

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *British Columbia (Attorney General) v. Malik*,
2012 BCCA 175

Date: 20120420
Docket: CA037170

Between:

Her Majesty the Queen in Right of the Province
of British Columbia as represented by
the Attorney General of British Columbia

Respondent
(Plaintiff)

And

Ripudaman Singh Malik

Appellant
(Defendant)

Before: The Honourable Mr. Justice Donald
The Honourable Mr. Justice Lowry
The Honourable Madam Justice Neilson

On judicial review from: Court of Appeal for British Columbia, February 3, 2012
(*British Columbia (Attorney General) v. Malik*, 2012 BCCA 58)

Oral Reasons for Judgment

Counsel for the Appellant: B.E. McLeod

Counsel for the Respondent: F.G. Potts and T. Goepel

Place and Date of Hearing: Vancouver, British Columbia
April 17, 2012

Place and Date of Judgment: Vancouver, British Columbia
April 20, 2012

[1] LOWRY J.A.: The Province of British Columbia was awarded judgment against Ripudaman Singh Malik for \$5,200,132.51 plus pre-judgment interest in an action to recover legal fees paid on his behalf for his defence in what is referred to as the “Air India Trial”. A part of Mr. Malik’s defence to the Province’s action was struck out and judgment for the debt was entered following a summary trial in May 2009. A claim for damages against Mr. Malik and others for conspiracy amounting to fraud remains outstanding. Mr. Malik initiated two appeals: the first in respect of the pleadings, the second in respect of the judgment. Neither appeal was prosecuted. Both were twice placed on the inactive list as the rules of this Court require. They were removed the first time by consent, but Mr. Malik made no application to have them removed a second time. On the Province’s application about two months ago, following a comprehensive review of the history of

the litigation, for reasons indexed as 2012 BCCA 58, Madam Justice Smith dismissed the two appeals as abandoned.

[2] In so doing, she applied the well recognized considerations stated in *Davies v. Canadian Imperial Bank of Commerce* (1987), 15 B.C.L.R. (2d) 256 (C.A.) at 260. She found she was unable to conclude Mr. Malik had a *bona fide* intention to appeal, the Province had suffered a measure of prejudice caused by the delay, no merit in either appeal had been established, and, most compelling, the interests of justice favoured dismissal. In concluding, she said:

[35] In all of the circumstances, including a failure by Mr. Malik to demonstrate any *bona fide* intention to pursue the Appeals, no apparent merit to the Appeals, and Mr. Malik's history of attempting to defraud the Province and admitted contempt of court orders, in my view it would not be in the interests of justice to grant an extension of time to Mr. Malik for the filing of the requisite appeal materials.

[3] Mr. Malik applies to have the order dismissing the appeals set aside. He contends the chambers judge proceeded on a "fundamental misapprehension of the facts" in saying he has a history of attempting to defraud the Province and that he has admitted contempt of court orders. The Province accepts there has been no finding that Mr. Malik has attempted to defraud the Province or that he has admitted being in contempt of any court order, but it maintains the dismissal of the appeals is sound in any event.

[4] Mr. Malik's dealings with the Province concerning the payment of his legal fees became the subject of an appeal to the Supreme Court of Canada in its consideration of an *Anton Piller* order made against him and members of his family: *British Columbia (Attorney General) v. Malik*, 2011 SCC 18, [2011] 1 S.C.R. 657. In saying what she did, the chambers judge appears to have drawn on what was said in a passage from the Supreme Court of Canada's judgment with respect to Mr. Malik's conduct that referenced a series of questionable transactions and the violation of a least one court order. The passage in the judgment concluded:

[55] In my view it was open to the chambers judge [2008 BCSC 1027] on the basis of the whole of the interlocutory record to conclude that the Province had made out a strong *prima facie* case to establish Mr. Malik's debt and the respondents' conspiracy to defraud the Province and to assist Mr. Malik to avoid his obligations under the Defence Counsel Agreement.

[5] I see nothing in what is accepted to be a factual misapprehension that impairs the chambers judge's reasons for dismissing the appeals.

[6] The chambers judge said she was unable to find Mr. Malik had a *bona fide* intention to appeal because he made out no case to establish otherwise. A "standstill" agreement he made with the Province precluded his prosecuting the appeal pending the Supreme Court's disposition of the *Anton Piller* appeal. But, once the court's decision was rendered, it was, from May 2011 onward, open to Mr. Malik to advance his appeals but he took no steps to have them removed from the inactive list. He adduced no evidence to explain his delay or his intention with respect to prosecuting the appeals.

[7] Prejudice was, in the view of the chambers judge, to be inferred from the fact the Province held a

judgment since 2009 against Mr. Malik in excess of \$5 million. She did not consider it a significant factor.

[8] With respect to the merit in the appeals, it is important that Mr. Malik did not contest the amount of the debt for which judgment was given. He commenced an action against the Province for malicious or wrongful prosecution and pleaded a set-off against any amount awarded to the Province in its action on the debt and for damages for fraud. He maintained he was entitled to what would be equitable relief. His pleading in this regard was struck out and is the subject of the pleadings appeal. The chambers judge considered that the reasons advanced both for striking the pleading and granting judgment on the debt were such that no appeal would succeed.

[9] I see no error in her conclusion in that regard and it is not necessary to say more. This is because we are told that, following the dismissal of his appeals, Mr. Malik satisfied the judgment on the debt out of the sale of some property. In addition, funds from the sale are being held in trust as security for the Province's claim for damages for fraud and costs. The appeal of the judgment on the debt is clearly now moot. Further, Mr. Malik has discontinued his action for wrongful prosecution so he now has no prospect of recovering damages against the Province to be set off against any award of damages for fraud or costs. He does intend to seek costs of the Air India Trial and, as I understand his counsel, it is suggested any costs awarded may in some way constitute an equitable set-off against any judgment for damages the Province may obtain. But, if Mr. Malik is entitled to an award of costs, there would appear to be no reason he would not be paid. I am, in the result, unable to see any utility in his being afforded the opportunity to apply to have the pleadings appeal removed from the inactive list. It properly stands dismissed.

[10] It follows I would dismiss Mr. Malik's application to discharge the order dismissing his appeals.

[11] DONALD J.A.: I agree.

[12] NEILSON J.A.: I agree

[13] DONALD J.A.: The appeal is dismissed.

“The Honourable Mr. Justice Lowry”