NOVA SCOTIA COURT OF APPEAL
Citation: ***Lienaux v. Nova Scotia Barristers' Society***, 2008 NSCA 40

Date: 20080428
Docket: CA 293547
Registry: Halifax

Between:

Charles D. Lienaux, a Barrister and Solicitor
of Halifax, Nova Scotia

Appellant

v.

The Nova Scotia Barristers' Society (the "Society")

Respondent

Revised judgment:	The original judgment has been corrected according to the erratum dated **April 30, 2008.**
Judge:	The Honourable Justice Nancy Bateman
Application Heard:	April 24, 2008, in Halifax, Nova Scotia, in Chambers
Held:	Application allowed in part.
Counsel:	appellant in person Clarence A. Beckett, Q.C., for the respondent

Decision:

[1] Mr. Lienaux has appealed from a decision (November 23, 2007) and Resolution (February 14, 2008) of the Nova Scotia Barrister's Society finding him guilty of conduct unbecoming a barrister.

[2] The penalty imposed includes a one month suspension from the practice of law; a contribution to the costs of the proceeding to a maximum of $30,000, payable in instalments; a prohibition against acting for himself, his family or corporate entities in the legal proceedings which gave rise to the complaint; and a three year prohibition against Mr. Lienaux having a law clerk articled to him.

[3] The Barristers' Society agrees to the stay of the one month's suspension. Mr. Lienaux seeks a stay of all aspects of penalty. I am, therefore, considering only whether to stay the penalty provisions made in addition to the practice suspension. All penalty provisions are set out in paragraph 5 of the Resolution.

[4] The application for the stay of execution is made pursuant to **Civil Procedure Rule 62.10** which provides:

> (1) The filing of a notice of appeal shall not operate as a stay of execution of the judgment appealed from.
>
> (2) A Judge on application of a party to an appeal may, pending disposition of the appeal, order stayed the execution of any judgment appealed from or of any judgment or proceedings of or before a magistrate or tribunal which is being reviewed on an appeal under Rules 56 or 58 or otherwise.
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> (3) An order under Rule 62.10(2) may be granted on such terms as the Judge deems just.

[5] The test to be applied in determining whether to grant a stay is that stated by Hallett, J.A. in **Fulton Insurance Agencies Ltd. v. Purdy** (1991), 100 N.S.R. (2d) 341 (C.A.) at pp. 346-347:

> **[28]** In my opinion, stays of execution of judgment pending disposition of the appeal should only be granted if the appellant can either:

[29] (1) satisfy the court on each of the following: (i) that there is an arguable issue raised on the appeal; (ii) that if the stay is not granted and the appeal is successful, the appellant will have suffered irreparable harm that it is difficult to, or cannot be compensated for by a damage award. This involves not only the theoretical consideration whether the harm is susceptible of being compensated in damages but also whether if the successful party at trial has executed on the appellant's property, whether or not the appellant if successful on appeal will be able to collect, and (iii) that the appellant will suffer greater harm if the stay is not granted than the respondent would suffer if the stay is granted; the so-called balance of convenience or:

> **[30]** (2) failing to meet the primary test, satisfy the Court that there are exceptional circumstances that would make it fit and just that the stay be granted in the case.

[6] In **Coughlan et al v. Westminer Canada Ltd. et al.** (1994), 125 N.S.R. (2d) 171, [1993] N.S.J. No. 329 (Q.L.), Freeman, J.A., for the Court, discussed the applicable principles:

> **[8]** Unless a stay is granted, the orders are to be paid forthwith. Stays deprive successful parties of their remedies, and they are not granted routinely in this province. They are equitable remedies and the party seeking the stay must satisfy the court it is required in the interests of justice.
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> . . .
>
> **[11]** "An arguable issue" would be raised by any ground of appeal which, if successfully demonstrated by the appellant, could result in the appeal being allowed. That is, it must be relevant to the outcome of the appeal; and not be based on an erroneous principle of law. It must be a ground available to the applicant; if a right to appeal is limited to a question of law alone, there could be no arguable issue based merely on alleged errors of fact. An arguable issue must be reasonably specific as to the errors it alleges on the part of the trial judge; a general allegation of error may not suffice. But if a notice of appeal contains realistic grounds which, if established, appear of sufficient substance to be capable of convincing a panel of the court to allow the appeal, the Chambers judge hearing the application should not speculate as to the outcome nor look further into the merits. Neither evidence nor arguments relevant to the outcome of the appeal should be considered. Once the grounds of appeal are shown to contain an arguable issue, the working assumption of the Chambers judge is that the outcome of the appeal is in doubt: either side could be successful.

> **[12]** Despite the commencement of an appeal based upon an arguable issue, it remains true that the respondents were successful at trial, and there is no presumption of error on the part of the trial judge. The judgment pronounced by the trial court remains effective pending the appeal unless a stay is based upon the remaining considerations under the primary test in **Fulton Insurance**. Establishment of an arguable issue is therefore merely a threshold for consideration of the issue of irreparable harm, which is the substantive basis for granting a stay. Even if irreparable harm is established, a stay may not follow unless the applicant is able to show further that the harm a stay causes to the respondent is less than the harm the applicant would suffer upon execution of the judgment: the balance of convenience. This test can arise only after irreparable harm has been shown. If it has been, questions of convenience may be balanced by imposing terms under rule 62.10(3).

[7] Mr. Lienaux's six grounds of appeal allege that the Hearing Panel erred in law and/or jurisdiction in the following ways: (i) in hearing the Complaint although the Society had not carried out any investigation of the charges made against him; (ii) in finding him guilty of the charges notwithstanding that it was allegedly admitted by one of the Society's witnesses that Mr. Lienaux owed a duty to complain to the court about the matters that gave rise to the charges; (iii) in refusing to permit him to call certain witnesses; (iv) in determining that the Society had jurisdiction to prosecute a charge against him for conduct unbecoming when he was representing himself as a party to the proceeding and not practising law on behalf of any other person or corporation; (v) in determining that the Society had jurisdiction to prosecute a charge against him for personal conduct unbecoming which does not fall within the meaning of **Regulation** 9.1.3 published pursuant to the **Legal Profession Act** S.N.S. 2004, c. 28; and (vi) in finding the evidence submitted met the standard necessary to prove conduct unbecoming. This is my summary of the grounds of appeal and not a *verbatim* recitation.

[8] The respondent Society, while not conceding that an arguable issue is raised by the above grounds, does not oppose the granting of the stay of the additional penalty provisions on that basis. I will therefore accept, without deciding, for purposes of this application, that Mr. Lienaux has met the relatively low threshold required to establish an arguable issue.

[9] Discussing the principles relating to stays pending appeal in **RJR - MacDonald Inc. v. Canada (Attorney General)**, [1994] 1 S.C.R. 311, Justices Sopinka and Cory describe irreparable harm at p. 341 as:

> . . . harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. ...

[10] It is the Society's position that the application should be dismissed because Mr. Lienaux has placed no evidence before the Court that he would suffer irreparable harm if the additional penalty conditions are not stayed.

[11] In support of this application Mr. Lienaux filed an extensive affidavit to which are appended forty-two exhibits. The first eighty-eight paragraphs of the affidavit provide "background" to the Society's complaint against Mr. Lienaux and impugn the process and substance of the Hearing Panel's Decision.

[12] Paragraphs 93 through 105 address the issue of "irreparable harm". The information contained in those paragraphs is directed entirely to the harm that would occur should the stay of the practice suspension not be granted. The affidavit provides no particulars of the harm Mr. Lienaux would suffer if the additional penalty conditions are not stayed.

[13] Mr. Lienaux filed a lengthy pre-hearing memorandum addressing primarily the first branch of the **Fulton** test. At the outset of the hearing of the application he advised that he was not relying upon this aspect of the **Fulton** test, but was resting his application on the secondary, "exceptional circumstances" test (see paragraph 5, above).

[14] Mr. Lienaux's oral submissions were nevertheless directed at both the primary and secondary tests. I have, therefore, considered whether he has satisfied the requirements of either branch of the **Fulton** test.

(i) The Primary Test

[15] The appeal is set for hearing in mid-November, 2008. I have no evidence before me that payment of the instalments of the costs which will be due before the appeal hearing; or the prohibition from having an articled clerk in his charge; or the inability to represent himself or others in the proceeding giving rise to the complaint will cause Mr. Lienaux to suffer irreparable harm if not stayed. The information provided in Mr. Lienaux's affidavit leads me to conclude that he has a sizable, busy and successful law practice and that he continues to attract new

clients. I would infer that payment of the $20,000 contribution to costs, which would be due in two instalments before the appeal is heard, would not cause irreparable harm.

[16] There is no suggestion that Mr. Lienaux currently has a clerk articled to him or intended to have a clerk for the upcoming several months, thus I do not find that this aspect of the penalty would cause irreparable harm.

[17] Mr. Lienaux says the penalty provision baring him from acting for himself, his wife or corporate entities in any matter related to the proceedings which gave rise to the complaint, if not stayed, will cause him irreparable harm. Mr. Lienaux has not provided any evidence that, assuming those proceedings are ongoing, there are events which will take place in the period of time before judgment is rendered in this appeal. Nor do I have evidence that any events in those proceedings which might arise could not be adjourned to await the outcome of the appeal. Nor is there evidence that he or his wife or any corporate entities involved would be unable to retain counsel to act in such proceedings. In his oral submissions on this issue, Mr. Lienaux submitted only that "it is very possible that he will have to go into court before the appeal is heard" and that he does not wish to retain counsel to act for him. Of course his submissions are not evidence, but even if taken as such, I am not persuaded that he would suffer irreparable harm should this penalty provision not be stayed.

[18] In summary, Mr. Lienaux has not established that he will suffer irreparable harm if the additional penalty provisions are not stayed. Absent irreparable harm, it is unnecessary for me to consider the balance of convenience.

(ii) Exceptional Circumstances

[19] I will now discuss the second branch of the **Fulton** test:

> (2) failing to meet the primary test, [the applicant must] satisfy the Court that there are exceptional circumstances that would make it fit and just that the stay be granted in the case.

[20] In **Coughlan**, **supra**, Freeman, J.A. said of this secondary test:

> **[13]** The secondary test applies when circumstances are exceptional. If for example, the judgment appealed from contains an error so egregious that it is clearly wrong on its face, it would be fit and just that execution should be stayed pending the appeal.

[21] In **W. Eric Whebby Ltd. v. Doug Boehner Trucking & Excavating Ltd.** 2006 NSCA 129; [2006] N.S.J. No. 481 (Q.L.), Cromwell, J.A. discussed the secondary test:

> **[11]** Very few cases have been decided on the basis of the secondary test in **Fulton**. Freeman, J.A. in **Coughlan et al. v. Westminer Canada Ltd. et al.** (1993), 125 N.S.R. (2d) 171 (C.A., in Chambers) at para. 13 offered as an example of exceptional circumstances a case in which the judgment appealed from contains errors so egregious that it is clearly wrong on its face. As Fichaud, J.A. observed in **Brett v. Amica Material Lifestyles Inc.** (2004), 225 N.S.R. (2d) 175 (C.A., in Chambers), there is no comprehensive definition of "exceptional circumstances" for **Fulton**'s secondary test. It applies only when required in the interests of justice and it is exceptional in the sense that it permits the court to avoid an injustice in circumstances which escape the attention of the primary test.
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> **[12]** While there is no comprehensive definition of what may constitute "exceptional circumstances" which may justify a stay even if the applicant cannot meet the primary test, those exceptional circumstances must show that it is unjust to permit the immediate enforcement of an order obtained after trial. . . .

[22] The test has sometimes been expressed as one requiring ‘circumstances of a special or persuasive nature’, for example, where in the case of a custody order, circumstances are such that it could be harmful to a child if the order was not stayed (**Fulton**, **supra** at para. [13]; **Millett v. Millett** (1974), 9 N.S.R. (2d) 26 (C.A.); **Routledge v. Routledge** (1986), 74 N.S.R. (2d) 290 (C.A.)).

[23] Below I reproduce, in full, Mr. Lienaux’s submission in his pre-hearing brief on this second branch of the **Fulton** test:

> The evidence set out in the foregoing [Mr. Lienaux’s detailed references in his Affidavit, to the proceedings before the panel and the merits of his appeal] shows that the Hearing Panel denied my right to procedural fairness, imposed sanctions on me for conduct unbecoming which does not fall within the parameters of the meaning of those words as they are defined in the Regulations published pursuant to the **Act**, and admitted out of the mouth of their own witness who swore the Complaint that I owed a duty to speak out about issues I raised with the Court.

> *Prima facie* the decision of the Hearing Panel is a nullity on its face. Therefore the stay should be granted.

[24] It is Mr. Lienaux's submission that exceptional circumstances arise from the fact that the result reached by the panel is so obviously wrong. He says the Reasons of the Hearing Panel and resulting Resolution fall within the category described by Freeman, J.A. in **Coughlan**, **supra** as a judgment containing ". . . an error so egregious that it is clearly wrong on its face". For the purposes of this submission I have considered, as the "judgment", the November 23, 2007, Decision of the Hearing Panel; the related Reasons of the Hearing Panel; and the February 14, 2008, Resolution, all of which are appended as exhibits to Mr. Lienaux's Affidavit.

[25] He cites four aspects of the proceeding as reflective of egregious and clearly fatal error: (i) the fact that he was not permitted to call certain witnesses which, he submits, denied him the right to procedural fairness; (ii) the charges against him were obviously unsustainable because of the comments he made to the court, which were found to be conduct unbecoming, were simply a legal submission and could not constitute conduct unbecoming within **Regulation 9.1.3**; (iii) the Hearing Panel proceeded without jurisdiction because he was acting in his personal capacity and not "practising law" when he made the submissions to the Court which form the basis of the complaint; and (iv) the Society's witness admitted that he had a professional duty to make such representations to the court.

[26] I cannot conclude that the fact that the Hearing Panel declined to issue the subpoenas requested by Mr. Lienaux for certain witnesses is, in itself, evidence of procedural unfairness. It will be for the panel hearing the appeal, having the benefit of the full record and submissions of the parties, to determine the impact, if any, of the absence of those witnesses on the fairness of the proceeding.

[27] Nor is it clear on the material before me that Mr. Lienaux was not "practising law" at the time he made the representations which are the subject of the complaint, or, that the Society had no jurisdiction to find his conduct unbecoming in the capacity in which he made the representations.

[28] Finally, I am not persuaded that his interpretation of the evidence of the Society's witness is accurate or that her testimony is dispositive of the issues before the Hearing Panel.

[29] In summary, Mr. Lienaux has not demonstrated that it would be unjust to enforce the additional penalty provisions prior to the hearing of the appeal.

Disposition

[30] I would dismiss the application save for staying Mr. Lienaux's one month's suspension from the practice of law, as has been agreed by the Society.

[31] According to the Resolution, the payment of the first instalment of costs ($10,000) is a condition of reinstatement after the one month's suspension which suspension was to have commenced on May 1, 2008.

[32] Pursuant to **Civil Procedure Rule** 62.10(3) I may grant a stay on terms. The stay of the suspension from practice is conditional upon Mr. Lienaux paying to the Society, on or before the 1st day of June, 2008, the first $10,000 instalment of costs, in substitution for the provisions of paragraph 5(e)(i) of the Resolution.

[33] Subject to further order of the panel hearing the appeal, the stay of Mr. Lienaux's suspension from the practice of law (paragraph 5(a) of the Resolution) shall remain in effect until of the earlier of the first day of the month following the first full calendar month after the delivery of judgement on this appeal or the termination of the appeal.

[34] All other penalty provisions contained in paragraph 5 of the Resolution remain in effect.

Costs

[35] I proceeded with the hearing of this application, with the consent of the Society, despite the fact that the Society did not receive timely notice. The Society advised of its preparedness to consent to a stay of the practice suspension well before the time appointed for the hearing. The hearing could have been avoided had Mr. Lienaux accepted the Society's concession. Mr. Lienaux sought costs of the application in the amount of $1000. The Society accepts that this is a reasonable figure. Mr. Lienaux has been entirely unsuccessful on the disputed aspects of this application. In these circumstances, I order that Mr. Lienaux pay to

the Society costs in the amount of $1000 inclusive of disbursements, in any event of the cause.

Bateman, J.A.