

IN THE SUPREME COURT OF NOVA SCOTIA  
**Citation:** Clark v. Canzio, 2003 NSSC 252

**Date:** 2003/12/19  
**Docket:** SH 193923  
**Registry:** Halifax

**Between:**

Robin D. Clark

Plaintiff

v.

Lesa Canzio

Defendant

**Judge:** The Honourable Justice Arthur J. LeBlanc

**Heard:** November 5, 2003, in Halifax, Nova Scotia

**Decision:** December 19, 2003

**Counsel:** Robin D. Clark, personally,  
C. LouAnn Chiasson, for the Defendant

**By the Court:**

[1] The claimant, Robin D. Clark advanced a claim in the Small Claims Court against the respondent, Lesa Canzio, to pay a portion of the debts incurred while they were cohabiting with each other.

[2] The claimant, Robin D. Clark advanced a claim in the Small Claims Court against the respondent, Lesa Canzio, to pay a portion of the debts incurred while they were cohabiting with each other.

[3] In a decision rendered on July 14th 2003, and filed July 16, 2003, Adjudicator Michael Cooke, Q.C. ordered Ms. Canzio to pay to the claimant an amount of \$9,368.73. No costs were awarded. Ms. Chiasson, solicitor for Ms. Canzio, received a copy of the decision (in the form of an order) on July 20, 2003.

[4] Ms. Chiasson issued a Notice of Appeal dated August 20, 2003 which was filed with the office of the Small Claims Court on August 25, 2003. The appellant's claim is that the adjudicator failed to take into account certain bank payments made by Ms. Canzio which were clearly identified on documents introduced as exhibits at the hearing. On the day she filed the Notice of Appeal, Ms. Chiasson wrote to the adjudicator stating that he had omitted to provide for a credit for the payments made by the respondent to ScotiaBank and inquiring if this was a typographical error. She later spoke to the adjudicator by telephone and says he took the position that he was *functus*, as he had signed the Order.

[5] In her affidavit, dated October 14, 2003, Ms. Chiasson states that, not having heard from the Small Claims Court, she phoned the Court and was advised by the clerk that the Notice of Appeal should have been forwarded to the Supreme Court. Thus it was only when Ms. Chiasson checked with the Small Claims Court office to determine the status of the appeal that she learned that she had not filed the Notice of Appeal in the appropriate office.

[6] Ms. Chiasson subsequently phoned the claimant to alert him that she was taking issue with the decision and claiming an oversight or error in the decision. She states that she informed him that she required his consent to appeal, given the passing of the date for filing. He refused to consent. Ms. Chiasson told the respondent that unless he accepted an amount less than his judgment as awarded by the adjudicator, she would seek leave to file the appeal late. This discussion occurred shortly after September 11, 2003.

[7] Ms. Chiasson also stated that, after receiving notice from the Small Claims Court, she was temporarily away from her office due to minor surgery. Upon her return her office was closed after Hurricane Juan. As such, she says, this

application is her first opportunity to seek an extension of time for filing the appeal.

[8] Ms. Chiasson claims that she notified that a Small Claims Court of her intention to appeal within a 35 days of the decision being filed with the Court.

[9] Ms. Chiasson failed to file her notice of appeal in the Supreme Court as required by the rules and failed to file an affidavit showing that she had served the claimant with her notice of appeal as required under the rules. In fact Mr. Clark was not served at all with the notice of appeal. It was necessary for the appellant to file an affidavit of service within seven days of the date of service of the notice of appeal on Mr. Clark. There is no explanation for the reason such service was not effected or the affidavit of service filed.

## **ISSUE**

[10] The issue is whether the Court should exercise its discretion to extend the time for filing of the notice of appeal and serving it on the claimant.

### **THE SMALL CLAIMS COURT ACT**

[11] The *Small Claims Court Act* provides that a party not satisfied with an adjudicator's decision may appeal to the Supreme Court on questions of law, jurisdictional error or failure to follow the requirements of natural justice (s. 32(1)). The *Small Claims Court Forms and Procedures Regulations* set out the procedure to be followed in filing a notice of appeal. Section 22 of the *Regulations* provides:

**22** (1) A Notice of Appeal shall be in Form 9.

(2) An appeal shall be commenced by the appellant

(a) filing 2 copies of the Notice of Appeal with the prothonotary;

and

(b) serving 1 copy of the Notice of Appeal on the respondent

not later than 30 days after the adjudicator's order or determination

is filed.

- (3) Service of the Notice of Appeal on the respondent shall be by personal service or registered mail.
- (4) The appellant shall file proof of service of the Notice of Appeal on the respondent with the prothonotary not later than 7 days after the last day for service of the Notice of Appeal.
- (5) Proof of service may consist of a letter certifying the fact of service and the mode of service, and where service is by registered mail, the appellant shall file the Canada Post registration receipt with the prothonotary.
- (6) Where a Notice of Appeal is filed, the prothonotary shall send 1 copy to the adjudicator who shall within 30 days complete a Summary Report in Form 10 and send 4 copies to the prothonotary.
- (7) Where the prothonotary has received 4 copies of a Summary Report from the adjudicator, the prothonotary shall immediately
- (a) send 1 copy to the appellant;
  - (b) send 1 copy to the respondent by Canada Post Corporation Priority Courier;

(c) advise the Supreme Court that the appeal is ready for hearing;  
and

(d) set a date for the appeal to be heard and advise the parties of that date by Canada Post Corporation Priority Courier.

(8) A judge may direct what additional material may be filed and may request a restatement of the case from an adjudicator.

(9) When both parties to an appeal submit briefs, the Court may dispense with oral argument.

(10) An appellant's brief shall be submitted at least 4 clear days prior to the date set for the appeal to be heard.

(11) A respondent's brief shall be submitted at least 2 clear days prior to the date set for the appeal to be heard.

(12) Noncompliance with this Section shall not render any proceeding void, but the proceeding may be amended, set aside as irregular or otherwise dealt with as the Court may direct.

[12] The law on the extension of time for filing a Notice of Appeal was recently stated by Oland J.A. in *G.S.H. v. Children's Aid Society of Cape Breton*, [2003] N.S.J. No. 301 (C.A.), at para. 10:

The court is to be satisfied that (a) the applicant had a *bona fide* intention to appeal while the right to appeal existed; (b) the applicant had a reasonable excuse for the delay in not launching the appeal within the prescribed time; and (c) the appeal has sufficient merit in the sense of raising a reasonably arguable ground. See *Nova Scotia (Attorney General) v. Mossman et al.* (1994), 133 N.S.R. (2d) 229 (C.A.). This three-part test is not to be applied inflexibly. As Hallett J.A. pointed out in *Tibbetts v. Tibbetts* (1992), 112 N.S.R. (2d) 173 at para. 14, the court must ask on such an application whether justice requires the application to be granted.

[13] Similarly, in *Briand v. Coachman Insurance*, [2003] N.S.J. No. 116 (C.A.), at para. 10 the Court cited *Spence v. Nantucket Investor Group* (1998), 169 N.S.R. (2d) 176 (C.A.), in which Cromwell J. A., in turn, cited *Nova Scotia (Attorney General) v. Mossman et al* (1994), 133 N.S.R. (2d) 229, where Roscoe J. A. referred the well-established three-part test at p. 231:



The time period for filing a notice of appeal should only be extended where:

The appeal has sufficient merit, on the basis that is arguable that the trial judge made clear error in his perception and evaluation of the evidence;

There was a bona fide intention to appeal while the right of appeal existed;

A reasonable excuse for the delay in launching the appeal is advanced.

In addition, as Hallett J. A. pointed out in **Tibbetts v. Tibbetts ...** the three-part test is not the only test for determining whether the time for appeal should be extended. An overriding question in all cases is whether the court is satisfied that justice requires that an application for extension of time be granted. There is no precise rule; the circumstances in each case must be considered so the justice can be done.

[14] I agree that that Ms. Canzio intended to appeal by virtue of her filing notice of appeal on August 25, 2003. The Adjudicator's decision was filed on July 16, 2003, which results in Ms. Cazio being nine days late in filing. Given that the Notice of Appeal was prepared August 20, 2003, the delay in disclosing an intention to appeal is actually only four days. There is no indication in the affidavit that Ms. Chiasson intended to file an appeal within the time prescribed by the *Regulations*. Neither is there any indication as to whether she reviewed the *Regulations* and misunderstood them or simply filed the notice without reviewing the provisions. I infer that, but for the misinterpretation of the *Regulations* – or failure to consult them – Ms. Chiasson indeed indicated an intention to appeal within the required time period. I am satisfied that the appellant intended to Appeal from at least August 20, 2003.

[15] The next question is whether there is a reasonable excuse for the delay in filing the Notice of Appeal.

[16] In the instant case, Ms. Chiasson, counsel for the appellant, committed the error of failing to file the Notice of Appeal within 30 days of the decision and failing to file it in the correct office. The error was entirely that of the solicitor.

[17] When exercising my discretion, I believe it is necessary to consider the impact of an extension or a refusal on the parties. Refusing the extension would mean that Ms. Canzio would be unable to have the decision reviewed to determine whether or not such an error was an oversight on his part. I find no prejudice to Mr. Clark if the extension is granted.

[18] Whether the adjudicator was *functus* as he informed Ms. Chiasson is relevant as to whether there is another avenue of redress.

[19] The Supreme Court has inherent jurisdiction to correct an error, in addition to the provisions of **Civil Procedure Rule 15.07**, which provides:

Clerical mistakes in judgements or orders, or errors arising therein from any accidental mistake or omission, or an amendment to provide for any matter which should have but was not adjudicated

upon, may at any time be corrected or granted by the court without appeal.

[20] The Small Claims court does not have any inherent jurisdiction except for the power and jurisdiction contained in the enabling statute. Thus I do not believe that a Small Claims Court adjudicator has inherent jurisdiction to correct an error after the Order has been granted and filed with the office of the Small Claims Court. Further, the current version of the *Small Claims Court Act* does not provide for the application of the **Civil Procedure Rules** to proceedings in the Small Claims Court.

In proceedings in the Small Claims Court, the Nova Scotia Rules of Practice apply except where there is a contrary intent shown by the Small Claims Court Act.

[21] It is evident that there was an intention to appeal this decision from at least August 20, 2003. Furthermore, there was contact with the claimant shortly after September 11, 2003. In his letter to Ms Chiasson dated October 16, 2003 Mr. Clark referred to a telephone call of the previous month. Therefore, Mr. Clark became aware of the intention to appeal around September 11, 2003 some three weeks late. On this occasion, Ms. Chiasson had attempted to negotiate a reduced

amount to take into account the alleged mistake made by the adjudicator. In his letter of October 16, 2003 Mr. Clark wrote: “My recollection of your telephone call last month was that of some slightly veiled threats to sign off on what you referred to as a \$5800 error by the Small Claims Court Adjudicator; or else it would cost me a lot more money for additional court costs etc.

[22] Although not all of the elements are met, I still must consider the overriding question of whether justice requires that the application for extension be granted. It is clear from such cases as *Tibbetts*, *Briand* and *G.S.H.* that the circumstances of each case must be considered so that justice can be done. In *Blundon v. Storm* (1970), 1 N.S.R. (2d) 621 (S.C.A.D.) the appellant missed the time for filing an appeal to the Supreme Court of Canada by approximately two weeks. There had been some discussion with the solicitor for the opposite party within the time period. The applicant relied on his misunderstanding as the precise meaning of the provision. At p. 635 Coffin J.A. concluded that

this is a case where the interests of justice require that leave to extend time be given. There was a *bona fide* error on the part of the solicitor for the plaintiff which he readily admits. The case is one of great importance involving what may be very substantial sums

and the interests of the defendant can well be protected by conditions attached to the granting of leave....

[23] In the matter before me it is likely that the adjudicator omitted to consider part of the evidence. It would be unfair not to have the matter determined on an appeal. It may turn out that Mr. Clark is entitled to the amount found owing by the adjudicator, but that is beside the point.

[24] In view of the circumstances of this case, I am granting the application for leave to extend the time on the following conditions:

Notice of Appeal to be filed not later December 29, 2003;

Service of the Notice of Appeal on Robin Clark on or before December 29, 2003;  
and

Affidavit in Proof of Service to be filed on or before December 31, 2003.

J.