NOVA SCOTIA COURT OF APPEAL
Citation: ***Mercier v. Nova Scotia (Attorney General)***, 2014 NSCA 93

Date: 20141015
Docket: CA 428778
Registry: Halifax

Between:

Roger Edouard Mercier

Applicant/Appellant

v.

Attorney General of Nova Scotia and
Police Complaints Commissioner

Respondents

Judge:	The Honourable Justice Cindy A. Bourgeois
Motion Heard:	October 9, 2014, in Halifax, Nova Scotia, in Chambers
Held:	Motion dismissed
Counsel:	Roger Edouard Mercier, Appellant in Person Duane Eddy, for the Respondents

Decision:

[1] The appellant has brought a motion seeking "an order that the court cause the production of the transcript of Hfx. No. 357941 for the purpose of the Appeal". At the hearing of the motion, I sought clarification as to whether the appellant was asking the Court to prepare and provide a transcript, or whether he sought some other remedy. The appellant advised that he was asking that the Court order the Attorney General of Nova Scotia ("AGNS") to pay for the cost of obtaining a transcript of the matter under appeal. For the reasons to follow, I dismiss the motion.

Background

[2] In October of 2010, the appellant was arrested by a member of the Halifax Regional Police and charged with two counts of breach of recognizance under s. 811 of the *Criminal Code*. Apparently those charges were eventually dismissed due to want of prosecution.

[3] The appellant filed a complaint against the arresting officer pursuant to the *Police Act*, S.N.S. 2004, c. 31. The Complaints Commissioner declined to refer the complaint to the Police Review Board. The appellant challenged that decision, seeking judicial review before the Supreme Court of Nova Scotia. In a decision dated February 27, 2014, Justice Arthur LeBlanc upheld the Commissioner's decision as being reasonable (see 2014 NSSC 79).

[4] The appellant has filed a Notice of Appeal challenging both the above decision, as well as the subsequent costs decision (2014 NSSC 309). The Notice of Appeal sets out 15 detailed grounds of appeal encompassing seven pages.

Position of the parties

[5] The appellant submits he is impecunious and unable to afford the cost of providing a transcript. In support of his motion, he filed a brief affidavit, noting his very modest monthly income of $621. He advised the Court that he has made arrangements for a qualified court reporter to certify a transcript, at a cost of $75. He is requesting that the Court compel the AGNS to pay that fee.

[6] In advancing his motion, the appellant cited to the Court various provisions of the *Canadian Charter of Rights and Freedoms*, as well as sections from both the provincial and federal human rights legislation. He provided the Court with a very recent decision of the Supreme Court of Canada, **Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)**, 2014 SCC 59, which he asserted supports his position that the respondent AGNS should pay the cost of the transcript.

[7] The respondents argue that this Court has no jurisdiction to order a respondent to pay the transcript costs of an appellant. As will be seen in the reasons which follow, it is not necessary to consider the validity of the respondent's argument in order to dispose of the motion before me.

Analysis

[8] A sensible starting point is a consideration of the *Civil Procedure Rules*, for it is here that the requirement for a transcript is found. Rule 90.29(5) provides:

> The appellant must cause a transcript of the proceeding to be prepared by a certified court reporter, unless legislation provides otherwise or a judge permits otherwise.

[9] Rule 90.30(2)(b)(iii) notes that "a copy of the transcript of everything said in the course of the proceedings under appeal" is to be included in the appeal book which "must" be filed by an appellant "unless a judge of the Court of Appeal directs otherwise".

[10] The requirement for the provision of a transcript, and the above noted Rules have been recently considered by this Court in **Li v. Jean**, 2012 NSCA 63. There, an appellant sought an order compelling the respondent to provide a transcript of the proceedings under appeal. I have found the approach of Justice Beveridge particularly helpful. He writes:

> [22] The second, and more fundamental problem, is that the appellant has been unable to identify any authority for me to make an order requiring the respondent Tribunal to pay for the preparation of the transcript. The *Judicature Act*, R.S.N.S. 1989, c. 240, bestows on the judges of the Court of Appeal broad rule-making powers regarding appeals. Rule 90.29 of the *Nova Scotia Civil Procedure Rules* provides as follows:

> **90.29** (1) An appellant who appeals from a decision or order of a court or judge must request a copy of the audio recording of the proceeding from the prothonotary or clerk of the court appealed from, and pay the prescribed fee to the prothonotary or clerk.
>
> (2) The prothonotary or clerk, on receipt of the prescribed fee from the appellant, must provide the appellant with an audio recording of the entire hearing of the proceedings, including evidence, the oral submissions and all oral rulings and decisions.
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> (3) An appellant who appeals from a decision or order of a tribunal must request a copy of the entire record of the proceedings before the tribunal and pay the prescribed fee for the copy to the tribunal.
>
> (4) The tribunal or other person or body that holds the record must, on receipt of the request and the prescribed fee from the appellant, provide the appellant with a copy of the entire record of the proceedings, including all rulings and decisions.
>
> (5) The appellant must cause a transcript of the proceeding to be prepared by a certified court reporter, unless legislation provides otherwise or a judge permits otherwise.

[23] Rule 90.29(5) clearly requires an appellant to cause a transcript of the proceeding under appeal to be prepared by a certified court reporter. There are two exceptions. Legislation or a court order. There are no legislative provisions that apply. I may excuse compliance, but I see no authority to direct another party to an appeal, or any other person, to prepare a transcript or pay for the preparation of a transcript.

[24] In my opinion, the discretion set out in Rule 90.29(5) must be read in conjunction with Rule 90.30(4) and (5). Rule 90.30 sets out in detail the requirements for the preparation and filing of appeal books and transcripts. The Rule does permit variance with the requirements of 90.30. Of import is 90.30(4) and (5). These provide:

> **90.30** (4) Parties to an appeal may make an agreement to avoid the expense or delay of reproducing material unnecessary for the appeal by abridging all or part of the transcript of evidence or of any other material otherwise required to be included in the appeal book, or substituting an agreed statement of facts instead of a transcript or exhibit.
>
> (5) A party may make a motion to a judge of the Court of Appeal for an order abridging a requirement for the form or content of the appeal book.

[11] Although recognizing the Court has the ability to waive the requirement of a transcript in appropriate circumstances, Beveridge, J.A. noted such a request was not before him. With respect to compelling a respondent to pay for the cost of a transcript, his Lordship observes:

> [27] This is not the first time that appellate courts have been asked to provide relief to individuals who are unwilling or unable to fund the cost of preparation of transcripts. I can find no authorities that have acceded to this request. (See, for example, *G.B.R. v. Hollett*, [1995] N.S.J. No. 545 (C.A.); *Ayangma v. French School Board*, 2009 PECA 10; *Pavlis v. HSBC Bank Canada*, 2009 BCCA 309; *Ocean v. Economical Mutual Insurance Co.*, 2011 NSCA 106; and most recently *R. v. Cummings*, 2012 NSCA 52.)

[12] As noted earlier, the appellant relies upon the recent decision of **Trial Lawyers, supra**, as support for his request to have the AGNS pay for the cost of the transcript of the proceeding under appeal.

[13] At this juncture, it is helpful to consider that particular decision. The matter began as a family law dispute. In British Columbia, the provincial government had enacted a scheme whereby escalating fees, based upon trial days required, were charged to those seeking to bring actions before the British Columbia Supreme Court. A self-represented litigant argued she was unable to afford the fees, and that such served to prevent access to the court. The British Columbia Trial Lawyers Association and the provincial branch of the Canadian Bar Association intervened, and challenged the fees as being unconstitutional.

[14] For the majority, Chief Justice McLachlin examined the interplay between s. 92(14) of the *Constitution Act, 1867* – the provincial power to legislate in relation to the administration of justice; and s. 96 – the provision from which provincial superior court's obtain their core jurisdiction. Although hearing fees can be a permissible exercise of a province's jurisdiction under s. 92(14), such cannot impede upon the jurisdiction of the superior courts entrenched within s. 96.

[15] In the case before it, the Supreme Court determined that the particular hearing fee scheme unreasonably prevented access to the courts, and was an improper infringement upon the jurisdiction of the court. In determining the scheme was unconstitutional, McLachlin, C.J. notes:

> [35] Here, the legislation at issue bars access to the superior courts in yet another way — by imposing hearing fees that prevent some individuals from having their private and public law disputes resolved by the courts of superior jurisdiction —

> the hallmark of what superior courts exist to do. As in *MacMillan Bloedel*, a segment of society is effectively denied the ability to bring their matter before the superior court.
>
> [36] It follows that the province's power to impose hearing fees cannot deny people the right to have their disputes resolved in the superior courts. To do so would be to impermissibly impinge on s. 96 of the *Constitution Act, 1867*. Rather, the province's powers under s. 92(14) must be exercised in a manner that is consistent with the right of individuals to bring their cases to the superior courts and have them resolved there.
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> [37] This is consistent with the approach adopted by Major J. in *Imperial Tobacco*. The legislation here at issue — the imposition of hearing fees — must conform not only to the express terms of the Constitution, but to the "requirements … that flow by necessary implication from the express terms of the Constitution." The right of Canadians to access the superior courts flows by necessary implication from the express terms of s. 96 of the Constitution, as we have seen. It follows that the province does not have the power under s. 92(14) to enact legislation that prevents people from accessing the courts.

[16] Notwithstanding the importance of the principle of "access to justice", the decision in **Trial Lawyers, supra**, has no bearing on the outcome of this particular motion. There are a number of key distinctions between the imposition of court fees in British Columbia and the requirement for a transcript for appeals in Nova Scotia.

[17] **Trial Lawyers, supra** was a constitutional challenge to a fee scheme implemented by a provincial government. Here, the requirement for a transcript is not being imposed by government, but rather by the Court itself by virtue of judge-made *Civil Procedure Rules*. There has been no suggestion, formal or otherwise, that the requirement for an appellant to provide a transcript infringes upon the core jurisdiction of the court, or is otherwise unconstitutional.

[18] Nowhere in **Trial Lawyers, supra**, is there any suggestion that a respondent could be held to pay the fees in question, or by implication other appeal expenses such as a transcript.

[19] Unlike the court fees in **Trial Lawyers, supra**, the cost of a transcript is not controlled by government. In this province, appeal transcripts are provided by independent third parties who, although certified by the government, are undertaking a private business enterprise. The costs are set and retained by the transcript provider, not the government.

[20] In my view, **Trial Lawyers, supra** is not of assistance to the appellant in relation to the motion before the Court. No other authority has been provided to satisfy me that it would be appropriate to transfer the financial obligation for the provision of a transcript to an opposing party, governmental or otherwise.

[21] Even if the Court was prepared to consider its authority to grant such an order, a necessary pre-requisite would be finding that an appellant was lacking the resources to pay for the needed transcript. I am unable to make such a finding in this case. Although the appellant's stated income is very modest, so is the cost of the transcript. Based on the very limited evidence before me, I cannot conclude that the appellant lacks the ability to pay the $75 cost for the transcript.

[22] For the reasons as outlined above, I dismiss the motion. As no costs were sought, none will be ordered.

Bourgeois, J.A.