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Refining Vexatious Litigant and Vexatious Spokesperson Jurisprudence

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Cases Considered:
Allen v Gray, 2012 ABQB 66

Alberta's new vexatious litigant provisions had been in force for almost five years now and a useful body of precedent has been developed. Novel points continue to arise, but these tend to be minor ones. Nevertheless, *Allen v Gray* makes three useful legal points: (1) case law from before the 2007 amendments continues to be useful, in part because the term "vexatious" is undefined; (2) it is irrelevant whether the alleged vexatious litigant is prosecuting (or defending) his or her own action or acting as an agent for another person (the "vexatious spokesperson"); and (3) the new provisions are of no help in preventing vexatious administrative proceedings.

Facts

The applicant in Alberta's latest successful vexatious litigant application was the University of Lethbridge Students' Union. The Students' Union was one of ten defendants in Rhona Allen's most recent foray into the courtroom, along with the University of Lethbridge, some of its administrators and a number of its instructors.

Ms. Allen appears to have been a student in the Faculty of Management at the University of Lethbridge as Calgary campus. She alleged that a fellow student yelled at her and she claimed that this was an assault. She also alleged that the University of Lethbridge, her instructors and the named University administrators had conspired to thwart her academic success. Her complaint against the Students' Union was that it had failed to come to her assistance during disciplinary hearings, failed to resolve certain issues concerning a course calendar, and failed to assist Ms. Allen to obtain a refund for certain courses. Ms. Allen sought $1.5 million dollars in damages, plus punitive and special damages. She also asked for an order to "prevent the defendants putting the plaintiff at a disadvantage at any time; prevent the instructors from having unfair or unreasonable test items in an exam; and an order that the Dean of faculty to be barred from accessing her academic records," and so on. As Justice Hawco concluded (at para 40), this action, rooted in a verbal argument between students, sought "ludicrous" amounts of money for damages and essentially requested that she be allowed to proceed through University without input from her future professors.

The Plaintiff, Rhona Allen, has brought twelve different lawsuits in the province of Alberta, including *Allen v Gray*. Nine of them remain active (if rather moribund).

The evidentiary basis for the application to have Ms. Allen declared a vexatious litigant was well developed. The pleadings filed in the eleven other actions were attached to the affidavit filed in support of the Students Union's application. Mr. Justice Gerard Hawco examined the pleadings,

motions, affidavits and letters filed in those other actions. The affidavit also described the nature of the claim against the Students Union and set out its grounds of defence. Justice Hawco's description of each of the eleven other lawsuits (at paras 3 to 17) reveals common themes: claims alleging others' incompetence and dishonesty, claims for damages of $1 million or more, allegations of bias and discrimination, and unpaid orders for costs. In addition, the ethics of the different lawyers who represented the many defendants that Ms. Allen had sued over the years were often the subject of derogatory remarks.

The lawyer for the University of Lethbridge applied for security for costs. Ms. Allen did not attend in Master's Chambers on June 30, 2011 when that application was heard; the Master nevertheless ordered her to post security for costs. Ms. Allen appealed and the appeal was heard and dismissed by Justice Hawco on September 2, 2011. The vexatious litigant application of the Students' Union was returnable the same day. However, Domenic Venturo (U of C LLB 1985), the lawyer for the Students' Union, advised the court that the matter should proceed as a special Chambers application and it was put over to December 14.

On December 14, the Students' Union's Special Chambers application to have Ms. Allen declared a vexatious litigant was heard. During that hearing, Ms. Allen made derogatory comments about Mr. Venturo. In particular, Ms. Allen stated to Justice Hawco that he had ordered costs in the amount of $500 against Mr. Venturo personally for inappropriate conduct on a different Chambers application the morning of September 2. Justice Hawco could not remember doing so. Mr. Venturo denied that any such order had been made but Ms. Allen insisted that Justice Hawco had made such an order. Justice Hawco listened to the recording of the September 2nd proceedings and found that he had made no such order against Mr. Venturo. In a completely unrelated application by a totally different lawyer, Justice Hawco had assessed costs of $500 against a party. Ms. Allen's lie about a court order that could be refuted by independent evidence no doubt contributed to her being found to be a vexatious litigant.

Law

In determining that Ms. Allen is a vexatious litigant, Justice Hawco first set out the provisions of subsection 23 (2) of the *Judicature Act*. Rather than define "vexatious", that provision describes a number of patterns of conduct that make proceedings vexatious. This is the typical statutory approach. Rather than attempting a definition for "vexatious", legislation usually includes a non-exclusive list of factors which a court can take into account in determining whether a litigant's conduct is vexatious. The list of factors has its roots in the frequently cited decision of *Lang Mitchener/Johnston v Fabian*, (1987), 59 OR (2d) 353 at 358-359 (Ont HC), in which Henry J. reviewed a number of other relevant Ontario decisions and distilled a number of relevant principles. he list of factors in subsection 23(2) includes:

> (a) persistently bringing proceedings to determine an issue that has already been determined by a court of competent jurisdiction;
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> (b) persistently bringing proceedings that cannot succeed or that have no reasonable expectation of providing relief;
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> (c) persistently bringing proceedings for improper purposes;
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> (d) persistently using previously raised grounds and issues in subsequent proceedings inappropriately;

(e) persistently failing to pay the costs of unsuccessful proceedings on the part of the person who commenced those proceedings;

(f) persistently taking unsuccessful appeals from judicial decisions;

(g) persistently engaging in inappropriate courtroom behaviour.

Justice Hawco also reviewed three Alberta decisions. The first, *Crocker-McEwing v Drake*, (2001) ABQB 13, was decided before the 2007 amendments to the *Judicature Act* and concerned an application for security for costs. Nevertheless, Justice Hawco found the statements made by Justice Jack Watson in *Crocker-McEwing* about the policy balance to be applicable to the vexatious litigant context. In *Crocker-McEwing*, Justice Watson said (at paras 33-34) that the policy balance was between the desire not to unnecessarily or unfairly impede access to the courts by legitimate plaintiffs on the one hand and the desire to ensure that the administration of justice is not perverted by risk-free and doubtful claims by plaintiffs ―whether "recreational litigants" or "litigation terrorists" ― to the harassment of defendants with meritorious answers to such claims.

Justice Hawco also referred to a decision by then Associate Chief Justice Neil Wittmann in *O'Neill v Deacons*, 2007ABQB 754 at para 22 in which he quoted from Justice Jack Watson's decision in *Jamieson v Denman*, 2004 ABQB 593 at paras 126-127. Justice Watson in that case had pronounced that "vexatious" was a normative as well as a legal concept:

> My view of the word "vexatious" is that it connotes not simply that the party was acting without the highest motives, or was acting in a manner which was hostile towards the other side. "Vexatious", as a word, means to me that the litigant's mental state goes beyond simple *animus* against the other side, and rises to a situation where the litigant actually is attempting to abuse or misuse the legal process.

Justice Hawco also relied on Justice Bonnie Romaine in *Del Bianco v T35074 Alberta Ltd*, 2007 ABQB 150, where she distinguished between the self-represented litigant and the vexatious litigant. Justice Romaine noted (at para 35) that it is "characteristic of vexatious litigation that the pleadings are replete with extreme and unsubstantiated allegations, and often referred to far flung conspiracies involving large numbers of individuals and institutions". She also noted that "with the allegations may be unfounded in fact or merely speculative, … the language is a vitriolic, offensive and defamatory."

Unfortunately, the quotations from Justice Wittmann's decision in *O'Neill* and Justice Romaine decision in *Del Bianco* are just that, bare quotations. We are not expressly told why Justice Hawco found them relevant in the matter before him.

Decision

Justice Hawco found that clauses 23(2) (b), (c), (e) and (g) of the *Judicature Act* all applied in this case. Ms. Allen persistently brought proceedings that could not succeed with it had no reasonable expectation of providing relief, that she persistently brought proceedings for improper purposes, that she persistently failed to pay costs, and that she persistently engaged in inappropriate courtroom behaviour. As a result, he had no doubt that Miss Allen was a vexatious litigant.

Comments

I stated at the beginning of this post that *Allen v Gray* makes three useful legal points: (1) case law from before the 2007 amendments continues to be useful, in part because the term "vexatious" is undefined; (2) it is irrelevant whether the alleged vexatious litigant is prosecuting (or defending) his or her own action or acting as an agent for another person (the "vexatious spokesperson"); and (3) the new provisions are of no help in preventing vexatious administrative proceedings. I will expand on each briefly.

(1) In quoting from then Associate Chief Justice Neil Wittmann in *O'Neill v. Deacons,* Justice Hawco relied upon a statement (at para 22) that the definitions and factors considered by the courts prior to the 2007 amendments to the *Judicature Act* remain helpful because subsection 23(2) did not purport to provide an exhaustive list of relevant criteria. Subsection 23(2) begins with the words: "For the purposes of this Part, instituting vexatious proceedings or conducting a proceeding in a vexatious manner *includes, without limitation*, any one or more of the following …" (emphasis added). Given the wording in subsection 23(2), the proposition that pre-2007 decisions are still relevant is uncontroversial, but still worth remembering.

(2) Among the twelve lawsuits commenced by Ms. Allen were four in which it appeared that she acted as an agent or spokesperson for the person with the claim, i.e., her mother or her daughter. Justice Hawco did not differentiate between those actions in which Ms. Allen was the plaintiff on her own behalf and those in which she acted on others' behalf. Nor does it appear that he needed to, based on the relevant provisions of the *Judicature Act*. Subsection 23(2) is a non-exhaustive list of what vexatious proceedings or conducting a proceeding in a vexatious manner includes; it is the proceedings which are vexatious, not the particular plaintiff. More importantly, the order which a court may make under clause 23.1(1) (a) includes an order that the vexatious litigant shall not "institute proceedings *on behalf of any other person*" without leave of the Court (emphasis added).

The vexatious spokesperson or agent is a phenomenon related to that of the vexatious litigant. As the Lord Commission of Nova Scotia notes in its 2006 *Final Report: Vexatious Litigants* at 29, this involves litigation carried on in a vexatious manner by a person without legal training on someone else's behalf. Such a spokesperson might conduct a legitimate claim in a vexatious manner, or might convince other people to allow him or her to begin groundless legal proceedings on their behalf.

(3) Among the twelve lawsuits commenced by Ms. Allen were at least two appeals from decisions made by the Alberta Human Rights Commission. The vexatious litigant provisions of the *Judicature Act* only catch actions commenced in Alberta courts; they do not include proceedings commenced in the many administrative tribunals of the province. In the case of the Alberta Human Rights Commission, the director may at any time dismiss a complaint if the director considers that the complaint is without merit under clause 22(1)(a) of the *Alberta Human Rights Act*, RSA 2000, c A-25.5. Neither the Commission nor the director, however, has any power to prohibit the filing of future complaints by Ms. Allen. Perhaps they should have that ability.