Re: R v. Legere

Notes for Digital Archives Project

Hon. D. M. Dickson

April, 2006

I've been asked to provide a few comments on the R v. Legere jury trial over which I had the duty of presiding in the Court of Queen's Bench of New Brunswick some fifteen years ago, and a transcript of which is now reproduced in the UNB Law School Digital Archives.

For one compelling reason I shall depart from what I have always considered a fast rule: that judges should not comment on their own cases; but in any event, my comments will be confined to a few procedural aspects. The compelling reason is that this may provide one of the few opportunities available to correct an impression that some viewers may have gained from an hour-long TV documentary on the case, first shown several years ago on the History Channel and since repeated, I am told, at fairly frequent intervals.

The piece deals primarily with the DNA aspects of the trial and does so, as I recall, most competently. I was, however, on viewing it, more than a little dismayed to find the character-actor playing the part of the presiding judge, engaging on one and perhaps more occasions in a verbal shouting-match with the accused when the latter became somewhat disruptive of the Court proceedings.

Perhaps the producers had watched too many American films depicting court-scenes. In any event, I point out for the record that on no occasion, either in this or any other trial, civil or criminal, in which I've been engaged have I ever found it necessary to raise my voice above a normal conversational level. Nor have others in the courtroom ever been permitted such behavior. My conduct and method in that regard is not in any way unique among Canadian judges. I'm sure most among them would wish me to make the point I have.

There are a few other procedural matters involving problems not apparent on the face of the transcript on which I might comment. Perhaps first it should be pointed out that while the trial proper, initiated by the selection and empanelling of the jury, commenced at Burton on August 26,

1991 (and ended with the return of verdicts and sentencing on November 3, 1991), the trial of the accused had, in fact, commenced at Newcastle on December 5, 1990. At that time a direct indictment had been preferred by the Crown on four counts of murder and the accused thereupon arraigned. On his failure to enter a plea, a plea of "Not Guilty" was directed by the Court to be entered in respect of each count.

On application of the accused, concurred in by the Crown, a change of venue was ordered, and the trial was directed to be held at a Nisi Prius sitting of the Court at or in the area of Fredericton. The change was, of course, dictated essentially by the extreme state of social turmoil which had existed in the Miramichi area over a period of many months as a result of the murders to which the charges related and other earlier crimes in the same area, but also by other factors: the need for selection of an impartial jury and its segregation from the public over the period of a fairly long trial; travel and accommodation arrangements for a large number of witnesses, many of them from outside the area; availability of courtroom facilities; security considerations, etc.

Shortly, the Provincial Courthouse at Burton was arranged for and designated as the locus of trial, even though its security and other facilities, including a rather inadequate courtroom not designed for jury trials, required a fair amount of renovation.

Following the principle that criminal trials should proceed with no undue delay, February 4, 1991 was initially set as the date for jury selection and commencement of the trial proper. But when the Court became apprised, through a series of Chambers meetings with counsel, of the large number of witnesses, many of them from outside the province, and of the difficulties in arranging for and scheduling their attendance for the trial; the time required by counsel for the accused to examine the numerous statements and other documents provided by the Crown, and to develop particularly the contemplated defences pertaining to DNA; the availability of

courthouse facilities; the time to be consumed in a variety of preliminary applications and in what was expected to be a long voir dire hearing in advance of trial; the re-scheduling of sittings of the displaced Provincial Court, etc., it soon became apparent that the February 4 date was not a realistic one.

Accordingly, it was arranged that the hearing on that date and on others to be subsequently fixed in March and April would be used for the hearing and disposition of preliminary motions, i.e. for a separate trial for each of the counts, etc., and that a six-week period in late May and June (before the onset of difficult summer conditions in a non-air-conditioned courthouse) would be devoted to dealing with the evidentiary questions in a voir dire. The trial proper would subsequently start in late August with jury selection. The timing was scheduled to coincide with the availability, before school resumed, of a high school auditorium in nearby Oromocto which was converted into a temporary courtroom and used for three days for jury selection before moving to the Burton location. The trial was there completed some nine or ten weeks later.

Over the years, both before and following retirement from the court, I've been a consistent critic of efforts to display on television court hearings filmed live for such a purpose. I say that regardless of how the Supreme Court of Canada has on occasion resorted to such a device under the guise of "educating the masses". All television is basically commercial in nature, and the primary purpose of commercial television is not to provide education, but to provide entertainment. Television has been aptly described on some occasion as "chewing-gum for the eyes".

But I must confess that in the instant trial a very practical and beneficial use was made of live television – albeit only in a closed circuit and in-house use. Early in the proceedings there had been indications that the accused might at some stage resort to endeavors to delay or otherwise frustrate the trial by disruptive conduct. Any such effort could be ignored

or downplayed only at risk of prejudicing the whole conduct, and even completion, of the trial. And so, before the opening at Burton, a brace was suspended from the ceiling of the courtroom, designed to hold in fixed position a small TV camera capable of filming the full range of activity across the front of the courtroom. The camera-view could be displayed simultaneously, and with sound, on a TV set which could, when required, be moved into position just outside a holding-cell in which the accused was held when not in the courtroom.

When any difficulty occurred, the jury was excused for a few minutes, the accused was conducted to the holding-cell, the arrangements were put into place, the camera turned on, and the trial resumed with only a couple of minutes delay. It was normally found that after a couple of Court sessions the accused could be returned to his normal place in the courtroom.

I don't wish to exaggerate the nature or number of disruptions. They were never allowed to get out-of-hand and occurred on only three or four occasions. The incidents and the remedial action taken were, however, of sufficient import that the Court felt obliged to impress subsequently in each instance on the jury, in the interest of maintaining an attitude of impartiality, that an accused in such circumstances, quite regardless of innocence or guilt, would be under very great stress and that any deviant conduct on his part should be overlooked.

I can only suggest that some of the methods employed at Burton to maintain decorum in the proceedings might well commend themselves to those conducting the current trial in Iraq of the former deposed President of that country and his fellow-accused.

Other difficulties arising in the instant case ran the whole gamut of those capable of arising in many criminal proceedings. At one end of the scale was the serious problem of discharging in mid-trial a jury member to whom subversive approaches had been made by friends on behalf of the

accused and, moreover, the associated problem of ensuring throughout that diversion, that the impartiality and integrity of other jury members had not been adversely affected. At the other end of the scale was the problem, in some sense minor in appearance, but nevertheless capable of serious consequence, of a threatening division of the jury into two camps – that half which wished fervently to smoke when in the jury-quarters outside the courtroom, and that half which just as resolutely felt that all should abstain.

Reference to one particular event occurring during the main trial will be found to appear in the transcript, but with no real explanation as to its background. I refer to the appointment of a "Queen's Proctor".

At the initial proceedings at Newcastle it had appeared that defence counsel intended personally to handle the total defence, without assistance from associate or assistant counsel. This was rather extraordinary, given the complexities of the trial and the apparent intention of the defence to question in depth the whole theory of comparison-proof by means of DNA sampling; the circumstance that defence counsel would be opposed by an able team of three experienced and competent crown prosecutors; and moreover, by the apparent desire of defence counsel to devote some considerable portion of his practice-time to other legal matters.

At the initial and subsequent meetings in Chambers with all counsel present, and again, for the formal record at several of the preliminary public hearings, the Court urged upon defence counsel the absolute necessity for his engaging, and as early as possible, other counsel to assist him.

If my recollection is correct, it was during the 'voir dire' phase of the trial that associate defence counsel, in the person of an experienced and competent former crown prosecutor, was finally engaged. But midway through the main trial, difficulties arose between the accused and his associate counsel, culminating in the discharge of the latter by his client. Within another day or so it appeared that the accused then had some desire

to discharge his principal counsel, and that the latter was considering applying for leave to withdraw from the case.

Either eventuality, coupled with the impracticality of bringing in and instructing new counsel at that stage of the trial, could have brought only mayhem to the trial process and probably the consequent declaration of a mistrial and the subsequent embarkation on a totally new one. The Court immediately appointed, with his consent, the former associate counsel as a "Queen's Proctor" (for want of a better term) with the assigned duties only of attending all sessions of the Court, following closely the proceedings from an assigned seat in the front row of the public gallery, and observing particularly from the accused's point of view.

All concerned, I think, appreciated that his true function was to be available for appointment by the Court as a backup defence counsel, fully conversant with the case, should that necessity arise. The trial would be thus enabled, in such eventuality, to continue without interruption. In any event the move brought about the result that there were no further rumblings about changes in representation. Some outside the courtroom, who may at the time have questioned the necessity or wisdom of paying remuneration for the duration of trial to an underutilized "Queen's Proctor", may at some stage later have appreciated that it was a small premium to pay for insurance against the risk of a new trial costing hundreds of thousands of dollars.

The trial, which is the subject of the present archival treatment, was an interesting one and replete with many unforeseen developments of a challenging nature. But, as the presiding judge, I cannot say that it was either more, or less, interesting and challenging than any one of the other one hundred and twenty four or so over which I was called upon to preside during my career on the Bench. After all, the primary purpose and aim of every criminal trial must be to ensure a fair and just trail for the accused, concomitant with ensuring, insofar as is possible, that the ends of justice be

served. And maintaining one's voice at a conversational level has, at least in my case, helped produce one beneficial result; no one or other of those 124 trials to which I've referred ever had to be re-tried.