NOVA SCOTIA COURT OF APPEAL

Citation: Nova Scotia (Attorney General) v. Morrison Estate, 2009 NSCA 116

Date: 20091116
Docket: CA 315014
Registry: Halifax

Between:

The Attorney General of Nova Scotia, representing Her Majesty the Queen in right of the Province of Nova Scotia, (Department of Health), The Minister of Health for the Province of Nova Scotia at the relevant time and The Executive Director of Continuing Care for the Province of Nova Scotia

Appellants

v.

The Estate of Elmer Stanislaus Morrison, By His Executor or Representative Joan Marie Morrison, Joan Marie Morrison, John Kin Hung Lee, By His Legal Guardian Elizabeth Lee and Elizabeth Lee

Respondents

Judge:	The Honourable Justice Duncan R. Beveridge
Application Heard:	August 28, 2009, in Chambers
Held:	Application for a stay of proceedings pending the outcome of the appeal is dismissed with costs to the respondent.
Counsel:	Ms. Alison Campbell, for the appellants Mr. Michael Dull and Ms. Anna Marie Butler, for the respondents

Decision:

INTRODUCTION

[1] MacAdam J., as the case management judge for a class action proceeding, declined to determine the merits of an application by the defendants to have the plaintiffs provide further and better particulars with respect to certain allegations in the Statement of Claim until after the certification hearing. The defendants appealed. They brought an application before me for a stay of the proceedings before MacAdam J., pending the outcome of the appeal. I heard the application on August 28, 2009. At the conclusion of oral argument I ruled that I would decline to grant the motion to stay with reasons to follow. These are my reasons.

PROCEDURAL HISTORY & OVERVIEW

[2] It is unnecessary to recount all the procedural events since this litigation began. But to understand the issues alive on the application to stay pending appeal, some reference to the history of the proceedings is appropriate.

[3] On September 8, 2005 an Originating Notice and Statement of Claim was issued. The original plaintiffs were Elmer Stanislaus Morrison, by his litigation guardian Joan Marie Morrison, and Joan Marie Morrison. The sole defendant was the Attorney General of Nova Scotia representing Her Majesty the Queen in right of the Province of Nova Scotia. The plaintiffs set out their intention to certify the action as a class proceeding and referenced the decision by the Supreme Court of Canada in *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 and Rule 5.09 of *Nova Scotia Civil Procedure Rules* (1972). In the spring of 2007 Justice MacAdam took on the role of case management judge.

[4] The Statement of Claim has been amended from time to time. Individual defendants were added, and then changed to designate the office held by them at the relevant time period. Mr. Morrison passed away in May 2007. The action was continued on behalf of his estate. John Kin Lee, by his legal guardian, and his spouse, Elizabeth Lee were added as additional representative plaintiffs.

[5] The version of the Statement of Claim considered by MacAdam J. on the application for further and better particulars was labelled “The Second Fresh as

Amended Statement of Claim". The plaintiffs propose to bring a class action on behalf of themselves and other residents of nursing homes, and their family members who have been required to pay for the health care costs of residents in Nova Scotia nursing homes for the period February, 2001 and January 1, 2005.

[6] The Statement of Claim sets out the history of the availability of and responsibility for the provision and funding of medically required hospital services and medically required services provided by physicians and other health care providers. It says that the full cost of insured health care services are covered for all residents who have a valid Nova Scotia Health Care Card number with no extra billing and no premiums. This was in contrast to the system for Nova Scotians who resided in nursing homes. The Department of Health set a per diem rate that each nursing home was permitted to charge.

[7] Up to February 21, 2001 there was a two-tier system for obtaining a bed in a nursing home. Those that had the financial ability to pay the full per diem rate set by the Department of Health could contract directly with any nursing home of their choice without submitting to a financial or other assessment by the Department of Health. Individuals who did not have the financial ability to pay for nursing home care, could apply to have the Department of Health pay all or part of the per diem charges, subject to a functional and financial assessment and they would be placed on a waiting list until a bed became available.

[8] The claim asserts that due to a shortage of hospital and nursing home beds, the Department of Health implemented a single coordinated placement list and assessment process throughout the province. This process purported to make it mandatory for all individuals, regardless of need or financial ability, to go through an assessment process. They say that this system prevented them from directly applying for and contracting with nursing home operators of their choice; forced them onto government controlled waiting lists behind persons who the Department of Health preferred to see obtain nursing home admission and care; and compelled them and their family members to submit to an intrusive and psychologically stressful financial disclosure, while at the same time continuing to require them to pay the full per diem charges, including health care costs.

[9] The plaintiffs allege that the responsible office holders knew that they did not have the requisite lawful authority to implement such a system. They say there were warnings before, during and after the class period by the Auditor General that

the legislation and regulations did not provide an adequate legal basis for the practices and programs of the Department of Health, in particular in relation to the long term care of seniors in nursing homes. Such conduct, they allege, was not only unlawful, but arbitrary and reprehensible, and merits an award of punitive damages.

[10] Finally on January 1, 2005 the Department of Health began paying for health care costs for residents of nursing homes, drastically reducing the per diem cost for residents having a valid Nova Scotia Health Card. The failure to have done so during the class period, they claim to be actionable.

[11] The plaintiffs assert the right to damages on the basis of claims in tort, including misfeasance in public office, fraudulent misrepresentation and deceit, negligence. In the alternative, they claim the right to damages for monies paid to nursing homes for health care costs. They also allege breach of fiduciary duty, equitable fraud, unjust enrichment and, finally, violation of their rights under the *Canadian Charter of Rights and Freedoms*.

[12] No defence has ever been filed by the defendants. The defendants did bring an application to strike the paragraphs in the Statement of Claim asserting misfeasance in public office, equitable fraud, breach of fiduciary duty and the claim for a remedy under s. 15(1) of the *Charter* for the Estate of Mr. Morrison. The defendants subsequently abandoned its challenge to the claim for misfeasance in office, and the plaintiffs abandoned the claim by the Estate of Mr. Morrison for a remedy under s 15(1) of the *Charter*. MacAdam J. heard the balance of the application on August 8 and 11, 2008. The application was dismissed in written reasons released October 14, 2008 (reported 2008 NSSC 281, 269 N.S.R. (2d) 295).

[13] Following the coming into force of the *Class Proceedings Act*, S.N.S. 2007, c. 28, the proceedings were continued pursuant to s. 3(4) of that *Act* by order of MacAdam J..

[14] In a case management conference held December 2, 2008, the dates for the certification hearing were set for June 22-24, 2009. A schedule was set for materials to be filed by the parties. This filing schedule was apparently revised at a further case management meeting on December 22, 2008.

[15] On January 16, 2009 the defendants served on the plaintiffs a demand for particulars. It contained 15 paragraphs. The plaintiffs communicated its misgivings about the need to provide particulars. Nonetheless, they provided a formal response to the demand on January 30, 2009. The defendants served a second demand for particulars (reduced to 14 paragraphs) on the plaintiffs on February 24, 2009 claiming the answers provided by the plaintiffs were insufficient.

[16] In the meantime, the plaintiffs filed their materials on February 6, 2009 for the June 22-24 certification hearing. The defendants were to file their materials on February 25, 2009. A further case management conference was held on May 22. The defendants indicated they would not be ready to proceed on June 22-24, 2009. The certification hearing was adjourned to August 13-14, 2009, with a new filing date of July 22, 2009 for the defendants' materials.

[17] The defendants brought a motion to compel answers to their demand for particulars, returnable on June 24, 2009. The motion was heard by MacAdam J. on that date. He released a written decision on June 26, 2009 dismissing the motion (reported 2009 NSSC 198, 279 N.S.R. (2d) 311). This resulted in an order dated July 20, 2009 that stayed the defendants' motion for further and better particulars pending the determination of the plaintiffs' motion for certification, without prejudice to the defendants filing an amended demand for particulars after determination of the plaintiffs' motion for certification.

[18] The defendants commenced the appeal process by filing and service of a Notice of Application for Leave to Appeal and Notice of Appeal on August 5, 2009, with a return date of August 20, 2009 to set a date and give directions. On August 20, the appeal was set to be heard on January 19, 2010 and filing dates set for the Appeal Book and facta. As is the norm in this court, the issue of leave to appeal will be determined by the panel on or after January 19, 2010.

[19] From the materials filed on this motion, it appears that the certification hearing was adjourned to accommodate the Supreme Court's schedule from August 13 to September 8-9 and then to October 13-14, 2009.

[20] The motion documents filed by the appellants request that I order a stay of the certification hearing pending the outcome of the appeal, and an order lifting

Justice MacAdam's stay of the motion for particulars to enable that motion to be heard in advance of the certification hearing.

ISSUES

1. What is the scope of my jurisdiction to grant the relief being requested?

2. Should I exercise that jurisdiction?

DISCUSSION

Jurisdiction

[21] The respondents did not initially advocate that I did not have, as a single judge of the Court of Appeal, the jurisdiction to grant the remedies being requested. I canvassed this issue with the parties due to the wording of the relief being sought. It is trite law that a superior court judge has the jurisdiction to stay the effects of his or her decision. However, in Nova Scotia, as in most provinces, the initiation of an appeal does not operate as a stay. Up to December 31, 2008 the *Nova Scotia Civil Procedure Rules* (1972) governed. The relevant provision was:

> 62.10. (1) The filing of a notice of appeal shall not operate as a stay of execution of the judgment appealed from.
>
> (2) A Judge on application of a party to an appeal may, pending disposition of the appeal, order stayed the execution of any judgment appealed from or of any judgment or proceedings of or before a magistrate or tribunal which is being reviewed on an appeal under Rules 56 or 58 or otherwise.
>
> (3) An order under rule 62.10(2) may be granted on such terms as the Judge deems just.
>
> (4) Interest for such time as execution may be delayed by an appeal shall be allowed on the judgment at the rate of six per cent (6%) per annum from the filing of the notice of appeal, unless otherwise ordered by the Court or a Judge, and the interest shall be added to the judgment on execution without an order for that purpose.

> (5) Nothing herein prevents the staying of execution or proceedings by the court appealed from, as authorized by rule of court or by an enactment.
>
> (6) Where an execution has been issued and is thereafter stayed as provided in this rule 62.10 the appellant is entitled to obtain a certificate from the Registrar that the execution has been stayed pending the appeal, and, upon the certificate being lodged with the sheriff, the execution shall be superseded, but the execution debtor shall pay the sheriff's fees and the sum so paid shall be allowed to him as part of the costs of the appeal.
> [Amend. 28/07/95]
>
> (7) Where the execution of a judgment is stayed pending an appeal, all further proceedings in the action other than the issue and recording of the judgment in the office of the Registrar of Deeds and the taxation of costs thereunder, shall be stayed unless otherwise ordered by the Court or a Judge.
> [Amend. 17/1/77]

[22] The seminal decision in Nova Scotia on obtaining a stay pending appeal is *Purdy v. Fulton Insurance Agencies Ltd.* (1990), 100 N.S.R. (2d) 341 (C.A.). The appellant was the respondent's financial controller for a number of years. Almost a year after his employment ceased, the respondent sued, alleging the appellant had defrauded the respondent of approximately $100,000. The appellant denied the allegations and counterclaimed for wrongful dismissal. Fulton Insurance Agencies brought an application for summary judgment with respect to some of the monies claimed. The Chambers judge granted summary judgment in the amount of $45,700 and refused an application by the appellant to stay execution of the judgment pending determination of the appellant's counterclaim. The appellant then appealed claiming error by the Chambers judge in granting summary judgment and refusing to stay the execution of the judgment until his counterclaim was determined. The appellant applied under *Nova Scotia Civil Procedure Rule* (1972) 62.10(2) for a stay of execution until his appeal was heard.

[23] Hallett J.A. heard the application. He referred to the then relatively recent decision of the Supreme Court of Canada in *Attorney General of Manitoba v. Metropolitan Stores (MTS) Ltd. et al*, [1987] 1 S.C.R. 110. In *Metropolitan Stores* the trial judge had upheld the validity of the *Labour Relations Act* that permitted the Labour Board to impose a first collective agreement if the employer and the union could not do so within a stated time frame. The trial judge refused to issue a stay, thereby permitting the Board to impose a collective agreement prior to the hearing of the constitutional challenge. The employer appealed the refusal. The

Court of Appeal allowed the appeal and granted a stay. On further appeal to the Supreme Court of Canada, the appeal was allowed and the decision of the trial judge reinstated. Beetz J. delivered the judgment of the court. Beetz J. noted that:

> A stay of proceedings and an interlocutory injunction are remedies of the same nature. In the absence of a different test prescribed by statute, they have sufficient characteristics in common to be governed by the same rules and the courts have rightly tended to apply to the granting of interlocutory stay the principles which they follow with respect to interlocutory injunctions: [authorities omitted] (par. 29).

[24] Hallet J.A. implicitly accepted the tenet that an order for a stay pending appeal should be governed by the same principles as for an interlocutory injunction. After reviewing the authorities, he articulated what he considered to be the appropriate tests to be considered on applications for stays of execution pending an appeal:

> [27] A review of the cases indicates there is a trend towards applying what is in effect the **American Cyanamid** test for an interlocutory injunction in considering applications for stays of execution pending appeal. In my opinion, it is a proper test as it puts a fairly heavy burden on the appellant which is warranted on a stay application considering the nature of the remedy which prevents a litigant from realizing the fruits of his litigation pending the hearing of the appeal.
>
> [28] In my opinion, stays of execution of judgment pending disposition of the appeal should only be granted if the appellant can either:
>
> > (1) satisfy the court on each of the following: (i) that there is an arguable issue raised on the appeal; (ii) that if the stay is not granted and the appeal is successful, the appellant will have suffered irreparable harm that it is difficult to, or cannot be compensated for by a damage award. This involves not only the theoretical consideration whether the harm is susceptible of being compensated in damages but also whether if the successful party at trial has executed on the appellant's property, whether or not the appellant if successful on appeal will be able to collect, and (iii) that the appellant will suffer greater harm if the stay is not granted than the respondent would suffer if the stay is granted; the so-called balance of convenience
>
> OR

> (2) failing to meet the primary test, satisfy the Court that there are exceptional circumstances that would make it fit and just that the stay be granted in the case.

[25] Hallett J.A. concluded that the appellant/applicant could not meet the primary test. He nonetheless granted the stay due to the combined effect of three factors that created exceptional circumstances making it fit and just. An application for a stay of execution was granted, but on terms.

[26] Although the kind of stay pending appeal in *Purdy v. Fulton Insurance Agency Ltd.* dealt with a stay of execution of a money judgment, it cannot be doubted that the tests articulated by Hallett J.A. have been consistently considered to govern all applications for a stay of proceedings pending an appeal.

[27] Here, the appellants do not just seek a stay of enforcement of an order, but to stay the effects of the order granted by MacAdam J.. Furthermore, they ask that I not only order the certification proceedings be stayed pending appeal, but direct that the original motion for further and better particulars be allowed to proceed in the meantime. The relief sought is what they would get if they were ultimately successful on the appeal – the requested particulars prior to the certification hearing. It would therefore be inappropriate to grant the second aspect of the relief sought.

[28] In my view, prior to the introduction of the *Nova Scotia Civil Procedure Rules*, there was some uncertainty whether a judge of this court had the jurisdiction to stay proceedings that were outstanding before a justice of the Supreme Court. For example, in *First Mortgage Fund Nova Scotia (III) Inc. v. HSBC Capital Inc*., 2000 NSCA 145, 192 N.S.R. (2d) 362, Flinn J.A. was asked to stay proceedings then pending before Justice Tidman of the Supreme Court pending the appeal of an interlocutory order that had been issued in those proceedings. Flinn J.A. was of the view that *Civil Procedure Rule* 62.10 did not provide the necessary jurisdiction to stay an action in the Supreme Court.

[29] A similar issue was raised in *Orabi v. Qaoud*, 2004 NSCA 104. Cromwell J.A. (as he then was) was asked to stay proceedings in the Family Division of the Supreme Court pending an appeal of a preliminary point of law. Cromwell J.A. did not decide whether or not he had jurisdiction to stay proceedings but held that, even if he had such jurisdiction, he would decline to intervene.

[30] In *Children's Aid Society and Family Services of Colchester County v. D.T.*, [1992] Can LII 4781, Hallett J.A. stayed outstanding proceedings in the Supreme Court with respect to custody pending appeal. No mention was made of the jurisdiction to do so. (See also *Quigley v. Willmore*, 2007 NSCA 122.)

[31] Clarke C.J.N.S. in *R. v. Dempsey* (1995), 138 N.S.R. (2d) 110 concluded that he had the jurisdiction to stay a trial scheduled in Supreme Court pending an appeal. He relied on *Civil Procedure Rule* 62.10(2), which applied by virtue Rule 65.03 (made pursuant to s. 482 of the *Criminal Code)*.

[32] However, whatever could be said in support or against a judge of the Court of Appeal having the jurisdiction to stay proceedings in the Nova Scotia Supreme Court, the debate, in my opinion, has been rendered academic by the promulgation of the new *Civil Procedure Rules*.

[33] *Civil Procedure Rule* 90.41 governs applications for stays in the Court of Appeal. It provides:

> 90.41 (1) The filing of a notice of appeal shall not operate as a stay of execution or enforcement of the judgment appealed from.
>
> (2) A judge of the Court of Appeal on application of a party to an appeal may, pending disposition of the appeal, **order stayed the execution and enforcement of any judgment appealed from or grant such other relief against such a judgment or order, on such terms as may be just.**
>
> (3) Interest for such time as execution may be delayed by an appeal shall be allowed on the judgment in accordance with the *Interest on Judgments Act* from the filing of the notice of appeal, unless ordered otherwise by the Court of Appeal or a judge of the Court of Appeal, and the interest shall be added to the judgment on execution without an order for that purpose.
>
> (4) This Rule 90.41 does not prevent the staying of execution or proceedings by the court appealed from, as authorized by a Rule or legislation.

> (5) An appellant who obtains a stay under this Rule 90.41 may obtain a certificate from the registrar stating that a stay of execution and enforcement has been granted and deliver the certificate to the sheriff.
>
> (6) A sheriff who receives a certificate must cease enforcement of the order under appeal.
>
> (7) An appellant who delivers a certificate to a sheriff who ceases enforcement must pay the outstanding sheriff's fees and the payment may be allowed as part of the costs of the appeal.
>
> (8) A stay of execution and enforcement stays other processes to enforce the order appealed from, other than the taxation of costs in the proceeding and the recording of the judgement in the Registry of Deeds, unless ordered otherwise by the Court of Appeal or a judge of the Court of Appeal.

[34] There are obvious similarities between this new Rule and the old. There are, in addition, significant changes. In particular, 90.41(2) empowers a judge to not merely stay the execution and enforcement of any judgment appealed from but also to "grant such other relief against such a judgment or order, on such terms as may be just."

[35] Similar language was considered by the Supreme Court of Canada in *RJR – MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311. The appellant/applicants challenged the constitutional validity of federal legislation on the basis it was *ultra vires* and in violation of s. 2(b) of the *Canadian Charter of Rights and Freedoms*. The Quebec Court of Appeal held that the *Act* was not *ultra vires*, did infringe the *Charter*, but was justified under s. 1 of the *Charter*. The applicants then filed an application for leave to appeal. They also filed applications seeking a stay pursuant to s. 65.1 of the *Supreme Court Act* or, in the event that leave to appeal was granted, a stay pursuant to r. 27 [now r. 62] of the *Rules of the Supreme Court of Canada*, S.O.R./83-74. These provisions are as follows: Supreme Court Act, R.S.C. 1985, c. S-26, s. 65.1:

> 65.1 The Court or a judge may, on the request of a party who has filed a notice of application for leave to appeal, order that proceedings be stayed with respect to the judgment from which leave to appeal is being sought, on such terms as the Court or the judge seem just.

Rules of Supreme Court of Canada, S.O.R./83-74, r. 27:

> 27 Any party against whom judgment has been given, or an order made, by the Court or any other court, may apply to the Court for a stay of execution or other relief against such a judgment or order, and the Court may give such relief upon such terms as may be just.

[36] Preliminary arguments were raised as to the court's jurisdiction to grant the relief requested. Since the applicants sought to be excused from having to comply with the requirements of the regulations, it was argued that the words "or other relief" in r. 27 were not broad enough to permit the court to defer enforcement of regulations. In addition, it was contended that since the judgment of the Quebec Court of Appeal was declaratory, it was not subject to execution and therefore no "proceeding" available to be stayed.

[37] Sopinka and Cory JJ. delivered the judgment of the court on the applications for interlocutory relief. They noted that since leave to appeal was granted, s. 65.1 of the *Act* was now academic. In light of the arguments advanced, they referenced the legislative basis for r. 27 as s. 97(1)(a) of the *Act*, which provided:

> 97. (1) The judges, or any five of them, may make general rules and orders
>
> > (a) for regulating the procedure of and in the Court and the bringing of cases before it from courts appealed from or otherwise, and for the effectual execution and working of this Act and the attainment of the intention and objects thereof;

[38] They observed that the relatively new amendment to the *Act* by the addition of s. 65.1 did not detract from the broad powers set out in r. 27 – rather it was simply to enable a single judge of the court to grant stays in circumstances which before the amendment could only be granted by the court. They concluded:

> [30] In light of the foregoing and bearing in mind in particular the language of s. 97 of the Act we cannot agree with the first two points raised by the Attorney General that this Court is unable to grant a stay as requested by the applicants. We are of the view that the Court is empowered, pursuant to both s. 65.1 and r. 27, not only to grant a stay of execution and of proceedings in the traditional sense, but also to make any order that preserves matters between the parties in a state that will prevent prejudice as far as possible pending resolution by the Court of

> the controversy, so as to enable the Court to render a meaningful and effective judgment. The Court must be able to intervene not only against the direct dictates of the judgment but also against its effects. This means that the Court must have jurisdiction to enjoin conduct on the part of a party in reliance on the judgment which, if carried out, would tend to negate or diminish the effect of the judgment of this Court. In this case, the new regulations constitute conduct under a law that has been declared constitutional by the lower courts.

[39] In my opinion, the *Judicature Act*, R.S.N.S. 1989, c. 240 confers similarly broad rule-making powers on the judges of the Court of Appeal. It provides:

> 46. The judges of the Court of Appeal or a majority of them may make rules of court in respect of the Court of Appeal and the judges of the Supreme Court or a majority of them may make rules of court in respect of the Supreme Court for carrying this Act into effect and, in particular
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> ...
>
> (j) generally for regulating any matter relating to the practice and procedure of the Court, or to the duties of the officers thereof, or to the costs of proceedings therein and every other matter deemed expedient for better attaining the ends of justice, advancing the remedies of suitors and carrying into effect the provisions of this Act, and of all other statutes in force respecting the Court.

[40] I would note that in addition to the broad and general language contained in Rule 90.41(1), Rule 7.28 provides:

> 7.28 (1) A judge may stay a decision under judicial review or appeal and any process flowing from the decision until the determination of the judicial review or appeal.
>
> (2) A motion for a stay must be made at the same time as the motion for directions, unless a judge orders otherwise.
>
> (3) The motion must be made by notice of motion in accordance with Rule 23 - Chambers Motion, although it is mentioned in the notice of appeal or notice for judicial review.
>
> (4) A judge may grant an interim stay until the hearing of a motion for a stay.

> (5) The judge may grant any order, including an injunction, as may be necessary to effectively stay a decision.

[41] By virtue of Rule 90.02(1), Civil Procedure Rules that are not inconsistent with Rule 90 apply to proceedings in the Court of Appeal with such necessary modifications as may be directed by the Court of Appeal or a judge thereof. I see nothing inconsistent with Rule 7.28 with the provisions of Rule 90.41.

[42] I would therefore conclude that whatever uncertainty there may have been with respect to the power of a single judge of the Court of Appeal to grant the kind of relief here being requested has now been removed.

[43] The decision of *RJR – MacDonald Inc. v. Canada (Attorney General), supra.*, is important for two reasons. It is persuasive authority that the language of Rule 90.41(2) to "grant such other relief against such a judgment or order" is broad enough to found the requisite jurisdiction to grant relief from the *effects* of the judgment being appealed from. It also affirms the test for such relief is the same three-part test when considering an application for an interlocutory injunction, which is in essence what Hallett J.A. articulated in *Purdy v. Fulton Insurance Agencies Ltd.*, with the additional safeguard of being able to grant such relief in "exceptional circumstances".

Exercise of Jurisdiction

[44] The parties are not in disagreement as to the appropriate test to be applied on this application. Where they differ is to the application of the test. The appellants claim that they have demonstrated an arguable issue, irreparable harm if the stay was denied, and that the balance of convenience favours the appellants or that, in any event, there are exceptional circumstances warranting a stay. The respondents take the position that the appellant has failed to satisfy any aspect of the requisite criteria.

[45] What constitutes an arguable issue was discussed by Freeman J.A. in *Coughlan et al. v. Westminer Canada Ltd. et al.* (1994), 125 N.S.R. (2d) 171 at para. 11:

> "An arguable issue" would be raised by any ground of appeal which, if successfully demonstrated by the appellant, could result in the appeal being allowed. That is, it must be relevant to the outcome of the appeal; and not be based on an erroneous principle of law. It must be a ground available to the applicant; if a right to appeal is limited to a question of law alone, there could be no arguable issue based merely on alleged errors of fact. An arguable issue must be reasonably specific as to the errors it alleges on the part of the trial judge; a general allegation of error may not suffice. But if a notice of appeal contains realistic grounds which, if established, appear of sufficient substance to be capable of convincing a panel of the court to allow the appeal, the Chambers judge hearing the application should not speculate as to the outcome nor look further into the merits. Neither evidence nor arguments relevant to the outcome of the appeal should be considered. Once the grounds of appeal are shown to contain an arguable issue, the working assumption of the Chambers judge is that the outcome of the appeal is in doubt: either side could be successful.

[46] This approach was echoed by Sopinka and Cory JJ. in *R.J.R. – MacDonald Inc. v. Canada (Attorney General), supra*, at paras. 49 and 50. (See also *MacCulloch v. McInnes, Cooper and Robertson*, 2000 NSCA 92, at para. 4.

[47] In the appellant's notice of application for leave to appeal, the suggested errors of the Chambers judge are:

> (1) The Learned Judge erred in finding that the demand for particulars related to substantive issues and so the motion for particulars was premature and should be stayed until after the certification hearing.
>
> (2) The Learned Judge erred in law in failing to consider the importance of adequate notice to the Attorney General of Charter challenges which includes particulars of the nature of the challenge such as are outlined in the *Constitutional Questions Act*;
>
> (3) The Learned Judge erred in law in failing to consider the importance of clarity in the nature of the claims being made which would enable the court at the certification motion to consider:
>
> > (a) what the identity of the class is or ought to be;
> >
> > (b) whether there is a proper cause of action set out in the pleading;

> (c) what might properly be an issue for all class members (as defined in the claim) which ought to be certified as a common issue to be determined by the court at the common issues trial;
>
> (d) what might properly be an issue that is individual in nature for each of the class members (as defined in the claim) which ought to be certified as an individual issue to be determined by the court at individual trials after the common issues trial, or as the court may direct;
>
> (e) whether the clearly defined common issues would sufficiently advance the proceeding that the proceeding ought to be certified as a class proceeding.

[48] The appellants argue that there is no dispute that particulars are needed as the respondents conceded this point in the hearing before MacAdam J. This is partially correct. The appellants' written and oral submissions before the Chambers judge were that the requested particulars were required so that it may "properly defend this claim"; without the particulars the "Department of Justice will not be able to provide a response to these allegations other than a general denial". The respondents did concede that at least some of the particulars sought would be appropriate in order to permit the defendants to draft the defence and to know the case they would be meeting at trial, but not prior to the certification hearing.

[49] There was no suggestion in the appellants' written materials before the Chambers judge of a need to have the requested particulars prior to the certification hearing. In oral argument the only reference by the appellants to obtaining particulars prior to the hearing was as follows:

> This is the other component, I guess, that we're struggling with, is as we prepare to go to the certification hearing those particulars, I would think, would be helpful in clarifying whether or not the common - - there's a cause of action, there's common issues or if there are individual issues, and it would be helpful not only for the defendant but also for the court to have those particulars at this stage going to certification. (Appeal Book, p. 367).

[50] The appellants now assert that the Chambers judge failed to give sufficient weight to the argument that particulars are needed for the purposes of the certification hearing, and erred in not recognizing and addressing that there are "two streams of jurisprudence on the issue of whether to order particulars prior to

certification." They cite the decision of Kirkpatrick J. in *Hoy v. Medtronic, Inc.*, 2000 BCSC 1902. There, the defendants requested particulars in order to draft their defence. Despite no demand having been made for the defence to be filed nor a requirement to do so prior to a certification hearing, Kirkpatrick J. did observe that the certification process may narrow the issues, and such a process would be enhanced if the pleadings were fully focussed with clarity and precision.

[51] What must be decided on a certification motion is set out in s. 7 of the *Class Proceedings Act*, S.N.S. 2007, c. 28:

> 7 (1) The court shall certify a proceeding as a class proceeding on an application under Section 4, 5 or 6 if, in the opinion of the court,
>
> (a) the pleadings disclose or the notice of application discloses a cause of action;
>
> (b) there is an identifiable class of two or more persons that would be represented by a representative party;
>
> (c) the claims of the class members raise a common issue, whether or not the common issue predominates over issues affecting only individual members;
>
> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the dispute; and
>
> (e) there is a representative party who
>
> (i) would fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the class proceeding that sets out a workable method of advancing the class proceeding on behalf of the class and of notifying class members of the class proceeding, and
>
> (iii) does not have, with respect to the common issues, an interest that is in conflict with the interests of other class members.
>
> (2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the dispute, the court shall consider

> (a) whether questions of fact or law common to the class members predominate over any questions affecting only individual members;
>
> (b) whether a significant number of the class members have a valid interest in individually controlling the prosecution of separate proceedings;
>
> (c) whether the class proceeding would involve claims or defences that are or have been the subject of any other proceedings;
>
> (d) whether other means of resolving the claims are less practical or less efficient;
>
> (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means; and
>
> (f) any other matter the court considers relevant.

[52] It was confirmed at the hearing of this motion that the respondents have filed their certification materials articulating the parameters of the proposed class and suggested common issues. In addition, the representative plaintiffs have been discovered. The appellants acknowledge that the Chambers judge "did not have the benefit" of the decision of Kirkpatrick J. in *Hoy v. Medtronic, Inc., supra*, nor any other decisions suggesting that particulars should be provided prior to a certification hearing.

[53] The appeal proceedings initiated by the applicants are not as of right. Leave is required. If leave to appeal is ultimately granted, the applicants will then be required to demonstrate that the Chambers judge applied wrong principles of law or that a patent injustice would result. *Milne v. Twin Mountain Construction Ltd.*, 2003 NSCA 41 was an appeal from a decision by a Chambers judge who refused to order particulars. Bateman, J.A., for the court, wrote:

> [13] The matter on appeal is an interlocutory, discretionary decision of a Chambers judge. The standard of review is a simple but stringent one. This Court will not interfere unless wrong principles of law have been applied or patent injustice would result. I am not persuaded that either is the case.

[54] The decision by MacAdam J. did not deal directly with the merits of a demand for particulars. The decision by the judge was pursuant to s. 16 of the *Act* that expressly bestows on a judge the power to stay any proceedings related to a class proceeding on such terms or conditions he or she considers appropriate. However, the decision by the Chambers judge was discretionary and interlocutory. Hence the comments by Bateman J.A. set out above will be equally applicable.

[55] In my opinion, grounds one and two come close to falling short of "an arguable issue". The first ground is simply a broad assertion that the judge erred in finding that the demand for particulars related to substantive issues and hence could wait till after the certification hearing. The second ground complains of error in failing to consider the importance of adequate notice to the Attorney General as is outlined in the *Constitutional Questions Act*. However, the appellant conceded before the Chambers judge that the *Act* does not apply since the Attorney General is a party to the proceeding.

[56] I need not make a definitive decision as I am unable to conclude that the allegations of error as set out in ground three do not meet the low threshold. I accept that I am entitled to take into account, in weighing the additional factors, my assessment of the relative strength of the applicants' case on appeal. This was the approach adopted by Bateman J.A. in *E.F.M. v. Her Majesty the Queen*, 2008 NSCA 73 where she quoted with approval Robert J. Sharpe, *Injunctions and Specific Performance*, looseleaf (Canada Law Book Inc.: Aurora, updated to November, 2007), who wrote, speaking in the context of an injunction sought before trial:

> The weight to be placed upon the preliminary assessment of the relative strength of the plaintiff's case is a delicate matter which will vary depending upon the context and circumstances. As the likely result at trial is clearly a relevant factor, the judge's preliminary assessment of the merits should, as a general rule, play an important part in the process. However, the weight to be attached to the preliminary assessment should depend upon the degree of predictability which the factual and legal issues allow. If the judge is of the view that the plaintiff is unlikely to succeed, but cannot say that the claim is frivolous or vexatious, he or she should still go on to consider the other factors, rather than dismiss the application at the threshold. This is a positive and helpful aspect of the *Cyanamid* case which should not be forgotten. However, the judge's negative impression of the plaintiff's chances of ultimate success should be taken into account, along with all other considerations. By the same token, even if the plaintiff's case looks

> very strong – a factor which should definitely weigh in his or her favour – the other factors should still be considered (para. 2.370).

[57] With respect to irreparable harm, the applicants allege three types. Without the particulars sought, the applicants will be unable to adequately respond that the *Charter* claims disclose a cause of action; whether there are common issues; is the class definition appropriate, and is a class proceeding the preferable procedure. Secondly, without particulars there is a risk of the action being certified with common issues defined in vague and general terms, causing a waste of time and resources in the future. Third, if the stay at the certification hearing is not granted, the applicants' appeal will be rendered moot.

[58] I am not convinced that the applicant has established irreparable harm. For the most part, the claim of irreparable harm is the procedural unfairness they say they will suffer if forced to litigate the certification hearing without the requested particulars. At the hearing before me, the appellants in fact conceded that a number of requested particulars are not needed at all, let alone prior to that hearing. Furthermore, the Chambers judge hearing the certification hearing is in the best position to assess any claim of procedural unfairness. There is nothing preventing the appellants from requesting relief from the Chambers judge.

[59] The appellants have already brought a proceeding to strike a number of allegations in the Statement of Claim on the basis that no cause of action was disclosed by the impugned pleadings. They did not include in that application any suggestion that the *Charter* claims as articulated did not disclose a cause of action. Furthermore, if the pleadings are deficient, it is the respondents that bear the risk of the proposed class action not being certified. If certification does not occur, the defendant/appellants here suffer no harm. If, as they allege, there will be procedural unfairness and the Chambers judge certifies the proceeding as a class proceeding, the defendant/appellants have a right of appeal that they may then pursue.

[60] Lastly, the certification of the class, if it occurs, is not a final judgment. Certification merely states that, for the time being, it is appropriate for the claim to proceed as a class proceeding. Section 11(4) and s. 13 of the *Class Proceedings Act* provide ample authority to the court to decertify the proceeding as a class proceeding or make appropriate amendments to the definition of the class or the common issues to be tried. The appellants concede as much and counter that this

would increase the cost of the litigation for all parties and needlessly waste scarce judicial resources. With respect, an increase in litigation costs and the possibility of wasting judicial resources does not constitute irreparable harm.

[61] The appellants cite cases where the release of information pending appeal (*O'Connor, supra*; *2502731 Nova Scotia Ltd. v. Plazacorp Retail Properties Ltd.*, 2004 NSCA 62), or the service of a penalty (*Grafton Street Restaurant Limited. v. Nova Scotia Utility and Review Board et al.*, 2002 NSCA 97) as being analogous to the type of harm that they would suffer. With respect, I do not accept that the appellants' situation is truly analogous. The most that can be said is that the appellants will be exposed to the risk that the certification hearing will be heard and decided prior to its appeal. If the certification hearing is unsuccessful the appeal is indeed rendered moot, but the applicants here suffer no harm.

[62] If a Chambers judge does certify the proceeding as a class proceeding, prior to the appeal proceedings being concluded and the applicants are ultimately successful in its appeal and particulars ought to have been ordered prior to the certification hearing, they will have available ammunition that the conduct of the certification hearing was flawed or that some aspect of the certification order with respect to defining the class or the common issues need to be revisited pursuant to the procedures available under the *Act* or otherwise.

[63] With respect to the balance of convenience, even if the applicants can show that they will suffer irreparable harm, the stay should not be granted if the respondents will suffer greater harm if the stay is granted than the applicants would suffer if the stay is not. Freeman J.A. in *Coughlan et al. v. Westminer Canada Ltd. et al.*, supra, wrote (at para. 12):

> Even if irreparable harm is established, a stay may not follow unless the applicant is able to show further that the harm a stay causes to the respondent is less than the harm the applicant would suffer upon execution of the judgment: the balance of convenience. This test can arise only after irreparable harm has been shown.

[64] Given my conclusion with respect to irreparable harm, it is not necessary for me to address the issue of balance of convenience. If it was, I am not satisfied that the applicants have met the burden of establishing the balance of convenience lies with the appellants as opposed to the respondents.

[65] With respect to the secondary test established by *Purdy v. Fulton Insurance Agencies Ltd., supra*, this requires that I be satisfied that there are "exceptional circumstances" requiring the granting of a stay. Cromwell J.A., as he then was, in *W. Eric Whebby Ltd. v. Doug Boehner Trucking & Excavating Ltd.*, 2006 NSCA 129, discussed what is meant by exceptional circumstances (para. 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.

[66] The only factor relied upon by the appellants, in addition to submissions already made with respect to the primary test, is that class proceedings in Nova Scotia are relatively novel and appellate consideration of the requisite particularity required in pleadings prior to a certification hearing would be of "great precedential value", thereby avoiding motions and appeals on particulars in the future. With respect, the relative novelty of class proceedings in Nova Scotia is not an exceptional circumstance. I am far from satisfied that it would be fit and just that the effects of the decision reached by the Chambers judge should be stayed pending the appeal.

[67] The application is dismissed with costs to the respondents in the amount of $750.

Beveridge, J.A.