NOVA SCOTIA COURT OF APPEAL

Citation: *Morgan v. Canada (Attorney General)*, 2019 NSCA 11

Date: 20190212
Docket: CA 483347
Registry: Halifax

Between:

O'Neil Morgan

Applicant

v.

Attorney General of Canada and Correctional Service Canada
(Springhill Institution)

Respondents

Judge:	The Honourable Justice Cindy A. Bourgeois
Motion Heard:	January 31, 2019, in Halifax, Nova Scotia, in Chambers
Held:	Motion to extend time to file notice of appeal dismissed
Counsel:	O'Neil Morgan, applicant in person Sarah Drodge, for the respondents

Decision:

[1] O'Neil Morgan is presently incarcerated, serving a 26-year sentence. In August 2018, he brought an application for *habeas corpus* in the Supreme Court of Nova Scotia. The application was heard by Justice Denise Boudreau on August 27, 2018. On the same day, Justice Boudreau gave oral reasons dismissing the application. An order was later issued on August 31, 2018.

[2] Mr. Morgan seeks to appeal the outcome of the application, but he did not file a Notice of Appeal within the prescribed time period. On December 10, 2018, Mr. Morgan filed a notice of motion to extend the time to file an appeal.

[3] I heard the motion for extension on January 31, 2019. For the reasons that follow, I would dismiss the motion.

Background

[4] Mr. Morgan has been serving a lengthy sentence for robbery and a number of firearm offences. In March 2017, Mr. Morgan reached his statutory release date and was released, subject to certain conditions. At the time of his release, Mr. Morgan had been assessed as having a minimum-security classification.

[5] After several months, Mr. Morgan's release was revoked, it being alleged he had breached the conditions of his release. He was returned to Springhill Institution and underwent an assessment that placed him at a medium-security classification.

[6] Although he had challenged the revocation of his statutory release with the National Parole Board, he sought to raise this issue, along with his re-classification to medium security, in his *habeas corpus* application. With respect to the revocation, the application judge set out the positions advanced by Mr. Morgan and the Crown as follows:

> [5] Mr. Morgan comes before this court objecting to that circumstance. He says that this suspension of his statutory release was based on unsubstantiated information about activities that he was engaging in while he was on release.
>
> [6] The respondent indicates that this revocation was the subject and decision of a parole board hearing in January 2018. The respondent, therefore, points out that this creates a jurisdictional issue for this court, specifically because there is a very clear statutory process in place through the CCRA to address these types of

> circumstances. Secondly, the respondent submits that if this issue is within the jurisdiction of this court that the decision to revoke release was a reasonable one.

[7] The application judge heard evidence relating to the revocation and Mr. Morgan's subsequent attempts to challenge it. She wrote:

> [12] I have also received, through the respondent, copies of information relating to the parole board process and decision. The parole board had a decision to make about suspension/revocation and communicated with Mr. Morgan about how the matter should proceed. It is indicated in the materials, and Mr. Morgan confirmed, before me, that he waived the right to a hearing before the parole board. He further indicated that he was not interested in being present for the hearing. He did indicate that he wished to make written submissions, and he did make written submissions to the parole board, dated October 22, 2017.
>
> [13] In that written submission to the parole board (which he confirmed on the stand), he addressed the issue of the unknown reliability of sources in the information before them. Mr. Morgan also, in that submission, admitted to breaking a condition of his release, and provided an apology for that.
>
> [14] That submission was put before the parole board; they provided a decision dated January 3, 2018. Their decision was to revoke statutory release. Within that decision, they reiterated all of the positive and negative factors that went into their decision.
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> [15] This decision, according to what is before me, was provided to Mr. Morgan. Mr. Morgan has not appealed it.

[8] The application judge declined to accept jurisdiction in relation to the revocation issue. Her explanation for doing so included:

> [18] It is clear to me from having reviewed the CCRA and the *Gallant* decision that the CCRA has a complete procedure for dealing with these issues, as the court noted in *Gallan*t. It seems obvious to me that if Mr. Morgan was dissatisfied with the decision of the parole board, he was to undergo the procedure that is outlined in the CCRA and ask for an appeal or a review of that decision.
>
> [19] I therefore find that the issue of the revocation and/or suspension of Mr. Morgan's release, is one of those limited circumstances where a provincial superior court should decline jurisdiction. I so decline.

[9] With respect to Mr. Morgan's classification, the application judge concluded, based on the evidence presented, that "the actions of the institution were lawful and reasonable in these circumstances". She further concluded the respondent had "complied with its procedural duties, and the requirement of fairness".

[10] Mr. Morgan seeks to challenge both the application judge's decision to decline jurisdiction to consider the revocation of his statutory release, and her conclusion regarding the reasonableness of his security classification.

The Law

[11] *Civil Procedure Rule* 90.37 gives a judge discretion to permit an extension of time for filing an appeal. In *Bellefontaine v. Schneiderman*, 2006 NSCA 96, Justice Bateman set out the factors to consider when considering a motion to extend time. She wrote:

> [3] A three-part test is generally applied by this Court on an application to extend the time for filing a notice of appeal, requiring that the applicant demonstrate (**Jollymore Estate Re** (2001), 196 N.S.R. (2d) 177 (C.A. in Chambers) at para. 22):
>
> > (1) the applicant had a *bona fide* intention to appeal when the right to appeal existed;
> >
> > (2) the applicant had a reasonable excuse for the delay in not having launched the appeal within the prescribed time; and
> >
> > (3) there are compelling or exceptional circumstances present which would warrant an extension of time, not the least of which being that there is a strong case for error at trial and real grounds justifying appellant 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)).

[12] I will apply the above factors to the matter before me.

Analysis

[13] With respect to the first two factors, Mr. Morgan says that he wanted to appeal the application judge's decision immediately but was waiting for receipt of her written reasons before he did so. He also says he experienced significant difficulties obtaining the necessary forms and legal materials to start his appeal.

[14] Even if I find Mr. Morgan possessed a *bona fide* intention to appeal within the prescribed period, and a reasonable excuse for not doing so, his motion must fail. He has not established compelling or exceptional circumstances warranting an extension of time.

[15] I have carefully reviewed the application judge's reasons for declining jurisdiction to consider the revocation of Mr. Morgan's statutory release. I am unable to conclude there is a "strong case" for establishing she erred. Similarly, Mr. Morgan has not satisfied me that the application judge's findings regarding the reasonableness of his classification give rise to a "strong case" for appellate intervention.

[16] I have also considered the broader question of whether justice requires that Mr. Morgan be allowed to pursue his appeal. I am of the view it does not.

[17] Mr. Morgan declined to utilize the mechanism available to him to appeal the parole board's upholding of the revocation of his statutory release. He should not be permitted to now utilize the resources of this Court to challenge that decision. Further, Mr. Morgan confirmed that since the hearing of his *habeas corpus* application, he has been re-assessed to a minimum security classification. As such, his challenge to the medium classification is now moot.

Conclusion

[18] For the reasons above, the motion to extend the time to appeal is dismissed, without costs.

Bourgeois, J.A.