
INTERVENTION: Legroulx v. Pitre and Labrecque

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The Advocates' Society recently intervened in the case of *Legroulx v. Pitre and Labrecque*. The case involved the issue of whether or not there was a constitutional right to a civil jury trial.

The Advocates' Society's involvement in the case arose in an unusual fashion in that it happened after the case had settled and was by invitation of the court. One of the terms of the settlement agreement was that the parties would proceed, post settlement, to argue the question of whether the judge's decision to dismiss the jury violated the constitutional rights of the defendant, specifically section 7 and section 15 of the *Charter of Rights and Freedoms* ("Charter").

Defendant/moving party

The constitutional question had been brought before the Superior Court of Justice (Justice Dennis Power) by way of a special case, pursuant to Rule 22.01 of the *Rules of Civil Procedure* ("Rules"). The argument was that while there is no express recognition of the right to trial by jury in civil cases under the *Charter* (section 11 of the *Charter* expressly recognizes the right to trial by jury only in certain serious criminal cases), "some degree" of constitutional protection should be recognized implicitly, by virtue of the principles set out in sections 7 and 15(1) of the *Charter*. The defendant also argued that the jurisprudence in respect of the discharge of juries in civil matters lacked clarity, particularly in respect of the ground of "complexity"; the defendant argued that there was no clear definition of what constitutes a case that is too complex to be trusted to a jury and no analysis as to why some cases should not be tried by a jury while others should.

The defendant submitted that the fundamental principles arising from s.7 of the *Charter* were violated on the basis of the significance of a civil suit to a civil litigant. The defendant equated a criminal defendant facing incarceration for commission of a serious offence with a civil litigant facing a multi-million dollar damage suit, which may spell financial ruin and on this basis argued that it was equally detrimental to that civil litigant's "life, liberty and security of the person" to deny him/her a right to trial by jury if he/she so elected ("security" impliedly being economic as opposed to personal security).

There was also a suggestion that s.15(1) of the *Charter* was violated, insofar as the denial of a jury trial to a civil litigant and not criminal defendants was a violation of the equality rights protected under this section. However, the crux of the defendant's oral submission at the Court of Appeal was in respect of s.15 *Charter* violations of discharged jurors. The defendant argued that the spirit of s.15 of the *Charter* should be interpreted to protect the dignity of jurors in not underestimating nor devaluing their abilities as triers of fact. The defendant argued that the dismissal of a civil jury on the basis of complexity was offensive to the discharged jurors and their equality rights (when compared to legal trained judges) were therefore violated.

Plaintiffs/respondents and intervenors: The Advocates' Society and the Ontario Trial Lawyers Association

The position of the plaintiffs and intervenors, including The Advocates' Society, at the Superior Court was five-fold. Firstly, it was submitted that Rules 47.02(2) and 47.02(3) as well as section 108(3) of the *Court of Justice Act* did not engage a s.7 *Charter* right (i.e. a right to life, liberty, and security of the person) and in any event, were not invalid having regard to s. 7 of the *Charter*. Secondly, it was argued that the impugned provisions neither engaged nor violated s. 15(1) *Charter* rights. It was further argued, that the doctrine of vagueness was inapplicable with respect to the s. 7 argument or, for that matter, to the s. 15(1) argument. Similarly, ss. 7 and 15(1) were not applicable to the jurisprudence that developed under these Rules, and alternatively, any violation of ss. 7 and 15(1) of the *Charter* were justifiable under s. 1.

The Advocates' Society also argued, at first instance, on a preliminary basis, that the issue was moot, pursuant to *Borowski*, which states that where the decision of a court will have no practical effect on the rights of the parties, the court will decline to decide the case, unless there is reason for the court to exercise its discretion to depart from this policy/practice.



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In this case, there no longer remained an adversarial context between the parties and no collateral consequences to the parties would result from a decision of this special case. Further, concern for judicial economy and conserving of judicial resources was relevant to a case such as this and these resources should only be expended where there are issues of public importance at stake and this case did not rise to the level of public importance necessary. Finally, The Advocates' Society noted that the Ontario Legislature had already considered this issue when certain amendments to Rules 47.02(2) and 47.03(3) were submitted to the Ontario Legislature by the Law Reform Commission, and since the Legislature had declined to adopt the amendments, it was submitted the matter need not be revisited by the judiciary at this time.

The Advocates' Society position at the Court of Appeal once again focused on the inapplicability of the *Charter*: neither s.7 nor s.15(1) were engaged in the circumstances. More particularly, there was no personal characteristic present or "life interest" engaged, such that s.7 of the *Charter* was applicable (particularly in the context of a corporate civil litigant - i.e. the insurance company - standing in the shoes of the civil defendant) and no analogous ground or comparable group such that s. 15 was applicable. Furthermore, even if the *Charter* rights had been properly engaged and/or contravened, the Rules and jurisprudence in issue were 'saved' as they accorded with principles of natural justice, both substantive and procedural: there was a rational connection between the attempt to ensure a fair trial and the Rules which allow judges to exercise their discretion to strike juries.

Decision of the Ontario Superior Court of Justice - February 11, 2008, Power, J.

While Justice Power was not satisfied that the issues raised were moot (and further held that even if the special case could be considered moot, it was a special case for which the court should exercise its discretion and entertain its jurisdiction to consider the motion), he ultimately dismissed the motion.

Justice Power held that regardless of whether the focus of the constitutional challenge was on Rules 47.02(2),(3) and

section 108(3) of the *Court of Justice Act* or on the jurisprudence that had developed outlining when a judge may discharge a jury in a civil action on the ground of complexity, there was no *Charter* contravention (either s. 7 or 15).

In respect of the *Charter* arguments, Justice Power found that the Defendant failed to establish they are persons who should be included within the rights bestowed by either s.7 or s.15 of the *Charter* and furthermore that they have

been deprived of life, liberty or security of the person. The court was not persuaded that, even if the *Charter* applied, Rules 47.02(2),(3) and section 108(3) of the *Court of Justice Act* and/or the jurisprudence concerning them, were vague so as to deny fundamental justice. Finally, the court concluded that the defendant had failed to demonstrate there was an analogous ground or appropriate comparator group, as

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required by s.15. In respect of the impugned Rules, the court held that while the rules are open-ended, the jurisprudence has established detailed criteria for the exercise of this judicial discretion and that such jurisprudence respects *Charter* values.

Ultimately, the court upheld the Rules and jurisprudence thereunder as valid and compliant with *Charter* values.

Decision of the Court of Appeal for Ontario - October 27, 2009, Laskin, Sharpe and Armstrong, JJ. A.

The panel at the Court of Appeal, being Justices Laskin, Sharpe and Armstrong, after hearing the submission of the defendant, held that while they should not wish to be taken as agreeing with Justice Power's decision to proceed with the *Charter* issues after the case was settled, they did agree that there was no breach of s.7 or s.15 of the *Charter*. Specifically, in respect of s.7, the court held that the defendant had failed to show that the provision applied at all, but in particular applied to a purely economic interest amounting to an interference with "life, liberty and security of the person."

Similarly, in respect of s.15, the court held that the defendant had failed to show discrimination on an enumerated or analogous ground and as such failed to show the applicability of s.15. Moreover, the court did not agree with the defendant's argument that the right of a trial judge to discharge a jury on the grounds of complexity amounted to a breach of the discharged jury's s.15 rights, nor did the court believe that a rule preferring a judge over a lay jury in a complex case demeans or stereotypes within the meaning of *Charter* jurisprudence.

The court noted that a trial judge cannot strike a jury on whim or on inadequate grounds, but rather a trial judge is expected to give a reasoned explanation regarding why the case would not continue before a jury, and that decision is subject to review on appeal. Further, the court rejected the proposition that a judge's discretion to discharge a civil jury was so vaguely defined as to constitute a denial of the principles of fundamental justice. Instead, the court accepted that "the statute, rules and jurisprudence that govern the exercise of that discretion provide an intelligible standard and an adequate basis for legal debate and plainly meet the standard laid down by the Supreme Court of Canada [citation omitted]."

Conclusion

In short, the court accepted the position of The Advocates' Society that the appellant fell well short of establishing that there is a constitutional right to a jury trial for civil litigants. Further, our system works. There are sound principles established by case law which set out the basis upon which a judge may exercise his or her discretion. The administration of justice has been, and will continue to be, well served by maintaining the flexibility of the regime. ■

The Advocates' Society extends its sincere gratitude to Michael Eizenga and Sabrina Lombardi for their representation of the Society at the Court of Appeal, and to Barbara McIsaac, Q.C. for her representation of the Society during the earlier course of this intervention.

Fall Convention in Grand Cayman

Co-chairs **Gordon Capern** of Paliare Roland Rosenberg Rothstein LLP, **Peter Lukasiewicz** of Gowling Lafleur Henderson LLP, and **Tracy Wynne** of Lax O'Sullivan Scott LLP delivered a Fall Convention with record-breaking attendance on November 11-15 at the Ritz-Carlton in Grand Cayman. The menu of CLE -- in turns stimulating, informative, challenging and entertaining -- featured Canadian, Caymanian and American speakers including Rebecca S. Snyder, Deputy Director, Navy-Marine Corps Appellate Defence Division, Office of the Judge Advocate General, who spoke about Guantanamo Bay and the case of Omar Khadr.

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