

**NOVA SCOTIA COURT OF APPEAL**

**Citation:** *Cain v. Canada (Attorney General)*, 2024 NSCA 65

**Date:** 20240705

**Docket:** CA 526430

**Registry:** Halifax

**Between:**

Percy Cain

Appellant

v.

The Attorney General of Canada

Respondent

**Judge:** Gogan J.A.

**Motion Heard:** June 5, 2024, in Halifax, Nova Scotia in Chambers

**Held:** Motion granted

**Counsel:** Percy Cain, appellant, self-represented  
Shauna Hall-Coates, for the respondent  
Caroline McInnes, Registrar for the Court of Appeal

## **Decision:**

### **Introduction**

[1] This is a decision on a Registrar’s motion to dismiss for noncompliance with the rules governing conduct of appeals.

[2] For the reasons that follow, the motion is allowed and the appeal is dismissed.

### **Background**

[3] Some background is necessary to provide context to the motion.

[4] On May 16, 2023, Percy Cain made his initial application to the Supreme Court of Nova Scotia seeking relief under a writ of *habeas corpus*. At the time, Mr. Cain was on statutory release, but compelled by the Parole Board of Canada (the “PBC”) to live at the Jamieson Community Correctional Facility in Dartmouth, Nova Scotia (the “Jamieson facility”). He claimed that the PBC had no ongoing authority over him and sought immediate release.

[5] Mr. Cain filed a second application on June 1, 2023, continuing to claim that he was unlawfully detained at the Jamieson facility.

[6] PBC contested both applications on the basis that it had ongoing authority over Mr. Cain under the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 (the “CCRA”). It argued that: (1) the decision requiring Mr. Cain to reside at the Jamieson facility was within its statutory authority, (2) the Jamieson facility was a community correctional center under s. 133 of the *CCRA*, (3) *habeas corpus* relief was not available as the *CCRA* provided a complete, comprehensive and expert procedure for review of administrative decisions, and (4) Mr. Cain had not appealed the decisions made by the PCB under the *CCRA*.

[7] The two applications came before Justice Joshua Arnold on June 30, 2023. After conducting a stage one hearing, Justice Arnold directed a jurisdictional hearing take place. That hearing was held on July 12, 2023. Justice Arnold concluded that the PBC had the authority over offenders who were on statutory release. As a result, *habeas corpus* jurisdiction was declined and Mr. Cain’s application dismissed. The decision on jurisdiction was dated July 27, 2023.

[8] Mr. Cain appealed on August 24, 2023. His Notice of Appeal lists seven grounds alleging various errors of law, mixed fact and law, and procedural fairness issues, all related in some way to the jurisdictional decision. He asks this Court to allow the appeal and permit his application for *habeas corpus* relief to proceed.

[9] In response to the filing of his Notice of Appeal, Mr. Cain received a letter from the Registrar on September 7, 2023. This letter set out the steps required to perfect his appeal and advised of resources available to assist. The Registrar's directions were clear and instructive, and included a caution:

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 August 25, 2023. This means that you must have your motion filed and heard no later than December 21, 2023.** 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.]

[10] The Registrar's letter left no doubt that: (1) further steps were required, (2) the time to complete those steps was limited, and (3) the failure to follow the *Rules* had consequences. In spite of the Registrar's assistance, Mr. Cain did not take any of the required steps by December 21, 2023, or for months thereafter.

[11] The Registrar brought a motion to dismiss this appeal on March 26, 2024. By that date, Mr. Cain remained noncompliant. He had not filed a Motion for Directions or a Certificate of Readiness, in spite of ongoing contact with court administration. He did not file an affidavit indicating why he could not comply with the *Rules*. Various letters received by the Registrar indicate that Mr. Cain wished to pursue his appeal, but also pursue other *habeas corpus* applications.

[12] All the while, Mr. Cain's release status was changing. He is no longer at the Jamieson facility. Since filing his appeal, he has moved between the Jamieson facility, Central Nova Scotia Correctional Facility, release, and Dorchester. He presented no evidence to clarify or confirm his change in status.

[13] The hearing of the Registrar's motion took place on May 1, 2024. Mr. Cain was then at Dorchester Institution and explained that being incarcerated and legally blind made it difficult to complete the steps necessary to move his appeal forward.

He wanted to proceed with his appeal. He expected to be released later that month. On this basis, he was given until May 30, 2024, to file his Motion for Date and Directions and Certificate of Readiness. The hearing of the Registrar's motion was adjourned.

[14] The motion returned on June 5, 2024. Mr. Cain remained noncompliant. Although a Motion for Directions was filed on May 17, 2024, there remained no basis to determine when the transcripts or Appeal Book would be ready.

[15] As a result of the ongoing noncompliance, the hearing of the Registrar's motion proceeded. The decision was reserved.

### **Issue**

[16] The issue is whether to allow the Registrar's motion to dismiss Mr. Cain's appeal.

### **Analysis**

#### *The Rules*

[17] The Registrar brings this motion for dismissal of Mr. Cain's appeal because he has not taken the steps required under the *Civil Procedure Rules* to perfect his appeal. *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 transcripts of evidence, in compliance with Rule 90.29;
  - (e) filing and delivery of the appeal book and of the appellant's factum.

[...]

- (3) In an appeal not perfected before 80 days from the date of 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.

[18] *Rule 90.43(3)* requires the Registrar to bring motions to dismiss when appeals are not perfected. Mr. Cain did not take the required steps within the prescribed period. In these circumstances, the motion must be made. The Registrar has no choice.

### *The Principles*

[19] A chambers judge hearing a motion to dismiss has discretion to grant an appropriate remedy. The principles governing the exercise of discretion were considered in *Islam v. Sevger*, 2011 NSCA 114. Oft cited since, Justice Saunders offered the following guidance:

[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] The list of considerations set out by Justice Saunders is not exhaustive. The unique circumstances of each appeal may raise other considerations or make certain factors more or less relevant to the exercise of discretion necessary to give effect to the object of the *Rules* (*McCarthy v. Pruneau*, 2023 NSCA 89 at para. 16).

### *The Principles Applied*

[21] Turning now to the present appeal, I am satisfied the Registrar has established that Mr. Cain has not complied with the *Rules*. As a result, the focus is on whether he can establish, on balance, that the motion should be dismissed. It is incumbent on Mr. Cain to persuade that dismissal of the appeal is not in the interests of justice.

[22] Although the relief sought by the Registrar requires the exercise of discretion, the exercise is not arbitrary. It involves balancing all of the relevant principles in order to achieve the overall objective of a just, speedy, and inexpensive disposition of the appeal.

### *Reasonable Excuse for the Delay*

[23] One of the relevant considerations on this motion is whether Mr. Cain has a good reason for the delay and, if so, whether it rises to the level of excuse.

[24] Mr. Cain is a self-represented person who says he is legally blind. He claims he cannot file the Appeal Book while he is incarcerated, and he will be imminently released. In his submissions on the motion, he said he: (1) relied on his parole officer to read his mail to him, (2) was aware of the steps he needed to perfect his appeal but the information he needed was at his home, and (3) needed time after his release to move his appeal forward.

[25] Although the information provided by Mr. Cain could explain his noncompliance to some degree, it does not establish sufficient reason to excuse the totality of the delay. The delay here is significant. It began tolling when he filed his appeal. He was well beyond the time permitted by the *Rules* when the Registrar brought her motion. He was given an additional period of thirty days to bring his Motion for Directions and Certificate of Readiness. He indicated that the additional time was sufficient to take the outstanding steps. Mr. Cain filed the motion on May 17, 2024. He did not file a completed certificate. There is no basis to determine when it could be provided. It is now almost one year since the application judge delivered the decision under appeal.

[26] I consider that the Notice of Appeal was filed on time with a detailed list of grounds. At the time of filing, Mr. Cain was still resident at the Jamieson facility. Notwithstanding, he was able to initiate his appeal. The record, although not clear, also indicates that he was not incarcerated for the entirety of the relevant period.

[27] Soon after commencing his appeal, Mr. Cain received an instruction letter from the Registrar. He acknowledged being aware of the steps required to advance his appeal. He had the assistance of his parole officer. He had contact with the Registrar and other court staff who repeatedly provided forms and information.

[28] I conclude that there is nothing in the record that excuses Mr. Cain's failure to comply with the rules over the extended period since starting his appeal.

#### *Arguable Issues and Substantive Impediments*

[29] The next consideration is whether the appeal raises arguable issues. Given the nature of the proceeding and Mr. Cain's changed circumstances, it is convenient to also deal with impediments to the appeal at this stage. In my view, these related considerations are material to the disposition of this motion.

[30] Mr. Cain's appeal is from a jurisdictional decision on a *habeas corpus* application. In his original application, he claimed to be unlawfully detained at the

Jamieson facility beyond his statutory release date and sought immediate release. Things have now changed. Mr. Cain is no longer at the Jamieson facility. It appears from the record that his incarceration status and institutional placement have changed several times since his application for relief. Most recently, he has been housed at Dorchester Institution. In view of this, the respondent argues the appeal is moot. In other words, the lawfulness of Mr. Cain's previous detention is no longer a live issue and the remedy sought is no longer available.

[31] In *Mercredi v. Saskatoon Provincial Correctional Centre*, 2019 SKCA 86, the well established doctrine of mootness was discussed in the context of *habeas corpus* relief:

18 In *Dearborn v. Saskatchewan (Financial and Consumer Affairs Authority)*, 2017 SKCA 63 (Sask. C.A.), Richards C.J.S. summarized the doctrine of mootness and the *Borowski* test:

[15] Before turning to the merits of Mr. Dearborn's submissions, it is useful to briefly review the doctrine of mootness. The leading case in this area is *Borowski v. Canada (Attorney General)*, 1989 CanLII 123 (SCC), [1989] 1 SCR 342 [Borowski]. There, the Supreme Court explained as follows at page 353:

The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. ...

[16] The consideration of an arguably moot appeal involves two steps. The first is to determine if the appeal is moot, *i.e.*, to determine if it involves a live and concrete controversy between the parties. The second step is to determine whether, notwithstanding that the appeal is moot, the court should nonetheless exercise its discretion to hear the case. That exercise of discretion, according to *Borowski*, should be undertaken with reference to the underlying basis of the mootness doctrine itself: (a) the presence of an ongoing adversarial context, perhaps because of the collateral consequences of the outcome of the appeal, (b) the importance of conserving judicial resources, and (c) the need for a court to be sensitive to its proper law-making function, *i.e.*, its role as an adjudicator of disputes affecting the rights of parties.

19 *Borowski* does not require that each of these three factors favour a hearing on the merits. As Sopinka J. noted (at 363):



In exercising its discretion in an appeal which is moot, the court should consider the extent to which each of the three basic rationales for enforcement of the mootness doctrine is present. This is not to suggest that it is a mechanical process. The principles identified above may not all support the same conclusion. The presence of one or two of the factors may be overborne by the absence of the third, and vice versa.

20 Further, the requirement for an adversarial context may be largely or wholly satisfied if the matter has been fully and zealously argued: *Borowski* at 363; *Radiology Associates of Regina Medical PC Inc. v. Sun Country Regional Health Authority*, 2016 SKCA 57 (Sask. C.A.) at para 23, [2016] 10 W.W.R. 662 (Sask. C.A.); *Peepetch v. Regina Provincial Correctional Centre*, 2017 SKQB 348 (Sask. Q.B.) at para 31.

[32] In *Mercredi*, the Court of Appeal considered mootness in the context of an appeal being heard after the inmate's release. The remedy sought was no longer available. The Court referenced the reasons of LeBel, J. in *Mission Institution v. Khela*, 2014 SCC 24, at para. 14, on the importance of reviewability. In that case, consideration of the central issue was in the public interest and important to inmates generally. The Court of Appeal exercised its discretion to hear the appeal on the merits notwithstanding the issue was moot.

[33] A similar approach was taken in *Springhill Institution v. Richards*, 2015 NSCA 40.

[34] In the present case, Mr. Cain was residing at the Jamieson facility at the time he sought *habeas corpus* relief. The issues remained live when his application was heard. At the jurisdictional hearing, Justice Arnold identified and examined the relevant issues. He delivered a thorough decision concluding that PBC had the authority to impose conditions on Mr. Cain during his statutory release. As a result, it was "one of the rare occasions where the court must decline jurisdiction" (*Cain v. Canada (Attorney General)*, 2023 NSSC 219, at para. 4 ("*Cain*"). That conclusion was reached on the basis that the *CCRA* contained a complete, comprehensive, and expert procedure, a point that is well canvassed in the authorities (see *Cain*, at paras. 25-33).

[35] Under the scheme established under the *CCRA*, the application judge found that Mr. Cain had been advised of the conditions being imposed by the PBC and his right to appeal. He did not pursue an appeal.

[36] I am not persuaded that the grounds of appeal raise any legitimate or arguable issues. I also consider that the broader issues raised on appeal are moot.

The relief sought by Mr. Cain originally and the relief he seeks now will not resolve any outstanding live issue. Mr. Cain has not perfected his appeal, nor presented any compelling reason on this motion for it to proceed in spite of its mootness. In my view, this combination of factors operates to fully dispose of the motion.

### *Other Considerations*

[37] As noted above, there are many considerations on these motions. Which have significance and how they are balanced reflect the unique circumstances of each case. Although those already reviewed are important, there are others on which I will briefly comment.

[38] I have no doubt that Mr. Cain wishes to pursue his appeal. He said so in his submissions and indicated his intentions when making inquiries of the Registrar. However, in spite of ample time, he has failed to comply with the *Rules*, and offers no basis to conclude he will comply going forward. He has repeatedly asked the Registrar to give him a hearing date while dismissing direction on what is required before that can take place.

[39] I am unable to assess the presence or absence of good faith. In terms of prejudice, the balance favours the respondent. If the Registrar's motion is denied, the respondent will have the prospect of an indefinite end point to a seemingly meritless and moot appeal. On a closely related note, this appeal is not one that justifies the ongoing allocation of valuable public, judicial, and administrative resources.

[40] The final consideration is unique to this appeal. The importance of *habeas corpus* relief and the challenges faced by most applicants was underscored by this Court in *Pratt v. Nova Scotia (Attorney General)*, 2020 NSCA 39. The barriers faced by self-represented prisoners in advancing *habeas corpus* claims are well recognized. This was noted in the court below, citing both *Pratt* (referencing *Springhill Institution v. Richards*, 2015 NSCA 40, at para. 159) and *Blais v. Correction Service Canada*, 2011 NSSC 508.

[41] Challenges continue for such litigants in conducting appeals. For this reason, the record was reviewed carefully and Mr. Cain was given a generous amount of time to move his appeal forward. Having approached the motion in this way, and accounting for the unique aspects of this appeal, I am unable to conclude that allowing the appeal to proceed is in the interests of justice.

**Conclusion**

[42] The Registrar has established that Mr. Cain's appeal remains noncompliant with the *Rules*. He has not persuaded me that dismissing the motion and allowing the appeal to proceed would be in the interests of justice.

[43] The Registrar's motion is granted and the appeal is dismissed without costs.

Gogan J.A.