

NOVA SCOTIA COURT OF APPEAL
Citation: *Hughes v. Vincent*, 2015 NSCA 21

Date: 20150306
Docket: CA 430455
Registry: Halifax

Between:

Trevor Idwal Hughes

Appellant

v.

Elaine (Hughes) Vincent

Respondent

Judge: The Honourable Justice Joel E. Fichaud

Motion Heard: February 25, 2015, in Halifax, Nova Scotia, in Telechambers

Held: Motion for production of transcript dismissed, and motion for dismissal of appeal reserved, per reasons for judgment of Fichaud, J.A.

Counsel: The Appellant Trevor Idwal Hughes on his own behalf
Joshua E. Cormier for the Respondent
Edward A. Gores, Q.C. for the Attorney General of Nova
Scotia

Reasons for judgment:

[1] The Appellant Mr. Hughes moves for an order that the Court provide the transcript of the matrimonial proceeding under appeal, at no expense to Mr. Hughes. This means the Province would absorb the expense. The Province opposes the motion. The Respondent moves for a dismissal of Mr. Hughes' appeal for non-perfection.

[2] On February 22, 2014, Mr. Hughes filed a Notice of Application in the Supreme Court of Nova Scotia (SAMDIVO No. 090119). The application was a matrimonial matter that followed divorce proceedings between the parties in Ontario. It appears, from the submissions to me, that Mr. Hughes applied in Nova Scotia to vary a divorce order of the Ontario court. The details of the Ontario proceeding and Mr. Hughes' Nova Scotia application are not in the material before me.

[3] On July 24, 2014, Supreme Court Justice Jamie Campbell dismissed Mr. Hughes' application. I understand from counsel and Mr. Hughes that the matter before Justice Campbell took less than one hour, involved no testimony, and the record comprised a limited number of documents.

[4] On August 14, 2014, Mr. Hughes appealed to the Court of Appeal.

[5] On August 22, 2014, the Registrar of the Court of Appeal sent Mr. Hughes the customary letter to appellants, notifying Mr. Hughes of the appellant's responsibilities under the Civil Procedure Rule 90.

[6] On November 24, 2014, Mr. Hughes filed a Notice of Motion to set a hearing date and obtain directions for filings. With his Notice, he signed and filed a Certificate of Readiness. The Certificate said he had ordered transcription of the audio recording of the hearing before Justice Campbell, that he was informed that the transcript would be completed by December 12, 2014, and that he would be able to file an Appeal Book by December 15, 2014.

[7] At a teleconference on December 3, 2014, based on Mr. Hughes' Certificate of Readiness, the Chief Justice scheduled the filings and hearing. Mr. Hughes was to file the Appeal Book by December 15, 2014, and his factum by January 7, 2015.

The Respondent's factum was due by January 23, 2015 and the hearing of the appeal was scheduled for March 17, 2015 at 10:00 a.m..

[8] On December 22, 2014, Mr. Hughes sent 19 pages of documents by fax to the Law Courts. The material failed to comply, in many respects, with the requirements for an Appeal Book stated in Rule 90.30. There was no transcript. On January 6, 2015, the Deputy Registrar wrote to Mr. Hughes, stating that the Court would not accept the material for filing, pointing out the requirements of Rule 90.30 that governs Appeal Books, providing a link to that Rule, and advising Mr. Hughes of the form and number of Appeal Books to be filed. On February 4, 2015, the Deputy Registrar again wrote to Mr. Hughes, reiterating the advice of January 6, 2015, and this time enclosing a copy of Rule 90.30.

[9] On January 7, 2015, in a tele-conference with Justice Farrar, Mr. Hughes acknowledged that he had not received the disks from the Court to order a transcript. He said that was because the Staff at the Amherst Courthouse had lost the disks. He said, however, that on that morning the Court staff telephoned to say the disks were available. But he could not predict when the transcript or Appeal Book would be ready. By an Order of January 7, 2015, Justice Farrar released the hearing and filing dates, and adjourned without prejudice to the Respondent's ability to move for a dismissal of the appeal.

[10] On January 16, 2015, the Respondent moved for an order striking the Notice of Appeal, relying on Rule 90.40(2):

90.40(2) A judge of the Court of Appeal may dismiss an appeal if the appeal is not conducted in compliance with this Rule 90 for any reason, such as, failing to comply with Rules respecting any of the following ...

Mr. Hughes' non-compliance cited for the Respondent's motion is his failure to file an Appeal Book, or obtain a transcript within the required time, after having filed a Certificate of Readiness that he would do so, and after the filing dates were scheduled in reliance on his Certificate.

[11] In support of the motion, the Respondent's solicitor filed an affidavit that exhibited an email exchange with Ms. Graham of the Amherst Court staff, respecting her dealings with Mr. Hughes. On January 8, 2015, Ms. McGuire of the Respondent's law firm asked Ms. Graham:

There appears to be some confusion with respect to the transcript of the hearing. After discussing this with you in August, I am hoping you can clarify what actually has happened with respect to the transcript of the hearing.

It appears that Mr. Hughes evidence yesterday to the Court of Appeal was that the matter is “out of his hands”. What I am wondering is did Mr. Hughes ever order the transcripts or even the disk?

Ms. Graham’s email of January 8, 2015 replied:

I can certainly help you with this. Mr. Hughes ordered the CD back in June. The cost of this was waived. He tried to order the typed transcript but was told it could not be waived, so he never did officially request it as a deposit would have been required. He was called by the court reporter a few days after the CD was ordered, back in June, and a message was left that it was ready. He did not come to pick it up. He called this week saying he never received either. I told him the CD was still here which he came to pick up that afternoon. As for the transcript, he again asked for it. I remembered my previous conversation with him about it and reminded him of it. He said he has no money and it has to be waived. I told him it would not be waived unless the court ordered it be. He said the appeal court said he needed it. I asked him if he asked the appeal court to order that the dept waive the cost and he said no, he did not ask them. I hope this clarifies his comments.

[12] At Mr. Hughes’ request, I agreed to hear the Respondent’s motion by teleconference, on February 5, 2015.

[13] On February 3, 2015, Mr. Hughes filed a motion for “the production of transcripts”. He wishes the Court to prepare the transcripts. The Province funds the Court’s operations. So Mr. Hughes’ motion is for an order that the Province pay for the transcript in a civil appeal of a private matrimonial dispute.

[14] Mr. Hughes did not give notice of his motion to the Province. I directed the Court’s staff to notify the Province of Mr. Hughes’ motion.

[15] Mr. Hughes’ motion was not filed in time for the scheduled teleconference of February 5. So I adjourned, to February 25, both the Respondent’s motion to dismiss and Mr. Hughes’ motion for production of a transcript. On February 25, 2015, by teleconference, I heard submissions on both motions from Mr. Hughes, counsel for the Respondent and counsel for the Province.

[16] In this decision, I will address Mr. Hughes’ motion that the Court (at the Province’s expense) prepare the transcript.

[17] Mr. Hughes' affidavit says:

The Appeal Notice was filed with understanding Amherst Justice Centre would produce the Transcripts. Only after 7 January Hearing was it made clear that Transcripts would NOT be made available to me.

On February 25, Mr. Hughes repeated his assertion that the Court staff told him that the Court would prepare the transcript, at no cost to Mr. Hughes.

[18] Mr. Hughes' assertions contradict Ms. Graham's detailed statement (above para. 11). Ms. Graham said she told Mr. Hughes that the cost of the transcript would "not be waived", unless a judge ordered otherwise. I accept Ms. Graham's statement and reject Mr. Hughes' contrary version. To be clear, I find that Mr. Hughes' allegation - that Court staff told him that the Court would provide him with the transcript free of charge - is untruthful.

[19] The Courts in Nova Scotia do not prepare transcripts for private litigants in divorce cases. The cost of the Appeal Book, including the transcript, is the responsibility of the appellant. Rule 90.29(5) says:

The appellant must cause a transcript of the proceeding to be prepared by a certified court reporter, unless legislation provides otherwise or a judge permits otherwise.

The point has been canvassed by Justices Bourgeois and Beveridge in *Mercier v. Nova Scotia (Attorney General)*, 2014 NSCA 93 (Chambers) and *Li v. Jean*, 2012 NSCA 63 (Telechambers).

[20] Rule 90.29(5) gives me a discretion to excuse Mr. Hughes from having the transcript prepared. I decline to exercise that discretion. The hearing involved no testimony. The matter took under one hour. I have considered waiving the requirement for a transcript of submissions. But I have decided against a waiver. From the tenor of what I have heard, in my view there is a risk that, without a transcript, Mr. Hughes' argument to the Court of Appeal might re-cast the submissions that were made to the judge of the Supreme Court. It is important that this Court be able to read what was said to Justice Campbell.

[21] I dismiss Mr. Hughes' motion for an order that the transcript be prepared by the Court. The order will be without costs.

[22] I direct Mr. Hughes to file and serve an Appeal Book that complies with Rule 90.30, and which includes a transcript, no later than Friday, April 10, 2015.

[23] The Respondent has moved for an order dismissing the appeal for non-compliance with Rule 90. I will reserve my decision on that motion. Mr. Hughes and the Respondent each may file with the Court of Appeal, addressed to my attention, a supplementary affidavit that addresses whether, by April 10, 2015, proper Appeal Books, compliant with Rule 90.30, have been filed and served. Any supplementary affidavit should be filed and served no later than Friday, April 17, 2015. After April 17, 2015, I will issue a decision on the Respondent's motion to dismiss.

Fichaud, J.A.