

CANADA / JUDGMENT

A.B. v. C.D.

2020 BCCA 57

COURT

British Columbia Court of Appeal

DECIDED

14 February 2020

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2020 BCCA 57 A.B. v. C.D.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

A.B. v. C.D.,

2020 BCCA 57

Date: 20200214

Docket: CA46359

Between:

A.B.

Respondent

(Claimant)

And

C.D.

Appellant

(Respondent)

And

E.F.

Respondent

(Respondent)

Sealed File

Before:

The Honourable Madam Justice Garson

(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated
August 19, 2019 (A.B. v. C.D. and E.F., Vancouver Docket E190334).

Counsel for the Appellant:

C. Linde

Counsel for the Respondent, A.B.:

b. findlay, Q.C.

C.E. Hunter, Q.C.

Place and Date of Hearing:

Vancouver, British Columbia

January 24, 2020

Place and Date of Judgment:

Vancouver, British Columbia

February 14, 2020

Summary:

The respondent AB applies for security for costs of the current appeal as well as security for costs of related appeals. Held: Application granted in part. The appellant is ordered to post security for costs of the current appeal. However, the Court of Appeal Act only contemplates security for costs for the order under appeal. The application for security for costs for the related appeals is dismissed.

Reasons for Judgment of the Honourable Madam Justice Garson:

- [1] This is an application for security for costs in an appeal that concerns medical treatment for a transgender teenager. The earlier main appeal was decided by this court in reasons for judgment pronounced on January 10, 2020, indexed at 2020 BCCA 11. In the overview provided in the reasons, the court set out a summary of the background and the court's decision not to interfere with the finding of the lower court that the child's consent to medical treatment was valid:
- [1] AB is a transgender teenager: assigned female at birth, he feels and perceives himself to be male. While still a minor, he wished to pursue hormone therapy, a medical procedure that would align his body more closely with how he perceives his gender (the treatment).

- [2] His father, CD, strongly opposed AB receiving this treatment, while his mother EF was supportive.
- [3] A medical team assessed AB as sufficiently mature to make the treatment decision on his own, and CD pursued litigation. AB and CD both commenced proceedings in the Supreme Court of British Columbia in February 2019 concerning CD's efforts to prevent the treatment and AB's ability to consent on his own behalf. The three orders under appeal stem from this litigation.
- [4] First, a February 2019 order declared AB validly able to consent to treatment, and that referring to AB as a girl or attempting to convince him to halt treatment would be considered family violence under the Family Law Act, S.B.C. 2011, c. 25 [FLA]. Second, an April 2019 protection order restricted CD's ability to speak with others, including media outlets and AB, about AB's decision to receive hormone therapy. Third, a July 2019 order dismissed the action initiated by CD as vexatious and an abuse of process.
- [5] CD appeals all three orders. He argues that they violate his Charter-protected freedoms of belief and expression and what he terms "parental rights", were procedurally unfair, and do not reflect AB's best interests.
- [6] AB maintains that these orders were fairly decided, are Charter-compliant, and reflect his best interests as well as the statutory right of mature minors to make their own medical decisions under s. 17 of the Infants Act, R.S.B.C. 1996, c. 223. He is supported by EF and the other respondents.
- [7] Following the hearing of this appeal, this court observed there was no reason to interfere with the finding that AB's consent was valid. The treatment, which AB began following the February order, was thus permitted to continue.
- [8] In these reasons, we explain that decision. We further explain why, in our view, certain aspects of the first two orders were issued in a procedurally irregular fashion and cannot stand. We would allow the appeals of these orders in part and substitute procedurally appropriate orders. We would dismiss the appeal of the July order dismissing CD's action.
- [2] Although this court's decision disposed of the appeal, the father of the child has brought a further appeal concerning an order made in the course of an interlocutory proceeding that took place before the appeal was decided.
- [3] Bowden J. had dismissed a petition by the father to halt the treatment recommended for AB. The father sought a stay of Bowden J.'s order in an application that was heard before the Chief Justice of the Supreme Court (in accordance with s. 233 of the Family Law Act, S.B.C. 2011, c. 25 [FLA]).

- [4] After the stay application was set down but before it was heard, counsel for CD, the father, learned from the Law Society of British Columbia that the Chief Justice had filed a complaint or had asked for an inquiry into counsel's conduct. (I was not told the nature of the complaint.) CD's counsel asked that the Chief Justice recuse himself from hearing the application for a stay of Bowden J.'s order.
- [5] The Chief Justice dismissed the recusal application. In brief reasons he said:
- [1] THE COURT: I dismiss your application, Mr. Linde. It is--I think you have not read the letter carefully enough that I sent to the Law Society. I asked them to investigate whether you had been in breach of court orders. I did not file a formal complaint. I will leave the matter at that.
- [2] In any event, you made no submissions before me, and any concern I may have about your conduct I am quite capable of separating from your client's interests.
- [3] So your application is dismissed.
- [6] He also dismissed the application to stay the order made by Bowden J.
- [7] On September 10, 2019, CD filed a Notice of Appeal of the Chief Justice's order dismissing the recusal application. That Notice of Appeal provided:

the Court of Appeal will be moved at the hearing of this appeal that the order appealed from be reversed, namely Chief Justice Hinkson be recused from any further dealing with the matter and parties to these proceedings and that orders made in the proceedings below by the Justice be declared nullities.

- [8] CD has already filed his factum. His claim for relief is as follows:

The appellant seeks the order appealed from be reversed namely Chief Justice Hinkson be recused from any further dealing with the matter and parties to these proceedings and the order made by the Justice below be declare[d] nullities.

- [9] Importantly for this application, the appeal of the Chief Justice's order has been filed in a separate appeal from the main appeal of Bowden J.'s order.

Application for Security for Costs of the Appeal

- [10] The legal framework and criteria applicable to an application for security for costs are set out in *Gardezi v. Positive Living Society of British Columbia*, 2018 BCCA 84 (Chambers) as follows:
- [28] The jurisdiction to order security for the costs of an appeal is found in s. 24(1) of the Court of Appeal Act. Importantly, on such an application, it is the appellant who bears the burden of showing why security is not required: *Creative Salmon Company Ltd. v. Staniford*, 2007 BCCA 285 at para. 9 (Chambers).

- [29] This Court generally considers five factors in determining whether to make an order for security for costs of the appeal. The first factor is the appellant's financial means. If ordering security for costs would prevent the appellant from pursuing a meritorious appeal, it may not be in the interests of justice to make the order: *Zen v. M.R.S. Trust Company* (1997), 88 B.C.A.C. 198 (Chambers). However, the Court may require the appellant to post security for costs of the appeal even if obtaining the funds would be difficult: *D. Bacon Holdings Ltd. v. Naramata Vines Inc.*, 2010 BCCA 427 at para. 21 (Chambers).
- [30] The second factor is whether the costs of the appeal will be readily recoverable if the respondent succeeds. If the applicant shows there is a serious question that recovery may be difficult, a presumption in favour of granting security for costs arises, unless the appellant can demonstrate the appeal has obvious merit: *Edwards v. Moran*, 2003 BCCA 443 at para. 14 (Chambers); *Sangha v. Azevedo*, 2005 BCCA 125 at para. 6 (Chambers).
- [31] The third factor is the timing of the application for security. Because the appeal is usually stayed until security is posted, injustice would result if the respondent applied for security for costs on the eve of the appeal: *M.(M.) v. F.(R.)* (1997), 43 B.C.L.R. (3d) 98 at 101 (C.A. in Chambers).
- [32] The fourth factor is the merits of the appeal. If the appeal is "virtually hopeless" or "bound to fail", security for costs may be ordered even if the order prevents the appellant from pursuing the appeal: *Jenkins v. Swallow Frames & Cycles Ltd.* (1997), 97 B.C.A.C. 81 at paras. 5, 7 (Chambers); *Freshway Specialty Foods Inc. v. Map Produce LLC*, 2006 BCCA 592 at para. 14 (Chambers). On the other hand, the Court will not order security for costs if it would prevent the appellant from pursuing a meritorious appeal: *Creative Salmon Company Ltd.* at para. 12.
- [33] The fifth and ultimate factor is whether the order for security for costs would be in the interests of justice: *Lu v. Mao*, 2006 BCCA 560 at para. 6 (Chambers).
- [11] I need only consider the merits of the appeal factor on the application before me, because it is determinative. There is little merit to the appeal. I say nothing about the actual decision of the Chief Justice not to recuse himself as there is no evidence about the facts underlying that decision before me. The question on appeal appears to me to be moot. It was an interlocutory decision concerning a stay of Bowden J.'s order. There is no utility to the appeal. Importantly, the appeal of the recusal order does not affect AB or EF.
- [12] CD earns about \$50,000 per annum, according to his counsel. He provided no other evidence as to his financial means.
- [13] The Bill of Costs as presented is \$5,100. I would order that this amount be posted as security for costs of the appeal within 30 days of pronouncement of these reasons for judgment. The appeal is stayed until the security is paid.

Application for Security for Costs of the Related Appeals

- [14] The second application before me is an application for security for costs of related appeals. CD has not paid the costs of the main appeal (CA45940 and CA46229) or a related abandoned appeal (CA45941). AB seeks an order that CD post an additional \$5,000 to satisfy a portion of the outstanding cost awards before being permitted to proceed further with the current appeal.
- [15] AB relies on *Lee v. Lee*, 2014 BCCA 155 (Chambers), for the proposition that a justice has authority to grant the application sought. In that case, the respondent sought security for outstanding trial costs awarded in the court below. Justice MacKenzie held that it was in the interests of justice to order security for partial costs of the trial.
- [16] Counsel for AB acknowledges that in *Lee* the respondent sought security for trial costs for the particular order under appeal. Nevertheless, she submits that the principles in *Lee* confer jurisdiction on a single justice to grant security for costs where the amounts outstanding were awarded in a related appeal.
- [17] There is no question that this court has authority to order security for costs of the trial (or an underlying proceeding) if the applicant satisfies the court that to do so is in the interests of justice. This authority is found in s. 10(2)(b) of the Court of Appeal Act, R.S.B.C. 1996, c. 77, which provides:

10 (2) In an appeal or other matter before the court, a justice may do one or more of the following:

- (b) make an interim order to prevent prejudice to any person;

- [18] AB submits that s. 10(2)(b) of the Court of Appeal Act is also the basis for my jurisdiction to grant security for costs of related appeals.
- [19] In *Carten v. Carten*, 2015 BCCA 201 (Chambers), application to vary dismissed 2015 BCCA 405, the applicant sought security for costs for related judgments, including costs in the British Columbia Supreme Court, that had been awarded in a longstanding family dispute. Justice Bennett declined to order security for trial costs where they related to matters other than the particular order under appeal. She wrote at para. 40:

Having said that, the costs Ms. Carten is seeking to have posted relate to costs and related judgments of the entire proceedings commencing in 1995. This is not what is contemplated by the provision [s. 10(2)(b)] in the Court of Appeal Act, which allows for security related to the order under appeal. There were no costs ordered by Mr. Justice Thompson. I would dismiss the application for security for trial costs.

[20] Similarly, in *L.S. v. G.S.*, 2015 BCCA 416 (Chambers), Justice Saunders was asked to order security for costs until all sums owing pursuant to related court orders, including costs ordered by the British Columbia Supreme Court and this court, were paid. Citing *Carten*, she declined to grant the order with respect to the related proceedings at para. 15:

However, I would not make any order in respect to payment of sums ordered to be paid by court orders that are not in issue in this appeal.

[21] Neither of these cases were cited by counsel in the application before me.

[22] AB contends that even though this appeal of Hinkson C.J.'s order has been appealed in a separate appeal from the main appeal of Bowden J.'s order, it is essentially the same proceeding. He says the as yet unassessed costs in the appeal of Bowden J.'s order should be paid as security for the costs of this appeal, because both appeals originate from the same Supreme Court proceeding.

[23] There is no doubt AB is prejudiced by having to respond to an appeal that will not affect him. He is named as a respondent in this appeal.

[24] However, I am not persuaded that my jurisdiction to order security for trial costs can be extended to provide a basis for the order sought here. In my view, s. 10(2)(b) does not provide the jurisdiction to make security for cost orders for related proceedings, even where those proceedings are related trials below or related appeals that have already been heard.

[25] As a result, the application for security for costs of the related appeals is dismissed.

Disposition

[26] The application for security for costs of the appeal is granted. The appellant must post \$5,100 within 30 days of the pronouncement of this judgment. The appeal is stayed pending payment into court of the security.

[27] The application for security for costs in the related proceedings is dismissed.

[28] The respondent CD shall have his costs of these applications.

"The Honourable Madam Justice Garson"

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