February 19, 2016

"On Its Own Motion": Section 23.1(1) *Judicature Act*

By: Jonnette Watson Hamilton

Case Commented On: *Lymer v Jonsson*, 2016 ABCA 32 (CanLII)

This very short decision by the Alberta Court of Appeal made an easy, but very important, point in the process of allowing an appeal. Pursuant to section 23.1(1) of the *Judicature Act*, RSA 2000, c J-2, a judge can make an order that prohibits a litigant from commencing or continuing court proceedings without first obtaining the permission of the court. Such an order is commonly known as a "vexatious litigant order." The judge can make such an order "on application or on its own motion, with notice to the Minister of Justice and Solicitor General." The question on this appeal concerned the scope of the phrase "on its own motion" in section 23.1(1). The specific issue was whether litigants have the right to receive notice and be heard before vexatious litigant orders are made against them on the court's own motion. Justices Peter Costigan, Marina Paperny and Thomas W. Wakeling determined that potential vexatious litigants did indeed have that right.

Vexatious litigant orders are made under the *Judicature Act's* Part 2.1: Vexatious Proceedings. The procedures for making such orders and appealing from them are found in section 23.1 of that statute, the relevant portions of which are as follows:

> 23.1(1) Where on application or on its own motion, with notice to the Minister of Justice and Solicitor General, a Court is satisfied that a person is instituting vexatious proceedings in the Court or is conducting a proceeding in a vexatious manner, the Court may order that
>
> > (a) the person shall not institute a further proceeding or institute proceedings on behalf of any other person, or
> >
> > (b) a proceeding instituted by the person may not be continued, without the permission of the Court.
>
> . . .
>
> (3) The Minister of Justice and Solicitor General of Alberta has the right to appear and be heard in person or by counsel on an application or a Court's motion under subsection (1) or (4).
>
> . . .
>
> (5.1) Subject to the Alberta Rules of Court, any party to a proceeding under subsection (1) . . . before the Provincial Court, the Court of Queen's Bench or a single justice of the Court of Appeal may appeal an order under subsection (1) . . . to the Court of Appeal.

This was an appeal from an order made by Justice Donald Lee in *Lymer (Re)*, 2014 ABQB 696 (CanLII). Justice Lee was the case management justice for Mr. Lymer's bankruptcy proceedings. At the time the vexatious litigant order was made, Mr. Lymer was self-represented (although he was represented by counsel on this appeal). Justice Lee prohibited Mr. Lymer from continuing or commencing proceedings in the Court of Appeal, Court of Queen's Bench or the Provincial Court of Alberta without first obtaining the permission of the court in which the proceedings were to be conducted. His order was reasoned; it provided examples of seven different indicia of vexatious litigation that had characterized Mr. Lymer's proceedings before the Court of Queen's Bench over the past two years, including collateral attacks, persistent unsuccessful appeals, and allegations of conspiracy, fraud and official misconduct. However, Justice Lee's order was not only made on his own motion, it was made without notice to Mr. Lymer or anyone else, and without giving Mr. Lymer or anyone else an opportunity to be heard. Justice Lee did not expressly address his authority to make a vexatious litigant order without giving the person to be affected by the order an opportunity to be heard. He merely stated that he was declaring Mr. Lymer to be a vexatious litigant on his own motion, noting that no application — perhaps read by him to include no notice — was necessary (2014 ABQB 696 (CanLII) at paras 9 and 57).

Because Justice Lee's vexatious litigant order existed, Mr. Lymer needed permission to appeal that order. That permission was granted on two grounds: (1) whether Justice Lee failed to comply with the principles of natural justice, and (2) whether a reasonable apprehension of bias arose from the circumstances surrounding the making of the order. However, the Court of Appeal only considered the first ground in its decision.

The Court of Appeal agreed that a court could make a vexatious litigant order on its own motion (at para 3), as provided for in section 23.2 of the *Judicature Act*. However, that section does not expressly give a court the authority to dispense with notice to the litigant. The Court of Appeal affirmed that the rules of natural justice require a court to provide an opportunity to be heard to those who will be affected by the court's order, and that failure to provide that opportunity is "fatal to the decision" (at para 3).

Most importantly, the Court of Appeal affirmed that these principles of natural justice apply in the context of vexatious litigant orders (at para 4). They relied upon the Ontario Court of Appeal decision in *Kallaba v Bylykbashi*, 2006 CanLII 3953 at paras 49-51, holding that because no meaningful opportunity was provided to the appellant in that case to be heard on the issue of a vexatious litigant order, the appellant's right to hearing fairness was compromised and for that reason alone the vexatious litigant order could not stand.

While the sufficiency or meaningfulness of notice may be an issue in other cases, in this case it appears there was no opportunity to be heard at all. There was nothing in the record to suggest that Mr. Lymer was notified that Justice Lee was thinking about issuing a vexatious litigant order. As a result, Mr. Lymer's appeal was allowed and Justice Lee's vexatious litigant order was set aside.

However, it appears that Justice Lee continues to be the case management justice for Mr. Lymer's bankruptcy proceedings. While the Court of Appeal did not address the second ground of appeal — whether a reasonable apprehension of bias arose from the circumstances surrounding Justice Lee's making of the vexatious litigant order — no one should be surprised if the issue of bias is raised again by Mr. Lymer.

Neither did the Court of Appeal comment on the fact that Justice Lee did not give the Minister of Justice and Solicitor General notice that he was thinking about issuing a vexatious litigant order, as required by section 23.1(1) of the *Judicature Act*. Justice Lee instead stayed his order for thirty days to allow the Minister of Justice and Solicitor General to make submissions to change or vary the already-granted order. It appears that this way of proceeding is becoming more common in Alberta, even though there is no authority for it in section 23.1 of the *Judicature Act*. See, for example, *R v Fearn*, 2014 ABQB 233 at para 54 and *Chutskoff v Bonora*, 2014 ABQB 389 at para 138. Notice to the Minister of Justice and Solicitor General has been seen to have several purposes. The Minister of Justice and Solicitor General is a non-partisan third party who might want to speak to the purpose of the vexatious litigant provisions, or who might see a public interest that needs protecting in a particular proceeding, or who might want to keep a close eye on how the vexatious litigant provisions are being understood and applied in practice (Law Reform Commission of Nova Scotia, Vexatious Litigants (Final Report, April 2006) at page 26). Unfortunately, the Court of Appeal did not comment on the propriety of this way of proceeding and so the issue remains for another day.