

CANADA / JUDGMENT

MacInnis v. MacInnis

2020 BCCA 190

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 190 MacInnis v. MacInnis

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

MacInnis v. MacInnis,

2020 BCCA 190

Date: 20200619

Docket: CA45993

Between:

Tracey Ellen MacInnis

Respondent

(Claimant)

And

Roderick Allan MacInnis

Appellant

(Respondent)

Before:

The Honourable Mr. Justice Fitch

The Honourable Mr. Justice Butler

The Honourable Mr. Justice Abrioux

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

March 4, 2019 (MacInnis v. MacInnis, Kelowna Docket E108220).

Oral Reasons for Judgment

Counsel for the Appellant

(via videoconference):

F.S. Murray

Counsel for the Respondent

(via videoconference):

R. Amit

Place and Date of Hearing:

Vancouver, British Columbia

June 15, 2020

Place and Date of Judgment:

Vancouver, British Columbia

June 19, 2020

Summary:

The appellant challenges the chambers judge's dismissal of his application to vary his child support obligations. Held: Appeal dismissed. The appeal is premised on a misunderstanding of the judge's order. The judge did not dismiss the variation application on its merits. Instead, he acceded to the respondent's preliminary application to dismiss on the basis of the appellant's non-compliance with a prior court order involving child support.

ABRIOUX J.A.:

I. Introduction

- [1] This appeal arises from an order made in the Supreme Court of British Columbia on March 4, 2019, dismissing the appellant, Mr. MacInnis', application for an order to vary his child support obligations arising pursuant to an order made on September 4, 2018 (the "Variation Application").
- [2] Mr. MacInnis was unrepresented at the time the Variation Application proceeded in Supreme Court of British Columbia Family Chambers. He submits that the judge did not provide sufficient reasons for judgment, and that the most reasonable inference that can be drawn from the decision is that the Variation Application was dismissed on its merits due to his non-compliance with an interim order made at a previous appearance. He argues that the judge erred in not basing his decision on the evidence before him, or, in the alternative,

failing to exercise his discretion to dismiss for non-compliance with a court order on correct principles.

- [3] As I will explain below, I would dismiss the appeal because it is predicated on a misunderstanding:
 - (a) as to the basis for the dismissal of the Variation Application, and in particular, that it was dismissed on the merits; and
 - (b) that short of a successful appeal setting aside the order, Mr. McInnis is prohibited from bringing a fresh variation application.
- [4] Notwithstanding my proposed disposition of the appeal, this case illustrates how the manner in which a hearing is handled by a chambers judge might avoid an unnecessary appeal and the consequential costs to the litigants.

II. Background

- [5] The appellant and respondent were granted an order for divorce by Justice Meiklem (the "trial judge") on June 4, 2018, following a one-day summary trial. In addition to the divorce proceedings, the trial dealt with property division, parenting time, child support, and spousal support.
- [6] In reasons for judgment rendered on September 4, 2018, indexed at 2018 BCSC 1507, the trial judge ordered joint custody and equal parenting time of the parties' two children. At the time of the summary trial, Mr. MacInnis was a commissioned account representative for a medical equipment supplier. The trial judge found his 2017 income for the purposes of determining child support to be \$182,298.46 and the claimant's 2017 income to be \$77,565.59. On that basis, the judge ordered child support in the monthly amount of \$1,336.00 commencing on September 1, 2018, as well as retroactive child support of \$15,929.00.
- [7] After the summary trial, but before the trial judge rendered his reasons for judgment, Mr. MacInnis was terminated from his employment without cause. In chambers on January 21, 2019, he informed the chambers judge that he did not accept a lump sum settlement offer of \$41,579 in exchange for executing a full and final release. The offered lump sum represented 12 weeks of average commission earnings. Accordingly, he stated in an affidavit that he received six weeks of income in lieu of notice in accordance with the Employment Standards Act, R.S.B.C. 1996, c. 113.
- [8] Mr. MacInnis then collected employment insurance of \$488 net per week during his period of unemployment, which continued until January 2019. He made child support payments of \$520 per month on an intermittent basis between June and November 2018, at which point he informed Ms. MacInnis' counsel that the child support payments would cease given his financial circumstances.

- [9] On December 19, 2018, Mr. MacInnis filed the Variation Application. Claiming an annual income of \$28,444, he sought an order varying his child support payments to \$0.00.

III. Chambers Proceedings

The January 21, 2019 Hearing

- [10] The Variation Application initially proceeded before the judge on January 21, 2019. At that time, Mr. MacInnis, who was self-represented, indicated to the court that he had commenced new employment on January 7, 2019 at an annual income of \$90,000 plus commissions of \$24,500, less business expenses which he estimated at \$31,000. The transcript from that proceeding refers to a conditional letter of employment, which Mr. MacInnis had provided to Ms. MacInnis' counsel that day.
- [11] Following submissions from the parties, the judge ordered that Mr. MacInnis disclose certain financial information including his credit card and bank statements, all employment documents from his new employer, his 2017 tax return, and his 2018 T4 statements. He also ordered on an interim without prejudice basis that Mr. MacInnis pay interim child support of \$600 per month for December 2018, January 2019, and February 2019, stating:

THE COURT: And, sir, that's going to -- and those all have to be brought up to date if you want to proceed on the 25th.

RODERICK MACINNIS: Okay.

THE COURT: Okay? Thank you

[Emphasis added.]

- [12] The reference to "the 25th" was to February 25, 2019, but the Variation Application was in fact adjourned on a peremptory basis to March 4, 2019 (the "January 2019 Order").

The March 4, 2019 Hearing

- [13] On March 4, 2019, the parties appeared before the same judge in Supreme Court Family Chambers. Mr. MacInnis was again unrepresented by counsel. Ms. MacInnis' counsel advised the court that she wished to bring a preliminary application to have the Variation Application dismissed on the basis that Mr. MacInnis had not fully complied with the January 2019 Order. Specifically, he had not provided all of the ordered financial documentation, nor had he made any of the \$600 interim child support payments.
- [14] Mr. MacInnis submitted that he had provided all the materials he had available to him. Despite having worked in January and February of 2019, earning approximately \$4,400 net per month, he claimed he had been unable to pay the \$600 per month child support since he had been previously unemployed, had exhausted his savings and gone into debt.

[15] Following some discussion between the court and Mr. MacInnis on the issue of child support and the disclosure of the remaining financial documents, the judge:

- dismissed the Variation Application with costs to Ms. MacInnis;
- vacated the January 2019 Order; and
- reinstated the trial judge's monthly child support order of \$1,336.

[16] The following extracts from the transcript set out the relevant portions of the reasoning process that lead to the judge's decision:

THE COURT: You - you've been working in January and February, correct?

RODERICK MACINNIS: I'm sorry?

THE COURT: You worked in January and February?

RODERICK MACINNIS: I've worked January and February, so I've just - I've been trying to get myself back on my feet so I'm able to have some money to -- to do this.

THE COURT: I'm sorry, but -- so you're working in January and February?

RODERICK MACINNIS: Correct.

THE COURT: How much are you making a month?

RODERICK MACINNIS: Net, about forty-four hundred dollars.

THE COURT: Okay. How many kids do you have?

RODERICK MACINNIS: Two .

RODERICK MACINNIS: No, they --

THE COURT: You're earning forty-four hundred dollars a month and you can't -- net, and you can't pay \$600?...

RODERICK MACINNIS: I've - I'm so far in debt because of my unemployment from July to --

THE COURT: Okay.

RODERICK MACINNIS: -- December that it's - it's been impossible to actually amass any amount that wouldn't put me in further ---

THE COURT: Okay. Well, sir, you've had your chance. Your application is dismissed. Thank you.

MS. MILLER: Order for costs --

THE COURT: Costs to Ms. MacInnis. Sir, people who disobey court orders don't get a second chance. Thank you.

MS. MILLER: My Lord, is it necessary to vacate the order that you made on the 21st?

THE COURT: Yes, and that order is vacated. The child support goes back to the higher amount. (the "March 2019 Reasons").

IV. Issues on Appeal

[17] Mr. MacInnis challenges the orders arising from the March 2019 Reasons on several grounds, including that the judge erred by:

- not providing sufficient reasons for his decision;
- not basing his decision on the evidence respecting the alleged material change of circumstances, but instead solely on non-compliance with the January 2019 Order; and
- in the alternative, if he had the discretion to dismiss the Variation Application, he failed to provide him with the opportunity to make submissions.

[18] Ms. MacInnis' position is that Mr. MacInnis was provided with the opportunity to explain his circumstances and make submissions regarding why the dismissal of the Variation Application based on the preliminary objection should not be granted. She also submits that the March 2019 Reasons did satisfy the legal test relating to the sufficiency of reasons.

[19] During the hearing of the appeal, Mr. MacInnis' counsel submitted that his client's primary concern related to an alleged ambiguity in the March 2019 Reasons, that is, whether the Variation Application had been dismissed on the merits. In that regard, he referred to the entered order, which provides, in part:

The Respondent's Application filed December 19th, 2018 for an Order varying the Order made before The Honourable Mr. Justice Meiklem on September 4th 2018 shall be and is hereby dismissed with costs to the Claimant.

[20] Of significance to this appeal is Ms. MacInnis' recognition that the Variation Application was not dismissed on the merits, but due to the judge acceding to her preliminary objection pertaining to Mr. MacInnis' failure to abide by the January 2019 Order.

[21] In fact, at paras. 35-37 of her factum, Ms. MacInnis states:

[35] The appellant's assertion that the chambers judge did not engage in a consideration of the evidence before him appears to be an assertion that the chambers judge ought to have considered the appellant's evidence on the merits of the appellant's application to vary, prior to dismissing his application for failure to comply with the Interim Order.

[36] The appellant's argument in this regard is not sustainable. The chambers judge dismissed the application of the appellant not on its merits, but on the respondent's preliminary application to dismiss for the appellant's non-compliance with the Interim Order.

- [37] The chambers judge was not required to consider the merits of the application to vary the Meiklem Order because he found in favour of the respondent's preliminary application to dismiss.

V. Analysis

- [22] Mr. MacInnis must demonstrate that there was a material error, a serious misapprehension of the evidence, or an error in law: *Hickey v. Hickey*, [1999] 2 S.C.R. 518 at para. 12 (S.C.C.). This narrow scope of appellate review applies to all family law matters, regardless of the issue under appeal: *McKenzie v. Perestrelo*, 2014 BCCA 161 at paras. 23-24, citing *Van de Perre. v. Edwards*, 2001 SCC 60 at paras. 14-15.
- [23] Turning to the March 2019 Reasons, it bears repeating that the parties appeared before the same chambers judge as on January 21, 2019. At that time, the chambers judge adjourned Mr. MacInnis' Variation Application to March 4, 2019, as Ms. MacInnis had not received the disclosure she needed from him to proceed. The judge thus made the January 2019 Order, requiring Mr. MacInnis to provide Ms. MacInnis with certain document disclosure as to his finances and employment. Furthermore, the judge's comments underscored that Mr. MacInnis would need to meet his reduced interim child support obligations under the January 2019 Order, in order to proceed with the adjourned Variation Application.
- [24] In my view, within this context, it was well-within the judge's discretion to grant Ms. MacInnis' preliminary application on March 4, 2019, thereby dismissing the Variation Application on the basis of non-compliance with the January 2019 Order.
- [25] That being the case, I would dispose of this appeal on the basis that the judge did not err in dismissing the Variation Application in light of Mr. MacInnis' non-compliance with the January 2019 Order.
- [26] As an integral element of Mr. MacInnis' submissions related to the sufficiency of the judge's reasons, I will comment on that issue.
- [27] This Court summarized the applicable legal framework in *Ecobase Enterprises Inc. v. Mass Enterprise Inc.*, 2017 BCCA 29 at paras. 7-9 [Ecobase]:
- [7] The test for sufficiency of reasons is set out in *K.L.K. v. E.J.G.K.*, 2011 BCCA 276:
- [25] The function of reasons in the civil context is to justify and explain the result, to tell the losing party why he or she lost, to provide for informed consideration of the grounds of appeal, and to satisfy the public that justice has been done: *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41.

A failure to give adequate reasons is not a free-standing basis for appeal. Nor can an appellate court intervene merely because it believes the trial judge did a poor job of expressing himself: *F.H. v. McDougall*, 2008 SCC 53 at para. 99.

- [8] In *R. v. Walker*, 2008 SCC 34, Binnie J. described the approach to be taken by an appellate court assessing the sufficiency of reasons this way:
- [20] ... Reasons are sufficient if they are responsive to the case's live issues and the parties' key arguments. Their sufficiency should be measured not in the abstract, but as they respond to the substance of what was in issue. ...The duty to give reasons "should be given a functional and purposeful interpretation" and the failure to live up to the duty does not provide "a free-standing right of appeal" or "in itself confe[r] entitlement to appellate intervention" (*R. v. Sheppard*, 2002 SCC 26] para. 53).
- [28] While I appreciate the time constraints under which chambers judges often operate, it is clear, in my view, that the March 2019 Reasons suffer from some obvious difficulties.
- [29] Firstly, while I understand that the judge was faced with a preliminary objection being brought without notice, that reality is not unusual in applications such as this. Unfortunately, there is no discussion, even in the most abbreviated form, of the legal framework that applied to the preliminary application. Such a discussion would not have required a comprehensive reference to the relevant authorities which would include *Elensky v. Elenskaya*, [1993] B.C.J. No. 2144 (C.A.), *Pfann v. Pfann*, 2008 BCSC 452, and *Larkin v. Glase*, 2009 BCCA 321, amongst others. But the judge, in my view, should have referred to the key factor in the exercise of judicial discretion on a preliminary application such as the one in this case, being whether, within the overarching rubric of the interests of justice, "a convincing explanation" has been provided for the failure to abide by a prior court order: *Elensky* at para. 6.
- [30] Secondly, as the authorities to which I have referred indicate, the judge's statement to Mr. MacInnis that, "Sir, people who disobey court orders don't get a second chance" is, quite simply, incorrect.
- [31] Finally, the March 2019 Reasons are particularly problematic in terms of the requirement that reasons "provide for informed consideration of the grounds of appeal": *K.L.K. v. E.J.G.K.*, 2011 BCCA 276 at para. 25. That is because the judge did not explain to Mr. MacInnis that, although the Variation Application had been dismissed due to his non-compliance with the January 2019 Order, this did not mean that the application had been dismissed on the merits. Nonetheless, Mr. MacInnis did have sufficient knowledge to bring an appeal with one ground of appeal relating to whether the Variation Application had been dismissed on the merits.
- [32] I would add that, to the extent Mr. MacInnis was uncertain as to the basis for the dismissal of the Variation Application, a review of the transcript for March 4, 2019 would have explained to him what had in fact occurred that day.
- [33] Despite these shortcomings, when I review the transcript of the March 2019 Reasons, I reach the following conclusions. The reasons explain to Mr. MacInnis why he had lost; namely, his failure to comply with the January 2019 Order, and in particular, the interim support

payments, which the judge had specifically told him at the January 2019 hearing had to be paid by the March 4, 2019 hearing date. The reasons also implicitly recognize that the judge did not view Mr. MacInnis' explanation for failing to make any interim support payment as ordered convincing.

- [34] Viewed from this perspective, the reasons would also satisfy the public that justice had been done. A member of the public would understand the importance of persons abiding by court orders, and that Mr. MacInnis had not made any child support payments for his children as ordered on January 21, 2019, notwithstanding a net monthly income of \$4,400.
- [35] Accordingly, I am of the view that the March 2019 Reasons do satisfy the legal test for sufficiency of reasons to which I have referred.
- [36] In any event, had I reached a different conclusion, the insufficiency of the reasons, which do not provide a "free-standing basis for appeal" (Ecobase at para. 7) would not, in my opinion, have justified appellate intervention.
- [37] Mr. MacInnis is now aware that the Variation Application was not dismissed on the merits. The Court was advised that he has made substantial child support payments since March 2019, although he may not be in complete compliance with the trial judge's order. Were Mr. MacInnis to bring a fresh application to vary the trial judge's order and, at that time, be in compliance with the trial judge's order and any other court orders made, including document production, it would presumably be heard on its merits. If not in complete compliance, then Mr. MacInnis may well face another preliminary application for dismissal as occurred on March 4, 2019. It would then be a matter for the chambers judge's exercise of discretion based on the circumstances then before the court as to whether any preliminary application should succeed.
- [38] Accordingly, I would dismiss the appeal.
- [39] Respectfully, I wish to add these comments as to what transpired on March 4, 2019. In my view, based on the record before the Court and the submissions of counsel, had the judge provided even a brief explanation to Mr. MacInnis as to the practical effect of his order, it may have been the case that no appeal would have been brought. In that regard, it would have been preferable for the judge to have advised Mr. MacInnis that:
- the Variation Application had not been dismissed on the merits, which was particularly important in that there had apparently been a significant decrease in his income since the trial judge's order; and
 - the application could be renewed to be decided on its merits upon compliance with the trial judge's order and/or any other court orders, or his
- providing affidavit evidence in support of a convincing explanation as to why compliance were not possible.

- [40] In *Mazraani v. Industrial Alliance Insurance and Financial Services Inc.*, 2018 SCC 50, at para. 39, the Supreme Court of Canada, albeit in different circumstances, offered the following guidance with respect to a judge's interactions with a self-represented party:
- [39] A judge should also take the time to explain the process to the parties and to ensure that they are aware of the options that are available to them in this area. By contrast, an attempt to simplify the hearing in this regard without properly consulting the parties and the witnesses with respect to their options and their needs could lead to unnecessary complications. In the case at bar, taking measures such as these would undoubtedly have been preferable and could have mitigated the impact of Mr. Mazraani's being unrepresented while ensuring that everyone's language rights were respected.
- [41] In my view, what occurred in this case was that the judge did not take the time to explain the process to a self-represented litigant, which later led to unnecessary complications. While this did not amount to an insufficiency of reasons, had the judge explained the practical implications of his decision to Mr. MacInnis, that discussion could have obviated the need for an appeal.

VI. Disposition

- [42] I would dismiss the appeal.
- [43] FITCH J.A.: I agree.
- [44] BUTLER J.A.: I agree.
- [45] FITCH J.A.: The appeal is dismissed.

"The Honourable Mr. Justice Abrioux"

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