

NOVA SCOTIA COURT OF APPEAL

Citation: *American Holdings 2000 Inc. v. Royal Bank of Canada*, 2019 NSCA 78

Date: 20191002

Docket: CA 481674

Registry: Halifax

Between:

American Holdings 2000 Inc.,
John T. Early III and Baypoint Holdings Limited

Appellants

v.

Royal Bank of Canada and Andrew Rankin

Respondents

Judge: Beaton, J.A.

Motion Heard: September 12, 2019, in Halifax, Nova Scotia in Chambers

Written Decision: October 2, 2019

Held: Motion granted

Counsel: John T. Early III, on his own behalf and for the corporate appellants
Joshua Santimaw, for the respondent Royal Bank of Canada
Stephen Kingston, for the respondent Andrew Rankin

Decision:

[1] On August 27, 2019, the Registrar of the Court of Appeal filed a motion pursuant to *Civil Procedure Rule* 90.43(3) seeking to dismiss the appeal. The motion was heard September 12, 2019 and at the conclusion of that hearing, in which the appellants opposed the motion and the respondents supported it, I set out cursory oral reasons as to why the Registrar's motion was granted and advised these written reasons would follow.

History of proceeding

[2] The history of the filings in this matter provide context. The Notice of Appeal was filed on October 23, 2018. The Court assigned a date for hearing of the appeal and provided filing instructions at an appearance on December 20, 2018. When the appeal was not perfected, the Registrar made a motion under *Rule* 90.43(3) on May 2, 2019 seeking to have the matter dismissed. The Court did not grant that motion, but rescheduled the appeal hearing to a later date and provided instructions for new filing deadlines. At that time the appellant Mr. Early, who is self-represented and acts on behalf of the two corporate appellants, was cautioned by Justice Van den Eynden about ensuring future deadlines were met.

[3] Specifically, the appellants were to file an Appeal Book by June 28, 2019 and a factum by July 15, 2019. Subsequently, the appellants were able to secure the consent of the respondents and the Registrar to delay those filings to July 29 and August 20, 2019 respectively.

[4] The appellants filed the Appeal Book on July 29, 2019, but did not file their factum which was due on August 20, 2019. On August 19, 2019, Mr. Early wrote to the Registrar seeking a further extension of time for the filing of the appellants' factum, which request was not granted as the respondent Bank did not consent. On August 23, 2019, the respondent Bank filed a motion seeking to have portions of the Appeal Book struck, which motion was set down (by consent) for hearing also on September 12, 2019.

[5] No motion was ever made by the appellants to seek permission from the Court to further extend the time for filing of the factum, despite the Registrar's motion and the respondent Bank's motion having both been scheduled for the September 12 date. However, the appellants eventually deposited a factum with the Registrar on September 10, which the Registrar could not accept for formal

filing absent an Order of the Court to extend the date for filing of their factum, which was by then three weeks overdue.

[6] At the outset of the hearing of the Registrar's motion to dismiss, I advised the parties I would consider that motion first, as the outcome would inform whether to proceed with the respondent Bank's motion to strike portions of the Appeal Book. There was no cross-examination on the affidavit filed by the appellant Mr. Early.

[7] The appellants argued the Registrar's motion should be dismissed as all parties now had the benefit of their overdue factum, the delay of which had been occasioned by the health problems of Mr. Early, and his having been interrupted in preparation of the factum by receipt of the respondent Bank's motion to strike portions of the Appeal Book, which portions Mr. Early maintained were central to the appellants' factum contents.

[8] Mr. Early submitted that having eventually decided to forge ahead with preparation of the factum regardless of the respondent Bank's motion, the appellants' late production of the factum was meant as no disrespect and did not create any prejudice to the respondents, nor would the date for hearing of the appeal be impacted by now adjusting the dates for the respondents to file their facta.

[9] Each respondent supported the Registrar's motion to dismiss the appeal. The respondent Bank argued its motion to strike portions of the Appeal Book had been intentionally scheduled to the same date as the Registrar's motion, in anticipation of a motion from the appellants to extend the time for filing and to introduce fresh evidence. Such motions were never filed by the appellants.

Analysis

[10] Filing of the Registrar's motion pursuant to *Rule* 90.43(3) is mandatory on the part of the Registrar; the granting of the motion is in the discretion of the Court. I am guided by the frequently cited reasoning of Saunders, J.A. in *Islam v. Sevgur*, 2011 NSCA 114, where he summarized the analysis the Court should undertake in considering the Registrar's motion:

[36] The approach I take in such matters is this. Once the Registrar shows that the rules for perfecting an appeal have been breached, and that proper notice of her intended motion has been given, the defaulting appellant must satisfy me, on a

balance of probabilities, that the Registrar's motions ought to be denied. To make the case I would expect the appellant to produce evidence that it would not be in the interests of justice to dismiss the appeal for non-compliance. While in no way intended to constitute a complete list, some of the factors I would consider important are the following:

- (i) whether there is a good reason for the appellant's default, sufficient to excuse the failure.
- (ii) whether the grounds of appeal raise legitimate, arguable issues.
- (iii) whether the appeal is taken in good faith and not to delay or deny the respondent's success at trial.
- (iv) whether the appellant has the willingness and ability to comply with future deadlines and requirements under the *Rules*.
- (v) prejudice to the appellant if the Registrar's motion to dismiss the appeal were granted.
- (vi) prejudice to the respondent if the Registrar's motion to dismiss were denied.
- (vii) the Court's finite time and resources, coupled with the deleterious impact of delay on the public purse, which require that appeals be perfected and heard expeditiously.
- (viii) whether there are any procedural or substantive impediments that prevent the appellant from resuscitating his stalled appeal.

[37] It seems to me that when considering a Registrar's motion to dismiss, a judge will wish to weigh and balance this assortment of factors, together with any other circumstances the judge may consider relevant in the exercise of his or her discretion.

[11] Several of the aforementioned factors are applicable in this case.

Reasons for Appellants' delay

[12] Mr. Early submitted in argument that he is ill, and his (unidentified) condition hampers him in responding in a timely fashion so as to meet deadlines. There was no evidence, either from Mr. Early or any health-care provider, to support that assertion, much less to draw sufficient connection between his health and his ability to meet deadlines imposed by the Court in past or in future.

[13] The evidence of Mr. Early was that he had been "knocked off course" during production of the appellants' factum by the respondent Bank's motion to strike portions of the Appeal Book. Mr. Early's concern that certain portions of the

impugned materials were critical to his factum contents meant "... the production of the Factum came to a halt ..." but eventually "... it was decided that the Factum be written ...".

[14] With respect, none of the evidence regarding the reasons for the appellant's delay is satisfactory to excuse the failure. Regardless of what steps the respondent Bank might have decided to take during the process, the appellants were previously well informed of their obligations to the process and the need to adhere to deadlines. The appellants' own evidence establishes that a unilateral decision was made to suspend preparation of the factum, and then deposit it out of time.

Willingness to comply with deadlines

[15] The history of the matter to date leaves me less than confident the appellants could adhere to deadlines going forward. It is an exacerbating factor that the Registrar has had to move for dismissal a second time in relation to this matter. The dismissal of the first motion left all the parties better equipped than most to appreciate the importance of meeting deadlines imposed by the Court and/or the *Civil Procedure Rules*. The appellants' approach to their obligations to date is in no way a positive predictor of the appellants' willingness and/or ability to comply with deadlines going forward.

Procedural or substantive impediments

[16] The file materials support that the appellant was in contact with counsel for the respondent Bank and with the Registrar throughout the time following the Registrar's first motion. Indeed as mentioned earlier, the appellants had successfully negotiated yet a further adjustment to the second set of filing deadlines imposed by the Court. Mr. Early's affidavit suggests he is somewhat familiar with the *Rules* and their impact, and the need to adhere to deadlines. While the appellants cannot be penalized for not filing a motion for fresh evidence or to extend the time for filing, it cannot be said that there existed any procedural or substantive impediments that prevented the appellant from moving forward with the appeal. As appropriate as it may be to show some latitude or flexibility to a self-represented litigant, the leeway extended to Mr. Early by the Court following the first motion of the Registrar does not seem to have increased his responsiveness.

Prejudice to either party

[17] There is an obvious or fundamental prejudice to any appellant who seeks to advance their position on an appeal where that appeal is dismissed by the Registrar's motion. As noted by Beveridge, J.A. in *Leigh v. Belfast Mini-Mills*, 2012 NSCA 67 at para. 22:

I think it fair to say that as a general rule a judge should be hesitant to deny an appellant his or her opportunity for this Court's review of a decision that can be appealed to this Court. ...

(See also *An Jager v. Jager*, 2019 NSCA 9 at para. 31). While such restraint is appropriate, it does not displace the burden on the appellants to show why the Registrar's motion, properly constituted, should be dismissed. In this case, I conclude that the respondents would be more prejudiced by allowing the matter to continue, given the chronology of the appellants' inability to meet Court or *Rule* imposed deadlines.

The interest in expeditious appeals

[18] Having been given a second opportunity to conform when the Registrar's first motion was dismissed, the appellants did not take that opportunity to comply going forward. I do not accept the appellants' argument that nothing has been lost as a result of one missed deadline that could not be restored by merely adjusting the remaining filing dates going forward, to accommodate the hearing of the appeal scheduled for November 13, 2019. Rather, what is lost is the Court's and the respondents' ability to have confidence that any further dates will be adhered to by the appellants. Sufficient resources, funded by the public, have already been expended in trying to ensure compliance by the appellants and still the appeal has not been perfected. The Court, litigants and the public have an interest in ensuring cases proceed efficiently or the *Rules* designed to promote that became pointless (*MacDonald v. Nova Scotia (Workers' Compensation Appeals Tribunal)*, 2010 NSCA 23; *S.S. v. D.S.*, 2011 NSCA 14).

Conclusion

[19] Applying the strict interpretation analysis referenced in *Islam v. Sevcur* to this matter, I conclude the appellants have not met the burden to demonstrate on a balance of probabilities that the Registrar's motion should not be granted. The appellants have not persuaded me that it is in the interests of the administration of

justice that the appeal be permitted to proceed in light of all of the events to date. As a result, I do not need to decide on the respondent's motion to strike portions of the Appeal Book as that issue is rendered moot by this decision.

[20] The Registrar's motion is granted; the Registrar shall prepare the Order dismissing the appeal.

Beaton, J.A.