NOVA SCOTIA COURT OF APPEAL

Citation: *American Holdings 2000, Inc. v. Royal Bank of Canada*, 2019 NSCA 82

Date: 20191025
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:	Wood, C.J.N.S.
Motion Heard:	Motion by Written Submission
Held:	Motion dismissed
Counsel:	John T. Early, III, for the appellants Joshua J. Santimaw, for the respondent Royal Bank of Canada Stephen Kingston, for the respondent Andrew Rankin

Decision:

[1] This is a motion for leave to review the decision of a chambers judge. By order dated October 2, 2019, the Honourable Justice Carole A. Beaton granted the Registrar's motion to dismiss this appeal pursuant to *Civil Procedure Rule* 90.43(3). Her written reasons for doing so are reported at 2019 NSCA 78.

[2] The appellant, John T. Early, III is president of the two corporate appellants and acts as their representative in this proceeding. According to his submissions, Mr. Early has been a member of the Connecticut bar for 37 years. He has represented himself and a number of corporate entities in various proceedings before the Nova Scotia Supreme Court and the Nova Scotia Court of Appeal over the last few years.

History of Proceedings

[3] This appeal arises out of the decision of the Honourable Justice Jamie Campbell of the Nova Scotia Supreme Court which is reported at 2018 NSSC 233.

[4] The Notice of Appeal was filed on October 23, 2018. A motion for date and directions took place on December 13, 2018 at which time the appeal hearing was set for June 4, 2019 and the deadline for filing the appeal book was March 4, 2019. Dates were also set for the parties' facta.

[5] Mr. Early did not file the appeal book and the Registrar made a motion under *Rule* 90.43(3) and (4) to dismiss the appeal on that basis. The motion was set to be heard on May 2, 2019. In response to the Registrar's motion, Mr. Early filed an affidavit explaining a number of serious health problems which he said had prevented him from being able to file the appeal book as required. In his affidavit, he expressed the view that he would be able to file the appeal book by no later than June 12, 2019.

[6] After receiving and reviewing Mr. Early's affidavit, neither the Registrar nor the respondents took a position in opposition to his request that he be given more time. The Registrar's motion was dismissed by the Honourable Justice Elizabeth Van den Eynden, and an order to that effect was issued on May 3rd.

[7] During the May 2nd court appearance, Justice Van den Eynden set new dates for the appeal – the hearing was set for December 2nd, and the appeal book was to

be filed by June 28th. The appellant's factum due on July 15th and the respondents facta on August 16th. On May 3rd, a written notice was sent by the Deputy Registrar to all parties confirming the new schedule. In accordance with the Court's practice, it included the following provision:

> To extend a filing date the permission of the Registrar must be obtained and all parties must consent to the extension. To request a new hearing date a motion must be made to the Chambers Judge.
>
> Failure to meet the above-noted filing dates may result in this appeal being dismissed by the presiding judge.

[8] On June 27th, Mr. Early contacted counsel for the respondents by email and requested an extension of the filing date for the appeal book based upon unspecified medical issues which left him "short of time and energy". Counsel agreed and, as a result, the Registrar granted an extension for filing the appeal book to July 29th with the appellant's factum due on August 20th and the responding facta on September 17th. The appeal remained scheduled for December 2nd.

[9] Following receipt of the filed appeal book, counsel for the Royal Bank of Canada ("RBC") advised Mr. Early that he objected to some of the materials which had been included on the basis that they were not part of the record before Justice Campbell. The Royal Bank initiated a motion to strike those portions of the appeal book with the notice of motion being filed on August 20th. Ultimately, that motion was scheduled for September 12th.

[10] On August 16th, Mr. Early sent an email to the Registrar advising that his efforts to prepare his factum had been "derailed" by RBC's challenge to the content of the appeal book. He requested an extension of time to complete the factum until that issue was resolved. Counsel for RBC did not agree with the adjournment and, as a result, on August 19th, the Registrar advised Mr. Early that she could not grant an extension and if he wished to pursue the issue a motion would be required. No motion for an extension was ever filed by Mr. Early.

[11] On August 27th, the appeal had not yet been perfected and the Registrar, on her own behalf, issued a Notice of Motion to dismiss the appeal on that basis pursuant to *Civil Procedure Rules* 90.43(3) and (4). The hearing was set for September 12th.

[12] On September 9th, Mr. Early filed an affidavit in response to the Registrar's motion in which he explained that the reason for missing the filing deadline for the appellants' factum was the threatened motion by RBC to strike out portions of the appeal book. His affidavit included the following paragraphs:

> 15. That when Appellants were contacted by Mr. Santimaw with the prospect that the Appeal Book would be gutted of the correspondence and that the Factum was to rely heavily on specific reference to the emails the production of the Factum came to a halt.
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> 16. That after the pause in production it was decided that the Factum be written without specific reference to the emails in the Appeal Book but only general reference to the emails as they were presented at hearing.
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> 17. That the additional time needed to complete the factum was a direct result of being knocked off course by Mr. Santimaw.
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> …
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> 24. That left with such circumstances I made the decision to alter the Factum and complete it as soon as possible with specific references to the emails appearing in the Appeal book not made for fear that they would be struck and my references would become meaningless.
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> 25. That the above statements represent the complete picture as to the late completion and filing of the Factum and Book of Authorities and that no delay or ill intent was present in me.
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> …
>
> 27. That the completed Appellants' Factum and Book of Authorities is expected to be completed by the printer tomorrow September 10, 2019 and filed on September 11, 2019.

[13] Mr. Early delivered a factum to the Registrar on September 10th. It was not accepted for filing since it was out of time.

[14] Following the September 12th hearing, Justice Beaton reserved her decision until October 2nd at which time she granted the Registrar's motion to dismiss the appeal.

Request for Review

[15] The appellants have made a motion pursuant to *Civil Procedure Rule* 90.38 which permits a decision of a chambers judge to be reviewed by a panel of the Court with leave of the Chief Justice. The respondents oppose this request and say that leave should not be granted.

[16] The relevant provisions of *Rule* 90.38 are as follows:

> (2) An order of a judge of the Court of Appeal in chambers is a final order of the Court of Appeal, subject only to review under this Rule 90.38.
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> (3) An order of a judge in chambers that disposes of an appeal may be reviewed by a panel of the Court of Appeal, with leave of the Chief Justice.
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> …
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> (6) The Chief Justice may do any of the following on a motion for leave to review:
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> (a) dismiss the motion for leave to review;
>
> (b) set the motion down for hearing;
>
> (c) grant leave to review the order of the judge in chambers if the Chief Justice is satisfied that the judge acted without authority under the rules, or the order is inconsistent with an earlier decision of a judge in chambers or the Court of Appeal, or that a hearing by a panel is necessary to prevent an injustice.
>
> (7) The Chief Justice need not give reasons for the determination of a motion under this Rule.

[17] These provisions were considered by MacDonald, C.J.N.S. in *Marshall v. Truro (Town)*, 2009 NSCA 89. In that case, the chambers judge had dismissed a motion to extend the time for filing a Notice of Appeal. Chief Justice MacDonald described the approach which he felt should be taken as follows:

> [9] When then should such motions be granted? As noted above, *Rule 90.38(6)(c)* contemplates three situations. The first two are straight forward; namely when the judge acted without authority or contrary to existing jurisprudence. The third situation - to prevent an injustice - is much more general and requires some elaboration.
>
> [10] It occurs to me that to warrant a review by a panel of this court, an aggrieved party must present a highly compelling case. In other words ,the potential for injustice must be clear and significant. Furthermore, one must presume that any potential injustice would have been obvious to the judge who granted the order under review. Therefore, I would expect to grant such relief only in very exceptional circumstances. Otherwise, this provision might be simply viewed as an opportunity for a rehearing; a consequence that would be clearly unintended and unnecessary. In fact, it would be ill advised to allow such a provision to serve as an opportunity for a rehearing. Indeed, courts in similar contexts have discouraged such approaches.

[18] In the end, the motion for leave to review the decision was dismissed.

[19] In cases where the motion record identifies significant information which was not available to the chambers judge and might have affected their decision, leave to review is more likely to be granted. For example, in *Crooks v. CIBC World Markets, Inc.*, 2018 NSCA 74, the Honourable Justice Joel Fichaud granted leave to review a decision of Justice Bourgeois in chambers. The record before Justice Fichaud included significant evidence which was not available to the chambers judge. This new information led to the granting of leave for the following reasons:

> [30] In my view, there is a reasonable possibility that, had Justice Bourgeois seen this evidence, her reasons would have followed a different course.
>
> [31] The appeal is acknowledged to have arguable merit. The appeal book was filed on time. The appellant's factum was tendered to the Court on July 16, 2018. A time extension for the respondent's factum would have enabled the appeal to proceed on the scheduled hearing date of September 28, 2018.
>
> [32] The dismissal of the appeal pivoted on what Justice Bourgeois termed the astounding series of delinquencies. Left with a vacuum of explanatory evidence, Justice Bourgeois inferred that the delays were intentional and strategic. An intentional and strategic delay implicates the client. So it was reasonable that the appellants should bear the consequence – i.e. dismissal of their appeal.
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> [33] The evidence before me depicts a very different scenario, one that does not implicate the appellants.
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> [34] This situation is not dissimilar to the circumstances in *Liberatore*, where the Chief Justice granted leave for a review by a panel.
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> [35] In my view, had Justice Bourgeois seen the evidence before me, it is quite possible that, instead of a dismissal of the appeal, there might have been an extension for the respondent's factum, meaning the hearing would proceed on September 28, 2018 as scheduled, and perhaps a costs award against the appellants or their counsel as the Chief Justice ordered in *Liberatore*.

[20] It is obvious that the availability of a review procedure should not create an opportunity to simply re-argue the case on the same evidentiary basis. For example, in *Crooks*, Justice Fichaud stated:

> [28] If the material before me matched the record before Justice Bourgeois, I would dismiss this motion. Applying *Marshall's* approach, I would see no basis for a review by a panel.

[21] I acknowledge that there could be some circumstances where leave to review should be granted even though new evidence is not provided in support of the review motion. These include where the decision was made without jurisdiction,

conflicts with existing jurisprudence, or is one of those rare and exceptional cases where the deficiency in the chambers decision is readily apparent and of such significance that a miscarriage of justice might result if a review does not occur. This philosophy can be found in the decision in *R. v. Mercier*, 2011 NSCA 58:

> [32] It is clear from Justice Beveridge's decision that he acted within the authority of the Rules and that his decision is not inconsistent with an earlier decision of a Chambers judge or the Court of Appeal in the context of denying leave to extend time to appeal, which are the first two considerations the Chief Justice must address when deciding whether to grant leave (sub-Rule 6(c) of 90.38). Ultimately then, the question for the Chief Justice would be whether leave is necessary to "prevent an injustice". As informed by *Marshall* and *Liberatore*, that means a finding of "exceptional circumstances". Examples include:
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> > (a) A patent error on a material point in a decision which leave is sought to review;
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> > (b) The decision was decided on a point that the parties had no opportunity to address.
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> > (c) The Chambers judge clearly overlooked or misapprehended the evidence or the law in a significant respect and there is consequently a serious risk of a miscarriage of justice.

[22] When I apply these principles to the motion for leave, I note that no new evidence was provided to me by the appellants. Mr. Early's arguments focused on his view that Justice Beaton did not properly take into account the medical problems described in his affidavit filed in response to the May Registrar's motion to dismiss. The difficulty with that assertion is that the affidavit which he filed on September 9th, in specific response to the Registrar's September motion, makes no reference to those conditions as causing his failure to file the factum on August 20th as required. In fact, the express reason for not filing on time was Mr. Early's view that the RBC motion to strike portions of the appeal book needed to be dealt with first.

[23] I would note that Justice Beaton was obviously aware of Mr. Early's position that his medical situation affected his ability to perfect the appeal because she mentions this in her decision. The earlier affidavit is in the Court file, and Mr. Early raised the issue in oral submissions. In addition, the formal order issued on October 2nd recites that Justice Beaton had reviewed and considered "all the file materials".

[24] Mr. Early also argues that Justice Beaton's decision is inconsistent with an earlier decision of the Court and, in particular, the decision of Justice Van den Eynden to dismiss the May Registrar's motion. The earlier motion was not opposed by anyone and was based upon the evidentiary record at that time. There was no inconsistency in Justice Beaton not granting Mr. Early a second opportunity for relief from his failure to meet filing deadlines. To take Mr. Early's argument to its logical conclusion would mean that once Justice Van den Eynden dismissed the Registrar's motion for non-compliance with filing deadlines, a subsequent judge could never enforce the new deadlines. That is patently unreasonable.

[25] Mr. Early's final argument is that the decision of Justice Campbell is so fundamentally wrong that it would be unjust to allow it to stand without appellate review. Having reviewed that decision, I do not agree with Mr. Early's position. Whatever merit there might have been to the arguments on appeal, I see nothing in the decision which creates an obvious miscarriage of justice.

[26] The decision of Justice Beaton correctly sets out the applicable law, accurately summarizes the appellants' submissions and describes how she applied the law to the circumstances before her. On their review motion, the appellants want those circumstances to be reweighed by a panel of the Court and a different outcome reached. In my view, that is not the purpose of the procedure found in *Civil Procedure Rule* 90.38.

[27] Having reviewed all of the materials, the appellants have not satisfied me that this an appropriate case to grant leave for a review of Justice Beaton's decision and I, therefore, dismiss their motion.

Wood, C.J.NS.