NOVA SCOTIA COURT OF APPEAL
Citation: *B.A. v. J.F.*, 2025 NSCA 53

Date: 20250623
(Addendum): 20250625
Docket: CA 537433
Registry: Halifax

Between:

B.A.

Appellant

v.

J.F.

Respondent

Restriction on Publication: s. 8 *Intimate Images and Cyber-protection Act*

Judge:	Derrick, J.A.
Motion Heard:	June 19, 2025, in Halifax, Nova Scotia by correspondence
Written Decision:	June 23, 2025
Addendum:	June 25, 2025
Held:	Motion granted; appeal dismissed.
Counsel:	Juliana Saxberg, for the appellant Mitchell Broughton, for the respondent

Intimate Images and Cyber-protection Act

8 (1) Subject to the regulations, where any person involved in a proceeding relating to an application made under Section 5 is a minor, no person shall publish or broadcast the name of that person, or any information likely to identify that person.

(2) In a proceeding to which subsection (1) applies, the Court shall identify the person by a pseudonym.

(3) For greater certainty, this Section continues to apply once the person is no longer a minor.

Decision:

Introduction

[1] These reasons address the respondent's Motion to dismiss the appellant's appeal for failure to perfect it as required by the Nova Scotia *Civil Procedure Rules*.

[2] I agreed to deal with the Motion by correspondence pursuant to *Civil Procedure Rule* 90.35(1)(e). This was communicated to counsel for the parties in an email of June 6, 2025. In addition, the parties were advised I would not entertain any other motions prior to dealing with this one. I directed that the appellant would have until 4:30 p.m. AST on Thursday, June 19, 2025 to file a response to the respondent's Motion. I further directed that any response was to be filed in accordance with the *Civil Procedure Rules*, including being copied to respondent counsel.

[3] For the reasons to follow, I have concluded the Motion should be granted and the appellant's appeal dismissed pursuant to *Civil Procedure Rule* 90.43(4).

Background to the Motion

[4] The history of this appeal is relevant to my determination of the Motion.

[5] By Order of Justice Timothy Gabriel of the Nova Scotia Supreme Court, issued March 20, 2025, the appellant was ordered to pay damages and costs to the respondent for engaging in cyber-bullying as defined in the *Intimate Images and Cyber-protection Act*, S.N.S. 2017, c.7. The trial judge's decisions are reported at 2024 NSSC 275 (merits decision) and 2025 NSSC 86 (costs decision).

[6] On October 15, 2024 the appellant filed a Notice of Appeal against the finding of liability and award of damages. An appeal against costs was added by way of an Amended Notice of Appeal filed in April 2025.

[7] After the filing of the October 2024 Notice of Appeal the next step in the appeal process was for the appellant to file a Motion for Date and Directions for dates to file the Appeal Book, the facta and Books of Authorities, and to obtain a date for the appeal hearing. In accordance with *Civil Procedure Rule* 90.25(2), the original deadline for filing the Motion was February 11, 2025, eighty days after the

filing of the Notice of Appeal. Counsel for the parties were advised of this in correspondence from the Court's Registrar dated November 6, 2024.

[8] The Registrar's letter was explicit:

> *Civil Procedure Rule* 90.25(2) requires the Motion for Date and Directions to be heard no more than eighty (80) days after the day the Notice of Appeal is filed; If the motion is not heard within that time, I as the Registrar, will 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*.
>
> By way of further assistance, your eighty (80) day period commenced running October 16, 2024. This means you must have your motion heard on or before February 11, 2025.

[9] The appellant did not schedule a Motion for Date and Directions to be heard by the February 11, 2025 deadline. On February 11, appellant counsel wrote to the Court requesting an extension of time to file the Motion. With the respondent's consent an extension was granted to February 26, 2025.

[10] Appellant counsel found she was unable to meet the February 26 date and, as a consequence, obtained the respondent's consent to a further extension of time to March 19, 2025. She did not advise the Court of the further extension.

[11] In an affidavit she filed on April 17, 2025, appellant counsel set out her reasons for not filing the Motion for Date and Directions on February 26:

- The "complexity of the legal issues involved in this appeal" which required "extensive preparation, research, and consultation" with her client;
- The release of the trial judge's costs decision only on March 4, 2025 "which necessitated additional consideration of how to address both the main appeal and costs issues".
- The appellant encountering "barriers in securing sufficient funds" to pay for the costs associated with perfecting the appeal, including filing costs, transcription costs and costs associated with hiring an agent to attend to filing documents in Halifax;
- Sensitivity related to the appellant's Indigenous identity and experiences "required careful consideration in preparing appeal materials";

- The effects of a fall sustained by appellant counsel on January 11, 2025 that caused a concussion which kept her away from her office for a week and reduced her ability to work to full capacity for several weeks afterwards.

[12] Appellant counsel indicated in her affidavit that in addition to obtaining the consent of respondent counsel to an extension of time for the Motion for Date and Directions to March 19, they had discussions about dates in March for "the possible hearing of the Motion for Directions".

[13] Appellant counsel did not obtain a court date in March for this Motion. On March 19, 2025, she was sent an email from the Court asking that she advise on or before March 28, 2025 about the appellant's intentions with respect to the appeal. The email indicated: "Failure to inform the Court of steps to be taken to perfect this appeal before that date may result in a summary dismissal of the appeal".

[14] Correspondence from appellant counsel was received by the Court on March 28, 2025 advising of the appellant's intention to make a motion to extend the time to file the Motion for Date and Directions and noting that Justice Gabriel's costs decision had only been released on March 4, 2025.

[15] Unaware of the correspondence, the Chambers judge on March 28, 2025 granted an Order dismissing the appeal due to the appellant's failure to make the Motion for Date and Directions within the time provided in the *Civil Procedure Rules* or the extensions of time provided by the Registrar. Then, upon receipt of the March 28 correspondence from appellant counsel, the Chambers judge set aside his March 28 Order. He ordered the appellant to "make a motion to extend the time for filing a Motion for Date and Direction on or before April 19, 2025".

[16] On April 17, 2025, appellant counsel filed a Notice of Motion for an extension of time to perfect the appeal. It was supported by her affidavit and an affidavit from the appellant sworn April 16, 2025. The Motion attached a Certificate of Readiness that indicated the appellant had prepared a draft index for the Appeal Book and anticipated filing the Appeal Book "no later than May 30, 2025".

[17] In addition, on April 17, 2025, appellant counsel filed a Motion for a stay of the damage and costs awards by the trial judge.

[18] Counsel for the parties attended Court of Appeal tele-Chambers via teleconferencing on April 30, 2025. The running file notes prepared by the Chambers judge for the Court file indicate what occurred:

- The appellant's Motion for an extension of time was granted.
- The respondent consented to the filing of an Amended Notice of Appeal.
- The Motion for Date and Direction was heard and dates were set. The appellant was to file the Appeal Book no later than May 30, 2025. On June 23, 2025 the appellant was to file her factum, Book of Authorities and fresh evidence motion materials, and on July 22, 2025 the respondent was to file his factum, Book of Authorities and reply to the appellant's fresh evidence motion.
- The appeal was scheduled to be heard for a full day (to accommodate the hearing of the fresh evidence) on October 8, 2025.
- Appellant counsel was directed to familiarize herself with the Court's Rules, i.e. the *Civil Procedure Rules*, and Practice Directives.
- The appellant's Motion for a stay was not opposed by the respondent. The determination of whether the stay should be granted was left to the discretion of the Court. The Chambers judge indicated she was "inclined" to order the stay but had not been provided with a draft Order. She directed the appellant counsel to prepare a draft Order and present it to respondent counsel to review and provide consent as to form. Appellant counsel was to submit the consented-to Order to the Chambers judge who would then grant the stay if satisfied with the Order.

[19] The appellant's Amended Notice of Appeal was filed on April 30, 2025.

[20] The appellant did not file the Appeal Book by May 30, 2025. No Motion was filed for an extension of time for filing.

[21] No stay Order was provided to the Chambers judge to review. Consequently, there is no Court order staying the damages and costs Orders of the court below.

[22] On June 3, 2025, appellant counsel faxed the Registrar of the Court seeking "a further case management conference call" to address two matters: (1) the lower court did not appear to have filed its Order from the trial decision and costs; and (2) with the exception of the missing lower court Order, the Appeal Book was

complete although “the Respondent has declined to review our Appeal Book in order to provide agreement on its contents”.

[23] The costs Order was issued by the lower court on March 20, 2025. There is a copy of it in the Court of Appeal file.

[24] Appellant counsel was advised in an email of June 3, 2025 from the Court that the appeal was not being case managed. She was directed to file a motion for Chambers to deal with the issues she had raised.

[25] On June 5, 2025, respondent counsel filed the Motion to dismiss the appeal for failure to perfect with a request for the Motion to be heard by correspondence.

The Respondent’s Motion to Dismiss

[26] Respondent counsel indicated in a covering letter to his Motion that the request for the matter to be heard by correspondence was due to appellant counsel advising she was unavailable for Court of Appeal regular Chambers on the next scheduled dates of June 19, 26 and July 3, 2025. Respondent counsel is local. Appellant counsel practices in Ontario.

[27] The respondent’s motion included the affidavit of counsel affirmed June 4, 2025 in which he explained his exchange with appellant counsel about the Appeal Book. He attached as exhibits copies of emails with appellant counsel.

[28] Respondent counsel disputed appellant counsel’s allegation that he had “declined to review [the] Appeal Book in order to provide agreement on its contents”. He said that on May 30 at 3:20 p.m. he received an email from appellant counsel attaching a “draft index” for the Appeal Book and asking that he “(1) review the attached index and provide us with your advice as to whether documents are missing or documents are included that should not be included, and (2) consent to a brief extension of time for the finalization and filing of this appeal book”.

[29] In an email to appellant counsel on May 30 at 4:01 p.m. respondent counsel declined to provide advice on the proposed content of the Appeal Book. He said he would need a complete copy of the Appeal Book to address any objections he might have to what the appellant proposed to include. Shortly beforehand he had emailed appellant counsel to advise his client did not consent to a further extension to file the Appeal Book.

[30] An email from respondent counsel to appellant counsel on June 3, 2025 at 10:40 a.m. acknowledged receipt of the Appeal Book that morning (in digital form) and noted problems with its contents and format.

[31] The respondent made the following submissions in support of the Motion to dismiss:

- The appellant has not provided any good reasons for defaulting on the requirement to file the Appeal Book. Indicating she did not have the lower court Order is not a valid excuse. The Order was available as it was issued on March 20, 2025. The Appeal Book could have been filed on time without it in any event and a Supplementary Appeal Book filed with the Order.
- There was no obligation on the respondent to review the contents of the Appeal Book. As noted, respondent counsel did not refuse to review it and indeed, on June 3 with a digital copy in hand, made comments on content and format.
- It was the appellant's obligation to prepare and file the Appeal Book in accordance with the *Civil Procedure Rules*.
- The appellant's grounds of appeal do not raise arguable issues.
- The continual delays and failure by the appellant to advance her appeal does not indicate good faith.
- The pattern of conduct with respect to requests for extensions and failure to meet deadlines indicates the appellant either does not have the willingness or does not have the ability to comply with future deadlines. The Court has had to prod the appellant to try and move the appeal forward.
- The appellant waited until the day the Appeal Book was due to be filed—May 30, 2025—to ask the respondent for a further extension of time.
- The appellant has consistently not complied with the *Civil Procedure Rules*.
- The respondent will be prejudiced if the Motion to dismiss is not granted. He will incur ongoing legal expenses and further delay in obtaining the relief awarded him at trial. The appeal was launched in October 2024 and there have been multiple delays and a failure by the appellant to advance the appeal.

- The Court's resources and time are being consumed by the additional correspondence and prompting by staff in an effort to move the appeal along.

[32] The respondent seeks costs of the Motion.

Civil Procedure Rules 90.43(2) and (4)

[33] The respondent's motion was brought pursuant to *Nova Scotia Civil Procedure Rule* 90.43(2) and (4). *Rule* 90.43 provides:

> (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.

[34] *Rule* 90.43(2) provides that where an appellant has failed to perfect an appeal, the respondent may make a motion to a judge to set down the appeal for hearing or, if five days notice is given to the appellant, to dismiss the appeal.

[35] *Rule* 90.43(4) provides a judge with the discretion, on motion of a party or the Registrar, to direct perfection of an appeal, set the appeal down for hearing, or on five days notice to the parties, dismiss the appeal.

The Filing of the Appellant's Response to the Motion

[36] The filing by the appellant of a response to the Motion followed a familiar and consistent pattern. It was down to the wire—almost literally at the last minute. Very shortly before 4:30 p.m. on June 19, the appellant filed her response, a document entitled "Appellant's Response to the Respondent's Motion to Dismiss Appeal". She also sought to file the following:

- A "cross-motion" for extension of time to file the Appeal Book.
- The Appeal Book described as Volumes 1 & 2.

- Appellant's Statement of Particulars.
- Notice of Constitutional Question.

[37] The above-noted materials were accompanied by a covering letter dated June 19, 2025 from appellant counsel to the Registrar. Appellant counsel quoted from the Court's June 6 letter containing the directions for the hearing of the respondent's Motion to dismiss. Appellant counsel indicated the June 19 filings were in response to the Motion to dismiss.

[38] I directed the Registrar to only accept for filing the "Appellant's Response to Respondent's Motion to Dismiss Appeal" document. The Appeal Book and the Appellant's Statement of Particulars did not comply with the *Civil Procedure Rules*. The Appeal Book did not adhere to the requirements of *Rule* 90.30. The *Rules* do not contemplate a Statement of Particulars in an appeal or on a motion. The "Cross-Motion" for an extension of time to file the Appeal Book was contrary to my explicit direction that I would not entertain any other motions until I had dealt with the respondent's Motion to dismiss. The Notice of Constitutional Question was not accompanied by an affidavit of service on the Attorney General.

[39] A Motion in Appeal Court Chambers is typically supported by an affidavit or affidavits. The appellant's response was in the form of a brief. No affidavit was filed in support of the Motion.

The Appellant's Response to the Motion to Dismiss

[40] The appellant's response asserts the following:

- The respondent's Motion is "substantively without merit and abusive to this Honourable Court's procedures".
- The Motion "seeks to deny the Appellant her right to appeal based on a short delay in filing the Appeal Book that has caused no prejudice to the Respondent".
- The Motion would prevent the Court from considering "an appeal of substantial public importance".
- The appeal "represents one of the first opportunities for this Honourable Court to interpret and apply the *Intimate Images and Cyber-protection Act* […] the constitutional validity of the *Act*'s interpretation and application is central to this appeal".

- The judge's interpretation of the *Act* has resulted in "multiple *Charter* violations that cannot be justified under section 1".
- It is "essential that this Honourable Court intervene to ensure the *Act* is interpreted and applied in a manner that meets the *Oakes* test requirements and ensures *Charter* compliance". (The appellant is referring to *R. v. Oakes*, [1986] 1 S.C.R. 103.)
- The factors in *Islam v. Sevgur*, 2011 NSCA 114 "overwhelmingly favour allowing this appeal to proceed on its merits".

[41] I address the appellant's submissions in relation to the *Islam v. Sevgur* factors below.

The Legal Principles that Govern a Motion to Dismiss

[42] In *Islam v. Sevgur*, 2011 NSCA 114, Saunders, J.A. summarized the principles governing a Chambers judge's discretion to dismiss an appeal for failure to perfect and set out a list of non-exhaustive factors to be considered:

> [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.

[43] The task before me requires a weighing and balancing of these factors, "together with any other circumstances" I may consider relevant to the exercise of my discretion (*Islam v. Sevgur* at para. 37). As Bourgeois, J.A. held in *LeBlanc v. LeBlanc*, 2023 NSCA 48 at para. 17, evidence is critical to explain why an unperfected appeal should not be dismissed:

> […] 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.

Applying the Principles

[44] *Islam v. Sevgur* was decided in the context of a Registrar's motion to dismiss an appeal for failure to perfect. The legal principles apply equally to a respondent's motion to dismiss an appeal. I endorse the overarching view of Saunders, J.A. that the *Civil Procedure Rules* and the explicit directions to the appellant from the Registrar in the standard letter about perfecting an appeal "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" (at para. 39).

[45] In this case, the Registrar's standard letter was sent to counsel for the parties on May 2, 2025. As is the Court's procedure, the letter is sent out following the hearing of a Motion for Date and Directions. Amongst other "Filing Instructions", the letter said:

> **Appeal Book**: For content and format requirements for the Appeal Book, please refer to *Civil Procedure Rule* 90.30 for civil matters.
>
> **Factum and Book of Authorities**: For content and format requirements for the Factum and Book of Authorities please refer to: *Civil Procedure Rules* 90.32 and 90.33 for civil matters.

[46] On the second page of the letter the Filing Information and Deadlines are set out precisely as reproduced below:

Filing Information and Deadlines		
	Number of Print and Electronic Copies	**Filing Deadline**
Appeal Book	**Printed:** Five (5) copies for the Court and One (1) copy for each other party, **AND** **Electronic** (transcript only)**:** by email or USB	**May 30, 2025**
Appellant's Factum and Book of Authorities	**Printed**: Five (5) copies for the Court and One (1) copy for each other party, **AND** **Electronic Factum**: by email or USB	**June 23, 2025**
Fresh Evidence Materials	**Printed: Five (5) copies for the Court and One (1) copy for each other party, AND** **Electronic Factum: by email or USB**	**June 23, 2025**
Reply to Fresh Evidence and Respondent's Factum and Book of Authorities	**Printed**: Five (5) copies for the Court and One (1) copy for each other party, **AND** **Electronic Factum**: by email or USB	**July 22, 2025**
Extra Copies for you to Deliver to Each Other Party	**You must file an extra copy of each document for each other party.** This is in addition to the five (5) copies that the Court will keep. These extra copies will be court stamped and returned to you for delivery on the other parties. *e.g.*: If there are two parties to the appeal, you will have to file seven copies of each document with the Court. The Court will keep five and return two to you – one for yourself, and one for you to deliver to the other party.	

How to File	Email electronic documents to: appealcourt@courts.ns.ca or provide by USB. Print copies and USBs may be filed by mail, courier, or by in-person drop-off at the Law Courts.
How to get a Filing Extension	**To extend a filing date**: Contact the Registrar. The Registrar may grant filing extensions if all parties agree to the extension and all documents are filed at least one month before the appeal hearing date. **To request a new hearing date or request extensions the other parties do not agree to**: a motion must be made to the Chambers Judge.
Consequences for Missed Deadlines	**Failure to meet above-noted filing dates may result in this appeal being dismissed by the presiding judge.**

[47] It is to be remembered that the Registrar's May 2 filing instructions letter was only the latest correspondence to the appellant about advancing and perfecting the appeal. As I reviewed earlier, letters or emails were sent to the appellant on November 6, 2024 and March 19, 2025. Furthermore, the Order of the Chambers judge of March 28 dismissing the appeal should have been viewed by the appellant as a near-death experience insofar as the appeal was concerned.

[48] In her response to the respondent's Motion, the appellant minimizes and understates the history of the delays that have plagued this appeal. I also note the appellant provided no evidence in support of her response. This alone could justify allowing the Motion. However, I decided to determine the Motion on the basis of appellant counsel's written submissions.

[49] The following explains my application of the *Islam v. Sevgur* factors to the Motion:

The "Good Reasons for Default" Factor

[50] The appellant describes her delay in filing the Appeal Book as "brief" and "caused by confusion respecting the final order of the lower court". These submissions are neither accurate nor persuasive. The appellant knew at the April

30 tele-Chambers appearance that she had until May 30 to file the Appeal Book. May 30 was the date she identified for filing. She did not file on May 30. She did not seek an extension of that filing deadline. She attempted to file a non-compliant version of the Appeal Book on June 19. This familiar pattern of delay-causing conduct by the appellant is drawn-out, not brief.

[51] There is no evidence the appellant made any effort to track down the lower court Order that had been issued on March 20, 2025. There cannot have been any confusion involved. There were a number of options available to appellant counsel: contacting the Nova Scotia Supreme Court, asking the Registrar for the Court of Appeal how to obtain the Order, asking respondent counsel how she might locate it. There is no indication she did anything at all.

[52] It was not, as the appellant claims, "impossible" for her to perfect her appeal before the deadline of February 11 and the extended deadline of February 26 because she did not have the costs Order. Those deadlines were for her Motion for Date and Direction which required her to file a Certificate of Readiness pursuant to *Rule* 90.26. An omission of a required component of a Certificate of Readiness, such as the Order being appealed from, can be explained in an affidavit in support of the Motion for directions (*Rule* 90.26(4)).

[53] As the respondent points out, the appellant could also have filed an Appeal Book without the Order and then filed a Supplementary Appeal Book containing it.

[54] The appellant contends that "determining the contents of an Appeal Book may be confusing and requires at least some collaboration between counsel" and argues this applies in her case. I do not accept this argument. There is nothing to show the appellant reached out to the respondent about the content of the Appeal Book until her email to respondent counsel on May 30 at 3:20 p.m.

[55] Furthermore, there was no obligation on respondent counsel to review and comment on the draft Appeal Book.

[56] I fail to see how respondent counsel's involvement would have been necessary in any event: the *Civil Procedure Rules* set out the content and format requirements for an Appeal Book. Even many unrepresented appellants succeed in filing *Rules*-compliant Appeal Books. A review of the trial judge's merits and costs decisions leads me to conclude that assembling a *Rules*-compliant Appeal Book for this appeal would not have been a complicated endeavour.

[57] The appellant has not shown valid reasons for defaulting on the requirements of the *Rules* and the direction of the Court.

The "Legitimate, Arguable Issues" Factor

[58] My review of Justice Gabriel's trial and costs decisions leave me in considerable doubt about there being arguable issues raised in the appellant's grounds of appeal.

[59] In her response to the Motion, the appellant says there are six grounds of appeal:

1) Judicial bias based on undisclosed conflicts of interest, use of inflammatory language, improper interventions during and after the trial, and "facilitation of submissions improperly targeting the appellant's counsel".
2) Errors in statutory interpretation "by failing to apply the correct test for cyberbullying, failing to consider statutory defenses, and conflating malice and recklessness".
3) Refusing to admit or consider relevant evidence. "The trial judge committed reversible error by rejecting the appellant's evidence in its entirety, which demonstrated bias and perpetuated harmful stereotypes".
4) Making findings unsupported by evidence regarding malicious intent, harm to the respondent, and the timing of communications.
5) Failure to interpret legislation "Consistently with Charter and Common Law Indigenous Rights" particularly in relation to freedom of expression, association and equality, "as well as common law Indigenous rights".
6) Awarding disproportionate damages that lacked an evidentiary foundation and improper and excessive punitive and "injunctive relief".

[60] My considerable doubt about there being "legitimate, arguable" issues advanced in this appeal is grounded in the following analysis. Of necessity I have gone into some detail.

<u>Bias Ground</u>

[61] Proving a reasonable apprehension of judicial bias requires clearing a high bar. There is a strong presumption of judicial impartiality which is a cornerstone of our legal system (*R. v. Nevin*, 2024 NSCA 64 at para. 49).

[62] The standard of proof for a reasonable apprehension of bias test is objective (*R. v. Nevin* at para. 50).

[63] The trial judge's reasons disclose no indication of bias. The appellant has brought forward no evidence to support her allegations of "inflammatory language, improper interventions during and after the trial", and "facilitation of submissions improperly targeting the appellant's counsel".

[64] The appellant did not seek the recusal of the trial judge.

[65] The appellant suggests the trial judge's "self-identification as a member of the Qalipu First Nation" is relevant to "the Appellant's impugned communications [including] an allegation that the Respondent had committed Indigenous identity fraud". The appellant indicates an intention to advance fresh evidence about the trial judge's "self-identification".

[66] There is nothing "fresh" about this evidence. It is a matter of public record and was available at the time of trial. That observation aside, it is not at all relevant to the appeal. Furthermore, the appellant's "impugned communications" about the respondent's Indigenous identity were not the focus at trial. As the trial judge said in his merits decision at para. 9: "It is abundantly clear that the Respondent [A.B.] has taken significant issue with the Applicant's [J.F.] claim to Indigeneity. However, he has chosen to concern himself, in this Application, with the more serious allegations against him contained in Exhibit 8" which the trial judge then summarized. Altogether, the trial judge's Indigenous identity has nothing whatsoever to do with this case.

Statutory Interpretation, Refusing to Admit/Consider Relevant Evidence, Findings without Support in the Evidence Ground

[67] The appellant's grounds in relation to statutory interpretation, refusing to admit or consider relevant evidence, and making findings without evidentiary support on a review of the trial judge's reasons do not strike me as being on solid ground. The trial judge made factual findings to which deference is owed on appeal in determining, in a careful review of the statutory provisions, whether the appellant's internet postings fell within the scope of the legislation. He extensively

detailed the content of the postings at paras. 8 and 9 of his merits decision. He found the only justification offered by the appellant for the publication of the impugned comments was "(in effect) that she believes them to be true" (para. 13). There is no obvious error of law in his interpretation of the legislation.

[68] The trial judge made reasonable factual findings about the postings, that most of them were "grossly offensive and indecent" and "maliciously intended" to cause harm to the respondent (merits decision at para. 37). Such findings are subject to deference on appeal.

Charter and Common Law Indigenous Rights Ground

[69] As for the ground of appeal alleging the trial judge failed to interpret the legislation "Consistently with the *Charter* and Common Law Indigenous Rights", the appellant says the judge made errors that "directly implicate the safeguards added to the new version of the *Act* in order to ensure *Charter* compliance including the test for cyberbullying, the existence of defences, and the standards of proof for intent and harm under the *Act*". However, the trial judge applied the definition and criteria for cyber-bullying to the facts before him. He addressed the burden of proof borne by the respondent "to prove each of the constituent statutory elements of the offence, on a balance of probabilities, in order to bring himself within the ambit of the remedial provisions set out in s. 6 of the *Act*" (merits decision at para. 22). He considered the applicability of the suite of statutory defences and found the appellant "had no legitimate defence to raise" (merits decision at para. 53). He made specific factual findings of harm in which he anchored the damage awards.

[70] Furthermore, the attempt by the appellant to file a Notice of Constitutional Question suggests she wants to argue on appeal what was not raised at trial, that the *Intimate Images and Cyber-protection Act* is unconstitutional. The general rule is that courts of appeal will not permit an issue to be raised for the first time on appeal "regardless of whether the arguments invoke the remedial powers of s. 24 of the *Charter* or the nullifying power in s. 52(1) of the *Constitution Act*" (*R. v. Roach*, 2009 ONCA 156 at para. 6).

[71] There is nothing to indicate the appellant raised "Common Law Indigenous Rights" before the trial judge.

[72] The appellant says there is a "compelling public interest" in her appeal proceeding to ensure that proceedings under the *Act* are not "weaponized by

abusive partners against survivors of intimate partner violence who attempt to speak about their experiences". I do not see any risk that granting the respondent's Motion will have this effect. This case was decided on its specific facts and the content of the postings by the appellant which the trial judge found to have been motivated by malice, not constituting fair comment or protected speech, and without any foundation in fact.

Excessive Damages Ground

[73] On appeal an award of damages made at trial "will not be altered unless there was no evidence on which the judge could have reached their conclusion, they proceeded on a mistaken or wrong principle of law or the result is so wholly erroneous that a Court of Appeal is entitled to intervene (*MacIsaac Estate v. Urquhart*, 2019 NSCA 25 at para. 43). An award of punitive damages may be reviewed for legal error or in the exercise of discretion (*Walker v. Walker*, 2025 NSCA 16 at para. 56). Damage awards are not lightly set aside on appeal.

[74] The trial judge considered the facts in this case and reached a conclusion about the seriousness of the appellant's misconduct. But for the respondent only seeking $70,000 in general damages, the judge indicated he would have awarded more. He imposed an award of $15,000 in punitive damages. There is nothing in his decision that indicates the application of a wrong principle of law or an exercise of discretion amounting to a manifest injustice.

Excessive Costs Ground

[75] As for the issue of the costs award being "excessive, arbitrary, and inconsistent with the law" I make two comments. An appeal against costs requires leave of the Court. Costs awards are discretionary and "courts of appeal will not interfere unless the judge applied wrong principles of law or the decision is so clearly wrong as to amount to a manifest injustice" (*Ponhook Lodge Ltd. v. Freeman Estate*, 2025 NSCA 3 at para. 54). There is nothing in the trial judge's costs decision that indicates any application of a wrong principle of law or manifest injustice.

[76] Indeed, the trial judge, taking note of the award of punitive damages, did not award solicitor-client costs despite having found the appellant's conduct "was actuated by malice toward J.F." (costs decision at para. 32). He held that "much, if

not all, of the misconduct on the part of B.A." had already been "censured" by the imposition of punitive damages (costs decision at para. 34).

[77] The trial judge's approach to damages and costs is inconsistent with the appellant's characterization of him as biased against her.

The "Failure to Meet Deadlines Not Constituting A Good Faith Effort" Factor

The "Ability to Comply with Future Deadlines and Rules Requirements" Factor

[78] Based on the history of this appeal, I do not have confidence in the appellant's ability to comply with future deadlines and requirements under the *Rules*.

[79] Despite the appellant having already cruised close to the abyss of having her appeal dismissed at the end of March 2025, she still did not comply with deadlines set by the Court. The ongoing delays and last minute extensions of time were endemic by May 30.

[80] I do not accept the appellant's characterization of her conduct as having "consistently demonstrated good faith in pursuing this appeal". The appellant's conduct of causing delays and seeking eleventh-hour extensions of time strongly suggests a lack of good faith in prosecuting this appeal. I am sceptical of the appellant's good faith. I have no confidence she will diligently comply with the *Rules* in future. The assertion in appellant counsel's brief that "The Appellant is fully prepared to meet all remaining deadlines" is not persuasive given the history of this appeal. Her transgressions reflect a pattern of either indifference toward the Court, the respondent and the *Rules*, or an unwillingness to comply with her obligations under the *Rules* and the Court's direction.

The "Obvious Prejudice to the Appellant Due to a Dismissal of the Appeal" Factor

[81] There is obvious prejudice to an appellant when a motion to dismiss an appeal is granted. The granting of the motion ends the appeal.

The "Prejudice to the Respondent Should the Motion Be Dismissed" Factor

[82] There is prejudice to the respondent if the Motion is denied and the appeal remains stalled or proceeds in a halting fashion with the attendant stress and frustration. The respondent is entitled to the appeal proceeding efficiently and promptly. He is entitled to expect the *Civil Procedure Rules* will deliver on their objective of ensuring "the just, speedy, and inexpensive determination of every proceeding" (*Rule* 1.01). He is also entitled to finality and an end to incurring the ongoing expense of responding to an appeal that is not being diligently pursued.

The "Public Interest in the Efficient Use of the Court's Resources and Time" Factor

[83] There is a public interest in the efficient use of the Court's resources and time. Appeals are to be perfected and heard in a timely way. The Court's time and resources have been unreasonably taken up with prompting the appellant to make progress in the appeal. The public interest is not served by permitting this to continue.

[84] I am not persuaded by the appellant's submission that "permitting the flawed and biased decisions of the lower court to stand will give rise to further flawed decisions and appeals concerning the interpretation of the *Act*". This supposes the appellant would be successful on appeal, an outcome that I have already identified as being in considerable doubt.

The "No Procedural or Substantive Impediments Faced by the Appellant" Factor

[85] There are no procedural or substantive impediments preventing the appellant from advancing her appeal. Nor have there been. The factors cited in appellant counsel's affidavit of April 17, 2025 (see para. 11 above) as impediments to proceeding with her Motion for Date and Direction by February 26, 2025 do not explain why she continued to fail to meet deadlines. Notably they are not mentioned as the reasons she did not file a *Rules*-compliant Appeal Book by the May 30 deadline. I addressed those reasons earlier, at paragraphs 50 to 57, and rejected them.

Conclusion

[86] In accordance with *Islam v. Sevgur*, the defaulting appellant had to satisfy me on a balance of probabilities that the respondent's Motion ought to be denied

(at para. 36). Having considered and weighed all the applicable factors and taken account of the history of this matter, I have concluded she has fallen far short of making a case for allowing this appeal to continue.

Disposition

[87] It is not in the public interest to overlook the desultory approach the appellant had taken to this appeal. The public interest favours granting the Motion to dismiss. I do so with costs to the respondent of $1000 inclusive of disbursements, payable forthwith.

ADDENDUM:

[88] After this decision was released a factual error was identified. Appellant counsel has advised that contrary to what is stated in the first sentence of paragraph 45 of the decision, she was not sent the Registrar's standard "filing instructions" letter of May 2, 2025. Due to an error by court staff (not the Registrar), an internal court memorandum, listing the filing dates and the date for the appeal, was mistakenly sent to counsel instead. This fact was unknown at the time the decision was released.

[89] Had the standard letter been sent in accordance with the Court's established practice the appellant would have received the content reproduced in paragraphs 45 to 46 of the decision. However, the filing dates for the appeal were all confirmed at the April 30, 2025 tele-Chambers hearing attended by appellant counsel. The recitals in the Registrar's standard letter merely repeat the filing requirements contained in the *Civil Procedure Rules.*

[90] The purpose of this Addendum is to correct the factual record. The error that was made has no effect on the decision.

Derrick, J.A.