December 21, 2018

Court of Queen's Bench Requires Vexatious Litigant to Seek Court's Permission Before Accessing Any Non-Judicial Body

By: Jonnette Watson Hamilton

Case Commented On: *Makis v Alberta Health Services,* 2018 ABQB 976

In many written decisions rendered over the past two years, some judges of the Court of Queen's Bench of Alberta have been rather disdainful of the vexatious litigant procedures added to the *Judicature Act*, RSA 2000, c J-2 in 2007, referring to them, for example, as "obsolete and inferior" (*Gagnon v Shoppers Drug Mart*, 2018 ABQB 888 at para 14). Although the *Judicature Act* procedures continue to be used in rare cases (e.g. *HRMT v SNS*, 2018 ABQB 843 at para 102), the Court usually makes it clear that it prefers its own two-step "modern" process – introduced in *Hok v Alberta*, 2016 ABQB 651 – which they justify as an exercise of a superior court's inherent jurisdiction. The use of their inherent jurisdiction is said to provide "a more robust, functional, and efficient response to control of problematic litigants" (*Templanza v Ford*, 2018 ABQB 168 at para 103; *Hill v Bundon*, 2018 ABQB 506 at para 53). The *Judicature Act* procedure requires "persistent" bad behavior by a litigant before that litigant's access to the courts can be restricted (s 23(2)), usually by requiring the litigant to obtain the court's permission before starting a new court action. The Court of Queen's Bench does not want to wait for persistent vexatious conduct (*Templanza* at para 101; *1985 Sawridge Trust v Alberta (Public Trustee)*, 2017 ABQB 548 at paras 49-50). The legislated procedure also requires notice to the Minister of Justice and Solicitor General (s 23.1(1)), who has a right to appear and be heard in person (s. 23.1(3)), a requirement that suggests how seriously our elected representatives saw restrictions on court access when they added the vexatious litigant procedures to the *Act* in 2007. The court-fashioned process does not usually require notice to anyone except the person about to be found to be a vexatious litigant, and it has become a written-submissions-only process – no one has the right to appear and be heard in person. The usual restrictions on court access are now characterized as a "very modest imposition" (*Knutson (Re)*, 2018 ABQB 858 at para 42). As this brief summary suggests, the changes made to this area of the law over the past two years have been fairly dramatic. But the Court of Queens' Bench has now pushed the envelope, extending their inherent jurisdiction even further. In *Makis v Alberta Health Services,* their inherent jurisdiction is used to control access by a litigant found to be vexatious to non-judicial bodies, i.e. administrative tribunals and other statutory decision-makers.

Administrative law scholars and practitioners might very well be looking at least a little askance at this point. But it is true. The order issued in this case requires Dr. Makis to get the permission of the Court of Queens' Bench before he can commence, attempt to commence, or continue any complaint, investigation, proceeding or appeal "with any non-judicial body" if that complaint is related to matters alleged in any of the three actions that were pending before the Court (at para 89). Those actions include Dr. Makis' wrongful employment termination action, a judicial

review of a decision of the College of Physicians and Surgeons of Alberta (CPSA) on Dr. Makis' complaints about another physician, and a third, broader action by Dr. Makis against several physicians, their professional corporations and the University of Alberta based on conspiracy to undermine his professional career, breach of contract, negligence and misfeasance in public office (at para 3). The first two of these actions are described by Justice Clackson as "having some prospect of success" (at para 78).

The order is limited as to the subject matter of new proceedings, but not as to the forum – *any non-judicial body* is within the order's scope (paras 89-90). If requesting the leave of the Court to commence a proceeding related to any of the proscribed issues before a non-judicial body, notice must be given to the Defendants in this action – Alberta Health Services (AHS) and the CPSA – and to any individual named in the proceeding for which leave is sought (at para 89). The court costs of this application awarded to AHS and CPSA must also be paid before permission can be sought (at para 88). The same need for permission applies to beginning appeals or proceedings before the Court of Queen's Bench or the Provincial Court (at para 89). Justice Clackson acknowledged that restricting Dr. Makis' non-court activities was an "unusual step" (at paras 4, 34). He also acknowledged that it would be a "new" step for the court (at para 35).

The applicants, AHS and CPSA, sought a court order to "manage" Dr. Makis' access to the courts and a number of tribunals and professional organizations (at paras 1, 22). They did not ask the court to limit Dr. Makis' ongoing Queen's Bench actions, but they did ask the court to stop his ongoing extra-judicial activities (at para 27). Those said to need protection from Dr. Makis' extrajudicial activities included not only AHS and the CPSA, but also the Edmonton Police Service, RCMP, AHS Ethics and Compliance Office, Alberta Human Rights Office, Alberta Public Interest Commissioner, Minister of Health, University of Alberta, Office of the Information and Privacy Commissioner, and any other body which Dr. Makis might contact in the future (at para 82).

The type of relief sought by AHS and the CPSA and their views on the source of the court's power to award that type of relief are not that clear. Justice Clackson noted that ordinarily someone seeking relief from unfair behavior would seek injunctive relief (at para 58). Later, however, he stated that the application did not clearly state that AHS and CPSA sought to enjoin Dr. Makis, although "that is one way to characterize what is being sought" (at para 84). He seems to absolve the parties of the need to actually seek an injunction for themselves and others, under the rules of law that apply to injunctive relief, because "where the court finds that someone has acted vexatiously and is likely to continue to do so, surely protecting those who may plausibly be abused should follow as a matter of course without the need for separate applications" (at para 58). Justice Clarkson concluded that "in effect" the applicants were arguing that once a litigant was found to be vexatious "they need not individually seeking an injunction nor provide undertakings as to damages" because "vexatiousness justifies access restrictions for all future actions of the vexatious litigant…[that] relate to the subjects that underpin the vexatious behaviors" (at para 85). Dispensing with the need to apply for injunctive relief is justified on the basis of "avoiding costs, formality and multiple applications" – all goals attributed to the "culture shift" heralded by *Hryniak v. Mauldin*, 2014 SCC 7.

Apparently, AHS and CPSA argued that it was within the court's inherent jurisdiction to bar Dr. Makis' access to entities other than the Alberta courts (at para 34). In assessing this argument, Justice Clackson reviewed the case law about the scope and extent of a superior court's inherent jurisdiction. It seems to have been accepted in Alberta since the *Hok* decision in 2016 that superior courts have inherent jurisdiction to control not only the court action and processes before them, but also court actions and processes that might be brought in the future (at paras 37-45).

I am not going to rehash that point, except to suggest that more care be taken with the justifications for extending the court's self-policed powers. For example, Justice Clackson relied upon the two usually-relied-upon English cases to say that the UK Court of Appeal had concluded "on the basis of historical research, that UK courts have always had an authority to use misconduct in one matter as a basis to conclude that court access restrictions may be imposed on other and future litigation" (at para 41). Those two cases are *Ebert v Birch*, [1999] EWCA Civ 3043, [1999] 3 WLR 670 (UKCA) and *Bhamjee v Forsdick* (No 2), [2003] EWCA Civ 1113 (UKCA). In deciding whether a court could prohibit new proceedings without leave and proceedings in other courts, Lord Woolf in *Ebert v Birch* looked at an incomplete list of vexatious litigant orders maintained by Court Services (at 678G WLR). He noted there were at least six orders which restrained new proceedings, all made between 1880 and 1894. He cautioned that there was nothing to suggest that the question of the extent of the inherent jurisdiction of the court had been argued in any of those cases (at 679A). Due to the lack of full argument, Lord Woolf indicated that he did not regard the historical research as conclusive (at 679F). This does not seem to support Justice Clackson's assertion that the UK Court of Appeal concluded "on the basis of historical research, that UK courts have always had an authority" to impose access restrictions on future litigation. Lord Woolf indicated he preferred to approach the issue on the basis of principle (at 679F).

The main issue in this case – the "unusual" and "new" issue – should have been the extension of that inherent jurisdiction courts to non-judicial bodies. Justice Clackson described this issue as whether "a superior court of inherent jurisdiction has the authority to respond to any justiciable issue, provided that authority has not been allocated by legislation to a different body" (at para 36). He does discuss a superior court's inherent jurisdiction to respond to any justiciable issue, but he does not canvass the authority allocated to the AHS or the CPSA, or to the Edmonton Police Service, the Minister of Health, or any of the other non-judicial bodies for whom the AHS and CPSA sought the court's protection. He does note that the Ontario government has, through legislation, provided some of its statutory decision-makers with the power to make vexatious litigant orders that require prior permission for commencing future proceedings (at paras 48-49), and that there is no equivalent authority granted by the legislature to Alberta tribunals (at para 50). The "gap" is seen as a reason for the court to act (at para 50). Justice Clackson does not say what legislation was examined, but perhaps the *Administrative Procedures and Jurisdiction Act*, RSA 2000, c A-3, was what was being referred to here. Or perhaps all primary and subordinate legislation applicable to all of the non-judicial bodies in Alberta – every decision-maker to which the order applied – was examined and found lacking.

On the main issue of the extension of the court's inherent jurisdiction from courts to non-judicial bodies, Justice Clackson makes a number of points, all in short order and without much

elaboration. He begins by stating that the "intrinsic power" that he relied upon is the power of a superior court of inherent jurisdiction that exercises "general jurisdiction over all matters of a civil and criminal nature" (at para 46). The basic idea was that, where there is a right, there must be a court which can enforce that right and provide a remedy (at paras 46-47). Exactly what right requires a remedy in this context, or whose right it is, was not stated.

Justice Clackson also relied upon a number of precedents. For example, he relied upon (at para 53) *Hok*'s description of the Quebec Court of Appeal's decision in *Production Pixcom inc v Fabrikant*, 2005 QCCA 703 (at paras 22-23) as stating that a court's inherent jurisdiction "extends to provide superior courts the authority to shelter tribunals and other bodies that are unable to control vexatious litigants" (at para 18 in *Hok*). However, there is no discussion in *Hok* or by Justice Clackson about the Quebec Court of Appeals' "in any case" reliance on article 46 of the *Code of Civil Procedure*, CQLR c C-25. Does that legislative context matter? Additionally, nothing is made of the way the Court of Appeal stated its conclusion (at para 23), which was to say that "for other courts or tribunals which are not so empowered, the Superior Court may *enjoin* a vexatious litigant from introducing proceedings …. In such case one can speak of *an injunctive remedy* …". (at para 23, emphasis added).

Justice Clarkson also mentioned (at para 54) a decision of the Prince Edward Court of Appeal: *Ayangma v Canada Health Infoway*, 2017 PECA 13 (at para 62-63) as identifying this broader authority for superior courts. However, that Court of Appeal determined that a ban on commencing new proceedings in the provincial Human Rights Commission was not required (at para 65). As a result, that Court of Appeal merely cited *Production Pixcom inc v Fabrikant* and *Nursing and Midwifery Council v Harrold,* [2015] EWHC 2254 (QB) for extending restraints to tribunal proceedings (at para 62), without discussing them at all. To use the latter case, the role of Rule 3.11 of the *Civil Procedure Rules* 1998/3132 would have to be disentangled from the inherent jurisdiction points. Rule 3.11 introduced a civil restraint order regime that put the inherent jurisdiction powers of the High Court to prevent abuse of its process on a statutory basis.

None of the cases cited by Justice Clackson are binding. Whether any of them are persuasive depends upon whether their reasoning, in their legislative context, is persuasive in the Alberta context. No Alberta vexatious litigant case has yet made this type of reasoned argument to say that they are.

The next rationales advanced for extending the court's inherent jurisdiction (at paras 57-60) are the points about "no need to apply for an injunction" that I have already mentioned. As well, we find quotations from *Canada v Olumide*, 2017 FCA 42 (at paras 17-20) about the misconduct of vexatious litigants who "squander … community property" and "gobble up scarce resources." Justice Clackson next mentions, as a justification for extending the court's inherent jurisdiction, that the substantive effect of restricting access without leave is "very limited" (at para 55). He does not consider whether the impact of requiring an application to a court for leave to commence proceedings in a non-judicial body may be greater than when leave is sought to commence proceedings in the same court. He mentions instead (at para 56) that "while access to the courts is a fundamental right, there is no commensurate right of access to the various bodies" that Dr. Makis' had accessed (such as, presumably, the RCMP, the Alberta Human Rights

Office, the Alberta Public Interest Commissioner, the Office of the Information and Privacy Commissioner, etc).

Justice Clackson's next rationale for not requiring AHS or CPSA to apply for injunctive relief was that to require abused persons or bodies to do so "could itself be a tool of abuse in the hands of the vexatious litigant" (at para 61). Here Justice Clackson asks us to imagine "a vexatious unrepresented litigant" that launches "all kinds of spurious claims just to force his victims to the expense and *public humiliation* of seeking relief" (at para 61, emphasis added). Why asking the court for an injunction involves "public humiliation" is not specified.

Justice Clackson's final reason is based on what he identifies as the "sound policy" of managing vexatious litigants' access to tribunals even when one cannot identify which tribunals require protection (at para 62). He implores us: "Surely, if harm can be prevented at a reasonable cost, it behooves the court to do so" (at para 62). He saw it as "my obligation to protect those who have and those who may continue to have and those who have not yet suffered, but may suffer from Dr. Makis' abuse of the non-court processes" (at para 87).

These various rationales are each advanced very briefly, and sometimes only for their rhetorical impact. There is no in-depth reasoning about whether and why an Alberta superior court should extend its inherent jurisdiction to control access to non-judicial bodies.

The issue in this case deserves better. It effectively makes administrative tribunals accountable to the Court of Queen's Bench for who and what those tribunals will hear. My administrative law colleagues confirm that this is "odd" because non-judicial bodies are delegates of the legislature and take their directions from that branch of government, normally by way of statutes and regulations prescribing their authority. The order here will have the tribunals looking to the Court for direction on what matters and who they hear, rather than to the legislature. This seems wrong in principle. While judicial review does or at least can impose accountability on administrative tribunals, that accountability is usually imposed *ex post facto*, i.e., after the tribunal has acted. The ability of an administrative tribunal to decide what matters and which cases to hear – to be master of its own procedure – will vary with the empowering statute, but Justice Clackson's order appears to ignore any such statutory powers. His order also lacks a basis in a statute (as there is no such jurisdiction over non-judicial bodies in the *Judicature Act*; see *Calgary (City) v Manyluk*, 2012 ABQB 178 at para 88), procedural fairness, or some constitutional ground.

As Lord Woolf said in *Eberts v Birch* (at 680D), when it comes to a major question about the extension of the superior court's authority, there is something to be said for "waiting for intervention either in the form of primary legislation or in the form of rules of court".

I would like to acknowledge the input of my colleagues Shaun Fluker, Nigel Bankes, Martin Olszynski, and Howie Kislowicz, while at the same time absolving them of any responsibility for any errors.

This post may be cited as: Jonnette Watson Hamilton, “Court of Queen’s Bench Requires Vexatious Litigant to Seek Court’s Permission Before Accessing Any Non-Judicial Body” (December 21, 2018), online: ABlawg, http://ablawg.ca/wp-content/uploads/2018/12/Blog_JWH_Makis_v_Alberta_Health_Services_December2018.pdf

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