

**NOVA SCOTIA COURT OF APPEAL**

**Citation:** *Leigh v. Belfast Mini-Mills*, 2012 NSCA 67

**Date:** 20120615

**Docket:** CA 353382

**Registry:** Halifax

**Between:**

Gillian Leigh, Wanda Cummings and  
Toltec Holdings Incorporated, carrying on business  
as Mabou Ridge Centre for Holistic Living

Appellants

v.

Belfast Mini-Mills and  
International Spinners Ltd.

Respondents

**Judge:** The Honourable Justice Duncan R. Beveridge

**Motion Heard:** May 31, 2012, in Halifax, Nova Scotia, In Chambers

**Held:** Registrar's motion to dismiss the appellants' application for  
leave to appeal is granted

**Counsel:** Gillian Leigh and Wanda Cummings, appellants, in person  
Robert K. Dickson, Q.C., for the respondent

**Decision:**

[1] The Registrar brought a motion to dismiss the appellants' application for leave to appeal for the failure by the appellants to comply with the requirements to perfect their appeal. I grant the motion. My reasons are as follows:

**FACTS**

[2] Wanda Cummings is not a lawyer. She represents herself and acts as agent for her partner and co-appellant Gillian Leigh and Toltec Holdings Incorporated. Although not a lawyer by training, Ms. Cummings is familiar with the court process. She has brought and been involved in numerous applications in the Supreme Court and the Court of Appeal (see for example, *Cummings v. Belfast Mini-Mills Ltd.*, 2010 NSSC 459; *Cummings v. Nova Scotia (Public Prosecution Service)*, 2011 NSSC 38; *Leigh v. Belfast Mini-Mills Ltd.*, 2011 NSSC 23; *Leigh v. Belfast Mini-Mills Ltd.*, 2011 NSSC 303; *Leigh v. Belfast Mini-Mills Ltd.*, 2011 NSSC 320; *Leigh v. Belfast Mini-Mills Ltd.*, 2011 NSSC 300; *Cummings v. Nova Scotia (Community Services)*, 2011 NSCA 2; *Cummings v. Belfast Mini-Mills Ltd.*, 2011 NSCA 56; *R. v. Cummings*, 2012 NSCA 52).

[3] The present appeal proceedings arise out of litigation commenced in 2006. Lists of documents were exchanged in 2007. Some examinations for discovery were held. In 2008, counsel for the appellants' withdrew. There was a hiatus.

[4] In April 2010, the plaintiffs' filed a notice of motion seeking:

- to strike the defence;
- to bar any further discovery of the individual plaintiffs;
- to bar any further demands for disclosure by the defendants;
- to convert the action to an application;
- summary judgment against the defendants;
- a remedy on the basis that the defendants were guilty of abuse of process.

[5] The respondents then brought a motion to force the appellants to comply with their obligations for disclosure and to respond to certain questions posed on examination for discovery.

[6] All of these motions were heard by the Honourable Justice Patrick J. Duncan on November 22 & 23, 2010. Written submissions followed. Justice Duncan released reasons for judgment on July 20, 2011 (2011 NSSC 300).

[7] Justice Duncan dismissed the motion for summary judgment. He found no abuse of process either by virtue of the delay in the civil proceedings or as a result of what the appellants say was a failure by the respondents to comply with undertakings; or by accessing court files that the appellants claim contained privileged or confidential information. Justice Duncan also declined to convert the action to an application. Because there was no separate motion to require the respondents to comply with undertakings or to disclose further information, this complaint was not dealt with.

[8] Justice Duncan did grant the motion by the respondents to require the attendance of the appellant Gillian Leigh for discovery and to produce certain documentation.

[9] Shortly thereafter, Justice Duncan dismissed a motion by the appellants to ban publication of his reasons for dealing with the various motions. Reasons were released on July 25, 2011 (2011 NSSC 303).

[10] The parties were unable to agree on the issue of costs. Justice Duncan heard the parties and released a decision on costs on August 16, 2011 (2011 NSSC 320). The form of the order was consented to and duly issued on September 26, 2011.

#### PROCEEDINGS BEFORE THE NOVA SCOTIA COURT OF APPEAL

[11] The appellants first filed their notice of application for leave to appeal and notice to appeal the interlocutory decisions by Justice Duncan on August 2, 2011. Because the application for leave to appeal was filed in relation to interlocutory proceedings, Rule 90.25(2) required the appellant to bring a motion for date and directions no later than 15 days after the filing of the application for leave to

appeal. The initial return date for the motion for date and directions was Thursday, August 11, 2011. This was rescheduled to September 1, 2011 to accommodate counsel for the respondents.

[12] The motion was removed from the docket for that date as no certificate of readiness had been filed by the appellants and the lower court order had not yet been finalized.

[13] Ms. Cummings filed an amended notice of appeal on October 5, 2011 with a new return date for motion for date and directions of October 26, 2011. The notice of appeal sets out the following grounds:

1. That the learned Justice Duncan did not invoke Rule 51.03 for breach of the undertaking rule by the Defendants, or to acknowledge that the Defendants were abusing the summary judgment rule;
2. That the learned Justice Duncan did not appropriately apply the relevancy test and likewise inappropriately broadened discovery beyond the scope of the pleadings in both substance and time;
3. That the learned Justice Duncan exceeded jurisdiction by ordering disclosure of protected documents which were obtained through privacy legislation, are outside the scope of the litigation herein, and are relevant only to an unrelated litigation;

4. That the learned Justice Duncan failed to consider the evidence in its totality and made findings of fact which were contrary to admissible evidence or could not be inferred, adduced or deduced from inadmissible evidence;
5. That the learned Justice Duncan erred in failing to find that the sealed and confidential *Freedom of Information and Protection of Privacy Act* and *Privacy Act* documents which were seized by the Defendants was a breach of the Plaintiffs' privacy as he was bound by the Nova Scotia Court of Appeal's decision in C.A. 341131, where the Courts did not have jurisdiction over the documents in the context of the Hfx. 272748 or C.A. 341131 matters;
6. That the learned Justice Duncan caused irreparable harm to the Plaintiffs by publishing online information regarding their *Freedom of Information and Protection of Privacy Act* and *Privacy Act* applications, and by not allowing submissions on the motion;
7. That the learned Justice Duncan erred in not giving proper consideration to the criteria for the Plaintiffs' motion to convert their action to an application under Rules 6.02 and 6.03;
8. That the learned Justice Duncan committed an appealable error by dismissing the Plaintiffs' applications for summary judgment and remedies sought for abuse of process by the Defendants;
9. That the learned Justice Duncan erred in awarding costs against the impecunious Plaintiffs whose procedural and substantive rights had been seriously eroded over time. [Emphasis in original]

[14] Also on October 5, 2011, Ms. Cummings filed a certificate of readiness certifying that she had ordered transcription of the proceedings and was advised by Judy Robson of Sydney Discovery Services that the transcription would be

complete in approximately two months and that she would anticipate being able to file the appeal book, electronically if leave is granted, no more than one month after receiving a certified copy of the transcripts.

[15] Ms. Cummings requested an adjournment of the motion for date and directions scheduled to be heard on October 26, 2011. The request was granted. The motion was rescheduled for November 24, 2011.

[16] The parties appeared before Oland J.A. on November 24, 2011. Ms. Cummings requested permission to file the appeal book electronically. The reason she advanced was the sheer volume of documentation and her lack of financial resources. Ms. Cummings explained that the transcript would be ready in one month. It was not the preparation and filing of the transcript that was her concern, but the volume of documentary materials. The appellants had filed two or three volumes of written materials before Justice Duncan. These were estimated to be as much as 500 pages of documentation. The respondents objected to electronic filing.



[17] Justice Oland pointed out to Ms. Cummings that the Rules do require the filing of the transcript and record in hard copy. Ms. Cummings had made no motion nor provided any evidence to do otherwise. The motion for date and directions was therefore adjourned without a set return date. Justice Oland explained that it may take Ms. Cummings a couple of weeks for her to put together her materials. When they were ready, she could file them with a convenient date and time. Ms. Cummings said she understood.

MAY 31, 2012

[18] The Registrar issued her motion May 14, 2012 to dismiss the appeal proceedings due to the failure by the appellants' to perfect their appeal as provided by Rule 90.43(3) and (4) of the *Nova Scotia Civil Procedure Rules*. Ms. Cummings and Ms. Leigh jointly requested that the Registrar's motion be removed from the docket or dismissed as being inappropriate. They submitted that a recent motion in Hfx No. 272748 was going to result in a further amendment to the application for leave to appeal and notice of appeal, and they have been moving diligently ahead on the appeal. An affidavit sworn by Gillian Leigh on May 24, 2012 was tendered.

[19] The respondents vigorously supported the Registrar's motion to dismiss. Mr. Dickson filed submissions by way of a letter dated May 24, 2012 and his affidavit sworn the same date. Attached to his affidavit is the exchange of correspondence between the appellants and Mr. Dickson from early December 2011 to May 14, 2012. Before dealing further with the respective evidence and positions of the parties, I will first comment on the applicable principles.

## PRINCIPLES

[20] Rule 90.43(3) and (4) are as follows:

**90.43** (3) In an appeal not perfected before 80 days from the date of the filing of the notice of appeal, or before any other time ordered by a judge, the registrar must make a motion to a judge for an order to dismiss the appeal on five days notice to the parties.

(4) A judge, on motion of a party or the registrar, may direct perfection of an appeal, set the appeal down for hearing, or, on five days notice to the parties, dismiss the appeal.

[21] Rule 90.43(3) imposes a positive obligation on the Registrar. The requirements to perfect an appeal are neither complex nor usually onerous whether

a party is represented by counsel or is self represented. On hearing the Registrar's motion, a judge may either direct perfection of the appeal, set the appeal down for a hearing or dismiss the appeal. No further guidance is provided by the Rule on how a judge should exercise his or her discretion in selecting the appropriate outcome.

[22] I think it fair to say that as a general rule a judge should be hesitant to deny an appellant his or her opportunity for this Court's review of a decision that can be appealed to this Court. I find useful, and adopt with respect, my brother Saunders J.A.'s analysis in *Islam v. Sevgur*, 2011 NSCA 114, where he wrote:

[36] The approach I take in such matters is this. Once the Registrar shows that the rules for perfecting an appeal have been breached, and that proper notice of her intended motion has been given, the defaulting appellant must satisfy me, on a balance of probabilities, that the Registrar's motions ought to be denied. To make the case I would expect the appellant to produce evidence that it would not be in the interests of justice to dismiss the appeal for non-compliance. While in no way intended to constitute a complete list, some of the factors I would consider important are the following:

- (i) whether there is a good reason for the appellant's default, sufficient to excuse the failure.
- (ii) whether the grounds of appeal raise legitimate, arguable issues.

- (iii) whether the appeal is taken in good faith and not to delay or deny the respondent's success at trial.
- (iv) whether the appellant has the willingness and ability to comply with future deadlines and requirements under the **Rules**.
- (v) prejudice to the appellant if the Registrar's motion to dismiss the appeal were granted.
- (vi) prejudice to the respondent if the Registrar's motion to dismiss were denied.
- (vii) the Court's finite time and resources, coupled with the deleterious impact of delay on the public purse, which require that appeals be perfected and heard expeditiously.
- (viii) whether there are any procedural or substantive impediments that prevent the appellant from resuscitating his stalled appeal.

[37] It seems to me that when considering a Registrar's motion to dismiss, a judge will wish to weigh and balance this assortment of factors, together with any other circumstances the judge may consider relevant in the exercise of his or her discretion.

## ANALYSIS

[23] I return to a consideration of the evidence and positions of the parties. The sole reason offered by Ms. Cummings, on behalf of the appellants, for her failure to perfect the appeal was that she was tied up in a motion that was heard by the

Honourable Justice Kevin Coady on April 18, 2012. This motion alleged failure by the defendants' to comply with the undertakings they had given arising out of the examinations for discovery in 2007-08. Apparently Justice Coady ruled on April 18, 2012 that this issue had been dealt with by Justice Duncan. Ms. Cummings explains that this ruling now requires her to file an amendment to her notice of appeal of October 5, 2011 and it changes dramatically the content of the appeal book.

[24] Mr. Dickson's affidavit of May 24, 2012 sets out a number of uncontested background facts. As noted earlier, it attaches correspondence between his office and Ms. Cummings from December 7, 2011 to May 14, 2012. Mr. Dickson wrote to Ms. Cummings and Ms. Leigh no less than 13 times. Each letter pointed out the numerous delays in perfecting the appeal and encouraged the appellants to file their affidavits regarding their claimed impecuniosity so that a judge of the court of appeal could make a ruling on their request to file the appeal book electronically. The first such letter is dated December 7, 2011. Ms. Cummings replied the same day. Her response was:

We are, as always, moving along with this matter as expeditiously as possible. As you are aware, Ms. Leigh is in England and is making her best efforts not only to

collect her financial information for her affidavit, but also to have it sworn. She is in a rural area and is yet unfamiliar with the process in England and the Court resources there.

We are following Justice Oland's instructions carefully. Our brief regarding the need to file electronically, as well as to file *in forma pauperis*, obviously require time and effort on our part, as well. Justice Oland has also allowed for your response on behalf of the defendants.

[25] In Mr. Dickson's letter of February 23, 2012 to Ms. Leigh and Cummings, he said:

This is further to my correspondence of December 7, 2011, December 16, 2011, December 22, 2011, December 29, 2011, January 13, 2012, January 23, 2012, January 24, 2012 and February 6, 2012.

Despite your assurances that I would be receiving your affidavits and documents in support of your impecuniosity, we have received nothing to date.

[26] He cautioned them that unless he received their documentation within a reasonable time he will have no choice but to seek direction of the court. Ms. Cummings responded on the same day.

Thank you for your correspondence. Once again, we are preparing the documents as quickly as we are possibly able. We anticipate that this will not now be much longer, as documents are on their way from England. As soon as I receive those documents via the post from Ms. Leigh, we shall incorporate those into our written submissions and you will have them forthwith.

[27] Mr. Dickson wrote on March 14, 2012, as follows:

I await receipt of the Affidavit of Wanda Cummings along with any other materials upon which you intend to rely upon.

I still have not received any documents from Ms. Leigh or Ms. Cummings as regards to a submission you intend to make to the Nova Scotia Court of Appeal as regards to each of your impecuniosity. The documents are long overdue.

I would ask that you direct your attention to providing me with the complete and appropriate documents so that we may move forward with the appeal.

Once again, if I do not receive your documents by the end of March you will leave me no choice but to make a motion to dismiss your appeal in the Court of Appeal.

[28] Ms. Cummings replied promptly on March 14, 2012. She wrote:

Again, we are doing our level best to get these documents to you as quickly as possible considering the number of documents we have to address and the circumstances we find ourselves in. I only received via the post late last week the documentation from England. You'll remember that this matter is not the only one we are dealing with. We will once again remind you, too, that it is very possible that this appeal book would have been filed very quickly after the motion for directions some months ago had there been no objection to filing electronically.

[29] Further letters were exchanged up to Mr. Dickson's last of May 14 pointing out the appellants' promise on numerous occasions to provide affidavits in support

of claimed impecuniosity. If he did not hear from them he would move to have the appeal struck.

[30] In light of the evidence tendered by Ms. Cummings and on behalf of the respondents, the appellants have not satisfied me that the Registrar's motion ought to be denied. No good reason has been put forward by the appellants that comes close to excusing their failure to take any steps to perfect their appeal by complying with the Rules or pursue their announced motion that they should be excused from complying with the Rules on the basis of their alleged impecuniosity.

[31] The correspondence establishes that Ms. Cummings claimed they were held up waiting for documentation to come from the United Kingdom. I am left completely in the dark as to what that documentation was supposed to demonstrate. Assuming that there was relevant information to come from the United Kingdom, Ms. Cummings advised on March 14, 2012 that she had received that documentation the previous week. On May 31, 2011 she confirmed that they did indeed have their materials on impecuniosity in their possession. I have no explanation why her motion was not brought in a timely fashion.



[32] Even when the Registrar brought a motion to dismiss the appeal, the appellants did nothing to advance their intended request to file documentation electronically due to a claim of impecuniosity. The sole response to the Registrar's motion to dismiss was their claim that they had been tied up by new developments by reason of further interlocutory proceedings before Justice Coady to try to enforce undertakings given by the respondents.

[33] I am also not satisfied that the appellants would meet any future filing dates on the motion if I directed perfection on a strict schedule. Ms. Cummings says she now wants to amend her application for leave to appeal again. We would still be faced with her motion to file the appeal documentation electronically. She has had over seven months to bring her motion. She failed to do so despite repeated urging by the respondents.

[34] The Rules strive for the just, speedy, and inexpensive determination of proceedings. This ideal is particularly important for interlocutory appeals. It is for this reason that a motion for a date for hearing of the appeal must be brought by the prospective appellant within 15 days (as calculated by Rule 9.25(2) ) from the

filing of the notice of appeal. The time limit for the perfection of an appeal (as opposed to an application for leave to appeal) and motion for a date for hearing is 80 days. If that lengthy time period is considered, the delay becomes more stark. Eighty days from August 2, 2011 was up on November 28; from October 5, 2011 (her amended notice of appeal) it was February 3, 2012; from November 24 (her last appearance in Chambers) it was March 22, 2012.

[35] I am also cognizant of Ms. Cummings' track record in other proceedings. Mr. Dickson provided to me reasons for judgment issued by Hamilton J.A. on May 11, 2012 (2012 NSCA 52) where two other appeals being prosecuted by Ms. Cummings were dismissed for failure to perfect. Ms. Cummings' response to Justice Hamilton's decision being provided to me was that the reasons by Hamilton J.A. were confidential. Absent statutory authority or exceptional circumstances, court proceedings are anything but confidential. Justice Hamilton sets out the history of the two separate appeals in this Court. She related a litany of motions and dates set for compliance. Justice Hamilton found that Ms. Cummings has repeatedly failed to file material necessary for her to proceed with her appeals and with directions given to her by various judges of this Court.

[36] In light of the materials and submissions of the appellants and the respondents', I am far from satisfied that Ms. Cummings has the willingness and ability to comply with future deadlines. Dismissal of this appeal does not dispose of the complex civil litigation still underway between the appellants and the respondents. The appellants are also at liberty, should they choose, to challenge the interlocutory order of Justice Coady arising out of the appellant's motion of April 18, 2012, but only if she complies with the requirements of the *Nova Scotia Civil Procedure Rules*. In this appeal she has not.

[37] I grant the respondents' motion without costs to any of the parties.

Beveridge, J.A.