**NOVA SCOTIA COURT OF APPEAL**
**Citation:** *Illingworth v. Illingworth*, 2021 NSCA 18

**Date:** 20210219
**Docket:** CA 502891
**Registry:** Halifax

**Between:**

Douglas James Illingworth

Appellant

v.

Patricia Blaire Illingworth (MacIntyre)

Respondent

| | |
|---|---|
| **Judge:** | Beaton J.A. |
| **Motion Heard:** | February 10, 2021, in Halifax, Nova Scotia in Chambers |
| **Held:** | Motion dismissed |
| **Counsel:** | Douglas Illingworth, appellant in person<br>Hannah Rubenstein, for the respondent |

**Decision:**

[1] The Appellant Mr. Illingworth brought a motion to dispense with the requirement to produce a transcript of the trial proceedings from which he now appeals. At the close of the contested motion, heard in telechambers on February 10, 2021, I reserved my decision. The motion is dismissed for the reasons that follow.

**Background**

[2] Mr. Illingworth filed a Notice of Appeal on December 22, 2020 seeking to have this Court overturn certain corollary relief contained in a divorce decision pertaining to matters of parenting, child support and debt classification. The decision of the Honourable Justice Theresa Forgeron of the Supreme Court of Nova Scotia, Family Division was reported at 2020 NSSC 285, and a subsequent costs decision was reported at 2020 NSSC 371.

[3] Like all appellants, after Mr. Illingworth filed his Notice of Appeal, he was provided with the standard detailed letter from the Registrar explaining the steps he would need to follow to perfect his appeal. That December 31, 2020 letter contained, among others, the following instructions:

> Before applying to get a date for your appeal hearing, you must do the following:
>
> …
>
> - Order the audio CD of the court proceedings you are appealing;
>
> - Once you get the audio CD of the court proceedings, take it to a certified court reporter/transcriber to get a transcript prepared. Ask the court reporter to provide you with a date estimating when the transcript will be ready. For a list of certified court transcribers, see the 'Nova Scotia Court Transcribers' website …

[4] That portion of the letter was meant to assist Mr. Illingworth in gathering the materials needed to meet *Civil Procedure Rule* 90.25(2), which requires a party to schedule a motion for date and directions within 80 days of filing of the Notice of Appeal. In the same Registrar's letter, Mr. Illingworth was advised the motion for date and directions would need to be filed and heard no later than April 22, 2021 in order to conform with the *Rule*.

[5] No less than four days before the motion for date and directions is to be heard, the party must file a Certificate of Readiness as described by *Civil Procedure Rule* 90.26(2):

> (2) By the certificate of readiness, the appellant or the appellant's counsel must certify all of the following:
>
> (a) the court appealed from has issued a formal order;
>
> (b) the appellant has a paper copy of the written decision under appeal,
>
> (c) the appellant has ordered copies of the audio recordings from the appropriate court;
>
> **(d) the appellant has ordered the transcription of the audio recordings from a certified court reporter;**
>
> **(e) the appellant has been informed by the certified court reporter that the transcription will be completed by a specified date;**
>
> (f) the appellant will be able to file the appeal book by a specified date;
>
> (g) the appellant has sent a copy of the notice of appeal to the judge or, in a tribunal appeal, to the tribunal, from whose decision the appeal is taken.
>
> [Emphasis added]

[6] On January 26, 2021 Mr. Illingworth filed a Notice of Motion with accompanying affidavit, asserting that the cost of transcribing the audio CDs of the divorce trial is prohibitive given his current financial circumstances. He implied the requirement that he pay for transcription of the trial proceedings violates s. 15 of the *Canadian Charter of Rights and Freedoms*. In the alternative, Mr. Illingworth suggested a solution, being that the Court permit him to transcribe the CDs and produce a transcript himself.

[7] The Respondent opposed the motion and provided the Affidavit of her trial counsel in support of her arguments as to why the motion should not be granted. The Respondent asserted Mr. Illingworth had not provided sufficient evidence to support his position that he is not financially capable of securing transcripts, and further, that the transcripts are vital to the appeal given the nature of the findings made by the trial judge and the particular grounds of appeal advanced by Mr. Illingworth.

[8] *Civil Procedure Rule* 90.30 directs appellants to file an Appeal Book. *Rule* 90.30(2) sets out the format of the Appeal Book and includes (in part) the following instruction:

> (2) An appeal book must be in the format required by Rule 90.30(3) and consist of the following two parts, containing all of the following in each part, unless a judge of the Court of Appeal directs otherwise:
>
> …
>
> (b) Part 2 - Evidence and Related Materials:
>
> (i) an index of witnesses describing each witness, including the name of the witness, the party who called the witness, and the page reference in the appeal book where the direct examination, cross-examination, or re-direct examination begins,
>
> (ii) a list of all exhibits,
>
> (iii) **a copy of the transcript of everything said in the course of the proceedings under appeal**, including all of the following:
>
> (A) a headline on each page stating the name of the witness and whether it is direct examination, cross-examination, or redirect examination;
>
> (B) unless the individual lines of transcript are numbered, the questions must be numbered consecutively, and each question to be preceded by the letter "Q" and each answer by the letter "A";
>
> (C) a copy of any written submissions and the transcript of submissions made … .
>
> [Emphasis added]

[9] *Rule* 90.29(5) captures the requirement Mr. Illingworth says he can't meet and for which he seeks to have the Court permit an exception:

> (5) The appellant must cause a transcript of the proceeding to be prepared by a certified court reporter, unless legislation provides otherwise or a judge permits otherwise.

[10] As I am not aware of any applicable legislative provision that could apply to excuse the need for a transcript in this case, I turn to a consideration of whether to exercise my discretion to grant the motion. I must be persuaded the transcript, or a portion of it, is unnecessary to the continuation of the appeal, or that the appeal can be delayed until such time as Mr. Illingworth might be in a financial position to secure the transcript.

[11] The Notice of Appeal filed by Mr. Illingworth sets out in some detail the very specific fact-findings in the judge's decision with which he takes issue on the

appeal. He asserts numerous errors of fact, which requires an examination of the trial record. I conclude it would be virtually impossible for a panel to undertake the function belonging to an appellate court without the benefit of the ability to review and consider in their entirety the proceedings conducted and the evidence heard by the judge at trial. In that respect, this case resembles closely the circumstances faced by Oland J.A. in *Ocean v. Economical Mutual Insurance Company*, 2011 NSCA 106. In concluding the complete trial record was crucial, she found:

> [34] In any event, it is my view that this appeal could not be properly heard or determined without a full transcript of the trial. The appellant's suggestion that the appeal panel could simply rely on the trial exhibits, decision and order, so-called "hard evidence" in the court record, does not allow an efficient and just conduct of the appeal and cross-appeal. The appellant's grounds claim that witnesses gave false testimony and the trial judge erred in her consideration and acceptance of evidence. This "hard evidence" without more, will not substantiate or refute perjury and may not serve to show the contradictions the appellant says the trial judge should have recognized. It would be difficult, if not impossible, for the panel to assess arguments regarding the reliability of evidence and findings of fact or inferences without a transcript of the testimony of witnesses given under direct and cross-examination.

[12] In *Hughes v. Vincent*, 2015 NSCA 21 the record of proceedings in the court below was very brief and presumably therefore less expensive than here. Nonetheless, Fichaud J.A. declined to exercise his discretion:

> [20] Rule 90.29(5) gives me a discretion to excuse Mr. Hughes from having the transcript prepared. I decline to exercise that discretion. The hearing involved no testimony. The matter took under one hour. I have considered waiving the requirement for a transcript of submissions. But I have decided against a waiver. From the tenor of what I have heard, in my view there is a risk that, without a transcript, Mr. Hughes' argument to the Court of Appeal might re-cast the submissions that were made to the judge of the Supreme Court. It is important that this Court be able to read what was said to Justice Campbell.

I share a similar concern in this case.

[13] As to when Mr. Illingworth might take the view he is ready to generate a transcript, I would merely be guessing to identify a future date without knowing whether it would be realistic. The Court is entitled to efficient carriage of the case and the Respondent is entitled to finality. Both goals would be impaired by putting the matter off for an indeterminate period.

[14] Beveridge J.A. considered the potential for production of only a portion of the trial record in *Li. v. Jean*, 2012 NSCA 63:

> [24] In my opinion, the discretion set out in Rule 90.29(5) must be read in conjunction with Rule 90.30(4) and (5). Rule 90.30 sets out in detail the requirements for the preparation and filing of appeal books and transcripts. The Rule does permit variance with the requirements of 90.30. Of import is 90.30(4) and (5). These provide:
>
> > **90.30** (4) Parties to an appeal may make an agreement to avoid the expense or delay of reproducing material unnecessary for the appeal by abridging all or part of the transcript of evidence or of any other material otherwise required to be included in the appeal book, or substituting an agreed statement of facts instead of a transcript or exhibit.
> >
> > (5) A party may make a motion to a judge of the Court of Appeal for an order abridging a requirement for the form or content of the appeal book.
>
> [25] These provisions recognize that **parties need not slavishly follow the detailed requirements set out in Rule 90.30 where the parties, or a judge is satisfied, that the issues on appeal can be fully argued and considered without reproduction of the complete record from the court or tribunal below.** This is what occurred in *LeBrun (c.o.b. LeBrun Construction) v. Woodward*, 2001 NSCA 9. Ms. LeBrun appealed from a decision by a judge of the Nova Scotia Supreme Court, in Chambers. The Registrar of this Court brought a motion to dismiss the appeal as the appeal book, including transcript, had not been filed. Ms. LeBrun claimed she had no money to pay for the preparation of these documents and sought an order that the Nova Scotia Department of Justice pay for the preparation of the transcript. Cromwell J.A., as he then was, dismissed the application, but declined the Registrar's motion to dismiss on the basis that a transcript of the proceedings was not necessary as there was no oral testimony given before the Chambers judge.
>
> [Emphasis added]

[15] I was not alerted to any such agreement between the parties here, and I am satisfied there is none. In addition, I am not persuaded this is an appropriate case in which to abridge the need for a complete record, given the particular nature of the grounds of appeal, as discussed earlier above.

[16] Mr. Illingworth's affidavit in support of the motion reproduced the text of s. 15 of the *Charter*, but did not explain how it is he maintains his s. 15 rights are violated here. Therefore, I have inferred he asserts the requirement that he produce the transcript discriminates against him because he cannot afford the cost of its production.

[17] In *Pavlis v. HSBC Bank Canada*, 2009 BCCA 450, Newbury J.A. rejected a similar argument advanced concerning s. 15 of the *Charter* in relation to British Columbia's analogous civil procedure rule. Ms. Pavlis argued the requirement infringed her right to equality before the law because as a disabled and indigent person she did not have the same opportunity to exercise her right of appeal as would an able-bodied person with financial means to adhere to the *Rule* and produce the transcript. The court found:

> 8 With respect, I am of the view that Ms. Pavlis' argument under this head is misconceived. Rule 20(1) applies equally to all would-be appellants and is clearly grounded in the necessity that the Court have a proper record of proceedings from which appeals are taken. I did not understand Ms. Pavlis to dispute this principle. As for the necessity of paying for transcripts, persons who are in the business of providing transcribing services require payment for their services as a matter of contract rather than any statutory provision. There is no authority in Canada supporting a general right to access to justice (see *British Columbia (Attorney General) v. Christie* 2007 SCC 21, [2007] 1 S.C.R. 873) that might extend to transcripts, and in my view, there is no basis for Ms. Pavlis' argument that R. 20(1) engages her right to the equal protection and equal benefit of the law. **No-one, as far as I am aware, is entitled to require that transcripts be prepared free of charge as a matter of right -- this is not a "benefit" given by law.** Conversely, the Rule does not impose any stereotypical distinction (see *Corbiere v. Canada (Minister of Indian and Northern Affairs*) [1999] 2 S.C.R. 203 at para. 7), or attribute stereotypical characteristics to any person or group (see *Eaton v. Brant County Board of Education* [1997] 1 S.C.R. 241 at paras. 66-7); nor is it discriminatory in its effect on any of the grounds referred to in s. 15 or analogous thereto. […]
>
> [Emphasis added]

[18] I am not persuaded that Mr. Illingworth's section 15 *Charter* rights are in any way compromised by requiring him, like any other party, to produce a transcript (see also *Mercier v. Nova Scotia (Attorney General)*, 2014 NSCA 93, at para. 17).

[19] A similar motion was considered in *Versluce Estate v. Knol*, 2008 YKCA 3 wherein the appellant asserted s. 15 of the *Charter* (among other matters) in seeking to waive the requirement for production of a transcript to facilitate the appeal. Hall J.A. concluded:

> 9 The appellant contends that Rule 20, which requires that a transcript be filed in an appeal proceeding, is out of accord with provisions of the Canadian ***Charter of Rights and Freedoms*** and the other instruments referred to in

> paragraph 1 above. It must be remembered that this is litigation between two private parties. I fail to see how it engages any of the provisions of the ***Charter*** or any international covenant or declaration relating to human rights. All litigants who are engaged in private litigation are required to follow the Rules of Court. […]

The same logic applies here.

[20] In relation to Mr. Illingworth's financial situation, as an exhibit to his Affidavit he provided an unsigned Statement of Income dated "01/11/2020". It is unclear if this represents the period January 11, 2020 or November 1, 2020. Either way, the document does not provide a sufficiently current picture of Mr. Illingworth's situation. Similarly, an unsigned Statement of Expenses bearing the same date, attached to the Statement of Income, shows a deficit of $614 per month. It is somewhat problematic that the Statement of Income suggests Mr. Illingworth's source of income is employment insurance in the amount of $497 every two weeks, as that does not equate to the monthly income of $2,156.98, nor to an annual income of $25,883.76, as suggested elsewhere in the document. The math is uncertain, but because the figure $2,156.98 appears under the column "Gross Monthly Income" and also shows in line 2A, and in line 2R marked "total monthly income", it is the amount I choose to rely upon in assessing Mr. Illingworth's financial circumstances.

[21] Unfortunately, Mr. Illingworth has not provided additional details about his financial situation that could have been of assistance in assessing the merits of his motion. For example, these might have included (but are not limited to):

(a) details as to his efforts to locate employment or his prospects for future employment, including independent evidence of jobs for which he has more recently applied;

(b) details as to whether there are any pending or future anticipated changes in his financial circumstances;

(c) information about his ability to raise credit, so as to borrow funds to pay for transcription;

(d) details of efforts he has made to source alternate funding to pay for transcription;

(e) his completed 2020 Income Tax Return or the supporting T4 slips illustrating his total 2020 income;

(f) regarding the source of income identified in his affidavit, documentation explaining the details of his employment insurance benefits and the duration of his claim.

[22] In short, Mr. Illingworth's evidence leaves me unable to understand anything about his financial situation other than that he says he currently collects employment insurance benefits of approximately $2,156.00 per month. I do not know how this relates to his overall ability to fund the cost of securing a transcript.

[23] Mr. Illingworth argued in the alternative that it would be sufficient to have the requirements of *Civil Procedure Rule* 90.30 met by having him prepare the transcript, rather than having to incur the cost of third party preparation by a certified court reporter, as the *Rules* require. With respect, his suggestion is not an appropriate solution.

[24] Having a transcript prepared by a certified court reporter provides to the Court a level of "quality assurance"; that is, the Court can be satisfied that certain standards have been met and a degree of accuracy in preparation is assured by a party qualified to do so. While this provides assistance to the Court, it also provides a measure of protection to both parties to the appeal, each with their own respective interests to protect. Having the transcript prepared by an independent party insures Mr. Illingworth against any suggestion from the Respondent that the transcript is less than accurate. This problem was considered by Fichaud J.A. in *Ocean v. Economical Mutual Insurance Company*, 2009 NSCA 24:

> [16] **Seventh:** Ms. Ocean asks that, instead of having these additional transcripts prepared by an official court reporter, she be permitted to type the transcripts herself. At one point in the hearing before me, Ms. Ocean suggested that she would prepare only those portions of the transcripts that supported her position. When questioned, she said she would type the entire transcripts. I deny Ms. Ocean's request that she may tender transcripts prepared other than by an official court reporter. Official court reporters are neutral to the dispute between the parties. The court is entitled to rely on that neutrality for transcription of the evidence. This appeal will be complex enough, without adding still another layer of debate between Economical and Ms. Ocean about accuracy of transcription.

[25] In summary, I have not been provided with sufficient evidence to persuade me there is reason to engage what prior decisions of this Court would suggest is a rather rare exercise of the discretion set out in *Rule* 90.29(5) so as to dispense with

production of any or all of the trial transcript. Nor am I persuaded it is appropriate to dispense with the requirement that such a transcript be prepared by a certified court reporter. The motion is dismissed.

[26] In her written materials the Respondent asked for costs. Under the circumstances, she is entitled to costs as the "successful party" on the motion. I exercise my discretion to impose nominal costs of $200.00 in her favour, payable by the Appellant forthwith.

Beaton J.A.