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Three Leaves to Appeal the Claimed Jurisdiction of Court of Queen's Bench Over Vexatious Litigants

By: Jonnette Watson Hamilton

Cases Considered: *Lymer (Re)*, [2018 ABCA 368 \(CanLII\)](#); *Jonsson v Lymer*, [2019 ABCA 113 \(CanLII\)](#); *Makis v Alberta Health Services*, [2019 ABCA 23 \(CanLII\)](#); *Vuong Van Tai Holding Inc v Alberta (Minister of Justice and Solicitor General)*, [2019 ABCA 165 \(CanLII\)](#); *Unrau v National Dental Examining Board*, [2019 ABQB 283 \(CanLII\)](#)

The Alberta Court of Appeal has granted leave to appeal three different vexatious litigant orders made by the Court of Queen's Bench in Edmonton that restricted individual litigant's access to the courts and, in one case, to administrative tribunals. Hopefully the three appeals will be heard either together or on the same day by the same panel, as suggested by Justice Bielby when she granted leave to appeal in *Vuong Van Tai Holding Inc v Alberta (Minister of Justice and Solicitor General)*, [2019 ABCA 165 \(CanLII\)](#) (at para 21). The [National Self-Represented Litigants Project](#) (NSRLP) has been granted leave to intervene in one of the three appeals – *Jonsson v Lymer*, [2019 ABCA 113 \(CanLII\)](#) – bringing its wider perspective on self-represented litigants and its national research on access to justice into the courtroom. The Alberta Minister of Justice and Solicitor General, who was represented on the leave to appeal application in *Vuong*, has been invited to participate as a party in that appeal. The arguments and outcomes of these three appeals should be very interesting on a number of issues of civil procedure, access to justice and procedural justice, but primarily on the question of the scope of the inherent jurisdiction of the Court of Queen's Bench. In this post, I will look at what is at stake in these three appeals.

I will also make a few points about a fourth and seemingly unrelated Queen's Bench decision. The Associate Chief Justice of the Court of Queen's Bench, John D. Rooke, took the unusual step of rendering a 1,059-paragraph judgment as the second step in his use of [Civil Practice Note No. 7](#) to strike a Statement of Claim: see *Unrau v National Dental Examining Board*, [2019 ABQB 283 \(CanLII\)](#). Six months earlier, in the first step of that document-based "show cause" procedure, Justice Rooke had determined Unrau's Statement of Claim appeared to be an abusive filing and issued an order giving Unrau two weeks to file a written argument rebutting Justice Rooke's initial assessment: *Unrau v National Dental Examining Board*, [2018 ABQB 874 \(CanLII\)](#). Unrau did not respond to that order. Nevertheless, this seemingly simple and uncontested matter became the vehicle for a 954-paragraph review (at paras 20-974) of the broader topic of vexatious litigant orders. That review includes a discussion of the court's inherent jurisdiction to make these orders (at paras 373-542), as well as an assessment of the merits of the Court of Appeal's decision on procedural justice in *Lymer v Jonsson*, [2016 ABCA 32 \(CanLII\)](#) (at paras 932-974). These are among the issues for which leave to appeal was granted in the *Lymer*, *Makis* and *Vuong* cases. We therefore know the substance of most of the

submissions the Court of Queen’s Bench would make in the three appeals were it appropriate for one court to make submissions in proceedings in another court – which it is not: *Ubah v Canadian Natural Resources Limited*, [2019 ABQB 359 \(CanLII\)](#) at para 24.

The issue that unites all three appeals, as well as the *Unrau* decision, is the question of the scope of the superior courts’ inherent jurisdiction. Ever since its decision in *Hok v Alberta*, [2016 ABQB 651 \(CanLII\)](#), the approach of the Court of Queen’s Bench of Alberta to restricting litigants’ access to the courts has been based on its inherent jurisdiction, rather than on the provisions governing vexatious litigants in the *Judicature Act*, [RSA 2000, c J-2](#). The Court calls the former the “modern approach” and the latter the “traditional approach”, although the latter dates from only twelve years ago, when the government of Alberta amended the *Judicature Act* to give more people standing to apply for broader vexatious litigant orders in 2007. More appropriate labels might be the “legislated” or “*Judicature Act*” approach for the latter and the “judicial” or “inherent jurisdiction” approach for the former. Rhetoric aside, Justice Rooke’s exploration in *Unrau* of the inherent jurisdiction of superior courts as a basis for the “modern approach” is a welcome development. *Unrau* marks the first time the Court of Queen’s Bench has made an extended reasoned argument to support its claims about the scope of its inherent jurisdiction, rather than relying on bare citations.

There are at least four major differences between the legislated and the judicial approaches. First, a litigant whose access to the courts might be restricted by court order has the right to appear in person to argue against the restriction under the *Judicature Act*. Under the “modern approach”, however, the Court of Queen’s Bench’s usually relies solely on written arguments when deciding whether to restrict a litigant’s court access or not. Second, while the *Judicature Act* requires “persistent” prior misconduct before the Court may impose access restrictions, the “modern approach” is prospective, with the court focusing on what it anticipates the litigant might do in the future. Third, there is a much broader and ever expanding set of indicators of vexatious conduct in the “modern approach” than is listed in the *Judicature Act*, including behavior unrelated to specific court proceedings. Fourth, under the *Judicature Act*, notice must be given to the Minister of Justice and Solicitor General, whereas that notice is dispensed with under the “modern approach” unless the court believes the proceedings should attract the interest of the Minister. The result of both approaches is usually an order that restricts a litigant’s access to the courts by requiring the litigant to obtain the courts’ permission to start or continue a court action.

When a litigant is declared a vexatious litigant, that litigant requires the permission of the Court of Appeal to appeal that order. Leave to appeal a vexatious litigant order requires the litigant meet the usual three-part test for permission to appeal, plus the additional requirement to show their appeal is not an abuse of process: *Belway v Lalande-Weber*, [2017 ABCA 108 \(CanLII\)](#) at para 5. The usual test requires an important question of law or precedent, a reasonable chance of success on appeal, and no undue prejudice due to the delay caused by an appeal.

Lymer (Re)

I have already commented on this November 2018 decision of Justice Frederica Schutz, which was the first of the three Court of Appeal decisions to grant leave to appeal. See “[Challenge to the Queen’s Bench Vexatious Litigant Procedure](#)” for the factual basis of the vexatious litigant order and the appeal.

The specific issues for which Justice Schutz granted leave to appeal are:

- (1) Did the case management judge err in finding that the applicant was a vexatious litigant?
- (2) Did the case management judge err in failing to ensure a full and fair hearing in respect of the vexatious litigant motion, in breach of natural justice?
- (3) Did the case management judge err in imposing an overly broad vexatious litigant order?
- (4) Did the case management judge err in imposing as a sanction for contempt a period of incarceration, without conducting a full and fair viva voce hearing, and in breach of the requirements of s 7 of the Charter and the principles of natural justice? (at para 9)

As I noted in my earlier post, the scope of the first issue is unclear. However, we know it is a question of law requiring argument about the appropriate approach to restricting litigants' access to the courts. The second issue raises a natural justice issue that the Court of Appeal has raised before with the lower court; see *Lymer v Jonsson*, [2016 ABCA 32](#). The third issue about over-breadth of the lower court's order has also been raised before, by the Minister of Justice in the *Hok* case and by the Court of Appeal in *RO v DF*, [2016 ABCA 170](#). The fourth issue is outside the scope of this post's focus on vexatious litigant orders.

Some clarity about the scope of the first issue was added by the subsequent decision of the Court of Appeal to allow an intervention in the *Lymer* appeal.

Jonsson v Lymer

This March 2019 decision of Justice Sheila Greckol is significant because it grants leave to the [National Self-Represented Litigants Project](#) (NSRLP) to intervene on the first three grounds of appeal in the *Lymer* appeal (at paras 10-11). The NSRLP is a unique Canadian organization that is focused on access to justice for self-represented litigants (SRLs). It is committed to the systemic change that a broad understanding of access to justice requires. Its mandate includes developing research on and resources for SRLs, as well as improving the responsiveness of the Canadian justice system to those litigants.

The NSRLP builds on the [National Self-Represented Litigants Research Study](#) conducted in 2011-2013 by Dr. Julie Macfarlane of the Faculty of Law at the University of Windsor. The NSRLP has been conducting research on the impact of vexatious litigant orders on SRLs for awhile now, although the subject of their research is fast-moving and constantly shifting. Within the parameters set by Justice Greckol's order, their approach will be to "focus on the broader policy implications of vexatious litigant procedures" (at para 34). The risk of conflating the ordinary behaviour of SRLs with vexatious litigation conduct is the NSRLP's main concern.

Makis v Alberta Health Services

I have also already written about the decision which is the basis for the second Court of Appeal decision to grant leave to appeal; see “[Court of Queen’s Bench Requires Vexatious Litigant to Seek Court’s Permission Before Accessing Any Non-Judicial Body.](#)” In *Makis v Alberta Health Services*, [2018 ABQB 976](#), Justice T.D. Clackson took what he acknowledged was a “new step” for the Court (at para 35) and extended the scope of the Court’s claimed inherent jurisdiction to control access by a litigant found to be vexatious to non-judicial bodies, i.e. administrative tribunals and other statutory decision-makers.

Justice Peter Costigan granted leave to appeal that unusual order in a brief five-paragraph decision handed down in January 2019. He found that the application for leave to appeal raised “important questions of law for which there is no existing appellate precedent and which have a reasonable chance of success” (at para 3). He therefore granted leave to appeal on two questions:

- (1) Did the chambers judge err in law by restricting the applicant’s access to non-judicial bodies?
- (2) Did the chambers judge err in law by restricting the applicant’s access to the Court of Queen’s Bench and Provincial Court? (at para 3)

Both of these grounds concern the scope of the Court of Queen’s Bench’s claimed inherent jurisdiction over other judicial and quasi-judicial bodies.

Vuong Van Tai Holding Inc v Alberta (Minister of Justice and Solicitor General)

The third and most recent case of the three to receive permission to appeal is the only one I have not already commented upon. I will therefore discuss it in more detail. The facts that are available in the court decisions raise the issue of conflating ordinary SRL conduct with vexatious behaviour, as well as the issue of a breach of natural justice.

Leave to appeal was granted in the *Vuong* case by Justice Myra Bielby in May 2019. In the March 2019 decision being appealed from – *Vuong Van Tai Holding / Q5 Manor v Krilow*, [2019 ABQB 146 \(CanLII\)](#) – Justice D.R.G. Thomas, on his own motion and without notice and with no one appearing, struck the litigant’s originating application that had been filed without leave in violation of a 2015 court access restriction order and imposed stricter court access restrictions which required the hiring of a lawyer by both the corporation and its sole director, Van Vuong. The lack of notice in this case raises the breach of natural justice ground of appeal. In *Unrau* (at paras 970, 980), Justice Rooke indicated that when a court considers imposing additional and more stringent court access restrictions – particularly those that impose financial costs such as hiring a lawyer – “procedural fairness will usually require an opportunity for oral and/or written submissions prior to those steps being imposed.”

The original October 2015 court access restriction order by Justice Germain is not reported. As a result, some of the facts in this case are unclear or unstated. According to Justice Thomas in his March 2019 decision, the original order banned Van Vuong and his company from starting new residential tenancy lawsuits in the Court of Queen’s Bench without leave (at para 2). Van Vuong

and his company own and rent out several residential properties in Edmonton. Apparently, Justice Germain imposed court restrictions because Van Vuong appeared before him to represent his company by himself, rather than using a lawyer. Representing his company as its agent is allowed in Provincial Court, but not in the Court of Queen's Bench: *Provincial Court Act*, [RSA 2000, c P-3](#), s 62.

Van Vuong's offending originating application was filed in the Court of Queens' Bench in February 2019 – more than three years after Justice Germain's order. It was a claim for rent and termination of a residential tenancy, and it was in a short form more suitable to Provincial Court.

Even though this was just one application three years later, Justice Thomas relied on a passage from *McMeekin v Alberta (Attorney General)*, [2012 ABQB 456 \(CanLII\)](#) for his reasons for imposing stricter court access restriction. The quoted passage stated in part: “When a person takes an incorrect action, is informed of their error, but then persists and commits the same ‘error’ again and again, that is evidence that the person does not misunderstand their action is incorrect. Rather, that indicates the person wants to break the rules” (at para 7, quoting *McMeekin* at para 199, emphasis added). Justice Thomas added: “That obviously applies here” (at para 8, emphasis added). Just why one incident in over three years amounts to “making the same ‘error’ again and again” is not explained – the word “obviously” is an argument that an explanation is unnecessary. But because he had found that Van Vuong and his corporation not only would not cooperate (at para 9) and, worse, were ignoring the court (at para 10), Justice Thomas held that stricter court access restrictions were necessary.

While Justice Germain's 2015 court access restrictions order was limited to residential tenancy matters in the Court of Queen's Bench, Justice Thomas' March 2019 court access restrictions were what the Court of Queen's Bench calls “global” ones. Van Vuong and his company were prohibited from commencing or continuing any kind of action in any court in Alberta, including Provincial Court, without an order from the relevant court giving them leave to do so. In addition, both Van Vuong and his company were required to use a lawyer to apply for leave to start or continue an action (at para 13).

Van Vuong and his company applied, through their lawyer, to the Court of Appeal for permission to appeal Justice Thomas's order, using the process specified in great detail in Justice Thomas' order (at para 13). Justice Bielby directed their lawyer to serve notice of their application on the Minister of Justice and Solicitor General of Alberta. As a result, the government was represented by counsel who filed materials to assist the court but took no position on whether leave should be granted or not (at para 2).

Van Vuong, who had not had any opportunity to explain himself before Justice Thomas, did provide an explanation to the Court of Appeal (at para 9). Like many landlords, he goes to court from time to time to collect rent, sue for damages, terminate leases, etc. He and/or his corporation have started five of these types of actions in Alberta courts since 2013. He thought Justice Germain's order said he could not represent his corporation in court himself and that he needed a lawyer unless he was also suing in his personal capacity. He had a lawyer represent his company in all but one hearing. On that one occasion, his lawyer was not available and so he had appeared

by himself. Van Vuong was especially concerned about the ban on appearing in Provincial Court without leave because of the negative impact on his residential tenancy business (at para 10).

Justice Bielby began her discussion of the test for granting leave to appeal by first noting the issues for which leave to appeal was granted in the *Lymer* and *Makis* appeals (at paras 13-14). On the question of whether the proposed appeal of Justice Thomas' order raised an important question of law, she described the issue in the following terms:

[W]hether the Court of Queen's Bench has jurisdiction to restrict access to the Court of Appeal or Provincial Court, ... involves an assessment of the question of whether a Court of Queen's Bench justice has inherent jurisdiction, as claimed, to grant vexatious litigant orders where the requirements of ss 23 and 23.1 of the *Judicature Act* regarding service and notice have not been met. (at para 15)

This is the most explicit statement of the issue in these three appeals, namely, the scope of the Court of Queen's Bench's claimed inherent jurisdiction to deal with vexatious litigants.

On the second part of the leave to appeal test, requiring a reasonable chance of success, Justice Bielby noted that a basic requirement of natural justice is the right to be heard and that in this case, it was arguable the litigants were not granted that right (at para 17). The fact that there was only one apparent breach of Justice Germain's order in more than three years, that there were none of the other usual indicia of vexatious litigation, and that English is not Vuong's first language were also factors in assessing the likelihood of success.

The third part of the leave to appeal test was easy to satisfy because the litigants acted promptly and there was no respondent to be prejudiced or delayed in this case (at para 19). The tenancy issues had been resolved.

Justice Bielby concluded that "this application for permission to appeal raises important issues of law for which there is no existing precedent and which have a reasonable chance of success" (at para 20). Accordingly, she granted leave to appeal on the following questions:

- (1) Did the chambers judge err in law by restricting the applicant's access to Alberta courts?
- (2) Did the chambers judge err in law by making a vexatious litigant designation without notice to or otherwise considering submissions from the Applicants? (at para 20)

Justice Bielby also gave permission to the Department of Justice to participate as a party to the underlying appeal (at para 21).

The first question on this appeal is very similar to the second in *Makis*, about whether it was an error to restrict that applicant's access to the Court of Queen's Bench and Provincial Court. This question – asking if it was an error in law to restrict the applicant's access to Alberta courts – seems the broadest of all the questions that will be before the Court of Appeal. The second question is very much like the second question in the *Lymer* appeal about whether a failure to provide a full

and fair hearing in respect of a vexatious litigant motion was a breach of natural justice. The question in this appeal is more specific about the failings, i.e. the lack of notice and the lack of any opportunity to make submissions, but it is still a question about a breach of natural justice.

Unrau v National Dental Examining Board

I do not want to say much about Justice Rooke's 195-page judgment in *Unrau*. That judgment comes with its own summary, as well as a table of contents, that makes it easier to navigate and pick and choose what to read. Nevertheless, there are three matters that I do want to comment on: the literature on inherent jurisdiction, the impact of requiring leave to appeal from the perspective of litigants, and the nature of legal scholarship.

Unrau and the Literature on Inherent Jurisdiction

There is a great deal that could be said about Justice Rooke's brief in support of superior courts' inherent jurisdiction, including the power to order court access restrictions on prospective litigation before that court or any number of other judicial and quasi-judicial decision-makers in Part E and F of his judgment (at paras 373-542). I will confine myself to two related points. The first is that the clarity, depth and persuasiveness of the discussion could be greatly increased by engaging with the scholarly literature that responds to and improves upon the oft-cited article by I. H. Jacob, "The Inherent Jurisdiction of the Court" (1970) 23 *Current Leg Problems* 23. The second is that the clarity, depth and persuasiveness of discussion could be greatly increased by distinguishing between superior courts' inherent jurisdiction and all courts' inherent powers – a point well made in some of that post-1970 literature.

On the first point, there is not a lot of relevant legal scholarship on the inherent jurisdiction of superior courts within the English or common law legal tradition, especially on the topic at issue in these appeals. The best known, and the place where almost every scholar and court begins (including Justice Rooke in *Unrau* at para 378), is with Sir Jack Jacob, an esteemed British civil procedure expert and Master and Senior Master of the High Court from 1957 to 1980. However, Jacob's article is not the last word on the topic; there have been refinements and improvements in the last forty-nine years that should not be ignored. A list of some of the more recent and helpful scholarship is attached as Appendix A.

I think it is especially useful to look at scholarship that clearly addresses the distinction between superior courts' inherent jurisdiction and all courts' inherent powers, and why that distinction is of critical importance to any analysis of the scope of inherent jurisdiction. Such scholarship includes: G. Yihan, "[The Inherent Jurisdiction and Inherent Powers of the Singapore Courts](#)" (2011) *Singapore Journal of Legal Studies* 178 (arguing that resolving the conflation between inherent jurisdiction and inherent powers is important because distinguishing the two concepts is necessary to determining the limits of inherent jurisdiction); Marcelo Rodriguex Ferrere, "[The Inherent Jurisdiction and its Limits](#)" (2013) 13:1 *Otago L Rev* 107 (defining inherent jurisdiction by resolving the confusion caused by Jacob's uncritically accepted definition and formulating limits on that jurisdiction by drawing on its exercise in four different common law systems: England, Canada, Singapore, New Zealand); and Rosara Joseph, "[Inherent Jurisdiction and Inherent Powers in New Zealand](#)" (2005) 11:2 *Canterbury Law Review* 220 (arguing that

reclassification is necessary to untangle inherent powers and inherent jurisdiction because the cases are impossible to reconcile).

Martin Dockray, "The Inherent Jurisdiction to Regulate Civil Proceedings" (1997) 113 Law Quarterly Review 120 (arguing that even when there is no risk of contravening legislation, a superior court's jurisdiction is not unlimited) is also recommended. This author discusses the limits on inherent jurisdiction that have been adopted in recent appellate decisions (e.g. *Al Rawi v The Security Service*, [2011] UKSC 34; [2011] 1 AC 531 (at para 22, per Lord Dyson; at para 74 per Lord Hope); *Gillespie v Manitoba (Attorney General)* (2000) MBCA 1 (CanLII) (at para 27)) that are not mentioned in *Unrau*. In *Gillespie*, a unanimous Manitoba Court of Appeal concluded that they shared Professor Dockray's view that inherent jurisdiction is not a kind of "ubiquitous judicial prerogative" and colourfully asserted: "Indeed, it is not a prerogative at all. The Divine Right of Kings is dead; it has not passed to judges" (at para 27).

Relatedly, Wendy Lacey, in "Inherent Jurisdiction, Judicial Power and Implied Guarantees under Chapter III of the Constitution" (2003) 31 Federal Law Review 57, explores the inherent jurisdiction of Australian federal courts in the context of the separation of federal judicial power from executive and legislative power. Lacey's piece may help clarify the issues in the *Makis* case where inherent jurisdiction was extended to non-judicial bodies.

On the second point, both Yihan and Ferrere are persuasive about the need to clearly conceptualize and differentiate inherent jurisdiction and inherent powers (Yihan at 188; Ferrere 114). As Joseph succinctly puts it:

"Jurisdiction" and "power" are distinct concepts. *The Laws of New Zealand* defines jurisdiction as "the authority which a Court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision." Jurisdiction is a substantive power to hear and determine a matter. Jurisdiction may be conferred by the statute under which the court is constituted ("statutory jurisdiction") or it may be "inherent" in a particular court ("inherent jurisdiction").

Jurisdiction must be distinguished from "power". All courts possess inherent powers which are incidental or ancillary to their substantive jurisdiction. These ancillary powers are procedural, rather than substantive, in nature. They enable a court to give effect to its jurisdiction, by enabling the court to regulate its procedure and protect its proceedings. The existence of the ancillary powers is parasitic on the court possessing jurisdiction. These ancillary powers are "inherent". (at 220-21, footnotes omitted, emphasis added)

Unfortunately, as Joseph also points out (at 221), Jacob's oft-cited definition of "inherent jurisdiction" describes the inherent powers that courts have in order to function fairly and efficiently as courts, and not inherent jurisdiction *per se*. Jacob's definition of inherent jurisdiction describes it as follows: "the jurisdiction which is inherent in a superior court of law is that which enables it to fulfil itself as a court of law. The juridical basis of this jurisdiction is therefore the authority of the judiciary to uphold, to protect and to fulfil the judicial function of

administering justice according to law in a regular, orderly and effective manner” (Jacob at 27-28).

The distinction between inherent jurisdiction and inherent powers has been recognized by courts, a few of whom have even tried to sort out the confused state of judicial pronouncements; see for example *Zaoui v Attorney-General*, [2005] 1 NZLR 577 (CA); [2005] 1 NZLR 666 (SC). However, as in most Canadian decisions discussing inherent jurisdiction, the two concepts are not differentiated in *Unrau* when Justice Rooke discusses “Two Potential Sources for Jurisdiction” (at paras 347-490). For example, an expansive scope for superior courts’ inherent jurisdiction is sometimes justified by reasons that are only relevant to any courts’ inherent powers. This lack of differentiation results in arguments that are less persuasive than they might be because they confuse and conflate too many ideas.

Narrower questions based on clearly defined concepts might be more useful. For example, do the inherent procedural powers that all courts possess in order to give effect to their jurisdiction and regulate their processes allow a court to restrict prospective actions that may be brought in that court? In other courts? Before other decision-makers? Or, does the inherent jurisdiction of a superior court extend to disputes that may or may not be litigated before it? Or disputes that will not be litigated before it, but rather may be heard by another court or by a non-judicial decision-maker? Or, can an inherent power to manage difficult litigants who appear in actions that have been brought to that court be transformed into a jurisdiction to exercise the same type of powers to control difficult litigants who have not brought actions to that court?

Unrau and the Impact of Requiring Leave

The Alberta cases that use the “modern approach” minimize the impact of requiring litigants to get leave from a court in order to commence or continue actions once they are found to be vexatious litigants. In *Unrau*, Justice Rooke characterizes vexatious litigant orders as having merely a “minimal screening” or “gatekeeping” or “court management” function or being a “simple permission gatekeeping requirement” or a “housekeeping litigation management step” (at paras 426, 928, 945, 963, 976, 1014). As such these court access restriction orders are seen to be “minimally intrusive” with limited consequences (at paras 426, 976). It is said that requiring leave does not deny access to the courts (at paras 426, 976, 1014). It merely regulates it (at para 772). Any acknowledgments of the extraordinary nature of court access restrictions are confined to what Justice Rooke calls the “traditional approach” (at paras 398, 519, 943-44).

In response to these assertions, I will confine myself to three points.

First, there is no evidence of the actual impact that I am aware of; none is cited by the courts. What there is are assertions of facts that appear to come from the perspective of judges for whom requiring leave may well be perceived as a relatively insignificant barrier to court access. I am not aware of any judgments adopting litigants’ perspective on this point.

Minimizing the impact of court access restriction orders allows courts to conclude that very little in the way of procedural fairness is required (*Unrau* at para 946, 975-76).

From a litigant's perspective, requiring leave might be very daunting, even if the litigant's cause of action is a good one for something like overdue rent, as in the *Vuong* case. Why might it be much more than the asserted "minimally intrusive"? For one thing, the litigant has been characterized as a "vexatious litigant" by a person in authority. Their reputation and credibility have been, or can be perceived by the litigant or others to have been, damaged. A vexatious litigant starts out with at least one strike against them if they walk into court as a supplicant to ask for permission to sue. *Unrau* concludes with an index of roughly 400 reported cases, mainly Alberta cases. What percentage of the hundreds of litigants who have been labelled vexatious litigants have asked a court for leave to bring an action?

Nikolas Kirby, in "[When Rights Cause Injustice: A Critique of the Vexatious Proceedings Act 2008 \(NSW\)](#)" (2009) 31 Sydney Law Review 163, correctly noted that the character of vexatious proceedings orders as *ad hominem* declarations about the litigant, and not their litigation *per se*, amplifies their seriousness. The orders attack the character, motive, or other attributes of the person declared to be a vexatious litigant, as the discussion of "Who are Abusive Litigants?" in *Unrau* illustrates (at paras 86-245). Kirby relies upon evidence given to a Victorian Parliamentary Committee looking at vexatious litigant law reform (Parliament of Victoria Law Reform Committee, [Inquiry into Vexatious Litigants](#), December 2008). Legal aid clinics had argued before that Committee that court access restriction orders further alienated those who were already marginalized, and mental health centres worried that public declarations labelling people vexatious litigants could compound the existing difficulties those people faced when seeking help (Kirby at 172). Kirby also noted that existing research, although not then verified, suggested that up to 25 per cent of litigants declared vexatious took their own lives, referencing evidence presented to the Parliamentary Committee by psychiatrist Grant Lester of the Victorian Institute of Forensic Mental Health (at 172).

Courts' inability or unwillingness to see a leave requirement as more than a "housekeeping litigation management step", i.e. to see it from the litigant's perspective, may be linked to two other notable aspects of the *Unrau* decision.

My second point on this topic concerns the very large amount of space that Justice Rooke devotes to the topic of mental illness (at paras 86-342). Justice Rooke is not clear about how medical characterizations of vexatious litigants are to be integrated into the law about vexatious litigants and litigation, which he acknowledges at the end of his judgment (at paras 1040-1049). The discussion is not part of a discussion of courts' duty to accommodate persons with mental disabilities to the point of undue hardship, for the courts have decided their public services are not within the scope of human rights legislation: *Gonzalez v Ministry of Attorney General*, [2009 BCSC 639 \(CanLII\)](#); *Ernst v Alberta Energy Regulator*, [2017 SCC 1 \(CanLII\)](#) at para 50. And judges cannot diagnose mental illness in litigants who appear before them, as Justice Rooke acknowledges (at paras 117, 122). However, Justice Rooke appears to think that courts can and should take the symptoms of mental illness described in the psychiatric literature and assess whether those symptoms are present in the litigant before them (at paras 118, 121, 127, 131-145, 148-155) or whether the conduct of a litigant is consistent with symptoms described in the medical literature (*Olumide v Alberta Human Rights Commission*, [2019 ABQB 186 \(CanLII\)](#) at para 57; *Unrau* at para 124). I am not sure how different those two types of assessments are from diagnoses.

A recent PhD thesis – Kathryn Leader, [*Fifteen Stories: Litigants in Person in the Civil Justice System*](#) (Department of Law, London School of Economics, 2017) – draws on fifteen life histories to ask what “going to law” is like for those who the British call “litigants in person” (LiPs). The author draws attention to the tendency to conflate all LiPs (or SRLs) with high-risk, querulous or vexatious litigants due to assumed personal deficiencies or behavioural disorders (at 26, 29). Leader found that, although LiPs are often conflated with vexatious litigants, they may in fact be less likely to pursue “frivolous” claims (at 32).

Justice Rooke’s discussion of “querulous paranoiacs” (at para 125-28) and “deluded litigants” (at paras 146, 157) seems to be used to justify imposition of broad court access restriction orders early in the litigation (at paras 154-55). The discussion also seems to allow Justice Rooke to assert that moving quickly to keep mentally ill vexatious litigants out of the courts is for their own good (at paras 125, 128, 155, 175, 976). These types of assertions have been characterized as paternalistic assumptions (Kirby at 180). Nevertheless, Justice Rooke is not alone in thinking that vexatious litigation is a medical problem; see, for example, M. Taggart and J Klosser, “Controlling Persistently Vexatious Litigants,” in Matthew Groves, ed, *Law and Government in Australia* (The Federation Press, 2005) 272.

Mental disabilities seem to be an unlikely source of justifications for adverse impacts on people’s rights. But if there is no or minimal adverse impact – if a court access restriction order is really only a “housekeeping litigation management step” – then this misgiving disappears.

My third point on the topic of supposed minimal impact concerns the Canadian empirical research conducted on leave requirements in another context which indicates how arbitrary they are: Shaun Fluker, [“Seeking Leave to Appeal a Statutory Decision: What is the Legal Test?”](#) (2019) 32 *Journal of Administrative Law & Practice* 81; Sean Rehaag, [“Judicial Review of Refugee Determinations: The Luck of the Draw?”](#) (2012) 38:1 *Queen’s Law Journal* 1; and Sean Rehaag, [“Judicial Review of Refugee Determinations \(II\): Revisiting The Luck Of The Draw”](#) (Working Paper 14 Sept 2018). Both authors examine requirements for leave to appeal decisions made by tribunals, agencies or other delegates of legislatures. The purposes of these leave requirements “would seem to be to weed out meaningless appeals and help ensure judicial resources are directed at resolving legitimate and important disputes” (Fluker at 2) – purposes very familiar to vexatious litigant decisions.

Fluker’s Alberta case study, albeit with a small sample size, corroborated findings by others who have examined leave decisions and who found those decisions to be based on arbitrary or partisan considerations due to the discretionary nature and malleable test for granting leave to appeal (Fluker at 5-6, 29-35; see also Rehaag, 2012 at 32). Rehaag, whose work analyzes thousands of decisions, found that the outcome of appeals by refugee claimants depended primarily on which judge heard the leave application and the various aspects of that judge’s identity such as gender, political party of appointment and political orientation (2012 at 13).

The arbitrary nature of the outcomes of seeking leave that is revealed by these studies led Fluker to conclude:

[T]here seems little doubt that the discretionary nature of leave applications means that the distinction between what is characterized as a frivolous or hopeless case which is not permitted to go to an appeal and a case with significance and merit which does warrant the attention of a superior court, may be more imaginary than real. (at 36)

The outcomes of requiring leave to commence or continue a court action have not been studied, but the Fluker and Rehaag research on the arbitrary nature of leave decisions in statutory appeals suggests that requiring leave is not a “housekeeping litigation management step” with no or minimal impact.

Unrau and Peer Reviewed Scholarship

There is at least one point on which Justice Rooke and I agree: there is not enough research on vexatious litigation. However, I think we might want different types of research.

I do not think that more research on the “Organized Pseudolegal Commercial Arguments” concept introduced by *Meads v Meads*, [2012 ABQB 571 \(CanLII\)](#) is needed. As Justice Rooke notes, OPCA litigation is in decline (*Unrau* at para 179). In Canada, there has been more peer-reviewed research on this very small sub-set of vexatious litigants than on any other aspect of vexatious litigation, almost all of it done by Donald J. Netolitzky, legal counsel at the Court of Queen’s Bench of Alberta. His work on OPCA litigation is heavily relied upon by Justice Rooke (at paras 42, 179, 181-83, 192, 736, 738, 1054).

My preference would be for thoroughly and thoughtfully researched analytical and theoretical work on the topic of vexatious litigation, and well analyzed, reliable empirical data on the costs and scale of vexatious litigation and the impacts of court access restriction orders on litigants. What are the costs of attempting to exclude litigants from the courts? How effective are these orders? How many litigants declared vexatious seek leave to commence or continue an action? What are the consequences of issuing these orders to the individuals whose access is restricted? Are the interests of people declared vexatious litigants best protected by curtailing or preserving their right to litigate? Is the line drawn between vexatious litigation and ordinary SRL litigation consistently and properly drawn? As others have argued (albeit in different jurisdictions), it is impossible to actually balance the public interest in the current continuous expansion of the scope of vexatious litigant orders in Alberta against those litigants’ ability to access the courts and other state-sanctioned decision-makers without such data (Kirby at 175).

Justice Rooke has some negative things to say about non-peer reviewed scholarship in *Unrau*. He states that certain legal academic commentary on the subject of vexatious litigation and SRLs is problematic, particularly “blog” publications and others not subject to anonymous peer review (at para 1053). Anonymous peer review is said to be “the defining feature of academic publications” and the Supreme Court of Canada is cited as having made “the importance of this screening procedure to validate novel claims very clear” (at para 1053, emphasis added). Anything that is not anonymously peer-reviewed seems to be categorized as merely “opinion pieces” (at paras 1052).

I do appreciate that peer review of vexatious litigant scholarship is usually some sort of assurance of thorough research and adequately supported arguments. But there are at least three problems with Justice Rooke's view of peer review.

First, his understanding of peer review is limited to disciplines such as mathematics and physics, in which the criteria of evaluation is one of correctness or truth. Peer review in law, as in the humanities, does not "validate" claims (*Unrau* at para 1053). Persuasiveness is the criteria for arguments in law, not correctness. Anonymous peer review in law requires reviewers to say that an author's conclusions are plausible and reasonably supported by whatever arguments and evidence the author has fairly marshalled – no matter how much the reviewer might disagree with the author. Judges should be familiar with persuasiveness; it is the basis upon which their own decisions are scrutinized by appellate courts.

This point about how legal scholarship is evaluated has been well made in what is probably the most highly-regarded non-peer review article on this topic, Edward L. Rubin, "The Practice and Discourse of Legal Scholarship" (1987-88) 86 *Michigan Law Review* 1835:

[T]he most distinctive feature of standard legal scholarship is its prescriptive voice, its consciously declared desire to improve the performance of legal decisionmakers. ... [T]he point of an article about a judicial decision is usually to remonstrate with the judge for the conclusion reached and for the rationale adopted. The point of an article about a statutory provision or a regulation is to expose the errors made in drafting it, and to indicate what should have been done instead.... This prescriptive voice distinguishes legal scholarship from most other academic fields. The natural sciences and the social sciences characteristically adopt a descriptive stance....

Because their discourse is a normative one, legal scholars are not attempting to describe an allegedly objective reality They are reasonably clear that they are addressing a specific audience, and advancing culturally contingent arguments as methods of persuasion. In other words, legal scholarship already concedes the primacy of the normative realm, and thus regards itself as a practice, not a disembodied declaration of objective truths. However disconcerting the critique of methodology may seem when applied to natural or social science, it represents our ordinary understanding of contemporary legal scholarship. (at 1847-48, 1854)

Second, a great deal of the writing by legal academics that is routinely cited by Canadian courts is not peer-reviewed. Case comments, for example, are rarely peer-reviewed. They may have editors, but so do many institutional blogs. And many blog posts are simply more quickly published case comments. Other work lacking anonymous peer review that is usually cited by courts as persuasive includes books and book chapters, PhD theses, law reform commission reports, and editorial comments in law reviews such as *Criminal Reports*. In addition, articles published in almost every American law review, including the *Harvard Law Review* and the *Yale Law Review*, are not peer-reviewed; they are merely edited by law students.

Third, and contrary to what Justice Rooke stated about blog posts, they *are* now cited by the Supreme Court of Canada. As one example, Justice Rooke must have missed the citing of [an](#)

[ABlawg post](#) by the Supreme Court of Canada in *Orphan Well Association v Grant Thornton Ltd*, [2019 SCC 5 \(CanLII\)](#), decided January 31, 2019 at para 212 (per Côté J). That post is also listed under “Authors Cited” with several peer-reviewed Canadian articles, a non-peer reviewed American article and mostly non-peer reviewed books. The Supreme Court of Canada has also cited a [feminist judgment](#) and an article in the Canadian Bar Association’s *Law Matters* magazine: see “Authors Cited” in [R v Goldfinch, 2019 SCC 38 \(CanLII\)](#). Perhaps the Supreme Court’s willingness to consider all types of commentary and judge it on its persuasiveness should be emulated as a “modern approach” to legal scholarship.

Appendix A: Some Recent Inherent Jurisdiction Scholarship

Canadian Scholarship:

- D Philip Jones, “Out of Nowhere: ‘Inherent Jurisdiction’ to Resolve Operational Conflicts” (1996) 31 Admin L R (2d) 151
- Keith Yamauchi, "The Courts' Inherent Jurisdiction and the CCAA: A Beneficent or Bad Doctrine?" (2004) 40 Canadian Business Law Journal 250
- Law Reform Commission of Nova Scotia, [Vexatious Litigants](#), Discussion Paper (December 2005)
- Law Reform Commission of Nova Scotia, [Vexatious Litigants: Final Report](#) (April 2006)
- William H. Charles, “Inherent Jurisdiction and its Application by Nova Scotia Courts: Metaphysical, Historical or Pragmatic? (2010) 33 Dalhousie Law Journal 63

Commonwealth Scholarship:

- G. Yihan, “[The Inherent Jurisdiction and Inherent Powers of the Singapore Courts](#)” (2011) Singapore Journal of Legal Studies 178
- Marcelo Rodriguex Ferrere, “[The Inherent Jurisdiction and its Limits](#)” (2013) 13:1 Otago L Rev 107
- Rosara Joseph, "[Inherent Jurisdiction and Inherent Powers in New Zealand](#)" (2005) 11:2 Canterbury Law Review 220
- Martin Dockray, "The Inherent Jurisdiction to Regulate Civil Proceedings" (1997) 113 Law Quarterly Review 120
- Keith Mason, "The Inherent Jurisdiction of the Court" (1983) 57 Australian Law Journal 449
- Jeffrey Pinsler, “Inherent Jurisdiction Re-Visited: An Expanding Doctrine” (2002) 14 Singapore Academy of Law Journal 1
- Wendy Lacey, “Inherent Jurisdiction, Judicial Power and Implied Guarantees under Chapter III of the Constitution” (2003) 31 Federal Law Review 57

This post may be cited as: Jonnette Watson Hamilton, “Three Leaves to Appeal the Claimed Jurisdiction of Court of Queen’s Bench Over Vexatious Litigants” (July 9, 2019), online: ABlawg, http://ablawg.ca/wp-content/uploads/2019/07/Blog_JWH_VexatiousAppeals.pdf

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