NOVA SCOTIA COURT OF APPEAL

Citation: Wagner v. Carvery, 2009 NSCA 102

Date: 20091008
Docket: CA 310785
Registry: Halifax

Between:

Raymond F. Wagner

Appellant

and

Rosella Ordra Carvery

Respondent

and

Philbert Downey and Mary Victoria Fraser

Respondents

Judge:	The Honourable Justice Duncan R. Beveridge
Application Heard:	October 8, 2009, in Chambers
Oral Decision:	October 8, 2009
Released:	October 15, 2009
Held:	On the motion for directions, the appellant is required to send a letter by registered mail to the respondent Carvery indicating the date and location of the appeal, filing instructions, and enclosing the appellant's factum. Service of the Application for Leave to Appeal and Notice of Appeal on the respondents Downey and Fraser is dispensed with.
Counsel:	Mr. Michael Dull, for the appellant

Decision: (Orally)

[1] On February 12, 2009, Justice Coughlan dismissed an *ex parte* application by the appellant to be removed as solicitor of record. This resulted in an order dated April 21, 2009. An application for leave to appeal and, if granted, notice of appeal was filed by the appellant but not served on any of the named respondents.

[2] The issues that I am to decide today are:

1. What is the jurisdiction of a judge sitting in Chambers to dispense with notice?

2. If I have jurisdiction, should the requirement to give notice be dispensed with?

BACKGROUND

[3] The materials filed before Justice Coughlan reveal that the respondent, Rosella Ordra Carvery, claimed to have been a pedestrian who was injured on September 11, 2001 when she was struck by a car. She first contacted Sarah Harris, an associate in the appellant's office, on April 27, 2004. Ms. Carvery named the respondent Philbert Downey as driver, and the respondent Mary Victoria Fraser as owner, of the car that struck her.

[4] On October 26, 2004, Ms. Harris filed an Originating Notice and Statement of Claim on behalf of Ms. Carvery against the named driver and owner. Shortly thereafter, Ms. Harris was advised by Carvery that she would be moving out of the province. However, within a few weeks, Harris received correspondence from a lawyer who said she was acting for Carvery on another matter. She advised Harris that Carvery requested her to obtain details of Carvery's claim against Downey and Fraser, in order that consideration be given by her to assume carriage of that action.

[5] A number of letters were exchanged between these lawyers for some 18 months with no resolution of Carvery's other lawyer assuming carriage of the outstanding action against Downey and Fraser.

[6] The Originating Notice and Statement of Claim were in fact never served on the defendants Downey and Fraser. Neither was notice given to any insurers as none were known. By July 2007, it appears from the materials filed that Wagner's employed a tracking service to try to locate their client. The information received back from that service confirmed that Carvery had moved out west. Nothing further of substance was learned.

[7] Further contact with Ms. Carvery's other counsel was apparently not terribly helpful. An address in Ottawa for Ms. Carvery was obtained from that other law office. This was approximately the spring 2008. It may well have been Ms. Carvery's mother's address. In any event, a registered letter was sent to Ms. Carvery in May 2008 at that address. It was returned unclaimed.

[8] It appears that Wagner's, over the years, had renewed the Originating Notice some seven times on behalf of Ms. Carvery. Finally, an application was brought by the appellant to be removed as solicitor of record, under *Nova Scotia Civil Procedure Rule* (1972) 44.06. The application was heard by Justice Coughlan on various dates from August 2008 to February 12, 2009. On the last date the application was dismissed.

[9] Application for Leave to Appeal and Notice of Appeal was filed on May 5, 2009. It has never been personally served on any of the respondents.

[10] On May 14 the Chief Justice, sitting in Chambers, set the appeal down for hearing for November 14, 2009, but required the appellant to reappear before the end of June to address the issue of notice. The appellant reappeared on June 11. On that date the Chief Justice directed that the style of cause be amended to reflect Mr. Wagner as the appellant and his former client Rosella Ordra Carvery as well as the defendants as respondents. The Chief Justice also directed that the motion for directions be adjourned with the appellant to return with evidence that service was attempted by registered letter at the last known address for Ms. Carvery, which was 3360 Paul Anka Drive in Ottawa.

[11] On August 27, 2009 Mr. Dull appeared before me, pursuant to a motion seeking directions whether the respondents must be given notice of the appeal. No evidence was tendered with respect to efforts to serve Ms. Carvery. I directed that Mr. Dull reappear before me on October 8, 2009 with evidence as to the efforts made to give notice of the motion and of the appeal to the respondent Carvery.

[12] Mr. Dull has filed an affidavit sworn September 24, 2009. This affidavit attaches correspondence sent by registered mail to Ms. Carvery on June 17, 2009, along with a copy of the Notice of Application for Leave to Appeal and Notice of Appeal. According to Mr. Dull's affidavit, the letter was not returned nor did he receive any communication from Ms. Carvery in response.

[13] Mr. Dull's affidavit also attaches a copy of a letter he swears he sent by registered mail to Ms. Carvery on August 19, 2009, enclosing a copy of the Notice of Motion seeking direction on the issue of notice to the respondents. Mr. Dull avers that this letter was returned to his office with a stamp from Canada Post indicating that Rosella Carvery had moved or was unknown at the address and return to sender. A copy of the envelope, so stamped, was attached.

JURISDICTION

[14] No submissions were made by Mr. Dull on this issue. The starting point for a discussion of the jurisdiction of a single judge of the Court of Appeal is a decision in *Future Inns Canada Inc. v. Labour Relations Board Nova Scotia*, (1996) N.S.J. No. 434, 154 N.S.R. (2d) 358. In *Future Inns* Justice Hallet stated:

> **[15]** In my opinion a judge of this court sitting in Chambers has a limited jurisdiction. An appeal court, when hearing an appeal, sits in panels of at least three. Insofar as the Nova Scotia Court of Appeal is concerned, this is provided for in Civil Procedure Rule 62.24(3) which states:
>
> > "62.24(3) Three or more judges, designated from time to time by the Chief Justice, shall sit on each appeal or other matter heard by the court."
>
> **[16]** A review of rule 62 in its entirety shows that the rule very carefully distinguishes between what may be done by a judge of the court and the court itself.
>
> **[23]** In summary, rule 62 does not expressly authorize a Chambers judge to deal with any civil applications other than those specifically delegated to a Chambers judge under rule 62. The rule is carefully drawn so as to distinguish what applications may be heard by a judge sitting in Chambers in contrast to those that must be heard by the court. There is no other rule that would allow an appeal court Chambers judge to refuse to set down an appeal on the basis that there is an outstanding order of a court that has not been complied with by an appellant.

> Neither the **Trade Union Act** nor any other enactment of the Legislature authorizes the Chambers judge to refuse to set down an appeal on the grounds sought by the respondents.

[15] This case has been frequently cited with approval by this court, most recently in *R. v. West*, 2009 NSCA 63, at para. 61, by Saunders, J.A..

[16] It is clear that notice must be delivered to each respondent to an appeal. Rule 90.01 defines respondent as "means a person against whom the appellant brings an appeal, and any other person other than an intervenor who is authorized by the Court of Appeal or a judge to be a party to the appeal."

[17] Downey and Fraser were not given notice of the proceedings below nor did they participate in them in any way. It is difficult to say that they are persons against whom the appellant brings an appeal. However, I will assume without necessarily deciding that Downey and Fraser are respondents within the meaning of Rule 90.01. Carvery also had no notice nor participated in the proceedings below, but it cannot seriously be contested that her interests are not touched on, at least in some way, by the appeal proceedings.

[18] It appears that by Rule 90.14 each respondent must be served within the deadline set out in 90.13(2), absent an order providing for substituted service or otherwise dispensing or waiving service. What then is the authority of a single judge of the Court of Appeal to dispense or waive service?

[19] There appears to be a number of provisions in the *Civil Procedure Rules* that can be relied upon to permit orders to be made with respect to service, both in respect to motions and the appeal itself.

Notice of Motion

[20] First, with respect to the notice of motion, a judge of the Court of Appeal can waive notice. Rule 90.34(5) provides:

> **90.34 (5)** A person who wishes to make a motion must make the motion on notice, unless they satisfy the Court of Appeal or a judge of the Court of Appeal that it is properly made *ex parte*.

This rule requires a moving party to satisfy a judge that the motion is one that is properly brought *ex parte*.

[21] Quite apart from the general applicability of the *Civil Procedure Rules* by virtue of 90.02(1) that are not inconsistent with Rule 90, *Civil Procedure Rule* 90.37(13) adopts by reference the rules with respect to Part 6 - Motions that deal with procedure and evidence. Part 6 starts with Rule 22.

[22] Rule 22.03 provides that

> **22.03 (1)** A party may make an *ex parte* motion in one of the following circumstances:
>
> (a) the order sought does not affect the interests of another person;

[23] Rule 94.08 defines a person as including both a party and a non party. Moreover, Rule 90.37(11) states:

> **90.37 (11)** A motion may be made *ex parte* in one of the following circumstances:
>
> (a) legislation or a Rule permits the motion to be made *ex parte*;
>
> (b) the other party waives notice in writing or consents to the proposed order;
>
> (c) the judge authorizes the motion to be made *ex parte*.

[24] It is therefore clear that a single judge may authorize a motion to be brought without notice or *ex parte*. Apart from the registered letters to Carvery, no other form of notice has been provided to her or to the other named respondents of the motion before me. For reasons that will be set out momentarily, I direct that no notice need be given to any of the respondents of this motion beyond what has already been given.

Notice of Appeal

[25] This motion, although framed as one seeking directions, in reality seeks an order dispensing with providing notice of the appeal to any of the named respondents. Contrary to the clear authority set out to dispense with notice on a motion, the present Rules are not explicit with respect to dispensing with service of a Notice of Appeal. I start by referring to Rule 90.37(12)(b). To put it into context, I include (a) as well. The Rule reads:

> **90.37 (12)** A judge of the Court of Appeal hearing a motion, in addition to any other powers, may order any of the following:
>
> (a) a notice of motion be delivered to a person as the judge directs and a hearing be adjourned to permit the delivery;
>
> (b) delivery of notice on a person be dispensed with;

[26] Rule 90.37(12)(b) refers to "notice". This may be contrasted with (a) which refers more specifically to a "notice of motion". The different language suggests that the power to dispense with notice in (b) is not limited to the Notice of Motion.

[27] The suggested interpretation tends to be confirmed by the explicit power noted in Rule 90.37(11)(c) that permits a motion to be made *ex parte*. The more specific power relating to motions suggests that jurisdiction contained in Rule 90.37(12)(b) relates to more general matters.

[28] I would note that historically, a single judge had clear authority to waive service of the Notice of Appeal. *Nova Scotia Civil Procedure Rules* (1972) Rule 62.11(b) provided:

> **62.11.** In addition to any other powers conferred by Rule 62 or otherwise, a Judge may at any time and on such terms as he deems just, on the application of the Registrar or of any party to an appeal, order that
>
> (b) service of a notice of appeal or respondent's notice be effected by substituted service or that service be waived;

[29] Apart from Rule 90.37(12)(b), another source of jurisdiction is Rule 2.03 which gives a general discretion to a judge as follows:

> **2.03 (1)** A judge has the discretions, which are limited by these Rules only as provided in Rules 2.03(2) and (3), to do any of the following:
>
> (a) give directions for the conduct of a proceeding before the trial or hearing;
>
> (b) when sitting as the presiding judge, direct the conduct of the trial or hearing;
>
> (c) excuse compliance with a Rule, including to shorten or lengthen a period provided in a Rule and to dispense with notice to a party.

[30] These discretions are not unlimited. First, Rule 2.03(3) provides:

> **2.03 (3)** The general discretions do not override any of the following kinds of provisions in these Rules:
>
> (a) a mandatory provision requiring a judge to do, or not do, something;
>
> (b) a limitation in a permissive Rule that limits the circumstances in which a discretion may be exercised;
>
> (c) a requirement in a Rule establishing a discretion that the judge exercising the discretion take into account stated considerations.

[31] Furthermore, in order to exercise these discretionary powers, the judge must turn his or her mind to certain defined matters. Rule 2.03(2) provides:

> **2.03 (2)** A judge who exercises the general discretion to excuse compliance with a Rule must consider doing each of the following:
>
> (a) order a new period in which a person must do something, if the person is excused from doing the thing within a period set by a Rule;
>
> (b) require an excused person to do anything in substitution for compliance;
>
> (c) order an excused person to indemnify another person for expenses that result from a failure to comply with a Rule.

[32] Rule 94.10 defines a judge as:

> "judge", where the word is used in connection with the Court of Appeal, means a judge of the Court of Appeal and, where it is used otherwise, means a judge of the court including a judge appointed to the Family Division;

[33] In my view, none of the limits set out in Rule 2.03(3) apply. Rule 2.03 is not inconsistent with Rule 90. In my opinion, both 90.37(12)(b) and 2.03(1)(c) supply the necessary authority for a single judge to dispense with service of Notice of Appeal or Notice of Application for Leave to Appeal.

APPLICATION OF THESE PRINCIPLES

[34] First, with respect to the service of the Notice of Motion on the respondents, Downey and Fraser, I am satisfied there is no need to give notice of this motion to any of the respondents. The respondents Downey and Fraser have no interest in the motion nor indeed in the issues alive on the appeal. It is a motion that can therefore be brought *ex parte*, vis-à-vis, them.

[35] I am also of the view that in these rather unique circumstances there is no need to provide notice of the motion to the respondent Carvery. The evidence demonstrates a complete disinterest in the contemplated proceedings for which the appellant's law firm was first retained in the spring of 2004. There is not one indication of any contact or attempt at communication with the appellant on behalf of Carvery since October 2004, except from another lawyer about assuming carriage of the file. Those communications petered out with no such assumption and with that firm also ceasing to act for the respondent Carvery,

[36] On June 11, 2009, MacDonald, C.J.N.S. directed the appellant to attempt service of Carvery by sending a letter to her by registered mail to the last known address for her in Ottawa. The Chief Justice directed the letter was to alert her that there is an appeal from an order to get off the record and there is a motion for directions with respect to that appeal. There followed two letters sent by Mr. Dull. The first was dated June17, 2009. This enclosed the amended Application for Leave to Appeal and Notice of Appeal and invited Ms. Carvery to contact Mr. Dull. The evidence is this letter was not returned, despite being sent by registered mail nor was there any response.

[37] The second letter was dated August 19, 2009. It was a one-sentence letter enclosing a copy of the Notice of Motion filed with this court on August 19, 2009. The Notice of Motion contained little detail. It simply provided the appellant "moves for directions regarding whether the respondents of this claim [sic] will require notice of the appeal of the *ex parte* decision dated February 12, 2009, of the Honourable Justice C. Richard Coughlan." It did contain the required caution that she may file material and attend and if she did not the judge may grant an order without further notice.

[38] The Notice of Motion is not terribly informative, to say the least. However, the deficiency is rather moot, since the registered letter and notice could not be delivered by Canada Post and was returned unopened. Ordinarily, I would have thought a more detailed notice and letter would be advisable, if not necessary, but given the rather unique circumstances surrounding this appeal and in light of my conclusion below with respect to service of the Notice of Appeal, the motion for directions may be made *ex parte*.

[39] With respect to the Application for Leave to Appeal and Notice of Appeal, I am prepared to grant an order dispensing with service of this on the respondents Downey and Fraser. It is patent that these respondents have absolutely no interest in the issues in this appeal. There is no order being sought against them. They have never participated in any aspect of the proceedings below.

[40] The issue of service on the respondent Carvery of the Notice of Appeal is different but it is not miles apart from that of Downey and Fraser. The appeal does touch on her interests in the sense that the court is ultimately being asked for an order to remove the appellant as solicitor of record in proceedings undertaken on behalf of Ms. Carvery. However, on the appeal, no order is sought against her. There is no issue of cost nor other deleterious ramifications.

[41] Nevertheless, ordinarily, service would be the norm. In these circumstances, further efforts at personal service or the usual means of substituted service would, in my view, be highly artificial and without any real purpose. Let me explain.

[42] First of all, there have never been any active proceedings undertaken by the appellant on behalf of Ms. Carvery. The Originating Notice and Statement of Claim have never been served on the named defendants. Ms. Carvery expressed an

interest in having another lawyer assume carriage of the proceedings, back in 2004-05, but nothing happened. Extensive efforts have already been undertaken to try to locate her. To some extent, they mirror the kinds of things set out in Rule 31.10. They were unsuccessful.

[43] The proceedings before Justice Coughlan were *ex parte*. He did not require substituted service. It appears that the reason given by the Chambers judge for refusing to issue the requested order was that the applicant was unable to provide a working address for Ms. Carvery.

[44] The tracking service provided information confirming that Ms. Carvery had moved out of the province. One of the last addresses available for her was that she was in Ottawa. A registered letter sent to that address in May 2008 was returned unclaimed. In June 2009 a registered letter was sent to the respondent at that same address with the amended Application for Leave to Appeal and Notice of Appeal. This was not returned. This certainly suggests that she has received this document. However, a subsequent registered letter sent on August 19, 2009 to the same address was returned unopened with the entry by Canada Post as "moved/unknown".

[45] I have considered the options that would be open to me to require the appellant to pursue different options in substitution for compliance with personal service. I am certainly not satisfied that publication in a newspaper would be suitable. There is no indication she is in Nova Scotia or in any particular location in Canada. Furthermore, it is unlikely her interests are truly at risk on the appeal.

[46] If the letter that had been sent to Ms. Carvery on June 17, 2009 had been returned, I would be disposed to grant an order dispensing with service of the Application for Leave to Appeal and Notice of Appeal, or any further documents on Ms. Carvery. However, it was not returned.

[47] What that amended notice of application for leave to appeal and notice of appeal did provide was a change as to who was the appellant and respondent. It set out the same grounds of appeal as the initial document. It also simply provided that there would be a motion for date and directions returnable on May 13, 2009, which would have been in excess of one month prior to when someone at that address would have received this document.

[48] Now, it is tempting to say that if she had any real interest in the appeal she would have contacted Mr. Dull as he invited her to do. However, I think out of an abundance of caution, I will direct the appellant to provide one further effort of notice to the respondent Carvery by sending to her a copy of the appellant's factum and a letter clearly identifying to her the date and location of the appeal, and her right to file written materials in response and/or to appear at the hearing of the appeal and to make submissions, and of course, her right to retain counsel to act for her with respect to those efforts.

Beveridge, J.A.