

NOVA SCOTIA COURT OF APPEAL

Citation: *Cummings v. Nova Scotia (Attorney General)*, 2013 NSCA 113

Date: 20131008

Docket: CA 415797

Registry: Halifax

Between:

Wanda Cummings

Appellant

v.

The Attorney General of Nova Scotia representing Her Majesty the Queen
in Right of the Province of Nova Scotia

Respondent

Judge: The Honourable Justice Joel E. Fichaud

Motion Heard: September 26, 2013, in Halifax, Nova Scotia, in Chambers

Written Release: October 8, 2013

Held: Directions given respecting the procedure for the appeal

Counsel: Wanda Cummings, Appellant, in Person
Duane Eddy for the Respondent

Reasons:

[1] Ms. Cummings has filed motions seeking direction on several procedural matters for this appeal.

[2] In a concurrently issued decision (*R. v. Cummings*, 2013 NSCA 112 , for the appeal file CAC 416755), I review the background to some of Ms. Cummings' interactions with the justice system. I will not repeat the background recited in that decision. The instant matter is separate, with a different history.

[3] Ms. Cummings was subject to a recognizance dated October 9, 2010, and varied on April 29, 2011. The recognizance contained conditions. The Crown alleges that, on September 7, 2011, Ms. Cummings breached those conditions. The Crown charged Ms. Cummings with failure to comply with an undertaking, contrary to s. 145(3) of the *Criminal Code*. The charge was scheduled for a continuance hearing on April 23, 2013, before Judge Beach of the Provincial Court.

[4] On April 9, 2013, Ms. Cummings had subpoenas issued for the April 23 hearing in Provincial Court. The subpoenas were directed at Mr. Kenneth Winch, Director of Court Services for the provincial Department of Justice, and Mr. Sheldon Choo, a solicitor for the provincial Department of Justice. Mr. Winch was requested to bring: (1) copies of a warrant and a committal to hospital for Ms. Cummings, dated April 28, May 27, June 4 and 5, and August 2, 2008, (2) an audio recording between an RCMP officer and a justice of the peace to obtain a search warrant on premises of 811 Southwest Ridge in Mabou, Nova Scotia, along with copies of the search warrant, any sworn information and the report by the officer, and any material sent to the justice to support the issue of the warrant on August 2, 2008, and (3) an audio recording from November 2, 2012, of the conversation between the Crown counsel, Judge Beach, and any others, respecting Ms. Cummings, which occurred after Ms. Cummings left the court room. Mr. Choo was requested to bring copies of all documents held by the provincial Department of Justice or the office of the Attorney General: (1) that refer to Ms. Cummings as of "special interest" to police or as fitting the "National Flagging System", or as mentally ill, suicidal, an alcoholic or a drug addict, or (2) that direct the arrest of Ms. Cummings, or (3) that relate to the destruction of warrants which Ms. Cummings had sought through freedom of information legislation.

[5] The Crown applied to a judge of the Supreme Court of Nova Scotia to quash the subpoenas. Justice Pickup heard the motion on April 18, 2013. By an oral decision on April 18, the judge quashed the subpoenas for Mr. Winch and Mr. Choo. The judge said that the subject matter of the subpoenas was irrelevant to the trial scheduled for April 23, 2013 on the charge of failure to comply with an undertaking contrary to s. 145(3) of the *Code*.

[6] On May 22, 2013, Ms. Cummings appealed to this Court from the decision of Justice Pickup. That is the matter under appeal in this proceeding (CA 415797). On May 30, 2013, in chambers, Justice Oland of this Court scheduled August 14, 2013 for the Appeal Book, September 16, 2013 (later extended to September 26), for Ms. Cummings to file a factum and any evidence that she wishes to support her fresh evidence motion, October 17, 2013 for the respondent's factum, and November 20, 2013 for the hearing of the appeal.

[7] On September 5, 2013, Ms. Cummings filed a Notice of Motion for (1) a direction that she may file a DVD of earlier court proceedings as fresh evidence, (2) an order directing the filing with the Registrar of a Notice of Constitutional Issue, (3) an extension of time for filing the appellant's factum and fresh evidence. The motion was to be heard in chambers on September 12, 2013.

[8] On September 12, 2013, I informed Ms. Cummings that, under Rule 90.18, a Notice of Constitutional Question must be served on the Attorney General but need not be filed with the Registrar of the Court of Appeal. I also told Ms. Cummings that, to raise an additional issue not mentioned in her Notice of Appeal, she must seek and obtain leave to amend her Notice of Appeal. I adjourned the motion to September 26, 2013, so Ms. Cummings could file a motion to amend her Notice of Appeal.

[9] On September 18, 2013, Ms. Cummings filed another Notice of Motion on this file. She requested that I direct that this appeal (CA 415797) be held "in abeyance pending the outcome of the *mandamus* application in CAC 416755, and so that the constitutional question can be considered by a panel of this Court" and that her two appeals, numbered CA 415797 and CAC 416755 be heard together.

[10] On September 26, 2013, in chambers, I heard these matters, and this is my decision.

[11] First I will address Ms. Cummings' submissions on the DVD and the Notice of Constitutional Issue, followed by the process for the filings and hearings of this appeal.

[12] My companion decision on Ms. Cummings' other appeal (CAC 416755) discusses Ms. Cummings' positions on the filing of the DVD and the Notice of Constitutional Issue. At the chambers hearing on September 26, 2013, Ms. Cummings made one joint submission for her motions on both appeals. I incorporate my comments from the companion decision (2013 NSCA 112, paras 18-20).

[13] Ms. Cummings proposes to file, as the appeal record, a DVD of all the Provincial Court proceedings that involve her. She terms this "fresh evidence". The DVD would encompass proceedings other than the matter before Judge Beach that underlies this appeal. According to counsel, the DVD would embody the equivalent of some 2000 pages of transcript of Ms. Cummings' interactions with the Provincial Courts over five years on various charges, a number of which have concluded. There would be no transcripts, no certification by a court reporter, and no isolation of the matters that pertain to this appeal. As I noted in the companion decision, the result would be a chaotic broadening of the issues that are pertinent to this appeal. This is an appeal from a decision of Justice Pickup, who quashed two subpoenas for a proceeding before Judge Beach on a charge of a breached undertaking. The appeal record should be the material that pertains to that matter only, in the normal form that is prescribed by Rules 90.30 and 91.15 for civil and criminal matters respectively. I reject Ms. Cummings' request that the DVD be filed instead of the normal appeal books that would include written transcripts.

[14] A motion for fresh evidence is for the panel of this Court, not for a motions judge. I have no jurisdiction to rule whether or not any fresh evidence will be admitted by the panel on the hearing of this appeal. If Ms. Cummings wishes to move to add the DVD as fresh evidence, she may make that motion. The result of the motion will be for the panel. But I underscore – and this is within a chambers judge's authority - that the DVD is not in *lieu* of the proper appeal books that must be filed in accordance with the *Rules*.

[15] Ms. Cummings Notice of Constitutional Issue seeks to challenge the validity of *Civil Procedure Rule 82.12*, the entire *Court Officials Act*, R.S.N.S.

1989, c. 373, as amended and ss. 29(1)(b) through (f) of the *Public Service Act*, R.S.N.S. 1989, c. 376, as amended. These legislative instruments govern electronic filing in the Supreme Court of Nova Scotia (Rule 82.12), the appointment of staff for the administration of justice in the Province (*Court Officials Act*) and the superintendence by the Minister of Justice and Attorney General of the provincial government's functions in the administration of justice (*Public Service Act*). Those topics have no relevance to whether or not Justice Pickup should have quashed two subpoenas for the trial, in Provincial Court, of Ms. Cummings' alleged breach of an undertaking for a recognizance by her conduct on September 7, 2011. I deny Ms. Cummings' request for an amendment of her Notice of Appeal to raise those issues.

[16] This leaves the logistical directions for the process of this appeal.

[17] Ms. Cummings asks that the instant appeal (CA 415797) be held "in abeyance pending the outcome of" the other appeal (CAC 416755) "so that the constitutional question can be considered by a panel of this Court". Alternatively, she requests that the two appeals be consolidated for a joint hearing.

[18] As discussed above, and reiterated in my companion decision for the other appeal, the constitutional issues are not pertinent to either appeal, and an amendment to the Notices of Appeal to raise those issues is denied. Neither is there any other connection between the two appeals. This one concerns whether Justice Pickup should have quashed two subpoenas for Messrs. Winch and Choo, for a trial before Judge Beach of a charge that Ms. Cummings breached a condition of a recognizance on September 7, 2011. The other appeal concerns whether Justice Robertson should have declined to hear a judicial review related to charges underway in Port Hawkesbury's Provincial Court before Judge Stroud. The two appeals are not interdependent. I decline to order either be held "in abeyance" pending conclusion of the other, or that the two appeals be consolidated for a joint hearing.

[19] It is clear, however, that the currently scheduled dates for filing and hearing of the appeal in CA 415797 must be changed. Ms. Cummings was to file the Appeal Book by August 14, 2013, her factum and any tendered fresh evidence by September 26, 2013. Then the respondent's factum was to be filed by October 17, 2013, with the appeal hearing to be on November 20, 2013. Ms. Cummings' dates

for the appeal book, tendered fresh evidence and appellant's factum have passed. It is too late to accommodate new filing dates and maintain the scheduled hearing on November 20.

[20] I will allow the Appellant until October 31, 2013 to file and serve the Respondent with all of: (1) an Appeal Book that complies with the *Rules*, and (2) a written copy of the evidence which is the subject of any fresh evidence motion that Ms. Cummings wishes to pursue before the panel of this Court, and (3) the Appellant's factum. The Appellant's factum should address both the fresh evidence motion and the merits of the appeal. Then the Respondent will have until November 28, 2013 to file a factum that responds to the fresh evidence motion and the merits. After the Appellant has properly filed her materials, Ms. Cummings may make a motion to reschedule the hearing date.

[21] I make no order on costs of these motions.

Fichaud, J.A.