

**IN THE COURT OF APPEAL OF MANITOBA**

*Coram:* Mr. Justice Michel A. Monnin  
Madam Justice Holly C. Beard  
Madam Justice Janice L. leMaistre

***Docket: A119-30-09206*** )  
***BETWEEN:*** )

***MARTIN GREEN*** )  
(*Plaintiff*) *Appellant* )

- *and* - )

***DAVE BELL, LAURALYN CANTOR, DON METZ, COLIN RUSSELL, JANE DOE and THE UNIVERSITY OF WINNIPEG*** )  
(*Defendants*) *Respondents* )

- *and* - )

***Docket: A119-30-09207*** )  
***BETWEEN:*** )

***MARTIN GREEN*** )  
(*Applicant*) *Appellant* )

- *and* - )

***THE UNIVERSITY OF WINNIPEG*** )  
(*Respondent*) *Respondent* )

***M. Green***  
*on his own behalf*

***B. J. Meronek, Q.C. and E. A. Lawlor-Forsyth***  
*for the Respondents*

*Appeals adjourned:*  
***October 30, 2019***

*Written reasons:*  
***January 13, 2020***

**BEARD JA** (for the Court):

[1] Steel JA, sitting in chambers, found the plaintiff (Mr. Green) to be a vexatious litigant in relation to these proceedings pursuant to section 31.1(1) of *The Court of Appeal Act*, CCSM c C240 (the *Act*) (subsequently amended effective July 1, 2019 (see para 5 herein)). Further thereto, she ordered that he was prohibited from continuing the proceedings instituted in the Manitoba Court of Appeal and from instituting any further appeals arising out of the underlying dispute between the parties without first obtaining leave of a judge of this Court. Mr. Green has appealed that decision to a panel of this Court without obtaining leave to do so.

[2] At the appeal hearing, this Court held that Mr. Green could not proceed with his appeal because he had not obtained leave. These are our reasons for doing so. At Mr. Green's request, the appeal of Steel JA's order was adjourned *sine die* pending his application under section 31.2(1) of the *Act* for either leave to appeal or for the rescission of Steel JA's order.

[3] The statutory provisions in the *Act* do not deal directly with the issue of whether leave is required to appeal the vexatious litigant finding and related order and there is little jurisprudence on point. Determining the effect of the legislation on the right to appeal the section 31.1(1) order is a question of statutory interpretation.

[4] The provisions of the *Act* applicable in this matter are as follows:

**Vexatious proceedings**

**31.1(1)** Where a judge sitting in chambers or the court is satisfied, on application, that a person, persistently and without reasonable grounds, is

- (a) instituting vexatious proceedings in the court; or
- (b) conducting a proceeding in a vexatious manner;

the judge or the court may order that

- (c) the person shall not institute a further proceeding; or
- (d) a proceeding instituted by the person shall not be continued;

except with leave of a judge.

#### **Consent of Attorney General**

**31.1(2)** An application under subsection (1) shall be made with the consent of the Attorney General, and the Attorney General is entitled to be heard on the application.

#### **Application for leave to proceed**

**31.2(1)** Where a person governed by an order under subsection 31.1(1) seeks to institute or continue a proceeding, the person may apply for

- (a) leave to institute or continue the proceeding; or
- (b) rescission of the order;

and for no other relief, including costs.

#### **Application to court for rescission**

**31.2(2)** If the order under subsection 31.1(1) was made by the court, the application for rescission of the order under clause (1)(b) shall be made to the court.

#### **Leave to proceed or rescission**

**31.2(3)** For purposes of an application under subsection (1), where a judge sitting in chambers or the court is satisfied that a proceeding to be instituted or continued is not an abuse of process and that there are reasonable grounds for the proceeding, the judge or the court may, by order,

- (a) grant leave to proceed; or

(b) rescind the order made under subsection 31.1(1).

**Attorney General to be heard**

**31.2(4)** A person making an application under subsection (1) shall give notice of the application to the Attorney General, and the Attorney General is entitled to be heard on the application.

**No appeal**

**31.2(5)** No appeal lies from a refusal to make an order under subsection (3).

[5] While some of these provisions were amended effective July 1, 2019 (see *The Courts Modernization Act (Various Acts Amended)*, SM 2019, c 16), those amendments do not relate to the right of appeal and do not affect the issues dealt with in these reasons. The new provisions are attached as an appendix to these reasons.

[6] This specific legislation has a fairly short history. In *Benson v Workers' Compensation Board (Man) et al*, 2008 MBCA 32, this Court had occasion to consider its jurisdiction to make a vexatious litigant order. It was determined that, because the right to appeal was granted by statute, the vexatious litigant provisions already in effect in *The Court of Queen's Bench Act*, CCSM c C280, could not be used to take away that right; rather, specific legislation was required to do so. The *Act* was amended within months of that decision to add sections 31.1 and 31.2 (see *The Court of Appeal Amendment Act*, SM 2008, c 35, section 11), to make the vexatious litigant provisions already in effect in the Court of Queen's Bench also applicable to the right of appeal.

[7] While there was no extended discussion regarding the enactment of this legislation, the then Minister of Competitiveness, Training and Trade

stated in Committee that “[Bill 39] would also include provisions to deal with vexatious proceedings, based on similar existing provisions in The Court of Queen’s Bench Act” (Manitoba, Legislative Assembly, Standing Committee on Justice, *Committee Debates (Hansard)*, 39-2, No 11 (5 June 2008) at 501 (Hon Andrew Swan)).

[8] As noted earlier, the 2008 provisions were amended in 2019. According to the Minister of Justice and Attorney General, this amendment “updates provisions to address vexatious litigants before the Court of Appeal and the Court of Queen’s Bench by ensuring that vexatious litigants can only file future claims with the permission of the court” (see “Bill 20, The Courts Modernization Act”, 2nd reading, Manitoba, Legislative Assembly, *Debates and Proceedings (Hansard)*, 41-4, No 41 (17 April 2019) at 1372 (Hon Cliff Cullen)).

[9] Given the decision in *Benson* and the comments of Minister Swan regarding the legislative intent of the original vexatious litigant amendments to the *Act*, it is clear that the legislation was enacted to enable the Court of Appeal or a judge of the Court to govern vexatious litigants in proceedings brought before the Court of Appeal. This was confirmed by the comments of Minister Cullen regarding the 2019 amendments to those provisions.

[10] While section 31.1(1) states that a judge can order that a person shall not institute a further proceeding; and any proceeding instituted by the person shall not be continued except with leave of a judge, there is no definition of the word “proceeding” in the *Act*. It is, however, trite to say that the word, generally, has a broad meaning in law and may encompass more than just one type of legal “event”.

[11] Furthermore, it is important to recall the presumption of consistent expression with respect to statutory interpretation, which presumes “that the legislature uses language carefully and consistently so that within a statute or other legislative instrument the same words have the same meaning”; and where the same phrase is used in close proximity, the presumption is particularly strong (Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed, (Markham: LexisNexis, 2014) at section 8.32; see also section 8.35). This presumption means that the words “proceedings” and “proceeding” used in the *Act* and related legislative instruments should be interpreted in the same way unless there is strong evidence suggesting that the words should be interpreted differently.

[12] In the Manitoba, *Court of Appeal Rules*, Man Reg 555/88R, (the *Rules*), being related legislation, the word “proceedings” clearly encompasses appeals, motions or applications to the Court or a judge of the Court. For example, r 7 indicates that “all proceedings in the court” must be entitled in the manner outlined, and r 47(1) gives the Court the discretion to award costs “in any proceeding before it.” The meaning of “proceedings” in these rules would clearly include an appeal, as well as any motions or applications made during the course of or in relation to an appeal.

[13] We are of the view that the “proceedings” referred to in section 31.1(1) clearly include appeals. Thus, a judge or the Court can make a vexatious litigant order if the person has persistently instituted vexatious appeals or conducted appeals in a vexatious manner. Further, a judge or the court making the vexatious litigant finding may order that: (a) the person not institute a further appeal; and (b) any appeal already instituted by the person not be continued, except with leave of a judge.

[14] Likewise, relying upon the presumption of consistent expression, the word “proceeding” in section 31.2 should be interpreted to include appeals. Thus, where a person is subject to a vexatious litigant order under section 31.1(1) and wants to institute or continue an appeal, that person must first apply for leave to do so, or apply for rescission of the vexatious litigant order.

[15] It is also of note that section 31.2(1) concludes by indicating that the person may apply for “no other relief”. This clearly indicates that the person subject to the vexatious litigant order cannot simply bring an appeal before the Court as a whole, absent an order granting leave to institute a “proceeding”, i.e., an appeal. Thus, applying the rules of statutory interpretation, the requirement for leave outlined in section 31.1 does not apply only to the underlying appeal between the parties, but it also applies to an appeal of the vexatious litigant order itself.

[16] Statutory interpretation often involves a consideration of the interpretation of similar legislation in other jurisdictions. While all Canadian jurisdictions have a form of vexatious litigant legislation, some with provisions very similar to those in Manitoba, there is very little jurisprudence addressing the issue raised in this matter.

[17] This issue has been addressed, albeit very briefly, by the Federal Court of Appeal. The provisions of sections 40(1) and 40(3) of the *Federal Courts Act*, RSC 1985, c F-7, are similar to those in the *Act*:

**Vexatious proceedings**

**40(1)** If the Federal Court of Appeal or the Federal Court is satisfied, on application, that a person has persistently instituted vexatious proceedings or has conducted a proceeding in a

vexatious manner, it may order that no further proceedings be instituted by the person in that court or that a proceeding previously instituted by the person in that court not be continued, except by leave of that court.

**Application for rescission or leave to proceed**

**40(3)** A person against whom a court has made an order under subsection (1) may apply to the court for rescission of the order or for leave to institute or continue a proceeding.

[18] In *Henry v Canada (Prime Minister)*, 1997 CarswellNat 651 (FCA), Hugessen JA, for the Court, stated (at paras 1-2):

It having appeared, on the hearing of these appeals, that the appellant is the subject of an Order made pursuant to subsection 40(1) of the *Federal Court Act* and that no rescission or leave pursuant to subsection 40(3) has been obtained, it follows that these appeals have been irregularly prosecuted. Even if, as suggested by respondent's counsel, we were to treat these appeals as applications under subsection 40(3) (which they manifestly are not), we could see no ground for granting the same.

In the result, the appeals will be dismissed.

[19] This interpretation of the very similar provisions in the *Federal Courts Act* to require leave to appeal the vexatious litigant order supports the interpretation adopted in this case.

[20] In conclusion, we are of the view that the provisions of sections 31.1 and 31.2 of the *Act* prevent Mr. Green from appealing Steel JA's vexatious litigant finding and her order under section 31.1(1) without first obtaining either leave or an order of rescission.

[21] For these reasons, we held that Mr. Green could not proceed with this appeal without first obtaining leave to do so. As he indicated his intention

to apply for leave, the appeal was adjourned *sine die*, pending a determination of that issue or until further order of the Court.

[22] The respondents will have one set of costs.

Beard JA

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Monnin JA

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leMaistre JA

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## **APPENDIX**

*The Court of Appeal Act, CCSM c C240 (at sections 31.1(1)-31.2(5)):*

### **Order restraining vexatious litigant**

**31.1(1)** If a judge sitting in chambers or the court is satisfied that a person has persistently instituted vexatious proceedings or conducted proceedings in a vexatious manner, the judge or the court may order that

- (a) the person must not institute a further proceeding; and
- (b) any proceeding already instituted by the person must not be continued; except with leave of a judge.

### **Obtaining order**

**31.1(2)** An order under subsection (1) may be made

- (a) on a judge's own motion in chambers or on the court's own motion; or
- (b) on application by
  - (i) a party against whom the alleged vexatious proceedings have been instituted or conducted, or
  - (ii) any other person, with leave of a judge.

### **Application for leave to proceed**

**31.2(1)** Where a person governed by an order under subsection 31.1(1) seeks to institute or continue a proceeding, the person may apply for

- (a) leave to institute or continue the proceeding; or
- (b) rescission of the order;

and for no other relief, including costs.

### **Application to court for rescission**

**31.2(2)** If the order under subsection 31.1(1) was made by the court, the application for rescission of the order under clause (1)(b) shall be made to the court.

**Leave to proceed or rescission**

**31.2(3)** For purposes of an application under subsection (1), where a judge sitting in chambers or the court is satisfied that a proceeding to be instituted or continued is not an abuse of process and that there are reasonable grounds for the proceeding, the judge or the court may, by order,

- (a) grant leave to proceed; or
- (b) rescind the order made under subsection 31.1(1).

**31.2(4)** [Repealed] S.M. 2019, c. 16, s. 3.

**No appeal**

**31.2(5)** No appeal lies from a refusal to make an order under subsection (3).