

CANADA / JUDGMENT

Salloum v. Smith

2022 BCCA 342

COURT

British Columbia Court of Appeal

DECIDED

23 September 2022

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2022 BCCA 342 Salloum v. Smith COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Salloum v. Smith, 2022 BCCA 342 Date: 20220923 Docket: CA48328 Between: Nuha Salloum, Ryan Dean and CICC College of Immigration and Citizenship Consultants Corp. Appellants (Plaintiffs) And Paul Smith c.o.b.a. Smiths IP and Paul Raymond Smith d.b.a. Smiths IP, Barristers and Solicitors, Patent and Trademark Agents, and Andy Chow and Karen Chow Respondents (Defendants) Before: The Honourable Mr. Justice Willcock (In Chambers) On appeal from: An order of the Supreme Court of British Columbia, dated May 9, 2022 (Salloum v. Smiths IP, Vancouver Dockets S219121; S2111281). Oral Reasons for Judgment The Appellant, appearing in person and on behalf of CICC College of Immigration and Citizenship Consultants Corp. (via videoconference): N. Salloum The Appellant, appearing in person (via videoconference): R. Dean The Respondent, appearing in person and on behalf of Paul Smith and Andy Chow: K. Chow Place and Date of Hearing: Vancouver, British Columbia September 23, 2022 Place and Date of Judgment: Vancouver, British Columbia September 23, 2022 Summary: The applicants seek an extension of the time within which a notice of appeal may be filed. The respondents oppose the extension on the ground that the appeal is lacking in merit. An application for leave to appeal was filed on time, but a notice of appeal ought to have been filed as leave was not required. In accordance with practice directions, the application for leave is ordered to stand as a notice of appeal not requiring leave (nunc pro tunc). An extension of time is not required. It is not necessary to address the merits of the proposed appeal.

- [1] WILLCOCK J.A.: On June 3, 2022, the applicants, Nuha Salloum, Ryan Dean, and CICC College of Immigration and Citizenship Consultants Corp., filed a notice of application for leave to appeal to this Court from the order of Justice Groves of the British Columbia Supreme Court, pronounced May 9, 2022.
- [2] The applicants were under the mistaken impression that the order they sought to set aside was a limited appeal order. It is not. Leave is not required.

- [3] Despite the fact they were so informed by the respondents' counsel, they appeared to speak to the leave application in Court of Appeal chambers on August 30, 2022. The respondents took the position that leave was not necessary, but sought the costs incurred for the unnecessary appearance. No party referred to this Court's practice direction with respect to the appropriate manner in which to proceed in those circumstances.
- [4] The respondents advised the justice in chambers that, while leave was not required to bring the appeal, they would not consent to an extension of the time within which the appeal could be commenced.
- [5] Justice Newbury made no order but, rather, gave directions to the parties, later described by the Registrar in correspondence in response to an application to settle an order, as follows:
- a) Justice Newbury made a direction that leave is not required;
 - b) Justice Newbury directed that a notice of appeal should be filed;
 - c) Justice Newbury directed that an application for an extension of time should be filed;
 - d) Costs of the proceeding were in the cause of the appeal.
- [6] On September 1, 2022, the applicants filed a notice of appeal and an application for an extension of time. That application is before me today.
- [7] While there was a direction that a notice of appeal should be filed, there was no order granting the extension of time for its filing, nor was the status of the June 3 application for leave to appeal settled.
- [8] In the circumstances, I am of the view that it remains open to me to make such orders as are necessary and incidental to the appeal pursuant to s. 30 of the Court of Appeal Act, S.B.C. 2021, c. 6, and in doing so I am not limited by the directions given by Newbury J.A.
- [9] Under the former Court of Appeal Rules, there was some uncertainty with respect to how to deal with applications for leave filed within time when a notice of appeal ought to have been filed because leave was not required. The uncertainty was addressed by Justice Bennett for this Court in *Gonzalez v. British Columbia (Attorney General)*, 2019 BCCA 88. After addressing the evolution in our practice directives, she described the manner in which to proceed as follows:
- [30] The former practice directive was replaced by the current directive on May 8, 2017: The Court will no longer entertain applications for directions as to whether leave to appeal is required. If a party is unsure if leave to appeal is required, the party should file a Notice of Application for Leave to Appeal and seek leave to appeal. If leave to appeal is not required, the presiding justice may order that the Notice of Application for Leave to Appeal stand as a Notice of Appeal along with any necessary extension(s) of time.

- [31] The 2017 practice directive, which was intended to stop the steady flow of applications for directions to this Court on the issue of whether leave to appeal was required, does not require the simultaneous filing of two notices in the event of uncertainty. It instead contemplates the following process: if a party filed a notice of application for leave to appeal but was later found to have an appeal as of right, then the chambers judge would either (a) convert the notice of application for leave to appeal into a notice of appeal or (b) require a notice of appeal to be filed in conformity with the rules.
- [32] The reference in the directive to "any necessary extension(s) of time" was only meant to cover the filing of subsequent materials, as the applicable deadlines would have likely passed before the matter could come before the chambers judge. No other extensions are necessitated by the practice directive. So long as the notice of application for leave to appeal was filed within the time limit for bringing the appeal, the judge would convert the application, *nunc pro tunc*, into a notice of appeal and no extension of time to file the notice of appeal would be required.
- [10] I had expressed similar views in *Forjay Management Ltd. v. Peeverconn Properties Inc.*, 2018 BCCA 188.
- [11] In my view, the practice described in *Gonzalez* is not affected by the 2022 amendments to the Act or Rules. In accordance with that practice, the applicants' notice of application for leave to appeal ought to have been ordered to stand as a notice of appeal *nunc pro tunc*, and neither an application for an extension of time nor a notice of appeal ought to have been considered to be necessary. In my view, it remains open for me to make that order now.
- [12] The June 3, 2022 notice of application for leave to appeal will stand as a notice of appeal not requiring leave. The notice of appeal filed on September 1, 2022, pursuant to the direction of Justice Newbury, will stand in the place of the June 3, 2022 notice because it more clearly sets out the grounds of appeal and will better serve the parties. The parties should proceed now as if the appeal was commenced on June 3, 2022 within time, and the effective notice of appeal is that which was filed on September 1, 2022, replacing the earlier document.
- [13] The time for filing of the appeal record and book of transcripts will begin to run from the date of this order. The parties will have to govern themselves by the Rules, and treat this as an appeal which commences today. In particular, the time for filing an appeal record and book of transcripts runs from today.
- [14] It should be clear this order is made without addressing the merits of the proposed appeal, so as to give effect to the practice described in *Gonzalez*. I am not saying anything about whether this appeal has any merit; simply that it ought to have been treated as having been commenced in time, and giving directions with respect to how it now moves forward.

[15] I am not inclined to make any order with respect to costs because Justice Newbury has already made a direction that costs of the proceeding before her were in the cause of the appeal. I see no reason to regard the conduct of either party before me as warranting any order other than that the costs of today's proceeding will be costs in the cause when the appeal is ultimately determined. "The Honourable Mr. Justice Willcock"

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