



Vexatious Litigants: A View From the Profession

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Litigant, March 10, 2016

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- The views expressed in this presentation include the personal views of Mr. Schreiter and Ms. Kristjanson and do not necessarily represent the views of the Ministry of the Attorney General.
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Overview

- Scope of conduct
- Legal test for vexatious conduct
- Civil litigation: Vexatious litigant orders, dismissal of suits, Ontario Rule 2.1
- Administrative litigation: Vexatious litigant orders, Rules
- A note on bias
- Issues for practitioners

Go placidly amid the noise and the haste, and remember what peace there may be in silence. As far as possible without surrender, be on good terms with all persons. Speak your truth quietly and clearly, and listen to others, even the dull and ignorant; they too have their story.And whether or not it is clear to you, no doubt the universe is unfolding as it should. ...With all its sham, drudgery and broken dreams, it is still a beautiful world.”

— Max Ehrmann, *Desiderata: A Poem for a Way of Life*

Criminal Sphere

- Private Prosecutions
- Complaints to admin bodies and civil suits re criminal sphere actors

Civil Sphere

- Civil suits involving admin, civil and criminal justice sphere actors
- Judicial review of admin sphere actors

Vexatious
Litigant

Administrative Justice Sphere

- Claims for relief before public decision-makers, administrative tribunals, accountability bodies (e.g., ombudsman)
- Complaints to disciplinary bodies (lawyer, judges, professionals) about civil, criminal, admin sphere actors

Civil Code, France, Titre XIV, Art. 441 – No Canadian Equivalent

English (Unofficial Translation)**

441. Even in cases where parties must be represented by counsel, they may, with the assistance of counsel, present their own oral observations.

The court retains the power to order them to be silent if passion or inexperience prevents them from discussing their case with the appropriate degree of decency or clarity.

Français

441. Même dans les cas où la représentation est obligatoire les parties, assistées de leur représentant, peuvent présenter elles-mêmes des observations orales.

La juridiction a la faculté de leur retirer la parole si la passion ou l'inexpérience les empêche de discuter leur cause avec la décence convenable ou la clarté nécessaire.

Self-rep ≠ vexatious

Manufacturers Life Insurance Co. v. Crowe:¹ Four types of Self-represent litigants:

1. Those self-represented litigants who are truly lost in the system - generally persons against whom legal proceedings have been commenced, but who lack the education to understand the nature of the proceeding or how to advance a defence;
 2. Those whom the law would describe as parties under disabilities and who suffer from some form of mental illness or mental impairment;
 3. Self-represented parties who lack the resources to hire a lawyer, but who have arguable claims or defences; and,
 4. Those who think they can do a better job than a lawyer and who proceed with an unreasonable zeal and narrowness of focus in their claims or defences. Although some possess claims or defences with merit, there are a large number who, when faced with an adverse ruling, tenaciously persist in disregard of the ruling, attempting to vindicate what they perceive as a righteous position.
- Vexatious conduct could arise in any category, but should affect remedy

¹ 2010 ONSC 3302

Defining Vexatious Conduct

- Categories of conduct are not closed. But classic test set out in *Re Lang Michener and Fabian*:¹
 1. Multiple actions to determine an issue already adjudicated
 2. Obvious that action cannot succeed, no reasonable person could expect to obtain relief sought.
 3. Brought for an improper purpose, including harassment.
 4. Grounds and issues raised earlier are rolled forward, supplemented, with parties added along the way.
 5. Court is to look at whole history of matter, and general conduct of litigant. Not just whether there is, or was, an arguable cause of action
 6. Failure to pay costs
 7. Persistently taking unsuccessful appeals (or steps to reconsider.)

¹ [1987] O.J. No. 355 (H.C.J.) at para. 19. See also : *Currie v. Halton*, [2003] O.J. No. 4516 (C.A.), *Murray v. New Brunswick Police Commission*, [2012] N.B.J. No. 211 (C.A.) (Chambers)

Further Considerations

- Nature of inquiry: The motions judge is making a discretionary decision, arising from both the applicable *Rules* but also the court's inherent jurisdiction to control its process. Vexatious conduct measured on an objective standard.¹
- Purpose: Beneficial to the public and all parties: (1) Allows scarce judicial resources to be devoted to meritorious disputes; (2) assists litigants plainly unable to regulate their own conduct; (3) prevents respondents from the stress and cost of mounting a defence²

¹ *Ontario v. Deutsch*, [2004] O.J. 535 (S.C.J.) at para. 16 - 21

² *Law Society of Upper Canada v. Chavali*, [1998] O.J. No. 5890 (Gen. Div.) at para. 26

³ *Kallaba v. Bylykbashi*, [2006] O.J. No. 545 (C.A.) at para. 30.

Procedural Tools – Civil SCJ

- (New) Rule 2.1 – Summary written procedure dismissing entire proceeding (Rule 2.1.01) or motion (Rule 2.1.02)
- Rule 21.01(3)(d) / Rule 25.11 – Motion on notice to strike action / any other step or document
- Section 140 of the Courts of Justice Act – Originating notice of application for final order declaring respondent vexatious litigant
- Ad hoc remedies – arising from inherent jurisdiction / power to stay under s. 106 of the CJA
 - Rules 2.1 and 21 aimed at vexatious litigation. Section 140 and *ad hoc* procedural remedies are aimed at vexatious litigants

Rule 2.1 of Ontario *Rules*

- Simple: Court may trigger Rule 2.1 on its own motion, or on referral from the registrar. Registrar can be invited to refer matter by a defendant, and may do so on her own. Short letter. No submissions.
- Fast and Inexpensive: Court gives notice to P that it is considering dismissing action as frivolous and abusive, and invites written submissions, 10 pages long, within 15 days.

Rules 21.01

- Rule 21.01(1)(b) is perhaps most well known. No reasonable cause of action / fundamental pleading defects. No evidence admissible. Must take pleadings as true.
- Rule 21.01(3)(d) is directly analogous to Rule 2.1, permits court to strike out abusive or vexatious proceeding. Any action with “clearly no merit” is vexatious. Evidence is admissible. Both of previous proceedings, and on the substantive merits of action.
 - *Currie v. Halton*.¹ Fresh affidavits filed on core of allegations. Previous transcripts used for truth of their contents.

¹ [2003] O.J. No. 4516 (C.A.) at para. 9-10, 12, 17-19

Rule 25.11

- Rule 21 aimed at entire proceeding. Rule 25.11 aimed at all or part of a pleading. Or any document.
- Same definition of vexatious.

Procedural Tools

- Avalanche of motions, documents, examinations, etc. can be controlled by Court. Advisable to attend for directions at the outset of proceeding, with (1) strict timetables, (2) limits or prohibition on further steps pending resolution, (3) limits on mode and length of evidence, (4) limits on oral argument.
- Applies to defendants as well. When litigant sues 30 defendants, not necessary to duplicate written materials, or set aside two days of argument so all defendants can make 30 minute submissions.
- See, for example, *Leong v. Ryabikhina*, and *626381 Ontario Ltd. v. Cote*¹

Vexatious Litigant Order

- Procedure (Ontario): Originating notice of application under s. 140 of the *CJA*. Supported by affidavit evidence.¹
 - Other jurisdictions may be more procedurally flexible. See e.g. Federal Court, section 40 of *Federal Courts Act*; Rule 67 of the Rules of the Supreme Court of Canada.²
- Test: Persistent vexatious conduct, as found by the Court, with *Henry* and other decisions as a guide.¹
- Interim relief, equally broad in scope, is available as part of inherent authority to control process.
- Fundamentally procedural: Court is made gatekeeper of what is normally permissive process. Orders do not deny, but merely regulate, access to the courts.³

¹ *Lukezic v. Royal Bank of Canada*, 2012 ONCA 350 at para. 6-17, adopting reasons of Lang J.A. (dissenting) in *Kallaba v. Bylykbashi*, *supra*.

² *Coote v. Lawpro*, 2014 FCA 98 at para. 13, *Coote v. Theroulde*, [2014] S.C.C.A. No. 569

³ *Law Society of Upper Canada v. Chavali*, [1998] O.J. No. 5890 (Gen. Div.) at para. 26

Ad hoc remedies

- All of the above tools are codifications of the Court's inherent authority to control its own process.
- The court has always had, and continues to have, broad remedial authority to prevent an abuse of process. This can include staying and dismissing any proceeding or step therein, establishing timetables, controlling the presentation of evidence, controlling the material to be filed with the court
 - *Toronto (City) v. (C.U.P.E.), Local 79*, [2003] 3 S.C.R. 77 at para. 35-51
 - *Currie v. Halton*, [2003] O.J. No. 4516 (C.A.)
 - *Leong v. Ryabikhina*, [2013] O.J. No. 4967 (Div. Ct.)

Outside Ontario

- Federal Court – s. 40 of the *Federal Courts Act*.
- Other provincial superior courts acting pursuant to same inherent jurisdiction to prevent abuse of process, even if specific *Rules* are different. See: *Toronto v. C.U.P.E.* (SCC)
- *Examples: Tupper v. Nova Scotia (Attorney General)*, 2015 NSCA 92 (CanLII); *Carten v. Carten*, 2015 BCCA 201 (CanLII); *Coote v. Lawyers' Professional Indemnity Company (Lawpro)*, 2014 FCA 98 (CanLII), *Murray v. New Brunswick Police Commission*, [2012] N.B.J. No. 211 (C.A.) (Chambers)

Admin Claims – Similar Issues

- Cases present similar issues as in civil sphere
- Multiple parties, relitigation of issues, ever-expanding claims, recusal motions...
- Justice system and government/admin sphere actors frequently named as parties
- Numerous motions, irrelevant evidence, frequent adjournment requests, firing counsel

Administrative Justice Sphere

- Human rights tribunals probably deal with highest volume of vexatious litigants (who are often complaining about other civil society, civil justice, admin justice and criminal justice actors)
- Disciplinary bodies (Law Societies, Judicial Councils, other regulated professions) also receive large number of unmeritorious complaints

Key differences admin v. civil spheres

- Masters of own procedure (though no inherent jurisdiction)
- Mandate to be accessible and expeditious.
- Often no filing fees and no costs sanctions available
- Should develop rules – from intake, pre-hearing procedures, summary hearings, to VL orders
- Need better linkages to civil sphere and other components of admin sphere



Undertakings to Tribunal: *Drenic v. Governing Council of Salvation Army*, 2010 HRTO 1667

- 11 Applications with Tribunal in 3 years under two names
- Step 1: Written undertaking re communication with tribunal
“I undertake to treat HRTO staff, adjudicators and other parties...with respect and courtesy, and will only provide e-mails and other materials that are related to issues in an application and do not contain any abusive, profane, lewd or threatening language....I understand that if I breach this undertaking, the HRTO may not proceed with my application.”
- Breached many times

HRTO Rules at the time

- s. 23 (1) of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, (“SPPA”), power to make such orders or give such directions in proceedings before it as it considers proper to prevent abuses of its process.
- Rule 1.1 , rules to be “liberally interpreted and applied by the Tribunal to facilitate an accessible process and to ensure the fair, just and expeditious resolution of the merits of the matters before it”.
- Rule 1.7 (v.1), Tribunal to “make such orders or give such directions as are necessary to prevent abuse of its processes and ensure that the conduct of participants in Tribunal proceedings is courteous and respectful of the Tribunal and other participants”.

Drenic – HRTTO – VL Order

- discretion that should be exercised in exceptional circumstances.
- should not lightly subject a particular individual to an additional step in bringing a human rights application
- should recognize that in some cases, an individual's improper conduct during Tribunal proceedings may be linked to a mental disability under the *Code*.
- Tribunal has a duty to ensure that public resources, and those of respondents, are not abused by a series of vexatious applications.
- moreover, the Tribunal must ensure that all parties and their representatives are treated with dignity and respect when they participate in the Tribunal process.

Drenic – terms of Order

- May not commence further applications at the HRTO without leave of an adjudicator of the Tribunal.
- If the applicant seeks leave, must include with his Application submissions that outline why Application:
 1. is intended as a legitimate assertion of his Code rights,
 2. is not intended to vex the respondents, and
 3. will not result in an abuse of process.

Social Justice Tribunals of Ontario Common Rules

A8 ABUSE OF PROCESS

A8.1 The tribunal may make such orders or give such directions in proceedings before it as it considers proper to prevent abuse of its processes.

A8.2 Where the tribunal finds that a person has persistently instituted vexatious proceedings or conducted a proceeding in a vexatious manner, the tribunal may find that person to be a vexatious litigant and dismiss the proceeding as an abuse of process for that reason. It may also require a person found to be a vexatious litigant to obtain permission from the tribunal to commence further proceedings or take further steps in a proceeding.

Freitag v. Penetanguishene (Town) et. al., 2015
HRTO 1275

- 45 other applications previously filed; 1 was successful following hearing, 44 others dismissed (2 following hearings), withdrawn, settled
- Additional 13 applications in 2015
- Written Case Assessment Directions, hearing on dismissals and VL Order by teleconference
- Applied new SJTO rules, issued VL order.

Judicial Councils

From “Complaint # 7” in the CJC 2006-07 annual report:

- Note: The Council sometimes receives complaints from vexatious litigants. These are people who repeatedly go before the courts and abuse the process. Following the receipt of numerous unfounded complaints, the complainant can be informed that future complaints regarding the same issues will not be reviewed by the Council. The following case is an illustration.

CJC Annual Report

- Complainant had filed previous complaints about the conduct of several different judges...alleged judge was discourteous, acted in a "criminal" manner by refusing to respect his rights under the Charter, a general bias against men in the justice system, that judges collude to render decisions to avenge the filing of complaints against other judges or to make good for political favours, or to harass him.
- Given that the complainant had filed six similar and unsupported complaints in one year, he was informed that future complaints relating to the same issues would not be given consideration in future.
- https://www.cjcccm.gc.ca/english/complaint/conduct_c_en.asp?selMenu=conduct_complaint_2006-2007_en.asp

Administrative Justice and VL's

- Administrative bodies must develop Rules to address VL issues.
- Accommodation for mental health issues – where to draw the line?
- Public interest – recognize the burden on the tribunal and respondents (public/private)
- Disturbing element is complaints to disciplinary bodies (legal, judicial, other)

Publishing Names- UK Example

- Issue: In Canada, names are circulated internally, not public
- UK – civil restraint orders and vexatious litigant orders
- Civil restraint orders: If a judge orders an extended civil restraint order, the order is limited to a specified group of courts; last 2 years, but can be renewed for a further 2 years; usually given when a person's application for a court hearing is refused but they won't accept the judge's decision.
<https://www.gov.uk/guidance/extended-civil-restraint-orders-in-force>
- Vexatious Litigant orders: Vexatious litigants are individuals who persistently take legal action against others in cases without any merit, who are forbidden from starting civil cases in courts without permission.
- <https://www.gov.uk/guidance/vexatious-litigants>



A note on Reasonable Apprehension of Bias



If a judge should himself, conduct the examination of witnesses 'he, so to speak, descends into the arena and is liable to have his vision clouded by the dust of conflict'
Lord Denning in *Jones v. National Coal Board* [1953] J. No. 136 2 Q.B. citing *Yuill v. Yuill*, [1945] P. 15, 20; 61 T.L.R.

Primary Areas of Risk

- Recusal applications
- Objective decision-making in light of frustration
- Intemperate remarks
- Controlling process/fairness to both sides
- See for example, F. Kristjanson and S. Naipaul, “Active Adjudication or Entering the Arena: How Much is Too Much?”, 24 *Canadian Journal of Administrative Law and Practice* 201 (2011)

Practical Issues of Concern to Counsel

- Service on SRLs and evasion of service by VLs
- Difficulty in confirming dates with VLs (and VL scheduling motions without consulting with counsel)
- Registries accept clearly deficient materials – cost, time for respondents
- Abusive correspondence, staff may be fearful
- Law Society complaints
- Adjournment applications and terms (peremptory)
- Costs issues
- Finalizing orders

Thank You – Questions?

Tom and Freya

Footnotes

- Article 441, Titre XIV : Le jugement. Chapitre 1er : Dispositions générales. Section I : Les débats, le délibéré et le jugement. Sous-section I : Les débats. Paragraphe 1 : Dispositions générales
<https://www.legifrance.gouv.fr/affichCodeArticle.do?idArticle=LEGIARTI000022889971&cidTexte=LEGITEXT000006070716&dateTexte=20160305>
- **Unofficial English translation from excellent article, Justice Yves-Marie Morissette, Court of Appeal of Quebec, QUERULOUS OR VEXATIOUS LITIGANTS, A DISORDER OF A MODERN LEGAL SYSTEM?, Canadian Association of Counsel to Employers (CACE) Conference, Banff, 2013 p. 14