

**THE ALBERTA COURT OF APPEAL’S VEXATIOUS LITIGANT  
ORDER TRILOGY: RESPECTING LEGISLATIVE SUPREMACY,  
PRESERVING ACCESS TO THE COURTS,  
AND HOPEFULLY NOT TO A FAULT**

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**I. INTRODUCTION**

In May 2020, the Court of Appeal of Alberta decided three cases concerning vexatious litigant orders: *Makis v. Alberta Health Services*;<sup>1</sup> *Vuong Van Tai Holdings v. Alberta (Minister of Justice and Solicitor General)*;<sup>2</sup> and *Jonsson v. Lymer*<sup>3</sup> (collectively, the Vexatious Litigant Order Trilogy). The Court of Appeal held that the “inherent” jurisdiction of the Court of Queen’s Bench of Alberta to issue a vexatious litigant order is narrow. Rather, vexatious litigant orders are generally to be sought pursuant to prescribed statutory criteria, and granted only if those criteria are met. Moreover, other mechanisms should be pursued to manage challenging litigation before the drastic step of issuing a vexatious litigant order. This was a clear rebuke of Court of Queen’s Bench decisions that had denigrated statutory criteria and procedure for issuing vexatious litigant orders, and instead issued broad vexatious litigant orders pursuant to the Court’s inherent jurisdiction.

By and large, the decisions should be lauded for recognizing that, once a statute or regulation addresses an issue, that statute should be how the issue is addressed, with that only rarely being complemented (and never contradicted) by the court’s inherent jurisdiction. This is essential to upholding the rule of law and the separation of powers. The decisions also protect a party’s constitutional right to access the courts. Nonetheless, one hopes that these decisions do not disincentivize the courts from using other aspects of civil procedure, short of vexatious litigant orders, to proactively address challenging litigation coming from a small number of persons who waste a disproportionate amount of resources. If the decisions can be criticized, it can be for understating the real damage that abusive litigation can do to the justice system, and the need for novel solutions to nip such litigation in the bud.

Part II of this article summarizes the cases and the holdings. In summarizing *Lymer*, the primary decision, the nature and purpose of vexatious litigant orders will also be explained. Part III notes how the decisions properly prioritize statutory provisions to address an issue over a court’s inherent jurisdiction. This is the decisions’ strongest dimension, upholding the rule of law and recognizing the limited role of the courts vis-à-vis the legislatures in Canada’s constitutional order. Part IV notes how the decisions can also be justified on policy grounds, protecting parties’ right to access to the courts. Part V nonetheless expresses concerns that the decisions could chill other proactive management of challenging litigation. This need not be the result of these decisions which, on their own, are to be commended. It

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<sup>1</sup> 2020 ABCA 168 [*Makis*].

<sup>2</sup> 2020 ABCA 169 [*Vuong*].

<sup>3</sup> 2020 ABCA 167 [*Lymer*].

is rather a plea that they be understood to address Alberta’s approach to vexatious litigant orders per se and not all issues relating to litigation that could fairly be called vexatious. Other mechanisms to manage abusive *litigation* — not all of which is brought by vexatious *litigants* — are explored in this final section. The Vexatious Litigant Trilogy should not dissuade the Court of Queen’s Bench from using these mechanisms, many of which it has already been at the vanguard in developing.

## II. THE DECISIONS — AND VEXATIOUS LITIGANT ORDERS IN CONTEXT

### A. BACKGROUND TERMINOLOGY

*Black’s Law Dictionary* defines “vexatious” as “without reasonable or probable cause or excuse; harassing; annoying.”<sup>4</sup> The Court of Appeal for Ontario has described legal vexatiousness as “broadly synonymous with the concept of abuse of process developed by the Courts in the exercise of their inherent right to control proceedings.”<sup>5</sup> Justice Goudge of the same Court has described abuse of process in a way that has been accepted by the Supreme Court of Canada:

[The doctrine of abuse of process] engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel.<sup>6</sup>

“Abusive” is perhaps a more apt term to use in this respect than “vexatious,” especially as frivolous (another related term) and vexatious litigation is also almost certainly going to be abusive.<sup>7</sup> However, “vexatious” is the commonly used term if referring to persons in case law, leading to the term “vexatious litigant order.” “Abusive” tends to refer to litigation itself. This article will attempt to use these terms in this way.<sup>8</sup> And as the rest of this article

<sup>4</sup> Bryan A Garner, ed, *Black’s Law Dictionary*, 11th ed (St Paul, Minn: Thomson Reuters, 2019) sub verbo “vexatious.”

<sup>5</sup> The dissenting opinion of Justice Blair in *Foy v Foy (No 2)* (1979), 26 OR (2d) 220 (CA) at 237, accepted in subsequent case law: see *Dale Streiman & Kurz LLP v De Teresi* (2007), 84 OR (3d) 383 (Sup Ct J) at para 7.

<sup>6</sup> *Behn v Moulton Contracting Ltd.*, 2013 SCC 26 at para 40 [emphasis added by LeBel J], citing *Canam Enterprises Inc v Coles* (2000), 51 OR (3d) 481 (CA) at para 55.

<sup>7</sup> See e.g. Gerard J Kennedy, “Rule 2.1 of Ontario’s *Rules of Civil Procedure*: Responding to Vexatious Litigation While Advancing Access to Justice?” (2018) 35 Windsor YB Access Just 243 at 246–47 [Kennedy, “Rule 2.1”].

<sup>8</sup> As I have noted before in Gerard Joseph Kennedy, *Hryniak, the 2010 Amendments, and the First Stages of a Culture Shift?: The Evolution of Ontario Civil Procedure in the 2010s* (PhD Dissertation, York University, 2020) [unpublished] at 79–80 [Kennedy, Dissertation], this terminology can be criticized. The National Self-Represented Litigant Project (NSRLP) has observed that “vexatious” can be used as an inappropriate label to dismiss the claims of marginalized persons: Julie Macfarlane, Katrina Trask & Erin Chesney, “The Use of Summary Judgment Procedures Against Self-Represented Litigants: Efficient Case Management or Denial of Access to Justice?” (Windsor: The National Self-Represented Litigants Project & The University of Windsor, 2015) [NSRLP, “Vexatiousness”]. “Ineffective” and “inappropriate” litigation may be more suitable, if less precise. However, such litigation still abuses the court’s process and can thus be fairly described as “abusive” (buttressing “abusive” being a preferable term to “vexatious”). Regardless, “vexatious” and “abusive” appear throughout the case law and the *Judicature Act*, RSA 2000, c J-2 and thus will be used in this article. And some linguists have suggested that attempts to change language to reduce stigma can have only limited effects, as the stigma and perceived euphemistic undertones migrate to the new terminology: Steven Pinker, *The Blank Slate: The Modern Denial of Human Nature* (New York: Viking Penguin, 2003) at 212. Ultimately, therefore, a discussion about changing terminology is warranted but can be left for another day.

will emphasize, there is a very large difference between vexatious or abusive litigation and a vexatious litigant.

**B. LYMER: THE NEW LEADING CASE ON VEXATIOUS LITIGANT ORDERS**

*Lymer* is the decision where Justice Slatter, for a unanimous Court, described the process and criteria that must be followed and met before issuing a vexatious litigant order in Alberta. In essence, he held that the statutory criteria for issuing a vexatious litigant order under the *Judicature Act* must take precedence over any residual power of a court to issue such an order pursuant to its inherent jurisdiction.<sup>9</sup>

The case emerged from a contentious and emotionally charged bankruptcy proceeding. Among other things, the appellant was found in contempt of court orders prescribing disclosure of documents to allow investors to trace their funds. The investors brought a proceeding under the *Judicature Act* to, among other things, have the appellant declared a vexatious litigant.<sup>10</sup> The case management judge decided not to decide the case under the *Judicature Act*, instead holding that the Court should determine the issue on a “prospective, rather than punitive basis” under its inherent authority to control its own processes.<sup>11</sup> A vexatious litigant order was issued on terms significantly broader than those the appellants sought. The National Self-Represented Litigants Project was granted leave to intervene on the appeal, but Justice Slatter emphasized that the expert report it presented, authored by Julie Macfarlane, was not subject to cross-examination, nor was Professor Macfarlane qualified as an expert witness.<sup>12</sup>

Alberta’s *Judicature Act* prescribes a process for subjecting a person to a vexatious litigant order.<sup>13</sup> Among other things, it requires notice to the Minister of Justice (prior to 2007, it required the Minister’s consent<sup>14</sup>), recognizing that restricting a person’s access to the courts has a constitutional dimension.<sup>15</sup> The statute gives examples of behaviour that would warrant a vexatious litigant order:

- (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;

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<sup>9</sup> *Lymer*, *supra* note 3.

<sup>10</sup> *Ibid* at paras 3–5.

<sup>11</sup> *Ibid* at para 4.

<sup>12</sup> *Ibid* at para 8.

<sup>13</sup> *Supra* note 8.

<sup>14</sup> Amended as a result of the *Judicature Amendment Act, 2007*, SA 2007, c 21. This requirement was removed amidst the background of the Law Reform Commission of Nova Scotia’s April 2006 Final Report on Vexatious Litigants: Law Reform Commission of Nova Scotia, “Final Report – Vexatious Litigants,” Law Reform Commission of Nova Scotia, 2006 CanLII Docs 222, online: <www.canlii.org/v/2fg8>.

<sup>15</sup> *Judicature Act*, *supra* note 8, s 23.1(1); *Lymer*, *supra* note 3 at paras 19–20. See also *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, 2014 SCC 59 [*Trial Lawyers*].

- (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.<sup>16</sup>

Justice Slatter explained how vexatious litigant orders prevent steps being taken by the person against whom the order was issued without first obtaining permission of the court.<sup>17</sup> The rationale is to prevent the responding party from having to incur expense after a party has repeatedly shown that it abuses the court system. In other words, respondents only need to become involved after a case or step therein is shown to have prima facie merit. While vexatious litigant orders do not permanently deny access to the courts, in some situations they may be an insurmountable barrier.<sup>18</sup> Therefore, such an order is appropriate only if other mechanisms to discipline inappropriate litigation (such as case management orders, and so on) prove unsuccessful. Before they are to be issued, vexatious litigant orders require a pattern of inappropriate behaviour.<sup>19</sup> Unmeritorious and even abusive litigation can be disposed of without the need to resort to issuing a vexatious litigant order.<sup>20</sup> In this sense, there is a difference between a one-off instance of abusive litigation and a vexatious litigant.

Justice Slatter also emphasized the importance of not conflating self-represented litigants with vexatious litigants.<sup>21</sup> Self-represented litigants appear to be responsible for a disproportionate share of abusive litigation,<sup>22</sup> perhaps because lawyers are professionally forbidden from bringing such litigation.<sup>23</sup> Even so, the overwhelming majority of self-represented litigants are neither vexatious litigants nor pursuing abusive litigation.<sup>24</sup> While being self-represented does not excuse abusing a court's processes, self-represented litigants may engage in behaviour that "vexes" the court without meaning that a vexatious litigant order is appropriate — it is entirely plausible that the litigant is simply confused or overwhelmed by the process.<sup>25</sup>

<sup>16</sup> *Judicature Act*, *ibid*, s 23(2).

<sup>17</sup> *Lymer*, *supra* note 3 at para 9.

<sup>18</sup> *Ibid* at paras 67, 71.

<sup>19</sup> *Judicature Act*, *supra* note 8, s 23(2).

<sup>20</sup> *Lymer*, *supra* note 3 at para 13.

<sup>21</sup> *Ibid* at para 14.

<sup>22</sup> Kennedy, "Rule 2.1," *supra* note 7 at 262–63.

<sup>23</sup> *Ibid* at 263; Law Society of Alberta, *Code of Conduct* (Calgary: Law Society of Alberta, 2020), r 5.1-1, online: <documents.lawsociety.ab.ca/wp-content/uploads/2017/01/14211909/Code.pdf>; *Lymer*, *supra* note 3 at para 72.

<sup>24</sup> Compare the number of instances of abusive behaviour caused by self-represented litigants in Kennedy, "Rule 2.1," *supra* note 7, to the observation in Julie Macfarlane, "The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants — Final Report" at 34, online: <representingyourselfcanada.com/wp-content/uploads/2016/09/srlreportfinal.pdf> of "some lower level civil courts reporting more than 70% of litigants as self-represented." See also Gerard J Kennedy, "The 2010 Amendments and *Hryniak v Mauldin*: The Perspective of the Lawyers Who Have Lived Them" (2020) 37 Windsor YB Access Just 21 [Kennedy, "Perspective"], which notes that many lawyers acknowledge self-represented litigants have serious claims with serious issues in dispute.

<sup>25</sup> NSRLP, "Vexatiousness," *supra* note 8.

In *Lymer*, Justice Slatter acknowledged that the comprehensive statutory scheme prescribed in the *Judicature Act* could be taken to occupy the entire sphere of responses to problems posed by vexatious litigants. But he also acknowledged that the inherent jurisdiction of courts to control their own processes is not easily displaced, and there is residual power in superior courts to control abusive conduct.<sup>26</sup> As such, a complementary role for inherent jurisdiction may be appropriate, especially as the legislature may not have anticipated every potential need for a vexatious litigant order. However, Justice Slatter emphasized that any such exercise of inherent jurisdiction cannot conflict with the statute, and that inherent jurisdiction should only be invoked to grant vexatious litigant orders if: “a) the provisions of the *Judicature Act* are clearly inadequate to answer the problem, and b) there are compelling reasons to step beyond what the statute provides for.”<sup>27</sup> He was highly critical of Court of Queen’s Bench decisions that held that the vexatious litigant order sections of the *Judicature Act* were “obsolete,” pointing out that they cannot become so unless the legislature repeals them.<sup>28</sup> Court of Queen’s Bench decisions that had ignored the *Judicature Act* to rely upon inherent jurisdiction to issue vexatious litigants orders criticized the provisions in the *Judicature Act* that require “persistent” vexatious behaviour.<sup>29</sup> Justice Slatter noted that one can legitimately disagree with that requirement. This topic will be returned to below. But it is nonetheless the requirement that the legislature chose, less than ten years before the Court of Queen’s Bench began to issue these decisions.<sup>30</sup> He observed that “one-off” actions can be struck if they are obviously meritless, without the need for broader restrictions on access to the courts.<sup>31</sup>

Respect for the legislature is not the only reason for courts not to resort to inherent jurisdiction to control abusive proceedings. Justice Slatter noted that maintaining the perception of judicial impartiality also requires restraint when issuing vexatious litigants orders on terms not sought by the parties, especially in an adversarial system of litigation. While this cannot justify abdication of the judiciary’s responsibility to ensure efficient and appropriate use of court resources, granting relief parties did not seek should be the exception, not the rule.<sup>32</sup>

Turning to the facts of the case, Justice Slatter held that it was inappropriate for the Court of Queen’s Bench to have used an application under the *Judicature Act* as a justification to use the Court’s inherent jurisdiction to find the appellant to be a vexatious litigant. He held that more intensive case management was the more appropriate remedy. He noted that the investors’ major concern was “what had happened to [their] money” and the belief that their ability to find out the answer to that question was impeded by the appellant’s contempt of court.<sup>33</sup> While their concern was legitimate, he failed to see how a vexatious litigant order would help them with their concerns regarding contempt and learning what happened to their money. He also found a vexatious litigant order, which prevents the continuing or commencing of proceedings, to be an odd fit vis-à-vis a defendant (rather than a plaintiff).

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<sup>26</sup> *Lymer*, *supra* note 3 at para 23.

<sup>27</sup> *Ibid* at para 33.

<sup>28</sup> *Ibid* at paras 34–35.

<sup>29</sup> *Ibid* at paras 36–38.

<sup>30</sup> *Judicature Amendment Act, 2007*, *supra* note 14.

<sup>31</sup> *Lymer*, *supra* note 3 at paras 13, 41, citing *Alberta Rules of Court*, Alta Reg 124/2010, r 3.68 [*Rules of Court*]; *Unrau v National Dental Examining Board*, 2019 ABQB 283.

<sup>32</sup> *Lymer*, *ibid* at para 48.

<sup>33</sup> *Ibid* at para 75.

While concerns about persistent unsuccessful appeals were real and legitimate, there was no reason that this could not be controlled by requiring leave from the case management judge to appeal.<sup>34</sup>

Justice Slatter also held that the order was too broad, prohibiting the appellant from engaging in behaviour for which there was no evidence of him engaging, such as using pseudonyms, providing legal advice to third parties, and swearing criminal informations.<sup>35</sup> Carrying over this “boilerplate” language from past orders where it may have been appropriate was improper.<sup>36</sup> He also noted that requiring that the appellant be represented by a lawyer was unreasonable for possibly being an insurmountable financial hurdle.<sup>37</sup> In any event, the rationale — that the lawyer would not commence meritless proceedings as a matter of professional responsibility — was redundant, as a vexatious litigant order requires a screening of an action for merit.<sup>38</sup> Justice Slatter also held that an order demanding that the appellant pay all costs awards before continuing was similarly unreasonable.<sup>39</sup>

Ultimately, Justice Slatter set aside the vexatious litigant order, holding that it was inappropriate and, in any event, unreasonably broad. He also set aside a finding that the appellant should be imprisoned for 30 days for contempt of court as based on a flawed credibility assessment.<sup>40</sup>

### C. *MAKIS*

*Makis* concerned the intersection of vexatious litigant orders and the courts’ jurisdiction over administrative tribunals. Dr. Makis had commenced or become party to a plethora of litigation with a great number of parties after his employment came to an end. This included commencing three actions in the Court of Queen’s Bench of Alberta.<sup>41</sup> Alberta Health Services and the Alberta College of Physicians and Surgeons (the College) brought an application to, among other things, declare Dr. Makis a vexatious litigant and severely restrict or control his behaviour before multiple administrative tribunals, the Provincial Court, and the Court of Queen’s Bench.<sup>42</sup> The trial judge concluded that, as a matter of the Court’s inherent jurisdiction, he had the authority to craft a remedy whenever a party’s rights were violated, and this extended to the Court’s supervisory role over administrative tribunals, which do not share the same inherent jurisdiction. He concluded that litigious behaviour of Dr. Makis all related to the same events, and that he would abuse the processes of both the courts and the administrative tribunals.<sup>43</sup> A “boilerplate” vexatious litigant order was granted and applied to the administrative tribunals, including the Privacy Commissioner and Human Rights Commission, neither of whom asked for the order, nor been made parties to the application wherein it was granted.<sup>44</sup>

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<sup>34</sup> *Ibid* at paras 56–58.

<sup>35</sup> *Ibid* at para 66.

<sup>36</sup> *Ibid* at para 63.

<sup>37</sup> *Ibid* at para 71.

<sup>38</sup> *Ibid* at para 72.

<sup>39</sup> *Ibid* at paras 68–70.

<sup>40</sup> *Ibid* at paras 81–82.

<sup>41</sup> *Makis*, *supra* note 1 at para 5.

<sup>42</sup> *Ibid* at paras 6–7.

<sup>43</sup> *Ibid* at paras 10–12.

<sup>44</sup> *Ibid* at para 12.

Justice Slatter agreed that Dr. Makis had abused and overused the process of the Court of Queen’s Bench, specifically by commencing three proceedings that essentially concerned the same facts. But this was also likely because he was not legally trained (and did not retain a lawyer) as he chose to assert claims against different defendants in different proceedings. Many specific parts of the vexatious litigant order (such as not contacting employees of the Alberta Health Services except through their counsel) were appropriate, but could have been addressed by a case management order.<sup>45</sup> Therefore, Justice Slatter concluded that the appropriate remedy, at least at first instance, was a case management rather than vexatious litigant order.<sup>46</sup>

Turning to the restrictions about actions before “non-judicial bodies,” Justice Slatter held that the very term used in the vexatious litigant order was unacceptably imprecise: given the serious consequences of breaching a vexatious litigant order, someone subject to it should know exactly what behaviour is prohibited.<sup>47</sup> On the merits, he drew attention to the fact that “general” jurisdiction to, for example, grant a remedy, is not synonymous with “inherent” jurisdiction.<sup>48</sup> He cited *R. v. Caron*,<sup>49</sup> a leading Supreme Court of Canada case on the inherent jurisdiction of superior courts to supervise inferior courts and tribunals, to buttress the notion that a court’s inherent jurisdiction will exceptionally allow it to render assistance to inferior courts and tribunals pursuant to their supervisory function:

Canadian courts have, from time to time, exercised their inherent jurisdiction to render assistance to inferior courts as circumstances required.

...

Of course the very plenitude of this inherent jurisdiction requires that it be exercised sparingly and with caution. In the case of inferior tribunals, the superior court may render “assistance” (not meddle), but only in circumstances where the inferior tribunals are powerless to act and it is essential to avoid an injustice that action be taken.<sup>50</sup>

However, given the deference that courts generally owe to administrative tribunals, Justice Slatter held that courts “should generally only act on the application or concurrence of the administrative tribunal itself” and this should always occur on notice to the tribunal.<sup>51</sup> He also queried whether administrative tribunals are truly powerless to control their own procedures.<sup>52</sup> He held that a gatekeeping function on Dr. Makis’ myriad complaints about other doctors would have been preferable to a broad vexatious litigant order. Given that Dr. Makis had commenced a plethora of complaints, Justice Slatter narrowed rather than quashed the order affecting Dr. Makis’ ability to make complaints before the College.<sup>53</sup> Turning to Alberta Health Services, Justice Slatter queried whether public law remedies could be

<sup>45</sup> *Ibid* at para 20.

<sup>46</sup> *Ibid* at para 19.

<sup>47</sup> *Ibid* at para 27.

<sup>48</sup> *Ibid* at para 31.

<sup>49</sup> 2011 SCC 5 [*Caron*], cited in *Makis, ibid* at para 32.

<sup>50</sup> *Caron, ibid* at paras 27–30.

<sup>51</sup> *Makis, supra* note 1 at para 34.

<sup>52</sup> *Ibid* at para 35.

<sup>53</sup> *Ibid* at para 46. Notably, he held that Dr. Makis could not commence more complaints before the College without the approval of the case management judge: para 68.

granted in respect of it. Its complaints seemed to be internal workplace matters that it should attempt to resolve itself before asking the courts to do so. As such, he remitted the matter to the case management judge for more information about why orders were required vis-à-vis Alberta Health Services.<sup>54</sup>

In addition to setting aside the order against all administrators not named in the action below, Justice Slatter made additional comments regarding the orders as against the Minister of Health and multiple police forces. He noted that politicians likely receive a great amount of misguided correspondence (which Dr. Makis apparently sent in this case), but given the importance of broad expressive rights on political matters, it is inappropriate to use a vexatious litigant order to prohibit such correspondence.<sup>55</sup> As for the police, Justice Slatter concluded that preventing Dr. Makis from making allegations of criminal conduct to the police was problematic, insofar as it could be construed as the targets of a criminal investigation seeking to stifle that investigation through a vexatious litigant order. He nonetheless held that the College and Alberta Health Services had already had complaints about them made to the police, and as such it was appropriate to defer to the police investigation, with Dr. Makis being able to make additional complaints about them to the police only with the approval of the case management judge.<sup>56</sup>

#### D. *VUONG*

*Vuong* was perhaps the clearest instance of the three cases where there was an inappropriately issued vexatious litigant order. The case had been directed to a chambers judge in the Court of Queen's Bench because an individual litigant (appellant on the appeal) purported to continually be representing a corporate litigant (also an appellant on the appeal) in the Court of Queen's Bench notwithstanding an order that prohibited him from doing so. The motions judge made a vexatious litigant order against the appellants without giving them notice.<sup>57</sup> Justice Slatter noted that nothing justified the lack of notice (with fresh evidence on appeal indicating that a language barrier impeded the individual litigant from understanding the order he was allegedly in contempt of<sup>58</sup>), notice was not given to the Minister of Justice, and the order was in any event disproportionate to the appellants' wrongdoing.<sup>59</sup> After giving advice on what may have been more appropriate responses and noting that there was nothing facially abusive about the underlying litigation, the Court of Appeal set aside the vexatious litigant order.<sup>60</sup>

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<sup>54</sup> *Ibid* at para 50.

<sup>55</sup> *Ibid* at paras 53–55.

<sup>56</sup> *Ibid* at paras 64–65.

<sup>57</sup> *Vuong*, *supra* note 2 at para 6.

<sup>58</sup> In Kennedy, "Perspective," *supra* note 24, several lawyers note that linguistic barriers can impede parties' ability to access justice.

<sup>59</sup> *Vuong*, *supra* note 2 at paras 7–9.

<sup>60</sup> *Ibid* at paras 10–16.



### III. RESPECTING LEGISLATION

#### A. THE RELATIONSHIP BETWEEN STATUTES AND INHERENT JURISDICTION IN CANADA

In *Caron*, Justice Binnie noted two aspects of a court's inherent jurisdiction that, on first glance, may appear to be in conflict.<sup>61</sup> First, relying on I.H. Jacob's seminal article "The Inherent Jurisdiction of the Court,"<sup>62</sup> Justice Binnie concluded that "[t]he inherent jurisdiction of the court may be invoked in an apparently inexhaustible variety of circumstances and may be exercised in different ways' ... [therefore a] 'categories' approach is not appropriate."<sup>63</sup> He then went on to say, however, that "the very plenitude of this inherent jurisdiction requires that it be exercised sparingly and with caution."<sup>64</sup> Notwithstanding this caution, however, on the facts of *Caron*, Justice Binnie held that the inherent jurisdiction of the Court of Queen's Bench of Alberta allowed it to make an interim costs order for Provincial Court of Alberta proceedings despite this being contemplated neither by costs provisions in Alberta's *Judicature Act*,<sup>65</sup> *Court of Queen's Bench Act*,<sup>66</sup> or *Rules of Court*,<sup>67</sup> nor by the procedures in the *Criminal Code*<sup>68</sup> or the *Provincial Offences Procedure Act*.<sup>69</sup> In Justice Binnie's view, the inherent jurisdiction of the court could only be ousted if the action contemplated through inherent jurisdiction would conflict with a statute.

Much of the controversy surrounding the intersection of statutory powers with inherent jurisdiction relates to what constitutes a "conflict." As Justice Dickson (as he then was) noted in *Baxter Student Housing Ltd. v. College Housing Co-operative Ltd.*, "the inherent jurisdiction of the Court of Queen's Bench is not such as to empower a judge of that Court to make an order negating the unambiguous expression of the legislative will."<sup>70</sup> In *Caron*, Justice Binnie held the standard for *ousting* — crucially distinguished from *declining to exercise* — inherent jurisdiction to be something close to "impossible to comply" with the statute.<sup>71</sup> This has also been picked up in cases such as *Canada (Human Rights Commission) v. Canadian Liberty Net*, where Justice Bastarache held that statutes should only be interpreted to deprive courts of inherent jurisdiction if done through "an explicit ouster of jurisdiction."<sup>72</sup> Similarly, Professor Thomas Cromwell (as he then was) wrote that clear language was necessary to abrogate a court's inherent jurisdiction.<sup>73</sup> And as Justice Cromwell, he wrote in *Endean v. British Columbia* that, while statutory powers ought to be considered before a court chooses to act pursuant to its inherent jurisdiction, those statutory powers should be viewed to complement and reflect a court's inherent jurisdiction.<sup>74</sup>

<sup>61</sup> *Supra* note 49.

<sup>62</sup> I.H. Jacob, "The Inherent Jurisdiction of the Court" (1970) 23 Current Legal Probs 23.

<sup>63</sup> *Caron*, *supra* note 49 at para 29, quoting Jacob, *ibid* at 23 [emphasis added by Binnie J].

<sup>64</sup> *Caron*, *ibid* at para 30.

<sup>65</sup> *Supra* note 8.

<sup>66</sup> RSA 2000, c C-31.

<sup>67</sup> *Supra* note 31.

<sup>68</sup> RSC 1985, c C-46.

<sup>69</sup> RSA 2000, c P-34.

<sup>70</sup> [1976] 2 SCR 475 at 480 [*Baxter*].

<sup>71</sup> *Caron*, *supra* note 49 at para 32.

<sup>72</sup> [1998] 1 SCR 626 at para 32.

<sup>73</sup> TA Cromwell, "Aspects of Constitutional Judicial Review in Canada" (1995) 46:5 SCL Rev 1027 at 1031.

<sup>74</sup> 2016 SCC 42 at paras 60-62 [*Endean*].

In *Caron*, Justice Binnie nonetheless proposed caution in exercising inherent jurisdiction, particularly when the legislature has spoken to the same matter. Other cases have found that it has been inappropriate for courts to step into areas where the government has made clear policy decisions through legislation and it would violate the legislation's spirit — even if not necessarily its letter — for the courts to exercise inherent jurisdiction instead of deferring to the legislature. For instance, in *Ontario v. Criminal Lawyers' Association of Ontario*, Justice Karakatsanis held that it was inappropriate for trial judges to appoint amici curiae and then pay them at higher rates than legal aid lawyers were paid, even though doing so did not conflict with a statute.<sup>75</sup> Justice Beard (as she then was) similarly held in *Canadian National Railway Company v. Huntingdon Real Estate Investment Trust*<sup>76</sup> that it would be inappropriate to use inherent jurisdiction to order more disclosure than required by the Manitoba Court of *Queen's Bench Rules*,<sup>77</sup> despite the technical lack of a conflict. Nor does inherent jurisdiction give courts the power to exercise substantive power that is not contemplated by statute. For instance, in *Nova Scotia (Public Trustee) v. I.W.*,<sup>78</sup> the Nova Scotia Court of Appeal held that the Public Trustee cannot be granted the power to sell the home of a person in need of protection through the inherent jurisdiction of the court when that was not contemplated by the *Adult Protection Act*.<sup>79</sup> In *Unity Insurance Brokers (Windsor) Ltd. v. Unity Realty & Insurance Inc.*,<sup>80</sup> the Ontario Divisional Court reached a similar conclusion when a party attempted to force the name change of a corporation in circumstances not contemplated by the Ontario *Business Corporations Act*.<sup>81</sup> Through these cases is an emphasis, as in *Lymmer*, that inherent jurisdiction should only be exercised when the legislature has prescribed in an area if: a) the proposed exercise of inherent jurisdiction does not contravene the statute; and b) justice cannot otherwise be achieved.

While the cases tend to be clear in emphasizing that the inherent jurisdiction of the court to control its own processes is rarely eliminated by statutory or regulatory language, calls for restraint in the face of a concurrent legislative scheme are very appropriate.<sup>82</sup> There are three primary reasons for this. The first is predictability. By relying on statutory text instead of potentially wide-reaching “inherent jurisdiction,” parties are more likely to be able to better predict appropriate procedure. Given the wide-ranging nature of inherent jurisdiction, if it were used regularly, it could create very unpredictable procedure. Given the paramount importance of predictability in civil procedure, this is to be given considerable weight.<sup>83</sup> The second reason is democratic legitimacy. Democratic legitimacy was at the centre of the

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<sup>75</sup> 2013 SCC 43.

<sup>76</sup> 2009 MBQB 232 [*Huntingdon*].

<sup>77</sup> Man Reg 553/88 [*QB Rules*].

<sup>78</sup> 2014 NSCA 10.

<sup>79</sup> RSNS 1989, c 2.

<sup>80</sup> (2005), 251 DLR (4th) 368 (Ont Sup Ct (Div Ct)).

<sup>81</sup> RSO 1990, c B.16.

<sup>82</sup> See also *Ziebenhans v Bahlieda*, 2014 ONSC 138 at paras 51–52.

<sup>83</sup> David Bamford et al, “Learning the ‘How’ of the Law: Teaching Procedure and Legal Education” (2013) 51:1 Osgoode Hall LJ 45 at 56.

decision of Justice Chartier (as he then was) in *Benson v. Workers' Compensation Board (Man.)*.<sup>84</sup> He adopted the reasoning in a portion of Martin Dockray's "The Inherent Jurisdiction to Regulate Civil Proceedings".<sup>85</sup>

[I]n the absence of an express provision, where legislation is introduced in an area in which the court has inherent jurisdiction, it may not be clear whether the statute abolishes, suspends or modifies the inherent jurisdiction because it is inconsistent with it, or whether it merely provides a supplement or alternative to the common law powers.... Although there is not a great deal of authority on this point, it has been said that *where a situation is the subject of detailed and precise legislation, the court will rarely choose to exercise its inherent powers, which are then regarded as residual and principally confined to dealing with cases which have not been contemplated.*<sup>86</sup>

This is very much in line with Justice Beard's view in *Huntingdon* that a "clear case" should be present before inherent jurisdiction is invoked in an area where the legislature has already spoken regarding an issue. In this vein, in *Baxter*, Justice Dickson cited the decision in *Montreal Trust Co. v. Churchill Forest Industries (Manitoba) Ltd.*, in which Chief Justice Freedman wrote that "[i]nherent jurisdiction cannot, of course, be exercised so as to conflict with a statute or rule."<sup>87</sup> Justice Steel agreed with this in *Best v. Paul Revere Life Insurance Co.*<sup>88</sup> This encourages greater respect for the rule of law.<sup>89</sup>

The third reason is judicial humility. In Canada's constitutional order, the legislature is the primary law-making branch. While courts must interpret legislation and develop the common law, they are not meant to second-guess legislation, barring unconstitutionality.<sup>90</sup> Doing so can have unintended consequences, especially as, from an institutional perspective, legislatures look forward and courts look backward.<sup>91</sup> The legislature must be assumed to have considered how to balance the benefits and costs of vexatious litigants orders, and courts should be reluctant to second-guess that.

Taken together, these principles underscore the *expressio unius est exclusio alterius* maxim of statutory interpretation — also expressed in English as "legislative exclusion can be implied when an express reference is expected but absent."<sup>92</sup> In the words of Justice Noël

<sup>84</sup> 2008 MBCA 32 [*Benson*].

<sup>85</sup> MS Dockray, "The Inherent Jurisdiction to Regulate Civil Proceedings" (1997) 113 Law Q Rev 120.

<sup>86</sup> *Benson*, *supra* note 84 at para 53 [emphasis added].

<sup>87</sup> (1971), 21 DLR (3d) 75 (Man CA) at 81.

<sup>88</sup> 2000 MBCA 81 at para 19.

<sup>89</sup> This is a principal argument in favour of textualist statutory interpretation: see e.g. Antonin Scalia & Bryan A Garner, *Reading Law: The Interpretation of Legal Texts* (St Paul, Minn: Thomson/West, 2012) at xxix, discussed in, *inter alia*, William N Eskridge, Jr., "The New Textualism and Normative Canons," Book Review of *Reading Law: The Interpretation of Legal Texts* by Antonin Scalia & Bryan A Garner (2013) 113:2 Colum L Rev 531 at 533. For a discussion in the Canadian context, see Mark Mancini, "A New Canadian Textualism Emerges from the Stratosphere" *Advocates for the Rule of Law*, online: <[www.ruleoflaw.ca/entertainment-software-assoc-2020-fca-100-a-new-canadian-textualism/](http://www.ruleoflaw.ca/entertainment-software-assoc-2020-fca-100-a-new-canadian-textualism/)>, discussing *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*, 2020 FCA 100.

<sup>90</sup> See e.g. *British Columbia v Imperial Tobacco Canada Ltd*, 2005 SCC 49 at para 52.

<sup>91</sup> This is emphasized in the scholarship of Mark Tushnet: see e.g. Mark V Tushnet, "The Role of Courts in Social Change: Looking Forward?" (2006) 54:4 Drake L Rev 909 at 909–10.

<sup>92</sup> *University Health Network v Ontario (Minister of Finance)*, 2001 CanLII 8618 (Ont CA) at para 31.

(as he then was) in *Canadian Private Copying Collective v. Canadian Storage Media Alliance*, this principle holds that:

[I]f a statute specifies one exception (or more) to a general rule [such as the general rule of access to the courts being constrained by the exception that is vexatious litigant orders on certain terms], other exceptions [such as vexatious litigant orders on broader terms] are not to be read in. The rationale is that the legislator has turned its mind to the issue and provided for the exemptions which were intended.<sup>93</sup>

It should be noted that this is all subject to constitutional constraints. Even though Parliament and provincial legislatures can establish courts and administrative tribunals in the interests of justice, they cannot abolish superior courts or their supervisory functions.<sup>94</sup> And if a statute removes a “core” aspect of inherent jurisdiction, it may be unconstitutional.<sup>95</sup> Justice Garson of the British Columbia Court of Appeal held this to be the case regarding a statute that purported to prevent the punishment of contempt in *Bea v. The Owners, Strata Plan LMS 2138*.<sup>96</sup>

There is also some controversy about the extent to which the inherent jurisdiction of courts applies to courts without inherent subject matter jurisdiction, such as Provincial Courts, the Tax Court of Canada, the Federal Court of Canada, the Federal Court of Appeal, and, indeed, the Supreme Court of Canada and provincial Courts of Appeal. These courts tend to have taken a broad view of their inherent jurisdiction, whether conceived as penumbral to their subject matter jurisdiction<sup>97</sup> or to ensure effective disposition of matters within their competence.<sup>98</sup> This is an issue that was recently in controversy before the Court of Appeal for Ontario. In *4352238 Canada Inc. v. SNC-Lavalin Group Inc.*,<sup>99</sup> a single judge of the Court held that the Court had inherent jurisdiction to have an appeal “heard” in writing notwithstanding provisions in the *Court of Justice Act*<sup>100</sup> and *Rules of Civil Procedure*<sup>101</sup> that clearly contemplated oral hearings as part of the appeal process, and exceptions to oral hearings being clearly prescribed. However, while the inherent jurisdiction of statutory courts should be recognized as an issue that may warrant further consideration, this is not relevant with respect to the Vexatious Litigant Order Trilogy, which addressed the jurisdiction of Alberta’s superior court. In this vein, however, it should be noted that any “inherent jurisdiction” that Provincial Courts and administrative tribunals lack can be assisted by making applications in a superior court. Justice Slatter contemplated in *Makis* that this would be rarely be appropriate — but it can occur.<sup>102</sup>

<sup>93</sup> 2004 FCA 424 at para 96.

<sup>94</sup> *Trial Lawyers*, *supra* note 15 at para 30.

<sup>95</sup> *MacMillan Bloedel Ltd v Simpson*, [1995] 4 SCR 725 at para 37.

<sup>96</sup> 2015 BCCA 31 at para 42.

<sup>97</sup> See e.g. David Stratias, “A Judiciary Cleaved: Superior Courts, Statutory Courts and the Illogic of Difference” (2017) 68 UNBLJ 54.

<sup>98</sup> *G(N) v Upper Canada College* (2004), 70 OR (3d) 312 (CA) at para 10, per Sharpe JA.

<sup>99</sup> 2020 ONCA 303.

<sup>100</sup> RSO 1990, c C.43, ss 7(1), 7(2) [*CJA*].

<sup>101</sup> RRO 1990, Reg 194, rr 1.08(1), 1.08(2), 1.08(3) [*Ontario Rules*].

<sup>102</sup> *Makis*, *supra* note 1 at para 32.

## B. THE PRINCIPLES IN THE VEXATIOUS LITIGANT ORDER TRILOGY

Turning to the Vexatious Litigant Order Trilogy, Justice Slatter took Justice Binnie’s call for restraint in *Caron* seriously. Also recalling Justice Cromwell’s reminder from *Endean* that courts are to look to statutory guidance before resorting to inherent jurisdiction, Justice Slatter emphasized that it was inappropriate for a judge to disparage statutory provisions as “obsolete” and thus to turn to inherent jurisdiction prior to analyzing a statutory process for issuing a vexatious litigant order. He noted that the legislature prescribed the particular process for issuing vexatious litigant orders with deliberation, and had amended it relatively recently.<sup>103</sup> It would be undemocratic to ignore the legislature’s choices in this regard, particularly in ignoring requirements such as serving the Attorney General. Justice Slatter thus upheld the principle of democratic legitimacy. He did acknowledge that the *Judicature Act* was insufficiently clear to remove any residual role for the courts to issue a vexatious litigant order, but suggested that rare would be the case where resorting to residual power would be appropriate.<sup>104</sup>

This is to be commended. It is democratic, in that it acknowledges the primacy of legislative prescriptions when enacted in particular areas. It also adheres to Supreme Court precedent, which has held that courts should be reluctant to resort to inherent jurisdiction when the legislature has prescribed rules in particular areas. To be sure, the Supreme Court has also (usually) emphasized that some residual inherent jurisdiction exists, and Justice Slatter agreed with that as well. But overall, his opinion expressed consistency with Supreme Court of Canada precedent and principles of statutory interpretation and democratic legitimacy.

Justice Slatter did hold that there could be a residual role for the court “on its own motion” to restrict court actions of vexatious litigants — indeed, this is especially contemplated by section 23.1 of the *Judicature Act*.<sup>105</sup> However, even this possibility in section 23.1 requires a pattern of persistent behaviour; the fact that the statute contemplates the Court bringing a motion on its own initiative therefore hardly justifies issuing a vexatious litigant order in the absence of persistent behaviour. In any event, it was proper to give a court’s own motion a subsidiary role given that the adversarial system continues to be the primary forum of dispute resolution in common law Canada. Though excessively passive parties can cause problems by not promptly resolving matters, a concern that will be returned to below, there remain “perceptions of fairness” concerns that arise when courts take control of the procedure — particularly without any notice, as occurred in *Vuong*.

To be sure, when interpreting analogous Nova Scotia legislation in *Tupper v. Nova Scotia (Attorney General)*, Chief Justice MacDonald was much more sanguine about a superior court issuing a prospective vexatious litigant order pursuant to its inherent jurisdiction.<sup>106</sup> It should be noted though, that the analysis in that case was not as comprehensive as in the Vexatious Litigant Order Trilogy. In any event, the facts of *Tupper* are clearly

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<sup>103</sup> *Lymer*, *supra* note 3 at para 20.

<sup>104</sup> *Ibid* at paras 22–23.

<sup>105</sup> *Supra* note 8.

<sup>106</sup> 2015 NSCA 92 at paras 25–27 [*Tupper*].

distinguishable given that it involved a conspiracy theorist who commenced many actions against an ever-growing number of alleged conspirators over decades.<sup>107</sup>

Of course the legislature could amend the *Judicature Act*, and eliminate its requirement of persistence. For instance, the *Federal Courts Act* does not require a pattern of persistent behaviour in different pieces of litigation before a party can be declared a vexatious litigant.<sup>108</sup> Justice Slatter noted that the *Judicature Act*'s requirement of such persistency frustrated many Court of Queen's Bench judges, and that this is a matter of legitimate concern.<sup>109</sup> But as Justice Stratas noted in *Canada v Olumide*, the Federal Court and Federal Court of Appeal can chart a different path because of statutory language, not (primarily) because of any inherent jurisdiction to control their own processes.<sup>110</sup> This Federal Court practice is thus distinguishable from the situation in Alberta. Barring legislative amendments to the *Judicature Act* or *Rules of Court*, the Vexatious Litigant Order Trilogy therefore appears to have struck the right balance between deferring to statutory language and exercising inherent jurisdiction.

### C. ADMINISTRATIVE LAW CONSIDERATIONS

*Makis* also called for respect for the role of administrative tribunals as bodies to be given deference in their own purviews. As *Canada (Minister of Citizenship and Immigration) v. Vavilov* noted, administrative tribunals cannot act in ways that the legislature did not reasonably intend — this creates a role, however narrow, for superior courts, in their constitutionally prescribed supervisory role, to render assistance to the tribunals.<sup>111</sup> At the same time, administrative tribunals are to be given significant deference in many aspects of their operations, including procedural.<sup>112</sup> Justice Slatter noted that this should always require notice to the tribunal before granting an order “assisting” the tribunal pursuant to the court's inherent jurisdiction and it will almost always require the tribunal's consent.<sup>113</sup> *Makis* recognizes all these principles of administrative law and should be commended for doing so.

## IV. PROTECTING ACCESS TO THE COURTS

The decisions also recognize the right of parties — particularly vulnerable parties — to access the courts. Parties' ability to access the courts, irrespective of their financial circumstance, is integral to the rule of law.<sup>114</sup> Given the rule of law concerns caused by vexatious litigant orders, the Minister of Justice must be served when such an order is sought. Given that vexatious litigant orders affect how a person can exercise his or her right to access the courts, the bar to be reached before one is granted is meant to be high, though not insurmountable. Of course, vexatious litigant orders do not eliminate access to the courts. However, at times the procedure to seek leave to commence a proceeding despite a vexatious

<sup>107</sup> *Ibid* at para 4.

<sup>108</sup> RSC 1985, c F-7, s 40(1).

<sup>109</sup> *Lymer*, *supra* note 3 at paras 36, 38.

<sup>110</sup> 2017 FCA 42 at para 14ff [*Olumide*].

<sup>111</sup> 2019 SCC 65 at paras 68, 109.

<sup>112</sup> See e.g. Simon Ruel, “The Review of Procedural Fairness Post-*Vavilov*: More of the Same?” (2020) 33:2 *Can J Admin L & Prac* 159 at 167.

<sup>113</sup> *Makis*, *supra* note 1 at para 34.

<sup>114</sup> See e.g. *Trial Lawyers, supra* note 15; the concurring opinion of Justice Brown in *Uber Technologies Inc v Heller*, 2020 SCC 16.

litigant order can be an insurmountable barrier. The term “vexatious” is usually used against self-represented parties.<sup>115</sup> The National Self-Represented Litigant Project has noted that such parties frequently benefit from in-court time, rather than the (largely in writing) process to have someone declared a vexatious litigant or commence a proceeding notwithstanding a vexatious litigant order.<sup>116</sup>

Vexatious litigant orders can of course still be appropriate. Protections of self-represented litigants’ interests should not be taken to an unhelpful extreme: while the overwhelming majority of self-represented litigants are not vexatious litigants, the overwhelming majority of vexatious litigants are self-represented,<sup>117</sup> perhaps due to ethical restrictions on lawyers bringing abusive litigation.<sup>118</sup> I have been highly supportive of summary procedures to bring a prompt end to abusive litigation when appropriate.<sup>119</sup> In the *Trial Lawyers* decision, which held that access to the courts is a constitutional right, Chief Justice McLachlin noted that no one is permitted to commence vexatious proceedings.<sup>120</sup> But the gravity of vexatious litigant orders mandates a comparably serious process.

Most importantly, vexatious litigant orders, given their gravity, ought to, as a matter of fundamental fairness, be tailored to a party’s abusive behaviour. Perceptions of fairness are achieved by ensuring a party believes that they have been individually heard, which also warrants tailoring the vexatious litigant order to the party.<sup>121</sup> A party may act vexatiously in one proceeding, but this may provide little insight about how they will act in another action. As an example, a party may act vexatiously in a family law proceeding where emotions are running high, perhaps as an attempt to “coercively control” an estranged spouse.<sup>122</sup> This may tell us very little about how that litigant would act in a wrongful dismissal case that is unlikely to be so emotionally charged.<sup>123</sup> This does not excuse the abusive behaviour in the family litigation (which can be disposed of by other mechanisms, as will be discussed below) but it does provide a rationale for the requirement of “persistence” in the *Judicature Act*.

In this vein, Justice Slatter was quite right to point out that using “boilerplate” language in vexatious litigant orders is inappropriate. First, it suggests that the vexatious litigant order is not based on actual behaviour, cutting against the traditional view that vexatious litigant orders ought only to be granted against behaviour that a party has actually exemplified. Indeed, the statutory language in the *Judicature Act* speaks of the actions the litigant has taken. Boilerplate vexatious litigant orders also cast doubt upon whether a party was heard individually, which is troubling from the perspective of fairness. There are no doubt cases where terms usually found in “boilerplate” orders are appropriate, but there needs to be some

<sup>115</sup> NSRLP, “Vexatiousness,” *supra* note 8.

<sup>116</sup> *Ibid.*

<sup>117</sup> Kennedy, “Rule 2.1,” *supra* note 7 at 262–63.

<sup>118</sup> *Code of Conduct*, *supra* note 23.

<sup>119</sup> Kennedy, “Rule 2.1,” *supra* note 7; Kennedy, Dissertation, *supra* note 8.

<sup>120</sup> *Trial Lawyers*, *supra* note 15 at paras 47–48.

<sup>121</sup> See e.g. Jona Goldschmidt & Loretta Stalans, “Lawyers’ Perceptions of the Fairness of Judicial Assistance to Self-Represented Litigants” (2012) 30 Windsor YB Access Just 139 at 157–59; E Allan Lind & Tom R Tyler, *The Social Psychology of Procedural Justice* (New York: Plenum Press, 1988) at 76–81; Julian V Roberts & Loretta J Stalans, *Public Opinion, Crime, and Criminal Justice* (Boulder: Westview Press, 2000) at 149.

<sup>122</sup> See e.g. Lori Chambers, Deb Zweep & Nadia Verrelli, “Paternal Filicide and Coercive Control: Reviewing the Evidence in *Cotton v Berry*” (2018) 51:3 UBC L Rev 671.

<sup>123</sup> Which is not to say that this never occurs in the employment context: *SAIC Canada v Pagourov*, 2012 ONSC 6514, aff’d 2013 ONCA 563.

reason to order conditions that affect parties' ability to access the courts. For instance, a plaintiff may commence a single piece of ill-advised abusive litigation, but then be victimized in a sexual assault. If she has not indicated a tendency to abuse the court process through commencing claims pseudonymously, why should this be taken away from her? Granting orders prohibiting activity never engaged in creates a perception of not treating that party as a unique, individual person. While boilerplate terms may be "nice to have," restricting constitutional rights — such as access to the courts — requires terms actually tailored to individual persons. The Supreme Court of Canada recently held this to be the case regarding terms affecting the constitutional right to bail: conditions on bail must not be based on "boilerplate" language.<sup>124</sup> This does not suggest that judges should not look to precedents on how to word a vexatious litigant order well, but they should not "copy-and-paste" without determining that each term is warranted.

Ultimately, the Vexatious Litigant Order Trilogy appropriately recognizes the importance of access to the courts, and the problematic consequences from vexatious litigant orders being granted too liberally. Inappropriate, real-world effects of what occurred when this happened in the Court of Queen's Bench illustrated these concerns vividly, particularly in *Vuong*. In this vein, while proactive judging can be valuable in many circumstances, as will be returned to, it nonetheless creates a risk of a perception of unfairness insofar as it creates a perception of judges losing their impartiality.<sup>125</sup>

## V. ABUSIVE LITIGATION AND THE NEED FOR SUMMARY PROCEDURES

The Vexatious Litigant Order Trilogy reached results and holdings that are principally to be commended for respecting principles of statutory interpretation, judicial restraint, and deference to the legislature. And the previous section shows how the results *can* be defended from a policy perspective. But this merely shows that the language of the *Judicature Act* is justifiable, and not that it is the only acceptable way to balance competing interests. The *Federal Courts Act* is a principled alternative. So the Alberta legislature should not interpret the Vexatious Litigant Order Trilogy as suggesting that it could not or should not amend the *Judicature Act* to be more in line with the *Federal Courts Act*. Nor does it mean that courts should be excessively reticent when faced with abusive litigation even pending any legislative amendments, as will now be discussed.

It must be remembered that vexatious litigants can pose serious problems that courts must address. If Justice Slatter's judgments can be critiqued, it could be for underemphasizing the very serious damage that abusive litigation can cause to the justice system, which trial courts acutely experience on a day-to-day basis. None of this justifies ignoring statutory criteria for issuing vexatious litigant orders, which causes the above-noted problems and violates the aforementioned values. True vexatious litigants are not plentiful in numbers but they cause a disproportionate amount of waste, and many of them are responsible for a disproportionate share of inappropriate litigation.<sup>126</sup> As Justice Stratias noted in *Olumide*, the victims of this

<sup>124</sup> *R v Zora*, 2020 SCC 14 at para 88.

<sup>125</sup> See e.g. Don Stuart & Ronald Joseph Delisle, *Learning Canadian Criminal Law*, 6th ed (Scarborough, Ont: Carswell, 1997) at 63.

<sup>126</sup> Kennedy, "Rule 2.1," *supra* note 7 at 263.



behaviour are not merely the responding parties in the litigation at issue, but the public at large who are impaired in their ability to access the courts.<sup>127</sup>

Many traditional vehicles for addressing problems posed by abusive litigation have been viewed — with good reason — as inadequate to address these problems.<sup>128</sup> Motions on notice to strike vexatious litigation can give the allegedly vexatious party a new opportunity to act in an abusive and wasteful matter. As Justice Myers of the Ontario Superior Court has noted, this can have the result that the “proposed cure” of a dispositive motion “causes a fresh outbreak of the disease” that is abusive litigation behaviour.<sup>129</sup> Vexatious litigant proceedings, on the other hand, require a party bringing a separate application in Ontario to explain why it should be granted.<sup>130</sup> This still gives the allegedly vexatious litigant many opportunities to act vexatiously. It also may not be in the financial best interests of any litigant to pursue the order if the litigant has acted vexatiously against multiple parties. Moreover, due to statutory language which must be respected, such orders cannot be granted in Alberta against single instances of obviously inappropriate litigation behaviour.<sup>131</sup> Given these facts, it is understandable — even if not justifiable — that the Court of Queen’s Bench of Alberta sought to use vexatious litigant orders pursuant to its inherent jurisdiction to address what it perceived as abusive litigation.

In the Vexatious Litigant Order Trilogy, Justice Slatter encouraged trial judges to look to case management, directions, sanctions for failure to comply, and tailored striking of documents as preferable to vexatious litigant orders.<sup>132</sup> If effective, these are certainly to be preferred. Case management, in particular, is becoming more common across the country because of its effectiveness in facilitating access to justice.<sup>133</sup> But this still does not address the significant damage by a small number of litigants who behave truly vexatiously, causing significant loss of financial and temporal resources to courts and responding parties in many proceedings.<sup>134</sup> An admittedly extreme example of this is “Organized Pseudolegal Commercial Argument” litigation, which Associate Chief Justice Rooke was at the forefront of combatting in *Meads*,<sup>135</sup> in what has been described as a “gift to the judiciary.”<sup>136</sup> And in cases such as these, costs awards — security for which Justice Slatter encouraged as

<sup>127</sup> *Supra* note 110 at para 20, *inter alia*.

<sup>128</sup> Kennedy, “Rule 2.1,” *supra* note 7 at 247–48.

<sup>129</sup> *Raji v Borden Ladner Gervais LLP*, 2015 ONSC 801 at para 8.

<sup>130</sup> *CJA*, *supra* note 100, s 140.

<sup>131</sup> This is in line with the law in Ontario prior to 2014: Kennedy, “Rule 2.1,” *supra* note 7 at 247–48.

<sup>132</sup> *Lyster*, *supra* note 3 at para 12.

<sup>133</sup> See e.g. Janet Walker, “Summary Judgment Has its Day in Court” (2012) 37:2 Queen’s LJ 697 at 724–25; Supreme Court of British Columbia, “Practice Direction: Case Management” (20 November 1998), replaced by the Supreme Court of British Columbia, “Practice Direction: Case Planning and Judicial Management of Actions,” PD-4 (1 July 2010); *QB Rules*, *supra* note 77, r 50.1; Ontario Superior Court of Justice, “Practice Advisory Concerning the Provincial Civil Case Management Pilot – One Judge Model” (effective 1 February 2019), online: <ontariocourts.ca/scj/practice/civil-case-management-pilot>.

<sup>134</sup> Kennedy, “Rule 2.1,” *supra* note 7 at 263. This is apparent most infamously — but by no means exclusively — in “Organized Pseudolegal Commercial Argument” litigation: see e.g. *Meads v Meads*, 2012 ABQB 571 [*Meads*]; Donald J Netolitzky, “The History of the Organized Pseudolegal Commercial Argument Phenomenon in Canada” (2016) 53:3 Alta L Rev 606.

<sup>135</sup> *Meads*, *ibid*. See also Netolitzky, *ibid*; Donald J Netolitzky, “Lawyers and Court Representation of Organized Pseudolegal Commercial Argument [OPCA] Litigants in Canada” (2018) 51:2 UBC L Rev 419; Donald J Netolitzky, “After the Hammer: Six Years of *Meads v. Meads*” (2019) 56:4 Alta L Rev 1167.

<sup>136</sup> *R v Duncan*, 2013 ONCJ 160 at para 23.

preferable to barring access to the courts in *Lymer*<sup>137</sup> — seem manifestly inadequate compensation to innocent responding parties if they are unlikely to ever be paid, as Justice Brown of the Court of Appeal for Ontario has also observed.<sup>138</sup> The Vexatious Litigant Trilogy ought not to be interpreted to disincentivize addressing such problematic litigation, so long as it can be done while respecting statutory language and, accordingly, democratic legitimacy.

So there is an apparent dilemma. On the one hand, abusive litigation is a real problem and traditional methods to respond to it can be inadequate. At the same time, issuing overbroad vexatious litigant orders pursuant to a court's "inherent jurisdiction" is problematic in terms of respecting both the primacy of statutes and the right of parties to access to the courts. So what should be done about this? Fortunately, there is another mechanism: Civil Practice Note 7 (CPN7), enacted pursuant to rule 3.68 of the *Alberta Rules of Court*.<sup>139</sup> Rule 3.68 allows the court to, on its own motion or a request from a party, dismiss a proceeding that is manifestly deficient. Bearing significant similarities to rule 2.1 of Ontario's *Rules of Civil Procedure*, CPN7 seeks to provide predictability in this regard, prescribing a procedure to address a proceeding that "appears on its face to be frivolous or vexatious or otherwise an abuse of the process of the court."<sup>140</sup> Either on its own motion or at the request of a party, the court may request a party *in writing* to explain why a proceeding or step therein should not be dismissed. Associate Chief Justice Rooke noted this rule's usefulness in *Ubah v. Canadian Natural Resources Limited*.<sup>141</sup> Justice Slatter acknowledged in *Lymer* that "one-off" actions that are obviously meritless can be dismissed through rule 3.68 without resorting to vexatious litigant orders.<sup>142</sup>

CPN7 has many attributes that make it preferable to courts choosing to issue vexatious litigant orders pursuant to their inherent jurisdiction. First, CPN7 is by definition tailored to particular vexatious proceedings. While it does not prevent a vexatious party commencing another such proceeding, all the responding party must do is bring the new matter to the attention of the court. While this is irritating, it is likely to be less time- and resource-consuming than participating in even a single vexatious litigant order proceeding. Moreover, some vexatious litigants are known to commence proceedings notwithstanding prohibitions on doing so, which would necessitate the use of CPN7 in any event.<sup>143</sup> Second, CPN7 is a lawful regulation made pursuant to legislative authority — it thus does not pose the same problems for democracy as the use of vexatious litigant orders pursuant to a court's inherent jurisdiction.<sup>144</sup> Finally, following Ontario case law,<sup>145</sup> there is an appropriately high bar to use CPN7 — the abusiveness must be facially apparent, however generously read, and there should be something else emanating from the pleadings that suggests an extremely truncated

<sup>137</sup> *Lymer*, *supra* note 3 at para 70.

<sup>138</sup> *Schwilgin v Szivy*, 2015 ONCA 816 at para 23 [*Schwilgin*].

<sup>139</sup> *Supra* note 31; Court of Queen's Bench of Alberta, "Civil Practice Note 7" (effective 4 September 2018), online: <albertacourts.ca/docs/default-source/qb/civil-practice-note-7---vexatious-application-proceeding-show-cause-procedure.pdf?sfvrsn=cb2fa480\_6>.

<sup>140</sup> Ontario *Rules*, *supra* note 101, described in Kennedy, "Rule 2.1," *supra* note 7.

<sup>141</sup> 2019 ABQB 347 [*Ubah*].

<sup>142</sup> *Lymer*, *supra* note 3 at para 13.

<sup>143</sup> See Kennedy, "Rule 2.1," *supra* note 7 at 254. Court staff are of course meant to prevent this but mistakes can inevitably be made.

<sup>144</sup> *Rules of Court*, *supra* note 31, r 3.68; *Ubah*, *supra* note 141 at para 33; *Martinez v Chaffin*, 2019 ABQB 349 at para 181.

<sup>145</sup> See e.g. *Gao v Ontario WSIB*, 2014 ONSC 6100 at para 9.

process is appropriate.<sup>146</sup> While there is a danger that this standard will be “read down,” an appeal as of right serves to minimize the risks associated with this.<sup>147</sup> Experience in Ontario suggests that rule 2.1 has not been abused in that province.<sup>148</sup> While most of those whose claims are dismissed pursuant to rule 2.1 are self-represented, they are still a tiny minority of claims with self-represented litigants; indeed, about 40 percent of rule 2.1’s uses are prompted by individuals responsible for multiple instances of its use.<sup>149</sup>

There are, to be sure, disadvantages to CPN7 compared to vexatious litigant orders. First, CPN7 usually requires a party to bring the case to the court’s attention, unlike using the court’s inherent jurisdiction. But this can be done through a one sentence letter, and is not terribly burdensome.<sup>150</sup> This seems worthwhile to ensure judicial impartiality. Second, CPN7 only addresses particular instances of abusive litigation, and does not address parties who act vexatiously repeatedly in different proceedings. As such, CPN7 needs to be invoked repeatedly. But as noted above, this may be a necessary cost to ensure that parties’ access to the courts is protected. Third, CPN7 disposes of abusive litigation while respecting the statutory requirement that vexatious litigant orders are only to be granted in the face of “persistent” behaviour.<sup>151</sup> Moreover, CPN7 is hardly an onerous procedure on the courts. Finally, CPN7 does contemplate judges making orders to prevent future abusive proceedings. While the Vexatious Litigant Order Trilogy rightly cautions against using this power overbroadly, CPN7 is less problematic given that it is enacted pursuant to regulation. As such, if used properly, it has the potential to be less problematic than overuse of the inherent jurisdiction of courts.

While CPN7 may be the prime vehicle to address manifestly abusive proceedings, it should be noted that it is not the *only* vehicle. There are times when motions to strike appear appropriate, as factums are necessary to explain the abusive nature of the proceedings. While these are more costly, those costs may simply need to be born in the interests of preserving fairness. Nor is it *never* appropriate to resort to the inherent jurisdiction of the courts. Justice Slatter acknowledged in the Vexatious Litigant Order Trilogy that the inherent jurisdiction of the court remains to address problems posed by vexatious litigation in exceptional circumstances.<sup>152</sup> Aspects of how they were being used in the Court of Queen’s Bench — such as boilerplate language — are likely ipso facto inappropriate, just as boilerplate conditions on bail are likely ipso facto inappropriate. But it is still conceivable that a person may sue so many defendants in different proceedings such that it is not in the interests of any one of them to seek a vexatious litigant order. If the person has also drafted their pleadings in such a way to make CPN7 inapposite, there is residual discretion for the courts to prevent the party’s abusive behaviour. This is likely to be extremely rare, and the Court of Appeal of Alberta helpfully reminded courts to be reticent of using their powers in this regard. But the powers remain.

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<sup>146</sup> Kennedy, “Rule 2.1,” *supra* note 7 at 251–52; *Ubah*, *supra* note 141 at paras 34–35, 47–48.

<sup>147</sup> John Sopinka, Mark A Gelowitz & W David Rankin, *The Conduct of an Appeal*, 4th ed (Toronto: LexisNexis, 2018), § 1.114, citing *Court of Appeal Act*, RSA 2000, c C-30, ss 2, 19.

<sup>148</sup> Kennedy, “Rule 2.1,” *supra* note 7.

<sup>149</sup> *Ibid* at 263.

<sup>150</sup> *Ibid* at 266.

<sup>151</sup> *Judicature Act*, *supra* note 8, s 23(2).

<sup>152</sup> *Lymer*, *supra* note 3 at para 38.

One final point is worth mentioning regarding a condition of the vexatious litigant order that the Court of Appeal of Alberta held to be unreasonable in *Lymer*: that Mr. Lymer must pay costs orders before continuing. It is hard to quarrel with Justice Slatter's conclusion that this condition should not be included in vexatious litigant orders as a matter of routine for the same reason that no term should be included in vexatious litigant orders as a matter of routine. One also has to be sympathetic to the notion that vexatious litigant orders are not the statutory mechanism to enforce costs orders, given the ability to seek security for costs and that costs awards are supposed to be enforced like other court orders.<sup>153</sup> The same principles of statutory interpretation that should lead to privileging statutory criteria for issuing vexatious litigant orders over a court's inherent jurisdiction should also privilege these other mechanisms to secure costs orders. Even so, one must also be sympathetic to parties who are unable to ever recover costs awards. Courts speak regularly that indulgences should be granted to parties unless relief is sought that cannot be compensated for by costs.<sup>154</sup> Indeed, Justice Slatter suggested in *Lymer* that costs awards are an alternative to vexatious litigant orders that could sanction inappropriate litigation behaviour.<sup>155</sup> But if costs awards are never paid, innocent responding parties are forced to endure litigation steps that are to be "compensated" through illusory means.<sup>156</sup> And the principle of the rule of law — which Justice Slatter gave appropriate emphasis to in *Lymer* — mandates that court orders, including costs orders, be obeyed.<sup>157</sup> All of this is to say that, while vexatious litigant orders may not be the means to enforce costs orders, courts should not be sanguine when they are ignored. This could and should be considered when a party seeks security for costs in the face of unpaid costs orders, or when a party that has not paid costs orders seeks further indulgences from the court after failing to adhere to procedural law. Holding that prejudice to the innocent responding parties can be compensated in costs may be inappropriate. This is to say nothing of the prejudice to all those who cannot access the court system due to the behaviour of litigants who will not pay costs orders and are thus undeterred from engaging in appropriate litigation.

## VI. CONCLUSION

I have been referring to *Lymer*, *Makis*, and *Vuong* as the "Vexatious Litigant Order Trilogy" in this article. They are a valuable contribution to the jurisprudence, first by reminding that access to the courts is an inherent part of access to justice. While parties may "vex" the court, that does not, without more, mean that they are "vexatious" within the meaning of the term "vexatious litigant." Much of the practice of the Court of Queen's Bench did not seem tailored to individual litigants and thus appeared particularly unfair. Even more importantly, the Court of Appeal appropriately gave paramount weight to statutory language, and the problems of judicial overreach that result when this is ignored or downplayed. The Court of Appeal's decisions in these respects should be lauded.

But this article also seeks to remind lawyers and judges that, despite the appropriateness of the Court of Appeal's holdings in the Vexatious Litigant Order Trilogy, those holdings are

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<sup>153</sup> *Rules of Court*, *supra* note 31, r 4.22.

<sup>154</sup> Classically in terms of amending pleadings: *Laurentian Bank of Canada v Vos*, 1996 ABCA 16 at para 2.

<sup>155</sup> *Lymer*, *supra* note 3 at para 12(c).

<sup>156</sup> *Schwilgin*, *supra* note 138 at para 23.

<sup>157</sup> *Lymer*, *supra* note 3 at paras 10–11.

also confined to the use of the inherent jurisdiction of the courts to issue vexatious litigant orders. The problems caused by abusive litigation are real, and put responding parties and courts in unenviable situations when seeking to respond to such litigation. This does not justify imposing vexatious litigant orders — especially overbroad vexatious litigant orders — unnecessarily. And it certainly does not justify ignoring binding statutes and principles of statutory interpretation. But just as excessively active judging can jeopardize the perception of justice, so can excessively passive judging.<sup>158</sup> Fortunately, other, more appropriate civil procedure rules can address abusive litigation while still respecting statutory language and parties' right to access the courts. Justice Slatter acknowledged this in the Vexatious Litigant Order Trilogy<sup>159</sup> — let us hope that trial judges pick this up when appropriate.

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<sup>158</sup> Kennedy, Dissertation, *supra* note 8 at 298ff.

<sup>159</sup> Lymer, *supra* note 3 at para 13.

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