

Date: 20020215  
Docket: CA 177065

**NOVA SCOTIA COURT OF APPEAL**  
**[Cite as: Tardif v. Halifax Shipyard, 2002 NSCA 27]**

**BETWEEN:**

FERN TARDIF, INTERNATIONAL BROTHERHOOD OF  
ELECTRICAL WORKERS, LOCAL 625,  
JAMES COSTELLO and INTERNATIONAL BROTHERHOOD  
OF ELECTRICAL WORKERS, LOCAL 2330

Appellants/Applicants

- and -

HALIFAX SHIPYARD, A DIVISION OF IRVING SHIPBUILDING INC.

Respondent

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DECISION

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Counsel: Gordon N. Forsyth for the applicants/appellants  
Brian Johnston, Q.C. and Rebecca K. Saturley for the  
respondent

Application Heard: February 14, 2002

Decision Delivered: February 15, 2002

**BEFORE THE HONOURABLE JUSTICE BATEMAN IN CHAMBERS**

**BATEMAN, J.A.:** (in chambers)

- [1] The appellants, International Brotherhood of Electrical Workers (IBEW), Local 625 et al (the “applicants”) seek stay of an order of Justice Arthur LeBlanc of the Supreme Court of Nova Scotia granting the respondent’s application pursuant to **Civil Procedure Rules** 18.06 and 32.01 for a letter of request to be issued to the Supreme Court of Newfoundland and Labrador for discovery examination of James Costello.
- [2] James Costello, one of the appellants, is the Business Manager of Local 2330 of the International Brotherhood of Electrical Workers, a Newfoundland local. Fern Tardif is the business manager and financial secretary of IBEW, Local 625.
- [3] Halifax Shipyard (“Shipyard”) obtained a \$60-million contract to complete an off-shore drilling rig, the Eirik Raude Oil Rig, which contract would require employment of 1,200 employees, including 450 electricians, for a six-month period. The Shipyard has a contract with the Marine and Shipbuilding Workers Union, which includes electricians. It proposed to hire the required electricians through that Union. The IBEW claimed “jurisdiction” and refused to clear its members for work on the rig. The IBEW allegedly threatened to discipline any member who was prepared to accept work under the Shipyard contract. The Shipyard sued the union for, among other things, interference with economic and contractual relations
- [4] Several parties, in three separate applications, applied for an interim injunction restraining the IBEW and its agents from continuing to interfere with the hiring of electricians to work on the project. Those applying for an injunction were: Halifax Shipyard, a Division of Irving Shipbuilding Inc.; Brayne McGrath, a journeyman wireman electrician and a longstanding member of IBEW, Local 625; the Industrial Union of Marine and Shipbuilding Workers, Local No. 1 (Local 1); Blaise Young and Fred Pickrem. Messrs. Young and Pickrem are both members of Local 1 who work at Halifax Shipyard as unionized employees and are also members of the IBEW.
- [5] Gruchy, J. granted the interim injunction (decision reported as **Industrial Union of Marine and Shipbuilding Workers of Canada, Local 1 v. International Brotherhood of Electrical Workers, Local 625** (2001), 198 N.S.R. (2d) 60; N.S.J. No. 409 (Q.L.)(N.S.S.C.)), and in so doing found that:

[55] All applicants herein have claimed that the respondents have directly interfered with their contractual relations. The Shipyard claims that IBEW, Local 625 has interfered with the contractual relationships between it and Local 1, a relationship which the Shipyard is both contractually and by statute obliged to honour. Brayne McGrath claims the respondents have interfered with his contract with Halifax Shipyard. Local 1 claims the respondents have interfered with its contract with Halifax Shipyard and with its contracts with its members. Blaise Young and Fred Pickrem similarly claim the respondents have interfered with their contracts with Local 1. The Shipyard claims the respondents have interfered or attempted to interfere with its contract for the completion of the Eirik Raude.

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[57] There has been sufficient prima facie evidence placed before me whereby it may be concluded as follows:

- (1) The respondents had knowledge of each of the various contracts under consideration and their terms.
- (2) The respondents intended to procure a breach or other termination or hindrance of the contracts, with the exception of the contract which the Shipyard has between it and Ocean Rig 2 AS to complete the Oil Rig and with which the Shipyard claims the respondents intended to interfere.
- (3) The respondents conduct directly persuaded or hindered (or is attempting to hinder) the parties from performing their contracts.
- (4) All applicants have suffered damage.

[6] Shipyard says that Local 2330 of the IBEW based in Newfoundland has continued to interfere with its electrician members who seek work on the rig project in the same manner as did Local 625. This, says Shipyard, is in breach of the interim injunction. Shipyard has been granted leave to apply for a Contempt Order against Mr. Costello. The order granting the leave is on appeal and the subject of a companion stay application by the appellants.

[7] In addition to citing Mr. Costello for contempt, Shipyard sought to discover him in the main action. The order of Justice LeBlanc dated January 31, 2002, which is the subject of this application for a stay, facilitated that discovery. Shipyard has undertaken not to use the discovery evidence in the contempt proceeding. The applicants say that such use would be in breach of s. 11(c) of the **Canadian Charter of Rights and Freedoms**, Part I of the

*Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11 (the “**Charter**”).

11. Any person charged with an offence has the right

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(c) not to be compelled to be a witness in proceedings against that person in respect of the offence;

[8] The discovery is scheduled for February 19, 2002 in Newfoundland. It would appear that there is no particular urgency that it take place. It would be attractive to simply allow the stay at least until the completion of the contempt proceedings. I must not, however, lose sight of the fact that the granting of a stay is an extraordinary remedy and generally requires the demonstration by the applicants of an arguable case and irreparable harm, not compensable by a monetary award.

[9] As noted by Freeman, J.A. in **Couglan v. Westminer Canada Limited** (1993), 125 N.S.R. (2d) 171 (p. 174):

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.

[10] In **Fulton Insurance Agencies Ltd. v. Purdy** (1990), 100 N.S.R. (2d) 341 (C.A.) Hallett, J.A., for this Court, set out the test. At para. 28:

[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 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 is 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.
- [11] The applicants rely upon the primary test and do not suggest that there are exceptional circumstances here.
- [12] I need not consider whether the applicants have raised an arguable issue. The application can be resolved on the basis of the requirement that there be “irreparable harm”. I am not satisfied that the applicants have demonstrated that if the discovery is not stayed they will suffer any harm, let alone irreparable harm.
- [13] In so finding I have been guided by the direction of the Supreme Court of Canada in **Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)**, [1990] 1 S.C.R. 425; S.C.J. No. 23 (Q.L.) and **R. v. White**, [1999] 2 S.C.R. 417; S.C.J. No. 28 (Q.L.), in which cases the court discusses the scope of the right not to incriminate oneself. Also relevant to my analysis are **Merck & Co. Inc. v. Apotex Inc.**, [1996] F.C.J. No. 88 (Q.L.) and **Vidéotron Ltée v. Industries Microlec Produits Électroniques Inc.**, [1992] 2 S.C.R. 1065; S.C.J. No. 79 (Q.L.).
- [14] As I have stated, Shipyard has undertaken not to use the discovery evidence of Mr. Costello in its pursuit of the contempt. That, says Shipyard, is a complete answer to the applicants’ concerns. They say, however, that other interested parties, such as Industrial Union of Marine and Shipbuilding Workers, Local No. 1 or Brayne McGrath may also initiate contempt proceedings against Mr. Costello and would be free to use the evidence compelled at the discovery. These other interested parties would not be bound by the Shipyard undertaking not to use the evidence. Once Mr. Costello has testified at discovery, the applicants say, the evidence is available and cannot be retracted. This, they say, is the irreparable harm.
- [15] In my view that argument is without merit. Assuming that Shipyard continues with its contempt application, now scheduled to be heard in March, 2002, it is doubtful that other interested parties would wish to initiate contempt proceedings, or that they would be permitted by the Court to do so. Leave is required for contempt. Should such contempt proceedings occur, I would think that Mr. Costello, whether ultimately found in contempt or not on the original, could successfully defend further proceedings, raising double jeopardy, *res judicata* or issue estoppel.

- [16] Secondly, should other interested parties initiate contempt proceedings and seek to use the discovery evidence to incriminate Mr. Costello, it is my view that they would be prevented from doing under the **Charter** through “use immunity”.
- [17] It is acknowledged here that the contempt proceeding is quasi-criminal and, thus, the alleged contemnor, Mr. Costello, is afforded the same **Charter** protections as would an accused. (**Vidéotron Ltée v. Industries Microlec Produits Électroniques Inc.**, *supra*).
- [18] Section 7 of the **Charter** provides:
7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
- [19] Sections 8 to 14 (including s. 11(c)) of the **Charter** are specific examples of the right to life, liberty and security of the person, protected under s. 7.
- [20] The **Charter** affords protection against self-incrimination in various ways. Section 11(c) protects an accused from being compelled to be a witness against himself or herself. Section 13 protects a witness from having his or her evidence in a proceeding used to incriminate him or her in another proceeding. Section 11(d) guarantees an accused a fair trial.
- [21] The applicants have framed their argument in a way that confuses an accused’s right to silence after arrest or detention (s. 7 of the **Charter**) with protection from self-incrimination. They say that s. 11(c) of the **Charter** entitles Mr. Costello not to testify on discovery, because the contempt action is a part of the same proceeding in which the discovery is sought. The issue, in my view, is not whether he must testify at discovery, but the use which may be made of his evidence. To hold otherwise would force a litigant to choose between advancing the main claim and taking action against an alleged contemnor, who has evidence relevant to the claim. The applicants do not suggest that Mr. Costello does not have evidence relevant to the civil action.
- [22] The Supreme Court of Canada in **R. v. White**, *supra*, noted that the application of the protection against self-incrimination requires a contextual analysis. Iacobucci, J., writing for the majority of the Court, said:

40 It is now well-established that there exists, in Canadian law, a principle against self-incrimination that is a principle of fundamental justice under s. 7 of the *Charter*. The meaning of the principle, its underlying rationale, and its current status within Canadian law have been discussed in a series of decisions of this Court, notably *Thomson Newspapers*, *supra*; *R. v. Hebert*, [1990] 2 S.C.R. 151; *R. v. P. (M.B.)*, [1994] 1 S.C.R. 555, per Lamer C.J.; *R. v. Jones*, [1994] 2 S.C.R. 229, per Lamer C.J.; *S. (R.J.)*, *supra*; *British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3; and *Fitzpatrick*, *supra*.

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43 The definition of the principle against self-incrimination as an assertion of human freedom is intimately connected to the principle's underlying rationale. As explained by the Chief Justice in *Jones, supra*, at pp. 250-51, the principle has at least two key purposes, namely to protect against unreliable confessions, and to protect against abuses of power by the state. . . .

44 The jurisprudence of this Court is clear that the principle against self-incrimination is an overarching principle within our criminal justice system, from which a number of specific common law and *Charter* rules emanate, such as the confessions rule, and the right to silence, among many others. The principle can also be the source of new rules in appropriate circumstances. Within the *Charter*, the principle against self-incrimination is embodied in several of the more specific procedural protections such as, for example, the right to counsel in s. 10(b), the right to non-compellability in s. 11(c), and the right to use immunity set out in s. 13. The *Charter* also provides residual protection to the principle through s. 7.

## (2) The Importance of Context

45 That the principle against self-incrimination does have the status as an overarching principle does not imply that the principle provides absolute protection for an accused against all uses of information that has been compelled by statute or otherwise. The residual protections provided by the principle against self-incrimination as contained in s. 7 are specific, and contextually-sensitive. This point was made in *Jones, supra*, at p. 257, *per* Lamer C.J., and in *S. (R.J.), supra*, at paras. 96-100, *per* Iacobucci J., where it was explained that the parameters of the right to liberty can be affected by the context in which the right is asserted. The principle against self-incrimination demands different things at different times, with the task in every case being to determine exactly what the principle demands, if anything, within the particular context at issue. See also *R. v. Lyons*, [1987] 2 S.C.R. 309, at p. 361, *per* La Forest J.

46 In *Fitzpatrick, supra*, at paras. 21-25, La Forest J., speaking on behalf of the full Court, confirmed that this Court has always expressly limited the application of the principle against self-incrimination to cover only the specific circumstances raised by a given case. He stressed, at para. 25, that a court must begin "on the ground", with a concrete and contextual analysis of the circumstances, in order to determine whether the principle against self-incrimination is actually engaged on the facts.

(Emphasis added)

- [23] Assuming that Mr. Costello's discovery evidence would be relevant to a future contempt proceeding initiated by another interested party, the evidence would not be admissible if its admission would violate the **Charter** or is otherwise inadmissible through statute or common law. The limitation, if any, on the use of Mr. Costello's evidence in these circumstances, in particular, whether it would offend the principle against self-incrimination cannot be decided in advance. The mere giving of the evidence through the discovery process, here, is not in violation of s. 11(c) of the **Charter**.
- [24] The applicants have raised, as well, a concern that Shipyard may discover and use in the contempt proceeding derivative evidence, flowing from Mr. Costello's discovery evidence, which derivative evidence may tend to incriminate him. In my view, the use by Shipyard of any derivative evidence in the contempt proceedings will be subject to **Charter** scrutiny at the time such use is attempted. (see **Thomson Newspapers**, supra, paras. 194 to 200 per LaForest, J.). Also relevant at that time will be a consideration of the breadth of the undertaking by Shipyard not to use the discovery evidence and, possibly, the parameters of the implied undertaking rule (see **Sezerman v. Youle** (1996), 150 N.S.R. (2d) 161; N.S.J. No. 172 (Q.L.)(N.S.C.A.)). (See also **MacNeil v. MacNeil** (1975), 14 N.S.R. (2d) 398 (Q.L.) (N.S.S.C.A.D.)).
- [25] I do not accept the applicants' submission that the decision in **Merck & Co. Inc. v. Apotex Inc.**, supra, stands for the proposition that the discovery evidence here can be used in contempt proceedings. **Merck** was a patent infringement case. The application, which resulted in the decision cited above, one of many in that case, involved the use of records provided by the alleged contemnor company, Apotex, which records were kept pursuant to a court order. The records were ordered by the Court to be kept in order to assist with the assessment of damages should Merck establish the patent infringement. Merck succeeded and a permanent injunction was ordered. The records in dispute allegedly disclosed contempt by Apotex of the order for a permanent injunction. Apotex applied to the court for a ruling that, pursuant to the implied undertaking rule, the records could not be used in the contempt proceeding. It was Apotex' submission that such use would be "for a collateral purpose" as is prohibited by that rule. The court held that the contempt proceedings were an integral part of the main action, not a separate proceeding. Use of the records in the contempt proceeding was not for a purpose collateral to the patent action and, thus, the implied undertaking rule did not prohibit their use. At para. 53, per MacKay, J.:

¶ 53 In my opinion, the information obtained by Merck's counsel and by Merck as a result of the order of November 4, 1993, was received on an implied undertaking that it be used only for purposes of the patent action, but those purposes include contempt proceedings for alleged violation of the Court's pronouncement by reasons and of its judgment. The contempt proceedings are an integral part of the Court's process arising in trial of the patent action, from its commencement to its conclusion including judgment and its enforcement. Those proceedings are not separate or distinct from the patent action and they are within the scope of the implied undertaking. The use of the information in these



proceedings is not for a collateral or ulterior purpose, in terms of the implied undertaking.

- [26] At issue in **Merck** was the scope of the implied undertaking which attached to the court ordered corporate records. Here we are concerned with individual self-incrimination under s. 11(c) of the **Charter**. This distinction is made clear by Strayer, J.A., for the court, in a brief decision dismissing the appeal from the trial court ruling (**Apotex Inc. v. Merck & Co. Inc. et al.** 70 C.P.R. (3d) 309):

There is no basis for quashing or staying the contempt proceedings. As noted by the learned motions judge, it remains for determination by the judge conducting the show cause hearing to determine, at the time of the hearing, on the basis of applicable provisions of the Canadian Charter of Rights and Freedoms and other principles of law, whether any particular evidence is admissible or any particular conduct of counsel at the hearing is impermissible.

- [27] Any issues which arise in relation to the admissibility of the discovery evidence in a future contempt proceeding will be resolved upon the application of the **Charter** protections which ensure a fair process.

[28] Accordingly, the application for a stay is dismissed.

- [29] Counsel are agreed that costs be in the cause. I so order and fix costs at \$1500 inclusive of disbursements.

Bateman, J.A.