

NOVA SCOTIA COURT OF APPEAL

Citation: *Nova Scotia (Securities Commission) v. Potter*,
2006 NSCA 7

Date: 20060116

Docket: CA 256947

Registry: Halifax

Between:

The Nova Scotia Securities Commission

Appellant

v.

Dan Potter

Respondent

Judge:

The Honourable Justice Thomas Cromwell

Application Heard:

January 12, 2006, in Halifax, Nova Scotia, in Chambers

Held:

Application granted in part.

Counsel:

Agnes MacNeil and Heidi Schedler, for the appellant
respondent in person

Reasons for decision:

1. The Application:

[1] The appellant Commission applies for a partial stay of execution pending its appeal of an interlocutory order made by Richard, J. I have set down the appeal to be heard on March 24, 2006. The appeal book has been filed and the appellant's and respondent's factums are due on February 3 and 24, respectively.

2. The proceedings before Richard, J.:

[2] The applications before Richard, J. were interlocutory applications brought within an application for judicial review. The background is this.

[3] The Commission issued an investigation order (which has been amended on a couple of occasions) under s. 27 of the **Securities Act**, R.S.N.S. 1989, c. 418 for the investigation of "the affairs of Knowledge House Inc, a reporting issuer, and any company or business owned, controlled or operated, in law or in fact, by Knowledge House Inc." Mr. Potter indicates that he is President, CEO and Chair of the Board of Knowledge House. The investigators served Mr. Potter with a notice of examination in the investigation.

[4] Mr. Potter sought judicial review requesting orders quashing, staying and prohibiting the Commission from pursuing the investigation. In brief, he deposed that a large number of emails and other documents had been wrongfully obtained from the server or servers of Knowledge House Inc. by Messrs. Parish and Awad, counsel for National Bank Financial. They supplied them to the Commission and, Mr. Potter says, the Commission in turn supplied a file of information to the RCMP. Mr. Potter alleges that the Commission acted improperly in taking possession of this material, in using it in the course of its investigation and in forwarding information to the RCMP. The merits of these arguments will be determined in the judicial review proceedings which have yet to be heard in the Supreme Court.

[5] There followed two interlocutory applications within the judicial review proceeding, one by Mr. Potter and one by the Commission.

[6] Mr. Potter applied for orders directing the Commission to file a complete return in the judicial review application, staying further Commission proceedings against him pending the judicial review application and returning his email material in the possession of the Commission. He also served a notice of examination on Mr. Peacock, the Commission's Deputy Director, Compliance and Enforcement. In essence, Mr. Potter's position was this. As he was seeking judicial review of the investigation, he was entitled: (1) to have all of the fruits of that investigation provided to him and to the court in the return which the Commission is required to file under **Rule 56.08**; and, (2) to discover the investigator.

[7] The Commission, for its part, applied for an interlocutory order setting aside the notice of examination of Mr. Peacock, striking out Mr. Potter's affidavit of March 29, 2004 on the judicial review application and striking out the amendments to his Originating Notice (Application Inter Partes).

[8] Richard, J., in brief oral reasons, dismissed the Commission's application and substantially granted Mr. Potter's. The judge said that Mr. Potter "... has to have the opportunity to ensure that things are being done in compliance with the law and that his rights in the intervening investigation remain untrammelled." In essence, his order stays further Commission proceedings pending the disposition of Mr. Potter's judicial review application, requires the Commission to supplement its return on the judicial review application by disclosing the fruits of its investigation to date and requires the Commission's Deputy Director, Compliance and Enforcement to submit to an examination for discovery. As the details of some of the provisions are important, I will set out the relevant operative paragraphs of Richard, J.'s order in full:

IT IS HEREBY ORDERED:

1. The compact disc (CD) containing the Potter email mailbox provided to the NSSC investigators by A. Parish on or about August 25, 2003, together with all electronic and paper-based copies of the documents retrieved or otherwise obtained by or on behalf of the NSSC investigators from that CD shall, after preparation by NSSC of a supplemental return as required by paragraph 2 of this Order, be sealed and given over to the Court forthwith for safekeeping pending final determination of the

- judicial review application and any appeals thereof, subject to further orders by the Court.
2. NSSC will file a complete Return by forthwith supplementing the Return dated March 31, 2004 previously filed by the addition of the following papers and documents, which will be and remain sealed until further order of the Court, provided, however, that such sealing shall not apply to Potter and/or his counsel and a fully copy of all such supplementary materials shall be provided forthwith by NSSC to Potter:
 - (a) A copy of the CD and any and all emails and other documents printed out or otherwise accessed or viewed by or on behalf of the NSSC investigators from the electronic copy of the Dan Potter email account (mailbox) obtained on CD from A. Parish or B. Awad on or about August 25, 2003;
 - (b) Transcripts or, in instances where no transcripts exist, audio recordings of any and all interviews of individuals conducted pursuant to the investigation that touch or concern Dan Potter;
 - (c) Any and all records and reports related to trading activity examined pursuant to the investigation that touch or concern Dan Potter, including but not limited to, expert's reports and reports provided by or on behalf of National Bank Financial Ltd.;
 - (d) Any and all reports containing or summarizing the findings of the investigation that touch or concern Dan Potter, but which do not include any documents which are subject to a claim solicitor-client privilege by NSSC or which are subject to Cabinet privilege; and,
 - (e) Any and all other evidence taken, exhibits filed and all other papers or documents in the investigation that touch or concern Dan Potter.
 3. Any further NSSC proceedings under the *Securities Act* against Potter arising from or related to the investigation in the matter of Knowledge House Inc. begun by NSSC by order issued on February 4, 2003 are stayed pending the determination of the judicial review application, subject to further order of the Court.

4. The Notice of Examination for Discovery of R. Scott Peacock dated August 29, 2005, which requires Mr. Peacock to bring with him certain books, papers, documents, records (that is, the paragraphs numbers 1, 2 and 3) shall be amended to require him to bring the following:
 1. Copies of any and all documents, including, but not limited to reports, letters, faxes, emails, records of instant messages, memoranda (including memoranda to self or to file) and notations in time keeping or activity dockets that touch or concern the coming into possession or accessing of a compact disc (CD) containing a copy of the Dan Potter email account and emails and other documents stored therein.
 2. Copies of any and all documents, including, but not limited to reports, letters, faxes, emails, records of instant messages, memoranda (including memoranda to self or to file) and notations in time keeping or activity dockets that touch or concern communications by, with, between or among any person or persons involved in the subject investigation and any other person or persons, including but not limited to, any person or persons from or on behalf of the Royal Canadian Mounted Police.
 3. Other than copies of documents which are subject to a claim solicitor-client privilege by NSSC or which are subject to Cabinet privilege, copies of any and all documents, including, but not limited to reports, letters, faxes, emails, records of instant messages, memoranda (including memoranda to self or to file) and notations in time keeping or activity dockets that touch or concern communications between or among any person or persons involved in the subject investigation and any person or persons who provide or provided information technology services, consulting, expert opinion or other advisory services to or for the benefit of the investigation.

3. The stay application:

[9] The Commission has filed an application for leave to appeal from Richard, J's order. On appeal, the Commission is asking this Court to confirm that the record filed by the Commission was complete, set aside the Notice of Examination issued to Mr. Peacock and the order requiring delivery of material, lift the stay of proceedings before the Commission and to strike out Mr. Potter's March 29, 2004 affidavit and the amendments to his Originating Notice in the judicial review proceedings.

[10] The Commission applies to stay the following aspects of the judge's order pending the hearing of its appeal:

- para. 1 – requiring the certain material provided to the Commission by counsel for NBFL to be sealed and given to the Court for safekeeping;
- para. 2 – directing the Commission to provide to Mr. Potter and to file with the Court in a sealed file a more extensive return on the judicial review application;
- para. 3 – staying all Commission proceedings under the **Securities Act** against the respondent Mr. Potter arising from or related to the investigation in the matter of Knowledge House Inc. The Commission only seeks to stay this aspect to the extent of allowing staff to file a Notice of Hearing naming Mr. Potter as a respondent.
- para. 4 – directing an amendment of the notice of examination issued by Mr. Potter to Mr. Peacock; I understand what the Commission really seeks is an order relieving Mr. Peacock of the obligation to attend for examination pending the appeal.

4. Legal Principles:

[11] The applicable legal principles are well known. The granting of a stay pending appeal is discretionary, not automatic. The Commission must meet either the 3-part primary test set out in **Fulton Insurance Agency Ltd. v. Purdy** (1990), 100 N.S.R. (2d) 341 (that is, show an arguable case, irreparable harm if the stay is not granted and that the balance of convenience favours the granting the stay) or show, as required by the secondary test, that there are exceptional circumstances making it just to grant the stay.

[12] The Commission relies only on the primary test, submitting that it satisfies each of its three branches. Mr. Potter submits that the Commission fails to meet the first part of the test because the appeal does not raise an arguable issue. In the event that I should rule against him on that point, Mr. Potter very fairly concedes that the other requirements for a stay are met with respect to para. 2 (b) (c) (d) and (e) and para. 4 of Richard, J.'s order. He submits, however, that the Commission does not meet either the second or the third branch of the test with respect to paras. 1, 2(a) or the partial stay of para. 3 which it seeks.

[13] I turn to the analysis of each of the branches of the primary test.

5. Analysis:

(a) Arguable issue:

[14] This is not a difficult threshold to meet. What is required is a notice of appeal containing realistic grounds which, if established, appear of sufficient substance to be capable of convincing a panel of the court to allow the appeal: **Coughlan v. Westminster** (1993) 125 N.S.R. (2d) 171; N.S.J. No. 329 (Q.L.) (C.A. Chambers); **MacCulloch v. McInnes, Cooper and Robertson** (2000), 186 N.S.R. (2d) 398; N.S.J. No. 238 (Q.L.) (C.A. Chambers). These, and many other decisions by judges of the Court, make the point that (subject to exceptions not relevant here) a stay application is not the occasion for a nuanced review of the merits of the appeal. In **RJR — MacDonald Inc. v. Canada (Attorney General)**, [1994] 1 S.C.R. 311 at paras. 49 - 50, the Supreme Court of Canada described the threshold as a "low one" and said that once satisfied that the matter is not "frivolous or vexatious" the motions judge should proceed to the other branches of the test "... even if of the opinion that the plaintiff is unlikely to succeed A prolonged examination of the merits is generally neither necessary nor desirable."

[15] In essence, the Commission's grounds of appeal are that the judge erred in finding that *certiorari* lies to challenge the investigation itself, in effectively closing down proceedings before the Commission by his interlocutory order, in ordering discovery, and in directing that the contents of the return be enlarged. The Commission says that an investigation such as the one being conducted under the **Securities Act** cannot be attacked by *certiorari*, that the fruits of the investigation are confidential under the provisions of s. 29A of the **Act**, that the

return required under **Rule 56.08** should not include the fruits of the investigation and that discovery is not appropriate.

[16] In my view, these points are arguable. The judge did not cite any authority and I have been referred to none which deals directly with whether *certiorari* is an appropriate means to attack the investigation. There is also the issue of whether the control of the investigation ought, in the first instance, to be a matter for the Commission to address. As for the scope of the return, in both **Canada Life Assurance Co. v. Nova Scotia (Minister of Municipal Affairs)** (1996), 150 N.S.R. (2d) 360; N.S.J. No. 194 (Q.L.)(C.A.) at para. 45 and **Waverley (Village) v. Nova Scotia (Minister of Municipal Affairs)** (1994), 129 N.S.R. (2d) 298; N.S.J. No. 84 (Q.L.)(C.A.) at para. 43, the Court has noted that **Rule 56.08(1)** cannot necessarily be applied literally to all situations. As Freeman, J.A. said in the latter case at para. 50, in determining the content of the record, "... the circumstances must govern." With respect to the examination of Mr. Peacock, the Court has made it clear that discovery in the context of judicial review is appropriate in only exceptional cases: **Waverley** at para. 5.

[17] Mr. Potter has a number of well developed arguments in support of his position which he presented with clarity and force before Richard, J. and in his brief for me. Without in any way commenting on the ultimate merit of the competing submissions, the Commission, in my view, has raised points which, if accepted, could result in a panel of this Court setting aside some or all aspects of the order under appeal. I am not persuaded, notwithstanding Mr. Potter's helpful and able submissions, that the law is so clear that the Commission's grounds of appeal could be said to be frivolous or vexatious or unarguable.

(b) Irreparable harm:

[18] As noted, Mr. Potter has conceded that the Commission would suffer irreparable harm (within in the meaning of the second step of the primary test) from the present enforcement of paras. 2 (b), (c), (d) and (e) and para. 4 of the order.

[19] With respect to para. 3 of the judge's order, the Commission seeks only a partial stay of this paragraph sufficient to allow staff to file a Notice of Hearing in relation to Mr. Potter. The Commission's concern is that a limitation period may

expire in June of 2006 which would preclude filing the Notice. Mr. Potter contests this and says the limitation period does not expire until 2007.

[20] In view of the dates set for argument of the appeal, the parties agreed this partial stay need not be addressed at this point and may never need to be considered if the appeal is determined before the beginning of June. It was agreed, therefore, that I would not decide this aspect of the matter now, but that the parties would raise it with the panel hearing the appeal.

[21] I will address my attention, therefore, to the stay sought in relation to paras. 1 and 2(a).

[22] For ease of reference, I repeat the terms of Paragraph 2(a) of the order:

2. NSSC will file a complete Return by forthwith supplementing the Return dated March 31, 2004 previously filed by the addition of the following papers and documents, which will be and remain sealed until further order of the Court, provided, however, that such sealing shall not apply to Potter and/or his counsel and a full copy of all such supplementary materials shall be provided forthwith by NSSC to Potter:
 - (a) A copy of the CD and any and all emails and other documents printed out or otherwise accessed or viewed by or on behalf of the NSSC investigators from the electronic copy of the Dan Potter email account (mailbox) obtained on CD from A. Parish or B. Awad on or about August 25, 2003;

[23] In view of the stay with respect to the other sub-paragraphs of this part of the order, we are now concerned only with the so-called "Dan Potter email box." Paragraph 2(a), unless stayed, would require the Commission to supplement and file its return by adding the CD and the related materials referred to in para. (a) in relation to the Dan Potter email box. Similarly, para. 1 of the order requires similar material to be filed in a sealed file with the Court for safe keeping:

1. The compact disc (CD) containing the Potter email mailbox provided to the NSSC investigators by A. Parish on or about August 25, 2003, together with all electronic and paper-based copies of the documents retrieved or otherwise obtained by or on behalf of the NSSC investigators from that CD shall, after

preparation by NSSC of a supplemental return as required by paragraph 2 of this Order, be sealed and given over to the Court forthwith for safekeeping pending final determination of the judicial review application and any appeals thereof, subject to further orders by the Court.

[24] Before me there was some uncertainty about exactly what these parts of the order require. Mr. Potter says that the evidence before me indicates that there is only one CD which contains the Dan Potter email box and that it alone is the CD referred to in this part of the order. In my view, although it may not be crystal clear from the record, that is the most reasonable interpretation of the material before me.

[25] Mr. Potter says that these are his materials, that the Commission has not argued that it has any right to retain them against his claim for possession and that no one has a confidentiality or privacy interest in them other than himself.

[26] The Commission claims irreparable harm if these portions of the order are not stayed.

[27] First, it says that there are privacy interests at stake of persons other than Mr. Potter and that putting such interests at risk constitutes irreparable harm. I agree with the principle, but not with its application here. The Commission's argument is premised on its understanding that there may not be a single CD with just Mr. Potter's email box reproduced on it. However, I do not think that is the case. As mentioned, I accept Mr. Potter's interpretation of the material in the record. On that understanding, no one's privacy interest is implicated but his. On the assumption that the material on the CD described in the relevant part of para. 2(a) and in para. 1 is from the Dan Potter email box only, I see no risk to anyone's privacy interests by a failure to stay these parts of the order.

[28] The Commission's second argument is that the failure to stay these parts of the order would be contrary to both the express provisions and the purposes of the **Securities Act**. It is said that s. 29A ousts the authority of a court to order disclosure of material obtained during an investigation and that, in any case, the request for the release of the information is properly made to the Commission in the first instance, not to the Courts.

[29] As noted, I agree with the Commission that these are arguable points which will have to be decided on the appeal. However, a judge of the Supreme Court has found against the Commission on these points and the question now is not whether he was right or wrong, but whether enforcing these aspects of his order before the appeal is heard will cause irreparable harm. In my view, it will not. The appeal will clarify the respective roles of the courts and the Commission in these matters. If Richard, J. was wrong, his decision will not stand as a precedent. The **Act** will be given its proper interpretation on appeal and effect will be given in future to its purposes. If I do not stay these provisions and the Commission's appeal is ultimately successful, it seems to me the worst thing that could happen is that the Commission will have been wrongly required to "disclose" to Mr. Potter the contents of his own email box.

[30] The Commission submits that failure to stay paragraphs 1 and 2(a) of the order will render its appeal moot. I do not agree. If its appeal succeeds, Mr. Potter can be ordered to return what the Commission was wrongly required to deliver to him and the contents of the judicial review return can be corrected. Mr. Potter will not have received disclosure of anything that he did not already know. It is his email box, and nothing else, that will have been revealed to him. What differentiates this case from cases like **O'Connor v. Nova Scotia** (2001), 193 N.S.R. (2d) 8; N.S.J. No. 90 (Q.L.)(C.A. Chambers) is that in the present case, there will be no "disclosure" in any meaningful sense if paragraphs 1 and 2(a) of the order are not stayed. All that will happen is that Mr. Potter will see the contents of his own email box.

[31] The Commission also relies on the **RJR-MacDonald** case, para. 64, for the proposition that the public interest in enforcement of the law must be taken into account. However, the Court was there referring to the third factor, the balance of convenience, not to the second requirement relating to irreparable harm: see paras. 62 - 75.

[32] I am not persuaded that there is any risk that the Commission will suffer irreparable harm if the stay in relation to paragraphs 1 and 2(a) of the order is denied. The absence of irreparable harm is fatal to this part of the stay application.

[33] I emphasize that my finding is premised on the fact that refusing the stay in relation to para. 1 and the relevant part of para. 2(a) will only involve the release to Mr. Potter and filing in a sealed file the contents of the Dan Potter email box. The

Commission is entitled to satisfy itself that this is the case and may reapply to me before complying with these parts of the order if it is not.

(c) Balance of convenience:

[34] The Commission having failed to satisfy me that it will suffer irreparable harm if the stay of the relevant portions of the order is refused, it is not necessary to consider the balance of convenience.

6. Disposition:

[35] Paragraphs 2 (b), (c), (d) , (e) and 4 of the order of Richard, J. dated December 8, 2005 are stayed pending the final disposition of the appeal. The stay is conditional on the Commission perfecting the appeal in accordance with the timetable set out in paragraph [1] of my reasons.

[36] The stay application with respect to paragraph 3 is premature and it is therefore dismissed, but without prejudice to the application with respect to that paragraph of the order being renewed in the event that it appears the appeal will not be heard and determined within the applicable limitation period. Counsel may wish to raise this matter with the panel hearing the appeal.

[37] With respect to paragraph 1 and 2 (a), the stay is refused to the extent that these paragraphs deal with the contents of the Dan Potter email box only. The provisions of paragraph 2(a), to the extent they contemplate expanding the material beyond that in relation to the Dan Potter email box are stayed. The Commission is to satisfy itself forthwith that the material to be released relates only to the Dan Potter email and, if not so satisfied, may reapply to me in chambers.

[38] The costs of the stay application will be in the cause of the appeal and fixed at \$1000 plus disbursements. I request Ms. McNeil to prepare an order and submit it to me, consented to as to form by Mr. Potter.

Cromwell, J.A.