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Striking a Balance: Efficiency and Fairness in an Evolving Justice System

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Case commented on: *Martin v. Sievers*, 2014 ABQB 357 (CanLII)

In *Martin v. Sievers*, 2014 ABQB 357 (*Martin)*, Master Smart confirmed that lawyers control the flow of relevant documents in an Independent Medical Examination (IME). This persists despite a more efficient mechanism for hired experts to access a party's full medical record. *Martin* stands for the proposition that the "cultural shift" towards efficiency in the courtroom cannot sacrifice long-standing quality protections for the justice system (at paras 10, 12). Viewed from an access to justice perspective, *Martin* held that increasing access should not sacrifice justice in the process.

Background Facts

Martin was an application to compel the Plaintiff to attend an IME and execute a consent form without modification (at para 5). In September 2013, the Plaintiff attended an IME organized by defence counsel, but did not proceed with the examination after a dispute arose regarding the doctor's consent form (at para 2). The consent form permitted the medical examiner to "collect" the Plaintiff's entire medical record, not just the documents produced in the action (at para 4).

In attempting to reschedule the examination, the medical expert refused to proceed if his ability to access the Plaintiff's full medical record was restricted. The doctor explained his rationale: after conducting a medical history during the IME, he would access the Plaintiff's medical records using the online source Alberta NetCare. Using Alberta NetCare, he could review "all relevant medical documents" immediately while the Plaintiff was still in the room (at para 4). This would save considerable time because it removed the need to formally request additional documents through lawyers, and then conduct a re-examination. In addition, it saved time and money because the medical expert did not have to re-familiarize himself with the file on several occasions. In short, it was a much more efficient way of proceeding. The medical examiner added that he had "no interest or time" to review medical records that were not relevant or pertinent to the action (at para 4).

Defence counsel argued that the arrangement was "logical, reasonable and practical" (at para 6). This method of proceeding advanced the efficiency of the legal system and could promote more timely resolution of disputes. Any complaints the Plaintiff may raise regarding prejudice could be adequately addressed by the trial judge (at para 9).

Counsel for the Plaintiff disagreed. They argued that lawyers determine what is relevant and material in an action, not defence-hired medical experts (at para 8). Medical professionals have no training to determine what documents are relevant and producible in a court action. The medical examiner's consent form provided defence counsel with backdoor access to the Plaintiff's entire medical record. This

circumvented the clear provisions in the *Alberta Rules of Court*, Alta Reg 124/2010 (the Rules) on document production.

The Decision

Master Smart found that the Rules do not mandate what documents are provided to experts (at para 7). However, the Rules should always be interpreted with a view to enhancing efficiency and the timely resolution of disputes (at para 10). The Supreme Court of Canada echoes this view, recently declaring the need for a "cultural shift" in civil litigation to promote "timely and affordable access to a civil justice system" (at para 10, quoting *Hryniak v. Mauldin*, 2014 SCC 7 (CanLII) at para 2 (*Hryniak)*).

These overriding concerns made defence counsel's argument "compelling" (at para 11). However, despite these pressures, Master Smart did not approve of the consent form. The Plaintiff should not have to open her entire medical record to an independent medical examiner.

The Rules on document production are well-established and based on sound principles (at para 12). While the legal system is moving towards efficiency, this cannot come at the expense of the justice system's established practices and procedures. Therefore, despite the fact that inefficiencies may arise, the Court should not sacrifice its core tenets for the sake of expediency. In Master Smart's words, "[q]uicker access to justice must not mean accepting less stringent practices which diminish the quality of a judicial process such that fair and proper adjudication is, or is seen to be, compromised" (at para 12).

Moreover, Master Smart was not persuaded that a trial judge could remedy any prejudice. Just as there needs to be a cultural shift in favour of efficiency, Courts need to cast aside the "legal fiction" that most cases proceed to trial (at para 11). Trials are a rarity, not the rule. Therefore, any theory that a trial judge can fix the problems caused by circumventing the Rules is not persuasive.

Discussion

In this decision, Master Smart was asked to balance the competing objectives of an evolving justice system. On the one hand, judges and rule-makers have declared that efficiency is a priority in civil litigation. This extends to the time and money spent by all actors -- including litigants, lawyers, judges, and (presumably) the experts and witnesses called in an action. On the other hand, while the rules on document production may be inefficient, they are fundamental to trial fairness. Irrelevant and/or privileged documents are rightfully protected from the prying eyes of opposing counsel and their agents.

Martin outlines a limit on efficiency as a priority. The pursuit of expediency and economy cannot compromise the integrity of the justice system. Giving medical experts access to complete medical records may make things quicker, but only because it disregards a collection of fundamental safeguards. It promoted efficiency, but sacrificed too much fairness in the process.

Master Smart also grappled with the "shifting culture" argument that has been advanced in the wake of the *Hryniak* decision. The culture of civil litigation is attempting to shift towards efficiency and away from technical and procedural impenetrability. Defence counsel was persuasive in arguing this point, but it was undercut by their proposed solution to the Plaintiff's concerns. By invoking the outdated notion that a trial judge can handle any prejudice, an air of artificiality was implanted into an otherwise practical argument. Given that most civil actions settle, it is unlikely that the parties would ever see a trial judge. Indeed, the prospect of settlement would only increase after a defence-hired expert was given unfettered access to the Plaintiff's medical records. Moreover, *Hryniak*'s efficiency-driven legal system advocates for early resolution and settlement of disputes, not trial. In his decision, Master Smart held that one cannot cherry-pick aspects of the new efficiency-driven legal culture.

Advancing access to justice is a critical issue facing the justice system, and increased efficiency is a crucial component of this movement. Notwithstanding this pressing concern, it is difficult to disagree with Master Smart's decision. Document production is almost always a hotly contested issue in civil

actions. This is especially so when dealing with medical records. Allowing a defence-hired expert unlimited access to the Plaintiff's entire medical records effectively undermines the well-established (and well litigated) rules regarding document production. In essence, it allows a fishing-expedition by proxy. Any significant change to the rules of document production should be set out in formal amendments to the Rules.

If there is any critique to be made, this decision does undoubtedly emphasize the view that lawyers own and control the justice system, and that anyone else who interacts with it has little to independently offer. The Plaintiff's argument was premised on the notion that only lawyers know what is relevant, and that medical experts cannot be trusted to have the knowledge, training (or possibly the integrity) not to draw on irrelevant documents to form their opinions (at para 11). While Master Smart doesn't expressly make this point, his decision implicitly supports this view.

Relevance is a legal question that lawyers are practiced in determining. It is understood, however, that lawyers regularly make these determinations by relying on their experts. This reliance increases with the complexity of a file. To take the present case as an example, in all likelihood the medical expert will now conduct his restricted IME, and then inform defence counsel which "relevant" medical documents should be requested from opposing counsel. Legal relevance will then be screened through the adversarial system. More likely than not, the outstanding documents deemed relevant by the expert will end up in a supplementary affidavit.

In this case the adversarial system's role was missing. Master Smart rightfully held that this vital step cannot be circumvented in the name of efficiency. While this conclusion is sound, the attitude underlying the Plaintiff's argument requires re-examination as the justice system evolves to facilitate access.

The notion that lawyers know best (and everyone else's opinions are deficient) is repeatedly identified as a significant barrier to accessing justice (see, for example, The Canadian Bar Association, Access to Justice Committee, *Reaching Equal Justice: An Invitation to Envision and Act* (Ottawa: The Canadian Bar Association, November 2013) at 129; Action Committee on Access to Justice in Civil and Family Matters, *Access to Civil & Family Justice: A Roadmap for Change* (Ottawa: Action Committee on Access to Justice in Civil and Family Matters, October 2013) at 7)). This view cannot continue unabated if meaningful reform of the justice system is to occur. Thus, while the decision in *Martin* may be the right one, there may be a case for formally identifying the role of experts and other actors in determining relevance. This would not diminish the role of lawyers in reaching these determinations, but would acknowledge that the justice system is owned and operated by the public, not a small group of legal professionals.