



**FREEMAN, J.A.:**

The applicant Ramey Ayre is a practicing member of the Nova Scotia Barristers' Society who is seeking relief from an order made respecting her by an adjudicative panel of the Society's discipline committee following an investigation and hearing.

A complaint against her listing some seven alleged instances of professional misconduct was filed in 1994 and amended in October, 1996. There was no allegation of criminal conduct. She was found guilty of professional misconduct June 13, 1997. The disposition was decided December 12, 1997 and made an order of the Supreme Court of Nova Scotia on January 7, 1998. It provides for a suspension from practice for a minimum of six months or until she receives an opinion proving she is medically and psychologically fit to practice law. She must take two professional training courses. She must pay \$100,000 costs of the formal inquiry, which can be spread over several years. Failure to comply with the order can result in disbarment. Ms. Ayre says that in her particular circumstances, the penalty is disbarment.

Miss Ayre has given notice of an application to be heard today under s. 32(13) of the **Barristers and Solicitors Act**, R.S.N.S. 1989 c.30 seeking intervention of the Court of Appeal and requesting three orders:

1. An order granting the stay of execution restraining the Nova Scotia Barristers' Society from implementing the Penalty imposed by the Adjudicative Panel by their resolution dated December 12, 1997 which was made into an order of the Supreme Court of Nova Scotia on January 7, 1998.

2. An order restraining the Nova Scotia Barristers Society from publishing and disseminating the sentencing decision imposed by the Adjudicative Panel by resolution dated December 12, 1997 to any one until the matter has been resolved in the courts.

3. An order consolidating the notices of appeal filed under C.A. 119800 and C.A. 116701 with the present notice of appeal C.A. 139683 pursuant to Rule 39 of the Civil Procedure Rules because all the appeals arise from the same facts and give rise to the same questions of law.

The application is made under s. 32(13) of the **Act** which provides:

(13) Where

- (a) an investigation is being conducted; or
- (b) a resolution or order is made,

pursuant to this Section, the Appeal Division of the Supreme Court, or in the case of urgency a judge of that Court, may, upon such grounds and in accordance with such procedures as it shall determine, at any time during the investigation or subsequent to a resolution or order being made but not later than six months following the day on which the order is made, intervene upon the request of

(c) the barrister or articled clerk being investigated or in

respect of whom a resolution or order is made;

(d) an officer of the Society; or

(e) a member of the Discipline Committee or a subcommittee thereof, and make such order or give such direction as it shall deem fit and necessary under the circumstances.

I would interpret “urgency” in the context of the practice of this court in dividing its functions between appeal panels and single judges in chambers, and assign it a low threshold in preliminary matters. That is, I am satisfied that as a judge in chambers I have jurisdiction to deal with questions of process which arise in the present matter prior to a panel’s consideration of the application to intervene. In my view the somewhat unusual language of this provision is intended to give the Court of Appeal a broad discretionary jurisdiction. In considering this section in dismissing an earlier application by Ms. Ayre to stay proceedings by the Committee, Justice Hallett remarked that “as a general rule, this process should take place without court intervention.” However it has now been carried through to a conclusion, and Ms. Ayre is entitled to seek intervention by the court.

**Civil Procedure Rule 62** governing civil appeals applies. **C.P. R.**

62(10) provides that a notice of appeal does not operate as a stay, which may,

however, be granted in the discretion of the Chambers judge.

The test to be applied in determining whether or not to grant a stay is stated by Hallett, J.A. in **Fulton Insurance Agencies Ltd. v. Purdy** ( 1991), 100 N.S.R. (2d) 341 (C.A.) at pp. 346-347:

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.

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.

The application is supported by a lengthy affidavit by Ms. Ayre containing numerous allegations that her rights, including rights under the Charter, have been infringed. For present purposes there are allegations as to the processes of the panel, both procedural and substantive in nature, sufficiently serious, if supported by evidence, to affect jurisdiction and therefore the outcome. I am satisfied that the application satisfies the requirement as to arguable issues. Therefore I must not speculate as to the outcome of the appeal process, but assume it to be one possibility among several that Ms. Ayre could succeed in having the disposition set aside.

The implementation of the present disposition prior to a successful appeal would unquestionably cause harm to a lawyer's career not susceptible to remedy by way of damages, particularly if the Barristers' Society fulfils its own requirements for publicizing the results. I would find the second **Fulton Insurance** criterion to be fulfilled.

The third consideration is the balance of convenience. The Barristers' Society represents the public's interest in being informed without delay when one of its members has been found guilty of professional misconduct. Ms. Ayre has the right to invoke an appeal process that could succeed. I do not find that the balance is so tilted against Ms. Ayre that she must be denied a stay. It may be possible to balance the competing interests by imposing appropriate conditions, which I will consider in consultation with counsel.

The foregoing was delivered as an oral decision following which discussions were held with counsel resulting in a number of determinations on my part which will be reflected in the order.

Ms. Ayre stated there were some seven thousand pages of transcript from fifty days of hearings spread over a period of two years. It will not be necessary to transcribe this; it may be filed with the court in the form of computer disks accompanied by a listing of passages to which the court's attention is directed. If counsel cannot agree to a list of relevant passages they are to submit separate lists. Any passages which counsel wish to emphasize may, of course, be separately transcribed to be included in factums or the

appeal book. An all-day hearing was scheduled for May 28, 1998. Ms. Roane, on behalf of the respondent, called attention to the need to notify the Justice Department because constitutional issues are raised and Ms. Ayre stated that notice has already been given. I understand that she will be confirming this. The appeal book, including the notice of appeal, pleadings and decisions, and which may include a separate book or books of exhibits, is to be filed by March 6; the appellant's factum is due April 14 and the respondent's factum is due May 8, 1998.

I will order that the disposition order imposing sanctions upon Ms. Ayre be stayed until May 28, 1998, by which time the panel hearing the appeal will have jurisdiction. Ms. Roane urged that the stay be made conditional upon an order that Ms. Ayre co-operate with a lawyer to be appointed by the Society to supervise her practice. Such an arrangement was tried earlier and I gather from Ms. Ayre it was, in her view, unsuccessful. I am mindful of the fact that she was free to practice during two years of hearings and nine months awaiting a decision. I am not satisfied the arrangement proposed

by the Society is necessary in the interest of the public. I refused the request



because it would cause intolerable stress.

I declined to order a publication ban as to the decisions of the discipline committee adjudication panel. It is a matter in the public domain which has already received considerable publicity. In light of the stay Ms. Roane has undertaken that publication of a notice of suspension required in such matters will not be necessary until the appeal has been heard. The society has the right to publish a summary of proceedings of the adjudication panel of the discipline committee in the disciplinary digest which is circulated to lawyers; it will be noted that the outcome has been appealed and that a stay has been granted. Ms. Ayre has undertaken to inform her clients of the present status.

I will order that the notices of appeal filed under C.A. 119800 and C.A. 116701 be consolidated with the present notice of appeal C.A. 139683. It would appear that all issues raised in C.A. 119800 and C.A. 116701 have been subsumed in the notice of appeal filed under C.A. 139683. If there are any that are not included, they shall be clearly identified as such under the heading of "Issues" in the applicant's factum.

Costs of this application, in which Ms. Ayre has enjoyed substantial success, shall be costs in the appeal.

Freeman, J.A

