

NOVA SCOTIA COURT OF APPEAL

Citation: *Fraser v. Nova Scotia Barristers' Society*, 2024 NSCA 26

Date: 20240304

Docket: CA 530978

Registry: Halifax

Between:

Donn Fraser

Appellant

v.

Nova Scotia Barristers' Society, a statutory body corporate,
including or as represented by the Complaints Investigation Committee of the
Nova Scotia Barristers' Society, and Attorney General of Nova Scotia

Respondents

Judge: Wood, C.J.N.S.

Motion Heard: March 1, 2024, in Halifax, Nova Scotia in Chambers

Held: Motion granted

Counsel: Donn Fraser, appellant in person
Matthew Gourlay and Ewa Krajewska, for the respondent
Nova Scotia Barristers' Society
Edward A. Gores, K.C. for the respondent Attorney General
of Nova Scotia

Decision:

[1] Mr. Donn Fraser has been in a dispute with members of his former law firm since at least 2021. Complaints were filed by his former business partners with the Nova Scotia Barristers' Society ("NSBS") starting in May 2021. Investigation of those complaints has continued since that time.

[2] In addition to NSBS complaints, there have been civil and criminal proceedings involving Mr. Fraser arising out of his former firm.

[3] On February 1, 2024, Mr. Fraser and two of his former colleagues were in court in Pictou in relation to one of the civil proceedings. Following the conclusion of the hearing, Mr. Fraser splashed water on the other parties. He was arrested by sheriffs in attendance and subsequently charged with assault and resisting arrest.

[4] On February 1st, Mr. Fraser's former colleagues complained to the NSBS about the incident. The next day a meeting was convened of the NSBS Complaints Investigation Committee ("CIC"). Mr. Fraser was not given notice of this meeting at which the CIC suspended his practicing certificate pursuant to s. 37 of the *Legal Profession Act*, SNS 2004, c. 28 (the "Act").

[5] Upon being notified of the suspension, Mr. Fraser requested an opportunity to meet with the CIC and provide a response. The CIC scheduled a further meeting for February 16, 2024 for this purpose, which was attended by Mr. Fraser and his legal counsel. Following this meeting, the CIC confirmed the decision to suspend his practicing certificate.

[6] On February 21, 2024, Mr. Fraser filed a Notice of Appeal challenging the suspension on a number of grounds, including breach of procedural fairness, exceeding statutory jurisdiction, reasonable apprehension of bias, consideration of irrelevant factors, and imposing a suspension for an improper purpose.

[7] Mr. Fraser also made a motion for stay of the CIC decision suspending his practicing certificate pending the outcome of his appeal. On March 1, 2024, I heard Mr. Fraser's motion. For the reasons which follow, I would grant the stay requested.

Statutory Jurisdiction of the CIC

[8] The CIC is an investigative committee whose powers are found in s. 36 of the Act. Those powers do not include the authority to make a finding of professional misconduct. If the CIC determines the evidence obtained through an investigation which can reasonably be believed presents a likelihood of a finding of professional misconduct they may direct that charges be laid against the lawyer. These charges would be adjudicated by a hearing committee with jurisdiction to make findings of professional misconduct and impose sanctions.

[9] The CIC has the authority to impose an interim suspension of a practicing certificate pursuant to s. 37 of the Act which provides:

37 (1) The Complaints Investigation Committee may, by resolution, where in its opinion it is in the public interest to do so,

(a) suspend a practising certificate; or

(b) impose restrictions or conditions on a practising certificate,

during or following an investigation until the suspension, restrictions or conditions are rescinded or amended by the Complaints Investigation Committee or a hearing panel.

(2) The power of the Complaints Investigation Committee pursuant to subsection (1) may be exercised with or without hearing the practising lawyer.

(3) The Complaints Investigation Committee shall, forthwith after passing a resolution pursuant to subsection (1), provide a copy of the resolution to the practising lawyer to whom the resolution applies, including the reasons for a decision to suspend the practising certificate or impose restrictions or conditions on the practising certificate.

(4) A lawyer who receives written notice pursuant to subsection (3) may request in writing, a meeting with the Complaints Investigation Committee.

(5) Where a request is received pursuant to subsection (4), the Complaints Investigation Committee shall

(a) provide an opportunity for the lawyer to meet with the Complaints Investigation Committee within ten days of the written request; and

(b) after meeting with the lawyer, confirm, vary or terminate the suspension, restrictions or conditions imposed pursuant to subsection (1).

(6) Where the Complaints Investigation Committee holds a hearing before making a determination under subsection (1), or where a lawyer requests the opportunity to meet with the Complaints Investigation Committee pursuant to subsection (4), the lawyer has the right to

(a) be represented by counsel, at the lawyer's expense;

(b) disclosure of the nature of the complaint; and

(c) an opportunity to present a response and make submissions.

(7) A lawyer may appeal to the Nova Scotia Court of Appeal on any question of law from a decision of the Complaints Investigation Committee pursuant to this Section, in accordance with Section 49. *2004, c. 28, s. 37; 2010, c. 56, s. 13.*

Jurisdiction to Grant a Stay

[10] Section 49(2) of the Act authorizes an appeal from a decision of the CIC on a question of law. Subsection 6 confirms the authority of this Court to grant a stay of such a decision pending the outcome of the appeal.

[11] The parties agree on the test to be applied on Mr. Fraser's motion. It is set out in the decision of Beveridge, J.A. in *Fadelle v. Nova Scotia College of Pharmacists*, 2012 NSCA 61:

[8] In common law jurisdictions, the normal rule is that the filing of a notice of appeal does not operate as a stay of execution of the judgment being appealed. Nonetheless, the law recognizes that there may be circumstances where it is appropriate to grant a stay. This is precisely what s. 58(4) of the *Act* does. In addition, Rule 90.41(2) of the *Nova Scotia Civil Procedure Rules* provides:

90.41 (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.

(4) This Rule 90.41 does not prevent the staying of execution or proceedings by the court appealed from, as authorized by a Rule or legislation.

[9] To state the obvious: the power to grant a stay is a discretionary one. The purpose in exercising this discretion is to achieve justice as between the parties in the particular circumstances of the case pending before the court (*MacPhail v. Desrosiers* (1998), 165 N.S.R. (2d) 32). The principles that govern the exercise of this discretion are well known. They attract no controversy. The appellant must establish, on its balance of probabilities that (1) there is an arguable issue raised by the appeal; (2) that if a stay is not granted and the appeal is successful, the appellant will have suffered irreparable harm; (3) that the appellant will suffer greater harm if the stay is not granted than the respondent will suffer if the stay is granted. Finally, this discretionary power may be exercised in favour of the appellant even if all three of these criteria are not met where there are nonetheless exceptional circumstances that would make it fit and just that the stay be granted. (See *Purdy v. Fulton Insurance Agencies Ltd.* (1990), 100 N.S.R. (2d) 341, per Hallet J.A.)

Analysis

Arguable Issue

[12] On the motion, counsel for NSBS argued strenuously that Mr. Fraser's Notice of Appeal did not establish an arguable issue. The authorities are clear this is a low threshold and a motion for a stay is rarely dismissed on this basis. In *Fadelle*, Beveridge, J.A. described the criteria for an arguable issue as follows:

[11] Demonstration of an arguable issue is not a difficult threshold. All that is required is a notice of appeal which contains realistic grounds which, if established, appear to be of sufficient substance to be capable of convincing a panel of this Court to allow the appeal (see *MacCulloch v. McInnes, Cooper and Robertson*, 2000 NSCA 92). The notice of appeal sets out a variety of complaints alleging error by the Hearing Committee, including reasonable apprehension of bias, misapprehension of evidence and making unreasonable findings that were unsupported by the evidence. At this stage, there is no record to review. It is difficult to conclude that none of the putative claims of error have no merit. Counsel for the respondent concede as much.

[13] I am satisfied Mr. Fraser has demonstrated an arguable issue in relation to his appeal. I need not comment on all of the grounds set out in the Notice of Appeal for purposes of this motion. It is sufficient to summarize the procedural fairness issue, which was addressed by both parties in argument.

[14] The CIC proceeded on an *ex parte* basis without notice to Mr. Fraser. In doing so they relied on s. 37(2) of the Act. At the time of their decision, CIC members had information concerning the incident in the Pictou Courthouse of February 1st as well as investigatory materials relating to the earlier complaints. In particular, they had a copy of a report prepared by an outside investigator retained by NSBS. Mr. Fraser was interviewed by the investigator twice during her retainer. Prior to the meeting on February 16th, counsel for Mr. Fraser requested copies of all materials which were before the CIC including any report prepared by the investigator. It was not provided.

[15] The CIC issued written reasons for the initial suspension decision on February 12, 2024. Those reasons included the following statements:

- “The Committee regards Mr. Fraser's behaviour on February 1, 2024 to be a culminating event of a pattern of behaviour that has continued and is the

subject of the other complaints. We do not view his conduct as isolated. Instead we regard it as ongoing misconduct.”

- “The public nature of the misconduct and Mr. Fraser’s prior pattern of conduct was considered as significant and demanding of a prompt and significant response.”
- “The Committee was of the view that it was more likely than not that Mr. Fraser’s pattern of conduct would continue, and possibly escalate unless an interim suspension was imposed. The pattern of behaviour has not abated as a result of prior complaints, and prior restrictions which were removed by the Committee and we are unable to conclude that lesser measures will be effective.”

[16] Following the meeting with Mr. Fraser and his counsel on February 16, 2024, the CIC issued further reasons confirming the decision to suspend his practicing certificate. Those reasons included the following:

The Committee notes that there are five complaints that have been recently referred for formal hearing. These included allegations of uncivil behaviour. It is for this reason that the Committee is of the view that Mr. Fraser has engaged in a pattern of behaviour and has not moderated his behaviour in any way. In addition, he has escalated to more than uncivil speech.

[17] One of the issues for the panel hearing this appeal will be whether the failure to provide Mr. Fraser with the investigator’s report impaired his ability to respond to the suspension thereby breaching the duty of procedural fairness. This Court recently discussed the principles to be considered in determining the scope and content of procedural fairness in *Saturley v. Nova Scotia (Securities Commission)*, 2024 NSCA 15. As that decision indicates, defining a duty of fairness is a context driven exercise which includes consideration of factors such as the nature of the decision, impact on the individual and statutory framework.

[18] Although it arose out of a somewhat different administrative structure I would note the decision of the Law Society Tribunal in *Law Society of Upper Canada v. Cengarle*, 2017 ONLSTH 129. In this case the Tribunal concluded the duty of procedural fairness required the Law Society to provide the lawyer under investigation with all potentially relevant materials in its possession in advance of a motion for an interim suspension of their practicing certificate. It did not matter

whether the materials were being relied upon by the Society in support of the motion.

[19] I do not have a copy of the record from the CIC meeting nor the investigator's report dealing with the earlier complaints. Despite this, I am satisfied that Mr. Fraser has raised an arguable issue with respect to whether procedural fairness required he be given additional documents, including the investigation report, prior to his interim suspension.

Irreparable Harm

[20] Mr. Fraser filed an affidavit indicating that if his suspension continues he will essentially lose his practice, have no income, and be unable to meet his financial obligations. Should his appeal ultimately succeed there is no mechanism for the calculation or recovery of those losses.

[21] This Court considered the impact of a lawyer's suspension from practice in *Ayre v. Nova Scotia Barristers' Society*, 1998 NSCA 1. The Court granted a stay pending appeal and said the following with respect to irreparable harm:

The implementation of the present disposition prior to a successful appeal would unquestionably cause harm to a lawyer's career not susceptible to remedy by way of damages, particularly if the Barristers' Society fulfils its own requirements for publicizing the results. I would find the second **Fulton Insurance** criterion to be fulfilled.

[22] Similarly, the Court in *Fadelle*, in considering a pharmacist who had been suspended, said:

[14] The materials filed by the appellant demonstrate that she is the sole owner and operator of her pharmacy in River Hebert. She swears that should a stay not be granted her business and personal reputation will be irreparably damaged. It would force closure of her pharmacy and also cause undue hardship on the residents of River Hebert and surrounding area. The respondent does not dispute the impact that would flow from the sanctions directed by the Hearing Committee should the substantive aspects not be stayed. There can be little doubt that irreparable harm would ensue if the stay were not granted, and the appellant was ultimately successful. Even if damages could be calculated for her losses, it has not been suggested that there is anyone she could look to for recovery.

[23] The question of whether irreparable harm will arise should a stay not be granted must be assessed based upon the entire context, including the evidentiary

record for the motion. I am satisfied on the materials before me that Mr. Fraser has established he will suffer irreparable harm if the stay is not granted and he ultimately succeeds on the appeal.

Balance of Convenience

[24] Having concluded that Mr. Fraser has raised an arguable issue and demonstrated he will suffer irreparable harm, I must weigh this against the harm that might arise should a stay be granted and the appeal ultimately fail. Counsel for NSBS explained why this balancing favoured his client:

The harm occasioned to the Applicant by a short time out of practice due to this interim action is clearly outweighed by the harm that would be caused to the repute of the profession by allowing him to continue practising in the face of the egregious (and largely undisputed) misconduct at issue here.

[25] Later in the NSBS brief, the position was repeated in the following terms:

In any event, it seems clear that the public's perception of the Society's ability to regulate its members would be diminished, not enhanced, by failure to take prompt action against a lawyer committing assault and resisting arrest in the body of the courtroom.

[26] This submission may support the CIC's decision to proceed with the s. 37 meeting and suspend Mr. Fraser on an urgent and *ex parte* basis. In taking those actions, they might be perceived to have acted promptly to regulate lawyer behaviour. In my view, this argument is less important in deciding whether this Court should exercise its equitable jurisdiction to stay the CIC decision pending the outcome of the appeal. It is significant that, to date, there has been no finding of professional misconduct on the part of Mr. Fraser. If such a finding had been made by a hearing committee, the balance of convenience analysis would be different.

[27] Counsel for NSBS relies on two decisions of the Ontario Superior Court of Justice where stays of disciplinary sanctions were refused pending appeal. In *Aboujamra v. The College of Physicians and Surgeons of Ontario*, 2023 ONSC 1136, a physician had been found guilty of sexually abusing a young female patient following a formal hearing. The penalty imposed included revocation of the physician's certificate to practice medicine. The motion judge concluded that allowing a stay in light of the Discipline Tribunal findings might undermine public confidence in the regulation of physicians:

[25] Since *Sazant* was decided in 2011, Ontario's zero-tolerance approach for sexual abuse by health professionals has been reinforced by legislative amendments providing for immediate interim suspension and mandatory revocation, as occurred in this case: *Protecting Patients Act, 2017*, S.O. 2017, c. 11. Although these amendments did not oust the court's jurisdiction to grant stays pending appeal, the statutory changes emphasize the seriousness of such conduct, and are intended to protect the public from it and enhance public confidence in the public institutions that address such cases. This is not to say that the balance of convenience will always weigh against granting a stay, but it must be recognized that any departure from the zero-tolerance approach, such as granting an interim stay of Dr. Aboujamra's penalty, may undermine public confidence in the regulation of physicians and other regulated health professions.

[28] Similarly, in *Kitmitto v. Ontario Securities Commission*, 2023 ONSC 1739 the fact there had been disciplinary findings following a 36-day hearing was a significant factor in refusing the stay:

[38] In my view, the balance of convenience favours the public interest over the private interests of the moving parties in not staying the market participation bans pending the appeals. **To continue the interim stay would ignore the fundamental change in circumstances brought about by the Tribunal's findings about each of the moving parties**, the legislative direction that sanctions are not to be delayed absent meeting the test for a stay, the limits on supervision of Goss, and the need to preserve public confidence in the administration and enforcement of the *Securities Act*.

[emphasis added]

[29] There is nothing in the record before me suggesting clients of Mr. Fraser are at risk of harm or loss. I do not have particulars of the other complaints, however, Mr. Fraser's affidavit avers they are limited to his dispute with his former business partners and do not relate to his work for clients. Counsel for NSBS did not dispute that characterization.

[30] The evidence filed by NSBS on the motion included two reports from the receiver appointed for Mr. Fraser's law practice following his suspension. These include a recommendation that Mr. Fraser's suspension be amended to permit him to continue representing two of his clients who were having difficulty securing alternate counsel. In addition, the receiver commended Mr. Fraser for his diligent work in protecting his clients' interests by ensuring their smooth transition to other lawyers.

[31] I am satisfied any risks which may arise from Mr. Fraser's continuing to practice pending the outcome of the appeal are outweighed by the irreparable harm he will suffer should the stay be denied and the appeal ultimately succeed.

Disposition

[32] I, therefore, order that the CIC decision to suspend the practicing certificate of Mr. Fraser pursuant to s. 37 of the Act be stayed pending the determination of this appeal or further order of this Court. The costs of this motion shall be in the cause.

Wood, C.J.N.S.