June 3, 2015

Life, Liberty, and the Right to CanLII: Legal Research Behind Bars

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Case Commented On: *R v Biever,* 2015 ABQB 301

The link between access to information and access to justice is not often discussed, but it is implicit in our legal process. Document production, questioning, and Crown disclosure are all premised on the notion that one needs access to relevant information in order to present one's case. This idea should also extend to legal research. Without access to precedents, case law and procedural texts, the ability to adequately argue a case is significantly impaired.

R v Biever, 2015 ABQB 301, tackles the issue of access to legal information in a unique context – the right of an imprisoned accused to conduct online legal research. While prisons provide access to criminal law texts, the Court in *Biever* considered whether those resources were adequate for an inmate to meet and defend the case against him. In ruling that the accused was entitled to more materials, the Court raised questions about how prisons should be providing access to legal information. *Biever* also raises interesting questions about how we deal with self-represented parties who simply do not want a lawyer.

Facts

The accused, Mr. Biever, was charged with of a number of offences related to bank robbery. He was denied bail and had been in custody since March 2013. After moving on-and-off through ten publicly and privately retained lawyers, Mr. Biever elected to represent himself (at paras 1, 8, 9).

Self-representation is complicated at the best of times, but it is particularly problematic for prison inmates. The Edmonton Remand Centre (ERC) – the facility housing Mr. Biever – does not provide internet access to prisoners. There is no formal library, but there is a collection of criminal law texts that can be ordered through an internal request system (at paras 22, 23). There is also no access to photocopying, scanning, word processing, or commissioning services (at paras 15, 17).

To facilitate his research efforts, Mr. Biever purchased an annotated criminal code and relied on family and friends to bring him case law. He experienced difficulty and delay getting that case law into the ERC.

In light of these difficulties, Mr. Biever launched a pre-trial application arguing that these restrictions (and particularly, the ban on internet research) violated his section 7 *Charter* right to

make a full answer and defence to the case against him. This argument was premised on three points (as presented by an *amicus*):

1. the election to self-represent was his right;
2. his liberty was infringed by the denial of bail; and
3. the conditions of his detention prohibited him from accessing information necessary to defend himself (at para 26).

In an attempt to meet Mr. Biever's continuing complaints (and perhaps, to undermine the weight of his argument) the Crown provided the accused with research materials and assistance short of internet access. In addition to the texts that are regularly available to inmates at the ERC, Mr. Biever was given:

- access to a laptop with the *DART Westerns Decisions* [*DART*] database uploaded on it; and
- an *amicus* defence counsel who would provide case law and guidance.

Mr. Biever appreciated these resources, but argued that they were inadequate. The *DART* database was limited – it provided case summaries only and was infrequently updated (paras 14, 29). As for the *amicus*, Mr. Biever was appreciative for this assistance, but expressed frustration at the restrictions placed on how frequently they could speak or meet (at para 34).

In defending the application, Crown counsel focused on the safety, logistical, and financial hurdles to Mr. Biever's request. The request would cost money not only in terms of equipment, but additional staffing and monitoring costs. Internet access raised questions about witness tampering, or the ability to access and use information against other inmates or staff. Logistically, there were numerous questions about exactly where and how access would be allocated and granted. In light of these concerns and the reasonable alternatives provided, the Crown argued that Mr. Biever's requests were neither required nor workable (at para 35).

Decision

Justice Graesser ruled in favour of Mr. Biever. He was satisfied that Mr. Biever would be unlikely to make a full answer and defence without having greater access to legal information (at paras 119, 121). Justice Graesser explained his reasoning at paragraph 87:

> At a minimum, Mr. Biever should have timely and reasonable access to all Canadian criminal law case authority. … Supreme Court of Canada decisions come out weekly, and Alberta Court of Appeal decisions come out daily. Their decisions are binding authority in Alberta and timely access to these decisions is essential to anyone attempting to anyone presenting arguments in a criminal matter, whether it be at trial or on pre-trial applications.

While he declined to order the exact legal sources that must be provided, Justice Graesser had some strong "suggestions" about what reasonable access would look like (at para 89). He was "hard pressed to see" how reasonable access could be provided without some access to the internet, and in particular, the CanLII website (at paras 92, 126). While the ERC would be under no obligation to pay for online research services like Westlaw or Quicklaw, Justice Graesser saw no reason why inmates could not be provided access to these sites at their own expense. Similarly, while inmates could not expect free typing or printing services, access to word

processing and printing at the inmate's expense appeared to be reasonable (at paras 97, 114-118, 127).

This decision signalled that Justice Graesser was unpersuaded by the Crown's arguments about practical constraints. In particular, concerns about the ERC's ability to provide restricted internet access rang hollow in light of its own website which called the ERC "the largest, most technologically advanced remand facility in Canada" (at para 93).

Justice Graesser was equally unpersuaded that his decision would create a slippery slope. He noted that most criminally accused persons choose to be represented by counsel, either through public or private sources. These inmates would not need access to online research sites (at paras 104, 106-108). Moreover, Justice Graesser took steps to constrain the decision to its particular facts. Mr. Biever had specifically demonstrated (through his evidence and prior appearances before the Court) that he would benefit from more and better access to legal information. In his efforts and previous appearances, Mr. Biever had demonstrated his ability to make use of legal information after being given access to better resources (at paras 106-108). Many other inmates would not be able to demonstrate this benefit.

Commentary

Justice Graesser had two bodies of case law to draw from in rendering his decision. Interestingly, he opted to follow the less predictable path.

The first collection of cases was directly on point. These Ontario and British Columbia decisions held that self-represented inmates simply cannot expect internet access to conduct research. The applications were dismissed for the following reasons:

- the right to self-represent is a right, but not one without consequences (at para 56, citing *R v Jordan,* [2002] OJ No 5250 (QL) (Ont Sup Ct J);
- practical and security constraints render requests for internet access unworkable (at para 58, citing *R v John*, [2007] OJ No 2257 (QL));
- reasonable alternatives (such as the appointment of an *amicus*) can remedy any constitutional concerns (at para 54, citing *Jordan* at para 20);
- a court lacks jurisdiction to order a remand centre to provide these facilities (at para 74, citing *R v Wilder,* 1998 CanLII 4172 (BC SC)); and
- cases that were not complex and did not raise unsettled points of law failed to establish the need for more fulsome legal resources (at para 59, citing *R v Parchment*, 2011 BCCA 174).

The cases of Mr. Biever and the *amicus* were more general, and drew on broad principles from Canadian and US case law. These decisions discussed the ability of self-represented inmates to prepare their cases, and held:

- there is an (American) constitutional right to prepare one's case, which includes an obligation on prisons to provide direct access to "truly adequate" law libraries (at para 68); and
- the right to make a full answer and defence can be impeded if there is a failure to provide adequate space or facilities where preparation can be performed (at para 74).

None of the cases cited by any party arose in Alberta, so Justice Graesser was free to draw from either camp. However, given that the Crown's cases provided a much closer analogy, why did he opt for the less obvious choice?

The first reason is context-specific and was made explicit in Justice Graesser's decision – Mr. Biever had demonstrated through his multiple court appearances that he actually uses and benefits from better access to legal information (at para 106). He had been given limited access to CanLII on a prior application, and had demonstrated an ability to make reasonable use of any resources provided (at paras 10, 111). With that backdrop, it was difficult to say that denying those resources would not impact his ability to defend himself.

In my view, however, two less explicit rationales equally guided Justice Graesser's decision.

A. Technology and Legal Research

We live in a technology driven age, and nowhere is this more evident than in reviewing how legal research has changed over the past 20 years. Legal research is now a predominately online exercise. It is likely beyond the contemplation of every legal researcher to imagine preparing for trial without access to the internet or a computer. Given that no one in 2015 would head to trial relying solely on research collected without at least checking online legal resources, it simply does not follow that an accused can adequately defend him or herself without it.

In a related vein, the ERC's argument that internet access is too risky or problematic does not fly in a way it might have 10 years ago. As any employment lawyer (or employee) knows, online access is regularly restricted and monitored. Providing an inmate with access to CanLII does not entitle him or her to peruse Facebook. In terms of logistics, Justice Graesser noted that internet ports were already installed in many rooms at the ERC – they just had not been connected yet. Any additional obligations in terms of monitoring or security were not unduly onerous (at paras 23, 93, 94, 104).

B. The Use (and Limits) of an *Amicus*

At various points in the judgment, Justice Graesser made special note of the value added by Mr. Badari, the *amicus* appointed to assist Mr. Biever (see, for example, at paras 103, 135). As *amicus*, Mr. Badari met with Mr. Biever, provided him with case law and research, and made arguments in support of Mr. Biever's position to the Court.

Justice Graesser not only approved of Mr. Badari's work specifically, he noted that (present circumstances notwithstanding) an *amicus* may often remedy the problems raised by a self-represented accused preparing for trial while incarcerated (at para 108). As Justice Graesser rightly noted, however (at paras 83, 108), there are limits to this practice. Mr. Badari was not Mr. Biever's lawyer, and should not be treated as such.

The appointment of an *amicus*, as helpful as they may be to the Court, Crown, and accused, raises some uncomfortable questions insofar as this practice is used to remedy constitutional defects. For better or worse, Mr. Biever elected self-representation because he did not like, trust, or want a lawyer. In this circumstance, can we say that he was able to fairly meet and defend the case against him because, instead of providing him with access to free legal information, we appointed a lawyer to assist?

Of course, Mr. Biever's subjective beliefs do not govern whether or not he received a fair trial – the test is an objective one. With that said, however, we must be cognizant of the limits of an *amicus*'s role, and the fact that self-represented persons are ultimately in charge of their own defence. Meeting that task requires access to adequate legal research materials. In deciding how to handle a self-represented inmate's right to defend him or herself, it is a dangerous presumption to conclude that an *amicus* fixes the constitutional defects arising from unduly restricting their ability to conduct research. While this was not the conclusion in the present case, it was a deciding factor in other decisions (for example see *Jordan, supra*).

Concluding Thoughts

In my view, this case is most important for its recognition of the changing face of legal research. The move to web-based resources has forever altered the way legal research is conducted. The *Biever* decision simply recognizes that this reality has implications for the pre-existing right of criminal accused persons to represent themselves and adequately prepare for trial. This decision has the further benefit of correctly confining the role of a court-appointed *amicus*. It will be interesting to see how Alberta detention facilities respond to Justice Graesser's suggestions, and how many self-represented inmates will reap the benefit of this decision.

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