2020

Access to Justice in Canada: The Unrepresented Accused and the Role of the Trial Judge

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In ***Reference to the Court of Appeal of Quebec pertaining to the constitutional validity of the provisions of article 35 of the Code of Civil Procedure***, 2019 QCCA 1492, the Quebec Court of Appeal recently indicated that "[a]ccess to justice is still one of the major challenges the Canadian judicial system faces" (at paragraph 185). Similarly, at the Official Opening of the Courts of Ontario for 2019-2020 Session, the Chief Justice of Ontario noted that "[o]n a daily basis throughout this province, judges discharge their obligation to assist unrepresented litigants. There are legal and practical limits on their ability to do so. I can tell you from personal experience, shared by every judge in this room, that the pace of a proceeding with an unrepresented litigant slows to a crawl and that every sector of the justice system bears increased costs as a result."

The Chief Justice of Ontario also indicated that "[r]ecent and scheduled reductions in funding of Legal Aid are of great concern to those involved in the justice system, including many of those in this courtroom. …It is not for judges to determine how public funding are to be allocated. …But what we judges can say is that reducing legal representation for the most vulnerable members of society does not save money. It increases trial times, places greater demands on public services, and ultimately delays and increases the cost of legal proceedings for everyone. We can also say that public confidence in the administration of justice is enhanced when the most vulnerable in our society are given a voice, so they can truly be heard."

One of the responses to the issue of access to justice by unrepresented litigants in Canada has been the creation of the *Action Committee on Access to Justice in Civil and Family Matters*, chaired by the former Chief Justice of Canada, Beverly McLachlin. The Committee, in assessing the issue of access to justice, has indicated that it is a serious problem:

> There is a serious access to justice problem in Canada. The civil and family justice system is too complex, too slow and too expensive. It is too often incapable of producing just outcomes that are proportional to the problems brought to it or reflective of the needs of the people it is meant to serve. While there are many dedicated people trying hard to make it work and there have been many reform efforts, the system continues to lack coherent leadership, institutional structures that can design and implement change, and appropriate coordination to ensure consistent and cost effective reform. Major change is needed.[1]

In this edition's column, I intend to look at the issue of access to justice from the perspective of the role of a Canadian trial judge conducting a criminal trial with an unrepresented accused. I will consider what is expected of a Canadian trial judge in such a situation and review some of the avenues open to a Canadian trial judge when the accused wishes to represent themselves and declines available legal representation.

THE ROLE OF THE TRIAL JUDGE WHEN THE ACCUSED IS UNREPRESENTED:

The Canadian Judicial Council, in its *Statement of Principles on Self-represented Litigants and Accused Persons*, has indicated that "[j]udges, the courts and other participants in the justice system have a responsibility to promote opportunities for all persons to understand and meaningfully present their case, regardless of representation"[2].

It has been noted that "[t]raditionally, self-represented litigants were required to bear the full risk of appearing in court without legal representation. They were essentially required to fit into the system without much expectation that the system would or could accommodate any special…circumstances resulting from their lack of representation." However, it "is being increasingly recognized that a judge has a responsibility to be pro-active in the way he or she manages the litigation to ensure that a self-represented litigant can effectively present or defend against the case and, by means of that treatment, perceive the process as being balanced and fair" (see ***Cabana v. Newfoundland and Labrador***, 2018 NLCA 52, at paragraphs 44 and 46).

How pro-active must a judge be? When will being too proactive raise an apprehension of bias? In ***Ontario v. Criminal Lawyers Association of Ontario***, 2013 SCC 43, the Supreme Court of Canada indicated that while "trial judges are obliged to assist unrepresented litigants, they are not permitted to give them strategic advice." Similarly, in ***R. v. Wyatt***, 2018 BCCA 162, the British Columbia Court of Appeal indicated that "[p]roviding the necessary minimal judicial assistance to a self-represented accused can be difficult. …A judge presiding over a criminal trial with a self-represented accused must remain neutral and cannot become the lawyer for the accused" (at paragraph 12).

Thus, we are called upon to assist an unrepresented accused, but without affecting our neutrality, or its appearance. This can be a difficult balance to achieve. However, some guidance can be found in appellate court decisions in which the judge's role in a criminal trial with an unrepresented accused became the focus of the appeal.

Footnotes

1. *See,* cfcj-fcjc.org › action-committee.
2. *See,* https://cjc-ccm.ca/en. In Pintea v. Johns, [2017] 1 S.C.R. 470, the Supreme Court of Canada indicated that it endorsed "the *Statement of Principles on Self-represented Litigants and Accused Persons* (2006) (online) established by the Canadian Judicial Council" (at paragraph 4).

APPELLATE COURT DECISIONS:

In ***R. v. Breton***, 2018 ONCA 753, for instance, a self-represented accused was convicted of a number of offences. On appeal, he argued that the trial judge failed to provide him with adequate assistance.

The Ontario Court of Appeal indicated that it "is well settled that where an accused is self-represented at trial, the presiding judge… must provide assistance to aid the accused in the proper conduct of his defence and to guide him, as the trial unfolds, in such a way that the defence is brought out with its full force and effect" (at paragraph 13).

The Court of Appeal also held that a trial judge has a responsibility to "assist a self-represented accused" to "raise *Charter* issues on the judge's own motion" (at paragraph 15).

The Court of Appeal ordered a new trial, concluding that there was evidence supporting a breach of section 10(b) of the *Charter*, but the trial judge failed to raise or otherwise alert the accused to the issue.

In ***Wyatt***, the accused was convicted of the offence of aggravated assault. He was unrepresented. He appealed from conviction, arguing that the trial judge failed to provide him with adequate assistance. Interestingly, the Crown agreed.

In allowing the appeal, the British Columbia Court of Appeal suggested that the accused's "lack of knowledge of the trial process was apparent." The Court of Appeal pointed out that the accused appeared to believe that the victim's evidence had to be "corroborated" and that "his denial of the offences would be in evidence, without the necessity of him testifying" (at paragraph 10).

The Court of Appeal held that trial judges "have an obligation to provide some minimal assistance to self-represented accused persons." The Court of Appeal noted that providing "the necessary minimal judicial assistance to a self-represented accused can be difficult" and that a trial judge "presiding over a criminal trial with a self-represented accused must remain neutral and cannot become the lawyer for the accused" (at paragraphs 11 and 12).

The British Columbia Court of Appeal held that the trial was "unfair" because the trial judge failed to address Mr. Wyatt's apparent misconception that various witness statements were "in the file" and "were something he could rely upon" (at paragraph 16).

The Court of Appeal concluded that "some step was required by the trial judge to correct the two important misconceptions held by Mr. Wyatt as to the law and process, as these were fundamental to his ability to bring out his defence...the failure to provide assistance to Mr. Wyatt in this regard made the trial unfair" (at paragraph 17).

Recently, in ***R. v. Forrester***, 2019 ONCA 255, a different result was reached. In this case, the accused was convicted of trafficking in a controlled substance. On appeal, he argued that "the trial judge failed to assist him in his defence."

In assessing this ground of appeal, the Ontario Court of Appeal noted that a "trial judge has a duty to assist a self-represented accused and to guide him or her throughout the trial so that his or her defence is brought out with its full force and effect…The scope of the duty depends on the particular circumstances of the case and is circumscribed by what is reasonable. … A trial judge, of course, has other duties, one of which is to ensure that the trial is effective, efficient and fair to both sides. … This includes ensuring that the trial does not become mired in irrelevant evidence and that the rules of evidence are applied fairly to both parties" (at paragraphs 15 and 16).

"[A] Canadian trial judge must take an active role in assisting the accused..."

The appeal was dismissed. The Court of Appeal pointed out that "at the outset of the trial, six days before the appellant was arraigned, the trial judge provided him with a detailed 22-page memorandum concerning trial procedures, important principles of criminal law, the essential elements of the offences with which he was charged, his right to examine witnesses and to call evidence, and certain rules of evidence, among other things" (at paragraph 19).

CONCLUSION-ASSISTING THE UNREPRESENTED ACCUSED:

What are we as trial judges to take of these decisions? We are cautioned about avoiding "becoming the lawyer" for an unrepresented accused, but encouraged to provide assistance, including pointing out and encouraging *Charter* applications. It is impossible to set out any hard and fast rules as to what a trial judge should or should not do when an accused person is unrepresented at trial. However, these appellate court decisions make it clear that a Canadian trial judge must take an active role in assisting the accused; including explaining the process and ensuring that apparent defences are presented. This can be difficult because it runs the risk of the trial judge taking over the defence case and creating a reasonable apprehension of bias against the Crown.

Having said this, there are some cases in which our assistance to an unrepresented accused will not be sufficient. In those cases, we must consider appointing counsel to represent the accused.

THE APPOINTMENT OF COUNSEL:

One of the obvious ways to alleviate the concerns raised by an unrepresented accused is to appoint counsel to represent him or her. In Canada, this can be achieved through statutory provisions or through the Constitution.

STATUTORY PROVISIONS:

There are statutory provisions that allow a Canadian judge to appoint counsel to represent an accused person.

The *Youth Criminal Justice Act*, R.S.C., 1985, for instance, allows a youth court judge to appoint counsel to represent a young person who is unable to obtain counsel through legal aid. When such an order is issued, the Attorney General must arrange for counsel to represent the young person (see sections 25(4) and (5) of the *Youth Criminal Justice Act*). In addition, the *Criminal Code of Canada*, R.S.C., 1985, allows for the appointment of counsel on appeal. Section 684 of the *Criminal Code* allows a court of appeal to "assign counsel to act on behalf of an accused who is a party to an appeal" if it "appears desirable in the interests of justice" to do so.

These types of provisions include statutory limitations on when a Canadian judge can appoint counsel. A much broader scope for the appointment of counsel has been found in the Canadian Constitution.

"'[T]here is no constitutional right to funded legal counsel in every case...'"

THE CANADIAN CONSTITUTION:

The common law does not "recognize the right of a person charged with a felony to be defended by counsel" (see ***R. v. Rowbotham*** (1988) 41 C.C.C. (3d) 1 (Ont. C.A.), at paragraph 147). In addition, the Alberta Court of Appeal has noted that "[w]hile an accused person has a constitutional right to a fair trial, there is no constitutional right to funded legal counsel in every case, nor is representation by a lawyer a prerequisite to a fair trial" (see ***R. v. Phillips***, 2003 ABCA 4, at paragraph 10).

The Canadian Constitution does not contain a provision that specifically provides a guarantee to be represented by counsel. Section 10(b) of the *Canadian Charter of Rights and Freedoms*, *Constitution Act, 1982*, for instance, only protects the right of an arrested or detained person to be informed of their right to contact counsel.

Sections 7 and 11(d) of the *Charter* protect the right of an accused person not to be denied their liberty "except in accordance with the principles of fundamental justice" and to trial "by an independent and impartial tribunal." It is these two latter provisions that formed the basis for the Ontario Court of Appeal's conclusion that "in cases not falling within provincial legal aid plans, ss. 7 and 11(d) of the *Charter*…require funded counsel to be provided if the accused wishes counsel, but cannot pay a lawyer, and representation of the accused by counsel is essential to a fair trial" (***Rowbotham***, at paragraph 156).

Applications for the appointment of counsel have become known in Canada as "***Rowbotham*** applications." The Ontario Court of Appeal held in ***Rowbotham***, that "a trial judge confronted with an exceptional case where legal aid has been refused, and who is of the opinion that representation of the accused by counsel is essential to a fair trial, may, upon being satisfied that the accused lacks the means to employ counsel, stay the proceedings against the accused until the necessary funding of counsel is provided" (at paragraph 167).

Recently, in ***R. v. Imona-Russel***, 2019 ONCA 252, the Ontario Court of Appeal indicated that the "three prerequisites for a *Rowbotham* order are that: the accused must have been refused Legal Aid; the accused must lack the means to employ counsel; and representation for the accused must be 'essential to a fair trial'" (at paragraph 38).

The Court of Appeal also held in ***Imona-Russel*** that "[t]rial and motion judges must evaluate whether appointing counsel under a *Rowbotham* order is necessary for a fair trial on a case-specific basis, having regard to relevant factors, including the seriousness of the charges, the likelihood of imprisonment, the length and complexity of the proceedings in terms of the factual evidence, and the procedural, evidentiary and substantive law that would apply. The judge must also attend to the possibility of specialized procedures such as *voir dires*, and the accused's personal ability to participate effectively in defending the case" (at paragraph 40).

As can be seen, the power to appoint counsel has been given a broad scope. It is not limited to any specific types of cases or involve any characterization of the accused.

The power to appoint counsel alleviates, in a specific case, the difficulties that arise when an accused person is unrepresented. But, what if that accused person does not want counsel appointed and wishes to represent him or herself?

WHAT IF THE ACCUSED DOES NOT WANT TO BE REPRESENTED BY COUNSEL?

In ***R. v. Cunningham***, 2010 SCC 10, the Supreme Court of Canada indicated that a court "cannot force counsel upon an unwilling accused" (at paragraph 9):

> An accused has an unfettered right to discharge his or her legal counsel at any time and for any reason. A court may not interfere with this decision and cannot force counsel upon an unwilling accused (see *Vescio v. The King*, [1949] S.C.R. 139, at p. 144; though exceptionally the court may appoint an *amicus curiae* to assist the court). Counsel, on the other hand, does not have an unfettered right to withdraw. The fiduciary nature of the solicitor-client relationship means that counsel is constrained in his or her ability to withdraw from a case once he or she has chosen to represent an accused...[3]

When an accused person wishes to represent him or herself, there are avenues open to a Canadian judge to alleviate the problems that can arise. These are based in statute and at common law.

STATUTE:

One of the available options for a trial judge is the appointment of counsel for limited purposes, even when the accused does not wish to be represented by counsel. For instance, section 486.3(1) of the *Criminal Code* indicates that a Canadian judge "shall" appoint counsel to cross-examine a witness who is under eighteen years of age, unless the judge concludes that the "proper administration of justice" requires personal cross-examination by the accused. Either the Crown or the witness can apply to the court for counsel to be appointed under this provision. Similarly, section 486.3(2) of the *Criminal Code* indicates that the judge "shall" appoint counsel for the purpose of the cross-examining of a witness in relation to a list of specified offences (criminal harassment and a number of sexual offences). There is no age limitation in this provision.

Interestingly, in both provisions the order is mandatory, unless that judge concludes that the proper administration of justice requires personal cross-examination, an outcome that would appear unlikely in most cases. Once counsel is appointed, he or she conducts the cross-examination, not the accused.

Finally, section 486.3(3) of the *Criminal Code* allows a Canadian judge to appoint counsel to cross-examine a witness to which subsection (1) and (2) do not apply. The appointment, however, is not mandatory. The judge must be satisfied that the

3. However, the Supreme Court also concluded that a court can refuse to allow counsel to withdraw if "withdrawal is sought because of non-payment of legal fees" (at paragraph 50).

appointment of counsel is necessary for "a full and candid account" to be obtained from the witness. The unrepresented accused can argue that counsel should not be appointed, but if counsel is appointed, the unrepresented accused is prohibited from conducting the cross-examination.

In ***R. v. Atzenberger***, 2018 BCCA 296, and ***R. v. Wapass***, 2014 SKCA 76, it was held that the accused cannot discharge counsel appointed pursuant to these provisions without approval of the court.

These provisions limit the right of the unrepressed accused to conduct certain cross-examinations. Is there a broader scope for a Canadian trial judge to impose counsel upon an accused person who does not want to be represented by counsel?

THE APPOINTMENT OF AMICUS CURIAE:

In some cases, an appointment of counsel beyond a limited role will be necessary. What can a Canadian trial judge do if such a case arises, but the accused does not wish to be represented by counsel. One solution is the appointment of an *amici curiae*.

In ***Ontario v. Criminal Lawyers Association of Ontario***, the Supreme Court of Canada indicated that it "is not disputed that a court may appoint a lawyer as '*amicus curiae*', a 'friend of the court', to assist the court in exceptional circumstances; or that the Attorney General is obligated to pay *amici curiae* when appointed" (at paragraph 2).

The Supreme Court of Canada indicated that the "capacity of a superior court to appoint an *amicus* stems from the court's inherent jurisdiction to act where necessary to ensure that justice can be done. For a statutory court, the capacity stems from the court's power to manage its own process and operate as a court of law, and arises in situations where the court must be able to appoint an *amicus* in order to exercise its statutory jurisdiction" (at paragraph 12).

"These provisions limit the right of the unrepressed accused to conduct certain cross-examinations."

Recently, in ***R. v. Verma***, 2019 BCCA 14, the British Columbia Court of Appeal held that two principles "guide the courts in determining whether to appoint *amicus curiae*: (a) the appointment must be essential to the discharge of the judicial function; and (b) the court must be wary of making an appointment that blurs the line between the role of friend of the court and the role of defence counsel" (at paragraph 33).

In ***Ontario v. Criminal Lawyers Association*** the Supreme Court cautioned, however, against the overuse of such appointments, pointing out that the appointment of *amicus* should "be used sparingly and with caution, in response to specific and exceptional circumstances" (at paragraph 47).

THE ROLE OF AMICUS CURIAE:

In ***Imona-Russel***, the Ontario Court of Appeal considered the differences between appointed counsel and *amicus curiae*. It pointed out that "since *amicus* does not represent the accused person, the accused person may not discharge amicus" (at paragraph 67). In addition, the Court of Appeal indicated that "while *amicus* may assist in the presentation of evidence, *amicus* cannot control the litigation strategy. While there may be an issue about whether a trial judge may impose a privilege on communications between *amicus* and the accused person, the necessary confiden-

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tiality can flow from an express Crown undertaking in consenting to the appointment of amicus" (at paragraph 68).

The Court of Appeal also held that while "it remains open to trial judges to appoint *amicus* where no ***Rowbotham*** appointment should be made…or to appoint ***amicus*** to function alongside a ***Rowbotham*** appointee, where there is a real risk that the accused will discharge counsel as a way of disrupting the trial. …It remains open to trial judges to make similar ***amicus*** appointments where the conditions warrant such an order, but exceptionally, bearing in mind the principles laid out by the Supreme Court in [*Criminal Lawyers Association*]" (at paragraph 94).

FIXING THE RATES FOR AMICUS COUNSEL:

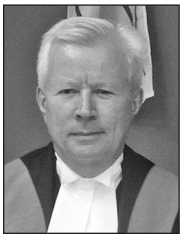
The Supreme Court asked itself in ***Ontario v. Criminal Lawyers Association*** "whether a court's inherent or implied jurisdiction extends to fixing the rates of compensation for *amici curiae*" (at paragraph 2). The Supreme Court of Canada held "the power to appoint *amici curiae*" does not "provide the power to determine what the Attorney General must pay them. ... As the Chief Law Officers of the Crown, responsible for the administration of justice on behalf of the provinces, the Attorneys General of the provinces, and not the courts, determine the appropriate rate of compensation for *amici curiae*" (at paragraph 5).

The Supreme Court of Canada concluded that "if the assistance of an ***amicus*** is truly essential and the matter cannot be amicably resolved between the ***amicus*** and the Attorney General, the judge's only recourse may be to exercise her inherent jurisdiction to impose a stay until the ***amicus*** can be found. If the trial cannot proceed, the court can give reasons for the stay, so that the responsibility for the delay is clear" (paragraph 76).

CONCLUSION:

An unrepresented accused can create significant problems for trial judges. It has been pointed out that a "judge must exercise great care not to descend from the bench and become a spectre at the accused's counsel table, placing himself 'in the impossible position of being both advocate and impartial arbiter'" (see ***Phillips***, at paragraph 24). However, it is clear that a Canadian judge has a responsibility to provide assistance to an unrepresented accused.

As a result, the scope of the decision in ***Breton*** is troubling. It suggests that the duty of a trial judge to intervene to assist the unrepresented accused is an expansive one, including providing assistance to the accused in raising *Charter*-based arguments. It puts trial judges in a difficult if not untenable position. Presenting a *Charter*-based argument can be complex and often requires a thorough appreciation of evidence of which the trial judge will be unaware. It invites excessive intervention on behalf of the accused by the trial judge and the potential of the judge's appearance of neutrality being brought into question by having provided "strategic advice" to the accused.



Wayne Gorman is a judge of the Provincial Court of Newfoundland and Labrador. His blog (Keeping Up Is Hard to Do: A Trial Judge's Reading Blog) can be found on the web page of the Canadian Association of Provincial Court Judges. He also writes a regular column (Of Particular Interest to Provincial Court Judges) for the Canadian Provincial Judges' Journal. *Judge Gorman's work has been widely published. Comments or suggestions to Judge Gorman may be sent to wgorman@provincial.court.nl.ca.*

Answers to Crossword
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