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The Vexing Question of Authority to Grant Vexatious Litigant Orders

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Case Commented On: *Hok v Alberta*, 2016 ABQB 651 (CanLII)

Hok v Alberta is an unusual vexatious litigant decision for three reasons. First, the Minister of Justice and Solicitor General of Alberta made submissions in a brief of law. Second, those submissions were purely about the law governing vexatious litigant orders. The submissions had no more to do with the facts of this particular case than they did with the facts of any and every other vexatious litigant case. Because these legal issues apply broadly, this November 2016 decision is worth noting and I will focus on the legal issues exclusively. Third, there appears to be a challenge in this decision to the Court of Appeal's jurisprudence on vexatious litigant orders and, specifically, to its doubts about the inherent jurisdiction of the Court of Queen's Bench to issue broad orders restraining abusive conduct in all forums and against all persons in all future litigation.

Three legal issues were raised by the Minister and dealt with by Justice Verville in response to what he called the "unsettled nature" of the Court of Appeal jurisprudence (at para 47).

The first had to do with the fact that the Minister appeared. This appearance was the result of Justice Verville applying a two-step process adopted by the Court of Queen's Bench in response to the Court of Appeal decision in *Lymer v Jonsson*, 2016 ABCA 32 (CanLII). *Hok v Alberta* is the first time the second step in the new two-step process has been taken.

Second, the Minister raised concerns about the proper scope or breadth of vexatious litigant orders. Based on the Court of Appeal decision in *RO v DF*, 2016 ABCA 170 (CanLII), the Minister submitted that such orders should be narrowed to a defined group of targets where that group can be identified by the litigant's history. The Minister also argued that these orders should normally be restricted to future actions brought before the court making the order, unless there is evidence that the litigant has acted or would likely act in a vexatious manner in some other court.

Third, the Minister raised what the Court of Appeal identified in *Pawlus v Pope*, 2004 ABCA 396 (CanLII) as an open question about the source of Alberta superior courts' authority to restrict litigants' access to the courts. Is that authority dependent upon the legislature and only found in the *Judicature Act*, RSA 2000, c J-2, sections 23-23.1 and the *Family Law Act*, SA 2003, c F-4.5, section 91? Or does the Court of Queen's Bench, as a superior court, have an inherent jurisdiction to restrict litigant access that co-exists with and is not limited by the statutory authority?

1. The Court of Queen's Bench Two-Step Process

In its 2016 decision in *Lymer v Jonsson* (which I commented on in "On Its Own Motion": Section 23.1(1) Judicature Act), the Court of Appeal held that the rules of natural justice that

require courts to provide an opportunity to be heard to those who will be affected by a decision apply to vexatious litigant orders. While the sufficiency of notice will be assessed in the context of the proceedings, failure to provide an opportunity to be heard will be fatal to the order and it will be set aside.

In response to *Lymer v Jonsson*, the Court of Queen's Bench adopted a two-step process when dealing with persons against whom court access restrictions are being considered (*Hok* at para 10). A judge who observes problematic conduct by a litigant is to first assess that conduct to determine if it is an abuse of court process or a sign of vexatious conduct that might require restrictions on court access. If the judge does decide that restrictions are potentially required, then the second step is necessary. The litigant is given an opportunity to make submissions about whether restrictions on their court access are appropriate and about the form that those restrictions should take.

Although the first step has been taken in two Court of Queen's Bench reported decisions, neither proceeded to the second step. *Hok v Alberta* is therefore the first case to include the second step of the new two-step process. The first step can be seen in the June 2016 decision in *R v Hok*, 2016 ABQB 335 (CanLII), at para 105. Justice Verville directed that a copy of his reasons be given to the Minister as notice of the court's intention to determine whether Ms. Hok was a vexatious litigant and invited both the Minister and Ms. Hok to make written submissions within 30 days of receiving that notice. Both did so. This November 2016 decision is the result of that notice.

In commenting on the new two-step process, Justice Verville noted that the process is not an absolute requirement (at para 11). As already pointed out, *Lymer v Jonsson* held that the sufficiency of notice will be assessed in the context of the proceedings. The test appears to be: Would the litigant be taken by surprise if the Court issued a vexatious litigant order on its own motion? (at para 12).

Justice Verville went on to point out a difficulty in evaluating what facts will satisfy what he called the Court of Appeal's "'no surprise' rule" (at para 13). The Court of Appeal in *Lymer v Jonsson* (at para 6) stated that there was nothing in the record to suggest that Mr. Lymer was not taken by surprise when Justice Donald Lee issued a vexatious litigant order in November 2014 in *Lymer (Re)*, 2014 ABQB 696 (CanLII)). However, Mr. Lymer had made submissions about whether his applications in the same case were frivolous or vexatious before Master Smart in June 2014: see *Lymer (Re)*, 2014 ABQB 674 (CanLII) at para 13. Because there seemed to be no surprise in the context of the 2014 bankruptcy proceedings as a whole, Justice Verville thought it difficult to know what would satisfy the test. However, because Master Smart looked at Mr. Lymer's conduct in the context of a contempt application and Justice Lee did not give notice that he was considering a vexatious litigant order and did not give Mr. Lymer an opportunity to address the vexatious litigant issue, it seems that Justice Verville is reading the "'no surprise' rule" too literally.

2. The Scope of Vexatious Litigant Orders

Should orders restricting a litigant's access to the courts be limited to that litigant's usual target group of defendants? And should it be limited to the level of court making the order, for example, in this case, to future litigation in the Court of Queen's Bench? These were the two questions raised by the Minister.

Both questions were based on the 2016 decision of the Alberta Court of Appeal in *RO v DF*, 2016 ABCA 170 (CanLII). As I mentioned in a previous post, Vexatious Proceedings Distinguished from Vexatious Litigants, *RO v DF* appeared to establish that vexatious behaviour confined to one case or one respondent will not justify the broad response of a typical vexatious litigant order under section 23.1 of the *Judicature Act*, which requires "persistent" improper conduct. Vexatious behaviour confined to one case will justify bringing the vexatious proceeding to an end and an order forbidding the commencement of further proceedings against the same individual. But a broad vexatious litigant order will require a history of vexatious behaviour in more than one case or against more than one person (except possibly in exceptional circumstances such as those found in *Henry v El*, 2010 ABCA 312 (CanLII)).

Justice Verville began his discussion of the principles that guide the scope of court access restrictions on future litigation by noting the "culture shift" brought about by *Hryniak v Mauldin*, 2014 SCC 7 (CanLII) (at para 26). Instead of the "historic over-emphasis on procedural rights and exhaustive formality," that case called for a new emphasis on efficiency and proportional procedures. Justice Verville noted (at para 27) that this new emphasis on efficiency and proportionality applied "especially" to court proceedings involving self represented parties, according to the Supreme Court of Canada in *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, 2014 SCC 59 at para 110 (CanLII). Chief Justice McLachlin had explained, in *Trial Lawyers Association of British Columbia* at para 47, that measures that deter frivolous or vexatious cases "may actually increase efficiency and overall access to justice".

Justice Verville then discussed (at para 30) the impact of a vexatious litigant order, acknowledging first that a person cannot be denied access to Canadian courts, but pointing out that there was, as *Trial Lawyers Association of British Columbia* put it (at para 47), "no constitutional right to bring frivolous or vexatious cases." He noted (at para 31) that *Trial Lawyers Association of British Columbia* had indicated that barriers to court are unconstitutional because they impede access to justice only if those barriers "effectively deny" people access to courts and that "undue hardship" is the measure for whether access is effectively denied.

How is this applied to vexatious litigant orders? Justice Verville observed that the standard order only required the vexatious litigant to obtain leave to commence an action (at para 33). The pre-filing leave application is a screening mechanism (at para 32). Typically, the vexatious litigant must provide an unfiled copy of their proposed statement of claim, motion, or application and an affidavit establishing the evidence and arguments they plan to make. There is no cost to make the application because the documents are not filed. In Justice Verville's opinion, because any legitimate litigant has to know the evidence they can muster and the arguments they can advance, and because transforming that into an affidavit is a comparatively minor additional step, there is no "undue hardship" (at para 33).

These discussions of the *Hryniak* "culture shift" and the constitutionality of the typical "evidence mustering" requirement of a vexatious litigant order lead to Justice Verville's analysis of the Minister's submission about the scope of these orders. These discussions do not seem that apropos to the scope issue; they seem to be more relevant to expanding the understanding of the inherent jurisdiction of a superior court. Nevertheless, the points raised led him to determine that the balance between the low cost to the litigant's rights and the benefits of efficiency will favour the granting of vexatious litigant orders as "prospective case management steps" (at para 37). Therefore, the court should focus on anticipated abuses when granting these orders.

Justice Verville concludes that the key questions with respect to the scope of the vexatious litigant order are (at para 36):

1. Can the court determine the identity or type of persons who are likely to be the target of future abuse of litigation?
2. What litigation subject or subjects are likely involved in that abuse of court processes?
3. In what forums will that abuse occur?

When he applies the third question in this particular case, although Justice Verville identified past misconduct in all three levels of Alberta courts and thought it highly likely that the litigation abuse would continue in the Court of Appeal (at paras 45, 47), he did not extend his vexatious litigant order to the Court of Appeal. He did not do so "in light of the jurisprudence that addresses court participant access for that institution" (at para 53).

3. The Source of the Court of Queen's Bench Authority

The Minister had pointed out that it is an open question whether the province's superior courts have an inherent jurisdiction to restrict litigant access or whether their authority must be found in legislation, i.e., the *Judicature Act*, RSA 2000, c J-2, sections 23-23.1 and the *Family Law Act*, SA 2003, c F-4.5, section 91. The Minister cited the Court of Appeal's 2004 decision in *Pawlus v Pope* as raising but not resolving the issue. As I mentioned in a post last year (Sources of Superior Courts' Jurisdiction to Declare Litigants to be Vexatious), there are a number post-*Pawlus* conflicting Alberta decisions in the civil law context, including *Lymer (Re)*, 2014 ABQB 696 (CanLII) at para 12, *Shreem Holdings Inc. v. Barr Picard*, 2014 ABQB 112 (CanLII) at para 29, and *Re Sikora Estate*, 2015 ABQB 467 (CanLII). And *Hok v Alberta* can now be added to that list.

There is no question that the inherent jurisdiction of superior courts to control the particular proceedings before them is not limited by the statutory vexatious litigants provisions; see section 23.1(9) of the *Judicature Act* and the Law Reform Commission of Nova Scotia (LRCNS), *Vexatious Litigants* Final Report (April 2006) at 15. The question is whether that inherent jurisdiction includes the ability of superior courts to prevent a vexatious litigant from commencing different legal proceedings against different people in different courts in the future. After reviewing case law and scholarly opinion, the LRCNS report concluded (at 11) that it did not:

> At best, it might be suggested there is some case law support for expanding the concept of inherent jurisdiction to empower a court to prevent a known vexatious litigant from commencing a legal proceeding. This would, however, be at odds with the traditionally-understood nature of inherent jurisdiction.

The difference between the two exercises of the court's power is the difference between their control of vexatious proceedings and their much broader and forward-looking control of vexatious litigants. This difference is the focus of the LRCNS report (at 7-11), which relied upon the oft-cited article by I.H. Jacob, "The Inherent Jurisdiction of the Court" (1970) 23 Current Legal Problems 23. That article identified (at 43) the conceptual gap between courts' ability to control the actions of people appearing before them and their inability to prevent people from starting actions "which may turn out to be vexatious". Unfortunately, Justice Verville does not discuss either the LRCNS summary of the law nor Jacob's article.

What Justice Verville does discuss, albeit in connection with the scope of vexatious litigant orders, is the *Hryniak* "culture shift" and the constitutionality of the typical "evidence mustering" requirement of a vexatious litigant order. Those discussions may have justifications for expanding the traditionally understood nature of inherent jurisdiction.

Justice Verville does mention that the issue is not free from doubt in those Commonwealth jurisdictions which received their law from the United Kingdom when they were colonies (at para 17). He also discusses three Alberta Court of Appeal decisions that recognized the inherent jurisdiction of both their court and the Court of Queen's Bench to restrict future litigation by an abusive litigant (at paras 19-20, 23-24). He concludes his discussion of the source of the Court of Queen's Bench's authority with the following odd remark (at para 25, emphasis added):

> *The Alberta Court of Queen's Bench, a superior court of inherent jurisdiction*, has at least the same authority to restrict court access as the Alberta Court of Appeal, especially since *the Court of Appeal derives its authority and power from legislation*: *Court of Appeal Act*, RSA 2000, c C-30.

Why compare the Court of Queen's Bench as "a superior court of inherent jurisdiction" to the Court of Appeal as a court "deriv[ing] its authority and power from legislation"? Is Justice Verville claiming that the Court of Appeal has no inherent jurisdiction to control their own processes and procedures?

I am not sure why Justice Verville pointed out that "the Court of Appeal derives its authority and power from legislation: *Court of Appeal Act*". Section 2(1) of that statute states: "The Appellate Division of the Supreme Court of Alberta is continued as a superior court of civil and criminal jurisdiction styled the Court of Appeal of Alberta." That is all that Act says about the Court of Appeal's power and authority. The *Court of Queen's Bench Act*, RSA 2000, c C-31, says much the same about that court in section 2(1): "The Trial Division of the Supreme Court of Alberta is continued as a superior court of civil and criminal jurisdiction styled the Court of Queen's Bench of Alberta."

It is the *Judicature Act*, RSA 2000, c J-2, which in Part 1 sets out the "Jurisdiction of the Court", with "Court" defined in section 1 to mean "the Court of Queen's Bench or, on appeal, the Court of Appeal" (except in Part 2.1 where it is even more inclusive; section 23(1)(b)).

The *Judicature Act* says almost the same things about the powers of the Court of Appeal that it says about the powers of the Court of Queen's Bench. It says, for example, that both have "all the jurisdiction, powers and authority that … were … vested in, or capable of being exercised within, Alberta by the Supreme Court of the North-West Territories" (section 2(1)). It says the judges of both courts have "all the powers, rights, incidents, privileges and immunities of a judge of a superior court of record" as fully as those were enjoyed in England by judges of "the Superior Courts of Law or Equity" and other superior courts or courts of record (section 4). Specifically, with respect to "the administration of the law", both courts "possesses, in addition, … the jurisdiction that on July 15, 1870, was in England vested in (a) the High Court of Chancery, as a common law court as well as a court of equity, including the jurisdiction of the Master of the Rolls as a judge or master of the Court of Chancery, and any jurisdiction exercised by the Master of the Rolls in relation to the Court of Chancery as a common law court" and other superior courts or courts of record (section 5(1)). I am afraid I do not see why it matters to the discussion of inherent jurisdiction that "the Court of Appeal derives its authority and power from legislation: *Court of Appeal Act*".

In the LRCNS report, the commissioners noted:

> The concept of inherent jurisdiction is an ancient one. It is part of the legal heritage … received from England, where inherent jurisdiction has been associated with superior jurisdiction courts since their beginnings. In *Halifax (Regional Municipality) v. Ofume,* [(2003), 218 N.S.R. (2d) 234 at 242 (N.S.C.A.)], Saunders, J.A. … confirmed, "...jurisprudence in this country clearly establishes that *Canadian courts of superior jurisdiction maintain a general inherent jurisdiction, which includes the discretion to control their own process*. (emphasis added)

The LRCNS relied (at 7) upon the English procedural law authority, I.H. Jacob, in "The Inherent Jurisdiction of the Court" (1970) 23 Current Legal Problems 23 at 25- 26 for the basis of inherent jurisdiction. Jacob wrote that "the juridical basis of this jurisdiction is therefore the authority of the judiciary to uphold, to protect and to fulfill the judicial function of administering justice according to law in a regular, orderly and effective manner".

Jacob was of the opinion (at 43) that "the court has *no power, even under its inherent jurisdiction, to prevent a person from commencing proceedings which may turn out to be vexatious*." (emphasis added). The problem, according to the LRCNS and Jacob, is not a lack of inherent jurisdiction, but a lack of an inherent jurisdiction that includes prospective vexatious litigant orders.

There appears to be some dissatisfaction within the Court of Queen's Bench about the Court of Appeal's recent handling of vexatious litigant cases and what Justice Verville referred to as "the unsettled nature" of its jurisprudence (at para 47).

The state of the Court of Appeal's "jurisprudence that addresses court participant access for that institution" (at para 53), is the reason Justice Verville gives for excluding litigation in the Court of Appeal from the vexatious litigant order he issued in this case, even though he believed "it is highly likely that Ms. Hok's abuse will continue in that court" (para 47). He extended his broadly-worded vexatious litigant order to the Provincial Court as well as the Court of Queen's Bench (at paras 47, 49, 51, and 53). He explicitly stated that he made the vexatious litigant order under the authority of both the *Judicature Act* and the court's inherent jurisdiction (at paras 48, 51and 53). He even invited tribunals who lacked the power to restrict the vexatious litigants' access to apply to the Court of Queen's Bench for protection, again citing the court's inherent jurisdiction as the source of the court's power to restrict the abuse of those tribunals' processes (at para 54). It is only the Court of Appeal that he left to fend for itself.

It would appear that the Court of Queen's Bench has thrown down the proverbial gauntlet. It will be interesting to see how the Court of Appeal responds to the challenge.

This post may be cited as: Jonnette Watson Hamilton "The Vexing Question of Authority to Grant Vexatious Litigant Orders" (23 December, 2016), online: ABlawg, http://ablawg.ca/wp-content/uploads/2016/12/Blog_JWH_HokvAlberta.pdf