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Vexatious Litigants: An Interpretation of Section 40 of the *Federal Courts Act*

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Case Commented On: *Canada v Olumide*, 2017 FCA 42 (CanLII)

In this March 2017 decision, Justice David Stratas encouraged Federal Court of Appeal litigants who find themselves up against litigants engaged in vexatious proceedings to apply more quickly and with less evidence for vexatious litigant orders under section 40 of the *Federal Courts Act*, RSC 1985, c F-7. Believing that uncertainty over what is required by section 40 to bring such an application has been holding these parties back, this decision is intended to take away that uncertainty. Because that was the focus of the judgment, it will be the focus of this post. However, there are some rhetorical flourishes in the judgment that are worth mentioning. In describing his understanding of the purpose of section 40, Justice Stratas relies on a metaphor analogizing courts to scarce natural resources, as well as the moralizing language of desert.

Facts and Law

This was an application by Her Majesty the Queen in Right of Canada and the Attorney General of Canada to have the respondent, Ade Olumide, declared a vexatious litigant under subsection 40(1) of the *Federal Courts Act*, RSC 1985, c F-7, which provides:

> 40 (1) If the Federal Court of Appeal or the Federal Court is satisfied, on application, that a person has persistently instituted vexatious proceedings or has conducted a proceeding in a vexatious manner, it may order that no further proceedings be instituted by the person in that court or that a proceeding previously instituted by the person in that court not be continued, except by leave of that court.

Justice Stratas declared the respondent to be a vexatious litigant (at para 48). He prohibited him from commencing new proceedings in the Federal Court of Appeal unless he had prior leave from that court. He also stayed all proceedings that the respondent had already started in that court and awarded costs against the respondent.

The Interpretation of Section 40

Justice Stratas began his interpretation of section 40 by noting that very few applications and motions have been brought under that section in the Federal Court of Appeal, and those few decisions have said little about its interpretation (at para 12). He speculated that this shortage had created uncertainty and that this likely uncertainty had probably had the effect of inhibiting parties from using section 40, which he concluded was "unfortunate" (at para 13).

The point that there have been few decisions interpreting section 40 is reinforced by Justice Stratas' lack of reliance on case law. Near the beginning of his judgment, he noted that section 40 is similar to vexatious litigant provisions in other jurisdictions and their case law could be ofistance (at para 16). However, he did not look to other jurisdictions for assistance. The only vexatious litigant cases that he relied upon — and then only minimally — were two federal court decisions about section 40: *Canada v Olympia Interiors Ltd*, 2001 FCT 859 (CanLII), affirmed 2004 FCA 195 (CanLII) (at paras 16, 34) and *Olumide v Canada*, 2016 FC 1106 (CanLII) (*Olumide* FC) (declaring the respondent in this case to be a vexatious litigant in the Federal Court) (at paras 16, 34).

He did state that *Canada v Olympia Interiors Ltd* offered what he characterized as "an excellent summary" of some of the case law from other jurisdictions (at para 16), although he did not set out that summary. And *Canada v Olympia Interiors Ltd* appears to be an odd case to rely upon. Its "excellent summary" appears in one paragraph — paragraph 51 — and it consists solely of a quotation of two paragraphs from *Vojic v Canada (Minister of National Revenue)*, [1992] FCJ No 902, a 1992 decision of the Federal Court. And those two paragraphs from *Vojic* referred to only three decisions, all from Ontario and decided between 1979 and 1988. Vexatious proceedings were not as common 40 years ago as they are now, and there are some excellent recent and useful reviews of the law in provincial jurisdictions (see e.g. *Chutskoff v Bonora*, 2014 ABQB 389 (CanLII)).

Justice Stratas next addressed the question of who section 40 is aimed at. This is where we find his analogizing of the federal courts to community property and setting up a dichotomy between greedy and innocent litigants (at paras 17-22). His conclusion to this part (at para 22) was that section 40 is aimed at two types of "misbehaving" litigants. The first type are litigants whose proceedings, intentionally or unintentionally, further improper purposes, such as inflicting damage upon other parties or the court. The second type are ungovernable litigants, i.e. those who "flout procedural rules, ignore orders and directions of the Court, and relitigate previously-decided proceedings and motions" (at para 22). Noting that both types might be found in a particular proceeding and cause only isolated harm, he added that recourse to section 40 is only needed if the misbehaviour is likely to or does recur in other proceedings (at para 24).

Justice Stratas then took issue with a point asserted by numerous other judges, which is the claim that vexatious litigant orders are a "drastic, last-resort option" and "a 'most extraordinary' power" that must be used sparingly because people are entitled to access the courts (at para 26). He thought that these sorts of claims are too easily exaggerated because a vexatious litigant order does not deny people access to the courts. Instead it merely "regulates" that access by requiring the vexatious litigant to get the permission of the court to start or continue proceedings (at para 27).

Turning to the question of what amounts to "vexatious" for the purposes of section 40, Justice Stratas stated that the answer to that question can be determined by looking at whether "continued unrestricted access of a litigant to the courts undermines the purposes of section 40" (at para 31). Unfortunately, although there is much discussion in the judgment about the need to interpret section 40 in accordance with its purpose (at paras 15, 24, 31), its purpose was not clearly stated until the judgment's "Postscript." At the end of the judgment, the purpose of section 40 was said to be, in part, "to further access to justice by those seeking the resources of the court in a proper way" (at para 45).

Justice Stratas stated that it is better not to be precise in defining "vexatious" — or the "proper way" to use the resources of the court — because vexatious behaviour "comes in all shapes and sizes" (at para 32). As such, he cautioned against the use of hallmarks to identify vexatious behaviour (citing *Olumide* FC at paras 9-10) while nonetheless conceding that hallmarks might be useful as long as they are taken only as non-binding *indicia* (at para 34). He specifically noted that no intent to cause harm is required (at para 33).

The next point made by Justice Stratas could be a helpful one for counsel if all federal court judges take the same approach. He noted that the record produced for section 40 applications is often "laborious to assemble and voluminous to present" (at para 35). However, this type of record is often unnecessary because the litigant is only being regulated, not barred from the court (at para 36). Instead, he urged "focused, well-chosen evidence, not an encyclopedia of every last detail about the litigant's litigation history" (at para 36). He also noted that other courts' findings of vexatiousness under similar statutory provisions can be introduced and heavily weighted (at paras 37-38). Thus, when Justice Stratas applied the law to the facts in this case, his starting point was the declarations that the respondent was a vexatious litigant that had been made by the Federal Court (*Olumide* FC) and by the Ontario Superior Court of Justice (at para 42).

Justice Stratas also made points about other judges' reasons in vexatious litigant applications. He decried those decisions that describe the litigants "in lurid ways that might amuse the more sophomoric among us" (at para 39). He noted that this description does not apply to the federal courts, where "the reasons have been restrained and appropriate, clinical in tone and minimalist in approach" (at para 39). He expanded upon the idea of minimalist reasons by citing *Canada v Long Plain First Nation*, 2015 FCA 177 (CanLII) at para 143 and its practical and functional approach to the adequacy of reasons, and by noting that the record is included in appellate courts' assessments of adequacy (at para 40).
At the end of his decision, in a section titled "PostScript", Justice Stratas states that, too often, applicants do not start vexatious litigant applications soon enough to protect innocent litigants and the court (at paras 44-45). While uncertainty in the case law might have excused such delays in the past, he announced: "Now the uncertainty is gone" (at para 46).

Rhetoric

In his discussion of the purpose of section 40 — the heart of the decision — Justice Stratas relied on an extended metaphor analogizing the federal courts to community property:

> Section 40 reflects the fact that the Federal Courts are community property that exists to serve everyone, not a private resource that can commandeered in damaging ways to advance the interests of one.
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> As community property, courts allow unrestricted access by default: anyone with standing can start a proceeding. But those who misuse unrestricted access in a damaging way must be restrained. In this way, courts are no different from other community properties like public parks, libraries, community halls and museums.
>
> The Federal Courts have finite resources that cannot be squandered. Every moment devoted to a vexatious litigant is a moment unavailable to a deserving litigant. The

> unrestricted access to courts by those whose access should be restricted affects the access of others who need and deserve it. Inaction on the former damages the latter (at paras 17-19, emphasis added).
> …
>
> [A]s community property, courts deserve to be protected for the benefit of all (at para 45, emphasis added).

The typical list of the types of property applicable to natural resources are: private (individual or corporate), common/communal, and state/public, with open-access commons a fourth "non-property" category, i.e., the antithesis of property: see Bruce Ziff, *Principles of Property Law*, 5th ed (Toronto: Carswell, 2010) at 7-9. Public or state property is owned by the state. Both common/communal property and open-access refer to a shared right of use exercised by a large number of people. However, common/communal property is held in collective ownership and collective owners can regulate access, whereas open-access is the property of no one and open to all (in law or in fact).

Which category of property Justice Stratas was referring to when he used the phrase "community property" is not clear. The resources that make up the federal court system seem to be (literally rather than figuratively) public or state property, much like the public parks, libraries, and museums that Justice Stratas puts in the same category (at para 18) — owned by one level of government or another, with the state having the power to exclude people. However, Justice Stratas also included community halls in his list of analogous resources and used the term "community property" (at para 18). Perhaps he meant federal courts were like communal or common property and "anyone with standing" (at para 18) were like the collective owners and users of that type of property. However, because he also referred to access to the federal courts as "unrestricted access" (at paras 18-19), and unrestricted access is one of the two hallmarks of an open-access commons, perhaps his point was that the federal courts were, in practice, open to all with their use regulated by no one. The other hallmark of an open-access commons is subtractability or the rivalrous nature of the resource, so that the use by one person detracts from the ability of another to use the same, scarce resource. Justice Stratas did refer to the subtractability idea when he stated that "[e]very moment devoted to a vexatious litigant is a moment unavailable to a deserving litigant" (at para 19). Perhaps he meant that, because applicants have not asked for enough vexatious litigant orders and courts have not granted enough, the federal courts are, in effect, open-access commons whose resources are tragically being depleted.

The metaphor also casts vexatious litigants as people who treat the communal or public or open-access federal courts as their own private property, as "a private resource that can be commandeered in damaging ways to advance the interests of one" (at para 17). This is an odd characterization because private property is usually presented as the solution to overuse.

The metaphor is essentially the "tragedy of the commons" hypothetical/economic theory popularized by the ecologist Garrett Hardin in "The Tragedy of the Commons" (1968) 162:3859 Science 1243. Start with a common property resource, defined as a resource which is non-excludable (i.e. it is difficult or impossible to exclude users) and rivalrous or subtractable (i.e. each person's use adversely affects every other person's use). The theory states that individual

users, acting independently to satisfy their own rational self-interest, will deplete that resource through their collective actions, contrary to the common good of all users.

For Justice Stratas, the federal courts are the common property resource and the litigants are the users of that scarce resource. Vexatious litigants play the role of rational actors whose short-term interests are at odds with long-term group interests. However, the rational actor of economic theory is a bad fit here. All users, not just some, are supposed to act in their own self-interest according to this theory, and thus use up the scarce resource.

Casting the problem of vexatious litigants in the federal courts in terms of property categories does not seem to be particularly helpful. tious litigants' behaviour is also characterized in moral terms. Vexatious litigants are said to be misbehaving and using the courts in improper ways. They are those who appropriate the resources of the courts to their own use "in damaging ways" (at paras 17-18) that cause harm to others. Those others are cast as "deserving litigant[s]" (at para 19) and "innocent litigants" (at para 20).

Those deserving litigants are also damaged by the courts' failure to act to restrict the access of vexatious litigants:

The unrestricted access to courts by those whose access should be restricted affects the access of others who need and deserve it. Inaction on the former damages the latter (at para 19, emphasis added).

There is more about the harm to "tens or more innocent litigants" that the vexatious litigant causes when he or she, acting with a voracious appetite, "gobbles up scarce judicial and registry resources" and about the type of injuries caused to, among others, "well-intentioned but needy self-represented litigants" (at paras 20-21). These innocent litigants are also described as "those seeking the resources of the Court in a proper way" (at para 45).

The moral language continues when Justice Stratas categorizes the litigants that section 40 is aimed at into two types. The first type are those who bring proceedings to further improper purposes, "such as inflicting damage or wreaking retribution upon the parties or the Courts" (at para 22). The second type are "ungovernable litigants," those who "flout procedural rules, ignore orders and direction of the Court, and relitigate previously-decided proceedings and motions" (at para 22).

The language of blame and guilt is an odd fit with another point Justice Stratas made, namely, that vexatious behaviour need not be intentionally harmful (at para 33). In an earlier ABlawg post, I noted research on vexatious litigants that sorts vexatious litigants into 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 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. 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." In casting vexatious litigants as undeserving, as

acting improperly, as greedy for "gobbling" up scarce resources (at para 20), and as "wreaking retribution" (at para 22), Justice Stratas appears to be using the kind of "lurid" description that he warned others against using, rather than the "restrained … clinical … and minimalist" reasons he praised (at para 39).

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