***In forma pauperis*: A Constitutional Right to Access to Justice**

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Case commented on: *Toronto Dominion Bank v. Beaton*, 2012 ABQB 125

Access to justice is a hot topic: it is the stuff of judicial speeches; test case litigation; law society initiatives; and the list goes on. In *Toronto Dominion Bank v. Beaton*, 2012 ABQB 125, which dealt with the seemingly routine issue of whether the court could order a fee waiver for transcripts for a leave to appeal application, Justice Joanne Veit of the Alberta Court of Queen's Bench held that there is a constitutional right to access to justice, but that it was not breached in the circumstances of the case.

Jerry Beaton, a self-represented litigant, was involved in a number of lawsuits concerning the TD Bank, the Workers Compensation Board, Burnco, and another individual. He appeared to be seeking leave to appeal an order of a Court of Appeal justice to the Supreme Court of Canada in the litigation with the TD Bank, although Justice Veit noted that she was not entirely clear on this, and there was no written Court of Appeal decision to be appealed from. Beaton's leave application required that he provide transcripts of the lower court hearing, and he asserted that he was impecunious and could not afford the cost of doing so.

Rule 13.32 of the *Alberta Rules of Court*, Alta Reg 124/2010, stipulates that it is up to the clerk of the relevant court to waive fees such as those for transcripts. Although Rule 13.38 provides that a judge "may authorize, direct, or give permission to a court officer to do an act…", Justice Veit found that this rule did not permit a judge to "circumvent the clear intention" of Rule 13.32 by ordering the clerk to waive court fees (at para 14). This interpretation was supported by Ministerial Order 8/2011, which identifies which court fees can be waived and notes that it is the clerk of the court who has the authority to do so.

This did not end the matter, as Justice Veit decided that the issue must be addressed "through the lens of access to justice" (at para 17). Relying heavily on *Polewsky v Home Hardware*, (2003) 66 OR (3d) 600; 229 DLR (4th) 308 [2003] O.J. 2908 (Div Ct) (referred to in *Beaton* as "*Polewski*"), Justice Veit held that access to justice was a constitutional right in some situations, based on "the common law historically, and the *Charter* today" (at para 18). This is really all that Justice Veit said about the basis for such a right. No sections of the *Charter* were specified, nor was there reference to the rule of law or other sources of constitutional law that might ground a right of access to justice. Justice Veit attached an excerpt from *Polewsky* as an Appendix to her judgment, and it is here that the basis for the right of access to justice is developed.

In *Polewsky*, a 3 member panel of the Ontario Divisional Court considered an application for a declaration that the tariff fees for small claims court were unconstitutional. In Ontario, unlike Alberta, there were no provisions in the relevant legislation dealing with fee waivers. Polewsky, supported by the Advocates' Society as intervener, argued that the fees impeded the access of indigent persons to the courts, and violated his rights under sections 7 and 15 of the *Charter*, as well as the rule of law. The Divisional Court dismissed the *Charter* arguments, finding that there was an insufficient evidentiary basis for the claim that the fees discriminated against persons on the analogous ground of poverty under section 15 of the *Charter* (at paras 45-49), and that the fees did not cause the sort of serious and profound

psychological stress required for a violation of section 7's guarantee of security of the person (at paras 50-54).

Polwesky had more success with the argument that the lack of jurisdiction to waive fees violated a common law right of access to justice and the rule of law. The Divisional Court noted that "Historically, where an individual was indigent and was unable to pay the costs of bringing an action, the individual could proceed *in forma pauperis,* or "in the manner of an indigent who is permitted to disregard filing fees and court costs." (Black's Law Dictionary, 7th ed. s.v. "in forma pauperis")." (at para 33). The *in forma pauperis* doctrine originated in British legislation, *A Means to Help and Speed Poor Persons in their Suits* (UK) (1495) Henry VII c 12. The Divisional Court referred to a number of cases where the doctrine had been considered, and concluded that a court's inability to allow a litigant to proceed *in forma pauperis* would breach the rule of law (at para 40). One of the cases relied upon in this regard was *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 SCR 214, where the Supreme Court held that:

> We have no doubt that the right to access to the courts is under the rule of law one of the foundational pillars protecting the rights and freedoms of our citizens. It is the preservation of that right with which we are concerned in this case. Any action that interferes with such access by any person or groups of persons will rally the court's powers to ensure the citizen of his or her day in court. Here, the action causing interference happens to be picketing. As we have already indicated, *interference from whatever source falls into this category* (at para 26, cited in *Polewsky* at para 68, with emphasis).

Although *B.C.G.E.U.* dealt with physical access to the courts blocked by picketing, the Divisional Court in *Polewsky* found that the Supreme Court's language took it beyond that context, and could apply to court fees impeding access to the courts (at para 69). In addition, the *in forma pauperis* doctrine was seen to give rise to a common law right of access to justice (at para 60). This right does not preclude reasonable court fees, but "in cases where their existence, combined with the requirement to pay them prevents a person from pursuing a meritorious claim, they are unconstitutional" (at para 64). Overall, "the existence of the Rule of Law combined with what we find to be the common law constitutional right of access to justice compels the enactment of statutory provisions that permit persons to proceed *in forma pauperis* in the Small Claims Court" (at para 76). This right, however, "must be subject to the exercise of judicial discretion on issues of merit and financial circumstances that trigger the right to proceed *in forma pauperis*" (at para 77).

Returning to *Beaton*, Justice Veit noted that the *Polewsky* criteria of indigence and merit are similar to those in the "*Okanagan* line of cases", referring (at para 21) to *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, [2003] 3 SCR 371; see also *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2, [2007] 1 SCR 38 and *R. v. Caron*, 2011 SCC 5, [2011] 1 SCR 78 (and see my blog on *Caron* here). The Supreme Court in *Okanagan* held that public interest litigants could be awarded interim costs of litigation where (1) the party seeking the order was impecunious, (2) the party established a meritorious case, and (3) there were special circumstances warranting the order of interim costs (at para 36). The Court noted that such costs were "extraordinary" and would be appropriate "in a narrow class of cases" (*ibid*).

Applying the *Polewsky* criteria of indigence and merit to the facts, Justice Veit stated that it was appropriate to consider "the relevant ability of the applicant" to pay the fees in question, "i.e. the obligation to pay a … fee may well create a different financial burden on a litigant whose only income is social assistance from the burden created on a person who is employed at minimum wage, or on a person who earns above the minimum wage but who has many legal dependents" (at para 22). However, she found that the evidence was lacking on Beaton's financial circumstances. He had made an oral submission as to his impecuniosity, noting that he was homeless as a result of foreclosure proceedings taken by the TD Bank, was living in his car, and had health problems (at para 9), but there was no evidence of an application to Legal Aid or whether Beaton met Legal Aid's financial guidelines.

As for the merits of the appeal, Justice Veit clarified that this should be assessed in relation to the particular step of the case for which relief is sought rather than the overall merits of the case (at para 23). She noted that Beaton's appeal of his litigation with the TD Bank likely would not be found to meet the test of national importance required for Supreme Court appeals, and that his application for a waiver of fees was thus not meritorious (at para 28).

The *Beaton* decision has the potential to be an important precedent in the area of access to justice, but there are a couple of caveats. First, Justice Veit noted that the matter of the court's jurisdiction to waive fees under the rubric of access to justice "is not free from doubt", and had not been fully argued before her since Beaton was unrepresented (at para 11). In addition, Justice Veit's statement that access to justice is a constitutional right based in part on "the *Charter* today" does not follow from *Polewsky*, and was not backed up by any other authorities. Grounding the right to a waiver of court fees based on access to justice under the *Charter* is a matter requiring further evidence and argument.

Second, Justice Veit's adoption of *Polewsky* could be seen as problematic because a subsequent case of the Supreme Court, *British Columbia (Attorney General) v. Christie*, 2007 SCC 21, [2007] 1 S.C.R. 873, called into question the existence of a broad right to access to justice. In that case, Christie challenged the constitutionality of a tax on legal services imposed by the B.C. government, arguing that the tax made it impossible for some of his poor clients to secure legal representation. At trial and the BC Court of Appeal, the courts held that the tax breached the right to access to justice for low-income persons, and declared the tax unconstitutional in that context. The Supreme Court unanimously overturned the appeal, finding that there was no constitutional right "to be represented by a lawyer in court or tribunal proceedings where a person's legal rights and obligations are at stake, in order to have effective access to the courts or tribunal proceedings" (at para 11). It also found that the *B.C.G.E.U.* case "cannot stand for the proposition that every limit on access to the courts is automatically unconstitutional" (at para 17), nor was "*general* access to legal services in relation to court and tribunal proceedings dealing with rights and obligations … a fundamental aspect of the rule of law" (at para 23, emphasis in original). Under the *Charter*, section 10(b) provides a limited right "to retain and instruct counsel without delay and to be informed of that right", but only on arrest or detention, and section 7 has been found to protect the right to counsel as an aspect of the principles of fundamental justice but only in circumstances where life, liberty or security of the person are engaged (*Christie*, paras 24-25). Beyond these specific situations, the Court held that a broad right of legal representation as an aspect of access to justice could not be grounded in the *Charter* or the rule of law (at para 27).

Christie could be distinguished from the scenarios in *Polewsky* and *Beaton*, which dealt with waiver of court fees rather than the right to legal representation. The Court in *Christie* was clearly concerned with the potential costs to society of the claim before it: the "logical result would be a constitutionally mandated legal aid scheme for virtually all legal proceedings, except where the state could show this is not necessary for effective access to justice", and this would be a "huge change that would alter the legal landscape and impose a not inconsiderable burden on taxpayers" (*Christie* at para 14). The right claimed in *Beaton* was much narrower, and so the attendant cost concerns would also be much lower. Also, in *Polewsky* it was noted that claims by indigent persons for waivers of court fees are infrequent (at para 14), and *Polewsky* itself has been referred to in only a handful of subsequent cases, most of them dealing with issues other than the waiver of court fees as a matter of access to justice (see e.g. *Alberta v. Kingsway General Insurance Company*, 2005 ABQB 662; *Quereshi v. Toronto (Board of Education)*, [2006] O.J. No. 1782; 268 DLR (4th) 281 (Div. Ct.); *Canadian Bar Assn. v. British Columbia*, 2008 BCCA 92; *Stanny v. Alberta*, 2009 ABQB 161; but see *Toussaint v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 873, [2010] 3 FCR 452, which distinguished *Polewsky* as inapplicable to the waiver of fees for an application for permanent residence status under the *Immigration and Refugee Protection Act*, SC 2001, c 27). The waiver of court fees in cases where the pre-conditions of indigence and merits are met would likely not amount to the sort of "huge change" the Court was trying to avoid in *Christie*. *Beaton* is arguably closer to *Okanagan* than it is to *Christie*, but the weight of Justice Veit's decision is reduced by the fact that she did not consider the impact of the Supreme Court's reasoning in the latter case.