# IN THE COURT OF APPEAL OF MANITOBA

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| ***Docket: AI18-30-09054*** | ) | |
| ***BETWEEN:*** | ) | |
| | ) | |
| ***MARTIN GREEN*** | ) | |
| | ) | |
| *(Plaintiff) Appellant* | ) | |
| | ) | |
| *- and -* | ) | |
| | ) | ***M. Green*** |
| ***DAVE BELL, LAURALYN CANTOR, DON METZ, COLIN RUSSELL, JANE DOE and THE UNIVERSITY OF WINNIPEG*** | ) | *on his own behalf* |
| | ) | ***B. J. Meronek, Q.C.*** |
| *(Defendants) Respondents* | ) | *for the Respondents* |
| | ) | |
| *- and -* | ) | |
| | ) | *Chambers motions heard:* |
| ***Docket: AI18-30-09055*** | ) | ***August 9, 2018*** |
| ***BETWEEN:*** | ) | |
| | ) | |
| ***MARTIN GREEN*** | ) | *Decision pronounced:* |
| | ) | ***December 17, 2018*** |
| *(Applicant) Appellant* | ) | |
| | ) | |
| *- and -* | ) | |
| | ) | |
| ***THE UNIVERSITY OF WINNIPEG*** | ) | |
| | ) | |
| *(Respondent) Respondent* | ) | |

## STEEL JA

[1] Access to the courts is a fundamental right in our judicial system. But it is a right that can be abused when individuals use the system in unreasonable, unmeritorious ways. A balance must be found between

appropriate use of judicial resources and endless court actions that result in harassment by means of litigation. That balance allows access to be limited but only as far as is necessary and only upon clear grounds. That is why *The Court of Appeal Act*, CCSM c C240 (the *Act*) allows an order to be made declaring an individual to be a vexatious litigant which limits his or her access to the courts. These appeals deal with such an order.

[2] Martin Green (Green) is appealing a Court of Queen's Bench judgment granting the defendants' motion for summary judgment and dismissing Green's statement of claim (see *Green v Bell et al*, 2018 MBQB 2 (*Bell 2018 QB*)). In a related appeal, Green is appealing another Court of Queen's Bench judgment dismissing his application for judicial review (see *Green v University of Winnipeg*, 2018 MBQB 4 (*University 2018 QB*)) (the University of Winnipeg is both a defendant in *Bell 2018 QB* and the respondent in *University 2018 QB* and is hereinafter referred to as the University). In response, the University and the remaining defendants brought this motion in chambers for "[a]n Order prohibiting [Green] from continuing the proceedings instituted herein" pursuant to the vexatious litigant provisions in section 31.1(1) of the *Act*. They argue that Green's appeals are vexatious and a clear abuse of the judicial process and the Court's limited resources. They ask that the vexatious litigant provisions be invoked to prohibit him from continuing the current litigation and from commencing future actions against the named parties.

[3] Alternatively, they seek an order requiring Green to pay the outstanding bills of costs in the amount of $41,132.60, or such other amount as the Court may deem appropriate, but not to be less than $18,399.60 in Court-approved bills of costs; as a prerequisite to the hearing of these appeals.

[4] In the further alternative, they seek an order for security for costs before allowing the appeals to proceed.

[5] At the hearing, I granted the University and the remaining defendants an order staying the requirement to file responding facta until after the disposition of this motion.

## FACTS

[6] Green became a student at the University in September 2011. A complaint was filed against him by the Associate Dean of Education on November 22nd of that year and one day previous to that, his high school practicum placement was terminated.

[7] Over the next several weeks, the Registrar of the University conducted an investigation of those complaints and eventually issued a report finding that Green was "unable to conduct [himself] without being perceived by staff and students as disruptive" and recommended a one-year suspension from the University's Bachelor of Education program. The recommendation was accepted by the President of the University and Green was suspended as of January 2012. His appeal to the Senate Appeals Committee was rejected. His later application for reinstatement was refused.

[8] Beginning in September 2011, as part of his teacher certification program, Green was assigned to Gordon Bell High School (Gordon Bell) for his student teaching practicum. Because of alleged concerns, among other things, with Green's failure to prepare adequate lesson plans, off-topic lectures and refusal to follow instructions, he was suspended from the practicum and subsequently removed. Of note, the substance of the

complaints from Green's university professors and fellow students were independent of, and in part took place before, the concerns articulated by the staff at Gordon Bell concerning Green's performance as a student teacher.

[9] As well, in January 2012, Green had an order made against him barring him from the University campus under the authority of *The Petty Trespasses Act*, CCSM c P50. In August 2014, he was convicted of trespassing on the University campus (see *R v Green*, 2014 MBPC 42, leave to appeal refused, 2015 MBCA 60).

[10] The above events formed the basis for a succession of unsuccessful court actions against the University and various individuals. Commencing in 2013, to date, Green has brought seven statements of claim and/or notices of application in the Court of Queen's Bench, 10 appeals to the Court of Appeal and five leave applications to the Supreme Court of Canada. Since 2014, all actions between Green and the University have come under the case management of Edmond J.

[11] In particular, Green has brought the following actions against the University and others which were dismissed or are pending as follows:

- See *Green v Tram et al*, 2014 MBQB 118 (*Tram 2014 QB*), aff'd 2015 MBCA 8, leave to appeal to SCC refused, 36339 (18 June 2015). Costs agreed to in the amount of $5,402.25.

- See *Green v Tram et al*, 2015 MBQB 128 (*Tram 2015 QB*), aff'd 2016 MBCA 99 (*Woloshyn 2016 CA*), leave to appeal to SCC refused, 37407 (6 April 2017). Costs agreed to in the amount of $3,763.81.

- See *Green v The University of Winnipeg*, 2014 MBQB 243 (*University 2014 QB*), aff'd 2015 MBCA 109 (*University 2015 CA*), leave to appeal to SCC refused, 36819 (21 April 2016). Costs agreed to in the amount of $6,227.54.

- See *Green v Bush et al*, 2017 MBQB 83 (*Bush 2017 QB*), aff'd 2018 MBCA 12 (*Bush/Metz 2018 CA*), leave to appeal to SCC pending. Costs agreed to in the amount of $323 and not yet agreed to in the amount of $2,560 in the Court of Appeal.

- See *Green v Metz et al*, 2017 MBQB 84 (*Metz 2017 QB*), aff'd 2018 MBCA 12, leave to appeal to SCC pending. Costs agreed to in the amount of $323 and not yet agreed to in the amount of $2,560 in the Court of Appeal.

- See *Martin v The University of Winnipeg*, 2017 MBQB 67 (*University 2017 QB*), aff'd 2018 MBCA 11. Costs not yet agreed to in the amount of $5,530.50.

- See *Green v University of Winnipeg*, 2017 MBCA 18 (*University 2017 CA*). Costs agreed to in the amount of $2,360.

- See *University 2018 QB*, appeal to Man CA pending. Costs not yet agreed to in the amount of $5,317.50.

- See *Bell 2018 QB*, appeal to Man CA pending. Costs not yet agreed to in the amount of $6,765.

[12] To give one a flavour of the many actions, let me review several of them. *Tram 2014 QB* was an action brought by Green for conspiracy,

defamation and breach of contract against the University and Gordon Bell staff for his removal and subsequent suspension from the practicum. The defendant, Mr. Tram, was a Gordon Bell teacher who supervised Green for one course and the defendant, Ms Skull, was the principal. Green blames all of the defendants for his removal, claiming they conspired together to injure him by depriving him of his opportunity to become a certified teacher. He further alleges that Mr. Tram and Ms Skull defamed him. Mr. Tram and Ms Skull successfully moved before a Master for summary judgment. On a fresh hearing in the Court of Queen's Bench, summary judgment was confirmed. In granting summary judgment, the Court made this comment (at para 27):

> Mr. Green relies on self-serving conjecture and speculation. I do not agree that the notes, reports, emails or any discrepancies are "severe" or show "great care" was taken to keep Mr. Green "in the dark", or that the notes were a "secret dossier" used to "ambush" Mr. Green. In analyzing the evidence, or his belief of omissions of evidence, he subjectively stitches together "facts", conclusions or inferences which, objectively, amount to a tapestry of mischaracterization. In saying this, I am in no way suggesting that Mr. Green is either being disingenuous or deceitful. I have no doubt that he honestly believes what he sees and says. However, I also have no doubt that the conclusions he urges upon the court to support his claim, and to show that there is a genuine issue for trial, fall within that category referred to in ***Manitoba (Hydro Electric Board)*** [*Manitoba Hydro Electric Board v John Inglis Co Limited et al*, 2000 MBQB 218], as "the product of wishful, fanciful or imaginative thinking on behalf of the plaintiff". There is no substance to it. There is no air of reality to it.

[13] *Tram 2015 QB* was an appeal from the decision of a Master dismissing the motion of the defendants Ms Woloshyn, Mr. Stewart, Mr. Anchan and the University for summary judgment dismissing Green's

claims against them (see *Green v Tram et al*, 2013 MBQB 154 (*Tram 2013 QB*)). After a careful analysis of the facts and law, the Court granted the motion for summary judgment, finding that there was no genuine issue for trial and that the steps taken by the University were in compliance with the requirements set forth in the University's 2011-2012 Certification Practicum Handbook and the Student Non-Academic Conduct and Discipline Policy (see para 91). The Court stated, "A review of all of the evidence establishes that the plaintiff's claim based on the tort of conspiracy to injure, breach of contract, and breach of duty of care must fail" (at para 95) and "I have determined that there is not a real chance that his action will be successful" (at para 96).

[14] *University 2017 QB* was an application for judicial review. It arises from the dispute over the grading of one of Green's assignments. The issue in this application was whether the University breached procedural fairness or natural justice in its handling of Green's grade appeal. The Court dismissed the application and held that the University acted with procedural fairness and the decision made was reasonable in the circumstances.

[15] It is unnecessary to review all of the matters that have proceeded in the Court of Queen's Bench, the Court of Appeal and the Supreme Court of Canada other than to say there has been a significant amount of litigation, all relating to the steps taken by the University to suspend Green from the University's teacher certification program and the conduct of the University staff in communicating certain information regarding his conduct and actions while he was enrolled in and after his suspension from the program. All have been unsuccessful, with most of them being dismissed by way of summary judgment as a result of the Court finding that Green's allegations do not raise

a genuine issue for trial. In addition, in *University 2018 QB*, the judge found that Green "was attempting to reargue prior decisions made by the University, this court and the Manitoba Court of Appeal and to, in effect, reconsider the facts and decisions previously made regarding his suspension" (at para 77).

[16] As of today, there remain pending the two appeals in the Court of Appeal that form the basis of this motion and two leave applications to the Supreme Court of Canada. All arise from the events discussed in these appeals.

[17] Significant costs have been assessed against him. Green has agreed to pay $18,399.60, but the remaining bills of costs totalling $22,733 remain unresolved. To date, Green has not made any payment towards the costs owing. He pleads impecuniosity.

[18] The University and the remaining defendants seek an order declaring Green to be a vexatious litigant and prohibiting the current matters under appeal from proceeding. They ask for an order that would require Green to seek leave from the court prior to commencing any future action against any of the named parties in all prior and current actions, including the University and its staff representatives; professors; administration; and security. They argue that Green's many pieces of litigation represent an attempt to relitigate matters that this Court has already determined to be without legal grounds or merit and in the absence of any reasonable expectation of relief.

## **DECISION**

[19] Sections 31.1-31.2 of the *Act* state:

**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).

[20] As required by the above sections, the motion was made with the consent of the Attorney General; however, he takes no position on the case.

[21] Let me start by indicating that although the sections refer to an application, I do not see a problem with the fact that this matter was brought by way of a motion. The proceeding is not flawed merely because it was brought by way of a notice of motion and not by application. It is an acceptable practice in a pending appeal. The words "application" and "motion" are not defined in the *Act* and should be given a liberal interpretation. In practice, there appears to be a blurring of the lines in this Court, between motions and applications.

[22] Indeed, there are several examples of the rules referring to an application, but the actual forms used are those of a notice of motion. Rule 31 of the *Manitoba Criminal Appeal Rules*, SI/92-106 speaks to an application for judicial interim release; however, the applications are normally styled as a notice of motion. The same is true of motions brought pursuant to *The*

*Residential Tenancies Act*, CCSM c R119, which speaks to an application for leave to appeal in section 175(3), but in practice is dealt with by way of a notice of motion.

[23] The Federal Court of Appeal also takes the view that, in this context, a motion is indistinguishable from an application. Section 40 of the *Federal Courts Act*, RSC 1985, c F-7 addresses vexatious litigants in both levels of the Federal Court and that section speaks of an application. However, several Federal Court of Appeal decisions have confirmed that a motion would be an acceptable practice pursuant to that section. The court has held that the term is sufficiently broad to include originating applications and motions and that vexatious litigant motions can be brought in the Federal Courts' system either by way of motion within a proceeding or by application, as an independent proceeding in itself (see *Coote v Lawyers' Professional Indemnity Company (Lawpro)*, 2014 FCA 98 at para 12, leave to appeal to SCC refused, 36218 (9 April 2015); and *Olumide v Canada*, 2016 FCA 287 at para 34).

[24] I acknowledge that the words are defined in *The Court of Queen's Bench Act*, CCSM c C280 (the *QB Act*) and refer to the fact that an application refers to a proceeding, other than an action, that initiates a proceeding in court while a motion means a motion within a proceeding (see r 1). Not surprisingly, when one turns to the Court of Queen's Bench cases that have considered a vexatious proceeding (see section 73(1) of the *QB Act*), most litigants have sought relief by way of an application. However, the practice is not uniform. In *Winkler v Winkler*, 1990 CarswellMan 238 (QB), aff'd 1991 CarswellMan 212 (CA); and *Fritschij v Bazan*, 2005 MBQB 179, a notice of motion was filed.

[25] I am aware of the general principle of statutory interpretation and the well-known presumption that the legislature uses language carefully and consistently so that the same words have the same meaning. Not only within statutes, but across statutes as well, especially statutes or provisions dealing with the same subject matter (see Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham: LexisNexis, 2014) at para 8.33). As well, section 36 of the *Act* provides that the Court of Queen's Bench practice will apply where procedure is not provided for in this *Act*. The corresponding vexatious litigant section in the *QB Act* (see section 73) reads almost identically to section 31.1(1) of the *Act* and similarly speaks of an application.

[26] While this Court will adopt the practice and procedure of the Court of Queen's Bench where it is appropriate, that adoption is permissive, not mandatory (see *Assn of Optometrists (Manitoba) v 3437613 Manitoba Ltd*, 1998 CarswellMan 160 at para 6 (CA) (in chambers)). Context is important. In an appellate court, applications for a vexatious litigant declaration do not usually constitute an originating process, but are almost always part of an appeal. This becomes clear in section 7(1) of the *Act* which deals with the powers of a judge in chambers and indicates that those powers are in relation to a cause or matter "pending in the court" and refers to both an application or a motion "incidental thereto". Viewed in this sense, the "application" is not an originating process and, further, is "incidental" to the within appeals.

**What Are the Factors that the Court Should Consider in a Vexatious Litigant Proceeding Motion to Declare Someone a Vexatious Litigant?**

[27] Whether a proceeding is vexatious is a matter to be determined by objective rather than subjective standards (see *Foy v Foy (No 2)* (1979), 102

DLR (3d) 342 at 349 (Ont SC (CA)); *Mascan Corp v French* (1988), 49 DLR (4th) 434 at 440 (Ont CA); *Henson et al v Berkowits*, 2005 MBQB 32 at para 28; and *Visic v HRTO and Law Society of Upper Canada*, 2015 ONSC 7161 at para 31). No one list of factors is exhaustive and no one factor is determinative. Nor is it necessary that all of the factors listed in the cases be present (see *Bossé c Caisse Populaire Acadienne Ltée*, 2018 CarswellNB 299 at para 35 (CA)). Rather, it is a holistic determination taking into consideration a variety of factors.

[28] What should be remembered is that the order is exceptional and should be used only when the court determines that the litigant has "taken himself over the line" (many cases have used this language, see, for example, *Lindsay v Canada (Attorney General)*, 2005 BCCA 594 at para 26). In Manitoba, the point was made in *Winkler*. Justice Davidson indicated that a vexatious litigant order (at para 34):

> [S]hould be used in only the rarest of circumstances. It is difficult to think of a more fundamental human right than the right to access to our justice system. No one should have that right restricted except for the clearest and most compelling of reasons.

[29] A leading case in this area is *Re Lang Michener and Fabian* (1987), 37 DLR (4th) 685 (Ont SC (H Ct J)). In that case, Henry J identified the following non-exhaustive factors to assist the Court in ascertaining whether a matter was vexatious (at p 691):

> (a) the bringing of one or more actions to determine an issue which has already been determined by a court of competent jurisdiction constitutes a vexatious proceeding;

> (b) where it is obvious that an action cannot succeed, or if the action would lead to no possible good, or if no reasonable person can reasonably expect to obtain relief, the action is vexatious;
>
> (c) vexatious actions include those brought for an improper purpose, including the harassment and oppression of other parties by multifarious proceedings brought for purposes other than the assertion of legitimate rights;
>
> (d) it is a general characteristic of vexatious proceedings that grounds and issues raised tend to be rolled forward into subsequent actions and repeated and supplemented, often with actions brought against the lawyers who have acted for or against the litigant in earlier proceedings;
>
> (e) in determining whether proceedings are vexatious, the court must look at the whole history of the matter and not just whether there was originally a good cause of action;
>
> (f) the failure of the person instituting the proceedings to pay the costs of unsuccessful proceedings is one factor to be considered in determining whether proceedings are vexatious;
>
> (g) the respondent's conduct in persistently taking unsuccessful appeals from judicial decisions can be considered vexatious conduct of legal proceedings.

[30] Over 30 appellate decisions across Canada have cited the *Lang Michener* decision, along with over 250 lower court decisions. A recent appellate example is *Van Sluytman v Muskoka (District Municipality)*, 2018 ONCA 32, leave to appeal to SCC refused, 38057 (1 November 2018). The Court states (at paras 23-24):

> Many of the salient characteristics of vexatious proceedings are usefully described in *Re Lang Michener et al. v. Fabian et al.* (1987) 59 O.R. (2d) 353 (H.C.). The application judge considered *Lang Michener* and these characteristics and evaluated the appellant's actions accordingly. He concluded at para. 13 that the

various actions commenced by the appellant "are a classic reflection of many of the characteristics outlined in *Lang Michener*", noting, among other matters:

- the appellant has commenced multiple actions involving the same issue or issues and threatened to commence 154 more actions in the face of dismissals of his previous ones;

- in most of his actions, the appellant sought the acknowledgement and correction of perceived government shortcomings, as distinct from asserting a right recognized at law;

- the damages claims advanced by the appellant in many of his actions were grandiose – often ranging in quantum from $5 to $15 million – and bore no relation to the wrongs alleged;

- the appellant's asserted claims were repetitious, with many rolling over from one action to the next, in only slightly modified form;

- the appellant's written submissions on the *CJA* [*Courts of Justice Act*, RSO 1990, c C43] s. 140 application continued this same pattern and attempted, as the application judge put it at para. 15 of his reasons, to "lay the blame for his deficient pleadings at the door of the government and the courts for not providing adequate training or allowing sufficient leeway to self-represented litigants. The government of Canada and the Premier of Ontario are blamed for these deficiencies"; and

- the appellant has appealed 7 of the 14 rulings made on his actions and failed to pay several outstanding adverse costs awards.

We agree with the application judge that these are hallmarks of vexatious proceedings, and a vexatious litigant.

[31] For an example from this Court, see the decision in *Benson v Workers' Compensation Board (Man) et al*, 2008 MBCA 32. Justice Chartier (as he then was) agreed with the respondent (CNR) that Benson had instituted vexatious proceedings. In the course of doing so, he repeated the following description, as described by CNR, that Benson's actions (at para 39):

> (3) are without foundation or groundless;
>
> (4) have been multiple and successive; and
>
> (5) serve no useful purpose and have no possible chance of success.

[32] In short, "[t]he essential vice of habitual and persistent litigation is keeping on and on litigating when earlier litigation has been unsuccessful and when on any rational and objective assessment the time has come to stop" (*Attorney General v Barker*, [2000] EWHC 453 (BAILII) at para 22 (Admin); see also *PAFL v OL*, 2002 MBQB 44 at para 16).

[33] One of the *Lang Michener* factors indicates that the court should look to the whole history of the matter. Does that mean the whole history of the matter in the Court of Appeal or all courts? Section 31.1(1) of the *Act* speaks of a litigant who institutes a vexatious proceeding in "the court", as opposed to "a court" and court is defined in the *Act* as the Court of Appeal.

[34] Other courts who have considered this question have held that while the central focus must always remain on the proceedings before the Court of Appeal, the lower court proceedings may certainly inform the Court of Appeal's decision (see *Dawson v Dawson*, 2014 BCCA 44; and *RD Backhoe Services Inc v Graham Construction and Engineering Inc*, 2017 BCCA 91 at

para 30). As MacDonald CJNS commented in *Tupper v Nova Scotia (Attorney General)*, 2015 NSCA 92 (at paras 31-32):

> Mr. Tupper's various vexatious proceedings in this Court alone are enough to justify the order requested. However, my analysis need not be confined to proceedings before this Court. Instead, in my view, Nova Scotia courts considering such motions must be at liberty to consider an impugned litigant's entire civil court record, whether within the Trial Court or the Court of Appeal. I say this because these provisions do more than prevent abuse in the subject court. They serve the broader purpose of protecting the integrity of the entire justice system. In my view, therefore, harm to one court is harm to all courts.
>
> As well, vexatious litigants display a fundamental disrespect for the entire court process. They do not distinguish between levels of court. How they act in one court is a strong indicator of how they will act in another.

[35] As part of the whole history, some courts have also indicated a willingness to explore extra-judicial conduct as part of that history.

[36] For example, in *Bishop v Bishop*, 2011 ONCA 211, leave to appeal to SCC refused, 34271 (20 October 2011), the lower court judge, in issuing a vexatious litigant order, considered numerous non-judicial proceedings including complaints to various professional bodies against individuals who had opposed him. In affirming that a consideration of such evidence was informative, the Court states (at paras 8-9):

> [W]e agree with the principle enunciated by Dawson J. in *Canada Post Corp. v. Varma*, [2000] F.C.J. No. 851 (Fed. T.D.) at para. 23:
>
> > A respondent's behaviour both in and out of the court has been held to be relevant. In *Canada v. Warriner* (1993), 70 F.T.R. 8 (T.D.), McGillis J. noted that frivolous and unsubstantiated allegations of impropriety had been levelled against lawyers

> who had acted for or against the respondent. In *Vojic*, *supra* [*Vojic (A) v Canada*, 1992 CarswellNat 343 (FCTD)], McGillis J. took into account the fact that the respondent had failed to appear on several occasions and had shown disregard for the court. In *Yorke v. Canada* (1995), 102 F.T.R. 189 (T.D.), Rouleau J. considered a number of factors, including that the respondent's proceedings in the Federal Court were replete with extreme and unsubstantiated allegations.
>
> We would simply add to that statement by noting that in our view, the institution of non-judicial proceedings can, depending on the circumstances, constitute evidence from which a court may infer that court proceedings commenced by the litigant are not *bona fide* but the product of someone who is unreasonably obsessed with a cause and likely to pursue vexatious court proceedings on an indefinite basis unless stopped.

[37] If we apply the above factors to the particulars of Green's recurring litigation, we see many of them duplicated. First, Green seeks to relitigate matters in which he previously was unsuccessful with the aid of material and evidence previously filed in other decided matters (see *Tram 2013 QB*; *Tram 2015 QB*; *Woloshyn 2016 CA*; *University 2017 QB*; *Bell 2018 QB*; and *University 2018 QB*).

[38] Green has unsuccessfully pursued at least three appeals (a further two are presently under consideration for leave to the Supreme Court of Canada) from a decision of the Court of Queen's Bench and this Court, which have repeatedly affirmed that the University:

- is a creature of statute that is self-regulated;
- is permitted to create and uphold its policy and procedures;

- has established policies and procedures existing at the time of Green's suspension which were adhered to; and

- pursuant to its ultimate authority to create its policies, has created specific balanced and fair review/appeal procedures.

See *University 2014 QB* at para 20; *Bell 2018 QB* at paras 59, 65, 78-81; and *University 2018 QB* at paras 57-59.

[39] Green seeks relief or remedies that are not available or are without basis. The courts have held in many pieces of his litigation that, aside from judicial review, the matter is within the University's jurisdiction and that he must adhere to the University's procedure when appealing his expulsion (see *Tram 2015 QB* at para 67; *University 2017 QB*; *University 2017 CA*; *Bell 2018 QB* at paras 78-79; and *University 2018 QB*).

[40] Many of Green's proceedings advance the same arguments relating to tortious and procedural claims relying on previously filed pleadings and supporting affidavits which were unsuccessful in previous litigation.

[41] He has recycled claims of defamation against the University administration and the professors who taught Green during his first semester. For each claim, he relied on the same legal authorities to underpin his argument, and in each instance, this Court has affirmed the lower court's rejection of Green's construct of the tort of defamation (see *Tram 2014 QB* at para 22; *Bush 2017 QB* at paras 2, 43; *Bush/Metz 2018 CA* at para 3; and *University 2018 QB*).

[42] In four separate actions, Green has argued that any statement issued by the University staff which supports the decision to suspend him is malicious, or "dripping" with malice. Green continues to rely on these affidavit statements in his appeals even though they have already been considered by the court which failed to find them to be malicious (see *Tram 2014 QB* at para 22; *Bush 2017 QB* at paras 2, 43; *Bush/Metz 2018 CA* at para 3; and *University 2018 QB*).

[43] This Court in *Woloshyn 2016 CA* at para 40; and *Bush/Metz 2018 CA*, upheld the lower court's decision to grant summary judgment and affirmed that the complained of remarks were not defamatory, nor was the inference of malice sufficient to defeat the defendants' prima facie defence of qualified privilege.

[44] An example of Edmond J's repeated review on his prior determination on this point of law are found in *Bush 2017 QB*; *Metz 2017 QB*; and *Bell 2018 QB.* He stated in *Bell 2018 QB* (at para 22):

> It is important to emphasize as I did in the previous defamation decisions (***Bush*** and ***Metz***) that, in examining the defence of truth or justification, it is not the literal truth of each and every act in the publication but only that the whole of the defamatory matter is substantially correct. . . . In my view, in examining all of the evidence and particularly the evidence set forth in Mr. Green's Affidavit #1, the defence of truth or justification applies.

[45] The sheer number of defamation suits advanced by Green, and the fact that none of them have shown a genuine issue for trial, support the University and the remaining defendants' position that Green's most recent grounds for appeal are merely a means to circumvent the rejection issued by

the University (see *Tram 2013 QB*; *University 2014 QB*; *Bush 2017 QB*; *University 2018 QB*; and *Bush/Metz 2018 CA*).

[46] Besides his multiple claims of defamation, Green has repeatedly called into question the University's decision to revoke his practicum as a teaching student at the University. He argues that his procedural rights were disregarded when his application to be reinstated as a teaching student at the University was rejected. Green claims his case merits an oral hearing; the reasons given for refusing his readmission were insufficient; and the decision-makers were biased against him sufficiently to justify overturning the University's decisions (*University 2018 QB* at paras 64-66, 75).

[47] With respect to that argument, Edmond J held in *Bell 2018 QB* (at paras 73-74):

> In my view, the evidence establishes that he was suspended for non-academic misconduct which involved conduct that was outlined in the complaints that were reviewed pursuant to the Policy.
>
> The University, in applying the Policy and taking the steps to suspend Mr. Green, did not act in an arbitrary or capricious manner. The University followed the Policy. Mr. Green appealed the decision and there is simply no evidence to establish that the University breached or violated the ***Charter*** [*Canadian Charter of Rights and Freedoms*], as alleged by Mr. Green.

[48] Yet, Green continues to litigate the same fact pattern. In the current matters before this Court, Green raises, among other claims, defamation and failure to afford procedural fairness. He reargues that his removal from his teaching practicum should give rise to a claim for actionable damages because his final appeal was denied. Therefore, he did not receive an adequate remedy.

[49] Damages will only be awarded where it can be shown that a person was damaged as a result of the claimed tort. Green presupposes that had it not been for his suspension, he would be successfully employed as a teacher.

[50] From the materials Green reproduced in support of his current claims, the following recurrent themes become evident; that the professors he interacted with during that first semester collectively, had professional concerns with his suitability with his choice of future occupation; he demonstrated in both social and academic settings mannerisms that were indicative of an underlying behavioural condition; he was a high-risk student and unlikely to satisfy the final conditions needed for him to graduate from the program successfully; and in the event he did graduate from the program, he was professionally unfit to practice and therefore, on a balance of probabilities, unlikely to find employment within the Winnipeg teaching system.

[51] Based on the above, it is possible to conclude Green's core aspiration to be reinstated into the Faculty of Education program is unfortunately remote and moreover, that any claim for damages that could be associated with loss of future employment is even more remote.

[52] This Court has repeatedly affirmed that there is no genuine issue for trial with regard to Green's tortious or contractual claims arising out of these facts. In 2016, this Court upheld the 2015 Queen's Bench decision, finding that Green had no claim for damages for breach of contract as the University correctly exercised its legislated authority (see *Woloshyn 2016 CA* at para 39, aff'g *Tram 2015 QB*). See also *Bush/Metz 2018 CA*, where Burnett JA, in affirming two dismissals on summary judgment, indicated that the record

disclosed "no 'realistic chance'" of success and that "there is no triable issue which realistically could result in a judgment" (at para 5).

[53] This Court has recognised and repeatedly affirmed that there was no purpose in allowing Green's proceedings to continue as any damages flowing from the alleged breach of contract would be overtaken by the subsequent suspension proceedings (see *Woloshyn 2016 CA*; and *University 2017 CA*).

[54] Green's actions consist of commencing separate claims against either the original decision-maker, the reviewing party at first instance or the general institution on the grounds of defamation; breach of contract or violation of the *Canadian Charter of Rights and Freedoms*; conspiracy; and breach of duty in establishing fair rules, among other claims (see *University 2015 CA* at para 24). The weakness of his claims and their repetitiveness suggest that these claims were an attempt to reopen the issue of his suspension while circumventing the proper avenues for review. This Court comments on this attempt in its most recent decision relating to these matters (see *University 2017 CA* at para 2).

[55] The issue of outstanding costs is also a significant factor. According to the University, there are outstanding overall costs of $41,132.60. With the high cost of litigation, in addition to the deleterious effect on a defendant, the punishing effect of continuing litigation on the finances of the vexatious litigant is a real consideration. The point is made in the oft-cited decision in *Kallaba v Bylykbashi* (2006), 265 DLR (4th) 320 (Ont CA) where Lang JA wrote (at para 115):

> In the leading Canadian authority of *Foy v. Foy (No. 2)* (1979), 26 O.R. (2d) 220, 102 D.L.R. (3d) 342 (C.A.), leave to appeal to

> S.C.C. refused, [1979] 2 S.C.R. vii, 102 D.L.R. (3d) 342 f*n*, Howland C.J.O. noted two purposes for a vexatious litigant declaration: first, to prevent litigants from harassing others; and, second, to protect vexatious litigants from squandering their own resources.
>
> [emphasis added]

[56] In this case, Green admits, in his motion brief, that "the evidence shows that I have paid significant costs so far up to the point where my assets have been effectively depleted."

[57] Unpaid and ongoing costs in a meritless action are also a real burden on a defendant. As was stated in *Pearlman v Insurance Corporation of British Columbia*, 2010 BCCA 362 (at para 19):

> Mr. Pearlman has put a number of litigants to considerable expense in defending the various actions he has brought and in responding to his appeals. He claims to be unable to pay the costs orders against him in the trial court or to post security for costs in any of the six appeals in which security has been ordered. It would be unfair to those he has sued and continues to sue to permit him to bring further appeals on these or related matters without leave.

[58] Of course, in addition to squandering their own resources and those of the defendant(s), there is no shortage of appellate decisions bemoaning the fact that the vexatious litigant also squanders valuable court resources. See, for example, *Canada v Olumide*, 2017 FCA 42, where Stratas JA wrote (at para 19):

> The Federal Courts have finite resources that cannot be squandered. Every moment devoted to a vexatious litigant is a moment unavailable to a deserving litigant. The unrestricted access to courts by those whose access should be restricted affects

> the access of others who need and deserve it. Inaction on the former damages the latter.

[59] Another factor considered by the courts is the making of unsubstantiated allegations of impropriety against the opposite party, legal counsel and the use of scandalous language. In his motion brief, Green impugns the integrity of the University administrators as follows:

> Why then are they proceeding with this motion? *Because they care not a whit about the unrecoverable costs to the University.* This case is surely under the control of a small clique of powerful administrators with a personal stake in my defeat. . . .
>
> The individuals responsible for the University's intransigence in this case do not care how much the University's money they have to spend. Their single-minded purpose is to prevent me from gaining access to an impartial decision-making body with the authority to reconsider my expulsion. Their Motion for Security is surely only a pretext to achieve this alternate and improper purpose: it cannot possibl[y] achieve its stated purpose of recouping their expenses, because the motion itself will cost them more than any award they stand to gain.

[60] It is quickly obvious from the eight affidavits Green filed in the *Bell 2018 QB* matter, that he makes multiple allegations of impropriety against many individuals, citing malice, outward hatred, and so on. His document titled "BLOG OF INDIGNITIES" is particularly telling as to his mindset.

[61] For all of the reasons set out above, I have concluded that the vexatious litigant provisions ought to be invoked in the circumstances of this case.

[62] I do wish to make clear which allegations I have not taken into account in coming to my decision. There have been two notices under *The*

*Petty Trespasses Act* barring Green from the University campus. In both instances, a generic barring notice was prepared by the University's security department and then circulated to relevant staff and faculty within the Education program. Green maintained that in each of these instances, the University defamed him through the publication of the barring notice.

[63] In their motion brief, the University and the remaining defendants allege that Green has repeatedly returned to the University campus for the sole purpose of inciting conflict and provoking the University into taking action, which would lead Green to challenge the barring notice in court once more. At the appeal hearing, Green denied these allegations and filed a notice asking to cross-examine the University's security officer, Martin Grainger, on his affidavit in order to challenge these allegations.

[64] In particular, he wished to cross-examine Mr. Grainger as follows:

> My cross-examination will be very brief and will only cover one subject: whether or not, and the extent to which, Mr. Grainger or other members of his security staff, in making complaints to the police about my presence on campus last month, took any measures to inform the police that notwithstanding my apparent violation of the barring notice, that I nevertheless had certain rights to be on campus property under Section 4 of the Petty Trespass[es] Act.

[65] The notice was filed late, would have required a further adjournment, was opposed by the University and the remaining defendants and had little, if any relevance to the matter at hand. It threatened to lead the motion down another rabbit hole. I did not allow the notice to be filed, but I also indicated that I would not take these latest disputes into account in making my decision and I have not.

**Remedy**

[66] Orders granted will vary depending on the specific circumstances of the case. Ultimately, and as noted by MacDonald CJNS in *Tupper*, "it will be up to the individual judge to assess each case on its own facts in order to determine appropriate parameters of the proposed restraining order" (at para 56).

[67] The University and the remaining defendants' motion asks for the following relief:

1. an order prohibiting Green from continuing the proceedings instituted herein; and

2. such further and other relief as this Honourable Court may deem just.

[68] However, in their motion brief, the University and the remaining defendants appear to expand their request for relief to not just the two current appeals, but to all "future action" against any of the named parties. In their motion brief, they also request the following further relief:

> The [University and the remaining defendants], in essence, seek an Order declaring Green to be a vexatious litigant. Such an order would require Green to seek leave from this Court prior to commencing any future action against any of the named parties in all prior and current actions, including the University and its staff representatives, including professors, administration and security.

[69] The order requested by the University and the remaining defendants in their motion brief is quite broad and does not draw a clear distinction between "a future action", a "new claim" and an appeal.

[70] While I can certainly consider the whole of Green's civil record when coming to my conclusion, my order should limit itself to vexatious proceedings in this Court. As an aside, there is no impediment to simultaneous applications for a vexatious litigant order in both the Court of Queen's Bench and Court of Appeal (see, for example, *Hokhold v Gerbrandt*, 2017 BCCA 216 at para 4).

[71] I would therefore order that Green be:

1. prohibited from continuing the proceedings instituted in the Manitoba Court of Appeal without first obtaining leave of a justice of this Court; and

2. prohibited from initiating any further appeals related to events and persons arising out of his dispute with the University and his removal from the teacher certification program without first obtaining leave of a justice of this Court.

[72] I would also order that the Registrar of the Court of Appeal is hereby authorised to reject any document that is attempted to be filed in contravention of this order.

[73] I am aware of this Court's decision in *Canada (Attorney General) v Courchene*, 2010 MBCA 4 and the comments of Mainella JA in *Klippenstein v Manitoba Ombudsman*, 2015 MBCA 15 with respect to the limitations of

the powers of a judge in chambers pursuant to section 7(1) of the *Act*, to the effect that a judge in chambers, as opposed to a panel, cannot issue an order that effectively dismisses an appeal. As Chartier JA (as he then was) stated in *Courchene*, "only the court . . . has the power to stay an appeal as an abuse of process" (at para 9).

[74] There has been no decision with respect to the interaction of section 7(1) and a declaration of proceedings to be vexatious pursuant to section 31.1 of the *Act* by a judge in chambers. If a proceeding is declared to be vexatious, it will not be allowed to proceed and that effectively stays the appeal, albeit unless the court grants leave. However, I do not believe the limitations discussed in the above two cases with respect to section 7(1) of the *Act* were meant to apply to section 31.1; otherwise, no order could be given under that section that would deal with appeals once a notice of appeal had been filed.

[75] I come to that conclusion for a number of reasons. First, *Courchene* is an abuse of process case. It did not consider a vexatious litigant order. Second, section 31.3 of the *Act* indicates that, "Nothing in section 31.1 or 31.2 limits the authority of the court to stay or dismiss a proceeding as an abuse of process or on any other ground." In contrast, section 31.1(1) speaks to "a judge sitting in chambers or the court" and the judge or the court may order that, "(d) a proceeding instituted by the person shall not be continued". In the *Klippenstein* case, Mainella JA was not dealing with the language found in section 31.1(1). I also note his comment in the case of *PricewaterhouseCoopers Inc v Ramdath*, 2018 MBCA 41, where he commented that the general rule is that a chambers judge should not decide a dispute absent some enactment assigning authority to do so (see para 18).

Section 31.1 provides such authority. Third, a vexatious litigant order does not end the appeal. It only stays the appeal from continuing without first obtaining leave of a justice of this Court.

[76] If I am wrong in that interpretation, I would have granted the University and the remaining defendants' alternative remedy, which was an order for security for costs, pursuant to section 31 of the *Act*. Given the multiple proceedings instituted by Green, all declared to be without merit, and the amount of costs already incurred and unpaid, an order for security for costs would be appropriate.

[77] Green has made representations to the courts that he is financially incapable of providing payment towards the increasing total costs award. In his affidavit filed July 11, 2018, he indicates that his income over the last two years has been under $10,000. I accept those representations. Yet, he proceeds with multiple litigation attempts, knowing well in advance that, if any further costs were awarded, he is financially incapable of paying them. As was stated in *Izyuk v Bilousov*, 2015 ONSC 3684, "The purpose of an order for security of costs is to protect a party from nuisance or irresponsible litigation, conducted without regard to the merits of the case or the costs likely to be incurred" (at para 36).

[78] Impecuniosity alone cannot be a reason for refusing an order for security for costs. One of the purposes of costs is to encourage parties to act reasonably in litigation and acting reasonably is within the control of each party, regardless of the party's financial circumstances. In *Kalo v Law Society of Manitoba*, 2010 MBCA 24, Chartier JA (as he then was) stated (at para 10):

> If a party chooses to act unreasonably, his or her impecuniosity alone cannot be a justification to set aside the principles relating to costs; otherwise, the legal system could be subjected to significant abuse by impecunious litigants.

[79] Consequently, as an alternative remedy, I would order Green to pay $5,000 into Court within 90 days of the publication of this decision as security for costs prior to continuing with his appeals. That amount is the amount likely to be assessed if the present two appeals were to go ahead and be dismissed. His appeals will be stayed pending payment of those costs. If that amount is not paid within 90 days, the appeals will be dismissed.

## CONCLUSION

[80] An order curtailing the access of an individual to initiate or continue legal proceedings should not be lightly granted. However, access to the judicial system does not include abuse of that system. The continual initiation of legal proceedings without merit should not be used as a method of harassing individuals.

[81] I understand that to Green, these are not frivolous or vexatious claims. As he put it in argument, referring to the University, "they deprived me of my most cherished desire". Yes, they did and I understand his deep disappointment, but they did so according to the discretion given to them, within the rule of law and confirmed by many court decisions. We can't always get what we want. So long as the University acted in accordance with the appropriate rules and procedures, they are entitled to decide who may and may not enter, continue in and graduate from the Faculty of Education. Green has challenged every aspect of their rules and procedures. Enough is enough.

[82] Costs are awarded to the University and the remaining defendants as per the tariff.

Steel JA