
CANADA / JUDGMENT

Khan v. Savino

2020 BCSC 2120

COURT

Supreme Court of British Columbia

DECIDED

3 December 2020

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2020 BCSC 2120 Khan v. Savino

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Khan v. Savino,

2020 BCSC 2120

Date: 20201203

Docket: S1912668

Registry: Vancouver

In the Matter of the Judicial Review Procedure Act, R.S.B.C. 1996, c. 241 and the Residential Tenancy Act, S.B.C. 2002, c. 78

Between:

Tyler Khan

Petitioner

And

Anthony Savino

Respondent

Before: The Honourable Madam Justice W.A. Baker

Oral Ruling Re Application to Amend a Costs Order from a Petition

In Chambers

Counsel for the Petitioner:

P. Kressock

Counsel for the Respondent:

M.L. Burris

Counsel for Director of the Residential Tenancy Branch and Attorney General of British Columbia:

J. Patrick

Place and Date of Hearing:

Vancouver, B.C.

November 27, 2020

Place and Date of Ruling:

Vancouver, B.C.

December 3, 2020

- [1] THE COURT: On April 8, 2020, I rendered a decision in this petition. I found in favour of the petitioner, Mr. Khan, and against the respondent, Mr. Savino. The director of the BC Residential Tenancy Branch and the Attorney General of British Columbia both also appeared on the petition, although neither was named as a petition respondent.
- [2] At paragraph 48 of my judgment, I awarded costs to Mr. Khan. On May 4, 2020, the parties entered an order which reflected my order for costs with the following language: "petitioner is awarded his costs of the petition against the respondent". All counsel signed the order before it was entered, including counsel for Mr. Savino.
- [3] The application before me is brought by Mr. Savino. He seeks to vary or amend my costs order to clarify that the costs of the petition are to be paid by the director of the Residential Tenancy Branch or that each party should bear their own costs. If I confirm that costs are awarded against Mr. Savino, he asks that an order be made pursuant to Supreme Court Rule 14-1(7) directing the registrar to limit the tariff items which may be claimed in a bill of costs payable by Mr. Savino.
- [4] Mr. Khan, the director of the BC Residential Tenancy Branch and the Attorney General of British Columbia all appeared on this application. Mr. Khan submits that if my order is to be varied, the award of costs to him should be made payable by the BC Residential Tenancy Branch jointly and severally with Mr. Savino. The director of the BC Residential Tenancy Branch and the Attorney General of British Columbia take no position on Mr. Savino's application except to the extent that they oppose any award of costs against the director of the Residential Tenancy Branch.
- [5] The issues raised on this application are:
- 1) Can the order entered on May 4, 2020, be varied?

- 2) If the order can be varied, should it be varied?
- 3) Should the registry receive any direction on the assessment of costs pursuant to Rule 14-1(7)?

Can the Order entered on May 4, 2020 be varied?

- [6] Mr. Savino raises an issue as to the entry of the order in this case. He was represented by counsel on the hearing of the petition, and his counsel signed the order following my judgment, which order included the term awarding costs to the petitioner.
- [7] All counsel agree that the court is normally functus officio once an order has been entered, but there are four exceptions where a court may amend its order. These are: where there has been a clerical error which needs to be corrected, where the order must be amended to provide for a matter that should have been but was not adjudicated on, where there is an error in the order expressing the manifest intention of court, or where it is in the interests of justice to do so: *GC Parking Ltd. v. New West Ventures Ltd.*, 2004 BCSC 1700; and *Buschau v. Rogers Communications Inc.*, 2004 BCCA 142, 237 DLR (4th) 260 (B.C.C.A.).
- [8] In addition, relying on the case of *Racz v. Mission (District)*, 22 B.C.L.R (2d) 70 1988, Mr. Savino also argues that the court has the inherent jurisdiction to set aside an order which constitutes an abuse of process. Mr. Savino argues that, because his former counsel signed the order which included a term for costs against his instructions, he is entitled to have that clause set aside.
- [9] Mr. Savino provided an affidavit on this application which sets out the following facts, supported by various correspondence. On April 8, 2020, counsel for Mr. Khan sent the draft form of order to Mr. Savino's then counsel. On April 20, 2020, Mr. Savino's then counsel advised the other parties that she would be signing the form of order. On April 22, 2020, Mr. Savino wrote to his lawyer and told her he did not think he should have to pay costs. On April 22 he told his counsel that he thought there had been a mistake in awarding costs to Mr. Khan which needed to be fixed. On April 27, 2020, counsel for Mr. Khan provided the resided draft order, which again included the costs award. On April 28, 2020, counsel for Mr. Savino returned a signed copy of the order to counsel for Mr. Khan. Mr. Savino states in his affidavit that it was only in mid-to-late July 2020 that he received a copy of the entered order which contains the costs award. At about that time, Mr. Savino changed counsel.
- [10] There is no affidavit from Mr. Savino's former counsel stating that as of April 28, 2020, when she signed the order, her client's instructions were to not sign the order.
- [11] The difficulty for Mr. Savino is that in *Racz* the plaintiff provided evidence of explicit instructions to his counsel to not sign the consent dismissal order which was at issue. In *Racz*, the counsel who signed the consent order was no longer acting for the party when the order was signed.

- [12] Mr. Savino has not provided similar evidence, i.e., that as of April 28, 2020, he expressly told his former counsel not to sign the order. There is no evidence that counsel for Mr. Savino notified the other lawyer that she wished to make further submissions on costs before the order was entered. There is no evidence that she was not acting for Mr. Savino at the time she signed the order. Rather, she signed the order which included the order for costs, and Mr. Savino has provided insufficient evidence to suggest that she did so contrary to the explicit instructions given by her client. I cannot find on the evidence before me that Mr. Savino's former counsel "clearly acted without authority" as was proven in *Racz*.
- [13] On the facts before me, Mr. Savino can only be successful in varying the entered order if he meets one of the four possibilities outlined in *GC Parking*. The only possibilities within the application before me are if the order contains an error in expressing the manifest intention of the court, or if the interests of justice require such a variation.
- [14] The petition before me sought an order for costs. The response of the director of the BC Residential Tenancy Branch and the Attorney General of British Columbia included a submission on costs. Mr. Savino opposed the order for costs, but his response to the petition did not make specific arguments in relation to costs. Mr. Savino did not make any oral submissions on costs at the hearing, and did not reserve the right to make submissions on costs following the release of my decision.
- [15] Mr. Khan was successful in this petition. The ordinary rule for costs is that costs follow the event. Where parties seek to make an exceptional order such as no costs, double costs, special costs or costs in any event of the cause on an interlocutory application, the parties must alert the court to this intention to ensure the court is able to consider whether a departure from the ordinary rule is warranted.
- [16] In the case before me, the director of the BC Residential Tenancy Branch and the Attorney General of British Columbia made submissions in writing as they sought an exceptional order. They sought an order that costs not be awarded against the Residential Tenancy Branch.
- [17] No other party submitted to the court that the ordinary rules should not apply, or that they sought leave to address the court on costs after the decision was rendered.
- [18] The intention to award costs to Mr. Khan is clear from the reasons for judgment. I have now heard submissions of Mr. Savino on costs, and nothing changes my view that in this case, costs must follow the event. The only issue is which party or parties are responsible to pay these costs.
- [19] My reasons for judgment do not state which party is liable to pay the costs of Mr. Khan. The entered order states that the respondent, singular, is liable to pay the costs of Mr. Khan. As I noted above, only Mr. Savino is noted as a respondent to this petition. While the director of the BC Residential Tenancy Branch and the Attorney General of British Columbia did file a response, there appears to be some uncertainty as to whether they are intended to be

respondents liable to pay the costs of Mr. Khan. I am satisfied that the entered order and the reasons for judgment contain ambiguity as to the intention of the court in making the order for costs. As such, I agree that the entered order can be varied, consistent with the law set out above.

If the order can be varied, should it be varied?

- [20] Mr. Savino argues that the error which was identified on the judicial review was an error of the tenancy branch arbitrator, and so he should not be held responsible in costs for any error the arbitrator made. Mr. Savino chose to respond to the petition. He mounted an extensive and vigorous defence of the Residential Tenancy Branch decision. He was the primary respondent on the hearing of the petition. He argues that because the case before the Residential Tenancy Branch was brought by Mr. Khan, and the petition was brought by Mr. Khan, he should not be penalized for coming to court to protect his interests. He argues that Mr. Khan would have had to bring this petition regardless of Mr. Savino's intention to respond, as Mr. Khan needed to set aside the Residential Tenancy Branch decision. As such, Mr. Savino argues that he should not be required to pay costs for a petition that Mr. Khan would have had to bring in any event.
- [21] I am not persuaded by Mr. Savino's argument. If Mr. Savino's argument were to succeed, it would mean that any defendant who was successful at trial but was unsuccessful on appeal would not have to pay the costs of the appeal because the error was not theirs, it was an error of the trial court.
- [22] Mr. Savino chose to respond to the petition and to place himself front and centre in the dispute. He could have relied on the Residential Tenancy Branch decision and waited to see what the outcome would be of the petition. He was not required to respond. He chose to respond, and in doing so, he runs the risk of an adverse costs order.
- [23] There is no rule which prevents an order for costs being made against a party to a judicial review of a Residential Tenancy Branch decision. In his own submissions, Mr. Savino included several cases where awards of costs were made to the successful party in judicial reviews of Residential Tenancy Branch decisions. It remains within the discretion of the hearing judge to make an order for costs in a judicial review.
- [24] On the material before me on the hearing of the petition, I was satisfied that Mr. Khan was entitled to his costs against Mr. Savino. It was my intention that such an order would be made against Mr. Savino.
- [25] A further question before me is whether it was my intention to award costs against the director of the BC Residential Tenancy Branch and the Attorney General of BC as well.
- [26] The parties agree that *18320 Holdings Inc. v. Thibeu*, 2014 BCCA 494, sets out the law applicable to an award of costs against a tribunal. The Court of Appeal found that a tribunal is ordinarily immune from a costs award unless:

- a) the tribunal exhibited misconduct or perversity in the proceedings before it, or
 - b) improperly argued the merits of the judicial review application.
- [27] No party argued that the tribunal improperly argued the merits of the judicial review application before me. If the director of the Residential Tenancy Branch were to be jointly liable with Mr. Savino to pay Mr. Khan's costs, the parties would have to convince me that the director of the BC Residential Tenancy Branch exhibited misconduct or perversity in the proceedings before it.
- [28] As was clear in *Thibeau*, a breach of procedural fairness can ground an award of costs. However, many, if not most, cases where a breach of procedural fairness has been found do not result in an award of costs against a tribunal. Examples of where costs have been awarded include cases where the tribunal was biased.
- [29] In *Thibeau*, the chambers judge did award costs against the tribunal. The seven breaches of procedural fairness alleged are set out at para. 15 of the appeal decision. On the hearing of the judicial review, the respondents consented to an order quashing the decision at issue on the basis of the tribunal improperly using a committee in the decision-making process. The Court of Appeal set aside the order for costs and confirmed the tribunal's costs immunity.
- [30] Mr. Savino provided five decisions of reviews of Residential Tenancy Branch decisions where breaches of procedural fairness were found. None of these resulted in a costs order against the Residential Tenancy Branch.
- [31] The director of the BC Residential Tenancy Branch and the Attorney General provided me with the cases of *Hefnawi v. Health Care Practitioners Special Committee for Audit Hearings*, 2016 BCSC 1067; and *Bradshaw v. Workers' Compensation Board*, 2017 BCSC 1092. Both of these cases involved successful petitions for judicial review where the tribunal was found to have breached procedural fairness. Both cases originated in facts where the petitioner was prevented from putting in evidence or responding to the case against him. Both of these cases are similar to the facts before me on this judicial review.
- [32] I am satisfied that the director of the BC Residential Tenancy Branch is immune from any order for costs in this petition. The breaches of procedural fairness which I have found do not rise to the level which would attract an award of costs.
- [33] Because the entered order refers to the liability of the respondent, (singular), and there is only one respondent noted on the style of cause to the petition, it does correctly reflect my reasons for judgment. However, for clarity, the order can be amended to add the words "Mr. Savino" following the word "respondent."

Should the registrar should receive any direction on the assessment of Costs pursuant to Rule 14-1(7)?

- [34] The final issues raised by Mr. Savino is with respect to Rule 14-1(7). Rule 14-1(7) permits the court to direct that any item of costs, including specific disbursements, be allowed or disallowed.
- [35] Mr. Savino argues that if costs are to be borne by him, they should be limited to tariff items that Mr. Khan would not have incurred but for Mr. Savino's participation. He argues that all process up to and including the hearing would have been incurred in any event and that only the increased tariff items for an opposed hearing should be granted.
- [36] The draft bill of costs prepared by Mr. Khan was before me on this application. It totalled \$6,600 for claimed units and \$1,419.11 for disbursements, both exclusive of tax.
- [37] The argument advanced by Mr. Savino is similar to his argument I have already addressed, namely, that because Mr. Khan had to file the application to overturn the decision of the Residential Tenancy Branch in any event, no costs should flow to Mr. Savino. This reasoning is not persuasive. Mr. Savino filed a response to the petition, and was fully engaged as a respondent. He filed responsive materials, including affidavit evidence. He was the primary respondent during oral argument. There is no reason, in my view, to direct the registrar to limit the costs award in the manner suggested by Mr. Savino.
- [38] The parties are free to make whatever arguments they choose before the registrar with respect to the units and disbursements claimed. I make no findings on the quantum or appropriateness of these items, other than to say I am not prepared to make any disallowance as suggested by Mr. Savino. The registrar's discretion to address these issues is wholly unfettered by me.
- [39] I order costs of this application in favour of Mr. Khan and against Mr. Savino.

"Baker J."

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