NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. Taylor***, 2007 NSCA 63

Date: 20070518
Docket: CAC280365
Registry: Halifax

Between:

Her Majesty the Queen

Appellant/Applicant

v.

Terry E. Taylor

Respondent

Judge:	The Honourable Justice M. Jill Hamilton
Application Heard:	May 17, 2007, in Halifax, Nova Scotia, In Chambers
Held:	Application dismissed
Counsel:	Keith Ward, for the appellant Duncan R. Beveridge, Q.C., for the respondent

Decision:

[1] The respondent, Terry E. Taylor, applied to have the Nova Scotia Supreme Court quash a **Criminal Code** search warrant that was executed by the Canada Revenue Agency. Justice Arthur J. LeBlanc set aside the search warrant and awarded costs of $17,000 against the appellant/applicant, Her Majesty the Queen in Right of Canada. The Crown applied to this Court for leave and, if granted, appeals the judge's costs decision. That appeal is set to be heard on October 9, 2007, less than five months from now.

[2] In the interim, the Crown applied under **Civil Procedure Rule** 62.10 for a stay of execution of the judge's award of costs. At the hearing of that application I indicated that the application was dismissed with reasons to follow. These are my reasons.

[3] As set out in **Fulton Insurance Agency v. Purdy**, [1990] N.S.J. No. 361; (1990), 100 N.S.R. (2d) 341 (C.A.), for a stay to be granted, the Crown must either:

> [29] (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. This involves not only the theoretical consideration whether the harm is susceptible of being compensated in damages but also whether if the successful party at trial has executed on the appellant's property, whether or not the appellant if successful on appeal will be able to collect, 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:
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> [30] (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.

[4] I will deal first with the primary test. No one suggests there is no arguable issue raised on appeal. With respect to irreparable harm, during oral argument the Crown conceded that there was no evidence before me suggesting that Mr. Taylor would probably be unable to repay the $17,000 if the Crown's appeal is successful. The Crown invited me to speculate that that may be the case. I decline to do so in

the absence of any evidence of the financial means of Mr. Taylor. Nor is there any evidence before me that Mr. Taylor has a history of not paying court ordered amounts. In light of this lack of evidence the Crown has not satisfied me that it will suffer irreparable harm if it is required to pay the costs award now. Because the Crown has failed to satisfy me that it would suffer irreparable harm, it is unnecessary for me to consider balance of convenience in concluding that a stay should not be granted under the primary test.

[5] The Crown also argued that a stay should be granted on the secondary test, exceptional circumstances that would make it fit and just that a stay be granted. The only exceptional circumstance the Crown suggested is based on the nature of the proceeding under appeal. It argued that an award of costs against the Crown in a criminal matter is in and of itself exceptional. It provided no cases supporting its position.

[6] This issue was canvassed by Justice Linda Lee Oland of this Court in **R. v. Innocente**, [2001] N.S.J. No 223; 194 N.S.R. (2d) 183:

> [34] 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.
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> [35] 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, **[Coughlan et al. v. Westminer Canada Ltd. et al.** (1993), 125 N.S.R. (2d) 171] provided this guidance at § 13:
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> > "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."
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> The appellant has not suggested an error of such magnitude in this case.

> [36] 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; 477 A.P.R. 236 (C.A.), at § 15. See also **Oceanart Pewter Canada Ltd. v. Hartlen et al.**, [1999] N.S.J. No. 192; [1999] N.S.R. (2d) Uned. 34 (C.A.), at § 8.

[7] I adopt that reasoning and dismiss the Crown's application.

Hamilton, J.A.