

NOVA SCOTIA COURT OF APPEAL

Citation: *Roy v. Schofield*, 2019 NSCA 17

Date: 20190307

Docket: CA 478248

Registry: Halifax

Between:

Amber Roy

Appellant

v.

Tony Schofield

Respondent

Judge: Cindy A. Bourgeois, J.A.

Motion Heard: March 7, 2019, in Halifax, Nova Scotia in Chambers

Written Release: March 11, 2019

Held: Registrar's motion to dismiss granted

Counsel: Jennifer K. Reid, for the appellant
Tony Schofield, on his own behalf

Decision:

[1] On March 7, 2019, I heard a motion brought by the Registrar to dismiss an appeal commenced by Amber Roy. After having heard from counsel for Ms. Roy, the respondent Tony Schofield, and having reviewed the materials before me, I advised the motion to dismiss was granted, with written reasons to follow. These are my reasons.

Background

[2] The appellant seeks to challenge an order rendered by Judge Jean M. Dewolfe of the Family Court. That order followed a three-day hearing which addressed the parenting arrangements for two children. In an order dated May 14, 2018 and issued on June 6, 2018, sole custody of the children was granted to the respondent. The appellant was entitled to supervised access through the Supervised Access and Exchange Program.

[3] The appellant filed a Notice of Appeal on July 12, 2018. At that time, she was self-represented. All her stated grounds of appeal relate to the alleged ineffective assistance of her trial counsel.

[4] The Registrar sent the appellant correspondence on August 6, 2018 setting out the steps required to move the proceeding forward. The Registrar further advised of the necessity to bring a motion for date and directions within the prescribed time frame. The letter stated:

It is important that you work quickly to take the necessary steps to move your appeal along. Your motion for date and directions (to get a hearing date for your appeal) must be heard no later than eighty (80) days from the date your Notice of Appeal was filed. **In this case, the time period started to run on July 12, 2018. That means that you must have your motion filed and heard no later than November 7, 2018.** If the motion is not done within this time, I am required as Registrar to make a motion pursuant to **Civil Procedure Rule 90.43(4)**, on five (5) days' notice, to have the appeal dismissed for non-compliance with the Rules. (Emphasis in original)

[5] On August 21, 2018, a notice of new counsel was filed by Jennifer K. Reid indicating she would be representing the appellant.

[6] The appellant did not file a motion for date and directions by the November 7th deadline. As is required by the *Rules*, the Registrar brought a motion to dismiss the appeal. Notice of the motion was forwarded on November 9th, with a hearing scheduled for November 29, 2018.

[7] Ms. Reid appeared in chambers before Justice Bryson at the hearing of the motion. An affidavit, sworn November 26, 2018, had been filed by counsel in support of her request to have the Registrar's motion dismissed. Counsel asserted that she had experienced difficulty obtaining the file materials from trial counsel, and had just recently received it. Counsel advised she may need to seek permission to amend the grounds of appeal and she anticipated "filing a motion to address the issues noted as soon as possible".

[8] Justice Bryson dismissed the Registrar's motion. He directed that the appellant file a motion for date and directions, along with any motion to amend the Notice of Appeal within three to four weeks.

[9] A motion for date and directions was not filed within the time frame directed by Justice Bryson. As such, on January 2, 2019, the Registrar contacted counsel by email. The Registrar wrote:

At the chambers hearing on November 29, 2018, Justice Bryson directed that you file a motion for date and directions or a motion to amend the notice of appeal (as you had indicated you may wish to file such a motion) within 3-4 weeks' time. To date, the Court has not received a motion nor heard from your office.

I would ask that you kindly advise what your client's intentions are with respect to this appeal by January 9, 2019.

[10] Counsel replied the same day:

Ms. Roy's intention at this point is to proceed with the appeal; however, I was trying to determine whether an amended notice should be filed with amended grounds or whether she would continue to rely on the grounds listed.

If acceptable, I will file the motion either to set the matter down based on the existing notice, or to seek to file an amended notice of appeal, by January 18th.

[11] The Registrar advised counsel that the January 18th time frame was agreeable. On January 18, 2019, counsel forwarded correspondence to the Registrar. It said:

I have instructions to advise the Court that Ms. Roy **does not intend to pursue the Appeal** and that we will file the Notice of Discontinuance in due course.

(Emphasis added)

[12] Having not received the anticipated Notice of Discontinuance, the Registrar emailed counsel on February 7, 2019 seeking the matter to be concluded. The Registrar subsequently received a voicemail from Ms. Reid advising she would be out of the office on leave and that Nicole MacIssac would be attending to the file.

[13] Having heard or received nothing further, on February 15, 2019, the Registrar brought a second motion to dismiss, with a hearing date of March 7th. The motion was forwarded to Ms. MacIssac's attention via fax and to the respondent by regular mail. Nine days later, on February 26, 2019, Ms. MacIssac wrote to the Registrar advising she was unavailable on March 7th, and sought an adjournment.

[14] On February 27, 2019, the Registrar, on the direction of the chambers judge, advised counsel that given the earlier representation received from Ms. Reid that the appellant did not intend to proceed with the appeal, the motion to dismiss would proceed as scheduled.

[15] No further communication was received from counsel or the appellant. Nothing was filed by the appellant in opposition to the motion. At 9:30 a.m. on March 7th, the Court received a request that Ms. Reid be permitted to speak to the motion via telephone. That request was granted.

[16] Ms. Reid advised the Court the appellant had changed her mind about proceeding with the appeal and she now wanted to pursue it. Apparently, the appellant had communicated this change of heart to her counsel at some point shortly after the January 18th letter to the Court. Counsel acknowledged that this had not been communicated to the Registrar. The Court was advised the CD of the hearing below had been received and efforts to obtain a transcriptionist would be made as soon as possible. Counsel asked that the appellant be given an opportunity to continue with the appeal and confirmed that no amendments to the Notice of Appeal would be sought.

[17] The respondent appeared in person. He supports the Registrar's motion to dismiss the appeal.

The Law

[18] *Nova Scotia Civil Procedure Rule 90.43* provides:

- (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. (Emphasis added)

[19] The principles that guide a judge in exercising his or her discretion to grant or deny a Registrar's motion are well-known. In *Islam v. Sevgur*, 2011 NSCA 114, Justice Saunders 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.

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

[39] In my opinion, the Rules and the Registrar's explicit directions concerning the perfecting of an appeal and the consequences of non-compliance ought to be strictly interpreted and applied so as to give effect to the object of the Rules which is to achieve the just, speedy, and inexpensive determination of every proceeding.

[20] In exercising my discretion, I adopt and will apply the above considerations.

Analysis

[21] When a litigant is unsatisfied with the outcome of a court proceeding, he or she, in most instances, has a right to appeal. That right carries with it, however, corresponding obligations. An appellant is required to undertake their appeal in accordance with the *Civil Procedure Rules*, including the timelines set out therein.

[22] In the present instance, the appellant has not abided by the mandatory deadlines. Despite having successfully fended off one Registrar's motion to dismiss, she is now faced with a second. The appellant has the burden to satisfy me that the Registrar's motion ought to be denied for a second time. She has filed no evidence in opposition to the motion.

[23] The appellant has not provided a good reason to explain her default. This is particularly so given that on January 18, 2019, the Court was advised in writing by counsel that the appeal would not be proceeding. In my view, that representation carries significant weight. The Court most certainly is entitled to rely upon it, as is the respondent.

[24] The Court was not advised the appellant had changed her mind until the day the motion was being heard. The appellant did not, upon deciding she wished to pursue the appeal, take any steps to file the long overdue motion for date and directions. Although it is noted Ms. MacIsaac wrote to seek an adjournment of the motion on February 26th, she did not indicate that the appellant's instructions had changed. With respect, even with Ms. Reid's departure from the office, there was ample time for the appellant to have responded meaningfully to the motion and to have provided evidence in support of her position. She did not.

[25] At the hearing of the motion, Ms. Reid confirmed that should the appeal continue, the appellant would not seek to amend the Notice of Appeal. As noted earlier, all the concerns raised by the appellant relate to the alleged ineffective assistance of trial counsel. The grounds contain no identified errors on the part of the trial judge. Allegations of ineffective assistance of counsel do not constitute a legitimate ground of appeal in civil matters. Appeals of orders rendered under child protection legislation are the rare exception (*M.W. v. Nova Scotia (Community Services)*, 2014 NSCA 103). The order presently under appeal was made under the *Parenting and Support Act*, not under child protection legislation. As such, the grounds of appeal that the appellant says she wishes to pursue are not legitimate.

[26] I have no evidence upon which to assess whether the appeal is being brought in good faith. Further, I have received little assurance that the appellant can be expected to comply with future deadlines and requirements. She does not have a favourable track record in that regard.

[27] With respect to the issue of prejudice, again, I have no evidence from the appellant. I do note, however, that the order under appeal contemplates a future review being undertaken by the court below. I also have no evidence from the respondent. I am prepared to recognize that, as the sole custodial parent, the uncertainty caused by an outstanding appeal relating to the circumstances of the children must cause at least some degree of concern and worry.

[28] It is unclear how long it would take the appellant to be in a position to advance the appeal. The preparation of the transcript can be a time-consuming undertaking. I understand it has yet to be requested. In fact, a transcriptionist has not yet been contacted. It may be months before the matter may be ready for hearing. Given the time that has already passed, I am concerned with the impact of the continuing delay.

Disposition

[29] In consideration of the above, I am of the view that the appeal ought to be dismissed. The Registrar's motion is granted.

Bourgeois, J.A.