IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Prince v. Canadian Imperial Bank of Commerce,* 2023 BCSC 2028

Date: 20230914
Docket: S222806
Registry: Vancouver

Between:

Earle Prince aka Earle B. Prince aka Earle Benjamin Prince

Petitioner

And:

Canadian Imperial Bank of Commerce

Respondent

Before: The Honourable Justice Ahmad

On judicial review from: An order of the Provincial Court of British Columbia, dated March 30, 2022 (*Canada Imperial Bank of Commerce v. Prince*, C-2169900).

Oral Reasons for Judgment

In Chambers

Petitioner on his own behalf:	E. Prince
Counsel for the Respondent:	D. Georgetti
Place and Date of Hearing:	Vancouver, B.C. July 14 & August 22, 2023
Place and Date of Judgment:	Vancouver, B.C. September 14, 2023

I. Introduction

[1] **THE COURT:** By order dated March 30, 2022 (the “Order”), a judge (the “Judge”) of the Provincial Court of British Columbia dismissed Mr. Prince’s application to set aside a garnishing order and ordered that funds that had been paid into court pursuant to the garnishing order be paid out to the judgment creditor, CIBC.

[2] Mr. Prince seeks a judicial review of that Order.

[3] The hearing (the “March 2022 Hearing”) that resulted in the Order proceeded in Mr. Prince's absence. Mr. Prince's argument on this judicial review is straightforward. He says that by proceeding in his absence, the Judge denied Mr. Prince the right to be heard, thus breaching the basic principles of procedural fairness. He argues that breach, by itself, is enough to overturn the Judge's decision.

[4] CIBC argues otherwise. It submits that when considered in the full context of the history of the proceedings, the Order, although made in Mr. Prince's absence, did not deprive Mr. Prince of the opportunity to be heard. It argues that in the context, the Order was reasonable and falls within a range of possible accepted outcomes which are defensible given the record that was before the judge.

[5] In any event, CIBC argues that since the garnished funds have been paid out of court, the issue is moot.

II. Background

[6] Although this judicial review was brought in respect of the Order made at the March 2022 Hearing, the genesis of the matter predates that hearing. I do not intend to review that history in detail. However, some background is required for context. A more detailed history is set out at paragraphs 1.4 to 1.26 of the Amended Response to Petition filed April 18, 2023. I have summarized the most salient background here.

[7] On September 28, 2021, CIBC filed a notice of claim in the Provincial Court to collect credit card debt owed to it by Mr. Prince. As Mr. Prince did not file a reply, on October 19, 2021, CIBC obtained a default judgment against Mr. Prince. On Mr. Prince's application, the default judgment was set aside on November 15, 2021.

[8] In approximately mid-November 2021, Mr. Prince sold real property, the proceeds of which were held in trust with his notary. On or about November 19, 2021, CIBC served a prejudgment garnishing order on the notary. On November 26, 2021, the notary paid into court the sum of $32,223.85 (the "Garnished Funds"), being the amount CIBC then claimed to be owing.

[9] In late November 2021, Mr. Prince:

a) filed a reply and counterclaim to CIBC's claim against him; and

b) filed an application to have the Garnished Funds paid out to him. He set that hearing of that application unilaterally to be heard on December 13, 2021.

[10] On December 9, 2021, CIBC filed an application in which it sought:

a) to have the reply and counterclaim struck and for judgment against Mr. Prince; and

b) to have the Garnished Funds paid out to it.

[11] On December 13, 2021, Mr. Prince's application came on for hearing before a judge (not the Judge who made the Order). At CIBC's request, Mr. Prince's application to have the Garnished Funds paid out to him was adjourned so that it could be heard together with CIBC's applications.

[12] On January 21, 2022, the same Judge who ultimately made the Order at the March 2022 Hearing heard the parties' competing applications (the "January 2022 Hearing"). In support of his position, Mr. Prince argued that the Garnished Funds were jointly held by him and his spouse, Mrs. Prince. He argued that to the extent

that moneys were owed to CIBC (and the court subsequently found that it was), it was owed by him alone and not his spouse. Accordingly, Mr. Prince argued that the joint funds were not subject to garnishment.

[13] At the conclusion of the January 2022 Hearing, the Judge:

a) granted judgment against Mr. Prince in favour of CIBC in the amount of $33,806.93 plus costs;

b) struck Mr. Prince's reply and counterclaim;

c) adjourned the competing applications regarding the payment of the Garnished Funds to a continuation to allow Mr. Prince to obtain the affidavit evidence he required "to advance [his] case further";

d) ordered that "any documents to be relied upon [at] the hearing are to be disclosed 30 days prior to the hearing"; and

e) seized himself of the continuation.

[14] On February 10, 2022, the continuation of the hearing was set to be heard on March 30, 2022, making March 1, 2022 the 30-day deadline by which Mr. Prince was to file further affidavit evidence in support of his position that the Garnished Funds were jointly owned and therefore not subject to garnishment. Mr. Prince did not file or serve any supporting evidence by that date.

[15] On March 28, 2022, Mr. Prince filed a requisition purporting to unilaterally cancel the continuation hearing on March 30, 2022. CIBC was not consulted nor did it consent to the adjournment or cancellation of that date. The matter was restored to the court list for March 30, 2022. However, Mr. Prince was not informed that was the case. To the contrary, by email dated March 29, 2022, the court registry advised Mr. Prince that “…Your hearing on March 30, 2022 is hereby cancelled.”

[16] On March 29, 2022, the court registry sent another email to Mr. Prince confirming that the hearing was scheduled to proceed on March 29, 2022, at 2:00

pm. That communication appears to be sent in error. In fact, the hearing proceeded on March 30, 2022 as originally scheduled.

[17] It was only by chance, having opened the erroneous email on March 30, 2022, that Mr. Prince attempted to call into the court registry to attend the hearing. However, his call was disconnected, and he was unable to connect with the Judge at the March 30, 2022 hearing.

[18] The March 2022 Hearing proceeded in Mr. Prince's absence. The judge ordered:

> [Mr. Prince] not appearing at the hearing but having filed a request to cancel his application and upon [Mr. Prince] not complying with the order of January 21, 2022, his application to set aside the garnishing order is dismissed.
>
> All funds in court pursuant to the garnishing order are to be paid out to [CIBC] forthwith.

[19] That is the Order that is the subject of this judicial review.

[20] On April 6, 2022, the Garnished Funds were paid out of court to CIBC through counsel in accordance with the Order.

[21] On April 5, 2022, Mr. Prince filed this application for judicial review. He served CIBC with a petition on May 12, 2022.

III. Issues

[22] Simply put, the issues to be determined on this judicial review are:

a) Did proceeding in the absence of Mr. Prince at the March 2022 Hearing constitute a breach of procedural fairness that requires a re-hearing; and

b) If not, was the Order reasonable and ought not to be disturbed?

IV. Legal Framework

A. Standard of Review

[23] The standard of review to be applied in reviewing the merits of a decision of the Provincial Court is reasonableness: *Revive Spa Ltd.* v. *Melka Construction Ltd.*, 2022 BCCA 336 at para. 27.

[24] In assessing whether a decision is “reasonable”, a reviewing court must look to the record as a whole to understand the decision and in doing so, the court will often undercover a clear rationale for the decision: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para. 137.

[25] However, a different standard of review applies where a petitioner alleges that the decision-making process did not meet the procedural fairness requirements. In that case, the role of the reviewing court is to determine whether the statutory decision maker's choice of procedure met the requirements of procedural fairness. The reviewing court does not owe deference to the decision maker in deciding where procedural fairness requirements are met; *Revive Spa* at para. 29, citing *Seaspan Ferries Corp.* v. *British Columbia Ferry Service Inc.*, 2013 BCCA 55 at para. 52.

B. Procedural Fairness

[26] The issue of procedural fairness was recently addressed by the Court of Appeal in *Boone v. Jones*, 2023 BCCA 215. In that case, having received conflicting emails from the Supreme Court registry regarding the scheduling of a hearing, the appellant was absent for virtually all of the hearing and only joined the hearing by video conference when the judge had nearly finished issuing oral reasons for judgment. As the reasons for judgment had by then been substantially concluded, the judge refused to re-open the matter. (However, she did suggest to the appellant that he may have a remedy available to him under Rule 22-1(3) which provides that an order made in the absence of a properly served party must not be reconsidered unless “the court is satisfied that the person failing to attend was not guilty of wilful

delay or default”.) An order for judgment in the amount of $200,000 was made against the appellant.

[27] The Court of Appeal concluded that in the circumstances, proceeding in the appellant's absence gave rise to a breach of procedural fairness. It stated:

> [47] As a general rule, and in this context, a proceeding found to be procedurally unfair nullifies the decision even if a different result was unlikely had the breach not occurred: See the remarks of Justice Le Dain made in an administrative law context in *Cardinal v. The Director of Kent Institution*, 1985 CanLII 23 (SCC), [1985] 2 S.C.R. 643 at 661. Generally speaking, it is unnecessary to ask whether the decision would have been the same absent the breach of procedural fairness because the unfair process, in and of itself, gives rise to a failure of justice. In other words, the absence of procedural fairness is a self-standing, crystallized legal wrong in its own right. The prejudice, which is both individual and systemic, lies in the fact that a litigant has been deprived of the right to be heard. To put it differently, a defensible result may nevertheless be set aside on appeal if it is shown that the process through which the result was reached was fundamentally unfair. For this reason, neither this Court in *Richards-Rewt*, nor the Saskatchewan Court of Appeal in *C.H.*, inquired into whether the attendance of the appellant personally, or through counsel, would have altered the result of the hearing.

[28] In *Boone*, the summary trial application was remitted back to the Supreme Court for a rehearing.

[29] In reaching its conclusion, the Court of Appeal accepted that the rule against proceeding in the absence of a party is not absolute. Rather, it accepted that "there are occasions on which it may be proper to proceed in the absence of one of the parties”: *Boone* at para. 44, citing *Richards-Rewt v. Rushchyna*, 2019 BCCA 143 at para. 7.

[30] The Court of Appeal also noted at para. 48, the requirements of procedural fairness are "context specific." Moreover, in "exceptional circumstances, relief for breach of procedural fairness may be withheld where issuance of the impugned order can be fairly described as in inevitable": *Boone* at para. 49, citing *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202 at paras. 51-54.

V. Discussion and Analysis

A. Fresh Evidence

[31] On this application, both Mr. Prince and CIBC sought to rely on evidence that was not before the Judge at the March 2022 Hearing.

[32] Generally speaking, the new evidence that Mr. Prince seeks to rely on has been adduced for one of two purposes:

a) To support the assertion that the garnished funds were jointly held with Mrs. Prince and therefore not properly subject to garnishment (the “Merits Evidence”); or

b) To explain Mr. Prince's efforts to obtain evidence prior to the March 2022 Hearing and to explain his non-attendance at that hearing (the “Process Evidence”).

[33] CIBC has referred to evidence on the status of matrimonial proceedings between Mr. Prince and Mrs. Prince, also on the issue of whether the Garnished Funds were jointly held (“CIBC’s Merits Evidence”).

[34] Before turning to the question of procedural fairness, I will provide a few comments on that evidence.

[35] The well-known criteria for the introduction of new evidence is set out in *R. v. Palmer*, [1980] 1 S.C.R. 759, 1979 CanLII 8 (SCC). In my view, the issue regarding both Mr. Prince's Merits Evidence and CIBC's Merits Evidence can be resolved by reference to the first of the Palmer factors: that is, could the evidence by the exercise of due diligence have been available for the hearing at the court below?

[36] I conclude that it could have been.

[37] Specifically, Mr. Prince's Merits Evidence primarily consists of documents relating to the sale of the property in November 2021 and communications with his notary, including:

a) a statutory declaration and a freehold transfer form dated November 18, 2021, in respect of the sale of the property;

b) a copy of a statement of adjustments dated November 19, 2021;

c) a letter from the notary addressed to Mr. and Mrs. Prince dated November 19, 2021, including the cheque for the net sale proceeds for the property; and

d) Mrs. Prince's affidavit sworn on April 4, 2022 in which she deposed to her communications with the notary in November 2021 and on March 2, 2022.

[38] CIBC’s Merits Evidence consists of information relating to a possible “separation agreement” that appears to have existed at the time the property was sold.

[39] Given the dates of that information, it is clear that all of Mr. Prince's Merits Evidence and CIBC's Merits Evidence were available or could have been available at the March 2022 Hearing. I decline to admit any of it as evidence on this application.

[40] However, the *Palmer* test is modified for the process evidence to the extent that evidence is tendered to enable the assessment of the March 2022 Hearing process and not to undermine the decision being made at the hearing: *Boone* at para. 34.

[41] I allow and I have considered those portions of Mr. Prince's evidence that explain the reasons that he did not have evidence that was ordered to be produced, the reasons that he required the adjournment, and the circumstances leading him to miss the March 2022 Hearing.

B. Was the Application Procedurally Unfair?

[42] Like the appellant in *Boone*, I am satisfied that it was Mr. Prince's intention to appear at the March 2022 Hearing, even if not with further evidence but to request an adjournment to allow him to obtain that evidence.

[43] I am also satisfied that he received incorrect information from the court registry both in respect of the cancellation of the hearing and then, subsequently, about the hearing date. I accept that both factors led to his non-attendance before the Judge at the March 2022 Hearing.

[44] On its face, when limited to the events of March 28 to March 30, 2022, this case appears to fall within the principle against proceeding in the absence of a party. However, as noted in *Boone*, the requirement of procedural fairness is context specific. That, in my view, requires an assessment of the broader context not limited to the day or two surrounding the missed hearing date. Rather, the analysis of procedural fairness must include an analysis of the broader context.

[45] When viewed more broadly, that context reveals that, unlike the decision in *Boone* and the cases it considered, the March 2022 Hearing was not the first or only opportunity Mr. Prince had to present evidence or make submissions to the court regarding what he said was the joint nature of the Garnished Funds. Indeed, despite the fact that the issue was squarely before the court at the January 2022 Hearing, Mr. Prince failed to adduce evidence to satisfy the Judge that his position should prevail. At Mr. Prince's request, the Judge allowed the March 2022 Hearing to allow Mr. Prince the <u>further</u> opportunity to adduce that evidence.

[46] That the January 2022 Hearing was adjourned for that purpose was clear. Specifically, the Judge canvassed Mr. Prince’s request to rely on the oral evidence of Mrs. Prince regarding her email communications with the notary. The transcript of the January 2022 Hearing included the following exchange, in part:

> **Mr. Prince**: …[Mrs. Prince] is here with us…and she did send a gmail off to [the notary] and it’s got the response on there. I’d like for her to read that into court for us.
>
> **The Court**: No, I’m not going to do that. I don’t have any affidavit materials from her, sir.
>
> **Mr. Prince**: Okay, do you have to have affidavit materials for that?
>
> **The Court**: Well, you’re asking her basically to give evidence.
>
> **Mr. Prince**: Okay. Well, the notary wasn’t very responsive to us after this all happening. I asked for a copy of the ledger showing that it’s a joint account

> and everything. He wouldn't provide it. So how do we prove that it was a joint account? Do we ask for an extension on this and come back?
>
> **The Court**: You could ask for an adjournment, but the matter is on the list for today. All the materials were filed. You had an opportunity to file materials if you are challenging the latest –
>
> **Mr. Prince**: Well, I just –
>
> **The Court**: - - garnishing order as being improper.
>
> *[Transcript of January 2022 Hearing, p. 14, ll. 38 -47; p. 15, ll 1 -4]*

[47] Having then provided the inadmissible email communication to the Judge, Mr. Prince continued:

> **Mr. Prince**: …So I don't know what else I can do in reference to that other than have her speak to you today.
>
> So the question becomes, should I extend this and put this in an affidavit form?
>
> **The Court**: Well, sir, that's up to you whether or not you want to make an application to adjourn this or not.
>
> **Mr. Prince**: I think I'll make an application to adjourn this and have proper evidence presented.
>
> *[Transcript of January 2022 Hearing, p. 15, ll. 41 -47; p. 16, ll 1 - 3]*

[48] Ultimately, Mr. Prince conceded that he had not produced the evidence required to succeed on his application, stating "…I have to agree with [counsel for CIBC] that there's not really any evidence to date. So we should probably be in a position to adjourn this. I'll go back to the notary and asked for my ledger, and present that along with his email…": [*Transcript of January 2022 Hearing, p. 18, ll. 23 - 28]*

[49] As noted, at the conclusion of the January 2022 Hearing, the Judge granted judgment in favour of CIBC against Mr. Prince. Having done so, in his oral reasons for judgment after the January 2022 Hearing, the Judge states:

> [13] The issue, then, is whether or not the funds that have been paid into court under the existing garnishing order are validly paid in, and whether there should be an attack upon that garnishing order. As I have said to that, I am going to allow Mr. Prince an opportunity to advance that case further. He has provided very little evidence of that. The cheque from the notary does not indicate that it was payable to, or would otherwise be payable to, two people. He has had some pretty ample time to file that if he wanted to. There is no

> affidavit evidence regarding that, and that it really goes to, as I say, the funds in court.
>
> [Added emphasis.]

[50] Rather than dismissing Mr. Prince's application, the Judge scheduled the March 2022 Hearing to allow him a further opportunity to present the evidence. Simply put, this is not a case in which Mr. Prince was denied the opportunity to be heard or to present his case. Unlike the situation in *Boone*, the March 2022 Hearing was not the first or only opportunity for Mr. Prince to be heard. It was an additional opportunity to be heard.

[51] In fact, Mr. Prince had had three opportunities to present evidence and make his submissions to the court. The first opportunity being the initial hearing that he unilaterally scheduled to be heard on December 13, 2021. The January 2022 Hearing, March 1, 2022 (the deadline by which he was ordered to disclose his evidence), and the March 2022 Hearing were the second, third, and fourth opportunities for him to do so.

[52] Those three previous opportunities to present the evidence are a significant factor in this analysis. With those previous opportunities, it cannot be said that Mr. Prince has been denied the opportunity to be heard.

[53] Two other aspects of this case are important considerations when analyzing the context. First, neither the Judge's decision to proceed with the March 2022 Hearing in Mr. Prince’s absence, nor the ultimate decision to pay the Garnished Funds to CIBC, resulted in the determination of the substantive claim against Mr. Prince. CIBC had obtained judgment against Mr. Prince at the January 2022 Hearing. There is no question that he owed those funds to CIBC.

[54] Second, the Court of Appeal's decision in *Boone* was framed by the fact that the stakes for the parties were high. As the court noted in that case, “If the appellant was found liable for a $200,000 debt, she would almost certainly lose her home”.

[55] It cannot be said that the stakes in this case, being the $32,000 Garnished Funds, were as high. There was no evidence before the court regarding the impact of the payment of the Garnished Funds to CIBC on Mr. Prince or Mrs. Prince.

[56] In my view, notwithstanding Mr. Prince's acceptable explanation for his absence, the broader context in this case distinguishes it from the situation in *Boone* and the cases that it considered and dictates that proceeding in his absence did not result in a breach of procedural fairness. I conclude that is the case.

[57] Even if I am wrong, I also conclude that the circumstances of this case were exceptional such that relief for a breach of procedural fairness may be withheld on the basis that the ultimate decision to pay the Garnished Funds to CIBC can fairly be described as "inevitable." In that regard, I note that having been involved in the proceeding from the January 2022 Hearing and having the record of the proceedings before him, the Judge was expressly aware of the circumstances that led to the March 2022 Hearing.

[58] Mr. Prince had four months from the time he initially filed his application, and two months from the date that the Judge expressly raised the issue regarding the sufficiency of his evidence, to gather and provide the evidence required to support his position. Again, the March 2022 Hearing was the fourth opportunity for him to do so. As of the date of that hearing, he had not disclosed any evidence that was not already before the court at the January 2022 Hearing. The Judge had already concluded that evidence was not sufficient to support Mr. Prince's application. There is no reason to conclude that the Judge's conclusion would have changed by the date of the March 2022 Hearing.

[59] To have any prospect of success, Mr. Prince would have had to succeed on what he says would have been his application to adjourn the March 2022 Hearing. In my view, it is inevitable that he would not have succeeded on that application.

[60] First, on hearing Mr. Prince's attempt to "cancel" the hearing, the Judge expressly contemplated the possibility that Mr. Prince sought an adjournment. He

proceeded on the basis that either Mr. Prince had abandoned his application, or he required an adjournment. Either possibility was premised on the fact that by the March 2022 Hearing, Mr. Prince did not have any additional evidence in support of his position.

[61] Second, Mr. Prince's explanation for requiring the adjournment is not compelling. On this application, Mr. Prince explained that around March 7, 2022, he and his wife contracted COVID, which made them "severely ill." He deposed that due to quarantine, he was "unable to make an overnight trip to Kelowna before and including March 28, 2022, to grab the sparse amount of paperwork that constituted his evidence out of storage."

[62] Other than his unsuccessful attempts to obtain evidence from the notary, which never materialized, there was no evidence as to why he did not obtain that paperwork at some point after the January 2022 Hearing but before March 7, 2022, when he contracted COVID. As noted, all if not most of Mr. Prince's Merits Evidence predates even the filing of his application in November 2021 and was available to him. Given his previous dealings with the notary, his decision to persist in trying to obtain evidence from the notary rather than obtain evidence from the documents he already had was ill-conceived.

[63] It is also significant that the 30-day deadline by which he was to produce his further evidence expired on March 1, 2022, almost a week before he contracted COVID. The fact that he had COVID does not excuse his failure to meet that deadline. Notably, Mr. Prince's failure to produce evidence by the March 1, 2022 deadline partially formed the basis of the Order:

> [Mr. Prince] not appearing at the hearing but having filed a request to cancel his [a]pplication and upon [Mr. Prince] not complying with the order of January 21, 2022, his application to set aside garnishing order is dismissed.
>
> [Added emphasis.]

[64] In my view, having found as he did in the January 2022 reasons that Mr. Prince had by then "had some pretty ample time to file evidence if he wanted to," it is

inevitable that the Judge would not have granted Mr. Prince even more time to produce evidence on March 30, 2022.

[65] Finally, I note that because Mr. Prince had not followed the proper procedure for requesting an adjournment, it was open for the Judge to deny that request.

[66] On the totality of the record, including the events which led the Judge to allow Mr. Prince more time to gather the evidence he required to support his position, I am satisfied that the Order made at the March 2022 Hearing fell within a range of possible acceptable outcomes which are defensible in respect of the facts and law. It was reasonable.

[67] In summary, I have concluded:

a) That the judge's decision to proceed with the March 2022 Hearing in the absence of Mr. Prince was not procedurally unfair; and

b) The Order that the Garnished Funds be paid out to CIBC was reasonable.

C. Is the Matter Moot?

[68] The well-known test for mootness is set out in *Borowski v. Canada (Attorney General)*, [1989] 1 SCR 342, 1989 CanLII 123 (SCC). It provides, in part, that a court may decline to decide an issue if the decision of the court will have no practical effect on the rights of the parties.

[69] In this case, the court registry delivered a cheque representing the Garnished Funds to counsel for CIBC on April 7, 2022, one week after the order was made at the March 2022 Hearing. It did so on its own initiative based on the Judge's order. Those funds were deposited into counsel's trust account and dispersed to CIBC on April 11, 2022.

[70] Although Mr. Prince had unilaterally attended in court to obtain an *ex parte* stay of the March 2022 order on April 7, 2022, he never advised CIBC that he had done so. Nor did he obtain a stay. It was only on May 12, 2022, over a month after

the Garnished Funds were paid out, when CIBC was served with this petition, and it became aware of Mr. Prince's challenge to the order.

[71] Now that the Garnished Funds have been paid out of court, any order compelling the Provincial Court to reconsider its decision or even to determine the matter is moot. The funds have been paid.

[72] Although I have included the reasons for my decision for mootness at the end, in my view, my conclusion would have been dispositive of this petition. However, because the parties focussed a significant portion of their arguments on the procedural issue, and because I suspect that issue is of more importance to Mr. Prince, I have addressed that issue first.

VI. Conclusion

[73] For the forgoing reasons, Mr. Prince's application for judicial review is dismissed.

[74] As CIBC was successful on this application, I order that it is entitled to costs of this application.

“Ahmad, J.”