NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Nova Scotia (Ombudsman)*, 2017 NSCA 9

Date: 20170116
Docket: CAC 457321
Registry: Halifax

Between:

Office of the Ombudsman of Nova Scotia

Appellant

v.

Her Majesty the Queen

Respondent

Judge:	Beveridge, J.A.
Motion Heard:	December 22, 2016, in Halifax, Nova Scotia
Held:	Motion granted
Counsel:	Roderick (Rory) H. Rogers, Q.C., for the appellant Roland Levesque, for the respondent

Reasons for judgment:

[1] The Office of the Ombudsman of Nova Scotia (the "Ombudsman") insists that information it gathers as part of an investigation is protected from disclosure. The RCMP obtained an Order for Production under s. 487 of the *Criminal Code*. The Ombudsman objected. A provincial court judge varied the Order.

[2] The Ombudsman unsuccessfully challenged that decision by way of judicial review in the Nova Scotia Supreme Court. The Ombudsman appeals to this Court. Further, he applies for a stay of the Production Order pending appeal.

[3] I heard the application on December 22, 2016, and granted a stay with reasons to follow. These are they.

[4] The facts of the underlying legal contest are not controversial. I will refer to some of them to provide context.

FACTUAL BACKGROUND

[5] In 2011, two former employees of the Cumberland Regional Development Authority (CRDA) complained to the Ombudsman of irregular practices at the CRDA. An investigation ensued. The Ombudsman released his Report in August 2012. It is a public document. He concluded that the financial concerns identified by the complaint were substantiated. A forensic examination under the guidance of the Provincial Auditor General was warranted, with the stated possibility of referral to the police.

[6] The Province engaged PWC to conduct a forensic examination of the CRDA. Their Report of June 2014 resulted in a referral to the RCMP Commercial Crime Unit.

[7] On August 10, 2015, the RCMP obtained a Production Order from a Justice of the Peace that required the Ombudsman to produce "All documents and data relating to the August 2012 Final Report of the Ombudsman". Included were specifics such as all interview notes, and audio-recordings of the forty-two individuals interviewed. The Ombudsman was to comply within sixty days.

[8] Pursuant to s. 487.0193(4) of the *Criminal Code*, the Ombudsman applied to a judge of the Provincial Court to revoke or vary the order on the basis that

production would disclose information that was privileged or otherwise protected from disclosure by law. The Honourable Judge Elizabeth A. Buckle heard the application. She released three decisions.

[9] In her first, dated December 8, 2015, she determined that the information gathered by the Ombudsman was "protected from disclosure by law". However, she interpreted s. 487.0193(4) as bestowing a discretion on a judge to decline to revoke the order even if the information is protected from disclosure by law. She asked for further submissions on whether the order could be varied rather than revoked.

[10] In her second, dated January 21, 2016, she concluded that she was not satisfied on a balance of probabilities she should exercise her discretion to revoke the Production Order. She rejected the requested wording of the Crown. Instead, she varied the Order to require the Ombudsman to produce a "summary of information that would suggest knowledge that CDRA was submitting false or improper documentation". The varied Production Order is dated January 25, 2016. It demanded compliance within 14 days.

[11] Judge Buckle consolidated the two decisions into one on February 8, 2016, and is now reported (2016 NSPC 58).

[12] The Ombudsman applied to the Nova Scotia Supreme Court for judicial review. The application was heard by the Honourable Justice Margaret J. Stewart on June 2, 2016. By informal agreement between the parties, the Ombudsman was not required to comply with the Production Order pending the judicial review application.

[13] Justice Stewart released her decision on October 13, 2016 (2016 NSSC 273). She agreed with Judge Buckle's interpretation of s. 487.0193(4), and with the balancing exercise that led her to vary rather than revoke the Production Order.

[14] The only additional background information that bears on the analysis concerns the investigation. The respondent asserts, and the appellant does not dispute, the RCMP completed their investigation and laid fraud and related charges against Rhonda Kelly on April 22, 2016. For unknown reasons, election and plea was adjourned to January 16, 2017.

PRINCIPLES AND ANALYSIS

[15] Applications for a stay or similar remedy are routine requests in civil cases. In criminal matters, the usual focus is on obtaining bail pending appeal. But in some situations, stays of *Criminal Code* proceedings or orders have been sought. There are some cases that doubt the power to make such orders (see for example: *R. v. Zurowski*, 2003 ABCA 174; *R. v. Howells*, 2009 BCCA 297; *R. v. Taylor*, 2006 BCCA 297). But in Nova Scotia, jurisdiction is well accepted (see: *R. v. Keating* (1991), 106 N.S.R. (2d) 63; *R. v. Dempsey* (1995), 138 N.S.R. (2d) 110; *R. v. MacIntosh*, 2008 NSCA 73).

[16] The respondent does not take issue with my jurisdiction to order a stay of the Production Order, nor with the requirements an applicant must meet for a stay articulated by Hallett J.A., in *Purdy v. Fulton Insurance Agencies Ltd*. (1990), 100 N.S.R. (2d) 341 (C.A.).

[17] There are two tests set out in *Purdy*. The primary test requires: (i) demonstration of an arguable issue raised by the appeal; (ii) 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; (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 balance of convenience). The secondary test permits a judge to issue a stay even if the applicant cannot meet the primary test, but only where there are exceptional circumstances. I need not discuss the secondary test.

[18] The respondent concedes that the appeal raises arguable issues. The concession is appropriate. I need not dwell on this aspect of the primary test. But in order to give context to the analysis of the remaining requirements of the primary test, I will refer to the provisions of the *Ombudsman's Act*, R.S.N.S. 1989, c. 327 that suggest the work of his office is to be done in private and in a confidential manner. For example:

> 3(5) Before entering upon the exercise of the duties of his office the Ombudsman shall take an oath that he will faithfully and impartially perform the duties of his office and will not divulge any information received by him under this Act except for the purpose of giving effect to this Act.
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> ...

> 16 (1) Every investigation under this Act is to be conducted in private.
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> …
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> 17(8) Except on the trial of a person for perjury, evidence given by any person in proceedings before the Ombudsman and evidence of any proceeding before the Ombudsman is not admissible against any person in any court or in any proceedings of a judicial nature.
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> ...
>
> 23(2) The Ombudsman and any person holding any office or appointment under the Ombudsman shall not be called to give evidence in any court or in any proceedings of a judicial nature in respect of anything coming to his knowledge in the exercise of his functions under this Act.

[19] The history and importance of the office is well-documented (see *British Columbia Development Corp. v. British Columbia (Ombudsman),* [1984] 2 S.C.R. 447). The grounds of appeal clearly engage legal issues about statutory interpretation. I turn to the issues of irreparable harm and balance of convenience.

Irreparable Harm

[20] The essence of irreparable harm is that it connotes consequences that cannot be undone or cured by an award of money damages. It is not the size of harm, but the nature of it that gives meaning to "irreparable" (*RJR-MacDonald Inc. v. Canada (Attorney General),* [1994] 1 S.C.R. 311 at para. 59).

[21] In the context of stays of production orders, Cromwell J.A., as he then was, discussed irreparable harm in *O'Connor v. Nova Scotia*, 2001 NSCA 47. A judge ordered disclosure of government documents. The government sought a stay pending appeal. Justice Cromwell set out three ways that irreparable harm might be caused by a failure to stay the order:

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

[22] Because there was no evidence of any actual potential harm to any individual in *O'Connor*, the focus was on the second and third type of irreparable harm. Cromwell J. concluded that this was sufficient:

> [20] I cannot accept this submission. 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 added]

[23] The appellant relies the decision of Justice Cromwell in *Gillespie v. Paterson*, 2006 NSCA 133. A trial judge ordered the appellant to produce medical, employment and other records she considered relevant to a trial where custody was in issue. Trial dates were set for June 2007. The appellant sought a stay pending appeal. Justice Cromwell, citing his reasons in *O'Connor*, agreed irreparable harm was made out:

> [8] I turn to the second requirement, that of irreparable harm. I am satisfied that the appellant will suffer irreparable harm if the orders for production are not stayed and the appeal ultimately succeeds. The essence of irreparable harm is that it is a wrong which cannot be undone or cured: see, for example, *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311. As I said in *O'Connor v. Nova Scotia* (2001), 193 N.S.R. (2d) 8 (C.A., in chambers), the forced disclosure

> of otherwise confidential information cannot be undone or compensated by money damages. Once the disclosure has been made the right of appeal becomes academic: see *O'Connor*, *supra*, at para. 20.
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> [9] In my view, this principle applies in the present case. If the enforcability of these production orders is not stayed and the appeal ultimately succeeds, the appellant will have suffered irreparable harm in the sense that it will not be possible to restore the appellant's rights of privacy in this information.
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> [10] In reaching this conclusion, I have not overlooked the submissions ably made by Mr. Sheppard on behalf of the respondent that many of the issues to which this confidential and private information is likely to relate had been put in issue by the appellant herself in these proceedings. On reflection, my view is that this point will be more properly considered by the panel of the Court which will deal with the appeal on its merits. The fact remains that, if the stay is denied, the production of these records cannot be undone even if the appeal succeeds. That, in my view, constitutes irreparable harm given the nature of these records.

[24] The respondent argues that Judge Buckle's variation of the Production Order has the effect of avoiding harm to the appellant's privacy rights in the information required to be disclosed. While there is no doubt that the varied Production Order is limited in the scope of the information to be produced, once in the hands of the police, the contended for confidentiality of the Ombudsman's work is rendered nugatory. The forced disclosure, which later may turn out to be unlawful, cannot be undone. I am satisfied that irreparable harm has been made out.

Balance of Convenience

[25] A stay is not appropriate unless the appellant can demonstrate that the harm it will suffer is greater than the harm the respondent must bear if the stay is granted. The appellant recognizes that there is a public interest in seeing criminal charges proceed without delay. To that end, it offered to meet compressed filing dates and an early hearing date for the appeal.

[26] Nonetheless, the respondent insists that the balance of inconvenience is tipped in its favour such that a stay is inappropriate. The respondent's brief claims: if the Production Order is stayed it may be in violation of its obligation to disclose all relevant information in its possession to the accused (*R. v. Stinchcombe*, [1991] 3 S.C.R. 326); and the stay could trigger a delay outside of the new presumptive time lines set by *R. v. Jordan*, 2016 SCC 27, thereby jeopardizing a trial on the merits due to unreasonable delay (s. 11(b) of the *Canadian Charter of Rights and Freedoms*).

[27] I am unable to agree that these concerns amount to more harm should a stay be granted. First, with respect to disclosure, the Crown is obligated to disclose what is in its possession or control. The respondent does not suggest that the information being sought by the Production Order is in its possession. I fail to see how this concern is at all relevant to demonstrating harm.

[28] As to delay, the clock starts running with the laying of the Information. The police, with full knowledge of the outstanding challenge to the Production Order before the Nova Scotia Supreme Court, laid the charges. I have no evidence as what has caused the delay from April 2016 to the scheduled date for election and/or plea of January 16, 2017. Most significantly, the identified harm is, at this stage, speculative at best.

[29] The presumptive ceilings on delay set by *Jordan* of 18 months in the provincial court and 30 months in the superior court may never be reached. Even if they are exceeded, the majority decision in *Jordan* refers to the ability of the Crown to avoid a s. 11(b) finding by demonstrating exceptional circumstances—delays caused by circumstances beyond its control or case complexity.

[30] No one has suggested that the dispute over the Production Order has caused any delay to the criminal process; nor is there is any evidence that a stay pending resolution of this appeal will do so.

[31] I referred earlier to the appellant's offer to meet compressed filing dates and an early hearing date. It is to file the Appeal Book by January 6, 2017, its factum by January 27, 2017, and the hearing date for the appeal is March 24, 2017.

[32] In the totality of the circumstances, I am not satisfied that the respondent will suffer more harm should a stay be granted.

[33] The Production Order is stayed, but can be re-visited should the appellant jeopardize an expeditious hearing of the appeal. No costs were sought. I order none.

Beveridge, J.A.