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A Rather Quick Response to a Rather Typical Vexatious Litigant

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Case commented on:

Onischuk v Alberta, 2013 ABQB 89

The prominent September 2012 decision of Court of Queen's Bench Associate Chief Justice John D. Rooke in *Meads v Meads*, 2012 ABQB 571, established a continuum of litigants, ranging from commonly encountered self-represented litigants, to infrequently encountered and almost always self-represented vexatious litigants, through to the highly unusual organized pseudolegal commercial argument (OPCA) litigant who is usually self-represented. Justice Rooke's decision in *Onischuk v Alberta* concerns a litigant who appears to fit in the middle of that continuum, a rather typical vexatious litigant, although perhaps found to be so more quickly than has been the usual case. It is those two matters — typicality and velocity — that I focus on in this post.

Facts

Onischuk's initial claim arose from his allegation that he was exposed to toxic chemicals as a result of voluntarily participating in a cleanup of chemicals that spilled into Lake Wabamun as a result of the derailment of a Canadian National Railway (CNR) train in 2005. Justice Rooke says nothing more about this instigating event; he has no reason to do so in the context of the applications before him. However, some third party description of the event is necessary to support my claim that Onischuk is a "typical" vexatious litigant.

The spill is described by Ron Goodman in "Wabamun: A Major Inland Spill" as follows:

> On August 3, 2005, forty-three cars of a westbound Canadian National Railways freight train derailed on the shore of Lake Wabamun, just west of Alberta's capital city of Edmonton, spilling about 750 m^3 of Bunker C and 75 m^3 of a pole-treating agent on the lakeshore. The spilled materials quickly flowed into the lake, forming a slick that spread rapidly along the north shore of the lake, oiling more than 12 km of shoreline …. The local volunteer fire department responded in a few minutes and evacuated local residents. There was no fire and the spilled material quickly flowed into the lake. There was a large amount of a single product (750m^3), which at the time was not identified as a dangerous good, so the fire department turned the response of the spill to the spiller. Canadian National Railways (CNR) called upon their response contractor to respond to the spill …. Bunker C is well known to have a serious environmental impact, mostly due to smothering. Its density being near that of freshwater, means it has a tendency to sink with only a limited amount of weathering or picking up of debris.

In 2009 CNR was fined a total of $1.4 million for the 2005 Lake Wabamun derailment. CNR pleaded guilty to three charges — one under Alberta's *Environmental and Enhancement Act* for failing to take all reasonable measures to remedy and confine the spill, one under the federal *Fisheries Act*, and a third under the federal *Migratory Birds Convention Act, 1994*. CNR was also ordered to implement an emergency response plan to meet industry standards. See Environment Canada Enforcement Notification, "Canadian National Railway Convicted In Environmental Enforcement Cases in Alberta and British Columbia" (May 25, 2009). Also as a result of the spill, and due to public concern about the lack of government response, the Alberta Minister of the Environment established the Environmental Protection Commission to develop an improved infrastructure to respond to environmental emergencies in Alberta. See "Environmental Disasters and Lake Wabamun: A Review of the Government's Response" by Jodie Hierlmeier, Staff Counsel, Environmental Law Centre (News Brief, Vol. 20 No. 5, 2005).

Onischuk initially sued CNR and a number of its employees, the Province of Alberta and several of its ministries, as well as ministries, boards and agencies of the federal government in August 2007. He discontinued his action against Alberta and Canada in 2009. His action against CNR and some of its employees was struck in 2009 by Justice Sulyma on the basis that Onischuk's claim did not disclose a reasonable cause of action. Negligence, as a cause of action, requires that the defendant owe the plaintiff a duty of care, a breach of that duty of care by the defendant, a causal connection between the negligent conduct of the defendant and the resulting injury to the plaintiff, and resulting damage to the plaintiff. Justice Rooke does not indicate in what way Onischuk's initial claim failed to disclose a reasonable cause of action, but I imagine it failed because the law does not recognize that a duty of care is owed by someone in CNR's position to someone in Onischuk's position.

That was the beginning. There was certainly a wrong by CNR: the spill of the Bunker C oil and pole-treating agent. And Onischuk may well have been exposed to toxic chemicals as a result of voluntarily participating in the cleanup of the spill. But because his claim was struck for failing to disclose a reasonable cause of action, we do not know if Onischuk suffered an injury that was caused by exposure to the Bunker C oil or pole-treating agent spilled by the derailment.

It was what happened after October 2009 — after Onischuk's 2007 action was struck — that resulted in him being declared a vexatious litigant less than three-and-a-half years later. Justice Rooke accepted the summary of facts prepared by CNR's lawyer and reproduced it as an eleven page Appendix to his Reasons for Decision. To very briefly summarize that summary:

- Onischuk filed a Notice of Appeal of Justice Sulyma's decision to strike his claim against CNR but did not file the required documents on time and his appeal was struck.
- Onischuk filed applications to restore his appeal and to retroactively extend the time to appeal but those applications were dismissed by Justice Costigan in *Onischuk v Canadian National Railway Co*., 2010 ABCA 411 because the appeal lacked arguable merit, there was no reviewable error on the face of Justice Sulyma's decision, and Onischuk had not proceeded with his appeal with the necessary diligence.
- Early in 2011 Onischuk filed a claim in the Federal Court that was nearly identical to the one struck by Justice Sulyma, an action which was struck by Prothonotary Lafrenière for lack of jurisdiction, failure to disclose a reasonable cause of action, futility and abuse of process.
- Onischuk appealed Prothonotary Lafrenière's decision but that decision was upheld by the Federal Court Trial Division.

- Onischuk appealed the Trial Division decision and it was upheld by the Federal Court of Appeal: *Onischuk v Alberta*, 2011 Carswell Nat 6111.
- Onischuk applied for leave to appeal to the Supreme Court of Canada but that was denied: *Onischuk v Alberta*, 2012 Carswell Nat 359.
- Early in 2011 Onischuk filed a second Court of Queen's Bench action that was nearly identical to the one struck by Justice Sulyma and the one struck by the Federal Courts. It differed in two ways from the first two:
    - Judges and lawyers who were involved in the first Queen's Bench action and in the Federal Court action were added as defendants, and Onischuk alleged negligence, bias, discrimination, misrepresentation, fraud and deceit, and more against them,
    - Remedies not available in our judicial system were sought, including a request for lawyers and judges submit to "lie detection exams" and the administration of a "truth serum" drug.
- In March 2012 Onischuk filed an Amended Statement of Claim in the second Queen's Bench action which named twenty-one additional defendants, including more lawyers and judges, the Governor General of Canada, the Premier of Alberta.
- In April 2012 Onischuk filed a 51 page Amended Amended Statement of Claim.
- In April 2012, Onischuk wrote to the Associate Chief Justice Rooke requesting the appointment of a Case Management Judge, a request to which all the Defendants subsequently agreed.
    - Onischuk subsequently requested adjournments of case management meetings and document production deadlines.
    - Onischuk subsequently alleged bias in Justice Rooke's actions as Case Management Judge.

Law

The Alberta government passed new legislation in 2007 for the express purpose of giving the courts in the province more power to deal efficiently and effectively with "vexatious litigants." Once a person is declared a "vexatious litigant," they are barred from bringing or continuing court actions without permission from a court. The new provisions are found in the *Judicature Act*, RSA 2000, c J-. Section 23(2) provides a non-exhaustive list of the types of conduct that make proceedings vexatious:

> (2) For the purposes of this Part, instituting vexatious proceedings or conducting a proceeding in a vexatious manner includes, without limitation, any one or more of the following:
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> > (a) persistently bringing proceedings to determine an issue that has already been determined by a court of competent jurisdiction;
> > (b) persistently bringing proceedings that cannot succeed or that have no reasonable expectation of providing relief;
> > (c) persistently bringing proceedings for improper purposes;
> > (d) persistently using previously raised grounds and issues in subsequent proceedings inappropriately;
> > (e) persistently failing to pay the costs of unsuccessful proceedings on the part of the person who commenced those proceedings;
> > (f) persistently taking unsuccessful appeals from judicial decisions;
> > (g) persistently engaging in inappropriate courtroom behaviour.

As can easily be seen from this list, a prolonged or insistently continuous quality to behaviour is key. Justice Rooke relied upon *Del Bianco v 935074 Alberta Ltd*., 2007 ABQB 150, *Jamison v Denman*, 2004 ABQB 593, *Prefontaine v Pairs*, 2007 ABQB 77, and *O'Neill v Deacons*, 2007 ABQB 754 to synthesize a definition of a "vexatious litigant" as "one who repeatedly brings pleadings containing extreme, unsubstantiated, unfounded, and speculative allegations against a large number of individuals to exploit or abuse the court process for an improper purpose, or to gain an improper advantage" (at para 9).

Decision

Justice Rooke concluded (at para 12) that Onischuk had instituted vexatious proceedings and conducted proceedings in a vexatious manner. In fact, he found (at para 15) that Onischuk's actions had "all the hallmarks of a vexatious litigant." Those hallmarks were (at paras 13-14):

- Onischuk continued to bring actions based on the same facts arising out of the 2005 derailment of the CNR train. When one action was dismissed, Onischuk started essentially the same action again, but with the addition of defendants who were members of the judiciary or legal community who were involved in the prior action.
- Onischuk persistently brought proceedings on issues that have already been decided.
- He failed to follow court directives and failed to meet procedural deadlines.
- Onischuk failed to pay the costs awarded against him.
- His pleadings were excessively lengthy.
- His pleadings were filled with inflammatory accusations and theories about conspiracies among judges and lawyers.
- His pleadings contained irrelevant arguments, jurisprudence and legislation, and failed to advance legitimate claims.

The defendants then asked that Onischuk's claims against them be struck pursuant to Rule 3.68 of the Alberta *Rules of Court*. Under Rule 3.68(2), a claim may be struck if a pleading discloses no reasonable claim; if a pleading is frivolous, irrelevant or improper; or if a pleading constitutes an abuse of process. Justice Rooke examined each ground for striking Onischuk's claim and found that it could be struck on all three bases.

Justice Rooke also went on to consider whether summary judgment was warranted in the circumstances. He concluded that it would have been available in the alternative, had the claims not been struck (at para 50).

Comments

A Rather Typical Vexatious Litigant

In the introduction to this post, I characterized Onischuk as "a rather typical vexatious litigant." In doing so I was referring to two recent law review articles which sort vexatious litigants into two categories: Didi Herman, "Hopeless cases: Race, racism and the 'vexatious litigant'" (2012) 8(1) International Journal of Law in Context 27, and Christian Diesen, "The Justice Obsession Syndrome" (2007-2008) 30 Thomas Jefferson Law Review 487. Herman is a Professor at Kent Law School in the UK. Diesen is a Professor of Procedural Law at Stockholm University in Sweden (where a person who become a vexatious litigant as a result of a loss in court is called *rättshaverist* or a "wreck of justice" (Diesen at 488-89).

In her study of the individuals declared to be "vexatious litigants" in the UK and her review of the vexatious litigant literature, Herman noted (at 28) that people declared to be vexatious litigants can be broadly sorted into two groups: (1) those with histories of mental health problems who launch multiple legal actions against diverse targets, and (2) those whose initial legal action was resolved against them, and who then attempt to carry on with aspects of that complaint in various ways. From the facts summarized by Justice Rooke, Onischuk appears to be a classic example of the second type of vexatious litigant as the series of actions summarized in the Appendix to *Onischuk* can be traced back to one instigating dispute, the 2005 CNR derailment. In the case of this second type of vexatious litigant, Herman argues that we can understand their litigation as being about a passionate search for justice, as opposed to, or at least as well as, an "obsession."

Herman focuses on two overlapping elements or themes of vexatious litigation: persistence or obsession, and hopelessness. Vexatious litigants refuse to accept the results of their initial trials and appeals and their continued persistence is taken as evidence of their unreasonableness. Their refusal to accept a matter is over is a failure to adopt the judges' perspectives on the injury. Linked to judges' disapproval of vexatious litigants' persistence and obsession is their understanding that the vexatious litigants' cases are hopeless. As Herman notes (at 39), "[i]t is the persistence in the face of this hopelessness that the courts find so hard to fathom, and that becomes evidence of unreasonableness." Linked to the hopelessness of the litigation is judges' view that the excessive litigation is all extremely wasteful. We can see an example of this in Justice Rooke's judgment in *Onischuk* (at para 35):

> To allow Onischuk to continuously bombard counsel, the judiciary, and this Court with lengthy pleadings, replete with inflammatory accusations, irrelevant legal argument, jurisprudence and legislation, that advance no reasonable cause of action, is manifestly unfair to all parties involved and other participants vying for *scarce judicial resources*. Consequentially, to allow this action to proceed would surely bring the administration of justice into disrepute (emphasis added).

Herman argues (at 40) that hope is about more than the rational assessment of legal prospects. Many of the vexatious litigants in her study appeared to recognize quite clearly that the legal system was unlikely to deliver justice in their case, but they were prepared to go on despite lack of this type of hope. They may have other kinds of hope they are pursuing.

Herman also found that many litigants refused to accept that a declaration that they were vexatious litigants terminated their pursuit of justice. They returned to court on their behalf or on behalf of others. They blog, post YouTube videos, and participate in online "victims of injustice" communities. Perhaps those online "victims of justice" communities lead them to "organized pseudolegal commercial argument" gurus.

Along very similar lines, Diesen (at 491) distinguishes between persons with querulous behaviour and persons with justice obsession syndrome. The core of justice obsession is the experience of justice denied and thus the starting point for the syndrome is "a legal decision or judgment against the complainant or the seeking of a legal decision to establish justice without the support of legal professionals" (at 492). With regard to this type of vexatious litigant, Diesen questions whether the legal system has a tendency to create these fixated losers. He also asks whether the syndrome might be a symptom of legal disorder, i.e., a way to identify the disadvantages of certain procedural rules.

A Rather Quick Response

I had also suggested in the introduction to this post that Onischuk was perhaps found to be a vexatious litigant more quickly than normal. The vexatious litigant provisions in Alberta's *Judicature Act* require persistence, or a prolonged or insistently continuous quality. In the first five years following the 2007 amendments to those vexatious litigation provisions, it appeared that vexatious litigant orders were only being granted in extreme cases. As I noted in an earlier post — "How persistent does a vexatious litigant have to be?" (July 27, 2011) — it seemed to take a lot of improper behaviour against a large number of long-suffering defendants for a very long time (more than ten years in the case commented upon) before a person was denied unmediated access to a court.

In Onischuk's case, the time from his initial loss to his being found a vexatious litigant was just over three years (October 2009 to November 2012). In *Onischuk* there were fewer years of litigation, fewer court actions, fewer interlocutory proceedings, and fewer unpaid cost awards than in many previous cases where people have been found to be vexatious litigants.

If I were to speculate, I might suggest that the relatively shorter time line may be because Justice Rooke, in his role of Associate Chief Justice of the Court of Queen's Bench and as the author of *Meads v Meads*, 2012 ABQB 571, has much more familiarity with vexatious litigation than most judges and is therefore more willing to put an end to it when it is identified. It may also be that Onischuk picked the wrong defendants. Justice Rooke characterized part of the content of Onischuk's pleadings as "inflammatory accusations and ever expanding conspiracy theories against Counsel who have argued, and the Judiciary who have heard his applications" (at para 14). Lawyers and judges have relatively easy access to all available judicial remedies for vexatious litigation.