# NOVA SCOTIA COURT OF APPEAL

**Citation:** Tingley v. Wellington Insurance Company, 2010 NSCA 86

**Date:** 20101108
**Docket:** CA 337720
**Registry:** Halifax

**Between:**

Patricia M. Tingley, Kelli L. Smith, Todd A. Smith and Margaret M. Burton

Appellants (Applicants)

v.

Wellington Insurance Company

Respondent

**Judge:** The Honourable Justice Fichaud

**Motion Heard:** November 4, 2010, in Chambers

**Held:** Application for stay and directions dismissed, with costs fixed at $500, payable in the cause of the appeal.

**Counsel:** Kevin A. MacDonald, for the appellants
W. Harry Thurlow and Ezra B. van Gelder, for the respondent

**Decision**:

[1] The appellants apply for a stay under *Rule* 90.41(2) or, alternatively, request that I give directions to the trial judge.

[2] There are not yet written reasons by the trial judge. So my summary of the background is from the affidavits the appellants have filed for this application. On September 19, 1991 someone broke into the appellants' home and deposited "suspicious and foreign substances" and "unknown and deleterious material". The affidavits do not give details. The appellants requested their insurer, the respondent Wellington Insurance, to deal with the matter. Wellington did not clean up the deposited material to the appellants' satisfaction. The appellants' health suffered, and they have incurred damages.

[3] On September 18, 1992, the applicants sued Wellington. The pleadings are not in the material for this application. Counsel inform me that the causes of action included negligence, negligent misrepresentation and breach of contract. Justice MacAdam of the Supreme Court of Nova Scotia heard the trial beginning in August 2008, concluding with final argument of April 6, 2010. There were 118 days of trial, making it one of the longest trials in Nova Scotia's history. From the limited documentation available to me on this application, I cannot comprehend how this action could have consumed so much trial time.

[4] Section 34(d) of the *Judicature Act*, R.S.N.S. 1989, c. 240 says the judge may "reserve judgment until a future day, not later than six months from the day of reserving judgment". Section 2(c) defines "judgment" as the "order, rule or decree". On October 4, 2010, immediately before the expiry of the six months limited by s. 34(d), Justice MacAdam faxed a letter to counsel . The letter attached a document, signed by Justice MacAdam. The attachment said:

> The claims by the Plaintiffs against the Defendants in this proceeding are dismissed. Written reasons will follow.

Justice MacAdam's enclosure letter said:

> Enclosed is a copy of my judgment in this proceeding. As noted, written reasons will follow. Pursuant to s. 34(d) of the *Judicature Act*, I am required to give judgment in this proceeding no later than six month [sic] from the day of

> reserving judgment. Decision was reserved on April 6, 2010 and therefore, by law, judgment must be given no later than October 5, 2010.
>
> It is my intention to file written reasons. They will be filed sometime this year. Depending on my court schedule, I would hope the filing would be sometime in November. However, if my present schedule remains intact, it may be December.

[5] On October 13, 2010, the appellants filed a Notice of Appeal to this court with the following grounds:

> The grounds of appeal are
>
> (1) The learned Judge erred in law on the face of the record by rendering a Judgment without reasons.
>
> (2) The Learned Judge is now functus and his failure to give reasons amounts to a denial of natural justice and a breach of the Appellants' fundamental rights pursuant to the Canadian Charter of Rights and Freedoms.
>
> (3) The learned judge erred in law by failing to analyze the evidence and make any findings of fact or credibility.
>
> (4) The decision is wrong in law; and
>
> (7) Such other ground as may appeal [sic].

There were no grounds "(5)"or "(6)".

[6] On October 21, 2010, the appellants filed this Notice of Motion:

> for an order staying any proposed further reasons the Judge alluded to; and, alternatively giving directions as to the appropriate time period and circumstances for such further reasons to be given; and additionally seeking an Order setting the matter down for hearing and giving directions as to what Appeal Books and Factums, if any, shall be filed.

[7] In support, the appellants filed their affidavits, and an affidavit of appellants' counsel. Ms. Tingley's affidavit includes:

> 17 On October 4th, 2010 I received a call from Kevin A. MacDonald while I was in Bridgewater for a medical appointment with my daughter, who

remains disabled from the effects of the substances deposited in our home, and was stunned to hear that our case was dismissed, but Mr. MacDonald could not tell us why, as apparently only a letter had been received advising that the claims had been dismissed.

18 I was very upset that I would not be able to explain to my daughter on the way back what happened.

19 My and my daughter's reaction and discussion as we drove back form Bridgewater was how surprised and upset we were that Justice MacAdam would treat us this way, the day before his written Decision was due.

20 If he knew he wasn't going to get his Decision out within the six months, I can only imagine that he would have been aware of that 4 or 5 weeks ago and could have come and told us then.

21 I and all the other Plaintiffs, to my knowledge, would have preferred to have the Decision late with reasons, than have a Judgment saying we've lost, without reasons.

22 I understand from the letter that he sent to counsel that he hopes to have his written reasons sometime in November or perhaps December if his present schedule remains. I was very upset and wanted to know why Justice MacAdam would do this.

23 When I asked him if this is how Judges do it, I was advised by Kevin A. MacDonald and do verily believe that several cases that he is familiar with where Judges have gone beyond the six month period provided for in the *Judicature Act*, involves Justices reserving both Judgment and written Decision and reasons.

24 Mr. MacDonald could not provide any explanation as to why Justice MacAdam did not do so here or why Justice MacAdam would not have taken into consideration the impact that this would have on the Plaintiffs; nor could Mr. MacDonald give any explanation as to why Justice MacAdam did not approach us a month or more ago and advise that his Decision and Judgment would be late.

25 I, and all the other Plaintiffs, to my knowledge, would have readily agreed to whatever extension Justice MacAdam felt was necessary to ensure that he had the proper time to review all the evidence, submissions, do an analysis and make necessary findings of fact and come to a reasoned Decision as justice requires in this case.

26 I am terribly disappointed and am upset that after approximately 18 years of litigation, 118 days of trial, numerous pre-trial Applications, discoveries, requests for productions, Applications to Dismiss, etc.; I cannot believe that my case would be dismissed and be told that I will have to wait to find out why.

27 I am left with the deep seated concern that Justice MacAdam simply did not have sufficient time to do all that was necessary, because he was busy with other matters and when he realized he was about to run out of time under the *Judicature Act*, gave a gut reaction Decision, without a total appreciation of the evidence and arguments and will now tailor his Decision, findings of fact and findings of credibility in support of his Judgment.

28 I also have concerns about filing this Appeal as I was advised by Kevin A. MacDonald and do verily believe, that he would have to advise Justice MacAdam of the Appeal in reply to Justice MacAdam's fax to counsel of October 4th, 2010, which I hereby attach as Exhibit "A" to this my Affidavit. I attach as Exhibit "B" the letter in reply from Mr. MacDonald.

29 I am now also concerned that and have increased anxiety about receiving the Decision because of all the foregoing, which I consider to be very unfair.

30 I have no desire to see anything further from Justice MacAdam, and even the thought of receiving anything causes me upset.

31 Because of the concerns I have as stated above, the only fair result would be a re-trial of this matter.

Margaret Burton's affidavit includes:

6 Ms. Tingley told me and I do verily believe, that there were no reasons given as to why we lost; only the fact that we had lost. I found this to be very upsetting as this matter has been outstanding for so long and the trial was very fatiguing.

7 I have been helped by various people over the years and feel an obligation to tell them what happened and the first thing they ask is why we lost. I find it very embarrassing to tell them that I don't know why and even find

myself making excuses as to why we may have lost, when really I can think of no reason for us to have lost when we told the truth throughout.

8 There are other individuals who I haven't even approached to tell, because once again I would be embarrassed to be questioned about why it was that we lost, when I really have no idea.

9 I find myself confused and upset and wondering where the justice is in this situation after so many years.

10 When I asked whether or not this was permissible, I was advised by Kevin A. MacDonald and do verily believe that the *Judicature Act* provides that a Justice may reserve their Decision for six months; but in his experience in those instances where a Justice does not meet the six month provision of the *Judicature Act*, the Judgment and Decision both are delayed until they are ready and delivered at the same time.

11 I am now left wondering what we will see if we get written reasons from Justice MacAdam and this is causing me anxiety. I would rather not see anything from Justice MacAdam and have a re-trial of this matter.

Todd Smith's Affidavit includes:

14 I am advised by Kevin A. MacDonald and do verily believe that cases that he is familiar with where Judges have gone beyond the six month time period provided in the *Judicature Act*; those Justices have reserved both the Judgment and written Decision and Reasons and deliver them at the same time.

15 I would have preferred that Justice MacAdam had done so, as not knowing why we have lost is very frustrating, especially given the length of time we were before the Courts and that we were at trial for 118 days. I feel I have a right to know why we lost and not have to wait until the Judge can write his reasons.

16 I am frankly now concerned about receiving the Decision and the way my exercising my right to Appeal and challenge this unjust and unfortunate turn of events may affect the Decision and the reasons he is contemplating.

17 I would rather not see any after the fact reasons from Justice MacAdam whatsoever, and have this matter re-tried in the Supreme Court of Nova

> Scotia, in the hopes that Justice can be done between the parties; notwithstanding the significant delay, time and costs that that will entail.

[8] The appellants' counsel filed a brief on October 18, 2010. This brief said that, with the passage of the six months mentioned in s. 34(d), Justice MacAdam "is now functus and in our respectful submission it is not open to a Justice then to provide additional reasons in support of their Judgment". The brief continued:

> The filing of a Judgment without reasons amounts to an error on the face of the record, a denial of natural justice and a breach of the Appellants' Charter rights.

The brief spoke to the remedy:

> The appropriate remedy is to issue an Order staying any further written reasons and dealing with the Appeal on the Judgment as issued.

[9] On October 18, 2010, the appellants' counsel filed a further brief. Respecting the stay, this brief said:

> **STAY**
>
> We respectfully submit that a Stay is an appropriate remedy here for two reasons:
>
> 1. That Justice MacAdam is functus and therefore there is no jurisdiction for any further reasons and to issue them could cause prejudice to my clients in the event of any retrial, and in any event will cause additional upset as my clients have averred in their Affidavits.
>
> 2. The extremely unusual and unfortunate circumstances of this case requires that in the interest of justice and to ensure no further emotional upset be visited upon the Appellants, that no further written reasons should be provided by Justice MacAdam.
>
> Even if you conclude that Justice MacAdam is not functus, his judicial independence has been called into question by rendering a Judgment without reasons and advising that he will provide further reasons.
>
> My clients now have a real concern that Justice MacAdam will go back and now try to analyze why the evidence and law supports his "gut reaction", or, even more troubling, they are concerned that whatever the status of his reasons were,

> knowing that they are appealing, he may now make other findings of fact and/or credibility that had not been made at the time he rendered his Judgment.
>
> In effect, Justice MacAdam's actions have now had a significantly negative impact on my clients and it is not in the interest of justice that any further reasons be provided.
>
> As such, we submit that this is an appropriate case for a permanent stay of any reasons; or alternatively, an interim stay pending the full appeal on the merits. Of course, it is our position that the most appropriate remedy is a permanent stay so that no further angst or emotional upset is visited upon the Appellants.

[10] At the chambers hearing on November 4, the appellants' counsel submitted that Justice MacAdam's delay in issuing reasons has violated the appellants' rights not to be deprived of security of the person contrary to principles of fundamental justice and not to be subjected to cruel and unusual treatment, under ss. 7 and 12 of the *Charter*.

[11] At the chambers hearing, the appellants' counsel requested one of two orders:

(1) That I order Justice MacAdam not to issue reasons. Counsel characterizes such an order as a form of stay.

(2) Alternatively, that I order Justice MacAdam to accompany his eventual written reasons with an affidavit to be signed by Justice MacAdam. The affidavit, according to counsel's submission, would attach the draft of the judge's reasons that existed on the day the six months expired under s. 34(d) of the *Judicature Act* and would swear that Justice MacAdam's reasoning, in fact and law, as expressed in his final written reasons, matched the state of his reasoning as it existed on the expiry of the six months.

[12] The appellants cited no authority that (1) the six months under s. 34(d) was mandatory, instead of directory, (2) s. 34(d) applied to reasons, as opposed to the judgment, (3) the passage of six months deprived the judge of jurisdiction or (4) rendered the judge *functus*. Neither did the appellants cite authority that supported a claim under (5) s. 7 of the *Charter*, or (6) s. 12 of the *Charter* or (7) suggested a chambers judge has jurisdiction under *Rule* 90.41(2) to issue either alternative of

the appellants' requested order or (8) supported either alternative of that requested order, even if I have jurisdiction. At the chambers hearing appellants' counsel suggested that I not be hidebound by precedent at the expense of justice. Pointing to his clients seated at the back of the court room, he challenged me to explain to them why they should not receive justice.

[13] The short answer is they will receive justice. Whether they receive victory is a different question.

[14] In *La Ferme D'Acadie v. The Atlantic Canada Opportunities Agency*, 2009 NSCA 5, ¶ 11, I summarized the well known test for stays on appeal:

> [11] In *Fulton Insurance Agencies Ltd. v. Purdy* (1990), 100 N.S.R. (2d) 341 (C.A.), at ¶ 27, Justice Hallett set out what has become the accepted definition of those principles under the former Rule 62.10(2), now Rule 90.41(2). Briefly, the applicant for the stay must show either that (1) there is an arguable appeal, denial of a stay would cause irreparable harm and the balance of convenience favours a stay or (2) there are exceptional circumstances making it just that the stay be granted.

[15] I will deal first with *Fulton*'s primary test.

[16] Is there an arguable appeal? At the chambers hearing, the appellants' counsel said that, according to his present intent, the only proposed grounds of appeal relate to the lateness of the judge's reasons. He asked that the appeal proceed without a trial transcript or the judge's reasons. So I will assess arguability from that perspective.

[17] The appellants' premise is that, once the six months under s. 34(d) expired, Justice MacAdam was *functus* and lost jurisdiction to give reasons. This position is wrong in law. Justice MacAdam issued a judgment on October 4, 2010, within the six months prescribed by s. 34(d). His reasons were delayed. Section 34(d) deals with the timing of a judgment, meaning the order. Section 34(d) does not prescribe a date for reasons. There is nothing legally objectionable in a judgment with "reasons to follow": *R. v. Assoun*, 2006 NSCA 47, ¶ 49-50, adopting the rulings in *R. v. Quinn* (2004), 372 A.R. 223 (A.Q.B.), ¶ 10 and *Crocker v. Sipus* (1992), 95 D.L.R. (4th) 360 (O.C.A.), pp. 362-4. Judgments with reasons to follow are not uncommon in courts of all levels. Even for a judgment, the passage of s. 34(d)'s six months before judgment neither deprives the judge of jurisdiction nor

renders the judge *functus*. Rather, the remedy is *mandamus* to produce the delayed judgment, not an order for a new trial: *Langille v. Midway Motors Ltd*, 2002 NSCA 39, ¶ 7-8; *Toronto Dominion Bank v. Lienaux*, 2005 NSCA 97, ¶ 9-10; *Luke v. Luke*, 2009 NSCA 57, ¶ 14.

[18] There is no violation of a principle of fundamental justice under s. 7 of the *Charter*. When Justice MacAdam issues his reasons, the appellants may pursue an appeal in this court just as if the reasons had accompanied the judgment of October 4, 2010. The appellants want the Court of Appeal to order a new trial, without this court even reading the judge's reasons or the trial transcript. The first trial took 118 days of court time, ending 18 years after the filing of the Originating Notice. The appellants would just pretend that never happened and start again. In my view, it is more consistent with principles of justice that the Court of Appeal have the opportunity to review the judge's reasons, when they arrive, and consider the merits of the argued grounds of appeal from those reasons, before this court decides whether there should be a new trial. That the appellants may have to undergo this normal appellate process does not violate principles of fundamental justice under the *Charter*.

[19] There is no cruel or unusual punishment or treatment under s. 12 of the *Charter*. In *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, at ¶ 176-83, Justice Sopinka for the majority discussed the meaning of cruel and unusual punishment or treatment in s. 12. There is not the remotest connection between Justice MacAdam's elapsed time for issuing reasons, after this 118 day trial, and the triggering standard for s. 12.

[20] The appellants' submissions are not arguable in law.

[21] Nor have the appellants suffered irreparable harm. When Justice MacAdam issues his reasons, the appellants may proceed with their appeal, on whatever grounds they chose to advance against the merits of the reasons for judgment. The appellants say they suffered stress from the uncertainty resulting from the absence of the reasons to accompany the October 4 judgment. They cite stress as irreparable harm. When the reasons arrive, that uncertainty, and the stress it induces, should end. They and their counsel may then focus their appeal on those aspects of the reasons which they believe to be erroneous. They will continue to feel the stress of having lost at trial. But that stress affects every appellant, and

does not constitute irreparable harm in the test for a stay. Otherwise, stays would be virtually automatic.

[22] In my view, the appellants have not established the first or second prerequisites of *Fulton*'s primary test.

[23] This is not a case for *Fulton*'s secondary test. The appellants' assume that the judge erred legally by reserving his reasons after his judgment, the judgment having been issued within s. 34(d)'s time limit. As I have discussed, there is no arguable basis for that assumption. When the applicant's submission lacks even a morsel of legal support, there is no "exceptional" case for a stay.

[24] There is no legal basis for the appellants' suggestion that I order Justice MacAdam to accompany his reasons with an affidavit outlining the judge's progression of reasoning. Such an order would not be a "stay" or "other relief" against a judgment that is contemplated for a chambers judge by *Rule* 90.41(2). Neither is there any legal basis for such an order, even if I had jurisdiction under *Rule* 90.41(2).

[25] I would dismiss the application. I fix costs at $500, payable in the cause of the appeal.

Fichaud, J.A.