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R v Boudreau: Senior Crown Recused Due to Hostility, "Animus" Toward Accused

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Case Commented On: *R v Boudreau*, 2021 ABPC 175 (CanLII)

In *R v Boudreau*, 2021 ABPC 175 (CanLII), Judge F. K. MacDonald for the Provincial Court of Alberta ordered that Mr. Mark Huyser-Wierenga, a Crown prosecutor, recuse himself from conducting a prosecution against the accused, Mr. William Boudreau. Judge MacDonald found that Mr. Huyser-Wierenga's conduct showed "a lack of objectivity and an inappropriate hostility" to Mr. Boudreau's defense counsel, Ms. Ellen Sutherland (at para 110). Mr. Huyser-Wierenga also put himself in a position of conflict and conducted himself recklessly or with unacceptable negligence. In this unusual decision, Judge MacDonald issues a stern rebuke to a very senior male Crown prosecutor who not only treated junior female defence counsel discourteously and unprofessionally, but also gave rise to a reasonable apprehension of bias against the accused by making himself a witness and using hyperbole and overstatement when before the court.

Facts

Mr. Boudreau was charged with several offences related to an incidence of domestic violence, including intimidation, assault, assault causing bodily harm, choking, and sexual assault. The events giving rise to the charges allegedly occurred on March 20th and 21st, 2020. The matter was subsequently set for trial on December 18th, 2020.

The events which prompted Ms. Sutherland to apply for an order that Mr. Huyser-Wierenga be recused from the prosecution occurred on the eve of trial, December 17th, 2020. Mr. Huyser-Wierenga met with Ms. Sutherland in a court anteroom and informed her that he was aware the accused had been in contact with the complainant, which was in violation of his bail conditions. Mr. Huyser-Wierenga did not provide Ms. Sutherland with information she asked for about the contact, which included a face-to-face meeting and some text messages. He allowed her to view, but did not provide her with copies of, some text messages between the complainant and the accused. The text messages contained an attempt to convince the complainant not to testify, as well as insulting comments about Mr. Huyser-Wierenga and his visual impairment.

Immediately following this conversation, Mr. Huyser-Wierenga applied to adjourn the trial and revoke the accused's bail. Ms. Sutherland objected on the grounds that she had received scant notice and nothing about the allegations in writing. Mr. Huyser-Wierenga then twice offered to testify. The court refused on the grounds that testifying in the case would prevent Mr. Huyser-Wierenga from prosecuting it, so Mr. Huyser-Wierenga called his assistant as a witness instead. The accused's bail was revoked and he was arrested.

Ms. Sutherland filed a motion for recusal on March 19th, 2021 and made oral arguments on April 22nd, 2021. She made this application after trying twice to obtain disclosure from Mr. Huyser-Wierenga about his conversations with the complainant, arguing that he had improperly taken on an investigative role in the prosecution. The subsequent decision from Judge MacDonald found that by behaving discourteously to defence counsel, making himself a witness in a criminal proceeding, and using imprecise language when before the court, Mr. Huyser-Wierenga created a reasonable apprehension of bias and was required to recuse himself from the prosecution.

The Law on Recusal

The court's inherent power to control its own process includes the power to deny audience to counsel (at para 15). However, the evidence on the application to recuse must show that "the Crown knew or ought to have known that their conduct had the effect of undermining the integrity of the judicial process." (at para 18, citing *R v Colson*, [2002] OJ No 1576, [2002] OTC 301 (Ont Sup Ct J) at para 17) The test is objective: would a fair-minded, reasonably informed member of the public conclude that the proper administration of justice required the prosecutor's removal (at para 19)? The onus is on the applicant to prove that a reasonably informed member of the public would, on a balance of probabilities, so conclude.

Discourteous Behaviour

In assessing Mr. Huyser-Wierenga's conduct, Judge MacDonald concluded that the evidence clearly established that Mr. Huyser-Wierenga had behaved in a hostile and confrontational manner to Ms. Sutherland. The context in which Mr. Huyser-Wierenga had acted inappropriately was, in fairness, quite serious: the accused had contacted the vulnerable complainant, a victim of domestic violence, on the eve of trial to attempt to obstruct justice by convincing her not to testify. Indeed, Judge MacDonald commented, "any decent and reasonable human being might well feel angry and indignant on behalf of the complainant … affronted by the boldness of the attempted obstruction … [and] nettled by the demeaning and insulting terms by which [Mr. Huyser-Wierenga] is portrayed [in the accused's messages] and, in particular, the derisive references to his disability." (at para 26) However, Judge MacDonald continued:

> … Mr. Huyser-Wierenga is not a man on the street. Mr. Huyser-Wierenga is one of the most senior Crown prosecutors practicing in Edmonton General Prosecutions. He has been a Crown Prosecutor for over 30 years. I doubt this is the first time he has been referred to disparagingly by an accused in a criminal case. His manner of address to Ms. Sutherland, who was called to the bar in 2020, was discourteous and unprofessional. The irony is not lost on me that, in service to the welfare of the female complainant, Mr. Huyser-Wierenga visited his outrage on a junior and female member of the bar. (at para 26)

Judge MacDonald further commented that Mr. Huyser-Wierenga's conduct violated the Law Society of Alberta, *Code of Conduct*, 2020 provisions requiring that lawyers demonstrate courtesy and good faith (paragraph 5.1-6 and 7.2-1 in particular). Despite the seriousness of this behaviour, he went on to conclude that this regrettable conduct was not enough to justify an inference of bias by itself. When combined with Mr. Huyser-Wierenga's blurring of the line between prosecutor

and investigator and his other behaviour in court, however, a reasonable apprehension of bias was made out.

The Prosecutor as Investigator

By acting as an investigator, creating new discloseable material, and failing to disclose it, Mr. Huyser-Wierenga fatally damaged his ability to prosecute the accused objectively. Mr. Huyser-Wierenga refused on December 18th, 2020 to give Ms. Sutherland information about his communication with the complainant. Ms. Sutherland requested this disclosure twice, and Mr. Huyser-Wierenga responded with general information (described by Judge MacDonald as a "cursory memo" at para 58) but did not provide copies of his communication with the complainant. Ms. Sutherland argued that the Crown was required to make disclosure of emails received from the complainant; that the Crown should have kept records of times, dates, and content of pre-trial preparation meetings with the complainant and should disclose them; that the Crown conducted an investigation and is now a witness; and that the Crown was deliberately withholding evidence in such a way that the accused's right to full answer and defence was prejudiced.

Relying on *R v Stinchcombe*, [1991] 3 SCR 326, 1991 CanLII 45, *R v Stinchcombe*, [1995] 1 SCR 754, 1995 CanLII 130 and *R v Stinchcombe*, 1994 ABCA 113 (CanLII), Judge MacDonald held that some of what Ms. Sutherland requested should have been provided to support Mr. Huyser-Wierenga's application to adjourn the trial: specifically, text communications between the complainant and the accused, information about a letter or affidavit the complainant had reportedly written at the urging of the accused, and more information about an in-person interaction between the complainant and the accused that occurred the week before the scheduled trial date on December 18th, 2020.

Judge MacDonald held that information about these interactions was relevant to the accused's defence on his substantive charges. By failing to disclose this relevant evidence, Mr. Huyser-Wierenga put himself in the position of being "potentially and realistically" a witness to the complainant's statements (at para 71). This intermingling of the Crown and investigative roles, when combined with Mr. Huyser-Wierenga's questionable behaviour toward Ms. Sutherland and his other behaviour in court (discussed below), gave rise to a reasonable apprehension of bias.

By taking on an investigative role, Judge MacDonald held Mr. Huyser-Wierenga lost the necessary objectivity that a Crown prosecutor must have toward a case. Justice Ian Binnie for the Supreme Court of Canada in *R v Regan*, 2002 SCC 12 (CanLII), outlined the three main components of the Crown's role in prosecution as objectivity, independence, and lack of animus (qtd. at para 74 of *Boudreau*). Mr. Huyser-Wierenga's error was not in meeting with the complainant: his error was in interviewing the complainant about new developments without an investigator present, taking no notes, and thus creating a situation where he is a witness to the complainant's statements. Mr. Huyser-Wierenga not only created this situation, but explicitly offered to act as a witness on a file he was prosecuting (see para 83 of the decision).

This behaviour, Judge MacDonald recognized, was a breach of paragraph 5.2 of the Law Society Code of Conduct (a lawyer cannot be both an advocate and a witness). It also put Mr. Huyser-Wierenga in breach of paragraph 3.4-1 of the Code, the duty to avoid conflicts of interest. This

was enough to require recusal, Judge MacDonald held at para 111, even without Mr. Huyser-Wierenga's problematic submissions to the court.

Exaggeration and Hyperbole in Court

The last source of a reasonable apprehension of bias that Judge MacDonald identified was Mr. Huyser-Wierenga's persistent habit of exaggerating the severity of the accused's conduct while before the court. Judge MacDonald provided a lengthy list of examples of Mr. Huyser-Wierenga's exaggerations. Mr. Huyser-Wierenga characterized occasional contact between the accused and the complainant as "continuous contact", "interference", and "a barrage of communication". However, Judge MacDonald found that there were three instances of communication on record between the accused and the complainant over the nine months preceding the trial—a pattern that could not be described as "continuous". He went on, "Hyperbole and overstatement have no place in a Crown's submissions to the Court when the liberty of the subject is at stake" (at para 107). This misrepresentation of the nature and kind of contact between the complainant and the accused also gave rise to a reasonable apprehension of bias.

Discussion and Conclusion

Judge MacDonald held that Mr. Huyser-Wierenga's behaviour, both in improperly acting as an investigator and exaggerating to the Court, reasonably led to "an inference of animus" toward the accused (at para 110). In addition, he showed "a lack of objectivity and an inappropriate hostility" to Ms. Sutherland as defence counsel (at para 110). Judge MacDonald commented that this was especially inappropriate given Ms. Sutherland's much more junior position: indeed, the decision notes she was called to the bar in 2020, just months before this incident.

Much has been written about the legal profession's inhospitality to female lawyers. Indeed, the Canadian Bar Association recognizes that the main cause of women leaving the legal profession is that "discrimination still exists in how women are treated and offered work." Judge MacDonald rightly recognized in this decision that Mr. Huyser-Wierenga's conduct toward a junior, female member of the bar was unacceptable.

One can only hope that most senior, male members of the bar treat their junior, female counterparts with much more respect than Ms. Sutherland experienced here. Unfortunately, the data do not bear that out. The Law Society of Alberta's 2019 Articling Survey Results indicate that one in three articling students experienced discrimination or harassment during their articles. Over half (54%) of articling students who reported experiencing harassment or discrimination identified as female, compared to just 22% who identified as male. A further 24% of articling students who reported harassment identified as "other" or preferred not to specify.

Judge MacDonald's decision was an appropriate and necessary response to bad behaviour by a very senior Crown prosecutor. However, the legal profession clearly needs to see much more public condemnation of such behaviour: the data we have indicate that there are many instances such as this that go both unreported and unresolved.

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