
CANADA / JUDGMENT

Dhillon v. Dhillon

2019 BCCA 163

COURT

British Columbia Court of Appeal

DECIDED

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2019 BCCA 163 Dhillon v. Dhillon

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Dhillon v. Dhillon,

2019 BCCA 163

Date: 20190510

Docket: CA45318

Between:

Sandeep Kaur Dhillon

also known as Sandeep Kaur Chahal

Respondent

(Claimant)

And

Amardeep Singh Dhillon

Appellant

(Respondent)

Before:

The Honourable Chief Justice Bauman

The Honourable Madam Justice D. Smith

The Honourable Mr. Justice Goepel

On appeal from: An order of the Supreme Court of British Columbia,
dated May 18, 2018 (Dhillon v. Dhillon, 2018 BCSC 833,
New Westminster Registry E51850).

Counsel for the Appellant:

C.K. Sabharwal

Counsel for the Respondent:

R.K. Khunkhun

Place and Date of Hearing:

Vancouver, British Columbia

March 15, 2019

Place and Date of Judgment:

Vancouver, British Columbia

May 10, 2019

Written Reasons by:

The Honourable Chief Justice Bauman

Concurred in by:

The Honourable Madam Justice D. Smith

The Honourable Mr. Justice Goepel

Summary:

Mr. Amardeep Dhillon appeals a parenting order made after trial that allocated the majority of parenting time to his former spouse. Mr. Dhillon submits that the judge erred by refusing to admit an audio tape into evidence, that the judge misapprehended the evidence, and that the judge's behaviour gave rise to a reasonable apprehension of bias. Held: appeal dismissed. The probative value of the audio tape was exceeded by its prejudicial effect, the judge made no palpable and overriding error in his apprehension of the evidence, and bias could not be reasonably apprehended from the judge's conduct.

Reasons for Judgment of the Honourable Chief Justice Bauman:

Overview

- [1] Mr. Amardeep Dhillon appeals a parenting order made after trial (reasons indexed at 2018 BCSC 833). The order allocates the majority of parenting time to Mr. Amardeep's former spouse, Ms. Sandeep Chahal. The order also entrusts Ms. Chahal with final decision-making authority over major decisions regarding their children in the event of disagreement between the parents.
- [2] Mr. Dhillon argues that the judge erred by refusing to admit an audio recording he had made of Ms. Chahal before separation, that the judge misstated and misapprehended the evidence of a counsellor and that the judge's actions gave rise to a reasonable apprehension of bias. Mr. Dhillon also asserts that the judge's conduct violated the principles of natural justice.
- [3] As I explain in the reasons that follow, I see no merit in any of the grounds for Mr. Dhillon's appeal. I would dismiss his appeal.

Trial Judgment

- [1] The parties were married in September 2008 and separated in September 2016. There are two children of the marriage: S.D., who was almost 4 years old at time of trial, and J.D., who was 2 years old. The parties are close in age and income.
- [2] The parties no longer live together, and they have sold the former matrimonial home.
- [3] The evidence at trial before Justice N. Brown made clear that there had been significant conflict between the parties. The judge found that Mr. Dhillon had acted in a "domineering" manner and pre-separation text messages demonstrated profanity, disrespect, and an "irresponsible attitude" on his part. The judge also noted other evidence showed Mr. Dhillon had engaged in intimidating behaviours, including filming and audio-taping exchanges. Nonetheless, the judge found, Mr. Dhillon was clearly committed to the children.
- [4] Communications between the parties improved after they saw a counsellor, Angela Herd. Ms. Herd gave oral testimony at trial. The judge summarized her testimony in his reasons. I quote an extract below, because the judge's summary is impugned on appeal:
 - [27] Ms. Herd recalled that, on at least one occasion during a counselling session, the respondent was aggressive, visibly upset and agitated, concerning her enough that she offered to accompany the claimant to her car.
- [5] The judge noted that Ms. Herd had encouraged the parties to use a communication book rather than email and text, and that the parties' use of such a book had increased the respectful communication between the parties.
- [6] The parenting schedule in use at the time of trial had been created by interim order of Armstrong J. It dictated that Ms. Chahal would have primary care of the children, but Mr. Dhillon would have parenting time amounting to one weekday and part of the weekend.

- [7] Ms. Chahal's proposal at trial was for this schedule to be made final.
- [8] Mr. Dhillon's proposal at trial was for a schedule that provided roughly equal time, one parent having from 7:00 p.m. Saturday until 9:00 a.m. Wednesday, the other, the opposite.
- [9] The judge found Mr. Dhillon's proposed schedule ignored the parties' work schedule and was predicated on reliance on Mr. Dhillon's parents providing child-care. The judge noted that reliance on grandparental care "should not be regarded as a negative factor" unless it "becomes a way for a parent to avoid their parenting responsibilities in favour of personal pursuits". The judge noted Ms. Chahal's proposed schedule fit with the parties' work schedules.
- [10] The judge also noted that Mr. Dhillon's proposal regarding which preschool S.D. should attend was "not reasonable in the current circumstances". Mr. Dhillon's proposed preschool would be more convenient for Mr. Dhillon, but would interfere with J.D.'s nap time and was not in the child's best interests.
- [11] Regarding decision-making, the judge reviewed Mr. Dhillon's behaviour with a view to determining whether Ms. Chahal should retain final decision-making authority.
- [12] The judge found, considering the evidence as a whole, that Mr. Dhillon had not been a reliable witness regarding some of his conduct toward Ms. Chahal -- the judge clarified that this was not because Mr. Dhillon was dishonest, but rather because he was not straightforward in his testimony.
- [13] The judge found Mr. Dhillon had acted in a "controlling manner" toward Ms. Chahal and at times had not respected that she was uncomfortable near him. The judge also found that Mr. Dhillon had been abusive toward Ms. Chahal by text messages. The judge found Mr. Dhillon had at times been unreasonably negative against Ms. Chahal's proposals and that Mr. Dhillon had at other times been "domineering" and "self-centred". The judge observed that at trial Mr. Dhillon had described Ms. Chahal in "negative demeaning terms".
- [14] The judge concluded that it was evident Ms. Chahal did not trust Mr. Dhillon, and Mr. Dhillon did not trust Ms. Chahal, and so the prospect of a collaborative relationship in the near future was scant.

Appeal

- [15] The first issue Mr. Dhillon raises on appeal concerns an audio recording Mr. Dhillon made of a conversation with Ms. Chahal. He made this audio recording without her knowledge. The judge declined to admit the audio recording into evidence. Mr. Dhillon submits the judge erred in so doing and violated the principles of natural justice by not affording Mr. Dhillon's counsel the opportunity to speak to the issue.

- [16] Mr. Dhillon submits that whether audio recordings obtained without the knowledge of one of the parties should be admitted depends on whether the information in the recording is relevant, whether the identity of the parties is known, and whether the recording is trustworthy. The probative value must also be greater than the prejudicial effect. He relies on *Finch v. Finch*, 2014 BCSC 653 at paras. 56-62.
- [17] Mr. Dhillon submits the trial judge acted inconsistently by refusing to admit the audio recording because it was from a time preceding separation. The trial judge had admitted text messages from the time preceding separation. Mr. Dhillon submits that the text messages had been used by the trial judge to find that Mr. Dhillon had acted in an overbearing and entitled manner. Accordingly, Mr. Dhillon submits, other pre-separation evidence including the audio recording would also have been relevant to the judge's determination.
- [18] Mr. Dhillon also submits that the only speakers in the recording were the parties, and the trustworthiness of the recording could have been verified by the parties. Mr. Dhillon further submits that the recording's probative value outweighs its prejudicial effect.
- [19] Mr. Dhillon argues the trial judge should have decided on the audio recording's credibility and relevance by listening to it and giving each party the opportunity to respond. Mr. Dhillon argues that by failing to hear from his counsel on the matter, the judge violated the principles of natural justice.
- [20] These submissions lack merit. As Ms. Chahal's counsel argued at trial, the recording was not trustworthy. Unlike the text messages, where both parties were aware that a record was being created, Mr. Dhillon participated in the conversation knowing it would be recorded, whereas Ms. Chahal did not know the conversation was being recorded. Moreover, the recording begins mid-conversation, so the court cannot know what was said before the recording began or after the recording ended. Nor is the recording probative of how Mr. Dhillon and Ms. Chahal interact when Mr. Dhillon is not recording the conversation.
- [21] Even if there had been sufficient probative value to merit the admission of the tape -- and in my view there was not -- it is implausible that the admission of the tape would have altered the overall assessment of the evidence. The evidence before the judge showing that Mr. Dhillon had acted in a domineering manner was overwhelming.
- [22] Mr. Dhillon's submission that the judge violated the principles of natural justice also lacks merit. Although Mr. Dhillon is correct that the judge did not ask his counsel to make submissions before rendering his decision on the admissibility of the audio tape, treating this omission as a fatal violation of natural justice would misread the trial record.
- [23] The trial transcript shows that the judge had invited submissions from both parties, and had been indifferent to whose submissions came first. Ms. Chahal's counsel happened to speak first, and spoke sufficiently compellingly to make the judge's decision clear to him. Although Mr. Dhillon's counsel did not raise any further objection after the judge had expressed his

view on the matter, it is clear that the judge should have first heard submissions from both counsel before making his ruling. In the end, however, this lapse in due process did not in the circumstances of this case impact the outcome because the judge's reasons for declining to admit the audio tape were correct.

[24] I would not give effect to this ground of appeal.

[25] The second issue Mr. Dhillon raises on appeal concerns the evidence of Ms. Herd. He submits that the judge incorrectly found that he had acted aggressively because of a misapprehension of the evidence of Ms. Herd. In Mr. Dhillon's submission, the trial judge incorrectly interpreted Ms. Herd's evidence that Mr. Dhillon was "activated" (the word Ms. Herd used) to mean that Mr. Dhillon was "aggressive" and "agitated". Mr. Dhillon further submits that the judge wrongly concluded that Mr. Dhillon had acted in an abusive or oppressive manner that could be understood as family violence under ss. 37(2)(g) and (h) of the Family Law Act, S.B.C. 2011, c. 25 and that this error infected the entirety of the judge's reasoning.

[26] Ms. Chahal submits the trial judge did not misapprehend the evidence, and if he did, the errors were not palpable and overriding. In Ms. Chahal's submission, it was open for the trial judge to infer that Mr. Dhillon had been aggressive and agitated from Ms. Herd's testimony that

[A]t one point in one of our sessions I asked [Ms. Chahal] if she would like me to walk her to her car because my sense was that [Mr. Dhillon] was very activated, although he did not make any threats. It was just obvious he was upset.

[27] Mr. Dhillon's submissions on this issue again lack merit. The judge's interpretation of Ms. Herd's evidence was open to him, given the other evidence in the case. The judge's finding that Mr. Dhillon had acted in an oppressive or abusive manner was also open to him given the evidence in the case. Moreover, even if the difference between "activated" and "aggressive" is palpable, I cannot see the difference as being overriding.

[28] I would not give effect to this ground of appeal.

[29] Mr. Dhillon's third and final ground of appeal is that the judge created a reasonable apprehension of bias against him.

[30] This is a serious allegation and one that should not be made lightly. The independence of the judiciary, both actual and reasonably perceived, is a foundation of our legal system.

[31] This is also an allegation that must overcome the high barrier set by the presumption of impartiality. As the Supreme Court of Canada explained in *Wewaykum Indian Band v. Canada*, 2003 SCC 45:

- [59] The presumption of impartiality carries considerable weight, and the law should not carelessly evoke the possibility of bias in a judge, whose authority depends upon that presumption. Thus, while the requirement of judicial impartiality is a stringent one, the burden is on the party arguing for disqualification to establish that the circumstances justify a finding that the judge must be disqualified.
- [60] In Canadian law, one standard has now emerged as the criterion for disqualification. The criterion, as expressed by de Grandpré J. in *Committee for Justice and Liberty v. National Energy Board*, *supra*, at p. 394, is the reasonable apprehension of bias:
- ... the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."
- [32] Mr. Dhillon submits that the judge's conduct rebuts the presumption of impartiality. He submits that the judge asked questions of the appellant that the judge did not of the respondent, including regarding who cooked for the children, and whether there was a daycare facility at his place of work. Mr. Dhillon also submits the judge appeared overly empathetic toward Ms. Chahal, asking her if she needed a break. In contrast, Mr. Dhillon submits that the judge was argumentative and critical toward him, particularly by demanding he answer a question posed on cross-examination without giving a further explanation.
- [33] Ms. Chahal submits that there can be no reasonable apprehension of bias, given the presumption of impartiality. Ms. Chahal submits that the questions the trial judge asked Mr. Dhillon were for the purpose of clarification and better understanding and related to Mr. Dhillon's ability to care for the children. Ms. Chahal submits that the judge's comments toward her were not overly empathetic, but rather acknowledged that she was exhibiting emotions during her testimony. Finally, Ms. Chahal submits that the judge did not prevent Mr. Dhillon from giving a full answer, but rather sought to ensure that Mr. Dhillon answered questions in a straightforward way. I agree.
- [34] There is no reason for Mr. Dhillon to apprehend the judge's questions as exhibiting bias. The prompt for the judge's line of questioning was founded on the evidence before him: the evidence before the judge showed Ms. Chahal's mother had done the cooking for Mr. Dhillon and Ms. Chahal when Ms. Chahal was recovering from giving birth to one of the children. It was reasonable for the judge to question why Mr. Dhillon had not done the cooking then. Moreover, it was appropriate for the judge to question Mr. Dhillon on this matter and not question Ms. Chahal: the evidence before the judge showed that Ms. Chahal was in fact quite skilled in the kitchen.

- [35] There is also no indication that the judge's question to Mr. Dhillon over whether there is a daycare facility at his work was motivated by bias. The question appears to have been inspired by Mr. Dhillon's testimony that he intended to go to work while his parents looked after the children.
- [36] There is similarly no merit to Mr. Dhillon's complaint that the judge had offered Ms. Chahal the opportunity to have a drink of water during her testimony.
- [37] On the final point, as the judge explained in his reasons, he found Mr. Dhillon less than straightforward in his responses. Guiding Mr. Dhillon to focus on the question at hand is not a violation of the principles of natural justice, but rather a way to keep the hearing proceeding apace.
- [38] This ground of appeal clearly lacks merit. I would not give effect to it.

Conclusion

[39] I would dismiss the appeal.

"The Honourable Chief Justice Bauman"

I agree:

"The Honourable Madam Justice D. Smith"

I agree:

"The Honourable Mr. Justice Goepel"

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