NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Cummings,* 2014 NSCA 22

Date: 20140304
Docket: CAC 416755
Registry: Halifax

Between:

Wanda Cummings

Appellant

v.

Her Majesty the Queen in right of Nova Scotia, The Provincial Court of Nova Scotia, The Attorney General of Nova Scotia representing Her Majesty the Queen in Right of the Province of Nova Scotia, and The Nova Scotia Department of Justice

Respondents

Judge:	Mr. Justice Jamie W.S. Saunders
Motion Heard:	February 27, 2014, in Halifax, Nova Scotia in Chambers
Held:	Motion adjourned to June 5, 2014
Counsel:	Appellant in person Marian Fortune-Stone, Q.C., for the respondents Sheldon Choo for the Attorney General of Nova Scotia

Decision:

[1] This matter came before me in Chambers this morning as a Registrar's motion to dismiss the appeal for non-perfection and non-compliance with the rules of procedure pursuant to Civil Procedure Rule 90.43(3). There were two such motions on the docket. The first concerns an appeal filed by Ms. Cummings on June 17, 2013, in CAC 416755 appealing what is characterized as a decision of Supreme Court Justice M. Heather Robertson dated June 13, 2013. The second concerns an appeal filed by Ms. Cummings on May 25, 2013, in CA 415797 where she appeals a decision of Nova Scotia Supreme Court Justice Arthur W.D. Pickup dated April 18, 2013.

[2] In her submissions this morning Ms. Cummings insisted that these two matters were "companion cases" and that she had urged the Supreme Court of Canada to hear them together. I have chosen to file separate decisions because each refers to a separate, discrete motion to dismiss from the Registrar, which in turn relate to entirely different files and factual matters and lower court decisions as found by my colleague Justice Fichaud whose decisions and confirmatory orders are now the subject of Ms. Cummings' application for leave to appeal to the Supreme Court of Canada.

[3] My reasons in this decision will be confined to the Registrar's motion related to CAC No. 416755. A separate decision will be filed dealing with the Registrar's motion in CA No. 415797.

[4] As will become clear in a moment, a consideration of the merits of the Registrar's motion to dismiss this appeal necessarily involves a reference to proceedings heard by my colleague Justice Fichaud last September which led him to issue a decision and an order which have now become the subject of Ms. Cummings attempt to obtain leave to appeal and appeal to the Supreme Court of Canada.

[5] To appreciate the nature of today's proceedings one needs to clearly understand the long and rather tortuous history that brings us to this place. In his decision, **R. v. Cummings**, 2013 NSCA 112 and confirmatory order Fichaud. J.A. provides a very thorough chronicle of that history which I do not propose to repeat here. Suffice it to say that in simple terms following that hearing in Chambers, Justice Fichaud dismissed Ms. Cummings' motion to amend her Notice of Appeal;

dismissed her motion for an order that the respondents "provide a complete copy of the records of the Provincial Court for all proceedings involving the Appellant" and denied Ms. Cummings' request to file a DVD instead of the appeal book as required by our **Civil Procedure Rules**. All of this relates to Ms. Cummings' appeal from the decision Justice Robertson where during a Crownside appearance by Ms. Cummings on June 13, Robertson, J. declined to take jurisdiction over matters heard or being heard in the Provincial Court and refused to accept documents Ms. Cummings had filed and labelled as her purported "Notice of Judicial Review". Those documents were returned to Ms. Cummings. No copy was kept by the court.

[6] I should say that between the date of Justice Robertson's decision last June and Justice Fichaud's decision and order of October 8, 2013, there were numerous other filings, claims for relief, motions, etc. which consumed much in the way of counsels' time and the Registrar's time in having to respond, and included a hearing in Chambers on August 22, 2013, before my colleague Justice Duncan R. Beveridge which led to his decision and confirmatory order dated August 27 wherein he dismissed Ms. Cummings' motion for a stay of the decision under appeal and of all matters in the Provincial Court pending appeal and for an order permitting an amendment to her Notice of Appeal.

[7] Since Justice Fichaud's decision and order of October 8, 2013, no action has been taken on this file in this Court insofar as this appeal is concerned. To date no Certificate of Readiness has been filed nor has Ms. Cummings brought a motion for date and directions.

[8] With this necessarily condensed history of the proceedings by way of background, the next step in the chronology from the perspective of this Court concerns today's motion brought by the Registrar to dismiss Ms. Cummings appeal pursuant to Civil Procedure Rule 90.43(3) and (4). All parties were properly served with the Registrar's notice of motion.

[9] Ms. Cummings opposed the motion. She filed an affidavit containing several attachments, as well as a brief, and a DVD which she said contains "the updated court record, including submissions and affidavits filed with the SCC to present day". In ¶3 of her affidavit sworn February 25, 2014, Ms. Cummings states:

> 3. On 23 February 2014, I retrieved the Supreme Court of Canada docket information for case files SCC 35657 and SCC 35711. Those dockets are related

> to appeals from decisions made by Justice Fichaud on 8 October 2013 in NSCA case files CAC 416755 and CA 41597 respectively. A true copy of the SCC docket information for these two case files is attached hereto as **Exhibit A**, pp. 2-5.

[10] In her oral submissions this morning Ms. Cummings said she relied upon the materials she had filed and that Justice Fichaud's decision and order dated October 8, 2013, were the reason why it was "impossible" for her to perfect her appeal.

[11] Ms. Fortune-Stone, Q.C., appeared for the Nova Scotia Department of Justice and Mr. Choo appeared for the Attorney General of Nova Scotia. They both expressed their support for the Registrar's motion to dismiss this appeal.

[12] From the affidavit and supporting materials filed by Ms. Cummings together with her brief submissions and counsels' submissions this morning it is obvious that there is an enormous gulf between their respective positions.

[13] Ms. Cummings passionately asserts that the Crown in its various iterations has over the last several years: driven her into penury; forced her to seek social assistance; treated her shabbily; and subjected her to relentless "prosecution and persecution" which have seriously affected her life and her liberty. She says the result of Justice Fichaud's decision and confirmatory order was effectively "final" because its terms make it "impossible" for her to proceed with her appeal from Justice Robertson's judgment (or any other appeal she has initiated for that matter). She protests that her treatment before the courts have made her the victim of a miscarriage of justice. She believes that the Crown's attempt to characterize Justice Fichaud's decision and order as simply "interlocutory" is nothing more than a ploy, a tactic by the Crown to defeat her.

[14] For their part Mr. Choo and Ms. Fortune-Stone said that Justice Fichaud's decision and order were in fact interlocutory because they in no way bar Ms. Cummings from proceeding with her appeal; rather he ordered that her intended appeal could proceed but only as permitted by the laws of evidence and the procedural requirements under our Rules; that he had instructed her on the requirements for seeking to introduce fresh evidence and had informed her that such a request for leave could only be decided by the panel hearing the merits of the appeal; that the Crown has and continues to have serious concerns about Ms. Cummings' health and well- being; and that its actions throughout have had nothing to do with her "liberty" but only reflect their best efforts to respond to and keep up with the flurry of seemingly endless motions or demands for relief she

files. Counsel for the respondents wished to remind Ms. Cummings that choosing to represent herself did not provide her with immunity from costs orders and that at some point the Crown might well seek to recover some of its agency fees and other costs.

[15] This wide dichotomy of views now brings me to a consideration of CPR 90.43, its purpose and effect.

[16] Civil Procedure Rule 90.43 is a very important and effective tool. It permits judicial culling of the herd. It promotes predictability, consistency and compliance. Most importantly it is fair. Fair to all those who choose to engage the litigation process in order to resolve their disputes.

[17] This Rule serves as a mechanism to carry out the object of the **Rules** which is to enable the just, speedy and inexpensive determination of every proceeding. Rule 90.43(3) imposes a positive duty upon the Registrar. Whenever a litigant fails to comply with the Rules in perfecting an appeal, the Registrar is bound to act. She must bring a motion to a judge for an order dismissing the appeal on five days' notice to the parties. Whether a party is represented by counsel or chooses to be self-represented the requirements for perfecting an appeal are neither complex nor particularly onerous. On hearing the Registrar's motion, a judge may either direct perfection of the appeal, set the appeal down for hearing, or dismiss the appeal.

[18] Receiving notice of such an intended motion from the Registrar tends to awaken sleepy litigants. It gets people's attention. Things happen. In that way access to justice is fairly monitored, managed and achieved. Judges are able to supervise the Court's finite and tapped resources to ensure that the system is not abused. After a full hearing, judges are able to move cases along expeditiously and prune out the clutter and debris of those files that have been abandoned, or were left to languish, or were ignored. Cases that deserve to be heard, are; such that their time in the queue is not delayed by litigants who have been shown to be lethargic,non-compliant or indifferent.

[19] Today, after hearing limited submissions, it seemed to me unwise to proceed with a consideration of the Registrar's motion on its merits. Mr. Choo, appearing as counsel for the Attorney General of Nova Scotia, advised that Ms. Cummings first sought to appeal Justice Fichaud's decision and order to the Supreme Court of Canada "as of right". The Registrar of the Supreme Court informed her that she had no such right and that she would have to seek the Court's leave. She challenged the Registrar's ruling which was later upheld by Justice Abella on

January 31, 2014. Mr. Choo advised that Abella, J. gave Ms. Cummings until February 14, 2014 to file documents in support of her application for leave to appeal. Evidently that has been done. Of course we do not know whether, or when, the Supreme Court might be disposed to consider Ms. Cummings' application for leave. Neither do we know whether the Supreme Court, through its Registrar, is even prepared to accept for filing Ms. Cummings' materials and/or whether the respondents will be required to respond. In response to my questions Mr. Choo said that in his experience with this and other files involving Ms. Cummings one might reasonably expect to hear whether the Court has decided to receive the filings or grant or refuse leave within three months from the date leave is sought.

[20] In these unusual circumstances Mr. Choo and Ms. Fortune-Stone suggested that I consider adjourning the hearing of the Registrar's motion pending a decision from the Supreme Court. I concurred and ordered that the matter be adjourned to Chambers before a Justice of this Court on Thursday, June 5, 2014 at 10:00 a.m. when the appellant and all counsel were available. I am not seized of the matter and it can be heard by whomever is presiding and available.

[21] Before concluding these reasons I wish to confirm, as I did in court, my response to five miscellaneous points or submissions made by Ms. Cummings. First, she said she disagreed with Justice Abella's decision affirming the Supreme Court's Registrar's decision that she could not appeal "as of right" Justice Fichaud's decision and order. She insisted that she could. I attempted to make it clear to Ms. Cummings that I do not sit on appeal from Justice Abella's or Registrar Bilodeau's rulings.

[22] Second, she continued to attack the basis of Justice Fichaud's decision and confirmatory order. I tried to explain to Ms. Cummings that I do not sit on appeal from a colleague's rulings.

[23] Third, when I had Ms. Cummings confirm that she had not sought a review of Justice Fichaud's decision and order by the Chief Justice pursuant to Civil Procedure Rule 90.38, Ms. Cummings said she "could not afford to do both" and inferred that the reason she did not seek a review in this case was because she was unhappy with Chief Justice MacDonald's dismissal of her motion for leave to review in a previous case of hers and that his decision had come without reasons. When I told Ms. Cummings that reasons were not required pursuant to CPR 90.38(7) she acknowledged her familiarity with that Rule but said that reasons

were called for in her case "following **Sheppard**" which I took to mean a reference to the Supreme Court of Canada's decision in **R. v. Sheppard**, 2002 SCC 26. When I asked the appellant what she meant by not being able to afford "both" she said one course of action would have been to seek Chief Justice MacDonald's review under CPR 90.38 whereas the other option, the one she chose to exercise, was to "appeal as of right" to the Supreme Court of Canada.

[24] As part of Justice Fichaud's decision and order (which Ms. Cummings now seeks to have overturned by the Supreme Court of Canada) my colleague denied Ms. Cummings' motion to order the respondents "...to provide a complete copy of the Provincial Court record .... (which) ... covers over five years of proceedings" or permit her to file her own DVD of the Provincial Court proceedings instead of the normal documentary appeal book. Justice Fichaud's reasons are fully explained in his decision but I would note, in part:

> [17] ... The only issue on this appeal is whether Justice Robertson erred in the ruling that is under appeal. The proper record for that appeal includes the material that was before Justice Robertson. It does not include five years of Provincial Court transcripts on other proceedings and material that was not before Justice Robertson.
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> [18] On the second point, I reject Ms. Cummings' request that she may file a DVD of the Provincial Court proceedings. .... The DVD that Ms. Cummings proposes to file would chronicle, in the equivalent of over 2,000 transcribed pages, virtually every interaction over five years between Ms. Cummings and the Provincial Court. There would be no transcripts, no certification of accuracy by a court reporter, and no isolation of the material that may have been before the judge whose decision is under appeal. ...
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> [20] I deny Ms. Cummings' request to amend her Notice of Appeal. The proposed constitutional issues have no relevance to the ruling of Justice Roberston that is under appeal. This appeal is limited to the question of whether Justice Roberston committed an appealable error, under the appropriate standard of review, in her ruling not to accept jurisdiction over Ms. Cummings' second notice of judicial review. It isn't a royal commission on the administration of justice.

[25] Evidently Ms. Cummings has chosen to place all of this information before the Supreme Court of Canada because as she declares in ¶6 of her affidavit sworn February 25, in opposition to the Registrar's motion:

> 6. I believe that I have been denied natural justice by all NS courts throughout these proceedings, including the actions and inactions of the registrar/prothonotary, which has resulte din a continued miscarriage of

> justice since 2008. This is outlined in past submissions with this Court, as well as submissions to the Supreme Court of Canada, the latter of which appear on the first level of the DVD, and in the folder on the DVD entitled "SCC Record". I continue to rely on those submissions for the purpose of this proceeding, as well as the NS courts record, including all submissions and affidavits.

[26] The fourth point I wish to make concerns Ms. Cummings' assertion this morning that "all of her cases" were shielded by a publication ban and that any order or decision on my part would have to be anonymized so as to conceal her identity. If I did not, she said I would be "in violation of the **Criminal Code**" and proceeded to reference a chain of section numbers which, to her mind, compelled me to keep her identity secret. I refused. The Registrar, who was present in Court, as well as counsel for the Department of Justice and the Attorney General of Nova Scotia all confirmed that as far as they were aware, there is no such publication ban covering these proceedings, in this Court. I observe that the impugned decision and order of Justice Fichaud which Ms. Cummings seeks to have overturned by the Supreme Court of Canada contains a full, open, transparent and standard style of cause where all of the parties are named and identified. So too do the title pages and styles of cause used by Ms. Cummings in her affidavit and other documents she filed for today's hearing.

[27] This brings me to the fifth and final point. As I told Ms. Cummings, and over her protests, none of the provisions from the **Criminal Code** cited by her this morning have any relevance to or any bearing upon this Court's consideration of the Registrar's motion. The approach taken by this Court in such matters is settled law. See for example, **Sevgur v. Islam**, 2011 NSCA 114; **Leigh v. Belfast Mini-Mills Ltd.**, 2012 NSCA 67; and **Mader v. Hatfield**, 2013 NSCA 56. The appellant's repeated references to sections of the **Criminal Code** are respectfully misguided and irrelevant.

[28] There is one last matter I wish to address. As I explained to the parties in Chambers, it is not automatic that a litigant's attempt to appeal to the Supreme Court of Canada will bar or stall this Court's consideration of a Registrar's motion to dismiss. If it were otherwise, any litigant could attempt to thwart the course of justice by simply filing a leave application. That is not the way things work. Just as filing a notice of appeal in Nova Scotia does not automatically stay the order of the court or tribunal below, but rather requires its own separate application and hearing in this Court to decide that relief on its merits, so too in cases where leave is sought from the Supreme Court of Canada (more particularly in interlocutory

matters such as this) where proceedings are still very much alive and ongoing in this province. Clearly, each motion must be decided based on its own set of circumstances. It was the unique and very protracted history of this case which persuaded me that it was prudent to adjourn the hearing to June to await the outcome of Ms. Cummings' attempt to have the Supreme Court hear her appeal from the decision and order of my colleague Justice Fichaud.

Conclusion

[29] The Registrar's motion to dismiss this appeal is adjourned to regular Chambers Thursday, June 5, 2014 at 10 a.m. I am not seized of the matter and it can be heard by whomever is presiding and available.

[30] I directed Mr. Choo and Ms. Fortune-Stone to advise the Registrar and seek an expedited continuance of today's hearing if they should learn of the Supreme Court of Canada's disposition of Ms. Cummings' leave application sooner than anticipated.

[31] No party sought costs at today's hearing, preferring to wait until the matter is heard and concluded in Chambers on June 5, 2014 or sooner, as circumstances dictate.

Saunders, J.A.