NOVA SCOTIA COURT OF APPEAL
Citation: *Hoffman v. Lamb*, 2003 NSCA 101

Date: 20030926
Docket: CA 203383
Registry: Halifax

Between:

Benjamin Ralph Hoffman

Applicant

v.

Carolyn Jane Lamb

Respondent

Judges:	Bateman, J.A. (in Chambers)
Application Heard:	September 18, 2003, in Halifax, Nova Scotia
Held:	Application allowed.
Counsel:	Duncan R. Beveridge, Q.C., for the applicant Bruce T. MacIntosh, Q.C., for the respondent

Reasons for judgment:

[1] The applicant, Dr. Benjamin Hoffman, has applied "for the application filed by [him] on July 3, 2003 for an order extending time to file a Notice of Appeal to be referred to the Court for hearing and disposition and to set a time and date for the hearing thereof."

[2] By way of background to this application, on October 10, 2000, the Supreme Court issued a Corollary Relief Judgment incidental to a divorce action between the applicant and his then wife, Carolyn Hoffman Lamb, who is the respondent to this application. Dr. Hoffman had not filed an Answer to the Divorce Petition and did not appear at the hearing although he was aware of the hearing and had counsel in attendance on his behalf. On November 7, 2000, Dr. Hoffman, through his then counsel, filed a Notice of Appeal of that judgment with this court. On April 11, 200,1 Dr. Hoffman was advised by letter from the Registrar of this Court that on April 26, 2001, she would apply to dismiss the appeal for failure to perfect in accordance with the rules of Court. The file reveals that no steps had been taken by Dr. Hoffman to perfect the appeal. The Registrar's motion came on for hearing before Chief Justice Glube and the appeal was dismissed for want of prosecution as is permitted by **Civil Procedure Rule 62.17**. Dr. Hoffman's counsel appeared on the Registrar's motion asking permission of the court to withdraw as counsel because he was unable to get instructions from Dr. Hoffman on the appeal. An order releasing counsel was issued by this Court on May 4, 2001.

[3] On March 12, 2003, Dr. Hoffman, apparently acting on his own behalf, filed what purported to be another Notice of Appeal of the Corollary Relief Judgment. It was filed with the Prothonotary in Pictou and forwarded to this Court.

[4] In that "Notice of Appeal" Dr. Hoffman states that "he takes full responsibility for the withdrawal of the" first appeal. On June 30, 2003, Dr. Hoffman filed a Notice of Application for an order extending the time for filing the Notice of Appeal, stating that the application would be brought before the Court on July 3, 2003. The application was not advanced on that date. Dr. Hoffman has now retained counsel who brings the current application on his behalf.

[5] Counsel for Dr. Hoffman submits that this application to extend time should be brought before a panel rather than heard by a Chambers judge because only a panel would have the authority to entertain another Notice of Appeal in the face of

the existing order of the Chief Justice dismissing the appeal. Notwithstanding the form of the application, what Dr. Hoffman seeks is a decision of this Court permitting the "re-hearing" of his appeal. I would agree with his counsel that if the jurisdiction exists to permit a re-hearing of the appeal, and I make no finding in that regard, it rests with a panel of the Court and not with a single Chambers judge.

[6] In **Future Inns Canada Inc. v. Nova Scotia (Labour Relations Board)** (1996), 154 N.S.R. (2d) 358; N.S.J. No. 434 (Q.L.)(C.A. Chambers) Hallett, J.A. conducted a detailed review of the powers of a Chambers judge of this court.

(1) **[16]** A review of rule 62 in its entirety shows that the rule very carefully distinguishes between what may be done by a judge of the court and the court itself.

(2) **[17]** The following is a summary of some of the applications a "judge" designated as Chambers judge of the Court of Appeal is authorized to hear:

(3) Applications to the "Judge":

(4) (1) Application to amend a Notice of Appeal. (r. 62.04(4))

(5) 2) Application to set down an appeal of an Interlocutory Order or costs. (r. 62.05)

(6) (3) Application to set down times for hearing appeals by the court. (r. 62.19)

(7) (4) Application for a stay of a judgment pending the appeal. (r. 62.10)

(8) (5) Application to dismiss an appeal for failure by the appellant to perfect the appeal in accordance with r. 62. (r. 62.11(d) and r. 62.17(1))

(9) (6) Applications for leave to appeal if it is required by an enactment. (r. 62.11(c))

(10) (7) Application to substitute service of Notice of Appeal. (r. 62.11)

(11) (8) Application to serve Notice of Appeal on a non-party. (r. 62.11)

(12) (9) Application for an order for security for costs of appeal. (r. 62.13(1))

(13) (10) Application to dismiss the appeal if security for costs are not paid. (r. 62.13(2))

(14) (11) Application for directions as to form and content of an abridged appeal book.. (r. 62.14(6))

(15) (12) An ex parte application to set a date for a hearing of an application by the Court to quash a Notice of Appeal. (r. 62.18 and r. 62.30(2))

> (16) (13) Other examples where a judge is authorized to act are to be found in Rule 62.31(8).

[7] **Rule 62.31(7)(d)** authorizes a Chambers judge to refer an application to the court.

[8] Counsel has not cited any authority from this Court in support of the assertion that we have the power to re-hear an appeal. There is authority to that effect in other Canadian jurisdictions, in some cases turning on specific Rules of Court or legislation expressly permitting the re-opening of an appeal. No comparable provisions exist in Nova Scotia. In **Midland Doherty v. Rohrer and Central Trust** (1985), 70 N.S.R. (2d) 234; N.S.J. No. 121 (Q.L.) (C.A.), a case not cited by counsel, a panel of this Court entertained an application by a party to an appeal, which appeal had been dismissed without costs, seeking to re-open the appellate disposition on costs. In that case, costs had not been argued on the appeal and, therefore, submitted the applicant for re-hearing, there had been no decision on the merits regarding costs, thus permitting that issue to be re-argued. That submission did not find favour with the Court. MacKeigan, C.J.N.S., writing for the Court, ultimately dismissed the application for a re-hearing. In so doing he said, at ¶ 5:

> (1) **[5]** Once a final order is issued on appeal this court has prima facie no jurisdiction to open the appeal to grant a new hearing of the appeal or to correct any substantive error made by it on the appeal; a party aggrieved by our error must ordinarily look for remedy to the Supreme Court of Canada. ...

[9] He noted, however, that this Court does have jurisdiction to re-hear an appeal where the interests of justice require it:

> (1) **[15]** This Court, I conceive, is not limited in jurisdiction as some statutory Courts may be. Its jurisdiction is that of the Supreme Court as originally established long before the **Judicature Act** of 1884. Section 8 of that **Act**, R.S.N.S., 5th Series, chap. 104, provided in part:
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> (2) "8. The Supreme Court of Nova Scotia shall continue to be a court of record, and subject to the provisions of this Act, shall continue to have and exercise the jurisdiction which, immediately preceding the first day of October, A.D. 1884, was vested in, or capable of being exercised

by, the Supreme Court and the Court of the Equity Judge; and shall be deemed to be and shall be a continuation of the said courts (subject to the provisions of this Act), under the name of 'The Supreme Court of Nova Scotia.'

(3) (1) The Supreme Court shall have within this Province the same powers as were formerly exercised by the Courts of Queen's Bench, Common Pleas, Chancery, and Exchequer, in England; and also such and the same powers as were on the nineteenth day of April, A.D. 1884, exercised in England by the Supreme Court of Judicature, save in respect of Probate and Surrogate Courts."

(4) Similarly the **Judicature Act** of 1972, Stats. N.S. 1972, c. 2, s. 2 and s. 3, states:

(5) "(2) The Supreme Court of Nova Scotia as constituted before this Act, a Court of common law and equity possessing original and appellate jurisdiction in both civil and criminal cases, shall continue under that name to constitute one supreme court of judicature for Nova Scotia.

(6) "(3) The Court shall continue to be a superior court of record, having civil and criminal jurisdiction and it has all the jurisdiction, power, and authority that on the coming into force of this Act, was vested in or might have been exercised by the Court, and such jurisdiction, power, and authority shall be exercised in the name of the court."

(7) **[16]** This Court under these ancient powers has, I am sure, jurisdiction to rehear an appeal or part thereof where justice manifestly requires and has doubtless done so in some very exceptional cases. One I recall is **County View Ltd. v. City of Dartmouth (No. 2)** (1974), 10 N.S.R. (2d) 361; 2 A.P.R. 361, where, after the death of Chief Justice McKinnon who had sat on the appeal,

> the other two judges saw fit to hear new evidence and argument and to render judgment anew.

[10] It is not clear from the decision in **Midland**, supra, whether the jurisdiction to re-hear extends to appeals which have been decided on the merits, or is limited to cases where an appeal has been summarily dismissed. To my knowledge, **Midland** has not been subsequently considered by this Court. In other jurisdictions it has been held that any power to re-hear extends only to appeals which have not been resolved on their merits. (See, for example, **R. v. H. (E.)** (1997) 33 O.R. (3d) 202 (Ont.C.A.)). It is unnecessary for me to consider the scope of any such jurisdiction, in that this appeal was dismissed on a Registrar's motion and, therefore, not heard on the merits.

[11] It is my view that this application should be entertained as an application for a re-hearing and referred to a panel pursuant to **Civil Procedure Rule 62.31(7)(d)**. In the interests of clarity, what I am referring to the panel is Dr. Hoffman's application for a re-hearing. That panel will decide whether a re-hearing can be granted in these circumstances and, if so, whether the case should be re-heard. I will set the matter for hearing, in consultation with counsel, but without prejudice to the respondent's right to raise with the panel the question of Dr. Hoffman's entitlement to be heard on the application in light of his ongoing contempt of the existing Nova Scotia court orders and any application which the respondent may wish to make to a Chambers judge for security for costs of the application.

[12] As it is Dr. Hoffman's default and unreasonable delay which had precipitated this application, this is an appropriate case for costs of the application before me payable by the applicant to the respondent, in any event. In setting the

> amount I have taken into account the lengthy Affidavit and memorandum prepared by the respondent in response to this novel issue. I fix costs in the amount of $1500 inclusive of disbursements and payable forthwith.