COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Badela v. Donald,*
2024 BCCA 215

Date: 20240604
Docket: CA49476

Between:

Kal Mohamed Badela

Appellant
(Plaintiff)

And

James Joseph Donald, Insurance Corporation of British Columbia, Beata Siwinski, Edward Leung, Ryan Ruggles, Claudia Cortez, Megan Stapelmann, Scot Jackson, Navdeep Brar, and Daryl Learned

Respondents
(Defendants)

Before: The Honourable Mr. Justice Butler
(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated October 20, 2023 (*Badela v. Donald*, 2023 BCSC 2366, New Westminster Docket M246736).

Oral Reasons for Judgment

The Appellant, appearing in person (via videoconference):	K. Badela
Counsel for the Respondent, James Joseph Donald:	V.G. Critchley
Counsel for the Respondents, Insurance Corporation of British Columbia, Beata Siwinski, Edward Leung, Ryan Ruggles, Claudia Cortez, Megan Stapelmann, Scot Jackson, Navdeep Brar, and Daryl Learned:	J.A. Morris
Place and Date of Hearing:	Vancouver, British Columbia May 29, 2024

Place and Date of Judgment:	Vancouver, British Columbia June 4, 2024

Summary:

The appellant appeals from an order sequencing the hearing of certain applications brought by the appellant and the respondents in the trial court. The ICBC Respondents apply to quash the appeal, arguing that the order is not appealable at this stage of the proceedings. Held: Application granted. In examining the substance of the event in the trial court, the judge's sequencing order does not give rise to an "order" under the Court of Appeal Act. It was a pre-hearing ruling designed to facilitate the hearing of the parties' applications efficiently, which did not determine the appellant's procedural or substantive rights. The order falls within a grey area of judicial decisions from which there is neither an automatic right of appeal nor an ability to seek leave to appeal.

[1] **BUTLER J.A.**: The respondents, Insurance Corporation of British Columbia, Beata Siwinski, Edward Leung, Ryan Ruggles, Claudia Cortez, Megan Stapelmann, Scot Jackson, Navdeep Brar, and Daryl Learned (the "ICBC Respondents"), apply for an order quashing the appeal. The appeal is from an order sequencing the hearing of certain applications brought by the appellant and the ICBC Respondents in the trial court (the "Sequencing Order"). The issue on this application is whether the Sequencing Order is an appealable order for the purposes of the *Court of Appeal Act*, S.B.C. 2021, c. 6 [*Act*]. If it is not appealable, then the ICBC Respondents take the position that the appeal must be quashed. The respondent, James Joseph Donald, supports the application.

[2] The appellant, Kal Mohamed Badela, opposes the application and asks that it be dismissed so that the appeal can proceed.

Background

[3] This application arises out of a single motor vehicle accident involving Mr. Badela and Mr. Donald. The accident was witnessed by Sterling Rychkun, who gave a statement to ICBC regarding the accident. The unusual circumstances that give rise to the question on this application were succinctly described by Justice Taylor who made the Sequencing Order and issued reasons for judgment indexed at 2023 BCSC 2366 (the "Reasons"):

> [3] Mr. Badela, by notice of civil claim filed September 12, 2022, commenced action number 245869. In that action, Mr. Badela claims against Mr. Donald and Mr. Rychkun in tort and conspiracy on the basis that the

defendants made false statements to ICBC regarding the circumstance of the Accident with the result that Mr. Badela was determined by ICBC to be 100% responsible.

[4] A few weeks later, Mr. Badela, by notice of civil claim filed on October 28, 2022, commenced a second claim with action number 246736. In that action, Mr. Badela advanced three separate claims also related to the Accident:

> 1) against the defendant Mr. Donald in tort for personal injuries caused by the Accident;
>
> 2) against ICBC and certain ICBC employees in tort and conspiracy in relation to ICBC's determination that the plaintiff was 100% responsible for the accident; and
>
> 3) against ICBC in relation to Part 7 entitlements.

[5] The defendants filed responses to the civil claims in both actions denying the allegations.

[6] On March 8 and March 14, 2023, the defendants filed applications seeking the following relief:

> 1) severance of the claim against Mr. Donald from the claims against ICBC and the ICBC employees in action number 246736;
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> 2) an order that the personal injury claim against Mr. Donald be tried before the claims against ICBC and the ICBC employees;
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> 3) an order staying the claims against ICBC and the ICBC employees, including with respect to document production and discovery, pending disposition of the claim against Mr. Donald;
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> 4) an order staying action number 245869 pending disposition of the claim against Mr. Donald; and
>
> 5) an order that production of documents in discovery and all matters besides the claim against Mr. Donald be stayed pending disposition of that claim.

[7] On June 19 and 26, 2023, the plaintiff filed an application seeking the following relief with respect to the two actions:

> 1) an order striking out the response to civil claim of Mr. Donald with leave to file an amended response in 14 days;
>
> 2) an order striking out certain paragraphs of the response to civil claim of ICBC and the ICBC employees with leave to file;
>
> 3) an order requiring the defendants to comply with discovery documents; and
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> 4) an order staying the defence application until the defendants have amended their pleadings and complied with discovery.

[4] The applications were set for hearing twice but on each occasion, there was insufficient court time available for the applications to be heard. At the second

scheduled application, knowing that there was insufficient time available to hear all of the applications, the parties asked Justice Taylor to rule on the sequencing of the applications. He did so, stating:

> [8] It was agreed between the parties at the outset of this hearing that my ruling would be limited to the procedural question of sequencing and that a ruling on the merits of the other issues could be addressed at a later date, depending on the outcome of this hearing. For clarity, I am not making a ruling in this decision on any of the substantive matters in any of the notices of applications other than the order of proceeding.

[5] The judge determined that he had jurisdiction to make the order sought, relying on Rule 22-1(7) of the *Supreme Court Civil Rules* and the general principle that the superior court has power to control its own process: Reasons at paras. 9–13.

[6] The judge then considered the sequencing application "in light of the larger context of judicial economy, procedural efficiency, and fairness to all parties": Reasons at para. 16.

[7] The judge found that the efficiency of sequencing the respondents' applications first significantly exceeded Mr. Badela's proposed sequencing for three reasons. First, it had the possibility to narrow the issues before the court. Second, the issues for discovery and pretrial procedures would be narrowed and the trial itself could be shortened. Finally, there would be no prejudice to Mr. Badela, as he would still have the opportunity to oppose the respondents' applications on the merits. The judge reasoned that, if Mr. Badela were unsuccessful, his right to make his applications would have only been delayed: Reasons at paras. 17–19.

[8] Ultimately, the judge determined that the respondents' applications should be heard first, and Mr. Badela's applications stayed pending the hearing of the respondents' applications: Reasons at paras. 24–25.

[9] On November 16, 2023, Mr. Badela filed his notice of appeal.

[10] On February 7, 2024, the parties settled the terms of the order:

> 1. The plaintiff's applications filed in BCSC Action No. 246736 on June 19, 2023, and in BCSC Action No. 245869 on June 26, 2023, are stayed pending disposition of the application of the [ICBC Respondents] filed on March 8, 2023 in BCSC Action No. M246736, and of the defendant, James Joseph Donald, filed on March 14, 2023 in BCSC Action No. M246736.
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> …

[11] On February 20, 2024, the ICBC Respondents' counsel wrote to the Registrar to request that their application to quash the appeal be heard prior to the hearing of the appeal, pursuant to Rule 60(4) of the *Court of Appeal Rules*, B.C. Reg. 120/2022 [*Rules*]. In a letter dated February 26, 2024, Registrar Outerbridge approved that request. He reasoned that the fundamental question of whether the order under review is appealable should be answered before the Court and the parties incur additional time and expense to bring the appeal to a hearing.

The Law

[12] Section 20(2)(a) of the *Act* provides that a justice may, on application, quash an appeal on the basis that the court lacks jurisdiction. This Court derives its jurisdiction from statute. Pursuant to s. 13 of the *Act*, an appeal may be brought from an order of the Supreme Court or a judge of that court. The *Act* defines order broadly:

> 1(1) … "order" includes
>
> (a) a judgment,
>
> (b) a decree, and
>
> (c) an opinion, advice, direction, determination, decision or declaration that is specifically authorized or required under an enactment to be given or made;
>
> …

[13] This Court has jurisdiction to hear appeals from final orders and from limited appeal orders, which are defined in Rule 11 of the *Rules*. Of course, for limited appeal orders there is no appeal as of right; an applicant must obtain leave to proceed with an appeal.

[14] Given the broad definition of order, and the restriction on appeals from limited appeal orders, it would appear, on first blush, that there is a right to appeal from any "order" that is not a limited appeal order. However, in *Skyllar v. The University of British Columbia*, 2022 BCCA 138, this Court recognized that there is an undefined subcategory of judicial decisions from which there is neither an automatic right of appeal nor an ability to seek leave to appeal. This so-called "grey area", "includes a wide number of decisions made by judges in the trial court, as they manage the case load in individual cases before them": at para. 18.

[15] In *Skyllar*, the appellant sought to appeal a judge's decision not to recuse herself from hearing an application in the trial court. The respondent took the position that the judge's recusal decision was not an appealable order. The Court referred to *Cambie Surgeries Corporation v. British Columbia (Attorney General)*, 2017 BCCA 287, explaining the "grey area", and describing the proper approach to take when deciding whether an "order" is appealable:

> [19] In her concurring reasons in *Cambie Surgeries*, Justice Saunders explained this grey area:
>
> > [70] The juridical nature of the Supreme Court's tools for managing its caseload has taken on added importance with the enactment of current s. 7 [now s. 13(2)(a)] of the *Court of Appeal Act* referred to by my colleague. That section changed the criterion for leave to appeal from "interlocutory order" to a "limited appeal order" enumerated in Rule 2.1 [now R. 11]. There are a great number of events that occur in the trial court under a rule that provides "the court may order", that are interlocutory, that would never have attracted leave to appeal under the former s. 7, and that are not under a rule enumerated in Rule 2.1. There are also judicial instructions given that are not expressly provided for by a rule but are recorded by the Supreme Court of British Columbia and filed in documents entitled "order". If such matters are within s. 6 [now s. 13(1)] of the *Court of Appeal Act,* they are appealable as of right. An example of this effect is demonstrated in *British Columbia (Director of Civil Forfeiture) v. Lloydsmith*, 2014 BCCA 72, a case concerning a document entitled "order" that addressed the timing of a cross-examination. This Court held the matter was not appealable because it concerned no more than a ruling made in the management of litigation.
> >
> > [71] Two approaches are possible. One is to give a literal reading to the *Supreme Court Civil Rules* and all documents entered by the Supreme Court of British Columbia entitled "order", so as to engage this Court's process whenever a litigant chooses to challenge such an

> "order". The other is to enquire into the substance of the event that occurred in the Supreme Court of British Columbia, to determine whether an "order", as intended by s. 6 of the *Court of Appeal* Act, has been made that allows an appeal.
>
> [20] In *Cambie Surgeries*, this Court endorsed the second approach articulated by Justice Saunders. The Court does not take a literal approach to the question of whether a document is an "order" to determine if it gives rise to a right of appeal or the right to seek leave to appeal. Rather, the substance of the matter is considered: [*The Owners, Strata Plan VR29 v. Kranz*, 2021 BCCA 32] at para. 51.

[16] In *Skyllar*, the Court concluded that it did not have jurisdiction, at that stage of the proceedings, to entertain an appeal, concluding:

> [37] … The chambers judge's decision to reject the application does not lead to an "order" under the *CA Act*. This was the type of mid-hearing ruling which is appealable only by way of appeal from the final judgment. Neither the *CA Act* or *CA Rules* permit a party, during the course of a hearing or trial, to appeal rulings or directions to a higher court. The rationale for such a principle is obvious: the trial process would soon grind to a halt if mid-trial rulings were subject to immediate appeal. ...

[17] The question that arises on this application is whether the order in question, which is not a limited appeal order, falls within the "grey area", or whether it is an order from which Mr. Badela has a right of appeal.

Positions of the Parties

[18] The ICBC Respondents contend that the order under appeal is a discretionary procedural decision, which is not appealable at this stage of the proceedings. They submit that Mr. Badela may include any alleged errors in that decision as a ground of appeal from a final order made at the trial of the action, or from an appealable order made at the conclusion of the respondents' applications.

[19] Mr. Badela contends that the Sequencing Order is appealable. He relies on *Grewal v. Grewal*, 2017 BCCA 261 at paras. 21–22, citing *First Majestic Silver Corp. v. Davila Santos*, 2015 BCCA 452, for the proposition that a decision that determines rights, whether procedural or substantive, or makes declarations of law, is an order. He submits that the order under appeal determined his substantive right to a fair and just determination of his claim. In making this argument, he stresses that pleadings

are a foundational step in any court proceeding and, as a consequence, disputes about the sufficiency or adequacy of pleadings must be determined prior to consideration of discretionary orders about sequencing.

Analysis

[20] As set out above, this Court only has jurisdiction to entertain an appeal if what is sought to be appealed falls within the definition of "order" within its constating statute: *Cambie Surgeries* at para. 29. The fact that something is documented in the record of the Supreme Court as an "order", does not make it an appealable "order" under s. 1 of the *Act*: *Skyllar* at para. 17. Additionally, the fact that reasons are given for a court pronouncement, does not make it an "order": *First Majestic* at para. 34.

[21] As set out in *Cambie Surgeries* at para. 71, I must enquire into the "substance of the event that occurred"; that is, the making of the Sequencing Order. When I do that, I conclude that it is not an appealable order.

[22] Examining the substance of the event includes considering both the effect of the order and the way in which it came about. The judge was careful to note that he was not ruling on the substance of any of the matters advanced in the parties' notices of applications: Reasons at para. 8. In order to facilitate the hearing of the competing applications that had twice been adjourned because of a lack of sufficient court time, the judge decided which party's applications should be heard first. The decision was limited to the sequencing of two competing sets of applications. Presumably the parties sought the ruling because they were of the view that it would be easier to get sufficient court time before a judge to hear one party's applications rather than both at the same time.

[23] In *Skyllar*, the Court was concerned that allowing appeals from mid-hearing rulings would grind trial proceedings to a halt. In this case, it is difficult to describe the ruling in question as "mid-hearing". It was a pre-hearing ruling designed to facilitate the hearing of the parties' applications efficiently for their benefit, and bearing in mind the interests of judicial economy. Permitting immediate appeals from

this type of order would do more than grind trial proceedings to a halt, it would make timely adjudication of claims unattainable.

[24] In arriving at this conclusion, I reject Mr. Badela's submission that the Sequencing Order determined his procedural (or substantive) rights. The judge did not determine that the personal injury claim would proceed in advance of the claims against the ICBC Respondents, only that the application seeking such relief would be heard in advance of Mr. Badela's applications seeking relief with respect to amending pleadings and document discovery.

[25] I also reject Mr. Badela's submission that the judge, made a determination going to the substance of his applications. This argument focuses on the judge's statement that the respondents' pleadings were sufficiently detailed:

> [20] Mr. Badela argues that it is necessary for the pleadings of the defendants to be further particularized to address the defendants' applications. I do not agree. On review of the defendants' pleadings, which I note have previously been amended in response to the plaintiff's earlier demands for particulars, these pleadings are in my view sufficiently detailed to enable the court to understand the nature of the claims and defences and to enable the defendants' applications on severance and a stay of proceedings to be addressed, at least at this stage.
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> [Emphasis added.]

[26] The judge was careful to note that he was only considering the sufficiency of the respondents' pleadings for the purpose of the Sequencing Order, not to determine the substance of Mr. Badela's applications. The judge did not purport to rule on the applications to strike or amend pleadings.

[27] At the hearing of this application, Mr. Badela's primary submission was based on his contention that pleadings are foundational such that any application questioning the sufficiency or viability of pleadings must be determined before consideration of other applications, including those sought by the respondents.

[28] The importance of pleadings cannot be understated. Their purpose and importance have been the subject of numerous decisions at all levels of court. Pleadings "serve the ultimate function of defining the issues of fact and law that will

be determined by the court" and "guide the litigation process": *Mercantile Office Systems Private Limited v. Worldwide Warranty Life Services Inc.*, 2021 BCCA 362 at paras. 21–23.

[29] However, the judge did not make any ruling that touched on Mr. Badela's rights in relation to the propriety or sufficiency of pleadings. Mr. Badela will be able to make the argument he advanced in this Court—that pleadings are foundational and that the respondents' pleadings are inadequate—at the hearing of the respondents' applications. He will be able to argue that their pleadings in their present form are lacking in sufficient particularity to support the respondents' applications for a severance and a stay. He will be able to argue that those applications should be adjourned to await a determination of his applications. The Sequencing Order does not prevent him from continuing to assert those positions.

[30] Returning to the application to quash the appeal, I would also note that Mr. Badela is not without a remedy in relation to the Sequencing Order. After a ruling is made on the respondents' applications, Mr. Badela may, subject to the *Act* and the *Rules*, be able to appeal or seek leave to appeal to this Court. Further, at the end of the trial, if he wants to challenge the final order, he may be able to advance a ground of appeal premised on the alleged error made by the judge in granting the Sequencing Order.

[31] In summary, when I examine the substance of the event in the trial court, I have no hesitation in concluding that the Sequencing Order is not appealable.

Disposition

[32] I would quash the appeal as not being authorized by s. 13 of the *Act*.

"The Honourable Mr. Justice Butler"