NOVA SCOTIA COURT OF APPEAL

Citation: Ofume v. Nova Scotia, 2004 NSCA 112

Date: 20040921
Docket: CA 225780
Registry: Halifax

Between:

Dr. Phillip Ofume and Mrs. Maureen Ofume

Appellants

v.

Government of Nova Scotia, Annette Boucher, C.I.B.C. Mortgage Corporation Laurel Purcell, Halifax Regional Police, High Sheriff in and for Halifax County Registrars, Supreme Court and Court of Appeal of Nova Scotia

Respondents

Judge: Fichaud, J.A.

Application Heard: September 16, 2004, in Halifax, Nova Scotia, In Chambers

Held:

Counsel: Matthew Williams, for the applicant, Halifax Regional Police Service
Phillip Ofume, for the respondents to the application
Edward Gores, for the Government of Nova Scotia, Annette Boucher, Laurel Purcell, High Sheriff for Halifax County and the Registrars for the Supreme Court and Nova Scotia Court of Appeal

Decision:

[1] The appellants Dr. Phillip Ofume and his wife Maureen Ofume sued numerous parties respecting the foreclosure of the Ofumes' home in Bedford, Nova Scotia. One defendant listed in the originating notice was "Halifax Regional Police", properly named Halifax Regional Police Services ("HRPS"). The originating notice and statement of claim was not served on HRPS. The other defendants, who were served with the originating notice, applied for a dismissal of the action under *Rule* 14.25. Justice Scanlan allowed that application and dismissed the actions against those applicant parties. Justice Scanlan's decision noted:

> ... I understand that the Halifax Regional Police have not been served with the statement of claim and really, I do not have much jurisdiction in that regard...

[2] Doctor and Mrs. Ofume appealed to the Court of Appeal from the decision of Justice Scanlan. The notice of appeal named HRPS as a respondent. The appeal is scheduled to be heard on December 2, 2004.

Issue

[3] HRPS applies under *Rules* 62.11(d) and (e) for an order quashing the notice of appeal against HRPS.

[4] *Rules* 62.11(d) and (e) states:

> 62.11. In addition to any other powers conferred by Rule 62 or otherwise, a Judge may at any time and on such terms as he deems just, on the application of the Registrar or of any party to an appeal, order that
>
> . . .
>
> (d) a notice of appeal be quashed because of failure by the appellant to comply with Rule 62 in respect thereof, provided that seven (7) days' notice has been given to the appellant.
>
> (e) a notice of appeal be quashed on the ground that no appeal lies to the Court, provided that seven (7) days' notice has been given to the appellant.

"No appeal lies to the Court" under Rule 62.11(e)

[5] HRPS was not served with the originating notice and statement of claim in the Supreme Court. The Supreme Court, as noted by Justice Scanlan, had no jurisdiction over HRPS. Justice Scanlan's decision did not determine any issue

between the Ofumes and HRPS. So there is no decision between the Ofumes and HRPS to be appealed.

[6] For those reasons, in my view, no appeal lay to the Court of Appeal within the meaning of *Rule* 62.11(e).

[7] *Rule* 62.18(1) states that the "court" may quash a notice of appeal or dismiss an appeal on the ground that the appeal is frivolous, vexatious or without merit. This power is to be exercised by a panel of judges, not a single justice: *Nova Scotia (Minister of Community Services) v. P(LL)*, 2002 NSCA 107, at para. 14 per Oland, J.A.; *Children's Aid Society of Inverness-Richmond v. JC and SC* (1998), 166 N.S.R. (2d) 41 (C.A.), at para. 3 per Cromwell J.A.; *Sweeney v. Nova Scotia (Attorney General),* 2002 NSCA 121; *CIBC v. Ofume,* 2002 NSCA 114.

[8] This ruling does not invade this power of the "court" under *Rule* 62.18(1). The ruling that no appeal lies to this Court under *Rule* 62.11(e) is not an assessment of the merits of the Ofumes' claim against HRPS, ie. whether the claim is arguable, frivolous or vexatious. Whatever degree of strength the Ofumes'

claim may or may not have, there simply is no decision by the Supreme Court on that matter, and therefore nothing to appeal.

[9] Because of my conclusion on *Rule* 62.11(e) it is unnecessary to consider *Rule* 62.11(d).

"Notice of appeal [may] be quashed" under Rule 62.11(e)

[10] *Rule* 62.11(e) states that if no appeal lies to the court of appeal, the "notice of appeal [may] be quashed" by a chambers justice.

[11] The Ofumes' notice of appeal names several respondents. The other respondents were served with the originating notice and participated in the proceeding before Justice Scanlan. The hearing of the appeal is scheduled for December 2, 2004. HRPS' motion would not affect the Ofumes' appeal against those other respondents.

[12] This raises an issue of interpretation of *Rule* 62.11(e). Do the words which permit "a notice of appeal [to] be quashed" contemplate that a notice of appeal

may be partially quashed, leaving the remainder of the notice of appeal intact? Or does the *Rule* contemplate a remedy only when it is feasible to quash the entire notice of appeal?

[13] In my view, the *Rule* 62.11(e) contemplates that a notice of appeal may be partially quashed.

[14] Generally, a court may partially quash an administrative action if the offending and residual matters are not so integrally connected that severance would be unworkable: Brown and Evans, *Judicial Review of Administrative Action in Canada* #5:2251 and authorities cited; e.g. *Board of Education of Northside-Victoria District Schoole Board v. Yorke* (1993), 122 N.S.R. (2d) 271 (C.A.) at para. 39. Under that test, clearly it is feasible to quash a notice of appeal against HRPS leaving the rest of the appeal intact. The Ofumes' claim against HRPS is not integrally connected to the issues involving the other respondents which Justice Scanlan considered in the decision under appeal.

[15] *Rule* 62.11(e) aims to extinguish at the outset an attempted appeal which is outside the jurisdiction of the Court of Appeal. An appeal against one respondent

may be outside the court's jurisdiction while the appeal against another respondent may be within the court's jurisdiction. Similarly, one ground of appeal may be outside the court's jurisdiction, while another ground of appeal may be within its jurisdiction. In such cases, it is the intent of *Rule* 62.11(e) that the needless prosecution of the extra-jurisdictional appeal be arrested by an early chambers application under *Rule* 62.11(e). It is immaterial to the purpose of *Rule* 62.11(e) whether or not the extra-jurisdictional ground happens to be accompanied by another ground of appeal within the court's jurisdiction.

[16] *F(R) v. Registered Nurses' Association (Nova Scotia)*, 2002 NSCA 106 is an example. A single notice of appeal challenged three separate decisions of an administrative tribunal. Justice Oland, as a single Chambers justice, determined that the first ground of appeal, against one decision, was untimely. Under *Rules* 62.11(d) and (e) Justice Oland quashed the first ground of appeal, leaving the remaining appeal intact.

[17] In this case, as discussed, "no appeal lies" to the Court of Appeal against HRPS. Under *Rule* 62.11(e) I would quash the notice of appeal insofar as the

notice of appeal is directed against HRPS. This ruling does not affect the appeal against the other respondents.

[18] Dr. and Mrs. Ofume shall pay costs of $500 all inclusive forthwith to HRPS.

Fichaud, J.A.