

NOVA SCOTIA COURT OF APPEAL

Citation: *Carvery v. Downey*, 2009 NSCA 117

Date: 20091112

Docket: CA 310785

Registry: Halifax

Between:

Raymond F. Wagner

Appellant

v.

Rosella Ordra Carvery

Respondent

and

Philbert Downey and Mary Victoria Fraser

Respondents

Judges: MacDonald, C.J.N.S.; Saunders and Hamilton, JJ.A.

Appeal Heard: November 12, 2009, in Halifax, Nova Scotia

Written Judgment: November 16, 2009

Held: Appeal allowed per oral reasons for judgment of MacDonald, C.J.N.S.; Saunders and Hamilton, JJ.A. concurring.

Counsel: Michael Dull, for the appellant
Rosella Ordra Carvery, respondent not appearing
Philbert Downey and Mary Victoria Fraser, respondents not appearing

Reasons for judgment: (Orally)

[1] We are of the unanimous view that this appeal be allowed for the following reasons.

[2] The appellant solicitor applied, pursuant to *Civil Procedure Rule* (1972) 44.06, to be removed from the record because, after a relentless search, he was unable to locate his client. As it was impossible to obtain instructions, he argued that there had been a complete breakdown in the solicitor-client relationship. His application was dismissed by Coughlan, J. of the Supreme Court sitting in Chambers, who said simply this in rejecting the motion:

There are two applications before the Court. The first application was that Mr. Wagner withdraw as solicitor of the record. I have reviewed the material filed in support of the application, and I am not prepared to grant the application. It seems to me that we have got a situation where we really do not know where Ms. Carvery is located, and I am not prepared to grant the application. So the application is dismissed.

[3] From the above passage, it appears to us that the judge dismissed the application solely because the client could not be located. In our view, this approach represents an error in principle leading to an injustice. Specifically, if such applications are dismissed each time a client goes missing, lawyers could

never be removed from the record. It would leave the lawyer in perpetual gridlock, unable to advance the litigation without the client's instructions, yet forever seized with the case as solicitor of record. While the nature of the application required the court's leave and called for the exercise of discretion, we are respectfully of the opinion that the Chambers judge erred in his assessment of this particular situation.

[4] In the circumstances, therefore, it is appropriate to allow the appeal, overturn the judge's order and direct that the appellant be removed as solicitor, without costs.

MacDonald, C.J.N.S.

Concurred in:

Saunders, J.A.

Hamilton, J.A.