FORM 30.001

Court File No.: 58772

Court Registry: Vernon

In the Supreme Court of British Columbia

BETWEEN:

COLTON KEVIN KUMAR,
1304139 B.C. LTD., and
KEVIN ANTHONY KUMAR — Plaintiff(s)

AND:

JOHN McDONALD,
HEIDI SEMKOWICH, and
McDONALD PARALEGAL SERVICES LTD. — Defendant(s)

BOOK OF AUTHORITIES

(RULE [15, 9-5])

John McDonald, McDonald Paralegal Services Ltd, and Heidi Semkowich	Colton Kevin Kumar, Kevin Anthony Kumar, and 1304139 B.C. Ltd.
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Date and Time of APPLICATION : January 20, 2024 at 10:00am
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Place of APPLICATION : Vernon Law Courts
[Indicate appearance type]

Time estimate of the Plaintiff: 20 Minutes

Time estimate of the Defendant:

To be heard before Judge

Book of Authorities provided by: Defendants
[Type of Record]

TABLE OF AUTHORITIES

Part 1 - Jurisdiction

1. *Court Jurisdiction and Proceedings Transfer Act* [SBC 2003] Chapter 28, ss.3,7,10, and 11
2. *Club Resorts Ltd. v Van Breda,* 2012 SCC 17 at para 41
3. *Hansraj v Ao,* 2004 ABCA 223

Part 2. – Vexatious Litigants/Abuse of Process

4. *Supreme Court Act* RSBC 1996 c.443 s.18
5. *Supreme Court Civil Rules* 9-5, 18
6. *1158997 Alberta Inc. v. Maple Trust Company,* 2013 ABQB 483
7. *Royal Bank of Canada v. Courtorielle,* 2024 ABKB 302
8. *Bonville v. President's Choice Financial* 2024 ABKB 356
9. *Bonville v. President's Choice Financial* 2024 ABKB 483
10. *Bonville v. President's Choice Financial* 2024 ABKB 546
11. *Unrau v. National Dental Examining Board* 2019 ABQB 283 at Para 180, 582
12. *Wu v Canada (Attorney General).* 2022 BCSC 2084 at para 43

Definitions

1 In this Act:

"person" includes a state;

"plaintiff" means a person who commences a proceeding, and includes a plaintiff by way of counterclaim or third party claim;

"procedure" means a procedural step in a proceeding;

"proceeding" means an action, suit, cause, matter, petition proceeding or requisition proceeding and includes a procedure and a preliminary motion;

"state" means

(a) Canada or a province or territory of Canada, and

(b) a foreign country or a subdivision of a foreign country;

"subject matter competence" means the aspects of a court's jurisdiction that depend on factors other than those pertaining to the court's territorial competence;

"territorial competence" means the aspects of a court's jurisdiction that depend on a connection between

(a) the territory or legal system of the state in which the court is established, and

(b) a party to a proceeding in the court or the facts on which the proceeding is based.

Part 2 — Territorial Competence of Courts of British Columbia

Application of this Part

2 (1) In this Part, **"court"** means a court of British Columbia.

(2) The territorial competence of a court is to be determined solely by reference to this Part.

Proceedings against a person

3 A court has territorial competence in a proceeding that is brought against a person only if

(a) that person is the plaintiff in another proceeding in the court to which the proceeding in question is a counterclaim,

(b) during the course of the proceeding that person submits to the court's jurisdiction,

(c) there is an agreement between the plaintiff and that person to the effect that the court has jurisdiction in the proceeding,

(d) that person is ordinarily resident in British Columbia at the time of the commencement of the proceeding, or

(e) there is a real and substantial connection between British Columbia and the facts on which the proceeding against that person is based.

Proceedings with no named defendant

4 A court has territorial competence in a proceeding that is not brought against a person or a vessel if there is a real and substantial connection between British Columbia and the facts upon which the proceeding is based.

Proceedings against a vessel

5 A court has territorial competence in a proceeding that is brought against a vessel if the vessel is served or arrested in British Columbia.

Residual discretion

6 A court that under section 3 lacks territorial competence in a proceeding may hear the proceeding despite that section if it considers that

(a) there is no court outside British Columbia in which the plaintiff can commence the proceeding, or

(b) the commencement of the proceeding in a court outside British Columbia cannot reasonably be required.

Ordinary residence — corporations

7 A corporation is ordinarily resident in British Columbia, for the purposes of this Part, only if

(a) the corporation has or is required by law to have a registered office in British Columbia,

(b) pursuant to law, it

(i) has registered an address in British Columbia at which process may be served generally, or

(ii) has nominated an agent in British Columbia upon whom process may be served generally,

(c) it has a place of business in British Columbia, or

(d) its central management is exercised in British Columbia.

Ordinary residence — partnerships

8 A partnership is ordinarily resident in British Columbia, for the purposes of this Part, only if

(a) the partnership has, or is required by law to have, a registered office or business address in British Columbia,

(b) it has a place of business in British Columbia, or

(c) its central management is exercised in British Columbia.

Ordinary residence — unincorporated associations

9 An unincorporated association is ordinarily resident in British Columbia, for the purposes of this Part, only if

(a) an officer of the association is ordinarily resident in British Columbia, or

(b) the association has a location in British Columbia for the purpose of conducting its activities.

Real and substantial connection

10 Without limiting the right of the plaintiff to prove other circumstances that constitute a real and substantial connection between British Columbia and the facts on which a proceeding is based, a real and substantial connection between British Columbia and those facts is presumed to exist if the proceeding

(a) is brought to enforce, assert, declare or determine proprietary or possessory rights or a security interest in property in British Columbia that is immovable or movable property,

(b) concerns the administration of the estate of a deceased person in relation to

(i) immovable property in British Columbia of the deceased person, or

(ii) movable property anywhere of the deceased person if at the time of death the person was ordinarily resident in British Columbia,

(c) is brought to interpret, rectify, set aside or enforce any deed, will, contract or other instrument in relation to

(i) property in British Columbia that is immovable or movable property, or

(ii) movable property anywhere of a deceased person who at the time of death was ordinarily resident in British Columbia,

(d) is brought against a trustee in relation to the carrying out of a trust in any of the following circumstances:

(i) the trust assets include property in British Columbia that is immovable or movable property and the relief claimed is only as to that property;

(ii) that trustee is ordinarily resident in British Columbia;

(iii) the administration of the trust is principally carried on in British Columbia;

(iv) by the express terms of a trust document, the trust is governed by the law of British Columbia,

(e) concerns contractual obligations, and

(i) the contractual obligations, to a substantial extent, were to be performed in British Columbia,

(ii) by its express terms, the contract is governed by the law of British Columbia, or

(iii) the contract

(A) is for the purchase of property, services or both, for use other than in the course of the purchaser's trade or profession, and

(B) resulted from a solicitation of business in British Columbia by or on behalf of the seller,

(f) concerns restitutionary obligations that, to a substantial extent, arose in British Columbia,

(g) concerns a tort committed in British Columbia,

(h) concerns a business carried on in British Columbia,

(i) is a claim for an injunction ordering a party to do or refrain from doing anything

(i) in British Columbia, or

(ii) in relation to property in British Columbia that is immovable or movable property,

(j) is for a determination of the personal status or capacity of a person who is ordinarily resident in British Columbia,

(k) is for enforcement of a judgment of a court made in or outside British Columbia or an arbitral award made in or outside British Columbia, or

(l) is for the recovery of taxes or other indebtedness and is brought by the government of British Columbia or by a local authority in British Columbia.

Discretion as to the exercise of territorial competence

11 (1) After considering the interests of the parties to a proceeding and the ends of justice, a court may decline to exercise its territorial competence in the proceeding on the ground that a court of another state is a more appropriate forum in which to hear the proceeding.

(2) A court, in deciding the question of whether it or a court outside British Columbia is the more appropriate forum in which to hear a proceeding, must consider the circumstances relevant to the proceeding, including

(a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum,

(b) the law to be applied to issues in the proceeding,

(c) the desirability of avoiding multiplicity of legal proceedings,

(d) the desirability of avoiding conflicting decisions in different courts,

(e) the enforcement of an eventual judgment, and

(f) the fair and efficient working of the Canadian legal system as a whole.

Conflicts or inconsistencies with other Acts

12 If there is a conflict or inconsistency between this Part and another Act of British Columbia or of Canada that expressly

(a) confers jurisdiction or territorial competence on a court, or

(b) denies jurisdiction or territorial competence to a court,

that other Act prevails.

Part 3 — Transfer of a Proceeding

General provisions applicable to transfers

13 (1) The Supreme Court, in accordance with this Part, may

(a) transfer a proceeding to a court outside British Columbia, or

(b) accept a transfer of a proceeding from a court outside British Columbia.

(2) A power given under this Part to the Supreme Court to transfer a proceeding to a court outside British Columbia includes the power to transfer part of the proceeding to that court.

(3) A power given under this Part to the Supreme Court to accept a proceeding from a court outside British Columbia includes the power to accept part of the proceeding from that court.

(4) If anything relating to a transfer of a proceeding is done or ought to be done in the Supreme Court, or in another court of British Columbia on appeal from the Supreme Court, the transfer is governed by the provisions of this Part.

(5) If anything relating to a transfer of a proceeding is done or ought to be done in a court outside British Columbia, the Supreme Court, despite any differences between this Part and the rules applicable in the court outside British Columbia, may transfer or accept a transfer of the proceeding if the Supreme Court considers that the differences do not

(a) impair the effectiveness of the transfer, or

(b) inhibit the fair and proper conduct of the proceeding.

Grounds for an order transferring a proceeding

14 (1) The Supreme Court by order may request a court outside British Columbia to accept a transfer of a proceeding in which the Supreme Court has both

Club Resorts Ltd. *Appellant*

v.

Morgan Van Breda, Viktor Berg, Joan Van Breda, Tony Van Breda, Adam Van Breda and Tonnille Van Breda *Respondents*

and

Tourism Industry Association of Ontario, Amnesty International, Canadian Centre for International Justice, Canadian Lawyers for International Human Rights and Ontario Trial Lawyers Association *Interveners*

- and -

Club Resorts Ltd. *Appellant*

v.

Anna Charron, Estate Trustee of the Estate of Claude Charron, deceased, the said Anna Charron, personally, Jennifer Candace Charron, Stephanie Michelle Charron, Christopher Michael Charron, Bel Air Travel Group Ltd. and Hola Sun Holidays Limited *Respondents*

and

Tourism Industry Association of Ontario, Amnesty International, Canadian Centre for International Justice, Canadian Lawyers for International Human Rights and Ontario Trial Lawyers Association *Interveners*

Indexed as: Club Resorts Ltd. *v.* Van Breda

2012 SCC 17

File Nos.: 33692, 33606.

2011: March 21; 2012: April 18.

Club Resorts Ltd. *Appelante*

c.

Morgan Van Breda, Viktor Berg, Joan Van Breda, Tony Van Breda, Adam Van Breda et Tonnille Van Breda *Intimés*

et

Tourism Industry Association of Ontario, Amnistie internationale, Centre canadien pour la justice internationale, Juristes canadiens pour les droits de la personne dans le monde et Ontario Trial Lawyers Association *Intervenants*

- et -

Club Resorts Ltd. *Appelante*

c.

Anna Charron, fiduciaire de la succession de Claude Charron, décédé, la dite Anna Charron, personnellement, Jennifer Candace Charron, Stephanie Michelle Charron, Christopher Michael Charron, Bel Air Travel Group Ltd. et Hola Sun Holidays Limited *Intimés*

et

Tourism Industry Association of Ontario, Amnistie internationale, Centre canadien pour la justice internationale, Juristes canadiens pour les droits de la personne dans le monde et Ontario Trial Lawyers Association *Intervenants*

Répertorié : Club Resorts Ltd. *c.* Van Breda

2012 CSC 17

N^os^ du greffe : 33692, 33606.

2011 : 21 mars; 2012 : 18 avril.

Present: McLachlin C.J. and Binnie,* LeBel, Deschamps, Fish, Abella, Charron,* Rothstein and Cromwell JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Private international law — Choice of forum — Court having jurisdiction — Forum non conveniens — Respondents injured while vacationing in Cuba — Actions for damages brought in Ontario — Defendants bringing motion to stay actions on grounds that Ontario court lacks jurisdiction, or alternatively, should decline to exercise jurisdiction on basis of forum non conveniens — Whether Ontario court can assume jurisdiction over actions — If so, whether Ontario court should decline to exercise its jurisdiction on ground that court of another jurisdiction is clearly a more appropriate forum for hearing of actions.

In separate cases, two individuals were injured while on vacation outside of Canada. Morgan Van Breda suffered catastrophic injuries on a beach in Cuba. Claude Charron died while scuba diving, also in Cuba. Actions were brought in Ontario against a number of parties, including the appellant, Club Resorts Ltd., a company incorporated in the Cayman Islands that managed the two hotels where the accidents occurred. Club Resorts sought to block those proceedings, arguing that the Ontario courts lacked jurisdiction and, in the alternative, that a Cuban court would be a more appropriate forum on the basis of the doctrine of *forum non conveniens*. In both cases, the motion judges found that the Ontario courts had jurisdiction with respect to the actions against Club Resorts. In considering *forum non conveniens*, it was also held that the Ontario court was clearly a more appropriate forum. The two cases were heard together in the Court of Appeal. The appeals were both dismissed.

Held: The appeals should be dismissed.

This case concerns the elaboration of the "real and substantial connection" test as an appropriate common law conflicts rule for the assumption of jurisdiction. In determining whether a court can assume jurisdiction over a certain claim, the preferred approach in Canada has been to rely on a set of specific factors which are

* Binnie and Charron JJ. took no part in the judgment.

Présents : La juge en chef McLachlin et les juges Binnie*, LeBel, Deschamps, Fish, Abella, Charron*, Rothstein et Cromwell.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Droit international privé — Choix du tribunal — Juridiction compétente — Forum non conveniens — Préjudice subi par les intimés à l'occasion de vacances à Cuba — Actions en dommages-intérêts intentées en Ontario — Demande de suspension de l'instance par les défendeurs au motif que le tribunal ontarien n'a pas compétence ou, subsidiairement, qu'il devrait décliner compétence pour cause de forum non conveniens — Le tribunal ontarien peut-il se déclarer compétent à l'égard des actions? — Dans l'affirmative, le tribunal ontarien devrait-il refuser d'exercer sa compétence au motif que le tribunal d'un autre ressort est nettement plus approprié pour instruire les actions?

Dans des affaires distinctes, deux personnes ont subi un préjudice pendant leurs vacances à l'extérieur du Canada. Morgan Van Breda a été très grièvement blessée sur une plage de Cuba. À Cuba également, Claude Charron est mort au cours d'une plongée autonome. Des poursuites ont été intentées en Ontario contre plusieurs défendeurs, notamment l'appelante Club Resorts Ltd., une société constituée aux îles Caïmans qui gérait les deux hôtels où sont survenus les accidents. Club Resorts a cherché à mettre un terme à ces poursuites, en invoquant d'abord le défaut de compétence des tribunaux ontariens, puis en affirmant à titre subsidiaire qu'il serait plus approprié, suivant la doctrine du *forum non conveniens*, que ces litiges soient instruits à Cuba. Dans les deux affaires, les juges saisis de la motion ont conclu que les tribunaux ontariens avaient compétence à l'égard des actions intentées contre Club Resorts. Dans l'analyse du *forum non conveniens*, il a également été décidé qu'il était nettement plus approprié que le litige soit instruit en Ontario. Les deux affaires ont été entendues ensemble en Cour d'appel. Les deux appels ont été rejetés.

Arrêt : Les pourvois sont rejetés.

En l'espèce, il s'agit d'élaborer le critère du « lien réel et substantiel » en tant que règle de droit international privé qu'un tribunal peut appliquer en common law pour déterminer s'il peut se déclarer compétent. Lorsqu'ils se prononcent sur leur compétence, les tribunaux canadiens préfèrent, à un régime où chaque

* Les juges Binnie et Charron n'ont pas participé au jugement.

given presumptive effect, as opposed to a regime based on an exercise of almost pure and individualized judicial discretion. Given the nature of the relationships governed by private international law, the framework for the assumption of jurisdiction cannot be an unstable, *ad hoc* system made up on the fly on a case-by-case basis — however laudable the objective of individual fairness may be. There must be order in the system, and it must permit the development of a just and fair approach to resolving conflicts. Justice and fairness are undoubtedly essential purposes of a sound system of private international law. But they cannot be attained without a system of principles and rules that ensure security and predictability in the law governing the assumption of jurisdiction by a court. The identification of a set of relevant presumptive connecting factors and the determination of their legal nature and effect will bring greater clarity and predictability to the analysis of the problems of assumption of jurisdiction, while at the same time ensuring consistency with the objectives of fairness and efficiency that underlie this branch of the law. From this perspective, a clear distinction must be maintained between, on the one hand, the factors or factual situations that link the subject matter of the litigation and the defendant to the forum and, on the other hand, the principles and analytical tools, such as the values of fairness and efficiency or the principle of comity.

To meet the common law real and substantial connection test, the party arguing that the court should assume jurisdiction has the burden of identifying a presumptive connecting factor that links the subject matter of the litigation to the forum. Jurisdiction must be established primarily on the basis of objective factors that connect the legal situation or the subject matter of the litigation with the forum. Abstract concerns for order, efficiency or fairness in the system are no substitute for connecting factors that give rise to a "real and substantial" connection for the purposes of the law of conflicts. In a case concerning a tort, the following factors are presumptive connecting factors that, *prima facie*, entitle a court to assume jurisdiction over a dispute:

(a) the defendant is domiciled or resident in the province;

(b) the defendant carries on business in the province;

(c) the tort was committed in the province; and

(d) a contract connected with the dispute was made in the province.

juge exercerait un pouvoir purement discrétionnaire, une approche leur permettant de se fonder sur un ensemble de facteurs précis auxquels ils confèrent l'effet d'une présomption. La nature des rapports régis par le droit international privé interdit de réduire le cadre applicable à la déclaration de compétence à un régime précaire et ponctuel élaboré sur le coup au cas par cas, aussi louable que soit l'objectif d'équité individuelle. Le régime doit être ordonné et doit permettre l'élaboration d'une méthode juste et équitable de règlement des conflits. La justice et l'équité constituent sans aucun doute des objectifs essentiels d'un bon système de droit international privé, mais elles ne peuvent se réaliser en l'absence d'un ensemble de principes et de règles assurant la sûreté et la prévisibilité du droit applicable à la déclaration de compétence d'un tribunal. L'établissement d'un ensemble de facteurs de rattachement pertinents créant une présomption et la détermination de leur nature et de leur effet juridiques rendra l'analyse des problèmes de déclaration de compétence plus claire et plus prévisible, tout en assurant leur conformité avec les objectifs d'équité et d'efficacité sur lesquels repose cette branche du droit. Dans cette optique, il faut conserver une nette distinction entre, d'une part, les facteurs ou les situations de fait qui relient l'objet du litige et le défendeur au tribunal et, d'autre part, les principes et les outils d'analyse, comme les valeurs que sont l'équité et l'efficacité ou le principe de la courtoisie.

Afin de satisfaire au critère du lien réel et substantiel de la common law, la partie qui plaide que le tribunal doit se déclarer compétent doit indiquer le facteur de rattachement créant une présomption qui lie l'objet du litige au tribunal. Il faut établir la compétence principalement sur la base de facteurs objectifs reliant la situation juridique ou l'objet du litige au tribunal. Des considérations abstraites d'ordre, d'efficacité ou d'équité du système ne sauraient se substituer aux facteurs de rattachement qui donnent lieu à un « lien réel et substantiel » pour l'application du droit international privé. Dans une instance relative à un délit, les facteurs suivants constituent des facteurs de rattachement créant une présomption qui, à première vue, autorisent une cour à se déclarer compétente à l'égard du litige :

a) le défendeur a son domicile dans la province ou y réside;

b) le défendeur exploite une entreprise dans la province;

c) le délit a été commis dans la province;

d) un contrat lié au litige a été conclu dans la province.

Although the factors set out in the list are considered presumptive, this does not mean that the list of recognized factors is complete, as it may be reviewed over time and updated by adding new presumptive connecting factors. When a court considers whether a new connecting factor should be given presumptive effect, the values of order, fairness and comity can serve as useful analytical tools for assessing the strength of the relationship with a forum to which the factor in question points. These values underlie all presumptive connecting factors, whether listed or new. In identifying new presumptive factors, a court should look to connections that give rise to a relationship with the forum that is similar in nature to the ones which result from the listed factors. Relevant considerations include:

(a) Similarity of the connecting factor with the recognized presumptive connecting factors;

(b) Treatment of the connecting factor in the case law;

(c) Treatment of the connecting factor in statute law; and

(d) Treatment of the connecting factor in the private international law of other legal systems with a shared commitment to order, fairness and comity.

The presumption of jurisdiction that arises where a recognized connecting factor — whether listed or new — applies is not irrebuttable. The burden of rebutting the presumption of jurisdiction rests, of course, on the party challenging the assumption of jurisdiction. That party must negate the presumptive effect of the listed or new factor and convince the court that the proposed assumption of jurisdiction would be inappropriate. This could be accomplished by establishing facts which demonstrate that the presumptive connecting factor does not point to any real relationship between the subject matter of the litigation and the forum or points only to a weak relationship between them.

If the court concludes that it lacks jurisdiction because none of the presumptive connecting factors — whether listed or new — apply or because the presumption of jurisdiction that flows from one of those factors has been rebutted, it must dismiss or stay the action, subject to the possible application of the forum

Bien que l'on considère que les facteurs énumérés créent une présomption, cela ce signifie pas que la liste des facteurs reconnus est définitive. Elle pourra être revue au fil du temps et mise à jour par l'ajout de nouveaux facteurs de rattachement créant une présomption. Le tribunal qui envisage la possibilité de conférer à un nouveau facteur de rattachement l'effet d'une présomption peut mettre à profit les outils utiles que constituent les valeurs d'ordre, d'équité et de courtoisie dans l'analyse de la solidité du rapport avec le tribunal révélé par ce facteur. Tous les facteurs de rattachement créant une présomption, qu'ils soient énumérés ou nouveaux, reposent sur ces valeurs. Lorsqu'ils reconnaissent de nouveaux facteurs créant une présomption, les tribunaux devraient envisager des liens qui révèlent avec le tribunal un rapport de nature semblable à ceux qui découlent des facteurs qui figurent sur la liste. Les considérations suivantes pourraient s'avérer pertinentes :

a) la similitude du facteur de rattachement avec les facteurs de rattachement reconnus créant une présomption;

b) le traitement du facteur de rattachement dans la jurisprudence;

c) le traitement du facteur de rattachement dans la législation;

d) le traitement du facteur de rattachement dans le droit international privé d'autres systèmes juridiques qui ont en commun avec le Canada les valeurs d'ordre, d'équité et de courtoisie.

La présomption de compétence créée lorsqu'un facteur de rattachement reconnu — énuméré ou nouveau — s'applique n'est pas irréfutable. Le fardeau de la réfuter incombe bien entendu à la partie qui s'oppose à la déclaration de compétence. Cette dernière doit réfuter la présomption créée par le facteur énuméré ou nouveau et convaincre la cour qu'une déclaration de compétence serait inopportune. Elle pourrait le faire en établissant les faits démontrant que le facteur de rattachement créant une présomption ne révèle aucun rapport réel, ou ne révèle qu'un rapport ténu, entre l'objet du litige et le tribunal.

Si la cour conclut qu'elle n'a pas compétence parce qu'aucun facteur de rattachement créant une présomption — énuméré ou nouveau — ne s'applique ou parce que la présomption de compétence découlant de l'un de ces facteurs est réfutée, elle doit rejeter l'action ou suspendre l'instance, à moins que ne s'applique la doctrine

of necessity doctrine. If jurisdiction is established, the claim may proceed, subject to the court's discretion to stay the proceedings on the basis of the doctrine of *forum non conveniens*.

A clear distinction must be drawn between the existence and the exercise of jurisdiction. Once jurisdiction is established, if the defendant does not raise further objections, the litigation proceeds before the court of the forum. The court cannot decline to exercise its jurisdiction unless the defendant invokes *forum non conveniens*. The decision to raise this doctrine rests with the parties, not with the court seized of the claim. If a defendant raises an issue of *forum non conveniens*, the burden is on him or her to show why the court should decline to exercise its jurisdiction and displace the forum chosen by the plaintiff. The defendant must show that the alternative forum is clearly more appropriate and that, in light of the characteristics of the alternative forum, it would be fairer and more efficient to choose an alternative forum and to deny the plaintiff the benefits of his or her decision to select a forum. When it is invoked, the doctrine of *forum non conveniens* requires a court to go beyond a strict application of the test governing the recognition and assumption of jurisdiction. It is based on a recognition that a common law court retains a residual power to decline to exercise its jurisdiction in appropriate, but limited, circumstances in order to assure fairness to the parties and the efficient resolution of the dispute. The court however, should not exercise its discretion in favour of a stay solely because it finds, once all relevant concerns and factors are weighed, that comparable forums exist in other provinces or states. It is not a matter of flipping a coin. A court hearing an application for a stay of proceedings must find that a forum exists that is in a better position to dispose fairly and efficiently of the litigation. On the other hand, a court must refrain from leaning too instinctively in favour of its own jurisdiction. The doctrine focuses on the contexts of individual cases and the factors that a court may consider in deciding whether to apply *forum non conveniens* may vary depending on the context. Such factors might include the locations of parties and witnesses, the cost of transferring the case to another jurisdiction or of declining the stay, the impact of a transfer on the conduct of the litigation or on related or parallel proceedings, the possibility of conflicting judgments, problems related to the recognition and enforcement of judgments, and the relative strengths of the connections of the two parties. Ultimately, the decision falls within the reasoned discretion of the trial court. This exercise of discretion will be entitled to deference from higher courts, absent an error of law or a clear and serious error in the determination of relevant facts

du for de nécessité. Si la compétence est établie, l'action peut être entendue, sous réserve du pouvoir discrétionnaire de la cour de suspendre l'instance en se fondant sur la doctrine du *forum non conveniens*.

Il faut conserver une nette distinction entre l'existence et l'exercice de la compétence. Une fois la compétence établie, l'instance suit son cours devant le tribunal si le défendeur ne soulève pas d'autres objections. Le tribunal ne peut décliner compétence, à moins que le défendeur n'invoque le *forum non conveniens*. Il appartient aux parties, et non au tribunal saisi du recours, d'invoquer cette doctrine. Le défendeur qui soulève l'application du *forum non conveniens* a le fardeau de démontrer pourquoi le tribunal devrait décliner sa compétence et renvoyer le litige dans un ressort autre que celui que le demandeur à choisi. Le défendeur doit démontrer que l'autre tribunal est nettement plus approprié et que, compte tenu des caractéristiques de l'autre tribunal, il serait plus juste et plus efficace de choisir cet autre tribunal et de refuser au demandeur les avantages liés à sa décision de choisir le tribunal saisi du litige. Si elle est invoquée, la doctrine du *forum non conveniens* oblige le tribunal à passer outre à l'application stricte du critère régissant la reconnaissance et la déclaration de compétence. Cette doctrine reconnaît que les tribunaux de common law conservent le pouvoir résiduel de ne pas exercer leur compétence dans des circonstances appropriées, quoique limitées, afin d'assurer l'équité envers les parties et le règlement efficace du litige. Le tribunal ne peut toutefois, dans l'exercice de son pouvoir discrétionnaire, suspendre l'instance uniquement parce qu'il conclut, après avoir examiné toutes les considérations et tous les facteurs pertinents, à l'existence de tribunaux comparables dans d'autres provinces ou États. Il ne s'agit pas de jouer à pile ou face. Un tribunal saisi d'une demande de suspension d'instance doit conclure qu'il existe un tribunal mieux à même de trancher le litige de façon équitable et efficace. Par contre, le tribunal doit éviter de pencher trop instinctivement en faveur de sa propre compétence. La doctrine est axée sur le contexte de chaque affaire et les facteurs dont le tribunal peut tenir compte dans sa décision d'appliquer la doctrine du *forum non conveniens* sont susceptibles de varier selon le contexte. Ces facteurs peuvent inclure, par exemple, l'endroit où se trouvent les parties et les témoins, les frais occasionnés par le renvoi de l'affaire à une autre juridiction ou par le refus de suspendre l'instance, les répercussions du changement de juridiction sur le déroulement du litige ou sur des procédures connexes ou parallèles, le risque de décisions contradictoires, les problèmes liés à la reconnaissance et à l'exécution des jugements ou la solidité relative des liens avec les deux parties. La décision relève en fin de compte du pouvoir discrétionnaire raisonné du tribunal de première

which takes place at an interlocutory or preliminary stage.

In *Van Breda*, a contract was entered into in Ontario. The existence of a contract made in Ontario that is connected with the litigation is a presumptive connecting factor that, on its face, entitles the courts of Ontario to assume jurisdiction in this case. Club Resorts has failed to rebut the presumption of jurisdiction that arises where this factor applies. Therefore, there was a sufficient connection between the Ontario court and the subject matter of the litigation. Club Resorts has not discharged its burden of showing that a Cuban court would clearly be a more appropriate forum. While a sufficient connection exists between Cuba and the subject matter of the litigation to support an action there, issues related to the fairness to the parties and to the efficient disposition of the claim must be considered. A trial held in Cuba would present serious challenges to the parties. All things considered, the burden on the plaintiffs clearly would be far heavier if they were required to bring their action in Cuba.

In *Charron*, the facts supported the conclusion that Club Resorts was carrying on a business in Ontario, which is a presumptive connecting factor. Club Resorts' commercial activities in Ontario went well beyond promoting a brand and advertising. Its representatives were in the province on a regular basis and it benefitted from the physical presence of an office in Ontario. It therefore follows that it has been established that a presumptive connecting factor applies and that the Ontario court is *prima facie* entitled to assume jurisdiction. Club Resorts has not rebutted the presumption of jurisdiction that arises from this connecting factor and therefore the Ontario court has jurisdiction on the basis of the real and substantial connection test. Furthermore, Club Resorts failed to discharge its burden of showing that a Cuban court would clearly be a more appropriate forum in the circumstances of this case. Considerations of fairness to the parties weigh heavily in favour of the plaintiffs.

Cases Cited

Explained: *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20; **referred to:** *Breeden v. Black*, 2012 SCC 19, [2012] 1 S.C.R. 666; *Éditions Écosociété Inc. v. Banro Corp.*, 2012 SCC 18, [2012] 1 S.C.R. 636; *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005

instance. En l'absence d'une erreur de droit ou d'une erreur manifeste et grave dans l'établissement des faits pertinents commise à un stade interlocutoire ou préliminaire, les juridictions supérieures feront preuve de déférence à l'égard de l'exercice de ce pouvoir discrétionnaire.

Dans l'affaire *Van Breda*, un contrat a été conclu en Ontario. L'existence d'un contrat conclu en Ontario et lié au litige constitue un facteur de rattachement créant une présomption qui, de prime abord, autorise les tribunaux ontariens à se déclarer compétents en l'espèce. Club Resorts n'a pas réfuté la présomption de compétence qu'établit l'application de ce facteur. Il existait donc un lien suffisant entre le tribunal ontarien et l'objet du litige. Club Resorts ne s'est pas acquittée de son fardeau de démontrer qu'un tribunal cubain serait nettement un ressort plus approprié. Bien qu'il existe entre Cuba et l'objet du litige des liens suffisants justifiant l'instruction du litige à Cuba, il faut tenir compte de questions relatives à l'équité envers les parties et au règlement de l'action d'une manière efficace. Un procès à Cuba présenterait de sérieux défis pour les parties. Tout bien considéré, les demandeurs auraient à supporter un fardeau beaucoup plus lourd s'ils devaient intenter leur recours à Cuba.

Dans l'affaire *Charron*, les faits permettaient de conclure que Club Resorts exploitait une entreprise en Ontario, ce qui constitue un facteur de rattachement créant une présomption. Les activités commerciales auxquelles se livrait cette société dans cette province allaient bien au-delà de la promotion d'une marque et de la publicité. Ses représentants se trouvaient régulièrement dans la province et elle tirait avantage de la présence d'un bureau en Ontario. Par conséquent, l'application d'un facteur de rattachement créant une présomption a été établie et le tribunal ontarien peut à première vue se déclarer compétent. Club Resorts n'a pas réfuté la présomption de compétence à laquelle donne naissance ce facteur de rattachement. Par conséquent, le tribunal ontarien est compétent suivant le critère du lien réel et substantiel. De plus, Club Resorts ne s'est pas acquittée de son fardeau de démontrer qu'il serait nettement plus approprié que le litige soit instruit à Cuba dans les circonstances. L'équité envers les parties fait pencher lourdement la balance en faveur des demandeurs.

Jurisprudence

Arrêt expliqué : *Muscutt c. Courcelles* (2002), 60 O.R. (3d) 20; **arrêts mentionnés :** *Breeden c. Black*, 2012 CSC 19, [2012] 1 R.C.S. 666; *Éditions Écosociété Inc. c. Banro Corp.*, 2012 CSC 18, [2012] 1 R.C.S. 636; *Colombie-Britannique c. Imperial Tobacco Canada*

SCC 49, [2005] 2 S.C.R. 473; *Castillo v. Castillo*, 2005 SCC 83, [2005] 3 S.C.R. 870; *Unifund Assurance Co. v. Insurance Corp. of British Columbia*, 2003 SCC 40, [2003] 2 S.C.R. 63; *Moran v. Pyle National (Canada) Ltd.*, [1975] 1 S.C.R. 393; *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077; *Hunt v. T&N plc*, [1993] 4 S.C.R. 289; *Beals v. Saldanha*, 2003 SCC 72, [2003] 3 S.C.R. 416; *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022; *McLean v. Pettigrew*, [1945] S.C.R. 62; *Spar Aerospace Ltd. v. American Mobile Satellite Corp.*, 2002 SCC 78, [2002] 4 S.C.R. 205; *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897; *Lemmex v. Bernard* (2002), 60 O.R. (3d) 54; *Gajraj v. DeBernardo* (2002), 60 O.R. (3d) 68; *Sinclair v. Cracker Barrel Old Country Store, Inc.* (2002), 60 O.R. (3d) 76; *Leufkens v. Alba Tours International Inc.* (2002), 60 O.R. (3d) 84; *Coutu v. Gauthier Estate*, 2006 NBCA 16, 296 N.B.R. (2d) 34; *Fewer v. Ellis*, 2011 NLCA 17, 305 Nfld. & P.E.I.R. 39; *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292; *Spiliada Maritime Corp. v. Cansulex Ltd.*, [1987] 1 A.C. 460; *Teck Cominco Metals Ltd. v. Lloyd's Underwriters*, 2009 SCC 11, [2009] 1 S.C.R. 321; *Oppenheim forfait GMBH v. Lexus maritime inc.*, 1998 CanLII 13001.

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CarswellOnt 6165 (*sub nom. Charron Estate v. Bel Air Travel Group Ltd.*). Appeals dismissed.

John A. Olah, for the appellant (33692).

Chris G. Paliare, *Robert A. Centa* and *Tina H. Lie*, for the respondents Morgan Van Breda et al. (33692).

Peter J. Pliszka and *Robin P. Roddey*, for the appellant (33606).

Jerome R. Morse, *Lori Stoltz* and *John J. Adair*, for the respondents Anna Charron et al. (33606).

Howard B. Borlack, *Lisa La Horey* and *Sabine Kharabian*, for the respondent Bel Air Travel Group Ltd. (33606).

Catherine M. Buie, for the respondent Hola Sun Holidays Limited (33606).

John Terry and *Jana Stettner*, for the intervener the Tourism Industry Association of Ontario (33606 and 33692).

François Larocque, *Michael Sobkin*, *Mark C. Power* and *Lauren J. Wihak*, for the interveners Amnesty International, the Canadian Centre for International Justice and the Canadian Lawyers for International Human Rights (33606 and 33692).

Allan Rouben, for the intervener the Ontario Trial Lawyers Association (33606 and 33692).

The judgment of the Court was delivered by

LeBel J. —

I. Introduction

[1] Tourism has grown into one of the most personal forms of globalization in the modern world. Canadians look elsewhere for the sun, or to see new sights or seek new experiences. Trips are planned and taken with great expectations. But personal

(QL), 2008 CarswellOnt 6165 (*sub nom. Charron Estate c. Bel Air Travel Group Ltd.*). Pourvois rejetés.

John A. Olah, pour l'appelante (33692).

Chris G. Paliare, *Robert A. Centa* et *Tina H. Lie*, pour les intimés Morgan Van Breda et autres (33692).

Peter J. Pliszka et *Robin P. Roddey*, pour l'appelante (33606).

Jerome R. Morse, *Lori Stoltz* et *John J. Adair*, pour les intimés Anna Charron et autres (33606).

Howard B. Borlack, *Lisa La Horey* et *Sabine Kharabian*, pour l'intimée Bel Air Travel Group Ltd. (33606).

Catherine M. Buie, pour l'intimée Hola Sun Holidays Limited (33606).

John Terry et *Jana Stettner*, pour l'intervenante Tourism Industry Association of Ontario (33606 et 33692).

François Larocque, *Michael Sobkin*, *Mark C. Power* et *Lauren J. Wihak*, pour les intervenants Amnistie internationale, Centre canadien pour la justice internationale et Juristes canadiens pour les droits de la personne dans le monde (33606 et 33692).

Allan Rouben, pour l'intervenante Ontario Trial Lawyers Association (33606 et 33692).

Version française du jugement de la Cour rendu par

Le juge LeBel —

I. Introduction

[1] Le tourisme est devenu l'une des formes les plus personnelles de la mondialisation des temps modernes. Les Canadiens se tournent vers d'autres horizons en quête de chaleur, de nouveaux paysages ou d'expériences enrichissantes. Les attentes

tragedies do happen. Happiness gives way to grief, as in the situations that resulted in these appeals. A young woman, Morgan Van Breda, suffered catastrophic injuries on a beach in Cuba. A family doctor and father, Dr. Claude Charron, died while scuba diving, also in Cuba. Actions were brought in Ontario against a number of parties, including the appellant Club Resorts Ltd. ("Club Resorts"), a company incorporated in the Cayman Islands that managed the two hotels where the accidents occurred. Club Resorts sought to block those proceedings, arguing that the Ontario courts lacked jurisdiction and, in the alternative, that a Cuban court would be a more appropriate forum on the basis of the doctrine of *forum non conveniens*. The same issues have now been raised in this Court. I will begin by summarizing the events that led to the litigation, the conduct of the litigation and the judgments of the courts below. I will then consider the principles that should apply to the assumption of jurisdiction and the doctrine of *forum non conveniens* under the common law conflicts rules of Canadian private international law. Finally, I will apply those principles to determine whether the Ontario courts have jurisdiction and, if so, whether they should decline to exercise it.

II. Background and Facts

A. *Van Breda*

[2] In June 2003, the respondent Viktor Berg and his spouse, Ms. Van Breda, went on a trip to Cuba, where they stayed at the SuperClubs Breezes Jibacoa resort managed by Club Resorts. Mr. Berg, a professional squash player, had made arrangements for a one-week stay for two people at this hotel through René Denis, an Ottawa-based travel agent operating a business known as Sport au Soleil.

[3] Mr. Denis's business involved arranging for racquet sport professionals for, among others, Club Resorts, in exchange for undisclosed compensation.

sont élevées au moment de préparer et d'entreprendre le voyage, mais des incidents tragiques peuvent survenir. Le bonheur cède alors la place au chagrin, comme l'illustrent les appels en l'espèce. Une jeune femme, Morgan Van Breda, a été très grièvement blessée sur une plage de Cuba. À Cuba également, un médecin et père de famille, le D^r^ Claude Charron, est mort au cours d'une plongée autonome. Des poursuites ont été intentées en Ontario contre plusieurs défendeurs, notamment l'appelante Club Resorts Ltd. (« Club Resorts »), une société constituée aux îles Caïmans qui gérait les deux hôtels où sont survenus les accidents. Club Resorts a cherché à mettre un terme à ces poursuites, en invoquant d'abord le défaut de compétence des tribunaux ontariens, puis en affirmant à titre subsidiaire qu'il serait plus approprié, suivant la doctrine du *forum non conveniens*, que ces litiges soient instruits à Cuba. Notre Cour est maintenant saisie des mêmes questions. Je vais d'abord résumer les faits à l'origine des litiges, le déroulement de ceux-ci et les décisions des juridictions inférieures. J'examinerai ensuite les principes qui devraient régir la déclaration de compétence et la doctrine du *forum non conveniens* sous le régime des règles de la common law applicables en droit international privé au Canada. En application de ces principes, je déterminerai finalement si les tribunaux ontariens ont compétence et, dans l'affirmative, s'ils doivent décliner cette compétence.

II. Contexte et faits

A. *L'affaire Van Breda*

[2] En juin 2003, l'intimé Viktor Berg et sa conjointe, M^me^ Van Breda, ont fait un voyage à Cuba, s'installant au centre de villégiature Breezes Jibacoa, un établissement de SuperClubs géré par Club Resorts. M. Berg, un joueur professionnel de squash, avait réservé un séjour d'une semaine pour deux personnes à cet hôtel par l'entremise de René Denis, un agent de voyage d'Ottawa exploitant une entreprise sous le nom de Sport au Soleil.

[3] Dans le cadre de son entreprise, M. Denis se chargeait de trouver des instructeurs de sports de raquette, notamment pour Club Resorts, en

Mr. Denis also received a fee from each professional. Once the arrangements for Mr. Berg were finalized, Mr. Denis sent him a letter on letterhead bearing the words "SuperClubs Cuba — Tennis", which confirmed the details of the agreement with Club Resorts: Mr. Berg was to provide two hours of tennis lessons a day in exchange for bed and board and other services for two people at the hotel.

[4] The accident happened on the first day of their stay. Ms. Van Breda tried to do some exercises on a metal structure on the beach, but the structure collapsed. She suffered catastrophic injuries and, as a result, became paraplegic. After spending a few days in a hospital in Cuba, she returned to Canada, going to Calgary where her family lived. She is now living in British Columbia with Mr. Berg. They never returned to Ontario, which they had planned to do after their holiday.

[5] In May 2006, Ms. Van Breda, her relatives and Mr. Berg sued several defendants, including Mr. Denis, Club Resorts, and some companies associated with Club Resorts in the SuperClubs group, in the Ontario Superior Court of Justice. Their claim was framed in contract and in tort. They sought damages for personal injury, damages for loss of support, care, guidance and companionship pursuant to the *Family Law Act*, R.S.O. 1990, c. F.3, and punitive damages.

[6] Some of the parties, including those who were served outside Ontario under rule 17.02 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, moved to dismiss the action for want of jurisdiction. In the alternative, they asked the Superior Court of Justice to decline jurisdiction on the basis of *forum non conveniens*.

B. *Charron*

[7] In January 2002, Dr. Charron and his wife booked a vacation package through a travel agent,

échange d'une rémunération non divulguée. M. Denis touchait aussi des honoraires de chaque instructeur. Une fois les arrangements pris pour obtenir les services de M. Berg, M. Denis lui a envoyé une lettre sur du papier à en-tête « SuperClubs Cuba — Tennis », confirmant les détails de l'entente conclue avec Club Resorts. Ainsi, M. Berg devait donner deux heures de leçons de tennis par jour moyennant l'hébergement, la nourriture et d'autres services pour deux personnes à l'hôtel.

[4] L'accident s'est produit le premier jour de leur séjour. M^me^ Van Breda essayait de faire quelques exercices à la plage sur une structure métallique qui s'est effondrée. Elle s'est blessée très grièvement et est restée paraplégique. Après quelques jours passés dans un hôpital de Cuba, elle est rentrée au Canada et s'est rendue à Calgary, où habitait sa famille. Elle vit maintenant en Colombie-Britannique avec M. Berg. Ils ne sont jamais retournés en Ontario, où ils comptaient revenir à la fin de leurs vacances.

[5] En mai 2006, M^me^ Van Breda, les membres de sa famille et M. Berg ont intenté en Cour supérieure de justice de l'Ontario une poursuite contre plusieurs défendeurs, y compris M. Denis, Club Resorts et quelques sociétés associées à Club Resorts au sein du groupe SuperClubs. Ils ont exercé leur recours en responsabilité contractuelle et en responsabilité délictuelle. Se fondant sur la *Loi sur le droit de la famille*, L.R.O. 1990, ch. F.3, ils ont réclamé des dommages-intérêts pour lésions corporelles, perte de soutien, de soins, de conseils et de compagnie, ainsi que des dommages-intérêts punitifs.

[6] Certaines des parties, notamment celles ayant reçu signification en dehors de l'Ontario en application de l'art. 17.02 des *Règles de procédure civile*, R.R.O. 1990, Règl. 194, ont demandé le rejet de l'action pour défaut de compétence. Elles ont demandé subsidiairement à la Cour supérieure de justice de décliner compétence selon la doctrine du *forum non conveniens*.

B. *L'affaire Charron*

[7] Le D^r^ Charron et son épouse ont réservé un forfait vacances en janvier 2002 auprès d'une

Bel Air Travel Group Ltd. ("Bel Air"). This package was offered by Hola Sun Holidays Ltd. ("Hola Sun"), which sold packages offered by, among others, SuperClubs. It was an all-inclusive package — at the Breezes Costa Verde hotel in Cuba — that featured scuba diving. The hotel was owned by Gaviota SA (Ltd.) ("Gaviota"), a Cuban corporation, but was managed by the appellant, Club Resorts. Dr. and Mrs. Charron reached the Breezes Costa Verde on February 8, 2002. Four days later, Dr. Charron drowned during his second scuba dive.

[8] Mrs. Charron and her children sued for breach of contract and negligence. Dr. Charron's estate sought damages for loss of future income, and the individual plaintiffs also sought damages for loss of love, care, guidance and companionship pursuant to the *Family Law Act*. The statement of claim was served on the Ontario defendants, Bel Air and Hola Sun. It was also served outside Ontario on several foreign defendants, including Club Resorts, under rule 17.02 of the *Rules of Civil Procedure*. The parties served outside Ontario included the diving instructor and the captain of the boat. Club Resorts and an associated company, Village Resorts International Ltd., which owned the SuperClubs trademark, moved to dismiss the action on the ground that the Ontario courts lacked jurisdiction or, in the alternative, to stay the action on the grounds that Ontario was not the most appropriate forum.

C. *Judicial History*

(1) *Van Breda* — Ontario Superior Court of Justice (2008), 60 C.P.C. (6th) 186

[9] In *Van Breda*, Pattillo J. held that Club Resorts' motion turned on whether there was a real and substantial connection in accordance with the test laid out by the Ontario Court of Appeal in *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20.

agence de voyages, Bel Air Travel Group Ltd. (« Bel Air »). Ce forfait était fourni par Hola Sun Holidays Ltd. (« Hola Sun »), qui vendait des forfaits dont certains étaient offerts par SuperClubs. Il s'agissait d'un forfait tout compris axé sur la plongée autonome à l'hôtel Breezes Costa Verde de Cuba. Cet hôtel appartenait à Gaviota SA (Ltd.) (« Gaviota »), une société cubaine, mais il était géré par l'appelante, Club Resorts. Le D^r^ Charron et son épouse sont arrivés à l'hôtel Breezes Costa Verde le 8 février 2002. Le D^r^ Charron s'est noyé quatre jours plus tard durant sa deuxième plongée autonome.

[8] M^me^ Charron et ses enfants ont intenté une action pour rupture de contrat et négligence. La succession du D^r^ Charron a réclamé des dommages-intérêts pour perte de revenus futurs. Les demandeurs ont également sollicité des dommages-intérêts pour perte d'amour, de soins, de conseils et de compagnie en se fondant sur la *Loi sur le droit de la famille*. La déclaration a été signifiée aux défenderesses ontariennes, Bel Air et Hola Sun. Elle a également été signifiée en dehors de l'Ontario à plusieurs défendeurs étrangers, notamment Club Resorts, en application de l'art. 17.02 des *Règles de procédure civile*. Parmi les parties ayant reçu signification en dehors de l'Ontario, mentionnons l'instructeur de plongée et le capitaine du bateau. Club Resorts et une société associée, Village Resorts International Ltd., la propriétaire de la marque de commerce SuperClubs, ont demandé le rejet de l'action pour défaut de compétence des tribunaux ontariens ou, subsidiairement, la suspension de l'instance au motif que l'Ontario n'est pas le ressort le plus approprié.

C. *Historique judiciaire*

(1) L'affaire *Van Breda* — Cour supérieure de justice de l'Ontario (2008), 60 C.P.C. (6th) 186

[9] Dans l'affaire *Van Breda*, le juge Pattillo a affirmé que, pour trancher la motion de Club Resorts, il fallait déterminer s'il existait un lien réel et substantiel conformément au critère établi par la Cour d'appel de l'Ontario dans *Muscutt c.*

He found that there was a connection between Ontario and Club Resorts by virtue of the activities the company engaged in in Ontario through Mr. Denis. He also found on a *prima facie* basis that the agreement between Mr. Berg and Club Resorts had actually been concluded in Ontario. After reviewing the other factors from *Muscutt*, including unfairness to the defendants in assuming jurisdiction, unfairness to the plaintiffs in not doing so and the involvement of other parties to the suit, he held that there was a sufficient connection between Ontario and the subject matter of the litigation. Pattillo J. then considered the issue of *forum non conveniens*. Although he accepted that Cuba also had jurisdiction, he concluded that it had not been established that a Cuban court would clearly be a more appropriate forum. For these reasons, he held that the Ontario Superior Court of Justice should entertain the action as against Club Resorts.

(2) *Charron* — Ontario Superior Court of Justice (2008), 92 O.R. (3d) 608

[10] In *Charron*, Mulligan J. held against Club Resorts. In his opinion, a contract had been entered into between Dr. Charron and Bel Air. The travel agency had booked an all-inclusive package at the Cuban hotel through Hola Sun, which had an agreement with Club Resorts. These facts weighed in favour of assuming jurisdiction. Mulligan J. also found that there was a connection between Ontario and the defendants. In his view, the resort relied heavily on international travellers to ensure its profitability. Club Resorts marketed the resort in Ontario by way of an agreement with Hola Sun. I note that the record indicated that Club Resorts or one of its associated companies had an office in Richmond Hill, Ontario. After reviewing the other factors from *Muscutt*, Mulligan J. held that the Ontario courts had jurisdiction with respect to Club Resorts. In considering *forum non conveniens*, Mulligan J. weighed several factors. He took into account the fact that more parties and witnesses were located in Ontario than in Cuba, that the damage had been sustained in Ontario

Courcelles (2002), 60 O.R. (3d) 20. Il a conclu à l'existence d'un lien entre l'Ontario et Club Resorts en raison des activités exercées par cette société en Ontario par l'entremise de M. Denis. Il a aussi conclu qu'à première vue, M. Berg et Club Resorts avaient en fait conclu l'entente en Ontario. Après avoir examiné les autres facteurs de l'arrêt *Muscutt*, y compris l'injustice causée aux défendeurs si le tribunal se déclare compétent, l'injustice causée aux demandeurs s'il ne se déclare pas compétent et la participation d'autres parties à l'instance, le juge Pattillo a conclu à l'existence d'un lien suffisant entre l'Ontario et l'objet du litige. Il a ensuite analysé la question du *forum non conveniens*. Le juge Pattillo a reconnu que Cuba avait aussi compétence, mais selon lui, on n'avait pas établi que le recours à un tribunal de Cuba serait nettement plus approprié. Pour ces motifs, il a conclu que la Cour supérieure de justice de l'Ontario devait instruire l'action intentée contre Club Resorts.

(2) L'affaire *Charron* — Cour supérieure de justice de l'Ontario (2008), 92 O.R. (3d) 608

[10] Dans l'affaire *Charron*, le juge Mulligan a rendu une décision défavorable à Club Resorts. À son avis, le D^r^ Charron et Bel Air avaient conclu un contrat. L'agence de voyage avait réservé un forfait tout compris à l'hôtel de Cuba auprès d'Hola Sun, qui était liée par entente avec Club Resorts. Ces faits militaient en faveur de la déclaration de compétence du tribunal ontarien. Le juge Mulligan a aussi conclu à l'existence d'un lien entre l'Ontario et les défendeurs. À son avis, le centre de villégiature comptait énormément sur les voyageurs étrangers pour assurer sa rentabilité. Club Resorts faisait la promotion du centre de villégiature en Ontario aux termes d'une entente intervenue avec Hola Sun. Selon ce qu'indiquait le dossier, Club Resorts ou l'une des sociétés associées à cette dernière avait ouvert un bureau à Richmond Hill, en Ontario. Après examen des autres facteurs énumérés dans *Muscutt*, le juge Mulligan a décidé que les tribunaux ontariens avaient compétence à l'égard de Club Resorts. Ensuite, le juge Mulligan a évalué plusieurs facteurs dans l'analyse du *forum*

and that a liability insurance policy was available to the foreign defendants in Ontario. In addition, Mrs. Charron and her children would lose the benefit of statutory family law remedies if the case were to proceed in Cuba. For these reasons, Mulligan J. held that the Ontario court was clearly a more appropriate forum than a Cuban court.

(3) Ontario Court of Appeal, 2010 ONCA 84, 98 O.R. (3d) 721

[11] The two cases were heard together in the Court of Appeal. After ordering a rehearing, the Court of Appeal, in reasons written by Sharpe J.A., took the opportunity to review and reframe the *Muscutt* test. I will discuss this new framework below in reviewing the evolution of the common law policy relating to conflicts of jurisdiction and conflicts of laws.

[12] Suffice it to say at this stage that, after recasting the *Muscutt* test, the Court of Appeal unanimously held, in both cases, that the Ontario courts had jurisdiction over the claims and the parties. It then decided that the Ontario courts should not decline jurisdiction on the basis of *forum non conveniens* principles, because a Cuban court would not clearly be a more appropriate forum.

[13] The appeals in *Van Breda* and *Charron* were also heard together in this Court. They were heard during the same session as two other appeals involving the issues of jurisdiction and *forum non conveniens*, which concerned actions in damages for defamation (*Breeden v. Black*, 2012 SCC 19, [2012] 1 S.C.R. 666, and *Éditions Écosociété Inc. v. Banro Corp.*, 2012 SCC 18, [2012] 1 S.C.R. 636).

non conveniens. Il a tenu compte de la présence d'un plus grand nombre de parties et de témoins en Ontario qu'à Cuba, de ce que le préjudice avait été subi en Ontario et que les défendeurs étrangers pouvaient bénéficier d'une police d'assurance de responsabilité en Ontario. De plus, l'instruction de la poursuite à Cuba priverait M^me^ Charron et ses enfants de la possibilité d'exercer les recours en droit de la famille prévus par la loi. Pour ces motifs, le juge Mulligan a conclu qu'il était nettement plus approprié que le litige soit instruit en Ontario qu'à Cuba.

(3) Cour d'appel de l'Ontario, 2010 ONCA 84, 98 O.R. (3d) 721

[11] Les deux affaires ont été entendues ensemble en Cour d'appel de l'Ontario. Après avoir ordonné une nouvelle audition, la Cour d'appel de l'Ontario, dans les motifs rédigés par le juge Sharpe, a profité de l'occasion pour réexaminer et reformuler le critère de l'arrêt *Muscutt*. Je vais analyser ce nouveau cadre ci-dessous lorsque j'aborderai l'évolution de la common law en ce qui a trait aux conflits de compétence et au droit international privé.

[12] Il suffit de dire ici qu'après avoir reformulé le critère établi dans *Muscutt*, la Cour d'appel a conclu à l'unanimité à la reconnaissance de la compétence des tribunaux ontariens à l'égard des demandes et des parties dans les deux affaires. Elle a ensuite statué que les tribunaux ontariens ne devaient pas décliner compétence en application de la doctrine du *forum non conveniens* parce qu'un tribunal cubain ne serait pas nettement un ressort plus approprié.

[13] Dans notre Cour, les pourvois formés dans les affaires *Van Breda* et *Charron* ont également été entendus ensemble. Au cours de la même session, la Cour a entendu deux autres affaires dans lesquelles des poursuites en dommages-intérêts pour diffamation posaient des problèmes de compétence et de *forum non conveniens* (*Breeden c. Black*, 2012 CSC 19, [2012] 1 R.C.S. 666, et *Éditions Écosociété Inc. c. Banro Corp.*, 2012 CSC 18, [2012] 1 R.C.S. 636).

III. Analysis

Issues

(1) Nature and Scope of Private International Law

[14] These appeals raise broad issues about the fundamental principles of the conflict of laws, as this branch of the law has traditionally been known in the common law, or "private international law" as it is often called now (A. Briggs, *The Conflict of Laws* (2nd ed. 2008), at pp. 2-3; Manitoba Law Reform Commission, *Private International Law*, Report #119 (2009), at p. 2; J.-G. Castel, "The Uncertainty Factor in Canadian Private International Law" (2007), 52 *McGill L.J.* 555).

[15] Although both appeals raise issues concerning both the determination of whether a court has jurisdiction (the test of jurisdiction *simpliciter*) and the principles governing a court's decision to decline to exercise its jurisdiction (the doctrine of *forum non conveniens*), those issues may have an impact on the development of other areas of private international law. Private international law is in essence domestic law, and it is designed to resolve conflicts between different jurisdictions, the legal systems or rules of different jurisdictions and decisions of courts of different jurisdictions. It consists of legal principles that apply in situations in which more than one court might claim jurisdiction, to which the law of more than one jurisdiction might apply or in which a court must determine whether it will recognize and enforce a foreign judgment or, in Canada, a judgment from another province (S. G. A. Pitel and N. S. Rafferty, *Conflict of Laws* (2010), at p. 1).

[16] Three categories of issues — jurisdiction, *forum non conveniens* and the recognition of foreign judgments — are intertwined in this branch of the law. Thus, the framework established for the purpose of determining whether a court has jurisdiction may have an impact on the choice of law and on the recognition of judgments, and vice versa.

III. Analyse

Les questions en litige

(1) Nature et portée du droit international privé

[14] Les présents pourvois soulèvent des questions importantes au sujet des principes fondamentaux applicables au conflit de lois tel qu'il est connu depuis longtemps en common law ou en « droit international privé », l'appellation que l'on donne souvent de nos jours à ce domaine du droit (A. Briggs, *The Conflict of Laws* (2e éd. 2008), p. 2-3; Commission de réforme du droit du Manitoba, *Private International Law*, Report #119 (2009), p. 2; J.-G. Castel, « The Uncertainty Factor in Canadian Private International Law » (2007), 52 *R.D. McGill* 555).

[15] Bien que les deux pourvois soulèvent des questions relatives à la reconnaissance de compétence (le critère de la simple reconnaissance de compétence) et aux principes régissant la décision par un tribunal de décliner compétence (la doctrine du *forum non conveniens*), ces questions peuvent influer sur l'évolution d'autres éléments du droit international privé. Ce domaine du droit relève essentiellement du droit interne et a pour objet la résolution des conflits entre des ressorts différents, entre des systèmes ou règles juridiques de ressorts différents et entre des décisions de tribunaux de ressorts différents. Il est formé de principes juridiques applicables dans des situations où plus d'un tribunal peut se déclarer compétent, ou lorsque les lois de plus d'un territoire peuvent s'appliquer, ou quand un tribunal doit décider s'il reconnaîtra et exécutera un jugement étranger ou, au Canada, un jugement d'une autre province (S. G. A. Pitel et N. S. Rafferty, *Conflict of Laws* (2010), p. 1).

[16] Dans ce domaine du droit, trois catégories de questions — la compétence, le *forum non conveniens* et la reconnaissance des jugements étrangers — sont étroitement liées. Le cadre établi afin de déterminer si un tribunal a compétence peut donc influer sur le choix de la loi applicable et la reconnaissance des jugements, et vice versa.

Judicial decisions on choice of law and the recognition of judgments have played a central role in the evolution of the rules related to jurisdiction. None of the divisions of private international law can be safely analysed and applied in isolation from the others. This said, the central focus of these appeals is on jurisdiction and the appropriate forum.

(2) Issues Related to Jurisdiction: Assumption and Exercise of Jurisdiction

[17] Two issues arise in these appeals. First, were the Ontario courts right to assume jurisdiction over the claims of the respondents Van Breda and Charron and over the appellant, Club Resorts? Second, were they right to exercise that jurisdiction and dismiss an application for a stay based on *forum non conveniens*?

[18] To be able to resolve these issues, I must first discuss the evolution of the rules of jurisdiction *simpliciter* in Canadian private international law. It will be necessary to review the approach the Ontario Court of Appeal adopted in respect of the questions of assumption of jurisdiction and *forum non conveniens* in its judgments in the cases at bar and, in particular, its reconsideration of the principles that it had previously set out in *Muscutt*.

[19] I will then propose an analytical framework and legal principles for assuming jurisdiction (jurisdiction *simpliciter*) and for deciding whether to decline to exercise it (*forum non conveniens*). On that basis, I will review the facts of the cases at bar to determine whether the Ontario courts made any reviewable errors when they decided to retain jurisdiction over them.

[20] Before turning to these issues, however, it is important to consider the constitutional

D'ailleurs, la jurisprudence en matière de choix de la loi applicable et de reconnaissance des jugements a joué un rôle primordial dans l'évolution des règles relatives à la compétence. Il s'avère impossible d'analyser et d'appliquer sans risque un des éléments du droit international privé en faisant abstraction des autres éléments. Cela dit, les présents pourvois portent essentiellement sur la reconnaissance de compétence et la détermination du tribunal approprié pour l'instruction d'un litige.

(2) Questions liées à la compétence : déclaration et exercice de la compétence

[17] Deux questions se posent en l'espèce. Premièrement, les tribunaux ontariens ont-ils eu raison de se déclarer compétents à l'égard des actions intentées par les intimés Van Breda et Charron ainsi qu'à l'égard de l'appelante Club Resorts? Deuxièmement, ont-ils eu raison d'exercer cette compétence et de rejeter la demande de suspension d'instance fondée sur le *forum non conveniens*?

[18] Pour résoudre ces questions, je dois d'abord analyser l'évolution des règles applicables à la simple reconnaissance de compétence en droit international privé au Canada. Je dois étudier la manière dont la Cour d'appel de l'Ontario a examiné les questions relatives à la déclaration de compétence et au *forum non conveniens* dans les jugements rendus en l'espèce, et, en particulier, là où elle a revu les principes qu'elle avait établis dans l'arrêt *Muscutt*.

[19] Je proposerai alors un cadre d'analyse et des principes juridiques applicables à la déclaration de compétence (la simple reconnaissance de compétence) ainsi qu'aux décisions sur l'opportunité de décliner compétence (le *forum non conveniens*). Me fondant sur ce cadre d'analyse, j'examinerai les faits de ces affaires afin de déterminer si, en décidant de se déclarer compétents dans ces instances, les tribunaux ontariens ont commis des erreurs donnant lieu à révision.

[20] Mais avant d'aborder ces questions, il importe d'analyser le fondement constitutionnel du

underpinnings of private international law in Canada. This part of the analysis is necessary in order to explain the origins of the "real and substantial connection test" as it is now known, its nature, and its impact on the development of the principles of private international law.

(3) Constitutional Underpinnings of Private International Law

[21] Conflicts rules must fit within Canada's constitutional structure. Given the nature of private international law, its application inevitably raises constitutional issues. This branch of the law is concerned with the jurisdiction of courts of the Canadian provinces, with whether that jurisdiction should be exercised, with what law should apply to a dispute, and with whether a court should recognize and enforce a judgment rendered by a court of another province or country. The rules of private international law can be found, in the common law provinces, in the common law and in statute law and, in Quebec, in the *Civil Code of Québec*, S.Q. 1991, c. 64, which contains a well-developed set of rules and principles in this area (see *Civil Code of Québec*, Book Ten, arts. 3076 to 3168). The interplay between provincial jurisdiction and external legal situations takes place within a constitutional framework which limits the external reach of provincial laws and of a province's courts. The Constitution assigns powers to the provinces. But these powers are subject to the restriction that they be exercised within the province in question (see P. W. Hogg, *Constitutional Law of Canada* (5th ed. 2007), vol. 1, at pp. 364-65 and 376-77; H. Brun, G. Tremblay and E. Brouillet, *Droit constitutionnel* (5th ed. 2008), at p. 569; *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473, at paras. 26-28, *per* Major J.), and they must be exercised in a manner consistent with the territorial restrictions created by the Constitution (see *Castillo v. Castillo*, 2005 SCC 83, [2005] 3 S.C.R. 870, at para. 5, *per* Major J.; *Unifund Assurance Co. v. Insurance Corp. of British Columbia*, 2003 SCC 40, [2003] 2 S.C.R. 63, at para. 51, *per* Binnie J.).

droit international privé au Canada. Cette partie de l'analyse s'impose afin d'expliquer l'origine du « critère du lien réel et substantiel », ainsi qu'on l'appelle maintenant, sa nature et son incidence sur l'élaboration des principes du droit international privé.

(3) Fondement constitutionnel du droit international privé

[21] Les règles du droit international privé doivent être conformes au régime constitutionnel canadien. Compte tenu de la nature du droit international privé, son application soulève inévitablement des questions constitutionnelles. Cette branche du droit traite de la compétence des tribunaux provinciaux canadiens, de l'opportunité d'exercer cette compétence, de la loi applicable dans un litige donné et des conditions de la reconnaissance et de l'exécution d'un jugement rendu par un tribunal d'une autre province ou d'un tribunal étranger. Ses règles se trouvent dans la common law et dans les lois des provinces de common law et, au Québec, dans le *Code civil du Québec*, L.Q. 1991, ch. 64, qui contient un ensemble complet de règles et de principes en la matière (voir le *Code civil du Québec*, Livre dixième, art. 3076 à 3168). L'interaction de la compétence provinciale et des situations juridiques survenues à l'extérieur de la province se situe à l'intérieur d'un cadre constitutionnel qui limite la portée extraterritoriale des lois provinciales et des tribunaux provinciaux. En effet, la Constitution attribue des pouvoirs aux provinces, mais elle n'en autorise l'exercice que sur leur territoire (voir P. W. Hogg, *Constitutional Law of Canada* (5e éd. 2007), vol. 1, p. 364-365 et 376-377; H. Brun, G. Tremblay et E. Brouillet, *Droit constitutionnel* (5e éd. 2008), p. 569; *Colombie-Britannique c. Imperial Tobacco Canada Ltée*, 2005 CSC 49, [2005] 2 R.C.S. 473, par. 26-28, le juge Major) et dans le respect des restrictions territoriales prévues par la Constitution (voir *Castillo c. Castillo*, 2005 CSC 83, [2005] 3 R.C.S. 870, par. 5, le juge Major; *Unifund Assurance Co. c. Insurance Corp. of British Columbia*, 2003 CSC 40, [2003] 2 R.C.S. 63, par. 51, le juge Binnie).

(4) Origins of the Real and Substantial Connection Test

[22] The real and substantial connection test arose out of decisions of this Court that were aimed at establishing broad and flexible principles to govern the exercise of provincial powers and the actions of a province's courts. It was focussed on two issues: (1) the risk of jurisdictional overreach by provinces and (2) the recognition of decisions rendered in other jurisdictions within the Canadian federation and in other countries. In developing the real and substantial connection test, the Court crafted a constitutional principle rather than a simple conflicts rule (see G. Goldstein and E. Groffier, *Droit international privé*, vol. I, *Théorie générale* (1998), at p. 47). However, the test was born as a general organizing principle of the conflict of laws. Its constitutional dimension appeared only later. Courts have used the expression "real and substantial connection" to describe the test in both senses, and often in the same judgment. This has produced confusion about both the nature of the test and the constitutional status of the rules and principles of private international law. A clearer distinction needs to be drawn between the private international law and constitutional dimensions of this test.

[23] From a constitutional standpoint, the Court has, by developing tests such as the real and substantial connection test, sought to limit the reach of provincial conflicts rules or the assumption of jurisdiction by a province's courts. However, this test does not dictate the content of conflicts rules, which may vary from province to province. Nor does it transform the whole field of private international law into an area of constitutional law. In its constitutional sense, it places limits on the reach of the jurisdiction of a province's courts and on the application of provincial laws to interprovincial or international situations. It also requires that all Canadian courts recognize and enforce decisions rendered by courts of the other Canadian provinces on the basis of a proper assumption of jurisdiction. But it does not establish the actual content of rules and principles of private international law, nor does

(4) Origine du critère du lien réel et substantiel

[22] Le critère du lien réel et substantiel provient d'arrêts dans lesquels notre Cour a tenté d'établir des principes larges et souples régissant l'exercice des pouvoirs des provinces et l'intervention des tribunaux provinciaux. À cette occasion, la Cour a mis l'accent sur deux difficultés : (1) le risque d'exercice d'une compétence trop étendue par les provinces, et (2) la reconnaissance des décisions d'autres ressorts rendues au sein de la fédération canadienne et à l'étranger. Ainsi, dans l'élaboration du critère du lien réel et substantiel, la Cour a créé un principe constitutionnel plutôt qu'une simple règle de droit international privé (voir G. Goldstein et E. Groffier, *Droit international privé*, t. I, *Théorie générale* (1998), p. 47). Cependant, le critère constituait au départ un principe directeur général de droit international privé. Sa dimension constitutionnelle est apparue seulement plus tard. D'ailleurs, les tribunaux utilisent, souvent dans le même jugement, l'expression « lien réel et substantiel » pour décrire les deux aspects du critère, ce qui entraîne la confusion quant à la nature du critère et au statut constitutionnel des principes et des règles de droit international privé. Il faut donc préciser la distinction entre le droit international privé et la dimension constitutionnelle du critère.

[23] D'un point de vue constitutionnel, la Cour tente, par l'élaboration de critères comme le critère du lien réel et substantiel, de limiter la portée des règles provinciales de droit international privé ou les déclarations de compétence des tribunaux provinciaux. Cependant, ce critère ne dicte pas le contenu de ces règles, qui peut varier d'une province à l'autre. Le critère ne transforme pas non plus l'ensemble du droit international privé en droit constitutionnel. Par son caractère constitutionnel, il établit des limites à la portée de la compétence des cours provinciales et à l'application des lois provinciales aux situations interprovinciales ou internationales. De plus, ce critère exige que toutes les cours au Canada reconnaissent et exécutent les décisions rendues par les cours des autres provinces lorsqu'elles se sont déclarées à bon droit compétentes dans une affaire donnée. Il ne permet toutefois

it require that those rules and principles be uniform.

[24] The first mention of a "real and substantial connection test" in the Court's modern jurisprudence can be found in the reasons of Dickson J. in *Moran v. Pyle National (Canada) Ltd.*, [1975] 1 S.C.R. 393. That case concerned a tort action with respect to manufacturer's liability. The main issue was whether the courts of Saskatchewan had jurisdiction over the claim and, if so, what substantive law governed it. Dickson J. suggested that the English courts seemed to be moving towards some form of "real and substantial connection test" (pp. 407-8) to resolve issues related to the assumption of jurisdiction by a province's courts and the appropriate choice of the law applicable to a tort. The test was formally adopted in *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077. As had been the case in *Moran*, the Court's intention in *Morguard* was to develop an organizing principle of Canadian private international law, albeit with constitutional overtones. The test's constitutional role in the Canadian federation was confirmed a few years later in *Hunt v. T&N plc*, [1993] 4 S.C.R. 289. Its Janus-like nature — with a private international law face on the one hand and a constitutional face on the other — crystallized in *Hunt* and remained a permanent feature of the subsequent jurisprudence.

[25] In retrospect, it can be seen that in *Morguard*, the Court initiated a major shift in the framework governing the conflict of laws in Canada by accepting the validity of the real and substantial connection test as a principle governing the rules applicable to conflicts. In view of its importance, the case merits closer consideration. At issue in *Morguard* was an application to enforce, in British Columbia, a judgment rendered in Alberta against a resident of British Columbia. The claim related to a debt secured by a mortgage on property in Alberta. The parties were resident in Alberta at the time the

pas de déterminer le contenu réel des règles et des principes de droit international privé et n'exige pas que ces règles et principes soient uniformes.

[24] C'est dans les motifs rédigés par le juge Dickson dans *Moran c. Pyle National (Canada) Ltd.*, [1975] 1 R.C.S. 393, que le « critère du rapport réel et substantiel » apparaît pour la première fois dans la jurisprudence moderne de la Cour. Il était question dans cette affaire d'une action en responsabilité délictuelle intentée contre un fabricant. La Cour devait principalement établir si les tribunaux de la Saskatchewan avaient compétence sur l'action et déterminer, dans l'affirmative, le droit substantiel applicable au litige. Selon le juge Dickson, les tribunaux anglais semblaient tendre vers une forme quelconque de « critère du rapport réel et substantiel » (p. 407-408) pour trancher les questions liées aux déclarations de compétence par les tribunaux provinciaux et celles relatives à la détermination du droit applicable à un délit. Le critère a formellement été adopté dans *Morguard Investments Ltd. c. De Savoye*, [1990] 3 R.C.S. 1077. Tout comme dans l'arrêt *Moran*, la Cour, dans *Morguard*, voulait établir un principe directeur de droit international privé canadien, comportant toutefois des connotations constitutionnelles. La Cour a confirmé, quelques années plus tard dans *Hunt c. T&N plc*, [1993] 4 R.C.S. 289, la place qu'occupe ce critère dans la fédération canadienne sur le plan constitutionnel. Le critère qui, à l'instar de Janus, se présente sous deux aspects — l'un de droit international privé et l'autre de nature constitutionnelle — a été confirmé dans l'arrêt *Hunt*, et toutes les décisions qui ont suivi l'ont conservé.

[25] Rétrospectivement, on peut constater que dans l'arrêt *Morguard*, la Cour a modifié considérablement le cadre du droit international privé au Canada en reconnaissant la validité du critère du lien réel et substantiel en tant que principe régissant l'application des règles du droit international privé. Un examen plus approfondi de cette affaire s'impose en raison de son importance. L'arrêt *Morguard* portait sur une demande d'exécution, en Colombie-Britannique, d'un jugement rendu en Alberta contre une personne résidant en Colombie-Britannique. La réclamation visait une dette

loan was made. La Forest J., writing for a unanimous Court, called for a re-evaluation of relationships between the courts of the provinces within the Canadian federation. The creation of the Canadian federation established an internal space within which exchanges should occur more freely than between independent states. The principle of comity and the principles of fairness and order applicable within a federal space required that the rules of private international law be adjusted (*Morguard*, at pp. 1095-96).

[26] In *Morguard*, the Court held that the courts of a province must recognize and enforce a judgment of a court of another province if a real and substantial connection exists between that court and the subject matter of the litigation. Another purpose of the test was to prevent improper assumptions of jurisdiction by the courts of a province. Thus, the test was designed to ensure that claims are not prosecuted in a jurisdiction that has little or no connection with either the transactions or the parties, and it requires that a judgment rendered by a court which has properly assumed jurisdiction in a given case be recognized and enforced. La Forest J. did not seek to determine the precise content of this real and substantial connection test (*Morguard*, at p. 1108), nor did he elaborate on the strength of the connection. Rather, he held that the connections between the matters or the parties, on the one hand, and the court, on the other, must be of some significance in order to promote order and fairness. They must not be "tenuous" (p. 1110). La Forest J. added that the requirement of a real and substantial connection was consistent with the constitutional imperative that provincial power be exercised "in the province" (p. 1109). Because the appeal had not been argued on constitutional grounds, however, he refrained from determining whether the real and substantial connection test should be considered a constitutional test.

[27] The Court's subsequent judgment in *Hunt* confirmed the constitutional nature of the real and substantial connection test. That case concerned

garantie par une hypothèque consentie sur un bien-fonds en Alberta. Les parties résidaient en Alberta au moment où le prêt avait été consenti. S'exprimant au nom d'une Cour unanime, le juge La Forest a préconisé une réévaluation des rapports qu'entretiennent entre eux les tribunaux provinciaux au sein de la fédération canadienne. La création de la fédération canadienne avait permis d'aménager un espace où les échanges devaient se faire plus librement qu'entre États indépendants. Les principes de courtoisie, d'équité et d'ordre applicables dans un espace fédéral exigeaient alors en conséquence une modification des règles du droit international privé (*Morguard*, p. 1095-1096).

[26] Dans *Morguard*, la Cour a conclu que les tribunaux d'une province doivent reconnaître et exécuter un jugement rendu par le tribunal d'une autre province lorsqu'un lien réel et substantiel rattache ce tribunal à l'objet du litige. Le critère visait aussi à prévenir les déclarations de compétence inopportunes par les cours provinciales. D'une part, ce critère visait donc à empêcher que des poursuites soient engagées dans un ressort n'ayant que peu ou pas de lien avec les opérations ou les parties. D'autre part, il exigeait la reconnaissance et l'exécution des jugements rendus par des tribunaux s'étant à bon droit déclarés compétents dans une affaire donnée. Le juge La Forest n'a pas cherché à déterminer la nature exacte de ce critère du lien réel et substantiel (*Morguard*, p. 1108), et il n'a pas non plus fourni de précisions sur la force de ce lien. Il a plutôt conclu que le lien entre les affaires ou les parties et la cour devait revêtir une certaine importance pour favoriser l'ordre et l'équité. Ce lien ne devait pas être « ténu » (p. 1110). Toujours selon le juge La Forest, la présence obligatoire d'un lien réel et substantiel respectait l'impératif constitutionnel selon lequel le pouvoir provincial doit être exercé « [dans] la province » (p. 1109). Comme le pourvoi n'avait pas été débattu sur la base de considérations constitutionnelles, le juge La Forest s'est toutefois abstenu de décider s'il fallait qualifier de constitutionnel le critère du lien réel et substantiel.

[27] Dans l'arrêt *Hunt*, rendu par la suite, notre Cour a confirmé la nature constitutionnelle du critère en question. Cette affaire portait sur

the application of a "blocking" statute enacted by the Quebec legislature that prohibited the transfer to other jurisdictions of certain documents kept by corporations in Quebec, even in the context of court litigation. The Court found that the statute was not applicable to litigation conducted in British Columbia. It held that assumptions of jurisdiction by a province and its courts must be grounded in the principles of order and fairness in the judicial system. The real and substantial connection test from *Morguard* reflected the need for limits on assumptions of jurisdiction by a province's courts (*Hunt*, at p. 325). Any improper assumption of jurisdiction would be negated by the requirement that there be a "real and substantial connection" (p. 328; see C. Emanuelli, *Droit international privé québécois* (3rd ed. 2011), at p. 38).

[28] Since *Hunt*, the real and substantial connection test has been recognized as a constitutional imperative in the application of the conflicts rules. It reflects the limits of provincial legislative and judicial powers and has thus become more than a conflicts rule. Its application was extended to the recognition and enforcement of foreign judgments in *Beals v. Saldanha*, 2003 SCC 72, [2003] 3 S.C.R. 416.

[29] But, in the common law, the nature of the conflicts rules that would accord with the constitutional imperative has remained largely undeveloped in this Court's jurisprudence. Although the real and substantial connection test has been consistently applied both as a constitutional test and as a principle of private international law, since *Hunt*, the Court has generally declined to articulate the content of the private international law rules that would satisfy the test's constitutional requirements or to develop a framework for them. The Court has continued to affirm the relevance and importance of the test and has even extended it to foreign judgments, but without attempting to elaborate upon the rules it requires (see *Beals*, at paras. 23 and 28, *per* Major J.).

l'application d'une loi « prohibitive » de la province de Québec interdisant, même dans le cas d'un litige devant les tribunaux, le transport dans d'autres ressorts de certains documents conservés par des sociétés québécoises. La Cour a jugé que la loi ne s'appliquait pas à une poursuite instruite en Colombie-Britannique. Selon elle, la déclaration de compétence d'une province et de ses tribunaux devait avoir pour assises les principes d'ordre et d'équité applicables dans le système judiciaire. Le critère du lien réel et substantiel adopté dans l'arrêt *Morguard* démontrait la nécessité d'établir des limites aux déclarations de compétence des tribunaux provinciaux (*Hunt*, p. 325). L'exigence du « lien réel et substantiel » ferait obstacle à toute déclaration de compétence inopportune (p. 328; voir C. Emanuelli, *Droit international privé québécois* (3e éd. 2011), p. 38).

[28] Depuis l'arrêt *Hunt*, on reconnaît le critère du lien réel et substantiel comme un impératif constitutionnel dans l'application des règles du droit international privé. Ce critère indique les limites auxquelles sont assujettis les pouvoirs législatif et judiciaire des provinces. Il est donc devenu plus qu'une règle de droit international privé. De plus, dans l'arrêt *Beals c. Saldanha*, 2003 CSC 72, [2003] 3 R.C.S. 416, la Cour a étendu son application à la reconnaissance et à l'exécution des jugements étrangers.

[29] Mais en common law, la nature des règles du droit international privé qui seraient compatibles avec l'impératif constitutionnel reste en bonne partie inexplorée dans la jurisprudence de notre Cour. Bien que le critère du lien réel et substantiel ait été constamment appliqué comme critère constitutionnel et principe de droit international privé, depuis l'arrêt *Hunt*, la Cour a généralement refusé de préciser le contenu et le cadre d'application des règles de droit international privé qui répondraient aux exigences d'ordre constitutionnel qu'impose le critère. La Cour a continué de souligner la pertinence et l'importance du critère, et a même étendu son application aux jugements étrangers, mais sans tenter de préciser les règles applicables (voir *Beals*, par. 23 et 28, le juge Major).

[30] So the test does exist. But what does it mean? What rules would satisfy its status as a constitutional imperative? Two approaches are possible. One approach is to view the test not only as a constitutional principle, but also as a conflicts rule in itself. If it is viewed as a conflicts rule, its content would fall to be determined on a case-by-case basis by the courts in decisions in which they would attempt to implement the objectives of order and fairness in the legal system. The other approach is to accept that the test imposes constitutional limits on provincial powers, but to seek to develop a system of connecting factors and principles designed to make the resolution of conflict of laws issues more predictable in order to reduce the scope of judicial discretion exercised in the context of each case. Some academic commentators view the second approach as critical in order to maintain order, efficiency and predictability in this area of the law. Indeed, the real and substantial connection test itself has been criticized as being much too loose and unpredictable to facilitate an orderly resolution of conflicts issues (see J.-G. Castel; J. Blom and E. Edinger, "The Chimera of the Real and Substantial Connection Test" (2005), 38 *U.B.C. L. Rev.* 373).

[31] Thus, in the course of this review, we should remain mindful of the distinction between the real and substantial connection test as a constitutional principle and the same test as the organizing principle of the law of conflicts. With respect to the constitutional principle, the territorial limits on provincial legislative competence and on the authority of the courts of the provinces derive from the text of s. 92 of the *Constitution Act, 1867*. These limits are, in essence, concerned with the legitimate exercise of state power, be it legislative or adjudicative. The legitimate exercise of power rests, *inter alia*, upon the existence of an appropriate relationship or connection between the state and the persons who are brought under its authority. The purpose of constitutionally imposed territorial limits is to ensure the existence

[30] Ainsi, le critère existe. Mais en quoi peut-il consister? Quelles règles répondraient à l'impératif constitutionnel qu'il constitue? Deux approches peuvent être retenues. On pourrait considérer le critère non seulement comme un principe constitutionnel, mais aussi comme une règle de droit international privé en soi. Si le critère était considéré comme une règle de droit international privé, il appartiendrait aux juges d'établir au cas par cas son contenu et de tenter, dans leurs décisions, de mettre en œuvre les objectifs d'ordre et d'équité au sein du système juridique. L'autre approche consisterait à reconnaître que le critère impose des limites constitutionnelles aux pouvoirs des provinces, tout en cherchant à développer un ensemble de facteurs de rattachement et de principes susceptibles d'accroître la prévisibilité du règlement des problèmes de droit international privé et de réduire par le fait même l'étendue du pouvoir discrétionnaire exercé par les juges dans chaque cas. Selon certains auteurs, l'adoption de la deuxième approche est essentielle au maintien de l'ordre, de l'efficacité et de la prévisibilité dans ce domaine du droit. En fait, on a critiqué le critère du lien réel et substantiel, parce qu'il serait beaucoup trop vague et imprévisible pour favoriser la résolution ordonnée des problèmes de droit international privé (voir J.-G. Castel; J. Blom et E. Edinger, « The Chimera of the Real and Substantial Connection Test » (2005), 38 *U.B.C. L. Rev.* 373).

[31] Dans la présente analyse, il nous faut donc garder à l'esprit la distinction entre le critère du lien réel et substantiel en tant que principe constitutionnel et ce même critère en tant que principe directeur du droit international privé. En ce qui concerne le principe constitutionnel, les limites territoriales de la compétence législative provinciale et de l'autorité des tribunaux provinciaux découlent du texte de l'art. 92 de la *Loi constitutionnelle de 1867*. Essentiellement, ces limites visent à assurer l'exercice légitime du pouvoir — législatif ou juridictionnel — de l'État. L'exercice légitime de ce pouvoir repose notamment sur l'existence d'un rapport ou d'un lien approprié entre l'État et les personnes sur lesquelles il peut exercer son autorité. Les limites territoriales qu'impose la Constitution garantissent l'existence du rapport ou du lien requis

of the relationship or connection needed to confer legitimacy.

[32] As can be observed from the jurisprudence, in Canadian constitutional law, the real and substantial connection test has given expression to the constitutionally imposed territorial limits that underlie the requirement of legitimacy in the exercise of the state's power of adjudication. This test suggests that the connection between a state and a dispute cannot be weak or hypothetical. A weak or hypothetical connection would cast doubt upon the legitimacy of the exercise of state power over the persons affected by the dispute.

[33] The constitutionally imposed territorial limits on adjudicative jurisdiction are related to, but distinct from, the real and substantial connection test as expressed in conflicts rules. Conflicts rules include the rules that have been chosen for deciding when jurisdiction can be assumed over a given dispute, what law will govern a dispute or how an adjudicative decision from another jurisdiction will be recognized and enforced. The constitutional territorial limits, on the other hand, are concerned with setting the outer boundaries within which a variety of appropriate conflicts rules can be elaborated and applied. The purpose of the constitutional principle is to ensure that specific conflicts rules remain within these boundaries and, as a result, that they authorize the assumption of jurisdiction only in circumstances representing a legitimate exercise of the state's power of adjudication.

[34] This case concerns the elaboration of the "real and substantial connection" test as an appropriate common law conflicts rule for the assumption of jurisdiction. I leave further elaboration of the content of the constitutional test for adjudicative jurisdiction for a case in which a conflicts rule is challenged on the basis of inconsistency with constitutionally imposed territorial limits. To be clear, however, the existence of a constitutional test aimed at maintaining the constitutional limits on

pour conférer la légitimité nécessaire à l'exercice de ce pouvoir.

[32] Comme l'illustre la jurisprudence, en droit constitutionnel canadien, le critère du lien réel et substantiel a affirmé les limites territoriales imposées par la Constitution qui sous-tendent la légitimité nécessaire à l'exercice du pouvoir juridictionnel de l'État. Ce critère suppose que le lien entre un État et un litige ne peut être ténu ni hypothétique. Un lien de cette nature jetterait un doute sur la légitimité de l'exercice, par l'État, de son pouvoir sur les personnes que touche le litige.

[33] Les limites territoriales à la compétence juridictionnelle qu'impose la Constitution sont reliées au critère du lien réel et substantiel exprimé dans les règles du droit international privé, mais ces limites demeurent distinctes de ce critère. En effet, les règles de droit international privé comprennent les règles choisies pour permettre aux tribunaux de déterminer dans quelles circonstances ils peuvent se déclarer compétents à l'égard d'un litige donné, quelles lois ils doivent appliquer à un litige ou de quelle façon ils doivent reconnaître et exécuter une décision rendue dans un autre ressort. Par contre, les limites territoriales prévues par la Constitution déterminent le territoire à l'intérieur duquel peuvent être élaborées et appliquées diverses règles de droit international privé appropriées. Le principe constitutionnel vise à assurer que les règles particulières de droit international privé respectent les limites de ce territoire et, par conséquent, qu'elles n'autorisent la déclaration de compétence que dans des circonstances représentant un exercice légitime du pouvoir juridictionnel de l'État.

[34] En l'espèce, il s'agit d'élaborer le critère du « lien réel et substantiel » en tant que règle de droit international privé qu'un tribunal peut appliquer en common law pour déterminer s'il peut se déclarer compétent. Le contenu du critère constitutionnel de la compétence juridictionnelle pourra être élaboré dans une affaire dans laquelle une règle de droit international privé serait contestée parce qu'elle ne respecterait pas les limites territoriales imposées par la Constitution. Précisons toutefois

the powers of a province's legislature and courts does not mean that the rules of private international law must be uniform across Canada. Legislatures and courts may adopt various solutions to meet the constitutional requirements and the objectives of efficiency and fairness that underlie our private international law system. Nor does this test's existence mean that the connections with the province must be the strongest ones possible or that they must all point in the same direction.

que l'existence d'un critère constitutionnel visant le maintien des limites constitutionnelles des pouvoirs des législatures et des cours provinciales ne signifie pas que les règles de droit international privé doivent être uniformes partout au Canada. Les législatures et les tribunaux provinciaux peuvent adopter diverses solutions pour satisfaire aux exigences constitutionnelles et aux objectifs d'efficacité et d'équité sur lesquels repose notre système de droit international privé. L'existence d'un tel critère ne signifie pas non plus que les liens avec la province doivent être les plus déterminants possible ou qu'ils doivent tous tendre à la même conclusion.

[35] Turning to the search for appropriate conflicts rules, the trend is towards retaining or establishing a system of connecting factors informed by principles for applying them, as opposed to relying on almost pure judicial discretion to achieve order and fairness. This trend is apparent in the laws passed by certain provincial legislatures and is reflected in a number of judicial decisions. These decisions include the important jurisprudential current that the Ontario Court of Appeal has been developing since *Muscutt*, which is in issue in the cases at bar. The real and substantial connection test should be viewed not in isolation, but rather in the context of its historical roots, contemporary legislative developments, the academic literature and initiatives aimed at developing and modernizing Canada's conflicts rules. The test was not born *ex nihilo*, without any awareness of the methods and techniques that evolved in the field of private international law. In this respect, both the common law and the civil law have relied largely on the selection and use of a number of specific objective factual connections.

[35] Dans la recherche de règles de droit international privé adéquates, la tendance prédominante consiste à maintenir ou à développer un ensemble de facteurs de rattachement inspirés des principes qui en régissent l'application, plutôt qu'à compter sur le pouvoir presque purement discrétionnaire des juges d'instaurer l'ordre et l'équité. Cette tendance ressort des lois que certaines provinces ont adoptées et d'un certain nombre de décisions judiciaires, notamment du courant jurisprudentiel important qui s'est établi en Cour d'appel de l'Ontario depuis l'arrêt *Muscutt*, et que nous devons examiner en l'espèce. Le critère du lien réel et substantiel devrait être examiné non pas hors contexte, mais bien en tenant compte de ses origines, des développements législatifs récents, de la doctrine et des initiatives destinées à développer et à moderniser les règles du droit international privé au Canada. En effet, on n'a pas créé ce critère *ex nihilo* sans tenir compte de l'évolution des méthodes et techniques dans le domaine du droit international privé. À cet égard, la common law et le droit civil se fondent dans une large mesure sur la sélection et l'utilisation d'un certain nombre de liens factuels objectifs et précis.

[36] In *Hunt*, La Forest J. cautioned against casting aside all the traditional connections. In commenting on the difficulties of framing an appropriate test for a reasonable assumption of jurisdiction and on the development of the real and substantial connection test, he wrote:

[36] Dans l'arrêt *Hunt*, le juge La Forest a indiqué qu'il faut se garder d'écarter tous les liens traditionnels. Dans son opinion, il a fait quelques observations sur les difficultés que présente la formulation d'un critère approprié de déclaration raisonnable de compétence et au sujet de l'élaboration du critère du lien réel et substantiel :

The exact limits of what constitutes a reasonable assumption of jurisdiction were not defined, and I add that no test can perhaps ever be rigidly applied; no court has ever been able to anticipate all of these. However, though some of these may well require reconsideration in light of *Morguard*, the connections relied on under the traditional rules are a good place to start. [p. 325]

[37] Not long after *Hunt*, the Court rendered its judgment in *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022, a case concerned mainly with determining what law should apply to a tort. In it, too, the Court's concern was to assure predictability in the application of the law of conflicts to tort claims. The Court established a new conflicts rule in respect of torts, abandoning the rule it had adopted in *McLean v. Pettigrew*, [1945] S.C.R. 62, that favoured the law of the forum (*lex fori*) and holding that, in principle, the law governing the tort should be that of the place where the tort occurred (*lex loci delicti*). The *situs* of the tort would also justify the assumption of jurisdiction by the courts of a province. The Court did not at that time rely solely on the real and substantial connection test as a conflicts rule. In a sense, it held that in this context, the objectives of fairness and efficiency in the conflicts system would be better served by relying on factual connections with the place where the tort occurred.

[38] In La Forest J.'s opinion, *Morguard* prevented courts from overreaching by entering into matters in which they had little or no interest (*Tolofson*, at p. 1049). But he also cautioned against building a system of private international law based solely on the expectations of the parties and concerns of fairness in a specific case, as such a system could hardly be considered rational. A degree of predictability or reliability must be assured:

The truth is that a system of law built on what a particular court considers to be the expectations of the parties or what it thinks is fair, without engaging in further probing about what it means by this, does not bear the hallmarks of a rational system of law. Indeed in the present context it wholly obscures the nature of

Les limites de ce qui constitue une déclaration raisonnable de compétence n'ont pas été déterminées et j'ajoute qu'aucun critère ne pourra peut-être jamais être appliqué rigidement; aucun tribunal n'a jamais pu prévoir tous ces cas. Toutefois, même s'il peut bien être nécessaire d'en réexaminer certains à la lumière de l'arrêt *Morguard*, les liens invoqués aux termes des règles traditionnelles constituent un bon point de départ. [p. 325]

[37] Peu après le prononcé de l'arrêt *Hunt*, la Cour a rendu l'arrêt *Tolofson c. Jensen*, [1994] 3 R.C.S. 1022, où elle devait essentiellement établir le droit applicable à un délit. Encore une fois, la Cour tenait à assurer une certaine prévisibilité dans l'application des règles de droit international privé aux actions en responsabilité délictuelle. La Cour a créé dans cet arrêt une nouvelle règle de droit international privé applicable aux délits. La Cour a alors abandonné la règle établie dans *McLean c. Pettigrew*, [1945] R.C.S. 62, qui favorisait la loi du for, et a conclu que le droit applicable au délit devait être en principe celui du lieu du délit (la *lex loci delicti*). La détermination du lieu du délit permettrait également aux cours provinciales de se déclarer compétentes. La Cour n'a pas tenté à l'époque de s'appuyer uniquement sur le critère du lien réel et substantiel en tant que règle de droit international privé. Dans un sens, elle a conclu que dans ce contexte, les objectifs d'équité et d'efficacité seraient mieux servis si les tribunaux s'appuyaient sur des liens factuels avec le lieu du délit.

[38] De l'avis du juge La Forest, l'arrêt *Morguard* a empêché les tribunaux d'abuser de leur pouvoir en intervenant dans des affaires où ils n'avaient que peu ou pas d'intérêt (*Tolofson*, p. 1049). Mais le juge La Forest a aussi souligné qu'il faut s'abstenir d'établir un régime de droit international privé fondé uniquement sur les attentes des parties et le souci d'équité dans une affaire donnée, car un tel régime pourrait difficilement être perçu comme rationnel. Il importe d'assurer une certaine prévisibilité ou fiabilité :

En vérité, un système de droit fondé sur la conception qu'un tribunal particulier a des attentes des parties ou de l'équité, sans chercher davantage à découvrir ce qu'il entend par là, n'a pas les caractéristiques distinctives d'un système juridique rationnel. En fait, il masque complètement la nature du problème dans le présent

the problem. In dealing with legal issues having an impact in more than one legal jurisdiction, we are not really engaged in that kind of interest balancing. We are engaged in a structural problem. [pp. 1046-47]

To La Forest J. in *Tolofson*, order was needed in the conflicts system, and was even a precondition to justice (p. 1058). Certainty was one of the key purposes being pursued in framing a conflicts rule (p. 1061). With this in mind, the Court crafted what it hoped would be a clear conflicts rule for torts that would bring a degree of certainty to this part of tort law and private international law (pp. 1062-64). Subject to the constitutional requirement established in *Morguard*, this rule would make it possible to identify some connecting factors linking the court or the law to the matter and to the parties. The presence of such factors would not necessarily resolve everything. Specific torts might raise particular difficulties that could require crafting carefully defined exceptions (p. 1050). Such difficulties indeed arise in the companion cases of *Breeden* and *Éditions Écosociété Inc.* Nevertheless, a conflicts rule based on specific connections seemed likely to introduce greater certainty into the interpretation and application of private international law principles in Canada.

[39] Legislative action since *Morguard* and *Hunt* points in the same direction. Without entering into the details of the complex, often flexible and nuanced, system of conflicts rules that became part of the *Civil Code of Québec* in 1994, it is worth mentioning that the *Civil Code* sets out a number of specific conflicts rules that identify connecting factors to be applied in various international or interprovincial situations. This Court has discussed the *Civil Code*'s scheme on a number of occasions. In particular, in *Spar Aerospace Ltd. v. American Mobile Satellite Corp.*, 2002 SCC 78, [2002] 4 S.C.R. 205, it reviewed the scheme applicable to the assumption by Quebec courts of jurisdiction over situations involving delictual or

contexte. Lorsque nous examinons des questions juridiques ayant une incidence dans plus d'un ressort, nous ne procédons pas vraiment à ce genre de pondération d'intérêts. Nous avons affaire à un problème structurel. [p. 1046-1047]

Selon le juge La Forest dans *Tolofson*, il fallait établir de l'ordre dans le système de droit international privé. Il considérait même l'établissement de cet ordre comme une condition préalable de la justice (p. 1058). La certitude constituait l'un des principaux objectifs que visait la formulation d'une règle de droit international privé (p. 1061). Dans cette perspective, la Cour a formulé ce qui, espérait-elle, deviendrait une règle claire de droit international privé applicable aux délits qui apporterait une certaine certitude à ce volet du droit des délits et du droit international privé (p. 1062-1064). Cette règle devrait, sous réserve de l'exigence constitutionnelle énoncée dans *Morguard*, permettre de relever certains facteurs de rattachement liant le tribunal ou le droit à l'affaire et aux parties. La présence de ces facteurs ne serait pas nécessairement une panacée. Certains délits particuliers pouvaient poser des difficultés particulières qui justifieraient la reconnaissance d'exceptions définies soigneusement (p. 1050). De telles difficultés se posent en effet dans les affaires connexes *Breeden* et *Éditions Écosociété Inc.* Toutefois, une règle de droit international privé fondée sur des liens précis apporterait vraisemblablement une certitude accrue dans l'interprétation et l'application des principes de droit international privé au Canada.

[39] Les interventions du législateur depuis les arrêts *Morguard* et *Hunt* s'orientent dans cette direction. Sans entrer dans les détails des règles du système de droit international privé complexe et généralement souple et nuancé que l'on a intégré au *Code civil du Québec* en 1994, il convient de signaler que le *Code civil* énonce plusieurs règles précises en la matière qui reconnaissent des facteurs de rattachement applicables à diverses situations aux plans international ou interprovincial. La Cour a analysé le régime du *Code civil* à quelques reprises. Plus particulièrement, dans l'arrêt *Spar Aerospace Ltée c. American Mobile Satellite Corp.*, 2002 CSC 78, [2002] 4 R.C.S. 205, elle a étudié le régime applicable aux déclarations de compétence par les

quasi-delictual liability in an international or interprovincial context.

[40] Across Canada, various initiatives have been undertaken to flesh out the real and substantial connection test. For example, the Uniform Law Conference of Canada proposed a uniform Act to govern issues related to jurisdiction and to the doctrine of *forum non conveniens* (see *Uniform Court Jurisdiction and Proceedings Transfer Act* ("*CJPTA*") (online)).

[41] The *CJPTA* focusses mainly on issues related to the assumption of jurisdiction. Section 3(e) provides that a court may assume jurisdiction if "there is a real and substantial connection between [enacting province or territory] and the facts on which the proceeding against that person is based" (text in brackets in original). Section 10 enumerates a variety of circumstances in which such a connection would be presumed to exist. For example, it lists a number of factors that might apply where the purpose of the proceeding is the determination of property rights or rights related to a contract. In the case of tort claims, s. 10(g) provides that the commission of a tort in a province would be a proper basis for the assumption of jurisdiction by that province's courts. Section 10 states that the list of connecting factors would not be closed and that other circumstances might be proven in order to establish a real and substantial connection. The *CJPTA* also includes specific provisions regarding forum of necessity (s. 6) and *forum non conveniens* (s. 11). A number of subsequent provincial statutes are clearly based on the *CJPTA* (see, e.g., *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28; *Court Jurisdiction and Proceedings Transfer Act*, S.S. 1997, c. C-41.1; *Court Jurisdiction and Proceedings Transfer Act*, S.N.S. 2003 (2nd Sess.), c. 2; *Court Jurisdiction and Proceedings Transfer Act*, S.Y. 2000, c. 7 (not yet in force)).

[42] In these statutes, the legislative scheme proposed in the *CJPTA* has been adopted, with some differences in wording, as they include

tribunaux québécois dans les cas de responsabilité délictuelle ou quasi délictuelle dans un contexte international ou interprovincial.

[40] Partout au Canada, diverses mesures ont été prises pour étoffer le critère du lien réel et substantiel. Par exemple, la Conférence pour l'harmonisation des lois au Canada a proposé une loi uniforme visant les problèmes relatifs à la compétence et à la règle du *forum non conveniens* (voir la *Loi uniforme sur la compétence des tribunaux et le renvoi des instances* (« *LUCTRI* ») (en ligne)).

[41] La *LUCTRI* a surtout mis l'accent sur les problèmes relatifs à la déclaration de compétence. Selon l'al. 3e), un tribunal peut se déclarer compétent s'« il existe un lien réel et substantiel entre [*province ou territoire qui adopte la Loi*] et les faits sur lesquels est fondée l'instance » (texte entre crochets dans l'original). L'article 10 énonce diverses situations dans lesquelles l'existence d'un tel lien serait présumée. À titre d'exemple, il dresse une liste de facteurs susceptibles de s'appliquer si l'instance se rapporte à la détermination de droits de propriété ou de droits découlant d'un contrat. Dans les cas d'actions en responsabilité délictuelle, l'al. 10g) prévoit que les tribunaux d'une province peuvent se déclarer compétents à l'égard d'un délit commis dans cette province. L'article 10 prévoit aussi que la liste des facteurs de rattachement ne serait pas limitative et qu'il serait possible d'établir que d'autres circonstances démontrent l'existence d'un lien réel et substantiel. La *LUCTRI* contient également des dispositions précises relatives au for de nécessité (l'art. 6) et au *forum non conveniens* (l'art. 11). Plusieurs lois provinciales subséquentes s'inspirent clairement de la *LUCTRI* (voir par exemple la *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, ch. 28; la *Loi sur la compétence des tribunaux et le renvoi des instances*, L.S. 1997, ch. C-41.1; la *Court Jurisdiction and Proceedings Transfert Act*, S.N.S. 2003 (2nd Sess.), ch. 2; la *Loi sur la compétence des tribunaux et le renvoi des instances*, L.Y. 2000, ch. 7 (non en vigueur)).

[42] Malgré un certain nombre de différences dans leur formulation, ces lois adoptent le régime proposé dans la *LUCTRI*, car elles comportent

non-exhaustive lists of prescriptive connecting factors which are presumed to establish a real and substantial connection. Unlike with Book Ten of the *Civil Code of Québec*, the legislatures that enacted them did not attempt to codify the entire field of private international law, but attached particular importance to issues related to the assumption and exercise of jurisdiction.

[43] Unlike in these other provinces, the Ontario legislature has not enacted a statute based on the *CJPTA*. However, the province has established its own set of connecting factors for the purposes of service outside Ontario, which are set out in the Ontario *Rules of Civil Procedure*. These factors, which are found in rule 17.02, are similar, in part, to those of the *CJPTA* and of the statutes based on the *CJPTA*. It has been observed, though, that rule 17.02 is purely procedural in nature and does not by itself establish jurisdiction in a case (P. M. Perell and J. W. Morden, *The Law of Civil Procedure in Ontario* (2010), at p. 121).

(5) Understanding the Real and Substantial Connection Test — The Ontario Court of Appeal in *Muscutt*

[44] Given the absence of statutory rules, the Ontario Court of Appeal endeavoured to establish a common law framework for the application of the real and substantial connection test in its important judgment in *Muscutt*. At issue in that case was a claim in tort. An Ontario resident had been injured in a car crash in Alberta. The four defendants lived in Alberta at the time. One of them moved to Ontario after the accident. The plaintiff returned to Ontario and sued all the defendants in Ontario. Two of the Alberta defendants moved to stay the action for want of jurisdiction and, in the alternative, on the basis of *forum non conveniens*. They argued that the action should be stayed for want of jurisdiction. They also challenged the constitutional validity of the provisions of the Ontario rules on service outside the province. In their opinion, those provisions were *ultra vires* the province of Ontario because they had an extraterritorial effect. The Ontario Superior Court of Justice dismissed the constitutional challenge and assumed

des listes non limitatives de facteurs de rattachement normatifs réputés établir un lien réel et substantiel. Contrairement au Livre dixième du *Code civil du Québec*, ces lois ne visaient pas à codifier tout le domaine du droit international privé mais accordaient une importance particulière aux problèmes que suscitent la déclaration et l'exercice de la compétence.

[43] Contrairement à ces autres provinces, l'Ontario n'a pas adopté une loi inspirée de la *LUCTRI*. Toutefois, pour les besoins de la signification en dehors de la province, l'Ontario a établi sa propre liste de facteurs de rattachement dans ses *Règles de procédure civile*. Ces facteurs, qui figurent à l'art. 17.02, ressemblent en partie à ceux énoncés dans la *LUCTRI* et les lois qu'elle a inspirées. On a fait remarquer toutefois que l'art. 17.02 est de nature purement procédurale et ne confère pas en soi compétence (P. M. Perell et J. W. Morden, *The Law of Civil Procedure in Ontario* (2010), p. 121).

(5) Critère du lien réel et substantiel — L'arrêt *Muscutt* de la Cour d'appel de l'Ontario

[44] En raison de l'absence de règles d'origine législative, la Cour d'appel de l'Ontario s'est appliquée à établir un cadre jurisprudentiel d'application du critère du lien réel et substantiel dans son important jugement dans l'affaire *Muscutt*, portant sur une action en responsabilité délictuelle. Un résidant de l'Ontario avait été blessé lors d'un accident d'automobile survenu en Alberta. Les quatre défendeurs vivaient en Alberta à l'époque, mais l'un d'eux a déménagé en Ontario par la suite. Le demandeur est revenu en Ontario et y a poursuivi en justice tous les défendeurs. Deux défendeurs albertains ont demandé la suspension de l'instance pour défaut de compétence et, subsidiairement, pour cause de *forum non conveniens*. Ils ont soutenu que la cour n'avait pas compétence et devait ordonner la suspension de l'instance. Ils ont aussi attaqué la constitutionnalité des règles ontariennes sur la signification en dehors de la province. Selon eux, du fait de leur portée extraterritoriale, ces dispositions outrepassaient les pouvoirs de la province de

jurisdiction. The matter was then appealed to the Court of Appeal, which took the opportunity to consider the constitutional issues, although the main focus of its decision was on the content and the application of the real and substantial connection test.

[45] The Court of Appeal quickly disposed of the argument that rule 17.02(h) was unconstitutional. It acknowledged that the real and substantial connection test imposed constitutional limits on the assumption of jurisdiction by a province's courts. But in its opinion, rule 17.02(h) was purely procedural and did not by itself determine the issue of the jurisdiction of the Ontario courts. The rule applied within the limits of the real and substantial connection test and did not resolve the issue of the assumption of jurisdiction (*Muscutt*, at paras. 50-52).

[46] The Court of Appeal then turned to the central issue in the case: whether it was open to the Superior Court of Justice to assume jurisdiction. Sharpe J.A. first sought to draw a clear distinction between the assumption of jurisdiction itself and *forum non conveniens*, which concerns the court's discretion to decline to exercise its jurisdiction. He cautioned against conflating what he viewed as different analytical stages in a situation in which the assumption of jurisdiction is in issue. A court must determine whether it has jurisdiction by applying the appropriate principles governing the assumption of jurisdiction. If it does have jurisdiction, it might then have to consider whether it should decline to exercise that jurisdiction in favour of a more appropriate forum (*Muscutt*, at paras. 40-42). The critical step in this process consists in determining when a court can properly assume jurisdiction in light of the constitutional limits imposed by the real and substantial connection test.

[47] Sharpe J.A. emphasized the importance of this Court's decisions — from *Morguard* to *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897 — in the re-crafting of the traditional approaches to the

l'Ontario. La Cour supérieure de justice de l'Ontario a rejeté la contestation constitutionnelle et s'est déclarée compétente. L'affaire a ensuite été portée en appel devant la Cour d'appel de l'Ontario, qui a profité de l'occasion pour examiner les questions d'ordre constitutionnel. La Cour d'appel s'est toutefois surtout attardée dans sa décision au contenu et à l'application du critère du lien réel et substantiel.

[45] La Cour d'appel a rapidement tranché l'argument selon lequel l'al. 17.02h) était inconstitutionnel. Elle a reconnu que le critère du lien réel et substantiel imposait des limites d'ordre constitutionnel au pouvoir des tribunaux provinciaux de se déclarer compétents. Mais, à son avis, l'al. 17.02h) des Règles était purement procédural et ne permettait pas en soi de trancher la question de la compétence des tribunaux ontariens. Cet alinéa s'appliquait dans les limites du critère du lien réel et substantiel et ne permettait pas de résoudre la question de la déclaration de compétence (*Muscutt*, par. 50-52).

[46] La Cour d'appel s'est ensuite penchée sur la question fondamentale dans cette affaire, à savoir si la Cour supérieure de justice de l'Ontario pouvait se déclarer compétente. Le juge Sharpe a tout d'abord tenté d'établir une nette distinction entre la déclaration de compétence elle-même et le *forum non conveniens*, qui touche le pouvoir discrétionnaire du tribunal saisi de décliner compétence. Il a souligné qu'il fallait éviter de confondre ce qu'il considérait comme des étapes distinctes de l'analyse dans un cas de déclaration de compétence. Le tribunal doit décider s'il a compétence selon les principes applicables en la matière. S'il a effectivement compétence, il devra peut-être décliner compétence en faveur d'un tribunal plus approprié (*Muscutt*, par. 40-42). L'étape cruciale de ce processus consiste à déterminer quand le tribunal peut à juste titre se déclarer compétent compte tenu des limites constitutionnelles imposées par le critère du lien réel et substantiel.

[47] Le juge Sharpe a souligné l'importance des décisions rendues par notre Cour — depuis l'arrêt *Morguard* jusqu'à l'arrêt *Amchem Products Inc. c. Colombie-Britannique (Workers' Compensation Board)*, [1993] 1 R.C.S. 897 — quant à la

resolution of conflicts in private international law. The adoption of the real and substantial connection test mandated a flexible approach to the assumption of jurisdiction informed by the underlying requirements of order and fairness. This approach required a concrete analysis of a number of factors that would allow a court to decide whether a sufficient connection existed between the forum and the subject matter of the litigation rather than with the parties. The court was to look not for the strongest possible connection with the forum, but for a minimum connection sufficient to meet the constitutional requirement that the matter be linked to the forum (para. 44). The Court of Appeal held that a court should consider a variety of factors to determine whether it has jurisdiction. Sharpe J.A. recommended taking a broad approach to jurisdiction. The defendant's relationship with the forum might be an "important" connecting factor, but not a "necessary" one (para. 74 (emphasis deleted)).

[48] Although the Court of Appeal acknowledged the importance of flexibility, it stressed that clarity and certainty are also necessary characteristics of the conflicts system. It accordingly developed a list of eight factors to be considered when deciding whether an assumption of jurisdiction is justified:

(1) the connection between the forum and the plaintiff's claim;

(2) the connection between the forum and the defendant;

(3) unfairness to the defendant in assuming jurisdiction;

(4) unfairness to the plaintiff in not assuming jurisdiction;

(5) the involvement of other parties to the suit;

(6) the court's willingness to recognize and enforce an extraprovincial judgment rendered on the same jurisdictional basis;

reformulation des méthodes traditionnelles de règlement des conflits en droit international privé. Avec l'adoption du critère du lien réel et substantiel, il fallait aborder avec souplesse la déclaration de compétence, en considérant les principes sous-jacents d'ordre et d'équité. Suivant cette approche, une analyse concrète d'un certain nombre de facteurs devait permettre au tribunal de déterminer s'il existe un lien suffisant entre le tribunal et l'objet du litige plutôt que les parties. Le tribunal doit rechercher non pas le lien le plus étroit qui soit avec le ressort, mais un lien minimal suffisant pour satisfaire à l'exigence constitutionnelle du rapport entre l'objet du litige et le ressort (par. 44). Selon la Cour d'appel, le tribunal doit examiner divers facteurs afin de décider s'il a compétence. Le juge Sharpe a recommandé une approche libérale à l'égard de la compétence. Ainsi, les rapports entre le défendeur et le ressort peuvent constituer un facteur de rattachement [TRADUCTION] « important », mais non un facteur « nécessaire » (par. 74 (italiques omis)).

[48] La Cour d'appel a reconnu l'importance de la souplesse dans l'établissement d'un régime de droit international privé, mais elle a souligné que la clarté et la certitude constituent également des caractéristiques essentielles de ce système. Elle a donc élaboré une liste de huit facteurs qu'il faut prendre en considération au moment de décider si une déclaration de compétence est justifiée :

(1) le lien entre le tribunal et la demande;

(2) le lien entre le tribunal et le défendeur;

(3) le caractère inéquitable, pour le défendeur, de la déclaration de compétence;

(4) le caractère inéquitable, pour le demandeur, du refus du tribunal de se déclarer compétent;

(5) la participation d'autres parties à l'instance;

(6) la volonté du tribunal de reconnaître et d'exécuter un jugement extraprovincial rendu sur le même fondement juridictionnel;

(7) whether the case is interprovincial or international in nature; and

(8) comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere.

[49] In the Court of Appeal's opinion, no single factor should be determinative. In Sharpe J.A.'s words, "all relevant factors should be considered and weighed together" (*Muscutt*, at para. 76). The Court of Appeal held that the Superior Court of Justice could assume jurisdiction in the case before it. It turned briefly to the issue of *forum non conveniens*, but found that an Alberta court would not be a more appropriate forum (para. 115).

[50] At the same time as its decision in *Muscutt*, the Court of Appeal applied this new template to four other cases in which the assumption of jurisdiction and *forum non conveniens* were in issue. In those appeals, it held that the Ontario courts should not assume jurisdiction, because the connections with Ontario were too insignificant to satisfy the real and substantial connection test. All four cases involved Ontario residents who had suffered injuries in accidents outside Canada and filed suits in Ontario courts (*Lemmex v. Bernard* (2002), 60 O.R. (3d) 54; *Gajraj v. DeBernardo* (2002), 60 O.R. (3d) 68; *Sinclair v. Cracker Barrel Old Country Store, Inc.* (2002), 60 O.R. (3d) 76; *Leufkens v. Alba Tours International Inc.* (2002), 60 O.R. (3d) 84). All the actions were dismissed in respect of the foreign defendants. The Court of Appeal found that the facts that the plaintiffs resided in Ontario and had sustained damage in the province did not create a real and substantial connection between the litigation and the Ontario courts. Since the courts lacked jurisdiction, there was no need for the Court of Appeal to consider the *forum non conveniens* arguments.

(6) Reconsideration of *Muscutt* by the Ontario Court of Appeal

[51] A few years after *Muscutt*, the Court of Appeal decided that, in the cases now before this

(7) le caractère interprovincial ou international de l'instance;

(8) la courtoisie et les normes de compétence, de reconnaissance et d'exécution retenues ailleurs.

[49] De l'avis de la Cour d'appel, aucun facteur en particulier n'est déterminant. Pour reprendre les propos du juge Sharpe, [TRADUCTION] « il faut étudier et évaluer globalement tous les éléments pertinents » (*Muscutt*, par. 76). La cour d'appel a conclu que la Cour supérieure de justice pouvait se déclarer compétente en l'espèce. Elle a examiné brièvement la question du *forum non conveniens*, mais a conclu qu'un tribunal de l'Alberta n'était pas un ressort plus approprié (par. 115).

[50] Lorsqu'elle a rendu l'arrêt *Muscutt*, la Cour d'appel a appliqué ce nouveau cadre d'analyse dans quatre autres affaires où se posaient des problèmes de déclaration de compétence et de *forum non conveniens*. Elle a conclu dans ces affaires que les tribunaux ontariens ne devaient pas se déclarer compétents, car les liens avec l'Ontario étaient trop ténus pour satisfaire au critère du lien réel et substantiel. Dans ces quatre affaires, des résidants de l'Ontario blessés au cours d'accidents survenus à l'étranger avaient intenté des poursuites devant les tribunaux ontariens (*Lemmex c. Bernard* (2002), 60 O.R. (3d) 54; *Gajraj c. DeBernardo* (2002), 60 O.R. (3d) 68; *Sinclair c. Cracker Barrel Old Country Store, Inc.* (2002), 60 O.R. (3d) 76; *Leufkens c. Alba Tours International Inc.* (2002), 60 O.R. (3d) 84). Toutes les actions intentées contre les défendeurs étrangers ont été rejetées. Selon la Cour d'appel, le fait que les demandeurs habitent en Ontario et qu'ils y aient subi un préjudice n'avait pas entraîné la création d'un lien réel et substantiel entre le litige et les tribunaux ontariens. La Cour d'appel n'avait pas à analyser les arguments relatifs au *forum non conveniens* en raison du défaut de compétence.

(6) Réexamen de l'arrêt *Muscutt* par la Cour d'appel de l'Ontario

[51] Quelques années après avoir rendu l'arrêt *Muscutt*, la Cour d'appel a estimé qu'il était devenu

Court, a review of the existing framework for the assumption of jurisdiction by Ontario courts and of issues related to *forum non conveniens* had become necessary. Since *Muscutt*, Ontario courts had consistently been applying the framework adopted in that case. Outside Ontario, *Muscutt* was considered an influential authority, and its framework was often accepted as an appropriate one for resolving issues related to the assumption of jurisdiction. But as I mentioned above, a number of common law provinces preferred to adopt the framework proposed in the *CJPTA*. On occasion, courts outside Ontario expressed reservations about certain aspects of the *Muscutt* framework (*Coutu v. Gauthier Estate*, 2006 NBCA 16, 296 N.B.R. (2d) 34, at paras. 67-68; *Fewer v. Ellis*, 2011 NLCA 17, 305 Nfld. & P.E.I.R. 39). It was suggested that the *Muscutt* test gave judges too much latitude in exercising their discretion on a case-by-case basis and was thus incompatible with the objectives of order and predictability in the assumption of jurisdiction. The wide parameters of this broad jurisdiction might also lead a court to conflate the jurisdictional analysis and the application of the doctrine of *forum non conveniens* in a search for the better or more appropriate forum in any given case. The analysis under the *Muscutt* test could also generate an instinctive bias in favour of the forum chosen by the plaintiff.

nécessaire, dans les affaires dont nous sommes actuellement saisis, de revoir le cadre des déclarations de compétence par des tribunaux ontariens ainsi que les questions liées au *forum non conveniens*. Depuis l'arrêt *Muscutt*, les tribunaux ontariens avaient appliqué invariablement le cadre établi dans cet arrêt. À l'extérieur de l'Ontario, on avait reconnu l'importance de l'arrêt *Muscutt* et le cadre qu'il propose avait souvent été retenu comme un cadre approprié pour régler les problèmes de déclaration de compétence. Mais, comme je l'ai déjà mentionné, plusieurs provinces de common law ont préféré adopter le cadre proposé dans la *LUCTRI*. De plus, à l'extérieur de l'Ontario, des tribunaux ont parfois exprimé des réserves au sujet de certains aspects du cadre analytique de l'arrêt *Muscutt* (*Coutu c. Gauthier Estate*, 2006 NBCA 16, 296 R.N.-B. (2e) 34, par. 67-68; *Fewer c. Ellis*, 2011 NLCA 17, 305 Nfld. & P.E.I.R. 39). Ainsi, on a affirmé que le critère établi dans *Muscutt* laissait trop de latitude aux juges dans l'exercice de leur pouvoir discrétionnaire au cas par cas et qu'il était donc incompatible avec les objectifs d'ordre et de prévisibilité dans la déclaration de compétence. Les vastes paramètres de ce large pouvoir pouvaient également amener un tribunal à confondre l'analyse de la compétence et l'application de la doctrine du *forum non conveniens*, à l'occasion d'une recherche d'un meilleur tribunal ou du tribunal le plus approprié dans un cas donné. Les analyses effectuées suivant le cadre retenu dans *Muscutt* pourraient aussi favoriser un parti pris instinctif en faveur du tribunal choisi par le demandeur.

(7) The New *Van Breda-Charron* Approach of the Ontario Court of Appeal

[52] As the Court of Appeal noted, it had heard a variety of opinions and conflicting suggestions regarding the need to reframe the *Muscutt* test and how this should be done. Some of the litigants wanted to retain *Muscutt* as it was; others proposed the adoption of a test based on a list of presumptive connecting factors similar to that of the *CJPTA* (*Van Breda-Charron*, paras. 56-57). The Court of Appeal declined to craft a common law rule that would in substance reproduce the content of the

(7) Nouvelle approche de la Cour d'appel de l'Ontario dans les affaires *Van Breda-Charron*

[52] Comme elle l'a mentionné, la Cour d'appel a entendu diverses opinions et reçu des propositions contradictoires relativement au besoin et à la manière de reformuler le critère établi dans *Muscutt*. Certains plaideurs souhaitaient que ce critère reste inchangé tandis que d'autres conseillaient de retenir un critère reposant sur une liste de facteurs de rattachement créant une présomption semblable à celle prévue dans la *LUCTRI* (*Van Breda-Charron*, par. 56-57). La Cour d'appel a refusé

CJPTA. Sharpe J.A. expressed the view that the unpredictability of the *Muscutt* test had been exaggerated, as had the degree of certainty and predictability that would result if the *CJPTA* scheme were adopted (para. 68). He proposed what he saw as a middle way. The Court of Appeal would retain the *Muscutt* test, but would modify it by simplifying it and bringing it closer to the *CJPTA* model. Sharpe J.A. stated: "In refining the *Muscutt* test, we can look to *CJPTA* as a worthy attempt to restate and update the Canadian law of jurisdiction . . . and, in so doing, bring Ontario law into line with the emerging national consensus on appropriate jurisdictional standards" (para. 69).

[53] On that basis, the Court of Appeal reframed the *Muscutt* test in part. The first change, as Sharpe J.A. stated, moved the existing framework closer to that of the *CJPTA*. It was the creation of a category-based presumption of jurisdiction modelled on s. 10 of the *CJPTA*. In the absence of statutory connecting factors, the court decided to rely for this purpose on the factors governing service outside Ontario set out in rule 17.02 of the Ontario *Rules of Civil Procedure* (para. 71). Sharpe J.A. asserted that most of the connecting factors enumerated in rule 17.02, such as the fact that a contract was made in Ontario (rule 17.02(f)) or a tort was committed in the province (rule 17.02(g)), would presumptively confirm the jurisdiction of the Ontario court (para. 72). In other words, whenever one of these factors was established, a real and substantial connection justifying the assumption of jurisdiction by an Ontario court would be presumed to exist.

[54] Sharpe J.A. added that where the presumption applied, it would be rebuttable. It would be open to a party to argue that, even though a presumptive connection existed, the real and substantial connection test had not been met (para. 72). Sharpe J.A. stated that these changes would be consistent with the incremental approach to the development

d'élaborer une règle de common law qui reproduirait essentiellement la *LUCTRI*. Selon le juge Sharpe, on avait exagéré le caractère imprévisible du critère établi dans *Muscutt* de même que la certitude et la prévisibilité qui découleraient de l'adoption du régime prévu dans la *LUCTRI* (par. 68). Il a proposé ce qu'il considérait comme une voie mitoyenne : la Cour d'appel maintiendrait le critère de l'arrêt *Muscutt* tout en le simplifiant et en le rapprochant du modèle de la *LUCTRI*. À ce propos, le juge Sharpe a affirmé ce qui suit : [TRADUCTION] « En précisant le critère établi dans *Muscutt*, nous pouvons voir dans la *LUCTRI* une tentative valable de reformuler et d'actualiser le droit canadien de la compétence [. . .] et ainsi rendre le droit ontarien conforme au consensus qui se dégage au Canada au sujet de normes applicables en matière de compétence » (par. 69).

[53] C'est dans cet esprit que la Cour d'appel a reformulé en partie le critère de l'arrêt *Muscutt*. Comme le juge Sharpe l'a affirmé, le premier changement a rapproché de la *LUCTRI* le cadre déjà établi. Il s'agit de la création d'une présomption de compétence fondée sur des catégories, qui s'inspire de l'art. 10 de la *LUCTRI*. En l'absence de facteurs de rattachement prévus par la loi, la cour a décidé de s'appuyer sur les facteurs énoncés à l'art. 17.02 des *Règles de procédure civile* de l'Ontario qui régissent les significations en dehors de la province (par. 71). Le juge Sharpe a affirmé que la plupart des facteurs de rattachement prévus à l'art. 17.02 — tels la conclusion d'un contrat en Ontario (al. 17.02f)) ou la perpétration d'un délit dans la province (al. 17.02g)) — seraient présumés établir la compétence du tribunal ontarien (par. 72). Autrement dit, lorsqu'un de ces facteurs est établi dans un cas donné, on présumerait l'existence d'un lien réel et substantiel justifiant la déclaration de compétence du tribunal ontarien.

[54] Toujours selon le juge Sharpe, cette présomption, lorsqu'elle s'applique, resterait réfutable. Une partie pourrait soutenir qu'il n'a pas été satisfait au critère du lien réel et substantiel malgré l'existence d'un lien créant une présomption (par. 72). Le juge Sharpe a affirmé que ces modifications s'accorderaient avec l'évolution progressive

of common law rules. In addition, almost all the post-*Muscutt* cases that he had reviewed seemed to have been resolved by one or another of the factors listed in rule 17.02 (paras. 74-75).

[55] According to this view, the appropriate factors generally operate as reliable markers of jurisdiction at common law. The adoption of these markers would mitigate the complexity and unpredictability of the *Muscutt* test. Sharpe J.A. noted that the jurisprudence on service *ex juris* provides support for the use of these factors as indicators of a real and substantial connection. For example, in *Hunt*, La Forest J. had observed that, even if some of the traditional rules of jurisdiction might have to be recast in light of *Morguard*, the established factors could nevertheless be viewed as "a good place to start" (p. 325; see also *Spar Aerospace*, at paras. 55-56, on the provisions of the *Civil Code of Québec* applicable to the assumption by Quebec courts of jurisdiction over situations involving delictual and quasi-delictual liability). But Sharpe J.A. declined to give presumptive effect to the factors set out in rules 17.02(h) (damage sustained in Ontario) and 17.02(o) (necessary or proper party). Neither of these factors is included in the *CJPTA*. Nor have they gained broad acceptance as reliable indicators of jurisdiction. Indeed, the Court of Appeal found in *Muscutt* and its companion cases that the factor of "damage sustained in Ontario" was often not reliable and significant enough to justify an assumption of jurisdiction by an Ontario court.

[56] Sharpe J.A. reaffirmed the need to draw a clear distinction between assuming jurisdiction and deciding whether to decline to exercise it on the basis of the *forum non conveniens* doctrine. He cautioned against confusing these two different steps in the resolution of a conflicts issue and emphasized that the factors that would justify a stay in the *forum non conveniens* analysis should not be worked into the jurisdiction *simpliciter* analysis (paras. 81-82 and 101). The conflation of the two analyses may have been the result of an

des règles de common law. En outre, presque toutes les affaires postérieures à l'arrêt *Muscutt* qu'il a examinées semblaient avoir été résolues au moyen de l'un ou de l'autre des facteurs énumérés à l'art. 17.02 (par. 74-75).

[55] Selon ce point de vue, ces facteurs servent généralement en common law d'indicateurs fiables de la compétence. Le recours aux indicateurs en question atténuerait la complexité et l'imprévisibilité du critère établi dans *Muscutt*. Le juge Sharpe a ajouté que la jurisprudence relative aux significations *ex juris* appuie le recours à ces facteurs en tant qu'indicateurs d'un lien réel et substantiel. Par exemple, le juge La Forest avait fait remarquer dans *Hunt* que, même s'il faut peut-être modifier certaines des règles traditionnelles de compétence à la lumière de l'arrêt *Morguard*, les facteurs établis peuvent néanmoins être perçus comme « un bon point de départ » (p. 325; voir aussi *Spar Aerospace*, aux par. 55 et 56, au sujet des dispositions du *Code civil du Québec* applicables à la déclaration de compétence des tribunaux québécois en matière de responsabilité délictuelle et quasi délictuelle). Le juge Sharpe a néanmoins refusé d'attribuer une valeur de présomption aux facteurs énoncés aux al. 17.02h) (préjudice subi en Ontario) et 17.02o) (partie essentielle ou appropriée). Aucun de ces facteurs ne figure dans la *LUCTRI*. Ils n'ont pas non plus été largement acceptés en tant qu'indicateurs fiables de la compétence. En fait, la Cour d'appel a conclu dans l'arrêt *Muscutt* et dans les appels connexes que le facteur du « préjudice subi en Ontario » n'était, dans bien des cas, pas suffisamment fiable et important pour permettre à un tribunal ontarien de se déclarer compétent.

[56] Le juge Sharpe a confirmé la nécessité d'établir une nette distinction entre la déclaration de compétence et la décision relative à l'opportunité de ne pas exercer la compétence selon la doctrine du *forum non conveniens*. Il a souligné qu'il faut se garder de confondre ces deux étapes distinctes de la résolution d'une question litigieuse en droit international privé, et il a rappelé que les facteurs qui justifieraient une suspension d'instance au terme de l'analyse relative au *forum non conveniens* ne doivent pas être intégrés à l'analyse de la simple

unduly broad interpretation of the fairness factors of the *Muscutt* analysis (para. 81).

[57] Building on this first principle that recognized the list of presumptive connecting factors, Sharpe J.A. re-crafted the *Muscutt* test. He retained part of the *Muscutt* analysis, merged some of its factors and reviewed the roles of other principles governing the assumption of jurisdiction. The defendants' connection with the court seized of the action continued to be a valid and important consideration. However, the connection between the plaintiffs' claim and the forum was maintained as a core element of the real and substantial connection test (paras. 87-88). A test based solely on the defendant's contacts with the jurisdiction would be "unduly restrictive" (para. 86).

[58] The Court of Appeal merged the two factors related to fairness to the parties of assuming or declining jurisdiction into a single one. At the same time, it recommended that judges avoid treating the consideration of fairness as a separate inquiry distinct from the core of the test, since fairness cannot compensate for weak connections. Sharpe J.A. understood, however, the need to retain fairness to the plaintiff and to the defendant as an analytical tool in assessing the relevance, quality and strength of the connections with the forum in order to determine whether assuming jurisdiction would accord with the principles of order and fairness (paras. 93, 95-96 and 98).

[59] Sharpe J.A. went on to observe that considerations of fairness would support the view that the forum of necessity doctrine is an exceptional basis for assuming jurisdiction (para. 100). I add that the forum of necessity issue is not before this Court in these appeals, and I will not need to address it here.

reconnaissance de compétence (par. 81-82 et 101). La tendance à confondre les deux analyses est peut-être imputable à une interprétation trop large des considérations d'équité qui entrent en ligne de compte dans l'analyse fondée sur l'arrêt *Muscutt* (par. 81).

[57] Partant de ce premier principe qui reconnaît une liste de facteurs de rattachement créant une présomption, le juge Sharpe a reformulé le critère de l'arrêt *Muscutt*. Il a conservé une partie de l'analyse fondée sur cet arrêt, a fusionné certains de ses facteurs et a réexaminé les rôles joués par d'autres principes applicables à la déclaration de compétence. Le lien entre les défendeurs et le tribunal saisi de l'action est resté une considération valable et importante. Toutefois, celui entre le recours des demandeurs et le tribunal est demeuré un élément principal du critère du lien réel et substantiel (par. 87-88). Un critère fondé uniquement sur les liens du défendeur avec le tribunal serait [TRADUCTION] « indûment restrictif » (par. 86).

[58] La Cour d'appel a fusionné en un seul les deux facteurs relatifs au caractère équitable pour les parties de la décision, par le tribunal, de se déclarer compétent ou de décliner compétence. Parallèlement, elle a recommandé aux juges de ne pas considérer l'examen de l'équité comme une analyse distincte du cœur du critère, car l'équité ne saurait compenser des liens trop ténus. Le juge Sharpe a toutefois estimé nécessaire de conserver l'équité envers le demandeur et le défendeur comme outil servant à analyser la pertinence, la qualité et la solidité des liens avec le tribunal lorsqu'il s'agit d'établir si la déclaration de compétence respecterait les principes d'ordre et d'équité (par. 93, 95-96 et 98).

[59] Le juge Sharpe a ensuite fait remarquer que les considérations d'équité étaieraient aussi la reconnaissance de la doctrine du for de nécessité comme fondement, à titre exceptionnel, de la déclaration de compétence (par. 100). Je tiens à ajouter que la Cour n'est point saisie en l'espèce de la question du for de nécessité et je n'ai pas à l'aborder dans les présents motifs.

[60] According to Sharpe J.A., the involvement of other parties would remain a relevant factor, but its importance would be downgraded. It should not be routinely considered but would become relevant only if a party raised it as a connecting factor (para. 102).

[61] He accepted that acts or conduct short of residence that take place in the jurisdiction will often support a finding that a real and substantial connection has been established (para. 92).

[62] In the future, Sharpe J.A. stated, whether the courts would be willing to recognize and enforce a foreign judgment should not be treated as a separate factor to be weighed against the other connecting factors in determining jurisdiction. Rather, it is a general and overarching principle that constrains, or "disciplines", as he wrote, the assumption of jurisdiction against extraprovincial defendants. A court should not assume jurisdiction if it would not be prepared to recognize and enforce a foreign judgment rendered on the same jurisdictional basis (para. 103). Whether the case is international or interprovincial was also removed from the list of factors. This would be treated as a question of law liable to be considered in the real and substantial connection analysis (para. 106). The court adopted the same approach in respect of comity and the standards of jurisdiction and of recognition and enforcement of judgments prevailing elsewhere. These considerations, while remaining relevant to the real and substantial connection analysis, would no longer serve as specific factors (paras. 107-8).

[63] Finally, the Court of Appeal held that considerations related to foreign law remain relevant to the issue of the assumption of jurisdiction. In Sharpe J.A.'s view, evidence on how foreign courts would treat such cases might be helpful (para. 107). I note in passing, however, that undue emphasis on juridical disadvantage as a factor in the jurisdictional analysis appears to be hardly consonant with the principle of comity that should govern legal relationships between modern democratic states,

[60] Selon le juge Sharpe, la participation de tierces parties demeurerait pertinente, quoique d'importance moindre. Il ne conviendrait pas de la prendre régulièrement en considération; elle ne deviendrait pertinente que dans les cas où une partie l'a invoquée comme facteur de rattachement (par. 102).

[61] Le juge Sharpe a reconnu que des actes ou une conduite dans le ressort n'équivalant pas à la résidence permettront souvent de conclure à l'existence d'un lien réel et substantiel (par. 92).

[62] Selon lui, l'ouverture des tribunaux à reconnaître et à exécuter un jugement étranger ne devrait pas être traitée comme un facteur distinct à évaluer par rapport aux autres facteurs de rattachement dans la reconnaissance de compétence. Il s'agit plutôt d'un principe général et prépondérant servant à restreindre la déclaration de compétence à l'encontre de défendeurs extraprovinciaux. Les tribunaux devront éviter de se déclarer compétents lorsqu'ils ne sont pas disposés à reconnaître et à exécuter un jugement étranger reposant sur le même fondement juridictionnel (par. 103). Le caractère international ou interprovincial d'une affaire a également été supprimé de la liste des facteurs. Ce sujet serait considéré comme une question de droit susceptible d'examen dans l'analyse du lien réel et substantiel (par. 106). La Cour d'appel a retenu la même approche relativement à la courtoisie et aux normes relatives à la compétence, ainsi qu'à la reconnaissance et à l'exécution des jugements applicables ailleurs. Ces considérations restent pertinentes relativement à l'analyse du lien réel et substantiel, mais elles ne constitueraient plus des facteurs précis (par. 107-108).

[63] Finalement, la Cour d'appel a jugé que les considérations relatives au droit étranger demeurent un facteur pertinent quant à la déclaration de compétence. Selon le juge Sharpe, des éléments de preuve exposant la façon dont les tribunaux étrangers traitent les affaires de cette nature pourraient être utiles (par. 107). Je signale toutefois au passage qu'une insistance indue sur le désavantage au plan juridique en tant que facteur dans l'analyse relative à la compétence ne paraît guère compatible avec

as this Court held in *Beals*. In particular, such an emphasis would seem hard to reconcile with the principle of comity that should govern relationships between the courts of different provinces within the same federal state, as this Court held in *Morguard* and *Hunt*.

[64] In summary, the *Van Breda-Charron* approach offers a simplified test in which the roles of a number of the factors of the *Muscutt* test have been modified. In short, when one of the presumptive connecting factors applies, the court will assume jurisdiction unless the defendant can demonstrate the absence of a real and substantial connection. If, on the other hand, none of the presumptive connecting factors are found to apply to the claim, the onus rests on the plaintiff to prove that a sufficient relationship exists between the litigation and the forum. In addition to the list of presumptive and non-presumptive factors, parties can rely on other connecting factors informed by the principles that govern the analysis.

[65] I will now turn to the issue of whether the Court of Appeal was right to hold that it was open to the Ontario courts to assume jurisdiction in the two cases now before us. If I conclude that it was open to them to do so, I will then discuss whether they should have declined to exercise their jurisdiction under the principles of *forum non conveniens*.

(8) Framework for the Assumption of Jurisdiction

[66] In this Court, as in the Court of Appeal, the parties and the interveners have expressed sharply different views about whether and how the law of conflicts should be changed in respect of the assumption of jurisdiction. As might be expected, the disagreements extend to the impact of possible changes on the outcome of these appeals. The conflicting approaches articulated in this Court reflect the tension between a search for flexibility, which is closely connected with concerns about fairness to individuals engaged in litigation, and a desire to

le principe de courtoisie qui doit régir les rapports juridiques qu'entretiennent des États démocratiques modernes, selon la conclusion de notre Cour dans l'arrêt *Beals*. Plus particulièrement, il semble difficile de concilier une telle approche avec le principe de courtoisie qui doit inspirer les rapports entre les tribunaux de différentes provinces au sein du même État fédéral, comme l'a affirmé notre Cour dans les arrêts *Morguard* et *Hunt*.

[64] En résumé, l'approche retenue dans *Van Breda-Charron* offre un critère simplifié, où la Cour d'appel a modifié le rôle que jouent plusieurs facteurs énoncés dans *Muscutt*. En bref, lorsque s'applique un des facteurs de rattachement créant une présomption, la cour se déclarera compétente à moins que le défendeur puisse démontrer l'absence d'un lien réel et substantiel. Par contre, s'il est établi qu'aucun de ces facteurs de rattachement ne s'applique au recours, il incombe alors au demandeur d'établir des rapports suffisants entre le litige et le tribunal. Outre les facteurs créant ou non une présomption qui sont énumérés, les parties peuvent invoquer d'autres facteurs de rattachement fondés sur les principes régissant l'analyse.

[65] J'aborde maintenant la question de savoir si la Cour d'appel a eu raison de décider que les tribunaux ontariens pouvaient se déclarer compétents dans les deux affaires qui nous occupent. Si je conclus qu'ils pouvaient le faire, j'examinerai ensuite s'ils auraient dû décliner compétence selon les principes du *forum non conveniens*.

(8) Un cadre applicable à la déclaration de compétence

[66] Les parties et les intervenants ont exprimé, devant notre Cour et la Cour d'appel de l'Ontario, des avis diamétralement opposés sur l'opportunité et la façon de modifier le droit international privé relatif à la déclaration de compétence. Comme on pouvait s'y attendre, les désaccords portent aussi sur l'incidence que d'éventuelles modifications peuvent avoir sur l'issue de ces pourvois. Les approches contradictoires exposées dans notre Cour traduisent la tension entre la quête de souplesse — intimement liée au souci d'équité envers les parties à

ensure greater predictability and consistency in the institutional process for the resolution of conflict of laws issues related to the assumption and exercise of jurisdiction. Indeed, striking a proper balance between flexibility and predictability, or between fairness and order, has been a constant theme in the Canadian jurisprudence and academic literature since this Court's judgments in *Morguard*, *Hunt*, *Amchem* and *Tolofson*.

[67] The real and substantial connection test is now well established. However, it is clear that dissatisfaction with it and uncertainty about its meaning and conditions of application have been growing, and that there is now a perceived need for greater direction on how it applies. I adverted above to the need to draw a distinction between the constitutional test and the rules of private international law — two aspects of the law of conflicts that have sometimes been conflated in previous cases. At this point, it is necessary to clarify the rules of the conflict of laws in a way that is consistent with the constitutional constraints on the provinces' courts but does not turn every private international law issue into a constitutional one.

[68] The legislatures of several provinces, as well as the Ontario Court of Appeal in *Muscutt* and *Van Breda-Charron*, have responded to these concerns and attempted to provide guidance for the application of the real and substantial connection test. We can build upon these legislative developments and judgments. Indeed, Sharpe J.A. referred in *Van Breda-Charron* to what he described, perhaps with some optimism, as an emerging consensus in Canadian law on how to resolve these issues. On the basis of this perhaps fragile consensus and these developments and judgments, this Court must craft more precisely the rules and principles governing the assumption of jurisdiction by the courts of a province over tort cases in which claimants sue in Ontario, but at least some of the events that gave rise to the claims occurred outside Canada or outside the province. I will also consider how jurisdiction should be exercised or declined under

un litige — et la volonté d'accroître la prévisibilité et la cohérence du processus institutionnel de résolution des problèmes de droit international privé que posent la déclaration de compétence et l'exercice de la compétence. En fait, l'établissement d'un juste équilibre entre la souplesse et la prévisibilité, ou entre l'équité et l'ordre, constitue un thème qui revient constamment dans la jurisprudence et la doctrine canadiennes depuis les arrêts de notre Cour dans *Morguard*, *Hunt*, *Amchem* et *Tolofson*.

[67] Le critère du lien réel et substantiel est maintenant bien établi. Toutefois, il est clair que l'insatisfaction suscitée par ce critère et l'incertitude entourant sa signification et les modalités de son application s'accroissent, et que des directives complémentaires sur la façon de l'appliquer apparaissent maintenant nécessaires. J'ai déjà fait ressortir la nécessité de distinguer le critère constitutionnel et les règles du droit international privé — deux aspects du droit international privé ayant parfois été confondus dans la jurisprudence. Il importe maintenant de préciser les règles de droit international privé applicables dans le respect des limites constitutionnelles des pouvoirs des cours provinciales, sans transformer toutefois chaque problème de droit international privé en question constitutionnelle.

[68] Plusieurs législatures, ainsi que la Cour d'appel de l'Ontario dans *Muscutt* et *Van Breda-Charron*, ont réagi à la situation en tentant de fournir des précisions sur l'application du critère du lien réel et substantiel. Nous pouvons nous inspirer de ces mesures législatives et de cette jurisprudence. D'ailleurs, le juge Sharpe a fait allusion dans *Van Breda-Charron* à ce qu'il a qualifié, peut-être avec un certain optimisme, d'émergence en droit canadien d'un consensus sur la façon de résoudre ces questions. Compte tenu de ce consensus sans doute fragile, de ces mesures et de cette jurisprudence, la Cour doit préciser davantage les règles et les principes applicables aux déclarations de compétence des tribunaux provinciaux en matière de responsabilité délictuelle dans les cas où les demandeurs poursuivent en Ontario et où une partie au moins des faits ayant donné naissance à l'action sont survenus à l'étranger ou à l'extérieur de la

the doctrine of *forum non conveniens*. This said, I remain mindful that the Court is not of course tasked with drafting a complete code of private international law. Principles will be developed as problems arise before the courts. Moreover, all my comments about the development of the common law principles of the law of conflicts are subject to provisions of specific statutes and rules of procedure.

province. J'examinerai aussi la façon de décliner compétence ou de l'exercer selon la doctrine du *forum non conveniens*. Je garde toutefois à l'esprit que notre Cour n'est évidemment pas chargée de codifier exhaustivement le droit international privé. Des principes se dégageront à mesure que les problèmes surgiront devant les tribunaux. De plus, toutes mes observations à propos de l'évolution des principes de la common law en matière de droit international privé n'écartent pas ce que prévoient les lois et règles de procédure civile applicables.

[69] When a court considers issues related to jurisdiction, its analysis must deal first with those concerning the assumption of jurisdiction itself. That analysis must be grounded in a proper understanding of the real and substantial connection test, which has evolved into an important constitutional test or principle that imposes limits on the reach of a province's laws and courts. As I mentioned above, this constitutional test reflects the limited territorial scope of provincial authority under the *Constitution Act, 1867*. At the same time, the Constitution acknowledges that international or interprovincial situations may have effects within a province. Provinces may address such effects in order to resolve issues related to conflicts with their own internal legal systems without overstepping the limits of their constitutional authority (see *Castillo*).

[69] Un tribunal saisi de questions de compétence doit d'abord axer son analyse sur les questions relatives à la déclaration de compétence elle-même. Cette analyse doit reposer sur une compréhension adéquate du critère du lien réel et substantiel. Dans son évolution, celui-ci est devenu un critère ou un principe constitutionnel important qui limite la portée des lois provinciales et la compétence des tribunaux provinciaux. Ce critère constitutionnel reflète, je le répète, la portée territoriale limitée de la compétence accordée aux provinces par la *Loi constitutionnelle de 1867*. Parallèlement, la Constitution reconnaît que des situations survenues à l'étranger ou dans d'autres provinces peuvent avoir des répercussions dans la province. Les provinces peuvent examiner ces répercussions afin de régler les questions de rapport avec leur propre système juridique interne sans, pour autant, outrepasser les limites de leur compétence constitutionnelle (voir *Castillo*).

[70] The real and substantial connection test does not mean that problems of assumption of jurisdiction or other matters, such as the choice of the proper law applicable to a situation or the recognition of extraprovincial judgments, must be dealt with on a case-by-case basis by discretionary decisions of courts, which would determine, on the facts of each case, whether a sufficient connection with the forum has been established. Judicial discretion has an honourable history, and the proper operation of our legal system often depends on its being exercised wisely. Nevertheless, to rely completely on it to flesh out the real and substantial connection test in such a way that the test itself becomes a conflicts

[70] Le critère du lien réel et substantiel ne signifie pas que les tribunaux doivent, dans l'exercice de leur pouvoir discrétionnaire, déterminer au cas par cas, suivant les faits de chaque cause, s'il existe un lien suffisant avec le ressort pour régler les problèmes de déclaration de compétence ou d'autres questions, comme le choix du droit applicable dans une situation donnée ou la reconnaissance de jugements extraprovinciaux. Les tribunaux ont toujours bien exercé leur pouvoir discrétionnaire et le bon fonctionnement de notre système juridique dépend souvent de l'exercice prudent de ce pouvoir. Toutefois, une solution qui s'en remettrait complètement à l'exercice de ce pouvoir et le transformerait

rule would be incompatible with certain key objectives of a private international law system.

[71] The development of an appropriate framework for the assumption of jurisdiction requires a clear understanding of the general objectives of private international law. But the existence of these objectives does not mean that the framework for achieving them must be uniform across Canada. Because the provinces have been assigned constitutional jurisdiction over such matters, they are free to develop different solutions and approaches, provided that they abide by the territorial limits of the authority of their legislatures and their courts.

[72] What would be an appropriate framework? How should it be developed in the case of the assumption and exercise of jurisdiction by a court? A particular challenge in this respect lies in the fact that court decisions dealing with the assumption and the exercise of jurisdiction are usually interlocutory decisions made at the preliminary stages of litigation. These issues are typically raised before the trial begins. As a result, even though such decisions can often be of critical importance to the parties and to the further conduct of the litigation, they must be made on the basis of the pleadings, the affidavits of the parties and the documents in the record before the judge, which might include expert reports or opinions about the state of foreign law and the organization of and procedure in foreign courts. Issues of fact relevant to jurisdiction must be settled in this context, often on a *prima facie* basis. These constraints underline the delicate role of the motion judges who must consider these issues.

[73] Given the nature of the relationships governed by private international law, the framework for the assumption of jurisdiction cannot be an unstable, *ad hoc* system made up "on the fly" on a case-by-case basis — however laudable the objective of individual fairness may be. As La Forest J. wrote in *Morguard*, there must be order in the system, and it must permit the development of a

lui-même en une règle de droit international privé ne respecterait pas certains objectifs fondamentaux d'un système de droit international privé.

[71] L'élaboration d'un cadre approprié applicable aux déclarations de compétence exige une compréhension claire des objectifs généraux du droit international privé. L'existence de ces objectifs ne signifie toutefois pas que le cadre nécessaire à leur réalisation doive être uniforme partout au Canada. La compétence constitutionnelle dont sont investies les provinces sur ces matières leur permet d'élaborer différentes solutions et approches, pour autant que les limites territoriales dans lesquelles le législateur et les tribunaux exercent leurs pouvoirs soient respectées.

[72] En quoi consisterait un cadre adéquat? Comment devrait-on l'élaborer pour les questions de déclaration et d'exercice de la compétence? Le fait que les décisions judiciaires sur les questions de déclaration et d'exercice de la compétence soient généralement des décisions interlocutoires rendues aux stades préliminaires de l'instance représente un défi particulier à cet égard. En effet, ces questions sont normalement soulevées avant le début du procès lui-même. En conséquence, bien que ces décisions puissent souvent avoir une importance capitale pour les parties et la poursuite du litige, elles doivent reposer sur les actes de procédure, les affidavits des parties et les documents qui constituent le dossier soumis au juge, y compris, s'il en est, les rapports d'experts ou les opinions sur l'état du droit étranger et sur l'organisation et la procédure des tribunaux étrangers. Les questions de fait pertinentes quant à la compétence doivent être tranchées dans ce contexte, souvent à l'issue d'une analyse sommaire. Ces contraintes font ressortir le rôle délicat du juge saisi de ces questions.

[73] La nature des rapports régis par le droit international privé interdit de réduire le cadre applicable à la déclaration de compétence à un régime précaire et ponctuel élaboré sur le coup au cas par cas, aussi louable que soit l'objectif d'équité individuelle. Comme le soulignent les propos du juge La Forest dans *Morguard*, le régime doit être ordonné et doit permettre l'élaboration d'une méthode juste et

just and fair approach to resolving conflicts. Justice and fairness are undoubtedly essential purposes of a sound system of private international law. But they cannot be attained without a system of principles and rules that ensures security and predictability in the law governing the assumption of jurisdiction by a court. Parties must be able to predict with reasonable confidence whether a court will assume jurisdiction in a case with an international or interprovincial aspect. The need for certainty and predictability may conflict with the objective of fairness. An unfair set of rules could hardly be considered an efficient and just legal regime. The challenge is to reconcile fairness with the need for security, stability and efficiency in the design and implementation of a conflict of laws system.

[74] The goal of the modern conflicts system is to facilitate exchanges and communications between people in different jurisdictions that have different legal systems. In this sense, it rests on the principle of comity. But comity itself is a very flexible concept. It cannot be understood as a set of well-defined rules, but rather as an attitude of respect for and deference to other states and, in the Canadian context, respect for and deference to other provinces and their courts (*Morguard*, at p. 1095; *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292, at para. 47). Comity cannot subsist in private international law without order, which requires a degree of stability and predictability in the development and application of the rules governing international or interprovincial relationships. Fairness and justice are necessary characteristics of a legal system, but they cannot be divorced from the requirements of predictability and stability which assure order in the conflicts system. In the words of La Forest J. in *Morguard*, "what must underlie a modern system of private international law are principles of order and fairness, principles that ensure security of transactions with justice" (p. 1097; see also H. E. Yntema, "The Objectives of Private International Law" (1957), 35 *Can. Bar Rev.* 721, at p. 741).

équitable de règlement des conflits. La justice et l'équité constituent sans aucun doute des objectifs essentiels d'un bon système de droit international privé, mais elles ne peuvent se réaliser en l'absence d'un ensemble de principes et de règles assurant la sûreté et la prévisibilité du droit applicable à la déclaration de compétence d'un tribunal. Les parties doivent pouvoir prédire avec une certitude raisonnable si un tribunal saisi d'une situation qui présente un aspect international ou interprovincial se déclarera ou non compétent. Toutefois, le besoin de certitude et de prévisibilité peut entrer en conflit avec l'objectif d'équité. On peut difficilement considérer qu'un ensemble de règles inéquitable puisse constituer un régime juridique efficace et juste. La difficulté réside dans la conciliation de l'objectif d'équité avec le besoin de sûreté, de stabilité et d'efficacité dans la conception et la mise en œuvre d'un système de droit international privé.

[74] Le système moderne de droit international privé vise à faciliter les échanges et les communications entre les personnes de différents ressorts et régimes juridiques. Il repose en ce sens sur le principe de la courtoisie. La courtoisie elle-même est cependant une notion très souple. Il faut la considérer non pas comme un ensemble de règles bien définies, mais comme une attitude de respect et de déférence envers d'autres États et, au Canada, envers d'autres provinces et leurs tribunaux (*Morguard*, p. 1095; *R. c. Hape*, 2007 CSC 26, [2007] 2 R.C.S. 292, par. 47). La courtoisie ne peut subsister en droit international privé sans l'ordre, qui exige une certaine stabilité et prévisibilité dans l'élaboration et l'application des règles qui régissent les relations internationales ou interprovinciales. L'équité et la justice constituent des éléments essentiels d'un système juridique, mais elles ne peuvent être dissociées des impératifs de prévisibilité et de stabilité qui assurent l'ordre du système de droit international privé. Pour reprendre les propos du juge La Forest dans *Morguard*, « ce sont les principes d'ordre et d'équité, des principes qui assurent à la fois la justice et la sûreté des opérations qui doivent servir de fondement à un système moderne de droit international privé » (p. 1097; voir aussi H. E. Yntema, « The Objectives of Private International Law » (1957), 35 *R. du B. can.* 721, p. 741).

[75] The development and evolution of the approaches to the assumption of jurisdiction reviewed above suggest that stability and predictability in this branch of the law of conflicts should turn primarily on the identification of objective factors that might link a legal situation or the subject matter of litigation to the court that is seized of it. At the same time, the need for fairness and justice to all parties engaged in litigation must be borne in mind in selecting these presumptive connecting factors. But in recent years, the preferred approach in Canada has been to rely on a set of specific factors, which are given presumptive effect, as opposed to a regime based on an exercise of almost pure and individualized judicial discretion.

[75] L'élaboration et l'évolution des méthodes d'analyse de la déclaration de compétence examinées ci-dessus supposent que la stabilité et la prévisibilité de ce volet du droit international privé devraient dépendre principalement de l'établissement de facteurs objectifs susceptibles de relier une situation juridique ou l'objet du litige au tribunal qui en est saisi. En même temps, la sélection de ces facteurs de rattachement créant une présomption doit tenir compte des besoins d'équité et de justice envers toutes les parties au litige. Ces dernières années, au Canada, les tribunaux ont toutefois préféré, à un régime où chaque juge exercerait un pouvoir purement discrétionnaire, une approche leur permettant de se fonder sur un ensemble de facteurs précis auxquels ils confèrent l'effet d'une présomption.

[76] For example, the statutes based on the *CJPTA* and Book Ten of the *Civil Code of Québec* rely on specific facts linking the subject matter of the litigation to the jurisdiction. These factors are considered in order to determine whether a real and substantial connection exists for the purposes of the conflicts rules.

[76] Par exemple, les lois inspirées de la *LUCTRI* et le Livre dixième du *Code civil du Québec* s'appuient sur des faits précis établissant un lien entre l'objet du litige et le ressort. Ces facteurs sont pris en compte pour déterminer s'il existe un lien réel et substantiel pour l'application des règles du droit international privé.

[77] In the *CJPTA*, in the case of tort claims, s. 10(g) refers to the *situs* of a tort as a specific factor connecting the act with the jurisdiction. The identification of the *situs* of a tort may well lead to further questions, to which the *CJPTA* does not offer immediate answers, such as: Where did the acts that gave rise to the injury occur? Did they happen in more than one place? Where was the damage suffered or where did it become apparent? Other connecting factors might also become relevant, such as the existence of a contractual relationship (s. 10(e)) or a business carried on in the province (s. 10(h)). Jurisdiction can also be presence-based, when the defendant resides in the province (s. 3(d)). Likewise, the *Civil Code of Québec* contains a list of factors that must be considered in order to determine whether a Quebec authority has jurisdiction over a delictual or quasi-delictual action (art. 3148).

[77] Dans le cas d'actions en responsabilité délictuelle, l'al. 10g) de la *LUCTRI* prévoit explicitement que le lieu où a été commis un délit constitue un facteur reliant l'acte au ressort. La détermination du lieu d'un délit pourrait fort bien soulever d'autres questions auxquelles la *LUCTRI* n'offre pas de réponses immédiates, par exemple : où ont été accomplis les actes ayant causé le préjudice? Ont-ils été accomplis à plus d'un endroit? Où le préjudice a-t-il été subi ou est-il devenu apparent? D'autres facteurs de rapprochement peuvent aussi devenir pertinents, par exemple l'existence d'obligations contractuelles (al. 10e)) ou une entreprise exploitée dans la province (al. 10h)). La compétence peut également reposer sur la présence dans un lieu, lorsque le défendeur réside dans la province (al. 3d)). De même, le *Code civil du Québec* énumère une série de facteurs qu'il faut prendre en considération pour établir si une autorité québécoise a compétence sur une action en responsabilité délictuelle ou quasi délictuelle (art. 3148).

[78] Some authors take the view that the true core of the revised *Van Breda-Charron* test consists of a set of objective factual connections. Likewise, the Court of Appeal stated in *Van Breda-Charron* that the issue was essentially about connections: "The core of the real and substantial connection test is the connection that the plaintiff's claim has to the forum and the connection of the defendant to the forum respectively" (para. 84; T. Monestier, "A 'Real and Substantial' Improvement? *Van Breda* Reformulates the Law of Jurisdiction in Ontario", in T. L. Archibald and R. S. Echlin, eds., *Annual Review of Civil Litigation, 2010* (2010) 185, at pp. 204-7). In my view, identifying a set of relevant presumptive connecting factors and determining their legal nature and effect will bring greater clarity and predictability to the analysis of the problems of assumption of jurisdiction, while at the same time ensuring consistency with the objectives of fairness and efficiency that underlie this branch of the law.

[79] From this perspective, a clear distinction must be maintained between, on the one hand, the factors or factual situations that link the subject matter of the litigation and the defendant to the forum and, on the other hand, the principles and analytical tools, such as the values of fairness and efficiency or the principle of comity. These principles and analytical tools will inform their assessment in order to determine whether the real and substantial connection test is met. However, jurisdiction may also be based on traditional grounds, like the defendant's presence in the jurisdiction or consent to submit to the court's jurisdiction, if they are established. The real and substantial connection test does not oust the traditional private international law bases for court jurisdiction.

[80] Before I go on to consider a list of presumptive connecting factors for tort cases, I must define the legal nature of the list. It will not be exhaustive. Rather, it will, first of all, be illustrative of the factual situations in which it will typically be open to a court to assume jurisdiction over a matter. These factors therefore warrant presumptive effect,

[78] Certains auteurs estiment que le véritable cœur du nouveau critère de l'arrêt *Van Breda-Charron* se compose d'un ensemble de liens factuels objectifs. De même, la Cour d'appel a affirmé dans l'arrêt *Van Breda-Charron* que la question en litige portait essentiellement sur les liens : [TRADUCTION] « Le lien entre le recours du demandeur et le tribunal et le lien entre le défendeur et le tribunal constituent respectivement le cœur du critère du lien réel et substantiel » (par. 84; T. Monestier, « A "Real and Substantial" Improvement? *Van Breda* Reformulates the Law of Jurisdiction in Ontario », dans T. L. Archibald et R. S. Echlin, dir., *Annual Review of Civil Litigation, 2010* (2010) 185, p. 204-207). À mon sens, l'établissement d'un ensemble de facteurs de rattachement pertinents créant une présomption et la détermination de leur nature et de leur effet juridiques rendra l'analyse des problèmes de déclaration de compétence plus claire et plus prévisible, tout en assurant leur conformité avec les objectifs d'équité et d'efficacité sur lesquels repose cette branche du droit.

[79] Dans cette optique, il faut conserver une nette distinction entre, d'une part, les facteurs ou les situations de fait qui relient l'objet du litige et le défendeur au tribunal et, d'autre part, les principes et les outils d'analyse, comme les valeurs que sont l'équité et l'efficacité ou le principe de la courtoisie. Ces principes et outils d'analyse éclaireront l'examen des facteurs en vue de décider s'il est satisfait au critère du lien réel et substantiel. Toutefois, la compétence peut également reposer sur des fondements traditionnels, comme la présence du défendeur à l'intérieur du ressort ou son consentement à se soumettre à la compétence du tribunal, si ces fondements sont établis. Le critère du lien réel et substantiel n'écarte pas les fondements traditionnels de la compétence judiciaire en droit international privé.

[80] Cependant, avant de passer à l'examen d'une liste de facteurs de rattachement créant une présomption applicables dans les actions fondées sur un délit, je dois préciser la nature juridique de cette liste. Celle-ci ne sera pas exhaustive. Il s'agira plutôt d'illustrer avant tout les situations de fait permettant généralement à un tribunal de se déclarer

as the Court of Appeal held in *Van Breda-Charron* (para. 109). The plaintiff must establish that one or more of the listed factors exists. If the plaintiff succeeds in establishing this, the court might presume, absent indications to the contrary, that the claim is properly before it under the conflicts rules and that it is acting within the limits of its constitutional jurisdiction (J. Walker, "Reforming the Law of Crossborder Litigation: Judicial Jurisdiction", consultation paper for the Law Commission of Ontario (March 2009), at pp. 19-20 (online)). Although the factors set out in the list are considered presumptive, this does not mean that the list of recognized factors is complete, as it may be reviewed over time and updated by adding new presumptive connecting factors.

[81] The presumption with respect to a factor will not be irrebuttable, however. The defendant might argue that a given connection is inappropriate in the circumstances of the case. In such a case, the defendant will bear the burden of negating the presumptive effect of the listed or new factor and convincing the court that the proposed assumption of jurisdiction would be inappropriate. If no presumptive connecting factor, either listed or new, applies in the circumstances of a case or if the presumption of jurisdiction resulting from such a factor is properly rebutted, the court will lack jurisdiction on the basis of the common law real and substantial connection test. I will elaborate on each of these points below.

(a) *List of Presumptive Connecting Factors*

[82] Jurisdiction must — irrespective of the question of forum of necessity, which I will not discuss here — be established primarily on the basis of objective factors that connect the legal situation or the subject matter of the litigation with the forum. The Court of Appeal was moving in this direction in the cases at bar. This means that the courts must rely on a basic list of factors that is drawn at first

compétent à l'égard d'une matière. Comme la Cour d'appel l'a affirmé dans *Van Breda-Charron* (par. 109), il est justifié de conférer à ces facteurs l'effet d'une présomption. Le demandeur doit établir l'existence de l'un ou de plusieurs des facteurs énumérés. S'il y parvient, la cour peut présumer, en l'absence d'indications contraires, qu'elle est à bon droit saisie de l'action en vertu des règles de droit international privé et qu'elle agit dans les limites de sa compétence constitutionnelle (J. Walker, « Réforme du droit régissant les litiges transfrontaliers : Compétence judiciaire », document de consultation présenté à la Commission du droit de l'Ontario (mars 2009), p. 23-24 (en ligne)). Bien que l'on considère que les facteurs énumérés créent une présomption, cela ce signifie pas que la liste des facteurs reconnus est définitive. Au contraire, elle pourra être revue au fil du temps et mise à jour par l'ajout de nouveaux facteurs de rattachement créant une présomption.

[81] La présomption que crée un facteur ne sera toutefois pas irréfragable. Le défendeur pourra plaider qu'un lien donné est inapproprié dans les circonstances de l'affaire. Dans un tel cas, il incombera au défendeur de réfuter la présomption créée par le facteur — énuméré ou nouveau — et de convaincre la cour qu'une déclaration de compétence serait inopportune. Si aucun facteur de rattachement — énuméré ou nouveau — créant une présomption ne s'applique dans les circonstances de l'affaire, ou si la présomption de compétence que fait naître ce facteur est valablement réfutée, la cour n'aura pas compétence en vertu du critère du lien réel et substantiel de la common law. J'expose chacune de ces questions ci-après.

a) *Liste de facteurs de rattachement créant une présomption*

[82] Sans égard à la question du for de nécessité, que je n'aborde pas en l'espèce, il faut établir la compétence principalement sur la base de facteurs objectifs reliant la situation juridique ou l'objet du litige au tribunal. C'est la voie qu'a empruntée la Cour d'appel dans les affaires qui nous occupent. Ainsi, les tribunaux doivent se fonder sur une liste de base énumérant les facteurs déjà reconnus dans

from past experience in the conflict of laws system and is then updated as the needs of the system evolve. Abstract concerns for order, efficiency or fairness in the system are no substitute for connecting factors that give rise to a "real and substantial" connection for the purposes of the law of conflicts.

[83] At this stage, I will briefly discuss certain connections that the courts could use as presumptive connecting factors. Like the Court of Appeal, I will begin with a number of factors drawn from rule 17.02 of the Ontario *Rules of Civil Procedure*. These factors relate to situations in which service *ex juris* is allowed, and they were not adopted as conflicts rules. Nevertheless, they represent an expression of wisdom and experience drawn from the life of the law. Several of them are based on objective facts that may also indicate when courts can properly assume jurisdiction. They are generally consistent with the approach taken in the *CJPTA* and with the recommendations of the Law Commission of Ontario, although some of them are more detailed. They thus offer guidance for the development of this area of private international law.

[84] I would not include general principles or objectives of the conflicts system, such as fairness, efficiency or comity, in this list of presumptive connecting factors. These systemic values may influence the selection of factors or the application of the method of resolution of conflicts. Concerns for the objectives of the conflicts system might rule out reliance on some particular facts as connecting factors. But they should not themselves be confused with the factual connections that will govern the assumption of jurisdiction.

[85] The list of presumptive connecting factors proposed here relates to claims in tort and issues associated with such claims. It does not purport to be an inventory of connecting factors covering the

le système de droit international privé et ceux qui s'ajoutent en fonction des besoins évolutifs de celui-ci. Des considérations abstraites d'ordre, d'efficacité ou d'équité du système ne sauraient se substituer aux facteurs de rattachement qui donnent lieu à un « lien réel et substantiel » pour l'application du droit international privé.

[83] À cette étape, j'examine brièvement certains liens pouvant servir aux tribunaux de facteurs de rattachement créant une présomption. À l'instar de la Cour d'appel, j'étudie en premier lieu un certain nombre de facteurs tirés de l'art. 17.02 des *Règles de procédure civile* de l'Ontario. Ces facteurs se rapportent à des situations où les tribunaux permettent la signification *ex juris* et ils n'ont pas été édictés en tant que règles de droit international privé. Ils expriment toutefois la sagesse et l'expérience de la vie juridique. Plusieurs d'entre eux reposent sur des faits objectifs susceptibles d'indiquer également si les tribunaux peuvent à bon droit se déclarer compétents. Ces facteurs sont généralement compatibles avec l'approche retenue dans la *LUCTRI* et avec les recommandations de la Commission du droit de l'Ontario, bien que certains soient plus détaillés. Ainsi, ils peuvent nous guider dans l'élaboration de cette partie du droit international privé.

[84] Il ne faudrait pas inclure à cette liste de facteurs de rattachement créant une présomption des principes généraux ou des objectifs du système de droit international privé comme l'équité, l'efficacité ou la courtoisie. Ces valeurs du système peuvent influer sur la sélection des facteurs ou l'application de la méthode de règlement des conflits. Les considérations relatives aux objectifs du système de droit international privé pourraient écarter toute possibilité que l'on retienne comme facteurs de rattachement certains faits en particulier. Cependant, il faut se garder de confondre ces valeurs avec les liens factuels qui régiront la déclaration de compétence.

[85] La liste des facteurs de rattachement créant une présomption proposés ici se rapporte à des actions en responsabilité délictuelle et aux questions s'y rattachant. Elle ne se veut pas une liste

conditions for the assumption of jurisdiction over all claims known to the law.

[86] The presence of the plaintiff in the jurisdiction is not, on its own, a sufficient connecting factor. (I will not discuss its relevance or importance in the context of the forum of necessity doctrine, which is not at issue in these appeals.) Absent other considerations, the presence of the plaintiff in the jurisdiction will not create a presumptive relationship between the forum and either the subject matter of the litigation or the defendant. On the other hand, a defendant may always be sued in a court of the jurisdiction in which he or she is domiciled or resident (in the case of a legal person, the location of its head office).

[87] Carrying on business in the jurisdiction may also be considered an appropriate connecting factor. But considering it to be one may raise more difficult issues. Resolving those issues may require some caution in order to avoid creating what would amount to forms of universal jurisdiction in respect of tort claims arising out of certain categories of business or commercial activity. Active advertising in the jurisdiction or, for example, the fact that a Web site can be accessed from the jurisdiction would not suffice to establish that the defendant is carrying on business there. The notion of carrying on business requires some form of actual, not only virtual, presence in the jurisdiction, such as maintaining an office there or regularly visiting the territory of the particular jurisdiction. But the Court has not been asked in this appeal to decide whether and, if so, when e-trade in the jurisdiction would amount to a presence in the jurisdiction. With these reservations, "carrying on business" within the meaning of rule 17.02(p) may be an appropriate connecting factor.

[88] The *situs* of the tort is clearly an appropriate connecting factor, as can be seen from rule 17.02(g), and from the *CJPTA*, the *Civil Code of Québec* and the jurisprudence of this Court since

complète des facteurs de rattachement concernant les conditions permettant aux tribunaux de se déclarer compétents à l'égard de tous les recours connus en droit.

[86] La présence du demandeur dans le ressort n'est pas en soi un facteur de rattachement suffisant. (Je n'examinerai pas la pertinence ou l'importance de ce facteur dans le contexte de la doctrine du for de nécessité, car cette question n'a pas été soulevée dans les pourvois qui nous occupent.) À elle seule, la présence du demandeur n'établira pas entre le tribunal et l'objet du litige ou le défendeur un lien créant une présomption. Par contre, un défendeur peut toujours être poursuivi devant un tribunal du ressort dans lequel se trouve son domicile ou sa résidence (dans le cas d'une personne morale, le lieu de son siège social).

[87] On peut également considérer l'exploitation d'une entreprise dans la province comme un lien factuel adéquat. Cela peut toutefois soulever des questions plus complexes. Il faut faire preuve d'une certaine prudence au moment de résoudre ces questions, et ce, afin d'éviter de créer ce qu'on pourrait assimiler à des formes de compétence universelle applicable aux actions en matière de responsabilité délictuelle découlant de certaines catégories d'entreprises ou d'activités commerciales. Une publicité active dans le ressort ou, par exemple, l'accès que l'on y offre à un site Web, ne suffirait pas à établir que le défendeur y exploite une entreprise. La notion d'exploitation d'une entreprise exige une forme de présence effective — et non seulement virtuelle — dans le ressort en question, par exemple le fait d'y tenir un bureau ou d'y effectuer régulièrement des visites. Cependant, la Cour n'est pas appelée à décider si, et, le cas échéant, à quel moment, le commerce électronique dans un ressort pourrait équivaloir à une présence dans celui-ci. Compte tenu de ces réserves, l' « exploit[ation] [d']une entreprise » au sens de l'al. 17.02p) peut constituer un facteur de rattachement approprié.

[88] Tel qu'il appert de l'al. 17.02g), ainsi que de la *LUCTRI*, du *Code civil du Québec* et de la jurisprudence de notre Cour depuis l'arrêt *Tolofson*, le lieu du délit constitue clairement un facteur de

Tolofson. The difficulty lies in locating the *situs*, not in acknowledging the validity of this factor once the *situs* has been identified. Claims related to contracts made in Ontario would also be properly brought in the Ontario courts (rule 17.02(f)(i)).

[89] The use of damage sustained as a connecting factor may raise difficult issues. For torts like defamation, sustaining damage completes the commission of the tort and often tends to locate the tort in the jurisdiction where the damage is sustained. In other cases, the situation is less clear. The problem with accepting unreservedly that if damage is sustained at a particular place, the claim presumptively falls within the jurisdiction of the courts of the place, is that this risks sweeping into that jurisdiction claims that have only a limited relationship with the forum. An injury may happen in one place, but the pain and inconvenience resulting from it might be felt in another country and later in a third one. As a result, presumptive effect cannot be accorded to this connecting factor.

[90] To recap, in a case concerning a tort, the following factors are presumptive connecting factors that, *prima facie*, entitle a court to assume jurisdiction over a dispute:

(a) the defendant is domiciled or resident in the province;

(b) the defendant carries on business in the province;

(c) the tort was committed in the province; and

(d) a contract connected with the dispute was made in the province.

(b) *Identifying New Presumptive Connecting Factors*

[91] As I mentioned above, the list of presumptive connecting factors is not closed. Over time, courts may identify new factors which also presumptively

rattachement approprié. La difficulté consiste souvent à situer ce lieu, et non à reconnaître la validité de ce facteur une fois que le lieu a été établi. Les recours liés à des contrats conclus en Ontario pourraient également être à bon droit intentés en Ontario (sous-al. 17.02f)(i)).

[89] Le recours au préjudice en tant que facteur de rattachement peut soulever des problèmes difficiles. Dans le cas des délits comme la diffamation, la perpétration du délit est complète lorsqu'il cause un préjudice, et l'on tend souvent à situer le délit dans le ressort où le préjudice se manifeste. Dans d'autres cas, la situation est moins claire. Si l'on admet sans réserve que la manifestation du préjudice à un endroit fera présumer que le recours relève de la compétence des tribunaux de cet endroit, on risque d'assujettir à la compétence de ces tribunaux des recours n'ayant qu'un faible lien avec eux. Une personne peut être blessée dans un lieu, mais la douleur et les inconvénients en résultant peuvent bien se faire sentir dans un autre pays et, plus tard, dans un troisième pays. Par conséquent, on ne saurait attribuer l'effet d'une présomption à ce facteur de rattachement.

[90] Pour récapituler, dans une instance relative à un délit, les facteurs suivants constituent des facteurs de rattachement créant une présomption qui, à première vue, autorisent une cour à se déclarer compétente à l'égard du litige :

a) le défendeur a son domicile dans la province ou y réside;

b) le défendeur exploite une entreprise dans la province;

c) le délit a été commis dans la province;

d) un contrat lié au litige a été conclu dans la province.

b) *Reconnaître de nouveaux facteurs de rattachement créant une présomption*

[91] Comme je l'ai indiqué, la liste des facteurs de rattachement créant une présomption n'est pas exhaustive. Au fil du temps, les tribunaux pourront

entitle a court to assume jurisdiction. In identifying new presumptive factors, a court should look to connections that give rise to a relationship with the forum that is similar in nature to the ones which result from the listed factors. Relevant considerations include:

(a) Similarity of the connecting factor with the recognized presumptive connecting factors;

(b) Treatment of the connecting factor in the case law;

(c) Treatment of the connecting factor in statute law; and

(d) Treatment of the connecting factor in the private international law of other legal systems with a shared commitment to order, fairness and comity.

[92] When a court considers whether a new connecting factor should be given presumptive effect, the values of order, fairness and comity can serve as useful analytical tools for assessing the strength of the relationship with a forum to which the factor in question points. These values underlie all presumptive connecting factors, whether listed or new. All presumptive connecting factors generally point to a relationship between the subject matter of the litigation and the forum such that it would be reasonable to expect that the defendant would be called to answer legal proceedings in that forum. Where such a relationship exists, one would generally expect Canadian courts to recognize and enforce a foreign judgment on the basis of the presumptive connecting factor in question, and foreign courts could be expected to do the same with respect to Canadian judgments. The assumption of jurisdiction would thus appear to be consistent with the principles of comity, order and fairness.

[93] If, however, no recognized presumptive connecting factor — whether listed or new — applies, the effect of the common law real and substantial

reconnaître de nouveaux facteurs créant eux aussi une présomption de compétence des tribunaux. Ce faisant, les tribunaux devraient envisager des liens qui révèlent avec le tribunal un rapport de nature semblable à ceux qui découlent des facteurs qui figurent sur la liste. Les considérations suivantes pourraient s'avérer pertinentes :

a) la similitude du facteur de rattachement avec les facteurs de rattachement reconnus créant une présomption;

b) le traitement du facteur de rattachement dans la jurisprudence;

c) le traitement du facteur de rattachement dans la législation;

d) le traitement du facteur de rattachement dans le droit international privé d'autres systèmes juridiques qui ont en commun avec le Canada les valeurs d'ordre, d'équité et de courtoisie.

[92] Le tribunal qui envisage la possibilité de conférer à un nouveau facteur de rattachement l'effet d'une présomption peut mettre à profit les outils utiles que constituent les valeurs d'ordre, d'équité et de courtoisie dans l'analyse de la solidité du rapport avec le tribunal révélé par ce facteur. Tous les facteurs de rattachement créant une présomption, qu'ils soient énumérés ou nouveaux, reposent sur ces valeurs. Ils révèlent généralement, entre l'objet du litige et le tribunal, un rapport tel qu'il serait raisonnable de s'attendre à ce que le défendeur soit appelé à se défendre dans une action devant ce tribunal. En règle générale, en présence d'un tel rapport, on s'attendrait à ce que les tribunaux canadiens reconnaissent et exécutent les jugements étrangers en se fondant sur ce facteur de rattachement créant une présomption, et à ce que les tribunaux étrangers fassent de même à l'égard des décisions canadiennes. La déclaration de compétence semblerait ainsi conforme aux principes de courtoisie, d'ordre et d'équité.

[93] Toutefois, si aucun facteur de rattachement créant une présomption — énuméré ou nouveau — ne s'applique, le critère de common law du lien réel

connection test is that the court should not assume jurisdiction. In particular, a court should not assume jurisdiction on the basis of the combined effect of a number of non-presumptive connecting factors. That would open the door to assumptions of jurisdiction based largely on the case-by-case exercise of discretion and would undermine the objectives of order, certainty and predictability that lie at the heart of a fair and principled private international law system.

et substantiel devrait empêcher le tribunal de se déclarer compétent. Tout particulièrement, le tribunal devrait refuser de se déclarer compétent en se fondant sur l'effet combiné de plusieurs facteurs de rattachement ne créant pas de présomption. Il évitera ainsi d'ouvrir la voie à des déclarations de compétence reposant en grande partie sur l'exercice au cas par cas du pouvoir discrétionnaire, ce qui contredirait les objectifs d'ordre, de certitude et de prévisibilité qui se situent au cœur d'un système de droit international privé équitable et fondé sur des principes.

[94] Where, on the other hand, a recognized presumptive connecting factor does apply, the court should assume that it is properly seized of the subject matter of the litigation and that the defendant has been properly brought before it. In such circumstances, the court need not exercise its discretion in order to assume jurisdiction. It will have jurisdiction unless the party challenging the assumption of jurisdiction rebuts the presumption resulting from the connecting factor. I will now turn to this issue.

[94] Par contre, si un facteur de rattachement reconnu créant une présomption s'applique, la cour doit supposer qu'elle est saisie à juste titre de l'objet du litige et que le défendeur a valablement été interpellé devant cette cour. Dans de telles circonstances, la cour n'a pas à exercer son pouvoir discrétionnaire pour se déclarer compétente. Elle aura compétence à moins que la partie qui s'oppose à la déclaration de compétence réfute la présomption découlant du facteur de rattachement. C'est cette question que j'aborde maintenant.

(c) *Rebutting the Presumption of Jurisdiction*

c) *Réfutation de la présomption de compétence*

[95] The presumption of jurisdiction that arises where a recognized connecting factor — whether listed or new — applies is not irrebuttable. The burden of rebutting the presumption of jurisdiction rests, of course, on the party challenging the assumption of jurisdiction. That party must establish facts which demonstrate that the presumptive connecting factor does not point to any real relationship between the subject matter of the litigation and the forum or points only to a weak relationship between them.

[95] La présomption de compétence créée lorsqu'un facteur de rattachement reconnu — énuméré ou nouveau — s'applique n'est pas irréfutable. Le fardeau de la réfuter incombe bien entendu à la partie qui s'oppose à la déclaration de compétence. Cette dernière doit établir les faits démontrant que le facteur de rattachement créant une présomption ne révèle aucun rapport réel — ou ne révèle qu'un rapport ténu — entre l'objet du litige et le tribunal.

[96] Some examples drawn from the list of presumptive connecting factors applicable in tort matters can assist in illustrating how the presumption of jurisdiction can be rebutted. For instance, where the presumptive connecting factor is a contract made in the province, the presumption can be rebutted by showing that the contract has little or nothing to do with the subject matter of the

[96] Des exemples tirés de la liste des facteurs de rattachement créant une présomption applicables en matière délictuelle permettent d'illustrer la façon de réfuter cette présomption. Ainsi, lorsque le facteur de rattachement créant une présomption prend la forme d'un contrat conclu dans la province, une partie peut réfuter cette présomption en démontrant que le contrat a peu ou rien à voir

litigation. And where the presumptive connecting factor is the fact that the defendant is carrying on business in the province, the presumption can be rebutted by showing that the subject matter of the litigation is unrelated to the defendant's business activities in the province. On the other hand, where the presumptive connecting factor is the commission of a tort in the province, rebutting the presumption of jurisdiction would appear to be difficult, although it may be possible to do so in a case involving a multi-jurisdictional tort where only a relatively minor element of the tort has occurred in the province.

[97] In each of the above examples, it is arguable that the presumptive connecting factor points to a weak relationship between the forum and the subject matter of the litigation and that it would accordingly not be reasonable to expect that the defendant would be called to answer proceedings in that jurisdiction. In such circumstances, the real and substantial connection test would not be satisfied and the court would lack jurisdiction to hear the dispute.

[98] However, where the party resisting jurisdiction has failed to rebut the presumption that results from a presumptive connecting factor — listed or new — the court must acknowledge that it has jurisdiction and hold that the action is properly before it. At this point, it does not exercise its discretion to determine whether it has jurisdiction, but only to decide whether to decline to exercise its jurisdiction should *forum non conveniens* be raised by one of the parties.

[99] I should add that it is possible for a case to sound both in contract and in tort or to invoke more than one tort. Would a court be limited to hearing the specific part of the case that can be directly connected with the jurisdiction? Such a rule would breach the principles of fairness and efficiency on which the assumption of jurisdiction is based. The purpose of the conflicts rules is to establish whether a real and substantial connection exists between the forum, the subject matter of the litigation and the defendant. If such a connection exists

avec l'objet du litige. Et si le fait que le défendeur exploite une entreprise dans la province constitue le facteur de rattachement créant une présomption, celle-ci peut être réfutée par la preuve que l'objet du litige est sans rapport avec les activités commerciales du défendeur dans la province. Par ailleurs, quand la perpétration d'un délit dans la province constitue le facteur de rattachement créant une présomption, il pourrait sembler difficile de réfuter la présomption, mais elle pourrait néanmoins l'être si, dans une affaire relative à un délit commis dans des ressorts multiples, seul un élément relativement mineur du délit s'est produit dans la province.

[97] Dans chacun de ces exemples, il est possible de soutenir que le facteur de rattachement créant une présomption révèle un rapport ténu entre le tribunal et l'objet du litige et qu'il serait donc déraisonnable de s'attendre à ce que le défendeur soit appelé à se défendre dans une action devant ce tribunal. Dans ces circonstances, il ne serait pas satisfait au critère du lien réel et substantiel, et le tribunal ne serait pas compétent pour connaître du litige.

[98] Toutefois, si la partie qui s'oppose à l'exercice de la compétence ne réussit pas à réfuter la présomption découlant d'un facteur de rattachement — énuméré ou nouveau — créant une présomption, le tribunal doit reconnaître sa compétence et le fait qu'il a été valablement saisi de l'action. À ce stade, il exerce son pouvoir discrétionnaire non pas pour décider s'il a compétence, mais uniquement pour décider s'il doit refuser de l'exercer si l'une des parties soulève la question du *forum non conveniens*.

[99] Il convient de préciser qu'un recours pourrait être fondé à la fois sur un contrat et un délit, ou sur plus d'un délit. Le tribunal devrait-il alors se limiter à n'entendre que la partie du recours pouvant se rattacher directement au ressort? Une telle règle porterait atteinte aux principes d'équité et d'efficacité qui sous-tendent la déclaration de compétence. Les règles de droit international privé visent à établir s'il existe un lien réel et substantiel entre le tribunal, l'objet du litige et le défendeur. Si l'existence d'un lien à l'égard d'une situation

in respect of a factual and legal situation, the court must assume jurisdiction over all aspects of the case. The plaintiff should not be obliged to litigate a tort claim in Manitoba and a related claim for restitution in Nova Scotia. That would be incompatible with any notion of fairness and efficiency.

[100] To recap, to meet the common law real and substantial connection test, the party arguing that the court should assume jurisdiction has the burden of identifying a presumptive connecting factor that links the subject matter of the litigation to the forum. In these reasons, I have listed some presumptive connecting factors for tort claims. This list is not exhaustive, however, and courts may, over time, identify additional presumptive factors. The presumption of jurisdiction that arises where a recognized presumptive connecting factor — whether listed or new — exists is not irrebuttable. The burden of rebutting it rests on the party challenging the assumption of jurisdiction. If the court concludes that it lacks jurisdiction because none of the presumptive connecting factors exist or because the presumption of jurisdiction that flows from one of those factors has been rebutted, it must dismiss or stay the action, subject to the possible application of the forum of necessity doctrine, which I need not address in these reasons. If jurisdiction is established, the claim may proceed, subject to the court's discretion to stay the proceedings on the basis of the doctrine of *forum non conveniens*. I will now turn to that issue.

(9) Doctrine of *Forum Non Conveniens* and the Exercise of Jurisdiction

[101] As I mentioned above, a clear distinction must be drawn between the existence and the exercise of jurisdiction. This distinction is central both to the resolution of issues related to jurisdiction over the claim and to the proper application of the doctrine of *forum non conveniens*. *Forum non conveniens* comes into play when jurisdiction is

factuelle et juridique a été établie, le tribunal doit se déclarer compétent relativement à tous les aspects du recours. Le demandeur ne devrait pas être tenu d'intenter une action en responsabilité délictuelle au Manitoba et une demande connexe de restitution en Nouvelle-Écosse. La création d'une telle situation ne respecterait aucun principe d'équité et d'efficacité.

[100] Pour récapituler, afin de satisfaire au critère du lien réel et substantiel de la common law, la partie qui plaide que le tribunal doit se déclarer compétent doit indiquer le facteur de rattachement créant une présomption qui lie l'objet du litige au tribunal. Dans les présents motifs, j'ai énuméré quelques facteurs de rattachement créant une présomption applicables aux actions en responsabilité délictuelle. Toutefois, la liste n'est pas exhaustive et les tribunaux pourront, au fil des ans, en recenser d'autres. De plus, la présomption de compétence découlant de l'existence d'un facteur de rattachement reconnu — énuméré ou nouveau — n'est pas irréfutable. Le fardeau de la réfuter incombe à la partie qui s'oppose à la déclaration de compétence. Si la cour conclut qu'elle n'a pas compétence en raison de l'absence de facteurs de rattachement créant une présomption ou parce que la présomption de compétence découlant de l'un de ces facteurs est réfutée, elle doit rejeter l'action ou suspendre l'instance, à moins que ne s'applique la doctrine du for de nécessité, dont il est inutile que je traite dans ces motifs. Si la compétence est établie, l'action peut être entendue, sous réserve du pouvoir discrétionnaire de la cour de suspendre l'instance en se fondant sur la doctrine du *forum non conveniens*. C'est ce sujet que j'aborde maintenant.

(9) La doctrine du *forum non conveniens* et l'exercice de la compétence

[101] J'ai déjà fait allusion à la nécessité de conserver une nette distinction entre l'existence et l'exercice de la compétence. Cette distinction constitue la clé à la fois de la résolution des problèmes liés à la compétence du tribunal sur l'action et de la bonne application de la doctrine du *forum non conveniens*. Cette doctrine entre en jeu une fois la

established. It has no relevance to the jurisdictional analysis itself.

[102] Once jurisdiction is established, if the defendant does not raise further objections, the litigation proceeds before the court of the forum. The court cannot decline to exercise its jurisdiction unless the defendant invokes *forum non conveniens*. The decision to raise this doctrine rests with the parties, not with the court seized of the claim.

[103] If a defendant raises an issue of *forum non conveniens*, the burden is on him or her to show why the court should decline to exercise its jurisdiction and displace the forum chosen by the plaintiff. The defendant must identify another forum that has an appropriate connection under the conflicts rules and that should be allowed to dispose of the action. The defendant must show, using the same analytical approach the court followed to establish the existence of a real and substantial connection with the local forum, what connections this alternative forum has with the subject matter of the litigation. Finally, the party asking for a stay on the basis of *forum non conveniens* must demonstrate why the proposed alternative forum should be preferred and considered to be more appropriate.

[104] This Court reviewed and structured the method of application of the doctrine of *forum non conveniens* in *Amchem*. It built on the existing jurisprudence, and in particular on the judgment of the House of Lords in *Spiliada Maritime Corp. v. Cansulex Ltd.*, [1987] 1 A.C. 460. The doctrine tempers the consequences of a strict application of the rules governing the assumption of jurisdiction. As those rules are, at their core, based on establishing the existence of objective factual connections, their use by the courts might give rise to concerns about their potential rigidity and lack of consideration for the actual circumstances of the parties. When it is invoked, the doctrine of *forum non conveniens* requires a court to go beyond a strict application of the test governing the recognition and assumption of jurisdiction. It is based

compétence établie. Elle n'intervient aucunement dans l'analyse relative à l'existence de la compétence.

[102] Une fois la compétence établie, l'instance suit son cours devant le tribunal si le défendeur ne soulève pas d'autres objections. Le tribunal ne peut décliner compétence, à moins que le défendeur n'invoque le *forum non conveniens*. Il appartient aux parties, et non au tribunal saisi du recours, d'invoquer cette doctrine.

[103] Le défendeur qui soulève l'application du *forum non conveniens* a le fardeau de démontrer pourquoi le tribunal devrait décliner sa compétence et renvoyer le litige dans un ressort autre que celui que le demandeur à choisi. Le défendeur doit désigner un autre tribunal ayant des liens appropriés selon les règles du droit international privé, et indiquer que ce tribunal pourrait trancher le litige. Le défendeur doit démontrer les liens qui existent entre cet autre tribunal et l'objet du litige au moyen de la même méthode d'analyse que celle employée pour établir l'existence d'un lien réel et substantiel avec le tribunal local. Enfin, la partie qui demande une suspension d'instance pour cause de *forum non conveniens* doit alors démontrer qu'il serait préférable que l'affaire soit soumise au tribunal proposé et qu'il faut considérer que ce dernier est plus approprié.

[104] Notre Cour a examiné et structuré l'application de la doctrine du *forum non conveniens* dans l'arrêt *Amchem*. Elle s'est alors inspirée de la jurisprudence de l'époque, plus particulièrement de l'arrêt de la Chambre des lords dans *Spiliada Maritime Corp. c. Cansulex Ltd.*, [1987] 1 A.C. 460. La doctrine vient atténuer les effets d'une application stricte des règles régissant la déclaration de compétence. Puisque ces règles se fondent essentiellement sur l'établissement de l'existence de liens factuels objectifs, leur application par les tribunaux pourrait susciter des inquiétudes quant à leur rigidité éventuelle et au fait qu'ils ne prennent pas en compte la situation véritable des parties. Si elle est invoquée, la doctrine du *forum non conveniens* oblige le tribunal à passer outre à l'application stricte du critère régissant la reconnaissance et la

on a recognition that a common law court retains a residual power to decline to exercise its jurisdiction in appropriate, but limited, circumstances in order to assure fairness to the parties and the efficient resolution of the dispute. The court can stay proceedings brought before it on the basis of the doctrine.

[105] A party applying for a stay on the basis of *forum non conveniens* may raise diverse facts, considerations and concerns. Despite some legislative attempts to draw up exhaustive lists, I doubt that it will ever be possible to do so. In essence, the doctrine focusses on the contexts of individual cases, and its purpose is to ensure that both parties are treated fairly and that the process for resolving their litigation is efficient. For example, s. 11(1) of the *CJPTA* provides that a court may decline to exercise its jurisdiction if, "[a]fter considering the interests of the parties to a proceeding and the ends of justice", it finds that a court of another state is a more appropriate forum to hear the case. Section 11(2) then provides that the court must consider the "circumstances relevant to the proceeding". To illustrate those circumstances, it contains a non-exhaustive list of factors:

(a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum;

(b) the law to be applied to issues in the proceeding;

(c) the desirability of avoiding multiplicity of legal proceedings;

(d) the desirability of avoiding conflicting decisions in different courts;

(e) the enforcement of an eventual judgment; and

(f) the fair and efficient working of the Canadian legal system as a whole. [s. 11(2)]

[106] British Columbia's *Court Jurisdiction and Proceedings Transfer Act*, which is based on the *CJPTA*, contains an identical provision — s. 11 — on

déclaration de compétence. Cette doctrine reconnaît que les tribunaux de common law conservent le pouvoir résiduel de ne pas exercer leur compétence dans des circonstances appropriées, quoique limitées, afin d'assurer l'équité envers les parties et le règlement efficace du litige. Les tribunaux peuvent, sur la base de cette doctrine, suspendre les procédures engagées devant eux.

[105] Une partie qui sollicite une suspension d'instance pour cause de *forum non conveniens* peut invoquer des faits, considérations et préoccupations divers. Je doute que l'on puisse un jour en dresser une liste exhaustive malgré les quelques tentatives en ce sens du législateur. La doctrine est axée essentiellement sur le contexte de chaque affaire, et elle vise à assurer l'équité envers les deux parties et l'efficacité de la démarche menant au règlement du litige. Par exemple, le par. 11(1) de la *LUCTRI* prévoit qu'« [a]près avoir pris en considération l'intérêt des parties à une instance et les fins de la justice », le tribunal peut refuser d'exercer sa compétence si, à son avis, il conviendrait mieux que l'instance soit instruite par un tribunal d'un autre État. Le paragraphe 11(2) prévoit ensuite que le tribunal doit prendre en considération les « circonstances pertinentes [à l'instance] ». Il dresse une liste non exhaustive de facteurs comme exemples de telles circonstances :

a) dans quel ressort il serait plus commode et moins coûteux pour les parties à l'instance et leurs témoins d'être entendus;

b) la loi à appliquer aux questions en litige;

c) le fait qu'il est préférable d'éviter la multiplicité des instances judiciaires;

d) le fait qu'il est préférable d'éviter que des décisions contradictoires soient rendues par différents tribunaux;

e) l'exécution d'un jugement éventuel;

f) le fonctionnement juste et efficace du système judiciaire canadien dans son ensemble. [par. 11(2)]

[106] La *Court Jurisdiction and Proceedings Transfer Act* de la Colombie-Britannique, inspirée de la *LUCTRI*, prévoit à son art. 11 une disposition

forum non conveniens. In *Teck Cominco Metals Ltd. v. Lloyd's Underwriters*, 2009 SCC 11, [2009] 1 S.C.R. 321, at para. 22, this Court stated that s. 11 of the British Columbia statute was intended to "codify" *forum non conveniens*. Article 3135 of the *Civil Code of Québec* provides that *forum non conveniens* forms part of the private international law of Quebec, but it does not contain a description of the factors that are to govern the application of the doctrine in Quebec law. The courts are left with the tasks of developing an approach to applying it and of identifying the relevant considerations.

[107] Quebec's courts have adopted an approach that, although basically identical to that of the common law courts, is subject to the indication in art. 3135 that *forum non conveniens* is an exceptional recourse. A good example of this can be found in the judgment of the Quebec Court of Appeal in *Oppenheim forfait GMBH v. Lexus maritime inc.*, 1998 CanLII 13001, in which an action brought in Quebec was stayed in favour of a German court on the basis of *forum non conveniens*. Pidgeon J.A. emphasized the wide-ranging and contextual nature of a *forum non conveniens* analysis. The judge might consider such factors as the domicile of the parties, the locations of witnesses and of pieces of evidence, parallel proceedings, juridical advantage, the interests of both parties and the interests of justice (pp. 7-8; see also *Spar Aerospace*, at para. 71; J. A. Talpis with the collaboration of S. L. Kath, *"If I am from Grand-Mère, Why Am I Being Sued in Texas?" Responding to Inappropriate Foreign Jurisdiction in Quebec-United States Crossborder Litigation* (2001), at pp. 44-45).

[108] Regarding the burden imposed on a party asking for a stay on the basis of *forum non conveniens*, the courts have held that the party must show that the alternative forum is clearly more appropriate. The expression "clearly more appropriate" is well established. It was used in *Spiliada* and *Amchem*. On the other hand, it has not always been used consistently and does not appear in the *CJPTA* or any of the statutes based on the *CJPTA*,

quasi identique au sujet du *forum non conveniens*. Dans *Teck Cominco Metals Ltd. c. Lloyd's Underwriters*, 2009 CSC 11, [2009] 1 R.C.S. 321, au par. 22, notre Cour a affirmé que l'art. 11 de la loi de la Colombie-Britannique visait à « codifier » la doctrine du *forum non conveniens*. L'article 3135 du *Code civil du Québec* prévoit aussi que le *forum non conveniens* fait partie du droit international privé du Québec, mais il n'indique pas les facteurs qui doivent régir l'application de cette doctrine en droit québécois. On laisse aux tribunaux le soin d'élaborer une méthode d'application de la doctrine et de déterminer les considérations pertinentes.

[107] Les tribunaux québécois ont retenu une méthode essentiellement identique à celle employée par les tribunaux de common law, sous réserve du texte de l'art. 3135, selon lequel le *forum non conveniens* constitue un recours exceptionnel. On trouve un bon exemple d'application du *forum non conveniens* dans l'arrêt *Oppenheim forfait GMBH c. Lexus maritime inc.*, 1998 CanLII 13001, où la Cour d'appel du Québec a suspendu, pour cause de *forum non conveniens*, une action intentée dans cette province en faveur d'un tribunal allemand. Le juge Pidgeon a souligné le caractère large et contextuel de l'analyse relative au *forum non conveniens*. Le juge peut tenir compte de facteurs tels le domicile des parties, l'endroit où se trouvent les témoins et les éléments de preuve, l'existence d'un recours parallèle, l'avantage juridique, l'intérêt des deux parties et l'intérêt de la justice (p. 7 et 8; voir aussi *Spar Aerospace*, par. 71; J. A. Talpis, avec la collaboration de S. L. Kath, *« If I am from Grand-Mère, Why Am I Being Sued in Texas? » Responding to Inappropriate Foreign Jurisdiction in Quebec-United States Crossborder Litigation* (2001), p. 44-45).

[108] Selon la jurisprudence qui traite du fardeau imposé à la partie qui sollicite une suspension d'instance pour cause de *forum non conveniens*, la partie doit démontrer que l'autre tribunal est nettement plus approprié. L'expression « nettement plus approprié » est bien établie. Elle figure dans *Spiliada* et *Amchem*. Par contre, elle n'a pas toujours été employée invariablement et elle n'apparaît pas dans la *LUCTRI* ni dans les lois inspirées de cette dernière, qui exigent

which simply require that the party moving for a stay establish that there is a "more appropriate forum" elsewhere. Nor is this expression found in art. 3135 of the *Civil Code of Québec*, which refers instead to the exceptional nature of the power conferred on a Quebec authority to decline jurisdiction: ". . . it may exceptionally and on an application by a party, decline jurisdiction . . .".

[109] The use of the words "clearly" and "exceptionally" should be interpreted as an acknowledgment that the normal state of affairs is that jurisdiction should be exercised once it is properly assumed. The burden is on a party who seeks to depart from this normal state of affairs to show that, in light of the characteristics of the alternative forum, it would be fairer and more efficient to do so and that the plaintiff should be denied the benefits of his or her decision to select a forum that is appropriate under the conflicts rules. The court should not exercise its discretion in favour of a stay solely because it finds, once all relevant concerns and factors are weighed, that comparable forums exist in other provinces or states. It is not a matter of flipping a coin. A court hearing an application for a stay of proceedings must find that a forum exists that is in a better position to dispose fairly and efficiently of the litigation. But the court must be mindful that jurisdiction may sometimes be established on a rather low threshold under the conflicts rules. *Forum non conveniens* may play an important role in identifying a forum that is clearly more appropriate for disposing of the litigation and thus ensuring fairness to the parties and a more efficient process for resolving their dispute.

[110] As I mentioned above, the factors that a court may consider in deciding whether to apply *forum non conveniens* may vary depending on the context and might include the locations of parties and witnesses, the cost of transferring the case to another jurisdiction or of declining the stay, the impact of a transfer on the conduct of the litigation

simplement que la partie demandant une suspension d'instance démontre l'existence quelque part d'un « tribunal plus approprié ». L'expression « nettement plus approprié » ne figure pas non plus à l'art. 3135 du *Code civil du Québec*, qui signale toutefois en ces termes le caractère exceptionnel du pouvoir d'une autorité du Québec de décliner compétence : « . . . une autorité du Québec peut, exceptionnellement et à la demande d'une partie, décliner cette compétence . . . ».

[109] Il faut voir dans l'emploi des termes « nettement » et « exceptionne[l] » une reconnaissance du fait qu'en règle générale, le tribunal doit exercer sa compétence lorsqu'il se déclare à juste titre compétent. Il incombe à la partie qui veut écarter l'application de la règle générale de prouver que, compte tenu des caractéristiques de l'autre tribunal, il serait plus juste et plus efficace de refuser au demandeur les avantages liés à sa décision de choisir un tribunal approprié suivant les règles de droit international privé. Le tribunal ne peut, dans l'exercice de son pouvoir discrétionnaire, suspendre l'instance uniquement parce qu'il conclut, après avoir examiné toutes les considérations et tous les facteurs pertinents, à l'existence de tribunaux comparables dans d'autres provinces ou États. Il ne s'agit pas de jouer à pile ou face. Un tribunal saisi d'une demande de suspension d'instance doit conclure qu'il existe un tribunal mieux à même de trancher le litige de façon équitable et efficace. Le tribunal doit cependant garder à l'esprit que sa compétence, établie en application des règles de droit international privé, peut parfois être fonction d'une norme peu rigoureuse. Le recours à la doctrine du *forum non conveniens* peut jouer un rôle important dans la recherche d'un tribunal nettement plus approprié pour trancher le litige et pour assurer ainsi l'équité envers les parties et leur permettre de résoudre plus efficacement leur conflit.

[110] Je tiens à répéter que les facteurs dont le tribunal peut tenir compte dans sa décision d'appliquer la doctrine du *forum non conveniens* sont susceptibles de varier selon le contexte. Ils peuvent inclure, par exemple, l'endroit où se trouvent les parties et les témoins, les frais occasionnés par le renvoi de l'affaire à une autre juridiction ou par

or on related or parallel proceedings, the possibility of conflicting judgments, problems related to the recognition and enforcement of judgments, and the relative strengths of the connections of the two parties.

[111] Loss of juridical advantage is a difficulty that could arise should the action be stayed in favour of a court of another province or country. This difficulty is aggravated by the possible conflation of two different issues: the impact of the procedural rules governing the conduct of the trial, and the proper substantive law for the legal situation, that is, in the context of these two appeals, the proper law of the tort. In considering the question of juridical advantage, a court may be too quick to assume that the proper law naturally flows from the assumption of jurisdiction. However, the governing law of the tort is not necessarily the domestic law of the forum. This may be so in many cases, but not always. In any event, if parties plead the foreign law, the court may well need to consider the issue and determine whether it should apply that law once it is proved. Even if the jurisdictional analysis leads to the conclusion that courts in different states might properly entertain an action, the same substantive law may apply, at least in theory, wherever the case is heard.

[112] A further issue that does not arise in these appeals is whether it is legitimate to use this factor of loss of juridical advantage within the Canadian federation. To use it too extensively in the *forum non conveniens* analysis might be inconsistent with the spirit and intent of *Morguard* and *Hunt*, as the Court sought in those cases to establish comity and a strong attitude of respect in relations between the different provinces, courts and legal systems of Canada. Differences should not be viewed instinctively as signs of disadvantage or inferiority. This factor obviously becomes more relevant where foreign countries are involved, but even then, comity and an attitude of respect for the courts and legal systems of other countries, many of which have the

le refus de suspendre l'instance, les répercussions du changement de juridiction sur le déroulement du litige ou sur des procédures connexes ou parallèles, le risque de décisions contradictoires, les problèmes liés à la reconnaissance et à l'exécution des jugements ou la solidité relative des liens avec les deux parties.

[111] La perte de l'avantage juridique peut poser une difficulté si l'action est suspendue et renvoyée dans une autre province ou un autre pays. La difficulté est exacerbée par la possibilité que l'on confonde deux questions distinctes : l'effet des règles de procédure qui régissent la conduite du procès, et le droit substantiel applicable à la situation juridique, soit, dans les deux pourvois en l'espèce, le droit applicable au délit. Lorsqu'il examine l'avantage juridique, le tribunal peut supposer trop rapidement que le droit applicable découle naturellement de la déclaration de compétence. Toutefois, le droit applicable au délit n'est pas nécessairement le droit interne du tribunal. Il en est peut-être ainsi dans bien des cas, mais pas toujours. Quoi qu'il en soit, si les parties invoquent le droit étranger, le tribunal peut fort bien être tenu d'étudier la question et de décider s'il doit appliquer le droit étranger une fois celui-ci établi. Même si l'analyse relative à la compétence permet de conclure que des tribunaux de différents États peuvent être saisis à juste titre d'un recours, il peut arriver que le même droit substantiel s'applique, du moins en principe, quel que soit l'endroit où l'affaire est entendue.

[112] Une autre difficulté, qui ne se pose pas dans ces pourvois, concerne le caractère légitime de l'utilisation de ce facteur de la perte de l'avantage juridique au sein de la fédération canadienne. Il se peut qu'une utilisation trop large de ce facteur dans l'analyse relative au *forum non conveniens* soit contraire à l'esprit et à l'objet des arrêts *Morguard* et *Hunt*, dans lesquels la Cour a voulu instaurer la courtoisie et une attitude de grand respect entre les provinces, les tribunaux et les systèmes juridiques du Canada. Il ne faut pas considérer instinctivement les différences comme des signes de désavantage ou d'infériorité. Ce facteur devient de toute évidence plus pertinent si des pays étrangers sont en cause, mais même dans de tels cas, la courtoisie et le respect envers les

same basic values as us, may be in order. In the end, the court must engage in a contextual analysis, but refrain from leaning too instinctively in favour of its own jurisdiction. At this point, the decision falls within the reasoned discretion of the trial court. The exercise of discretion will be entitled to deference from higher courts, absent an error of law or a clear and serious error in the determination of relevant facts, which, as I emphasized above, takes place at an interlocutory or preliminary stage. I will now consider whether the Ontario courts properly assumed jurisdiction in these cases and, if so, whether they should have declined to exercise it on the basis of *forum non conveniens*.

(10) Application

[113] Before discussing the outcomes in the two appeals, I must note that the evidence was not the same in *Van Breda* and *Charron*, although they did raise similar legal issues and their factual matrices were the same in important aspects. The Court of Appeal rightly observed that the evidence about Club Resorts' activities in Ontario was not identical in the two cases. In particular, the plaintiffs in *Charron*, unlike the plaintiffs in *Van Breda*, asserted that the SuperClubs group of companies, to which the appellant Club Resorts belonged, maintained an office near Toronto and that Club Resorts had availed itself of that office's services. They also relied on the fact that representatives of Club Resorts had travelled to Ontario to promote their business. Moreover, it is important to note that in considering the decisions of the courts below, this Court must show deference to the findings of fact of the judges of the Superior Court of Justice.

(a) *Van Breda*

[114] In *Van Breda*, there is little evidence about the existence of sufficient factual connections.

tribunaux et les systèmes juridiques d'autres pays, dont bon nombre partagent les mêmes valeurs fondamentales que le Canada, peuvent toujours être de mise. En définitive, le tribunal doit procéder à une analyse contextuelle tout en évitant de pencher trop instinctivement en faveur de sa propre compétence. La décision relève à ce stade du pouvoir discrétionnaire raisonné du tribunal de première instance. En l'absence d'une erreur de droit ou d'une erreur manifeste et grave dans l'établissement des faits pertinents commise, je l'ai déjà signalé, à un stade interlocutoire ou préliminaire, les juridictions supérieures feront preuve de déférence à l'égard de l'exercice de ce pouvoir discrétionnaire. Je vais maintenant examiner si les tribunaux ontariens se sont déclarés à bon droit compétents dans ces affaires et, dans l'affirmative, s'ils auraient dû refuser d'exercer cette compétence pour cause de *forum non conveniens*.

(10) Application

[113] Avant d'examiner les décisions à prendre dans ces deux pourvois, je dois signaler que les éléments de preuve présentés dans *Van Breda* et dans *Charron* diffèrent, même si ces affaires soulèvent des questions de droit semblables et si leur cadre factuel est le même sous bien des aspects importants. En effet, la Cour d'appel de l'Ontario a fait remarquer à juste titre que la preuve relative aux activités exercées par Club Resorts en Ontario n'était pas identique dans les deux affaires. Plus particulièrement, les demandeurs dans *Charron*, contrairement à ceux dans *Van Breda*, ont plaidé que le groupe de sociétés SuperClubs dont faisait partie l'appelante Club Resorts tenait un bureau près de Toronto, et que Club Resorts avait fait appel aux services de ce bureau. Ils ont aussi invoqué que des représentants de Club Resorts s'étaient rendus en Ontario pour promouvoir leur entreprise. En outre, il importe de signaler que dans l'examen des décisions des juridictions inférieures, notre Cour doit faire preuve de déférence envers les conclusions de fait tirées par le juge de la Cour supérieure de justice.

a) *L'affaire Van Breda*

[114] Dans l'affaire *Van Breda*, la preuve de l'existence de liens factuels semble plutôt mince.

Ms. Van Breda's accident and physical injuries happened in Cuba. Mr. Berg and Ms. Van Breda were living in Ontario at the time of their trip. After the accident, however, they did not return to Ontario, as they moved first to Calgary and later to British Columbia, where they were living when they brought their action. Ms. Van Breda's damage, pain and suffering have happened mostly in British Columbia, like most of the treatments she has received. In addition, the evidence is essentially silent about Club Resorts' activities in Ontario, except on one point which I will address below. Moreover, I do not accept that evidence of advertising in Ontario would be enough to establish a connection. Advertising is often international, if not global. It is ubiquitous, crossing borders with ease. It does not, on its own, establish a connection between the claim and the forum. If advertising sufficed to create a connection with a forum, commercial organizations of a certain size could be sued in courts everywhere and anywhere in the world. The courts of a victim's place of residence would possess an almost universal jurisdiction over diverse and vast classes of consumer claims.

C'est à Cuba que l'accident s'est produit et que M^me^ Van Breda a subi ses blessures. Elle et M. Berg vivaient en Ontario au moment de ce voyage. Ils ne sont toutefois pas revenus en Ontario après l'accident. Ils ont d'abord déménagé à Calgary, et plus tard en Colombie-Britannique, où ils habitaient au moment d'intenter leur action. C'est principalement en Colombie-Britannique que M^me^ Van Breda a subi un préjudice et ressenti des souffrances et des douleurs, et c'est là principalement que les soins lui ont été dispensés. De plus, la preuve est essentiellement muette au sujet des activités auxquelles se livrait Club Resorts en Ontario, sauf sur un point que j'aborderai plus loin. Qui plus est, la preuve de la publicité faite en Ontario ne suffit pas, selon moi, pour établir un lien. La publicité prend souvent une dimension internationale. Elle est omniprésente, franchissant facilement les frontières. À elle seule, elle n'établit pas un lien entre l'action et le tribunal. Si la publicité suffisait pour créer un lien avec un tribunal, les organisations commerciales d'une certaine taille pourraient être poursuivies en justice à peu près partout dans le monde. Les tribunaux du lieu de résidence d'une victime posséderaient alors une compétence presque universelle à l'égard de catégories de litiges de consommation vastes et variées.

[115] The motion judge and the Court of Appeal concluded, however, that a sufficient connection between the claim and the province arose out of the contractual relationship created between Mr. Berg and Club Resorts through the defendant Denis. Mr. Denis, who operated a specialized travel agency known as Sport au Soleil, had an agreement with Club Resorts under which he found tennis and squash professionals and sent them to Club Resorts hotels. In exchange for bed and board at a resort, each professional would give a few hours of instruction to guests of the hotel during his or her stay. It appears that Mr. Denis received some form of compensation from Club Resorts.

[115] Le juge saisi de la motion et la Cour d'appel ont toutefois conclu que la relation contractuelle qui s'est tissée entre M. Berg et Club Resorts par l'entremise du défendeur M. Denis a créé un lien suffisant entre l'action et la province. M. Denis, qui exploitait une agence de voyage spécialisée sous le nom de Sport au Soleil, avait conclu avec Club Resorts une entente suivant laquelle il a trouvé des instructeurs de tennis et de squash et les a envoyés aux hôtels Club Resorts. Moyennant l'hébergement et la nourriture, chaque instructeur devait donner quelques heures de cours à des clients de l'hôtel durant son séjour. Il semble que M. Denis ait reçu de Club Resorts une quelconque forme de rémunération.

[116] I find no reviewable error in the findings that Mr. Denis had the authority to represent Club Resorts and that a contract existed under which Mr. Berg was to provide services to Club Resorts.

[116] Je ne trouve pas d'erreur susceptible de révision dans la conclusion que M. Denis pouvait représenter Club Resorts et qu'il existait un contrat aux termes duquel M. Berg devait fournir des

The benefit of this contract, accommodation at the resort, was extended to Ms. Van Breda, who was injured while there in the context of Mr. Berg's performance of his contractual obligation. Deference is owed to the motion judge's findings. No palpable and overriding error has been established. A contract was entered into in Ontario and a relationship was thus created in Ontario between Mr. Berg, Club Resorts and Ms. Van Breda, who was brought within the scope of this relationship by the terms of the contract.

[117] The existence of a contract made in Ontario that is connected with the litigation is a presumptive connecting factor that, on its face, entitles the courts of Ontario to assume jurisdiction in this case. The events that gave rise to the claim flowed from the relationship created by the contract. Club Resorts has failed to rebut the presumption of jurisdiction that arises where this factor applies. On this basis, I would uphold the Court of Appeal's conclusion that there was a sufficient connection between the Ontario court and the subject matter of the litigation.

[118] Whether the Superior Court of Justice should have declined jurisdiction on the basis of the doctrine of *forum non conveniens* remains to be determined. Club Resorts had the burden of showing that a Cuban court would clearly be a more appropriate forum. I recognize that a sufficient connection exists between Cuba and the subject matter of the litigation to support an action there. The accident happened on a Cuban beach, at a hotel managed by Club Resorts. The initial injury was suffered there. Some of the potential defendants reside in Cuba. However, other issues related to fairness to the parties and to the efficient disposition of the claim must be considered. A trial held in Cuba would present serious challenges to the parties. There may be problems with witnesses, concerns about the application of local procedures, and expenses linked to litigating there. All things considered, the burden on the plaintiffs clearly would be far heavier if they were required to bring their action in Cuba. They would face substantial additional expenses and would be at a clear disadvantage relative to the defendants. They might

services à Club Resorts. M^me^ Van Breda, qui a été blessée au centre de villégiature alors que M. Berg s'acquittait de ses obligations contractuelles, bénéficiait elle aussi, aux termes du contrat, de l'hébergement à ce centre. Il faut faire preuve de déférence envers les conclusions du juge saisi de la motion. Aucune erreur manifeste et dominante n'a été établie. La signature d'un contrat en Ontario a noué des rapports entre M. Berg, Club Resorts et M^me^ Van Breda, qui était incluse dans ces rapports aux termes du contrat.

[117] L'existence d'un contrat conclu en Ontario et lié au litige constitue un facteur de rattachement créant une présomption qui, de prime abord, autorise les tribunaux ontariens à se déclarer compétents en l'espèce. Les faits à l'origine du recours découlaient des rapports créés par le contrat. Club Resorts n'a pas réfuté la présomption de compétence qu'établit l'application de ce facteur. Pour cette raison, je suis d'avis de confirmer la conclusion de la Cour d'appel qu'il existait un lien suffisant entre le tribunal ontarien et l'objet du litige.

[118] Il reste à trancher la question de savoir si la Cour supérieure de justice aurait dû décliner compétence selon la doctrine du *forum non conveniens*. Club Resorts avait le fardeau de démontrer qu'un tribunal cubain serait nettement un ressort plus approprié. Je reconnais qu'il existe entre Cuba et l'objet du litige des liens suffisants justifiant l'instruction du litige à Cuba. L'accident s'est produit à Cuba, sur la plage d'un hôtel géré par Club Resorts. M^me^ Van Breda a été blessée à cet endroit. Certains des défendeurs éventuels résident à Cuba. Il faut cependant tenir compte d'autres questions relatives à l'équité envers les parties et au règlement de l'action d'une manière efficace. Un procès à Cuba présenterait de sérieux défis pour les parties. Il pourrait soulever des problèmes en ce qui concerne les témoins ainsi que des craintes au sujet de l'application des procédures locales et des dépenses associées à l'instruction du litige. Tout bien considéré, les intimés auraient manifestement à supporter un fardeau beaucoup plus lourd s'ils devaient intenter leur recours à Cuba. Ils devraient alors engager des dépenses supplémentaires considérables et

also suffer a loss of juridical advantage. But on this point the evidence is far from clear and satisfactory. In the end, the appellant has not shown that a Cuban court would clearly be a more appropriate forum. I agree that the motion judge made no reviewable error in deciding not to decline to exercise his jurisdiction, and I would affirm the Court of Appeal's judgment dismissing the appeal from that decision.

(b) *Charron*

[119] In *Charron*, the existence of a sufficient connection with the Ontario court was hotly disputed. As in *Van Breda*, the accident itself happened in Cuba. On the other hand, Mrs. Charron returned to Ontario after her husband's death and continued to reside in that province. The damage claimed by the respondents was sustained largely in Ontario. But these facts do not constitute presumptive connecting factors and do not support the assumption of jurisdiction on the basis of the real and substantial connection test.

[120] However, the evidence does support the presumptive connecting factor of carrying on business in the jurisdiction. The Superior Court of Justice assumed jurisdiction, and the Court of Appeal upheld its decision, mainly on the basis of an active commercial presence in Ontario that was not limited to advertising campaigns targeting the Ontario market. In the opinion of the courts below, Club Resorts had an active presence in Ontario even though its corporate head office was not in that province. Its presence was not limited to advertising activities or to contacts with travel package wholesalers or travel agents. The courts below concluded that the appellant had engaged in significant commercial activities in Ontario, especially through the office of the SuperClubs group, before the Charrons booked their holiday. The booking resulted at least in part from those activities in Ontario. After reviewing the evidence, Sharpe J.A. wrote the following for the Court of Appeal in respect of this factor:

accuseraient un net désavantage par rapport aux défendeurs. Ils pourraient aussi perdre un avantage juridique, mais la preuve produite à ce sujet est loin d'être claire et satisfaisante. En définitive, l'appelante n'a pas démontré qu'un tribunal cubain serait nettement un tribunal plus approprié. J'estime que le juge saisi de la motion n'a pas commis d'erreur justifiant une révision en décidant de ne pas décliner compétence et je suis d'avis de confirmer le rejet de l'appel de cette décision.

b) *L'affaire Charron*

[119] L'existence d'un lien suffisant avec le tribunal ontarien a été vivement débattue dans l'affaire *Charron*. À l'instar de l'affaire *Van Breda*, l'accident lui-même s'est produit à Cuba. Par contre, M^{me} Charron est revenue en Ontario après la mort de son mari et a continué d'y résider. Le préjudice allégué par les intimés a été subi en grande partie en Ontario. Toutefois, ces faits ne constituent pas des facteurs de rattachement créant une présomption et ne permettent pas au tribunal de se déclarer compétent en vertu du critère du lien réel et substantiel.

[120] Cependant, selon la preuve, l'appelante exploitait une entreprise dans le ressort et il s'agit là d'un facteur de rattachement créant une présomption de compétence. La Cour supérieure de justice s'est déclarée compétente, et la cour d'appel a confirmé sa décision, surtout en raison d'une présence commerciale active en Ontario qui ne se limitait pas à des campagnes de publicité ciblant le marché ontarien. De l'avis des juridictions inférieures, Club Resorts était très présente en Ontario même si son siège social ne se trouvait pas dans cette province. Elle ne se contentait pas d'y faire de la publicité ou de communiquer avec les grossistes en forfaits voyage ou les agents de voyage. Les juridictions inférieures ont conclu que l'appelante s'était livrée à des activités commerciales de grande envergure en Ontario, particulièrement par l'entremise du groupe SuperClubs, avant que la famille Charron ne fasse sa réservation. La réservation résultait, du moins en partie, de l'exercice des activités susmentionnées en Ontario. Après examen de la preuve, le juge Sharpe, au nom de la Cour d'appel, a affirmé ce qui suit relativement à ce facteur :

The record reveals that CRL [Club Resorts Ltd.] was directly involved in activity in Ontario to solicit business for the resort. Unlike the defendants in *Leufkens*, *Lemmex* and *Sinclair*, CRL did not confine its activities to its home jurisdiction:

- pursuant to its contract with the Cuban hotel owner, CRL was required to and did promote and advertise the resort using the "SuperClubs" brand in Canada;
- CRL relies on maintaining a high profile for the SuperClubs brand in Ontario as residents of Canada and Ontario represent a high proportion of CRL's target market;
- CRL was licenced to use the "SuperClubs" label and itself "created" the "SuperClubs Cuba" label and used these labels to market the resort in Ontario;
- CRL's witness Abe Moore agreed on cross-examination:
  - "that CRL was in the business of carrying out activities in countries such as Canada to generate paying guests of the resort";
  - that to do so CRL had to "either directly or engage others to undertake the activity of solicitation, promotion and advertising" in Canada;
  - that CRL ensured that it had relationships with others to do so in Ontario to satisfy its contractual obligation to promote the resort;
- CRL representatives regularly travel to Ontario to further CRL's promotional activity;
- CRL arranged for the preparation and distribution of promotional materials in Ontario; and
- as outlined in the following paragraph, CRL benefited from an office in Ontario that provided information and engaged in the promotion of the SuperClubs brand.

. . .

In my view, one can fairly infer from this body of evidence that although CRL itself maintained no office

[TRADUCTION] Il ressort du dossier que CRL [Club Resorts Ltd.] participait directement en Ontario aux activités de recherche de clients pour le centre de villégiature. Contrairement aux défendeurs dans les affaires *Leufkens*, *Lemmex* et *Sinclair*, CRL n'exerçait pas ses activités uniquement à Cuba :

- aux termes du contrat conclu avec le propriétaire de l'hôtel cubain, CRL était tenue de promouvoir le centre de villégiature en employant la marque « SuperClubs » au Canada, ce qu'elle a fait;
- CRL voit à ce que la marque SuperClubs reste bien en vue en Ontario, car les résidants canadiens et ontariens représentent une part importante du marché ciblé par CRL;
- CRL était autorisée à utiliser la marque « SuperClubs » et elle a elle-même créé la marque « SuperClubs Cuba », deux marques dont elle s'est servie pour promouvoir le centre de villégiature en Ontario;
- le témoin de CRL, Abe Moore, a reconnu ce qui suit en contre-interrogatoire :
  - « que CRL se livrait à des activités dans des pays comme le Canada en vue de gagner des clients pour le centre de villégiature »;
  - que, pour ce faire, CRL devait « elle-même ou par d'autres personnes, se livrer à la sollicitation, à la promotion et à la publicité » au Canada;
  - que CRL a veillé à nouer des rapports avec d'autres personnes à cette fin en Ontario pour remplir son obligation contractuelle de promouvoir le centre de villégiature;
- des représentants de CRL se rendent régulièrement en Ontario afin de poursuivre la promotion faite par CRL;
- CRL a pris des dispositions en vue de la préparation et la diffusion de documents promotionnels en Ontario;
- comme l'indique le paragraphe suivant, CRL disposait, en Ontario, d'un bureau qui fournissait des renseignements et faisait la promotion de la marque SuperClubs.

. . .

À mon avis, on peut déduire à juste titre de cet ensemble d'éléments de preuve que, même si CRL

in Ontario, CRL is implicated in and benefits from the physical presence in Ontario of an office and contact person held out to the public as representing the same "SuperClubs" brand CRL uses to carry on its business of promoting and operating the resort. [paras. 117 and 119]

[121] The Superior Court of Justice considered this evidence at a preliminary stage on the basis of the parties' pleadings. The nature and weight of this evidence has been challenged in this Court. But the courts below made findings about its content and about what it meant. The appellant has not demonstrated that the motion judge made any reviewable errors, and deference must be shown to his findings of fact.

[122] Although whether this factor applies was a very hard fought issue in these appeals, the motion judge's findings of fact lead to the conclusion that Club Resorts was carrying on business in Ontario. Club Resorts' commercial activities in Ontario went well beyond promoting a brand and advertising. Its representatives were in the province on a regular basis. It benefited from the physical presence of an office in Ontario. Most significantly, on cross-examination Club Resorts' witness admitted that it was in the business of carrying out activities in Canada. Together, these facts support the conclusion that Club Resorts was carrying on business in Ontario. It follows that the respondents have established that a presumptive connecting factor applies and that the Ontario court is *prima facie* entitled to assume jurisdiction.

[123] Club Resorts has not rebutted the presumption of jurisdiction that arises from this presumptive connecting factor. Its business activities in Ontario were specifically directed at attracting residents of the province, including the Charron family, to stay as paying guests at the resort in Cuba where the accident occurred. It cannot be said that the claim here is unrelated to Club Resorts' business activities in the province. Accordingly, I find that the

elle-même ne tenait pas de bureau en Ontario, elle peut avantageusement compter sur la présence, en Ontario, d'un bureau et d'une personne-ressource que l'on présente au public comme représentant la même marque « SuperClubs » dont se sert CRL pour promouvoir et exploiter le centre de villégiature. [par. 117 et 119]

[121] La Cour supérieure de justice a pris en considération ces éléments de preuve à un stade préliminaire, en se fondant sur les actes de procédure des parties. La nature et la force probante de ces éléments de preuve ont été contestées devant la Cour. Toutefois, les juridictions inférieures ont tiré des conclusions au sujet du contenu de ces éléments de preuve et de ce qu'ils établissent. L'appelante n'a pas démontré que le juge saisi de la motion avait commis des erreurs susceptibles de révision, et il faut faire preuve de déférence à l'égard de ses conclusions de fait.

[122] Bien que la question de savoir si ce facteur s'applique ait été âprement débattue dans les présents pourvois, les constatations de fait du juge saisi de la motion permettent de conclure que Club Resorts exploitait une entreprise en Ontario. Les activités commerciales auxquelles se livrait cette société dans cette province allaient bien au-delà de la promotion d'une marque et de la publicité. Ses représentants se trouvaient régulièrement dans la province et elle tirait avantage de la présence d'un bureau en Ontario. Bien plus, des témoins de Club Resorts ont admis en contre-interrogatoire qu'elle se livrait à des activités au Canada. Considérés ensemble, ces faits permettent de conclure que Club Resorts exploitait une entreprise en Ontario. Par conséquent, les intimés ont établi l'application d'un facteur de rapprochement créant une présomption et le tribunal ontarien peut à première vue se déclarer compétent.

[123] Club Resorts n'a pas réfuté la présomption de compétence à laquelle donne naissance ce facteur de rattachement. Ses activités commerciales en Ontario visaient précisément à gagner des clients dans la province, dont la famille Charron, pour son centre de villégiature à Cuba où l'accident s'est produit. On ne peut prétendre que ce litige n'est pas lié aux activités commerciales de Club Resorts dans la province. Par conséquent, je conclus que le tribunal

Ontario court has jurisdiction on the basis of the real and substantial connection test.

[124] I also find that the motion judge made no error in declining to stay the proceedings on the basis of *forum non conveniens*. Club Resorts failed to discharge its burden of showing that a Cuban court would clearly be a more appropriate forum in the circumstances of this case. Considerations of fairness to the parties weigh heavily in the respondents' favour. The inconvenience to the individual plaintiffs of transferring the litigation is greater than the inconvenience to the corporate defendant of not doing so. On the question of juridical advantage, I refer to my comments about *Van Breda*. I would add that keeping the case in the Ontario courts will probably avert a situation in which the proceedings against the various defendants are split.

IV. Conclusion

[125] For these reasons, I would dismiss Club Resorts' appeals with costs to the respondents other than Bel Air Travel Group Ltd. and Hola Sun Holidays Limited.

Appeals dismissed with costs.

Solicitors for the appellant (33692): Beard Winter, Toronto.

Solicitors for the respondents Morgan Van Breda et al. (33692): Paliare, Roland, Rosenberg, Rothstein, Toronto.

Solicitors for the appellant (33606): Fasken Martineau DuMoulin, Toronto.

Solicitors for the respondents Anna Charron et al. (33606): Adair Morse, Toronto.

Solicitors for the respondent Bel Air Travel Group Ltd. (33606): McCague Borlack, Toronto.

Solicitors for the respondent Hola Sun Holidays Limited (33606): Buie Cohen, Toronto.

ontarien est compétent suivant le critère du lien réel et substantiel.

[124] J'estime aussi que le juge saisi de la motion n'a pas refusé à tort de suspendre l'instance pour cause de *forum non conveniens*. Club Resorts ne s'est pas acquittée de son fardeau de démontrer qu'il serait nettement plus approprié que le litige soit instruit à Cuba dans les circonstances. L'équité envers les parties fait pencher lourdement la balance en faveur des intimés. Changer le lieu de l'instruction causerait aux demandeurs personnellement des inconvénients plus importants que ceux que subirait la société défenderesse en Ontario. Quant à l'avantage juridique, je renvoie à mes observations au sujet de l'affaire *Van Breda*. J'ajoute qu'entendre l'affaire en Ontario permettra probablement d'éviter la séparation des poursuites engagées contre les différents défendeurs.

IV. Conclusion

[125] Pour les motifs qui précèdent, je suis d'avis de rejeter les pourvois formés par Club Resorts, avec dépens en faveur des intimés sauf Bel Air Travel Group Ltd. et Hola Sun Holidays Limited.

Pourvois rejetés avec dépens.

Procureurs de l'appelante (33692) : Beard Winter, Toronto.

Procureurs des intimés Morgan Van Breda et autres (33692) : Paliare, Roland, Rosenberg, Rothstein, Toronto.

Procureurs de l'appelante (33606) : Fasken Martineau DuMoulin, Toronto.

Procureurs des intimés Anna Charron et autres (33606) : Adair Morse, Toronto.

Procureurs de l'intimée Bel Air Travel Group Ltd. (33606) : McCague Borlack, Toronto.

Procureurs de l'intimée Hola Sun Holidays Limited (33606) : Buie Cohen, Toronto.

Solicitors for the intervener the Tourism Industry Association of Ontario (33606 and 33692): Torys, Toronto.

Solicitors for the interveners Amnesty International, the Canadian Centre for International Justice and Canadian Lawyers for International Human Rights (33606 and 33692): Heenan Blaikie, Ottawa.

Solicitor for the intervener the Ontario Trial Lawyers Association (33606 and 33692): Allan Rouben, Toronto.

Procureurs de l'intervenante Tourism Industry Association of Ontario (33606 et 33692) : Torys, Toronto.

Procureurs des intervenants Amnistie internationale, le Centre canadien pour la justice internationale et Juristes canadiens pour les droits de la personne dans le monde (33606 et 33692) : Heenan Blaikie, Ottawa.

Procureur de l'intervenante Ontario Trial Lawyers Association (33606 et 33692) : Allan Rouben, Toronto.

In the Court of Appeal of Alberta

Citation: Hansraj v. Ao, 2004 ABCA 223

Date: 20040628
Docket: 0203-0368-AC
Registry: Edmonton

Between:

Anthony Hansraj and Roger Hansraj

Appellants
(Plaintiffs)

- and -

Zefeng Ao

Respondent
(Defendant)

- and -

Richard Medeirus and John Doe I and John Doe II

Defendants
(Not Parties to Appeal)

Corrected judgment: A corrigendum was filed on August 11, 2004, the corrections have been made to the text and the corrigendum is appended to this judgment.

The Court:

The Honourable Chief Justice Catherine Fraser
The Honourable Mr. Justice John McClung
The Honourable Mr. Justice Jean Côté

Reasons for Judgment Reserved of the Honourable Mr. Justice Côté
Concurred in by the Honourable Chief Justice Fraser
Concurred in by the Honourable Mr. Justice McClung

Appeal from the Order by
the Honourable Mr. Justice Slatter
Granted April 9, 2002 and August 9, 2002
Filed on October 9, 2002
Amended by Subsequent Order granted on March 28, 2003
Filed on May 8, 2003
(Docket: 9803-18965)

Reasons for Judgment of the
Honourable Mr. Justice Côté

A. Introduction

[1] The problem here revolves around a motor vehicle statement of claim served substitutionally by newspaper advertisement, in another province, during a short renewal of the statement of claim. The chambers judge struck out that service long after.

B. Facts

[2] The full facts are set out in the judgment appealed from, which is reported at (2002) 314 A.R. 262, 2002 ABQB 385. I will use the page and paragraph numbers from the law report.

[3] The appellants are the two plaintiffs. The respondent is one of several defendants. The other defendants are not involved in this appeal. Ms. Miller and her firm were not involved in earlier stages of this suit.

[4] A chronology of the basic facts is as follows:

November 9, 1996	Motor vehicle accident
February 12, 1997	Counsel for appellants wrote to SGI (respondent's supposed insurer), asserting that the respondent was solely liable for the accident. Appellants' counsel indicated that he was gathering medical evidence, and asked SGI to forward any photographs.
March 13, 1997	SGI's adjuster faxed a note to counsel for the appellants. Probably the respondent had now signed the non-waiver agreement. The adjuster said that he was in a position to "deal with your demands".
November 3, 1998	Statement of claim issued
November 9, 1998	Limitation expired
May 5, 1999	Copy of claim sent to insurer
August 24, 1999	***Ex parte*** order for substitutional service ***ex juris.***
November 1, 1999	***Ex parte*** order renewing statement of claim

November 6, 1999	Notice of claim in Markham newspaper
February 1, 2000	Statement of claim expired
September 14, 2001	Defendant filed Notice of Motion attacking service of statement of claim
December 7, 2001	Decision of Master dismissing application to set aside statement of claim
May 3, 2002	Decision now under appeal, reversing the Master

[5] Any other facts which I wish to emphasize are discussed in the body of my reasons.

C. Issues

[6] At first, this case looks simple. But the more that one examines it, the more it begins to resemble a civil procedure examination question set by a daunting professor. More and more potential issues lurk below the surface. The cross-appeal raises one issue, the main appeal names four grounds of appeal, more emerged during oral argument, and still more now occur to me.

[7] I will list all the issues here of which I am aware.

1. Should some of the correspondence referred to have been excluded as written without prejudice and so privileged? (discussed in Part D below)

2. Were the respondent's motions to set aside the service and the order permitting it, brought too late? (discussed in Part E below)

3. Did the respondent give enough evidence to support those motions? (discussed in Part F below)

4. Has the respondent attorned to Alberta's jurisdiction and so lost a chance to upset an order for service out of the jurisdiction? (discussed in Part G below)

5. Was there a waiver of time between the parties? (discussed in Part H below)

6. Should equitable or discretionary principles have been exercised to give the appellants a (new?) chance to serve the respondent? (discussed in Part I below)

7. Will the material originally filed support the order permitting service? (discussed in Part J below)

8. Can or should that order be set aside on other grounds, having been given ***ex parte***? (discussed in Part K below)

9. If the order is later set aside, does the service under it automatically or necessarily become a nullity? (discussed in Part L below)

10. Were any deficiencies in the material which had been filed to get the order permitting service, curable? (discussed in Part M below)

11. Is it now possible to serve the statement of claim afresh, e.g. by renewing it? (discussed in Part N below)

12. (a) Was the statement of claim served on the respondent by giving a copy to his insurance adjuster? (discussed in part O.1 below)

    (b) Was that in time? (discussed in part O.2 below)

13. Is it too late to raise some of these issues on appeal? (discussed in Part P below)

14. What is the appropriate remedy now? (discussed in Part Q below)

D. Without-Prejudice Privilege

[8] The chambers judge discussed this topic at length (pp. 268-74, paras. 10-30). He concluded that none of the correspondence relied upon was closely enough connected to settlement negotiations to be privileged. I agree with his analysis of the law. It is possible that in one or two instances I might have found enough connection to negotiation for one or two pieces of correspondence, but the standard of review of fact decisions on appeal does not dictate any interference with his fact findings.

[9] This privilege is the subject of the cross-appeal, and was touched on briefly both in the factums and the oral argument. As counsel noted, much of the correspondence is not of much importance, except maybe to show that there were negotiations during a certain period.
[10] In the rest of my reasons I will only mention a few pieces of correspondence, and it is clear that they did not constitute an attempt to compromise, except in a very indirect or preliminary sense. Besides, R. 11(9), (10) dictates examination of one narrow aspect of such correspondence, even if it is otherwise privileged (as I show in Part H.2 below).

[11] In sum, most of this disputed correspondence has little importance and whether it was privileged is academic. The few that matter plainly are not privileged.

E. Were this Respondent's Motions Too Late?

[12] This is the appellants' first ground of appeal (on the main appeal). The chambers judge seems not to discuss this exact point, though he does speak about possible prejudice to the appellants. The point does seem to have been argued in Queen's Bench, so far as one can tell.

[13] The appellants cite R. 559, which sets two time limits for a motion "to set aside any process or proceedings for irregularity". Such a motion must be brought

> (a) within a reasonable time, and
>
> (b) before "the party applying has taken a fresh step after knowledge of the irregularity".

[14] When the party moving learned of the defect is critical to both (a) and (b). That party would delay unreasonably if he did not move when he first learned the facts. There is no direct evidence of when this respondent learned the facts about service or the order permitting it.

[15] Even though what I call branch (b) of R. 559 does not speak expressly of what the party moving should have known, I would read that into the Rule. And if I am wrong there, to move long after one should have learned of the flaw with reasonable care, is to move outside a reasonable time.

[16] There is no direct evidence on the subject of the defendant's knowledge here. However, the appellants point out that the respondent's duly-accredited agent, his adjuster, was promptly told that the statement of claim was "out for service". The respondent must have known that the last address he had left in several places (including Alberta's Motor Vehicle Registry) was in Markham, Ontario, which would require an order permitting service. He also had known for some time that the appellants had a lawyer and were making a claim, and were advancing that

claim to his (the respondent's) liability insurer through its adjuster. The respondent had retained an Edmonton lawyer as well. Had he kept in touch with his lawyer or adjuster, he could easily have learned that a suit had been commenced within the limitation period, its nature (as the appellants' lawyer sent a courtesy copy to the respondent's adjuster), and that the appellants were seeking to serve him with it. Had those facts left him in any serious doubt as to what was going on, a simple inquiry with the Clerk's office or the appellants' lawyer, would have cleared that up.

[17] I agree with counsel for the appellants that there is no general duty on litigants or potential litigants to check the Clerk's file to see if anything is happening in a suit. But where one is put on notice that something probably is happening, one should either play safe and act as though it were, or clear up the mystery by checking some reliable source, such as the Clerk's file.

[18] The great majority of statements of claim are served, not allowed to die unserved. Service is the natural and necessary next step in a suit. To assume that the appellants here had done nothing would be unreasonable.

[19] The appellants also rely heavily upon ***Shah v. Christiansen*** (1992) 135 A.R. 74 (C.A.). There the statement of claim served suffered from irregularities in its expiry date or renewal. In that case, the defendants moved to set aside the service, without giving any evidence about when they learned of the irregularities. It was over five months later that those defendants in that case filed a defence. The Court of Appeal there inferred that by then they had earlier learned of the irregularities in expiry or renewal.

[20] The courtesy copy of the statement of claim was sent to the adjuster in early May 1999, but the notice of motion to "set aside the statement of claim" was not filed until mid-September 2001.

[21] In all the circumstances, that seems to me too late, and a violation of R. 559.

[22] But that is not an end of the litigation, for much the same legal rules urged by the appellants. Rule 559 sets time limits, and R. 548 lets the court extend most time limits in the Rules. And R. 558 says that ordinarily a breach of the Rules is curable. If the facts are fully explored, it may be unjust to let the appellants simultaneously hold the respondent to the letter of the law, yet get an indulgence from all their defaults. So I must go on to the other issues.

F. Did the Respondent Give Enough Evidence to Support His Motions?

[23] The chambers judge does not discuss this topic, and it may not have been argued before him.

[24] The respondent did not give the evidence which he should have, in two respects. First, he gave no evidence to show when he learned of the appellants' irregularities, as I have discussed above in Part E. Second, he gave no evidence about notice to him.

[25] In form, the order under appeal sets aside the order for substitutional service ***ex juris.***, and sets aside the statement of claim. But in substance, its effect is to set aside the service (by advertisement) made under that order. The parties have so treated it. Therefore, this was in effect also a motion to set aside service.

[26] What is more, it is important to note that the motion was brought by the respondent. We may suspect that the lawyers were actually following orders by his insurer, Saskatchewan Government Insurance. But it is a motion by the respondent. Saskatchewan Government Insurance is not a party (or third party) to this suit. So it is no answer that the insurer would not have known the facts. It was not the litigant, nor the party moving.

[27] A defendant who knows of an originating document against him cannot avoid the effects of appearing in the action and thereby making service academic, by instructing counsel to appear in court as ***amicus curiae***; such appearance by counsel whom he instructs cures service or its lack: ***Grice v. R.*** [1957] O.W.N. 527, 11 D.L.R. (2d) 699, 701 ff., 119 C.C.C. 18, 26 C.R. 318 (traffic offence summons); ***Raspier v. Robertson*** (1977) 4 C.P.C. 103 (Sask.); ***Re Raspa*** (1972) 33 D.L.R. (3d) 605, 10 C.C.C. (2d) 342, 19 R.F.L. 90 (N.S.) (even appearance just to get an adjournment); ***Tasse v. Hoveland*** (1992) 132 A.R. 117, 120-21 (M.) (paras. 21-2) (statement of defence without service of statement of claim); but cf. ***Paupst v. Henry*** [1984] I.L.R. I-1718, 43 O.R. (2d) 748, 2 D.L.R. (4th) 682, 38 C.P.C. 5 (Ont.) (counsel for insurer allowed to withdraw unconditional appearance for one of two defendants who was not served) (critical annotation on pp. 6-8).

[28] Possibly R. 27 might be an answer here: see Part G below.

[29] Whether the insurer could have got itself added to this suit in some capacity and then moved, I need not decide. I need not pursue that topic because of the matters which follow. It troubles me, as it properly troubled the chambers judge under appeal.

[30] A party who moves to set aside service is always under an obligation to give evidence about whether he in fact got notice or was in effect served, whether or not in the precise manner intended by the party serving him. Why? In the first place, it would be pointless to set aside service by method A, if service by method B had occurred around the same time. In the second place, it would be unjust to set aside purported service, or to declare that service had never

occurred, if in fact the physical statement of claim, or knowledge of its existence and contents, had come to the knowledge of the defendant in question.

[31] The court will not set aside service of a document, or set aside a later step needing service, such as default judgment, if the intended recipient (defendant) later actually got the document, or notice of it: ***Vidito v. Veinot*** (1912) 10 E.L.R. 292, 3 D.L.R. 179 (N.S.) (writ of summons); ***Hoehn v. Marshall*** (1917) 12 O.W.N. 193; ***Morozuk v. Fedorek*** [1941] 1 W.W.R. 382, 389 (Alta. C.A.); ***Cdn.-Dom. Leasing Corp. v. Corpex*** [1963] 2 O.R. 497 (M.), affd. ***id.*** at p. 499n.; ***Pettigrew v. Robb*** A.U.D. (M.) 1296, 1297-8, J.D.E. 8303-19103 (Oct. 26, 1983); ***A.-G. Can. v. Doucette*** (1992) 133 A.R. 68, 71-2, 11 C.P.C. (3d) 81 (paras. 14-16); ***Hnatyshyn Singer Thorstad v. Robson*** (1998) 33 C.P.C. (4th) 135 (Sask.).

[32] To undo the consequences of not carrying out what an official document directs the recipient to do, it is not enough that he shows that the document was not served on him. He must also show that he did not know of the document: ***Kistler v. Tettmar*** [1905] 1 K.B. 39, 74 L.J.K.B. 1 (C.A.) (defendant knew of a judgment and evaded service and knew of an order for an examination in aid and did not come); ***Fontaine v. Serben*** [1974] 5 W.W.R. 428 (Alta. D.C.), affd. (1976) (C.A.): see Note (1977) 15 Alta. L. Rev. 194 (no service, but learned later); ***Eyre v. Eyre*** [1971] 2 O.R. 744, 746-7 (M.); cf. ***Admin. of M.V.A. C.A. v. Gray*** (1986) 71 A.R. 24, 45 Alta. L.R. (2d) 172, 19 C.C.L.I. 246 (C.A.); cf. ***Golden Ocean Assce. v. Martin (The Goldean Mariner)*** [1990] 2 Ll. R. 215 (C.A.). A defect in service is curable under R. 558, if the contents of the statement of claim came to the attention of the defendant, even imperfectly: ***Clarke v. Treadwell*** [1987] A.U.D. 857, [1987] A.J. #683, Calg. 16149 (C.A. June 11). (One may compare ***Sissons v. Whiteside***, Calg. 0201-0248-AC, 2004 ABCA 96 (Mar. 9).)

[33] To set aside or nullify service of a statement of claim then would be even more unjust if the defendant were intending to argue that service now was impossible (e.g., because of expiry of the statement of claim), or if the plaintiff had in the meantime relied upon apparent service to his detriment.

[34] So a defendant moving to set aside purported service is expected to swear that neither any copy of the statement of claim, nor knowledge of its contents, was known to him. For instance, he might swear that he never saw the advertisement in the newspaper, never heard of it, and was thousands of miles away at a mining camp in Bolivia at all material times. In practice, such contents are usual in a defendant's affidavit.

[35] It is possible that this respondent is either blissfully unaware of this entire lawsuit, or only learned of it recently. Maybe he has been out of Canada for years. On the other hand, it is possible that he has been aware all along of what was going on, and read a copy of the statement

of claim shortly after its issue. Or the truth may lie in between these two extremes. We simply do not know.

[36] It appears that this respondent has never given any evidence to support the motion to strike out, or for any other purpose. All the affidavits in the appeal book are from the appellants' side.

[37] In my view, the respondent should have presented some evidence about service or notice, and should not get an order which in effect upsets the order for service, or upsets the service, without such evidence.

G. Has the Respondent Attorned to Alberta's Jurisdiction?

[38] No one raised this question on appeal, and the chambers judge does not mention it. Probably it was not raised there.

[39] The order permitting service was an order for service ***ex juris.***, since the address known was in Markham, Ontario and the newspaper selected was a Markham newspaper. The key motion by the respondent (two years later) was to set aside that order.

[40] If someone takes steps in an Alberta suit (other than objecting to Alberta's jurisdiction or its order for service ***ex juris.***), then he attorns to Alberta's jurisdiction. He cannot later object to that jurisdiction or seek to upset the order for service out of the jurisdiction.

[41] Here the appeal books reveal three notices of motion by the respondent:

(a) filed September 14, 2001: "to set aside the statement of claim";

(b) filed January 11, 2002: "to set aside the statement of claim" and appeal the contrary decision of a Master;

(c) filed April 3, 2002: "to expunge the affidavit of Kristy Kolodychuk" recounting correspondence between the parties, on grounds of privilege.

[42] Rule 27 makes some exceptions to the rule about attornment. It says that it is not attornment to move to set aside

(a) service of the statement of claim, or

(b) the order authorizing such service, or

(c) the statement of claim.

[43] On its face, the April motion does not fit within any of these three exceptions, though it might be argued that it was partly ancillary to such a motion.

[44] On their face, the September and January motions do fit within the exceptions to attornment in R. 27. But again it might be argued that they really do more. The order being attacked had two aspects, and the respondent made separate attacks on both aspects. As the heading says, it was an order both for substitutional service, and for service ***ex juris.*** To attack service ***ex juris.*** is not attornment. But it is arguable that to attack substitutional service could be attornment in some circumstances.

[45] I would not decide these issues of attornment without argument, and without any chance for anyone to lead evidence or otherwise prepare to meet them.

H. Was There a Waiver of Time Between the Parties?

1. Preliminary

[46] "Standstill agreement" is a very imprecise and often misleading term. I will begin with the type of waiver most germane here.

2. Rule 11(9)

[47] In ordinary circumstances, R. 11 is very strict. A statement of claim can only be served while alive, it lasts originally only 12 months, it can be renewed but once for three months only, and it can only be renewed while still alive.

[48] However, the Rule is mitigated in one relevant circumstance, which the appellants' detailed written argument and the special chambers brief filed in Queen's Bench do not mention. The chambers judge adverts to this briefly (Reasons para. 53).

[49] A statement of claim may be renewed (and hence served) after it has expired, in several circumstances: see subrule (9) of R. 11. The circumstance relevant here is that

> "another person purporting to negotiate on behalf of a defendant caused the . . . plaintiff's lawyer to reasonably believe, and to rely on that belief, that . . . liability was or would not be contested. . ."

[50] In my view that applies here. The appellants' lawyer was the person on the other side. He wrote on February 12, 1997 saying that "there is no doubt that liability for this accident rests exclusively with the respondent." He requested that, "If you disagree with that position please advise." The adjuster never disagreed.

[51] At first (in February), the insurance adjuster said that there were legal hitches, and that he could not represent the respondent. The hitches were a denial of coverage, and the refusal of the respondent to sign a non-waiver agreement.

[52] Then on March 13, 1997, the adjuster faxed a handwritten note to the appellants' lawyer. In it, he said:

> "This office represents SGI & Mr. Ao. We are now able to deal with your demands. I await your further correspondence."

Obviously the non-waiver agreement had been signed in the meantime.

[53] The appellants' lawyer then gave the adjuster details of the appellants' injuries and treatment over a considerable interval. During all of it, the adjuster never suggested that liability was not admitted, still less in issue. Therefore, I conclude that the appellants' lawyer could reasonably believe that liability was or would not be contested. He seems to have relied on that. (A similar conclusion was reached in ***Hohnstein v. Gunther*** (2001) 293 A.R. 399, 2001 ABCA 297, but the reports of that decision do not seem to recite the relevant facts.)

[54] Unfortunately there is no affidavit swearing that the appellants or their lawyer did believe that liability was not contested, or that any of them relied upon that belief or that assurance, or what caused that belief or reliance.

[55] Since a reasonable person could have so believed and relied, that belief and reliance may well have existed, but the court cannot simply assume that.

[56] If that were proven, it would do nothing to shore up the existing orders or service. But it might allow the appellants to start afresh, find the respondent or make out a good new case for substitutional service, get the statement of claim renewed again under R. 11(9), and then serve the statement of claim. In other words, this action is not necessarily dead, even if there has been no service to date.

[57] Subrule 11(5) bars a second renewal of a statement of claim if the renewal is under the usual power in subrule (2). But the postulated second renewal here would be under subrule (9), not subrule (2). Besides, the rationale for subrule (9) would often be negated if it barred a second

renewal. For example, as soon as a defendant learned that someone was trying to serve a renewed statement of claim, he could tell the plaintiff that he had been served. The plaintiff would cancel any further efforts to serve. Then after three months, the defendant could say, “Ha, I fooled you,” and the statement of claim would die irrevocably. I would not interpret subrule (5) or (9) in such a way. So the fact that this statement of claim in this case was renewed once before may not be a bar, given my findings in Part H above about subrule (9).

3. Other Types of Time Extension Agreement

[58] The appellants' factum argues this question at length. The chambers judge does not seem to discuss it, and I doubt that it was raised before him.

[59] I have trouble seeing that times for service have been extended by agreement, even an implied agreement. Still less can I see that there is an agreement to stop the clock running entirely or tack an interval of time onto the normal time to serve. Nor can I see any agreement to extend time for anyone to bring any motions.

[60] Given the length of this judgment, I will simply say that the chambers judge did not find a time waiver contract on this evidence, and the standard of review does not let this court do so.

[61] The Supreme Court of Canada has held that an admission of liability is not an alternative ground to found promissory estoppel and thereby escape a limitation period: ***Travellers Indem. Co. v. Maracle*** [1991] 2 S.C.R. 50, 125 N.R. 294.

I. Equitable or Discretionary Principles

[62] This topic is argued in the appellants' factum. The respondent denies that it was raised in Queen's Bench. It may have been briefly or cryptically adverted to in the appellants' Queen's Bench brief, but does not seem to have been really argued there. It is, therefore, not surprising that the chambers judge did not deal with this issue.

[63] The basic context is that R. 11 is mandatory, and service is impossible after the statement of claim expires at the end of 12 months (or 15 if it is renewed): ***Martinez v. Hogeweide*** (1998) 209 A.R. 388, 1998 ABCA 34. The exceptions in R. 11 are narrow.

[64] Equitable principles are not usually heard of in connection with civil procedure. The court has power to grant equitable remedies: ***Judicature Act***, R.S.A. 2000, c. J-2, various sections including s. 10. That ***Act*** says that in the case of conflict, equitable principles prevail over legal ones (s. 15), but that last section has been uniformly held not to apply to questions of civil procedure: ***La Grange v. McAndrew*** (1879) 14 Q.B.D. 210 (D.C.); ***Newbiggin-by-the-Sea Gas Co. v. Armstrong*** (1879) 13 Ch. D. 310, 311, 312 (C.A.); ***Friendly v. Carter*** (1881) 9 Ont. P.R. 41, 46-47; ***Barry v. Sullivan*** (1909) 18 Man. R. 614, 10 W.L.R. 640. Since 1914, Alberta has had no Rule adopting English practice; in cases not provided for, we work by analogy to our Rules: R. 4; ***Barry v. Sullivan***, ***supra***. Our courts have not generally adopted Chancery procedure. Instead, they have chosen that practice which is more convenient, which is often the legal one, not the Chancery one: ***La Grange v. McAndrew***, ***supra***; ***Newbiggin v. Armstrong***,

supra; ***Friendly v. Carter***, ***supra***; ***Thomas v. Palin*** (1882) 21 Ch. D. 360, 367 (C.A.); cf. ***dicta*** in ***Hudson Bay Co. v. Green*** (1881) 1 B.C.R. (Pt. 1) 247, 249, 250 (C.A.).

[65] Though equity can relieve against a forfeiture under limited circumstances, the term "forfeiture" in that context has a limited and technical meaning. ***Snell's Equity*** 599 (30th ed. 2000) speaks of

> "forfeiture for breach of covenant or condition where the primary object of the bargain is to secure a stated result and the provision for forfeiture is added as security for the production of that result."

Usually that was done only where in substance the forfeiture was merely security for a sum of money, or leases (***id.*** at 599).

> "The doctrine of relief against forfeiture is, however, restricted to contracts concerning the transfer of proprietary or possessory rights, whether in land or other assets . . . "

not to ship charters or licenses: (***id.*** at 599).

[66] The only case which the appellants cite for resort to equitable principles or relief against forfeiture is ***MacNeil v. Hodgin*** (1998) 215 A.R. 133, 1998 ABQB 145. That case is not consistent with the clear wording of R. 11 and binding cases interpreting that Rule. It did precisely what that Rule forbids, by invoking equitable rights to relieve against forfeitures. It cited no authority for that proposition. I have never seen any such authority (except for one case which seems to cite it ***obiter*** with approval: ***Fehr v. Immaculata Hosp.*** (1999) 253 A.R. 188, 194-5, 1999 ABQB 865 (paras. 29-33)). Courts have no "inherent power" to do what statutes forbid: ***Glover v. Glover (#1)*** (1980) 29 O.R. (2d) 392, 399 (C.A.), affd. [1981] 2 S.C.R. 561. I do not agree with, and decline to follow, the ***MacNeil*** case.

J. Does the Original Material Support the Order for Service?

1. Service out of the Jurisdiction

[67] The chambers judge correctly discusses this topic.

[68] Rule 31 lists the evidence needed to get leave to serve originating documents outside Alberta. This is a serious topic, because it extends the arm of the Alberta courts outside Alberta, to other provinces which have their own Legislature and courts. It is more serious now than ever, because the grounds for recognition of judgments from other provinces are broader than they

used to be. At one time, a judgment founded upon service ***ex juris.*** was not enforceable outside Alberta; that is no longer so.

[69] The only affidavit used to get the order for service in Ontario was by a process server who would know nothing about the automobile accident or injuries in question. He merely swore to attempts to serve the respondent and to information that the respondent was now in Markham, Ontario.

[70] Rule 31 requires statements under oath

(a) of belief in a reasonable cause of action, and

(b) giving the grounds upon which the application is made.

[71] Item (b) would have to show that the case came within the terms of R. 30, which in this case would presumably be para. 30(h), "the action is founded on a tort committed within Alberta."

[72] None of that is found in the process server's affidavit. It was the only affidavit existing when the order was made. If the respondent can move to attack the order, it cannot stand, as it lacks all of the evidentiary foundation required by law.

2. Substitutional Service

[73] The chambers judge briefly but correctly discusses the applicable law.

[74] The ***ex parte*** order had also permitted substitutional service by newspaper advertisement in a newspaper, the Markham Economist and Sun. Rule 23(2) expressly requires an affidavit "proposing an alternative mode of service which, in the opinion of the deponent will or is likely to be effective." There is nothing like that in the only affidavit filed before the order. The name of the newspaper just appears suddenly in the order for substitutional service. We do not know any details about that newspaper, or what its readership or circulation is. We have no evidence to let the court conclude that anything in that newspaper would be likely to come to the respondent's attention, directly or through friends or family.

[75] These concerns are more than theoretical. Is Markham a free-standing town or city? I am under the impression that it is part of York and so part of Metropolitan Toronto. In other words, a suburb of Toronto. I am not prepared to take judicial notice of that, but if it is true, and if most newspaper readers in Markham simply read a Toronto newspaper, it could cause problems for the plan to advertise in a Markham newspaper.

[76] There is another potential problem. Is the Markham Economist and Sun a general daily news newspaper? Or is it a neighbourhood or semi-weekly or give-away newspaper? We do not know. If it is not a daily news newspaper, an advertisement in it might not come to the attention of a Markham resident.

[77] Rule 23 is not a formality. Substitutional service is not a way of dispensing with service, nor a legal fiction. Substitutional service does not dispense with service; it replaces personal service with some other method likely to come to the personal attention of the defendant in question.

[78] An order cannot be made (or upheld) under R. 23, unless there is evidence to show that the statement of claim is likely to reach the defendant or come to his attention, if the proposed method of service is used: ***Saskatoon Mortgage & Loan Co. v. Roton*** [1942] 2 W.W.R. 219, 223-4 (Sask. C.A.) (service on agent prevented by war from communicating with the defendant); ***V.L. Churchill & Co. v. Lonberg*** [1941] 3 All E.R. 137, 138 (C.A.) (newspaper advertisement in neutral country to reach defendant in occupied country); ***Re Judgment Debtor (#1539 of 1936)*** [1937] Ch. 137, 145-6; ***Porter v. Freudenberg*** [1915] 1 K.B. 857, 888, 889 (C.A.) (defendant was enemy alien resident in enemy country); ***Brisette v. City-Wide Taxi*** [1952] O.W.N. 501 (M.); ***Laframboise v. Woodward*** (2002) 59 O.R. (3d) 338 (para. 14) (whereabouts of defendant unknown). The requirements of R. 23 are serious, and an order under it made without complying with it should be set aside: ***Saskatoon Mortgage & Loan Co. v. Roton***, ***supra***; ***V.L. Churchill & Co. v. Lonberg***, ***supra***; ***Re Judgment Debtor (#1539 of 1936)***, ***supra***, at 145-6.

[79] Even impending time limits offer no ground for waiving the requirements of R. 23: ***Paragon Group v. Burnell*** [1991] Ch. 498 (C.A.), leave den. [1991] 1 W.L.R. 279 (H.L.).

[80] The fact that a person used to be in a city is insufficient ground to get an order for substitutional service by an advertisement in a newspaper in that city: ***Josephs v. Sooley*** (unrep. 28 April 1992) J.D.E. 9103-19342 (Alta. M.)(text on disc in ***Civil Procedure Handbook***). ***A fortiori*** where the plaintiff has no idea where the defendant is: ***McGillis v. Hirtle*** (1992) 128 A.R. 83 (M.).

[81] The onus of proof is on the plaintiff, even on a motion to set aside the ***ex parte*** order for substitutional service: ***McGillis v. Hirtle***, ***supra***.

[82] Therefore, if the respondent is entitled now to attack the order for substitutional service, in that event he can benefit from the fact that it is completely without some of the evidentiary support mandated by law.

K. Setting Aside an Ex Parte Order on Other Grounds

[83] This topic was treated in Queen's Bench chambers, and in appellate argument, as part of other issues. But I find it helpful to treat it separately.

[84] We must recall that the order permitting service was given ***ex parte***. Someone affected by an ***ex parte*** order may move to set it aside: R. 387(2). That may be done upon any ground which would have sufficed originally to deny the order on the merits, had it been opposed at the time. Indeed, a motion to set aside is often treated as a ***de novo*** hearing of the original application (assuming, of course, that there is no operative bar to the motion to set it aside, such as delay). Lack of proper evidence would certainly suffice to set aside. The party later moving to set it aside is also entitled to give new evidence which either rebuts the evidence used originally to get the order, or which establishes some legal bar to granting the order. And the order can also be set aside if the original evidence failed to disclose material facts, given the duty of good faith lying upon anyone making an ***ex parte*** application.

[85] The respondent never filed any kind of evidence in this suit. But Part J. above shows that the appellants did not disclose vital facts, despite their duty to do so, a matter of good faith in an ***ex parte*** application. If the respondent is permitted to move to set aside the original order, he has grounds to do so.

L. If an Order is Set Aside, is Service Under it Bad?

[86] The chambers judge dealt with this at some length, and reviewed the authorities. I agree with his summary of the case law, in paras. 47 to 51 of his Reasons. The service is not necessarily bad. See also ***dicta*** in ***Vaters v. Calgary Cab Co.*** (2001) 286 A.R. 107, 92 Alta. L.R. (3d) 224, 225 (para. 3) (C.A.). Setting aside an order renewing a statement of claim may have a more drastic result, but I need not pursue that here, as the renewal order is not under attack here.

[87] If the order permitting service is not set aside, then this problem becomes moot. If the order is set aside, the court might be able, nevertheless, to cure that defect in service. But the court would need a good deal of evidence, such as whether the contents and existence of the statement of claim had come to the actual attention of the respondent. We have some further post-order evidence from the appellants and their solicitors in several affidavits, but they add very little relevant to the precise topic of this Part L. They show that some slight efforts to locate the respondent were unsuccessful.

M. Are Deficiencies in the Appellants' Evidence to Get the Order Curable Later?

[88] The appellants' chambers brief filed in the Court of Queen's Bench contained this passage:

> "In the alternative that the court decides on whether the Order was void and the Order is found to be void, can the Plaintiffs obtain a new Order on further evidence, or otherwise effect service of the Statement of Claim on the Defendants?" (p. 5, para. 3)

That is not quite the same issue as that discussed in this Part M, which was likely not argued to the chambers judge.

[89] What if the appellants now produced a new affidavit or affidavits which give facts which would fully support the original order to serve substitutionally in Ontario? Would that cure the appellants' problems? The case law seems to conflict.

[90] Alberta law requires prior leave for valid service out of the jurisdiction. The topic is sensitive, because it is one of territorial jurisdiction (as noted above in Part J.1). After purported service, if we too readily cure a completely inadequate earlier application for leave, in effect we may allow service ***ex juris.*** without prior leave. We must look at the substance, not just the form.

[91] If an affidavit used to get an ***ex parte*** order allowing service ***ex juris.*** was wholly insufficient, must the court set aside that order? Can it take into account a later affidavit by the party who got leave giving further evidence? Can the appellants thus shore up their original affidavit?

[92] Though the cases on this point seem at first to conflict, careful examination suggests that they do not conflict so much as might appear.

[93] Only one case binds this court, and I will begin with what it decides. ***Res judicata*** is no bar to a fresh application for new leave to serve ***ex juris.***, based on fresh evidence, even if the first order is set aside: ***Talbot v. Pan Ocean Oil Corp.*** (1977) 5 A.R. 361 (C.A.).

[94] Therefore, where time is not an important issue, and a fresh order and fresh service would be just as good as the original order and service, practically that should end the matter. To deny use of the new affidavit to shore up the old affidavit in such a situation would usually be pointless; a new notice of motion and order of service would inevitably be decided on the merits of all the evidence. To require a second motion would just waste ink and shoe leather. That

doubtless explains the many cases which allow a new affidavit from the plaintiff to shore up the original order for service ***ex juris.***, on a motion to set it aside.

[95] However, that is not this case. Time does matter here, because the statement of claim expired some time ago. Whether the statement of claim could now be renewed, and whether the respondent could now be found, are both unclear.

[96] A number of the cases which allow a fresh affidavit to bolster the old order say that receiving such evidence is a question of discretion: ***Kraupner v. Ruby*** (1957) 21 W.W.R. 145, 152, 153 (B.C. C.A.); cf. ***Iwai & Co. v. The Panaghia*** [1962] Ex. C.R. 134. Therefore, whether allowing the appellants that indulgence would prejudice the respondent is a very important factor. A host of cases in many contexts say that it is error in principle to cure a slip or grant an indulgence, except upon terms remedying any resulting prejudice. If the prejudice is irreparable, the indulgence cannot be granted.

[97] There is another important consideration. Even where the court can cure the later defect (breach of R. 31 about mandatory evidence), it does not have to do so. If it does so too readily, where the evidence needed for an order was totally lacking in substance that does not differ much from upholding service ***ex juris.*** without previous court leave. The court should not ordinarily do that: ***Leal v. Dunlop Bio-Processes Int.*** [1984] 1 W.L.R. 874, 881-2 (C.A.); cf. ***Parker v. Schuller*** (1901) 17 T.L.R. 299 (C.A.). For example, the court cannot use a new affidavit to uphold the original order on a ground (head of R. 30) not supported by the original affidavit: ***Parker v. Schuller***, ***supra***.

[98] Therefore, it seems wrong to me to bypass R. 11 and years later retroactively build a foundation to support leave to serve ***ex juris.*** which had been improperly given long before, and thus validate such old service. I speak of a case where an entire side of the necessary evidentiary foundation was entirely absent. I would leave for another day a case where the flaw in the first affidavit is much smaller. I do not (of course) speak of a case where the statement of claim in fact was served on the defendant, irrespective of the defects.

[99] Instead of shoring up the original order for service ***ex juris.*** here, I would let the appellants move afresh for leave to serve ***ex juris.*** with new evidence.

[100] The tests for shoring up other kinds of order by new evidence may be laxer. Cf. ***Strazisar v. Cdn. Univ. Ins. Co.*** (1981) 21 C.P.C. 51, 58 (Ont. C.C.), and ***Baly v. Barrett*** [1988] N.I. 412, 103 N.R. 379, 382-3 (para. 15) (H.L.) on renewal of a statement of claim and later evidence to shore it up. What if the appellants could now get new evidence on topics other than service ***ex juris.***? Markham is not in Alberta, and the order had to allow service ***ex juris.*** to be of any use. So the only useful exception would arise in the event that back in August 1999 the respondent

was living in Alberta, yet subscribing to and reading the Markham Economist and Sun. That is too remote a possibility to pay any attention to.

[101] Therefore, the theoretical power to adduce new evidence to shore up the substitutional service aspect of the original order, would be of no practical benefit.

N. Can the Statement of Claim Be Served Afresh Now?

[102] The answer to this question is largely found in Part H above. This statement of claim plainly cannot be served afresh now, because it has expired. But if it could be validly renewed hereafter, then it could be validly served afresh during the renewal period. I have already shown in Part H that with some evidence about belief and reliance, the appellants might well be able to show that R. 11(9) is satisfied. Therefore, the fact that the statement of claim has expired may turn out not to be a bar to renewal (though ordinarily it is a bar because of subrule (3)(a)).

O. Was this Statement of Claim Timely Served?

1. On the Adjuster?

[103] The chambers judge did not discuss this, and there is no indication that it was argued in Queen's Bench.

[104] When a copy of the statement of claim was sent to the respondent's adjuster on May 5, 1999, it was under cover of a letter headed "without prejudice" (A.B. p. E23). That heading is not decisive, but if one is trying to decide whether the letter and enclosure were intended to create important formal legal consequences by their mere receipt, the heading is some evidence.

[105] The body of that letter said:

> "Further to the above matter, please find enclosed courtesy copy of the Statement of Claim which has now gone out for service. Please be advised that we do not require a Statement of Defence at this time and we will provide you with ample prior written notice before taking any further steps in this action."

[106] In my view, the phrase "courtesy copy" means a copy for information, not for action; it negates service. Cf. ***Baly v. Barrett***, ***supra*** (para. 9). And the phrase "has now gone out for service" means that it is not yet served, and will be served by other means in the future. That too negates service. The following sentence in the letter about not requiring a defence is not quite so clear, but it certainly does not do anything to negate the first sentence.

[107] In my view, viewed as a whole, this letter and enclosure plainly did not constitute service upon anyone.

2. Served in Time Before Statement of Claim Expired?

[108] I do not know of anything else that could even arguably have constituted service before the renewed statement of claim expired on February 1, 2000.

P. Is it Too Late to Raise Some of These Issues on Appeal?

[109] There is no absolute rule against raising on appeal a new issue which was not raised in the court appealed from, especially if it is a purely legal issue. However, it is proper to do that only if the court cures any prejudice resulting. Often prejudice will result; the most common example is depriving the other side of a chance to lead or contest evidence (or more evidence) relevant to the new issue. If there is such prejudice, it can usually be cured only by giving a chance to lead more evidence, which would usually require a new hearing on the merits in the first court.

[110] If the first hearing was a trial of some length, the expense, inconvenience and injustice of a new trial (especially some time after the events) is usually undue. If the new issue would be the only ground for a new trial, it is ordinarily refused, and the new issue cannot be raised.

[111] Here, however, the situation is somewhat different. The hearing in the Court of Queen's Bench was a fairly short chambers motion on affidavits, not a trial with live evidence. Holding a new hearing would not be a huge expense. Furthermore, neither side here has adduced all the evidence that the law required it to lead. Presumably each side would prefer a further opportunity to do so, rather than lose the fight over whether the suit is now dead.

[112] Furthermore, the evil of raising a new ground on appeal (need for new evidence) shrinks considerably if there are independent grounds to order a new hearing in the original court. Here there are such grounds based on some of the issues raised in the Court of Queen's Bench, even if one ignored the issues probably raised for the first time on appeal.

[113] Therefore, it is not too late to raise these matters on appeal.

Q. Law Reform

[114] It may be that the respondent here has acted in good faith, and has been unaware of this suit. However, that is little consolation to any plaintiff who is in the position of these appellants.

The law requires a car owner to maintain liability insurance, and allows one injured by the car to sue on that insurance. Yet the law partly negates that by requiring the injured party first to get a judgment against the owner or driver, which ordinarily requires service of the statement of claim on him or her (not the insurer) within 12 or 15 months of its issue. See ***Vaters v. Calgary Cab Co.***, ***supra***. The ***Motor Vehicle Accident Claims Act***, R.S.A. 2000, c. M-22, gives relief if the driver is unknown or uninsured; it gives no relief if he is known but missing.

[115] A liability insurer need not help a plaintiff effect service, and can refuse to disclose the defendant's whereabouts, even if it knows them. So a driver or owner who has caused an accident has much to gain by lying low for two or so years. Failure to keep his or her address current with the Alberta Motor Vehicle Registry would yield a small fine at most. If he or she leaves Alberta, the chance of that is slight.

[116] Many types of business have to post a bond to go to work in Alberta. All companies must give an address for service (registered office). Others, such as caveattors or newspapers, have to give an address for service or publish their addresses.

[117] Therefore, there seems to be a gap in Alberta law.

[118] We respectfully suggest that various legislative bodies consider some legal reform in this area. One possibility might be legislation allowing service of a motor vehicle statement of claim by delivery at, or registered mail to, the last address of the defendant registered with the Motor Vehicle Registry (and upon the insurer, named in any insurance pink card produced, or otherwise later notified). Another might be to allow substituted service upon the Superintendent of Insurance or Registrar of Motor Vehicles (the latter having the name and address of the declared insured). Such a change might obviate many problems for injured plaintiffs, and prevent the law from rewarding defendants who abscond or are uncooperative. It would prevent expensive and time-consuming jousting over procedure.

[119] Indeed while legislative change is awaited, the appellants could consider asking a chambers judge to direct substitutional service of a statement of claim, when all else has failed, upon either (or both) the Superintendent of Insurance and the Registrar of Motor Vehicles. Such an order might prevent cost and delay as in this case. Maybe R. 23 could be invoked in these disappearing policy holder cases. We will not prejudge the results of such a motion, as it was not really argued before us.

[120] Reforms in this whole area would not be out of keeping with the legislation whereby proof of issuance of liability insurance has been made a legal requisite to registration of any vehicle. Reforms to the motor vehicle insurance régime may encourage reasonable access to

liability insurance for car owners and expedited access to compensation for those negligently injured by errant drivers.

R. Conclusion and Remedies

[121] It is useful now to summarize my conclusions in this case. For the reasons given above, I would hold that the following propositions are now finally decided, and no party to this appeal can argue the contrary in the future, whatever any future evidence may say:

1. For the purposes and issues discussed in this judgment, the correspondence found in the appeal book is admissible evidence, and not excluded by privilege. (It might be inadmissible for other purposes and issues.)

2. The respondent would need some evidence to support his present or any future motion to set aside service and to set aside the order permitting service; he has no significant evidence at present (even looking at the appellants' evidence).

3. For purposes of R. 11(9), the person negotiating on behalf of the respondent did what could cause a person to believe that liability was or would not be contested, and such a belief would be reasonable (but it is still open to dispute, with more evidence, whether the appellants' lawyer in fact believed that or relied upon it).

4. Subject to the decision of point 3 just recited, the negotiations between the parties did not waive or remove or extend any time limits for the appellants to seek leave to serve, or to serve, the statement of claim. (The "point 3" just mentioned is not the same as "issue 3" in Part C, para. 7.)

5. The court has no general equitable or discretionary power to bypass R. 11, and the equitable power to relieve against forfeitures has no application to this lawsuit.

6. The evidence available on August 24, 1999 was insufficient to permit the court to allow either substitutional service or service out of the jurisdiction (as it did that day).

7. The appellants did not make sufficient disclosure of facts to discharge their duty in getting the ***ex parte*** order permitting service, on August 24, 1999.

8. None of the dealings between the appellants' lawyers and the respondent's adjuster themselves constituted service of the statement of claim (but it would be open on fresh evidence to show that a copy of the statement of claim which the adjuster received had come to the actual knowledge of the respondent, and so was served, or was sufficient ground to bar any attempt to set aside service).

[122] The situation here is complicated and unfortunate. No party to the appeal has taken all the steps, nor led all the evidence that he should have. Some of the defaults tend to cancel each other out. For example, the order permitting service lacked vital evidence, but so did the motion to strike it out. In my view, it would not be fair to render a judgment now declaring either that the action is irretrievably dead against the respondent, or declaring that the respondent was timely served or cannot contest service. Some of the relief given here at first may seem contradictory. But each party has shown flaws in his opponent's procedure. This Court is not bound to give relief where it would be unfair, and most of the relief here is not open in law if there would be irreparable harm. Therefore, the relief to each party should be conditional. The conditions are set out below.

[123] I hate to condemn the parties to still more procedural fights after all these years, but that seems to be a lesser evil than an unfair loss now to either. Nor did the appellants protest the idea of further motions; they sought them from this Court. Furthermore, allowing some new motions would bypass the question of whether certain later evidence filed by the appellants was admissible or effective at the time it was tendered.

[124] Therefore, I would allow either the appellants or the respondent to bring any further motion in the Court of Queen's Bench that it wishes, providing that it is not upon any of the eight topics which I have listed in this Part R as decided. New evidence may be adduced to support such motions, if desired. That court may decide such new motions on their merits (provided that they are not on any of the eight topics already decided).

[125] In partly allowing the appeal, I do not criticize the chambers judge. He wrote careful reasons, and no one has demonstrated any error of law or fact in what he said, though I seem to disagree with him somewhat on one topic (in my Part H.2). The big problem is that there are many other issues, and it seems very probable that they were not raised before the judge.

[126] The other defendants are not parties to this appeal, and the relief which I discuss in this judgment is not intended to apply for or against them.

[127] Success on this appeal has been highly divided, and many of the issues first arose on appeal. But the appeal books benefitted both sides. Therefore, I would order the respondent to pay the appellants half the disbursement for preparing and serving the appeal books. I would give no other costs to anyone of this appeal. That would render moot the question of whether factums were filed on time or not.

[128] If both parties bring any further motions in Queen's Bench, they should be heard consecutively by the same judge, or at the same time. Any Queen's Bench judge or Master may give directions to ensure that that occurs, or to assist in expediting the matter.

[129] I would cancel the existing costs awards in the Court of Queen's Bench, and remit to the judge hearing the new motions the question of what costs should be awarded in the Court of Queen's Bench, and to whom. If no further motions are brought or decided in the Court of Queen's Bench within six months of the date of these Reasons, then either party may apply within three further months to the panel hearing this appeal, by written argument in quintuplicate, for our decision about the Court of Queen's Bench costs to date.

Appeal heard April 14, 2004

Reasons filed at Edmonton, Alberta
this 28th day of June, 2004

Côté J.A.

I concur:

Fraser C.J.A.

I concur:

McClung J.A.

Appearances:

S.L. Miller, Q.C.
for the Appellants

M.D. Kondrat
for the Respondent

Corrigendum of the Reasons for Judgment of the Honourable Mr. Justice Côté

In the last line of the chronology in paragraph [4], the word “affirming” has been corrected to read “reversing”.

In paragraph [118], third sentence, “Registry of Motor Vehicles” has been corrected to read “Registrar of Motor Vehicles”.

15 A judge or associate judge may transfer proceedings to the Provincial Court of British Columbia if

(a) the proceedings are within the jurisdiction of the Provincial Court under the *Small Claims Act*,

(b) a party to the proceedings applies to the judge or associate judge, or all parties to the proceedings agree to the transfer, and

(c) the judge or associate judge considers it appropriate to do so.

Power to reserve decision

16 A judge, associate judge, registrar or district registrar may reserve their own decision.

Issues may be submitted to jury

17 Nothing in an Act or the rules takes away or prejudices the right of a party to an action to have the issues for trial by jury submitted and left by the judge to the jury before whom the party comes for trial, with a proper and complete direction to the jury on the law and the evidence applicable to the issues.

Vexatious proceedings

18 If, on application by any person, the court is satisfied that a person has habitually, persistently and without reasonable grounds, instituted vexatious legal proceedings in the Supreme Court or in the Provincial Court against the same or different persons, the court may, after hearing that person or giving the person an opportunity to be heard, order that a legal proceeding must not, without leave of the court, be instituted by that person in any court.

Court administration

18.1 (1) The Attorney General is responsible for the provision, operation and maintenance of court facilities, registries and administrative services.

(2) A chief administrator of court services, an administrator of court services for each registry and other persons necessary to carry out this Act and the duties assigned to a registry may be appointed under the *Public Service Act*.

(3) Subject to the direction of the Attorney General, and to the direction of the Chief Justice in matters of judicial administration and the use of courtroom facilities, the chief administrator of court services must direct and supervise registries and administrative services for the court.

(4) The chief administrator of court services, for the purposes of carrying out the duties of that person under this Act, may disclose to the Chief Justice information regarding the conduct of persons appointed under subsection (2) in the performance of their duties under this Act.

Court of Queen's Bench of Alberta

Citation: 1158997 Alberta Inc v Maple Trust Company, 2013 ABQB 483

Date: 20130822
Docket: 1201 12187, 1201 14301, 1201 11892
Registry: Calgary

Docket: 1201 12187

Between:

1158997 Alberta Inc. and 1673793 Alberta Ltd. and Partners in Success Mortgage Inc. and Joffrey Reynolds

Plaintiffs

- and -

Maple Trust Company and Cass Lintott and Calgary Court of Queen's Bench and Master Judith Hanebury

Defendants

Docket: 1201 14301

And Between:

1158997 Alberta Inc. and 1691482 Alberta Inc. and Partners in Success Mortgage Inc.

Plaintiffs

- and -

Alberta Treasury Branches and Grant W.D. Cameron and Terry L. Czechowskyj and Calgary Court of Queen's Bench and Master Keith Laycock

Defendants

Docket: 1201 11892

And Between:

1158997 Alberta Inc. and 1660112 Alberta Ltd. and Partners in Success Mortgage Inc. and Carla Kells and Ashley Critch

Plaintiffs

- and -

Royal Bank of Canada and Denise Whiteley and Calgary Court of Queen's Bench and Master Judith Hanebury

Defendants

Reasons for Judgment
of the
Honourable Mr. Justice Sal J. LoVecchio

I. Introduction

[1] The Courts are an open process and available to all. Unfortunately, some of those who access the Courts have their own agenda. They often portray that agenda as being on the side of equity and fairness. However, far too often these days the reality is quite different. These three cases are vivid examples.

[2] The name of one of the Plaintiffs, Partners in Success Mortgage Inc., really says it all. We will be the "Partner" of the little guy or gal and help the little guy or gal successfully defend a mortgage foreclosure brought against them by those big bad financial institutions. The problem - they don't really want to help the little guy or gal.

[3] Quite to the contrary, they often contribute to the misery of the debtor by initially holding out false hopes and then, in the end, taking money from them, thereby increasing not decreasing their misfortune. Along the way, they leave a trail of unpaid cost awards against them when their various actions are dismissed.

II. Background

[4] For simplicity, the three Actions noted above will be referred to as the Maple Trust Action, the ATB Action, and the RBC Action, respectively.

[5] Each of the three actions is predicated on similar circumstances and the overlap in Plaintiffs in the Actions is not a quirk of fate but rather a part of the pattern.

[6] The Defendants/Applicants in each of the actions seek summary relief of a similar nature against the respective Plaintiffs/Respondents.

[7] By an Order dated April 8, 2013 of the Honourable Chief Justice N.C. Wittmann, their Applications were to be heard together in one special chambers application. That Application took place before me on the 6th and 17th days of June, 2013.

[8] I gave an oral decision at that time granting summary judgment which in effect dismissed the Plaintiffs' claims and at the same time declared certain corporations and individuals vexatious litigants. I indicated at that time that I would provide some written reasons for my decision. These are those reasons.

[9] I will begin by briefly reviewing each action.

III. The Three Actions

a. The Maple Trust Action

[10] On January 15, 2007, Joffrey Reynolds as the sole mortgagor entered into a mortgage agreement with Maple Trust Company in connection with the purchase of a home with the municipal address of 1065 Kincora Dr NW, Calgary, Alberta.

[11] Some time later, and for context only, I note Maple Trust amalgamated with Scotia Mortgage Corporation. This occurred in 2011.

[12] Subsequently, Mr. Reynolds renewed the mortgage on February 10, 2012.

[13] When Mr. Reynolds defaulted on the mortgage, an initial foreclosure action was commenced by Scotia Mortgage. Cass Lintott was foreclosure counsel for Scotia Mortgage. This initial application did not proceed as Mr. Reynolds brought the mortgage back into good standing.

[14] Subsequently, Mr. Reynolds again defaulted on the mortgage. A second action was commenced by Mr. Lintott on behalf of Scotia Mortgage. During these proceedings, a Certificate of *Lis Pendens* was registered against title to the property.

[15] After this foreclosure proceeding was commenced, Mr. Reynolds sold the home to 1158997 Alberta Inc.

[16] Then 115 sold the home to 1673793 Alberta Ltd. 167 obtained a mortgage from Partners in Success Mortgage Inc. Even though a second mortgage was placed on the property, the Applicant says neither 167 nor 115 made any arrangements for payment or assumption of the Scotia Mortgage.

[17] There are facts alleged in the Statement of Claim which suggest that Mr. Reynolds became a tenant in the home, presumably paying rent to the new owner. If that is the case and the new owner made no payments on the mortgage, it is easy to see how the scam would emerge. In fairness, that particular issue is not before me and I will not comment further about it here.

[18] On May 31, 2012, Master Hanebury granted an Order for Sale of the property by Scotia Mortgage Corporation. This Order was appealed and set for a special chambers hearing. Eventually, the appeal was struck as neither Mr. Reynolds, nor any other party pursued the appeal.

[19] The Maple Trust Action was then commenced by 115, 167, Partners, and Mr. Reynolds on September 26, 2012. The Plaintiffs allege that Mr. Lintott, as directed by his client Maple Trust (now Scotia Mortgage), ignored correspondence from 115, 167 and Mr. Reynolds.
[20] It is further alleged that Maple Trust in conjunction with Mr. Lintott refused pay out of the mortgage, ignored conveyance conditions, and moved forward with the marketing and sale of the property. It is also alleged that the Calgary (sic) Court of Queen's Bench assisted in this process through the negligence of Master Judith Hanebury.

[21] By Order of Justice William Tilleman dated October 19, 2012, the claims against the Court of Queen's Bench and Master Judith Hanebury were struck and the Plaintiffs were directed to file an amended Statement of Claim. As well, the Defendants were awarded costs. To date, the cost awards remain unpaid.

[22] A Civil Notice of Appeal was filed by Derek Johnson on November 7, 2012 with respect to Justice Tilleman's Order removing Master Judith Hanebury and the Court of Queen's Bench as Defendants from the Statement of Claim. This appeal has been struck.

[23] In addition, by a Partial Consent Dismissal Order dated October 19, 2012 (also granted by Justice Tilleman), Mr. Reynolds withdrew from the action so the remaining Plaintiffs in the action (being the Respondents to this Application) became 115, 167 and Partners.

[24] Mr. Derek Johnson is the sole director and voting shareholder of both 115 and Partners. Mr. Sarabjit Singh Sarin is the sole director and voting shareholder of 167.

b. The ATB Action

[25] When Robert James Kelloway and Glenda MacDonald were unable to meet their obligations under their mortgage agreement with Alberta Treasury Branches, ATB commenced foreclosure proceedings on May 22, 2012. The foreclosure proceedings concerned a property municipally located at 236 Queen Alexandra Road SE, Calgary, Alberta.

[26] Grant W.D. Cameron acted as legal counsel for ATB in those proceedings.

[27] Just like in the Maple Trust Action, subsequent to the commencement of the foreclosure proceedings, the property was sold to 115 and then 115 resold the property, however, this time to a different numbered company. It was sold to 1691482 Alberta Inc. Again, as in the Maple Trust Action, a mortgage was obtained from Partners.

[28] Mr. Jason Mizzoni is the sole director and shareholder of 169.

[29] In October 2012, an application was brought by Mr. Cameron on behalf of ATB to obtain an Order for Sale of the property. At the hearing before Master Laycock, Mr. Terry L.

Czechkowskyj attended as counsel for the original mortgagors, Mr. Kelloway and Ms. MacDonald. Mr. Johnson and Mr. Mizzoni were also in attendance and requested time to pay.

[30] The Order for Sale was granted pending a two week stay to allow 169 to payout the entire balance of the mortgage plus interest and costs. No payments were made to ATB with respect to the outstanding mortgage.
[31] The Order of Master Laycock was not appealed and ATB sold the property on February 14, 2013.

[32] The ATB Action was then commenced by 115, 169 and Partners. It is alleged that ATB in conjunction with their attorney Mr. Cameron, and Mr. Czechowskyj, attorney for Mr. Kelloway and Ms. MacDonald, ignored the sale of the property and the attempts by the new owners to complete the conveyance and pay out the mortgage.

[33] In addition, alleging that due process was not observed, the Court of Queen's Bench and Master Keith Laycock were also named as parties to this claim.

[34] By Order of Justice Sandra Hunt McDonald dated December 7, 2012, the claims against the Court of Queen's Bench and Master Keith Laycock were struck. The Plaintiffs were directed to file an amended Statement of Claim and the Defendants were awarded costs. To date, the cost awards remain unpaid.

[35] A Civil Notice of Appeal was filed by Jason Mizzoni on behalf of 169 on January 9, 2013 with respect to Justice Hunt McDonald's Order removing Master Keith Laycock and the Court of Queen's Bench as Defendants from the Statement of Claim. This appeal has been struck.

c. The RBC Action

[36] When Carla Kells and Ashley Critch breached their mortgage agreement with the Royal Bank of Canada, RBC commenced foreclosure proceedings on April 5, 2012. The property in question has the municipal address: Unit 8, 609 - 67 Avenue SW, Calgary, Alberta.

[37] The Statement of Claim in this foreclosure action also named 115 and 1660112 Alberta Ltd. as Defendants, as in this case, the timing of the transfer pattern was a little different.

[38] It appears that 115 purchased the property from the defaulting party and then transferred title to 166 before the foreclosure commenced. Again, Partners provided a mortgage.

[39] Ajay K. Aneja is the sole director and shareholder of 166.

[40] Denise Whiteley acted as legal counsel for RBC with respect to the original mortgage agreement obtained by RBC and in the foreclosure proceedings.

[41] No payments were made in respect of the original mortgage and on August 16, 2012, Master Hanebury granted an Order for Sale. This Order was not appealed.

[42] The RBC Action was then commenced by 115, 166, Partners, Carla Kells, and Ashley Critch.

[43] The Statement of Claim alleges that Ms. Whiteley through directions from RBC ignored correspondence from the Plaintiffs who were attempting to complete the property conveyance and pay out the mortgage.

[44] It is further alleged, that RBC refused a pay out and instead repossessed the home with the assistance of the Court of Queen's Bench and the negligence of Master Hanebury.

[45] While nothing in the pleadings for the RBC Action directly addresses an agreement between 115 or other numbered corporations and the original home owners for a lease arrangement, Exhibit B, Section 8.1 of Mr. Johnson's unfiled Affidavit of June 14, 2013 references a "Rent-to-Own agreement" but no further details are provided.

[46] An Order was pronounced on October 19, 2012, by Justice Tilleman striking out the claims against the Court of Queen's Bench and Master Judith Hanebury. The Plaintiffs were directed to file an amended Statement of Claim and the Defendants were awarded costs. To date, the cost awards remain unpaid.

[47] Justice Tilleman's Order removing Master Judith Hanebury and the Court of Queen's Bench as Defendants from the Statement of Claim was appealed on November 7, 2012 by Derek Johnson by way of a Civil Notice of Appeal. This appeal has been struck.

[48] Furthermore, a Partial Consent Dismissal Order was granted by Justice Paul Jeffrey on November 14, 2012, removing Carla Kells and Ashley Critch as Plaintiffs. Therefore, the remaining Plaintiffs in the action (being the Respondents to this Application) are 115, 166 and Partners.

d. The Similarity of the Saga

[49] In each of these actions, there are striking similarities in their history and process. 115 would purchase and obtain title to a residential property that is either in or nearing foreclosure. 115 would then resell the residential property, transferring title to a numbered company. A mortgage would be subsequently registered on title from Partners. In each action, the first mortgagee, the financial institution, received no payments from 115, Partners, or the respective numbered company involved.

[50] Consequently, foreclosure proceedings were commenced by the respective financial institutions, which led to an Order for Sale for each property. These Orders were either not

appealed or the party instituting the appeal failed to submit briefs. The Orders for Sale form the basis of the Plaintiffs' actions.

[51] The Court of Queen's Bench, the Master who granted the Order for Sale in the foreclosure proceedings, counsel for the foreclosing financial institution, and the financial institution itself are all then named in an action.

[52] In each case, the claims against the Court of Queen's Bench and the respective Master have been struck and costs were awarded against the respective Plaintiffs. The Orders striking the respective Defendants from the Statements of Claim were appealed. However, all these appeals have been struck.

[53] The original purchaser(s) of the residential property, the mortgagors, who sold their home to 115 (subject to an existing mortgage) were either not involved as Plaintiffs or have obtained a Partial Consent Dismissal Order removing them as a party in the action.

[54] This fact pattern is strikingly similar to ***Scotia Mortgage Corporation v Gutierrez***[1], another case involving Mr. Derek Johnson and 115. The material facts in that case are that the Gutierrezs had transferred title of their home, which was in foreclosure, to 115 for no money. Instead of monetary compensation, the Gutierrezs had an agreement with 115 to remain in the property as renters with the option to repurchase the home in two years for the same price that they had sold the home to 115 for. In regards to this arrangement, Master Laycock at para 8 of the decision stated:

> None of this make[s] sense. The defendants would be paying less that the regular monthly mortgage payments. I am expected to believe that 115 will make up the difference plus pay the property taxes and then after 2 year[s] of losing money, transfer the property back to the defendants. The math and economics do not work.

[55] In the case of ***Scotia Mortgage Corporation v Gutierrez*****,** Master Laycock provides a historical overview of unscrupulous individuals which he refers to as "Dollar Dealers". He then summarized the scheme as it related to the facts of that case at paras 23-26:

> We now find that history repeats itself. The Calgary real estate market boomed again until the recession in 2008. Homeowners began defaulting on their mortgages and walking away from their properties. Some desperate homeowners sought help to maintain their properties. A new type of Dollar Dealer has emerged on the scene to take advantage of the unwary and desperate homeowner. This scheme involved a homeowner transferring title to a numbered Alberta corporation with the promise that the property would be reconveyed at some

[1] 2012 ABQB 683.

> future time. The transferee corporation was to bring the mortgage into good standing. The homeowner was to pay rent. The advantage of this new scheme was that the scoundrel didn't have to go to the trouble of locating a tenant.
>
> The new scoundrel, while collecting rent would appear in court and make outlandish statements to obfuscate and delay the proceedings. The scoundrel obtained a substantial cash flow from numerous desperate homeowners. While the homeowner was able to remain in the residence, the mortgage debts and legal costs increased substantially because of the activity of the scoundrel. Eventually the mortgage company would obtain title to the property and, in many cases, obtain a deficiency judgment against the homeowner.
>
> In many of these foreclosures, the mortgage company would also obtain judgment against the numbered Alberta corporation. It is clear that Mr. Johnson is a scoundrel for holding out hope to desperate homeowners in order to enrich himself. 115 has in many cases been added as a defendant and several judgments has [sic] been obtained against 115. A search at the Personal Property Registry reveals that eight judgments have been assigned by the mortgage company to Canada Mortgage and Housing Corporation in the total amount of $624,655. Another insurer, Genworth Financial Mortgage Insurance Company has six judgments assigned to it in the total amount of $729,920. Two other lenders have judgments against 115 totalling $157,083.
>
> When Mr. Johnson advises the court that he has years of experience in the Calgary real estate market and that the Court has not kept up with and does not understand the current real estate practices, he makes a vexatious argument. My grandfather's generation would describe him as a snake oil salesman. There is no merit to any of his arguments. His appearances cause unnecessary costs and delay. He shows a lack of understanding of basic real estate and mortgage practice and procedures. His arguments have been rejected repeatedly by both Masters and Justices on appeal.

[56] While the facts at bar are slightly different, the underlying plot has the same flavour. Many of the players are the same, namely, Mr. Johnson and 115. Outstanding judgments remain unpaid.

[57] Further, ***Xceed Mortgage Corporation and Xceed Funding Corp v 1158997 Ltd***[2] and ***HSBC Finance Mortgages Inc v Strand***[3] are two additional cases involving Mr. Johnson and 115 with similar fact scenarios. Both are matters where 115 purchased property involved in

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[2] (December 3, 2010), Calgary 1001-08610 (ABQB).

[3] (February 9, 2011), Calgary 1001-14143 (ABQB).

foreclosure proceedings (subject to an existing mortgage). In both cases, 115 was declared to be a vexatious litigant.

e. Ty Griffiths

[58] In each action, an individual named Ty Griffiths is identified as agent for all of the remaining Plaintiffs. Mr. Rooney, Q.C. (who is one of the Counsel for the Applicants) indicated that he received an e-mail in all 3 actions stating that Ty Griffith is the agent for the Respondent parties.

[59] Based on the Affidavit of Mr. Lintott, the Respondent corporations, 115, Partners, and 167 are not represented by an active member of the Law Society of Alberta and the Applicants also submit that Ty Griffiths is not an active member of the Law Society of Alberta.

[60] A Ty Griffiths was not present at the hearings and I do not know whether or not he is a real person. To further complicate the matter, Ms. Evanna Ellis said at the hearing that she was the agent for Ty Griffiths.

IV. The Applications

[61] While the Applicants have each structured their arguments a little differently in their respective briefs and there are slight differences in the remedies sought, generally, each of the Applicants seek in effect the same result.

[62] Firstly, the Applicants seek to have the Respondents' pleadings struck on the basis of Rule 3.68 of the Alberta *Rules of Court*[4] for failing to disclose any, or any reasonable, claim, being improper, and constituting an abuse of process.

[63] Alternatively, the Applicants seek to have the claim dismissed on the basis of Rule 7.3(1)(b) as there is no merit to the claim. During oral argument, the Applicants indicated that this would be their preferred remedy.

[64] In support of the Applicants' arguments to strike or dismiss the claims, the Applicants submit that the Statements of Claim do not disclose a reasonable cause of action that is supported by facts. Furthermore, it is the Applicants' position that the Statements of Claim are stated to contain purported hypothetical situations and bare allegations.

[65] The Applicants also take the position that these actions are a collateral attack on foreclosure proceedings that are now concluded and that appeals in those actions were either unsuccessful or not pursued. Accordingly, these matters are now *res judicata*; the matters have been concluded with finality.

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[4] Alta Reg 124/2010.

[66] As authority for this latter proposition, the Applicants cite ***Onischuk v Alberta***[5].

[67] As a matter of procedure, some of the Applicants also raised the argument that the Respondents, as corporate entities, commenced the above actions independently without a legal representative who is an active member of the Law Society of Alberta. Section 106 of the *Legal Professions Act*[6] is cited as authority for this point.

[68] In addition to having the claims struck or dismissed, the Applicants seek that the Respondents in these actions, as well as the individuals associated with the Respondents in these actions, be declared as vexatious litigants pursuant to Section 23.1 of the *Judicature Act*[7].

[69] As required by Section 23.1 of the *Judicature Act*, notice was provided to the Minister of Justice and Attorney General by a letter dated March 22, 2013.

[70] The ***Onischuk*** case lists the characteristics that are indicative of vexatious proceedings. They are:

> (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 an 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) they are often brought for an improper purpose, including the harassment and oppression of other parties by multifarious proceedings for purposes other than the assertion of legitimate rights;
>
> (d) generally, cases where the grounds and issues raised tend to be rolled forward into subsequent actions and repeated and supplemented, often with actions brought against the lawyers who have acted for or against the litigant in earlier proceedings, or the judiciary involved in rulings on previous cases;
>
> (e) the failure of the person instituting the subsequent proceedings to pay the costs of unsuccessful earlier proceedings; and

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[5] 2013 ABQB 89, aff'd 2013 ABCA 129 where at para 32 it is stated that a Statement of Claim which seeks to re-litigate a matter that has been determined renders the plaintiffs' claim as frivolous, irrelevant or improper.

[6] RSA 2000, c L-8.

[7] RSA 2000, c J-2.

(f) persistently taking unsuccessful appeals from judicial decisions.

[71] The indicia listed in the ***Onischuk*** case are a textbook precis of the three actions.

[72] Furthermore, the Applicants note that 115 has previously been declared a vexatious litigant in two Court of Queen's Bench decisions. They reference the cases of ***Xceed Mortgage Corporation and Xceed Funding Corp v 1158997 Ltd*** and ***HSBC Finance Mortgages Inc v Strand***. As reviewed earlier, these cases contain similar fact patterns and both declare 115 to be a vexatious litigant.

[73] As well, the Applicants state that both 115 and Mr. Johnson's related companies may only be represented by a lawyer authorized to practice, pursuant to the Court of Queen's Bench decision in ***Scotia Mortgage Corporation v Gutierrez.***

[74] The Applicants also submit that Mr. Johnson was fined by the Real Estate Council of Alberta for being in contravention of the *Real Estate Act*[8]. The fine was levied for deceiving people by acting in contravention of the *Real Estate Act*.

[75] The Applicants also cite Section 23.1(4) of the *Judicature Act* in support of their application to declare individuals and entities associated with the Respondents in these actions as vexatious litigants. It reads:

> (4) The Court may at any time on application or on its own motion, with notice to the Minister of Justice and Attorney General, make an order under subsection (1) applicable 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 subsection (1) is made.

[76] ***Meads v Meads***[9] is also submitted as an authority by the Applicants for the vexatious litigant declaration. They submit that the Respondent corporations and their directors are Organized Pseudolegal Commercial Argument litigants. Ty Griffiths, if he exists, would be a classic "guru" of OPCA litigants.

[77] Further in the alternative, some of the Applicants request that the Respondents be ordered to pay security for costs if the claims are to proceed. Among other arguments, it is submitted that 115 has outstanding judgments in the range of $1.5 million. In support of the application for security for costs, Section 254 of the *Business Corporations Act*[10] is cited as authority. This

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[8] RSA 2000, c R-5.

[9] 2012 ABQB 571.

[10] RSA 2000, c B-9.

section says the court may make an order for security for costs if it appears that a corporate Plaintiff will be unable to pay the costs of a successful Defendant.

a. Respondents/Plaintiffs

[78] No briefs were filed by the Respondents in this application. During oral argument, Mr. Derek Johnson submitted that as a director of his corporation, Partners, he is able to represent his corporation. No legal arguments or jurisprudence was provided by him with respect to his standing before this Court. He also referred on occasion to his unfiled Affidavit.

[79] Mr. Johnson acknowledged that in each of the actions, the home owners sold their homes to his corporation subject to an existing mortgage. Furthermore, Mr. Johnson stated that finance conditions were in place in each of the respective actions but that the respective financial institutions in each of the actions ignored correspondence and stalled the Respondents' attempt to obtain conveyance conditions. The Respondents submit that they made efforts to pay out the mortgages by contacting the respective financial institutions and their counsel.

[80] Notwithstanding his assertions just noted, he also made it clear in response to a question from the Court that no payments were ever made and that no financing commitments were ever obtained. He said that was all the fault of the foreclosing financial institutions. I note not one shred of evidence was provided to support that allegation of fault or the existence of any financing arrangements other than the assertion he originally made which he was then required to subsequently recant.

[81] In regards to the vexatious litigant portion of the application, Mr. Johnson alleges a conflict of interest between the Court of Queen's Bench and the respective financial institutions. He submits that the Court of Queen's Bench is a registered corporation that profits from the sale of debt.

[82] Evanna Ellis, appearing as an agent for Ty Griffiths, during oral argument directed a number of submissions with respect to the vexatious litigant portion of the application. She added that the OPCA portion of the Applicants' argument was not applicable. Ms. Ellis argued that to apply the label of vexatious litigants to investors in a private enterprise in a capitalistic society was erroneous. Ms. Ellis submits that they were denied due process and that the denial of due process has lead to the current proceedings.

[83] Furthermore, she also submitted that the Applicants' argument was based on family law and family issues. In fairness, the OPCA portion of the Applicants' argument relied in part on the ***Meads*** case where the factual background arose in the context of family law.

[84] As well, Ms. Ellis submitted that the respective financial institutions had a responsibility to respond to the Respondents' requests earlier in the process, or alternatively, that the financial institutions be more specific in regards to their arguments against accepting the Respondents'

offer. It was submitted that this would have provided the Respondents an opportunity to amend their conveyance conditions as needed. She did not appear at the second day of the hearing.

[85] Mr. Jason Mizzoni was only in attendance on the first day of the hearing on behalf of 169 and no submissions were made by him.

V. Discussion and Analysis

a. Application for Summary Judgment

[86] Rule 7.3 of the *Rules of Court* states the test for summary judgment. It reads:

> 7.3(1) A party may apply to the Court for summary judgment in respect of all or part of a claim on one or more of the following grounds:
>
> (a) there is no defence to a claim or part of it;
> (b) there is no merit to a claim or part of it;
> (c) the only real issue is the amount to be awarded.
>
> (2) The application must be supported by an affidavit swearing positively that one or more of the grounds described in subrule (1) have been met or by other evidence to the effect that the grounds have been met.

[87] The Alberta Court of Appeal in ***Condominium Corp No 0321365 v 970365 Alberta Ltd***[11] reviewed the test for summary judgment. It said:

> The *Old Rules* have now been replaced by the *New Rules of Court* which became effective November 1, 2010. Under transitional *New Rule* 15.2(1), the *New Rules* apply to this appeal. *New Rule* 7.3.1(b) provides that summary judgment is available when "there is no merit to a claim or part of it". It is unnecessary on this appeal to consider whether there exists a subtle difference in the summary judgment rule under the *New Rules* as opposed to the *Old Rules*. That is not in issue on this appeal and I leave it for another day. It is clear under both the *New Rules* and the *Old Rules* that summary judgment may be granted where there is "no merit" to a claim or part of it.
>
> In the first instance, a summary judgment application involves two steps. First, the moving party must adduce evidence to show there is no genuine issue for trial. This is a high threshold. If there is no genuine issue for trial, then there will be no merit to a claim. Accordingly, if the evidentiary record establishes either that there are missing links in the essential elements of a cause of action or that there is no

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[11] 2012 ABCA 26, 519 AR 322, at paras 42-43.

> cause of action in law, then there will be no genuine issue for trial. The fact there is no genuine issue for trial must be proven; relying on mere allegations or the pleadings will not suffice: ***Canada (Attorney General) v Lameman***, 2008 SCC 14 (SCC) at para 11, [2008] 1 SCR 372. Second, once the burden on the moving party has been met, the party resisting summary judgment may adduce evidence to persuade the court that a genuine issue remains to be tried: ***Murphy***, *supra* at para 25. That effectively means showing that the claim has what is often referred to as "a real chance of success". This may be accomplished by establishing the existence of disputes on material questions of fact, including inferences to be drawn therefrom, or on points of law that cannot be readily resolved given the factual disputes.

[88] In each of the actions, an individual or individuals obtained a mortgage from a financial institution to purchase residential property. Each of the mortgages were in default and foreclosure proceedings were commenced. 115 purchased homes in foreclosure (or nearing foreclosure) with outstanding mortgages that were in default.

[89] Each sale and subsequent transfer of title for each residential property was subject to the original mortgage. In each of the actions, the respective financial institutions did not have any agreement with 115 or the other Respondents. The respective financial institutions remained as the first mortgagee on title through their mortgage agreements with the original mortgagor.

[90] In each action, the respective financial institutions have affirmed that it did not have an agreement with 115 or the other Respondent corporations respecting these sales. Consequently, the respective conveyance conditions are not binding on the financial institutions. The Respondents pleaded no material facts and presented no evidence to support the position that there was ever any agreement in place between the financial institutions and the Respondent corporations.

[91] The respective Respondents who claim title to the property were afforded an opportunity for due process at the respective foreclosure hearings prior to the various Orders for Sale being granted.

[92] In each action, the solicitors for each of the financial institutions commenced with foreclosure proceedings as directed by their respective clients. These proceedings resulted in an Order for Sale. In each of the actions, the Order for Sale was either not appealed, or the appeal was unsuccessful. Furthermore, the respective financial institutions have not received any payments with respect to their mortgages in default. Nor, as stated, have any payments been made on any of the cost awards.

[93] Having reviewed the Statements of Claim for each action, I agree that there is no merit to the Respondents' claims. Furthermore, the Respondents have presented no evidence to rebut the

Applicants' position. I hereby order summary judgment be directed as per Rule 7.3(1)(b) of the *Rules of Court* in favour of all Applicants and that all actions be dismissed.

[94] If I were wrong in that conclusion, I would strike the claims under Rule 3.68 of the *Rules of Court*. Under this rule, the Court may order that all or any part of a claim or defence be struck out if:

> [...]
> (b) a commencement document or pleading discloses no reasonable claim or defence to a claim;
> (c) a commencement document or pleading is frivolous, irrelevant or improper;
> (d) a commencement document or pleading constitutes an abuse of process;
> [...]

[95] The test for striking out pleadings has not changed under the new *Rules of Court*: See ***Donaldson v Farrell***[12]. The test is affirmed in ***MacKay v Farm Business Consultants Inc***[13] which quotes ***Korte v Deloitte, Haskins & Sells***[14] in stating that: "the test for striking pleadings under Rule 129 [now Rule 3.68] is not in issue. It is whether it is plain and obvious or beyond reasonable doubt that the claim cannot succeed."

[96] In the case at bar, the Plaintiffs' Statements of Claim is riddled with speculative facts and hypothetical scenarios and I am satisfied that it is plain and obvious that the claims cannot succeed. Therefore, the claims may be struck under Rule 3.68(2)(b).

[97] Further in the alternative, for reasons that will be further explored in my analysis concerning a declaration of vexatious litigants, the Plaintiffs' Statements of Claim may also be struck under Rule 3.68(2)(c) or Rule 3.68(2)(d).

b. Application for Declarations of Vexatious Litigants

[98] Section 23(2) of the *Judicature Act*, defines vexatious proceedings or conducting a proceeding in a vexatious manner as:

> (2) For the purposes of this Part, instituting vexatious proceedings or conducting a proceeding in a vexatious manner includes, without limitation, any one or more of the following:

---

[12] 2011 ABQB 11 at paras 9, 30.

[13] 2006 ABCA 316, 397 AR 301 at para 7.

[14] 135 AR 389 at para 26 (ABCA).

(a) persistently bringing proceedings to determine an issue that has already been determined by a court of competent jurisdiction;

(b) persistently bringing proceedings that cannot succeed or that have no reasonable expectation of providing relief;

(c) persistently bringing proceedings for improper purposes;

(d) persistently using previously raised grounds and issues in subsequent proceedings inappropriately;

(e) persistently failing to pay the costs of unsuccessful proceedings on the part of the person who commenced those proceedings;

(f) persistently taking unsuccessful appeals from judicial decisions;

(g) persistently engaging in inappropriate courtroom behaviour.

[99] Section 23.1 of the *Judicature Act* provides in part:

23.1(1) Where on application or on its own motion, with notice to the Minister of Justice and Attorney 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 leave of the Court.

[...]

(4) The Court may at any time on application or on its own motion, with notice to the Minister of Justice and Attorney General, make an order under subsection (1) applicable 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 subsection (1) is made.
>
> [...]

[100] As required by Section 23.1(1) of the *Judicature Act*, notice was provided to the Minister of Justice and Attorney General[15] by a letter dated March 22, 2013 that the Applicants would be seeking an Order declaring the Respondents, as well as the various individuals associated with the Respondents, as vexatious litigants. A representative of the Minister of Justice and Attorney General was not present at these hearings.

[101] As noted, the ***Onischuk*** case lists a number of indicia which are indicative of vexatious proceedings. These indicia are consistent with the definition of vexatious proceedings or conducting a proceeding in a vexatious manner, as defined in Section 23(2) of the *Judicature Act*. As I said, these criteria are met.

[102] In particular, 115 and its sole director and shareholder, Mr. Derek Johnson, have brought and continue to bring actions where no reasonable cause of action is pleaded and in matters that have been decided. Furthermore, actions were brought in contravention of previous court orders declaring 115 and Mr. Derek Johnson‘s related companies as a vexatious litigant.

[103] Therefore, pursuant to Section 23.1(1) of the *Judicature Act*, 115, Partners, and the corporations’ sole corporate director and shareholder, Mr. Derek Ryan Johnson are declared as vexatious litigants. Each is prohibited from commencing or attempting to commence, or from continuing, any appeal, action, application, or proceeding in the Court of Appeal, the Court of Queen’s Bench or the Provincial Court of Alberta (Civil), on their own behalf or on behalf of any other entity or estate without an Order of the appropriate court in which the proceeding is conducted or to be conducted.

[104] Furthermore, pursuant to Section 23.1(4) of the *Judicature Act*, 167, 169, 166 and their respective directors, Sarabjit Singh Sarin, Jason Mizzoni, and Ajay K. Aneja are also declared as vexatious litigants as individuals and entities “[...] associated with the person against whom an order under subsection (1) is made”.

[105] As I noted already, Ty Griffiths, who has been identified as agent for the Respondents, has not appeared before this Court and I have no idea whether or not he actually exists.

[106] If he does, Ty Griffiths, an individual associated with the corporate Respondents and being a person they have identified as their agent, is declared as a vexatious litigant pursuant to Section 23.1(4) of the *Judicature Act*.

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[15] As required at the time the Applications were made. The Notice would now be given to the Minister of Justice and Solicitor General.

[107] As I noted earlier, during oral argument, Ms. Ellis said she was appearing as an agent for Ty Griffiths. Consequently, by extension, pursuant to Section 23.1(4) of the *Judicature Act*, Evanna Ellis, as an individual who is "[...] associated with the person against whom an order under subsection (1) is made", is declared as a vexatious litigant.

[108] If he does not exist, she has misled the Court in a very a material way and as such should be declared a vexatious litigant in her own right.

[109] The above Orders declaring vexatious litigants are effective as of June 17, 2013.

VI. Conclusion

[110] Summary judgment dismissal is granted as per Rule 7.3(1)(b) of the *Rules of Court* for all three actions, the Maple Trust Action, the RBC Action, and the ATB Action in favour of the Applicants.

[111] Alternatively, I would strike the claims under Rule 3.68 of the *Rules of Court*.

[112] 115, Partners, and Mr. Derek Ryan Johnson are declared to be vexatious litigants pursuant to Section 23.1(1) of the *Judicature Act*.

[113] Furthermore, the remaining corporate Respondents in this action 167, 169, 166 and their respective directors, Sarabjit Singh Sarin, Jason Mizzoni, and Ajay K. Aneja are declared as vexatious litigants pursuant to Section 23.1(4) of the *Judicature Act* as individuals and entities "[...] associated with the person against whom an order under subsection (1) is made".

[114] Ty Griffiths and Evanna Ellis are also declared vexatious litigants pursuant to Section 23.1(4) of the *Judicature Act*.

VI. Costs

[115] In each of the ATB Action and the RBC Action, one set of costs is awarded under Schedule C Column 3 of the *Rules of Court*. In the Maple Trust Action, costs are awarded under Schedule C Column 4 of the *Rules of Court*.

[116] In each of the actions, each of the respective Respondents shall be jointly and severally liable for the costs award.

Heard on the 6th day of June, 2013 and the 17th day of June, 2013.
Dated at the City of Calgary, Alberta this 22nd day of August, 2013 .

Sal J. LoVecchio
J.C.Q.B.A.

Appearances:

James B. Rooney, Q.C. / Rachel A. Howie
Dentons Canada LLP
for Cass Lintott, Denise Whiteley, Grant W.D. Cameron, and Terry L. Czechowskyj

Joe D. Spelliscy
Duncan & Craig LLP
for Maple Trust Company

Tara L. Petersen/Jennifer Faircloth
Warren Tettensor Amantea LLP
for Royal Bank of Canada

Wesley M. Pedruski, Q.C.
Reynolds, Mirth, Richards & Farmer LLP
for Alberta Treasury Branches

Derek Johnson
for 1158997 Alberta Inc. and Partners in Success Mortgage Inc.

Evanna Ellis
for 1660112 Alberta Inc. and 1673793 Alberta Ltd.

Jason Mizzoni
for 1691482 Alberta Inc.

Court of King's Bench of Alberta

Citation: Royal Bank of Canada v Courtoreille, 2024 ABKB 302

Date: 20240524
Docket: 2310 00279
Registry: Red Deer

Between:

Royal Bank of Canada

Plaintiff

- and -

Patrick Courtoreille also known as Patrick John Courtoreille

Defendant

Memorandum of Decision
of Associate Chief Justice
K.G. Nielsen

I. Introduction

[1] On March 10, 2023, Royal Bank of Canada (RBC) filed a Statement of Claim alleging that Patrick Courtoreille (Mr. Courtoreille) had an unpaid credit card debt of $17,067.46 (the *Debt Lawsuit*). Mr. Courtoreille on March 28, 2023 filed a Statement of Defence that acknowledged he had obtained and used a credit card from RBC, but claimed that RBC had "... failed to verify ownership of the indebtedness behind the Contracts ...". Further, Mr. Courtoreille "... [denies] defaulting on the Contract as alleged ..." by RBC, and so the lawsuit should be dismissed.

[2] RBC applied for Summary Judgment, pursuant to rr 7.2-7.3 of the *Alberta Rules of Court*, Alta Reg 124/2010. That Application was heard by Applications Judge Park on August 29, 2023. Applications Judge Park granted judgment in favour of RBC for $19,452.98 and solicitor client

costs. The August 29, 2023 Decision and Order have not to date been appealed by Mr. Courtorielle.

[3] This matter has been referred to me as the Administrative Justice of the Court of King's Bench of Alberta who responds to abusive litigation and litigants. Here, specifically, the defence advanced by Mr. Courtoreille was based on well-known and rejected Organized Pseudolegal Commercial Argument (OPCA) concepts: ***Meads v Meads***, 2012 ABQB 571. Even more serious is that these arguments were advanced by third parties to the litigation: "UnitedWeStandPeople", and at the August 29, 2023 an individual named "Kevin Kumar" (Mr. Kumar). Mr. Kumar acted as Mr. Courtoreille's representative in the August 29, 2023 hearing.

[4] Mr. Kumar is well known to this Court. This Memorandum of Decision responds to Mr. Kumar's illegal and inappropriate involvement in the *Debt Lawsuit*.

II. OPCA Arguments

[5] Part of the evidence submitted by RBC is an Affidavit of Marsha Christensen, sworn on August 24, 2023, that attached communications received by counsel for RBC in the period leading up to the August 29, 2023 hearing. These emails purport to originate from an entity called UnitedWeStandPeople, which is the "Chosen Agent" of Mr. Courtorielle. Here are some of the key elements of those communications:

1) Mr. Courtorielle has designated a Chosen Agent in the *Debt Lawsuit*, and RBC and its counsel must interact with that Chosen Agent, UnitedWeStandPeople;

2) UnitedWeStandPeople claims that a "Private Lender" will pay Mr. Courtorielle's debts;

3) Mr. Courtorielle rejects he has any debts, unless RBC provides:

    a) an "original wet ink signed loan document (NOT a photocopy)", and

    b) an affidavit from a "... Chartered Accountant verifying the debt was not sold ..."; and

4) neither Mr. Courtorielle or the Private Lender will provide any money unless RBC provides the "wet ink" contract and accountant's affidavit.

[6] The requirement for a wet ink signature contract is a well-documented and notorious pseudolaw debt elimination strategy. Claims that a debt may only be established by an original wet ink signature physical contract are a common and legally rejected OPCA motif deployed as a basis alleged to invalidate debt contracts, e.g., ***Gacias v Equifax Canada Co***, 2019 ABQB 640 at para 14; ***Royal Bank of Canada v Skrapec***, 2011 BCSC 1827 at para 24, leave to appeal to BCCA refused, 2012 BCCA 10; ***Xceed Mortgage Corporation/Corporation hypothécaire Xceed c Pépin-Bourgouin***, 2011 QCCS 2116 at paras 15–18; ***Banque Royale du Canada c Tremblay***, 2013 QCCQ 12827 at para 14, aff'd 2013 QCCA 2035 at para 7; ***Canadian Imperial Bank of Commerce v Piedrahita***, 2012 NBQB 101 at para 8, leave to appeal to NBCA refused (2012), 387 NBR (2d) 399 (CA); ***The Bank of Nova Scotia v Lai-Ping Lee***, 2013 ONSC 6698 at para 10; ***First National Financial GP Corporation v Maritime Residential Housing Development Ltd***, 2013 NSSC 219 at para 7; ***Toronto-Dominion Bank v Devries***, 2013 CanLII 41978 (Ont Sup Ct (Sm Cl Ct)) at paras 2–3, 40–48; ***Banque Royale du Canada c Minicozzi***, 2013 QCCQ 6566 at para 21, aff'd 2013 QCCA 1722; ***Bank of Montreal v Rogozinsky***, 2014 ABQB 771 at

paras 24, 41–43, 56, 603 AR 261; ***Toronto-Dominion Bank v Thompson***, [2015] OJ No 5141 (QL) at paras 7, 16 (Sup Ct (Sm Cl Ct)); ***Alberta v Greter***, 2016 ABQB 293 at paras 2, 11, 16; ***Royal Bank of Canada v 101000039 Saskatchewan Ltd***, 2017 SKQB 253 at paras 9, 19; ***Knutson (Re)***, 2018 ABQB 858, note 9 at Appendix E; ***Royal Bank of Canada v Anderson***, 2022 ABQB 354 at paras 23-24; ***Royal Bank of Canada v Anderson***, 2022 ABQB 525 at para 33; ***Osadchuk v The King***, 2023 TCC 70 at para 5. If this rule were, in fact, true, then no contract formed via electronic means would ever be enforceable.

[7] Second, the demand for an accountant to verify a debt has not been sold is commonly referred to as the "securitization" OPCA argument. RBC introduced extensive documentation on Mr. Courtorielle's credit card and its use. However, both UnitedWeStandPeople, and Mr. Kumar at the August 29, 2023 hearing, made extensive and aggressive demands claiming the information before the Court was not enough. The securitization OPCA money-for-nothing argument has also been repeatedly rejected by Canadian courts: e.g., ***Royal Bank of Canada v Skrapec***; ***Xceed Mortgage Corporation/Corporation hypothécaire Xceed c Pépin-Bourgouin***; ***Banque Royale du Canada c Tremblay***; ***The Bank of Nova Scotia v Lai-Ping Lee***, ***Bank of Montreal v Rogozinsky***; ***Alberta v Greter***; ***Royal Bank of Canada v 101000039 Saskatchewan Ltd***, ***Gacias v Equifax Canada Co***, 2019 ABQB 640, action struck out as an abuse of court processes, 2019 ABQB 739; ***Toronto Dominion Bank v Giercke***, 2021 ABQB 262, action struck out as an abuse of court processes, 2021 ABQB 320.

[8] A third pseudolaw scheme is also apparent from the materials received by the Court. The emails in Ms. Christensen's Affidavit include links to a website, "https://unitedwestandpeople.com". The website obviously promotes legally false OPCA concepts. For example, a link at the top of the website reads "Click Here To Learn More About How To Access Your Birth Certificate Bond". This same general language, "... reclaim your Birth Certificate Bonds / Birthright ..." is also located in a YouTube video website screen print in Ms. Christensen's Affidavit, Exhibit "C". Similarly, another printout in Exhibit "C" states:

> Via Your BIRTH CERTIFICATE BOND! Learn How To Access It For FREE! UnitedWeStandPeople.com ... If You Are Not Aware Of Your Birth Certificate Bond That Has Hundreds of ThousandsOf Dollars In It For You Watch This Series ! (sic)

[9] The "Birth Bond" concept is part of "Strawman Theory", the idea that a person has two halves, a "flesh and blood" entity, and an immaterial "Strawman". The reproduced website printouts in Ms. Christensen's Affidavit point to the rather notorious "Meet Your Straw Man" YouTube video. Supposedly, the Strawman is associated with a secret bank account, what the UnitedWeStandPeople Internet materials calls the "Birth Certificate Bond", that contains vast sums of money that can be tapped with secret techniques and documents: ***Meads v Meads***, paras 417-446, 531-543. I have reviewed and rejected Strawman Theory and Birth Bond schemes in ***Burles v Lakhani***, 2023 ABKB 409 at paras 9-21.

[10] No Court in any jurisdiction has accepted the stereotypic conspiratorial not-law concepts that make up pseudolaw. Employing pseudolaw is always an abuse of Court processes, and warrants immediate Court response: ***Unrau v National Dental Examining Board***, 2019 ABQB 283 at paras 180, 670-671 (***Unrau #2***). Furthermore, any litigation that involves Strawman Theory is presumed to be in bad faith, and for abusive, ulterior purposes: ***Fiander v Mills***, 2015 NLCA 31 at paras 37-40; ***Rothweiler v Payette***, 2018 ABQB 288 at paras 6-21; ***Unrau #2*** at para

180. There is no question that UnitedWeStandPeople and Mr. Kumar are advancing rejected and abusive pseudolaw concepts.

[11] Other problematic items disclosed in Ms. Christensen's Affidavit include that counsel for RBC was threatened with Law Society of Alberta complaints, and allegedly had engaged in "... gross negligence and human rights violations ...". UnitedWeStandPeople also appears to have created multiple YouTube videos attacking counsel for RBC, and bulk emailed these claims and videos to numerous Alberta law firms and lawyers.

[12] More recently, UnitedWeStandPeople has appeared in two debt related proceedings before the Court of King's Bench of Alberta:

(i) *Kerslake v Capital One Bank*, Action No. 2304 00761; and

(ii) *Kohut v Capital One Bank*, Action No.2403 08261.

In each case the Plaintiffs are debtors who claim to defeat their outstanding debts using the OPCA securitization scheme discussed above. The two Statements of Claim contain duplicate and parallel language, that on a balance of probabilities establishes a common source.

[13] Thus, the UnitedWeStandPeople OPCA debt-elimination scheme is continuing before the Court of King's Bench of Alberta. That is a reason for the Court to take further steps.

III. Kevin Kumar

[14] As previously indicated, Mr. Kumar, the person who appeared via videoconference and who acted as the representative for Mr. Courtorielle, is well-known to this Court. Along with Derek Ryan Johnson, Mr. Kumar was one of the two directing personalities of a "Dollar Dealer" mortgage fraud scam that operated in the Calgary area in 2010-2014. Associate Chief Justice Rooke provides a detailed review of the Kumar and Johnson operation in ***Unrau #2*** at paras 205-212. Reproduction of that explanation in full is appropriate to illustrate Mr. Kumar's background:

> ... 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.
>
> ... 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' ...

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.

... 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.

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.

... 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.
>
> ... 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.
>
> ... 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.
> ...

[15] Another Memorandum of Decision by Hawco J illustrates Mr. Kumar operating as the central player in one instance of the Dollar Dealer scheme. In ***Glover v Kumar***, 2012 ABQB 516, the Court was asked to clear the land titles record for a property that had gone through the Dollar Dealer scam, and in which Mr. Kumar was now on title. Justice Hawco describes at paras 7-20 how Mr. Kumar played off the various involved individuals and institutions, and in the process registered a one third interest in the property. Justice Hawco concluded Mr. Kumar had no legitimate interest in the property, ordered the Alberta Land Titles office remove Mr. Kumar's registration, and observed how Mr. Kumar had deceived multiple actors in the transaction: para 47.

[16] Legal academic investigation has also identified Mr. Kumar as the directing mind of UnitedWeStandPeople, and demonstrated that the current unitedwestandpeople.com website is Mr. Kumar reviving the 2010-2014 Dollar Dealer scam website, "privatesectoract.com", that offered Strawman Theory and Birth Bond debt and mortgage elimination services: Donald J Netolitzky, "The Dead Sleep Quiet: History of the Organized Pseudolegal Commercial Argument Phenomenon in Canada - Part II" (2023) 60:3 Alta L Rev 795 at 828.

[17] I conclude, based on Mr. Kumar's history and his more recent activities, that steps should be taken to control Mr. Kumar's activities before the Court of King's Bench of Alberta. Mr. Kumar is not a lawyer, so he is prohibited from representing persons before the Court of King's Bench of Alberta: *Legal Profession Act*, RSA 2000, c L-8 s 106. Mr. Kumar is clearly engaged

in the unauthorized practice of law. That is a first reason why Mr. Kumar should be subject to control. I note that at the August 29, 2023 hearing Mr. Kumar was uncooperative, argumentative, and aggressive.

[18] This Court has a broad and flexible inherent jurisdiction to control its processes, so that the Court may operate effectively to achieve its functions: ***R v Cunningham***, 2010 SCC 10 at para 10; I H Jacob, "The Inherent Jurisdiction of the Court" (1970) 23 Curr Legal Probs 23 at 27-28. That inherent jurisdiction includes the authority to remove lawyers, where appropriate: ***MacDonald Estate v Martin***, [1990] 3 SCR 1235 at 1245. That same authority applies to non-lawyer representatives and agents. The law in Canada is clear that a Court does not merely have the authority to restrict and control who acts as a legal representative of any type, but, further, that the Court has a positive obligation to ensure persons appearing before the Court are "... properly represented ...", and "... to maintain the rule of law and the integrity of the court generally ...": ***R v Dick***, 2002 BCCA 27, para 7.

[19] Anyone who uses OPCA concepts abuses the Court: ***Unrau #2*** at para 180. A person who endorses and/or applies OPCA schemes is not an appropriate litigation representative: ***R v Dick***; ***Scotia Mortgage Corporation v Landry***, 2018 ABQB 951; ***Mukagasigwa v Nkusi***, 2023 ABKB 423, leave to appeal refused 2023 ABCA 272. That is a further reason why Mr. Kumar should be prohibited from participating in litigation in which he is not a party.

[20] Mr. Kumar's past and current OPCA guru activities, his being incarcerated for contempt after ignoring Court Orders and professional regulation, his promoting money for nothing and debt elimination scams, and his record of abusing lenders and debtors by "playing from the middle" means Mr. Kumar has no legitimate place in the Court of King's Bench of Alberta, except if he, personally, is a litigant.

[21] Mr. Kumar is not an appropriate litigation representative or McKenzie friend. Mr. Kumar should have no role in the litigation of other people. I conclude Mr. Kumar should not be permitted to participate in the litigation of other people before the Court of King's Bench of Alberta.

[22] Given these conclusions, I make the following Orders:

1. Kevin Kumar shall only communicate with the Court of King's Bench of Alberta using the name "Kevin Kumar", and not using initials, an alternative name structure, or a pseudonym.
2. Kevin Kumar is prohibited from:
   (i) providing legal advice, preparing documents intended to be filed in the Court of King's Bench of Alberts for any person other than himself, and filing or otherwise communicating with the Court of King's Bench of Alberta, 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 proceedings, before the Court of King's Bench of Alberta.
3. For clarity, Kevin Kumar is entirely prohibited from any further participation in any sense in these actions:

(i) *Royal Bank of Canada v Patrick Courtoreille also known as Patrick John Courtoreille*, Court of King's Bench Action No. 2310 00279 proceeding;

(ii) *Terry Kerslake v Capital One Bank*, Court of King's Bench Action No. 2304 00761; and

(iii) *Timothy Laurea Kohut v Capital One Services (Canada) Inc*, Court of King's Bench Action No. 2403 08261.

4. The Clerks of the Court of King's Bench of Alberta shall refuse to accept or file any documents or other materials from Kevin Kumar, unless Kevin Kumar is a named party in the action in question.

IV. Conclusion

[23] Mr. Kumar is prohibited from participation in Court of King's Bench of Alberta proceedings, except where he, personally, is a named party.

[24] The Court shall prepare the Order giving effect to this Memorandum of Decision. Mr. Kumar and Mr. Courtoreille's approval of that Order is dispensed with, pursuant to the *Alberta Rules of Court*. This Memorandum of Decision and the corresponding Order may be served upon Mr. Courtoreille and Mr. Kumar to the email addresses in the Statement of Defence (Patrick.Courtoreille@gmail.com) and the email communications reproduced in Ms. Christensen's Affidavit (unitedwestandpeople@gmail.com).

[25] A copy of the Memorandum of Decision and Order will also be directed to counsel for RBC and Capital One Bank. In light of Mr. Kumar's resuming his fraudulent OPCA activities in Alberta, I also direct a copy of this Memorandum of Decision and corresponding Order be sent to the Real Estate Council of Alberta, and the Law Society of Alberta.

[26] I very strongly recommend Mr. Courtoreille read the case law cited in this Memorandum of Decision. Most of these judgments may be accessed from the CanLII website (www.canlii.org) at no cost. If Mr. Courtoreille employs pseudolaw tactics in future Court of King's Bench of Alberta litigation then Mr. Courtoreille can anticipate negative outcomes, and potentially litigation and litigant management steps.

[27] Mr. Kumar will likely disagree with this result. Mindful of the ***Pintea v Johns***, 2017 SCC 23 instruction that Canadian judges shall provide information on litigation alternatives to persons not represented by lawyers, if Mr. Kumar seeks to challenge steps imposed in this Memorandum of Decision, then the appropriate remedy is with the Court of Appeal of Alberta.

Dated at the City of Edmonton, Alberta this 24th day of May, 2024.

K.G. Nielsen
A.C.J.C.K.B.A.

Appearances:

None

Court of King's Bench of Alberta

Citation: Bonville v President's Choice Financial, 2024 ABKB 356

Date: 20240618
Docket: 2403 01300; 2401 06187
Registry: Edmonton

Between:

Action No. 2403 01300

Claire Bonville

Plaintiff

- and -

President's Choice Financial

Defendant

And between:

Action No. 2401 06187

Sydney Socorro M. Davis

Plaintiff

- and -

President's Choice Financial

Defendant

Corrected judgment: A corrigendum was issued on June 19, 2024; the corrections have been made to the text and the corrigendum is appended to this judgment.

Memorandum of Decision
of Acting Chief Justice
K.G. Nielsen

I. Introduction

[1] The past several years has seen the Court of King's Bench of Alberta encounter a dramatic increase in the frequency of matters in which an unauthorized representative has attempted, sometimes successfully, to introduce themselves into litigation without a legitimate basis: e.g., ***ATB Financial v Dimsdale Auto Parts Ltd***, 2024 ABKB 143 (***Dimsdale***); ***AVI v MHVB***, 2020 ABQB 489, representation and litigation activity restrictions imposed 2020 ABQB 790 (***AVI***); ***Docken v Anderson***, 2023 ABKB 291 (***Docken #1***); ***Docken v Anderson***, 2023 ABKB 313 (***Docken #2***); ***Docken v Anderson***, 2023 ABKB 515 (***Docken #3***); ***Lemay v Zen Residential Ltd.***, 2023 ABKB 682 (***Lemay***); ***Manulife Bank of Canada v Thomas***, 2023 ABKB 564 (***Thomas***); ***Mukagasigwa v Nkusi***, 2023 ABKB 42, late appeal dismissed as hopeless, 2023 ABCA 272 (***Nkusi***); ***Richardson v Schafer***, 2022 ABKB 645; ***Tican v Alamgir***, 2022 ABKB 626, unauthorized representation prohibition made permanent 2022 ABKB 843, leave to appeal denied 2023 ABCA 115; ***Van Nostrand (Re)***, 2024 ABKB 293. These interfering third parties take on a lawyer-like role, and claim authority with various titles such as "*amicus curiae*" (e.g., ***Dimsdale***), or "McKenzie friends" (e.g., ***Lemay***; ***Van Nostrand (Re)***), or claim representative status via a "power of attorney" (e.g., ***AVI***).

[2] Many of these interfering third parties are promoters of "Organized Pseudolegal Commercial Arguments" (OPCA) (***Meads v Meads***, 2012 ABQB 571 (***Meads***)), a category of not-law concepts that purport to be the actual law, and offer extraordinary authority, benefits, and immunities, e.g., ***AVI***; ***Dimsdale***; ***Docken #1***; ***Docken #2***; ***Docken #3***; ***Nkusi***; ***Thomas***. What has been long recognized is that some individuals have made a business of promoting and selling OPCA strategies for their own benefit. In ***Meads*** at paras 85-158, Associate Chief Justice Rooke named and described certain of these individuals, who he called "gurus". Rooke ACJ at paras 669-670 compared these gurus to the "evil counsellors" and "falsifiers" of Dante's *Inferno*:

> Persons who purposefully promote and teach proven ineffective techniques that purport to defeat valid state and court authority, and circumvent social obligations, appear to fall into those two categories. That they do so, and for profit at the expense of naive and vulnerable customers, is worse.

[3] For a period in the late 2010s pseudolaw activity and guru promoters were much less common in the Court of King's Bench of Alberta. That pattern has now, unfortunately, reversed. Debt and mortgage elimination and "money for nothing" scams are, at present, the OPCA litigation type most commonly encountered in the Court. One such recent example is the re-emergence of a Kevin Kumar, who operates a pseudolaw debt elimination scheme named

"UnitedWeStandPeople". Kevin Kumar has a lengthy history of abusive and illegal litigation and real-estate related activities that dates back to the early 2010s, when he and other collaborators operated "PrivateSectorAct.com", a Calgary-area "Dollar Dealer" mortgage fraud that is documented in ***Unrau v National Dental Examining Board***, 2019 ABQB 28 at paras 205-212 (***Unrau #2***) and ***Royal Bank of Canada v Courtoreille***, 2024 ABKB 302 at paras 14-17 (***Courtoreille***). Kevin Kumar has been incarcerated for contempt of court. Unfortunately, that has not deterred him from continuing to promote pseudolaw schemes.

[4] ***Courtoreille*** describes and refutes the UnitedWeStandPeople debt elimination scheme, which has these parts:

1) the debtor claims to have a "private lender" who will pay for any outstanding debt;

2) the debtor demands the debt contract is proven by an "original wet ink signed loan document (NOT a photocopy)"; and

3) the lender must provide an affidavit from a chartered accountant to verify the debt was not sold, otherwise no debt exists.

[5] The "wet ink" contract and "securitization" are long debunked pseudolaw strategies that are reviewed in detail in ***Courtereille*** at paras 6 and 7, respectively. The lender in ***Courtoreille*** also introduced evidence from the UnitedWeStandPeople website and correspondence that demonstrated Kevin Kumar is teaching "Strawman Theory", an OPCA concept so notoriously false that simply engaging this concept presumptively establishes bad faith and abusive ulterior motives: ***Courtoreille*** at paras 8-10.

[6] On this basis, and given his history, Kevin Kumar was explicitly prohibited from acting as a litigation representative or engaging in lawyer-type activities:

> ... Kevin Kumar is prohibited from:
>
> (i) providing legal advice, preparing documents intended to be filed in the Court of King's Bench of Alberta for any person other than himself, and filing or otherwise communicating with the Court of King's Bench of Alberta, 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 proceedings, before the Court of King's Bench of Alberta.
>
> (***Courtoreille*** at para 22).

Kevin Kumar was also explicitly banned from any participation in three Court of King's Bench of Alberta Actions in which UnitedWeStandPeople strategies had been advanced.

II. Colton Kumar

[7] On June 7, 2024, Counsel for President's Choice Bank (PC Bank) wrote to me to draw to my attention two Court of King's Bench of Alberta Actions that involve its client:

- *Claire Bonville v President's Choice Financial*, Court of King's Bench of Alberta Action No. 2403 01300, Statement of Claim filed January 19, 2024 (*Bonville lawsuit*); and
- *Sydney Socorro M Davis v President's Choice Financial*, Court of King's Bench of Alberta Action No. 2401 06187, Statement of Claim filed May 3, 2024 (*Davis lawsuit*).

[8] The bodies of the *Bonville lawsuit* and the *Davis lawsuit* Statements of Claim are identical, except that the *Bonville lawsuit* has one additional paragraph, paragraph 8, below:

> **Statement of Facts relied on:**
>
> l. PC Financial was served a Registered Letter on [date] containing details of a payout arrangement to pay [name's] debt with PC in Full
>
> 2. [Name] qualified for private financing and had arranged the funds to pay PC in full
>
> 3. Within the PC CardHolder Agreement it states "18.3 Assignment We may sell, assign or transfer any or all of our rights or obligations under this Cardholder Agreement"
>
> 4. Due to the fact PC stated in the Agreement they could sell the right to the agreement at any time [name] requested PC provide Proof of Ownership of the debt to ensure she was forwarding funds to the correct entity in the case that her debt had been sold to a third party
>
> 5. [Name] requested a sworn affidavit from Presidents Choice's chartered accountant that stated they had checked the ledgers and the debt was not sold, simply because the chartered accountant would be the only entity with access to the information in order to make that claim
>
> 6. PC never provided the requested documentation that proves PC still maintains ownership of the rights to [name's] debt
>
> 7. PC made multiple "Missed Payment" reports even though they were well aware [name] was attempting to pay the debt in full
>
> 8. Claire Served PC a "No Contact" Letter on November 9th
>
> 9. PC continued to harass [name] while she awaited the requested documentation from PC
>
> **Remedy sought**
>
> 10. All false Credit Reports from [date] forward be removed from [name's] Credit history
>
> 11. $100,000 In damages for Negligence in the workplace leading to damages, False or Misleading Credit Reporting, and Harassment

[9] PC Bank has filed Statements of Defence in both the *Bonville lawsuit* (March 1, 2024) and *Davis lawsuit* (June 7, 2024) that plead that both Plaintiffs have defaulted on credit card debts of $7,801.687 and $6,050.08, respectively, and that in each case the Plaintiff demanded an original not photocopy "wet ink" contract to establish the credit card debt, along with other

documentation. The Plaintiffs each claimed that "Colton Kumar" is acting as their representative in the credit card debt dispute, and provided contact information:

- website: UnitedWeStandPeople.com;
- email address: UnitedWeStandPeople@gmail.com; and
- telephone number: (250) 306 1534.

[10] Counsel for PC Bank noted in their correspondence that there appear to be linkages between the *Bonville lawsuit* and the *Davis lawsuit*, and Kevin Kumar's abusive pseudolaw activities as documented in ***Courtoreille***. Counsel indicates that PC Bank has given instructions to apply to the Court for summary judgment in the *Bonville lawsuit* and the *Davis lawsuit*.

III. Effective Response to For Profit Litigation Schemes that Exploit Court Processes

[11] The usual approach to abusive litigation is two-fold:

1) individual abusive and bad purpose lawsuits are terminated as they are identified, usually by rr 3.68 and 7.2-7.3 of the *Alberta Rules of Court*, Alta Reg 124/2010 and Civil Practice Note No. 7; and

2) when a sufficient volume of abusive litigation that involves a particular party has accumulated then that party may be subject to *Judicature Act*, RSA 2000, c J-2, ss 23-23.1 court access restrictions.

[12] These processes each have sharp limitations. Processes that terminate individual bad actions still involve significant Court resources and litigant expenses. Cost awards are often, bluntly, a polite fiction, that are never collected by the abused party. Similarly, court access restrictions only occur too late, after "persistent" and repeated bad litigation steps and lawsuits. Court access restrictions may only be imposed as a "last ditch" effort to control a litigant after all other steps, including case management, have failed: ***Jonsson v Lymer***, 2020 ABCA 167. This approach all but inevitably means substantial waste of Court resources and harm inflicted on targeted litigants.

[13] The current situation with the emerging UnitedWeStandPeople OPCA debt elimination / "money for nothing" scam is even worse. One or more individuals are advertising on the Internet that they have secret techniques that will eliminate debt. That has now led to a large array of different but centrally coordinated litigants entering into the Court apparatus, using parallel techniques and documents, but in separate litigation processes. This litigation debt elimination business is the proverbial hydra with many heads, sprouting from a body that is out of reach.

[14] The Court of King's Bench of Alberta has already experienced the effect of such a networked program because in 2010-2014 the Court of King's Bench of Alberta in the Judicial Centre of Calgary was targeted by one such scheme, that involved Kevin Kumar, personally. As is reviewed in ***Unrau #2*** at paras 205-212, court-mediated attempts to manage this mortgage "Dollar Dealer" scam were a near total failure. The participants, including Kevin Kumar himself, simply outmaneuvered litigation and litigant control by inventing new identities, via "pop up" shell corporations, and what appeared to be pseudonyms, and then "agents" purporting to act on behalf of these actors. Counter-attack litigation, such as the *Bonville lawsuit* and the *Davis lawsuit*, were launched at little cost against lenders. Judicial decision makers were also sued, personally. The "Dollar Dealers" 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.

[15] The Court responded to the Dollar Dealers via the conventional approaches of lawsuit-specific litigation management steps, then issued a total of six *Judicature Act* ss 23-23.1 court access restrictions Orders, each expanding and attempting to constrain the Dollar Dealer scam. None of this worked. Associate Chief Justice Rooke in ***Unrau #2*** at paras 211-212 offered this "after action" evaluation of these litigation and litigant management efforts:

> ... 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. ... 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 .... 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 ... Johnson and Kumar had also between them accumulated $125,000.00 in fines, which presumably remain unpaid.
>
> ... 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.
>
> (Citations omitted.)

[16] Now history repeats itself, even with one of the same actors. New approaches by the Court and litigants are required because of the unique issues in responding to what is essentially an extortion and fraud scheme engaged through the Court and its processes, in which the directing minds of the abusive proceedings are not themselves litigants.

[17] The Court's primary abuse management role is clear in situations such as this. Chief Justice Wagner of the Supreme Court of Canada has recently in ***British Columbia (Attorney General) v Council of Canadians with Disabilities***, 2022 SCC 27 at para 1, defined "access to justice" in this manner:

> Access to justice depends on the efficient and responsible use of court resources. Frivolous lawsuits, endless procedural delays, and unnecessary appeals increase

> the time and expense of litigation and waste these resources. To preserve meaningful access, courts must ensure that their resources remain available to the litigants who need them most - namely, those who advance meritorious and justiciable claims that warrant judicial attention. (Emphasis added.)

The Court has the responsibility to protect its resources, and to ensure litigation is meritorious and justiciable.

[18] Furthermore, the Supreme Court of Canada has clearly indicated that abuse of the Court and innocent litigants may be mitigated by expense. In ***Trial Lawyers Association of British Columbia v British Columbia (Attorney General)***, 2014 SCC 59 at para 47, McLachlin CJC (as she then was) stated explicitly:

> ... hearing fees that prevent litigants from bringing frivolous or vexatious claims do not offend the Constitution. There is no constitutional right to bring frivolous or vexatious cases, and measures that deter such cases may actually increase efficiency and overall access to justice.

[19] The UnitedWeStandPeople scheme is based on money; inflicting expenses on lenders by retaliatory litigation such as the *Bonville lawsuit* and the *Davis lawsuit*, and attempting to frustrate or defeat litigation to collect unpaid debts, as in ***Courtoreille***. The UnitedWeStandPeople scheme can be expected to abuse the Court of King's Bench of Alberta as long as its promoters and/or users obtain an advantage.

[20] On a policy basis, in these circumstances, the Court should and now engages steps to ensure that *abusive* litigation by the UnitedWeStandPeople promoter(s) and their customers involves legitimate expense. At this point the merit of the *Bonville lawsuit* and the *Davis lawsuit* has not yet been evaluated conclusively, though there are strong indications these are abusive proceedings:

1) the apparent OPCA UnitedWeStandPeople character of this litigation, including deployment of wet ink and securitization demands;

2) use of almost identical form filings; and

3) the $100,000 damages sought by the Plaintiffs are apparently disproportionate and ungrounded in any particulars.

[21] There is a more than adequate basis to conclude, on a balance of probabilities, that the *Bonville lawsuit* and the *Davis lawsuit*: (1) are being conducted for bad faith purposes, (2) misuse the Court's resources, and (3) abuse the Defendant PC Bank. In these circumstances, the Plaintiffs should be willing to "put their money where there mouth is", if they do indeed have a legitimate action.

[22] I therefore direct:

1) The *Bonville v President's Choice Financial*, Court of King's Bench of Alberta Action No. 2403 01300 and *Davis v President's Choice Financial*, Court of King's Bench of Alberta Action No. 2401 06187 lawsuits are stayed.

2) Claire Bonville has until July 5, 2024 to submit to my office and serve on counsel for PC Bank Written Submissions and/or Affidavit evidence as to why she should

not be required to pay to the Clerk of the Court $10,000 in security for costs pursuant to r 4.22 of the *Alberta Rules of Court*.

3) Sydney Socorro M. Davis has until July 5, 2024 to submit to my office and serve on counsel for PC Bank Written Submissions and/or Affidavit evidence as to why she should not be required to pay to the Clerk of the Court $10,000 in security for costs pursuant to r 4.22 of the *Alberta Rules of Court*.

[23] To be explicit, so Ms. Bonville and Ms. Davis have no misunderstanding, if this Court imposes a security for costs requirement in the *Bonville lawsuit* and/or the *Davis lawsuit*, then failure to pay those amounts will:

1) result in the Plaintiff's action being terminated;

2) result in a costs award against the Plaintiff paid to PC Bank as a consequence of PC Bank being the successful party (r 10.29 of the *Alberta Rules of Court*); and

3) may result in the Plaintiff being required to pay an additional r 10.49(1) of the *Alberta Rules of Court* penalty to the Clerk of the Court for engaging in abusive litigation that misuses the Court's resources.

The *Bonville lawsuit* and/or the *Davis lawsuit* will proceed if the security for costs amounts are paid, and then may be subject to other litigation management steps, if those are sought by the Defendant.

[24] The Order giving effect to this step will be prepared by the Court, and served on Ms. Bonville and Ms. Davis by mail to the addresses on the *Bonville lawsuit* and the *Davis lawsuit* Statements of Claim. I request that Counsel for PC Bank also serve Ms. Bonville and Ms. Davis by electronic means, if PC Bank has information to effect service in that manner. Ms. Bonville and Ms. Davis's approval of that Order is dispensed with, pursuant to r 9.4(2)(c) of the *Alberta Rules of Court*.

[25] I very strongly recommend that the *Bonville lawsuit* and the *Davis lawsuit* Plaintiffs immediately consult with an accredited lawyer qualified to practice law in Alberta. Ms. Bonville and Ms. Davis face significant potential financial and legal consequences.

[26] The next issue is how to manage the person or persons directing UnitedWeStandPeople. I do not know if Kevin Kumar and Colton Kumar are the same or different people. Kevin Kumar is known to participate in fraudulent schemes in which multiple aliases and alter egos have been deployed: ***Unrau #2***. Representation restrictions were imposed on Kevin Kumar in ***Courtoreille***. It is plausible that Kevin Kumar has simply adopted a new name to evade Court-imposed litigation management steps.

[27] Following the principle above that meaningful litigation management in these circumstances can only be effected by combining litigation management and financial consequences, I take these steps. Kevin Kumar and Colton Kumar shall by July 5 2024 submit to my office and serve on counsel for PC Bank:

1) an Affidavit that:

a) deposes the *personal* mailing addresses, telephone numbers, and email addresses of Kevin Kumar and Colton Kumar;

b) deposes the URLs of all Internet and social media websites operated by Kevin Kumar and Colton Kumar, directly, or indirectly as UnitedWeStandPeople or any other purported debt elimination service; and

c) attaches as exhibits a Canada or provincial government-issued identification document that includes a photograph and date of birth of Kevin Kumar and Colton Kumar;

2) Written Submissions and Affidavit evidence as to why Colton Kumar should not be subject to the same representative and lawyer activity restrictions imposed on Kevin Kumar in ***Courtoreille*** at para 22; and

3) Written Submissions and Affidavit evidence as to why:

a) Kevin Kumar and/or Colton Kumar should not be made joint and severally subject to pay any costs awards made against the Plaintiffs in the *Bonville lawsuit* and/or the *Davis lawsuit*; and

b) Kevin Kumar and/or Colton Kumar have an adequate excuse so that they are not subject to r 10.49(1) of the *Alberta Rules of Court* penalties for their directing and engaging in OPCA litigation.

[28] The Order giving effect to this step will be prepared by the Court. Kevin Kumar's and Colton Kumar's approval of that Order is dispensed with, pursuant to r 9.4(2)(c) of the *Alberta Rules of Court*.

[29] If PC Bank wishes to make Written Submissions and/or provide Affidavit evidence in relation to these security for costs and litigation and litigant management steps in relation to the *Bonville lawsuit* and the *Davis lawsuit*, then these should be received by July 12, 2024 Given the unusual nature of the abusive litigation scheme and its distributed character, there plausibly is additional UnitedWeStandPeople litigation ongoing in Alberta Courts, in addition to the five matters that have been identified to date. Other affected parties may also submit Affidavit evidence concerning the UnitedWeStandPeople scheme and Kevin Kumar and Colton Kumar, due also on July 12, 2024.

[30] Kevin Kumar and Colton Kumar should also consult with and retain lawyers. They now face direct Court-ordered penalties as well as contempt of Court sanctions. Service of this Memorandum of Decision and the corresponding Order on Kevin Kumar and Colton Kumar will be via email to: UnitedWeStandPeople@gmail.com.

[31] Copies of this Memorandum of Decision and corresponding Order will be directed to Counsel for:

- Royal Bank of Canada in the *Royal Bank of Canada v Patrick Courtoreille also known as Patrick John Courtoreille*, Court of King's Bench Action No. 2310 00279 proceeding;
- Capital One Bank in the *Terry Kerslake v Capital One Bank*, Court of King's Bench Action No. 2304 00761 proceeding; and
- Capital One Services (Canada) Inc. in the *Timothy Laurea Kohut v Capital One Services (Canada) Inc*, Court of King's Bench Action No. 2403 08261 proceeding.

[32] Mindful of the ***Pintea v Johns***, 2017 SCC 23 instruction that Canadian judges shall provide information on litigation alternatives to persons not represented by lawyers, if the

Plaintiffs, Kevin Kumar, and/or Colton Kumar seeks to challenge steps imposed in this Memorandum of Decision, then they should seek a remedy from the Court of Appeal of Alberta.

Dated at the City of Edmonton, Alberta this 18th day of June, 2024.

K.G. Nielsen
A.C.J.C.K.B.A.

Appearances by writing:

Claire Bonville
No appearance

Sydney Socorro M. Davis
No appearance

Kevin Kumar
No appearance

Colton Kumar
No appearance

Lindsey E. Miller
Field Law LLP
Co-counsel for the Defendant

Elisa Carbonaro
Field Law LLP
Co-counsel for the Defendant

Corrigendum of the Memorandum of Decision
of Acting Chief Justice
K.G. Nielsen

Action Number has been corrected from 2403 06187 to 2401 06187 in paragraph 22(1).

Ms. Carbonaro has been added to the list of appearances.

Court of King's Bench of Alberta

Citation: Bonville v President's Choice Financial, 2024 ABKB 483

Date: 20240820
Docket: 2403 01300; 2401 06187; 2403 05588; 2403 09627
Registry: Edmonton and Calgary

Between:

Action No. 2403 01300

Claire Bonville

Plaintiff

- and -

President's Choice Financial

Defendant

And between:

Action No. 2401 06187

Sydney Socorro M. Davis

Plaintiff

- and -

President's Choice Financial

Defendant

And between:

Action No. 2403 05588

Timothy Lauren Kohut

Plaintiff

- and -

Royal Bank of Canada

Defendant

And between:

Action No. 2403 09627

Royal Bank of Canada

Plaintiff

- and -

Timothy Kohut, also known as Timothy Lauren Kohut

Defendant

Memorandum of Decision
of Associate Chief Justice
K.G. Nielsen

I. Introduction and Background

[1] This Memorandum of Decision has both a general and specific focus. Specifically, this Memorandum of Decision has the Court engage processes to manage what appears to be abusive litigation conducted by three individuals to evade debt obligations by means of misapplication of Court processes.

[2] More broadly, this Memorandum of Decision responds to the proliferation of "money-for-nothing" / debt elimination schemes being marketed on the Internet by for-pay promoters

who claim to know secret legal processes and tricks that they will share – for money - to make debts disappear. These promoters often do not directly engage the Court, but instead operate behind the scenes, or as "agents", or "*amicus curiae*", or other status claims such as "human rights defenders".

[3] These schemes and their promoters harm legitimate lenders by inflicting litigation expense and delaying collection. Courts are injured because their resources are wasted by attempts to deploy long-debunked strategies that inevitably fail. What both lenders and Courts face is an industry, an international business model intended to harm both the interests of the lenders and Courts. In the process involved debtors will often be injured as well. The only beneficiaries of this debt elimination strategy are its promoters, who are difficult to address because of their interacting with Courts and lenders via proxies, false fronts, aliases, and corporations, both registered and imaginary.

[4] This Memorandum of Decision takes a new approach. If people want to advance known and rejected not-law claims in relation to their debts, they may be required "to put their money where their mouth is" and take steps to establish their litigation and intentions are genuine.

A. The Proliferation of Pseudolaw "Money-For-Nothing" and Debt Elimination Schemes in Alberta

[5] The Court of King's Bench of Alberta is currently encountering an influx of litigation in which debtors attempt to eliminate or negate debts without any valid legal basis. Sometimes that takes the form of the debtor advancing money-for-nothing and/or debt elimination schemes during a foreclosure or debt collection proceeding, arguing in various ways that the lender does not have a valid interest or claim. Other times the debtor initiates legal proceedings against the lender, alleging wrongdoing by the lender, even demanding penalties or refunds of debt repayments already made.

[6] Several elements unify this debt elimination litigation. These schemes are based on well-known and long debunked Organized Pseudolegal Commercial Argument (OPCA) (***Meads v Meads***, 2012 ABQB 571 (***Meads***)) bases. OPCA are not-law concepts that purport to be the actual law, and promise extraordinary authority, benefits, and immunities. Employing pseudolaw is always an abuse of Court processes, and warrants immediate Court response: ***Unrau v National Dental Examining Board***, 2019 ABQB 283 at paras 180, 670-671 (***Unrau #2***). Money-for-nothing and debt elimination OPCA schemes are nothing new. In Canada new and variant schemes of this kind have regularly appeared for years: Donald J Netolitzky, "After the Hammer: Six Years of Meads v Meads" (2019) 56:4 Alta L Rev 1167 at 1176-1182. Truly novel debt elimination strategies are very unusual. The more common situation is old concepts get recycled, though sometimes dressed up with minor new language and trappings.

[7] The current wave of OPCA money-for-nothing / debt elimination schemes has an underlying commercial basis. These concepts are promoted and sold on the Internet by what Associate Chief Justice Rooke in ***Meads*** called "gurus". This is a long-standing practice in which individuals have made a business of promoting and selling OPCA strategies for their own profit, and for the promised but illusory benefit of their customers: ***Meads*** at paras 85-158. Promoters of this kind currently operating in Alberta ground their claims on various bases.

[8] For example, "minister" Mr. Edward Jay Robin Belanger of the Church of the Ecumenical Redemption International claims he can provide religious immunity from paying

debts, provided you are willing to become a King James Bible literalist: ***ATB Financial v Dimsdale Auto Parts Ltd***, 2024 ABKB 143 (***Dimsdale***). Mr. Belanger rejects any Court authority over his activity, since his "God's law" is supreme: ***Dimsdale*** at para 33. Mr. Belanger was recently banned from representing other individuals in Alberta trial courts, made subject to court access restrictions, and prohibited from physically entering Alberta courthouses: ***Belanger (Re)***, 2024 ABKB 449. However, realistically, these steps do not stop Mr. Belanger from manipulating other victims into self-destructive behaviour, but at least these steps limit Mr. Belanger's direct participation in Court proceedings that then result.

[9] Similarly, another guru named Peter Temple in 2023 surfaced in the Court of King's Bench of Alberta: ***Manulife Bank of Canada v Thomas***, 2023 ABKB 564 (***Thomas***). Mr. Temple claimed to represent a person whose home was being foreclosed and who had outstanding credit card debts. Mr. Temple, who declared he represented the debtor's birth certificate, claimed to have a "private investor" who would take over the debt. Mr. Temple denied there were valid lending contracts and debts. In response Mr. Temple was banned from engaging in lawyer-type activities that relate to Court of King's Bench of Alberta proceedings, and representing anyone before the Court of King's Bench of Alberta: ***Thomas*** at para 27.

[10] That, of course, does not prevent Mr. Temple from continuing to advertise his illegitimate pseudolaw-based debt elimination processes on his website (https://worldcyclesinstitute.com). In fact, it appears that Mr. Temple published a further pseudolaw video promising money for nothing - "The Incredible Mortgage Scam! Exposed!" (online: *YouTube* <www.youtube.com/watch?v=H2a_nJ7oyk4>) - after the ***Thomas*** Memorandum of Decision was released. ***Thomas*** conducted a detailed review of the relevant case law and rebuttal of Mr. Temple's false not-law claims that were rejected by the Court.

[11] In Canada Courts apply the common-sense presumption that people intend the natural consequences of their actions: ***R v Tatton***, 2015 SCC 33. ***Thomas*** explained to Mr. Temple the law, and why the foreclosure and mortgage negation claims he has made will never be successful in Canadian Courts. But Mr. Temple continues to advertise his services. The natural consequence of Mr. Temple's actions is he will cause his customers/clients much harm when they inevitably lose their homes, with substantially reduced equity. I can and do infer Mr. Temple does not care about that inevitable outcome, as long as he gets money. That is the natural consequence of his activity. But again, the Court cannot do anything directly that would stop Mr. Temple and his business. The result is future victims of Mr. Temple's guru activities are predictable.

[12] Some pseudolaw money-for-nothing / debt elimination schemes are objectively bizarre. Perhaps the strangest currently operating in Canada is Ms. Romana Didulo, a middle-aged Filipino immigrant who claims to be a shape-shifting Arcturian extraterrestrial. Ms. Didulo self-identifies as "Her Majesty Queen Romana Didulo of the Kingdom of Canada" "Head of State and Commander-in-Chief, Head of Government, National Indigenous Chief, President and Queen of the Kingdom of Canada": The Kingdom of Canada, online: *The Kingdom of Canada* <www.thekingdomofcanada.ca>); Christine M. Sarteschi, "The Social Phenomenon of Romana Didulo" (2023) 6 International Journal of Coercion, Abuse, and Manipulation DOI: 10.54208/1000/0006/002; Donald J Netolitzky, "New Hosts for an Old Disease: History of the Organized Pseudolegal Commercial Argument Phenomenon in Canada – Part III" (2023) 60:4 Alta L Rev 971 at 981-985. I am unclear how someone who claims to be an otherworldly extraterrestrial and non-human could also be "Indigenous", at least in relation to Canadian Indigenous populations.

[13] Among many other peculiar claims, Ms. Didulo has issued "Royal Decrees" that purport to impact debt obligations. For example, Royal Decree #38 is titled: "Debt Forgiveness/Cancellation of All Financial Obligations for All Canadians (Inside and Outside Canada), Landed Immigrants Status (in Canada), Permanent Resident Status Holders in the Kingdom of Canada", that claims it "... eliminates, in FULL any and all of the following financial obligations ...", followed by a lengthy list that includes everything from mortgages, credit card debts, medical bills, and bankruptcies.

[14] Ms. Didulo also claims that her followers may discharge their debts by "promissory notes", which are literally a document promising to pay a debt at a future point. This debt elimination claim is consistently rejected by common law courts worldwide, e.g., ***Re Boisjoli***, 2015 ABQB 629 at paras 32-34; ***Servus Credit Union Ltd v Parlee***, 2015 ABQB 700 at paras 65-68, ***Canadian Imperial Bank of Commerce v McDougald***, 2017 ABQB 124 at paras 35-37; ***Dove v Legal Aid Ontario***, 2018 ONSC 17 at paras 4, 8; ***Knutson (Re)***, 2018 ABQB 858 at paras 68-71; ***Bank of New Zealand v Donaldson***, [2016] NZHC 1225 at paras 47-52; ***Child Maintenance and Enforcement Commission v Wilson***, 2014 SLR 46; ***Krajciova v Feroz***, [2014] ScotSC 72 at paras 2-3; ***ACM Group Limited v McClymont***, [2014] FCCA 2581 at paras 6, 25; ***Bertola v Australian and New Zealand Banking Corporation***, [2014] FCA 609 at paras 16-17; ***Deputy Commissioner of Taxation v Aitken***, [2015] WADC 18 at paras 65-67; ***Deputy Commissioner of Taxation v Sproule***, [2012] FMCA 1188 at paras 22-23; ***St. George Bank v Hammer (No 2)***, [2015] NSWSC 953 at para 35; ***McLean v Westpac Banking Corporation***, [2013] FCA 126 at para 45; ***Wilmink (Trustee) v Westpac Banking Corporation***, [2014] FCA 872 at para 34; ***Santander (UK) Plc v Parker***, [2015] NICA 41. As Rooke ACJ observed in ***Re Boisjoli*** at para 35, this concept is nonsense, since the end result would be nothing more than "a conga line of promissory notes, each purporting to satisfy the debt of the note one step up the cue".

[15] Unfortunately, this Court now encounters individuals who rely on these meaningless declarations by Ms. Didulo as a purported basis to avoid foreclosures and other debt enforcement steps: e.g., ***Thomas*** a paras 21-22. That does not work. These individuals inevitably face worst-case outcomes, usually losing their homes. In the meantime, "Queen" Ms. Didulo holds often daily Internet video broadcasts - "Queen Romana Tell Real Vision News" - where Ms. Didulo and her inner cadre instruct followers to send Ms. Didulo money. And, apparently, they do, since on that basis Ms. Didulo and a dozen or so core followers have toured Canada in a convoy of recreational vehicles since 2022, and are currently occupying a decommissioned school in Richmound, Saskatchewan.

[16] Reported cases show other provinces also now encounter analogous money-for-nothing / debt elimination scams. For example, the Ontario Courts have rejected two purported Metis groups, the "Kinakwii Private Sovereign Nation" "Sovereign, Indigenous, Aboriginal" country, and the "Anishinabek Solutrean Metis Indigenous Nation", as fake "indigenous status for pay" entities: ***Sarac v Wilstar Management Ltd***, 2021 ONSC 7776, appeal dismissed as an abuse of Court 2022 ONCA 320; ***Mukwa v Farm Credit Canada***, 2021 ONSC 1632, appeal dismissed as an abuse of Court 2022 ONCA 320; ***Farm Credit Canada v 1047535 Ontario Limited***, 2021 ONSC 3820, appeal dismissed as an abuse of Court 2022 ONCA 320 (***Farm Credit***). These groups, led by suspended Law Society of Ontario lawyer Glenn Patrick Bogue, a.k.a. "Spirit Warrior", have argued their "indigenous status for pay" defeats debt collection. For example, the

debtors in ***Farm Credit*** claimed the lender did not provide money but only "print[ed] up numbers in their computer", and, in any case the mortgage cannot apply to "unceded land".

B. UnitedWeStandPeople

[17] This particular Memorandum of Decision responds to a money-for-nothing / debt elimination scheme advanced under the banner of "UnitedWeStandPeople", a scam advanced by Kevin Kumar and Colton Kumar, who are discussed further below. The pseudolaw advanced by UnitedWeStandPeople is reviewed in ***Royal Bank of Canada v Courtoreille***, 2024 ABKB 302 (***Courtoreille***):

> 1) [The borrower] has designated a Chosen Agent in the Debt Lawsuit, and [the lender] and its counsel must interact with that Chosen Agent, UnitedWeStandPeople;
>
> 2) UnitedWeStandPeople claims that a "Private Lender" will pay [the borrower's] debts;
>
> 3) [the borrower] rejects they have any debts, unless [the lender] provides:
>
> a) an "original wet ink signed loan document (NOT a photocopy)"; and
>
> b) an affidavit from a "... Chartered Accountant verifying the debt was not sold ..."; and
>
> 4) neither [the borrower] nor the Private Lender will provide any money unless [the lender] provides the "wet ink" contract and accountant's affidavit.

Thus, the UnitedWeStandPeople scam, as publicly deployed, has three chief components.

1. A Contract Requires a Wet Ink Signature

[18] First, the UnitedWeStandPeople scam demands a contract with a "wet ink" signature. Claims that a debt may only be established by an original wet ink signature physical contract are a common and legally rejected OPCA motif that has for over a decade been deployed in Canada as a purported basis to invalidate debt contracts, e.g., ***Xceed Mortgage Corporation/Corporation hypothécaire Xceed c Pépin-Bourgouin***, 2011 QCCS 2116 at paras 15–18; ***Royal Bank of Canada v Skrapec***, 2011 BCSC 1827 at para 24, leave to appeal to BCCA refused, 2012 BCCA 10; ***Canadian Imperial Bank of Commerce v Piedrahita***, 2012 NBQB 101 at para 8, leave to appeal to NBCA refused (2012), 387 NBR (2d) 399 (CA); ***Banque Royale du Canada c Tremblay***, 2013 QCCQ 12827 at para 14, aff'd 2013 QCCA 2035 at para 7; ***The Bank of Nova Scotia v Lai-Ping Lee***, 2013 ONSC 6698 at para 10; ***Toronto-Dominion Bank v Devries***, 2013 CanLII 41978 (Ont Sup Ct (Sm Cl Ct)) at paras 2–3, 40–48; ***First National Financial GP Corporation v Maritime Residential Housing Development Ltd***, 2013 NSSC 219 at para 7; ***Banque Royale du Canada c Minicozzi***, 2013 QCCQ 6566 at para 21, aff'd 2013 QCCA 1722; ***Bank of Montreal v Rogozinsky***, 2014 ABQB 771 at paras 24, 41–43, 56; ***Toronto-Dominion Bank v Thompson***, [2015] OJ No 5141 (QL) at paras 7, 16 (Sup Ct (Sm Cl Ct)); ***Alberta v Greter***, 2016 ABQB 293 at paras 2, 11, 16; ***Royal Bank of Canada v 101000039 Saskatchewan Ltd***, 2017 SKQB 253 at paras 9, 19; ***Knutson (Re)***, 2018 ABQB 858, note 9 at Appendix E; ***Gacias v Equifax Canada Co***, 2019 ABQB 640 at para 14; ***Royal Bank of Canada v Anderson***, 2022 ABQB 354 at paras 23-24; ***Royal Bank of Canada v Anderson***, 2022 ABQB 525 at para 33; ***Osadchuk v The King***, 2023 TCC 70 at para 5. If this purported rule of contract law were, in

fact, true, then no contract formed by electronic means would ever be enforceable. Similarly, the usual way consumers make any in-person purchase would not be enforceable, except with atypical paperwork.

[19] This strange claim probably originates from the US, where numerous Court judgments evaluate and reject the requirement for a wet ink signature. For example, the US Fifth Circuit of Appeal in ***Martens v BAC Home Loans Servicing***, 722 F.3d 249 (2013) concluded:

> The first theory posits that to foreclose, a party must produce the original note bearing a wet ink signature. Numerous federal district courts have addressed this question, and each has concluded that Texas recognizes assignment of mortgages through MERS and its equivalents as valid and enforceable without production of the original, signed note. The court summarized Martins's strategy accurately in Wells v. BAC Home Loans Servicing, L.P., No. W-10-CA-00350, 2011 WL 2163987, at *2 (W.D.Tex. Apr. 26, 2011) (internal citations and quotation marks omitted):
>
> > This claim-colloquially called the "show-me-the-note" theory — began circulating in courts across the country in 2009. Advocates of this theory believe that only the holder of the original wet ink signature note has the lawful power to initiate a non-judicial foreclosure. The courts, however, have roundly rejected this theory and dismissed the claims, because foreclosure statutes simply do not require possession or production of the original note. The "show me the note" theory fares no better under Texas law.

[20] The wet ink signature requirement has similarly been rejected in Australia as a pseudolaw debt elimination strategy: e.g., ***ACM Group Limited v McClymont***, [2014] FCCA 2581 at paras 13, 17; ***St George Bank v Hammer (No 2)***, [2015] NSWSC 953 at paras 7, 35; ***Schafer v RHG Mortgage Corporation Ltd [No 2]***, [2015] WASCA 106; ***Australia and New Zealand Banking Group Ltd v Evans; Evans v Esanda Finance Corporation Ltd***, [2016] NSWSC 1742 at paras 110-112 (***Evans***); ***Ennis v Credit Union Australia***, [2016] FCCA 1702 at paras 4, 25-32, 41; ***Permanent Custodians Limited v Sanders***, [2017] VSC 516 at paras 35-36, 45; ***Perpetual Trustees Victoria Limited v Sanders***, [2017] VSC 555 at paras 35-36, 50; ***Lion Finance Pty Ltd v Johnston***, [2018] FCCA 2745 at paras 18-20; ***Bendigo and Adelaide Bank Ltd v Prichard***, [2021] QSC 179 at paras 26-27. In ***Evans*** at para 112, Garling J called this argument "embarrassing", and litigation based on this claim should be struck out on that basis. I agree. The same result has occurred in New Zealand: ***WorkSafe New Zealand v Rayner***, [2022] NZDC 7870 at paras 28-29.

[21] Other Commonwealth-tradition jurisdictions where the wet ink signature OPCA claim has been rejected in reported Court decisions include Northern Ireland (***Santander (UK) Plc v Parker***, [2012] NICh 6; ***Santander UK v Plc Parker (No 2)***, [2012] NICh 20; ***Doherty & nor v Perrett & Ors***, [2015] NICA 52), the Republic of Ireland (***McCarthy & Ors v Bank of Scotland Plc & Anor***, [2014] IEHC 340; ***KBC Bank Ireland PLC v McNamee & anor***, [2016] IEHC 347; ***Bank of Ireland Mortgage Bank v Martin & anor***, [2017] IEHC 707), and Scotland (***Krajciova v Feroz***, [2014] ScotSC 72)

[22] As is clear from this review, the wet ink signature OPCA motif is broadly disseminated and used, world-wide. No nation's Courts have accepted this argument as a basis to defeat a

lender's claim to collect a debt. All have rejected this argument as baseless and a waste of Court resources. In Canada employing pseudolaw arguments is always abusive. Given the simply absurd basis for the wet ink signature claim as a requirement for a contract, and it repeated rejection by common law tradition Courts, world-wide, I conclude that simply advancing this argument creates a *prima facie* presumption of bad faith, and ulterior motive intentions. Canadian Courts have previously categorized some arguments as so broadly and notoriously false that simply raising these concepts creates a negative presumption, for example employing "Strawman Theory" concepts (***Fiander v Mills***, 2015 NLCA 31 at paras 37-40; ***Rothweiler v Payette***, 2018 ABQB 288 at paras 6-21; ***Unrau #2*** at para 180) and the Three/Five Letters foisted unilateral agreement scheme (***Rothweiler v Payette***, 2018 ABQB 288 at paras 6-21).

[23] I find the UnitedWeStandPeople scheme's using the wet ink signature argument both has no basis in law, and that advancing this claim creates a presumption of bad faith and ulterior purpose intentions by the UnitedWeStandPeople principals and their customers. Put another way, anyone who claims they do not need to pay back a debt on this basis is not acting honestly, but with the intention to scam and defraud the lender, and waste Court resources for no valid purpose. In fact and law, there cannot be any other honest intention, if one advances wet ink signature claim.

2. Lenders Must Prove a Loan Has Not Been "Securitized"

[24] The second commonplace pseudolaw debt elimination argument is that a lender must prove that a debt is not "securitized" prior to asserting a claim for outstanding money and interest. The underlying concept is that sometimes lenders sell a debt contract, or may otherwise transfer title to a debt contract. This scheme then argues the debtor post-securitization may not know to whom the debtor truly owes money. So, the securitization argument goes that when Bank A seeks to collect a debt by foreclosing on a property, that bank may be lying about its legal right to claim those funds. Bank A may have sold the mortgage to Bank B (or someone else), and so the debtor would pay Bank A, in good faith, then suddenly discover Bank B is the true debt holder, and now the debtor would be forced to pay the same debt twice. Thus, the debtor, as a precondition to paying anything, supposedly has the right to demand a lender prove it owns the debt, in whatever manner the debtor demands. How else will the debtor truly know who to pay?

[25] There is, of course, an obvious and basic flaw to this argument. If Bank A were to falsely and without right foreclose on a property where the debt was owed to Bank B, then Bank A would have engaged in serious and illegal conduct, in breach of both: 1) the original mortgage contract, and 2) the contract on which Bank A sold Bank B the debt. Regulatory issues would also very probably arise. In short, there is a legal remedy for the strange hypothetical of a lender attempting to assert a debt it no longer owns.

[26] In ***Courtoreille*** at para 7 I identified and reviewed Canadian case law that has examined and rejected the securitization argument: ***Royal Bank of Canada v Skrapec***; ***Xceed Mortgage Corporation/Corporation hypothécaire Xceed c Pépin-Bourgouin***; ***Banque Royale du Canada c Tremblay***; ***The Bank of Nova Scotia v Lai-Ping Lee***; ***Bank of Montreal v Rogozinsky***; ***Alberta v Greter***; ***Royal Bank of Canada v 101000039 Saskatchewan Ltd***; ***Gacias v Equifax Canada Co***, 2019 ABQB 640, action struck out as an abuse of court processes, 2019 ABQB 739; ***Toronto Dominion Bank v Giercke***, 2021 ABQB 262, action struck out as an abuse of court processes, 2021 ABQB 320.

[27] Much like the wet ink signature claims, the securitization money for nothing / debt elimination argument has been deployed by many OPCA scammers in other jurisdictions. For example, in the UK the England and Wales High Court (King's Bench Division) recently issued a comprehensive analysis of another instance of the securitization scam, here advanced by "Matrix Solutions", an entity operated by a guru named Iain Clifford Stamp: ***Stamp & Ors v Capital Home Loans Ltd (t/a CHL Mortgages) & Ors***, [2024] EWHC 1092 (***Stamp***). This decision reports on litigation in which over 200 mortgage holders paid Stamp £1,000 each to conduct Court proceedings to eliminate their debts, and, instead, obtain hundreds of thousands of pounds in "damages" from the lenders. The guru/promoter Mr. Stamp did not appear in Court. The ***Stamp*** decision at para 3 states "that [Stamp] was beyond the seas and that he relied upon the documents he had already delivered to the Court".

[28] The Matrix Freedom scam is apparently a large-scale enterprise (para 35):

> ... In separate current proceedings in this Court Mr. Stamp describes himself as "the founder, driving force, and Chairman of Matrix Freedom, a private members association with over 50,000 members" and states that he employs "a full-time staff of over forty individuals to support the services required by my members". Mr Stamp has at least four other claims that are currently before this Court. In these he appears to be active in pursuing defendants who hold unfavourable views about the products and services that are available from Matrix Freedom or as to the nature of the business and how it should be treated, amongst other things, for credit and tax purposes.

In light of the consistent paperwork and uniform characteristic arguments employed in the Matrix Freedom scheme, as well as its hopeless and abusive character, the England and Wales High Court ordered no further litigation by this scheme would be permitted to issue: para 38.

[29] Once again, the securitization claim is not a new one, and has been broadly employed in Commonwealth countries, but never with success:

- Australia: ***RHG Mortgage Corporation Ltd v Astolfi***, [2011] NSWSC 1526 at paras 13-14, 19; ***Westpac Banking Corporation v Mason***, [2011] NSWSC 1241 at paras 29-31; ***RHG Mortgage Corporation v Astolfi***, [2011] NSWSC 1526 at paras 13-14; ***National Australia Bank Limited v Norman***, [2012] VSC 14 at paras 41-43; ***Westpac Banking Corporation v McLean***, [2012] WASC 182 at para 87-99; ***Puglia v RHG Mortgage Corporation Ltd***, [2013] WASCA 143 at para 9; ***Summerland Credit Union Ltd v Lamberton; Summerland Credit Union Ltd v Jonathan***, [2014] NSWSC 547 at para 15; ***Hour v Westpac Banking Corporation Ltd***, [2015] VSCA 57 at paras 64-66; ***St. George Bank v Hammer (No 2)***, [2015] NSWSC 953 at para 35; ***Kanakaridis v Westpac Banking Corporation***, [2015] FCA 1146; ***Collis v Bank of Queensland Ltd***, [2021] VSCA 17.
- New Zealand: ***Bass v Westpac New Zealand Limited***, (24 November 2009) Christchurch CIV 2009-409-002289 (NZ HC) (Nov. 24, 2009).
- Northern Ireland: ***Bank of Scotland PLC v Foster***, [2014] NICh 18; ***Doherty & nor v Perrett & Ors***, [2015] NICA 52.
- Republic of Ireland: ***Wellstead v Judge White & Anor***, [2011] IEHC 438; ***Freeman & anor v Bank of Scotland PLC & Ors***, [2014] IEHC 284 at paras 12-15; ***McCarthy & Ors***

v Bank of Scotland Plc & Anor, [2014] IEHC 340 at para 18; ***Kearney v KBC Bank Ireland Plc & Anor***, [2014] IEHC 260 at paras 24-26; ***Danske Bank A/S v Crowe and Crowe***, [2015] IEHC 567; ***Harrold v Nua Mortgages Ltd.***, [2015] IEHC 15; ***Quearney v Allied Irish Bank Plc***, [2015] IEHC 858 at para 34; ***Danske Bank A/S v Scanlan***, [2016] IEHC 118; ***KBC Bank Ireland PLC v McNamee & anor***, [2016] IEHC 347; ***AIB Mortgage Bank & Anor v Cosgrove***, [2017] IEHC 803 at paras 53-57; ***McMahon & anor v Bank of Scotland PLC & anor***, [2017] IEHC 438 at paras 21-23; ***Start Mortgages DAC v Ryan & Anor***, [2021] IEHC 719 at paras 25-31; ***Start Mortgages DAC v Galibert & Anor***, [2022] IEHC 190 at paras 58-60.

- UK: ***Sinclair v Accord Mortgage Ltd.***, [2014] UKFTT 0303 (PC).

[30] As with the wet ink signature OPCA argument, the securitization pseudolaw money-for-nothing / debt elimination strategy is very clearly false, and has been denounced repeatedly by Courts across the Commonwealth.

[31] On that basis I conclude that any individual who uses this argument as a basis to impose conditions on a lender, and/or deny an obligation to pay a debt, presumptively does so for false, improper purposes, and with an ulterior motive. To be explicit, this presumption is limited to circumstances in which the debtor who refuses to pay has no basis to advance the question "To whom do I owe this money?" If a debtor did have evidence of two or more competing claims for repayment of a loan, then that is potentially a valid argument. What the presumption of bad intent captures are debtors who have no evidence of multiple duplicate debt claims, and who simply demand proof securitization has not occurred, without evidence to support that possibility.

[32] In the context of this Memorandum of Decision and the UnitedWeStandPeople scheme, I conclude that unless rebutted, the promoters and users of this scheme do so with the intention of illegally avoiding their debts, scam their lenders, and in the process misuse and waste this Court's resources without any valid purpose.

3. Anonymous "Private" Lenders or Buyers

[33] A third element of the UnitedWeStandPeople scam is that the UnitedWeStandPeople communications and Court filings state that there is a "private lender" or "private financing" that has agreed to take over the UnitedWeStandPeople client's loan, and this private source will pay the outstanding debt to the lender. The private lender is never identified, nor have UnitedWeStandPeople or its customers provided any basis for the Court or the lenders to believe this claim is real, and/or that the private lender/buyer even exists.

[34] Instead, this unidentified private lender/buyer who will take over a loan is another broader feature of money-for-nothing / debt elimination pseudolaw scams. For example, this same claim was advanced by Temple in ***Thomas*** at para 6, where a never-identified private investor supposedly was willing and eager to take on the mortgage. Of course, that individual and his/her money never materialized.

[35] A variation on this theme is reported in ***ATB Financial v 1719091 Alberta Ltd***, 2024 ABKB 461 at para 11, in which the debtor actually did identify and provide documents from the proposed private lender, an individual named Vanessa Amy Landry. Ms. Landry happened to already be well-known to this Court as a participant in OPCA debt elimination schemes: e.g., ***Scotia Mortgage Corporation v Landry***, 2018 ABQB 951 (***Landry***). There was, naturally, a

catch in Ms. Landry's offer to take on the debt. She would repay the outstanding $1.5 million at a rate of $200 per month.

[36] I find as fact and law that no lender has any obligation to respond to a debt repayment proposals such as these, in which a lender purports to have a third party who will take over a debt, unless the lender and debtor have already agreed in advance to that arrangement in contract. Instead, when critically evaluated in the context of contract law, the whole private lender/buyer scheme falls apart and makes no sense at all. For example, if Debtor A owes Lender B $1,000. Private Lender/Buyer C can enter into a contract with Debtor A to provide $1,000. The terms can be whatever Debtor A and Private Lender/Buyer C choose. That is their own business, and that contract is binding *only* on those two parties: Debtor A and Private Lender/Buyer C. It does not matter if Debtor A used the $1,000 to pay Lender B, or instead buys a new television. Or that Debtor A suddenly discovers that the debt has been securitized to Lender D. Privity of contract means each of these arrangements are separate.

[37] Stripped of its misleading characteristics, what the UnitedWeStandPeople arrangement is - if it were genuine instead of a fraud - is a proposal that Private Lender/Buyer C is taking over the debt contract, as the new debtor, and Private Lender/Buyer is legally binding itself to take on all of Debtor A's contractual obligations, including to pay off the debt. Of course, no lender (primary or securitized) has to agree to that, unless the original debt contract had the very unlikely clause that any third party could come in and purport to become the new debtor. And there is no need for that. If the UnitedWeStandPeople scheme was not a scam, then the result would be two contracts. In contract #2, Private Lender/Buyer C loans Debtor A a sum. Then in the pre-existing loan contract #1, Debtor A pays off their pre-existing debt, ending contract #1. These are two entirely separate transactions, each separately subject to the law of contract.

[38] But that is not what is going on in OPCA money-for-nothing / debt elimination scams in which a private lender/buyer is purportedly involved. These private lender/buyers are nothing more than fictions, or outsiders who unilaterally seek to redefine contract terms, such as with the Landry $200 per month for $1.5 million loan. These are strategies to defraud lenders, and waste Court resources, nothing less.

II. UnitedWeStandPeople Litigation Under Review

[39] This Memorandum of Decision relates to four UnitedWeStandPeople actions which the Court responded to in ***Bonville #1*** and ***Kohut #1***:

- *Bonville v President's Choice Financial*, Court of King's Bench of Alberta Action No. 2403 01300 (*Bonville Attack Lawsuit*)
- *Davis v President's Choice Financial*, Court of King's Bench of Alberta Action No. 2401 06187 (*Davis Attack Lawsuit*)
- *Kohut v Royal Bank of Canada*, Court of King's Bench of Alberta Action No. 2403 05588 (*Kohut Attack Lawsuit*)
- *Royal Bank of Canada v Kohut*, Court of King's Bench of Alberta Action No. 2403 09627 (*Kohut Defence Lawsuit*)

[40] All four of these proceedings are currently stayed: ***Bonville #1*** at para 22; ***Kohut #1*** at paras 7, 11.

[41] The Court now adopts a common approach to each of these Actions given their overlapping OPCA strategies and because each applies the UnitedWeStandPeople money-for-nothing / debt elimination scam. The UnitedWeStandPeople customers have also made a common response, or more accurately, non-response, to ***Bonville #1*** and ***Kohut #1***. In the analysis and response that follows this Court applies the ***R v Tatton*** "... common sense inference that a person intends the natural consequences of his or her actions ...". In other words, when one of the UnitedWeStandPeople customers took OPCA-based steps to impede debt collection, or to assert spurious claims and damages, then the Court can and does infer that these individuals have done so to illegally interfere with their contractual obligations, to frustrate lender litigation by means of Court processes, and with the natural and intended result of wasting Court resources.

A. *Bonville v President's Choice Financial*, Court of King's Bench of Alberta Action No. 2403 01300

[42] Ms. Bonville in ***Bonville #1*** was given until July 5, 2024 to make submissions and/or submit Affidavit evidence as to whether she should be required to pay $10,000 in security for costs in the *Bonville Attack Lawsuit*. Ms. Bonville made no response to this Court. She did, however, file an appeal with the Court of Appeal of Alberta (*Bonville v President's Choice Financial*, Action No. 2403 0137AC) in which the entire grounds of appeal read: "Decision is unreasonable or not supported by evidence."

[43] Counsel for President's Choice Financial (PC Bank) concludes that a r 4.22 of the *Alberta Rules of Court*, Alta Reg 124/2010 security for costs Order is appropriate, primarily under the r 4.22(e) general factor authority. PC Bank has submitted the July 16, 2024 Affidavit of Brian Reid that documents and substantiates the debt owed by Ms. Bonville, and confirmed that the debt owed by Ms. Bonville is to PC Bank itself, and has not been sold or transferred to some other entity. I accept that uncontested evidence. PC Bank characterizes the *Bonville Attack Lawsuit* as a groundless OPCA scheme intended to defeat PC Bank's valid claim under its credit card contract with Ms. Bonville. I agree.

[44] On March 1, 2024, PC Bank filed a Counterclaim to enforce and collect the credit card debt owed by Ms. Bonville. On March 13, 2024, Ms. Bonville filed a Statement of Defence to Counterclaim which makes stereotypic UnitedWeStandPeople securitization arguments and that indicates Ms. Bonville is represented by Colton Kumar.

[45] Ms. Bonville has been identified as engaging the UnitedWeStandPeople OPCA scam. There is no apparent legitimate basis for her *Bonville Attack Lawsuit* or its $100,000 quantum: ***Bonville #1*** at paras 20-21. Ms. Bonville was given the opportunity to make submissions, but has provided nothing to challenge the Court's evaluation that the *Bonville Attack Lawsuit* is an illegitimate abusive proceeding. I, therefore, conclude that Ms. Bonville shall pay the Clerk of the Court $10,000 in security for costs pursuant to r 4.22 of the *Alberta Rules of Court* by September 6, 2024. Ms. Bonville now has the opportunity to put her money where her mouth is, if she does genuinely believe she has a valid basis for the *Bonville Attack Lawsuit* that seeks $100,000 in damages.

[46] If the $10,000 r 4.22 of the *Alberta Rules of Court* security for costs is not paid to the Clerk of the Court by September 6, 2024, then, without any further Order of the Court:

1) the *Bonville Attack Lawsuit* Statement of Claim is struck out as a for profit pseudolaw-based abuse of the Court and the Defendant PC Bank;

2) the *Bonville Attack Lawsuit* Statement of Defence to Counterclaim is struck out;

3) judgment of $7,801.68 is granted in favour of PC Bank, along with interest as specified in the Counterclaim at paragraph 14(b); and

4) PC Bank is awarded $5,000 in costs, to be paid forthwith by Ms. Bonville.

[47] In calculating the lump sum quantum of costs award to PC Bank, I take into account:

- the r 10.29(1) of the *Alberta Rules of Court* presumption that costs are due to PC Bank;
- baseline cost amounts due to PC Bank as set in Schedule C of the *Alberta Rules of Court* for a proceeding in which the quantum in dispute is $100,000;
- r 10.33(1) of the *Alberta Rules of Court* factors implicated by the abusive OPCA character of the *Bonville Attack Lawsuit*; and
- the natural inference that results since Ms. Bonville's litigation had no genuine basis, and she is not willing to put her money where her mouth is.

[48] If the *Bonville Attack Lawsuit* is terminated in this manner a lump sum award is appropriate, following this Court's approach to bring problematic litigation to a timely and conclusive endpoint: e.g., ***Uhrik v Barata***, 2023 ABKB 517; ***Uhrik v Terrigno***, 2023 ABKB 223; ***Rana v Rana***, 2022 ABQB 139, leave to appeal denied 2022 ABCA 179; 2022 ABCA 306, leave to appeal to SCC refused, 40505 (9 March 2023); ***Doniger v Law Society of Alberta***, 2021 ABQB 200; ***Liu v Kadiri***, 2024 ABKB 271, leave denied 2024 ABCA 250.

[49] Rule 1.2 of the *Alberta Rules of Court* sets the foundational principles for how civil litigation must be conducted in Alberta. That provision imposes these obligations on parties:

> ... the parties must, jointly and individually during an action,
>
> (a) identify or make an application to identify the real issues in dispute and facilitate the quickest means of resolving the claim at the least expense,
>
> (b) periodically evaluate dispute resolution process alternatives to a full trial, with or without assistance from the Court,
>
> (c) refrain from filing applications or taking proceedings that do not further the purpose and intention of these rules, and
>
> (d) when using publicly funded Court resources, use them effectively.

A person conducting OPCA-based litigation breaches all of these obligations. My negative conclusions as to the character of wet ink signature and securitization arguments above means someone who engages these strategies presumptively breaches the r 1.2 of the *Alberta Rules of Court* directions with a bad faith motive, ulterior purposes, and abusive illegitimate objectives.

[50] If Ms. Bonville does not by September 6, 2024 pay the $10,000 security for costs ordered above, then Ms. Bonville also has a deadline of September 6, 2024 to provide argument and/or Affidavit evidence as to why she should not be subject to an additional r 10.49(1) of the *Alberta Rules of Court* penalty paid to the Clerk of the Court, specifically:

1) how Ms. Bonville has not contravened or failed to comply with the *Alberta Rules of Court*, or a practice note or direction of the Court, by advancing an unmeritorious and abusive OPCA proceeding for ulterior bad faith purposes; and/or

2) why Ms. Bonville has an adequate excuse for her initiating and pursuing the *Bonville Attack Lawsuit*?

B. *Davis v President's Choice Financial*, Court of King's Bench of Alberta Action No. 2403 06187

[51] The situation with the *Davis Attack Lawsuit* is essentially the same. Ms. Davis has not responded to ***Bonville #1***, except by filing a Civil Notice of Appeal in the Court of Appeal of Alberta: *Davis v President's Choice Financial*, Action No. 2403 0138AC. The ground of appeal in this case reads: "Decision is unreasonable or not supported by evidence."

[52] Counsel for PC Bank makes the same submissions in relation to the credit card debt owed by Ms. Davis. PC Bank has submitted a July 16, 2024 Affidavit of Brian Reid that documents and substantiates the debt owed by Ms. Davis, and that the debt owed by Ms. Davis is to PC Bank itself. I accept that uncontested evidence. PC Bank characterizes the *Davis Attack Action* as a groundless OPCA scheme intended to defeat PC Bank's valid claim under its credit card contract with Ms. Davis. I agree.

[53] On June 7, 2024, PC Bank filed a Counterclaim to enforce and collect the credit card debt owed by Ms. Davis. On June 12, 2024, Ms. Davis filed a Statement of Defence to Counterclaim which makes stereotypic UnitedWeStandPeople securitization arguments.

[54] I conclude the same outcome now results. Ms. Davis shall pay the Clerk of the Court $10,000 in security for costs pursuant to r 4.22 of the *Alberta Rules of Court* by September 6, 2024. Ms. Davis therefore also has the opportunity to put her money where her mouth is, if she does genuinely believe she has a valid basis for the *Davis Attack Lawsuit* that seeks $100,000 in damages.

[55] If the $10,000 r 4.22 of the *Alberta Rules of Court* security for costs is not paid to the Clerk of the Court by September 6, 2024, then without any further Order of the Court:

1) the *Davis Attack Lawsuit* is struck out as a for profit pseudolaw-based abuse of the Court and the Defendant PC Bank;

2) the *Davis Attack Lawsuit* Statement of Defence to Counterclaim is struck out;

3) judgment of $6,060.08 is granted in favour of PC Bank, along with interest as specified in the Counterclaim at paragraph 15(b); and

4) PC Bank is awarded $5,000 in costs, to be paid forthwith by Ms. Davis.

[56] If Ms. Davis does not by September 6, 2024 pay the $10,000 security for costs ordered above, then Ms. Davis also has a deadline of September 6, 2024 to provide argument and/or Affidavit evidence as to she should not be subject to an additional r 10.49(1) of the *Alberta Rules of Court* penalty, specifically:

1) how Ms. Davis has not contravened or failed to comply with the *Alberta Rules of Court*, or a practice note or direction of the Court, by advancing an unmeritorious and abusive OPCA proceeding for ulterior bad faith purposes; and/or

2) why Ms. Davis has an adequate excuse for her initiating and pursuing the *Davis Attack Lawsuit*?

C. ***Kohut v Royal Bank of Canada*, Court of King's Bench of Alberta Action No. 2403 05588**

[57] The *Kohut Attack Lawsuit* follows the same pattern as the previous two matters. Mr. Kohut in a March 24, 2024 Statement of Claim demanded $250,000 in damages for "False Credit Reporting". The Statement of Claim makes the usual UnitedWeStandPeople attack variant claims that Mr. Kohut (by his private lender) will pay his debt, but only if the Royal Bank of Canada (RBC) proves a contract and debts according to Mr. Kohut's demands.

[58] In ***Kohut #1*** I concluded the *Kohut Attack Lawsuit* had no apparent valid legal basis, since it is based on OPCA UnitedWeStandPeople arguments. The *Kohut Attack Lawsuit* was stayed. Mr. Kohut was instructed if he seeks to pursue this litigation, then he must put his money where his mouth is, or provide an explanation to the Court why he should not pay to the Clerk of the Court $25,000 in security for costs pursuant to r 4.22 of the *Alberta Rules of Court* by July 12, 2024.

[59] That deadline has passed without a response from Mr. Kohut. Instead, Mr. Kohut on July 11, 2024 filed an appeal of ***Kohut #1*** (*Kohut v Royal Bank of Canada*, Action No. 2403 0157AC), which states:

> **5. Provide a brief description of the issues:**
>
> The appeal challenges the trial court's characterization of requesting proof of debt ownership as an Organized Pseudolegal Commercial Argument (OPCA) scheme and the imposition of $25,000 in security for costs in Kohut v Royal Bank of Canada and $10,000 in security for costs in Royal Bank of Canada v Kohut.
>
> **6. Provide a brief description of the relief claimed:**
>
> The appellant seeks to overturn the orders requiring payment of security for Costs and to assert the right to request proof of debt ownership without such requests being deemed as OPCA schemes.

[60] I note this appeal appears to be premature since ***Kohut #1*** did not, factually, impose a security for costs requirement on Mr. Kohut. However, this Memorandum of Decision does take that step. Mr. Kohut shall pay the Clerk of the Court $25,000 in security for costs pursuant to r 4.22 of the *Alberta Rules of Court* by September 6, 2024. If Mr. Kohut does genuinely believe he has a valid basis for the *Kohut Attack Lawsuit*, as stated in his Notice of Appeal, then he can put up $25,000 in advance of that lawsuit that claims $250,000 in damages.

[61] If the $25,000 r 4.22 security for costs is not paid to the Clerk of the Court by September 6, 2024, then without any further Order of the Court:

1) the May 3, 2024 Noting in Default is set aside;

2) the *Kohut Attack Lawsuit* is struck out as a for profit pseudolaw-based abuse of the Court and the Defendant RBC; and

3) RBC is awarded $10,000 in costs, to be paid forthwith by Mr. Kohut.

[62] As I have previously indicated with the *Bonville Attack Lawsuit* and the *Davis Attack Lawsuit*, a lump sum costs award here is appropriate to bring this abusive OPCA litigation to an end. The quantum of the lump sum costs here is larger than in the *Bonville Attack Lawsuit* and the *Davis Attack Lawsuit* because the two previous lawsuits fell into column 2 of Schedule C of the *Alberta Rules of Court*. The $250,000 sought by Mr. Kohut means his default costs calculation falls into the higher column 3 of Schedule C, and thus warrants this larger costs award.

[63] I also Order that if the $10,000 lump sum costs amount becomes due because Mr. Kohut does not pay security for costs, then RBC may, without further Order, add that costs award to the outstanding credit card debt that Mr. Kohut is seeking to avoid. Negative costs consequences for Mr. Kohut incurred in the *Kohut Attack Lawsuit* are deemed by the Court as part of the costs payable to RBC under the terms of the credit card contract for recovery of the outstanding and unpaid credit card debt. I take this step in response to the *Kohut Attack Lawsuit*'s illegitimate objective of driving up expenses for RBC in recovery of debts owed to RBC. That, after all, is the ultimate underlying purpose of money-for-nothing / debt elimination scams like the UnitedWeStandPeople scheme. If the debt cannot be negated, then the scammer kingpins and their customers plan would succeed, and impose illegitimate expenses and delay that would, operationally, frustrate debt collection by making enforcing legal rights uneconomical.

[64] In parallel with the other UnitedWeStandPeople attack lawsuits, if Mr. Kohut does not by September 6, 2024 pay the $25,000 security for costs Ordered above, then Mr. Kohut also has a deadline of September 6, 2024 to provide argument and/or Affidavit evidence as to he should not be subject to an additional r 10.49(1) of the *Alberta Rules of Court* penalty, specifically:

1) how Mr. Kohut has not contravened or failed to comply with the *Alberta Rules of Court*, or a practice note or direction of the Court, by advancing an unmeritorious and abusive OPCA proceeding for ulterior bad faith purposes; and/or

2) why Mr. Kohut has an adequate excuse for his initiating and pursuing the *Kohut Attack Lawsuit*.

D. *Royal Bank of Canada v Kohut*, Court of King's Bench of Alberta Action No. 2403 09627

[65] The final lawsuit addressed in this Memorandum of Decision is the *Kohut Defence Lawsuit*. Here, RBC on May 15, 2024 filed a Statement of Claim that sued Mr. Kohut to recover $21,015.54 in debts and post-April 26, 2024 interest. This is the debt that Mr. Kohut in the *Kohut Attack Lawsuit* claimed he has an unnamed private lender to take over the loan.

[66] Mr. Kohut on June 10, 2024 filed a Statement of Defence that deployed the stereotypic UnitedWeStandPeople scam defence that Mr. Kohut had a private lender who would take over the debt, and pay RBC, but that RBC had failed to prove the existence of the debt owed to RBC in an adequate manner. This is the same UnitedWeStandPeople pseudolaw defence rejected in ***Courtoreille***. ***Kohut #1*** at para 11 instructed that Mr. Kohut had until July 12, 2024 to make submissions on why Mr. Kohut should not be required to pay into Court $10,000 in security for costs, pursuant to r 4.22 of the *Alberta Rules of Court*. As noted above, Mr. Kohut made no response in this Court but instead filed an appeal to the Court of Appeal of Alberta.

[67] Since Mr. Kohut has provided no basis to challenge this Court's conclusion that his June 10, 2024 Statement of Defence is baseless and an OPCA attempt to avoid his debt obligations to

RBC, I order that Mr. Kohut shall pay the Clerk of the Court $10,000 in security for costs pursuant to r 4.22 of the *Alberta Rules of Court* by September 6, 2024. If Mr. Kohut does genuinely believe he has a valid basis to refuse to pay his outstanding debts because he has an unnamed private lender, and that Mr. Kohut can unilaterally set how a debt is proven, as stated in his Notice of Appeal, then Mr. Kohut can put up $10,000 to establish he conducts this defence in good faith, and not as a strategy to abuse RBC and the Court.

[68] If the $10,000 r 4.22 of *Alberta Rules of Court* security for costs is not paid to the Clerk of the Court by September 6, 2024, then without any further Order of the Court:

1) the June 10, 2024 Statement of Defence is struck out;

2) judgment is ordered in favour of RBC, and Mr. Kohut is ordered to pay RBC the $21,015.54 debt and post-April 26, 2024 interest claimed; and

3) RBC is awarded $5,000 in costs, to be paid forthwith by Mr. Kohut.

D. Conclusion

[69] Whether the four UnitedWeStandPeople scheme lawsuits now continue is up to Ms. Bonville, Ms. Davis, and Mr. Kohut. All have filed appeals with the Court of Appeal of Alberta; however that does not affect processes at this Court.

[70] I suggest that these individuals very carefully review the case law cited in this Memorandum of Decision. Most of these case decisions are available at no cost on the CanLII, AustLII and BaiLII websites. I also recommend these individuals consult with a lawyer accredited to practice law in Alberta. These individuals face potentially serious legal consequences.

[71] Ms. Bonville, Ms. Davis, and Mr. Kohut might also want to ask Colton Kumar and Kevin Kumar these questions, adapted from a list that Associate Chief Justice Rooke included in ***Meads*** at para 668:

1. Why do Colton Kumar and Kevin Kumar seem to have little, if any, wealth, when they say they hold the proverbial keys to untold riches?

2. Why do Colton Kumar and Kevin Kumar not go to Court themselves, if they are so certain of their knowledge? If they say they have been to Court, ask them for the proceeding file number, and see if their account is accurate. Those are public records.

3. Can Colton Kumar and Kevin Kumar identify even one reported Court decision in which their techniques proved successful? If not, why then are all successes a tale of an unnamed person, who knew someone who saw that kind of event occur?

4. How are Colton Kumar's and Kevin Kumar's ideas different from the OPCA gurus who have been unsuccessful and found themselves in jail? Why did Kevin Kumar end up with a two-month prison sentence for contempt of Court?

5. Will Colton Kumar and Kevin Kumar promise to indemnify you, when you apply the techniques they claim are foolproof? If not, why?

6. If they cannot explain these points, then why should they not pay for their actions?

III. Colton Kumar and Kevin Kumar

[72] In ***Courtoreille*** at paras 14-17 I reviewed the abusive litigation record of Kevin Kumar. In brief, Kevin Kumar was one of two kingpins who between 2010 and 2014 operated a large scale OPCA money-for-nothing / debt elimination mortgage scam under the name "PrivateSectorAct.com". That URL now redirects traffic to the UnitedWeStandPeople.com website. During this period Kevin Kumar conducted a "Dollar Dealer" scam which this Court was unable to manage using conventional litigation and litigant management steps, as reviewed in ***Unrau #2*** at paras 205-212. The PrivateSectorAct.com scammers launched multiple lawsuits and appeals, including those that targeted Court decision makers, created new corporations to continue their scams, and deployed what appear to be false aliases and agents. PrivateSectorAct.com even went so far as to set up a fake vigilante court, the "Alberta Court of Kings Bench" (sic) that issued what to a layperson might appear to be valid Court filings and Orders.

[73] Court countermeasures under the *Judicature Act*, *Alberta Rules of Court*, and common law processes utterly failed to constrain these strategies. What finally ended the PrivateSectorAct.com scam was that Kevin Kumar was found guilty of contempt of court and sentenced to two months incarceration: ***Real Estate Counsel of Alberta v Johnson***, Calgary 1401-11567, 1401-12622, 1501-02988 (Alta QB).

[74] In 2023 Kevin Kumar resurfaced and appeared in the ***Courtoreille*** proceeding, acting as the debtor's OPCA litigation representative. On that basis in ***Courtoreille*** at para 22 I imposed these restrictions on Kevin Kumar:

1. Kevin Kumar shall only communicate with the Court of King's Bench of Alberta using the name "Kevin Kumar", and not using initials, an alternative name structure, or a pseudonym.
2. Kevin Kumar is prohibited from:
   (i) providing legal advice, preparing documents intended to be filed in the Court of King's Bench of Alberts for any person other than himself, and filing or otherwise communicating with the Court of King's Bench of Alberta, 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 proceedings, before the Court of King's Bench of Alberta.
3. For clarity, Kevin Kumar is entirely prohibited from any further participation in any sense in these Actions:
   (i) *Royal Bank of Canada v Patrick Courtoreille also known as Patrick John Courtoreille*, Court of King's Bench Action No.: 2310 00279;
   (ii) *Terry Kerslake v Capital One Bank*, Court of King's Bench Action No. 2304 00761; and
   (iii) *Timothy Lauren Kohut v Capital One Services (Canada) Inc*, Court of King's Bench Action No. 2403 08261.

4. The Clerks of the Court of King's Bench of Alberta shall refuse to accept or file any documents or other materials from Kevin Kumar, unless Kevin Kumar is a named party in the action in question.

Kevin Kumar did not appeal this result.

[75] In the *Bonville*, *Davis*, and *Kohut* UnitedWeStandPeople litigation a different person has been involved; a "Colton Kumar". Since Kevin Kumar has a history of making up fictitious names and entities, this Court considered it possible this is just another pseudonym. On that basis the Court ordered in ***Bonville #1*** at para 27 that Kevin Kumar and Colton Kumar (if there is such a person) shall by July 5 2024 submit to my office and serve on counsel for PC Bank:

1) an Affidavit that:

a) deposes the personal mailing addresses, telephone numbers, and email addresses of Kevin Kumar and Colton Kumar;

b) deposes the URLs of all Internet and social media websites operated by Kevin Kumar and Colton Kumar, directly, or indirectly as UnitedWeStandPeople or any other purported debt elimination service; and

c) attaches as exhibits a Canada or provincial government-issued identification document that includes a photograph and date of birth of Kevin Kumar and Colton Kumar;

2) Written Submissions and Affidavit evidence as to why Colton Kumar should not be subject to the same representative and lawyer activity restrictions imposed on Kevin Kumar in ***Courtoreille*** at para 22; and

3) Written Submissions and Affidavit evidence as to why:

a) Kevin Kumar and/or Colton Kumar should not be made joint and severally subject to pay any costs awards made against the Plaintiffs in the Bonville lawsuit and/or the Davis lawsuit; and

b) Kevin Kumar and/or Colton Kumar have an adequate excuse so that they are not subject to r 10.49(1) of the *Alberta Rules of Court* penalties for their directing and engaging in OPCA litigation.

[76] PC Bank and other potentially relevant litigants were invited to provide submissions and Affidavit evidence concerning Kevin Kumar, Colton Kumar, and the UnitedWeStandPeople business: ***Courtoreille*** at para 29.

[77] Nothing was received from either Kevin Kumar or Colton Kumar by July 5, 2024. That means that Kevin Kumar and Colton Kumar are in *prima facie* contempt of Court in relation to production and submission of the Affidavit with their information, websites, and identification.

[78] PC Bank filed a July 11, 2024 Affidavit sworn by Alma Corado that documents information concerning UnitedWeStandPeople, its operation, and Colton Kumar and Kevin Kumar. I accept this evidence as accurate. First, Colton Kumar is an actual person. A September 18, 2021 obituary of a Joan Anne Kumar indicates Kevin Kumar is Colton Kumar's father. The Corado Affidavit includes information linking these two individuals and their joint participation in the UnitedWeStandPeople scheme. Thus, UnitedWeStandPeople is a father/son operation. I conclude, on a balance of probabilities, that the UnitedWeStandPeople operation is a shared

collaborative venture between Colton Kumar and Kevin Kumar. The Corado Affidavit also provides images of these two individuals. I reproduce these below as Appendices "A" and "B" for the purposes of public, government, and regulatory information and enforcement. This step is appropriate because Colton Kumar and Kevin Kumar did not meet this Court's ***Bonville #1*** at para 27 Order.

[79] Based on the Corado Affidavit, UnitedWeStandPeople appears to now operate under a number of names:

- CreditorControl.ca (https://www.creditorcontrol.ca/), and affiliated social media TikTok page (@iongivafuxxwututhink) and Instagram account (@themoneymink), apparently operated by Colton Kumar;
- UnitedWeStandPeople (https://unitedwestandpeople.com/) and affiliated YouTube account (https://www.youtube.com/@unitedwestandpeople9472), apparently operated by Kevin Kumar;
- ReduceMyDebtByThousands (https://reducemydebtbythousands.com/) and affiliated YouTube account (https://www.youtube.com/@reducemydebtbythousands3734) and Facebook page (https://www.facebook.com/reducemydebtbythousands/); and
- Debt Consolidation in Canada – Beat The Banks – Secrets Exposed (https://www.facebook.com/debtconsolididationincanada/) and YouTube channel (@reducemydebtbythousands4006).

[80] The Corado Affidavit confirms my conclusion in ***Courtoreille*** at paras 5-10 that Kevin Kumar employs OPCA strategies, including endorsing presumptively abusive Strawman Theory concepts and the wet ink signature and securitization schemes. As reviewed above, Colton Kumar is doing the same. On the basis of this information, and the Court's findings in ***Courtoreille***, ***Bonville #1***, and ***Kohut #1***, I conclude that Kevin Kumar and Colton Kumar are collaborators in the UnitedWeStandPeople scam and its broader manifestations. I will generally respond to these two individuals together for that reason.

[81] After the deadlines for submissions set in ***Bonville #1*** at para 27 expired, the Court on July 18, 2024 received an unsigned email from the email address "unitedwestandpeople@gmail.com", which appears to have been directed to counsel for PC Bank, and copied to the Court. That attached an undated electronic document titled "Letter to K.G. NEILSEN Response to order" (sic), and signed by "Colton Kumar Affected Party". In the email and "Letter", Colton Kumar:

1) denies he is involved in any OPCA schemes;

2) discloses he is the private lender in the UnitedWeStandPeople scheme, who operates a business, 1304139BCLTD, in:

> ... which he is under contract with the borrowers to pay, Colton Kumar's actions to validate debts before paying them are entirely within his legal rights and align with consumer protection principles ...

3) states PC Bank and the Court are engaged in fraud;

4) threatening a media and publicity campaign that PC Bank is misleading the Court, and that Loblaws cannot afford the scandal resulting from its lending misconduct with the UnitedWeStandPeople borrowers;

5) that:

> ... any attempt to restrict or shut down Colton Kumar's business websites would violate his rights under the **Canadian Charter of Rights and Freedoms**, specifically Section 2(b), which guarantees freedom of thought, belief, opinion, and expression, including freedom of the press and other media of communication ...

and

6) that the Corado Affidavit does not comply with the "**Canadian Rules of Court**".

[82] I note in relation to these claims that there is no such thing as the "Canadian Rules of Court". PC Bank is not subject to *Charter* prohibitions, since PC Bank is not a government actor: ***Dolphin Delivery Ltd v RWDSV***, Local 580, 1986 CanLII 5 (SCC), [1986] 2 SCR 573; In Canada economic and business activity is not protected by the *Charter*: ***Irwin Toy Ltd v Quebec (Attorney General)***, 1989 CanLII 87 (SCC), [1989] 1 SCR 927, 58 DLR (4th) 577. Furthermore, there is no constitutional right to abuse Court processes: ***Trial Lawyers Association of British Columbia v British Columbia (Attorney General)***, 2014 SCC 59 at para 47.

[83] Colton Kumar's July 18, 2024 correspondence has no legal weight because, as he himself argued, in Alberta documentary evidence must take the form of an Affidavit. Though Colton Kumar was directed to provide evidence in that manner in ***Bonville #1***, he has not done so. Despite that, I accept Colton Kumar's correspondence for two points:

1) Colton Kumar and Kevin Kumar admitting they have received the ***Bonville #1*** and ***Kohut #1*** Memoranda of Decision; and

2) Colton Kumar and Kevin Kumar do not dispute their participation in and direction of the UnitedWeStandPeople scheme.

[84] The Court now moves to three issues.

A. Representation and Litigation Restrictions on Colton Kumar

[85] First, the Court in ***Bonville #1*** requested submissions from Colton Kumar as to why he should not be subject to the same representation and litigation activities as were imposed on Kevin Kumar in ***Courtoreille*** at para 22. In his July 18, 2024 materials Colton Kumar provided no principled argument as to why he should not be subject to the Kevin Kumar ***Courtoreille*** management steps. What is particularly relevant is Colton Kumar instead openly admits he engages the same money-for-nothing / debt elimination schemes as his father, and Colton Kumar declares he is doing nothing wrong.

[86] This Court has a broad and flexible inherent jurisdiction to control its processes, so that the Court may operate effectively to achieve its functions: ***R v Cunningham***, 2010 SCC 10 at para 10; I H Jacob, "The Inherent Jurisdiction of the Court" (1970) 23 Curr Legal Probs 23 at 27-28. That inherent jurisdiction includes the authority to remove lawyers (***MacDonald Estate v***

Martin, 1990 CanLII 32 (SCC), [1990] 3 SCR 1235 at 1245) and determine whether non-lawyers are appropriate representatives, agents, and other kinds of participants in Canadian legal proceedings (***R v Dick***, 2002 BCCA 27; ***Van Nostrand (Re)***, 2024 ABKB 293; ***World Energy GH2 Inc v Ryan***, 2023 NLSC 109 (***Ryan***); ***Lemay v Zen Residential Ltd***, 2023 ABKB 682; ***AVI v MHVB***, 2020 ABQB 489 (***AVI***)).

[87] The law in Canada is clear that a Court does not merely have the authority to restrict and control who acts as a legal representative of any type, but, further, that the Court has a positive obligation to ensure persons appearing before the Court are "... properly represented ...", and "... to maintain the rule of law and the integrity of the Court generally ...": ***R v Dick*** at para 7.

[88] Anyone who uses OPCA concepts abuses the Court: ***Unrau #2*** at para 180. A person who endorses and/or applies OPCA schemes is not an appropriate litigation representative or participant in other persons' litigation: ***R v Dick***; ***Ryan***; ***Dimsdale***; ***Landry***; ***Thomas***; ***AVI***; ***Mukagasigwa v Nkusi***, 2023 ABKB 423, leave to appeal refused 2023 ABCA 272; ***Gauthier v Starr***, 2016 ABQB 213, leave denied 2018 ABCA 14; ***Shannon v The Queen***, 2016 TCC 255.

[89] Colton Kumar's participation in the UnitedWeStandPeople money-for-nothing / debt elimination scheme, both directly and as a directing mind, means Colton Kumar has no legitimate place in the Court of King's Bench of Alberta, except if he, personally, is a litigant. He is not an appropriate litigation representative or *McKenzie* friend. Colton Kumar should have no role in the litigation of other people. I conclude Colton Kumar should not be permitted to participate in the litigation of other people before the Court of King's Bench of Alberta.

[90] Given these conclusions, I direct that Colton Kumar should be subject to the same litigation representation and activity restrictions imposed on Kevin Kumar in ***Courtoreille***:

1. Colton Kumar shall only communicate with the Court of King's Bench of Alberta using the name "Colton Kumar", and not using initials, an alternative name structure, or a pseudonym.

2. Colton Kumar is prohibited from:

   (i) providing legal advice, preparing documents intended to be filed in the Court of King's Bench of Alberta for any person other than himself, and filing or otherwise communicating with the Court of King's Bench of Alberta, 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 proceedings, before the Court of King's Bench of Alberta.

3. For clarity, Colton Kumar is entirely prohibited from any further participation in any sense in these actions:

   (i) *Bonville v President's Choice Financial*, Court of King's Bench of Alberta Action No.: 2403 01300

   (ii) *Davis v President's Choice Financial*, Court of King's Bench of Alberta Action No.: 2401 06187

(iii) *Kohut v Royal Bank of Canada*, Court of King's Bench of Alberta Action No.: 2403 05588; and

(iv) *Royal Bank of Canada v Kohut*, Court of King's Bench of Alberta Action No.: 2403 09627

except to the degree of making submissions and entering Affidavit evidence in relation to r 10.49(1) of the *Alberta Rules of Court* penalty steps engaged in ***Bonville #1*** and this Memorandum of Decision.

4. The Clerk of the Court of King's Bench of Alberta shall refuse to accept or file any documents or other materials from Colton Kumar, unless Colton Kumar is a named party in the action in question.

[91] The Court will prepare the Order giving effect to this part of this Memorandum of Decision. Colton Kumar's approval of that Order is dispensed with pursuant to the *Alberta Rules of Court*. If Colton Kumar disagrees with this result, he should seek a remedy from the Court of Appeal of Alberta.

B. Joint and Several Costs

[92] In ***Bonville #1*** I requested submissions on whether "Kevin Kumar and/or Colton Kumar should not be made joint and severally subject to pay any costs awards made against the Plaintiffs in the Bonville lawsuit and/or the Davis lawsuit". If ordered, that would mean Colton Kumar and Kevin Kumar would each be equally liable as Ms. Bonville and Ms. Davis for any unfavourable cost awards made against Ms. Bonville and Ms. David.

[93] PC Bank took the position that step was appropriate. Colton Kumar and Kevin Kumar provided no arguments as to why they should not be made jointly and severally liable for the costs awards against their clientele. That said, it appears in his July 18, 2024 materials, Colton Kumar did claim his activities are legal, legitimate, and nothing more than ordinary business practices. Colton Kumar's correspondence claims that:

> ... all similar cases in Ontario, Saskatchewan, and British Columbia have been met with upstanding due process for all parties involved, and adhere to fundamental fair trade practices.

[94] I presume this claim is supposedly an explanation for why the UnitedWeStandPeople scam is legitimate. However, I put no weight on that, given: (1) no Affidavit evidence supports that, and (2) Colton Kumar has not provided a single Court judgment that rejects the wet ink signature and securitization case law reviewed above, or Court filings that would substantiate his claim.

[95] Colton Kumar claims he is not engaged in prohibited OPCA-based activities. I have reviewed above why that is incorrect, and, instead, he and Keven Kumar's activities are only one instance of an international pattern of parallel pseudolaw money-for-nothing / debt elimination scams. I find as fact that Colton Kumar is an OPCA guru, like Kevin Kumar. Both propagate and sell pseudolaw scams to make money.

[96] Additional relevant factors are:

- Evidence shows that Colton Kumar and Kevin Kumar are facilitating and instructing the UnitedWeStandPeople clientele, including both in interactions with lenders, but also appearing in Court.
- Colton Kumar and Kevin Kumar are operating websites in which they, personally, advertise and promote the UnitedWeStandPeople scam with videos, OPCA declarations, and promises that are obviously false in law. They openly seek to recruit others to (purportedly) benefit from their special knowledge money-for-nothing and debt elimination schemes.
- Colton Kumar has disclosed that he, personally, is the anonymous private lender who purports to be eager to take over other peoples' debts. If true, then Colton Kumar has taken no steps to actually put his money where his mouth is. Instead, until now, Colton Kumar has concealed he is the private lender from the Court and the lenders. I infer that Colton Kumar has no legitimate intention to take on other peoples' debts, unless he plans to "pay" for those debts using the Strawman Theory concepts that were employed by Kevin Kumar during the PrivateSectorAct.com period, and that Kevin Kumar has advertised on the UnitedWeStandPeople website: ***Courtoreille*** at paras 8-10.

[97] Beyond that, as I have previously reviewed, Colton Kumar is nothing but an intruding busybody in other peoples' loan contract arrangements. If he wants to engage in contractual arrangements with debtors, that is his business, but privity of contract means he cannot step into a debtor's shoes and make demands or dictate the terms of a loan contract, unless the lender permits him to do so.

[98] The problem, as I explained in ***Bonville #1*** at para 13, is that promoters like Colton Kumar and Kevin Kumar are out of reach of the usual tools available to Courts that could alter or mitigate the misconduct of these pseudolaw guru promoters:

> The current situation with the emerging UnitedWeStandPeople OPCA debt elimination / "money for nothing" scam is even worse. One or more individuals are advertising on the Internet that they have secret techniques that will eliminate debt. That has now led to a large array of different but centrally coordinated litigants entering into the Court apparatus, using parallel techniques and documents, but in separate litigation processes. This litigation debt elimination business is the proverbial hydra with many heads, sprouting from a body that is out of reach.

[99] I conclude, in the absence of other meaningful tools to manage Internet-based money-for-nothing / debt elimination scams, that the persons who direct and benefit from these schemes should also be directly responsible for the expense they inflict on lenders. For that reason, I order that Colton Kumar and Kevin Kumar are each liable, on a joint and several basis, for any cost award made against Ms. Bonville and Ms. Davis in the *Bonville Attack Lawsuit* and the *Davis Attack Lawsuit*.

[100] Furthermore, I conclude this gurus/promoters liability for costs mechanism should be a general principle of law. Gurus/promoters of pseudolaw-based money-for-nothing / debt elimination schemes should be jointly and severally liable for cost awards made against their customers. Having a Court take that step will usually require either:

1) Evidence that the guru/promoter was a courtroom participant in an OPCA-based money-for-nothing / debt elimination process. Examples where that threshold has been established include Kevin Kumar in ***Courtoreille***, "minister" Mr. Belanger in ***Dimsdale***, and Mr. Temple in ***Thomas***. In these circumstances, the guru/promoter's direct participation is sufficient basis for the Court to immediately order joint and several costs in favour of the lender.

2) Evidence that the guru/promoter is:

   a) acting as a litigation representative and/or agent during interactions with the lender, purporting to advance pseudolaw-based money-for-nothing / debt elimination claims; and/or

   b) preparing documents, either directed to the lender or the Court, that purport to advance pseudolaw-based money-for-nothing / debt elimination claims.

3) Evidence that the guru/promoter is engaged in Internet advertising of pseudolaw-based money-for-nothing / debt elimination schemes in which the guru/promoter is directly or indirectly obtaining benefits from those claims, and evidence which links the debtor's OPCA-based activities to the guru/promoter's scheme.

[101] I conclude that Colton Kumar and Kevin Kumar satisfy all these criteria for joint and several costs. It is only fair that lenders be able to recover their expenses from the individuals who caused those unnecessary and illegal costs. In relation to the third category, I note that the threshold evidence to link the guru/promoter to a particular scheme will probably develop as Courts evaluate under what exact circumstances imposing this joint and several cost structure is appropriate.

[102] Nevertheless, I conclude this category should be evaluated generously, keeping in mind the objectives:

1) of Courts acting to protect their own functions, as is mandated in ***British Columbia (Attorney General) v Council of Canadians with Disabilities***, 2022 SCC 27 at para 1;

2) of fairness to lenders who face abuse by arms-length money-for-nothing / debt elimination guru/promoter that are otherwise out of reach;

3) that money-for-nothing / debt elimination guru/promoters experience meaningful negative consequences for their actions; and

4) upholding the confidence of the public in the rule of law and enforcement of contracts.

[103] To illustrate this approach, and while not determining this point as a question of law and fact, I would, for example, consider that "Queen" Ms. Didulo might be jointly and severally subject to cost awards against "her subjects", when those followers refuse to pay their debts on the basis of Ms. Didulo's "Royal Decrees" and/or promissory notes. In coming to that determination, I note:

1) Ms. Didulo is claiming special knowledge and authority to eliminate debts;

2) people are relying on these Royal Decrees and promissory notes to attempt to resist, frustrate, and/or negate foreclosures and other debt collection processes;

3) Ms. Didulo's followers often end up in Court, where they inevitably lose, causing unnecessary expense and resource wastage to the lenders and Courts; and

4) Ms. Didulo is obtaining a benefit from her claims by obtaining money from her followers.

[104] These observations suggest that, with the appropriate evidence, a Court might impose joint and several costs against Ms. Didulo where the debtor attempted to resist, frustrate, or negate a debt collection step on the basis of Ms. Didulo's so-called authority.

[105] If Colton Kumar and/or Kevin Kumar disagree with this step then they should seek a remedy with the Court of Appeal of Alberta. Given my analysis above, I note that the joint and several costs award now imposed in the *Bonville Attack Lawsuit* and the *Davis Attack Lawsuit* would probably also be appropriate for the *Kohut Attack Lawsuit* and the *Kohut Defence Lawsuit*, and any other Court of King's Bench of Alberta matters that involve UnitedWeStandPeople money-for-nothing / debt elimination strategies.

C. r 10.49(1) of the *Alberta Rules of Court* Penalties Against Colton Kumar and Kevin Kumar

[106] The joint and several costs awards above are intended to provide a meaningful sanction against the gurus/promoters of the UnitedWeStandPeople scheme, and to help cure the illegal pseudolaw-based injuries caused to the lender PC Bank because of Colton Kumar's and Kevin Kumar's activities.

[107] However, that does not mitigate and/or deter injury to the Court, and how the Court has been forced to waste its time and resources in responding to this pseudolaw litigation. Chief Justice Wagner of the Supreme Court of Canada recently in ***British Columbia (Attorney General) v Council of Canadians with Disabilities***, at para 1 defined "access to justice":

> Access to justice depends on the efficient and responsible use of court resources. Frivolous lawsuits, endless procedural delays, and unnecessary appeals increase the time and expense of litigation and waste these resources. To preserve meaningful access, courts must ensure that their resources remain available to the litigants who need them most - namely, those who advance meritorious and justiciable claims that warrant judicial attention. (Emphasis added.)

[108] Thus, it is up to Courts themselves to protect their function. When faced with arms-length pseudolaw money-for-nothing / debt elimination promoters, I concluded in ***Bonville #1*** that steps by the Court itself to impose sanctions for damage inflicted on the Court by OPCA gurus like Colton Kumar and Kevin Kumar should be evaluated. At paragraph 27(3)(b) I invited Colton Kumar and Kevin Kumar to make submissions as to why:

> ... Kevin Kumar and/or Colton Kumar have an adequate excuse so that they are not subject to r 10.49(1) of the Alberta Rules of Court penalties for their directing and engaging in OPCA litigation.

[109] I interpret the July 18, 2024 correspondence of Colton Kumar to be a candidate excuse: (1) UnitedWeStandPeople does not engage in OPCA strategies, and (2) Colton Kumar is just a

legitimate businessman making peoples' debts go away. I have rejected these grounds. Kevin Kumar has not directly provided any explanation of why he should not be penalized.

[110] Rather than immediately impose r 10.49(1) of the *Alberta Rules of Court* penalties at this point, I provide Colton Kumar and Kevin Kumar one more opportunity to establish they should not be subject to r 10.49(1) penalties. First, they are in *prima facie* contempt of court for not providing the Affidavit evidence required in ***Bonville #1*** at para 27. Whether they purge that contempt is a factor I will consider in whether to impose a r 10.49(1) of the *Alberta Rules of Court* penalty, and, if so, the quantum of that penalty.

[111] Colton Kumar says he is the private lender who will meet the Bonville, Davis, and Kohut debts. If Colton Kumar is truly a good-faith actor, as he claims, then he can demonstrate that by paying into Court funds to pay those debts. If he does not, that has obvious implications as to whether his intentions as the private lender are, or are not, genuine.

[112] Further, a major objective of any r 10.49(1) of the *Alberta Rules of Court* penalty is not just to penalize abuse of the Court's processes, but to deter further abuse. To date Colton Kumar and Kevin Kumar have said what they do is legal. I have extensively documented why that is not correct, and, instead, their UnitedWeStandPeople scheme is just another example of a commonplace international pseudolaw money-for-nothing / debt elimination strategy. Now Colton Kumar and Kevin Kumar have no excuse to believe that what they do is correct in law. Thus, I once again invite Colton Kumar and Kevin Kumar to provide submissions and Affidavit evidence that they are not engaged in illegal pseudolaw activities, and, if so, that they have an adequate excuse for their conduct. Those submissions are due on September 6, 2024. If no submissions are received the Court will move to immediately evaluate the requirement for and potential quantum of appropriate penalties against Colton Kumar and Kevin Kumar in relation to the *Bonville Attack Lawsuit*, *Davis Attack Lawsuit*, and *Kohut Attack Lawsuit* UnitedWeStandPeople Court of King's Bench of Alberta litigation.

IV. Conclusion

[113] I very strongly suggest that Ms. Bonville, Ms. Davis, Mr. Kohut, Colton Kumar and Kevin Kumar immediately consult with and retain lawyers. This Memorandum of Decision has provided a detailed guide forward as to impending steps in their litigation, as well as the consequences of their choices. They should get legal advice to help minimize negative consequences.

[114] This Memorandum of Decision and the corresponding Order will be sent to Kevin Kumar and Colton Kumar by email to the email address used by Colton Kumar in communicating with the Court: UnitedWeStandPeople@gmail.com. Ms. Bonville and Mr. Kohut will be served to their email addresses in their Court of Appeal of Alberta Appeal Notices: claire@bonville.net, tim.kohut@outook.com, respectively.

[115] Copies of this Memorandum of Decision and the corresponding Order will be directed to Counsel for:

- Capital One Bank in the *Terry Kerslake v Capital One Bank*, Court of King's Bench Action No. 2304 00761 proceeding; and
- Capital One Services (Canada) Inc. in the *Timothy Lauren Kohut v Capital One Services (Canada) Inc*, Court of King's Bench Action No. 2403 08261 proceeding.

[116] Mindful of the ***Pintea v Johns***, 2017 SCC 23 instruction that Canadian judges shall provide information on litigation alternatives to persons not represented by lawyers, if Ms. Bonville, Ms. Davis, Mr. Kohut, Kevin Kumar, and/or Colton Kumar seek to challenge steps imposed in this Memorandum of Decision, then they should seek a remedy from the Court of Appeal of Alberta.

Dated at the City of Edmonton, Alberta this 20th day of August, 2024.

K.G. Nielsen
A.C.J.C.K.B.A.

Appearances by writing:

Lindsey E. Miller
Field Law LLP
for the Defendant/Plaintiff by Counterclaim President's Choice Financial

Stephanie C. Chau
Witten LLP
for the Defendant/Plaintiff Royal Bank of Canada

Colton Kumar
Self-represented Third Party

Appendix "A" – Instagram Page and Photograph of Colton Kumar

Appendix "B" – Still From Video Recording of Kevin Kumar

Court of King's Bench of Alberta

Citation: Bonville v President's Choice Financial, 2024 ABKB 546

Date:
Docket: 2403 01300; 2401 06187; 2403 05588; 2403 09627
Registry: Edmonton

Between:

Action No. 2403 01300
Registry: Edmonton

Claire Bonville

Plaintiff

- and -

President's Choice Financial

Defendant

And between:

Action No. 2401 06187
Registry: Calgary

Sydney Socorro M. Davis

Plaintiff

- and -

President's Choice Financial

Defendant

And between:

Action No. 2403 05588
Registry: Edmonton

Timothy Lauren Kohut

Plaintiff

- and -

Royal Bank of Canada

Defendant

And between:

Action No. 2403 09627
Registry: Edmonton

Royal Bank of Canada

Plaintiff

- and -

Timothy Kohut, also known as Timothy Lauren Kohut

Defendant

Memorandum of Decision
of Associate Chief Justice
K.G. Nielsen

I. Introduction

[1] This Memorandum of Decision concludes a litigation management process conducted in Memoranda of Decision reported as ***Bonville v President's Choice Financial***, 2024 ABKB 356

(***Bonville #1***) and ***Bonville v President's Choice Financial***, 2024 ABKB 483 (***Bonville #2***). ***Bonville #1*** and ***Bonville #2*** responded to a collection of Alberta Court of King's Bench of Alberta lawsuits that were each part of a common Organized Pseudolegal Commercial Argument (OPCA) (***Meads v Meads***, 2012 ABKB 571 (***Meads***) money-for-nothing / debt elimination scam operated by a father and son duo, Colton Kumar and Kevin Kumar, under a number of names, but chiefly "UnitedWeStandPeople". Three individuals - Claire Bonville (Ms. Bonville), Sydney Socorro M. Davis (Ms. Davis), and Timothy Kohut (Mr. Kohut) - used the services of UnitedWeStandPeople to conduct illegal and abusive OPCA defences intended to: (1) block debt collection by lenders; and (2) to retaliate against the lenders for alleged bad conduct, and because the debts in question purportedly did not exist.

[2] ***Bonville #2*** set a deadline of September 6, 2024 for Ms. Bonville, Ms. Davis, Mr. Kohut, Colton Kumar and Kevin Kumar to make responses, and/or make payments of security for costs to the Clerk of the Court pursuant to r 4.22 of the *Alberta Rules of Court*, Alta Reg 124/2010. None of these individuals took the steps directed or made submissions to this Court. As a consequence, and in the interest of judicial economy, this Memorandum of Decision will not conduct a detailed review of this litigation, and instead relies on the analysis and conclusions in ***Bonville #1***, ***Bonville #2***, and ***Royal Bank of Canada v Courtoreille***, 2024 ABKB 302 (***Courtoreille***) to describe the relevant litigation, the UnitedWeStandPeople scam, and that scam's promoters. This Memorandum of Decision should therefore be read in conjunction with these three decisions.

II. The Debtors - Bonville, Davis, and Kohut

[3] The situation for the three debtors and the Court's steps in response are detailed in ***Bonville #2*** at paras 39-71. All three debtors engaged in similar conduct, or, more specifically, UnitedWeStandPeople appears to have directed parallel steps on behalf of these debtors. The debtors:

1) claimed that they owed no debts because the lender had not produced a "wet ink signature" contract, and because the lender had not disproven the debts were "securitized"; and

2) sued for damages, alleging bad conduct by the lenders.

[4] ***Bonville #2*** at paras 18-38 reviewed the law that rejected the money-for-nothing / debt elimination UnitedWeStandPeople scam as just the most recent duplicate of the same baseless claims that have been previously encountered worldwide. The law is thus very clear, in Canada and in other jurisdictions, that these concepts are consistently rejected and classified as abusive strategies, marketed by unscrupulous people.

[5] This Court has adopted a "put your money where your mouth is" rule when a litigant advances a known and baseless abusive money-for-nothing / debt elimination scheme. The debtors were instructed to by September 6, 2024, either:

1) pay into Court security for costs amounts, which if received would result in their legal proceedings and defences continuing; or

2) if no security for costs payment was received, the debtors' lawsuits/defences would be struck out, costs imposed, and the debtors were instructed to make submissions on why they should not be subject to a r 10.49(1) of the *Alberta*

Rules of Court penalty for their misuse and abuse of Court processes for ulterior, improper purposes.

[6] No responses or submissions were received from the debtors. The debtors did not pay the r 4.22 of the *Alberta Rules of Court* security for costs amounts. As a consequence:

Ms. Bonville:

- the *Bonville v President's Choice Financial*, Court of King's Bench of Alberta Action No. 2403 01300 Statement of Claim is struck out;
- the *Bonville v President's Choice Financial* Statement of Defence to Counterclaim is struck out;
- President's Choice Financial is granted judgment in the sum of $7,801.68 along with interest as specified in the Counterclaim at paragraph 14(b);
- President's Choice Financial is awarded $5,000 in costs, to be paid forthwith by Ms. Bonville; and
- Colton Kumar and Kevin Kumar are jointly and severally liable for the $5,000 costs award in favour of President's Choice Financial.

Ms. Davis:

- the *Davis v President's Choice Financial*, Court of King's Bench of Alberta Action No. 2401 06187 Statement of Claim is struck out;
- the *Davis v President's Choice Financial* Statement of Defence to Counterclaim is struck out;
- President's Choice Financial is granted judgment in the sum of $6,060.08 along with interest as specified in the Counterclaim at paragraph 15(b);
- President's Choice Financial is awarded $5,000 in costs, to be paid forthwith by Ms. Davis; and
- Colton Kumar and Kevin Kumar are jointly and severally liable for the $5,000 costs award in favour of President's Choice Financial.

Mr. Kohut:

- the *Kohut v Royal Bank of Canada*, Court of King's Bench of Alberta Action No. 2403 05588, May 3, 2024 Noting in Default is set aside;
- the *Kohut v Royal Bank of Canada* Statement of Claim is struck out;
- The *Royal Bank of Canada v Kohut*, Court of King's Bench of Alberta Action No. 2403 09627 Statement of Defence is struck out;
- judgment is ordered in favour of Royal Bank of Canada in *Royal Bank of Canada v Kohut*, and Mr. Kohut is ordered to pay Royal Bank of Canada the sum of $21,015.54 debt and post-April 26, 2024 interest claimed; and
- Royal Bank of Canada is awarded $15,000 in costs, to be paid forthwith by Mr. Kohut.

[7] Ms. Bonville, Ms. Davis, and Mr. Kohut were instructed that if they did not pay the security for costs ordered in ***Bonville #2*** that they may be subject to r 10.49(1) of the *Alberta Rules of Court* penalties for having wasted this Court's resources by engaging proxies to advance known, long-denounced OPCA schemes with the intention of avoiding legal obligations and inflicting cost upon the lenders. The Court instructed the debtors to explain:

1) how the debtor had not contravened or failed to comply with the *Alberta Rules of Court*, or a Practice Note or direction of the Court, by advancing an unmeritorious and abusive OPCA proceeding for ulterior bad faith purposes; and/or

2) why the debtor had an adequate excuse for his or her initiating and pursuing their money-for-nothing / debt elimination litigation.

[8] I note that ***Bonville #2*** provided a very detailed analyses of why the UnitedWeStandPeople scheme was wrong in law and presumptively advanced for ulterior, bad faith purposes. I also pointed the debtors to ***Meads*** and other general authorities on the false and abusive not-law character of OPCA strategies, and reviewed Colton Kumar's and Kevin Kumar's known Court and litigation scammer history. I further observed that the amounts claimed by the debtors were disproportionate, and not potentially grounded in pleadings that explained, for example, why Ms. Bonville was owed $100,000 for steps by the lender to collect an outstanding debt of $7,801.68.

[9] I also cited the r 1.2 general purpose and foundational principles provisions of the *Alberta Rules of Court*, which impose these obligations on litigants:

> ... the parties must, jointly and individually during an action,
>
> (a) identify or make an application to identify the real issues in dispute and facilitate the quickest means of resolving the claim at the least expense,
>
> (b) periodically evaluate dispute resolution process alternatives to a full trial, with or without assistance from the Court,
>
> (c) refrain from filing applications or taking proceedings that do not further the purpose and intention of these rules, and
>
> (d) when using publicly funded Court resources, use them effectively.

[10] In light of the non-response by the debtors to the request for r 10.49(1) of the *Alberta Rules of Court* submissions, I conclude that the debtors' litigation has interfered with the proper and efficient administration of justice:

1) their OPCA litigation strategy is globally identified in law as illegal, unknown to Canadian law, and an abuse of the Court and its processes;

2) the specific wet ink signature and securitization OPCA schemes employed by the debtors are notoriously false and abusive, which creates a presumption these money-for-nothing / debt elimination strategies were deployed for ulterior and bad faith purposes;

3) the debtors had explicitly employed a scam, UnitedWeStandPeople, and its non-lawyer operators to act as their litigation agents/representatives;

4) the debtors engaged in baseless retaliatory steps that sought excessive and ungrounded remedies not supported by any relevant particulars; and

5) the debtors were given the opportunity to "put their money where their mouth is", to establish they engaged this litigation in good faith, as fair-dealing litigants, but instead did not take that opportunity, leading to the inference their attack/counterattack steps did not have a legitimate purpose, but were conducted to inflict expense, cause delay, and defeat legitimate legal rights.

[11] Globally, these steps breach the debtors' r 1.2 of the *Alberta Rues of Court* obligations to not abuse and misuse Court of King's Bench of Alberta processes. None of the debtors made any submissions on why their actions had an adequate excuse.

[12] My response to the debtors might be different if they had provided at least some indication they understood their errors and misconduct, and would not engage in parallel activity in the future. But they did not. While that non-response does not aggravate their misconduct, the debtors' not acknowledging the detailed reasons and law presented to them in ***Bonville #2*** re-emphasizes why a meaningful and tangible step is appropriate so that the debtors are subject to negative consequences for misusing Court processes to attempt to evade and frustrate collection of legitimate debts.

[13] I, therefore, direct that Ms. Bonville, Ms. Davis, and Mr. Kohut are each ordered to pay a $5,000 r 10.49(1) of the *Alberta Rules of Court* penalty to the Court of King's Bench of Alberta Clerk of the Court. This, I stress, is not a debt owed to the Court, but a penalty due to the Province of Alberta for the debtors wasting state and taxpayer resources in their improper attempts to apply a money-for-nothing / debt elimination scheme. The debtors should be aware that if these amounts are not paid, that the Alberta government may engage its debt collection and recovery processes to enforce this Court's Order by garnishees and other enforcement steps.

[14] Counsel for President's Choice Financial and Royal Bank of Canada shall prepare and serve the Orders giving effect to Part II of this Memorandum of Decision. The approval of Ms. Bonville, Ms. Davis, Mr. Kohut, Colton Kumar and Kevin Kumar's of these Orders is dispensed with pursuant to the *Alberta Rules of Court*.

III. Colton Kumar and Kevin Kumar

[15] ***Bonville #1***, ***Bonville #2***, and ***Courtoreille*** review and summarize the UnitedWeStandPeople promoters Colton Kumar and Kevin Kumar father and son team litigation and their OPCA activities. In ***Bonville #1***, I instructed Colton Kumar and Kevin Kumar provide:

1) Affidavit evidence documenting their identification information and Internet activity;

2) written argument and Affidavit evidence on why Colton Kumar should not be made subject to prohibitions on representative/agent activities before this Court that parallel those previously imposed on his father in ***Courtoreille***;

3) written submissions and Affidavit evidence on whether Colton Kumar and Kevin Kumar should not be made jointly and severally liable for costs imposed against Ms. Bonville and Ms. Davis; and

4) written submissions and affidavit evidence on whether Colton Kumar and Kevin Kumar should not be subject to a r 10.49(1) of the *Alberta Rules of Court* penalty for directing and engaging in OPCA litigation.

[16] Neither Colton Kumar nor Kevin Kumar responded to these instructions. In ***Bonville #2*** I imposed representative/agent prohibitions on Colton Kumar and Kevin Kumar (paras 85-91), and made Kevin Kumar and Colton Kumar jointly and severally liable for any costs awards imposed on their clients Ms. Bonville and Ms. Davis (paras 92-105).

[17] Colton Kumar and Kevin Kumar did not provide the Affidavit as required in ***Bonville #1*** at para 27, and remain in *prima facie* contempt of the Court on that requirement.

[18] Kevin Kumar has not responded to the instructions and submissions requirements in ***Bonville #1*** and ***Bonville #2***, though he has posted multiple videos on the UnitedWeStandPeople websites that reject and denounce the Court of King's Bench of Alberta's decisions and authority. Kevin Kumar is obviously aware of the ***Bonville #1*** and ***Bonville #2*** decisions. Colton Kumar and Kevin Kumar on July 18, 2024 copied the Court on an email that comments on and rejects the Court's conclusions in this litigation, and states everything Colton Kumar and Kevin Kumar have done is legal and appropriate. It is the bank lenders who engage in fraud: ***Bonville #2*** at paras 81-83. Both Colton Kumar and Kevin Kumar were therefore clearly aware of and had notice of this Court's actions, instructions, and decisions.

[19] Thus, Colton Kumar and Kevin Kumar *intentionally* made no response to the ***Bonville #1*** instruction that they make submissions on whether they should be subject to a r 10.49(1) of the *Alberta Rules of Court* penalty for their UnitedWeStandPeople activities. Rather than immediately proceed to determine whether a penalty of that kind should be imposed, I instead in ***Bonville #2*** at paras 110-112 gave Colton Kumar and Kevin Kumar one final chance to make submissions to explain their conduct, due September 6, 2024:

> ... Rather than immediately impose r 10.49(1) of the *Alberta Rules of Court* penalties at this point, I provide Colton Kumar and Kevin Kumar one more opportunity to establish they should not be subject to r 10.49(1) penalties. First, they are in *prima facie* contempt of court for not providing the Affidavit evidence required in ***Bonville #1*** at para 27. Whether they purge that contempt is a factor I will consider in whether to impose a r 10.49(1) of the *Alberta Rules of Court* penalty, and, if so, the quantum of that penalty.
>
> ... Colton Kumar and Kevin Kumar says he is the private lender who will meet the Bonville, Davis, and Kohut debts. If Colton Kumar and Kevin Kumar is truly a good-faith actor, as he claims, then he can demonstrate that by paying into Court funds to pay those debts. If he does not, that has obvious implications as to whether his intentions as the private lender are, or are not, genuine.
>
> ... Further, a major objective of any r 10.49(1) of the *Alberta Rules of Court* penalty is not just to penalize abuse of the Court's processes, but to deter further abuse. To date Colton Kumar and Kevin Kumar have said what they do is legal. I have extensively documented why that is not correct, and, instead, their UnitedWeStandPeople scheme is just another example of a commonplace international pseudolaw money-for-nothing / debt elimination strategy. Now Colton Kumar and Kevin Kumar have no excuse to believe that what they do is

> correct in law. Thus, I once again invite Colton Kumar and Kevin Kumar to provide submissions and Affidavit evidence that they are not engaged in illegal pseudolaw activities, and, if so, that they have an adequate excuse for their conduct. Those submissions are due on September 6, 2024. If no submissions are received the Court will move to immediately evaluate the requirement for and potential quantum of appropriate penalties against Colton Kumar and Kevin Kumar in relation to the Bonville Attack Lawsuit, Davis Attack Lawsuit, and Kohut Attack Lawsuit UnitedWeStandPeople Court of King's Bench of Alberta litigation.

[20] Kevin Kumar has made no response. Colton Kumar and Kevin Kumar on August 30, 2024 filed a Notice of Appeal of ***Bonville #2*** with the Court of Appeal of Alberta: *Kumar v PC Financial*, Action No. 2403 0203AC. The entire grounds of appeal are: "Decision is unreasonable and not supported by the evidence".

[21] Since neither of Colton Kumar nor Kevin Kumar have either explained why their conduct does not abuse this Court and the lender parties defendants, nor identified an adequate excuse, I conclude that their actions breach the r 1.2 of the *Alberta Rues of Court* obligation on Court participants to not abuse and misuse Court of King's Bench of Alberta processes, and constitute the unlicenced practice of law before the Court of King's Bench of Alberta. Further, they are OPCA promoters, which in ***Meads*** were called "gurus", individuals who profit off deploying false not-law concepts that damage their clientele, opposing parties, and waste and misuse Court resources.

[22] The specific wet ink signature and securitization OPCA scams sold by Colton Kumar and Kevin Kumar are so notoriously false and abusive that using these strategies creates a presumption these money-for-nothing / debt elimination strategies were deployed for ulterior and bad faith purposes. I note that what Colton Kumar and Kevin Kumar are selling is, in fact, nothing new, but simply copied from other OPCA gurus worldwide who have unsuccessfully used these same arguments for over a decade.

[23] Colton Kumar and Kevin Kumar operate online, advertising their scam with the promise that it will allow persons to use Court processes to illegally avoid legitimate debts, by frustrating and delaying legitimate Court litigation processes, and consequently wasting Court resources. The demands made by the UnitedWeStandPeople promoters on behalf of their clientele were excessive, disproportionate, and intended to intimidate opposing parties by running up litigation costs.

[24] Colton Kumar, who claims to be a legitimate businessman who buys up debt, was given the opportunity to "put his money where his mouth is", to substantiate his claim that he is eager to assist the debtors, but is only frustrated in doing so by the lenders not complying with his purportedly legitimate requirements. Colton Kumar did not provide funds to substantiate his claim, leading to the inference he never would pay money to anyone, and the UnitedWeStandPeople scheme is simply a sham.

[25] Given these conclusions, I find that Colton Kumar and Kevin Kumar have interfered with the proper and efficient administration of justice and have provided no adequate excuse. I, therefore, impose $10,000 r 10.49(1) of the *Alberta Rules of Court* penalties on each of Colton Kumar and Kevin Kumar that are to be paid, forthwith, to the Clerk of the Court. As I previously

explained, these are debts owed to the Alberta government, and if not paid may result in collection processes against Colton Kumar and Kevin Kumar.

[26] I also caution Colton Kumar and Kevin Kumar that if they, under the umbrella of the UnitedWeStandPeople scam or its related schemes, again attempt to interfere in other people's litigation before the Court of King's Bench of Alberta, they can anticipate further and larger r 10.49(1) of the *Alberta Rules of Court* penalties, following this Court's established practice: ***Royal Bank of Canada v Anderson***, 2022 ABQB 577. These penalties will increase, stepwise, with each instance of bad conduct, and may be further aggravated by the nature of Colton Kumar's and Kevin Kumar's interference, abuse, and wastage of the Court's limited resources: e.g., ***Docken v Anderson***, 2023 ABKB 291 at paras 27, 30; ***Docken v Anderson***, 2023 ABKB 474 at para 17.

[27] The Court will prepare and serve the Order giving effect to Part III of this Memorandum of Decision. The approval of this Order by Colton Kumar and Kevin Kumar is dispensed with pursuant to the *Alberta Rules of Court*.

IV. Conclusion

[28] Ms. Bonville, Ms. Davis, and Mr. Kohut are subject to litigation steps, costs awards, and r 10.49(1) of the *Alberta Rules of Court* penalties. I am aware these individuals have initiated appeals of earlier decisions of this Court. If they disagree with the results of this Memorandum of Decision, they should seek a remedy from the Court of Appeal of Alberta. I very strongly suggest that Ms. Bonville, Ms. Davis, and Mr. Kohut immediately consult with and retain lawyers. They have not been well served by Colton Kumar and Kevin Kumar, and face the possibility of additional negative consequences.

[29] Colton Kumar and Kevin Kumar are also subject to r 10.49(1) of the *Alberta Rules of Court* penalties. They, too, would benefit from legal counsel and advice.

[30] I caution Ms. Bonville, Ms. Davis, Mr. Kohut, and Colton Kumar and Kevin Kumar that further abuse of the Court of King's Bench of Alberta will have negative consequences, including possible court access restrictions, enhanced costs, additional fines and penalties, and referrals to the Crown for contempt proceedings.

[31] This Memorandum of Decision and the corresponding Order will be sent to Kevin Kumar and Colton Kumar by email to the email address used by Colton Kumar and Kevin Kumar in communicating with the Court: UnitedWeStandPeople@gmail.com. Ms. Bonville and Mr. Kohut will be served to their email addresses in their Court of Appeal of Alberta Appeal Notices: claire@bonville.net, tim.kohut@outook.com, respectively. Ms. Davis will be served at her mailing address in her Court of Appeal of Alberta Appeal Notice: 125 Eldorado Close NE, Calgary, AB, T1Y 6T3

[32] Copies of this Memorandum of Decision and the corresponding Order will be directed to Counsel for:

- Capital One Bank in the *Terry Kerslake v Capital One Bank*, Court of King's Bench Action No. 2304 00761 proceeding; and
- Capital One Services (Canada) Inc. in the *Timothy Lauren Kohut v Capital One Services (Canada) Inc*, Court of King's Bench Action No. 2403 08261 proceeding.

[33] I thank Counsel for President's Choice Financial for its very helpful participation in this litigation. I encourage other lenders who encounter OPCA money-for-nothing / debt elimination scams such as the UnitedWeStandPeople scheme to seek steps from this Court to respond to and control these scams, including targeting the hidden hands who direct these proceedings. In this sense, the Court and lenders face a common overarching challenge, but in related ways. Managing these abusive schemes is necessarily a collective effort, as is developing the mechanisms to end this waste of Canadian Court resources.

Dated at the City of Edmonton, Alberta this 16th day of September, 2024.

K.G. Nielsen
A.C.J.C.K.B.A.

Appearances by writing:

Lindsey E. Miller
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Colton Kumar and Kevin Kumar
Self-Represented Third Party

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.*

Table of Contents

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) 273 [***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:

<u>*Grepe v Loam Orders*</u> - interlocutory case management steps that are imposed and operate inside a single existing legal dispute.

<u>Vexatious litigant orders</u> - 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):

> ... <u>The possibilities are unlimited</u>. What is important is that the remedy should always <u>be proportionate to the mischief that needs remedying</u>. [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) persistently bringing proceedings to determine an issue that has already been determined by a court of competent jurisdiction;
> >
> > ...
> >
> > (d) persistently 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 to prevent future abuse of the court process. ..." [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, subject to any terms or conditions it may impose, grant permission ..."
>
> *Family Law Act*, s 91(2): "... The court, before granting permission ... may impose any terms as a condition 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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1920341 Alberta Ltd v Jonsson, 2018 ABCA 231.

7451190 Manitoba Ltd v CWB Maxium Financial Inc, 2019 MBCA 28.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Wu v. Canada (Attorney General),* 2022 BCSC 2084

Date: 20221130
Docket: 33318
Registry: Vancouver

Between:

Weimin Wu

Applicant

And

Attorney General of Canada

Respondent

Before: The Honourable Madam Justice Forth

Reasons for Judgment

The Applicant, appearing in person:	W. Wu
Counsel for the Respondent:	S. Rapley
Place and Date of Hearing:	Vancouver, B.C. September 28, 2022
Place and Date of Judgment:	Vancouver, B.C. November 30, 2022

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Introduction

[1] The applicant, Weimin Wu, is an inmate at the Mission Institution in Mission, BC. and filed a Writ of *Habeas Corpus* ("Writ") on August 30, 2022. On September 16, 2022, the respondent, the Attorney General of Canada ("AGC"), served an application seeking to have the Writ struck as disclosing no reasonable claim and being frivolous, vexatious, embarrassing, and an abuse of the court process. The respondent further seeks a declaration declaring Mr. Wu a vexatious litigant pursuant to s. 18 of the *Supreme Court Act*, R.S.B.C. 1996, c. 443, and that he be precluded from commencing any future legal actions without leave of the Court.

[2] On October 4, 2022, the Supreme Court of BC, Vancouver Registry, received Mr. Wu's application response via mail. The application response is addressed to the respondent although it is unclear if the respondent has been served this document. I permitted it to be filed since, in my view, there was no new information contained in it that would impact my decision on the respondent's application before me.

[3] For the reasons set out below, I grant the respondent's application to strike the Writ. Further, I grant the vexatious litigant order but not with the condition that the respondent requested.

Factual Background

[4] Mr. Wu is a federal inmate at Mission Institution. He was arrested on March 11, 1992 for the second-degree murder of his ex-wife. He pled guilty and was sentenced on October 5, 1993. He is currently serving a life sentence with no eligibility for parole for 12 years.

[5] On January 18, 2019, Randy Kenning, Mr. Wu's parole officer, completed an "Assessment for Decision" report in which he recommended that full parole be granted.

[6] On February 19, 2018, Dr. R.J. Howe, a forensic psychologist, prepared a psychological/psychiatric report to address the issue of Mr. Wu's suitability for full

parole for deportation to his homeland. Dr. Howe opined that Mr. Wu represents a very low risk of reoffending and was fully supportive of his release for deportation. According to the report, Mr. Wu told Dr. Howe that he had kidnapped the victim somewhere in Indiana, United States and then drove her across the border into Ontario, Canada, eventually reaching Québec as a final destination. After getting stuck in a snow bank, "[h]e acted quickly by shooting her once in the head" and then "defiled her body to hinder identification".

[7] On February 22, 2019, the Parole Board of Canada ("Parole Board") denied full parole for Mr. Wu on the basis that he presented as an undue risk on a full parole release. Mr. Wu appealed to the Parole Board of Canada, Appeal Division ("Appeal Division") which rendered a decision affirming the denial of full parole on May 27, 2019.

Nature of the Allegations Made

[8] The Writ is lengthy, consisting of 25 pages of single-spaced allegations. The gist of the allegations is difficult to discern but include the following:

a) The AGC is "the Inhumanity-Brainwashed Respondent Deviants who has deceived and controlled the Federal Court";

b) Mr. Wu's parole board hearing was held in a "sham fashion in bad faith" by the Parole Board;

c) The "Inhumanity-Brainwashed Respondent Deviants" abused its power in the course of Mr. Wu's appeal before the Appeal Division;

d) The "malice controlled deviants" continue to justify "their obsessive compulsive malice in continuing inflicting cruel and unusual punishment" on Mr. Wu;

e) Mr. Wu was wrongfully sentenced to a life sentence with eligibility for full parole at 12 years and he has been cruelly and unusually tortured and imprisoned for more than 30 years;

f) Mr. Wu claims he is innocent of the second-degree murder on the basis that he legally lost competent control of his mental state due to fear and panic;

g) Mr. Wu was defrauded and tortured into an "illegal sham guilty plea" of the second-degree murder;

h) The alleged murder occurred in the Unites States and there is no evidence suggesting it happened in Canada. Therefore, as Canada did not have jurisdiction over the crime, it was illegal for a Canadian court to accept his murder plea;

i) Mr. Wu has been "dehumanized and enslaved" by the Correctional Service of Canada ("CSC"), which have been framing him, falsifying charges, and torturing him "for their perverted fun";

j) Mr. Wu claims that "the inhuman-compulsive-fixation-brainwashed-&-dehumanized psychopaths always falsify RCMP charges and frame" him;

k) The Canadian authorities who have "mass-raped and mass murdered and mass-hide-buried hundred of thousands of autochthonous children" have been "brainwashed and dehumanized by the inhuman compulsive fixation"; and

l) The CSC uses the "fantasized undue risk identity to nefariously frame" him.

[9] The remedies sought are as follows:

1. Grant the applicant full parole to be deported by the Canadian Border Service Agency ASAP, Or:
2. Order the stay of proceeding of the 2nd degree murder conviction against [Mr. Wu]. Or best:
3. Order to quash or stay the proceeding of the 2nd degree murder conviction against [Mr. Wu].

> 4. And make any other order to rectify this ongoing anti-humanitarian cruel and unusual alien abduction and brutalization against [Mr. Wu].

Other Proceedings

[10] Mr. Wu has made a number of *habeas corpus* and other applications over the years he has been incarcerated.

[11] A summary of some of them are:

a) *Wu v. Canada (Attorney General)*, 2019 ABQB 902 –while an inmate at the Bowden Institution in Innisfail, Alberta, Mr. Wu sought, by a notice of motion of a Writ of *habeas corpus,* an order that he be transferred to a minimum-security prison near Montreal, Québec and an order for damages. The application was dismissed.

b) *Wu v. Canada (Attorney General),* 2021 ABQB 749 [*Wu #1*] –Mr. Wu complained that he might be infected with COVID-19 and that he was wrongfully convicted of second-degree murder of his ex-wife in March 1992. The court struck the *habeas corpus* notice as "hopeless and an abuse of the court process".

c) *Wu v. Canada (Attorney General)*, 2021 ABQB 904 –Mr. Wu filed a "Notice of Motion for Remedy for Cruel and Unusual Punishment Inflicted by the Respondent with Years of Locking the Application in Segregation Prison Cell/Cage" in which he sought $3,300 trillion and an order "setting aside" his second-degree murder conviction. Mr. Wu was directed to file a written submission within a time period. He failed to do so and as a result the application was struck as being "a hopeless and abusive proceeding". Costs of $500 were awarded against Mr. Wu.

d) *Wu v. Canada (Attorney Canada)*, 2021 ABQB 1017 [*Wu #2*] – the AGC applied for an order that Mr. Wu become subject to the *Judicature Act*, R.S.A. 2000, c. J-2, ss. 23–23.1 and be declared a vexatious litigant. In the course of that proceeding, Mr. Wu sought to file another application

> for the issuance of a writ of *habeas corpus* complaining of being wrongfully denied deportation by way of full parole by the Parole Board. The leave application was denied.

[12] I note that the Federal Court currently has in place an order prohibiting Mr. Wu from commencing any new proceedings or continuing any existing proceeding without leave of the court. The Federal Court order does not prohibit Mr. Wu from instituting any proceedings but requires him to seek leave first.

Issues

[13] The Writ, application, and submissions raise the following issues:

1) Should Mr. Wu's application for *habeas corpus* be struck on the grounds that it discloses no reasonable cause of action?

2) Is Mr. Wu's application unnecessary, frivolous, or vexatious, or an abuse of process?

3) Does this Court have jurisdiction to vary the decisions by the Parole Board and its Appeal Division?

4) Does this Court have the jurisdiction to stay or quash the second-degree murder conviction?

5) Should this Court declare Mr. Wu a vexatious litigant?

Issue 1: Should Mr. Wu's application for *habeas corpus* be struck on the grounds that it discloses no reasonable cause of action?

[14] A claim will be struck where it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action: *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para. 17.

[15] The writ of *habeas corpus* protects individuals from unlawful deprivations of their liberty: *Canada (Public Safety and Emergency Preparedness) v. Chhina,* 2019 SCC 29 at para. 1. On an application for *habeas corpus*, the applicant must

establish that they have been detained and that there is a legitimate ground upon which to question the legality of that detention: *Khela v. Mission Institution*, 2014 SCC 24 at para. 30. If established, the onus shifts to the respondent to show that the detention was lawful: *Khela* at para. 30.

[16] If an incarcerated person is already detained, *habeas corpus* can be employed to challenge changes to the conditions of that detention which result in a "significant reduction" of the inmate's "residual liberty": *R. v. Elliot*, 2022 BCSC 1946 at para. 95. Examples of decisions that result in a loss of residual liberty include: subjecting an inmate to administrative segregation; confining them in a special handling unit; and transferring them to a higher security institution: *Khela* at para. 34. The essential element is that the physical environment of the inmate be altered in such a way so as to offer them less freedom: *Ewanchuk v. Canada*, 2017 ABQB 237 at para. 21.

[17] *Habeas corpus* has no application to a decision to deny parole, since such a decision does not result in a change in the conditions of an inmate's detention: *Dixon v. Mountain* Institution, 2017 BCSC 183 at para. 83; *Lord v. Coulter*, 2009 BCCA 62 at para. 5–6. This is exactly what Mr. Wu is seeking: to use *habeas corpus* as a means to challenge the decision to deny his parole.

[18] I am satisfied that it is plain and obvious that the Writ cannot be maintained. The denial of parole does not constitute a deprivation of liberty for the purposes of a *habeas corpus* application (*Dixon* at para. 78), and therefore his application discloses no reasonable cause of action.

Issue 2: Is Mr. Wu's application unnecessary, frivolous, or vexatious, or an abuse of process?

[19] A pleading is unnecessary or vexatious if it does not go to establishing the plaintiff's cause of action, or if it does not advance any claim known in law, or where it would serve no useful purpose and would be a waste of the court's time and public resources: *Willow v. Chong*, 2013 BCSC 1083 at para. 20.

[20] In *Lang Michener and Fabian* (1987), 37 D.L.R. (4th) 685 at 691 (Ont. H.C.J.), the Court outlined the following non-exhaustive list of principles to consider when determining whether an action is vexatious, which has been repeatedly endorsed by the BC Courts (see, for example, *Simon v. Canada (Attorney General)*, 2015 BCSC 924 at para. 97, aff'd 2016 BCCA 52):

> (a) the bringing of one or more actions to determine an issue which has already been determined by a court of competent jurisdiction constitutes a vexatious proceeding;
>
> (b) where it is obvious that an action cannot succeed, or if the action would lead to no possible good, or if no reasonable person can reasonably expect to obtain relief, the action is vexatious;
>
> (c) vexatious actions include those brought for an improper purpose, including the harassment and oppression of other parties by multifarious proceedings brought for purposes other than the assertion of legitimate rights;
>
> (d) it is a general characteristic of vexatious proceedings that grounds and issues raised tend to be rolled forward into subsequent actions and repeated and supplemented, often with actions brought against the lawyers who have acted for or against the litigant in earlier proceedings;
>
> (e) in determining whether proceedings are vexatious, the court must look at the whole history of the matter and not just whether there was originally a good cause of action;
>
> (f) the failure of the person instituting the proceedings to pay the costs of unsuccessful proceedings is one factor to be considered in determining whether proceedings are vexatious;
>
> (g) the respondent's conduct in persistently taking unsuccessful appeals form judicial decisions can be considered vexatious conduct of legal proceedings.

[21] The doctrine of abuse of process is a flexible doctrine that allows the court to prevent a claim from proceeding where to do so would violate principles of judicial economy, consistency, finality, and integrity of the administration of justice: *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 at para. 37; *Green v. Proline Management Limited*, 2017 BCSC 1656 at para. 37.

[22] To challenge a decision by the Parole Board, Mr. Wu must make a claim in the Federal Court, not a *habeas corpus* application in this Court. Mr. Wu has been told this a number of times in response to similar applications he has brought in

other jurisdictions. For example, the Alberta Court of King's Bench stated in *Wu #2* at para. 11:

> …
>
> 2. The Court of Queen's Bench of Alberta has no authority to review decisions of the Parole board of Canada by habeas corpus: *Armaly v. Canada*, 2001 ABCA 280; *R v Latham*, 2018 ABCA 267; *R v Latham*, 2018 ABCA 308. Mr. Wu's proposed habeas corpus application is therefore hopeless.

[23] It is therefore clear that the Writ is vexatious and an abuse of process. Further, the allegations in the Writ are convoluted, prolix, lacking in any jurisprudential support, and rampant with unprovable speculations and inflammatory statements.

[24] Additionally, I am concerned by the use of judicial resources when Mr. Wu has been judicially told on a number of occasions that the approach he is taking is not permitted by law. He simply disregards the judicial commentary. His continual attempts to use *habeas corpus* to question the decisions of the Parole Board is an abuse of process.

[25] Mr. Wu has to understand that bringing the same *habeas corpus* application in different jurisdictions will not change the outcome. If he wishes to challenge the decisions of the Parole Board he has to do so in the Federal Court.

[26] I am satisfied that Mr. Wu's *habeas corpus* application is both vexatious and an abuse of process.

Issue 3: Does this Court have jurisdiction to vary the decisions by the Parole Board and its Appeal Division?

[27] Mr. Wu's position is that the Federal Court is controlled by the respondent and as a result he will never be granted leave to commence litigation in the Federal Court. He claims he has fresh evidence that the Parole Board, in denying his parole, acted in bad faith. He claims he has no other recourse but to come to this Court to seek justice.

[28] The Parole Board is a federal board. Under s. 107 of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 [*CCRA*], the Parole Board has the exclusive jurisdiction to grant parole of an offender. This jurisdiction does not rest with the Supreme Court of BC or any other superior courts of Canada. If an appeal is sought of a Parole Board decision, that appeal is made to the Appeal Division pursuant to s. 147 of the *CCRA*.

[29] Judicial reviews or declaratory relief relating to decisions by the Appeal Division must be made before the Federal Court pursuant to ss. 18 and 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7. Mr. Wu understands this but his position is that he is barred from making such applications in the Federal Court or at least that is his perception. The reality is that he is not barred; he simply must first seek leave. He is free to make the leave application and that is the process he must follow.

[30] I conclude that this Court does not have jurisdiction to review decisions by the Parole Board or its Appeal Division.

Issue 4: Does this Court have jurisdiction to stay or quash the second-degree murder conviction?

[31] The Supreme Court of Canada in *May v. Ferndale Institution*, 2005 SCC 82 at para. 36 and *R. v. Sarson*, [1996] 2 SCR 223 at para. 32, made it clear that *habeas corpus* relief cannot be used to quash a murder conviction. Put differently, an application for *habeas corpus* cannot be used as a vehicle to appeal the merits of a conviction under the *Criminal Code of Canada,* R.S.C. 1985, c. C-46 [*Code*]. That is precisely what Mr. Wu is trying to do here. Further, in *R. v. Wu*, 2001 BCCA 90 [*Wu #3*], Mr. Wu was told that he could not challenge his conviction by way of *habeas corpus* but must instead proceed under the appeal provisions found in the *Code*. Since 2001, Mr. Wu has continuously disregarded that direction.

[32] In effect, Mr. Wu seeks to have this Court do something which is “impossible in law”: *Wu #2* at para. 11; *Wu #1* at paras. 15–16.

Issue 5: Should this Court Declare Mr. Wu a Vexatious Litigant

Legal Principles

[33] Section 18 of the *Supreme Court Act* empowers the Court to prohibit a person from instituting legal proceedings without prior leave of the Court:

> 18. If, on application by any person, the court is satisfied that a person has habitually, persistently and without reasonable grounds, instituted vexatious legal proceedings in the Supreme Court or in the Provincial Court against the same or different persons, the court may, after hearing that person or giving him or her an opportunity to be heard, order that a legal proceeding must not, without leave of the court, be instituted by that person in any court.

[34] Section 18 confers a broad jurisdiction on the court to control is own processes. This is a power that must not be used lightly. The court must balance the important values underlying open court access against the need to prevent the abuse of that right: *Semenoff Estate v. Semenoff*, 2017 BCCA 17 at para. 31, citing *S.(M.) v. S.(P.I.)* (1998), 60 B.C.L.R. (3d) 232 (B.C.C.A), leave to SCC ref'd, 27151 (25 November 1999).

[35] The court may consider proceedings before administrative tribunals in determining whether an order under s. 18 is appropriate: *Bajwa v. British Columbia Veterinary Medical Assn.,* 2012 BCSC 878 at para. 211.

[36] As helpfully summarized by Justice Iyer in *Rafique v. AWM-Alliance Real Estate Group Ltd*., 2019 BCSC 247 at para. 51, citing *Carten v. Carten*, 2015 BCCA 201, key indicators of a vexatious proceeding include:

a) bringing one or more actions to determine an issue which has already been determined by a court of competent jurisdiction;

b) it is obvious that the action cannot succeed, would lead to no possible good, or no reasonable person can reasonably expect to obtain relief;

c) the action is brought for an improper purpose, including the harassment and oppression of other parties by multifarious

proceedings brought for purposes other than the assertion of legitimate rights;

d) the grounds and issues in the first proceeding have been rolled forward into subsequent actions and repeated and supplemented, often with actions brought against the lawyers who have acted for or against the litigant in earlier proceedings;

e) the person who instituted the proceedings has failed to pay the costs of the unsuccessful proceedings; and

f) the person has persistently taken unsuccessful appeals.

[37] The ultimate question is whether the litigant has taken himself over the line: *Lindsay v. Canada (Attorney General)*, 2005 BCCA 594 at para. 26.

Position of the Respondent

[38] The respondent argues that Mr. Wu is vexatious and in support references the lack of merit in the Writ, his past failed *habeas corpus* attempts, and that he has been declared vexatious in the federal court and in two other Canadian jurisdictions.

Position of Mr. Wu

[39] Mr. Wu claims that he is left with no choice but to turn to this Court since he is not able to turn to the Federal Court. He claims that the Federal Court would “never ever” allow him to file an application. He claims that this Court is his “last recourse”.

Analysis

[40] It is clear that, at least in Alberta and before the Federal Court, Mr. Wu brought multiple *habeas corpus* applications leading to the declaration that he was vexatious: *Wu #2* at para. 1; *Wu v. Canada*, 2003 FCA 110 at para. 2**.**

[41] Mr. Wu has brought previous *habeas corpus* writs in this jurisdiction when he was an inmate at the Kent Institution in Agassiz, BC in June 2000. His application

was dismissed on the basis that he had to take his complaints to the Federal Court by way of s. 18 of the *FCA*: *Wu #3*.

[42] In *Wu #3*, Mr. Wu was told by our Court of Appeal that he could not challenge his murder conviction by way of *habeas corpus* but must instead proceed under the appeal provisions of the *Code*. This statement from the Court of Appeal did not deter Mr. Wu. On January 5, 2005, he applied to this Court for an order requiring CSC to transfer him to a penitentiary near Montreal, Québec so that he could apply to the Québec Court of Appeal for leave to appeal his conviction and to adduce fresh evidence. In *Wu v. Canada (Attorney General)*, 2006 BCSC 46, request was denied on the basis that his intended applications had no merit. Justice Joyce referenced the decision of Proulx J.A. (as he then was) in *R. v. Wu*, [1999] Q.J. No. 1416 (Q.C.C.A.):

> [2] Essentially, the petitioner argues that this verdict is ill-founded since the murder did not happen in the province of [Québec]. However, this issue could have been raised by the petitioner in first instance, but it was obviously discarded by his plea of guilty. In fact, this is clearly illustrated in some extracts, attached hereto, of the representations made by Crown counsel before sentence (pages 2 to 13), which were never contested in the court below.
>
> [3] When the matter came for trial, the petitioner changed his plea to guilty on a reduced charge of second degree murder, with the advice of counsel and after having signed a document dated September 11, 1993, which is attached to the present judgment. At that time, the trial judge satisfied himself that the petitioner was fully aware of the consequences of his plea (see pages 5 and following).
>
> [4] The sentence was rendered on October 5, 1993. On October 8, 1993, the petitioner was admitted to the penitentiary and, in a document produced by the petitioner himself, it is reported that he stated having pleaded guilty essentially to avoid a first degree murder conviction and he even **acknowledged that the crime had been committed in Canada**.
>
> [5] When asked by the undersigned at the hearing if he had anything to complain about the two lawyers who represented him in first instance, the one at the time of his plea of guilty and the other for the representations on sentence, the petitioner answered in the negative and specified that he was not raising the issue of competency of his counsel.
>
> [6] In these circumstances, I fail to see how the interests of justice can be served in granting an extension to appeal more than five years after a judgment rendered on a plea of guilty which was fully understood by the petitioner and in respect of which he has no valid complaint. After all, if an issue was to be raised as to where the murder occurred, the petitioner was

> the only person who could then do so. For the reasons stated above it seems obvious to me that the petitioner clearly chose not to do so.
>
> [Bold emphasis in original.]

[43] Since then Mr. Wu has conducted numerous unsuccessful applications as summarized by Justice Henderson in *Wu #1*:

> [20] Canadian courts have concluded that Mr. Wu conducts hopeless moot proceedings (e.g. *R v Wu*, 1999 CanLII 13350 (QCCA)), has previously sought to undo his conviction via habeas corpus (e.g. *R v Wu*, 2001 BCCA 90), and conducted collateral attack proceedings (e.g. *Wu v Attorney General of Canada*, 2006 BCSC 46). The Manitoba Court of Appeal has indicated Mr. Wu is a suitable candidate for court access restrictions by what is sometimes called a "vexatious litigant order", given Mr. Wu's repeated abusive habeas corpus applications: *Wu v Attorney General of Canada*, 2008 MBCA 132 at para 3. Mr. Wu is already subject to court access restrictions in [Québec] (*Wu v Her Majesty the Queen in right of Canada* (17 June 1999), Docket 540-36-000154-996 (QCCS)) and the Federal Courts (*Wu v Canada*, 2003 FCA 110). Existing court access restrictions in a different jurisdiction is a prima facie basis for Mr. Wu to be subject to court access restrictions in the Alberta Court of Queen's Bench: *Unrau v National Dental Examining Board*, 2019 ABQB 283 at para 582-586, adopting *Fabrikant v Canada*, 2018 FCA 171 at paras 14-15.

[44] Justice Henderson concludes at para. 21:

> …Mr. Wu's has a well-established record of abuse of *habeas corpus* proceedings. Mr. Wu's continuing abuse of this Court cannot be mediated by case management, since Mr. Wu repeatedly and persistently makes entirely abusive *habeas corpus* applications. I, therefore, request that Canada file a *Judicature Act*, ss. 23-23.1 application in relation to Mr. Wu by October 29, 2021.

[45] Mr. Wu fits squarely within most of the key indicators of a vexatious litigant, in his incessant pursuit of unsuccessful *habeas corpus* writs and applications. Mr. Wu has been told by multiple courts that he cannot bring a *habeas corpus* application to challenge his second-degree murder conviction nor to challenge the decisions of the Parole Board.

[46] He has made serious allegations of misconduct against the respondent, the Parole Board, and the CSC without any support for such allegations. Many other of his allegations can only be described as bizarre, delusional, and challenging to understand.

[47] He continues to seek the same relief where it is obvious that the relief being sought cannot be granted by this Court.

[48] He has persistently initiated unsuccessful appeals.

[49] I am persuaded that a vexatious order should be made. If I do not, there is a high likelihood that Mr. Wu will persist in bringing meritless applications at a significant cost to the respondent.

[50] The respondent seeks a condition on the order that any leave application filed by Mr. Wu be restricted to three pages or less, and accompanied by only one affidavit, not to exceed five pages in length. In support of these conditions, the respondent relies on *Hokhold v. Canada (Attorney General),* 2019 BCSC 1106 at para. 106. I would not yet put Mr. Wu in the same category as Dr. Hokhold, who submitted a 25-page long notice of civil claim, along with a 65-page complaint to the Canada Judicial Council, a 44-page letter to Chief Justice Hinkson, and a proposed amended notice of civil claim 40-pages in length. In the Court of Appeal, Dr. Hokhold filed an affidavit consisting of 278 pages in length. As the court noted at para. 104: “This pressure is multiplied due to his practice of filing large volumes of materials, much of which is often irrelevant to the issue”.

[51] While I agree that much of the 23-page single spaced Writ is irrelevant, I am not persuaded that Mr. Wu has yet crossed the line, as Dr. Hokhold had, and needs to be restricted in the length of his leave applications. This further restriction can be revisited in the future, if needed.

[52] I further accept the respondent’s position that an award of costs should be made to discourage Mr. Wu from continuing down the path of hopeless and meritless applications. In the circumstances, a lump sum award of costs in the amount of $440 is just and reasonable.

Conclusion

[53] The following orders are made:

a) The Notice of Special Motion for a Writ of *Habeas Corpus* filed by Mr. Wu on August 30, 2022 is struck.

b) Pursuant to s. 18 of the *Supreme Court Act*, Mr. Wu is prohibited from commencing any legal proceedings in the Supreme Court of BC, without leave of the Court.

c) The respondent is entitled to lump sum costs set at $440, payable by Mr. Wu to the Receiver General for the Attorney General of Canada.

d) The signature of Mr. Wu on the form of the order is dispensed with.

[54] I reiterate that Mr. Wu's desire to have the Parole Board's decision judicially reviewed is understandable. Mr. Wu has the right to apply for judicial review of the decision. However, in this case, Mr. Wu has chosen the wrong forum for his application. His application must be made in the Federal Court, as that is the only Court which has jurisdiction to review decisions made pursuant to the *CCRA.*

[55] However, as Mr. Wu has been declared a vexatious litigant by the Federal Court, there is an additional step he must take prior to bringing his application for judicial review. He must apply for leave. The Federal Court of Appeal has provided comments on what a vexatious litigant must show for leave to be approved: *Bernard v. Professional Institute of the Public Service of Canada*, 2020 FCA 211 at paras. 9–13. Mr. Wu may find these comments particularly instructive.

[56] Specifically, Mr. Wu must assure the Court that the purpose of his application is to vindicate a *bona fide* claim, not pursue a personal vendetta: *Bernard* at para. 9. In this regard, it may be helpful for Mr. Wu to remove from his application any inflammatory language. His application should focus on why he believes the Appeal Division erred and should avoid levying unsupported allegations against the Attorney General.

[57] Additionally, Mr. Wu should avoid submitting an application that is unnecessarily lengthy: *Canada v. Olumide*, 2017 FCA 42 at para. 31. Brevity and clarity are essential.

[58] The key for Mr. Wu will be showing that he is willing to pursue his claim in an acceptable manner, consistent with the Rules, orders and directions of the Federal Court: *Bernard* at paras. 10–11. As a starting place, Mr. Wu must bring his application in the correct forum, which in this case is not the Supreme Court of BC.

"Forth J."