

NOVA SCOTIA COURT OF APPEAL

Citation: *Can*Sport v. HarbourEdge*, 2025 NSCA 46

Date: 20250613

Docket: CA 535915

Registry: Halifax

Between:

Can*Sport Incorporated and Lee Adamski

Appellants

v.

HarbourEdge Mortgage Investment Corporation

Respondent

Judge: Derrick, J.A.

Motion Heard: June 12, 2025, in Halifax, Nova Scotia in Chambers

Written Decision: June 13, 2025

Held: Motion granted

Counsel: Richard A. Bureau and Ashley Hilton, articling clerk for the appellants

Sara L. Scott and Adam Downie, for the respondent

Noah Yao, for the Receiver, MNP Ltd., watching brief

Decision:

Introduction

[1] These reasons deal with HarbourEdge’s motion for security for costs in the appeal brought by Can*Sport Incorporated and Lee Adamski. The appeal is scheduled to be heard on November 12, 2025.

[2] The appeal is from a decision by Justice Ann Smith on April 9, 2024 in which she dismissed, in its entirety, a counterclaim by Can*Sport/Lee Adamski against the respondent (2024 NSSC 98). I will refer to this as the “merits” decision.

[3] The trial judge, in her lengthy and detailed decision, dismissed all of Can*Sport/Lee Adamski’s claims, finding that “however framed” they were not made out on the evidence. On November 20, 2024, she awarded HarbourEdge costs of \$200,000, inclusive of disbursements, payable within thirty calendar days of her decision. (2024 NSSC 356).

[4] The costs award has not been paid.

[5] HarbourEdge is seeking an Order for a significant amount as security for costs on the basis of: the number of grounds of appeal—21 grounds relating to the merits and 4 relating to costs, the substantial trial record and lengthy trial decision (270 paragraphs), and the substantial costs award. HarbourEdge asks for security for costs to be payable within three weeks of the date of the Order and indicates it “may make a motion seeking dismissal of the claims against it, if security for costs is not paid as required” by the Order.

[6] As these reasons explain, I am satisfied a security for costs order is warranted in this case.

Background

[7] The legal controversy between HarbourEdge and Can*Sport/Lee Adamski, arose after HarbourEdge loaned the appellants approximately two million dollars as initial funding for the construction of a complex to house a hockey school, tenants and hockey arena in Bedford, Nova Scotia. Can*Sport intended to develop the project on land at 44 Verdi Drive, Bedford, Nova Scotia. It used funds advanced by the respondent to acquire the land.

[8] Justice Smith succinctly described what led to the litigation:

[2] The building was never built; there were no tenants, no school, no new ice rinks and Can*Sport did not repay the loan. HarbourEdge wants its money back.

[9] In the fall of 2014 the parties signed a contract (the “Commitment”) for mortgage funding for the Can*Sport/Lee Adamski project. The term of the Commitment was two years. Under the contractual arrangement Can*Sport would be advanced funds in three “facilities” subject to satisfying preconditions.

[10] In late 2016, with construction delayed, cost over-runs, a proposed tenant pulling out of the project, and a lien against the property for over \$400,000, HarbourEdge advised Mr. Adamski it would not advance more money to Can*Sport for the project. Can*Sport/Lee Adamski were unable to secure alternative financing. The project was dead.

[11] HarbourEdge sued for repayment of the loan, over two million dollars with interest, fees and expenses. Can*Sport/Lee Adamski counterclaimed, alleging HarbourEdge had breached the Commitment with Can*Sport and seeking damages said to have flowed from the breach. Justice Smith set out the essence of the Can*Sport/Lee Adamski claim:

[5] Can*Sport and Adamski claim that HarbourEdge was solely responsible for its difficulties in completing the Project. They say that HarbourEdge acted in bad faith throughout the contractual arrangement and, in particular, at crucial junctures where it failed in its duties to them.

[6] HarbourEdge responds that the difficulties in completing the Project are the direct fault of Adamski, including delay and cost overruns.

[12] In June 2020, Can*Sport and Lee Adamski brought a motion in the Nova Scotia Supreme Court for an Order discharging the mortgage held by HarbourEdge over 44 Verdi Drive. They proposed Can*Sport either pay into court or to HarbourEdge directly the sum of \$2.6 million, or in the alternative, the displacement of the HarbourEdge mortgage from first to second priority upon payment of the \$2.6 million. The motion failed. Bodurtha, J. held that the amount proposed to be paid was less than the amount due and that the balancing of the equities favoured not discharging the mortgage (2020 NSSC 383).

[13] On October 14, 2021, pursuant to a Receivership Order, the assets and operations of Can*Sport Incorporated were taken over by a Receiver, MNP Ltd. Can*Sport/Lee Adamski unsuccessfully opposed the appointment of a Receiver.

They sought leave to appeal the appointment, pursuant to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3. Bourgeois, J.A. dismissed the motion (2022 NSCA 8).

[14] The trial of the counterclaim was heard over seven days in 2023. Can*Sport/Lee Adamski claimed to owe nothing to HarbourEdge and sought almost five million dollars in damages for breach of contract, loss of profits and other damages.

[15] As noted, the counterclaim was wholly unsuccessful.

The Notice of Appeal

[16] Can*Sport/Lee Adamski filed an Amended Notice of Appeal on May 28, 2025 containing 21 grounds relating to the merits decision and 4 grounds of appeal relating to costs.

[17] The grounds of appeal challenging the merits decision include allegations the judge failed to apply: the “*contra proferentem*” rule; promissory estoppel; part performance; contract variation based on a pattern of behaviour inconsistent with the terms of the agreement; the clean hands doctrine; and the good faith doctrine. The grounds in relation to the costs order allege errors of law and palpable and overriding errors.

Facts in Support of the Motion for Security for Costs

[18] HarbourEdge’s counsel, Sara L. Scott, filed an affidavit sworn May 21, 2025 in which she set out the following information, supported by exhibits:

- Can*Sport is a Nova Scotia limited company with a registered address of 1549 Birmingham Street, Halifax, Nova Scotia. Lee Adamski is the President and Recognized Agent of Can*Sport. The affidavit attaches a printout from the Nova Scotia Registry of Joint Stock Companies for Can*Sport.
- A search on May 12, 2025 of the records maintained by the Land Registration Office in the Property Online database showed Can*Sport to be the owner of real property located at 44 Verdi Drive in Bedford, Nova Scotia (PID 41395831).

- The Verdi Drive property is an asset under the control of the court appointed Receiver.
- The search revealed no properties held by Mr. Adamski in Nova Scotia.
- A search on May 12, 2025 of the Nova Scotia Personal Property Registry revealed that neither Can*Sport nor Mr. Adamski have any registered personal property or registered interests in the Personal Property Registry in Nova Scotia.

[19] In HarbourEdge’s motion brief, the Verdi Drive property is noted as owing significant property tax arrears.

The Response of Can*Sport/Lee Adamski to the Motion for Security for Costs

[20] Can*Sport/Lee Adamski responded to the motion with the affidavit of Lee Adamski and a brief. Mr. Adamski’s affidavit attached as exhibits documentation I refer to below.

[21] Mr. Adamski states he is the President, Secretary and Director of Can*Sport Incorporated and describes Can*Sport as “an active company registered to carry on business in the Province of Nova Scotia”.

[22] Mr. Adamski attached to his affidavit an appraisal completed in 2018 of the value of the vacant lands at 44 Verdi Drive—\$6,100,000. The appraisal notes the site improvements:

The subject site is improved with a single surface ice rink facility which is covered with an inflatable dome on a concrete slab. There is an attached pre-engineered steel service building. The improvements include all mechanical and electrical systems necessary for the rink operation. The total area for the facility is 29,440 sq. ft. The access lane and parking area is gravel surfaced.

[23] I assume it is these site improvements that the 2018 appraisal gives a depreciated value of \$2,080,000. Mr. Adamski relies on these figures—the value of the vacant land and the depreciated value of improvements—to assert a value of \$8,180,000 for 44 Verdi Drive. More than enough, he says, to satisfy any outstanding debts owed by Can*Sport.

[24] This statement was elaborated upon by Mr. Bureau at the hearing before me. I address it further in my analysis.

[25] Mr. Adamski says the Receiver, who has authorization to sell the property, is poised to sell it for much less than it is worth. He says the Receiver and HarbourEdge have rebuffed his overtures to bid on the property. He indicates he has been given “access to funds conditional on clear title (albeit expensive funds) to purchase the property” but the Receiver has ignored his requests to be considered.

[26] Mr. Adamski says he was retained by the Receiver to look after the property but his services were terminated in December 2024 with \$89,104.71 owed to him. He has commenced an action against the Receiver to recover what he is owed and filed a lien against the property.

[27] Mr. Adamski says the following about his circumstances:

- As a result of the termination of his retainer with the Receiver, he “will soon have to find the resources to seek leave of the Registrar of Bankruptcy to approve the Action” against the Receiver.
- All of the legal proceedings have taken a financial toll on him and he is not able to post the security for costs sought by the HarbourEdge.
- All he “could possibly agree to” is an assignment of the money he is owed by the Receiver as security.
- He is not sure he can raise the funds for a motion to stay the sale of 44 Verdi Drive, to prevent the property being sold for much less than it is worth. He says a sale of the property for less than what he claims as the appraised value of \$8,180,000 “will create an insolvency”.
- He has borrowed the money to fund the appeal “in the hopes that I can get this project back on track”.
- If an Order is made for security for costs he will be unable to pursue the appeal “and all the equity and uniqueness of the property that is owned by Can*Sport will be lost”.

[28] Other than what I have recited above, Mr. Adamski has not provided any evidence about his personal financial circumstances.

[29] In their brief, Can*Sport/Lee Adamski take the position that HarbourEdge, by obtaining the Receivership Order in relation to Can*Sport, has “artificially created the insolvency and are now relying on it to seek security for costs”.

[30] Can*Sport/Lee Adamski claim the Receiver has failed to safeguard their interests as well as those of HarbourEdge, for example, by not doing all it can to recover monies owed to “both Can*Sport and Mr. Adamski”. Their brief also criticizes the process for the sale of the property as set out in the Order of Justice John Keith of the Nova Scotia Supreme Court issued on December 3, 2024. The Order is attached as an exhibit to Mr. Adamski’s affidavit.

Legal Principles

[31] *Civil Procedure Rule 90.42* provides that:

- (1) A judge of the Court of Appeal may, on motion of a party to an appeal, at any time order security for 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 of costs when ordered.

[32] The parties concurred that the principles governing security of costs motions have been well established by this Court. Their application can be summarized as follows:

- The granting of security for costs is a discretionary remedy.
- The respondent must establish “special circumstances” that impact the degree of risk it faces of being unable to collect its costs on the appeal should the appeal fail (*Sable Mary Seismic Inc. v. Geophysical Services Inc.*, 2011 NSCA 40 at para. 6).
- Impecuniosity—the risk the appellant may be unable to afford a costs award on appeal—is generally insufficient to establish “special circumstances” (*Williams Lake Conservation Co. v. Kimberley-Lloyd Development Ltd.*, 2005 NSCA 44 at para. 11).

- The respondent who seeks security for costs should have “an objective basis to be concerned about his [*sic*] recovery of prospective appeal costs” (*Williams Lake Conservation Co.* at para. 11).
- Special circumstances can be established by: actual insolvency; a demonstrated unwillingness or inability to meet obligations to pay a judgment or costs order; failing to pursue the appeal in good faith or otherwise abusing the court’s process (*Marshall v. Robbins*, 2020 NSCA 7).

[33] There is discretion to dismiss a security for costs motion if granting the order would impede a good faith appellant from prosecuting an arguable appeal. In *Sable Mary Seismic, Inc.*, Beveridge, J.A. noted the need for caution to be exercised in considering a security for costs motion, “lest a party be effectively denied their right to appeal merely as a result of impecuniosity” (para. 7).

Application of the Legal Principles

[34] HarbourEdge submits it has made out the required special circumstances. Can*Sport/Lee Adamski say special circumstances are not present in this case.

[35] HarbourEdge says Can*Sport/Lee Adamski have not only acted in an insolvent manner—failing to satisfy or even make any efforts to satisfy the costs order—Can*Sport at least, is actually insolvent. Insolvency can constitute the “special circumstances” necessary for a security for costs order.

[36] HarbourEdge also notes that underpinning the litigation that is continuing between the parties is a significant unpaid debt which remains outstanding—the loan made under the Commitment that enabled the purchase of 44 Verdi Drive.

[37] Other factors operate to provide objective evidence on which HarbourEdge relies for its concern that recovery of appeal costs is imperilled. There are third parties with claims against Can*Sport. According to HarbourEdge, Can*Sport owes the Halifax Regional Municipality \$640,702.21 for accumulated municipal taxes, interest and fees.

[38] At the hearing of the motion, Mr. Bureau emphasized Mr. Adamski’s view the sale of 44 Verdi Drive has the potential to produce a return that “could result in there not being an insolvency”. I am not persuaded by this argument. As HarbourEdge has noted, until the sale process for 44 Verdi Drive is complete, what

HarbourEdge may be able to recover is unknown. I agree with Ms. Scott's submission that given Can*Sport/Lee Adamski's history before the courts in relation to their dealings with HarbourEdge, it is reasonable to think proceeds from the sale could be subject to further dispute between the parties.

[39] However, that is beside the point. Whether Can*Sport can eventually lift itself out of insolvency is entirely speculative. Can*Sport is currently insolvent.

[40] The fact of Can*Sport's insolvency also dispenses with the Receivership and the value of 44 Verdi Drive having any relevance to this motion for security for costs. I find the terms of the Receivership and the proposed sales and investment solicitation process ("SISP") for 44 Verdi Drive fall outside the scope of HarbourEdge's motion.

[41] What is relevant to the motion is the outstanding costs order. Can*Sport/Lee Adamski have neither paid towards the order nor applied for a stay of it pending the appeal. (Which is not to suggest that a stay motion would necessarily succeed.)

[42] Mr. Adamski rests his opposition to being ordered to pay security for costs on impecuniosity. He says he will be unable to prosecute the appeal on behalf of himself and Can*Sport if a security for costs order is made. He says he does not have the financial means to raise the security. Mr. Bureau said I should infer that the borrowing by Mr. Adamski for the appeal is the extent of the borrowing he can do.

[43] While being impecunious, if Mr. Adamski indeed is, alone does not establish special circumstances, where special circumstances exist, impecuniosity does not bar an order for security for costs on appeal. Mr. Adamski and Can*Sport have already had their "day in court" at trial.

[44] As for Mr. Adamski's complaint, referred to earlier, that the Receiver will not entertain his interest in acquiring the property, I note that Justice Keith's December 3, 2024 Order grants broad powers to the Receiver for conducting the sale of the property which do not require any involvement with Can*Sport or Mr. Adamski:

The Receiver, in consultation with HarbourEdge Mortgage Investment Corporation, shall have the right to modify the SISP and/or adopt such other rules for the SISP as it considers appropriate, subject to the condition that should the Receiver determine that material changes or a termination of the SISP is necessary it shall seek Court approval.

[45] Mr. Adamski participated in the motion brought by HarbourEdge for the appointment of a Receiver. As Justice Keith's Order indicates, Mr. Adamski and Can*Sport were represented in that proceeding by Mr. Bureau.

[46] I accept it is advisable to proceed with caution in exercising the discretion to make a security for costs order. I should be reluctant to prevent "a good faith appellant who is truly without resources from being able to prosecute an arguable appeal" (*Sable Mary Seismic, Inc.* at para. 7).

[47] In addressing this principle I am limited in assessing the merits of the appeal to the grounds in the Amended Notice of Appeal and the decisions being appealed. It is relevant that Can*Sport/Lee Adamski were wholly unsuccessful in the court below. Their counterclaim was dismissed completely following a seven day trial which produced a comprehensively analyzed decision by an experienced trial judge who made detailed factual findings on the evidence. The trial judge found no breach of the Commitment and accordingly, no damages (Merits decision at para. 262.¹)

[48] My reading of the trial judge's merits decision has not left me with a strong impression of the appeal's prospects for success. The judge undertook a close examination of the evidence and based her conclusions on numerous factual findings. As for her costs order, the awarding of costs is highly discretionary and not to be readily interfered with on appeal (*Casavechia v. Noseworthy*, 2015 NSCA 56 at para. 42).

[49] Furthermore, the Can*Sport/Lee Adamski Notice of Appeal raises issues that do not appear to have been addressed before the trial judge. As the trial judge noted in her costs decision, the primary issue in the trial of the counterclaim was whether the respondent had acted in breach of contract. The judge said this question engaged principles of contractual interpretation including: waiver of terms, contractual renewal, notice, and allegations of bad faith. This summary of the issues is borne out by the Can*Sport/Lee Adamski Counterclaim which alleged

¹ I note there is a typographical error in this paragraph of the decision which reads: "Can*Sport had not proven that it suffered any damages because the Court has found that HarbourEdge did breach Facility 2 and did not waive the pre-conditions for Facility 3". At para. 219 of her decision the trial judge correctly stated her finding, that HarbourEdge "did not breach the terms of Facility 2".

breach of contract by HarbourEdge, amendment of the contract by agreement of the parties, waiver of lending preconditions by HarbourEdge, bad faith by HarbourEdge, and damages for breach of contract.

[50] My necessarily limited consideration of the merits of the appeal leads me to conclude that an order for security for costs is not precluded. I am not persuaded a promising appeal will be jeopardized if security for costs is ordered.

[51] I do not find there is a basis to conclude that a security for costs will torpedo the ability of Can*Sport and Mr. Adamski to pursue the appeal. They pursued a seven day trial represented by counsel and have counsel for the appeal. They also have an established history of litigation against HarbourEdge. I am not at all convinced they would abandon this appeal. To do so would be inconsistent with how they have conducted themselves since 2020.

[52] Also relevant to the exercise of my discretion to order security for costs is the absence of any detailed evidence from Mr. Adamski about his income, assets and liabilities beyond what he has described in relation to the property and the unpaid services he says he rendered in relation to it. He does not explain why he cannot raise any security from any source. I have assertions but not evidence “that if an order for security of costs is made, resources are not available” for him to draw from (*Sable Mary Seismic, Inc.* at para. 20).

[53] To borrow from Bryson, J.A.’s words in *Ketler* at para. 30: if Can*Sport/Lee Adamski are pursuing their appeal in good faith, they can risk something to do it. HarbourEdge is required by the appeal to expend the time and expense of responding.

[54] In exercising my discretion to award security for costs, “All the circumstances should be taken into account, including the interests of the respondent on appeal” (*Norbridge Management Ltd.* at para. 26).

[55] The interests of HarbourEdge support an order for security for costs, as otherwise it will be left to bear the entire risk of the cost of the appeal.

[56] In conclusion, I am satisfied HarbourEdge has established special circumstances that justify an order for security for costs. I find it has advanced an objective basis for concern about its ability to recover the prospective costs of the appeal.

Setting an Amount of Security for Costs

[57] As for the amount of the security for costs, HarbourEdge acknowledges the costs award on appeal should the appeal fail is unlikely to be 40 percent of the trial costs which would be \$80,000. However, an award for costs is ultimately discretionary and not simply a mathematical exercise (*Sable Mary Seismic Inc.* at paras. 33-35).

[58] A security for costs order is not in the nature of a debt collection nor a means to enforce Justice Smith's costs award (*Mercier v. Nova Scotia (Police Complaints Commissioner)*, 2014 NSCA 101 at para. 30). As Bourgeois, J.A. held in *Mercier*: "The purpose of an order under Rule 90.42 is to assure that funds are paid into court to cover the anticipated costs arising from the present appeal" (para. 31).

[59] In *Sable Mary Seismic, Inc.* Beveridge, J.A. reviewed the decision of Cromwell, J.A. in *Smith v. Michelin North America (Canada), Inc.*, 2008 NSCA 52 which he described as providing "the best guidance at arriving at a just quantum" (para. 37). In *Smith*, Cromwell, J.A. found special circumstances justified a security for costs order. He doubted the appeal panel would award 40 percent of trial costs of \$300,000 but found that appeal costs would be significant given the amount involved and the length and complexity of the appeal. He acknowledged the best he could do was "make a rough estimate of the amount that falls within the likely range of a costs award on appeal based on past experience and the limited information now before me about this appeal" (para. 52).

[60] I find myself in the same position of having to make a rough estimate of the security to be ordered. There are features of this appeal that are similar to *Sable Mary Seismic, Inc.* where \$35,000 in security for costs was ordered. The appeal book will be voluminous. The trial judge's decision is lengthy and comprehensive. There are a total of 25 grounds of appeal. There are however, differences.

[61] The *Sable Mary Seismic, Inc.* appeal was set for a full day. The appellants' joint factum in *Sable* was just over 100 pages. There were 90 alleged errors. The respondent in *Sable* was permitted to file a factum that exceeded the typical 40 page limit.

[62] The Can*Sport/Adamski appeal is only scheduled for a half-day. There has been no motion by either party here that would entitle them to file a longer than

normal 40 page factum. However, *Sable* is now a 14 year old case. Costs to defend an appeal have risen since then.

[63] Having found HarbourEdge has satisfied the requirements for an order for security of costs, I order Can*Sport/Lee Adamski to:

- 1) Deposit with the Registrar of the Court security in the amount of \$30,000 on or before July 4, 2025 at 4:30 p.m.
- 2) In the event Can*Sport/Lee Adamski fail to pay the security ordered, HarbourEdge will be entitled to file a motion dismissing the appeal without further notice to Can*Sport and Lee Adamski. There is precedent for a respondent being permitted to make a motion to dismiss an appeal without further notice to the appellant where security for costs have not been paid (see, for example: *Ketler* at para. 32; *Norbridge Management Ltd.* at para. 47).
- 3) Costs of this motion are \$1000, inclusive of disbursements, payable in the cause.

Derrick, J.A.