NOVA SCOTIA COURT OF APPEAL
Citation: *Downey v. Burroughs*, 2022 NSCA 16

Date: 20220214
Docket: CA 507417
Registry: Halifax

Between:

Lavell Andrew Downey

Applicant

v.

Sabrina Burroughs

Respondent

Judge:	Beveridge J.A.
Motion Heard:	By written submissions (last submission filed on January 20, 2022), in Halifax, Nova Scotia
Held:	Motion for leave dismissed
Counsel:	Lavell Downey, applicant Christine Nault, for the respondent

Decision:

[1] Justice Cindy Bourgeois dismissed the applicant's appeal for failure to prosecute it in accordance with the *Nova Scotia Civil Procedure Rules*. He immediately applied to the Chief Justice for leave to have the dismissal reviewed by a panel. The Chief Justice designated me to decide this issue.

[2] I need not give reasons for my determination but choose to do so. I will set out the established principles that guide resolution of these applications, the background, and why the applicant has failed to convince me a panel should be struck to review Justice Bourgeois' order.

PRINCIPLES

[3] There is no constitutional or common law right to appeal. Appeals exist solely because of legislation. In civil cases, the *Judicature Act* gives a dissatisfied litigant the right to seek leave to appeal interlocutory and costs decisions and the right to appeal to the Court of Appeal any final order or decision.[1]

[4] This legislative entitlement to appeal is not absolute. An appellant must comply with the requirements of the *Nova Scotia Civil Procedure Rules* enacted pursuant to the authority of the *Judicature Act*. These *Rules* govern such things as: the timeframe within which an appeal can be filed; the format and service of documents; and the requirements an appellant must meet in order to be permitted to continue the appeal proceedings.

[5] Compliance with these Rules is generally monitored by the Registrar. Nothing precludes a respondent to seek a remedy for non-compliance. A single judge of the Court can excuse compliance and give directions or order the appeal proceedings dismissed.

[6] The order by a single judge of the Court is a final order subject only to a successful motion under *Rule* 90.38 for the Chief Justice to grant leave for a panel to review the order. In order to grant leave, the Chief Justice must be satisfied that either the chambers judge acted without authority, the order issued is inconsistent with an earlier decision of a judge in chambers or the Court of Appeal, or a panel hearing is necessary to prevent an injustice.

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[1] R.S.N.S. 1989, c. 240, ss. 38-40

[7] The relevant provisions of *Rule* 90.38 are as follows:

> 90.38(1) In this Rule 90.38,
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> > (a) a reference to the "Chief Justice" includes a judge designated by the Chief Justice for the purpose of this Rule;
> >
> > …
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> (2) An order of a judge of the Court of Appeal in chambers is a final order of the Court of Appeal, subject only to review under this Rule 90.38.
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> (3) An order of a judge in chambers that disposes of an appeal may be reviewed by a panel of the Court of Appeal, with leave of the Chief Justice.
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> (4) A party who requests leave to review an order of a judge must file a notice of motion for leave to review with the Chief Justice and deliver the notice to the other parties to the appeal, no more than seven days after the date of the order to be reviewed.
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> (5) A party who opposes a motion for leave to review must file with the Chief Justice, and deliver to the other parties, a reply no more than seven days after the date of the filing of the motion for leave to review.
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> (6) The Chief Justice may do any of the following on a motion for leave to review:
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> > (a) dismiss the motion for leave to review;
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> > (b) set the motion down for hearing;
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> > (c) grant leave to review the order of the judge in chambers if the Chief Justice is satisfied that the judge acted without authority under the rules, or the order is inconsistent with an earlier decision of a judge in chambers or the Court of Appeal, or that a hearing by a panel is necessary to prevent an injustice.
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> (7) The Chief Justice need not give reasons for the determination of a motion under this Rule.
>
> (8) If leave is granted, the Chief Justice must set a time and date for the hearing of the review before a panel of the Court of Appeal and give directions for the filing of factums and other material.
>
> …

[8] Obviously, it is the applicant's burden to satisfy the Chief Justice on a balance of probabilities of at least one of the 90.38(6)(c) criteria. There are a handful of cases that provide guidance: *Marshall v. Truro (Town)*, 2009 NSCA 89; *R. v. Liberatore*, 2010 NSCA 26; *Crooks v. CBIC World Markets Inc.*, 2018 NSCA 74; *American Holdings 2000, Inc. v. Royal Bank of Canada*, 2019 NSCA 82.

[9] As observed by MacDonald C.J.N.S. in *Marshall*, *supra*, the first two criteria in 90.38(6)(c) were straightforward, while the third "a panel hearing to prevent an injustice" required elaboration:

> [9] When then should such motions be granted? As noted above, *Rule 90.38(6)(c)* contemplates three situations. The first two are straight forward; namely when the judge acted without authority or contrary to existing jurisprudence. The third situation -- to prevent an injustice -- is much more general and requires some elaboration.
>
> [10] It occurs to me that to warrant a review by a panel of this court, an aggrieved party must present a highly compelling case. **In other words, the potential for injustice must be clear and significant.** Furthermore, one must presume that any potential injustice would have been obvious to the judge who granted the order under review. Therefore, I would expect to grant such relief only in very exceptional circumstances. Otherwise, this provision might be simply viewed as an opportunity for a rehearing; a consequence that would be clearly unintended and unnecessary. In fact, it would be ill advised to allow such a provision to serve as an opportunity for a rehearing. Indeed, courts in similar contexts have discouraged such approaches.
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> [Emphasis added]

[10] It is clear, despite the language of 90.38(6)(c), that a leave for a review must be "necessary to prevent an injustice", the applicant need not establish an actual injustice—the focus must be on the potential for injustice should a review not be ordered. This is because absent a review, the chambers judge's decision is a final order and the appellant's complaint of error will never be heard, subject only to the rather remote possibility of successful application for leave to appeal to the Supreme Court of Canada.

[11] It is not up to the Chief Justice or his designate to be convinced if a review were ordered, the panel will order the chambers judge's decision set aside, or that the appeal will necessarily succeed if allowed to proceed.

[12] Reviews have been ordered where appellants were unaware of their counsel's failure to properly prosecute the appeal (*R. v. Liberatore*, *supra*; *Crooks v. CIBC World Markets*, *supra*). In essence, lack of a review risked injustice for the failures of counsel for professional or personal reasons to deprive the appellants of their right to appeal. It should not go unnoticed that in both *Liberatore* and *Crooks*, the review panel set aside the dismissals and reinstated the appeals.

APPLICATION OF THE PRINCIPLES

[13] The applicant does not suggest the chambers judge acted without authority or the order was inconsistent with an earlier decision. In essence, he argues the failure to perfect was not his fault and a review is necessary to prevent an injustice.

[14] To assess this argument, I will set out the relevant background and why I am not satisfied the applicant has met his burden to have me order a review.

Background

[15] A head-on collision caused significant injury to the applicant. He sued the other driver. The Honourable Chief Justice Deborah K. Smith was the trial judge. She delivered an oral unreported decision on May 27, 2021. The trial judge found the accident to be the applicant's fault and dismissed his lawsuit.

[16] The applicant's trial lawyer filed a Notice of Appeal. Recordings of the trial proceedings and of the unreported decision by the trial judge were ordered. No transcripts were prepared. It is clear, counsel failed to perfect the appeal. There was no motion for date and directions within the 80-day time set by *Rule* 90.25.

[17] The failure to bring a motion for date and directions mandated the Registrar request a judge to dismiss the appeal (*Rule* 90.43(3)). The Registrar filed her motion on November 9, 2021, to be heard on December 1, 2021. It was served that day on trial counsel and the respondent. It was this correspondence that alerted the respondent there was an appeal.

The hearing before Justice Bourgeois

[18] There was no hearing on December 1, 2021. At the request of applicant's counsel, it was rescheduled to December 15, 2021.

[19] Applicant's counsel did not file his materials until late in the day of December 14, 2021. No permission was sought to file out-of-time materials. The applicant had no explanation for the late filing. The chambers judge nonetheless considered the materials.

[20] The chambers judge's decision is reported (2021 NSCA 87). I need not canvass all the details. A short précis will suffice.

[21] Bourgeois J.A. cited the well-known case of *Islam v. Sevgur*, 2011 NSCA 114 that summarized the burden on the appellant and the factors a chambers judge should consider on a motion to dismiss. Amongst the factors she considered were: the reasons for the failure to perfect; whether there were arguable grounds of appeal; good faith; willingness to comply with future requirements; and, prejudice to the appellant and respondent.

[22] The chambers judge was not satisfied there were arguable grounds of appeal in relation to the use of the respondent's apology for the accident or the alleged failure of the trial judge to consider unconscious or subconscious bias (paras. 25-26).

[23] With respect to good faith, the chambers judge noted three considerations: the lack of evidence directly from the appellant whether the appeal was being advanced in good faith; the numerous failures by the appellant to comply with the Rules' requirements; and, the unexplained timing of the appellant's response to the Registrar's motion.

[24] After considering all of the relevant factors, Bourgeois J.A. concluded:

> [34] The information before me readily establishes the rules regarding the perfecting of the appeal have been breached and the appellant has had ample notice of the motion. The appellant has failed to establish on a balance of probabilities the Registrar's motion should be dismissed. The motion is granted, and the appeal is dismissed. The appellant shall forthwith pay costs to the respondent in the amount of $250.00.

Rule 90.38 Review

[25] The applicant is self-represented on the motion to review. His Notice of Motion specifies it be heard by way of written submissions. In support, he relies on his affidavit of January 11, 2022, and trial counsel's previously filed affidavit. The applicant filed a brief and expressed reliance on trial counsel's previous submissions. The respondent opposes the motion.

[26] The applicant's materials do not suggest the chambers judge acted without authority, or her order is inconsistent with an earlier decision of a chambers judge or the Court of Appeal. Nor do his materials address directly why a review is necessary to prevent an injustice.

[27] He argues the failure to perfect the appeal was the result of a misunderstanding between he and trial counsel and the trial judge committed legal error in not taking into account subconscious racial bias. It is this point, he describes as the "foundation of my appeal". He writes that any concerns Bourgeois J.A. had about unexplained reasons for the delay are addressed in his affidavit. If she had had this information, he presumes she would not have dismissed his appeal.

[28] With respect, the applicant's affidavit does not address the unexplained reasons for filing materials on the afternoon before the December 15 hearing date. His affidavit is silent on this point and there is no other affidavit to explain.

[29] The applicant's review materials raise more questions than answers.

[30] For example, with respect to the timing of the miscommunication and failure to perfect the appeal, trial counsel's December 14, 2021, affidavit asserted:

> 8. **Mr. Downey and I engaged in some discussion about proceeding with this appeal.** As a result of these discussions, I was under the erroneous impression that he did not wish to proceed. I realize now that Mr. Downey did wish to proceed, potentially with alternative counsel. **From speaking to Mr. Downey this week**, it is clear to me that he wishes to pursue this appeal.
>
> [Emphasis added]

[31] When were those discussions? Why is it that trial counsel is just speaking to the applicant "this week", which literally would be December 13 or 14, 2021?

[32] The applicant's January 11, 2022, affidavit provides:

> 5. In my conversations with Mr. Mason I thought I was clear that I wished to Appeal Chief Justice Smith's decision. Unfortunately it appears that Mr. Mason misunderstood my instructions and did not perfect my Appeal after filing the Notice of Appeal. It was/is always my intention to appeal Chief Justice Smith's decision.
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> 6. **I received correspondence from Mr. Mason concerning his opinion on my Appeal. I received Mr. Mason's email in December**. Mr. Mason advised at that time that my Appeal had not been perfected. At that time I directed Mr. Mason to attempt to perfect my Appeal so I could proceed with my Appeal.
>
> [Emphasis added]

[33] When was the correspondence with trial counsel's opinion? How and when did the applicant follow up with trial counsel? His brief contains this submission:

> With respect to Justice Bourgeois' decision, there was a misunderstanding and miscommunication between myself and Mr. Mason. I have always wanted to appeal the decision. **Mr. Mason believed that I was waiting his opinion on the strength of my appeal and other issues before proceeding.**
>
> [Emphasis added]

[34] This is a troubling submission because the applicant's affidavit says he received correspondence from trial counsel concerning his opinion on the appeal.

[35] In *R. v. Liberatore* and *Crooks v. CIBC World Markets Inc.*, the grounds of appeal were, if not of substance, at least arguable. Here, Bourgeois J.A. was unconvinced the identified grounds of appeal raised arguable issues (paras. 25-27).

[36] The applicant complains about how the trial judge dealt with the respondent's apology and her lack of comment on the dangers of subconscious bias by the white police officers against the applicant who is an African Nova Scotian male. These are the same grounds found wanting by Bourgeois J.A.

[37] The only additional information provided by the applicant is a recording of the trial judge's oral decision and a brief excerpt from trial counsel's oral submissions.

[38] I have listened to the recording of the oral decision. With respect, it does not add substance to either ground of appeal. The trial judge did not reject the applicant's argument that an apology might be relevant to the credibility of a party. Instead, she appeared to accept the respondent's evidence she had said she was sorry out of kindness, not out of acceptance of blame. More importantly, the trial judge found as a fact there was nothing in her apology that affected her credibility.

[39] As for the issue of subconscious bias, the brief excerpt from trial counsel's submissions adds no weight to the complaint. In those submissions, trial counsel urged the trial judge take into account how it was that the two white officers could remember an accident six years later in a way helpful to the white respondent and unhelpful to the black applicant. Trial counsel denied any suggestion the officers were in any way racist.

[40] The applicant complains the trial judge erred in not mentioning subconscious bias in her reasons. He adds in his brief, it was legal error for the trial judge to place any weight on the police officers' testimony.

[41] There are several problems with these assertions. There was no expert evidence about the possible existence or influence of subconscious bias. Although the trial judge did refer to the police officers as truly independent witnesses, she expressed surprise they had recall of the accident so many years later where no one appeared to be injured and no charges laid. She identified this as a factor to consider.

[42] The key issue at trial was the location of the accident. The applicant said the respondent's vehicle shot out from behind a parked mail truck. The respondent testified she pulled out and was ahead of the mail truck when the applicant came onto the street and swung into her lane.

[43] The trial judge said she had carefully analyzed all the evidence and was satisfied on a balance of probabilities the accident happened in front of the mail truck. The trial judge cited the evidence to that effect by the respondent, the two police officers, and the fact the applicant himself had said on discovery the accident occurred in front of the mail truck.

[44] It is not a tenable proposition that the trial judge would be precluded in these circumstances from placing any weight on the police officers' testimony.

[45] The approach and conclusion reached by Bourgeois J.A. were reasonable. The applicant has not presented any truly new information or explanation, or demonstrated other circumstances that persuade me a review by a panel is necessary in order to prevent an injustice.

[46] The motion for leave to have the chambers judge's decision reviewed by panel of the Court is dismissed.

Beveridge, J.A.