IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Conway v. Nova Scotia (Human Rights Commission), 2008 NSSC 5

Date: 2008/01/08
Docket: S. H. No. 260438
Registry: Halifax

Between:

Paul Conway

Applicant

v.

Nova Scotia Human Rights Commission,
Department of Justice (NS) Sean Kelly, Randy McQuade
and Richard Parsons

Respondents

Judge:	The Honourable Justice N. M. Scaravelli
Heard:	December 4, 2007, in Halifax, Nova Scotia
Counsel:	Kevin A. MacDonald, for the Applicant Michael Wood, Q.C., Jennifer Ross and Audrey Barrett for the Respondent, Nova Scotia Human Rights Commission Rebekah Powell, for the Respondents, Department of Justice, (NS), Sean Kelly, Randy McQuade, and Richard Parsons

By the Court:

[1] This matter arises from an Application filed by Paul Conway for an Order in the nature of Certiorari quashing the decision of the Nova Scotia Human Rights Commission ("the Commission") to discontinue Mr. Conway's human rights complaint against the Province of Nova Scotia (Department of Correctional Services) and several of its employees.

[2] The Commission has made an Interlocutory Application for a preliminary determination as to whether the Application for Judicial Review was filed within the time period required under *Civil Procedure Rule 56.06*. It contends the Originating Notice filed and served was out of time and seeks an Order dismissing the Application. The Respondent, the Nova Scotia Department of Justice, joins in contending that the filing and service of the Notice of Application was out of time.

[3] The relevant facts as they relate to the Application on the preliminary issue are not in dispute.

[4] Following an investigation, the decision of the Commission to discontinue Mr. Conway's complaint was made on June 22nd, 2005. The decision was communicated to Mr. Conway on June 30th, 2005. The Application for Certiorari was filed and served by Mr. Conway on December 23rd, 2005.

[5] The delay in hearing of this preliminary Application was as a result of an agreement between the parties to wait for the release of the Nova Scotia Court of Appeal decision in the case of *Halifax Community Association v. Halifax (Regional Municipality)*, 2007 NSCA 39 (a "Central Halifax case"). This decision was released on April 5, 2007. The Court of Appeal confirmed the decision of Kennedy, C.J. rendered in July 2006, where he found that the commencement of the time lines for filing and service under *Civil Procedure Rule 56.06* was on the day the decision was made, and not when the parties received notice of the decision.

[6] In the present case, the Commission argues Mr. Conway would have been required to file and serve his Notice of Application for review on or before December 22nd, 2005. As the Application was filed on December 23rd, 2005, it is out of time and should be dismissed.

[7] Counsel for Mr. Conway argues in the alternative as follows:

(I) The Application for Certiorari was filed in time pursuant to *Civil Procedure Rule 56.06*;

(ii) If the Application was filed and served out of time, it amounted to only an irregularity in a proceeding, pursuant to *Civil Procedure Rule 2.02*;

(iii) The time lines should be extended under Section 4 of the *Limitations of Actions Act* or under the Court's inherent jurisdiction, as Mr. Conway was under a disability;

(iv) The Respondents are prevented from objecting to timeliness based on the doctrine of estoppel.

Was the Originating Notice Filed and Served in Time?

[8] *Civil Procedure Rule 56.06* states:

> An originating notice for an order in the nature of certiorari shall be filed and served within six (6) months after the judgment, order, warrant or inquiry to which it relates, and rule 3.03 does not apply hereto.

[9] *Civil Procedure Rule 3.03* states:

> 3.03.(1) The court may, on such terms as it thinks just, extend or abridge the period within which a person is required or authorized by these Rules, or by any order, to do or abstain from doing any act in a proceeding. [E. 3/5(1))]
>
> (2) The court may extend any period referred to in paragraph (1) although the application for extension is not made until after the expiration of the period. [E.2/5(2)]
>
> (3) The period within which a person is required by these Rules or any order to serve, file or amend any pleading or other document may be extended by consent in writing of the parties. [E.3/5 (3)]

[10] Counsel for Mr. Conway argues that *Rule 3.01(f)* applies to the present case and as such, June 22nd, 2005 (the day of the decision) is not included in the calculation of time, but that counting begins with the next day, June 23rd ending within six months on December 23rd, 2005, the actual day of filing and service of the Notice herein. *Rule 3.01(f)* states:

> 3.01 Unless the contrary otherwise appears, the computation of time under these Rules or any order of the court is governed by the following provisions:
>
> (f) where anything is to be done within a time after, from, of or before a specified day, the time does not include the day;

[11] In fact, *Civil Procedure Rule 3.01(g)* governs the computation of time when the time limit is expressed in months. It states as follows:

> 3.01 (g) where there is a reference to a period of time consisting of a number of months after or before a specified day, the number of months shall be counted from, but not so as to include, the month in which the specified day falls, and the period shall be reckoned as being limited by and including
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> (I) the day immediately after or before the specified day, according as the period follows or precedes the specified day, and
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> (ii) the day in the last month so counted having the same calendar number as the specified day, but if the last month has no day with the same calendar number, then the last day of that month;

[12] An analysis of s. 3.01(f) and 3.01(g) was conducted by Wright, J. in *Melford Concerned Citizens Society v. Nova Scotia (Minister of the Environment)* [1999], N.S.J. No. 432.

[13] Paragraph 21:

> The first proposition was that the six month limitation period expired on September 27, 1999 and hence, no limitation problem arises. The analysis of this proposition begins with determining the 'specified date' of the impugned decision from which the six month limitation period starts to run. In this case, it has to be

> one of the two dates. Either the specified date should be considered to be March 23,1999 (the actual date of the Minister's decision) or March 24, 1999 which the Society urges that the court should treat as the deemed date of the decision being the date on which the Society effectively got notice of the decision.
>
> In my view, March 23, 1999 is the appropriate date to be recognized as the specified date under the Civil Procedure Rules for purposes of time computation of the limitation period. ...

[14] Paragraph 26:

> Rules 3.01(f) and (g) clearly apply to the computation of the time period in the case at hand and those two subsections in my view are capable of only one interpretation. Having determined the specified dated to be March 23, 1999, it follows that the six month limitation period under Rule 56.06 began to run the following day March 24, 1999 and ended on September 23, 1999 being the day in the last month having the same calendar number as the specified day. In the result, the Society is clearly out of time in effecting service of the Originating Notice.

[15] In the present case the specified day was June 22nd, 2005, the date the decision was rendered by the Commission. Accordingly, the six month time line began on June 23rd, 2005 and Mr. Conway had until December 22nd 2005 to file and serve the Originating Notice. As the Notice was filed and served on December 23rd, 2005, it was beyond the time limits set under *Rule 56.06*.

[16] Clearly not every six months will have the same number of days. It is also recognized that parties may not become aware of a decision for some period of

time. However, as stated by our Court of Appeal in the *Central Halifax* case, the six month time line for a certiorari application (as opposed to appeal time limits of 30 days or less) provides "ample leeway" for filing an application for the extraordinary remedy of certiorari.

Rule 2.01

[17] The failure to comply with time lines under *Rule 56.06* is not a procedural irregularity preventing a nullity of proceedings pursuant to *Rule 2.01*. The Court's jurisdiction to extend time is found in *Rule 3.03.* The fact that there is no flexibility in filing deadlines for certiorari applications is evident by the express exclusion of *Rule 3.03.*

Limitation of Actions Act

[18] Counsel for Mr. Conway argues his client is under a disability and, therefore, Section 4 of the Nova Scotia *Limitation of Actions Act* applies. Section 4 refers to persons entitled to any action mentioned in Section 2 of the *Act.* The *Limitations of Actions Act* has no application to the time limits for making an

application for certiorari as it is not an "action" of the type mentioned in the *Act*. See *Ingham v. West Hants (Municipality)* [2006] N.S.J. No. 107 N.C.C.A.

Inherent Jurisdiction

[19] Counsel for Mr. Conway argues the Court should use its inherent jurisdiction to allow the application for judicial review to proceed due to Mr. Conway's disability. An Affidavit sworn by Mr. Conway dated November 6th, 2007 was filed as evidence of his disability.

[20] The Court's use of its inherent jurisdiction is reserved for exceptional cases, where, to do otherwise would result in a miscarriage of justice. In *Central Halifax, supra*, the Court referred to *Blue v. Antigonish District School Board* (1990), 95 N.S.R. (2d) 118 (T.D.) where Glube, C.J. (as she then was) exercised the Court's inherent jurisdiction as the application was filed after the deadline due to a power outage at the Prothonotary's office. The Appeal Court in considering the reasoning of the *Blue, supra,* case at paragraph 44:

> ... the bottom line on inherent jurisdiction is this. While it may be available for those rare cases like Glube, C.J. faced in *Blue, supra*, there is nothing on the facts

> of this case to justify such an application. As noted, the Appellant had 5 ½ months to file her application and there is no evidence or circumstances so exceptional to invoke this relief. Nonetheless, the fact that inherent jurisdiction remains a safety net that can prevent abuse in those truly exceptional cases supports my conclusion that the 6-month clock should begin when the impugned decision is made as opposed to when the agreed party may become aware of it.

[21] Mr. Conway's Affidavit purports to establish both physical and psychological disabilities. Overall, the Affidavit does not conform to the requirements under the *Civil Procedure Rules*. It contains commentary and hearsay. Portions of the contents are irrelevant to this Application and contain what may be described as oppressive or scandalous matters capable of being struck from the Affidavit pursuant to *Rule 38.11*. There was no direct admissible evidence establishing an inability of Mr. Conway to handle his affairs or understand the nature of the proceedings at all relevant times. Indeed, the Affidavit confirms he was aware of the decision of the Commission and his right to apply for an Order in the nature of certiorari. He confirms his instructions to counsel to make application. Certainly his Affidavit, sworn on December 23rd, 2005 in support of the application for judicial review, contains a concise history of the proceedings with no indication of any disability that would affect his ability to appreciate the proceedings or instruct counsel. There is no suggestion of his requiring a litigation guardian throughout these proceedings.

[22] In summary, there is no evidence of any event or cause that interferred with Mr. Conway's ability to file the Originating Notice by December 22nd, 2005 which would warrant exercising the Court's inherent jurisdiction.

Estoppel

[23] Counsel for Mr. Conway argues the Respondents are estopped from raising the jurisdictional issue by their conduct which included accepting service of the Originating Notice and failing to raise this preliminary objection in a timely manner. Counsel submitted a number of authorities, all labour arbitration cases which relate to collective agreements between union and employers dealing with the issue of waiver. The doctrine of estoppel has no application in the present case. The *Civil Procedure Rules* have the force of law. Certiorari is an extraordinary remedy dealing with the review of public decisions. As such, *Rule 56.06* sets out strict time lines to be followed which by specific reference cannot be extended, even with the consent of the parties.

[24] In the result the Applicant, Mr. Conway, is out of time in filing and serving the Originating Notice. Accordingly, the Application for Certiorari is dismissed.

J.