NOVA SCOTIA COURT OF APPEAL

Citation: *Canada (Transportation Safety Board) v. Carroll-Byrne*, 2020 NSCA 21

Date: 20200310
Docket: CA 495035
Registry: Halifax

Between:

The Transportation Safety Board

Appellant

v.

Kathleen Carroll-Byrne, Asher Hodara, Georges Liboy, Air Canada, Airbus S.A.S., Nav Canada, Halifax International Airport Authority, The Attorney General of Canada, representing Her Majesty the Queen in Right of Canada, John Doe #1 and John Doe #2, and the Air Canada Pilots' Association

Respondents

Judge:	Beaton, J.A.
Motion Heard:	February 6, 2020, in Halifax, Nova Scotia in Chambers
Held:	Motion granted
Counsel:	Richard Norman, for the appellant Raymond Wagner, Q.C. and Kate Boyle, for the respondents Kathleen Carroll-Byrne, Asher Hodara, George Liboy Robert Mroz, for the respondent Air Canada, John Doe #1 and John Doe #2 Chris Hubbard, for the respondent Airbus S.A.S. Robert Bell, for the respondent Nav Canada (not participating) Michelle Chai, for the respondent Halifax International Airport Authority Heidi Collicutt and Angela Green, for the respondent the Attorney General of Canada Chris Rootham, for the respondent the Air Canada Pilots' Association (not participating)

Decision:

[1] Following a contested interlocutory hearing, the Transportation Safety Board of Canada (the "TSB") was ordered by the Honourable Justice Patrick J. Duncan of the Supreme Court of Nova Scotia to produce to the respondent Air Bus S.A.S. ("Air Bus") certain audio data from a Cockpit Voice Recorder ("CVR") made during an Air Canada flight, along with any transcripts of the recorded data. The production order was made in the course of class action litigation currently before the Supreme Court of Nova Scotia concerning the landing of the flight at Halifax International Airport on March 28, 2015.

[2] While the TSB is not a party to the class action litigation, the CVR data and transcripts are in its possession, as a result of which the TSB was granted intervenor status to permit it to oppose the interlocutory motion before Justice Duncan.

[3] Immediately following the issuing of the production order, the TSB filed a Notice of Appeal and made a motion in chambers before me, seeking a stay of the Order for production pending hearing of the appeal (*Rule* 90.41(2)). The class action plaintiffs, being some of the respondents on appeal ("the Class") opposed the motion for a stay, and their position was adopted by the respondents Halifax Airport Authority and Air Bus. The remaining respondents took no position on the motion. At the conclusion of the hearing I reserved my decision. The motion is granted for the reasons that follow.

[4] A stay of execution is a discretionary remedy. The burden is on the moving party to establish the necessity for a stay on a balance of probabilities. The TSB and the Class agreed on the test to be applied by this Court, set out in the frequently cited decision in *Fulton Insurance Agencies Ltd. v. Purdy*, 1990 NSCA 23, recently reviewed in *Colpitts v. Nova Scotia Barristers' Society*, 2019 NSCA 45. In *Colpitts*, Beveridge, J.A. discussed the two-part test for granting a stay:

> [22] For the primary test, an applicant will be successful if the Court is satisfied on a balance of probabilities: an arguable issue is raised by the appeal; the appellant will suffer irreparable harm should the stay not be granted (assuming the appeal is ultimately successful); and, the appellant will suffer greater harm if the stay is not granted than the respondent if the stay is granted.

> [23] The appellant may also obtain relief pending an appeal, even if it cannot meet all of the criteria for the primary test, if there are exceptional circumstances that nonetheless make it fit and just to grant a stay. This is known as the secondary test.

[5] The TSB relied on both the primary and secondary tests in support of its motion. The Class acknowledged that the threshold with respect to the first branch of the primary test—whether an arguable issue is raised by the appeal—was met and properly conceded "…that the appellant raises at least one arguable issue that if successfully demonstrated on appeal, could result in the appeal being allowed" (Brief, p. 12).

[6] The Class opposed the motion on the basis the TSB could not establish on a balance of probabilities the second branch of the primary test—that the appellant will suffer irreparable harm should the stay not be granted—nor the third branch—that the TSB will suffer greater harm if the stay is not granted than would the Class if the stay is granted.

[7] As to the second branch of the primary test—whether the appellant will suffer irreparable harm if the stay is not permitted—the TSB asserted there is a broader public interest at stake, despite the private nature of the production order, owing to the statutory privilege the TSB exerts pursuant to s. 28 of the *Canadian Transportation Accident Investigation and Safety Board Act*, S.C. 1989, c. 3 (the "*Act"*). That section provides (in part):

> **Definition of on-board recording**
>
> 28 (1) In this section, ***on-board recording*** means the whole or any part of
>
> (a) a recording of voice communications originating from, or received on or in,
>
> (i) the flight deck of an aircraft,
>
> (ii) the bridge or a control room of a ship,
>
> (iii) the cab of a locomotive, or
>
> (iv) the control room or pumping station of a pipeline, or
>
> (b) a video recording of the activities of the operating personnel of an aircraft, ship, locomotive or pipeline
>
> that is made, using recording equipment that is intended to not be controlled by the operating personnel, on the flight deck of the aircraft, on the bridge or in a control room of the ship, in the cab of the locomotive or in a place where pipeline

> operations are carried out, as the case may be, and includes a transcript or substantial summary of such a recording.
>
> **Privilege for on-board recordings**
>
> (2) Every on-board recording is privileged and, except as provided by this section, no person, including any person to whom access is provided under this section, shall
>
> > (a) knowingly communicate an on-board recording or permit it to be communicated to any person; or
> >
> > (b) be required to produce an on-board recording or give evidence relating to it in any legal, disciplinary or other proceedings.

[8] The TSB relied on s. 28 of the *Act* in support of its position that it would suffer irreparable harm were the stay not granted, as the privilege it asserts pursuant to s. 28 of the *Act* would lose meaning if any of the respondent parties were able to access the CVR pending hearing of the appeal.

[9] In *Colpitts*, Beveridge, J.A. discussed the importance of context in assessing whether irreparable harm can be found to exist:

> [48] Irreparable harm is informed by context. This was described by Cromwell J.A., as he then was, in *Nova Scotia v. O'Connor*, 2001 NSCA 47:
>
> > [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 *R.J.R.-MacDonald v. Canada (Attorney General),* [1994] 1 S.C.R. 311 at 341, the traditional notion of irreparable harm is, because of its origins, closely tied to the remedy of damages.
> >
> > [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."

[10] The TSB maintained the irreparable harm here would occur as the contents of the CVR, once released, could not be "undone", thereby rendering moot its appeal of the granting of the production order.

[11] In *Nova Scotia v. O'Connor*, 2001 NSCA 47, the Court was satisfied the release of certain documents, prior to the hearing of the appeal from the chambers

judge's decision requiring disclosure, could injure persons affected by its release in ways that: would not be compensated by money; could not reverse the undoing of the access to the information; and, would render the effect of a successful appeal nugatory. I am satisfied a similar conclusion can be reached in this case with respect to the inability of the TSB to undo access to the CVR following a successful appeal, and more significantly, the real potential for the outcome of a successful appeal to be rendered effectively meaningless. I agree with the argument put forward by the TSB that there is irreparable harm to be found in the pre-appeal release of the CVR within the context of this case.

[12] As to the balance of convenience question, the third branch of the first test, the TSB argued no harm would come to any of the respondents in granting the stay, other than the delay in releasing the CVR if the June 2020 appeal is unsuccessful, contrasted against the five-year lifespan of the litigation to date.

[13] The TSB maintained it would suffer greater harm if the stay was not granted than would the Class if the stay was granted, as the potential inconvenience of a further modest delay in the progress of the litigation would not be as significant to the Class as would the inability of the TSB to undo the consequences of an already released CVR, should its appeal be successful. I agree.

[14] The Class has no concrete ability to contemplate at this point how release of the CVR might impact or inform settlement of the class action. I cannot disagree with the TSB's observation that in this case its public interest in preserving the statutory privilege it enjoys pursuant to the *Act* outweighs the unknown impact upon the Class's potential for settlement, particularly in the brief time period between release of this decision and the hearing of the appeal on its merits.

[15] The TSB has met its burden in relation to the three aspects comprising the primary test.

[16] As to the second test in *Fulton*, the "exceptional circumstances" assessment, the Class argued the circumstances of the production order cannot be characterized as exceptional. The test was explained by Roscoe, J.A. in *Landry v. 3171592 Nova Scotia Ltd.*, 2007 NSCA 111:

> [10] The secondary test in *Fulton*, states that in exceptional circumstances the court may grant a stay if it is fit and just. Recently in *W. Eric Whebby Ltd. v. Doug Boehner Trucking & Excavating Ltd.*, 2006 NSCA 129, Justice Cromwell considered the secondary test and explained that it is rarely satisfied:

> [11] Very few cases have been decided on the basis of the secondary test in *Fulton*. Freeman, J.A. in *Coughlan et al. v. Westminer Canada Ltd. et al.* (1993), 125 N.S.R. (2d) 171 (C.A., in Chambers) at para. 13 offered as an example of exceptional circumstances a case in which the judgment appealed from contains errors so egregious that it is clearly wrong on its face. As Fichaud, J.A. observed in *Brett v. Amica Material Lifestyles Inc.* (2004), 225 N.S.R. (2d) 175 (C.A., in Chambers), there is no comprehensive definition of "exceptional circumstances" for *Fulton's* secondary test. It applies only when required in the interests of justice and it is exceptional in the sense that it permits the court to avoid an injustice in circumstances which escape the attention of the primary test.
>
> [12] While there is no comprehensive definition of what may constitute "exceptional circumstances" which may justify a stay even if the applicant cannot meet the primary test, those exceptional circumstances must show that it is unjust to permit the immediate enforcement of an order obtained after trial. So, for example, in *Fulton* itself, Hallett, J.A. found that exceptional circumstances consisted of three factors in combination: first, that the judgment was obtained in a summary proceeding rather than after trial; second, that on the face of the pleadings the appellant raised what appeared to be an arguable issue and, thus, was likely to be successful on appeal; and third, the appellant had a counterclaim and claim to a set off that had not been adjudicated making it premature to execute on the summary judgment.
>
> [13] ***While there can be no comprehensive definition of what constitutes special circumstances, they must be circumstances which show that it would be unjust to permit immediate enforcement of the judgment.*** This is because a stay of execution, in common with interim injunctive relief, must justly apportion the risk of uncertainty about the ultimate outcome of the case. There are arguable issues raised on appeal, but one cannot at this stage speculate about what the outcome of the appeal will be. The risk created by this uncertainty is shared by both the appellant and the respondents. If a stay is granted and the appeal ultimately fails, the respondents will have been kept out of their money needlessly. If, on the other hand, the stay is denied and the appeal ultimately succeeds, the appellant will have been required to pay the judgment needlessly.
>
> [Emphasis added]

[17] The TSB asserted the exceptional nature of this case also rests in its statutory privilege under the *Act*. Jean L. Laporte, the former Chief Operating Officer of the TSB, filed affidavit evidence on the motion to the effect that the release of the CVR pending the decision on appeal could have the potential to compromise future investigations by the TSB because potential witnesses (e.g. pilots) might in future

avoid having certain conversations in the cockpit knowing a record of those might potentially be shared. Additionally, Mr. Laporte testified the CVR is effectively already in the hands of the litigants by virtue of the TSB Report previously generated concerning the plane landing, which Mr. Laporte viewed as providing sufficient information to permit the parties to reconstruct in detail both the flight and events in the cockpit, without need for the CVR. The evidence on these points, while not challenged by cross-examination, seems on its face to be speculative in nature. I am not persuaded the TSB's concerns as expressed by Mr. Laporte rise to the level of exceptional circumstances. Given my earlier conclusion as to the primary test having been met, the absence of exceptional circumstances does not prevent the imposition of a stay.

[18] As an alternative, the Class proposed that any determination that the TSB could meet either of the two tests in *Fulton* could be resolved by the imposition of a partial stay. Permitting the CVR to be released to a limited and circumscribed audience consisting of counsel for a party and their office staff but not the party would, according to counsel for the Class, meet the TSB's concerns by limiting circulation of the information simultaneously with permitting any of the respondents to continue exploration of a potential resolution of the action regardless of the pending appeal hearing. On p. 13 of its brief the Class proposed:

> 39. Pending the outcome of the Appeal, the CVR and transcript would not be disclosed more broadly to any named party, insurers of a named party, to experts or consultants who are assisting counsel in the prosecution or defense of the Action; or to the court, mediators, and court reporters. If necessary, to facilitate resolution, counsel could advise their clients about the strength of their case based on their review of the CVR, but could not disclose any specific conversations or facts they learned from the CVR.

[19] The Class suggested that permitting a partial stay in this manner would not cause irreparable harm to the TSB, and further that acting under such "comprehensive confidentiality safeguards" would effectively negate concerns in respect of the balance of convenience branch of the primary test, as both the TSB's and the respondent parties' interests would be served. According to the Class, proceeding in this fashion would avoid any conclusion the TSB might suffer irreparable harm:

> 48. By permitting the CVR's release only to counsel for the parties, who are under order to maintain its strict confidentiality, there is no "wrong which cannot be undone or cured." (p. 16, Brief)

[20] The Class asserted the only risk associated with the granting of a partial stay on the terms it proposed would be that counsel for the parties, but not the parties themselves, would have access to the CVR. Counsel for the Class suggested that if the appeal should determine the CVR should not have been disclosed, then counsel for the parties would then simply treat the CVR contents in the same fashion as they would any other privileged information received in the course of litigation.

[21] The Class invited this Court to balance its proposed solution against the prejudice of further delay to the Class that would be occasioned by the imposition of a stay. It suggested a partial stay would put counsel for the parties in a position analogous to that of a Court receiving evidence in a criminal trial *voir dire.* I am of the view there is a difference between the evidentiary rules and considerations arising from *voir dire* evidence, and the ethical obligations that bind counsel in a solicitor-client relationship. While it is not for this decision to delve into counsels' ethical obligations, nonetheless some practical questions arise from the Class's suggestion of a partial stay, where parties' counsel would be privy to the contents of the CVR but the parties themselves would not:

(a) How would counsel meet its duty of candor to the client?

(b) How would counsel treat any work product that might include descriptions or information garnered from the CVR?

(c) How would production of the CVR to counsel assist in settlement if counsel cannot share the information with their client?

(d) How would counsel advance settlement discussions with and on behalf of the clients if certain information is known to counsel but not to the clients?

(e) If the appeal should be successful:

  (i) how might that impact counsel in their role, if they had to proceed with the case in the face of knowledge that could not ever be shared with the client?

  (ii) how could counsel continue to cleave to the professional conduct adage that the knowledge of the client and counsel are one and the same?

The efforts of the Class to preserve their position pursuant to the interlocutory hearing judge's order through the imposition of a partial stay cannot, in my view, overcome these concerns.

[22] In summary, the primary test in *Fulton* has been met. While the parties do not dispute there is an arguable issue raised by the appeal, the TSB will suffer irreparable harm should the stay not be granted. Further, the harm to the TSB if the stay is not granted would be greater than any potential or actual harm to any of the other parties if the stay were granted.

[23] I am not persuaded the solution of a partial stay, as proposed by the Class, can sufficiently address and overcome either the irreparable harm or the greater harm components of the primary test, and indeed, may create further practical and possibly ethical difficulties for counsel for the parties or any one of them.

[24] The motion is granted; an order imposing the stay shall issue. The Notice of Motion (Amended) did not request, nor did the written or oral arguments from the parties address the matter of costs, and accordingly none are ordered.

Beaton, J.A.