CITATION: R. v. Drabinsky, 2011 ONCA 647
DATE: 20111014
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COURT OF APPEAL FOR ONTARIO

Doherty J.A. (in chambers)

BETWEEN

Her Majesty the Queen

Respondent

and

Garth Howard Drabinsky

Applicant

Edward L. Greenspan, Q.C., and Michael W. Lacy, for the applicant

Alexander Hrybinsky, for the respondent

Heard: October 11, 2011

Doherty J.A. (in chambers):

[1] This is an application for bail pending the determination of the applicant's application for leave to appeal to the Supreme Court of Canada from the order of this court dismissing his conviction appeal. For the reasons that follow, the application is dismissed.

[2] The events giving rise to the charges against the applicant (Drabinsky) occurred in the 1990s. Charges were laid several years ago. In March 2009, after a lengthy trial, Drabinsky was convicted of two counts of fraud. In August 2009, he was sentenced to a total of seven years imprisonment. Drabinsky appealed and was released on bail pending appeal. His appeal was heard in May 2011, and in September 2011 this court dismissed the conviction appeal, allowed Drabinsky's sentence appeal and reduced his sentence to five years.

[3] Drabinsky has been on bail throughout his prolonged march through the criminal justice system. He has complied fully with his bail requirements. He has been in custody since this court released its reasons in September 2011.

[4] This application is governed by s. 679(3) of the *Criminal Code*, R.S.C. 1985, c. C-46. Drabinsky must establish that:

- his application for leave to appeal to the Supreme Court of Canada is not frivolous (s. 679(3)(a));
- he will surrender himself into custody in accordance with the terms of any release order (s. 679(3)(b)); and
- his detention is not necessary in the public interest (s. 679(3)(c)).

[5] There is no concern that Drabinsky would surrender himself into custody as required. He has satisfied that criterion in s. 679(3)(b).

[6] It is difficult for a judge of this court to determine whether an application for leave to appeal to the Supreme Court of Canada is frivolous. I am prepared to assume that this application clears that low standard as in my view the appellant has not shown that his release is in the public interest: see *France v. Ouzghar*, 2009 ONCA 137, 95 O.R. (3d) 187, leave to appeal to S.C.C. refused, [2009] S.C.C.A. No. 122, at para. 13.

[7] The meaning of the "public interest" in the context of post-conviction bail applications was described by Arbour J.A., for a five-judge panel, in *R. v. Farinacci* (1993), 86 C.C.C. (3d) 32 (Ont. C.A.), at pp. 47-48:

> The concerns reflecting public interest, as expressed in the case law, relate both to the protection and safety of the public and to *the need to maintain a balance between the competing dictates of enforceability and reviewability. It is the need to maintain that balance which is expressed by reference to the public image of the criminal law, or the public confidence in the administration of justice.* The "public interest" criterion in s. 679(3)(c) of the [*Code*] requires a judicial assessment of the need to review the conviction leading to imprisonment, in which case execution of the sentence may have to be temporarily suspended, and the need to respect the general rule of immediate enforceability of judgments. [Emphasis added.]

[8] Arbour J.A. goes on to explain in *Farinacci* that the principle of reviewability of court orders carries with it the need to have some means to stay or delay the enforcement of the order under review. Without that mechanism, the principle of the reviewability of a conviction could, in some circumstances, be rendered all but meaningless to an accused who might well serve months of his sentence awaiting appellate review only to have his conviction quashed on that review.

[9] Arbour J.A. also explains, however, that the reviewability principle does not stand alone. The enforceability principle, an aspect of finality, calls for the enforcement of court orders, including sentences imposed after criminal trials. Where an accused is convicted of a serious crime and sentenced to a significant jail term, public confidence in the effective operation of the justice system must suffer if years go by before the accused serves that sentence. The public interest in the prompt and effective enforcement of court orders, including sentences, distinguishes the public interest inquiry necessitated where bail is sought pending an appeal from conviction from the inquiry undertaken in extradition matters. In extradition cases, the surrender order, the only order in issue, cannot be enforced while judicial proceedings are extant challenging the surrender. Consequently, a bail order pending judicial review of that surrender order has no effect on the enforceability of the order: see *France*, at paras. 11-12.

[10] Where an application for bail post-conviction turns on the public interest criterion in s. 679(3)(c), the court must determine whether the principle of enforceability should yield to the principle of reviewability. At this stage of the appellate proceedings, priority should be given to the enforceability principle. I come to that conclusion for three reasons. First, the reviewability principle has been recognized and given priority up to this point in the appellate process. Drabinsky was on bail for over two years after he was sentenced while he pursued an appeal to this court. In its reasons dismissing the conviction appeal, this court not only rejected all arguments put forward on behalf of Drabinsky, but also described the case against him as “overwhelming, particularly in the

absence of any testimony from the appellants": see *R. v. Drabinsky*, 2011 ONCA 582, at para. 55, leave to appeal to S.C.C. pending. The pendulum must swing towards enforceability and away from bail pending further review after the correctness of the convictions entered at trial has been affirmed on appeal.

[11] Second, in considering the effect to be given to the reviewability principle, one must bear in mind that Drabinsky has no further right of appeal. Before he can obtain any further review of his convictions, he must obtain leave to appeal from the Supreme Court of Canada. Leave to appeal is of necessity granted sparingly by that court. Nothing in the material presented on this application points to any feature of this case which would suggest that it is likely that the Supreme Court will grant leave in this case. While I assume the application is not frivolous, I think it is fair to say that leave is not likely to be granted. Any right of review that Drabinsky maintains is a tenuous one that depends entirely on the outcome of his leave application. At this stage of the proceedings, the principle that trial judgments should be enforced is very much in play while the operation of the reviewability principle is contingent upon the granting of leave to appeal.

[12] Third, denying bail, at least until the leave application is determined, will not render Drabinsky's attempt to further review his convictions meaningless in the sense that he will have served most, if not all, of his sentence before the outcome of his application is determined. Counsel advised that the Supreme Court of Canada normally takes between three to six months to decide leave applications. Drabinsky has served

about a month of a five-year sentence. He will still have years to serve when he knows whether the Supreme Court of Canada will hear his case.

[13] The public interest requires that the enforceability principle be given paramountcy at this stage of the proceedings. If Drabinsky does receive leave to appeal, that changed circumstance may well call for a reassessment of his bail status.

[14] The application for bail pending appeal is refused without prejudice to a further application should leave to appeal to the Supreme Court be granted.

RELEASED: "DD" "OCT 14 2011"

"Doherty J.A."