

CANADA / JUDGMENT

Galloway v. A.B.

2019 BCCA 385

COURT

British Columbia Court of Appeal

DECIDED

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2019 BCCA 385 Galloway v. A.B.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Galloway v. A.B.,

2019 BCCA 385

Date: 20191031

Docket: CA46380

Between:

Steven Galloway

Respondent

(Plaintiff)

And

A.B.

Appellant

(Defendant)

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SEALED FILE

Before:

The Honourable Madam Justice Griffin

(In Chambers)

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

August 22, 2019 (Galloway v. A.B., 2019 BCSC 1417,

Vancouver Docket S1811588).

Oral Reasons for Judgment

Counsel for the Appellant:

D.K. Wotherspoon

R. Mittal

Counsel for the Respondent:

D.W. Burnett, Q.C.

Place and Date of Hearing:

Vancouver, British Columbia

October 30, 2019

Place and Date of Judgment:

Vancouver, British Columbia

October 31, 2019

Summary:

The parties dispute whether leave is required to appeal an order for production of documents made during cross-examination on affidavits in respect of an application under the Protection of Public Participation Act, S.B.C. 2019, c. 3. Held: The order for production of documents arising from cross-examination on affidavits was made under authority of R. 22-1(4) of the Supreme Court Civil Rules, B.C. Reg. 168/2009. This is not a limited appeal order pursuant to R. 2.1 of the Court of Appeal Rules, B.C. Reg. 297/2001 and therefore leave is not required to appeal the order. The notice of application for leave to appeal will stand as a notice of appeal.

Overview

- [1] GRIFFIN J.A.: This application arises out of an order to produce documents in connection with an "anti-SLAPP" (strategic lawsuit against public participation) application brought by the appellant, A.B., in response to a defamation action commenced by the respondent, Steven Galloway.
- [2] Mr. Galloway sued A.B., along with several other defendants, in defamation following A.B.'s statements to the University of British Columbia ("UBC") and others that Mr. Galloway had sexually harassed and sexually assaulted her. His employment was suspended and eventually terminated by UBC.
- [3] In response to Mr. Galloway's action, A.B. and two other defendants brought applications under s. 4 of the Protection of Public Participation Act, S.B.C. 2019, c. 3 [PPPA] to have Mr. Galloway's application dismissed. They filed affidavits in support of their applications.
- [4] Mr. Galloway exercised his right to cross-examine A.B. and the other defendants on their affidavits in support of their applications, pursuant to s. 9(5) of the PPPA. During the course of cross-examination, Mr. Galloway requested production of several documents, which A.B. and the other defendants opposed. Mr. Galloway then made an application for orders that A.B. and the other defendants produce the requested documents.
- [5] On August 22, 2019, in reasons for judgment indexed as 2019 BCSC 1417, the judge granted Mr. Galloway's application, ordering production of many, but not all, of the documents requested.
- [6] A.B. wishes to appeal the order that she produce documents.
- [7] The parties are in disagreement over whether leave to appeal is required. Accordingly, A.B. filed a notice of application for leave to appeal, pursuant to this Court's practice directive, *Commencing an Appeal When Uncertain if Leave to Appeal is Required* (Civil Practice Directive, 8 May 2017).
- [8] Under s. 7(2) of the Court of Appeal Act, R.S.B.C. 1996, c. 77, a "limited appeal order" cannot be appealed without leave of a justice.
- [9] Rule 2.1 of the Court of Appeal Rules, B.C. Reg. 297/2001 provides an exhaustive list of orders that constitute limited appeal orders: *Araya v. Nevsun Resources Ltd.*, 2019 BCCA 104 at paras. 8-10. I will refer to the Court of Appeal Rules as the "CA Rules". All other references to rules in my reasons are to the Supreme Court Civil Rules, B.C. Reg. 168/2009.
- [10] In *Clifford v. Lord*, 2013 BCCA 302 at para. 29, Justice Garson (in Chambers) noted that the jurisprudence in this Court has interpreted R. 2.1 of the CA Rules in a literal manner, as bringing clarity and certainty to the question of whether leave is required. The Court is not required to look at the underlying proceeding but simply to the jurisdictional basis for granting the order.

- [11] Mr. Galloway's position is that leave to appeal is required, because the order below was made pursuant to R. 7-1(17).
- [12] Rule 7-1(17) provides:
- (17) The court may order the production of a document for inspection and copying by any party or by the court at a time and place and in the manner it considers appropriate.
- [13] Orders made under Part 7 [Procedures for Ascertaining Facts] of the Supreme Court Civil Rules are limited appeal orders pursuant to R. 2.1 of the CA Rules.
- [14] A.B.'s position is that leave to appeal is not required, because the order for production of documents was made under authority of R. 22-1(4)(c). An order made under this authority is not a limited appeal order.
- [15] Rule 22-1 deals with chambers proceedings. Rule 22-1(4) provides:
- (4) On a chambers proceeding, evidence must be given by affidavit, but the court may
- (a) order the attendance for cross-examination of the person who swore or affirmed the affidavit, either before the court or before another person as the court directs,
- (b) order the examination of a party or witness, either before the court or before another person as the court directs,
- (c) give directions required for the discovery, inspection or production of a document or copy of that document,
- (d) order an inquiry, assessment or accounting under Rule 18-1, and
- (e) receive other forms of evidence.
- [Emphasis added.]
- [16] As the hearing which gave rise to the order for production of documents arose under the PPPA, some understanding of this Act is required.

The PPPA

- [17] The PPPA was enacted on March 25, 2019. Under s. 2 of the PPPA, this Act applies to actions commenced on or after May 15, 2018.
- [18] As noted by the judge in her reasons for judgment at para. 2, the purpose of the PPPA is to "enhance public participation by protecting expression on matters of public interest from defamation litigation which is brought to stop people from talking".
- [19] Key sections of the PPPA for purposes of this hearing are ss. 4, 5 and 9. They provide:
- 4 (1) In a proceeding, a person against whom the proceeding has been brought may apply for a dismissal order under subsection (2) on the basis that

- (a) the proceeding arises from an expression made by the applicant, and
 - (b) the expression relates to a matter of public interest.
- (2) If the applicant satisfies the court that the proceeding arises from an expression referred to in subsection (1), the court must make a dismissal order unless the respondent satisfies the court that
- (a) there are grounds to believe that
 - (i) the proceeding has substantial merit, and
 - (ii) the applicant has no valid defence in the proceeding, and
 - (b) the harm likely to have been or to be suffered by the respondent as a result of the applicant's expression is serious enough that the public interest in continuing the proceeding outweighs the public interest in protecting that expression.

5 (1) Subject to subsection (2), if an applicant serves on a respondent an application for a dismissal order under section 4, no party may take further steps in the proceeding until the application, including any appeals, has been finally resolved.

(2) Subsection (1) does not apply to an application for an injunction.

9 (1) Subject to this Act, an application for a dismissal order under section 4 must be made in accordance with the Supreme Court Civil Rules.

- (2) An application for a dismissal order under section 4 may be made at any time after the proceeding has commenced.
- (3) An application for a dismissal order under section 4 must be heard as soon as practicable.
- (4) Subject to subsections (5) and (6) of this section, on an application for a dismissal order under section 4, evidence must be given by affidavit.
- (5) An applicant or respondent may, before the hearing of the application,
 - (a) call, out of court before an official reporter, the witness who swore or affirmed the affidavit for cross-examination on the witness's affidavit, and
 - (b) cross-examine the witness on the witness's affidavit, provided that
 - (i) the total period of cross-examination of all applicants in the proceeding does not exceed 7 hours in duration, and
 - (ii) the total period of cross-examination of all respondents in the proceeding does not exceed 7 hours in duration.
- (6) The court may extend the period permitted for cross-examination under subsection (5) if the court considers it necessary in the interests of justice.

[Emphasis added.]

Application for Production Below

- [20] As mentioned, A.B. applied under s. 4 of the PPPA for an order dismissing Mr. Galloway's claim. Mr. Galloway exercised his right under s. 9(5) to cross-examine A.B. and the other affiants on their affidavits.
- [21] On June 17, 2019, in the course of cross-examining A.B. on her affidavit sworn in support of the PPPA dismissal application, Mr. Galloway's counsel requested that A.B. provide various documents.
- [22] A.B. opposed Mr. Galloway's requests, arguing the requests amounted to a form of discovery, which was prohibited by s. 5(1) of the PPPA as a "further step in the proceeding".
- [23] Mr. Galloway then made an application in Supreme Court chambers for an order that A.B. produce the requested documents, arguing the requests were not a form of discovery, but rather, were necessary in order to address the various defences advanced by A.B. in her application.
- [24] In his notice of application for production of the documents requested on cross-examination, under "Part 3: Legal Basis", Mr. Galloway argued that the right to cross-examine under s. 9 of the PPPA must be a meaningful right, as it is the only step a plaintiff can make to defend against the drastic consequence of having the plaintiff's action dismissed. As such, the right of cross-examination must include a right to make requests for documents.
- [25] For legal authority, Mr. Galloway in his notice of application, relied on the case of *Hoy v. Medtronic*, 2000 BCSC 1105 at para. 12, Rules 7-1, 14-1, 22-7(2), and the inherent jurisdiction of the court.
- [26] The case of *Hoy* dealt with the scope of cross-examination on affidavits filed in support of an application to certify an action as a class action, and related document production. The court's ruling made it clear that document production and cross-examination, at that stage of the proceeding, was limited to addressing the issues material to the certification application, and not the broader merits of the lawsuit. In the paragraph cited by Mr. Galloway, the court held:
- [12] I therefore conclude that document production should be limited to those matters addressed above [material to the certification application]. It is of course open to counsel for the defendants to request production of documents at the cross-examination on affidavits. If such documentation relates to issues to be addressed at the certification hearing, such documents should be produced. If it is not, and there is a genuine dispute as to the necessity of its production, then counsel may apply for a determination as to the relevance of a particular document.

[Emphasis added.]

- [27] In A.B.'s application response, she submitted, amongst other things, that the requests for documents were "broad and sweeping", and as mentioned, that what Mr. Galloway was seeking was "in effect discovery rights."
- [28] A.B. also submitted that there was a general common law rule against requesting documents on cross-examination of affidavits, subject to the court's discretion.
- [29] A.B. submitted that the discretion to order production of documents on cross-examination could not be exercised under the PPPA, as to do so would be a "further step" in the proceeding, contrary to s. 5(1) of the PPPA. I note parenthetically that A.B. seems to have modified this position in submissions before the judge, as the judge noted that it seemed to be agreed that she did have discretion to order disclosure (at para. 39). This was the position taken on the present application before me, namely, that the judge would have the discretion under the PPPA to order production of a "specific document". A.B.'s position is that the disclosure was so broad as to be equivalent to discovery.
- [30] In Mr. Galloway's written submissions filed in support of his application before the judge, he made no reference to R. 7-1. He disagreed with A.B.'s position that what he was seeking was akin to discovery. He submitted that the documents requested went to the heart of the application for dismissal under the PPPA and were limited to the evidence put in issue by the affiants. He referred to the fact that s. 9(1) incorporates by reference the procedures provided under the Supreme Court Civil Rules, and expressly referenced R. 22-1(4)(c) as an example (although more than once made a typographical error and referred to the Rule as R. 22-1(c)).
- [31] Mr. Galloway cited case law such as *Wilkie Garment Co. v. Interlock Holdings Ltd.*, [1993] B.C.J. No. 2604 (S.C.), which also considered R. 22-1(4)(c) (or its predecessor, R. 52(8)(c) of the Supreme Court Rules, B.C. Reg. 221/90).

Judgment Below

- [32] To begin her reasons, the judge set out the applicable provisions of the PPPA. The judge noted that s. 9(1) of the PPPA incorporates the procedures provided for in the Supreme Court Civil Rules, and she referenced as relevant R. 22-1(4)(c), as follows:
- [7] Of further significance is s. 9(1) which incorporates the procedures provided for in the Supreme Court Civil Rules as follows:

Subject to this Act, an application for a dismissal order under section 4 must be made in accordance with the Supreme Court Civil Rules. [Emphasis added.]

- [8] Relevant to this application is Rule 22-1(4)(c) which states that on a chambers proceeding, evidence must be given by affidavit, but the court may give directions required for the discovery, inspection or production of a document or copy of that document.

[9] The current application arises from requests for disclosure made by counsel for the plaintiff during the cross-examination of defendant affiants.

[Emphasis in original.]

[33] The judge noted the position of Mr. Galloway that what he was requesting was not discovery, but went to the heart of the PPPA dismissal application (at para. 18).

[34] The judge noted the position of A.B., that amongst other things, argued that Mr. Galloway's requests were so broad as to be likened to discovery (at para. 30).

[35] The judge held:

[38] While I appreciate that the aim of the Act is to provide defendants in SLAPP actions a timely and expedient process to have unmeritorious actions dismissed, the flip side cannot be to deprive a plaintiff with a valid cause of action the ability to proceed. Section 4 places a burden on the plaintiff. An unusually onerous burden of proving not only that they have a case but that the defendants do not. To have to do that in a vacuum would be unjust and contrary to R. 21-1(4) [sic].

[36] The judge's reference to R. 21-1(4) was a typographical error as that Rule has no relevance on the matters at issue. The judge clearly meant to refer to R. 22-1(4).

[37] The judge went on to hold:

[39] Clearly I have the discretion to order disclosure. That seems to be agreed upon by the defendants and it accords with the finding in *United Soils*.

[40] The question is how much disclosure to order. I am of the view that the disclosure that may be ordered on a dismissal application is confined to matters that relate to that application only.

[38] The reference in para. 39 of the judge's reasons was to the case of *United Soils Management Ltd. v. Mohammed*, 2017 ONSC 904. The judge cited *United Soils*, at para. 34 of her reasons, for the proposition that under the Ontario statute (*Courts of Justice Act*, R.S.O. 1990, c. C.43) which is the equivalent of the PPPA, one can distinguish between steps in the proceeding and steps on the motion, with the latter being permitted while the former is not.

[39] The judge then analyzed the requests from the perspective of whether they related to matters relevant to the PPPA application. She ordered disclosure where she viewed the information as necessary to Mr. Galloway's ability to address the validity of A.B.'s defences. For example, where A.B. had been unable to recall details about the correspondence requested by Mr. Galloway on cross-examination, the judge ordered disclosure. The judge declined to order disclosure of documents she did not view as necessary for Mr. Galloway to adequately address A.B.'s defences.

Analysis

Is Leave Required?

- [40] In my view, the authority for the order made was R. 22-1(4)(c), not any part of R. 7-1.
- [41] Not only did the judge reference R. 22-1(4) twice, the entire logic of her reasons for ordering production was that the requests related to the cross-examination on the affidavits. Her reasoning was that since the PPPA permitted cross-examination on affidavits, and incorporated the Supreme Court Civil Rules, she had the discretion to order production of documents related to that cross-examination under R. 22-1(4)(c). Her logic was a rejection of A.B.'s argument that what was sought was akin to general discovery, which was not permitted under the PPPA.
- [42] I will address an argument advanced by Mr. Galloway before me that the only jurisdictional basis for the order is R. 7-1(17).
- [43] The only mention of R. 7-1 in the written materials below was in Mr. Galloway's notice of application. It was a reference to R. 7-1 generally, not to subrule (17).
- [44] Rule 7-1 generally deals with the wide right to discovery of documents from a party in an action. Most of the subrules deal with that general discovery right, as well as some limited rights of production of documents from non-parties.
- [45] Mr. Galloway relies on a comment in *Bentley v. The Police Complaint Commissioner*, 2012 BCCA 514 at para. 10, in which Justice Saunders (in Chambers) stated that it seemed to her that the party applying in the trial court for production of a document referred to in an affidavit must have been engaging R. 7-1(17). It is difficult to know whether this comment was based on a reading of the submissions or application made to the court below, or the reasons of the court below, none of which were mentioned.
- [46] The Bentley decision did not mention the potential applicability of R. 22-1(4)(c) as a basis for ordering production of the document referred to in the affidavit and certainly did not say that Rule would not provide authority for such an order. Further, unlike the present case, it is clear that the application for production of the document in Bentley arose prior to cross-examination on the affidavit in question. The application for cross-examination was denied. Indeed, at para. 18, the Court noted that an application for cross-examination under R. 22-1(4) is not a limited appeal order and was open for challenge without leave. I therefore cannot take the comment in Bentley relied upon by Mr. Galloway as being a studied conclusion that in all cases where document production is ordered based on the requests made on cross-examination of an affiant in relation to a chambers proceeding, the authority for production is R. 7-1(17) rather than R. 22-1(4)(c). I do not see Bentley as helpful to the issue before me.

- [47] In *Ip v. Wilson*, 2019 BCCA 189 at para. 2, a division of this Court held that an order made under R. 22-1(4)(c) does not require leave to appeal, noting that this Rule provides discretion to judges in chambers to give directions for discovery and production of documents.
- [48] Mr. Galloway seeks to distinguish *Ip* on the basis that it involved an appeal from an order dismissing an application for production of documents in the context of a petition for judicial review rather than an action. However, this was also the case in *Bentley*. I think it matters not in the context of R. 22-1, as it is clear that a petition proceeding is a chambers proceeding, as it is so defined in R. 22-1(1). The hearing below at issue was a chambers proceeding and R. 22-1 applied to it.
- [49] Even if the judge was referred to R. 7-1(17), it was not mentioned by her and did not provide the authority for her order.
- [50] It is apparent from her reasons that the judge considered Mr. Galloway's application for production of documents to arise as part of the chambers proceeding before her pursuant to the PPPA, and thereby the order could be made under R. 22-1(4)(c). She turned her mind to this Rule when making her decision. As such, it is not necessary to look any further in determining the jurisdictional basis of the order.
- [51] I am satisfied that the order to produce documents below was made pursuant to R. 22-1(4)(c), in relation to a cross-examination on an affidavit which was provided as evidence in the chambers proceeding before the judge. Leave to appeal is therefore not required.

Conclusion and Ancillary Orders

- [52] I will make an order pursuant to s. 10(2) of the Court of Appeal Act that the notice of application for leave to appeal stand as a notice of appeal.
- [53] Mr. Galloway seeks that the appeal be expedited due to the fact that while the PPPA application is outstanding, no steps can be taken in the underlying action. The PPPA application, even if ultimately dismissed, is thereby impeding the parties' ability to prepare for trial. A trial date is looming in June 2020.
- [54] The appeal record and appeal book materials are easy to compile, and the parties have already made written submissions on the matters at issue, both before the judge below and on this application for leave. The division hearing the appeal will require time to review the materials, however, and so it will be important to get those filed soon.
- [55] I have checked with the Registry and it appears there is availability on the Court's calendar to hear this appeal on January 7, 2020. I can see it taking no longer than two hours subject to discussion with counsel following these reasons. I will set this appeal down for hearing on that day.

[56] I will order that A.B. file and serve all her materials (appeal record, appeal book, factum, certificate of readiness, and notice of hearing) by November 18, 2019; and the respondent file his factum by December 6, 2019.

[57] The parties are, of course, permitted to consent to changes to the filing and hearing dates.

[Discussion with counsel]

[58] GRIFFIN J.A.: I will set the matter for a one-day hearing on January 7, 2020.

"The Honourable Madam Justice Griffin"

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