

CANADA / JUDGMENT

Harras v. Lhotka

2015 BCCA 329

COURT

British Columbia Court of Appeal

DECIDED

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2015 BCCA 329 COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Harras v. Lhotka, 2015 BCCA 329 Date: 20150703 Docket: CA042328 Between: Patricia Ann Harras Respondent (Claimant) And Peter Ivan Lhotka Appellant (Respondent) And Intrepid Films Inc. and Intrepid Entertainment Inc. Respondents Before: The Honourable Madam Justice Saunders (In Chambers) On appeal from: an order of the Supreme Court of British Columbia dated September 16, 2014 (Harras v. Lhotka, Vancouver Registry No. E130640) Oral Reasons for Judgment Counsel for the Appellant: M.A. Slay Counsel for the Respondent: M.J. Cochrane Place and Date of Hearing: Vancouver, British Columbia July 2, 2015 Place and Date of Judgment: Vancouver, British Columbia July 3, 2015 Summary: The issue is whether leave to appeal is required as being an interim order under the Family Law Act. The order does not recite the Act under which it was made, but the action is one brought under the Divorce Act. The order was a "review" of child support provided by a separation agreement. Held: Leave is not required. On the premise that the order was made in the Divorce Act proceedings, and thus under the Divorce Act, leave is not required. However, even as an order under the Family Law Act, it is not an interim order as it was a complete answer to the only issue before the court. A future review contemplated by the separation agreement does not change its character.

- [1] SAUNDERS J.A.: Mr. Lhotka applies for an extension of time to today, July 3, 2015, to file and serve his factum and appeal books.
- [2] The appeal involves a dispute over the calculation of the appellant's income for the purposes of child support payments.
- [3] The parties were married in 1997 and divorced on September 20, 2013. The parties have two children.
- [4] The parties entered into a separation agreement on July 26, 2013. A recital in the agreement provides that the parties intend that the agreement is to be a final settlement of property, guardianship, parenting, and support of the children. The agreement provides for child support. Each year, the parties may review child support and, if necessary, revise it to ensure that it accords with the Federal Child Support Guidelines. After that agreement was made, an order of Divorce was granted on September 20, 2013, and claims in relation to the children were adjourned generally.

- [5] On August 12, 2014, Mr. Lhotka applied for a review of child support pursuant to the terms of the agreement.
- [6] By judgment of Madam Justice Maisonville pronounced on September 16, 2014, the order now being appealed was made, or the order sought to be appealed was made, whichever it be, depending on whether leave is required. The judge explained that this was a review rather than variation of child support and, as a result, she found a material change in circumstance was not required.
- [7] On November 5, 2014, Mr. Lhotka filed a notice of appeal although the deadline for bringing the appeal had passed. On December 30, 2014, Mr. Justice Lowry granted Mr. Lhotka an extension in filing the notice of appeal.
- [8] On January 14, 2015, Ms. Harras filed a cross-appeal from the term of the order requiring the parties to bear their own costs.
- [9] On March 2, 2015, Mr. Lhotka filed the appeal record in his appeal. He has not yet filed the appeal or factum thus requiring the extensions if time that he seeks.
- [10] Ms. Harras says that leave to appeal is required. Absent a determination of that question, she has withheld her consent to late filing of the factum and appeal books.
- [11] In the event the order was made under the Divorce Act, R.S.C. 1985, c.3 (2nd Supp.) leave to appeal is not required. However, if it is made under the Family Law Act, S.B.C. 2011, c. 25, the question of the need for leave to appeal does arise. Section 7 of the Court of Appeal Act, R.S.B.C. 1996, c. 77, provides that leave to appeal is required for a "limited appeal order" as prescribed by Rule 2.1 of the Court of Appeal Rules, and Rule 2.1 provides: 2.1 The following orders are prescribed as limited appeal orders for the purposes of section 7 of the Act:
- (c) an order granting or refusing interim relief under the Family Law Act;
- [12] The term interim relief is not defined in the Court of Appeal Rules or the Family Law Act. Thus the question here is under which Act the order was made, and if the Family Law Act, was it in the nature of interim relief for purposes of our Rule 2.1?
- [13] Mr. Lhotka submits that leave to appeal is not required because the new order is a final order on child support, subject only to future review, and is thus not interim relief. He says as well that the order was made pursuant to the Divorce Act and therefore leave is not required.
- [14] Ms. Harras contends that the order is not final as it contemplates an application for a review and she says it is not an order under s. 15.1 of the Divorce Act because it relies on the Family Law Act. She notes that the Notice of Application referred to the Family Law Act as the legal basis for the relief sought, and that the judge referred to the Family Law Act in her reasons. In the submission of Ms. Harras, the order merely sets aside or replaces, on a provisional basis, part of the separation agreement as allowed in s. 148(3) of the Family Law Act.

- [15] Although the processes usually employed for a hearing into corollary relief were not engaged, it seems that the application was made in the Divorce Act proceeding in respect to which the question of child support was adjourned generally. That the order itself did not specify the Act, suggests, I think, that it was made under the Divorce Act in respect to which legal proceedings the application was filed. For purposes of the right to appeal, I think I must consider that the application was made under the Divorce Act, see for example *Jacobs v. Jacobs*, 2015 BCCA 173. On that basis leave to appeal is not required. However, even looking at this as an order under the Family Law Act, I would conclude it is not an order for interim relief: the mere ability to review the amount of child support in the future does not make the order interim. The court has given a complete answer to the only issue before it.
- [16] In other words, whatever be the basis for the court assuming jurisdiction to determine the matter, an order has resulted that does not provide interim relief under the Family Law Act. Thus leave to appeal is not required.
- [17] The only question then is the extensions of time sought. The materials are ready to file, the appellant has maintained an intention to appeal as known by the respondent, and a satisfactory explanation for the delay has been proffered. In the circumstances I would extend the time to file the factum and the appeal books to today, July 3, 2015. "The Honourable Madam Justice Saunders"

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