



## I. INTRODUCTION

- [1] On September 28, 2007 the Applicant Attorney General of Canada (Canada) filed a notice of motion requesting an order adding the Government of Nunavut (GN) as a defendant in this action (Joinder Application).
- [2] I denied the Joinder Application in Reasons for Judgment filed on April 11, 2008. After a conference call the Clerk filed the formal Order on April 29. Paragraph 3 of the Order permits Canada to file a Third Party Notice by May 20, 2007.
- [3] Canada seeks an Order from this Court staying the operation of paragraph 3 of the Order pending the outcome of its appeal of paragraphs 1 and 2 of the Order.
- [4] The Respondent opposes, while the GN consents to the motion.
- [5] I heard argument on May 14 and reserved judgment until today.

## II. ARGUMENT

### A. Canada

- [6] Canada argues that the three part test set out in *RJR-MacDonald Inc. v. Canada (A.G.)*, [1994] 1 S.C.R. 311 is satisfied.
- [7] In the first part of the test the Court must be satisfied that Canada has raised a serious issue in the notice of appeal. As discussed in *Integral Energy & Environmental Engineering Ltd. v. Schenker of Canada Ltd.* (2001), A.R. 360, 2001 ABCA 215, the serious issue threshold is low and an examination of the merits of the appeal is not required. The test will be met unless the appeal is frivolous and vexatious or has no reasonable possibility of success.
- [8] Canada submits that the Notice of Appeal discloses three errors that satisfy the test.

- [9] In the second part of the test the Court must be satisfied that Canada will suffer irreparable harm if the stay is not granted. Irreparable refers to the nature of the harm suffered, rather than its magnitude. It is harm that cannot be quantified in monetary terms or that cannot be cured.
- [10] Canada submits that if a stay is not granted it will be forced to choose between two unpalatable options that will result in irreparable harm. If Canada does not file a Third Party Notice and loses the appeal the Third Party Notice will be lost.
- [11] On the other hand, by filing the Third Party Notice by the filing deadline it will be barred by case law from pursuing the appeal because it will have acted under and taken advantage of the judgment being appealed. (See *Honey Dew Ltd. v. Ryan* [1935] O.R. 56, 1934 CarswellOnt 68, *Piggot v. Piggot* [1969] 2 O.R. 427, 1969 CarswellOnt 993 and *Kingpin Investments Ltd. v. Melton Real Estate Ltd.* (1978), 6 Alta. L.R. (2d) 193, 1978 CarswellAlta 68).
- [12] In the third part of the test the Court must determine which of the parties will suffer the greater harm from the granting or refusal of the stay pending the appeal.
- [13] Canada argues that a stay of proceedings pending appeal will not prejudice the Respondent or the GN because the action between Canada and the Respondent can continue while the appeal proceeds. However, if the stay is not granted Canada's ability to issue Third Party Notices in the event of an unsuccessful appeal may be lost.
- [14] Finally, the Court was invited to follow *Deloitte Haskins & Sells v. Coopers & Lybrand Inc.* (1996) 37 Alta L.R. (3d) 64, 1996 Carswell Alta 38. In that case, Russell J. granted a stay pending appeal because it would not affect substantive rights. Whereas the denial of a stay would affect substantive rights.

## **B. Respondent**

[15] The Respondent argues that Canada failed to provide any material that would permit a meaningful assessment of whether there is a serious issue for appeal. The Notice of Appeal contains only the bare grounds for the appeal and does not identify and explain the specific alleged flaws in the decision under appeal.

[16] Further, Canada did not identify any jurisprudence that conflicts with the reasons of the Court in the Joinder Application judgment.

[17] The Respondent offered to provide an undertaking not to raise on appeal the "mootness" legal problem faced by Canada in filing the Third Party Notice while simultaneously appealing the other parts of the Order.

[18] The Respondent did not disagree with Canada's argument on the balance of convenience, but was concerned that a stay and appeal would delay the main action. As noted by Côté J. in *S.E. v. Law Society of Alberta* [1992] A.J. No. 838, leisurely litigation and a stay of execution cannot co-exist. To prevent the anticipated delay the Respondent argues that the court should impose conditions as discussed by Vertes J. in *C.I.B.C. v. 882432 N.W.T. Ltd.* [1994] N.W.T.J. No. 2.

[19] In support of the concern over delay the Respondent noted that under the initial case management plan Canada was required to file any contemplated Third Party notice by October 1, 2007. On September 28, 2007 Canada filed the Joinder Application that effectively delayed the filing of the Third Party notice until the May 20 deadline. In addition, Canada has not delivered its List of Documents and has not provided available dates for discovery in the fall of this year.

[20] To overcome the potential delay the Respondent requests the Court to set a deadline of June 30, 2008 for the filing of the Appeal Book and July 30 for the filing of the factum. This would

permit the appeal to be perfected by August 30, 2008 and to be heard at the Court of Appeal sitting in September 2008.

[21] Finally Canada should be required to deliver a sworn List of Documents by September 30, 2008.

### III. ANALYSIS

[22] In *Mahe v. Nunavut Liquor Licensing Board* 2006 NUCJ 23, I applied the reasoning of the Supreme Court of Canada in *Manitoba (A.G.) v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110, 1987 Canlii 79. In *Metropolitan* the Court held the principles governing interim injunctions were applicable to a stay of proceeding stating:

"[p.127] 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."

[23] In *S. (J.) (Litigation Guardian of) v. Nunavut*, 2006 NUCJ 01, [2006] Nu.J. No. 1 I applied the three-part test from *RJR-MacDonald* stating:

"[39] Both counsel relied on *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 1994 CanLII 117, that outlined a three-part test for granting interlocutory relief. The requesting party must establish that:

- (a) there is a serious legal issue to be determined;
- (b) the moving party will suffer irreparable harm prior to the hearing if the interlocutory relief is not granted;
- (c) the balance of inconvenience, taking into account the public interest, favors a departure from the status quo."

[24] The Notice of Appeal contains the barebones minimum. While it is understood that the detail will come later in the factum, the appellant must provide some basis for a meaningful assessment of whether there is a serious issue for appeal. Canada simply asserts the three errors but does not provide any particulars.

[25] On the first ground of appeal, Canada does not identify what criteria the Court considered that did not properly form part of the legal test for compulsory joinder. On the second ground, Canada does not identify what cause of action the Court missed in the statement of claim that would justify a finding that a cause of action existed between the Respondent and the GN. On the third ground of appeal, Canada does not disclose how the Court erred in interpreting the Nunavut Rules on third party claims.

[26] Although the threshold is low a court must have some basis for determining whether the appeal is frivolous or has no reasonable possibility of success. As Russell J. stated in *Deloitte Haskins & Sells*:

“[10]... While the prima facie test no longer needs to be proven in private law matters, absent complexities similar to Charter issues, a preliminary assessment of the applicant's success on the appeal must be considered. Since this is an interlocutory matter, the burden on the applicant is not as great as it would be if the matter had been finally disposed of at trial. The ultimate rights of the parties will not be finally determined as a result of this application. If the stay is not granted, the applicant may still proceed with its third party action, and may yet successfully defend the plaintiffs claim. However, what the applicant must show is a potential for success both on the appeal and in the ultimate result. The stronger the potential, the greater the likelihood that a stay will be granted, subject to a consideration of the other two factors.”

[27] Russell J. had sufficient information about the legal arguments to carry out some analysis and to conclude that there was a serious issue to be tried.

[28] In *Integral Energy* the appellant provided some basis for Wittman J. to analyze the merits of the appeal. He stated:

“[12]...In the context, what must an appellant show to disclose a serious and arguable issue on appeal? Stukwerkers asserts that the appeal is good and arguable based upon the following:

(1) When addressing the existence of a good and arguable cause of action, the learned chambers judge failed to consider the only available evidence as to the relevant tort law in Belgium which, if applicable, would result in no cause of action being available against Stukwerkers by either Integral or Schenker;

(b) The learned chambers judge erred in his interpretation of the applicable substantive law, having regard to the location of the accident in Ghent, Belgium which, in turn, affected his analysis of the forum non conveniens issue;

(c) The learned chambers judge erred in his interpretation of *United Oilseed Products Limited v. Royal Bank of Canada*, [1988] 5 W.W.R. 181 (Alta. C.A.) in failing to recognize that the jurisdiction of the Alberta Court over Stukwerkers does not exist as a matter of right and that the respondents were not able to demonstrate that Alberta was clearly and distinctly a more suitable forum in the present action;

(d) The learned chambers judge erred in interpreting Rule 30(j) too broadly so as to practically obliterate any distinction as to whether a tort occurs in Alberta when an Alberta resident suffers the damage;”

[29] Finally in *Triple Five Corp. v. United Western Communications Ltd.* (1994) 19 Alta (3d) 153 Kerans J. A. had some affidavit material to consider.

“[8]...The first question that arises, however, is whether there is any reasonable possibility of success. Mr. Zalmanowitz has argued that there is none, that I ought to say that there is no issue here. He says insufficient evidence has been put before the Court to indicate that there is any confidential information, as that term is used as a term of art in law. Mr. Brumlik replies that is putting too big an onus on him, who had to prepare an affidavit in rushed circumstances.”

[30] I have insufficient information before me to determine if there are serious appeal issues. Canada is asking me to assume that there are serious issues simply because a notice of appeal has

been filed. I therefore conclude that Canada has failed to satisfy the burden of proof on this part of the test.

- [31] Canada argues that it will suffer irreparable harm unless a stay is granted because it will be forced to choose between two inconsistent courses of action prior to the disposition of the appeal. As noted by Côté J. in *Katz v. Katz* [1993] A.J. No. 554:

In general, a stay exists in order to prevent a situation where the appellant wins the appeal but gets a hollow victory because in the meantime the subject matter of the lawsuit has disappeared or in some other way the appeal has been rendered nugatory.

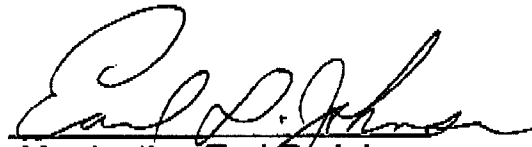
- [32] The solution to this problem has been provided by the offer of the Respondent to give an undertaking not to raise the issue of "mootness" on appeal. This eliminates the irreparable harm that would otherwise be present.
- [33] The final issue is the balance of convenience. The Respondent acknowledged that the balance of convenience favored Canada if I was satisfied on the other parts of the test. The Respondent's main concern was the impact of the stay on the main action. It requested firm timelines for the appeal and the next step in the action. While I have some concern about the pace of this action, I would point out that it is under case management. The concerns of the Respondent can be addressed through that process.

#### **IV. CONCLUSION**

- [34] I therefore conclude that Canada has failed to satisfy two of the three tests for a stay and deny the application.
- [35] Since Canada is facing a filing deadline today and may wish to appeal this ruling I will grant a stay of proceedings of the Order until May 30, 2008.

[36] Costs are awarded to the Respondent and shall be in the cause.

Dated at the City of Iqaluit this 20th day of May, 2008



Mr. Justice Earl D. Johnson  
Nunavut Court of Justice