November 2019

BRIEFING NOTE

Guild Yule LLP
BARRISTERS AND SOLICITORS
2100 – 1075 Georgia Street
Vancouver, BC V6E 3C9
www.guildyule.com
P 604 688 1221
F 604 688 1315
E feedback@guildyule.com

The Chief Justice of the British Columbia Supreme Court, Hinkson C.J., has ruled in *Crowder v. British Columbia (Attorney General),* 2019 BCSC 1824, that the recent procedural rule limiting the number of damages experts is unconstitutional, and their enactment is ultra vires the authority of the government of the Province of British Columbia.

Rule 11-8 ("the impugned Rule") was enacted by the Lieutenant Governor in Council on February 11, 2019 by Order in Council No. 40 (the "Rule 11-8 Order"). After February 1, 2020, the impugned Rule was to apply to all actions, pursuant to Schedule 2 of Order in Council No. 40.

The petitioners, Mr. Crowder and Trial Lawyers Association of British Columbia, sought in part the following declarations:

- the Rule 11-8 Order was contrary to a convention that requires such changes to be proposed or approved by the Rules Revision Committee (the "Committee");
- the Rule 11-8 Order is not authorized by the *Court Rules Act,* R.S.B.C. 1996, c.80 (the "Act"); and
- the Rule 11-8 Order is unconstitutional and of no force and effect, being contrary to s.96 of the *Constitution Act,* 1867 (U.K.), 30 & 31 Vict. C. 3, or

Is the Rule 11-8 Order Contrary to a Constitutional Convention?

The petitioners argued that the Attorney General's recommendation to enact the Rule 11-8 Order was invalid because it was not approved by the Committee.

The Committee was formed when the 1977 Rules were brought into force. Its members are appointed by the Attorney General on the advice of the Chief Justice. Hinkson C.J. provides a helpful and interesting history of British Columbia Supreme Court's rule-making authority at paragraphs 9 through 20, a recitation of which will not be provided here.

The petitioners submitted that there is a constitutional convention requiring the approval of the Committee that is meant to reflect the overlapping legislative, executive, and judicial functions involved in the making of rules for the conduct of judicial proceedings. They argued that the convention operates to protect against executive overreach into a fundamentally judiciary function, giving it a constitutional character.
Citing *Reference re Secession of Quebec*[1], the court decided that it was unnecessary to determine if the convention exists because constitutional conventions carry only political sanctions and the remedy for a breach thereof lies outside the courts.

[1] [1998] 2 S.C.R. 217 at para. 98 and *Ontario English Catholic Teachers' Assn. v. Ontario (Attorney General),* 2001 SCC 15 at para. 63

Is the Rule 11-8 Order Authorized by the Act?

The petitioners submitted that the Rule 11-8 Order is beyond the provincial government's authority under the *Act* and that it was an unreasonable exercise of the provincial government's power. The court agreed with the Attorney General that the proper framework for this issue could be found in *Katz*[2] where the question was whether the impugned Rule is inconsistent with the objective of the Act or the scope of the statutory mandate, the starting point of which is determining the "overarching purpose" of the enabling statute.

The petitioners argued that the overarching purpose of the enabling statute is simply to "provide procedural guidelines for the conduct of litigation" and does not include changes to substantive rights of litigants, while the Attorney General submitted it is to "permit the creation of a regulatory structure that ensured the efficient and effective functioning and the "better administration of justice" in the three levels of court in British Columbia".

Hinkson C. J. held that the impugned Rule which limits the number of damages reports a litigant is entitled to serve and rely upon does effect a change in substantive law and provided at paragraph 119 that "…while it is not impossible for the *Rules* to create new substantive law, I conclude that the ability to use the *Rules* in this fashion must be the exception, and not usual practice…". He went on to hold that this is not one of the exceptional cases where the *Rules* may create new substantive law, and therefore the Rule 11-8 Order is not authorized by the *Act.*

Does the Impugned Rule Infringe the Core Jurisdiction of a Superior Court?

The petitioners argued that the impugned Rule unconstitutionally infringes the superior court's core jurisdiction because it is a mandatory rule, eliminating judicial discretion, which rises to a level of impairment as it interferes with the authority of the superior court to protect the integrity of its process. The petitioners further submitted that the provincial power to legislate for the administration of justice under s.92(14) of the *Constitution Act*, 1867 is subject to the principle that a superior court's core and inherent jurisdiction must be free of legislative encroachment and that there is a "constitutionally meaningful distinction" between preventing the exercise of a superior court function and guiding or structuring that function.

The Attorney General's position was that the impugned Rule does not interfere with the core jurisdiction of the Supreme Court as it permits each party to a vehicle action to tender, as of right, opinion evidence from three experts on the issue of damages arising from personal injury or death, and allows the parties to adduce opinion evidence from an unlimited number of joint experts by consent or joint or court-appointed experts on application (Rules 11-3 and 11-5 respectively). The Attorney General further argued, citing *Reference re Amendments to the Residential Tenancies Act*[3], that the court's s. 96 core jurisdiction is narrow, including only critically important jurisdictions which are essential to the existence of a superior court of inherent jurisdiction and to the preservation of its foundational role within the legal system. The Attorney General went on to emphasize that the impugned Rule does not affect the court's control over its process more than any other rule or law permitting or restricting the introduction of evidence in civil cases. In support of this last point, the Attorney General referred to Rule 15-1 which limits adversarial experts on damages in fast track vehicle actions. The court noted that little reliance could be placed upon that argument as the constitutionality of Rule 15-1 has not been tested, but accepted that it is one example of a Rule which purports to restrict the introduction of evidence.

[2] *Group Canada Inc. v. Ontario (Health and Long-Term Care),* 2013 SCC 64
[3] *(N.S.),* [1996] 1 S.C.R 186 at paragraph 56

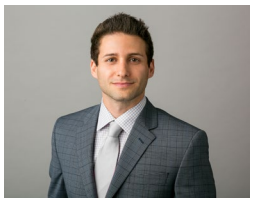
Guild Yule LLP
BARRISTERS AND SOLICITORS
2100 – 1075 Georgia Street
Vancouver, BC V6E 3C9
www.guildyule.com
P 604 688 1221
F 604 688 1315
E feedback@guildyule.com

With respect to the Attorney General's submissions regarding the residual discretion retained by the court to appoint its own experts following applications by the parties, Hinkson C.J. provided at paragraph 171 that the residual discretion is not created or preserved by the impugned Rule as Rules 11-3 and 11-5 already formed part of the Rules. At paragraphs 178 and 179 Hinkson C.J. went on to say "I am also not persuaded that joint experts are a satisfactory replacement for expert witnesses chosen and instructed by the parties. Like court-appointed experts, joint experts depart from the principle of party presentation" and "…raise issues around litigation privilege".

At paragraph 172, Hinkson C.J. found that "Transferring the responsibility of ensuring that there is relevant evidence upon which to decide the issues in a personal injury case from the parties to the court does, in my view, intrude upon what has, to date, been the core functions of the court: to decide a case fairly upon the evidence adduced by the parties".

In conclusion, the impugned Rule was held to infringe "…on the court's core jurisdiction to control its process, because it restricts a core function of the court to decide a case fairly upon the evidence adduced by the parties".

As a result, Rules 11-8(3), (4), (5), (10), and (11) have been set aside. We now wait to see if this decision will be appealed.



Mario Checchia
Direct Line:
604-844-5564
Email:
mchecchia@guildyule.com

Guild Yule LLP
BARRISTERS AND SOLICITORS
2100 – 1075 Georgia Street
Vancouver, BC V6E 3C9
www.guildyule.com
P 604 688 1221
F 604 688 1315
E feedback@guildyule.com