

CANADA / JUDGMENT

## Semenoff v. Bridgeman

2015 BCCA 139

COURT

British Columbia Court of Appeal

DECIDED

31 March 2015

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2015 BCCA 139 Semenoff v. Bridgeman

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Semenoff v. Bridgeman,

2015 BCCA 139

Date: 20150331

Docket: CA041029

Between:

Robert Semenoff,

Executor of the Estate of Bill Semenoff, Deceased

Appellant

(Plaintiff)

And

Lewis J. Bridgeman

Respondent

(Defendant)

And

Marion Demosky and Michael William Semenoff

Respondents

(Third Parties)

Before:

The Honourable Mr. Justice Chiasson

The Honourable Madam Justice MacKenzie

The Honourable Mr. Justice Goepel

On appeal from: An order of the Supreme Court of British Columbia,  
dated June 7, 2013 (Semenoff Estate v. Bridgeman, 2013 BCSC 1022,  
Rossland Registry Docket 9044).

The Appellant appearing In Person

Counsel for the Respondent,

Lewis J. Bridgman:

C.E. Selby

Counsel for the Attorney General of British Columbia:

L. Greathead

Place and Date of Hearing:

Vancouver, British Columbia

March 9, 2015

Place and Date of Judgment:

Vancouver, British Columbia

March 31, 2015

Written Reasons by:

The Honourable Mr. Justice Goepel

Concurred in by:

The Honourable Mr. Justice Chiasson

The Honourable Madam Justice MacKenzie

Summary:

This is an application for a review of an order by a single justice of this Court in chambers dismissing an application by the appellant to remove his appeal from the inactive list. The prosecution of the appeal had been significantly delayed prior to the hearing of the application. The chambers judge did not consider it in the interest of justice to remove the appeal from the inactive list given the delay, the prejudice to the respondents, and most significantly, the lack of

merit to the appeal. Held: Appeal dismissed. The chambers judge did not err in law, in principle, or misconceive the facts going to a material issue in the application.

Reasons for Judgment of the Honourable Mr. Justice Goepel:

## INTRODUCTION

- [1] The appellant, Robert Semenoff, applies to review an order made by Mr. Justice Frankel, in chambers, dismissing his application to remove his appeal from the inactive appeal list pursuant to s. 25(2) of the Court of Appeal Act, R.S.B.C. 1996, c. 77 (the "Act"). Because the appellant failed to obtain his order, his appeal stands, as of January 1, 2015, dismissed as abandoned pursuant to s. 25(5) of the Act.
- [2] A review application is not a rehearing of the application: *DeFehr v. DeFehr*, 2002 BCCA 139 at para. 6. To succeed the appellant must establish that the chambers judge erred in law or principle or misconceived the material facts: *Haldorson v. Coquitlam (City)*, 2000 BCCA 672 at para. 7. If the chambers judge did not commit any of the aforementioned errors, then the Division of the Court in review will not vary the order of the chambers judge.

## BACKGROUND

- [3] To put the application into context, it is necessary to review the underlying litigation. The appeal arises from the dismissal of the appellant's claim in professional negligence against Mr. Bridgeman. The reasons of the trial judge are indexed as 2013 BCSC 1022.
- [4] The appellant commenced the litigation on August 27, 2007. The background of the matter was summarized by Madam Justice MacKenzie in her reasons of August 27, 2013 (in Chambers), ordering the appellant to post security for the costs of the appeal:
- [4] In the 1970's [sic], Polly Semenoff transferred her interest in an acreage at Ootischenia, B.C. (the "Property") to her four children, Bill Semenoff, Marion Demosky, Michael Semenoff, and Steve Semenoff, as joint tenants. The four siblings were registered as joint tenants.
- [5] Bill lived on the Property for many years. He sought to subdivide the Property so he could retain his home and a lot, and his three siblings could also have a lot. However, this proved difficult due to potable water issues.
- [6] In 1987, the four siblings entered into an agreement prepared by Mr. Bridgeman, Bill's lawyer. The agreement provided that the Property was registered in all four names, as of that date the Property could not be subdivided, Bill could remain living on the Property and he would buy it when it was subdivided and provide each of his three siblings with \$7,000 toward an undetermined sale price and the registered ownership of the property would not change until a subdivision could be effected.
- [7] By 1990, it appeared a subdivision would be impossible and the siblings agreed Bill could continue to live on the Property and pay occupational rent.

- [8] In 1990, Bill had Mr. Bridgeman prepare his will. He died on September 15, 2006, and the surviving siblings effected the transmission of the Property to them as surviving tenants.
- [9] In August 2007, Mr. Semenoff brought a claim against Mr. Bridgeman, alleging Mr. Bridgeman was negligent in providing legal services to Bill in 1987 and 1990. Generally, Mr. Semenoff claimed Mr. Bridgeman failed to investigate the state of title to the Property, and if he had not failed to do so, he would have been prompted to sever the joint tenancy so that Bill's interest in the Property would have passed to his estate.
- [10] Mr. Bridgeman denied all claims against him, but alleged that if he were found negligent, Marion Demosky and Michael Semenoff (the "Third Parties") were responsible as third parties for some or all of the losses sustained.
- [11] During the trial management proceedings, Mr. Semenoff brought an application to amend his notice of civil claim and requested an adjournment of the trial to explore the new matters he raised. On February 1, 2013, Mr. Justice McEwan permitted the notice of civil claim to be amended, but denied Mr. Semenoff's request for an adjournment.
- [12] The trial took place in February 2013, before Mr. Justice McKinnon. At the close of Mr. Semenoff's case, the Third Parties elected not to call evidence and applied under Rule 12-5(6) of the Supreme Court Civil Rules, B.C. Reg. 168/2009, for dismissal of Mr. Semenoff's case on the basis the evidence was insufficient to support the claim against Mr. Bridgeman.
- [13] The judge first concluded that a third party is entitled to invoke an insufficient evidence motion at the close of the plaintiff's case. The judge also noted that if the motion were granted in this case, it would dispose of all claims advanced.
- [14] The judge then concluded Mr. Semenoff had failed to establish any of the claims advanced. On June 7, 2013, the judge granted the Third Parties' application for dismissal of Mr. Semenoff's claim.
- [5] The trial judge found that the appellant, in essence, claimed that Mr. Bridgeman was professionally negligent in failing to determine that the family lot was held in joint tenancy and that, therefore, he failed to protect the interest of the appellant's father in that lot. The trial judge stated his conclusions as follows:
- [60] The plaintiff has utterly failed to establish any of the many claims he has made. He failed to establish the nature and extent of the retainer between Bill and the defendant Bridgeman. He led no expert evidence as to the duty that might be owed in these circumstances.
- [61] The evidence that he did proffer, leads me to conclude that Mr. Bridgeman was engaged to put in letter form that which the siblings had agreed upon. I also accept that Mr. Bridgeman was not aware at any relevant time just how ownership was recorded in the land titles office, nor, given the evidence that his retainer was limited in the manner I have set out, was he obliged to investigate the state of title. In any event, the plaintiff led no evidence as to the standard of care one should expect from a solicitor in these circumstances.

- [62] The inferences available to me from the evidence at trial is that the siblings, including Bill, knew the property was registered in joint tenancy, knew what a joint tenancy meant and were content to have it remain that way, at least until subdivision occurred.
- [63] In the result, I accept that the third party motion for dismissal should be granted.
- [6] On July 30, 2012, the appellant commenced a second action against Mr. Bridgeman and his wife, Anne Bridgeman, alleging that Mr. Bridgeman fraudulently conveyed his interest in their matrimonial home to Mrs. Bridgeman for the purpose of hindering his future potential creditors. In particular, the appellant alleged the transfer was made to defeat the execution of any judgment he may obtain against Mr. Bridgeman. In connection with the fraudulent conveyance action, the appellant filed a certificate of pending litigation against the Bridgeman's property.
- [7] On October 11, 2012, Mr. Justice McEwan dismissed the fraudulent conveyance action on the basis that it was an abuse of process. He further ordered the cancellation of the certificate of pending litigation and special costs against Mr. Semenoff.
- [8] On October 23, 2012, Mr. Semenoff filed an appeal from Mr. Justice McEwan's order.
- [9] On May 2, 2013, Mr. Justice Hall of this Court stayed that appeal until 45 days after the delivery of judgment in the professional negligence action. At the time that the stay was granted, the trial judge had reserved judgment in the professional negligence action.
- [10] The trial judgment was rendered on June 7, 2013. The appellant filed a notice of appeal from that decision on July 4, 2013. Mr. Justice Frankel summarized the proceedings that have taken place in this Court:
- [10] On August 26, 2013, Madam Justice MacKenzie refused Mr. Semenoff's application for indigent status on this appeal and granted Mr. Bridgeman's application for an order that Mr. Semenoff post security for the costs of the appeal. That order required Mr. Semenoff to post security in the amount of \$8,610.00 by October 4, 2013. Madam Justice MacKenzie adjourned Mr. Bridgeman's application for security for trial costs until after those costs had been determined.
- [11] Also on August 26, 2013, Madam Justice MacKenzie, on the application of the Bridgemans, extended the stay of the appeal from Mr. Justice McEwan's order until 45 days after the delivery of judgment on the appeal from Mr. Justice McKinnon's order.
- [12] On August 29, 2013, Mr. Semenoff filed a motion to review the indigent status and security for the appeal costs orders before a division of this Court. In September 2013, motion books were filed by Mr. Semenoff, Mr. Bridgeman and Michael Semenoff and Marion Demosky. It is my understanding that the Deputy Registrar attempted to contact Mr. Semenoff regarding setting a date for the motion, but he did not respond to the voice-mail message she left for him.

[13] Mr. Semenoff posted security for the appeal costs on September 30, 2013.

[14] On November 18, 2013, counsel for Mr. Bridgeman wrote to the Registrar of this Court requesting the appointment of a case-management judge. In her letter, counsel stated:

Mr. Semenoff is appealing the dismissal of his action by Mr. Justice McKinnon on June 7, 2013. It was a lengthy and expensive process taking nearly six years to get to trial. In the later stages the parties had the benefit of a case management judge and believe that similar direction on the appeal would be of great assistance to the orderly conduct of the appeal.

Mr. Semenoff is now late in filing his appeal record and transcripts although he recently suggested that he is ready to do so.

A case-management judge was not appointed. I was advised by counsel for Mr. Bridgeman that she did not pursue the matter as she was engaged in other matters arising out of the actions commenced by Mr. Semenoff and because it was not her client's responsibility to move the appeal forward.

[15] On May 13, 2014, Mr. Semenoff wrote to the Registrar requesting a prehearing conference pursuant to Rule 29 of the Court of Appeal Rules. In that letter Mr. Semenoff stated, in part:

My appeal has been outstanding for almost a year now.

I have made much progress in terms of legal research and preparation of material but given the time pressure, and that I have a number of steps that I need to take, I would appreciate some guidance as to the extent of argument and affidavit materials that I should present on certain motions.

As I read his letter, Mr. Semenoff was seeking advice generally on how to conduct his appeal and, more particular, with respect to what arguments he might make.

[16] A prehearing conference was not scheduled. Mr. Semenoff took this as an indication his request has been refused. He continued to take no steps to advance his appeal.

[17] On July 4, 2014, the appeal was moved to the inactive list pursuant to s. 25(1) of the Court of Appeal Act.

[18] By letter dated July 4, 2014, the Deputy Registrar of this Court advised Mr. Semenoff his appeal had been placed on the inactive list. She further advised him he could apply to have it removed from the inactive list and that failure to have the appeal removed from the inactive list would result in it standing dismissed as abandoned on January 1, 2015, pursuant to s. 25(5) of the Court of Appeal Act.

[19] On November 24, 2014, Mr. Semenoff filed a notice of motion returnable on December 2, 2014, seeking an order removing the appeal from the inactive list. The following day, Mr. Bridgeman filed a requisition resetting his application for security for trial costs for that same day.

## THE STATUTORY FRAMEWORK

[11] This application concerns s. 25 of the Act. The section, in its entirety, provides as follows:

25 (1) If a certificate of readiness is not filed in accordance with the rules within one year after the filing of the applicable notice of appeal or notice of application for leave to appeal, or if a certificate of readiness has been filed within that period but a notice of hearing has not been filed within 2 months after the filing of the certificate of readiness, the registrar must

- (a) place the appeal or application for leave to appeal on the inactive appeal list maintained in the registry, and
- (b) mail notice of the action taken by the registrar under paragraph (a) to the following persons at their respective addresses for delivery:
  - (i) each counsel of record;
  - (ii) each unrepresented appellant or respondent who has provided the registry with an address for delivery.
- (2) An appeal or application for leave to appeal referred to in subsection (1) must be removed from the inactive appeal list when a justice grants leave to the appellant or the applicant to proceed with the appeal or application for leave to appeal.
- (3) A justice may, in an order under subsection (2), impose terms and conditions and give directions that the justice considers appropriate.
- (4) The registrar must return the appeal or application for leave to appeal to the inactive appeal list and must mail notice of that action in accordance with subsection (1) (b) if
  - (a) a justice makes an order under subsection (2) that requires terms, conditions or directions to be complied with by a specified date and the appellant or applicant fails to comply with those terms, conditions or directions by that date, or
  - (b) in any other case, a certificate of readiness is not filed in accordance with the rules within 180 days after the making of an order under subsection (2) in respect of the appeal or application for leave to appeal.
- (5) If an appeal or application for leave to appeal has remained on the inactive appeal list for 180 consecutive days, on the 181st day it stands dismissed as abandoned.
- (6) An appeal or application for leave to appeal that stands dismissed as abandoned under subsection (5) must not be reinstated unless a justice orders otherwise.

## REASONS OF CHAMBERS JUDGE

[12] Mr. Justice Frankel summarized the test for determining whether to remove an appeal from the inactive list as follows:

- [20] There is no rigid test for determining whether to remove an appeal from the inactive list. The overriding consideration is whether it is in the interests of justice to do so. The factors to be considered are: (a) whether there has been inordinate delay; (b) whether the delay was unexplained or inexplicable; (c) whether there has been prejudice; and (d) the merits of the appeal: *Deline v. Kidd*, 2003 BCCA 170 at para. 11, 180 B.C.A.C. 124; *Olenga v. Insurance Corporation of British Columbia*, 2007 BCCA 87 at paras. 12-13 (Chambers), 235 B.C.A.C. 315, application for review dismissed 2007 BCCA 256, 239 B.C.A.C. 320, application for leave to appeal refused [2007] 3 S.C.R. xiii. The burden is on the appellant: *Cabaniss v. Cabaniss*, 2009 BCCA 333 at para. 14 (Chambers), 274 B.C.A.C. 12.
- [13] He noted that the chambers application was being heard 17 months from when the notice of appeal was filed and well past the time limits set out in this Court's rules for the filing of the appeal record, transcript, appeal book and appellant's factum. He noted, taking into account the stay ordered by Madam Justice MacKenzie pending the posting of security for costs of the appeal, that all those items should have been filed by early November 2013. He further noted that after being advised his appeal had been placed on the inactive list, the appellant waited more than four months before applying to have it removed.
- [14] Mr. Justice Frankel reviewed and considered the submissions made before him. He discussed the delay in proceeding, prejudice to the respondents, and in considerable detail each of the proposed grounds of appeal. He summarized his findings as follows:
- [31] In my view, it is not in the interests of justice to remove this appeal from the inactive list. The delay has been inordinate and, should the appeal be removed from the inactive list it is a certainty that further delays will be occasioned by Mr. Semenoff. Such delays will only add to both the stress suffered by the respondents and to their legal expenses. More importantly, the proposed grounds of appeal are devoid of merit.

In the result, Justice Frankel dismissed the application to remove the appeal from the inactive list.

## THE ADJOURNMENT APPLICATIONS

- [15] In advance of this application, the appellant filed a notice under the Constitutional Question Act, R.S.B.C. 1996, c. 68, according to which he indicated he would be questioning the constitutional validity of:
- (1) the order made in this appeal by Mr. Justice Frankel of December 8, 2014 denying leave to proceed with the appeal, which is on the inactive list;
  - (2) the Court of Appeal Act, R.S.B.C. c.77, s. 28;
  - (3) the Court of Appeal Rules – Part 5 time limits; and
  - (4) the common law allowing a single justice to deny leave to proceed with the appeal which is on the inactive list.

- [16] The appellant served the Attorney General of British Columbia and his representative appeared at the hearing of the application. The Attorney General opposed the granting of any constitutional declarations: first, on the ground that there was an insufficient evidentiary basis to undertake the constitutional challenge; and second, on the ground that the appellant had not provided any legal basis that would support such declarations.
- [17] At the commencement of the hearing, the appellant acknowledged a lack of an evidentiary basis to raise a constitutional challenge. To remedy this defect, he proposed that his present application to review the order of Mr. Justice Frankel be adjourned so that he could commence a constitutional challenge to the legislation in the Supreme Court of British Columbia. The Division denied his application for an adjournment on the basis that to do so would delay this proceeding indefinitely and that it would be prejudicial to the respondents.
- [18] The appellant also sought to adjourn his application on several additional grounds, including that he was not fully prepared to argue the matter. Several of the grounds had nothing to do with the review application. The Division reviewed the various grounds with the appellant and then gave short reasons refusing the adjournment.

## MERITS OF THE REVIEW APPLICATION

- [19] As I noted at the outset of these reasons, a review application is not a rehearing: DeFehr at para. 6, Haldorson at para. 7. To succeed, the appellant must show that the chambers judge was wrong in law or in principle or misconceived the facts.
- [20] In this case, Mr. Justice Frankel correctly set out the factors that must be considered in an application to reinstate an appeal, which factors are well-settled in the case law. He reviewed those factors as they applied to the facts of the case in detail. He noted the delay, the prejudice to the respondents, and most significantly, the lack of merit to the appeal. Having considered the relevant factors he concluded that it was not in the interests of justice to remove the appeal from the inactive list.
- [21] I can see no error in law on the part of Mr. Justice Frankel. He applied the correct legal principles to the question of the reinstatement of an appeal. He did not misconceive any facts that would materially bear upon the application. His assessment of the merits of the appeal is well justified.
- [22] The appellant has not shown that the chambers judge was wrong in law or in principle or misconceived the facts.

## DISPOSITION

- [23] For all of the above reasons, I would dismiss the application to review the order of Mr. Justice Frankel.

"The Honourable Mr. Justice Goepel"

I agree:

"The Honourable Mr. Justice Chiasson"

I agree:

"The Honourable Madam Justice MacKenzie"

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