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Unauthorized practice and access to justice

By Alice Woolley

Cases Considered:
Lameman v Alberta, 2011 ABQB 396

The Beaver Lake Cree Nation have commenced an action against the federal and provincial Crowns claiming that their treaty rights have been infringed by the Crown "taking up so much of their traditional territory that [they] have no meaningful right to hunt, trap or fish" (*Lameman v Alberta* 2011 ABQB 396, para 12). The Crown brought applications to strike the Nation's actions, the hearings in respect of which were adjourned on the basis of the Nation's impecuniosity.

The Nation then commenced an application to use a firm of English barristers, Took Chambers, in their case against the Crown. None of the members of the Took Chambers are members of the Law Society of Alberta, or of any Canadian Law Society. They offered their services to the Nation for free, apart from reimbursement for travel and associated expenses. The Nation sought permission to use Took Chambers to prepare their briefs but also to make arguments in court and to question witnesses, without the Nation's Canadian counsel being present.

The Nation's use of Took Chambers in this way was challenged by the Crown Defendants, and also by the Law Society of Alberta, who sought and received permission to intervene on the matter. The position of the Defendants and the Law Society was that subsection 106(1) of the *Legal Professions Act*, RSA 2000, c.L-8 (*LPA*), prohibits any person who is not a member of the Law Society of Alberta from practicing law in Alberta. Further, the provision of the new Rules of Court, which gives the Court the power to permit a person to "assist a party before the Court" does not limit the operation of the *LPA*, and does not extend to the type of activities sought to be performed by Took Chambers.

In a short and carefully reasoned judgment, Mr. Justice Yamauchi accepted the arguments of the Defendants and the Law Society, and refused to make an order permitting Took Chambers to act. He noted that there was no issue with the English barristers giving assistance to Canadian counsel, but that what was being proposed went well beyond mere assistance, and clearly constituted legal practice. He noted that "questioning of witnesses, preparation of argument, and advocacy before the Court, clearly encompasses matters in respect of which law students receive training and which the public understands to form part of a litigator's stock and trade… If these tasks do not form part of the practice of law, what does?" (para 36).

Yamauchi J. noted the clear terms of the *LPA*, and found that the purpose of the restriction in the legislation was to ensure that lawyers be "competent and proficient", insured and compliant with the Law Society's Code of Professional Conduct (para 37). He noted that while the lawyers from Took Chambers could be considered to be competent and proficient, there was no evidence

that they were insured, or that they would be bound by the Code of Professional Conduct. Further, the new Rules of Court only permit the Court to grant someone the opportunity to "assist" a party, not to represent that party, and the Rules cannot contravene the clear provisions of the *LPA*: "The Court has no inherent jurisdiction to make an order negating the unambiguous expression of the will of the Alberta legislature" (para 39). It is true that there is an exception in the *LPA* for foreign lawyers who are providing advice on the laws of a foreign country; however, that provision has no application given that the lawyers from Took Chambers would be acting on matters of Canadian law, not foreign law.

Justice Yamauchi's reasons seem compelling given the clear terms of the *LPA*, and the constrained language of the Rules of Court. The case does raise, though, the question of whether lawyers in Alberta should be given a monopoly over the provision of legal services as extensive as the one they enjoy.

It is true that the lawyers from Took Chambers may not carry Canadian insurance, and may not be technically bound by the Code of Professional Conduct. It is also true that they have not been trained – at law school, through articles or otherwise – in the substantive content of Canadian law. However, these barriers do not seem especially substantial, or to undermine the point that the firm's services would provide real and tangible benefits to the Nation in the prosecution of their action at little cost. The terms of English codes of conduct are in substance similar to those that apply in Canada. In the event that their services prove to be negligent or in breach of contract, it seems likely that the firm has resources to cover claims made against them by their clients. Further, those clients are not unsophisticated, and could make the decision themselves as to whether to be represented by an uninsured firm. After all, most American lawyers are not legally required to carry insurance, and yet the US legal services market seems to carry on regardless. Lawyers are rarely sued successfully for their conduct of litigation.

Further, what information I could obtain on them from the web suggests that lawyers from Took Chambers are likely to provide outstanding service to their clients, whether in Canada or elsewhere. They have a practice that they describe as "unashamedly political" and have been involved in a wide variety of domestic and international matters raising questions of access to justice and civil rights. In one article that mentioned them they were described as "Left-wing legal Chambers presided over by the wildly grand Michael Mansfield QC" (Mail Online, Quentin Letters, "Vera the Amazon is back as Bar maid", January 23, 2011). Mansfield represented those wrongfully convicted in the IRA's Guildford and Birmingham pub bombings, amongst other high profile cases.

On the specific facts of this case it seems likely that the benefits of the Took Chambers representing the National significantly outweigh the costs and risks with their doing so.

The arguments against the representation are likely to operate at the level of generality and policy – that even if it might be a good thing for the Took Chambers to act for the Nation, it is nonetheless a bad thing to allow people who are not members of the Law Society of Alberta (or, given our new mobility rules, another Canadian law society) to practice law here. Non-members may not be competent, and their practice cannot be regulated by the law society; they may inflict costs on their clients and the functioning of the administration of justice while not meaningfully improving access to justice.

These general arguments undoubtedly have considerable weight. One of the reasons why we license certain activities and restrict who may participate in them is to protect the public against incompetent or unscrupulous persons to whom they might otherwise be vulnerable. But their

weakness in the particular case of Took Chambers does suggest that we should be careful in simply assuming that those arguments are sufficient to justify the blanket prohibitions contained in the *LPA*. Can there not be a more nuanced or careful approach to the provision of legal services, in which consumer and public interests are protected, but the availability of competent and helpful legal advice is not irrationally restricted? I have to think that there could be; the facts of this case invite us to try.