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Judicial Dissent over Priorities in Civil Justice: Queue-Jumping and the Commercial List

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Cases Considered: *Lustre Studio Inc. v West Edmonton Mall Property Inc*, 2014 ABQB 525

In *Lustre Studio Inc. v West Edmonton Mall Property Inc*, 2014 ABQB 525, the Honourable Mr. Justice B.R. Burrows provided a candid window into judicial frustrations with access to justice in Alberta. In pointed words, he expressed dissatisfaction with the courts' willingness to prioritize and accommodate commercial cases through mechanisms unavailable in family and non-commercial matters. While Justice Burrows clearly criticizes this preferential treatment, he also expresses resignation in quelling the tide. This decision implicitly questions the priorities of our justice system and the preference given to commercial matters over non-commercial cases, even when they urgently require the court's attention. Practically speaking, Justice Burrows may be correct in stating that expanded accommodations for commercial cases are here to stay. If so, this innovative project should be harnessed to create equally effective mechanisms for family and other non-commercial cases.

Facts

On August 22, 2014, Justice Burrows was completing a week on Edmonton Chambers Duty (sitting in Family, Regular and Special Chambers). Many of the matters he heard in Family and Regular Chambers were complicated and required a Special Chambers hearing. Unsurprisingly, however, there was a significant queue for Special Chambers dates stretching until the winter and/or spring of 2015.

That same day, Justice Burrows received a request from counsel for Lustre Studio Inc. ("Lustre") to have an interim injunction application heard as part of the Commercial/Duty Justice Initiative at a full day hearing on September 12, 2014. The injunction revolved around a commercial lease dispute between Lustre and its landlord West Edmonton Mall Property Inc. ("West Ed"), wherein West Ed invoked a lease provision requiring Lustre to relocate by January 16, 2015, which Lustre sought to avoid.

Lustre's effort to have its case heard in September 2014 (rather than early 2015) is permitted by the Commercial/Duty Justice Initiative (the "Commercial List"). The Commercial List is a 2010

initiative of the Court of Queen's Bench (Notice to the Profession #2010-08) that creates a separate queue for commercial cases to access specialized judges on an expedited basis. Practically speaking, if a case falls within the Commercial List mandate, it can be heard by a judge from the Commercial Practice Group within weeks, not months. While it began as a Calgary/Edmonton project to accommodate bankruptcy, insolvency and related matters, the Commercial List was expanded in a Notice to the Profession issued by the Chief Justice and Associate Chief Justice of the ABQB (NP#2014-04) in April 2014 to include non-bankruptcy commercial matters such as:

- Mareva Injunctions;
- Anton Pillar Orders;
- Third-Party Production (Norwich) Orders;
- Remedies under Business Corporations or Securities legislation; and
- Other matters permitted by a Commercial Duty Judge sitting in Commercial Appearance Court or a Co-Chair of the Commercial Practice Group or her designate (at paras 5, 6).

Counsel for Lustre relied on the last of these headings. In its letter to Justice Burrows, Lustre did not allege that its matter was urgent, as urgency is not a requirement of the expanded Commercial List initiative (at para 8).

Reasons

Justice Burrows granted Lustre's request (at para 12). The expanded Commercial List initiative did not provide guidance for his exercise of discretion. Since it fit within the mandate and nothing else was scheduled on that day, he had no reason to refuse the request.

Justice Burrows explained, however, that he was granting the request despite his fundamental disagreement with the expanded Commercial List initiative. While it is uncharacteristic for a judge to highlight his disagreement with a law, Justice Burrows was compelled to make this comment because the law in question was a judicial policy implemented by the Alberta judiciary. As such, he wished to make his personal disagreement with this law crystal clear. In his words:

> [15] … My oath requires me to apply the law even when I am of the view that the law is not what it should be. This is a situation where I am obliged to apply "law" with which I fundamentally disagree.
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> [16] Ordinarily, it would not be relevant or even appropriate for a judge to point out where he does not agree with the law he is obliged to apply. In my view that is not the case where, as here, the judge is a member of the policy setting body which adopted the law in question and might otherwise be thought to have agreed with the law as adopted.

Justice Burrows' objection was not based in opposition to Lustre's argument, injunction applications, lease disputes, or commercial matters generally. Rather, he was motivated by the inequity of dedicating scarce judicial resources to prioritize commercial matters over family and non-commercial civil actions. The Commercial List plainly prioritizes non-urgent commercial

cases over urgent family and non-commercial civil matters. Thus, while bound to apply the law, Justice Burrows expressed his palpable distaste for it. He concluded:

> [17] The Court clearly requires a triage system to deal with matters which have an element of urgency. In this Court there is no formal triage system. A family and non-commercial civil litigant who feels their matter requires priority judicial attention can do little more than hope that a judge will agree and make some *ad hoc* arrangement for the early hearing of the application. As noted, pursuant to the Notice to the Profession, commercial business matters are simply given automatic priority assuming there is free time on the schedule of the commercial duty judge. In Edmonton at least, such free time occurs frequently.
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> [18] I have on several occasions made my view on this subject known to my colleagues. I have been unable to prevent the adoption of this Notice to the Profession. I record here that, though I am bound to apply it, I believe it institutes an extremely ill-advised policy.

Commentary

The Priority of Commercial List

Commercial litigators in Calgary and Edmonton often praise the efficiency, specialization, and practicality of the Commercial List. As a former commercial litigator, I have some familiarity with the Commercial List where matters are often undeniably urgent and the stakes are high. The Commercial List itself is not inherently bad, nor does it impede access to justice. It is an intelligent response to a problem facing commercial litigants who need to access the courts on time sensitive matters. The Commercial List has undeniably advanced access to justice for many commercial parties who (for example) face immediate and irreparable harm from a creditor-induced bankruptcy application, or a permanent injunction that could destroy a business and put many people out of work.

The problem with the Commercial List arises from its inequity in relation to non-commercial cases. While certain commercial litigants are able to access a formal queue-jumping system, as Justice Burrows stated "[a] family and non-commercial civil litigant who feels their matter requires priority judicial attention can do little more than hope that a judge will agree and make some *ad hoc* arrangement for the early hearing of the application" (at para 17).

As matters stand, the expanded Commercial List effectively creates a two-tiered system whereby non-urgent commercial matters are blatantly prioritized over urgent family and non-commercial civil cases. This distinction is unfounded and unacceptable.

I would not, however, suggest that we abolish the Commercial List to rebalance the current inequity. It is an example of a positive and practically based solution to the problem of accessing courts. Therefore, instead of attacking the program, we ought to use it as an example. The same innovative thinking used to develop the Commercial List (and the resources needed to implement it) would be well-utilized developing a similar program for family and non-commercial litigants

in urgent cases. This would rebalance the current inequity while promoting innovative solutions to make courts more accessible.

The Emergence of a Trend?

On a concluding note, the timing of Justice Burrows' comments also merits discussion. Earlier this month, I blogged on *R v Smart*, 2014 ABPC 175, where the Honourable Assistant Chief Judge Anderson stayed proceedings against three accused persons who could not afford counsel, but did not qualify for Legal Aid. Like *Lustre*, *Smart* contained considerable commentary on the barriers to justice faced by parties who fail to fit within a particular initiative (in that case, Legal Aid). While couched in different terms, both decisions expressed frustration with the justice system's failure to adequately serve the people who use it.

Strikingly, despite their stated views on increasing access to justice, in both cases the adjudicators ultimately sacrificed civil and family law matters in favor of cases with a greater priority. In *Lustre*, Justice Burrows was ultimately required to accommodate the applicant's request to the detriment of non-commercial civil and family law cases. In *Smart*, Judge Anderson leveraged the constitutional priority given to criminal cases to demand that the accused persons be appointed Legal Aid counsel. As discussed in my earlier blog, this decision will likely come at the expense of civil and family litigants seeking Legal Aid.

Lustre and *Smart* were released approximately two weeks apart. It is likely premature to label two cases a "trend", but they are consistent with recent reports on access to civil justice, and this recent judicial commentary does provide an invaluable perspective on how barriers to justice are directly encountered and perceived in the courtroom. These decisions also highlight the fact that barriers to justice are often systemic. In their decisions, Judge Anderson and Justice Burrows both clearly wanted to increase access to justice. Their decisions, however, were ultimately compelled by the application of a triage system that prioritizes some cases over others. Unfortunately, when there aren't enough resources to go around, family and non-commercial civil matters are continually left in the cold. Clearly, this inequity cannot be remedied on a case-by-case basis in the courtroom. Policies and (before that) perspectives on the importance of civil justice must change if we want to level the playing field.