
CANADA / JUDGMENT

Dawson v. Dawson

2014 BCCA 44

COURT

British Columbia Court of Appeal

DECIDED

31 January 2014

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2014 BCSC 44 Dawson v. Dawson

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Dawson v. Dawson,

2014 BCCA 44

Date: 20140131

Docket: CA041154

Between:

Judith Gwenda Dawson

Respondent

(Plaintiff)

And

David Reid Dawson

Appellant

(Defendant)

Before:

The Honourable Madam Justice D. Smith

The Honourable Madam Justice Bennett

The Honourable Mr. Justice Harris

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

July 29, 2013 (Dawson v. Dawson, Vernon Docket 41550).

The Appellant appeared on his own behalf

via telephone

Counsel for the Respondent:

D. Djordjevich

Place and Date of Hearing:

Vancouver, British Columbia

January 21, 2014

Place and Date of Judgment:

Vancouver, British Columbia

January 31, 2014

Written Reasons of the Court

Summary:

Application to dismiss an appeal as an abuse of process granted. The appellant sought to raise issues that were res judicata. Order declaring the appellant a vexatious litigant granted.

Reasons for Judgment of the Court:

[1] Ms. Corfield, previously Ms. Dawson, brings several applications in this appeal. They are:

- 1) To have the appeal, filed by her ex-husband, David Dawson, dismissed as an abuse of process on the ground that the matters raised by it are res judicata;
- 2) Alternatively, to have the appeal dismissed as abandoned on the ground that leave to appeal is required but has not been sought;
- 3) To have Mr. Dawson declared a vexatious litigant;
- 4) To be awarded special costs on a lump sum basis.

[2] Mr. Dawson's appeal arises in the context of family law proceedings. Mr. Dawson and Ms. Corfield brought proceedings to dissolve their marriage and deal with all related incidental issues, principally the division of assets. This specific appeal is from the dismissal of an application brought by Mr. Dawson to vary the trial order, even though Mr. Dawson's appeal from that order had been appealed and the appeal dismissed.

[3] It is only necessary to set out some limited background. The parties were married for 15 years. Their relationship broke down in part because of a violent and unprovoked assault on Ms. Corfield by Mr. Dawson. Litigation ensued and the issues between the parties were tried by way of a summary trial: Dawson v. Dawson, 2010 BCSC 1015. Mr. Justice Barrow ordered

that the family assets be divided equally and dismissed Ms. Corfield's claim for lump-sum spousal support. Included in this decision was the dismissal of Mr. Dawson's claim for \$5,000 in commission for selling one of the parties' properties. It is this aspect of the judgment that underlies the current appeal.

- [4] Mr. Dawson appealed Justice Barrow's order, alleging a number of errors in the division of family assets. In his appeal, Mr. Dawson applied for leave to adduce new evidence, which included a letter purporting to prove his entitlement to the \$5,000 commission. His application and appeal were dismissed: *Dawson v. Dawson*, 2012 BCCA 410. At para. 25, Neilson J.A. commented:
- [25] The summary trial record contained over 800 pages of affidavits and exhibits. The appellant now seeks to lead voluminous fresh evidence, comprised of a 37-page affidavit and over 300 pages of documentary exhibits, all of which were filed after the parties had exchanged their factums.
- [26] The objectives of certainty and finality in matrimonial litigation significantly restrict the right to admit fresh evidence on an appeal. The purpose of an appeal is to examine the record that was before the trial court, to determine whether the judge made an error of law or a palpable error of fact that justifies intervention. It is not an opportunity to retry the case. To justify consideration of fresh evidence, the applicant must establish it was not discoverable by reasonable diligence before the trial; it is credible; it would be practically conclusive of an issue before the court; and, if believed, could have affected the result at trial: *Scott v. Scott*, 2006 BCCA 504 at paras. 21-24, 61 B.C.L.R. (4th) 9.
- [27] The appellant frankly admits that almost all of the material he seeks to admit existed prior to the trial. He submits it should nevertheless be received because, as a self-represented litigant, he was naïve, ignorant, and at a disadvantage. He says he failed to foresee some of the issues that arose at trial, and the evidence he needed to respond to them. He maintains the fresh evidence will be decisive on several issues, and the interests of justice require its admission.
- [28] I am not persuaded the appellant's application should be granted. While I am sympathetic to the challenges faced by a party who represents himself, fairness requires that the governing principles be applied consistently to all litigants. The fact a litigant did not have counsel cannot alone justify permitting that party to treat an appeal as an opportunity to present his or her case anew, on a more comprehensive evidentiary base informed by hindsight and the decision of the trial judge.
- [29] While the appellant's application has been painstakingly put together, it is not always easy to decipher. It appears to me, however, that almost all of the evidence he now seeks to lead was available with due diligence prior to trial. Further, I discern little in his material that might have persuaded the trial judge to exercise his discretion differently

- [5] In addition to these reasons, it is apparent from the transcript record that the division expressly turned its mind to the issues connected to the letter.
- [6] After the release of this Court's judgment, Mr. Dawson applied for a "rehearing of the appeal". His application was dismissed and was described as being "without merit and was highly inappropriate": 2013 BCCA 344 at para. 21 ("Costs Decision").
- [7] At the same time, the division exercised its powers under Appendix B of the Court of Appeal Rules, B.C. Reg. 297/2001, to compensate Ms. Corfield for the unwarranted expenses she incurred responding to certain steps in the appeal, which were found to be unnecessarily drawn out and without merit: *Dawson v. Dawson*, Costs Decision at paras. 21, 22. We will briefly return to this costs proceeding in connection with other aspects of the applications before us.
- [8] Mr. Dawson applied for leave to appeal to the Supreme Court of Canada but leave was refused and the Court ordered costs against Mr. Dawson on a solicitor and client basis: *Dawson v. Dawson*, [2012] S.C.C.A. No. 545.
- [9] It is apparent that, with the dismissal of his leave application by the Supreme Court of Canada, the legal issue between the parties over the commission and whatever potential relevance the letter may have had to that issue had been conclusively and finally decided against Mr. Dawson.
- [10] Undeterred, Mr. Dawson applied within the same proceeding to vary the trial order notwithstanding having exhausted his appeal rights arising from it. He also alleged that both Ms. Corfield and her counsel engaged in perjury by failing to produce the letter at the original trial. Mr. Justice Cole dismissed the application as being *res judicata*, without commenting on the allegation of perjury.
- [11] In our opinion, Cole J. correctly dismissed the application to vary the trial order. The issue raised in the application to vary has been conclusively and finally decided against Mr. Dawson in the proceedings before this Court and the subsequent application for leave to appeal to the Supreme Court of Canada. The appeal is wholly without merit. This Court has inherent jurisdiction to quash an appeal if it is so devoid of merit that to countenance it would be an abuse of the court's process: *Wiens v. Campbell* (1992), 74 B.C.L.R. (2d) 154, 21 B.C.A.C. 206.
- [12] We have no hesitation in concluding that this appeal is an abuse of process and it is therefore dismissed. Accordingly, it is unnecessary to consider Ms. Corfield's alternative ground for bringing the appeal to an end.
- [13] In our view, Mr. Dawson's attempt to advance his position by alleging perjury is similarly devoid of merit. It is not open to Mr. Dawson to allege perjury in the context of these civil proceedings. If any impropriety attached to the fact that the letter (which in any event Mr. Dawson at all times had access to) was not disclosed in the original trial proceedings, the potential relevance of that impropriety was encompassed within the application to adduce

fresh evidence on the appeal of the trial judgment. But given the serious nature of the allegation, we think it important to emphasize that we see no merit in it. It appears the letter related to an ultimately unsuccessful attempt to settle issues in dispute between the parties and was accordingly irrelevant to the issues before the trial judge.

[14] We turn now to deal with the application to have Mr. Dawson declared a vexatious litigant. Section 29 of the Court of Appeal Act, R.S.B.C. 1996, c. 77, provides that:

If, on the application of any person, a justice is satisfied that a person has habitually, persistently and without reasonable cause commenced vexatious proceedings in the court, the justice may, after hearing that person or giving that person an opportunity to be heard, order that proceedings must not be brought or commenced in the court without leave of a justice.

[15] The Court may declare a litigant to be vexatious even after judgment on the merits of the appeal has been given: *Holland v. Marshall*, 2010 BCCA 243 at para. 9 (Chambers), *aff'd* 2010 BCCA 562.

[16] This Court has regularly adverted to and endorsed the following non-exhaustive factors that should be considered in an application to declare a person a vexatious litigant enumerated in *Re Lang Michener and Fabian* (1987), 37 D.L.R. (4th) 685 (Ont. H.C.J., per Henry J. at para. 19):

- (a) the bringing of one or more actions to determine an issue which has already been determined by a court of competent jurisdiction constitutes a vexatious proceeding;
- (b) where it is obvious that an action cannot succeed, or if the action would lead to no possible good, or if no reasonable person can reasonably expect to obtain relief, the action is vexatious;
- (c) vexatious actions include those 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) it is a general characteristic of vexatious proceedings that grounds and issues raised tend to be rolled forward into subsequent actions and repeated and supplemented, often with actions brought against the lawyers who have acted for or against the litigant in earlier proceedings;
- (e) in determining whether proceedings are vexatious, the court must look at the whole history of the matter and not just whether there was originally a good cause of action;
- (f) the failure of the person instituting the proceedings to pay the costs of unsuccessful proceedings is one factor to be considered in determining whether proceedings are vexatious;
- (g) the respondent's conduct in persistently taking unsuccessful appeals from judicial decisions can be considered vexatious conduct of legal proceedings.

See, for example, *Attorney General of B.C. v. Lindsay*, 2007 BCCA 165 at para. 27, Huddart J.A., leave to appeal ref'd [2007] S.C.C.A. No. 359; *Holland v. Marshall*, supra, at para. 13; *Pearlman v. Insurance Corporation of British Columbia*, 2010 BCCA 362 at para. 5, Low J.A. (Chambers), aff'd 2010 BCCA 568, leave to appeal ref'd [2011] S.C.C.A. No. 39.

- [17] The purpose of the provision permitting the Court to declare a person to be a vexatious litigant was explained in *Houweling Nurseries Ltd. v. Houweling*, 2010 BCCA 315. The section gives the Court the ability to control its own process to prevent the abuse of that process by a litigant repetitively bringing unmeritorious proceedings that result in the needless expenditure of judicial resources and cause unnecessary expense to other parties: see, paras. 1 and 40.
- [18] We are persuaded that Mr. Dawson should be declared a vexatious litigant. We reach that conclusion based on his conduct in this Court, but informed also by his conduct in the Supreme Court. As will be seen, Mr. Dawson has, in both courts, taken repetitive steps in relation to matters that have already been decided.
- [19] This Court commented critically on Mr. Dawson's conduct in the Costs Decision:
- [16] First, he brought an application for leave to appeal when leave was clearly not required.
- [17] Second, he brought an application in this Court for a stay of proceedings, when the proper forum for such a motion was the Supreme Court.
- [18] Third, despite a letter from Ms. Corfield's counsel warning Mr. Dawson he must file appeal books that were "100% complete" or face increased costs and delay, the three appeal books he prepared and filed did not include half of Ms. Corfield's affidavit material from the summary trial, and mixed up the affidavits and exhibits that they did include. We accept that, as a result, Ms. Corfield's counsel was required to review the 564 pages in the three appeal books to determine what was missing, and ultimately prepare a fourth volume to ensure the record before this Court was complete. This fourth appeal book was essential and of considerable assistance to the Court on the appeal. Yet Mr. Dawson objected to having it filed, necessitating a Registrar's hearing to settle the contents.
- [19] Fourth, on March 20, 2012, after Ms. Corfield's counsel had filed her factum and a month before the appeal, Mr. Dawson filed a 367-page application to lead new evidence, and an accompanying 18-page argument, which effectively constituted a revised factum. We have no doubt Ms. Corfield's counsel was required to spend significant time in responding to this application, which we found to be without merit because virtually all of the material Mr. Dawson sought to have admitted had been available to him prior to the trial.
- [20] Fifth, in May 2012, several weeks after the appeal was heard, Mr. Dawson attempted to present an unsolicited supplementary argument to the Court, which we declined to accept. We are satisfied Ms. Corfield's counsel was required to review this, although the Court rejected it summarily without requiring a response from her.

- [21] Finally, in November 2012, a month after the reasons for judgment of this Court were released, Mr. Dawson delivered to the Court an 18-page application for a "rehearing of the appeal". This application was without merit and was highly inappropriate, in that it alleged both the trial court and this Court were prejudiced and biased against him due to his gender, his mental illness, his status as a self-represented litigant, and the fact his marriage to Ms. Corfield had ended because he had viciously and unexpectedly assaulted her. His critical and derogatory submissions set out multiple perceived errors attributable to this alleged partiality to Ms. Corfield, and repeated many of the submissions he had made on the appeal. We accept that Ms. Corfield's counsel was required to reacquaint herself with the matter and prepare a "ready for filing" response, which was submitted to the Court but not filed as the application was peremptorily dismissed.
- [20] At that time, this Court was not satisfied that Mr. Dawson's conduct of the appeal justified special costs, but it did order a lump sum award of increased costs to compensate Ms. Corfield for the unnecessarily protracted litigation and the additional expenses she incurred.
- [21] Since the final disposition of the appeal, Mr. Dawson has brought these proceedings which are a further attempt to relitigate matters that have already been decided against him. As we shall describe, not only has he brought proceedings that are utterly devoid of merit, he has done so in a manner that involves the harassment of both of Ms. Corfield and her counsel.
- [22] Mr. Dawson's effort to relitigate the issue of the letter purportedly entitling him to commission has not been restricted to this appeal. There have been other proceedings in the Supreme Court, culminating in a decision of Mr. Justice Barrow's on January 13, 2014 declaring him a vexatious litigant: 2014 BCSC 44. We intend to quote extensively from the recitation of the background to that application since much of what is said there informs our analysis here:
- [17] On July 12, 2013, Mr. Dawson filed a further application in the context of this litigation, seeking an order varying the July 2010 trial decision and a stay of the various orders that followed from that decision. By paragraph 3 of Part 1 on that application, he sought directions:
- 3) as to the charge that the Plaintiff and her counsel, Ms. Djordjevich misled justice and committed perjury by repeatedly denying the truth of a fact, both in written submissions to the Supreme Court of BC, the Court of Appeal of BC and the Supreme Court of Canada and orally in trial in the Supreme Court of BC the effect of which was to mislead the trial judge and result in a mistaken finding and order based precisely on those representations

The facts asserted by Mr. Dawson in support of that application relate to his claim to a \$5,000 commission from the sale of the parties' Chase condominium. His application was heard by Cole J. on July 29, 2013. It was dismissed on the basis that the issue was *res judicata* inasmuch as Mr. Dawson had sought to adduce the same evidence, both before the Court of Appeal and the Supreme Court of Canada, and on both occasions, his applications were refused. Cole J. also ordered that Mr. Dawson pay costs, which he summarily fixed at \$1,500.

- [18] Mr. Dawson has appealed Mr. Justice Cole's order. Ms. Corfield has filed an application to have Mr. Dawson's appeal of Cole J.'s order dismissed. That application is scheduled to be heard on January 28, 2014. [In fact January 21, 2014]
- [19] On September 9, 2013, Mr. Dawson filed a requisition asking to appear before me for the purpose of re-opening the June 2010 trial. In his requisition, he set out that the September 23, 2009 letter amounted to an agreement to pay commission and that through the "perjury" and "deceit" of Ms. Corfield and Ms. Djordjevich, that letter had been improperly suppressed. He made no mention of the fact that he had attempted to adduce the very same evidence before the Court of Appeal and had sought to pursue the matter just a month previous before Cole J. I indicated to Mr. Dawson through the trial scheduler's office that he could make this application. As soon as Ms. Djordjevich became aware of the application, she informed the court of the proceedings that had taken place in the Court of Appeal and before Mr. Justice Cole. I then dismissed Mr. Dawson's request to have the matter heard.
- [28] Mr. Dawson's appeals to the British Columbia Court of Appeal and the Supreme Court of Canada are relevant to the question of whether an order under s. 18 of the Supreme Court Act or s. 221 of the Family Law Act should be made to this extent: those proceedings conclusively established the finality of the issues raised in this family litigation. They established that the September 23, 2009 correspondence from Ms. Djordjevich to Mr. Dawson's then lawyer will not be considered in this case. This conclusion is important because on three occasions since the Supreme Court of Canada refused leave, Mr. Dawson has sought to have the Supreme Court of British Columbia consider that issue. His first attempt was his application of July 12, 2013. Mr. Dawson's argument that he was merely seeking directions by that application is disingenuous. One of the orders he sought was a variation of the trial judgment. In Part 3 of his application, he set out the additional orders he was seeking. They included a reduction in the costs ordered following the trial and punitive costs against Ms. Corfield for her "perjury" and that of her counsel.
- [29] The second application was Mr. Dawson's requisition of September 9, 2013. By this requisition, he sought to raise precisely the same issues. Mr. Dawson clearly understood that there was a risk that his application could be dismissed on the basis that the issue raised was *res judicata*. He was careful to point out in his requisition that neither the Court of Appeal nor the Supreme Court of Canada had passed judgment on the question of whether either Ms. Djordjevich or Ms. Corfield had committed perjury or otherwise misled the court because he had not raised the issue in those proceedings. What Mr. Dawson did not disclose in his requisition was the fact that Mr. Justice Cole had determined that the very issue he

sought to raise was *res judicata*. Whether Mr. Dawson is successful in his appeal of that decision, he knew the decision was extant and he knew the basis on which it was made. He deliberately chose not to include that information in his request to appear back before me.

- [30] The third instance in which Mr. Dawson has sought to revisit this issue is his application of December 2, 2013. As noted above, by that application, he seeks an order that Ms. Djordjevich personally pay damages to him for what he maintains was perjury. The perjury he relies on relates to the September 23, 2009 letter. Mr. Dawson's December 2, 2013 application is also revealing in another respect. In Ms. Corfield's November 12, 2013 application, the first two orders she sought were for a declaration under s. 18 of the Supreme Court Act and an order under s. 221 of the Family Law Act. In paragraphs 2 and 3 of Part 1 of Mr. Dawson's December 2, 2013 application, he has reproduced verbatim the orders sought by Ms. Corfield and replaced his name with hers. He has not pointed to any action taken by either Ms. Corfield or Ms. Djordjevich that even remotely resembles a vexatious or abusive step.
- [31] I am satisfied that Mr. Dawson's conduct in repeatedly attempting to revisit an issue that was finally determined by the highest court in this country amounts to a misuse of this court's process.
- [23] Mr. Justice Barrow, in considering issues connected to the restraining orders against Mr. Dawson in favour of Ms. Corfield and her counsel, referred to Mr. Dawson's anger, apparent obsession with the litigation, and threats he has made. Those threats are in the material before us. They include threatening criminal proceedings against Ms. Corfield's counsel, threatening to report her to the RCMP, and accusing her of perjury and dishonesty. As summarized by Barrow J.:
- [46] Mr. Dawson's conduct in this litigation supports the proposition that he remains excessively preoccupied with and obsessed by it. His materials also support the conclusion that he remains angry towards Ms. Corfield. His anger is not limited to Ms. Corfield but, rather, extends to virtually all of those who have had involvement in this litigation. On November 12, 2010, Mr. Dawson swore an affidavit (No. 9 in this proceeding) in support of his application to have Ms. Corfield and Ms. Djordjevich "cited for contempt". He deposed that the plaintiff's application, to which his affidavit was also in response to, was:
- 3) another vindictive and vicious attack by a counsel so prejudiced by personal animosity and so determined to annihilate me that she loses sight of need to find a settlement that both parties can live with
- [47] On August 7, 2013, Mr. Dawson wrote to Ms. Djordjevich accusing her of perjury and writing that:

Your career is over - I promise you that.

In a January 21, 2013 letter to Ms. Djordjevich, he wrote:

My motivation is the pursuit of justice as I earned the money in dispute without doubt - you personally cheated me out of commission by your denial and cover up of the agreement

A month later in a February 7, 2013 letter, Mr. Dawson wrote:

The venom came from you Don't you consider all your low tactics, the contempt citation and all the lies in court have steeled my defence? Your determination to win has cost your client dearly.

There are numerous other references in the material to a similar effect.

[24] The material before us similarly includes numerous instances of similar statements. Based on the material that is before us, we would agree with the assessment of Barrow J. referred to in para. 46 of his judgment just quoted.

[25] It is clear to us that Mr. Dawson's unrelenting pursuit of issues connected to the commission he has claimed to be entitled to has become obsessive. Given amounts paid to him on account of expenses incurred in selling the property, the amount in issue is in the order of \$2,000. He is pursuing the matter, despite the issue having been finally decided, in an abusive manner that includes repeated threats against both Ms. Corfield and her counsel. It is apparent that in doing so he has subjected both of them to great stress. We were advised by counsel at the hearing of this matter that neither Ms. Corfield nor her counsel would appear to any further court process involving this or related matters. We are satisfied that part of the reason for this goes beyond merely the cost in time, energy and money to respond, but is rooted also legitimately in fear and anxiety.

[26] In summary, we are persuaded that Mr. Dawson is a vexatious litigant. His conduct in this Court alone justifies that conclusion. But his conduct in the litigation generally, in the Supreme Court as well as this Court, also informs our conclusion. In both courts he has brought multiple proceedings on issues already decided against him and that are devoid of merit. The proceedings have involved improper conduct and harassment, including defamatory statements and threats against Ms. Corfield and her counsel. Mr. Dawson's obsessive pursuit of these proceedings has drained the resources of Ms. Corfield, compelled her counsel to respond to unfounded allegations, and is conduct that cannot, nor likely ever would, be adequately compensated in costs. Mr. Dawson's conduct exemplifies many of the factors set out in para. 16 above.

[27] Previously, this Court concluded that Mr. Dawson's conduct did not warrant sanction through an award of special costs. In our view, his conduct since the Costs Decision justifies an award of special costs. Unfounded allegations of perjury are exceptionally damaging to the reputation of anyone, but they are particularly harmful to a professional, such as counsel. In our view, Mr. Dawson's conduct has gone further than that commented on by this Court earlier, and now can properly be regarded as reprehensible and deserving rebuke.

[28] The difficulty with making an award of special costs, is that those costs must be assessed and to do so would require further proceedings. Ms. Corfield, accordingly, withdrew her application for special costs to try to bring this litigation to an end. Instead, she asked for an

order that would compensate for the disbursements incurred in relation to this proceeding. Those disbursements total \$1,474.70. In addition, we would award lump sum costs for 25 units on Scale 1 in the amount of \$1,200. Those costs reflect tariff entitlements for advising the respondent, assembling a motion book, and preparing for and attending the application.

[29] We turn now to the form of order declaring Mr. Dawson to be a vexatious litigant. The order will go in the following form:

This Court Orders that:

1. Mr. David Reid Dawson, be declared a vexatious litigant pursuant to section 29 of the Court of Appeal Act;
2. Mr. Dawson, and anyone acting on his behalf, except a member in good standing of the Law Society of British Columbia, shall not file or attempt to file, by any means whatsoever, any document in the registry of the Court of Appeal for British Columbia pertaining to or in any way connected with the subject matter of the proceedings in Court of Appeal Registry File No. CA041154, or pertaining to or connected with the subject matter of his allegations against Judith Gwenda Corfield or her counsel D. Djordjevich, or arising from or related to that subject matter;
3. The order in paragraph 2 does not apply to any order that is made against Mr. Dawson at the behest of another party, provided that any notice of appeal, application, or other initiating document filed in this Court by Mr. Dawson is signed by a member in good standing of the Law Society of British Columbia and Mr. Dawson is represented by such a member at any hearing;
4. Mr. Dawson, and anyone acting on his behalf, except a member in good standing of the Law Society of British Columbia, shall not attend in person at the Court of Appeal registry and shall not file or attempt to file by any means whatsoever any document in the Court of Appeal Registry;
5. Registry staff are authorized to reject any document that is attempted to be filed in contravention of this order.

[30] In the result, we would dismiss the appeal as an abuse of process, declare Mr. Dawson to be a vexatious litigant, and award costs as set out above. We would also dispense with Mr. Dawson's approval of the form and content of the order.

"The Honourable Madam Justice D. Smith"

"The Honourable Madam Justice Bennett"

"The Honourable Mr. Justice Harris"

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