IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Marples v. Biddlecome,* 2023 BCSC 1690

Date: 20230919
Docket: S02764
Registry: Abbotsford

Between:

Katelyn Marples and Sue Marples

Petitioners

And:

Miranda Biddlecome dba Contagious Studios

Respondent

Before: The Honourable Justice Riley

Oral Reasons for Judgment

In Chambers

Counsel for the Petitioners (by video):	D.M. Klassen
Counsel for the Respondent (by video):	M.L. Sagert
Place and Date of Hearing:	Abbotsford, B.C. September 12, 2023
Place and Date of Judgment:	Abbotsford, B.C. September 19, 2023

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[1] **THE COURT:** This is a petition for judicial review from an interlocutory decision of a Provincial Court Judge in a small claims action. The interlocutory decision was a dismissal of an application by the petitioners for an order that the opposing party's counsel be disqualified from continuing to act on the case, on the basis that counsel would be a required witness at the trial.

[2] In very brief reasons for judgment, the Provincial Court Judge dismissed the application. The petitioners now seek judicial review, arguing that the Provincial Court Judge's decision was unreasonable because it did not grapple with the key issue, which was whether the respondent's counsel would ultimately be required to testify as to contentious facts at trial.

Background

[3] The underlying action is a claim of breach of contract and the tort of intimidation.

[4] The claimants Katelyn and Sue Marples entered into a contract to sell certain business assets related to a hair salon to the respondent Ms. Biddlecome. Basically, Ms. Biddlecome was going to take over the salon from Katelyn and Sue Marples, and also contracted to allow the claimant Katelyn Marples to continue to use some of the space in the salon for her own clients.

[5] In their small claims action, Katelyn and Sue Marples allege that Ms. Biddlecome breached or repudiated the contract by failing to allow the claimants continued access to the salon, and further that Ms. Biddlecome made threats amounting to the tort of intimidation.

[6] At a certain point in the proceedings, the claimants retained Mr. Klassen, who then filed an amended notice of claim specifically pleading certain correspondence allegedly sent by respondent's counsel, Ms. Sagert. As I understand it, the correspondence in question, one letter and one email, are said by the claimants to constitute repudiation of the original contract, and to involve threats that constitute

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part of the alleged tort of intimidation. For ease of reference I will refer to the correspondence in issue, the letter and the email, as the impugned correspondence.

[7] The respondent Ms. Biddlecome then filed an amended response, in which she expressly denied a number of paragraphs in the amended notice of claim, including the paragraphs in which the impugned correspondence had been pleaded.

[8] Thus, on the face of it, the claimants were relying on correspondence sent by the opposing party's counsel as part of its case, material facts, and the opposing party was denying the impugned correspondence, or at least denying the paragraphs of the amended notice of claim in which the impugned correspondence had been pleaded or alleged by the claimants.

The Application for an Order Disqualifying Opposing Counsel

[9] Against this backdrop, counsel for the claimants brought an application in the Provincial Court of British Columbia, seeking either (a) an order under Rule 16(6)(o) of the *Small Claims Rules*, B.C. Reg. 261/93 that opposing counsel be disqualified from continuing to act in the small claims matter, or (b) an order that the issue of counsel disqualification be determined by the Supreme Court of British Columbia, per its inherent jurisdiction.

The Provincial Court Judge's Ruling on the Application

[10] The application was heard on 11 August 2022. Immediately after hearing from counsel for the claimants, and without calling on opposing counsel for responding submissions, the Provincial Court Judge gave very brief oral reasons dismissing the application. The Provincial Court Judge said:

> [1] The issue in this litigation is whether there has been a breach of contract or tortious conduct. The evidence will come through the parties to the contract and the parties to the conduct in question.
>
> [2] The letters, the impugned letters, do not include any information that would suggest that cross-examination of counsel will elicit relevant information to determine the issues this court will need to determine. I find it simply a statement of the position of the lawyer's client who will be giving evidence.

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> [3] As such, the application filed June 1st, 2022 is dismissed and this matter is referred back to the judicial case manager for the setting of a settlement conference.

Analysis

[11] In the hearing before me, counsel for the petitioners acknowledged that the Provincial Court Judge's decision amounts to an interlocutory ruling on a small claims action. Counsel says that interlocutory rulings of this sort under the *Small Claims Act*, R.S.B.C. 1996, c. 430 are reviewable under the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 on the standard of reasonableness. Opposing counsel did not take issue with any of this. My own research indicates that this Court does in fact have the authority to review an interlocutory decision of a Provincial Court Judge sitting under the *Small Claims Act*, and that the applicable standard of review is reasonableness: *Farrell v. TD Waterhouse Canada Inc.*, 2010 BCSC 1930 at paras. 22–25, aff'd 2011 BCCA 61; *Cheung v. Moorley*, 2011 BCSC 1641 at para. 56. This reasoning was most recently applied in this Court in *National Dispatch Services Limited v. Dumoulin*, 2021 BCSC 2138 at para. 7, and in *1534 Harwood St. (St. Pierre) Ltd. v. McTavish*, 2023 BCSC 675 at para. 19.

[12] Moving on to the merits, my consideration of the concept of reasonableness is guided by the leading case of *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65. At the hearing before me, both parties made extensive reference to principles discussed in *Vavilov*, and how they ought to be applied in this case.

[13] Reasonableness is a deferential standard. The reviewing court is not allowed to simply substitute its view for the view of the original decision maker. Nor is the reviewing court permitted to conduct a new analysis in an effort to determine its view of the correct outcome: *Vavilov* at para. 83. The reviewing court can only intervene where satisfied that the decision, in light of both the rationale and the outcome, was unreasonable: *Vavilov* at para. 87. The decision must be transparent, intelligible, and justified: *Vavilov* at para. 15. Thus, the reasonableness standard of review involves a consideration of both the outcome and the reasoning process that led to that

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outcome: *Vavilov* at para. 83. The reviewing court should adopt a "reasons first" approach: *Vavilov* at para. 84.

[14] I agree with respondent's counsel that brevity of reasons does not equate to unreasonableness. I also agree with counsel that the reasons must be read in context. Although the decision maker's reasons themselves clearly play a pivotal role in *Vavilov*'s reasons-first approach, this does not mean the reasons stand alone. The Provincial Court Judge's reasons must be read in light of the record as a whole and the context, including the positions taken by the parties.

[15] It is important to understand the nature of the application that was being made by the petitioners, and the legal principles or parameters that govern such applications.

[16] The gist of the application was for an order disqualifying counsel for the respondent from acting in the small claims matter. The basis for the application was that: (a) the petitioners had the burden of proving their case, (b) the petitioners had an unqualified right to call whatever witnesses they see fit to prove their case, provided the evidence was relevant and admissible, (c) counsel for the respondent was a material witness because she was the author of the impugned correspondence, which was said to be relevant to the issue of repudiation going to the breach of contract claim, and alleged threats or intimidation said to go to the tort claim as pleaded in the amended notice of claim, and (d) counsel's evidence would be contentious because the paragraphs alleging the impugned correspondence were in fact denied in the amended response to the notice of claim. I pause here to note that this is merely a recitation of counsel's position, as best I could ascertain it. In reciting counsel's position, I do not wish to be taken as endorsing or agreeing with all of the propositions I have just summarized.

[17] This brings me to the relevant law. The reasons for judgment did not set out the Provincial Court Judge's assessment of the relevant legal principles governing such applications. In the parlance of *Vavilov*, the Provincial Court Judge did not

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identify the relevant “legal constraints” applicable to the point she was being asked to decide.

[18] The application by the petitioners for an order disqualifying counsel for the opposing party from continuing to act was governed by constraints in the form of legal principles emerging from the common law. The petitioners relied upon a number of authorities discussing the parameters of the law in this area. Three somewhat related propositions of law emerge from these authorities.

[19] First, it is true that a party has a right to call any witness who has relevant evidence to give on a material fact, provided the evidence is admissible and not subject to any rule of privilege: *Tritan Construction Ltd. v. Webb* (1990), 46 B.C.L.R. (2d) 148 at p. 149. However, when it comes to cases where a party seeks to call the opposing party’s counsel as a witness, the court has an overriding discretion to determine whether the intention to call opposing counsel is genuine, or whether it has been undertaken for some tactical reason, for example to cause delay or to force opposing counsel off the case. This is generally framed as a discretion to refuse to hear a witness or to quash a subpoena on the basis of an abuse of process: *Tritan Construction* at p. 150.

[20] Second, when it comes to applications to disqualify opposing counsel on the basis of a conflict, the court should proceed with caution. The starting point is that each party has a right to be represented by counsel of his or her choice and as a general rule the court should be reluctant to interfere with that right. As Justice Williamson put it in *Fraresso v. Wanczyk*, 1995 CanLII 1127 (B.C.S.C.) at para. 8, “the Court should be slow to interfere with a litigant’s right to choose his own counsel”.

[21] Third, although the practice of a lawyer giving evidence in a case where he or she is counsel ought not to be encouraged and indeed is frowned upon for many good reasons, there is no absolute rule prohibiting a lawyer who gives evidence from acting or continuing to act as counsel: *Tritan Construction* at p. 149; *Fraresso* at paras. 5, 7. The line is crossed where counsel is called upon to give testimony on a

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contested point of fact, thereby placing the court in an invidious position of having to accept counsel's evidence over that of another witness in the case: *Tritan Construction* at pp. 149–150; *Fraresso* at paras. 7, 17, 18.

[22] On the basis of these legal constraints, it seems to me that the determinative or controlling issue before the Provincial Court Judge was whether this was a case where counsel would be called upon to give evidence on a material fact in dispute in the litigation. In light of the legal constraints discussed above, it would have been fundamentally unreasonable for the Provincial Court Judge to decide the application before her without turning her mind to that question.

[23] However, when I examine the reasons in view of the record as a whole and the submissions of the petitioners, I am unable to determine whether the Provincial Court Judge actually addressed that key issue, and if so, how she resolved it. The Provincial Court Judge did find that the "impugned letters, do not include any information that would suggest that cross-examination of counsel will elicit relevant information to determine the issues this court will need to determine". However, that reasoning does not account for or address (i) the position of the claimants that the impugned correspondence amounted to or constituted repudiation of the contract, and threats forming part of the tort of interference, or (ii) the denial of the impugned correspondence in the response to the amended notice of claim.

[24] On the one hand, the petitioners certainly had a case to make for saying that in view of the pleadings, there was a possibility that opposing counsel, Ms. Sagert, could be a witness, and that she might have material evidence to give on a point that is in dispute between the parties. I say that because (i) the amended notice of claim referred to correspondence authored by Ms. Sagert, (ii) the correspondence was relevant to a material issue, namely alleged repudiation going to the breach of contract claim and alleged threats going to the tortious intimidation claim, and (iii) the particular paragraphs in the notice of claim that referenced the impugned correspondence were expressly denied in the responding pleading. So, on the face of the pleadings, this could indeed be a situation where counsel's testimony turns

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out to be necessary to prove material correspondence which has been expressly denied in the response to the notice of claim.

[25] On the other hand, it was not necessarily the case that the points about which Ms. Sagert could give testimony would be material facts in dispute at trial. As respondent's counsel pointed out in the hearing before me, the portions of the notice of claim referencing the impugned correspondence might fairly be characterized as block pleadings. Those particular paragraphs of the notice of claim quote portions of the impugned correspondence, at length. Both paragraphs state not only that the correspondence was sent by the respondent's counsel but that it was received by the claimants. Further, one of the impugned paragraphs quotes selectively from the impugned correspondence. I do not use the term "selectively" here with any intended criticism, but simply to point out the position of respondent's counsel that the subsequent denial of these particular paragraphs in the responding pleading need not necessarily be taken as a denial that the impugned correspondence existed or that it was sent. Rather, it could easily be a denial of the accuracy or completeness of the quotation, or the import or legal significance of the correspondence as alleged by the claimants.

[26] Now, the responding pleading could certainly be criticized on the basis that it was imprecise and failed to make clear what the respondent was in fact disputing. Nonetheless, the issue before the Provincial Court Judge was not lack of precision in the pleading, but whether it was likely or inevitable that respondent's counsel would end up being a witness to material facts in issue between the parties.

[27] As counsel for the respondent pointed out in submissions before me, had the Provincial Court Judge grappled with this issue, that is, the possibility that there might or might not be a dispute between the parties on a material fact pertaining to the very existence of the impugned correspondence, the Provincial Court Judge might have considered remedies or means of clarifying that point. For example, the Provincial Court Judge might have adjourned the application to disqualify on the condition that the respondent file a further amended response to the claim, or furnish

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particulars clarifying what in fact is being denied. Alternatively, the Provincial Court Judge might have adjourned the application to disqualify on the condition that the claimants file a notice to admit with respect to the impugned correspondence, with leave to renew the disqualification application if the impugned correspondence was not admitted.

[28] All of these would have been alternatives to actually granting the disqualification application, but they would not have left open the possibility — a possibility which still exists on the current state of the pleadings — that respondent's counsel will end up being a compellable witness on material facts that are contentious. None of these recourses were considered by the Provincial Court Judge, who dismissed the application immediately after hearing from counsel for the petitioners, without hearing any submissions from respondent's counsel.

[29] To go back to the Provincial Court Judge's reasons themselves, it is not at all clear to me whether the Judge actually turned her mind to the key question of whether the respondent's counsel would be required to give evidence on a material fact in issue between the parties. As I say, that possibility does appear to exist on the pleadings as they stand, and the Provincial Court Judge made no effort to clarify or refine the positions of the parties to effectively rule out that possibility, before pronouncing on and dismissing the disqualification application. On the state of the record, it still remains a possibility that respondent's counsel could be a material witness to facts that are in dispute between the parties. And if that were the case, then there would be a strong case for an order that counsel could not continue to act for the respondent at the trial in this matter.

[30] In the result, I must conclude that the Provincial Court Judge's decision dismissing the application to disqualify counsel for the respondent is unreasonable and cannot stand. I want to stress that it is not the result itself that is unreasonable, but rather the Provincial Court Judge's failure to articulate how she arrived at that result. I would say that the reasons are intelligible, but lacking in transparency and also in justification. The reasons are not transparent because they do not reflect that

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the Provincial Court Judge gave due consideration to the arguments of the petitioners. The reasons are not justified because they do not lay out a pathway to the outcome, and it is not possible on the whole of the record to determine what that pathway was.

[31] What remains to be considered is what remedy should issue. In *Vavilov*, the majority explained at para. 141 that where a reviewing court determines that the decision under review cannot be upheld on the standard of reasonableness, it will "most often be appropriate to remit the matter to the decision maker to have it reconsider the decision" with "the benefit of the court's reasons". This is the preferred approach for a number of reasons. For one thing, it gives due respect to the institutional role and competence of the first instance decision maker, in this case a Provincial Court Judge presiding under the *Small Claims Act*. For another thing, this deferential approach acknowledges that in reconsidering the matter, the first instance decision maker may arrive at the same outcome, or a different one.

[32] The majority in *Vavilov* went on to explain at para. 142 that there are "limited scenarios" where remitting a matter for reconsideration would "stymie the timely and effective resolution of matters in a manner that no legislature could have intended". Examples might include situations where there is a risk of an "endless merry-go-round" of judicial reviews and subsequent reconsiderations, or where a particular outcome is inevitable such that remitting the matter would serve no useful purpose.

[33] In the instant matter, counsel for the petitioners urged the Court to rule on the merits of the disqualification application, rather than remitting the issue to the Provincial Court. Counsel points to the delay and cost that will flow from having to re-argue the disqualification application in Provincial Court. Counsel adds that the original application filed in Provincial Court included an alternative plea that the disqualification application be referred to this Court, which has inherent jurisdiction over such matters.

[34] Despite the able submissions of counsel, I decline the invitation to decide the merits of the disqualification application, for three reasons.

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[35] First, in my view, to do so would not reflect proper respect for the institutional role of the Provincial Court as set out by the legislature under the *Small Claims Act*. The Provincial Court Judge did not dismiss the disqualification application on the basis that she had no jurisdiction to decide it, and I would certainly expect that the Provincial Court has jurisdiction to control its own process, and to make rulings necessarily incidental to that jurisdiction.

[36] Second, the history of this case does not suggest any real likelihood of an "endless merry-go-round" of judicial reviews.

[37] Third, and perhaps most importantly, the outcome of the disqualification application is far from certain. I agree with respondent's counsel that there may well be mechanisms that the Provincial Court could employ to determine with greater precision whether there is indeed a material dispute on a fact about which counsel could be required to testify at trial. Resort to those mechanisms could make the entire issue moot.

[38] I conclude that this is not an appropriate case for the Court to go any further than to set aside the impugned decision and remit the matter to the Provincial Court for reconsideration in accordance with these reasons.

"Riley J."

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