Date: 20010615
Docket No.: CAC 169169

NOVA SCOTIA COURT OF APPEAL

[Cite as: R. v. Innocente, 2001 NSCA 97]

BETWEEN:

HER MAJESTY THE QUEEN

Applicant/Appellant

- and -

DANIEL JOSEPH INNOCENTE and GILLES POIRIER

Respondents

DECISION

Editorial Notice

Information has been removed from this electronic version of the judgment to comply with the publication ban.

Counsel:	Craig M. Garson, Q.C., for the applicant/appellant Daniel Joseph Innocente, respondent in person Kevin A. Burke, Q.C. for the respondent, Gilles Poirier
Appeal Heard:	May 17, 2001
Judgment Delivered:	June 15, 2001

BEFORE THE HONOURABLE JUSTICE LINDA LEE OLAND
IN CHAMBERS

PUBLICATION BAN IN PART

Publishers take note that the Chambers judge has issued a partial publication ban in this matter as it relates to the property at [...] , Halifax. No detailed financial information relating this property including the efforts to sell it, the appraised values or any offers to purchase is to be published.

This decision may require editing prior to publication.

Oland, J.A. (In Chambers):

[1] The respondents, Daniel Joseph Innocente and Gilles Poirier, proceeded to trial on charges of conspiracy to traffic in narcotics. On April 7, 2000 Justice Allan Boudreau of the Supreme Court of Nova Scotia granted a stay of proceedings based on abuse of process. The appellant, the Crown, filed a notice of appeal three weeks later.

[2] The respondents subsequently sought costs. By a decision released January 4, 2001, Justice Boudreau awarded costs of $20,000 to Mr. Innocente and $35,000 to Mr. Poirier. The Crown filed a notice of appeal on January 26, 2001. It now seeks to stay execution of the order for costs dated March 5, 2001 pursuant to **Civil Procedure Rule 62.10**, applicable by virtue of **Rule 65.03**.

[3] **Rule 62.10** provides that an appeal does not operate as a stay of execution, although the court has jurisdiction to order a stay. For its application to succeed, the appellant Crown must meet the test set out by Hallett, J.A. in **Fulton Insurance Agencies Ltd. v. Purdy**, [1990] 100 N.S.R. (2d) 341 (C.A.) at pages 346 - 347:

> In my opinion, stays of execution of judgment pending disposition of the appeal should only be granted if the appellant can either:
>
> (1) satisfy the Court on each of the following: (i) that there is an arguable issue raised on the appeal; (ii) that if the stay is not granted and the appeal is successful, the appellant will have suffered irreparable harm that it is difficult to, or cannot be compensated for by a damage award. . . . and (iii) that the appellant will suffer greater harm if the stay is not granted than the respondent would suffer if the stay is granted; the so-called balance of convenience or:
>
> (2) failing to meet the primary test, satisfy the Court that there are exceptional circumstances that would make it fit and just that the stay be granted in the case.

Arguable Issue

[4] Under the first requirement of the primary test, the appellant must show that there is an arguable issue raised on appeal. Cromwell, J.A. stated in **MacCulloch v. McInnes, Cooper & Robertson** (2000), 186 N.S.R. (2d) 398; 581 A.P.R. 398

at § 4 that this is not a difficult threshold to meet. He continued:

> What is required is a notice of appeal which contains realistic grounds which, if established, appear of sufficient substance to be capable of convincing a panel of the court to allow the appeal: see Freeman, J.A., in **Coughlan et al. v. Westminer Canada Ltd. et al.** (1993), 125 N.S.R. (2d) 171; 349 A.P.R. 171 (C.A.). It is not my role as a Chambers judge hearing a stay application to enter into a searching examination of the merits of the appeal or to speculate about its probable outcome but simply to determine whether the arguable issue threshold has been reached.

[5] I have reviewed the grounds of appeal in the notices of appeal filed by the Crown. On the stay of proceedings, among other things, the grounds relate to the admissibility of evidence, misapprehension of evidence, and error in the conclusions reached by the trial judge on the infringement or denial of constitutional rights. On the costs award, the Crown raises the same last ground and submits there was an error in awarding costs as an appropriate remedy under s. 24(1) of the **Canadian Charter of Rights and Freedoms**. I am satisfied that the appellant meets the arguable issue threshold.

Irreparable Harm and Balance of Convenience

[6] To fulfill the second and third requirements of the primary test in **Fulton Insurance**, supra, the Crown must establish that it will suffer irreparable harm if the stay is not granted and that it will suffer greater harm if it is not granted than the respondent would suffer if it were. Its submission on these grounds boils down to this: if the costs awarded are paid to the respondents, the risk is high that the Crown will be unable to recover those monies should it succeed on appeal and in these circumstances the balance of convenience favours the appellant.

[7] The burden is on the appellant to adduce evidence to satisfy the requirements for a stay of execution of judgment pending disposition on appeal. Whether or not an appellant successful on appeal will be able to collect if a stay of execution is not granted goes to the issue of irreparable harm: **Fulton Insurance**, supra, at pages 346-347. Irreparable harm takes its meaning in the context of each particular case and the extent of the risk of non-repayment if the appeal should succeed can be a relevant consideration: see Cromwell, J.A. in **MacPhail** et al. **v. Desrosiers et al.** (1998), 165 N.S.R. (2d) 32. Payment to an insolvent party is capable of causing irreparable harm: see Freeman, J.A. in **Coughlan et al. v.**

Westminer Canada Ltd. et al. (1993), 125 N.S.R. (2d) 171.

[8] In support of its application, the Crown filed two affidavits. The first, that of Raymond Patrick Oliver who had been a lead investigator with the R.C.M.P. Integrated Proceeds of Crime Unit, focused on the seizure of property under court order and court applications and proceedings which involved Mr. Innocente but included information relating to both respondents. The second, that of Phil McNeil, a case officer with Seized Property Management Directorate, Public Works and Government Services (Canada), concerned Mr. Innocente's residence at [...] Halifax County, Nova Scotia (the G. property). That property remains under a Restraint Order issued June 24, 1996 by the Nova Scotia Supreme Court pursuant to s. 462.33 of the **Criminal Code**, as amended by an order dated October 29, 1999 and an Amended Order dated February 4, 2000. Neither of the respondents conducted any cross-examination on these affidavits.

[9] Nor did either of the respondents present any evidence to refute that presented by the Crown. A judgment creditor does not have to prove his financial stability as a condition of collecting on his judgment: **Anwar Construction Ltd. et al. v. Phillips (J.R.) Electrics Ltd. et al.** (1991), 108 N.S.R. (2d) 324, 294 A.P.R. 324 (C.A.).

[10] I will consider the evidence presented by the appellant as it pertains to each of the respondents in turn. In doing so, I will assess it against the remaining requirements of the primary test and, where necessary, against the secondary test in **Fulton Insurance**, supra.

Daniel Joseph Innocente

[11] The appellant argues that Mr. Innocente could not satisfy any judgment for return of $20,000 in costs in the event of a successful appeal. It submits that he is essentially insolvent, does not own personal property of any considerable value, would apply the costs award against existing obligations so the funds would then be unavailable for repayment, and there is insufficient equity remaining in the G. property.

[12]In response, Mr. Innocente points out that since 1998 the Crown has successfully opposed several of his applications for release of personal property

for the payment of reasonable legal and living expenses and for state funded counsel on the grounds that he had the means to retain legal representation. He argues that it is inconsistent for it to now urge that he is without resources.

[13] In making his representations, Mr. Innocente agreed that indeed if the stay were not granted, he would apply the costs awarded to him against arrears of mortgage payments on the G. property or against counsel fees or against other expenses and obligations. Almost all of his property continues to be restrained pursuant to order of the Supreme Court of Nova Scotia. However, he urged there was money tied up in personal property and that the G. property had equity that could be accessed, should the Crown succeed on appeal.

[14] Mr. Innocente submitted that Bateman, J.A. in Chambers in **R. v. Innocente**, 2000 NSCA 124 had established his ownership of a trailer and some four wheel vehicles and their value. I am unable to agree. In the course of that application for the appointment of counsel pursuant to s. 684 of the **Criminal Code**, Justice Bateman reviewed the evidence presented by way of extensive affidavits and detailed cross-examination. Her decision reads in part:

> [29] On cross-examination, Mr. Innocente . . . adamantly denies that he owns the 1987 customized Harley Davison motorcycle which was seized by the R.C.M. Police. It is in his father's name. Nor does he admit ownership of the Coachman trailer. He estimates the trailer's worth at $12,000 to $15,000. He says that his mother advanced the money for the trailer. He acknowledged on cross-examination that on his February 1996 mortgage application he represented that the Coachman trailer was his asset and that it had a value of $35,000.
>
> [30] Mr. Innocente acknowledges that he owns two all terrain vehicles worth about $5,500 together. He would not sell the one that his son uses. These vehicles are in his brother Gary Innocente's name but are part of the goods under seizure.
>
> . . .
>
> [32] He owns two acres of land in Stewiacke which he purchased in May of 1990 for $1250. In his view the land belongs to his 14 year old son and Mr. Innocente will not sell it. On cross-examination he admitted that he did not disclose this asset in previous court proceedings.
>
> . . .
>
> [47] . . . Mr. Innocente has not satisfied me that he does not have access to

> resources, separate from those assets under seizure, sufficient to meet his need for counsel on this appeal. There is so much inconsistency within the information and evidence that has been provided by Mr. Innocente, that I am unable to accept as truthful his complaint that he lacks the means to retain counsel. As was demonstrated throughout his cross-examination, Mr. Innocente is cavalier with the truth. Matters as simple as his place of residence, employment or annual income are distorted by him to meet the circumstances. The concept of ownership within the Innocente family is a fluid one. Sometimes he owns an asset, sometimes he does not. Sometimes he owes money, sometimes he does not. He might own an asset which is not in his name, or profess not to own an asset which is in his name.
>
> [48] . . . while Mr. Innocente's acknowledged available assets are limited, he appears to be making no real effort to dispose of what he has. . . . I do not accept that he does not own and therefore cannot sell the Coachman travel trailer or that his mother has a moral "lien" on the proceeds. Once again, both Mr. Innocente and his mother testify to a hand to mouth existence yet neither indicates a willingness to sell this asset which has an admitted value of at least $12,000. Most importantly, over a period of several years Mr. Innocente and Ms. Harrison have been able to support a standard of living that far exceeded their stated joint means. I can only infer that Mr. Innocente has recourse to funds which he has not disclosed.

[15] The proceeding before Justice Bateman was not a dispute as to title. Rather, that Chambers application was brought by Mr. Innocente who sought to persuade the court that he did not have sufficient means to obtain legal assistance. Justice Bateman recounted the evidence on income, debts, and property and found that this respondent did have sufficient means, without recourse to either the assets under seizure or to the equity then in the G. property. While she had to consider the evidence as to ownership, in the particular circumstances of that application Justice Bateman did not have to determine title. I cannot agree that she clearly did so in these passages.

[16] In any event, it is evident that before Justice Bateman, Mr. Innocente did not agree that he was the owner of some of this property, in particular the trailer which is the most valuable item. Nor did he agree that all items were free of liens and claims or that he was entitled to dispose of them and to retain all the proceeds. In my view, it is also significant that in this stay application before me, he did not present any affidavit or other evidence establishing his ownership of this property, but instead chose to point to Justice Bateman's decision as proving title and the value of that property.

[17] Even if I were to accept that Justice Bateman determined that this property belongs to Mr. Innocente free of any claims or liens, which I do not, when its value is calculated using the lower range for the trailer and including the Stewiacke property which this respondent did not mention in his submissions, it comes to less than $20,000 before deduction of any execution and sale costs. Even this valuation requires an assumption that every item will be sold for at least the estimate given in that earlier proceeding.

[18] In my view then, title to these assets and the clarity of that title is doubtful in view of Mr. Innocente's own evidence before Chambers last October. Moreover, their value is likely insufficient to reimburse the Crown for the costs awarded should it succeed on appeal.

[19] Mr. Innocente's major asset is the G. property. [...]

[20] [...]

[21] [...]

[22] [...]

[23] [...]

[24] [...]

[25] Nor can the fact that the G. property is subject to the Restraint Order as amended be overlooked. Should the stay be refused, the Crown succeed on appeal, and Mr. Innocente be unable to repay the costs award, the Crown cannot quickly or easily access the equity in the property. Paragraph 4 of the Amended Order dated February 4, 2000 stipulates that no mortgage, charge, encumbrance or conveyance of any interest in the property may be entered into or registered against this property after the date of that order except as may be permitted by further order of the court. Consequently, an application would have to be brought seeking such authorization and recovery from the equity when the property is sold. The success or failure of such an application cannot be ascertained now. As indicated above, there may already be insufficient equity in the G. property to

meet that amount. The passage of time is not likely to increase the amount of that equity, but rather, in the circumstances of this case, makes it more feasible that the equity will be less.

[26] Having considered all these circumstances surrounding the personal property and the G. property, I am of the view that there is a very considerable risk that the appellant will not recover the costs award payable to Mr. Innocente if the stay is not granted. I am satisfied that the appellant has met the irreparable harm requirement of the primary test for a stay.

[27] I am also satisfied that the Crown has met the third and final requirement of that test. There was no evidence of such harm presented by this respondent. Where irreparable harm might be suffered by the applicant and none indicated to the respondent if the stay is not granted, the balance of convenience favours the appellant: see **B. & G. Groceries Ltd. v. Economical Mutual Insurance Co.** (1992), 112 N.S.R. (2d) 322 at § 2 (Hallet, J.A. in Chambers).

Gilles Poirier

[28] In my view, in seeking a stay of the costs awarded this respondent, the appellant has failed to meet the second requirements of the primary test in **Fulton Insurance**, supra. It has not established that the appellant will suffer irreparable harm that it is difficult to or cannot be compensated for by a damage award.

[29] The evidence the Crown put forward is limited to two paragraphs in the Oliver affidavit. The deponent states that he was advised that Mr. Poirier resides in Quebec but does not give the source of that information. He deposes that he is not aware of any assets that Mr. Poirier may possess in this province without stating what investigation, if any, was conducted to ascertain assets or liabilities. He attaches a copy of the Canadian Police Information Centre printout showing that in 1994 Mr. Poirier was sentenced to four years on each of two charges of possession of narcotics for the purpose of trafficking and to two months for possession of property obtained by crime.

[30] The appellant's submission in support of the irreparable harm requirement amounts to nothing more than statements that this respondent resides outside of Nova Scotia and was sentenced seven years ago for three offences, and a

suggestion that adverse inferences be drawn from these circumstances. That evidence is not sufficiently compelling for any finding of irreparable harm. The appellant having failed to demonstrate irreparable harm, it is not necessary for me to consider the balance of convenience requirement.

[31] As its application relates to Mr. Poirier then, the Crown must meet the secondary test in **Fulton Insurance**, supra. The appellant's argument that there are exceptional circumstances that would make it fit and just that a stay of the award of costs be granted is largely based on the nature of the proceedings under appeal. It urges that an award of costs against the Crown in and of itself is exceptional, and that a stay of proceedings such as that which gave rise to the costs award in this case is also exceptional.

[32] In **R. v. Cole**, [2000] N.S.J. No. 84 at § 50, this Court described an order for costs against the Crown in a criminal prosecution as "a rare and exceptional remedy." A judicial stay of proceedings has been described as a remedy to be imposed only in the "clearest of cases": **Canada (Minister of Citizenship and Immigration) v. Tobiass et al.**, [1997] 3 S.C.R. 391 at p. 435. In **R. v. Regan**, [1999] N.S.J. No. 293, C.A.C. 147242 at § 106, Cromwell J.A. called a stay of proceedings "a drastic remedy" which is to be imposed only in "very clear cases" and only if no other remedy can sufficiently protect the integrity of the judicial process from the anticipated harm.

[33] The question before me, however, is not whether the proceedings under appeal are themselves unusual or exceptional. Rather, having in mind the general principle that a successful litigant is entitled to the fruits of his litigation and a judgment is enforceable pending appeal, I must consider whether such exceptional circumstances exist that a stay of execution should be granted.

[34] The appellant has not provided any jurisprudence in support of its submission that, of itself, an appeal of a stay of proceedings in a criminal prosecution and/or one of an award of costs against the Crown merits a stay of execution pending disposition on appeal. It is necessary to consider what constitutes exceptional circumstances for the purposes of a stay. Freeman, J.A. in **Coughlan**, supra, provided this guidance at § 13:

> The secondary test applies when circumstances are exceptional. If for example,

> the judgment appealed from contains an error so egregious that it is clearly wrong on its face, it would be fit and just that execution should be stayed pending the appeal.

The appellant has not suggested an error of such magnitude in this case.

[35] The judgment under appeal which is the subject of this stay application is an award of costs. Where a stay involves a judgment for costs or any other monetary sum, the appellant is normally required to meet the primary test and if the appellant fails to do so, it would be rare to find exceptional circumstances justifying the exercise of discretion in favour of granting a stay: **Lienaux et al. v. Toronto-Dominion Bank** (1997), 161 N.S.R. (2d) 236 (C.A.) at § 15. See also **Hartlen v. Oceanart Pewter Canada Ltd.**, [1999] N.S.J. No. 192 (C.A.) at § 8.

[36] In **Coughlan**, supra, Freeman, J.A. considered the secondary test in **Fulton Insurance**, supra, after the appellants had failed to satisfy the primary test. The case under appeal there was described as unusual. The award of $6,000,000, chiefly in solicitor and client costs, the length of the trial, the volume of evidence, and the ill will between the parties were all unusual. However, novelty in many aspects of the case was not found to amount to proof beyond a balance of probabilities that there were exceptional circumstances that would make it fit and just that a stay be granted.

[37] Similarly, while each of the orders under appeal, namely a stay of proceedings for abuse of process and an award of costs against the Crown in a criminal proceeding, is unusual and uncommon, I am not persuaded that that is sufficient to constitute exceptional circumstances that warrant a stay of execution in this particular case.

Disposition

[38] The application for a stay of the award of costs in favour of Mr. Innocente is granted. **Rule 62.10(3)** allows a stay on such terms as the judge deems just. The order on costs granted by Justice Boudreau directed the Attorney General of Canada to pay costs to Mr. Innocente through his former solicitor, in trust. With this stay, the Crown shall pay the costs of $20,000 awarded Mr. Innocente to its own solicitors to be held in trust, invested in a certificate of deposit issued by one of the chartered banks of Canada for an initial term of 150 days and thereafter for

consecutive terms of 30 days each, pending the disposition of the appeals of the stay of proceedings for abuse of process and the award of costs. Should the Crown be unsuccessful on appeal, Mr. Innocente is entitled to receive those monies including the accumulated interest.

[39] The application for a stay of the order of costs in favour of Mr. Poirier is dismissed.

Oland, J.A.