

NOVA SCOTIA COURT OF APPEAL
Citation: *Fraser v. MacIntosh*, 2024 NSCA 70

Date: 20240717
Docket: CA 532155
Registry: Halifax

Between:

Donn Fraser and DLF Law Practice Incorporated

Appellants

v.

Bruce Tait MacIntosh

Respondent

Judge: Justice Anne S. Derrick
Motion Heard: July 11, 2024, in Halifax, Nova Scotia in Chambers
Held: Motions granted
Counsel: Donn Fraser, representing himself and DLF Law
Practice Incorporated.
Bruce Tait MacIntosh, representing himself

Decision:

Introduction

[1] In March 2023, the appellants filed a Notice of Action against the respondent, seeking relief under various heads of damage, and costs. Various motions spun off from this litigation and certain of them came to be dealt with by Justice Mona Lynch of the Supreme Court of Nova Scotia, in Special Chambers on October 18, 2023.

[2] On March 18, 2024, Justice Lynch (“Chambers Judge”) issued, in relation to the motions, an Order for costs against the appellants in the amount of \$20,000. The Order emerged from her decision of March 5, 2024 (*Fraser v. MacIntosh*, 2024 NSSC 63 - “Costs decision”). Justice Lynch had received written costs submissions from the parties through the period of November 10, 2023 to January 29, 2024.

[3] Mr. Fraser (“the appellant”) is seeking to have the costs award overturned. On April 3, 2024, he filed a Notice of Application for Leave to Appeal and Notice of Appeal (Costs Only) (“the appeal”). The leave application and appeal are scheduled to be heard together by a Panel of this Court on September 11, 2024.

[4] On July 2, 2024, the respondent, Bruce MacIntosh, filed Motions seeking Orders requiring the appellants to:

- (1) forthwith file a Supplementary Appeal Book for all matters of record filed between August 17, 2023 and September 22, 2023;
- (2) forthwith and no later than July 18, 2024 deliver to the Respondent, in the printed format required by *Rule* 90, a copy of both the original Appeal Book and the Supplementary Appeal Book. Such delivery to be made to the respondent during normal business hours at the law office of the Appellant Fraser, or such other time and location as the parties may mutually agree; and
- (3) pay costs of these July 11, 2024 Motions and with respect to the earlier Notice of Application for Leave to Appeal and Notice of Appeal filed November 2, 2023, as CA No. 528419, which was abandoned by Notice of Discontinuance filed on or about February 9, 2024.

[5] The Motions came before me in Chambers on July 11, 2024. By that date, the appellant had delivered to the respondent a printed copy of the Appeal Book. Therefore that issue did not need to be litigated on its merits. However, the respondent raised an issue with respect to the appellant's delivery of the hard copy to his home. More about that later.

[6] The parties filed material in support of their respective positions on the Supplementary Appeal Book and costs issues and made submissions. I reserved my decision.

The Motion for a Supplementary Appeal Book

[7] The appellant has filed an Appeal Book that he says satisfies the requirements of *Civil Procedure Rule 90.31* for costs appeals. The respondent disagrees, saying there are materials missing that should be before the Panel hearing the appeal. The appellant acknowledged that as the parties have been unable to agree on the content for the Appeal Book, I will have to determine whether there should be additional material from the record of the court below filed for this appeal.

[8] I have concluded a Supplementary Appeal Book shall be filed by the appellant. The Panel hearing the appeal will ultimately be in the best position to assess whether the additional material assisted them in assessing the appellant's allegations of error by the Chambers Judge.

[9] The following are my reasons for ordering a Supplementary Appeal Book to be filed.

[10] The appellant says on a costs appeal *CPR 90.31* simply requires him to file as substantive content: a copy of the notice of appeal; a copy of the order and decision appealed from; a copy of the pleadings, including any particulars; any offers to settle, exhibits and evidence relevant to the appeal; and a transcript of submissions made. He says his Appeal Book is compliant.

[11] The respondent says the appellant has left out relevant material, specifically aspects of the record considered by the Chambers Judge and referenced by her in a conference call on October 3, 2023, at the special chambers hearing on October 18, 2023, and in her costs decision of March 5, 2024. It is the respondent's submission the Appeal Book should have included: the materials relating to an Appearance Day Motion which was an Affidavit Disclosing Document motion ("ADD

motion”), including the respondent’s response to the motion, and a transcript of the September 8, 2023 Appearance Day before Justice Christa Brothers of the Supreme Court of Nova Scotia.

[12] The Chambers Judge stated her focus plainly in her Costs decision:

[23] ...The costs in question are in relation to motions which were before the court on Appearance Day, a telephone conference, a full day hearing, and submissions in relation to Rule 78.08.

[13] The Chambers Judge was referring to the ADD motion, the October 3, 2023 conference call, the October 18, 2023 Special Chambers hearing, and the dismissal of the appellants’ motion to strike portions of the respondent’s affidavits.

[14] The ADD motion was filed by the appellant on August 17, 2023. In his written submissions on the Supplementary Appeal Book issue, the respondent says the ADD motion was premature, intended to harass, and contained pejorative content requiring a response. The respondent says the ADD motion and his response and related materials were before the Chambers Judge and should be included in the record on the appeal.

[15] The Appeal Book filed by the appellant contains transcripts of a conference call held by the Chambers Judge on October 3, 2023 and the Special Chambers hearing on October 18, 2023. The transcripts indicate there was discussion about the ADD motion.

[16] In the October 3, 2023 conference call, the Chambers Judge advised the parties she had listened to the audio-recording of the September 8, 2023 Appearance Day before Justice Brothers.

[17] The ADD motion was the subject of discussion at the Special Chambers hearing on October 18, 2023. The appellant refers to it in a written submission dated October 9, 2023 for the Special Chambers hearing (Appeal Book, page 391).

[18] At the September 8, 2023 Appearance Day hearing before Justice Brothers, which I have listened to, Justice Brothers expressed concern about the content and tone of filings by the appellant. The respondent excerpts in his written submissions before me some of the allegations made in the appellant’s ADD motion notice.

[19] None of the above—not the ADD motion filings nor the September 8, 2023 Appearance Day hearing transcript—have been included in the appellant’s Appeal

Book. Also missing from the Appeal Book are materials post-dating the September 8, 2023 Appearance Day. Near the end of the October 18, 2023 hearing, the Chambers Judge referred to one such document, a letter sent by the appellant to a junior lawyer: (Appeal Book, pp. 712 and 713)

I have looked at the correspondence between the parties, and I have looked at what has been filed with the court. Things such as the Appearance Day notice which, as pointed out, should be pretty clear notice of appearance motion, and instead it goes into basically personal comments about Mr. MacIntosh...

...

I was quite shocked, I will say, as I said today in the proceeding, to see the lack of civility that was shown, particularly in relation to the pleadings and the correspondence from Mr. Fraser. I think most shocking to me was the letter—which I have to find here in front of me—the September 26th letter that Mr. Fraser sent to Ms. Langor.

[20] In her Costs decision, in addition to reciting the contents of the September 26, 2023 email, the Chambers Judge at paragraphs 27 to 31 referred to correspondence sent by the appellant to the respondent during the period of August 17, 2023 to September 22, 2023. The appellant's filings on the motion before me also contain inflammatory language about the respondent.

[21] In his submissions before me, the appellant said none of these materials are relevant to his costs appeal. He says the Panel has everything needed to decide the appeal.

[22] However, I note in the appellant's written submissions opposing the respondent's Supplementary Appeal Book motion he says the following:

[11] ...paragraph 9 of the Respondent's affidavit proceeds on the flawed premise that because a Chambers Judge (whose decision is before the Court of Appeal because...the Chambers Judge decided matters improperly and committed a multitude of errors) has made reference to material that was not properly before her for consideration somehow renders that extraneous material part of a record that forms part of the appeal. To the contrary, to the extent the Chambers Judge referred to extraneous material which was not properly before the Chambers Judge for determination of the limited issues and motions before the Chambers Judge, that is something going to errors committed by the Chambers Judge.

...

[22] If the Chambers judge chose to reference information that [w]as not properly before her or part of what was evidence she could have properly

considered, that does [not] expand what the proper record is, versus represent one of many errors by the Chambers judge.

[23] I am persuaded the Panel should have the materials the Chambers Judge referred to at the Special Chambers hearing and in her Costs decision. I do not see how the Panel can effectively assess the appellant's allegations of error, in particular, the allegation the Chambers Judge referred to material not properly before her, without the complete record.

Costs of the Supplementary Appeal Book Motion

[24] The respondent has been successful on the Supplementary Appeal Book motion. However, I find the cost repercussions should be left for the Panel to assess once they have decided whether the materials I am ordering to be added to their record “were useful and necessary to the arguments and their deliberations” (*Armoyan v. Armoyan*, 2013 NSCA 42 at para. 33 per Saunders, J.A.).

[25] As I am deferring the matter of costs to the Panel, the Supplementary Appeal Book to be filed by the appellant shall contain the filings on the motions argued before me—the motions materials and submissions and the correspondence forwarded to the Court by the appellant and the respondent up to and including July 11, 2024.

Costs of the Discontinued Leave to Appeal and Appeal – CA No. 528419

[26] Simply put, the respondent says he is entitled pursuant to *CPR* 90.46(2) to modest costs for this discontinued proceeding. The *Rule* states: “On filing the notice of discontinuance, the appeal...is at an end and the other party is entitled to costs of the appeal...unless a judge orders otherwise”.

[27] The appellant says the respondent cannot claim costs in respect of a separate legal proceeding. In his written submission he says the respondent must file “a proper motion in CA 528419” and have it heard on a new and mutually agreeable date. And he delivered a threat, which he repeated at the hearing:

[32] ...Concurrent with that, I will then also be filing a motion in CA No. 528419 to be heard at the same time, seeking to have the discontinuance set aside or otherwise leave provide[d] to set new dates set [*sic*] to move forward with the substance of that appeal...I will be looking to proceed with the CA 528419 if the Respondent has the senseless audacity to seek costs in all the circumstances.

[28] The appellant did not point to any authority for his position that the respondent must initiate a stand-alone motion for costs. *CPR* 90.46(2) does not stipulate this. The appellant's position strikes me as unreasonable and inefficient. The appellant had the opportunity to respond to the motion and he took it. I am satisfied it is appropriate to order the appellants pay the respondent forthwith costs in the amount of \$500 for the discontinued appeal, CA No. 528419.

Delivery of Filings by the Appellant to the Respondent

[29] On November 28, 2023, the Chambers Judge issued an amended Order arising out of the October 18, 2023 Special Chambers hearing. It included the following provision:

The individual Plaintiff, Donn Fraser, shall refrain from personally attending the private Quarry Island Sub-division, including 22 Quarry Lane, for any purpose connected with this proceeding, including for the purpose of serving or delivering documents for the Plaintiffs, unless and until further order of this Court.

[30] The November 28, 2023 Amended Order is not under appeal and has not been stayed.

[31] The respondent indicated in Chambers before me that the appellant had hand-delivered to his home a hard copy of the Appeal Book. (As I noted earlier, being provided with a hard copy had been the subject of a motion by the respondent.) This happened on July 9, 2024. The appellant does not deny it.

[32] The purpose of the March 18, 2024 Order is clear from Justice Lynch's statements at the end of the Special Chambers hearing in which she referred to the appellant's "disgraceful conduct, and cursing at Mr. MacIntosh at his home and telling him to do what he was told...I don't see why Mr. MacIntosh should have to have him on his property". She accepted the evidence from Mr. MacIntosh "with regard to the concern that his family is expressing" and his indication of what had occurred on an earlier occasion (August 17, 2023) when the appellant went to the respondent's home to deliver documents.

[33] Filings in relation to the appeal from the Chambers Judge's Costs decision are connected to the proceeding before her. The Order is a valid exercise of the court's authority in relation to the proceedings out of which the costs award arose. The appellant is not to disregard it.

Derrick, J.A.