NOVA SCOTIA COURT OF APPEAL
Citation: *Nova Scotia (Attorney General) v. Connolly*, 2004 NSCA 107

Date: 20040915
Docket: CA 208848
Registry: Halifax

Between:

The Attorney General of Nova Scotia representing
Her Majesty the Queen in Right of the Province of Nova Scotia

Appellant

v.

Dennis Connolly

Respondent

and

The Nova Scotia Government and General
Employees Union

Intervenor

Judges:	Roscoe, Freeman and Cromwell, JJ.A.
Appeal Heard:	March 22 and 23, 2004, in Halifax, Nova Scotia
Held:	Leave to appeal is granted but other than in respect to the change in the costs order the appeal is dismissed per reasons for judgment of Cromwell, J.A.; Freeman and Roscoe, JJ.A. concurring.
Counsel:	Dale Darling, for the appellant Dale Dunlop, for the respondent Raymond Larkin, Q.C., for the intervenor

Reasons for judgment:

[1] This appeal was argued immediately after the appeal in **Smith v. Attorney General (N.S.)**, 2004 NSCA 106 and our reasons in both appeals have been released at the same time.

[2] In this case, Kennedy, C.J.S.C. granted an interlocutory injunction enjoining all employees of the Province from terminating Mr. Connolly's employment or salary pending trial and ordering the responsible body to pay Mr. Connolly the salary withheld from him to the date of the order. The learned Chief Justice made this order because in his view the principles applied by Moir, J. in **Smith** also apply here.

[3] In **Smith**, I concluded that the interlocutory injunction was properly issued: Mr. Smith established both an arguable case that the deputy minister had exceeded his statutory authority by taking unilateral action outside the terms of the MOA and that damages would not be an adequate remedy. In light of that holding in **Smith**, the main issue in the present appeal is whether Mr. Connolly's case falls within the same principles.

[4] Although some of the appellant's submissions were put forward on the basis of *stare decisis*, the fundamental questions, although not the facts, are the same as in the **Smith** appeal: Did Mr. Connolly establish an arguable case that actions by Crown officers were of the sort that the court may enjoin and did he show that he would suffer irreparable harm if the injunction were not granted?

[5] Turning to the first question, my view is that Mr. Connolly, like Mr. Smith, established an arguable case that he had been dealt with unilaterally by the deputy minister of justice outside the terms of the MOA.

[6] I will briefly refer to the evidence in the record that has led me to this conclusion. I will not, however, summarize the provisions of the MOA or discuss their arguable legal implications as I have done both in detail in my reasons in **Smith**.

[7] Mr. Connolly has been an employee of the Province since 1981. He was the Chaplain at the Shelburne Youth Centre. This was a non-bargaining unit position

and both the Province and the Catholic Diocese of Yarmouth contributed to his salary. Originally, this was a casual position with no benefits or pension rights, but it became permanent part-time in 1992 so that Mr. Connolly had access to benefits and made pension contributions. He is not, we are told, eligible for LTD benefits.

[8] In 1997, Mr. Connolly received notice that a former resident of the Shelburne Youth Centre had accused him of sexually assaulting her. He was investigated by the Catholic Diocese of Yarmouth, the Internal Investigation Unit of the Department of Justice and the RCM Police. Ultimately, the allegations of sexual assault were found to be groundless and Mr. Connolly was formally advised in early 2002 that he was no longer under investigation and that no disciplinary action was warranted.

[9] The allegations made against him contributed significantly to his development of a depressive illness. While Mr. Connolly hopes to be able work in the future, the medical evidence before the learned Chief Justice was that Mr. Connolly is permanently disabled. He has been on a leave of absence with pay since October of 2000.

[10] Sharalyn Young, Chair of the Union-Management Committee responsible for administering the MOA, gave evidence that initially Mr. Connolly's salary and benefits were continued under the MOA. However, he was given notice that his leave with pay status would end on April 30, 2003 unless he returned to work or provided documentation to support his claim for sick leave. Mr. Connolly was not able to return to work for health reasons and, as noted, is not eligible for LTD benefits. Ms. Young wrote to Mr. Connolly in May of 2003 to advise that he had some sick leave and vacation credits but these apparently ran out in early July. Since then, he has received no salary (except under the order which is the subject of the appeal), but his employment has not been terminated and his benefits have been continued. We are told that he has been offered a pension enhancement by the Province in the event he resigns from the civil service. Ms. Young's evidence was unequivocal that the decision to discontinue Mr. Connolly's salary was the act of the executive director confirmed by the deputy minister of justice. As she testified,: "It [i.e. the decision to cut off his pay] wasn't under the MOA. It was not done directly under the MOA." She said that she did not know the rational for the decision.

[11] On the record as it stands, it is a reasonable inference that the continuation of Mr. Connolly's pay while he was not working was done, as Ms. Young put it, "... under the MOA" but that the decision to change his status to leave without pay was a unilateral act of the deputy minister and did not come about through the MOA process.

[12] It follows that the discontinuance of Mr. Connolly's pay was arguably a unilateral action by the deputy minister contrary to the MOA. For the reasons given in **Smith**, I am of the view that such actions by the deputy minister of justice are at least arguably outside his statutory powers and may be enjoined notwithstanding s. 16(4) of the **Proceedings Against the Crown Act**, R.S.N.S. 1989, c. 360.

[13] I conclude, therefore, that the learned Chief Justice did not err in finding that Mr. Connolly had made out an arguable case of unauthorized conduct by Crown officers that could be enjoined.

[14] I turn to the question of irreparable harm.

[15] In **Smith** I discussed how the MOA must be viewed as protecting much more than the financial interests of employees caught up in the institutional abuse scandal and its aftermath. That discussion applies here. Mr. Connolly's interests in having the MOA applied to him as he alleges it ought to be cannot be measured in purely economic terms. Moreover, there was evidence in this case that the discontinuance of his salary would have disastrous and irreversible consequences for him. He testified that absent the injunctive relief, he and his family would lose their home and vehicle and would be "out on the street." This reality, together with the unique provisions of the MOA, persuade me that a damage award after a trial some years down the road could not cure the harm in the event that Mr. Connolly establishes at trial that his rights have been infringed as he alleges.

[16] I conclude, therefore, that Mr. Connolly met the irreparable harm threshold for an interlocutory injunction.

[17] There were regrettable difficulties with the issuance of the formal order in this case. It appears that costs were fixed without the appellant having an

opportunity to make written submissions as contemplated by the Chief Justice's oral decision. I would, therefore, set aside the costs provision in his order and in its place make the same order for costs as made by Moir, J. in **Smith**, namely costs and disbursements of $1500 payable forthwith. Costs in excess of that amount paid under the terms of the Chief Justice's order should be repaid to the appellant. I am not persuaded by Mr. Dunlop's submissions that this case was so obviously governed by Moir, J.'s decision in **Smith** that the Province should be penalized in costs for having opposed Mr. Connolly's application.

[18] As the application was brought promptly upon the discontinuation of Mr. Connolly's salary, I see no error in the Chief Justice's order having effect from the date of that discontinuation.

[19] I would grant leave to appeal, but other than with respect to the change in the costs order made by the Chief Justice, I would dismiss the appeal. As in **Smith**, I would order the costs of the appeal fixed at $3,000.00 to be costs in the cause of the main action. There should be no costs for or against the intervenor.

Cromwell, J.A.

Concurred in:
Freeman, J.A.
Roscoe, J.A.