

NOVA SCOTIA COURT OF APPEAL

Citation: *Hennick v. Children's Aid Society of Cape Breton*, 2003 NSCA 84

Date: 20030819

Docket: CA 205158

Registry: Halifax

Between:

Gregory Scott Hennick

Applicant

v.

Children's Aid Society of Cape Breton

Respondent

Judge: Justice Linda Lee Oland

Application Heard: August 14th, 2003, in Halifax, Nova Scotia, in Chambers

Held: Application for extension of time to file the notice of appeal granted, with conditions. Application for a date for hearing dismissed.

Counsel: Gregory S. Hennick, self-represented applicant
Matthew Williams, for the respondent

Decision:

[1] This is an application for an order extending the time to file a notice of appeal and, if granted, an order to set the matter down for hearing.

[2] The parties to this application signed an order consenting to the settlement of the applicant's claim against the respondent. The order was signed by a Supreme Court Judge and issued on July 17, 2003.

[3] The applicant filed by fax a notice of appeal appealing that order on July 18, 2003, one day after the period prescribed by **Civil Procedure Rule 62.02(1)**. The grounds of appeal alleged that the judge erred in law in allowing a consent order where the quantum of damages was far less than would have been granted by a trial judge, where the applicant agreed to settlement under duress and threat and without representation by proper legal counsel, and by denying the applicant the right to counsel under the **Charter**.

[4] In support of his application, the applicant filed a short affidavit which, after stating that at the time of the settlement referred to in the order he was unrepresented by legal counsel, continues:

4. I have attempted to obtain legal counsel to conduct my appeal and was unsuccessful in doing so. I did feel that it would serve me to have legal counsel present my appeal;

5. I was then in a position where I had to initiate this appeal on my own and have done so. I am not familiar with civil law and did not compute the time properly and thus was approximately 10 hours late in filing my documents;

6. The documents for my appeal were to be file (sic) by July 17, 2003 by 4:30 pm and the documents were not filed until July 18, 2003. I had faxed the documents to the Appeals Court to a Ms. Jean O'Hearn;

7. I am looking for an extension in time to provide me with the opportunity to file and serve my appeal notice. I would then require a three week extension to complete those procedures;

[5] At the hearing of the application in chambers, the applicant stated that he had received the respondent's written submission the afternoon of the previous day and had not had an opportunity to review it fully. Counsel for the respondent indicated that the applicant had not served him properly and that he had had to prepare for this application within a compressed time. However, each assured me that he was not seeking an adjournment and wished to proceed.

[6] In oral submissions and the respondent's written submission, the applicant and counsel for the respondent provided what purported to be information or additional details that each thought might be helpful in determining the application. These pertained to matters such as the nature of the claim and various proceedings since the action commenced some years earlier. They included comments attributed to judges or statements alleged to have been made by the applicant or counsel for the respondent or others during court proceedings or in conferences. Some accounts were disputed. For example, the parties did not agree whether the applicant had indicated an intention to appeal during a telephone conference with a judge held after the consent order issued.

[7] Neither party presented this material in the form of a sworn affidavit. The applicant was not cross-examined on the affidavit he provided and no oral evidence was received in chambers. As I pointed out during the hearing, unsworn statements made during submissions do not constitute evidence for the purposes of this application.

[8] The applicant argues that he is entitled to relief because the late filing was caused by his inability to obtain legal counsel and his faulty calculation of the time for filing a notice of appeal. The respondent submits that the issues are two-fold: first, whether a consent order can be appealed from; and second, if so, whether the appellant is entitled to an extension pursuant to **Civil Procedure Rule 62.34**. Following the hearing, its counsel provided additional case authority on the first issue.

[9] With respect, it is neither necessary nor appropriate to determine in this chambers application whether a consent order can be appealed to this court and, if so, whether leave would be required. In my view, those issues are separate from those raised on this application and ones which should be considered by a panel. In that regard, I would observe that the jurisprudence indicates some reservation as to whether a consent order can be appealed to this court. See, for example, the

comments of Bateman, J.A. in **Irving v. Irving** (1997), 164 N.S.R. (2d) 330; 491 A.P.R. 330 (N.S.C.A.) at ¶ 39 et seq. However, the wording of s. 39 of the **Judicature Act**, R.S.N.S. 1989, c. 240 as amended might be interpreted as allowing an appeal of a consent order, provided leave of the court is first obtained. See **Cosper v. Cosper** (1995), 141 N.S.R. (2d) 344 (C.A.) where a panel dismissed an application for such leave. The law on this matter may yet be unsettled.

[10] To determine this application, I turn to the guidelines for extensions of time for filing a notice of appeal. The court is to be satisfied that (a) the applicant had a *bona fide* intention to appeal while the right to appeal existed; (b) the applicant had a reasonable excuse for the delay in not launching the appeal within the prescribed time; and (c) the appeal has sufficient merit in the sense of raising a reasonably arguable ground. See **Nova Scotia (Attorney General) v. Mossman et al.** (1994), 133 N.S.R. (2d) 229 (C.A.). This three part test is not to be applied inflexibly. As Hallett, J.A. pointed out in **Tibbetts v. Tibbetts** (1992), 112 N.S.R. (2d) 173 at ¶14, the court must ask on such an application whether justice requires the application to be granted.

[11] I have scant evidence as to the applicant's intention to appeal while the right to appeal existed. He deposed that he was unsuccessful in obtaining counsel but his affidavit did not provide any specifics as to the efforts he made. Nor did it state that the applicant made the respondent or its counsel aware of his dissatisfaction with the consent order or of his intention to appeal during the appeal period. In essence, the court is asked to infer the requisite intention from his statement that he was unable to obtain counsel.

[12] I am satisfied that the applicant had reasonable excuse for delay and so has met the second part of the test. According to his affidavit, he was self-represented and calculated the appeal period improperly.

[13] In neither his affidavit nor during submissions did the applicant address the third part of the test, namely whether there was an arguable issue in his grounds of appeal.

[14] The applicant has failed to meet all the components of the three-part test. However, as stated earlier, on an application for extension of time to file a notice of appeal, the court is to ask itself whether justice requires the application to be

granted. There is no precise rule and the particular circumstances of each case are to be considered.

[15] I am of the view that generally, some degree of latitude in the application of the **Rules** should be considered for self-represented litigants. There will be those who are knowledgeable of procedural or substantive requirements through study, considerable experience in the courts, or other means. However, the applicant here who spoke at length in chambers did not strike me as being one of those.

[16] In granting an extension in **Tibbetts**, supra, Hallett, J.A. noted at ¶ 20 that relief had been granted in a number of cases where counsel had failed to file in time due to a misunderstanding of the time periods required under the **Rules**. Here the self-represented applicant deposed that he miscalculated the time.

[17] Moreover, the delay in filing the notice of appeal is particularly short. The applicant was but one day late. I am not persuaded that the respondent has been unduly prejudiced by this delay.

[18] Having considered the circumstances of this case, including my having been satisfied that the applicant had reasonable excuse for delay, I would grant an order extending time to file the notice of appeal, but on the following terms: (a) since, as I have observed, if a consent order can be appealed to this court, there may be a requirement to first obtain leave to appeal a consent order, the applicant is to amend his notice of appeal to seek such leave and, if granted, to appeal the order; (b) the amended notice of appeal is to contain the same grounds as set out in the notice of appeal that was filed late; (c) the amended notice of appeal is to be filed with the court and served upon the respondent on or before September 10, 2003.

[19] In his application documents, the applicant had also sought a date for the hearing of his appeal. However, this was not addressed in chambers, no certificate respecting preparation of the appeal book had been filed in accordance with **Rule 62.02(5)**, and the application for extension of time has been granted on terms. Consequently, the application to set down for hearing is not granted. When the applicant reapplies, he may wish to consider having that application heard in telephone chambers.

[20] I will leave the question of the costs of this application to be decided by the court on the hearing of the application for leave and, if granted, the appeal.

Oland, J.A.