NOVA SCOTIA COURT OF APPEAL

Citation: *Cape Breton Development Corporation v. Nova Scotia (Workers' Compensation Appeals Tribunal)*, 2008 NSCA 11

Date: 20080204
Docket: CA 289398
Registry: Halifax

Between:

Cape Breton Development Corporation (Employer)

Appellant

v.

The Nova Scotia Workers' Compensation Appeals Tribunal,
The Workers' Compensation Board of Nova Scotia and
Janice O'Neill, Survivor of Gerard O'Neill (Deceased Worker)

Respondents

Judge: The Honourable Chief Justice MacDonald

Application Heard: January 28, 2008, in Halifax, Nova Scotia, In Chambers

Held: Stay application dismissed without costs.

Counsel: Nancy F. Barteaux, for the appellant
Louanne Labelle and Alexander MacIntosh for the respondent, WCAT
Paula Arab and Madeleine Hearns for the respondent, WCB
Kenny LeBlanc for the respondent, Janice O'Neill

Decision:

[1] The Nova Scotia Workers' Compensation Appeals Tribunal ("WCAT") awarded survivor benefits to the widow of a Cape Breton Development Corporation ("DEVCO") employee. DEVCO has filed an application for leave to appeal this decision. It is scheduled to be heard on May 20th of this year. In the meantime DEVCO has asked me to grant a stay of execution.

Background

[2] Mr. Gerard O'Neill was a DEVCO coal worker. In 1975, he hurt his back while on the job and received a permanent medical impairment rating award (PMI). Over the years he had received several additional PMI's. He became an alcoholic.

[3] Mr. O'Neill died in May of 2004. His widow, the respondent Janice O'Neill, maintained that her husband's work-related injuries caused him to become an alcoholic and this in turn contributed to his death.

[4] Ms. O'Neill sought and was denied survivor benefits up to and including the hearing officer level. However in November of 2007, WCAT Appeal Commissioner Glen Johnson concluded that Mr. O'Neill's work injuries contributed to his alcoholism and that the medical evidence supported a finding that the alcoholism contributed to his demise. He reasoned:

> Once one accepts (for the purposes of this appeal) that the compensable injuries contributed to the development of the Deceased Worker's alcoholism, the medical-legal reports of Dr. Burnstein and Dr. Giacomantonio suggest that the compensable injuries did materially contribute to the occurrence or timing of the Deceased Worker's demise. This is particularly true given that alcoholism was the cause of the liver transplant, which in turn contributed to the need to use immunosuppressants.
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> Further, the Registration of Death identified the liver transplant as a significant condition contributing to death. It is the Deceased Worker's alcoholism which gave rise to the liver transplant.

[5] Commissioner Johnson ordered lump sum death benefits together with a monthly survivor's pension (including a significant retroactive component). The

initial payment will likely exceed $80,000, together with ongoing monthly payments of approximately $1,500.

[6] DEVCO, in seeking leave, lists several grounds of appeal primarily involving issues of causation and remoteness between the work-related injuries and Mr. O'Neill's death.

The Stay Application

[7] The facts supporting the stay application are unique. DEVCO finds itself in a dilemma. It is a self-insured federal Crown corporation whose compensation claims are administered by the Nova Scotia Workers' Compensation Board ("the Board"). It must reimburse the Board's accident fund for the entire principle amount paid from the fund to Ms. O'Neill and on top of that it will be assessed an administration fee representing approximately 17.5% of the payout, for a total reimbursement of approximately 117.5% of the total payout. Furthermore DEVCO is bound by the Board's policies.

[8] On this basis, DEVCO asserts that without a stay, the Board will pay Ms. O'Neill a significant lump sum that will likely not be recovered should the award under appeal be quashed. In her brief, DEVCO's counsel explains:

> 21. DEVCO is currently unaware of any means by which it could recover these payments if this stay is not allowed. Payments to the worker are made by WCB out of the Fund. Given that DEVCO submits to relying on the WCB system to pay injured workers, technically speaking DEVCO has no legal right of action against the Respondent if the payments are made in this case. We admit that this situation is, as far as we are aware, without precedent. There is a great deal of uncertainty surrounding the issue of which party, if any, will be liable to reimburse DEVCO if this appeal is successful. If WCB will not pursue reimbursement from the Respondent, which would be consistent with its practice under policy 10.21R, it is highly unlikely DEVCO would be able to recover these funds from WCB directly and, as mentioned previously, even if DEVCO did have a cause of action against WCB to recover the principal payments, the administrative fee would be unrecoverable in any event.
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> 22. Alternatively, DEVCO's only recourse would be an independent action against the Respondent. This is highly problematic for two reasons: First, the Respondent would not be liable for the administrative fee that will be charged to DEVCO if this stay is not granted. This fee is non-refundable, and DEVCO will

> have no cause of action through which to recover it. Second, as regards the principle payments, DEVCO submits that given the amounts involved it is unlikely the Respondent would be able to reimburse DEVCO in the event that the appeal is successful, There is legal authority in Nova Scotia supporting the proposition that this latter consideration, in itself, satisfies the test for irreparable harm.

Analysis

[9] This court has enshrined a primary three step test together with an overarching secondary test when considering stay applications. In **Fulton Insurance Agencies Ltd. v. Purdy** (1990), 100 N.S.R. (2d) 341 (C.A.), Hallett, J.A. confirmed:

> ¶28 In my opinion, stays of execution of judgment pending disposition of the appeal should only be granted if the appellant can either:
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> ¶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:
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> ¶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.

[10] At the same time, it must be remembered that stays are discretionary remedies designed to achieve justice on the facts of each individual case. In **MacPhail et al. v. Desrosiers et al.** (1998), 165 N.S.R. (2d) 32 (C.A.), Cromwell, J.A. explains:

> ¶8 In considering a stay application, I think it is important to remember that a stay is a discretionary order. The general rule is set out in rule 62.10(1) to the effect that "the filing of a notice of appeal shall not operate as a stay of execution of a judgment appealed from". The discretionary nature of the power to grant a

> stay is clear in the text of rule 62.10(2) which indicates that a judge may order a stay, and further in rule 62.10(3) which indicates that the stay may be granted on such terms as the judge deems just.
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> ¶9 I mention this because I sense that counsel were parsing the numerous decisions on stay applications made by judges of this court as if those decisions were detailed statutory provisions. The elaboration of principles to guide the exercise of this discretion is essential to ensure that the discretion is exercised judicially. However, general principles must not be treated as inflexible rules. Such an approach undermines the true objective of granting judges the discretionary power to grant a stay of execution: that is, to achieve justice as between the parties in the particular circumstances of their case. For a similar statement in the context of applications for extensions of time see the decision of Flinn, J.A., in **Massey Estate, Re**, [1997] N.S.R. (2d) TBEd. DE.007.

[11] I now turn to the primary test and its three components.

Arguable Issue

[12] To qualify for a stay of execution, the appellant must first establish that the appeal raises an arguable issue. The bar facing the applicant at this stage is relatively low. In **Amirault et al. v. Westminer Canada Limited et al.** (1993), 125 N.S.R. (2d) 171 (C.A.), Freeman, J.A. explains:

> ¶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.

[13] In fact, this test has been used interchangeably with applications for leave to appeal. See **Pearce v. Nova Scotia (Workers' Compensation Board)**, [1996] N.S.J. No. 433:

> ¶13 The test on a leave application is whether the appellant has raised an arguable issue; that is, an issue that could result in the appeal being allowed *Coughlan v. Westminer Canada Ltd. et al.* (1993), 125 N.S.R. (2d) 171 (C.A.).

[14] See also **Geldart v. Nova Scotia (Workers' Compensation Board)** (1996), 155 N.S.R. (2d) 51.

[15] In this matter, however, DEVCO's bar is even lower. It need not establish the existence of an arguable issue that might lead to a successful appeal. This is an application for a stay pending **leave** to appeal. As such, DEVCO need only establish the existence of an arguable issue that might simply support the granting of leave to appeal. This is akin to stay applications pending applications for leave to appeal decisions from this court to the Supreme Court of Canada. For example, in **Amica Mature Lifestyles Inc. v. Brett** (2004), 226 N.S.R. (2d) 188, Fichaud, J.A. concludes:

> ¶38 With respect to the first element, the serious issue to be litigated, the application is for an interim stay pending the decision by the Supreme Court of Canada whether to grant leave to appeal. So the "serious question" to be litigated is not whether the appeal to the Supreme Court of Canada would succeed, but whether there is an arguable issue of law of sufficient public importance for leave to be granted by the Supreme Court. *Minister of Community Services v. B.F.* at para. 11; *Turf Masters Landscaping Ltd. v. T.A.G. Developments Ltd.* (1995) 144 N.S.R. (2d) 326 (C.A.), per Freeman, J.A.

[16] See also **Nova Scotia** (**Minister of Community Services) v. B.F.** (2003), 219 N.S.R. (2d) 67 and **Salama Enterprises (1988) Inc. v. Grewal**, [1992] 12 B.C.A.C. 112.

[17] Here DEVCO's right to appeal is limited to questions of law or jurisdiction: *Workers' Compensation Act*, S.N.S. 1994-95, c. 10, s. 256(1). Factual findings can only be considered as errors of law or jurisdiction if they are seen to be patently unreasonable. See **Workers' Compensation Board (N.S.) v. Johnstone et al.**, 1999 NSCA 164 at para. 37. In advancing its appeal, DEVCO focuses on what it views as WCAT's mishandling of the law of causation when it first linked Mr.

O'Neill's physical injuries to his alcoholism and then linked his alcoholism to his death. Apparently this is the first time that WCAT has confirmed this type of nexus. When I superimpose these issues upon DEVCO's low threshold at this initial stage, I am satisfied that the requisite arguable issue has been raised.

Irreparable Harm

[18] I have a problem however with DEVCO's assertion that, without a stay, it will suffer irreparable harm. I acknowledge at the outset that DEVCO faces a very serious risk that it will not be reimbursed should its appeal be allowed. In fact if this were a conventional damage award at stake, I would be tempted to grant the stay. This court has recognized that such a risk can, in such circumstances, amount to irreparable harm. For example in **Nova Scotia (Attorney General) v. B.M.G.**, [2007] N.S.J. No. 200 (C.A.), Fichaud, J.A. noted:

> ¶13 *In Wright v. the Nova Scotia Public Service Long Term Disability Plan Trust Fund*, [2006] N.S.J. No. 11, 2006 NSCA 6 (Chambers), at para. 12, I said:
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> > [14] 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] N.S.J. No. 284, 2004 NSCA 93 at para. 14, and cases there cited; *MacPhail v. Desrosiers* (1998), 165 N.S.R. (2d) 32 (C.A.), at para. 14-24 and cases there cited.
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> > [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.
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> ¶14 BMG wants to enjoy the fruit of the litigation -- i.e. the freedom to spend the full amount of his judgment as he wishes. If BMG obtained and spent the $723,125 judgment, it is clear from the evidence before me that he would not remotely be able to reimburse the Province should the appeal later be allowed. I am satisfied that this establishes irreparable harm.

[19] Yet irreparable harm is a context driven concept. As Cromwell, J.A. noted in **MacPhail**, *supra* (at para. 20), "irreparable harm is not a term which has been

given a definition of universal application but rather one which takes its meaning in the context of each particular case". Thus, the risk of a successful appellant losing its money does not amount to irreparable harm in every circumstance.

[20] For the following reasons, I conclude that in this case DEVCO's risk, albeit very real, does not amount to irreparable harm.

[21] As I noted earlier, it is not a conventional damage award that DEVCO seeks to overturn. It is a workers compensation benefit. It is the product of an "historic trade-off" where a worker (in this case his dependant) foregoes all rights to sue an employer in return for an *immediate* payment regardless of fault or the employer's ability to pay. According to the Supreme Court of Canada:

> ¶26 The importance of the historic trade-off has been recognized by the courts. *In Reference re Validity of Sections 32 and 34 of the Workers' Compensation Act, 1983* (1987), 44 D.L.R. (4th) 501 (Nfld. C.A.), Goodridge C.J. compared the advantages of workers' compensation against its principal disadvantage: benefits that are paid immediately, whether or not the employer is solvent, and without the costs and uncertainties inherent in the tort system; however, there may be some who would recover more from a tort action than they would under the Act. ... [*Pasiechnyk v. Saskatchewan (Workers' Compensation Board),* [1997] 2 S.C.R. 890.]
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> [Emphasis added.]

[22] Furthermore, by virtue of the *Government Employees Compensation Act*, R.S., c. G-8, together with an agreement between DEVCO and the Board, claims by DEVCO employees are fully administered by the provincial Board and therefore these employees can expect the same treatment as provincial employees. Freeman, J.A. of this court in **Cape Breton Development Corporation v. Estate of James Morrison**, 2003 NSCA 103**,** noted:

> The language of **GECA** is intended to be general and inclusive because its purpose is to provide federal employees with workers' compensation benefits in accordance with the particular wording of the workers' compensation acts of various provinces. The Parliamentary objective of making one federal act mesh with many provincial ones would be more difficult to achieve if **GECA** were to be read more narrowly than its natural meaning might support. Like other workers compensation legislation it is to be construed liberally and in favour of

> all workers within its purview. (See **Workmen's Compensation Board v. Theed**, [1940] S.C.R. 553.)

[23] Yet the Board's policies and practices are revealing. The Board in practice does not apply for stays of execution when it seeks to overturn awards pending appeal. Furthermore, its policy (number 10.2.1) is to seek recovery of overpayments only in limited circumstances. In practice, it does not seek to recover overpayments resulting from awards that have been overturned on appeal. Thus it is no surprise that it is DEVCO and not the Board seeking the stay in this case. In my view the Board's policy and practice reflects the spirit of the "historical trade-off" particularly as it applies to a worker's right to immediate compensation. It appears that, for the Board, the risk of losing an overpayment in certain circumstances is to be expected. It is certainly not viewed as constituting irreparable harm. In this context should it be viewed as irreparable harm simply because the risk involves the widow of a federal employee? I think not.

[24] Let me hasten to add however that, for provincial workers, the risk is shared by thousands of provincial employers because the payouts come from the Board's general fund. Here DEVCO assumes all the risk plus an administration fee. Yet in the absence of any evidence suggesting that DEVCO was at risk of enduring undue hardship, the amount of this potential loss does not make the case for irreparable harm. See **Amirault**, *supra*, at para. 22. As the Supreme Court of Canada stated in **RJR-MacDonald Inc. v. Canada (Attorney General)**, [1994] 1 S.C.R. 31, at para. 59: "'Irreparable' refers to the nature of the harm suffered rather than its magnitude."

[25] Finally, while I make no comment on the merits of any future action DEVCO may contemplate, it cannot proclaim that all hope of recovery would be lost in the event of an overpayment. I simply note that, given the ongoing relationship between the Board and DEVCO and their comprehensive agreement, some future accommodation is conceivable.

[26] For all these reasons, DEVCO has not met its burden of establishing irreparable harm. Having reached this conclusion, there is no need for me to consider the balance of convenience issue.

Secondary test- Exceptional Circumstances

[27] I now turn to the second test articulated in **Fulton**, *supra*: Are there still exceptional circumstances justifying a stay in this case? I think not. This application has been brought for one reason only - DEVCO fears that it will be unable to recoup an overpayment should the appeal be allowed. This is not unusual. In fact, it is a dynamic common to most appeals. In other words, while the facts of this case may be unique, the issues are not.

Conclusion

[28] The interests of justice do not command a stay in this case. I dismiss this application and, as agreed by all parties, without costs.

MacDonald, C.J.N.S.