

CANADA / JUDGMENT

Allen v. Khinda

2022 BCCA 175

COURT

British Columbia Court of Appeal

DECIDED

20 May 2022

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2022 BCCA 175 Allen v. Khinda COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Allen v. Khinda, 2022 BCCA 175 Date: 20220520 Docket: CA47960 Between: Felicia Allen Appellant (Plaintiff) And Meor Singh Khinda Respondent (Defendant) Before: The Honourable Madam Justice Newbury The Honourable Mr. Justice Willcock The Honourable Mr. Justice Voith On an application to vary: An Order of the Court of Appeal for British Columbia, dated February 25, 2022 (Allen v. Khinda, Vancouver Docket CA47960). The Appellant, appearing in person (via teleconference): F. Allen Counsel for the Respondent (via teleconference): J. Gill Place and Date of Hearing: Vancouver, British Columbia April 25, 2022 Place and Date of Judgment: Vancouver, British Columbia May 20, 2022 Written Reasons by: The Honourable Mr. Justice Willcock Concurred in by: The Honourable Madam Justice Newbury The Honourable Mr. Justice Voith Summary: The appellant was ordered to pay the costs of an application in chambers to extend the time within which she could file an appeal record. She applies to discharge or vary the costs order on the grounds that she was successful in chambers, she has been granted indigent status, and the judge erred in finding her at fault for bringing an application rather than seeking the consent of the respondent. Held: Application dismissed. The party seeking an extension of time is usually ordered to pay the costs of the application, and the fact a party has indigent status does not preclude a cost order against that party. There is no evidence to suggest there was a misapprehension of the facts. Reasons for Judgment of the Honourable Mr. Justice Willcock: The Order Under Review

- [1] The appellant, Felicia Allen, sought and obtained leave to extend the time within which she could file an appeal record (the Record) in these proceedings on February 25, 2022, but was ordered to pay costs of the application. She applies to this division of the Court pursuant to s. 9(6) of the Court of Appeal Act, R.S.B.C. 1996, c. 77 for an order discharging or varying the costs order of the justice in chambers.
- [2] The underlying appeal is from an order pronounced on December 3, 2021. A notice of appeal was filed on December 14, 2021. The Record ought to have been filed within 60 days of bringing the appeal, on or before Friday, February 11, 2022.

- [3] In her affidavit filed in support of the motion for an extension, Ms. Allen deposed that she mistakenly thought the Record was due for filing on February 21, 2022, and she arrived at the Registry on that day intending to file it, but the Registry was closed for a statutory holiday, Family Day. She filed an application to extend the time for filing on February 23, 2022.
- [4] Mr. Khinda's counsel, Mr. Gill, did not oppose the application. He filed no responsive material, but attended in chambers and advised the judge of his client's position that the order under appeal was interlocutory, and had been stayed, and the appeal was inconsequential (although technically not moot). After granting the substantive order sought, the judge ordered Ms. Allen to pay costs, because the application was necessitated by her error in missing the filing deadline. He added that the application might have been avoided if Ms. Allen had sought Mr. Khinda's consent to late filing, rather than filing a motion and setting the matter down for hearing in chambers.
- [5] Ms. Allen filed the Record, and immediately applied to vary the costs order on February 25, 2022, on the grounds the chambers judge erred because:
- a) she was successful and costs should follow the event;
 - b) she is indigent; and
 - c) the judge erred in finding her at fault for bringing on an application rather than seeking Mr. Khinda's consent, because Mr. Khinda's counsel had been unresponsive to her attempts to obtain his consent.
- [6] In an affidavit filed on the same day, Ms. Allen deposed that Mr. Gill had set an application for hearing in the trial court on a day she was not available, without her consent: February 11, 2022, the last day for filing the Record. After a long wait, that application did not get heard and was adjourned. She said the need to be available to speak to that application (remotely) precluded her from filing the Record on the date it was due. She deposed: Mr. Gill was contacted three times by me and also once by the Court of Appeal staff for permission to file the Appeal Record late since I had intended to file it on February 11, 2022. [Emphasis added]
- [7] The highlighted passage is difficult to reconcile with her prior sworn statement that she missed the filing deadline because she thought the Record was due on February 21, 2022, and was ready and able to file it on that date, but was unable to do so because, unbeknownst to her, that day was a statutory holiday.

- [8] Before us, Ms. Allen said her failure to comply with the Rules was due to a misunderstanding or honest mistake and anyone can make a mistake. She advised us she had telephoned Mr. Gill from the Court of Appeal Registry to seek his consent for late filing of the Record. She did not claim to have spoken to Mr. Gill, but said she left messages then, and on two other, unspecified, occasions that were not returned. In addition, she claimed to have sent an email to Mr. Gill asking him to consent to the late filing of the Record.
- [9] On being advised by Ms. Allen that she had emailed Mr. Gill seeking his consent, we adjourned the review hearing to obtain clarification from Mr. Gill. Our concern was that his failure to respond to a written request for an extension may have necessitated an unnecessary appearance in court. We sought Mr. Gill's evidence in response.
- [10] Mr. Gill has now filed an affidavit in which he deposes that Ms. Allen did not send him any emails requesting his client's consent to the late filing of the Record. The only email correspondence that included any discussion of the application was received by him on February 23, 2022. It contained only the following reference to the application filed on that date and heard on February 25, 2022: I am unavailable from March 9 to March 18, 2022 [referring to another matter in the trial court]. As well as this upcoming Friday where another date may be scheduled for the filing of the Appeal Book at the Court Of Appeal.
- [11] Ms. Allen has also now filed a further affidavit in response to our request for clarification. It confirms but does not add to our appreciation of events. She deposes that she tried, unsuccessfully, to contact Mr. Gill on at least two occasions on February 25, 2022, to see whether he could obtain instructions to consent to the late filing of the Record. She was told he was not available. She does not claim to have left a message for him. A Court Registry staff member also tried unsuccessfully to contact Mr. Gill by telephone in her presence on that date. She deposes: I had provided a court date of February 11, 2022 to Mr. Gill then realizing that I had to file the Appeal Book I tried to change that Court date with emails to Mr. Gill unsuccessfully. There were many emails between Mr. Gill and myself about this date because obviously I needed to file the Appeal Record on the same date. I have tried to locate the email exchanges because I recall asking Mr. Gill in one of the emails that if he was going ahead with the February 11, 2022 date for his Application hearing then would he be agreeable to an extension for me to file my appeal record. I recall that he did not reply to that request in that email when he confirmed by reply email that he was going ahead with the August 11th date.
- [12] The correspondence Ms. Allen has now produced and appended to her affidavit does not refer to the date for filing the Record, and does not contain a request for an extension of the time for filing it. Discussion
- [13] Pursuant to s. 9(6) of the Court of Appeal Act, a division of the court may discharge or vary an order made by a single justice, other than an order granting leave to appeal. The court will not interfere with the decision unless satisfied the judge was wrong in law, or in principle, or misconceived the facts: *Haldorson v. Coquitlam (City)*, 2000 BCCA 672 at para.

7.

- [14] Cost awards are discretionary and attract deference: *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71 at para. 42.
- [15] In my view, the chambers judge was not wrong in law or in principle.
- [16] The fact the appellant was successful does not mean that it was erroneous to make this costs order. The party seeking an extension of time is usually ordered to pay the costs of the application in any event of the cause.
- [17] The fact that a party has indigent status or legal aid does not preclude a cost order against that party: *Morales v. Puri*, 2016 BCCA 216 at para. 31. Ms. Allen's indigency did not compel the chambers judge to depart from the general rule.
- [18] Nor was there was there a misapprehension of the facts in this case. The chambers judge was not wrong to conclude that Ms. Allen was primarily responsible for bringing the parties to court. The evidence before him was that Ms. Allen had been mistaken about the filing deadline, which she thought was February 21, 2022. There was no evidence that she sought Mr. Khinda's consent to an extension of time before February 21, 2022, when the Record should have been filed.
- [19] Even now, on an expanded record, there is no evidence in writing of Ms. Allen having sought Mr. Khinda's consent to extend the filing date in the short interval between the date Ms. Allen attempted to file the record on February 21, and the hearing of the application on February 25, 2022. The evidence is that she tried unsuccessfully to contact Mr. Gill on the hearing date. She has tried but failed to locate a record of a request in writing for an extension. Mr. Gill says there was no such request.
- [20] The chambers judge accepted Ms. Allen's evidence that the application was necessitated by an honest mistake on her part. Neither Mr. Khinda nor his lawyer contributed to that mistake. Nor has Ms. Allen established that Mr. Gill failed to respond to a clear request for consent to an order which Mr. Khinda had no good reason to oppose.
- [21] Ms. Allen says her calls to Mr. Gill went unanswered on February 25, 2022. That is not denied. That is a cause for concern generally. Rule 7.2-1 of the Code of Professional Conduct for British Columbia requires a lawyer to be courteous and civil and act in good faith with all persons with whom the lawyer has dealings in the course of his or her practice. In its commentary on this obligation, the Law Society recommends that lawyers agree to reasonable requests concerning trial dates, adjournments, the waiver of procedural formalities and similar matters that do not prejudice the rights of the client. The Law Society has expressed the view that a lawyer's general duty of courtesy and good faith to all persons with whom the lawyer has dealings may require a lawyer to extend certain courtesies to self-represented persons similar to those accorded to lawyers: *The Law Society of British Columbia, Code of Professional Conduct*, Vancouver: Ethics Committee, April 2014, Annotation to Rule 7.2-1.

- [22] Rule 7.2-5 of the Code requires lawyers to answer with reasonable promptness all professional letters and communications from other lawyers that require an answer. The same courtesy should be extended to self-represented litigants.
- [23] In my opinion, the record does not support the conclusion that the application in this case was necessitated by a failure on the part of Mr. Gill to obtain instructions in response to a request for his client's consent to the order sought by Ms. Allen. Had such a specific request been made, it ought to have been addressed promptly and courteously.

Disposition

- [24] I would dismiss the application to set aside or vary the costs order. "The Honourable Mr. Justice Willcock" I agree: "The Honourable Madam Justice Newbury" I agree: "The Honourable Mr. Justice Voith"

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