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# Access to Justice, Self-Represented Litigants and Court Resources: A Snapshot from Alberta Superior Courts for the Month of May

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**Cases Commented On:** *Pintea v Johns*, 2016 ABCA 99 (CanLII); *Erdmann v Complaints Inquiry Committee*, 2016 ABCA 145 (CanLII); *JE v Alberta (Workers' Compensation Board)*, 2016 ABCA 147 (CanLII); *HH v DB*, 2016 ABQB 164 (CanLII); *Pickett v Walsh*, 2016 ABQB 222 (CanLII); *McCallum v Edmonton Frame and Suspension (2002) Ltd*, 2016 ABQB 271 (CanLII); *R v Cullen*, 2016 ABQB 272 (CanLII); *Alberta v Greter*, 2016 ABQB 293 (CanLII); *ET v Rocky Mountain Play Therapy Institute Inc*, 2016 ABQB 299 (CanLII)

As the Coordinator and Student Assistant for ABlawg, we review all Alberta Court of Queen's Bench and Court of Appeal decisions each week for their blogworthiness. During the month of May, we noted several cases dealing with issues related to access to justice and the courts' role in and resources for dealing with self-represented litigants. Of course, resource issues do not only arise in cases involving self-reps. On June 1, 2016, Justice Berger of the Court of Appeal chastised counsel for parties to protracted litigation with the following words:

> I would be remiss if I failed to express serious concerns for that which I perceive to be a disregard on the part of counsel for the limited resources available to the judiciary, particularly at a time when the courts are functioning with less than a full complement (*Weatherford Canada Partnership v Kautschuk*, 2016 ABCA 173 at para 7).

This statement refers to the fact that Alberta is short of both Court of Queen's Bench and Court of Appeal justices. The need for the federal Minister of Justice to make judicial appointments to fill these vacancies and to create new positions given the increase in Alberta's population has been commented on by Alberta's Justice Minister Kathleen Ganley, as well as Chief Justice Neil Wittman of the Court of Queen's Bench (see here and here). Chief Justice Wittman called the shortage a "crisis" as far back as October 2015, when he stated that the courts "are literally at the breaking point right now."

In light of this crisis, it seems worthwhile to look at a snapshot of cases involving issues concerning access to justice, the impact of self-represented litigants on the courts' resources, and how the courts have been handling such issues. Some of these cases will also be the subject of more detailed ABlawg commentary. Although the nine decisions covered by this post amount to what could be called "anecdata" – a term used by Nicole Aylwin at the recent Access to Social Justice Symposium in Calgary to describe some of the research of the Cost of Justice project – our hope is that it is still useful to round up a month's worth of decisions to get a sense of the breadth and depth of the problems. The cases we look at here are probably just the tip of the iceberg – some of the courts' decisions might be communicated orally and not result in written reasons. And, it is important to note that the decisions we comment on here say nothing about the many, many legal problems that never end up in court because the parties do not have the support or resources to litigate.

**Issues on Appeal**

Three decisions of the Alberta Court of Appeal deal with issues arising when self-represented litigants manage and assess the prospects of success of their own litigation.

In *Pintea v Johns*, 2016 ABCA 99 (CanLII), the appellant missed service of notice of a hearing before a case management judge because he had moved and failed to provide his new address to the respondents or the court. A majority of the Court of Appeal (Justices Bruce McDonald and Barbara Lea Veldhuis) upheld the case management judge's decision striking the appellant's statement of claim in relation to a motor vehicle accident and issuing an order for costs against him. The majority found that "The fact that the appellant is a self-represented litigant in this appeal does not excuse his failure to comply with the *Rules of Court* in respect of notifying both the court and opposing counsel of a change of his address for service." (at para 20) Justice Peter Martin, writing in dissent, disagreed, noting that in his opinion:

> [T]he consequences of dismissing this appeal are excessively punitive. We now know that the appellant's failure to attend the case management meetings was not an act of contempt; he was simply not aware of them. The appellant is a self-represented litigant, who we understand had no fault in the motor vehicle accident and who could reasonably have expected a significant award of damages for the injuries he suffered. Now instead, this disabled, unemployed man is saddled with a cost award of almost $83,000. In my respectful opinion, that is a significantly disproportionate consequence for failing to file a change of address with the court. (at para 34)

Justice Martin would have would have allowed the appeal, restored the statement of claim and set aside the order of costs (at para 35).

Self-represented litigants had their appeals dismissed in two other cases where the Court of Appeal noted that their claims were non-meritorious. In *JE v Alberta (Workers' Compensation Board)*, 2016 ABCA 147 (CanLII), Justice Veldhuis, sitting alone, considered an application to restore a worker's compensation appeal that was struck by the Registrar for failure to file the appeal record. The applicant deposed that "he took significant steps to retain counsel to represent him, including refinancing his home to raise fees" (at para 3). However, there was delay in proceeding with the appeal, and in any event, the Court found that it had no arguable merit: "This appeal could never succeed, and it would be a waste of the parties' resources to restore this appeal." (at para 9).

Similarly, in *Erdmann v Complaints Inquiry Committee*, 2016 ABCA 145 (CanLII), Justices Jack Watson, Bruce McDonald and Frederica Schutz dismissed an appeal of a professional disciplinary body's decision against the appellant, where she had been found guilty of three counts of unprofessional conduct as a chartered accountant and ordered to pay fines and costs. One of the appellant's grounds of appeal was her lack of legal competency, but the Court found that this argument had no merit:

> The only evidence on this issue was a GAF test score put forward by the appellant at the hearing before the Appeal Tribunal. No expert witness was called or tendered to interpret the score or explain the test results, and the appellant herself refused to testify under oath and be subjected to cross-examination. (at para 39)

The appellant's other grounds of appeal were also found to have no merit and her appeal was dismissed.

**Issues at Trial**

A number of decisions at the Court of Queen's Bench level concern issues relating to self-represented litigants at trial.

In *HH v DB*, 2016 ABQB 164 (CanLII), Justice J.S. Little dealt with Ms H's appeal of a parenting order made in Provincial Court, where she was represented by counsel and Mr B was not. Quoting an Ontario Court of Appeal decision, Justice Little noted that "Running a trial with a self-represented individual can put a trial judge in a very difficult position: 'When one party is self-represented, balancing trial efficiency and effectiveness with the appearance of independence and impartiality can be truly challenging'" (at para 10, quoting *Martin v Martin*, 2015 ONCA 596(CanLII) at para 108). Justice Little found that in this case, the trial judge's conduct – which included interrupting Ms H's counsel and limiting her time to examine her client, helping Mr B cross-examine Ms H, leading the direct examination of Mr B, and limiting Ms H's counsel's cross-examination of Mr B – led to the conclusion that "a well-informed person viewing the trial would conclude that consciously or unconsciously, the trial judge did not decide fairly." (at para 17) The matter was sent back to Provincial Court for a re-hearing.

In contrast, in *McCallum v Edmonton Frame and Suspension (2002) Ltd*, 2016 ABQB 271 (CanLII), Justice Robert A. Graesser considered an appeal from a small claims court ruling where both parties were self-represented. He cited a recent decision, *Malton v Attia*, 2016 ABCA 130 (CanLII) – which falls just outside our snapshot, having been decided on April 29, 2016 – where the Court of Appeal recognized the challenges posed by self-represented litigants in another case where the trial judge was found to have gone too far in assisting the litigant:

> [2] Self-represented litigants appear with increasing frequency in our trial courts. In response, courts have made procedural reforms to facilitate effective and efficient dispute resolution. However, the fundamentals of trial process have not changed. A fair hearing requires an impartial, independent adjudicator. It requires that parties know the case they have to meet, have the opportunity to martial evidence to meet it, and the opportunity to make submissions with respect to it. These are core elements of our justice system.
> [3] These basic requirements can pose a challenge to the trial judge presiding over a trial with self-represented litigants. He or she must carefully walk the line between being of assistance to those litigants and becoming their advocate.

In *McCallum*, however, "both sides were on a level playing field: both were unrepresented by counsel. The trial judge played no favourites and applied the same rules to both parties. He was not obliged to relax his standards to accommodate the parties' lack of experience or familiarity with the rules of evidence and trial procedures." (at para 107) Justice Graesser found "no bias or reasonable apprehension of bias on the part of the trial judge" (at para 100), and dismissed the appeal. He did note that if the appellant had possessed greater familiarity with court procedure, that could have led to a different result, but this was not seen as an error attributable to the trial judge:

> The results might have been different if Mr. McCallum had been able to secure the attendance of the expert from Derrick Dodge, as he had planned. However, his inability

> to do so is not visited on the trial judge, but rather Mr. McCallum's unfamiliarity with the rules of evidence and court procedure. (at para 102)

Conversely, in *Pickett v Walsh*, 2016 ABQB 222 (CanLII), a dispute over spousal support and matrimonial property, Justice Wayne Renke found that a trial had not been hindered by the parties' lack of counsel – though issues related to self-representation were not directly before the court: "The parties represented themselves. They conducted the trial with calm civility and focus. I thank them for the seriousness and objectivity they brought to the proceedings." (at para 7) There are other cases where being self-represented clearly hinders the ability of parties to properly conduct their litigation.

In *R v Cullen*, 2016 ABQB 272 (CanLII), a self-represented litigant attempted to file an application alleging *Charter* breaches in relation to his arrest as well as against mental health and government housing agencies. Justice B.R. Burrows noted that the accused had counsel for the trial of his criminal charges, but not for the *Charter* application. He indicated that while he was "mindful that both the Crown and the Court will always exercise great flexibility so as to ensure that an accused in custody can bring alleged breaches of *Charter* rights to Court and to seek a remedy", the problem was that in this case, "the materials are so woefully deficient that to permit the application to proceed would necessitate the exercise of an unreasonable degree of flexibility." (at para 8) The application was adjourned so that the accused, who has mental health issues, "can seek a *Charter* remedy either by filing appropriate materials in this application or by commencing a new application." (at para 12) Although he gets a second chance, one is left to wonder about Mr Cullen's capacity to develop appropriate application materials if he continues to be self-represented.

Adverse consequences in the form of costs awards may also befall some self-represented litigants. In *ET v Rocky Mountain Play Therapy Institute Inc*, 2016 ABQB 299 (CanLII), the claimant was subject to an enhanced costs award against him of $18,000 for making "serious unfounded allegations" (at para 9) against the respondents and their counsel in an interlocutory proceeding related to his claim for breach of contract, defamation and negligence. More fortunate was the self-represented litigant in *Alberta v Greter*, 2016 ABQB 293 (CanLII), who attempted to use "pseudolaw" concepts to excuse her liability to repay her student loans. The Alberta government originally sought double costs against her, but did not pursue this position following its successful application for summary judgment. According to Master in Chambers S.L. Schulz, "If Alberta had maintained that claim I would have granted the double costs award sought, or ordered solicitor and own client indemnity costs against Ms. Greter." (at para 33) Instead, Ms Greter was ordered to pay costs of $3000. These cases are interesting to compare to *Pintea*, where the costs award of $83,000 seems highly punitive, especially in light of Justice Martin's point about the merits of the action.

**Commentary**

One initial observation is that the nine decisions covered in this post cover a broad range of underlying legal issues, including motor vehicle accidents, employment-related claims, family and criminal law issues, and small claims and debt-related matters. This is consistent with the recent findings of the Cost of Justice project that access to justice issues can arise in relation to myriad "everyday legal problems" (See Trevor C.W. Farrow, Ab Currie, Nicole Aylwin, Les Jacobs, David Northrup and Lisa Moore, Everyday Legal Problems and the Cost of Justice in Canada: Overview Report at p 8).

The Everyday Legal Problems report focuses on the cost of legal problems to the litigants, based on a telephone survey of 3000 Canadians. Our snapshot of cases captures a somewhat different picture, which is the cost of self-represented litigants to the justice system in terms of frivolous, unsupported, or improperly framed claims, applications and appeals, resulting in adjournments and, more generally, wasted and inefficiently used court time. But the justice system and its requirements may also impose costs on self-represented litigants – not just costs in the technical sense of a penalty for unsuccessful litigation, but also costs in terms of the inability to properly mount claims that may be meritorious. In cases where judges step in to assist self-represented litigants, they must exercise great caution in remaining impartial and independent so as to avoid having their conduct lead to further litigation.

These are issues that courts in Alberta and elsewhere have been facing for some time – see for example the work of Julie Macfarlane on self-represented litigants in Canada. In Alberta, however, the shortage of judges is likely exacerbating some of the negative effects of a system full of self-represented litigants, for example by increasing the use of court time, resulting in delays and the negative consequences associated with delays. We add our voices to those of others who have called on the federal Minister of Justice to make it a priority to fill the vacancies in Alberta superior courts and to provide a proper complement of judges in Alberta, before matters get any worse.