

CANADA / JUDGMENT

Chen v. Nip

2022 BCCA 101

COURT

British Columbia Court of Appeal

DECIDED

17 March 2022

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2022 BCCA 101 Chen v. Nip

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Chen v. Nip,

2022 BCCA 101

Date: 20220317

Docket: CA46802

Between:

Margaret Ying Ting Chen

Respondent

(Claimant)

And

Leslie Horn Nip

Appellant

(Respondent)

Before:

The Honourable Mr. Justice Harris

(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated

March 19, 2020 (M.Y.T.C. v. L.H.N., 2020 BCSC 414,

Vancouver Docket E172700).

The Appellant, appearing in person:

L.H. Nip

Counsel for the Respondent:

P.P. Paul

Place and Date of Hearing:

Vancouver, British Columbia

March 10, 2022

Place and Date of Judgment:

Vancouver, British Columbia

March 17, 2022

Summary:

The appellant applied for orders to remove his appeal from the inactive list, to require the filing of a previously rejected certificate of readiness and for the filing of transcript extracts. The respondent cross applied, inter alia, to have the appeal dismissed as abandoned. Held: Appeal dismissed as abandoned. The appellant failed to order transcripts as required by the Rules and despite being on notice of his obligation to do so. He has not obtained a transcript, and not applied until this application to be relieved of his obligation to do so. The delay in prosecuting the appeal has been inordinate, the appeal lacks discernible merit, and the continuation of an active appeal is prejudicial to the respondent. It is not in the interests of justice to allow the appeal to proceed. Accordingly, it is dismissed as abandoned.

Reasons For Judgment Of The Honourable Mr. Justice Harris:

Introduction

- [1] This is an application by the appellant, Dr. Nip, to remove his appeal from the inactive list. He also applies for orders that his certificate of readiness and transcript extract books be accepted for filing, and that the time limit for the next step starts to run from the date of this order. These applications are met by cross applications by the respondent, Ms. Chen, that the appeal be dismissed as abandoned for failure to comply with the Court of Appeal Act and Rules, in particular because the appellant has not filed a transcript of oral evidence as required by R. 20 of the Court of Appeal Rules. In the alternative, the respondent seeks security for costs.

- [2] The appeal arises out of a 28-day family trial resulting in orders pronounced on March 19, 2020. The notice of appeal was filed April 15, 2020. The appellant filed an appeal record on November 10, 2020, appeal books on December 8, 2020 and his factum on December 8, 2020.
- [3] The appellant did not file a transcript of the oral testimony taken at trial within 60 days after bringing the appeal as required by R. 20(1). The appellant's factum referred to a transcript extract book, although some transcript excerpts were included in the appeal book. To this day, a transcript has not been filed, nor, apparently has one been ordered.
- [4] Before the appellant filed his factum and appeal books, he was put on notice, on November 24, 2020, that the respondent required him to comply strictly with the time limits of the Act and Rules.
- [5] The respondent filed a motion on December 22, 2020, applying for an order that the appeal be dismissed for failure to file the trial transcripts within time, or, alternatively, that the time for the respondent to file her factum and appeal books be extended to a day 60 days from the date the appellant filed the transcripts of the trial proceeding. That motion did not proceed, apparently on the strength of assurances that the trial transcripts would be provided.
- [6] In the appellant's affidavit, he exhibits a transcript extract book index bearing a date stamp February 4, 2020, which he says he attempted to file, but was told it was not necessary to do so under a notice for filing electronically. He also exhibits a certificate of readiness which he faxed to the registry on April 9, 2021. The certificate of readiness was not accepted because, it appears, the registry noted that transcripts had not been obtained and filed in accordance with R. 20(1).
- [7] On September 22, 2021, the associate registrar sent a letter to the appellant advising him that pursuant to s. 25(1) of the Act, the appeal had been placed on the inactive appeal list and would stand dismissed as abandoned on March 15, 2022, failing a successful application to remove it from the inactive list or by consent.
- [8] From March 18, 2020 to September 14, 2020, the deadlines for filings were suspended owing to the COVID-19 pandemic. Hence, for approximately six months, the appellant was not subject to a filing deadline, and applicable filing deadlines must be adjusted to reflect that fact.
- [9] What is also clear is that the appellant has repeatedly been informed by the respondent that she considers him to have abandoned his appeal because he has not complied with his obligation to obtain and file a transcript, and that he must file an application to extend time to file a transcript if he intends to do so.

- [10] The appellant has not demonstrated that he has ordered a transcript. He has not applied to extend time to file a transcript. His position seems to be that it is sufficient if he files those portions of the transcript he considers necessary to raise the issues he wants to advance on appeal. The appellant has, he says, listened to the recording of proceedings and had those portions he considers necessary (and those largely consist of submissions and not evidence) transcribed. It is these extracts that he asks I order to be filed to perfect his appeal.
- [11] I observe that there can be no doubt that the appellant has known the respondent's position about the transcripts since late 2020. I am satisfied that the appellant knew that he had an obligation to obtain and file a transcript. He has displayed a familiarity with and understanding of the procedural steps necessary to prosecute his appeal. He has taken those steps he considers necessary to advance his appeal, including filing an appeal record, factum, appeal books and a certificate of readiness (however imperfect those materials may be). I find that the appellant's failure to file a transcript as required, or to file a motion to extend time to do so, is a deliberate decision made with knowledge of his obligation.
- [12] Finally, despite not taking steps to deal with a number of issues that have arisen, such as his inability to file transcript extracts and the rejection of his certificate of readiness, I am satisfied that from time to time, when it suits him, the appellant has communicated his intention to proceed with the appeal. This happened, for example, in the face of the respondent's application in December 2020 to have the appeal dismissed as abandoned, and again months later when the appellant relied on his ongoing appeal as a means to prevent a 10-day hearing to assess special costs against him. At the same time, it is not lost on me that the respondent has not taken some proactive steps that are available to her to force the resolution of the appeal, preferring, I take it, to allow it to die with the effluxion of time.

Preliminary Issue

- [13] Section 25(1) of the Act stipulates, among other things, that an appeal will be placed on the inactive appeal list if a certificate of readiness is not filed in accordance with the Rules within one year after the filing of the applicable notice of appeal. In this instance, the s. 25 letter was sent on a date that accommodated both the one-year period, and the period during which time limits were suspended.
- [14] That, however, is not the end of the matter. The appellant attempted to file a certificate of readiness on April 9, 2021. The certificate was not accepted. It appears, from notations on the exhibit, that the certificate was not accepted because transcripts had not been filed in accordance with R. 20. The difficulty is that R. 28 does not, by its terms, require the filing of the transcript as a condition for filing a certificate of readiness. The rule reads follows:

28 (1) In this rule, an appeal is ready for hearing

- (a) when the Appeal Record and the appellant's factum and Appeal Book are filed, or

- (b) if an order has been made under Rule 21 (4) dispensing with the appellant's factum, when the appellant's Appeal Book is filed.
- (2) The registrar is to maintain a list of appeals that are ready for hearing.
- (3) The appellant must file a certificate of readiness in Form 14 immediately after an appeal is ready for hearing.

...

- [15] The appellant submitted that he had complied with R. 28, his certificate should have been accepted, and his appeal should not have been put on the inactive list.
- [16] There are a number of problems with the way in which the appellant has dealt with this issue. I see nothing to suggest that he took steps to challenge the rejection of his certificate of readiness in the months after it was rejected. He also did not respond to his appeal being put on the inactive list for many months. Nonetheless, it does appear that there is a gap in the Rules since compliance with R. 20 governing the filing of a transcript is not stipulated as a condition to filing a certificate of readiness. Clearly, the intent of the rule is that everything that needs to be done by the appellant to perfect an appeal has been done, but the express language of the rule leaves a gap.
- [17] Even if the certificate should have been accepted for filing, an appeal will be placed on the inactive list if a notice of hearing is not filed within two months of filing a certificate of readiness. I think it inevitable that a notice of hearing could not have been properly filed owing, at a minimum, to the lack of transcripts and the assertion contained in the certificate that over 20 days were required for the hearing of the appeal. It is most probable that this appeal would now be on the inactive list. Nonetheless, in these circumstances, I am unwilling to dispose of this application on the basis that this appeal is properly placed on the inactive list. Accordingly, I will order that the appeal be removed from the inactive list or reinstated (as the statutory deadline for the appeal to be dismissed as abandoned will have passed by the date these reasons are released). I do this in order to deal with the issue whether I should extend time to allow the filing of the transcripts or make an order that dispenses with the complete transcript for the purpose of this appeal.

Abandonment of Appeal and Extension of Time

- [18] The starting point is that the appellant has not complied with his obligation to file a transcript of the proceedings, given that oral testimony was heard at the trial. The appellant does not appear to accept that this is his obligation. He asserts that he need only file extracts, and that I should make an order confirming that his extracts are sufficient for the appeal. He appears to think that he need only file those extracts that advance his case, not those necessary to decide the issue before the Court. Justice Hunter explained the regime in *Sharifpour v. Rostami*, 2019 BCCA 61: a case the appellant is aware of since he brought it to my attention. Justice Hunter explains:

[2] The requirement to file a transcript is statutory. Section 16 of the Court of Appeal Act, R.S.B.C. 1996, c. 77, requires that the appellant must file an appeal book and a transcript in accordance with the Court's rules. Rule 20(1) of the Court of Appeal Rules, B.C. Reg. 297/2001 sets out this requirement in greater detail:

20 (1) If oral testimony was presented in the court appealed from, the appellant must, within 60 days after bringing the appeal,

- a) obtain a transcript of the oral testimony,
- b) file one paper copy of that transcript for use by the court plus such additional paper copies as are required for the purposes of paragraph (d),
- c) file one electronic copy of the transcript,
- d) serve one filed paper copy of the transcript on each of the other parties, and
- e) serve on each party who requests it an electronic copy of the transcript.

[3] While only one copy of the paper transcript need be filed with the Court, the parties must also file four copies of a transcript extract book containing any portions of the oral testimony relied upon in that party's factum: Rule 27.

[4] The Court is aware that the cost of a transcript can be an impediment to bringing an appeal, and the Court's rules provide two mechanisms for reducing that burden. A single justice such as myself may exclude any testimony from the transcript in accordance with Rule 20(5), and the registrar of the Court has the authority under Rule 26.1 to settle the contents of the transcript.

[19] It is noteworthy that the appellant has not sought to avail himself of either of these mechanisms. He has simply disregarded this obligation over many months, despite being put on notice of his obligation to file a transcript, that the respondent demanded he strictly comply with the time limits imposed by the Rules, and that a motion had been filed in December 2020 to have the appeal dismissed as abandoned for failure to order and file a transcript. The respondent has consistently and repeatedly put the appellant on notice that he needed to file an application to extend time to file a transcript, and that her position was that the appellant had effectively abandoned his appeal by failing to respect filing obligations and deadlines. The appellant has taken no steps to comply with his obligation to file a transcript since December 8, 2020. Even now, in his motion to remove his appeal from the inactive list, he does not seek an order extending time to file a transcript, rather he seeks an order that I confirm that his proposed extracts are sufficient.

[20] It appears clear that the appellant has, despite some assurances to the contrary, not ordered or received a transcript, has not provided a transcript to the respondent, and not provided the respondent with transcript extracts (except those included in the appeal books).

- [21] I recognize the cost burden associated with ordering a transcript. That is why mechanisms exist to alleviate that burden if something less than a full transcript can provide a record sufficient to allow the Court to deal with the issues raised on appeal. As Justice Hunter explained:
- [5] Registrar Outerbridge has reviewed the considerations that affect the exclusion of portions of the transcript in *Foote v. Canada Revenue Agency*, 2016 BCCA 188. As he noted, the purpose of requiring a transcript of the evidence is to ensure that the Court will have a proper record of the proceedings from which appeals are taken: *Pavlis v. HSBC Bank Canada*, 2009 BCCA 450 at para. 8.
- [6] Depending on the issues to be addressed in the appeal, it may be possible to reduce the bulk of the transcript that is required, and even to eliminate the need for a transcript of the evidence, although it is seldom that an appeal is framed so narrowly that no transcript at all is required.
- [7] The appellant's statement that he does not intend to rely on the oral evidence from the trial is not relevant to the question of excluding evidence from the transcript. What is significant is the manner in which the appeal is framed, and whether recourse to the oral evidence may be required by the Court in its consideration of the appeal. Registrar Outerbridge addressed this issue in this way in *Foote*:
- [12] It is a misconception that an appellant need only obtain those portions of the transcript that are necessary to advance arguments within their factum and then leave a respondent to obtain whatever else they require at their expense. This position was taken by the appellants at the appointment.
- [13] The appellants' responsibility, as noted in *Pavlis*, is to ensure the transcript is sufficient to allow an appeal to be considered in its proper context. They are charged with the responsibility and expense of obtaining the transcript in the discharge of that obligation, given it is their appeal. Where there is a dispute or the parties are unsure, they may settle the transcript before the Registrar or limit the contents of the transcript before a Justice.
- [8] In this appeal, there is no possibility of hearing the appeal as it is being advanced by the appellant without recourse to the evidence at trial. This conclusion flows from the issues the appellant wishes to canvas on appeal. The notice of appeal, for example, lists 17 grounds for appeal, virtually all of which are allegations of error in the manner in which the trial judge treated the evidence. The appellant has filed his factum, and Part 2 of the factum identifies 18 allegations of error by the trial judge. The allegations are framed almost entirely in terms of the judge's assessment of the evidence, including allegations such as the trial judge "committed a palpable error in finding that ", " failed to adequately consider the evidence that ", "erred on the evidence that ", and "erred on the evidence and committed a palpable error in finding that ".

- [9] In an earlier judgment concerning the filing of appeal books and factum, Justice Garson described this proceeding as "a fact-intensive, complicated trial": 2018 BCCA 397 (Chambers) at para. 14. I agree with that characterization. It is perhaps inevitable that an appeal of such a trial will be laden with allegations of factual error. But that is the kind of appeal where a transcript is most necessary.
- [10] Justice Saunders recently dealt with a similar application in *Agent E v. Canada (Attorney General)*, 2018 BCCA 492 (Chambers), review dismissed 2018 BCCA 491. In considering the need for a full transcript, Saunders J.A. referred with approval to the judgment in *Brazeau v. International Brotherhood of Electrical Workers*, 2004 BCCA 333, in which Justice Low made these comments:
- [5] In most appeals the panel members hearing the appeal will wish to have the evidence given by the witnesses available to them. In the present case the appellant argues that no transcripts are necessary because the basis of the appeal is that the trial judge erred in applying the law as to the facts that she found and which are now undisputed. Although this position is attractive in the interests of lessening the volume of the record, I am not persuaded that the court will not need the transcripts.
- [6] I confess that I am approaching the issue cautiously, but this is a fact-rich case, and I can foresee that members of the panel hearing this appeal will likely wish to have access to the evidence to learn the context in which significant findings of fact were made, notwithstanding that those findings of fact are not in dispute.
- [7] It is not enough, in my opinion, to dispense with transcripts simply because it is not contended that the trial judge made any factual errors by misapprehending the evidence or disregarding important evidence therefore making a palpable and overriding error.
- [11] This case also is a fact-rich case. Unlike the *Brazeau* judgment, the appellant in this case does contend that the trial judge made factual errors by misapprehending or disregarding important evidence. As presently framed, this appeal requires a full transcript to be filed. I am not prepared to waive the requirement of a transcript.
- [22] As I have noted, this was a 28-day trial with extensive oral evidence. The case involved a large number of fact intensive family law issues. Credibility findings, adverse to the appellant, played an important part in result. After trial, the judge awarded special costs in relation to a number of matters against the appellant, arising out of his conduct in the litigation.
- [23] In his factum, the appellant raises a large number of issues. Primarily, as it seems to me, he contests any factual finding with which he disagrees. Many of the issues he raises amount to complaints the respondent was lying, judges believed her, and judges acted in a biased manner. It is striking that many of these complaints relate to interim orders, as well as to the trial itself. The appeal book is replete with materials filed on interim applications. They are of doubtful, if any, relevance to issues properly raised on appeal.

[24] It is difficult to make sense of the appellant's factum. He raises by way of general issues:

- Whether the judge erred in law by misunderstanding and misapplying the applicable legal principles and instruments to the case.
- Whether the judge erred in law by misapprehending his role in the administration of justice.
- Whether the judge erred in fact by overlooking essential evidence.
- Whether the judge erred by conducting the trial with a reasonable apprehension of bias.

[25] More specifically, although without listing each problem the appellant raises with the judgment below, he claims:

- The judge ignored much of his submissions and materials, or did not allow him to present evidence or make arguments, instead relying on the respondent's materials alone.
- The judge was biased against him. This includes the conduct above.
- The judge imposed heavy costs on him, including imprisonment.
- The judge did not follow the correct judicial process.
- The respondent and her lawyer often lied to the court, both in evidence and in argument; did not make full disclosure; illegally obtained materials; brought applications in a manner oppressive to him; and violated professional legal conduct standards.
- The court condoned and encouraged the above behaviour.
- The respondent subjected him and their child to similarly manipulative and abusive conduct throughout the parties' marriage.
- The respondent threw him out of the family home and refused him re-entry, preventing him from amassing evidence; lured Dr. Nip to the house to collect belongings before staging an altercation; and rented out the family home. This all before he could make opening statements at trial.

[26] I identify these issues for two reasons. It seems clear to me that there is no realistic prospect that the need to file a transcript can be avoided. The issues are fact intensive, and call into question all aspects of the trial. Even if an application to permit transcript extracts in place of a full transcript had been made in a timely way, I would not have acceded to it. Second, when read against the trial judgment, I can discern little if any merit in the appeal. The appellant seeks to reargue his case at trial, complains that his view of the facts was not accepted and his positions rejected, and casts serious accusations of professional misconduct against counsel and, for that matter, the judge.

- [27] I turn now more specifically to the issue of whether I should extend time to bring any application to keep this appeal extant. I note that there is still no application for an extension of time to file a transcript. At most, reading the record generously, there is an application to rely on transcript extracts in prosecuting the appeal. From what I have said above, I see no merit in the substance of such an application.
- [28] It is settled that, in addressing the matter before me, I should have regard to the bona fides of the appellant's intention to prosecute the appeal, the respondent's appreciation of the appellant's intention to do so, the merit in the appeal, and the overarching consideration of the interests of justice.
- [29] While I have no doubt that the appellant passionately believes in the merits of his appeal, I cannot say that he has demonstrated any effective or practical interest in prosecuting it, after having filed his factum. He has done nothing to advance his appeal since December 2020, save for a failed attempt to file extracts in February 2021, and the attempt to file his certificate of readiness a little later. He took no steps to address the problems with his transcript extracts or the certificate. He has known that the respondent required him to file a transcript, and to apply for an extension of time, for more than a year. He knew it would be opposed. He took months to respond to the s. 25 letter. I do not accept that he could ignore his obligation to file a transcript, or fail to take advantage of the mechanisms to avoid doing so. Given the lengthy delays in advancing the appeal, I am not persuaded that the appellant has demonstrated a bona fide serious and settled intention to prosecute the appeal. He has seemed willing to sit on his hands and assert an intention to proceed when it suited tactical interests, such as avoiding the assessment of special costs.
- [30] The respondent, for her part, has been consistent in demanding compliance with the Rules, and has taken the position that, in her view, the appellant's failure to prosecute the appeal by dealing properly with transcripts meant that the appeal had been abandoned. Whatever the merits of that position may be, the respondent has not acquiesced in the delays or condoned them.
- [31] As I have already intimated, I see very little merit in the appeal. In my view, the appeal is doomed to fail. I see no realistic prospect that the appellant will be able to persuade a division of this Court that the trial judge made palpable and overriding errors in his appreciation of the evidence. I see little in anything in the materials to suggest that the appellant has made a legitimate effort to demonstrate such errors. I can discern no merit in the attack on the judge's integrity or on his appreciation of his judicial responsibilities.
- [32] In my view, the interests of justice do not justify any extension of time to bring this appeal into compliance with the Rules. In addition to what I have already said, there is prejudice to this appeal continuing as an active appeal. The appellant has made serious allegations impugning the character of the respondent, counsel and the judge. An active appeal with these allegations lingering is a form of prejudice that I can consider under this rubric. If these allegations were to be made at all, the appeal should have been prosecuted with

dispatch. It was not. Unless and until the transcript issue was dealt with by the appellant, the respondent could not file a factum. As observed, the appellant has delayed inordinately in dealing with this issue.

- [33] Even if some kind of extension were granted, it is apparent that the appeal is far from ready to be heard. The transcript would need to be ordered, time would be required for the respondent to prepare a factum. Realistically, any hearing of the appeal is months away. This litigation has been lingering for too long. An unmeritorious appeal like this, in these circumstances, should not be put on life support. It is time to bring it to an end. In my view, there has been an inordinate or inexcusable delay in pursuing the appeal. The appellant has not discharged his burden to show that the respondent would not be prejudiced by allowing the appeal to continue notwithstanding the delay.

Conclusion

- [34] This matter came before me initially as a contested application to remove the appeal from the inactive list. The appellant also applied for an order that the time limit for taking the next step commence on the date of the order, and an order that the certificate of readiness be accepted for filing along with the transcript extract books.
- [35] The respondent cross applied for an order that the appeal be dismissed as abandoned for failure to comply with the Act and Rules and/or that it be dismissed for failure to file the trial transcripts within the stipulated time limits. In order to bring this cross application, the respondent needed an order to abridge time by one day. I grant that order.
- [36] I have ordered that the appeal be removed from the inactive list or, more properly now, that it be reinstated owing to an apparent error in refusing the filing of the certificate of readiness.
- [37] I have examined the issue of whether the appeal should be dismissed as abandoned, or some kind of extension of time be granted to perfect the appeal, essentially as one issue. I dismiss the application for an order that the time begins to run for taking the next step in the appeal from the date of this order. I dismiss the appeal as abandoned. The application for an order limiting the transcripts to the extracts is dismissed, as is the application to file the certificate of readiness. The application to restrict the transcripts to the extracts was not brought in a timely fashion in order that the appeal be ready for hearing. If that were the only issue, I would not have entertained the application in light of the inordinate delay. I would not extend the time to bring an application to extend the time to file a transcript, if that is something I could have ordered on the record.

"The Honourable Mr. Justice Harris"

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