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The Increasing Risk of Conflating Self-Represented and Vexatious Litigants

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Case Commented On: *Alberta Treasury Branches v Hawrysh*, 2018 ABQB 475 (CanLII) (*Hawrysh #*1) and *Alberta Treasury Branches v Hawrysh*, 2018 ABQB 618 (CanLII) (*Hawrysh #2*)

The August 20th decision of Justice Peter Michalyshyn in *Hawrysh #2* was step two of the now usual two-step process adopted by the Alberta Court of Queen's Bench in *Hok v Alberta*, 2016 ABQB 651 (CanLII) to deal with vexatious litigants. Step one was taken two months earlier in *Hawrysh #1*. The two decisions are interesting for at least three reasons. First, they show just how quickly the Court of Queen's Bench of Alberta now acts to restrict access to the courts by someone whose litigation behaviour is judged to be vexatious. Second, very little of the behaviour found to be abusive in these cases occurred in the courtroom or in documents filed with the court. Third, and most importantly, the litigant's use of *Pintea v Johns*, 2017 SCC 23 (CanLII), [2017] 1 SCR 470 and the Canadian Judicial Council "*Statement of Principles on Self-represented Litigants and Accused Persons* (2006)" was held to be an independent indicia of abusive litigation justifying the imposition of court access restrictions.

These cases also appear to provide further examples of what Dr. Julie Macfarlane of the National Self-Represented Litigants Project (NSRLP) wrote about in her September 6th blog post, "Inequality and Discrimination in the Justice System" – that, in her words, "SRLs are "the other" in the justice system." Specifically, Dr. Macfarlane noted that the NSRLP Research Reports show that most self-represented litigants "[a]re penalized for errors that are seen as intentional mischief-making," and "[p]ushback is regarded as bad behaviour that must be punished."

The Alberta Process

The 2016 decision of Justice Gerald A. Verville in *Hok* ushered in the what the Alberta courts call the "modern" approach to "court access restriction orders" (*Hawrysh #1* at para 33). These court access restriction orders are issued in Alberta under the Court's inherent jurisdiction, rather than under the vexatious litigant provisions of the *Judicature Act*, RSA 2000, c J-2.

The first step in this modern approach is an order, often made on the court's own initiative, that sets a deadline for the litigant whose conduct is called into question to make written submissions – and only written submissions – about being potentially subject to court access restrictions. Other parties to the litigation might also be invited to make written submissions. At the same time, the court issues an interim order that immediately prohibits the litigant from continuing or commencing further court proceedings in any court in Alberta without leave. These interim orders are prepared by the court, without the need of approval by any party. See, for example, *Hawrysh #1* at paras 49-54.

In the second step – illustrated by *Hawrysh #2* – the same judge reviews the written submissions and assesses the litigant's conduct against the still-expanding list of the indicia of abusive litigation, before determining whether court access restrictions are appropriate and, if so, how broad they should be. If a court access restriction order is granted, it is prepared and filed by the court. It is more detailed than the interim order (*Hawrysh #2* at para 48-49).

Hok (at paras 14-25) and *1985 Sawridge Trust v Alberta (Public Trustee)*, 2017 ABQB 548 (CanLII) (at paras 42-54) are the two Alberta decisions that examine whether or not the Court of Queen's Bench has the inherent jurisdiction to restrict prospective litigation. The Court of Queen's Bench asserts that it does have the inherent jurisdiction to do so and that it co-exists with its statutory jurisdiction under the *Judicature Act*. Although this issue is yet to be conclusively addressed by the Alberta Court of Appeal or the Supreme Court of Canada, it has been resolved in favour of recognizing an inherent jurisdiction elsewhere (see, for example, *Gichuru v Pallai*, 2018 BCCA 78 (CanLII), at paras 73-84).

The reason for the Court of Queen's Bench's clear preference for its own process, rather than the procedures under the *Judicature Act*, was articulated in *1985 Sawridge Trust* by Justice D.R.G. Thomas. According to Justice Thomas (at para 49), the "critical defect" in the *Judicature Act* procedure is that section 23(2) requires "persistent" misconduct by a litigant in order for a court to conclude he or she is conducting proceedings in a vexatious manner that warrants issuing an order restricting their court access. In the words of Justice Thomas, the problem is that "*Judicature Act*, ss 23-23.1 authorize court access restrictions only after 'persistent' misconduct has occurred" (at para 50). See my July 2011 post, "How persistent does a vexatious litigant have to be?" for an idea of how different this area of the law was seven years ago.

Speed of Issuing Court Access Restriction Orders

Hawrysh #1 and *Hawrysh #2* provide a startlingly good example of the speed with which court access restriction orders can be issued in Alberta if "persistence" is not required. The "first point at which Mr. Hawrysh's activities exhibited characteristics of abusive litigation" was on June 12, 2018 (*Hawrysh #2* at para 7; *Hawrysh #1* at para 23), although it was the documents he tried to file two days later, on June 14, 2018, that caused the court to take the first step in the two-step process and issuing an Interim Court Access Restriction Order on June 19, 2018 (*Hawrysh #2* at para 1). It took a mere seven days from what was said to be the first indication of a problem with Mr. Hawrysh's litigation conduct to the issuance of an interim order prohibiting him "from continuing or instituting further court proceedings without the permission of the Chief Justice, Associate Chief Justice, Chief Judge, or his or her designate, of the Alberta Court in question." This interim order was affirmed and expanded upon in the second step taken on August 20, 2018.

Mr. Hawrysh's conduct was found to be that of an "Organized Pseudolegal Commercial Argument" (OPCA) litigant, which put him at the extreme end of the spectrum of vexatious litigants. That characterization probably explains, in part, the speed with which his access to the courts was restricted. "OPCA" is a term coined by Associate Chief Justice John D. Rooke in *Meads v Meads*, 2012 ABQB 571 (CanLII). In *A.N.B. v Hancock*, 2013 ABQB 97 (CanLII) at para 9, Justice Rooke summarized the nature of OPCA litigation:

> In brief, OPCA concepts are legally incorrect schemes marketed and promoted by a collection of conmen ["OPCA gurus"] that claim to allow a person to avoid or impose legal obligation outside of recognized legal processes.

And in *Gauthier v Starr*, 2016 ABQB 213 (CanLII) at para 23, Justice Rooke summarized OPCA litigation strategies in the following terms:

> These concepts purport to give individuals special, extralegal status and immunities thanks to hidden or concealed secret alternative laws. OPCA litigation is, by its nature, vexatious . . . [citations omitted]. OPCA litigants should be subjected to a broad restriction on potential litigation, because their "... sole motivation is to wreak havoc on the civil justice system ... these litigants seek only disruption as opposed to justice ...": *Tupper v Nova Scotia (Attorney General)*, 2015 NSCA 92 (CanLII) at paras 52-53, 390 DLR (4th) 651, leave denied [2015] SCCA No 520.

Mr. Hawrysh's OPCA materials are reproduced in Appendix A to *Hawrysh #1*. The indicia in those materials included, among others, a double aspect or "Strawman" argument that has been described and rejected so many times by so many different courts that "a litigant who introduces this motif is presumed to litigate in bad faith and for ulterior purposes" (*Hawrysh #2* at para 6; *Hawrysh #1* at paras 25-28).

Another possible reason for why Alberta's Court of Queen's Bench is able to issue these court access restriction orders so quickly is the "fill in the template" or "cut and paste" nature of large chunks of these orders. For example, in their summary of the law, there is typically an assertion of the court's inherent jurisdiction, supported by a string of bare citations that begins with two English cases, *Ebert v Birch & Anor*, [1999] EWCA Civ 3043 (UK CA) and *Bhamjee v Forsdick & Ors (No 2)*, [2003] EWCA Civ 1113 (UK CA), and includes *Hok* and the most recent cases. This is usually followed by a reference to *Chutskoff v Bonora*, 2014 ABQB 389 (CanLII) at para 92, affirmed 2014 ABCA 444 (CanLII), and its summary of eleven "indicia" of abusive litigation. This list is then expanded by further indicia introduced in cases that followed *Chutskoff*. Next is an assertion of the breadth of the court's inquiry into the litigation behaviour of the prospective vexatious litigant, which includes the ability to refer to behaviour in other cases and to other external evidence. The final principle usually noted is that any indicium is enough to attract a court's evaluation of a litigant's conduct and that the presence of multiple indicia favours court intervention. See, for example, *Hawrysh #1* at paras 32-38; *d'Abadie v Her Majesty the Queen*, 2018 ABQB 438 (CanLII) at paras 25-29 (per Justice Janice Ashcroft); *Toronto-Dominion Bank v Leadbetter*, 2018 ABQB 611 (CanLII) at paras 10-14 (per Justice Peter Michalyshyn); and *McKechnie (Re)*, 2018 ABQB 493 (CanLII) at paras 6-12 (per Justice E. J. Simpson).

Breadth of Conduct Scrutinized

Hawrysh #2 illustrates two of the points in that standard recitation of the law of court access restriction orders in Alberta. The first point it illustrates is the breadth of the court's inquiry into the litigation behaviour of the possibly vexatious litigant, which includes the ability of the court to rely on the litigant's behaviour in other cases, as well as other external evidence.

In these cases, the conduct that triggered the court access restriction orders was Mr. Hawrysh's attempts to file documents by fax with a clerk of the Court of Queen's Bench on June 14, 2018 (*Hawrysh #1* at para 1; *Hawrysh #2* at para 1). The clerk rejected the documents on the basis of

the "Master Order for Organized Pseudolegal Commercial Arguments" issued on June 18, 2013 by Justice Rooke and described in *Re Gauthier*, 2017 ABQB 555 (CanLII) at paras 3-8.

Activities outside of the courtroom count as "other external evidence" under Alberta's modern two-step process, as has the litigant's entire public dispute history, including proceedings in other jurisdictions and non-judicial proceedings (*Hawrysh #1* at para 34). In this case, activity outside the court room – the attempt to file documents containing OPCA motifs – was almost all there was. It is true Mr. Hawrysh had been before Justice Michalyshyn on June 12, 2018 on an appeal from a foreclosure order made by Master Schlosser. Mr. Hawrysh is a bankrupt and Master Schlosser had held that Mr. Hawrysh had no rights in the property held by his bankruptcy trustee on which the Alberta Treasury Branch was foreclosing. Justice Michalyshyn upheld that order based on some well-settled law (*Hawrysh #1* at paras 3-16). That June 12 hearing did include a demand by Mr. Hawrysh that Justice Michalyshyn produce his oath of office to prove his authority as a judge, a well-known indication of OPCA tactics (*Hawrysh #2* at para 8). These OPCA concepts were repeated in Mr. Hawrysh's invited written submissions.

Even though a litigant's entire public dispute history is said to be relevant, Mr. Hawrysh's participation in an OPCA tax evasion scam, which was the cause of his bankruptcy, was not counted as part of his OPCA litigation history (*Hawrysh #2* at paras 27-29, 32-35), perhaps because he was acknowledged to be a victim of that scam (*Hawrysh #2* at para 32). He had been a customer of DeMara Consulting, which encouraged its customers to claim as business expenses things like grocery bills and mortgage payments (*Hawrysh #1* at para 3, citing *R v Stancer*, 2016 BCSC 192). Instead, Mr. Hawrysh's "refus[al] to accept the consequences of his ill-considered tax evasion strategy" was counted as a separate indicia of abusive litigation conduct because it predicted future litigation abuse (*Hawrysh #2* at para 35).

Mr. Hawrysh's other courtroom behaviour on June 12 seemed to be confined to his asserting what he saw as his rights as a self-represented litigant based *Pintea v Johns*, 2017 SCC 23 (CanLII), [2017] 1 SCR 470 and the CJC "Statement of Principles" (*Hawrysh #1* at paras 14-15). Justice Michalyshyn did not characterize those arguments as part of Mr. Hawrysh's OPCA litigation. However, Justice Michalyshyn did characterize those arguments as indicia of abusive litigation.

The issuance of a court access restriction order based on very little courtroom conduct is not unprecedented in this province. *Re Bruce*, 2018 ABQB 283 (CanLII), is another case involving only documents that Mr. Bruce simply mailed to Chief Justice M. T. Moreau. The Chief Justice issued an "Endorsement" in response to the unfiled documents on the basis that it was necessary in order to fulfill the court's duty to self-represented persons and in the name of efficiency (*Re Bruce* at para 7). That endorsement did include a simple court access restriction prohibiting Mr. Bruce for continuing or commencing actions in Alberta courts without leave. However, that endorsement also gave Mr. Bruce leave to file a *habeas corpus* application (*Re Bruce* at paras 17-18 and 21).

Assertion of Entitlements as a Self-represented Litigant

One of the post-*Chutskoff* indicia of abusive litigation conduct is described as:

> where the litigant minimizes or dismisses litigation defects and abuse on the basis the person is a self-represented litigant (*Van Sluytman v Muskoka (District*

Municipality), [2018 ONCA 32 (CanLII)] at paras 23-24; *Re Bruce*, 2018 ABQB 283 (CanLII) at paras 8-9) (*Hawrysh # 1* at para 36, *Hawrysh #2* at para 21).

This indicium (to adopt the court's use of Latin gender and number forms) of abusive litigation conduct that targets arguments based on status as a self-represented litigant appears to be new as of 2018.

In one of his written submissions, Mr. Hawrysh asserted what he saw as his entitlements as a self-represented litigant. Those written submissions relied on *Pintea v Johns* and the CJC "Statement of Principles" to support what Justice Michalyshyn summarized as Mr. Hawrysh's argument that his conduct did not warrant a court access restriction order because he was a self-represented litigant and not bound by the same standards as other litigants (*Hawrysh #2* at para 14).

Justice Michalyshyn quoted Mr. Hawrysh's submissions on this argument and it is important to set out substantial portions of those quotes to see just what Mr. Hawrysh was arguing that was held to be so abusive:

> There is no basis for the court to make suggestions of OPCA conduct or vexatious litigation where [Mr. Hawrysh] is simply requesting information, clarification, or asking questions, or bringing forward factual information ... [Mr. Hawrysh] believes no self-litigant can be reprimanded for simply asking a question (*Hawrysh #2* at para 13).
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> Furthermore, as a self-litigant [Mr. Hawrysh] should not be chastised for any lack of knowledge in court procedures and investigative skills, as being a self-litigant is an ongoing learning endeavor, which at times is performed under extreme stress and hardship, and of course [Mr. Hawrysh] will make mistakes to which the courts should not punish or chastise [Mr. Hawrysh], or even attempt to restrict [Mr. Hawrysh] as these are obvious errors and mistakes, to which [Mr. Hawrysh], a self-litigant, should not be held liable. (*Hawrysh #2* at para 14).
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> . . . Any attempt to restrict [Mr. Hawrysh's] self-litigant unlimited rights as mentioned in section 7 of the Charter, or by cutting [Mr. Hawrysh] off from any legal defence whatsoever is clearly a Charter violation or a clear violation of his right to natural justice. If the Courts are unable to supply [Mr. Hawrysh] with a highly trained lawyer to match the parallel training and skills of the lawyers to which [Mr. Hawrysh], a self-litigant must rise up against, the least the Courts must do is to honor and protect [Mr. Hawrysh's] rights to produce his legal defense to which he cannot be deprived thereof by any court. (*Hawrysh #2* at para 14).
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> [Mr. Hawrysh] sees no injury to the Courts from dealing with [Mr. Hawrysh] or any other self-litigant, merely at worse case, somewhat annoying, which as frustrating as this may be, is a duty that must be performed by the court in order to preserve the rights of the self-litigant and uphold the good administration of Justice, to which the courts are charged to do. (*Hawrysh #2* at para 14).

Justice Michalyshyn characterized these submissions as a claim for "Special Status as a SRL," and as indicia of abusive litigation (*Hawrysh #2* at sub-heading II.B.4 and para 26). Mr.

Hawrysh's claim to "self-litigant unlimited rights" based on section 7 of the *Charter* was quickly dismissed as "incorrect" (*Hawrysh #2* at para 36). *Hryniak v Mauldin*, 2014 SCC 7 (CanLII) at paragraphs 2 and 28 was cited, as it often has been in the vexatious litigation context, as favouring rights and procedures that are "proportional to their functional value" and reflective of "modern reality" (*Hawrysh #2* at paras 37-38). Next, *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, 2014 SCC 59 (CanLII) at paragraph 110 was relied upon for the proposition that this "modern reality" applies to all court proceedings and "especially those involving self-represented litigants" (*Hawrysh #2* at para 39). The CJC "Statement of Principles" was quoted for the "fair-dealing obligations" that it imposes on self-represented litigants and its concession that self-represented litigants "may be treated as vexatious or abusive litigants where the administration of justice requires it…" (*Hawrysh #2* at paras 40 and 41).

What is new appeared next. Justice Michalyshyn asserted that an increasing number of self-represented litigants "attempt to use their lack of legal representation as a 'sword' to obtain advantage" (*Hawrysh #2* at para 42). He relied on the 2018 decision of the Ontario Court of Appeal in *Van Sluytman v Muskoka (District Municipality)*, 2018 ONCA 32 which held that denying responsibility for abusive litigation because one is a self-represented litigant is an indicia of vexatious litigation, as well as the 2018 Court of Queen's Bench of Alberta decision in *Re Bruce* which held that demands for special treatment as a self-represented litigant "indicated a potential for future litigation abuse" (*Hawrysh #2* at para 42). Justice Michalyshyn explicitly agreed with and adopted the approach used in those two cases to conclude:

> Mr. Hawrysh's demands for special status and denial of all past and future fault for his misconduct on the basis he is a SRL is a separate and independent reason to conclude that court access restrictions are appropriate for this litigant. (*Hawrysh #2* at para 43, emphasis added; see also paras 45-46).

The Ontario Court of Appeal decision in *Van Sluytman* involved eight appeals, seven from orders – all upheld – dismissing seven actions by Mr. Van Sluytman on the grounds those actions were frivolous or vexatious. The eighth order – also upheld by the Court of Appeal – was based on an application by the Attorney General of Ontario to have Mr. Van Sluytman declared a vexatious litigant under section 140 of the *Courts of Justice Act*, RSO 1990, c C-43, the equivalent of the provisions in Alberta's *Judicature Act*. Reliance was placed on the characteristics of vexatious litigation identified in the 31-year-old decision in *Re Lang Michener et al. v Fabian et al.* 1987 CanLII 172 (ON SC). Among the aspects of the case on appeal that the court below had held exemplified the *Lang Michener* characteristics was one related to Mr. Van Sluytman's self-representation, even though *Lang Michener*'s list of indicia did not refer to self-representation. It was noted that Mr. Van Sluytman blamed the government and courts "for not providing adequate training or allowing sufficient leeway to self-represented litigants" (*Van Sluytman* at para 23). The Court of Appeal merely agreed with the lower court that its entire list of characteristics was "hallmarks of vexatious proceedings, and a vexatious litigant" (*Van Sluytman* at para 24). The Court of Appeal decision is quite conclusory, offering little in the way of substantial reasons.

In *Re Bruce*, Chief Justice M. T. Moreau did state that "Mr. Bruce is demanding special treatment on the basis that he is a self-represented litigant" (*Re Bruce* at para 8, no. 5). Only one

example of such a demand is noted. Mr. Bruce, an inmate in the Bowden Institution, wrote a letter to Assistant Chief Judge Hunter of the Provincial Court of Alberta which claimed that *BCGEU v British Columbia (Attorney General)* [1988] 2 SCR 214 meant the judiciary and court had a duty to ensure access to the courts. Justice Moreau does not respond to this assertion. However, *BCGEU* was a case about whether disobeying an order to stop picketing a law court during the course of a legal strike was criminal contempt. The access at issue in that case was physical access to the building that housed the court, which was allegedly being blocked by the picketing activity. However, Mr. Bruce was not demanding physical access; he asserted it was the court staff's "obligation to help self-represented Citizens defend their rights" (*Re Bruce* at para 4, no. 3). He cited the wrong authority for his argument, but his argument is not without basis in law (for example, *Pintea v Johns)*. The endorsement provides no further details of demands for special treatment as a self-represented litigant, but this may simply be because it is a relatively short endorsement triggered by unfiled documents. Citing an incorrect authority, on its own and by itself, surely cannot amount to abusive litigation conduct.

The two cases that *Hawrysh #1* and *Hawrysh #2* relied upon – *Van Sluytman* and *re Bruce* – seem like slender reeds on which to construct a new indicium of abusive litigation conduct, and especially one that is based on the status of being a self-represented litigant.

Conclusion

As the Alberta courts have said time and again, one of the indicia of abusive litigation that justifies issuing a court access restriction order is "advancing OPCA strategies" (*Hawrysh #2* at para 20, citing *Chutskoff v Bonora* at para 92). Mr. Hawrysh was found to be engaged in abusive litigation on the basis that he used an OPCA strategy in his June 12 hearing, and then additional OPCA concepts in his unfiled June 14 documents and in his invited written submissions.

Mr. Hawrysh was also found to be engaged in abusive litigation because he tried to use his lack of legal representation, the Supreme Court decision in *Pintea v Johns,* and the CJC "Statement of Principles" as the basis of "demands for special status and denial of all past and future fault for his misconduct" (*Hawrysh #2* at para 43). The court clearly separates this basis for granting its order from the OPCA conduct.

The danger of conflation lies between the category of vexatious litigants (or what the court refers to as litigants engaged in abusive litigation justifying court access restriction orders) and the category of self-represented litigant. The risk has been increased by the recent adoption in Ontario and Alberta of a new indicium of abusive litigation, namely: "where the litigant minimizes or dismisses litigation defects and abuse on the basis the person is a self-represented litigant" (*Hawrysh #2* at para 21, no. 5).

The only reason that conflation is not a concern in this particular case is because Mr. Hawrysh was also found to be an OPCA litigant. His use of OPCA concepts probably explains the quickness with which the court moved to assert its authority to restrict his access. His use of OPCA concepts might also explain why the court acted even though Mr. Hawrysh had used very few court resources before the court acted on its own motion – aside from the oath point raised in

the June 12 hearing, the only point of contact with the court was the court staff's refusal to file his faxed documents.

However, for the far-and-away vast majority of self-represented litigants who do not use OPCA concepts or strategies, the risk of being conflated with vexatious litigants has become greater. The line between the abusive use of *Pintea v Johns* and the CJC "Statement of Principles" and their appropriate use may be a difficult one for self-represented litigants to draw.

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