

NOVA SCOTIA COURT OF APPEAL

Citation: *Fraser v. Nova Scotia Barristers' Society*,
2025 NSCA 8

Date: 20250205

Docket: CA 536690

Registry: Halifax

Between:

Donn Fraser

Appellant

v.

Nova Scotia Barristers' Society,
a statutory body, including or as represented
by its Complaints Investigation Committee and
Elaine Cumming and Julie MacPhee

Respondents

Judge: Bourgeois, J.A.

Motion Heard: January 23, 2025, in Halifax, Nova Scotia in Chambers

Written Decision: February 5, 2025

Held: Motion dismissed with costs

Counsel: Donn Fraser, self-represented appellant
Ewa Krajewska and Erik Arsenault, for the respondents, Nova
Scotia Barristers' Society and Elaine Cumming
Julie MacPhee, self-represented respondent

Decision:

[1] On January 23, 2025 I heard a motion brought by the Nova Scotia Barristers' Society (the "NSBS") asking I direct that the appellant, Donn Fraser, be prohibited from withdrawing certain grounds of appeal. The appeal is scheduled to be heard on April 2, 2025.

[2] In the alternative, the NSBS requested if the grounds are withdrawn, I direct that the appellant be barred from raising those grounds in a subsequent appeal. The NSBS asked for costs on the motion.

[3] The respondent Julie MacPhee supported the NSBS' motion and filed an affidavit in which she raised concerns regarding the appellant's conduct towards her. She requested the NSBS' motion be granted, and she be awarded a total of \$1,500.00 in costs against the appellant.

[4] The appellant opposed the motion. He filed materials in reply to not only the NSBS' motion, but the affidavit filed by Ms. MacPhee. He asked for the motion to be dismissed, with costs payable by both respondents.

[5] At the conclusion of the hearing, I advised the parties the NSBS' motion was dismissed. I reserved on the issue of costs and promised written reasons to follow. These are my reasons.

Background

[6] Some procedural background will be of assistance in placing the arguments advanced and the disposition of the motion in context.

[7] The respondent MacPhee is a practising member of the NSBS. The appellant filed complaints with the NSBS alleging professional misconduct on the respondent MacPhee's part. A Complaints Investigative Committee issued two decisions resolving the complaints.

[8] The appellant filed a Notice of Judicial Review in which he sought to challenge the above-noted decisions. A number of procedural motions were brought by the parties, several of which were heard by Justice Frank Hoskins of the Supreme Court of Nova Scotia.

[9] Justice Hoskins released a written decision on June 14, 2024 in which he disposed of a number of motions (2024 NSSC 173). The resulting order was issued on September 3, 2024.

[10] On September 16, 2024 the appellant filed a Notice of Application for Leave to Appeal (Interlocutory) in which he raised a number of grounds of appeal in relation to the order issued September 3, 2024.

[11] Justice Hoskins recused himself from the matter. The issue of costs in relation to the disposition of the motions was directed to Justice James Chipman. After hearing from the parties, Justice Chipman released a written decision on September 25, 2024 on the issue of costs (2024 NSSC 288).

[12] On October 7, 2024, the appellant filed an Amended Notice of Application for Leave to Appeal (Interlocutory) in which he added grounds of appeal relating to Justice Chipman's decision. In the Amended Notice, the appellant noted "[t]he Order concerning the Costs Decision has not yet issued, but the [Chipman Written Decision] was issued dated September 25, 2024 and once issued the related Order will be included in the Appeal Book".

[13] The Motion for Date and Directions was heard in chambers on October 10, 2024 at which time the appeal hearing date was scheduled for April 2, 2025. Filing dates were set. This included a direction that the appellant's factum and fresh evidence motion be filed by January 10, 2025.

[14] On January 9, 2025 the appellant filed a Notice of Motion, returnable on January 16, 2025 seeking to extend the filing date of his factum and fresh evidence motion from January 10, 2025 to January 20, 2025. The NSBS consented to the motion, with a corresponding extension to its subsequent filing date. The respondent MacPhee opposed the motion. I granted the motion.

[15] On January 10, 2025, the appellant filed a document entitled "Notice of Limited Withdrawal" in which he withdrew the grounds of appeal relating to the Chipman costs decision but stating he reserved the right to subsequently appeal "as to costs only (if necessary)".

[16] On January 16, 2025 the NSBS filed the current motion in which it moved “for directions pursuant to Rule 90.27(1) with respect to the Appellant’s discontinuance of his appeal against a costs decision. . .”.

[17] The appellant filed his factum and fresh evidence materials on January 20, 2025 in accordance with the extended date.

[18] At the time of hearing the motion, I was advised the order in relation to the costs decision had yet to be issued. More details in that regard follow below.

Analysis

[19] The primary submission of the NSBS is that I should direct the appellant to proceed with his pled grounds of appeal in relation to the costs decision at the appeal hearing on April 2, 2025. In its written submissions the NSBS explained:

11. ...Mr. Fraser’s purported withdrawal runs counter to the tenor of Part 18 of the *Civil Procedure Rules* in general. Rule 90.15 entitles him to appeal from a decision for which no order is issued – as was the case here – provided that he file the order before the appeal is set down for hearing. Clearly, this Rule does not permit Mr. Fraser to put both Respondents and Court into limbo while he muses on the correct time to bring his costs appeal simply because the decision appealed from has not yet been formalized into an order.

12. Rather, the *Rules* suggest the exact opposite. Rule 90.13(4) states that an appeal from a decision of a court that has not issued an order is subject to the deadlines as an appeal from a decision that has resulted in an order. In other words, the order changes nothing in the procedure governing an appeal.

13. Mr. Fraser cannot have it both ways. He decided to seek leave to appeal from the decision rather than the order. He is bound to that choice, and cannot withdraw these proposed grounds of appeal only to revive them once the order has issued. In fact, Rule 90.13 strongly suggests that he would be well out of time to do so. He must pursue his appeal with respect to costs now or not at all.

[20] I am aware of no authority that would permit a judge in chambers to compel an appellant to argue specific grounds of appeal. Nor am I aware of any authority that would allow a judge in chambers to pre-emptively bar an appellant from raising specific grounds of appeal in a future proceeding.

[21] When questioned as to what authority the NSBS was relying on, counsel submitted two sources: firstly, Rule 90.27 and secondly, “the Court’s” inherent jurisdiction to prevent abuses of process. In my view, neither give me the power to do what the NSBS sought. I will explain.

[22] Rule 90.27 states:

90.27 Motion by respondent for directions

- (1) A respondent in an appeal may make a motion to a judge of the Court of Appeal to set the time and date for the appeal to be heard and for directions for the appeal, including as to the appeal book and factums to be filed by the parties.

(Underlining added)

[23] The NSBS argued the above provision provides a chambers judge with the authority to give wide ranging “directions” including compelling an appellant to continue with pled grounds of appeal and prohibiting an appellant from raising identified grounds of appeal in future. With respect, the position advanced by the NSBS is untenable and demonstrates a fundamental misunderstanding of the relevant Rules and role of a chambers judge.

[24] Rule 90.27(1) is used when an appellant has not made a Motion for Date and Directions and the respondent seeks to have the appeal set down. “Directions” in this context is intended to address procedural requirements such as filing dates, not substantive issues. A review of Rule 90 demonstrates that a chambers judge has limited authority to address substantive matters, but is tasked with making procedural decisions¹. In my view, compelling an appellant to proceed with certain grounds and alternatively prohibiting certain grounds from being advanced in future are substantive matters which only a panel of the Court should consider.

[25] The NSBS’ second source of authority is equally problematic. There are two main problems with asking a chambers judge to exercise the Court’s inherent jurisdiction to prevent an abuse of process. Firstly, as Rule 90 makes clear, “the Court” and a judge in chambers are two different entities. As noted above, the authority of a single judge in chambers, is much narrower than the “Court”. The

¹ See for example Rule 90.12(1) - granting leave to appeal; Rule 90.19 – permitting intervention; Rule 90.30(5) – abridging the contents of an appeal book; Rule 90.41 – granting a stay of execution; Rule 90.42 – granting security for costs; and Rule 90.43 – dismissing an appeal for failure to perfect.

NSBS did not explain how a chambers judge could exercise “the Court’s” inherent jurisdiction.

[26] The second problem is that even if as a chambers judge, I possess the inherent jurisdiction to control the Court’s processes in the face of an abuse of process, the NSBS has not demonstrated that the appellant’s conduct – seeking to withdraw the grounds of appeal relating to the costs decision and reserving the right to appeal the issued order – is abusive.

[27] As noted earlier, at the time of the motion hearing, Justice Chipman had yet to issue an order in relation to his written costs decision. The unchallenged evidence filed on the motion by the appellant provides the following factual context:

- Following the release of the costs decision, a draft order was prepared by counsel for the NSBS on October 3, 2024 and circulated to the appellant and counsel for the respondent MacPhee;
- On October 10, 2024, the appellant wrote to the respondents attaching a revised order for their respective considerations;
- On October 22, 2024 counsel for the NSBS wrote to the parties indicating that some of the appellant’s suggested changes were agreeable, but others were not;
- On October 23, 2024 the appellant wrote to the respondents regarding the draft order and advised:

I am not aware of anything in my redraft that is not in keeping with the actual written decision of Justice Chipman and the qualifier you seek to add seems to be something not reflected in Justice Chipman’s written decision. However, if there is something in my redraft version which you believe is not accurate relative to what Justice Chipman’s cost decision actually was, please identify what precisely is that inaccuracy.

Otherwise, I asked (sic) my version of the Order be submitted for issuance.

- There was no further communication between the parties in relation to formalizing an order for the balance of 2024. It would appear that the next communication in that regard was on January

9, 2025 when counsel for the NSBS sent the following email to the appellant:

Mr. Fraser,

I don't think the costs order has been approved as to form and content.
Can you confirm your approval and I will send it to the Prothonotary to be issued and entered?

- In an email the same day, as well as on January 10, 2025, the appellant referenced counsel for the NSBS to his position as stated in his October 23, 2024 email.

[28] On the motion, the NSBS argued the absence of an order from Justice Chipman is irrelevant and would not prevent the appellant from arguing the grounds of appeal relating to costs at the April 2nd hearing. The NSBS is mistaken. The appeal of the cost decision cannot proceed without an issued order.

[29] Although an appellant can file an appeal upon receipt of a written decision from a Supreme Court justice, that matter cannot be set down until such time as an order is issued. Rule 90.15 provides:

90.15 Appeal from decision

A person may appeal from a decision for which no order is issued, and the person must file the order before the appeal is set down for hearing unless the decision is of a tribunal that does not issue an order.

[30] At the time the appeal hearing was scheduled, the only order issued was that of Justice Hoskins. As such, the April 2nd hearing date could only be considered as being tentative in relation to the costs decision pending receipt of an issued order. As reflected in the above Rule, it is the longstanding practice of the Court that an appeal will not be heard in the absence of an order (unless it is from a tribunal that does not issue orders).

[31] However, the appellant's factum was due to be filed on January 10th (later extended to January 20th) in which he was to set out his arguments on appeal. In the absence of an order, the appellant sought to withdraw the costs grounds and proceeded to file his factum only in relation to the grounds arising from the Hoskins order. I do not view the appellant's approach, given the facts of this case, as being improper or abusive.

[32] Without an issued order, this Court will not hear grounds of appeal relating to the costs decision. It would be unreasonable to force the appellant to proceed to prepare for these grounds, including setting out his arguments in his factum. His withdrawal of those grounds simply reflected the above Rule and the practice of this Court. As of the date of the motion (three days past the deadline for the appellant's factum), the costs order had still not been issued.

[33] This is not a situation where the appellant delayed having the order taken out. The evidence satisfies me he was participating in attempts to reach agreement regarding the form of the order. It was the NSBS who did not follow up in a timely way following the appellant's email of October 23, 2024. The absence of an order, and the impact it has on the ability to have the costs appeal heard at the same time as the grounds relating to the Hoskins order, falls at the feet of the NSBS. The appellant's withdrawal of these grounds is not abusive conduct and presuming I had the authority to do so, I would not compel him to argue them on April 2nd.

[34] As noted earlier, I am similarly of the view that I have no authority as a chambers judge to bar the appellant from raising grounds of appeal in future in relation to the costs order. As contemplated in Rule 90.44, any argument in that regard would need to be made to the Court, not a chambers judge, once the appellant files an appeal of the costs order:

90.44 Quashing or dismissing appeal

- (1) A party to an appeal may make a motion to the Court of Appeal at any time before or at the hearing of the appeal for an order setting aside the notice of appeal or dismissing the appeal on either of the two following grounds:
 - (a) the appeal is frivolous, vexatious, or without merit;
 - (b) the appellant has unduly delayed perfection of the appeal.
- (2) A party who makes a motion for an order setting aside the notice of appeal or dismissing the appeal must, no later than fifteen days after the day the notice of motion is filed, make a motion to a judge in chambers for directions on the motion for an order to set aside or dismiss, including setting a date to hear the motion and as to the record and written submissions to be filed by the parties.

[35] As a final matter, I turn to costs. Although both the NSBS and respondent MacPhee asked for costs to be awarded against the appellant on the motion should it be granted, once it became apparent the motion was to be dismissed, both argued costs should be awarded to the successful party on appeal.

[36] In my view, costs are warranted on the motion. Notwithstanding the appellant is self-represented, he was required to prepare a response to the NSBS' motion which, as I have found, was misguided and reflected a misunderstanding of the relevant *Civil Procedure Rules* and practices of this Court. The motion was unnecessary and non-sensical.

[37] As for the respondent MacPhee, her affidavit was irrelevant to the issue of whether I should (or could) direct the appellant to argue certain grounds of appeal and whether I should (or could) bar him from raising future grounds of appeal.

[38] For the reasons set out above, the motion is dismissed. The NSBS shall forthwith pay costs of \$500.00 to the appellant. The respondent MacPhee shall forthwith pay costs of \$200.00 to the appellant.

Bourgeois, J.A.