NOVA SCOTIA COURT OF APPEAL
Citation: Deveau v. Fawson Estate, 2013 NSCA 54

Date: 20130430
Docket: CA 390659
Registry: Halifax

Between:

Sandra Marie Deveau

Appellant

v.

James Robert Fawson, Francis J. Fawson, Personal Representative of the Estate of Margaret Anne Fawson, deceased, Patrick J. Fawson, Samantha Alexandria Fawson, Sarah Marie Fawson, Jenna Fawson and Myles Fawson

Respondents

Judges:	The Honourable Justice Peter M. S. Bryson
Motion Heard:	April 18, 2013, in Halifax, Nova Scotia, in Chambers
Held:	Motion of Appellant dismissed. Motion of Respondent granted and appeal dismissed.
Counsel:	N. Kent Clarke, for the appellant Keith MacKay, for the respondent James Fawson Francis J. Fawson, respondent in person

Reasons for Judgment:

[1] "Manners Makyth Man": so said William of Wykeham, Bishop of Winchester and Lord Chancellor of England, almost 700 years ago. His family motto now graces two of his "progeny" – Winchester School and New College, Oxford. Much time, expense and grief could have been spared in this case if the appellant and her counsel had observed the simple courtesy which this aphorism counsels. That failure has prompted a motion for dismissal of this appeal.

Background to Motions

[2] In a careful and lengthy decision issued February 6, 2012, the Honourable Justice Suzanne Hood granted James Fawson's application setting aside the last will and testament of his late sister, Margaret Anne Fawson, (2012 NSSC 55). Justice Hood found that Ms. Fawson's 2004 will was executed by her when she was under a delusion which caused her to exclude her brothers, James (Jim) and Francis (Frank), from her will. Instead, she named her brother, Patrick Fawson and some of her nieces and nephews as beneficiaries. She appointed her friend, Sandra Deveau, as Executor. Ms. Deveau was also the sole residuary beneficiary of Miss Fawson's will.

[3] Justice Hood's order following trial was issued March 6, 2012. On April 5, 2012, Ms. Deveau appealed Justice Hood's decision, alleging:

> (1) THAT the Learned Trial Judge erred in her interpretation of the law regarding the burden of proof as it applies to:
>
> a. testamentary capacity;
>
> b. suspicious circumstances; and/or
>
> c. delusion.
>
> 2. THAT the Learned Trial Judge erred in her interpretation of the law and her application of the facts with regard to the issues of:
>
> a. testamentary capacity;

b. suspicious circumstances; and/or

c. delusion.

(3) THAT the Learned Trial Judge erred in law because she failed to give any weight to the testator's presumption of capacity.

(4) THAT the Learned Trial Judge erred in her interpretation of the expert evidence on the issue of delusion and by placing weight on speculative conclusions.

(5) THAT the Learned Trial Judge erred in law by her misapplication of the facts with regard to the timing of delusion affecting testamentary capacity;

(6) THAT the Learned Trial Judge erred in law by placing little, or any, weight on the evidence of the Testator's family doctor.

(7) Such other grounds as may appear from the record and which may be allowed.

[4] Ms. Deveau commenced the appeal describing herself as "personal representative of the Estate of Margaret Anne Fawson, deceased". This is incorrect. By order of Justice Hood of March 6, 2012 the grant of probate to Ms. Deveau was revoked. Subsequently, Mr. Frank Fawson was appointed administrator of his late sister's Estate. This is not simply a matter of semantics. Ms. Deveau is appealing in her own right. Unless she is successful on the merits of the appeal, she exposes herself to an award of costs personally. She cannot assume that she would be indemnified out of the Estate. Her counsel, Mr. Clarke, confirms that she is aware of this.

[5] Nothing was done by Ms. Deveau to perfect her appeal. By notice of motion dated August 13, 2012, the Registrar sought an order dismissing the appeal for Ms. Deveau's non-compliance with *Civil Procedure Rules* 90.43(3) and (4) ("*Rules*"). That motion was heard August 30th before the Honourable Justice Jill Hamilton. Frank Fawson was unrepresented. Mr. Keith MacKay was acting for Jim Fawson. He was previously scheduled to be out of the province on August 30th so he was unable to attend. He had heard nothing from Mr. Clarke in response to his recent overtures regarding costs or setting the appeal down for

hearing. Ms. Deveau filed nothing in response to the Registrar's motion for dismissal.

[6] Following representations to Justice Hamilton by Mr. Clarke, the Registrar's motion was adjourned. In an October 17, 2012 telephone conference with the Honourable Justice David Farrar, the appeal was set down for hearing on April 10, 2013. Ms. Deveau was required to file the appeal books by December 17th. Although appeal books were filed by that date, they were seriously deficient as described further below. Ms. Deveau's factum was due January 25, 2013. It was never filed.

March 28, 2013 motion:

[7] As a result of Ms. Deveau's non-compliance with the *Rules* and the failure of Mr. Clarke to respond to inquiries from Mr. MacKay, Jim Fawson brought a motion to dismiss the appeal. That motion was heard before the Honourable Justice Jamie W. S. Saunders on March 28, 2013. Mr. Fawson was seeking solicitor-client costs from Ms. Deveau personally. The motion was supported by Frank Fawson, who was unrepresented. Again, Ms. Deveau filed nothing with the Court in response to Mr. Fawson's motion.

[8] Justice Saunders expressed concern about carriage of the appeal by Ms. Deveau. After hearing extensive submissions, he adjourned the motion for dismissal and invited Mr. Clarke to apply to extend time for perfecting the appeal. He awarded costs to Jim and Frank Fawson payable forthwith. He set strict guidelines with respect to what needed to be done and when. At the conclusion of the hearing before Justice Saunders, he provided these directions to the parties:

> **THE COURT:** All right. Thank you all very much. This is a case that is troubling for all the reasons that I've indicated and it's difficult because of the fact that among the sought after relief advanced by Mr. MacKay on behalf of his client is the request that solicitor/client costs be awarded in their [sic] favour, not out of the Estate but payable by the respondent personally.
>
> That gives me some pause on account of the potential liability of this individual respondent, and based on what I've heard this morning I think that those □ that her vulnerability, her liability, ought to be explained on the record before me so that I

> can properly understand what the consequence may be if I were to strike out this appeal and grant the relief that Mr. MacKay and Mr. Fawson seek.

Justice Saunders ordered that the matter return to Chambers on April19.

April 19, 2013 motions:

[9] Accordingly, there were two motions before the court on April 19: Ms. Deveau sought an extension of time to perfect her appeal; Jim Fawson supported by his brother, Frank, sought dismissal of the appeal.

[10] In support of his motion, Jim Fawson filed an affidavit from Keith MacKay which sets out some of the appeal process. Frank Fawson has also filed an affidavit setting forth the background concerning administration of the Estate. For her part, Ms. Deveau apparently relies on the affidavit of her lawyer, Kent Clarke. There is no affidavit evidence from Ms. Deveau herself.

[11] Mr. Clarke's affidavit inappropriately combines assertions of fact, arguments and submissions. Some of the facts are obviously on information and belief without source attribution. These shortcomings are not fatal to consideration of the substance of the motions before the court, but are an unnecessary and unwelcome distraction.

Extension of Time/Dismissal - Legal Principles

[12] Section 50 of the *Judicature Act*, R.S.N.S. 1989, c. 20, expressly authorizes the court to make rules extending time periods preliminary to an appeal. *Rule* 90.37(11)(h) allows a motions judge to extend or abridge any time prescribed by the *Rule*. *Rule* 90.43(4) authorises perfection of an unperfected appeal, or dismissal of the appeal. *Rule* 90.40(2) authorizes dismissal of an appeal which is not conducted in accordance with the *Rules*.

[13] Ms. Deveau also quotes *Rule* 90.44 "quashing or dismissing appeal" as authority for dismissal on a motion in Chambers. In fact, that *Rule* only applies where a motion is made to the Court of Appeal; that is to say, a panel of three

judges. *Rule* 90.44 does not apply to a motion before a single judge of the Court of Appeal in Chambers.

[14] The test for extending time to file an appeal applies to Ms. Deveau's motion here and has been expressed by the court on numerous occasions. In *Bellefontaine v. Schneiderman*, 2006 NSCA 96, Bateman, J.A. put it this way:

> [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 (**Tibbetts v. Tibbetts** (1992), 112 N.S.R. (2d) 173 (C.A. in Chambers)).

[15] The ultimate question is whether justice requires that an extension be granted. The three-part test is a useful, but not exhaustive guide for the exercise of the court's discretion, *Farrell v. Casavant*, 2010 NSCA 71, at para. 17 and *Cummings v. Nova Scotia* (*Community Services*), 2011 NSCA 2, at para. 19.

[16] As a corollary, similar considerations apply to a motion to dismiss an appeal, which is effectively the result of refusing to extend time. Both parties refer to the decision of *Islam v. Sevgur*, 2011 NSCA 114, for the criteria that should govern the court's discretion with respect to both motions. In *Islam*, Justice Saunders helpfully summarized the principles:

[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.

[38] **Civil Procedure Rule** 90.43(a) is mandatory. It obliges the Registrar to enforce the **Rules** and chase delinquent appellants.

[17] In bringing his motion, and resisting Ms. Deveau's, Jim Fawson accuses Ms. Deveau of:

- failing to perfect the appeal in a timely way, leading to the Registrar's motion to dismiss of August 30, 2012;
- inaccurately characterizing the pre-motion exchange between counsel regarding costs to Justice Hamilton on August 30;
- failing to file complete appeal books in compliance with *Rule* 90;
- failing to respond to Mr. Fawson's counsel when the shortcomings in the appeal books were brought to the attention of Ms. Deveau's counsel;
- failing to file a factum in compliance with Justice Farrar's direction and *Rule* 90;
- failing to respond to queries from counsel and the court regarding the appellant's factum;
- a general lack of cooperation from Ms. Deveau's counsel in advancing the appeal.

[18] To most of this, Mr. Clarke falls on his sword and admits culpability. But he submits:

- the omissions from the appeal books were:
    - trivial;
    - or were omitted inadvertently because not all trial dates were on the trial decision cover page;
    - could be easily remedied;

- his silence in March 2013 can be attributed to illness or absence from the province.

- he saw no reason to file a factum in light of Mr. MacKay's January 21, 2013 letter regarding deficiencies in the appeal book; he assumed new dates would be necessary;

- he also says that unresolved trial costs delayed perfection of the appeal throughout the process.

- his failures should not be borne by his client.

Appellant's defaults and excuses for defaults:

Appeal Book Omissions:

[19] The appeal books were filed on December 17, 2012, but omitted material evidence. Some of those material omissions were: no transcription of the evidence of June 21 and 23, 2011, involving some or all of the evidence of six witnesses; no pre or post trial submissions and substantial portions of the pleadings. On January 21, 2013 after perusing the appeal books, Mr. MacKay wrote a detailed letter to Mr. Clarke setting forth these and many other omissions. Mr. Clarke neither acknowledged nor replied to this letter.

[20] In his affidavit, Mr. Clarke suggests that the trial judge's cover page (which omits mention of two trial dates) was "an error". In his brief he describes these as a "... clerical error in the trial judge's decision."

[21] Mr. Clarke's affidavit argues that the majority of items named by Mr. MacKay in his letter "... are irrelevant for the purposes of the within appeal". He then goes on to say that other items identified by Mr. MacKay can be dealt with by way of supplementary appeal books. The explanation that is missing here is why this response was not made to Mr. MacKay or the court in January when first brought to Mr. Clarke's attention.

[22] The integrity of the record filed with the court is primarily the responsibility of appellant's counsel. Ascribing blame to a "clerical" error in the covering page of the trial decision is an unbecoming abdication of counsel's responsibility. Nor is it for appellant's counsel to unilaterally determine what goes into the appeal books. That is firstly a matter of the *Rules*, which prescribe the contents of the appeal books, (*Rule* 90.30(2)). Certainly it may be wise and prudent in some cases to limit the record before the Court of Appeal to evidence material to the appeal. But that is for negotiation with opposing counsel or order of the court, (*Rules* 90.30(4) and (5)). Mr. Clarke filed incomplete appeal books. He did not remedy that or reply to Mr. MacKay when the deficiencies of the record were brought to his attention.

Factum

[23] The January 28, 2013 date for filing Ms. Deveau's factum came and went. No factum appeared. No explanations were forthcoming from Mr. Clarke. Three follow-up communications to Mr. Clarke from Mr. MacKay were ignored. In early February the Registrar also wrote to Mr. Clarke inquiring about his factum and book of authorities. She informed Mr. Clarke that Ms. Deveau would require an order authorizing an extension of time to file. She was not favoured with any reply.

[24] Mr. Clarke deposes that:

> The Appellant's factum was due for filing on January 25, 2013. Four days prior to the filing date and more than a month after he was in receipt of the appeal books, Mr. MacKay identified a number of what he called deficiencies in the record ...

[25] Just as he appears to blame the trial judge for errors in the trial dates on the covering page of her decision, Mr. Clarke implies that Mr. MacKay delayed bringing the appeal book deficiencies to Mr. Clarke's attention. In effect, Mr. MacKay is faulted for failing to bring Mr. Clarke's own procedural shortcomings to his attention sooner. These aspersions are unworthy of an officer of the court and are without merit.

[26] Mr. Clarke's explanation that his factum need not be filed in light of Mr. MacKay's January 21 letter regarding appeal book deficiencies implies that he

was only aware of these deficiencies as a result of the letter. As Mr. MacKay argues, if Ms. Deveau genuinely intended to file her factum on January 28, how did omissions in the appeal books escape Mr. Clarke's notice? In any event, Mr. Clarke never had the courtesy to say to Mr. MacKay what he now says to the court.

Trial costs as excuse:

[27] With respect to extending time to file the appeal book, Mr. Clarke deposes:

> An application for extension of time in filing the appeal book should have been filed in February but I was waiting to see if we could resolve the cost issue and see if that was to be subject to appeal.

[28] It is clear from the exchange of emails between counsel concluding on December 5, 2012, that there was no live issue with respect to the amount of trial costs as between Ms. Deveau and Mr. Fawson. But even if there were, this explanation does not excuse the failure of Mr. Clarke either to communicate with Mr. MacKay or to make the necessary application for extension of time to file.

[29] Mr. Clarke further submits through his affidavit that:

> 23. The issue of costs in the proceeding was not determined in Justice Hood's decision. The Appellant took the position that until the issue of costs was decided the appeal could not be perfected ...

[30] On April 12, 2012, Mr. Clarke sent Mr. MacKay an email in which he invited comment on chambers dates for setting down the appeal:

> … We should discuss available Thursday's and whether we can agree on the procedure in the interim …

[31] On April 18, Mr. MacKay replied, proposing chambers dates in May. Mr. Clarke and Mr. MacKay met on May 10 to discuss trial costs and chambers dates. Following further communications and a meeting between counsel, Mr. MacKay wrote to Mr. Clarke addressing costs and chambers dates:

> I understand you will inform me shortly concerning your client's position on the costs of the proof application and Jenna Fawson's costs on the interlocutory motion …
>
> My present commitments allow me to be available for a Chambers appearance any Thursday except July 19, 2012.

[32] Mr. MacKay received no reply.

[33] Nothing in any of this suggested that costs would delay the setting down of the appeal, as Mr. Clarke represented to Justice Hamilton on the Registrar's August 30, 2012 motion to dismiss. There is no indication that this was the appellant's position at any time prior to that - and at that time the appeal had been ongoing for almost five months.

[34] Counsel can hardly rely on his own indolence to justify an argument of delay on what he alleges is a material issue. In these circumstances, Mr. Clarke had an obligation to resolve the matter of costs promptly, either by negotiation or by accepting the trial judge's invitation for submissions. That did not occur until after the Registrar's motion and Mr. Clarke's reliance on outstanding costs issues to avoid it.

[35] Mr. Clarke also says that Ms. Deveau opposed solicitor-client costs for Jim Fawson, but agreed that he should receive party-party costs. That issue was resolved in favour of Mr. Fawson by Justice Hood's November 20, 2012 decision. Despite this Mr. Clarke deposes in part:

> 25. Justice Hood's decision on costs is dated March 15, 2013 ... The Order was issued March 15, 2013 ...
>
> 26. The issue of costs award was always available as an appealable issues to my client should she so choose especially if the parties were not able to agree as to its form or how costs would be calculated.

[36] In fact, Justice Hood's decision was issued November 30, 2012. The order was issued March 15, 2013. Mr. Clarke returned to the issue of costs as a reason for delay during the March 28, 2013 hearing before Justice Saunders. He even

suggested his client could still appeal costs. He gave that up during submissions on the current motions.

[37] If Ms. Deveau seriously wished to appeal costs - and use that as an excuse for not perfecting the appeal - she could have appealed Justice Hood's November 20, 2012 costs decision at that time, or moved to amend the Notice of Appeal in this proceeding. She did neither. It was unnecessary to await either agreement on amounts (resolved by December 5, 2012) or the order itself (March 15, 2013) to advance this issue - which turns out to be a non-issue now.

[38] Jim and Frank Fawson argue that these breaches of the *Rules* and reliance on costs as an excuse exemplify an overall strategy of delay. There is much evidence that sustains this contention. These are but a few examples:

- Mr. Clarke submitted to Justice Hamilton at the August 30, 2012 Registrar's motion to dismiss, that the failure to resolve trial costs was a principal cause for delay. Notwithstanding this submission, Mr. Clarke did not respond to correspondence from Mr. MacKay regarding costs as follows:
    - May 14, 2012 letter proposal;
    - May 24, 2012, follow-up inquiry;
    - June 28, 2012 inquiry regarding Ms. Deveau's position on costs;
    - August 8, 2012 e-mail with proposed costs for Mr. Fawson.

[39] Thereafter, as previously described, the appeal books filed omitted much material evidence. Deficiencies were ignored when brought to counsel's attention. The appellant's factum was not filed and inquiries about the factum went unanswered.

[40] There is simply no basis for excusing excessive delay in pursuing the main issue on appeal because trial costs remained unresolved. Counsel, relying on such arguments, must demonstrate that they diligently pursued resolution of the

outstanding issue before purporting to rely upon it to excuse delay. They must also show how such an issue was material to delaying the main issues on appeal.

[41] Ms. Deveau's explanations for the delay in setting down the appeal, in filing incomplete appeal books, in failing to file her factum, in failing to remedy defects in the appeal books, are unsatisfactory, as is failure of her counsel to respond to reasonable queries from opposing counsel and the court.

Good Faith

[42] Has Ms. Deveau pursued the appeal in good faith, and not tried to delay or frustrate the Fawsons' success at trial?

[43] There is no direct evidence before the court of Ms. Deveau's intentions. In her counsel's affidavit he suggests that the payment of $5,720.07 for transcripts and filing of appeal books is indicative of good faith. But there is no evidence from her explaining any of the delays or troubling conduct since Justice Hood's decision was issued.

[44] A further concern arises regarding Ms. Deveau's willingness to respect decisions of the court. Frank Fawson was appointed administrator of his sister's estate in August of 2012. In his affidavit he deposes to shortcomings in the administration of the estate by Ms. Deveau and a failure to account for that administration or cooperate in its transfer:

> After examining the contents of the family homes I directed the Estate lawyer Keith MacKay to request Sandra Deveau, the executrix named in the contested will, to provide information of the whereabouts of family china and jewellery belonging to my mother, financial documents including RBC Estate bank account statements opened under her direction, information regarding the management of the homes including frozen burst water lines in the Claremont St. home. A true copy of the letter, sent via email requesting these things and much more was sent via email January 22, 2013 and is attached as Exhibit "3". There has been no response to this request to date.

[45] This is troubling evidence of further lack of cooperation by Ms. Deveau personally.

[46] Mr. Fawson says that Ms. Deveau has not provided all financial information regarding her time as personal representative. As Mr. Fawson testifies, Mr. MacKay wrote to Mr. Clarke on January 22, 2013 with an extensive list of allegedly missing information. Characteristically, Mr. Clarke did not reply to that letter but now submits that Ms. Deveau has fully accounted for her administration of the Estate. In reply, Mr. Frank Fawson reiterated that no estate bank account information has been turned over. That evidence is not contradicted by other evidence.

[47] Also of concern is Ms. Deveau's failure to pay the costs awarded three weeks ago "forthwith" to James and Frank Fawson by Justice Saunders.

[48] Most troubling about the materials filed on behalf of Ms. Deveau is that they do not directly address Justice Saunders' concerns expressed on March 28th:

> I would want it clearly explained on the record, under oath or affirmation, that there was a serious intention to pursue the appeal, that there are legitimate arguable issues to be pursued on the appeal and giving an explanation for all of the delay that has been described by Mr. MacKay and Mr. Fawson this morning, so that by looking at such an affirmation or an affidavit I would then have some basis to understand why there has been such silence and inactivity associated with this case and this file. [Emphasis added]

[49] That direction remains fundamentally unanswered by the appellant.

[50] The *Rules* exhort that the court's process should be "just, speedy, and inexpensive". The interests of the public and litigants ideally coincide here. But these goals are not always coincident; "quick and wrong" and "just but slow" are equally undesirable alternatives. The first is of no value; the second may be too late to be of any value. A balance must be struck. That is hard to do without the co-operation of both parties.

[51] Participants in the justice system can become insensitive to the delays that fair process inevitably imposes. But sometimes those delays themselves become unfair process. In a civil proceeding where litigants pursue private rights and interests, there is no reason why the courts - and the public purse - should be more diligent in protecting and promoting those rights and interests than the litigants

themselves. Although he is not a neutral observer, Mr. Frank Fawson's submissions to Justice Saunders likely reflect what many informed, reasonable members of the public think of cases such as this:

> ... Ms. Deveau's actions are an abuse of the judicial process in my opinion. The actions have been malicious and frivolous. My brother, Jim, and I have spent countless hours that will not be compensated for, even if costs are awarded for Mr. MacKay's time.
>
> And, as I explained, every court appearance I have to arrange to take time from my work, which I don't - - there's no compensation, and I travel here one hour each way. Today we have Mr. Clarke asking for more delays due to illness and individuals being out of the country, but he's only offering reasons for his inaction in the last few weeks. This has been close to a year of events gong on, of inaction.
>
> The lack of communication, failure to file proper appeal documents, failure to file a factum all took place before the last few weeks which Mr. Clarke is suggesting are valid reasons for his inaction. And this is only the tip of the iceberg. The communication that has gone to Mr. Clarke for Ms. Deveau in regards to Estate matters, there's a long, long list of unanswered communication that we just - - we just don't hear anything.
>
> It's my opinion that the courts have given Sandra Deveau more than enough opportunity to move her appeal forward if she truly desired to. Any more delays would only inflict more costs and hardship on the Estate, my brother, Jim, and myself. I think the unprofessional conduct of Mr. Clarke denigrates the legal profession.
>
> Those are harsh words, but I'm afraid that's how I feel. Granting further delays only condone the actions, and Mr. Clarke will utilize this approach of manipulating and abusing the judicial process again in the future. I thank you for your time. That's all I have to say.

[52] That is not an unfair characterization of what has transpired in this appeal.

[53] I am not satisfied that Ms. Deveau has adduced evidence that she is pursuing this appeal in good faith.

Merits of the Appeal

[54] In his affidavit, Mr. Clarke sets out extensive excerpts of evidence presumably to establish that the appeal has some merit. In her 103 page decision, Justice Hood addresses the evidence of all the witnesses relied on by Ms. Deveau to suggest error by the judge.

[55] Many of the grounds of appeal attack the trial judge's weighing of the evidence. The decision is lengthy and detailed. The standard of review for such grounds is "palpable and overriding error". That is hard to establish. Ms. Deveau also alleges errors of law regarding the burden of proof. In his affidavit Mr. Clarke submits:

> … Ultimately, the issues of this appeal can be summarized as "What is the test for delusion and suspicious circumstances?" A further important issue in the appeal will be if a delusion cannot be seen or ascertained what steps if any can a solicitor take to assure himself or herself that a client is not under a delusion.

[56] The questions of delusion and suspicious circumstances are well settled principles of law. There is nothing novel about them. The question is whether the trial judge mistook them. Ms. Deveau cites no passage in the decision in which she alleges a clear error of law.

[57] The question of a solicitor's standard of care has nothing to do with this appeal. It would be relevant in a contest between solicitor and client. This appeal is not that contest.

[58] In oral submissions, Mr. Clarke elaborated on the merits. He said the trial judge was wrong to reject the evidence of Margaret Fawson's family doctor. That would normally be a matter of weight for the trial judge, reviewable on a clear and material error of fact standard.

[59] Mr. Clarke also submitted that the "real issue" regarding suspicious circumstances was the trial judge's "turning the burden" against the appellant. But the trial judge cited the leading Supreme Court of Canada case – *Vout v. Hay*, 1995 2 S.C.R. 876 and quoted from ¶ 26-27, which explain that those alleging suspicious circumstances have the burden of proving those circumstances. If they

do, the burden shifts to the proponents of the will who must prove testamentary capacity. The trial judge applied this law:

> [266] The presumption of testamentary capacity has been rebutted by the evidence. The onus then shifts to the proponent of the will to satisfy me that, in spite of the suspicious circumstances, Margaret Fawson had testamentary capacity and, therefore, the will is valid.

There is no apparent error of law here.

[60] In his affidavit, Mr. Clarke quotes from psychiatrist Dr. Grainne Nielson and implies that the trial judge incorrectly relied upon Dr. Neilson's "speculative" evidence about Margaret Fawson's delusions. In fact, the trial judge treated this evidence with great circumspection:

> [221] Because of the limitations of her report, which she recognized, I conclude I should give little weight to her speculative opinions which are her answers to questions 2 and 3. However, having her expert opinion on the nature of a delusion and how it manifests itself at times and can be unnoticed most of the time is helpful to me in assessing whether there were suspicious circumstances surrounding the making of Margaret Fawson's will.

[61] The burden of persuasion is on the appellant – but the test is not onerous – are there "arguable issues" which appear of "sufficient substance" that they could persuade the court to allow the appeal? (*Nova Scotia Attorney General v. Spence*, 2004 NSCA 45 at ¶10) . Jim Fawson concedes the point. Although I entertain doubts, I won't gainsay him. I will assume that there are arguable issues on appeal. I would not describe them as obviously strong, (per Bateman, J.A. in *Bellefontaine*, ¶14, *supra*).

Prejudice

[62] The prejudice to be considered is not confined to the appellant, but embraces the parties and the public interest, (*Islam*, ¶36 v, vi, vii).

[63] Ms. Deveau has filed no evidence. Mr. Clarke submits in his affidavit:

> 46. If the court were to dismiss the within appeal, Sandra Deveau would lose a substantive right. The fault in failing to file an amended appeal book and factum should not be attributable to Ms. Deveau.

[64] Jim Fawson has tendered evidence that Ms. Deveau has no expectation of receiving anything under the Will. She is the residuary beneficiary and she deposed under oath at trial that there would be nothing for her:

> Q. Ms. Deveau what is your understanding of the expression residue when we're speaking about an Estate?
>
> A. Well I'm not a lawyer. But my understanding is that things are not specifically named in the Will are residue. And they are to be used to pay off the bills of the Estate. And if there's anything left over then they go to whoever is named for - - to receive that residue.
>
> Q. Okay. And in this Will you are the only beneficiary named to receive the residue, aren't you?
>
> A. Yes, I am.
>
> Q. Have you made a calculation of the prospective value of that gift to you?
>
> A. Zero. There is not enough money to pay the bills. Therefore there will be no residue. I will not gain anything from that.
>
> Q. So if the Will is found to be invalid you will not have lost that gift will you?
>
> A. No.
>
> **MR. CLARKE:** There was no gift, Mr. MacKay.
>
> **- - - BY THE WITNESS:**
>
> A. I don't gain or lose anything in this.
>
> **THE COURT:** Yeah.

- - - BY THE WITNESS:

A. I have nothing to gain. I have nothing to lose.

[65] Accordingly, the only question from Ms. Deveau's point of view is who controls the administration of the Estate. Since someone must and the Estate is subject to the supervision of the courts, there is no real prejudice to Ms. Deveau in having someone other than her administer the Estate. On the other hand, there is evidence that the appeal is impeding proper administration of the Estate.

[66] Mr. Frank Fawson submitted to Justice Saunders that the appeal is frustrating administration of the Estate:

> From June 2012, as I said, I've been acting as the administrator of the Estate of Margaret Anne Fawson, my sister. The pretence of appeal repeatedly becomes a barrier to settling affairs of the Estate. It's slowing the whole process down to a snail's pace. The following is one recent example in a letter from my brother, Pat's lawyer, Mr. Owen, dated March 11, 2013, his answer to my question of whether to sell shares the Estates holds, which I as the administrtor am looking after. And a quote from the letter:
>
> > "At this time Mr. Patrick Fawson does not want the Emera shares liquidated. As you are aware, the appeal in the Estate matter is scheduled to be heard in April 2013, and until the appeal is decided Mr. Frank Fawson should not liquidate the shares in question. The issue can be revisited once the appeal has been disposed of."
>
> Today, this very day today, the Estate has huge outstanding bills, and these are barriers to trying to deal with those bills. There's over a hundred and eighty thousand dollars ($180,000) owed to Revenue Canada, there's a small furnace oil bill to heat the home through the winter that - - there's no money in the Estate to even pay that bill.
>
> The property taxes, HRM is threatening to start an action where they'll take it to the tax sale. In April they're going to start that action. So, all these - - and all these actions are delaying moving the Estate to a settlement. There's also matters that are tangential to the appeal but I have to think they've been motivating the appeal action over the past year. Sandra Deveau has been asked to provide pension beneficiary designations. To date all this information has not been provided.

[67] This evidence is uncontradicted. Ms. Deveau's silence is no response. It suggests that this appeal is really about power and control - who has it and can exercise it as personal representative.

[68] Margaret Fawson's nephews and nieces are disinherited by Justice Hood's decision. But they have declined to participate in the appeal. They are not asking this court to overturn Justice Hood's decision.

[69] There is little to no prejudice to Ms. Deveau if the appeal is dismissed. There is evidence that the appeal is prejudicing the proper administration of the Estate. This case has already required three motions before three different judges of this court, as well as a telephone chambers conference. That is three motions too many. The apparent insouciance of Mr. Clarke and the languid pace of this appeal is wasting the time and resources of the Estate as well as of the court.

[70] Weighing prejudice favours dismissal of the appeal.

Procedural Compliance:

[71] Ms. Deveau's history does not assist her here. As previously suggested, it is troubling that she has not paid the costs ordered "forthwith" by Justice Saunders three weeks ago. There has been no attempt - until now - to file or seek permission to file - amended appeal books. There is no indication of any attempt to remedy their deficiencies by negotiating with Mr. MacKay. Mr. Clarke's habitual neglect of correspondence and communications does not bode well for the future.

[72] Notwithstanding Mr. Clarke 's expressed good intentions, I remain sceptical about Ms. Deveau's future compliance with the *Rules* or her intention to cooperate in any way with the administrator of the Estate.

[73] As previously described, there has not been adequate compliance with Justice Saunders' admonition to "clearly explain on the record ... that there was a serious intention to pursue the appeal ... [and] an explanation for all of the delay ...". We have heard from Mr. Clarke; we have not heard from Ms. Deveau - and yet we are invited not to penalize Ms. Deveau for Mr. Clarke's conduct. Ms.

Deveau cannot simultaneously repudiate Mr. Clarke and embrace him. Hers is an ominous silence.

Interest of Justice – Other Factors:

Access to the Courts

[74] The "right to appeal" is an important principle but is the occasional refuge of the dilatory and leisurely litigant. It is not an unqualified right because it is given context and life through the *Rules* of Court, and the numerous decisions which control its process. In the context of an appeal, the parties have already had "their day in court". In *Munroe v. Morgan Industrial Contracting*, 2004 NSCA, 49, Justice Oland quoted from Chief Justice MacKeigan in *L. E. Powell & Co. Ltd. v. Wadden National Railway Co. et al. (No. 2)* (1975), 11 N.S.R. (2d) 532 (N.S.C.A.):

> By Rule 62.30, *supra*, this Court or a judge thereof, like the English courts, may now order security for costs on appeal in "special circumstances". The basic principle applied by the English courts in cases like the present has been set forth by Bowen, L.J., in *Cowell v. Taylor* (1885), 31 C.D. 34 (C.A.) at p.38:
>
> > The general rule is that poverty is no bar to a litigant, that, from time immemorial, has been the rule at common law, and also, I believe, in equity. There is an exception in the case of appeals, but there the appellant has had the benefit of a decision by one of Her Majesty's Courts, and so an insolvent party is not excluded from the Courts, but only prevented, if he cannot find security, from dragging his opponent from one Court to another. There is also an exception introduced in order to prevent abuse, that if an insolvent sues as nominal plaintiff for the benefit of somebody else, he must give security. In that case the nominal plaintiff is a mere shadow.

If we substitute "non-compliant" for "insolvent", those words are apposite here. Ms. Deveau would not be losing access to the courts for accidental, procedural reasons, but for failing to observe the process which she invokes in her own cause.

Counsel's conduct should not prejudice client:

[75] Finally, Mr. Clarke argues that the court should not penalize his client for his shortcomings. The corollary of that argument is that the court should penalize the Fawsons instead. Unlike Ms. Deveau, the Fawsons have no potential remedy against Mr. Clarke.

[76] To what extent should the court accede to this submission? At first blush, it is an odd approach in a judicial system that assumes and depends on a professional class to operate - both formally, in court, and informally, out of court. Parties are generally bound by what is done and said on their behalf by their counsel. If it were otherwise, the system would collapse. One obvious example of this dependency on and respect for the commitments made by counsel is the binding nature of settlement agreements which, absent special circumstances, cannot be repudiated by their clients. Nevertheless, courts occasionally relieve clients from the prejudicial conduct of their counsel. Is this such a case?

[77] As a general proposition, clients should be bound by the conduct of their legal counsel. Ultimately counsel act on a client's instructions. Clients have an obligation to inquire of counsel regarding both merits and process, just as counsel have an obligation to advise on such matters. If a client wishes to distance herself from her lawyer's conduct, some evidence from the client should be forthcoming. Even then, it will often be unfair to the opposing party to relieve a client from the consequences of her lawyer's conduct or neglect.

[78] Whether counsel's fault can be retrieved by a client's innocence is contextual. It is but one factor to consider. It will be stronger where the public interest in the administration of justice favours an appeal and/or the liberty of a litigant is at risk, as in a criminal case, (*R. v. Libertore*, 2010 NSCA 33).

[79] An examination of the case law reveals that the judicial desire to protect a client from her lawyer's misconduct is not unconditional. In *Marché D'Alimentation Denis Thériault Ltée v. Giant Tiger Stores Ltd*. 2007 ONCA 695, the Ontario Court of Appeal was not persuaded that a six year delay in advancing a case to trial could be excused by the fault of counsel. The availability of a

remedy against the lawyer, and the public interest in the administration of justice prevailed:

> 28 ***One important consideration is that the plaintiff will not be left without a remedy***. I recognize here the need to ensure that adequate remedies are afforded where a right has been infringed. The law will not ordinarily allow an innocent client to suffer the irrevocable loss of the right to proceed by reason of the inadvertence of his or her solicitor: see e.g. Chiarelli v. Wiens (2000), 46 O.R. (3d) 780, at para. 9 (C.A.).
>
> 29 However, this calculus implicitly assumes that the court is left with a stark choice between defeating the client's rights and forcing the opposite party to defend the case on its merits. That assumption is faulty where, as in this case, the solicitor's conduct is not mere inadvertence, but amounts to conduct very likely to expose the solicitor to liability to the client. When the solicitor is exposed in this way, the choice is different; refusing the client an indulgence for delay will not necessarily deny the client a legal remedy.
>
> …
>
> 31 ***A second consideration is that the nature of the delay and the solicitors' conduct in this case amount to more than that kind of lapse or inadvertent mistake that the legal system can countenance***. We should opt for a resolution that discourages this type of conduct which undermines the important value of having disputes resolved in a timely fashion. The decision of the Master sends the right message and provides appropriate incentives to those involved in the civil justice system.
>
> 32 ***Moreover, excusing a delay of this magnitude and gravity risks undermining public confidence in the administration of justice. Lawyers who fail to serve their clients threaten public confidence in the administration of justice***. The legal profession itself has recognized this danger: Commentary to rule 2.01 of the Law Society of Upper Canada's Rules of Professional Conduct states, "A lawyer who is incompetent does the client a disservice, brings discredit to the profession, and may bring the administration of justice into disrepute." [Emphasis added.] There is a risk that the public would perceive disregarding the solicitor's conduct in the circumstances of this case as the legal system protecting its own. Excusing a delay of this kind would through into question the willingness of the courts to live up to the stated goal of timely justice. [Emphasis added]

> 33 Overall, reinstating this action would excuse a five-year delay after the dismissal of an action, explained only by the fact that a lawyer formed "a deliberate intention not to advance the litigation toward trial" and "put the file in abeyance". That would risk undermining the integrity and repute of the administration of justice.

[80] By contrast, our court overturned a chambers judge's decision, which had refused to set aside a prothonotary's order dismissing the plaintiff's action. Justice Roscoe referred to the fault of counsel (2008 NSCA 101):

> [24] The application of this test, in my view, leads to the conclusion that it is in the interests of justice that the plaintiff's action should be reinstated and the prothonotary's order be set aside. The almost 10 year delay from the date of the accident in April 1998 to the date of the hearing of the application before Justice Edwards in January 2008 could easily be labelled as inordinate. However, as found by Justice Edwards, ***the plaintiff was not personally responsible for the delay. She attempted unsuccessfully to have her lawyer advance the file and twice retained other counsel for assistance.***
>
> [25] ***Furthermore, it is also clear that the plaintiff always intended that her action proceed and she was not aware of the notices being sent to Mr. McMahon or his lack of response thereto.***
>
> [26] Of critical importance is the fact, as found by Justice Edwards, ***the defendant has not been prejudiced by the delay in this case.***
>
> [27] Although in some cases the negligence and ineptitude of the plaintiff's lawyer might be a pivotal consideration, especially in a case where the plaintiff is more experienced, it should not become the predominant factor in balancing the relevant circumstances on an appeal of a Rule 28.11 order. With respect, the chambers judge erred by over emphasizing Mr. McMahon's neglect and in failing to consider the plaintiff's lack of blameworthiness in attempting to balance the interests of the parties. [Emphasis added]

[81] Both *Marché* and *Pasher* involved the potential liability of counsel which would provide the client with a remedy. That was not decisive in *Pasher*, because there was no evidence of prejudice to the defendant there . And unlike *Pasher*, there is no evidence in this case that can separate Ms. Deveau from her counsel, (i.e., the emphasized passages from *Pasher*, *supra*).

[82] Both *Marché* and *Pasher* involved plaintiffs who had not had any trial – i.e., "their day in court". Ms. Deveau has been the beneficiary of a lengthy trial and a 103 page decision from a highly experienced trial judge. By analogy to *Munroe, supra,* Ms. Deveau is in a weaker position than the plaintiffs in *Pasher* or *Marché*.

[83] Assuming for the sake of argument – and notwithstanding any evidence from Ms. Deveau herself – that all of the delay and misconduct in this case is solely attributable to Mr. Clarke – that is only one factor that must be weighed in the balance here. In my view, it does not tip that balance in Ms. Deveau's favour, when all other factors are considered. This is a case where "the client must answer for the conduct of her counsel", *Dominion Readers' Service Ltd.* v. *Brant et al* [1982] O.J. No. 3631 at ¶40; 41 O.R. (2d) 1, ONCA.

Conclusion:

[84] Delays in litigation have numerous pernicious effects. In trials, evidence may be lost and a remedy comes too late. Litigants "down tools" only to pick them up later, reproducing work and duplicating expense. Litigation can often have an injunctive effect – because of uncertainty, plans are put in abeyance. Businesses delay investment, personal choices are deferred. Time, money and opportunity are lost. Often the more vulnerable party suffers. A judicial system too tolerant of delay encourages poor practice in the legal profession. It diminishes respect for the administration of justice.

[85] Courts routinely lament the time and expense of litigation. One remedy is to enforce the Rules of Court. That remedy is appropriate here.

[86] I am not satisfied that Ms. Deveau has explained the numerous errors and delays in her appeal. I am sceptical that she is pursuing the appeal in good faith and will comply with the *Rules* in future. The prejudice to her of dismissing the appeal is minimal and is easily eclipsed by the prejudice to Jim and Frank Fawson - and the Estate - by artificial respiration from the court now. It is not in the "interests of justice" to continue this appeal. Ms. Deveau's motion is dismissed. Mr. Jim Fawson's motion is allowed. The appeal is dismissed.

Costs:

[87] Jim Fawson seeks costs on a solicitor-client basis against Ms. Deveau. Certainly he should receive solicitor-client costs himself out of the Estate as it was reasonable that the appeal be defended. Although not the administrator of the Estate, he effectively played that role in this appeal. That is the ordinary rule for a personal representative such as an executor or administrator (*Prevost Estate v. Prevost Estate* 2013 NSCA 20 at ¶17). The question ultimately is whether the Estate should be indemnified for all of those costs by Ms. Deveau. It would not be appropriate in this case. The lethargic and neglectful manner in which this appeal has proceeded does not quite approach the "exceptional circumstances" in which solicitor-client costs have been awarded. Such awards generally sanction positive misconduct in or related to the litigation: *Norberg* v. *Wynrib* [1992] 2 S.C.R. 226 at 317 – approved in *Barrett* v. *Reynolds*, (1998) 170 N.S.R. (2d) 201, (C.A).

[88] In this case, the conduct of Ms. Deveau and Mr. Clarke can better be characterized as "sins of omission", rather than of positive malice or ill-will. Their conduct should not attract the severity of censure reserved for solicitor-client cost awards.

[89] Party-party costs should be awarded against Ms. Deveau. At the hearing before Justice Saunders, he granted costs of $2000.00 to Jim Fawson and $500.00 to Frank Fawson, payable forthwith in any event of the cause. In addition to those amounts, I award $5000.00 inclusive of disbursements to Jim Fawson and $1500.00 inclusive of disbursements to Frank Fawson payable by Ms. Deveau. Normally, that would dispose of costs. But on the record before me, it is clear that many of the problems with this appeal can be attributed to Mr. Clarke. His habitual failure to respond or acknowledge reasonable requests from opposing counsel; his failures to communicate with the court; his neglect in filing an incomplete appeal book record; his erroneous description of his client as personal representative of the Estate (requiring additional evidence from Jim Fawson); his filing of an affidavit that does not meet the basic requirements of the *Rules* or the law of evidence are examples of his want of attention in this matter. I am well aware of the demands on busy counsel. We all make mistakes, miss deadlines and require the indulgence and generosity of others. But sadly in this case, the pattern of neglect has been endemic. Accordingly, I exercise my discretion under

Rule 77.12 and order that half of the aforesaid $6500.00 in total costs awarded today – namely $3250.00 – be paid by Mr. Clarke personally; $2500.00 to Jim Fawson and $750.00 to Frank Fawson.

Bryson, J.A.