

**NOVA SCOTIA COURT OF APPEAL**

**Citation:** Nova Scotia (Public Service Long Term Disability Plan Trust Fund) v.  
Wright, 2006 NSCA 6

**Date:** 20060116

**Docket:** CA 260409

**Registry:** Halifax

**Between:**

The Nova Scotia Public Service Long Term Disability  
Plan Trust Fund

Appellant

v.

Robert Wright

Respondent

**Judge:** The Honourable Justice Fichaud

**Application Heard:** January 12, 2006, in Halifax, Nova Scotia, In Chambers

**Held:** Partial stay of execution ordered with conditions.

**Counsel:** Colin D. Bryson, for the appellant  
Joshua Martin, for the respondent

**Decision:**

[1] The appellant (“Trust Fund”) applies for a stay of execution.

[2] The respondent Mr. Wright sued the Trust Fund in the Supreme Court for benefits under the Nova Scotia Public Service Long Term Disability Plan (“Plan”). After a trial, Justice Douglas MacLellan issued a decision and order that the Trust Fund pay \$114,767.75 plus interest and costs to Mr. Wright for a total judgment of \$138,569.58. The Trust Fund has appealed and will ask the Court of Appeal to reverse the decision of Justice MacLellan and dismiss Mr. Wright’s claim. The appeal hearing is scheduled for May 15, 2006. The Trust Fund applies for a stay of execution of the judgment pending the appeal decision.

[3] In Nova Scotia, unlike some jurisdictions, an appeal does not automatically stay execution. Rather Rule 62.10(2) gives the chambers judge a discretion to issue a stay. The starting principle is that a successful litigant may keep the fruit of his judgment unless “required in the interests of justice” *Coughlan v. Westminster Canada Limited* (1993), 125 N.S.R. (2d) 171 (C.A.), at p. 174, per Freeman, J.A.

[4] In *Fulton Insurance Agency v. Purdy* (1990), 100 N.S.R. (2d) 341 (C.A.) at ¶ 28, Justice Hallett stated the tests which govern the chambers judge’s discretion on a stay application:

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.

[5] The Trust Fund relies on Justice Hallett's primary test. This involves an assessment of the arguable issue, irreparable harm and balance of convenience.

[6] Counsel for Mr. Wright concedes that the appeal raises an arguable issue.

### *Irreparable Harm*

[7] Included in the evidence for this application was an extract from Mr. Wright's transcript of testimony at trial. This transcript indicates that Mr. Wright is divorced, his wife has filed for bankruptcy, the bank has repossessed the family home, he does not own a vehicle, he is living with one of his children, and his sole income is Canada Pension disability of \$969 per month indexed. According to Mr. Wright's transcript, after the long term disability benefits were cut off, he began to feel financial strain, and "we were scrambling after that trying to keep things afloat."

[8] Counsel for the Trust Fund acknowledged there was no evidence Mr. Wright had committed an act of insolvency.

[9] Counsel for Mr. Wright says that, in the absence of any evidence that Mr. Wright has acted in an insolvent manner, the Trust Fund has not satisfied its burden to prove irreparable harm. Further, according to counsel, Mr. Wright's reduced income resulted from the Trust Fund's conduct which led to the judgment under appeal, and an appellant should not be able to utilize the consequence of its wrongful act as a basis for a stay.

[10] There is nothing to show that Mr. Wright has committed an act of insolvency. Although the evidence on this application is ambiguous, it appears that the bankruptcy of Mr. Wright's wife occurred after their divorce, and the repossession of their home, which was in her possession, also postdated their divorce. I cannot connect these events to the credit worthiness of Mr. Wright.

[11] Nonetheless, in my view the Trust Fund has established irreparable harm.

[12] Generally, if the judgment is monetary, the appellant (applicant for a stay) can afford to pay and the respondent can afford to repay, there is no irreparable harm. But a real risk that the respondent would be unable to repay may establish

irreparable harm. See *Bruce Brett and 2475813 Nova Scotia Limited v. Amica Mature Lifestyles Inc.*, 2004 NSCA 93 at ¶ 14, and cases there cited; *MacPhail v. Desrosiers* (1998), 165 N.S.R. (2d) 32 (C.A.), at ¶ 14-24 and cases there cited.

[13] Mr. Wright wishes the freedom to spend the fruit of his judgment. If Mr. Wright obtained and spent \$138,000 from the judgment and the appeal was allowed then, from the evidence before me of Mr. Wright's circumstances and income, it is clear that he would be unable to reimburse \$138,000 to the Trust Fund. That would be irreparable harm.

### ***Balance of Convenience***

[14] If the payment of the judgment was delayed and the appeal failed, would Mr. Wright suffer greater harm than the harm to the Trust Fund from immediate payment followed by a successful appeal?

[15] Mr. Wright's affidavit says nothing on this matter. Mr. Wright's current income is approximately \$12,000 per annum from his Canada Pension disability benefits. This has been his sole income for several years. From the affidavit of Mr. Brace for the Trust Fund, it appears that Mr. Wright's medication requirements would be paid by the consolidated health care plan of the Province of Nova Scotia. Beyond these bare facts and the common sense inferences I may draw from them, I have no evidence respecting Mr. Wright's circumstances or how a delay of several months in the payment of the judgment would affect Mr. Wright's quality of life.

[16] Justice Cromwell's decision in *MacPhail* offers useful guidance in a situation such as this. In *MacPhail*, after a substantial damage award, the defendant appealed and applied for a stay. The respondent was not insolvent but had limited income. It was clear that, if the judgment was paid in full and spent, the respondent would not be able to repay the judgment. Justice Cromwell ordered a partial stay of execution on the conditions that the appellant pay to the respondent on account of the damages the sum of \$5,000 per month until the appeal hearing and that pre-judgment interest be at the higher of the post-judgment interest rate or the pre-judgment rate awarded by the trial judge.

[17] If I ordered a full stay, the financial swing for an individual of Mr. Wright's very limited means would be severe. The balance of convenience would favour Mr. Wright.

[18] On the other hand, if I denied the stay outright, and if Mr. Wright received and spent \$138,000, the irreparable harm to the Trust Fund would outweigh any harm to Mr. Wright from a delayed payment.

[19] Here, as in *MacPhail*, there is no absolute balance of convenience. There is a variable balance or, put differently, a sliding scale of convenience. The appropriate remedy is a partial stay.

[20] In my view the amount to be exempted from the partial stay should approximate the value of the benefits for the period equivalent to the interval from the date of the decision under appeal, June 3, 2005, to the projected date of the decision of the Court of Appeal, which I estimate to be June, 2006. The interval is approximately one year. From the data in the Order of Justice MacLellan (which covers December 10, 1997 to June 10, 2005), I estimate the benefits payable to Mr. Wright for one year as \$15,000. In the absence of more useful evidence, this is the best objective measure of the amount which should be exempted from the stay of execution.

[21] I will order a stay of execution, to the date of the decision of this court after the hearing of the appeal, on two conditions, namely:

- (1) On or before February 1, 2006, the Trust Fund pay to Mr. Wright, or to Mr. Wright's counsel on behalf of Mr. Wright, \$15,000, this payment to be on account of the judgment under appeal; and
- (2) On or before February 1, 2006, the Trust Fund file with this court and serve the solicitor for Mr. Wright with a written undertaking that, to the extent the judgment survives after the appeal, any interest on the judgment from the date of this decision on the stay to the date of the eventual payment of the remainder of the judgment, be at the higher of the pre-judgment interest rate applied by the trial judge and the statutory post-judgment interest rate.

[22] The costs of this application will be in the cause of the appeal.

Fichaud, J. A.