Vexatious Litigant Order: Procedural Framework

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ONTARIO BAR ASSOCIATION
A Branch of the Canadian Bar Association

L'ASSOCIATION DU BARREAU DE L'ONTARIO
Une division de l'Association du Barreau canadien

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EXECUTIVE SUMMARY

The OBA appreciates the opportunity to provide comments on amending the *Rules of Civil Procedure* (the "*Rules*") and the *Courts of Justice Act* (the "*CJA*") with respect to the procedure to seek a vexatious litigant order.

For the reasons set out more fully below, the OBA supports reforms to the *CJA* that would expand s. 140 orders to be obtained by way of motion (or application), and to make it clear that a judge has the discretion to make such an order on their own initiative as part of their inherent jurisdiction. Further, we recommend the following:

- In addition to reviewing Rule 2 and *CJA* s. 140, also look at other Rules and case law dealing with vexatious litigants, and frivolous and vexatious litigation with a view to ensuring consistency and clarity in how these related matters are dealt with, preferably within a single Rule.
- Create pathways to allow for expedited access to the court to head off a vexatious litigant as soon as the need arises.
- Clarify that a vexatious litigant order can be granted based on a single set of proceedings, without the need to show that the vexatious litigant has brought multiple proceedings (including appeals and proceedings before boards and tribunals) over a period of years.
- Allow for best efforts for personal service.
- Consider developing a non-exhaustive list of factors the court might consider as hallmarks of a vexatious litigant, drawing from case law and the approach taken in other jurisdictions.
- Review the vexatious litigant issue in the context of family law, considering court's and parties' special needs.

The Ontario Bar Association (OBA)

The OBA is the largest volunteer lawyer association in Ontario, with approximately 16,000 members, practicing in every area of law in every region of the province. We provide updates and education on every area of the law to combined audiences of 20,000 lawyers annually. The members of our 40 practice sections include leading experts in their field who provide practical advice to government and other decision-makers to ensure the economy and the justice sector

work effectively and efficiently to support access to high-quality justice for Ontarians.

This submission has been prepared by a critical cross-section of OBA sections including Civil Litigation, Insurance, and Family Law. Members of these sections include highly experienced litigators from all regions of Ontario, representing a range of interests and clients. We received input from lawyers who have represented litigants found to be vexatious, and lawyers representing clients targeted by vexatious litigants. The submission was also reviewed by several other OBA sections and the Board of Directors.

Comments

The OBA supports reforms to the *CJA* that would expand s. 140 orders to be obtained by way of motion (or application), and to make it clear that a judge can make such an order on their own initiative as part of their inherent jurisdiction.[1] The balance of this submission focuses on other considerations that would strengthen and create a more coherent approach to dealing with vexatious litigants and litigation.

1. Is your organization concerned about vexatious litigants/vexatious litigation in the Ontario civil justice system?

Yes. Vexatious litigants (and vexatious litigation) consume an enormous amount of court and counsel time and have been appearing with increasing regularity in Ontario Courts especially during and after the pandemic. Vexatious litigants add to the court backlog, use precious court resources (which could be dealt with more expeditiously), and cause parties to incur substantial costs and, in some cases, mental distress. Vexatious litigants may not limit themselves to targeting a single party or proceeding; it is not uncommon for the vexatious litigant to pursue actions against tribunals, boards, and counsel.

While access to justice is fundamental to the rule of law and a healthy democratic society, with rights come responsibilities and accountability. The courts and parties need to have better resources to deal with vexatious litigants in a timely manner that recognizes that persons on the receiving end of a vexatious litigant also have the right to access justice without being the target of endless vexatious and frivolous proceedings themselves. For this reason, we also recommend

[1] This is consistent with the Court of Appeal's comments in *Williams* v. *Tuck*, 2023 ONCA 452 (CanLII), https://canlii.ca/t/jxvks

that the 'threshold' for a vexatious litigant order be lowered, and a non-exhaustive list of "hallmarks" be developed to assist the court in identifying vexatious litigants, which is more fully addressed below.

2. Downsides of the current framework for dealing with parties who engage in vexatious litigation.

Inconsistencies

- There are number of "downsides" to the current framework, including inconsistencies between Rules 2.1.0 which allows the court to stay or dismiss a frivolous or vexatious proceeding "on its own initiative", while an order pursuant to section 140 of the *CJA* which applies to issuing a vexatious litigant order, cannot be made on the court's own initiative.[2] The language for dealing with vexatious litigants in the *CJA* and vexatious litigation in the Rules should be reviewed and aligned to clarify that the court may issue an order on its own initiative in either case. This may be an opportunity to create a more comprehensive omnibus rule for dealing with both vexatious litigants and vexatious proceedings.[3]
- Consideration should also be given to allowing the moving party the opportunity to provide evidence in some cases to provide the necessary context to demonstrate why a pleading on its face is frivolous or vexatious.[4]
- The Family Law Rules should also be brought into alignment with the *CJA* and the Civil Rules.

Onerous Process

We are encouraged that thought is being given to making the process less onerous to obtain a vexatious litigant order. Allowing the process to be initiated by motion (or application) creates a more direct path to getting before the court and getting an order. Dealing with the many proceedings and communications initiated by a vexatious litigant can be very time consuming and expensive, as is bringing a s. 140 (CJA) **application**.[5] In addition to allowing a vexatious litigant

[2] See Williams v Tuck, 2023 ONCA 452 (CanLII), https://canlii.ca/t/jxvks, at para 16
[3] In addition to Rule 2 and CJA s 140, consideration should be given to reviewing Rule 21.01(3)(d) and 25.11 which are also directed at dealing with matters that are frivolous and vexatious. There should be some uniformity instead of four different provisions of Rules and sections of the *CJA*.
[4] For example, filing documents from other related proceedings.
[5] Take but one example of *GoodLife Fitness Centres Inc. v. Hicks*, 2019 ONSC 4942, where the litigation lasted six years in multiple forums before it was dealt with.

order to be initiated by motion, application or at the court's own initiative, we recommend creating additional mechanisms to facilitate bringing a vexatious litigant (and litigation) to the attention of the court more expeditiously, including the following:

- An early judicial intervention meeting to enable parties to get before a judge quickly to get relief in circumstances where the vexatious litigant is attempting to take default steps against a person or property. This is important because many vexatious litigants take unilateral actions against defendants (such as noting them in default and taking default proceedings without notice). Special priority should be given to a party seeking to have someone designated as a vexatious litigant.
- Allowing judges to case manage issues related to a vexatious litigant and (litigation) with a fast track to enable the parties to get back in front of the judge quickly.
- Develop a procedure for court staff could be able to flag and bring to the court's attention a vexatious litigant's attempt to bring new or additional proceedings before "accepting" the filing. The court could exercise its discretion as to whether the filing is accepted, including whether notice should be provided to the targeted defendant with an opportunity for them to be heard on whether the proceeding should be allowed.[6]
- Associate judges and Dispute Resolution Officers should be able to bring a vexatious litigant (litigation) to the court's attention and recommend that an order be reviewed and endorsed by a judge.

Service Requirements

Many vexatious litigants refuse/evade service and so there should be enough flexibility built into the Rule that the person or party seeking a vexatious litigant order needs to show that they have engaged in "reasonable efforts" to serve the vexatious litigant to the satisfaction of the Court. If they have made reasonable efforts, it should be clear that the court can exercise its discretion to dispense with service and provide direction.

[6] See for example, Alberta CPN7 paragraph 2:
In accordance with Alberta Rules of Court, R.3.68 (reproduced below), and the summary procedures set out in this Practice Note, the Court may make an order to stay or dismiss an AVAP: (a) on its own initiative, (b) upon the written request of any party to a proceeding, or (c) after notification from a Clerk of the Court, Complex Litigant Management Counsel, or Case Management Counsel.

3. Are there specific reforms to this framework that you would propose?

Identifying the Hallmarks of Vexatious Litigants

There is no definition in the Rules or the *CJA* of a "vexatious litigant", nor is there a list of foundational hallmarks provided to guide the court, and generally speaking, the order is only granted in the clearest and most extreme cases.

The purpose of a vexatious litigant order is, in many ways, to protect society and the courts from harassment and incurring unnecessary legal costs incurred in an effort to protect themselves from someone who is using vexatiousness as part of their litigation strategy for improper purposes.

It would be useful to provide guidance, such as a non-exhaustive list of some of the hallmarks of a vexatious to facilitate decisions[7]. We would be pleased to provide additional input into what such a list might contain and where it might be provided. As a starting point, it is useful to review *Colbert* v *Colbert* et al. 2023 ONSC 811, in which the court sets out some of the types of behaviors that a vexatious litigant as typically engaged in as set out in case law to date, including:[8]

- they have brought one or more legal proceedings that obviously cannot succeed;
- they have brought these proceedings for an improper purpose, including "the harassment and oppression of other parties by multifarious proceedings brought for other than the assertion of legitimate rights";
- they have rolled over, repeated, and supplemented grounds and issues raised from one proceeding to another;
- they have failed to pay the costs of unsuccessful proceedings;
- they make inappropriate submissions in both form and content, including repeated misuse of technical terms, inappropriately ingratiating statements, ultimatums, and threats;

[7] Examples of jurisdictions that enumerate hallmarks of a vexatious litigant (litigation) include Alberta, Nova Scotia and the Federal Court.

[8] The list is intended to capture and summarize of the comments and principles referred to in *Colbert* that are taken from many leading cases, and those made by the presiding judge. It is not intended to be exhaustive.

- "typically, they are self-represented litigants who seem intent, through a series of persistent and fruitless proceedings, on wearing down their opponents through an ongoing battle of attrition"

- they provide written submissions that contain much that is not legally relevant; "unsustainable allegations and gratuitous complaints against members of the legal profession"; and cessation of proceedings only when they are unable to pay legal fees and costs:

- relevant conduct may include frivolous and unsubstantiated allegations of impropriety against lawyers who had acted for or against the party responding to a s. 140 application, and actions that show disregard for the court. An email campaign can be found to be part of an overall strategy of abuse and harassment:

- stating that they will not respect any orders issued by the court (particularly costs order), or asserting that the court does not have jurisdiction over them;

- accusing lawyers of unethical or illegal conduct in relation to the proceeding(s);

- contemptuously calling into question the competence and honesty of court staff and judges into question.

- stating that they will use the court's process for an inappropriate purpose, such as getting "payback";

- threatening to bring other legal proceedings (in the courts, tribunals or before regulators) including against other parties, family members, and against the lawyers and court officers, or threatening to report someone to the police (without reasonable grounds).

- It is also important to make it clear that a vexatious litigant order does not need to be based on conduct in numerous proceedings, as there may be instances where a litigant is conducting themselves and the litigation in a vexatious manner within a single proceeding.

Simplified Summary Procedure

Consideration should be given to an even more simplified summary procedure. For example, in Alberta, litigants, including regulators, need only write a letter asking the court to review the legal

proceeding.[9]

Family Law

Consideration should be given to providing the family law bar with more tools to deal with apparently vexatious litigants, without having to bring a separate application. The Family Law Rules do not contain the authority to seek the substantive relief of a vexatious litigant order or declaration. It is only available under the *CJA* and the Rules.

We recognize that family law proceedings are beyond the scope of this consultation, so we will limit our comments to the following:

- Vexatious litigants are a significant concern in family law.
- Parties should be able to bring an apparently vexatious litigant to the court's attention in an expedited summary manner. This could shorten some unnecessarily long proceedings that are challenging for the courts and the parties.
- Care needs to be given to defining or setting out the "hallmarks" of a vexatious litigant in the family law context. For example, failure to comply with parenting time orders, parenting agreements, and other contested matters unique to family law may be more nuanced than in a civil context and should not automatically be attributed to vexation.
- Family law litigants, particularly where family violence has occurred, may be particularly vulnerable to vexatious litigants
- Allow DROs to make recommendations to the court where an apparent vexatious litigant is identified, and relief needed.

We would be pleased to provide further comments and support the court in addressing vexatious litigants specifically in the family law context. This is an important issue.

4. Safeguards to protect the right of Ontarians to access the civil courts to resolve their disputes?

Access to justice is fundamental to the rule of law and to democracy. But where a person has so abused the justice system as to be the subject of a vexatious litigant order, it is fair and reasonable

[9] Alberta Court of Queen's Bench, Civil Practice Note No. 7 ("CNP7") and Rule 3.68. Note that the term vexatious "litigant" is not used; the language is used is, "apparent vexatious applicant or proceeding ("AVAP"). The procedure is set out in Alberta Civil Practice Note 7 and Alberta Judicature Act (Part 2.1). CPN7 also sets out the courts options on dealing with significant deficiencies from Rule 3.68 – providing an additional set of tools for the court.

to "limit" this right. And while it is an extraordinary remedy, it is important to note, as the court states in *Colbert* para 19, it does not, "*a person of their right to begin legal proceedings, it instead providers for judicial supervision of a party's use of the courts to ensure there is a reasonable basis for any proceeding*."

As the process stands, if the vexatious litigant has a 'legitimate' grievance in the future, they can apply to the court for 'permission' to pursue their action. We are satisfied that the existing process provides appropriate safeguards.

As always, the OBA would be pleased to discuss this submission with you and provide support as you move forward in addressing this important issue.