Court of Queen's Bench of Alberta

Citation: Unrau v National Dental Examining Board, 2019 ABQB 283

Date: 20190425
Docket: 1801 12350
Registry: Calgary

Between:

Bernie Unrau

Plaintiff

- and -

National Dental Examining Board - Jack Gerrow, Canadian Dental Association, Ethics Board, Attn: Alberta Dental Association, re: death threat by Brian Ruddy etc., AB Health c/o Foothills Hosp., Rockyview Hosp. Ethics and Complaints Officer, CND Human Rights Commission, Office of Ethics Commissioner of Canada, NSDT c/o Gov't of Canada, NAIT, City of Calgary - Legal and Corporate Security et al, US Dep't of Justice/FBI re Amblin, Amazon et al, copyright infringements, lawyers misbehaviour, political prejudice judge, theft of IP

Defendants

Reasons for Decision
of the
Associate Chief Justice J.D. Rooke

Summary:

Unrau filed a Statement of Claim that made bald allegations which did not reference any of the eleven named Defendants specifically, but, nevertheless, sought $5 million and impossible remedies. The Court, on its own motion, initiated a Rule 3.68 "show cause" procedure that required Unrau to identify a valid basis for his action. Unrau made no reply. His lawsuit was struck out as an abusive and vexatious proceeding.

The remaining issue is whether Unrau should immediately be subject to ongoing court access restrictions by a vexatious litigant order. This requires that the Court evaluate Unrau's litigation conduct, and determine whether ***Lymer v Jonsson****, 2016 ABCA 32 is a*

binding authority that requires an additional court process prior to imposing indefinite court access restrictions.

***Held**: Unrau is, and should be, immediately subject to court access restrictions by a vexatious litigant order, that declares him to be a vexatious litigant.*

Abusive litigation and litigants require a new approach that is prospective rather than punitive, and which applies the Court's inherent jurisdiction to achieve the post-"culture shift" objective of fair and proportionate steps that manage abusive litigation, preserve limited and stressed court resources, but maintain access to the Courts. These Reasons illustrate the improved current understanding of the increasingly common vexatious litigation phenomenon. Vexatious litigants are a diverse group. Many are affected by mental health issues which lead to litigation misconduct. Others abuse courts for ideological reasons or personal benefit. The broad range of bad conduct encountered is surveyed. Abusive litigation must be countered at the earliest opportunity for the benefit of all involved, including the abusive litigants themselves.

Court access restrictions are divided into two types: intra-dispute Grepe v Loam Orders, and vexatious litigant orders which potentially impose gatekeeping steps on more than one dispute, including hypothetical litigation. Commonwealth authorities disagree on the basis on which courts may impose the latter type. The "Traditional Authority" holds vexatious litigant orders are only authorized by statute, while the "Modern Approach" concludes both legislation and inherent court jurisdiction provide independent but complementary bases to impose court access restrictions. This Court has adopted the Modern Approach. Early intervention is triggered when future abusive litigation is anticipated. The Modern Approach provides a broad and open-ended suite of court access restrictions which permit measured, fair, and proportionate responses to the diverse and sometimes extreme misconduct, and physical threats, now increasingly encountered by trial courts.

Court intervention is possible either on application, or on the Court's own motion, when an abusive litigant exhibits one or more characteristics, or "indicia", of abusive litigation. A very broad range of evidence is potentially relevant, since this is a deep inquiry into the litigant, his or her personal characteristics and activities, and as to whether abusive litigation indicia are present. A renewed indicia scheme is proposed. The critical question is whether future abusive litigation is anticipated. If so, and if that anticipated abuse meets the "threshold criterion" of extending outside a single dispute, then a vexatious litigant order is usually appropriate. A requirement for the vexatious litigant to seek permission to initiate or continue litigation - leave - is usually a fair and proportionate response to anticipated abusive litigation misconduct. A leave requirement is a minimal impediment to court access. Further and more strict gatekeeping steps may also be imposed, where warranted, such as if anticipated misconduct is more likely, disruptive, and/or harmful.

Court Orders which impose court access restrictions must be explicit and enforceable. Court Clerks enforce vexatious litigant orders, so orders must be written to be clearly understood and followed by all, especially the Court Clerks. This Court has developed a

set of ancillary restrictions that should always be imposed: 1) to stop future abusive litigation, 2) to minimize "busybody" and "proxy" litigation, 3) to prohibit unauthorized practice of law, 4) to control abuse of fee waivers, and 5) to be conducive to the revision of vexatious litigant court orders by affected Courts, as necessary.

In the post-"culture shift" context, and per the Modern Approach, no further steps are necessary before imposing indefinite court access restrictions on Unrau. ***Lymer v Jonsson****, 2016 ABCA 32 is not a binding authority where a litigant had the opportunity to explain why he or she is a fair dealer, and how their conduct was in good faith. Unrau had that chance. While Unrau's Statement of Claim, on its own, was vexatious, that did not warrant ongoing court access restrictions. However, the broader litigation record shows Unrau is obsessed with a desire to be an unregistered, unregulated dentist. With that broader context, future litigation misconduct by Unrau is plausible, and so a vexatious litigant order is imposed. That makes Unrau a vexatious litigant.*

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I. INTRODUCTION

[1] This Decision has a general and a specific function. The specific function is to evaluate whether a Statement of Claim filed by a litigant, Bernie Unrau [Unrau], ought to be struck out as an abusive proceeding (Parts I-II), and, second, whether Unrau should be subject to indefinite court access restrictions by a vexatious litigant order (Parts III, V).

[2] However, to reach that point, the Court needs to investigate, explain and illustrate its experiences with abusive litigation (Part IV). That review in Part IV of this decision is a deep exploration of:

1. the Court's understanding of what are the causes of and factors involved in abusive litigation (Parts IV(C));
2. the range of court access restrictions which have been imposed by Canadian courts, and the circumstances that warranted these steps (Parts IV(D)(I));
3. the authority on which those steps were imposed (Parts IV(E-F)); and
4. the procedures, relevant evidence and tests on which court access restrictions are imposed (Parts IV(G-H, J)).

[3] Beyond that, Part IV of this Decision examines the broader policy and functional context in which court access restrictions are now imposed by this Court. Since 2016, the Court has evaluated the need for and imposed court access restrictions primarily under its inherent jurisdiction, as a superior provincial court, so as to control its processes. This Decision now reviews that approach, and how this step has led to more timely, fair, and proportionate responses to abusive litigation. That benefits everyone, *including abusive litigants*.

[4] On October 24, 2018, I concluded in a decision reported as ***Unrau v National Dental Examining Board***, 2018 ABQB 874, 79 Alta LR (6th) 411 [***Unrau #1***] that a Statement of Claim filed by Unrau was a potential target of a Civil Practice Note No. 7 [CPN7] 'show cause' procedure. CPN7 is a new process that came into force in Alberta on September 4, 2018, and which permits the Court to apply *Rule* 3.68 of the *Alberta Rules of Court*, Alta Reg 124/2010 [the *Rules*, or individually a *Rule*] to strike out abusive and hopeless filings by a paper-only documentary process which does not involve any court hearings.

[5] In this instance CPN7 was initiated by one of the Defendants, Alberta Health Services [AHS]. By the time AHS took that step, Masters Prowse and Mason had already struck out several Defendants: ***Unrau #1***, at para 3.

[6] Since this was the first occasion where CPN7 had been applied in an Alberta Court, I detailed the procedure and test that would be applied to review Unrau's remaining Statement of Claim: ***Unrau #1***, at paras 7-25. In brief, where a judge concludes that a filing *prima facie* exhibits defects so that the proceeding has no valid basis, and/or is an abuse of court processes, then the Court may apply CPN7. CPN7 is an "extremely blunt instrument", and is not intended for "close calls", but instead for "clearer cases of abuse": ***Unrau #1***, at paras 22, 24. Where that threshold is met, the Court instructs the party who filed the apparently abusive document that they have two weeks to submit up to ten pages of written material to rebut that conclusion.

[7] Unrau's Statement of Claim reads, *in toto*:

Statement of facts relied on:

1. Defamed, libeled, slandered, smeared, prejudiced, wrongfully imprisoned, theft, loss of gainful lawful employment
2. Abuse of process, malicious prosecution, obstruction of justice
3. Continuous obstruction to accredit a long track record - academic, clinical, exams, CE et al.
4. theft of 30 yrs IP - copy, pasted, hacked, keystrokes monitored

Remedy sought

5. Damages, punitive damages, retroactive dental / clinic income,
6. Full accreditation, retroactive licensure, gainful lawful employment
7. apologies, respect, ethical integrity, more open mindedness, amendment of boards' rules et al
8. $5 million + damages - writing credit, respect, security (from hackers et al)

[8] In ***Unrau #1*** I concluded that Unrau's Statement of Claim had two chief defects.

[9] First, it was *prima facie* only composed of "bald allegations" (***GH v Alcock***, 2013 ABCA 24 at para 58 [***GH***]) that provide no explanation of the basis of the claim. Not one of the eleven Defendants is named anywhere in the "Statement of facts relied on". The Federal Court in ***kisikawpimootewin v Canada***, 2004 FC 1426 at paras 8-9, 134 ACWS (3d) 396 [***kisikawpimootewin***] concluded that, in circumstances such as these, where the Court and responding parties are unable make a meaningful response to a vague, incomplete, or gibberish pleading, then that pleading was vexatious and an abuse of the Court's processes. That is the first basis on which I indicated to Unrau that the Statement of Claim appeared to be futile and abusive: ***Unrau #1***, at para 33.

[10] Second, I concluded, at paras 34-36, that the Unrau Statement of Claim exhibited four indicia of abusive litigation:

1. global but unsubstantiated complaints of conspiratorial and abusive conduct;
2. apparently unwarranted relief claims, such as the $5 million in damages, and "punitive damages";
3. impossible claims, such as "retroactive licensure", "more open mindedness"; and "respect"; and
4. the Statement of Claim failed to adequately identify the alleged defendants.

[11] Per CPN7, Unrau was given 14 days to make a reply of up to ten pages to indicate why his lawsuit was valid.

II. UNRAU'S STATEMENT OF CLAIM IS STRUCK OUT

[12] Unrau made no such reply. Therefore, per CPN7, para 3(c), Unrau's Statement of Claim was struck out.

[13] The Court prepared and filed the Order to strike out the Unrau Statement of Claim, and informed the parties by letter that it would in due course issue a written decision in relation to this step.

III. CONTINUING UNRAU'S INTERIM COURT ACCESS RESTRICTIONS

[14] That is this Decision. Unrau's Statement of Claim is now struck out, but there remains one additional question. In ***Unrau #1***, at para 39, and per CPN7, para 7(a), I imposed interim court access restrictions on Unrau, which requires that he obtain leave prior to initiating or continuing any litigation in the Alberta Courts.

[15] The outstanding issue is whether or not Unrau's interim court access order should be made permanent, and, if so, what is the procedure that the Court should follow to evaluate that? Usually, the Court investigates whether a person should be subject to indefinite court access restrictions by what is sometimes called a vexatious litigant order using a two-step process, first implemented in ***Hok v Alberta***, 2016 ABQB 651 at paras 2-3, 273 ACWS (3d) 533, leave denied 2017 ABCA 63, leave to appeal to SCC refused, 37624 (2 November 2017) [***Hok v Alberta #2***].

[16] In the first step the Court issues a decision that identifies why the Court has concluded that court access restrictions are potentially warranted, typically called "indicia of abusive litigation". These "indicia" are fingerprint characteristics of litigation misconduct that predict future abuse of the Court's processes: ***Chutskoff v Bonora***, 2014 ABQB 389 at para 92, 590 AR 288, aff'd 2014 ABCA 444, 588 AR 303 [***Chutskoff #1***]; ***Biley v Sherwood Ford Sales Limited***, 2019 ABQB 95 at para 47, leave to appeal refused (27 February 2019) (Alta CA) [***Biley v Sherwood***]. The candidate for court access restrictions is given an opportunity to respond, usually in writing, and then the Court issues a second decision which concludes whether prospective court access restrictions are, or are not, warranted.

[17] One significant factor distinguishes the situation with Unrau and most ***Hok v Alberta #2*** processes. In ***Unrau #1*** I found, *prima facie*, that Unrau's Statement of Claim was an improper action, vexatious, and that Unrau exhibited multiple indicia of abusive litigation. Unrau had an opportunity to respond to those findings. He did nothing. Unrau at that point was also aware that his litigation conduct had led the Court to impose global interim court access restrictions. Unrau still made no response.

[18] The question, then, is does this Court have a legal obligation to, in some form or another, issue a further court decision that indicates Unrau might be subject to indefinite court access restrictions, and seek submissions or conduct a hearing on that question? Or may I immediately move to impose indefinite court access restrictions, if I conclude that is an appropriate step for this particular litigant?

[19] This is the core issue now before the Court. However, to get to that point, I believe it is both necessary and appropriate to review the jurisprudence on which this Court has, since 2016, evaluated and implemented court access restrictions in relation to abusive litigation. I take this additional step for three reasons:

1. In 2016, with ***Hok v Alberta #2***, this Court broadly shifted its approach to control of abusive litigants by engaging its inherent jurisdiction to restrict abuse of the court via a prospective, threat- and harm-based evaluation of the abusive litigant, rather than the punitive, retrospective evaluation based on "persistent" misconduct

authorized under *Judicature Act*, RSA 2000, c J-2, ss 23-23.1. There has been much additional development in the law since that point. Now, several years later, this is a useful opportunity to review and summarize the procedures and techniques developed by this Court, synthesize relevant legal principles, and provide guidance to litigants and lawyers on when prospective court access restrictions are, or are not, appropriate.

2. The past decade has provided the Court a much improved understanding of the nature of abusive litigants, their activities, and their motivations. This population is not homogeneous. As the stratum of court that most directly interacts with these individuals, this Court and other trial courts have special expertise and knowledge about this subject. A survey of what has been learned, what works, and what does not, is therefore helpful.

3. Last, this global review provides a solid foundation for the question on whether this Court can and should immediately impose an indefinite gatekeeping court access restriction scheme on Unrau, in anticipation of his potential for future litigation misconduct.

IV. COURT ACCESS RESTRICTIONS - A REVIEW

[20] As I have previously indicated, during the past decade, this Court's approach to manage problematic litigants and litigation has undergone substantial evolution and re-orientation. That re-orientation has many facets, but all have two central organizing objectives. First, legitimate litigants must have the ability to obtain the remedies to which they are entitled to under Canadian law. Second, abusive litigants and litigation must be addressed at the first opportunity, using fair and proportionate steps that minimize harm to Alberta Courts and innocent litigants.

[21] One early step forward to that objective was the identification and description of a special category of abusive litigants who attempt to impose on courts a spurious false law, or "pseudolaw" - "Organized Pseudolegal Commercial Arguments" [OPCA] - concepts which are marketed as commercial products by "gurus" who promise "money for nothing", "get out of jail free cards", and other dubious, illusory, benefits. Identification of the OPCA phenomenon led to my decision in ***Meads v Meads***, 2012 ABQB 571, 543 AR 215 [***Meads***], a comprehensive response to this class of abusive litigation, which instructed immediate response to these false, non-law, misconceptions so as to minimize harm to all involved, including the abusive OPCA litigants themselves.

[22] A second facet of this Court's response to OPCA litigation was a 2013 "OPCA Document Master Order", that required that Court Clerks refuse to file documents which exhibit unique but meaningless characteristic OPCA 'fingerprint' formal defects, such as bloody thumbprints, postage stamps, strange name structures, and so on. This simple procedure has proven extremely effective: ***Gauthier (Re)***, 2017 ABQB 555 at paras 3-8, 87 CPC (7th) 348, aff'd 2018 ABCA 14 [***Gauthier (Re) #1***]. On January 21, 2019, Chief Justice Moreau issued an updated Alberta-wide Master Order to better manage these defective and abusive filings.

[23] This Court has also implemented several new procedures to intercept and evaluate potentially abusive filings by a document-based "show cause" procedure.

[24] The first mechanism of this type was the Accelerated *Habeas Corpus* Review Procedure (***Latham v Her Majesty the Queen***, 2018 ABQB 69, 72 Alta LR (6th) 357 [***Latham #1***]), which diverted apparently futile or abusive *habeas corpus* applications to a document-based *Rule* 3.68 analysis. The Accelerated *Habeas Corpus* Review Procedure was implemented in response to a dramatic post-2014 increase in hopeless *habeas corpus* applications filed by self-represented litigant [SRL] inmates located in Correctional Service Canada institutions. Those applications inflicted substantial harm on the Court's function and pre-empted valid litigation: ***Ewanchuk v Canada (Attorney General)***, 2017 ABQB 237 at paras 170-187, 54 Alta LR (6th) 135, appeal abandoned, Edmonton 1603-0287AC (Alta CA) [***Ewanchuk***]. It later emerged that the numerous futile *habeas corpus* applications were, at least in part, the products of a number of "*habeas corpus* entrepreneurs", inmates who prepared these materials, and who even tried to represent their fellow prisoners, for profit: ***Lee v Canada (Attorney General)***, 2018 ABQB 40 at paras 205-239, 403 CRR (2d) 194 [***Lee v Canada #1***]; ***Lee v Canada (Attorney General)***, 2018 ABQB 464 at paras 49-74 [***Lee v Canada #2***].

[25] Subsequently, the Court issued CPN7, which adapts the Accelerated *Habeas Corpus* Review Procedure for general application to hopeless and abusive civil proceedings: ***Unrau #1***. Importantly, CPN7 instructs court staff to identify candidate bad filings for review by a judge, which promotes early resolution of problematic filings: e.g. ***Bruce v Bowden Institution***, 2018 ABQB 903, action struck 2018 ABQB 970; ***Bissky v Macleod***, 2019 ABQB 127, action struck 2019 ABQB 179; ***Labonte v Alberta Health Services***, 2019 ABQB 41, actions struck 2019 ABQB 92 [***Labonte #1***].

[26] In addition, this Court has substantially revised its approach to abusive litigation, and what are sometimes called "vexatious litigants". The keystone is a flexible, fair, and proportionate outcome. As I will subsequently review, sometimes this new approach meant the Court responds quickly, for example putting in place interim gatekeeping steps while a potentially problematic litigant is evaluated. Abusive litigants, who are usually SRLs, need to be clearly informed concerning the limits on their court activities, and the procedures in place to enable future access to engage in legitimate litigation. That requires detailed court orders, and avoids ambiguous gatekeeping limits and instructions.

[27] But the most important shift in the Court's reorientation around abusive litigation is to approach court access gatekeeping functions as a prospective, purposive, exercise. In the past there has been a tendency to target abusive litigants by their *intent*. They are bad actors, "vexatious", out to harm and "vex" others. "Vexatious litigants" should be punished for that, and their access to courts restricted in response to their misconduct. However, the truth has proven more complicated and nuanced, and our modern understanding of problematic litigation is not so much focussed on litigant *intent* and *causes*, but rather its *effects*. *Problematic litigation misuses court resources*. When that is predicted, *then it is time for the court to intervene*.

[28] The usual tools to manage problematic litigation are what I will refer to, collectively, as "court access restrictions". These are usually filtering or gatekeeping processes, where the Court screens existing and proposed litigation to evaluate its potential merit, or lack there-of. The objective of court access restrictions is not to *exclude illegitimate litigants* from the court, but instead to *minimize abusive litigation*. This benefits everyone. An often overlooked fact is that abusive litigation usually harms everyone involved, *including the abusive litigant*. These are "no win" situations.

A. The Modern Civil Litigation Milieu

[29] Understanding the appropriate approach to managing problematic litigants requires looking outside that specific subject and to a broader overview of the state of civil litigation in Canada. Succinctly, there are very big problems.

[30] First, it is commonly recognized that many Canadian courts are struggling to discharge their statutory and constitutional obligations. If there ever was a point where there were plentiful resources to accommodate the needs of all court users, that time has long since past. I agree with Justice Stratas, who recently in ***Fabrikant v Canada***, 2018 FCA 224 at para 25 observed:

> Most certainly there is a resource issue, even at the best of times ... And the best of times is not now. The legal complement of the Court has fallen behind Canada's population growth. Sprawling, multifarious cases with complexity as great as this Court has ever seen now vie for space in an already full, difficult docket. ... the resource issue remains pressing, impairing litigants' access to timely justice.

[31] Similarly, in ***Bhamjee v Forsdick (No 2)***, [2003] EWCA Civ 1113 (UK CA) [***Bhamjee***], the UK Court of Appeal observed court resources are limited, and worthless litigation is an attack on those institutions' most basic operations. This issue is not simply a nuisance, and is more than merely an unfair imposition on opposing parties. Instead (paras 8, 54):

> In recent years the courts have become more conscious of the extent to which vexatious litigation represents a drain on the resources of the court itself, which of necessity are not infinite. ... Today it is also the resources of the courts themselves that require protection. [Emphasis added.]

[32] In the case of criminal litigation, prosecutions of serious criminal offenses are being struck out because these matters take too long to reach and complete trial. Limited court and judicial resources are one factor that has contributed to these failures of the justice apparatus: ***R v Jordan***, 2016 SCC 27 at paras 40-41, 116-117, [2016] 1 SCR 631 [***Jordan***].

[33] Another measure of inadequate and stressed court resources is how long a person must wait for a trial or hearing. The delays to access a judge of this Court are troubling. For example, as of November 2018, in this Court, parties who are fully ready to immediately proceed to a trial of over five days must wait three years, four months to have their matter heard in Calgary, and two years, ten months in Edmonton. "Justice delayed is justice denied" should not be just a trite slogan, but a true measure of the harm which results when legal disputes remain unresolved and fester. These delays injure not only the involved parties, but public confidence in the court apparatus as a whole.

[34] A second complex factor is the entry of large numbers of SRLs into Canadian courts. The increasingly common appearance of SRLs has multiple causes, but the expense of legal representation and increased litigation complexity are without any doubt major contributing factors. This is understandable. Many people simply cannot afford to pay lawyers what lawyers demand, particularly where litigation is ongoing, which is common in family subject litigation. As Justice Karakatsanis observed in ***Hryniak v Mauldin***, 2014 SCC 7 at para 1, [2014] 1 SCR 87 [***Hryniak***]:

> … Trials have become increasingly expensive and protracted. Most Canadians cannot afford to sue when they are wronged or defend themselves when they are sued, and cannot afford to go to trial. …

[35] Any trial court judge will tell you that a matter which involves one or more SRLs will typically consume more court resources and courtroom time. *This is not the SRLs' fault.* They try to operate in a complex, foreign apparatus. Most SRLs obviously make their best efforts to work within this alien, and sometimes counterintuitive system, filled with arcane terminology and unwritten principles. They attempt to follow court rules and judicial instructions, but that is simply not always that easy.

[36] In ***Pintea v Johns***, 2017 SCC 23, [2017] 1 SCR 470 [***Pintea***], the Supreme Court of Canada endorsed the Canadian Judicial Council *Statement of Principles on Self-represented Litigants and Accused Persons (2006)* [*SRL Statement*], though those guidelines were frequently referenced by lower courts prior to that. The *SRL Statement* stresses that judges and court personnel have an obligation to facilitate SRL access to meaningful review and resolution of their disputes:

> Judges, the courts and other participants in the justice system have a responsibility to promote access to the justice system for all persons on an equal basis, regardless of representation.

[37] The *SRL Statement* directs judges to assist SRLs and to promote closer management of their litigation. That is not new: ***R v Phillips***, 2003 ABCA 4 at paras 16-28, 320 AR 172, aff'd 2003 SCC 57, 339 AR 50. However, as Thomas J observed in ***1985 Sawridge Trust v Alberta (Public Trustee)***, 2017 ABQB 530 at paras 44-45, 61 Alta LR (6th) 324 [***Sawridge #7***], one new consequence of the *SRL Statement* being defined as a mandatory guide for Canadian courts is that the rules of evidence and procedure no longer apply equally to everyone who appears in Canadian courts. SRLs get preferred, special treatment on evidence and procedural matters.

[38] The *SRL Statement* is not, however, a unilateral statement of rights and obligations. SRLs, too, have responsibilities. They are expected to familiarize themselves with the law and legal procedure, to prepare their own cases, and, importantly for the purposes of this decision:

> Self-represented persons are required to be respectful of the court process and the officials within it. Vexatious litigants will not be permitted to abuse the process. [Emphasis added.]

[39] The *SRL Statement* explicitly confirms that Canadian courts may take steps to manage abusive litigation:

> 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. [Emphasis added.]

[40] But who are these "vexatious or abusive litigants"? What characteristics define them, or make them different from other SRLs? What kinds of controls may a court legitimately apply to "vexatious or abusive litigants"? The remainder of this judgment explores those questions.

1. Diverse and Multi-Faceted Abusive Litigants

[41] One fact that is now clear is that abusive litigants are a diverse collection. In some cases mental health issues are the foundation for their litigation. Other abusive litigants are anti-authority revolutionaries who claim their secret but superior law permits them to overturn the conventional order, and obtain special advantages. Some abusive litigants are motivated by profit, and appear in court and misuse its processes to obtain a monetary benefit.

2. Lawyers Involved in Abusive Litigation

[42] An additional important point is not all abusive litigants are SRLs. Some lawyers have "gone rogue", arguing pseudolaw, which harms themselves and their clients: Donald J Netolitzky, "Lawyers and Court Representation of Organized Pseudolegal Commercial Argument [OPCA] Litigants in Canada" 51(2) UBC L Rev 419 at 460-485 [Netolitzky, "Lawyers"]. Other lawyers represent persons who are abusive litigants and require court intervention and sanction: e.g. ***Sawridge #7***; ***Hill v Bundon***, 2018 ABQB 506 [***Hill #1***]; ***Stout v Track***, 2013 ABQB 751, 95 Alta LR (5th) 32, aff'd 2015 ABCA 10, 599 AR 98 [***Stout***]; ***Lymer (Re)***, 2018 ABQB 859 [***Lymer (Re) #3***]. As Justice Thomas observed in ***Sawridge #7***, at para 74, this problematic representation "digs a grave for two".

3. The "Culture Shift" and the New Litigation Milieu

[43] Canadian trial courts' escalating dysfunction has also led the Supreme Court of Canada to instruct trial courts that they must re-orient civil and criminal litigation from a principally rights-based structure that emphasizes strict formality to a more cooperative, proportionate approach. In ***Hryniak***, at para 2, Karakatsanis J called this a "culture shift" to simplify procedures, adopt proportionate procedures and measures that address particular needs, so as to obtain fair, timely, and just results that "... balance procedure and access ... to reflect modern reality ...". The "culture shift" recognizes that "undue process" [emphasis added] results in "unnecessary expense and delay", and "... can prevent the fair and just resolution of disputes." [emphasis added]: para 24.

[44] Similarly, in ***Royal Bank of Canada v Trang***, 2016 SCC 50 at para 30, [2016] 2 SCR 412 [***Trang***], Côté J endorsed a criticism made at trial of an "overly formalistic" approach to litigation: "... A legal system which is unnecessarily complex and rule-focused is antithetical to access to justice. ...". Justice Côté then continued to observe that court rules should take into account the full spectrum of litigants, which necessarily includes SRLs, and their means and resources: "... Ensuring access to justice requires paying attention to the plight of all litigants". [Emphasis added.]

[45] Justice Karakatsanis in ***Hryniak***, at para 29, continued to observe that the nature of a complaint affects the resources that should properly be dedicated to it:

> There is, of course, always some tension between accessibility and the truth-seeking function but, much as one would not expect a jury trial over a contested parking ticket, the procedures used to adjudicate civil disputes must fit the nature of the claim. If the process is disproportionate to the nature of the dispute and the interests involved, then it will not achieve a fair and just result.

Put another way, not all litigation has equal inherent value.

[46] Naturally, abusive litigation has no positive value at all, but instead its existence subverts public confidence in the courts and judicial processes, particularly when courts are starved for resources, and ordinary litigants are queued up, waiting years for courtroom time and the opportunity to (hopefully) resolve their disputes.

[47] Subsequently, the Supreme Court of Canada in ***Jordan*** and ***R v Cody***, 2017 SCC 31, [2017] 1 SCR 659 [***Cody***], expanded its instruction that criminal law, too, must re-orient to a functional, proportionate approach, and defeat the "culture of delay and complacency" that subverts confidence in the justice system itself:

> ... Unnecessary procedures and adjournments, inefficient practices, and inadequate institutional resources are accepted as the norm and give rise to ever-increasing delay. This culture of delay "causes great harm to public confidence in the justice system" ... It "rewards the wrong behaviour, frustrates the well-intentioned, makes frequent users of the system cynical and disillusioned, and frustrates the rehabilitative goals of the system". ...
>
> (***Jordan***, at para 40).

[48] Overcoming the "culture of delay and complacency" is an objective and responsibility for *all* court participants: ***Jordan***, at paras 117, 137-141; ***Cody***, at paras 36, 38, see also ***Groia v Law Society of Upper Canada***, 2018 SCC 27 at para 230, [2018] 1 SCR 772 (Karakatsanis, Gascon, Rowe JJ in dissent).

[49] The Alberta Court of Appeal has stressed this "culture shift" is a clear break with past approaches to litigation:

> ... The issue cannot be resolved by seeing which "school of thought" has the most support in the case law. Historical analyses are not determinative given the call for a "shift in culture". ...
>
> (***Weir-Jones Technical Services Incorporated v Purolator Courier Ltd***, 2019 ABCA 49 at para 23) [***Weir-Jones***]).

[50] There is no right for a litigant to demand trial, "the most expensive modality of dispute resolution": ***Weir-Jones***, at para 42. Other mechanisms, such as summary judgment, are a fair and proportionate means to resolve legal disputes.

[51] The Alberta Legislature has also directed that function should trump pure formality, and strict, but ineffectual, demands for legal rights. When the legislature, in 2010, enacted the broadly revised *Alberta Rules of Court*, Alta Reg 124/2010, it too explicitly indicated that the "culture shift" was critical to the new direction for civil litigation. "The purpose of these rules is to provide a means by which claims can be fairly and justly resolved in or by a court process in a timely and cost-effective way.": *Rule* 1.2(1). *Rule* 1.2(3) further requires that parties must identify true issues in dispute, and only take steps that resolve litigation and respect court resources.

[52] SRLs are an important part of this new approach to civil litigation. The "culture shift" is a global re-orientation of litigation in Canada. It applies to "all court proceedings", but "especially those involving self-represented litigants": ***Trial Lawyers Association of British Columbia v British Columbia (Attorney General)***, 2014 SCC 59 at para 110, [2014] 3 SCR 31 [***Trial Lawyers***].

[53] Unsurprisingly, many courts have concluded effective management of abusive litigation by fair and proportionate steps is a critical aspect of the "culture shift": ***Chutskoff v Bonora***, 2014 ABQB 628 at para 31, 598 AR 55, aff'd 2014 ABCA 444, 588 AR 303 [***Chutskoff #2***]; ***Hok v Alberta #2***, at para 29; ***Tupper v Nova Scotia (Attorney General)***, 2015 NSCA 92 at paras 46-49, 390 DLR (4th) 651, leave to appeal to SCC refused, 38030 (4 October 2018) [***Tupper***]; ***Lelond v The Park West School Division***, 2015 MBCA 116 at paras 79-84, 323 Man R (2d) 188 [***Lelond***]; ***Olumide v Canada***, 2017 FCA 42 at para 45, [2018] 2 FCR 328 [***Olumide v Canada***]; ***Bossé v Immeubles Robo Ltée***, 2018 CanLII 71340 at para 37 (NBCA) [***Bossé v Immeubles***]; ***Grenier c Procureure générale du Québec***, 2018 QCCA 266 at para 34, leave to appeal to SCC refused, 38155 (21 February 2019) [***Grenier***].

[54] An under-appreciated aspect of abusive litigation is that its effect 'cascades', and inflicts unusual harm on court processes. That brings up a second important fact. Abusive litigation has a disproportionate negative effect on court function. Again, Justice Stratas has written eloquently on this point:

> ... Federal Courts are community property that exists to serve everyone, not a private resource that can [be] commandeered in damaging ways to advance the interests of one.
>
> ... As community property, courts allow unrestricted access by default: anyone with standing can start a proceeding. <u>But those who misuse unrestricted access in a damaging way must be restrained</u>. In this way, courts are no different from other community properties like public parks, libraries, community halls and museums.
>
> ... The Federal Courts have finite resources that cannot be squandered. <u>Every moment devoted to a vexatious litigant is a moment unavailable to a deserving litigant. The unrestricted access to courts by those whose access should be restricted affects the access of others who need and deserve it</u>. Inaction on the former damages the latter.
>
> ... This isn't just a zero-sum game where a single vexatious litigant injures a single innocent litigant. <u>A single vexatious litigant gobbles up scarce judicial and registry resources, injuring tens or more innocent litigants</u>. The injury shows itself in many ways: to name a few, <u>a reduced ability</u> on the part of the registry <u>to assist well-intentioned but needy self-represented litigants</u>, a reduced ability of the court to manage proceedings needing management, and delays for all litigants in getting hearings, directions, orders, judgments and reasons.
>
> [Emphasis added.]
>
> (***Olumide v Canada***, at paras 17-20).

[55] Though the rule should be obvious, McLachlin CJC has explicitly declared *no one has a constitutional right to engage in abusive litigation*: ***Trial Lawyers***, at para 47. That justifies courts taking steps to manage abusive litigation, since "... measures that deter [frivolous or vexatious claims] may actually increase efficiency and overall access to justice."

[56] The appellate courts' direction to trial courts to implement the "culture shift", the critical resource stresses experienced by Canadian courts, a rise in abusive litigation, and the new and expanding need to provide assistance and meaningful litigation solutions to self-represented persons all may be grouped under an umbrella: "access to justice". While this term is, at a

minimum, amorphous, the leading judges of this nation have repeatedly warned that, in relation to "access to justice", Canada is in a crisis. In her speech "The Legal Profession in the 21st Century" before the 2015 Canadian Bar Association meeting, Chief Justice McLachin stressed:

> The sad truth is that around the world, the legal profession and the courts are often not fulfilling the expectations of consumers of legal services. Legal systems everywhere are experiencing an access to justice crisis that cries out for innovative solutions. Legal aid funding and coverage is not available for most people and problems, and the cost of legal services and length of proceedings is steadily increasing.

[57] Chief Justice Wagner has subsequently reaffirmed this is a critical issue for the legal apparatus in Canada: Wagner CJC, "Remarks of the Right Honourable Richard Wagner", Official Welcome Ceremony for the New Chief Justice (Ottawa, 5 February 2018).

[58] Boring down to the role of court access restrictions in the post-"culture shift" milieu, and the crisis of access to justice, there are several critical points.

[59] First, the courts must stay open and accessible to all, *including problematic litigants*: ***Trial Lawyers***. However, the negative effects of abusive litigation degrade the function of these institutions as a common community resource: ***Olumide v Canada***; ***Bhamjee***; ***Fabrikant v Canada***, 2018 FCA 206.

[60] The Supreme Court of Canada and *SRL Statement* confirm that steps to minimize abusive litigation are a valid and necessary exercise of court authority.

[61] Public confidence in the court apparatus erodes when people cannot obtain meaningful remedies in a timely manner. Similarly, an informed member of the public will be outraged that unmeritorious, abusive litigation consumes public resources, denies valid complaints, and impedes access to justice. Court tolerance of abusive litigation is inconsistent with both the "culture shift" and the principles of fundamental justice.

[62] Combined, that means that court access restrictions best ensure access to justice when those steps have a gatekeeping function. Potentially valid litigation by persons working within the court system, per their obligations, should be encouraged, promoted, and assisted. Futile litigation, and litigation conducted in an abusive manner, should be terminated, where that is a fair and proportionate step. As Thomas J observed in ***Sawridge #7***, at para 120:

> ... The door of "access to justice" swings open or drops like a portcullis depending on how the courts and their resources are used. ...

[63] Painful experience has shown some individuals repeatedly, or predictably, misuse court resources. Given that fact, access to justice is promoted when courts screen the ongoing activities of persons who are plausible candidates to misuse court procedures in the future.

B. Language Matters

[64] Judges and those in legal professions are no doubt familiar with three terms that may plausibly be called "the Trinity of Bad Litigation": "frivolous", "vexatious", and "an abuse of process". These terms are what usually identify bad litigation that merits court intervention, for example: *Alberta Rules* 1.4(2)(b), 3.68, 5.3, 5.19, 14.74, 14.92; ***Anthony M McWilliams Designs Ltd v Fowler***, 2004 ABCA 370, 357 AR 284; ***Decock v Alberta***, 2000 ABCA 122, 186 DLR (4th) 265, leave to appeal to SCC discontinued, 27980 (10 September 2001); ***Dykun v Odishaw***,

2001 ABCA 204, 286 AR 392, leave to appeal to SCC refused, 28784 (31 January 2002) [***Dykun #2***].

[65] In my opinion, two of the Trinity are not ideal to describe abusive litigation, and the litigants who engage in abusive litigation.

[66] *Black's Law Dictionary*, 9th ed, provides these definitions:

> **abuse of process**. The improper and tortious use of a legitimately issued court process to obtain a result that is either unlawful or beyond the process's scope. ...
>
> **abusive** ... *adj*. 1. Characterized by wrongful or improper use <abusive discovery tactics>. ...
>
> **frivolous**, *adj*. Lacking a legal basis or legal merit; not serious; not reasonably purposeful <a frivolous claim>
>
> **vexatious** ... adj. (Of conduct) without reasonable or probable cause or excuse; harassing; annoying

[67] These definitions in many senses overlap. For example, an action that is "without reasonable or probable cause" (vexatious), is also one "lacking a legal basis or legal merit" (frivolous).

[68] These descriptors are often used in combination, or with descriptions of activities that could be identified by those words. For example, in *Rule* 3.68, the authority to strike out a pleading may be invoked where the pleading:

1. discloses "no reasonable claim or defence" (potentially meaning "vexatious") (*Rule* 3.68(2)(b)),
2. is "frivolous, irrelevant or improper" (*Rule* 3.68(2)(c)), or
3. is "an abuse of process" (*Rule* 3.68(2)(d)).

Similarly, *Rule* 14.74 (for the Court of Appeal) authorizes steps to terminate proceedings that are "frivolous, vexatious, without merit or improper, or ... an abuse of process".

[69] Jurisprudence indicates that, at a minimum, these terms are interlinked. In ***Mcmeekin v Alberta (Attorney General)***, 2012 ABQB 144 at para 11, 537 AR 136, Marceau J concluded that "vexatious" is "broadly synonymous with impropriety and abuse of process". McLachlin J (as she then was) expressly recognized the interrelationship between vexatious and abusive litigation in ***R v Scott***, [1990] 3 SCR 979 at 1007, 116 NR 361:

> ... abuse of process may be established where: (1) the proceedings are oppressive or vexatious; and, (2) violate the fundamental principles of justice underlying the community's sense of fair play and decency. The concepts of oppressiveness and vexatiousness underline the interest of the accused in a fair trial. ...

[70] Similarly, I H Jacob, "The Inherent Jurisdiction of the Court" (1970) 23:1 Current Legal Problems 23 at 41 [Jacob, "Inherent Jurisdiction"] observed that "frivolous" and "vexatious" are "... used interchangeably with "abuse of the process of the court" ...".

[71] More recently, Chief Justice McLachlin in ***Trial Lawyers***, at paras 45-48, observed that barriers which impede frivolous or vexatious litigation are *Charter*-compliant as mechanisms to increase court efficiency and access to justice. That stops abuse of process.

[72] "Vexatious litigant" is the usual term used in judgments and legal authorities to identify persons whose litigation activities have been restricted by court intervention, although some writers use "querulous". The latter has a specific technical psychiatric meaning: Paul E Mullen & Grant Lester, "Vexatious Litigants and Unusually Persistent Complainants and Petitioners: From Querulous Paranoia to Querulous Behaviour" (2006) 24 Behav Sci Law 333; Grant Lester *et al*, "Unusual persistent complainants" (2004) 184 British Journal of Psychiatry 352.

[73] I suggest that of the Trinity, the most useful term is "abusive", and that "vexatious" and "frivolous" are better avoided. There are two reasons for this.

[74] First, the issue with "frivolous" and "vexatious" is each has an implicit and/or definition meaning that indicates *intent*. Frivolous is for no good reason or purpose. Vexatious is to cause harm, harass, or annoy. Wrongful *intent*, either 'for no good reason', or 'for bad reason', is a weak approach to establish a threshold for whether or not a person's court activity may warrant court intervention. An intent-based approach does not take account of what happens to the court as a *consequence* of this litigation misconduct.

[75] Second, now that we better understand abusive litigants, it has become very obvious that many, if not most, abusive litigants do not see their litigation as either "frivolous" or "vexatious". Instead, the opposite is true. From the perspective of many abusive litigants, their court actions are a central, if not *the very defining*, focus of their lives. Further, many abusive litigants actually conduct their litigation in good faith. They truly believe that their actions are correct, justified, and even necessary. There are different reasons why that may (or may not) be the case, but there is little doubt to me that many of the abusive litigants I have encountered are, in this critical sense, sincere.

[76] I am not the first to make that observation. For example, in ***Green v University of Winnipeg***, 2018 MBCA 137 at para 81 [***Green***], Steel JA observed:

> ... I understand that to [the abusive litigant], these are not frivolous or vexatious claims. As he put it in argument, ... "they deprived me of my most cherished desire". Yes, they did and I understand his deep disappointment, but they did so according to the discretion given to them, within the rule of law and confirmed by many court decisions. We can't always get what we want. ...

[77] Similarly, Veldhuis JA in ***Clark v Pezzente***, 2017 ABCA 403 at para 11, leave refused 2018 ABCA 76, leave to appeal to SCC refused, 38161 (24 January 2019) [***Clark #1***] concluded:

> There is no doubt that Mr. Clark sincerely believes he has been wronged by the respondents. But the sincerity of his belief does not entitle him to pursue redress through the courts indefinitely – at considerable expense to the respondents – when his claims have already been considered and dismissed in accordance with the law.

[78] This illustrates why terms like "frivolous" and "vexatious" are misleading. They imply bad or meritless *intent*. Should there be a different approach to the "innocent but misguided" problem litigant? I do not think so. Both subtypes cause harm. That injury to the courts and other parties cannot be tolerated.

[79] So that shifts this investigation to what I conclude is the appropriate focus, not *what the abusive litigant intends*, but rather *what is the effect of their conduct*. Justice Shelley in ***Kavanagh v Kavanagh***, 2016 ABQB 107 at para 64, [2016] AWLD 1516 [***Kavanagh***] made that

important observation. What identifies an appropriate target for judicial gatekeeping functions is the *effect of their litigation*. The characteristic which unites people who are subject to court access restrictions is their actions mean court processes are abused or misused:

> ... All misuse legal procedure in a manner that has no valid purpose, and, as a consequence, causes harm to involved litigants and the waste of court resources. While non-legal dictionary definitions of "vexatious" focus on an act being wrongful, harassing, malicious, or intended to annoy, the legal meaning is this word is broader. A vexatious proceeding is one that in effect abuses or misuses legal processes. [Emphasis added.]

[80] Similarly, in ***KE v CSM***, 2016 ABQB 342, 268 ACWS (3d) 135 [***KE***], Browne J concluded at para 15 that "[w]hat triggers court intervention is an abuse of its processes, and vexatious litigation is, by definition, abusive. ...".

[81] It seems to me that "abusive" is a better, more descriptive, and functional adjective than "vexatious". It relates to the effect, "wrong or improper", rather than intent. Throughout these reasons I will therefore usually refer to problematic litigation as "abusive", and test whether litigation merits court response by its effect.

[82] This shift in language is not merely a question of semantics, because this choice of terminology leads to a fundamentally different perspective on what court access restrictions should do. These court-imposed steps control misuse of the court and its processes, rather than to interdict persons who are bad actors and seek to harm others.

[83] Nor is this the first occasion where legal language inherited from an earlier period distorts perspectives. For example, in the family law context, the law has moved away from conflict-laden terms like "custody" and "access", and instead adopted neutral or constructive language, such as "guardianship" and "parenting time". As former Justice Marguerite Trussler observed in "Managing High Conflict Family Law Cases for the Sake of the Children" (2008) 86:3 Canadian Bar Review 515 at 525, this choice of language "... is of great benefit in high conflict cases."

[84] Thus, throughout this Decision, I will not generally use the terms "frivolous" or "vexatious" to identify problematic litigation that potentially warrants court intervention. "Abusive" is the better label. Nevertheless, the Court has inherited the term "vexatious" from earlier jurisprudence and legislation. I therefore, for clarity, will continue to use that word in the following specific manner:

- "Vexatious litigation" is a legal proceeding where the lack of merit and/or bad conduct of the action warrants the action being terminated.
- "Vexatious litigant order" is an order that imposes prospective court access restrictions on future court activity based on anticipated future litigation misconduct.
- "Vexatious litigant" is a person subject to a vexatious litigant order.

I will later comment further on the scope of a "vexatious litigant order", to better clarify and define the limit of that category.

[85] My use of these phrases which include the word "vexatious" does not mean I think that is the preferred way to identify problematic litigation that warrants court intervention. "Vexatious" is, however, the word that the court has inherited. It would be better if legislatures and appellate

courts chose other alternatives which describe the targeted litigation in a *functional* manner, but, to ensure this decision is clear, I will nevertheless use "vexatious" in these three specific contexts.

C. Who Are Abusive Litigants?

[86] Abusive litigants are nothing new. The UK courts, at least as early as the 19th century, imposed measures to respond to misuse of the courts. The first Commonwealth legislation to authorize steps to manage abusive litigants was the *Vexatious Actions Act*, 1896 (UK), 59 & 60 Vict, C-51. Its passage was in many ways triggered by a single man, Alexander Chaffer, who filed 48 lawsuits against leading British personalities, politicians, and judges: Michael Taggert, "Alexander Chaffers and the Genesis of the Vexatious Actions Act 1896" (2004) 63(3) Cambridge L J 656.

[87] Historic reports that identify abusive litigants describe persons whose characteristics are very familiar to modern trial court judges. For example, Grant Lester and Simon Smith, in "Inventor, Entrepreneur, Rascal, Crank or Querulent: Australia's Vexatious Litigant Sanction 75 Years On" (2006) 13 Psychiatry, Psychol & L 1, discuss Rupert Frederick Millane, the first Australian to be subject to a vexatious litigant order. An inventor and entrepreneur, Millane began a campaign of litigation when new regulations hampered his bus business. However, it was the demolition of his homemade house constructed with empty petrol tins and concrete that appears to have set off Millane's cascade of 23 actions in just four years that led to him being declared a vexatious litigant in 1930. Millane nevertheless persisted with leave applications and litigation via proxies through the remainder of his life.

[88] Unlike the present, historically this phenomenon appears to have been quite rare. For example, Lester and Smith, at 17, include Australian statistics on the total number of persons in that country subject to vexatious litigant orders by region and period. Between 1930 and 1969 only seven orders were issued. Then the frequency begins to rise, roughly doubling each decade.

[89] That is also the pattern in Canada. In Alberta, during my 28 years on the Bench, abusive litigants have gone from a comparative rarity, to an everyday phenomenon. I will later discuss what might be the reasons for that.

1. Litigation Related to Mental Health

[90] The past decade and the increasing frequency at which the Court has encountered and responded to abusive litigants has made clear that mental health is an important factor for many, *if not most*, abusive litigants.

[91] This should not have come as a surprise, as mental health experts have for some time indicated that was the case. These expert opinions have highlighted an alarming possibility: at least some abusive litigation is the consequence of psychiatric conditions *induced or aggravated by litigation itself*. *Court processes harm people*.

a. The Role of Mental Health in Abusive Litigation

[92] Very little is written about abusive litigants and litigation, and its incidence. One general investigation on the subject was by Quebec Court of Appeal Justice Yves-Marie Morissette: Yves-Marie Morissette, "Querulous or Vexatious Litigants, A Disorder of a Modern Legal System?" (Paper delivered at the Canadian Assocation of Counsel to Employers, Banff AB (26-28 September 2013). Justice Morissette approaches this phenomenon from a dual psychiatric and

legal perspective, noting investigation of abusive ("querulous") litigants shows their court behaviour reflects an obsessive, treatment-resistant, personality disorder where they believe they are right, and everyone who opposes their position is wrong. Typically, these persons are educated middle-aged males who exhibit narcissistic personalities: at 4-5. This phenomenon is triggered by an adverse result, which the abusive litigant will not accept. That leads to litigation which cannot be settled, and then repeats and expands to capture all involved parties. Any concession or compromise simply causes further escalation: at 6. This continues until the abusive court participant is exhausted (at 7), or effectively restricted.

[93] This phenomenon is growing. Justice Morissette collected data from Quebec, England, and Wales that indicated that courts are increasingly making orders that restrict court access to abusive court participants: at 26-28. In Quebec, almost 20% of such orders related to individuals who were already subject to court access restrictions. Justice Morissette observes that means an earlier and more limited court access restriction order failed to control the abuse of court.

[94] The recent 2015 paper by University of Toronto Faculty of Law professors, Gary M. Caplan and Dr. Hy Bloom (Gary M Caplan & Hy Bloom, "Litigants Behaving Badly: Querulousness in Law and Medicine" 2015 44:4 Advocates' Quarterly 411), provides an overview of abusive court participants from both a medical and legal standpoint.

[95] The authors note that the abusive litigation phenomenon is comparatively under-investigated, despite a general consensus that it is on the rise in Commonwealth countries: at 417. Conduct of this kind causes expense and harm to the targets of these litigants, and consumes scarce resources. One interesting fact identified by Caplan and Bloom is that litigation by abusive litigants vs lawyers typically costs four times the amount of other legal complaints: at 417.

[96] Abusive litigation often appears to have a mental health component, and manifests not just in court, but more broadly in interactions with state authorities, agencies, and tribunals. Caplan and Bloom observe that a range of psychiatric conditions are implicated in abusive litigation, though there is disagreement of how this behaviour should be characterized in medical terms. "Querulous paranoia" is the traditional category, but, under the current DSM-5 scheme, persons of this kind are usually placed in the Delusional Disorder, persecutory subtype category: at 421-422. Other vexatious litigants have personality disorders, such as paranoia, narcissism, obsessive-compulsive behaviour, or major mental illnesses: schizophrenia and bipolar disorder: at 427-430, 432-434.

[97] Some persistent litigants are "normal" and may be simply wrapped up in an issue or dispute, or pursue that for altruistic or social reasons. However, Caplan and Bloom observe that these "normal" abusive litigants can be distinguished from those influenced by psychiatric pathologies by the apparent objective of the litigation. Abusive litigants usually focus on personal reward, vindication, or vengeance: at 426.

[98] These authors note that where abusive litigation involves a mental health component then the resulting distorted and maladaptive conduct evolves. Stereotypic "querulous" litigation emerges from an initial disappointing result, then aggravated by "sensitizing traits, events and phenomena", which include a number of mental disorders: 423-424. That leads to an obsessive cascade of escalating disputes. While this population operates on a spectrum of mental illness, they share a common trait: disproportionate overinvestment in legal proceedings that are unlikely to provide the desired result: at 425. These people also appear unable to recognize they will not

likely succeed, and that their activities harm others, lawyers, judges, and the court apparatus itself: at 425. Vexatious litigants usually focus on "vindication and retribution": at 438.

[99] The stereotypic or "true querulous litigant" is a deluded individual, whose condition is difficult to treat or address via psychotherapeutic intervention: at 431. This means that querulous litigation is essentially untreatable. True querulous litigants exhibit a highly stereotypic document style and personal behaviour that is recognized by clinicians and academics who have studied this population: at 431-432. Caplan and Bloom conclude this group probably represents the majority of the "vexatious litigant pool": at 435.

[100] Caplan and Bloom rely heavily on several earlier papers by psychiatrist Grant Lester which examine the characteristics of querulous paranoia. Paul E Mullen & Grant Lester, "Vexatious Litigants and Unusually Persistent Complainants and Petitioners: From Querulous Paranoia to Querulous Behaviour" (2006) 24 Behav Sci Law 333 provides a detailed explanation of querulous paranoia, a highly destructive behavioural disorder. These "unusually persistent complainers and ... indefatigable litigators" have long been the targets of procedures which attempt to curb their misconduct. The authors draw their conclusions in part from an earlier population study of querulous paranoiacs (Grant Lester *et al*, "Unusual persistent complainants" (2004) 184 British Journal of Psychiatry 352), which concludes that the majority of querulous paranoiacs are male, engage in lengthy, persistent complaint behaviour (over four-fold longer), and are three-fold more likely to not resolve their dispute(s). They are far more likely to appear unscheduled in courts, and to demand a different replacement dispute resolution worker. They stereotypically escalate their activities. Over three quarters of this category expanded their complaints to at least one other agency - 40% contacted four or more.

[101] Mullen and Lester note these persistent complainers frame their complaint in a highly distinctive manner. They see their personal struggles as a vindication of broader principles and social rights, and demand heightened public sanction of perceived wrongdoers, including public exposure and humiliation: at 336, 338-340. Those who do not agree with querulous paranoiacs are labelled as enemies and become the latest branches of the perceived conspiracy: at 340, 342. Mullen and Lester observe this drive for exposure, vindication, and retribution is a poor match for modern complaints resolution mechanisms, including courts: at 336.

[102] Querulous individuals also often exhibit unusual and atypical 'fingerprint' characteristics (at 335-336), including frequent, lengthy, and difficult to interpret documentation, and an unusual text style, with exaggerated capitalization, underling, multiple forms of emphasis including exclamation points and other atypical punctuation. Copied and supporting documents are often annotated with marginal notes and highlighting. Another unusual feature of this group is filing of third party and personal endorsements of personal good character and conduct, as well as unrelated documents, particularly court decisions and treaties. Documents prepared by querulous individuals may refer to the author in third person, often misuse technical and legal terms, and feature rhetorical questions.

[103] Another troubling aspect of this subset of litigants is that over half engaged in threats against others, and a significant but small subset threatened to kill themselves if unsatisfied with the treatment of their complaint: at 345. Mullen and Lester observe that persons who attack senior politicians often fall into this category: at 337. Serious violence is preceded by a period of escalating threats: at 345-346. Caplan and Bloom also note this risk of violence from abusive litigants: at 414-415, 432-434.

[104] These individuals, who are under 1% of the complainer population, typically consume 15-30% of all resources of agencies dedicated to responding to public complaints: Mullen and Lester at 335. Their obsessive pursuit of a "vision of justice" also leads to the loss of jobs, friends, and partners: at 335. The stereotypic pattern is that a minor grievance, even if legitimate, becomes an obsessive focus. The complainer perceives his issue as one of general application with himself as a crusader or whistle-blower, and pursues ever escalating steps with an increasing number of actors: at 341. The process is self-destructive, and ultimately leads to paranoia, and much personal harm and chaos: at 335, 338-340. Despite that, querulous paranoiacs remain consistent that success is inevitable, given the rightness of their perspective.

[105] Like Caplan and Bloom, Mullen and Lester conclude what distinguishes querulous paranoiacs from social reformers is the *objective* of the abusive litigation. While both frame issues in a rights-based context, the latter do not focus on personal grievances and demand escalating public retribution, but instead seek a social objective in cooperation with others: at 340-342. Querulous complainers may try to be leaders, but instead alienate others: at 341.

b. Litigation Induces Mental Health Issues and Abuse of Court

[106] All three of these papers, Morissette, Caplan and Bloom, and Mullen and Lester, implicate the nature of litigation itself in the emergence of mental health issues, and, in particular, querulousness.

[107] Justice Morissette makes the fascinating observation that, in many ways, abusive litigation is a phenomenon limited to the UK tradition common law world. "Vexatious litigation" is effectively unknown in certain legal traditions, particularly those of Asia and Continental Europe, where the structure of court operations, requirements for representation, and procedures reduce or minimize the possibility of abusive litigation: at 14-15. The US represents the opposite extreme. Restrictions on abusive litigation are extremely limited, litigants have a nearly unlimited right to a court hearing, and in-court failure has no associated court costs consequences: at 15-16.

[108] Justice Morissette observes that "access to justice" also opens the door for litigation abuse. This has emerged as a concern in other jurisdictions, such as the UK, where the Master of the Rolls attributes the rise in vexatious litigation to the simplification of court procedure: at 12-13. Another factor is social emphasis on individual rights through charters and human rights legislation, particularly where these rights are expressed in an open-ended, abstract manner, such as a right to "dignity". That provides "fertile ground" to querulous conduct: at 10. Justice Morissette concludes at 24:

> ... Policy makers and legislators will continue to work for better access to justice, which in practice often means better access to the courts, something which, in turn, translates into an increase or even an exacerbation of the numerous difficulties created by vexatious litigants. For them, and for those who are more directly exposed to them, there are few reasons to be optimistic. ...

[109] Caplan and Bloom also conclude that litigation processes may, by their nature, transform what are generally normal people into abusive litigants: at 426-427. A contributing factor may be the "justice system's emotional opacity". A party loses, but feels their personal distress and perspectives are not recognized. The authors observe (at 438) that courts may have a:

> ... prominent, if not causative role the legal system can play in transforming vulnerable individuals into querulous litigants. Awareness that there is such a tipping point, and working towards keeping litigants from getting there, is a worthwhile exercise in prevention. [Emphasis added.]

[110] Similarly, Mullen and Lester conclude that while the development of civil, private, and public remedies for complaints has provided an effective mechanism for resolution of many disputes and complaints, opening these processes has also inadvertently facilitated the rise of "unusually persistent complainants".

c. How to Approach Abusive Litigation and Mental Health Issues

[111] Morissette, Caplan and Bloom, and Mullen and Lester agree on one point: *for best results the Court should intervene at the earliest possible opportunity*. While psychiatric treatment is the preferred recourse, that is simply not available to the Courts: Morissette at 18. Mullen and Grant observe that while the distinct fingerprints of a querulous litigant might, in theory, appear to permit early intervention, ideally before the obsession has escalated into a more destructive form, psychiatric management is rarely successful: at 347-348. The ideas that drive a querulous paranoiac are very resistant to change, since for these persons "... the core belief that they were right never wavers.": at 347.

[112] Caplan and Bloom explain *early intervention is the best opportunity to assist abusive litigants with psychiatric issues*. The key is to avoid "a tipping point". These authors question the efficacy of the current legislative approach. *It is reactive, and therefore ineffective*. Caplan and Bloom are sharply critical of "persistence" being the trigger for court access restriction. By the time that requirement has been met much damage will have already been incurred and inflicted. Instead:

> ... a better approach is to initiate early remedial provisions where it can be demonstrated on a balance of probability, there is a likelihood that harmful conduct or vexatious proceedings may occur. [Emphasis added.]

[113] Courts should instead focus "... on the conduct of the litigant, rather than the nature and quality of the proceedings and the pleadings" [emphasis added]. That shifts the analysis to "motivation and pathology": at 450-451. *The recommended threshold for intervention*:

> ... is strong *prima facie* evidence that a litigant has engaged in and in the future will likely engage in the unusual or unreasonable pursuit of a claim or claims in court in a manner which is and will be seriously or materially damaging to the economic, social, health, resource and equity and fairness interests of that person and other interested persons, and which disproportionately and unjustifiably consumes court resources and services. ... [Italics in original, underlining added for emphasis.]
>
> (Caplan and Bloom at 450).

[114] Mullen and Lester agree with this approach. *Illegitimate claims should to be identified, then firmly closed*: at 347.

d. Conclusions from this Review

[115] The observations and conclusions of these writers match the experience of this Court in its attempts to manage abusive litigation. The querulous paranoia litigation cascade is a sadly

familiar phenomenon. So is the absolute confidence many abusive litigants have concerning their beliefs. The fault is *never* theirs. As I have previously indicated, many abusive litigants appear sincere, but are badly misguided.

[116] Certain conclusions that emerge from this review have serious policy implications:

1. Abuse of court processes is increasing. That is consistent with data from Alberta Courts.
2. Traditional legal responses to abusive court participants occur too late to protect affected parties and institutions. Earlier intervention is necessary.
3. Abusive litigants escalate their activities and the range and variety of their targets. Small disputes grow. Their misconduct ends when the abusive litigants are exhausted or too personally damaged to continue.
4. Mental health issues are a significant, if not critical, factor for many abusive litigants.
5. Abusive litigants exhibit recognizable and characteristic features that distinguish them from normal litigants. That may permit earlier court intervention.
6. Court processes may transform normal people into abusive litigants. Comparatively unrestricted court access, combined with an emphasis on rights, exacerbates abusive litigation.

e. Examples of Abusive Litigation that Implicate Mental Health

[117] One of the challenges for a judge addressing an abusive litigant, who is quite likely, in some sense, affected by mental health issues, is that the court is not expert in psychiatry and psychology. Its expertise is law. Judicial notice sharply limits how the court may evaluate a person's state. For example, a judge cannot diagnose someone as suffering from querulous paranoia.

[118] That said, the expert psychiatrist authors, above cited, have provided some characteristics and traits that can be readily identified by a non-expert. As I will subsequently describe in more detail, querulous litigants predictably seek disproportionate remedies and other punitive steps intended to discipline their targets. A judge can assess whether those characteristics are present or absent. Querulous litigants exhibit an expanding pattern of litigation, where new issues and targets accumulate around the original seed conflict. That, too, is something a judge can evaluate.

[119] When a litigant exhibits a large constellation of these warning signs, it seems reasonable to me that a judge may take that into account when evaluating how the court should respond. For example, if characteristics of querulous paranoia are clearly apparent, I believe that favours broad court access intervention, before the dispute conflict expands further.

[120] The discussion that follows suggests two quite different instances where mental health is deeply implicated in abusive litigation. Additional categories may be identified, particularly with the assistance of expert investigators. Understanding more about abusive litigants, and their motivation and pathology, may be very helpful to manage their litigation activities in a fair and proportionate manner. Ultimately, perhaps the legal apparatus might better interact and communicate with problem litigants, and minimize the injuries and damage that result when court processes are misused.

(i) Mental Health Issues Induced by Litigation - Querulous Litigants

[121] The first category of litigants who are affected by mental health issues are the querulous paranoiacs, as identified and described by the experts, above. While there may be instances where a court receives an expert opinion that a person is affected by this mental health condition, the more likely circumstance where this category may come into play is where a judge observes a litigant *whose characteristics are consistent* with the defined behaviour and attributes mental health experts indicate are exhibited by these persons.

[122] As I have previously explained, judges do not make mental health diagnoses. They are not qualified to do so. However, judges can watch for characteristics that may be recognized by a lay person, and the conclusions that follow may be useful to help understand an abusive litigant, and then better organize the court's response to these problematic litigants.

[123] That is what Thomas J recently did in ***Olumide v Alberta Human Rights Commission***, 2019 ABQB 186 [***Olumide v Alberta***]. He concluded that Ade Olumide, a vexatious litigant who in some manner evaded an existing vexatious litigant order, exhibited characteristics consistent with a querulous litigant. This analysis is worth reproducing at some length:

> [54] ... Olumide's conduct is consistent with that of a "querulous litigant" or "querulous paranoiac", a category of persons affected by a psychiatric condition which is described in Gary M Caplan & Hy Bloom, "Litigants Behaving Badly: Querulousness in Law and Medicine" 2015 44:4 Advocates' Quarterly 411 and Paul E Mullen & Grant Lester, "Vexatious Litigants and Unusually Persistent Complainants and Petitioners: From Querulous Paranoia to Querulous Behaviour" (2006) 24 Behav Sci Law 333.
>
> [55] These authors, psychiatric and legal experts, describe a pattern of mental health dysfunction where a discrete, often minor, unfavourable dispute outcome becomes the seed from which an ever metastasizing, expanding and branching web of litigation, complaints, and appeals then extends. Persons trapped in this pattern of behaviour may have been relatively ordinary at first, but become completely caught up in the growing disputes, investing those disputes with an unwarranted personal and social significance. Querulous litigants see their dispute as an expression of high principles. Their belief in the correctness of their cause is absolute.
>
> [56] Querulous litigants do not seek redress, but instead vengeance, public humiliation, and punishment against those that oppose them. Worse, anyone who disagrees with them or opposes their objectives is attacked. They are an enemy, corrupt, and a part of a greater conspiracy. Querulous litigants are relentless. Their litigation cascade only stops when the querulous litigant is exhausted, or too damaged to continue. By then they usually have alienated everyone around them.
>
> [57] To be clear, I am not diagnosing Olumide as a querulous paranoiac. I can't. A psychiatric diagnosis requires professional expertise, and I am not a psychiatrist. However, what I am doing in this judgment is saying Olumide exhibits characteristics *consistent with* querulous paranoia. The authors I cited above in their papers provide simple behavioural and documentary features that

> are commonly seen with querulous litigants. These are features that a lay person like me can evaluate. For example, these authors describe how materials filed by querulous litigants exhibit curious formatting and multiple forms of emphasis, are lengthy, attach irrelevant materials, often relating to rights. Olumide's materials exhibit these characteristics. Similarly, these experts identify a characteristic pattern of escalating litigation, where failure triggers new allegations, and new enemies are attacked. Again, that is obvious in Olumide's record.
>
> [58] From that, I can conclude Olumide's conduct *is consistent with* this category of abusive litigation triggered by mental illness. I can act on that. To use a topical parallel example, since I am not a medical professional, I cannot diagnose whether someone has measles. But I can look at a photo of a person afflicted by measles which a physician says is representative of the disease, look at the potential measles host, and say that what I observe is consistent with the photo.
>
> [59] That is what I am doing here. I am not saying Olumide is a querulous paranoiac. I am saying he is acting in a manner consistent with that, using identification and recognition guidelines prepared by appropriate professionals who have expertise in their fields.
>
> [60] And that conclusion is very bad news. Caplan & Bloom and Mullen & Lester indicate querulous litigants will never stop, unless they are brought under effective control or are self-injured to the point they can no longer continue. This condition cannot be effectively treated because persons caught in the querulous litigation vortex are totally confident they are right, and their actions are justified. Querulous litigants reject therapy because they see nothing wrong with themselves.
>
> [61] My conclusion that Olumide is conducting himself in a manner consistent with a querulous litigant warrants strict court access restriction. Nothing less will stop him. His litigation record shows that, too.
>
> [Emphasis in original.]

[124] I adopt this approach. A judge who encounters a person who exhibits characteristics that mental health experts say identifies querulousness may conclude that abusive litigant is exhibiting characteristics *consistent* with querulousness. Again, this is not a diagnosis. This is evaluating whether expressed behaviours and characteristics which may be evaluated by a layperson are consistent with a diagnosis. In this Decision, I will use "*querulous litigant*" to indicate a person who exhibits characteristic, readily ascertained traits indicated by experts to identify this form of mental illness.

[125] What are the implications of that? Querulous litigants exhibit a predictable pattern of expanding litigation and dispute misconduct. Experts describe the result of this behaviour: self-destructive self-injury, and broad-based waste of state, court, and litigant resources. I think there is no exaggeration in saying the result is a worst-case outcome for all involved. Caplan and Bloom and Mullen and Lester are also clear on what to do when querulousness emerges: act sooner rather than later. Act firmly. Rein in the abusive litigation cascade.

[126] Where it appears an abusive litigant is a querulous litigant, that is a strong basis for the court to impose prospective court access restrictions. Since one defining characteristic of querulous paranoia is expanding, metastasizing dispute activities, that means court access restrictions to manage these persons should always cast a broad net.

[127] From my review of the experts, the behaviours that identify a querulous litigant are:

1. A key discrete trigger event, where the querulous litigant is unsuccessful, and the querulous litigant rejects that outcome.
2. The querulous litigant absolutely believes in the correctness of their perspective. This conviction never waivers. The querulous litigant concludes his or her answer to the seed dispute is obvious. He or she is not at fault.
3. The querulous litigant puts disproportionate social and personal significance on the trigger event. The trigger event is characterized as having broad social, political, human rights, or legal significance and implications, when it usually does not.
4. The querulous litigant repeatedly challenges the original unsuccessful result, by direct and indirect means, including appeals, judicial reviews, lawsuits that attack the original results, human rights complaints, complaints to ombudsmen and other trouble-shooter and complaints resolution bodies.
5. Decision-makers and adjudicators who reject the position of the querulous litigant are personally classified as enemies, as acting in bad faith, biased, incompetent, and/or part of a conspiracy. To querulous litigants these decision-makers and adjudicators are not simply wrong; their error is more fundamental than that.
6. The querulous litigant does not seek to receive an equitable outcome or compensation, but instead seeks disproportionate, punitive outcomes, such as excessive damages, public humiliation and punishment, disciplinary steps, loss of professional status, criminal prosecution, and changes to public policy and/or legislation.
7. Litigation and dispute activities expand, accumulate, and escalate, for example adding new parties and new issues, branching into multiple lawsuits, disputes, appeals, and other tribunal and professional challenges.

[128] The mental health experts who have studied querulousness identify this as a progression which becomes more extreme over time. Thus, these characteristics will become more obvious and exaggerated as an abusive litigant falls deeper into the querulousness vortex. *These experts stress that the best hope to end this descent and self-injury is early intervention*. Thus, a judge who sees indications this process is underway acts to everyone's benefit by imposing fair and proportionate steps when these signs appear.

[129] The psychiatric experts also mention that documents querulous litigants use provide clues as to whether a person is a querulous litigant. They use multiple forms of emphasis. Materials are lengthy, difficult to understand, and disorganized, often attaching or incorporating parts of other documents and texts, such as case law, rights-oriented treaties, legislation, policies, and protocols, without any real relevance.

[130] There are numerous examples close at hand.

Olumide

[131] These characteristics are often very readily identifiable. For example, ***Olumide v Alberta*** surveys what was known about this querulous litigant's dispute-related activity. It is depressing. This man's seed conflict apparently involved him not obtaining a Conservative Party of Canada nomination: ***Olumide v Conservative Party of Canada***, 2015 FC 893. ***Olumide v Alberta*** identifies 34 Federal Court actions and appeals, 18 Supreme Court of Canada leave applications, and reported decisions in British Columbia, Alberta, Ontario, Quebec, and Prince Edward Island, the majority of which all flow from that original seed dispute. Olumide acknowledged he is at present conducting simultaneous, largely identical human rights disputes *in every province*: para 12. Olumide says this is all about racism - he is black, and has been denied his political aspirations on that basis: at para 16.

[132] Olumide's materials are the usual all but indecipherable assemblage typical of querulous litigants: at paras 1, 5-7. Justice Thomas observed that aside from apparently invoking *Charter* rights, these documents are "... otherwise difficult to interpret ... I will not attempt to summarize its content, beyond indicating it seems largely a melange of declarations, argument, and quoted materials.": para 6. After having his action struck out by Master Birkett, Olumide filed several Alberta Court of Queen's Bench appeals (paras 19-20), the first a hand-annotated version of his previous application, and then (para 20):

> ... a "3rd Amended Notice of Application and Appeal of Master's Judgement", and 969 pages of "Appeal New Evidence".

[133] Olumide certainly appears confident of his cause, and had nothing good to say about those who opposed him. He final comments before the Master were (para 17):

> ...You should be ashamed of yourself. ... Whether I succeed or not, there is a god in heaven. One day, all of you, all of you involved in this crime, you will have to answer to god.

[134] Olumide has been made subject to vexatious litigant court access restrictions in at least Alberta, Ontario, and the Federal Courts: paras 13, 22, 36, 44. Sadly, the action struck out in ***Olumide v Alberta*** was entirely unnecessary. Olumide had managed to file his lawsuit despite already being subject to vexatious litigant order gatekeeping on his filings in this Court: para 22.

Thompson

[135] Olumide is certainly a worst of the worst scenario, but he is hardly unique. Subsequently, in Part IV(H)(4)(c), I will discuss the litigation activity of Derek Thompson, whose conduct is consistent with that of a querulous litigant: a minor trigger seed dispute that has led to an expanding web of litigation, appeals, judicial reviews, and judicial complaints. Thompson claims judges who reject his claims are biased, they have false motivations, and conspire together:

> ... [Thompson] stated that I had smiled from ear to ear and looked at him in a threatening way, my body language appearing to be harsh or angry. He further stated that after the first [Canadian Judicial Counsel] complaint, I commenced a campaign of revenge to punish him. He submitted that I am unable to come to a correct and reasonable conclusion. He took the position that applying for recusal would just provide another opportunity to humiliate him. He also took the position that I should be removed from the bench. Mr. Thompson noted that the

> Associate Chief Justice [me] had been involved, and opined that he might therefore need a federal judge from outside the province for the case. ...
>
> (***Thompson v International Union of Operating Engineers Local No 955***, 2017 ABQB 210 at para 38, 47 Alta LR (6th) 300, leave refused 2017 ABCA 193, leave to appeal to SCC refused, 37974 (7 June 2018) [***Thompson v International #1***]).

[136] Despite that, Thompson's resolve never wavered. "I feel unbeatable.": para 42.

Hok

[137] Another dramatic example of a person whose litigation conduct is consistent with a querulous litigant is Shirley Hok, the abusive litigant in the ***Hok v Alberta*** cases: ***R v Hok***, 2016 ABQB 335 [***Hok v Alberta #1***]; ***Hok v Alberta (Justice & Solicitor General)***, 2016 ABCA 356, leave to appeal to SCC refused 37446 (20 April 2017) [***Hok v Alberta Justice***]; ***Hok v Alberta #2***. In her case the seed was minor disputes with her neighbors, which then escalated and expanded into a broad range of litigation against those neighbors, the RCMP and RCMP officers, a psychiatric hospital, Crown Prosecutors, and judges. Hok herself said she had filed over 850 complaints with the RCMP: ***Hok v Alberta #1***, at para 9.

[138] The Hok decisions provide a dramatic and extreme example of the unusual text emphasis patterns exhibited by some querulous litigants:

> 76) All that I am going say regarding that above falsely misleading accusation (by demented judge/Verville) that takes into account his paragraphs 98-100, is that I DEFINITELY DO have the PROOF of my claims about the slough of gross misconducts et all perpetuated via lawyers, judges, police-members, etc. *KNOW* that each and every organization has a ***CODE OF CONDUCT*** and/or a ***CODE OF ETHICS*** and/or ***PROFESSIONAL STANDARDS*** et al -->> that ***over-rules*** each and every *regulated members*. And *KNOW* that we, the *lowly "little people"* have ***RIGHT***S, including the right to have decent and ethically given ***PUBLIC SERVICE*** (given by those within the realms of providing *public-service*) ET AL!
>
> 77) And again - know that a judge is there in place to be a ***public service*** to that of even the *lowly "little person"* that is ***without*** *MEGA-MONEY-BUCKS/mega-influence* et al. And, for a judge (like that of judge/Verville) to do such mal-service and mega-damage et al to me displays HIS intentional ***demeaning INSOLENCE ARROGANCE*** - up to the point one can safely assume that judge/Verville is using his PENIS-head to do the thought-processing, and/or has "itchy palms" (*jist* waiting for a pay-off et al).
>
> (***Hok v Alberta #2***, at para 6).

I believe this excerpt also effectively illustrates how Hok concluded the judge who heard her proceeding was not merely wrong, but something worse. See also ***Alberta Treasury Branches v Hok***, 2018 ABQB 316 at paras 6-16 [***ATB v Hok #1***].

Paraniuk

[139] These three example querulous litigants appear to have advanced far down the stereotypic querulous litigant progression. The recent ***Paraniuk v Pierce***, 2018 ABQB 1015 [***Paraniuk v Pierce***] decision of Justice Little catches what appears to be a querulous litigant at an earlier

stage. Here the seed dispute was noise complaints between two condo neighbors: para 2. That led to alleged harassment, and when Paraniuk was assaulted outside the condo building he blamed the neighbor, though really there was no evidence to support that allegation: para 29.

[140] When police investigated the assault they did not blame the neighbor, so Paraniuk concluded that was negligent investigation, if not a cover-up. Complaints to the Edmonton Police Service followed, and, unsatisfied with the outcome, Paraniuk then sought review by the Alberta Law Enforcement Review Board. When that appeal was unsuccessful (***Paraniuk v Edmonton (Police Service)***, 2017 ABLERB 17, leave to appeal refused 2017 ABCA 338), Paraniuk concluded the Board was conspiring with the police against him: ***Paraniuk v Pierce***, at paras 85-91. The tribunal decision was "falsified", and Paraniuk concluded (para 90):

> ... It is absolutely mind-boggling, disgusting, and shameful, how much evidence of corruption I described in my complaint documentation has been buried and eliminated by EPS, PSB, and LERB.

Those who disagreed with Paraniuk were "absolutely lying".

[141] The next evolution of this dispute was a civil lawsuit against the neighbors and the police. The initial Statement of Claim was prepared by a lawyer, but he was soon fired. Paraniuk explained the lawyer "... had done a poor job and not understood the basis for Mr. Paraniuk's lawsuit." Now, Paraniuk's civil action began to grow, as Paraniuk added new parties, including the condo building and its management (who had allegedly interfered with, now lost, but purportedly incriminating video evidence) and new police defendants. Lawyers involved in this dispute were criticized and then the subject of unsuccessful professional complaints: paras 69, 76, 92. Damages claims increased. While the original Statement of Claim had 30 paragraphs, Paraniuk's final version was 440 paragraphs in length. Paraniuk said this outlined a greater plot (para 116):

> ... Mr. Paraniuk claims he has identified a pattern of wrongdoing, conspiracy, cover-ups, lies, and misconduct. He says there is a much bigger picture - and he is uncovering that web of bad conduct where he is at the epicentre and its target. As he told me in court: "So much more than to this than meets the eye."

[142] As is typical for querulous litigants, Paraniuk was deeply focussed on this dispute and its importance, both for him, and in general (at para 117):

> There's nothing that I've written that isn't backed up by something. I don't just spout, y'know, I don't just say you lie you lie you lie. Like, that's not me. Like, I'm a pretty articulate person. I don't think you could write hundreds of pages about this and respond to everything unless you have some degree of understanding, and, y'know, for lack of a better word, passion about it, I guess. I believe in what I say.

[143] Paraniuk's materials became voluminous. Some of his text reproduced in this judgment also shows the multiple emphasis characteristic: paras 85, 88.

[144] Justice Little struck out Paraniuk's lawsuit, concluded court access restrictions were appropriate for Paraniuk, and issued a global vexatious litigant order which imposed gatekeeping screening in all three Alberta Courts. I agree with that result.

[145] What happens next with Paraniuk will be very interesting. As I noted, this is a comparatively early intervention, where Paraniuk's first lawsuit led to court access restrictions. Mental health experts recommend early intervention, firm control, and an explanation of where the appropriate litigation boundaries are. That has now occurred.

(ii) Litigation Based on Delusion

[146] In ***Kavanagh***, at para 63, Shelley J identified a second class of abusive litigants whose court activities are linked to a psychiatric condition. Unlike the querulous litigant type, these litigants' abuse of court processes flows from a psychiatric condition, that condition caused altered perceptions and delusions, and then the litigant sued based on those false beliefs. These litigants are sincere, in the sense that their beliefs are caused by a psychiatric ailment, and then they litigate based on those delusions.

[147] The two examples identified by Justice Shelley clearly illustrate how this class of psychiatric abusive litigants is very distinct from the querulous litigant category.

Koerner

[148] The first example was a medical malpractice lawsuit where the doctor's alleged wrongdoing was imaginary and a consequence of mental delusion. The abusive litigant, Lisa Koerner, sued various medical defendants, arguing she was injured by a conspiracy that concealed her gall bladder *had not been removed* during surgery. Koerner's action was terminated for contempt after her repeated failure to comply with court orders: ***Koerner v Capital Health Authority***, 2011 ABQB 191, 506 AR 113, aff'd 2011 ABCA 289, 515 AR 392, leave to appeal to SCC refused, 34573 (26 April 2012) [***Koerner #3***]. Justice Shelley subsequently declared Ms. Koerner a vexatious litigant and prohibited her from directly or indirectly pursuing further litigation against the defendants in relation to the gall bladder surgery and alleged subsequent cover-up and conspiracy: ***Koerner v Capital Health Authority***, 2011 ABQB 462, 518 AR 35 [***Koerner #4***].

[149] Ms. Koerner was diagnosed with somatoform disorder (***Koerner v Capital Health Authority***, 2010 ABQB 590 at paras 4-5, 498 AR 109), a psychiatric condition where a person reports spurious physical disorders, which, in Ms. Koerner's case, were perceived as being the result of her still experiencing gallstone pain after her gall bladder had (allegedly) fraudulently not been removed. Ms. Koerner lived on government funded disability assistance (***Koerner v Capital Health Authority***, 2012 ABCA 367 at para 5, 539 AR 256), and claimed she incurred much expense to travel out of country to locations such as Thailand to obtain the medical care she alleged had been wrongly denied to her by the Alberta medical establishment: ***Koerner v Capital Health Authority***, 2010 ABQB 518, 191 ACWS (3d) 991.

[150] Ms. Koerner repeatedly re-litigated the same issues, arguing she is "fighting for her life", so that conduct was justified: ***Koerner #4***, at para 22. As a self-represented litigant, she claimed the usual rules of court did not apply to her. As her litigation progressed, Ms. Koerner self-diagnosed an expanding range of medical ailments, including kidney failure, multiple forms of cancer and tumours, thalassemia, periodic deafness, and sickle cell anemia: ***Koerner #3***, at paras 31-33.

FJR

[151] The second example, ***FJR (Re) (Dependent Adult)***, 2015 ABQB 112, is a sad scenario where an elderly father sued one of his daughters. The father suffered from dementia and

paranoia, and had been declared a dependent adult. The daughter was one of his guardians. The father had on numerous occasions consulted with and retained lawyers with the objective of challenging the guardianship order. The father said his money was being stolen. In the process of retaining lawyers, and making these applications, the father had spent much money. He also filed a complaint against the daughter's lawyer. The evidence was overwhelming there was no theft. The father clearly lacked capacity; indeed, his condition was deteriorating.

[152] An obvious concern was that the father would continue his attempts to challenge the guardianship order. The daughter suggested a solicitor and client cost award, but Shelley J concluded that was not an effective deterrent. Instead, the Court imposed a broad multicourt *Judicature Act*, ss 23-23.1, court access restriction order. This protected the best interests of both litigants and the Court's resources.

Shafirovitch

[153] The lawsuit struck out in ***Shafirovitch v The Scarborough Hospital***, 2015 ONSC 7627, 85 CPC (7th) 149 is likely another example of this category. The Statement of Claim stated the Plaintiff had been subjected to improper treatment at a hospital. Bugs had been thrown on him to induce itching, he was "... frozen for an interrogation ...", and the military put implants in him to brainwash him: para 2. Myers J dismissed the action and suggested the Plaintiff consult with the Ontario Public Guardian and Trustee: para 4.

[154] These examples are abusive court participants who misuse of the court flowed from a psychiatric condition that led them to engage in spurious and futile litigation, but not out of any malevolent purpose. These were simply people who were ill, and their illness led them to ungrounded court litigation activities. It seems to me that court access restriction for persons like this will favour a broader degree of litigation control, since these individuals are simply unaware of, or incapable of understanding, that their litigation is, objectively, unreasonable and improper.

[155] Litigation initiated by abusive litigants of this type are 'no win' situations. Immediate court intervention is warranted once the underlying cause for the litigation has been identified. Sadly, that will do little, if anything, to address the underlying root issue, but at least a gatekeeping step will hopefully minimize further litigation injury to others, or to the justice system, or self-injury.

(iii) Additional Possible Mental Health Abusive Litigant Types - Flurry and "Linear"

[156] Further investigation by legal and psychiatric experts may uncover other distinct groups or types of persons who engage in abusive litigation because of psychiatric illness and mental health issues, in addition to the two previous types.

[157] In conducting this review, and from my personal observations, I have identified what might be two additional candidate types. I suspect these individuals are affected in some sense by mental health issues, but that suspicion is because I do not have a way to rationally explain what I have observed and am here reporting. The litigation patterns exhibited by these individuals are distinct from the querulous litigant and deluded litigant types described above.

[158] First, in Part IV(C)(6)(a), below, I discuss "flurry litigants". In brief, these are individuals who, within a short period, initiate a large number of court actions. They then do nothing or little more. One "flurry litigant" I review was subject to mental health intervention during the "flurry" period.

[159] A second possible type resemble querulous litigants in that they are extremely persistent in their court activities, however, their litigation activity does not expand or metastasize. Instead, their activities stay more centered around the original seed dispute.

Grabowski

[160] The first is Peter Bish Grabowski. Since 1998 he has repeatedly launched and pursued lawsuits which relate to a dispute involving a Ukrainian church's dance club and the cultural director, who is Grabowski's wife. This started out as a defamation action, though later claims of conspiracy and intellectual property issues appeared. The most detailed account of the conflict is reported in ***Grabowski v Bodnar***, 2007 ABQB 366, 428 AR 34 [***Grabowski v Bodnar #1***], and indicates the original dispute flowed from a charity event to raise funds for Ukrainian orphans. A conflict arose around control of the funds raised and who owned a trademark based on these dance events, "Kids Helping Kids - A Ukrainian Montage".

[161] The initial action (Alberta Court of Queen's Bench Docket 9803-18546), led to a number of decisions as to the scope of the action: ***Grabowski v Karpiak***, 1999 ABQB 19; ***Grabowski v Karpiak***, 1999 ABQB 457; ***Grabowski v Karpiak***, 1999 ABQB 753. When the defendants obtained an order for security for costs, those were paid. An appeal was made but dismissed. Then, in 2002, Grabowski unilaterally discontinued the action.

[162] Two years after the first statement of claim, and while the first lawsuit was still live, a second action was launched, with much the same set of allegations, though a number of new defendants were added (Court Docket 0003 10976). The second action was struck out as a collateral attack and duplicative lawsuit: ***Grabowski v Karpiak***, 2001 ABQB 1090, 111 ACWS (3d) 235 [***Grabowski v Karpiak #4***].

[163] A third lawsuit (Court Docket 0203 24432), again with much the same subject and parties, was filed soon after the first and second lawsuits were terminated. Grabowski sought summary judgment, which was denied, and a new security for costs order was imposed on him: ***Grabowski v Bodnar #1***. A subsequent appeal was denied leave: ***Grabowski v Bodnar***, 2007 ABCA 280, 429 AR 1, panel hearing denied 2007 ABCA 305, 162 ACWS (3d) 7, stay refused 2007 ABCA 312, 429 AR 3.

[164] Grabowski is not a querulous litigant. His dispute remained tightly focused on a single subject. He did not villainize decisions makers (at least to the same degree) as a querulous litigant, nor did he seem to elevate the seed dispute to having general social relevance. That said, he obviously would not take "No." for an answer: ***R v Grabowski***, 2015 ABCA 391, 609 AR 217 [***R v Grabowski #4***].

[165] Interestingly, the same pattern again emerged from the same abusive litigant a few years later (when my involvement started), but in relation to a totally different litigation subject: traffic tickets. Grabowski first complained of inadequate disclosure, which he took to the Alberta Court of Appeal: ***R v Grabowski***, 2010 ABCA 265. Next, he argued issues of procedural fairness and jurisdiction: ***R v Grabowski***, 2011 ABQB 510, 527 AR 80. The mature form of Grabowski's traffic-related argument now emerged: the Provincial Court of Alberta allegedly had no jurisdiction to conduct traffic offense proceedings, that was restricted to the Traffic Safety Board. Multiple actions evaluated and dismissed that argument: ***R v Grabowski***, 2014 ABCA 123, 572 AR 244; ***R v Grabowski #4***. Grabowski was ultimately made subject to broad vexatious litigant court access restrictions.

[166] Grabowski is not the only very persistent, abusive litigant who engages in multiple but linear dispute activities.

Onischuk

[167] My second example is Daniel Onischuk. His first dispute was a complaint that he was injured by chemicals spilled into a lake during a train derailment: ***Onischuk v Canadian National Railway Co***, 2010 ABCA 411, 195 ACWS (3d) 912. Onischuk then conducted a parallel action in Federal Court, appealed to the Supreme Court of Canada: ***Onischuk v Alberta***, Edmonton T-26-11 (FC), aff'd Edmonton A-225-11 (FCA), leave to appeal to SCC refused, 34528 (23 February 2012).

[168] At this point I enter into the picture. Onischuk launched a third lawsuit relating to the train derailment. I struck that out, and imposed vexatious litigant gatekeeping on any further litigation: ***Onischuk v Alberta***, 2013 ABQB 89, 555 AR 330 [***Onischuk v Alberta #1***].

[169] By this point Onischuk was involved in a separate dispute. He had bid for a contract to control an overpopulation of rabbits in the town of Canmore. His contract bid was not accepted, and Onischuk sued to obtain an injunction to block the Town's rabbit control efforts. That was rejected as "busybody" litigation: ***Onischuk v Alberta***, 2013 ABCA 129, 227 ACWS (3d) 996 [***Onischuk v Alberta #***2]. The Court of Appeal imposed court access restrictions in relation to the rabbit matter: ***Onischuk v Alberta #2***. Onischuk's subsequent leave to appeal to the Supreme Court of Canada was denied: ***Onischuk v Town of Canmore*** (23 January 2014), Ottawa 35472 (SCC).

[170] Next was a new litigation subject. Onischuk and his wife challenged their municipal tax evaluation and an income tax debt in a dispute that blended municipal and federal tax and bankruptcy arguments. This led to a number of linked actions and applications, which are reported in: ***Onischuk (Re)***, 2017 ABQB 553, 283 ACWS (3d) 291 [***Onischuk (Re) #1***]; ***Onischuk v Edmonton (City)***, 2017 ABQB 647 [***Onischuk v Edmonton***]; ***Onischuk (Re)***, 2017 ABQB 659 [***Onischuk (Re) #2***]; ***Onischuk (Re)***, 2017 ABQB 663 [***Onischuk (Re) #3***]. Onischuk employed his wife as a litigation proxy to evade the court access restrictions already imposed on him. Ultimately, I ended up imposing strict and broad court access restrictions on both Onischuks.

[171] That is still not the end of Onischuk's court activities. He recently had a leave to file application rejected: ***Onischuk (Re)***, 2019 ABQB 229 [***Onischuk (Re) #4***]. Onischuk attempted to re-open the 2017 actions (para 6), but also raised an entirely new subject - he sought to interfere with the probate of an estate which appeared to have a negative net balance (paras 6, 8). Onischuk's application was rejected as an attempted abuse of the Court's processes: paras 16-18.

[172] Similar to Grabowski, the multiple Onischuk disputes were largely linear. They were also, without question, abusive, but in a quite different pattern from that exhibited by querulous or delusionary litigants.

[173] That said, Onischuk's litigation developed a strong retribution aspect. He began to target individuals, and demanded they be personally made to pay damages. He claimed that at least half of the damages should come from individuals' pensions and RRSPs: ***Onischuk v Edmonton***, at para 25; ***Onischuk (Re) #3***, at para 14. His litigation did accumulate issues and parties (***Onischuk v Edmonton***, at para 25), but they remained more clustered than the pattern exhibited by the stereotypic querulous litigant. His misconduct "escalated", but did not so much expand:

Onischuk (Re) #2, at para 61. The action that I struck (***Onischuk v Alberta #1***) had "accumulated" new defendants including several judges. Perhaps it is fair to say Onischuk is an intermediate between Grabowski and the querulous litigants I have previously reviewed.

[174] What conclusions should flow from these brief investigations of "flurry" and "linear" abusive litigation patterns? Not much, except that these examples illustrate there may be multiple abusive litigation patterns that involve mental health. Not every abusive litigant exhibits the characteristics of querulous or delusionary litigation, which is why the defining traits of abusive litigants are potentially so helpful.

[175] I hope that describing these different abusive litigation patterns may lead mental health and legal professionals to dig into this subject. Perhaps their advice and observations may help the courts take steps to more effectively manage additional problematic litigant types. If so, that would very likely also benefit abusive litigants, and minimize their self-injury.

2. Abusive Litigation Based on Ideology and/or Political Beliefs

[176] A second major category of potentially problematic litigants are persons whose court misconduct emerges from their ideological and political beliefs. Caplan and Bloom, and Mullen and Lester, briefly discuss "social reformers", who differ from querulous litigants in that they do not exhibit an escalating dispute pattern, and their goal is a social objective, rather than retribution, retaliation, and humiliation.

a. Social Reformers and Activists

[177] Some social reformer or activist litigants have relatively conventional goals. Others have more exotic objectives, for example:

- demanding state actors acknowledge Sasquatch is real (***Standing v British Columbia (Minister of Forests, Lands and Natural Resource Operations)***, 2018 BCSC 1499);
- litigation to compel the Bank of Canada to adopt monetary policies (***Committee for Monetary and Economic Reform ("COMER") v Canada***, 2013 FC 855, action struck but amendment permitted 2014 FC 380, 468 NR 197 aff'd 2015 FCA 20, amended action struck 2016 FC 147, 351 CRR (2d) 1, aff'd 2016 FCA 312, leave to appeal to SCC refused, 37431 (4 May 2017)); and
- a proposed class action to stop the Canadian military from spreading mind control chemicals via "chemtrails": ***Pelletier v Her Majesty the Queen***, Toronto T-431-16 (FC); ***Pelletier v Her Majesty the Queen***, Calgary A-249-18 (FCA).

Others, such a "Pastafarian", who sued to be permitted, in a drivers' licence photo, to wear her purported religious headgear, a pasta colander or pirate tricorn hat, litigate to make a political or satirical point: ***Narayana c Société de l'assurance automobile du Québec***, 2015 QCCS 4636.

b. OPCA Abusive Litigation

[178] However, most ideologically driven litigation encountered in our Court comes from persons who subscribe to and employ pseudolaw, a set of legal-sounding but false concepts that are marketed commercially by "gurus". These purport to provide free money, "get out of jail free cards", and allow one to ignore legal obligations. I surveyed these concepts and their host communities in ***Meads*** and grouped pseudolaw motifs and arguments under a general label: "Organized Pseudolegal Commercial Arguments", or "OPCA". Pseudolaw promoters claim it is

the true, superior, but concealed, law. In reality, pseudolaw has no positive effect whatsoever. It is nonsense.

[179] There appears to be consensus from expert authorities that OPCA litigation in Canada is in decline: Donald J Netolitzky, "The History of the Organized Pseudolegal Commercial Argument Phenomenon" (2016) 53:3 Alta L Rev 609 at 624-627, 639 [Netolitzky, "History"]; Barbara Perry *et al*, "Broadening our Understanding of Anti-Authority Movements in Canada" (2017) University of Waterloo TSAS Working Paper No 17-02 at 15-18. The Detaxer phenomenon is dead, and the Freemen-on-the-Land are demoralized and without effective guru figures. That said, OPCA litigation still makes up a substantial portion of the worst-case abusive litigants in this Court. In 2018, roughly a third of all vexatious litigant orders (10 of 33) were issued to manage OPCA litigants.

[180] All OPCA are legally incorrect and an abuse of the court's processes. *Anyone who employs OPCA concepts is an abusive litigant*. Some OPCA concepts are so notoriously bad that merely deploying these OPCA motifs creates a presumption that a person appears in court for bad-faith, ulterior purposes:

1. "Strawman Theory" (***Fiander v Mills***, 2015 NLCA 31 at paras 37-40, 368 Nfld & PEIR 80 [***Fiander***]), where individuals are purportedly divided into two linked halves, one physical and "flesh and blood", the other an immaterial "legal person". The latter half is also commonly called "The Strawman". Strawman Theory claims that government actors, courts, police, and other authorities can only affect the Strawman and not the flesh and blood human. They claim, get rid of your Strawman, and you are free from state authority.
2. One can choose to "opt out" of any law since all state and legal authority requires consent of the individual: ***Fiander***, at paras 37-40.
3. Birth certificates and registration have special legal significance beyond documenting a person's birth: ***Fiander***, at paras 37-40. Typical claims are that these documents are linked to government-operated bank accounts that contain very large sums.
4. Foisted unilateral agreements allow a person to impose obligations, decide issues and facts, and obtain default judgments when the recipient does not answer as instructed and by a deadline: ***Rothweiler v Payette***, 2018 ABQB 288, at paras 6-21, 72 Alta LR (6th) 374 [***Rothweiler #3***]; ***Potvin (Re)***, 2018 ABQB 652 at paras 74-75 [***Potvin #1***]; ***Knutson (Re)***, 2018 ABQB 858 at para 58 [***Knutson #1***].

[181] The ***Meads*** review and description of pseudolaw remains accurate. There has been little innovation by OPCA abusive litigants encountered by the Court over the past six years. However, one post-2012 change is that courts now have a much better understanding of the people who use OPCA concepts. Some are simply greedy and out for a fast buck (e.g. not having to pay income tax), or are trying to avoid a crisis situation such as a home foreclosure or child welfare intervention. However, these "mercenary" OPCA litigants rarely persist with pseudolaw. They quit once they recognize this false law offers no real advantages: Donald J Netolitzky, "Organized Pseudolegal Commercial Arguments [OPCA] in Canada; an Attack on the Legal System" (2016) 10 JPPL 137 at 179-181 [Netolitzky, "Attack"].

[182] However, many, and probably most, OPCA litigants are anti-social conspiratorial activists, hostile to government, police, institutions, and courts. Morissette JA at 11 observed for these abusive litigants "[v]exatiousness thus becomes the vector of an ideology for a class of actors in the legal system." Pseudolaw has also been described as "a disease of ideas" spread by guru "Typhoid Marys": Netolitzky, "History", at 611.

[183] The preferred weapon of choice for these self-proclaimed revolutionaries is their purported superior and secret law: Netolitzky, "Lawyers" at 421-422. These ideological OPCA litigants engage in "offensive" litigation (***1985 Sawridge Trust v Alberta (Public Trustee)***, 2017 ABQB 548 at paras 68-74, 13 CPC (8th) 92 [***Sawridge #8***]) that attacks their perceived enemies:

> Judicial and legal academic authorities uniformly identify OPCA narratives and their associated pseudolegal concepts as resting on and building from a foundation of paranoid and conspiratorial anti-government and anti-institutional political and social belief. ... They may act for personal benefit, but they also do so with the belief they are justified and act lawfully when they injure others and disrupt court processes. ... Their next target can be anyone who crosses their path - government officials or organizations, peace officers, lawyers, judges, business employees - and who then offends the OPCA litigant's skewed perspectives. ...
>
> These individuals believe they have a right to attack others via the courts, they like the idea of doing that, and they view their litigation targets as bad actors who deserve punishment.
>
> (***Sawridge #8***, at paras 72-73).

c. OPCA Litigation is Easily Recognized and Controlled

[184] Though it may be surprising, given their troublesome reputation, in many ways OPCA litigants are among the easiest abusive litigants to control. OPCA litigants never present arguments that have any potential merit. Canadian jurisprudence which rejects pseudolaw has always been carefully constructed and reasoned. ***Meads*** did not invent that law, but instead that decision simply collected and organized the reasoning of numerous judgments issued by Canadian judges over the previous several decades. Subsequent court decisions which reject OPCA concepts continue that tradition of careful, responsive analysis: e.g. ***Bossé v Farm Credit Canada***, 2014 NBCA 34, 419 NBR (2d) 1, leave to appeal to SCC refused, 36026 (11 December 2014); ***Crossroads-DMD Mortgage Investment Corporation v Gauthier***, 2015 ABQB 703, 28 Alta LR (6th) 104 [***Crossroads-DMD #1***]; ***Pomerleau v Canada (Revenue Agency)***, 2017 ABQB 123, 275 ACWS (3d) 884 [***Pomerleau***].

[185] Not only are OPCA litigants doomed to fail, but they are also extremely easy to identify. Their materials use weird and stereotypic language. Their documents often have unorthodox ornaments and formatting, such as blood or ink fingerprints and postage stamps. Strawman Theory leads them to spell and structure their names is unusual and distinctive ways. They demand payment in gold and silver, not "fiat currency".

[186] The conspiracies which are the basis for their concepts are often front and centre. A dramatic example is reported in ***Rothweiler v Payette***, 2018 ABQB 399 at paras 61-65 [***Rothweiler #4***]: a pseudolaw argument that all Commonwealth state authority has collapsed into "post-Elizabethan chaos" because Queen Elizabeth II's Coronation Oath was alleged a fraud as it

was made while she was seated on a counterfeit Stone of Scone, and because the Monarch has not subsequently ordered the execution of same-sex orientation persons.

[187] The same is true for court appearances. Once you know the usual OPCA litigant in-court script motifs, these abusive litigants are very hard to miss. My encounter with Freeman-on-the-Land Adam Christian Gauthier reported in ***Gauthier v Starr***, 2016 ABQB 213, 86 CPC (7th) 348, leave refused 2018 ABCA 14 [***Gauthier v Starr***] illustrates this very well. First, Gauthier insisted I only call him "Adam", he is not "Mr. Gauthier": para 9. "... This court needs to move under the inherent jurisdiction of Queen's Bench, I am a man of no title. ...": para 15 When I instructed that Gauthier sit, he replied "I sit of my own volition.": para 15. He objected anytime the opposing parties were identified as "defendants" (para 15):

> They are not Defendants as named on the Statement of Claim. They are actually wrongdoers. That's a specific amendment I made.

Then it became apparent that Gauthier was clandestinely recording the proceeding. He had deployed a camera in his briefcase. Gauthier did not deny what he was doing, but when he was ordered to terminate the recording he replied: "I don't want to do so." Gauthier was then removed from the courtroom: paras 18-19.

[188] Normal SRLs, even those who are affected by psychiatric conditions, do not act in this manner. In fact, mental health expert opinion is uniform that the bizarre behaviour and language of OPCA litigants is the result of their political and conspiratorial beliefs, rather than mental health issues: Jennifer Pytyck & Gary A Chaimowitz, "The Sovereign Citizen Movement and Fitness to Stand Trial" (2013) 12:2 Intl J Forensic Mental Health 149; George F Parker, "Competence to Stand Trial Evaluations of Sovereign Citizens: A Case Series and Primer of Odd Political and Legal Beliefs" (2014) 42:3 J Am Acad Psychiatry L 338; Cheryl M Paradis *et al*, "Evaluations of Urban Sovereign Citizens' Competency to Stand Trial" (2018) 46(2) J Amer Acad of Psych & L 158. See also ***Gauthier (Re) #1***, at para 92.

[189] Other decisions also report the in-court statements of OPCA litigants, e.g. ***R v Boisjoli***, 2018 ABQB 410 at paras 12-16 [***R v Boisjoli***]; ***Scotia Mortgage Corporation v Landry***, 2018 ABQB 951 at para 11, leave to appeal denied (19 December 2018) (Alta CA) [***Landry #2***]; ***R v Grant***, 2016 ONCJ 170 [***Grant***]. Only someone entirely unfamiliar with the OPCA phenomenon would fail to recognize these very distinctive litigants for what they are.

[190] However, the fact OPCA litigants are easily recognized does not mean OPCA litigants are not a problem. They can be very persistent, which is unsurprising given their extremist ideology. For example, Gauthier has:

1. repeatedly fought foreclosure of his residence, claiming banks do not lend money (***Crossroads-DMD #1***; ***Crossroads-DMD Mortgage Investment Corporation v Gauthier***, 2015 ABQB 809);
2. acted as a "busybody" representative for a Freeman-on-the-Land drug producer (***d'Abadie v Her Majesty the Queen***, 2016 SKQB 101, aff'd 2016 SKCA 72, 480 Sask R 161, leave to appeal to SCC refused, 37507 & 37508 (27 September 2017) [***d'Abadie v Canada***]);
3. attacked Crown prosecutors and an RCMP officer, declaring himself to be their "prosecutor" (***Gauthier v Starr***);

4. attempted to sue state actors after his car with a homemade license plate which read "private non commercial use only" was seized, which led to him being subject to strict vexatious litigant order restrictions (***Gauthier (Re) #1***);

5. filed multiple unsuccessful leave applications (***Gauthier (Re)***, 2017 ABQB 673 [***Gauthier (Re) #2***]; ***Gauthier (Re)***, 2018 ABQB 99 [***Gauthier (Re) #4***]); and

6. started, but then did not pursue, what appears to be a collateral attack on this Court's foreclosure action in Federal Court (***Gauthier v Equitable Bank*** (12 December 2018), Edmonton T-696-18 (FC)).

[191] This type of persistence, coupled with deep ideological hostility to government actors, is a significant problem.

d. OPCA Litigants - Tenacious Enforcers

[192] What is unique to the pseudolaw phenomenon is the level of actual or potential illegal action by OPCA litigants. They not only say their law is right, but these individuals sometimes take steps to enforce "the common law", as it is usually called, via "paper terrorism", threats, vigilante courts and police forces, and violence. ***Knutson #1***, at paras 72-80 reviews this issue, see also Netolitzky, "Attack"; Barbara Perry *et al*, "Anti-Authority and Militia Movements in Canada" (2019) 1:3 Journal of Intelligence, Conflict, and Warfare 30. They can attack anyone who they view as breaking 'their law'. This is why in ***Gauthier (Re) #1***, at para 78, I concluded about Gauthier:

> His philosophy and animus to government means he plausibly will litigate against any government, law enforcement, or court actor who will or has crossed his path. ... Given these facts I cannot identify a subset or category of potential litigation targets for Gauthier's abusive court activities. He is a threat to every Canadian.

[193] Sometimes the threat is closer to home. ***SS (Re)***, 2016 ABPC 170, 91 RFL (7th) 471 reports on parents who had a child with cancer and rejected child services intervention. They instead treated the child with "Miracle Mineral Solution", better known as bleach. The parents were followers of OPCA guru Carl (Karl) Rudolph Lentz, who claims that parents own their children as chattel property: ***DKD (Re) (Dependent Adult)***, 2018 ABQB 1021 at paras 8-11 [***DKD #1***], see also ***Gauthier v Starr***; ***Lemay v Steele***, 2019 ABQB 202 at paras 14-18. Other instances where OPCA litigant parents have employed pseudolaw to interfere with health care of their children include: ***AS (Re)***, 2014 ABPC 300; ***MM (Re)***, 2013 ABPC 59, 558 AR 136; ***Children's Aid Society of Ottawa v SI***, 2015 ONSC 5692, appeal dismissed for delay 2016 ONSC 2353, aff'd 2016 ONCA 512, leave to appeal to SCC refused, 37380 (23 March 2017); ***Chalupnicek v Children's Aid Society of Ottawa***, 2016 ONSC 1278; ***Chalupnicek v Children's Aid Society of Ottawa***, 2016 ONSC 4452; ***Miracle v The Queen of England*** (7 September 2016), Ottawa T-195-16 (FC); ***Protection de la jeunesse - 171194***, 2017 QCCQ 3716.

e. OPCA Litigants Engage in Violent and Criminal Activity

[194] That is not to say that all or most OPCA litigants are dangerous or violent, but nevertheless, there are examples of that, and much other criminal activity by this population. These persons think they can engage in what is otherwise illegal conduct, because their law, their "common law", permits it. That includes what is otherwise considered serious crime. Reported examples include:

1. a campaign to kill perceived wrongdoers, which resulted in multiple deaths and an attempted murder (***R v Bush***, 2017 ONSC 2202; ***R v Bush***, 2017 ONSC 7050; ***R v Bush***, 2017 ONSC 7426; ***R v Bush***, 2017 ONSC 7627);
2. opening fire on police officers with a shotgun while concealed inside a hidden room (***R v King***, 2018 ONCJ 190);
3. threats of lethal violence from a person identified as a high threat for violence against members of the justice apparatus (***McKechnie (Re)***, 2018 ABQB 493, 77 Alta LR (6th) 493 [***McKechnie #1***], court access restricted 2018 ABQB 677 [***McKechnie #2***]);
4. knifing a fellow inmate (***R v Thompson***, 2017 NBQB 81);
5. sexual assaults on multiple minors (***R v Seagull***, 2013 BCSC 1106, sentenced 2013 BCSC 1811, aff'd 2015 BCCA 164; ***R v TLP***, 2015 BCSC 618, declared long-term offender 2017 BCSC 1868); and
6. large-scale fraud and economic crime (***R v Baron***, 2017 ONCA 772, 356 CCC (3d) 212; ***R v Baudais***, 2014 BCSC 2161, [2015] GSTC 8; ***R v Lawson***, 2016 BCSC 2446, 2017 DTC 5006, aff'd 2019 BCCA 109; ***R v Millar***, 2017 BCSC 402, 2017 DTC 5029; ***R v Porisky***, 2016 BCSC 1757, 2016 DTC 5105 [***Porisky***]; ***R v Watts***, 2016 ONSC 4843, 2018 DTC 5024, aff'd 2018 ONCA 148, 2018 DTC 5023, leave to appeal to SCC refused, 38141 (27 September 2018)).

[195] Freemen-on-the-Land, in particular, have a pattern of certain criminal charges, including:

1. firearms charges (e.g. ***R v Fearn***, 2014 ABPC 56, 586 AR 148, sentenced 2014 ABPC 58, 586, AR 173; ***R v Hughes***, 2014 ONCJ 441; ***R v Louie***, 2017 BCPC 54; ***R v Louie***, 2018 BCSC 937; ***R v Kekemueller***, 2018 ONSC 6306; ***R v McCormick***, 2012 NSSC 288, 319 NSR (2d) 17, bail refused 2012 NSCA 58, 317 NSR (2d) 273; ***R v Nascimento***, 2014 ONSC 2379; 2014 ONSC 6730, sentenced 2014 ONSC 6739; ***R v Sands***, 2013 SKQB 115, 416 Sask R 279 [***Sands***]; ***R v Sawatzky***, 2017 ONSC 4289, 389 CRR (2d) 366; ***R v Smith***, 2014 NSSC 124 [***Smith***]; ***R v Unger***, 2016 ABPC 46), and
2. drug production and trafficking (e.g. ***Law Society of British Columbia v Boyer***, 2016 BCSC 342 [***Boyer***]; ***d'Abadie v Canada***; ***R v Brenton***, 2016 NLTD(G) 69, sentenced 2016 NLTD(G) 121, aff'd 2016 NLCA 66; ***Grant***; ***Sands***; ***Smith***; ***R v Thompson***, 2013 ONSC 3180; ***R v Zombori***, 2013 BCSC 2461, aff'd ***R v zombori***, 2013 BCCA 9).

[196] Illegal conduct extends to their upper leadership guru ranks. Freeman guru Dean Clifford was convicted of firearms and grow-op charges and sentenced to three years incarceration: ***R v Clifford*** (12 January 2016), Winnipeg CR14-01-33786 (Man QB). The founder of the Freeman movement, Robert Menard, absconded after being charged with personating a peace officer: ***R v Menard***, Toronto 4813998143500374700, 4813998143500427000 (Ont CJ). Similarly, "minister" Edward Robin Jay Belanger, the leader and founder of the Church of the Ecumenical Redemption International, a OPCA fake religious group, was recently convicted on drug charges and sentenced to 45 days (***R v Belanger*** (3 April 2019), Edmonton 180995987P1 (Alta PC)), only several months after his previous 30 day sentence (***R v Belanger*** (20 September 2018),

Edmonton 180222747P1 (Alta PC)). These are only the latest in Belanger's lengthy record of criminal convictions, including drug and weapon offenses.

[197] OPCA litigants also attempt to use courts to further their illegal and criminal schemes: ***Boisjoli (Re)***, 2015 ABQB 629 at paras 98-103, 29 Alta LR (6th) 334 [***Boisjoli (Re) #1***]; ***Rothweiler #3***, at para 35; ***McKechnie #2***, at paras 3, 31. Obviously, that cannot be tolerated.

[198] The anti-social belief and corresponding illegal actions of OPCA litigants further illustrates how abusive litigants engage in self-destructive behaviour. They engage in litigation they will predictably lose. OPCA beliefs aggravate and escalate what might otherwise be comparatively minor misconduct.

[199] Perhaps worst of all is how these beliefs distort their perception of everyday life. Step into their shoes, and imagine how the world looks to them, filled with legal traps and conspiracies, unauthorized despotic governments, and ongoing oppression. No one benefits from existing in that perceived, but illusory, dystopia.

3. Abusive Litigation for Profit and Advantage

[200] The next class of abusive litigants are persons who have found a way to obtain an advantage by engaging in unmeritorious or futile litigation. I will discuss several examples of this category of litigation, including two specific case studies which have had a significant deleterious impact on court operations here in Alberta.

[201] Strategic Lawsuits Against Public Policy [SLAPP] are typically where a well-financed entity engages in lawsuits to harass and/or exhaust a smaller opponent, often via defamation lawsuits: Byron Sheldrick, *Blocking Public Participation: The Use of Strategic Litigation to Silence Political Expression* (Waterloo: Wilfrid Laurier University Press, 2014); Hillary Young, "The Canadian Defamation Action: An Empirical Study" (2017) 95-3 Can Bar Rev 591 at 599-602; Taylor Hudson, "1704604 Ontario Ltd. v. Pointes Protection Association: Anti-SLAPP Motions - The Ontario Court of Appeal Point the Way" (2019) 49:3 Adv Q 367.

[202] Some organizations, such as the Church of Scientology, are notorious for using SLAPP lawsuits as a mechanism to suppress perceived enemies, opponents, and dissidents: Stephen A Kent & Robin D Willey, "Sects, Cults, and the Attack on Jurisprudence" (2013) 14:2 Rutgers JL & Religion 306 at 330-340.

[203] Some Canadian jurisdictions have enacted legislation to help minimize this type of abusive litigation, e.g. *Courts of Justice Act*, RSO 1990, c C.43, s 137.1; *Code of Civil Procedure*, CQLR c C-25.01, s 51. For example, the latter Quebec legislation defined one form of abusive litigation as where "... it operates to restrict another person's freedom of expression in public debate."

[204] The two other Alberta-specific examples involved more direct benefits, rather than the "strategic" advantages obtained via SLAPP lawsuits. These "litigants for profit and advantage" have instead found ways to 'game the system', and, as a consequence, benefit.

a. The Johnson Dollar Dealers

[205] The first example was a "Dollar Dealer" swindle that operated between 2010-2014 in the Calgary area. That resulted in the Court in Calgary issuing many *Judicature Act*, ss 23-23.1 court access restriction orders which attempted to manage a mortgage fraud scheme advanced by a number of conspirators who targeted distressed persons whose homes were being foreclosed.

The fraudsters also acted as middlemen for investors, and scammed funds from both sides, all the while jousting in court with the original mortgage lenders and court decision makers.

[206] The Calgary Dollar Dealer ring's activities included counter-attack lawsuits against opposing parties, their lawyers, and Masters in Chambers of this Court. These scammers and their activities are partially documented in two reported decisions: ***Scotia Mortgage Corporation v Gutierrez***, 2012 ABQB 683, 84 Alta LR (5th) 349 and ***1158997 Alberta Inc v Maple Trust Co***, 2013 ABQB 483, 568 AR 286 [***1158997***]. The scam also had an OPCA aspect, since the scammers invoked OPCA theories in their lawsuits to challenge whether banks lend money, claiming instead lenders 'just create money from thin air': see ***Crossroads-DMD #1***, at paras 68-85.

[207] The scammers even went so far as to set up their own fake vigilante court, the "Alberta Court of Kings Bench" [sic], which issued relatively authentic-looking Statements of Claim targeting those who attempted to recover their lost money.

[208] The scammers operated under a number of guises, both personal and via a series of corporations. Though many cost awards were made, none appear to have been paid. New personas appeared, one after another, including what may have been an entirely fictional person, "Ty Griffiths", who interposed himself as an agent for the scammers and their corporations, claiming he was defending their "human rights": ***1158997***, at paras 58-60. Then, a new person appeared in court to, in turn, act as the agent for Ty Griffiths: para 60.

[209] The *Judicature Act*, ss 23-23.1 court access restriction orders issued by this Court as it attempted to control this fraud illustrate the Dollar Dealers' evasion strategy:

> Dec. 15, 2010 - Wilson J, docket 1001-08610 - 1158997 Alberta Ltd is declared a "vexatious litigant" and prohibited from instituting further proceedings itself or on behalf of any other person. This order appears to operate in this Court only.
>
> Feb. 17, 2011 - Strekaf J, docket 1001-14143 - 1158997 Alberta Inc is declared a "vexatious litigant" and is prohibited from instituting further steps in this proceeding without leave, on behalf of itself or any other person.
>
> Nov. 1, 2012 - Master Laycock, docket 1201 09396 - Derek Ryan Johnson and his employees are prohibited from appearing to represent 1158997 Alberta Inc, Partners in Success Mortgage Inc, and any related companies.
>
> Dec. 21, 2012 - Wilson J, docket 1001-08610 - 1158997 Alberta Ltd and 1158897 Alberta Inc are declared "vexatious litigants" and prohibited from instituting further proceedings themselves or on behalf of any other person. This order appears to be limited to operate in this Court only.
>
> July 2, 2013 - Lovecchio J, dockets 1201-11892, 1201-12187, 1201-14301 - 1158997 Alberta Inc, 1660112 Alberta Ltd, 1691482 Alberta Inc, Partners in Success Mortgage Inc, Ashley Critch, Carla Kells, Derek Ryan Johnson, Ty Griffiths, Ajay Aneja are globally prohibited from any litigation activity, except with leave, in all Alberta courts, on behalf of themselves or any other entity or estate. Sarbjit Sarin and Jason Mizzoni are declared vexatious litigants, but no court access restrictions are imposed.
>
> November 12, 2013 - Lovecchio J, dockets 1301-05965, 1301-04219 - 1158997 Alberta Inc, 1603376 Alberta Inc, 1731272 Alberta Inc, Partners in Success Mortgage Inc, and

> Derek Ryan Johnson, are globally prohibited from any litigation activity, except with leave, in all Alberta courts, on behalf of themselves or any other entity or estate.

[210] In the end, attempts to control this scam and its participants accounted for two thirds of all global court access restriction orders issued by the judicial officers of this Court in Calgary between 2000-2014. I cannot meaningfully assess the amount of time and judicial, staff, and victim resources wasted by these individuals.

[211] What is noteworthy, and, frankly, rather depressing, is viewed objectively, this scenario shows the limits of the current approach to court access restrictions. Though many court orders were issued to rein in these scammers, and cost sanctions were imposed to deter further misconduct, the scammers simply reappeared and counterattacked. New corporate guises and possibly false personas were introduced to draw out the process. In ***1158997*** Justice Lovecchio explains the kingpin of the scammer ring, Derek Ryan Johnson, was also frustrating parallel efforts by the Real Estate Counsel of Alberta to control his activities: para 74. Johnson had been fined for operating as an unlicensed real estate agent. These scammers only stopped when Johnson and an accomplice, Kevin Kumar, were found in contempt of court by Martin J and each sentenced to two months in jail: ***Real Estate Counsel of Alberta v Johnson***, Calgary 1401-11567, 1401-12622, 1501-02988 (Alta QB). Johnson and Kumar had also between them accumulated $125,000.00 in fines, which presumably remain unpaid.

[212] What the Johnson Dollar Dealer fraud ring illustrates is that even comprehensive court access restrictions can sometimes be circumvented or defeated by motivated and creative abusive court actors. Anyone can register a corporation and thereby obtain a new identity under which to engage in litigation misconduct. The same problem exists for false identities, as illustrated by "Ty Griffiths". Where a court participant is simply abusing court processes for greed or profit - and succeeding - there is no reason why that individual would do otherwise in the future, provided the benefits obtained continue to outweigh costs. The traditional leave requirement court access restriction is fair and proportionate because that prerequisite has only a minimal associated cost. Where the abusive litigant's motive is profit, this kind of hurdle may prove ineffectual, or even counterproductive. The protection it promises is a mirage.

b. Spurious *Habeas Corpus* Applications

[213] The second Alberta example of abusive litigation for profit and advantage started around the time when Johnson's Dollar Dealers disappeared. In 2014, the Supreme Court of Canada in ***Mission Institution v Khela***, 2014 SCC 24, [2014] 1 SCR 502 [***Khela***] expanded the scope of *habeas corpus* to include court review of Correctional Service Canada decisions that result in prisoners experiencing a deprivation of residual liberty. Following ***Khela***, this Court received an unprecedented number of *habeas corpus* applications from SRL Correctional Service Canada inmates.

[214] While the manner in which this Court tracks proceedings in its docket record does not permit exact statistics on this phenomenon, I believe it is safe to say that the Court went from receiving perhaps one or two *habeas corpus* applications annually, to thirty to forty applications, at a minimum, per year. These applications sometimes appeared singly, but other times large bundles of 'carbon copy' applications were received. Given the limited means of most Correctional Service Canada inmates, and the rule that court filing fees may not be imposed where that causes an undue hardship (***Trial Lawyers***, at paras 45-46), that meant for prisoners "... a habeas corpus application costs nothing more than the postage required to deliver that

paperwork to the Court ...": ***Getschel v Canada (Attorney General)***, 2018 ABQB 409 at para 86, 70 Alta LR (6th) 111 [***Getschel***]. Costs awards to sanction bad litigation obviously had little effect for the same reason.

[215] The overwhelming majority of these *habeas corpus* applications were unsuccessful (four successful applications, post-***Khela***: ***Hamm v Attorney General of Canada (Edmonton Institution)***, 2019 ABQB 247 at paras 243-244 [***Hamm***]. However, not only were many of these applications weak, most had no merit whatsoever.

[216] Some complained about events that had happened many years in the past: e.g. ***Cundell v Bowden Institution***, 2016 ABQB 348 at paras 37-50. Instead of release, some inmates sought declarations: e.g. ***Larente v Bonnefogel***, 2018 ABQB 140 at paras 12-13. Many applications demanded court supervision of institutional programs and living conditions, complained that guards were rude, and that food was bad - for example that prison menus did not suit the inmate, there were too many pasta dishes, and the "goo-lash" was hard to "decipher": ***Ewanchuk***, at paras 47-51.

[217] Another common demand was money. Some so-called *habeas corpus* applications were actually statements of claim in disguise: e.g. ***Ewanchuk***, at para 68. Many inmates believed *habeas corpus* was a way to directly or indirectly get quick cash, with no real expense: ***Getschel***, at paras 62-89; ***Hamm***, at para 242.

[218] The complaints on which some of these *habeas corpus* applications demanded (often impossible) relief bordering on the absurd, such as:

1. smelling bacon, but not being able to eat it (***Ewanchuk***, at para 58);
2. when an inmate emerged from his cell with an erection sticking out of his open jeans fly, and a female guard stared at that, that staring was sexual harassment of the inmate (***Getschel***, at paras 23-31); and
3. a transfer from minimum to medium security was procedurally unfair because the inmate was *not* handcuffed (***Loughlin v Her Majesty the Queen***, 2017 ABQB 677 at para 19).

[219] It ultimately came to light that the surge of boilerplate, often incoherent, *habeas corpus* applications received by the Court were, at least in part, because Alberta institutions housed at least four competing "*habeas corpus* entrepreneurs" inmates (***Lee v Canada #1***, at paras 205-239, ***Lee v Canada #2***, at paras 49-74; ***McCargar v Canada***, 2017 ABQB 729 at paras 51-55, 68 Alta LR (6th) 305 [***McCargar #2***]), who were paid to prepare these materials, and often interacted directly with the Court Clerks as a kind of litigation representative (e.g. ***McCargar v Canada***, 2017 ABQB 416 at para 8, 63 Alta LR (6th) 88 [***McCargar #1***]). This phenomenon is not apparently limited to Alberta, see: ***Jones v Mountain Institution (Warden)***, 2017 BCSC 1304; ***Law Society of British Columbia v Parchment***, 2018 BCSC 2257. While one cannot know what exactly was promised to the customers of these *habeas corpus* entrepreneurs, the evidence available makes it clear that at least some of these applications were based on the promise of quick fast cash. The effective absence of any negative consequences to the *habeas corpus* applicants no doubt was also a major reason why this form of litigation abuse surged so dramatically, post-2014: ***Hamm***, at paras 249-256.

[220] Another serious problem with this particular type of abusive litigation was *spurious habeas corpus applications are unusually disruptive for the Court*. By law, these applications

must take priority over all other Alberta Court of Queen's Bench proceedings (***Storgoff (Re)***, [1945] SCR 526 at 590-591, [1945] 3 DLR 673; ***Khela***, at para 3; ***DG v Bowden Institution***, 2016 ABCA 52 at paras 41, 124, 612 AR 231), pushing legitimate litigation 'back down the queue' (***Ewanchuk***, at paras 170-187).

[221] Another issue was these applications, in certain instances, expanded dramatically after being filed, growing multiple new collateral issues and demands. For example, the ***MacKinnon v Bowden Institution***, 2018 ABQB 144, 71 Alta LR (6th) 267 [***MacKinnon #2***] *habeas corpus* application was made on completely false auspices. This inmate's true intention was to use *habeas corpus* as the thin edge of the wedge to open up his decades old murder conviction: para 29. He demanded documents be provided, evidence from the original trial, and government-paid lawyers. Stephen Harper (allegedly) led a conspiracy to keep this inmate behind bars: at para 29. This was only the latest in much litigation abuse with the same objective: paras 36-39.

[222] While the number of unmeritorious and abusive *habeas corpus* applications filed by SRL inmates declined in 2018 after the Court instituted a document-based "show cause" procedure (***Latham #1***), there are continuing challenges to avoid court proceedings and hearings in response to apparently hopeless *habeas corpus* applications. For example, all three of the examples of frivolous complaints identified above at para [218] *led to full court hearings*, commandeering and wasting critically stressed court resources. Unfortunately, now lawyers are also filing *habeas corpus* applications which have no possible merit (e.g. ***RP v Alberta (Director of Child, Youth and Family Enhancement)***, 2018 ABQB 391, action struck out 2018 ABQB 508, 12 RFL (8th) 345; ***Wilcox v Alberta***, 2019 ABQB 60, action struck out ***Wilcox v Alberta***, 2019 ABQB 201 [***Wilcox #3***]), or are seeking to transform *habeas corpus* into a quick cash remedy (***Hamm***).

c. Strange Abusive Litigant Phenomena

[223] Sometimes the selfish or goal-oriented motivation of an abusive litigant is unexpected, or not initially obvious. An example of that was a matter I heard, reported as ***Stout***. Here, the submissive half in a sadomasochist relationship sued his former partner after their tumultuous relationship collapsed due to his infidelities with prostitutes. The Plaintiff alleged malicious prosecution, despite him being convicted on multiple counts: ***R v Stout***, 2013 ABPC 108 [***R v Stout***]. I dismissed Stout's malicious prosecution lawsuit on multiple grounds, including that it was an abuse of process, and conducted for an improper purpose.

[224] One possible explanation for that improper purpose was the Plaintiff had a "post-break up protocol", where he would obsessively pursue his now ex-partner, and in that way restore their unusual relationship: ***Stout***, at paras 31, 80. In other words, here it was plausible the Plaintiff was suing his current ex-partner to express his affection and obsession with her, and, in that way, they would get together again, just the latest instance of a pattern that had apparently repeated as many as 25 times in the previous five years (***R v Stout***, at paras 12-13, 25) (though this was the first time the "protocol" led to court proceedings). The lesson, in brief, is sometimes what appears to be inexplicable litigation conduct may have a not so obvious reason.

[225] The uncomfortable truth is that when the Court faces truly determined abusive litigants who have found a way to exploit court processes for money or other benefits, the current mechanisms Canadian courts possess to manage abusive litigation will be challenged, or, at best, provide bandages for already inflicted wounds. Abusive litigants can don new corporate masks, or employ proxy actors. Some court processes, like *habeas corpus*, must remain 'largely

unlocked' because of their constitutional function, so that an abusive litigant will face, at most, reduced potential scrutiny: ***Hamm***, at paras 195-214. Realistically, Canadian courts may have to rely on more creative judicial decisions, or on other government actors, law enforcement, and Parliament and the legislatures to create meaningful mechanisms that discourage this category of abusive litigation.

[226] After all, ultimately, this form of abusive litigation is a question of profit and loss. When the latter outweighs the former, these abusive litigants will stop. Until then, they have no reason to change their ways, and they don't. We have to be more vigilant and effective.

4. Litigation Terrorists

[227] The last abusive litigant category are persons who use court processes to inflict harm on targets, intimidate, and empower themselves to dominate others. While the "litigation terrorist" label has been used in a number of contexts, including by myself, I now adopt the definition set by Shelley J in ***Lee v Canada #2***, at para 155:

> I define a "litigation terrorist" as a person who engages in meritless litigation where the principal intended purpose is to intimidate and/or cause harm to the other party or parties. ... These litigants 'weaponize' the courts and the law.

[228] Shelley J continues to observe that some abusive litigants, such as OPCA litigants, have a "litigation terrorist" aspect, in that they like the idea of inflicting harm or "disciplining" their ideological enemies: para 156.

[229] Fortunately, pure litigation terrorists appear to be quite uncommon. Most abusive litigants have at least some kind of identifiable personal goal, and do not simply litigate purely for the simple enjoyment of harming others.

Lee

[230] There are, however, exceptions. Bowden Institution inmate John Mark Lee Jr. is an archetype of the true litigation terrorist. His court misconduct is reviewed in ***Lee v Canada #1*** and ***Lee v Canada #2***. This prolific litigant's lawsuits and court applications appear to have no foundation other than his desire to harm and dominate others. Shelley J concluded that Correctional Service Canada's evaluations of Lee were correct; he "gets off" by dominating and harming others via the courts: ***Lee v Canada #2***, at para 157.

[231] ***Lee v Blondin***, 2017 ABQB 800, 22 CPC (8th) 291 is a disturbing illustration of Lee's malice. Lee is incarcerated for murder. In 1989 Lee stabbed a young boy to death. The child was attempting to escape sexual assault by Lee after Lee had produced a fake police badge. Lee, in 2017, sued the family of his victim, claiming Lee had suffered mental distress when the family of his victim attended Parole Board of Canada proceedings and made victim impact statements that included unfavorable things about Lee. Lee claimed that these statements "... were intended to expressly harm him ... the tort of misfeasance.": para 7. On this basis Lee sued for $200,000.00, or that the family cease attending his parole hearings and remove a memorial website to their dead child. Shelley J, on her own motion, struck out this action per *Rule* 3.68, as "... contrary to the interests of justice, a further abuse of process, and contrary to public policy ...".

[232] Lee subsequently claimed that since his lawsuit in Alberta was frustrated in this manner, he now has his relatives conducting litigation with the same objective in Ontario: ***Lee v Canada #2***, at para 85.

[233] Lee's other litigation targets practically anyone who offends him. Some of his litigation is ridiculous, such as a lawsuit against Canada that demanded $100,000.00 since he was not permitted to sunbath nude, which aggravated "... the Acne problem on his bare backside (rump) ..." (***Lee v Canada #2***, at para 101), or his lawsuit that demanded a bank use him as "their corporate cover boy" for the purposes of advertising and credit card promotions (***Lee v Canada #2***, at para 106).

[234] However, most of Lee's abusive litigation targets Correctional Service Canada workers who have in some way offended him. For example, after he was suspended from working at the Bowden Institution kitchen, Lee filed four lawsuits against the Warden and others, demanding between $500,000.00 and $800,000.00 each: ***Lee v Canada #2***, at paras 116-117. ***Lee v Hache***, 2018 ABQB 88 [***Lee v Hache #1***] reports Master Smart striking out a lawsuit by Lee against an institutional nurse from whom he demanded $20,000.00. The nurse had refused to personally deliver Lee's medication to his cell, but instead required Lee attend a nursing station to pick up his medication. Lee's ***Lee v Hache #1*** statement of claim says this caused Lee stress, which led to him having more sex with fellow inmates, who Lee calls "peer counsellors". That stress and sexual activity (allegedly) warranted the damage award. This action was struck out by the Court as abusive.

[235] Being made subject to court access restrictions did not stop Lee. He applied for leave to continue ten civil lawsuits and appeals (including an appeal of ***Lee v Hache #1***), but provided no substantive basis for why any of his litigation was valid. All the actions were therefore struck out: ***Lee v Hache***, 2018 ABQB 384 [***Lee v Hache #2***]. After that, Lee simply shifted his litigation activities to the Federal Court: ***Lee v Canada #2***, at paras 175-176. The Attorney General of Canada has now applied to have Lee subject to court access restrictions in that jurisdiction, too: ***Attorney General of Canada v Lee***, Edmonton T-2084-18 (FC).

[236] But that is still not the full extent of Lee's abusive terrorist litigation activity. He was one of the prison inmate *habeas corpus* entrepreneurs. Lee not merely acknowledged that, but proudly detailed how he had prepared materials for at least 20 actions conducted by other inmates, including 16 *habeas corpus* applications: ***Lee v Canada #2***, at paras 49-74. Lee openly admitted that as far as he was concerned, he did not care if those lawsuits and applications had no merit. What mattered to him was that this litigation harmed and intimidated Correctional Service Canada and its employees. That harassment and injury was his litigation terrorism objective, a method to discipline those Lee identified as enemies and wrongdoers.

[237] Fortunately, it seems these true litigation terrorists are uncommon. Recent Alberta jurisprudence provides few other examples.

- ***IntelliView Technologies Inc v Badawy***, 2018 ABQB 961 at paras 151-152, leave refused 2019 ABCA 66 [***IntelliView v Badawy #1***] - a divorced spouse obtained corporate and intellectual property registrations for the name of his ex-wife's law firm and lawyer, then sued for breach of those. Campbell J concluded there was no legitimate explanation for that, the ex-husband "... [used] legal processes with the intention to harass, harm, and intimidate. ...".
- ***Lymer (Re) #3***, at paras 102-113 - the Court concluded that the abusive litigant is either or both a litigation terrorist who "gets off" on harming others via the courts, or used his court activities to conceal millions of dollars in investor funds that the abusive litigant had obtained under false auspices.

[238] The critical point is that abuse by litigation terrorists should not be tolerated. When one of these malignant personalities is identified, public confidence in the judicial system will be severely taxed unless their "weaponized litigation" is brought under *immediate* and *effective* control.

5. Sometimes Things Are Complicated

[239] The four general types of abusive litigant I have identified previously (mental health abusive litigants, ideological abusive litigants, abusive litigants for profit and advantage, litigation terrorists) are not mutually exclusive. Sometimes an abusive litigant straddles a number of these categories.

McKechnie

[240] A recent and extreme example is Amos Edwin McKechnie, who was first made the subject of interim court access restrictions (***McKechnie #1***), then comprehensive and very strict ongoing restrictions (***McKechnie #2***). In the first decision, McKechnie was given the opportunity to make submissions as to whether he should be subject to ongoing court access restrictions. McKechnie did not provide a written response, but instead left a phone message that he would kill the judge for interfering with McKechnie's court and litigation activities: ***McKechnie #2***, at para 7. He later repeated that threat in court and on the record.

[241] As indicated, McKechnie combined a number of abusive litigant types. He appears to be a litigation terrorist. He filed with the Court various family law applications where he claimed parentage to a child, describing sex acts with the mother in pornographic detail, and that McKechnie had a contractual right to kill the child's mother: ***McKechnie #1***, at paras 14-16. Simpson J concluded this was an attempt to stalk, harass, and intimidate the mother of McKechnie's purported child.

[242] McKechnie's numerous declarations in documents and in court that he would kill, or order killed, persons who interfere with his court activities also extended to additional judges, lawyers, including his former criminal defence counsel and her law firm, court staff, the Law Society of Alberta, employees of Alberta Correction Services, and police: ***McKechnie #2***, at paras 2, 13, 34. McKechnie was explicit in court and in his materials: those killings would be legal and are justified. As one might anticipate, McKechnie was an OPCA litigant, and a self-declared Freeman-on-the-Land: ***McKechnie #1***, at paras 22-25; ***McKechnie #2***, at paras 33-34. McKechnie's interpretation of the *Criminal Code* (purportedly) permits him to execute those he identifies as wrongdoers, and who do not follow *his* law. McKechnie's abusive litigation therefore also had an ideological component, targeting the usual objects of the pseudolaw community's hatred and paranoid, conspiratorial belief.

[243] If that were not enough, McKechnie also had serious psychiatric issues, meeting the criteria for delusional disorder, primarily persecutory and grandiose delusions, or very severe personality disorder with paranoid, antisocial, and narcissistic traits: ***McKechnie #2***, at para 15. Moreover, the risk associated with McKechnie's threats, beliefs and mental illness were real. Professional threat assessment classified McKechnie as a high risk of violence to those in the justice system: ***McKechnie #2***, at para 16.

[244] Managing persons like McKechnie is a challenge. He is facing a range of serious criminal charges, and so he must be permitted his right to make a full answer and defence. Despite his very troubling conduct, McKechnie still also has a *prima facie* right to engage the courts in civil

litigation, even against the woman he was trying to terrorize. I will subsequently describe the unusual and in some ways intrusive court access restrictions which were ordered, however, given McKechnie's complex profile and the synergy of his problematic attributes, these steps were responsive, but also fair and proportionate.

[245] Fortunately, McKechnie is unusual, but that said, the unusual cases such as his are what illustrate that the courts need flexible, adaptable, mechanisms to respond not only to the 'simpler' abusive litigants, but also the more complex and exceptional individuals. This can be a difficult balancing act.

6. What is Abusive Litigation Like?

[246] In addition to dealing with Unrau directly, this decision is intended to help explain this Court's experiences with abusive litigation. Thus, I believe it is helpful to describe what abusive litigation looks like, a view from the trenches, if you will.

[247] First, much like how the apparent causes of abusive litigation varies, the same is also true for how abusive litigants conduct themselves in court. Some additional detail on the mechanisms of their activity is therefore illustrative.

a. Flurry Litigation

[248] Sometimes abusive litigants initiate a flurry of proceedings, but then do not do much with them. A recent example of this abusive litigation pattern is described in ***Gagnon v Shoppers Drug Mart***, 2018 ABQB 888 [***Gagnon v Shoppers***]; ***Gagnon v Core Real Estate Group***, 2018 ABQB 913, actions struck out 2019 ABQB 86 [***Gagnon v Core***]. Over two months, this abusive litigant filed ten statements of claim against a variety of defendants. Most of these statements of claim were 'skeletal', with only a couple paragraphs, little more than bald allegations of misconduct, and demands for millions in damages. After initiating these applications, Gagnon was hospitalized under the *Mental Health Act*, RSA 2000, c M-13: ***Gagnon v Shoppers***, at paras 9-10. Gagnon did not subsequently pursue these actions in a timely manner.

[249] Gagnon's litigation nevertheless incurred significant expenses for all involved. The Defendants were obliged to file Statements of Defence, or risk default judgments. The multiple proceedings used court resources, though the effect on the Court was effectively minimized via the CPN7 "show cause" procedure. As I have previously stressed, *abusive litigation costs everyone*. Gagnon paid filing fees for each of his lawsuits. He may have had limited means, since he explained he is a 74 year old retired person: ***Gagnon v Shoppers***, at para 10. The very large sums he sought as damages meant that if Gagnon were assessed costs, the default *Rules* Schedule C amounts he would presumptively pay (*Rule* 10.29) would be substantial.

[250] Another "flurry litigant" was Mahmoud Elsayed, who on December 9, 2016 filed 26 statements of claim that each demanded $50,000.00 in damages from an Alberta hospital, the Edmonton Remand Centre, or Alberta Health Services (Dockets 1603-21861; 1603-21862; 1603-21863; 1603-21864; 1603-21865; 1603-21866; 1603-21867; 1603-21868; 1603-21869; 1603-21870; 1603-21871; 1603-21872; 1603-21873; 1603-21874; 1603-21875; 1603-21876; 1603-21878; 1603-21955; 1603-21956; 1603-21957; 1603-21958; 1603-21959; 1603-21960; 1603-21961; 1603-21962; 1603-21963). The statements of claim were otherwise identical, with a single sentence complaint: "[Date] admitted and discharged with no stable housing, no stable income." Elsayed had a fee waiver, and so paid nothing to initiate this lawsuit flurry.

[251] Other abusive litigants are much more "invested" in their litigation, which often turns into a blizzard of paperwork. There are patterns to that, too.

b. Successive and Expanding Litigation

[252] One is successive litigation, often initiated even while the original action remains live. Sometimes these new lawsuits and/or applications are obviously designed to evade developments in the first lawsuit. Grabowski's Ukrainian dance litigation (Part IV(C)(1)(e)(iii)) is an example of that. Other times they target parties who have become involved in the original action, and are now caught up within the subsequent lawsuits.

Biley

[253] The successive litigation pattern appears in ***Biley v Sherwood***, where a trio of lawsuits by Jonathan Karl Wayne Biley were struck out. Biley was also declared a vexatious litigant and made subject to court access restrictions. Biley started a lawsuit against a former employer, and when the scope of his potential claim was limited by court decisions, Biley then launched two additional lawsuits:

1. a purported class action, where Biley said he represented all sales employees of his former employer, and
2. a lawsuit where Biley now sought damages of $20 million against the same employer, allegedly his lost employment income meant that Biley had been unable to pursue his invention, a drone that harvested seaweed and underwater gold.

Badawy

[254] Wael Badawy (***IntelliView v Badawy #1***), who I previously identified as a litigation terrorist, provides another instance of successive litigation. Badawy expanded his litigation outside his initial divorce action to enforce spurious intellectual property claims against his ex-wife's lawyer. Shortly after his first lawsuit on this subject was struck out (***Badawy v Igras*** (23 June 2017), Vancouver T-1289-14 (FC)), Badawy filed essentially the same lawsuit again on December 15, 2017 (***Badawy v Minister of Justice and Attorney General of Canada***, Calgary T-1965-17 (FC)), but now added multiple additional Defendants who had no relation to the dispute whatsoever (***Badawy v Minister of Justice and Attorney General of Canada*** (16 August 2018), Calgary T-1965-17 (FC), aff'd 2018 FC 1189).

Chisan

[255] In ***Chisan v Fielding***, 2017 ABQB 233, Eamon J imposed court access restrictions on a vexatious litigant who had been re-litigating disputes with the City of Calgary *since 1991*.

Templanza

[256] Lawyers who represented someone in a lawsuit are often targets of 'downstream' expanding actions. For example, ***Templanza v Ford***, 2018 ABQB 168, 69 Alta LR (6th) 110 [***Templanza #1***] struck out eight lawsuits that each involved lawyers who had become involved in an earlier real property dispute. The abusive litigant, Rosalina Templanza, sued her own and opposing lawyers, claiming they were part of a conspiracy.

Williams

[257] I, personally, am facing something similar in relation to an Ontario OPCA litigant who calls himself "minister David Williams". I was named as a Defendant in a Federal Court action which seeks $100 million in damages from 27 defendants, but does not include any allegations against me, personally: ***Williams v Payette***, Toronto T-1200-18 (FC). When that lawsuit faced applications that it should be struck out, Williams filed another lawsuit against me, personally, this time for $150 million. Williams claims he has been defamed by court judgments that I have written which do not involve him, but instead denounce OPCA concepts: ***Williams v Rooke***, Ottawa T-2105-18 (FC). I should note that my mentioning this litigation in the context of a decision about abusive litigation is not me giving a judicial opinion on the merits of these lawsuits, which I respectfully leave to the Federal Court and/or Federal Court of Appeal. However, I believe it is fair to observe that the Federal Court of Appeal in ***Crowe v Canada (Attorney General)***, 2008 FCA 298 at para 18, 382 NR 50 concluded that Federal Courts have no jurisdiction over possible misconduct by judges.

Paraniuk

[258] Other abusive lawsuits grow and grow and grow. ***Paraniuk v Pierce*** describes how the abusive litigant filed a Statement of Claim, then an Amended Statement of Claim, then an Amended Amended Statement of Claim. Each document was longer, and the damages sought escalated: $100,000.00, then $300,000.00. The Court refused to permit filing of a yet additional Further Amended Statement of Claim, which demanded $800,000.00. Paraniuk claimed he was uncovering a greater conspiracy at every turn, and kept naming new Defendants. The Amended Amended Statement of Claim had 31 paragraphs. The final refused Further Amended Statement of Claim was over 440 paragraphs in length.

c. The Blizzard of Paper

[259] Abusive litigation scenarios often feature an astonishing quantity of paperwork, both in frequency and the volume of individual items.

[260] Typical patterns are repeated interlocutory applications and appeals, demands to revisit and/or vary prior orders, retaliatory 'tit-for-tat' applications and allegations in response to any step by the opposing party, and extensive, escalating affidavits.

Mazhero

[261] A common result of this blizzard of paperwork is that actions which should advance in a timely manner instead progress in the opposite direction. Stratas JA in ***Mazhero v Fox***, 2014 FCA 219 [***Mazhero #1***], ***Mazhero v Fox***, 2014 FCA 226 [***Mazhero #2***], and ***Mazhero v Fox***, 2014 FCA 238 [***Mazhero #3***] examines an example of this phenomenon, involving a pair of consolidated appeals. Justice Stratas observes that the only tangible step to date was filing of the notice of appeal. The next step, to file appeal books, usually takes less than 60 days: ***Mazhero #1***, at para 9.

[262] However, with this action, 1279 days and 1244 days later, that still had not occurred: para 9. Instead, "[t]he appeals have been frozen by numerous motions and letters requesting relief of various sorts, and also by some earlier orders of the Court.": para 9. The problem was Mazhero's unrelenting paperwork (para 11):

> ... Justice Sharlow has correctly observed that the appellant has been submitting letters and documents to the Court faster than the Court can deal with them ... A number of these letters and documents do not have any legal merit and a few contain attacks on the bona fides and motivations of the Court. Yet, when filed, the Court must still deal with them, a task that fritters the Court's scarce resources away without moving the matter any closer to hearing.

[263] In an attempt to combat this, Justice Stratas, quite correctly in my view, ordered the Registry not to respond to and instead reject any irregular documentation: para 14. That still left numerous unmeritorious applications. For example, one of Mazhero's applications was to hold two opposing parties and the Registrar in contempt because those opposing parties *had not filed* reply submissions to Mazhero's application, despite the fact that omission would more likely mean that Mazhero's application would succeed: ***Mazhero #2***, at paras 10-12, 14. After another wave of applications, the appeals were ultimately dismissed (***Mazhero #3***, at para 3):

> ... Mr. Mazhero's persistent and continued defiance of orders of this Court show that he will not deviate from a pattern of abusive litigation behaviour and is ungovernable. For these reasons, I would dismiss the consolidated appeals with costs.

Liu

[264] Similarly, in ***Liu***, at para 2, the Alberta Court of Appeal describes how the abusive litigant had made 24 applications and seven attempted appeals after he was fired from his job.

Olumide

[265] Perhaps unsurprisingly, Ade Olumide exhibits this pattern. His recent proceeding in this Court, described in ***Olumide v Alberta***, featured multiple variations on his applications and appeals, and while the first application had 355 pages, his next "Appeal New Evidence" document was 969 pages long.

Lee

[266] Litigation terrorist John Mark Lee Jr. provides a further example of this process: ***Lee v Canada #1***. The *habeas corpus* application rejected in that decision went through successive waves of documentation, each larger than the last. Ultimately, the Court received six binders, each an assortment of documents that ranged from unfiled notices, various affidavits, an "opening presentation" which declared this was *not* a *habeas corpus* application, case law, affidavits, exhibits, and much more.

[267] Justice Shelley at para 37 concluded:

> I believe it is fair to say that Mr. Lee's voluminous Six Binders are internally inconsistent, include much whose relevance is not obvious, and seem to relate to subjects outside the limited scope of his initial [habeas corpus filings]. Counsel for the Respondent called this material "confusing". This is accurate. I have therefore not relied extensively on Mr. Lee's Six Binders in preparing this judgment, but instead focussed on his submissions [in court], and the original [habeas corpus] filings.

Thompson / Bourque

[268] 'Tit-for-tat' applications are also commonplace, such that an application for a vexatious litigant order results in the same step or allegations of that kind, but in the opposite direction: ***Thompson v International #1***, at para 62; ***Alberta Lawyers Insurance Association v Bourque***, 2018 ABQB 311 at para 23 [***ALIA v Bourque #1***].

Badawy

[269] A common aspect of the blizzard is that each 'dump' of paperwork will usually run before an event, at the hearing, and then continue afterwards. ***IntelliView v Badawy #1***, at para 13, identifies eight separate sets of documents which were submitted by Badawy in relation to a single application by the opposing party.

[270] Court access restrictions are indispensable when dealing with a blizzard of paperwork, not just to keep the court from being 'snowed under', but also to bring order and a fair process to all parties. For example, a problematic litigant is far better served by being required to wait and then respond after the opposing party has filed documents that advance its position and evidence, rather than multiple piecemeal and repetitious filings, scattered over a longer period.

d. Procedural Nitpicking

[271] Another common feature of abusive litigation is an obsession about procedure and formalities. Some abusive litigants scrutinize every item of paperwork that they receive, seeking out any alleged defect, which they then usually say is fatal to the opposing party.

Biley

[272] For example, in ***Biley v Sherwood***, the abusive litigant complained that he received a copy of a court order that was "degraded ... documents that appear to be decoys"; the judge's signature was barely visible. That, allegedly, was professional lawyer misconduct that required sanction: paras 10, 63.

Thompson

[273] Similarly, Derek Thompson demanded opposing counsel be disbarred and face criminal charges for using "altered forms": ***Thompson v International #1***, at para 24. He also repeatedly protested that essentially every draft order prepared by the other side was defective and demanded revisions: paras 5, 9, 18, 20, 22.

Paraniuk

[274] Vexatious litigant, Gregory Paraniuk, pursued *Rule* 5.12 penalties for allegedly late filing of affidavits of records by the various defendants: ***Paraniuk v Pierce***, at paras 125-130. His position was that although the *Rule* specifying these penalties was clearly discretionary, those penalties should nevertheless *always* be imposed. Paraniuk argued that it was irrelevant that, with one group of defendants, he had timely receipt of an unsworn affidavit of records, which was exactly the same as the late sworn affidavit of records. Paraniuk argued it did not matter there was no possible injury to Paraniuk.

[275] This attitude is very typical of abusive litigants. When they may serve as a sword, 'the *Rules* are the *Rules*', and must be followed rigidly with robot-like mindlessness, common sense and substance being ignored. This is clearly contrary to the post-"culture shift" approach. "... A

legal system which is unnecessarily complex and rule-focused is antithetical to access to justice. ...": ***Trang***, at para 30.

Badawy

[276] Another example of pointless niggling in an effort to obtain advantage is reported in ***IntelliView Technologies Inc v Badawy***, 2019 ABCA 66 at para 2 [***IntelliView v Badawy #2***]. The abusive litigant complained that the other party's materials did not satisfy the Alberta Court of Appeal's formatting requirements, despite those materials being accepted by the Registrar. The abusive litigant sought and obtained an adjournment, in part, on that basis, and at the full hearing wanted the Respondent sanctioned for the so-called "irregularities". Veldhuis JA declined to do so.

[277] Meaningless questioning on affidavits is another common nitpicking behaviour. This was one of the grounds on which vexatious litigant, Wael Badawy, appealed from being made subject to a vexatious litigant order. However Veldhuis JA observed the contents of the affidavit was court procedural documentation, so it is not as if that questioning would have been anything but an empty exercise: ***IntelliView v Badawy #2***, at para 11. Worse, Badawy had been offered an opportunity to examine the deponent of the affidavit, but declined.

Paraniuk

[278] ***Paraniuk v Pierce***, at para 95 shows another example of "minutiae", a complaint that the fact a document attached to an affidavit was highlighted made that "a false document":

> ... Any and all highlighting added to that document is "a material addition to a genuine document". If the highlighting added to that document **were not** intended to be a **material addition** to that document, that highlighting would not have been **added** to that document. [Emphasis in original.]

Here, again, is an instance of the querulous litigant text emphasis pattern.

e. Fabrications and Excuses

[279] When caught in lies, or having acted in questionable ways, abusive litigants often advance what are, at best, superficial excuses.

Paraniuk

[280] When confronted with a Law Society of Alberta complaint which expressly indicated he demanded opposing counsel be disbarred and receive "the maximum punishment possible" (***Paraniuk v Pierce***, at para 76), abusive litigant Paraniuk said, that in his mind, he had made no complaint - he only provided "information" (para 69).

Onischuk

[281] Another common excuse is that documentary records cannot be trusted. This is particularly true for transcripts, which abusive litigants often claim are unreliable, were edited, or tampered with: e.g. ***Onischuk v Alberta #1***, at para 35.

Bourque

[282] ***Alberta Lawyers Insurance Association v Bourque***, 2018 ABQB 821 at paras 38-52 [***ALIA v Bourque #3***] illustrates the preposterous lengths to which some abusive litigants will go to provide excuses and obtain advantage. First, the abusive litigant mother and son team reported

they were unable to meet court filing deadlines because their family members had medical emergencies. However, the dates of those several medical crises shifted, affidavit to affidavit, to align with different filing deadlines required by the specific Alberta Court where the abusive litigants were making their otherwise identical excuses: at paras 38-40.

[283] Even more absurd is that the son protested he could not follow the terms of an interim court access restriction order. He could not lawfully file court documents if he were to self-identify simply as "Stephen Bourque". Stephen Bourque said, as a veterinarian and pharmacist, he must always name himself as a "Dr.", and list his "DVM" degree. The problem here was "Dr." Bourque "DVM" had been stripped of his professional credentials as a consequence of his drug abuse and criminal convictions: at paras 41-48.

[284] It gets worse. Not only did Stephen Bourque claim he could not follow the Court's instructions because he is a veterinarian, he also argued that being labelled a "vexatious litigant" would have serious consequences to his veterinarian professional status and his career in that field, which was by this point over: paras 49-51. Mandziuk J observed this satisfied the definition of the Yiddish word "chutzpah": "a man who has been convicted of murdering his parents seeking mercy on the ground that he is an orphan".

[285] Another example of abusive litigants engaged in bald-faced lies for advantage was a group of *habeas corpus* litigants, all residents of the Edmonton Institution maximum security prison. Their materials were written in what appeared to be the exact same handwriting, and with many identical passages and document formatting quirks. When confronted with the possibility that these items were the product of a *habeas corpus* entrepreneur, all four applicants insisted they had each separately prepared their own materials. It was just by some coincidence that their handwriting was so uncannily similar: ***Badger v Canada***, 2017 ABQB 457 at paras 13-15 [***Badger***]; ***McCargar #2***, at paras 36-47.

[286] ***Kavanagh***,[1] at paras 45-60, describes how an abusive litigant ex-husband attempted to explain away a series of insulting and threatening emails sent from his email address to his ex-wife's lawyer. His explanation was that hackers did it. These Chinese hackers had "spooked" the ex-husband's email account, and, apparently, considered it important to write false emails to the ex-wife's lawyer that called the lawyer a "bohunk runt". Unsurprisingly, Shelley J did not accept that explanation: para 59.

[287] This review of instances of less than honest or forthright abusive litigants is not intended to give the impression that all abusive litigants operate in this manner. Some are quite the opposite, and are startlingly forthright about their beliefs, opinions, and intended plans. However, a degree of healthy skepticism is sometimes warranted.

[288] Justice Manderscheid in ***VWW v Wasylyshen***, 2013 ABQB 327, 563 AR 281, leave denied 2014 ABCA 121, 572 AR 235 [***VWW***] provided a good example of a useful response to unusual and implausible claims. This decision involved a vexatious litigant who argued that a stayed action should be continued. However, this vexatious litigant said she did not personally want to pursue the lawsuit. She was nevertheless compelled to do so because, among other

[1] This decision, which preceded ***Hok v Alberta #2***, would have been the first instance where this Court implemented a two-step document-based vexatious litigant order proceeding, except that the abusive litigant died prior to the second step.

things, the vexatious litigant's dead sister was haunting her and insisted that the lawsuit must proceed.

[289] Justice Manderscheid, at para 52, responded with an approach that may have useful application when dealing with abusive litigants and their more unusual statements - "extraordinary claims require extraordinary proof":

> I have no difficulty concluding that V.W.W. is neither credible nor reliable. Many of her claims are extraordinary, and do not meet the principle suggested by Marcello Truzzi in "On the Extraordinary: An Attempt at Clarification", (1978) 1 Zetetic Scholar 11 at 11, and subsequently popularized by scientist Carl Sagan, that "[a]n extraordinary claim requires extraordinary proof." V.W.W.'s allegations of conspiracy, murder, counterfeiting, poisoning attempts, and supernatural contact obviously fall within this category.

[290] Absurd excuses are not limited to abusive litigants. Abusive lawyers have done much the same. ***Sawridge #8***, at para 34 reports how a lawyer whose client engaged in "busybody" litigation in this Court rejected that allegation by citing the *Federal Courts Rules*, SOR/98-106, s 114 as the authority for a purported "Representative proceeding".

f. Pushing Judicial 'Hot Buttons'

[291] Many abusive litigants are very well aware of judicial 'hot buttons', issues that will almost always lead a judge to act in certain ways. For example, judges are extremely sensitive to the possibility that an order or decision may be procedurally unfair because a party did not have an adequate opportunity to respond.

Judicial Fairness Betrayed

[292] An excellent illustration of how abusive litigants "play dirty", and exploit their knowledge of judge and court staff 'hot buttons', is described in ***MacKinnon #2***, at paras 44-85. The abusive litigant was a Correctional Service Canada inmate whose *habeas corpus* application was dismissed. The Court then considered whether to impose court access restrictions. As the deadline for the inmate's written submissions on that issue approached, the Court and the Clerks began to receive faxes complaining that the inmate was being held incommunicado and could not respond or access legal services. MacKinnon was (allegedly) being denied his right to counsel. He could not defend himself. The source of these faxes was not indicated. The fax author called him or herself an "uninvolved 3rd party". Then more faxes arrived, this time purporting to be from the Edmonton John Howard Society, and making similar claims. Finally, a third wave of faxes were received from the inmate himself. None were copied to opposing counsel.

[293] Worse, these faxes were sent to multiple Court fax numbers, which triggered two parallel attempts to resolve the issue. This purported emergency led two different judges to both simultaneously become involved, each unaware of the other's actions. They each issued two opposite and conflicting court orders. Despite MacKinnon's obvious questionable conduct, the submission deadline was still extended. This illustrates just how cautious courts are, when responding to complaints of procedural unfairness, but then that process results in additional abuse of court processes.

[294] However, rather than file submissions in response to the vexatious litigant issue, the inmate instead *started a completely new action*, a 102 page application that was specifically

directed to an uninvolved third judge, that again tried to re-open the subject matters which had already been struck out during the *habeas corpus* proceeding.

[295] As the extended deadline for the vexatious litigant order submissions approached, the same pattern repeated. Once more faxes from the "uninvolved 3rd party" began to arrive, claiming the inmate could not communicate with the Court. The Edmonton Institution was on a lock down. Then the inmate sent a wave of communications. Naturally, the purported lockdown was a complete fabrication. Ultimately, the abusive inmate filed nothing, and was made subject to vexatious litigant court access restrictions.

[296] Justice Manderscheid concluded that the *habeas corpus* applicant's "... dishonest and manipulative communications with the Court favoured strong and strict court access restrictions.": para 85. I think any objective observer would agree.

False Allegations of Incomplete/Ineffective Service

[297] A further example of how abusive litigants manipulate judicial 'hot buttons' are allegations of incomplete or ineffective service. One of the most common complaints by abusive litigants is that they have not received the opposing party's materials. The abusive litigant is therefore "surprised", and does not know the case against them. It is, thus, unfair to proceed. I think it is fair to say that at least some, or perhaps most, of these defective service complaints are fabrications. Otherwise, there is a peculiar and widespread pattern that process servers, Canada Post, and courier delivery services operate very effectively with the vast majority of SRLs, but not this one select group.

Badawy

[298] One example of service-related abuse is reviewed in ***IntelliView v Badawy #1***, at paras 65-70. The abusive litigant responded to a vexatious litigant court access restriction application by complaints he was not properly served. This was nothing new. The Alberta Court of Appeal found this particular abusive litigant did the exact same thing during his earlier divorce action. In ***Nafie v Badawy***, 2015 ABCA 36, 381 DLR (4th) 208, leave to appeal to SCC refused, 36371 (5 November 2015), the majority decision observed the "[c]hronic complaints" by the abusive litigant concerning defective and evaded service, and stressed "... procedural rules governing service are not a sword to be used to stall proceedings": at para 115. The abusive litigant also did the very same thing in Federal Court: ***Badawy v Igras*** (20 January 2015), Calgary T-1289-14 (FC)).

[299] On appeal, Badawy again argued service was an issue, but the Court observed that he already had these materials in his possession. They were filed court documents *from his own litigation*: ***IntelliView v Badawy #2***, at para 9.

[300] Defective service allegations are sometimes waved like a magic wand, to purported undo entire proceedings. Even when the function of service has been met, and adequate notice has been provided along with an opportunity to respond, some abusive litigants still continue to raise that same issue, over and over, by rote: ***IntelliView v Badawy #1***, at paras 13, 68-70; ***IntelliView v Badawy #2***, at paras 6-9.

[301] Abusive litigants sometimes go so far as to exploit service for offensive purposes. For example, in ***IntelliView Technologies Inc v Badawy*** (8 January 2018), Calgary 1601-07860 (Alta QB), the abusive litigant filed a counterclaim, created a forged Affidavit of Service, and then obtained a default judgment. When confronted with this misconduct, the abusive litigant

denied everything and blamed the opposing parties' lawyers: "I have no control on how they manage their operation." See also ***Al-Ghamdi v College and Association of Registered Nurses of Alberta***, 2017 ABQB 685 at para 77, 285 ACWS 93d) 873 [***Al-Ghamdi***].

Bourque

[302] In ***ALIA v Bourque #3***, at paras 19, 28, 54, 91-92, the abusive mother and son team continued to complain about defective service and argued that should 'undo everything', even after the Alberta Court of Appeal had ruled that even if there were any service issues, those had been cured many months earlier, and it was obvious the abusive litigants had received the material because they were responding to it: ***ALIA v Bourque #3***, at para 140; ***Bourque v Alberta Lawyers Insurance Association***, 2018 ABCA 257 at para 5 [***ALIA v Bourque #2***]. This was bad faith litigation intended to frustrate the proceedings: ***ALIA v Bourque #3***, at para 159.

Inadequate Preparation Time and Resources

[303] Inadequate preparation and resources is another common complaint: "I strongly oppose the judge's motion and I require case law to argue and oppose that as well! To be meaningful!!": ***MacKinnon #2***, at para 21.

Abusive Litigants Claiming to be Fair-Dealing SRLs

[304] A comparatively new 'hot button' tactic is an "abusive litigant wolf" in a "fair-dealing SRL sheep's clothing". Many of the recent abusive litigants encountered by this Court loudly declare they are SRLs, and deserve special status. ***Pintea*** and the *SRL Statement* are invoked. The abusive litigants often complain after an unsuccessful outcome that they were unfairly disadvantaged, and the judge failed in his or her duty to provide adequate support and assistance. I further discuss this phenomenon at Part IV(H)(4)(e), below.

g. Judicial Bias and Demands for Recusal

[305] Abusive litigants often allege that a judge is biased, and either should be removed, or recuse him or herself: e.g. ***Laird v (Alberta) Maintenance Enforcement***, 2019 ABQB 12 at para 54 [***Laird***]; ***IntelliView v Badawy #1***, at paras 114-120; ***Onischuk (Re) #2***, at paras 23-34; ***Onischuk v Edmonton***, at paras 46-49; ***Onischuk (Re) #1***, at para 4; ***Onischuk (Re) #4***, at para 18.

[306] Other times allegations of bias are made against a lower court judge, or a court Master: e.g. ***Biley v Sherwood***, at para 75; ***Paraniuk v Pierce***, at para 64; ***ATB v Hok #1***, at para 11; ***Bourque v Tensfeldt***, 2018 ABQB 419 at paras 10-12, 17; ***Thompson v International Union of Operating Engineers Local No 995***, 2017 ABCA 193 at paras 28-29, leave to appeal to SCC refused, 37974 (7 June 2018) [***Thompson v International #2***]. The abusive litigant then argues the current court should review and reject earlier outcomes on that basis.

[307] Sometimes allegations of bias are obviously an attempt to replace the current decision-maker with a hopefully more agreeable or more compliant alternative, what is commonly called "judge shopping": ***IntelliView v Badawy #1***, at paras 143-145; ***ALIA v Bourque #3***, at paras 188-189; ***Onischuk (Re) #4***, at para 18. A common strategy is to complain to the Court's Chief Justice that a hearing, trial, or case management judge is biased: e.g. ***Botar (Re)***, 2018 ABQB 193 at paras 4-6 [***Botar (Re)***]; ***Thompson v International #1***, at paras 25-26, 32-33. Other times the abusive litigant takes a more indirect approach, such as submitting a request to the Chief Justice or Associate Chief Justice that a case management justice be assigned to the matter, and

in that way displace the judge already dealing with the abusive litigation: ***McCargar #1***, at paras 104-112.

[308] In some instances these demands for recusal are an attempt to eliminate a court's entire judicial complement from hearing matters relating to an abusive litigant: e.g. ***Bossé v Chiasson & Roy***, 2019 CanLII 6671 (NBCA) at para 8 [***Bossé v Chiasson***]. This 'nuclear option' would then, in theory, paralyze the court.

[309] Abusive litigants also often complain to the Canadian Judicial Counsel, alleging bias and requesting that institution take steps to address the alleged judicial misconduct. I have lost track of how often that has happened to me.

[310] However, sometime abusive litigants employ more unorthodox means to remove judges they consider problematic. For example, the abusive litigant in ***Thompson v International #1***, at paras 32, 54 unilaterally "fired" his case management justice:

> Today I write to you with the following request (Hell demand) Because of the following reasons. I have made a complaint against My case management Justice , K.G. Nielsen to Canadian Judicial counsel and I feel that Justice K.G. Nielsen is not being fair , non basis to me, to the point I had to fire Justice Nielsen last Case management meeting . So I am wanting and needing a new Justice to help get this to trial as per the Alberta rules Of Court ... [Sic.]

That didn't work.

[311] Daniel Onischuk demanded he choose the judge who would hear his matters, that he had the "right of veto for any Judge", and that his litigation is "... removed to a Court far outside his supervisory influence as Assoc. Chief Justice, and far from the influence of his cronies of Appeal Judges Costigan and Slattern": ***Onischuk (Re) #2***, at paras 15, 23. That also didn't work.

[312] Other times an allegation of bias is linked to a greater conspiracy. For example, in ***ALIA v Bourque #3***, the abusive litigants concluded they had uncovered a larger pattern. Every judge who had heard their matter was a former president of the Law Society of Alberta. That meant those judges would always take the side of their opponent, a lawyers' insurance organization: para 184.

[313] One might imagine that abusive litigants immediately accuse any judge of bias. In my experience that is not always the case, particularly with persons who exhibit the querulous litigant dispute pattern. Instead, these litigants are usually highly cooperative during their early interactions with a particularly judge. In contrast, OPCA litigants are almost always obnoxious and aggressive from the very first moment, and that conduct never improves, e.g. ***Gauthier v Starr***; ***R v Boisjoli***.

[314] Why the difference? It makes sense when one steps into the shoes of someone whose distorted perceptions and perspective means they are totally confident they are correct, but entirely wrong about that. These problematic litigants enter the courtroom expecting to be successful. In their minds, the facts and their arguments are invincible. As Derek Thompson said: "I feel unbeatable." They expect any sensible judge will realize that. From their perspective, perhaps the last couple of judges were biased, part of a conspiracy, or simply clueless. Surely, this one will be better.

[315] After the first litigation setback all that changes. Any provisional goodwill evaporates. Tensions rise. In ongoing case management scenarios, after a number of unfavourable results, the atmosphere may accurately be described as toxic. In ***Laird*** practically any event was perceived in a deeply negative light. For example, when an email was sent to the wrong address (".com" was used as a suffix, rather than ".ca"), that allegedly indicated bias and conspiracy: paras 96-98. ***Toller v Hnatiuk***, 2018 ABQB 430 at paras 22-25 [***Toller***] reports another deeply hostile case management scenario.

Prefontaine

[316] Maurice Prefontaine, a persistent abusive litigant who has often appeared in this Court, displays this "Dr. Jekyll and Mr. Hyde" transformation: ***R v Prefontaine***, 2002 ABQB 980, 12 Alta LR (4th) 50, appeal dismissed for want of prosecution 2004 ABCA 100, 61 WCB (2d) 306 [***R v Prefontaine***]. Prefontaine was involved in a two decade long dispute with the Canada Revenue Agency. Hearings that involve Prefontaine might as well follow a script. Prefontaine, a former lawyer, initially presents himself in a polite, ordered manner in court. During his submissions and opposing argument he is calm, but once Prefontaine's application or action is rejected, he exploded, making obscene insults and threats directed to the hearing judge and opposing parties. This has led to him being found in contempt of court (***R v Prefontaine***), and barred from self-representing in the Federal Court of Appeal and Tax Court of Canada (***Prefontaine v Canada***, 2004 FCA 52 at para 9, 318 NR 306 [***Prefontaine v Canada #1***]; ***Prefontaine v Canada***, 2004 TCC 775, 2005 DTC 33 [***Prefontaine v Canada #2***]).

[317] Psychiatric expert evidence explained this conduct. Prefontaine suffers from delusional disorder or paranoid personality disorder: ***R v Prefontaine***, at para 11. He understands and is able to follow court procedure (paras 10-17), but loses control when "things don't go his way" (para 15). He honestly believes judges and the Canada Revenue Agency are part of a conspiracy: para 11.

[318] Suffice to say, maintaining good relations with abusive litigants is a very challenging task. Any setback or lack of agreement will often mean the judge is perceived as an enemy, as malicious, incompetent, biased, or as part of a larger web of concealed influences.

[319] That sometimes goes in strange directions, such as Eva Sydel, who was apparently convinced the judiciary were a large Freemason conspiracy that had targeted her for being of German descent: ***Sydel v HMTQ***, 2010 BCSC 638, [2010] DTC 5120, aff'd 2011 BCCA 233, [2011] DTC 5123, leave to appeal to SCC refused, 34366 (15 December 2011). Sydel went so far as to hire a magician to attend court and scrutinize the judge and Crown Prosecutor for secret hand motions and gestures, a silent clandestine dialogue, with Sydel as the intended victim: paras 33-35.

h. Winning by Cheating

[320] Some abusive litigants engage in criminal misconduct to evade court litigation management. One such example is Andrew S. Botar. I was the case management justice in Botar's most recent lawsuits with his two different landlords on litigation which appeared to have been initiated for financial gain, and that led to several actions in our Court. Botar, on December 16, 2016, was fined $2,000.00 for contempt and made subject to court access restrictions after he was found to have attended multiple chambers courtrooms, one after the other, and repeatedly made the same application, until he was finally successful.

[321] Now subject to my case management supervision, Botar wrote me on January 5, 2017, asking permission to take litigation steps. I responded by letter on January 20, 2017, denying Botar leave. Botar then took that letter and forged a new variant, adding a new sentence to the end of it: "For the interim, I grant you leave to make any application."

[322] Botar then presented the forged variant of my letter to justices of our Court and the Alberta Court of Appeal, purporting I had lifted the court access restrictions imposed on him the previous month. In our Court the result was a judge issued an order to pay out $10,000.00 that Botar had garnisheed from his landlord via a default judgment which was then set aside: ***Botar v Braden Equities Inc***, 2017 ABQB 21. (Botar had actually sued for $1 million, but had not garnisheed the full amount).

[323] Botar ended up under police investigation for the forged letter, but appears to have left the jurisdiction when also pursued for fraud by his landlord. Botar nevertheless continued with many subsequent abusive and inappropriate litigation steps, including attempting to bypass and remove me from my case management role by irregular correspondence and purported applications to the Chief Justice of the Court: ***Botar (Re)***. Ultimately, all of Botar's lawsuits were dismissed.

[324] Similarly, the abusive litigant in ***Al-Ghamdi***, at para 77, made inappropriate *ex parte* applications, repeatedly appeared on the same matter, filed inaccurate affidavits of service and then attempted to note the Defendants in default on that basis.

i. Conclusion - Abusive Litigation

[325] These are vignettes. Often it is not this bad. Sometimes it is even worse.

[326] The reader may fairly ask - these acts you describe seem not just unfounded, ill-advised, but malicious. How can you say these people are sometimes sincere but misguided, when they behave this way?

[327] Make no mistake, there are abusive litigants who are entirely happy to cause injury and harm because they like it, or because that outcome is collateral to a benefit. However, for others, there is another factor in play, particularly for those whose perceptions have become distorted because of mental illness, or because litigation processes and over-investment in their disputes now dominates their minds.

[328] These abusive litigants are the committed. They believe totally they are right and their cause is justified. When they fail, they conclude that is not because their cause is false, but because of the actions and the interference of an enemy, who they perceive is wrong, and who they allege knows that. Judges, lawyers, court clerks, Crown prosecutors, government actors, legislators, law societies, administrative tribunals, the Canadian Judicial Council. Those are the enemies who they allege are negligent, biased, incompetent, corrupt, conspirators, or worse. With that realization, the enemy is now known and defined. So what do these abusive litigants do? Since they believe so strongly in their cause, the ends justify the means.

[329] From that perspective, the ruthlessness, tenacity, lies, willingness to game and abuse rules, targeting 'hot buttons', and distorting processes for tactical advantage comes into focus. Many abusive litigants see their perceived opponents as cheaters. Faced with cheaters, they ask why should they play fair? And so they don't.

[330] As the mental health experts who have studied this phenomenon observe, there is no simple answer to this problem. Maybe there is no court-mediated answer. But what is important is to understand that here normal litigation ends, and we move into a new and more challenging dispute landscape.

[331] Attempting to manage an abusive litigant is like skiing on an avalanche. Nothing is settled. Nothing can be expected. All a judge can do is attempt to remain balanced, to keep processes as fair as possible, and try to minimize the stereotypic dispute expansion process seen in so many abusive litigation scenarios, the querulous litigation cascade.

[332] This is why timely and effective litigation management steps are so important. Much of court procedure is based on the presumption parties *want to work with the courts*. With abusive litigants there may be cooperation, but if that cooperation does not produce the desired results, then there are few, if any, borders and prohibitions that will not be violated by these crusading abusive litigants.

[333] The Alberta Court of Appeal has recognized that fact. For example, in ***Crawford v Crawford***, 2015 ABCA 376 at para 12, 68 RFL (7th) 1 [***Crawford***], the Court observed that procedural fairness in difficult litigation should be evaluated in light of the "realities on the ground". That still does not make addressing this unusual litigation any easier.

7. Conclusion - Who Are Abusive Litigants?

[334] Most abusive litigants are not "the enemy". Some, like OPCA litigants, litigants for profit, and litigation terrorists, most certainly are. However, all are a problem. That distinction is very important to keep in mind when responding to these individuals. The *SRL Statement* indicates all SRLs have needs. It is just that the needs of abusive SRLs are more complex. That does not, however, mean those needs can be ignored or disregarded. Abusive litigants, too, have at least some legal rights.

[335] But where and how do those rights balance, vs the public and court interests? With the growing awareness of the role that mental health issues play in triggering and aggravating abusive litigation, another issue emerges: should courts ignore the deleterious results of letting persons whose litigation is influenced by psychological and psychiatric issues advance their own litigation without restraint? Put another way, does it matter that abusive litigation is frequently self-injurious, and that outcome is often grimly predictable from an early point, or when the stereotypic metastatic dispute expansion exhibited by querulous litigants is first glimpsed?

[336] I think it matters. To me, there is something fundamentally wrong with a court sitting back and ignoring that its functions are being manipulated by a person who is ill, and whose illness causes self-injury and injury to others. To choose to not act is still a decision.

[337] How do courts modulate conduct in light of this self-injury by persons with mental illness? That question is not so easy to answer, but one point is clear - waiting makes things worse.

[338] While OPCA litigation may be in decline, there seems to be relatively little dispute that the volume and frequency of other abusive litigation is increasing. Why is that? My suggestion - and it is only that - is the more common appearance of abusive litigants has some relationship to the overall rise in SRL appearances in Canadian courts. The experts previously reviewed have noted a distressing possibility: that the litigation process itself seems to induce or aggravate mental health issues.

[339] SRLs enter into a foreign and complex apparatus, possibly with serious misconceptions and false expectations of what that entails. They have no-one to help lead them through that maze, nor do they have an experienced guide to moderate their expectations, or act as a 'cushion' when setbacks occur. As Burrows J recently observed in ***Davis v Alberta (Human Rights Commission)***, 2019 ABQB 6 at paras 32-37, some honest and sincere abusive litigants very likely would not engage in questionable, ill-advised, or wrongly directed litigation, if they received the appropriate guidance, such as from a lawyer. And now, as Chief Justice McLachlin has concluded, lawyers have priced themselves beyond the means of most Canadians.

[340] Judges can't help. Under the UK Commonwealth legal tradition, we are neutral arbiters. The rules that control our conduct mean we cannot give advice, and, for example, warn that a litigation strategy will likely have very bad results. All we can do is grit our teeth, and hope the SRL, often with what might be mental health limitations, and on a predictably bad pathway, has a moment of insight.

[341] So, instead, SRLs have no one to act as pathfinders and counsellors as they move through a labyrinthine apparatus, which at times likely feels arbitrary and unfair. Caplan and Bloom describe the "justice system's emotional opacity", and how unsuccessful SRLs may feel their emotions and perspectives are not understood or appreciated. When viewed this way, it is not hard to understand why court proceedings lead to psychological harm.

[342] If so, then abusive litigation is very much a symptom of the modern litigation environment. I do not know how to solve that, but at least judges can try to minimize the injury that results. Court access restrictions are a powerful gatekeeping mechanism to help *everyone* avoid unnecessary injury and expense. That is why they should be used sooner, rather than later.

D. Two Classes of Court Access Restrictions

[343] An important distinction must be made before proceeding any further. Prospective limits on an abusive litigant's initiating or continuing litigation can be divided into two broad functional types. Court access restrictions imposed by a judge that either:

1. only affect the legal disputes before that judge, or
2. extend outside the current dispute, and affect other unrelated litigation, including future hypothetical litigation.

1. Grepe v Loam Orders

[344] The former court order category has long been recognized as a necessary element of all UK common law tradition courts' inherent jurisdiction: ***Grepe v Loam***, (1887) 37 Ch D 168 (UK CA) [***Grepe v Loam***]; I H Jacob, "The Inherent Jurisdiction of the Court" at 38, 41-46. That authority includes the inherent jurisdiction to stay and terminate litigation, if appropriate, such as when the action is hopeless, relitigates a settled issue, or abuses court processes.

[345] For the purposes of this decision, I will describe court orders that impose restrictions *inside* a particular dispute as a *Grepe v Loam Order*. ***Grepe v Loam*** is only rarely referenced in Canadian jurisprudence outside of Quebec, but, in my opinion, the distinction it provides to define the scope and types of court access restrictions is an important one.

[346] Common *Grepe v Loam Orders* prohibit a party from taking a step, or require permission to take a step, until a 'milestone' is met. For example:

1. a time period has elapsed;
2. a scheduled or planned hearing occurs;
3. one or more parties have completed a litigation step, such as filing an affidavit, disclosing financial or tax records, or have completed discoveries;
4. a case management process by a judge or case management counsel has been completed;
5. a decision has been issued; or
6. an outstanding costs award is paid.

[347] Other times the restrictions imposed by a *Grepe v Loam Order* are indeterminate, and continue to operate until the stay or requirement to obtain permission is terminated.

[348] At one point this Court tracked the number of *Grepe v Loam Orders* issued vs other, broader gatekeeping orders. Unsurprisingly, *Grepe v Loam Orders* far outnumber the latter. For example, in 2015, the Court in Calgary issued 145 *Grepe v Loam Orders*, and only 30 orders with a broader potential effect. 63% of those *Grepe v Loam Orders* were issued in family law matters. That correlation is unsurprising, given the well-recognized issue of high conflict family law disputes. That is the context in which *Grepe v Loam Orders* are most commonly imposed. However, the principles and approaches to court access restrictions which operate inside a dispute are essentially the same for any type of civil trial litigation between parties whose conflicts and litigation approaches require close judicial oversight.

[349] Orders of this kind are case management 'housekeeping' restrictions on court access, and are absolutely integral and necessary for the effective and efficient management of certain court proceedings. Though an everyday part of the activities of a trial court judge, this category of court access restrictions is largely invisible to appellate courts, academia, and the public. These orders are almost never captured in reported jurisprudence. The Alberta Court of Appeal has repeatedly concluded deference is appropriate when evaluating case management steps, for example ***Mills v Mills***, 2018 ABCA 374 at para 20, leave to appeal to SCC sought 38235 (7 January 2019); ***Piikani Nation v Kostic***, 2018 ABCA 358 at paras 5-6; ***Lakhoo v Lakhoo***, 2016 ABCA 200 at paras 8-9, 40 Alta LR (6th) 1; ***Balogun v Pandher***, 2010 ABCA 40 at para 9, 474 AR 258.

[350] The *Grepe v Loam Order* intra-trial authority to control court participant activity may be framed in another way. This is an interlocutory exercise of the court's inherent jurisdiction to control its processes. Appellate review and intervention is not appropriate for this category of decision, particularly for family matter dispute interim orders, where "exceptional circumstances" are required: ***Hickey v Hickey***, [1999] 2 SCR 518, 240 NR 312; ***Quraishi v Merah***, 2016 ABCA 116 at para 6.

[351] More generally, I believe there is a building appreciation of how high conflict dispute scenarios can involve 'gamesmanship' and other questionable litigation strategies that create special difficulties for the trial judges who manage these complex matters, particularly when scrutinized through the optics of strict formal court procedure and procedural rights. For example, in ***Crawford***, the Alberta Court of Appeal concluded that *procedural fairness must be examined "... in light of the "realities on the ground ..." as it were. ...", and that the fundamental*

policy for case management methodology in difficult and high conflict family dispute cases includes flexibility of process, where necessary: para 12.

[352] *Grepe v Loam Orders* are imposed immediately, where that is a fair and proportionate step. I am unaware of any authority which states a judge *must* go through some kind of hearing or receive submissions prior to imposing a *Grepe v Loam Order*. That is not to say that such is never appropriate, but rather that additional procedural step *should not be an absolute requirement*. The reasons for that include:

1. management of high conflict litigation disputes requires a different, more flexible, and often immediate approach to process and procedure;
2. all court access restrictions of this kind are interlocutory, in the sense they address an ongoing and existing dispute and its parties, and are not a final decision on the merits;
3. the trial court's inherent jurisdiction to control its processes is adaptive to meet the specific requirements of a specific type of proceeding, and a particular dispute and its court participants; and
4. a formal, and procedurally rigid approach will, in certain instances, cause the very harm sought to be avoided by adding yet another layer of complexity, cost, time, stress, and expenditure that injures the parties and the court, rather than achieving a functional and proportional result; "undue process" [emphasis added] can *prevent* the fair and just resolution of disputes: ***Hryniak***, at para 24.

[353] However, sometimes a judge may conclude that a *Grepe v Loam Order* is not an adequate solution to anticipated abusive litigation.

2. "Vexatious Litigant Orders" and "Vexatious Litigants"

[354] At present there does not appear to be a clear understanding of what labelling someone a "vexatious litigant" means. Indeed, as I have recommended in Part IV(B), perhaps the better language is "abusive litigant", a person who engages in "abusive litigation". Nevertheless, the historical term is "vexatious litigant". As previously indicated, I am using that term and "vexatious litigant order" in a very specific context.

[355] In Alberta "vexatious litigant" apparently has no set definition. It seems the only occasion where the Supreme Court of Canada has used "vexatious litigant" was ***Ernst v Alberta Energy Regulator***, 2017 SCC 1, [2017] 1 SCR 3. No definition was indicated, and instead "vexatious litigant" was used as a label in a dissent by Abella J, where a tribunal discontinued communication with an individual.

[356] However, the term "vexatious litigant" appears twice in *Rule* 14.5:

- For appeals to the Alberta Court of Appeal, *Rule* 14.5(1)(j) imposes a requirement that permission is required as a pre-requisite to "any appeal by a person who has been declared a vexatious litigant in the court appealed from." [emphasis added].
- *Rule* 14.5(4) prohibits any appeal "... from an order denying the vexatious litigant permission to institute or continue proceedings." [emphasis added].

The *Rules* do not define "vexatious litigant", nor is this term used in any other Alberta legislation. However, *Rule* 14.5(4) does tell us one thing. At least one characteristic of a "vexatious litigant" is that person needs "permission to institute or continue proceedings".

[357] In the absence of any clear indication otherwise, I would define these terms in a functional manner. I previously said a "vexatious litigant order" is "an order that imposes prospective court access restrictions on future court activity based on anticipated future litigation misconduct". There is a second way of describing this kind of order - a vexatious litigant order is a court order that imposes prospective court access gatekeeping functions that are broader than a *Grepe v Loam Order*.

[358] A "vexatious litigant" then is a person subject to a "vexatious litigant order". The label "vexatious litigant" has no special status or meaning beyond its functional identification of a person who is subject to broad prospective litigation gatekeeping controls that includes hypothetical future litigation.

[359] Again, this language is not used in a consistent manner in Alberta jurisprudence. While many Alberta court decisions refer to an abusive litigant who is subject to court access restrictions as a "vexatious litigant", others do not.

[360] For example, there are orders which impose court access restrictions that exceed the scope of a *Grepe v Loam Order*, but which do not label an abusive litigant as a "vexatious litigant".

[361] ***Dykun #2*** seems to be the first reported instance where prospective vexatious litigant restrictions were imposed by an Alberta court. The panel issued an "injunction" (para 9):

> Mr. Dykun's legal infinity of mirrors cannot be endlessly extended. Courts must reserve their limited time and resources for the benefit of ingenuous litigants, not those who insist on the use of public forums to indulge oblique motives. ... we direct that the Clerk of the Court of Queen's Bench and staff, and the Registrar of the Court of Appeal and staff, refuse the issuance of any new pleadings by Mr. Dykun, by himself or by counsel, without his first obtaining leave of the Chief Justice of the Court whose jurisdiction is claimed. The injunction relates to the commencement of any new action that derives from his dispute with Canada Post or with his first lawyer, Mr. Rogers. ... [Emphasis added.]

I note that neither Canada Post nor the first lawyer were parties to this appeal. This order is therefore clearly broader than a *Grepe v Loam Order*.

[362] Other times a Court may identify litigation as abusive and respond by not just dismissing the action but also imposing court access restrictions. For example, in ***R v Olumide***, 2017 ABCA 366 at para 3 [***R v Olumide***] the Court of Appeal ordered: "The appellant may not file any applications in the Court of Appeal without writing ... for permission to do so." However, the abusive litigant was not identified as a vexatious litigant.

[363] Similarly, in ***D.L. Pollock Professional Corporation v Blicharz*** (17 July 2018), Calgary 1801-0142-AC, 1801-0155-AC (ABCA), court access restrictions were ordered in all Alberta Courts, "in all matters pertaining to the present litigation between the parties", then subsequently expanded to impose a requirement the abusive litigant must seek permission to engage in any litigation at the Alberta Court of Appeal: ***D.L. Pollock Professional Corporation v Blicharz***,

2019 ABCA 41 [***Blicharz***]. The abusive litigant is not, however, identified as a "vexatious litigant", nor did the applicants seek a "vexatious litigant order".

[364] I am unable to identify any features that distinguish between Alberta court decisions which:

1. declare a person is a vexatious litigant and impose court access restrictions,
2. impose court access restrictions but do not label the abusive litigant in any particular manner, and
3. impose an "injunction" on an abusive litigant which imposes court access restrictions.

As far as I can tell, these three variations involve the same general considerations and have parallel, if not identical, objectives.

[365] I have personally muddied the water as to what "vexatious litigant" status means. In ***Gauthier v Starr*** I declared that Adam Christian Gauthier, a Freeman-on-the-Land, was a vexatious litigant (para 49), but then did not impose any court access restrictions on him. At para 53, I invited the Attorneys General of Canada and Alberta to apply to have this abusive litigant made subject to prospective court access restrictions as a vexatious litigant. Regrettably, that did not happen. Instead, Gauthier persisted in his abuse of the courts and was ultimately subject to a strict court access restriction order made on the Court's own motion and under its inherent jurisdiction: ***Gauthier (Re) #1***.

[366] To be explicit, I now conclude that when in ***Gauthier v Starr*** I declared that Gauthier was a "vexatious litigant", but then did not impose any court access restrictions, that was wrong in law. The vexatious litigant label and its functional effect are two sides of the same coin. A vexatious litigant must be a person who is subject to prospective court access restrictions that extend outside the 'parent' litigation dispute. Gauthier therefore was not a vexatious litigant by definition (at least up to ***Gauthier (Re) #1***) because he had no limits on his personal access to any Alberta court. Put another way, if I had correctly concluded that Gauthier was a vexatious litigant in ***Gauthier v Starr***, I should have imposed gatekeeping limits on him at that point.

3. Conclusion - Two General Court Access Restriction Categories

[367] I conclude there are two basic and distinct court access restriction types:

> *Grepe v Loam Orders* - interlocutory case management steps that are imposed and operate inside a single existing legal dispute.
>
> Vexatious litigant orders - prospective gatekeeping court access restrictions that extend outside a single dispute, and include hypothetical future litigation.

[368] A person who is subject to a vexatious litigant order is a vexatious litigant.

[369] Another way of viewing this distinction is by the purpose of the two categories of class access restrictions. In the first instance a judge examines court activities he or she knows first-hand, and evaluates whether litigation management is appropriate.

[370] However, for a vexatious litigant order to be fair and proportionate, then the judge must conclude that the abusive litigant's conduct has 'spilled out', or will plausibly 'spill out', of the

current dispute, so that a broader pattern of litigation misconduct is anticipated. That then may warrant broader prospective court intervention.

[371] A further distinction between these two court access restriction classes is the manner in which they impinge on a person's access to court processes. A *Grepe v Loam Order* is narrower. A vexatious litigant order, however, has a much broader potential impact.

[372] The special character of vexatious litigant order restrictions has resulted in two theories for that jurisdiction.

E. Two Potential Sources for Jurisdiction

[373] For decades Canadian courts have imposed court access restrictions via vexatious litigant orders that extend beyond the scope of *Grepe v Loam Orders*. Despite that, there are two different, and in many senses opposite, explanations for where the authority to do so originates.

[374] This duality has previously been examined by this Court in ***Hok v Alberta #2***, at paras 14-25, ***Sawridge #8***, at paras 42-78, and ***Makis v Alberta Health Services***, 2018 ABQB 976 at paras 36-63 [***Makis #1***].

[375] The first, what I will call the "Traditional Jurisdiction", is that any authority to impose prospective vexatious litigant court access restrictions is strictly and solely reliant on legislation.

[376] The second, more recent view, concludes that courts possess an inherent jurisdiction to impose vexatious litigant orders. In this scenario courts have two parallel bases on which vexatious litigant orders may be imposed: 1) as authorized by legislation, and 2) under the courts' inherent jurisdiction to both control abuse of its processes, and to assist other tribunals to manage their operations. I will refer to this rival perspective as the "Modern Approach".

[377] Before going further, I stress this analysis focuses on the jurisdiction of provincial superior trial courts of inherent jurisdiction. Courts that derive their authority strictly from legislation may not have the same inherent jurisdiction to impose vexatious litigant court access restrictions. I will leave that question to the appropriate courts.

[378] In something of an ironic twist, to evaluate these two alternatives, I will rely heavily on the same authority, a frequently referenced paper written in 1970 by I H Jacob, "The Inherent Jurisdiction of the Court" (1970) 23:1 Current Legal Problems 23. In ***BCGEU v British Columbia (Attorney General)***, [1988] 2 SCR 214 at para 49, 53 DLR (4th) 241 [***BCGEU***], Dickson CJ said Jacob's paper "admirably summarized" this topic. By my count, this paper has been cited with approval by the Supreme Court of Canada on twelve occasions, most recently in ***Quebec (Director of Criminal and Penal Prosecutions) v Jodoin***, 2017 SCC 26 at para 21, [2017] 1 SCR 478.

[379] Jacob describes the inherent jurisdiction of the Court as a "... peculiar concept ..." that is "... so amorphous and ubiquitous and so pervasive in its operation that it seems to defy the challenge to determine its quality and to establish its limits. ...": at 23. Similarly, Lamer CJ concluded in ***R v Morales***, [1992] 3 SCR 711 at 755, 144 NR 176:

> ... The nature of the application of these rules reflects the requirement that they be reasonably flexible and applicable even in unforeseen and unusual circumstances.
> ...

[380] The organizing principle of this authority is effective court function. The court "... should be invested with a power to maintain its authority and to prevent its process being obstructed and abused. ..." [emphasis added]: Jacob, "Inherent Jurisdiction" at 27. This includes that a court of inherent jurisdiction makes its own rules, and despite the organization of any other body to address aspects of that inherent jurisdiction domain, a court still retains an inherent rules-making authority via "Practice Directions": at 33-35.

[381] Rules of court and the authority obtained via inherent jurisdiction are complementary: at 50-51. The latter "... supplements and reinforces ..." the former. Inherent jurisdiction provides "... wider and more extensive powers ..." and fills "... gaps left by the Rules and they can be exercised on a wider basis ...".

[382] The close interrelationship between court rules and inherent jurisdiction was also stressed by the Supreme Court of Canada in ***Hunt v Carey Canada Inc***, [1990] 2 SCR 959 at 968, 74 DLR (4th) 321 [***Hunt***], where the Court observed that many modern rules of court are simply a codification of its inherent jurisdiction authority. In that way *court rules are less an act of the legislatures granting authority, than the legislative recognition of an authority that was always there.*

[383] Very relevant for this matter is that a superior court of inherent jurisdiction has the authority to take steps to control "abuse of process". Again, Jacob, "Inherent Jurisdiction", at 40-41 makes clear this is a question of function:

> ... [Abuse of process] connotes that the process of the court must be used properly, honestly and in good faith, and must not be abused. It means the court will not allow its function to be misused, and it will summarily prevent its machinery from being used as a means of vexatious or oppression in the process of litigation. Unless the court has the power to intervene summarily to prevent misuse of legal machinery, the nature and function of the court would be transformed from a court dispensing justice to an instrument of injustice. ... [Emphasis added.]

[384] Investigation and management of abusive litigation is a deep inquiry, "[t]he very nature of the inherent jurisdiction of the court enables it to go behind the pleadings and to inquire summarily what are the true facts and circumstances of the case.": at 42. Jacob, "Inherent Jurisdiction" at 42-43 suggests four broad bases for court intervention: 1) where litigation is a deception or a sham; 2) where litigation is not fair or honest, but has an ulterior purpose; 3) where litigation has no basis or potential benefit; and 4) repeated litigation that causes harm.

[385] Importantly, this authority to ensure function and inhibit abuse *extends to protect inferior courts and tribunals*. Jacob, "Inherent Jurisdiction" at 48-49 concludes inherent jurisdiction courts have a:

> ... power by summary process to prevent any person from interfering with the due course of justice in any inferior court ... The basis for the exercise of this jurisdiction is that the inferior courts have not the power to protect themselves.

This principle was endorsed in ***R v Caron***, 2011 SCC 5 at paras 24-35, [2011] 1 SCR 78 [***Caron***].

[386] While the Court's inherent jurisdiction may overlap with legislation, inherent jurisdiction cannot be applied in a manner that is in conflict with legislation (at 24):

> ... The contrast is not between the common law jurisdiction of the court on the one hand and its statutory jurisdiction on the other, for the court may exercise its inherent jurisdiction even in respect of matters which are regulated by statute, so long as it can do so without contravening any statutory provision. ... [Emphasis added.]

See also ***Caron***, at para 32.

[387] A superior court's inherent jurisdiction may be limited by legislation, but "... legislation should not be construed so as to oust the inherent jurisdiction unless in clear and unambiguous terms it provides that the inherent jurisdiction is no longer to be exercised. ..." [emphasis added]: ***Harrison v Tew***, [1990] 1 All ER 321 (UK HL). This requirement that *only explicit legislative intent will exhaust the inherent jurisdiction of courts* applies to legislation that restricts the authority of a court to control abuse of its processes:

> ... the Courts of this Province have from the earliest times invoked an inherent jurisdiction to prevent the abuse of their process through oppressive or vexatious proceedings ...
>
> ... the inherent jurisdiction of superior courts is a significant and effective basis for preventing abuse of the court's process and ensuring fairness in the trial process. This enduring and important jurisdiction of the court, if it is to be removed can only be accomplished by clear and precise statutory language. ... [Emphasis added.]
>
> (***R v Rose***, [1998] 3 SCR 262 at paras 132-133, 166 DLR (4th) 385 [***Rose***], in part quoting ***Amato v The Queen***, [1982] 2 SCR 418 at 449, 140 DLR (3d) 405 [***Amato***]).

1. The Traditional Jurisdiction

[388] Given how broadly Jacob expresses the inherent jurisdiction of superior UK tradition courts, it may be unexpected that the Jacob, "Inherent Jurisdiction" paper is also a powerful basis to argue this Court's authority to impose court access restrictions via a vexatious litigant order is only based on statutes.

[389] At page 43 of that paper, Jacob identifies a gap in courts' inherent jurisdiction to control their own processes:

> The court has no power, even under its inherent jurisdiction, to prevent a person from commencing proceedings which may turn out to be vexatious. ... The inherent jurisdiction of the court has, however, been supplemented by statutory power to restrain a vexatious litigant from instituting or continuing any legal proceedings without leave of the court.

No authority is cited for the first sentence. Jacob then points to 1896 and 1925 UK legislation in a footnote to the second sentence.

[390] This passage has been cited when Canadian courts evaluated and considered an inherent jurisdiction to impose court access restrictions that extend beyond the scope of a *Grepe v Loam Order*.

[391] In ***Benson v Workers' Compensation Board (Man)***, 2008 MBCA 32 at paras 50-70, 228 Man 5 (2d) 46 [***Benson***], the Court was asked to impose a *prospective* court access vexatious litigant order that would prohibit any further litigation by a vexatious litigant vs a target litigant. The Court references Jacob, "Inherent Jurisdiction" as the relevant authority (para 56), confirmed it possessed the authority to make *Grepe v Loam Order* type orders which respond to existing abusive litigation before the court (para 63), and to impose restrictions on appeals of existing orders (para 63). The Court then declined to declare jurisdiction to impose gatekeeping steps on *future hypothetical* litigation: paras 64-69. See also ***Shaward v Shaward*** (1988), 51 Man R (2d) 222, 8 ACWS 412 (Man CA).

[392] The Jacob rule has been cited in New Brunswick for the principle that the New Brunswick Court of Queen Bench lacked "... the inherent jurisdiction to prohibit [an abusive litigant] from instituting future proceedings ...": ***Dieppe (Town) v Charlebois*** (1995), 163 NBR (2d) 394, 55 ACWS (3d) 747 (NBQB). Deschênes J specifically relied on Manitoba and Ontario jurisprudence to reach that conclusion.

[393] Surprisingly, Johnstone J in ***Midwest Property Management v Moore***, 2003 ABQB 581 at para 41, 341 AR 386 cited Jacob, "Inherent Jurisdiction" and stated "[The Alberta Court of Queen's Bench] does not have the inherent jurisdiction to prevent a litigant from instituting or continuing legal proceedings without leave. ...". With respect to my late, departed colleague, I do not agree.

[394] Similar conclusions were reached in ***Ashby v McDougall Estate*** (2005), 2005 NSSC 148 at paras 84-89, 234 NSR (2d) 162 (NSQB), and ***Presley v Canada (Royal Canadian Mounted Police)***, [1999] YJ No 20 (QL) at para 11 (Yuk Sup Ct), that those Courts had no authority to restrain a plaintiff from commencing an action. While Jacob, "Inherent Jurisdiction" is not referenced, these decisions rely on cases that specifically identify the restrictive Jacob rule.

[395] Certain other Commonwealth countries follow the rule that a court's inherent jurisdiction to respond to abusive litigation has no application to future, hypothetical litigation. Notably, in ***Commonwealth Trading Bank v Inglis***, [1974] HCA 17 [***Inglis***], the Australian High Court concluded that Australian courts have no inherent jurisdiction to impose court access restrictions against future litigation. The Court observed there were no recognized prior examples of a court exercising its inherent jurisdiction in this manner (para 5), and concluded that only legislation provided that authority (paras 7-16). However, the High Court did conclude that inherent jurisdiction does extend to steps that manage existing abusive litigation: para 20.

[396] New Zealand took a similar approach. ***Stewart v Auckland Transport Board***, [1951] NZLR 576 (NZCA) acknowledged the well-established ***Grepe v Loam*** authority, noted that legislation had, in the UK, authorized court access restrictions of hypothetical future proceedings, and concluded "I cannot make an order preventing the plaintiff from issuing other proceedings, even though they may be vexatious."

[397] This appears to remain the law in New Zealand: ***KM v TL***, [2016] NZHC 1327 at para 57; ***Flujo Holdings Pty Limited v Merisant Company***, [2017] NZHC 1656 at paras 57-66, aff'd on other ground [2018] NZCA 226 [***Flujo***]. In the former decision Brown J at para 57 concluded: "... every citizen has the right to unimpeded access to a Court unless that right is abrogated by statute." ***Flujo***, at para 66, notes the emergence of the Modern Approach in UK appellate decisions, but nevertheless concludes even if such an authority exists, it should "... be reserved for the most exceptional of circumstances."

[398] The Traditional Jurisdiction in Canada has usually been associated with statements like those by the New Zealand courts, which stress an unlimited, unrestricted right to access common law tradition courts. Any interference with that has been described as very unusual or serious, for example:

> [Vexatious litigant steps] should be used in only the rarest of circumstances. It is difficult to think of a more fundamental human right than the right to access to our justice system. No one should have that right restricted except for the clearest and most compelling of reasons.
>
> (***Winkler v Winkler*** (1990), 70 Man R (2d) 47, 23 ACWS (3d) 909 (Man QB), aff'd 70 Man R (2d) 45, 25 ACWS (3d) 273 (Man CA) [***Winkler***]).
>
> ... [a vexatious litigant] order is an extraordinary remedy that alters a person's right to access the courts. ...
>
> (***Kallaba v Lylykbashi*** (2006), 265 DLR (4th) 320, 207 OAC 60 (Ont CA) [***Kallaba***]).
>
> What should be remembered is that the order is exceptional and should be used only when the court determines that the litigant has "taken himself over the line" ...
>
> (***Green***, at para 28).
>
> The power conferred on the Court by [vexatious litigant legislation] is, of course, most extraordinary, so much so that it must be exercised sparingly and with the greatest of care. In a society such as ours, the subject is generally entitled to access the courts with a view of vindicating his or her rights. ...
>
> (***Olympia Interiors Ltd v Canada***, 2004 FCA 195 at para 6, 323 NR 191 [***Olympia***]).

[399] Therefore, under the Traditional Jurisdiction, vexatious litigant court access restrictions are an unusual step, and not one that is automatically open to the Courts. Restricting future, hypothetical litigation is seen as something fundamentally different from a court managing the litigation in front of it, via steps like *Grepe v Loam Orders*.

[400] When one examines early legislation enacted in Commonwealth jurisdictions in response to the perceived Traditional Jurisdiction lacuna in the courts' inherent jurisdiction toolkits, those legislative schemes usually deny the court permission on its own motion to evaluate the need for and to impose vexatious litigant orders. Ordinary litigants are also often denied that right. For example, the first vexatious litigant order legislation in Alberta was enacted via *The Attorney General Statutes Amendment Act*, SA 1975, c 44, s 3, which amended the *Judicature Act*, RSA 1970, c 193 to add section 22.1:

> 22.1(1) Where, upon an application made by way of originating notice with the consent in writing of the Attorney General, a judge of the Supreme Court is satisfied that any person has habitually and persistently and without any reasonable ground instituted vexatious legal proceedings in the Supreme Court or in any other court against the same person or against different persons, the judge may order that no legal proceedings shall, without leave of the Supreme Court or a judge thereof, be instituted in any court by the person taking such vexatious

> legal proceedings, and such leave shall not be given unless the court or judge is satisfied that the proceedings are not an abuse of the process of the court and that there is prima facie ground for the proceedings.
>
> (2) The Attorney General has the right to appear and be heard in person or by counsel upon any application under subsection (1).
>
> [Emphasis added.]

[401] In this scheme the Attorney General is the ultimate arbiter of whether or not a court will evaluate if court access restrictions broader than a *Grepe v Loam Order* are appropriate. While this close rein on the legislative authority to engage court access restrictions has been loosened in Alberta by the modern *Judicature Act*, ss 23-23.1 procedure, there nevertheless are still some Canadian courts, such as the Federal Courts, where neither the courts nor litigants may initiate vexatious litigant order processes. Instead, that remains the sole domain of the state: *Federal Courts Act*, RSC 1985, c F-7, s 40.

[402] As I will later discuss in detail, the Traditional Jurisdiction is no longer responsive to the post-"culture shift" litigation context, and especially the need to take immediate action to restrict potentially abusive litigants.

2. The Modern Approach

[403] The conclusion in Jacob, "Inherent Jurisdiction" that courts lack any inherent jurisdiction to order reviews of prospective and hypothetical litigation does not appear to be universal in academic commentary that examines the scope of inherent jurisdiction. For example, M S Dockray, "The Inherent Jurisdiction To Regulate Civil Proceedings" (1997) 113 L Q Rev 120 at 130 reviews instances of where courts have no inherent jurisdiction. Prospective management of abusive litigation is not listed. Similarly, the Jacob, "Inherent Jurisdiction" prospective litigation management gap is not identified in Rosara Joseph, "Inherent Jurisdiction and Inherent Powers in New Zealand" (2005) 11 Canterbury L Rev 220.

[404] Beyond that, the past several decades has seen an increasing tension in court commentary on whether or not prospective court management of hypothetical litigation is truly outside the courts' own jurisdiction.

a. Statutory Vexatious Litigant Order Authority Codifies an Inherent Jurisdiction

[405] Sometimes a court decision simply denies there ever was a gap. For example in ***Kallaba*** the majority decision of Cronk and Juriansz JJA identifies legislation (*Courts of Justice Act*, RSO 1990, c C.43, s 140) which provides the basis for the Ontario Superior Court of Justice to impose prospective court access restrictions, but then concludes:

> The purpose of s. 140(1) of the [Courts of Justice Act] is <u>to codify the inherent jurisdiction of the Superior Court</u> to control its own process and to prevent abuses of that process by authorizing the judicial restriction, in defined circumstances, of a litigant's right to access the courts. [Emphasis added.]

[406] ***Kallaba*** therefore appears to reject the exception identified in Jacob, "Inherent Jurisdiction". Instead, this statement aligns with the observation by the Supreme Court of Canada in ***Hunt*** that legislation and court rules which relate to litigation procedure usually codify pre-existing authority. If true, then the Ontario Courts may use their inherent jurisdiction to "fill in"

and supplement the legislated vexatious litigant order authority: Jacob, "Inherent Jurisdiction" at 50-51.

b. Statutory Vexatious Litigant Authority is Incomplete and Inadequate

[407] A second tension is a perception that Traditional Jurisdiction legislation has left gaps, and, despite the rule in Jacob, "Inherent Jurisdiction", then inherent jurisdiction may augment that incomplete legislative scheme.

British Columbia

[408] An early British Columbia jurisdiction example is found in ***Household Trust Co v Golden Horse Farms Inc*** (1992), 13 BCAC 302, 65 BCLR (2d) 355 (BCCA), leave to appeal to SCC refused, 23022 (19 November 1992). Here, an abusive litigant and his corporations had been found on several previous occasions to have abused court processes. He was subject to vexatious litigant orders made under legislation. Southin JA concluded that while legislation and those vexatious litigant orders prevent a litigant from initiating future litigation, that legislation "... does not of itself prevent a litigant from defending proceedings vexatiously."

[409] The trial judge imposed an additional requirement: the abusive litigants may only interact with the court or file materials *via a lawyer*. Justice Southin concluded that the British Columbia Supreme Court has an inherent jurisdiction to take steps that provide "... relief in that Court from proceedings by a defendant who is vexatiously abusing the process of the court." The lower court order was confirmed, but with some adjustments to its scope.

[410] The British Columbia Court of Appeal next returned to the issue of inherent jurisdiction and court access restrictions in ***British Columbia (Attorney General) v Lindsay***, 2007 BCCA 165, 238 BCAC 254, leave to appeal to SCC refused, 32026 (15 November 2007). Here, the appellant, notorious Detaxer OPCA guru David Kevin Lindsay, was subject to comprehensive vexatious litigant court access restrictions. Lindsay appealed that.

[411] One of his arguments was that while British Columbia legislation may provide for a vexatious litigant order authority, that legislation has no application except in civil proceedings: paras 17-18. That makes sense. Provinces have no authority to enact legislation that affects Canada's criminal law jurisdiction.

[412] Huddart JA observed that Lindsay's litigation had spilled over the civil and criminal division, "... he was instituting a civil action, attempting to use a criminal process to obtain a civil remedy, or attempting to use a civil process to obtain relief in a criminal or quasi-criminal proceeding, and doing so on grounds without any merit. ...": para 30. In this context legislation and the court's inherent jurisdiction combined so that the vexatious litigant order was valid: para 30.

[413] Several decisions of the British Columbia Court of Appeal respond to a person subject to vexatious litigant orders, but who then established a pattern of persistent abusive and duplicate leave and re-hearing applications. In ***Croll v Brown***, 2003 BCCA 105 at para 17, 120 ACWS (3d) 353 [***Croll***], ***Boe v Boe***, 2014 BCCA 208 at paras 32-37, 356 BCAC 217, leave to appeal to SCC refused, 36048 (26 February 2015) [***Boe***], and ***Houweling Nurseries Ltd v Houweling***, 2010 BCCA 315 at paras 40-45, 321 DLR (4th) 317 [***Houweling***], the Court engaged its inherent jurisdiction, and prohibited filing any future leave applications, *except where the abusive litigant was represented by a lawyer*.

[414] While commenting on this line of cases, the Court, in ***Extra Gift Exchange Inc v Ernest & Twins Ventures (PP) Ltd***, 2014 BCCA 228 at para 32, 357 BCAC 55, observed: "The jurisdiction to make a vexatious litigant order arises from this Court's ancillary (inherent) jurisdiction to control its own processes, as well as under [legislation]."

[415] In ***Dawson v Dawson***, 2014 BCCA 44 at para 29, 349 BCAC 307 [***Dawson***], ***Hutton v Zelter***, 2015 BCCA 217 at paras 2-5 [***Hutton***], and ***Hoessmann v Aldergrove Credit Union***, 2018 BCCA 218 at para 3 [***Hoessmann***] *even broader lawyer representation requirements* were imposed, so that the abusive litigant was prohibited from interacting with the court and filing any materials, except by a lawyer, or if acting as a respondent.

[416] A further gap in the legislative authority to impose court access restrictions was evaluated in ***Gichuru v Pallai***, 2018 BCCA 78 at paras 73-83, 8 BCLR (6th) 97, leave to appeal to SCC refused, 38123 (31 January 2019) [***Gichuru #1***]. The trial judge had imposed a pre-filing requirement that an abusive litigant, who was trained as a lawyer, could not initiate any new proceedings *until all outstanding cost awards were satisfied*. The affected litigant appealed, saying there is no legislative authority for that. Kirkpatrick JA observed that the Court "... has already recognized that the ancillary (inherent) jurisdiction of the Court of Appeal can ground vexatious litigant orders made on the Court's own motion": para 75. If a statutory court has that jurisdiction, then an inherent jurisdiction superior court must have the same: at para 76. The British Columbia Court of Appeal therefore confirmed the trial order was valid, and then expanded it further, *to impose a leave requirement as well as the costs precondition*: para 83.

[417] The abusive litigant sought leave from the Supreme Court of Canada, which was denied. Interestingly, the bases for that appeal are reproduced in ***Gichuru v Pallai***, 2018 BCCA 422 at para 14. The first two grounds relate directly to the scope of court access restrictions:

> 1. Does the court's inherent jurisdiction include a power to restrict access to the court?
>
> 2. If so, does the enactment by the Legislature of a statute permitting the court to restrict a person's future access to the court replace or modify the court's inherent jurisdiction?

[418] ***Bea v The Owners, Strata Plan LMS 2138***, 2015 BCCA 31 is another instance where an abusive litigant, a condo owner, ignored vexatious litigant orders, repeating the same lawsuit against the strata corporation, accumulating penalties and costs that were never paid. Garson JA concluded the Court's inherent jurisdiction should extend to punishing this contempt by a *court-ordered sale of the condo unit*.

[419] At a minimum, *the British Columbia courts have concluded that "vexatious litigation" control steps are not limited to the authority provided via legislation. Instead, that authority is supplemented by the courts' inherent jurisdiction to manage abuse of its processes. The two authorities are therefore complementary*.

Federal Courts

[420] The Federal Court of Appeal has also imposed court contact restrictions and a lawyer representation requirement when faced with a "busybody" abusive litigant. Maurice Prefontaine engaged in "verbal attacks" in court that required RCMP remove this abusive litigant from the courtroom: ***Prefontaine v Canada #1***, at para 9. Prefontaine also conducted himself in a highly inappropriate, abusive manner during interactions with the court registry staff: para 13. In light

of this "abusive and intimidating conduct", the Court prohibited Prefontaine from physically attending court registries, that he only communicate with the Court via mail or courier, and that Prefontaine must always be represented in Court by a lawyer: para 15.

[421] The Federal Court of Appeal does not specifically identify the authority which was the basis for these steps, though it indicates failure to impose these limits would bring the administration of justice into disrepute: para 14. The Tax Court of Canada subsequently imposed parallel court access restrictions on Prefontaine: ***Prefontaine v Canada #2***.

c. The Modern Approach - Statutory and Inherent Jurisdiction to Impose Vexatious Litigant Orders Co-Exist

Nova Scotia

[422] Nova Scotia has gone further. In ***Tupper***, at para 27, a five judge panel concluded vexatious litigation legislation does not replace the courts' inherent jurisdiction, but instead:

> ... the two work hand in hand ... There is considerable authority to support the principle that both this Court and the Nova Scotia Supreme Court have an inherent authority to declare a litigant to be vexatious ... inherent jurisdiction includes the jurisdiction to impose terms or conditions necessary to achieve the objective of restricting the actions of a litigant that are found to be vexatious. ... In addition to the inherent jurisdiction, both Courts have also been granted jurisdiction [by legislation]. ... the two sources of jurisdiction are to be read as cumulative. To the extent one may be broader in scope, that broader scope is to be given effect. [Emphasis added.]

[423] In this scheme there are two parallel mechanisms to address abusive litigation, and neither may reduce or minimize the other.

United Kingdom

[424] However, the Modern Approach's full form emerged in the UK from its Court of Appeal. In two decisions, ***Ebert v Birch*** (also cited as ***Ebert v Venvil***), [1999] EWCA Civ 3043 (UK CA) [***Ebert***] and ***Bhamjee***, the Court concluded that the Traditional Jurisdiction gap was simply a historical error. UK courts had been imposing what I have defined as vexatious litigant orders before any legislation was passed to authorize that step. On this basis the Court of Appeal in ***Ebert*** concluded ***Inglis*** was wrongly decided.

[425] Beyond that, this authority to screen prospective litigation was a simple necessity:

> That a court should have the jurisdiction which is in issue can hardly be doubted.
> ...
> ... We prefer to approach the issues from a standpoint of principle. Doing so, the starting point must be the extensive nature of the inherent jurisdiction of any court to prevent its procedure being abused. We see no reason why, absent the intervention of a statute cutting down the jurisdiction, that jurisdiction should apply only in relation to existing proceedings and not to vexatious proceedings which are manifestly threatened but not yet initiated. ...
> ... The court undoubtedly has the power to stay or strike out vexatious proceedings when they are commenced under its inherent power. We can see no

> reason in principle why it should not also, in accord with the general approach to the granting of quia timet injunctions, exercise that power to prevent the serious loss that anticipated but unidentified proceedings could cause the defendants to those proceedings.
>
> [Emphasis added.]

[426] ***Ebert*** stresses that *a vexatious litigant order is a screening function, does not deny access to the courts*, and, in that sense, *its consequences are limited, and not extraordinary*:

> ... the extent of this interference should not be exaggerated. First it is only an inhibition for bringing proceedings without the leave of the court. If the proceedings are arguably meritorious leave will be forthcoming. Secondly, the court will not make an order unless there is serious grounds for doing so and if there are no serious grounds, the order will be capable of being set aside on appeal. [Emphasis added.]

[427] Four years later in ***Bhamjee*** the UK Court of Appeal returned to this subject, and in a detailed decision laid out a scheme for the operation of vexatious litigant orders made under the UK courts' inherent jurisdiction that was identified in ***Ebert***.

[428] However, now the focus and context of the analysis had shifted. While earlier jurisprudence was largely orientated around the harm that abusive litigation caused to opposing parties, now the Master of the Rolls stressed that litigation misconduct also harms courts, too. That also implicates inherent jurisdiction:

> In recent years the courts have become more conscious of the extent to which vexatious litigation represents a drain on the resources of the court itself, which of necessity are not infinite. ...
>
> ... it is necessary to go back to first principles, both as to the inherent power of a court to protect its processes from abuse, and as to its ability, absent statutory authority or any explicit authority granted by the rules, to place fetters on a litigant's ability to access the court in the event that he has abused the court's process.
>
> The court, therefore, has power to take appropriate action whenever it sees that its functions as a court of justice are being abused. ... A court's overriding objective is to deal with cases justly. This means, among other things, dealing with cases expeditiously and allotting to them an appropriate share of its resources (while taking into account the need to allot resources to other cases). This objective is thwarted and the process of the court abused if litigants bombard the court with hopeless applications. They thereby divert the court's resources from dealing with meritorious disputes, delay the handling of those disputes, and waste skilled and scarce resources on matters totally devoid of any merit. ...
>
> Today it is also the resources of the courts themselves that require protection. ...
>
> [Emphasis added.]
>
> (***Bhamjee***, at paras 8, 10, 15, 54).

[429] There is much here that is familiar. The language used by the Master in many ways parallels how the Supreme Court of Canada in ***Hryniak*** described the "culture shift".

[430] ***Bhamjee***, at para 4, also clearly describes what I have called querulous litigation:

> ... in many, if not most, of these cases the litigant in question has been seriously hurt by something that has happened to him in the past. He feels that he has been unfairly treated, and he cannot understand it when the courts are unwilling to give him the redress he seeks. ... In most cases, particularly after an unsuccessful appeal has been handled in the same way, that will be the end of the matter so far as the courts are concerned, even if the litigant's sense of unfair treatment will often linger on. But in a tiny minority of cases he will not take "no" for an answer. He may start collateral litigation about the same subject matter. He may sue the judge. He may sue the lawyers on the other side. He may bombard the court in the same case with further applications and appeals. He may sue the Lord Chancellor, or the Home Secretary, or some other public authority whom he thinks may be legally liable for his misfortune. ...

[431] ***Bhamjee*** provides a number of important principles:

1. though these actions are traditionally described as "vexatious", the "hallmark" for this category of abusive litigation is *its effect is abusive*, rather than "whatever the intent of the proceeding may be" (para 7);
2. the categories of abuse are not set (para 33);
3. "[n]o litigant has any substantive right to trouble the court with litigation which represents an abuse of its process" (para 33);
4. *statutory and inherent jurisdiction authority to respond to abusive litigation co-exist* (para 25);
5. steps "proportionate to the identified abuse (whether it is existing or threatening)" may be taken under a court's inherent jurisdiction, provided those do not "extinguish" access to the courts (para 33);
6. *procedures that respond to abusive litigation may be conducted in writing only* (paras 33-34);
7. steps that respond to abusive litigation should be flexible and creative (para 35):

> ... The possibilities are unlimited. What is important is that the remedy should always be proportionate to the mischief that needs remedying. [Emphasis added.]

[432] Some Canadian appeal courts have explicitly adopted this UK jurisprudence, while the Court in ***Tupper*** came to essentially the same result, but does not explicitly rely on the UK Modern Approach case law.

Quebec

[433] ***Tremblay c Charest***, 2006 QCCA 204 at para 6 identifies ***Ebert*** for the inherent authority of superior courts. ***Grenier*** subsequently confirmed that authority (para 27), and the legislature had recently codified that authority via a very broad legislative authority (paras 27, 40). ***HE c***

Lack, 2013 QCCA 746 [***HE***] also confirms the Quebec Cour Supérieure has inherent jurisdiction to engage in gatekeeping steps for future litigation, and that Court may, on its own authority, impose vexatious litigant orders that affect other courts and tribunals.

[434] Prior to his appointment, Justice Morissette had also endorsed the UK Court of Appeal's approach to the scope of common law inherent jurisdiction identified in ***Ebert***: Yves-marie Morissette, "Abus de droit, quérulence et parties non représentées" (2004) 45 McGill L J 23. That case "meticulously traced the evolution" of that authority: at 47. He notes this authority is, however, already well established in Quebec, and has multiple highly adaptive facets: at 49-50.

Prince Edward Island

[435] The Prince Edward Island Court of Appeal in ***Ayangma v Canada Health Infoway***, 2017 PECA 13 at para 62, leave to appeal to SCC refused, 38030 (4 October 2018) [***Ayangma***] adopted ***Bhamjee***:

> In Bhamjee the court stated that it is well settled that any court may make such an order in the exercise of its inherent jurisdiction to protect its process from abuse ... So long as the very essence of a litigant's right to access the court is not extinguished, a court has a right to regulate its processes as it thinks fit so long as its remedies are proportionate to the identified abuse ...

The Court continued to indicate this is a prospective analysis, whether "... litigation history demonstrates a need to have litigation activities restricted to prevent future abuses of court processes." [emphasis added]: para 64.

[436] In ***Hok v Alberta #2***, this Court adopted the UK Modern Approach jurisprudence, and has generally followed that since.

d. Commonwealth Responses to the Modern Approach

[437] Other Commonwealth countries are also responding to the UK Modern Approach.

Australia

[438] In Australia the law remains that courts do not have an inherent jurisdiction to impose court access restrictions on hypothetical litigation: ***Inglis***. That said, again there is tension in relation to the Traditional Jurisdiction approach. The rule in ***Inglis*** has been 'read down' to only apply to *unrelated* future hypothetical litigation.

[439] In ***Velissaris v Dynami Pty Ltd***, [2013] VSCA 299 [***Velissaris***], the Victoria Supreme Court, Court of Appeal reviews cases in Australia which have explored and limited the effect of ***Inglis***. Whelan JA examined Australian developments chronologically. First, ***Inglis*** concluded that hypothetical future litigation is exempt from court inherent jurisdiction to control its processes because that was what the historical record had indicated: ***Velissaris***, at paras 91-97.

[440] Subsequently, a number of Australian decisions concluded that ***Inglis*** only meant *unrelated* future litigation was not subject to court gatekeeping authority. Australian Courts' inherent jurisdiction included issuing prospective orders that impose court gatekeeping where the same dispute is potentially re-litigated.

[441] ***Ebert*** and ***Bhamjee*** were then released. Justice Whelan reviewed how those decisions rejected the conclusion in ***Inglis***, and concluded UK tradition courts historically exercised their

inherent jurisdiction to impose court access restrictions on any future litigation by a general scope vexatious litigant order.

[442] Justice Whelan then examines post-UK Modern Approach Australian jurisprudence which endorsed the inherent jurisdiction identified in ***Ebert*** and ***Bhamjee***, and increasingly ruled ***Inglis*** did not prohibit prospective inherent jurisdiction vexatious litigant orders which screened re-litigation of an existing dispute: ***Velissaris***, at paras 120-137. Inherent jurisdiction was available to screen "anticipated but unidentified proceedings" to protect successful litigants "... from the commencement of fresh proceedings substantially related to the subject matter of proceedings which have already been resolved against that litigant. ...": para 124, citing ***Goodwin v Goodwin***, [2005] QCA 117 at para 12.

[443] Justice Whelan concluded that ***Inglis*** remains a binding authority which prohibits Australian courts' inherent jurisdiction to impose court access restrictions as broad as those authorized in the UK Court of Appeal jurisprudence. Except for that, he would adopt the UK Modern Approach *in toto* (***Velissaris***, at para 141), and concludes (para 142):

> ... Orders can be made in exercise of a court's inherent jurisdiction to prevent abuse of its own processes so as to restrain the institution of fresh proceedings without leave, where those proceedings are in substance an attempt to overturn a judgment already given and re-litigate a matter already decided.

[444] See also ***Manolakis v Commonwealth Director of Public Prosecution***, [2009] SASC 193; ***Westwill v Health***, [2010] SASC 358; ***Quach v New South Wales Health Care Complaints Commission (No 3)***, [2016] NSWCA 284; ***Hambleton & Anor v Labaj***, [2011] QCA 17.

Hong Kong

[445] The Hong Kong Court of Final Appeal has also adopted UK Modern Approach jurisprudence. Extensive reasons by Justice Ribeiro in ***Ng Yah Chi v Max Share Ltd***, [2005] HKCFA 9 [***Ng***] review the legislative and inherent jurisdiction of Hong Kong courts. Justice Ribeiro agrees with ***Bhamjee*** that litigation of this kind inflicts serious waste of limited court resources (paras 52-53), and the public interest requires an effective response (para 54). In Hong Kong this form of litigation abuse is increasing: para 47.

[446] Justice Riberio also observes that a 'one size fits all' solution does not take into account that vexatious litigants are a diverse collection (para 48), and exhibit several litigation and motivation patterns:

> There are many variants of such abuse and of what motivates it. It may represent a calculated attempt by a defendant to delay an inevitable judgment or its execution. Or it may be a malicious campaign of harassment directed against a particular adversary. Actions which are unintelligible or wholly frivolous may be commenced by litigants who are unfortunately mentally unbalanced. Sometimes the vexatious conduct springs from some deeply-felt sense of grievance left unassuaged after unsuccessful litigation. The vexatious litigant typically acts in person and characteristically refuses to accept the unfavourable result of the litigation, obstinately trying to re-open the matter without any viable legal basis. Such conduct can become obsessive with the litigant not shrinking from making wild allegations against the court, or against the other side's legal representatives or targeting well-known public personalities thought to be in some way

> blameworthy. Numerous actions may be commenced and numerous applications issued within each action. [Emphasis added.]

[447] *Though legislation provided a vexatious litigant process, Justice Riberio concluded that mechanism was inadequate*. The Secretary of Justice acts as a 'gatekeeper' (para 58), and even if the Secretary of Justice does act, the delay: "... gives the vexatious litigant ample opportunity to pile on the abuse. ..." [emphasis added] (para 59). Second, Ribeiro J observes *the threshold for intervention in that legislation is too high*, "... habitually and persistently and without any reasonable ground instituted vexatious legal proceedings. ...": para 60. Instead, "... [m]easured intermediate responses, tailored to different variants and degrees of abuse by vexatious litigants, are needed.": para 60. Justice Ribeiro then points to how ***Ebert*** and ***Bhamjee*** provide for graduated, adaptive, flexible responses.

[448] After a detailed review of Hong Kong legislation which relates to control of abusive litigants, he concludes at para 100:

> The court's inherent jurisdiction to make extended orders is therefore now firmly established in England and Wales, as shown by Ebert v Venvil and Bhamjee (No 2). ... It is, in my view, a soundly-based jurisdiction which is equally enjoyed by our courts. Accordingly, the subject order, which was intended to be [a vexatious litigant order], was made within jurisdiction and justified on the facts, although the appropriateness of its terms will require examination.

and then, at para 101, stresses the key objectives of the Modern Approach - *flexible and proportional* response:

> The focus of this judgment has of course been on [vexatious litigant orders]. It should not, however, be thought that the court's inherent jurisdiction to prevent abuse of its process is rigidly confined to the measures so far discussed. Abuse of process may come in a wide variety of forms and be of different degrees and, subject to the principles discussed above, the court's inherent jurisdiction enables it flexibly to develop such proportionate responses as may be appropriate. [Emphasis added.]

[449] Some additional tools to achieve that result include *mandatory lawyer representation* (para 103), barring access to the physical courthouses, except with permission (paras 108-110), and limits on communication (paras 109-110).

[450] The Justice concludes in this specific case broader prospective court access restrictions issued under the court's inherent jurisdiction were appropriate. That certainly was supported by the evidence. Succinctly, the abusive litigant's conduct is consistent with a querulous litigant: paras 33-46, 51.

[451] The other opinions in this decision agree with Justice Ribeiro's analysis and conclusion. Chief Justice Li adopted that decision *in toto*: "I am in complete agreement with his judgment.": para 1. Similarly, Justice Bokhary concludes, at para 25, that court inherent jurisdiction to issue vexatious litigant orders is necessary "[t]o protect others from vexation and [court] resources from wastage ...".

Singapore

[452] Recently, the High Court of Singapore has also adopted the Modern Approach. In ***Chang v Loong***, [2018] SGHC 217 [***Chang***], Thean J concluded that although legislation provided a basis on which to impose a vexatious litigant order, that authority was not an adequate mechanism to address abusive litigation. Justice Thean conducts an extensive review of Commonwealth jurisprudence, adopts the UK Modern Approach, and applies the Court's inherent jurisdiction to control an abusive litigant.

[453] Justice Thean accepts the conclusion in ***Ebert*** that the Australian ***Inglis*** decision was based on a historical error (para 32), and highlights the UK Court of Appeal shifting to a flexible proportionate response in ***Bhamjee*** (paras 36-37). Besides reviewing the Modern Approach jurisprudence in Australia and Hong Kong, ***Chang*** also cites this Court's ***Hok v Alberta #2*** and ***Sawridge #8*** decisions, *highlighting Justice Thomas's critique of a "persistence-driven approach" to managing abusive litigation*: paras 50-52.

[454] After reviewing prior Singapore jurisprudence on the subject of inherent jurisdiction, Justice Thean concluded that legislation did not exhaust that authority, and so what mattered was whether there is, or is not, a need for the Court's inherent jurisdiction to be exerted in a flexible and proportionate manner (para 72):

> ... On this point, Ebert, Sawridge and Bhamjee well put the genuine need for courts to devise flexible means to address an intermediate range of abusive conduct in a proportionate and nuanced manner ...

[455] But I believe what is, in many sense, the most interesting aspect of ***Chang*** is found in its first paragraph. Justice Thean makes the observation that I have repeated in this decision. When it comes to abusive litigation, often, there are no winners - everyone is harmed:

> ... Litigants who pursue claims with vexatious persistence take up a disproportionate amount of attention, to the detriment of other claims and the needs of other litigants. <u>For the vexatious litigant himself, and often his family, such continuous litigation also exacts a financial, emotional and mental cost</u>. [Emphasis added.]

e. Conclusion - the Modern Approach

[456] There appears to be a shift in both Canada and other Commonwealth countries away from the conclusion that only legislation authorizes court access restrictions such as vexatious litigant orders. The common thread throughout this jurisprudence is *need*. The existing mechanisms, if they exist, are identified as inadequate for the task of responding to modern litigation realities.

[457] I agree with that. The historical basis for the Traditional Jurisdiction is, at best, questionable. Abusive litigation is, without any dispute, a problem, and growing. Once one examines vexatious litigants *by their effect, rather than their intentions*, it becomes apparent that this is not a monolithic population, but instead a variety of types. These observations, and the need for early intervention, means the courts' best response is via a flexible tool set. Next, I will investigate how this Court has been equipped, in that sense, by legislation.

3. The Scope of Legislated Authority in Alberta to Impose Vexatious Litigant Orders

[458] In Alberta there are two legislative authorities that explicitly authorize court-ordered steps that impose court access restrictions which extend beyond the scope of a *Grepe v Loam Order*: *Judicature Act*, ss 23-23.1, and *Family Law Act*, SA 2003, c F-4.5, s 91.

The *Judicature Act*

[459] Examining first the current *Judicature Act*, ss 23-23.1 were enacted in 2007 and replaced the earlier 1975 authority where the Attorney General was the sole gatekeeper to vexatious litigant orders. The current *Judicature Act*, ss 23-23.1 have only been subject to minor subsequent amendments which do not affect their overall operation.

[460] The core *Judicature Act* authority to impose court access restrictions is provided by s 23.1(1):

> 23.1(1) Where on application or on its own motion, with notice to the Minister of Justice and Solicitor General, a Court is satisfied that a person is instituting vexatious proceedings in the Court or is conducting a proceeding in a vexatious manner, the Court may order that
>
> > (a) the person shall not institute a further proceeding or institute proceedings on behalf of any other person, or
> >
> > (b) a proceeding instituted by the person may not be continued,
>
> without the permission of the Court.

[461] Thus, there are two bases that trigger this section: "instituting vexatious proceedings", or "conducting a proceeding in a vexatious manner". I conclude that the legislature here is indicating that court access restrictions may be triggered either by:

1. an action whose substance is bad, "instituting vexatious proceedings", or
2. where a litigant has conducted a potentially valid action in an abusive manner, "conducting a proceeding in a vexatious manner".

[462] What constitutes "vexatious proceedings" and "conducting a proceeding in a vexatious manner" is indicated by s 23(2), which provides a non-exclusive list of seven examples of 'vexatiousness'. Each example is prefixed with "persistently", for example s 23(2)(a):

> ... persistently bringing proceedings to determine an issue that has already been determined by a court of competent jurisdiction ... [Emphasis added.]

[463] A proceeding that investigates whether *Judicature Act*, ss 23-23.1 court access restrictions should be imposed may be initiated by the Court, the Minister of Justice and Solicitor General, "a clerk of the Court",[2] an involved party, or, with court permission, anyone else.

[464] As previously indicated, the Minister of Justice and Solicitor General is no longer the sole gatekeeper of whether or not vexatious litigant orders are imposed, but remains involved via a notice requirement: *Judicature Act*, s 23.1. In this sense ***Pawlus v Pope***, 2004 ABCA 396, 357

[2] I know of no example of a clerk initiating a *Judicature Act*, ss 23-23.1 process, and am unclear on how that would occur.

AR 347 [***Pawlus***] is of limited relevance, since that decision evaluated the failure to give notice under the pre-2007 *Judicature Act* scheme, where the Minister of Justice and Solicitor General was the absolute gatekeeper on whether court access restrictions may be imposed by a vexatious litigant order.

[465] *Judicature Act*, s 23.1(4) provides an interesting and little used provision where the Court may expand an existing order:

> ... to any other individual or entity specified by the Court who in the opinion of the Court is associated with the person against whom an order under [*Judicature Act*, s 23.1(1)] is made ...

The two reported instances where s 23.1(4) was applied were in response to proxy litigants and representatives: ***1158997***; ***Onischuk (Re) #4***.

[466] *Judicature Act*, s 23(5) prohibits imposing an order against a lawyer who is representing a client. The constitutionality of this provision has been questioned as infringing the courts' inherent supervisory role over lawyer conduct: ***Sawridge #7***, at paras 57-58.

[467] The *Judicature Act* explicitly authorizes the Alberta Court of Queen's Bench and Alberta Court of Appeal to make orders that affect litigation in all three Alberta Courts. The Provincial Court of Alberta may only impose gatekeeping steps on itself: *Judicature Act*, s 23.1(6).

[468] Last, *Judicature Act*, s 23.1(9) states:

> Nothing in this section limits the authority of a Court to stay or dismiss a proceeding as an abuse of process or on any other ground. [Emphasis added.]

[469] Justice Wakeling, as he then was, in ***Shreem Holdings Inc v Barr Picard***, 2014 ABQB 112 at para 40, 585 AR 356 concluded that while a legislature may be able to affect the inherent jurisdiction of courts to control abusive litigation, section 23.1(9) *indicated Alberta's intent was the opposite*:

> ... noteworthy is s. 23.1(9) which reads as follows: "Nothing in this section limits the authority of a Court to stay or dismiss a proceeding as an abuse of process or on any other ground". This subsection is an unequivocal statement that the legislature did not intend Part 2.1 to be the only source of rules regulating this topic. [Emphasis added.]

[470] There is surprisingly little Alberta appellate commentary which interprets *Judicature Act*, ss 23-23.1.

[471] ***RO v DF***, 2016 ABCA 170, 36 Alta LR (6th) 282 [***RO***] reduced the scope of a global vexatious litigant order issued by this Court per *Judicature Act*, ss 23-23.1. The Court, at para 39, appears to indicate that '*past persistence*' is the defining character of misconduct that triggers *Judicature Act*, ss 23-23.1 intervention:

> There was insufficient evidence before the case management judge (or before us) to support a finding that the appellant has a history of "persistently" engaging in any of the prohibited actions in subsection 23(2) against anyone other than the respondent ... [Emphasis added.]

The abusive litigant's "history" has therefore defined the scope of court intervention.

[472] Similarly, in ***Dahlseide v Dahlseide***, 2009 ABCA 375, 73 RFL (6th) 57 [***Dahlseide***], the Alberta Court of Appeal, at para 37, struck out a vexatious litigant order on the basis that the trial judge had not considered the list identified in ***Judicature Act***, s 23(2). Some more recent Court of Appeal decisions also identify 'persistence' as a characteristic of the relevant abusive misconduct: e.g. ***Thompson v International #2***.

[473] However, in ***Liu v Matrikon Inc***, 2010 ABCA 383 at para 18, 493 AR 378, leave to appeal to SCC refused, 34149 (7 July 2011) [***Liu***] the Court of Appeal does not rely on the *Judicature Act*, s 23(2) "persistently" indicia, but instead references five factors adapted from ***Lang Michener Lash Johnston v Fabian*** (1987), 37 DLR (4th) 685, 59 OR (2d) 353 (Ont HCJ), which are quite different from the indicia list set in *Judicature Act*, s 23(2):

> The following criteria apply to determine if a litigant is vexatious, all of which have been met in this case:
>
> a. the bringing of one or more actions to determine an issue which has already been determined by a court of competent jurisdiction;
>
> b. where it is obvious that the action cannot succeed, or if the action would lead to no possible good, or if no reasonable person can reasonably expect to obtain relief;
>
> c. grounds and issues raised in one proceeding are rolled forward into subsequent actions and repeated or supplemented;
>
> d. failure to pay costs of unsuccessful proceedings;
>
> e. persistently taking unsuccessful appeals from judicial decisions
>
> [Emphasis added.]

Interestingly, the first two "criteria" clearly do not involve persistence at all. One action is enough to trigger intervention.

[474] The Court then concludes:

> From his conduct and statements there is a real risk that the appellant will continue to commence actions relating to his dismissed claims and attempt to re-litigate matters which have already been decided against him. [Emphasis added.]

This is not a pure "history" based analysis relying on "conduct", but rather forward-looking, that there is a "real risk", as indicated by statements of intent.

The *Family Law Act*

[475] The *Family Law Act*, s 91 provision is much simpler than the *Judicature Act* equivalent. It reads in full:

> 91(1) Where the court is satisfied that a person has made a frivolous or vexatious application to the court, the court may prohibit that person from making further applications under this Act without the permission of the court.
>
> (2) The court, before granting permission under subsection (1), may impose any terms as a condition of granting permission and make any other order in the matter as the court considers appropriate.

[476] The test also seems different. There is *no persistence component*, and the trigger for intervention is "a frivolous or vexatious application". *Family Law Act*, s 91 restricts "further applications", which is narrower than the *Judicature Act*, s 23.1 which controls "further proceedings".

[477] The maximum scope of a *Family Law Act*, s 91 order is only matters "under this Act", but the language of s 91(1) does not appear to limit the authority granted under s 91(1) to only operate within a single action, so arguably this authority is broader than a codification of the *Grepe v Loam Order* authority.

[478] Very few cases report orders imposed under *Family Law Act*, s 91. Neither of the Alberta Court of Appeal decisions that mention this provision comment on its operation and scope: ***DM v Alberta (Child, Youth and Family Enhancement Act, Director)***, 2014 ABCA 92; ***Belway v Lalande-Weber***, 2017 ABCA 108, leave to appeal to SCC refused, 37708 (21 December 2017) [***Belway #2***].

[479] ***Cox v Novosilets***, 2014 ABQB 729 at para 17 seems to indicate a *Family Law Act*, s 91 order is anticipated as interdicting future appeals from the Provincial Court of Alberta to this Court. The *Family Law Act*, s 91 order imposed in ***Lalande-Weber v Belway***, 2015 ABQB 233, aff'd 2017 ABCA 108, leave to appeal to SCC refused, 37708 (21 December 2017) [***Belway #1***] has the same scope as a *Grepe v Loam Order*.

[480] ***KE***, at paras 13-20, appears to provide the most extensive commentary on the differences between the *Family Law Act* and *Judicature Act* provisions. Justice Browne concludes:

1. the same criteria identify abusive litigation by either pathway (para 15);
2. when the Provincial Court of Alberta imposed a *Judicature Act*, ss 23-23.1 order, appeal is to the Alberta Court of Appeal, however *Family Law Act*, s 91 appeals are in this Court (para 16);
3. the "applications" vs "proceedings" distinction (para 17); and
4. the *Family Law Act* allows the court to impose preconditions to submitting a leave application (para 18).

[481] With respect to Justice Browne, I disagree with her interpretation of *Family Law Act*, s 91(2). Rather than interpret *Family Law Act*, s 91(2) to mean that the legislation authorizes a judge to impose preconditions on a leave application, I interpret that provision to indicate that a judge may grant leave, but that leave may only be exercised after certain preconditions are met. In any case, I am unaware of any case that was decided on this point.

4. Alberta Jurisprudence Concerning the Competing Approaches to Inherent Jurisdiction and Court Access Restrictions

[482] I will briefly comment on the positions of the Alberta Courts in relation to inherent jurisdiction and the legislative authority concerning court access restrictions.

[483] This decision reviews how, since 2016, the Alberta Court of Queen's Bench has usually conducted proceedings to impose court access restrictions via a vexatious litigant order under the Court's inherent jurisdiction. Case law in support of that authority is largely consistent.

[484] Reported Provincial Court of Alberta decisions where court access restrictions were imposed sometimes explicitly indicate a legislative authority, either the *Judicature Act*, ss 23-

23.1 (e.g. ***Armstrong v United Alarm Systems Inc***, 2017 ABPC 242; ***SC v JD***, 2013 ABPC 220), or *Family Law Act*, s 91 (e.g. ***DM v Alberta (Child, Youth and Family Enhancement Act, Director)***, 2017 ABPC 12; ***MAM v DJM***, 2013 ABPC 101).

[485] One decision does not identify any authority (***NK v BH***, 2017 ABPC 100 [***NK***]). Interestingly, ***NK*** imposes a five-year prohibition on further leave applications due to repeated abuse of the leave process: paras 39-40. Under the strict Traditional Jurisdiction approach that precondition is not apparently authorized by legislation.

[486] An unusual vexatious litigant order was issued in ***Ens v General Motors of Canada Company*** (19 July 2017), Stony Plain P1704200131 (Alta PC). This decision declared the plaintiff is a vexatious litigant, and prohibits "... further application to any Alberta Court regarding the subject action or institute new proceedings without leave of the Chief Judge of Alberta or Chief Justice of Alberta ...". The authority on which this order was issued is not identified, nor is there a corresponding reported judgment. This order appears to exceed the authority granted to the Provincial Court of Alberta under the *Judicature Act*.

[487] As for the Alberta Court of Appeal, ***Pawlus***, at paras 16-17 indicates: "There are conflicting authorities as to a court's inherent jurisdiction to prevent a litigant from commencing an action without leave of the court. ...", and that the inter-operation of the *Judicature Act* and inherent jurisdiction is unclear.

[488] No subsequent Alberta Court of Appeal decision appears to have re-visited that element of ***Paulus***, though in ***R v Grabowski #4***, at para 9, the Court indicates that the authority to impose court access restrictions on the court's own motion is based on inherent jurisdiction.

[489] More recently two vexatious litigants were granted leave to appeal where those appeals implicate whether this Court may impose court access restrictions under its inherent jurisdiction: ***Lymer (Re)***, 2018 ABCA 368; ***Makis v Alberta Health Services***, 2019 ABCA 23. That indicates, at a minimum, that from the perspective of that Court, the law on this point is unsettled.

[490] As I have examined above, there are competing explanations for the origin and scope of this Court's authority to engage in gatekeeping of hypothetical future abusive litigation. Hopefully, this Decision will provide an impetus to resolve this uncertainty.

F. The Court's Inherent Jurisdiction is a Superior and Necessary Basis on Which to Evaluate the Need for and to Implement Court Access Restrictions

[491] Now that I have reviewed the authority this Court has obtained, via legislation, to manage abusive litigation, the next step is to explore why those mechanisms are incomplete and inadequate to manage abusive litigation in the post-"culture shift" post-***Hryniak*** litigation context.

[492] As I have previously indicated, the Modern Approach operates from the foundation that legislative and inherent jurisdiction litigation abuse management authorities co-exist. However, the Alberta Legislature has not exhausted that inherent jurisdiction authority by "... clear and precise statutory language ..." (***Rose***, at paras 132-133; ***Amato***, at 449), and instead has indicated the opposite intent (*Judicature Act*, s 23.1(9)). The question, then, is whether inherent jurisdiction ought to be exercised to protect the Court's processes, and respond to abusive litigation, and anticipated abusive litigation, in a fair and proportionate manner.

[493] Since 2016 and ***Hok v Alberta #2***, this Court has usually evaluated potential vexatious litigant orders under its inherent jurisdiction. When vexatious litigation proceedings are initiated by a *Judicature Act*, ss 23-23.1 application, the Court instead now usually conducts those analyses under its inherent jurisdiction: ***Templanza #1***, at paras 94-104.

[494] The reason for that is the Court's inherent jurisdiction is simply the more appropriate alternative. The authority provided under Alberta legislation is not an adequate and complete basis to implement court access restrictions in the modern post-"culture shift" civil litigation milieu.

1. Retrospective Review and Persistent Historic Misconduct

[495] As I have previously explained, the *Judicature Act*, s 23(2)(a-g) examples of 'vexatiousness' are all identified as requiring 'persistence'. The plain meaning of that language indicates that only *repeated* misconduct is what attracts court scrutiny. Court access restrictions are therefore backwards-looking and punitive. After someone has done enough bad things enough times, then the court may intervene to stop that specific bad conduct: ***RO***.

[496] I believe that is contrary to the modern Canadian approach to civil litigation and the "culture shift". Read strictly, a persistence requirement can have absurd results. For example, *Judicature Act*, ss 23(2)(a) and (d) says persistent collateral attacks are 'vexatiousness' that warrants court intervention:

> 23.2 For the purposes of this Part, instituting vexatious proceedings or conducting a proceeding in a vexatious manner includes ... :
>
> > (a) <u>persistently</u> bringing proceedings to determine an issue that has already been determined by a court of competent jurisdiction;
> >
> > ...
> >
> > (d) <u>persistently</u> using previously raised grounds and issues in subsequent proceedings inappropriately;
> >
> > ...
>
> [Emphasis added.]

[497] As I will subsequently discuss in detail (Part IV(H)(4)(a)), collateral attacks are among the most obnoxious forms of litigation misconduct possible, and are strictly prohibited. Read literally, under the *Judicature Act* authority, one such incident is not enough to trigger court intervention. There instead must be multiple instances of this form of litigation abuse, "persistently" repeating and wasting court and litigant resources, again and again.

[498] I do not accept that repeated serious litigation abuse of this kind must be endured by parties and the administration of justice prior to the court stepping in. There are some forms of litigation misconduct where this Court may say "once is enough".

[499] Similarly, *Judicature Act*, s 23(2)(c) permits court intervention in response to "persistently bringing proceedings for improper purposes". When faced with a litigation terrorist, is confidence in the administration of justice, and the interests of the court and litigation participants, served by waiting until a litigation terrorist has harmed others "persistently"?

[500] What does "persistently" even mean? Is a history of three collateral attacks 'persistence'? Five? Ten?

[501] In ***Wood v Yukon (Public Service Commission)***, 2019 YKCA 4 at para 36 [***Wood #2***], Smallwood JA rejected an argument by a vexatious litigant that she was not 'vexatious enough' to warrant court intervention. This vexatious litigant had only made three unmeritorious appeals, while her comparator vexatious litigant, Ade Olumide, had over 40 abusive actions. This illustrates the problem with a volume-based persistence requirement.

[502] Justice Smallwood also observed that *slow response to abusive litigants just causes injury to accumulate*, endorsing ***Olumide v Canada***, at para 44; and ***Wood v Yukon (Public Service Commission)***, 2018 YKCA 15 at para 25. Additional unnecessary injury is the inevitable result of requiring repeated bad conduct as the threshold for court intervention. *A 'persistence' requirement always means the court waits and watches, sitting on its hands, while abuse piles on abuse, and misconduct escalates*. That is not justice.

[503] As was observed in ***Sawridge #8*** at para 53:

> ... the strict "persistence"-driven approach in the Judicature Act and [***RO***] only targets misconduct that has already occurred. It limits the court to play 'catch up' with historic patterns of abuse, only fully reining in worst-case problematic litigants after their litigation misconduct has metastasized into a cascade of abusive actions and applications.

[504] This approach is not conducive to effective management of court resources, but the issue goes further and deeper than that. What message is sent to those who are injured by abusive litigants? Is the abuse, injury, and expense they have endured are not important enough for the Court to respond? Will the Court not do anything, until they are harmed, *repeatedly*?

[505] Waiting further until already serious abuse accumulates past some threshold is incompatible with the modern approach to litigation in Canada - it is contrary to justice. The Supreme Court has instructed in both the civil (***Hryniak***) and criminal (***Jordan, Cody***) law context that efficiency, timeliness, and proportionate use of court resources and litigation management steps are *mandatory*. The 'persistence' requirement is, in some instances, simply incompatible with this "culture shift".

[506] Then there is the advice of experts who have investigated and written about the abusive litigation phenomenon. All agree that earlier intervention is preferred. I note that Caplan and Bloom single out "persistence" as an inappropriate threshold. That is too late, after the "tipping point", and means much damage and harm will have already occurred.

[507] The Modern Approach avoids these issues by shifting the question. There is no "red line" past which court intervention is appropriate. The inquiry is not what has happened, and now must be punished. Instead, the court asks what can be anticipated, and then what responses should flow from that. Veldhuis JA in ***IntelliView v Badawy #2***, at para 17 acknowledged this approach: "The order imposing court access restrictions on [the vexatious litigant] is not punitive in nature; it is intended <u>to prevent future abuse of the court process</u>. ..." [emphasis added.].

[508] As Thomas J in ***Sawridge #8***, at para 75, observed, it is not that persistent misconduct is unimportant, but rather that threshold should not be the *only* determinant on whether a court does or does not act:

> All this is not to say that "persistence" is irrelevant. In fact, it is extremely important. A history of persistent abuse of court processes implies the likelihood of other, future misconduct. Persistence is relevant, but must not be *the only prerequisite* which potentially triggers court intervention. Persistence is a clear and effective basis for a court to predict actions when it cannot ascertain motivation or pathology, and from that derive what is likely and predictable. However, that should not be the only evidence which is an appropriate basis on which to restrict court access. [Emphasis in original.]

[509] There are other reasons why a strict requirement of a history of "persistently" engaging in abusive litigation leads to absurd results. One is that sometimes a litigant says exactly what they are going to do. For example, in ***McMeekin v Alberta (Attorney General)***, 2012 ABQB 625 at para 44, 543 AR 11 [***McMeekin #3***], a vexatious litigant made his future intentions very clear indeed:

> I can write, I can write the judicature counsel, I can write the upper law society of Canada. I got Charter violations. I got administrative law violations. I've got civil contempt. I've got abuse of process. I've got abuse of qualified privilege. I can keep going, I haven't even got, I haven't even spent two days on this so far. And if you want to find out how good I am, then let's go at it. But you know, at the end of the day, I'm not walking away. And it's not going to get any better for them.

[510] I agree with Justice Thomas, who in ***Sawridge #8***, at para 56, observed:

> It seems strange that a court is prohibited from taking that kind of statement of intent into account when designing the scope of court access restrictions. This kind of stated intention obviously favours broad control of future litigation activities.

[511] Similarly, 'persistence' is less necessary as a predictor of bad future conduct when more about the litigant is known, such as demeanor, involvement of mental health issues, and litigation motivated by ideology: ***Sawridge #8***, at paras 60-74. As Caplan and Bloom indicated at 450-451, "motivation and pathology" are the appropriate focus.

[512] In summary, if *Judicature Act*, ss 23-23.1 only operates where litigation misconduct is 'persistent', then I conclude that authority will only capture and restrain, via gatekeeping processes, a subset of abusive litigants for whom court access restrictions are fair, proportionate, and necessary. The Court's response will be too late. This is a reason why the Court's inherent jurisdiction should enter, operate, and address this lacuna. The broader, prospective, litigation management approach to vexatious litigant orders available under this Court's inherent jurisdiction not only provides a superior methodology to respond to abusive litigation, but is consistent with the "culture shift" mandated by the Supreme Court of Canada.

2. Interim Court Access Restrictions

[513] A second major gap in the *Judicature Act*, ss 23-23.1 procedure is that legislation does not provide for interim court access restrictions, imposed while a court evaluates whether a person should be subject to indefinite court access restrictions, or steps are taken per the CPN7 process.

[514] It is difficult to overstate the serious implications of this gap. As I have previously described, much abusive litigation is a manic process, with a torrent of new lawsuits, applications, appeals, and other less classifiable paperwork. Abusive litigants are known to attempt to dodge the effect of countermeasures in one action by initiating other lawsuits.

[515] There are few worse ways to induce a flurry of problematic activity, than an abusive litigant knowing "the clock is now ticking", but there is a window within which to continue or expand his or her efforts.

[516] The Court of Appeal has now, on multiple occasions, enforced interim court access restrictions issued by this Court under its inherent jurisdiction (e.g. ***Hok v Alberta Justice***; ***R v Latham***, 2018 ABCA 267; ***R v Latham***, 2018 ABCA 308 at paras 6, 8, leave to appeal to SCC refused, 38437 (14 March 2019) [***R v Latham #2***]), and ruled interim court access restrictions are a fair and proportionate litigation management step (***ALIA v Bourque #2***, at para 7). Slatter JA has ruled that, like a challenge to an *ex parte* application without notice order, any challenge to an interim court access restriction order should first be directed to the judge who made that order, not to the Court of Appeal: ***R v Latham #2***, at paras 6, 8.

[517] I conclude this is a critical instance where *Court inherent jurisdiction is absolutely necessary to deal with abusive litigation and litigants, and fill an operational and functional requirement not provided for by legislation*.

3. Only One Prospective Litigation Management Step

[518] A third gap in the *Judicature Act*, ss 23-23.1 procedure is that legislation provides for only one remedy: a leave requirement, "permission from the Court", to initiate or continue litigation.

[519] Under the Traditional Jurisdiction approach, the *Judicature Act* must be read in a strict, literal, and limited manner. The Traditional Jurisdiction concludes that all vexatious litigant order authority derives *solely* from legislation. Any limit on a person's capacity to conduct litigation is an "extraordinary step". Thus, if the *Judicature Act* says the Alberta courts may respond to "vexatious proceedings" and "conducting a proceeding in a vexatious manner" and then limit future and ongoing litigation with a "permission of the Court" requirement, *then that is all the Court can do*.

[520] Such a strict interpretation would mean this Court has no authority to, for example, impose a requirement that, because of apparent abuse of the court's processes, a litigant must seek leave to bring a new application or proceeding, and also that the litigant must first pay outstanding costs or court penalties prior to initiating future lawsuits. That costs payment precondition was actually ordered in ***Gichuru #1***, ***R v Grabowski #4***, and ***Belway v Lalande-Weber***, 2017 ABCA 433, leave to appeal to SCC refused, 37708 (21 December 2017) [***Belway #3***].

[521] In ***Bhamjee***, when the UK Court of Appeal described the potential steps that may be taken under the courts' inherent jurisdiction, the Master of the Rolls stressed the exact opposite. A flexible, proportionate response is the rule. Beyond that, there are no limits.

> ... The possibilities are unlimited. What is important is that the remedy should always be proportionate to the mischief that needs remedying. ... [Emphasis added.]

[522] Courts in Hong Kong and Singapore also stress how their legislative schemes were too inflexible, and therefore did not provide adequate mechanisms to manage abusive litigation: ***Ng***, at paras 58-60, 100-101; ***Chang***, at para 72.

[523] As is reviewed in Parts IV(I)(4) and IV(J)(2), this Court, and other Canadian courts, have exercised their inherent jurisdiction to impose court access restrictions, in addition to a leave requirement. Highly disruptive and difficult to control litigation may require representation by a lawyer, or that a lawyer act as a pre-filing screen. "Offshore litigants" who abuse the court at "an arm's length" have been required to personally appear in court in future litigation, so that if sanctions or contempt of court incarceration are appropriate, then that response may occur. Abusive litigants have been instructed to structure their communications in certain ways.

[524] As I have previously reviewed, the British Columbia Court of Appeal has identified an inadequate range of remedies as a reason why British Columbia courts possess an inherent jurisdiction authority to supplement what is provided for by legislation: e.g. ***Croll***, at para 17; ***Boe***, at paras 32-37; ***Houweling***, at paras 40-45; ***Hutton***, at paras 2-5. So have the Federal Courts: ***Prefontaine v Canada #1***, at para 9; ***Prefontaine v Canada #2***.

[525] In discussing this issue, I stress there is no clear rule where the boundaries of "vexatious litigant orders" end, and other exercises of inherent court jurisdiction to control its processes start. For example, with Freeman-on-the-Land Amos McKechnie, the Court took the extraordinary step of barring McKechnie from being physically in or near courthouses, except to appear in court: ***McKechnie #2***, at paras 45-51. Simpson J concluded this authority is grounded in the Court's jurisdiction to secure its processes in response to potential threat and disruption. Was this a "vexatious litigant order"? That step was part of a larger scheme to structure McKechnie's interactions with the Court, including how he may engage in litigation. I believe it is fair to simply observe that the Modern Approach integrates vexatious litigant orders into a spectrum of historical and novel court-ordered litigation and litigant management steps, all of which emerge from a common objective: *that the Court controls its processes via its inherent jurisdiction to ensure its operation and public access to justice*.

4. No Preconditions to Apply for Leave

[526] Continuing with this discussion on the narrow authority granted under Alberta legislation to manage prospective abusive litigation, I have previously noted that *Judicature Act*, s 23.1(7) and *Family Law Act*, s 91(2) authorize the Court to grant leave *on conditions*:

> *Judicature Act*, s 23.1(7): "... the Court may, <u>subject to any terms or conditions</u> it may impose, grant permission ..."
>
> *Family Law Act*, s 91(2): "... The court, before granting permission ... <u>may impose any terms as a condition</u> of granting permission ..."
>
> [Emphasis added.]

[527] What neither of these sections appears to permit is that conditions may be imposed on a vexatious litigant as a *prerequisite* for submitting a leave application.

[528] Alberta Courts have, in certain instances, ordered that step, after concluding, either explicitly or implicitly, that an abusive litigant will plausibly misuse the leave process, or because the abusive litigant has already abused the leave process. I subsequently discuss examples of pre-leave conditions and why those were imposed at Part IV(I)(4)(b).

[529] Succinctly, if legislation is the only authority on which to design vexatious litigant orders, then the Court has no jurisdiction to impose 'pre-leave' requirements. That makes the leave process itself a potential target of unlimited abuse. I believe the problem with that is self-evident, when litigants have already conducted themselves in a manner that resulted in a vexatious litigant order.

[530] Again, this is an instance where inherent jurisdiction fills, or supplements, a gap in the legislative scheme, and a reason why this Court should impose vexatious litigant orders under its inherent jurisdiction. The British Columbia Court of Appeal has also identified this as a necessary inherent court authority: ***Croll***, at para 17; ***Boe***, at paras 32-37; ***Houweling***, at paras 40-45; ***Dawson***, at para 29; ***Hutton***, at paras 2-5.

5. Notice to the Alberta Minister of Justice and Solicitor General

[531] Section 23.1(1) of the *Judicature Act* requires "notice" to the Attorney General, and subsection 23.1(3) states the Attorney General has a right to appear in relation to *Judicature Act*, ss 23-23.1 processes. As previously discussed, this is a reduced role for the Attorney General compared to its prior direct supervision and control of all potential vexatious litigant orders.

[532] Prior to ***Hok v Alberta #2***, while the Court relied strictly on the *Judicature Act*, ss 23-23.1 authority as the basis to evaluate court access restrictions, there were very few instances where the Attorney General was involved in vexatious litigant order proceedings. If there was, at one point, a policy by the Attorney General to careful supervise vexatious litigant order proceedings, that authority is now apparently vestigial or abandoned, and so it should be.

[533] When the Court acts on its own motion to initiate an investigation of whether court access restrictions are appropriate, as is now very common, this notice and appearance requirement may lead to a gap period where an abusive litigant will not know whether he or she is potentially subject to court access restrictions, or will actually be subject to court access restrictions (e.g. ***R v Fearn***, 2014 ABQB 233 at para 54, 586 AR 182; ***Al-Ghamdi***, at para 81), with the court access restrictions being paused until the Attorney General indicates whether it will exercise its s 23.1(3) right to appear. When this 'gap period' is combined with a rule that no interim court access restrictions are available, there is obviously a potential for very serious mischief.

[534] One 'work-around' developed to address this issue is that this Court sometimes issued an interim vexatious litigant order that only 'crystalized' into final permanent effect after a delay period, usually a month, in which the Attorney General may seek to re-open the matter and make submissions: e.g. ***Sikora Estate (Re)***, 2015 ABQB 467 at para 19 [***Sikora***]; ***Boisjoli (Re) #1***, at para 112; ***Onischuk (Re) #1***, at paras 22-24. As far as I know, the Attorney General has never done so.

[535] The *Judicature Act*, ss 23.1(1), 23.1(3) notice requirement is a comparatively minor disadvantage to that procedure, compared to the Court proceeding on its inherent jurisdiction. The Legislature does not appear to have intended this to be a global and mandatory requirement, given *Judicature Act*, s 23.1(9), which preserved the Court's inherent jurisdiction to control abusive litigation. Again, the ss 23.1(1), 23.1(3), and 23.1(9) language is not "... clear and precise statutory language ..." to exhaust the Court's inherent jurisdiction to address abuses of its processes: ***Rose***, at paras 132-133; ***Amato***, at 449.

[536] The *Family Law Act* vexatious litigant provision has no equivalent notice requirement. I have no suggestion for why the Legislature has taken different approaches in these two acts.

[537] I also note that, when the Court has exercised its inherent jurisdiction, it has also involved the Attorney General in proceedings where there were reasons the matter is one that should attract comment and interest by the Attorney General, e.g. ***McKechnie #1***, at para 28.

6. Conclusion - Inherent Jurisdiction Provides a Complete, Flexible, Fair, Proportionate, and Responsive Mechanism to Impose Court Access Restrictions

[538] The preceding are reasons why the Court has and should impose court access restrictions under its inherent jurisdiction, rather than rely on the authority provided by legislation. While some of this Court's decisions describe the *Judicature Act*, ss 23-23.1 authority as "obsolete" (e.g. ***ALIA v Bourque #3***, at paras 6, 80; ***Templanza #1***, at para 99; ***Lee v Canada #2***, at para 13), in my opinion the intended message was not that the *Judicature Act* is no longer relevant, or inoperative. Rather, it is that legislative authority co-exists with an inherent jurisdiction authority: ***Bhamjee***. At present, in the post-"culture shift" civil litigation context, the latter provides a significantly better approach to identify and manage problematic litigation.

[539] Under the Modern Approach, which I adopt, that authority has always been there. *Judicature Act*, s 23.1(9) indicates the Legislature was sensitive to the possibility that the *Judicature Act*, ss 23-23.1 might be interpreted as an attempt to extinguish or limit the Court's inherent jurisdiction. Section 23.1(9) clearly shows that the Legislature's intended result was the opposite.

[540] Managing abusive litigants and litigation is an important part of the "culture shift" (***Chutskoff #1***, at para 31; ***Hok v Alberta #2***, at para 29; ***Tupper***, at paras 46-49; ***Lelond***, at paras 79-84; ***Bossé v Immeubles***, at para 37; ***Olumide v Canada***, at para 45; ***Grenier***, at para 34), as are all matters which involve or relate to SRLs (***Trial Lawyers***, at para 110).

[541] Trial Courts must adopt litigation mechanisms that appropriately allocate their resources and function: ***Hryniak***; ***Jordan***; ***Cody***.

[542] In this new environment, it matters less whether a solution is the predominate rule or approach identified in prior law, than adopting the strategy which responds effectively to the modern Canadian litigation landscape and its issues: ***Weir-Jones***, at para 23. Given that, the prospective litigation management approach identified in ***Hok v Alberta #2***, and developed over the next several years of this Court's jurisprudence, is the more appropriate way to address abusive litigants in a fair and proportionate manner. With that, I will now describe how this Court now exercises that authority.

G. The Procedure to Evaluate Possible Court Access Restrictions

[543] An investigation into whether court access restrictions are potentially appropriate may arise in one of two ways:

1. via an application, or
2. on the Court's own motion.

These two alternative pathways implicate procedural fairness in different ways. The Court has therefore developed different approaches to both alternatives when it exercises its inherent jurisdiction.

[544] There is a deeper principle, too. When the Court detects abuse of its processes, the Court is *always* entitled to act:

> ... succinctly, if a judge of this Court detects one or more problem litigants, that judge is *always* authorized to take whatever steps are appropriate to respond to and address the identified issue(s). The surrounding context in which disruption to court function has emerged is irrelevant to solving that problem. [Emphasis in original.]
>
> (***ALIA v Bourque #3***, at para 66).

[545] I have adopted this principle in ***Unrau #1***, at para 31, see also ***IntelliView v Badawy #1***, at para 78; ***Wilcox #3***, at paras 12-21. A court always has the inherent jurisdiction to protect itself, and those who appear before it, from litigation misconduct. Once that is identified, the Court may, indeed must, act.

1. Via Application

[546] The first alternative is most commonly an application by a party or other authorized person made pursuant to *Judicature Act*, ss 23-23.1. However, subsequent to ***Hok v Canada #2***, this Court has conducted its analysis of whether or not court access restrictions ought to be imposed under its inherent jurisdiction.

[547] ***Templanza #1*** was the first occasion where this Court 'switched' post-application from the *Judicature Act*, ss 23-23.1 mechanism to proceed under its inherent jurisdiction. Neufeld J concluded that since the Court has a dual authority to evaluate prospective court access restrictions, via inherent jurisdiction and *Judicature Act*, ss 23-23.1 (at paras 94-99), that *the Court may choose between these alternatives and should elect to use the methodology which results in the more proportionate, fair, and effective result* (at paras 100-104). Under the "culture shift", that is the Court's inherent jurisdiction.

[548] In coming to this conclusion, Justice Neufeld adopted the criticisms of the *Judicature Act* procedure identified by Thomas J in ***Sawridge #8***, at paras 42-79. The *Judicature Act*'s mechanism has serious limitations, such as a fault-based analysis, its requirement for "persistence", and not taking into account an abusive litigant's statements of intent, demeanor, and personal characteristics. That, collectively leads to court access restrictions which 'catch up' to abusive conduct, rather than anticipate and pre-empt future litigation misconduct.

[549] As is likely obvious, I agree with Justice Neufeld's conclusion.

[550] Subsequent decisions have generally adopted this approach, converting *Judicature Act*, ss 23-23.1 applications to proceedings where court access gatekeeping restrictions were evaluated under the Court's inherent jurisdiction: e.g. ***ALIA v Bourque #1***, at paras 11-15; ***Toller***, at paras 30-32; ***Hill #1***, at paras 49-54; ***ALIA v Bourque #3***, at paras 78-83; ***Lymer (Re) #3***, at paras 33-36; ***Gagnon v Shoppers***, at para 14; ***IntelliView v Badawy #1***, at para 5; ***Makis #1***, at para 45; ***Paraniuk v Pierce***, at paras 108-109; ***Biley v Sherwood***, at paras 131-132. Alternatively, the Court has concluded both methods would lead to the same result: e.g. ***Laird***, at para 136.

[551] In most instances the application will be set for a hearing, and, after submissions are received, the court moves to make its decision.

[552] However, if that decision is reserved, I strongly believe that the Court should immediately issue an interim court access restriction order to 'bridge the gap' until a final determination is made. Interim court access restrictions were first imposed in ***Hok v Alberta #1***, and those interim court access restrictions were subsequently enforced in ***Hok v Alberta Justice***, at para 7, to terminate an unauthorized appeal as an abuse of process. The practice of interim court access restrictions was also considered and confirmed in ***ALIA v Bourque #2***, at paras 5-7.

[553] I have previously explained the need for interim court access restriction orders. Without this step, mischief can occur, and is probably encouraged by the knowledge that there is a 'window of vulnerability' to exploit. For example, in ***MacKinnon v Bowden Institution***, 2017 ABQB 654, no interim court access restrictions were imposed. Sure enough, the abusive litigant then took the opportunity to initiate a new proceeding that was a collateral attack on his recently terminated action: ***MacKinnon #2***, at paras 58-65.

[554] Regardless of the result of the application process, the interim court access restriction order should be vacated when the Court issues its final decision.

[555] In closing this section, I note that Veit J in ***Sikora***, at paras 16-18, concluded that when the Court is asked via application to impose a vexatious litigant order then that application must be made per *Judicature Act*, ss 23-23.1, see also ***Ewanchuk***, at para 96; ***Sawridge #8***, at para 79. I am not certain that the *Judicature Act* exhausts and displaces this Court's jurisdiction to receive applications made pursuant to its inherent jurisdiction to control abuse of its process. Indeed, I would assert the contrary. In any case, the point is something of a technical one, given this Court's current practice of responding to *Judicature Act*, ss 23-23.1 applications under its inherent jurisdiction.

2. Applications on the Court's Own Motion

[556] The second alternative is that a candidate abusive litigant's conduct is evaluated when the Court initiates a vexatious litigant order process on its own motion. The authority to do so is explicitly provided in *Judicature Act*, s 23.1(1), but the Alberta Court of Appeal in ***R v Grabowski #4***, at para 9 also confirmed that, in any case, that this Court "... enjoys an inherent jurisdiction to control its own process; as such, a judge may declare a litigant vexatious on his or her own motion. ...".

[557] In ***Lymer v Jonsson***, 2016 ABCA 32 at paras 3-4, 612 AR 122 [***Lymer v Jonsson***], Costigan JA ruled that a trial court may not immediately proceed to impose court access restrictions, unless the candidate abusive litigant has an opportunity to make submissions on that question. That said, ***Lymer v Jonsson***, at para 4, also acknowledges that the Alberta Court of Appeal has, itself, not strictly followed this rule, but in those instances the abusive litigant "... was not taken by surprise by the issuance of a vexatious litigant order on the Court's own motion. ...". This "no surprise" rule has been criticized as difficult to apply, and I will subsequently discuss that issue in Part V(A).

[558] Post-***Lymer v Jonsson***, the "no surprise" exception has almost never been used by this Court.

[559] Instead, vexatious litigant order proceedings are conducted by the Court following the two-part ***Hok v Alberta #2*** process, which was first applied in ***Hok v Alberta #1***, court restrictions imposed ***Hok v Alberta #2***. The Court:

1. issues a first decision on its own motion and under its inherent jurisdiction that:

    a) identifies indicia of abusive litigation relevant to the candidate abusive litigant,

    b) reviews the law and principles that guide when and how the Court imposes court access restrictions,

    c) invites written submissions and affidavit evidence from the candidate abusive litigant and other parties, and sets deadlines for those materials, and

    d) imposes interim court access restrictions;

2. receives those materials, if any, and

3. issues a second decision that:

    a) reviews the total information available to the court relevant to the candidate abusive litigant, including information from the candidate abusive litigant,

    b) determines whether that information predicts abusive litigation activity from the candidate abusive litigant which warrants court access restrictions,

    c) assesses the plausible future litigation misconduct of the candidate abusive litigant as to subject matter, parties, forums, and special aggravating factors,

    d) imposes ongoing court access restrictions that respond to the plausible future litigation conduct, if appropriate, and

    e) terminates the interim court access restrictions.

[560] Many Alberta Court of Queen's Bench decisions illustrate this two-part, two-judgment procedure, for example:

1. A Church of the Ecumenical Redemption International OPCA "minister" was made subject to vexatious litigant court access restrictions in response to his pattern of lawsuits and claims he does not have to pay for his mortgage because of his purported religious beliefs: ***Potvin #1*** (step 1); ***Potvin (Re)***, 2018 ABQB 834 [***Potvin #2***] (step 2).

2. A "flurry litigation" abusive litigant was subject to a vexatious litigant order: ***Gagnon v Shoppers*** (step 1); ***Gagnon v Core*** (step 2).

3. Strict court access restrictions were imposed on litigation terrorist Amos McKechnie: ***McKechnie #1*** (step 1); ***McKechnie #2*** (step 2). This example is atypical in that the step 1 decision imposed unusually strict interim court access restrictions in light of McKechnie's very troubling conduct.

[561] On other occasions, the two-step ***Hok v Alberta #2*** process is part of a combined proceeding to both evaluate the potential merit of an action (is it vexatious litigation?), and whether the litigant should be subject to court access restrictions (is a vexatious litigant order appropriate?), e.g. ***Rothweiler v Payette***, 2018 ABQB 134 [***Rothweiler #2***] (step one and a *Rule* 3.68 procedure); ***Rothweiler #3*** (step two and the statement of claim is struck out per *Rule* 3.68). Similarly, the ***Hok v Alberta #2*** process may occur as part of a CPN7 proceeding: ***Labonte #1*** (CPN7 step 1); ***Labonte v Alberta Health Services***, 2019 ABQB 92 [***Labonte #2***] (CPN7 step 2, ***Hok v Alberta #2*** step 1); ***Labonte v Alberta Health Services***, 2019 ABQB 137 [***Labonte #3***] (***Hok v Alberta #2*** step 2).

[562] Review of the jurisprudence to date, and my personal experience, shows the two-part ***Hok v Alberta #2*** process works well.

[563] Step one is a written decision, and is usually detailed:

1. indicia and specific instances of apparently abusive conduct are clearly identified;
2. law relevant to the apparent bad conduct is indicated or reviewed;
3. the authority for the vexatious litigant order process, descriptions of relevant evidence categories, and core principles which will be applied to determine whether prospective court access restrictions are imposed are surveyed; and
4. a timeline for submissions and other materials is laid out.

[564] One might arguably call that a lot of "boilerplate", but I disagree. The usual recipient of a step one ***Hok v Alberta #2*** decision will be a SRL who may be unfamiliar with court access restrictions. In these circumstances, it is particularly important that the Court provide a basic introduction to the procedure now underway, without recourse to reviewing multiple case law authorities. In this sense, that "boilerplate" has an important functional role to ensure that any vexatious litigant order will - indeed it must - result in a fair and proportionate procedure. A detailed step one decision provides a SRL the opportunity for a full response and the opportunity to rebut identified problematic conduct. A decision that simply says "you might be vexatious - prove otherwise" does not.

[565] The methodology I have described means this a document-only procedure. That is authorized by *Rule* 6.9(1)(c): ***IntelliView v Badawy #2***, at para 10. While hearings could be set to resolve these questions, and should never be completely excluded in appropriate circumstances, in my opinion, there are several reasons a paper-only approach is the better alternative.

[566] First, as Thomas J explained in ***1985 Sawridge Trust v Alberta (Public Trustee)***, 2017 ABQB 436 at paras 59-62, this approach is procedurally fair, complies with the Supreme Court of Canada's instruction in ***Cody***, at para 39, and therefore is consistent with "culture shift" litigation. Recently, Chief Justice Richard in ***Bossé v Chiasson***, at para 6, concluded a document-based methodology is appropriate when a court responds to abusive litigants.

[567] Second, a document-based approach avoids the persistent issue of hearings expanding outside their set parameters. That is not unusual in the high-tension, unpredictable context of abusive litigation. For example, in ***Thompson v International #1***, at para 42, what was originally scheduled to be a one-day hearing to evaluate court access restrictions ended up requiring three days spread over seven months. That is hardly a model of post-"culture shift" civil litigation, and was not fair to any of the parties, including the candidate abusive litigant.

[568] Third, my observation is that written submissions provide a superior mechanism for candidate abusive litigants to present their arguments, thoughts, and evidence. It may not come as a surprise that proceedings which evaluate court access restrictions are often highly charged affairs. The involved parties' emotional state is heightened due to the preceding events, a likely history of conflicts, and high investment in this litigation. *That includes lawyers, when they are involved*. Candidate abusive litigants often report these hearings are stressful and upsetting - and I believe them.

[569] Written submissions provide the opportunity for involved parties to organize, explain, and develop their position in a more cohesive way, and with greater detachment. That promotes the court getting the actual information it needs, in a meaningful manner. Written argument also provides an opportunity to revisit and review positions. That includes acknowledging missteps and errors, such as occurred in ***DKD (Re)***, 2019 ABQB 26 at paras 9-12 [***DKD #2***], where a party abandoned OPCA concepts.

[570] That said, as noted above, if a candidate abusive litigant were to identify a genuine requirement for a full in-court hearing, such as a communication, literacy, or language difficulty, the court should accommodate that, per the obligations indicated in the *SRL Statement*. Absent that, document-based submissions are the superior, and fairer, alternative.

[571] Deadlines for these submissions should be flexible. Interim court access restrictions mitigate possible additional litigation misconduct. For example, time extensions have been granted:

1. for health reasons (e.g. ***Gagnon v Shoppers***, at para 12; ***ALIA v Bourque #3***, at paras 19, 38-40, 53);
2. where the candidate abusive litigant claimed work obligations precluded a timely response (e.g. ***Knutson (Re)***, 2018 ABQB 1050 at para 7 [***Knutson #2***]);
3. where submissions were sent in an irregular manner and therefore not immediately identified (e.g. ***Rothweiler #4***, at paras 3-8);
4. where the abusive litigant indicated he was seeking Legal Aid support and a lawyer (e.g. ***McCargar #2***, at para 12); and
5. after claims of logistics and communication issues (e.g. ***ALIA v Bourque #3***, at para 19).

[572] In some instances, these extensions were an abusive litigant's attempts to 'game the system' (e.g. ***ALIA v Bourque #3***, at paras 19, 38-40; ***Knutson #2***, at paras 7-8), for example with fabricated medical emergencies. Again, since interim court access restrictions were in place, these stratagems had little actual negative effect.

[573] I do not think there should be a page count limit on written submissions that respond to a ***Hok v Alberta #2*** step one decision. Some court procedures that address problematic litigation have imposed a maximum page submission requirement. For example, CPN7 limits written submissions to ten pages. Submission limitations such as that are not appropriate during the ***Hok v Alberta #2*** two-part document-based process given the very broad range of potentially relevant information to evaluate a candidate abusive litigant. Limiting the written submissions may therefore be unfair. It is better to give the candidate abusive litigant and other involved parties a full opportunity to provide information to help the court reach an appropriate outcome.

[574] I also note that the two-part ***Hok v Alberta #2*** document-based process may also be very useful where the Court responds to an application to make a person subject to a vexatious litigant order. In some instances, a candidate abusive litigant may appear in court and express concerns that the proceeding is unfair due to a lack of notice, issues relating to service, or inadequate preparation. A simple way to resolve that potential unfairness is to transform the hearing into a two-part document-based ***Hok v Alberta #2*** process, set deadlines for written submissions from the parties, and impose interim court access restrictions.

[575] Veldhuis JA, in ***IntelliView v Badawy #2***, at para 10, observed this is an "eminently reasonable" response to concerns of this kind. An oral hearing converted to written submission methodology has been used in a number of reported vexatious litigant order proceedings in this Court: e.g. ***ALIA v Bourque #1***, at paras 5-9, 28-31; ***IntelliView v Badawy #1***, at paras 10-14; ***Biley v Sherwood***, at paras 6-7.

[576] In my opinion this document-based process should be flexible. The scope of evidence which is potentially relevant is very wide. Provided interim court access restrictions are in place, there is no harm in permitting extra time. The Court should be sensitive for new developments, and relevant changes.

[577] The final step in the two-part ***Hok v Alberta #2*** procedure follows once the submissions and other materials from the parties are received. The remainder of this review examines that analysis, and whether court access restrictions should be imposed, or not.

H. Evidence of Abusive Litigation

[578] I will next review:

1. the kinds of evidence used to evaluate whether a person is an abusive litigant, and
2. the key evidence and features that are indications, or "indicia", of abusive litigation.

1. Kinds of Evidence that are Relevant when Investigating Court Access Restrictions

[579] The range of information that a court may examine to evaluate possible abusive litigation and identify an appropriate court response has always been understood as a broad and purposive inquiry. Jacob, "Inherent Jurisdiction" at 42, emphasized that when the court engages its inherent jurisdiction in this context then the court "... [goes] behind the pleadings ..." to evaluate "... the true facts and circumstances of the case ...".

[580] Jacob, "Inherent Jurisdiction' is confirmed by modern Canadian case law, which has consistently ruled that, when evaluating potentially abusive litigation, the inquiry may refer to more than just the immediate matter at hand. The entire dispute history of the litigation and the candidate abusive litigant is potentially relevant, including:

1. activities both inside and outside of the courtroom (***Bishop v Bishop***, 2011 ONCA 211 at para 9, 200 ACWS (3d) 1021, leave to appeal to SCC refused, 34271 (20 November 2011) [***Bishop***]; ***Henry v El***, 2010 ABCA 312 at paras 2-3, 5, 193 ACWS (3d) 1099, leave to appeal to SCC refused, 34172 (14 July 2011) [***Henry***]);

2. the litigant's entire public dispute history (***Thompson v International #2***, at para 25), including:

    a) litigation in other jurisdictions (***Chutskoff***; ***McMeekin v Alberta (Attorney General)***, 2012 ABQB 456 at paras 83-127, 543 AR 132 [***McMeekin #2***]; ***Curle v Curle***, 2014 ONSC 1077 at para 24; ***Fearn v Canada Customs***, 2014 ABQB 114 at paras 102-105, 586 AR 23; ***Hill #1***, at paras 68-80, 91-96; ***ALIA v Bourque #3***, at paras 41-51; ***Olumide v Alberta***, at paras 33-45);

    b) non-judicial proceedings (***Bishop***, at para 9; ***Thompson v International #2***, at paras 24-25; ***Green***, at paras 36-37); and

    c) public records that are a basis for judicial notice (***Wong v Giannacopoulos***, 2011 ABCA 277 at para 6, 515 AR 58 [***Wong***]).

[581] In many instances this information comes to the Court's attention in a documentary form, as court filings, hearing transcripts, reported court and tribunal decisions, docket records, etc. A court which evaluates a candidate abusive litigant may investigate this public record, but this information is commonly also received via affidavits from involved parties.

[582] A particularly important form of evidence is where a court has already concluded that a person is an abusive litigant and has taken litigation management steps on that basis. That may take the form of a vexatious litigant order, a more limited effect *Grepe v Loam Order*, or any other court access restriction(s).

[583] This Court has adopted the reasoning of Stratas JA in ***Olumide v Canada***, at para 37:

> ... other courts' findings of vexatiousness under similarly-worded provisions can be imported into later applications against the same litigant and can be given much weight ... The wheel needn't be reinvented. [Emphasis added.]

See also ***Hill #1***, at paras 68-80; ***Armstrong v Daniels***, 2018 ABQB 926 at paras 14-24; ***ALIA v Bourque #3***, at paras 153-158; ***Peters v Keef***, 2019 ABQB 85 at para 17 [***Peters***]; ***IntelliView v Badawy #1***, at paras 103-106.

[584] Subsequently, Justice Stratas in ***Fabrikant v Canada***, 2018 FCA 171 at paras 14-15 explained that the fact that an abusive litigant has been made subject to court access restrictions in another jurisdiction is relevant to more than just whether parallel court access restrictions are appropriate in the 'local' jurisdiction. A vexatious litigant may be subject to potentially "aggressive" steps on the court's own motion, "closer-than-normal management", and a requirement to provide further evidence to establish an action has a valid basis. Globally, when one court imposes court access restrictions, that is a 'warning flag' everywhere.

[585] *In Alberta, existing court access restrictions create a presumption that parallel steps are appropriate in the local jurisdiction, or in a new litigation dispute where abusive litigation seems underway*. Anderson J in ***Hill #1***, at para 79 expressed the principle in this manner:

> I conclude as a point of law that where a court in another jurisdiction has imposed court access restrictions on a person then that creates a presumption that analogous court access restrictions are also warranted, either on application or the court's own motion, in Alberta, unless that presumption is rebutted by the alleged abusive litigant. [Emphasis added.]

[586] Similarly, Moreau CJ in ***Peters***, at para 17, concluded:

> ... When a court has already concluded that court access restrictions are necessary to manage a litigant, then that is, of itself, a very strong factor in support of additional court access restrictions that respond to additional anticipated litigation misconduct ... [Emphasis added.]

[587] The final category of evidence relates directly to the candidate abusive litigants themselves, rather than their litigation activities, and includes what they say, what are their apparent affiliations and motivations, and other personal attributes.

[588] In ***Sawridge #8***, at paras 55-59, Thomas J discusses the first example of this evidence category: statements of intent. Sometimes a person will say exactly what they intend to do, and the effect of that intention is to abuse the Court's processes. Since the Modern Approach to litigation is prospective, when an abusive litigant says he or she will engage in future litigation misconduct. that obviously is potentially very relevant: ***Liu***, at para 19; ***Lofstrom v Radke***, 2017 ABCA 362 at para 8 [***Lofstrom***]; ***Van Sluytman v Muskoka (District Municipality)***, 2018 ONCA 32 at paras 23-24, leave to appeal to SCC refused, 38057 (1 November 2018) [***Van Sluytman***]; ***Templanza #1***, at para 120; ***Rothweiler #3***, at paras 42-44; ***ET v Calgary Catholic School District No 1***, 2017 ABCA 349 at para 11, leave to appeal to SCC refused, 38081 (8 November 2018) [***ET v Calgary***]; ***Lee v Canada #2***, at para 148; ***ALIA v Bourque #3***, at paras 190-193; ***Labonte #3***, at para 14; ***Peters***, at paras 38-39.

[589] For example, Shirley Hok, in her submissions to the Court described in ***Hok v Alberta #2***, at paras 44-46, was quite straight forward. She said she would not stop, and she would attack all those she identifies as members of the conspiracy against her. That certainly is relevant to anticipate future litigation misconduct.

[590] Hok's statements were also important in another way - she concluded that the persons she complains about are bad actors, and deserve punishment. That, too, is relevant to understanding her motivation.

[591] The abusive litigant in ***Lofstrom***, at para 8, openly declared he would never stop his litigation and other activities until he obtained his desired outcome:

> The respondent acknowledges his obsession with obtaining parenting rights to the children, and indicates that if he is not restrained he will continue to litigate until he achieves success. He states that he will not "capitulate", and will continue "hoping beyond hope that someone will hear, listen and help protect the children". He states: "I will continue to seek their protection and best interests, no matter the cost to myself, always within the law if at all possible."

Naturally, that is highly relevant to future potential litigation activities.

[592] Similarly, demeanor may be relevant to evaluate whether or not a litigant will plausibly engage in future litigation misconduct: ***Sawridge #8***, at paras 60-62. I have previously described Maurice Prefontaine's highly volatile response to failure (Part IV(C)(6)(g)). Conduct like that does not bode well for future court activities.

[593] Understanding what motivates a person's conduct is always potentially relevant. That is why mental health questions, and affiliations with groups, such as the OPCA phenomenon, are also potentially highly relevant: ***Sawridge #8***, at paras 63-74.

[594] Once again, the inquiry conducted when exercising the Court's inherent jurisdiction to manage abusive litigation is a broad-based one. The categories I have indicated are not an exclusive list of what the Court may rely upon when screening its processes from abuse, but rather are illustrations of what may be relevant. Ultimately, the exercise is an open-ended one, tailored to the individual person.

[595] That is why the Alberta Court of Appeal reviews trial court access restriction proceedings as "... a discretionary decision ..." that is tested to see whether or not it is reasonable, which "... is a high threshold": ***Liu***, at paras 10, 17; ***RO***, at para 33; ***Clark v Pezzente***, 2018 ABCA 76 at para 15, leave to appeal to SCC refused, 38161 (24 January 2019) [***Clark #2***]. An alternative formulation for that threshold "... is whether there is an error of law or principle, or a failure to exercise the discretion judicially.": ***Coote v Lawyers' Professional Indemnity Company (Lawpro)***, 2014 FCA 98 at para 15, 459 NR 174.

2. Vexatious Litigants vs Vexatious Litigation

[596] Evidence of abusive litigation is relevant to both whether:

1. an action, application, or other proceeding may be struck out:

   a) as vexatious litigation and an abuse of court processes under *Rule* 3.68, either on application or per CPN7, or

   b) via summary judgment per *Rules* 7.2-7.3, as the proceeding has no merit and may fairly be terminated (***Weir-Jones***), or

2. a person should be subject to prospective court access restrictions as a vexatious litigant or by a *Grepe v Loam Order*.

[597] In ***RO***, at para 38, the Alberta Court of Appeal indicated there is an important difference between "vexatious litigation", and "a vexatious litigant". But what distinguishes the two?

[598] That answer was neatly summarized in ***Biley v Sherwood***, at paras 42-44:

> A person who is subject to court access restrictions is sometimes called a "vexatious litigant", and their access to courts is controlled by a "vexatious litigant order". [The applicant] has argued that [a lawsuit] is "vexatious litigation", an abuse of process, and therefore should be struck out per Rule 3.68. While these various items use the same descriptor, "vexatious", the Court in evaluating these applications is engaged in two quite different tasks.
>
> When evaluating whether [the lawsuit] is abusive litigation that should be struck out per Rule 3.68, the Court looks at the potential merit of the lawsuit, and also how the lawsuit has been conducted. If the action is futile or otherwise has been conducted in an abusive manner, then the Court may terminate the litigation per Rule 3.68. This is largely a retrospective inquiry that asks what has occurred, and from that determine whether a lawsuit should be ended in whole or in part.
>
> In contrast, imposing court access restrictions [by] a "vexatious litigant order" is a prospective step which evaluates, in light of what is known about the abusive litigant, whether the Court should impose gatekeeping functions to minimize and manage anticipated potential future bad litigation conduct. The usual court access

> restriction is that an abusive litigant is required to seek permission - "leave" - prior to initiating or continuing an action, appeal, application, or motion.

[599] Thus, while the same factors are relevant to evaluate existing and future litigation misconduct, that evidence may not be equally relevant when evaluating vexatious *litigation*, vs the vexatious *litigant*.

[600] For example, consider the implications where an abusive litigant has initiated multiple court proceedings that are collateral attacks which attempt to challenge a court decision. If the present litigation is one such collateral attack, then that is a powerful, if not decisive, reason to end the lawsuit as *vexatious litigation*.

[601] But what if the collateral attacks have occurred in other unrelated proceedings? Then that fact is basically irrelevant to whether a non-collateral attack, but otherwise potentially abusive proceeding, should be terminated. However, a history of collateral attacks is very likely always relevant when evaluating whether that individual is a *vexatious litigant*, and plausibly will engage in future abusive litigation.

[602] Not all evidence of abusive litigation misconduct carries the same weight. I will later review that subject in more detail.

[603] Sometimes, relevant evidence is all but determinative. For example, if another Court ruled that a person has engaged in abusive conduct, and that warranted court intervention, then that clearly is a highly significant factor when evaluating the same abusive litigant in a different jurisdiction.

[604] In other instances, the form of the abusive litigation may have particular relevance. For example, abuse of *habeas corpus* procedures carries a particular weight and strongly favours court intervention because of how provincial superior courts are particularly vulnerable to abuse of that kind (***Hamm***, at paras 195-214), and due to the disproportionate damage which results (***Ewanchuk***, at paras 170-187; ***McCargar #1***, at paras 5-6; ***Loughlin v Her Majesty the Queen***, 2018 ABQB 45 at para 8, 74 Alta LR (6th) 171 [***Loughlin #2***]; ***d'Abadie v Her Majesty the Queen***, 2018 ABQB 298 at para 97 [***d'Abadie v Alberta #1***]; ***d'Abadie v Her Majesty the Queen***, 2018 ABQB 438 at para 33, 75 Alta LR (6th) 206 [***d'Abadie v Alberta #2***]; ***Getschel***, at para 59).

[605] Evidence of litigation abuse also has a cumulative effect. The presence of multiple characteristics and examples of abusive litigation favours court intervention: ***Ewanchuk***, at para 159; ***Chutskoff #1***, at para 131; ***Boisjoli (Re) #1***, at para 104; ***Hok v Alberta #2***, at para 39; ***644036 Alberta Ltd v Morbank Financial Inc***, 2014 ABQB 681 at para 91, 26 Alta LR (6th) 153 [***644036***].

3. Indicia of Abusive Litigation

[606] Over the past several decades Canadian courts have identified a range of activities, events, characteristics, and traits that are evidence that a person is engaged in abusive litigation which may warrant court intervention. These are sometimes called "indicia" of abusive litigation.

[607] The abusive litigation indicia serve several roles when a court responds to problematic litigation. Indicia of abusive litigation:

1. are a potential basis to conclude that an action, appeal, or application is vexatious litigation and an abuse of the courts' processes;

2. provide evidence that predicts an abusive litigant will engage in future litigation abuse, the kinds of litigation abuse that may be anticipated, and what court access restrictions may be appropriate to manage the abusive litigant, if any;

3. as aggravating factors that help evaluate contempt of court (e.g. ***Lymer (Re)***, 2014 ABQB 674 at paras 34-35, 9 Alta LR (6th) 57, aff'd 2018 ABCA 36, leave to appeal to SCC refused, 38042 (27 September 2018) [***Lymer (Re) #1***]);

4. on whether to impose costs, and what the appropriate cost quantum should be (e.g. ***R v Eddy***, 2014 ABQB 391 at para 48, 583 AR 268 [***Eddy***]; ***Loughlin #2***, at para 24; ***Sawridge #7***, at paras 84-88); and

5. whether litigation proposed by a person subject to court access restrictions is an abuse of process, and should be denied leave (e.g. ***ATB v Hok #1***, at para 18; ***Thompson v Alberta Labour Relations Board***, 2018 ABQB 220 at para 10, leave to appeal to SCC refused, 38266 (31 January 2019) [***Thompson v ALRB #2***]; ***Botar (Re)***, at para 27; ***Trinity Place Foundation of Alberta v Templanza***, 2019 ABQB 45 at para 5 [***Trinity***]; ***Onischuk (Re) #4***, at paras 17-18).

[608] I will focus on two potential applications of the abusive litigation indicia: vexatious *litigants*, and vexatious *litigation*.

4. Indicia of Abusive Litigation Categories

[609] In ***Chutskoff #1***, at para 92, Michalyshyn J synthesized Canadian case law and the *Judicature Act*, ss 23-23.1 to identify eleven abusive litigation "indicia" categories. Since 2014 these indicia have formed the foundation on which this Court has evaluated whether to terminate abusive litigation and/or impose prospective court access restrictions. Since then additional abusive litigation indicia have been identified in Canadian jurisprudence, for example those listed in ***Biley v Sherwood***, at para 47.

[610] This is not a closed list: ***Dahlseide***, at para 37; ***Bhamjee***, at para 33. That fact is important given our developing understanding of the abusive litigant phenomenon, and that novel and different forms of abusive litigation have emerged in the last decade, e.g. the OPCA movements, the Johnson Dollar Dealers, and the *habeas corpus* entrepreneurs. More, and possibly quite different, forms of abusive litigation may appear.

[611] I believe this is a useful point to return to and review the abusive litigation indicia. My doing so does not mean I disagree with the indicia scheme laid out by Justice Michalyshyn or how it has been implemented, but instead that the passage of time has provided additional perspectives on how to approach these factors, their features, relevance, and weight. As will become apparent, in some instances I have gathered together a number of "indicia" into new, larger classes, based on their common characteristics.

a. Collateral Attacks

[612] A collateral attack is a litigation step or proceeding that challenges, directly or indirectly, a prior court decision or result. Collateral attacks are generally prohibited and an abuse of process (***British Columbia (Workers' Compensation Board) v Figliola***, 2011 SCC 52 at para 28, [2011] 3 SCR 422), with only narrow exceptions (***R v Bird***, 2019 SCC 7 [***R v Bird***]).

[613] Examples of prohibited collateral attacks include:

1. bringing proceedings to determine an issue that has already been determined by a court of competent jurisdiction,
2. using previously raised grounds and issues improperly in a subsequent proceedings,
3. conducting a proceeding to circumvent the effect of a court order, and
4. conducting multiple proceedings with the same litigation objective.

(***Chutskoff #1***, at paras 92, 97-98; ***Stoney Nakoda Nations v Canada (Attorney General)***, 2013 ABQB 752 at paras 11-18, 60 CPC (7th) 440; ***Grabowski v Karpiak #4***, at paras 30-32).

[614] Put another way, the only proper method to challenge a court decision is via appeal. Attempts to evade that are an abuse of the Court's processes. A decision is final once its appeal options are exhausted. Control of this form of litigation misconduct has always been part of the Court's inherent jurisdiction: Jacob, "Inherent Jurisdiction" at 43-44.

[615] Collateral attacks are very serious litigation misconduct. Attempts to re-litigate matters only result in meaningless, wasteful litigation, a highly objectionable result in the "culture shift" context of limited court resources. An *undetected* collateral attack proceeding may result in inconsistent court decisions. Collateral attacks subvert "the orderly and functional administration of justice": ***Dagenais v Canadian Broadcasting Corp***, [1994] 3 SCR 835 at 871, 120 DLR (4th) 12. When a lawyer knowingly persists in this litigation misconduct, the Court should impose personal sanctions against that lawyer: ***Sawridge #7***, at paras 125-131.

[616] Justice Ribeiro, in ***Ng***, at paras 120-121, makes the useful observation that to evaluate whether an abusive litigant has engaged in a collateral attack one examines the "... the substance of what is sought to be done in the new matter and not to its form. ...".

[617] Aside from the narrow exception recently reviewed in ***R v Bird***, any action or application which is identified as a collateral attack should be terminated, immediately: ***Alberta v Pocklington Foods Inc***, 1995 ABCA 111 at para 14, 123 DLR (4th) 141; ***644036***, at paras 65, 67; ***Onischuk (Re) #4***, at para 17. Where an abusive litigant engages in collateral attacks, that is a very strong basis for court intervention to impose court access restrictions: ***644036***, at paras 65, 91; ***Boisjoli (Re) #1***, at para 82; ***Sawridge #8***, at paras 81-82; ***Alberta Treasury Branches v Hawrysh***, 2018 ABQB 618 at paras 32-35 [***Hawrysh #2***]; ***ALIA v Bourque #3***, at para 161; ***IntelliView v Badawy #1***, at paras 126-128; ***Paraniuk v Pierce***, at para 78; ***Lee v Canada #2***, at para 120.

[618] As I have previously indicated, in my opinion, "once is enough" for this kind of abuse of court processes.

b. Hopeless Proceedings

[619] As the name of this category suggests, a hopeless proceeding is one that cannot be successfully pursued, or which pursues objectives that are disproportionate, excessive, or impossible (***Chutskoff #1***, at paras 92, 102-107). Hopeless proceedings have three broad categories:

1. The litigation is flawed from the start and has no potential to provide any relief. The law, alleged facts, and/or the jurisdiction of a court means the action or application cannot succeed, or has no reasonable expectation to provide relief.
2. The outcome sought is flawed. The relief sought, including costs, is impossible, moot, disproportionate, or excessive.
3. The action is unclear. The pleadings do not adequately identify the dispute, facts, parties, or are simply gibberish.

[620] ***Chutskoff #1*** illustrates many examples of a hopeless proceeding. The abusive litigant demanded that the Court order a criminal prosecution, when that authority is reserved for the Attorneys General: para 103. Chutskoff sought to challenge a moot issue, which is an exceptional step (para 106), and he demanded *Charter* relief against private individuals, who, of course, are not subject to those constitutional obligations (para 107). The abusive litigant's monetary claims were disproportionate relative to the potential value of the dispute (para 104), and excessive (para 103) given the cap on general damages set by ***Andrews v Grand & Toy Alberta Ltd***, [1978] 2 SCR 229, 83 DLR (3d) 452. In short, his proceedings were hopeless.

[621] Similarly, in ***Templanza #1***, many hopeless claims were barred by limitations periods.

[622] ***Onischuk v Edmonton***, at para 25 and ***Onischuk (Re) #2***, at para 51 report attempts to attack tax proceedings, both a hopeless action but also a collateral attack on the jurisdiction of another court. Later, Onischuk demanded the Alberta Court of Queen's Bench re-open proceedings in the Alberta Court of Appeal: ***Onischuk (Re) #2***, at para 16.

[623] Sometimes abusive litigants seem to imagine the courts operate far outside their actual role. For example, Unrau sought this Court grant him "Full accreditation, retroactive licensure, gainful lawful employment", and in some manner impose "respect, ethical integrity, more open mindedness".

[624] Disproportionate damage claims are both hopeless and a common feature of abusive litigation. These are often large even numbers, apparently plucked out of nowhere. Unrau sought "$5 million and damages". Why? Who knows? Freeman-on-the-Land, Allen Nelson Boisjoli, demanded $100,000.00 in penalties for each time someone used his name. This preposterous claim warranted court response: ***Boisjoli (Re) #1***, at para 85.

[625] However, these amounts are dwarfed by the claim advanced by rogue Freeman-on-the-Land, Ontario lawyer, Glenn Bogue, who in ***Miracle v The Queen of England***, Ottawa T-195-16 (FC) sought no less than "$2 Quadrillion" (a thousand billion) in damages from Queen Elizabeth II, several provinces, the Bank of Canada, government officials, and others, for "rent" of "native soils" and "theft of natives' identity as Domestic Sovereigns". Unsurprisingly, the action was struck out without leave to amend: ***Miracle v The Queen of England*** (7 September 2016), Ottawa T-195-16 (FC). In another action Bogue demanded $3 quadrillion, "which amount equal the global sub-prime real estate debt": ***Law Society of Upper Canada v Bogue***, 2017 ONLSTH 215 at para 24.

[626] One aspect of hopeless proceedings that was not substantively explored in ***Chutskoff #1*** is the requirement for adequate pleadings: statements of claim, originating applications, and other applications. Pleadings are always important, since pleadings set out the issues to which the opposing party must respond, and alert a party of the case it must meet: ***Whiten v Pilot Insurance Co***, 2002 SCC 18 at para 87, [2002] 1 SCR 595. A factual foundation, or an alleged

factual foundation, is an absolute requirement for pleadings that seek potential *Charter* relief: ***Mackay v Manitoba***, [1989] 2 SCR 357, 61 DLR (4th) 485. I concluded in ***Unrau #1***, at paras 35-36, that pleadings must also identify the involved parties.

[627] While some pleadings filed by abusive litigants are extremely detailed, others are simply "bare bones", skeletal allegations. These pleadings are sometimes described as nothing more than "bald allegations", and are not a proper basis for a lawsuit: ***GH***, at para 58.

[628] Unrau's Statement of Claim is a good example of bald allegations, as are the multiple statements of claim reproduced in ***Gagnon v Shoppers***, and ***Gagnon v Core***. Another common phenomenon is that an abusive litigant will invoke the *Charter*, but not explain how it is implicated, offending the rule in ***Mackay***, e.g. ***McKechnie #1***, at para 19; ***d'Abadie v Alberta #1***, at para 41, court access restricted ***d'Abadie v Alberta #2***.

[629] Inadequate pleadings are an indicium of abusive litigation. This Court has adopted the reasoning in ***kisikawpimootewin***, at paras 8-9, that litigation is an abuse of court processes when a "... defendant cannot know how to answer, and a court will be unable to regulate the proceedings ...", "bare assertions and bald statements" leave the defendant "... both embarrassed and unable to defend itself ...", and the court is unable to identify the intended argument and/or specific material facts. As Gill J observed in ***Arabi v Alberta***, 2014 ABQB 295 at paras 85-86, 589 AR 249, there is no need for a court or responding litigant to answer claims that are "gibberish", which "simply make no sense", or which are "illogical, impenetrable claims".

[630] ***Blackshear v Canada***, 2013 FC 590 illustrates the "gibberish" category. This was a lawsuit by "'Maitreya' Isis Maryjane Blackshear, the Divine Holy Mother of All In/Of Creation' and All Isis Nation Estates" against a collection of government actors. At paras 4-5, Prothonotary Lafrenière, as he then was, struggled to summarize the lawsuit:

> ... The allegations set out in the 84 page pleading are for the most part unintelligible and consequently difficult to summarize. The Plaintiff states that she is the "Divine Mother of All in/of Creation". She also claims to be the only one authorized and qualified to fill the See of Rome. The Plaintiff is seeking damages against the Alberta Crown and the Federal Crown on behalf of "Tiamat Ki-Earths Kaneh Bosm Signatory Tribal Nations' and "Independent Spiritual International Signatory (ISIS) Nation Estates" in an astronomical amount of over one hundred and eight quadrillion dollars. The Plaintiff claims damages based on breach of covenant, breach of trust, fiduciary duty and obligations, false imprisonment, and other injustices.
>
> ... The Plaintiff also requests that the Defendants immediately cede to her original and final jurisdiction under Ancient Clanmother Laws; liquidate all global assets into Equity through the Bank of International Settlements; immediately acknowledge her as The Divine Holy Mother and cede to her Matriarchal Society; inform and teach all ISIS Nations Estates about their inheritance; cease and desist all blasphemy against the Divine Mother, the Queen of Heaven, delta9Lucifer; announce in both private and public statements acknowledging her return as The Divine Holy Mother; act in compliance with All of The General Executrix Administrative Orders; and guarantee the restoration of her All Signatory Tribal Nations and each and every ISIS Nation Estate to their immortal, pristine, peaceful, blissful and abundant lives.

I think it is obvious why this lawsuit was struck out as "... fundamentally vexatious and an abuse of the system. ...": para 14.

[631] Perhaps stating the obvious, when a court identifies a hopeless action, it should be struck out per *Rule* 3.68. The "culture shift" and the inherent jurisdiction of the court to control abuse of its processes demands that a court cut to the substance of the matter, and evaluate whether or not litigation should, or should not, proceed.

[632] Pursuing hopeless proceedings is strong evidence that favors imposing prospective court access restrictions (***Ewanchuk***, at paras 117-125), particularly if the abusive litigant has done this repeatedly (e.g. ***Gagnon v Shoppers***; ***Gagnon v Core***; ***Templanza #1***; ***IntelliView v Badawy #1***, at paras 107-125; ***Lee v Canada #2***, at para 114).

c. Escalating and Expanding Proceedings

[633] Another common indicium of abusive litigation is that the dispute grows over time: ***Chutskoff #1***, at paras 92, 109. This has three related aspects:

1. "grounds and issues tend to roll forward into subsequent actions, repeated and supplemented",
2. actions have an "accumulative" nature, adding new parties, issues, and remedies, and
3. new disputes and litigation "hive off" the original conflict.

This indicium is usually ongoing, so that the litigant's activities may branch through multiple disputes, appeals, complaints, and different forums. As previously explored (Part IV(C)(1)), this is a key characteristic of querulous litigants. The extraordinary activities of Ade Olumide are an archetype abusive litigant engaged in escalating proceedings: ***Olumide v Alberta***, at paras 33-44.

Thompson

[634] Here, in Alberta, we too have similar examples. One is Derek Thompson. Thompson's workplace complaints about safety concerns with industrial cranes (***Procrane Inc (Sterling Crane) v Thompson***, 2016 ABCA 61; ***Thompson v Procrane Inc (Sterling Crane)***, 2016 ABCA 71; ***Procrane Inc v Thompson***, 2016 ABCA 345) then led to conflict with his union (***Thompson v International Union of Operating Engineers, Local Union No 955***, 2015 CanLII 77155 (AB LRB); ***Thompson v International Union of Operating Engineers, Local Union No 955***, 2015 CanLII 103339 (AB LRB)) and multiple lawsuits against his union concerning alleged election misconduct (***Thompson v International #1***), judicial reviews (***Thompson v Alberta Labour Relations Board***, 2017 ABQB 205), law society complaints concerning involved lawyers, baseless allegations of police misconduct (***Thompson v Edmonton (Police Service)***, 2016 ABLERB 24 [***Thompson v EPS***]), multiple Canadian Judicial Counsel complaints against judges, and then an unsuccessful judicial review of the Canadian Judicial Counsel itself (***Thompson v Canada (Attorney General)***, 2018 FCA 212).

[635] Thompson was declared a vexatious litigant: ***Thompson v International #1***. He then abused the Court's leave process with multiple unmeritorious applications (***Thompson (Re)***, 2018 ABQB 87, 74 Alta LR (6th) 160, aff'd 2018 ABCA 111, leave to appeal to SCC refused 38204 (14 February 2019) [***Thompson (Re) #1***]; ***Thompson v ALRB #2***; ***Thompson (Re)***, 2018 ABQB 355 [***Thompson (Re) #2***]), and in each instance Thompson unsuccessfully sought leave to appeal from the Supreme Court of Canada (***Thompson*** (14 February 2019), Ottawa 38204

(SCC); ***Thompson*** (31 January 2019), Ottawa 38266 (SCC); ***Thompson v Nielsen*** (31 January 2019), Ottawa 38267 (SCC)).

[636] All this litigation can be traced back to a single, precipitating event, which then, over time, led to Thompson's ever expanding crusade. Thompson's conduct is obviously consistent with that of a querulous litigant.

Other Examples

[637] An example of the third category is where a lawyer, in a 'parent' dispute, later finds him or herself personally the target of litigation or professional complaints: e.g. ***IntelliView v Badawy #1***, at paras 34-46, ***Paraniuk v Pierce***, at para 76; ***Templanza #1***.

[638] Sometimes the dispute-related steps form a kind of tree, where every setback becomes the branch off from which yet more complaints and litigation develop: ***Makis #1***; ***Hok v Alberta #2***, at paras 43-46.

[639] The previously examined ***Paraniuk v Pierce*** action illustrates an escalating proceeding largely contained within a single lawsuit. Each time Paraniuk filed a revised statement of claim he added new parties and new allegations: paras 62, 83-84. In ***Chutskoff #1*** the abusive litigant sought to "consolidate" other decided litigation into his current abusive lawsuit, therefore combining escalating proceedings with multiple collateral attacks.

[640] Escalating proceedings are the defining characteristic of querulous litigants. That predicts very negative outcomes. In making that observation I am not saying that every litigant who exhibits the escalating proceedings indicium is caught within the querulous litigant pattern of repeated, expanding litigation, but rather that this indicium is a very strong warning sign that court intervention is appropriate both to successfully manage a lawsuit (or lawsuits), and to minimize self-injury to the abusive litigants themselves. Psychiatric professionals who have examined abusive litigation linked to mental health issues are consistent that early, firm intervention is the best, though limited, hope to assist abusive litigants who are drifting deeper into this whirlpool.

[641] Escalating proceedings are a very strong basis to impose court access restrictions by a vexatious litigant order: e.g. ***Ewanchuk***, at paras 126-130; ***IntelliView v Badawy #1***, at paras 129-133; ***Makis #1***, at paras 77, 80; ***Paraniuk v Pierce***, at paras 83-84; ***Biley v Sherwood***, at para 91.

[642] However, the escalating proceedings indicium is a weaker basis on which to terminate a particular action as an abuse of the courts' processes. Sometimes there is a core issue to the escalating process that may have some merit. For example, in ***Templanza #1***, at para 126, Justice Neufeld observed that regardless of the surrounding allegations of a network of Jewish lawyer conspirators, Templanza's original complaint might have merit, and was proceeding. Again, mental health professionals who have investigated persons engaged in abusive, escalating litigation stressed that the trigger for this behaviour is usually a discrete seed event, which is perceived as unjust, and where that perception may have some tangible basis. What follows is a chaotic thrashing about, but there may be a kernel of truth which has been the trigger for what then followed.

[643] I believe the courts should be sensitive to this possibility. That can be achieved in two ways. First, the escalating proceedings pattern *must* be restrained. Vexatious litigant orders are an excellent tool to meet that objective. Broad restrictions should be imposed without hesitation.

[644] Second, courts should scrutinize attempts to expand litigation, such as the repeatedly amended statements of claim described in ***Paraniuk v Pierce***. New, expanded claims are more likely questionable, particularly if they are nothing more than allegations of conspiracy, corruption, biased decision making, etc.

[645] Last, look carefully at the core or seed conflict. While the potential abusive litigant may or may not be right about whether that unsuccessful result was reached incorrectly or improperly, there may be a benefit to the court investigating whether that point was, at least, arguable. Would acknowledging that change the litigation trajectory of an abusive litigant engaged in a pattern of expanding litigation and disputes? I do not know, but perhaps with that observation, and an explanation of the limited role of reviewing or appeal bodies, maybe the abusive litigant might better appreciate why he or she is now subject to court access restrictions.

d. Proceedings with an Improper Purpose

[646] The improper purpose category gathers together instances of abusive litigation where the objective of the lawsuit is one that is inconsistent with the function of the courts, attacks the proper administration of the court, and would, if permitted, subvert the public's confidence in the proper administration of justice. These are often instances where the abusive litigant is *intentionally* misusing the court for some reason.

[647] ***Chutskoff #1***, at para 92, identifies five examples of proceedings without a proper purpose and which are instead intended to achieve an illegitimate end-result. Actions:

1. without a legal basis and intended disrupt, pre-empt, or frustrate other litigation,
2. with an ulterior motive or to seek a collateral advantage,
3. intended to extort a settlement or other benefit,
4. intended as revenge, harassment, to oppress, or to inflict harm, and
5. conducted in retaliation to other persons' successes or their failure to cooperate with the plaintiff, including unwarranted complaints to professional bodies.

[648] Another way to group these examples is this conduct is characteristic of persons with an abusive litigation *intention*: e.g. ideological litigants, litigants for profit, litigation terrorists, and persons whose distorted perceptions have led them to falsely identify their targets as wrongdoers or as part of a hostile conspiracy.

[649] I believe that it is helpful to merge this category with some other separate abusive litigation types identified in ***Chutskoff #1***, at para 92 and other subsequent jurisprudence. For example, SLAPP lawsuits, "busybody" litigation, and OPCA litigation exhibit the same general characteristic: bad intention and objectives.

[650] Intent is relevant to the proceedings with an improper purpose category. The problem with that, of course, is that sometimes discerning why a person does something is not so simple.

[651] That said, sometimes the abusive litigant is quite forthright about what they intend to do, and directly indicates he or she will engage in future abuse of the courts processes.

Lee

[652] John Mark Lee Jr. is an example of that. He openly acknowledged he initiates personal and "busybody" litigation to attack Correctional Service Canada and its employees (***Lee v Canada #2***, at paras 140-143), and that he will not stop (paras 148-153).

Biley

[653] Similarly, the abusive litigant in ***Biley v Sherwood***, at paras 141-144, was direct about his objective. He wanted revenge, and to humiliate and destroy those he had sued.

Templanza

[654] Rosalina Templanza sought to retaliate against what she alleged was a Jewish lawyer conspiracy set out to defraud her. Her lawyer targets were "mentally ill", "thieves" and "extortionists". Templanza also was forthright about her plans. She would not stop pursuing her objectives in existing and future litigation: ***Templanza #1***, at paras 116-120.

MacKinnon

[655] Similarly, the inmate in ***MacKinnon #2***, at paras 89-92, was committed to his overturning his criminal conviction and thereby defeating Stephen Harper's conspiracy against him.

ET

[656] The abusive litigant in ***ET***, at para 11, was explicit in his oral submissions, he is "seeking the truth", and would not be deterred by any court decision that disagreed with his truth.

Unrau

[657] Other times the improper purpose is apparent from the objectives of the litigation. Unrau is an example of that. Certain of the remedies he has sought, such as "apologies, respect, ethical integrity, more open mindedness, amendment of boards' rules et al", shows he views his litigation is intended to have broader social and policy effects.

[658] These remedies are not only impossible, but seek to have the court act outside its proper authority. In ***Van Sluytman***, at paras 23-24, the Ontario Court of Appeal described abusive litigation as seeking "... the acknowledgement and correction of perceived government shortcomings, as distinct from asserting a right recognized at law ...".

[659] However, when intentions are less obvious, intentions may be assessed by applying the well-established principle that a person can be presumed to intend the natural consequences of their acts: ***Starr v Houlden***, [1990] 1 SCR 1366, 68 DLR (4th) 641. As Shelley J observed in ***McMeekin #2***, at paras 199-201, when an abusive litigant is told what they are doing is wrong, and they persist, then that means the abusive litigant "... wants to break the rules."

[660] Mandziuk J inferred abusive intent on this basis in ***ALIA v Bourque #3***, at paras 197-198 in relation to a mother/son vexatious litigant duo:

> Why do they do this? In truth, their exact purpose does not matter. ... They know what they do is wrong, but do it anyway. That is the only natural consequence which may be inferred from what they say and do.

[661] Other times, it may not be necessary to identify the precise motivation for bad acts. As I noted in ***Stout***, at paras 77-82, sometimes it is not possible to exactly identify which illegitimate alternative explanation for bad litigation is the true motivation or motivations. All that matters is

that there is no legitimate basis for court activities, when evaluated on the basis of the natural consequences of the litigation misconduct.

[662] For example, the litigation terrorist in ***IntelliView v Badawy #1*** had no possible legitimate reason for his strategy of spurious intellectual property registrations, then lawsuits against his ex-wife's lawyer: paras 149-152. In ***Hill #1***, Anderson J at paras 106-110 concluded that the abusive litigant's multi-jurisdictional pattern of court activity might be a crusade against a sibling, a form of revenge, a calculated strategy of economic warfare, or a combination of all three. Ultimately, his exact motivation was irrelevant. What mattered was the only explanation was his lawsuits were conducted for an improper purpose. See also ***Boisjoli (Re) #1***, at para 87.

[663] SLAPP litigation as a whole is litigation for an improper purpose. The same is true where litigation has a political focus and is directed towards acknowledgement and correction of perceived government shortcomings, rather than asserting a right recognized in law: ***Van Sluytman***, at paras 23-24; ***Rothweiler #3***, at para 36; ***Makis #1***, at para 73.

Busybody Litigants

[664] There are several particularly serious forms of litigation for an improper purpose which deserve special mention. The first is "busybody" litigation, where the abusive litigant engages in litigation to enforce the alleged rights of third parties. "Busybody" litigation is particularly serious since that puts potentially innocent and uninvolved parties at risk (***Sawridge #8***, at paras 84-86; ***Morin v TransAlta Utilities Corporation***, 2017 ABQB 409 at paras 31-38, 64 Alta LR (6th) 60; ***McCargar #2***, at para 51; ***Lee v Canada #2***, at para 127-131), as well as leading to unnecessary and hopeless litigation (***Hawrysh #2***, at paras 30-31).

Furthering Illegal or Criminal Activities

[665] A second very serious form of litigation for an improper purpose is where an abusive litigant uses court processes to further illegal or criminal activities: ***Boisjoli (Re) #1***, at paras 98-103; ***Rothweiler #3***, at para 35; ***McKechnie #2***, at paras 3, 30.

[666] The Johnson Dollar Dealer ring is a further example. I group true litigation terrorists, such as John Mark Lee Jr., into this same subclass: ***Lee v Canada #2***, at paras 136-145.

[667] Courts should take all steps that are available to terminate, or at least mitigate, misuse of its processes in this manner. Public confidence in the administration of justice will be serious taxed if the Court ignores that court processes have been "weaponized" and turned against innocents.

Profit Motive

[668] Similarly, attempts to misuse court processes for profit is an aggravating factor: e.g. ***Getschel***, at paras 130-133.

OPCA Litigation

[669] All OPCA litigation is litigation for an improper purpose. OPCA litigants attempt to impose their own so-called law. They re-classify what is illegal as legal. As I have previously investigated, this litigation is often the product of a misguided, anti-social, paranoid political philosophy.

[670] OPCA-related litigation for an improper purpose occurs in broad range of litigation scenarios, for example:

1. illegal benefits, such as:

    a) not having to pay income tax (e.g. ***Porisky***; ***R v Lindsay***, 2008 BCPC 203, [2009] 1 CTC 86, aff'd 2010 BCSC 831, [2010] 5 CTC 174, aff'd 2011 BCCA 99, 302 BCAC 76, leave to appeal to SCC refused, 34331 (6 October 2011); ***Pomerleau***); and

    b) not having to repay loans and "money for nothing" schemes (e.g. ***Dempsey v Envision Credit Union***, 2006 BCSC 750, [2006] BCTC 750; ***Crossroads-DMD #1***; ***Scotia Mortgage Corporate v Landry***, 2018 ABQB 856, court access restricted 2018 ABQB 951 [***Landry #1***]); and

2. attacks on state and institutional actors to inflict harm and/or penalties (e.g. ***Rothweiler #2***, court access restricted 2018 ABQB 288, result confirmed 2018 ABQB 399; ***Potvin #1***, court access restricted ***Potvin #2***; ***Labonte #1***, action struck out ***Labonte #2***, court access restricted ***Labonte #3***);

3. immunity from government regulation and criminal liability to:

    a) use motor vehicles without registration, insurance, and in any manner (e.g. ***Gauthier (Re) #1***; ***d'Abadie v Alberta #1***, court access restricted, ***d'Abadie v Alberta #2***);

    b) ignore Canadian and Alberta law, since there is "no evidence" that law applies (e.g. ***R v Boisjoli***); and

    c) deal in and produce drugs, and own illegal firearms (see Part IV(C)(2)(e)).

[671] Some litigation misconduct that flows from OPCA activities merits more strict response due to its disruptive effect, illegality, and the harm caused to innocent parties, such as:

1. OPCA litigation that co-opts the court to further criminal purposes (***Boisjoli (Re) #1***; ***McKechnie #2***; ***Rothweiler #2***);

2. "offensive" OPCA litigation that attempts to impose legally false obligations and penalties on a pseudolegal basis (***Sawridge #8***, at paras 69-74, e.g. ***d'Abadie v Alberta #2***, at paras 5-7; ***Potvin #2***, at paras 10-14; ***Knutson #2***, at paras 17-18; ***Labonte #3***, at para 7);

3. attempts to usurp court authority, engage in vigilante litigation, or impose orders or judgments of vigilante OPCA courts and other entities (***Knutson #1***, at paras 72-80; ***Toronto-Dominion Bank v Leadbetter***, 2018 ABQB 472, court access restricted 2018 ABQB 611 at para 17 [***Leadbetter***]; ***DKD #1***, at para 29); and

4. persons engaged in promoting pseudolaw and selling pseudolaw services, commonly called "gurus" (e.g. ***Landry #2***).

[672] If a court concludes a specific action was conducted for one or more improper purposes, then the action should be struck out as an abuse of the court's processes. This is a long-recognized key component of the courts' inherent jurisdiction: Jacob, "Inherent Jurisdiction" at 42-43. That authority is now even more relevant, in the post-"culture shift" milieu.

[673] Litigation for an improper purpose is a strong basis on which to impose prospective vexatious litigant gatekeeping steps (***Ewanchuk***, at paras 131-134; ***MacKinnon #2***, at paras 90-92; ***Lee v Canada #2***, at para 145), unless there is some reason to expect that terminating the parent lawsuit will end the abuse.

[674] The intentions and motivation of the abusive litigant will always be relevant to that inquiry. As I have previously indicated, it is difficult to imagine why a litigation terrorist should not be subject to gatekeeping review, and perhaps other steps, at the first possible opportunity.

e. Attempts to Evade Court Litigation Management

[675] The next abusive litigation indicium category captures countermeasures employed by an abusive litigant to evade the courts' effective management of bad litigation conduct. These are active steps which attempt to subvert or delay necessary litigation management. In the discussion the follows I will examine five examples.

Attempts to Pre-empt, Divert, or Sabotage Steps to Manage Abusive Litigation

[676] The first category is a general one, where abusive litigants engage in bad faith litigation strategies to pre-empt, divert, or sabotage proceedings that address court access restrictions: ***ALIA v Bourque #3***, at paras 159-160, 175. These bad faith litigation strategies included the mother and son abusive litigant pair repeatedly advancing the same arguments after the court rejected those, or where those allegations were dismissed by a binding appellate authority.

Judge Shopping

[677] "Judge shopping" is when an abusive litigant attempts to involve a new judge so as to obtain an advantage (see Part IV(C)(6)(g)). Probably the most common example of this indicium are attempts to remove the judge, case manager, or panel who are assigned to hear a matter.

[678] In ***Boardwalk Reit LLP v Edmonton (City)***, 2008 ABCA 176 at paras 93-108, 437 AR 199, leave to appeal refused, 32742 (18 December 2018), Côté JA conducted a broad inquiry into the issue of judge shopping. He observed the much increased frequency of complaints that judges are biased, or otherwise should recuse themselves. Justice Côté concludes that judges should exercise caution before removing themselves from a matter. Similarly, the Saskatchewan Court of Appeal recently in ***Ayers v Miller***, 2019 SKCA 2 concluded that allegations of bias were really a camouflaged attempt at judge shopping.

Forum Shopping

[679] "Forum shopping" is an abusive litigant switching to a new court or jurisdiction, usually to either evade court access restrictions, or to re-litigate an issue that was already adjudicated in another jurisdiction.

[680] ***Sawridge #8***, at paras 91-97, is the first reported instance in Alberta where this mechanism to evade court litigation management was identified as an indicium of abusive litigation. Here, the abusive litigant had twice unsuccessfully sued in Federal Court to obtain membership in an Indian Band. He then switched to this Court, where his abusive lawyer piggybacked his claims to Band membership on trust litigation.

[681] Switching between Federal Court and a provincial superior court is a common form of forum shopping. ***Liu***, at paras 2-7, reports how an abusive litigant started out in Alberta Courts, switched to the Federal Courts, then resumed litigation in Alberta.

[682] This strategy seems popular with OPCA litigants. For example, Freeman-on-the-Land gurus, Dean Clifford and Robert Menard, both unsuccessfully tried to neutralize their provincial criminal proceedings in this manner: ***Clifford v Her Majesty the Queen*** (16 May 2014), Winnipeg T-869-14 (FC); ***Menard v Her Majesty the Queen*** (18 May 2015), Montreal T-43-15 (FC). I have described Freemen-on-the-Land, Alfred Potvin's and Adam Christian Gauthier's, attempts to continue their Alberta 'house for free' litigation in Federal Court: ***Potvin v Prowse*** (6 July 2018), Calgary T-83-18 (FC); ***Gauthier v Equitable Bank*** (12 December 2018), Edmonton T-696-18 (FC). It seems the Freemen are convinced, absent legal logic or authority, that the Federal Courts operate in a supervisory role over provincial courts.

[683] A less common form of forum shopping is where a litigant switches from province to province. Roger Callow is an example of that. Callow was a British Columbia teacher who, in 1985, was fired, and then began litigation activities that continue to the present day: ***Callow v Board of School Trustees, School District No. 45***, 2008 BCSC 778, 168 ACWS (3d) 906; ***West Vancouver School District No 45 v Callow***, 2014 ONSC 2547. Callow started off litigating in British Columbia courts. After he exhausted his opportunities there he switched to the Federal Courts, then Ontario, then Quebec and Saskatchewan, and finally, Alberta: ***Callow v West Vancouver Teacher's Association (Local School District Number 45)***, 2019 ABQB 236 at paras 8-14. However, Callow had no link to any of those post-British Columbia jurisdictions. He simply switched location whenever he had exhausted his previous option. That is a growing phenomenon, ***Potvin #1***; ***Potvin #2***.

[684] Ade Olumide took forum shopping to its abusive endpoint - he litigates in every possible jurisdiction, simultaneously: ***Olumide v Alberta***, at para 12.

[685] I believe it is fair to anticipate that attempts at forum shopping will become more common, as courts increasingly implement electronic document filing, and that litigants may appear remotely. The old logistical barriers to suing all over the country (and, for that matter, across the world), are diminishing.

Proxy Actors and Alternative Identities

[686] Another example of an abusive strategy to evade court litigation management is to employ proxy actors or alternative identities to circumvent court orders, court access restrictions, impede litigation, and improperly communicate with the court: ***Onischuk v Edmonton***, at paras 24-25, 32; ***Onischuk (Re) #2***, at paras 11, 21; ***MacKinnon #2***, at paras 44-85; ***Lymer (Re) #3***, at para 91. I have previously discussed how this was also a major strategy employed by the Johnson Dollar Dealers. When their court activities were curtailed a new corporation and/or representative was conjured up to resume the abuse of the court and opposing litigants.

[687] Daniel Onischuk resorted to using his wife as a litigation proxy after he was made subject to effective court access restrictions as a vexatious litigant. There nevertheless was an attempt to mask this activity as the wife's own litigation, however, closer review revealed the majority of complaints and issues related instead to Onischuk personally: ***Onischuk (Re) #1***, at paras 9-13. I also concluded the Onischuks had "... adopted what appears to be a tactic of making selective and irregular appearances before this Court in furtherance of their abuse of court ...": ***Onischuk (Re) #3***, at para 23. Sometimes one would appear, saying he or she represented the other. Sometimes neither would attend court. I concluded this was a tactical choice, rather than fair dealing conduct.

Using SRL Status as "A Sword", Instead of "A Shield"

[688] The Ontario Court of Appeal in ***Van Sluytman***, at paras 23-24, identified an emerging phenomenon, problematic SRLs who minimize or dismiss their litigation defects and abusive conduct on the basis the person is a SRL. In ***Carleton Condominium Corporation 116 v Sennek***, 2018 ONCA 118 at para 3 the vexatious litigant complained there was a systematic bias by judges against SRLs - she argued that is a reason why she was unfairly sanctioned. Justice Conlan in ***Kirby v Kirby***, 2019 ONSC 232 at paras 12-17 rejected arguments that a SRL who engaged in unreasonable and abusive conduct could shield herself from costs because she did not have a lawyer.

[689] The same pattern has now appeared in Alberta. A number of abusive litigants demand special treatment on the basis they are SRLs: ***Bruce (Re)***, 2018 ABQB 283 at paras 8-9; ***Hawrysh #2***, at paras 36-46; ***Biley v Sherwood***, at paras 102-113. In ***Hawrysh #2***, Michalyshyn J described an abusive self-represented litigant wielding SRL status "... as a 'sword' to obtain advantage." Hawrysh was an OPCA litigant who cited ***Pintea***, and said that was a basis for him to re-litigate issues decided against him.

[690] More recently, the abusive litigant in ***Biley v Sherwood*** claimed the legislation and rules of court which structure class action proceedings do not apply to him, since he is a SRL: paras 23-24.

[691] Similarly, vexatious litigant, Wael Badawy, on appeal complained he should have been given "an extra degree of latitude" because he is an SRL. Veldhuis JA observed *the SRL Statement does not excuse abusive litigation, and expressly permits court-ordered steps to restrain that*: ***IntelliView v Badawy #2***, at para 16.

[692] His fellow litigation terrorist Neil Lymer:

> ... presents himself as a self-represented litigant who is abused by others. He claims he has been subject to extraordinary and unique court processes and sanctions, and that others, particularly "the Bar", take advantage of him because he is self-represented and "a layman".
>
> (***Lymer (Re) #3***, at para 116).

Justice Lee concluded at para 119:

> In brief, Mr. Lymer protests too much. He seeks without justification to obtain special status as a self-represented litigant. Overall, while this is a minor factor which favours that Mr. Lymer be made subject to court access restrictions, the way Mr. Lymer attempts to garner sympathy as a vulnerable self-represented litigant certainly says much about how he 'stage manages' his litigation for what he perceives is maximum tactical advantage.

[693] To be explicit, it is *not* my opinion, *nor* is it the law, that a person saying "I'm a SRL", and citing ***Pintea***, indicates an abusive or malicious intent. However, abusive litigants are not stupid. They are often very well aware that they may obtain tactical advantage by stressing they are SRLs. That is a judicial 'hot button'. What I am instead targeting are attempts to evade effective court litigation management, and claims that are contrary to the law. In wielding SRL status as a sword, the SRL *defies* the *SRL Statement*, and says: "The rules do not apply to me - I

demand special treatment - treatment that is contrary to the established law - because I am a SRL."

[694] Fair-dealing SRLs do not do that. They try impressively to work within the Rules of Court, legislation, and the common law. When a mistake is pointed out to a fair-dealing SRL, they attempt to correct that and avoid any further reoccurrence. Abusive litigants, however, seek to turn their SRL status into an unwarranted and undeserved advantage. When that is identified, the court now knows the abusive litigant is not planning to work within the apparatus, and, thus, this attempt to evade court authority is what favours imposing court access restrictions.

[695] All of these examples of litigation misconduct demonstrate bad intent. A person may fairly dispute a litigation result or a court order, but the proper response is to appeal, not attempt to evade the outcome. Litigants who employ these strategies are not fair dealers, but instead attempt to cheat. That warrants court intervention.

[696] Attempts to evade court litigation management are strong bases to terminate proceedings as abusive. Bad conduct of an action is a basis to terminate litigation which potentially was initially valid: ***Dykun v Odishaw***, 2000 ABQB 548 at para 42, 267 AR 318, affirmed 2001 ABCA 204, 286 AR 392, leave to appeal to SCC refused, 28784 (31 January 2002) [***Dykun #1***]; ***Del Bianco v 935074 Alberta Ltd***, 2007 ABQB 150 at para 39, 156 ACWS (3d) 786.

[697] Attempts to circumvent and evade litigation management are a very strong basis on which to impose court access restrictions of some form: ***MacKinnon #2***, at para 85.

[698] After all, steps of this kind indicate an intention to not be bound by the court, its orders, and the law. Early and broad intervention is therefore warranted - it is better to rein in an emerging problem before the horse is out of the corral.

f. Persistent Unsuccessful Appeals

[699] Another long-recognized indicium of abusive litigation is where the problematic litigant engages in a pattern of *persistent* unsuccessful appeals: ***Chutskoff #1***, at paras 92, 115-116. Note this indicium is defined by "persistence". Though I generally do not consider that persistence is required for many of the other indicia, per the Modern Approach to abusive litigation control, "persistence" is appropriate in this case due to the interrelationship between the unsuccessful appeals and the hopeless proceedings indicia. If an appeal court were to explicitly find that an appeal had no or little merit, then that appeal is likely best identified as an example of a hopeless proceeding. Even one such unmeritorious appeal is potentially relevant to whether a person is a problematic litigant.

[700] What the persistent unsuccessful appeals indicium captures is where a litigant exhibits a pattern of repeatedly conducting appeals as a rote response to any court decision, e.g. ***Paraniuk v Pierce***; ***IntelliView v Badawy #1***; ***R v Grabowski #4***. Appeals become a normal or repeated pattern where-ever the abusive litigant meets a setback. The Derek Thompson litigation reviewed above is also a good example of that.

[701] Requests "to correct", reconsider, or vary decisions are other ways the persistent unsuccessful appeal category may manifest itself during litigation: e.g. ***ALIA v Bourque #3***, at paras 170-174.

[702] The persistent unsuccessful appeal indicium is one of the weakest bases to impose court access restrictions, and probably never a basis to terminate potentially abusive litigation.

Litigants usually have a right to challenge court and tribunal decisions in one manner or another, so a potentially legitimate exercise of that right is little use to predict future litigation misconduct. In that sense, this indicium is usually an "aggravating" factor which favors court intervention (e.g. ***Chutskoff #1***, at para 116; ***Lymer (Re)***, 2014 ABQB 696 at para 38, 601 AR 165 [***Lymer (Re) #2***]; ***644036***, at para 85; ***Boisjoli (Re) #1***, at para 89), and rarely the sole basis to impose court access restrictions.

[703] However, that changes when the pattern of persistent appeals aligns with evidence of improper litigation. For example, in ***McMeekin #3***, at paras 38, 41, and ***ALIA v Bourque #3***, at para 175, the Court concluded that appeals were intended to inflict cost and delay, or were a bad faith attempt to sabotage a proceeding. This was an aggravating factor which warranted court intervention and more stringent court access restrictions. In effect, the pattern of persistent appeals was no longer just an indication an abusive litigant would not 'let go' of their matter. The appeals and reviews had themselves become a mechanism to evade court authority and cause harm to opposing parties.

[704] ***IntelliView v Badawy #1***, at paras 137-138, and ***Lee v Canada #2***, at paras 121-126, are exceptions to the usual pattern. In ***IntelliView v Badawy #1***, Campbell J concluded that an extremely persistent and aggressive appeal pattern was, in itself, a basis to impose court access restrictions. That said, I note many of these appeals were identified as having no legitimate basis, or were baseless allegations of decision-maker bias "judge shopping" attempts. Badawy therefore exhibited not only a pattern of persistent appeals, but of persistent *bad abusive* appeals. The same is true for Lee's appeals in ***Lee v Canada #2***.

[705] In conclusion, a pattern of persistent appeals, in itself, is a limited basis on which to impose prospective court access restrictions. This indicium category probably has no or little relevance to whether a particular action should be terminated per *Rules* 3.68 or 7.2-7.3, or CPN7. A pattern of appeals, applications for reconsideration, or order variations becomes much more relevant when that pattern has an identifiable underlying bad purpose, such as to inflict harm, cause delay or expense, or to impede legitimate court litigation management.

g. Failure to Abide By Court Orders / Contempt of Court

[706] A further well-established, and in many senses obvious, indicium of abusive litigation is a failure to honour court-ordered obligations: ***Chutskoff #1***, at para 92. One form of this class of litigation misconduct is when the abusive litigant is in contempt of court.

[707] Justice Michalyshyn identified three subcategories for this indicium in ***Chutskoff #1***, at para 92 [citations omitted]:

> a) failing to pay costs ...
>
> b) a failure to abide by court orders ...
>
> c) misconduct that is intended to or has the effect of circumventing the operation of court orders ...

[708] Rather than parse out different categories of disobeying court instructions and orders, my suggestion is to simply observe that when an abusive litigant fails to abide by court directions, that builds an expectation of future litigation misconduct.

[709] The impact of that indicium is aggravated in several ways:

1. misconduct is a mechanism to circumvent or frustrate court authority and function (e.g. ***Chutskoff #1***, at paras 112-114);
2. misconduct repeats, particularly after a litigant has been instructed on how to properly conduct him or herself (e.g. ***McMeekin #2***, at paras 199-201); and
3. failure to honour court orders and instructions is a strategy to harm other parties (e.g. ***Hill #1***, at paras 102-110).

[710] Contempt of court is a potential basis on which to strike out litigation: e.g. ***Trigg v Lee-Knight***, 2009 ABCA 224; ***Koerner #3***, at paras 57-61; ***Bourque v Tensfeldt***, 2017 ABQB 519 at paras 81-89. The law for this response to vexatious litigation is clearly developed in these and other Alberta authorities.

[711] In relation to court access restrictions, the impact of failure(s) to abide by court orders is contextual. Some breaches of court directions and obligations are comparatively minor, and should be measured in that sense. For example, failures to pay court costs are often considered to be an aggravating factor, rather than an independent basis to impose court access restrictions: e.g. ***644036***, at para 71.

[712] However, if the contempt attacks the basis for litigation or a defence, then that weighs more heavily. For example, Lisa Koerner, the woman who alleged she had a gall bladder, refused to provide mental health records, despite being ordered to do so by the Court: ***Koerner #3***. Obviously, those records might have strong negative implications for her case, leading to an inference on why she was evading compliance - this was bad faith conduct to obstruct the defendants. Much the same conclusion in ***ALIA v Bourque #3***, at paras 167-168, led Mandziuk J to conclude disobeying court orders and not paying costs was a separate basis to impose court access restrictions.

[713] Similarly, gestures of good faith are potentially very relevant, such as apologies and acknowledgment of errors, and steps to correct past misconduct. So are steps such as paying outstanding cost awards. But if the abusive litigant refuses to take responsibility for their improper actions, claims their litigation misconduct was justified, or says they will do it again, then the potential weight of this factor is much increased.

h. Inappropriate Demeanor and Unjustified Belief

[714] The next indicium category groups a number of forms of litigant activity that in ***Chutskoff #1***, at para 92, were described in this manner:

> ... persistently engaging in inappropriate courtroom behaviour ...
>
> ... scandalous or inflammatory language in pleadings or before the court ...
>
> ... unsubstantiated allegations of conspiracy, fraud, and misconduct, including:
>
> a) claims of judge and lawyer deception, fraud, perjury, conspiracy, tampering of records and transcripts, and other conspiratorial misconduct made without the positive evidence ...
>
> b) sensational claims of conspiracies and intimidation, harassment and racial bias ...

c) pleadings that are "replete with extreme and unsubstantiated allegations, and often refer to far-flung conspiracies involving large numbers of individuals and institutions", "where the allegations may be unfounded in fact or merely speculative, but the language is vitriolic, offensive and defamatory" ...

[715] While these specific examples are, in themselves, useful, I believe this category of misconduct also may be viewed collectively to identify a litigant who no longer evaluates the dispute in which he or she is involved in an objective manner, but instead has distorted the substance of the dispute so that the abusive litigant:

1. is emotionally and intellectually over-invested in his or her dispute so that the abusive litigant ignores the usual standard of conduct and language expected in legal matters, "acts out", and uses inappropriate and/or scandalous language, and
2. is so certain of his or her cause that the abusive litigant refuses to accept failure, and instead:
    a) displaces blame to purportedly corrupt decision-makers, politicians, government officials, judges, lawyers, police, etc., and
    b) constructs imaginary conspiracies, biases, and other schemes to shift the blame for failure from the litigant to somebody else.

Put another way, these are symptoms of an underlying disorder.

[716] Both these characteristics, over-investment in the dispute, and unwillingness to concede any explanation other than "whoever is not with me is against me" are obviously traits of abusive litigants with mental health issues described by Caplan and Bloom, and Mullen and Lester.

[717] So really what this indicium category is identifying is a kind of mindset. The person no longer views their dispute and failure in an objective way. The specific examples identified in ***Chutskoff #1*** and subsequent litigation are illustrations of how a person, with this mindset, acts.

[718] What mental health experts indicate is that these features become particularly relevant when they dominate a litigant's demeanor and belief.

[719] For that reason, a minor and isolated outburst of inappropriate language, or a litigant who storms out of a courtroom but then returns later and apologizes, do not satisfy this indicium's characteristics. Similarly, a litigant complaining that a particular judge was biased does not show that the litigant's overall perspective of the dispute has become distorted. That one judge might indeed be biased.

[720] However, when the pattern broadens, then that becomes potentially relevant to whether court access restrictions are imposed. When inappropriate behaviour and language becomes common, then that points to the potentially abusive litigant operating within an underlying distorted perspective. Similarly, if every opposing party and decision maker is identified as being in cahoots for no other reason than they disagree or are non-compliant, then there is a problem.

[721] All this is a matter of degree. However, rather than characterize this criterion as requiring 'persistence', I think the better way to evaluate if court intervention is favoured is by whether distorted emotional and intellectual investment has become global or general. Has this issue emerged only 'locally', and in isolated instances, or is it much broader? If the former, then its

relevance is probably limited. However, once a litigant's perspective is permeated with this flavor, then that is highly relevant.

[722] The various ***Chutskoff #1*** examples of inappropriate conduct and unjustified belief commonly appear in many decisions where a vexatious litigant order was issued. In most instances these are aggravating factors: e.g. ***644036***, at paras 77-78; ***IntelliView v Badawy #1***, at paras 139-142.

[723] However, in a few decisions, misconduct of this kind was an independent factor that favoured court access restrictions, but in those cases these allegations were also linked to other very serious litigation misconduct, for example:

- ***Boisjoli (Re) #1***, at paras 94-97 - conspiratorial OPCA beliefs were the basis for attempts to use court processes to further a criminal scheme.
- ***Ewanchuk***, at paras 142-158 - conspiratorial and scandalous allegations were the basis for abuse of *habeas corpus*.
- ***ALIA v Bourque #3***, at paras 176-188 - allegations of conspiracy and misconduct were coupled with deliberate attempts to frustrate court proceedings.

[724] Similarly, Little J in ***Paraniuk v Pierce***, at paras 85-98, reviewed the general and deepening conspiratorial allegations in that proceeding. That provided context as to what to anticipate from the abusive litigant.

[725] That makes sense. This indicium helps understand the "why?" of an abusive litigant's conduct. Justice Thomas in ***Sawridge #8***, at para 99, observed that conspiratorial beliefs held by the abusive litigant:

> ... are not in themselves a basis to restrict ... court access, however they provide some insight into his litigation objectives and how he views his now longstanding conflict ...

Someone may have very strong views about a dispute, but unless they act on those beliefs, or promise they will act on those beliefs, there is little basis to predict bad future litigation conduct because someone is unpleasant in a courtroom, or believes the judicial apparatus is corrupt.

[726] Of course, in these cases there may be a basis for a court to exercise its public or private contempt authority, but that is a different issue and remedy: ***United Nurses of Alberta v Alberta (Attorney General)***, [1992] 1 SCR 901, 89 DLR (4th) 609; ***BCGEU***.

[727] The inappropriate conduct and unjustified belief indicium is most relevant to evaluate the probability of future litigation misconduct, and whether that pattern of abuse of court processes will persist, or even expand. For example, in ***Ewanchuk***, at paras 142-158, inappropriate language and allegations of conspiracy and fraud illustrated the abusive litigant's deep hostility to state and court actors. That predicted future abusive litigation.

[728] Similarly, in ***ET***, at paras 11-12, an abusive litigant's "seeking the truth" in relation to ungrounded allegations predicted future litigation misconduct. Shelley J in ***Lee v Canada #2***, at paras 132-135 concluded broad conspiratorial allegations illustrate the basis for litigation terrorist activities, "[Lee] believes he has enemies who scheme against him and who deserve to be punished." Future misconduct by the abusive OPCA bankrupt in ***Hawrysh #2***, at para 35, was predicted by his false and conspiratorial beliefs.

[729] In summary, the appearance of inappropriate conduct and unjustified belief is a characteristic that helps one understand the reason abusive litigants do what they do, and therefore predict what they will do. In that way, this indicium is usually of limited weight, until a litigant has begun to abuse court processes, or says they will do so. If that is the case, then a general appearance of inappropriate conduct and unjustified belief are a strong aggravating basis to impose court access restrictions. Mental health experts are clear this characteristic is a feature of querulous litigants, and a broad-based appearance of this characteristic, in conjunction with bad litigation conduct, favours immediate and general court intervention.

i. Conclusion - Indicia of Abusive Litigation

[730] Any indicium is a basis for a court to intervene and take steps in relation to a vexatious lawsuit, or to impose court access restrictions on an abusive litigant: ***Chutskoff #1***, at para 93. However, not all indicia carry the same weight, and, as I have indicated, some indicia categories will rarely, on their own, be a basis for court intervention.

[731] Usually abusive litigants' activities exhibit multiple indicia categories, which often combine in a synergistic manner. That then predicts an elevated probability of future problematic activity.

[732] This review of indicia of abusive litigation has hopefully illustrated that there are larger themes among the various traits and characteristics which case law has previously concluded identify problematic litigation. This eight category scheme is ideally less a 'grab bag' of factors, but instead shifts the court's inquiry to a number of key questions:

1. Why is this activity bad, and may or may not merit a response?
2. What does this activity or characteristic tell about the abusive litigant?
3. How does the class of behaviour predict future misconduct?

5. Evaluation of Potential Abuse is an Ongoing Process

[733] Court access restrictions are a prospective tool; they are imposed to manage future bad litigation.

[734] That means that not all improper litigation conduct has the same relevance. Some problematic or abusive conduct may have no relevance at all. Second, this means the courts' evaluation of the abusive litigant and the resulting response ought not to be static, but should evolve with the circumstances.

[735] OPCA court activities provides an excellent example of irrelevant litigation misconduct. That may seem surprising, since I have previously stressed the ideological component of these ideas. However, ideology is only one motivation that may lead to adopting pseudolaw. Greed is another.

[736] The now extinct Detaxer OPCA community, which promised immunity to income tax, was at least partially a consequence of greed, rather than an expression of a malignant political ideology. "Fiscal Arbitrators" was the final Detaxer scam; a rather unsophisticated scheme which operated from 2007-2009. It promised large tax refunds via pseudolegal means: ***Torres v The Queen***, 2013 TCC 380, 235 ACWS (3d) 844, aff'd ***Strachan v Canada***, 2015 FCA 60, [2015] 3 CTC 87; ***Gray v Canada***, 2016 TCC 54, 2016 DTC 1049; ***Mallette v Canada***, 2016 TCC 27, 2016 DTC 1025; Netolitzky, "Lawyers" at 430-434.

[737] Sadly, the scam proved popular, and hundreds hired Fiscal Arbitrators to file their tax returns. Initially, they relied on Fiscal Arbitrators to defend against Canada Revenue Agency audits and responded with abusive OPCA threats. However, the overwhelming majority of Fiscal Arbitrators taxpayers soon abandoned pseudolaw, and instead proceeded with their appeals, usually with lawyer representation, and only in relation to a single discrete legal issue: should the taxpayer be liable for gross negligence penalties per *Income Tax Act*, RSC 1985, c 1 (5th Supp), s 163(2).

[738] Case law reports isolated examples where a Fiscal Arbitrator taxpayer continued to endorse pseudolaw, but these were very few in number: e.g. ***Haynes v The Queen***, 2013 TCC 229, 2013 DTC 1186; ***Brown v Canada***, 2014 TCC 91, 2014 DTC 1107, rev'd 2014 FCA 301, 2015 DTC 5030, see also Netolitzky, "Lawyers" at 430-434.

[739] I would put little relevance on the fact a candidate abusive litigant had participated in the Fiscal Arbitrators scheme, if that litigant subsequently conducted a valid appeal or otherwise resolved their tax dispute via conventional means. That taxpayer has broken away from their prior pattern of OPCA misconduct.

[740] Of course, if a former Detaxer still were to continue to advance pseudolegal claims, allege tax-related conspiracies, and espouse other OPCA beliefs, then that would favour court intervention. This is exactly what occurred in ***Alberta Treasury Branches v Hawrysh***, 2018 ABQB 475, court access restricted 2018 ABQB 618 [***Hawrysh #1***]. A bankrupt Detaxer who had participated in a scheme related to Fiscal Arbitrators argued he had no debts since the Canada Revenue Agency was engaged in fraud. Hawrysh attempted to interfere in a foreclosure sale as a "busybody" ex-owner, and threatened to impose pseudolegal sanctions on the involved justice. Hawrysh was, unsurprisingly, made subject to a vexatious litigant order.

[741] Similarly, in ***ALIA v Bourque #3***, one abusive litigant argued she was no longer "vexatious", the court order which had restricted her litigation was no longer in effect. That was because the relevant action had ended against her. Nevertheless, Justice Mandziuk at para 157 concluded here ongoing misconduct meant those earlier court-imposed restrictions were still relevant:

> The potential implications of the [historic and now ended] court access restrictions might be modulated or tempered if the subsequent litigation conduct of Stephanie Bourque indicated that she had 'turned over a new leaf' and abandoned the kinds of litigation misconduct which led to the ... court access restrictions. However, as the analysis that follows illustrates, Ms. Bourque's litigation conduct has, if anything, gotten worse. ...

[742] Similarly, people sometimes realize what they have done is wrong. A recent example of that was another OPCA litigant, who responded to the proposed adoption of his son with OPCA-based litigation threats and declared the child was his chattel property: ***DKD #1***. The Court responded by initiating a two-step ***Hok v Alberta #2*** procedure. After receipt of the first step decision, the father entirely abandoned his prior position. He apologized for what he had done. The father explained he had investigated the pseudolaw he had tried to employ and its gurus, determined these ideas were false, and its proponent was "a nut cake": ***DKD #2***, at paras 9-11.

[743] Mandziuk J concluded that, after this change in conduct, there was no need to impose vexatious litigant restrictions on the father, and instead terminated the existing interim court

access restrictions: para 21. I strongly agree with this response, and have observed, too, first-hand, how even persons deeply embedded in a pattern of abusive litigation can change. Dennis Larry Meads, the OPCA litigant who is delineated in ***Meads***, abandoned pseudolaw after release of that decision. His divorce was subsequently resolved in a conventional manner.

[744] Positive steps should be noted when evaluating a candidate for court access restrictions. For example, an abusive court participant might take tangible positive steps to demonstrate he or she is a fair dealer by, *inter alia*:

1. voluntarily terminating or limiting abusive litigation,
2. abandoning claims, restricting the scope of litigation, consenting to issues or facts previously in dispute,
3 retaining counsel, and
4. paying outstanding cost awards.

(***Sawridge #8***, at paras 58-59).

[745] Positive litigation steps may warrant an abusive court participant receiving limited court access restrictions, a *Grepe v Loam Order*, or no court access restrictions at all. Successful leave applications indicate both good faith litigation, and a willingness to comply with court rules and litigation management. Acknowledging meaningful steps to self-regulate court activities promotes the administration of justice and is consistent with the modern "culture shift" functional approach to civil litigation. Doing so emphasizes the prospective role of court access restrictions, and that the Court respects and supports people who will change.

[746] A court's inherent jurisdiction to control its processes is best served by permitting appropriate litigation, in a fair and reasonable manner. Where an abusive litigant chooses a different and non-abusive litigation path, that should be encouraged. Of course, if this apparent shift proves to be just a ploy, and a new cycle of court abuse occurs, then the natural consequences of those actions will require a very strict response: e.g. ***Boisjoli (Re) #1***, at paras 107-108.

I. The Scope, Range, and Form of Court Access Restrictions

[747] Once the court concludes that a person has engaged in abusive court activities, and court access restrictions are potentially appropriate, the next two steps are to evaluate:

1. the scope of those court access restrictions, in relation to litigation issues, parties, and forums where the abusive litigant is subject to potential prospective gatekeeping steps as a vexatious litigant; and
2. whether a requirement to obtain leave prior to initiating or continuing civil proceedings is an adequate and proportionate response to a vexatious litigant, or are further, additional steps also required.

[748] Both of these issues center on a single question: what the court anticipates from the abusive litigant.

1. Threshold Test - Is a Vexatious Litigant Order Required?

[749] The first step in considering whether a vexatious litigant order is required is to evaluate whether the information available supports an expectation that the abusive litigant will plausibly

engage in litigation misconduct that extends outside the current lawsuit, legal proceeding, or appeal. Stated in an alternative form, will a *Grepe v Loam Order* manage this litigant, or is something more required?

[750] This threshold question may be satisfied in many ways. For example, the abusive litigant:

1. has already engaged in abusive litigation in multiple legal disputes,
2. has engaged in collateral attacks on settled court or tribunal decisions,
3. exhibits an expanding pattern of litigation misconduct, involving new parties, issues, and re-litigating decided issues,
4. has engaged in forum shopping,
5. has stated he or she will engage in other abusive litigation, outside the current dispute, and
6. in unrelated matters is subject to a vexatious litigant order, or more limited scope court access restrictions.

[751] Ultimately, the judge must identify a basis for why the abusive litigant is plausibly expected to engage in litigation misconduct that spills outside of the current dispute. If there is no such expectation, then a vexatious litigant order gatekeeping step is neither necessary, nor appropriate. The abusive litigant can instead be managed by a *Grepe v Loam Order*. That is the correct step.

[752] The key here is that the expectation of 'spillover' has a *reasonable* foundation. That will depend on the conclusions that the judge has reached in relation to the particular abusive litigant. As previously indicated, this is a broad-based inquiry, and may rely on broader factual patterns.

[753] ***Sawridge #8*** provides a useful example of how this threshold may be explored in relation to a specific class of abusive litigants. In that decision, Thomas J concluded, as a general principle, that certain litigation steps by OPCA litigants establish an expectation of future broad-based abusive litigation. That satisfies the threshold test. A vexatious litigant order which imposes prospective court access restrictions is appropriate

[754] As I have previously reviewed, OPCA litigation is grounded in incorrect claims that the true law is something other than what is recognized by Canadian courts. These concepts are part of a conspiratorial matrix of belief, and are a self-destructive extremist political ideology that circulates in some antisocial subcommunities, such as the Freemen-on-the-Land. As Justice Thomas observed, at paras 72-73, persons from these populations do not simply litigate to obtain personal benefit. They abuse courts for ideological reasons, and because they *like* harming and harassing people and institutions they see as enemies:

> Judicial and legal academic authorities uniformly identify OPCA narratives and their associated pseudolegal concepts as resting on and building from a foundation of paranoid and conspiratorial anti-government and anti-institutional political and social belief. ... They may act for personal benefit, but they also do so with the belief they are justified and act lawfully when they injure others and disrupt court processes. Persons who advance OPCA litigation to harm others have no place in Canada's courts. ... Their next target can be anyone who crosses their path - government officials or organizations, peace officers, lawyers,

> judges, business employees - and who then offends the OPCA litigant's skewed perspectives.
>
> These individuals believe they have a right to attack others via the courts, they like the idea of doing that, and they view their litigation targets as bad actors who deserve punishment. ...

[755] However, here Justice Thomas makes an important distinction. Not all OPCA litigants employ pseudolaw *to harm others*; some apply these ideas *as a defence*, albeit an ultimately futile one. 'Defensive' OPCA litigation sometimes occurs during foreclosures and debt collection (e.g. ***Servus Credit Union Ltd v Parlee***, 2015 ABQB 700, 7 Admin LR (6th) 321; ***Robert John: of the familymacmillan v Johannson***, 2017 BCSC 1069, 2017 DTC 5084), or as a "get out jail free card" (e.g. ***R v Boisjoli***). In these instances there is no basis to *immediately* conclude that 'defensive' applications of pseudolaw means the abusive litigant (any OPCA litigant is, by definition, an abusive litigant) will engage in litigation misconduct outside the current dispute.

[756] However, *immediate court intervention is warranted once an OPCA litigant has employed pseudolaw to attack others in a 'offensive' manner consistent with their skewed ideology*: ***Sawridge #8***, at para 74. The OPCA litigant has put his or her anti-government, anti-social ideology into action. Once that has occurred, then further abusive litigation is foreseeable against a broad range of potential targets: any government or state authority, police forces, courts, banks and other institutions, and their employees.

[757] This conclusion has a solid factual foundation. Numerous examples of how OPCA litigants make abusive, bizarre claims are documented in reported Canadian court decisions, such as those reviewed in ***Sawridge #8***, at para 69. Many more are never reported, but still consumed critical court resources.

[758] For example, in 2016-2018 the Alberta Court of Queen's Bench rejected diverse OPCA arguments by Alfred Potvin, a member of the so-called Church of the Ecumenical Redemption International, in debt-related matters. Potvin claimed he was owed a free house and imposed an over $7 million bill on his creditors because Potvin claimed he cannot be linked to his name written in all upper case letters. He alleged that this was "necrophilia" and "necromancy": ***Potvin #1***.

[759] When Potvin's arguments were rejected in this Court, he then sued the Masters and judge involved in his Alberta litigation in Federal Court: ***Potvin v Prowse***, Calgary T-83-18 (FC). Unsurprisingly, that lawsuit was struck out: ***Potvin v Prowse*** (6 July 2018), Calgary (T-83-18) (FC). Undeterred, Potvin then filed another lawsuit in Federal Court, this time also including as Defendants the Federal Court judge who had struck out his first action, myself, Chief Justice Moreau, various officers of this Court, the Mayor of Calgary, and the Federal and Alberta Attorneys General: ***Potvin v Rooke***, Calgary T-1546-18 (FC). Unsurprisingly, that, too, did not work. Potvin was declared a vexatious litigant, and ordered to pay the judges he had sued solicitor-client costs: ***Potvin v Rooke*** (1 March 2019), Calgary T-1546-18 (FC).

[760] This example of how 'offensive' OPCA litigation predicts future abusive litigation is just one illustration of how what the court knows about a litigant may satisfy the threshold criterion for a vexatious litigant order. Similarly, if a person were to exhibit the "fingerprint characteristics" of a querulous litigant, then that too would be a reason to conclude the threshold

criterion has been satisfied, and something broader than a *Grepe v Loam Order* should be evaluated. Obviously, there are more potential examples where the nature of an abusive litigant and their motivations satisfies this threshold requirement. For example, a true litigation terrorist probably should always be subject to prospective court access restrictions.

[761] In conclusion, this first threshold step may be met in many different ways - but it is a critical element in any analysis of whether prospective court access restrictions may be imposed. Access to Canadian courts is *prima facie* a core legal right of persons in this country. The threshold test criterion is important to ensure that the court's prospective steps are proportionate and fair.

2. Requiring Court Permission to Take Litigation Steps

[762] Once the threshold test to justify a vexatious litigant order is satisfied the usual next step will be to inquire whether imposing a leave requirement on the abusive litigant is appropriate, proportionate, and fair.

[763] First, it is important to recognize what this step represents. Court access restriction orders issued by this Court usually use language like this:

> [The vexatious litigant] is prohibited from commencing, or attempting to commence, or continuing any appeal, action, application or proceeding [in one or more courts] on his own behalf or on behalf of any other person or estate without an order of the Court in which the proceeding is conducted. [Emphasis added.]

[764] So there are therefore two branches to this order:

1. the abusive litigant is prohibited from initiating a new court matter, except with permission, and
2. any existing litigation initiated by the abusive litigant in the affected courts is stayed until the abusive litigant obtains permission from the court to resume the stayed litigation.

[765] Another more general way of expressing a leave requirement is that "... a person subject to court access control is presumed to engage in illegitimate litigation unless the Court is satisfied otherwise. ...": ***Thompson (Re) #1***, at para 19.

[766] This leave requirement has no effect on the vexatious litigant's capacity to defend or respond to other parties' applications or actions. For example, a person subject to a vexatious litigant leave gatekeeping order may, without restriction, file affidavits, submissions, authorities, and other materials *in response* to a step *initiated by the opposing party or the court*. Prospective leave requirements do not affect the abusive litigant's ability to 'defend' or 'respond'.

[767] Permission to initiate litigation or continue stayed litigation both test the merit of court activities on the same standard. A person subject to a vexatious litigant order must:

1. establish reasonable grounds for the litigation, and
2. depose fully and completely as to the facts and circumstances surrounding the proposed claim or proceeding.

(***Thompson (Re) #1***, at paras 19, 27; ***VWW***, at para 42).

[768] This threshold, which must be established on a balance of probabilities, is not a high one, and in many ways parallels the test for summary judgment: ***Thompson (Re) #1***, at paras 19, 26. The vexatious litigant is expected to put his or her "best foot forward" to establish the basis to initiate or continue an action: ***Thompson (Re)***, at paras 26-27.

[769] The documents necessary to seek leave are usually an affidavit to provide evidence, and, in the case of a new action, application, or other litigation step, a copy of the proposed filing: e.g. ***Moore (Re)***, 2018 ABQB 261; ***Latham (Re)***, 2018 ABQB 906 [***Latham (Re)#1***]. Leave may be granted in part: e.g. ***Latham (Re) #1***, at paras 16-22; ***Belway #2***, at para 10.

[770] Submissions to initiate or continue litigation may also be rejected:

1. where the materials do not satisfy the criteria set in the vexatious litigant order (e.g. ***Thompson (Re) #1***, at paras 7-8, 15-16; ***Gauthier (Re) #4***, at paras 7-11; ***Botar (Re)***, at paras 12-17; ***Thompson v ALRB #2***, at para 11; ***Thompson (Re) #2***, at paras 6-8, 13);
2. if the submissions exhibit indicia of abusive litigation (e.g. ***ET***, at para 12; ***ATB v Hok #1***, at para 21; ***Thompson v ALRB #2***, at paras 16-19, 22-23; ***Botar (Re)***, at paras 18-28; ***Trinity***, at para 5; ***Onischuk (Re) #4***, at para 18); and
3. where the vexatious litigant:
    a) refused to provide the proposed filing (e.g. ***Thompson (Re) #2***, at paras 9-10, 14; ***Onischuk (Re) #4***, at para 15);
    b) provided false information (e.g. ***Gauthier (Re) #4***, at paras 19-23); and
    c) failed to provide materials that are required for the proposed litigation step, such as an appeal transcript (e.g. ***ATB v Hok #1***, at para 21).

[771] Appeal courts which have endorsed the Modern Approach indicate that this leave procedure is, at most, a modest imposition on the abusive litigant. For example, in ***Wong***, at para 8, Slatter JA emphasized how this step is a gatekeeping function, and does not impose an unfair or disproportionate burden:

> The applicant argues that the vexatious litigant order denies her the basic right of a Canadian citizen to commence a legal action. That is not the true effect of the order. The applicant can still commence any legitimate action; she is only subject to a screening procedure to make sure that any action she proposes is properly founded in fact and law, and will be diligently prosecuted. The vexatious litigant order does not substantially prejudice the applicant. [Emphasis added.]

This statement in ***Wong*** has subsequently been endorsed in ***Bossé v Immeubles***, at para 38, and ***Grenier***, at para 29.

[772] Similarly, in ***Olumide v Canada***, at paras 26-29, Stratas JA indicated that it is important to not misconstrue the effect of a leave requirement. While the Federal Court in earlier cases had called this "a most extraordinary power", to be used "with the greatest of care", Justice Stratas concluded that exaggerates the effect of court-ordered leave gatekeeping. Instead, this is just a tool so that litigation is "... pursued in an orderly fashion, under a greater degree of Court supervision ...". The Yukon Court of Appeal in ***Wood #2***, at para 35, adopted Justice Stratas'

characterization of a vexatious litigant order: "... access to the court is regulated ...", but not denied.

[773] In ***Hok v Alberta #2***, at para 33, Justice Verville looked closely at what, substantively, is imposed by a vexatious litigant leave requirement:

> Typical vexatious litigant orders ... require that the vexatious litigant provide to the court an unfiled copy of the proposed statement of claim, motion, or application, and a supporting affidavit to establish grounds for that filing. Realistically, this is not a great hurdle. There is no cost to submit this material (it is not "filed") or make this application. Filing fees only follow if leave is granted. The proposed filing had to be prepared anyway. Any person considering legitimate litigation should at least have taken the step of mustering the evidence and argument they plan to advance. Transforming that into an affidavit is a comparatively minor additional step. Courts often strike out actions that are based on bald allegations: GH v Alcock, 2013 ABCA 24 at para 58. A person subject to a vexatious litigant order should not be able to access the courts with bald allegations. This 'evidence mustering' requirement is therefore unremarkable and would be required for a valid claim in any event. This step does not represent "undue hardship" any more than other routine litigation steps that require documentation. [Emphasis added.]

See also ***Thompson (Re) #1***, at para 27.

[774] The test for a prohibited court access restriction is one that would imposes "undue hardship", and "... effectively denies people the right to take their cases to court ..." [emphasis added]: ***Trial Lawyers***, at paras 40, 45-48. It is difficult to see how a leave requirement would therefore ever be prohibited as an "undue hardship", though that gatekeeping requirement must always be fair and proportionate.

[775] Not only are no expenses such as filing fees involved in the leave process used by this Court, but after an unsuccessful leave submission no litigation cost award is applied against the abusive litigant. This point is important, as it illustrates how a pre-filing leave requirement shields the litigant subject to court gatekeeping functions from the potential negative consequences of their own errors. If a new faulty statement of claim or application is filed in court by an abusive litigant, and then is dismissed or struck, that abusive litigant will very likely be assessed court costs, since: 1) the successful and injured party is presumptively due their court costs (*Rule* 10.29), and, 2) in light of the abusive character of the litigation, those costs may be awarded on an elevated basis (*Rule* 10.33).

[776] To date there has only been one instance where this Court has contemplated any potential sanction for an unsuccessful leave application, and that was when a vexatious litigant repeatedly flouted leave application instructions to make a leave application, refused to even provide the proposed filing, and purported to demand costs from Chief Justice Moreau, as the "Defendant/Respondent" to his submissions for leave: ***Thompson (Re) #2***. This abusive litigant was not sanctioned and ordered to pay a penalty, per *Rule* 10.49, but was instead warned that further abuse of the leave to file process may result in that step. His ignoring court instructions harmed the Court, and wasted its resources.

[777] Perhaps unsurprisingly, this vexatious litigant then appealed to the Supreme Court of Canada from the Court's refusal of his proposed filing, which, as previously noted, he had not even supplied to the Court. He also named the judge who issued ***Thompson (Re) #2*** as the Respondent to that appeal, and demanded costs against the judge, personally: ***Thompson v Nielsen***, leave to appeal to the SCC refused, 38267 (31 January 2019).[3]

3. The Scope of Prospective Court Access Restrictions

[778] Once the threshold test has been passed, the next step is to evaluate the plausible scope of the abusive litigant's future misconduct in Alberta courts. As previously indicated, the usual minimum step is that the abusive litigant is required to seek leave to initiate or continue certain litigation.

[779] In ***Hok v Alberta #2***, at para 36, Verville J expressed that inquiry as:

> ... when a court considers limits to future court access by a person with a history of litigation misconduct the key questions for a court are:
>
> 1. Can the court determine the identity or type of persons who are likely to be the target of future abusive litigation?
> 2. What litigation subject or subjects are likely involved in that abuse of court processes?
> 3. In what forums will that abuse occur?

[780] The underlying principle is that fair and proportionate prospective court access restrictions should not be arbitrary. Courts should not impose a gatekeeping requirement where none is apparently necessary. This principle is also reflected in the threshold test described above in Part IV(I)(1).

[781] Again, a broad range of information is potentially relevant to this inquiry. The substantive question for the judge is what is known about this abusive litigant, and, therefore, what can be anticipated.

a. Vexatious Litigant Orders Must Be Explicit

[782] However, what is known about an abusive litigant is not the only factor which is relevant when designing the appropriate scope for court access restrictions. A further requirement is certainty - the person(s) affected by a court gatekeeping order must be able to evaluate whether or not they are captured by it. This has been a problem with some vexatious litigant orders issued by Alberta courts, particularly during the period where these steps were less common. For example, in ***Kretschmer v Terrigno*** (3 May 2012), Calgary 1101-0112 AC (Alta CA), paragraph six of the vexatious litigant order reads:

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[3] I note that the omission of any Alberta Court of Appeal citation here is correct. *Rule* 14.5(4) prohibits appeal of a decision to deny leave to a vexatious litigant (***Gauthier (Re) #3***, at para 8; ***Thompson (Re)***, 2018 ABCA 111 at para 3), which, surprisingly, appears to arguably create a direct right of appeal to the Supreme Court of Canada: ***Halifax (City) v The McLaughlin Carriage Co*** (1907), 39 SCR 174; ***Reference as to the Legislative Competence of the Parliament of Canada to Enact Bill No 9 of the Fourth Session, Eighteenth Parliament of Canada, Entitled "An Act to Amend the Supreme Court Act",*** [1940] SCR 49, [1940] 1 DLR 289.

> With respect to the Respondent Kretschmer's application to have the Appellant(s) designated as a frivolous and vexatious litigant as against her, the following provisions are ordered:
>
> > a) The Appellant(s) and Respondent, and any related family members or corporations or entities (however described), are prohibited from instituting new actions by or on behalf of any other person where the issue arises from the cohabitation, marriage, separation or divorce of Maurizio Terrigno and Monica Kretschmer. ...

[783] Here, the parties affected by the order are potentially unclear. While the issuing justice's concern and intent is obvious, he anticipated that proxy actors may attempt to continue abusive litigation, the final result is so open-ended that the scope of the order cannot be defined.

[784] Similarly, the scope of the litigation which is potentially subject to gatekeeping must be explicit. In ***Anny v Scarpino*** (1 May 2015), (Calgary) 1501 04904 (Alta QB) the Court access restriction is:

> Anny Sun shall not file any further applications in either the Provincial Court of Alberta or the Court of Queen's Bench of Alberta in matters related to past events, except those matters which are live applications before the Court.

Is operation of this order restricted to the specific dispute in some way? What is a "matter related to past events"? Again, this is a problem more often encountered in older court orders. Judges are now more sensitive to this issue.

[785] Recently, in ***Blicharz***, at para 11, O'Ferrall JA expanded the scope of prior court access restrictions imposed in ***D.L. Pollock Professional Corporation v Blicharz*** (17 July 2018), Calgary 1801-0142-AC, 1801-0155-AC (ABCA). This step was at least in part because the first court access restrictions were difficult to interpret. They related "... to any and all matters pertaining to the present litigation between the parties ...".

[786] The point is that, because vexatious litigant orders operate as gatekeeping tools, the scope of the parties and litigation affected by the orders should be sufficiently clear that the boundaries of the order are readily understood by everyone, and particularly the vexatious litigant. Breach of a vexatious litigant order is contempt of court: ***Lofstrom***, at para 10; ***Clark #1***, at para 16. Courts therefore must ensure the operation of a vexatious litigant order is explicit.

b. Vexatious Litigant Orders Must Be Enforceable

[787] When designing the scope of court access restrictions, the judge must also be mindful of who actually implements the order. In the case of this Court, that is the Court Clerks. When they receive a filing they check against an index of persons who are subject to court access restrictions, and then review the orders relevant to those persons. If the Clerk concludes that a vexatious litigant order or other court access restriction order captures the candidate filing, it will then be rejected. Otherwise, that document must be filed.

[788] The design of a vexatious litigant order must take this process into account, otherwise the system simply does not work. For example, there is a vexatious litigant order in the Court's database where the abusive litigant is only identified as "R.O.": ***RO v DF*** (19 June 2014), Calgary 1301-06765 (Alta QB). This order is not enforceable as the Court Clerks have no way to identify "R.O.".

[789] Court clerks have no jurisdiction to interpret the substantive content of a court document: ***R v Verma***, 2016 BCCA 307 at para 20, 341 CCC (3d). Their jurisdiction is to ensure that a potential court filing complies with the *Rules*, other legislation, restricted access orders, and any necessary filing fee has been paid. Clerks have no authority to, for example, reject a statement of claim where plaintiff Bob Smith names the Moon as the defendant, and sues the Moon for inducing lunacy in his cat. Provided Bob Smith's statement of claim meets the formal requirements for a valid statement of claim, and Smith has paid his filing fee, then the statement of claim must be filed.[4]

[790] This means that the scope of a vexatious litigant order must be one that the Court Clerks can interpret. I adopt the explanation and approach by Justice Kendell in ***Biley v Sherwood***, at paras 145-154, concerning this point. Justice Kendell rejected a proposed court access restriction that would restrict litigation versus a car dealership, and its "directors, officers, employees, successors and assigns". She concluded that the Clerks cannot meaningfully enforce the scope of the proposed order:

> ... While the Clerks could under the suggested terms fairly reject a new statement of claim by Mr. Biley against [the car dealership], the Clerks are not in a position to identify who are [the car dealership's] "directors, officers, employees, successors and assigns".

[791] The ***RO*** action has the same issue. In ***RO***, the Court of Appeal, at para 40, reduced the scope of the vexatious litigant order imposed by this Court, so that it only imposed a gatekeeping function on "R.O." against "D.F.", and "... those associated with him, including his family (immediate and extended) and his employer." Again, this order, as it stands, cannot be enforced by the Clerks. Who is someone "associated" with "D.F."? Who is "D.F."'s employer?

[792] The problem of creating enforceable court access restrictions was identified and reviewed by MacDonald CJNS in ***Tupper***. The Chief Justice concluded at paras 51-56 that, when designing prospective court access restrictions, the court should issue a "blanket restraint" to avoid forcing court staff "... to make the call as to whether a proposed new matter is subject to the restraining order." That is one solution to the problem of making certain that a vexatious litigant order is enforceable and adequately captures the anticipated future litigation misconduct.

[793] Similarly, Justice Ribeiro in ***Ng***, at para 115, concluded non-global vexatious litigant orders can only be meaningfully enforced by a judge, and preferably the judge who imposed those court access restrictions. "Certainly the staff at the counter of the High Court Registry cannot be expected to undertake that task when deciding whether to seal a Writ or some other form of process."

[794] As for the effect of an inadequately specific court access restriction order, Justice Kendell concluded in ***Biley v Sherwood***, at para 153, that when the Clerks cannot meaningfully evaluate a court access restriction, then they have no option but to file what may be questionable items:

> In my opinion, when a Clerk cannot interpret the scope of a court access restriction order then the Clerk has no choice but to file the potentially abusive document. That is obviously an undesirable result. This outcome can be avoided by defaulting to a broad court access restriction regime, where necessary. ...

[4] Service, obviously, may be a challenge.

See also ***Laird***, at para 133.

[795] I agree that is the appropriate response for a Court Clerk who cannot confirm the potential application of a vexatious litigant order. This means that, when designing orders, to 'default broad' is the better solution to manage abusive litigation, when no other alternative is possible.

[796] Justice Kendell makes another observation at paras 151-152 that I think is important. This Court's limited capacity to conduct a substantive "pre-filing" review of court filings is the result of legislative choice:

> ... Alberta could have enacted legislation to provide a capacity to conduct a substantive 'pre-filing' review by the Alberta Court of Queen's Bench of the legal and factual characteristics of a candidate court filing. That is exactly what Canada did when it enacted Federal Courts Rules, SOR/98-106, s 72 ...
>
> Alberta has chosen to not enact an equivalent provision that empowers the judiciary or another court officer to conduct pre-filing review of potential Alberta Court of Queen's Bench documents. The result of that choice by the Legislature is that when a judge designs court access restrictions as a gatekeeping function for the Alberta Court of Queen's Bench then those restrictions should ... [b]e sufficiently explicit that a Clerk may interpret the potential application of the court access restriction order ...

Similarly, *Rule* 14.92 provides the Court of Appeal a summary process to evaluate potentially abusive or defective filings. The *Rules* provide no equivalent to this Court.

[797] These factors do not, in my opinion, mean that every vexatious litigant order must always be global in scope. In this sense, while I overall agree with the conclusion of the Nova Scotia Court of Appeal in ***Tupper***, there are still instances where a narrower court access restriction regime may be both effective and enforceable.

[798] For example, I have described how this Court has, for several years, experienced a "tsunami" of abusive, unmeritorious *habeas corpus* applications filed by self-represented inmates in Correctional Service Canada facilities, recently reviewed in ***Hamm***, at paras 183-265. If a judge was to conclude that abusive *habeas corpus* applications were the only form of bad litigation that is plausible for a particular abusive litigant, then a limited scope vexatious litigant order that only imposes a gatekeeping leave requirement for *habeas corpus* applications would be a restriction the Court Clerks can effectively execute: e.g. ***Ewanchuk***; ***Latham (Re)***, 2019 ABQB 223 [***Latham (Re) #2***].

[799] Another example of where a restricted scope order may be appropriate is where litigation has, to date, been limited to a certain set of parties, and all the anticipated abusive litigation involves further new lawsuits against the same target party or parties. The court might then conclude, that in the absence of evidence to support any expansion of the problematic litigation to new targets, then an effective vexatious litigant order would only require leave where the abusive litigant sought to initiate new proceedings against his or her historic targets. Now the Clerks can enforce an order with those specifics: 1) the parties to which the order applies are known and 2) the court access restriction, permission to initiate new litigation, is explicit.

c. Multicourt Vexatious Litigant Orders

[800] The next question is whether court access restrictions imposed by this Court should also apply to the other Alberta Courts. In my opinion most vexatious litigant orders that affect activity in this Court should also extend to the Provincial Court of Alberta. The reason is that these two courts have broadly similar jurisdiction to hear civil matters. If a litigant abuses one trial court, it will plausibly abuse the other in relation to the same or similar subjects.

[801] That said, to obtain a fair and proportionate result, court access restrictions may take into account the different jurisdictions of the two courts. For example, the hypothetical *habeas corpus* abusive litigant described above could never file a *habeas corpus* application in Provincial Court, so it would not be fair and proportionate (or in any way useful) to extend those court access restrictions to the Provincial Court. Similarly, certain family law disputes, estate matters, and judicial review are the sole jurisdiction of the Provincial Superior Courts. If anticipated litigation misconduct is restricted to a specific subject, there may be no basis to expand court access restrictions to Provincial Court.

[802] The question of whether this Court's vexatious litigant order should extend to the Alberta Court of Appeal is more nuanced. Expanded court access gatekeeping restrictions for the Court of Appeal would be appropriate, for example, where the abusive litigant:

1. exhibits a pattern of persistent appeals, particularly abandoned or unsuccessful appeals that were identified as having no merit, or
2. states he or she will take on any and all appeals, no matter their merit.

That response is fair and proportionate. Litigation misconduct before the Alberta Court of Appeal is foreseeable and plausible: e.g. ***Labonte #3***, at para 14.

[803] However, what if there is no record of problematic appeals, and the abusive litigant has, to date, only operated in trial level courts? ***Biley v Sherwood*** examines this specific question. I adopt Justice Kendell's analysis at paras 156-158. Justice Kendell observed that when the Alberta Legislature, on September 9, 2014, enacted Part 14 of the *Rules*, it introduced *Rule* 14.5(j), which has as a requirement that any person "... who has been declared a vexatious litigant in the court appealed from." may only file an appeal after first obtaining permission to make that filing. Justice Kendell concludes, and I agree, that:

> ... the Alberta Legislature has concluded that any person who is found to be a vexatious litigant and is made subject to court access restrictions in the Alberta Court of Queen's Bench must also be subject to a pre-filing leave court access restriction in the Alberta Court of Appeal in any appeal.

[804] In enacting this provision, the Alberta Legislature has implicitly overruled and rejected the earlier ***Del Bianco v Lequier***, 2008 ABCA 124, 429 AR 94 [***Del Bianco #2***] decision, where at para 11, Martin JA concluded that a person who is made subject to a vexatious litigant order *never* requires permission to appeal that vexatious litigant order. ***Del Bianco #2*** relies on ***Kallaba***, which identifies court access restrictions as "an extraordinary remedy". An absolute right to appeal is necessary, as pre-appeal gatekeeping at the appellate level "could result in fundamental unfairness": ***Kallaba***, at para 31, cited in ***Del Bianco #2***, at para 10.

[805] *Rule* 14.5(j) not only overrules ***Del Bianco #2***, but it also mandates that the scope of court access restrictions imposed by a trial court *will inevitable expand to have a global scope at*

the Alberta Court of Appeal. If an abusive litigant is classified as a "vexatious litigant", then *any* appeal must first obtain leave.

[806] That means that if this Court were to impose prospective court access restrictions by a vexatious litigant order that only affects future *habeas corpus* applications, then, presumably, that vexatious litigant could freely initiate a civil tort action at this Court, but would nevertheless be required to obtain leave prior to filing an appeal of a decision from that civil tort action at the Alberta Court of Appeal. ***Jordan v De Wet***, 2016 ABCA 366 at para 7 confirmed *Rule* 14.5(j) operates in this manner.

[807] I conclude that *Rule* 14.5(j) is one aspect of the Alberta government's efforts to implement the ***Hryniak*** "culture shift". It has set a policy that when a trial court imposes prospective court access restrictions broader than a *Grepe v Loam Order*, then it is always proportionate and fair to assume any appeal by that vexatious litigant warrants gatekeeping review, because of the probability of an abusive appeal, and the need to screen the limited resources of the Alberta Court of Appeal from abusive appeals.

[808] Given that policy, and the automatic operation of *Rule* 14.5(j) to impose court access restrictions on appeals, then what is the point of this Court's decision ever imposing a gatekeeping leave requirement to the Alberta Court of Appeal?

[809] ***Biley v Sherwood***, at para 156, provides the explanation:

> ... in KE v CSM, 2016 ABQB 342 at paras 35-38, 268 ACWS (3d) 135 Justice Browne stressed the importance that an order which imposes court access restrictions provide "... a number of elements to assist persons who are typically self-represented litigants to make informative and focussed applications for "permission"". I agree with this approach, and therefore the court access restrictions I impose on Mr. Biley will also specify the appropriate method for him to seek leave to appeal a decision of this Court, including this decision, to the Alberta Court of Appeal. The specific order follows the standard procedure for the Court of Appeal.

[810] I agree with this approach. Most abusive litigants are SRLs, and, per ***Pintea*** and the *SRL Statement*, this Court has an obligation to ensure any court access restrictions it imposes are clear, and explicitly indicate how the court access restrictions will operate. While any vexatious litigant court access restriction applied by this Court which creates a gatekeeping step for litigation at the Alberta Court of Appeal is, arguably, duplicative, issuing vexatious litigant orders that include the Alberta Court of Appeal will alert the abusive litigant as to the fact any appeal will also have a leave requirement, and provides instructions on how the abusive litigant may seek permission to file an appeal.

[811] That said, if the Alberta Court of Appeal has already put in place court access restrictions for an abusive litigant, this Court has no jurisdiction to affect that: e.g. ***Olumide v Alberta***, at para 73. No potentially conflicting steps should be imposed.

4. Court Access Restrictions in Addition to Permission to Start and Continue Litigation

[812] In ***Bhamjee***, at para 35, the Master of the Rolls stressed that court access restrictions operate best as a flexible response.

> ... In what follows we must not be taken to be excluding the possibility that other forms of order may be made if the situation seems to demand it. For instance, it may on occasion be thought appropriate to direct that permission to make an application or to institute an action will only be considered if an advocate with higher court rights of audience considers there is merit in it, or that the requisite applications in the High Court should be made to a Master in the first instance. The possibilities are unlimited. What is important is that the remedy should always be proportionate to the mischief that needs remedying. [Emphasis added.]

See also ***Ng***, at paras 100-110.

[813] I restated this principle in ***Rothweiler #3***, at para 45:

> ... Court access restrictions are designed in a functional manner and not restricted to formulaic approaches, but instead respond in a creative, but proportionate, manner to anticipated potential abuse ...

[814] Sometimes Canadian courts have concluded that a leave to file or continue litigation requirement is not sufficient to manage an abusive litigant. Additional steps are appropriate.

[815] The underlying rule remains the same: any step must be proportionate and fair, in light of the anticipated litigation misconduct by the abusive litigant.

[816] So far these additional court access restrictions have taken the following forms:

1. a requirement that an authorized legal representative is involved in future litigation steps,
2. preconditions to seeking permission to initiate or continue litigation,
3. control of physical access to court facilities,
4. mandatory personal appearances in court,
5. gatekeeping access to non-judicial tribunals,
6. restrictions on modes of communication with the court and its personnel,
7. screening of *Criminal Code* private informations, and
8. limits on fee waivers.

These are examples of potential additional court access restrictions, which I will discuss in detail. This survey does not limit the Court's arsenal of possible mechanisms to manage future abusive litigation activities, but these are instead examples of the courts' broad abusive litigation management tool kit.

a. Mandatory Lawyer Representation

[817] A legal representation requirement is fair and proportionate when an abusive litigant's conduct is such that the abusive litigant will not only predictably target opposing parties, but also misuse the courts and their services: ***Croll***, at para 17; ***Boe***, at paras 32-37; ***Houweling***, at para 40; ***Dawson***, at para 29; ***Hutton***, at paras 2-5; ***Prefontaine v Canada #1***, para 15.

[818] To date this additional step is usually only imposed to protect the court's leave to file or continue litigation process. The abusive litigant is no longer able to freely submit a leave application, but instead a licenced lawyer or a person qualified in law to act as a representative is

required to submit a leave application. This additional requirement is intended to provide some pre-submission screening of unmeritorious leave applications, based on the presumption that a qualified legal representative will identify defects in a leave application.

[819] Legal representation has been required where some factor predicts that an abusive litigant may extend their litigation misconduct to the court's leave process, such as:

1. an established pattern of meritless and persistent filings, or improper communications (e.g. ***Dawson***, at paras 26, 29; ***Hoessmann***, at paras 3, 9; ***Boisjoli (Re) #1***, at paras 108-109; ***Onischuk v Edmonton***, at paras 30, 33; ***Onischuk (Re) #2***, at para 67; ***Gauthier (Re) #1***, at paras 79, 83; ***Lee v Canada #2***, at paras 154, 159; ***Templanza #1***, at paras 132-133; ***Hill #1***, at para 123; ***ALIA v Bourque #3***, at para 202; ***Potvin #2***, at paras 15-16; ***IntelliView v Badawy #1***, at paras 159-160; ***Prefontaine v Canada #1***, at para 12);

2. where the abusive litigant has made abusive leave applications (e.g. ***Thompson v ALRB***, at paras 25-34; ***Croll***; ***Boe***, at paras 35-36; ***Houweling***, at para 40; ***ALIA v Bourque #3***, at para 203; ***Latham (Re) #2***, at paras 20-22);

3. the abusive litigant has employed proxies to continue his or her litigation misconduct (e.g. ***Onischuk v Edmonton***, at paras 23-24, 30-33; ***Re Onischuk #2***, at paras 11, 21; ***Lymer (Re) #3***, at para 129); and

4. court filings were made in contempt of an existing court access restriction order (e.g. ***Vuong Van Tai Holding / Q5 Manor v Krilow***, 2019 ABQB 146 at paras 9-12 [***Vuong***]; ***McKechnie #2***, at paras 35-38).

[820] In other instances the unusually abusive and/or damaging character of the anticipated abusive litigation warranted this step, for example:

1. more than one instance of abuse of *habeas corpus* processes (e.g. ***Ewanchuk***, at paras 170-187; ***Gauthier (Re) #1***, at paras 82-83, 87; ***Lee v Canada #2***, at paras 154, 159; ***Latham (Re) #2***, at paras 20-22);

2. attempts to use court processes to further criminal activities (e.g. ***Re Boisjoli***, at paras 108-109; ***McKechnie #2***, at paras 31, 34-35, 37);

3. where an abusive litigant is a "litigation terrorist" who engages in meritless litigation intended to intimidate and/or cause harm (e.g. ***Lee v Canada #2***, at paras 154-159; ***McKechnie #2***, at paras 31-34, 37; ***Lymer (Re) #3***, at paras 128-129; ***IntelliView v Badawy #1***, at paras 152, 155); and

4. OPCA litigation:

   a) which attempts to enforce fictional OPCA claims on a target (e.g. ***Re Boisjoli*** at paras 108-109; ***Gauthier (Re) #1***, at paras 77-79, 82-83; ***Potvin #2***, at paras 15-16; ***Knutson #2***, at paras 21-23; ***Boyer***, at para 7);

   b) which involves an OPCA guru or OPCA advocate engaged in the business of promoting pseudolaw (e.g. ***Gauthier (Re) #1***, at paras 82-83; ***Landry #2***, at para 55); and

c) where the OPCA litigant attempts to invoke the authority of a fictitious, vigilante pseudolaw court or authority (e.g. ***Knutson #2***, at paras 23-25; ***Boisjoli (Re) #1***, at paras 55, 58).

[821] On rare occasions, Canadian courts have gone even further and imposed a global requirement that the abusive litigant may only interact with the court via a lawyer. For example, ***Boe*** describes an abusive litigant who evaded a common vexatious litigant order with incomprehensible materials, and concealed his filings in large bundles of other materials: paras 32-33. "He engages in conduct that is abusive to the Court, the respondents, and their counsel. His actions unjustifiably take Court time and resources from other deserving parties." The Court concluded at para 35 that the only appropriate step was an order: "... to conduct all future business in this Court through a member in good standing of the Law Society of British Columbia." See also ***Hutton***, at paras 2-5, and ***Hoessmann***, at paras 40-45.

[822] In ***Dawson***, at paras 25-26, 29, this step was ordered not only on the basis of aggressive, persistent, litigation, but also because of harassing, defamatory, threatening, and abusive conduct. Similarly, in ***Prefontaine v Canada #1***, at paras 12-14, a litigant's "paranoid views", him being "unable to control himself from giving them expression", and a history of in-court misconduct, including threats, and abuse of court registry staff, led the Federal Court of Appeal to order the abusive litigant must be represented by a lawyer in any appearance before that body.

[823] This Court has imposed this very strict limitation on two occasions. First, Simpson J in ***McKechnie #2***, ordered global lawyer representation as both a step that responded to that abusive litigant's difficult to control court activities, but also as a safety measure, since this litigation terrorist was identified as a high risk of violence to court personnel. Second, Ade Olumide was made subject to a similar requirement, based on him having repeatedly ignoring an existing vexatious litigant order, an extreme history of abusive litigation, including forum shopping, and obnoxious and improper in-court behaviour: ***Olumide v Alberta***, at paras 68-70.

[824] Lawyer representation is not, however, only an expense to the abusive litigant, but may have some off-setting benefits. Legal counsel can assist in avoiding contempt of court, may focus litigation on valid issues or aspects, and help the abusive litigant "put his or her best foot forward": ***Templanza #1***, at paras 133-137. This may be a very relevant factor when a judge is confronted by an abusive litigation cascade which might have a valid seed point of origin. Imposing legal representation might effectively focus, advance, and resolve the action in the abusive litigant's favour.

[825] In conclusion, mandatory lawyer filing of leave applications is a relatively modest imposition, but one that may be warranted in light of an elevated probability, frequency, form, and deleterious effect of the predicted future abuse.

[826] A global requirement that an abusive litigant retain a lawyer for all interactions with the court is an unusual step, and only merited in exceptional circumstances. These different thresholds flow from the fact that any court access restriction must be fair and proportionate, and not impose unwarranted undue hardship. Legal services may involve significant expense, but in some instances, that litigation cost is appropriate, given the misconduct, injury, and risks of harm anticipated from a particular abusive litigant. Court resources, too, are not free, and court staff and the judiciary have the right to a safe workplace.

b. Preconditions to Seeking Leave

[827] A second category of court access restrictions is that a litigant must satisfy a precondition prior to seeking leave.

Payment of Prior Ordered Costs

[828] The most common precondition is a requirement that the abusive litigant pay outstanding costs orders prior to filing for leave. For example, in ***R v Grabowski #4***, at para 12, the Court of Appeal confirmed a vexatious litigant order, but also instructed: "... all outstanding costs be paid in full before leave of the court is sought for any further litigation and that evidence of such payment be filed with the court where proceedings are contemplated." The Court does not, however, explain why this step was appropriate, though it emphasized how the abusive litigant had repeatedly sued on the exact same issue. See also ***Gichuru v #1***, where inherent jurisdiction was invoked to order costs payment prior to any leave to continue or initiate litigation application.

[829] More recently in ***Belway #3***, at para 15, the Alberta Court of Appeal imposed a pre-filing costs payment requirement which "... prohibited from bringing any further applications of any nature or kind whatsoever in the Court of Appeal of Alberta ...", unless all outstanding costs were paid. This requirement appears to 'layer on top of' an earlier *Judicature Act*, ss 23-23.1 vexatious litigant order: ***Belway v Lalande-Weber*** (7 April 2017), Calgary 1701-0020AC (Alta CA). The basis for the pre-filing costs payment requirement is not identified.

[830] A more detailed explanation for this precondition is found in ***Hill #1***, at paras 120-122. In that action the abusive litigant had run up $3.7 million in costs in a series of lawsuits and appeals in several jurisdictions, and paid none of them. Justice Anderson, at paras 104, 121, concluded that the abusive litigant's lawsuits were "... a form of economic warfare directed at people and organizations that [the abusive litigant] dislikes." This could not be tolerated. It "... transformed the courts into tools of economic warfare." The abusive litigant's actions had shown he was in contempt of courts, and was willing to exploit and abuse those public resources. Anderson J concluded that if the abusive litigant "... wishes to re-establish his credentials as a fair-dealer good faith litigant then paying his court ordered debts is a mandatory first step."

[831] The fact an abusive litigant was a US resident was a basis to impose a costs payment precondition in ***ALIA v Bourque #3***, at para 207. The same precondition was not applied to his mother, a Canadian resident: para 206.

[832] In ***Sawridge #8***, at para 25, and ***Lymer (Re) #3***, at paras 130-133, a payment of costs precondition was imposed because the abusive litigant had an extended history of not paying costs and injuring the same party. Notably, in both these disputes the abusive litigant had been required to pay security for costs, but had not done so: ***Stoney v Twinn***, 2018 ABCA 81; ***1920341 Alberta Ltd v Jonsson***, 2018 ABCA 231.

[833] Another aggravating aspect of the abusive litigant's conduct in ***Sawridge #8*** was that the abusive litigant attempted to shift and foist his potential cost liability to the target of his abusive litigation, a trust that held property on behalf of people in an aboriginal community: paras 23, 25, 87-90. Similarly, in ***Makis #1***, at paras 88, 92-95, a costs payment precondition was apparently imposed in light of the abusive litigant's contempt for court instructions.

[834] Interestingly, in ***IntelliView v Badawy #1***, Campbell J considered, but did not impose, a pre-submission costs obligation. She explained her reasoning at para 159:

> I am not satisfied that this requirement is necessary at this time. Ultimately, the objective of court access restrictions is the effective management of abusive litigants and their dispute-related misconduct. Here, for IntelliView, the best objective is to bring its lawsuit to a conclusion, and 'ungum' what IntelliView very correctly identifies as an "effectively stalled" action. It seems to me that the best mechanism to obtain that result is not a cost-recovery step, but rather that Mr. Badawy's litigation steps are filtered in a strict manner. I conclude that ordering that any leave application by Mr. Badawy can only be submitted by a lawyer is a more effective way to achieve that outcome.

[835] This helps clarify the purpose of a costs payment precondition. This mechanism prevents economic abuse, where the abusive litigant targets the same actors, has inflicted litigation expense on them, but then has not paid. Evidence that the abusive litigant is unwilling to "put money down up front" via a security for costs order is a strong basis for this step. Pre-filing costs payment shields against bad plausible future litigation, and is not appropriate where the litigation management objective is to move the case forward in the face of resistance by an abusive litigant.

Security for Costs

[836] A second similar potential precondition is that the abusive litigant is required to pay security for costs prior to applying for leave to continue litigation: ***Thompson v International #1***, at paras 72-78.

Other Precondition Requirements

[837] To date, satisfaction of unpaid costs, and payment of security for costs, appear to be the only leave preconditions which have been imposed in Alberta. In my opinion, that should not been seen as a limit to this tool. As the UK Court of Appeal instructed in ***Bhamjee***, a step of this kind is appropriate where it is fair and proportionate. A leave precondition requirement may be useful to impose requirements that establish the good faith conduct of an abusive litigant, and/or cure injuries caused by the abusive litigant's past bad conduct. For example, where the abusive litigant has failed to complete a litigation step, such as attend questioning, or to provide or file certain documents, then that step may be a useful leave precondition.

c. Physical Access to Court Facilities

[838] Prohibiting or restricting physical presence and/or access to courthouse facilities is comparatively uncommon court access restriction.

[839] The Federal Court of Appeal and Tax Court of Canada took this step in response to an abusive litigant who was physically disruptive and abusive when attending the court Registries: ***Prefontaine v Canada #1***; ***Prefontaine v Canada #2***. While this abusive litigant had a broad history of abusive and disruptive behaviour, the Federal Court of Appeal decision also indicates the abusive litigant had to be escorted and controlled by court security (paras 9, 13), staff had felt sufficiently threatened that they received security escorts (para 13), and during one outburst the abusive litigant went so far as to physically damage the Registry facility (para 13).

[840] ***Manitoba (Attorney General) v Lindsay***, 2000 MBCA 11, 145 Man 4 (2d) 187 [***Manitoba v Lindsay #2***] evaluates an order that prohibited a notorious OPCA guru from attending a Manitoba courthouse, except where he was appearing in court, or had made an appointment with at least 24 hours notice. MacInnes JA varied the original order to permit

Lindsay to attend court as an observer in the public gallery and to visit the courthouse public law library, again with 24 hours notice.

[841] The British Columbia Court of Appeal in ***British Columbia (Attorney General) v Andrews***, 2016 BCCA 361 [***Andrews***] confirmed an order prohibiting an abusive litigant from accessing or being within 100 meters of British Columbia courts, in relation to civil matters, except where the abusive litigant had made prior arrangements with Sheriff Services. The trigger for this intervention was persistent and unreasonable interactions and demands with the court registry staff, abusive and insulting language, phoning court staff at home and at unreasonable hours, and baseless and unintelligible allegations: para 2.

[842] This decision provides a useful template order at para 13 for these terms, and exempted appearances in relation to criminal matters, or where the abusive litigant was otherwise required to attend court.

[843] Quebec's *Règlement de procédure civile*, RLRQ c C-25.01, r 4, s 85 authorizes courts, as part of a vexatious litigant order, to physically restrict access to court facilities:

> ... In an extreme case, the order of prohibition may include an order preventing the person from having access to the courthouse.

[844] ***Grenier*** rejected an appeal that this provision is unconstitutional, and instead concluded section 85 codifies an aspect of the Quebec Courts' inherent jurisdiction.

[845] The most recent example of an order which restricts a vexatious litigant from physical access to court facilities was issued by Simpson J in ***McKechnie #2***. After reviewing the Court's inherent jurisdiction to secure its physical integrity (paras 41-51), Justice Simpson concluded that McKechnie ought to be prohibited from being within 300 meters of any courthouse in Alberta (para 49). This is a remedy for "extreme cases" (paras 50-51), but in this instance was warranted by McKechnie's "... unusual, threatening, and disruptive conduct ..." (para 51).

[846] These cases establish that an order to physically exclude an abusive litigant should be made with caution and usually only where the prior history establishes the abusive litigant does not conduct him or herself in a proper manner, or, in a situation, such as with McKechnie, where a professional threat assessment indicates that the abusive litigant is a physical risk threat to the court staff and others in that location.

d. Mandatory Personal Court Appearances

[847] Court access restriction orders have ordered the opposite of the physical access restriction, and instead required that an abusive litigant must be personally present in future court appearances. To date this step has only been imposed when the abusive litigant:

1. resides in a location other than Alberta or Canada, and
2. did not personally appear in Court.

[848] ***Hill #1*** was the first instance where this requirement was imposed. Here, the abusive litigant, Daniel Hill, lived in Bermuda and Florida, and had repeatedly re-litigated the same dispute concerning his father's estate in three countries (Canada, US, UK) and two provinces (Alberta, Saskatchewan): para 3. Every action had been unsuccessful, but in his lawsuits Hill incurred $3.7 million in costs awards and paid none: paras 3, 102-110. Anderson J called this litigation "economic warfare". In the previous US proceeding, Hill had been put on the stand,

personally, was sharply criticized for his misconduct, and told if this were to occur again Hill would be jailed: para 70.

[849] In the subsequent Alberta court proceedings, Hill did not attend but instead acted via a lawyer.

[850] Justice Anderson, at para 124, concluded:

> One further court access restriction is appropriate for Daniel Hill. He is neither a resident of Alberta, nor Canada. His documents indicate he lives in Bermuda and Florida. Daniel Hill has thus far employed lawyers to represent him in his litigation. Since Daniel Hill is an 'offshore litigant', and given his extensive history of ignoring court-ordered sanctions, I conclude that Daniel Hill should be personally required to attend any future Alberta court hearing where he is a plaintiff or applicant. That way he can be held personally accountable for future misconduct.

[851] A similar requirement was imposed by Mandziuk J in ***ALIA v Bourque #3***. In this instance one of the mother and son vexatious litigant duo resided in California. He claimed he could not afford to travel to attend Court. However, his credibility as a witness was negligible, he did not pay unfavourable judgment costs, and, unlike his mother, the son was "judgment proof": paras 205-210. Justice Mandziuk concluded at para 210:

> I predict Stephen Bourque will complain that these steps are unwarranted and excessive. He has said he is unemployed, impoverished, and cannot travel. Perhaps that is true, but I put no more weight on those complaints than I do his claims of family illness. It is equally plausible, if not more plausible, that Stephen Bourque carefully maintains himself outside the reach of the court whose processes he has abused.

[852] "Offshore" and "out of jurisdiction" abusive litigants are probably the main category of persons for whom this additional step is appropriate, fair, and proportionate. Since this step may create significant expense, mandatory court appearances should probably only be ordered where the abusive litigant's conduct leads to a conclusion that non-appearance in court is plausibly a tactical, rather than financial, choice.

e. Access to Tribunals and Other Non-Judicial Administrative Bodies

[853] It is not unusual for abusive litigants to also operate in tribunals and other administrative bodies, making complaints related to their court litigation: e.g. ***ET v Rocky Mountain Play Therapy Institute Inc***, 2017 ABQB 475 at paras 98-99, leave refused 2017 ABCA 349; ***Thompson v EPS***; ***Paraniuk v Pierce***, at paras 85-91.

[854] A recent development is that, in ***Makis #1***, this Court imposed a court order that not only affected access to an Alberta Court, but also to Alberta non-judicial administrative tribunals. Here, the abusive litigant had litigation before the Court, but also had engaged in many applications, complaints, and appeals in a range of professional, ethics, privacy, human rights, and police bodies: para 19. The parties who applied for a vexatious litigant order also sought the Court extend that protection to administrative tribunals.

[855] The evidence illustrated broad-based, energetic, and 'branching' dispute-related behaviour by the abusive litigant, whose conduct was consistent with that of a querulous litigant.

[856] Clackson J ordered that, in addition to vexatious litigant controls in relation to court proceedings, the Court, under its inherent jurisdiction, could and did prohibit the vexatious litigant from initiating or continuing further tribunal proceedings, except with leave from this Court: paras 81-87. In effect, this order extended the usual vexatious litigant leave requirement to Alberta tribunals and other non-judicial bodies. Justice Clackson, at paras 34-63, explained this step relied on the Court's inherent jurisdiction in two senses:

1. inherent jurisdiction functions to control abuse of adjudicative processes (paras 41-45), and
2. superior courts of inherent jurisdiction may respond to any "justiciable right" and order a remedy when no other court has jurisdiction to engage in that function (paras 46-50).

[857] To the best of my knowledge, this is the first instance where a Canadian court has taken this step explicitly under its inherent jurisdiction. That said, this supervisory and protective function is a well-recognized aspect of the superior courts' inherent jurisdiction. Jacob, "Inherent Jurisdiction" at 32, 48-49 identifies as part of the courts' inherent jurisdiction "Control over Powers of Inferior Courts and Tribunals":

> Under its inherent jurisdiction, [superior courts have] the power by summary process to prevent any person from interfering with the due course of justice in any inferior court ... The basis for the exercise of this jurisdiction is that the inferior courts have not the power to protect themselves.
>
> But [superior courts] also [have] the power under its inherent jurisdiction to render assistance to inferior courts to enable them to administer justice fully and effectively ... and to exercise general superintendence over the proceedings of inferior courts ...

[858] As previously noted, the Supreme Court of Canada in ***Caron***, at paras 24-35, has endorsed this authority, though in the context of this Court authorizing interim costs for a proceeding before the Provincial Court of Alberta.

[859] The principle that vexatious litigant orders may also address potential abuse of tribunals was endorsed in a number of pre-***Makis #1***, decisions: ***Hok v Alberta #2***, at paras 18, 54; ***Productions Pixcom Inc v Fabrikant***, 2005 QCCA 703 at paras 22-23, 142 ACWS (3d) 86, leave to appeal to SCC refused, 31137 (16 January 2006); ***Ayangma***, at paras 62.

[860] ***Ayangma*** cites ***Nursing & Midwifery Council v Harrold***, [2015] EWHC 2254 (UK QB). This was the first UK case to apply the Modern Approach to inherent jurisdiction in the tribunal context. Here the abusive litigant had made numerous unsuccessful applications to the Employment Tribunal. Hamblin J concluded, at paras 16-19, that jurisdictional principles distilled from Jacob, "Inherent Jurisdiction" proved the Court had the inherent jurisdiction to manage access to tribunals. That supervisory authority goes beyond judicial review of tribunal proceedings and decisions, to assisting in the tribunal's effective operation: para 29. The fact legislation had provided for summary review and other procedural steps did not negate that the Employment Tribunal was not authorized to engage in pre-submission screening: para 32. Court gatekeeping was therefore potentially appropriate, depending on the facts of a particular abusive litigant scenario: para 36.

[861] A point that was stressed by Justice Hamblin is that the court's inherent jurisdiction cannot operate *in conflict with legislation*. This was also indirectly addressed in ***Makis #1***, where, at paras 48-50, Justice Clackson observes that in some instances tribunals have been authorized to issue the equivalent of court access restriction orders in relation to their own proceedings. In those circumstances, this Court's inherent jurisdiction would not apply. As with the *Rules*, the Court's inherent jurisdiction to supervise lower court and tribunal function operates where there are gaps in the legislative scheme: Jacob, "Inherent Jurisdiction" at 50.

[862] Though ***Makis #1*** indicates that this is the first instance a Canadian court imposed a gatekeeping function for access to tribunals, that may, in fact, not be accurate. ***HE***, at para 5 seems to confirm a vexatious litigant order which prohibited access to tribunals, including the Quebec Syndic du Barreau.

[863] Obviously, this is a developing area of the law. A perhaps useful general principle is that if Parliament or the legislatures have not provided a tribunal or other non-judicial decision maker with a way to screen itself via an effective gatekeeping mechanism, and in that way manage abuse of its own processes, then the well-recognized supervisory role of the superior provincial courts permits leave gatekeeping functions where that is a fair and proportionate response to anticipated misconduct with the tribunal in question by a particular abusive litigant.

f. Communications Restrictions

[864] In some instances the Court has imposed restrictions on the manner in which a litigant communicates with the Court and its staff. The usual reason for this step is an established pattern of abusive, excessive, harassing, threatening, or otherwise inappropriate communication. Court clerks are particularly vulnerable to this form of abuse given their obligation to serve the public. As Justice Shelley observed in ***Alberta Treasury Branches v Hok***, 2019 ABQB 196 at para 10 [***ATB v Hok #2***]:

> The Court Clerks serve a critical function as part of the administration of justice in this province. They are the front line of the Alberta Court of Queen's Bench. They are required to assist litigants and others who have business with the Court. However, the obligation to provide these services to the public does not extend to them being bullied, abused, or otherwise mistreated in an unfair and unprofessional manner.

I agree. Protecting court staff is not only an aspect of the Court's inherent jurisdiction to control its processes, but also reflects Alberta policy against abuse and bullying, and providing government workers a safe workspace.

[865] For example, in ***Boisjoli (Re)***, 2015 ABQB 690, the Court imposed a requirement that this continuously abusive litigant, a Freeman-on-the-Land, shall only communicate via email to a specific email address after the Freeman engaged in inappropriate, scandalous, derogatory, and threatening communications.

[866] A communications restriction was also a way that the court may physically protect its staff from both abuse and threats. The abusive litigant in ***McKechnie #2*** was prohibited from attending courthouses except to appear in court: para 49. Personal communication by the abusive litigant to court staff was restricted to by fax only: para 40. Similarly, the Federal Court of Appeal in ***Prefontaine v Canada #1***, at para 15, prohibited the abusive litigant from attending

any Federal Court Registry. He may only conduct business with the Court via mail or courier. This abusive litigant had a history of problematic phone communications to court staff: para 13.

[867] Similarly, in ***Andrews***, the Court confirmed court access restrictions that prohibited telephone calls from the abusive litigant, and that any future communications be conducted in writing, via fax, mail, or email, and only to a designated single contact. As previously described, this communications prohibition was complemented by a procedure where the abusive litigant coordinated with Sheriffs to physically access the Court and its services, which I think is an eminently practical arrangement for all concerned.

[868] Justice Shelley, recently, in ***ATB v Hok #2*** prohibited Shirley Hok from communicating with the Court Clerks, except by writing, and prohibited Hok's attendance at the Clerks' Counter. I imposed a very similar step in ***Botar v Braden Equities Inc*** (7 February 2018), Edmonton 1603 11591 (Alta QB).

[869] I view this physical court access restriction as imposing only a minor obligation on an abusive litigant, and so it would be a fair and proportionate step in most cases where the court may anticipate problematic in-person contact with staff. If there is a threat or history of violence, then this step is highly appropriate, proportionate, and fair.

[870] I note that mandatory lawyer representation, discussed above, has the same effect, but involves a much greater imposition on the abusive litigant, given the cost involved.

[871] The result is that, where an abusive litigant has not cooperated with communications restrictions imposed by the court, then that more onerous step might be considered as a second-tier response.

g. *Criminal Code* Private Informations and Other Processes

[872] One of the less common court access restrictions imposed by this Court relates to a specific *Criminal Code*, RSC 1985, c C-46 process. Generally, criminal prosecutions are the sole domain of the Crown. The Crown lays and prosecutes criminal charges. There are, however, several narrow exceptions.

[873] One is the private information process authorized by *Criminal Code*, ss 504 and 507.1. These sections permit that anyone who, on reasonable grounds, believes an indictable offence has occurred may initiate a criminal prosecution by laying a "private information". That leads to a "pre-enquete" hearing before a Provincial Court judge, who then evaluates whether the private information and supporting evidence establish a basis for the criminal prosecution. If that threshold is met, then a summons or arrest will issue.

[874] While the private individual who initiated this process may, in theory, then continue that prosecution, the usual next step is, instead, that the provincial or federal Attorney General takes control of the litigation: *Criminal Code*, s 579.1(b). Interesting, Ade Olumide tried to open the private prosecution procedure further, unsuccessfully applying for a declaration that this provision is unconstitutional, since it denied him the sole authority to criminally prosecute those he views as wrongdoers: ***Olumide v Her Majesty the Queen in Right of Ontario***, 2017 ONSC 1201 [***Olumide v Ontario***].

[875] By this point it is probably unsurprising to the reader that the private information procedure has been targeted by abusive litigants.

[876] The provincial courts which receive private informations and conduct the s 507.1 pre-enquete hearings have no discretion to refuse or screen those filings (***R v Thorburn***, 2010 ABQB 390, 500 AR 1; ***Olumide v Ontario***; ***Parchment v British Columbia***, 2015 BCSC 1006). While Parliament could possibly authorize such a refusal or screening process, in the interval, any further court access restrictions which address the *Criminal Code*, ss 504, 507.1 private information procedure will have to be made under the supervisory authority of a superior court of inherent jurisdiction: Jacob, "Inherent Jurisdiction" at 48-49.

[877] Arguably, there is inconsistent jurisprudence as to whether a superior provincial court may act as a 'gatekeeper' to the private information process. The Manitoba Court of Appeal in ***Manitoba v Lindsay #2*** confirmed a lower court decision (***Manitoba (Attorney-General) v Lindsay*** (1997), 120 Man R (2d) 141, 13 CPC (4th) 15 (Man QB)) where the Crown sought and received an order that prohibited Detaxer guru, David Kevin Lindsay, from swearing private informations, except with leave of a judge of the Manitoba Court of Queen's Bench. Lindsay in the previous several years had submitted 28 private informations against police officers and court staff. However, the Lindsay cases were decided before Parliament implemented the *Criminal Code*, s 507.1 pre-enquete hearing process, so their value as precedent is unclear.

[878] Ontario court decisions have subsequently concluded that, although superior courts of inherent jurisdiction have jurisdiction to potentially regulate the private information process, pre-enquete hearings render other gatekeeping functions unnecessary (***R v Jogendra***, 2012 ONSC 3303 at paras 61-67, aff'd 2012 ONCA 834, leave to appeal to SCC refused, 35211 (25 April 2013)), and to impose an absolute prohibition on access to private informations is not lawful (***Olumide v Ontario***, at para 19). I agree with that. The Courts' inherent jurisdiction cannot operate in conflict with the *Criminal Code*, and close off a positive right authorized by that legislation: Jacob, "Inherent Jurisdiction" at 24.

[879] That said, Canadian courts have, in some instances, imposed additional requirements to better manage abuse of the *Criminal Code* private information process. In ***Her Majesty the Queen in Right of Ontario v Strang***, 2018 ONSC 2648 at para 2, Dunphy J reports that he had prohibited an abusive litigant from laying any private informations until outstanding cost awards were paid.

[880] Starting with ***Lee v Canada #2***, at paras 160-164, this Court has, in certain instances, expanded an order that requires lawyer representation to include that the vexatious litigant may only lay a *Criminal Code*, ss 504, 507.1 private information while represented by a lawyer. Since this additional step imposes further potential cost on the abusive litigant, there must be a basis for why this additional step is fair and proportionate.

[881] This Court has ordered lawyer representation to lay private informations where the abusive litigant:

1. has already laid abusive private informations (e.g. ***McKechnie #1***, at paras 20-22, 30, court access restricted ***McKechnie #2***, at para 32; ***Olumide v Alberta***, at para 72);
2. has explicitly indicated he or she intends to pursue criminal prosecution of the abusive litigant's targets (e.g. ***Lee v Canada #2***, at para 160; ***Knutson #2***, at para 26; ***Paraniuk v Pierce***, at paras 120-121);

3. is an OPCA litigant affiliated with an OPCA group that abuses the *Criminal Code*, ss 504, 507.1 procedure, such as the "Church of the Ecumenical Redemption International" (e.g. ***Knutson #2***, at para 26; ***Potvin #2***, at para 17), or is an OPCA guru and litigation entrepreneur (e.g. ***Landry #2***, at para 56);

4. has a broad and persistent history of abusive litigation, so that attempts to expand abusive litigation avenues are foreseeable (e.g. ***Hill #1***, at para 125; ***ALIA v Bourque #3***, at paras 201-204; ***Potvin #2***, at para 17; ***IntelliView v Badawy #1***, at para 160); and

5. is a litigation terrorist (e.g. ***McKechnie #2***, at paras 31-32; ***Lymer (Re) #3***, at para 135).

[882] Cases which report on the fourth category above have highlighted that these are creative and determined litigants who either have demonstrated or are likely to 'work around' court-imposed obstacles, or locate new avenues to continue attacks on their targets. For example, Campbell J in ***IntelliView v Badawy #1***, at para 160, observed the abusive litigant was "... both persistent and creative in his attempts to resist and harass opposing parties, their counsel, and third parties ...". This reasoning was confirmed on appeal: ***IntelliView v Badawy #2***, at para 15.

[883] *Criminal Code*, s 810.1(1) permits "[a]ny person who fears on reasonable grounds" may lay an information concerning someone who will commit a sexual offense in relation to a person "under the age of 16 years". While I am unaware of any abusive litigant using *Criminal Code*, s 810.1(1) as a mechanism to lay a spurious and/or harassing information, I see no reason why a court may not also require lawyer representation for that procedure as well.

h. Fee Waiver Limitations

[884] While the legislatures and Parliament may impose fees to file documents and initiate an action in court, there is a constitutional requirement that persons with limited means are not denied access to the court due to undue hardship caused by those filing fees: ***Trial Lawyers***. To comply with this requirement, the Alberta Minister of Justice issued Ministerial Order, "M.O.J 18/2015", dated April 21, 2015, which requires the court clerk "shall" waive certain fees where "... the court clerk or registrar (or designate) is satisfied that the applicant's gross family income ... does not exceed [a threshold]".

[885] However, the Ministerial Order continues to indicate a fee waiver may not be granted where a person has been subject to court access restrictions via *Judicature Act*, ss 23-23.1:

> ... where an individual is subject to an order under section 23.1(1) or (4) of the Judicature Act (Vexatious Proceedings) which is binding on the Court, the individual may not apply for a waiver of fees applicable to that Court in accordance with these guidelines, unless the individual has obtained leave from the Court under s. 23.1(7) of the Judicature Act to institute or continue the proceedings.

The Minister has therefore explicitly concluded that court filing fees are a fair and proportionate step where a court has concluded that prospective court access restrictions are appropriate to manage a vexatious litigant. It is not obvious to me why the Ministerial Order, however, does not institute a parallel result for a vexatious litigant order issued under the *Family Law Act*.

[886] This Court has an inherent jurisdiction to cancel fee waivers: ***Loughlin #2***, at paras 36-43, adopting ***Ellis v Wernick***, 2017 ONSC 1461 at paras 7-11. In parallel with the step mandated by the Ministerial Order, this Court may therefore prohibit an abusive litigant from using an existing fee waiver, or obtaining a further fee waiver, without permission of the Court. This step is fair and proportionate, since as Chief Justice McLachlin indicated in ***Trial Lawyers***, at para 47, filing fees that deter abusive litigation are a valid step that "... may actually increase efficiency and overall access to justice ...".

[887] A parallel fee waiver cancellation was also recently imposed by the Alberta Court of Appeal on vexatious litigant Alex Martinez: ***Martinez v Chaffin*** (13 February 2019), Calgary 1901-0024AC (Alta CA).

[888] This Court's usual approach is that if it grants leave to initiate a court proceeding, then it will also order a fee waiver, if a fee waiver was requested by a qualifying litigant: e.g. ***Latham (Re) #1***. Ontario follows the same approach: ***Caplan v Atas***, 2018 ONSC 7093 at paras 3-4.

[889] Unlike other additional court access restrictions, I conclude cancelling fee waivers and prohibiting applications for new fee waivers is always fair and proportionate whenever the Court imposes a prospective leave to initiate or continue litigation requirement on an abusive litigant. That was the Minister's conclusion. I see no reason why the Court should operate any differently.

[890] I therefore recommend that any vexatious litigant order which imposes prospective court access restrictions steps also include clauses that cancel existing fee waivers, and prohibit any application to the Clerks for a new fee waiver, except with permission of the Court. Examples of these clauses are found in Part V(B)(5), para [1010], sub paragraphs 9-10.

J. Content of Court Access Restriction Orders and Ancillary Restrictions

[891] It is helpful to review the appropriate content, terms, and structure of vexatious litigant orders and interim court access restriction orders. This Court has, over the past several years, developed a standard form document. Most decisions that impose court access restrictions detail exactly the scope and form of those restrictions. These orders also include ancillary clauses, which I will discuss below. This current detailed court order is an evolved descendant of the Court of Appeal vexatious litigant order issued in ***Henry***.

1. Orders Must Provide Adequate Guidance

[892] The present approach taken by this Court to these orders is based around a very important observation made by Browne J in ***KE***, at paras 35-38. Persons who are subject to court access restriction orders will typically be SRLs. Per ***Pintea*** and the *SRL Statement*, courts should give clear guidance to a SRL subject to gatekeeping restrictions so that the SRL may "... make informative and focussed applications ...": ***KE***, at para 36. That means the SRL should know:

1. the authority on which the court access restrictions were imposed,
2. what specific litigation activity is restricted, and in what forums,
3. any preliminary requirements or preconditions necessary prior to an application for permission to take a litigation step,
4. the documents and information required for a proper leave application,
5. to what judge, judges, or court official the application should be directed,

6. in what forum or forums the permission request will be evaluated, and

7. whether notice to other parties is required, or per the court's direction.

[893] In my opinion, Justice Browne is correct that fairness means providing the necessary information that permits meaningful, informative leave submissions. This objective can be met in several ways. The Supreme Court of British Columbia took leadership to outline the mechanism and requirements to seek leave in an Administrative Notice: "AN-16 - Vexatious Litigants - Request for Leave to File Process or Document", dated August 15, 2018. This Court has instead opted for detailed court orders that guide SRLs through the leave process. Quebec has provided instructions in the *Regulation of the Superior Court of Québec in civil matters*, CQLR c C-25.01, r 0.2.1, ss 70-71. Any of these approaches works - the critical point is that an abusive litigant who is subject to prospective court gatekeeping functions should know how to seek permission to continue or initiate non-abusive litigation.

[894] I stress this information is particularly important where a court orders that an unsuccessful leave application is final, which is the usual practice of this Court, and where there is no appeal of a decision that denies permission to initiate or continue litigation, such as *Rule* 14.5(4). Naturally, it is very important that a vexatious litigant order warn of the former restriction, see for example Part V(B)(5), para [1010], subparagraph 6.

[895] Usual leave to file procedures for the Alberta Court of Appeal, and the Alberta trial courts, are indicated below, at Part V(B)(5) para [1010], subparagraphs 3 and 4, respectively.

[896] My approach is that the leave process should be flexible. For example, if application materials appear to indicate a viable action, but perhaps a single element is missing to confirm that, I would identify that gap, and invite the person(s) subject to court access restrictions to see if they might address that issue. Where appropriate, the Court should engage in additional steps or seek further submissions. This is a particularly true for leave applications by SRLs.

[897] For example, in ***Gauthier (Re) #2***, the vexatious litigant submitted materials that did not comply with the terms of his vexatious litigant order. However, in light of him identifying what appeared to be an unfair foreclosure process, I permitted the opportunity to make a new compliant leave application.

[898] Nevertheless, if the applicant treats the leave process as a hollow formality (e.g. ***Lee v Hache #2***), ignores or defies the requirements of the leave process (e.g. ***Thompson (Re) #2***; ***Thompson v ALRB #2***), or exhibits continuing characteristics of abusive litigation (e.g. ***ATB v Hok #1***; ***Trinity***), then there is no need for any additional steps. The Court should proceed to immediately reject that leave application.

[899] In other words, where an abusive litigant appears to have engaged the court in good faith, that should be acknowledged by a flexible, supportive response.

2. Ancillary Restrictions

[900] Most of this Court's interim and indefinite court access restriction orders include a number of ancillary clauses.

[901] First, the order requires that any application for leave or other documents by a litigant use the abusive litigant's specific name, and "... not by using initials, an alternative name structure, or a pseudonym." (see Part V(B)(5), para [1010], subparagraph 2). This clause has several purposes. First, a specific name is important as that is how the Court Clerks and other staff

identify whether a litigant is or is not subject to court access restrictions, since existing court access restriction orders are indexed by name.

[902] Second, some abusive litigants use variant names which they say are their true selves, and that supposedly distinguish their "flesh and blood" human being identity from other purportedly separate pseudolegal entities. This usually relates to OPCA "Strawman" doppelgangers, such as when vexatious litigant Stephanie-Lynn Leadbetter called herself "Stephanie-Lynn: House of Leadbetter (sui juris) Estate dignitary": ***Leadbetter***. Sometimes these alternative names are even more fanciful, such as Sean Wesley Henry, who prefers to be known as "Chief :Nanya-Shaabu: El of the At-sik-hata Nation of Yamasee Moors": ***Meads***, at para 189. Mandating that any future filings with the courts will involve a specific name facilitates effective communication and enforcement of gatekeeping functions.

[903] A second standard ancillary element of vexatious litigant orders imposes the fee waiver restrictions I have previously identified in Part IV(I)(4)(h), above. This clause will normally be a part of any court access restriction order of this Court. Sample clauses of this kind are found at Part V(B)(5) para [1010], subparagraphs 10-11.

[904] Third, any of this Court's interim or vexatious litigant court access restriction orders (***MacKinnon #2***, at paras 95-96) should have a clause that prohibits the abusive litigant:

1. from providing legal advice,
2. preparing court documents for other persons,
3. communicating with the court except on his or her own behalf, and
4. acting as an agent, next friend, or McKenzie Friend ((from ***McKenzie v McKenzie***, [1970] 3 All ER 1034 (UK CA) and *Rules* 2.22-2.23).

[905] There are many reasons these prohibitions are important, fair, and proportionate. First, this requirement blocks "busybody" litigation: ***Templanza #1***, at paras 121-122, 138-139.

[906] Second, this step inhibits attempts by an abusive litigant to conceal his or her identity behind proxy actors and thereby evade court access restrictions. For example, vexatious litigant Neil Lymer filed lawsuits as "Neil A. Lymer and Associates", though it appears Lymer himself was still the plaintiff of the actions: ***Lymer (Re) #3***, at paras 82, 91. He used this spurious name in an attempt to confuse his role in that abusive litigation. Similarly, vexatious litigant Van Vuong appears to have made false or questionable claims concerning whether real properties are owned by him or his company: ***Vuong Van Tai Holding / Q5 Manor v Wilson*** (8 October 2015), Edmonton 1503 14640 (Alta QB).

[907] Other times abusive litigants use corporations as the vehicles for their misconduct: e.g. ***644036***, at paras 100-101; ***1158997***.

[908] Third, this Court has repeatedly encountered vexatious SRLs attempting to intrude into third party litigation as advisors, pseudolawyers, and as 'for pay' entrepreneurs. Here are a few Alberta examples:

- Vexatious litigant Wael Badawy operated the "Standforyourself.com" website where he promoted his "The WIN your case court coaching system" to SRLs, promising proven techniques that "empower self-represented litigants": ***IntelliView v Badawy #1***, at paras 51-57. Badawy went so far as to advertise his services on the website operated by the

> National Self-Represented Litigants Project, an organization that publishes reports about SRLs and provides a "National Directory of Professionals Assisting SRLs", which included Badawy's website. Badawy's extremely abusive litigation conduct in Alberta and Federal courts led Campbell J to conclude in ***IntelliView v Badawy #1*** that Badawy "... is a litigant who uses legal processes with the intention to harass, harm, and intimidate." - a litigation terrorist.

- OPCA guru Dean Christopher Clifford, and his private corporation, purported to provide debt elimination services, after he was "assigned" a "Birth Certificate Cestui Que Trust" by "a Notarized Private Security Agreement": ***Landry #2***. Clifford's materials claimed Landry had discharged her mortgage debt with an ounce of silver. Clifford was, as a result, made subject to strict court access restrictions.
- *Habeas corpus* entrepreneur Brook McCargar prepared other inmates' court materials, and attempted to act as their court representative. After being told to desist, he ignored those instructions: ***Badger***; ***McCargar #2***.
- A second *habeas corpus* entrepreneur, John Mark Lee Jr, prepared court filings and other materials for multiple court applications, with Lee himself filing the materials and otherwise communicating with the Clerks on behalf of his "clients": ***Lee v Canada #2***. I have previously explored the personal and proxy litigation misconduct by this vexatious litigant.
- In ***VWW***, the vexatious litigant purported to continue litigation on behalf of her dead sister's ghost.

[909] This is not just an Alberta-specific phenomenon. For example, recently the Manitoba Court of Appeal encountered a similar situation, and refused to permit representation by a vexatious litigant with some legal training: ***7451190 Manitoba Ltd v CWB Maxium Financial Inc***, 2019 MBCA 28. See also ***Prefontaine v Canada #1***, at para 15; ***Law Society of British Columbia v Boyer***, 2016 BCCA 169 at para 18, 381 BCAC 260; ***Holland v Marshall***, 2009 BCCA 199 at para 14, rejected as representative ***Holland v Marshall***, 2009 BCCA 311 at paras 39-48.

[910] Fourth, any court has not merely an authority, but an obligation, to ensure that persons who appear as litigation representatives are qualified for that role. This is an aspect of the court's inherent jurisdiction: Jacob, "Inherent Jurisdiction" at 46-48; Dockray at 120, 126. As the British Columbia Court of Appeal observed in ***R v Dick***, 2002 BCCA 27 at para 6, 163 BCAC 62 [***Dick***], being a litigation representative is "a privilege", "it lies within a court's discretion to permit or not to permit a person who is not a lawyer, to represent a litigant in court.", and permitting non-lawyer representation should be "exercised 'rarely and with caution'", citing ***Engineers' and Managers' Association v Advisory, Conciliation and Arbitration Service (No 1)***, [1979] 3 All ER 223 at 225 (UK CA); ***O'Toole v Scott***, [1965] 2 All ER 240 at 247 (UK PC); and ***Venrose Holdings Ltd v Pacific Press Ltd*** (1978), 7 BCLR 298 at 304 (BCCA). The Court then concludes at para 7:

> ... Each court has the responsibility to ensure that persons appearing before it are properly represented and (in the case of criminal law) defended, and to maintain the rule of law and the integrity of the court generally. ...

[911] See also ***R v Crooks***, 2011 ABCA 239, 510 AR 364.

[912] Where a person has acted as an abusive litigant or conducts themselves in an abusive manner, then that is a basis to reject the abusive litigant status as a litigation representative: ***Dick***, at paras 16-17; ***Perreal v Knibb***, 2014 ABQB 15 at para 36, 8 Alta LR (6th) 55; ***Hill v Hill***, 2008 SKQB 11 at para 30, 306 Sask R 259; ***R v Main***, 2000 ABQB 56 at para 36, 259 AR 163; ***Gauthier v Starr***, at paras 54-56; ***Prefontaine v Canada #1***, at para 15; ***Peddle v Alberta Treasury Branches***, 2004 ABQB 608 at paras 42-53, 133 ACWS (3d) 253; ***R v Reddick***, 2002 SKCA 89 at para 6, 54 WCB (2d) 646; ***Law Society of British Columbia v Dempsey***, 2005 BCSC 1277, 142 ACWS (3d) 346, aff'd 2006 BCCA 161, 149 ACWS (3d) 735; ***Boyer***, at paras 32-33, 38. The authority and obligation to control problematic representation by abusive litigants also extends to statutory courts: ***Shannon v The Queen***, 2016 TCC 255, 2016 DTC 1204.

[913] Last, whenever a court order potentially affects litigation at more than one court, then it is very important to include an ancillary clause that permits the other courts as an authority to vary the terms of the vexatious litigant order in relation to that court. See Part V(B)(5) para [1010], subparagraph 13 for an example of that clause. A clause of this kind is particularly important where a 'superior' court imposes a court access restriction scheme that also operates in a 'subordinate' court, so as to permit the lower court to take any necessary steps that may arise.

[914] One example that illustrates the need for this authority was a recent instance where the Alberta Court of Appeal issued a court access restriction gatekeeping order which required that a specific judge of this Court receive and review any leave application which the vexatious litigant submitted to that Court. The issue that emerged was that a leave application was submitted where the designated judge had a possible conflict of interest given the proposed defendant. This example is only one of many possibilities where an unanticipated factor may lead to unintended consequences and complications. A pre-emptive solution is the better approach, and also permits the courts on their own motion to update existing court access restriction schemes in response to evolving legislation and common law developments.

3. Lawyers Preparing Court Access Restriction Orders

[915] In the past several years, the majority of interim and vexatious litigant court access restriction orders issued by this Court were also drafted by the Court itself. While this adds to the Court's workload, court-prepared and issued orders have provided a consistent set of court access restrictions, developed procedures and guidelines for SRLs to seek leave per ***KE***, and helpful ancillary restriction clauses.

[916] That said, sometimes lawyers have prepared court access restriction orders. That will likely occur more often in the future. I hope these Reasons will assist in that process.

[917] Unfortunately, I must report that some of the court access restriction orders prepared by lawyers have had serious shortcomings. For example, the vexatious litigant order associated with ***Al-Ghamdi*** simply states:

> Dr. Al-Ghamdi is declared a vexatious litigant and is prohibited from bringing further proceedings against [the defendant] without the Court's permission. The operation of the vexatious litigant order is stayed for 30 days in order for notice to be given to the Minister of Justice and Solicitor General.

[918] Obviously, this order could have been better drafted. The authority on which this step was taken is not identified (it was the *Judicature Act*). The scope of the order is adequately clear, since it identifies the kind of litigation subject to gatekeeping with sufficient specificity for the

Clerks to enforce the order, but it would have been helpful to clarify the jurisdiction(s) where those restrictions operate. The major shortcoming is that the order provides no guidance at all as to how the abusive litigant, a SRL, should proceed to obtain leave to institute further future proceedings, contrary to the instruction in ***KE***. Similarly, standard ancillary restrictions would have been preferable.

[919] In the future when Alberta lawyers prepare draft court access restriction orders it would be preferable if they refer to the outline I have provided above, and review recent decisions of this Court that impose vexatious litigant restrictions to incorporate provisions that ensure these orders are complete, provide adequate detail, and provide fair guidance to an abusive, potentially unrepresented person, per ***KE***.

[920] As I have previously indicated, this ultimately is a question of fairness, and the obligations of the court and lawyers to SRLs to ensure access to justice. If the judge's instructions would result in an order where the scope of the court access restrictions is unclear, or cannot be meaningfully enforced, the lawyer should return to the judge to seek instructions and clarification. Ineffective vexatious litigant orders benefit no-one, including the vexatious litigant.

K. Costs

[921] My review of the recent Alberta case law relating to vexatious litigant orders indicates there appear to be two usual responses to whether costs are ordered after a vexatious litigant order is imposed.

[922] When a vexatious litigant order is the result of a party's application, costs have been awarded, pursuant to the presumption that a successful party is due costs per *Rule* 10.29(1). That has usually been a lump sum amount award: e.g. ***Templanza v Ford***, 2018 ABQB 422 at para 7; ***ALIA v Bourque #3***, at paras 215-217; ***IntelliView v Badawy #1***, at paras 165-167; ***Makis #1***, at para 94; ***Paraniuk v Pierce***, at paras 140-143; ***Biley v Sherwood***, at paras 175, 180-181; ***Hill v Bundon***, 2019 ABQB 118 at paras 6-7 [***Hill #2***].

[923] Where the abusive litigant has acted in bad faith, been in contempt of court, or attempted to frustrate the court access restriction litigation process, then elevated costs (e.g. ***ALIA v Bourque #3***, at paras 214, 217; ***IntelliView v Badawy #1***, at para 165; ***Makis #1***, at para 94), or partial indemnity costs (***Hill #2***, at para 7) have been ordered.

[924] I strongly recommend the lump sum approach. As Green CJNL observed in ***Fiander***, at para 56, when responding to abusive litigation, lump sum cost awards are an appropriate step "... to bring this proceeding to a conclusion and to send a message that this type of litigation will be dealt with swiftly and decisively ...".

[925] When a vexatious litigant order is the result of the Court acting on its own motion then costs are not usually ordered. This makes sense. The remedy here is the vexatious litigant order itself, and any other court access restrictions that are imposed.

[926] ***1985 Sawridge Trust v Alberta (Public Trustee)***, 2018 ABQB 213, 69 Alta LR (6th) 343 [***Sawridge #9***] is the one instance I identified where costs were ordered in favour of parties to litigation when the court initiated the vexatious litigant order process. The situation here was unusual. A lawyer represented the vexatious litigant, and after acknowledging she had engaged in repeated and abusive collateral attacks on prior litigation (***Sawridge #7***), that lawyer then reneged on her prior statement, and resumed the same vexatious arguments as previously employed (***Sawridge #8***). Another atypical aspect of this litigation was the other parties involved

were substantially affected by this litigation, in one instance the target being a trust holding property for an aboriginal community, the other an Indian Band whose membership process was under attack.

[927] While that result may be warranted in this instance, ***Sawridge #9*** appears to be an outlier off the usual pattern. I therefore conclude that in most instances when a person is subject to a vexatious litigant order made on the court's own motion that no cost award should also be imposed against the vexatious litigant.

L. Conclusion - Vexatious Litigant Restrictions

[928] In summary, the process followed when a court considers whether to impose court access restrictions has the following steps:

1. Conduct a broad-based review to identify potentially relevant information concerning the candidate abusive litigant, his or her dispute-related activities, including demeanor and statements of intent.
2. Evaluate the available information for indicia of abusive litigation, and whether, in the context of this litigant, those indicia plausibly predict future abusive litigation conduct. If so, court intervention is warranted.
3. Is the anticipated abusive litigation constrained within a particular dispute? If so, a *Grepe v Loam Order* should be issued, immediately. If the plausible future litigation abuse satisfies the threshold criterion and extends into multiple disputes, or involves hypothetical litigation, then a vexatious litigant order may be appropriate. Interim court access restrictions should always be imposed, immediately.
4. Has the candidate vexatious litigant had an adequate opportunity to make submissions as to whether court access restrictions are appropriate? This requirement is probably satisfied if this analysis is the result of an application by an opposing party which has led to a hearing which considered whether court access restrictions should be imposed. If the court is acting on its own motion then the document-based two-part ***Hok v Alberta #2*** process should usually be followed. Written submissions and affidavit evidence are received from the involved parties.
5. Given the plausible anticipated future litigation misconduct, is it fair and proportionate to impose a leave requirement to initiate or continue litigation? In most instances this step is fair and proportionate, since a simple permission gatekeeping requirement is a minimal screening infringement on access to court processes, and does not impose an undue burden. A leave requirement does not deny access to the court.
6. Determine what is the fair and proportionate scope of the leave gatekeeping restriction, in relation to:

    a) the kinds of litigation affected,

    b) the parties who are involved in the restriction, and

    c) what courts or other forums are affected by the leave requirement.

Equivalent gatekeeping steps are usually appropriate for the Provincial Court of Alberta. Global gatekeeping restrictions are appropriate for the Alberta Court of Appeal, per *Rule* 14.5. The scope of any leave requirement must be sufficiently specific so that the court's instructions to affected parties are clear, and so that the vexatious litigant order can be enforced by the Clerks of the Court. Where the court cannot design a narrow and enforceable vexatious litigant scheme, then the leave requirement should be global.

7. Evaluate any potential requirement for additional, more intrusive court access restrictions, such as lawyer representation, payment of costs, personal appearances, and communications limits. The critical question is whether, given the abusive litigant's plausible anticipated conduct, is it fair and proportionate to impose any of these additional steps, or do they represent an undue hardship in this specific context?

8. Prepare a detailed set of court access restrictions, with appropriate exceptions to take into account other ongoing litigation and existing court access restrictions imposed by other *Grepe v Loam* and vexatious litigant orders. Terminate any interim court access restrictions. At a minimum, this order must:

    a) indicate the authority under which it is issued,

    b) clearly identify the litigation and forums which are now subject to gatekeeping steps,

    c) explain what process and materials the vexatious litigant must provide to seek leave from affected courts, including:

        1) preconditions to seek permission,

        2) documents and information required,

        3) the judge, judges, or court official to whom the application should be directed, and

        4) the mechanism by which the leave application will be evaluated, and

    d) appropriate ancillary clauses.

[929] Justice Ribeiro in ***Ng***, at para 112, captures the objective of the overall process:

> ... it is important that the scope of the restraint is clear and that, supported by any desirable ancillary directions, it consciously aims to promote, in a workable manner, the objectives of preventing abuse at minimum cost to the vexed party and to the courts, in terms of time, effort and money.

[930] Whatever else, court access restrictions must be a *functional* response to abusive litigation.

V. SHOULD UNRAU BE SUBJECT TO ONGOING COURT ACCESS RESTRICTIONS?

[931] Now that I have completed a general review of the principles and processes involved in imposing vexatious litigant orders and other court access restrictions, I will next return to the issue of whether the interim court access restrictions imposed in ***Unrau #1*** should be continued in some form, or vacated, as against Unrau.

A. Procedural Fairness When Evaluating and Imposing Vexatious Litigant Orders

[932] The first question is whether I may now immediately proceed to evaluate if Unrau should be subject to court access restrictions, or instead must the Court enter into a ***Hok v Alberta #2*** two-part procedure where it:

1. issues a decision identifying indicia of abusive litigation that may warrant prospective court access restrictions,
2. invites submissions from the affected person, Unrau, and
3. issues a further judgment which then finally determines whether or not Unrau's conduct, including the abusive and unmeritorious Statement of Claim he filed on August 29, 2018, is a sufficient basis for the Court to impose gatekeeping functions by a vexatious litigant order.

[933] At first glance, the answer appears to be very simple. In ***Lymer v Jonsson***, Costigan JA concluded that "... [t]he rules of natural justice require courts to provide an opportunity to be heard to those who will be affected by a decision ..." (para 3) and "[t]hese principles apply to vexatious litigant orders" (para 4), citing ***Kallaba***.

[934] Justice Costigan continued to say this is not an absolute rule. He acknowledged that the Alberta Court of Appeal has, in fact, dispensed with a separate hearing or process prior to imposing vexatious litigant sanctions, identifying ***R v Grabowski #4*** as an example. The difference is "... given the history of the proceedings, the appellant was not taken by surprise by the issuance of a vexatious litigant order on the Court's own motion ...": para 4.

[935] I have previously alluded to this "no surprise" rule, and how it is difficult for this Court to evaluate. For that reason this Court has only, in a few instances, proceeded to directly issue ongoing court access restrictions via a vexatious litigant order. Most post-2016 litigation instead follows the two-step ***Hok v Alberta #2*** procedure.

[936] Other judges have observed there are deeper issues with ***Lymer v Jonsson*** and the "no surprise rule": e.g. ***Hok v Alberta #2***, at paras 12-13; ***Ewanchuk v Canada (Attorney General)***, at paras 97-98; ***McCargar #1***, at para 113; ***ALIA v Bourque #3***, at paras 93-100; ***Lymer (Re) #3***, at paras 20-24. I agree.

[937] These decisions highlight two points. First, the Alberta Court of Appeal does not seem to always follow the "no surprise" rule.

[938] Second, these decisions observe that it is difficult to understand how the abusive litigant Lymer would have been factually surprised, since the same litigation misconduct which led to him being made subject to a vexatious litigant order had previously been examined, evaluated, and criticized when Lymer was found in contempt of court. Lymer during his earlier litigation had made submissions his actions were not frivolous or vexatious: ***Lymer (Re) #3***, at para 13.

The Master hearing the contempt application specifically applied the ***Chutskoff #1***, at para 92, indicia to evaluate Lymer's actions, and in a detailed analysis concluded Lymer's court conduct exhibited five separate abusive litigation indicia categories: 1) collateral attacks, 2) escalating proceedings, 3) bringing proceedings for improper purposes, 4) persistently taking unsuccessful appeals, and 5) unsubstantiated allegations of conspiracy, fraud, and misconduct: ***Lymer (Re) #3***, at paras 85-113. This all occurred *prior* to Lymer being made subject to a *Judicature Act*, ss 23-23.1 vexatious litigant order: ***Lymer (Re) #2***. Then that contempt and abusive conduct was confirmed by the Alberta Court of Appeal in ***Lymer v Jonsson***, 2018 ABCA 36, leave to appeal to SCC refused, 38042 (27 September 2018).

[939] Third, I note that if the appropriate approach is a purely subjective "no surprise" test, then that is not workable. Many abusive litigants honestly, but incorrectly, believe their litigation misconduct is valid and justified. They will always be "surprised" by a vexatious litigant order. To be fair, ***Lymer v Jonsson*** does not indicate a subjective test, but also does not appear to exclude it.

[940] However, the reason I am going to look deeper and evaluate the rule in ***Lymer v Jonsson*** is because the Alberta Court of Appeal has already ruled that there is no absolute prohibition on prospective court access restrictions that exceed the scope of a *Grepe v Loam Order*, and which were made without notice. Mandziuk J in ***ALIA v Bourque #1***, imposed interim court access restrictions without notice to the mother and son abusive litigant duo. They then appealed that, arguing ***Lymer v Jonsson*** prohibited that step without notice. The abusive litigants claimed that in these circumstances they had an absolute right to litigate and their procedural fairness rights had been trampled. That argument was dismissed by the Court of Appeal (***ALIA v Bourque #2***, at para 6), and subsequently by Justice Mandziuk (***ALIA v Bourque #3***, at paras 93-100) when he imposed strict global court access restrictions on the abusive litigants.

[941] I believe that this is an instance where it is helpful to go to first principles and examine what are the fairness rights and interests in play when it comes to vexatious litigant orders. In doing this, I observe that in ***Weir-Jones*** our Court of Appeal has stressed that in the post-"culture shift" era, it may sometimes be necessary and appropriate to depart from earlier authorities. What matters is that legal procedures meet the present needs of court participants, and the court apparatus. "[U]ndue process" is a real issue, and itself can lead to unfairness, "unnecessary expense and delay", and "prevent the fair and just resolution of disputes": ***Hryniak***, at para 24.

1. How Does a Vexatious Litigant Order Affect Rights?

[942] In light of my taking a broader look at the procedural fairness requirements to court actions which impose court access restrictions, I will first examine the implications of court access restrictions in light of ***Baker v Canada (Minister of Citizenship and Immigration)***, [1999] 2 SCR 817, 174 DLR (4th) 193 [***Baker***]. Justice L'Heureux‑Dubé in that benchmark decision concluded that the importance of the decision to the affected individual is a critical factor to evaluate what degree of procedural fairness is required by law (para 25):

> ... The more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated. ...

[943] As I have previously indicated, case law illustrates two very different views of what a vexatious litigant order does, and how it affects the rights of abusive litigants. The Traditional

Jurisdiction view is that orders of this kind are an extraordinary imposition on personal rights: e.g. ***Winkler***; ***Kallaba***; ***Green***, at para 28; ***Olympia***, at para 6. The Modern Approach says a vexatious litigant order does not take away rights. These court access restrictions are a form of gatekeeping, or screening: e.g. ***Wong***, at para 8; ***Bossé v Immeubles***, at para 38; ***Grenier***, at para 34; ***Olumide v Canada***, at paras 26-29; ***Wood #2***, at para 35; ***IntelliView v Badawy #2***, at para 17.

[944] ***Lymer v Jonsson*** relies on ***Kallaba***, which characterizes vexatious litigant orders as "... an extraordinary remedy that alters a person's right of access to the court. ...": para 31. That is the Traditional Jurisdiction perspective.

[945] I disagree with this view. *Many* Canadian appellate authorities say a vexatious litigant order is simply a gatekeeping and screening procedure. As I have previously indicated, when viewed critically, the leave requirement is not a high imposition on the affected abusive litigant. They can still file lawsuits and applications. They can still initiate appeals. They merely have to establish some potential merit, and that their proposed action is not abusive. As Stratas JA observed in ***Olumide v Canada***, this is screening and court management of proceedings, not taking away rights. See also ***Wong***, at para 8; ***Bossé v Immeubles***, at para 38; ***Grenier***, at para 34; ***Wood #2***, at para 35; ***IntelliView v Badawy #2***, at para 17.

[946] I therefore question whether there is a high degree of procedural fairness required prior to imposing court access restrictions via a vexatious litigant order. Such orders only apply to litigants who have been found abusive - there is no such order for law abiding litigants. The impact of this step is both legitimate and minimal. It does not affect the substantive litigation rights of the affected vexatious litigant to engage in *legitimate* litigation. Admittedly, a vexatious litigant order has a dramatic effect on the ability of a vexatious litigant to initiate or continue *abusive* litigation, but a vexatious litigant has no constitutional right to do that: ***Trial Lawyers***, at para 47. It would be strange if procedural fairness *protects illegal conduct that impedes court function and harms third parties*.

2. Legislative Intent

[947] A second factor identified by Justice L'Heureux‑Dubé in evaluating the need for procedural fairness is to look to the statutory scheme in which the alleged unfairness is set: ***Baker***, at para 24.

[948] Here, the Alberta Legislature has taken an interesting step. As I have previously discussed, when the new Court of Appeal Rules were implemented, *Rule* 14.5(1)(j) automatically imposed global Alberta Court of Appeal vexatious litigant restrictions on any litigant who is subject to a vexatious litigant order issued by either the Provincial Court of Alberta, or this Court. As explained earlier, this *Rule* potentially imposes *broader* appeal subject restrictions on the litigation activity of the abusive litigant before the Alberta Court of Appeal, versus the lower court(s) that initially identified the abusive litigant as requiring gatekeeping steps via a vexatious litigant order.

[949] From the Traditional Jurisdiction perspective, *Rule* 14.5(1)(j) is a draconian step. The Legislature has unilaterally expanded the 'zone of restriction' of an abusive litigant. That will occur even when there is *no evidence at all* that would have led the judge who issued the vexatious litigant order to conclude abuse of the Alberta Court of Appeal's processes was in any sense plausible.

[950] The alternative explanation is that the Alberta Legislature now subscribes to the Modern Approach. It has made a policy decision: when a trial level judge concludes that the conduct of an abusive litigant in his or her court warrants a vexatious litigant order, then it is good policy to always secure the Alberta Court of Appeal from any potential abuse by imposing a pre-appeal gatekeeping step on that vexatious litigant.

[951] The Alberta Legislature is constitutionally prohibited from imposing a court access regime that causes undue hardship: ***Trial Lawyers***, at para 46. The legislature is presumed to draft legislation with knowledge of the related legislation, common law, and "... the problems its legislation is meant to fix. ...": Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed (Markham: LexisNexis, 2008) at 205. If the Legislature concluded that *Rule* 14.5(1)(j) is an appropriate and proportionate restriction, and may be imposed without any judicial process to evaluate its fairness on the individual abusive litigant, then that indicates the Legislature has concluded that the rights impinged and at risk via vexatious litigant order restrictions are minor.

[952] Put another way, the Legislature has concluded that arbitrarily expanding court access restrictions via legislation is not unfair, because the effect on access to justice is not "extraordinary", but something much less.

[953] The Legislature's recent (September 9, 2014) enactments concerning vexatious litigants therefore also leads me to conclude that court access gatekeeping steps do not require a high and strict degree of procedural fairness.

3. Reasons of the Alberta Court of Appeal

[954] In ***Baker***, Justice L'Heureux‑Dubé, at paras 35-44, discusses how, in some contexts, procedural fairness requires a written explanation for a decision. Again, that requirement relates to the kind of interests which are affected by the decision-maker:

> ... in certain circumstances, the duty of procedural fairness will require the provision of a written explanation for a decision. The strong arguments demonstrating the advantages of written reasons suggest that, in cases such as this where the decision has important significance for the individual, when there is a statutory right of appeal, or in other circumstances, some form of reasons should be required. This requirement has been developing in the common law elsewhere. The circumstances of the case at bar, in my opinion, constitute one of the situations where reasons are necessary. The profound importance of an [humanitarian and compassionate] decision to those affected ... militates in favour of a requirement that reasons be provided. It would be unfair for a person subject to a decision such as this one which is so critical to their future not to be told why the result was reached.

[955] Restating that principle, where serious rights are affected, a decision-maker has an obligation to give an explanation for why these serious rights were affected.

[956] Subsequently, in ***R v Sheppard***, 2002 SCC 26, [2002] 1 SCR 869, Binnie J examined how that principle applies to criminal court decisions. This is a question of "... the *articulation* of the reasons rather than of the reasoning itself. ..." [emphasis in original]: para 23. A similar approach applies to review of decisions made by trial judges in civil matters: ***Rockall v Rockall***, 2010 ABCA 278 at paras 26-27, 490 AR 135.

[957] When the Alberta Court of Appeal has imposed vexatious litigant court access restrictions it sometimes does so with minimal reasons. For example, in ***R v Olumide***, the complete analysis at paras 2-3 is:

> ... We have reviewed the filed materials and the oral submissions of Mr. Olumide and we see no arguable merit in this appeal. In our view, it is frivolous and vexatious. We exercise our power under s 685 of the Code and summarily dismiss this appeal.
>
> ... The appellant may not file any applications in the Court of Appeal without writing to Mr. Justice Peter Martin for permission to do so.

[958] In ***Martinez v Chaffin*** (13 February 2019), Calgary 1901 0024AC (Alta CA), an abusive litigant was "... prohibited from filing any further documents in the Court of Appeal ...", however no decision was issued in relation to that step. The Court's order in its preamble provides no explanation for this step.

[959] I note that, in this context, the Alberta Court of Appeal is operating more in a trial court capacity. It has identified and weighed relevant facts, applied the appropriate law, and reached a result.

[960] This is not a consistent practice. In other recent instances where the Alberta Court of Appeal has imposed a vexatious litigant order it is has done so after conducting a full analysis of the abusive litigant's conduct: e.g. ***Lofstrom***; ***Clark #1***.

[961] I am not indicating that the more succinct Alberta Court of Appeal decisions are examples of inadequate reasons. Where I can make some evaluation on the steps taken, such as for example with Ade Olumide in ***R v Olumide***, I fully agree the decision to impose prospective court access restrictions via a vexatious litigant order was correct. My observation here is instead that the Court of Appeal is presumably mindful of its obligation to provide adequate reasons to permit appellate review and explain to the abusive litigant why he or she is now subject to court-ordered gatekeeping protocols.

[962] If imposing court access restrictions is "extraordinary", and strikes at a fundamental right of access to justice and to court remedies, then one would expect detailed reasons that catalogue the relevant evidence, the legal authority on which the Alberta Court of Appeal operated, the tests and factors in question, why an "extraordinary" step was necessary, etc.

[963] My conclusion is simply an inference. Certain decisions issued by the Alberta Court of Appeal indicate it interprets vexatious litigant orders as a housekeeping litigation management step. Slatter JA said as much in ***Wong***, at para 8, when he indicated a "... vexatious litigant order does not substantially prejudice the applicant." I therefore conclude that the Alberta Court of Appeal's jurisprudence is consistent with a lower fairness standard when it comes to imposing vexatious litigant orders.

[964] To be explicit, in coming to this conclusion, I am not recommending that decisions which impose vexatious litigant orders ought to be brief and summary. The recent jurisprudence of this Court, which responds to abusive litigation, has instead provided detailed reasons, including the evidence examined, a clear explanation of the authority and process involved in the exercise of the Court's inherent jurisdiction, and the basis for why court access restriction steps were or were not appropriate. My practice will be to continue to write decisions of that kind, and I encourage other trial judges to do the same.

[965] Doing so not only provides a complete foundation for appellate review, but also has an important public service component. Some SRLs may be concerned about how this Court imposes court access restrictions. The best reply to that is not only *to do justice* by preventing abuse of the court, but also *to show how justice was done* and that result was obtained. Detailed written vexatious litigant decisions provide for that, and given that many abusive litigants are prone to hostile, conspiratorial thinking patterns, that extra effort is warranted.

4. Vexatious Litigant Leave Requirements and Other Responses to Abusive Litigation

[966] I now want to draw a clear line. Up until now I have been examining only the degree of procedural fairness which is implicated by requiring an abusive litigant obtain leave before continuing or initiating litigation.

[967] The situation is very different where a Court evaluates whether an action is *vexatious litigation* and should be struck out or dismissed by summary judgment. Now something substantial is in play - a lawsuit, application, or appeal. The outcome affects rights, and whether that proceeding will continue or end. Terminating an action will usually also mean an unfavourable costs award, or at least the risk of that. In these circumstances, procedural fairness usually requires the opportunity to make submissions with the knowledge of the potential consequences.

[968] That is why, for example, the CPN7 process provides the opportunity for an "apparently abusive litigant" to make submissions. I note that a recent comprehensive academic review of Ontario's equivalent *Rule 2.1* provision concluded that procedural fairness was met in these circumstances, for that very reason: Gerrard J Kennedy, "Rule 2.1 of Ontario's Rules of Civil Procedure: Responding to Vexatious Litigation While Advancing Access to Justice?" (2018) 35 Windsor Yearbook of Access to Justice 243.

[969] Recently, in ***Wilcox v Alberta***, 2019 ABQB 110, Henderson J discontinued a CPN7 procedure to ensure fairness and instead ordered a *Rule* 3.68 hearing with oral argument. Justice Thomas, after oral submissions, struck out the vexatious and abusive *habeas corpus* application in question, and strongly criticized the lawyer who had filed it: ***Wilcox #3***. This example illustrates how the Court's approach is flexible, depending on case-specific circumstances.

[970] In my opinion, under the Modern Approach, imposing a prospective leave requirement is a minimal litigation housekeeping step that does not necessarily create a requirement for a separate hearing or written submissions. However, when the Court considers additional, more stringent court access restrictions, then procedural fairness will usually requires an opportunity for oral and/or written submissions prior to those steps being imposed, particularly if the additional steps have an associated financial cost, such as retaining a lawyer, paying outstanding costs, or a foreign resident being required to travel to appear in an Alberta court, in person.

[971] Framed in the language used in ***Trial Lawyers***, a court access restriction that potentially imposes undue hardship needs to be critically evaluated to ensure the step contemplated is fair and proportionate.

[972] In coming to that conclusion, I note that I have twice, without a two-step ***Hok v Alberta #2*** process, imposed an additional lawyer representation requirement to file a leave application: ***Boisjoli (Re) #1***; ***Gauthier (Re) #1***. The latter decision and its requirement for lawyer representation was confirmed by the Alberta Court of Appeal: ***Gauthier (Re)***, 2018 ABCA 14

[***Gauthier (Re) #3***]. I think no matter how one frames the ***Lymer v Jonsson*** "no surprise" rule, neither of these OPCA litigants (Boisjoli, Gauthier) could either objectively or subjectively claim that result was unexpected. In the case of Gauthier, he was previously designated as a vexatious litigant, and had been specifically cautioned that if he continued to use OPCA strategies then that could lead to a vexatious litigant order: ***Gauthier v Starr***, at para 50. Similarly, Boisjoli had a lengthy history of OPCA-related litigation misconduct, and ended up with vexatious litigant order restrictions after he tried to file and enforce a home-made default judgment issued by a Notary, fraudulently roleplaying as a judge. That was an example of improperly using the Court process for criminal purposes, and vigilante OPCA fake court processes.

[973] The same is true for when this Court immediately imposed stricter court access sanctions on vexatious litigants who had initiated lawsuits by filing documents despite that being prohibited by an existing vexatious litigant order: ***Vuong***; ***Olumide v Alberta***. These were not 'good faith' litigants. They were in contempt of court: ***Lofstrom***, at para 10; ***Clark #1***, at para 16.

[974] In summary, I conclude that if a judge is considering a vexatious litigant order that includes court access restrictions beyond a simple leave permission requirement, then in most instances the better path is to follow the two-step ***Hok v Alberta #2*** procedure to ensure the result is procedurally fair. Once "undue hardship" is a potential consequence of a vexatious litigant order, that elevates the degree of procedural fairness which is required to obtain a fair and proportionate outcome.

5. Does Procedural Fairness Require a Separate Vexatious Litigant Order Process for Unrau?

[975] With all those conclusions, my next question is whether in the current situation, where I have struck out Unrau's Statement of Claim, does procedural fairness require that I then conduct a separate procedure or step prior to potentially imposing a vexatious litigant order and court access restrictions, so that Unrau has another chance to make more submissions?

[976] I conclude no such separate step is required. First, the step I am considering does not affect Unrau's right of access to the Alberta Courts. A leave requirement is a minimal infringement on his access to justice. The possible step that I am considering is a form of litigation management, and as much for Unrau's benefit as anyone else.

[977] Second, in this situation the "*audi alteram partem*" principle that courts are required to provide parties potentially affected by a decision an opportunity to be heard (***A (LL) v B (A)***, [1995] 4 SCR 536, 130 DLR (4th) 422) has already been satisfied. In ***Unrau #1***, I clearly identified for Unrau the apparently abusive character of his lawsuit, and the reasons I had come to those conclusions. Unrau had a chance to respond and to indicate why he is a good-faith, fair-dealing SRL. He said nothing.

[978] In ***Hryniak***, at para 2, Karakatsanis J called for a "culture shift" to simplify procedures, adopt proportionate procedures that address particular needs, to obtain fair, timely, and just results that "... balance procedure and access ... to reflect modern reality ...". The "culture shift" recognizes that "undue process" results in "unnecessary expense and delay", and "... can prevent the fair and just resolution of disputes." [emphasis added]: para 24. Thus, in the context of the civil litigation milieu, post-"culture shift", strict formality can result in "undue process". Here, a further litigation step, with potential submissions, an additional decision, and commitment of yet

more court resources is neither fair and proportionate, nor is it protecting substantial litigant rights. That would be an empty exercise. Unrau had his chance.

[979] In circumstances such as this, where the Court has already evaluated whether litigation is an abuse of the courts processes, and where the abusive litigant has had the opportunity to respond to those concerns, then I conclude the Court may, on its own, and without further investigation, continue to immediately consider and impose a vexatious litigant leave to initiate or continue litigation court access restriction.

[980] Again, that does not apply in other cases where the Court evaluates more stringent steps that may potentially result in undue hardship.

[981] To the degree that this step is in conflict with ***Lymer v Jonsson***, I do not consider that to be a currently binding authority. ***Lymer v Jonsson*** relies upon an authority which places an unwarranted and exaggerated stress on the purported effect on an individual's access to justice by a vexatious litigant leave to initiate or continue litigation order. ***Lymer v Jonsson*** in that sense relies on pre-"culture shift" jurisprudence, and may be distinguished on that basis: ***Weir-Jones***, at para 23.

[982] In coming to that conclusion, I also note that it is entirely possible that what I have concluded is also compatible with ***Lymer v Jonsson***. Perhaps Unrau is no longer "surprised" by my taking this step, after he received and had the opportunity to reply to ***Unrau #1***. In ***R v Grabowski #4***, at para 10, the Alberta Court of Appeal proceeded to directly impose court access restrictions without further argument because the abusive litigant "... had ample opportunity to deny impropriety and to assert his good faith ...". I believe, similarly, ***Unrau #1*** provided an opportunity for Unrau to state his case.

[983] I will not pursue that avenue any further, since I agree with other commentary by judges of this Court that the "no surprise" test is, at present, difficult to apply.

[984] In either case, I now turn to whether Unrau should be made subject to a leave to initiate or continue litigation requirement. In doing so, I will illustrate how the Court exercises the inherent jurisdiction procedure I have previously outlined, step by step.

B. Are Prospective Court Access Restrictions Appropriate for Unrau?

[985] The final step in this decision is to return to the issue which led to the preceding detailed review and analysis. Unrau is presently subject to interim court access restrictions. Should the interim court access restriction order be vacated, or those restrictions continued in some form or another?

1. Evidence of Litigation Conduct and Indicia of Abusive Litigation

[986] The first step in that process is to examine what is known about Unrau. When I struck out Unrau's August 29, 2018 Statement of Claim, I concluded it appeared to be abusive because the Statement of Claim:

1. was a hopeless and abusive proceeding, since it offended the rule that pleadings must permit a meaningful response (***Unrau #1***, at paras 33, 35-36);
2. appeared to advance global but unsubstantiated complaints of conspiratorial and abusive conduct (***Unrau #1***, at para 34); and

3. sought impossible remedies (e.g. “more open mindedness”, “respect”) and disproportionate remedies ($5 million for no apparent basis) (***Unrau #1***, at para 34).

[987] Unrau did not contest those findings.

[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’.

[989] The Court may also take notice of any other litigation by Unrau. It turns out he is not a newcomer to this Court. Several earlier reported decisions tell a startling tale - Unrau is a self-declared, self-taught dentist who refuses to be governed by the Alberta Dental Association and the *Dental Profession Act*, SA 1983 c D-9.5. In 1999, “Dr. Bernie Unrau DDS” set up a dental suite in his home and was advertising his services, despite him not being licensed to practice dentistry in Alberta: ***Alberta Dental Assn v Unrau***, 2001 ABQB 24, 288 AR 20 [***Alberta Dental Assn #2***]. An interlocutory injunction was issued in 2000 that Unrau must cease his dental activities, and stop advertising himself as a dentist. A permanent injunction to prohibit Unrau from identifying himself as a dentist and offering dental services was subsequently issued by Veit J on January 15, 2001: ***Alberta Dental Assn #2***.

[990] In a further decision, Justice Veit found Unrau in contempt of court by disobeying the Court prohibiting his dentistry activities: ***Alberta Dental Assn v Unrau***, 2001 ABQB 315, 287 AR 391. She ordered a two-year sentence, suspended provided Unrau abided by the Court’s orders. Importantly, Justice Veit evaluated Unrau and his motives. She concluded his misconduct was intentional and serious (para 11), and is the product of obsessive behavior (para 12):

> Mr. Unrau erroneously characterizes his breaches of the injunction as merely technical. They are deliberate and repetitive. Moreover, they demonstrate a disquieting singleness of purpose. Mr. Unrau’s behaviour may verge on the chronic; the court recognizes that it may be difficult to desist from behaviour patterns which have developed over a long period of time. The breaches are therefore serious because they reasonably ground an apprehension that, without careful surveillance, Mr. Unrau may indeed start to practice dentistry. Moreover, by passing himself off as a dentist, Mr. Unrau has probably gained some undeserved commercial benefit in relation to the insurance which he has obtained for his dental equipment.

[991] I also note that earlier Justice Veit had the opportunity to evaluate Unrau as a litigant, and concluded Unrau was attempting to frustrate the Alberta Dental Association by seeking an adjournment: ***Alberta Dental Assn v Unrau***, 2001 ABQB 20.

[992] However, that was not the end of the matter. In 2006 the Alberta Dental Association applied to have Unrau found in contempt of the permanent injunction previously issued by Justice Veit. Unrau had resumed calling himself a dentist, and was holding himself out to the public as such: ***Alberta Dental Assn v Unrau***, 2006 ABQB 799, 408 AR 387 [***Alberta Dental Assn #4***]. Ross J concluded Unrau had again breached the Court’s orders, found Unrau in contempt, and ordered probation.

[993] Unrau did not appear at the 2006 proceeding. His communications indicated he did not acknowledge the Court's jurisdiction: ***Alberta Dental Assn #4***, at para 4. The evidence at the 2006 proceeding established that Unrau began demanding registration from the Alberta Dental Association in 2003, claiming he had 'self-educated' into the profession: para 12. After a visit from Calgary Police that stopped (para 13), but then Unrau's attention in 2005 shifted to the National Dental Examining Board (para 14), with similar demands.

[994] Next, in 2006, Unrau set up a website which advertised himself as a dentist who operated the "Implandent Inc." business: paras 16-17. At this time Unrau wrote to the Alberta Dental Association:

> Wheres my license I'm not volunteering 20 yrs of my life I will continue to practice with or without it as I have for the last 20 yrs! ... I will practise when I decide. I don't need your permission to study / practise medicine / dentistry.

[995] Now Unrau's otherwise rather inexplicable 2018 Statement of Claim falls into focus. That was the latest step in Unrau's now 20 year long campaign to practice dentistry, on his own terms, and without regulatory oversight.

[996] Returning to the indicia of abusive litigation, Unrau's earlier litigation shows:

1. he disobeys court orders, deliberately and persistently,
2. he refuses to acknowledge the Court's jurisdiction, and
3. that he uses litigation steps as a tactic to obtain delay.

All this favours court intervention.

[997] But, more importantly, we now know more about this abusive litigant, and understand why he filed the Statement of Claim. That lawsuit was part of a long-standing objective of Unrau. He sees himself as a dentist, and has for decades rejected those who impede or frustrate his objective. In the Statement of Claim he demands recognition that he was right, damages, "full accreditation" and "retroactive licensure".

[998] Obviously, this larger history suggests a mental health component to Unrau's activities. However, I do not need to delve into that. There is evidence here to evaluate what Unrau will plausibly do in the future. I mention what are probably mental health issues at this point to illustrate again how often this factor appears to be lurking in the background of persons who are considered for court access restrictions, and to remind the reader that Unrau may be a sincere, but very badly misguided, or mentally challenged, individual.

2. Will the Abusive Litigant Plausibly Engage in Future Litigation Misconduct?

[999] With this broader background and context, the next question is whether it is plausible that Unrau will conduct future abusive litigation? I note here I am only evaluating one abusive court action. Unrau is not "persistent" in the *Judicature Act*, s 23(2) sense he repeatedly has initiated bad litigation. He, however, certainly is *very* persistent when it comes to his objective of practicing dentist procedures.

[1000] Nevertheless, the answer is obvious. For twenty years Unrau has been on a crusade to practice dentistry on his own terms. It is very plausible he will continue. Viewed in the larger context, and knowing Unrau's past record, one bad lawsuit is enough to predict that, unless court access restrictions are imposed, more are likely to follow.

[1001] I note if I did not have enough information to evaluate Unrau at this point, I might have conducted a two-part ***Hok v Alberta #2*** procedure to obtain more context about Unrau and his activities. As it turns out, I find that is not necessary. The record here says enough. I have concluded that it is procedurally fair to act without further submissions, and so the Court may, and should, move forward without unnecessary further expenditure of resources in relation to this abusive litigant.

3. The Threshold Test

[1002] The next step is to evaluate whether this abusive litigant passes the threshold test, and further litigation misconduct outside the 2018 action is plausible. Since I have terminated the action, any future abusive litigation by Unrau will be in a new lawsuit. The threshold test is therefore satisfied. A vexatious litigant order and court gatekeeping is the appropriate fair and proportionate response.

4. What is the Scope of Appropriate, Fair, and Proportionate Court Access Restrictions?

[1003] Since I have concluded that future abusive litigation by Unrau is plausible, the next question is what ought to be the scope of that court access restriction order. Are his litigation interests sufficiently focused that I can design court access restrictions which will protect the public and the courts, without issuing a global court access restriction order?

[1004] At first blush, this might seem possible, since Unrau's historic complaint has been about him identifying and operating as a dentist. However, review of the August 29, 2018 Statement of Claim indicates that is no longer Unrau's sole focus. He now identifies some kind of intellectual property issue ("theft of 30 yrs IP"), and complains about hackers, and "keystrokes monitored". Even more telling is looking at the named Defendants. No longer are his targets only related to medicine or dentistry. He sued NAIT, the City of Calgary, the FBI, and "Amazon et al", presumably the well-known Internet retailer. The scope of Unrau's target list has greatly expanded. Worse, I see no pattern to it.

[1005] I therefore cannot design a limited scope court access restriction regime that will reliably capture Unrau's potential future litigation. The appropriate step is a global order that imposes a gatekeeping requirement on Unrau to seek leave to initiate or continue any litigation in this Court.

[1006] I note that even if I were to conclude that Unrau's dispute-related misconduct was 'just about dentistry', it would still be very difficult to design an effective court order that would both adequately protect the plausible targets of Unrau's abusive litigation activities, and which could be enforced by the Court Clerks. For example, it would be wrong for me to issue an order that requires leave for "any matter relating to Unrau's dental certification dispute" or "any litigation against the Alberta Dental Association and the National Dental Examining Board, and/or their employees or officers". The Clerks cannot enforce such vague orders, thus the appropriate choice is to 'default broad'.

[1007] Next, I must consider whether court access restrictions should extend to the other Alberta Courts. That is automatic for the Court of Appeal per *Rule* 14.5(1)(j), but, as I have previously discussed, since Unrau is not already subject to court access restrictions in that forum, I will make that specific order so as to provide guidance to this SRL, if he chooses to appeal this or

other decisions. Since Unrau's claim was a civil tort lawsuit (after a fashion), I extend the gatekeeping to the Provincial Court of Alberta.

[1008] Last, are any additional court access restrictions beyond a leave requirement fair and proportionate, in relation to Unrau's plausible litigation trajectory? I see no need for additional steps. From what I know about Unrau, I believe a simple leave requirement is an adequate gatekeeping precaution to prevent him from filing further unmeritorious lawsuits in Alberta Courts.

5. Court Access Restrictions

[1009] I have concluded that Unrau's plausible future litigation misconduct will require broad prospective court access restrictions via a vexatious litigant order. Unrau is therefore a vexatious litigant.

[1010] I therefore order:

1. Bernie Unrau is a vexatious litigant, and is prohibited from commencing, or attempting to commence, or continuing, any appeal, action, application, or proceeding:

    (i) in the Alberta Court of Appeal, Alberta Court of Queen's Bench, or the Provincial Court of Alberta, and

    (ii) on his own behalf or on behalf of any other person or estate,

    without an order for leave of the Court in which the proceeding is conducted.

2. Bernie Unrau must describe himself in any application for leave or document to which this Order applies as "Bernie Unrau", and not by using initials, an alternative name structure, or a pseudonym.

3. Subject to paragraph 13 hereof, and otherwise in accord with the Court of Appeal's normal process, to commence or continue an appeal, application, or other proceeding in the Alberta Court of Appeal, Bernie Unrau must apply to a single appeal judge for leave to commence or continue the proceeding, and

    (i) The application for leave must be made in writing by sending a Letter addressed to the Alberta Court of Appeal Case Management Officer explaining why the new proceedings or the continuance of an existing proceedings is justified.

    (ii) The Letter shall not exceed five double-spaced pages.

    (iii) The Letter is to contain no attachments other than, for a new proceeding, the proposed notice of appeal, application or other proceeding.

    (iv) If the single appeal judge requires further information, he or she can request it.

    (v) The single appeal judge can respond to and dispose of the leave application in writing, or hold the application in open Court where it shall be recorded.

    (vi) If the single appeal judge grants Bernie Unrau leave to commence an appeal, Bernie Unrau may be required to apply for permission to appeal

under *Rule* 14.5(1)(j). An application for permission to appeal must comply with the requirements of the *Alberta Rules of Court* and must be accompanied by an affidavit:

a) attaching a copy of this Order restricting Bernie Unrau's access to the Alberta Court of Appeal;

b) attaching a copy of the appeal, application, or proceeding that Bernie Unrau proposes to file;

c) deposing fully and completely to the facts and circumstances surrounding the proposed appeal, application, or proceeding, so as to demonstrate that it is not an abuse of process, and that there are reasonable grounds for it; and

d) indicating whether Bernie Unrau has ever sued some or all of the respondents previously in any jurisdiction or Court, and if so providing full particulars.

4. Subject to paragraph 13 hereof, to commence or continue an appeal, application, or other proceeding in the Alberta Court of Queen's Bench or the Provincial Court of Alberta, Bernie Unrau shall submit an application to the Chief Justice or Associate Chief Justice, or Chief Judge, respectively, or his or her designate:

(i) The Chief Justice or Associate Chief Justice, or Chief Judge, or his or her designate, may, at any time, direct that notice of an application to commence or continue an appeal, action, application, or proceeding be given to any other person.

(ii) Any application shall be made in writing.

(iii) Any application to commence or continue any appeal, action, application, or proceeding must be accompanied by an affidavit:

a) attaching a copy of the Order restricting Bernie Unrau's access to the Court of Queen's Bench of Alberta, and Provincial Court of Alberta;

b) attaching a copy of the appeal, pleading, application, or process that Bernie Unrau proposes to issue or file or continue;

c) deposing fully and completely to the facts and circumstances surrounding the proposed claim or proceeding, so as to demonstrate that the proceeding is not an abuse of process, and that there are reasonable grounds for it;

d) indicating whether Bernie Unrau has ever sued some or all of the defendants or respondents previously in any jurisdiction or Court, and if so providing full particulars;

e) undertaking that, if leave is granted, the authorized appeal, pleading, application or process, the Order granting leave to proceed, and the affidavit in support of the Order will promptly be served on the defendants or respondents; and

f) undertaking to diligently prosecute the proceeding.

(iv) The Chief Justice or Associate Chief Justice, or Chief Judge, or his or her designate, may:

a) give notice of the proposed claim or proceeding and the opportunity to make submissions on the proposed claim or proceeding, if he or she so chooses, to any of:

(1) the potentially involved parties;

(2) other relevant persons identified by the Court; or

(3) the Attorneys General of Alberta and Canada;

b) respond to and dispose of the leave application in writing; and

c) decide the application in open Court where it shall be recorded.

5. Leave to commence or continue proceedings may be given on conditions, including the posting of security for costs, and proof of payment of all prior cost awards.

6. An application that is dismissed may not be made again, directly or indirectly.

7. An application to vary or set aside this Order must be made on notice to any person as directed by the Court.

8. Bernie Unrau is prohibited from:

(i) providing legal advice, preparing documents intended to be filed in court for any person other than himself, and filing or otherwise communicating with any Alberta court, except on his own behalf; and

(ii) acting as an agent, next friend, McKenzie Friend (from ***McKenzie v McKenzie***, [1970] 3 All ER 1034 (UK CA) and *Alberta Rules of Court*, Alta Reg 124/2010, ss 2.22-2.23), or any other form of representation in court proceedings,

before the Provincial Court of Alberta, Court of Queen's Bench of Alberta, and Alberta Court of Appeal.

9. The Clerks of the Provincial Court of Alberta, Court of Queen's Bench of Alberta, and Alberta Court of Appeal shall refuse to accept or file any documents or other materials from Bernie Unrau, unless:

(i) Bernie Unrau is a named party in the action in question, and

(ii) if the documents and other materials are intended to commence or continue an appeal, action, application, or proceeding, Bernie Unrau has been granted leave pursuant to this Order to take that step by the Court.

10. All fee waivers granted to Bernie Unrau by the Clerks of the Provincial Court of Alberta, Court of Queen's Bench of Alberta, and Alberta Court of Appeal are revoked.

11. The Clerks of the Provincial Court of Alberta, Court of Queen's Bench of Alberta, and Alberta Court of Appeal shall refuse any fee waiver application by Bernie Unrau unless Bernie Unrau has a court order which authorizes same.

12. The "Interim Court Filings Restrictions for Bernie Unrau" Order issued by myself in Alberta Court of Queen's Bench Docket 1801 12350 on October 24, 2018 is vacated, immediately.

13. The Chief Justice of the Alberta Court of Appeal and the Chief Judge of the Provincial Court of Alberta, or his or her designate, may, on his or her own authority, vary the terms of this Order in relation to the requirement, procedure or any preconditions to obtain leave to initiate or continue litigation in their respective Courts.

[1011] This decision takes effect immediately. The Court will prepare and file the appropriate Order to reflect this decision. Unrau's approval of this Order is dispensed with per *Rule* 9.4(2)(c).

C. Conclusion - Ongoing Court Access Restrictions for Unrau

[1012] I conclude that based on the content of Unrau's August 29, 2018 Statement of Claim, his failure to respond to the Court identifying defects in that Statement of Claim in ***Unrau #1***, and Unrau's litigation history before this Court, that the interim court access restriction order which I imposed in ***Unrau #1*** should be continued.

[1013] Unrau must seek leave to initiate or continue litigation in Alberta Courts. He may access that gatekeeping process following the procedure identified in the Order corresponding to these Reasons for Decision.

[1014] This result is not a morality test. This is a litigation management step. Unrau is a plausible source for Alberta Court activities which abuse the resources of those institutions. On that basis Unrau is subject to an additional gatekeeping, or screening, function. Unrau can still access Alberta Courts. He simply has to take an additional minimally intrusive step to do so.

[1015] Since the interim court access restrictions and subsequent abusive litigant analysis was conducted on this Court's own motion I conclude Unrau should not be liable for costs in relation to this aspect of his litigation.

VI. STEPS FORWARD

[1016] Given the preceding review I believe it may be useful to make a number of additional observations.

1. Supreme Court of Canada

[1017] First, Canadian courts' jurisdiction to impose court access restrictions and other measures that control abusive litigation would benefit from review and commentary by the Supreme Court of Canada. Appellate authority on the scope of that authority is in conflict. For example, ***Benson*** (Manitoba Court of Appeal) and ***Tupper*** (Nova Scotia Court of Appeal) appear to be incompatible when it comes to the extent to which inherent jurisdiction is available to respond to problematic litigants. The degree to which inherent jurisdiction is also available to statutory courts is a further question that I believe would benefit from the attention of the Supreme Court.

[1018] The "culture shift" mandated in ***Hryniak*** is logically relevant to how courts manage problematic litigants and litigation. ***Hryniak*** provides assistance on how to conduct litigation steps which may end an action prior to trial: ***Weir-Jones***; ***O'Connor Associates Environmental Inc v MEC OP LLC***, 2014 ABCA 140, 572 AR 354. Guidance on the extent, if any, to which the "culture shift" rebalance steps which do not terminate litigation, but which do impose additional costs and effort on court actors, is very important for lower courts, particularly in light of the Supreme Court of Canada endorsing the *SRL Statement* in ***Pintea***.

2. Inherent Jurisdiction to Manage Abusive Criminal Litigation

[1019] A second general question is the potential role of the superior courts' inherent jurisdiction in management of problematic criminal litigation. I have deliberately not addressed this subject in the preceding review, aside from the *Criminal Code* private information lawyer representation requirement in Part IV(I)(4)(g), above.

[1020] I do not believe there is any dispute that provincial legislation, such as the *Judicature Act*, cannot affect the conduct of criminal proceedings. However, that is not a theoretical obstacle for the courts' inherent jurisdiction. This Court has taken steps on that basis, for example in imposing costs against a criminal accused in response to abusive litigation (***Eddy***), and switching a jury trial to a judge-alone proceeding in the face of an abusive, disruptive OPCA litigant (***R v Boisjoli***).

[1021] The standard on which to test whether court access restrictions are available and should be applied in a criminal proceeding, particularly against an accused person, will very likely be different from the threshold and factors reviewed in this decision. The right to full answer and defence, the presumption of innocence, the potential for detention, and the very different legal and social roles of the Crown and accused appear to require that. More self-represented accused appearing in Canadian criminal courts is plausible. New litigation management approaches may be necessary and appropriate. However, in my opinion, this topic is better investigated in a criminal litigation context.

3. Legislation

[1022] There may be occasion for Alberta to revisit the legislation it has enacted in relation to vexatious litigant orders. If it does so, I have a number of suggestions.

[1023] First, the parallel but different provisions in the *Family Law Act* and *Judicature Act* are difficult to understand. A single authority (or identical provisions) for all civil litigation might make more sense, and certainly would be easier to interpret.

[1024] I would suggest that legislation which authorizes vexatious litigation be general, rather than specific. The approach in Quebec is, in my opinion, a useful one. The current legislated authority in *Regulation of the Superior Court of Québec in civil matters*, CQLR c C-25.01, r 0.2.1, ss 68-75 addresses "Quarrelsome Conduct". The authority of the Court is identified in ss 68-69:

> **68. Necessity to obtain prior authorization.** If a person acts in a quarrelsome manner, by exercising litigious rights in an excessive or unreasonable manner, the court may, on initiative or on request, in addition to the measures provided for in the Code of Civil Procedure (chapter C-25.01), prohibit that person from instituting a judicial application or from producing or presenting a pleading in a previously instituted proceeding without prior authorization from the Chief

> Justice or a judge designated by the Chief Justice, and on the conditions the latter determines.
>
> **69. Order.** The order may be general or limited to certain proceedings, courts or bodies subject to the judicial control of the Superior Court, and may apply in one or more judicial districts, or with respect to one or more persons. It may also be limited in time. In exceptional circumstances, the order of prohibition may prohibit or limit access to a court house.

I would, however, recommend that "quarrelsome manner" be replaced with "abusive manner".

[1025] If, however, the Alberta Legislature were to favour a more detailed approach, closer to the current *Judicature Act*, ss 23-23.1, I would recommend a number of revisions which would, in my opinion, make that legislation more compliant with the "culture shift" and Modern Approach to abusive litigation:

1. If examples of abusive litigation conduct are indicated, there should not usually be a requirement that misconduct occur "persistently". Alternatively, an approach that orients around the effect and motivation of bad litigation would be helpful. For example, the previous Quebec legislation (*Code of Civil Procedure*, CQLR c C-25, ss 54.1-54.6) triggered court access restrictions by a "procedural impropriety" which:

   > ... may consist in a claim or pleading that is clearly unfounded, frivolous or dilatory or in conduct that is vexatious or quarrelsome. It may also consist in bad faith, in a use of procedure that is excessive or unreasonable or causes prejudice to another person, or in an attempt to defeat the ends of justice, in particular if it restricts freedom of expression in public debate.

   Note that this definition captures SLAPP litigation by its effect on court function and public expression.

2. The current *Judicature Act* appears to only authorize a leave requirement. A broader authority, including the option to have preconditions to a leave application, would fill gaps identified in Canadian jurisprudence which has evaluated recent legislation-based court access restriction schemes.

3. Legislation should authorize the Court to impose interim steps to manage abusive litigants without a notice or submissions requirement, prior to a final determination on whether court access restrictions ought to be imposed.

4. The current *Rules* impose steps on "vexatious litigants", but that term does not have a clear meaning (though I have suggested one in this Decision). Resolving this ambiguity would be helpful, for example, by a definition in the *Judicature Act*, and/or the *Rules*. For example:

   > "vexatious litigant" is a person who is subject to a court order of an Alberta court that requires permission from an Alberta court:
   >
   > a) to institute proceedings, or
   >
   > b) continue proceedings that have been stayed.

5. The Legislature has concluded that where a trial court has imposed a vexatious litigant order on a person, then any appeal to the Alberta Court of Appeal by that person is permitted only on leave: *Rule* 14.5(1)(j). I do not see a policy basis why this Court would be treated any differently, when it acts as an appeal court to trials conducted in the Provincial Court of Alberta. A possible Rule of Court to implement that step would be:

> No appeal is allowed to the Alberta Court of Queen's Bench:
>
> > (a) by a person who has been declared a vexatious litigant in the Provincial Court, unless permission to appeal has been obtained, or
> >
> > (b) from an order of the Provincial Court denying a vexatious litigant permission to institute or continue proceedings.

[1026] An additional, broader legislative step which could prove very helpful would be if Alberta were to enact an authority for pre-filing review of court documents. For example, *Federal Court Rules*, s 72(1) authorizes the Court Registry to refer documents which have been submitted but not yet filed for review by a judge or prothonotary: s 72(2).

[1027] While this Court has, on certain occasions, done basically that (e.g. ***Boisjoli (Re) #1***), a codified authority of that kind would be helpful, particularly to establish who would refer "irregular documents" for review, and the appropriate party to receive and review those. Similarly, *Federal Court Rules*, s 74 provides a broad authority to remove documents from a file, which is clearly helpful when managing abusive litigation and litigants.

4. Tribunals Self-Regulating Abusive Participants

[1028] The abusive dispute scenarios reviewed in this decision make very clear that the abusive litigation and litigant phenomenon is not unique to courts. The same problematic court litigants are also often active before administrative bodies and tribunals. Sometimes their disputes originate in those forums, and then move to the courts via appeal and judicial review. Other times, and particularly with querulous litigants, the processes co-exist, as disputes rage through any available avenue.

[1029] Just like courts, administrative bodies and tribunals have limited capacity. They, too, operate as a communal public resource. I think it is self-evident to say that their time, personnel, and resources are also valuable, and should not be squandered and abused.

[1030] Part IV(I)(4)(e) reviewed how superior provincial courts of inherent jurisdiction have a potential role to help administrative bodies and tribunals manage abusive actors. However, that is not the only potential response to this issue. In ***Makis #1***, at paras 48-50, Justice Clackson observed that Ontario has enacted in its *Social Justice Tribunal Ontario (SJTO) Common Rules of Procedure* a provision that granted certain Ontario tribunals the authority to impose a leave requirement tribunal access restriction in response to abusive actors.

[1031] This approach may also be useful in Alberta.

5. Forum Shopping

[1032] Part IV(H)(4)(e) examined forum shopping, where an abusive litigant switches between jurisdictions to evade court access restrictions and to re-litigate decided matters. I very much support the principle that where a court in jurisdiction A has imposed court access restrictions, then that step strongly favours jurisdiction B taking analogous steps. That rule is applied by the this Court and the Federal Courts. There is much benefit to that approach.

[1033] However, this principle only works as long as court access restrictions in jurisdiction A may be identified in jurisdiction B. For that to happen, steps like vexatious litigant orders need to be public or searchable in some manner.

[1034] In ***Olumide v Alberta***, at paras 82-93, Justice Thomas concluded that Olumide's most recent Alberta litigation could have been prevented by a publicly searchable registry, and notes that Quebec has already implemented a system of that kind: paras 89-91. I also support Alberta Justice permitting public searching of the existing Alberta Courts abusive litigant database information in some manner. Not only would the decisions of this Court then better help reduce forum shopping in other Canadian jurisdictions, but also innocent litigants would hopefully not find themselves unnecessarily in Court with a person who is already subject to court access restrictions.

[1035] Academic authorities and other judges have called for a national database of this kind: Caplan and Bloom at 457-458; Morissette at 22; ***Lee v Canada #2***, at paras 177-183; ***Hill #1***, at paras 75-77; ***IntelliView v Badawy #1***, at paras 175-178; ***Olumide v Alberta***, at paras 83-84. I agree this is a worthwhile objective. As Justice Stratas put it, "The wheel needn't be reinvented.": ***Olumide v Canada***, para 37.

[1036] A national database would also permit Canada and the provincial governments, by legislation, to create a form of interjurisdictional enforcement when one jurisdiction has imposed prospective vexatious litigant order gatekeeping steps. That could be as simple as a global leave to apply requirement. For example, a simple rule may be that where a person is named in the national vexatious litigant database, then that individual must obtain leave to initiate or continue any litigation in the local jurisdiction.

6. Earlier Intervention

[1037] In ***Olumide v Canada***, at paras 44-46, Justice Stratas observed there sometimes seems to have been a slowness or hesitance on the part of parties to advance vexatious litigant applications. He encourages earlier action:

> In the Federal Courts system, the applicants in this case are often respondents to proceedings. In some of them, they face litigants who exhibit vexatiousness. Too often though, the applicants do not start vexatious litigant applications for months, if not years, even many years. In the meantime, much damage to many is done.
>
> To reiterate, [vexatious litigant legislation] aims in part to further access to justice by those seeking the resources of the Court in a proper way. All participants in litigation—courts, parties, rule-makers and governments—must have a pro-access attitude and act upon it: Hryniak v. Mauldin, 2014 SCC, [2014] 1 S.C.R. 87. And as community property, courts deserve to be protected for the benefit of all.

[1038] Stopping preventable damage is one reason for early intervention. So is that mental health professionals stress an earlier response is better.

[1039] Sometimes the full extent of an issue is not obvious to the Court. Litigants can be very helpful to reveal the scope and context of problematic court activity when the Court initiates a vexatious litigant order process on its own motion. Where the larger pattern may favour court intervention, litigants help everyone by bringing those facts before the Court.

7. Further Investigation

[1040] In two recent papers, psychologist Benjamin Lévy of the University of Lorraine (Benjamin Lévy, "From paranoia querulans to vexatious litigants: a short history on madness between psychiatry and the law. Part 1" (2014) 25(3) History of Psychiatry 1 [Lévy #1]; Benjamin Lévy, "From paranoia querulans to vexatious litigants: a short history on madness between psychiatry and the law. Part 2" (2015) 26(1) History of Psychiatry 36 [Lévy #2]) compares what he identifies as two very different approaches to persistent and abusive litigators.

[1041] Lévy traces how in Europe, and in especially Germany, mental health professionals "pathologized" the pattern of persistent, expanding litigation. The litigant becomes increasingly alienated, and hostile to all opponents (notational and otherwise) and decision-makers: Lévy #1 at 3-9. While mental health experts identified different models for the causes of "pathological litigiousness", the general consensus was litigiousness was a *symptom* of an underlying mental health pathology. In France, early commentary on the litigious focussed on heredity factors and land owner interests, but Lévy concludes interest in this subject had died off by the 1930s: Lévy #1 at 9-15.

[1042] The author then observes how a completely different pattern emerged in the UK, the Commonwealth, and the US:

> ... while German and also French psychiatrists, from the nineteenth century on, had been busy inventing new nosological concepts which gave rise to the pathologization of overzealous suitors, the English-speaking experts preferred to create purely juridic measures designed to keep the most difficult complainants at bay. We shall endeavour to understand exactly why this was the case: why were unreasonable suitors considered vexatious litigants and not pathological litigants by the authorities of the English-speaking countries? Why were juridic measures taken but no diagnosis made? Why did the legal perspective prevail over the medical viewpoint?
>
> (Lévy #2 at 37).

[1043] Lévy #2 at 37-38, 40 examines how in English-speaking jurisdictions psychiatry has evaluated litigiousness, noting practically no investigation on this subject. What did emerge, such as the work I reviewed in Part IV(C)(1), remained anchored on challenging and problematic court conduct, and less on underlying processes. Lévy traces how, instead, legislation was deployed to control abusive litigation (Lévy #2 at 39-41), but wonders "Why were vexatious litigants seldom pathologized?" He suggests the cause was, at least in part, cultural. Mavericks and heroic 'little guy' resisters are a common motif in these cultures. Lévy also observed how the UK and US legal traditions place great weight on self-representation, and the individual's right to have their "day in court": at 41-42.

[1044] From that starting point, vexatiousness is just an extension or extreme expression of what is viewed as a universal legal right:

> ... The *will* to defend oneself, though it may lead to misuse cannot be considered an illness, for it corresponds to the fundamental *right* to defend oneself, which is one of the cornerstones of all the legal traditions inherited from British common law. [Emphasis in original.]
>
> (Lévy #2 at 42).

[1045] Lévy concludes that the fate of persons with the same characteristics is therefore entirely different, depending on the traditions of the jurisdiction where they appear. A "vexatious litigant" in Australia would receive mental health care in Germany: Lévy #2 at 36-37. This author does not provide a model mechanism forward, though he does discuss attempts by the Australian state of Victoria to develop a more integrated legal/psychiatric approach to problematic litigants: Lévy #2 at 43-46.

[1046] I find Lévy's observations very interesting. What are usually positioned as key basic common law tradition rights, "access to justice" and the right to litigate to enforce personal rights, collides with another basic social core objective: caring for those who are ill, and social intervention to assist those in need.

[1047] There is no simple solution to this issue. As a judge, I am a front-line observer (and occasional defending combatant). I can see and report things, and they are not pleasant, but I have neither the perspective nor health science expertise to say exactly what should be done. That said, I hope these Reasons assist in moving forward with that dialogue.

[1048] What all the academic commentary I have referenced does agree on is there is more work to be done on this subject. We know some things. Early intervention is better. The litigation activities of many abusive litigants cause self-harm. Mental health issues, either pre-existing, or induced or aggravated by litigation processes, are a significant factor.

[1049] I hope there will be more attention paid to this issue by academics (medical, social sciences, and legal) and law-makers. Viewing abusive litigation as a purely legal phenomenon misses critical factors. Quantitative population studies of abusive litigants would probably offer much useful information. There are many questions. For example, is the phenomenon the same at trial and appellate proceedings? Are there some subject areas or kinds of conflict that promote or exacerbate abusive conduct? Why has the frequency of abusive litigation increased so dramatically, across common law tradition nations?

[1050] Are there procedural approaches that can help manage this litigation? I have made some suggestions:

1. While I have gone back to the "old language" in much of these Reasons, neutral and functional language is better to describe court access restrictions, rather than "vexatious", and "vexatiousness", and its implied meaning. The modern approach to family law may provide useful lessons to management of "abusive litigants".
2. Document-based procedures may help disengage emotional commitments and the heightened stresses of the moment, and permit more functional, meaningful response. Are there other tools that can help 'scale down' these conflicts?

3. Decisions that impose court access restrictions should provide a substantive explanation for that step, despite the likelihood that those reasons may very well be rejected by the problematic litigant. The alternative, no, or perfunctory, reasons, will only certainly exacerbate mistrust and the perception of bias and persecution.

[1051] There are some provisos, too. First, certain legal academic commentary on the subject of vexatious litigation and SRLs has issues, in particular "blog" publications, and other materials that have not been subject to anonymous peer review. The utility and merit of resources of this kind has been questioned: e.g. ***Condominium Corporation No 052 0580 v Alberta (Human Rights Commission)***, 2016 ABQB 183 at paras 79-80, 35 Alta LR (6th) 330; ***ALIA v Bourque #3***, at para 95.

[1052] In the latter decision Mandziuk J concludes publications of this kind are not appropriate authorities for court purposes:

> ... are no more persuasive than the opinion pieces one encounters in general interest and legal trade publications and in online news article public commentary and other communications that lack editorial oversight.

[1053] Justice Mandziuk bases his criticism on the absence of peer review, "the defining feature of academic publications". I share this concern. The Supreme Court of Canada has made the importance of this screening procedure to validate novel claims very clear: e.g. ***R v J-LJ***, 2000 SCC 51 at para 33, [2000] 2 SCR 600; ***R v Trochym***, 2007 SCC 6 at paras 36, 39-40, [2007] 1 SCR 239. I do not see why legal academics should have their writing treated differently from other professionals.

[1054] Then there is a very unfortunate negative effect of careless editorializing on these subjects. Abusive litigants whose perceptions have become distorted due to querulous paranoia and other mental health disorders will latch onto anything they believe will support their perspective. For example, Brian Chutskoff, the abusive litigant in ***Chutskoff #1***, clearly believed his litigation misconduct was justified and he was subject to unfair and illegal judicial persecution, at least in part due to the utterly baseless concern he, an SRL, had been "conflated" with OPCA litigants. He pointed to a collection of "blog" posts as the basis for that: para 77. I note this purported "conflation" issue and other OPCA-related blog commentary has been sharply criticized in peer-reviewed publications as being conjecture, rather than based on actual investigation: Netolitzky, "Attack" at 140-143; Donald J Netolitzky, "Organized Pseudolegal Commercial Arguments in Canadian Inter-Partner Family Law Court Disputes" (2017) 54:4 Alberta L Rev 955 at 957, 994.

[1055] Second, as one of the administrative justices of this Court, I receive, review, and respond to correspondence from persons who express concerns with the Court and its operation. That correspondence has included complaints that a judge has illegally prohibited access to the Court by court access restrictions. If true, that would be a very serious issue, given the constitutional right to access court remedies. However, when these claims are investigated, they inevitably reveal those allegations were false. Aside from a finding of a lack of capacity, there is no way a person can be "banned" from the courts. While there may be gatekeeping steps and preconditions, the door is never barred to constitutionally valid litigation.

[1056] There is no constitutional right to engage in abusive litigation: ***Trial Lawyers***, at para 47. So it usually turns out that is what the complaint was really about - not obstruction of the exercise of legal rights, *but stymied attempts to assert illegal rights*.

[1057] Put more succinctly, when someone says they are excluded from the courts and prohibited from what they are owed in law, then "extraordinary claims require extraordinary proof".

[1058] Abusive litigants are sometimes - indeed often - not honest, though they are often very sincere in what they believe has happened, and ought to occur. The Russian proverb "doveryai no proveryai" - "trust but verify" - is useful to keep in mind. These people see the world from a different position. At a minimum, the basis for their allegedly meritorious litigation ought to be examined. Otherwise, how can you tell whether you are dealing with a good-faith, fair-dealing SRL, or an abusive litigant with distorted perceptions or ulterior motives?

[1059] Those concerns aside, there is much to be learned on this subject. My hope is that with more investigation and interdisciplinary exchange that better policies and methods will emerge to assist in management of both those abusive litigants who are misguided, due to mental health issues or extremist political philosophies, and to secure the Courts against those who would misuse its processes for profit and advantage, or with the intent to cause harm and misery to others, who are not abusive litigants, but seek fair access to and redress from our courts.

Dated at the City of Calgary, Alberta this 25th day of April, 2019.

J.D. Rooke
A.C.J.C.Q.B.A.

Appearances:

None

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Belway #3 - Belway v Lalande-Weber, 2017 ABCA 433, leave to appeal to SCC refused, 37708 (21 December 2017).

Benson - Benson v Workers' Compensation Board (Man), 2008 MBCA 32, 228 Man 5 (2d) 46.

Bhamjee - Bhamjee v Forsdick (No 2), [2003] EWCA Civ 1113 (UK CA).

Biley v Sherwood - Biley v Sherwood Ford Sales Limited, 2019 ABQB 95, leave to appeal refused (27 February 2019) (Alta CA).

Bishop - Bishop v Bishop, 2011 ONCA 211, 200 ACWS (3d) 1021, leave to appeal to SCC refused, 34271 (20 November 2011).

Bissky v Macleod, 2019 ABQB 127, action struck 2019 ABQB 179.

Blackshear v Canada, 2013 FC 59.

Boisjoli (Re) #1 - Boisjoli (Re), 2015 ABQB 629, 29 Alta LR (6th) 334.

Boisjoli (Re), 2015 ABQB 690.

Blicharz - D.L. Pollock Professional Corporation v Blicharz, 2019 ABCA 41.

Boardwalk Reit LLP v Edmonton (City), 2008 ABCA 176, 437 AR 199, leave to appeal refused, 32742 (18 December 2018).

Boe - Boe v Boe, 2014 BCCA 208, 356 BCAC 217, leave to appeal to SCC refused, 36048 (26 February 2015).

Bossé v Chiasson - Bossé v Chiasson & Roy, 2019 CanLII 6671 (NBCA).

Bossé v Farm Credit Canada, 2014 NBCA 34, 419 NBR (2d) 1, leave to appeal to SCC refused, 36026 (11 December 2014).

Bossé v Immeubles - Bossé v Immeubles Robo Ltée, 2018 CanLII 71340 (NBCA).

Botar (Re) - Botar (Re), 2018 ABQB 193.

Botar v Braden Equities Inc, 2017 ABQB 21.

Bourque v Tensfeldt, 2018 ABQB 419.

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