COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Lieberman v. Business Development Bank of Canada,*** 2006 BCCA 363

Date: 20060802

Docket: CA033886

Between:

Lucien Lieberman and Marjory Morris

Respondents
(Plaintiffs)

And

Business Development Bank of Canada

Appellant
(Defendant)

Before: The Honourable Madam Justice Saunders
(In Chambers)

C.A.B. Ferris and M. Vesely — Counsel for the Appellant

D.A. Klein and S. Tucker — Counsel for the Respondents

Written Submissions Received:

Place and Date of Judgment: Vancouver, British Columbia
August 2, 2006

Supplementary Written Reasons by:
The Honourable Madam Justice Saunders

Reasons for Judgment of the Honourable Madam Justice Saunders:

[1] On June 20, 2006, in reasons for judgment indexed at 2006 BCCA 300, I dismissed the application of the Business Development Bank of Canada for leave to appeal. In those reasons for judgment, I did not address the question whether leave to appeal was required. These are my reasons for concluding that leave to appeal is required.

[2] The centre of the issue is s. 7 of the ***Court of Appeal Act***, R.S.B.C. 1996, c. 77, which requires leave to appeal an interlocutory order:

> **7**(1) In this section, **"interlocutory order"** includes
>
> . . .
>
> (b) an order made under the Supreme Court Rules on a matter of practice or procedure
>
> (2) Despite section 6 (1), an appeal does not lie to the court from
>
> (a) an interlocutory order,
>
> (b) an order respecting costs only, or
>
> (c) an order or determination under Rule 50 of the Supreme Court Rules
>
> without leave of a justice. …

[3] Until recently, a refusal of the Supreme Court of British Columbia to decline jurisdiction has been considered to be an interlocutory order: see, for example, ***Reynolds v. Cheng***, 2005 BCCA 16 *per* Low J.A. (in Chambers). Recent case authorities, however, invite a re-examination of the question: ***Radke v. M.S. (Guardian ad litem of)*** (2006), 49 B.C.L.R. (4th) 82, 2006 BCCA 12; ***Balla v. Fitch Research Corp.***, 2006 BCCA 212; and ***Tamarack Capital Advisors Inc. v. SEM Holdings Ltd.***, 2006 BCCA 349. ***Radke*** is a decision of a panel of this Court, whereas ***Balla*** and ***Tamarack*** are decisions of a single judge in Chambers. ***Tamarack*** and ***Balla*** reveal different understandings of the effect of ***Radke***.

[4] Much ink and many words have been spent over the years explaining the word ‘interlocutory’. Those efforts are often framed around discussion of whether the order is final, final being seen as the converse of interlocutory.

[5] I prefer to focus directly on the word ‘interlocutory’, the word chosen by the Legislature. The etymology of the word ‘interlocutory’ is of interest. The *Oxford English Dictionary*, 1933, reprinted 1961 & 70, refers to ‘interlocution’, from *inter*, meaning between, and *loqui*, meaning to speak. It gives as the definition in law, "Pronounced during the course of an action; not finally decisive of a case or suit. … Also, relating to a provisional decision in a case”. Quoting Swinburne's *Testaments*, it adds this:

> An interlocutory sentence, is a decree given by the judge, betwixte the beginning and ending of the cause, touching some incident or emergent question.

[6] In ***Radke***, a panel of this Court addressed the meaning of the word 'interlocutory' in the context of split trials and orders made under Rule 18A of the Supreme Court ***Rules of Court***. Until Rule 18A was enacted, the opportunity available to a party to try only one aspect of the case was limited. Using the robust approach to Rule 18A advocated in ***Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.*** (1989), 36 B.C.L.R. (2d) 202 (C.A.), parties have increasingly obtained orders from the Supreme Court of British Columbia on only one aspect of the case, or, to put it in more legalistic language, one aspect of the *lis*. However, s. 7 of the ***Court of Appeal Act*** did not change, with the result that parties were faced more frequently with orders, obtained on summary trial, that were dispositive of a significant issue in the litigation but were not appealable as of right.

[7] It was in this context that ***Radke*** took a fresh look at the circumstances in which leave to appeal is required from an order that does not bring an end to the action in the Supreme Court of British Columbia. Although the order sought to be appealed is defined as arising from a split case, some of the language in ***Radke*** demonstrates an intention that the decision be applied broadly. That approach was taken by Mr. Justice Donald in ***Balla.***

[8] ***Balla*** was spawned by a tangled action which had been back and forth between this Court and the Supreme Court of British Columbia, and involved two orders, one of which was an order that the court had jurisdiction *simpliciter*. Mr. Justice Donald concluded that the order could be appealed without leave, applying what he understood to be the application approach adopted in ***Radke***. He took from ***Radke*** a reciprocal principle, such that if the application could have a dispositive effect if answered one way, a right of appeal is available whichever way the application is answered. In dealing with the requirement for leave to appeal that order, and with reference also to the second order that involved consideration of dispositions of this Court, Mr. Justice Donald said:

> [9] Jurisdiction *simpliciter, forum conveniens*, and attornment, all issues canvassed in the jurisdiction decision, are normally resolved as preliminary matters early in an action. They are unlikely subjects for a trial. Similarly, the status of a default judgment or a damage assessment are unlikely subjects for trial, especially when the issue must be decided by reference to dispositions of this Court.
>
> [10] In ***Radke***, there is a reciprocal principle in the rationale: if the application could be answered with dispositive effect one way, thereby giving the unsuccessful party a right of appeal, then, if it is answered the other way, a right of appeal should also be available. So if Alliance's challenge to jurisdiction had succeeded, Balla's action would have been over - a final effect giving the right of appeal. It follows then that if the application goes the other way, as it did, a corresponding right of appeal arises.

[9] Likewise ***Radke*** was considered to have broad application, but to a different effect, by Mr. Justice Thackray in ***Tamarack***. There Mr. Justice Thackray found that an order which declined to

stay the action in deference to an arbitration process was not appealable as of right. In reaching this decision he said:

> [14] Under the application approach, therefore, only when an application inevitably would lead to a final order is the resultant order final for the purposes of appeal.. . .
>
> . . .
>
> [16] When asking whether an application would necessarily lead to a final order, 'final' is now defined as 'forming a substantive part of the trial' (***Radke***, paragraph 25). Therefore, under the "application approach" we must look at the application that was before Stewart J. and ask if it would have led to a final order – one that would have formed a substantive part of the final trial – no matter who succeeded … [H]is order refusing the stay can hardly be called a substantive part of the final trial.

[10] The different results in ***Balla*** and ***Tamarack*** come from different views on the effect of ***Radke*** and what was intended when the Chief Justice adopted the "application approach", explained in these terms:

> [19] This approach to the issue of "final or interlocutory" has sometimes been called the "application approach". Rather than look to the order "as made", one looks to the application that gave rise to the order. On this approach, a final order is one made on such an application or proceeding that, no matter who succeeds, the order will, if sustained, finally determine the matter in litigation. Examples of this approach go back at least to *Salaman v. Warner* [1891] 1 Q.B. 734.
>
> [Emphasis added.]

[11] On my reading of that paragraph, any order on a matter of jurisdiction is interlocutory because, in the event the court refuses to decline jurisdiction, the matter in litigation is not finally determined and, as Mr. Justice Thackray found at para. 16 of ***Tamarack***, the decision to take jurisdiction is not the "'substantive part' of the litigation as is the determination of liability in a split trial".

[12] I cannot say which of these views of ***Radke*** will prevail. Nor can I say that ***Radke*** will be found to have practical effect only in the area of split trials in which all or part of the *lis* between the parties is finally resolved. It seems to me that there is some virtue in considering ***Radke*** as addressing the split trial situation encouraged by Rule 18A. Such an approach is complementary to Rule 1(5), which speaks of determination of every proceeding on its merits, and the ***Court of Appeal Act***, which gives a right of appeal on dispositions made on the merits.

[13] The order in this case was made under Rule 14(6.1) and was in response to an application to decline jurisdiction on the basis that the court was *forum non conveniens*. On my understanding of the authorities, and both harking to the language of s. 7 which directs one to "the order" and bearing in mind the dictionary meaning of the word "interlocutory", I conclude that the

order in issue was interlocutory because it neither disposed of the case nor disposed of any aspect of the merits of the action. To hold otherwise, in my view, is to stray from the language of the ***Act***.

[14] For these reasons, in my view, the applicant requires leave to appeal.

"The Honourable Madam Justice Saunders"