

In the Court of Appeal of Alberta

Citation: Marshall v Lee, 2024 ABCA 86

Date: 20240313
Docket: 2301-0178AC
Registry: Calgary

Between:

Gavin Marshall

Respondent
(Plaintiff)

- and -

Hani Lee

Applicant
(Defendant)

**Reasons for Decision of
The Honourable Justice April Grosse**

Application to Restore Appeal

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[1] The applicant seeks to restore her appeal of a decision of the Court of King's Bench that addressed parenting and child support.

[2] The applicant filed her notice of appeal on July 21, 2023. While she was represented by counsel in the Court of King's Bench proceedings, she filed the notice of appeal without the assistance of legal counsel. Because her appeal was a fast track appeal, she had one month to file her appeal record: *Alberta Rules of Court*, Alta Reg 124/2010, rr 14.14(2), 14.16(3) [*Rules*]. The applicant submitted her appeal record on Friday, August 18, 2023, but it was rejected on the basis that she did not upload a separate copy of the transcripts. The applicant took steps to rectify the error that same day and submitted a separate copy of the transcripts for review. On Monday, August 21, 2023, the applicant served counsel for the respondent with unfiled copies of the appeal record and transcripts. On August 22, 2023, the registry rejected the applicant's transcripts because it was not apparent the submission was copied to opposing counsel. On August 22, 2023, the applicant's appeal was struck because the appeal record was not filed within the time mandated by the *Rules*. Upon receiving notice that her appeal had been struck, the applicant retained counsel and prepared an application to restore her appeal. She filed her application on August 25, 2023, three days after receiving notice that her appeal had been struck.

[3] The application to restore the appeal was originally set to be heard on October 4, 2023. On October 3, 2023, counsel jointly requested an adjournment to permit resolution discussions, which adjournment was granted on the basis that counsel would update the Court by October 31, 2023 as to whether the appeal would be abandoned, the application to restore re-scheduled, or the respondent would consent to restoration. Counsel wrote back, stating that they agreed to so notify the Court by October 31 and requesting that the application be adjourned *sine die*.

[4] On October 31, 2023, counsel wrote to the Court asking for two more weeks for continued discussions. The Case Management Officer granted the request and extended the deadline for notification as to the status of the matter to November 14, 2023.

[5] On November 14, 2023, counsel wrote to the Court requesting that they be given until January 15, 2024, to advise the Court whether the appeal would be proceeding and if so, whether the restoration application needed to be rescheduled. They asked that the matter remain adjourned *sine die* in the meantime. The Case Management Officer granted this request.

[6] On January 15, 2024, counsel for the applicant advised the Court that the parties had been unable to resolve the matter and the applicant wished to re-list the application to restore the appeal. The respondent opposed the application being re-scheduled and took the position that the matter was closed. On January 16, 2024, the Case Management Officer directed that the application to

restore the appeal could be set for a hearing and she extended the deadline for the appeal to be restored to the hearing date.

[7] I heard the contested application on March 6, 2024.

[8] The test for restoring an appeal is discretionary and engages the following considerations, no one of which is determinative:

- a) Whether there is arguable merit to the appeal;
- b) Any explanation for the defect or delay which caused the appeal to be struck;
- c) Reasonable promptness in moving to cure the defect and have the appeal restored;
- d) Timely intention to proceed with the appeal; and
- e) Potential prejudice to the respondent, including the length of the delay.

The court must weigh all of these factors to determine whether, overall, it is in the interests of justice to permit the appeal to proceed: *Prairie West Homes Inc v Baraka Homes Ltd*, 2023 ABCA 256 at para 10; *Wolk v Wolk*, 2023 ABCA 66 at para 3; *Kelley (Re)*, 2023 ABCA 219 at para 7.

[9] The applicant tried to file the appeal record within the deadline. After inadvertently failing to comply with this Court's technical requirements, the applicant moved quickly to cure the defect and have her appeal restored with the assistance of counsel. Her actions demonstrated a timely intention to proceed with the appeal.

[10] The respondent argues that the subsequent adjournments amount to unacceptable delay and that adjourning *sine die* is a reflection of no longer intending to proceed with the appeal. On these facts, I disagree. All the adjournments were by consent. Even though the matter was adjourned *sine die*, there were deadlines in place to update the Court. The adjournment and extension correspondence always contemplated the potential for the restoration application to be re-set if resolution were not possible. There is no record of the respondent objecting to the adjournments or otherwise raising any concern about delay in the restoration application. In fact, the positions set out in the correspondence in support of the adjournments were stated to be joint, and the respondent never indicated otherwise.

[11] In these circumstances, there is no basis to find that the adjournments are inconsistent with the applicant intending to proceed with the appeal, or that the respondent was misled in this regard. Similarly, I am not satisfied that there has been any prejudice to the respondent.

[12] With respect to the merits of the appeal, the applicant points in particular to the trial judge departing from the disclosure requirements set out in sections 21 and 22 of the *Alberta Child*

Support Guidelines, Alta Reg 147/2005, by ordering the respondent to disclose financial information for corporations in which he holds an interest of 9% or more instead of 1% or more. I agree that for the purpose of the application to restore, the appeal has arguable merit. I note that during the hearing, the respondent’s counsel wanted confirmation from the Court or the applicant that the appeal would be limited to the 9% disclosure issue and I advised the parties that I was not dealing with that point in the context of the application to restore.

[13] Finally, the respondent argues that the appeal must now be deemed abandoned pursuant to r 14.65(3)(b) because more than three months have passed since the appeal was struck and the application to restore the appeal has not yet been granted. The consent adjournments and the case management officer’s express extension of the time for restoration are a complete answer on this point.

[14] When an appeal is struck, it may be restored with the filed written consent of the parties. That did not happen in this case. Parties and counsel should be mindful of r 14.55(1), which provides that “[t]he parties to an appeal are responsible for managing the appeal and for planning its resolution in a timely and cost-effective way.” “Responsible management of an appeal includes reacting responsibly to non-prejudicial slips”: *1664694 Alberta Ltd v Beljan Development Management*, 2022 ABCA 41 at para 13.

[15] The application to restore the appeal is granted. During the oral hearing, I extended time for the restoration of the appeal to the date on which my order is entered.

Application heard on March 6, 2024

Reasons filed at Calgary, Alberta
this 13th day of March, 2024

Grosse J.A.

Appearances:

L.E. Sherry
for the Respondent

M. Sadiq
for the Applicant