NOVA SCOTIA COURT OF APPEAL

Citation: *Dempsey v. Pagefreezer Software Inc.*, 2025 NSCA 40

Date: 20250606
Docket: CA 542305
Registry: Halifax

Between:

Nathan Kirk Dempsey

Appellant

v.

Pagefreezer Software Inc. & Michael Riedijk

Respondents

Judge:	Derrick, J.A.
Motion Heard:	June 5, 2025, in Halifax, Nova Scotia in Chambers
Written Decision:	June 6, 2025
Held:	Motion dismissed with costs
Counsel:	Nathan Kirk Dempsey, appellant in person Noah Entwisle, for the respondents

Decision:

Introduction

[1] In an oral decision on April 1, 2025, Justice Ann Smith of the Nova Scotia Supreme Court found Mr. Dempsey in contempt for failing to attend for discovery examination in aid of execution. She set June 18, 2025 as the date for the penalty hearing.

[2] Mr. Dempsey brought a motion to stay the execution of the civil contempt proceeding "thus precluding its penalty hearing which is scheduled for June 18th, 2025". He also seeks an injunction "to prevent actions by the Respondents to enforce any execution order related to the Parties, including the current subpoena, any subsequent subpoena, and/or any further punitive actions".

[3] On June 5, 2025 I heard Mr. Dempsey's stay/injunction motion and reserved my decision. For the reasons that follow the motion is dismissed.

Background

[4] The *Dempsey v. Pagefreezer* proceedings have a protracted and fraught history with litigation in British Columbia and then in Nova Scotia. I do not intend to review it in detail or the many decisions from the courts in both jurisdictions. I have confined my attention to recent proceedings here in Nova Scotia that are directly relevant to Mr. Dempsey's motion.

[5] Enforcement proceedings by the respondents against Mr. Dempsey are underway in Nova Scotia. In brief, the respondents are seeking enforcement of a Contempt Costs Order ($41, 271.53) and a Special Costs Order ($295, 581.11) granted by the British Columbia Supreme Court. Those costs orders have been recognized as judgments of the Nova Scotia Supreme Court on April 17, 2023 and December 14, 2023 respectively, pursuant to the *Enforcement of Canadian Judgments and Decrees Act*, S.N.S. 2001, c. 30. The registration of the Orders gives them the equivalent status to Nova Scotia Judgments for enforcement purposes.

[6] Pagefreezer Software Inc. ("Pagefreezer") obtained Execution Orders in Nova Scotia permitting it to pursue Mr. Dempsey's assets to satisfy the Contempt Costs and Special Costs judgments.

[7] In *Dempsey v. Pagefreezer Software, Inc*., 2023 NSSC 240, Justice Rosinski of the Nova Scotia Supreme Court dismissed a motion by Mr. Dempsey to stay the enforcement of the Contempt Costs Order.

[8] Mr. Dempsey launched an appeal from the decision. On a motion by the respondents, Beaton, J.A. ordered Mr. Dempsey to pay security for costs in relation to the appeal (*Dempsey v. Pagefreezer*, 2023 NSCA 60).

[9] Mr. Dempsey paid the ordered security for costs and his appeal was heard on December 4, 2023. It was dismissed from the Bench by oral decision. Justice Farrar, on behalf of the panel found the appeal to be "entirely without merit".

[10] On March 7, 2024, Mr. Dempsey brought a motion to stay the enforcement of the Special Costs Order. Justice Ann Smith of the Nova Scotia Supreme Court, in oral reasons, dismissed the motion on March 21, 2024. She ordered Mr. Dempsey to pay an elevated costs award of $1500.

[11] Mr. Dempsey filed an appeal from the dismissal of his stay motion. Bourgeois, J.A., on motion by the respondents, ordered Mr. Dempsey to pay security for costs. He failed to post the ordered security and consequently, his appeal was summarily dismissed.

[12] In short, Mr. Dempsey has been unsuccessful in his attempts to appeal the enforcement of the Contempt Costs and Special Costs Execution Orders.

[13] The respondents pressed on with pursuing enforcement. They have endeavoured to cause Mr. Dempsey to attend for discovery in aid of execution. To date a total of three subpoenas have been issued by the Nova Scotia Supreme Court in aid of the respondents' efforts to enforce the Execution Orders. Mr. Dempsey has failed to respond to any of the subpoenas.

[14] Mr. Dempsey's defiance of the subpoenas has resulted in civil contempt proceedings in the Nova Scotia Supreme Court. In July 2024 Justice Norton of the Nova Scotia Supreme Court found Mr. Dempsey in contempt for failing to respond to discovery subpoenas in aid of enforcement of the Execution Order for the Special Costs Order. Mr. Dempsey refused to purge his contempt and received a custodial term of 30 days.

[15] Mr. Dempsey's failure to attend for discovery in aid of execution notwithstanding a third discovery subpoena occasioned a civil contempt

proceeding in the Nova Scotia Supreme Court before Justice Ann Smith on April 1, 2025. In an oral decision following submissions by the respondents and Mr. Dempsey, Justice Smith found Mr. Dempsey in contempt. In accordance with the legal principles articulated in *Carey v. Laiken*, 2015 SCC 17, she was satisfied on the evidence before her that: (1) Justice Norton's Order of October 25, 2024 clearly stated what was to be done (attendance for discovery in aid of execution); (2) Mr. Dempsey had actual knowledge of the Order and what was required; and (3) Mr. Dempsey intentionally did not attend for discovery contrary to the Order. Justice Smith rejected Mr. Dempsey's assertion of a defence of necessity. As I noted earlier, she scheduled the penalty hearing for June 18, 2025.

[16] Justice Smith's Order dated April 10, 2025 provided Mr. Dempsey with the option to purge his contempt by appearing for discovery in aid of execution on May 5, 2025 at the law offices of the respondents' counsel.

[17] In an email dated April 23, 2025, Mr. Entwisle had urged Mr. Dempsey to comply with Justice Smith's Order and attend on May 5 for discovery to avoid the penalty hearing. He advised Mr. Dempsey that, in relation to penalty for contempt, the respondents reserved "their rights to seek any punishment available at law".

[18] Mr. Dempsey did not attend for discovery.

[19] I note from the respondents' filings of June 3 in response to Mr. Dempsey's stay/injunction motion that a problem has arisen in relation to the June 18 penalty-hearing date—Mr. Entwisle discovered a scheduling conflict—and a new date has to be set. Mr. Dempsey advised on June 2 he was no longer available for a date-setting telephone conference with Justice Smith and Mr. Entwisle that had been arranged for June 3. At the hearing of his motion I was advised there is a conference call scheduled with Justice Smith and the parties on July 4 at which time a date will be set for the penalty hearing.

Mr. Dempsey's Notice of Appeal

[20] Mr. Dempsey's appeal against Justice Ann Smith's decision finding him in contempt is set to be heard on October 3, 2025. He was ordered by Justice Van den Eynden of this Court to pay security for costs in relation to this appeal (2025 NSCA 36) and has done so.

[21] Mr. Dempsey's Notice of Appeal filed April 9, 2025 indicates he is seeking "a reversal of the entire Decision, thus overturning the declaration of civil contempt".

[22] Mr. Dempsey's Notice of Appeal contains 53 densely detailed paragraphs. They mostly constitute submissions, for example, addressing the test for obtaining leave to appeal an interlocutory decision. In addition, Mr. Dempsey advances allegations that Justice Smith's decision: is unreasonable; lacks impartiality; gave no weight to various assertions made by him; constitutes a miscarriage of justice; fails to recognize the invalidity of the Execution Orders; subjects him to irreparable harm; contains palpable and overriding errors "in law"; ignored his written submissions; and dismissed his "valid defense of necessity". Mr. Dempsey submits "there is a strong objective likelihood of the success of the appeal".

Mr. Dempsey's Motion for a Stay/Injunction

[23] In support of his motion, Mr. Dempsey filed briefs dated April 9, 2025 and May 29, 2025. He introduced his April 9 written submissions as follows:

> Please accept the following letter as my brief in relation to my motion for a stay of execution concerning the contempt penalty hearing scheduled for June 18th, 2025 in NSSC 529459, and my motion for injunction to preclude the Respondents from taking enforcement actions in accordance with the test in *RJR MacDonald Inc. v. Canada (AG)* (1994) 111 DLR (4th) 385, [1994] 1 SCR 311.

[24] Mr. Dempsey states his motion "for stay and injunctive relief" relies on the three-part test in *RJR MacDonald Inc. v. Canada (AG)*: (a) Is there a serious question to be tried? (b) Will the party seeking the injunction suffer irreparable harm if the relief sought is not granted? (c) Will granting the relief do more good to the Appellant than harm to the Respondents?

[25] Mr. Dempsey correctly describes the *RJR MacDonald* test from paragraph 43 of that decision.

[26] Mr. Dempsey asserts "a systemic miscarriage of justice" and other grounds in support of the "serious question" requirement and says he will suffer irreparable harm to his physical health if he is ordered into custody at the penalty hearing.

[27] Mr. Dempsey claims a stay will favour him and be harmless to the respondents.

[28] Mr. Dempsey's May 29 brief provides what he terms a "decision tree" to guide the approach to, and analysis of, the issues. I have reviewed it. My analysis of his motion does not require me to address its contents.

[29] I also do not find it necessary to address Mr. Dempsey's three page letter-brief filed June 3, 2025 which responded to Mr. Entwisle's brief of June 2. It offers nothing new. Although the *Civil Procedure Rules* do not provide Mr. Dempsey with the right to file a rebuttal brief, I reviewed in in preparation for the hearing.

The Respondents' Position on the Stay Motion

[30] The respondents say Mr. Dempsey has not only failed to satisfy the requirements for obtaining a stay of the contempt proceedings, he does not come before this Court with "clean hands". A stay is a discretionary, equitable remedy that requires the party seeking one to have "clean hands" (*Zinck v. Stewart*, 2024 NSCA 96 at paras. 14-17; *Ewert v. Penny*, 2024 NSCA 104 at para. 6; *Oliver v. Oliver*, 2022 NSCA 57 at para. 12).

Analysis

[31] This Court decides stay motions under *Civil Procedure Rule* 90.41 on the basis of the "*Fulton*" test (*Fulton Insurance Agencies Ltd. v. Purdy*, 1990 NSCA 23). I have applied this test in deciding Mr. Dempsey's motion. I recently applied it in *Stanton v. Stanton*, 2025 NSCA 38 and find it convenient to simply re-state what I said in those reasons:

> [19] A stay is a discretionary remedy and not often granted. The filing of a Notice of Appeal does not suspend the enforcement of the order being appealed from. As stated in *Westminer Canada Ltd. v. Amirault* (1993, 125 N.S.R. (2d) 171 (C.A.)):
>
> > Unless a stay is granted, the orders are to be paid forthwith. Stays deprive successful parties of their remedies, and they are not granted routinely in this province. They are equitable remedies and the party seeking the stay must satisfy the court it is required in the interests of justice.
>
> [20] The discretionary power to enter a stay is structured by the "*Fulton*" test (*Fulton Insurance Agencies Ltd. v. Purdy*, 1990 NSCA 23). Under the *Fulton* test, the party seeking the stay carries the burden of showing, on a balance of probabilities: (1) an arguable issue for appeal; (2) they would experience irreparable harm if the stay was to be denied; and (3) the balance of convenience favours a stay. The balance of convenience concerns the question of whether the

> appellant will suffer greater harm if there is no stay than the respondent will suffer if a stay is granted.
>
> [21] In the event the applicant for a stay cannot satisfy the primary test's three criteria, exceptional circumstances may justify the granting of a stay on the basis of it being "fit and just" to do so (*Colpitts v. Nova Scotia Barristers' Society*, 2019 NSCA 45 at para. 23). In this case there is nothing to indicate "exceptional circumstances" for granting a stay.
>
> [22] In any event, where the primary test addresses all the relevant considerations, "it is inappropriate to resort to the secondary test" (*Zinck v. Stewart*, 2024 NSCA 96 at para. 16).
>
> [23] *Fulton* establishes that the "fairly heavy burden" borne by the applicant is warranted "considering the nature of the remedy which prevents a litigant from realizing the fruits of his litigation pending the hearing of the appeal" (*Fulton* at para. 27).

[32] Mr. Dempsey's appeal from Justice Smith's Order cannot succeed unless he is able to show an error of law or principle; a clear and material error of fact or mixed fact and law; or a patent injustice (*McLean v. Sleigh*, 2019 NSCA 71 at para. 30).

[33] I do not see anything in Mr. Dempsey's Notice of Appeal that can be characterized as an arguable issue. His "grounds" amount to recitals of his disagreements with Justice Smith's decision and reassert what he had argued before her. He has advanced, in his grounds and his oral submissions at the hearing, a concentrated effort to relitigate issues that have been exhaustively recycled through earlier proceedings, including at the contempt hearing on April 1, 2025. There is nothing to indicate any errors by Justice Smith in her factual findings, let alone clear and material errors. And there is no basis for a finding of patent injustice.

[34] Mr. Dempsey says he has been the victim of a miscarriage of justice and that constitutes an arguable issue. His submissions on this point were focused on issues that have already been adjudicated. The enforcement proceedings now underway are very far downstream from where all this started in British Columbia. For the purposes of his stay/injunction motion, Mr. Dempsey carries the burden of showing an arguable issue arising from Justice Smith finding him in contempt.

[35] "Arguable issue" is a low threshold but it is a threshold. I am not satisfied Mr. Dempsey's Notice of Appeal clears it. I fail to see a ground of appeal that, if established, would qualify as having "sufficient substance to be capable of

convincing a panel of the court to allow the appeal (*R. v. Ankur*, 2023 NSCA 2 at para. 45; *Westminer* at para. 11).

[36] It is also relevant to my analysis that Mr. Dempsey appealed unsuccessfully against the enforcement order for the Contempt Costs Order and failed to prosecute the appeal against the enforcement order for the Special Costs Order. The order for discovery in aid of execution which underpins Justice Smith's contempt finding has survived Mr. Dempsey's attempts at appeal. This also cuts against the likelihood of a panel of the Court allowing this appeal.

[37] I am also not satisfied Mr. Dempsey has made out irreparable harm. He says that due to his serious health issues being incarcerated would threaten his life. However, it is unknown what result will flow from the penalty hearing. Mr. Dempsey has the available option of purging his contempt. He will be able to advance evidence and argument at the penalty hearing in support of the court not sentencing him to a custodial term. If a custodial penalty was imposed, he could seek to have the order take into account his health issues, or at least ask the judge to make relevant recommendations to correctional officials.

[38] The irreparable harm Mr. Dempsey alleges he will face if the penalty hearing proceeds is self-inflicted. He is exercising a choice by not complying with the discovery subpoena and advances a claim of irreparable harm to throw a spanner in the works of the enforcement process.

[39] Mr. Dempsey cannot use a claim of irreparable harm to avoid the consequences of his own actions—his refusal to comply with a court order for enforcement—especially where he has been unsuccessful in neutralizing, through appeal, the validity of the enforcement orders.

[40] It is unnecessary for me to consider the balance of convenience issue as Mr. Dempsey's stay motion fails to clear both the arguable issue and irreparable harm hurdles.

[41] Finally, I find there is no basis for granting the stay motion on the basis of "exceptional circumstances" that could make it fit and just to grant a stay. Furthermore, as held by Gogan, J.A. in *Zinck v. Stewart* at paragraph 16: "If the primary test accounts for all the relevant considerations, it is inappropriate to resort to the secondary test".

[42] Although I have considered Mr. Dempsey's stay motion on the basis of the *Fulton* test, there is an overarching factor that causes me to conclude a stay must be denied. Mr. Dempsey does not come to this Court with clean hands. As noted, the discretionary, equitable remedy of a stay requires clean hands. He has refused to comply with three discovery in aid of execution subpoenas now. He has been given opportunities to attend for discovery, to purge his contempt, and has chosen not to do so.

[43] In addition to Mr. Dempsey's contemptor status in Nova Scotia, he has been found in contempt by courts in British Columbia. At least one of the contempt findings is reported (2023 BCCA 202 per Voith, J.A.). In a footnote, Justice Rosinski indicated in his decision that Mr. Dempsey has not purged his contempt in the British Columbia courts. There is nothing before me to suggest otherwise.

[44] At the hearing of his motion Mr. Dempsey was unequivocal that he has no intention of purging his contempt. He responded to the clean hands issue by saying he relied on *Perka v. R.*, [1984] 2 S.C.R. 232 and the defence of necessity as justification or excuse (these are different legal concepts) for refusing to comply with the discovery subpoenas.

[45] I do not accept that *Perka* is material to Mr. Dempsey's stay motion:

- Mr. Dempsey argued necessity at the contempt hearing before Justice Smith. She found the defence had not been made out.

- The majority in *Perka* referred to "the perceived injustice of punishing violations of the law in circumstances in which the person had no other viable or reasonable choice available, the act was wrong but it is excused because it was realistically unavoidable".

[46] Mr. Dempsey has already failed to establish a defence of necessity for his non-compliance with the discovery subpoenas. The *Perka* principles have no application on the facts of his case. *Perka* does not alleviate the obligation on Mr. Dempsey to come before me with clean hands.

[47] Mr. Dempsey cannot expect to obtain the relief of a stay where he has flagrantly defied court orders. It would not be appropriate to exercise equitable jurisdiction in these circumstances (*Bonitto v. Halifax Regional School Board*, 2015 NSCA 3 at paras. 46-50).

[48] Aside from any other considerations, Mr. Dempsey's lack of clean hands is fatal to his motion.

Injunctive Relief

[49] As I indicated at the start of these reasons, Mr. Dempsey's Notice of Motion of April 9, 2025 sought, in addition to a stay, an injunction "to prevent actions by the Respondents to enforce any execution order related to the Parties, including the current subpoena, any subsequent subpoena, and/or any further punitive actions".

[50] As I explained at the hearing of the motion, the injunctive relief Mr. Dempsey seeks can be dispensed with in short order. Neither a single judge in Chambers nor the Court has the jurisdiction to order an injunction which is a remedy of first instance.

[51] As Bryson, J.A. held in *Abridean International Inc. v. Bidgood*, 2017 NSCA 25:

- The powers of a Chambers judge "are largely procedural and interlocutory (90.37; 90.40)".
- The Nova Scotia Court of Appeal is not a court of first instance. The Court's jurisdiction is set out in ss. 38-40 of the *Judicature Act*, R.S.N.S. 1989, c. 240. "Those sections describe appeal, not original jurisdiction".
- An injunction would be a new cause of action, justiciable in the Nova Scotia Supreme Court if the applicant could satisfy the legal requirements.

[52] In conclusion on this issue, an injunction application in the Nova Scotia Supreme Court would be subject to the *RJR MacDonald Inc. v. Canada* legal test that Mr. Dempsey has been unable to satisfy on this stay motion. In other words, even if this Court had jurisdiction (which it does not), Mr. Dempsey's motion for injunctive relief would fail for the same reasons his stay motion has failed, including by operation of the clean hands doctrine.

Disposition

[53] The motion for a stay/injunction is dismissed with costs to the respondents of $1,500 inclusive of disbursements.

Derrick, J.A.