NOVA SCOTIA COURT OF APPEAL

Citation: *Langille v. Nova Scotia (Attorney General)*, 2017 NSCA 12

Date: 20170126
Docket: CA 457555
Registry: Halifax

Between:

Eric Langille & Maritime Financial Services Incorporated, a body corporate
Appellants

v.

The Attorney General of Nova Scotia, representing
Her Majesty the Queen in the Right of the Province of Nova Scotia,
PPI Solutions (Atlantic) Inc., a body corporate, and
TransAmerica Life Canada, a body corporate
Respondents

Judge:	Beveridge, J.A.
Motion Heard:	December 15, 2016, in Halifax, Nova Scotia
Held:	Motion dismissed
Counsel:	John O'Neill, for the appellants Gavin Giles, Q.C. and Michelle Awad, Q.C. for McInnes Cooper William Ryan, Q.C. for TransAmerica Life Canada Matthew Moir for PPI Solutions (Atlantic) Inc. Terry Potter, for the Attorney General of Nova Scotia

Reasons for judgment:

[1] Eric Langille and Maritime Financial Services Inc. ask that I extend the time to permit them to file an Application for Leave to Appeal from an interlocutory order. The order, issued by the Honourable Justice Josh Arnold, permitted McInnes Cooper to withdraw as counsel for Mr. Langille and Maritime Financial.

[2] For reasons that follow, the request is denied. I will set out only the facts necessary to provide context, then turn to the principles that govern consideration of this request and my application of them.

FACTUAL BACKGROUND

[3] Eric Langille hired lawyers from McInnes Cooper to act for himself and Maritime Financial Services Inc. The principal lawyers were George MacDonald, Q.C. and Michelle Awad, Q.C. They sued the respondents. One of the respondents, PPI Solutions Inc., counter-claimed. The case was ready for trial. But within easy sight of the courthouse steps, the lawyers at McInnes Cooper said that satisfactory arrangements were not in place for them to get paid for their services.

[4] The trial judge was Justice Arnold. He first heard of the problem on August 23, 2016. Gavin Giles, Q.C., on August 25, 2016, applied on behalf of Mr. MacDonald, Ms. Awad and McInnes Cooper to withdraw as counsel of record. The motion was to be heard on September 1, 2016. Mr. Langille opposed. The respondents took no position.

[5] The motion was supported by a brief and Ms. Awad's short affidavit of August 25, 2016. She deposed that, in 2015, security had been provided by Mr. Langille for his accounts with McInnes Cooper, but, by May 2016, the unpaid accounts exceeded the value of the security. New arrangements would have to be made. Additional services were provided to Mr. Langille. Satisfactory arrangements had not been made, and this issue "is causing a breakdown in the solicitor/client relationship".

[6] The motion was adjourned to September 20, 2016 to give Mr. Langille an opportunity to obtain legal advice. Mr. Langille filed an affidavit dated September 16, 2016. It attached correspondence, emails, and a copy of the security

that had been provided to McInnes Cooper. On September 20, 2016, Ms. Awad tendered a further affidavit in response. I will return to some of these details later.

[7] There was no cross-examination of any affiant. Following submissions, Justice Arnold delivered an oral judgment. It is not reported. He referenced the principles on withdrawal of counsel set out in the criminal case of *R. v. Cunningham*, 2010 SCC 10. Later, I will set out those principles and how they impact on the present motion to extend the time to appeal.

[8] Justice Arnold observed that there were differences between the facts as perceived by Mr. Langille and those set out by Ms. Awad. What had started out as a request to withdraw for non-payment also became a request to withdraw because of a breakdown in the solicitor-client relationship.

[9] The motions judge referred to the complexity of the pending trial, the doubtful feasibility for Mr. Langille to represent himself, the prejudice to McInnes Cooper if forced to proceed without being paid, and to the administration of justice. But all of those considerations fell away, given what he referred to as the breakdown of the solicitor-client relationship. He concluded:

> While there is prejudice in the global sense to the administration of justice in relation to court time and the difficulty Mr. Langille will no doubt face retaining new counsel, that falls away with the breakdown of the solicitor-client relationship.
>
> Although partially self-created by the fee issue when that was raised, there is now a significant dispute between the solicitor and the client. There is no way that McInnes Cooper or George MacDonald, Q.C. can continue to represent Mr. Langille considering the tenor of the fee dispute. I will allow McInnes Cooper and George MacDonald, Q.C. to withdraw as solicitor of record for Mr. Langille.

[10] Justice Arnold immediately explained to Mr. Langille his options with the trial scheduled to commence just two months hence: proceed with the trial; act for himself and Maritime Financial; get new counsel; or seek an adjournment.

[11] On October 21, 2016, Justice Arnold heard, and granted Mr. Langille's adjournment request. His decision is reported (2016 NSSC 298). There is now no trial date. The parties are scheduled to have a Date Assignment Conference in February 2017 to set dates, which are not expected to be any time soon.

[12] With this background, I will briefly describe the principles that guide the discretion to extend time to file an appeal.

THE PRINCIPLES

[13] *Nova Scotia Civil Procedure Rule* 90.37(12) gives a single justice of the Court a discretion to extend or abridge any time limits referred to *Rule* 90. Experience has shown there are a wide range of circumstances that could cause a party to fail to meet the time limits to appeal. Because of this, there is no rigid or bright line rule. Instead, the fundamental question is whether the interests of justice require the application to be granted.

[14] In *Farrell v. Casavant*, 2010 NSCA 71, I summarized the approach that has developed:

> [17] Given the myriad of circumstances that can surround the failure by a prospective appellant to meet the prescribed time limits to perfect an appeal, it is appropriate that the so called three-part test has since clearly morphed into being more properly considered as guidelines or factors which a Chambers judge should consider in determining the ultimate question as to whether or not justice requires that an extension of time be granted. (See *Mitchell v. Massey Estate* (1997), 163 N.S.R. (2d) 278; *Robert Hatch Retail Inc. v. Canadian Auto Workers Union Local 4624*, 1999 NSCA 107.) From these, and other cases, common factors considered to be relevant are the length of delay, the reason for the delay, the presence or absence of prejudice, the apparent strength or merit in the proposed appeal and the good faith intention of the applicant to exercise his right of appeal within the prescribed time period. The relative weight to be given to these or other factors may vary. As Hallett J.A. stressed, the test is a flexible one, uninhibited by rigid guidelines.

See also: *Cummings v. Nova Scotia (Minister of Community Services)*, 2011 NSCA 2; *McCully v. Rogers Estate*, 2013 NSCA 22; *Deveau v. Fawson Estate*, 2013 NSCA 54; *Wadden v. BMO Nesbitt Burns*, 2014 NSCA 45; *Tupper v. Nova Scotia Barristers' Society*, 2014 NSCA 90, para. 22; *Cormier v. Graham*, 2015 NSCA 17; *Marshall v. Robbins*, 2016 NSCA 51 at para. 22, leave to appeal refused, [2016] S.C.C.A. No. 405.

ANALYSIS

[15] Mr. John O'Neill acted for the applicants on this motion. I have his brief and Mr. Langille's affidavits. Mr. O'Neill argues that the essential points in Mr. Langille's affidavits are corroborated by other material, and, on key assertions, are not contradicted by people that had the ability to do so if they did not agree. This adds up, he says, to the conclusion that: Mr. Langille formed the intention to

appeal within the ten-day window; he has a good explanation for why the appeal documents were not filed within that window; there would be no prejudice to the respondents should the extension to file be granted; and, there is merit in the proposed application for leave to appeal. In sum, he says it is just and equitable to grant the motion to extend time.

[16] Justice Arnold's oral decision was delivered on September 20, 2016. The Order that Mr. Langille seeks to appeal is dated September 22, 2016. That is the date that started the clock ticking for the ten-day window to file an application for leave to appeal.

[17] How to calculate time is set out in *Rule* 94.02. Excluded from the count are the days the period begins and ends and all days the court office is closed (Saturdays, Sundays and holidays). October 7, 2016 was the last day he could file, as of right, an application for leave to appeal.

[18] Mr. Langille swears that he received a certified copy of the September 22 order on Monday, September 26, 2016. During that week, he spoke with George MacDonald, Q.C., then counsel at Pink Larkin. He asked Mr. MacDonald if he could help him find a new lawyer. During the conversation, he says Mr. MacDonald told him he had nothing to lose if he appealed Justice Arnold's order, and he should call the Prothonotary's office to find out how to appeal. No mention was made of the ten-day window.

[19] Mr. Langille says he called the Prothonotary's office that same day. He received direction to the Court website for information on how to appeal and where to find the forms. Apparently, the person he spoke to said he "would be good" if he filed his appeal by October 31, 2016.

[20] A telephone conference with the respondents and Justice Arnold was scheduled for October 7, 2016. It was re-scheduled to October 13, 2016. Mr. Langille says on October 13, 2016, he advised the parties and Justice Arnold that he planned to appeal. No one told him anything that dispelled his belief he had until October 31, 2016 to file an appeal.

[21] Mr. Langille's adjournment application was heard by Justice Arnold on Friday, October 21, 2016. It was during that hearing counsel for the defendants in the civil action told Mr. Langille he did not have until October 31, 2016 to file an appeal. For example, Mr. Moir said:

> My Lord, Mr. Langille says that he intends to file an appeal of the decision that Your Lordship grant…made permitting his legal counsel to withdraw. He gave notice some weeks ago that he intended to file such an appeal and at the time that he did that, by my calculation, he was within the time for filing an appeal of an Interlocutory Order but he's well without…he's well outside that time frame…

[22] On Monday, October 24, 2016, Mr. Langille went to the Prothonotary's office to confirm the deadline. There is no need to detail the discussions that led to his eventual understanding that October 7, 2016 was the last date he could file an application for leave to appeal from Justice Arnold's interlocutory order.

[23] Mr. O'Neill rightly concedes that the respondents' counsel had no obligation to give Mr. Langille legal advice, and he cannot simply invoke the apparently flawed information Mr. Langille says he received from court staff.

[24] In light of all of the evidence, I accept that Mr. Langille formed an intention to appeal within the relevant time period. I can see no objectionable delay once he became aware of the problem. I also accept that the respondents can point to no serious prejudice to their interests should leave be granted. The proposed appeal is not likely to interfere with trial dates. It is, of course, a question of time and money. They have announced an intention to seek orders for security for costs in the trial proceedings, let alone these contemplated appeal proceedings.

[25] Ordinarily, these conclusions should suffice. Nonetheless, I am not satisfied that the interests of justice require me to exercise my discretion to extend the time to appeal.

[26] The problem is twofold. First, I have difficulty seeing real merit in the proposed grounds of appeal. Second, and more fundamentally, I am not convinced that the remedy the applicants say they want this Court to grant is arguably available. I will explain.

[27] Attached to one of Mr. Langille's affidavits is a copy of his proposed Application for Leave to Appeal. It sets out four grounds of appeal. There is much overlap between them. I will quote them:

> 1. In deciding McInnes Cooper's motion, the Appellants', Eric Langille and Maritime Financial Services Incorporated, solicitors, to permit the law firm to withdraw as counsel, the learned Judge erred in law in determining the obligation of good cause and providing reasonable notice to withdraw.

2. In deciding the motion, the learned Judge erred in law in determining the obligation the client(s) would not suffer serious prejudice by the withdrawal of counsel.
3. In deciding the motion, the learned Judge erred in law in determining the obligation or nature of serious loss of confidence that justifies counsel's withdrawal.
4. In deciding the motion, the learned Judge erred in law by disregarding, misapprehending and/or failing to consider the evidence as a whole and in particular, the terms of the retaining agreement, the effect of the assignment of the life insurance policy as collateral security to guarantee fees in defining the terms of the retaining agreement, the breach of the retaining agreement by failing to provide a retainer or funds on account of disbursements or fees, the untimeliness or late hour in bringing the motion, the severe prejudice compromising the Appellants' interests by loss of the services of lawyers who had carriage of the matter from the outset of the litigation and who have a special knowledge of the circumstances and information necessary to prosecute the claim, the impact of the assignment of the life insurance policy as collateral security to guarantee fees that would render it difficult, if not impossible, for the Appellants to retain new counsel, and that the evidence supported a conclusion that the relationship as between the Appellants and McInnes Cooper had so broken down as to necessitate the termination of the solicitor-client relationship and permit the withdrawal.

[28] Various descriptors can be found for what an applicant should show with respect to merit: "strongly arguable case", "real grounds for interfering" or "fairly arguable issues". Something more than an arguable issue is necessary. Merely claiming reversible error does little to demonstrate merit.

[29] No reference was made by the applicants to Justice Arnold's decision identifying what they say was legal error or misapprehension of evidence. Justice Arnold was called upon to make a discretionary decision about whether to permit counsel to withdraw. He was well aware of all of the factors that the applicants now say he got wrong. They were thoroughly canvassed in the affidavits and submissions in the withdrawal motion.

[30] Justice Arnold's decision was guided by the principles set out in *R. v. Cunningham*, 2010 SCC 10. *Cunningham* was a criminal case that asked the fundamental question: can a court have the authority to require counsel to continue to represent an accused despite non-payment of legal fees. The Supreme Court was unanimous—a court has that authority, but it must be exercised sparingly, and "only when necessary to prevent serious harm to the administration of justice" (para. 1).

[31] Justice Rothstein wrote the unanimous reasons for judgment. He identified a number of important principles. Among them: ordering counsel to work for free is a remedy of last resort (para. 45); if counsel seeks to withdraw far in enough in advance of proceedings such that an adjournment will not be necessary, the court should allow the withdrawal (para. 47); if timing is an issue, the court may inquire further about the reasons; if withdrawal is sought for ethical reasons, the court must grant withdrawal (para. 49).

[32] Rothstein J. identified a non-exhaustive list of factors a court should consider if withdrawal is sought because of non-payment in a criminal case. They are as follows:

- whether it is feasible for the accused to represent himself or herself;
- other means of obtaining representation;
- impact on the accused from delay in proceedings, particularly if the accused is in custody;
- conduct of counsel, e.g. if counsel gave reasonable notice to the accused to allow the accused to seek other means of representation, or if counsel sought leave of the court to withdraw at the earliest possible time;
- impact on the Crown and any co-accused;
- impact on complainants, witnesses and jurors;
- fairness to defence counsel, including consideration of the expected length and complexity of the proceedings;
- the history of the proceedings, e.g. if the accused has changed lawyers repeatedly.

[33] While there may well be numerous reasons to distinguish between criminal and civil proceedings, no one has suggested that the basic principles that guide counsel withdrawal would be more stringent or markedly different for civil cases. There is no suggestion that the motions judge erred in law in using the legal principles and guidance in *Cunningham*.

[34] In his oral decision, the motions judge commented on the history of the solicitor-client relationship. The judge found it was healthy for the majority of the time span, but one that was apparently without a formal retainer agreement. When Mr. Langille could not pay McInnes Cooper's invoices, a life insurance policy worth $200,000 was assigned to the law firm in February 2015.

[35] In May 2016, the accounts exceeded the value of the security. Mr. Langille could no longer afford to pay the premiums on the policy. McInnes Cooper did.

[36] There is no need to detail the evidence about the ensuing discussions between Ms. Awad and Mr. Langille. It is sufficient to say that they both agreed to a proposed contingency fee arrangement. But that arrangement needed firm approval. That was not forthcoming. With respect to what transpired at the motion to withdraw, Justice Arnold accepted that the dispute was not just about non-payment:

> Put very simply so as not to devolve into assessing the credibility, Mr. Langille disputes some of the contents of Ms. Awad's affidavit. In submission, Mr. Giles disputes some the facts alleged by Mr. Langille.
>
> The relationship between a solicitor and client cannot exist without trust. What started as a request to withdraw for non-payment of fees has become a request to withdraw as well because of a breakdown in the solicitor-client relationship.
>
> Mr. Langille who is very motivated to keep McInnes Cooper involved says that he still trusts them implicitly, although he takes issue with what is sworn in an affidavit by his lawyer regarding the fee issue.

[37] The motions judge reviewed the non-exhaustive factors set out in *R. v. Cunningham*. I will repeat the motions judge's conclusion:

> Although partially self-created by the fee issue when that was raised, there is now a significant dispute between the solicitor and the client. There is no way that McInnes Cooper or George MacDonald, Q.C. can continue to represent Mr. Langille considering the tenor of the fee dispute. I will allow McInnes Cooper and George MacDonald, Q.C. to withdraw as solicitor of record for Mr. Langille.

[38] These are findings of fact. Absent some error in principle, misapprehension of evidence, or palpable and overriding error, a panel of this Court would defer to such findings.

[39] Having said that, I do not think it is at all axiomatic that simply because a client voices a different perspective about facts surrounding fee arrangements dictates that the relationship has been so damaged that permission to withdraw is a foregone conclusion.

[40] However, even if I was satisfied that the applicants could demonstrate sufficient merit in their proposed challenge to the motion judge's decision, I am not convinced that leave to extend time should be granted.

[41] Mr. Giles points out, even if time was extended and this Court was ultimately convinced that the motions judge committed reversible error and quashed the Order of September 22, 2016, there is nothing to prevent McInnes Cooper from again seeking permission to withdraw. With no trial date in sight, on what grounds could leave to withdraw be denied?

[42] Even if the reasons for withdrawal were solely non-payment of fees, Justice Rothstein directs that ordering counsel to continue is a remedy of last resort. It is useful to repeat his words:

> [45] That being said, ordering counsel to work for free is not a decision that should be made lightly. Though criminal defence counsel may be in the best position to assess the financial risk in taking on a client, only in the most serious circumstances should counsel alone be required to bear this financial burden. In general, access to justice should not fall solely on the shoulders of the criminal defence bar and, in particular, legal aid lawyers. **Refusing to allow counsel to withdraw should truly be a remedy of last resort and should only be relied upon where it is necessary to prevent serious harm to the administration of justice.**
>
> *D. Refusing Withdrawal*
>
> [46] The court's exercise of discretion to decide counsel's application for withdrawal should be guided by the following principles.
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> [47] **If counsel seeks to withdraw far enough in advance of any scheduled proceedings and an adjournment will not be necessary, then the court should allow the withdrawal. In this situation, there is no need for the court to enquire into counsel's reasons for seeking to withdraw or require counsel to continue to act.**
>
> [Emphasis added]

[43] Mr. O'Neill acknowledges that the feelings of counsel matter, and that this Court, even if the appeal was ultimately successful, could not realistically require McInnes Cooper to act for the applicants at a trial upwards of a year away.

[44] Instead, Mr. O'Neill argues that this Court could order the assignment of the life insurance policy vacated or postponed in favour of new counsel or be available to post as security for costs. No specific authority was cited for granting that kind of relief on appeal. Nonetheless, Mr. O'Neill says that this Court can make any order that is just in order to overcome the serious prejudice he claims was caused by McInnes Cooper's withdrawal.

[45] This is hardly the case to make definitive pronouncements on the scope of the jurisdiction of the Court of Appeal to grant remedies on appeal. The applicants did not identify any statutory or other authority for the Court to do what they say it would be able to do. In effect, grant a remedy to the applicants where there has been: no cause of action between the applicants and McInnes Cooper attacking the legitimacy of the collateral security; no pleadings; no evidence tendered; and no ruling made in a lower court on any of the attendant issues.

[46] The proposed remedy would be to, in effect, have the Court of Appeal give a $200,000 refund to the applicants for legal work which they did to advance the applicant's cause of action against the respondents.

[47] The Court of Appeal may well enjoy broad remedial powers by virtue of s. 41(g) of the *Judicature Act*, R.S.N.S. 1989, c. 240, *Rule* 90.48 (1) of the *Rules* and whatever the well of inherent jurisdiction may provide. I cannot see how it could extend to interfering in contractual rights, which on their face appear to be regular and unobjectionable, in the absence of a proper legal challenge.

[48] As to the "serious prejudice" to be cured by vacating the collateral security, the applicants misapprehend what is involved in a court's query into prejudice or potential harm. That query is about the serious harm to the administration of justice. It may take the form of potential prejudice to the applicants of having to proceed with a trial without counsel; to counsel should permission to withdraw be denied; and to the harm caused by delay should the proceedings have to be adjourned. Those were the factors that Justice Arnold considered and weighed.

[49] The "serious prejudice" that the applicants now speak about is the unfortunate prospect that, absent the insurance policy, they may not have the resources to engage other counsel to conduct the balance of the litigation. There was reference before the motions judge of Mrs. Langille's house being put on the market. There is also the possibility of a contingency fee arrangement such as the one proposed and nearly agreed to between the applicants and McInnes Cooper.

[50] However, whatever prejudice the applicants are now left to suffer from the withdrawal of McInnes Cooper, it is caused by the fact that the cost of the litigation outstripped their readily available resources.

[51] After considering all of the circumstances, I am not convinced that it is in the interests of justice to extend the time for the applicants to file their intended

Application for Leave to Appeal. The application is dismissed, without costs for or against any party.

Beveridge, J.A.