

SUPREME COURT OF NOVA SCOTIA

Citation: Reed v. Iran (Islamic Republic of) , 2015 NSSC 226

Date: 2015-07-27

Docket: Hfx No. 422558

Registry: Halifax

Between:

Tarek A. Reed

Plaintiff

v.

The Islamic Republic of Iran

Defendant

Judge: The Honourable Justice Peter P. Rosinski

Heard: July 16, 2015, in Halifax, Nova Scotia

**Written Release
of Decision:** July 29, 2015, in Halifax, Nova Scotia
[Edited for grammar, punctuation and readability]

Counsel: David G. Coles, QC, for the Plaintiff
Michael T. Pugsley, for the Sheriff of Halifax County

Orally by the Court:

Introduction

[1] This matter is in camera as a result of my July 16, 2015 Order. I put the matter over for decision on the motion of the Sheriff to today's date at 2:00 p.m..

[2] Tarek Reed has obtained a reciprocal judgment in Nova Scotia of a judgment issued against Iran in the United States of America. Based thereon, an Execution Order issued out of this Court on January 26, 2015 in the amount of Canadian dollars \$8,990,442.75.

[3] Mr. Reed asserts that Iran has a 50% interest in the corporate shares of APC Holdings Ltd. which is a federally incorporated, private Canadian corporation. He asserts that these 2,799 Class B shares are physically present at the law offices of Stewart McKelvey in Halifax, Nova Scotia. He has requested the Sheriff of Halifax County to effect their seizure under the Execution Order. To date the Sheriff has resisted doing so, and I infer that this is likely so on the advice of his legal counsel.

[4] To resolve the disagreement between Mr. Reed and the Sheriff as to whether the Sheriff is authorized to seize the shares, the Sheriff asks this Court for "directions". He seeks this as per his written submission as follows:

... the guidance/authorization of the Court as to what assets in which the judgment debtor has an interest in the jurisdiction of Nova Scotia are legally subject to seizure.

[5] The draft Order attached with the Motion of the Sheriff included:

1. The Sheriff is hereby directed and authorized to seize the following assets in which the Respondent judgment debtor has an interest:
2. The Sheriff is authorized to take all steps necessary to enforce this Order.

[6] This Court must consider whether this is a proper request for "directions" and, if so, whether the Court should give an opinion regarding the proposed seizure of the shares.

The Sheriff's Concerns

[7] These were expressly addressed in a letter to the Court dated July 13, 2015, (followed up in other correspondence and during oral submissions). I will set them out:

1. On behalf the Sheriff, I need to ensure the Sheriff is not executing on/interfering with rights of ownership of Israel, but only assets of the judgment debtor/State of Iran.
2. The proposed execution raises a number of issues which the Sheriff respectfully requests be addressed in this Motion... The Sheriff is being requested to execute on inferences the Plaintiff Applicant states can be drawn from the collection of exhibits and from reviewing the affidavit as follows:
 - a) NIOC, the National Iranian Oil Company, is a state-owned enterprise owned by Iran.
 - b) APC Holdings is the corporate venture in which Israel and NIOC have a joint interest.
 - c) 50% of the shares in APC are beneficially owned by NIOC. These consist of the Class B shares.
 - d) The APC shares are in Halifax.

Questions

The proposed execution raises a number of issues which the Sheriff respectfully requests be addressed in the Motion.

1. Are the Hirsch affidavits sufficient to prove the assertions of ownership alleged by the Plaintiff?
2. Are the various exhibits in the Hirsch affidavit admissible? Are they legal proof of what is alleged?
3. Are any of the proposed targeted assets ones in which the judgment debtor has a sufficient interest to warrant seizure?
4. How can such assets be identified, and how can the Sheriff avoid seizing assets in which others, such as the state of Israel, have an interest?
5. Are the subject assets in English or French (two official languages) and, if not, how can the Sheriff read them?
6. Are any of the targeted assets protected by international law from seizure, as diplomatic assets or otherwise? In particular, it is noted the state of Israel is involved in the joint project and has not lost its immunity under Canadian law.
7. Should Israel be advised?

8. How can the Sheriff if he executes on APC shares be assured he is not impairing the rights of the state of Israel which according to the Hirsch Affidavit is a co-venturer in APC? How will the Sheriff avoid interfering with/compromising the rights of the state of Israel?
9. How will the Sheriff know which specific shares of APC Holdings Inc., NIOC has an interest in? Is that an undivided interest? How can the shares be identified? How can the Sheriff be sure APC is the company that owns the pipeline?

Given the financial and political ramifications the Sheriff respectfully seeks the directions of the Court on the above.

[8] Based on the oral and written submissions, I recast those concerns, if you will, in a condensed manner as follows:

1. Has Mr. Reed provided sufficient information and guidance to the Sheriff to allow him to:
 - a. Identify the precise shares and their location;
 - b. Conclude that Iran has an interest therein, which interest is not exempt from seizure (see, for example, on state immunity *Canadian Planning and Design Consultant Inc. v. Libya*, 2015 ONSC 3386.)
 - c. Conclude that he will not expose himself to liability vis à vis the state of Israel, which since 1968 appears to have had an interest in the joint venture oil pipeline from Eilat to Ashkelon, Israel by virtue of APC apparently being the owner of the Eilat-Ashkelon Pipeline Co. which operates/owns the pipeline.

[9] The Sheriff submits that he has neither the benefit of immunity from civil prosecution at common law nor by statute. His concern is heightened because the jurisprudence has permitted successful civil suits for the torts of trespass and conversion against Sheriffs in similar situations. He cites as authority for these propositions the following cases: *384238 Ontario Limited v. Canada*, (1983) 8 DLR (4th) 676 at pp. 687-688; *Overn v. Strand*, [1931] SCR 720; *Cherubini Metal Works Ltd. v. Nova Scotia (Attorney General)*, 2011 NSCA 43; and excerpts from the text *Tort Law* by Lewis Klar, QC, 5th edition, 2012, Carswell, pp. 90-93.

Mr. Reed's Position

[10] Counsel for Reed argues that the Court need not give the Sheriff "directions". He says the information and guidance that Reed has provided makes this seizure fundamentally the same as any other: the Sheriff ought to go to the offices of Stewart McKelvey and advise the appropriate persons that he has been advised that the 2,799 Class B shares of APC are physically present there and Iran has an interest in them; therefore, he is seizing them under the Execution Order herein.

[11] Reed asserts that the Sheriff is seeking an unnecessarily high level of proof of the information/evidence that Reed has provided. Namely, the Sheriff is insisting on proof on a threshold required normally at a hearing or trial (that being more likely than not) which is not legally required before a Sheriff can proceed to seize assets under an Execution Order.

[12] Based on the Federal Court of Appeal decision in *384238 Ontario Limited v. Canada, supra; British Columbia (Deputy Sheriff) v. Canada (Petro Canada Inc.)*, 1987 B.C.L.R. (2d) 190, (Co. Ct.); and the Canadian Encyclopedic Digest regarding "**Execution and Seizure under Execution**", ("Liability of Execution Creditor for Wrongful Seizure"), and under "**Trespass**" "Wrongful Searches and Seizures", Mr. Reed asserts that the Sheriff need only have a reasonable basis for seizing the assets in question, and act within the facial authority of the Order to avoid successful civil prosecution for his actions. Moreover, in addition to these justifications, he says the Sheriff has the benefit of the processes and protection contained in the *Creditors Relief Act*, R.S.N.S. 1989 c. 112 as amended, in combination with the protective mechanisms in our *Civil Procedure Rules* 76 (Interpleader) and 79 (Enforcement by Execution Order).

[13] Section 2A of the *Act* permits a judgment creditor to "register a notice of judgment in the [*Personal Property Security Act*] Registry in accordance with the regulations made pursuant to the *Personal Property Security Act*."

[14] Subsection 2A(4) requires a judgment creditor to "discharge the registration of a notice of judgment within 30 days after the judgment is satisfied, or within 30 days after the occurrence of any other event as a result of which there is no longer a subsisting judgment."

[15] Subsections 2A(5) and (6) provide that within a similarly short period of time it is possible for a debtor to successfully have a registration of judgment discharged.

[16] Also particularly relevant here are *Rules 79.04* and *79.05*:

79.04 A person who obtains a judgment and wishes to bind a moveable under the *Creditors' Relief Act* and the *Personal Property Security Act* may deliver to the prothonotary a draft document that is entitled "Notice of Judgment" and that conforms with Section 2A of the *Creditors' Relief Act*.

79.05 (1) A judgment creditor may obtain an execution order by delivering to the office of the prothonotary a draft execution order that conforms with this Rule, or a variation permitted by a judge, no more than five years after the date of the judgment.

(2) A judge may permit a person to make a motion to the prothonotary for an execution order more than five years after the date of the judgment.

(3) A prothonotary may require a person who obtains permission, and then delays making the motion for the execution order, to seek fresh permission.

(4) A motion for permission may be made ex parte.

[17] I observe that ss. 47-51 of the *Securities Transfer Act*, S.N.S. 2010 c.8, as amended, may have application as well:

47 Subject to the necessary modifications for the purposes of permitting the operation of Sections 48 to 51, the laws governing the civil enforcement of judgments apply to seizures described in those Sections. *2010, c. 8, s. 47.*

48 (1) Except as otherwise provided in subsection (2) and in Section 51, the interest of a judgment debtor in a certificated security may be seized only by actual seizure of the security certificate by a sheriff.

(2) A certificated security for which the security certificate has been surrendered to the issuer may be seized by a sheriff serving a notice of seizure on the securities intermediary. *2010, c. 8, s. 48.*

49 Except as otherwise provided in Section 51, the interest of a judgment debtor in an uncertificated security may be seized only by a sheriff serving a notice of seizure on the issuer at the issuer's chief executive office. *2010, c. 8, s. 49.*

50 Except as otherwise provided in Section 51, the interest of a judgment debtor in a security entitlement may be seized only by a sheriff serving a notice of seizure on the securities intermediary with whom the judgment debtor's securities account is maintained. 2010, c. 8, s. 50.

51 The interest of a judgment debtor in one or more of the following may be seized by a sheriff serving a notice of seizure on the secured party:

- (a) a certificated security for which the security certificate is in the possession of a secured party;
- (b) an uncertificated security registered in the name of a secured party; and
- (c) a security entitlement maintained in the name of a secured party. 2010, c. 8, s. 51.

[18] In any event, Mr. Reed says that the upshot is there are two stages of likely process that protects the Sheriff from successful prosecution of a civil claim against him:

- i. The Sheriff, upon seizing the shares, would not be converting them – he is not committing the tort of conversion, but rather only temporarily taking possession of them, creating only a temporary interference with them, and an interference that is sufficiently justified under the Execution Order and buttressed by the provisions of the *Creditors Relief Act*;
- ii. Moreover, once seized, the Sheriff has a ready mechanism in the interpleader rule, *Rule 76*, to put possession of the shares into the hands of the Court for a determination of competing claims of ownership interests.

[19] At this juncture, it is appropriate to briefly comment on the duties of a Sheriff. Helpful in this respect is the final report of the Enforcement of Civil Judgments Law Reform Commission of Nova Scotia report published in August of 2014. In its summary, the Commissioners state:

Nova Scotia's current judgment enforcement system is spread across a number of pieces of legislation, the common law, and the Nova Scotia *Civil Procedure Rules*. It lacks a robust, modern set of powers to seize different types of property and its exemptions are significantly out of date. It is clear that many judgment creditors are not aware of the difficulties they may face in enforcing a judgment in their favour and many are not aware of the resources available to help them. We are concerned as well that many judgment debtors are not aware of, or are given insufficient opportunity, to claim the legal protections and exemptions that are available to them.

[20] At page 22, under “The Current System”, they state:

The judgment creditor can also obtain an execution order under the *Civil Procedure Rules*. In simple terms, the execution order directs the Sheriff to seize and liquidate all property and income of the debtor subject to certain exemptions and pay the proceeds to creditors with an outstanding judgment. In practice, the Sheriff acts only on receiving information, typically from the creditor, as to the location of available assets and income. The Sheriff typically requires any expenses to be paid upfront by the creditor.

[21] At page 102 of their report, under Role of the Enforcement Officer”, they go on to state:

We do not recommend a substantial shift in the concept of creditor initiative. It has been a policy choice of government for many years to avoid having the Sheriff taking a more proactive role in locating and seizing assets. While the former system – in which some Sheriffs function practically as private investigators – was almost certainly more effective in realizing better results for judgment creditors, a return to that situation would require a substantial investment of public funds.

...

In this section we consider the options for delegating some of the responsibilities of the Sheriff to private enforcement officers.

...

On the other hand, it was observed that the Sheriff’s performance has left many judgment creditors dissatisfied owing to lack of resources and competing priorities, especially Court security and prisoner transfer, which are the Sheriff’s main responsibilities.

...

We have concluded that some of the authority and responsibilities of the Sheriff with respect to judgment enforcement should be capable of being delegated to licensed civil constables.

[22] Finally under “Recommendations”, the Commissioners state, at p. 117 and 119:

Authority of enforcement officers under judgment enforcement legislation should be delegated to a limited extent to civil constables with the appropriate training

and supervision. Civil constables should have delegated authority to investigate assets and income of the debtor and to deliver forms and notices to debtors, creditors, and third parties. Physical seizure and sale of tangible property should not be delegated. The Office of the Sheriff should have oversight responsibility for the work of civil constables who undertake delegated judgment enforcement authority. The Office of the Sheriff should remain responsible to collect and distribute proceeds of enforcement action, resolve disputes over allowable debtor deductions and exemptions, and disseminate basic forms and information.

Is this a proper case for “directions” to the Sheriff by the Court?

[23] The authority for the Sheriff’s motion is found in the Execution Order itself at clause 18, which reads:

The Sheriff who receives a copy of an Execution Order may make a Motion for Directions on the Sheriff’s duties under the Order or any other subject related to the Order, and the Sheriff maybe represented by counsel or act on the Sheriff’s own behalf.

That clause derives from *Rules* 79.16(2) and (3) and the template order, per *Rule* 79.17(2) and Form 79.17A.

[24] I acknowledge as well that clause 3 of the Execution Order reads in the mandatory:

The Sherriff must seize, otherwise take control of, and accept as receiver all property in which the judgment debtor has an interest, except property exempt from execution and held by the execution debtor as trustee for another person.

[25] I have not been referred to any cases that have interpreted those provisions in our *Rules*, however to my mind such references to “directions” are generally accepted as relating to procedural matters, namely, in these circumstances, in relation to the duties imposed on a Sheriff by the Court’s Order. They are not generally seen to include rulings by a Court on matters of substance, such as, for example:

- a) What persons or entities have a property interest in the shares in question here?
- b) Is the interest of Iran, if any, exempt from seizure?

- c) Has the Sheriff been provided a sufficient basis in fact and law to effect the seizure requested by Reed in these circumstances?

[26] While I acknowledge that clause 18 in the Order includes the words “may make a Motion for Directions on the Sheriff’s duties under the order or any other subject related to the order”, I conclude that the “any other subject” reference is still intended to reference procedural matters, and not to include matters of substance. I note that neither counsel, the Sheriff’s counsel or counsel for Mr. Reed, have provided any case where the Court has been asked to give “directions” in circumstances such as these, and I have not been able to find any such cases either.

[27] Nevertheless, if I am wrong and clause 18 does import an entitlement to the directions sought here, I consider it appropriate to then proceed as if the matter is really a request for declaratory relief. If an interested person such as a Sheriff wishes the Court to provide “guidance/authorization of the Court as to what assets in which the judgment debtor has any interest in the jurisdiction of Nova Scotia, which are legally subject to seizure”, one recourse would be to make a formal motion for declaratory relief regarding “the legal status or rights of a person”, pursuant to *Rule* 38.07(5). Such declarations by courts are a form of discretionary relief, and are to be made with restraint.

[28] The Court must be satisfied that:

1. There is a sufficient factual and/or legal foundation in place to avoid giving a “declaration in the air”;
2. There are no available effectual alternative remedies;
3. The interests of justice favour making the declaration on the question in issue.

per Justice Bryson for the Court in *Nova Scotia(Securities Commission) v. Potter*, 2012 NSCA 12.

[29] Having said that, I acknowledge that the Sheriff has had a time honoured and exceptional status vis à vis the Court. The origin and history of the Sheriff’s position and authority is succinctly captured by the authors of *Mather on Sheriff and Execution Law* [3rd ed. 1935, reprinted 1990 by William M. Gaunt & Sons Inc., Holmes Beach, Florida, USA] at chapters 1 and 2 being “The Shrievalty from

early times” and “Encroachments on the original power of the Sheriff”. The authors note at p. 2 that the position of the Sheriff as the executive officer of the Crown “has all along been the outstanding characteristic of the office”.

[30] Furthermore they note that the residual powers of the Sheriff in carrying out court orders are preserved unless removed by proper authority, citing the Lord Chief Justice in *R. v. Lydford*, [1914] 2 KB 378. The text, therefore, is an excellent source of the law as it stood in England in 1935. While encroachments on the Sheriff’s status and duties have eroded the full extent of their ancient duties in Nova Scotia, their continued status is not to be underestimated.

[31] However, does that extraordinary status entitle the Sheriff to exceptional recourse to this Court as requested here? With respect to those who believe otherwise, I do not conclude that it does, in the circumstances of this case. In essence, the Sheriff seeks an opinion from the Court that he believes would clothe him with greater protection from civil immunity than he would otherwise enjoy. I decline to make such pronouncements because:

1. The Court does not have the benefit of the evidence and arguments of either Iran or Israel, which would present a full “airing” of the facts and law upon which I could make such sought after declarations. I observe here that even Sheriff’s counsel did not cross-examine Mr. Emil Hirsch, the affiant and U.S. counsel for Mr. Reed on the matters in dispute when given the opportunity.
2. There are available alternative effectual remedies:
 - (a) The Sheriff has the benefit of his own cadre of legal counsel available to guide the execution of his duties, and to give him opinions as to his liability exposure in carrying them out.
 - (b) The Sheriff also has the available procedural protections of the *Creditors Relief Act* and the Interpleader Rule (see also s. 15 of the *Proceeding Against the Crown Act*, R.S.N.S. 1989 c.360).
 - (c) Though expressing no opinion on its availability or merits, arguably the Sheriff could request an indemnification agreement from the creditor, Mr. Reed, before he acts, though this may be seen as inconsistent with his public duties to act as directed by the Court’s Execution Order. In this respect, see for example the following:

- i. Paras. 82 and 90 of *Wickwire Holm v. Nova Scotia (Attorney General)*, 2007 NSSC 287;
 - ii. *Borealis Exploration Ltd. v. Manitoba*, 2000 MBQB 239, at para 48, affirmed in an endorsement, 2001 MBCA 165;
 - iii. *Overn v. Strand*, [1931] SCR 720, which appears to hold that “where a Sheriff seizes and sells property under a writ of execution which is regular on its face and was issued out of a court of competent jurisdiction, he is protected by the writ unless the goods are not in fact the good of the execution debtor”; and
 - iv. As to the effect of interpleader, see *British Columbia (Deputy Sheriff) v. Canada (Petro Canada Inc.)*, [1987] BCJ No. 2360 (Co. Ct.).
- (d) Furthermore, other cases of interest are:
- i. *Canada v. James Noseworthy Ltd.*, (1990) 271 APR 77, (NLSC).
 - ii. *Ballantyne v. McCulloch and Company*, [1927] 3 WWR 148, (BCCA) at para 5.

[32] On balance, the law does seem to incline to protecting a Sheriff who merely seize “chattels” under an Execution Order, and if he/she use the interpleader mechanism to preserve them, provided he/she acts within the facial authority of the order, and has a reasonable basis for seizing the assets in question.

[33] I should acknowledge that there may be implications arising from the *State Immunity Act*, RSC 1985, c. S-18 and the *Justice for Victims of Terrorism Act*, S.C. 2012 c.1, s.2 which came into force March 13, 2012, as well as the Regulations Amending the Special Economic Measures (Iran) Regulations, SOR/213-283.

[34] However, these arguments of substantial rights and immunities should not be, and need not be, addressed by me at this hearing. Any arguments about state immunity can be adequately made at a later date – see for example *Steen v. Islamic Republic of Iran*, 2013 ONCA 30.

[35] Lastly, in the factors regarding declaratory relief, I find it is not in the interests of justice to grant declaratory relief in this case at this time, because:

3. (a) To do so would unnecessarily create for Sheriffs, and possibly others, an “open door policy” by this Court which I believe would be difficult to close in future.

(b) The Sheriff has effectual alternative routes to address his concerns and the Court should only act to declare on matters of law where it is necessary to do so, and then only when it has a proper factual foundation to determine the matter.

Conclusion

[36] Whether characterized as not being a proper “Motion for Directions”, or as an anomalous request for declaratory relief, I find it appropriate to decline to give the Sheriff the requested “guidance/authorization of the Court as to what assets in which the judgment debtor has an interest in the jurisdiction of Nova Scotia are legally subject to seizure.”

Rosinski, J.