

CANADA / JUDGMENT

Acapella Holdings Ltd. v. Drover

2020 BCSC 530

COURT

Supreme Court of British Columbia

DECIDED

24 February 2020

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2020 BCSC 530 Acapella Holdings Ltd. v. Drover

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Acapella Holdings Ltd. v. Drover,

2020 BCSC 530

Date: 20200224

Docket: S163524

Registry: Vancouver

Between:

Acapella Holdings Ltd.

Plaintiff

And

David Howard Drover

Defendant

Docket: L170091

Registry: Vancouver

Between:

The Association of Professional Engineers and Geoscientists of Alberta

Applicant

And

David Howard Drover

Respondent

Before: The Honourable Mr. Justice Branch

Oral Reasons for Judgment

Counsel for Acapella Holdings Ltd.:

D.K. Georgetti

Counsel for the Association of Professional Engineers and Geoscientists of Alberta:

S.N. Finlay

Appearing on his own behalf:

D. Drover

Place and Date of Hearing:

Vancouver, B.C.

February 24, 2020

Place and Date of Ruling:

Vancouver, B.C.

February 24, 2020

- [1] Before me are three applications in two separate matters, all arising from Mr. Drover's conduct over the past several months said to be in violation of extant court orders.
- [2] Acapella Holdings Ltd. is the plaintiff in S163524 (the "Acapella matter"). A history of this matter is provided in judgments of Justice Young, reported at 2016 BCSC 1342 and 2016 BCSC 1630, as well as in oral reasons issued on February 22, 2018. I will not repeat the facts set out in those judgments, except as necessary for this decision.
- [3] Several findings of contempt have already been made by Justice Young in the Acapella matter: February 22, 2018 Oral Reasons at para. 2. On February 22, 2018, Justice Young, after hearing a joint submission on penalty, issued an order providing for a committal of imprisonment for a term of 15 days. However, this sentence was suspended on the condition that the defendant strictly comply with certain conditions. These conditions were set out in paragraphs 6 to 10, 12 to 16, and 18 to 21 of the February 22, 2018 order.
6. Drover, is enjoined and restrained from disseminating, posting on the Internet, distributing or publishing in any manner whatsoever, directly or indirectly, statements, comments, videos, pictures or depictions about or concerning:

- (a) the plaintiff, Acapella Holdings Ltd. ("Acapella");
 - (b) Acapella's current or former directors, officers, employees, shareholders, contractors, investors, advisors, lawyers or agents (the "Acapella Parties");
 - (c) the family members, business associates or the employers of the Acapella Parties; and
 - (d) persons or entities with which Acapella is engaged in negotiations,
- (collectively, the "Protected Parties")
7. For further particularity, Drover shall not publish or cause to be published or otherwise disseminate or distribute in any manner whatsoever, whether by way of the Internet or other medium, any statements, videos, photographs or other communications, including email communications, which refer to the Protected Parties by name, depiction or description;
 8. Drover shall immediately remove any statements published on the Internet, including on any social media account, with [sic] refer to the Protected Parties by name, implication, depiction or description;
 9. Drover is enjoined and restrained from directly or indirectly contacting the Protected Parties by any means whatsoever including by social media except as expressly permitted herein;
 10. Drover is enjoined and restrained from directly or indirectly disseminating or publishing any confidential information acquired from Acapella by way of his current or former status as a shareholder;
 12. Drover is enjoined and restrained without leave of the Court from instituting proceedings in any Court against the Protected Parties or their current or former legal counsel, and for the purposes [sic] of clarity, the Estate of George Gosbee is deemed to be a Protected Party;
 13. Drover shall be enjoined and restrained without leave of the Court from:
 - (a) instituting contempt proceedings in this action against the Protected Parties or their current or former legal counsel; and
 - (b) serving any notices to admit.
 14. Drover shall not threaten the Protected Parties or their current or former legal counsel directly or indirectly, including by implication with:
 - (c) [sic] lawsuits;
 - (d) complaints to any regulator or government agency, including the police; or
 - (e) contempt proceedings;

15. Drover is restrained and enjoined from encouraging, aiding, abetting or assisting others from engaging in any conduct which Drover is prohibited from engaging in pursuant to this Order or any other order made in this proceeding;
16. Drover shall be entitled to communicate with counsel with the plaintiff but not with other lawyers or staff at counsel's firm;
18. Drover shall not initiate or maintain statutory freedom or access to information requests in any jurisdiction made to, or in respect of, the Protected Parties and Drover shall use his best efforts to cause any such outstanding requests to be withdrawn;
19. Drover shall not initiate complaints to any regulator or government agency in respect of the Protected Parties;
20. Drover shall pay within thirty (30) days of the date of this Order to the plaintiff the sum of \$20,000.00 (the "Payment") payable to "Vertlieb and Company - In Trust" on account [sic] of the special costs award set out in paragraph 5 of the order of Madam Justice Young made on September 1, 2016.;
21. If Drover strictly complies with the terms of this Order then the plaintiff shall not be entitled to pursue its claim for damages in this proceeding, however the plaintiff shall remain at liberty to apply for expanded injunctive relief against Drover if circumstances justify additional protections for the plaintiff, the Protected Parties or others as the Court may deem expedient;

(the "Conditions")

- [4] In Acapella's first application, dated January 8, 2020 (as amended), Acapella took the position that Mr. Drover had breached the Conditions by engaging in a series of acts and communications with certain protected parties. However, as a result of certain submissions and concessions made by Mr. Drover, Acapella reduced the scope of alleged breach of Conditions being pursued to a narrow set, and adjourned its reliance on the balance. The specific breaches being relied upon are as follows, using the lettering scheme in the Amended Notice of Application:
- (e) on or about January 4, 2020, publishing (or causing to be published) prohibited content online, in particular, posting to his LinkedIn account a link to a publicly accessible Dropbox folder containing a PDF document entitled "APEGA IC Drover.pdf", which contains numerous references to the plaintiff and other Protected Parties, including Brian Hunter, George Gosbee, and Shane Hawryluk;
 - (f) on or about January 6, 2020, publishing (or causing to be published) prohibited content online, in particular, posting to his LinkedIn account a link to a publicly accessible Dropbox folder containing a PDF document entitled "Submissions of EGBC - February 11, 2019.pdf", which contains numerous references to the plaintiff and other Protected Parties, including Brian Hunter, George Gosbee and Shane Hawryluk; and

- (g) on or about January 6, 2020, publishing (or causing to be published) prohibited content online, in particular, posting to his LinkedIn account a link to a publicly accessible Dropbox folder containing a PDF document entitled "Drover - submissions, Pigott, BCHRT, Document Dis July 16, 2019.pdf", which contains numerous references to the plaintiff and other Protected Parties, including Brian Hunter, George Gosbee, and Shane Hawryluk.
- [5] Acapella filed a second application on January 23, 2020, which particularized further alleged breaches of the Conditions, and sought an additional finding of contempt, as well as an additional sentence. However, Acapella decided to adjourn this second application given its position that a sentence could be imposed as a result of the initial breach of Conditions, and that it would wait to consider whether a further remedy was required after completion of that sentence, and Mr. Drover's response to same.
- [6] The second action relates to a similar order protecting against improper communication put in place within litigation between Mr. Drover and the Association of Professional Engineers and Geoscientists of Alberta ("APEGA"), being Action L170091 (the "APEGA action").
- [7] In their application, APEGA sought a finding of contempt arising out of alleged breaches of an order issued on December 16, 2016 by Associate Chief Justice Rooke of the Court of Queen's Bench of Alberta in that court's Action 1603 21383, which order was subsequently made effective in B.C. through registration on May 13, 2017. I will refer to these collectively as the "APEGA Orders".
- [8] Mr. Drover has already been found in contempt of the APEGA Orders by Associate Chief Justice Rooke on May 24, 2017. The present application arises from more recent conduct by Mr. Drover in B.C., where he now resides. These new breaches are set out in paragraphs 1(i)-(vii) of APEGA's January 13, 2020 Notice of Application:
- i. On or about November 19, 2019, posting a reply to a comment made by Garth Jespersen, an investigator at APEGA, on LinkedIn referencing investigations by the Alberta Securities Commission;
 - ii. On or about November 29, 2019, sending a message on LinkedIn to Garth Jespersen attaching a DropBox link to what Mr. Drover refers to as "RCMP Audio";
 - iii. In or around November 2019, posting comments to George Eynon's, LinkedIn profile. Mr. Eynon is the President of APEGA;
 - iv. On or about December 12, 2019, attempting to contact Jessica Vandenberghe through LinkedIn. Ms. Vandenberghe is the former Director of Enforcement at APEGA;
 - v. On or about December 18, 2019, posting a comment on his LinkedIn profile accusing Garth Jespersen of corruption;

vi. On or about December 18, 2019 sending an email with comments regarding Mr. Marc Sabourin to a number of parties. Marc Sabourin is a former member of the Disciplinary Committee that presided over proceedings regarding complaints regarding Mr. Drover's behaviour; and

vii. On or about December 19, 2019, posting negative comments on the Women Building Futures' website regarding Carol Moen, the former Registrar of the APEGA.

- [9] Mr. Drover appeared in person at the hearing of these applications. I raised with him at the outset of the hearing whether he wished to make additional efforts to seek the assistance of counsel given the custodial jeopardy he was facing, but he stated he was ready, willing, and able to act on his own behalf, as he has been doing in these matters for several years.
- [10] After hearing part of his submissions however, I had some concern about his decision to act without counsel, as he appeared to be raising issues of diminished capacity. He provided certain unfiled medical records which raised at least some air of reality to these issues.
- [11] I adjourned the hearing to allow Mr. Drover to further develop any evidentiary support for an argument regarding diminished capacity. I also directed that the Legal Services Society ("LSS") engage with Mr. Drover to determine whether it would be prepared to provide him with some legal assistance.
- [12] At the subsequent court hearing, Mr. Drover did not provide any additional medical evidence supporting diminished capacity. I did allow him to file the previous medical material in the record, with the consent of the other parties.
- [13] The LSS also appeared and indicated that, although there is some potential for coverage for situations where an individual faces a prison term for civil contempt, Mr. Drover's financial position was such that he did not qualify for assistance. His wife is employed, and he is in receipt of a substantial disability pension. Even deducting medical expenses, he remained over LSS's income threshold.
- [14] Mr. Drover indicated that he had also contacted a number of private counsel, but none were prepared to act for him. Based on the information provided to me, there appeared to be little point in allowing him further time to retain counsel, as he had no remaining active leads.
- [15] Given the active nature of Mr. Drover's campaign against the applicants and related persons, I did not deem it advisable to further delay the consideration of their applications. Although Mr. Drover's rights are important, so too are the rights of those persons who have been subjected to intense response from Mr. Drover over the past number of months.
- [16] Furthermore, the integrity of the court process must be respected through suitable enforcement of its orders. Although I acknowledge that I had the discretion to order a medical evaluation of my own motion, and to directly appoint counsel to act on his behalf, I did not find that it was appropriate to exercise that discretion in the circumstances, for the reasons expressed both above and below.

- [17] In the Acapella matter, the first step was to determine whether the alleged breaches were established by the evidence. This was facilitated by Mr. Drover's admission that he did perform the acts alleged. I am also comfortable that each of the acts does violate Justice Young's order. Mr. Drover did not really suggest otherwise.
- [18] Similarly, in the APEGA action, Mr. Drover agreed that he did perform the acts alleged, and did not contest that they were breaches of the APEGA Orders.
- [19] Mr. Drover did raise certain issues, none of which I find avoids a finding that the Conditions or the APEGA Orders have been breached.
- [20] First, Mr. Drover alleged that he "snapped" as a result of a long period of pressure in the litigation with the applicants, and that this caused his communications in violation of the various orders. It was this suggestion that raised my concern about diminished capacity, as discussed above. Although he did not frame it this way, I considered the possibility that this submission could be characterized as an argument that, while he knowingly performed the acts, his capacity was so impaired that he could not be treated as having the requisite intent.
- [21] I find that Mr. Drover bore the burden of establishing on a balance of probabilities that he was suffering from a mental disorder that should be treated as negating the applicable intent elements, akin to a situation when a defence is advanced in a criminal matter of not being criminally responsible on account of mental disorder under the Criminal Code: *Workers' Compensation Board of British Columbia v. Skylite Building Maintenance Ltd.*, 2019 BCSC 231 at paras. 116-117.
- [22] The evidence before me, and the submissions of Mr. Drover, were not sufficient to negate the intent elements required to ground either Acapella's breach application or APEGA's contempt application. The medical information provided to me indicated that Mr. Drover is suffering from post-traumatic stress disorder. However, I cannot find that such a condition negates the requisite intent. While there was some suggestion that Mr. Drover could possibly be suffering from a delusional disorder, it was clear that further investigation would have been required to make such a finding, and there was no formal diagnosis to that effect.
- [23] Further, Mr. Drover vigorously denies that he suffers from such a condition. I saw no evidence that Mr. Drover was suffering from delusions during the course of his submissions. He is obviously highly and inappropriately fixated on his grievances in relation to his history with the applicants, but I saw no evidence of a break from reality. He knew where he was. He was able to draft and file substantial affidavit materials. He understood the jeopardy he faced. He was able to make submissions which, with some guidance from the court, fell into logical, if unsuccessful, legal positions.
- [24] Furthermore, the prolonged temporal period over which the acts alleged by both applicants took place belie the suggestion that this was a purely temporary reaction that could possibly be characterized as the result of automatism or other such temporary medical condition.

- [25] Finally, the careful design and targeting of his communications said to be in violation of the orders also belies the suggestion that he was operating under anything other than a desire to pursue a continued campaign of harassment against the subject individuals, conduct that justified the earlier orders and findings of contempt.
- [26] Second, in relation to APEGA, Mr. Drover suggested that he was misled into thinking that the APEGA orders were no longer operative as a result of certain correspondence with APEGA arising out of their enforcement of costs orders following his underlying disciplinary proceedings before that body.
- [27] I find the correspondence upon which Mr. Drover relied to support this position was not sufficiently particular to allow Mr. Drover to draw the conclusion that the APEGA orders were no longer in effect. Indeed, there was other correspondence, both before and after the cited correspondence, that would, or should, have made it clear that the injunction was still in effect, including correspondence from Mr. Drover himself. In any event, ignorance of the law is not a defence to contempt. The requisite intention is simply to perform the acts that violate the orders, and the test does not require an assessment of whether there is a full and proper legal understanding of the ongoing validity of any orders: *Skylite*, at paras. 109-112.
- [28] Given that there have been multiple breaches of the February 22, 2018 Acapella order, I find that the conditions for the suspension of the sentence have been breached, and the suspended sentence should now be imposed.
- [29] Mr. Drover asked that rather than immediate committal here in Vancouver, that he be allowed to report to the sheriff in his hometown of Castlegar, or, alternatively in Nelson, to serve out his sentence.
- [30] I find that this is appropriate. After consultation with the sheriffs, I find that it is most appropriate that he report at 9:00 a.m. this Wednesday to the sheriff's office at the courthouse in Nelson, B.C.
- [31] Mr. Drover also asked that he be allowed to serve his sentence intermittently. I find that this is effectively a request to review the penalty imposed by Justice Young and, hence, it is not appropriate for me to make such a change at this late stage, particularly given that the penalty was only imposed after a negotiated joint submission was developed.
- [32] Furthermore, even if I had the discretion to do so, I find that it would not be appropriate to make that change. Mr. Drover needs a short, sharp period of incarceration, with the object of causing him to carefully rethink his choices in terms of his continued communication with these parties and their associates. He is being given a chance to re-evaluate his conduct, but with the sword of Damocles hanging over his head in the form of the adjourned aspects of the Acapella applications.

- [33] Given that there have been breaches of the APEGA orders, I find that a contempt finding is appropriate in that matter. As agreed by counsel for APEGA, the determination of penalty shall be adjourned until after Mr. Drover has served his sentence in the Acapella matter. Again, the extent of his self-reflection, and the hoped-for result of a change in conduct arising therefrom, may well be important to the determination of that penalty.
- [34] Mr. Drover, you would be well advised to think long and hard about whether now is the time to stop your campaigns, and move on with your life as best you can. I am sure your family wants you focussed on your health and your income, rather than on spending time on the Internet hounding other people for no real purpose.
- [35] THE COURT: So, as I have said, your responsibility is to report on Wednesday at nine o'clock to the sheriffs in Nelson. Does that make sense?
- [36] MR. DROVER: Correct.
- [37] MR. GEORGETTI: I have a vetted form of order, My Lord.
- [38] THE COURT: Thank you.
- [39] MR. GEORGETTI: I was unable, I have several, actually, but, well, two. I wasn't able to see any clear advantage either way to having the contempt, this is to the point that was addressed earlier, the finding of contempt versus just the breach triggering, so I'm in your hands in that respect, My Lord. I have turned my mind to it, but I can't see one way being any better than the other. If the breaches are found, it is contempt, and I think Mr. Drover admitted that. On the other hand, I don't know that it's strictly speaking necessary. The balance, of course, is adjourned to another day, so any sentence that arises out of that will be down the road, too. So, I can hand both copies up.
- [40] THE COURT: Sure.
- [41] MR. GEORGETTI: And both have been vetted, My Lord. And the difference, of course, is in paragraph 2.
- [42] THE COURT I will adopt the version that just relies simply on the breach of the Conditions rather than a fresh contempt finding.
- [43] MR. GEORGETTI: Certainly, My Lord.

"Branch J."

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