

NOVA SCOTIA COURT OF APPEAL

Citation: *Houghton v. McCarron*, 2003 NSCA 148

Date: 20031218

Docket: CA 212369

Registry: Halifax

Between:

Darcy Leigh Houghton

Appellant/Applicant

v.

Donald H. McCarron

Respondent

Judge: Oland, J.A.

Application Heard: December 18, 2003, in Halifax, Nova Scotia, In Chambers

Written Decision: December 23, 2003

Held: Application granted.

Counsel: Derrick G. Wickstrom, for the appellant/applicant.
Respondent in person.

Decision: (Orally)

[1] This is an application for extension of time to file a notice of appeal. The applicant seeks to appeal an order of Justice Gruchy released August 3, 2003.

[2] The facts are set out in the applicant's affidavit in support of her application. Briefly they are these. She had been self-represented before Justice Gruchy. After receiving his decision pertaining to spousal support, among other things, she contacted Nova Scotia Legal Aid. She was advised to file the appeal herself.

[3] On August 23, 2003 the applicant couriered a notice of appeal to the court. According to her affidavit, the following day she received a call advising that the notice had been filed but that she needed to send in the filing fee. When in contact with Nova Scotia Legal Aid subsequently the applicant advised that she had filed the notice of appeal.

[4] On October 13, 2003 the applicant received a letter from the registrar of this court advising that she did not have an appeal filed as the filing fee had not been paid. She sent along the letter to Nova Scotia Legal Aid without reviewing that letter closely. It was only after Nova Scotia Legal Aid had sent in the filing fee, which was returned as the time for filing had expired, and the appellant met with her counsel in November of 2003, that she realized that her appeal had not been filed.

[5] The accepted test for an extension application as set out in the *Jollymore Estate v. Jollymore* (2001), 196 N.S.R. (2d) 177 wherein Saunders, J.A. stated:

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.

I must also be conscious that Hallett, J.A. observed in *Tibbetts v. Tibbetts* (1992), 112 N.S.R. (2d) 173 (N.S.C.A.):

The simple question the court must ask on such an application is whether justice requires that the application be granted. There is no precise rule. The circumstances in each case must be considered so that justice can be done.

[6] I will consider the factors in the three-part test. There is no question that the applicant had a *bona fide* intention to appeal while the right to appeal existed. She sent in the notice of appeal in time.

[7] I am also satisfied that applicant had a reasonable excuse for the delay. While she failed to read the court's letter closely, she knew that the filing fee was outstanding. However it appears that there was confusion as to whether the notice had been accepted for filing and as to whether the fee could be paid later. She believed she had perfected her appeal. There was also confusion because of her dealings and involvement with Nova Scotia Legal Aid, including as to who would incur those disbursements and when.

[8] I am not entirely convinced that in the particular circumstances of this case there are compelling or exceptional circumstances warranting an extension of time as set out in the three part test. It is, however, not necessary that I determine that component as I am satisfied that the extension should be granted based on the principles and the discretion given to me as set out in *Tibbetts*, supra.

[9] The applicant made efforts to file her notice and believed that she had done so. Her misunderstanding of the filing requirements and the confusion following her retention of Nova Scotia Legal Aid are the main reasons for the delay in the payment of the filing fees. She has brought her application for extension of time promptly upon realizing that her appeal was not filed as she had believed.

[10] There appears to be no substantial prejudice to the intended respondent, Mr. McCarron. According to the applicant's affidavit she sent him the notice of appeal by mail after she couriered it to the court. Mr. McCarron appeared in Chambers this morning and stated that if she sent it to him, he did not receive it. However the

sole prejudice which he raised was the inability to retain counsel for the hearing of this application for extension of time. He will have sufficient time to retain counsel to represent his interests at the hearing of the merits of the appeal.

[11] Consequently, I would grant the application and would require that the applicant file her notice of appeal within ten days of today, December 18, 2003.

Oland, J.A.