NOVA SCOTIA COURT OF APPEAL
Citation: *Raymond v. Brauer*, 2014 NSCA 43

Date: 20140429
Docket: CA 426354
Registry: Halifax

Between:

Paulette Raymond

Appellant

v.

Connie Brauer and Victor Harris

Respondents

Judge:	Bryson, J.A.
Motion Heard:	April 24, 2014, in Halifax, Nova Scotia in Chambers
Held:	Motion dismissed.
Counsel:	Paulette Raymond, in person Connie Brauer and Victor Harris, in person

Decision:

[1] Ms. Raymond wants to appeal the December 11, 2013 decision of the Honourable Justice Michael J. Wood, refusing her contempt order against Connie Brauer (2013 NSSC 388). Ms. Raymond and her former husband, Victor Harris, have a history of acrimonious matrimonial litigation. Ms. Brauer is Mr. Harris's current partner.

[2] In 2012, Ms. Raymond sued Ms. Brauer for alleged defamation arising from postings on the internet.

[3] By order granted by the Honourable Justice John D. Murphy on December 7, 2012, Mr. Brauer and Mr. Harris were:

> Prohibited and restrained from broadcasting, disseminating, posting on the Internet, distributing or publishing in any manner whatsoever, directly or indirectly, any statements, depictions, descriptions, opinions and commentary, which reference by name or innuendo Paulette Raymond.

[4] Ms. Raymond felt that Ms. Brauer had breached Justice Murphy's Order and brought a motion for civil contempt against Ms. Brauer in June of 2013. Justice Moir dismissed that motion for contempt. Ms. Raymond brought a second motion before Justice Wood in November of 2013. Justice Wood dismissed this second motion. He concluded:

> [9] Based upon the evidence filed, I am not satisfied that Ms. Raymond has proven beyond a reasonable doubt that there have been any new internet postings which refer to Ms. Raymond either by name or innuendo. Ms. Brauer acknowledges that she has not taken down or made inaccessible information which does refer to Ms. Raymond that was posted prior to November 7, 2012. Ms. Raymond argues that Ms. Brauer has created new hyperlinks which causes the old material to be made current so that it shows up in various internet searches. Despite making this assertion, Ms. Raymond provided no evidence to show that such hyperlinks exist. In all likelihood, this would have required technical opinion evidence as it is not readily apparent from the materials which she filed with the Court.
>
> [10] Having concluded that Ms. Raymond has not provided clear proof of new postings after November 7, 2012 which refer to her, the remaining issue is whether the failure to take down or remove earlier postings represents a violation of the Court order. Applying the principles related to contempt of court, the first

> step in the analysis is to determine whether the order was "clear and unambiguous" in requiring such steps.
>
> [11] The language of Justice Murphy's order appears directed to future conduct. The introductory phrase says the order applies "until further Court Order or conclusion of this proceeding". There is no express provision that says historic postings must be removed. In the absence of such a provision, I cannot conclude that the order clearly and unambiguously required this to be done.

[5] It emerged during argument in this Court that Ms. Raymond has brought a third motion for contempt which was heard before Justice Warner some weeks ago, no decision has been made in that motion.

Proposed Grounds of Appeal:

[6] Ms. Raymond lists eight grounds of alleged error by Justice Wood in her proposed grounds of appeal, which can be summarized as:

1. A failure to mention "broadcasting, disseminating, distributing or publishing *et al* …" in the decision. Rather Justice Wood only referred to "posting on the internet".
2. A failure to consider whether the evidence referred to Ms. Raymond by innuendo.
3. A failure to interpret the injunction correctly by referring to new internet postings after the date of the order. "New" and "after" are not in the order.
4. A failure to examine all the evidence concerning hyperlinks and their use, which covertly target Ms. Raymond.
5. A failure to conduct a "contextual analysis" and draw reasonable inferences from the evidence.
6. A failure to refer to materials filed in June 2013 (at the first contempt hearing before Justice Moir).
7. Technology necessary to prove defamatory conduct in breach of the order was unavailable before Justice Wood. Also there was inadequate time for the hearing.
8. The absence of technical opinion evidence was an oversight by Ms. Raymond. Ms. Raymond implies that the Court of Appeal can allow this evidence.

[7] In her "order requested", Ms. Raymond wants two things:

> 1. "… a determination that will explicitly liberally and qualitatively describe the operative provision of the …" order in relation to evidence submitted.
> 2. Secondly she asserts a breach of the order by Ms. Brauer and appears to seek an order requiring deletion of websites and social media accounts by Ms. Brauer.

[8] Justice Wood's Order is dated December 16, 2013. Ms. Raymond deposes that she formed the intention to appeal on January 9, 2014—but her motion for an extension was not filed until April 14, 2014.

[9] *Civil Procedure Rule* 90.37(12)(h) describes a judge's authority to extend time to appeal:

> **90.37 (12)** A judge of the Court of Appeal hearing a motion, in addition to any other powers, may order any of the following:
>
> ...
>
> (h) that any time prescribed by this Rule 90 be extended or abridged before or after the expiration thereof.

[10] Justice Bateman described the usual three-part test when exercising discretion to extend time in *Bellefontaine v. Schneiderman*, 2006 NSCA 96:

> [3] A three-part test is generally applied by this Court on an application to extend the time for filing a notice of appeal, requiring that the applicant demonstrate (**Jollymore Estate Re** (2001), 196 N.S.R. (2d) 177 (C.A. in Chambers) at para. 22):
>
> (1) the applicant had a bona fide intention to appeal when the right to appeal existed;
>
> (2) the applicant had a reasonable excuse for the delay in not having launched the appeal within the prescribed time; and
>
> (3) there are compelling or exceptional circumstances present which would warrant an extension of time, not the least of which being that there is a strong case for error at trial and real grounds justifying appellate interference.

[11] The three-part test described in *Schneiderman* is not conclusive. Residuary discretion remains in the Court to extend time where it would be just to do so:

> [5] Although courts most commonly allude to the three-part test in *Jollymore, supra*, the ultimate question is whether justice requires that an extension be granted: *Farrell v. Casavant*, 2010 NSCA 71, at para. 17 and *Cummings v. Nova Scotia (Community Services)*, 2011 NSCA 2, at para. 19. Accordingly, the three-part *Jollymore* test is an appropriate guide for the exercise of the court's discretion but it is not an exhaustive description of that discretion.
>
> (*Brooks v. Soto*, 2013 NSCA 7)

[12] In *Farrell*, Justice Beveridge carefully considered the history of jurisprudence respecting extensions of time to appeal and emphasized—as a number of the cases do—that exercising discretion to extend the time to appeal must ultimately be required in the interests of justice, (¶14, 16). The analysis is highly contextual.

Bona Fide Intention to Appeal:

[13] In support of her motion Ms. Raymond has filed an affidavit in which she deposes that:

> I was not able to file my Notice of Appeal within the deadline provided in the Civil Procedure Rule 90.13 or 91.05(94) for the following reasons as stated in my Brief I am attaching with this Affidavit in support of my motion for extension of time to file an appeal.

[14] In her brief, Ms. Raymond says:

> The 25 day time-frame, in which to file this appeal was personally impossible for me in early January 2014. I knew the amount of time and energy it would take in order to formulate grounds to appeal Justice Wood's decision. I did write the court in early January and said I disagreed with the decision, but I had to leave it for now.

[15] Also in her brief she mentions related litigation and family illness as reasons for not complying with deadlines in other litigation and presumably, by implication, for failing to meet the Notice of Appeal filing timelines in this case.

[16] Ms. Raymond's affidavit does not say that she at any time indicated to the Court of Appeal prior to April 14th that she had a desire to appeal—nor is there any evidence that she advised Ms. Brauer that she intended to appeal. For the purpose of this motion I will assume that Ms. Raymond had a *bona fide* intention to appeal during the relevant appeal period.

Excuse for Delay:

[17] Ms. Raymond provides very little evidence in her affidavits explaining why she did not appeal within the appeal period or in the almost three months thereafter, although she says she intended to appeal. She actually gives no reasons in her affidavit but, as indicated above, refers to her brief. Ms. Raymond also late filed a chronology of "other obligations" which provide some context for Ms. Raymond's activities.

[18] In her brief, Ms. Raymond describes the timelines for procedures in the main action in the Supreme Court. She characterizes these timelines as "stressors". She also alludes to family illnesses involving her two sisters. But her references are quite general. In response to questions from the Court, Ms. Raymond remained vague about the specific demands on her time. She did say that her sisters now live in Halifax and drop by without warning. Upon further questioning, it appeared that Ms. Raymond suffers from anxiety which prevented her from focussing on writing out and filing her appeal. She submits that the Court should have sympathy for her and exercise its discretion in her favour. Certainly one has sympathy for Ms. Raymond. But that cannot be a sufficient principle for the exercise of discretion. Other considerations are also at play.

[19] The onus rests on Ms. Raymond to provide a reasonable excuse for the nearly three month delay in filing the motion to extend time for filing a Notice of Appeal. I am not satisfied that she has done so. Ms. Raymond is an intelligent and articulate person. She has considerable experience with the courts. She claims Justice Wood's errors are "plain and obvious". While I accept that Ms. Raymond suffers from anxiety, in the absence of medical evidence, that alone cannot explain a failure to pursue her appeal within time, or to apply for an extension promptly. For a layperson, Ms. Raymond is relatively familiar with the *Civil Procedure Rules* and appeals. She has failed to explain why someone of her obvious ability has been so dilatory in trying to correct what she perceives to be a wrong.

Exceptional Circumstances/Grounds of Appeal:

[20] Ms. Raymond's Notice of Appeal essentially argues that Justice Wood misinterpreted Justice Murphy's Order and that he should have considered innuendo as a possible basis for breach of the Order and a finding of contempt. She also alleges the failure of Justice Wood to "examine the evidence" with regard to a "hyperlinks and their use". She goes on to say that the technology "necessary

to prove defamatory conduct in a breach of the contempt order was not available on November 19, 2013" and that she inadvertently failed to adduce technical opinion evidence which Justice Wood felt was necessary to sustain her motion.

[21] With respect, none of these arguments are compelling grounds of appeal. There is no obvious error of law in Justice Wood's decision. He correctly cited law that showed the very heavy onus on an applicant in Ms. Raymond's position to prove contempt of an order on a standard beyond reasonable doubt. He was satisfied that she had failed to do this.

[22] The fact is that Ms. Raymond has a main action underway in the Supreme Court dealing with the merits of her defamation claims against Ms. Brauer. Justice Murphy's interlocutory order, which Ms. Raymond is trying to enforce by contempt proceedings, is not the end of the process, but really a beginning. The parties will be put to further expense and delay by extending time to appeal. Even assuming Ms. Raymond were successful, that would not resolve the main issues between the parties. It would be better for Ms. Raymond, Ms. Brauer, and the public interest, to have Ms. Raymond's main proceeding dealt with as soon as possible. Ms. Raymond's proposed appeal does not serve that purpose.

[23] To quote Justice Bateman in *Schneiderman*, I am not satisfied that "there are compelling or exceptional circumstances present which would warrant an extension of time, not the least of which being that there is a strong case for error at trial and real grounds justifying appellate interference". That is especially so here where a final resolution of Ms. Raymond's claim awaits determination in the main action. By denying Ms. Raymond an extension to appeal Justice Wood's decision, she is not losing an opportunity to correct any alleged wrongdoing by Ms. Brauer.

[24] It is not in the interests of justice to extend time to appeal in this case. Ms. Raymond's motion to extend time to appeal Justice Wood's dismissal of her motion for contempt, is dismissed.

[25] In their written submissions, the respondents did not address the legal test for extending time. They moved—without proper notice—for an abuse of process remedy under Rule 88. During Ms. Raymond's oral submissions, Ms. Brauer interrupted more than once. In the circumstances, there will be no order for costs.

Bryson, J.A.