May 22, 2012

No ~~Soup~~ Practice For You!

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Cases Considered:
Lameman v Alberta, 2012 ABCA 59

Introduction

On March 1, 2012 the Alberta Court of Appeal upheld the judgment of Justice Yamauchi dismissing the application of the Beaver Lake Cree Nation to have English lawyers appear on their behalf. In a blog on Justice Yamauchi's decision, I suggested that the decision was legally sound but raised questions of public policy in relation to whether the practice of law should be so rigorously constrained. Specifically, I questioned whether "there [could] 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." (Unauthorized Practice and Access to Justice).

The judgment of the Court of Appeal similarly rests on legally solid ground. The prohibition on persons who are not members of the Law Society of Alberta from acting in Alberta courts is clearly set out in section 106 of the *Legal Profession Act*, RSA 2000, c L-8, and nothing in the provisions of the Alberta Rules of Court provides a sufficient basis to permit a judge to nullify that rule. Once you characterize the appeal as the Court of Appeal does – as being "about whether a judge can override a prohibition in the *Legal Professions Act*" (para 1) – the outcome is obvious. Absent constitutional challenge what legal basis could a judge ever have for overriding a legislative provision?

That said, however, the Alberta Court of Appeal's judgment does not quiet at least my uneasy feeling that section 106 of the *Legal Professions Act* is unsatisfactorily broad, and that a more nuanced approach to this question is both possible and desirable. Indeed, the strength and certainty of the Court's endorsement of the principles and policy underlying section 106 only adds to that lurking discomfort, especially because some of that strength and certainty does not seem to be especially justified or warranted.

The decision

Justice Côté first summarized the background for the application, including the fact that "none of the six barristers has sought any kind of admission to the Law Society of Alberta, nor its permission to appear temporarily or for one suit, nor relaxation of any of its rules. Statute allows the Law Society to grant such requests" (para 4). After also setting out the terms of the relevant legislation, Justice Côté noted the essential points that, first, the Rules of Court expressly prohibit any decision "that would contravene section 106(1) of the *Legal Profession Act*" and, in

any event, no regulation can override a statutory provision (para 9). Further, no court can override a legislative act absent a Charter violation, which was never alleged in this case (para 11).

Côté J. then considered the arguments of the appellant that section 106 did not apply where the non-member seeking to practise law was not being paid. Côté J. made the fairly obvious (and sensible) observation that there is no reason that the characterization of something as the practice of law would depend on whether the practitioner is compensated (para 15). He also noted that fulfillment of the policy reasons underlying the provision – the protection of the public from "incompetent or unethical lawyers or advocates" – does not depend on whether the person providing the services is paid; indeed, someone who cannot pay for legal services may be especially vulnerable to "imposters, and disbarred, suspended, or unwanted lawyers" (para 17). The relationship between restrictions on legal practice and ensuring public trust in the legal system, is also not qualified or limited by whether or not the person restricted is being paid. Also, an exception applied simply on the basis of whether the person providing the services is paid, would result in no protection whatsoever to those receiving such services, it would "hand over the counsel table and podium to a while gamut of persons" (para 24). It is true that judges would determine who receives an audience, but that is a potentially undesirable bypassing of "the entire elaborate screening and evaluation system by Canada's various law societies and national accreditation bodies, set up by or under legislation" (para 25). Justice Côté noted that it may be difficult to determine what constitutes providing services for "free" (para 28-29). He also rejected categorically the allegation that the Law Society of Alberta was being protectionist; since the statutory provision comes from the provincial legislature, not the Law Society, it "is scarcely likely to be 'protectionist'" (para 31).

Justice Côté noted as well that it was incorrect to suggest that the parties to the litigation had no proper standing to oppose it – any party can be heard on a motion relevant to its action and, in any event, any lawyer acting in a case has a direct interest in ensuring that the lawyer on the other side is neither incompetent nor unethical.

Justice Côté rejected the view that Justice Yamauchi had not properly exercised his discretion to permit an audience; Yamauchi J. did not have such discretion but, even if he had, there was reason to support the exercise of discretion against allowing the foreign representation. In particular, there was reason to be doubtful about the assertion that the Beaver Lake Cree require representation by a person not called to a Canadian law society. The evidence provided about their lack of financial means was "very unsatisfactory" (para 45), the British lawyers did not provide affidavits and could not be cross-examined. This meant, for example, that it was stated that those lawyers would obtain insurance, but Côté J. suggested that doing so may be difficult – "Most or all of the Canadian market for [lawyer insurance] has been abandoned in the last 30 years by private insurers, leaving only captive insurers formed by associations of lawyers" (para 51). It was also not clear whether the foreign lawyers would satisfactorily respond to undertakings or how they would be regulatorily governed, given that they would not be subject to the Alberta code of conduct, their own code of conduct may be different and, in any event, it was not clear "who would have jurisdiction and willingness to enforce the applicable code" (para 53). The lawyers did not provide any meaningful or useful evidence on this point. The Court noted that there are some 30,000 lawyers in Canada, any of whom could appear on behalf of the appellant (para 54). Further, the issues raised by the case are about aboriginal law, a matter with no equivalency in many foreign jurisdictions, including England (para 56).

Commentary

As noted, Justice Côté's analysis of the language of the statute, and of its intersection with the Rules of Court makes sense. The blanket prohibition of the *Legal Professions Act* is clear, and the Rules of Court do not purport to override that prohibition. It would perhaps have been best had the Court of Appeal restricted its analysis to this point. As noted, however, the Court bolstered its analysis through making various observations about the background and policy underlying the restriction in the *Legal Professions Act* and its application to the Beaver Lake Cree. Those observations are significantly more problematic than the basic legal analysis. I will note some of those problems here. I do so simply because if, as I strongly believe, the merits of allowing "non-lawyers" to practice should be the subject of significant and serious public discussion, it is important that that discussion be well-informed. I have five short observations.

Applying to the Law Society would have been a waste of time

In setting out the background for his decision, Justice Côté noted that the barristers had not sought admission to the Law Society even though "Statute allows the Law Society to grant such requests" (para 4). This characterization of the *Legal Professions Act* is misleading, at least in the context of this proceeding, and these barristers. It is true that it is possible to obtain a temporary call in Alberta; however, under the terms of section 48 of the *Legal Profession Act*, the power to grant a temporary call is restricted to "an individual enrolled as a member of a law society in any province or territory of Canada other than Alberta." It would thus have been of no assistance to the barristers in this case. A foreign trained lawyer may become a member of the Law Society; however, that process is the extensive process followed to allow that lawyer to become a permanent member of the Law Society. That lengthy accreditation scheme would also have been of no practical benefit. Whatever the merits of the scheme governing admission of foreign lawyers to the Law Society, applying to the Law Society would have been a fruitless endeavor for these barristers, and it is misleading to imply that the problem here was simply that the lawyers had not followed the process that would permit them to appear. There was no process to permit them to appear.

What is in the best interests of "the poor" is uncertain

Justice Côté suggested that ensuring that only members of the Law Society of Alberta practice is in the best interests of "the poor" because they "need the protection more than do the rich" (para 17). It may be true to say that "the poor" are more vulnerable to unscrupulous lawyers (although I think even that assertion is less obvious than it seems to Justice Côté; the imperfections in the market for legal services apply broadly - see here). However, in discussing this issue it is important to look squarely at the fact that most people who cannot afford lawyers simply end up unrepresented. Poor people are not at risk of making an unwise choice about which lawyer to retain. They have no choice; there is no one who will represent them at a price they can afford, and usually no legal aid to assist them in retaining a lawyer. Ensuring access to lawyers for those who need them is a serious public policy problem. It is too simplistic to assert that restricting the practice of law to members of the Law Society is unambiguously in the best interests of "the poor."

Who should be the gatekeepers to legal practice?

Justice Côté casts doubt on the ability of judges to screen who should practice relative to the expertise of the Law Society. Undoubtedly Canadian law societies do have elaborate

mechanisms to determine who should be admitted to legal practice. However, it is not at all obvious that it remains in the best interests of the Canadian public that Canadian lawyers are so wholly self-regulated. As I have discussed elsewhere, the rest of the common law world has abandoned this self-regulatory model to the extent they ever had it, and the justifications for doing so are strong (see here). Any conversation about how to address the scope of non-lawyer participation in the market for legal services should not assume the regulatory incompetence of other players in the legal system, and most especially of judges.

Legislative power does not prevent protectionist regulation

At one point Justice Côté suggests that because the provision in the *Legal Professions Act* comes from the legislature, it is not plausible that it could be protectionist. This assertion seems naïve. History shows that legislators and regulators may act to protect the economic interests of segments of society without proper regard to the public interest. With respect to the legal profession, at the very least there has been a disappointing absence of political or public engagement in Canada about how best to regulate what lawyers do. The question of whether the result of that has been protectionist is at minimum a question for serious public discussion, rather than a possibility to be blithely dismissed.

Let's not overstate the problems

Justice Côté variously notes that English lawyers may not be subject to a code of conduct, may not be bound by undertakings, may not be able to purchase insurance and are not familiar with the unique requirements of Canadian aboriginal law. While these are certainly valid considerations for assessing whether and in what way to expand the boundaries of legal practice, it is not obvious how significant they are on the facts of this case. Other countries do grant rights of audience to lawyers from other jurisdictions and appear to do so without particular incident – I'm thinking of Eddie Greenspan's representation of Conrad Black for example. The Court has considerable power over anyone appearing before it, a power which is in many ways more significant than the regulatory authority the law societies have over even their own members. It is my understanding that the national Canadian law firms purchase insurance beyond the amounts provided by the law societies, so the assertion that there is no ability to obtain such insurance seems doubtful.

Finally, while Canadian aboriginal law does not have a counterpart in England, it is not unique in the common law world; many other common law countries have extensive aboriginal law jurisprudence. Moreover, while aboriginal law is complicated, it isn't *that* complicated, and most civil litigators become practiced at gaining expertise in areas of law previously unfamiliar to them.

Again, this is not to say that the question of how and whether to expand who may practice law does not require consideration of these and similar issues. But these are not as significant barriers as Justice Côté's reasons imply.

Conclusion

As I said in my previous blog, my purpose here is not to make any particular public policy recommendations about the expansion of legal practice. My point is two-fold: 1) to reiterate my previous suggestion that this case invites us to think about how to be appropriately less restrictive in who we permit to provide legal services to clients; and 2) to help ensure that discussion of how to address this problem does not get derailed by misconceptions or doubtful assumptions.