
CANADA / JUDGMENT

Galloway v. Galloway

2008 BCCA 302

COURT

British Columbia Court of Appeal

DECIDED

16 July 2008

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2008 BCCA 302 Galloway v. Galloway

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Galloway v. Galloway,

2008 BCCA 302

Date: 20080716

Docket: CA034642

Between:

Meriel Anne Galloway also known as Merial Anne Galloway

Respondent

(Plaintiff)

And

Robert Harold Galloway

Appellant

(Defendant)

Before:

The Honourable Mr. Justice Chiasson

(In Chambers)

T.L. Jackson

Counsel for the Appellant

B.E. Bulmer

Counsel for the Respondent

Place and Date of Hearing:

Vancouver, British Columbia

27 June 2008

Place and Date of Judgment:

Vancouver, British Columbia

27 June 2008

Date of Reasons:

16 July 2008

Reasons for Judgment of the Honourable Mr. Justice Chiasson:

- [1] This application raises issues concerning the operation of s. 25 of the Court of Appeal Act, R.S.B.C. 1996, c. 77.

Background

- [2] On 10 November 2006 Mr. Justice Macaulay pronounced reasons for judgment in this matrimonial action and ordered divorce, division of assets and maintenance. His reasons are indexed as 2006 BCSC 1677. A notice of appeal was filed on 8 December 2006 and a notice of cross-appeal on 22 December 2006.
- [3] On 22 January 2007 the trial judge gave judgment on costs. Thereafter the parties corresponded on outstanding issues and sought clarification from the judge, which was given in supplemental reasons issued on 21 January 2008 (2008 BCSC 83). An appointment to settle the judge's orders was set for 31 March 2008. The order was entered 2 April 2008.
- [4] On 24 December 2007 the Deputy Registrar of this Court wrote to the parties advising them that pursuant to s. 25(1) of the Act the matter had been placed on the inactive list and if no steps were taken to remove it from that list, the appeal and cross-appeal would stand dismissed as abandoned respectively on 8 June 2008 and 22 June 2008.
- [5] The appellant filed a notice of motion on 5 June 2008, returnable 6 June 2008, seeking short notice and applying "[t]o have this matter removed from the inactive list pursuant to s. 25(2) of the Court of Appeal Act". On 6 June 2008 the parties consented to adjourn the application to be heard on or before 30 June 2008. The respondent purported to consent to the appeal not being dismissed as abandoned before the hearing.
- [6] The application came on before me on 27 June 2008. At that time, the parties again advised that the application was to be adjourned and provided to me a consent order stating:

1. The Appellant's appeal and the Respondent's cross-appeal shall not be dismissed pursuant to s. 25(5) of the Court of Appeal Act until the Appellant's application is heard on a mutually agreeable date prior to July 31, 2008.
2. The Appellant's application is adjourned generally.
- [7] I declined to sign the order as presented, but adjourned the application, to be heard on or before 31 July 2008, on the basis I would provide reasons for declining to sign the order. I also drew to the attention of the parties the fact there is no application before the Court concerning the cross-appeal.

Discussion

[8] Section 25 of the Act states:

- (1) 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 or notice of application for leave to appeal, or if a certificate of readiness has been filed within that period but a notice of hearing has not been filed within 2 months after the filing of the certificate of readiness, the registrar must
 - (a) place the appeal or application for leave to appeal on the inactive appeal list maintained in the registry, and
 - (b) mail notice of the action taken by the registrar under paragraph (a) to the following persons at their respective addresses for delivery:
 - (i) each counsel of record;
 - (ii) each unrepresented appellant or respondent who has provided the registry with an address for delivery.
- (2) An appeal or application for leave to appeal referred to in subsection (1) must be removed from the inactive appeal list when a justice grants leave to the appellant or the applicant to proceed with the appeal or application for leave to appeal.
- (3) A justice may, in an order under subsection (2), impose terms and conditions and give directions that the justice considers appropriate.
- (4) The registrar must return the appeal or application for leave to appeal to the inactive appeal list and must mail notice of that action in accordance with subsection (1) (b) if
 - (a) a justice makes an order under subsection (2) that requires terms, conditions or directions to be complied with by a specified date and the appellant or applicant fails to comply with those terms, conditions or directions by that date, or
 - (b) in any other case, a certificate of readiness is not filed in accordance with the rules within 180 days after the making of an order under subsection (2) in respect of the appeal or application for leave to appeal.

- (5) If an appeal or application for leave to appeal has remained on the inactive appeal list for 180 consecutive days, on the 181st day it stands dismissed as abandoned.
- (6) An appeal or application for leave to appeal that stands dismissed as abandoned under subsection (5) must not be reinstated unless a justice orders otherwise.
- [9] Section 25(2), pursuant to which the present application was brought, provides for the removal of an appeal from the inactive list. The criteria for doing so are well known (*Kar Recovery, Ltd. v. KDA*, 2004 BCCA 503 at paras. 23-24, 204 B.C.A.C. 181 (Ryan J.A. in Chambers), and *Murphy v. Wynne*, 2008 BCCA 26 at paras. 19-20, 250 B.C.A.C. 249 (Finch C.J.B.C. in Chambers)).
- [10] If an appeal is not removed from the inactive list within 180 days of being placed there, by s. 25(5) of the Act, it automatically stands dismissed as abandoned on the 181st day (*Convoy Supply Ltd. v. Drummond* (1996), 78 B.C.A.C. 27 at para. 13, 6 C.P.C. (4th) 5 (Donald J.A. in Chambers)).
- [11] Section 10(1) of the Act authorizes a justice to extend or shorten the time for bringing an appeal and s. 10(2)(d) enables a justice to extend or shorten the time provided in the Act "for the doing of an act or taking of a proceeding". In my view, these provisions are not applicable to an appeal that has by statute been dismissed. Both the appeal and the cross-appeal stand dismissed as abandoned.
- [12] The criteria for reinstating a dismissed appeal are somewhat more stringent than those applicable to removing an appeal from the inactive list (*Olenga v. ICBC*, 2007 BCCA 87 at para. 23, 235 B.C.A.C. 315, 51 C.C.L.I. (4th) 161 (Chiasson J.A. in Chambers)), application to vary dismissed, 2007 BCCA 256, 239 B.C.A.C. 320, leave to appeal to S.C.C. refused, [2007] S.C.C.A. No. 332 (QL)).
- [13] The proper application before the Court now must be pursuant to s. 25(6). The fact that the present application is brought under s. 25(2) should not defeat the appellant. The Court is entitled to treat it as an application under s. 25(6) (*Melnikov v. Insurance Corporation of British Columbia*, 2008 BCCA 124 at para. 5, 52 C.P.C. (6th) 410, 59 C.C.L.I. (4th) 11 (Chiasson J.A. in Chambers)).
- [14] As noted, there is no application concerning the cross-appeal. Recently, relying on *Boaler v. Brar* (1997), 88 B.C.A.C. 243, 9 C.P.C. (4th) 48, Frankel J.A. (in Chambers) in *B.B. v. M.B.*, 2008 BCCA 52 at paras. 36-40, concluded there was no need for a separate application to remove a cross-appeal from the inactive list. The circumstances in both cases were somewhat unique and supported that approach in the interests of justice.

- [15] In my view, as a general proposition, appeals and cross-appeals should be dealt with individually on applications pursuant to s. 25. Although the facts concerning delay are often the same or similar for an appeal and cross-appeal, that is not invariably the case. Also relevant to applications under s. 25 are the merits of an appeal and cross-appeal, which may differ.
- [16] In summary, in my view, neither the parties nor the Court can prevent the operation of s. 25(5) of the Act. The appeal and cross-appeal stand dismissed as abandoned. It is open to the Chambers judge who hears the appellant's application to treat it as an application for reinstatement pursuant to s. 25(6) of the Act. It also is open to the Chambers judge who hears the application to address the cross-appeal in the absence of an application concerning it, but it would be preferable if an application for reinstatement of the cross-appeal and applicable material in support were filed.
- [17] The appellant's application is adjourned to be heard on or before July 31, 2008.

"The Honourable Mr. Justice Chiasson"

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