
CANADA / JUDGMENT

H. (T. J.) v. H. (C. C.)

2003 BCCA 277

COURT

British Columbia Court of Appeal

DECIDED

12 May 2003

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2003BCCA0277

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

T.J.H. v. C.C.H.,

2003 BCCA 277

Date: 20030512

Docket: CA030300

Between:

T.J.H.

Appellant

(Defendant)

And

C.C. div H. nee McC. now W.

Respondent

(Plaintiff)

Before:

The Honourable Madam Justice Saunders

(In Chambers)

W.D.H.

Representative for the Appellant

K.D. Watts

Counsel for the Respondent

Place and Date of Hearing:

Vancouver, British Columbia

April 23, 2003

Place and Date of Judgment:

Vancouver, British Columbia

May 12, 2003

Reasons for Judgment of the Honourable Madam Justice Saunders:

- [1] C.C.H., the wife in these proceedings, seeks an order for summary dismissal of this appeal, an order restraining T.J.H. from filing documents in this Court without leave, an order for costs of the motion payable forthwith and an order that W.D.H., the father of T.J.H., be personally liable for those costs.
- [2] The underlying litigation resulted in an order dated 25 September 2000 which, amongst many orders, assigned sole custody of the two children of the marriage to C.C.H., denied T.J.H.'s access to one child with opportunity to apply for access following completion of a custody and access report under s. 15 of the Family Relations Act, R.S.B.C. 1996, c. 128, and provided T.J.H. with supervised access to the other child.
- [3] On September 24, 2002, some two years later, Madam Justice Ryan heard a motion by T.J.H., for leave to appeal the September 2000 order under CA030092. The orders sought on appeal included an order "to rescind all 'Restraining Orders' and all 'Maintenance Orders' and all 'Court Orders' that were ordered against the Appellant with the exception of the 'Divorce Order' itself."
- [4] In her reasons for judgment dated 1 October 2002, Madam Justice Ryan found that with narrow exceptions, (a restraining order, an order adjourning the claim for spousal support and an order of costs), the orders sought to be appealed were in the nature of final orders and leave to appeal was not required. She then considered the lapse of time between the orders and the attempt to appeal them, and her discretion to extend time for filing an appeal. She concluded, in a careful explanation of T.J.H.'s legal avenues, that an extension of time to appeal should not be granted:
- [9] An examination of the order reveals that the trial judge had not foreclosed the question of custody and access. While the order permits only supervised access to [T.J.H.] to one of the children, and no access to the other, it permits [T.J.H.] an opportunity to reapply for access once a s. 15 report is made. Since custody and access issues are never final, it would also be open to [T.J.H.] to revisit custody issues once the s. 15 report has been prepared.

- [10] The order sets out a procedure to follow in finding a suitable person to prepare the s. 15 report. Failing agreement, the parties are to submit two names to the trial court and the trial court will make the appointment. [T.J.H.] told me that there was no agreement, that he could find only one person prepared to do the report, and that he has not submitted that name to the trial court or taken any further steps for the preparation of the report. As a result, no s. 15 report has ever been prepared and no application has been made to the trial court to resolve the problem.
- [11] To explain the delay in dealing with the s. 15 report and in filing an appeal, Dr. H. outlined certain difficulties [T.J.H.] had suffered after the order in question was made on September 25, 2000. Dr. H. said that his son was devastated by the effect of the order. It is only now that [T.J.H.] is able to tackle the issues raised by the order.
- [12] I am of the view that, no matter the reason for the delay, too much time has passed for the fair resolution of these matters on appeal. The matters which the appellant wishes to deal with may still be dealt with in the trial court under the auspices of the order now in existence. If there continues to be some difficulty obtaining a s. 15 Custody and Access Report, it is open to the appellant to return to Supreme Court to seek further directions with respect to the preparation of that report. Once the report is prepared, the appellant can deal with the question of access, and if the report provides him with the proper support, he can also raise the question of custody.
- [13] If [T.J.H.]'s circumstances have changed over the last two years, it is also open to him to bring on an application in Supreme Court to vary the award of child support.

In the result, she dismissed the application for extension of time and for leave to appeal.

- [5] T.J.H. did not apply to the court for variation of the order of Madam Justice Ryan, as he could have done within seven days. The result is that T.J.H. has been denied the extension of time required by him to advance an appeal of the order of the British Columbia Supreme Court.
- [6] T.J.H., however, filed a notice of appeal and was assigned case number (CA030300) on 12 November 2002.
- [7] T.J.H. brought an application for indigent status. His father, W.D.H., spoke on his behalf. In her reasons for judgment dismissing the application, Madam Justice Rowles adverted to the proceeding before Madam Justice Ryan and repeated the explanation of T.J.H.'s rights before the Supreme Court of British Columbia.
- [8] C.C.H., on this application through her counsel, complains of the second appeal proceeding and that three different versions of a notice of appeal have been received. The three versions all have the same front page including a copy of the registry stamp and appeal number, but are different in substance: one twenty-five paragraphs long and not signed by the appellant, one sixteen paragraphs long dated 12 November 2002 and signed by the appellant and one sixteen paragraphs long dated 2 December 2002 and signed by the appellant. In fact the filed

notice of appeal is eighteen paragraphs long.

[9] W.D.H., on behalf of T.J.H., says that versions that are not true copies of the notice of appeal came into being by some error of a technological nature and complains that Mr. Watts did not shred those versions when told by him to do so. With respect, that response illustrates a misunderstanding of the significance of court documents and the seriousness of documents afoot which are not the true copy they pretend to be, and confirms the conclusions I have reached below on the issue of further appeal proceedings by T.J.H.

[10] The first application is for an order dismissing this appeal.

[11] Section 28 of the Court of Appeal Act permits an order to be made by a justice, dismissing the appeal as abandoned for non-compliance with the Court of Appeal Act or Rules:

28 If a party fails to comply with this Act or the rules, the court or a justice may

- (a) dismiss the appeal as abandoned if the party is the appellant,
- (b) refuse to hear the party, or
- (c) impose terms including terms respecting the payment or disallowance of costs or disbursements.

[12] In this case, the notice of appeal has been filed without the requisite order for extension of time. That circumstance is similar to one in which a notice of appeal is filed without first obtaining needed leave to appeal. In *Dow v. Briggs* (1994), 98 B.C.L.R. (2d) 372 (C.A.) Mr. Justice Taylor said as to the latter circumstances at 373-74:

. . . While the matter was not argued I have been concerned whether a judge in chambers has authority to deal with the first matter, the authority of such a judge to dismiss an appeal being limited, both by s. 10(e) and 29(a) of the Act, to cases in which the appeal can be said to have been "abandoned" by failure to comply with the Act or Rules. But I have concluded that where notice of appeal has been filed against an order which is interlocutory only, and leave to appeal is not then obtained, it can fairly be said that the appeal of which notice has been given has been abandoned by failure to bring the necessary application for leave. I am fortified in this conclusion by the decision of Mr. Justice Craig in chambers in *Equus Petroleum Corp. v. Supt. of Brokers et al.*, [1985] B.C.J. No. 2228 [March 1, 1985, Vancouver CA003388 (B.C.C.A.)] a case in which leave to appeal was required and not sought. I note that the relief there given was a declaration that there was no appeal properly before the court, rather than dismissal of the appeal as "abandoned", which may be all that a single judge of this court could order in the circumstances, but I think this a matter of form, or choice of words only, and not of substance, and a notice of appeal was held to be a nullity by Mr. Justice Wallace in *B.C.G.E.U. v. Royal Canadian Legion* (1989), 36 B.C.L.R. (2d) 308 (C.A.).

[13] In my view, this is a case in which one can fairly say that the appeal was abandoned for failure either to file the notice of appeal in a timely fashion or to obtain an extension of time to do so. It follows that I would dismiss the appeal under s. 28.

[14] The next application is for an order restraining T.J.H. from filing documents in this Court without leave. That application is brought pursuant to s. 29 of the Court of Appeal Act, R.S.C. 1996, c. 77.

[15] Section 29 of the Act provides:

29 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.

[16] The word 'vexatious' used in s. 29 describes proceedings that ought not to be brought, it does not describe the personality of the litigant. It is a word used to indicate a quality to the substance of the case that persuades one the court system should not be burdened with the case. It includes cases in which an issue has already been determined by a court of competent jurisdiction. In *Re Lang Michener et al. and Fabian et al.* (1987), 37 D.L.R. (4th) 685, Henry J. observed that it is a general characteristic of vexatious proceedings that issues tend to be called forward and repeated.

[17] In the case at bar, T.J.H. has brought this appeal after failing on an application to regularize his first appeal by obtaining leave where required, and an extension of time. The duplicate proceedings, in circumstances of multiple versions of the notice of appeal, are sufficient, in my view, to satisfy the criteria for an order under s. 29 of the Act, with the intention that prevent further appeals of the order of September 2000.

[18] I therefore order that T.J.H. not bring or commence proceedings in this Court without leave of a justice.

[19] C.C.H. seeks cost of this motion payable forthwith, and an order that W.D.H. be personally liable for them. C.C.H., having been successful on the application, is entitled to an order for costs and I so order, such costs to be payable forthwith. I am not satisfied, however, on the material that W.D.H. has been responsible for the duplication of proceedings or duplication of documents masquerading as a true copy of the nature of appeal. Accordingly, I could not fix W.D.H. with personal liability for those costs.

"The Honourable Madam Justice Saunders"

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