In the Court of Appeal of Alberta

Citation: Jonsson v Lymer, 2020 ABCA 167

Date: 20200501
Docket: 1803-0302-AC
Registry: Edmonton

Between:

Diane Jonsson, Georgina Porozni, Natalie Minckler, Keith Porozni, Colleen Porozni, Willis Porozni, 1146601 Alberta Ltd., 1419253 Alberta Ltd. and 782409 Alberta Ltd.

Respondents
(Applicants)

- and -

Neil Alan Lymer

Appellant
(Respondent)

- and -

The National Self-Represented Litigants Project

Intervenor
(Not Party to the Application)

The Court:

The Honourable Mr. Justice Frans Slatter
The Honourable Madam Justice Myra Bielby
The Honourable Madam Justice Barbara Lea Veldhuis

Reasons for Judgment Reserved of the Honourable Mr. Justice Slatter
Concurred in by the Honourable Madam Justice Bielby
Concurred in by the Honourable Madam Justice Veldhuis

Appeal from the Decision by
The Honourable Mr. Justice D. Lee
Dated the 22nd day of October, 2018
Filed on the 22nd day of October, 2018
(2018 ABQB 859, Docket: BE03 446521)

Reasons for Judgment Reserved
of the Honourable Mr. Justice Slatter

[1] The appellant appeals a vexatious litigant order made against him, and a sanction imposed on him for contempt: ***Lymer (Re)***, 2018 ABQB 859.

[2] The appeal was argued with two other appeals raising related issues: ***Makis v Alberta Health Services***, 2020 ABCA 168 and ***Vuong Van Tai Holdings v Alberta (Minister of Justice and Solicitor General)***, 2020 ABCA 169. The three appeals raise issues about the scope of the Court's inherent jurisdiction to restrain vexatious litigation, the proper breadth of vexatious litigant orders, and related procedural issues. In the circumstances, some broader discussion of vexatious litigant orders is required.

Facts

[3] The appellant was involved in an investment scheme under which he solicited funds from a number of investors in breach of the *Alberta Securities Act*, RSA 2000, c. S-4. He is an undischarged bankrupt, and has been involved in a lengthy dispute with some of the investors who are trying to trace their lost funds: reasons at paras. 1-3. The appellant was ordered to disclose documents, and when he failed to do so he was found in contempt*:* ***Lymer (Re)***, 2014 ABQB 674, affirmed 2015 ABQB 347, 618 AR 209, which was affirmed ***Lymer v Jonsson***, 2016 ABCA 76, 616 AR 190. He failed to fully purge his contempt: ***Lymer (Re)***, 2017 ABQB 110 affirmed ***Lymer v Jonsson***, 2018 ABCA 36. The investors then brought the present application seeking the imposition of sanctions on the appellant for his contempt, including an order under the *Judicature Act*, RSA 2000, c. J-2, s. 23-23.1 declaring the appellant to be a vexatious litigant.

[4] Even though the application for a vexatious litigant order was specifically brought under the *Judicature Act*, the case management judge did not analyze it on that basis, ruling at para. 32:

> This Court no longer uses that procedure, but instead evaluates the potential need for court access restrictions on a prospective, rather than punitive basis, under its inherent jurisdiction to control its own processes . . .

In adopting that approach, the case management judge followed a line of Queen's Bench decisions which describe the procedure under the *Judicature Act* as "obsolete, or at best duplicative of the authority vested in the Alberta Queen's Bench as a consequence of its inherent jurisdiction to control its proceedings" and which apply a common law ". . . more robust, functional, and efficient response to control of problematic litigants . . .": ***Templanza v Ford***, 2018 ABQB 168 at paras. 99, 103.

[5] The case management judge found many indicia of vexatious activity, including some that do not appear to be within the parameters of the *Judicature Act*. He granted a vexatious litigant

order significantly wider than the one applied for: compare the reasons at para. 58 to the order granted at para. 138.

[6] The case management judge next considered the appropriate sanction to impose on the appellant for his contempt of prior court orders. He concluded that, despite the appellant's assertions to the contrary, he had still not purged his contempt. He had not done everything as could reasonably be expected to disclose the documents he was ordered to produce. The case management judge found the appellant's contempt to be persistent and intentional, and that a number of aggravating factors were present: reasons at para. 182. This was one of the exceptional cases where incarceration was required to meet the objectives of deterrence and denunciation, and the case management judge imposed a sentence of 30 days. The appellant was given 90 days thereafter to purge his contempt, failing which the case management judge would determine what further steps should occur.

[7] The appellant was granted permission to appeal (***Lymer (Re)***, 2018 ABCA 368) on the following issues:

(a) Did the case management judge err in finding that the appellant was a vexatious litigant?

(b) 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?

(c) Did the case management judge err in imposing an overly broad vexatious litigant order?

(d) 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?

[8] The National Self-Represented Litigants Project was given permission to intervene to "focus on the broader policy implications of vexatious litigant procedures": ***Jonsson v Lymer***, 2019 ABCA 113 at para. 34. It tendered as fresh evidence a report by Dr. J. Macfarlane, "The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants", dated May, 2013. This report noted the increasing presence of self-represented litigants in the legal system, and that the vast majority of vexatious litigants are self-represented litigants. The report suggests:

- Self-represented litigants "find the courts complex, confusing and intimidating, and often lack the knowledge, skills and literacy or language fluency to participate effectively in their own litigation". The very behaviours that "vex" courts and other parties are often generated by those challenges;

- Many of the proposed "indicia" of vexatiousness, such as advancing hopeless causes and engaging in "inappropriate" courtroom behaviour, are "also the behaviours exhibited by ill-informed or emotionally overwhelmed" self-represented litigants;

- Vexatious litigant orders are said to be justified on the basis that they do not bar access to the courts, but many of the conditions in vexatious litigant orders may amount to insurmountable barriers. 90% of self-represented litigants represent themselves because they cannot afford counsel. A precondition that the self-represented litigant retain counsel or pay costs may amount to an insurmountable barrier;

- Self-represented litigants returning to court are tainted by the finding of vexatiousness, often made in "lengthy, colourful and inherently prejudicial reasons".

While no other party objected to the introduction of the report, it was not tested by cross-examination, and the author was not qualified as an expert witness. The opinions expressed would not be universally accepted by all involved in the judicial system, and some may be inconsistent with judicial experience. While some of these observations may generally be accurate, it obviously does not follow that they excuse vexatious behavior.

Vexatious Litigant Orders in Context

[9] A vexatious litigant order prevents a named litigant from commencing or continuing proceedings in court, unless the litigant obtains permission from the court to initiate the intended step or proceeding.

[10] It is important to remember the constitutional context. The rule of law, which is one of the foundational concepts of the constitution, has many facets. One is that no person is above the law; all citizens are to be subject to the same law, regardless of social status, wealth, or high office. Requiring every citizen to obey the law is an empty concept unless there is some way of holding everyone to account. The rule of law thus requires the establishment of a universal "superior" court of general jurisdiction, to which all citizens are subject. Universal access to the courts is therefore an important component of the rule of law, allowing every citizen to hold every other citizen to account.

[11] It follows that any restriction or impediment to court access must be carefully monitored. The point was made in ***Trial Lawyers Association of British Columbia v British Columbia (Attorney General)***, 2014 SCC 59, [2014] 3 SCR 31:

> 32 The historic task of the superior courts is to resolve disputes between individuals and decide questions of private and public law. Measures that prevent people from coming to the courts to have those issues resolved are at odds with this basic judicial function. The resolution of these disputes and resulting determination of issues of private and public law, viewed in the institutional context of the

> Canadian justice system, are central to what the superior courts do. Indeed, it is their very book of business. To prevent this business being done strikes at the core of the jurisdiction of the superior courts protected by s. 96 of the *Constitution Act, 1867*. . .
>
> 38 While this suffices to resolve the fundamental issue of principle in this appeal, the connection between s. 96 and access to justice is further supported by considerations relating to the rule of law. This Court affirmed that access to the courts is essential to the rule of law in *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214. As Dickson C.J. put it, "[t]here cannot be a rule of law without access, otherwise the rule of law is replaced by a rule of men and women who decide who shall and who shall not have access to justice" (p. 230). . .
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> 40 In the context of legislation which effectively denies people the right to take their cases to court, concerns about the maintenance of the rule of law are not abstract or theoretical. If people cannot challenge government actions in court, individuals cannot hold the state to account -- the government will be, or be seen to be, above the law. If people cannot bring legitimate issues to court, the creation and maintenance of positive laws will be hampered, as laws will not be given effect. . .

Of course, a vexatious litigant order does not bar all access to the courts. It is merely a screening mechanism, and vexatious litigant orders invariably provide that the person subject to the order can commence or continue proceedings with leave of the court: see *Judicature Act* s. 23.1(7). Nevertheless, a vexatious litigant order is a barrier to access to the courts, and depending on the terms of the order it may become an insurmountable barrier.

[12] There are many procedural techniques for ensuring that litigation is conducted in a proportionate manner:

(a) Courts have a wide discretion to grant procedural orders: R. 1.4, 4.14 of the *Rules of Court*. Procedural orders may impose terms, conditions or time limits on proceedings, may regulate the sequence in which proceedings will occur, may set the method by which issues should be resolved, and may otherwise manage the litigation.

(b) Case management orders are made in, and directed at a specific, existing action, in which a single judge is nominated to deal with every interlocutory issue: R. 4.14(2). They can be contrasted with vexatious litigant orders which generally relate to anticipated future applications or actions. Case management is appropriate for complex actions, actions involving multiple parties, or actions where the litigants have been unable to establish a good and respectful working relationship. A case management judge has wide powers: R. 4.14.

(c) Courts can impose sanctions for failure to comply with court orders or the *Rules of Court*: for example, striking pleadings under R. 3.68(2); costs awards under R. 10.31 and R. 10.33(2); penalties under R. 10.49; and sanctions for contempt under R. 10.53. Vexatious litigant orders are not an effective or remedial sanction for such failures.

Vexatious litigant orders are the most extreme response to inappropriate litigation. Vexatious litigant orders are intended to be extraordinary in nature, and they should only be used when other procedural techniques are ineffective. They are not generally an appropriate method of specific case management. They should be no wider than is necessary in the circumstances.

[13] Vexatious litigation must be contrasted with unmeritorious or unsuccessful litigation. Where litigation is without merit it should be struck out under R. 3.68, or summarily dismissed under R. 7.3, upon application of the appropriate tests. A vexatious litigant order is not the appropriate response to litigation that is merely lacking in merit, absent a pattern of abuse.

[14] Vexatious litigants must be distinguished from self-represented litigants. Merely because a self-represented litigant uses a process that is not in accordance with the *Rules of Court,* or advances a claim without merit does not mean that they are vexatious. Many self-represented litigants are unfamiliar with court procedures, and are inadequately or inaccurately informed about their legal rights and the limitations on them. Merely because the self-represented litigant excessively or passionately believes in the merit of his or her cause does not make them vexatious.

[15] On the other hand, being self-represented does not excuse abuse of court procedures. Rule 1.1(2) confirms that the *Rules* govern all persons who come before the court "whether the person is a self-represented litigant or is represented by a lawyer". The Canadian Judicial Council's *Statement of Principles on Self-represented Litigants and Accused Persons (2006)* confirms that principle. While the *Statement of Principles* reminds courts of their obligation to assist self-represented litigants, it also confirms:

> B.4 Self-represented persons, like all other litigants, are subject to the provisions whereby courts maintain control of their proceedings and procedures. In the same manner as with other litigants, self-represented persons may be treated as vexatious or abusive litigants where the administration of justice requires it. The ability of judges to promote access may be affected by the actions of self-represented litigants themselves.

This point was confirmed in ***Trial Lawyers Association*** at para. 47: "There is no constitutional right to bring frivolous or vexatious cases, and measures that deter such cases may actually increase efficiency and overall access to justice". A litigant cannot therefore shield or excuse abusive behaviour simply because he or she is self-represented.

[16] Ultimately, the response to problematic litigation must find the proper balance between maintaining reasonable access to the court, while preserving court resources and shielding other

litigants from abusive behavior. Controls must be implemented through fair and proportionate procedures.

Jurisdiction to Make Vexatious Litigant Orders

[17] As noted, in Alberta there are two competing sources of jurisdiction to make vexatious litigant orders. The statutory authority is found in s. 23-23.1 of the *Judicature Act*. In addition, the Court of Queen's Bench has sometimes relied on an inherent common law jurisdiction to make such orders: see ***Hok v Alberta***, 2016 ABQB 651 at paras. 14-25, [2017] 6 WWR 831 and ***1985 Sawridge Trust v Alberta (Public Trustee)***, 2017 ABQB 548 at paras. 42-54, 13 CPC (8th) 92. The "inherent" jurisdiction has been said by judges of that Court to supersede the statutory regime, not merely to operate parallel to it.

[18] In England it has long been accepted that the court has an inherent jurisdiction to control applications in an existing proceeding, notwithstanding any parallel statutory jurisdiction: ***Grepe v Loam*** (1887), 37 Ch D 168 (CA). Such orders are a logical extension of case management orders. The inherent jurisdiction to regulate new proceedings in England was not confirmed until the decision in ***Ebert v Venvil***, [2000] Ch 484 (CA). A parallel inherent jurisdiction has been recognized in ***Gichuru v Pallai***, 2018 BCCA 78 at paras. 73-9, 8 BCLR (6th) 97; ***Ayangma v Canada Health Infoway***, 2017 PECA 13 at paras. 61-5; ***Tupper v Nova Scotia (Attorney General)***, 2015 NSCA 92 at paras. 25-7, 390 DLR (4th) 651; ***Peoples Trust Co v Atas***, 2019 ONCA 359 at para. 5, leave to appeal denied April 23, 2020, SCC #38883, and ***Canada v Olumide***, 2017 FCA 42 at para. 23, [2018] 2 FCR 328.

[19] Prior to 2007, an application in Alberta for a vexatious litigant order could only be brought with the written consent of the Minister of Justice and Attorney General of Alberta: *Judicature Act*, RSA 2000, c. J-2, s. 23. That requirement reflected that there is a public and constitutional aspect to denying access to the courts. The statute required that the underlying vexatious conduct of the litigant be "habitual and persistent and without any reasonable ground".

[20] In 2007, the *Judicature Act* was amended to remove the requirement for consent, requiring instead that the application be on notice to the Minister of Justice and Attorney General: *Judicature Amendment Act, 2007*, SA 2007, c. 21, s. 2. The amendments introduced an expanded definition of what constitutes vexatious behaviour:

> 23(2) For the purposes of this Part, instituting vexatious proceedings or conducting a proceeding in a vexatious manner includes, without limitation, any one or more of the following:
>
> > (a) persistently bringing proceedings to determine an issue that has already been determined by a court of competent jurisdiction;

> (b) persistently bringing proceedings that cannot succeed or that have no reasonable expectation of providing relief;
>
> (c) persistently bringing proceedings for improper purposes;
>
> (d) persistently using previously raised grounds and issues in subsequent proceedings inappropriately;
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> (e) persistently failing to pay the costs of unsuccessful proceedings on the part of the person who commenced those proceedings;
>
> (f) persistently taking unsuccessful appeals from judicial decisions;
>
> (g) persistently engaging in inappropriate courtroom behaviour.

This provision confirms that it is "persistent" behaviour that is to be addressed by vexatious litigant orders. Further, vexatious litigant orders were to be based on the past conduct of the litigant.

[21] Where the persistent past conduct of the litigant supported an inference that additional vexatious proceedings might be brought in the future, a vexatious litigant order might be appropriate. Orders made under the *Judicature Act* are not punitive, they are protective and prospective. Both the statutory and the "inherent" approach rely on the inference that past behaviour is predictive of future behaviour, and they are both intended to be protective and prospective.

[22] An argument can be made that the Legislature intended to occupy the field of vexatious litigant orders by these provisions. The existence of a comprehensive statutory regime on vexatious litigant orders implies certain boundaries on any residual inherent jurisdiction of the courts. On the other hand, the definition of vexatious conduct in s. 23(2) of the *Judicature Act* in inclusive, not closed.

[23] It is, however, difficult to anticipate all the circumstances that might arise, and the inherent jurisdiction of the superior courts is not easily displaced. Notwithstanding the provisions of the *Judicature Act*, there is a residual common law jurisdiction to regulate vexatious conduct. As confirmed in ***Ontario v Criminal Lawyers' Association of Ontario***, 2013 SCC 43 at para. 26, [2013] 3 SCR 3, ". . . the inherent jurisdiction of superior courts provides powers that are essential to the administration of justice and the maintenance of the rule of law and the Constitution. It includes those residual powers required to permit the courts to fulfill the judicial function of administering justice according to law in a regular, orderly and effective manner - subject to any statutory provisions".

Limits on Inherent Jurisdiction

[24] Accepting that, notwithstanding the provisions of the *Judicature Act*, a residual common law jurisdiction to regulate vexatious conduct remains, which procedure takes priority? The answer is provided by the context.

[25] As noted, the "superior courts" are a key part of the Canadian constitutional infrastructure. Many characteristics, powers and attributes of the superior courts are described as being "inherent". In some respects, these characteristics have little in common other than the use of the common adjective "inherent"; they can be invoked ". . . in an apparently inexhaustible variety of circumstances": I. H. Jacob "The Inherent Jurisdiction of the Court" (1970), 23 Curr. Legal Probs. 23, cited in ***R. v Caron***, 2011 SCC 5 at para. 29, [2011] 1 SCR 78. Their many manifestations derive from different constitutional, statutory and common law sources, and they are governed by different principles and rules. Some of these "inherent" features are entrenched, to a greater or lesser degree, in the unwritten constitution.

[26] For example, the superior courts have an inherent right to independence protected by the constitution: security of tenure, financial security, and administrative independence: ***Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island***, [1997] 3 SCR 3 and ***Valente v The Queen***, [1985] 2 SCR 673. The principles underlying "inherent" judicial independence are not engaged by this appeal.

[27] The superior courts also have an "inherent" jurisdiction to judicially review the decisions of administrative tribunals. The core of that jurisdiction is also constitutionally protected: ***Crevier v Québec (Attorney General)***, [1981] 2 SCR 220. This inherent jurisdiction extends to assisting administrative tribunals in discharging their functions: ***Caron*** at paras. 27-8. The legislatures can, however, regulate matters such as the procedures to be used, the standards of review to be applied, and the levels of procedural fairness required. The principles underlying judicial review are not engaged by this appeal, although they are by the companion appeal of ***Makis v Alberta Health Services***.

[28] Another "inherent" power of the courts is the jurisdiction to issue injunctions to restrain breaches of public and private rights. This jurisdiction was originally vested in the courts of equity, and is now confirmed by s. 5 of the *Judicature Act*. This "inherent" power is also most directly engaged by the companion appeal of ***Makis v Alberta Health Services***.

[29] This appeal is most directly concerned with the aspect of the "inherent" power of the courts that gives them the ability to prevent abuses of their processes. As confirmed in ***Criminal Lawyers' Association*** at para. 26, the inherent power of the court to control its processes is "subject to any statutory provisions". It is, at its highest, parallel to the statutory regime. Closely related is the power of the courts to make rules of procedure, now confirmed in R. 1.6. By convention, in Alberta neither the courts nor the executive branch make rules unless they have been reviewed by the Rules of Court Committee established by s. 28.2 of the *Judicature Act*.

[30] When citing general statements about the "inherent" characteristics of the superior courts, attention must be paid to the circumstances in which the statement was made. For example, statements that "inherent jurisdiction" is limited by statute only apply where there are no constitutional limits at play. Broad statements about the "inherent" characteristics of superior courts may not be completely transferable outside their particular context.

[31] The "inherent" power of the superior courts to prevent abuses of their processes is an aspect of their jurisdiction that is subordinate to related statutory provisions. As stated in ***Ebert*** at p. 493:

> . . . This is one of the situations where it is accepted that notwithstanding the intervention of Parliament an inherent jurisdiction remains alongside the statutory jurisdiction. This does not mean that intervention of Parliament may not have cut down the inherent jurisdiction of the court. If there was an application for an order of the same width as the statutory jurisdiction, the court could only appropriately deal with such an application under the statutory jurisdiction. The inherent power to make an order is now more restricted. . . . (Emphasis Added)

It is an error for the courts to assert an aspect of this inherent jurisdiction that conflicts with the wording in the *Judicature Act*, or that takes priority over the statutory regime: ***Caron*** at para. 32.

[32] For example, applications for vexatious litigant orders must be served on the Attorney General, regardless of which jurisdiction is being invoked. Vexatious litigant proceedings are to be "on notice"; anyone charged with vexatious conduct must be given a fair opportunity to respond. The court's ability to initiate such applications on its own motion is not the same thing as granting those orders without notice: ***Lymer v Jonsson***, 2016 ABCA 32 at para. 3, 612 AR 122[1]. *Ex parte* vexatious litigant orders should be rare, even on an interim basis, not routine, and when justified must be short term.

[33] As stated in ***Endean v British Columbia***, 2016 SCC 42 at para. 23, [2016] 2 SCR 162 citing the seminal article by I. H. Jacob, "The Inherent Jurisdiction of the Court" (1970), 23 Curr Legal Prob's 23:

> 24 The courts have recognized that, given the broad and loosely defined nature of these [inherent] powers, they should be "exercised sparingly and with caution": . . . It follows that courts should first determine the scope of express grants of statutory powers before dipping into this important but murky pool of residual authority that

[1] This decision remains good law and is binding on trial courts in Alberta, despite what was suggested in ***Unrau v National Dental Examining Board***, 2019 ABQB 283 at paras. 932-974, 981, 94 Alta LR (6th) 1. There is a strong presumption that vexatious litigant orders must not be given without notice. The occasional failure to do so, and the fact that a resulting appeal may be unsuccessful when there is no miscarriage of justice, does not mean the basic rule has been abrogated.

> forms their inherent jurisdiction: [and] "[i]t is only where broad statutory authority is unavailable that inherent jurisdiction needs to be considered as a possible judicial tool to utilize in the circumstances". (Emphasis added)

It follows that resort to any residual inherent jurisdiction to control vexatious litigation should only be made when a) the provisions of the *Judicature Act* are clearly inadequate to answer the problem, and b) there are compelling reasons to step beyond what the statute provides for.

[34] Some trial court decisions have expressed the opinion that the applicable provisions of the *Judicature Act* are "obsolete". No authority is given for the court's mandate to marginalize legislation in this manner. The *Interpretation Act*, RSA 2000, c. I-8, s. 9 declares that statutes are "always speaking" and should be "applied to circumstances as they arise":

> The decision to pursue a social goal, eradicate a mischief or promote a policy lies at the heart of the legislative function. It would exceed the constitutional role of the courts to effectively reverse this decision by refusing to apply legislation to existing facts: R. Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham: LexisNexis, 2014) at p. 188.

The courts cannot refuse to apply statutes based on a bald declaration of obsolescence.

[35] Legislation must be interpreted and applied in its present context, but legislation does not become "obsolete" unless and until the Legislature repeals it. As noted in ***Krayzel Corp v Equitable Trust Co***, 2016 SCC 18 at para 32, [2016] 1 SCR 273:

> 32 . . . This Court has recently observed that it cannot "do by 'interpretation' what Parliament chose not to do by enactment": *Canadian Broadcasting Corp. v. SODRAC* 2003 Inc., 2015 SCC 57, [2015] 3 S.C.R. 615, at para. 53. But the converse is also true: courts may not undo by "interpretation" what Parliament chose to do by enactment. If s. 8 reflects bad or outdated public policy, the remedy lies with Parliament, not with the courts.

The relevant provisions of the *Judicature Act* have been amended as recently as 2014, precluding any inference that the Legislature has forgotten about them. The vexatious litigant provisions of the *Judicature Act* may be narrower than some would like, but that does not provide any basis for the courts to displace the statutory scheme with what is perceived by some to be a better solution.

[36] The justification sometimes given for stepping around the provisions of the *Judicature Act*, and instead relying on an expansive "inherent jurisdiction", is that the provisions of the statute are not responsive to the problem. For example, the regime set out by the *Judicature Act* has been criticized because it requires "persistent" behavior that "only targets misconduct that has already occurred": ***1985 Sawridge Trust v Alberta (Public Trustee)***, 2017 ABQB 548 at para. 53, 13 CPC (8th) 92. The asserted inherent jurisdiction of the court is said to be better because it assesses "the

potential need for court access restrictions on a prospective, rather than punitive basis": reasons at para. 32.

[37] As noted, the fact that the *Judicature Act* draws an inference of likely future conduct from past conduct does not make it "punitive". The objective is still to prevent future vexatious conduct, not to punish past behaviour. Secondly, the statutory requirement that there be a pattern of "persistent" behaviour is reflective of the important constitutional values surrounding access to the courts. One, or even a few procedural missteps do not justify the extreme remedy of a vexatious litigant order. Thirdly, the Legislature has determined that a pattern of past persistent behaviour is a precondition to a vexatious litigant order, and the court cannot use any "inherent jurisdiction" to ignore it.

[38] While some may disagree with the need for "persistence", that is the standard that has been selected by the Legislature. Persistence is important, because the more persistent the behaviour, the stronger is the inference that past behaviour predicts future behavior. The inherent jurisdiction of the court might still be invoked in exceptional circumstances, absent "persistence", but the inherent jurisdiction of the court does not permit the complete abrogation of that requirement. As previously noted, access to the court has a constitutional dimension. Barring access to the court absent some actual pattern of abuse of that right is problematic. A single procedural misstep by a litigant calls for a single and focused remedy, not a blanket vexatious litigant order: ***Olumide*** at para. 24.

[39] While the definition of vexatious conduct in s. 23(2) of the *Judicature Act* confirms that it is "without limitation" to what might be vexatious, it nevertheless provides some guidance as to the type of conduct that justifies limiting access to the courts. The inherent jurisdiction asserted by the Court of Queen's Bench relies on "indicia" of vexatiousness, many of which overlap with the statutory definition: see the list of over 20 in ***Alberta Treasury Branches v Hawrysh***, 2018 ABQB 618 at paras. 20-22, 75 Alta LR (6th) 296. The list includes some characterizations that are themselves very wide, for example "being an OPCA litigant".

[40] However, some generic or imprecise "indicia" are questionable reasons to impose blanket limits on court access:

- "Hopeless proceedings", "collateral attacks", "making unsubstantiated allegations of misconduct", and "initiating 'busybody' lawsuits" are all generic failings that demonstrate a lack of merit or standing. There are specific remedies for those errors: striking out pleadings under R. 3.68, or summary dismissal under R. 7.3. Individual occurrences should be dealt with under those focused rules. It is only when this type of conduct is <u>persistent</u> that vexatious litigant orders may be justified.

- "Where the litigation has a political focus . . . directed to the correction of perceived government shortcomings" is said to be another indicium of

vexatiousness. This criterion is particularly problematic because one of the constitutional backbones of universal access to the superior courts is to allow evaluation of the legality of government action. Claims that are "justiciable" are legitimately brought, even if they turn out to be without merit; there is no recognized barrier to "political" litigation. There are many reported decisions that might be characterized as "political", but they are not "vexatious". Examples include a great deal of *Charter* litigation (specifically under s. 7 and s. 35), and cases like ***Harper v Canada (A.G.)***, 2000 SCC 57, [2000] 2 SCR 764 and ***Miller, R. (on the application of) v The Prime Minister***, [2019] UKSC 41.

- In ***Pintea v Johns***, 2017 SCC 23 at para. 4, [2017] 1 SCR 470 the Supreme Court endorsed the Canadian Judicial Council's "*Statement of Principles on Self-represented Litigants and Accused Persons (2006)*". As noted (*supra*, para. 15), the *Statement of Principles* does not endorse abuse of court procedures by self-represented litigants, although some of them misunderstand the direction in ***Pintea*** that the system should be more accommodating of the self-represented. Nevertheless, it is problematic to suggest that the mere assertion of rights as a self-represented litigant is itself "a separate and independent reason to conclude that court access restrictions are appropriate for this litigant": ***Hawrysh*** at para. 43.

- The identified "indicia" are also not limited to conduct within the legal system, but are said to engage "external" conduct. Reference to litigation conduct in other jurisdictions and other forums is legitimate, but the vexatious litigant analysis must not turn into a broad-based investigation into the character and political views of the litigant, based on speculation about his or her motives and possible future conduct. Attempted medical diagnoses of the litigant are inappropriate. The analysis is not to be a "deep inquiry into the litigant, [and] his or her personal characteristics and activities" as suggested in the Court summary of ***Unrau v National Dental Examining Board***, 2019 ABQB 283, 94 Alta LR (6th) 1.

These "indicia" invite a formalistic analysis which does not focus on the individual litigant, or whether the perceived "indicia" justify a vexatious litigant order in the particular case. Rather, they result in wide boilerplate orders, arising after ". . . an assertion of the court's inherent jurisdiction, supported by a string of bare citations": J. Watson Hamilton, "The Increasing Risk of Conflating Self-Represented and Vexatious Litigants" (17 September 2018), online: ABlawg <http://ablawg.ca/wp-content/uploads/2018/09/Blog_JWH_ATB_v_Hawrysh_Sept_2018.pdf.>. Different categories of vexatious litigants are identified, inviting an inference of guilt by association for the particular respondent, even if he does not fit any category.

[41] An example of the use of vexatious litigant orders to address the merits of the litigation can be found in ***Unrau***. The statement of claim in that action did not disclose any cause of action, or claim any relief that was potentially available. It was properly struck out under R. 3.68. But was a vexatious litigant order justified? As the court noted:

> 988 Viewed as a whole, while this pleading was clearly an abuse of this Court's processes, which warranted the action being struck out per Rule 3.68 and CPN7, the Statement of Claim does not provide much assistance in evaluating whether Unrau should be subject to continued court access restrictions. Arguably, his bad action might be "a one off". (Emphasis added)

As previously noted, a "one off" misstep calls for a single focused remedy. The Court's own research, however, disclosed that between 2001 and 2006 (i.e., 12 years before the statement of claim was issued) ***Unrau*** purported to practice dentistry without a licence, and resisted attempts to stop him. Even though the practice of dentistry has nothing to do with the prosecution of litigation, this was found to be enough to declare him a vexatious litigant. Without evidentiary support, the chambers judge presumed he had "a mental health component" behind his fixed desire to be a dentist, and that supported him being a vexatious litigant.

[42] In summary, the inherent jurisdiction of the courts to control their processes is subordinate to the statutory process for vexatious litigant orders found in the *Judicature Act*. The inherent jurisdiction should be invoked when the statutory process has proven to be inadequate in the particular case, not routinely based on a perception that the inherent jurisdiction approach is "preferable". The inherent jurisdiction should not be exercised in a manner that is inconsistent with the principles underlying the statutory regime. It should only be used when more focused remedies are unavailable: see *supra*, para. 12. It goes without saying that a vexatious litigant order should only be granted where it would serve the underlying purposes of the process: ***Olumide*** at para. 31.

The Role of the Court in Controlling Vexatious Proceedings

[43] Prior to 2007, a vexatious litigant application could only be brought by way of an application, with the written consent of the Attorney General. The 2007 amendments confirmed that the court could act on its own motion. That provision, however, was not intended to displace the litigant-driven adversarial system.

[44] It is important that the judges and the court remain neutral and impartial. Judges should not routinely become protagonists in the litigation. As it was put in ***R. v Mian***, 2014 SCC 54, [2014] 2 SCR 689:

> 38 Our adversarial system of determining legal disputes is a procedural system "involving active and unhindered parties contesting with each other to put forth a case before an independent decision-maker" (Black's Law Dictionary (9th ed. 2009), *sub verbo* "adversary system"). An important component of this system is

> the principle of party presentation, under which courts "rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present" (*Greenlaw v. United States*, 554 U.S. 237 (2008), at p. 243, per Ginsburg J.).

This point has been made many times, for example in ***Imperial Oil v Jacques***, 2014 SCC 66 at para. 25, [2014] 3 SCR 287:

> 25 Although the power of judges to intervene in the conduct of civil proceedings has become increasingly broad, judges generally do not play an active part in the search for truth . . . . In an accusatory and adversarial system, the delicate task of bringing the truth to light falls first and foremost to the parties . . .

Another expression of the principle is found in ***R. v Oracz***, 2011 ABCA 341 at para. 7:

> A cautionary note is in order. It is essential that trial judges not descend into the arena. It is always preferable for the trier of fact and the adjudicator of law to leave to the parties or their counsel the initiative to advance legal and factual arguments. Our system of criminal justice is premised on an adversarial model. Judicial inquests are not part of the process. While judges, in keeping with their sworn duties, may seek clarification of points in issue, the extent to which a judge may properly go beyond that is circumscribed. The judge must not enter the fray. That which governs is the necessity of ensuring a fair trial and one that is perceived by all concerned to have been conducted fairly and impartially.

Just because the court can initiate vexatious litigant proceedings on its own motion does not mean that it should routinely do so. A primarily court-initiated process risks undermining the neutrality of the court.

[45] As noted, the Court of Queen's Bench has adopted a policy of diverting vexatious litigant proceedings. Even when proceedings are brought by litigants under the *Judicature Act*, the Court routinely converts the application to an invocation of the court's inherent jurisdiction: see ***Alberta Lawyers Insurance Association v Bourque***, 2018 ABQB 311 at paras. 14-15. Where a litigant brings an application for relief under the *Judicature Act*, the application should be dealt with under the statute. If the court seizes the agenda and diverts the application to any process based on a residual inherent jurisdiction, then the judge has entered the fray. This may give the appearance of the judge siding with the applicant. Further, the courts should generally not decide issues or grant relief outside the scope of the pleadings, if only because the respondent is entitled to notice of the case he or she has to meet.

[46] Further, as noted, even if there is an inherent jurisdiction to control vexatious litigation, that inherent jurisdiction is subordinate to the statutory jurisdiction. The former should not routinely be used to displace the latter.

[47] That being said, the *Judicature Act* does recognize that sometime the court must take the lead in controlling abuses. There is a public aspect to the use of court resources. As it was put in ***Olumide*** at paras. 17-19: ". . . Courts are community property that exists to serve everyone . . [and] . . . have finite resources that cannot be squandered". Nevertheless, the courts should initiate vexatious litigant proceedings with caution, and should rarely assume the prosecution of such applications commenced by the parties.

[48] In summary, even though the court has the jurisdiction to institute vexatious litigant proceedings on its own motion, that should be the exception. The litigation should still be left in the hands of the litigants. If the litigants find behaviour to be vexatious, but do not bring an application for a vexatious litigant order, they must not expect the court to take the initiative. The court should only act where the parties have for some reason failed to act, and the broader interests of the administration of justice are compromised.

Was a Vexatious Litigant Order Justified in this Case?

[49] With that background, the issues on which permission to appeal were granted in the case under appeal can be analyzed. The first issue is whether the case management judge erred in granting a comprehensive vexatious litigant order against the appellant.

[50] As noted, the application for a vexatious litigant order was brought by the parties, and was not generated on the court's own motion. The application was specifically brought under the *Judicature Act*, and there was no justification for the court to mechanically divert it to be considered under the court's inherent jurisdiction. If a generalized vexatious litigant order was called for there was no reason why the application could not have been analyzed in terms of the *Judicature Act*. There was no basis to suggest that the statutory regime was somehow inadequate, forcing the Court to resort to its inherent jurisdiction.

[51] Further, the context is important, regardless of which procedure was used. As noted, the litigation arising from the appellant's bankruptcy has been going on for number of years, and has been highly contentious. One of the Registrars has been dealing with all applications at that level, and there have been case management judges in place for much of the time. It is not apparent that case management is an inadequate remedy for the problems identified.

[52] The application that lead up to the order under appeal was brought before the case management judge by a number of investors who had lost money in the appellant's enterprise, described as the "Objecting Creditors". The overall scope of the application was "fixing the appropriate penalty for the findings of contempt" against the appellant that had previously been made and upheld on appeal: see para. 3, *supra*. A wide variety of relief was claimed, including imprisonment for contempt. The application also claimed:

(a) Judgment against the appellant in favour of each Objecting Creditor in specified amounts, with an order that the judgments would survive bankruptcy.

(b) An order restraining the appellant from disposing of property, and requiring third parties to disclose property of the appellant.

(c) An order preventing the appellant from commencing or continuing any proceeding until all outstanding costs were paid.

(d) A vexatious litigant order.

In other words, the application for a vexatious litigant order was seen as being part of a remedy for contempt of court.

[53] The grounds for the application were largely centered on the previous findings of contempt. It was alleged that the appellant's contempt remained "flagrant, repeated, continuous and unrepentant", that he had flouted orders for production, that he had "mocked and disregarded" the orders of the court, and had never apologized or attempted to purge his contempt.

[54] The application also listed some examples of the "indicia" of vexatious conduct commonly relied on by the court when invoking the inherent jurisdiction to impose vexatious litigant orders. For example, it listed some instances of "collateral attack", "escalating proceedings", "bringing proceedings for improper purposes", "persistently taking unsuccessful appeals from judicial decisions", and "unsubstantiated allegations of conspiracy, fraud and misconduct". These, however, were said to be "evidence of his continuing intention to flout Court Orders". The tone of the application is that the appellant routinely disregarded court orders, the *Rules of Court* and directions by the case management judge, and generally defended the bankruptcy litigation in a contemptuous way.

[55] The appellant points out that fresh attempts to purge his contempt are not a "collateral attack" on previous findings he had failed to do so, nor are they brought for "improper purposes". He also notes that an application by his counsel to extend time to seek permission to appeal to the Supreme Court of Canada was incorrectly called a collateral attack, and that he has been successful on some appeals. Some of the objectionable material in his pleadings has been removed now that he has counsel.

[56] A vexatious litigant order prevents the litigant from continuing or commencing proceedings: *Judicature Act*, s. 23.1. A vexatious litigant order is not the obvious remedy for contempt. The fundamental question for the Objecting Creditors is: "Where did the money go?": ***Lymer (Re)***, 2020 ABQB 157 at para. 48. A vexatious litigant order is not going to generate the answer to that question. A vexatious litigant order cannot make a litigant discharge obligations under the *Rules of Court* or court orders.

[57] As noted, the purpose of a vexatious litigant order is to prevent a named litigant from commencing or continuing proceedings. It is somewhat anomalous to apply the concept to a defendant. The appellant has not been "commencing or continuing proceedings". It is the

Objecting Creditors who continue to press for further and better disclosure, and sanctions for contempt. The appellant is primarily in a defensive mode, seeking to establish that he has in fact purged his contempt. He may be mounting his defence in an inappropriate way, but a vexatious litigant order precluding new proceedings appears out of context, and the order cannot reasonably prevent him from defending the allegations of contempt against him.

[58] Some of the allegations in the application did disclose vexatious conduct, for example collateral attacks on decisions previously made by the Registrar or the case management judge, and persistently taking unsuccessful appeals. But it appears that all of the appellant's conduct related to the bankruptcy proceedings. There is no indication that he commenced or continued proceedings with respect to any other topic. A case management order requiring that he receive permission before commencing any application or appeal within the bankruptcy proceeding was called for, but a general prohibition on him starting any action on any topic against any defendants was not justified.

[59] Further, there is no indication why a separate vexatious litigant order was needed, much less one of the breadth granted. The bankruptcy was already in case management. The Registrar and case management judge had more than enough authority under R. 4.14 to deal with any abuses within the bankruptcy litigation. It is unclear why the Objecting Creditors thought that a comprehensive vexatious litigant order was the proportionate response to the problem. Vexatious litigant orders should not become the default method of managing complex litigation. They are not the obvious response to defendants who are in default of their obligations under the *Rules* or court orders.

[60] In summary, this was a case of complex litigation involving a difficult litigant which was already in case management. The issues should have been dealt with in case management. A blanket vexatious litigant order did not address the problem in a proportionate or effective way, and was not an effective or appropriate remedy for contempt. The case management judge should have granted a carefully crafted case management order, and possibly a litigation plan under R. 4.5, instead of a boilerplate vexatious litigant order.

Was a Fair Process Utilized?

[61] The appellant argues that he did not receive a fair hearing before the vexatious litigant order was imposed. The application was brought on notice, the appellant was represented by counsel at the hearing, and he was given a full opportunity to address the issues. He argues that a two-stage process is required. First, the chambers judge should decide if the respondent to the application is a vexatious litigant. Then a second hearing should be held to determine the scope of the order.

[62] A respondent to a vexatious litigant application is entitled to a fair hearing, but that does not invariably require a bifurcation of the proceedings. The application gave notice that a

vexatious litigant order was requested. The appellant was given a full opportunity to respond. Whether the order as granted was over-broad is discussed in the next section of these reasons.

Was the Vexatious Litigant Order Overly Broad?

[63] When a vexatious litigant order is granted pursuant to the court's inherent jurisdiction, a practice has developed of issuing lengthy, detailed, boilerplate vexatious litigant orders: see ***Unrau*** at para. 900. Since vexatious litigant orders restrict access to the courts, they should be focused on the specific litigant, be proportionate to the issues, and be no wider than is reasonably necessary. In this case a vexatious litigant order was not justified, but in any event the order that was granted was overly broad.

[64] At a threshold level, the order granted was wider than the order requested in the application: compare paras. 58 and 138 of the reasons. If nothing else, the appellant was not given full notice of the case he had to meet.

[65] The *Judicature Act* expressly gives the Court of Queen's Bench jurisdiction to make vexatious litigant orders that cover proceedings in the Provincial Court and the Court of Appeal. That jurisdiction can only be exercised pursuant to the *Judicature Act*. The inherent power of the court to "control its own processes" does not extend to controlling the processes of other courts. Since the chambers judge purported to grant this order under the inherent jurisdiction of the court, it was overbroad in its scope.

[66] There is no apparent explanation for a number of provisions in the order. For example, the appellant is directed to only describe himself by name, not by initials or pseudonym. There is no indication that he has ever done so: compare the prior history of the litigant in ***Wong v Giannacopoulos***, 2011 ABCA 206, 510 AR 234. Likewise, there is no indication that the appellant has ever improperly provided legal advice to third parties, or abusively acted as an agent or McKenzie Friend. There is no indication that he has ever improperly attempted to swear a criminal information against any third party. These boilerplate provisions seem to have merely been carried forward from other orders where they may have been appropriate.

[67] The order requires the appellant to seek permission of the court before commencing or continuing any proceedings. It goes on to say that such permission can only be applied for if the appellant demonstrates that he has "paid in full all court-ordered cost awards against Neil Alan Lymer in the Alberta Courts". Such a provision is unreasonable. Vexatious litigant orders are tolerable because they do not foreclose all access to the court, and merely perform a gatekeeping function. Insurmountable preconditions, however, effectively amount to a total barrier to court access.

[68] Assume that the vexatious litigant is injured in a motor vehicle accident, and the other driver is at fault. The vexatious litigant has a legitimate claim for damages. It would be an injustice

to prevent that litigant from even applying to commence a personal injury action unless all prior costs awards, in all other actions in Alberta, are paid.

[69] Even though persistent failure to pay costs may be evidence of vexatious conduct (s. 23(2)(e) of the *Judicature Act*), vexatious litigant orders are not intended to be a method of enforcing the payment of past financial obligations. Other than by operating as a total bar to court access, requiring payment of all outstanding past costs awards does nothing to prevent further vexatious litigation. It has been said that vexatious litigant orders should be "prospective", rather than "punitive", yet this type of provision is routinely included in boilerplate vexatious litigant orders.

[70] If a vexatious litigant seeks permission to continue or commence legitimate fresh proceedings, it might well be appropriate to make the posting of security for costs a condition of those fresh proceedings. As observed in ***Goldstick Estates (Re)***, 2019 ABCA 508:

> 44 A case management judge has a wide discretion to specify when and how applications will be brought, including the imposition of conditions precedent to any procedural step: R. 4.14(1). . . . Specifying that costs must be paid before further steps can be taken is not *per se* objectionable, but all of the relevant considerations must be carefully balanced. Controlling disproportionate and excessive litigation is important, but so too is maintaining access to justice. A beneficiary is entitled to have the conduct of an executrix examined by the court.
>
> 45 It must be obvious that requiring the payment of costs of as much as $340,000 is an insurmountable barrier to most litigants, even wealthy ones. The order under appeal effectively prohibits any further applications by the appellant. . . .

Security for costs is primarily forward looking, and relates to proposed new procedures. Security for costs is not intended to be a method of enforcing past costs awards: ***Goldstick Estates*** at para. 47.

[71] The order also provides that the appellant cannot seek permission to commence fresh proceedings unless he is represented by a lawyer. Litigants have a right to represent themselves in court, and as previously noted, most self-represented litigants are unrepresented because they cannot afford a lawyer. Requiring the vexatious litigant to obtain a lawyer presents a financial barrier that may be insurmountable.

[72] The requirement that permission be requested through a lawyer also appears to be redundant. The very purpose of requiring a vexatious litigant to seek permission before commencing fresh proceedings is to allow the presiding judge to screen those proceedings. The presiding judge will want to ensure that the fresh proceedings disclose a known cause of action, are not a collateral attack on previous decisions, are not being commenced against parties who are unreasonably being brought into the litigation, etc. Requiring the application for permission to be

brought by a lawyer seems to be protection against the same things. Presumably no responsible lawyer would seek permission to commence abusive proceedings. However, whatever advantage there might be from having the fresh litigation screened twice is disproportionate to the expense involved. It would generally be an error to impose such a condition at the permission stage, without precluding such a condition being imposed subsequently.

[73] In summary, the vexatious litigant order should not have been granted. What was called for was, at best, a more intensive case management process. However, even if the vexatious litigant order had been appropriate, the conditions imposed were unreasonable.

The Contempt Sanction

[74] The primary focus of the application brought by the Objecting Creditors was to set a sanction for the appellant's conduct which was previously determined to be in contempt of court. The vexatious litigant order was proposed as a part of that sanction. The case management judge concluded that the appropriate sanction was 30 days imprisonment, and a vexatious litigant order. The appellant argues that the sanction was imposed on him without a full and fair hearing, and that the penalty is excessive. He argues that a *viva voce* hearing was required.

[75] The core of the appellant's contempt was his failure to comply with various orders requiring that he disclose what had happened to the investors' money. He was ordered on several occasions to produce records from the corporations involved. He variously asserted that he had no records, he could not remember some of the facts, and he could not reconstruct the transactions. Then he produced some records, including five hard drives said to contain relevant records. His explanations were rejected by the Court. He was found to be in contempt, and those findings were upheld on appeal.

[76] The respondents correctly argue that the findings of contempt are *res judicata*, and the appellant is not entitled to question them at the sanctions stage. The appellant agrees. However, the appellant argues that he has now purged his contempt, and that this is a significant mitigating factor in setting a sanction: ***Demb v Valhalla Group Ltd***, 2016 ABCA 172 at para. 55.4, 38 Alta LR (6th) 15.

[77] The appellant was originally found to be in contempt by the Registrar on November 6, 2014, and the jurisdiction of the Registrar to do so was ultimately confirmed by this Court on March 21, 2016: ***Lymer v Jonsson***, 2016 ABCA 76, 616 AR 190, which affirmed ***Lymer (Re)***, 2015 ABQB 347, 618 AR 209, which had affirmed ***Lymer (Re)***, 2014 ABQB 674. At the subsequent sanctions hearing in January 2015, the appellant was given an opportunity to purge his contempt, and on February 9, 2015 and August 22, 2016 he filed fresh affidavits of records in an attempt to do so. In May 2016, his creditors filed a second contempt application, alleging fresh instances of contempt.

[78] In December 2015 the appellant applied for a declaration that he had purged his contempt. On February 14, 2017 the Registrar concluded he had not completely purged his contempt, because his affidavits were qualified, evasive, and lacked detail. His appeal to a chambers judge was dismissed on May 26, 2017, and a further appeal was dismissed based on the overwhelming evidence that he had failed to purge his contempt: ***Lymer (Re)***, 2017 ABQB 110 affirmed ***Lymer v Jonsson***, 2018 ABCA 36.

[79] That set the stage for the present phase of the proceedings. On May 15, 2017, May 30, 2018 and June 21, 2018 the appellant filed further affidavits in another attempt to purge his contempt. The record does not indicate that his affidavit of May 15, 2017 was considered at the appeal on May 26, 2017, because it was anticipated that the Registrar would review it at a future hearing[2]. The appellant had not been cross-examined on any of these three affidavits.

[80] The sanctions hearing that generated this appeal occurred on April 20, 2018. The thrust of the appellant's argument was not an attack on the original findings of contempt, but an argument that his latest affidavits had purged that contempt. Despite not having cross-examined the appellant on his affidavits, the Objecting Creditors took the view that the affidavits still did not provide the required disclosure.

[81] The case management judge recognized that the record created a clear issue of credibility, for example:

> 161 I reject this argument. It ultimately relies on Mr. Lymer's word. I make an unfavourable finding of fact in relation to Mr. Lymer's credibility. . . . He is not an honest, credible person. . . .
>
> 163 I do not believe Mr. Lymer. . . .
>
> 165 These are two of many examples where Mr. Lymer is not a credible person.
> . . .

Although issues of credibility usually require an oral hearing, the case management judge concluded that one was not needed to resolve the credibility issue, because he was not going to believe the appellant anyway:

> 174 Since I conclude there is no credible evidence that Mr. Lymer has successfully purged his contempt, or made good faith efforts to unsuccessfully purge his contempt, there is no need for a *viva voce* trial to evaluate to what degree Mr. Lymer has met those objectives.

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[2] The results of that hearing are now reported as ***Lymer (Re***), 2020 ABQB 157.

The case management judge essentially held that there was no "credible evidence" because he did not believe the appellant, and he did not believe him because there is no evidence to support his position. This entirely circular reasoning reflects palpable and overriding error.

[82] Civil contempt proceedings are quasi-criminal in nature, and they call for a high level of procedural fairness, especially where imprisonment is a real possibility. The principle was confirmed in ***Panesar v Palia***, 2008 ABCA 354 at paras. 10-11, 440 AR 187:

> 10 It is trite law that a party facing a contempt finding should be given an opportunity to retain and instruct counsel as well as an opportunity to provide an adequate excuse for a failure to comply with court orders . . . the consequences of a contempt order are serious so a contempt application merits a full and fair hearing with the opportunity to retain and instruct counsel and provide evidence.

While these comments were made with respect to findings of contempt, imposing sanctions for contempt raises similar issues. As confirmed in ***250242 Alberta Ltd v Sohal***, 1983 ABCA 109 at para. 24, 25 Alta LR (2d) 382, 44 AR 34, a person found in contempt "should be accorded the opportunity to offer an explanation or an apology before punishment is imposed". A person being sanctioned for contempt is entitled to make full answer and defence, and if he wants to testify under oath in mitigation, he should rarely be denied the opportunity to do so.

[83] The appellant argues in the alternative at the 30 days of imprisonment imposed on him was unreasonably harsh. He argues that when the underlying contempt is a failure to produce documents, the contempt sanction is aimed more at securing the missing discovery than at punishment: ***Demb v Valhalla Group Ltd*** at para. 55.3. Since the question of mitigation and sanction must be referred back for a new hearing, no further comment is needed on this argument at this time.

[84] The sanction must be set aside because of the failure to give the appellant a fair hearing, and the matter remitted back to the trial court for a proper hearing before a different judge.

Summary

[85] In summary, the following principles underlie vexatious litigant applications[3]:

(a) The primary jurisdiction for awarding a vexatious litigant order is under the *Judicature Act*. Applications should *prima facie* be initiated pursuant to the statute, whether by a litigant or by the court on its own motion. When proceedings are initiated pursuant to the statute they should be adjudicated accordingly, and should not routinely be diverted to any residual common law process.

[3] These principles do not apply directly to *habeas corpus* applications, which arise in a different historical and constitutional context, although there is obviously an overlap. See for example ***Wilcox v Alberta***, 2020 ABCA 104.

(b) The provisions of the *Judicature Act* substantially occupy the field, and any residual inherent jurisdiction of the court is limited. Any application for a vexatious litigant order should first be assessed pursuant to the provisions of the *Judicature Act*. If the applicant cannot meet the test under that statute, the court may in narrow circumstances resort to its inherent jurisdiction. However, clear and compelling reasons must be shown for granting an order pursuant to the inherent jurisdiction when the applicant has failed to meet the test in the statute.

(c) In those circumstances where the court may rely on its residual inherent jurisdiction, vexatious litigant orders should not be granted that are in direct conflict with the statute. For example, such orders should not be granted unless the Attorney General has been given notice, and generally are not appropriate unless the conduct is "persistent".

(d) Vexatious litigant applications should primarily be litigant driven. While the court has a residual ability to trigger a vexatious litigant application on its own motion, the court should only initiate the process where the litigants have failed to do so after invitation and the overall interests of the administration of justice are engaged, or there is another justification for doing so.

(e) Applications for vexatious litigant orders are to be brought on notice to the respondent and the Attorney General, unless the conditions of R. 6.4(b) are met: i.e., serving notice of the application might cause undue prejudice to the applicant: ***Lymer v Jonsson***, 2016 ABCA 32 at paras. 3-4, 612 AR 122. The respondent must be given a fair opportunity to be heard before the order is granted. In those rare cases where an *ex parte* or interim vexatious litigant order is appropriate, the order should be for a short, defined period of time, and should be reviewable on short notice.

(f) Parties are entitled to self-represent, and the court should be sensitive to the challenges faced by self-represented litigants. Vexatious litigant orders should only be made when other procedural techniques have proven to be inadequate and the offensive conduct is persistent.

(g) Any restrictions imposed in a vexatious litigant order must be focused on the particular litigant, be proportional to the problematic conduct revealed by the record, and they should be incremental and adapted to the specific problem. Such orders should be no wider than is necessary, and must not routinely limit access to court facilities, or restrain resort to fee waivers, unless warranted by the facts of the particular case. Vexatious litigant orders are not a substitute for case management, and they are not a universal remedy for all procedural problems that may be encountered.

(h) Restrictions on a litigant's conduct should not as a matter of course include a requirement of legal representation, or the precondition that all accumulated court costs be paid.

[86] In conclusion, the appeal is allowed. The vexatious litigant order should not have been granted in these circumstances, and in any event the form of order granted was overbroad. The sanction for contempt cannot stand given the failure to afford the appellant a fair hearing. The question of sanction for contempt is referred back to the trial court for a fresh hearing before a different judge.

Appeal heard on January 9, 2020

Memorandum filed at Edmonton, Alberta
this 1st day of May, 2020

Slatter J.A.

I concur:

Bielby J.A.

I concur:

Authorized to sign for: Veldhuis J.A.

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