NOVA SCOTIA COURT OF APPEAL

Citation: *Certified Coating Specialists Inc. v. Halifax-Dartmouth Bridge Commission*, 2016 NSCA 77

Date: 20161031
Docket: CA 456195
Registry: Halifax

Between:

The Bowra Group Inc., as Receiver and Trustee in Bankruptcy for Certified Coating Specialists Inc.

Appellant

-and-

Halifax-Dartmouth Bridge Commission and Cherubini Metal Works Limited

Respondents

-and-

The Attorney General of Nova Scotia

Intervenor

Judge:	The Honourable Justice Joel Fichaud in chambers
Motions Heard:	October 27, 2016, in Halifax, Nova Scotia
Held:	Motion for a stay denied and motion for security for costs granted
Counsel:	John T. Shanks for the Appellant Douglas Tupper, Q.C., for the Respondent Cherubini Metal Works Limited Kevin D. Gibson for the Respondent Halifax-Dartmouth Bridge Commission Michael Pugsley, Q.C., for the Intervenor the Attorney General of Nova Scotia

Reasons for judgment:

[1] The Appellant moves for a stay of execution, and the Respondent Cherubini requests security for costs.

Background

[2] The Macdonald Bridge spans Halifax Harbour between Halifax and Dartmouth. Recently, the sixty year old Bridge has needed significant reconstruction. Hence the project, known as the Big Lift, to replace the Bridge's road deck, beams, trusses and suspension cables.

[3] The Respondent Halifax-Dartmouth Bridge Commission owns the Bridge.

[4] The Commission hired American Bridge Co. as general contractor for the Big Lift project. American Bridge hired the Respondent Cherubini Metal Works Limited to fabricate and supply the 46 road panels needed to re-deck the Bridge. Cherubini subcontracted the painting of the panels to Certified Coating Specialists Inc.

[5] In January 2016, Certified Coating entered receivership, then bankruptcy. The Appellant Bowra Group Inc. is Certified Coating's receiver and trustee in bankruptcy. On January 20, 2016, Certified Coating stopped work on its subcontract with Cherubini. Certified Coating had painted 11 of the 46 deck panels. Since then, Cherubini has had to continue the painting by other means.

[6] Cherubini claimed a set-off for its additional expenses to complete Certified Coating's work. Bowra disputed the set-off. There is no question that Cherubini is solvent and has the ability to pay. The issue is the amount of any set-off.

[7] The *Builders' Lien Act*, R.S.N.S. 1989, c. 277 provides for a builders' lien to protect unpaid contractors. On March 16, 2016, Bowra registered a Claim for Lien at the Registry of Deeds. The document claimed a builders' lien against 13 parcels of land owned by the Bridge Commission. These parcels comprised the Bridge and its related property, such as the bridge toll plaza. Bowra then sued to enforce the Claim for Lien and, on April 29, 2016, filed a *lis pendens* at the Land Registration Office.

[8] On September 6, 2016, Cherubini moved to vacate the Claim for Lien and *lis pendens*. Its motion was under s. 29(4) of the *Builders' Lien Act*:

> 29(4) Upon application, the court or judge having jurisdiction to try an action to realize a lien, may allow security for or payment into court of the amount of the claim, and may thereupon order that the registration of the lien be vacated or may vacate the registration upon any other proper ground and a certificate of the order may be registered.

[9] Cherubini's motion did not offer security or payment into court. Rather, it claimed there was "other proper ground" to vacate the lien, namely s. 3(1) of the *Builders' Lien Act*:

> 3(1) Nothing in this *Act* extends to any public street or highway or to any work or improvement done or caused to be done thereon.

Cherubini said the Bridge's decking pertained to a public street or highway against which no builders' lien may be filed.

[10] On September 6, 2016, in the Supreme Court, Justice Michael Wood heard Cherubini's motion. On September 22, 2016, Justice Wood issued a decision that vacated the lien (2016 NSSC 250). The judge concluded:

> [23] For the above reasons I am satisfied that the road which crosses the MacDonald bridge is a "public street or highway" within the meaning of s. 3(1) and therefore any work on it is exempt from application of the *Act*. CCS Inc. painted the deck panels which were incorporated in the new road deck. No builders' lien rights arose under the *Act* in favour of CCS Inc. This means they are not entitled to register liens against the lands on which the bridge sits nor any other property used or enjoyed in conjunction with the operation of the bridge. This includes the five parcels located adjacent to the toll plaza in Dartmouth.

The decision acknowledged that Bowra's claim against Cherubini for the debt and the set-off dispute may proceed, but without a builders' lien.

[11] On October 5, 2016, Bowra applied to the Court of Appeal for leave to appeal from Justice Wood's ruling. The leave motion and appeal are scheduled for hearing on March 15, 2017.

Issues

[12] On October 20, 2016, Bowra moved for a stay, pending the Court's decision on the appeal, of Justice Wood's ruling that the liens be vacated. Cherubini countered with a motion for security for costs. On October 27, 2016, I heard both motions, then reserved decision.

First - Stay of Execution

[13] Rule 90.41 says:

> 90.41 (1) The filing of a notice of appeal shall not operate as a stay of execution or enforcement of the judgment appealed from.
>
> (2) A judge of the Court of Appeal on application of a party to an appeal may, pending disposition of the appeal, order stayed the execution and enforcement of any judgment appealed from or grant such other relief against such a judgment or order, on such terms as may be just.
>
> …

[14] Rule 90.41(1) means the successful party presumptively is entitled to the benefit of his judgment pending the appeal decision, unless the unsuccessful party satisfies the conditions that govern the judge's discretion under Rule 90.41(2).

[15] Those conditions remain as stated by Justice Hallett in *Fulton Insurance Agencies Ltd. v. Purdy* (1990), 100 N.S.R. (2d) 341 (C.A.), paras. 28-30, under the former Rule 62.10(2). The stay applicant must show either: (1) he has an arguable ground of appeal, and denial of a stay would cause him irreparable harm, and the balance of convenience favours the stay applicant, or (2) there are exceptional circumstances making it just that a stay should issue.

[16] First, the primary test.

[17] An "arguable" ground is a realistic proposition that, if supported by the record, could have sufficient substance to persuade a panel to allow the appeal. The motions judge does not have the resources - the record and detailed submissions - to undertake a deeper inquiry. The process of appeal assumes that the Court's panel, not just a motions judge, undertakes the full merits analysis. *Nova Scotia (Attorney General) v. MacLean*, 2016 NSCA 69, para. 21. *Federated Life Insurance Company v. Fleet*, 2008 NSCA 90, para. 19. *Wolfridge Farms Limited v. Bonang*, 2014 NSCA 70, para. 22.

[18] Bowra says Justice Wood's ruling - that the Bridge deck was a "public street or highway" under s. 3(1) of the *Builders' Lien Act* - misinterpreted that *Act* and the *Halifax-Dartmouth Bridge Commission Act*, S.N.S. 2005, c. 7. Justice Wood's decision cited provisions of the latter statute that supported the judge's conclusion. Bowra's brief for this motion quotes those passages, then says:

> 21. In coming to this conclusion the Learned Hearing Judge failed to comment upon or seemingly consider any of the additional sections of the *Halifax-Dartmouth Bridge Commission Act* which display a clear separation between the Province and the Bridge Commission. This interpretation, drawn only from considering selective sections of that *Act*, failed to properly assess the provisions in the context of the *Act* as a whole and as a consequence incorrectly interpreted the true meaning of the *Act*.

[19] At the hearing of this motion, I asked Bowra's counsel which legislative provisions support Bowra's submission that Justice Wood misinterpreted s. 3(1) of the *Builders' Lien Act* and selectively mistook the true meaning of the *Halifax-Dartmouth Bridge Commission Act*. Counsel cited nothing from the *Builders' Lien Act*. Counsel cited no specific provision in the *Halifax-Dartmouth Bridge Commission Act*, but referred generally to the Bridge Commission's powers to own property, borrow with the Province's guarantee, and act. Bowra says these are badges of autonomy, from which one may deduce that the Commission's property, *i.e.* the Macdonald Bridge, is not a "public" street or highway. Apparently, the Bridge's thoroughfare would be the Commission's private street.

[20] I will summarize the pertinent provisions of the *Halifax-Dartmouth Bridge Commission Act*:

1. The Commission was established and is continued under s. 3 the *Act*, a public statute. Section 19(1) designates the Commission as a public utility under the *Public Utilities Act*.
2. Section 3 says that the Commission consists of five members appointed by the Governor in Council and four appointed by Halifax Regional Municipality.
3. Section 7(4) says that, once the provincial Minister of Transportation appoints the Commission as a traffic authority, the *Motor Vehicle Act* applies to all persons and vehicles using the Bridge.
4. Section 23 says that, after satisfying the Commission's expenses and debt obligations, the Commission's profits shall be paid into a reserve

account, then applied to purposes that are agreed by the Commission, Province and Municipality.

5. Section 9 says that the Commission's sole objectives are to operate and maintain the Macdonald Bridge, its sister the A. Murray Mackay Bridge and other transportation systems approved by the Governor in Council, and to operate toll collection systems for those facilities that are approved by the Governor in Council.

[21] The Commission's powers, including those cited by Bowra, are dedicated to its statutory objective of operating and maintaining the Macdonald Bridge. The Bridge's only function is to carry thousands of public commuters daily between Halifax and Dartmouth.

[22] A stay motion has a low threshold for arguable merit. But it isn't a free pass. At least the reasoning should follow some frayed thread through the knotty issue. Bowra's submission just ignores the inconvenient factors. I see no arguable issue.

[23] Neither is there irreparable harm.

[24] Bowra's brief says:

> 25. Section 24 of the *Builders' Lien Act* mandates that a Claim for Lien must be registered within sixty days of completing the provision of services to the property being liened. There is no provision in that *Act* to extend the time for registration of the Claim for Lien beyond that timeframe. If the requested stay was not granted and the Order of Justice Wood was operative, the Claims for Lien and Lis Pendens would be vacated and Bowra, even if successful in its appeal, would be unable to re-register its Claims for Lien and regain its priority position vis-à-vis the properties.

[25] The point has no merit. If Bowra succeeds on the appeal, Justice Wood's vacating order would be overturned. Bowra's lien, filed March 16, 2016, would reawaken. It would not be necessary that Bowra file a new Claim for Lien after the Court of Appeal's decision.

[26] Bowra says, alternatively, that any alienation of the Bridge property between today and the Court of Appeal's decision will have priority over Bowra's reinstated lien. Bowra's degraded priority would be irreparable harm.

[27] A stay applicant, facing the presumption under Rule 90.41, must establish irreparable harm by evidence. I agree with Bowra that proof of irreparable harm

normally involves a predictive inference. But an inference rests on some evidential basis. It doesn't materialize like a singularity from mere unworn speculation at the counsel table. *Nova Scotia (Attorney General) v. MacLean*, para. 25. *Halifax (Regional Municipality) v. Casey*, 2011 NSCA 69, para. 41; *C.B. v. T.M.*, 2012 NSCA 75, para. 13; *Sydney Steel Corporation v. MacQueen*, 2012 NSCA 78, para. 20.

[28] The appeal hearing is scheduled for March 15, 2017. Normally a decision would follow within a month. There is not a hint of evidence that, between today and the Court's anticipated decision about six months from now, the Commission may alienate, dispose of, mortgage or encumber the MacDonald Bridge. Nothing suggests an anticipated refinancing or other basis for predicting a potential charge on the Bridge property. Bowra has not satisfied its onus to prove the harm.

[29] It is unnecessary to discuss balance of inconvenience.

[30] There is no basis for *Fulton*'s secondary test of exceptional circumstances.

[31] I dismiss the motion for a stay.

Second - Security for Costs

[32] Rule 90.42(1) says:

> 90.42(1) A judge of the Court of Appeal may, on motion of a party to an appeal, at any time order security for the costs of the appeal to be given as the judge considers just.

[33] *Disabled Consumer Society of Colchester v. Burris*, 2009 NSCA 21 identified the starting point under Rule 90.42(1):

> [11] The case law from this court, discussing the principles governing security, derives from the former Rule 62.13, replaced by Rule 90.42 on January 1, 2009. The former Rule 62.13(1) permitted a judge to order security for costs "as the judge considers just". In my view, the test has not changed, and the case law under the former Rule 62.13 applies to this application under the new Rule 90.42.
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> [12] The starting principle is that security for costs on appeal is ordered only when the evidence shows "special circumstances". *Frost v. Herman* (1976), 18 N.S.R. (2d) 167 (C.A.), at p. 168 per Macdonald, J.A., which has been followed in many later rulings of this court.
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> [13] The meaning of "special circumstances" may differ with the context. …

To the same effect: *Leigh v. Belfast Mini-Mills Ltd*., 2013 NSCA 110, para. 12.

[34] Recently in *Ketler v. Nova Scotia (Attorney General),* 2016 NSCA 15, Justice Bryson elaborated on "special circumstances":

> [10] Special circumstances are those which support an objectively justified concern that the respondent will be unable to recover from an unsuccessful appellant. …
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> [11] "Insolvent behaviour" towards the respondent is one way of giving objectivity to the respondents' concern: it is not the only way. Special circumstances may include evidence that the appellant is actually insolvent; or has demonstrated an unwillingness or inability to meet his obligations because he has failed to pay judgements or costs, including trial costs; is not pursuing an appeal in good faith or is otherwise abusing the court's process; or has behaved fraudulently, to name only some such circumstances. …
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> [12] Even where special circumstances are demonstrated, a discretion remains in the Court to refuse security. A common example occurs where the Court is reluctant to prevent a "good faith appellant who is truly without resources from being able to prosecute an arguable appeal" [*Sable Mary Seismic Inc. v. Geophysical Services Inc.*, 2011 NSCA 40, para. 7].
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> [13] While the merits of the appeal are rarely weighed by a single judge in Chambers, they can be relevant to the exercise of discretion. …

[35] Rule 45.02(3), in the Rules of the Supreme Court of Nova Scotia, lists facts that establish a rebuttable presumption to assist the judge's appraisal of a motion for security for costs in that court. Included are Rules 45.02(3)(a) and (c), that the claimant resides outside Nova Scotia and is nominal without sufficient assets to satisfy a prospective costs award. In the Court of Appeal, Rule 90.42 has no such rebuttable presumption. But Rule 90.02(1) permits a judge of the Court of Appeal to consider standards from the Supreme Court Rules, that are not inconsistent with Rule 90, with appropriate modifications.

[36] Certified Coating is insolvent. Bowra is a nominal party whose assets to satisfy costs are limited to the balance in its receiver's account outside Nova Scotia.

[37] Bowra responded to the motion with an affidavit of one of its Nova Scotia counsel. The affidavit attached Bowra's Interim Statement of Receipts and Disbursements for January 21, 2016 to October 25, 2016. The Interim Statement says that after "Payments to Secured Creditor" of $1,608,067, the "Current funds in Receiver's trust account" are $150,623.

[38] There is no affidavit from anyone with personal knowledge of the receiver's accounts.

[39] There is nothing to indicate whether there are realizations to come.

[40] There is no evidence who the secured creditor is, whether anything remains outstanding to the secured creditor, whether there will be further payments to the secured creditor, whether there are other secured creditors or statutory charge holders or preferred creditors, or the amounts claimed by or due to those persons.

[41] I have nothing to indicate whether there are outstanding or anticipated expenses of the receivership that may be paid before the Court of Appeal issues its decision some six months from now. In the nine months covered by its Interim Statement, Bowra's disbursements of the receivership totalled $925,234. It is not difficult to project that, over the next six months, the Receiver's expenses may exceed the current balance of $150,623.

[42] Bowra would have information on these points. It was not provided for this motion.

[43] The material leaves me with an objectively justified concern that, if the appeal is dismissed, the successful respondent will be unable to recover the amount of any costs award for the appeal. In my view, there are special circumstances that justify security for costs.

[44] Cherubini requests security of $12,000. Cherubini's counsel says that this amount includes $7,500 toward its costs of the proceeding before Justice Wood. My task is to quantify security for costs of the appeal, not to assist in the collection of a costs award from the Supreme Court. In my view, $4,000 is appropriate to secure Cherubini's anticipated appeal costs.

Conclusion

[45] I dismiss Bowra's motion for a stay.

[46] I grant Cherubini's motion for security for costs of the appeal, in the amount of $4,000. This is to be posted with the Registrar by November 18, 2016, failing which Cherubini may, on notice to Bowra, apply to a chambers judge for dismissal of the appeal.

[47] I quantify the costs of these two motions as $1,000 each, the total of $2,000 to be payable in the cause of the appeal.

Fichaud, J.A.