NOVA SCOTIA COURT OF APPEAL
Citation: *Raymond v. Brauer*, 2015 NSCA 37

Date: 20150421
Docket: CA 432911
Registry: Halifax

Between:

Paulette Raymond

Appellant

v.

Connie Brauer and Victor Harris

Respondent

Judge:	Beveridge, J.A.
Motion Heard:	April 16, 2015, in Halifax, Nova Scotia
Held:	Appeal dismissed.
Counsel:	Paulette Raymond, appellant in person Connie Brauer and Victor Harris, respondents in person

Reasons for judgment:

[1] On April 16, 2015 I dismissed Ms. Raymond's Notice of Appeal (General) for non-compliance with the *Nova Scotia Civil Procedure Rules*. I briefly explained to Ms. Raymond why, and said written reasons would follow. These are they.

BACKGROUND

[2] While not all of the details are documented, the essential ones are known. Ms. Raymond is a plaintiff. She sued the respondents for defamation. There is a counter-claim.

[3] Various motions were heard by The Honourable Justice Gregory Warner. At least two orders were issued by Justice Warner on September 30, 2014. One dismissed Ms. Raymond's motion to set aside a jury notice. The other dismissed Ms. Raymond's motion for summary judgment on evidence.

[4] Ms. Raymond filed a Notice of Appeal (General) on October 31, 2014. In due course, she brought a motion for date and directions on March 3, 2015. The parties appeared before me on March 26, 2015 to deal with that motion. The respondents, for reasons that I need not repeat, opposed the setting of dates and asked that the appeal be dismissed.

[5] On March 26, 2015, I alerted Ms. Raymond to the problem that the orders of Justice Warner that she wished to challenge in this Court appeared to be, at first glance, interlocutory in nature. If that were the case, her Notice of Appeal was filed out of time, and was deficient in a number of ways. Not the least of which was that there was no application for leave to appeal.

[6] It was clear on March 26, 2015, Ms. Raymond understood that there is a difference between an interlocutory appeal and a general appeal filed as of right. She requested an opportunity to make submissions why her Notice of Appeal (General) was properly before the Court.

[7] Dates were set for the filing of written submissions, and a return date of April 16, 2015. Ms. Raymond filed a brief on April 9, 2015. This brief requires separate comment.

Brief of April 9, 2015

[8] Ms. Raymond identified three questions of law that she said arise on the overall question of a general appeal versus an interlocutory appeal. She wrote that they were:

> 1. What is the Standard of Review for the Appellate Court with regard to the interlocutory and substantive decisions? Are there similarities and differences?
>
> 2. What might be the legal ramifications be if the Court of Appeal were to consider "out of time" interlocutory / pretrial decisions, together with "in-time" substantive decisions in a General Appeal? Could there be a quality resolve?
>
> 3. Could the matter for Appellate review be stayed until pre-trial procedures have finished? Would either party suffer prejudice? Would a stay be reasonable? Would a stay be in the best interests of justice?

[9] There is no need to offer details of Ms. Raymond's arguments, since they do not address the real issue: are the orders she seeks to appeal interlocutory (requiring an Application for Leave to Appeal) or are they final (hence appealable by way of a Notice of Appeal (General))?

[10] Ms. Raymond acknowledged having consulted case law and reference works from a law library: Mike Madden, " Conquering the Common Law Hydra: A Probably Correct and Reasonable Overview of Current Standards of Appellate and Judicial Review" (2010), 36 *The Advocates' Quarterly* 269; and Sopinka, John: Gelowitz, Mark A., *The Conduct of an Appeal*, 2nd ed., (Butterworths Canada Ltd., 2000).

[11] On April 16, 2015, she referenced pages from the text, *The Conduct of An Appeal*, about the difficulties that have, at least historically, been encountered in resolving this question.

[12] Nonetheless, Ms. Raymond framed her argument that the real issue was whether the matter was interlocutory or "substantive". Her submissions were therefore, unfortunately, not helpful. Nor do I find it necessary to delve into a discussion of the intricacies of the different standards of review that may, or may not, be applicable when this Court deals with an interlocutory appeal as opposed to an appeal of a final order.

[13] Significantly, what Ms. Raymond asked for in her brief of April 9 was for "the Honourable Court to respectfully suspend judgment" . On April 16, 2015, Ms. Raymond confirmed that what she wanted was an adjournment of my

consideration whether her appeal proceedings were properly before this Court in order for her to bring a motion to stay her own appeal proceedings.

[14] She offered in her brief of April 9 that her motion and brief in support of a stay would be filed by Friday, April 17, 2015. Ironically, she concluded her brief as follows:

> In my view, a ***stay*** will move this litigation forward expeditiously. This proposal is reasonable. Ideally, I think it will work for everyone.
>
> [Emphasis in original]

[15] The respondents say her proposal is not reasonable. They vehemently opposed any adjournment of the proceedings, and asked that the appeal be dismissed.

ANALYSIS

[16] There are really two issues to address: are the orders of Justice Warner dated September 30, 2014 interlocutory or final in nature; if they are interlocutory, what are the consequences?

Interlocutory vs. Final

[17] After decades of debate about how to distinguish between an interlocutory and final order, the definitive test was articulated by Middleton J.A. in *Hendrickson v. Kallio*, [1932] O. R. 675:

> The interlocutory order from which there is no appeal is an order which does not determine the real matter in dispute between the parties -- the very subject matter of the litigation, but only some matter collateral. It may be final in the sense that it determines the very question raised by the applications, but it is interlocutory if the merits of the case remain to be determined.
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> p. 678[1]

[18] This is the general governing test in Nova Scotia. In *Van de Wiel v. Blaikie*, 2005 NSCA 14, Cromwell J.A., as he then was, reviewed the principles and

[1] This same quote appears in the text that Ms. Raymond relied upon for her research and brought with her to court, John Sopinka and Mark A. Gelowitz, *The Conduct of an Appeal*, 2nd Ed. at p 15.

provided a concise overview of the distinction between interlocutory and final orders. He wrote:

> [12] In general, an order is interlocutory which does not dispose of the rights of the parties in the litigation but relates to matters taken for the purpose of advancing the matter towards resolution or for the purpose of enabling the conclusion of the proceedings to be enforced: see *Cameron v. Bank of Nova Scotia et al.* (1981), 45 N.S.R. (2d) 303 (S.C.A.D.).
>
> [13] In *Irving Oil Ltd. v. Sydney Engineering Inc*. (1996), 150 N.S.R. (2d) 29 (C.A. Chambers), Bateman, J.A. considered the distinction between interlocutory and final orders. Although finding it unnecessary to conclusively determine the nature of the order in the case before her, she cited with approval the first edition of *The Conduct of an Appeal* by Sopinka and Gelowitz (1993) at p. 15 which described the distinction as follows:
>
> > Where such orders have a terminating effect on an issue or on the exposure of a party, they plainly "dispose of the rights of the parties" and are appropriately treated as final. Where such orders set the stage for determination on the merits, they do not "dispose of the rights of the parties" and are appropriately treated as interlocutory.

[19] It is plain that the two orders of Justice Warner dated September 30, 2014 did not finally dispose of the matters in dispute between Ms. Raymond and the respondents.

[20] One order dismissed Ms. Raymond's motion for summary judgment on the evidence. The terms of the Order reflect that she did not call any evidence on her own motion. The Order disposed of her motion for summary judgment, but not her overall claim against the respondents. That claim is still outstanding.

[21] An order denying summary judgment is interlocutory since it does not bring the proceedings to an end (See for example: *Cherny v. GlaxoSmithKline Inc.*, 2009 NSCA 68 (¶ 6); *Sinclaire v. Nicols*, [1999] N.B.J. No. 394 (N.B.C.A.); *V.K. Mason Construction Ltd. v. Canadian General Insurance Group Ltd.*, [1998] O.J. No. 5291 (C.A.).

[22] The other order dismissed Ms. Raymond's motion to set aside a jury notice. It also did not bring the proceedings to an end. The merits of the parties' competing claims are yet to be determined. There are any number of decisions by this Court that have found such orders to be interlocutory (see for example: *Anderson v. Cyr*, 2014 NSCA 51; *Anderson v. Queen Elizabeth II Health Sciences Centre*, 2010 NSCA 7; *Wall v. Horn Abbot Ltd.*, 2006 NSCA 36).

[23] The result is clear. The orders sought to be challenged by Ms. Raymond are interlocutory.

What are the consequences?

[24] *Rule* 90.40(2) gives to me the discretion to dismiss an appeal if the appeal is not conducted in compliance with this *Rule* 90 for any reason. The formal words are:

> (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:
>
> (a) the form of the notice of appeal,
>
> (b) notifying a person of the appeal,
>
> (c) making a motion for directions,
>
> (d) setting the appeal down for a hearing,
>
> (e) filing the certificate of readiness.

[25] Obviously a judge should be slow to dismiss an appeal for failure to comply with *Rules*. We enjoy a broad discretion to abridge or extend time limits, amend or permit the filing of amended documents, or to excuse compliance, and to otherwise give directions.

[26] All of these powers should be exercised to ensure that proceedings are conducted justly, quickly and with a mind to the cost consequences to the parties, and to the overall administration of justice. Guidance for the exercise of discretions can be found in such cases as *Farrell v. Casavant*, 2010 NSCA 71, *Islam v. Sevgur*, 2011 NSCA 114, and *Deveau v. Fawson Estate*, 2013 NSCA 54.

[27] In this case, the problem was not a minor difficulty with a form. Ms. Raymond had no right to appeal to this Court. She must apply for leave to appeal. The time to try to bring appeal proceedings in interlocutory matters is much shorter, as are the requirements to set down and prosecute the appeal.

[28] Unfortunately, the Registrar's office should not have accepted the Notice of Appeal on October 31, 2014. However, when the problem was pointed out to Ms. Raymond, she did not seek to invoke any of the possible remedial measures that might be invoked to try to overcome the flaw in her attempt to appeal the interlocutory orders.

[29] Instead, she insisted that I was wrong. Her Notice of Appeal (General) was properly before the Court; the problem was that I did not understand the difference between interlocutory and final orders.

[30] Furthermore, rather than try to remedy the problem, she announced her intention to move for a stay of her appeal proceedings. Interlocutory appeals are designed to be conducted quickly, not delayed by the prospective appellant.

[31] I have also examined her proposed grounds of appeal. It is difficult to recognize even a glimmer of merit in her complaints of error. On her motion for summary judgment on evidence before Justice Warner, she produced no evidence. Section 34 (a) of the *Judicature Act*, R.S.N.S. 1989, c. 240 requires defamation actions to be tried by jury. She says the *Act* is somehow unconstitutional, and that the motion judge erred in not striking a jury "with respect to an equitable and prolonged reflective analysis by judge alone that would benefit the parties and minimize the risks".

[32] In these unusual circumstances, I was satisfied that it was in the interests of justice to dismiss the Notice of Appeal.

Beveridge, J.A.