NOVA SCOTIA COURT OF APPEAL

Citation: A.B. v. Bragg Communications Inc., 2011 NSCA 38

Date: 20110502
Docket: CA 330605
Registry: Halifax

Between:

A.B. by her Litigation Guardian, C.D.

Applicant

v.

Bragg Communications Incorporated,
a body corporate, The Halifax Herald Limited,
a body corporate, and Global Television

Respondents

Judge:	The Honourable Justice Duncan R. Beveridge
Motion Heard:	April 28, 2011, in Chambers
Held:	Motion is dismissed without costs.
Counsel:	Jane O'Neill and Ryan Conrod, for the applicant Nancy G. Rubin and Maggie Stewart, for the respondent, The Halifax Herald Limited Alan Parish, Q.C., for the respondent, Global Television (not appearing) Kimberley Hayes, for the respondent, Bragg Communications Incorporated (not appearing)

Decision:

INTRODUCTION

[1] On April 28, 2011 I heard a motion by A.B. requesting an order that would: a) permit her, and her litigation guardian to use pseudonyms in her intended application for leave to appeal to the Supreme Court of Canada; and b) extend a publication ban pending the ultimate disposition of the proceedings before the Supreme Court of Canada. I invited submissions from the parties as to my jurisdiction to grant the relief requested. Submissions were filed by the parties on April 28 and 29, 2011. At the end of the day on April 29, 2011, I wrote to the parties advising that the motion was dismissed with written reasons to follow. These are my reasons.

BACKGROUND

[2] The background to this motion is taken from the proceedings in the Nova Scotia Supreme Court (2010 NSSC 215), the interlocutory proceedings before Oland J.A. (2010 NSCA 57) and the disposition of the appeal by the Court of Appeal (2011 NSCA 26).

[3] A.B. appears to have been the victim of a cruel hoax. Person or persons unknown created a fake Facebook profile using her photo and a slightly modified version of her name. The page contained juvenile and disparaging remarks. A.B.'s father retained counsel. The IP address that created the page was traced to a customer of Bragg Communications (Eastlink). Following the dictates of *Personal Information Protection and Electronic Documents Act* ("PIPEDA"), S.C. 2000, c. 5, Bragg Communications would not disclose the identity of the subscriber without a court order. A.B., with her father acting as litigation guardian, sought a production order requiring Bragg to provide the requested disclosure.

[4] The motion was heard by Justice Arthur J. LeBlanc of the Nova Scotia Supreme Court on May 26 and 28, 2010. Bragg did not oppose the motion. However, the production order was not the only relief requested by A.B. She also sought permission from the Court to use pseudonyms and an order banning publication of the proceedings. These kind of orders may be granted pursuant to Rule 85.04 of the *Nova Scotia Civil Procedure Rules*, which provides:

> **85.04 (1)** A judge may order that a court record be kept confidential only if the judge is satisfied that it is in accordance with law to do so, including the freedom of the press and other media under section 2 of the *Canadian Charter of Rights and Freedoms* and the open courts principle.
>
> **(2)** An order that provides for any of the following is an example of an order for confidentiality:
>
> (a) sealing a court document or an exhibit in a proceeding;
>
> (b) requiring the prothonotary to block access to a recording of all or part of a proceeding;
>
> (c) banning publication of part or all of a proceeding;
>
> (d) permitting a party, or a person who is referred to in a court document but is not a party, to be identified by a pseudonym, including in a heading.

[5] Notice of these requests were given to the media. The Halifax Herald and Global Television appeared before LeBlanc J. and objected. LeBlanc J. noted that the Facebook profile had been removed by Bragg Communications in March 2010. Although he found the statements on the Facebook profile were *prima facie* defamatory, he was not satisfied there was the requisite evidentiary basis to grant the requested confidentiality orders (paras. 32, 35, 37-38). In subsequent oral decisions, LeBlanc J. stayed the effect of his decision until June 25, 2010.

[6] A.B. appealed to the Nova Scotia Court of Appeal. She applied to a single judge of the Court for an order permitting the use of pseudonyms in her pleadings, and to extend the stay of the judgment pending the final disposition of the appeal. Halifax Herald and Global took no position on the motions. On June 25, 2010 Oland J.A. ordered that A.B. could proceed by the use of initials and imposed a publication ban on the actual words in the Facebook profile, pending any further order of the Court.

[7] The appeal was ultimately dismissed on March 4, 2011. Saunders J.A. wrote the unanimous reasons for the Court. Saunders J.A. found the decision by Justice

LeBlanc to have been an interlocutory discretionary ruling. Deference was therefore owed to his decision. This meant the appellant had to demonstrate an error in principle by LeBlanc J., or that absent intervention a patent injustice would result. Saunders J.A. not only found no error in principle by the learned Motions judge, he wrote that the rejection of the requested publication ban was correct (para. 96-100). Nonetheless, at the conclusion of reasons for judgment, Saunders J.A., wrote (para. 103):

> ...To preserve any further rights of appeal, I would continue the publication ban issued by Oland, J.A. (2010 NSCA 57) for a period of sixty days or such further time as this Court or the Supreme Court of Canada may direct.

[8] These words were duly incorporated into the formal order for judgment as follows: "AND IT IS FURTHER ORDERED THAT the publication ban issued by Oland J.A. (2010 NSCA 57) shall remain in effect for a period of sixty days or such further time as this Court or the Supreme Court of Canada shall direct."

THE MOTION

[9] The applicant filed her Notice of Motion and related documents on April 19, 2011. The relief requested in the Notice was for an order extending the publication ban issued by Oland J.A. and continued by the Court in its decision of March 4, 2011. No other relief was identified. The sole basis for the request was identified as "*Civil Procedure Rule* 90.37".

[10] The only evidence submitted was the Affidavit of Michelle Awad, Q.C., sworn April 19, 2011. She deposed that she is counsel for the appellant and has received instructions to appeal to the Supreme Court of Canada.

[11] The precise relief requested was set out in a draft Order as follows: "The publication ban issued by Oland J.A. in the decision bearing citation 2010 NSCA 57 and extended in the decision bearing citation 2011 NSCA 26 is hereby extended pending the ultimate disposition of this matter by the Supreme Court of Canada."

[12] The respondents to the motion filed no materials. At the hearing, only Ms. Rubin, for the Halifax Herald appeared for the respondents.

[13] As already noted, I questioned the source of my jurisdiction to grant the requested relief. The applicant provided further submissions in letters dated April 28, 2011 and April 29, 2011, the latter in response to Ms. Rubin's letter of April 29, 2011. From these, A.B., amended the relief being requested to include, in addition to the publication ban, permission for A.B. and her litigation guardian to proceed by way of pseudonyms in the Supreme Court of Canada.

[14] There was no longer any reliance on *Civil Procedure Rule* 90.37. Instead the applicant said I have jurisdiction because: a) it is common practice for the Supreme Court of Canada to respect publication bans or anonymization orders issued by Courts of Appeal; b) s. 65.1(2) of the *Supreme Court Act*, R.S.C. 1985, c. S-26; or c) jurisdiction to extend the order was reserved by the reasons for judgment and formal order issued by the Nova Scotia Court of Appeal. I turn to each of these.

Common Practice

[15] The argument of the applicant is framed in the context of the formal order issued by the Court extending the terms of the order issued by Oland J.A. for a period of sixty days "or such further time as this Court or the Supreme Court of Canada shall direct." She says it is common practice of the Supreme Court of Canada to respect publication bans or orders concerning the use of initials. She cites the requirement in the *Supreme Court of Canada Rules* for counsel for the appellant to file a form, Certificate 25B. This form requires counsel for the appellant to:

> State whether there is, pursuant to on order or legislation, a ban on the publication of evidence or the names or identity of a party or witness and whether any document filed includes information that is subject to that ban.

[16] I agree with the submissions of the respondent Halifax Herald. The required certificate is a procedural requirement designed to alert the Supreme Court about existing publication bans or anonymization orders that could impact that Court's management of the file. Giving of such notice can hardly be the source of authority for a judge of a Court of Appeal to issue such an order.

[17] Counsel for the appellant advised that she intends to file the application for leave to appeal to the Supreme Court of Canada on May 3, 2011. As of that date,

the anonymization order and publication ban will still be in effect. If the appellant wants it to continue, she can request that Court to do so.

Section 65.1 Supreme Court Act

[18] Section 65.1 provides:

> **65.1** (1) The Court, the court appealed from or a judge of either of those courts may, on the request of the party who has served and filed a notice of application for leave to appeal, order that proceedings be stayed with respect to the judgment from which leave to appeal is being sought, on the terms deemed appropriate.
>
> Additional power for court appealed from
>
> (2) The court appealed from or a judge of that court may exercise the power conferred by subsection (1) before the serving and filing of the notice of application for leave to appeal if satisfied that the party seeking the stay intends to apply for leave to appeal and that delay would result in a miscarriage of justice.
>
> Modification
>
> (3) The Court, the court appealed from or a judge of either of those courts may modify, vary or vacate a stay order made under this section.

[19] Since no application for leave to appeal has been filed, the prerequisites identified in ss.(2) must be satisfied for the Nova Scotia Court of Appeal, or a judge of that court, to have the power to order a stay of proceedings with respect to the judgment from which leave to appeal is being sought. I must be satisfied that the party seeking the stay intends to apply for leave to appeal, and that delaying an application for a stay until the notice of application for leave to appeal has been served and filed would result in a miscarriage of justice.

[20] I have no difficulty with the first of these prerequisites. I accept the assurance set out in the affidavit of counsel for the applicant that she intends to apply for leave to appeal. It is the second that is problematic.

[21] There are a number of Nova Scotia cases that have discussed the scope of the remedy available, and the appropriate test to be applied, with respect to an application pursuant to s.65.1(1) of the *Supreme Court Act* (see *Turf Masters*

Landscaping Ltd. v. T.A.G. Developments Ltd. (1995), 144 N.S.R. (2d) 326 (C.A.-Chambers); *Re J.J. v, Nova Scotia (Minister of Health)*, 2003 NSCA 71; *Wall v. Horn Abbot Ltd. et al.*, 2006 NSCA 60). *Minister of Community Services v. B.F.*, 2003 NSCA 125 addressed the prerequisite set by s. 65.1(2). At issue was the planned taking of four children into permanent care as soon as an appropriate placement could be found for them. The parents evinced an intention to seek leave to appeal to the Supreme Court of Canada. With respect to the requirement that delay would result in a miscarriage of justice, Cromwell J.A., as he then was, wrote:

> [17] In the time available to me, I have found little judicial consideration of this requirement: see **Pelley v. Pelley** (2003), 222 Nfld. & P.E.I.R. 305 (N.L.C.A. Chambers); **Canada (Minister of Indian and Northern Affairs) v. Corbiere** (1996), 206 N.R. 122; [1996] F.C.J. No. 1620 (Q.L.) (F.C.A. Chambers). I take the requirement to mean that there is a risk of injustice occurring if the consideration of the stay application were to be deferred until after the leave application has been filed. Here, the respondent intends to remove the children from the applicants' care as soon as an appropriate placement can be found for them. This could occur at any time and once a placement is found, the Minister intends to act on it quickly. I am, therefore, satisfied that to delay considering the stay application until an application for leave has been filed could result in a miscarriage of justice in the sense that if a stay is found to be appropriate, it could come too late if delayed until after the leave application has been filed.

See also *Brett v. Amica Mature Lifestyles Inc.*, 2004 NSCA 100.

[22] With all due respect to the applicant, her initial supplementary submissions did not address the requirement that delay in getting the relief pending the actual filing of the leave application would result in a miscarriage of justice. In her second supplementary submissions she says:

> ...The appellants submit that a miscarriage of justice would result from Your Lordship's failure to exercise jurisdiction and grant the Order sought. The Appellant is seeking leave to appeal a decision that has denied her access to the identity of the individual who posted the fake Facebook Profile without disclosing her identity. Without an Order protecting the appellant's identity pending its application for leave to appeal, the Appellant's plan to appeal to the Supreme Court of Canada is moot. Section 65.1 of the *Supreme Court Act* allows this Honourable Court to grant the relief sought in the face of potential miscarriage of justice.

[23] The applicant does not explain how her planned leave application would be rendered moot if the requested relief is not granted prior to the leave application being served and filed. I can see no reason that the applicant could not have proceeded expeditiously with her intended leave application. Once it was filed, she could have then sought the relief requested either from the Supreme Court of Canada, or a judge thereof, or from the Nova Scotia Court of Appeal or a judge thereof. I do not see how her delay in proceeding demonstrates a potential miscarriage of justice. Nor do I see any bar to her being able to file her application for leave to appeal utilizing the Rules of that Court to protect her identity.

[24] Quite apart from those considerations, with respect to the publication ban lapsing as of the end of May 3, 2011, the applicant has presented no evidence demonstrating a potential miscarriage of justice if this relief were not considered now, only later to be found that it should have been. She faces no trial. Her identity is unknown. There was no publication ban from March to June 2010. There is no evidence of harm occurring to her then, or now if the ban is not extended. She may have a remedy if anyone choses to republish details of the fake Facebook profile. LeBlanc J. has already found those details to be *prima facie* defamatory. Clearly the public are on notice of the risk attendant on publication.

Jurisdiction Reserved

[25] The formal order of the Court extends the publication ban issued by Oland J.A. for a period of sixty days, or such further time "as this Court or the Supreme Court of Canada may direct." The applicant contends that by virtue of this language, and quite apart from s. 65.1 of the *Supreme Court Act*, jurisdiction was reserved to the Court to consider and order a further extension. The respondent says the proceedings before the Court are over, and absent a statutory foundation, the quoted language cannot bestow jurisdiction.

[26] I have no way of divining the meaning of the language of the formal order beyond what is revealed by those words. On their face, they reflect the reality that applications for leave to appeal may be brought within sixty days of the formal order of judgment from a final order of a Court of Appeal, and by virtue of s. 65.1 of the *Supreme Court Act* concurrent jurisdiction is created to deal with relief pending proceedings in that Court. I pause to observe, that such jurisdiction may be exercised before or after the application for leave to appeal has been granted

(see *Quebec (Commission des droits de la personne at des droits de la jeunesse) v. Montreal (City)*, [1999] 1 S.C.R. 381). I need not resolve the issue of reservation since, if the words reserve a jurisdiction, in my opinion, it is a reservation to the Court and not to a single judge of the Court.

[27] The distinction between what a judge of the Court can do, and what powers the Court has is well known. Hallett J.A. in *Future Inns Canada Inc. v. Labour Relations Board Nova Scotia*, [1996] N.S.J. No. 434, 154 N.S.R. (2d) 358 stressed the sharp delineation of what matters a single judge of the court can deal with in Chambers, as opposed to what the Court itself could do when sitting in a panel of least three judges. This distinction remains with the new Rules (see *R. v. West*, 2009 NSCA 63).

[28] *Civil Procedure Rule* 90.37 (1) provides that motions to a judge of the Court of Appeal may be made in accordance with Rule 90.37. Rule 90.37(15) is as follows:

> **90.37** (15) A judge of the Court of Appeal, on motion, may make an order to do any of the following, until the Court of Appeal provides a further order:
>
> (a) allow the use of pseudonyms in the pleadings;
>
> (b) impose a publication ban;
>
> (c) require a sealing of a court file;
>
> (d) require a hearing to be *in camera*.

[29] It is plain that absent some other source of jurisdiction, sitting as a single judge of the Court, I can allow the use of pseudonyms, impose a publication ban, seal a court file, or order a hearing to be *in camera* until the Court of Appeal provides a further order. This was the Rule under which Oland J.A. granted the order pending the applicant's appeal. The Court of Appeal has provided a further order. By the terms of that order, it reserved to itself “this Court” the power to extend the publication ban ordered by Oland J.A. It did not say “this Court or a judge this Court”.

[30] The Rules plainly allow for motions to be made to the Court of Appeal, either directly by virtue of Rule 90.36 (2) or by reference by a single judge of the Court (90.37(12)(d)). No such motion was made, nor a request for me to refer the matter to the Court.

SUMMARY AND CONCLUSION

[31] The applicant sought to extend the kind of relief granted by Oland J.A. pending the completion of the appeal in the Nova Scotia Court of Appeal to contemplated proceedings before the Supreme Court of Canada. No evidence was submitted in support of the motion. Initial reliance on Rule 90.37 to ground the power to grant such a motion was abandoned. Instead the applicant cited common practice, s. 65.1(2) of the *Supreme Court Act* and the reservation of jurisdiction to extend based on the formal order of the Court.

[32] The fact that the Supreme Court of Canada regularly respects anonymization orders or publication bans granted by lower courts does not create a jurisdiction to grant such orders. Section 65.1(2) of the *Act* does provide for a single judge of a provincial court of appeal to grant relief under s. 65.1(1) to "order proceedings be stayed" on appropriate terms. I need not decide the extent to which this power includes the precise relief the applicant requests since to be able to consider such a request prior to an application for leave to appeal has been served and filed requires the applicant to demonstrate an intention to apply for leave to appeal and delay in seeking a stay of proceedings would result in a miscarriage of justice.

[33] The applicant has shown an intention to apply for leave to appeal, but she has not satisfied me that her delay in waiting to request the relief until her application for leave to appeal has been served and filed would result in a miscarriage of justice. I am not satisfied that her application for leave to appeal would be rendered moot or that irreparable harm would ensue. Accordingly, I am presently without jurisdiction under s. 65.1(1) to consider the relief requested.

[34] Furthermore, if the Court reserved to itself jurisdiction to extend the ban by virtue of the wording of the Court's formal order, independently of the jurisdiction found in s. 65.1 of the *Supreme Court Act*, it is a jurisdiction that can only be exercised by the Court and not a single judge.

[35] The motion is dismissed, but in the circumstances without costs.

Beveridge, J.A.