April 16, 2014

Access to Justice and Costs Against the Crown

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Case commented on: *R v A.Y.A.*, 2014 ABQB 103

In *R v A.Y.A.*, 2014 ABQB 103 [*AYA*], the Honourable Madam Justice C.A. Kent suggested that access to justice considerations have a role to play in awarding costs against the Crown. *AYA* built on pre-existing case law that laid the groundwork to make this exceptional award in situations where there was no Crown misconduct. Prior to *AYA*, however, applicants had been unsuccessful in achieving these ends. This decision is particularly fascinating because Justice Kent used access to justice concerns to distinguish the case before her from the earlier unsuccessful case law. In the process (and despite Justice Kent's best efforts to narrowly confine the decision) *AYA* raises wide-ranging questions about remedial entitlements for access to justice breaches.

The accused in *AYA* was charged with a series of sexually related offences. He required the use of an interpreter during the course of a scheduled 5-day trial. The Crown engaged an interpreter but (minutes before the trial was to begin) the interpreter quit -- citing a personal sensitivity to the nature of the charges. Given the unique language of interpretation (Ahmaric), the trial had to be adjourned for several months while a new interpreter was located. When the trial finally proceeded, the accused was acquitted (at para 1).

Post-trial, the accused sought to be reimbursed for some of the costs he incurred as a result of the adjournment. Defence and Crown counsel agreed that s. 14 of the *Charter* guaranteed the accused an interpreter, and that adjournment was the only way to preserve this right. The parties disagreed, however, on who ought to bear the costs related to this unexpected and significant delay.

Defence counsel submitted affidavit evidence demonstrating that the accused had to bear the costs related to the unused trial time, and that his total bill ($17,500.00) was higher than it would have been but for the adjournment (at para 2).

The Crown filed affidavit evidence demonstrating that it had followed all correct procedures in retaining the interpreter (who was not a Crown employee). The Crown further submitted that, given the interpreter's uneventful involvement in pre-trial procedures, they could not have anticipated her sudden departure (at paras 3 and 4).

Justice Kent reviewed the relevant case law and considered the two sources of authority she possessed to make such an award: s. 24(1) of the *Charter* and her inherent jurisdiction. Case law was clear that, regardless of which authority is invoked, a costs award against the Crown is an exceptional remedy that is typically premised on serious Crown misconduct. As McFadyen J.A. explained in the leading case on point -- *R v Robinson*, 1999 ABCA 367:

> [29] The Crown is not an ordinary litigant, does not win or lose criminal cases, and conducts prosecutions and makes decisions respecting prosecutions in the public interest. In the absence of proof of misconduct, an award of costs against the Crown would be a harsh penalty for a Crown officer carrying out such public duties.

In *Robinson*, the Court of Appeal held that a costs award pursuant to s. 24(1) of the *Charter* must be premised on "[s]ome degree of misconduct or an unacceptable degree of negligence" (at para 30). However, it declined to rule on whether the same restriction applied to a costs award made pursuant to inherent judicial jurisdiction.

Case law developed pursuant to *Robinson* built on this opening, but declined to exercise the inherent jurisdiction. In *R v Griffin*, 2011 ABCA 197, the Alberta Court of Appeal canvassed Canadian case law, and found that costs may be awarded against the Crown in situations that were not based on misconduct but were nonetheless "exceptional", "remarkable", or "unique" (at para 27). The Nova Scotia Court of Appeal opined that costs could be awarded against the Crown in "exceptional circumstances" that could include situations of "conduct by the police or systemic failures so extraordinary as to be virtually unique in character" (*Griffin* at para 29 citing *R v Taylor*, 2008 NSCA 5 at para 54).

Justice Kent agreed with Crown counsel that it could not have anticipated the interpreter's last minute refusal to act (at para 8). Thus, the adjournment was not the result of any Crown misconduct, foreclosing on any recovery pursuant to s. 24(1) of the *Charter*. Justice Kent was, however, persuaded that the situation was a unique and exceptional systemic failure that was unlikely to occur again (at para 9). Thus, while the Crown was not to blame for the interpreter's departure, it did bear responsibility for a systemic failure – entitling the accused to partial indemnity of $5,000.00.

To bolster her decision (and to distinguish it from *Robinson* and *Griffin*) Justice Kent reflected on how the systemic failure could have impacted the accused's ability to access justice:

> [10] I make one comment on the application of the law to cases of interpretation. The cases which bind me [*Robinson* and *Griffin*] do not deal with interpretation. The concern I raise is that the right to an interpreter is fundamental for access to justice, for without interpretation, the accused cannot provide an adequate defence. In addition to adequate interpretation, the best defence is one provided with the assistance of counsel. Although the accused in this case was able to maintain his relationship with his counsel, that may not always be the case. What if an accused in a similar situation but with fewer resources (but not so few as would qualify himself for legal aid) is left with the choices of defending

> himself without counsel, or worse yet, pleading guilty simply because he could not defend himself? That would be a serious denial of access to justice.

In this passage, Justice Kent engages two distinct access to justice concerns to tip the balance in favour of exercising her inherent jurisdiction: a) the original adjournment was necessary to preserve the accused's right to an interpreter, which is fundamental to access justice; and b) the delay caused by a systemic failure imperiled the accused's relationship with his counsel. This had the potential to impact the accused's ability to access justice (though ultimately it did not).

These two grounds are interesting for several reasons. As it relates to the first rationale, Justice Kent articulates a narrow view of the scope of what access to justice encompasses. To explain, Justice Kent distinguished *AYA* from *Robinson* and *Griffin* on the basis that her case dealt with fundamental access to justice issues. This distinction implies that *Griffin* and *Robinson* lacked this concern. A closer review of those cases casts doubt on her assumption.

Robinson dealt with an alleged s. 7 *Charter* violation based on the Crown's "egregious" failure to fulfill its disclosure obligations (*Robinson* at paras 23 and 28). Justice Kent does not explain why disclosure breaches do not engage access to justice concerns. One can imagine that the accused in *Robinson* felt that his ability to access justice was impacted by the Crown's "egregious" failure to provide him with relevant information.

Griffin dealt with a s. 8 *Charter* violation resulting from the Crown's inappropriate use of privileged documents to obtain production of the accused's confidential medical records (para 11). One may similarly assume the accused in *Griffin* felt his ability to access justice was impeded by the Crown's illegal access to his medical records.

Justice Kent's suggestion that her exercise of discretion was justified in *AYA* because it dealt with access to justice concerns (while implying that *Griffin* and *Robinson* did not) fails to consider whether access to justice requires more than just access to courts.

While this first point raises interesting questions for debate, it is Justice Kent's second rationale (imperiling a relationship with counsel impacts access to justice) that is particularly striking. Despite her attempt to narrowly confine the decision to unique or remarkable interpretation issues, Justice Kent's statement conflates access to justice with access to counsel. She then justifies a remedial and exceptional costs order because this relationship was threatened.

This reasoning has potential implications for the thousands of Albertans who cannot afford to retain counsel. There is near universal acceptance of the fact that Alberta is facing a legal aid crisis, and that the system is drastically underfunded. While the law is clear that there is no general constitutional right to counsel (*British Columbia (Attorney General) v Christie*, 2007 SCC 21 at para 23) Justice Kent has suggested that an individual may be entitled to a remedy if systemic failings impede their ability to access counsel.

Before getting ahead of ourselves, it is worth emphasizing that the current law would not permit an exceptional costs award based purely on the legal aid crisis. Sadly, the denial of legal aid

services because of underfunding is not the unique, remarkable, once in a life time occurrence articulated in *Griffin*. Justice Kent's statement does, however, raise an interesting query as to who ought to bear responsibility for individuals who are precluded from accessing justice because of a systemic failing.

Interestingly, there may be room for developing the law on this point. In *AYA*, Justice Kent suggested that she would have been receptive to an argument that some broad Crown policies could themselves qualify as systemic failures:

> [8]…Not argued was whether there is anything in the process of retaining and training interpreters that would have impressed upon this interpreter the need for an early determination about her capacity to act or whether the absence of such training is itself a systemic failure. That may be for another day.

As the issue was not argued, there was no opportunity to consider this angle.

It is unlikely we'll have the unanswered questions from *AYA* clarified any time soon. The Crown has not appealed the decision, and the time for doing so has expired. This was a curious choice, given that both *Robinson* and *Griffin* were Crown appeals from a trial judge's award of exceptional costs. In both of those cases, the Court of Appeal reversed the trial judge's costs award, and emphasized the narrow scope of a judge's inherent jurisdiction.

Because the Crown decided not to appeal, Justice Kent's comments on access to justice remain a valid and unaltered precedent. It will be interesting to see how future courts treat *AYA* as a precedent that not only expands on the ability to award costs against the Crown, but possibly opens the door to remedial entitlements for access to justice breaches.