

In the Court of Appeal of Alberta

Citation: Lymer v Jonsson, 2016 ABCA 32

Date: 20160204
Docket: 1403-0297-AC
Registry: Edmonton

Between:

Neil Alan Lymer

Appellant

- and -

**Diane Jonsson, Georgina Porozni, Natalie Minckler, Keith Porozni, Michael Wygera,
Willis Porozni, 1146601 Alberta Ltd., 1419253 Alberta Ltd. and 782409 Alberta Ltd.**

Respondents

The Court:

**The Honourable Mr. Justice Peter Costigan
The Honourable Madam Justice Marina Paperny
The Honourable Mr. Justice Thomas W. Wakeling**

Memorandum of Judgment Delivered from the Bench

Appeal from the Decision by
The Honourable Mr. Justice D. Lee
Dated the 13th day of November, 2014
Filed on the 13th day of November, 2014
(2014 ABQB 696, Docket: BE03 1446521)

**Memorandum of Judgment
Delivered from the Bench**

Costigan, J.A. (for the Court):

[1] The appellant appeals an order which, among other things, prohibited him from commencing proceedings without leave. The judge who made the order was case managing the appellant's bankruptcy proceedings. At the time, the appellant was self-represented. The order, commonly called a vexatious litigant order, was made on the case management judge's own motion, without notice to the appellant or anyone else involved in the litigation, and without affording an opportunity to be heard on the issue. The order was stayed for a period of 30 days to allow the Minister of Justice and Solicitor General to make submissions to change or vary the order: *Lymer (Re)*, 2014 ABQB 696.

[2] The appellant was granted permission to appeal the order on two grounds: whether the chambers judge failed to comply with the principles of natural justice and whether a reasonable apprehension of bias arises from the circumstances surrounding the making of the order.

[3] A court may make a vexatious litigant order on the court's own motion with notice to the Minister of Justice and Solicitor General: *Judicature Act*, RSA 2000 c J-2, s 23.1(1). This legislation does not authorize a court to dispense with notice to the litigant. The rules of natural justice require courts to provide an opportunity to be heard to those who will be affected by a decision: *LLA v AB*, [1995] 4 SCR 536 at para 27. Failure to provide an opportunity to be heard is fatal to a decision: *R v Graham*, 2007 ABCA 153 at paras 11 and 12.

[4] These principles apply to vexatious litigant orders: *Kallaba v Bylykbashi*, 207 OAC 60 at paras 49-51. The sufficiency of notice will be assessed in the context of the proceedings in which the order was issued. For example, in *R v Grabowski*, given the history of the proceedings, the appellant was not taken by surprise by the issuance of a vexatious litigant order on the Court's own motion: 2015 ABCA 391 at para 10. In *Dahlseide v Dahlseide*, although the vexatious litigant order was issued on the Court's own motion, the Court raised the possibility of such an order and afforded the affected party an opportunity to comment: 2009 ABCA 375 at paras 9 and 36.

[5] The respondent argues that the order is an *ex parte* order and the appellant should have applied to the Court of Queen's Bench to have the order set aside or varied rather than seeking a remedy on appeal: Rule 9.15(1). This Rule is designed to provide an avenue for relief where an order is issued in circumstances that make the provision of notice impractical. The record does not suggest that notice to the appellant was impractical in this case. In these circumstances, the appellant is not precluded from seeking appellate review.

[6] There is nothing in the record to suggest that the appellant was notified that the judge was considering the issuance of a vexatious litigant order or that the appellant was afforded an

opportunity to address the possibility of a vexatious litigant order. There is nothing to suggest the appellant was not taken by surprise. In these circumstances, the failure to provide notice to the appellant is fatal to the order. It is unnecessary to consider the second ground of appeal.

[7] The appeal is allowed. The order under appeal is set aside.

Appeal heard on February 2, 2016

Memorandum filed at Edmonton, Alberta
this 4th day of February, 2016

Costigan, J.A.

Appearances:

S.M. Renouf, Q.C.
for the Appellant

P.D. Kirwin
for the Respondents