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A Superior Court's Inherent Jurisdiction to Infringe the Charter Right to a Jury Trial?

By: Admin

Case Commented On: *R v Boisjoli*, 2018 ABQB 410 (CanLII)

The decision of Justice Eldon J. Simpson in *R v Boisjoli* is unusual. On April 5, 2018, the Crown and the accused, Mr. Boisjoli, appeared before Justice Simpson to select jurors for a trial scheduled for the week of April 9. The charge (or one of the charges) was one of intimidation of a justice system participant, contrary to section 423.1 of the *Criminal Code*, RSC 1985, c C-46. However, no jury was selected on April 5. Instead, Justice Simpson, by his own motion and under the claimed authority of the court's inherent jurisdiction, ordered that Mr. Boisjoli's trial go ahead as a trial by judge alone. Justice Simpson's order was made because of the anticipated behavior of Mr. Boisjoli, i.e. that he intended to "artificially frustrate the jury selection process" (at para 24) and "disrupt and sabotage" the jury trial (at para 37). There was only a brief mention of Mr. Boisjoli's *Charter* right to a trial by jury, and no *Charter* analysis. Instead, Justice Simpson relied upon an analogy to a section in the *Criminal Code* that equated an accused's non-appearance with a waiver of a jury trial.

That was not the only curious aspect of the decision. According to media reports, on April 9, in the trial by judge alone, before any evidence was heard but after the Crown began to outline its case, Justice Sterling Sanderman interrupted the Crown to say: "It seems like you're going after a mosquito with a bazooka, but it's your call" and the Crown stayed the charges against the accused later that day: 'Paper terrorism' trial against Freeman on the Land collapses as charges stayed. Justice Simpson's written decision ending the trial by jury process and ordering a trial by judge alone was dated and released May 22, five weeks after the charges were stayed in front of Judge Sanderman. Justice Simpson's written decision begins by acknowledging his April 5 order was an unusual one, while asserting that the circumstances that led to it are not unique and therefore his May 22 decision was written to provide reasons for his April 5 order (at para 2).

Nowhere in Justice Simpson's written decision does it say what charge or charges Mr. Boisjoli was facing in the trial scheduled to be heard the week of April 9. However, there are enough clues within the decision to link the trial and Justice Simpson's order to a well-publicized series of events. According to a September 21, 2016 story in the *National Post*, In Canadian first, Edmonton police charge Freeman on the Land with 'paper terrorism' in speeding ticket dispute:

> In a precedent-setting move against a self-proclaimed Freeman on the Land, a 45-year-old man has been charged with intimidation of a justice system participant by filing a deluge of documents in court.

> The charges against Allen Boisjoli of Vegreville stem from a speeding ticket issued by a community peace officer outside Edmonton in May 2015.
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> Boisjoli filmed the incident, posted to YouTube, and then launched a campaign of legal filings against the officer. He attempted to file a lien against the officer in Edmonton courts, claiming that the officer was liable for $225,000 for detaining him and issuing the ticket.

For more coverage, see 'Paper terrorism' leads to charges against Alberta Freeman on the Land, 'These people are psychopaths': accused paper terrorist, and Freeman on the Land accused of 'paper terrorism' has hostile exchange with judge.

The *National Post* story notes that, in October 2015, Court of Queen's Bench Associate Chief Justice John Rooke had declared Mr. Boisjoli to be a "vexatious litigant" who was restricted from filing or continuing actions in all Alberta courts.

Justice Rooke's decision in *Re Boisjoli*, 2015 ABQB 629 (CanLII), dated October 2015, details the events that led to Mr. Boisjoli's lien being filed against the property of the community peace officer who issued the speeding ticket. It notes that Mr. Boisjoli has been previously tried and convicted of criminal intimidation and harassment targeting government workers and his total gaol sentence exceeded one year. It goes on to add that he claimed his criminal activities were legal on an OPCA basis, grounded his lawsuits in OPCA pseudolaw, unsuccessfully defended civil proceedings using OPCA arguments, and was subject to repeated judicial rulings that his OPCA documents and schemes were invalid, frivolous and vexatious (at para 19). OPCA is an acronym for Organized Pseudolegal Commercial Argument, a phenomenon named and explained in Justice Rooke's oft-cited decision in *Meads v Meads*, 2012 ABQB 571 (CanLII). In his written decision, Justice Simpson called OPCAs "a kind of self-destructive extremist political ideology that circulates in antisocial subcommunities" (at para 9).

Justice Rooke's 2015 decision appears to have been an impetus for the criminal charges of intimidation of a justice system participant that were laid against Mr. Boisjoli that were to be heard in a trial by jury in April 2018. In a part of his judgment headed "The Criminal Character of Boisjoli's Actions," Justice Rooke noted that Mr. Boisjoli's documents included a claim against the community peace officer for issuing a traffic ticket after he observed Mr. Boisjoli speeding (at para 60). Justice Rooke then quotes section 423.1(1) of the *Criminal Code*, which provides as follows:

> 423.1 (1) No person shall, without lawful authority, engage in any conduct with the intent to provoke a state of fear in
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> (a) a group of persons or the general public in order to impede the administration of criminal justice;
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> (b) a justice system participant in order to impede him or her in the performance of his or her duties; or
>
> (c) a journalist in order to impede him or her in the transmission to the public of information in relation to a criminal organization. (emphasis

added)

After noting that the community peace office was obviously a justice system participant (at para 62), Justice Rooke stated:

> I conclude that, on a balance of probabilities, Boisjoli has attempted to intimidate and intended to intimidate a justice system participant, the Officer, contrary to Criminal Code, s 423.1. I make this finding as a basis for possible prosecution under the Criminal Code and, more explicitly herein, for the purposes of evaluating whether Boisjoli is currently engaged in vexatious litigation, and as a consequence should be the subject of a vexatious litigation order under the *Judicature Act* (at para 63, emphasis added).

Criminal Code offences must, of course, be proven by the Crown beyond a reasonable doubt, not on the balance of probabilities as in the civil proceedings before Justice Rooke. Justice Rooke also directed that his order and Mr. Boisjoli's documents be sent to the Minister of Justice and Attorney General for possible action against Mr. Boisjoli (at para 126). According to the *National Post* news story, Mr. Boisjoli was arrested and charged with intimidation of a justice system participant on August 27, 2016.

Subsequent events are detailed in Justice Simpson's written decision of May 22. As Justice Simpson noted, Mr. Boisjoli was not a cooperative participant in the criminal proceedings based on the intimidation of a justice system participant charges (at para 3). His basic position was that the Alberta courts had no jurisdiction over him and no Canadian or Alberta law applied to him – a familiar OPCA position described in Justice Simpson's written decision (at para 8). Mr. Boisjoli appears to have attended court when required to do so, but he refused to enter a plea and he refused to elect between trial by judge and jury or trial by judge alone (at paras 6-7).

Criminal Code section 606(2) states that a plea of not guilty is entered when an accused refuses to plead. *Criminal Code* section 565(1)(c) states that an accused is deemed to have elected trial by judge and jury if the accused does not elect. Those sections explain why Mr. Boisjoli ended up with a trial by judge and jury and with jury selection to begin on April 5 of this year.

Justice Simpson then noted that not only did Mr. Boisjoli deny the courts' jurisdiction, but he was actively obstructionist when he appeared in court (at para 11). Justice Simpson's illustration of this point is from a transcript of the March 20 pre-trial conference before Justice Sanderman (at paras 11-17) – the same justice who analogized Mr. Boisjoli to a mosquito and the criminal charge of intimidation that he was facing to a bazooka. While the pre-trial conference was to be about issues such as whether the trial would proceed with or without a jury, Mr. Boisjoli only wanted to discuss the court's jurisdiction, or lack of it.

Mr. Boisjoli's conduct was not much different when he appeared before Justice Simpson on April 5. Not only was Mr. Boisjoli not prepared to cooperate in the selection of a jury, he was not prepared to remain silent either (at paras 18-24). As a result, Justice Simpson wrote:

> I concluded that Mr. Boisjoli by his conduct was attempting to frustrate the system, and was frustrating the system. He intended to thereby impede the administration of justice. Mr. Boisjoli had no right to squander the resources of the court. I therefore cancelled the jury selection under the Court's inherent jurisdiction. The trial would proceed on a judge-alone basis (at para 24, emphasis added).

In explaining the legal basis of his order, Justice Simpson began with *R v Jordan*, 2016 SCC 27 (CanLII), its challenge to "a culture of delay and complacency," and its call to "better promote the administration of justice and the efficient use of scarce court resources," citing (at para 26) the following observation of the Supreme Court majority:

> Each procedural step or motion that is improperly taken, or takes longer than it should, along with each charge that should not have been laid or pursued, deprives other worthy litigants of timely access to the courts (*Jordan* at para 43, emphasis added).

That particular quote seems at least somewhat ironic given the scarce court resources wasted on the intimidation charge against Mr. Boisjoli that was, in the end, stayed. More importantly, it seems to elevate the efficient use of scarce court resources to the status of a competing right. While the efficient use of scarce court resources could be a factor in a *Charter* analysis even in a criminal matter, it is not used in that way here.

Justice Simpson then relied upon three further Supreme Court of Canada decisions: *R v Cody*, 2017 SCC 31 (CanLII) at para 38 concerning the need to dismiss meritless applications summarily; *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, 2014 SCC 59 (CanLII) at para 47 confirming "[t]here is no constitutional right to bring frivolous or vexatious cases"; and the endorsement in *Pintea v Johns*, 2017 SCC 23 (CanLII) at para 4 of the Canadian Judicial Council Statement of Principles on Self-represented Litigants and Accused Persons (2006) which stated that "[v]exatious litigants will not be permitted to abuse the process" (*Boisjoli* at paras 27-29). The principle that Justice Simpson synthesized from these authorities is the very general one that "where a self-represented accused appears in court and attempts to frustrate the conduct of the criminal proceeding then a court may take steps under its inherent jurisdiction in response" (at para 30). There is at least a suggestion in his conclusion that these Supreme Court cases support a more expansive view of a superior court's jurisdiction.

It is only at this point that Justice Simpson finally turned to the constitutional right to a trial by jury in section 11(f) of the *Charter*, which provides:

> 11. Any person charged with an offence has the right
> …
> (f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment; (emphasis added)

The previously quoted section 423.1(1) *Criminal Code* offence is an indictable offence and those convicted are liable to imprisonment for a term of not more than fourteen years: section 423.1(3). The charge against Mr. Boisjoli was therefore included within the scope of section 11(f). However, rather than discussing the applicable *Charter* right, or its purpose, Justice Simpson immediately moved to section 598(1) of the *Criminal Code*, a "jury forfeiture" provision, which sets out what happens when an accused fails to appear for their trial:

> 598 (1) Notwithstanding anything in this Act, where a person ... has elected or is deemed to have elected to be tried by a court composed of a judge and jury and, at the time he failed to appear or to remain in attendance for his trial, he had not re-elected to be tried by a court composed of a judge without a jury or a provincial court judge without a jury, he shall not be tried by a court composed of a judge and jury unless
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> (a) he establishes to the satisfaction of a judge of the court in which he is indicted that there was a legitimate excuse for his failure to appear or remain in attendance for his trial; or
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> (b) the Attorney General requires pursuant to section 568 or 569 that the accused be tried by a court composed of a judge and jury. (emphasis in *R v Boisjoli* at para 31)

As Justice Simpson next noted (at para 33), the Supreme Court in *R v Lee*, 1989 CanLII 21 (SCC), decided that while section 598(1) of the *Criminal Code* infringed section 11(f) of the *Charter*, the restriction was justified under section 1 of the *Charter*. Justice Simpson quoted the majority decision of Justice Lamer on the section 1 justification issue on the purpose of section 598(1), namely "the 'cost' to potential jurors and to the criminal justice system in terms of economic loss and of the disaffection created in the community for the system of criminal justice."

Justice Simpson then asserted that the situation created by Mr. Boisjoli's conduct was analogous to the situation governed by section 598(1) (at para 35).

After reiterating the abusive nature of Mr. Boisjoli's conduct, Justice Simpson concluded:

> Put another way, Mr. Boisjoli might as well have failed to attend the jury selection process. He was not there to be present and silent, but as an agent of havoc. If a jury is forfeit by an accused's non-attendance, I cannot see why an accused person should be entitled to a jury proceeding where the accused person intends to disrupt and sabotage it.
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> That is why, in this circumstance, I concluded that the Court's inherent jurisdiction permitted me and required me to cancel jury selection to order that Mr. Boisjoli's trial proceed before a judge, alone (at paras 37-38).

It is not clear if Justice Simpson was interpreting section 598(1) broadly to include an accused who appeared and acted abusively, as well as one who failed to appear – which might be signaled by the use of "analogy" – or whether he was creating a new exception to the constitutional right to a trial by jury, suggested by his use of the inherent jurisdiction concept. It

is not difficult to understand Justice Simpson's impulse. But the latter is an assertion of the court's inherent jurisdiction to infringe *Charter* rights.

There are alternatives for dealing with difficult accused persons that do not involve taking away the right to a jury. An example of several of these can be seen in the July 2015 decision of Justice Michael Code of the Ontario Superior Court of Justice in *R v Jaser*, 2015 ONSC 4729 (CanLII).

R v Jaser involved a contentious hearing into fitness for sentencing for Chiheb Esseghaier. Mr. Esseghaier and a second man, Raed Jaser, had been convicted of conspiracy to commit murder for the benefit of a terrorist group in March 2015. Mr. Esseghaier had refused to enter a plea and so was tried by judge and jury. He refused to participate in the trial because he was only willing to be tried pursuant to the Qur'an. He refused to be represented by a lawyer who accepted the *Criminal Code*, rather than the Qur'an, as the governing law for the trial and was therefore a self-represented litigant. He was adamant that he would not attend his trial if it was conducted under the *Criminal Code*, and he threatened to disrupt the trial (at paras 6-13).

Justice Code noted that Mr. Esseghaier had been "a challenging accused and, on two occasions, there have been significant difficulties and I have had to remove him from the court room pursuant to the powers set out in s. 650(2)(a)" (at para 6). He was placed in a cell with a video and audio link to the court room (at para 13). Section 650(2)(a) of the *Criminal Code* allows a court to have an accused removed and kept out of court "where he misconducts himself by interrupting the proceedings so that to continue the proceedings in his presence would not be feasible." Justice Code had also appointed an *amicus curiae* after Mr. Esseghaier insisted on representing himself. The *amicus* conducted the jury selection.

The courtroom removals were followed by negotiations between Mr. Esseghaier and Justice Code in which conditions for his attendance in court were worked out (at paras 12-16), as were the means by which his closing address was put to the jury (at para 18). During the trial, Mr. Esseghaier did confer with the *amicus* on occasion (at para 17). The jury selection and trial were not free from misconduct on Mr. Esseghaier's part, but Justice Code dealt with it.

It appears that Mr. Esseghaier was more cooperative in the end than Mr. Boisjoli appeared to be willing to be. Nevertheless, the *Jaser* trial illustrates there are other ways to deal with disruptive accused persons than by denying them a trial by jury.

Asserting a superior court's inherent jurisdiction to infringe upon the section 11(f) *Charter* right of an accused without a *Charter* analysis appears to set a new precedent. True, the charges were stayed so that Justice Simpson's decision had little impact on Mr. Boisjoli. However, such a precedent uses little understood and contentious powers of the court to achieve a result better accomplished through other, more ordinary means.

This and previous posts about cases involving alleged or self-proclaimed Freemen on the Land or others at the extremist end of the OPCA spectrum are written by "Admin" in order to shield individual blog writers from the harassment and threats that writing about members of such

groups has attracted in the past, and to encourage writing on new legal developments in this area of the law.

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