

CANADA / JUDGMENT

Orlando v. Boylan

2023 BCCA 51

COURT

British Columbia Court of Appeal

DECIDED

1 February 2023

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2023 BCCA 51 Orlando v. Boylan

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Orlando v. Boylan,

2023 BCCA 51

Date: 20230201

Docket: CA48667

Between:

Myriam Orlando

Appellant

(Defendant)

And

Brendan Boylan

Respondent

(Plaintiff)

Before:

The Honourable Madam Justice Bennett

(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated
October 25, 2022 (Boylan v. Orlando, Prince George Docket S2057986).

Counsel for the Appellant:

J. Der

S Basra, Articled Student

Counsel for the Respondent

(via videoconference):

D. Gallant

Place and Date of Hearing:

Vancouver, British Columbia

January 12, 2023

Place and Date of Judgment:

Vancouver, British Columbia

February 1, 2023

Summary:

Application by appellant for leave to appeal and stay of an order requiring the appellant to attend a previously-scheduled examination for discovery in the court below. That order was made despite the appellant filing an anti-SLAPP application against the respondent, which halts the underlying proceeding. The proceeding encompasses debt and defamation actions. The Respondent similarly applies for leave to cross appeal and stay the same order. Among other submissions, he seeks leave to argue that the debt and defamation actions be severed to allow discovery to proceed only on the debt claim until the anti-SLAPP application is decided. **HELD:** Applications dismissed. The interests of justice weigh in favor of denying leave and, accordingly, the stay application also fails. The proposed appeals are of limited significance to the practice generally due to the unique factual circumstances of this case. Similarly, they are of minimal significance to the parties: the intended appeals would be rendered moot if the appellant's anti-SLAPP application is simply set down for hearing "as soon as practicable". The parties conceded as much at the hearing. There is merit to the contention the chambers judge erred in ordering the discovery to proceed. However, granting the appeal would introduce significant further delay in these proceedings, which could be avoided if the anti-SLAPP application is pursued forthwith. Overall, the proposed appeals engage a threshold question of whether BC anti-SLAPP legislation even applies to this ostensibly private-party dispute. Granting leave would therefore invite this Court to comment on a matter that has not yet been concluded in the court below.

Reasons for Judgment of the Honourable Madam Justice Bennett:

I. Overview

- [1] The Applicant, Ms. Myriam Orlando, seeks leave to appeal the order of Justice Matthews made on 25 October 2022. That order required her to attend an examination for discovery for a proceeding in the court below, despite her having filed an application under the Protection of Public Participation Act, S.B.C. 2019, c. 3 (the "PPPA", colloquially known as 'anti-SLAPP' legislation) -- an application that ordinarily halts the underlying proceeding to which it relates. She also seeks a stay of the Order pending the outcome of her appeal.
- [2] The Respondent, Mr. Brendan Boylan, seeks leave to cross appeal the Order on various grounds, along with a stay.

II. Background

- [3] Ms. Orlando was previously in an intimate relationship with Mr. Boylan, which lasted for less than two years and ended in late May 2018. According to Mr. Boylan, he loaned approximately \$40,000 to Ms. Orlando during the course of their relationship, which she has not repaid.
- [4] In September 2018, Ms. Orlando provided Mr. Boylan with a letter alleging that he had sexually assaulted her just prior to their separation. Mr. Boylan subsequently learned Ms. Orlando had told other people about the alleged sexual assault, and was claiming the money she received from him were gifts, not loans.
- [5] On 10 July 2020, Mr. Boylan filed a notice of civil claim against Ms. Orlando seeking damages for breach of contract related to the debt he claimed he was owed by Ms. Orlando, as well as damages for defamation in relation to her allegation of sexual assault (the "BCSC Proceeding").
- [6] On 16 July 2020, Ms. Orlando made a statement to police concerning the alleged sexual assault. Mr. Boylan has since been charged and criminal proceedings are underway.
- [7] In September 2021, Mr. Boylan took out an appointment to examine Ms. Orlando for discovery. Ms. Orlando failed to attend that appointment. An application was brought before Justice Tindale to compel Ms. Orlando to attend an examination for discovery. That order was made on 1 November 2021.
- [8] Another appointment for discovery was set for 24 January 2022. Counsel for the Applicant requested an adjournment of that appointment to 28 March 2022.
- [9] On 7 March 2022, an application was brought by Ms. Orlando's new counsel under the PPPA seeking to dismiss Mr. Boylan's claim against her (the "PPPA Application"). That application was set to be heard on 28 March 2022 -- the same day as the scheduled examination for discovery. Mr. Boylan filed a cross-application, but the hearing never took place.

- [10] Mr. Boylan then applied to the BC Supreme Court for guidance as to how the litigation between himself and Ms. Orlando should proceed. That application was heard by Justice Matthews (the "Chambers Judge"), who summarized it as follows:
- [1] The plaintiff, Brendan Boylan, seeks directions about this ongoing litigation as well as orders pertaining to the application brought by the defendant, Myriam Orlando, to dismiss his claim pursuant to the [PPPA]. Most substantively, he seeks an order that Ms. Orlando be required to attend at an examination for discovery, that she be cross-examined in the [PPPA] application, and that she be required to comply with discovery obligations that Mr. Boylan said pre-existed her [PPPA] application. []
- [11] Mr. Boylan also sought other orders predominantly related to the conduct of the PPPA Application, which the Chambers Judge held were mostly premature and should be determined by the judge who eventually hears that application.
- [12] Ms. Orlando challenged the orders sought by Mr. Boylan on the basis that, in her view, once a PPPA application was brought, s. 5(1) of the PPPA pauses the underlying proceeding:

No further steps

5 (1) Subject to subsection (2), if an applicant serves on a respondent an application for a dismissal order under section 4, no party may take further steps in the proceeding until the application, including any appeals, has been finally resolved.

The chambers judgment

- [13] The Chambers Judge first considered Mr. Boylan's application for an order that Ms. Orlando attend oral examination for discovery, and that she also complies with her extant obligations for document discovery. The key issue was "whether requiring her to do so is in essence permitting Mr. Boylan to take a "further" step in the proceeding" contrary to s. 5(1) of the PPPA: at para. 8.
- [14] She observed there was no caselaw considering how s. 5 might apply in the context of obligations that pre-dated a PPPA Application, especially where those obligations, as in this case, had already been confirmed by an order of the BC Supreme Court with a view to enforcing compliance with the Supreme Court Civil Rules.
- [15] The Chambers Judge concluded Ms. Orlando's attempted use of the PPPA in this way would be an abuse of the process of the court, allowing litigants to sidestep existing court orders by making a PPPA application. In her words, "Ms. Orlando's position would permit a party to use the PPPA as a shield to avoid extant obligations under the Rules and under court orders": at para. 13.

- [16] She held that if no examination appointment had been taken out in the BCSC Proceeding prior to the PPPA Application being filed, s. 5(1) would be engaged so as to halt the examination. In this case, the appointment pre-dated the PPPA Application so s. 5(1) did not apply and the examination should go forward.
- [17] The Chambers Judge made other conclusions, including that Ms. Orlando was required to disclose documents on her list of documents for discovery -- a list made prior to her PPPA Application. Documents not on that list but merely requested by Mr. Boylan were not required to be disclosed as doing so would, in her view, constitute a 'further' step in the proceeding.
- [18] The Chambers Judge made various orders relating to the conduct of the contract and defamation claim, and also declined to make a number of orders sought by Mr. Boylan which, in her view, would be most appropriately determined by the judge hearing the PPPA Application itself.

III. Positions of the Parties

- [19] Ms. Orlando applies for leave to appeal the decision of the Chambers Judge on the grounds that she erred in:
- a) Misinterpreting the meaning of s. 5 of the PPPA; and
 - b) Interpreting the PPPA as conferring discretion to make the order she did in fact make.
- [20] Alternatively, Ms. Orlando says the Chambers Judge erred by exercising her discretion in a manner inconsistent with the PPPA and in a way that undermines or is contrary to its purposes.
- [21] If leave is granted, Ms. Orlando also asks that this Court stay Mr. Boylan's civil proceeding against her, pending the outcome of her appeal.
- [22] Mr. Boylan also seeks leave to cross appeal on the basis that the Chambers Judge erred by:
- a) Declining to order that Ms. Orlando disclose documents relevant to her PPPA Application, including a supporting affidavit;
 - b) Declining to order that Ms. Orlando attend an out-of-court examination, which appears to be in relation to the PPPA application;
 - c) Not exercising her discretion to provide directions on how the PPPA Application (including Mr. Boylan's cross-application) should proceed;
 - d) Declining to make various procedural orders, including:
 - i. That the PPPA Application and cross-application be heard together;
 - ii. That the claims in the BCSC Proceeding be severed to allow the non-defamation claims to proceed; and

- e) Determining that Mr. Boylan "contravened" s. 5(1) of the PPPA by seeking directions from the Court.
- [23] The parties agree that each of their leave applications should be granted due to the absence of caselaw speaking to the nuanced procedural circumstances in this case. As I advised them at the hearing before me, their agreement on this point does not necessarily mean leave will be granted: *Murphy v. Wynne*, 2007 BCCA 434 at para. 11 (Chiasson J.A. in Chambers). I note, parenthetically, that Mr. Boylan's application for a cross appeal appears to be out of time, as it does not appear to have been filed within 15 days of the filing of the Notice of Appeal (Rule 9). The issue was not raised by the parties. Given that Ms. Orlando consents to leave to appeal being granted, I will assume that if an extension of time to file the notice of cross appeal is required, that is also by consent.
- [24] I will first address the leave applications, followed by the stay applications.

IV. Leave to Appeal

- [25] The order of Justice Matthews is a 'limited appeal order' within the definition of Rule 11 of the Court of Appeal Rules, B.C. Reg. 120/2022. Under s. 13(2)(a) of the Court of Appeal Act, S.B.C. 2021, c. 6, an appeal may not be brought to this Court from a limited appeal order unless leave to appeal is granted by a justice.
- [26] The party bringing a leave application bears the onus of establishing that leave on their proposed grounds should be granted: *British Columbia Teachers' Federation v. British Columbia (Attorney General)*, 1986 CanLII 1089 (B.C.C.A.) at para. 5, 4 B.C.L.R. (2d) 8 at 11 (McLachlin J.A. in Chambers). Applications for leave to cross appeal are treated the same as applications for leave to appeal, meaning leave must be granted for each: *Avon Canada Inc. v. British Columbia (Minister of Finance)*, 1986 CanLII 802 (B.C.C.A.), 8 B.C.L.R. (2d) 56 (McLachlin J.A. in Chambers); *Hansra v. Hansra*, 2017 BCCA 199 at para. 36.
- [27] The test for leave, as articulated in *Power Consolidated (China) Pulp Inc. v. B.C. Resources Investment Corp.* (1988), 19 C.P.C. (3d) 396 (C.A.), is:
- a) Whether the point on appeal is of significance to the practice;
 - b) Whether the point raised is of significance to the action itself;
 - c) Whether the appeal is prima facie meritorious or, on the other hand, whether it is frivolous; and
 - d) Whether the appeal will unduly hinder the progress of the action.
- [28] These criteria are considered under the overarching rubric of the interests of justice: *Vancouver (City) v. Zhang*, 2007 BCCA 280 at para. 10 (Saunders J.A. in Chambers).

V. Discussion

- [29] At the outset, I find it useful to observe that each of Ms. Orlando and Mr. Boylan's intended grounds of appeal are premised on a common threshold question: does the PPPA actually apply in the circumstances of this case? An answer to this question would solve the key issue on appeal -- i.e., as Ms. Orlando puts it, "the effect of orders granted prior to the filing of an application under the PPPA". Counsel for each party openly acknowledged in the hearing before me that each of their appeals would fall away if the PPPA application was heard and decided.
- [30] With this in mind, I asked counsel for Mr. Boylan and Ms. Orlando why the PPPA Application had not yet been heard, despite many months passing since its filing. Neither party could provide a satisfactory response and, in fact, both agreed that the application ought to be pursued forthwith.
- [31] Ultimately, whether the PPPA does or does not apply is properly a question for the application judge hearing that matter to determine. I do not purport to answer that question here. However, deciding the leave to appeal and cross appeal applications necessarily requires me to consider, at least in a cursory manner, the merit of the proposed grounds of appeal, all of which relate to the effect of the PPPA on the underlying proceedings in this case.
- [32] I turn now to the submissions of each party as they relate to the test for leave.

Significance to the practice

- [33] Ms. Orlando says that due to the relative infancy of the PPPA in British Columbia, it would be of significance to the practice for this Court to grant leave to appeal. She submits there are no cases referring to s. 5 that address the proposed point of appeal. In her view, lawyers, litigants and judges alike would benefit from guidance on how the PPPA interacts with pre-existing court orders.
- [34] Mr. Boylan advances many of the same considerations in his cross appeal. He makes further points in relation to Justice Matthews declining to make a number of procedural orders concerning governance of the PPPA application. Namely, he says it would benefit the practice for this Court to "provide authority" on: (i) the effect of a PPPA application on existing disclosure obligations; (ii) whether a party can be compelled to provide evidence to support that application (at the hearing before me, he submitted Ms. Orlando had provided minimal evidence supporting her application, presumably making preparation for that hearing somewhat difficult); and (iii) the meaning of 'public interest' under the PPPA.

- [35] He also says this Court should provide direction on whether Supreme Court claims involving multiple causes of action can be severed in order to allow actions unrelated to the PPPA application to proceed. As argued before Justice Matthews, Mr. Boylan contends the PPPA application should only halt the defamation proceedings in this case, while the debt claim (and the associated discovery obligations) should continue.
- [36] The parties are correct in saying there are few decisions interpreting the PPPA in B.C., and even fewer decisions specifically dealing with the effect of s. 5 on pre-existing court orders. However, the mere fact that there may be no decisions on precisely the point raised in an appeal will not necessarily support granting leave to appeal: *Stanway v. Wyeth Canada Inc.*, 2013 BCCA 256 at para. 15 (Prowse J.A. in Chambers).
- [37] Further, where the order being appealed is very specific to the action, there will be limited significance to the practice generally: *Gulamani v. Chandra*, 2009 BCCA 206 at para. 15 (Bauman J.A. (as he then was) in Chambers). This appears to be the case here. The only reason the parties seek guidance on the above-mentioned matters is because the PPPA application has not yet been heard despite it being filed nine months ago. Indeed, it may be that the reason there is scant case law on precisely this issue is because PPPA applications tend to be set down for hearing and decided in line with the timeline set out in s. 9(3) of the PPPA itself -- i.e., "as soon as practicable". This has not occurred here and no party was able to explain to me why this is so.

Significance to the action

- [38] Ms. Orlando submits that the issues raised in her intended appeal are significant to the BCSC Action because it will determine whether Mr. Boylan can commence examination for discovery in relation to the defamation claim against her prior to the PPPA Application being determined. She says this would make a potentially-successful PPPA Application moot, and would inflict "serious and irreparable" harm upon her in requiring her to submit to questioning about the defamation claim (and therefore, the alleged sexual assault).
- [39] She also says the information she gives in that discovery could give Mr. Boylan a tactical advantage in the subsequent PPPA Application.
- [40] Under this criterion, counsel for Mr. Boylan relies on the same grounds he advanced above under 'significance to the practice'. I would simply note for his benefit that the two inquiries are distinct: an appeal that is of significance to the practice may be of limited or no significance to the parties where, for example, the issues raised have become moot or are not necessary to determine in order for the underlying action to proceed.

[41] I consider this to be the case in the present action. While I acknowledge the important concerns raised by Ms. Orlando regarding the potential harms of being compelled to attend discovery, I observe that they will fall away entirely if she takes steps to advance her PPPA Application to a hearing. For this reason, the significance of the appeal to the action itself is minimal at best.

Is the appeal *prima facie* meritorious?

[42] Ms. Orlando argues it is contrary to the legislative intent of s. 5 of the PPPA for an examination for discovery ordered prior to a PPPA application to proceed once that application has been filed. She cites Hansard Debates discussing the PPPA as support for her proposition that once an application has been initiated, "everything stops" with respect to other proceedings that the impugned 'expression' is related to. Ms. Orlando says that functions as an "absolute prohibition on any further steps in the overall BCSC action".

[43] Mr. Boylan asserts that neither party's proposed appeals is frivolous, and that both deserve judicial attention.

[44] The merits threshold is relatively low: *Bartram v. Glaxosmithkline Inc.*, 2011 BCCA 539 at para. 16 (Prowse J.A. in Chambers). It asks whether the applicant has demonstrated a "good arguable case of sufficient merit to warrant scrutiny by a division of this Court": *Johnston v. Matheson*, 1994 CanLII 2614 (B.C.C.A.), 46 B.C.A.C. 158 at para. 10 (Hinds J.A. in Chambers).

[45] In my view, there is merit to the submission that the Chambers judge erred in ordering Ms. Orlando to proceed with her existing discovery obligations in the debt and defamation claims. Section 5(1) of the PPPA states that once an application has been made, "no party may take further steps in the proceeding" until the application has been heard. I consider it arguable that compelling Ms. Orlando to attend a discovery appointment, even one that was previously scheduled, constitutes a "further step" in the proceeding contrary to s. 5(1).

[46] Mr. Boylan proposes a remedy for this problem. He says that leave to appeal and cross appeal should be granted along with a stay of the order of Justice Matthews, but says the action should be severed so that only the defamation claim is stayed pending the hearing of the PPPA Application. This would mean no further steps could be taken in the defamation claim to which the PPPA Application relates, while the debt claim could proceed.

[47] Mr. Boylan says the Chambers judge erred in declining to make such an order. In my respectful view, there is insufficient merit to this argument. Section 5(1) contemplates staying a "proceeding" when a PPPA application is served on another party, not a "claim" or only part of a proceeding.

- [48] Mr. Boylan also points out that the order of Justice Tindale of November 2021 requiring Ms. Orlando to attend an examination for discovery is still in effect. If I understand correctly, the argument seems to be that even if this Court grants leave to appeal the order of Justice Matthews, Ms. Orlando would still need to attend an examination for discovery in accordance with the 2021 order.
- [49] This proposal is unsatisfactory: it would directly contradict the purpose of issuing a stay of the 2022 order until a potential appeal is heard.
- [50] I return to my initial observations at the outset of these reasons. The applications for leave to appeal and cross appeal are intertwined with the substance of an open PPPA Application. It is not the usual practice of this Court to interfere with proceedings yet to be concluded in the court below: *Hama v. Werbes*, 1999 BCCA 714 at para. 2 (*Esson J.A. in Chambers*); *Mayer v. Mayer*, 2011 BCCA 290 at paras. 11-12.
- [51] I have reservations about whether the PPPA -- legislation intended to protect expressions on matters of public interest and, in doing so, "safeguard the fundamental value that is public participation in democracy" -- applies to this dispute between two private parties: *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22 at paras. 21, 30; *Grant v. Torstar Corp.*, 2009 SCC 61 at paras. 101-102, 103-106. However, it is ultimately for the judge hearing the PPPA Application to determine whether that legislation applies to the facts of this case.
- [52] In sum, there is merit to the argument that the Chambers Judge erred in ordering Ms. Orlando to continue with her discovery obligations despite the PPPA Application. At the same time, the terms of the Order are necessarily bound up with the overarching question of whether the PPPA has any real bearing on this case. Given the PPPA application is yet to be heard, granting leave to appeal the Order would risk asking this Court to inadvertently review a determination not yet concluded by the lower court.
- [53] Again, these concerns would not arise if the parties were to simply advance the PPPA Application to a hearing. This reduces the overall importance I give to the merits criteria.

Will the appeal unduly hinder the progress of the action?

- [54] Ms. Orlando says that an appeal will not unduly hinder the progress of the BCSC Action because no party has been discovered yet. She further says "the next steps in the BCSC Action is the hearing of the PPPA Application" and that "the PPPA Application will be set down for hearing promptly upon the outcome of the proposed appeal."
- [55] At the hearing before me, Mr. Boylan submitted that any appeal should happen promptly so as to allow him to pursue his claim in the court below and bear the fruits of that judgment.
- [56] Although there is merit to the submission that the Chambers Judge erred in ordering Ms. Orlando to attend discovery, granting leave to appeal the decision of the Chambers Judge would add months to the litigation that, in my opinion, are entirely unnecessary. The issues at the core of the appeal concerning the application and effect of the PPPA on ongoing

litigation could be dealt with more expeditiously if the PPPA Application is set down and heard, as it should have been some time ago. Counsel for each party admitted as much at the hearing.

- [57] The overarching consideration in a leave to appeal application is whether granting leave would be in the "interests of justice": Zhang, at para. 10; Hanlon v. Nanaimo (Regional District), 2007 BCCA 538 at para. 2 (Saunders J.A. in Chambers). Even where the four criteria have been met, leave may still be denied where it would not be in the interests of justice to grant leave: Movassaghi v. Aghtai, 2010 BCCA 175 at para. 27 (Smith J.A. in Chambers).
- [58] In my view, this is one of those cases where the interests of justice weigh strongly in favor of denying leave, despite the parties' appeals having some merit. Granting leave to appeal to this Court would introduce needless expense and hinder the progress of the case more than simply having the PPPA Application heard on its merits. That hearing will address the issues raised by the parties in their respective leave to appeal, cross appeal and stay applications. If the parties disagree with the substance of the Application judge's decision as to whether the PPPA applies to their circumstances, they would be free to appeal it at that time.

VII. Disposition

- [59] The leave to appeal and cross appeal applications are dismissed. Given this determination, there is no basis upon which to order a stay of the Order of Justice Matthews.
- [60] The next step in this litigation is to set down the PPPA application before any discovery proceeds on the main litigation. Ms. Orlando cannot continue to stall the litigation by failing to bring that application. If she does not bring the application expeditiously, as required by the legislation, she is at risk of being required to comply with the orders of Matthews and Tindale JJ.
- [61] Each party will bear their own costs of this application.

"The Honourable Madam Justice Bennett"

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Prepared on 26 October 2026 · Esheria