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Vexatious *Habeas Corpus* Applications Contribute to Delayed Access to the Courts

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Case Commented On: *Ewanchuk v Canada (Attorney General)*, 2017 ABQB 237 (CanLII)

This vexatious litigant case is interesting for five reasons. First, it was tied to an application for *habeas corpus* and in the process of the decision we learn something about the Court of Queen's Bench's procedure for hearing such applications. Second, there is an emphasis on vexatious litigation's cost to other litigants. Third, Justice D.R.G. Thomas' order explicitly followed *Hok v Alberta*, 2016 ABQB 651 (CanLII) by making the vexatious litigant order under the court's inherent jurisdiction, rather than under the *Judicature Act*. Fourth, this order also follows *Hok* in extending the protection of the order to the Provincial Court of Alberta but omitting the Alberta Court of Appeal from its scope. And finally, yes, the Stephen Brian Ewanchuk who is the applicant in this case is *that* Ewanchuk. He is the individual who was convicted of sexually assaulting a 17-year-old female by the Supreme Court of Canada in *R v Ewanchuk*, [1999] 1 SCR 330, 1999 CanLII 711 (SCC), in a case made infamous by the exchange between Justice McClung of the Alberta Court of Appeal and Justice L'Heureux-Dubé of the Supreme Court of Canada — the "bonnet and crinolines" case. These days Ewanchuk is a prisoner at the Bowden Institution, serving a 16.5-year sentence for sexually assaulting an 8-9 year old female, his fifth conviction for sexual assault. His *habeas corpus* application essentially complained about the conditions of his detention at the Bowden Institution and some readers might experience *schadenfreude* in reading about his complaints (i.e. pleasure derived from the misfortune of others when the other person is perceived to deserve the misfortune, the misfortune is relatively minor, and we ourselves did not generate the other's misfortune).

I will start with the last point and a brief explanation of *habeas corpus* because it is necessary to understand what Ewanchuk was complaining about in his *habeas corpus* application in order to understand the vexatious litigant points.

Habeas Corpus and Ewanchuk's Complaints

The writ of *habeas corpus* is the ancient common law right of persons who are detained by the state to go to court and demand that the state prove that their detention is lawful (at para 18). In Canada, that right is also enshrined in section 10(c) of the *Canadian Charter of Rights and Freedoms*. When the person is incarcerated and therefore already detained, they may use *habeas corpus* to challenge a loss of their residual liberty (at para 21).

The respondents, the Attorney General of Canada and Correction Service of Canada, applied to strike out Ewanchuk's writ because the court had no jurisdiction to hear the application, or, in the

alternative, because the application was frivolous, improper, or an abuse of process. In connection with the first basis, the respondents argued:

> The Court may only take jurisdiction and inquire into the legality of a detention via *habeas corpus* where the applicant identifies:
> 1. *a substantial change in conditions that amounts to a deprivation* of liberty, or, *in the case of an incarcerated criminal, in the prisoner's residual liberty*,
> 2. a decision that led to the deprivation of liberty, and
> 3. a basis to question the legality of the decision to reduce the prisoner's liberty. (at para 8, emphasis added)

The issue was whether Ewanchuk's complaints amounted to a deprivation of his residual liberty as an incarcerated person. He complained about:

- Lockdowns (intermittent periods of detention that occur throughout the day) that followed violence between inmates or took place because staff were being trained or were conducting searches (at para 39)
- Yelling and verbal abuse and being told to "shut up" by the unit manager (at para 43)
- Assaults on sex offenders by other inmates using socks that contain rocks or tunafish cans (at para 44)
- Being served pork (at para 46)
- Being served meals camouflaged with sauce (at para 46)
- Irregular meal times (at para 46)
- Getting only 15 minutes to eat (at para 47)
- Food that was overcooked or undercooked (at para 48)
- Portions of meat less than 8 ounces (at para 48)
- Too many pasta items on the menu (at para 48)
- Serving ladles touched by 700 inmates (at para 49)
- Condiments mixed together (at para 49)
- Hats not worn in the kitchen to cover inmates' hair (at para 49)
- Outdated food (at para 50)
- Food left out overnight (at para 50)
- Butter not served with meals (at para 50)
- Going days without salt or pepper (at para 50)
- A National Grievance Process that took too long and never decided in favour of the prisoner (at para 52)
- Mail that had to be picked up at the unit control desk instead of being delivered to the inmates' cells (at para 53)
- Nurses who yelled through cell doors when speaking to inmates (at para 54)
- Health products passed under cell doors (at para 54)
- No telephone calls during lockdowns (at para 55)
- The $8.40 monthly charge for telephone services (at para 55)
- Not being able to access closed-circuit television camera system recordings on demand (at para 56)
- Policies that result in guards working 16 hour shifts and becoming unpleasant or falling asleep or cooking delicious smelling steaks for themselves (at para 58)
- Computers taken away during lockdowns (at para 60)

- Printer paper costing too much (at para 60)
- Being permitted to make only one copy of legal documents on the printer and required to make the rest of the copies on a photocopier (at para 61)
- The ignorance and indifference of the facility librarian (at para 62)
- Restricted internet access to legal information (at para 62)
- Older information media such as 3.5" floppy disks (at para 62)

For reasons that I will not go into, Justice Thomas held that none of Ewanchuk's complaints of alleged misconduct involved the loss of his residual liberty (at paras 42, 45, 51, 52, 57, 59, and 65). As a result, Justice Thomas granted the respondents' application to strike out Ewanchuk's *habeas corpus* application and granted $500 costs against him.

In addition, because the remedies demanded by Ewanchuk were for monetary damages rather than for any remedy that might result from a *habeas corpus* application, Justice Thomas held that Ewanchuk's application was a simple statement of claim in disguise (at para 68). Worse, his application was "a mockery of a true *habeas corpus* application [that] wasted judicial resources and denied other persons access to this Court in a manner that is reprehensible" (at para 69). That assessment led to the vexatious litigant proceedings and order.

The Vexatious Litigant Order

After striking out Ewanchuk's *habeas corpus* application, Justice Thomas advised the parties that the court, on its own motion, would investigate whether Ewanchuk's access to the Alberta courts should be restricted. Justice Thomas did so using the two-step process adopted by the Court of Queen's Bench in response to the Court of Appeal decision in *Lymer v Jonsson*, 2016 ABCA 32 (CanLII) and implemented for the first time in *Hok v Alberta*, 2016 ABQB 651 (CanLII). As a first step, Justice Thomas assessed Ewanchuk's conduct to decide if it was an abuse of court process that might require restrictions on his court access (at paras 74, 97-99). Then, because he decided that restrictions were potentially required, he took the second step and gave Ewanchuk an opportunity to address the court on the issue (at paras 75, 103).

After the hearing, Justice Thomas concluded there were five independent bases on which he could conclude Ewanchuk was a vexatious litigant (at paras 117-158).

The next question was what kind of order to make and what type of restrictions to impose on Ewanchuk. Because Ewanchuk's *habeas corpus* action was really a civil action for damages, Justice Thomas did not limit his order to *habeas corpus* proceedings. Instead he found that a broad court filing restriction was appropriate (at para 164). He concluded that most of Ewanchuk's anticipated litigation misconduct could be addressed with an order that he obtain leave before initiating or continuing an action — the typical vexatious litigant order (at para 169).

However, the order imposed on Ewanchuk's future *habeas corpus* applications was more restrictive. Justice Thomas ordered that any future leave application for a *habeas corpus* application could only be made via a member of the Law Society of Alberta who would screen Ewanchuk's proposed applications to ensure they were valid (at para 185).

This special treatment of anticipated *habeas corpus* applications was justified by Justice Thomas on the basis of how the court deals with those applications and the increased adverse impact frivolous *habeas corpus* applications have on the court and on other litigants.

The Impact of Frivolous Habeas Corpus Applications on Access to the Court

The idea that vexatious litigation by one person is a denial of access to the courts by many other individuals is gaining in importance in the case law. See, for example, *Canada v Olumide*, 2017 FCA 42 (CanLII) at paras 17-21, and my comment on it: "Vexatious Litigants: An Interpretation of Section 40 of the *Federal Courts Act*."

What is new in Justice Thomas's remarks is how he tied them to the way the Alberta Court of Queen's Bench handles *habeas corpus* applications.

Justice Thomas began with the idea that *habeas corpus* is a unique common law remedy, with a *Charter*-recognized function to ensure that no one is illegally held prisoner. Because of the unique nature of the writ, the Court of Queen's Bench procedures give priority to *habeas corpus* applications to ensure they are heard without delay (at paragraph 170-171). Because those procedures are not well-known even within the legal profession, Justice Thomas spelled them out in some detail:

> When a new *habeas corpus* application is received by the Court that application is then set down for the next Queen's Bench Appearance Court ["QBAC"] session. At QBAC the *habeas corpus* application is scheduled for the first possible hearing date. *Habeas corpus* applications take priority over other possible judicial assignments. Adding a *habeas corpus* application will usually mean a judge is shifted from another proceeding. A *habeas corpus* application therefore means delaying or cancelling a civil or criminal trial, commercial matters, family law special chambers applications, or case management hearings, and so on. (at para 172)

Justice Thomas then linked the procedure for handling *habeas corpus* applications to the shortage of judges in Alberta Court of Queen's Bench (at para 173) and then to the increase in the number of *habeas corpus* applications and, in particular, the number of frivolous *habeas corpus* applications which we rarely hear about:

> The last several years has seen a remarkable increase in the frequency *habeas corpus* is invoked. The overwhelming majority of Alberta Court of Queen's Bench *habeas corpus* applications in Alberta are heard in the Edmonton judicial district. These are largely from persons detained in remand centres and prisons. While some of these applications have had merit and that resulted in the Court exercising its *habeas corpus* jurisdiction, many other applications have had no merit whatsoever. . .
>
> Most of these meritless applications have not resulted in a reported court decision simply because they are so obviously futile and there is little point on wasting court time preparing a written judgment. (at paras 174-175)

Justice Thomas next turned to one of the most serious results of the increase in frivolous *habeas corpus* applications: "that persons who attempt to have a matter heard in the court have to wait a

long time for hearing because of chronic backlogs" (at para 177). Just how long these other litigants have to wait is, as Justice Thomas put it, "a grim tale" (at para 178):

> In Edmonton as of February 2017, if litigants wanted to book a one day special chambers hearing their first available time would be March 14, 2018. That is over a year away. As of March 2017 a half day special chambers appearance would only first be available on November 8, 2017, a delay of over eight months. Litigants seeking a *one hour hearing* in this Court have to wait for *five months*.
>
> Many delay times in Calgary are even worse. (at paras 178-179, emphasis in original)

Thus, Ewanchuk's *habeas corpus* application cost others their time in court and pushed their hearing dates further back in time:

> Ewanchuk's actions are obnoxious in many senses. He has wasted much of Canada's resources. He has attempted to worm his away around the waiting list for litigants in Alberta by superficially covering his civil litigation actions (such as they are) in the guise of *habeas corpus* applications. (at para 182)

All of these comments about Ewanchuk's abuse of the habeas corpus application and its impact on others are fairly easily characterized as policy reasons rather than legal ones in their content and tone, especially those that castigate the federal government for their "ongoing failure… to maintain an adequate judicial complement in this court" (at para 173). They also seem designed to garner public and/or political understanding of, and support for, the court's role in trying to ensure access. Just as Justice Stratas did in *Canada v Olumide*, Justice Thomas set up an "us versus them" dynamic, with judges and lawyers on the side of deserving and innocent litigants (at paras 180, 183) and in opposition to obnoxious and abusive "others" (at paras 159, 182-183).

Following *Hok v Alberta*

Justice Thomas explicitly made his vexatious litigant order under the inherent jurisdiction of the Alberta Court of Queen's Bench (at para 188). In the general part of the order, he prohibited Ewanchuk from commencing or continuing proceedings in the Court of Queen's Bench and the Provincial Court of Alberta without leave of the court in which the proceeding is conducted (at para 188). On both of these aspects — acting under the inherent jurisdiction rather than under the *Judicature Act*, RSA 2000, c J-2, and omitting the Court of Appeal of Alberta from the protection of his order — Justice Thomas followed Justice Verville's decision in *Hok v Alberta*.

Justice Thomas did not say much about using the Court's inherent jurisdiction as the authority for making the vexatious litigant order beyond his reliance on *Hok* (at paras 89-96) and neither will I. I discuss this point at length in my post on *Hok*: "The Vexing Question of Authority to Grant Vexatious Litigant Orders." Suffice it to say here that there is at least some question about whether the court's inherent jurisdiction extends as far as future proceedings that may or may not turn out to be vexatious.

Justice Thomas had even less to say about excluding the Court of Appeal from his vexatious litigant order. He merely noted (at para 193) that he had not extended his order to the Alberta Court of Appeal "in light of the inconsistent jurisprudence on court participant access to that

institution," citing *Hok* at paras 12-13, 35, 53 (although I cannot see why para 35 in *Hok* is relevant).

We are still waiting for the Court of Appeal response to these challenges to its vexatious litigant jurisprudence.

This post may be cited as: Jonnette Watson Hamilton "Vexatious *Habeas Corpus* Applications Contribute to Delayed Access to the Courts" (16 May, 2017), online: ABlawg, http://ablawg.ca/wp-content/uploads/2017/05/Blog_JWH_Ewanchuk_v_Canada.pdf