COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Morrison v. Laas,*
2024 BCCA 191

Date: 20240506
Docket: CA49570

Between:

Merle Thomas Morrison

Appellant
(Defendant)

And

Corey Edward Laas and Angela Christine Laas

Respondents
(Plaintiffs)

Before: The Honourable Madam Justice Horsman
(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated December 4, 2023 (*Laas v. Morrison*, 2023 BCSC 2130, Vernon Docket S57811).

Oral Reasons for Judgment

Counsel for the Appellant appearing via videoconference:	M.S. Dugas
Counsel for the Respondents appearing via videoconference:	K. Burnham
Place and Date of Hearing:	Vancouver, British Columbia May 6, 2024
Place and Date of Judgment:	Vancouver, British Columbia May 6, 2024

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Summary:

The appellant filed a notice of appeal from a decision of the chambers judge granting the respondents relief on a summary trial. The appellant did not serve his notice of appeal, or file his appeal record, within the time requirements of the Court of Appeal Rules. He applies for an extension of time to take these steps. Held: Application dismissed. The only ground of appeal identified by the appellant is that the judge erred in finding the case suitable for resolution on a summary trial. Given the discretionary nature of a decision on suitability, and the fact that there was unchallenged and uncontradicted evidence before the court on the narrow issue that arose for determination, the appeal was bound to fail. It is therefore not in the interests of justice to grant an extension of time.

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[1] **HORSMAN J.A.**: The appellant applies for an extension of time to file and serve his notice of appeal and to file his appeal record pursuant to s. 32 of the *Court of Appeal Act*, S.B.C. 2021, c. 6 and R. 41 of the *Court of Appeal Rules*, B.C. Reg. 120/2022.

Background

[2] This proceeding arises in the context of a longstanding dispute between neighbouring property owners over the location of an easement on the appellant's property. This is the second round of litigation that has arisen over the issue. To properly understand the issues in this proceeding, it is necessary to review the judicial findings that were made in the first round of litigation.

The prior litigation

[3] The parties own neighbouring properties on the shore of Shuswap Lake. The lots were originally created by subdivision as Lot B (owned by the appellant) and Lot C (now identified as Lot 1, and owned by the respondents). The source of the dispute between the parties is an easement that runs across Lot B to the lakeshore and turns north to reach Lot 1, thereby providing access to Lot 1.

[4] The appellant bought Lot B in 1993. In 2007, he commissioned a report from a surveyor, Mr. Sansom. Mr. Sansom produced a posting plan based on calculations derived from the original reference plan (Plan 5558) that had been deposited in the land title registry in connection with the original subdivision (the "Lewall Plan").

Mr. Sansom's plan suggested that the property line between the lots was inaccurate, and that Lot B actually extended 100 feet north of the property line.

[5] Relying on Mr. Sansom's plan, the appellant commenced a proceeding against the former owners of Lot 1 (the Van Den Tillaarts) in which he asserted ownership of a substantial portion of Lot 1. The Van Den Tillaarts filed a counterclaim seeking damages and an injunction against the appellant for blocking their easement over his property.

[6] In a judgment indexed as 2012 BCSC 669, and dated February 10, 2012, Justice Dley dismissed the appellant's claim. He accepted the evidence of a different land surveyor, Mr. Maddox, that the Lewall Plan contained "glaring errors", and the Sansom plan was, in its reliance on the Lewall Plan, seriously flawed. He accepted survey evidence tendered by the Van Den Tillaarts, prepared by Mr. Maddox, to the effect that the property boundary was located where it was historically understood to be. Justice Dley ordered the Land Title Office to accept for registration the plan that had been prepared by Mr. Maddox that showed the correct property lines, but did not plot the location of the easement. Justice Dley stated that the easement "conformed to the road" that had always been used, and concluded there was a lawful easement. He also ordered the appellant to clear the easement, and not to interfere with access to Lot 1.

[7] This Court dismissed the appellant's appeal of Justice Dley's decision in oral reasons: *Morrison v. Van Den Tillaart*, 2013 BCCA 48. On appeal, the appellant had argued, in part, that Justice Dley erred in ordering him to clear the blocked access to Lot 1. In dismissing this ground of appeal, the Court stated:

> [28] I accept the respondents' submission that the intention of the owners was to create an easement entering Lot B from the private crossing, running to the lakeshore and turning along the lakeshore towards Lot C. In the absence of any reliable evidence that the land area had shrunk by erosion, the best evidence of the location of the easement is the road which has always been used to reach Lot C. Within the hierarchy of evidence, the course travelled by the owners from the time of the subdivision is evidence of fences or possession reasonably related to the time of the original survey. Certainly, "measurements", in this case, are of little or no probative value.

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> [29] In my view, the trial judge was entitled to find that there was a lawful easement in place, to locate it as he did, and to conclude that Mr. Morrison had blocked it.
>
> [Emphasis added.]

[8] Accordingly, the prior litigation conclusively determined the correct property line between Lot B and Lot 1. The decision of Justice Dley, as confirmed on appeal, also generally located the easement, although not its precise boundaries.

The current proceeding

[9] The respondents (plaintiffs in the court below) purchased Lot 1 from the Van Den Tillaarts in 2021. It appears that, despite the earlier court proceeding, conflict has continued between the parties over the location of the easement. The existence of the easement is not in doubt. It is registered against the appellant's title, and described as "20 feet wide more or less as shown outlined in green on Plan 5558". However, plan 5558 was found by Justice Dley, and affirmed on appeal, to be inaccurate. While the decisions of Justice Dley and the Court of Appeal identified the inaccuracies in the reference plan, and generally described the correct location of the easement, the registered reference plan was not corrected to reflect the actual location of the easement.

[10] After the respondents purchased Lot 1, they say that the appellant continued to block their access to the easement, relying on the incorrect reference plan. The respondents filed a notice of civil claim. They sought, among other things, orders correcting the reference plan so that the location of the easement was properly depicted, and requiring the appellant to provide clear access to the easement.

[11] The respondents applied for judgment on a summary trial. Each party retained an expert to provide a survey report: Mr. Hol for the appellant and Mr. Minifie for the respondents. The preparation of the appellant's expert evidence was subject to the terms of the order of Justice Hori, dated March 21, 2023, which stated:

> The survey commissioned on behalf of the Defendant, Merle Thomas Morrison, will be conducted in accordance with the findings made and

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> confirmed by the Court of Appeal in the case of *Morrison v. Van Den Tillaart*, 2013 BCCA 48 and the surveyor is not to stray and create new boundaries that do not fit within the description of the easement set out in the Court of appeal decision.

[12] At the summary trial application, the appellant took the position, among other things, that the case was not suitable for resolution on a summary trial in light of conflicts in the survey evidence. The appellant argued that the reports of both experts "are plausible and require additional evidence on the issue of the cancellation of the easement": appellant's application response, quoted in the chambers judgment at para. 34.

[13] In the decision under appeal, the chambers judge found the case was suitable for a summary trial. The judge noted that neither party challenged the admissibility of the other party's expert report, or sought to cross-examine the experts. He found that the scope of the conflict in the evidence was not central to a determination of the issues. The judge was critical of the evidence of the appellant's expert, Mr. Hol, because, contrary to the order of Justice Hori, Mr. Hol's proposed location of the easement was inconsistent with judicial findings in the prior proceeding. As the judge observed:

> [61] …Mr. Hol is asserting that [the] easement should be located somewhere other than where the existing road is and, crucially, somewhere other than where the Court of appeal says that it is.

[14] Accordingly, the judge found that Mr. Hol's approach was "flawed", and his opinion to be "of no value": at para. 63.

[15] By contrast, the approach of the respondents' surveyor, Mr. Minifie, was to centre the existing road within the easement. The judge found Mr. Minifie's approach to be logical because having the travelled portion of the road centred within the easement provided users of the travelled roadway a buffer equidistant on either side. This ensured flexibility in the event that access was required for larger vehicles. It also ensured that the owners and occupiers of Lot B could not place any structures or items close to the travelled portion of the road so as to impede access: at para. 64. The judge concluded:

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> [65] The defence provided no evidence that having the easement defined in these terms creates any practical or other issue. As noted, Mr. Hol's report is of no utility on the subject and the defendant presented no other contrary evidence.
>
> [66] It is my conclusion that Mr. Minifie's opinion as to the appropriate location for the 20-foot wide easement does accord with the Court of Appeal's decision, with common sense and logic, and there is no evidence that alternative locations are either justified or to be preferred.

[16] The judge granted some, but not all, of the relief sought by the respondents. Among other things, he ordered that: (1) the easement in the registered plan be modified pursuant to s. 35 of the *Property Law Act*, R.S.B.C. 1996, c. 377, by reference to a new reference plan of easement based on Minifie's report, to depict its actual location, and (2) the order of Justice Dley requiring the appellant to clear the easement is extended and confirmed.

The notice of appeal

[17] On January 2, 2024, the appellant filed a notice of appeal of the December 4, 2023 decision of the judge on the summary trial. However, the notice of appeal was not served on the respondents until January 25, 2024. This was not compliant with R. 6(2)(a) of the *Court of Appeal Rules*, which requires that a notice of appeal be filed and served no more than 30 days after the order appealed from is pronounced. Rule 22(a) of the *Court of Appeal Rules* provides that an appeal is brought for the purpose of the *Rules* when the appellant files the notice of appeal and serves a copy of the filed notice on each respondent named in the notice of appeal. Even if a notice of appeal is filed on time, if it is not served within the timelines in the *Court of Appeal Rules*, and no extension of time to serve the notice of appeal has been granted, the appeal has not been brought in time: *Wu v. Murray*, 2023 BCCA 270 at para. 13 (Chambers).

[18] The appellant also did not file an appeal record within 60 days of the filing of the notice of appeal, as required by R. 23(1)(a) of the *Court of Appeal Rules*.

[19] By email of March 22, 2024, counsel for the appellant sought the respondents' consent to an extension of time to file the appeal record. The

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respondents declined to consent to an extension. The respondents also decline to consent to an extension of time to serve the notice of appeal.

Legal principles

[20] An application to extend the time to file and serve a notice of appeal is governed by the well-known criteria set out in *Davies v. C.I.B.C.* (1987), 15 B.C.L.R. (2d) 256 at 259–260, 1987 CanLII 2608 (C.A.):

1) Was there a *bona fide* intention to appeal?

2) When were the respondents informed of the intention?

3) Would the respondents be unduly prejudiced by an extension of time?

4) Is there merit in the appeal?

5) Is it in the interest of justice that an extension be granted?

[21] The *Davies* criteria also apply in applications to extend other time limits, with appropriate modifications: *Barnes v. Letkeman*, 2016 BCCA 455 at para. 10 (Chambers), application to vary dismissed 2017 BCCA 123.

[22] The threshold for the assessment of the merits of the appeal is low. The question is whether the appeal is "doomed to fail", or whether "it can be said with confidence that the appeal has no merit": *Stewart v. Postnikoff*, 2014 BCCA 292 at paras. 5–6 (Chambers). When an appeal has not been brought in time, an extension of time to bring the appeal should not be granted if the appeal is without merit: *Wu* at para. 18.

Analysis

[23] In my view, there is no question that the first three of the *Davies* criteria tend to support an extension of time. The appellant had a *bona fide* intention to appeal, and did, in fact, file his notice of appeal within the prescribed time. It is the appellant's late service of the notice of appeal that creates his first hurdle. The

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second hurdle is his failure to file the appeal record within the prescribed time. Although the appellant did not inform the respondents of his intention to appeal within the appeal period, the respondents were informed of the appellant's intention to appeal without any significant delay. The three-week delay in service of the notice of appeal has not caused them obvious prejudice.

[24] The central issue on this application is whether the appellant's appeal passes the merits threshold. If the appeal is doomed to fail, then an extension of time to bring the appeal should not be granted.

[25] The respondents say the appeal is doomed to fail. This is because the question of the location of the easement was effectively decided in the prior proceeding, and all that remained was to correct the inaccurate registered reference plan. The respondents further argue that the case was clearly suitable for resolution on a summary trial, which is a matter within the discretion of the judge in any event, because any conflict in the expert reports was illusory. The judge found Mr. Hol's expert report to be seriously flawed because it was inconsistent with the judicial findings in *Morrison v. Van Den Tillaart*, 2012 BCSC 669, aff'd 2013 BCCA 48, and contrary to the order of Justice Hori (which was not appealed) directing that the appellant's expert was bound by the findings in that case. Thus, as the judge found, the respondents' evidence as to the proper location of the easement was uncontradicted.

[26] The appellant maintains that the appeal is not bound to fail. His main ground of appeal is that the judge erred in finding the case was suitable for resolution on a summary trial because he says there was no evidence to support Mr. Minifie's opinion that the easement should be located with the road as its centre. The appellant says that evidence could have been provided on the location based on the historic use of the easement. Further, the appellant could have provided evidence as to the impact that Mr. Minifie's location of the easement has on his use of his property.

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[27] I am not persuaded that the appellant's appeal meets the low merits threshold for an extension of time to bring the appeal. The appellant's argument about the alleged lack of evidence to support Mr. Minifie's opinion must be placed in context. The appellant sought and obtained an eight-month adjournment of the originally scheduled hearing date for the summary trial in order to have an opportunity to tender expert evidence. The appellant had Mr. Minifie's report, and every opportunity to adduce evidence that he considered necessary to counter it. Yet, as the judge noted, the appellant "provided no evidence that having the easement defined in these terms creates any practical or other issue": at para. 65.

[28] Furthermore, the appellant did not object to the admissibility of Mr. Minifie's report, nor did he seek any opportunity to cross-examine Mr. Minifie: at para. 42. As I have noted, the appellant's objection to suitability at the summary trial was largely based on the purported conflict between two "plausible" analyses. However, given the flaws in the report of the appellant's surveyor, Mr. Hol, the judge was left with only one plausible analysis.

[29] As the respondents emphasize, this case is unusual in that the location of the easement had already been established in the prior litigation, and all that remained in this proceeding was to correct the inaccuracies in the existing reference plan. As of the time of the summary trial, it had been conclusively determined that: (1) a 20-foot wide easement existed over Lot B; (2) the easement conformed to the existing road; and (3) the existing reference plan did not accurately depict the location of the easement. The judge accepted the evidence of the respondents' surveyor that located the easement in a manner consistent with these facts, and rejected the evidence of the appellant's surveyor that proposed a location that was inconsistent. It is difficult to understand how the judge could be said to have erred in light of the record and issues that were before him.

[30] A decision that a case is suitable for summary trial is discretionary and entitled to deference on appeal, absent an error of law or principle: *Hudema v. Moore*, 2021 BCCA 482 at para. 44. I see no prospect that a division of this Court

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will find that the judge erred in law or principle in finding a case suitable for summary trial where there was uncontradicted and unchallenged evidence that disposed of the narrow question that arose for adjudication.

[31] Given that the appeal is bound to fail, it is also not in the interests of justice to grant the appellant an extension of time to bring it.

Disposition

[32] The appellant's application for leave to extend the time to serve his notice of appeal is dismissed, with costs to the respondents.

"The Honourable Madam Justice Horsman"

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