QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2020 SKQB 40**

Date: **2020 02 20**
Docket: QBG 3533 of 2018
Judicial Centre: Regina

BETWEEN:

REGINALD WILCHUCK

PLAINTIFF/
RESPONDENT

-and-

WESTFIELD TWINS CONDOMINIUM CORPORATION

DEFENDANT/
APPLICANT

Appearing:

Reginald Wilchuck	self-represented
Randall M. Sandbeck, Q.C.	for the applicant

JUDGMENT
FEBRUARY 20, 2020

MITCHELL J.

OVERVIEW

[1] It has oft been observed that a lawsuit is not a tea party. Nor, for that matter, is it akin to a game of baseball. However, a fundamental rule in baseball, namely "three strikes and you're out", aptly applies to this application.

[2] On December 18, 2018, Mr. Reginald Wilchuck [Mr. Wilchuck] commenced an action – his third – against the Westfield Twins Condominium Corporation [Westfield Twins]. Westfield Twins is a condominium corporation operating under *The Condominium Property Act, 1993,* SS 1993, c C-26.1 [*CPA, 1993*]. It operates a condominium complex located in the south west corner of the City of Regina.

[3] Mr. Wilchuck owns a condominium unit in that complex, more properly described as Unit 6 in Westfield Twins Condominium Plan #88R68050.

[4] In the impugned statement of claim, Mr. Wilchuck alleges negligent and fraudulent misrepresentations on the part of Westfield Twins because it failed to follow the law, especially provisions of the *CPA, 1993*.

[5] In the wake of its previous litigation history with Mr. Wilchuck, Westfield Twins commenced this application and sought to have his statement of claim struck on the basis that it either discloses no reasonable cause of action or is scandalous, vexatious, and otherwise an abuse of process.

[6] Should it succeed on this application, Westfield Twins seeks a further order declaring Mr. Wilchuck to be a vexatious litigant. Westfield Twins submits that Mr. Wilchuck has habitually and persistently, and without reasonable grounds, instituted legal proceedings against it.

[7] These reasons explain why I agree with Westfield Twins. I conclude that his statement of claim discloses no reasonable cause of action and amounts to an abuse of process. It must be struck out in its entirety for those reasons. Further, I conclude Westfield Twins has demonstrated that Mr.

Wilchuck is a vexatious litigant within the scope of Rule 11-28 of *The Queen's Bench Rules*. Accordingly, I order that Mr. Wilchuck cannot institute any further proceeding in this Court without leave.

BACKGROUND

[8] To give context to the analysis which follows, it is necessary to provide a detailed history of the prior litigation between Mr. Wilchuck and Westfield Twins. Much of this history is taken from the Affidavit of Darren Bird dated February 19, 2019 [Bird Affidavit] and filed with Westfield Twin's application.

[9] On October 25, 2017, Mr. Wilchuck commenced an application numbered QBG 2692 of 2017, Judicial Centre of Regina against Westfield Twins and its Board of Directors seeking an oppression remedy under s. 99.2 of the *CPA, 1993*. He claimed that Westfield Twins breached the *CPA,1993* by implementing increased condominium fees and a special assessment vote without a majority vote of the condominium owners.

[10] On January 8, 2018, Layh J. dismissed Mr. Wilchuck's application. See: *Wilchuk v Westfield Twins Condo Corporation*, 2018 SKQB 2 [*Wilchuk (No.1)*]. (It is noted that Mr. Wilchuck's name is misspelled in the style of cause in that decision.) He concluded at para. 25 that Westfield Twins and its Board of Directors "did not act in an oppressive manner in assessing the fees" because they had "a statutory right to place liens and initiate collection action against owners who refuse to pay the special assessment of condominium fees levied upon them". Justice Layh ordered Mr. Wilchuck to pay $1,000 in costs.

[11] On February 20, 2018, a few short weeks following Layh J.'s decision, Mr. Wilchuck issued a statement of claim numbered QBG 534 of 2018. In his pleading, Mr. Wilchuck essentially repeated the allegations advanced in his initial application which had been dismissed in *Wilchuk (No.1)* by Layh J. He again asserted that Westfield Twins unlawfully implemented increased condominium fees and a special assessment in contravention of the *CPA, 1993*.

[12] This time, Westfield Twins moved to have Mr. Wilchuck's statement of claim struck pursuant to Rule 7-9 of *The Queen's Bench Rules*. Alternatively, Westfield Twins asked that this action be adjudicated and dismissed in accordance with the summary judgment procedure set out in Rules 7-2 and 7-5 of *The Queen's Bench Rules*.

[13] On April 6, 2018, Chow J. struck Mr. Wilchuck's claim in its entirety. See: *Wilchuk v Westfield Twins Condominium Corporation*, (6 April 2018) Regina, QBG 534/2018 (Sask QB) [*Wilchuk (No. 2)*]. (It is noted that Mr. Wilchuck's name is misspelled in the style of cause in that decision.)

[14] In his reasons for decision, Chow J. compared the claims advanced in the impugned statement of claim before the court, and those adjudicated by Layh J. in *Wilchuk (No.1)*. He determined that they were substantively identical. Justice Chow stated at paras. 13 and 14 as follows:

> [13] While the plaintiff, Mr. Wilchuk, purports to assert various causes of action and grounds, including unjust enrichment, it is patent from the pleadings that the within action seeks to re-litigate, once again, the very same matters at issue in the previous action adjudicated by Justice Layh.

> [14] The central and indeed, sole issue raised by the plaintiff in both actions is the legal authority of Westfield and its board of directors to impose fees and assessments upon the plaintiff and other unit holders. The January 8, 2018 judgment of Layh J. [*Wilchuk (No.1)*] is a final decision of a court of competent jurisdiction, and the parties to both proceedings are identical. As such, the plaintiff's claim is clearly *res judicata*, and the within proceedings an abuse of the court's process.

[15] Dissatisfied with Chow J.'s judgment, Mr. Wilchuck appealed. He sought the intervention of the Court of Appeal which, it transpired, was not forthcoming. On December 5, 2018, in a fiat rendered by Whitmore J.A., Mr. Wilchuck's appeal was dismissed. See: *Wilchuck v Westfield Twins Condominium Corporation*, (5 December 2018) Regina, CACV3242 (Sask CA) [*Wilchuck (CA)*]. The court observed that striking a statement of claim as an abuse of process is a discretionary decision. It concluded Chow J. committed no error when he struck Mr. Wilchuck's claim in these circumstances. Consequently, no basis for appellate intervention existed.

[16] The chronology now arrives at this action. On December 18, 2018, less than two weeks after the Court of Appeal dismissed Mr. Wilchuck's appeal, he initiated a second statement of claim numbered QBG 3533 of 2018.

[17] In this pleading clearly drafted by a lay litigant, Mr. Wilchuck's principal claim is one of negligent misrepresentation. It is particularized of sorts in para. 6 which reads as follows:

> **NEGLIGENT MISREPRESENTATION**
>
> 6. At all material times, [Westfield Twins] owed a duty to the Plaintiff to exercise a reasonable standard of care, skill and diligence to ensure [Westfield Twins] followed the law as noted above, and the bylaws.

> The Defendant regularly breaches the law, and then misrepresents that they are following the law. This conduct is still ongoing, and for its damaging effects, the Defendant is negligent and liable. Many times the Plaintiff believes they knew, or ought to have known, it is damaging.
>
> [Westfield Twins] also regularly misrepresents other important information.
>
> There is evidence of occurrences of this type of conduct as recently as December 5th 2018.

[18] Mr. Wilchuck goes on in his pleading to enumerate the kind of relief he seeks including:

- Compensatory damages in the amount of $62,500;
- Aggravated damages in the amount of $15,000;
- General and special damages in the amount of $15,000;
- Restitutionary and nominal damages in the amount of $5,000;
- Punitive and exemplary damages in the amount of $62,500;
- Pre and Post-judgment interest; and
- Costs

[19] Westfield Twins now seeks to have Mr. Wilchuck's statement of claim struck pursuant to Rule 7-2 of *The Queen's Bench Rules*.

ISSUES

[20] Two general issues were presented for adjudication:

1. Should the impugned statement of claim be struck in its entirety under Rule 7-2 of *The Queen's Bench Rules*? [The Striking of Pleadings Issue]

2. If so, should Mr. Wilchuck be declared a vexatious litigant? [The Vexatious Litigant Issue]

THE STRIKING OF PLEADINGS ISSUE

A. Relevant Legal Principles

1. Rationale for Applications to Strike

[21] In *R v Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 SCR 45 [*Imperial Tobacco*], the Supreme Court of Canada emphasized the "gate-keeping" function fulfilled in the litigation process by applications seeking to have a pleading struck. McLachlin C.J. stated:

> [19] The power to strike out claims that have no reasonable prospect of success is a valuable housekeeping measure essential to effective and fair litigation. It unclutters the proceedings, weeding out the hopeless claims and ensuring that those that have some chance of success go on to trial.
>
> [20] This promotes two goods — efficiency in the conduct of the litigation and correct results. Striking out claims that have no reasonable prospect of success promotes litigation efficiency, reducing time and cost. The litigants can focus on serious claims, without devoting days and sometimes weeks of evidence and argument to claims that are in any event hopeless. The same applies to judges and juries, whose attention is focused where it should be — on claims that have a reasonable chance of success. The efficiency gained by weeding out unmeritorious claims in turn contributes to better justice. The more the evidence and arguments are trained on the real issues, the more likely it is that the trial process will successfully come to grips with the parties' respective positions on those issues and the merits of the case.

[22] The precise issue in *Imperial Tobacco* asked whether the statement of claim in question disclosed a reasonable cause of action, and it was in this context that the former Chief Justice made these statements.

However, the rationale she offers applies to all applications commenced under *The Queen's Bench Rules* to have pleadings struck out.

[23] Much of the philosophy espoused by McLachlin C.J. in this passage from *Imperial Tobacco* is reflected in Part I of *The Queen's Bench Rules*. In *Reisinger v J.C. Akin Architect Ltd.*, 2017 SKCA 11, 411 DLR (4th) 687, the Court of Appeal elaborated on these themes as follows:

> [38] The upshot of the implementation of the foundational rules of court, which require the parties to identify the real issues in dispute and facilitate quick resolution of claims, is that they inform, as the case may require, applications under Rule 7-9, especially those under Rule 7-9(2)(b), (c), (d) and (e). Poorly drafted claims in the sense that they are logorrheic may, depending on the degree, offend Rule 1-3 and Rule 13-8 and affect analysis under the aforementioned sub-rules of 7-9(2).
>
> [39] This makes sense because one of the purposes of Rule 7-9 is to save the court, especially the trial court and the parties, the time, cost and inconvenience of dealing with seriously defective or unmeritorious pleadings, claims or defences (*Roynat Inc. v Northland Properties Ltd.*, [1994] 2 WWR 43 at para 32 (Sask QB)). In exceptional cases, where pleadings are very poorly drafted, such drafting can be construed against the pleader as indicated in *Ducharme* [[1984] 1 WWR 699 (Sask CA)] (para 65). This last principle applies to the Rule 7-9 application made by the appellants.

2. Principles Governing Applications Alleging Scandalous, Frivolous, Vexatious Pleadings

[24] Westfield Twin's application seeks to have the pleading struck out under either Rule 7-9(2)(b) or Rule 7-9(2)(e). The relevant portions of Rule 7-9 read as follows:

> **7-9**(1) If the circumstances warrant and one or more conditions pursuant to sub-rule (2) apply, the Court may order one or more of the following:
>
> (a) that all or any part of a pleading or other document be struck out;
>
> (b) that a pleading or other document be amended to set aside;
>
> (c) that a judgment or an order be entered;
>
> (d) that the proceeding be stayed or dismissed.
>
> (2) The conditions for an order pursuant to subrule (1) are that the pleading or other document:
>
> ...
>
> (b) is scandalous, frivolous or vexatious;
>
> ...
>
> (e) is otherwise an abuse of process of the Court.

[25] *Sagon v Royal Bank of Canada* (1992), 105 Sask R 133 (Sask CA) [*Sagon*] is the seminal case relating to striking a pleading. It is especially relevant for present purposes because it addressed an application alleging a statement of claim was deficient, in part, because it was scandalous, frivolous, vexatious, and an abuse of process. Respecting arguments that the pleading ran afoul of what are now Rules 7-9(2)(b) and 7-9(2)(e), Sherstobitoff J.A. said this:

> [18] Striking out an entire claim on the ground that it is frivolous, vexatious or an abuse of process of the court is based on an entirely different footing [than the ground of disclosing no reasonable cause of action]. Instead of considering merely the adequacy of the pleadings to support a reasonable cause of action, it may involve an assessment of the merits of the claim, and the motives of the plaintiff in bringing it. Evidence other than the pleadings is admissible.

> Success on such an application will normally result in dismissal of the action, with the result that the rule of res judicata will likely apply to any subsequent efforts to bring new actions based on the same facts. Odgers on *Pleadings and Practice,* 20th Ed. says at pp. 153-154:
>
> > "If, in all the circumstances of the case, it is obvious that the claim or defence is devoid of all merit or cannot possibly succeed, an order may be made. But it is a jurisdiction which ought to be very sparingly exercised, and only in very exceptional cases. Its exercise would not be justified merely because the story told in the pleadings is highly improbable, and one which it is difficult to believe could be proved." (footnotes omitted)
>
> [19] Finally, a separate mention should be made of the power of the court to prevent abuse of its process, a power which is inherent as well as conferred under rule 173. Bullen and Leake [*Precedents of Pleadings*, 12th ed.] defines the power as follows at pp. 148-149:
>
> > "The term 'abuse of the process of the court' is a term of great significance. It connotes that the process of the court must be carried out properly, honestly and in good faith; and it means that the court will not allow its function as a court of law to be misused but will m a proper case, prevent its machinery from being used as a means of vexation or oppression in the process of litigation. It follows that where an abuse of process has taken place, the intervention of the court by the stay or even dismissal of proceedings, 'although it should not be lightly done, yet it may often be required by the very essence of justice to be done'.
> >
> > "The term 'abuse of process' is often used interchangeably with the terms 'frivolous' or 'vexatious' either separately or more usually in conjunction." (footnotes omitted)

[26] Although these terms are often used interchangeably, it is helpful to differentiate among them. A pleading will qualify as "scandalous" if it levels degrading charges or baseless allegations of misconduct or bad faith against an opposite party. See: *Paulsen v Saskatchewan (Ministry of*

Environment), 2013 SKQB 119 at para 45, 418 Sask R 96 [*Paulsen*] and the authorities cited there. Courts in British Columbia, for example, have described a scandalous pleading as "one that is so irrelevant that it will involve the parties in useless expense and will prejudice the [pursuit] of the action by involving them in a dispute apart from the issues". See: *Turpel-Lafond v British Columbia*, 2019 BCSC 51 at para 23, 429 DLR (4th) 131 [*Turpel-Lafond*] quoting from *Woolsey v Dawson Creek (City)*, 2011 BCSC 751 at para 28.

[27] A pleading will qualify as "vexatious" if it was commenced for an ulterior motive (other than to enforce a true legal claim) or maliciously for the purposes of delay or simply to annoy the defendants. See: *Paulsen* at para 46. Put another way, it is vexatious if it does not assist in establishing a plaintiff's cause of action or fails to advance a claim known in law. See: *Turpel-Lafond* at para 23.

[28] A pleading will qualify as "frivolous" if it is plain or obvious or beyond reasonable doubt the claim it advances is groundless and cannot succeed. See: *Hunt v Carey Canada Inc.*, [1990] 2 SCR 959 at 980; *Paulsen* at para 47; and *Wayneroy Holdings Ltd. v Sideen*, 2002 BCSC 1510 at para 17.

[29] Finally, the concept of a pleading qualifying as an abuse of process is more expansive than the other categories identified above. In *Bear v Merck Frosst Canada & Co.*, 2011 SKCA 152, 345 DLR (4th) 152, for example, the Court of Appeal described it at para. 36 as "a flexible concept not restricted by the requirements of issue estoppel" reflecting "the inherent power of a judge to prevent an abuse of his or her court's authority". Writing

for the court, Richards J.A. (as he then was) elaborated at para. 38 as follows:

> [38] The need to maintain the integrity of the adjudicative process sits at the heart of the concept of abuse of process. The Supreme Court of Canada explained this point as follows in *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77:
>
> > [51] Rather than focus on the motive or status of the parties, the doctrine of abuse of process concentrates on the integrity of the adjudicative process. Three preliminary observations are useful in that respect. First, there can be no assumption that re-litigation will yield a more accurate result than the original proceeding. Second, if the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resources as well as an unnecessary expense for the parties and possibly an additional hardship for some witnesses. Finally, if the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue, the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality.

See also: *Insurance Company of the State of Pennsylvania v Cameco Corporation*, 2010 SKCA 95 at paras 47-50, [2010] 10 WWR 385 per Cameron J.A.

[30] More recently, the Court of Appeal explained in *Canada (Attorney General) v Merchant Law Group LLP*, 2017 SKCA 62, [2017] 10 WWR 664 [*Merchant Law Group (SKCA)*] that there "is no set test for determining whether something amounts to an abuse of process". Rather, such a determination is discretionary. See: *Merchant Law Group (SKCA)* at para 100, and *Wilchuck (CA)* at para 14.

[31] Finally, any applicant asserting that a statement of claim runs afoul of Rules 7-9(2)(b) or (e) bears the onus to establish that "the alleged cause of action is such that no reasonable person could treat it as *bona fide* and contend that [the plaintiff] was entitled to approach the court with such a complaint". See, for example: *Kichula v Farm Credit Corp.* (1991), 95 Sask R 245 (QB) at para 18; and *Rubbert v Boxrud*, 2014 SKQB 221 at para 38, 450 Sask R 147.

[32] With these governing legal principles identified, I turn now to measuring the sufficiency of the impugned pleading against them.

B. Analysis

1. Mr. Wilchuck is a Lay Litigant

[33] Mr. Wilchuck is a lay litigant who, as is obvious from a simple review of the impugned pleading, drafted it without the assistance or benefit of professional legal advice.

[34] The concept of access to justice encourages individuals to seek vindication of legal grievances in the courts, and commends some latitude be extended to individuals who for various reasons have chosen to represent themselves. At the same time, lay litigants should not interpret this indulgence as a licence to ignore basic rules of civil procedure or legal drafting. The court is obliged to control its own processes and procedures. See, especially: *Siemens v Baker*, 2019 SKQB 99 at para 31; *Yashcheshen v College of Physicians and Surgeons of Saskatchewan*, 2019 SKQB 43 at paras 7-10; *Amendt v Canada Life Assurance Co.*, 1999 CanLII 12560 at para

14 (Sask QB); and *Kieling v Saskatchewan Wheat Pool*, [1994] 3 WWR 714 at para 43 (Sask QB).

[35] In keeping with this approach, I will accord to Mr. Wilchuck some latitude when assessing the arguments advanced by the defendants on this application.

2. No Reasonable Cause of Action

[36] I begin by addressing Westfield Twins' submissions that the impugned statement of claim discloses no reasonable cause of action.

[37] Mr. Wilchuck's principal claim against Westfield Twins is one of negligent misrepresentation. In *Queen v Cognos Inc.*, [1993] 1 SCR 87 (QL) [*Cognos Inc.*], the Supreme Court of Canada identified the requisite elements to be plead when the claim is one of negligent misrepresentation. They include: (1) a duty of care based on a "special relationship" between the representor and the representee; (2) the representation in question must be untrue, inaccurate or misleading; (3) the representor must have acted negligently in making the misrepresentation; (4) the representee must have relied, in a reasonable manner, on the negligent misrepresentation; and (5) the reliance must have been detrimental to the representee in the sense that damages resulted. See: *Cognos Inc.* at para 17.

[38] In the alternative, Mr. Wilchuck pleads fraudulent misrepresentation on Westfield Twins' part. In *Bruno Appliance and Furniture, Inc. v Hryniak*, 2014 SCC 8, [2014] 1 SCR 126 [*Bruno Appliance*], for example, the Supreme Court identified the requisite elements of fraudulent misrepresentation as follows: (1) a false representation is made by a

representor; (2) some knowledge on a representor's part that the representation is false; (3) the false representation caused the representee to act; and (4) those actions resulted in a loss to the representee. See: *Bruno Appliance* at para 21.

[39] Apart from loosely identifying the nature of the claims he advances, Mr. Wilchuck pleads no material facts which could remotely support the various serious allegations he makes against Westfield Twins.

[40] Rule 13-9 of *The Queen's Bench Rules* addresses what is required in any pleading alleging fraud, misrepresentation or other forms of malfeasance. It stipulates as follows:

> **13-9**(1) In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default or undue influence, full particulars must be stated in the pleading.

[41] In *Merchant Law Group v Canada Revenue Agency*, 2010 FCA 184, at para 38, 321 DLR (4th) 301, for example, Stratas J.A. on behalf of the court characterized a pleading lacking such detail as an "abuse of process". He explained at para. 34 as follows:

> [34] . . . .When pleading bad faith or abuse of power, it is not enough to assert baldly, conclusory phrases such as "deliberate or negligently", "callous disregard", or "by fraud and theft did steal". . .Making bald, conclusory allegations without any evidentiary foundation is an abuse of process. . .If the requirement of pleading material facts did not exist in Rule 174 [of the Federal Court Rules] or if courts did not enforce it according to its terms, parties would be able to make the broadest, most sweeping allegations without evidence and embark upon a fishing expedition...[citations omitted].

[42] It is apparent that the impugned statement of claim fails to provide any factual underpinning, let alone an adequate one, to support Mr. Wilchuck's claims of negligent misrepresentation or fraud. Consequently, it violates not only the requirements of *The Queen's Bench Rules* but also contemporary jurisprudence on this point.

[43] Accordingly, I conclude that on this basis alone the impugned statement of claim is beyond redemption and must be struck out in its entirety.

C. Scandalous, Frivolous or Vexatious Pleading

[44] Although it is not necessary for me to address the issue of whether the impugned statement of claim may be characterized as scandalous, frivolous or vexatious for purposes of Rule 7-9(2)(d) of *The Queen's Bench Rules*, oral argument was advanced on this issue. I will, therefore, address it briefly below.

[45] On an application under this Rule, the court is not solely restricted to the pleading itself under this Rule and may refer to other materials filed on the application. See: *Sagon* at para 18. Counsel for Westfield Twins referred me to various statements made by Mr. Wilchuck alleging improper conduct on the part of Westfield Twins. He submitted that at bottom, this action grew out of Mr. Wilchuck's dissatisfaction with how Westfield Twins increased the condominium fees and levied a special assessment against all owners in the complex.

[46] Counsel for Westfield Twins further submitted that Mr. Wilchuck's application amounts to an abuse of process relying on the doctrine of *res judicata*. He argued that the claims advanced in the impugned statement

of claim have already been adjudicated adversely to Mr. Wilchuck by Layh J. in *Wilchuk (No.1)*, and by Chow J. in *Wilchuk (No.2)*. It would, therefore, be an abuse of the justice system to allow this third action to proceed.

[47] I have concluded that Westfield Twins should succeed on this last ground, namely that the doctrine of *res judicata* applies. In order to succeed on a claim of this doctrine, it is necessary for the party relying on it to show that (1) there is a previous final decision of a court of competent jurisdiction; (2) the parties are the same; and (3) the final judicial decision determined the same issues as those not being raised, including points properly belonging to the subject of litigation that the parties might have brought forward in the previous litigation. See for example: *Jones v Kindrachuk and Canadian Imperial Bank of Commerce* (1991), 96 Sask R 73 (QB); *Haug v Loran*, 2017 SKQB 92 at para 30; and *Wilchuk (No.2)* at para 30.

[48] I have reviewed the previous pleadings filed by Mr. Wilchuck, as well as the decisions of Layh J. in *Wilchuk (No.1)*, and Chow J. in *Wilchuk (No.2)*. I am unable to discern any substantive difference between those earlier applications and Mr. Wilchuck's statement of claim impugned here.

[49] The claims of negligent representation and fraudulent representation are essentially the same as those which were advanced in the previous actions and, subsequently, dismissed by two other judges of this Court. Mr. Wilchuck now attempts to reframe those issues as misrepresentations; however, the basis for those claims is grounded in the same circumstances, namely that Westfield Twins allegedly failed to comply with its own by-laws or the *CPA, 1993* in the actions it took.

[50] The previous decisions were final decisions, the parties were identical in both proceedings, and *Wilchuk (No.1)* determined the same issues which were before Chow J. in *Wilchuk (No.2)* and are now before me. These three actions all relate to the actions of Westfield Twins through its Board of Directors and whether it had the lawful authority to levy a special assessment and to increase condominium fees. These prior decisions, not to mention *Wilchuck (C.A.),* demonstrate conclusively that any further attempt by Mr. Wilchuck to relitigate these issues yet again, is foreclosed through the operation of the doctrine of *res judicata.*

[51] Accordingly, I conclude that the various claims set out in the impugned statement of claim are *res judicata* and it must be struck, for to permit it to proceed would amount to an abuse of process.

THE VEXATIOUS LITIGANT ISSUE

[52] In the event it is successful in having the impugned statement of claim struck, Westfield Twins is seeking an order declaring Mr. Wilchuck to be a vexatious litigant.

[53] To declare a litigant vexatious is no small matter. In *Green v University of Winnipeg*, 2018 MBCA 137, [2019] 2 WWR 35 [*Green*], for example, Steel J.A. highlighted the tensions at play any time there is an attempt by one party to limit another party's access to the courts. She stated as follows at para. 1:

> [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.

[54] After reviewing the litigious nature of Mr. Wilchuck against Westfield Twins and his persistent attempts to relitigate matters which various judges of this Court, and the Court of Appeal have repeatedly determined are devoid of legal merit, I conclude that in order to maintain the balance referred to by Steel J.A. in *Green* it is necessary to limit Mr. Wilchuck's unfettered access to this Court. Accordingly, I declare Mr. Wilchuck to be a vexatious litigant pursuant to Rule 11-28 of *The Queen's Bench Rules*.

[55] My reasons for this conclusion follow.

A. Relevant Legal Principles

[56] Rule 11-28 governs applications for declaring a litigant vexatious. It reads as follows:

> **11-28**(1) If on an application by or with the written consent of the Attorney General for Saskatchewan, the Court is satisfied that any person has habitually and persistently and without any reasonable ground instituted vexatious legal proceedings against the same person or against different persons, the Court may order that the person shall not institute any proceedings in the Court without leave of the Court.
>
> (2) The Court may require that the local registrar at each judicial centre be notified of an order pursuant to this rule.

[57] Prior to the revision of *The Queen's Bench Rules*, these types of applications were governed by former Rule 662, the terms of which were effectively identical to Rule 11-28. Consequently, jurisprudence interpreting former Rule 662, the predecessor Rule, remains good law.

[58] In addition to this Rule, there is a body of jurisprudence which holds that superior courts possess the inherent jurisdiction to declare litigants as vexatious, and to limit such an individual's future access to the courts. This compelling jurisprudence has its roots in two decisions of the United Kingdom Court of Appeal: *Bhamjee v Forsdick (No. 2)*, [2003] EWCA Civ 1113, and *Ebert v Birch*, [1999] EWCA Civ 3043. The evolution of this jurisprudence is extensively chronicled by Rooke A.C.J. in *Unrau v National Dental Examining Board*, 2019 ABQB 283, 94 Alta LR (6^{th}) 1, especially at paras. 422-457.

[59] Indeed, judges of this Court have acknowledged the inherent jurisdiction to limit a vexatious litigant's access to the courts. See for example: *Saskatchewan Wheat Pool v Kieling* (1993), 117 Sask R 218 (QB); *R v Zarubin* (1999), 180 Sask R 113 (CA); *Kashuba v Online Productions Incorporated,* 2001 SKCA 27; and *Jackson v Canada (Customs and Revenue Agency)*, 2001 SKQB 377 at para 35, 210 Sask R 285 [*Jackson*]. This inherent jurisdiction supplements the procedure codified in *The Queen's Bench Rules*. See: *Jackson* at para 35.

[60] Westfield Twins' application invokes Rule 11-28, and I will confine my analysis to the operation of that Rule.

[61] The term "vexatious" which appears in Rule 11-28 is intended to describe proceedings that should not be brought. It does not refer to the personality of a litigant, however disagreeable he or she may be. Rather it is intended to ascribe a quality to the substance of the case which persuades a court that the judicial system should not be burdened with it. See for example:

T.J.H. v C.C.H., 2003 BCCA 277 at para16; and *Carten v Carten*, 2015 BCCA 201 at para 30, 372 BCAC 108.

[62] In *Canada v Olumide*, 2017 FCA 42, Stratas J.A., for example, offered this perspective on vexatiousness at para. 32 as follows:

> [32] In defining "vexatious", it is best not to be precise. Vexatiousness comes in all shapes and sizes. Sometimes it is the number of meritless proceedings and motions or the reassertion of the proceedings and motions that have already been determined. Sometimes it is the litigant's purpose, often revealed by the parties sued, the nature of the allegations against them and the language used. Sometimes it is the manner in which proceedings and motions are prosecuted, such as multiple, needless filings, prolix, incomprehensible or intemperate affidavits and submissions, and the harassment or victimization of opposing parties.

[63] For a recent and careful academic consideration of vexatious litigants in criminal and civil matters, see: Yves-Marie Morissette, "Querulous and Vexatious Litigants as a Disorder of a Modern Legal System" (2019), 24 Can Crim L Rev 265, and Donald J. Netolitzky, "Comment on Y.M. Morissette, "Querulous and Vexatious Litigants as a Disorder of a Modern Legal System" " (2019), 24 Can Crim L Rev 251.

[64] The leading case in Canada for determining whether a litigant may be characterized as "vexatious" is *Re Lang Michener and Fabian* (1987), 37 DLR (4th) 685 (Ont H Ct) [*Lang Michener*]. In *Green*, for example, Steel J.A. noted at para. 30, that as of December 17, 2018, it had been cited by over "30 appellate decisions across Canada...along with over 250 lower court decisions." As of today, a quick CanLII search reveals that *Lang Michener* has now been cited approximately 390 times by Canadian appellate and trial courts.

[65] Among those numerous trial court decisions are decisions from this Court, including *Sheppard v Sheppard*, 2003 SKQB 461 at para 47, 243 Sask R 79; *B.K.B. v J.L.L.*, 2016 SKQB 93 at para 235; and *Babatunde v Bank of Canada*, 2017 SKQB 62 at para 53.

[66] In *Lang Michener*, Henry J. of the then Ontario Hight Court laid out at page 691 a non-exhaustive list of seven key factors intended to assist a court in determining whether an impugned proceeding is, indeed, vexatious. Those factors include:

a) Bringing one or more action to determine an issue which has been determined by a court of competent jurisdiction;

b) It is obvious that the action in question cannot succeed, would lead to no possible good, or no reasonable person can reasonably expect to obtain relief;

c) The action is 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) The grounds and issues in the first proceeding have been rolled forward into subsequent actions and repeated and supplemented, often with actions brought against the lawyer who have acted for or against the litigant in earlier proceedings;

e) The person who instituted the proceedings has failed to pay the costs of unsuccessful proceedings, and

f) The person has persistently taken unsuccessful appeals.

[67] With these principles set out, I turn now to consider whether, in light of Mr. Wilchuck's continued and repeated actions against Westfield Twins, his access to this Court should now be limited.

B. Analysis

1. Statutory Pre-Condition to Application

[68] A statutory pre-condition to bringing an application to have a litigant declared vexatious is the written consent of the Attorney General for Saskatchewan. It is uncertain the reason for this, some might say, peculiar requirement. It may well be that as the principal legal advisor to the Crown (*The Justice and Attorney General Act*, SS 1983, c J-4.3, s 10), one of the Attorney General's functions is to oversee the appropriateness of an application which seeks to restrict a citizen's access to the province's courts. Yet, despite its uncertain provenance, written consent of the Attorney General to an application to declare a litigant vexatious is required, and the failure to produce it means the court lacks jurisdiction to entertain it. See, especially: *Chutskoff (Chutskoff Estate) v Waterhouse (Ruskin Estate)*, 2011 SKCA 10 at paras 26-28, 366 Sask R 166.

[69] In this case, Westfield Twins obtained the Attorney General's written consent to its application and filed it with the court. Accordingly, the statutory pre-condition has been satisfied.

2. Application of *Lang Michener* Indicators

[70] Many, if not all, of the *Lang Michener* factors, in my view, are satisfied in this application.

a) Issues Previously Decided

[71] The first factor asks whether the issues raised in the impugned application have been previously and finally decided by a court of competent jurisdiction. This criterion is satisfied here. In *Wilchuk (No.1)*, Layh J. determined that Westfield Twins and its board of directors acted appropriately and lawfully when it raised condominium fees and set a special levy to be paid by condominium owners. In *Wilchuk (No.2)*, Chow J. determined that Mr. Wilchuck's second legal action against Westfield Twins raised the same substantive issues presented and decided in *Wilchuk (No.1)*, a conclusion endorsed by the Court of Appeal in *Wilchuck (C.A.)*.

[72] After reviewing the impugned statement of claim in this application, I am satisfied Mr. Wilchuck seeks to advance the same substantive issues yet again. Those issues were decided adversely to Mr. Wilchuck by Layh J. Accordingly, the first *Lang Michener* factor is satisfied.

b) This Action Cannot Succeed

[73] The second factor is satisfied for the same reasons, namely the issues pled in the impugned statement of claim have already been finally determined by Layh J. Consequently, the doctrine of *res judicata* applies here. In *Wilchuk (No. 2)*, Chow J. at para. 14 determined that as the claims advanced in the statement of claim before him had been adjudicated by Layh J., they were *res judicata*. I am of the same view respecting Westfield Twins' present application.

c) The Action is Brought to Harass the Other Party

[74] In support of its application to have Mr. Wilchuck declared a vexatious litigant, Westfield Twins filed the Bird Affidavit. Mr. Bird is President of the Westfield Twins' Board of Directors. He pointed to various statements made by Mr. Wilchuck in previous filings which were either untrue or intended to harass Westfield Twins or cause them reputational harm.

[75] For example, in his initial application Mr. Wilchuck alleged at para. 7 that Westfield Twins is "artificially inflating expenses and risks" to the detriment of all condominium owners.

[76] In relation to his statement of claim in QBG 534 of 2018, Mr. Wilchuck filed a document entitled "Matter of Issue". In that document, Mr. Wilchuck asserted that Westfield Twins had "bilked" him of "1000's of dollars", and its "increasing thirst...to increase fees at a fast pace smelled of rip off".

[77] In the statement of claim in QBG 3533 of 2018, Mr. Wilchuck asserts at para. 4, among other things, that Westfield Twins "regularly misrepresents important information and the law through written correspondence, documents, and at meetings". At para. 8, he asserts that Westfield Twins' actions "amount to high-handed, malicious behaviour that justifies punitive damages". He insists that a large award of punitive damages is "appropriate, just and necessary" in order "to act as a deterrent to offset [Mr. Wilchuck] from [Westfield Twins'] future reckless and destructive practices".

[78] It is apparent even from this brief review that the tenor of Mr. Wilchuck's filings is vitriolic and vindictive. They are intended to place Westfield Twins in the most negative light possible. The fact that Mr. Wilchuck repeats them in filing after filing demonstrates he seeks continuously to intimidate and harass Westfield Twins and its Board of Directors, and hopes to enlist this Court's assistance to advance this end.

[79] Accordingly, in my view, the third *Lang Michener* factor is satisfied in this application.

d) Issues in First Proceeding are Repeated in Subsequent Actions

[80] The fourth *Lang Michener* factor is plainly satisfied in this case. As already stated, all the actions Mr. Wilchuck initiated against Westfield Twins, at bottom, make the same claim, namely, that Westfield Twins enacted unlawfully when it increased condominium fees and imposed a special levy on all owners. These allegations have been adjudicated by Layh J., and Chow J. It

is obvious then that this third action is simply a repetition of the previous two actions.

e) Failure to Pay Costs Previously Ordered

[81] In the two previous actions, the judges imposed increasingly heavy costs awards against Mr. Wilchuck. Justice Layh ordered Mr. Wilchuck to pay costs in the amount of $1,000. Subsequently, Chow J. ordered him to pay costs of $1,500. Yet, faced with these orders, Mr. Wilchuck has failed to comply with them. Plainly, the sixth *Lang Michener* factor is satisfied.

f) Persistently Pursues Unsuccessful Appeals

[82] The seventh and final *Lang Michener* factor is the one factor which is not satisfied in this case. To be sure, Mr. Wilchuck appealed Chow J.'s decision in *Wilchuk (No.2)*, an appeal which proved unsuccessful. See: *Wilchuck (C.A.)*. However, Mr. Wilchuck did not seek appellate review of Layh J.'s decision in *Wilchuk (No.1)*. Consequently, it cannot be said that Mr. Wilchuck has persistently pursued unsuccessful appeals against unfavourable rulings.

3. Conclusion on the Vexatious Litigant Issue

[83] As the above analysis reveals, Mr. Wilchuck's actions against Westfield Twins satisfy six of the seven factors identified in *Lang Michener*,

and for this reason he should be declared a vexatious litigant pursuant to Rule 11-28 of *The Queen's Bench Rules*.

[84] Further, in accordance with Rule 11-28, Mr. Wilchuck may not file any further legal actions in the Court of Queen's Bench without leave.

[85] Finally, Westfield Twins has requested that rather than make another costs award against Mr. Wilchuck, I direct that an appointment be taken out pursuant to Rule 11-11 of *The Queen's Bench Rules* to have the Local Registrar tax costs against him. I make such an order.

ADDENDUM

[86] While Westfield Twins' application was reserved, Mr. Wilchuck became embroiled in further litigation against Westfield Twins – QBG 2822 of 2018. His application to strike Westfield Twins' statement of claim in that matter, was dismissed by Robertson J. in *Westfield Twins Condominium Corporation v Wilchuck*, 2019 SKQB 173. Justice Robertson also granted Westfield Twins' application to strike Mr. Wilchuck's statement of defence.

[87] Mr. Wilchuck wished to appeal Robertson J.'s decision; however, he first had to obtain an extension of time in which to file a formal appeal. Justice Whitmore denied him such an extension. He determined that Mr. Wilchuck had no arguable case. In a short fiat – *Wilchuck v Westfield Twins Condominium Corporation* (14 November 2019) Regina, CACV 3498 (Sask CA) – Whitmore J.A. stated:

> [14] Turning to whether Mr. Wilchuck has an arguable case, I also observe that this Court, in dismissing another of Mr. Wilchuck's disputes with Westfield in December 2018,

> found that the Chambers judge in that matter did not err in finding that Mr. Wilchuck's action – which claimed the Board of Directors of Westfield had unlawfully imposed a special assessment on unitholders and improperly imposed condominium fees – was itself an abuse of process because it dealt with the same issue that was contained in an earlier action of his.
>
> [15] **The matter before me now attempts to deal yet again with the same issue, namely the authority of Westfield and its Board of Directors to impose condominium fees and assessments.**
>
> [16] I do not accept Mr. Wilchuck's first proposed ground of appeal, namely that granting an extension of time to allow the appeal to proceed will save further legal expenses and resources, as having any merit whatsoever. **As stated, Mr. Wilchuck has been before the courts on numerous occasions on essentially the same issue. His conduct in bringing these numerous claims indicates that economy of legal expenses is not of any concern to him.** Further, and more to the point, this ground of appeal does not point to any error on the part of the Chambers judge.
>
> [Emphasis added.]

[88] Although these subsequent proceedings did not factor into my decision on this application, I refer to them because they confirm my conclusion that Mr. Wilchuck is a litigant who will not take "no" for an answer. Consequently, Mr. Wilchuck's access to this Court must be restricted in order to maintain the balance identified in *Green* "between appropriate use of judicial resources and endless court actions that result in harassment by means of litigation".

J.
G.G. MITCHELL