A Troubling Menagerie: Abusive Litigants and How To Manage Them

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The views expressed in this seminar are those of the author, and not those of any other member of the Court of King's Bench, or the Court itself.

My Two Hats

- ▶ ABKB Complex Litigant Management Counsel
 - Province-wide assistance to ABKB judges and staff.
 - Managing & tracking abusive litigants.
 - General trouble-shooter for problem litigants and litigation.
- Hobbyist Academic & Subject Expert
 - Pseudolaw litigation and litigants, groups, concepts, ideology.
 - Quantification of court processes using public records, dockets, reported cases.

Part I: Who Are Abusive Litigants?

- Since around 2010 a narrative has developed about who and what SRLs are, and what they do:
 - SRL "explosion"
 - It's a family law thing
 - SRLs are good-faith dealers, never intentionally abusive
 - SRLs cannot afford lawyers, or run out of money
 - SRLs are baffled by the law, helpless
 - Mental health factors are not relevant for SRLs.
- "Sources": opinion surveys, National Self Represented Litigant Project reports.
- Until recently very little was measured.

- New data:
 - long duration data for SRLs at SCC, BCCA
 - detailed litigation process data for SCC, FCA.
- Volumes of SRLs in the past 20-25 years are constant. No "SRL explosion" in Canadian appeal courts.
- Proportion of SRL appeals is increasing due to a marked decrease in "lawyer appeals".
- ▶ Family dispute SRL appeal litigation is uncommon:
 - BCCA under 20%
 - SCC under 6%.

- > SRLs at appeal courts are unsuccessful.
- ▶ Past 25 years at SCC, 3103 SRL appeals initiated:
 - 0.26% leave applications granted.
 - 0.074% appeals granted.
 - 23% of SCC input. Is this a valid allocation of court resources?
- FCA in 2016-2017:

0	Crown appeals	granted:	45%
		<u></u>	

- Lawyer non-Crown appeals granted: 19%
- SRL appeals granted: 4.7%.

- Less than 10% of SCC SRLs have any potential for success, before considering the actual merit of appeal.
- Abusive litigation and litigant records are very common in SCC and FCA SRL litigation.
- Mental health often implicated: 40% of SRL SCC appeals.
- SRLs do not litigate legal issues, focus on *Charter* rights, human rights, allegations of judicial bias and criminality.

- ▶ The "Distillation Effect" abusive litigation is overrepresented or "concentrated" in appellate tribunal and court bodies.
- Distillation Effect driven by abusive litigants appealing and re-litigating disputes.
- Most extreme form Supreme Court of Canada:
 - In 2017, 23% of 122 self-represented candidate appellants were subject to "vexatious litigant" court access restriction orders.
 - Only 575 such orders issued by all Quebec and Alberta courts in 1993 to 2019!

Language Matters

- "Vexatious" litigant and litigation language should be rejected – use "Abusive" instead:
 - Litigation that is intended to "vex" or "harm" is rare.
 - The large majority of problematic litigants are actually "good faith" "fair dealers" from their own perspectives.
 - They "abuse" and "misuse" Canadian courts.
- "Vexatious":
 - distorts "abusive" litigants actions and perspectives.
 - is an obstacle to courts' making a valid contextual response.

- Abusive litigants are not all the same.
- May be organized into several general categories.
 - Each has its own characteristics.
 - Motivations vary.
 - Some are easier to manage.
- Understanding abusive litigants helps tailor strategies to better manage their future litigation activity.
- *Unrau* #2, 2019 ABQB 283 extensive and detailed review of abusive litigant subtypes.

1: Psychiatric Impairment Leads to Litigation

- Abusive litigant is afflicted with a psychiatric condition that distorts perceptions.
- Distorted perceptions are the basis for the abusive litigation.
- ▶ No "bad intent" this is honest but misdirected litigation.
- Court and tribunal proceedings offer no benefit, instead reinforce distorted perceptions and extend self-injury.
- ▶ Subtype: "Targeted Individuals" / "Gang Stalking".

2: Querulous Paranoia

- Comparatively normal individual exhibits pattern of persistent, escalating complaints.
- Psychiatric condition <u>induced</u> by litigation.
- Starts with a discrete, sometimes minor, failure.
- Perceived as unfair.
- Triggers a cascade of litigation, complaints, appeals.
- Absolutely confident they are right.

2: Querulous Paranoia

- Characteristics:
 - Abusive litigant is a crusader who misidentifies a minor issue as of public and legal importance.
 - Seek more than equity, but retaliation, unreasonable remedies, public exposure and humiliation of "enemies".
 - Dispute expands through every avenue.
 - Want to be social leaders, but instead alienate everyone.
 - "If you are not with me, you are against me."

2: Querulous Paranoia

- Worst case outcomes are common extremely selfdestructive.
- Continues until the abusive litigant is exhausted.
- Psychiatrists indicate no treatment but recommend:
 - early intervention.
 - firm, constant limits.
- Some violence risk, but usually directed to selves.

3: Abusive Litigants Motivated by Ideology

- Abusive litigation is a consequence of beliefs or philosophy:
 - SLAPP litigation appear to be very rare.
 - Anti-pandemic activists:
 - Substantial volume of litigation across Canada during pandemic.
 - Some SRLs, some represented by politically oriented lawyers.
 - Almost entirely unsuccessful.
 - Failed largely on alleged facts, rather than law.
 - Organized Pseudolegal Commercial Argument [OPCA] litigants.

OPCA Litigants

- Organized Pseudolegal Commercial Argument [OPCA] litigants are the most common kind encountered in Canada:
 - A social phenomenon:
 - Freemen-on-the-Land
 - Sovereign Citizens
 - Detaxers
 - Moors
 - Reichsbürgers.
 - Believe in a true hidden law, which trumps "conventional law", and gives special advantages "pseudolaw".

OPCA Litigants

- Some are "mercenaries" looking for easy benefits.
- Others are "true believers" who belong to conspiratorial fringe communities.
- ▶ Despite their fierce reputation, OPCA litigants are the abusive litigants who are the easiest to manage they inevitably fail in court.
- Currently OPCA litigants are increasing in volume:
 - Fake First Nations: e.g., Kinawkii, ASMIN, "Spirit Warrior".
 - "Queen" Romana Didulo of the "Kingdom of Canada".
 - debt elimination "Strawman Theory" schemes.

4: Litigants for Profit or Advantage

- Have identified some way to exploit legal proceedings to make money or obtain other advantages.
- Examples:
 - Calgary "Dollar Dealer" scammers 2010-2014.
 - Post-2014 Correctional Service Canada inmates abusing *habeas corpus*.
 - Lawsuits / complaints to extort monetary settlement.
- Difficult to manage, except to remove the potential benefit.

5: Litigation Terrorists

- Use courts to harm, intimidate, and retaliate because they enjoy that.
- The true "vexatious" litigants.
- ▶ Appear to be very rare thankfully.
- If identified warrant immediate and strict responses.

Part II: Strategies and Techniques when Dealing with Abusive Litigants

The "Traditional Approach"

Principles:

- 1. Access to courts is paramount any interference with litigant activity must be avoided.
- 2. No obstacles to litigation are tolerated no financial obstacle to litigation is permitted.
- 3. Responses to abusive litigation should only come from litigants courts are not permitted to initiate litigation and litigant management steps.
- 4. Prospective litigation management is a "last ditch" extraordinary remedy all lesser means to manage abusive litigants must be used first and fail litigant's history is all that matters.

The "Modern Approach"

Principles:

- 1. Management, not punishment —minimize abuse of the court, and harm to all affected, *including the abusive litigant*.
- 2. Litigation management is adaptable as litigation evolves so does litigation management.
- **3. Litigant management is prospective** what are the abusive litigant's probable <u>future</u> actions?
- **4. Responses must be proportionate** balance effects on the abusive litigant and others vs the potential benefit.

The "Modern Approach"

Processes:

- 1. Early identification of problem litigants and litigation ongoing surveillance for candidate problematic litigation and litigation.
- 2. Collective engagement all court personnel should identify and communicate candidate abusive litigation.
- **3.** Forward defence address and engage abusive litigation sooner than later.
- **4. Defence in depth** build capacity to efficiently manage abusive litigation throughout litigation processes.
- 5. **Prospective gatekeeping** adaptive steps respond to identified abusive litigants and their evolving conduct.

Incremental Litigation Management Does Not Work

- ▶ 2016-2017 Federal Court of Appeal SRLs:
 - Abusive litigant appeals required nearly double the amount of Registry activity and filed documents.
 - Incremental attempts to rein in abusive litigants failed:
 - security for costs, striking out, appeal stayed
 - no effect on litigation cost and scale
 - incrementally managed appeals took almost twice as long to resolve.

Intervention During Filing

- ▶ Ideal point for court intervention is during the filing process early interception.
- Issue clerks have very limited authority to reject documents by content.
- Possible solution court order that instructs clerks to reject certain materials.
- ▶ E.g., ABKB OPCA Document Master Order:
 - Designates unique pseudolaw motifs as "formal defects".
 - Instructs OPCA litigants "fix" their materials.
 - Almost 100% successful they never reappear.

Intervention During Filing

• E.g., Federal Courts *Rule* 72:

72(1)(b) ... where the Administrator is of the opinion that the document is not in the form required by these Rules or that other conditions precedent to its filing have not been fulfilled, refer the document without delay to a judge or prothonotary.

- 72(2) On receipt of a document referred under paragraph (1)(b), the judge or prothonotary may direct the Administrator to
 - (a) accept or reject the document; or
 - (b) accept the document subject to conditions as to the making of any corrections or the fulfilling of any conditions precedent.

Show Cause Procedures

- ▶ ABKB uses "Civil Practice Note No. 7".
- Adapted from Ontario Rule 2.1.
- Document-only "show cause" procedure.
- A different <u>mechanism</u> to conduct a striking out pleadings process.
- ▶ Implemented in 2018.
- ▶ Targets "clearer cases" of abusive and futile litigation.

Show Cause Procedures

- ▶ Up to 2023 250+ matters, over 95% struck out.
- Triggered by either clerks or parties "referring" candidate target.
- ▶ Roughly 50/50 split on referrers.
- Court "owns" the CPN7 process, not parties, important since:
 - Only target truly hopeless litigation.
 - Court sets the scope of the issues for review.
 - Limits the kind of argument and claims addressed.

Show Cause Procedures

▶ CPN7 Decision #1:

- Court identifies apparently fatal defects.
- Party that filed the target document has 14 days to make a 10 page Written Submission.
- If nothing is received, the target filing is struck out about half of show cause reviews.
- Opposing parties have 7 days to make a 10 page Written Reply.

▶ CPN7 Decision #2:

- Court evaluates whether the apparently fatal defects are rebutted. If not, strike out the target filing.
- Costs usually awarded if referred by party and then struck out.

Communications and Access

- ABKB now attempts to limit abuse of clerks and court with communications and access restrictions.
- Respond to particular identified abuse pattern.
 - E.g., litigant abusive at counter? Ban counter appearances, communication only by email or mail.
 - E.g., litigant abuses email? Only communications by registered mail.
 - E.g., litigant reverses credit card payments? Only payments by bank draft.
- Always with a reported written decision and order prepared by the court. Want this to be a public record.

"Vexatious Litigant" Orders

- "Vexatious Litigant Orders" / court access gatekeeping.
- ▶ Law across Canada is completely inconsistent:
 - Some jurisdictions have "Modern Approach" rules, other highly limit court access gatekeeping via "Traditional Approach".
 - Is self-representation an absolute right? No agreement.
 - Are money expenses to filing permissible? No agreement.
 - In Alberta the ABCA is taking steps that appear inconsistent with its own jurisprudence. Provides no explanation why.
- Some parts of Canada are out of step with UK and Commonwealth.

"Vexatious Litigant" Orders

- Most recent Canadian commentary on the "legal theory" behind litigant gatekeeping is *College of Registered Nurses of Manitoba v Hancock*, 2023 MBCA 70.
- Discusses interplay of inherent jurisdiction versus statutory controls.
- Important for recognizing inherent jurisdiction "*Grepe v Loam*" orders:
 - Hancock paras 59-60
 - Litigation management orders that operate "inside" a proceeding, rather than affect future hypothetical litigation.

General Principles

- One decision-maker for an abusive litigant.
- Consider specialized counsel & judges.
- ▶ Do it in writing these people should be excluded from the courtroom whenever possible.
- ▶ Issue written decisions one of the few ways to publicly identify bad actors.
- Try to impose money penalties and preconditions.
- Are you concerned about physical risk? Do not ignore that contact security immediately some abusive litigants are genuinely dangerous.

Thank you!



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