Family Court. The guidelines are set out as follows:

> "(1) An unrepresented litigant has the right to reasonable assistance from a lay person, known as a McKenzie friend, even where the proceedings related to a child and were being heard in private.
>
> (2) The presumption in favour of allowing a McKenzie friend was a strong one and permission should be given unless the judge was satisfied that fairness and the interests of justice did not require it.
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> (3) A request, including the name of the proposed McKenzie friend, should be made as early as possible.
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> (4) The court's decision should be regarded as final and should not be challenged later unless there was misconduct by the McKenzie friend or the efficient administration of justice was impeded. In the latter situation, the court should consider whether an unequivocal warning might suffice in the first instance.

(5) A request for a McKenzie friend engaged the European Convention on Human Rights 1950 art.6 (namely the right to a fair trial) and the court had to consider such a request judicially, allowing the litigant reasonable opportunity to develop the argument in favour of the request.

(6) The litigant should not be required to justify a desire to have a McKenzie friend. It was for an objecting party to rebut the presumption in favour of allowing a McKenzie friend to attend.

(7) Neither the confidentiality of proceedings nor the capability of the litigant to conduct the proceedings alone should outweigh the presumption in favour of a McKenzie friend, nor should the fact that the litigant was unrepresented by choice, the fact that the hearing was a directions hearing or case management hearing or the fact that the proposed McKenzie friend belonged to an organisation that promoted a particular cause.

(8) The McKenzie friend should be allowed to help the litigant make the application and should not be excluded from the courtroom or chambers while the application was being made.

(9) The McKenzie friend should produce a short curriculum vitae setting out relevant experience, confirming the absence of an interest in the case and confirming their understanding of the role.

(10) A refusal of permission to allow a McKenzie friend had to be fully explained to both the litigant and the proposed McKenzie friend. A litigant could appeal against the refusal but the McKenzie friend had no standing to do so.

(11) Legal representatives should serve documents on the litigant in good time to allow him to seek assistance from the McKenzie friend in advance of any hearing or meeting.

> (12) A McKenzie friend could provide moral support for the litigant, could take notes, help with case papers and quietly give advice on points of law or procedure, issues that the litigant might wish to raise in court or questions the litigant might wish to ask witnesses. **A McKenzie friend could not act on behalf of the litigant by signing court papers, addressing the court or questioning witnesses.** If the litigant wanted the McKenzie friend to be granted a right of audience or the right to conduct the litigation an application under the Courts and Legal Services Act 1990 s.27 and s.28 had to be made at the start of the hearing." (emphasis added)

British Columbia statutes are not set out in precisely the same terms as s.27 and s.28 of the *Courts and Legal Services Act* 1990 UK. The UK statutes provide a slightly broader statutory framework for exercising a discretion to permit a non-lawyer to be granted the privilege of audience before the Court. The principle summed up by Lord Neuberger are the same as articulated in by the BC Court of Appeal in *Venrose* (supra.), and the Manitoba Court of Appeal in *Pollock* (supra.), namely that a self-represented litigant may be accompanied by a friend, may receive advice from the friend, and may direct the friend to take notes, but the friend may not advance argument, cross examine witnesses, or perform any other functions that fall to licensed counsel.

CONCLUSION

R v Dick (supra.) is sometimes cited as authority for the proposition that the Court has an unfettered discretion to permit a non-lawyer to represent a litigant. That is not the rule from *R v Dick* where it was decided that Mr. Lindsay not be permitted to act on behalf of Mr. Dick. The Province of British Columbia has clearly limited the role of a non-lawyer by statute. Moreover, the British Columbia Court of Appeal in *Venrose* (supra.) is authority for the proposition that any exercise of discretion be granted only "rarely and with caution". It must be added that the

McKenzie Friend, even when permitted, does not have the right to address the Court. This privilege is reserved for the self represented litigant.

One can contemplate many circumstances where the discretion to grant to the litigant the privilege to rely on the assistance of a McKenzie Friend should be denied. The first is where the McKenzie Friend has an interest in the outcome, as articulated in *Practice Note (McKenzie Friends: Civil and Family Courts)* [2010] 1WLR by Lord Justice Neuberger (supra). It is also clear that any proceeding where a self represented litigant brings an application of a quasi-criminal nature (i.e., contempt) the litigant should not expect the discretion to be exercised.

One clear example of where a Court may not exercise discretion and grant an unrepresented litigant the privilege of assistance from a McKenzie Friend is a contempt application which may attach committal as a penalty. Civil contempt in Canada is a common law offence which must be proved "beyond reasonable doubt." The rules of court and the rules of evidence require the applicant to have a nuanced understanding of the standard to which the court must determine the matter. A lay person would be ill equipped to understand these rules and the constitutional constraints that are afforded to any defendant who may be subject to a loss of liberty. It is clear this is not a circumstance that conforms with the test adopted in *R v Dick* (supra.) that this discretion be exercised "rarely and with caution".

The author will close by relying on the words of Dr. Samuel Johnson, who was quoted by Lord Simon of Glaisdale in *D. v. National Society for the Prevention of Cruelty to Children* [1978] AC 171 at 17. His Lordship emphasized that the promotion of "justice in adversary procedure involves advocacy of contrary contentions by representatives with special gifts and training". His Lordship closed by adopting the words of Dr. Samuel Johnson:

> "As it rarely happens that a man is fit to plead his own cause, lawyers are a class of the community who, by study and experience, have acquired the art and power of arranging evidence, and of applying to the points at issue what the law has settled."

[i] Bar Council of Ireland, (accessed at 24 May 2011) at http://www.lawlibrary.ie/viewdoc.asp?fn=/documents/barristers_profession/qualifyingasab.asp

[ii] *(Collins (aka Haas) v R* (1975) 133 CLR 120

[iii] ss. 15(1)(a) & 15(5) *Legal Profession Act* 1998 (S.B.C.)

[iv] Cameron, C, Kelly, E, 'Litigants in Person: Part I' Hong Kong Law Journal, 32 HKLJ 313 at 7