

Date:20010122
Docket: CA 166921

NOVA SCOTIA COURT OF APPEAL
[Cite as:Smith v. Heron, 2001 NSCA 10]

BETWEEN:

BRIAN S. HERON

Appellant

- and -

CHARLES A. SMITH

Respondent

D E C I S I O N

Counsel: Vincent A. Gillis for the appellant
John E. MacDonell for the respondent.

Application Heard: January 18, 2001

Decision Delivered: January 22, 2001

BEFORE THE HONOURABLE JUSTICE CROMWELL IN CHAMBERS

CROMWELL, J.A.: (in chambers)

- [1] The appellant, Mr. Heron, filed a notice of appeal on October 26th appealing orders of Goodfellow, J. dated August 16, 2000. The orders appealed from granted the respondent (the plaintiff in the action) summary judgment in his action on judgments for court costs obtained against the appellant in California.
- [2] There are three applications before the Court. The respondent asks that I quash the notice of appeal because it was filed out of time or, alternatively, that I order that the appellant post security for costs of the appeal. The appellant asks that I extend the time for serving and filing the notice of appeal, if necessary.
- [3] As I indicated to counsel at the hearing, I will not quash the notice of appeal and I will extend the time for filing it to the day it was, in fact, filed, that is October 26, 2000.
- [4] In my view, the appeal should have been filed within 30 days of the date of the orders appealed from: see **Rule 62.02(1)(c)**. The Notice of Appeal was, therefore, filed about 40 days late. There were, however, some extenuating circumstances. Goodfellow, J. stayed execution of one of his orders pending determination of an appeal pending in California. After the hearing before Goodfellow, J. and, indeed, after the orders were signed, there was

correspondence among the parties and the judge concerning whether execution of the second order should also be stayed. The judge advised on September 27th that there would be no stay and that he had concluded his consideration of the matter. Mr. Heron says that he misunderstood when the appeal period would begin to run and also that he was travelling so that communication with the court and his counsel was difficult. It appears from the material that Mr. Heron formed an intention to appeal within the appeal period and this was conceded by Mr. MacDonell. There is no evidence that the respondent on appeal has been prejudiced by the delay.

- [5] The appeal raises arguable issues, there was an intent on Mr. Heron's part to appeal within the time and, while Mr. Heron was careless with respect to filing his notice of appeal, there is an explanation for his delay that, if not reasonable, at least negates any suggestion that he blatantly disregarded the Court's rules. As noted, there is no evidence of prejudice to the respondent on appeal. Apparently the litigation in California dates back to the late 1980's and the California judgments which form the basis of Goodfellow, J.'s orders were made in 1997 and 1999 respectively.
- [6] As several chambers decisions in this Court have said, the discretion to extend time is not confined by the three part test as set out in cases such as

Maritime Co-op Services Ltd. and Martin v. Maritime Processing Co.

Ltd. et al. (1979), 32 N.S.R. (2d) 71 although it continues to be a useful guide to the exercise of discretion under **Rule 62.31(8)(e)**: see for example, **Hatch (Robert) Retail Inc. et al. v. Canadian Auto Workers Union, Local 4624** (1999), 179 N.S.R. (2d) 280. In all of the circumstances set out in the material filed in this case, it would not be just to quash the notice of appeal. I will order the extension of time for filing the notice of appeal to October 26, 2000, and dismiss the application to quash the notice of appeal.

[7] I think, however, it would be appropriate to impose some terms on the granting of the extension. Mr. Heron has been careless in his pursuit of this appeal and has not paid costs of an interlocutory proceeding which were ordered by Moir, J. to be paid forthwith on February 19, 2000. There is no evidence that Mr. Heron lacks the ability to pay this obligation which has now been outstanding for nearly a year. He does not currently reside in Canada. The material filed persuades me that it is appropriate in granting the extension of time to impose terms which will provide some assurance to the respondent that the appellant will pursue the appeal with dispatch and that he will not continue to ignore court orders.

[8] I, therefore, order that the extension of time for filing the notice of appeal will be conditional on Mr. Heron complying with each of the following terms:

1. The Appeal Book and Appellant's factum will be served and filed no later than March 1st, 2001, and an application to set the appeal down for hearing will be made no later than March 15th;
2. The costs of \$750.00 ordered paid by Moir, J. in his order dated February 29, 2000, in File S.H. No. 160780 will be paid on or before the date of the application to set down the appeal and proof thereof shall be filed with this Court on or before the date of the application to set down the appeal;
3. He shall pay the respondent costs of the application to extend time fixed at \$300.00 inclusive of disbursements on or before the date of the application to set down the appeal and proof of such payment shall be filed with the Court on or before that time;

[9] In default of compliance with any of these conditions, the respondent may apply to Court of Appeal chambers for an order dismissing the appeal without further notice to the appellant.

[10] Given the conditions I have imposed on the order granting the extension, it would not, in my opinion, be just to order the appellant to post security for costs of the appeal. The application for security for costs is dismissed but without costs.

[11] I would ask Mr. MacDonell to prepare an order for my signature.

Cromwell, J.A.