

**NOVA SCOTIA COURT OF APPEAL**

**Citation:** *Mercier v. Nova Scotia (Attorney General)*, 2014 NSCA 101

**Date:** 20141106

**Docket:** CA 428778

**Registry:** Halifax

**Between:**

Roger Edouard Mercier

Respondent/Appellant

v.

Attorney General of Nova Scotia and  
Police Complaints Commissioner

Applicants/Respondents

**Judge:** The Honourable Justice Cindy A. Bourgeois

**Motion Heard:** October 30, 2014, in Halifax, Nova Scotia, in Chambers

**Held:** Motion granted

**Counsel:** Duane Eddy, for the Applicants/Respondents  
Roger Edouard Mercier, Respondent/Appellant in Person

## **Decision:**

### **Introduction**

[1] In Chambers on October 30, 2014, I heard a motion brought by the respondents Attorney General of Nova Scotia (AGNS) and the Police Complaints Commissioner for an order for security for costs. The motion was opposed by Mr. Mercier. Following submissions, I reserved my decision. For the reasons to follow, the motion is granted.

### **Background**

[2] The appeal presently before the Court arises from a decision of Justice Arthur LeBlanc dated February 27, 2014 (see 2014 NSSC 79).

[3] In October of 2010, Mr. Mercier was arrested by a member of the Halifax Regional Police and charged with two counts of breach of recognizance under s. 811 of the *Criminal Code*. Those charges were dismissed on November 30, 2010 due to want of prosecution. The Crown prosecutor responsible for the file was Mr. Arthur Theuerkauf.

[4] On April 6, 2011, Mr. Mercier filed a complaint against the arresting officer pursuant to the *Police Act*, S.N.S. 2004, c. 31. On September 29, 2011, the Complaints Commissioner declined to refer the complaint to the Police Review Board. Mr. Mercier challenged that decision, seeking judicial review before the Supreme Court of Nova Scotia, eventually coming before Justice LeBlanc.

[5] For the purpose of considering the appropriateness of an order for security for costs, the litigation history of this matter is relevant. As such, it will be outlined in some detail.

[6] Mr. Mercier filed a Notice of Judicial Review on October 21, 2011 in which he sought to challenge the decision of the Police Complaints Commissioner. There was apparent difficulty with reaching agreement as to what would properly constitute the Record on judicial review. Mr. Mercier brought a motion challenging the Record filed by the respondents, and seeking an order permitting him to file additional materials to supplement it. He also submitted the respondents had improperly failed to include materials in the Record which were in

their respective possession. Justice Coady heard the motion, and by order issued May 15, 2012, it was dismissed without costs.

[7] On May 18, 2012, Mr. Mercier filed another motion challenging the adequacy of the Record. By order issued June 12, 2012, Justice Moir dismissed the motion, and ordered Mr. Mercier pay costs of \$250.00 to the respondents “forthwith”.

[8] On July 3, 2012, Mr. Mercier filed a Notice of Appeal to this Court, where he sought to appeal the interlocutory decisions of Justices Coady and Moir. By decision dated April 10, 2013 that appeal was dismissed, with Mr. Mercier being ordered to pay costs of \$200.00 to the respondents “forthwith”. See 2013 NSCA 43.

[9] Following dismissal of the above interlocutory appeal, on June 24, 2013 Mr. Mercier filed a Notice of Motion seeking to amend the Notice of Judicial Review to “permit the completion of the record”. That motion was heard by Justice Pickup, and dismissed. By order issued July 3, 2013, Justice Pickup ordered Mr. Mercier to pay costs of \$200.00 to the respondents.

[10] Following Justice LeBlanc’s decision on the judicial review, Mr. Mercier filed a Notice of Appeal challenging that decision, as well as the subsequent costs decision (2014 NSSC 309). The Notice of Appeal sets out 15 detailed grounds of appeal encompassing seven pages.

[11] I note that following the filing of the Notice of Appeal on September 18, 2014, Mr. Mercier brought a motion to this Court in chambers seeking “the court cause the production of the transcript” of the matter before Justice LeBlanc. That matter was heard on October 9, 2014 at which time Mr. Mercier clarified that he was seeking to have this Court order the respondents pay for the cost of the transcript. That motion was dismissed, and given that the respondents had not sought costs, none were ordered. See 2014 NSCA 93.

[12] It would appear that in addition to the complaint involving the arresting officer and the proceedings following therefrom, Mr. Mercier also had brought a separate civil action against Crown Prosecutor Theuerkauf and the Attorney General of Nova Scotia alleging various acts of malfeasance and breach of his *Charter* rights. In response to a motion for summary judgment brought by the defendants, Justice Coughlan dismissed Mr. Mercier’s action – see 2012 NSSC

111. The decision indicates that as the Crown did not seek costs on the motion, none were ordered.

[13] Mr. Mercier appealed Justice Coughlan's decision to this Court, which involved at least two interlocutory motions. It would appear that on February 27, 2012 Mr. Mercier made an *ex parte* motion in Chambers, requesting orders compelling disclosure of documents from Nova Scotia's Freedom of Information and Protection of Privacy Review Office, the Public Prosecution Service, the Police Complaints Commissioner, the Minister of Justice and the Halifax Regional Police. Justice Fichaud dismissed the motion, not satisfied it was appropriate to proceed on an *ex parte* basis, but permitted Mr. Mercier to advance a motion on notice. See 2012 NSCA 25.

[14] Mr. Mercier then brought an identical motion on notice. It was heard May 3, 2012 by Justice Hamilton. The respondents opposed the motion, it being dismissed without costs. See 2012 NSCA 51.

[15] The appeal was ultimately heard by this Court on September 17, 2012. In a decision reported at 2012 NSCA 100, the appeal was dismissed and Mr. Mercier was ordered to pay costs of \$500.00 to the respondents. Mr. Mercier sought leave to appeal to the Supreme Court of Canada, however, his leave application was dismissed. On May 14, 2013, a Certificate of Taxation was issued by the Supreme Court of Canada ordering Mr. Mercier to pay costs of \$1,323.54 to the Attorney General of Nova Scotia and Mr. Theuerkauf.

[16] The evidence submitted on behalf of the respondents on this motion is that Mr. Mercier has not made payment towards any of the outstanding cost awards. Mr. Mercier did not challenge that assertion. The six outstanding cost awards total \$2,973.54.

## **Analysis**

[17] *Civil Procedure Rule* 90.42 governs security for costs in appeals. It provides:

### **Security for costs**

**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.

(2) A judge of the Court of Appeal may, on motion of a party to an appeal, dismiss or allow the appeal if an appellant or a respondent fails to give security for costs when ordered.

[18] In the recent decision **Tupper v. Nova Scotia (Attorney General)**, 2014 NSCA 60, Scanlan, J.A. succinctly summarized the approach of this Court to motions for security for costs. He writes:

[14] This Court has noted on numerous occasions that security for costs will only be granted when an applicant can establish “special circumstances”. This was noted by Bryson, J.A. in **Wolfridge Farm Ltd. v. Bonang**, 2014 NSCA 41, ¶16. Justice Bryson referred to **Bardsley v. Stewart**, 2014 NSCA 32 and **Sable Mary Seismic Inc. v. Geophysical Services Inc.**, 2011 NSCA 40 and described special circumstances as including the degree of risk that a respondent will be unable to collect monies from the appellant if the appellant is unsuccessful on appeal.

[15] In **Williams Lake Conservation Co. v. Chebucto Community Council of Halifax Regional Municipality**, 2005 NSCA 44, Justice Fichaud noted the risk that an appellant may be unable to afford costs is by itself, insufficient reason to establish special circumstances. Justice Fichaud suggested that it is usually necessary there be evidence that in the past the appellant had acted in an insolvent manner towards the respondent. That type of evidence can form an objective basis for a court to be concerned about recovery of prospective appeal costs. Justice Fichaud referred to continuing failures by an appellant to pay costs awards.

[19] The respondents point to the outstanding cost awards, in this and the previous related proceeding, and submit that there are ample “special circumstances” to justify an order for security.

[20] Mr. Mercier filed an affidavit in opposition to the motion, which outlines his health difficulties and his limited monthly income. The bulk of the affidavit is a recounting of evidence pertaining to his interactions with the arresting officer, Mr. Theuerkauf, and others involved with his police complaint.

[21] In his written submissions, Mr. Mercier makes fleeting reference to the merits of the motion for security for costs. Other than alleging such an order would prevent him from pursuing justice in the face of governmental malfeasance due to his impecuniosity, the bulk of the submissions appear to be a rehashing of previous arguments relating to the inadequacy of the Record, and his pursuit for more documentary disclosure. There have been at least three previous decisions determining the Record on judicial review was appropriate.

[22] A flavour of the nature of the submissions can be taken from Mr. Mercier's concluding paragraph:

The Respondents are requesting this court to sanction the abuse of power, criminal acts of members of the Public Prosecution Services, unlawful arrest, detention and imprisonment of the Appellant. All in an effort to conceal and/or protect the actions of Cst. Jardine of the Halifax Regional Police and all those who followed his unlawful and illegal conduct as perpetrated against the Appellant commencing the evening of October 26, 2010.

[23] From the materials before me, I disagree with Mr. Mercier's characterization of the respondents' current motion. Succinctly, because he has failed to pay costs as ordered in the past, the respondents assert Mr. Mercier will not pay costs ordered if his appeal is unsuccessful. The respondents seek, based on this documented history of non-payment, to have Mr. Mercier pay a sum into court to secure the payment of any cost award forthcoming at the conclusion of the appeal.

[24] Mr. Mercier argues that "no case exists where the Attorney General of Nova Scotia has brought a motion of this nature to the court in relation to rule 90.42". He asserts that to permit the AGNS to do so would infringe upon his constitutional right to defend himself. Mr. Mercier has provided the Court with no legal authority in support of his position. I note that **Tupper, supra**, was an instance where the Court found it appropriate to award security for costs upon the motion of the AGNS.

[25] Mr. Mercier raised the issue of his impecuniosity, and I accept that he lives on a very limited income. It is clear however, that impecuniosity is not a bar to an order for security for costs where such is otherwise warranted. I note in particular the comments of Oland, J.A. in **Munroe v. Morgan Industrial Contracting**, 2004 NSCA 49, as follows:

[8] Even if I were to assume that he is self-represented and has not paid any portion of the trial costs because he is impecunious, that financial situation of itself does not preclude an order for security for costs. In regard to the previous *Rule* on such security, MacKeigan, C.J.N.S. stated in *L.E. Powell & Co. Ltd. v. Canadian National Railway Co. et al. (No. 2)* (1975), 11 N.S.R. (2d) 532 (N.S.C.A.), as follows:

By Rule 62.30, supra, this Court or a judge thereof, like the English courts, may now order security for costs on appeal in "special circumstances". The basic principle applied by the English courts in cases like the present

has been set forth by Bowen, L.J., in *Cowell v. Taylor* (1885), 31 C.D. 34 (C.A.) at p.38:

The general rule is that poverty is no bar to a litigant, that, from time immemorial, has been the rule at common law, and also, I believe, in equity. There is an exception in the case of appeals, but there the appellant has had the benefit of a decision by one of Her Majesty's Courts, and so an insolvent party is not excluded from the Courts, but only prevented, if he cannot find security, from dragging his opponent from one Court to another. There is also an exception introduced in order to prevent abuse, that if an insolvent sues as nominal plaintiff for the benefit of somebody else, he must give security. In that case the nominal plaintiff is a mere shadow.

The following comments by Bateman, J. in *Smith's Field Development Ltd. v. Campbell*, supra, are also worth noting:

[40] The appellants are able to pursue this appeal, as they have the litigation before the trial court, principally without concern for legal fees. Should the appeal fail, the only risk to the appellants, apart from their own disbursements, is an order for costs, which will inevitably go unanswered. As Pugsley J.A. said in *Arnoldin Construction*, supra:

[9] ...

(1) ... [the respondent] is entitled to a substantial sum for its taxed costs of successfully defending a trial. To permit the company to have a "free ride" without posting security, renders an[d] injustice to Alta. Alta's rights must also be considered... .

[26] I am mindful that the sum of \$2,973.54 is, in all likelihood, a large amount of money to Mr. Mercier. It is insignificant in terms of the financial resources of these particular respondents. That disparity is not, however, justification to dismiss the motion. The respondents have undoubtedly spent significant time and resources in terms of their counsel's time alone in responding to the matters brought before the courts by Mr. Mercier. The courts themselves have also incurred significant "expense" in terms of administration costs of these various matters being advanced. Citizens have the right to have their legitimate disputes heard before the courts, but one must not lose sight, even in the face of relatively modest cost awards such as in the present case, that there are significant costs associated with those pursuits. The right to argue every point, make every allegation and appeal every decision, is not limitless.

[27] From the review of the various proceedings outlined above, Mr. Mercier has advanced his disputes to date, without regard for financial consequences. Although the accumulated quantum is modest, there are six unpaid cost awards outstanding in relation to Mr. Mercier's pursuit of his view of justice. He has been unsuccessful at every turn, including on several occasions where costs were not sought by the respondents. I readily conclude that if Mr. Mercier is unsuccessful on this appeal, he will treat any award of costs in the same fashion as the previous six. It will remain unpaid.

[28] I am satisfied that special circumstances exist justifying an order for security for costs. I do not however, agree that the \$5,000.00 sought by the respondents is appropriate.

[29] When asked how that proposed quantum was derived, counsel pointed to the sums ordered to be posted as security in other reported cases, and further submitted that the sought sum would be used to pay the outstanding cost awards, with the remaining balance being a reasonable amount for security for costs on the present appeal.

[30] With respect, a motion for security for costs is not a collection proceeding, or a means to enforce previous orders from this, or other courts. There are other mechanisms which serve those purposes.

[31] The purpose of an order under Rule 90.42 is to assure that funds are paid into court to cover the anticipated costs arising from the present appeal. Costs on appeal are often calculated as being 40% of the costs awarded below, although the panel ultimately has the discretion to set whatever amount it deems fit. On the judicial review, Justice LeBlanc ordered costs of \$500.00. I also note that when before this Court on appeal in 2012, that matter was dismissed with costs ordered of \$500.00 (see 2012 NSCA 100).

[32] In the present circumstances, the court must balance the respondents' legitimate request for security, with the reality of Mr. Mercier's financial position. Security should not be set so high as to constitute an unreasonable bar to Mr. Mercier continuing his appeal, nor so low that it does not provide adequately for potential costs.



[33] I order Mr. Mercier to post \$500.00 as security for costs for this appeal no later than December 19, 2014, failing which the respondents will be at liberty to bring a motion, on notice, seeking to have the appeal dismissed.

Bourgeois, J.A.