NOVA SCOTIA COURT OF APPEAL

Citation: Cummings v. Nova Scotia (Community Services), 2011 NSCA 2

Date: 20110106
Docket: CA 341127
Registry: Halifax

Between:

Wanda Cummings and Gillian Leigh

Applicants

v.

Minister of Community Services
Capital District Health Authority
Department of Justice
Royal Canadian Mounted Police
Department of Community Services

Respondents

Judge: The Honourable Justice Duncan R. Beveridge

Motion Heard: December 23, 2010, in Chambers

Held: Motion to extend the time to file a Notice of Appeal is dismissed without costs

Counsel: Wanda Cummings, applicant, in person
Gillian Leigh, applicant, in person
Carrie Ricker, for the respondent, Capital District Health Authority
Melissa Chan, for the respondent, Royal Canadian Mounted Police
Sheldon Choo, for the respondents, Department of Justice and Department of Community Services

Decision:

INTRODUCTION

[1] Wanda Cummings and Gillian Leigh ask that I grant extensions of time to file appeals from decisions by Robertson J. made in May 2010. The decisions in question were refusals by the judge to grant relief to try to ensure confidentiality of information that had been filed with the Supreme Court in pursuit of five separate proceedings. The necessary details of the requests and the various proceedings in issue will be set out below.

[2] I heard the application on December 23, 2010. It was opposed by the proposed respondents. I reserved decision. For the following reasons, the application for an extension of time is dismissed.

BACKGROUND

[3] The genesis of the application is complex. Both applicants have sued corporate entities Belfast Mini-Mills Ltd. and International Spinners Ltd. (S.H. No. 272748). These entities are represented by Robert K. Dickson Q.C., of the law firm Boyne Clarke. The applicants are self represented in all of the various actions and applications. I am unaware of the precise nature of the action against Belfast Mini-Mills and International Spinners or its current status. The relevance of this litigation will become evident.

[4] The applicants explain that they sought production of documents from various government agencies in order to "correct the erroneous information which circulated between the departments and the RCMP" and for other litigation purposes. Their requests for production were refused. In April 2010 four appeals were filed challenging these refusals, pursuant to s. 41 of the *Freedom of Information and Protection of Privacy Act*, S.N.S. 1993, c. 5 (S.H. Nos. 326867, 326871, 327449 and 327460). In addition, an application was filed for judicial review regarding a decision by the Minister of Community Services (S.H. No. 327460).

[5] The applicants say they were concerned over confidentiality of the documents they were seeking and of the documents they intended to file in support of the enumerated proceedings. They also say they researched the applicable

procedure to ensure confidentiality and consulted with court staff. In particular, they placed reliance on what was at one time Practice Memorandum No. 28 (accessed by them by a link from the FOIPOP website) which contained language they interpreted as providing for confidentiality of not just the records in dispute, but also the proceedings and documents filed in support of the appeals.

[6] Notices of Motion were also filed by the applicants on all of the five proceedings requesting a confidentiality and non publication order "in the filing and prosecution of present and future related matters before the court, pursuant to s. 41 of the *Freedom of Information and Protection of Privacy Act*" and pursuant to Rule 7 of the *Nova Scotia Civil Procedure Rules*. They also sought "a retroactive redaction of an order filed with the Supreme Court". The motions were returnable on May 11, 2010 before Robertson J.

[7] It is not entirely clear from the materials filed as to what happened when. The applicants say that representatives of Boyne Clark, at the behest of Mr. Dickson, and for use in the outstanding litigation against Belfast Mini-Mills (S.H. No. 272748), requisitioned the court files for four of the enumerated proceedings and may have accessed them and copied the documents they had filed – decidedly contrary to their understanding that these files would not be accessible to the public. There is also some reference in the materials before me that the applicants had been directed to Rule 85 that deals with the requirements to obtain confidentiality orders.

[8] On either May 10 or 11, 2010, the applicants concede that Robertson J. declined to grant any confidentiality order with respect to the documents or briefs filed in support of any of the five proceedings. The applicants also concede that all five of those proceedings have since been concluded, either by abandonment or consent dismissal.

[9] There is apparently no written decision, nor transcript of any reasons by Robertson J. that addresses the confidentiality and non publication requests made by the applicants. The parties also advise no orders were taken out.

[10] The applicants candidly admit that they knew they could try to appeal Justice Robertson's disposition of their confidentiality motions, but due to financial and time constraints pursued other remedies to try to accomplish their goals. By June 3, 2010 they formally requested that the outstanding interlocutory

proceedings in the main litigation (S.H. No. 272748) be adjourned pending their announced motion for injunctive and other relief.

[11] An application for injunction, and other relief, was commenced by the applicants (Hfx. No. 333144) against Belfast Mini-Mills Ltd. and International Spinners Ltd. to prohibit the defendants or any member of Boyne Clarke from using any documents obtained from the previously enumerated Supreme Court files, disclosing their content, and for the return of all copies.

[12] The application was heard by Coughlan J. on November 3 and 10, 2010. At the conclusion of the hearing, Justice Coughlan gave an oral decision dismissing the application with costs. An order was duly taken out on November 18, 2010.

[13] The applicants filed a Notice of Appeal from this outcome on December 13, 2010 (C.A. 341131). Various motions were filed by the applicant appellants with respect to appeal C.A. 341131, returnable in Chambers before me on December 23, 2010. They sought dates and directions, permission to adduce fresh evidence, and that the appeal be heard together with their proposed appeal (C.A. 341127), either by formal joinder of the parties or by intervenor status.

[14] On December 23, 2010 I set dates and gave directions to the parties with respect to the filing of an Appeal Book, facta and materials for the motion to adduce fresh evidence. With respect to the motion to, in some manner, join the appeals, I found it to be premature since there was not yet any other appeal in existence, simply an application to extend time to file an appeal.

ISSUE

[15] The sole issue to be resolved is whether or not an extension to file appeal documents should be granted.

ANALYSIS

[16] The motion for extension to file the notice of appeal is brought pursuant to *Nova Scotia Civil Procedure Rule* 90.37(12)(h). It provides:

> **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:

> (h) that any time prescribed by this Rule 90 be extended or abridged before or after the expiration thereof.

[17] This Rule does not provide any particular guidance on how a judge is to exercise the broad discretion permitted by 90.37(2)(h). Neither does Rule 94.02 by its reference to 2.03(2). However, the overall purpose of the *Civil Procedure Rules* is that they are enacted for "the just, speedy, and inexpensive determination of every proceeding".

[18] Bateman J.A. in Chambers in *Bellefontaine v. Schneiderman*, 2006 NSCA 96 succinctly set out the test that an applicant is required to address on a motion to extend the time to commence appeal proceedings. She wrote:

> [3] A three-part test is generally applied by this Court on an application to extend the time for filing a notice of appeal, requiring that the applicant demonstrate (**Jollymore Estate Re** (2001), 196 N.S.R. (2d) 177 (C.A. in Chambers) at para. 22):
>
> (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.
>
> [4] Where justice requires that the application be granted, the judge may allow an extension even if the three part test is not strictly met. (**Tibbets v. Tibbets** (1992), 112 N.S.R. (2d) 173 (C.A. in Chambers)).

[19] Even a cursory review of reported decisions on requests to extend time reveals a wide array of circumstances behind the failure by a prospective appellant to pursue an appeal within the prescribed time. It is for this reason that the three part test is really a convenient list of factors or guidelines that should be considered in determining what is the ultimate question – whether or not justice requires that

an extension of time be granted. (See *Farrell v. Casavant*, 2010 NSCA 71, at para. 17).

[20] Mr. Choo, as counsel for Attorney General, representing the Department of Community Services and Department of Justice argued that the decisions sought to be appealed were interlocutory in nature and hence the applicants had only ten days to file an application for leave to appeal as opposed to the more ample period of 25 days for final decisions or orders. It is sometimes difficult to neatly categorize what is a final and what is an interlocutory appeal (see John Sopinka & Mark A. Gelowitz, *The Conduct of an Appeal*, 2nd ed. (Toronto: Butterworths, 2000) p. 9 *et seq.*). In either event, the applicants here are well beyond the relevant time to bring appeal proceedings.

[21] I am not satisfied that the applicants have established that they had a *bona fide* intention to appeal the decision by Robertson J., whether the time period is 10 or 25 days. The applicants candidly admit they were aware they could seek to appeal the decision by Robertson J., but instead made the conscious decision to pursue what they considered to be a more effective remedy, injunctive relief to prevent the use of what they considered to have been confidential information.

[22] The affidavit of Ms. Cummings sworn December 13, 2010 says that they did not have the financial or legal resources, nor the time to effect an appeal at the same time as an injunction. It is virtually impossible to conclude there was a *bona fide* intention to appeal when the applicants thought about appealing, but rejected that course of action in favour of pursuing different legal recourse.

[23] I am also not satisfied there is a reasonable excuse for the delay in bringing the application for an extension of time to file appeal proceedings. As noted, the applicants deliberately chose not bring an appeal within the prescribed time period. They say they moved quickly once the application for an injunction was not successful. There may be circumstances where a prospective appellant may not have pursued a timely appeal due to a legitimate misapprehension as to the meaning or significance of a decision they now wish to appeal. The applicants here do not say they misunderstood the consequences of the dismissal by Justice Robertson of the various confidentiality motions in May 2010.

[24] They say Coughlan J. found in his decision of November 10, 2010 that absent a sealing order documents filed in court are a matter of public record. This

can hardly be a novel or new proposition to the applicants. Indeed they did not say it was. In these circumstances, a reference by Coughlan J. to this fact does not constitute a reasonable excuse for waiting in excess of six months to try to pursue an appeal.

[25] Mr. Choo also argues that the applicants have not demonstrated a strong case for error or identified real grounds of appeal that would justify appellate interference. Despite the polished presentation of the applicant's Motion documents (Notice of Motion, Affidavit and Brief), it is well to remember that they are self represented. While a number of types of relief requested (should the time to file appeal proceedings be extended) are patently beyond what this Court could grant, others are well within the jurisdiction of this Court.

[26] More importantly, the grounds of appeal identified by the applicants are not generic in nature. They allege specific types of error that present, at least on their face, arguable issues. There is indeed some authority that supports the contention of the applicants that in FOIPOP proceedings confidentiality orders for documents filed in support of judicial proceedings ***may*** be necessary to ensure the fair hearing rights of the litigants. (See *Shannex Health Care Management v. Nova Scotia (Attorney General)*, 2005 NSCA 158.)

[27] In my opinion, the more merit an applicant can demonstrate in the proposed grounds of appeal, the more that weakness of an excuse and/or the absence of a *bona fide* intention to appeal within the prescribed time period may fade in significance. That is not the case here.

[28] The materials filed in support of this application leave a number of questions unanswered. I do not know when the enumerated files were accessed by the representatives of Boyne Clarke – was it before or after the hearing before Robertson J.? Copies of the requisition slips appended to the affidavit of Ms. Cummings indicate it may have been before May 11, 2010. If it was, how can an appeal from the dismissal of the May 11, 2010 refusal to issue confidentiality orders address the access and perhaps copying of the files? I am not advised what information was submitted by the applicants as part of the FOIPOP appeal process. There is no evidence or submissions demonstrating why that information should have been protected. Without this background it is impossible to be favourably impressed with the strength of the applicants' assertions of reversible error.

[29] As mentioned, the applicants do not argue that the documents they filed in the enumerated Supreme Court files should have been confidential for any particular reason. Their real complaint appears to be that the defendants Belfast Mini-Mills and International Spinners and their counsel have those materials and plan to use them in their outstanding action. How they are relevant, if at all, I do not know. They have appealed Justice Coughlan's decision refusing injunctive relief, prohibition of use of those documents in the outstanding action, and the return of all copies.

[30] The ultimate question is whether or not I am satisfied that justice requires that the requested extension of time be granted. This requires me to balance all of the relevant factors. Here, the proposed appeal appears to be from an interlocutory decision made more than six months ago in five separate proceedings, all of which have now been concluded. Obviously, the appeal would have no bearing on the conduct of those proceedings. If the application is granted, the proposed respondents would be called upon to participate in an appeal that the applicants could have pursued more than six months ago.

[31] Taking all of the circumstances into account, the applicants have not satisfied me that justice requires this application to be granted. The respondents have not requested costs. Accordingly, the application to extend time to commence appeal proceedings is dismissed without costs.

Beveridge, J.A.