Court of King's Bench of Alberta

Citation: Gunda v Allied Shortridge Civil Enforcement Agency, 2022 ABKB 638

Date: 20220922
Docket: 2101 11653
Registry: Calgary

Between:

Maria L. Gunda

Respondent

- and -

Allied Shortridge Civil Enforcement Agency

Respondent

- and -

AG Law and Austin Nguyen

Applicants

Reasons for Judgment on Rule 9.15 Application
of the
Honourable Mr. Justice N.E. Devlin

Overview

[1] Earlier this year, the Court heard and determined the substantive appeal from the Provincial Court Civil Division in this matter: ***Gunda v Allied Shortridge Civil Enforcement Agency***, 2022 ABQB 431. In those reasons, the Court reviewed the conduct of the Appellant's previous solicitors, as revealed by the record. The reasons concluded by stating at paras 85-87:

> Concerns revealed by this record
>
> This case is extremely disturbing. Lawyers purporting to act for the Appellant took a series of steps which appear to have been opposite to her financial interests, that benefitted another of their clients on the same matter, yielding a

> financially ruinous and entirely predictable result to her. This lady went from being days away from fully realizing a judgment that she said was critical to her financial wellbeing – at no cost – to losing that judgment and becoming liable for over $40,000 in fees and legal expenses.
>
> Moreover, in the course, of those actions, AG Law had the Appellant swear an affidavit which has proven to be inaccurate and misleading and appears to have been used both before this Court and the Court of Appeal. That Court of Appeal application, which was the pivotal event in this disaster, also appears to have been made on an unexplained *ex parte* basis.
>
> Appreciating that AG Law has not had a chance to explain its actions before this Court, or the full circumstances of its retainer, this record raises very serious concerns over conflict of interest, competency of advice, and performance of fiduciary duties. As the professional regulator, the Law Society of Alberta may wish to engage in a review of this matter.

[2] The Applicants, AG Law and Austen Nguyen, petition this court to vary the appeal judgment under Rule 9.15 to "remove the findings, conclusions and assessments made therein regarding the Applicants."

[3] For the reasons that follow, the application is dismissed. The Applicants lack standing to seek this relief and I would decline to grant it in any event.

Standing to bring the application

[4] Rule 9.15 now permits "affected persons" to ask for a variation of a judgment or Order in limited circumstances. It provides that:

> **Setting aside, varying and discharging judgments and orders**
>
> 9.15(1) On application, the Court may set aside, vary or discharge a judgment or an order, whether final or interlocutory, that was made
>
> > (a) without notice to one or more affected persons, or
> >
> > (b) following a trial or hearing at which an affected person did not appear because of an accident or mistake or because of insufficient notice of the trial or hearing.
>
> (2) Unless the Court otherwise orders, the application must be made within 20 days after the earlier of
>
> > (a) the service of the judgment or order on the applicant, and
> >
> > (b) the date the judgment or order first came to the applicant's attention.
>
> (3) The Court may, on any terms the Court considers just,
>
> > (a) permit a defence to be filed by a party who has been noted in default,

> (b) set aside, vary or discharge a judgment granted upon application against a defendant who was noted in default, or whose statement of defence was struck out under rule 3.37, or
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> (c) set aside, vary or discharge a judgment entered in default of defence by the plaintiff for the recovery of property under rule 3.38, or for a debt or liquidated demand under rule 3.39.
>
> (4) The Court may set aside, vary or discharge an interlocutory order
>
> (a) because information arose or was discovered after the order was made,
>
> (b) with the agreement of every party, or
>
> (c) on other grounds that the Court considers just.

[5] The Applicants argue that they come within the scope of Rule 9.15(1)(b) as individuals affected by the judgment and who did not receive notice of their reputational jeopardy. Thus, they claim a lack of opportunity to seek to participate as parties or otherwise be heard, which justifies a re-opening of the decision pursuant to Rule 9.15.

[6] Mr. Halt concedes that the judgment and Order in this case did not have binding legal effect on the Applicants. Rather, he submits that the recent change to the language of Rule 9.15, from "parties" to "affected persons", expands its scope to include individuals or entities who suffer a significant impact from a decision, irrespective of whether it has any binding legal effect on them. Notwithstanding his able submissions on this point, I am unable to agree with that interpretation.

[7] I fully accept that the change of the wording of Rule 9.15 expanded its scope; not, however, to the world at large. Properly read, the term "affected persons" in Rule 9.15 means someone who is *legally* affected by a judgment or Order of the Court. It does not extend to individuals who may have a personal or moral stake in a legal proceeding.

[8] I am bolstered in this conclusion by several considerations. First, neither counsel nor the Court could locate a case in which an individual was permitted to apply under Rule 9.15 for variation of a judgment that did not impact their legal rights and interests. The only judicial consideration on point appears to be a refusal by Hillier J. to extend Rule 9.15 to a minority shareholder of a litigant company that was negatively impacted by his ruling: see ***Composite Technologies Inc v Shawcor Ltd***, 2017 ABCA 160 at paras 65-68.

[9] Second, a reading of the entire rule demonstrates that its key orientation is to remedy situations in which individuals become unfairly bound by orders of the Court on which, through no fault of their own, they were not heard. This concentration on legal rights, as opposed to more general personal interests, suggests that "affected persons" should be given a similarly focussed meaning.

[10] Third, the Courts in this province have resisted the intervention of non-parties on the basis of reputational or other non-legal interests. In ***PriceWaterhouseCoopers Inc v Perpetual Energy Inc***, 2020 ABCA 254 [***PriceWaterhouseCoopers***], our Court of Appeal dismissed an application by an aggrieved member of the bar to intervene in appellate proceedings where his conduct had been collaterally criticized by a chambers judgment in the Court of first instance. His application was dismissed, with the Court stating as follows at paragraph 13:

> Mr. Darby argues that an officer of the court whose integrity is at risk as a result of findings made by a lower court is "typically" granted leave to intervene to be able to defend his reputation. We disagree.

[11] The Court of Appeal noted that it was not "persuaded by the reasons or the approach" of decisions from other provinces permitting solicitors to become personally involved in proceedings where in their conduct was the subject of the judicial comment and criticism: ***PricewaterhouseCoopers*** at para 16.

[12] This approach is consistent with that taken by Justice Strekaf (as she then was) in ***R v BP***, 2010 ABQB 204 at para 15, where, in refusing to grant intervenor status to former counsel on an appeal in which his conduct during earlier proceedings was going to be questioned and impugned, she made the following apt observation:

> As with any professional when his or her conduct is called into question, it is not surprising that Mr. McAviney takes issue with some of the allegations in relation to him advanced in Mr. P.'s appeal....I am not persuaded that Mr. McAviney should be afforded any special status because it is his conduct as an officer of the Court that is at issue. Courts must exercise caution and restraint whenever any special status or privileges are sought to be afforded to participants in the legal process beyond that available to members of the public in general. I see no reason to do so in the circumstances of this case.
>
> [emphasis added]

[13] The principles animating these decisions apply here by analogy. Attempts to intervene on appeal to vindicate non-legal interests resemble in purpose and effect an application to re-open a reserved final judgment under Rule 9.15. The Applicants here effectively attempt to appeal paragraphs of a final judgment that they consider contrary to their non-legal interests.

[14] Fourth, there is no general right or authority at common law for non-parties to seek variation of an issued judgment on the basis that their reputation may be injured by direct or indirect criticisms in those reasons. The Applicants rely on the decision in ***United Pacific Capital v Piché***, 2005 BCSC 1018 [***United Pacific Capital***] for its articulation of the principles of judicial restraint in the criticism of non-parties. In that case, a member of the bar sought to vary a judgement which had observed that "there is at least a strong hint of sharp practice" in respect of his conduct on the file. Justice Groberman dismissed the application, stating at paras 8-9:

> It is not always possible for the court to avoid findings that might affect the reputations of non-parties. In some circumstances, it may be appropriate to afford non-parties limited status to make argument and even to present evidence as interveners. Even this degree of participation by non-parties may prove problematic, however. For the most part, the reputations of non-parties must be protected by judicial restraint rather than by affording them rights to control the process.
>
> The considerations that led this court to deny a non-party the right to challenge proceedings in ***Re Brown*** continue to be the over-riding concerns on applications

> such as the present one. I find, therefore, that the solicitor does not have standing to apply to have the reasons for judgment amended.
>
> [emphasis added]

[15] Justice Southin succinctly disposed of a similar request in ***Re Brown***, [1988] BCJ No 550 at paras 1-2, 9 ACWS (3d) 240 (BCSC):

> There being no precedent for this petition brought by someone who is not a party to the action in which the remark complained of was made but concerning whom since the remark was made much evidence has been properly adduced by counsel at the trial of that action, I do not think it appropriate to grant any relief upon it.
>
> Whatever is appropriate to be said should only be said in reasons for judgment in that action.

[16] Based on the above-cited case law, the expansion of "affected persons" sought by the Applicants is markedly divergent from the existing state of the law. There is no indication that such a radical expansion was the legislative intent of Rule 9.15's current language.

[17] Fifth, the concept of an "affected person" in other contexts generally refers to someone with a concrete legal interest in the matter: see e.g. ***Moulton Contracting Ltd v Behn,*** 2014 BCCA 134; ***Ntibarimungu v British Columbia (Social Development)***, 2014 BCCA 135 at para 3; ***Kitt v British Columbia (Ministry of Environment)***, [2021] BCEA No 4 at paras 61-62, 70; ***Sanofi-Aventis Canada Inc v (Canada) Health***, 2007 FC 1156 at para 9.

[18] Finally, the broad interpretation of "affected person" urged by the Applicants invites great mischief. Put simply, allowing any party who is criticized or subjected to an adverse comment in a legal proceeding the right to reopen those proceedings would invite unbounded collateral litigation.

[19] Extending re-litigation rights to parties broadly aggrieved by judgments which do not legally impact them runs contrary to principles fundamental to the administration of justice: namely finality, judicial economy, and the limitation of "standing to persons whose private rights were at stake or who were specially affected by the issue": ***R v Mahalingan***, 2008 SCC 63 at para 47; Rule 1.2(2)(b); ***Amoco Canada Petroleum Co v Alberta & Southern Gas Co***, 1993 CanLII 7084 at para 23, 140 AR 244 (ABKB); ***Prosper Petroleum Ltd v Her Majesty the Queen in Right of Alberta***, 2020 ABQB 128 at paras 8-10; ***Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society***, 2012 SCC 45 at para 1.

[20] For these reasons, I find that the applicants do not fall within the ambit of Rule 9.15. This is sufficient to dispose of the application to re-open the judgment.

Merits of the Application

[21] If I am mistaken on the issue of standing, I would nonetheless decline to re-open the reasons for judgment on appeal. To begin with, it bears re-iterating that no factual or legal findings have been made against the Applicants. If legal or disciplinary proceedings result from the events described, they will have a full opportunity to respond to any allegations that carry potential legal jeopardy. Nothing in the impugned paragraphs of the reasons for judgment constitute findings that would carry evidentiary or other weight in a disciplinary proceeding.

[22] The Court must balance a number of values when crafting reasons. These include the wise maxims of judicial restraint and the duty of the Court to ensure that vital public interests, such as confidence in the legal system and the administration of justice, are protected.

[23] This case concerned a woman who the Applicants described as vulnerable and legally naïve. This hardworking woman of modest means had her legal representation end in a financially disastrous result. Both Respondents submitted that the impugned observations about these circumstances were supported by the record.[1]

[24] While Ms. Gunda was represented by counsel from a different firm on appeal, that counsel was nevertheless a member Mr. Nguyen's family. While I cast no aspersions on appeal counsel's conduct of the matter – he diligently advanced the grounds of appeal as he understood them – the Court lacked confidence that Mrs. Gunda received truly independent legal advice in respect of her previous legal experiences.

[25] The values of judicial restraint, aptly described by Justice Groberman in ***United Pacific Capital*** at para 3, were at the forefront of the Court's mind in drafting the reasons on appeal. On this matrix of facts, however, the public interest in judicial comment on the concerns arising from the record outweighed the judicial inclination towards restraint. I am not persuaded that the reasons on appeal should be varied, assuming jurisdiction to do so existed in this case.

Conclusion

[26] For all of these reasons, the application is dismissed. The judgment and Order issued pursuant to pursuant to s 53 of *Provincial Court Act*, RSA 2000, c P-31 stand unchanged.

[27] As the Respondents took no position on this matter, the parties shall bear their own costs.

Heard on the 13th day of September 2022.
Dated at the City of Calgary, Alberta this 22nd day of September, 2022.

N.E. Devlin
J.C.K.B.A.

[1] Similarly, while I place no reliance on this fact, the affidavit filed by Mr. Nguyen neither provides evidence, nor asserts, that the observations regarding his, and his firm's conduct are incorrect, misinformed, or misleading. Appreciating the limits imposed by solicitor-privilege, it would nevertheless behove a party seeking to have an issued judgment redacted or edited to make a good-faith proffer that facts supporting their remedy exist.

Appearances:

Edward W. Halt KC,
for the Applicants

Keith Marlowe KC and Sydni Kind,
For Maria Gunda

Daniel D. Peterson KC,
For Allied Shortridge Civil Enforcement Agency Inc