

CANADA / JUDGMENT

Szopa v. Canada (Attorney General)

2020 BCCA 47

COURT

British Columbia Court of Appeal

DECIDED

28 January 2020

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2020 BCCA 47 Szopa v. Canada (Attorney General)

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Szopa v. Canada (Attorney General),

2020 BCCA 47

Date: 20200128

Docket: CA45625

Between:

Stanislaw Szopa

Appellant

(Plaintiff)

And

The Attorney General of Canada

Respondent

(Defendant)

Before:

The Honourable Madam Justice Bennett

The Honourable Mr. Justice Willcock

The Honourable Mr. Justice Goepel

On an application to vary: An order of the Court of Appeal for British Columbia, dated December 10, 2018 (Szopa v. Canada (Attorney General),

Vancouver Docket CA45625).

Oral Reasons for Judgment

The Appellant, appearing in person:

S. Szopa

Counsel for the Respondent:

A. Gardner

Place and Date of Hearing:

Vancouver, British Columbia

January 28, 2020

Place and Date of Judgment:

Vancouver, British Columbia

January 28, 2020

Summary:

The appellant seeks to vary an order of a justice that dismissed his application for leave to appeal an order which had dismissed his action as showing no cause of action. In the event, this Court converts the appellant's notice of application for leave to appeal into a notice of appeal, the respondent seeks an order quashing the appeal on the basis that it is devoid of merit. Held: The appellant was entitled to bring his appeal as of right notwithstanding its lack of merit.

Accordingly, the order is varied and the notice of application for leave to appeal is converted into a notice of appeal. The appeal is however devoid of any arguable merit and respondent's application to quash the appeal is allowed.

- [1] GOEPEL J.A.: The appellant seeks to vary an order of a justice, pronounced on December 10, 2018, which dismissed his application for leave to appeal the August 30, 2018 order of Mr. Justice Macintosh which had dismissed his action as showing no cause of action. He also seeks a no-fee order.
- [2] In the event this Court converts the appellant's notice of application for leave to appeal into a notice of appeal, the respondent seeks an order quashing the appeal on the basis that it is devoid of merit. In the alternative, the respondent seeks an order for security for costs of the appeal in the amount of \$3,000.

BACKGROUND

- [3] The appellant emigrated from Poland with his family in 1981. In Poland, he had earned a master's degree in mechanical engineering. In the process of immigrating to Canada, he interacted with an official of the Canadian Embassy in Vienna. That official marked down on his application for immigration that his profession was "automobile mechanic" rather than "master mechanical engineer".
- [4] The appellant is of the view that because of that mistake on his papers, he could not find employment in Canada that was suitable to his training and skills. He alleges the government forced him to work in jobs that were beneath him and as a result, he and his family suffered economically and emotionally. He also says the government had a duty to properly inform him of the economic circumstances in Canada in 1981.
- [5] On February 28, 2018, the appellant commenced proceedings in the Supreme Court alleging that he had been misled, that the government had made misrepresentations to him and that he should have a remedy for those wrongs. He claimed \$23 million in damages, resulting from his loss of employment income from not being able to work as a mechanical engineer in Canada. He also claimed damages for mental distress resulting from his lower standard of living because of the work he was required to undertake.
- [6] The respondent applied to have the action struck out as disclosing no cause of action. On August 30, 2018, Justice Macintosh struck out the claim. His reasons are indexed at 2018 BCSC 2164.
- [7] The appellant then filed a notice of application for leave to appeal. That application, together with an application for a no-fee order came on for hearing in this Court on December 10, 2018. The chambers judge dismissed his application for leave to appeal. She did so on the basis that the action was without merit. In that regard she said:
- [10] My task on an application for leave to appeal is to act as a gatekeeper - to ensure that judicial resources are not expended on matters that do not merit the attention of a full division of this Court, but also to ensure that self-represented litigants do not expend the money and effort to put forward an appeal that would ultimately results in costs orders being made against them.
- [11] When I look at the decision of Mr. Justice MacIntosh, it is apparent that he read the claim very liberally. He looked past some of the deficiencies in the form, recognizing Mr. Szopa is a self-represented litigant. He considered whether it would be possible, if the claim was re-framed, to establish a claim for negligent misrepresentation. The judge concluded that it could not be. He found that Mr. Szopa's claim did not fall into the category of a novel claim, which has a reasonable prospect of being recognized at common law. In other words, the judge looked at the claim and asked if this was the kind of claim, like the Tobacco litigation, where the court would move incrementally to recognize this as an appropriate case to expand the law and permit someone to bring forward this kind of claim. He concluded that

it did not have that kind of prospect. I agree with Mr. Justice MacIntosh, as the law is quite settled and it does not appear that there would be any prospect that this claim would be recognized. There is also the problem of the limitation period. As the judge explained, this is a claim that arose in 1981. Even recognizing that Mr. Szopa has had some mental health problems, he was capable of asserting his concerns to the newspaper, for example, and of bringing them to the attention of the government. It seems Mr. Szopa, that despite your disabilities, you are a person capable of commencing a legal action by filing a notice of civil claim, as you have. There is not enough in the record to suggest that for the more than 30 years that have passed, you were unable to bring an action, to start a case and proceed with the litigation. So, for that reason too, it seems to me that your claim would be bound to fail. Ultimately, you would have to convince a division of this Court that Mr. Justice MacIntosh made errors which would warrant overturning his decision and reinstating your notice of civil claim. That, in my view, would not happen, even before a full division.

- [12] For these reasons, I have to dismiss the application for leave to appeal. As that is the case, it is not necessary for me to fully address the application for no-fee status or for the extensions of time. I would dismiss those applications as well as they fall because the leave to appeal cannot be granted.
- [8] The appellant did not immediately seek a review of the chambers judge's order. Rather, he filed a notice of application for leave to appeal to the Supreme Court of Canada. That application was dismissed as premature.
- [9] On November 4, 2019, the appellant applied in chambers for an order extending the time to seek a review of the order of the chambers judge dismissing his application for leave to appeal. On that hearing, the respondent conceded that the appellant did not require leave to appeal the order striking his claim. The appellant had an appeal as of right. This point, however, apparently had not been brought to the attention of the chambers judge when the leave to appeal application was heard in chambers. In the result, Mr. Justice Hunter granted the required extension of time to review the chambers judgment.
- [10] In *Gonzalez v. British Columbia (Attorney General)*, 2019 BCCA 88, this Court discussed the procedure to be followed when a party has a right to appeal but mistakenly brings an application for leave to appeal. In such circumstances, the chambers judge should convert, nunc pro tunc, the notice of application for leave to appeal into a notice of appeal and although a chambers judge may exercise discretion in granting the conversion, in exercising that discretion no consideration should be given to the merits of the proposed appeal.
- [11] That is the situation on this application. The appellant was entitled to bring his appeal as of right notwithstanding its lack of merit. The respondent does not suggest otherwise. Accordingly, I would allow the review and convert the notice of application for leave to appeal into a notice of appeal.

- [12] While the Court cannot consider the merits in regards to the conversion of the notice of leave to appeal into a notice of appeal, the merits are crucial to the other applications before the Court. The respondent seeks to quash the appeal because it is devoid of merit. The merits of the proposed appeal are also key to the determination of the no-fee and security for costs applications.
- [13] This Court has the inherent jurisdiction to quash an appeal that is so devoid of merit or substance as to constitute an abuse of the Court's own procedure: *Milani v. Milani*, 2019 BCCA 361 at para. 13. In *Milani*, Justice Smith, speaking for the Court, said:
- [13] In these circumstances, I find Mr. Milani's appeal of the Clarification Decision to be so devoid of any arguable merit as to amount to an abuse of process. This Court has the inherent jurisdiction to quash such an appeal as was confirmed in *Kaiser (Re)*, 2007 BCCA 253 at paras. 15-16:
- [15] Mr. Nicholson, for the trustee, cited *Wiens v. Vancouver (City)* (1992), 74 B.C.L.R. (2d) 154 (C.A.) as authority for the inherent jurisdiction of the Court to quash. Gibbs J.A., speaking for the Court, said at para. 3:

There is ample authority for the principle that this Court has inherent jurisdiction to quash an appeal which is so devoid of merit or substance as to constitute an abuse of the Court's own procedure. See, for example, *Singh (Banns) v. Bank of Montreal* (1979), [1980] 3 W.W.R. 403, 18 B.C.L.R. 149, 15 C.P.C. 89, 109 D.L.R. (3d) 117 (C.A.), and this passage from *National Life Assurance Co. v. McCoubrey*, [1926] S.C.R. 277, [1926] 2 D.L.R. 550 quoted therein [p. 118 D.L.R.]:

"Every Court of Justice has an inherent jurisdiction to prevent such an abuse of its own procedure (*Reichel v. Magrath* (1889), 14 App. Cas. 665, at p. 668). If an appeal, though within its jurisdiction, be manifestly entirely devoid of merit or substance, this Court will entertain favourably a motion to quash it, as it does in cases where costs only are involved as a convenient way of disposing of the appeal before further costs have been incurred."

- [16] But this is a power of the Court constituted as a division. The Act does not give the power to a single justice in chambers.
- [14] In this case, the chambers judge held that the appeal was without merit and would be bound to fail. I can see no errors in her conclusion. The appeal is so devoid of any arguable merit as to amount to an abuse of process. In the result, therefore, I would grant the respondent's application and order the appeal be quashed. It follows the review of the appeal of the no-fee order is dismissed and it is not necessary to deal with the security for costs application.
- [15] Given the manner in which this appeal has come forward today, I would make no order as to costs.
- [16] BENNETT J.A.: I agree.
- [17] WILLCOCK J.A.: I agree.

[18] BENNETT J.A.: The application of Mr. Szopa to set aside the refusal of leave to appeal is allowed, by consent. Leave to appeal was not required. The application by the Attorney General of Canada to have the appeal quashed is granted. It follows that the review of the refusal of the no-fee status is dismissed. Each party will bear their own costs.

"The Honourable Mr. Justice Goepel"

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