NOVA SCOTIA COURT OF APPEAL
Citation: ***Nova Scotia (Health) v. J.J.***, 2003 NSCA 71

Date: 20030619
Docket: 180517
Registry: Halifax

Between:

Nova Scotia (Minister of Health)

Appellant

v.

J.J.

Respondent/Applicant

Judge:	Bateman, J.A. (in Chambers)
Application Heard:	June 5, 2003, in Halifax, Nova Scotia
Held:	Application allowed per reasons of Bateman, J.A.
Counsel:	I. Claire McNeil, for the applicant Karen Quigley, for the respondent

Decision:

[1] This is an application by JJ for a stay of proceedings pending appeal to the Supreme Court of Canada.

[2] The background circumstances are thoroughly canvassed in the decision of this Court (reported as **J.J. (Re)** (2003), 212 N.S.R. (2d) 193; N.S.J. 57 (Q.L.)(C.A.)) which decision and order are the subject of this application. Briefly, JJ is an adult in need of protection within the meaning of s. 3(b) of the **Adult Protection Act** R.S.N.S., 1989c. 2 (**APA**). She is unable, by reason of mental disability, to care for herself. A patient at the Nova Scotia Hospital since December of 1998, she has been diagnosed as having psychosis, borderline personality disorder, mild mental retardation and a pervasive developmental disorder which affects her communication and interpersonal skills. The lower court judgment (reported as **J.J.(Re.),** 2001 NSSF 12, [2001] N.S.J. No. 101 (Q.L.)(S.Ct., Fam. Div.)), quoted from reports by JJ's doctors and social workers, which summarize the behavior precipitating JJ's admission to hospital:

> A history of eviction from apartments;
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> Exposing herself;
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> Threats including threats with a knife, a bomb threat, harassment;
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> Telephone calls and the removal of the telephone by MT&T;
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> Frequent calls to ambulance and fire department for assistance;
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> Frequently presenting in the Emergency Department;
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> Setting her hair on fire to gain attention;
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> Setting her coat on fire;
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> Violent behaviour towards others; and
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> Placing herself in situations of extreme risk.

[3] Commencing with an order in March of 1999, a series of consent renewal orders continued the initial finding that JJ was an adult in need of protection. Consistent with s. 9 of the **APA**, the Minister responsible, formerly the Minister of Community Services, now the Minister of Health, applied for a protective intervention order which included a plan for JJ's care in the community in a residence of her own. She requires 24 hour supervision. That plan was approved and reaffirmed in the consent orders. Each adult protection order is effective for only six months (ss.9(5) and (8) of the **APA**).

[4] The original plan for community care has never been implemented by the Minister. Lacking an alternative placement, JJ has remained at the Nova Scotia Hospital. The Minister, apparently for budget and safety reasons, is not prepared to fund private supervision and accommodation for JJ. It is the Minister's position that the plan is too expensive and not the appropriate arrangement for JJ.

[5] Preparatory to formulating an alternative plan, the Minister arranged for an assessment of JJ. It was determined that the proper placement for her was in a Regional Rehabilitation Centre ("RRC"). Kings Regional Rehabilitation Center in Waterville, Nova Scotia is the RRC facility in closest proximity to Halifax Regional Municipality (HRM). There is none in the HRM. According to the affidavit of Robert Turnbull, Provincial Co-ordinator of Adult Protection services, filed on this application, there is currently a two year waiting list for a placement in the Kings Regional Rehabilitation Center. JJ is not yet on the waiting list.

[6] The Minister applied to the Supreme Court (Family Division), pursuant to s. 9(3) of the **APA**, for approval of the plan to place JJ in the Kings facility. At the hearing before Justice Moira Legere, JJ opposed the Minister's placement plan. The move to Waterville would limit the frequency of JJ's visits with her family who live in HRM. Such a move would also necessitate termination of a day job at a sheltered workshop and of other programming now available for JJ in HRM. It was and is the Minister's position that equivalent or better programming would be available at the Kings facility.

[7] The May 13, 2002 order of the trial court, which was appealed to this Court, prohibited the Minister from placing JJ outside HRM. That order provided:

> IT IS ORDERED that pursuant to s. 9(3)(c) of the **Adult Protection Act**, the Minister of Health is authorized to provide [JJ] with services including placement

> in a facility approved by the Minister of Health, which will enhance the ability of [JJ] to care and fend for herself; as determined by the Minister of Health in consultation with the Supportive Community Outreach Team of the Nova Scotia Hospital, and including admissions of short duration in the Nova Scotia Hospital as directed by the SCOT Teamof the Nova Scotia Hospital or an Adult Protection Worker, from time to time in accordance with the legislative direction and the best interests of the adult;
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> **IT IS FURTHER ORDERED** that such placement shall not include the plan proposed by the Minister before the court, which plan required placement in an RRC Institution outside of the HRM region:
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> **IT IS FURTHER ORDERED** that the order of August 8, 2001 shall be varied only to the extent required to expand the placement options within the HRM region providing such placement is in accordance with the best interest of the Adult and will enhance the ability of the Adult to care and fend adequately for herself in accordance with the duty of the Minister under s. 7 and 9(3)(c).
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> (Emphasis added)

[8] The Minister appealed the geographic restriction on placement. Notwithstanding the wording of the order which approves ". . . placement [of JJ] in a facility approved by the Minister . . .", because there is no RRC facility in HRM, the Minister argued that practical effect of the order is to require a community placement for JJ.

[9] The order of this Court, which is the subject of this stay application, allowed the Minister's appeal, on the ground that the trial judge exceeded her jurisdiction under the **APA**, in prohibiting the Minister from placing J.J. in a facility outside the HRM region. This Court ordered:

> IT IS ORDERED THAT the appeal is allowed without costs and the matter is returned to the Supreme Court (Family Division) for review in accordance with the reasons for judgment.
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> IT IS FURTHER ORDERED THAT pending that review, the variation order sought by the Minister of Health is granted, that is, the prohibition regarding placement and the limitation of variation clauses contained in the order of the Supreme Court (Family Division) dated May 13, 2002 and any renewal of it are struck out. In all other respects that order shall continue to be effective until it is varied or renewed by a judge of the Supreme Court (Family Division), or it otherwise expires.

[10] JJ is seeking leave to appeal to the Supreme Court of Canada. It is expected that the leave application will be heard by that Court in six to eight months. She has applied to this Court for "a Stay of Proceedings pursuant to s. 65.1 of the **Supreme Court Act**, R.S.C. 1985, c. S-26", until the leave application is determined. JJ submits that she is not looking for a stay of execution of this Court's order but a broader form of relief which would suspend the effect of this Court's reasons for judgment and thereby allow the trial court, on future protection applications, to dispose of the application as if the appeal to this Court had not occurred.

[11] The applicant says in her written submission:

> 12. The effect of a stay of proceedings in this case would be to suspend the effect of this Court's decision and order. The result would be to allow the trial decision to stand. It should be remembered that, given the requirement under the *APA* for a review by the court of the order every six months, the original decision of the trial judge is no longer in force. However, the outcome of this application for a stay of proceedings will determine the scope of all subsequent review decisions by the trial judge. The next review before the trial judge is scheduled to take place May 13, 2003."
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> 13. If a stay is not granted, the trial judge, on a review will be bound by this Court's ruling concerning section 9(3), and thus unable to restrict the Minister's discretion in placing J.J. If the stay is granted, the trial judge may decide to place restrictions on the Minister in accordance with the adult's best interests.

[12] As stated above, adult protection orders are effective for only six months. Indeed, by the time the appeal of the May 13, 2002 order was heard in February of 2003, the order was no longer in effect. A further protection order had issued in November, 2002. Given the short life of a protection order, it is virtually impossible for the applicant to be heard in this Court while the order under appeal is still in effect. A stay of the May 13th, 2002 order would be of no assistance to JJ.

[13] I am advised that another hearing took place in May 2003 wherein JJ was again found to be an adult in need of protection. Judgment was pronounced but the order has not yet issued. The form of the order is expected to contain wording consistent with this Court's direction, which does not restrict JJ's placement to HRM.

[14] In the May, 2003 application before the Supreme Court (Family Division), I am advised by counsel that JJ, for the first time, opposed the finding "in need of protection". It is JJ's view that she is not an adult in need of protection and is capable of caring for herself in the community, save for her need of finances. Another protection proceeding is scheduled in the Supreme Court (Family Division) on September 22, 23 and 24, 2003. At that hearing, JJ will raise a constitutional challenge to a number of sections of the **Adult Protection Act**, alleging infringment of ss. 7, 9 and 15 of the **Canadian Charter of Rights and Freedoms**, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11 (the "**Charter**"). There was no constitutional challenge before the trial judge at the May 2002 hearing. Counsel advise that pre-trial steps may delay the September hearing.

[15] All parties agree that JJ's legal status at the Nova Scotia Hospital is uncertain. It is not clear under what authority she remains there. She is currently occupying an acute care bed. That hospital is not a placement setting available to adults under the **APA**. The Minister has no authority to assure continuation of that placement while the issues between the parties are resolved. The hospital has, to date, permitted JJ to remain, there being no other option currently available.

[16] In support of this application, JJ has filed an affidavit from her father, A.B., deposing to the disruption and, in JJ's submission, the irreparable harm which would be caused to JJ if she is required to move from HRM, pending the hearing of her application for leave. Mr. and Mrs. B., although unable to have JJ in their care, visit with her weekly or more often. JJ is recently separated from her husband but has a boyfriend, J.H., who resides in HRM. They see each other almost daily. Since January of 2002, JJ has been employed full time in a sheltered work place, DASC Industries. Mr. B. expresses concern that if JJ is moved to the Kings facility, her behaviour will deteriorate. With such a move she would also lose the connection with her treatment team at the Nova Scotia Hospital. JJ further submits that if she is moved to Waterville and the application for leave to the Supreme Court of Canada is successful, the harm to her will be compounded because it may then be necessary for her to move back to HRM, by which time her place at the Nova Scotia Hospital may no longer be available and the other day arrangements made for her will be lost. Counsel for JJ advises that, if leave is granted, pursuant to s. 65 of the **Supreme Court Act**, there will be an automatic stay of this Court's proceedings until the matter is heard in the Supreme Court of Canada. I am doubtful that s. 65 will automatically provide the remedy expected by the

applicant, however, that issue is not for my consideration (See **Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montreal (City), Quebec (Commision des droits de la personne et dres droits de la jeunesse v. Boisbriand (City)**, [1999] 1 S.C.R. 381).

[17] This Court's jurisdiction to grant relief on this application is contained in s. 65.1 of the **Supreme Court Act** R.S., c. S-19 which provides:

> **65.1** (1) The Court, the court appealed from or a judge of either of those courts may, on the request of the party who has served and 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 the terms deemed appropriate.
>
> . . .

[18] The power to stay proceedings does not, in my opinion, include a remedy in the nature sought by JJ. Effectively she is asking this Court to remove the precedential effect of our decision, such that the lower court, in hearing the adult protection application(s) anew, may ignore the disposition by this Court.

[19] In **R. v. Jewitt**, [1985] 2 S.C.R. 128, Dickson C.J. described a stay of proceedings as follows at p. 137:

> A stay of proceedings is a stopping or arresting of a judicial proceedings by the direction or order of a court. As defined in *Black's Law Dictionary* (5th ed. 1979), it is a kind of injunction with which a court freezes its proceedings at a particular point, stopping the prosecution of the action altogether, or holding up some phase of it. A stay may imply that the proceedings are suspended to await some action required to be taken by one of the parties as, for example, when a non-resident has been ordered to give security for costs. In certain circumstances, however, a stay may mean the total discontinuance or permanent suspension of the proceedings.

[20] As I understand it, using its power to stay proceedings, a court may order the suspension of lower court proceedings, pending disposition of the appeal. For example, where the court of appeal has ordered a retrial, that retrial might be stayed pending the hearing of a further appeal to the Supreme Court of Canada.

[21] In allowing the Minister's appeal this Court said:

[31] The appellant submits that the trial judge erred in law in assuming the jurisdiction to evaluate the merits of the Minister's plan as compared to the plan recommended by the Nova Scotia Hospital staff. It is argued that the court's role is to determine if services should be "authorized" or not. The court does not have the authority to "direct" or "specify" a particular placement or to prohibit placement by the Minister in a specific facility or outside a certain geographic area. The appellant contends that if the trial judge does not find that the plan as proposed by the Minister is in the adult's best interest, then she should refuse to make the order pursuant to s. 9(3)(c).

[32] The respondent submits that it is the court's role to assess whether the Minister's plan is in the best interests of the adult in need of protection and to evaluate other placements that may better suit the person's needs, and that the trial judge did not err in doing so in this case. It is argued that the court has the jurisdiction to direct the Minister to provide placements and services so as to ensure that the best interests of the adult in need of protection are protected. It is also submitted that in interpreting the **APA** [**Adult Protection Act**], the court must take into account and promote **Charter** values such as the liberty of the person guaranteed by s. 7 and equality rights pursuant to s. 15. It should be noted, however, that the respondent did not question the constitutionality of the **APA**, so it is not necessary to speculate as to the outcome of such a challenge.

[33] With respect, it is my view that the trial judge exceeded her jurisdiction in making an order prohibiting the Minister from placing the respondent outside the Halifax Regional Municipality. In that regard, she erred and the appeal should be allowed on that ground.

. . .

[40] . . . The Minister's plan is placement in an RRC institution for at least the immediate future. There, JJ will receive programming, her environment will be controlled and structured, her medication will be monitored and her personal needs, food, clothing and shelter will be provided. That is the only plan advanced through the auspices of the provincial treasury. The **APA** unquestionably confers no jurisdiction to order the Minister to adopt and finance any other plan. Although the proposal suggested by the NSH staff and embraced by JJ's counsel is probably in her best interests as found by the trial judge, it is not one being offered or approved by the Minister and no other person or agency has agreed to fund it, so it is, accordingly, not one available for the court's consideration pursuant to the **APA**. Here, the choices available are the Minister's plan or no plan. That is, if the order authorizing the Minister's plan is not made, JJ would be free to return to whatever residence may be made available to her through her own resources or arrangements or through the assistance of her family or friends. If the judge is of

> the view that the plan submitted by the Minister is not in the adult's best interests, then the judge ought not to have made any order pursuant to s. 9(3)(c).
>
> (Emphasis added)

[22] While I would agree with the applicant that the effect of the reasons for judgment may be broader than that reflected in this Court's order (¶ 9 above), it is my view that this Court does not have the authority, pursuant to s. 65.1 of the **Supreme Court Act**, to suspend the precedential effect of our decision.

[23] The applicant advises that each application in relation to JJ in the Supreme Court (Family Division) has been approached by the parties as a new proceeding, and not as a continuation of the previous one. Although, in the order under appeal, this Court directed a rehearing of the matter, the hearing scheduled for September is not the rehearing but a new protection application. The addition of the constitutional challenge to aspects of the **APA** materially expands the issues before the court. The order of Justice Legere was issued May 13, 2002. Pursuant to s. 9(5) of the **APA**, it has now expired, thus, a stay of this Court's order would not revive the Supreme Court order nor provide any effective remedy to JJ.

[24] While I am satisfied that I do not have the jurisdiction to grant the relief which is sought by JJ, it is my view that I should consider an option which would forestall a forced move of JJ to the Kings facility, pending determination of the leave application.

[25] According to Mr. Turnbull's affidavit, referred to at ¶ 5, above, although the waiting list for entry into the Kings facility is currently about two years, the Minister would place JJ on that list on a "priority basis". There is no evidence as to the effect of a priority listing on the expected wait time for admission. While taking the position that a move within months is unlikely, the Minister is not prepared to agree that JJ remain in her current situation until the leave application is heard, should a position become available in Waterville. It is my understanding that the Minister is unable to make such a commitment because he cannot guarantee continuation of the Nova Scotia Hospital placement. Should that placement end, or an opportunity unexpectedly arise in the Kings facility, the Minister wishes to be free to move JJ from HRM.

[26] I am satisfied that this Court's power to grant relief pursuant to s. 65.1 of the **Supreme Court Act** is not limited to a simple stay of execution. The scope of s.

65.1 was discussed by Sopinka and Cory, JJ., for the Court, in **RJR-MacDonald Inc. v. Canada (Attorney General)**, [1994] 1 S.C.R. 311. There the Court said at p. 329:

> 30 . . . 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.
>
> (Emphasis added)

[27] In **Fulton Insurance Agencies Ltd. v. Purdy** (1990), 100 N.S.R. (2d) 341 (C.A.) Hallett, J.A. set out the test to be applied when a stay of execution pending appeal is sought:

> **[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:
>
> **[29]** (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:

> **[30]** (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.

[28] On an application for a stay pending appeal to the Supreme Court of Canada the applicant must, additionally, satisfy the court that he or she meets the requirements of s. 40(1) of the **Supreme Court Act**:

> **40.** (1) Subject to subsection (3), an appeal lies to the Supreme Court from any final or other judgment of the Federal Court of Appeal or of the highest court of final resort in a province, or a judge thereof, in which judgment can be had in the particular case sought to be appealed to the Supreme Court, whether or not leave to appeal to the Supreme Court has been refused by any other court, where, with respect to the particular case sought to be appealed, the Supreme Court is of the opinion that any question involved therein is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in that question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it, and leave to appeal from that judgment is accordingly granted by the Supreme Court.

[29] In **Turf Masters Landscaping Ltd. v. T.A.G. Developments Ltd.** (1995), 144 N.S.R. (2d) 326; N.S.J. No. 406 (Q.L.)(C.A.) per Freeman J.A. in Chambers said of this additional requirement:

> **[18]** While I will use the term "arguable issue" I would draw no distinction between that and the terms "serious issue" or "fair issue". When a stay is sought in a provincial court of appeal pending the hearing of an application for leave to appeal to the Supreme Court, the applicant must be able to show that in addition to an arguable issue on the merits, there is an arguable issue with respect to the criteria for appeals to the Supreme Court of Canada referred to in s. 40 (1), that is, a question of public importance, an important issue of law or mixed law and fact, or that the matter is otherwise of such a nature and significance as to warrant decision by the Supreme Court. It is not necessary to speculate as to the outcome of the leave hearing, merely to determine that the applicant is able to present serious argument for leave.

[30] A stay of proceedings and an interlocutory injunction are remedies of the same nature such that common principles are applied (see **Manitoba (Attorney General) v. Metropolitan Stores Ltd.**, [1987] 1 S.C.R. 110 at p. 127, per Beetz J.). In a comprehensive review of the law in Robert J. Sharpe, *Injunctions and*

Specific Performance, Looseleaf Edition updated to May, 2003, at pp. 2-46 the author observed of the **American Cyanamid** test:

> Treating the checklist as a "multi-requisite test" will often produce results which do not reflect the balance of risks and do not minimize the risk of non-compensable harm. The most notable instance of this result was the tendency to refuse an interlocutory injunction at the threshold, and without further inquiry, in cases where the judge formed the view that the plaintiff did not have a strong *prima facie* case.
>
> The checklist of factors which the courts have developed — relative strength of the case, irreparable harm and balance of convenience — should not be employed as a series of independent hurdles. They should be seen in the nature of evidence relevant to the central issue of assessing the relative risks of harm to the parties from granting or withholding interlocutory relief.

[31] The above approach is consistent with that counselled in **British Columbia (Attorney General) v. Wale et al.** (1986), 9 B.C.L.R. (2d) 333; B.C.J. No. 1395 (Q.L.) (C.A.) where, McLachlin J.A., as she then was, wrote for the majority of that court at p. 346:

> In many cases, assessing where the balance of convenience lies is a simple matter. Where there is a fair question to be tried and the applicant demonstrates that damages may not provide an adequate remedy, an interlocutory injunction may be justified. Similarly, if the only irreparable harm would be to the party against whom the injunction is sought, an injunction would not normally be granted.
>
> More difficult is the case where both parties demonstrate that damages might not be an adequate remedy - the applicant if no injunction is granted, the respondent if an injunction goes. In *Amer. Cyanamid Co. v. Ethicon Ltd., supra*, considerations are discussed which may assist the court. One factor which may assist the court in assessing where the balance of convenience lies when the parties' interests are relatively evenly balanced is the fact that one side bases his claim on existing rights, while enforcement of the other's rights would change the status quo. To put it another way, where the only effect of an injunction is to postpone the date upon which a person is able to embark on a course of action not previously open to him, it is a counsel or prudence to preserve the status quo: *Pac. Northwest Ent. Inc. v. Ian Downs & Assoc.* (1983), 42 B.C.L.R. 126; 73 C.P.R. (2d) 159 (C.A.) Another factor which may be considered at this stage is the strength of the applicant's case. Finally, there may be special factors to be considered in the particular circumstances of the case.

> It is important to note that clear proof of irreparable harm is not required. Doubt as to the adequacy of damages as a remedy may support an injunction: *Amer. Cyanamid Co. v. Ethicon Ltd.*

[32] The threshold necessary to demonstrate a serious or arguable issue is not high. The Court said in **RJR –MacDonald**, **supra**, at pp. 337-338:

> What then are the indicators of "a serious question to be tried"? There are no specific requirements which must be met in order to satisfy this test. The threshold is a low one. The judge on the application must make a preliminary assessment of the merits of the case. The decision of a lower court judge on the merits of the *Charter* claim is a relevant but not necessarily conclusive indication that the issues raised in an appeal are serious: see *Metropolitan Stores, supra*, at p. 150. Similarly, a decision by an appellate court to grant leave on the merits indicates that serious questions are raised, but a refusal of leave in a case which raises the same issues cannot automatically be taken as an indication of the lack of strength of the merits.
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> Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable.
>
> (Emphasis added)

[33] As to the first requirement of the **American Cyanamid** test, the appellant frames the issue on the Leave Application as follows:

> 32. The extent of the Court power on the Adult Protection Act, R.S.N.S. 1989, c.2, to place limits and conditions on the Minister's intervention in the lives of persons with disabilities, in the context of a statute which results in a significant deprivation of liberty and personal autonomy, is an issue of public importance.

[34] The respondent submits that this states the issue too broadly. It is true that this Court's order was directed only to the trial court's geographical restriction on placement. However, as is evident from the reasons for judgment reproduced at ¶ 21, above the issues in the case before this Court are more far reaching than that which is reflected solely by the order. I am satisfied that the matter in issue, the jurisdiction of the court, under the **APA** to direct the details of the Minister's placement plan, is one of public importance and not frivolous or vexatious or not capable of supporting serious argument. In so saying, I have refrained from speculating on the outcome of the leave application.

[35] As to “irreparable harm”, the court, in **RJR–MacDonald, supra** directs at p. 341:

> At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.
>
> "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. . . .

[36] The evidence of JJ’s father is that a relocation the Kings facility will likely diminish JJ’s direct contact with her parents and current boyfriend. A move would also end JJ’s job with DASC Industries. Should she be moved and then it be found that she should return to HRM, it is a fair inference that the Nova Scotia Hospital placement may no longer be available. I am not here suggesting that the Kings facility would not offer benefits comparable to those now available to JJ, however, the concern on this application is not an assessment of the merits of the proposed placement, but the nature of the loss to JJ should she be moved prematurely.

[37] As to the balance of convenience. Although, in view of the two year waiting list for placement at the Kings facility, there appears to be no imminent danger that JJ will be moved, Robert Turnbull, Provincial co-ordinator of adult placement, deposes that JJ will be put on the list “on a priority basis”. It appears, then, that there is a possibility of a place for JJ opening sooner. I have considered the evidence of the potential disruption to JJ should a move occur as outlined in Mr. B’s affidavit. I can see no immediate detriment to the Minister should I place a restriction on a move at this time. The balance of convenience favours JJ remaining in HRM until the leave application is heard.

[38] In summary, I am satisfied that it is appropriate here that relief be granted. If JJ is moved to the Kings Facility, such would tend to diminish the effect of the judgment of the Supreme Court of Canada, should leave be granted and JJ succeed on the appeal (see ¶ 26 above). The services and other arrangements for JJ now in place in HRM could be lost. She would undoubtedly experience a period of disruption, with unknown effect. Damages are unlikely to be an adequate remedy.

The balance of convenience favours postponement of JJ moving to the Kings facility, if practicable.

[39] Accordingly, I would order that JJ not be moved from HRM until determination of her application for leave to appeal to the Supreme Court of Canada, provided, however, that should JJ's placement at the Nova Scotia Hospital be terminated, or a position at the Kings Regional Rehabilitation Center become available, during the currency of this stay order, then either party may make application to this Court for further relief. Additionally, I would order that the Minister is at liberty to place JJ on the waiting list for a placement at the Kings facility.

Bateman, J.A.