NOVA SCOTIA COURT OF APPEAL
Citation: Annapolis County (Municipality) v. Nova Scotia (Human Rights Commission), 2005 NSCA 164

Date: 20051216
Docket: CA 259385
Registry: Halifax

Between:

The Municipality of the County of Annapolis

Appellant

and

The Nova Scotia Human Rights Commission

Respondent

Judge:	The Honourable Justice M. Jill Hamilton
Application Heard:	December 15, 2005, in Halifax, Nova Scotia, In Chambers
Held:	Stay granted.
Counsel:	W. Bruce Gillis, Q.C., for the appellant J. Michael Wood, Q.C., for the respondent Edward Gores, for the Attorney General of Nova Scotia

Decision:

[1] This is an application by the Municipality for a stay of execution under **Civil Procedure Rule** 62 (10) of the order under appeal, except that part ordering it to pay costs.

[2] The Municipality has appealed the decision and order of Warner, J. in which he ordered the Municipality to provide certain information, including oral information from municipal councillors and employees, to the Commission in connection with an investigation. Broadly stated the Commission is investigating a complaint made by a former voluntary member of one of the Municipality's committees, in which the complainant alleged that he was discriminated against because of his political beliefs when his position on that committee was terminated. The Commission's investigator wants to talk to the people who have knowledge of the reasons why the complainant was removed from the committee.

[3] The Municipality has filed a notice of appeal generally alleging that the judge erred by ordering the production of documents that had already been provided; by ordering the production of information from municipal councillors who are not under the control of the Municipality; by finding that there was insufficient evidence as to the presence of a solicitor at the two meetings where the decision to terminate the complainant was made; in determining what discussions are subject to solicitor-client privilege and by deciding that the municipal councillors have no right to remain silent under the common law or the **Canadian Charter of Rights and Freedoms** during the Commission's investigation.

[4] Both parties accept that the onus is on the Municipality to prove that it meets the three part test set for a stay out in **Fulton Insurance Agencies Limited v. Purdy** (1990), 100 N.S.R. (2d) 341 (S.C.A.D. chambers) at p. 346-347: that there is (1) an arguable issue raised on the appeal, (2) that if the stay is not granted the Municipality will suffer irreparable harm, and (3) that the balance of convenience between the Municipality and the Commission favors the granting of the stay.

[5] The Commission concedes the first aspect of the test, that there is an arguable issue raised on appeal.

[6] On the second aspect of the test, the Commission agrees that prima facie there is irreparable harm because the forced disclosure of information alone may constitute irreparable harm. It argues however that some further consideration is required to determine whether actual harm will result in the context of the appeal, which it argues has not been shown in this appeal. I disagree.

[7] In **O'Connor v Nova Scotia**, [2001] N.S.J. No.90, Cromwell, J. A., in Chambers, granted a stay of an order requiring the Province to produce documents, relating to a review that it had done of a large number of government programs, pursuant to the **Freedom of Information and Protection of Privacy Act**, 1993, c. 5, s.1. When considering the issue of irreparable harm Cromwell, J.A. states:

> [12] The term "irreparable harm" comes to us from the equity jurisprudence on injunctions. In that context, it referred to harm for which the common law remedy of damages would not be adequate. As Cory and Sopinka, JJ. pointed out in **RJR — MacDonald v. Canada (Attorney General)**, [1994] 1 S.C.R. 312 at 341, the traditional notion of irreparable harm is, because of its origins, closely tied to the remedy of damages.
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> [13] However, in situations like this one which have no element of financial compensation at stake, the traditional approaches to the definition of irreparable harm are less relevant. As Robert J. Sharpe put it in his text, *Injunctions and Specific Performance* (Looseleaf edition, updated to November, 2000) at § 2.450, "... irreparable harm has not been given a definition of universal application: its meaning takes shape in the context of each particular case."
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> [14] It is, therefore necessary to consider the risk of harm in the specific context of an access to information case in which an order granting access has been made and is being appealed. In that situation, the risk if a stay is not granted pending appeal is that the information will be released and thereafter, if the appeal succeeds, that release will be found to have been unlawful. In my view, such wrongful release may constitute irreparable harm in at least three ways.

[15] First, the release of the information may injure the persons affected by its release in ways which cannot be compensated by money.

[16] Second, once access to information is granted, it cannot be undone if the order for access is subsequently reversed on appeal. The harm is irreparable in the sense that a legal wrong has been committed which cannot be compensated or reversed. In some cases, the injury resulting from disclosure will be minimal, but that does not detract, in my view, from the proper characterization of the wrongful disclosure as constituting irreparable harm. As Cory and Sopinka, JJ. said in **RJR — MacDonald, supra**, irreparable refers to the nature of the harm rather than its magnitude. The essence of the concept is a wrong which cannot be undone or cured. **The unlawful disclosure of information, even where it does not injure anyone, is a wrong which cannot be undone or cured and is, therefore, capable of being "irreparable" for the purposes of a stay pending appeal**.

[17] **Third, the disclosure of the contested information will generally render the effects of a successful appeal nugatory. There is ample authority for the proposition that where that is the result of the refusal of a stay pending appeal or judicial review, irreparable harm has been shown:** see, for example, **National Financial Services Corp. v. Wolverton Securities** (1998), 160 D.L.R. (4th) 688 (B.C. C.A. Chambers) at § 29 and 32; **Suresh v. Canada (Minister of Citizenship and Immigration)** (1999), 176 D.L.R. (4th) 296 (Fed. C.A. Chambers) at pp. 305 - 307; **Gaudet v. Ontario (Securities Commission)** (1990), 38 O.A.C. 216 (Div. Ct.); **Re Hayles and Sproule** (1980), 29 O.R. (2d) 500 (Ont. Div. Ct.).

. . .

[20] . . . In my view, the respondent's argument focuses, incorrectly, on the injury (or lack of it) that may be caused by the information becoming public. As the analysis above shows, the risk of actual injury caused by wrongful disclosure may constitute irreparable harm. That is not the only way, however, that wrongful disclosure may constitute irreparable harm. **In my view, the forced disclosure of information, if subsequently proved to have been wrongful, itself constitutes irreparable harm. The forced disclosure is an action taken under compulsion which is later proved to have been unlawful. The wrongful disclosure cannot be undone or compensated by money damages. Once disclosure has been made, the right of appeal becomes academic.** In my

> opinion, the refusal of a stay in this case exposes the appellant to irreparable harm in these two senses of the term
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> (Emphasis mine)

[8] I accept these principles and find them applicable here. Once the information is provided by the Municipality, it cannot be undone if the order for production is subsequently reversed on appeal. The failure to grant the stay would negate the effect of a successful appeal, constituting irreparable harm without the need to prove actual harm. See also **Fulton Insurance**, supra, ¶ 14, 15 and 16.

[9] The third aspect to be considered is the balance of convenience. The Municipality argues that it will suffer significant prejudice if the stay is not granted because once it has provided the information ordered it cannot be undone and the appeal will be rendered useless. The Commission argues that it will suffer prejudice if the stay is granted because the information being sought is oral and for the most part depends on the memories of those in attendance at two meetings held in August and September of 2003.

[10] The date set for the appeal is April 19, 2006, approximately four months from now. The meetings about which oral information is sought were held approximately 2 years and three months ago. While I appreciate a further four months may affect the memories of those who attended the meetings and cause prejudice to the Commission, I am satisfied the Municipality would suffer greater prejudice if the stay is not granted since its appeal would be rendered nugatory.

[11] For the foregoing reasons I grant the stay requested. It will remain in effect until the disposition of this appeal or earlier order of the panel at the time of the hearing of the appeal. I request the Municipality's counsel to prepare an order to this effect and submit it to me.

Hamilton, J.A.