

NOVA SCOTIA COURT OF APPEAL

Citation: *Osif v. College of Physicians and Surgeons of Nova Scotia*,
2015 NSCA 46

Date: 20150512

Docket: CA 438700

Registry: Halifax

Between:

Dr. Stani Osif

Appellant

v.

The College of Physicians and Surgeons of Nova Scotia

Respondent

Judge: Beveridge, J.A.

Motion Heard: May 7, 2015, in Halifax, Nova Scotia in Chambers

Held: Motion dismissed.

Counsel: Dr. Stani Osif, appellant in person
Danielle Kershaw, for the respondent

Decision:

[1] Dr. Osif's last day to file a Notice of Appeal was March 6, 2015. She missed that deadline. She brought a motion to extend the time to file her Notice of Appeal. The College resisted. I heard the motion on May 7, 2015, and reserved my decision.

[2] To understand the issues, I need to set out at some basic background information.

BACKGROUND

[3] Dr. Stani Osif owes the College of Physicians and Surgeons \$200,000 plus interest. This debt is based on a disposition and costs decision by a Hearing Committee dated June 26, 2008. The outcome of the disciplinary proceedings, including the disposition and costs award, were appealed by Dr. Osif to the Nova Scotia Court of Appeal. This Court dismissed the appeal by Dr. Osif in a lengthy decision released in March 2009 (2009 NSCA 28).

[4] It was not until January 2015 that the College sought a judgment from the Nova Scotia Supreme Court to enforce the costs decision. The Honourable Justice Glen MacDougall heard the application on January 14, 2015. Dr. Osif appeared in opposition to the application.

[5] Justice MacDougall gave oral reasons that day for granting the application. The order issued on January 29, 2015. It granted judgment to the College in the amount of \$246,020.55, based on the principal of \$200,000 plus \$45,520.55 for pre-judgment interest (5% per annum from June 27, 2010 to January 14, 2015).

THE PRINCIPLES

[6] A judge of the Court of Appeal has ample power to grant relief to a prospective appellant who has not met deadlines for filing an application for leave to appeal or an appeal (94.03; 90.37(12)). Over time, various words have been used to describe how a judge should exercise his or her power to grant such relief. Frequently judges relied on a three part test, but cautioned that ultimately the issue is a discretionary one that must maintain flexibility to ensure that justice is achieved (see *Tibbetts v. Tibbetts* (1992), 112 N.S.R. (2d) 173, ¶ 14, 19).

[7] A useful recitation of the three part test was set out by Saunders J.A. in *Jollymore v. Jollymore Estate*, 2001 NSCA 116:

[22] In this province, reference is often made to the so-called three part test for extensions of time in cases such as this. It is said that in order to qualify for such relief the court must be satisfied that:

- (1) the applicant had a *bona fide* intention to appeal when the right to appeal existed;
- (2) the applicant had a reasonable excuse for the delay in not having launched the appeal within the prescribed time; and
- (3) there are compelling or exceptional circumstances present which would warrant an extension of time, not the least of which being that there is a strong case for error at trial and real grounds justifying appellate interference.

[8] But Justice Saunders embraced the flexible approach referenced above by Hallett J.A. in *Tibbetts*. These, and other authorities, were distilled in *Farrell v. Casavant*, 2010 NSCA 71:

[17] Given the myriad of circumstances that can surround the failure by a prospective appellant to meet the prescribed time limits to perfect an appeal, it is appropriate that the so called three-part test has since clearly morphed into being more properly considered as guidelines or factors which a Chambers judge should consider in determining the ultimate question as to whether or not justice requires that an extension of time be granted. (See *Mitchell v. Massey Estate* (1997), 163 N.S.R. (2d) 278; *Robert Hatch Retail Inc. v. Canadian Auto Workers Union Local 4624*, 1999 NSCA 107.) From these, and other cases, common factors considered to be relevant are the length of delay, the reason for the delay, the presence or absence of prejudice, the apparent strength or merit in the proposed appeal and the good faith intention of the applicant to exercise his right of appeal within the prescribed time period. The relative weight to be given to these or other factors may vary. As Hallett J.A. stressed, the test is a flexible one, uninhibited by rigid guidelines.

[9] This approach has frequently been used to guide the exercise of this discretion (see: *McMullin-Mullin v. Henley*, 2013 NSCA 85; *McCully v. Rogers Estate*, 2013 NSCA 22; *Forrest v. Forrest*, 2013 NSCA 15; *Brooks v. Soto*, 2013 NSCA 7; *Self v. Scotia Mortgage Corporation*, 2014 NSCA 24; *Wadden v. BMO Nesbitt Burns*, 2014 NSCA 45).

APPLICATION OF THE PRINCIPLES

[10] The College concedes that Dr. Osif had a *bona fide* intention to appeal when the right to appeal existed, and does not contest that there were reasons for her delay. But the College suggests what should prevent the extension of time is that the proposed grounds of appeal identified by Dr. Osif in her draft Notice of Appeal have nothing to do with the decision by Justice MacDougall. In other words, there is no merit to the proposed appeal.

[11] I am not entirely satisfied that Dr. Osif has presented evidence that satisfactorily explains her delay in filing a notice of appeal. Quite apart from that issue, I agree with the position of the College. Dr. Osif's proposed appeal has nothing to do with the decision by Justice MacDougall. The focus of the appeal she says she wants to advance is nothing more than an attempt to ask this Court to re-visit the original findings of the Hearing Committee, including its decision on costs. The following reasons explain.

[12] Dr. Osif is a highly educated individual. She graduated as a medical doctor in 1978, and obtained Certification in Anesthesia and Resuscitation in 1981. She has lived and practiced medicine in Canada since 1987. In support of her motion to extend time to file a notice of appeal, she swore an affidavit on March 19, 2015.

[13] It is short. She swears that on January 14, 2015 she first made contact with the Law Courts in Halifax about getting a CD of the hearing of that day. She made arrangements on January 29, 2015 to get the CD. An attached invoice confirms she ordered the CD and court log on that day. She suggests Canada Post did not deliver the shipment. When she followed up with the Law Courts, the CD and log were shipped by Priority Post on February 19, 2015. It was picked up by her on February 23, 2015.

[14] From this information, the College's concession that Dr. Osif had an intention to appeal before March 6, 2015 is appropriate. But I have no explanation from Dr. Osif why it was necessary for her to obtain a copy of the CD of the January 14, 2015 hearing before proceeding with her appeal, nor why she did not file her notice of appeal within the ensuing twelve days after she had received the CD.

[15] Attached to Dr. Osif's affidavit is her proposed Notice of Appeal. She says her grounds of appeal are:

- (1) Gross errors and omissions in calculating financial cost and subsequently awarding interest earnings to the amount
- (2) Acceptance of disproportionate preceded proceedings building the arbitrary cost
- (3) Prolonged process (2006-2015) with the time lapse between proceedings
- (4) Biased reliance on public interest as opposed to natural justice

[16] Given the approach of the College, I asked Dr. Osif to specifically address the issue of the perceived lack of merit to her proposed grounds of appeal. During the hearing, Dr. Osif argued that the process before the Hearing Committee of the College was flawed. There had been no explanation as to how certain allegations came to the attention of the College. She cited excerpts from arguments made before the Hearing Committee in November 2007. She urged that it was the responsibility of this Court to re-visit the past decisions, including the costs order. She also complained about the delay by the College in seeking payment.

[17] I asked Dr. Osfi directly: are you asking this Court to permit your appeal to proceed from Justice MacDougall's order based on an alleged error he made, or would you be asking this Court to re-visit the costs order? She answered it was the latter.

[18] Dr. Osif faced complicated and serious charges of incompetence and professional misconduct. A Hearing Committee held a 14 day hearing into those allegations. She was partially successful, but was found guilty of a number of charges. A two day hearing followed to determine disposition and costs. The Committee released its decision on June 26, 2008.

[19] The Committee suspended her license for an indefinite period of time, until she satisfactorily completed a detailed program of re-education, and examinations by the Canadian College of Family Physicians. According to the written decision by the Hearing Committee, the College incurred costs of approximately \$400,000. The College requested an order for Dr. Osif to pay costs in the amount of \$250,000.

[20] The Hearing Committee noted that Dr. Osif did not dispute the amount of the actual expenses incurred by the College, but argued that no costs should be awarded due to the divided success, and her claim of procedural irregularities in the investigation process and hearing.

[21] The Hearing Committee rejected Dr. Osif's claims of irregular conduct by the College. The Committee calculated that the College's actual cost in successfully proving the charges of professional misconduct and incompetence was approximately \$265,000. It then reduced that amount, after taking into account public interest factors, to \$200,000.

[22] Further, the Committee qualified that award by stipulating that it would be reduced by reasonable expenses Dr. Osif paid for the cost of re-education and assessment the Committee ordered. It explained:

113. Our whole disposition is aimed at allowing Dr. Osif to re-educate herself, to remedy the incompetence demonstrated in this hearing and to show by objective standard that she is able to meet the requirements of a licensed medical practitioner. To the extent that Dr. Osif does this successfully, her costs will be reduced. While, in effect, this requires the College to pay for her remedial program by foregoing costs, we consider it to be in the public interest that Dr. Osif be given the opportunity to remedy her deficiencies and to meet the standards of the medical profession. This will be a costly enterprise for her because she will remain on suspension other than for educational purposes, having already served a long period of administrative suspension pending disposition of these charges.

[23] Payment of the costs order was postponed by the Hearing Committee for two years to permit Dr. Osif to pursue a program of re-education. In the event she did not complete that program within two years, her licence to practice would be revoked, and she must pay the \$200,000 costs order forthwith.

[24] Dr. Osif appealed the findings of the Hearing Committee, its disposition and costs order to this Court. As noted earlier, her appeal was not successful. The unanimous reasons for judgment were written by Saunders J.A., and are reported as 2009 NSCA 28. Before me, Dr. Osif objected to a copy of the reasons being included in the materials submitted by the College in response to motion to extend, since they were, in her view, not relevant.

[25] It is plain from reading Justice Saunderson's reasons for judgment that all of Dr. Osif's complaints about the process before the Hearing Committee, and its decision on costs were fully argued before this Court in 2009. Dr. Osif had experienced and able counsel throughout the proceedings before the Hearing Committee, and the appeal proceedings that followed.

[26] Justice Saunders thoroughly considered all of her complaints. He found no merit in any of them. The appeal was accordingly dismissed.

[27] In the meantime, Dr. Osif did not complete the stipulated re-education program. There is no evidence she incurred any expenses toward doing so. She was notified in June 2010 of her requirement to pay the costs order. She has paid nothing. Demand letters were sent in 2012. There was no payment.

[28] Finally, proceedings were commenced in the fall of 2014 to enforce the costs awarded by the Hearing Committee. Dr. Osif does not identify or suggest any error by Justice MacDougall in granting the order. Instead, if the time to appeal was extended, it would be to pursue again her complaints about the disciplinary proceedings, and the original order for costs.

[29] To grant an extension in these circumstances would not be in the interests of justice. Dr. Osif has not identified any arguable issues to be advanced on appeal. It would be an exercise in futility to extend the time to file her proposed appeal since her complaints of error have already been ruled on.

[30] The motion to extend is dismissed with costs to the respondent in the amount of \$500.00.

Beveridge, J.A.