

NOVA SCOTIA COURT OF APPEAL

Citation: *Innocente v. Canada (Attorney General)*, 2017 NSCA 95

Date: 20171220

Docket: CA 470879

Registry: Halifax

Between:

Daniel J. Innocente

Appellant

v.

Attorney General of Canada

Respondent

Judge: Derrick, J.A.

Motion Heard: December 14, 2017, in Halifax, Nova Scotia in Chambers

Held: Motion dismissed

Counsel: Appellant in person
Sarah Drodge, for the Respondent

Decision:

Introduction

[1] Mr. Innocente has missed the deadline for filing an appeal against an Interlocutory Order. His motion for an extension of time is opposed by the respondent.

[2] Mr. Innocente's involvement in court proceedings has a long history. In 1996 and 1997 he was charged with various offences following a drug trafficking and proceeds of crime investigation. The Crown obtained a restraint order against his home in Five Island Lake and personal property.

[3] Mr. Innocente was ultimately convicted of conspiracy to traffic in cannabis resin and sentenced to seven years in prison. His property was managed and maintained by the Seized Property Management Directorate ("SPMD") of Public Works and Government Services Canada. In 2002, the Supreme Court approved the sale of the Five Island Lake property. (*R. v. Innocente*, 2003 NSSC 75)

[4] The proceeds of crime charge against Mr. Innocente was stayed. The restraint order obtained in 1996 was revoked and Mr. Innocente's personal property was returned to him. (*Innocente v. Canada (Attorney General)*, 2012 NSCA 36)

[5] In 2009 Mr. Innocente started an action in the Nova Scotia Supreme Court against the Crown alleging losses related to the sale of his home and damage to his personal property which he claimed was in a "dilapidated state".

[6] Mr. Innocente's pleadings have been the subject of motions by the respondent for summary judgment. He also has been litigating, making various motions, most recently before Chipman, J. in June of this year. It is Chipman, J.'s decision that Mr. Innocente wishes to appeal to this Court.

A Short History of Mr. Innocente's Litigation against the Respondent

[7] Some further background will help to contextualize Mr. Innocente's motion before me.

[8] Mr. Innocente's original Statement of Claim and a subsequent Amended Statement of Claim were the subject of summary judgment. Although LeBlanc, J. dismissed his original Statement of Claim as failing to disclose a cause of action, Mr. Innocente was not precluded from filing an Amended Statement of Claim. (2010 NSSC 111, para. 54)

[9] Mr. Innocente did not appeal the LeBlanc dismissal. Instead he filed an Amended Statement of Claim. The Attorney General again applied for summary judgment on the pleadings. The motion was granted, without leave to amend. Coady, J. concluded that Mr. Innocente's amended claim was "clearly unsustainable" and dismissed it. (2011 NSSC 184, para. 31)

[10] This time Mr. Innocente appealed. On appeal, the Court scrutinized his claims in relation to each category of property identified in his pleadings – his real property and his personal property. The Court upheld Coady, J.'s conclusions that Mr. Innocente's claim of damages for "reduced realty value" of his home was "clearly unsustainable." The Court further agreed that Mr. Innocente's claim for damages relating to the alleged condition of his personal property was unsustainable due to the lack of particularization. (2012 NSCA 36, paras. 36 and 39)

[11] Mr. Innocente's appeal did secure him a modest measure of success. The Court permitted Mr. Innocente to file a further Amended Statement of Claim to identify the damaged personal property items and describe the damage. (para. 57) However, his claim in relation to his Five Island Lake home was not resuscitated. The Court held: "There has been no suggested amendment that might establish a sustainable claim for the lost market value to Mr. Innocente's home and realty." (para. 41)

[12] Mr. Innocente filed a Third Amended Statement of Claim in which he particularized the damage to his personal property. In the course of the document disclosure and discovery processes, Mr. Innocente sought an order permitting him to discover certain individuals, including a retired RCMP officer, Ray Oliver. The respondent had advised Mr. Innocente that its Crown deponent for discovery purposes would be Robert Charlebois, the Regional Representative and Senior Case Officer in eastern Canada for the SPMD.

[13] As indicated in its brief on this motion, the respondent opposed the request for discovery of Mr. Oliver and the other individuals, "arguing that pursuant to the *Crown Liability and Proceedings (Provincial Court) Regulations*, the Crown is

entitled to designate its deponent for discovery purposes.” Moir, J. dismissed Mr. Innocente’s motion to discover Mr. Oliver. Mr. Innocente subsequently discovered Mr. Charlebois on August 1, 2014.

[14] Mr. Innocente did not appeal Moir, J.’s order. But he did try again, in July 2015, by filing another motion for an order to discover Mr. Oliver. The respondent opposed the motion but advised Mr. Innocente that counsel would arrange for Mr. Charlebois to answer additional questions in writing.

[15] Wood, J. dismissed Mr. Innocente’s motion to discover Mr. Oliver. The questions Mr. Innocente subsequently submitted to Mr. Charlebois were answered with the exception of two which the respondent objected to on the basis of relevance.

[16] On June 8, 2017 Mr. Innocente made a further motion in Supreme Court seeking an order for the respondent,

To produce the shadow file of my case that the RCMP has and will not produce when was ask for or order to produce Ray Oliver of the RCMP he was lead investigator of the proceed of crime in my case.

[17] Chipman, J. dismissed Mr. Innocente’s motion in its entirety on June 28, 2017. The Order was signed on August 23, 2017.

Pursuing the Appeal of Chipman, J.’s Order

[18] Mr. Innocente sought to appeal Chipman, J.’s Order by filing a Notice of Appeal on September 26, 2017. As he explained in oral submissions before me, he was provided with, and relied on, incorrect information and did not appreciate he was appealing an Interlocutory Order. Consequently he did not realize that under Civil Procedure Rule 90.13(3) he only had ten, not thirty, days in which to file his Notice of Appeal.

[19] Mr. Innocente’s Notice of Appeal was not only out of time, it was not accompanied by the required filing fee. Mr. Innocente says money has been very tight for him recently. He has had some extraordinary expenses and is owed a substantial amount of money for contracting work done for a client. The constellation of these factors has prevented him from paying the filing fee.

[20] The respondent submits that the deficiencies in Mr. Innocente’s filing of his proposed Appeal are not central to its opposition to his motion for an extension of

time. The respondent's primary argument against Mr. Innocente's motion is that his proposed Appeal is completely without merit.

The Test for Obtaining an Extension of Time to File an Appeal

[21] As noted by Beveridge, J.A. in *Haince v. Wiseman* 2016 NSCA 92, *Civil Procedure Rule* 90.37(12) says that a judge may extend or abridge any time limits referred to in Rule 90. Whether a time limit should be extended is to be decided by whether the interests of justice require it: there are no rigid rules that govern the issue. (*para. 10*)

[22] In *Farrell v. Casavant* 2010 NSCA 71, Beveridge, J.A. discussed the "common factors" that are relevant to determining whether justice requires the extension of a time limit:

17...the length of delay, the reason for the delay, the presence or absence of prejudice, the apparent strength or merit in the proposed appeal and the good faith intention of the applicant to exercise his right of appeal within the prescribed time period. The relative weight to be given to these or other factors may vary...

The Apparent Strength or Merit in the Proposed Appeal

[23] The respondent does not take issue with Mr. Innocente's good faith intention to appeal and says there is no reason to doubt the truthfulness of his explanation for why he missed the filing deadline. It is therefore the "merits in the proposed appeal" factor that is the determinative factor in my assessment of whether the interests of justice require that Mr. Innocente be granted the extension of time he is seeking.

[24] Mr. Innocente responded to the respondent's submission that his proposed appeal has no merit by insisting that the RCMP does have a "shadow file" and saying he needs to discover Ray Oliver because he cannot read his notes. Counsel for the respondent countered this by explaining that Mr. Oliver's notes are irrelevant to Mr. Innocente's claim and stating that the RCMP have confirmed they have nothing in their possession that is relevant.

[25] In her brief, counsel for the respondent has explained the "shadow file" that Mr. Innocente says Chipman, J. should have ordered produced to him. She states:

...there is no RCMP shadow file. The term "shadow file" was used by Crown deponent Robert Charlebois, in his discovery. In his follow-up discovery

questions, the Plaintiff [Mr. Innocente] asked Mr. Charlebois about the “shadow file” and Mr. Charlebois provided the following answer, “The shadow file is a copy of a regional case file that is kept at SPMD (Seized Property Management Directorate) headquarters in Gatineau, Quebec (Ottawa area). It has the same information contained in the regional file.” The Defendant [respondent on this motion] included these materials in its documentary disclosure. Counsel for the Defendant also clarified at the hearing of the motion that the “shadow file” to which Mr. Charlebois referred in his discovery evidence was a file maintained at the headquarters of the Seized Property Management Directorate.

[26] This makes it clear that Mr. Innocente has received the SPMD file materials through documentary disclosure by the respondent.

[27] As for Ray Oliver, he was one of the RCMP officers involved in the original criminal investigation of Mr. Innocente. He had nothing to do with the Seized Property and Management Directorate. If, as Mr. Innocente says, Mr. Oliver attended at the Five Island Lake property with representatives of SPMD, this does not change the fact that he was not working for SPMD. It was SPMD who were responsible for the personal property seized from Mr. Innocente.

[28] Mr. Innocente has made the argument that he needs to be able to read Mr. Oliver’s notes to advance his claim against the respondent. Counsel for the respondent explained that Mr. Innocente was not provided with Mr. Oliver’s notes because they are relevant to the claim. They were provided to Mr. Innocente at his request because he had lost portions of the original disclosure from the criminal investigation. The notes relate to the criminal investigation, not to the seizure of the personal property and the claim that Mr. Innocente has brought in respect of it. The notes are not relevant to Mr. Innocente’s civil claim against the respondent for damages.

[29] And, the respondent further notes, the issue of whether there should be an order permitting discovery of Mr. Oliver by Mr. Innocente has already been adjudicated. Two Supreme Court justices - Moir, J. and Wood, J. - dismissed motions brought by Mr. Innocente seeking to discover Mr. Oliver, decisions that Mr. Innocente did not appeal.

[30] Counsel for the respondent makes an additional point in her brief that:

...[Mr. Innocente] has not established that he is entitled to discover a second Crown deponent. [He] has not demonstrated, nor has he even argued, that the Crown deponent, Mr. Charlebois, was uninformed or incapable of becoming informed about any relevant matter. [Mr. Innocente] has not identified any

question Mr. Charlebois was unable to answer. As such, he has not established the special circumstances which would permit him to discover a second Crown deponent.

[31] There is nothing to indicate that Mr. Oliver has relevant information to offer in relation to Mr. Innocente's claim. This ground has already been ploughed by Mr. Innocente before Justices Moir and Wood. Mr. Oliver was involved in the criminal investigation of Mr. Innocente and not the management of his personal property by SPMD.

[32] It is the respondent's position that through his motion before Chipman, J. and by seeking to appeal that decision, Mr. Innocente is trying to expand the scope of his claim. That was apparent in Mr. Innocente's submissions before me. As I explained earlier in these reasons, the scope of Mr. Innocente's claim has already been clearly defined by the courts. It is limited to an action for damages in relation to personal property that was held by Seized Property Management Directorate.

Conclusion

[33] The interests of justice can require that the time for filing a notice of appeal be extended where the filing deadline has been missed. In Mr. Innocente's case he had to show that his proposed appeal against Chipman, J.'s order has merit. For the reasons I have given, I am amply satisfied it does not. An extension of time to allow Mr. Innocente to file a Notice of Appeal is not in the interests of justice. Mr. Innocente's motion is dismissed without costs.

Derrick, J.A.