

In the Court of Appeal of Alberta

Citation: Piikani Nation v Kostic, 2017 ABCA 399

Date: 20171128
Docket: 1701-0063-AC
Registry: Calgary

Between:

Piikani Nation

Respondent
(Plaintiff)

- and -

Liliana Kostic

Applicant/Respondent
(Defendant)

- and -

Bruce Alger, Grant Thornton Limited, Grant Thornton Alger Inc.

Applicants/Respondents
(Not Parties)

- and -

Grant Thornton LLP

Applicant/Respondent
(Not a Party)

- and -

Scott Venturo Rudakoff LLP

Applicant
(Not a Party)

- and -

CIBC Trust Corporation and CIBC World Markets Inc.

Not Parties to the Applications
(Third Parties)

- and -

Raymond James Ltd., Peter Strikes with a Gun, Rod North Peigan, Brian Jackson, Daniel Northman, Janet Potts, Dexter Junior Smith, Neil Sharp Adze, deceased, Ron S. Maurice, and Dale S. Szakaacs of the Law Firm Maurice Law

Not Parties to the Applications
(Defendants)

**Reasons for Decision of
The Honourable Madam Justice Jo'Anne Strekaf**

Application for Stay/Extension Order
Application to Strike Appeal as Against Some Parties
Application for Intervenor Status
Application to Strike Intervenor

**Reasons for Decision of
The Honourable Madam Justice Jo'Anne Streckaf**

I. Introduction

[1] Ms Kostic (appellant) has appealed various orders granted by a case management judge in an action commenced against her and others by the Piikani Nation (“Nation”) in which the Nation alleges negligence, breach of fiduciary duty and conspiracy (QB Action No 0601-13081, “Negligence Action”). After the appeals were filed, the opposing parties consented to a suspension of all deadlines related to the appeals until August 4, 2017. When the parties refused the appellant’s request for a further extension, this Court’s Case Management Officer advised her that the appeal deadlines would be reinstated effective September 22, 2017 and she would need to make an application if she wished further extensions of the filing deadlines (Extension Application).

[2] I heard the appellant’s Extension Application with respect to a number of the appeals on October 3, 2017 and granted it in part: *Piikani Nation v Kostic*, 2017 ABCA 350 (First Extension Application Decision). At that hearing I adjourned the appellant’s Extension Application in relation to this appeal and an associated application by Bruce Alger, Grant Thornton Limited and Grant Thornton Alger Inc (Grant Thornton Group) to strike the appeal as it affected their interests (Striking Application): para 13. These and several related applications were heard on November 7.

[3] Very briefly, this appeal concerns a case management order which denied the appellant permission to seek costs from the Piikani Investment Corporation (“PIC”) on a full indemnity basis; add parties to the Negligence Action; and apply for a declaration to have the Nation declared a vexatious litigant: *Piikani Nation v Raymond James Ltd*, 2017 ABQB 81 (Decision).

[4] By way of context, Grant Thornton Limited’s corporate predecessor was appointed under the *Bankruptcy and Insolvency Act*, RSC 1985, B-3 as regards matters involving the solvency of the Piikani Investment Corporation (“PIC”). PIC was the Nation’s investment vehicle and was previously involved in the Negligence Action. PIC’s action against the appellant was dismissed on September 13, 2013 and the case management judge made two subsequent orders concerning costs and damages. In part, the first issue in this appeal relates to matters arising from those orders. By virtue of its appointment as PIC’s proposal trustee, the Grant Thornton Group is involved. As well, the appellant applied on February 24, 2016 in the Court of Queen’s Bench for permission to have the Grant Thornton Group and Grant Thornton LLP added as third party defendants and defendants by counterclaim in the Negligence Action; this application remains extant.

II. Issues

[5] Four issues were considered at the November 7 hearing:

- i. The appellant's application for reconsideration of my October 3 decision to add the Grant Thornton Group as respondents to the Extension Application;
- ii. The application by Scott Venturo Rudakoff LLP (SVR) to intervene on the Striking Application and the Extension Application and, if necessary, on the appeal;
- iii. Grant Thornton Group's Striking Application (brought on the basis that the Notice of Appeal was not served on them within the time contemplated in the *Rules*) and the appellant's cross-application to dismiss the Striking Application; and
- iv. The appellant's Extension Application.

[6] Various other issues were raised by the appellant but only the issues set out above and relevant to this appeal are addressed below.

[7] I decided the first two issues at the hearing. As regards the first issue, I was not persuaded to revisit my October 3 decision adding the Grant Thornton Group as respondents to the Extension Application and the appeal, and I also granted Grant Thornton LLP status as a respondent to the Extension Application and the appeal. As regards SVR's application, I permitted it to intervene on the Striking Application and the Extension Application. Although it also applied for permission to intervene on the appeal that was not seriously pursued on the application and counsel indicated this was done because the outcome of the Striking Application and the Extension Application was unknown.

[8] My reason for granting this relief on the first two issues and discussion of the third and fourth issue follows.

III. Analysis

A. Grant Thornton Parties' Status on These Applications and this Appeal

[9] Because I adjourned this appeal, it is not reflected in the First Extension Application Decision that the Grant Thornton Group was granted status as respondents on this appeal. This decision was based on their participation in the case management proceedings that led to this appeal. They were granted status even though they have not been formally added as parties in the Court of Queen's Bench.

[10] The appellant subsequently filed an application seeking a declaration that the Grant Thornton Group had been improperly added. She contended that the case management judge's reasons reflect that only "Grant Thornton LLP" participated in the proceedings that led to this appeal: Decision at para 5.

[11] While the case management judge did refer specifically to Grant Thornton LLP in the Decision, I am satisfied from the materials submitted on these applications that he heard representations from counsel on behalf of the Grant Thornton Group. Consequently I was not prepared to revisit my decision to grant the Grant Thornton Group respondent status. Counsel for the Grant Thornton Parties acknowledged his error in failing to include Grant Thornton LLP in the materials.

[12] In an abundance of caution, I therefore also added Grant Thornton LLP in the same capacity to ensure that the appropriate parties are before the court on this appeal (the Grant Thornton Group and Grant Thornton LLP collectively are the "Grant Thornton Parties"). I find no prejudice to the appellant in adding Grant Thornton LLP, in addition to the Grant Thornton Group, as parties to these applications and the appeal.

[13] In conclusion, Bruce Alger, Grant Thornton Limited, Grant Thornton Alger Inc and Grant Thornton LLP have respondent status on this appeal.

B. SVR Application to Intervene

[14] SVR sought permission to intervene on the Grant Thornton Parties' Striking Application and on the appellant's Extension Application and, if necessary, on this appeal. SVR's application was consented to by the Nation, not opposed by the Grant Thornton Parties but opposed by the appellant. At the hearing I granted SVR's application to intervene on both applications with reasons to follow. These are my reasons.

[15] The test to intervene on an appeal was recently outlined in *Canadian Centre for Bio-Ethical Reform v Grande Prairie (City)*, 2017 ABCA 280 at paras 8-9 (citations omitted):

Rules 14.37(2)(e) and 14.58 of the *Alberta Rules of Court*, AR124/2010, permit a single judge to consider an application to intervene and to impose conditions. Unless otherwise ordered, the intervenor may not raise or argue issues not raised by the other parties to the appeal: Rule 14.58(3).

A single appeal judge may grant permission to intervene in an appeal if satisfied that the applicant (a) will be directly and "specially" affected by the outcome of the appeal or, (b) has special expertise or a unique perspective relating to the subject matter of the appeal that will assist the Court in its deliberations ...

Other considerations which bear on these criteria include:

1. Is the presence of the intervenor necessary for the court to properly decide the matter;

2. Might the intervenor's interest in the proceedings not be fully protected by the parties;
3. Will the intervention unduly delay the proceedings;
4. Will there possibly be prejudice to the parties if intervention is granted;
5. Will intervention widen the dispute between the parties; and
6. Will the intervention transform the court into a political arena?

[16] SVR was retained by the appellant's insurer in January 2017 to assume conduct of her defence in the Negligence Action. The appellant objected. The decision on appeal was released February 7, 2017. SVR filed the Notice of Appeal on March 6, 2017. SVR also called other counsel the same day, including counsel for the Grant Thornton Parties, to discuss the matter. Rule 14.8(1) requires the Notice of Appeal to be filed and served on "every other party to the appeal" within one month of the date of the decision. The Notice of Appeal was served on the Grant Thornton Parties 13 days after expiry of the one month period (March 20 not March 7). This is basis for the Grant Thornton Parties' Striking Application (discussed in the next section).

[17] The appellant and the Grant Thornton Parties made various allegations about SVR's involvement in the appeal. However, I have concluded that SVR has a unique perspective to advance that could be helpful in dealing with the Grant Thornton Parties' Striking Application and the appellant's Extension Application. SVR has a reasonable concern that its interests may be affected and its participation will not delay matters or prejudice the parties.

[18] As a result, I granted SVR's application to intervene.

C. Grant Thornton Parties' Striking Application

[19] The Grant Thornton Parties' Striking Application is made on the grounds that they were not served the Notice of Appeal within one month of the date of the decision as required by Rule 14.8(1). As mentioned, the Grant Thornton Parties participated in the case management proceedings but are not (yet) parties in the Queen's Bench Actions.

[20] The Grant Thornton Parties' counsel was contacted by SVR in relation to the appeal on March 6, received a copy of the Notice of Appeal on March 17 and was served with it on March 20. As mentioned, I granted the Grant Thornton Group status on October 3 and permitted Grant Thornton LLP to participate despite the inadvertent failure by their counsel to include them initially.

[21] The Grant Thornton Parties now submit that they were not "added" as parties to the appeal on October 3, 2017 but merely had their status reflected "as of right". I do not share that view. I

added them as respondents to ensure that the proper parties would be before this court. It was my view that despite the lack of formal party status in the Court of Queen's Bench, it was nonetheless appropriate for them to be permitted to participate in the appeal. Their participation on appeal would reflect their participation at case management and their interest in the outcome.

[22] It surely would not be appropriate to grant the Striking Application because of a 13-day 'delay' in service of the Notice of Appeal at a time when the Grant Thornton Parties lacked formal status at the Court of Queen's Bench proceedings that gave rise to this appeal and had no status on this appeal until October 3, well after the Notice of Appeal was served.

[23] The Grant Thornton Parties' Striking Application is therefore dismissed.

D. Appellant's Extension Application

[24] The appellant is seeking a similar order to that discussed in the First Extension Application Decision, being an order extending filing deadlines with respect to this appeal until 45 days after a decision is delivered in her Queen's Bench application in a related matter (Pending Decision). One of the issues in the Pending Decision is whether other parties owe her a duty to defend her in the Negligence Action. The Nation and the Grant Thornton Parties oppose the Extension Application.

[25] Much of the reasoning in the First Extension Application Decision applies and I do not propose to repeat it in its entirety. The legal test on an application to extend was set out in paragraphs 20-22 of that decision.

[26] I am satisfied that it would not be appropriate to delay this appeal until 45 days after the Pending Decision is delivered, particularly because the Nation and the Grant Thornton Parties are not parties to that action.

[27] I am not persuaded that there would be prejudice to anyone in granting the appellant the same limited extension to proceed with this appeal by requiring her to comply with the usual deadlines from the date of this decision. However, one of the considerations on an application for an extension of time is the merit of the proposed appeal. The court may refuse an extension "where there is no merit whatsoever ... as there is no reasonable prospect that a panel of this Court would interfere": *Bacon v Gullberg*, 2016 ABCA 62 at para 15.

[28] I was not satisfied that the appeals dealt with on the First Extension Application Decision were in that category. However, the issues on this appeal are more limited and additional materials have been provided that permit a preliminary assessment of the merit of the appeal.

[29] As mentioned, this is an appeal of parts of the order granted on February 7, 2017 in which the case management judge denied the appellant's applications for permission to:

- i. seek full indemnity costs and punitive damages against PIC for commencing and maintaining an action against the appellant alleging fraud. The case management judge dismissed the PIC action September 13, 2013, with costs reserved.

The case management judge concluded that costs were set by consent pursuant to his order on April 7, 2014 in the amount of \$63,280.47, which was not appealed, and the matter is therefore *res judicata*.

- ii. add Nation Councillor Doan Crow Shoe and external and internal counsel, Solomon, Hawkes and Pflueger so the appellant could seek costs against them jointly and severally in connection with the summary dismissal application.

The case management judge concluded that the allegations of misconduct would not be determined until trial; there was some evidence that Ms Kostic's motivation was to cause delay and expense by having counsel removed; and it was improper to add parties solely for the purpose of questioning or costs.

- iii. seek a declaration that the Nation is a vexatious litigant by virtue of having made allegations of fraud, bribery, kickback and conspiracy against her.

The case management judge concluded it was premature to determine whether the Nation was vexatious because that could not be determined until trial.

[30] I am satisfied that the second and third issues have no reasonable prospect of success and therefore deny the applicant an extension of time to pursue those issues on appeal.

[31] With respect to the first issue, the appellant submits that the case management judge's refusal to grant her permission to pursue this matter was inconsistent with two of his earlier orders. Paragraph 7 of his June 22, 2016 order stated that the:

April 7, 2014 Order shall be finalized without prejudice to Ms Kostic applying for a reconsideration or amendment of the April 7, 2014 Order to correct slip or because of new evidence. Such an application will be subject to costs.

Paragraph 6 of his August 26, 2016 order (finalized and filed October 27, 2017, now pending appeal) stated that the appellant:

is granted leave to renew her application filed on August 5, 2016 seeking a variation of the Order granted on April 7, 2014 including enhance costs and related remedies. Counsel for the parties shall arrange, by agreement, scheduling of the pre-hearing steps. Failing Agreement, counsel may bring application for directions.

[32] While the case management judge rejected the appellant's submission that permission had previously been granted by a fiat on August 5, 2016 (signed on his behalf by another judge), I am not satisfied that an appeal of this issue is entirely without merit, having regard to the state of the record and the pending appeal of the August 26, 2016 order.

[33] As a result, the appellant is permitted to pursue her appeal of this issue only, on the basis outlined below.

IV. Conclusion

[34] Grant Thornton LLP and, pursuant to my direction on October 3, the Grant Thornton Group are added as respondents. SVR is added as an intervenor on the Grant Thornton Parties' Striking Application and the appellant's Extension Application.

[35] The Grant Thornton Parties' Striking Application is dismissed.

[36] The appellant is permitted to proceed with her appeal on the first issue only. That is, her appeal from the case management judge's decision refusing to grant her permission to seek "costs against ... PIC ... on a solicitor/client full indemnity basis as well as punitive damages for commencing and maintaining a claim containing allegations that Kostic engaged in fraud, attempted fraud, embezzlement, bribes, kickbacks and conspiracy (collectively the 'fraud allegations')": Decision at para 8. The appellant must comply with the deadlines in rules 14.15 (Ordering the Appeal Record), 14.17 (Filing the Appeal Record), 114.24 (Filing Factums), 14.27 (Filing Extracts of Key Evidence) and 14.30 (Filing Book of Authorities). Failure to comply with the deadlines as calculated from the date of this decision will result in the appeal being struck by the Registrar without further order.

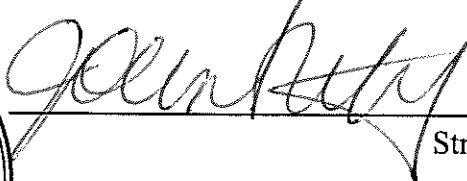
[37] This appeal and the 2017 appeals referred to in First Extension Application Decision, shall be heard by the same panel since they all originate in the same action.

[38] Once the Appeal Record has been filed for this appeal, the parties shall consult with the court's Case Management Officer prior to the appeal being scheduled to ensure it will be conducted in the most efficient manner with respect to timing, the filing of factums and such other matters that the Case Management Officer considers appropriate.

Application heard on November 7, 2017

Reasons filed at Calgary, Alberta
this 28th day of November, 2017




Strekaf J.A.

Appearances:

R. J. Hawkes, Q.C.

for the Respondent Piikani Nation

Applicant/ Respondent, Liliana Kostic, In Person

R.J.D. Gilborn

for the Applicants/Respondents Bruce Alger and others

C. Otto-Johnston

for the Applicant Scott Venturo Rudakoff LLP

I.J. Breneman

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