

IN THE COURT OF APPEAL OF MANITOBA

BETWEEN:

<i>HIS MAJESTY THE KING</i>	)	<i>W. G. Marks</i>
	)	<i>for the Appellant</i>
	)	
<i>Respondent</i>	)	<i>M. Moorthy</i>
	)	<i>for the Respondent</i>
	)	
<i>- and -</i>	)	<i>M. Zurbuchen</i>
	)	<i>on behalf of Trial Counsel</i>
	)	
<i>DEREK PAUL DARCH</i>	)	<i>Chambers motion heard:</i>
	)	<i>September 29, 2025</i>
<i>(Accused) Appellant</i>	)	
	)	<i>Decision pronounced:</i>
	)	<i>October 27, 2025</i>

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 motion), appointing counsel to assist in the appeal of his convictions after a trial on June 27, 2023, of the following offences (the 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*.

[2] The motion was originally heard in chambers on May 15, 2025 (the first hearing) and, on May 23, 2025, I granted an order to provide legal assistance to the appellant for the preliminary purpose of finalizing the record, as well as appearing and making submissions on the motion (see *R v Darch*, 2025 MBCA 50 [*Darch*]). After the first hearing, the appellant appointed counsel and filed an affidavit of Lisa Sophie Miclette, affirmed July 9, 2025 (the Miclette affidavit), attaching documents alleged to be relevant to the motion, including:

- (1) a letter from trial counsel to Legal Aid Manitoba (Legal Aid) dated August 29, 2024;
- (2) an agreed statement of facts filed at the trial;
- (3) trial transcripts and reasons for judgment of the trial judge; and
- (4) the appellant's criminal record.

[3] In addition, I received briefs of arguments filed by the parties. Finally, I received an affidavit of trial counsel, affirmed September 13, 2025 (the trial counsel affidavit), that responds to the allegations made by the appellant in his affidavits and the claim of ineffective assistance of counsel. In accordance with rule 21 of the MB, *Court of Appeal Rules (Civil)*,

Man Reg 555/88R [the *CA Rules*], the affidavit of the appellant affirmed April 1, 2025 (the second affidavit) and the trial counsel affidavit have been sealed. The sealing order remains in place until the court makes a decision on the introduction of the further evidence.

[4] A preliminary issue was raised at the hearing. A request was made that the motion proceeding be sealed and/or for a publication ban to prevent publication of the name of trial counsel. I advised the parties that I was not prepared to seal the record as the proceedings are open to the public and such an order would be inconsistent with the open court principle. As to the request for a publication ban, I stated that an order preventing the publication of the name of trial counsel appeared appropriate but that I would further consider that in my reasons for decision.

[5] Upon further consideration, a publication ban is not an appropriate order in the circumstances of this case. The name of trial counsel has not been referenced in these reasons for decision. Sealing the affidavits that contain further evidence is all that is required pursuant to the rule 21 of the *CA Rules*.

[6] For the reasons that follow, the motion is dismissed.

Background

[7] After a trial in Provincial Court on June 27, 2023, the appellant was convicted of the offences. Reasons for judgment were delivered orally by the trial judge.

[8] The evidence filed at the trial included an agreed statement of facts and a photobook. The relevant portion of the agreed statement of facts for the motion reads as follows:

At 9:25 pm, P. Sgt. Degroot advised [the appellant] that he was being detained, provided him with his legal rights and police caution. [The appellant] understood, and declined to contact counsel. P. Sgt. Degroot instructed [the appellant] to remove his fanny pack and backpack. [The appellant] was asked if he had any sharp items as he was going to be searched prior to being placed into the car. [The appellant] advised that he had a needle and insulin as he was diabetic.

[The appellant] was told to place the backpack on the ground, and he did so. The backpack was open and police could see it had a large Milwaukee battery powered angle grinder and some other tools inside, such as pliers and a screwdriver. [The appellant] was searched and placed into the rear of the police vehicle.

P. Sgt. [Degroot] spoke with [the appellant] in the police vehicle, the details of this conversation will be explored in Court. However, during the conversation [the appellant] did reveal the backpack was not his.

It was determined that [the appellant] would be released at this time, while the investigation was still ongoing. [The appellant] was told that since he advised the backpack was not his, it would not be returned to him.

[9] Two police officers (the officers) testified at the trial regarding the circumstances of the appellant's arrest. Officer Jason Degroot (Officer Degroot) is the officer who had the direct conversation with the appellant.

[10] The officers were investigating a stolen motor vehicle, and they had set up a road-watch lineup in the vicinity of the Pembina Highway and Jubilee Avenue underpass. They were alerted by a passerby concerning a

motor vehicle bearing a Quebec licence plate that had stopped short of the road-watch lineup and three occupants were seen fleeing from the vehicle.

[11] As the officers pursued the occupants of the motor vehicle, the appellant was seen walking eastbound on Jubilee Avenue. The appellant was approached by two officers. Officer Degroot advised the appellant that they were investigating a stolen vehicle and were searching the area for suspects. He also asked the appellant whether he was willing to answer to some questions. The appellant agreed and, thereafter, answered some questions.

[12] Officer Degroot testified that, at 21:25 hours, he told the appellant that he was under detention, gave the reason for the detention and advised of his right to counsel. His notes confirmed that the appellant understood and, when asked if he wished to consult with a lawyer, he answered: “No, I don’t need to.”

[13] The appellant had a backpack and a fanny pack on at the time of detention. Officer Degroot asked the appellant if he had anything sharp on his person, at which time the appellant removed his backpack and started unzipping a large compartment on it. Officer Degroot advised him to stop and the appellant advised that he had insulin and a needle in the backpack. An angle grinder inside the backpack was clearly visible to the officers as the appellant placed it on the ground. Officer Degroot took custody of the partially opened backpack.

[14] The appellant was then placed into the police cruiser and asked further questions. Ultimately, the appellant was released and not arrested. His fanny pack was returned to him with his needle and insulin. Since he said the backpack was not his, the officers seized the backpack.

[15] The backpack was searched at the police headquarters and, in a back pouch (the one worn closest to the body), an officer located a .22-calibre bolt action firearm and one clip of ammunition in the same pocket of the backpack. The firearm was examined and no fingerprints were found. Subsequently, the appellant was arrested and charged with the offences.

[16] After a trial on June 27, 2023, the appellant was found guilty of the offences and, on November 13, 2024, the trial judge imposed a custodial sentence of four years.

[17] On December 2, 2024, the appellant filed a notice of appeal, appealing his convictions. His sole ground of appeal is ineffective assistance of counsel.

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

[19] On April 17, 2025, Mr. William Marks (Mr. Marks), acting as a "friend of the court" on behalf of the appellant, filed the motion.

[20] In addition to the Milette affidavit, the appellant filed two affidavits in support of the motion: one affirmed January 24, 2025 (the first affidavit), and the second affidavit.

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

[22] The 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, and 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.”

[23] 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.

[24] In support of the motion, the appellant alleges that:

- (1) Trial counsel never reviewed the agreed statement of facts with him in advance of filing it as an exhibit at the trial.
- (2) He did not tell the officers that the backpack was not his. He maintains that he told them and advised trial counsel that the backpack was his.
- (3) Now understanding the law better, he would have asked trial counsel to bring a *Charter* challenge (see *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [the *Charter*]) in relation to the search and seizure of the backpack.
- (4) If the *Charter* challenge was unsuccessful, his position would have been that someone else likely placed the firearm in his backpack.

- (5) A miscarriage of justice happened in this case. This could have been avoided had the agreed statement of facts been stated on the record in his presence in court, as he would have flagged the issue on the day of trial, rather than finding out about the issue after conviction and through subsequent counsel.

[25] Since the appellant has advanced the position that he received ineffective assistance of counsel at his trial, trial counsel was put on notice of that position. In response, the trial counsel affidavit was filed responding to the appellant's position. In accordance with this Court's practice direction and the *CA Rules*, the second affidavit and the trial counsel affidavit were sealed and are not part of the public record. However, they were reviewed for the sole purpose of deciding the motion. They will only be considered on the appeal if a motion for fresh evidence is brought by the appellant and is ultimately granted by this Court.

[26] Suffice it to say that the trial counsel affidavit is consistent with the position advanced at trial—that the backpack was not the appellant's.

Test to Assign Counsel

[27] Section 684(1) of the *Code* provides:

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,

Assistance d'un avocat

684 (1) Une cour d'appel, ou l'un de ses juges, peut à tout moment désigner un avocat pour agir au nom d'un accusé qui est partie à un appel ou à des procédures préliminaires ou accessoires à un appel, lorsque, à son avis, il paraît

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.	désirable dans l'intérêt de la justice que l'accusé soit pourvu d'un avocat et lorsqu'il appert que l'accusé n'a pas les moyens requis pour obtenir l'assistance d'un avocat.
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[28] An appellate court judge has discretion to assign counsel to act on behalf of an accused in certain circumstances. Section 684(1) has two components. The accused must demonstrate that (1) it appears desirable in the interests of justice, and (2) it appears that the accused has not sufficient means to obtain that assistance (see *R v Becks*, 2025 MBCA 69 at para 23 [*Becks*]; *Darch* at para 13; *R v JJB*, 2016 MBCA 4 at paras 26-27 [*JJB*]; *R v Bernardo*, 1997 CanLII 2240 at paras 11, 14 (ONCA) [*Bernardo*]).

[29] As to the interests of justice component, Hamilton JA summarized that criteria as follows (*JJB* at paras 28-29):

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.

Analysis and Decision

Sufficient Means

[30] Legal Aid denied the appellant’s application for counsel to be appointed for his appeal. The appellant exhausted all of his appeals through the Legal Aid system. He has a grade nine education and affirmed in his first affidavit that he has no income and no savings to pay for a lawyer. He is presently incarcerated and has no access to computers, the internet, legal materials or precedents, and he states that he does not believe he has the knowledge or tools to advance his appeal effectively.

[31] The appellant did not provide any information in his first affidavit about whether he could obtain funds from his family or whether any loan may be available to him to pay for legal representation.

[32] He provided no information about his previous employment.

[33] While the information provided is limited, the appellant is incarcerated, and I accept his statement that he has no income or savings. I am prepared to conclude, on the basis of this information, that he does not have the financial means to privately retain a lawyer to assist him in the appeal.

The Interests of Justice

[34] The appellant has the onus of demonstrating that there is an arguable ground to appeal his convictions. While the threshold is a low one, I considered, as pointed out by Doherty JA in *Bernardo* at para 22, “[a]ppeals which are void of merit will not be helped by the appointment of counsel”, quoted in *Becks* at para 28 and *JJB* at para 29).

Ineffective Assistance of Counsel

[35] In *R v Ramos*, 2020 MBCA 111 at para 120 [*Ramos*], this Court summarized the prerequisites that must be met to find incompetency affecting the reliability of a verdict, quoting the test from *R v Le (TD)*, 2011 MBCA 83 at para 189 [*Le*]:

To recap, before a court will find incompetency affecting the reliability of the verdict, certain prerequisites must be met. These prerequisites include a factual component (is there a factual foundation to the claim), a prejudice component (is there a miscarriage of justice) and a performance component (is there actual incompetence). As the Supreme Court of Canada said in *G.D.B. [R v GDB]*, 2000 SCC 22] at para. 29, there is no need to evaluate the performance component if the prejudice component has not been proven. In order to determine whether an appeal will be successful on this ground, the following analysis must be undertaken:

- (1) The factual component: an appellant must establish, on a balance of probabilities, the facts on which the claim of

incompetency is based. If that is not established, there is no need to go any further.

(2) The prejudice component: if the factual foundation has been made out, the court will, for the purposes of this component, assume incompetence on the part of counsel. See *Joanisse [R v Joanisse (1995), 102 CCC (3d) 35 (Ont CA)]* at p. 62, Doherty J.A. At this stage, an appellant must establish, on a balance of probabilities, that the presumed incompetence resulted in a miscarriage of justice. If it did not, there is no need to go any further.

(3) The performance component: if it is determined that the reliability of the verdict was affected by the presumed incompetence, the court will then consider whether the actions of counsel were, in fact, incompetent. At this stage of the analysis, the presumption reverts to “a strong presumption that counsel’s conduct fell within the wide range of reasonable professional assistance” and the onus falls on an appellant to establish that it did not (*G.D.B.* at para. 27). Again, that analysis is conducted without the benefit of hindsight.

[emphasis in original]

Factual Component

[36] Following the first hearing, the relevant trial record was filed, including the agreed statement of facts and the transcript of the trial. The factual foundation for the ineffective assistance of counsel argument is based on two primary allegations: (1) the appellant did not know about nor agree to the agreed statement of facts before it was entered as an exhibit at the trial, and (2) the backpack seized by the officers was his.

[37] These two facts are contradicted by a review of the record:

- Trial counsel indicated to the trial judge when the agreed statement of facts was filed: “I’ve reviewed it with [the appellant] and I’ve signed it.”
- Although the agreed statement of facts was filed prior to the appellant entering the courtroom, once the appellant was present, trial counsel stated: “for [the appellant’s] edification we’ve already provided the Agreed Statement of Facts to Her Honour, she’s just reviewing it now, and otherwise we are ready to proceed, if there’s any preliminary issues that need to be addressed.”
- The appellant was present at the trial when Officer Degroot read into the record verbatim responses that the appellant provided to him during the roadside interaction. The appellant twice told him that the backpack was not his and that some guy, whose name he did not know, gave it to him to hold. Officer Degroot testified that the appellant was told that the backpack would remain with them as the appellant had advised them that it was not his, and that it would not be returned to him.
- During closing submissions, both Crown and trial counsel referred to the agreed statement of facts. Trial counsel submitted the following: “ultimately part of the evidence that [the appellant] provided a number of times to [Officer] Degroot

and is in the Agreed Statement of Facts is that the backpack was not his.” Trial counsel repeated, at least four times, in his submissions that the appellant told the officers that the backpack was not his.

[38] The trial counsel affidavit provides a summary of trial counsel’s response to the position now being advanced by the appellant. It is unnecessary to provide details of trial counsel’s response other than to say I considered his affidavit to assess whether the appellant is advancing an appeal with arguable merit.

[39] A review of the trial record and the material filed on the motion fails to establish the factual foundation supporting the appellant’s claim of ineffective assistance of counsel. As an officer of the Court, it is incredible that trial counsel would state that he had reviewed the agreed statement of facts with the appellant and agreed to certain facts without the approval of the appellant.

[40] Further, the appellant sat through the trial and heard numerous references to the fact that the backpack was not his and, if that was incorrect, it is reasonable to expect that he would have brought that to the attention of trial counsel. After the close of the Crown’s case, trial counsel had a lengthy break with the appellant to consider whether the appellant would testify, and it defies logic that the appellant would not have told trial counsel the backpack was his if that was true.

[41] I am not satisfied that the appellant’s allegation that he did not know about the agreed statement of facts and, specifically, that the backpack was not his until after his convictions and after speaking with Mr. Marks, is

credible. In my view, the ground of appeal alleging ineffective assistance of trial counsel lacks arguable merit.

Prejudice and Performance Components

[42] It is therefore unnecessary to review the prejudice component and the performance component of the allegation of ineffective assistance of counsel. Assuming for the moment that the factual component and the prejudice component had been met, there is “a strong presumption that counsel’s conduct fell within the wide range of reasonable professional assistance” (*R v GDB*, 2000 SCC 22 at para 27) and the onus falls on an appellant to establish that it did not (*ibid*). As pointed out in *Ramos*, the analysis must be conducted without the benefit of hindsight (see para 120, quoting *Le* at para 189; see also *Ramos* at para 122). The approach taken by trial counsel was based on the facts that were disclosed to him by the appellant and confirmed during his interaction with the officers at the time he was detained.

[43] Now, with the benefit of hindsight, counsel for the appellant advances the position that the appellant was not given proper advice and that trial counsel ought to have advanced challenges based on alleged violations of sections 8, 9, 10(a) and 10(b) of the *Charter*.

[44] While it is arguable that *Charter* challenges could have been considered if indeed the backpack was the appellant’s, in my view, the decision not to advance a *Charter* challenge fell within the wide range of reasonable professional assistance based on the facts of this case. The assessment of ineffective assistance of counsel must be based on the facts

presented at the trial and what actually occurred during the interaction with the officers.

Conclusion

[45] In the circumstances, I am not satisfied that it is desirable in the interests of justice to appoint counsel as the ground of appeal advanced does not have arguable merit.

[46] The Crown acknowledges, as do I, that it is unlikely that the appellant would be able to effectively present his appeal without the assistance of counsel. The ground of appeal advanced will require the appellant to file a fresh evidence motion and a waiver of solicitor-client privilege and, potentially, to cross-examine trial counsel. The appellant may also be cross-examined by the Crown and trial counsel's counsel. This is one factor I considered in determining whether it is in the interests of justice to grant the motion.

[47] Finally, I considered the broad access to appellate review contemplated by section 675 of the *Code* and that the appellant should have a meaningful opportunity to establish the merit of his ground of appeal. That right must be balanced with a review of the merits of the appeal. In this case, the failure to establish the appeal has arguable merit is fatal to the motion. Ordering legal assistance for an appellant pursuant to section 684(1) requires that the appellant demonstrate both pre-conditions, namely: it is desirable in the interests of justice and the appellant does not have sufficient means to obtain the assistance. In my opinion, it is not desirable in the interests of justice to grant the motion to appoint counsel for the appeal in the circumstances.

Disposition

[48] For the foregoing reasons, the motion is dismissed.

Edmond JA