

**NOVA SCOTIA COURT OF APPEAL**

**Citation:** *Alementary Services Ltd. v. Nova Scotia (Alcohol and Gaming)*,  
2009 NSCA 61

**Date:** 20090605

**Docket:** CA 311401

**Registry:** Halifax

**Between:**

Alementary Services Limited

Appellant

v.

Alcohol and Gaming Division, and  
The Attorney General of Nova Scotia, and  
The Nova Scotia Utility and Review Board

Respondents

**Judge:** The Honourable Chief Justice Michael MacDonald

**Motion Heard:** June 4, 2009, in Halifax, Nova Scotia in Chambers

**Held:** Stay is granted with costs in the cause.

**Counsel:** Christopher I. Robinson, for the appellant  
Dale Darling, for the respondent Attorney General  
Bruce Outhouse, Q.C. for the NSUARB, not appearing

**Decision:**

[1] Finding several regulatory infractions, the Nova Scotia Utilities and Review Board suspended the Split Crow Pub's liquor license for this coming Saturday and Sunday, June 6<sup>th</sup> and 7<sup>th</sup>. The Pub seeks to stay the order pending its appeal to be heard by this court in September. Following oral arguments, I said that I would grant the stay with reasons to follow. Here are my reasons.

[2] The test for granting a stay pending appeal is well established in this Province. In fact, in the context of an appeal of a liquor license suspension, Bateman, J.A. recently confirmed:

[5] In **Fulton Insurance Agencies Ltd. v. Purdy** (1990), 100 N.S.R. (2d) 341 (C.A.) Hallett J.A., for this Court, set out the test to be applied on an application for a stay pending appeal. At para. 28:

[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.

[6] As was noted by Cromwell, J.A. in **MacPhail v. Desrosiers** (1998), 165 N.S.R. (2d) 32, a stay is a discretionary order, the purpose of which is to achieve justice as between the parties in the particular circumstances of their case.

[3] Let me now apply the initial three-part **Fulton** test to the facts before me.

**Arguable Issue**

[4] Here are the Pub's grounds of appeal:

1. That the UARB erred at law in that its conclusion that the crowding of patrons in particular areas inside the appellant's premises therefore constituted an activity permitted by the licensee that is detrimental to the orderly control and operation of the licensed premises, was not reasonable.

2. That the UARB erred at law in that its conclusion that the observations of Compliance Officer Matheson as cited at paragraphs 103 - 105 of the decision inclusive, constituted an activity permitted by the licensee inside the licensed premises that is detrimental to the orderly control and operation of the licensed premises, was not reasonable.

3. That the UARB erred at law when it applied the quiet enjoyment of neighbouring properties standard to its analysis of an infraction of s. 64(1) of the *Liquor Licensing Regulations*.

4. That the UARB erred at law when it concluded that the licensee was required to exercise due diligence under s. 64(1) of the *Liquor Licensing Regulations*, to prevent the incidents which occurred outside its premises, in defence of an infraction of said Regulation.

[5] These are sufficient to meet the arguable issue threshold. In other words, at this early stage and without the benefit of the record, it is difficult to conclude that none of these grounds have merit. Counsel for the Respondent Attorney General concedes as much.

### **Irreparable Harm**

[6] The concept of irreparable harm is very much context driven. For example, in **RJR-MacDonald Inc. v. Canada (Attorney General)**, [1994] 1 S.C.R. 311, [1994] S.C.J. No. 17, Justices Sopinka and Cory noted:

59 "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. Examples of the former include instances where one party will be put out of business by the court's decision (*R.L. Crain Inc. v. Hendry* (1988), 48 D.L.R. (4th) 228 (Sask. Q.B.)); where one party will suffer permanent market loss or irrevocable damage to its business reputation (*American Cyanamid*, supra); or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined (*MacMillan Bloedel Ltd. v. Mullin*, [1985] 3 W.W.R. 577 (B.C.C.A.)).

The fact that one party may be impecunious does not automatically determine the application in favour of the other party who will not ultimately be able to collect damages, although it may be a relevant consideration (*Hubbard v. Pitt*, [1976] Q.B. 142 (C.A.)).

[7] In this motion, I conclude that irreparable harm will result without a stay. I say this because of the cumulative effect of the following two factors.

[8] Firstly, I am satisfied that without a liquor license, the Pub will close its doors for the duration of the suspension. Its losses, while not impossible, would be difficult to calculate. Furthermore, should the appeal be allowed, it is unclear from whom if anyone these losses could be recovered.

[9] Secondly, without the stay, the suspension will have been served by the time the appeal is heard. This would effectively deny the Pub its right to appeal.

### **Balance of Convenience**

[10] Finally, the balance of convenience also favours the granting of a stay. Again, without the stay the Pub's appeal may be rendered moot. Also, as noted, should the appeal be allowed, the Pub would have difficulty calculating its losses which in any event may not be recovered. On the other side of the scale, should the appeal be dismissed, the Pub would still within the next several months be forced to serve its suspension.

[11] For all these reasons, I grant the stay with costs of this motion in the cause.

MacDonald, C.J.N.S.