
CANADA / JUDGMENT

R.D. Backhoe Services Inc. v. Graham Construction and Engineering Inc.

2017 BCCA 91

COURT

British Columbia Court of Appeal

DECIDED

16 February 2017

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2017 BCCA 91 R.D. Backhoe Services Inc. v. Graham Construction and Engineering Inc.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R.D. Backhoe Services Inc. v. Graham Construction and Engineering Inc.,

2017 BCCA 91

Date: 20170216

Docket: CA43860

Between:

R.D. Backhoe Services Inc.

Appellant

(Petitioner)

And

Graham Construction and Engineering Inc.

Respondent

(Respondent)

Before:

The Honourable Madam Justice Kirkpatrick

The Honourable Mr. Justice Frankel

The Honourable Mr. Justice Harris

On appeal from: an order of the Supreme Court of British Columbia, dated
July 19, 2016 (R.D. Backhoe Services Inc. v. Graham Construction
and Engineering Inc., New Westminster Registry No. S179451)

Oral Reasons for Judgment

Appellant appearing In Person:

Rodney Dick

Counsel for the Respondent:

J.A. Burgess

Place and Date of Hearing:

Vancouver, British Columbia

February 14, 2017

Place and Date of Judgment:

Vancouver, British Columbia

February 16, 2017

Summary:

Appellant applies to review an order denying it extension of time to apply to vary an earlier order requiring it to post security for costs. Respondent cross-applies for the appeal to be dismissed as abandoned and for the appellant to be declared a vexatious litigant. Held: application dismissed; cross-applications allowed. The appeal has no merit and the chambers judge did not err in legal principle in denying an extension of time. Security has not been posted, and the appeal is dismissed as abandoned. In light of the entirety of the record, Mr. Dick and his related companies are declared vexatious litigants.

[1] HARRIS J.A.: We have before us several applications. The appellant applies to vary or discharge the order of a single justice in chambers denying it an extension of time to apply to vary an earlier order requiring the posting of security. The respondent opposes this application and cross-applies to have the appeal dismissed as abandoned, if the appellant's application is dismissed. The respondent seeks in the alternative that the appeal be dismissed as devoid of merit or as an abuse of process. As well, the respondent seeks an order that Mr. Dick, the principal of the appellant and a related company, together with those companies, be declared vexatious litigants and be enjoined from bringing further appeals, motions or applications against the respondent, Graham, and related parties.

[2] The application to vary or discharge relates to what I will refer to as the "extension order". A brief procedural history is in order.

- [3] This appeal is from the dismissal by Madam Justice Brown of the appellant's petition on July 19, 2016. The petition was dismissed because it was *res judicata* and barred by the operation of the Limitation Act, S.B.C. 2012, c. 13. It is incontrovertible that the petition attempted to relitigate the same issues between the same parties, or their privies, as had formed the basis of an earlier action. That action had been dismissed by Mr. Justice Steeves and an appeal from that judgment had been dismissed by this Court.
- [4] This appeal was started on August 16, 2016.
- [5] The respondent filed and served a motion for security for costs on October 31, 2016.
- [6] On November 7, 2016, Madam Justice Dickson ordered security for costs in excess of \$36,000. That order consisted of security for unpaid costs from the previous appeal, security for costs of the petition, and security for costs of the appeal.
- [7] Mr. Dick did not appear at the motion, even though he had been notified of the respondent's intention to seek such an order on several occasions even before the application was served on him.
- [8] On November 8, 2016, the respondent informed Mr. Dick of the order for security for costs. He did not apply to vary or discharge it within seven days, although he stated his intention to do so. He filed his application two days late. The respondent does not allege that missing the deadline by two days caused it any prejudice.
- [9] Having missed the deadline for making the application, the appellant applied to extend the time to apply to vary or discharge the order for security for costs. The application was heard on November 24, 2016. Madam Justice Fenlon refused to extend time. It is this order the appellant seeks to discharge or vary.
- [10] The test to vary or discharge an order of a single justice in chambers is well settled. A review is not a rehearing of the original application. The Court will interfere only if there has been an "error in principle", the justice was "wrong in the legal sense", the justice misconceived the facts, or other certain relevant information was not brought to the justice's attention. It is not sufficient merely to allege that a single justice erred in the exercise of her discretion and invite a Division to exercise the discretion differently. The justice must have erred in principle.
- [11] Madam Justice Fenlon began by identifying the terms of the order for security. Security had been ordered to be posted by December 7, 2016, pending which the appeal was stayed.
- [12] The chambers judge then canvassed the nature of the dispute between the parties. She repeated the summary of that dispute set out by Dickson J.A. in ordering security. I set out that summary here:
- [4] In a claim filed in 2011, 611481 B.C. Ltd., which is another of Mr. Dick's companies, sought damages in excess of \$2 million for breach of contract, loss of reputation and loss of opportunity. In 2013, 611 brought on a summary trial application. In 611481 BC Ltd. v.

Graham Construction and Engineering (1985) Ltd. (24 October 2013), Vancouver S042966 (B.C.S.C. Chambers), Mr. Justice Steeves dismissed the application. In doing so he made various findings, including findings relating to the contract price, the quality of work performed and Graham Construction's right to terminate the contract.

- [5] 611 appealed Mr. Justice Steeves' decision. In reasons indexed as 2014 BCCA 500, a division of this Court dismissed the appeal and awarded costs to Graham Construction. A portion of that costs award was satisfied using funds that had been posted as security. Graham Construction seeks security for costs in respect of the outstanding amount owed from the appeal (\$6,361.91) as part of the order it seeks here today.
- [6] On April 11, 2016, R.D. Backhoe filed a petition in British Columbia Supreme Court seeking substantially the same relief as that sought in the prior 611 action. On May 10, 2016, Graham Construction applied for an order striking the petition and declaring that Mr. Dick, R.D. Backhoe and 611 are vexatious litigants. It also sought special costs.
- [7] On July 19, 2016, Graham Construction's application came on for hearing before Madam Justice Brown. In reasons indexed as 2016 BCSC 1590, she dismissed the petition and declared that Mr. Dick, R.D. Backhoe and 611 are vexatious litigants. Amongst other things, Madam Justice Brown prohibited Mr. Dick, R.D. Backhoe and 611 from commencing further actions or petitions against Graham Construction or related entities in British Columbia Supreme Court without leave. She also ordered special costs.
- [8] On the application to strike the petition, Madam Justice Brown found that the 611 action and the petition both arose out the contract and development in approximately 2003. She also found that, while 611 was the plaintiff in the 611 action, each of 611 and R.D. Backhoe is a privy to Mr. Dick. She went on to find this is a classic case of *res judicata* because exactly the same issues are at the core of those proceedings. She found further that even if a *res judicata* analysis did not apply, the limitation period had long since elapsed. Accordingly, she struck the petition as an abuse of process under Rule 9-5(1) of the Supreme Court Civil Rules, B.C. Reg. 168/2009.
- [9] On the application for a declaration that Mr. Dick, R.D. Backhoe and 611 were vexatious litigants, Madam Justice Brown noted there have been only two proceedings regarding this matter. Nevertheless, she also noted that Mr. Dick and his entities have brought numerous other actions in the British Columbia Supreme Court. She concluded that Mr. Dick and his related entities have habitually, persistently and without reasonable grounds instituted vexatious legal proceedings. In these circumstances she made the declarations sought and ordered special costs against Mr. Dick in recognition of the costs incurred in responding to vexatious proceedings.
- [10] On August 16, 2016, R.D. Backhoe filed a notice of appeal to this Court.

- [13] Madam Justice Fenlon recognized that the only issue before her was whether Mr. Dick should be granted an extension of time to file an application on behalf of the appellant to vary the security for costs order. She set out the settled test to determine whether such an order should be made. After correctly setting out the test, she considered the circumstances relevant to the exercise of her discretion.
- [14] She noted that Mr. Dick had been properly served, but did not read the materials and did not attend the hearing. She recognized that when he was told of the order he immediately expressed his intention to apply to vary it. Mr. Dick was late in making the application and despite his experience as a frequent litigator in the Court and his awareness of the Rules, he offered no real explanation for missing the deadline. The critical part of her judgment is found at paragraphs 9-11:
- [9] Generally, in dealing with an application to extend a time requirement, the Court is addressing the merits of the underlying appeal. Here, as Madam Justice Dickson noted in her reasons, there appears to be very little merit to the underlying appeal, which is from Madam Justice Brown's finding that the action brought by the appellant is barred because it is the same action that was brought and dismissed in 2013 by Mr. Justice Steeves.
- [10] However, the precise step for which an extension is sought is to vary an order requiring the appellant to post security for costs, including costs below and costs relating to the appeal from the original decision of Mr. Justice Steeves. In my view, it does not appear that there is a likelihood of success with respect to Mr. Dick's application to vary. The basis for that order, as set out in the reasons for judgment of Madam Justice Dickson, is sound.
- [11] On either count, and given the background of this protracted litigation, generally between the same parties, I conclude that it is not in the interests of justice to grant the extension Mr. Dick seeks.
- [15] It is evident that the chambers judge exercised her discretion to refuse to grant an extension of time to apply to vary the security for costs order because she saw no merit in that application. Her view was informed also by her assessment that there was very little merit in the underlying appeal: an opinion she shared with Dickson J.A. In sum, the judge concluded that it was not in the interests of justice to grant the extension given the background of protracted litigation between substantially the same parties.
- [16] On this application, Mr. Dick did not identify any errors in principle underlying the order we are reviewing. In relation to the security for costs order he wanted to have reviewed, he suggested that he had not appreciated that an application for security for costs was going to be made, believing that the proceeding he faced would be the assessment of costs associated with the petition in the Supreme Court. That assessment did not proceed before the application for security for costs was heard. He also argued that the amount sought as security for costs of the petition was out of proportion to any realistic award that would or should be made. It is unclear to me whether he suggests that Dickson J.A. ought not to have made an award for security for costs of the petition costs before they were assessed or that

the amount awarded was too high.

- [17] I observe that the record shows that the respondent went out of its way to advise Mr. Dick of the pending security for costs application and he was properly served. I do not think that Fenlon J.A. misapprehended Mr. Dick's argument or the evidence concerning why he did not attend the security for costs application.
- [18] Madam Justice Dickson, in the original security application, was, in any event, aware that the costs of the petition had not yet been assessed and set security at an amount that reflected the possibility that the assessment might be lower than requested. She also allowed for the possibility of varying the amount of security in light of the actual assessment. In approaching the matter in this way, Dickson J.A. exercised her discretion on proper principles.
- [19] Mr. Dick's argument does not support a conclusion that there was merit to his attempt to vary the security for costs order. What is important to us on this application is that it does not support an argument that Fenlon J.A. erred in her assessment of the merits of the security order in deciding whether to extend time to allow it to be reviewed.
- [20] Mr. Dick also attempted to explain to us why he was late in seeking to review the security for costs order and why therefore he needed an extension of time to do so. Mr. Dick had every opportunity to explain to Fenlon J.A. why he missed the deadline. She was not persuaded that he had an adequate explanation for missing it. I do not think there is any proper basis that would justify us interfering with Fenlon J.A.'s conclusion on this question.
- [21] In my view, Mr. Dick cannot demonstrate any proper basis upon which this Division should interfere with the order. The single justice applied the correct test, considered the material circumstances, and reached a judgment about what the interests of justice required. In doing so she exercised her discretion. She did not err in principle or misconceive any relevant facts or information.
- [22] I would, accordingly, dismiss the application to vary or discharge the extension order.
- [23] I turn now to the applications of the respondent.
- [24] It is common ground that security for costs has not been posted. The respondent is, accordingly, in a position to apply for an order that the appeal be dismissed as abandoned. I see no reason why this order should not be made. An order for at a minimum security for costs of the appeal and costs of the proceeding below were clearly appropriate. There is no merit to a challenge to those orders. Moreover, I share the view of both Madam Justice Dickson and Madam Justice Fenlon that there is no merit to the underlying appeal. It is evident from the reasons of Madam Justice Brown that the petition was explicitly acknowledged by the appellant to be an effort to overturn the trial decision of Mr. Justice Steeves and the decision of this Court upholding that judgment. Madam Justice Brown properly recognized that the issues raised in the petition were *res judicata*, as well as barred by operation of the Limitation Act. These conclusions are amply supported by the record. In

the circumstances, the interests of justice require that this litigation be brought to an end.

[25] Accordingly, I would dismiss the appeal as abandoned. It is unnecessary to consider the other grounds on which the respondent seeks to have the appeal dismissed.

[26] I turn now to consider the respondent's application to have Mr. Dick, RD Backhoe and 611481 BC Ltd. declared vexatious litigants and be enjoined from bringing further appeals, motions or applications against Graham and related parties.

[27] It is certainly the case that Mr. Dick and his companies have demonstrated a pattern of conduct in this Court which readily can be characterized as vexatious in repeatedly pursuing meritless proceedings. They have demonstrated similar conduct in the Supreme Court. I agree with Graham Construction when they characterize Mr. Dick's conduct on behalf of his companies as including "a persistent and unreasonable pattern of commencing baseless actions and appeals, bringing actions which are res judicata or engage issue estoppel, attempting collateral attacks on orders of this Court and the Supreme Court and attempting to appeal and/or vary orders in every manner available to them".

[28] Section 29 of the Court of Appeal Act, R.S.B.C. 1996, c. 77 provides that:

If, on the application of any person, a justice is satisfied that a person has habitually, persistently and without reasonable cause commenced vexatious proceedings in the court, the justice may, after hearing that person or giving that person an opportunity to be heard, order that proceedings must not be brought or commenced in the court without leave of a justice.

[29] A non-exhaustive list of the considerations this Court may take into account in deciding whether to make a vexatious litigant order were set out by Mr. Justice Donald in *Lindsay v. Canada (Attorney General)*, 2005 BCCA 594. They include:

The respondents urged on us the summary provided by Henry J. in *Re Lang Michener et al.* and *Fabian et al.* (1987), 37 D.L.R. (4th) 685 at 691, 59 O.R. (2d) 353 (H.C.J.):

From these decisions the following principles may be extracted:

- a) the bringing of one or more actions to determine an issue which has already been determined by a court of competent jurisdiction constitutes a vexatious proceeding;
- b) where it is obvious that an action cannot succeed, or if the action would lead to no possible good, or if no reasonable person can reasonably expect to obtain relief, the action is vexatious;
- c) vexatious actions include those brought for an improper purpose, including the harassment and oppression of other parties by multifarious proceedings brought for purposes other than the assertion of legitimate rights;
- d) it is a general characteristic of vexatious proceedings that grounds

- e) and issues raised tend to be rolled forward into subsequent actions and repeated and supplemented, often with actions brought against the lawyers who have acted for or against the litigant in earlier proceedings;
- f) in determining whether proceedings are vexatious, the court must look at the whole history of the matter and not just whether there was originally a good cause of action;
- g) the failure of the person instituting the proceedings to pay the costs of
- h) unsuccessful proceedings is one factor to be considered in determining whether proceedings are vexatious;
- i) the respondent's conduct in persistently taking unsuccessful appeals
- j) from judicial decisions can be considered vexatious conduct of legal proceedings.

[30] While our focus on whether an order should be made in this Court depends on the litigant's conduct in this Court, our analysis may also be informed by the litigant's conduct in the courts below.

[31] I am satisfied, on reviewing the record of Mr. Dick and his companies' conduct in this Court standing alone, that a vexatious litigant order is fully justified. The current appeal is wholly without merit. It is an example of his incorrigible tendency to bring proceedings to determine issues which have already been decided in circumstances where it is obvious that the appeal cannot succeed. Moreover, Mr. Dick's conduct in respect of his litigation involving VanCity in this Court reinforces the conclusion that he ignores the most explicit statements that his proceedings are without merit and persists in bringing meritless further proceedings.

[32] I am satisfied that, even though I propose that we dismiss this appeal, a vexatious litigant order should nonetheless be made both to protect the integrity of this Court's process and to prevent the respondent and related parties being further burdened by the need to respond to wholly unmeritorious proceedings.

[33] Accordingly, I would make an order that RD Backhoe Services Inc., 611481 BC Ltd. and Mr. Dick and their respective agents be prohibited from commencing any further appeals or bringing any further motions or applications against the respondent, Graham Construction and Engineering Inc. or its subsidiaries, parent companies, partners successors, agents, officers, directors or employees without leave of this Court. I would however make the following exceptions to the requirement for leave in three circumstances. First, where an appeal is taken from a proceeding in the Supreme Court in respect of which leave has been granted to Mr. Dick or his companies by the Supreme Court to start the proceeding. Second, an appeal taken from a proceeding in the Supreme Court in which Mr. Dick or his companies were named as defendants or respondents. Third, an appeal in this Court in which Mr. Dick or his companies are respondents.

- [34] In conclusion, I would dismiss the application to vary or discharge the extension order, dismiss the appeal as abandoned, and make the vexatious order in the terms set out above.
- [35] Finally, although this appeal is without merit, I would not order increased or special costs.
- [36] KIRKPATRICK J.A.: I agree.
- [37] FRANKEL J.A.: I agree.
- [38] KIRKPATRICK J.A.: The orders will go in the terms set out by Mr. Justice Harris.
- "The Honourable Mr. Justice Harris"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/ca/17/00/2017BCCA0091.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-d-backhoe-services-inc-v-graham-construction-and-engineering-inc-2017>

Prepared on 28 October 2026 · Esheria