

CANADA / JUDGMENT

Pavlis v. HSBC Bank Canada

2009 BCCA 450

COURT

British Columbia Court of Appeal

DECIDED

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2009 BCCA 450 Pavlis v. HSBC Bank Canada COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: Pavlis v. HSBC Bank Canada, 2009 BCCA 450 Date: 20091021 Docket: CA037070 Between: Marcia Hattie Pavlis Appellant (Plaintiff) And HSBC Bank Canada and HSBC Securities (Canada) Inc. Respondents (Defendants) Before: The Honourable Madam Justice Newbury The Honourable Madam Justice D. Smith The Honourable Madam Justice Bennett On appeal from the Court of Appeal, Pavlis v. HSBC Bank Canada, 2009 BCCA 309, July 3, 2009, Docket CA037070 Acting on her own Behalf: M. Pavlis Counsel for the Respondents HSBC Bank Canada and HSBC Securities (Canada) Inc. G. Johnson Counsel for the Respondent, Attorney General of B.C.: B. Mackey Place and Date of Hearing: Victoria, British Columbia September 25, 2009 Place and Date of Judgment: Vancouver, British Columbia October 21, 2009 Written Reasons by: The Honourable Madam Justice Newbury Concurring in by: The Honourable Madam Justice D. Smith The Honourable Madam Justice Bennett Reasons for Judgment of the Honourable Madam Justice Newbury:

- [1] In 2002, Ms. Pavlis sued the defendants for constructive dismissal and negligence arising as a result of the alleged termination of her employment as an investment advisor. After a trial of 19 days, her action was dismissed by Madam Justice Dorgan for reasons indexed as 2009 BCSC 498. Ms. Pavlis seeks to appeal the dismissal of her action and was granted indigent status and an extension of time for various filings in this court. However, for reasons indexed as 2009 BCCA 309, the chambers judge dismissed her application for an order "that the Supreme Court order transcripts of the trial" for purposes of the appeal. The chambers judge ruled that this court does not have jurisdiction to order that it, or the Crown, pay for transcripts on behalf of an appellant, citing *Jong v. Jong* 2002 BCCA 322 and *Barbeau-Lafacci v. Homgren* 2002 BCCA 553 at para. 20, and R. 20(1) of the Court of Appeal Rules. That rule provides: 20(1) If oral testimony was presented in the court appealed from, the appellant must, within 60 days after bringing the appeal,
- (a) obtain a transcript of the oral testimony,
 - (b) file one paper copy of that transcript for use by the court plus such additional paper copies as are required for the purposes of paragraph (d),

- (c) file one electronic copy of the transcript,
 - (d) serve one filed paper copy of the transcript on each of the other parties, and
 - (e) serve on each party who requests it an electronic copy of the transcript.
- [2] Ms. Pavlis now seeks to vary this part of the chambers judge's order. Presumably on the basis that she was mounting a constitutional challenge to R. 20, Ms. Pavlis served the Attorney General of British Columbia with notice pursuant to the Constitutional Question Act, R.S.B.C. 1996 c. 68, and counsel for the Attorney General appeared in this court in response.
- [3] In the course of her reasons, the trial judge mentioned various health difficulties experienced by Ms. Pavlis over the last two or so years of her employment by the defendant HSBC Securities (Canada) Inc., which difficulties resulted in her taking long-term disability leave. She never returned to her position after the leave. As well, she became a bankrupt in October 2002 (after leaving HSBC) and as a result, was unable to obtain work elsewhere in the financial services industry, at least until two years after her discharge from bankruptcy on July 31, 2003. At the time of trial she was 54 years old and was living on CPP disability benefits. From her comments to us, I gather this may still be the case, although Ms. Pavlis was clearly able to make her submissions competently in this court and did not provide us with evidence of any present disability.
- [4] Before us, Ms. Pavlis read from a prepared submission rather than from the argument in her motion book. The gist of her argument was that the chambers judge had erred in refusing the order sought, and that her rights under s. 7 and 15(1) of the Charter had thereby been infringed. Sections 7 and 15 state:
7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice. 15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
- [5] In addition, Ms. Pavlis submits that s. 30 of the Court of Appeal Act, R.S.B.C. 1996, c. 77 (the "Act") may be invoked to give effect to the Charter rights she asserts. Section 30 provides that in the absence of a special provision in the Act or Rules, this court may regulate matters of procedure by analogy to the Supreme Court Act, R.S.B.C. 1996, c. 443, and Rules. Rule 40(5) of the Supreme Court Rules allows that court to order the preparation of transcripts in certain circumstances and to order that where doing so would impose hardship on a party, the cost be borne by the Crown. It does not appear that Ms. Pavlis made this argument to the chambers judge, but in any event, I would not think it appropriate to consider invoking s. 30 of the Act or Supreme Court Rule 40(5) unless there was merit to her underlying claim. As the Attorney General notes, a court of law does not have a general power to expropriate public funds in the absence of a specific authorization: see *R. v. Ho* 2003 BCCA 663, 21

B.C.L.R. (4th) 83 at para. 70.

- [6] Ms. Pavlis told us that the estimated cost of the transcripts of the trial is some \$15,000. When we inquired whether she might "make do" with extracts only, she stated that because one of her intended grounds of appeal is that the entire trial was unfair in that the trial judge "appeared to be biased", she requires transcripts of the entire trial. In addition to broad allegations of unfairness, Ms. Pavlis intends to allege certain "errors on the face of the decision" of the trial judge, and errors of law "on the face of the evidentiary records". The latter appear to relate to the manner in which the defendants carry on their business and to rulings made by the court below that prevented Ms. Pavlis from pursuing claims for defamation and conspiracy, neither of which was pleaded in her Further Amended Statement of Claim. We advised Ms. Pavlis that these matters were beyond the scope of her constitutional challenge and that we would be restricting ourselves on this occasion to the question of whether the chambers judge in this court had erred in ruling at para. 15 of her reasons that "indigent status does not relieve a party from the costs of putting together his or her appeal materials." Section 15 of the Charter
- [7] As I understand Ms. Pavlis' argument regarding s. 15 of the Charter, it is that the requirement that she provide the Court with transcripts in accordance with R. 20(1) infringes her right to equality before the law because as a disabled and indigent person, she does not have the same opportunity to exercise her right of appeal as does an able-bodied person of means. Effectively, she says, she is denied the "benefit of the law" by the requirement for transcripts and accordingly, this court should declare R. 20(1) of no force and effect.
- [8] With respect, I am of the view that Ms. Pavlis' argument under this head is misconceived. Rule 20(1) applies equally to all would-be appellants and is clearly grounded in the necessity that the Court have a proper record of proceedings from which appeals are taken. I did not understand Ms. Pavlis to dispute this principle. As for the necessity of paying for transcripts, persons who are in the business of providing transcribing services require payment for their services as a matter of contract rather than any statutory provision. There is no authority in Canada supporting a general right to access to justice (see *British Columbia (Attorney General) v. Christie* 2007 SCC 21, [2007] 1 S.C.R. 873) that might extend to transcripts, and in my view, there is no basis for Ms. Pavlis' argument that R. 20(1) engages her right to the equal protection and equal benefit of the law. No-one, as far as I am aware, is entitled to require that transcripts be prepared free of charge as a matter of right - this is not a "benefit" given by law. Conversely, the Rule does not impose any stereotypical distinction (see *Corbiere v. Canada (Minister of Indian and Northern Affairs)* [1999] 2 S.C.R. 203 at para. 7), or attribute stereotypical characteristics to any person or group (see *Eaton v. Brant County Board of Education* [1997] 1 S.C.R. 241 at paras. 66-7); nor is it discriminatory in its effect on any of the grounds referred to in s. 15 or analogous thereto. Accordingly, this court has held in the criminal context that an appellant is not entitled to an order directing the trial court or the Crown to make a transcript of the trial available for purposes of an appeal: see *R. v.*

L'Espinay 2008 BCCA 20, 228 C.C.C. (3d) 129 at para. 39. A fortiori, the same must be true in the civil context: see Versluce Estate v. Knol 2008 YKCA 3, at para. 9, per Hall J.A. Section 7

- [9] I am also of the view that the argument based on s. 7 of the Charter must fail. Neither the life, liberty or security of the person of Ms. Pavlis is jeopardized by the requirement that she provide transcripts to this court in order to pursue her civil appeal. As counsel for the Attorney General noted, courts have held on many occasions that s. 7 is generally not intended to protect economic rights or property interests: see *Ford v. Quebec (Attorney General)* [1988] 2 S.C.R. 712 at 762-3; and *Gosselin v. Quebec (Attorney General)* 2002 SCC 84, (2002) 4 S.C.R. 429 at paras. 80-1.
- [10] The notion that a plaintiff may invoke s. 7 to advance an economic interest was dealt with more directly by this court early on in the life of the Charter in *Whitbread v. Walley* 51 D.L.R. (4th) 509, 26 B.C.L.R. (2d) 203, (aff'd [1990] 3 S.C.R. 1273). In that case, a plaintiff had suffered personal injuries in an accident on board a pleasure craft, but was met with a defence of limited liability under certain provisions of the then Canada Shipping Act (R.S.C. 1970, c. S-9, now repealed). The plaintiff argued inter alia that those provisions violated his right to life, liberty and security of the person under s. 7. In rejecting this argument, McLachlin J.A. (as she then was) for the Court reasoned as follows: ... The plaintiff submits that if he is deprived of full compensation for his injuries by the operation of ss. 647 and 649, he will be unable to purchase the care and assistance and benefits in the nature of solace which he would otherwise be able to and will thus suffer an actual deprivation of liberty and security of person, as compared with the state he would be in if no limitation of liability were applied. This argument may be summarized this way: a claim for an economic interest which may enhance a person's ability to acquire aids and amenities to improve the person's life, liberty or security of person, falls under s. 7 of the Charter. In my opinion, these arguments do not establish that the limitations of liability in ss. 647 and 649 of the Canada Shipping Act constitute a violation of the right to life, liberty and security of person guaranteed by s. 7. The first argument -- that s. 7 applies to an economic interest that is based on a loss of life, liberty or security of person -- requires the words "life, liberty, and security of person" in s. 7 to be read as if they were amplified by the words "or such economic benefit as the law may award in their stead". In the absence of compelling circumstances, I would be loath to embark on a course of reading into the Charter words which its drafters did not see fit to include and which the objectives of the Charter provision in question, as interpreted in *Reference re Section 94(2) of the Motor Vehicle Act*, supra, do not require. The second argument, that economic interests which may affect a person's life, liberty or security of person fall under s. 7, raises the same difficulty. Arguably, it requires reading into s. 7, after the declaration that a person has the right to "life, liberty and security of person", the additional phrase that he has the right to "any benefit which may enhance life, liberty or security of person". This argument, however, is undermined by an even more serious problem. It is difficult to conceive of a property or economic interest which does not arguably impact on the life, liberty or security of person. Liberty and security of person are flexible and expansive concepts, and the degree to which they can expand is intimately tied

with the amount of money one has at his or her disposal. For example, a person who is barred by legislation from raising a claim for breach of contract or whose corporation is denied a licence, might claim that the resultant financial loss has affected his liberty and security of person because without money he cannot go where he wants to go, pursue the activities he wishes to pursue, or provide adequately for his future. To accept the plaintiff's second argument would be to make s. 7 applicable to virtually all property interests. Given the scheme of the Charter and the absence of any reference to the right to property, I cannot accept that this was the intention of its framers. The matter may be viewed in another way. The deprivation of life, liberty and security of person which the plaintiff has suffered is not caused by ss. 647 and 649 of the Canada Shipping Act. Rather, it was caused by the accident. The plaintiffs physical and psychological loss arose independently of the impugned provisions and will, in large part, continue, regardless of whether those provisions apply or not. What the limitations on liability in ss. 647 and 649 cause is not the plaintiff's physical loss of liberty and security, but his inability to recover more than a stipulated amount of money from the persons legally responsible for the accident. While money, as already noted, may almost always be argued to affect a person's liberty and security, that is an indirect and incidental effect not contemplated by s. 7 of the Charter. [At 521-2; emphasis by underlining added.] Similarly in the case at bar, any connection between Ms. Pavlis' life, liberty or security of the person and the necessity of supplying her own transcripts in order to pursue a civil claim for damages is at best tenuous. Section 7 cannot have been intended to extend to obligations of this kind.

- [11] Courts have held that the jurisdiction of a trial judge in a criminal proceeding may extend to appointing counsel in order to ensure the fairness of the trial (see the cases cited at para. 11 of *Canada (Attorney General) v. Savard* (1996) 74 B.C.A.C. 81, 106 C.C.C. (3d) 130 (Y.K.C.A.)); but in the civil context, where no party is at risk of being deprived of life, liberty or security of the person, s. 7 is not engaged. (See *Gosselin*, supra.) Although it has been said that the right to security of the person extends to both the "physical and psychological integrity of the individual," recent authorities have made it clear that there must be state interference having a profound effect on a person's "psychological integrity", such as occurred in *New Brunswick (Min. of Health and Community Services) v. G.(J.)* [1999] 3 S.C.R. 46, before such a deprivation may be found. (See especially paras. 58-60.) None of these elements exists here.
- [12] In *British Columbia (Minister of Forests) v. Okanagan Indian Band* 2003 SCC 71, [2003] 3 S.C.R. 371, the Supreme Court of Canada upheld an order for prospective costs made in favour of an indigent aboriginal band, but it has not been argued here, nor could it be, that the circumstances of that case bear any resemblance to those of the case at bar.
- [13] For the foregoing reasons, I would dismiss this application. "The Honourable Madam Justice Newbury" I Agree: "The Honourable Madam Justice D. Smith" I Agree: "The Honourable Madam Justice Bennett"

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