NOVA SCOTIA COURT OF APPEAL
Citation: *Bonitto v. Halifax Regional School Board*, 2015 NSCA 3

Date: 20150113
Docket: CA 431358
Registry: Halifax

Between:

Sean Bonitto

Appellant

v.

Halifax Regional School Board

Respondent

Judge:	Farrar, J.A.
Motion Heard:	January 8, 2015, in Halifax, Nova Scotia in Chambers
Held:	Appellant's motion for stay dismissed. Respondent's motion for security for costs dismissed.
Counsel:	Appellant in person Sheree L. Conlon, for the respondent

Decision:

[1] Sean Bonitto was unsuccessful in an action against the Halifax Regional School Board (HRSB) wherein he alleged that the HRSB violated his rights under s. 2(a) and (b) of the **Canadian Charter of Rights and Freedoms**, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11.

[2] Costs were awarded against him in the amount of approximately $15,000 including disbursements.

[3] Mr. Bonitto appeals the dismissal of his action and seeks a stay of the costs order. The HRSB, in turn, seeks security for costs.

[4] Both motions were heard together on January 8, 2015. For the reasons that follow I would dismiss both motions. I would not award costs to either party on the motions.

Background

[5] This appeal arises out of a decision of Justice Pierre Muise dismissing Mr. Bonitto's action against the HRSB.

[6] Mr. Bonitto is a fundamentalist Christian who has two children who attend the Park West School in Halifax, Nova Scotia. Park West has students ranging from grades primary to nine, ages 4 to 15.

[7] While attending at the school to deliver or retrieve his children or to meet with school staff, Mr. Bonitto distributed religious literature in the form of gospel tracts to persons on the school grounds, including students, during school hours.

[8] He was directed by the principal of Park West and other representatives of HRSB to discontinue the practice while students were present and HRSB was responsible for them.

[9] The principal also refused Mr. Bonitto's request to approve distribution of the religious material.

[10] Mr. Bonitto commenced action against HRSB alleging that his freedom of religion and freedom of expression under s. 2(a) and (b) of the **Charter** had been infringed.

[11] He sought damages of $85,000 and a declaration that he be permitted to distribute the materials on the school grounds.

[12] The trial was heard over three days in November, 2013. By written decision dated December 9, 2013 (2014 NSSC 311), Justice Muise dismissed the action. In his decision, the trial judge found:

1. The Park West School was not a location where the appellant's right to religious freedom was protected;
2. Alternatively, if the property was a location where his rights were protected, those rights were not breached; and
3. In the further alternative, if his rights had been breached the breach was justified.

[13] Mr. Bonitto appeals citing 21 grounds of appeal questioning the trial judge's determination on all of the above-noted findings.

[14] I will not set out all of the grounds of appeal, however, they include:

- There is no prescribed law according to s. 1 of the **Charter** and, therefore, that section could not be invoked to justify violating Mr. Bonitto's rights;
- The Park West School property is public property covered by s. 2(a) and (b) of the **Charter** and that the trial judge erred in finding that it was not;
- The trial judge's decision was a complete ban of Mr. Bonitto's freedom of religious expression which did not constitute proportionality in relation to the supposed objective promoted by HRSB; and
- Numerous other grounds of appeal where Mr. Bonitto alleges that Justice Muise either misapprehended the evidence, misunderstood Mr. Bonitto's argument, or misapplied case law.

[15] In a separate decision released November 14, 2014 (2014 NSSC 406), Mr. Bonitto was ordered to pay to HRSB a total of $13,500 in costs plus $2,078.40 in disbursements inclusive of HST.

[16] As of the date of the motions Mr. Bonitto had not paid the costs award.

[17] With the background in mind, I will now turn to the motions that were before me.

Mr. Bonitto's Stay Motion

[18] The substance of Mr. Bonitto's evidence on his stay motion is contained in his affidavit. Portions relating to his reasons for the stay are relatively short and I will reproduce them here in their entirety:

> 4. THAT the Halifax Regional School Board is a government funded agency, financially aided, and supported by the Government of Nova Scotia.
>
> 5. THAT Mr. Bonitto receives a small honorarium as a Pastor, and has been working entry level positions at or slightly above minimum wage levels, per hour, for many years, and is not working a full-time job at this time.
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> 6. THAT the costs far exceed Mr. Bonitto's ability to pay, and would cause extreme financial hardship to Mr. Bonitto and his family.
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> 7. THAT Mr. Bonitto would be unable to fulfil the order to pay the costs in the 30 days required by the lower court.
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> 8. THAT Mr. Bonitto would not be able to pay at this time the $2,078.40 in disbursements, much less the $13,500 in costs.

[19] In addition to the evidence set out in his affidavit, Mr. Bonitto sought to introduce other evidence by way of his oral submissions and his pre-motion brief.

[20] HRSB, properly, objected to Mr. Bonitto attempting to introduce evidence during his oral submissions. As a result, I ruled it inadmissible. The information in his pre-hearing brief is not contentious. I will refer to some of it.

[21] Finally, Mr. Bonitto disclosed to the Court during the course of his motion that he is continuing to disseminate religious materials at the Park West School and will continue to do so in the future. His explanation being that Justice Muise's decision does not prevent him from disseminating the materials but rather, simply dismissed his action and awarded costs against him.

[22] With respect to Mr. Bonitto, this ignores the obvious. The school principal refused his request to disseminate religious materials on the school grounds. Justice Muise's decision found that the school principal's decision was a valid decision and dismissed Mr. Bonitto's request for a declaration allowing him to distribute the material. It follows from the decision that Mr. Bonitto is not to be distributing religious materials on the school property.

[23] I will come back to this point later in these reasons.

[24] Mr. Bonitto's motion is pursuant to s. 90.41 of the **Civil Procedure Rules**:

> 90.41 (1) The filing of a notice of appeal shall not operate as a stay of execution or enforcement of the judgment appealed from.
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> (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.

[25] **Purdy v. Fulton Insurance Agencies Ltd.** (1990), 100 N.S.R. (2d) 341 (C.A.) remains the leading authority regarding stays of execution pending appeal. An appellant who seeks a stay bears the burden of satisfying a 3-part test or showing that there are exceptional circumstances:

> [28] In my opinion, stays of execution of judgment pending disposition of the appeal should only be granted if the appellant can either
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> (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
>
> (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.

[26] I will now turn to address each of the elements in **Fulton**.

Arguable Issue

[27] This aspect of the **Fulton** test was discussed by Beveridge, J.A. in **Soontiens v. Giffen**, 2011 NSCA 1:

> [22] What constitutes an arguable issue was addressed by Freeman J.A. in *Coughlan et al. v. Westminer Canada Ltd. et al.* (1994), 125 N.S.R. (2d) 171 at para. 11:
>
> > "An arguable issue" would be raised by any ground of appeal which, if successfully demonstrated by the appellant, could result in the appeal being allowed. That is, it must be relevant to the outcome of the appeal; and not be based on an erroneous principle of law. It must be a ground available to the applicant; if a right to appeal is limited to a question of law alone, there could be no arguable issue based merely on alleged errors of fact. An arguable issue must be reasonably specific as to the errors it alleges on the part of the trial judge; a general allegation of error may not suffice. But if a notice of appeal contains realistic grounds which, if established, appear of sufficient substance to be capable of convincing a panel of the court to allow the appeal, the Chambers judge hearing the application should not speculate as to the outcome nor look further into the merits. Neither evidence nor arguments relevant to the outcome of the appeal should be considered. Once the grounds of appeal are shown to contain an arguable issue, the working assumption of the Chambers judge is that the outcome of the appeal is in doubt: either side could be successful.

[28] I have summarized above some of Mr. Bonitto's grounds of appeal. As has been said by this Court many times and recently in **Soontiens**, it is not for the Chambers judge to examine the merits of the grounds of appeal. It is sufficient if I am satisfied that an arguable issue has been raised.

[29] On a review of the grounds of appeal, I find that they are specific and raise questions of law and are of sufficient substance to be capable of convincing a panel of this Court to allow the appeal. I am satisfied the grounds raise arguable issues.

[30] It is not necessary for me to say anything more with respect to this part of the **Fulton** test.

Irreparable Harm

[31] This is not the usual situation faced by this Court when looking at the issue of irreparable harm. There is no allegation that HRSB is incapable of reimbursing

Mr. Bonitto should he be successful on the appeal (See for example, **R. v. Innocente**, 2001 NSCA 97, ¶6), which is the usual foundation for arguing irreparable harm.

[32] Mr. Bonitto's argument is somewhat unique. He says that he will suffer irreparable harm in the following ways:

1. his credit rating may be impacted;
2. if he has to pay the judgment debt or his income is garnished, he would be unable to meet his other financial obligations which could cause a hardship to his family; and,
3. if his automobile is seized on an execution order, he would not be able to earn any income.

[33] In my view, the evidence submitted by Mr. Bonitto falls far short of showing irreparable harm.

[34] Dealing first with the credit rating, Mr. Bonitto already has a judgment against him in the amount of approximately $15,000. There is no evidence that an issuance of a stay in this proceeding would in any way impact on his credit rating either negatively or positively. The reality is, regardless of whether a stay is granted or not, there is a debt owing by Mr. Bonitto to HRSB.

[35] With respect to the creation of a financial hardship, although Mr. Bonitto has not provided a lot of particulars with respect to his income, he has sworn in his affidavit that he receives a small honorarium as a pastor and has been working at entry level positions at the above minimum wage level for many years.

[36] In his motion brief he indicates that his usual monthly income is approximately $250-$350 CAD and at times raises to $350-$600 CAD per month if more time is devoted to the ministry work.

[37] This falls far short of the minimum set out in Rule 79.08(3) of the **Civil Procedure Rules** which provides that no amount is payable under an execution order if the debtor's net wages are less than $450 per week for someone who supports a dependent or $330 per week for someone who has no dependents. Mr. Bonitto's stated salary falls far below either of those minimums.

[38] Finally, with respect to the use of a car, Mr. Bonitto provided no details as to the type of vehicle which he drives, the owner of that vehicle, whether or not it is

subject to a finance agreement or any other particulars. In fact, he indicated during the hearing of this matter that he did not own the car. Again, this falls far short of establishing irreparable harm. On the information provided, it appears the vehicle would not be subject to execution.

[39] Mr. Bonitto provided no evidence of any property, real or personal, that would be subject to seizure or that the seizure which would result in irreparable harm to him.

[40] He fails on the second part of the **Fulton** test. As a result, it is not necessary to address the balance of convenience part of the test.

Exceptional Circumstances

[41] Having found that Mr. Bonitto's stay motion does not meet the 3-part test in **Fulton**, I will now turn to whether he has established exceptional circumstances.

[42] I refer, again, to Justice Oland's decision in **Innocente, supra**, where she discussed exceptional circumstances:

> [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.
>
> [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*, provided this guidance at para. 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.
>
> [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 (C.A.) at para. 15. See also *Hartlen v. Oceanart Pewter Canada Ltd.*, [1999] N.S.J. No. 192 (C.A.) at para. 8. [Emphasis added]

[43] The evidence submitted in support of the motion and the circumstances surrounding the action and the award of costs do not give rise to any exceptional circumstances that would justify a stay.

[44] The motion for a stay is dismissed.

Clean Hands

[45] Even if I were satisfied that Mr. Bonitto satisfied the 3-part test in **Fulton** or that there were exceptional circumstances, I would nevertheless deny his motion. I will explain why.

[46] Earlier I commented about Mr. Bonitto admitting that he was continuing to distribute religious materials at Park West and that he intended to continue to do so in the future. In my view, this clearly contravenes the trial decision.

[47] In **White v. E.B.F. Manufacturing Ltd.**, 2005 NSCA 103, Saunders, J.A. held:

> 25 Notwithstanding the powerful arguments advanced by Mr. McLellan for the appellant, I am not persuaded that I ought to exercise my discretion by granting a stay pending the appeal.
>
> 26 The remedy sought by the appellant is an equitable one. To be accorded such equitable relief, the applicant must come to the court with clean hands. In my opinion it has not.

[48] Similarly, I am not satisfied that Mr. Bonitto comes to this Court with clean hands.

[49] It seems to me to be somewhat incongruent to order a stay on the costs decision of Justice Muise while Mr. Bonitto openly defies the substance of the original decision. His suggestion that he is not acting contrary to the decision of Justice Muise – because the decision simply dismissed his action and did not prevent him from disseminating religious materials – is a distinction without a difference. Clearly the issue that was front and center before the trial judge, and

which is addressed in his decision, was Mr. Bonitto's ability to disseminate religious information on the school grounds.

[50] Mr. Bonitto's actions in continuing to disseminate religious material in the face of the trial decision would result in my refusing his motion even if he were otherwise entitled.

[51] I will now turn to HRSB's motion for security for costs.

Security for Costs

[52] HRSB brings a motion pursuant to Civil Procedure Rule 90.42 for an order requiring Mr. Bonitto to post security for costs. It has not filed any affidavit evidence in support of its motion. Rather, it relies upon Mr. Bonitto's own evidence referred to by me earlier when addressing the stay motion.

[53] Civil Procedure Rule 90.42 governs security for costs and provides:

> 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.

[54] It is well-established that security for costs on an appeal is ordered only where the respondent can show "special circumstances".

[55] In **Sable Mary Seismic Inc. v. Geophysical Services Inc.,** 2011 NSCA 40, Beveridge, J.A. discussed what constitutes special circumstances and the residual discretion that remains even if special circumstances exist:

> *Special Circumstances*
>
> [6] There are a variety of scenarios that may constitute "special circumstances". There is no need to list them. All bear on the issue of the degree of risk that if the appellant is unsuccessful the respondent will be unable to collect his costs on the appeal. In *Williams Lake Conservation Co. v. Kimberley-Lloyd Development Ltd.*, 2005 NSCA 44, Fichaud J.A. emphasized, merely a risk, without more, that an appellant may be unable to afford a costs award is insufficient to constitute "special circumstances". He wrote:

> [11] Generally, a risk, without more, that the appellant may be unable to afford a costs award is insufficient to establish "special circumstances." It is usually necessary that there be evidence that, in the past, "the appellant has acted in an insolvent manner toward the respondent" which gives the respondent an objective basis to be concerned about his recovery of prospective appeal costs. The example which most often has appeared and supported an order for security is a past and continuing failure by the appellant to pay a costs award or to satisfy a money judgment: *Frost v. Herman*, at para. 9-10; *MacDonnell v. Campbell*, 2001 NSCA 123, at para. 4-5; *Leddicote*, [2001] N.S.J. No. 394, at para. 15-16; *White*, [2000] N.C.J. No. 162, at para. 4-7; *Monette v. Jordan* (1997), 163 N.S.R. (2d) 75, at para. 7; *Smith v. Heron*, at para. 15-17; *Jessome v. Walsh*, [2002] N.S.J. No. 458, at para. 16-19.

See also *Branch Tree Nursery & Landscaping Ltd. v. J & P Reid Developments Ltd.*, 2006 NSCA 131.

> [7] However, the demonstration of special circumstances does not equate to an automatic order of security for costs. It is a necessary condition that must be satisfied, but the court maintains a discretion not to make such an order, if the order would prevent a good faith appellant who is truly without resources from being able to prosecute an arguable appeal. This has sometimes been expressed as a need to be cautious before granting such an order lest a party be effectively denied their right to appeal merely as a result of impecuniosity (*2301072 Nova Scotia Ltd. v. Lienaux*, 2007 NSCA 28, at para. 6; *Smith v. Michelin North America (Canada) Inc.*, 2008 NSCA 52).

[56] HRSB's argument is that there are special circumstances in this case which support an order for security for costs. It relies on Mr. Bonitto's affidavit evidence which it says shows he has no ability to pay even the lower court disbursements awarded against him, let alone the costs of $13,500 or any costs of disbursements which may be awarded against him if the respondent is successful on the appeal.

[57] I am prepared to accept that the fact the costs order below has not been satisfied and Mr. Bonitto's own evidence that he has no ability to pay it, are special circumstances which may give rise to an order for security for costs.

[58] However, in these circumstances, I decline to exercise my discretion in making an order for security for costs. The same evidence which HRSB relies upon to show that there are special circumstances leads me to conclude that Mr. Bonitto is without resources to pay security for costs. As a result, an order for cost would prevent him from being able to prosecute his appeal.

[59] I had earlier found that Mr. Bonitto's case raised arguable issues. As noted by Justice Muise in his costs decision (**Bonitto v. Halifax Regional School Board**, 2014 NSSC 406), Mr. Bonitto's action brings into play a novel set of facts with some legal complexity which were of significant importance to both him and HRSB (see ¶10, 11 and 12). In my view, Mr. Bonitto is a good faith appellant who is without resources to pay a security for costs award. His appeal is not frivolous. The result of my order would be to deny him his right of appeal.

[60] I am not prepared to do so. I would exercise my discretion to dismiss the order for security for costs.

Conclusion

[61] The motions are dismissed without cost.

Farrar, J.A.