

**NOVA SCOTIA COURT OF APPEAL**

**Citation:** *Y. v. Swinemar*, 2020 NSCA 57

**Date:** 20200909

**Docket:** CA 499817

**Registry:** Halifax

**Between:**

Y

Appellant

v.

Schelene Swinemar, X, and Nova Scotia Health Authority

Respondents

**Judge:** Wood, C.J.N.S.

**Motion Heard:** Motion proceeded by way of written submissions

**Held:** 90.38 motion for leave to review order dismissed

**Counsel:** Hugh Scher, John Champion, and Kate Naugler, for the  
appellant  
Philip Romney, for the respondent X  
Karen Bennett-Clayton, for the respondents Ms. Swinemar  
and Nova Scotia Health Authority  
Mary Ann Persaud, for the respondent Nova Scotia Health  
Authority (in-house counsel)

## Overview

[1] The appellant has commenced legal proceedings in the Supreme Court of Nova Scotia for an injunction to prevent her husband from obtaining medical assistance in dying (MAiD) on the basis that he allegedly did not meet the eligibility criteria for that procedure. She made a motion for an interlocutory injunction restraining her husband and his health professionals from taking this step pending the outcome of the litigation.

[2] By decision issued on August 14, 2020 (2020 NSSC 225) the motion for an interlocutory injunction was dismissed. On that same day, the appellant filed a Notice of Appeal and a motion for a stay of the lower court order pending determination of the appeal. The appeal hearing is set for September 24, 2020 at 2:00 p.m.

[3] By decision dated September 4, 2020, Justice Van den Eynden of this Court dismissed the motion for a stay (2020 NSCA 56). On that same day, the appellant filed a Notice of Motion requesting a review of the decision of Justice Van den Eynden in accordance with *Civil Procedure Rule* 90.38 which provides as follows:

### **90.38 Review of order of judge**

- (1) In this Rule 90.38,
  - (a) a reference to the “Chief Justice” includes a judge designated by the Chief Justice for the purpose of this Rule;
  - (b) “party” includes an intervenor under Rule 90.19.
- (2) An order of a judge of the Court of Appeal in chambers is a final order of the Court of Appeal, subject only to review under this Rule 90.38.
- (3) An order of a judge in chambers that disposes of an appeal may be reviewed by a panel of the Court of Appeal, with leave of the Chief Justice.
- (4) A party who requests leave to review an order of a judge must file a notice of motion for leave to review with the Chief Justice and deliver the notice to the other parties to the appeal, no more than seven days after the date of the order to be reviewed.
- (5) A party who opposes a motion for leave to review must file with the Chief Justice, and deliver to the other parties, a reply no more than seven days after the date of the filing of the motion for leave to review.
- (6) The Chief Justice may do any of the following on a motion for leave to review:

- (a) dismiss the motion for leave to review;
- (b) set the motion down for hearing;
- (c) grant leave to review the order of the judge in chambers if the Chief Justice is satisfied that the judge acted without authority under the rules, or the order is inconsistent with an earlier decision of a judge in chambers or the Court of Appeal, or that a hearing by a panel is necessary to prevent an injustice.

(7) The Chief Justice need not give reasons for the determination of a motion under this Rule.

(8) If leave is granted, the Chief Justice must set a time and date for the hearing of the review before a panel of the Court of Appeal and give directions for the filing of factums and other material.

(9) A judge may not sit as a member of the panel of the Court of Appeal hearing an appeal from the judge's order.

(10) An order granting leave to appeal under this Rule 90.38 is a final order of the Court of Appeal and is not subject to further review.

[4] As set out in subsection (3), review of a decision made by a judge in chambers by a panel of the Court is only available if that decision “disposes of an appeal” and if the Chief Justice grants leave. The circumstances when the Chief Justice may give leave are found in subsection (6)(c).

[5] A stay of a decision under appeal is a discretionary interim remedy which may be granted pending the disposition of an appeal. It does not bring the proceeding to a conclusion and, therefore, does not dispose of an appeal. For this reason, review under *Rule* 90.38 is not available.

[6] In the circumstances of this matter, the appellant submits that because of the refusal of the stay motion, she is concerned the respondent, Mr. X, might access MAiD. Should he do so prior to September 24<sup>th</sup>, the appellant says this will bring the appeal to an end. I disagree. Justice Van den Eynden's refusal to issue the stay did not dispose of the appeal. That will only happen if the appellant files a Notice of Discontinuance or the panel assigned to hear the case dismisses the appeal, after receiving submissions from the parties. The death of Mr. X does not necessarily mean the appeal is moot and will not proceed.

**Conclusion**

[7] For the above reasons, I will not grant leave to review the decision of Justice Van den Eynden and the appellant's motion under *Rule 90.38* is dismissed.

Wood, C.J.N.S.