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Vexatious Proceedings Distinguished from Vexatious Litigants

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Case Commented On: *R.O. v D.F.,* 2016 ABCA 170 (CanLII)

This Court of Appeal decision is useful in drawing a distinction between litigation that is vexatious and a litigant who is vexatious. A vexatious court proceeding may be challenged under various provisions in the *Alberta Rules of Court*, Alta Reg 124/2010. Typically, the vexatious proceeding is brought to an end and costs are awarded against the person responsible. The scope of the relief is confined to the one particular case. A vexatious litigant order, on the other hand, is made under section 23.1 of the *Judicature Act*, RSA 2000, c J-2, and typically forbids the person against whom it is made from commencing or continuing any proceedings in any court in Alberta against any person. Declaring someone to be a vexatious litigant is a much broader and more serious matter. The issue in this appeal was whether R.O. was a vexatious litigant, as the Court of Queen's Bench judge had declared her to be, when all of her allegedly vexatious behaviour was confined to this one case.

The issue is not easy to decide because of the wording of section 23(2) of the *Judicature Act,* which describes when a vexatious litigant order may be made:

> 23(2) 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:
>
> (a) persistently bringing proceedings to determine an issue that has already been determined by a court of competent jurisdiction;
> (b) persistently bringing proceedings that cannot succeed or that have no reasonable expectation of providing relief;
> (c) persistently bringing proceedings for improper purposes;
> (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. (emphasis added)

The opening clause of section 23(2) states that a vexatious litigant order can be made for "conducting a proceeding in a vexatious manner", i.e., for conducting only one proceeding in a vexatious manner. This is apparently contradicted by the list of seven examples which follow, because all but the last example in the list refer to "proceedings" or "appeals" in the plural. Nonetheless, section 23(2) leaves open the question of whether acting vexatiously in only one proceeding is enough to leave a person vulnerable to an order that bars them from bringing any further proceedings.

Justices Peter Costigan, Marina Paperny, and Patricia Rowbotham heard this appeal from two orders made by Mr. Justice B.A. Millar, the case management judge, on June 18, 2014. One

of his orders found R.O. to be in contempt of court for failing to comply with previous orders that banned the identification of the parties and penalized her contempt by striking her statement of claim and directing her to pay costs of $217,000. The Court of Appeal upheld this order, acknowledging that while the penalties were harsh they were justified because "this was a very serious breach of a clear court order" (para 32).

The other order by Justice Millar declared R.O. to be a vexatious litigant in very broad terms:

> 1. [R.O.] is declared a vexatious litigant pursuant to Section 23.1 of the *Judicature Act*, RSA 2000, c J-2, and is hereafter prohibited from instituting any further proceedings, or instituting proceedings on behalf of any other person, or continuing any proceeding which she has already instituted without leave of the Court in which the proceeding is to be initiated or continued.
> 2. This Order shall be binding upon the Provincial Court of Alberta, the Court of Queen's Bench of Alberta and the Alberta Court of Appeal. (emphasis added)

As the Court of Appeal noted, the decision to declare someone a vexatious litigant is a discretionary one: see section 23.1 of the *Judicature Act* providing that "the Court may order". The standard of review for this discretionary ruling is reasonableness (para 33, citing *Liu v Matrikon Inc*, 2010 ABCA 383 (CanLII) at para 10). The Court of Appeal found the vexatious litigant order made by Justice Millar to be unreasonable because it was "overbroad" (para 37).

Justice Millar's stated reasons for granting the vexatious litigant order focused on this particular case. R.O. had been found in contempt for breaching court orders twice, had filed four applications seeking many types of interlocutory orders, had attempted to re-litigate matters that had already been decided, had failed to pay court costs when ordered to do so, had threatened to sue others connected to D.F., and had put forward "far flung conspiracy theories" (para 35).

Certainly some of this behaviour falls within the types of behaviour listed in section 23(2). But is it "persistent"? Did R.O. "persistently [bring] proceedings to determine an issue that had already been determined"? Did she "persistently [fail] to pay the costs of unsuccessful proceedings"?

The Court of Appeal noted (at para 38) that Justice B.A. Browne, in *644036 Alberta Ltd v Morbank Financial Inc*, 2014 ABQB 681 (CanLII), had explicitly drawn a distinction between a vexatious proceeding and a vexatious litigant. Justice Browne had held that the litigant before her was vexatious because his behaviour was not confined to the case before her but had spilled over into other proceedings in Alberta and British Columbia. She held that the "more general response" of a vexatious litigant order — "a wider net … cast to constrain" — was warranted because of the breadth of his litigation activities (*644036 Alberta Lt* at para 97).

In this case, the Court of Appeal found that there had not been enough evidence before Justice Millar to justify a finding that R.O. had a history of "persistently" engaging in any of the behaviours in section 23(2) against anyone other than D.F. (para 39). The key point is that R.O.'s behaviour was confined to this one proceeding, and, being so confined, it did not warrant the broad response of a vexatious litigant order.

This is a helpful line that has been drawn, and certainly more helpful than the authority that the Court of Appeal cited for drawing it. They refer to *Pawlus v. Pope*, [2004 ABCA 396 (CanLII)](#) for its general support (para 39). However, the court in *Pawlus v. Pope* set aside a vexatious litigant order because the necessary notice had not been given to the Minister of Justice and Attorney General so that argument could be made about the impact of section 23 of the *Judicature Act* on the court's inherent jurisdiction (*Pawlus v. Pope* at para 17) and because the proposed vexatious litigant had requested an adjournment and that request was not opposed by the other party (*Pawlus v. Pope* at para 18). Neither of these reasons is relevant in this case.

Because Justice Millar's goal was to put an end to all litigation between R.O. and D.F. and those associated with D.F. — a reasonable goal in the Court of Appeal's estimation — the Court of Appeal substituted its own much narrower vexatious litigant order: "Any litigation or steps in litigation against [D.F.] and those associated with him, including his family (immediate and extended) and his employer shall require leave of the Court of Queen's Bench" (paras 37, 40).

As mentioned, the helpful guiding point for lower courts is that vexatious behaviour confined to one case will not justify (except possibly in exceptional circumstances) the broad response of a typical vexatious litigant order under section 23.1 of the *Judicature Act*. It will justify bringing the vexatious proceeding to an end and an order forbidding the commencement of further proceedings against the same individual. A broad vexatious litigant order will require (except perhaps in exceptional circumstances) a history of vexatious behaviour in more than one case.

It also appears that it now takes a shorter history and fewer instances of vexatious behaviour in fewer cases to warrant the issuance of a vexatious litigant order than it did even five years ago. In 2011, I noted in "How persistent does a vexatious litigant have to be?" that it seemed to take a lot of improper behaviour against a large number of long-suffering defendants for a very long time (e.g., ten years) before a person was denied unmediated access to a court. That no longer seems to be true.

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