NOVA SCOTIA COURT OF APPEAL
Citation: *Young v. 3349659 Canada Inc.*, 2022 NSCA 45

Date: 20220603
Docket: CA 513036
Registry: Halifax

Between:

Jared Luben Young

Appellant

v.

3349659 Canada Inc., John Doe, and Persons Unknown

Respondents

Judge:	Beaton J.A.
Motion Heard:	June 2, 2022, in Halifax, Nova Scotia in Chambers
Held:	Motion granted
Counsel:	Alex Embree, for the appellant Richard Norman and Sarah Shiels, for the respondent

Decision:

[1] Mr. Young seeks a stay of an order pending hearing of his appeal, pursuant to *Civil Procedure Rule* 90.41(2). That appeal is scheduled to be heard next week. For the reasons that follow, the motion is granted.

[2] Mr. Young and 3349659 Canada Inc. ("the company") are engaged in litigation in the Supreme Court of Nova Scotia ("the court") concerning matters related to the company's business activities. The company has sued Mr. Young, asserting damage to the company's equipment and interference with its commercial elver fishing activity in May 2021. The action also names John Doe and Persons Unknown as defendants.

[3] Mr. Young has also been charged with thirteen *Criminal Code* offences allegedly arising from the same circumstances as described in the civil action, and in particular, concerning certain events on the evening of May 16, 2021. Mr. Young's trial on the charges is scheduled to be heard in August 2022 in the Provincial Court of Nova Scotia. The tension between simultaneous civil and criminal proceedings forms the backdrop of the motion for a stay, heard by me on June 2, 2022.

[4] On February 8, 2022, Justice S. Norton rendered the court's decision in response to Mr. Young's motion for a stay of the civil proceeding pending resolution of his criminal charges. That decision is reported as *3349659 Canada Inc. v. Young*, 2022 NSSC 36. Mr. Young sought that stay of proceedings because he is not prepared to answer certain interrogatories served upon him by the company. Those questions ask him to identify the names and contact information of others present during the events of May 16, 2021. He resists doing so, arguing it would interfere with his right to remain silent and his right to not incriminate himself in the face of his pending trial on the criminal allegations. Justice Norton dismissed Mr. Young's motion for a stay of the civil proceedings. By order dated February 15, 2022 ("the order"), he directed Mr. Young to respond to the interrogatories within ten days, with costs on the motion in favour of the company.

[5] Mr. Young then filed a Notice of Appeal (Interlocutory), seeking leave to appeal and appealing the order. As noted earlier, that appeal is scheduled to be heard by a panel of this Court on June 10, 2022, only eight days after the hearing of this stay motion. In addition, the parties confirm the company has now filed in the civil action a motion for contempt, on the basis Mr. Young has not yet fulfilled

his obligation to comply with the order, which requires him to respond to the interrogatories. I am advised by the parties that motion is scheduled to be heard by the court on June 8, 2022, two days prior to the appeal hearing in this Court.

[6] Mr. Young says the imposition of a stay of Justice Norton's order is critical. He asserts if a stay is not granted, not only will he be subject to the contempt hearing on June 8, with any of its potential consequences, but he risks "ringing a bell" that cannot be later unrung if he is required to produce answers to the interrogatories before the outcome of his appeal is known.

[7] In opposition to the motion, the company says Mr. Young has not provided any evidence which could properly persuade the Court the test for imposition of a stay is met. The company maintains Mr. Young's concerns constitute mere speculation that he would be negatively impacted absent a stay of the order.

[8] A stay is a discretionary remedy. The burden rests with Mr. Young to establish, on a balance of probabilities, the necessity of such an order. The principles governing the analysis of whether to grant a stay are found in the long-standing guidance provided by *Purdy v. Fulton Insurance Agencies Ltd.*, 1990 NSCA 23. There is no dispute between the parties that the *Fulton* analysis, comprised of the so-called primary and secondary tests, applies here. Its principles were most recently summarized by Derrick J.A. in *Muir v. Day*, 2022 NSCA 34:

> [6] The discretionary power to enter a stay is structured by the "*Fulton*" test (*Fulton Insurance Agencies Ltd. v. Purdy*, 1990 NSCA 23). Under the *Fulton* test, the party seeking the stay carries the burden of showing, on a balance of probabilities: (1) an arguable issue for appeal; (2) they would experience irreparable harm if the stay was to be denied; and (3) the balance of convenience favours a stay. The balance of convenience concerns the question of whether the appellant will suffer greater harm if there is no stay than the respondent will suffer if a stay is granted.
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> [7] In the event the applicant for a stay cannot satisfy the primary test's three criteria, exceptional circumstances may justify the granting of a stay on the basis of it being "fit and just" to do so (*Colpitts v. Nova Scotia Barristers' Society*, 2019 NSCA 45 at para. 23). […]
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> [8] I am reminded by *Fulton* that the "fairly heavy burden" borne by the applicant/appellant is warranted "considering the nature of the remedy which prevents a litigant from realizing the fruits of his litigation pending the hearing of the appeal" (*Fulton*, supra at para. 27).

[9] As to the first branch of the primary test, whether there is an arguable issue for appeal, I am mindful this is a question the panel of this Court assigned to the appeal will also consider when determining whether leave to appeal should be granted. In *Muir*, the limited parameters of the chambers judge's task in relation to this question was discussed:

> [17] As Chambers judge, I am to assess the "arguable issue" question without speculating about the outcome of the appeal or scrutinizing its merits. The focus is on whether the Muirs have advanced grounds of appeal that, if established, qualify as having "sufficient substance to be capable of convincing a panel of the court to allow the appeal…" (*Westminer Canada. Ltd. v. Amirault* (1993), 125 N.S.R. (2d) 171 at para. 11 (C.A.)).

[10] The grounds of appeal set out in the Notice of Appeal assert misapprehension of evidence, errors of law and errors of mixed fact and law. For the purposes of this motion (and without usurping the role of the panel), I am prepared to conclude, on the operative low threshold, that there is an arguable issue of "sufficient substance" raised by Mr. Young in his appeal. As was the case in *Muir*, here "[t]he 'arguable issue' question is ultimately diminished in significance by the more pronounced controversy between the parties on the stay motion" (para. 18). That controversy rests in the second branch of the primary test, which is whether the imposition of a stay is necessary to avoid irreparable harm to Mr. Young.

[11] Mr. Young argues if compelled to answer the interrogatories prior to the trial of his criminal matters, his trial rights to remain silent and to not self-incriminate will have been defeated. The respondent is correct there was no specific evidence put before me to establish what harm would be occasioned to Mr. Young in asserting those rights. Mr. Young's concerns as communicated to the Court in submissions are, strictly speaking, speculative, as the company maintains.

[12] In *Colpitts v. Nova Scotia Barristers' Society*, 2019 NSCA 45, Beveridge J.A. reminded that "[i]rreparable harm is informed by context" (para. 48). Here, Mr. Young being asked (if he knows) the identity of others present during the events of May 16, 2021. During the motion hearing, counsel agreed with me that the questions Mr. Young is being asked to answer by the interrogatories require no explanations or descriptions of the events of May 16, but only names and contact information that may be within his knowledge.

[13] The company makes clear its intention to pursue civil action and to contact police, should individuals' identities be revealed by Mr. Young's answers to the interrogatories. The potential civil jeopardy of others, or actions that might be taken by police, do not on their face impair Mr. Young's rights. Mr. Young maintains others might be subpoenaed to give evidence against him in his August trial, or others might be criminally charged and point to his alleged involvement to protect their own jeopardy. I agree with the respondent this series of "maybe's" does constitute speculation, but it is not of a sort that is completely outside the realm of possibility.

[14] The speculative nature of Mr. Young's concerns is not the most significant consideration in relation to the irreparable harm analysis. What is of greater import, in my view, is the implication for the integrity of any information possessed by Mr. Young, absent a stay. By that I refer to the impossibility of undoing the sharing or transfer of any information that could be realized by having Mr. Young respond to the interrogatories, before knowing whether Mr. Young's appeal will meet with success. If Mr. Young has knowledge and he is compelled to reveal it before his appeal is determined, the outcome of the appeal will be meaningless for Mr. Young. This is not to suggest the appeal will necessarily be rendered moot, but the impact upon Mr. Young of a decision in his favour will have already been lost if he answers the interrogatories before that decision is made.

[15] Disclosure of the information could not later be reversed if now required, and could render a successful appeal "nugatory" (*Nova Scotia v. O'Connor*, 2001 NSCA 47, at paras. 16-17). Mr. Young will not be able to "take back" his answers to the interrogatories, if he has any, should he be successful on appeal. In this way, his situation mirrors the difficulty presented in *Canada (Transportation Safety Board) v. Carroll-Byrne*, 2020 NSCA 21 (para. 11), where a stay was imposed to avoid the harm that would occur if the contents of a cockpit voice recorder were revealed before hearing of an appeal of the decision to order production of that information.

[16] The company relies on the Court's decision in *Intact Insurance Company v. Malloy*, 2019 NSCA 85, wherein my colleague Justice Van den Eynden declined to impose a stay pending appeal. There, the appellant argued irreparable harm would occur once it was required to produce documents it maintained were irrelevant to the litigation, and that such production could render moot any later success on

appeal. In refusing to grant a stay, the Court recognized that once produced, documents could not be "undone", however:

> [19] […] there is no suggestion that the documents ordered to be produced are sensitive in nature, contain personal information or that their mere disclosure would otherwise harm the appellant. In fact, the appellant said (through its affiant) that it is willing and able to produce the balance of the outstanding production at an appropriate time once relevance has been determined on appeal. Furthermore, as the respondent pointed out, the implied undertaking in Rule 14.03 protects against the use of documents for a purpose outside the purpose of this action. [Emphasis added]

[17] The *Intact* case is distinguishable from the circumstances of this motion as the issue under appeal in that case was one of relevancy of documentation sought by the respondent. The appellant sought a stay to avoid the onerous task of the mechanics of voluminous production before an appeal decision on the relevancy question. In this case, the concern is rooted in a different consideration—the inability to restore or recover information, once shared, even should an appeal be later successful.

[18] Even despite the absence of evidence in the sense with which the respondent complains, the harm Mr. Young will suffer is recognizable. I am satisfied it is of an irreparable nature as the information sought cannot be undone or returned once provided. These reasons should not be read as suggesting that every refusal by a court to impose a civil stay will automatically trigger success on the irreparable harm component of the primary test in a stay pending appeal motion. As noted earlier, the context of each case will influence the analysis.

[19] I am persuaded the irreparable harm would be occasioned by the sharing of information which cannot be later "unshared", even if the appeal is resolved in Mr. Young's favour. The implications for Mr. Young in the context and circumstances of this case are clear. The second branch of the primary test is met.

[20] On the third branch of the primary test, I must consider the so-called "balance of convenience" question. Would the harm to Mr. Young be greater, absent the imposition of a stay, than the harm to the company, should a stay be imposed? Mr. Young says the company need only forebear for a further brief period, until the appeal decision is known. The company says if the interrogatories are not now answered, the harms to it continue as the identities of the defendants John Doe and Persons Unknown remain undetermined, thereby hampering the company's ability to pursue other individuals.

[21] What the interrogatories seek to gain may still be achieved, albeit at a later time. The company's interest in using the information is not compromised, but instead delayed. However, if Mr. Young now shares any information sought to be elicited by the interrogatories, the effect of doing so is permanent.

[22] I am prepared to accept the balance of convenience argument tips in favour of Mr. Young. The harm which will be occasioned to him by answering the interrogatories, before the outcome of his appeal, outweighs the harm to the company of having to wait a further period of time for a decision of the panel, and if the appeal is dismissed, for the answers to the interrogatories. Mr. Young has met the third branch of the primary test.

[23] Having been persuaded on the primary test, it is not necessary for me to consider the secondary test of exceptional circumstances.

[24] Finally, I must note the timing of this motion is troublesome. It appears to have been spurred by an effort to forestall the contempt motion pending in the other court. Correspondence between counsel since the very day the appeal was commenced was filed by Mr. Young in support of his motion. It clearly reveals Mr. Young had no intention to seek a stay, despite unequivocal indications by the company, even before the actual filing of the Notice of Appeal, that it would pursue a contempt hearing absent the imposition of a stay by this Court. It was only once a date for the contempt hearing was very recently secured that Mr. Young found a sense of urgency and filed his motion for a stay so close in time to his appeal hearing. This decision should not be interpreted as condoning that approach.

[25] The motion for a stay of the order is granted. The appellant did not seek costs on the motion; none are awarded.

Beaton J.A.