In the Court of Appeal of Alberta

Citation: Makis v Alberta Health Services, 2020 ABCA 168

Date: 20200501
Docket: 1803-0363-AC
Registry: Edmonton

2020 ABCA 168 (CanLII)

Between:

Dr. Viliam Makis and Viliam Makis Professional Corporation

Appellants
(Plaintiffs/Respondents)

- and -

Alberta Health Services and College of Physicians and Surgeons of Alberta

Respondents
(Defendants/Applicants)

- and -

Information and Privacy Commissioner

Intervenor
(Not Party to the Application)

The Court:

The Honourable Mr. Justice Frans Slatter
The Honourable Madam Justice Myra Bielby
The Honourable Madam Justice Barbara Lea Veldhuis

Reasons for Judgment Reserved of the Honourable Mr. Justice Slatter
Concurred in by the Honourable Madam Justice Bielby
Concurred in by the Honourable Madam Justice Veldhuis

Appeal from the Decision by
The Honourable Mr. Justice T.D. Clackson
Dated the 3rd day of December, 2018
Filed the 3rd day of December, 2018
(2018 ABQB 976, Docket: 1603 18935)

2020 ABCA 168 (CanLII)

Reasons for Judgment Reserved
of the Honourable Mr. Justice Slatter

2020 ABCA 168 (CanLII)

[1] The appellant, Dr. Makis, appeals a comprehensive vexatious litigant order made against him: ***Makis v Alberta Health Services***, 2018 ABQB 976, 80 Alta LR (6th) 378. He was denied permission to appeal on any questions of fact, but in ***Makis v Alberta Health Services***, 2019 ABCA 23 he was granted permission to appeal on two questions of law:

> (a) Did the chambers judge err in law by restricting the applicant's access to non-judicial bodies?
>
> (b) Did the chambers judge err in law by restricting the applicant's access to the Court of Queen's Bench and Provincial Court?

The Information and Privacy Commissioner was granted permission to intervene: ***Makis v Alberta Health Services***, 2019 ABCA 288. The appeal was argued with two other appeals raising related issues: ***Jonsson v Lymer***, 2020 ABCA 167 and ***Vuong Van Tai Holdings v Alberta (Minister of Justice and Solicitor General)***, 2020 ABCA 169.

Facts

[2] The appellant is a medical doctor. He was under contract as a nuclear medicine physician at the Cross Cancer Institute. In 2014 the appellant complained about his workload and other matters relating to his contract: reasons at para. 9. He was dissatisfied with the responses he received from hospital management when he attempted to raise these issues. A research proposal he put forward was not approved. A term of his contract provided that it was to end on October 31, 2016.

[3] A high level of workplace conflict developed, and the appellant went on leave in December, 2015. A Triggered Initial Assessment relating to "concerns respecting a physician" was initiated, and a complaint was made to the College of Physicians and Surgeons of Alberta. The 46 page Triggered Initial Assessment report prepared in June 2016 was critical of the appellant's workplace behaviour: reasons at para. 15.

[4] The appellant disagreed with the findings in the Triggered Initial Assessment report: reasons at para. 16. He launched a number of complaints against various members of hospital management to a number of different agencies, alleging unprofessional conduct, harassment, retaliation, conspiracy, fabricating evidence, and failing to properly investigate his complaints. The chambers judge listed 106 instances of such complaints in the reasons at para. 19, directed to a number of agencies including the Alberta Health Ethics and Compliance Office, the Edmonton Police Service, the Alberta Human Rights Commission, the Law Society, the Privacy Commissioner, and the Alberta Public Interest Commissioner. The chambers judge

concluded at para. 20 that "Dr. Makis has flooded every person and agency he could think of with paper".

[5] The appellant has also commenced three actions in the Court of Queen's Bench:

> Makis v Alberta Health Services, (QB#1603 18935), a wrongful termination of employment action.
>
> Makis v College of Physicians and Surgeons of Alberta (Complaint Review Committee), (QB#1803 01472), an application for judicial review of a decision that rejected complaints the appellant made against another physician.
>
> Makis v McEwan, (QB#1803 16582) a claim against a number of physicians and the University of Alberta, alleging a conspiracy to undermine and terminate the appellant's professional career, breach of contract, negligence, and misfeasance in public office.

The appellant was represented by counsel when the first action was commenced, but has been self-represented since.

[6] On May 10, 2018 Alberta Health Services brought an application that resulted in the order that is the subject of this appeal. The preamble of the application asked that the Court find the appellant and his professional corporation ". . . to be vexatious litigants pursuant to s. 23.1 of the *Judicature Act* and/or its inherent jurisdiction . . .", and went on to ask for specific relief:

> (a) that the Respondents be prohibited from commencing any non-judicial proceedings, complaints, investigations and appeals, that are connected to the allegations in the within litigation, to bodies that include: AHS, College of Physicians and Surgeons of Alberta ("CPSA"), Edmonton Police Services ("EPS"), Royal Canadian Mounted Police ("RCMP"), AHS Ethics and Compliance Office ("ECO"), Alberta Human Rights Commission ("HRC"), the Public Interest Commissioner ("PIC"), Minister of Health, and the University of Alberta and Office of the Information and Privacy Commissioner of Alberta ("OIPC"), without the permission of the Court;
>
> (b) that the Respondents be prohibited from using and sharing confidential information obtained during the course of this litigation and Questioning within this action with non-parties to this action, unless the Court otherwise orders or the parties otherwise agree;
>
> (c) that the RCMP destroy, and abstain from using any documents provided by the Respondents for investigative purposes where the documents were obtained through the litigation processes within this action;

2020 ABCA 168 (CanLII)

(d) that the Respondents shall cease contacting AHS witnesses that have requested that all contact take place through legal counsel;

(e) that the Respondents be prohibited from commencing any appeal, action, application or proceeding in the Court of Queen's Bench, or the Provincial Court of Alberta without permission of the court in which he seeks to commence the proceeding;

(f) that any application for permission to commence any proceeding based on concerns involving AHS and any non-judicial proceedings referenced in paragraph 1(a) be accompanied by an Affidavit;

(i) Attaching a copy of the vexatious litigant order;

(ii) Attaching the filings necessary to commence the proposed proceeding;

(iii) Deposing to the facts and circumstances necessary to support the proceeding and identifying the evidence relied on in support; and

(iv) Attaching proof that any costs from any prior actions or proceedings have been satisfied.

(g) declaring that the Respondents are in civil contempt for breaching the implied undertaking owed to the Court.

The requested order did not primarily relate to the prosecution of the three actions the appellant had already commenced in the Court of Queen's Bench, which have subsequently been placed in common case management.

[7] On August 31, 2018 the College of Physicians and Surgeons of Alberta filed an application seeking similar relief. On October 10, 2018 Alberta Health Services brought another application alleging that the appellant was in contempt of court, specifically that the appellant had failed to attend for questioning as ordered. The three applications were heard together.

[8] The respondents in the appeal (applicants in the trial court) argue that Dr. Makis has engaged in a persistent, relentless, and escalating pattern of filing and prosecuting complaints against various persons and agencies. His activities have crossed the boundary and are harassing and abusive, and Dr. Makis has expressed an intention to continue that conduct. They argue that public resources are being wasted responding to his complaints, and that the court should intervene: reasons at paras. 22-27. Dr. Makis replies that he has been the target of much unprofessional and inappropriate conduct, and that he is the victim of a conspiracy to destroy his professional career. He denies being a vexatious litigant, and justifies his complaints as

2020 ABCA 168 (CanLII)

being the performance of an obligation to report unprofessional conduct in the healthcare system: reasons at paras. 28-33.

[9] The chambers judge noted that the applications were in some respects novel. While they invoked the vexatious litigant provisions of the *Judicature Act*, those provisions only extended to controlling further litigation, rather than controlling abuses in the making of complaints. He cited the standard, lengthy rationale for an "inherent jurisdiction" in the courts to restrain vexatious litigation, including that the inherent jurisdiction prevailed over the statutory jurisdiction: reasons at paras. 37-45, 64-67. These issues are discussed in ***Jonsson v Lymer*** at paras. 17-48.

[10] The chambers judge then explored a different aspect of the Court's jurisdiction. He stated that as Alberta's superior court of general jurisdiction, it has an inherent power to provide a remedy wherever a right exists. This provided the Court with an inherent jurisdiction to restrain proceedings in non-court tribunals: reasons at paras. 46-57. Significantly, the chambers judge appears to have concluded that Alberta's administrative tribunals have no "inherent jurisdiction" to prevent abuses of their own proceedings: reasons at para. 50. Since there was a "gap" the Court could intervene wherever there was "unfairness": reasons at paras. 50, 57. Further, the Court could intervene wherever it perceived abusive processes, even if the administrative tribunal involved had not complained or could not be identified:

> 62 As well, it seems to me that, when a Court evaluates whether a person is abusing court and tribunal processes it does so in the context of determining whether there is a need to control the litigant and protect all from the abusive litigant's actions. When the Court finds the litigant is abusive and the abuse extends to non-judicial bodies, it is sound policy to take a step to manage access to tribunals, even though one cannot specifically identify precisely what body or persons might be subject to future abuse. Surely, if harm can be prevented at a reasonable cost, it behooves the Court to do so.

Restraining access to administrative tribunals was justified because ". . . while access to the Courts is a fundamental right, there is no commensurate right of access . . ." to administrative tribunals: reasons at para. 56.

[11] The chambers judge then reviewed the prior litigation conduct of Dr. Makis, both before the Court and before various tribunals: reasons at paras. 71-80. He noted that Dr. Makis had launched many proceedings and appeals, all of them relating to the issues with his employment which were the subject of the three Queen's Bench actions he had commenced. The review revealed unsuccessful appeals, unsubstantiated allegations, scandalous and inflammatory language, "litigating for a political purpose" and escalating proceedings. The chambers judge found broad court access restrictions were called for. The standard boilerplate vexatious litigant order was granted: reasons at para. 89.

2020 ABCA 168 (CanLII)

[12] The remaining issue was whether the order should extend to non-court proceedings. The only parties before the Court were the applicants Alberta Health Services and the College of Physicians and Surgeons. Those applicants, however, wished to have the order extend to many other tribunals, such as the Human Rights Commission and the Privacy Commissioner: see *supra*, para. 6(a). Not only had those tribunals not applied for any protection, they had not been made parties to the application. The chambers judge concluded:

> 86 I have found Dr. Makis to be a vexatious litigant. Furthermore, it is patently obvious that the processes ongoing before many tribunals and professional bodies are, by their continuing existence, abusive. Allowing them to continue would be allowing unjustified abuse to continue.
>
> 87 It is my obligation to protect those who have and those who may continue to have and those who have not yet suffered, but may suffer from Dr. Makis' abuse of the non-court processes. The record could hardly be clearer that Dr. Makis' actions in relation to his dispute with AHS are expanding to involve new agencies, actors, complaints and appeals. It is almost certain that will continue, unless the Court acts. No one else can. I therefore conclude that this Court should intervene broadly, and impose restrictions both in relation to courts and non-court tribunals, including hitherto uninvolved tribunals.

The vexatious litigant order was accordingly extended to "Commencing, attempting to commence or continuing any complaints, investigations, proceedings and appeals with any non-judicial body, related to matters alleged . . ." in the three Queen's Bench actions: reasons at para. 89(1)(a). Further, ". . . all actions ongoing before any non-judicial body are hereby stayed": reasons at para. 90.

[13] Because Dr. Makis had been asked not to contact witnesses and officials employed by the respondents, but had continued to do so, the chambers judge granted an order that he not contact anybody who had made it known that contact was unwelcome: reasons at para. 91. A list of 27 persons was attached to the order.

[14] During the litigation Dr. Makis had obtained documents that were subject to the "implied undertaking" that they not be used for any collateral purpose: R. 5.33 of the *Rules of Court*. Dr. Makis did not accept that there were any restrictions on the use of those documents, and had breached that undertaking by providing them to the Edmonton Police Service and the Royal Canadian Mounted Police, both of which subsequently indicated that they had no objection to returning those documents. The chambers judge so ordered: reasons at para. 93.

[15] The chambers judge found that Dr. Makis was in contempt as a result of failing to attend for questioning: reasons at para. 94. He ordered Dr. Makis to pay the thrown away costs, and "an additional $1,000 as a penalty for his contempt". The formal order provided that this

2020 ABCA 168 (CanLII)

penalty was to be paid to Alberta Health Services. In addition, the chambers judge indicated that he would ask the Chief Justice to appoint him as case manager for these actions.

2020 ABCA 168 (CanLII)

The Issues

[16] The applications raised a number of discrete complaints:

(a) potentially vexatious litigation in court;

(b) potentially vexatious proceedings in various administrative tribunals;

(c) complaints to the College of Physicians and Surgeons;

(d) uncontrollable activity within Alberta Health Services, essentially relating to workplace management issues and workplace complaints;

(e) potentially unwelcomed or misdirected complaints being made to public officials;

(f) the use of documents allegedly in breach of the "implied undertaking" that documents produced during the litigation discovery process will not be used for collateral purposes. A specific concern was use of these documents to found police complaints;

(g) allegations of contempt of court.

Included in many of these allegations was said to be harassment of various individuals who did not wish to have communications with Dr. Makis. These different issues engage different principles and sources of jurisdiction.

[17] It is quite clear that Dr. Makis has engaged in obsessive conduct which has consumed excessive resources of many institutions. The respondents have been unable to control Dr. Makis's conduct, and there is ample evidence that his conduct will not change. The issue on this appeal is the proper scope of the remedy, if any, to be given to the respondents. This raises issues concerning the source of the jurisdiction to give relief, and the tests to be applied before that relief is granted.

The Vexatious Litigant Order

[18] The respondents applied for a vexatious litigant order, referring both to the provisions of the *Judicature Act*, RSA 2000, c. J-2, and the court's inherent jurisdiction. As explained in ***Jonsson v Lymer*** at paras. 24-42, the application should have been analyzed under the provisions of the *Judicature Act*.

2020 ABCA 168 (CanLII)

[19] Dr. Makis has commenced three actions in the Court of Queen's Bench. It is apparent from the record that he has abused or overused court processes, likely in part because he is not legally trained. Vexatious litigant orders, however, are not intended as a case management tool: ***Jonsson v Lymer*** at para. 59. The chambers judge sensibly recommended that the three actions be placed under common case management, and that has now occurred. It is within the mandate of the case management judge to issue directions controlling applications, appeals and other procedures within the three actions, and also regulating any new actions relating directly or indirectly to the subject matter of the existing actions. The appropriate remedy, at least in the first instance, was a case management order, not a vexatious litigant order.

[20] For example, the portion of the order restraining Dr. Makis from contacting Alberta Health Services employees who are unwilling to communicate with him, and who may be witnesses, could have been issued as a case management order.[1]

[21] As Dr. Makis points out, each of his three actions assert conventional claims; they are not pseudo-legal claims. If they are without merit, they should be dealt with under the rules respecting summary dismissal, not indirectly by a vexatious litigant order. All of Dr. Makis' complaints arise out of his failed working relationship at the Cross Cancer Institute; he is not using the court system as a platform for generalized vexatious purposes. His inappropriate litigation activity is taking place within the four corners of the issues in the three Queen's Bench actions, and should, if possible, be dealt with in that context.

[22] Further, the boilerplate vexatious litigant order was over-reaching: ***Jonsson v Lymer*** at paras. 63-73. It directs that Dr. Makis not use pseudonyms, although there was no evidence he had ever done so. It cancels any fee waivers he may have, but there was no evidence he ever had any. Even though the reasons confirmed at para. 88 that "there is no history of nonpayment", any future proceedings were made contingent on all past costs awards being satisfied. In any event, the precondition that costs be paid is unsupported: ***Jonsson v Lymer*** at paras. 67-70.

[23] In summary, the vexatious litigant order should not have been granted without an analysis of whether the provisions of the *Judicature Act* had been satisfied. Insofar as it relates to proceedings in the Court of Queen's Bench, the order should be set aside, excepting for clause 10 respecting contacting employees of Alberta Health Services. The matter is referred back to the case management judge, who can give any appropriate case management directions going forward.

---

[1] This type of order should not be granted as a matter of routine. It is unclear from the record whether Alberta Health Services had the consent of or a mandate from the named individuals to seek that order.

2020 ABCA 168 (CanLII)

Restraining Activity Outside the Court Proceedings

[24] In addition to restraining further court proceedings by Dr. Makis, the order restricted his access to all non-judicial bodies and tribunals. For ease of reference, the relief requested in the applications was:

> (a) that the Respondents be prohibited from commencing any non-judicial proceedings, complaints, investigations and appeals, that are connected to the allegations in the within litigation, to bodies that include: AHS, College of Physicians and Surgeons of Alberta ("CPSA"), Edmonton Police Services ("EPS"), Royal Canadian Mounted Police ("RCMP"), AHS Ethics and Compliance Office ("ECO"), Alberta Human Rights Commission ("HRC"), the Public Interest Commissioner ("PIC"), Minister of Health, and the University of Alberta and Office of the Information and Privacy Commissioner of Alberta ("OIPC"), without the permission of the Court;

[25] The order as granted directed:

> 2. The Respondent, Dr. Villam Makis is enjoined or restricted from the following conduct:
>
> (a) Commencing, attempting to commence or continuing any complaints, investigations, proceedings and appeals with any non-judicial body, related to the matters alleged in the Docket 1603 18935, 1803 01472, and 1803 16582 in the Court of Queen's Bench of Alberta, without prior leave of the Court, and notice to the Defendants and other individuals who may be the subject of the complaint, investigation, proceedings and appeals; . . .

While the applications named some specific institutions, the formal order as entered did not, and merely encompassed "any non-judicial body". That wording would encompass the named tribunals, as well as some like the Law Society of Alberta that were not named. The over-breadth of that provision was compounded by the further direction that "All actions ongoing before any non-judicial body are hereby stayed": reasons at para. 90.

[26] In the context of this record, it appears that the term "any non-judicial body" included the following:

> (a) Administrative tribunals, such as the Human Rights Commission, the Law Society of Alberta and the Privacy Commissioner;
>
> (b) The College of Physicians and Surgeons;

(c) Internal workplace complaint mechanisms at Alberta Health Services, and the Alberta Health Services Ethics and Compliance Office;

(d) Political entities, such as the Minister of Health, and presumably Members of the Legislative Assembly;

(e) Police forces: the Edmonton Police Service and the Royal Canadian Mounted Police.

Different principles apply to each category, as indicated in the following analysis.

[27] At a threshold level, it is clear the use of the term "any non-judicial body" was unacceptably broad and imprecise. A breach of a vexatious litigant order is a contempt of court, which may result in severe sanctions. Any person subject to such an order is entitled to know exactly what conduct is prohibited: ***Gurtins v. Panton-Goyert***, 2008 BCCA 196 at paras. 14-16, 81 BCLR (4th) 81.

[28] Further, directing a blanket stay of all proceedings before every non-judicial body, especially without notice to those bodies, was in error.

<u>Restraining Access to Administrative Tribunals</u>

[29] The chambers judge relied on the "inherent jurisdiction" of the Court as providing a mandate for the order granted.

[30] One of the features of superior courts of record is that they have a very wide jurisdiction and remedial power. Parts of their mandate are either confirmed or established by statute, but some of them arise from their status as superior courts. The term "inherent jurisdiction" is, in its narrowest sense, a reference to the procedural jurisdiction of the court to prevent abuses of its own processes: I. H. Jacob, "The Inherent Jurisdiction of the Court" (1970), 23 Curr Legal Prob's 23 at p. 24. That is the non-statutory jurisdiction the court relies on when granting vexatious litigant orders covering proceedings in the court itself.

[31] The term "inherent jurisdiction" is not the same thing as the court's "general" jurisdiction: Jacob at p. 23. There are many different components of the jurisdiction, and concurrent powers, of the superior courts, each of which is based on different principles, and the invocation of which depends on different circumstances: see ***Jonsson v Lymer*** at paras. 25-30. Further, all courts and tribunals have inherent powers, which are to be distinguished from their jurisdiction: see the helpful summary of the academic literature in J. Watson Hamilton, "Three Leaves to Appeal the Claimed Jurisdiction of the Court of Queen's Bench Over Vexatious Litigants" (July 9, 2019), online: ABlawg, http://ablawg.ca/wp-content/uploads/2019/07/Blog_JWH_VexatiousAppeals.pdf. Some of what the respondents relied on in this case as "inherent jurisdiction", are actually manifestations

2020 ABCA 168 (CanLII)

2020 ABCA 168 (CanLII)

of the general jurisdiction of the court. Superior courts, for example, have the jurisdiction to grant injunctions, including, in appropriate circumstances, to restrain harassing behavior: see ***Jonsson v Lymer*** at para. 28.

[32] Superior courts have a supervisory jurisdiction over inferior courts and tribunals. The inherent jurisdiction of the court also extends, in exceptional circumstances, to rendering assistance to inferior courts as an incident to that supervisory jurisdiction: Jacobs at p. 48. As noted in ***R. v Caron***, 2011 SCC 5 at para. 27, [2011] 1 SCR 78 at paras. 27, 30:

> 27 Canadian courts have, from time to time, exercised their inherent jurisdiction to render assistance to inferior courts as circumstances required. . . .
>
> 30 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. . . .

Examples given in ***Caron*** include a) ensuring the timely transferring of prisoners to provincial court hearings, b) holding a union in contempt for defying a ruling of the Labour Relations Board, c) issuing subpoenas to witnesses, and d) granting interim costs, as occurred in ***Caron***.

[33] As noted in ***Caron*** at para. 30, the jurisdiction to assist administrative tribunals is not an invitation for the superior courts to "meddle" in their business. The relationship between superior courts and administrative tribunals is defined by "deference" to the jurisdictional choices made by the Legislature: ***Canada (Minister of Citizenship and Immigration) v Vavilov***, 2019 SCC 65 at para. 30. Administrative tribunals have been given a mandate by legislation, and they are *prima facie* to be left to do their work without interference.

[34] Accepting that the superior courts have a mandate to "assist" administrative tribunals in their work, without "meddling", when should the superior courts step in? As a general principle, the superior courts should generally only act on the application or concurrence of the administrative tribunal itself. Further, in those cases where a litigant seeks to restrain activities before an administrative tribunal, the administrative tribunal should invariably be given notice. In this case, none of the "non-judicial bodies" were given notice of the applications. That, in itself, should have precluded restraining or staying proceedings before them.

[35] The order under appeal was justified on the basis that the non-judicial bodies were "powerless" to prevent abuses of their processes. That assumption is of doubtful validity: see ***Bernard v Canada Revenue Agency***, 2017 PSLREB 46 at para. 91; ***Peoples Trust Company v Atas***, 2018 ONSC 58 at paras. 307-8, affm'd ***Peoples Trust Company v Atas***, 2019 ONCA 359, leave to appeal denied April 23, 2020, SCC #38883. None of the examples in ***Caron*** related to the inability of the tribunal to restrain abuses of its own processes. If the courts have an inherent

power to control abuses of their processes, it is not obvious that every tribunal has no such power: compare the discussion on this issue in ***Yee v Chartered Professional Accountants of Alberta***, 2020 ABCA 98 at paras. 46-57 and 80-93.

2020 ABCA 168 (CanLII)

[36] To take one example, s. 17(1)(a) of the *Alberta Human Rights Act*, RSA 2000, c. A-25.5, empowers the Commission to make bylaws respecting "procedural matters related to the handling of complaints". There is no reason to read that power narrowly, so as to exclude an ability to control vexatious complaints. Bylaw 6(1) directs an investigator to decide "whether or not there is a reasonable basis to proceed with the complaint". Section 22(1)(a) of the *Act* give a director a wide power to "dismiss a complaint if the director considers that the complaint is without merit". There is no reason to assume that the Commission is "powerless" to prevent abuses of its process. In any event, until the Commission tries to control abuses of behaviour, fails to do so, and seeks the assistance of the court, judicial intervention is not warranted.

[37] There is also the prospect that an administrative tribunal may not wish to have complaints screened. The Human Rights Commission, for example, may be prepared to entertain all complaints of subjectively perceived discrimination, even if they are objectively unfounded. The Commission may well disagree with the assertion at para. 56 of the reasons that there is no right of access to administrative tribunals. Unless the Commission invites the Court to perform a gatekeeping function, an order restraining the filing of complaints is not warranted.

[38] The Information and Privacy Commissioner was granted permission to intervene. She advised that the blanket stay included in the order had the effect of staying 35 active files before the Commissioner. While the Commissioner acknowledged the residual jurisdiction of the Court to restrain abusive procedures, she objected to the order having been granted without any notice to her.

[39] The Commissioner also questioned whether there was any "legislative gap" which prevented the Commissioner from dealing with abusive procedures, and which would justify the intervention of the Court. She asserted an inherent power to control her own procedures, relying on ***Prassad v Canada (Minister of Employment and Immigration)***, [1989] 1 SCR 560 at pp. 568-9. She has in fact invoked that power to prevent abuses: see ***Carter v Alberta (Ministry of Justice and Solicitor General)***, 2019 ABQB 491 at para. 33. The Commissioner's enabling statutes also contain "gatekeeping" provisions. For example, s. 55(1) of the *Freedom of Information and Protection of Privacy Act*, RSA 2000, c. F-25, allows the Commissioner to authorize any public body to "disregard one or more requests" if they are repetitious, systemic, frivolous, or vexatious.

[40] In summary, the chambers judge's universal assumption that administrative tribunals are "powerless" to control abuses of their own procedures is unsupported on this record. In any event, any jurisdiction of the court to assist a tribunal should *prima facie* only be exercised on the request or with the concurrence of the tribunal. Finally, no such order should be made

without notice to the tribunals affected, as they are entitled to make submissions on their need for judicial assistance. The order should not have been extended to "all non-judicial bodies".

2020 ABCA 168 (CanLII)

The College of Physicians and Surgeons of Alberta

[41] The College of Physicians and Surgeons is one of the "non-judicial bodies" covered by the order, but it was also one of the applicants. The College brought an application for a vexatious litigant order about three months after Alberta Health Services first applied for that relief. The two applications are roughly similar in scope: see *supra*, para. 6.

[42] The College has a particular interest in what it perceives to be abuses of its disciplinary process. Several complaints of professional misconduct have been made against Dr. Makis. He in turn has made complaints of professional misconduct against other doctors, including senior managers at the Cross Cancer Institute, doctors who have made complaints against him, and staff of the College, including the College's Complaints Director. One of the Queen's Bench actions (#1803 01472), is an application for judicial review of a decision that rejected complaints Dr. Makis made against another physician. Dr. Makis has also filed complaints with the Law Society relating to the conduct of the College's lawyer, and his own lawyer.

[43] As previously noted, the court does have an inherent jurisdiction to assist administrative tribunals when their processes are being abused. Generally, the court should only act at the request of the tribunal; the College has requested that assistance.

[44] It seems apparent that the College has become overwhelmed by the number of complaints being filed by Dr. Makis. It suggests that many of those complaints are without merit, and have been dismissed. While a gatekeeping function is called for, the College has not clearly indicated what it has done internally to control its own processes. Generally, a tribunal should not expect that it can download its regulatory functions on the superior court unless and until it has failed to exercise other internal controls and remedies. As noted, it is unclear whether professional disciplinary tribunals have an ability to control abuses of their own processes: ***Yee v Chartered Professional Accountants***, *supra* para 35.

[45] The chambers judge could have suggested to the College that it develop an internal screening mechanism; nevertheless he was prepared to take on the gatekeeping role, and his direction included that no further complaints to the College can be filed by Dr. Makis without prior judicial approval. A more targeted order than the boilerplate order that was granted, directed at the College's complaints procedure, would have been justified.

[46] The College's application requested widespread restraints on all other proceedings before other non-judicial bodies. Those portions of the application suffer from the same deficiencies discussed in these reasons. The appeal should be allowed only to the extent of focusing the order on the College's complaints procedure.

2020 ABCA 168 (CanLII)

Workplace Disputes at Alberta Health Services

[47] It appears that the restraint on "proceedings, complaints, and investigations" to "non-judicial bodies" included the internal workplace complaint mechanisms at Alberta Health Services and the Alberta Health Services Ethics and Compliance Office. There appear to be policies in place respecting the filing of workplace complaints, the processes by which they are evaluated, and some review and appeal mechanisms. The reasons of the chambers judge disclose that much of the problematic activity by Dr. Makis was his complaints to decision makers at Alberta Health Services and the Cross Cancer Institute, directed at other decision makers and staff, over his perceived mistreatment: see the reasons at para. 19.

[48] Alberta Health Services may well not be the type of body or engage in the type of activities that engage public law remedies: see ***Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall***, 2018 SCC 26 at para. 14, [2018] 1 SCR 750. In any event, its relationship with its officers and employees is a matter of private law: ***Dunsmuir v New Brunswick***, 2008 SCC 9 at paras. 112-4, [2008] 1 SCR 190. This part of the order, however can be supported by the superior court's general jurisdiction to restrain what might be called "harassment".

[49] The effect of this order was that Dr. Makis could not avail himself of any internal workplace complaint mechanisms, or make any complaints to his employer, without the prior approval of the case management judge. The order contemplates that prior to making any such workplace complaint, Dr. Makis must apply to the case management judge, attaching "a copy of the proposed complaint, investigation, appeal, action, application or proceeding", depose in an affidavit to all the supporting facts and circumstances, and comply with the other preconditions in the order. It can safely be said that managing human resource issues at individual workplaces is not within the mandate of the superior courts, which have many more pressing matters to deal with. A superior court should only undertake that task if the employer has diligently attempted to solve the problem internally, and can establish that the situation is sufficiently serious to warrant judicial intervention. Any such intervention should be as limited as possible.

[50] Dr. Makis has not worked at Alberta Health Services since about December 2015, yet he continues to shower his former employer with correspondence, inquiries and complaints of various kinds. It is not clear why Alberta Health Services does not just "say no". Email accounts can be set up to block messages from him. Written correspondence can be ignored. Again, the case management judge concluded that the matter was serious enough to warrant judicial intervention, in the form of an injunction restraining harassing behavior, but the sweeping boilerplate order that was granted was over-reaching. A more appropriate initial response could include things like:

A) Identifying a single person at Alberta Health Services who would receive, and deal with, all communications from Dr. Makis. That person could deal with those

inquiries himself or herself, forward them to others, or ignore them as seemed appropriate. Essentially that person would do the gatekeeping that the order under appeal assumes will be done by the case management judge.

B) Dr. Makis could then be enjoined from communicating with anyone at Alberta Health Services other than that single designated person.

C) The designated person would also deal with any legally contemplated communications, such as requests under the *Freedom of Information and Protection of Privacy Act*. Those requests would be dealt with in accordance with any guidance received from the Privacy Commissioner, who might also implement gatekeeping procedures.

Since the parties did not address the specifics of any alternative remedy that might be appropriate, the present order should be set aside, and the matter returned to the case management judge for further submissions.

Public Officials

[51] The Minister of Health was included in the "non-judicial bodies" named in the applications, although notice was not given to her office. The boilerplate order under appeal appears to preclude Dr. Makis making any complaints to the Minister of Health.

[52] Alberta Health Services tendered fresh evidence showing that Dr. Makis continues to communicate with the Minister and the Premier. Common features of this correspondence are:

(a) It relates to his litigation, and uses strong language such as: "UPDATE AHS CORRUPTION SCANDAL", "illegally sabotaged and destroyed our [clinical trial]", "AHS lawyers lied extensively to the Court", "extensive illegal activities", "sabotage of physicians' careers", "illegal manipulation of and tampering with AHS complaints", and "rigged . . . results to repeatedly threaten and extort me". It names the persons said to be responsible, and calls on them to resign, or to be terminated. It threatens criminal charges. It gives Dr. Makis' perception of the progress of the litigation, and the effect of various judicial decisions.

(b) It is copied to dozens of people including many other physicians, and many people at Alberta Health Services, hospitals, and various universities.

(c) It attaches extracts from his factum, including his recitation of the facts, and portions of the Extracts of Key Evidence.

2020 ABCA 168 (CanLII)

2020 ABCA 168 (CanLII)

Alberta Health Services argues that this fresh evidence confirms the need for the Court to act proactively with respect to Dr. Makis' vexatious conduct, which is continuing.

[53] In a democratic system, citizens are allowed to correspond with their elected public officials. There is no doubt that the Prime Minister, the Premier, Cabinet Members, and elected representatives receive a great many submissions, complaints, and policy suggestions. Some of them are likely misdirected; they should have been sent to other institutions who have a mandate over the particular issue. In some cases, citizens are motivated to write to the appropriate institution, but send a copy to their elected representatives. Some of these messages are undoubtedly without merit, and some might even be "harassing" or inappropriate in their language or content.

[54] It is not, however, within the mandate of the superior courts to invoke their "inherent jurisdiction" to prevent citizens from communicating with their elected officials. Public officials undoubtedly have systems in place within their offices to deal with, divert, and respond to the submissions they receive from the public. If those public officials feel that certain messages "cross the line" they know of the remedies available to them. If they feel particular communications are unacceptably inappropriate, they can themselves apply to the courts for injunctive relief. In extreme cases, the police can be involved.

[55] The appropriate remedy is not, however, for defendants in a particular piece of litigation to apply to the court, under the guise of a "vexatious litigation order", for an injunction restraining communications with public officials. To the extent that the order under appeal purports to do that, it reflects reviewable error and it should be set aside.

[56] Another challenged feature of the correspondence is that it is not only sent to the Minister, it is copied to a large number of other persons. In fact, some of the correspondence appears to be primarily directed at others, and merely copied to the Minister. For example, one of the emails contains the salutation: "Dear Physician Colleagues".

[57] One of the core messages in the communications (although expressed in extreme language) is that the regulatory process of the College of Physicians and Surgeons has been corrupted and abused. It also alleges misconduct by some College staff. It makes similar allegations about senior management at Alberta Health Services. These are all matters that are, potentially, of interest to physicians in Alberta. The integrity of the regulatory system for doctors in Alberta is a legitimate matter for debate.

[58] Any attempt, therefore, to restrain Dr. Makis from communicating his concerns on these topics to his fellow physicians engages the principle of "prior restraint" of potentially defamatory communications. Without precluding an injunction in these circumstances, we note that injunctions restraining speech are only granted in exceptional circumstances: ***Canada (Human Rights Commission) v Canadian Liberty Net***, [1998] 1 SCR 626 at pp. 665-6; ***Kent v Martin***, 2012 ABQB 507 at paras. 7-9, 70 Alta LR (5th) 258, 543 AR 177. If the respondents

2020 ABCA 168 (CanLII)

are seeking that sort of relief, it should be applied for directly, not disguised as a vexatious litigant application.

Police Forces

[59] The Edmonton Police Service and the Royal Canadian Mounted Police were included with the "non-judicial bodies" in the applications. Dr. Makis had reported to the police what he believed was criminal conduct, including various types of allegedly fraudulent or criminal malfeasance in public office, conspiracy, forgery, and "extortion" (which appears to relate to attempts to settle the dispute). The respondents sought an order that no further complaints be made to the police, that the existing complaints be stayed, and that the two police forces return any documents "produced in the course of litigation" that were provided to them by Dr. Makis

[60] Without suggesting there is or is not merit in Dr Makis' allegations, there are obvious concerns about the potential targets of a criminal investigation asking the Court to enjoin those investigations.

[61] A side issue was the allegation that Dr. Makis had provided the police with documentation contrary to the "implied undertaking" that information produced during the discovery process cannot be used for collateral purposes. Reporting suspected criminal activity is not an exception to the implied undertaking: ***Juman v Doucette***, 2008 SCC 8, [2008] 1 SCR 157. The implied undertaking that existed at common law has now been codified in R. 5.33. It does not cover all information revealed during the litigation, only the information that is derived pursuant to the discovery procedures in Division 1 of Part 5 of the *Rules of Court*: affidavits of records and questioning. The implied undertaking does not, for example, cover pleadings, exhibits attached to affidavits, or exhibits entered on the court record. It also does not cover information revealed during proceedings before administrative tribunals, or as a result of the internal workplace procedures at Alberta Health Services.

[62] The Edmonton Police Service Witness Statement Form completed by Dr. Makis recites that ". . . 3800 documents were revealed in an Affidavit of Documents . . .", leading to the strong inference that there had been some breach of the implied undertaking. The reference in the order under appeal to "any documents produced in the course of litigation" was, however, overbroad.

[63] It is not necessary in this appeal to explore the scope of the court's jurisdiction to manage the police or criminal investigations. The police should obviously not be enjoined except on notice to them. The police are well equipped to decide which complaints justify further investigations, and which are unfounded. It would likely take exceptional circumstances for the court, without the concurrence of the police, to order that the police release potential evidence, or stop a criminal investigation. In this case the police were advised of the respondents' concerns, and indicated that they had no objection to returning the documents

provided by Dr. Makis, and implicitly that they were not going to investigate his complaints further: reasons at para. 93.

2020 ABCA 168 (CanLII)

[64] Nevertheless, the inclusion of the police forces among the undefined “non-judicial bodies” covered by the vexatious litigant order, and the blanket stay on all “actions ongoing”, were overbroad.

[65] A public allegation of criminal conduct is a serious matter, especially when it relates to the office or employment of the person accused. Where it appears that unfounded allegations of criminal conduct are being made that are related to what is essentially a civil dispute, those who are being accused are entitled to look to the court for protection. A case management judge is well equipped to decide whether proposed criminal charges have any foundation in law, and any air of reality in fact. The respondents are accordingly entitled to an order that Dr. Makis may not make any further allegations of criminal conduct against Alberta Health Services, the College of Physicians and Surgeons, or their employees, officers, and lawyers, without the prior approval of the case management judge.

The Sanction for Contempt

[66] The chambers judge found that Dr. Makis was in contempt of court for having failed to attend questioning. In accordance with R. 10.53(1)(c), he imposed a penalty of $1,000: reasons at para. 94. The formal order provided that the penalty was to be paid to Alberta Health Services, but penalties under R. 10.49(1) or R. 10.53(1)(c) are to be paid to the Government of Alberta: ***Susin v Susin***, 2014 ONCA 733 at para. 39, 379 DLR (4th) 308. Sanctions for contempt of court are directed at the public interest in the due administration of justice, not any private interest. Sanctions for contempt are as much to coerce compliance as they are to punish. A contempt sanction can be structured, for example, to make the sanction conditional upon remedial action being taken by the contemnor. However, if those efforts fail, any fine must be payable to the Provincial Treasurer.

Conclusion

[67] In summary, in addition to the proper parameters on granting vexatious litigant orders set out in ***Jonsson v Lymer***, the inherent jurisdiction of the courts to supervise subordinate tribunals may be used to grant orders limiting access to administrative tribunals where the tribunal is identified by name, it is the applicant or has been given reasonable notice of the application and an opportunity to be heard, and it has no adequate authority to control abuses of its own processes.

[68] In conclusion, the applications to admit fresh evidence are allowed. The vexatious litigant order granted by the chambers judge is set aside, excepting:

(a) Clause 10, respecting contacting employees of Alberta Health Services;

(b) Clause 11, respecting the return of documents from the two police forces;

(c) Clause 12(b), respecting thrown away costs of examining Dr. Makis;

(d) Clause 13, respecting the appointment of a common case management judge.

Clause 2(a) of the order is amended to provide only that Dr. Makis may not file any further complaints with the College of Physicians and Surgeons or the police relating to his relationship with the respondents without the prior approval of the case management judge. Clause 12(c) of the order, respecting the sanction for contempt of court, is varied to provide that the $1,000 penalty is payable to the Province of Alberta.

[69] As outlined in these reasons, the respondents were not entitled to the blanket vexatious litigant order that was granted, but they may be entitled to other forms of relief. The entire matter is therefore returned to the case management judge, who can receive further submissions and make further orders or directions.

Appeal heard on January 9, 2020

Reasons filed at Edmonton, Alberta
this 1st day of May, 2020

Slatter J.A.

I concur:
Bielby J.A.

I concur:
Authorized to sign for: Veldhuis J.A.

2020 ABCA 168 (CanLII)

Appearances:

Appellant Dr. V. Makis in Person and for the Appellant Viliam Makis Professional Corporation

P.J. Faulds, Q.C./A. Werbeniuk/J.M.. Jackson
for the Respondent Alberta Health Services

M.D. Tiessen
for the Respondent College of Physicians and Surgeons of Alberta

J.A. Harker
for the Intervenor

2020 ABCA 168 (CanLII)