

**NOVA SCOTIA COURT OF APPEAL**  
**Citation:** *R. v. Derbyshire*, 2015 NSCA 23

**Date:** 20150306  
**Docket:** CAC 435848  
**Registry:** Halifax

**Between:**

Her Majesty the Queen

Appellant

v.

Brittany Leigh Derbyshire

Respondent

**Restriction on Publication: Pursuant to s. 486.5(1)  
of the *Criminal Code of Canada***

**Judge:** The Honourable Justice Joel E. Fichaud  
**Motion Heard:** March 5, 2015, in Halifax, Nova Scotia, in Chambers  
**Held:** Motion for extension to serve Notice of Appeal granted  
**Counsel:** Jennifer A. MacLellan for the Appellant  
The Respondent not appearing

## **Order restricting publication — victims and witnesses**

**486.5** (1) Unless an order is made under section 486.4, on application of the prosecutor, a victim or a witness, a judge or justice may make an order directing that any information that could identify the victim or witness shall not be published in any document or broadcast or transmitted in any way if the judge or justice is satisfied that the order is necessary for the proper administration of justice.

**Reasons for judgment:**

[1] The Appellant moves for an extension of time to serve a Notice of Appeal.

[2] Ms. Derbyshire was charged with being an accessory after the fact to murder, an offence under s. 240 of the *Criminal Code*. Justice Wood presided at the trial in the Supreme Court of Nova Scotia. The judge concluded that the police undercover operation was an abuse of process, and excluded the resulting evidence (2014 NSSC 371). Ms. Derbyshire was acquitted.

[3] On January 28, 2015, Her Majesty the Queen (“Crown”) filed a Notice of Appeal under s. 676(1)(a) of the *Criminal Code*.

[4] By s. 678(1) of the *Code*, the appeal is governed by this Court’s *Civil Procedure Rules*. Rule 91.09 permits the filing of a Notice of Appeal within 25 days from the date of acquittal, the interval to be calculated in accordance with Rule 94.02. Rule 91.10(1)(b) requires the Appellant to deliver the Notice of Appeal to the Respondent within those 25 days.

[5] The affidavit of Detective Constable Langille describes the Crown’s efforts to serve Ms. Derbyshire with the Notice of Appeal. I won’t list the particulars. It is clear that diligent efforts were made to achieve service within the 25 days prescribed by Rules 91.09 and 91.10(1)(b).

[6] On February 12, 2015, Det. Cst. Langille learned, through the Canada Border Services Agency, that Ms. Derbyshire had entered the United States with no known date of return. By the expiry date for service of the Notice of Appeal, February 23, 2015, Ms. Derbyshire had not returned to Canada.

[7] Det. Cst. Langille had left a message on Ms. Derbyshire’s voicemail. On February 24, 2015, Ms. Derbyshire returned Det. Cst. Langille’s message. He advised her that he had a document for service, but that the time for service had expired the day before. He asked if she would accept service. She said she would. Det. Cst. Langille told her he would contact her.

[8] On February 26, 2015, the Crown filed this motion for an extension of time to serve the Notice of Appeal on Ms. Derbyshire. The motion was scheduled for

March 5, 2015. Det. Cst. Langille has filed an affidavit that, on February 26, 2015, he served Ms. Derbyshire with the Notice of Motion and supporting documents.

[9] I heard the motion on March 5, 2015. Ms. Derbyshire did not appear.

[10] Section 678(2) of the *Code* permits a judge of this Court to extend the time for giving a Notice of Appeal. Similarly, Rule 91.04 gives the chambers judge discretion to extend time periods, before or after the period has expired.

[11] In *R. v. R.E.M.*, 2011 NSCA 8 (Chambers), para. 39, Justice Beveridge said:

[39] ... The Court should consider such issues as whether the applicant has demonstrated he had a *bona fide* intention to appeal within the appeal period, a reasonable excuse for the delay, prejudice arising from the delay, and the merits of the proposed appeal. Ultimately, the discretion must be exercised according to what the interests of justice require. (See *R. v. Paramasivan* (1996), 155 N.S.R. (2d) 373; *R. v. Pettigrew* (1996), 149 N.S.R. (2d) 303; *R. v. Butler*, 2002 NSCA 55; *R. v. Roberge*, 2005 NSCA SCC 48.)

To similar effect: *Cormier v. Graham*, 2015 NSCA 17 (Chambers), paras. 10-12, and authorities there cited, under the equivalent Rule 90.37(12)(h) for civil appeals.

[12] It is clear that the Crown had a *bona fide* intention to appeal within the time limit. The Crown did what it could to serve Ms. Derbyshire before the time limit expired. Service was not accomplished because Ms. Derbyshire was outside Canada. This is a reasonable explanation for the failure to serve within the time limit.

[13] It remains to address whether the Notice of Appeal raises an arguable ground. The grounds listed include whether the judge applied the correct test for determining there was an abuse of process, and whether he applied the correct test for excluding the evidence. The grounds would involve the interpretation and application of the Supreme Court's recent decisions in *R. v. Hart*, 2014 SCC 52 and *R. v. MacK*, 2014 SCC 58, respecting the appropriate conduct of "Mr. Big operations", and whether the undercover operation of police in Ms. Derbyshire's case resulted in the type of unfair coercion posited by Justice Moldaver in *Hart*, para. 89. In my view, the Crown's Notice of Appeal involves arguable issues.

[14] I will grant the motion to extend the time for delivery of the Notice of Appeal for 25 days from the date of this Order, and direct that a copy of the extension order be delivered to the Respondent with the Notice of Appeal.

Fichaud, J.A.