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Sources of Superior Courts' Jurisdiction to Declare Litigants to be Vexatious

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Case Commented On: *Sikora Estate (Re),* 2015 ABQB 467 (CanLII)

This decision indirectly raises a question about the jurisdiction of Alberta's Court of Queen's Bench and Court of Appeal to declare that a person cannot start or continue court proceedings without first obtaining the court's permission, i.e., to declare that a person is a vexatious litigant. Section 23.1 of the *Judicature Act*, RSA 2000, c J-2 grants the courts that authority, whether on their own motion or on an application by a party to the proceedings, if notice is given to the Minister of Justice and Solicitor General. But what if notice has not been given to the Minister of Justice and Solicitor General? Does the court have inherent jurisdiction to make such a declaration? If they do, how far does it extend? Can the court enjoin only further applications without its permission in the case before it, or can the court prohibit any and all future court actions in the province without its leave? This issue was explicitly raised, but not decided, by the Alberta Court of Appeal in *Pawlus v Pope*, 2004 ABCA 396 (CanLII), and the issue does not appear to have been resolved in the intervening ten years. The decision in *Re Sikora Estate* suggests it needs to be.

In *Pawlus v Pope*, Justices Carole Conrad, Constance Hunt and Peter Costigan considered an appeal by Pawlus from a Court of Queen's Bench decision that enjoined him from commencing any further actions without leave of the court. The defendants had asked that Pawlus be stopped from bringing any proceedings against either defendant without leave of the court — a much narrower order. (They probably did so because they did not have the written consent of the Attorney General, which was required by the pre-2007 vexatious litigant provisions of the *Judicature Act*.) The Court of Appeal noted that "[t]here are conflicting authorities as to a court's inherent jurisdiction to prevent a litigant from commencing an action without leave of the court" (at para 16). They also noted that "there is a real question as to whether, and to what extent, s. 23 of the *Judicature Act*, R.S.A. 2000, c. J-2 limits a court's inherent jurisdiction" (at para 16) and that:

> The issues relating to inherent jurisdiction and the breadth of any inherent jurisdiction to deal with vexatious proceedings are very important. This Court has not dealt with s. 23. Nor do we wish to do so without notice to the Minister of Justice and Attorney General, who should have an opportunity to address the meaning of s. 23 and the extent to which it should limit the court's inherent jurisdiction, if at all (at para 17).

As to the conflicting authorities referred to in *Pawlus v Pope*, but not cited, the Court of Appeal might have been referring to the following:

- *Midwest Property Management v. Moore*, 2003 ABQB 581 (CanLII), where Justice C.I. Johnstone determined that "[t]his Court does not have the inherent jurisdiction to prevent a

litigant from instituting or continuing legal proceedings without leave", citing I.H. Jacob, "The Inherent Jurisdiction of the Court" (1970) 23 Current Legal Problems 23 at 43 (at para 41)

- *S.G. v. LaRochelle*, 2004 ABQB 33 (CanLII), where Justice Lee invoked inherent jurisdiction to prohibit S.G. "from filing any further applications in this Action or initiating any other proceedings in this Court without prior leave of the Court", citing the general propositions set out by Lord Morris of Borth-y-Gest in *Connelly v. Director of Public Prosecutions*, [1964] A.C. 1254 at 1301 (H.L.): "There can be no doubt that a court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. I would regard them as powers which are inherent in its jurisdiction. A court must enjoy such powers in order to enforce its rules of practice and to suppress any abuses of its process and to defeat any attempted thwarting of its process."

Although the Alberta government amended the vexatious litigant provisions of the *Judicature Act* in 2007 for the express purpose of giving the courts in the province more power to deal more efficiently and effectively with vexatious litigants (see "How persistent does a vexatious litigant have to be?"), the changes did not resolve the question of the interaction between the court's inherent jurisdiction and what is now section 23.1 of the *Judicature Act*. The key changes in the 2007 amendments were the substitution of notice to the Minister of Justice and Solicitor General for the more onerous written consent of the Attorney General, and the more detailed definition of vexatious proceedings and conduct. It is true that section 23.1(9) does state that the provision does not diminish the court's authority to "stay or dismiss a proceeding as an abuse of process or on any other ground." Thus the inherent jurisdiction of the superior courts to control the particular proceedings before them is not limited by the vexatious litigants provisions. See also Law Reform Commission of Nova Scotia, *Vexatious Litigants* Final Report (April 2006) at 15.

But the "real question as to whether, and to what extent, s. 23 of the *Judicature Act*, R.S.A. 2000, c. J-2 limits a court's inherent jurisdiction" that the Court of Appeal identified in *Pawlus v Pope* remains. The open nature of the issue was also noted by the Law Reform Commission of Nova Scotia in the *Vexatious Litigants* report, where they concluded "it might be suggested there is some case law support for expanding the concept of inherent jurisdiction to empower a court to prevent a known vexatious litigant from commencing a legal proceeding. This would, however, be at odds with the traditionally-understood nature of inherent jurisdiction" (at 11). There are also additional conflicting Alberta decisions post-2004 (especially in the criminal law context, which is not considered here), including *Lymer (Re),* 2014 ABQB 696 (CanLII) at para 12, *Shreem Holdings Inc. v. Barr Picard*, 2014 ABQB 112 (CanLII) at para 29, and now the decision of Justice Joanne Veit in *Re Sikora Estate*.

In *Re Sikora Estate*, the issue of vexatious litigation was raised in an application by the estate under the *Judicature Act* (at para 1). However, the estate did not give notice to the Minister of Justice and Solicitor General as required by section 23.1 (at para 18). In her July 17, 2015 oral decision, it seems that when Justice Veit declared Wayne Sikora to be a vexatious litigant and required him to get the court's prior permission before bring any applications in the Sikora Estate proceedings, she did so on the basis of the court's inherent jurisdiction. She begins her July 22, 2015 written reasons by stating: " Relying on the Court's *inherent jurisdiction*, at the hearing, I declared Wayne Sikora a vexatious litigant *in these proceedings* and ordered that he cannot file any application *in this litigation* without leave of the Court" (at para 2, emphasis added). She concludes that that her July 17 "declaration of Wayne Sikora as a vexatious litigant will *stand for the time being*" (at para 19, emphasis added), and that if the Minister of Justice does not indicate an intention to appear within 30 days of accepting notice of the estate's application, "the Court's

orders herein will be made final" (at para 19). It is unclear whether the final order will be one made under section 23.1 of the *Judicature Act*, and thus applicable to all proceedings that Wayne Sikora might want to start in the future in Alberta, or whether it will continue as an exercise of the court's inherent jurisdiction and therefore only apply to the Sikora estate proceedings. Her use of the phrase "for the time being" might suggest the declaration based on the court's inherent jurisdiction will expire 30 days after service of the estate's application on the Minister of Justice, when the court will have acquired the jurisdiction to make an order under section 23.1 of the *Judicature Act*.

There is reason to question whether an order under section 23.1 of the *Judicature Act* is even warranted. The hallmark of the indicia of vexatious proceedings or conduct listed in section 23(2) of the *Judicature Act* is "persistence":

> 23(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:
> (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. (emphasis added)

Justice Veit does not refer to these criteria. She did conclude that most of the conduct the estate complained about — things like Wayne Sikora not going along with all the other residuary beneficiaries, or his being difficult to serve, or his not retaining a lawyer — was "mere litigious, not vexatious, conduct" (at para 23). However, she did find that he "engaged in some clearly vexatious actions" (at para 24) and specifies three matters:

- without any justification, he failed to do what the Court explicitly ordered him to do with respect to service on all residuary beneficiaries;
- while his current application to contest his father's will was still a live application, he launched yet another application for the same remedy
- he was twice reminded that, because of the passage of time between the time that he knew of the application for probate and his own applications, that it was likely that his applications would be out of time because he had not filed his applications quickly enough.

It is difficult to see how this conduct amounts to the type of persistent conduct required by section 23(2) of the *Judicature Act*. Is bringing a second application for the same remedy before the first has been decided "*persistently* using previously raised grounds and issues in subsequent

proceedings inappropriately"? Is not withdrawing two pending applications because a judge told you it was likely the applications would be statute-barred "persistently bringing proceedings that cannot succeed or that have no reasonable expectation of providing relief"? Is failing to serve two of six residual beneficiaries, as required by court order, "persistently engaging in inappropriate courtroom behavior"?

Justice Veit concludes that these specific behaviors "are, in the circumstances here, sufficient to declare Wayne Sikora a vexatious litigant" (at para 25). This conduct seems too trivial to justify an order under the *Judicature Act* that would require Wayne Sikora to obtain permission of the court before commencing any future proceedings in the province against any other person. "Persistent" connotes continuing a course of conduct over a prolonged period. Two applications do not amount to a course of conduct, let alone the persistent course of conduct required by the *Judicature Act*. They might be enough under the court's inherent jurisdiction to prohibit future applications in the Sikora estate action itself without the court's permission, but it is not at all clear that Justice Veit's order be confined to that particular action once the Minister of Justice and Solicitor General have been given notice and 30 days have expired.

There is a major difference between a court striking proceedings or applications that have been brought before it because they are vexatious, and a court requiring a person to get the permission of a court before starting any future court action. This difference is the focus of the *Vexatious Litigant* report of the Law Reform Commission of Nova Scotia (at 7-11). They rely on the oft-cited article by I.H. Jacob, "The Inherent Jurisdiction of the Court" (1970) 23 Current Legal Problems 23, which identified the conceptual gap between courts' ability to control the actions of people appearing before them and their inability to prevent people from starting actions "which may turn out to be vexatious" (Jacobs at 43).

The question asked by the Court of Appeal in 2004 in *Pawlus v Pope* as to "whether, and to what extent, s. 23 of the *Judicature Act* . . . limits a court's inherent jurisdiction" (at para 16) needs to be answered, given the conflicting decisions rendered over the past ten years and the confusing decision rendered in *Re Sikora Estate*. And one way to answer that question might be to first ask whether a superior court's inherent jurisdiction has ever included the power to prevent people from starting actions which might turn out to be vexatious.