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Granting a Vexatious Litigant's Application for Leave to Appeal

By: Jonnette Watson Hamilton

Case Commented On: *Belway v Lalande-Weber*, 2017 ABCA 108 (CanLII)

In the case law on vexatious litigation, it is occasionally noted that a vexatious litigant order does not bar that litigant's access to the courts. Instead, a vexatious litigant must apply for and obtain leave from the court before starting or continuing a proceeding. In other words, access to the courts is regulated, not prohibited. But the distinction between regulated access and no access depends to a large extent on what the test is for granting leave. This decision by Justice Sheilah Martin is a rare example of an application for leave being granted. As such, it is interesting to see how high or low it sets the bar for obtaining leave. And because the self-represented applicant in this case had vexatious litigant orders made against him under both the *Family Law Act*, SA 2003, c F-4.5 and the *Judicature Act*, RSA 2000, c J-2, it is also interesting to note the contrast between the two regimes on this issue and how Justice Martin deals with the two tests by combining them into one.

Facts

The applicant, Brian Belway — who represented himself before Justice Martin — sought permission to appeal the decision of the case management judge handling the family law litigation between Belway and his former common law partner and the mother of their child, Shawna Lalande-Weber. The case management judge, Justice Earl C. Wilson, had denied Belway leave to apply to vary the amount of child support he was paying under a consent order granted in 2011 and varied with respect to the amount in 2012. Belway claimed there had been a material change in circumstances that justified a variation. The alleged material change was that the child was turning eighteen and was planning on attending university and the consent order only provided for a continuation of support for the child's university expenses after the child reached the age of majority under section 7 of the *Federal Child Support Guidelines*, SOR/97-175, but was silent as to the treatment of section 3 of those guidelines. The parents had a shared parenting arrangement with the child and had agreed to offset the father's section 3 child support amount with the mother's section 3 child support amount. (See *Belway v The Queen*, 2015 TCC 249 (Informal Procedure), holding that offset child support amounts are not eligible for tax credits in respect of a wholly dependent person.)

Belway needed the court's permission to appeal because Justice Wilson had prohibited Belway from making further applications without the court's permission pursuant to section 91 of the *Family Law Act*: see *Lalande-Weber v Belway*, 2015 ABQB 233 (CanLII) at para 49.

Law

Section 91 of the *Family Law Act* provides:

> 91(1) Where the court is satisfied that a person has made a frivolous or vexatious application to the court, the court may prohibit that person from making further applications under this Act without the permission of the court.
>
> (2) The court, before granting permission under subsection (1), may impose any terms as a condition of granting permission and make any other order in the matter as the court considers appropriate.

As well, after filing his application for leave to appeal Justice Wilson's denial of his application to vary, Belway had been declared a vexatious litigant pursuant to section 23.1 of the *Judicature Act*:

> 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.
> . . .
> (7) A person against whom an order has been made under subsection (1) or (4) may apply to a Court for permission to institute or continue a proceeding in that Court and the Court may, subject to any terms or conditions it may impose, grant permission if it is satisfied that the proceeding is not an abuse of process and that there are reasonable grounds for the proceeding. (emphasis added)

Because Belway was declared a vexatious litigant in the court whose order he wanted to appeal, he needed permission to appeal pursuant to Rule 14.5(i)(j) of the *Alberta Rules of Court*, Alta Reg 124/2010. That rule had been amended in 2014 to require vexatious litigants to obtain permission to launch any appeal, includes appeals against a vexatious litigant order: *Chutskoff Estate v Bonora*, 2014 ABCA 444 (CanLII) at para 1. It applies to any vexatious litigant declaration, whether under the *Judicature Act*, the *Family Law Act*, or a superior court's inherent jurisdiction: KE v CSM, 2016 ABQB 342 (CanLII) at para 40.

Decision

Justice Martin quoted the general test for deciding whether to grant leave to appeal set out in *Thompson v Procrane Inc (Sterling Crane*), 2016 ABCA 71 (CanLII), [2016] AJ No 237 at para 7:

> The test for obtaining permission to appeal under R. 14.5 is generally that:
> (a) There is an important question of law or precedent,
> (b) There is a reasonable chance of success on appeal, and

(c) The delay will not unduly hinder the progress of the action or cause undue prejudice.

The test will manifest itself slightly differently, depending on the subject matter of the appeal and the overall context, but these basic principles apply to all types of applications for permission to appeal: [citations omitted].

Justice Martin noted that Belway's status as a vexatious litigant under both the *Judicature Act* and the *Family Law Act* required that the tests under Rule 14.5 and the *Judicature Act*'s section 23.1(7) operate together. Following the decision in *Hutterian Brethren of Summerland v Vulcan (County)*, 2017 ABCA 8 (CanLII) at para 10 (holding that an appeal has a reasonable chance of success if it is arguable and a question of law is arguable if it is not frivolous), Justice Martin held that "the standard of an arguable case used in section 23.1(7), and that of a reasonable chance of success under Rule 14.5, are the same; that is the applicant must show the case is not frivolous. . ." (at para 6).

Applying that test to the proposed appeal, Justice Martin was satisfied "that on the single issue of whether the child's age and attendance at university represents a material change of circumstance [the application] does not constitute an abuse of process" (at para 7). Unlike Belway's earlier unsuccessful applications, the alleged change of circumstances had not previously been dealt with and concerned only future child support. That finding satisfied the need for an arguable application that was not an abuse of process under section 23.1(7) and an application with a reasonable chance of success under Rule 14.5. She also noted that the bar of an "arguable case" was a "low bar" (at para 9).

Justice Martin also held that the two other requirements of Rule 14.5 had been met. Analyzing whether a child reaching the age of majority may be a material change and the role on other heads of child support of a consent order providing for the section 7 expenses of an adult child was "a sufficiently important question of law and precedent" (at para 8). In addition, any delay would not unduly hinder the progress of matter because the child did not begin university until the fall, and any prejudice could be dealt with by a costs order (at para 9).

Justice Martin therefore concluded that Belway met what she called "the combined test under Rule 14.5(1)(j) and section 23.1(7) of the *Judicature Act*" (emphasis added) (at para 10), but only on the narrow question of whether the case management justice erred in finding there was no material change in circumstances as a result of the child turning 18 and planning to attend university because the consent order foresaw those events.

Comment

Combining the test under Rule 14.5(1)(j) and section 23.1(7) of the *Judicature Act* does not lead to a different result than does the application of both tests separately. Two things are required under section 23.1(7):

(1) an abuse of process, and
(2) reasonable grounds for the proceeding.

Three things are required under Rule 14.5(1)(j):

(3) an important question of law or precedent,
(4) a reasonable chance of success on appeal, and
(5) no undue hindrance of the progress of the action or undue prejudice.

Because the Alberta Court of Appeal held in *Hutterian Brethren of Summerland v Vulcan (County)* that both (1) and (2) were satisfied if a case or application was "arguable", and Justice Martin held that an arguable case or application was the same as requirement (4), proving an arguable case satisfies requirements (1), (2) and (4). Justice Martin addressed requirements (3) and (5) independently. The combined test therefore requires an applicant to prove:

(1) an arguable case
(2) an important question of law or precedent, and
(3) no undue hindrance of the progress of the action or undue prejudice.

A previous Court of Queen's Bench decision by Justice Beverly Browne in *K.E. v C.S.M.*, 2016 ABQB 342 (CanLII) also addressed the differences between the vexatious litigant provisions of the *Family Law Act* and those of the *Judicature Act*. She noted that both types of orders are available to an Alberta court in a family law dispute and a court could choose either alternative (at para 20). In order to determine which Act had been used when the access of K.E., a self-represented litigant, to the courts was restricted, Justice Browne helpfully summarized the similarities and differences between the two vexatious litigant provisions (at paras 14-19). Put briefly, those differences are:

- The provisions of the *Family Law Act* appear to have been intended to give the courts access to a less onerous process to prevent abusive applications in family law matters than does the *Judicature Act*.
- The *Judicature Act* requires notice to be given to the Minister of Justice and Solicitor General, but this notice requirement has been applied in a flexible manner, with courts issuing interim vexatious litigant orders that become final after the Minister of Justice and Solicitor General has been given notice and has chosen to not make submissions. There is no notice requirement under the *Family Law Act*. However, because the Minister rarely makes submissions at the hearings under the *Judicature Act*, the difference in practice is not great.
- Abuse of process triggers court intervention and vexatious litigation is, by definition, abusive. The criteria to determine whether litigation is frivolous and vexatious under section 91 of the *Family Law Act* targets the same indicia as a section 23.1(1) application under the *Judicature Act*.
- The Alberta Court of Appeal hears appeals of an order made under the *Judicature Act* by the Provincial Court, whereas an appeal of a *Family Law Act* vexatious litigation order is to the Alberta Court of Queen's Bench.
- The scope of a *Family Law Act* vexatious litigation order is restricted to further applications that Act. A vexatious litigation order under the *Judicature Act* may restrict the ability of a person to "institute or continue a proceeding" — a potentially much broader scope.
- The *Family Law Act* authorizes a Provincial Court Judge to create a condition precedent to granting a leave application. The *Judicature Act* does not authorize an similar pre-leave requirement.

Justice Martin's explication of the differences and similarities between Rule 14.5(1)(j) and the *Family Law Act*, on the one hand, and section 23.1(7) of the *Judicature Act*, on the other hand, on the issue of leave to appeal can now be added to Justice Browne's list.

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