NOVA SCOTIA COURT OF APPEAL
Citation: *Young v. Jackson Estate*, 2020 NSCA 74

Date: 20201113
Docket: CA 496525
Registry: Halifax

Between:

Bill Young

Appellant

v.

Estate of Judith Marie Jackson, as represented by Laura Beth Kelly & Sarah Jillian Barnes in their capacities as Administrators of the Estate and Attorney General of Nova Scotia

Respondents

and

Women's Legal Education and Action Fund Inc.

Intervenor

Judge:	Van den Eynden, J.A.
Motion Heard:	October 7, 2020, in Halifax, Nova Scotia in Chambers
Held:	Appellant's motion for advance costs and preservation order dismissed. Respondent Estate's motion for security of costs granted.
Counsel:	Allison Kouzovnikov, Roseanne Skoke and Allison Avery, for the appellant Daniel Boyle, for the respondent Estate of Judith Marie Jackson Jeff Waugh, for the respondent Attorney General of Nova Scotia Kelly McMillan, for the intervenor Women's Legal Education and Action Fund Inc.

Decision:

Overview

[1] The process for setting this appeal down for hearing stalled. The appellant (Mr. Young) says he cannot file a compliant Certificate of Readiness. This certificate requires that he confirm a transcript of the proceeding below has been ordered, when it will be completed and the date the Appeal Book will be filed. Mr. Young says he cannot afford to produce the required transcript and Appeal Book, nor can he fund any other costs of moving his appeal forward. Mr. Young thinks the Attorney General of Nova Scotia (AG) should be obliged to fund the costs of advancing his appeal, including the legal fees of his two counsel.

[2] To that end, Mr. Young filed a motion requesting an award of advance (or interim) costs. He also requests a preservation order aimed at preserving the real property in dispute.

[3] The respondent Estate filed a security for costs motion because, if Mr. Young is unsuccessful on appeal, there is legitimate concern he will be unable to pay any costs award made against him.

[4] Both parties requested costs, depending on the success of their respective chamber motions.

[5] After hearing the contested motions, I reserved decision. For the reasons that follow, I dismiss Mr. Young's request for relief and grant the Estate's motion for security for costs in the amount of $3,000 payable on the terms set out herein. For these motions, Mr. Young shall also pay costs of $500 to the Estate.

[6] I turn to set out the background, the issues, and my analysis.

Background

[7] Mr. Young appeals an order arising from the decision of the Honourable Justice Glen G. McDougall (*Jackson Estate v. Young*, 2020 NSSC 5). Mr. Young was the common law partner of the late Judith Marie Jackson (Ms. Jackson) who died intestate. Meaning, she died without preparing a will.

[8] Ms. Jackson and Mr. Young lived in Ms. Jackson's home. The title to this property was solely in Ms. Jackson's name and the couple did not take any steps to

add Mr. Young as a title holder. Nor did they register their relationship as a domestic partnership under the *Vital Statistics Act,* R.S.N.S. 1989, c. 494, which would have altered their rights and obligations. Both Mr. Young and Ms. Jackson had been previously married and divorced, and Justice McDougall found as a fact that they would have had some understanding of matrimonial property rights.

[9] Ms. Jackson's daughters, Laura Beth Kelly and Sarah Jillian Barnes, were appointed administrators of her estate. In this capacity, Ms. Kelly and Ms. Barnes initiated the proceedings below. Part of the relief sought was an order requiring Mr. Young to vacate the home. He refused and took the position he was a "spouse" for the purposes of the *Intestate Succession Act*, R.S.N.S. 1989, c. 236 *(ISA),* and was entitled to inherit Ms. Jackson's property. Alternatively, he argued the exclusion of common law couples under the *ISA* infringes s. 15(1) of the *Canadian Charter of Rights and Freedoms (Charter);* and, as a further alternative, he claimed equitable relief. Mr. Young filed a notice of constitutional question below; hence the AG was added as a party.

[10] The judge determined that common law spouses are excluded from inheritance under the *ISA*, the Act was constitutional and there was no basis to award equitable relief. Mr. Young was ordered to vacate the home and to pay costs to the Estate in the amount of $10,000.

[11] As noted, Mr. Young has not perfected his appeal—he says without public funding from the AG he cannot proceed. Mr. Young filed an affidavit setting out his financial circumstances. He deposed:

> [13] My only source of income in 2020 is my disability cheque in the amount of $1,041.17 per month and my Widower's Allowance (coded Old Age Security) which totals $966.62 per month.…
>
> [15] I have no assets to draw upon, such as savings, investments or real property.
>
> [16] I am not currently employed and am not able to work due to my disability.
>
> [17] Due to my low income, I do not have the ability to pay for this litigation. I have only been able to contribute a small amount, such as $100 here and there to cover photocopying and court fees.
>
> …
>
> [18] As I live with my daughter, my monthly expenses are as follows: $300 contribution towards rent; $175 for car insurance, $200 for gas, $200 for car maintenance, $60 for cell phone, $400 for groceries, $600 for pain management (medical marijuana), plus miscellaneous expenses.

> …
>
> [20] To continue these proceedings, my lawyers are volunteering their time.
>
> [21] I cannot afford the transcript required to support this appeal, which has an estimated cost of $4,800 plus HST.
>
> [22] I am not able to borrow the money needed to fund this appeal as I had credit card debt and no income to pay it off. That situation gave me bad credit.
>
> [23] I will not be able to proceed with this appeal without funding.

[12] The noted cost award of $10,000 is outstanding. Mr. Young acknowledges he is unlikely to pay these costs, nor respond to any costs this Court might award in the event his appeal is unsuccessful.

[13] The property at the center of this dispute, a home in rural Pictou County, is of modest value—optimistically $60,000. It is quite run down and badly in need of major repairs. The home is the only Estate asset of any value and, due to the litigation costs already incurred for the proceedings below and now in responding to this appeal, legal costs will likely surpass the value of the Estate. At the same time, carrying costs of the Estate are ongoing and the administrator, Ms. Kelly, personally loaned $10,000 to the Estate to cover some cleanup and partial maintenance to the home. In short, the net effect of this appeal, regardless of the outcome, is there will likely be nothing left for any beneficiary. Mr. Young recognizes that even if he were successful on appeal, returning to the home he formerly shared with Ms. Jackson is not a realistic option.

[14] Nevertheless, Mr. Young contends the appeal raises issues of public importance which he says will affect the law of intestate succession beyond the scope of his private dispute with the Estate. As stated, Mr. Young wants the AG to fund the costs of advancing his appeal which includes the cost of preparing the transcript, appeal disbursements and the fees for his two lawyers (Allison Kouzovnikov and Roseanne Skoke). He asks that I approve a "litigation budget". And to assuage the Estate's concerns with its mounting legal costs in responding to his appeal, well, Mr. Young submits, *"the Attorney General of Nova Scotia does have the financial means to fund this* [appeal] *litigation - for all parties if that is this Honourable Court's will - and in fact* [the AG] *has a moral duty to do so…"*

[15] Mr. Young also asks for a preservation order, preventing the sale of the home. He did not pursue a stay of execution under *Civil Procedure Rule* 90.41, which is the process to follow when seeking to halt the enforcement of an order pending appeal.

[16] Mr. Young's motion included a request to grant him immunity from any cost award should he be unsuccessful on appeal. When I pressed his counsel for any authority I have as a chambers judge to usurp the panel's authority to award costs following their determination of his appeal, Mr. Young withdrew his request for immunity.

[17] Mr. Young also sought an extension of time to file his required Motion for Date and Directions. In an earlier chambers appearance, the extension was granted as well as a motion to join the Women's Legal Education and Action Fund Inc. (LEAF) as an Intervenor. The Intervenor took no position on the various contested motions before me on October 7th.

[18] The Estate opposes the motion for advance costs and preservation relief sought by Mr. Young. However, the Estate contends that, should I order the AG to fund Mr. Young's appeal litigation, then I should consider, as Mr. Young suggests, that the Estate also receive funding. As to its motion for security for costs on appeal, the Estate is seeking $4,000 or 40% of the costs awarded in the court below.

[19] Mr. Young seeks costs of $2,500 for having to pursue his motion. The Estate asks for $500 in costs.

[20] The AG opposes the motion for advance costs and does not seek costs against Mr. Young. The AG takes no position on the other motions.

[21] A number of affidavits were filed in support of the motions. As noted, Mr. Young provided an affidavit, as did his counsel Ms. Kouzovnikov, Allison Avery, articled clerk to Ms. Skoke, and Ms. Kelly, one of the Estate Administrators. Some affidavit evidence was struck by agreement. Cross-examination of the deponents was waived. Extensive written and oral submissions were provided.

[22] I will review any other necessary background or affidavit evidence in my analysis.

Issues

[23] The various motions filed presented the following issues for determination:

1. Should advance costs be paid by the AG?
2. Should a preservation order be granted?

3. Should the appellant pay security for costs?
4. Should costs be awarded on these motions?

I will deal with each in turn.

Analysis

Should advance costs be paid by the AG?

[24] As a general statement, it is Mr. Young's responsibility to perfect and marshal his appeal forward. But he says he cannot afford to do so and wants the AG to shoulder the financial responsibility by providing (public) advance funds. Mr. Young has fixed on the AG paying the costs because the Estate's only asset of value (the home) has dwindled as a result of the litigation and Estate insolvency looms.

[25] As noted, Mr. Young wants funds sufficient to procure the necessary transcripts, prepare and file the Appeal Books, cover other appeal disbursements, and secure counsel to represent him on appeal. He asks that I approve a "litigation budget" so he can proceed with his appeal.

[26] Mr. Young provided information about his projected costs; however, some details were lacking. For example, in her affidavit, Ms. Kouzovnikov deposed:

> 74. I have recently discovered that I may in fact need recordings of every Court appearance in this matter, not simply the trial, so will likely need to order additional recordings.
>
> 75. Two estimates for the completion of the transcript based on the trial alone have been obtained. One over the phone and one in writing. They are in the range of $4,000 - $5,000 + HST. Costs for the appeal book are estimated at another $1,000 - $1,500 if they must be printed.

[27] Mr. Young did not provide the costs of the additional transcripts; however, if a transcript of all appearances in the court below is required, which may well be the case, the expenses will exceed the above estimates.

[28] Similarly, the request for the AG to fund Mr. Young's counsels' fees lacks detail. The focus of the affidavit evidence was on the financial circumstances of counsel and the nature of their respective practices (something the AG submits should have no bearing on whether the taxpayers of Nova Scotia should bear the

financial burden of this appeal), rather than providing a projected budget for the appeal litigation. For example, Ms. Kouzovnikov deposed:

> 6. I am a sole practitioner. I practise in association with Archibald Lederman in Truro.
>
> 7. At any point in time about 30-40% of my practise consists of legal aid certificates.
>
> 8. Currently I have legal aid certificates in Shubenacadie, Truro, Pictou, Antigonish and Kentville.
>
> 9. Legal Aid pays an hourly rate of $80 for someone with my years of experience. Legal Aid also sets the maximum number of billable hours per file which generally means that several hours are written off with each file.
>
> …
>
> 11. I have tried to reduce the number of certificates that I take on in order to increase my earnings, but the demand far exceeds the supply of lawyers willing to work at this rate. I regularly receive calls from the respective offices asking me to help.
>
> 12. My annual income is negatively impacted by the amount of legal aid work I take on as it leaves me with fewer hours available to see client's (sic) at my regular rate of $225-$250 per hour. In addition to taking certificates, I also offer a sliding scale based on my client's ability to pay.
>
> 13. I am the breadwinner in my home. …
>
> 14. To date I have worked *pro bono* on this file due to Mr. Young's inability to pay or obtain funding from Nova Scotia Legal Aid. I have incurred out-of-pocket expenses of driving from Halifax to Pictou for several days of trial, the filing fee for the appeal, and the fees to obtain the recordings of the trial.
>
> 15. This file is very complex and requires a lot of work. I estimate that I have donated at least $30,000 worth of services to date. This is a very significant amount to me and my family.
>
> 16. Thinking about the financial cost of this file to date causes me anxiety. When this happens, I try to focus on the greater public good involved.
>
> 17. It will be a very substantial financial burden to me to continue working for free if Mr. Young's motion for advance costs is not granted.

[29] The circumstances of Mr. Young’s other counsel on appeal (Ms. Skoke) were set out in the affidavit of her articling clerk, Ms. Avery. She deposed:

> 3. I understand and do verily believe based on my discussions with Roseanne Skoke and my direct observations of her practise that Ms. Skoke's practise is largely devoted to servicing the poor in the Pictou County area.

> …
>
> 6. Ms. Skoke and Ms. Allison Kouzovnikov are co-counsel for the Appellant Bill Young. Together we are providing our legal services for this appeal at no charge ("Firm"). This is a significant burden for the Firm and one which significantly challenges its resources. Both counsel have already provided their services for free, or essentially for free, at the trial level.

[30] Apart from the above affidavit evidence and Mr. Young's co-counsel indicating in written submissions that should advance costs be awarded they presume their regular hourly rates will apply, not much further detail was provided.

[31] I posed questions to Ms. Kouzovnikov to try and ascertain the scope of the financial ask for the requested litigation budget. Nothing specific was provided other than it might be in the range of $25,000 to $50,000. But that was a guess.

[32] Both the Estate and the AG expressed frustration that Mr. Young did not provide any proposed budget. He suggests their concerns could be addressed by a two step process—should advance costs be approved (step one), limited funds could be advanced now so the transcript and Appeal Book could be prepared and filed and the matter could return to chambers at a later date to establish a litigation budget (step two). However, this approach involves additional costs to the parties, something the Estate, for good reason, is very sensitive to given the dwindling net value of the Estate. Alternatively, Mr. Young suggests costs could be capped at a figure I thought appropriate or taxed at a later date.

[33] Although the request for advance costs should have been better specified, the lack of detail is not why the motion failed. The award of advance costs is a rare discretionary remedy; reserved for exceptional cases. Before I review the legal principles that govern, I note Mr. Young cited no authority where advance costs were awarded to fund appellate litigation. I raised this point with the parties when setting this matter down for a hearing. All authorities referred to advance costs at the trial level. (Mr. Young did not seek an award in the court below.)

[34] There are cases where this Court has considered an appellant's request to escape the obligation to produce a transcript (For example, see chamber decisions: *Hughes v. Vincent*, 2015 NSCA 21; *Mercier v. Nova Scotia (Attorney General)*, 2014 NSCA 93; and *Li v. Jean*, 2012 NSCA 63). However, I am unaware of any decision of this Court determining a motion for advance costs to fund appellate litigation.

[35] That said, there are several authorities dealing with a request for advance costs to fund appellate litigation in other jurisdictions. (For example, see *C.(L.) v. Alberta*, 2017 ABCA 133; *Québec (Procureure générale) c. D'Amico*, 2016 QCCA 351; *Versluce Estate v. Knol*, 2008 YKCA 3; *Johnson v. Fishing Lake Metis Settlement*, 2020 ABCA 17; *Corneau c. Procureure générale du Québec*, 2018 QCCA 1171; *The Hastings Park Conservancy v. Vancouver (City)*, 2007 BCCA 69; *Mahjoub v. Canada (Citizenship and Immigration)*, 2012 FCA 296; *Metrolinx (Go Transit) v. Canadian Transportation Agency*, 2010 FCA 45; *Wang v Alberta (Justice)*, 2018 ABCA 345; *Schmidt v. Canada (Attorney General)*, 2016 FCA 206; and *Edmonton (City) v Edmonton (Subdivision and Development Appeal Board)*, 2018 ABCA 382).

[36] I note that two of the foregoing cases (*Schmidt* and *Edmonton (City)*) raise the issue of whether a court of appeal judge sitting alone should hear a motion for advance costs, or defer to the panel.

[37] In *Schmidt*, the appellant's motion failed because the judge was not satisfied the appellant was unable to fund his own appeal. However, the judge went on to query, but not answer, whether such a motion was more properly addressed by a panel, because any award of costs might be seen to usurp the panel's authority to award costs. And in *Edmonton (City)*, the judge deferred to a panel as he found the record before him insufficient to determine all aspects of the requisite test. Some of the advance costs cases cited in para. 35 herein were decided by judge alone, some by panels. The rules of court or statutory provisions of a particular jurisdiction inform whether such a motion would be heard by a panel or a judge alone or both.

[38] This is a civil appeal governed by Rule 90. Nothing in Rule 90 expressly deals with advance costs. Mr. Young relies upon Rules 90.37 (1), (2), (14) and 90.48(1)(c) as authority for advance costs.

[39] Rule 90.48 speaks to the powers of the Court of Appeal, not a single judge sitting in chambers. Rule 90.48(1)(c) and (e) provide:

> 90.48 Powers of the Court of Appeal
>
> (1) Without restricting the generality of the jurisdiction, powers and authority conferred on the Court of Appeal by the *Judicature Act* or any other legislation the Court of Appeal may do all of the following:
>
> …

> (c) make such order as to costs of the trial, hearing, or appeal as the Court of Appeal considers is in the interest of justice;
>
> …
>
> (e) make any order or give any judgment that the Court of Appeal considers necessary.

[40] There is no question a panel has authority to determine a motion for advance costs, but do I, as a judge sitting alone? The parties did not question my authority to determine a motion for advance costs; in fact, they did not address this question. Given it appears this is the first instance advance costs have come before this Court to fund appellate litigation, and the Rules are not express, I examined my authority to determine the issue as judge alone.

[41] As noted, nothing in Rule 90.37 or elsewhere in Rule 90 expressly speaks to a motion for advance costs on appeal.

[42] Mr. Young relies on Rule 90.37(14), but it is too narrow and is intended to capture a judge awarding costs, in the usual course, after determining the outcome of a motion. In fact, he relies upon this Rule when requesting costs for having to bring his motion—which is the final issue I address. Rule 90.37(14) provides:

> 90.37 (14) A judge of the Court of Appeal may order costs of a motion be paid by a party to another party.

[43] However, Rule 90.37(1) and (2) are broadly worded and provides:

> 90.37 Motion to a judge of the Court of Appeal
>
> (1) A motion to a judge of the Court of Appeal may be made or responded to, in accordance with this Rule 90.37.
>
> (2) **A judge of the Court of Appeal has and may exercise any power necessary to deal with a motion made to the judge under this Rule 90.37 or any other Rule**, or other legislation. [emphasis added]

[44] Rule 90.02 (1) provides:

> 90.02 Scope of Rule 90
>
> (1) The *Civil Procedure Rules* that are not inconsistent with this Rule apply to proceedings in the Court of Appeal with necessary modifications as directed by the Court of Appeal or a judge of the Court of Appeal.

[45] Advance costs appear to fall under Rule 77.02(1), which applies to proceedings in the Supreme Court of Nova Scotia (NSSC) and provides: "A presiding judge may, at any time, make any order about costs as the judge is satisfied will do justice between the parties." That rule was referenced in *Pictou Landing First Nation v. Nova Scotia (Attorney General),* 2014 NSSC 61, and in *Armoyan v. Armoyan,* 2014 NSSC 143, decisions where the NSSC determined motions for advance costs at the trial level.

[46] I am mindful of the parameters a judge sitting alone has. In *Future Inns Canada Inc. v. Nova Scotia (Labour Relations Board),* 1996 NSCA 11, Justice Hallett explained that the jurisdiction of a judge of the NSCA sitting alone to hear civil applications is limited to what is delegated under the *Civil Procedure Rules*, or by statute. Similarly, in *R.B. v. Children's Aid Society of Nova Scotia,* 2002 NSCA 108, Justice Cromwell clarified that this must be either an express or implied grant of power. And in *Abridean International Inc. v Bidgood,* 2017 NSCA 25, Justice Bryson noted that the powers of a single NSCA judge are largely procedural and interlocutory in nature.

[47] I am also mindful that judges sitting in chambers have utilized Rule 90.02(1), where appropriate, to consider the engagement of other Rules, including Rule 77. (See for example: *Sable Mary Seismic Inc. v. Geophysical Services Inc.*, 2012 NSCA 57; *Nova Scotia (Attorney General) v. Morrison Estate,* 2009 NSCA 116; *R. v. Ross,* 2012 NSCA 8; C*ape Breton Explorations Ltd. v. Nova Scotia (Attorney General),* 2013 NSCA 116; and *Lewis v. Tsavos*, 2013 NSCA 115.)

[48] Although, a motion for advance costs could be deferred to a panel, I see no prohibition in our Rules or *Judicature Act,* R.S.N.S., c. 240, that would prevent my determination of the motion as a judge alone in chambers. This is a motion for interim relief, incidental to the appeal, and in no way is determinative of the merits. In addition to the requisite authority, I have the benefit of the extensive materials filed and submissions, which I am satisfied properly equip me to decide the issue.

[49] I turn to the principles which, the parties agree, govern a motion for advance costs. The Supreme Court of Canada (SCC) established the following criteria in *British Columbia (Minister of Forests) v. Okanagan Indian Band,* 2003 SCC 71:

> 40 … I would identify the criteria that must be present to justify an award of interim costs in this kind of case as follows:
>
> > 1. The party seeking interim costs genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial

> — in short, the litigation would be unable to proceed if the order were not made.
> 2. The claim to be adjudicated is *prima facie* meritorious; that is, the claim is at least of sufficient merit that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means.
>
> 3. The issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases.

[50] However, even if these conditions are met, that does not mean costs will necessarily be granted. In *Okanagan* the SCC explained:

> 41 … The fact that they are met in a particular case is not necessarily sufficient to establish that such an award should be made; that determination is in the discretion of the court. If all three conditions are established, courts have a narrow jurisdiction to order that the impecunious party's costs be paid prospectively. … When making these decisions courts must also be mindful of the position of defendants. The award of interim costs must not impose an unfair burden on them. In the context of public interest litigation judges must be particularly sensitive to the position of private litigants who may, in some ways, be caught in the crossfire of disputes which, essentially, involve the relationship between the claimants and certain public authorities, or the effect of laws of general application. …

[51] Subsequent SCC decisions made clear that advance costs awards are the exception and rare. They are a last resort and only to be granted when the lack of public funding would work a serious injustice (see *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue),* 2007 SCC 2, and *R. v. Caron*, 2011 SCC 5).

[52] Further, just because Mr. Young advances a *Charter* challenge, that does not automatically equate to an issue of sufficient public importance. On this point, the majority decision of the SCC in *Little Sisters* explains:

> [64] … **But not all *Charter* litigation is of exceptional public importance**, … **It is not enough to contend that the *Charter* breach, if proven, would have implications beyond the individual litigant. What must be proved is that the alleged *Charter* breach begs to be resolved in the public interest**. In the context of *Okanagan*, this meant proving that there were issues that had to be resolved one way or the other. The exceptional circumstances in that public interest case were related not so much to obtaining a certain result as to ensuring that the state's and bands' rights and obligations were defined properly — and

> definitively — in a context where it seemed important that the court develop a proper method for adjudicating land claims. Thus, not every case that could, once decided, be seen as being of public importance should be viewed as a special case within the meaning of *Okanagan*. Recognizing a case as special cannot be justified solely by reference to one particular desired or apprehended outcome of the litigation. It must be based on the nature of the litigation itself. [Emphasis added in original]

[53] Although *Okanagan, Little Sisters*, and *R. v. Caron* dealt with advance costs for proceedings at the trial level, the same criteria applies when determining whether advance costs should be granted to pursue appellate litigation. While there appears to be no decision from this Court on that point, other appellate courts have so held. For example, see *C.(L.) v. Alberta, Québec (Procureure générale) c. D'Amico, Versluce Estate v. Knol,* and other cases cited in para. 35 herein.

[54] Turning to the application of the legal principles, the first question to consider is whether Mr. Young can afford to pay for the litigation, and is there no other realistic option to bring the issues to trial?

[55] The AG concedes Mr. Young is impecunious and has no ability to personally fund his own appeal. Nor does the Estate challenge on this ground. But what about funding options other than the AG?

[56] The efforts made by Mr. Young to secure funding from various third parties is set out in the affidavits of Ms. Avery and Ms. Kouzovnikov. They depose that multiple entities were considered in an effort to secure funding, including Nova Scotia Legal Aid, Law Foundation of Nova Scotia, LEAF (who intervenes), Charter Challenges Program, Dalhousie Law School, Canadian Constitution Foundation, and the Nova Scotia Advisory Council on the Status of Women.

[57] Mr. Young did not secure funding; however, the inquiry to the Access to Justice and Law Reform Institute raised a possible funding option—it said it could explore crowd funding or fundraising for the intervenor. Mr. Young acknowledged he did not follow up on this possibility. And also the Law Foundation of Nova Scotia reportedly rejected the request, in part, because it was out of sync with its grant cycle. However, this was not pursued further by Mr. Young.

[58] I am satisfied Mr. Young does not have the personal funds to bring his appeal. Although it appears he did not completely exhaust all the above-noted funding leads, it seems unlikely they would realistically materialize, at least to the full extent he requests.

[59] Next, I consider whether Mr. Young's claim is *prima facie* meritorious—in other words, *"is at least of sufficient merit that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means."* (para. 40, *Okanagan)*

[60] In his Notice of Appeal, Mr. Young challenges the decision and resulting order on these grounds:

> 1. The learned judge erred in law and fact in determining that the legislature's objective for excluding common law couples from the *ISA* was to preserve the choice and individual autonomy of the members of a common law marriage.
>
> 2. The learned judge erred in law in determining that the exclusion of common law couples from the *ISA* was rationally connected to the objective.
>
> 3. The learned judge erred in law in determining that the exclusion of common law couples under the *ISA* was not disproportionate to the overall benefits of the legislation.
>
> 4. The learned judge erred in law and fact in determining that Mr. Young's claim for equitable remedies failed and that he did not have an equitable interest in the real property.

Mr. Young requests these remedies on appeal: (1) an order declaring that the exclusion of common law couples from the *ISA* infringes s. 15 (1) of the *Charter* and the infringement is not justified under s. 1; and (2) common law couples should be read into the *ISA* and the *Probate Act's* reference to "spouse" with retrospective effect.

[61] The AG did not clearly oppose the motion for advance costs on the basis Mr. Young failed to demonstrate sufficient merit. Nor did the Estate. Rather, the focus of the main objection is on the third criteria of the *Okanagan* test—whether "*the issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases."*

[62] The ultimate merit of Mr. Young's grounds of appeal is for a panel to decide. Although there may well be some basis to question the merit of at least some grounds of appeal for the purpose of this motion, I do not decline to award advance costs under this inquiry. The AG's and the Estate's focus on the third requirement is well placed. The material shortcomings of Mr. Young's motion are apparent when analyzing whether he has met this requirement to which I turn.

[63] Mr. Young contends the issues he raises on appeal transcend his personal interests, are of public importance, and have not been resolved in previous cases, either before this Court or the SCC. In his written submission, Mr. Young says:

> …this case is not just about Mr. Young, his deceased common-law wife Judy Jackson, and a run-down house in the middle of nowhere Nova Scotia. It's about every common law couple in Nova Scotia today that is not aware of their inability to access Nova Scotia's succession law regime despite the *Charter* protections which are supposed to exist, and the perils which flow from that which can include becoming homeless in the middle of a global pandemic when you have no other assets, no access to credit, and live in poverty.
>
> Neither the Nova Scotia Court of Appeal nor Supreme Court of Canada have previously considered the issues raised in this appeal specific to succession law.

[64] In summary, the AG submits:

- The appeal is not a unique circumstance of public importance because the *Charter* issues raised have already been addressed by the SCC in *Quebec (Attorney General) v. A*, 2013 SCC 5.
- This is fundamentally a dispute between Mr. Young and the Estate over a rapidly dwindling asset. The Estate is the party who theoretically should respond to a motion for advance funds to level any financial playing field between the main litigants. However, the Estate is also impecunious and cannot realistically respond to such a request; however, that does not make it appropriate to seek costs from the AG to have the public fund Mr. Young's ongoing dispute with the Estate. Particularly when Mr. Young has already had the benefit of lengthy proceedings and a decision below.
- Although their willingness to provide *pro bono* services to Mr. Young to date may be commendable, the financial circumstances of Ms. Kouzovnikov and Ms. Skoke do not drive the analysis—as the test is not to lighten the financial burden of counsel.
- Common law couples are presumptively excluded from the *ISA*, but are not totally excluded. Thus, the legislation does not present a legislative gap. Specifically, common law couples can obtain the benefits (and subject themselves to the burdens) of the *ISA* if they register as a domestic partnership under the *Vital Statistics Act*. Further, the Government of Nova Scotia has been publicly

exploring potential changes to the *Matrimonial Property Act*, R.S.N.S. 1989, c. 275, relating to common law couples through consultation and through the legislature. The Government is in the best position to engage in public consultation, to consider evidence from social scientists and others, and then to decide how to proceed.

- Although LEAF has been granted, by consent, intervenor status in this appeal, that does not elevate this case to the level of public importance required to obtain an order for advance costs.
- Advance costs are rare and only awarded in exceptional circumstances and these circumstances fall far short of what is required.

[65] The Estate essentially echoes the AG's position. The AG's arguments are persuasive; however, I need only focus on whether Mr. Young's appeal is of sufficient public importance, and whether issues raised have been previously resolved—matters which he must establish in order to succeed on his motion.

[66] Constitutional litigation, as a general statement, is a matter of public importance. However, when advance costs are at stake, something more than simply raising *Charter*/constitutional issues is required given the threshold established by the SCC that such costs are rare and only to be awarded in exceptional circumstances. I repeat what was established in *Little Sisters:*

> [64] …not all *Charter* litigation is of exceptional public importance, … It is not enough to contend that the *Charter* breach, if proven, would have implications beyond the individual litigant. What must be proved is that the alleged *Charter* breach begs to be resolved in the public interest."

[67] Although our understanding of the *Charter* evolves, Mr. Young has not persuaded me that the issues he raises on appeal beg to be resolved in the public interest. Nor has he established that the issues raised have not been addressed in previous cases. Apart from stating the SCC decision in *Quebec v. A* was "a split decision with little cohesion" and that "the particular facts … were not helpful to the consideration of common people…" nothing of any substance was offered by Mr. Young to establish that this SCC decision has no bearing on the issues Mr. Young claims are unresolved on appeal.

[68] The AG addressed the application of *Quebec v. A* extensively in its written submissions. I refer to these excerpts:

> 27. At issue in *Quebec v. A* was the exclusion of common law partners from rights and obligations of married partners under the *Civil Code of Quebec.* Common law partners had no right to claim support, no right to divide the family assets, and were not governed by any matrimonial regime. This is unlike Nova Scotia, where common law couples can register as a domestic partnership. The Supreme Court of Canada held in *Quebec v. A* that the exclusion was an infringement of section 15(1) of the *Charter* but that the infringement was constitutional. Four of five judges found that the provisions of the *Civil Code* did not infringe section 15(1), and Justice McLachlin created a majority of the Court upholding the provisions by finding that there was an infringement, but that it was justified under section l.
>
> 28. The decision is *Quebec v. A* was relied upon by Justice McDougall at the Court below to find that, while the exclusion of common law couples infringes section 15(1) of the *Charter,* the infringement is saved by section 1. ...
>
> 29. It was also noted by Justice McDougall in the decision below that, although the Law Reform Commission had discussed the presumptive exclusion of common law spouses, it did not state that the ISA was unconstitutional:
>
> > [188] Before moving on, I acknowledge that the Law Reform Commission has recommended that the *Matrimonial Property Act*, the *Probate Act* and the *Intestate Succession Act* be amended to include common law couples. The Commission has not, however, suggested that the exclusion of common law couples is unconstitutional. In its Final Report - Division of Family Property (2017), after reviewing the Supreme Court of Canada rulings in *Walsh*[1] and *Quebec v. A,* the Commission stated:
> >
> > > Absent a constitutional obligation to include common law couples, it remains up to provincial legislatures to decide whether or not to extend their matrimonial property regimes.
>
> 32. The Appellant argues that *"Quebec* v. *A* was a split decision with little cohesion". While there was certainly some divergence in the reasoning of the judges, a coherent decision of the Court upheld the exclusion of common law spouses …

[69] Given the context of Mr. Young's appeal and the foregoing SCC authorities that bear upon his appeal, an award of advance costs is not warranted. No serious injustice results as the issues are not unique, nor do they equate to exceptional

---

[1] *Nova Scotia (Attorney General) v. Walsh*, 2002 SCC 83, a majority of the SCC upheld Nova Scotia's *Matrimonial Property Act* in the face of a *Charter* challenge regarding the exclusion of common law spouses from the property division regime. The majority found there was no section 15 infringement.

circumstances. Mr. Young has not satisfied the third requirement of the *Okanagan* test.

[70] Further, even if Mr. Young were to have met all of the *Okanagan* criteria, which he has not, I would decline to exercise my discretion. I refer back to these comments contained in *Okanagan*:

> 41. … The fact that they [the requisite criteria] are met in a particular case is not necessarily sufficient to establish that such an award should be made; that determination is in the discretion of the court. If all three conditions are established, courts have a narrow jurisdiction to order that the impecunious party's costs be paid prospectively. … When making these decisions courts must also be mindful of the position of defendants. The award of interim costs must not impose an unfair burden on them…

[71] Both the Estate and AG have a long list of reasons why I should decline jurisdiction in the event all the preconditions were satisfied. They include:

- the appeal process is certain to bankrupt the Estate, leaving no prospect of any beneficiary receiving any benefit from the Estate;

- Mr. Young has already received his day in court, so to speak, in the proceedings below. Given his acknowledgement that the Government is already seeking public input on potential legislative amendments, he can advocate for change through participation in the consultation and legislative process versus a judicial route. These considerations help offset the effect of having to abandon his appeal in the event his counsel are not prepared to continue *pro bono* as they were content to do so in the court below; and

- no litigation budget has been submitted for the Court and AG to review. Having to return on yet another chambers motion to finalize a litigation budget is an ongoing waste of the parties' limited resources.

[72] Had I determined the requisite criteria was met, several of these factors, as well as others, present compelling reasons to decline the exercise of discretion.

[73] In conclusion, the AG should not shoulder any costs of advancing Mr. Young's appeal. I decline to award any advance costs.

Should a preservation order be granted?

[74] In the court below, the trial judge determined Mr. Young had no legal or equitable interest in the home and ordered him to vacate. As noted, Mr. Young appealed this order.

[75] In his motion Mr. Young requests an order:

> e) Preserving and preventing the sale or disposal of the only asset in dispute, the former … home… Pictou County, Nova Scotia, pending the outcome of this Appeal.

[76] Mr. Young devoted little attention to this relief in his original written submissions and relied on Rule 42.01 which governs preservation orders in the court below. The Rule provides:

> 42.02 Preservation of evidence or property by injunction
>
> (1) A party who files an undertaking as required by Rule 42.07 may make a motion for an injunction to preserve evidence relevant to an issue in, or to preserve property claimed in, a proceeding.
>
> (2) The motion must be made on notice to each party and the person in control of the evidence or property, unless the motion may be made *ex parte* under Rule 22.03, of Rule 22 - General Provisions for Motions.
>
> (3) The order may be restraining, mandatory, or part restraining and part mandatory.

[77] When setting this matter down for a contested chambers hearing, I informed Mr. Young's counsel of the Rule 90 stay provisions which govern the stay of an order pending appeal. The Rule provides:

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

And further, although the applicable legal principles for a stay and a preservation order are to a great extent comparable, I questioned Mr. Young's counsel whether there was any authority for his approach to ignore Rule 90.41.

[78] Mr. Young provided no authority where this Court granted a preservation order versus a stay. Nor did he amend his motion to seek a stay under Rule 90.41. Rather, he filed supplemental submissions referencing unhelpful cases pertaining to the granting of preservation relief at the trial level.

[79] I decline to entertain Mr. Young's motion for a preservation order. Should Mr. Young wish to halt the operation of the order below pending appeal, the remedy is a stay, not a preservation order.

[80] The foregoing is not to encourage a stay motion; making such a motion is up to Mr. Young. That said, I note the Estate advises it has no intention of selling or encumbering the property in dispute until the appeal is determined.

Should the appellant pay security for costs?

[81] Security for costs addresses a respondent's concern over the collection of costs on appeal in the event an appellant is unsuccessful. It is discretionary relief—both in terms of quantum and whether to grant the order. The Rule provides:

> 90.42 Security for costs
>
> (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.

[82] To succeed, the Estate must establish "special circumstances". But again, even if established, the Court maintains discretion not to make such an order. As explained in *Sable Mary Seismic Inc*:

> [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: [citations omitted]

[83] *Lienaux v Norbridge Management Ltd*., 2013 NSCA 3, addressed impecuniosity of an appellant, explaining how courts have approached this factor:

> [26] This jurisprudence shows that litigants will not be denied access to the courts – even to the Court of Appeal – simply because they cannot post security for costs. However, the authorities do suggest that the "access to courts" argument is weaker in appeal settings because the appellant has already been heard at trial. Nevertheless, security for costs has been refused where an impecunious appellant risks losing his day in the Court of Appeal. **But the loss of one's day in court is not usually determinative. The Court's exercise of discretion is not so one-dimensionally constrained. All the circumstances should be taken into account, including the interests of the respondent on appeal,** (2001 NSCA 122, at 35). I would not dismiss the motion simply because it may prevent Mr. Lienaux from pursuing his appeal. … [emphasis added]

[84] Turning to the circumstances before me, there is no dispute that Mr. Young is impecunious. He cannot even afford to procure the required transcript for his appeal. He acknowledges it is unlikely he can pay the outstanding cost award of $10,000 from the court below or respond to any costs awarded against him if unsuccessful on appeal. In fact, as noted, he wanted me to grant him immunity from costs if unsuccessful on appeal—something I have no authority to do. There is more than just mere risk. Taken together, it is clear that if Mr. Young is unsuccessful on appeal, the Estate will not be able to recover any award of costs.

[85] There are other factors to consider. Mr. Young has had the benefit of a trial, although unsuccessful in the end. The legal costs of that lengthy process heavily eroded the value of the Estate. (While on the other hand, Mr. Young benefited from *pro bono* representation.) Of great concern to the Estate is that by the time this appeal is over the Estate will most likely be insolvent. The Estate says Mr. Young should bear at least some responsibility and risk in advancing his appeal, as otherwise he is incentivized to pursue litigation regardless of prejudice to the other parties. And as I have determined under the advance costs issue, this appeal is not a unique matter of public importance and it appears the SCC has addressed the *Charter* issues at play, at least to an extent.

[86] I am satisfied, in the context of this case, the foregoing equates to special circumstances which warrant security for costs even if that impairs Mr. Young's ability to advance his appeal. I turn to quantum.

[87] Rule 90.42 provides no guidance as to the amount. In *Sable Marine Seismic Inc.*, Beveridge, J.A. explained that quantum is discretionary:

> [38] It is obvious that in deciding if security for costs is going to be required, and the quantum, is an exercise of judicial discretion. It must be set in light of the likely award of costs on the appeal if the appellants are unsuccessful. It only seems logical that a cautionary and conservative approach has been traditionally adopted out of concern in creating an unwarranted impediment to accessing the court. …

[88] The Estate requests $4,000 which is 40% of the costs awarded below. Although that is not an unreasonable request, I prefer a more conservative approach in these circumstances and order Mr. Young to post $3,000 as security for costs payable by December 18, 2020. If not paid, the Estate (and/or AG) can bring a motion to have the appeal dismissed.

Should costs be awarded?

[89] Mr. Young was unsuccessful in his motion for advance costs and a preservation order. The Estate was successful in its motion for security of costs. Both the Estate and AG have been put to considerable expense in responding; however, the AG is not seeking costs.

[90] Mr. Young is of limited financial circumstances. But if parties advance positions, they do so knowing there can be costs consequences. In these circumstances, a cost award against Mr. Young is warranted.

[91] Mr. Young shall pay costs in the amount of $500 (inclusive of disbursements) to the Estate. No costs are awarded to the AG as none were sought.

Conclusion

[92] Mr. Young's motion for advance costs and preservation order is dismissed. The Estate's motion for security of costs is granted in the amount of $3,000. Mr. Young shall forthwith pay costs of $500 to the Estate.

[93] This matter is scheduled to return to tele-chambers in the near future. Should Mr. Young intend to pursue his appeal, he must promptly file a Motion for Date and Directions together with a compliant Certificate of Readiness.

Van den Eynden, J.A.