

NOVA SCOTIA COURT OF APPEAL

Citation: *Fadelle v. Nova Scotia College of Pharmacists*, 2012 NSCA 61

Date: 20120607

Docket: CA 392882

Registry: Halifax

Between:

Tamala Fadelle

Appellant

v.

Nova Scotia College of Pharmacists &
the Attorney General of Nova Scotia

Respondents

Judge: The Honourable Justice Duncan R. Beveridge

Motion Heard: May 31, 2012, in Halifax, Nova Scotia, in Chambers

Held: Motion for a stay is granted with the exception of the restriction on the appellant's practice in para. 4(c) of the sanctions decision of May 3, 2012

Counsel: Jim O'Neil, for the appellant
Scott Sterns and Tammy Manning, for the respondent
Edward Gores, Q.C. for the Attorney General of Nova Scotia
(not present)

Decision:

INTRODUCTION

[1] The appellant is a pharmacist. She seeks a stay of the sanctions imposed by a Hearing Committee pending determination of her appeal to this Court. The respondent does not consent to this proposed relief but, essentially, voiced no opposition.

[2] I heard the motion on May 31, 2012. At the conclusion of oral submissions, I granted the requested relief for a stay of the sanctions with the exception of one particular, with reasons to follow. These are my reasons.

BACKGROUND

[3] Ms. Tamala Fadelle is a registered pharmacist and operates the River Hebert Pharmacy in the small rural community in Nova Scotia. The Nova Scotia College of Pharmacists (“College”) alleged that she had violated her professional responsibilities under the *Pharmacy Act*, S.N.S. 2001, c. 36 and Regulations. The hearing took place over 10 days in December 2011 and January 2012. The Committee released its decision finding numerous of the allegations had been established including trafficking, falsification of prescriptions, and the creation of a fictitious patient profile.

[4] The Hearing Committee reconvened to consider the issue of sanctions on April 4, 2012. The Committee released its decision on sanctions on May 3, 2012. It concluded that the serious misconduct by the appellant warranted a two-year suspension, a \$10,000 fine, conditions on re-entry into practice, and payment of a portion of the costs incurred by the College.

[5] The sanctions imposed by the Hearing Committee, to take effect May 17, 2012, were:

1. The Registrant’s license and the Registrant’s ability to practice pharmacy shall be suspended for a period of two years. For clarification, during this time, the registrant shall also not be permitted to be a license holder of a pharmacy.

2. A fine of \$10,000.00 is payable by the Registrant to the Nova Scotia College of Pharmacists on or before December 31, 2012.
3. Prior to the reinstatement of the Registrant's license, the Registrant must, at her own expense, successfully complete the following:
 - a. An educational program, approved by the Nova Scotia College of Pharmacists, the principal curriculum of which is based on ethics.
 - b. An educational program, approved by the Nova Scotia College of Pharmacists, the principal curriculum of which is based on public policy.
 - c. An educational program, approved by the Nova Scotia College of Pharmacists, the principal curriculum of which is based on addiction.
4. Following the reinstatement of the Registrant's license, the following restrictions shall be placed on her license to practice for a period of three years:
 - a. The Registrant shall not work as a manager of a pharmacy.
 - b. The Registrant must report all new patient profiles to her Pharmacy Manager in a form and on a schedule to be determined with her Pharmacy Manager.
 - c. The Registrant shall not dispense prescriptions, of any nature or kind whatsoever, to herself or to any family member, spouse, grandparent, parent, child or sibling.
5. The Registrant shall be subject to up to six random, unannounced audits over a period of three years, on a schedule to be determined by the College. The costs of such audits will be calculated by the College using standard rates and paid by the Registrant within 60 days of invoicing. The total costs of these paid audits will be credited to the balance of costs payable by the Registrant as noted in #6 below. To illustrate, if the audits cost \$10,000, this amount will reduce the balance payable by \$10,000.
6. The Registrant shall pay to the Nova Scotia College of Pharmacists costs in the amount of \$100,000.00 to be paid in monthly installments of \$3,000.00 commencing on the first day of the month following the date of

reinstatement of her license and continuing on the first of every month thereafter until the amount of \$100,000.00 is paid in full. Any credits for the costs of the inspections pursuant to clause 5 shall be credited to the final balance owed.

7. Publication of a summary of the determination of the Hearing Committee in the Nova Scotia College of Pharmacists President's Bulletin including penalty imposed, with reference to name.
8. A notice of the Registrant's suspension from the practice of pharmacy is to be published in a newspaper with provincial circulation. The publication is to include the Registrant's name, the effective date of the suspension, and the term of the suspension.
9. For clarity, it is the order of this Hearing Committee that paras. 1, 2, and 3 must be fully and completely complied with prior to the reinstatement of the Registrant's license. For further clarity, if the Registrant defaults on the payment of costs in para. 6, the Registrant shall be suspended from practice until such time as any arrears have been paid in full. Should financial exigency necessitate changes to these terms, the Registrant has the option to apply for new terms with the College. The College will have the final decision in this application.
10. Following reinstatement of her license. the Registrant must disclose the summary of the determination of the Hearing Committee, including penalty, to any prospective employer and to her Pharmacy Manager for a period of three years.

[6] No restrictions had been in place on the appellant's practice pending the investigation and hearing of the complaints, nor between the finding of misconduct and the sanction decision. On the appellant's filing of her notice of appeal in this Court on May 11, 2005, the respondent undertook not to take action to enforce the orders of the Hearing Committee pending the outcome of the decision of a judge of this Court on the anticipated application for a stay.

LEGAL PRINCIPLES

[7] The appeal is brought as of right pursuant to s. 58 of the *Pharmacy Act*. It provides:

58 (1) The member or pharmacy complained against may, within thirty days of the date of the decision of the hearing committee, appeal from the findings of the hearing committee to the Nova Scotia Court of Appeal on any point of law.

(2) The notice of appeal shall be served upon the Registrar.

(3) The Civil Procedure Rules governing appeals from the Supreme Court of Nova Scotia to the Nova Scotia Court of Appeal apply *mutatis mutandis* to appeals pursuant to this Section.

(4) Where a matter is appealed to the Nova Scotia Court of Appeal pursuant to subsection (1), the Court of Appeal, pending a decision by the Court of Appeal, has jurisdiction to grant a stay of any order made pursuant to this Act where, in its discretion, it deems it fit.

(5) The College may destroy records relating to a disciplinary hearing at any time after the time for appealing a decision has expired.

[8] In common law jurisdictions, the normal rule is that the filing of a notice of appeal does not operate as a stay of execution of the judgment being appealed. Nonetheless, the law recognizes that there may be circumstances where it is appropriate to grant a stay. This is precisely what s. 58(4) of the *Act* does. In addition, Rule 90.41(2) of the *Nova Scotia Civil Procedure Rules* provides:

90.41 (2) A judge of the Court of Appeal on application of a party to an appeal may, pending disposition of the appeal, order stayed the execution and enforcement of any judgment appealed from or grant such other relief against such a judgment or order, on such terms as may be just.

(4) This Rule 90.41 does not prevent the staying of execution or proceedings by the court appealed from, as authorized by a Rule or legislation.

[9] To state the obvious: the power to grant a stay is a discretionary one. The purpose in exercising this discretion is to achieve justice as between the parties in the particular circumstances of the case pending before the court (*MacPhail v. Desrosiers* (1998), 165 N.S.R. (2d) 32). The principles that govern the exercise of this discretion are well known. They attract no controversy. The appellant must establish, on its balance of probabilities that (1) there is an arguable issue raised by the appeal; (2) that if a stay is not granted and the appeal is successful, the appellant will have suffered irreparable harm; (3) that the appellant will suffer

greater harm if the stay is not granted than the respondent will suffer if the stay is granted. Finally, this discretionary power may be exercised in favour of the appellant even if all three of these criteria are not met where there are nonetheless exceptional circumstances that would make it fit and just that the stay be granted. (See *Purdy v. Fulton Insurance Agencies Ltd.* (1990), 100 N.S.R. (2d) 341, per Hallet J.A.)

ANALYSIS

[10] In support of her motion for a stay, the appellant relied on her notice of appeal, her affidavit sworn May 18, 2012, an affidavit from a physician practicing in Amherst, Nova Scotia, and from three residents of River Hebert. The appellant also filed a detailed brief. No materials were filed by the respondent.

Arguable Issue

[11] Demonstration of an arguable issue is not a difficult threshold. All that is required is a notice of appeal which contains realistic grounds which, if established, appear to be of sufficient substance to be capable of convincing a panel of this Court to allow the appeal (see *MacCulloch v. McInnes, Cooper and Robertson*, 2000 NSCA 92). The notice of appeal sets out a variety of complaints alleging error by the Hearing Committee, including reasonable apprehension of bias, misapprehension of evidence and making unreasonable findings that were unsupported by the evidence. At this stage, there is no record to review. It is difficult to conclude that none of the putative claims of error have no merit. Counsel for the respondent concede as much.

Irreparable Harm

[12] The question of irreparable harm is driven by context. In *RJR – MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, Sopinka and Cory JJ. noted (p. 341):

“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.)).

[13] The appellant relies on the decision of Freeman J.A. in *Ayre v. Nova Scotia Barristers' Society* (1998), 165 N.S.R. (2d) 212 (N.S.C.A.). Ms. Ayre was found guilty of professional misconduct. She was suspended for a minimum period of six months, required to fulfill a number of conditions before readmission, and pay \$100,000 costs. Freeman J.A. said:

[9] 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.

[10] 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.

[14] The materials filed by the appellant demonstrate that she is the sole owner and operator of her pharmacy in River Hebert. She swears that should a stay not be granted her business and personal reputation will be irreparably damaged. It would force closure of her pharmacy and also cause undue hardship on the residents of River Hebert and surrounding area. The respondent does not dispute the impact that would flow from the sanctions directed by the Hearing Committee should the substantive aspects not be stayed. There can be little doubt that irreparable harm would ensue if the stay were not granted, and the appellant was ultimately successful. Even if damages could be calculated for her losses, it has not been suggested that there is anyone she could look to for recovery.

Balance of Convenience

[15] The balance of convenience also favours the granting of a stay. It will be some months before a panel of this Court will be able to hear the appeal, let alone consider the issues and release reasons for judgment. The respondent filed no materials on this motion nor identified any claimed harm should a stay be granted.

[16] I recognize that it is the duty of the College to protect the public as it fulfills its role governing the profession of pharmacy. During oral submissions, counsel for the respondent suggested that the restriction on practice set out in para. 4(c) of the sanctions should not be stayed. It also requested that the requirement to pay the fine of \$10,000 be enforced and the College be permitted to carry out the six, unannounced, random audits, with the cost of the audits to be paid by the appellant.

[17] The appellant voiced no objection to the requested restriction on her practice directed by para. 4(c) of the sanctions. It prohibits the appellant from dispensing prescriptions to herself or any family member, spouse, grandparent, parent, child or sibling. However, she saw no reason to require payment of the fine prior to the determination of her appeal. In addition, random, unannounced audits are already well within the powers of the College with respect to any pharmacist, including the appellant.

[18] I see little point in requiring the appellant to pay a fine of \$10,000 before her appeal is heard and disposed of by this Court. The respondent College's concern, on behalf of the public interest, appears to be otherwise well protected by its existing audit powers. I would grant the requested motion for a stay of the sanctions ordered by the Hearing Committee with the exception of the restriction on the appellant's practice identified in para. 4(c) of the sanctions decision of May 3, 2012.

[19] There are two aspects of relief requested by the appellant that I declined to deal with. The first is a request in the final paragraph of counsel's brief on the stay application filed May 28, 2012, asking for a publication ban on the evidence adduced before the Hearing Committee, its decision dated January 24, 2012 and the sanctions decision dated May 3, 2012.

[20] The second is in a letter dated May 29, 2012 announcing that he would be moving that the style of cause be amended to "T.F." to describe the appellant. The

respondent opposed both of these requests. In any event, the dictates of Rule 90.37(15) and the Practice Directive of this Court of November 8, 2005 had not been complied with. I concluded that the requests for publication ban and use of pseudonyms were not properly before me.

[21] Since neither party sought costs, none will be ordered.

Beveridge, J.A.