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A Constitutional Right to Free Transcripts?

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Case Commented On: *Taylor v St. Denis*, 2015 SKCA 1

Last fall, the Supreme Court of Canada found a hearing fee scheme unconstitutional because it prevented people from accessing courts (see *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, 2014 SCC 59 (*Trial Lawyers*)). In *Taylor v St. Denis*, 2015 SCKA 1 (*St Denis*), the Saskatchewan Court of Appeal was asked to extend this reasoning to exempt a self-represented litigant from the cost of mandatory trial transcripts. The Court declined this request, choosing instead to distinguish the landmark Supreme Court decision. Unfortunately, the decision in *St Denis* was impacted by deficits in the applicant's evidence and arguments. Despite these shortcomings, *St Denis* serves as a useful indicator to highlight how the Supreme Court's decision will function as a future precedent.

Facts

The applicant, Taylor, appealed the judgments in two defamation actions he commenced. Under the Saskatchewan *Court of Appeal Rules*, Taylor was required to pay for and file a trial transcript as part of the appeal record (*Court of Appeal Rules,* Sask Gaz April 18, 1997, Rule 19; *The Court Officials Act,* SS 2012, c C-43-101, s. 14(2)). Without relevant transcripts, the appeal would not proceed. If the parties could not agree on relevant extracts to produce, the entire transcript was required. The transcript fee in this case was $20,500. Taylor alleged that he could not afford to pay for the transcripts, and sought an order directing an exemption from the fee. He lost that battle on jurisdictional grounds because, in Saskatchewan, transcribing services are provided by and paid to private third parties. The presiding justice lacked jurisdiction to order a private non-party to forego the fee for their services. Taylor then amended his application to request that the Attorney General pay the transcript fee. The Attorney General intervened in opposition to the amended application.

Reasons for Decision

Taylor's application failed. As is unfortunately the case with many self-represented litigants, Taylor was not his own best advocate, and many of his arguments were hindered by unfamiliarity with complex legal principles. As such, several of his arguments (including a claim under the doctrine of state necessity, *Charter* ss. 7 and 15(1) breaches, reliance on *Criminal Code* provisions, and an assertion that the trial judge's reasoning breached the rule of law) were dismissed with little difficulty (*St Denis* at paras 12 – 37).

However, Taylor's submission that the transcript fee violated a constitutional right to access superior courts merited more detailed discussion. This argument rested on the *Trial Lawyers* decision, wherein the Supreme Court held that hearing fees impermissibly encroach on s. 96 of the *Constitution Act, 1867* and the rule of law if they effectively block access to courts (*Trial Lawyers* at para 2).

Taylor argued that his situation mirrored that in *Trial Lawyers*. Madam Justice Ryan-Froslie was less convinced, and distinguished *Trial Lawyers* on four grounds:

- Every limit on accessing courts is not an automatic constitutional problem (see, for example, *British Columbia (Attorney General) v Christie*, 2007 SCC 21 (*St Denis* at para 59)).
- Transcript fees differ significantly from the hearing fees in *Trial Lawyers*. Transcripts are a form of evidence, the assembly of which have always been considered personal in nature. Moreover, transcript fees are charged by private individuals as part of their business. It is not a government fee or method of broader government policy implementation (*St Denis* at para 60).
- Appellants have some control over the extent and cost of the transcripts they produce on appeal. Where disputes arise, a court application can determine which transcripts are necessary to an appeal (*St Denis* at para 61).
- The government's position on transcript fees is a question about the allocation of scarce resources. This determination is better left to the legislative and executive branches of government (*St Denis* at para 62).

Alternatively, even if she was wrong in her assessment of *Trial Lawyers*, Justice Ryan-Froslie noted that Taylor failed to meet the evidentiary standards established in that case. In particular, Taylor failed to demonstrate that he could not afford the $20,500 fee, as the evidence he submitted regarding his financial position was lacking on several vital points (*St Denis* at paras 33-35, 63, 65).

On a conciliatory note, Justice Ryan-Froslie adjourned opposing counsel's cross-application demanding that Taylor's appeal be perfected. She directed the parties to a pre-hearing conference where they could determine what portions of the trial transcripts were actually necessary to the appeal.

Discussion

Distinguishing the* Trial Lawyers *Decision

Given the burden that a broad reading of *Trial Lawyers* could impose on courts and government, this application would have been difficult to win even with an ideal fact pattern and experienced counsel. Unfortunately, neither of these factors was present here. As such, the Court did not hear a clear and compelling argument about how the hearing fees in *Trial Lawyers* are comparable to mandatory trial transcripts. This missed opportunity permitted the Court of Appeal to emphasize the differences between these two cases and draw on Taylor's evidentiary weaknesses to reach its decision.

For example, unlike *Trial Lawyers*, Taylor's $20,500 transcript fee was not a flat and unavoidable charge. Instead, it depended on the scope and style of appeal being launched. While

not stated expressly, it seems that Taylor was demanding that the full trial record from the 29-day trial be transcribed. As Justice Ryan-Froslie correctly noted, there were a variety of methods open to Taylor to reduce the $20,500 fee to a more affordable level. Even though a much more reasonable fee (say $5,000) could still have been too expensive to afford, Taylor's role in reaching the $20,500 figure significantly weakened his argument that the government should bear the cost.

The Court of Appeal further emphasized the difference with *Trial Lawyers* by reference to government policy. The Supreme Court in *Trial Lawyers* was notably influenced by the fact that hearing fees were a tool to implement government policy (in that case, encouraging the efficient use of court time). However well intentioned, this policy had the effect of entirely blocking some people with valid claims from accessing court, and that was unacceptable (*Trial Lawyers* at paras 22, 51, 52). In *St Denis*, the transcript fee was not a government fee. Justice Ryan-Froslie used this discrepancy to distinguish the Supreme Court's decision (*St Denis* at para 60). A persuasive argument could have been made that that the privatization of transcribing services is indeed a government policy. Arguably, this policy accomplishes the same goal, and has the same shortcomings, as the policy at issue in *Trial Lawyers.* Unfortunately, this argument was not pursued by Taylor.

Lastly, the *St Denis* decision was likely influenced by the fact that Taylor sought access to the Court of Appeal as opposed to the Court of Queen's Bench. Justice Ryan-Froslie correctly noted that Courts of Appeal are "superior courts" (*The Court of Appeal Act*, SS 2000, c C-42.1 s 3(1)), and that the reasoning in *Trial Lawyers* applied equally to Courts of Appeal (*St Denis* at para 57). Nonetheless, this unquestionably lessened the persuasiveness of Taylor's argument. The Court in *Trial Lawyers* provided inspired passages on the fundamental importance of superior courts and their core jurisdiction in resolving disputes (*Trial Lawyers* at paras 31-33). This rhetoric does not resonate as strongly when discussing the Court of Appeal, as Taylor already had his day in court. Given the broad nature of the appeal he was launching, it seemed that he was seeking the right to re-argue that case. In short, Taylor's facts did not create any incentive for the Court of Appeal to stretch the reasoning in *Trial Lawyers* to help him out.

Developing Law with Self Represented Litigants

Unfortunately, Taylor's self-representation clearly hindered his ability to launch a successful argument, and the evidentiary shortcomings may have defeated his case before it began. One cannot help but feel Taylor's frustration with the complexity of the process. From his perspective, Taylor faced a $20,500 cover charge to launch an appeal. Finding this burden insurmountable, he applied to have the fee waived. His application was dismissed on a jurisdictional point and before he knew it, Taylor was arguing about the constitutionality of s. 14 of *The Court Officials Act* against counsel for the Attorney General.

This complexity is commonplace in the legal profession, but it does little to make the justice system appear accessible to our community. It also does not help the justice system's struggling public image as a broken and insular entity (see Dr Julie MacFarlane, The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants (May 2013) at 110); Canadian Bar Association, Reaching Equal Justice Report (November 2013)). Indeed, the Court of Appeal's written decision itself is legalistic and formal, and I suspect it will serve lawyers looking for a precedent more than it will ever help Taylor understand why he lost his application.

Having said all that, there is a significant positive development in the decision. Justice Ryan-Froslie should be commended for providing a much-needed beacon of practical insight when she directed that the matter proceed to a pre-hearing conference. In so doing, she cut through the complex legal concerns to address the real issue, the $20,500 price tag. Even though there may be no constitutional right to free transcripts, this direction recognizes the Court's discomfort with fees preventing someone from launching an otherwise meritorious appeal.

By stepping into a role more akin to case management, Justice Ryan-Froslie will be able to achieve more for both parties than any court application would ever accomplish. This step is often invaluable when dealing with self-represented litigants, who have repeatedly expressed their increased satisfaction with Court processes when they can deal with judges in this capacity (see MacFarlane, *supra* at 13, 14, 126). Shifting to case management orientation is a move that, at first, may appear to strain an already stretched legal system. I would suggest, however, that it will save time and money in clearing the courtroom of many inefficient applications, and will increase public confidence and support of our justice system.