

# COURT OF APPEAL FOR ONTARIO

CITATION: Caja Paraguaya De Jubilaciones Y Pensiones Del Personal De  
Itaipu Binacional v. Obregon, 2022 ONCA 724

DATE: 20221019

DOCKET: M53804 (C70951)

Sossin J.A. (Motion Judge)

BETWEEN

Caja Paraguaya De Jubilaciones Y Pensiones Del Personal De Itaipu  
Binacional

Plaintiff (Respondent/Responding Party)

and

Eduardo Garcia Obregon a.k.a. Eduardo Garcia a.k.a. Eddie Obregon,  
Claudia Patricia Garcia a.k.a. Patricia Garcia a.k.a. Claudia Patricia De Garcia  
a.k.a. Claudia Santisteban, Ligia Ponciano, Managed (Portfolio), Corp,  
Genesis (LA), Corp. (Ontario Corporation Number 1653094), Genesis (LA), Corp.  
(Alberta Corporate Access Number 2013145921), FC Int, Corp., First Canadian  
Int , Corp., Union Securities Limited, Scott Colwell, Marty Hibbs,  
Hibbs Enterprises Ltd., Columbus Capital Corporation, Antonio Duscio,  
Leanne Duscio, Leanne Duscio carrying on business as The Queen St.  
Conservatory, Catan Canada Inc., Vijay Paul, Greg Baker, Bradley F. Breen,  
Lou Maraj, 2138003 Ontario Inc., Mackie Research Capital Corporation,  
First Canadian Capital Markets Ltd., First Canadian Capital Corp, FC Financial  
Private Wealth Group Inc., Jason C. Monaco, Daniel Boase, Paolo Abate,  
Nikolaos Stylianos Tsimidis, Genesis Land Development Corporation, Limited  
Partnership Land Pool (2007), and GP LPLP 2007 Inc.

Defendants (Appellant/Moving Party)

Antonio Duscio, acting in person

Myles Anevich, appearing as duty counsel

John De Vellis and Jacqueline King, for the responding party

Erica Whitford, for the Attorney General of Ontario

Heard: October 14, 2022 by video conference

## ENDORSEMENT

### OVERVIEW

[1] Antonio Duscio (“Mr. Duscio” or “the moving party”) seeks release from custody pending an appeal of his sentence imposed by Koehnen J. for civil contempt. This contempt relates to the dissipation of funds contrary to court orders after Mr. Duscio was found civilly liable for defrauding the responding party, a Paraguayan pension fund.

[2] Mr. Duscio was sentenced to 16 months in jail without the possibility of parole. However, this sentence is subject to the condition that he may be released at any point if he can demonstrate that he has purged his contempt. At the end of the sentence, if the contempt has not yet been purged, Mr. Duscio must appear before Koehnen J. to determine whether a further sentence should be imposed relating to the ongoing contempt.

[3] This is the second sentence for contempt by Mr. Duscio in these proceedings. He was originally sentenced by Dunphy J. on April 5, 2019, for a period of 12 months (with no restrictions on parole). That sentence was upheld by this court on appeal: *Caja Paraguay de Jubilaciones y Pensiones del Personal de Itaipu Binacional v. Obregon*, 2019 ONCA 803. Mr. Duscio was granted parole

after serving seven months of his sentence, and was subsequently found to have engaged in further acts of contempt while on parole.

[4] On February 5, 2021, Mr. Duscio was found in contempt for the second time, by Koehnen J. That finding was also upheld by this court on appeal: *Caja Paraguayaya De Jubilaciones Y Pensiones Del*, 2022 ONCA 225. He was sentenced by Koehnen J. on April 28, 2022.

[5] Mr. Duscio is currently serving his sentence and has yet to purge his contempt. His application for legal aid assistance was denied, as Legal Aid Ontario does not, as a matter of policy, provide funding to those serving sentences for civil contempt. As a result, he is currently self-represented in the inmate appeal stream. He is assisted for purposes of this application by Mr. Anevich, acting as duty counsel.

[6] The status of Mr. Duscio's appeal was spoken to before Trotter J.A. on October 5, 2022, as a matter in the inmate appeal stream. In consultation with duty counsel, Trotter J.A. directed that Mr. Duscio bring a motion either for release pending appeal or a stay of proceedings, which is the basis for the motion now before me.

## **ANALYSIS**

### **Is the applicable standard the stay of a civil order or bail pending appeal?**

[7] The first issue to be determined is the procedural avenue that applies where a person serving a sentence for civil contempt seeks release before an appeal of their sentence is heard.

[8] Generally, bail pending an appeal is governed by s. 679 of the *Criminal Code*, R.S.C. 1985, c. C-46. In sentence appeals such as this one, in addition to satisfying the criteria under s. 679(4), the offender must also be granted leave to appeal the sentence under s. 679(1)(b) before release can be ordered.

[9] However, civil contempt is not governed by the *Code*. Mr. Duscio is subject to a warrant of committal pursuant to the *Courts of Justice Act*, R.S.O 1990, c. 43 and r. 60.11 of the *Rules of Civil Procedure*. Civil orders may be stayed by a court on its own initiative or on motion by any person, whether or not a party, pursuant to s. 106 of the *Courts of Justice Act*. Rule 63.02(1) further provides that an interlocutory or final order may be stayed by a judge of the court to which a motion for leave to appeal has been made or to which an appeal has been taken.

[10] If s. 679 of the *Code* applies, this court would have jurisdiction to order bail as Mr. Duscio seeks both leave to appeal his sentence and, if leave is granted, interim release pending appeal. If r. 63.02(1) applies, this court would have

jurisdiction to stay the warrant of committal, with conditions, as Mr. Duscio is appealing an order made pursuant to r. 60.11(7).

[11] In *Directv, Inc. v. Boudreau* (2005), 42 C.P.R. (4th) 388 (Ont. C.A.), Blair J.A. considered a motion for a stay pending an appeal of the sentence but not the conviction for civil contempt. In addressing the proper legal framework, Blair J.A. suggested that s. 679 of the *Code* applied, but found he did not need to decide between the two avenues. He stated, at para. 4:

As this is a civil proceeding, and Mr. Boudreau has been ordered committed for civil contempt, the parties have approached this motion from a civil perspective, notwithstanding that Mr. Boudreau has now been sentenced to imprisonment, and Mr. Wagman seeks a stay in accordance with the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, and the principles outlined by the Supreme Court of Canada in *RJR-Macdonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 54 C.P.R. (3d) 114. Is there a serious question to be determined? Will there be irreparable harm if the stay is not granted? Where does the balance of convenience lie? No authority was cited on the subject, but I would have thought the better approach to be through the provisions of s. 679(1) of the *Criminal Code*, R.S.C. 1985, c. C-46, dealing with judicial release pending determination of the appeal, since Mr. Boudreau has now been ordered imprisoned and it is that order which is the subject of the appeal. Is the appeal frivolous? Will Mr. Boudreau surrender in accordance with the terms of any order made? Is his detention necessary in the public interest? It is not necessary to decide this issue, however, since I am satisfied, on either approach, that Mr. Boudreau should not have to serve his term of imprisonment pending the disposition of the appeal.

[12] In *T.(M.) v. A.(H.)*, [1995] 1 S.C.R. 445, on an application for release pending appeal of a sentence for civil contempt, Sopinka J. stated at para. 4 that s. 679 “arguably” does not apply to civil contempt. He instead applied the test for a stay from *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 to order interim release pursuant to the *Supreme Court Act*, R.S.C. 1985, c. S-26.

[13] In *Chiang (Trustee of) v. Chiang*, 2007 ONCA 529, this issue returned to this court. The appellant moved for a stay pending his appeal of the order committing him to 12 months in jail for contempt. Doherty J.A. did not refer to this uncertainty between the two avenues directly or cite to either of the earlier cases, but stated at para. 2 that he would “bear in mind” the principles underlying a stay motion as well as a motion for bail pending appeal. He dismissed the motion for a stay.

[14] In this case, both the moving and responding parties approached this matter principally as an application for bail pending appeal under s. 679 of the *Criminal Code*, and governed by the principles set out in *R. v. Oland*, 2017 SCC 17, [2017] S.C.R. 250.

[15] The Attorney General, which appeared as an observer rather than a party, submits to the contrary that s. 679 is not available to an individual serving a custodial sentence for civil contempt. This is because the definition of “sentence” in s. 673, which applies to criminal appeals, does not include sentencing orders

made in relation to the common law offence of civil contempt. The *Criminal Code* is a complete code for criminal matters, which this is not.

[16] Mr. Anevich submits that the proper pathway for interim release in a civil contempt matter is fact dependent. In situations where the purpose of a sentence is to incent compliance with a civil order, a civil stay may be the preferred framework, but where the purpose is punishment for a contemnor who is unable or unwilling to purge the contempt, s. 679 of the *Code* is appropriate.

[17] I disagree. In my view, the proper procedural route for the release of a person serving a sentence for civil contempt is a stay of that civil order. As this court confirmed in *Kopaniak v. MacLellan* (2002), 159 O.A.C. 37 (C.A.), at para. 27, leave to appeal refused, [2002] S.C.C.A. No. 263, the *Rules of Civil Procedure* govern civil contempt proceedings.

[18] Similarly, in *DM v. WS*, 2019 ABCA 422, at paras. 4-5, the Alberta Court of Appeal applied its civil rules and the *RJR-MacDonald* test to adjudicate a request to stay a civil contempt order pending appeal.

[19] The application of the *RJR-MacDonald* factors to determine whether a stay is warranted, of course, may be informed by the principles underlying applications for bail pending appeal as outlined in cases such as *Oland*. This approach is consistent both with the case law and the statutory regimes governing civil contempt and criminal offences.

[20] There are three characteristics of sentences for civil contempt that distinguish them from sentences for criminal convictions. First, a sentence for civil contempt is not purely penal. It is intended to incent compliance with court orders and the purging of contempt. The second, related distinction is that a sentence for civil contempt generally will end once the contempt is purged. In this case, for example, Koehnen J. underscored that demonstrated purging of the contempt would bring Mr. Duscio's sentence to an end. Third, civil contempt does not involve the Crown (unless it is party to a civil dispute) and therefore the court will not normally have the benefit of submissions by the Crown on issues relating to the public interest. These distinctions mean that, while relevant, the *Oland* principles will not be determinative of a stay motion involving a sentence for civil contempt.

[21] The distinction between civil contempt and a criminal offence, however, should not be overstated. In Master Linda S. Abrams et al., *Halsbury's Laws of Canada*, "Civil Procedure", (Toronto: LexisNexis Canada, 2021 Reissue), at HCV-318, the authors observe:

Civil contempt constitutes an offence. It might naturally be assumed from the terminology employed that civil contempt constitutes an actionable civil wrong, whereas criminal contempt constitutes a crime. But the terminology is misleading, insofar as civil contempt is quasi-criminal in nature. Both civil and criminal contempt constitute offences, and both are subject to the normal standards of proof (i.e., beyond a reasonable doubt) and the constitutional safeguards applicable to a criminal charge. [Footnotes omitted.]

[22] I should add that my conclusion on the proper procedural pathway will not result in any prejudice to Mr. Duscio. Mr. Anevich submits that under either the stay or bail pending appeal standard, release is justified, while the responding party submits that release is not justified on either standard. The Attorney General, while taking a view on the proper procedural pathway, takes no position on Mr. Duscio's release.

[23] It is unclear whether Mr. Duscio must first be granted leave to appeal his sentence before this court would have jurisdiction over a stay application. He specifically seeks this leave in his materials. Rule 22 of the Ontario Court of Appeal's *Criminal Appeal Rules* provides:

(17) Where a convicted person seeks to appeal against sentence only and also seeks their release from custody pending appeal, a judge shall first hear and determine the motion for leave to appeal sentence.

(18) A motion for leave to appeal sentence and an application for release pending appeal may be brought at the same time before a judge, or the motion for leave to appeal sentence may be submitted first in writing.

[24] Neither the *Courts of Justice Act* nor the *Rules of Civil Procedure* provide any specific direction on appealing a warrant of committal for civil contempt.

[25] Whether or not leave is required for purposes of a stay of proceedings, I have no difficulty granting Mr. Duscio leave to appeal his sentence. The threshold is a low one, and as I elaborate further below, I cannot say the proposed appeal is "devoid of merit": *R. v. Hassan*, 2017 ONCA 1008, at paras. 14-16.

### **Application of the stay framework in this case**

[26] The framework for a stay pursuant to r. 63.02(1) has been well settled since *RJR-MacDonald* and has three parts:

- a) Is there a serious issue to be determined?
- b) Will the failure to grant the stay result in irreparable harm to the moving party? and,
- c) Where does the balance of convenience lie?

#### **(1) Is there a serious issue to be determined?**

[27] In this case, the first prong of the *RJR-MacDonald* framework is straightforward. The moving party raises a serious issue on appeal. His position is that the sentence imposed was disproportionate, and that, following the Supreme Court of Canada's decision in *R. v. Bissonnette*, 2022 SCC 23, 469 D.L.R. (4th) 387, any sentence which precludes eligibility for parole violates the *Canadian Charter of Rights and Freedoms*. This ground of appeal also would easily meet the the threshold of "sufficient merit" pursuant to s. 679(4)(a) of the *Code*.

[28] The responding party argues that the issue is an abstract one, as it is highly unlikely the moving party would ever obtain parole given his past record of engaging in further acts of contempt while released from custody from his first sentence for contempt. They also reject the analogy between *Bissonnette*, where

ineligibility for parole would mean imprisonment for life, and the sentence of 16 months at issue here.

[29] According to Mr. Anevich, civil contempt appears to be the only offence where a sentence without possibility of parole is now available. Whether or not this status quo has been altered by *Bissonnette* is an important matter to be settled.

**(2) Would the moving party suffer irreparable harm if the stay is not granted?**

[30] With respect to the second prong, at first glance, continued detention would appear to constitute irreparable harm. However, this factor depends to some extent on the length of time before Mr. Duscio will be able to have his appeal heard. At the moment, his appeal has not been scheduled.

[31] While Trotter J.A. raised scheduling the appeal during Mr. Duscio's last appearance in the inmate appeals stream, Mr. Duscio preferred to pursue release pending appeal so that he could actively assist in the preparation for the appeal. This consideration is clearly relevant, but I do not believe it rises to irreparable harm. As he remains in the inmate appeals stream, an appeal may be scheduled without the usual delay of several months that would accompany the scheduling of a solicitor appeal.

[32] Further, I do not view irreparable harm due to continuing detention as applicable in a setting where an individual may end his detention at any time by purging his contempt.

**(3) Does the balance of convenience favour granting or denying the stay?**

[33] Even if continuing detention did constitute irreparable harm, however, the balance of convenience in this case does not favour granting a stay.

[34] The seriousness of the moving party's disregard for court orders must be considered at this stage of the analysis.

[35] Mr. Duscio was found liable for defrauding the responding party of over \$7 million: *Caja Paraguaya de Jubilaciones Y Pensiones Del Personal De Itaipu Binacional v. Garcia*, 2018 ONSC 5379. Prior to that judgment, in May 2018, Dunphy J. issued non-dissipation and disclosure orders which froze Mr. Duscio's assets worldwide (but for his employment income) and directed him to swear an affidavit respecting all of his "current and historical worldwide assets, whether in [his] own name or not, and whether solely or jointly owned." In December 2018, Dunphy J. convicted him of contempt of court for specific violations of the orders and sentenced him to 12 months in jail: *Caja Paraguay de Jubilaciones y Pensiones del Personal de Itaipu Binacional v. Garcia*, 2018 ONSC 7771.

[36] The contempt in this case was by any measure extreme. Mr. Duscio ignored clear court orders not to dissipate funds and instead actively set out to do so. Dunphy J. described the contempt of the non-dissipation orders as “flagrant” and “deliberate”, adding, “I do not for one moment accept a semicolon or syllable of the explanation offered as honest and in good faith, at all.” Mr. Duscio compounded this behaviour with further acts in contempt, including as noted above, when released from custody during his first sentence.

[37] In issuing the sentence under appeal, Koehnen J. stated, “The wrongdoing here is serious. This is not a single act of contempt but an ongoing pattern of serial breaches of court orders and a serial refusal to comply with them. Mr. Duscio remains defiant in flaunting the orders against him. His contempt strikes at the heart of the administration of justice”: *Caja Paraguaya De Jubilaciones Y Pensiones Del Personal De Itaipu Binacional v. Obregon et al.*, 2022 ONSC 2360, at para. 11.

[38] With respect to the balance of convenience, a stay pending appeal, even a brief one, would frustrate the purposes of the court’s response to the moving party’s contempt by allowing him the opportunity to continue actively disregarding the court’s orders.

[39] In this regard, the approach taken by Doherty J.A. in *Chiang* is helpful. He stated, at paras. 9-11:

Unlike a criminal case in which incarceration is imposed exclusively as a punishment for prior criminal conduct,

Mr. Chiang's incarceration serves both as a punishment and as an incentive to purge his ongoing contempt. Prior experience suggests that Mr. Chiang complies with court orders, when he complies at all, only as a begrudging last resort.

Even if some of the undertakings which the trial judge found that Mr. Chiang had not complied with are vague and it can be said that he has made best efforts to comply with others, some of the undertakings are worded in a very specific manner and the trial judge made strong findings with respect to those undertakings. Mr. Chiang has made no efforts since the trial judge's findings to address the failures identified by her. Instead, he seeks to stay the order.

In the face of what appears to me to be a continued, ongoing, serious contempt, I think the public interest in the enforcement of the committal order must outweigh Mr. Chiang's liberty interests. The balance may well change if meaningful compliance with some of the outstanding undertakings were to occur at some future point in time. [Emphasis added.]

[40] For similar reasons, I conclude that the balance of convenience does not favour granting the stay sought in these circumstances.

[41] The *Oland* factors for bail pending appeal relating to the public interest may also inform the balance of convenience prong of the *RJR-MacDonald* framework.

[42] The public interest component includes two aspects: public safety and public confidence in the administration of justice. There does not appear to be any public safety issue raised on this application, although the responding party argues Mr. Duscio's lack of credibility makes any commitment on his part to surrender into

custody following a period of release suspect. That said, he has surrendered into custody on at least two occasions when this has been required.

[43] On balance, I do not believe detention is necessary on public safety grounds.

[44] With respect to the public confidence aspect of this prong, the court must balance the societal interest in enforcing the sentence imposed on the one hand, with the societal interest in reviewing that sentence on the other, in light of the strength of the proposed case on appeal and the right to have that appeal heard before serving the full sentence.

[45] While the reviewability interest is relatively high in this case, the enforceability interest is higher. As Doherty J.A. observed in *Chiang*, imprisonment for civil contempt is specifically directed towards securing compliance with court orders, not simply punishment for violating them. Contrary to the submissions of Mr. Anevich, I would see this rationale as more apposite in the context of a serial contemnor such as Mr. Duscio, rather than less.

[46] While I have set out the ways in which the *Oland* framework informs the determination of this motion for a stay, I should add that if I were simply applying s. 679(4) of the *Criminal Code*, the result would be the same. While the appeal certainly meets the low bar of having sufficient merit, the public confidence dimension of the test for whether continuing detention is required is squarely

engaged. In my view, it would be unacceptable to a reasonably informed member of the public to permit a person who has shown such ongoing and flagrant disregard for the administration of justice to be released pending appeal: *Oland*, at para. 47.

## **DISPOSITION**

[47] For the reasons set out above, the application for leave to appeal sentence is granted but the motion for release pending appeal is dismissed.

[48] The scheduling of Mr. Duscio's sentence appeal should be spoken to at the next available opportunity in the inmate appeal stream during the week of November 7, 2022, with a view to setting an appeal date as soon as possible.

[49] As this is a civil proceeding, costs would normally be available (and were ordered, for example, in *Chiang*). However, as the parties approached this matter pursuant to s. 679 of the *Criminal Code*, no costs were sought by either party. Consequently, no costs will be ordered.

“L. Sossin J.A.”