

CANADA / JUDGMENT

Watchel v. British Columbia

2020 BCCA 100

COURT

British Columbia Court of Appeal

DECIDED

12 March 2020

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2020 BCCA 100 Watchel v. British Columbia

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Watchel v. British Columbia,

2020 BCCA 100

Date: 20200312

Docket: CA46298

Between:

Barry William Watchel

Appellant

(Plaintiff)

And

Her Majesty the Queen in Right of the Province of British Columbia

Respondent

(Defendant)

Before:

The Honourable Madam Justice Newbury

The Honourable Madam Justice Fenlon

The Honourable Mr. Justice Butler

On appeal from: Orders of the Supreme Court of British Columbia, dated

July 11, 2019 and August 8, 2019 (Watchel v. British Columbia, 2019 BCSC 1087 (July 11, 2019), New Westminster Docket S211834).

Oral Reasons for Judgment

The Appellant, appearing in person:

B.W. Watchel

Counsel for the Respondent:

L.F. de Lima

Place and Date of Hearing:

Vancouver, British Columbia

March 12, 2020

Place and Date of Judgment:

Vancouver, British Columbia

March 12, 2020

Summary:

The appellant was charged with criminal harassment as a result of email communications he sent to his spouse in the course of their acrimonious family litigation. Shortly before the trial of the charge, the charge was stayed. He commenced this action against the Province alleging that he was wrongfully or maliciously prosecuted. The chambers judge granted the Province's application to have the claim struck as disclosing no reasonable claim. The appellant appeals that decision and applies to adduce fresh evidence. Held: Appeal dismissed. The appellant's challenges to the Court's jurisdiction were without merit. The chambers judge read the amended notice of civil claim liberally, stated the law correctly and did not err in her analysis.

- [1] BUTLER J.A.: Barry Watchel appeals an order striking his claim against the respondent, Her Majesty the Queen in Right of the Province of British Columbia (the "Province"). In August 2017, the appellant was charged with criminal harassment contrary to s. 264 of the Criminal Code, R.S.C. 1985, c. C-46 as a result of email communications sent to his spouse in the course of acrimonious family litigation. The charge was stayed by Crown counsel shortly before the scheduled trial date of October 19, 2018. The appellant claims that he was wrongfully or maliciously prosecuted. The appellant commenced this action seeking damages of approximately \$10 million, alleging he suffered injury and loss as a result of the criminal charge.
- [2] The order under appeal was made after the chambers judge heard two applications: 1) the appellant's application for an order that the Province pay him the legal fees he incurred in defending the criminal charge and \$9,999,999.99 in damages; and 2) the Province's

application to have the appellant's claim struck pursuant to Supreme Court Civil Rules, B.C. Reg. 168/2009, Rule 9-5(1)(a) or (d). In reasons indexed as *Watchel v. British Columbia*, 2019 BCSC 1087, the judge struck the appellant's amended notice of civil claim ("ANCC") on the basis that it disclosed no reasonable claim. The judge did not consider whether the claim should be struck as an abuse of process, the Province's alternate basis for relief. Having struck the ANCC, the judge did not need to consider the appellant's application for judgment.

- [3] A few days after the order was made, the appellant applied to "void" the judge's order on the basis that it was made in excess of her jurisdiction. The judge treated the appellant's motion as an application to reopen and dismissed the application following a hearing on August 8, 2019. The appellant also appeals the dismissal of his application to reopen.
- [4] The appellant also applies to introduce new evidence on appeal. He has sworn an affidavit attaching the Canadian Bill of Rights, the United Nations Universal Declaration of Human Rights, the Canadian Charter of Rights and Freedoms, a redacted report dated December 7, 2015 assessing the appellant's personality and psychological functioning, and other documents. The affidavit is highly argumentative; the appellant describes it as "evidence in the defense of the written material" of the judge.
- [5] For the reasons that follow, I would dismiss the application to introduce new evidence and dismiss the appeal.

Background and Reasons

- [6] The appellant is a self-represented litigant. The ANCC is rambling and abstruse. The judge described the appellant's pleadings and the nature of his claim at paras. 2-3 of her reasons:
- [2] Mr. Watchel's pleadings bear several of the indicia of the Organized Pseudolegal Commercial Arguments ("OPCA") discussed in *Meads v. Meads*, 2012 ABQB 571. The style of cause in his pleadings and application materials is the "Watchel Court at Supreme Court of British Columbia, Venue: New Westminster, B.C." His amended notice of civil claim bears "seals" of the "Watchel Court" and Canada Post date stamps. It attaches notices to court employees that they will be held liable for damages for interference with his claim. His pleadings refer to the Magna Carta, U.S. case law, and Black's Law Dictionary, and his application materials make assertions regarding the common law and jurisdiction of this Court.
- [3] Mr. Watchel, who is self-represented, does not identify the Rule under which he brings his application. This appears to be a result of his belief that his action is being brought in the "Watchel Court" under "sovereign authority". In his application response he states that "it is the rules of the Watchel Court that apply only". He alleges that common law is "nature law", there are no codes or statutes that limit common law, and that under the common law there must be a remedy for an injury caused by a wrongdoer. He alleges the British Columbia Supreme Court is only the venue at which he is bringing his claim, and has no jurisdiction to make a decision or order, but only to sign orders as to the remedy he seeks.

- [7] The appellant has taken great exception to the judge's reference to *Meads v. Meads*, 2012 ABQB 571, and to her observation that his pleadings bear indicia of Organized Pseudolegal Commercial Arguments ("OPCA"). He says that by doing so, the judge engaged in "character assassination". He argues that by comparing his claim to *Meads*, the judge caused further harm, interfered with "due justice", and violated the rule of law because of the prejudice and stigma of being associated with possibly violent or unlawful groups. The appellant says that the position he is taking is different from the positions taken by "de-taxers" or "freemen-on-the-land" and says he is not attempting to disrupt court operations or the legal rights of government. Rather, he is an aggrieved man seeking to restore his "property".
- [8] The appellant is correct in noting that, unlike "de-taxers" or "freemen", he has brought a claim to the British Columbia courts and is attempting to obtain relief from these courts. However, the judge was also correct in noting that the appellant's misplaced reliance on venerable legal sources, his misstatements of legal principles, and his challenge to the jurisdiction of the courts "bears several of the indicia of the OPCA" discussed in *Meads*.
- [9] The appellant argued that the Supreme Court of British Columbia did not have jurisdiction to consider or reject his claim. He was of the view that his claim was properly brought in the "Watchel Court" which is authorized by the "Common Law" and that he was entitled to the order he sought from the court below. The judge amended the style of cause to correctly name the court and to properly name the Province as a defendant: at para. 4. In his argument to this Court, the appellant maintains that the judge exceeded her jurisdiction and that the "Common Law" is the appropriate legal framework to adjudicate his claim. He comes to the courts for relief while simultaneously rejecting the laws of those very courts.
- [10] The judge noted that *Meads* cautions courts to carefully examine pleadings in an attempt to identify genuine claims that may be masked by the language used by OPCA litigants. The judge diligently identified the gist of the appellant's claim: he believes he was "wrongfully criminally charged during the course of a family law proceeding" for sending allegedly harassing communications: at para. 5.
- [11] The judge referred to the ANCC for some details concerning the family litigation: at paras. 7-8. The ANCC alleges that the appellant's former spouse, the respondent in the family litigation, did not agree with orders made in that action dealing with communications between the parties. The judge described the appellant's allegation that his spouse sought out a "certain police officer to proceed with the charge which was laid shortly thereafter." The appellant says the police officer had previous dealings with his former spouse. He alleged that the dispute between the parties to the family litigation should have been referred back to the Supreme Court by Crown counsel.
- [12] At para. 9, the judge particularized the appellant's allegations based on the ANCC:
- [9] In subsequent paragraphs of the amended notice of civil claim, Mr. Watchel alleges that Crown counsel:

- a) should have directed the Respondent back to the family proceedings to seek a remedy. He alleges there was adequate remedy within the family litigation and he should not have been charged. He alleges Crown counsel abused their power, and that the criminal charge was brought with the intent to interfere with the family litigation and to assist the Respondent in preventing him from having his property restored. He alleges Crown counsel cannot "take sides";
- b) failed to adequately investigate the charge. He alleges Crown counsel did not adequately review the history of emails in the family litigation, and did not speak to him to get full information. He alleges if Crown counsel had done so, they would have realised these were proper emails to prosecute the family litigation;
- c) included emails that were outside the date scope of the charge, and included duplicated and irrelevant emails; and
- d) failed to promptly notify him or his counsel when the charge was stayed.

[13] As Crown counsel are government employees or contractors, the appellant brought the action against the Province: at para. 10. At para. 11, the judge noted that the cause of action alleged by the appellant is "trespass on the case". She referred to *Perry, Farley & Onyschuk v. Outerbridge Management Ltd.* (2001), 54 O.R. (3d) 131 (C.A.) to explain the historical development of trespass and actions on the case.

[14] The judge then set out the test for striking a claim under Rule 9-5(1)(a) by referring to *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42. She referred to para. 22 of that decision for the proposition that it is incumbent on a plaintiff to clearly plead the facts upon which he or she relies in making a claim.

[15] The judge next turned to the issue of prosecutorial discretion. She noted that pursuant to the Crown Counsel Act, R.S.B.C. 1996, c. 87, s. 2(a) and s. 4., Crown counsel "approve and conduct, on behalf of the Crown, all prosecutions of offences in British Columbia": at para. 15. Referring to *Krieger v. Law Society of Alberta*, 2002 SCC 65, the judge identified the core elements of prosecutorial discretion which include the discretion to prosecute a charge laid by police and the discretion to enter a stay of proceedings. She set out para. 47 of *Krieger* explaining the nature of the decisions covered by prosecutorial discretion:

Significantly, what is common to the various elements of prosecutorial discretion is that they involve the ultimate decisions as to whether a prosecution should be brought, continued or ceased, and what the prosecution ought to be for. Put differently, prosecutorial discretion refers to decisions regarding the nature and extent of the prosecution and the Attorney General's participation in it.

[Emphasis in original.]

[16] At para. 17, the judge observed that Crown counsel's decisions to prosecute the appellant and stay the charge fell within the core elements of prosecutorial discretion.

- [17] The judge then noted that the courts cannot interfere with the exercise of prosecutorial discretion except in circumstances of flagrant impropriety or in actions for malicious prosecution: at para. 18. The judge set out the principle of prosecutorial independence and the limited power courts have to intervene to control prosecutorial discretion. She referred to para. 33 of *British Columbia (Attorney General) v. Davies*, 2009 BCCA 337, leave to appeal ref'd [2009] S.C.C.A. No. 421 for the proposition that prosecutors are immune from civil suit unless their discretion has been exercised maliciously. It is therefore not correct, as the appellant suggests in the written materials submitted today, that the Crown has absolute immunity.
- [18] The judge turned to her analysis of the Province's application and set out the issue she had to consider at para. 20:
- [20] Mr. Watchel's claim is for "trespass on the case". He did not provide argument on the nature of this claim, other than to state that he should not have been charged, that Crown counsel interfered with the family litigation, and that this was an abuse of process and malicious. As the court's role in reviewing prosecutorial discretion in charging decisions is limited to malicious prosecution or flagrant impropriety in the private law context, I have considered Mr. Watchel's pleadings liberally on that basis, keeping in mind that the pleadings could potentially be amended. The issue is whether Mr. Watchel has pleaded material facts sufficient to support a claim for malicious prosecution or facts that would establish flagrant impropriety.
- [Emphasis added.]
- [19] The judge set out the four elements that must be established for malicious prosecution and referred to *Henry v. British Columbia (Attorney General)*, 2015 SCC 24, for the proposition that the malice standard is stringent and will only be met in exceptional circumstances: at paras. 21-22.
- [20] The judge then considered the allegations in the ANCC. She found that none of the appellant's allegations could support a claim for malicious prosecution:
- a) The judge noted that the existence of the family litigation did not preclude a criminal charge. She accepted that bringing a criminal charge for a wholly improper purpose, such as interfering with the family litigation, could be the basis for a malicious prosecution claim. However, the appellant failed to plead any facts to support that conclusion which was simply a "bald assertion": at paras. 25-26.
 - b) The judge observed that the claim that the charge was improperly investigated could not form the basis for a claim of malicious prosecution as Crown Counsel do not investigate crimes, the police do. To the extent that the ANCC raises an issue of negligence in the charge approval process, that allegation was not actionable: at paras. 27-28.

- c) The judge rejected the appellant's submission that the disclosure by the Crown of emails outside the date scope of the charge could support a claim of malice. Crown counsel was simply fulfilling the disclosure obligations under *R. v. Stinchcombe*, [1991] 3 S.C.R. 326: at para. 29.
 - d) The judge also rejected the argument that Crown counsel's alleged delay in advising the appellant that the charges were stayed could support a claim of malice or flagrant impropriety: at para. 30.
- [21] The judge concluded that the appellant did not plead facts which, if true, would provide a basis upon which a claim for malicious prosecution or flagrant impropriety could be established. She found it plain and obvious that the ANCC did not establish a reasonable cause of action: at para. 31.
- [22] The judge also considered whether the ANCC could be amended and concluded, at para. 32, that it could not:
- [32] At the hearing, Mr. Watchel did not suggest there were any other facts that could be pleaded in a possible amendment. He identified the facts that supported malice as being that Crown counsel should have directed the Respondent to seek a remedy in the family litigation and that Crown counsel did not immediately advise him when the charges were stayed. As discussed above, I find these do not support a finding of malice or flagrant impropriety. An argument that Crown counsel acted with a "biased opinion" or "tunnel vision", or proceeded on the basis of biased information provided by the Respondent and the police officer, does not support malice or flagrant impropriety. Mr. Watchel's action is therefore dismissed.

On Appeal

Application to Adduce Fresh Evidence

- [23] The test to determine if fresh evidence should be admitted is set out in *Palmer v. The Queen*, [1980] 1 S.C.R. 759 at 775. The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial. The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial. The evidence must be credible in the sense that it is reasonably capable of belief, and it must be such that if believed it could reasonably be expected to have affected the result.
- [24] The appellant's application fails on all four grounds. To the extent that his proposed affidavit presents evidence, that evidence was in existence and could have been adduced at the hearing of the application to strike. Most of the appellant's affidavit is argument, not evidence. It is objectionable on that ground alone. Nothing in the affidavit could be expected to have affected the result below.
- [25] I would dismiss the appellant's application to adduce fresh evidence.

Issues on Appeal

- [26] The appellant has made extensive arguments on appeal which, like his allegations in the ANCC, confuse and conflate various legal principles. It is difficult to identify discrete issues. However, as the Province has identified in its factum, the arguments focus on alleged jurisdictional errors. The appellant says that the judge erred by ignoring that he was "moving under common law"; by making orders outside of her jurisdiction; by delaying his access to courts and justice; and by ignoring that his "property" was harmed. He also alleges that the judge erred by comparing him to unlawful groups. I have already commented on the judge's reference to Meads above and do not need to consider that alleged error further.
- [27] I will consider the following issues:
- Did the judge err in law in striking the ANCC as not disclosing a cause of action?
 - Did the judge err in dismissing the application to reopen?
 - Did the judge err in concluding that the appellant should not be given an opportunity to amend his pleadings?

Standard of Review

- [28] Whether a pleading discloses a cause of action is a question of law: *Union Road Properties Ltd. v. British Columbia (Agricultural Land Commission)*, 2019 BCCA 302 at para. 8. The standard of review on questions of law or principle is correctness: *Housen v. Nikolaisen*, 2002 SCC 33.
- [29] A judge's decision whether to permit an amendment rather than striking the claim is an exercise of discretion: *Jones v. Bank of Nova Scotia*, 2018 BCCA 381 at para. 35. Similarly, a judge's decision whether to reopen a hearing where a final order has been pronounced but not entered is also an exercise of discretion: *Grewal v. Grewal*, 2016 BCCA 237 at para. 70. A discretionary decision of a lower court is only reversible if the court misdirected itself or if the decision is so clearly wrong that it amounts to an injustice: *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19 at para. 27.

Analysis

Did the Judge Err in Law in Striking the ANCC as Not Disclosing a Cause of Action?

- [30] The judge had the jurisdiction to consider the Province's application which was properly brought under Rule 9-5. Rule 9-5(1)(a) provides that a court may strike a pleading if the pleading discloses no reasonable claim. The judge read the appellant's ANCC liberally and carefully, ensuring she considered all relevant factors. The judge informed herself of the appropriate legal test from *Imperial Tobacco* and properly applied that test, concluding that the facts as pleaded, or as possibly amended, did not disclose a reasonable claim.

- [31] The judge committed no error in her analysis. There is no reason to interfere with her decision.
- [32] Contrary to the appellant's submissions, the judge did not exceed her jurisdiction. The judge properly applied the laws of British Columbia. Section 129 of the Constitution Act, 1867, 30 & 31 Victoria, c. 3 (U.K.) provided that all laws and courts that existed at the time of confederation continued to exist after confederation. British Columbia received the laws of England by adoption in 1858: Law and Equity Act, R.S.B.C. 1996, c. 253, s. 2. These provisions mean that the courts of British Columbia retain their inherent jurisdiction as modelled by the English courts, as indicated in *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626 at para. 26:

The unique historical feature of provincial superior courts [] is that they have traditionally exercised general jurisdiction over all matters of a civil or criminal nature. This general jurisdictional function in the Canadian justice system precedes Confederation, and was expressly continued by s. 129 of the Constitution Act, 1867, "as if the Union had not been made"

- [33] The inherent jurisdiction of the court includes the procedural power to manage its own affairs. As noted by Chief Justice Dickson in *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214 at 240, the court's jurisdiction is well established:

It is well established that the courts have the jurisdiction to defend their own authority. This jurisdiction is inherent in the very idea of a court. It is admirably summarized by I. H. Jacob in "The Inherent Jurisdiction of the Court" (1970), 23 *Current Legal Problems* 23, at pp. 27-28:

For the essential character of a superior court of law necessarily involves that it should be invested with a power to maintain its authority and to prevent its process being obstructed and abused. Such a power is intrinsic in a superior court; it is its very life-blood, its very essence, its immanent attribute. Without such a power, the court would have form but would lack substance. The jurisdiction which is inherent in a superior court of law is that which enables it to fulfil itself as a court of law. The juridical basis of this jurisdiction is therefore the authority of the judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner.

- [34] The judge had both the inherent jurisdiction and the statutory jurisdiction as provided by the Rules to strike the ANCC. The appellant's arguments that the judge exceeded her jurisdiction are without merit.

Did the Judge Err in Dismissing the Application to Reopen?

[35] The judge noted that she had the discretion to reopen the case if a miscarriage of justice would probably occur, citing *Leonard v. The Manufacturers Life Insurance Company*, 2019 BCSC 598 at para. 31. Again, she cited and applied the correct legal test. The appellant has not identified an error in her analysis. The judge neither misdirected herself nor did her decision amount to a miscarriage of justice. The appellant's arguments that the judge exceeded her jurisdiction fail here for the same reasons as above.

Did the Judge Err in Concluding that the Appellant Should Not Be Given an Opportunity to Amend his Pleadings?

[36] In deciding to strike the appellant's ANCC, the judge considered the possibility of amendments. A party who seeks to amend deficiencies in pleadings should raise that issue in the trial court: *Jones* at para. 36. In the court below, the appellant did not indicate any wish to amend his pleadings. He does not seek to do so now. The appellant seems to believe his pleadings are sufficient for the remedy he seeks. The judge properly and generously read the pleadings and considered whether an amendment would have any effect: at paras. 20, 32. There is nothing on the record to suggest that an amendment would change the outcome of this case. The judge committed no error in her analysis.

Conclusion

[37] I would dismiss the application to adduce fresh evidence and dismiss the appeal.

[38] NEWBURY J.A.: I agree.

[39] FENLON J.A.: I agree.

[40] NEWBURY J.A.: The appeal is dismissed and the application to adduce fresh evidence is dismissed.

"The Honourable Mr. Justice Butler"

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