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Challenge to the Queen's Bench Vexatious Litigant Procedure

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Case Commented On: *Lymer (Re)*, 2018 ABCA 368, *Lymer (Re)*, 2018 ABQB 859

On November 16, in *Lymer (Re)*, 2018 ABCA 368 (*Lymer* CA), Justice Frederica Schutz granted Neil Alan Lymer permission to appeal two orders, one declaring him to be a vexatious litigant, and a second imposing 30 days' imprisonment as the sanction for an earlier finding of contempt. Both of those orders were granted by Lymer's case management judge, Justice Donald Lee, on October 22, 2018 in *Lymer (Re)*, 2018 ABQB 859 (*Lymer* QB). It is unusual for the Court of Appeal to grant permission to appeal a finding that a litigant's access to the courts must be restricted because they have abused court processes (although it happened with an earlier vexatious litigant order imposed by Justice Lee on Mr. Lymer: see *Lymer v Jonsson*, 2016 ABCA 32). However, the relative scarcity of successful applications for leave to appeal is not the sole reason why Justice Schutz's decision is of interest. More important to the Court of Queen's Bench current approach to vexatious litigants are the first three of the four issues Justice Schutz identified as the grounds of appeal (at para 9):

> (1) Did the case management judge err in finding that the applicant was a vexatious litigant?
>
> (2) Did the case management judge err in failing to ensure a full and fair hearing in respect of the vexatious litigant motion, in breach of natural justice?
>
> (3) Did the case management judge err in imposing an overly broad vexatious litigant order?
>
> (4) Did the case management judge err in imposing as a sanction for contempt a period of incarceration, without conducting a full and fair viva voce hearing, and in breach of the requirements of s 7 of the Charter and the principles of natural justice?

Leave to appeal was granted on the basis that Mr. Lymer met the general test for permission to appeal, as well as the additional burden imposed on a litigant found to be vexatious (*Lymer* CA, at para 8). The general test requires an important question of law or precedent, a reasonable chance of success on appeal, and no undue prejudice due to the delay caused by an appeal (*Lymer* CA, at para 6). The additional element requires someone like Mr. Lymer to show his case does not amount to an abuse of process (*Lymer* CA, at para 7). The only indication of what the important questions of law are in this case are the four issues Justice Schutz set out as the grounds of appeal. She did not discuss them any further. Nor did she say anything about why or how the "reasonable chance of success on appeal" element was fulfilled.

In the balance of her order, Justice Schutz stayed the custodial sentence of imprisonment which Mr. Lymer had been serving at the Edmonton Remand Centre since Justice Lee's October 22 order (*Lymer* CA, paras 10-12).

First Issue

The scope of the first question – whether the case management judge erred in finding that the applicant was a vexatious litigant – is unclear. Is it the law cited and applied by Justice Lee that is being called into question, or merely whether that law was properly applied in Mr. Lymer's case? Given the apparent breadth of the challenges to the Queen's Bench procedure in questions 2 and 3, it seems more likely than not that it is the law that was cited and applied that is to be scrutinized.

Justice Lee's court access restriction order was issued under the Court's claimed inherent jurisdiction, rather than under the vexatious litigant provisions of the *Judicature Act*, RSA 2000, c J-2 Part 2.1. Justice Lee had adopted and applied what the Court of Queen's Bench calls the "modern" approach to "court access restriction orders," introduced two years ago in *Hok v Alberta*, 2016 ABQB 651 and applied in more than thirty subsequent cases.

I first discussed the unusual nature of the two-step process adopted in *Hok* in "The Vexing Question of Authority to Grant Vexatious Litigant Orders." Interestingly, the two-step process was the Court of Queen's Bench's response to the Court of Appeal decision in *Lymer v Jonsson* – the same Neil Alan Lymer.

Second Issue

The second question on the Lymer appeal is whether the rules of natural justice have been complied with, specifically in ensuring a full and fair hearing on the vexatious litigant motion brought by the court on its own motion. The issue of a full and fair hearing was the issue on which the Court of Queen's Bench pre-*Hok* process had faltered in *Lymer v Jonsson*.

In response to *Lymer v Jonsson*, the Court of Queen's Bench adopted a two-step process when dealing with persons against whom court access restrictions are being considered (*Hok* at para 10). A judge who observes problematic conduct by a litigant is to first assess that conduct to determine if it is an abuse of court process or a sign of vexatious conduct that might require restrictions on court access. If the judge does decide that restrictions are potentially required, the judge makes an order that sets a deadline for the litigant whose conduct is called into question to make written submissions. Only this written submission is allowed. At the same time, the court issues an interim order that immediately prohibits the litigant from continuing or commencing further court proceedings in any court in Alberta without leave. These interim orders are prepared by the court, without the need of approval by any party. In the second step, the same judge reviews the written submission, if there is one, and assesses the litigant's conduct against the still-expanding list of the indicia of abusive litigation, before determining whether court access restrictions are appropriate and, if so, how broad they should be. If a court access restriction order is granted, it is prepared and filed by the court.

The two-step, Alberta-specific process is discussed in more detail in my September 2018 post, "The Increasing Risk of Conflating Self-Represented and Vexatious Litigants."

Third Issue

The question about whether the order in this case was overly broad is a question that has been raised about vexatious litigant orders before, by both the Minister of Justice and the Court of Appeal.

In *Hok*, the Minister of Justice had raised concerns about the proper scope or breadth of vexatious litigant orders. The Minister submitted that such orders should be narrowed to a defined group of targets where that group can be identified by the litigant's history. The Minister also argued that these orders should normally be restricted to future actions brought before the court making the order, unless there is evidence that the litigant has acted or would likely act in a vexatious manner in some other court.

The Court of Appeal previously expressed its reservations about the breadth of vexatious litigant orders granted under the *Judicature Act* in *RO v DF*, 2016 ABCA 170. That case held that vexatious behaviour confined to one case or one respondent will not justify the broad response of a typical vexatious litigant order under section 23.1 of the *Judicature Act*, which requires "persistent" improper conduct.

The Court of Queen's Bench's current approach is to focus on anticipated future abuses when determining the scope of their orders. The future is predicted based on the litigant's past conduct.

For example, in this particular case, Justice Lee's order required Mr. Lymer be represented by a lawyer if he sought permission from a court to bring a new or continue an old court action (at paras 48-50, and 138).

Conclusion

As is evident from the fact that the Minister of Justice raised the same three issues in *Hok* as the first three issues in justice Schutz's order, these questions have lingered for the past two years. This is the first time that the two-step *Hok* process will be scrutinized by the Court of Appeal.

This post was revised on June 10, 2019 to delete all reference to the Court of Queen's Bench Civil Procedure Note 7.

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