

CANADA / JUDGMENT

Ram v. British Columbia (Family Maintenance Enforcement Program)

2015 BCSC 1368

COURT

Supreme Court of British Columbia

DECIDED

7 July 2015

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2015 BCSC 1368 Ram v. British Columbia (Family Maintenance Enforcement Program) IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Ram v. British Columbia (Family Maintenance Enforcement Program), 2015 BCSC 1368 Date: 20150707 Docket: A881746 Registry: Vancouver Between: Munendra Kumar Ram Applicant And Director, Family Maintenance Enforcement Program, and Insurance Corporation of British Columbia Respondents Before: The Honourable Mr. Justice Voith Oral Reasons for Judgment In Chambers Counsel for the Applicant: M.C. Canofari Counsel for the Respondent, Director, Family Maintenance Enforcement Program: A.M. Accettura For the Respondent Insurance Corporation of British Columbia No appearance Place and Date of Trial/Hearing: Vancouver, B.C. July 6, 2015 Place and Date of Judgment: Vancouver, B.C. July 7, 2015

- [1] THE COURT: The applicant, Mr. Ram, seeks two distinct orders: first, that the respondent, Director of Family Maintenance Enforcement Program (the "Director"), withdraw a notice of attachment, bearing number 784917 and dated May 3, 2013 (the "Notice of Attachment"), that was earlier served on the Insurance Corporation of British Columbia (the "Corporation"), and second, that the Corporation forthwith pay Mr. Ram \$32,314.52, which represents a portion of the settlement funds otherwise due to Mr. Ram pursuant to a settlement agreement. The Corporation takes no position on this application.
- [2] The following facts, which are straightforward and not in dispute, underlie this application:
1. Mr. Ram owes child support pursuant to the order of Mr. Justice Scarth dated February 21, 1990.
 2. As of July 2, 2015, the support arrears owed by Mr. Ram were, inclusive of interest, in excess of \$32,000.
 3. On May 3, 2013, the Director issued notices of attachment to various parties including the Corporation pursuant to s. 15 of the Family Maintenance Enforcement Act, R.S.B.C. 1996, c. 127.

4. A portion of the Notice of Attachment stated, "You, (the Corporation), must deduct money from any sum you presently owe to the debtor or which you may owe to the debtor in the future until May 3, 2018."
 5. Mr. Ram was injured in a motor vehicle accident on July 4, 2013.
 6. On May 21, 2015, Mr. Ram's motor vehicle claim was settled for \$70,203.57.
 7. As a result of the Notice of Attachment, the Corporation withheld a portion of the agreed upon settlement. The amount that was withheld is the \$32,314.52 figure that is the subject matter of this application.
- [3] This application is also the direct product of the recent judgment of Mr. Justice Jenkins in *Loft v. Nat*, 2015 BCSC 198. In *Loft*, the defendants sought double costs as a result of two earlier offers to settle that they had made. Jenkins J. said:
- [6] There was a unique clause in the offers to settle which related to the Insurance Corporation of British Columbia ("ICBC") having been served with a Notice of Attachment and/or Requirement to Pay from the settlement funds, assuming one of the offers was accepted, obligating ICBC to firstly pay the Family Maintenance Enforcement Program ("FMEP") the amount claimed in the Notice of Attachment and/or Requirement to Pay before paying out the balance of the settlement to Mr. Loft.
- [7] By way of background, while this litigation was proceeding, Mr. Loft was involved in family proceedings with his former spouse and with a previous common law partner. In those two proceedings there were arrears of support which at the time of service of the Notice of Attachment and/or Requirement to Pay were in the range of \$100,000. Apparently FMEP had gotten wind of the claim in this action and were hoping the arrears of support could be paid from the proceeds of settlement or a judgment in favour of Mr. Loft.
- [8] The wording of the applicable paragraph in the offers to settle is significant and stated: The defendants confirm that this offer is made with the acknowledgement that the Insurance Corporation of British Columbia ("ICBC") has been served with a Notice of Attachment and/or Requirement to Pay and is therefore obligated to first pay to Family Maintenance Enforcement Program ("FMEP") from the Settlement Payment in this matter. The defendants and /or ICBC are required to first meet any obligation to FMEP before paying monies to the plaintiff in relation to the Settlement Payment, pursuant to the Family Maintenance Enforcement Act, R.S.B.C. 1996, c. 127 and amendments and regulations thereto.
- [9] The plaintiff did not respond to the offers to settle. This action proceeded to trial commencing January 29, 2013 and concluded with submissions in August 2013.
- [10] ICBC was not a party in this action.

- [13] The plaintiff also submits that the Notice of Attachment and/or Requirement to Pay should not have been included in the offers to settle as those documents were issued to ICBC, not to the defendants, and ICBC was not and would not become obligated to pay the settlement amount or the amount of any judgment. The Family Maintenance Enforcement Act provides for a notice of attachment in s. 15 (1) which states: 15(1) If the debtor has at any time defaulted in a payment required under a maintenance order, the director may serve a notice of attachment in the prescribed form on a person who is indebted or likely to become indebted to the debtor. A "debtor" under the Act is defined as: "debtor" means a person required under a maintenance order to pay maintenance;
- [14] The plaintiff submits that service of the Notice of Attachment and/or Requirement to Pay on ICBC would not attach the settlement funds, if one of the offers had been accepted, as ICBC would not have been indebted to the plaintiff. According to the wording of the settlement offers, it was the defendants who had offered to pay the plaintiff the settlement funds. ICBC was obligated to indemnify the defendants and had no obligation to pay the plaintiff the settlement amount upon acceptance of an offer to settle.
- [4] Jenkins J. ultimately concluded, *inter alia*:
- [31] I am unable to make a costs award in favour of the defendants on the basis of the defendants' two offers to settle as I conclude they were not offers that ought reasonably to have been accepted on the dates the offers were made. I accept both submissions put forward by the plaintiff in this regard. Even if the plaintiff was inclined to accept one of the offers to settle, the condition included in the offers relating to the Notice of Attachment and/or Requirement to Pay from FMEP should not have been a term of the offer. ICBC was not and would not have been indebted to Mr. Loft. ICBC was not a party to the action and its obligation was only to indemnify the defendants for negligence if the court awarded damages to Mr. Loft. As well, the offers of settlement were made by the defendants, not ICBC, and the defendants had no obligation to ICBC if one of the offers was accepted.
- [5] It is relevant that on March 25, 2015, the Corporation filed a notice of application for leave to appeal the Loft decision. On April 21, 2015, leave to appeal in Loft was granted. I understand the Corporation expects to file its factum in the next week or two. The application response filed by the Director on this application also confirms that the Director intends to seek intervener status in that appeal. Still further, I was advised that, as a result of a memorandum of understanding, made between the Corporation and the Director on or about June 4, 2015, all funds that have or will be withheld by the Corporation due to the receipt of a notice of attachment from the Director will now be held by the Director, in trust, pending the determination of the Loft appeal.
- [6] The applicant's position is straightforward. He argues that Loft is on point and that it is determinative of this application. He further argues that it was open to the Corporation or the Director to seek a stay of Loft. Absent such a stay, there is no principled basis for the Director to continue to seek to withhold the monies owed to Mr. Ram, or for the Director

and the Corporation to enter into a memorandum of understanding that results in the ongoing withholding of settlement monies from plaintiffs to whom such settlement monies are owed.

- [7] The respondent Director, in turn, argues that I am not bound to follow Loft and that the considerations or circumstances identified in *Re Hansard Spruce Mills*, [1954] 4 D.L.R. 590, are engaged. Specifically, counsel for the Director argues, respectfully, that Loft was not fully considered. In particular, the Director was not apprised of the issues raised in Loft and was not provided with any opportunity to properly explain the relevant provisions of the regime that is created by the Family Maintenance Enforcement Act, R.S.B.C. 1996, c. 127 [FME Act], to Jenkins J.
- [8] Furthermore, it does not appear that any of (i) s. 76 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231, which addresses third-party rights, (ii) s. 16(4) of the FME Act, which provides a means of determining if an attachee is liable under a notice of attachment, or (iii) case law such as the decision in *British Columbia (Director of Maintenance Enforcement) v. I.W.A. Forest Industry Pension Plan* (1991), 61 B.C.L.R. (2d) 264 (C.A.), which provides guidance both on how the FME Act should be interpreted and on how its objects can best be advanced, were provided to Jenkins J. In the result, the Director suggests that I should decline to follow Loft and that I should dismiss the present application.
- [9] I do not consider the position of either party is appropriate. Instead, the position of each party is unnecessarily inflexible in circumstances where a more measured result is appropriate. The Director's pre-Loft practice, as it relates to the Corporation and the use of notices of attachment, had been in place, I am told, since 1990. Hundreds of notices of attachment are delivered annually resulting in significant sums being collected indirectly from persons who have defaulted on their support obligations.
- [10] In *British Columbia (Director of Maintenance Enforcement)*, the court said: 20 The Family Maintenance Enforcement Act is an example of what is sometimes referred to as "social legislation". It is designed to address the evil of widespread default in payments required to be made by family maintenance payment orders. In essence it makes available to persons entitled to maintenance payments the power and the resources of the state to enforce payment and thereby alleviate the distress which is the frequent consequence of non-payment. It is of the class of enactment to which the court has traditionally given a "purposive" construction.
- [11] At the same time, the Director's historical practice has been successfully challenged, and although Loft is presently under appeal, counsel for the Director accepts that, depending on the outcome of that appeal, some amendment of the FME Act may become necessary.
- [12] The memorandum of understanding that has been developed between the Corporation and the Director has much to commend it. It gives rise to a prudent balancing of various interests. It ensures that the respective positions of the parties are, pending the Loft appeal, neither advanced nor prejudiced. They are simply held in abeyance. It also provides a

means by which the risk of potentially inconsistent decisions from this court in respect to the same legal issue, and the uncertainty that would likely arise from such inconsistency, can be avoided. Furthermore, there is no particular urgency attached to this application and it is clear that the Loft appeal is being pursued diligently.

[13] In such circumstances, and having regard to the considerations I have described, I consider it appropriate to adjourn the present application generally. This will enable the Court of Appeal to provide the parties, the profession, and this court with the guidance that is required.

[14] I do not consider that either party should receive the costs of this application. "Voith J."

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