

IN THE COURT OF APPEAL OF MANITOBA

BETWEEN:

HIS MAJESTY THE KING

Respondent

- and -

DEREK PAUL DARCH

(Accused) Appellant

) ***D. P. Darch***
) *on their own behalf*
)
) ***M. Moorthy***
) *for the Respondent*
)
) *Chambers motion heard:*
) ***May 15, 2025***
)
) *Decision pronounced:*
) ***May 23, 2025***

EDMOND JA

Introduction

[1] The appellant seeks an order pursuant to section 684(1) of the *Criminal Code*, RSC 1985, c C-46 [the *Code*] (the section 684(1) application), appointing counsel to assist in the appeal of his conviction after a trial on June 27, 2023, of the following offences:

- (1) possession of a firearm while he was prohibited from doing so contrary to section 117.01(1) of the *Code*;
- (2) possession of a prohibited firearm, to wit: a sawed-off rifle, together with readily accessible ammunition without authorization or licence contrary to section 95 of the *Code*; and

- (3) possession of instruments suitable for the purpose of breaking into any place, motor vehicle, vault or safe under circumstances that give rise to a reasonable inference that these said instruments have been used or were intended to be used for such purpose, contrary to section 351(1) of the *Code* (collectively, the convictions).

[2] At the hearing, I advised the appellant and the Crown that there was an insufficient record filed to assess whether the appeal has arguable merit, one of the primary factors considered in assessing the appellant's motion. As a result, I adjourned the motion to July 3, 2025, and I directed the parties to comply with the following schedule:

- (1) The appellant is to file any further evidence, as well as a brief, on or before June 5, 2025.
- (2) The Crown is to file any responding affidavit material and a brief on or before June 26, 2025.

[3] Following the hearing, the Crown contacted registry and requested additional time to file material. After consultation with me, registry advised the Crown that the deadlines were extended to June 30, 2025 for the Crown and to June 9, 2025 for the appellant.

[4] I also advised the parties that I would consider granting an order appointing counsel for the preliminary purpose of assisting the appellant with the section 684(1) application. After hearing brief submissions on that issue, I advised the parties that I would deliver brief reasons for decision on this preliminary issue. These are those reasons.

Background

[5] On December 2, 2024, the appellant, as a self-represented litigant, filed a notice of appeal, appealing his convictions. His sole ground of appeal is ineffective assistance of counsel. The appeal has not been perfected.

[6] Legal Aid Manitoba, by letter dated October 31, 2024, denied the appellant's application for counsel to be appointed for his appeal.

[7] On April 17, 2025, legal counsel, William Marks (as friend of the Court) on behalf of the appellant, filed the present motion for an order that counsel be appointed to assist the appellant in his appeal.

[8] The appellant affirmed two affidavits in support of this motion, one on January 24, 2025 (the first affidavit) and one on April 1, 2025 (the second affidavit).

[9] In the first affidavit, the appellant states that he has no income and no savings, has a Grade 9 education and he does not believe he has the knowledge or tools to advance his appeal effectively.

[10] The appellant's second affidavit addresses "the merit assessment on [his] appeal as it relates to the s. 684(1) application", but does not provide details of the factual background. The second affidavit refers to an agreed statement of facts, the trial transcript and the strategy used by trial counsel, but neither the agreed statement of facts nor the transcript was before me. The appellant states: "Now that I understand the law better, I would have asked my counsel to bring a *Charter* challenge in relation to police seizing and

searching my backpack based on my version of the interaction with Winnipeg Police.”

[11] Further, the appellant states he believes a miscarriage of justice occurred on the basis that it was inappropriate for trial counsel to make agreements without consulting him.

[12] No briefs were filed by the parties and, at the hearing of the motion, the Crown provided an oral submission regarding trial counsel’s response to the appellant’s affidavits. Trial counsel has been made aware of the allegations being made by the appellant.

Criteria Under Section 684(1)

[13] In *R v JJB*, 2016 MBCA 4 at paras 26-29 [*JJB*], Hamilton JA summarized the criteria to be considered on a section 684(1) application as follows:

Section 684(1) of the *Code* provides as follows:

Legal assistance for appellant

684(1) A court of appeal or a judge of that court may, at any time, assign counsel to act on behalf of an accused who is a party to an appeal or to proceedings preliminary or incidental to an appeal where, in the opinion of the court or judge, it appears desirable in the interests of justice that the accused should have legal assistance and where it appears that the accused has not sufficient means to obtain that assistance.

Section 684(1) has two components. The appellant must demonstrate that: 1. “it appears desirable in the interests of justice that the [appellant] should have legal assistance”; and 2. “it appears that the [appellant] has not sufficient means to obtain that assistance.” See *R v Bernardo (PK)* (1997), 105 OAC 244, applied

in *R v BLB*, 2004 MBCA 100, 190 ManR (2d) 6; and *R v Bicknell*, 2009 MBCA 34.

When considering the “interests of justice” component, it is important to “take cognizance of the broad access to appellate review contemplated by s. 675 and the wide remedial powers of the Court of Appeal set out in s. 686” (*Bernardo* at para 20). Therefore, an appellant must have a meaningful opportunity to establish the merit of his or her grounds of appeal and the appellate court must be able to properly exercise its broad review jurisdiction at the conclusion of the appeal. See *R v Abbey (W)*, 2013 ONCA 206 at para 30, 303 OAC 335. The seriousness of the offence and the penalty imposed are also relevant considerations, although not determinative. See *R v Yukon (F)*, 2011 SKCA 77, 375 SaskR 85.

The Crown helpfully acknowledges that the appellant cannot pay for a lawyer and that he cannot effectively present his appeal without the assistance of counsel. Counsel rightly agree that the sole issue for me is whether the appellant has demonstrated that there are any arguable grounds of appeal from his conviction and any arguable grounds for his application for leave to appeal sentence. This is a low threshold. Watt JA in *Abbey* described it as “modest” (at para 32). As explained by Doherty JA in *Bernardo* (at para 22):

In deciding whether counsel should be appointed, it is appropriate to begin with an inquiry into the merits of the appeal. Appeals which are void of merit will not be helped by the appointment of counsel. The merits inquiry should not, however, go any further than a determination of whether the appeal is an arguable one. I would so limit the merits inquiry for two reasons. First, the assessment is often made on less than the entire record. Second, any assessment beyond the arguable case standard would be unfair to the appellant. An appellant who has only an arguable case is presumably more in need of counsel than an appellant who has a clearly strong appeal.

Discussion

[14] The record required to assess the factors to be considered on a section 684(1) application to appoint counsel is incomplete, and I am not satisfied that the appellant has the knowledge to advance the motion.

[15] In *JJB*, this Court ordered that the attorney general provide counsel for the appellant for the preliminary purpose of making the section 684(1) application (see also *R v JN*, 2013 ONCA 251; *R v C (P)*, 2014 ONCA 577 [*C (P)*], leave to appeal to SCC refused, 36129 (15 January 2015)). Section 684(1) of the *Code* contemplates counsel being appointed for “proceedings preliminary or incidental to an appeal”.

[16] In *C (P)*, the Ontario Court of Appeal noted that there is authority for the motion judge to appoint counsel for the limited purpose of aiding in the application (see para 27).

[17] Since the appellant has been denied legal aid and has no income nor savings to afford a lawyer, this is an appropriate case to make a preliminary order to appoint counsel to assist the appellant with the section 684(1) application and specifically address whether there are arguable grounds of appeal.

Disposition

[18] The Crown is ordered to provide counsel for the appellant for the preliminary purpose of finalizing the record, as well as appearing and making submissions on the section 684(1) application. The schedule for the hearing

of the application is as stated above in paragraph 2, as revised in paragraph 3.
I will remain seized of the section 684(1) application.

Edmond JA