NOVA SCOTIA COURT OF APPEAL

Citation: *Colpitts v. Nova Scotia Barristers' Society*, 2019 NSCA 45

Date: 20190527
Docket: CA 487356
Registry: Halifax

Between:

R. Blois Colpitts

Appellant

v.

Nova Scotia Barristers' Society

Respondent

Judge:	Beveridge, J.A.
Motion Heard:	May 16, 2019, in Halifax, Nova Scotia in Chambers
Written Decision:	May 30, 2019
Held:	Motion dismissed
Counsel:	Christopher I. Robinson, for the appellant Bernadine MacAulay, for the respondent

Decision:

INTRODUCTION

[1] Blois Colpitts is a lawyer. He says he negotiated an agreement in March 2018 with the Nova Scotia Barrister's Society that guaranteed him two things: any and all disciplinary proceedings against him would be held in abeyance pending the outcome of his conviction appeal and the agreement and its terms would be kept confidential.

[2] On November 27, 2018, the Bar Society notified him that charges of unprofessional conduct had been referred to a Hearing Committee and asked for his response. His response was to turn to the courts.

[3] He filed a judicial review application to challenge the Bar Society's actions. The review was scheduled to be heard on May 29, 2019.

[4] Mr. Colpitts filed a motion for an interlocutory interim confidentiality order to use the pseudonym XYZ and to seal the Court file pending a full hearing of a confidentiality motion. The motion was by correspondence.

[5] The interim motion was granted and then extended to March 27, 2019. The order included a "publication ban". The Honourable Peter P. Rosinski heard the motion on March 27, 2019. He dismissed the confidentiality motion in written reasons on April 17, 2019 (2019 NSSC 125). An order was eventually taken out on May 14, 2019.

[6] Justice Rosinski's reasons are not yet available to the public because Mr. Colpitts filed a Notice of Application for Leave to Appeal to this Court on April 23, 2019, and Justice Van den Eynden granted an interlocutory interim order staying the effect of the decision by Rosinski J. pending a full hearing on May 16, 2019. In the interim, the appellant would be referred to as XYZ in all court filings and the Supreme Court file would remain sealed.

[7] I heard the stay motion on May 16, 2019 and reserved my decision. I was not convinced that I should exercise my discretion to grant the relief requested. On Monday, May 27, 2019, I issued an order dismissing the motion for a stay of execution, with reasons to follow. These are they.

[8] Before setting out the principles that guide the discretion to order a stay and how they applied here, I will set out sufficient information to provide context.

BACKGROUND

[9] Knowledge House Inc. (KHI), a publicly traded company imploded in 2001. Multiple civil proceedings followed.

[10] Criminal charges commenced in 2011 when the Crown preferred an indictment against KHI's CEO, Daniel Potter, Blois Colpitts, its lead director and counsel, and Bruce Clarke. The indictment alleged numerous counts of fraud and conspiracy to commit fraud related to the market price for KHI shares. There were various pre-trial applications. The trial did not commence until November 2015.

[11] The trial has been labelled the longest running in Nova Scotia's history. Justice Kevin Coady found Messrs. Potter and Colpitts guilty on March 9, 2018 and entered convictions on two counts of conspiracy to commit fraud and fraud in relation to manipulation of KHI's stock price (2018 NSSC 40).

[12] Mr. Colpitts reported the convictions to the respondent. Tilly Pillay, Q.C., Executive Director for the respondent, issued a complaint (C-6226) against Mr. Colpitts. The Complaints Investigation Committee (CIC) scheduled a hearing for March 28, 2018 under s. 37 of the *Legal Profession Act*, S.N.S. 2004, c. 28 to determine if it would suspend or otherwise impose restrictions on Mr. Colpitts pending the outcome of the complaint.

[13] The March 28, 2018 hearing did not proceed. Mr. Colpitts and the Society signed an agreement on March 27, 2018. It is this agreement that is the foundation for his motion for judicial review and confidentiality. Many of its terms are set out in Justice Rosinski's decision. I need not review them in detail.

[14] The interim agreement recites: the CIC's decision to hold a s. 37(1) hearing to determine if it is in the public interest to suspend or impose practice restrictions; Mr. Colpitts' request to adjourn the s. 37(1) hearing; and, the Society's agreement subject to certain conditions to adjourn the s. 37(1) hearing.

[15] The terms were that: effective April 6, 2018 Mr. Colpitts shall voluntarily cease the practice of law on an interim basis; Mr. Colpitts can choose to reconvene the s. 37(1) hearing; if Mr. Colpitts' conviction appeal is allowed, he will be allowed to engage in the unrestricted practice of law; the Society shall post on its

website a notice that Mr. Colpitts has voluntarily withdrawn from the practice of law, and his RBC Law Inc. practice has been assumed by Warren J. Chornoby; and, the terms of the agreement shall remain strictly confidential except for necessary communication by Messrs. Colpitts and Chornoby.

[16] On July 25, 2018, Justice Coady sentenced Mr. Colpitts to 4.5 years' incarceration. He was subsequently released on bail pending appeal, now scheduled for September 2019.

[17] The CIC met on September 20, 2018. They sought Mr. Colpitts' response to its opinion that evidence that could reasonably be believed may present a finding of professional misconduct or conduct unbecoming. Mr. Colpitts said the interim agreement of March 27, 2018 precluded any action pending the outcome of his conviction appeal.

[18] The CIC disagreed. A Notice of Hearing issued on November 27, 2018. It is this action that is challenged by the judicial review proceedings scheduled for May 29, 2019. Justice Rosinski's decision of April 17, 2019 rejected Mr. Colpitts' request that he be allowed to pursue his challenge anonymously without the public having access to the file and a publication ban on the proceedings.

PRINCIPLES

[19] The filing of a Notice of Appeal does not operate as a stay of execution or enforcement of the judgment under appeal. However, there may be circumstances where, to ensure that the statutory right to challenge the correctness of a lower court's decision is not rendered illusory, the court scheduled to hear an appeal can grant a stay or some other order.

[20] The power to grant such relief is discretionary. It is set out in *Civil Procedure Rule* 90.41(2):

> (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.

[21] How this discretionary power should be exercised is guided principally by Justice Hallett's test set out in *Purdy v. Fulton Insurance Agencies Ltd.* (1990), 100 N.S.R. (2d) 341 (C.A.). The test has two parts.

[22] For the primary test, an applicant will be successful if the Court is satisfied on a balance of probabilities: an arguable issue is raised by the appeal; the appellant will suffer irreparable harm should the stay not be granted (assuming the appeal is ultimately successful); and, the appellant will suffer greater harm if the stay is not granted than the respondent if the stay is granted.

[23] The appellant may also obtain relief pending an appeal, even if it cannot meet all of the criteria for the primary test, if there are exceptional circumstances that nonetheless make it fit and just to grant a stay. This is known as the secondary test.

[24] The parties agree that this is the test. The appellant only relies on the primary test.

APPLICATION OF THE PRINCIPLES

[25] The burden is on the applicant appellant to meet the three part test for a stay of execution pending appeal. I am not satisfied that the grounds of appeal present any arguable issue, nor that, in the context of these proceedings, he would suffer irreparable harm. I need not consider the balance of convenience.

[26] A judge hearing a stay application should not engage in a prolonged examination of the merits of an appeal. An arguable issue is a low threshold. The Application for Leave to Appeal must contain realistic grounds which, if established, appear to be of sufficient substance to be capable of convincing a panel of the Court to allow the appeal. Freeman J.A. in *Coughlan et al. v. Westminer Canada Ltd.* (1993), 125 N.S.R. (2d) 171 (C.A.) articulated how to assess if an arguable issue is made out:

> [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.
>
> [Emphasis added]

[27] Justice Rosinski's decision and consequent order were interlocutory. Further, it required him to exercise discretion under *CPR* 85.04. This is important because the appellant does not have an automatic right of appeal.

[28] No appeal lies from any interlocutory order save by leave of the Court of Appeal. Interlocutory appeals, especially from discretionary decisions, require the appellant to demonstrate clear legal error or that the order would cause a patent injustice (see: *Innocente v. Canada (Attorney General)*, 2012 NSCA 36; *A.B. v. Bragg Communications Inc.*, 2011 NSCA 26).

[29] To demonstrate that he has an arguable issue, the appellant must be able to identify a ground of appeal that has a realistic chance of being able to convince a panel of the Court that the judge erred in law or that the result of the order would cause a patent injustice.

[30] The respondent specifically argued that even though the threshold for an arguable issue is low, the appellant failed to meet it. The appellant sets out twelve grounds of appeal. Despite the quantity, they either raise irrelevant or factual matters or otherwise simply complain about how the motions judge exercised his discretion.

[31] The appellant distilled the alleged errors of law as follows:

> a) The Court ignored or misapprehended the jurisprudence regarding established exceptions to the public policy principle of open courts, one of which is when a hearing will be rendered moot if conducted in public. (Ground # 1)
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> b) The Court erred when it assessed the salutary effects, the deleterious effects, and the balancing of them. (Ground # 1)
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> c) The Court misunderstood the precise nature of the relief being sought, and the purpose of the confidentiality motion itself. (Grounds 2, 3, 11 & 12)
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> d) The Court presumed the outcome of the Judicial Review, and then applied that presumed outcome to the legal test for the confidentiality motion. (Ground 8)

[32] In his decision, the motions judge outlined the test for whether a confidentiality order should be granted:

> [35] Importantly, it must be remembered that the precise wording of the test in any particular case requires an adaptation of the rights and interests engaged in the case to the analytical framework arising from cases such as: *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 SCR 835; *R. v. Mentuck*, [2001] 3 SCR 442; *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 SCR 522.
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> [36] The binding and pervasive jurisprudence collectively require me to consider the following questions:
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> 1. Is the order necessary to prevent a serious risk to an important public interest (which must be real, substantial and well-grounded in evidence) because reasonable alternative measures would not alleviate the risk?; and if so
> 2. Do the salutary effects of the confidentiality order, outweigh the deleterious effects thereof?
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> [37] This was succinctly stated by Justice Binnie in *F.N. (Re)*, [2001] 1 SCR 880, at para. 10 as: " [the open court rule only yields] when the public interest in confidentiality outweighs the public interest in openness". I add here that the persuasive and evidentiary onus is on the party seeking the confidentiality order.

[33] This is the proper test for determining whether to grant a confidentiality order. The appellant does not suggest otherwise (see for example: *Osif v. College of Physicians and Surgeons of Nova Scotia*, 2008 NSCA 113).

[34] As to the application of the test, the motions judge was not satisfied that a confidentiality order was necessary to prevent a serious risk to an important public interest. This required him to assess the evidence that supported the existence of an important public interest. The motions judge did just that. After reference to the affidavit of Mr. Colpitts and his submissions, the motions judge concluded:

> [41] In summary, Mr. Colpitts is alleging that the "important interest" to be protected is: the preservation of the privacy as set out according to the terms of the private Agreement; and the effects of not issuing a confidentiality order include direct and indirect financial and reputational consequences to Mr. Colpitts.
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> [42] I am not convinced that there is a serious risk to an important public interest to be protected here, but for my purposes in this motion, I will continue my analysis of the effects, if the confidentiality order is not granted.

[35] I am not satisfied that the appellant has identified any arguable issue that the motions judge erred in this conclusion. The motions judge was aware that an important commercial interest can sometimes also involve an important public interest in confidentiality.

[36] He referenced *Resolve Business Outsourcing Income Fund v. Canadian Financial Wellness Group Inc.*, 2014 NSCA 98, at paras. 24-26, in particular Justice Fichaud's articulation of the test for confidentiality:

> [26] To summarize the test's two branches, the judge determines whether (1) the confidentiality order is necessary to prevent a serious risk to an important public interest, because reasonable alternative measures would not alleviate the risk, and (2) the salutary effects of the confidentiality order, that may include the promotion of a fair trial, outweigh its deleterious effects, that include a limitation on constitutionally protected freedom of expression and public access to the courts. For the first branch, the important interest must (a) be real, substantial and well-grounded in the evidence, and (b) involve a general principle of public significance, rather than be merely personal to the parties, while (c) the judge's consideration of reasonable alternative measures must restrict the confidentiality order as much as possible while preserving the important public interest that requires confidentiality.

[37] The only interest put forward by the appellant was that he wanted to preserve his privacy, something he says he had bargained for and secured by the March 27, 2018 agreement with the Society.

[38] The motions judge rejected this claim:

> [58] While the Agreement contained a "strictly confidential" provision, in its express terms it is wholly concerned with procedural matters and does not contain any substantive information that could be construed as deserving of the court's protection due to its sensitive and private nature. The Agreement merely provides that Mr. Colpitts voluntarily withdraw from practice in response to an investigation by the Society arising from his conduct associated with KHI.
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> [59] I am not satisfied that there is, as claimed, a serious privacy "public interest" in maintaining the confidentiality of that Agreement.

[39] The appellant does not identify any putative legal error in the motion judge's analysis about public interest.

[40] As to the remaining complaints, the assessment of salutary and deleterious effects are driven by factual considerations, as is the balancing of them. In any

event, having found no serious risk to an important public interest, this complaint is irrelevant.

[41] It is plain that the motions judge understood the relief being sought and the purpose of the confidentiality motion. He quoted from the Notice of Motion and the appellant's own materials:

> [8] In the interim, and the subject of this written decision, Mr. Colpitts has filed (most recently) on February 7, 2019, an amended Notice of Motion seeking: "an order of confidentiality pursuant to Civil Procedure Rule 85 such that the Applicant may only be identified by a pseudonym, and a publication ban be applied to the proceeding".
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> [9] Simply stated, Mr. Colpitts says that he had a "standstill" agreement with the Society to prevent any further disciplinary proceedings against him arising from his criminal convictions, and to protect his privacy, including preventing the public from even knowing about the existence of the Agreement, pending the outcome of his criminal appeals.
>
> [10] If he is not granted the confidentiality order sought, he says that even if he is successful in the Judicial Review, the publicity of the Judicial Review itself will undermine what he seeks – *inter alia*, that the public not be permitted to be aware that Mr. Colpitts was formally charged…

[42] As to a presumption about the outcome of the judicial review, the motions judge made no such finding. At most, when he carried out a balancing of the salutary and deleterious effects of the requested order, he considered the consequences that would flow if confidentiality is granted and the Society is not precluded from taking further action because of the agreement. This presents no arguable issue on appeal.

[43] In his affidavit in support of the motion for a stay of execution pending appeal, the appellant asserts:

> I believe my appeal has merit because the lower court overlooked the fact that the purpose of my Review is to enforce an agreement I entered into with the Respondent (the "Agreement"), a critical and central term of which was strict confidentiality…

[44] There are two problems. First, the allegation that the motions judge made a factual error does not present an arguable ground of appeal when the appeal is restricted to legal error. Secondly, it is patent that the motions judge did not overlook the claimed purpose of strict confidentiality. He just did not agree that

there was anything in the agreement that could be construed as deserving of the Court's protection.

[45] Furthermore, it is not the Society that is seeking to disclose the terms of the March 27, 2018 agreement. It is Mr. Colpitts who has sued to question the validity or legality of the Society's actions based on the agreement. Courts operate in the public domain, not behind closed doors, unless it is necessary to prevent a serious risk to an important public interest and the salutary effects outweigh the deleterious effects of the requested confidentiality order.

[46] Here, the motions judge was not satisfied that there was an important public interest. There was therefore no need for him to carry out an assessment of the deleterious and salutary effects of the requested confidentiality order. I have examined all of the appellant's grounds of appeal beyond his distillation outlined above. Although the appellant repeatedly complains that the motions judge erred in law and fact about how he resolved various issues, the complaints are about findings of fact or are irrelevant to the outcome of the confidentiality motion.

[47] Even if I were satisfied that the appellant has at least one arguable issue, the motion for a stay of execution fails. He has not demonstrated irreparable harm. It is to that issue I will briefly turn.

Irreparable harm

[48] Irreparable harm is informed by context. This was described by Cromwell J.A., as he then was, in *Nova Scotia v. O'Connor*, 2001 NSCA 47:

> [12] The term "irreparable harm" comes to us from the equity jurisprudence on injunctions. In that context, it referred to harm for which the common law remedy of damages would not be adequate. As Cory and Sopinka, JJ. pointed out in *R.J.R.-MacDonald v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at 341, the traditional notion of irreparable harm is, because of its origins, closely tied to the remedy of damages.
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> [13] However, in situations like this one which have no element of financial compensation at stake, the traditional approaches to the definition of irreparable harm are less relevant. As Robert J. Sharpe put it in his text, *Injunctions and Specific Performance* (Looseleaf edition, updated to November, 2000) at § 2.450, "... irreparable harm has not been given a definition of universal application: its meaning takes shape in the context of each particular case."

[49] The irreparable harm advanced is that if the requested stay were not ordered, the appeal will be rendered moot as the judicial review motion would proceed without a confidentiality order before the application for leave to appeal could be heard.

[50] The potential impact on an appellant's right of appeal is relevant—particularly where the appellant would suffer the penalty imposed before the appeal challenging that penalty could be heard (see: *Grafton Street Restaurant Ltd. v. Nova Scotia (Utility and Review Board)*, 2002 NSCA 97; *Alementary Services Ltd. v. Nova Scotia (Alcohol and Gaming)*, 2009 NSCA 61 at paras. 7-9; *Dixon v. Nova Scotia (Public Safety)*, 2011 NSCA 15 at para. 12).

[51] But the fact that a denial of a stay may render an appeal nugatory does not automatically constitute irreparable harm (*La Ferme D'Acadie v. Atlantic Canada Opportunities Agency*, 2009 NSCA 5, paras. 16-17); *Canglobe Financial Group v. Johnson*, 2010 NSCA 46; *Lawton's Drug Stores Ltd. v. United Food and Commercial Workers Union Canada, Local 864*, 2016 NSCA 14).

[52] I agree with the Society that there is no evidence how or why Mr. Colpitts would suffer irreparable harm if the public is aware that, in reliance on the terms of the March 27, 2018 agreement, he challenges the Society's decision to lay charges of unprofessional conduct.

[53] The motion for a stay is dismissed with $1,000.00 costs to the Society payable forthwith.

Beveridge, J.A.