WHAT DO I TELL A CLIENT WHO ASKS:
What Do I Do When a Debtor files a "Freeman of the Land" Claim or Motion
(Sub Nom: "Frivolous or Vexatious Claims and Motions – a Rule 2.1 Primer")

Introduction

The question "How do you solve a problem like Maria?" was posed by Rodgers and Hammerstein in their iconic 1959 musical, *The Sound of Music*. A similar question: "How do you solve a problem like Mark Shafirovitch?" must have been asked by the Committee responsible for drafting new Ontario Rules of Civil Practice to deal with the likes of Mr. Shafirovitch.

Now, there is absolutely no reason why you should recognize the name 'Mr. Shafirovitch'; for he is but one of dozens and dozens of vexatious litigants who clog up the courts with frivolous claims and vexatious motions that are destined to lose because they contain absolutely no cause of action whatsoever, are a complete waste of precious Court time, and thus are an abuse of the Court's process. But which, nonetheless, have to be defended by innocent parties at considerable personal cost and expense.

In Mr. Shafirovitch's case, he sued a local hospital because, he claimed, hospital staff threw bugs at his collar which forced him to itch and become frozen for an interrogation; the result of which engaged the implants the military illegally put in him to create a new way of brainwashing people. And all of this was allegedly done in front of or with the help of the hospital staff.

While the general guiding principal in the past was simply to give everyone their proverbial 'day in Court', the Supreme Court in Hryniak[1] mandated a culture shift; our Courts must ensure that everyone has timely and affordable access to a fair and just process. But this new culture shift does not guarantee that every dispute has to go to trial, or that every litigant gets their 'day in Court'. Rather, Hryniak stands for the proposition that the Courts must provide for alternative ways of resolving disputes (in a timely, affordable and proportionate manner). Hryniak was decided in a summary judgment scenario. But the same principles apply to the resolution of claims and proceedings that are frivolous, vexatious or an abuse of process.[2]

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[1] *Hryniak v. Mauldin, 2014 SCC 7 (CanLII)* at paras. 1-2, 28
[2] *Gao v Ontario (Workplace Safety and Insurance Board)* 2014 ONSC 6497 at par 6

The Courts have struggled with frivolous and vexatious claims for decades. Of course, there were (and continue to be) no less than three separate procedures available for dealing with claims of this nature. Rules 21.01(3)(d) and 25.11(b) and (c) of the *Rules of Civil Procedure* and section 140 of the *Courts of Justice Act*[3], all set out various procedures for allowing defendants and respondents who are served with frivolous or vexatious actions, motions or materials to move to strike them out or have them dismissed.

But each of these procedures requires a motion to be brought by the innocent party which, by its very nature, gives the vexatious litigant yet one more opportunity to wreak havoc with the innocent party and with the Courts. The shortfalls of these procedures for dealing with frivolous and vexatious claims were discussed in detail by Mr. Justice Myers in his Gao[4] decision from November 2014. Whether an innocent party tried to declare the transgressor a 'vexatious litigant' under section 140 of the Courts of Justice Act or whether the innocent party simply tried to dismiss an action under subrule 21.01(3)(d) or strike out all or part of a pleading or document under subrules 25.11(b) or (c), each of these procedures requires a motion to be brought by the innocent party on fresh evidence. This new motion gives the vexatious litigant yet another platform from which he or she can repeat all of his or her vexatious conduct; including filing voluminous motion materials, conducting cross-examinations, serving summons on third party witnesses and bringing additional procedural motions, all of which are emotionally exhausting and can be extremely costly to the innocent party. And in virtually all instances, the vexatious party is impecunious thus making costs awards completely ineffectually both as a deterrent to prevent the vexatious behavior and as even a modicum of compensation to the innocent party. In *Raji v Borden Ladner Gervais*[5], the Court said:

"The court has always had difficulty with the Catch-22 nature of dealing with vexatious litigants. Any time that proceedings are brought to try to end a vexatious proceeding, the vexatious litigant is provided with a fresh opportunity to conduct that proceeding in a vexatious, expensive, wasteful, and abusive manner. That is, the proposed cure causes a fresh outbreak of the disease. Vexatious litigant proceedings under s.140 of the CJA can take years and be very expensive in light of the many opportunities provided to the alleged vexatious litigant to file

[3] R.S.O. 1990, c. C.43
[4] Supra note 2, paras. 7 - 10
[5] 2015 ONSC 801 (CanLII) at par 8

material, examine and cross-examine witnesses, bring interim motions, and take advantage of other available procedures.".

Proclamation of Rule 2.1

Until June 1, 2014, that is. For on that date, the answer to the question "How do you solve a problem like Mr. Shafirovitch?" was proclaimed into force. Rule 2.1 was added to the Rules. It was intended to add to the arsenal available to deal with motions or actions or applications that are frivolous, vexatious or an abuse of the Court's process. Rule 2.1 is a short rule. But although short in length, its effect appears to be far reaching and extremely potent. And in the 2 plus years since the inception of Rule 2.1, we have had numerous claims and proceedings summarily stuck out by the Courts in a quick and cost-effective manner, without the need to resort to the usual motion process. In the Raji[6] decision, the Court commented that Rule 2.1 imposes….."*a quick and limited written process that provides one opportunity to the plaintiff to show why the claim should not be dismissed [-* this*] is an important advance toward meeting the goals of efficiency, affordability, and proportionality in the civil justice system as discussed by the Supreme Court of Canada in Hryniak .....*".

Rule 2.1 - General

A motion is not available nor necessary under Rule 2.1. The Court is empowered (either on its own initiative or after receipt of a written request from a party) to review a proceeding, and

- to ask the plaintiff for written submissions (no more than 10 pages in length) explaining why the proceeding ought not to be dismissed under this Rule
- to ask the innocent party to respond with no more than 10 pages of submissions (if the Court deems it necessary to do so)
- to dismiss the proceeding if it is found to be frivolous or vexatious or an abuse of the Courts' process

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In Goa[7], the Court gave us some guidance on what might be some of the hallmarks of an offensive pleading or proceeding under this new Rule 2.1 (without intending this list to be exhaustive):

[6] Ibid
[7] Supra note 2, paras. 15-16

Form

- *curious formatting*
- *many, many pages*
- *odd or irrelevant attachments—e.g., copies of letters from others and legal decisions, UN Charter on Human Rights etc., all usually, extensively annotated*
- *multiple methods of emphasis including:*
  - ➔ *highlighting (various colours)*
  - ➔ *underlining*
  - ➔ *capitalization*
- *repeated use of ‘’’, ???, !!!*
- *numerous foot and marginal notes*

Content

- *rambling discourse characterized by repetition and a pedantic failure to clarify*
- *rhetorical questions*
- *repeated misuse of legal, medical and other technical terms*
- *referring to self in the third person*
- *inappropriately ingratiating statements*
- *ultimatums*
- *threats of violence to self or others*
- *threats of violence directed at individuals or organizations*

These signs may assist in determine [SIC] *whether an action is a bona fide civil dispute or the product of vexatiousness. I would also include among these signs or factors, many of the hallmarks of OPCA litigants described by Rooke, A.C.J., in Meads v. Meads*[8].

Rule 2.1.01 is available to stay or dismiss a *proceeding* which appears on its face to be frivolous, vexatious or an abuse of process. Rule 2.1.02 is available to stay or dismiss a *motion* which appears on its face to be frivolous, vexatious or an abuse of process. Rule 2.1.03 is available to stay or dismiss a proceeding which was brought or continued by a person who has been declared to be a vexatious litigant under Subsection 140(1) of the *Courts of Justice Act*.

[8] 2012 ABQB 571 (CanLII)

How to Invoke Rule 2.1

Rule 2.1 may be invoked by the Court or local Registrar (on its own initiative) or by any party to the proceeding or motion upon their own written request for an order under this Rule.[9] In the Raji[10] decision, the Court wrote that subsection 2.1.01(6) requests from defendants or respondents should be limited to a one or two line request for a review by a judge under rule 2.1. The court was of the view that a detailed 'argument' from the innocent party was of little use. This is due to the fact that Rule 2.1 is "not for close calls"[11]. The Court held that the availability of relief under his rule *"……is predicated on the abusive nature of the proceeding being apparent on the face of the pleadings themselves. No evidence is submitted on the motion. As discussed more fully in Gao No.2, the use of rule 2.1 is justified by the need to prevent an apparently abusive litigant from inflicting the Catch-22 on the other parties and the court.*"[12] Similarly, the Court held in Kyriakopoulos[13] that *"Rule 2.1 is for claims that are frivolous, vexatious, or an abuse of process on their face. It involves an attenuated written hearing process that is designed to nip in the bud cases that appear to be so abusive that merely providing an oral hearing to consider the pleading could itself be an abuse the process. Rule 2.1 is not for close calls let alone cases in which there is a real dispute between the parties."* [emphasis added].

The Test

The Ontario Court of Appeal has, in its Scaduto[14] decision, approved the lower Court's handling of the Rule 2.1 dismissals. Specifically, the Court of Appeal approved the 2 part test established by the lower Court in the Scaduto[15] matter. This two-part test requires, firstly, that the proceeding be frivolous, vexatious or an abuse of process *on its face*. And secondly, the Court should generally be satisfied that there is a basis in the pleading giving rise to the need to resort to the 'attenuated' process prescribed by Rule 2.1.

This second requirement is not in Rule 2.1 and is not a fixed requirement. As stated by the Court in the Ashgar[16] decision, it is included to remind the Court that there are other Rules available for the same subject matter; and that resort to the attenuated process in Rule 2.1 should be justified in

[9] Subrule 2.1.01(6)
[10] Supra note 5, at par. 12
[11] Ibid, at par. 9
[12] Ibid
[13] *Kyriakopoulos v Lafontaine*, 2015 ONSC 6067 (CanLII), at par. 5
[14] *Scaduto v LSUC* 2015 ONCA 733 (leave to appeal dismissed 2016 CanLII 21790 (SCC)
[15] *Scaduto v LSUC* 2015 ONSC 2563
[16] *Ashgar v Alon*, 2015 ONSC 7823, at par. 4

each case. For instance, the proceeding being examined under Rule 2.1 should give the Court reason to believe that the ordinary process of the Court will be subject to abuse by the plaintiff behaving as a vexatious or querulent litigant. For example, the pleadings may contain inherently abusive claims like the Freemen of the Land (OPCA) claims as discussed by Rooke A.C.J. in *Meads.* Or the proceedings may contain hallmarks of vexatious litigants or querulous litigant behavior as discussed in *Gao* (and quoted above).

Conclusion

Tom Robbins said that: *"The world is a wonderfully weird place, consensual reality is significantly flawed, no institution can be trusted, certainty is a mirage, security a delusion, and the tyranny of the dull mind forever threatens*"……..but Ontario now boasts Rule 2.1 which may be used by The proposed counsel to summarily snuff out proceedings that are frivolous, vexatious or simply an abuse of the Court's process. This Rule may be invoked by a 1 – 2 line letter filed with the registrar, preferably with a copy being mailed to the plaintiff or applicant. The letter should merely ask the Court to invoke its jurisdiction under rule 2.1 to strike out or dismiss the proceeding. No argument should be proffered, as none is needed for a request to be successful. If the proceeding is frivolous, vexatious or an abuse of the Court's process on its face and if the proceeding appears to be one that is likely to result in the Court's processes being abused, then the proceeding will be struck out or dismissed. But it is not for close calls. And Rules 21.01(3)(d) and 25.11(b) and (c) of the *Rules of Civil Procedure* and section 140 of the *Courts of Justice Act* continue to apply if the matter does not fit squarely within the purview of Rule 2.1.

When the dog bites,
when the bee stings,
when I'm feeling sad,
I simply remember
my favorite things
and then I don't feel so bad.
Rodgers and Hammerstein, The Sound of Music