NOVA SCOTIA COURT OF APPEAL
Citation: ***MacGillivary v. Smith***, 2003 NSCA 82

Date: 20030807
Docket: CA 189018
Registry: Halifax

Between:

Donald MacGillivary and Brian Heron

Applicants

v.

Charles A. Smith

Respondent

Judge:	Saunders, J.A.
Application Heard:	July 31 & August 7, 2003, in Halifax, Nova Scotia, in Chambers
Held:	Application dismissed with costs of $2,850.00, inclusive of disbursements, payable to the respondent forthwith.
Counsel:	Brian Heron, representing the applicant Donald MacGillivary Eugene Y. S. Tan, representing the applicant Brian Heron John E. MacDonell, solicitor for the respondent

Decision:

[1] At the conclusion of the hearing I informed the parties that the application was dismissed with reasons and an award of costs to follow. These are my reasons and my disposition of costs.

[2] Messrs. Heron and MacDonell first appeared before me in chambers last Thursday, July 31. Their appearance came about as a result of Mr. Heron filing a document he entitled "Notice of Appeal" date stamped as received in the prothonotary's office on July 11, 2003. The document is not lengthy and I will quote it in its entirety:

> The Defendants Appellants, Donald MacGillivary and Brian Heron hereby give notice, to the Court and all parties, and their attorneys of record, of appeal of the Court's judgment limiting the amount of time for examination of the affidavits of Mr. John MacDonell, in the hearing before Justice J. Hamilton, on security of costs brought on application of the respondent, Mr. Smith.
>
> The Defendants Appellants further give notice of appeal with respect to the judgment and or ruling of the Court disallowing examination of the affiant, Mr. MacDonell with respect to questions of California law and to relevant questions regarding legal education and competency and foundation for submission of various submissions in support of his affidavits.
>
> Additionally, the appellants request an opportunity to brief the Court on this interlocutory appeal until after meeting with their anticipated Nova Scotia associate (sic) counsel, Mr. Raymond S. (sic) Riddell on July 22nd 2003.
>
> Respectfully submitted for appellants,
>
> _____
>
> DATED: July 10, 2003 BRIAN S. HERON
>
> cc. Mr. J. MacDonell - 902 420-1417

[3] I will refer in more detail to Mr. Heron's notice of appeal in a moment. It has been acknowledged by counsel that Mr. Heron has been permitted to act for

Mr. MacGillivary in the proceeding before Hamilton, J.A. and that I need not question that arrangement further in this application before me.

[4] The matter was placed on the chambers docket for Thursday, July 31.

[5] When the case was called I raised with Messrs. Heron and MacDonell a jurisdictional issue, specifically what authority did I, sitting as a single judge of this court in chambers or, did a panel of this court, have to deal in any manner whatsoever with an "appeal" from a determination made by another member of this same court? I use the term "determination" advisedly to avoid, for the moment, any reference to other characterizations such as "decision", "judgment" or "order."

[6] After considering further representations from Messrs. Heron and MacDonell, and shortly before the noon break Mr. Heron told me he was not prepared to proceed that day with any substantive arguments on the merits of his application having earlier concluded that the purpose of his appearance would be limited to setting a future date for such arguments. Mr. Heron said he would use the noon recess to attempt to find Mr. Raymond S. Riddell, Q.C., a barrister with whom he said he had consulted from time to time about certain aspects of this proceeding and, if successful, to see if Mr. Riddell might appear with him that afternoon to make further submissions.

[7] When we resumed at 2:00 p.m., Mr. Heron was joined by Eugene Y. S. Tan, a barrister and associate or partner of Mr. Riddell. After hearing briefly from Mr. Tan it was not clear to me in what capacity he purported to speak. I permitted Messrs. Heron and Tan the opportunity to consult privately and sort out their business relationship. When they returned to court Mr. Tan confirmed that he was not retained by Mr. Heron and that he would not be saying anything further on his behalf that day.

[8] Mr. Heron then sought a formal adjournment on the basis that he was not ready to proceed with any submissions concerning the merits of his application or "appeal," nor respond to the jurisdictional issue I had raised with him and Mr. MacDonell at the outset.

[9] Mr. MacDonell, on behalf of the respondent, Mr. Smith, opposed the request for an adjournment.

[10] Notwithstanding Mr. MacDonell's forceful and persuasive arguments to the contrary, I reluctantly granted Mr. Heron's request and put the matter over to today for argument. I concluded, but not without some serious reservations, that because of possible mis-communication between the parties and the Registrar's office and Mr. Heron's eleventh-hour or errant written communications sent by facsimile that were not, for a time, directed to the proper recipient, Mr. Heron may, arguably, have had reason to think that his only purpose in appearing on July 31 was to set a date for the hearing of his "appeal". Accordingly, I reluctantly agreed to a short adjournment of one week. In the result, a good half day was lost taken up with matters of procedure and standing, largely to accommodate Mr. Heron.

[11] I gave specific directions to Messrs. Heron and MacDonell as to the filing and service of any additional written materials relating to today's application. I said I would deal with both the costs of the July 31 appearance as well as costs of the August 7 appearance, as part of today's hearing.

[12] Before adjourning I reminded Messrs. Heron and MacDonell of the issues to be addressed on August 7, they being the two matters identified by Mr. Heron in his "Notice of Appeal" filed July 11:

> . . . appeal of the Court's judgment limiting the amount of time for examination of the affidavits of Mr. John MacDonell, in the hearing before Justice J. Hamilton, on security of costs . . .

and

> . . . appeal with respect to the judgment and/or ruling of the Court disallowing examination of the affiant, Mr. MacDonell, with respect to questions of California law and to relevant questions regarding legal education and competency and foundation for submission of various submissions (sic) in support of his affidavits.

together with the jurisdictional issue I had raised with them, that being whether and under what circumstances an appeal lies to a panel of this court, or to me, from a decision of a judge of this court sitting in chambers.

[13] Finally, I discussed with Messrs. Heron and MacDonell the material I was prepared to consider in preparing for the hearing on August 7. After noting their representations and the fact that Mr. Heron was not able to articulate any prejudice

to his position by my familiarizing myself with the material included in the following list of items, I made it known that I would read the following material:

1. The "Summary" dated July 31st that Mr. Heron wrote out in longhand and handed to the clerk, with copies to opposing counsel. It is a one page document he said he felt obliged to file under the Rules.

2. A copy of Mr. MacDonell's brief to Justice Hamilton, with cases attached, dated April 22nd.

3. A copy of Mr. MacDonell's post-hearing submissions to Justice Hamilton, dated July 18th, and

4. Mr. MacDonell's brief to me, with copies of cases attached, dated July 30th.

[14] Apart from those materials, I have since received, in accordance with my earlier directions, the following additional material:

5. Letter dated August 5, from Mr. Tan to me, comprised of six pages.

6. Brief from Mr. MacDonell to me, dated August 6, comprised of 25 pages, as well as an index of some 21 authorities, with those cases tabbed and copied within the booklet of material.

7. The affidavit of Michele Joseph, assistant to John E. MacDonell, sworn August 1 and filed August 6, 2003.

[15] In my letter to Messrs. Tan and MacDonell dated August 6 (which I asked Mr. Tan to communicate to Mr. Heron, directly) I fixed strict time limits for their oral arguments.

[16] In deciding today's application I have reviewed all of the materials identified in the course of these reasons, and considered the arguments advanced by Messrs. Heron, Tan and MacDonell.

[17] The application brought by Mr. Heron on his own behalf and on behalf of Mr. MacGillivary whether framed as an “appeal” or characterized as an application to set a date for hearing of an interlocutory appeal, is dismissed.

[18] Given the history of this perpetual dispute in its attendant forms over the years, one is reluctant to attempt to provide any brief but meaningful outline of the circumstances leading to today’s application. All I propose to do - for the purposes of explaining today’s decision - is provide the barest of summaries. I hasten to add that my description merely deals with one aspect of this seemingly never ending litigation.

[19] Mr. Smith is a judgment creditor of Mr. Heron by virtue of two judgments for costs granted by courts in the State of California in 1997 and 1999, in the amounts of approximately $53,000 USD and $10,000 respectively.

[20] Mr. Heron was the registered owner of property in Richmond County, Nova Scotia. In an attempt to recover on the unpaid California judgments, Mr. Smith commenced a common law action on those judgments in the Supreme Court of Nova Scotia, in December 1999.

[21] On July 18, 2000, Justice Goodfellow granted summary judgment in favour of Mr. Smith, thereby “domesticating” the California judgments. Orders for two judgments were granted by Justice Goodfellow. Mr. Smith proceeded in his collection attempts by recording one judgment for approximately $15,000 CDN at the Registry of Deeds. However, execution on that judgment was otherwise stayed, pending determination of Mr. Heron’s appeal of the underlying California judgment or judgments, (which has since been dismissed). Mr. Smith’s other judgment was for approximately $90,000 CDN, plus costs and disbursements. Mr. Heron’s appeal of those judgments was dismissed by this court in June 2001, as was his application for leave to appeal to the Supreme Court of Canada.

[22] From the documentary evidence it is alleged that on August 8, 2000, Mr. Heron executed a deed of his property in Nova Scotia to Mr. MacGillivary, which conveyance was found by Justice Moir of the Supreme Court to have been “for no consideration.” Mr. Smith concluded that his ability to seize this asset to satisfy - even partly - his judgments, had been deliberately frustrated. He commenced a fraudulent conveyance action against both appellants, Messrs. Heron and

MacGillivary, in June 2001. On June 12, 2001, Justice Wright issued an attachment order barring any further conveyance of the subject property.

[23] On September 18, 2002, Justice Moir granted Mr. Smith's application for an order striking the appellants' defence, entering judgment against them jointly and severally, declaring that the conveyance from Mr. Heron to Mr. MacGillivary was utterly void and of no force and effect, and setting it aside. Moir, J. also ordered that the appellants pay Mr. Smith costs of $1,500 by August 23, 2002. The appellants attempted to have Justice Moir revisit his decision, which he declined to do in a supplementary decision dated September 25, 2002.

[24] The appellants have appealed the September 18, 2002 decision and order, and the September 25, 2002 supplementary decision.

[25] Mr. Smith then applied for an order requiring the appellants to post security for costs of the underlying appeal. The appellants sought leave to cross-examine John E. MacDonell, counsel for Mr. Smith, and leave was granted. Mr. MacDonell was then obliged to retain Mr. Gavin Giles as his counsel to represent him during such cross-examination. The effect of leave being granted allowing the appellants to cross-examine counsel for Mr. Smith was that the hearing took place in chambers, rather than by telephone. Mr. Smith sought and was granted leave to cross-examine Mr. Heron on affidavits filed in opposition to the application.

[26] The hearing took place on June 30, 2003, before my colleague Justice M. J. Hamilton. When both cross-examinations were completed, Justice Hamilton directed that the parties submit post-hearing briefs. Mr. Smith's brief was submitted on July 18, 2003. The appellants' brief is due today, August 7, 2003.

[27] As is now obvious the purported "appeal" launched by Messrs. Heron and MacGillivary from the proceedings taken before Hamilton, J.A. has been initiated by them while the security for costs application brought by Mr. Smith is still in progress before Justice Hamilton.

[28] Mr. Heron's cross-examination of counsel for Mr. Smith lasted almost three hours. Details of that cross-examination are set out in Mr. Smith's July 18, 2003 post-hearing submission to Justice Hamilton. I need not refer to them here. It is enough to observe that the security for costs application before Justice Hamilton is still in progress. According to the written materials placed before me, Justice

Hamilton is still expecting a post-hearing brief from Mr. Heron. Thus, she has not made any "decision" or rendered any "judgment" or "order" in the proceeding she is conducting.

[29] In his purported "notice of appeal" Mr. Heron characterizes his application as "an interlocutory appeal" and relies upon *Civil Procedure Rule* 62.02(1) and 62.05 in support. I do not agree with either the characterization of the appellants' application, nor the applicability of those provisions of the *Rules*.

[30] The portions of *Rule* 62.02(1) material to this application concern, in subsection (a) "an appeal from an interlocutory order" and time is triggered "from the date of the order for judgment appealed from or, if no order has been made from the date of the decision." In my opinion, this *Rule* has no application in that Justice Hamilton has not rendered either an "interlocutory order" or a "decision." Similarly, *Rule* 62.05 has no application, as it deals with procedures governing an appeal "from an interlocutory judgment." Even if *Civil Procedure Rule* 62.05 could be said to apply to "appeals" taken from proceedings before a member of this court sitting in chambers, Hamilton, J.A. has not made any determination that might fairly be characterized as the triggering event, namely "an interlocutory judgment." I add parenthetically that no appeal lies to this court from an interlocutory order, whether made in court or in chambers, except by leave of this court. (*The Judicature Act*, R.S.N.S. 1989, c. 240 as amended, s. 40.)

[31] Mr. Heron's notice of appeal, on its face, relates solely to rulings made by Justice Hamilton in the course of the hearing on June 30, 2003, concerning the scope of the appellants' cross-examination of Mr. MacDonell, counsel for Mr. Smith. I reject the notion expressed by Mr. Heron in oral argument that - despite his notice of appeal - the points he contests are not really evidentiary rulings, but rather matters of fundamental "due process" or natural justice. The words chosen by Mr. Heron clearly challenge rulings related to relevance and materiality and the orderly completion of proper questioning. These rulings are matters of evidence and procedural management, all falling under Justice Hamilton's superintendence. I also reject Mr. Tan's submission that the notice ought to be read as a request for an extension of time, or that there are legitimate reasons here to excuse the late filing on an equitable basis.

[32] There is no "judgment", "decision", or "order" open to challenge. The timeliness or otherwise of Mr. Heron's notice is irrelevant. Justice Hamilton's

determinations are what they are, nothing more nor less than evidentiary rulings, in the course of an ongoing proceeding over which she continues to preside.

[33] Rulings such as these, made during the course of a hearing that is still in progress, cannot be the subject of some kind of immediate and intermediate level of appeal. If such were the case there would be no end to on-going litigation in this province. Delay and added expense to the litigants would be enormous. Legitimate hearings would have to be postponed in order to accommodate intermittent appeals over evidentiary or procedural points about which one party or the other happened to disagree. Confusion, interruption and multiplicity would be the hallmarks of such a system. The stated object of our *Civil Procedure Rules* is:

> **Object of Rules**
>
> **1.03.** The object of these Rules is to secure the just, speedy and inexpensive determination of every proceeding.

[34] I cannot imagine that such steps would be seen to do justice between the parties or enhance the community's respect for the administration of justice.

[35] In reaching this conclusion I find support for my analysis in some of the authorities cited by Mr. MacDonell in his excellent brief. In *Halifax (County) v. Sackville Manor Ltd.* (1997), 160 N.S.R. (2d) 156 (C.A.), the trial judge ruled that reports of experts not called to testify were inadmissible through another expert. While the trial was still in progress, the appellants appealed this ruling. The appeal was dismissed, with Clarke, C.J.N.S. (for the Court) citing two reasons for the dismissal, the first of which is relevant here:

> [9] The first is that this appeal is premature. An evidenciary (sic) ruling was made by the trial judge during the course of the trial. Until such time as the trial is concluded and a decision is rendered, it appears to us that the timing of this appeal is too early and, therefore, unnecessary.

[36] In *Balders Estate v. Halifax (County) Registrar of Probate* (1999), 180 N.S.R. (2d) 92 (C.A.), Roscoe, J.A. (for the Court) said:

> [4] Normally this Court will not entertain appeals from interlocutory rulings on the admissibility of evidence.

[37] In support of this statement, Roscoe, J.A. cited *Children's Aid Society of Halifax v. H. (L.T.)* (1989), 90 N.S.R. (2d) 44 (C.A.), where a trial judge had ruled that various agencies' files were inadmissible in a custody hearing. By the time of the appeal, the controversy over the evidentiary ruling disappeared with the decision reached, so the appeal was dismissed as moot. However, Chipman, J.A. (for the Court) also stated:

> [19] As a result of the dismissal of the appeal as moot, it is not possible for this Court to render a decision on what I consider a very important issue, namely whether a ruling such as that made by Judge Roscoe can in itself be the subject of an appeal before the trial has concluded. Nevertheless, because of the importance of the point and because counsel addressed it specifically on oral argument at the request of the court, I propose to make my views known with respect to appeals taken from rulings of a trial judge affecting the course of trial.
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> . . .
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> [25] . . . I accept the following from the decision of Hughes, C.J.N.B. in The New Brunswick Telephone Company, Limited v. John Maryon International Limited et al. (1980), 32 N.B.R. (2d) 133 where he said at p. 136:
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> > The judge presiding at a trial of a civil action in the Court of Queen's Bench is, I think, the master of the proceedings from the commencement until the conclusion. He is required to make decisions on numerous questions arising in the course of the trial, which may be the basis of an appeal against the judgment rendered in the action. However, notwithstanding that a ruling as to the admissibility of evidence may fall within the word "decision" within the meaning of s. 8(3) of the Judicature Act, I cannot accept the proposition that a litigant has an immediate right to appeal such a decision although the decision may constitute a basis for an appeal against the judgment in the case.
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> [26] A ruling in the course of trial is to be distinguished from an interlocutory order from which an appeal may be taken only with leave (Judicature Act s. 37). In The New Brunswick Telephone, Limited v. John Maryon International Limited et al., supra, Hughes, C.J.N.B. after stating that the two proceedings were not analogous, said as to the latter at p. 136:
>
> > Clearly that was an appeal of an interlocutory order, being a matter incidental to the principal object of the action and distinguishable

> from a ruling of a trial judge as to the admissibility of evidence tendered at trial.

[27] In Black's Law Dictionary, Revised Fourth Edition, the term "interlocutory" is defined as follows:

> Interlocutory. Provisional; temporary; not final. Something intervening between the commencement and the end of a suit which decides some point or matter, but is not a final decision of the whole controversy.

[28] The expeditious and orderly resolution of disputes require that a trial judge be in command of the proceedings until their end. Only then is it possible to tell whether or by whom an appeal should be attempted. The whole issue raised here might have, by the end of the day, become entirely moot. The judge could arrive at a decision totally without reference to the points at issue or a decision entirely to the satisfaction of the party complaining of the ruling on the admissibility of the evidence. As I have said, Judge Roscoe has reached her conclusions on the basis of extensive viva voce evidence which she has summarized. It is not apparent from the decision that the challenged business records played any role in the conclusions which she reached. The only reference in the entire decision to the subject records is a statement that the respondent's evidence confirmed certain entries in those records respecting her.

[29] To permit appeals in midstream, as it were, would only create such delay and confusion as appears to have resulted from this premature and ill-conceived challenge to Judge Roscoe's ruling.

[38] I see no merit to Mr. Heron’s complaint that the ultimate decision of Justice Hamilton may be “wholly dependant upon the evidentiary findings arising from the cross-examination” and that therefore some sort of timely appellate intervention by a panel of this court is warranted before Hamilton, J.A. files her decision.

[39] Whether, and if so, under what circumstances, a panel of this court might ever consider an appeal from a formal decision of a member of this court sitting in chambers may be left for resolution to another day. Evidentiary or procedural rulings made by the judge during the course of the chambers hearing would be obvious from the record of the proceedings and so not “lost” in any reconsideration of the ultimate judgment or outcome, were such a step ever countenanced.

[40] In the result I find that the appellants' application, made as it is while the security for costs hearing before Justice Hamilton is still in progress, is premature and cannot be sustained. Their application is dismissed with costs of $2,850.00 inclusive of disbursements, payable to the respondent forthwith. This sum of costs principally represents Mr. Smith's success, after a prodigious amount of work and effort on the part of his counsel, in resisting the application today but also reflects, to a limited extent, a portion of the costs I will allow following the July 31 appearance and subsequent adjournment, and for which I have assessed the appellants some degree of responsibility.

Saunders, J. A.