NOVA SCOTIA COURT OF APPEAL

Citation: *LeBlanc v. LeBlanc*, 2023 NSCA 48

Date: 20230630
Docket: CA 521172
Registry: Halifax

Between:

Elena LeBlanc

Appellant

v.

Alain LeBlanc

Respondent

Judge:	Bourgeois, J.A.
Motion Heard:	June 22, 2023, in Halifax, Nova Scotia in Chambers
Held:	Registrar's motion to dismiss granted
Counsel:	Elena LeBlanc, appellant, on her own behalf Alain LeBlanc, respondent, not appearing Caroline McInnes, Registrar

Decision:

[1] On June 22, 2023, I heard a motion brought by Caroline McInnes, Registrar of the Court, for the dismissal of an appeal brought by Elena LeBlanc. In addition to hearing from the Registrar, I heard from Mrs. LeBlanc. The respondent, Alain LeBlanc, contacted the Court in advance of the hearing and advised he would not be in attendance.

[2] After considering the material before me, and the submissions heard, I am satisfied the Registrar's motion should be granted and the appeal be dismissed.

Background

[3] The parties have been involved in an eight year history of contentious litigation in the Supreme Court of Nova Scotia (Family Division) which has also found its way to this Court.

[4] Recently, this Court heard an appeal brought by Mrs. LeBlanc in which she challenged an order arising from a decision of Justice Cindy Murray. In dismissing the appeal, this Court wrote in *LeBlanc v. LeBlanc*, 2023 NSCA 36:

> 2. The appeal is dismissed. The appellant has failed to identify any error in the Order or decision of Justice Murray. The entirety of the appellant's submissions, both oral and written, seek to relitigate the application that was before the judge. Appellate courts owe deference to judges' decisions in family matters, absent legal error of a misapprehension of evidence (*D.A.M. v. C.J.B.*, 2017 NSCA 91, at 28). The role of an appellate court is not to rehear and reweigh evidence (*A.M. v. Children's Aid Society of Cape Breton-Victoria*, 2005 NSCA 58, at 26).

[5] The Court further ordered Mrs. LeBlanc pay costs to Mr. LeBlanc in the amount of $1,000.00, inclusive of disbursements.

[6] The present appeal was commenced by Mrs. LeBlanc on February 8, 2023 by way of a Notice of Application for Leave to Appeal and Notice of Appeal (Interlocutory). In that Notice, Mrs. LeBlanc seeks to challenge a Case Management Conference Memorandum (the "Memorandum") prepared by Justice Moira Legere-Sers on February 6, 2023.

[7] From the materials before me, it appears that case management was being conducted by Justice Legere-Sers in relation to two applications brought by Mrs. LeBlanc – one seeking to enforce the order of Justice Cindy Murray and another seeking to vary the order of Justice Murray. The Memorandum consists of 14 pages. In her Notice of Application for Leave to Appeal and Notice of Appeal (Interlocutory), Mrs. LeBlanc sets out the following grounds of appeal in relation to the Memorandum:

1. CPR 59A/59.38 and 90.13
2. Giving directions contrary to current order (without consent or Hearing)
3. Conduct of bias favoratism (sic), unprofessional speech
4. Canadian Judicial Council 2019 CanLII Docs #4547

[8] In her Notice of Application for Leave to Appeal and Notice of Appeal, Mrs. LeBlanc seeks the following relief from this Court:

1. That False Statements be <u>RECINDED</u> (sic)
2. That there is significant evidence that Justice Moira Legere-Sars (sic) has not been directing the Case Management of this File in Lawful Procedural Fairness, therefore, that the Court of Appeals Justices appoint a non-bias Judge/Justice to be assigned to this case management. (see transcripts)

[9] A Motion for Date and Directions was held on February 22, 2023. In her Certificate of Readiness, Mrs. LeBlanc certified she could have the Appeal Book filed no later than May 1, 2023. Based on the information provided, Justice Beaton directed Mrs. LeBlanc to have the Appeal Book filed by May 1, 2023, and her Factum and Book of Authorities to be filed by June 2, 2023. Mr. LeBlanc was directed to file his responding materials by July 7, 2023. The hearing of the appeal was scheduled for September 14, 2023.

[10] On February 22, 2023, Deputy Registrar MacLeod sent a letter to the parties in which the filing dates directed by Justice Beaton were set out. That letter also stated, "**Failure to meet above-noted filing dates may result in this appeal being dismissed by the presiding judge**". (Emphasis in original)

[11] Mrs. LeBlanc did not file the Appeal Book on May 1, 2023 as directed. On May 24, 2023, Mrs. LeBlanc filed a motion seeking the extension of filing dates.

That motion was scheduled for May 31, 2023, however, it was dismissed as Mrs. LeBlanc did not appear.

[12] Mrs. LeBlanc did not file her Factum and Book of Authorities on June 2, 2023.

[13] On June 6, 2023, the Registrar brought a motion to dismiss the appeal pursuant to *Civil Procedure Rule* 90.43(3) and (4), with a scheduled hearing date of June 22, 2023. On June 14, 2023, Mrs. LeBlanc filed a "Notice of Motion by Elena LeBlanc Response to Caroline McInnes's motion of June 6th 2023" and supporting affidavit.

The Law

[14] As noted above, the Registrar's motion was brought pursuant to *Nova Scotia Civil Procedure Rule* 90.43(3) and (4). Rule 90.43 provides:

> **90.43 Appellant failing to perfect appeal**
>
> **(1)** In this Rule 90.43 a "perfected appeal" means one in which the appellant has complied with the Rules as to each of the following:
>
> (a) the form and service of the notice of appeal;
> (b) applying for a date and directions in conformity with Rule 90.25;
> (c) filing the certificate of readiness in conformity with Rule 90.26;
> (d) the ordering of copies of the transcript of evidence, in compliance with Rule 90.29;
> (e) filing and delivery of the appeal book and of the appellant's factum.
>
> **(2)** A respondent in an appeal not perfected by an appellant may make a motion to a judge to set down the appeal for hearing or, if five days notice is given to the respondent, to dismiss the appeal.
>
> **(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.

[15] Rule 90.43(3) places an obligation on the Registrar to monitor appeals filed with the Court and act when they have not been perfected. It is mandatory. When a motion to dismiss is brought, Rule 90.43(4) provides a chambers judge with the discretion to provide further directions to move a stalled appeal toward conclusion, or grant dismissal.

[16] In *Islam v. Sevgur*, 2011 NSCA 114, Justice Saunders summarized the principles governing a chambers judge's discretion to dismiss for failure to perfect the appeal. He 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.
>
> (Emphasis added)

[17] As noted by Justice Saunders, the above factors do not constitute a finite list. Further, the unique circumstances of each appeal will make certain factors more or less relevant to the exercise of a chambers judge's discretion. Ultimately, a chambers judge must consider whether it is in the interests of justice for an appeal to proceed to hearing. A defaulting appellant who does not provide evidence justifying the continuation of their appeal will face a strong likelihood of it being dismissed.

Analysis

[18] Mrs. LeBlanc filed an affidavit in response to the motion and brought with her an Appeal Book for filing if permitted by the Court. At the outset of the hearing I reviewed with Mrs. LeBlanc the factors as set out in *Islam*, so she would be aware of the law relevant to the motion to dismiss. She was given the opportunity to speak to each factor. Given the nature of certain concerns she raised, I further agreed to provisionally accept the Appeal Book in order to fully consider her submissions.

[19] From Mrs. LeBlanc's submissions, I am aware that

- the variation application she filed in the lower court has been withdrawn;
- the application for enforcement of Justice Murray's decision remains outstanding;

- since the date of the Memorandum under appeal, Justice Legere-Sers has undertaken another case management conference, and issued another memorandum. Mrs. LeBlanc tried to file an appeal of that new memorandum, but the Registrar refused to accept it as being out-of-time; and

- Justice Legere-Sers is no longer case managing the remaining application. Justice Robert Gregan has recently started acting as case management judge. She is no longer requesting this Court direct Justice Legere-Sers to be removed as case management judge.[1]

[20] I will turn now to the relevant factors.

Reason for the default

[21] In short, Mrs. LeBlanc says she missed the filing deadline for the Appeal Book because she was pre-occupied with matters in the lower court. She explained that she had to prioritize which court proceedings received her attention, and she felt the matters in the Supreme Court (Family Division) were more pressing. She indicated if she was aware the Registrar would bring a motion to dismiss the appeal because of missing the filing date, she would have placed more priority on her obligations in this Court.

[22] Although Mrs. LeBlanc may have found herself needing to attend to more than one court proceeding, based on the evidence before me, I do not view that as a reason sufficient to excuse her default. In reaching that conclusion, I note in particular:

- In her Certificate of Readiness dated February 2, 2023, Mrs. LeBlanc advised she would be able to file her Appeal Book by May 1, 2023;

- Mrs. LeBlanc was advised in writing that her appeal could be dismissed if she did not meet the filing deadlines directed by the Court;

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[1] In these reasons I am simply stating Mrs. LeBlanc is no longer seeking a remedy she requested in her Notice of Application for Leave to Appeal and Notice of Appeal. My comment should not be interpreted as suggesting such a remedy is one that this Court would consider granting.

- At no time prior to May 1, 2023, did Mrs. LeBlanc notify the Court that she was unable to meet the filing deadline for the Appeal Book, or request an extension; and

- The vast majority of appellants, even those who are self-represented, are able to meet the obligations that arise by virtue of their decision to commence an appeal in this Court. This includes those who are juggling pressing family and work responsibilities, and those who find the preparation of an appeal book to be challenging.

[23] Based on the evidence, I am unable to conclude Mrs. LeBlanc's circumstances were such that she was unable to meet the filing deadline, or ask for an extension in advance. She simply chose to put off attending to her appeal obligations in favour of other court matters, and was aware, or ought to have been, from the Court's letter of February 22, 2023, that doing so was at her peril.

Legitimate and arguable grounds of appeal

[24] I have set out earlier the four grounds of appeal contained in the Notice of Application for Leave to Appeal and Notice of Appeal. For ease of reference, I will repeat them:

1. CPR 59A/59.38 and 90.13
2. Giving directions contrary to current order (without consent or Hearing)
3. Conduct of bias favoratism (sic), unprofessional speech
4. Canadian Judicial Council 2019 CanLII Docs #4547

[25] Ground 1 is not a legitimate ground of appeal. Mrs. LeBlanc has merely referenced three Rules without stating how the judge erred in relation to them. Further, Ground 4 is not a legitimate ground of appeal. The document referenced is a 10 page pamphlet published by the Canadian Judicial Council entitled "*The Conduct of Judges and the Role of the Canadian Judicial Council*". This Court has no role in the disciplinary process pertaining to judges.

[26] The remaining two grounds, 2 and 3, could depending on the context, give rise to arguable grounds of appeal. However, Mrs. LeBlanc has failed to adduce

evidence that demonstrates her concerns could result in the appeal being granted. I will explain.

[27] The context here is important. As noted earlier, Justice Legere-Sers was acting as a case management judge. Her role was to assist the parties in organizing and preparing the application for enforcement to be eventually heard on the merits by another judge. The powers of a case management judge are set out in Rules 59.38(3) and 59A. Rule 59.38(3) provides:

> **59.38 (3)** A judge may give directions for the conduct of a proceeding and, otherwise, provide case management.

[28] Rule 59A.05 more specifically states:

> **59A.05 Judicial Dispute Resolution: Process Management**
> At every appearance, including a conference under Rule 59.38, a judge may by direction or order:
>
> (a) identify the parties to the dispute and identify the issues in dispute;
>
> (b) assist the parties to identify an appropriate dispute resolution process;
>
> (c) make orders to which all parties consent;
>
> (d) direct a party to attend the Parent Information Program;
>
> (e) provide for an immediate need by making an interim temporary time limited order based upon evidence contained in affidavits and documents filed with the court with or without cross-examination of a party;
>
> (f) require disclosure of documents, financial information or other relevant information within a fixed time and:
>
> (i) name the party who is to receive the disclosure;
>
> (ii) direct whether the disclosure is to be filed with the court.
>
> (g) make a ruling about an evidentiary or procedural matter that does not require a motion hearing;

(h) require a motion to be made within a fixed time;

(i) manage the hearing, trial, or dispute resolution process by:

- (i) limiting the use of expert evidence;
- (iii) limiting the number of witnesses;
- (iv) limiting the number of affidavits;
- (v) limiting the number of paragraphs and pages in affidavits;
- (vi) specifying the issues to be addressed in affidavits;
- (vii) setting page limits for written submissions;
- (viii) limiting and apportioning the time available to complete any step in a hearing, trial or dispute resolution process including limiting the time allotted to complete oral evidence, examination, cross-examination and/or submissions;
- (ix) specifying the order in which issues are to be examined and the time allotted to each issue;
- (x) separating and prioritizing the time for hearing specific issues within a dispute.

(j) require a party, by a fixed date, to prepare and file calculations showing and rationalizing the amount that party is requesting for the following claims:

- (i) child support, ongoing and retroactive;
- (ii) spousal support, ongoing and retroactive;
- (iii) division of property and/or debt.

(k) give any direction and make any order that is appropriate to promote the proportional, just, fair, timely, and cost-effective resolution of issues in dispute.

[29] As the above demonstrates, a case-management judge has a broad discretion to provide directions to the parties. Mrs. LeBlanc's affidavit in response to the motion does not explain how Justice Legere-Sers gave "directions contrary to the current order", nor, in light of the wide discretion outlined above, how such direction gave rise to an error of law. On its face, the Memorandum under appeal does not contain any provision that is obviously contrary to the existing order. Further, I have taken the opportunity to review the transcript of the case management conferences, and cannot identify any direction that would give rise, without further evidentiary support, to an arguable ground of appeal.

[30] I turn now to Ground 3, the claim of judicial bias. This Court recently set out the law relating to such claims in *Green v. Green*, 2022 NSCA 83. There, Justice Van den Eynden wrote:

> [41] In *Wewaykum Indian Band v. Canada*, 2003 SCC 45, the Supreme Court of Canada explained that the apprehension of bias must be a reasonable one:
>
> > 60 In Canadian law, one standard has now emerged as the criterion for disqualification. The criterion, as expressed by de Grandpré J. in *Committee for Justice and Liberty v. National Energy Board*, supra, at p. 394, is the reasonable apprehension of bias:
> >
> > …the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."…
>
> [42] As stated by this Court in *R. v. Potter; R. v. Colpitts*, 2020 NSCA 9 where there is a finding of a reasonable apprehension of bias, the offending judge's decision results in an error of law:
>
> > [753] If a reasonable apprehension of bias arises from, or an actual bias is found in, a judge's words or conduct, then the judge has exceeded his or her jurisdiction and erred in law.
>
> [43] **The burden on a party claiming a reasonable apprehension of bias or actual bias on the part of a judge is onerous. There is a strong presumption of judicial impartiality that must be overcome by a claimant. The inquiry is**

> **also fact-specific and the claimant must present cogent evidence establishing serious grounds** (see *Wewaykum* at paras. 76-77 and *R. v. Teskey*, 2007 SCC 25 at para. 21).
>
> (Emphasis added)

[31] As noted above, establishing a claim of judicial bias is onerous. Much more is required than simply asserting a judge was biased because they made a finding an appellant does not like, or that they were firm in tone or direction.

[32] On a Registrar's motion to dismiss, an appellant must produce evidence which shows that a ground of appeal pled is arguable. Mrs. LeBlanc's affidavit on the motion is silent with respect to the evidence she asserts demonstrates the existence of judicial bias. She has failed to meet her burden to show this is a legitimate and arguable ground of appeal. Additionally, the transcripts provisionally accepted by the Court do not provide any assistance to Mrs. LeBlanc in establishing actual bias or a reasonable apprehension thereof.

[33] Mrs. LeBlanc has not demonstrated that the grounds of appeal she has pled are arguable. Given this particular context, it is difficult to see how the appeal has any merit at all. There could be circumstances where a case management judge exceeds their authority or commits an error of law which would justify intervention by this Court. However, given the discretion granted by the *Civil Procedure Rules*, such occasions will be rare. Appealing such orders will most often constitute an unsuccessful, time-consuming and costly undertaking for litigants who would be better served focusing on the merits of the underlying matter in the court below.

Willingness and ability to comply with Rules and directions

[34] Mrs. LeBlanc says she is willing to comply with the Court's direction. She says the Appeal Book is ready to be filed and all that is required now is for her to file her Factum (which arrived at the Court on June 29, 2023). She says there is still plenty of time to give Mr. LeBlanc the opportunity to file his responding factum on July 7, 2023 and to have the appeal heard on September 14th as scheduled.

[35] Notwithstanding Mrs. LeBlanc's assurances, I am not satisfied she has the willingness and ability to comply with the Rules and directions of this Court. I need only reference the Appeal Book she asserts is ready to be filed. It is not in compliance with the requirements set out in Rule 90.30(2). In particular, the

Notice of Application for Leave to Appeal and Notice of Appeal filed with the Court on February 8, 2023 is not included in the Appeal Book as required. Rather, Mrs. LeBlanc has provided a handwritten document which she identifies in the index as being the "Notice of Appeal". That document contains no filing stamp, nor is it certified by the Registrar. The contents are different from those in the Notice of Application for Leave to Appeal and Notice of Appeal filed with the Court. The appeal must be based on the filed Notice, not some other document Mrs. LeBlanc says is the Notice of Appeal.

[36] Further, Mrs. LeBlanc has not included in the Appeal Book the Notice of Application for Enforcement which underlies the Memorandum under appeal. This ought to have been included.

[37] Finally, I have concerns with respect to the completeness of the materials contained in the Appeal Book. Tab O appears to be an affidavit filed in the Supreme Court of Nova Scotia (Family Division) on February 6, 2023. Mrs. LeBlanc recently provided exhibit U to the affidavit (on June 29, 2023), which was originally missing from the Appeal Book. However, a closer look at the affidavit demonstrates that other materials referenced in it are missing, including exhibit Q – a "witness list affidavit", and exhibit X – "Order Changes". References to these exhibits have been struck out in blue ink and initialled by Mrs. LeBlanc.

[38] The Court must be satisfied the affidavit contained in the Appeal Book contains all of the exhibits that were filed with the Supreme Court, and not just those Mrs. LeBlanc views as being relevant to the appeal. At a minimum, this would require further clarification from Mrs. LeBlanc before accepting the Appeal Book for filing.

Prejudice

[39] The consideration of prejudice can be dealt with summarily. There is no prejudice to Mrs. LeBlanc in being prevented from advancing a meritless appeal. Requiring Mr. LeBlanc to respond to such an appeal is clearly prejudicial.

Court resources and the public purse

[40] There is a cost associated with every appeal brought in this Court. This includes the time and effort of administrative staff in opening an appeal file and monitoring it to ensure compliance with the *Rules*. Meritless appeals take time away from other matters, and often occupy space on busy court dockets that could be used more effectively by other litigants with legitimate disputes requiring the Court's attention. Permitting Mrs. LeBlanc's appeal to continue would constitute an unjustified waste of valuable resources.

Conclusion

[41] For the reasons above, the Registrar's motion to dismiss the appeal is granted.

Bourgeois, J.A.