NOVA SCOTIA COURT OF APPEAL
Citation: *MacNeil v. Yeadon*, 2022 NSCA 32

Date: 20220427
Docket: CA 512634
Registry: Halifax

Between:

James D. MacNeil

Appellant

v.

Julie K. Yeadon

Respondent

Judge:	Derrick, J.A.
Motion Heard:	April 21, 2022, in Halifax, Nova Scotia in Chambers
Held:	Motion to strike allowed in part Motion for stay of proceedings granted
Counsel:	Jessica Chapman, for the appellant (applicant for stay) Christopher I. Robinson, for the respondent (applicant for motion to strike)

Decision:

Introduction

[1] These reasons address two motions: Mr. MacNeil's motion for a stay until his appeal is resolved and Ms. Yeadon's motion to strike portions of the affidavits filed by Mr. MacNeil. In a tele-chambers call on March 21st, 2022 I scheduled the appeal for a full day on September 29th, 2022 to accommodate a probable fresh evidence motion by Mr. MacNeil and imposed an Interim Stay Order. This maintained the status quo between the parties until the merits of the stay motion could be heard.

[2] On April 7th , 2022 Mr. Robinson filed a motion to strike certain portions of Mr. MacNeil's affidavits, sworn on March 10th and March 16th, 2022. Mr. Robinson sought to have a subsequent affidavit sworn by Mr. MacNeil on April 19th, 2022 struck in its entirety.

[3] On April 21st, 2022 I heard submissions on both motions. Concessions by Mr. MacNeil in relation to some of the impugned passages in his March 10th and 16th affidavits resulted in the strike motion being partially successful. I heard argument on what remained in issue, including the April 19th affidavit, and the stay motion. My reasons will address the following: the agreements reached by counsel on the content of the affidavits; my determinations where agreement was not forthcoming; and the basis for my decision the stay being requested by Mr. MacNeil should be granted.

Factual Background

[4] Mr. MacNeil and Ms. Yeadon were married in 2002 and separated in 2005. Their sons, T. and J., were born in 2001 and 2004. The parties' Corollary Relief Order from 2011 required Mr. MacNeil to pay approximately $2300.00 in monthly child support. T. started university in September 2019. In August 2022, J. will be moving away to begin his university degree. Mr. MacNeil pays almost all of T.'s university expenses and will be doing the same for J.

[5] In October 2019, Mr. MacNeil filed a Notice of Variation Application in the Nova Scotia Supreme Court, Family Division pursuant to the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp), and the *Federal Child Support Guidelines*, SOR/97-175. In September 2020, Ms. Yeadon filed a Response to Variation Application seeking

increased prospective child support, and a retroactive recalculation of child support to January 1st, 2017. She argued that Mr. MacNeil had not provided full financial disclosure between 2014 and September 2019 and that the parties' agreements on child support should not be binding.

[6] Justice Cindy Cormier heard the matter. She released lengthy reasons with detailed calculations on January 17th, 2022 (2022 NSSC 17). She found that child support should be recalculated. She held the tax information Mr. MacNeil "reportedly provided to Ms. Yeadon in 2016 was not sufficient financial disclosure to allow Ms. Yeadon to be fully informed about Mr. MacNeil's means and circumstances, before reaching an agreement regarding ongoing child support in a shared parenting arrangement" (para. 33). She found a change of circumstances "related to Mr. MacNeil's failure to adequately disclose his financial information" (para. 44).

[7] In recalculating child support, Justice Cormier considered various sources of income for Mr. MacNeil, including "retained earnings" of his incorporated law practice, JDM Law (para. 56). She calculated retroactive child support based on finding that Mr. MacNeil's annual guidelines income was $527,336.00 for 2017, $541,189.00 for 2018, $593,297.00 for 2019, $888,025.00 for 2020, and $898,795.00 for 2021.

[8] In her Order of February 14th, 2022, Justice Cormier directed Mr. MacNeil to pay $7,061 per month in ongoing child support to Ms. Yeadon commencing March 1st, 2022. She also ordered him to pay retroactive child support for the period January 1st, 2017 to February 1st, 2022 totalling $193,607.00. She apportioned special or extraordinary expenses associated with the children beginning June 1st, 2021 as 94.3 percent for Mr. MacNeil and 5.7 percent for Ms. Yeadon.

[9] In her recalculation of child support and retroactive child support, the trial judge considered the retained earnings of JDM Law, the law practice Mr. MacNeil had incorporated in 2017, a total just exceeding $700,000. She found that due to the retained earnings she was "not concerned" about Mr. MacNeil's ability to pay retroactive child support to Ms. Yeadon (para. 181).

The Grounds of Appeal

[10] Mr. MacNeil's Notice of Appeal sets out 31 grounds, grouped under the following headings: Imputation of the Appellant's income; Imputation of the

Respondent's Income; Conditions, Means, Needs, Circumstances and Standards of Living; Child Support over the Age of Majority; Retroactive Child Support; and Findings without Proper Evidentiary Support. The particularized errors alleged include: errors of law by the trial judge in her imputation of income for the purposes of calculating retroactive and prospective child support; use of the Mr. MacNeil's law corporation's retained earnings; misapprehension of the evidence; and numerous errors of mixed fact and law.

The Legal Principles Governing Motions for a Stay

[11] A stay is a discretionary remedy. It is intended "to achieve justice as between the parties in the particular circumstances of their case" (*Hendrickson v. Hendrickson*, 2004 NSCA 98 at para. 11, per Saunders, J.A. quoting *Widrig et al. v. R. Baker Fisheries Ltd.* 1998 NSCA 20 at para. 8.

[12] In *Green v. Green*, 2022 NSCA 30 at para. 11, Justice Van den Eynden noted:

> The filing of a Notice of Appeal does not operate as a stay of execution of the judgment being appealed. That is because a successful party is entitled to the benefit of the judgment obtained. This is in keeping with the companion proposition that an order, although under appeal, is presumed correct unless and until it is set aside.

[13] The discretionary power to enter a stay is structured by the "*Fulton*" test (*Fulton Insurance Agencies Ltd. v. Purdy*, 1990 NSCA 23). Under the *Fulton* test, the party seeking the stay carries the burden of showing, on a balance of probabilities: (1) an arguable issue for appeal; (2) they would experience irreparable harm if the stay was to be denied; and (3) the balance of convenience favours a stay. The balance of convenience criterion concerns the question of whether the appellant will suffer greater harm if there is no stay than the respondent will suffer if a stay is granted.

[14] In the event the applicant for a stay cannot satisfy the three criteria of the primary *Fulton* test, exceptional circumstances may justify the granting of a stay on the basis of it being "fit and just" to do so. This is known as the secondary test for a stay (*Fulton; Colpitts v. Nova Scotia Barristers' Society*, 2019 NSCA 45 at para. 23). If the primary *Fulton* test is satisfied, the secondary test does not need to be considered.

[15] I am reminded by *Fulton* that the "fairly heavy burden" borne by the appellant seeking a stay is warranted "considering the nature of the remedy which prevents a litigant from realizing the fruits of his litigation pending the hearing of the appeal" (*Fulton*, supra at para. 27).

[16] The threshold for establishing an arguable ground is low (*National Bank Financial Ltd. v. Barthe Estate*, 2013 NSCA 127 at para. 14). An applicant for a stay is only required to show they have advanced grounds of appeal that, if established, qualify as having "sufficient substance to be capable of convincing a panel of the court to allow the appeal…" (*Westminer Ltd. v. Amirault* (1993), 125 N.S.R. (2d) 171 at para. 11 (C.A.)). As Chambers judge, I am to assess the "arguable issue" question without speculating about the outcome of the appeal or scrutinizing its merits.

[17] In this case, the arguable issue is not the battleground. Ms. Yeadon concedes there is an arguable issue in Mr. MacNeil's appeal. Her concession resolves that issue. My focus in these reasons will be on irreparable harm and the balance of convenience.

The Motion to Strike

[18] Before addressing the merits of the Stay Motion, it is necessary to deal with Ms. Yeadon's motion pursuant to *Civil Procedure Rule* 39.04 to strike portions of Mr. MacNeil's affidavits of March 10th and 16th and the status of the affidavit of April 19th. Mr. Robinson has said the contents of the April 19th affidavit are irrelevant.

[19] Mr. Robinson filed a brief identifying what he objected to in each of Mr. MacNeil's March affidavits. He relied on *Civil Procedure Rule* 39.04 and the principles set out in *Waverley (Village Commissioners) v. Nova Scotia (Minister of Municipal Affairs)*, 1993 NSSC 71 at para. 20. In Ms. Chapman's response brief she proposed amendments to address some of Mr. Robinson's objections, with the proviso that Mr. MacNeil was not conceding the objections were valid. Mr. Robinson accepted almost all the amendments, which largely resolved the motion to strike. In due course, I will address what was left in dispute and what constitutes the evidence before me on the Stay Motion.

[20] Mr. Robinson objected to an exhibit attached to Mr. MacNeil's March 10th affidavit on the basis it was being proffered as fresh evidence without Mr. MacNeil having made a motion for the admission of fresh evidence. The exhibit is a

Guideline Income Report prepared on February 22nd, 2022 by Nikki Robar, CPA, CA, CBV, a partner with the accounting firm, PricewaterhouseCoopers LLP. I will deal with this objection once I have reviewed the affidavit's amended paragraphs.

Mr. MacNeil's March 10th Affidavit

[21] Mr. MacNeil's affidavit of March 10th set out certain background facts that were mostly undisputed, including that he and Ms. Yeadon have been engaged in a shared parenting arrangement for many years. Mr. Robinson objected to Mr. MacNeil saying that to his knowledge, Ms. Yeadon is currently unemployed. With Ms. Chapman's amendment, the paragraph now reads:

> 12. Ms. Yeadon provided evidence to Justice Cormier at, or prior to, the Hearing on May 21, 2021, indicating she was unemployed. She shares a 5-year-old daughter Isla, with Dr. Harding. I understand Isla is not attending primary school full-time.

[22] In response to an objection the last sentence constituted speculation, the sentence was deleted and paragraph 22 of Mr. MacNeil's affidavit now says:

> 22. Justice Cormier also set my 2021 income at $898,795. While my 2021 financials are not yet available, I expect my 2021 earnings to be in line with Ms. Robar's figure of $488,500.

[23] Although Ms. Chapman proposed an amendment to paragraph 23 of Mr. MacNeil's affidavit to address Mr. Robinson's complaint the paragraph constituted argument, he did not accept it. I find the original wording of the paragraph is not argument. It is a factual statement by Mr. MacNeil. I do not need to determine if it is accurate. The paragraph states:

> 23. I do not have an income that is commensurate with paying $7,063 per month in child support, in addition to the entirety of our son's university expenses.

[24] Paragraph 26 of Mr. MacNeil's affidavit was objected to on the basis it contained speculation and argument in relation to: (1) whether tax liability incurred by Mr. MacNeil as a result of compliance with Justice Cormier's Order could be reversed by the Canada Revenue Agency, and (2) the impact on Mr. MacNeil's retirement income if registered investments were seized by the Maintenance Enforcement Program. Mr. MacNeil agreed to the entire paragraph being deleted.

[25] Ms. Chapman indicated that Mr. MacNeil also agreed to paragraph 27 being deleted. It was a statement by Mr. MacNeil that he understood Ms. Yeadon was "presently unemployed". Mr. Robinson had objected this was speculation.

[26] In paragraph 28, Mr. MacNeil's stated belief that T. and J. would not suffer any harm if a stay was granted, was deleted as proposed by Ms. Chapman. Mr. Robinson had objected to the statement on the basis it was speculative and opinion. The paragraph otherwise simply states that J. would be moving in August to Ontario for university and, like his brother, would have almost all of his tuition and living expenses paid for by Mr. MacNeil.

The PricewaterhouseCoopers Report

[27] Mr. MacNeil's March 10th affidavit refers in a number of paragraphs to the report by Ms. Robar of PricewaterhouseCoopers. Significantly, in paragraph 19, Mr. MacNeil notes the report's calculations of his Guideline Income, "including all corporate attribution for the relevant years" as: $442,600 (2017); 484,000 (2018); 403,900 (2019); and 488,500 (2020). These amounts contrast sharply with Justice Cormier's calculations. Paragraph 20 of his affidavit indicates the report also calculated the total pre-tax corporate income of Mr. MacNeil's law corporation. In paragraphs 21 and 22, Mr. MacNeil stated:

> 21. Justice Cormier concluded that my total income between 2017 and 2020 was $2,549,847. Ms. Robar's report assesses my total income for the same time period as $1,819,000. This is a difference in calculation of $730,847.
>
> 22. Justice Cormier also set my 2021 income at $898,795. While my 2021 financials are not yet available, I expect my 2021 earnings to be in line with Ms. Robar's 2020 figure of $488,500.

[28] Mr. Robinson argued strenuously to have the PricewaterhouseCoopers report and reference to it in Mr. MacNeil's March 10th affidavit struck. In his submission the report was inadmissible on the stay motion because (1) Mr. MacNeil failed to bring a fresh evidence motion for its admission; and (2) even if he had, the report would not pass the tests that govern the admission of fresh evidence. I am not persuaded by these submissions. I find a motion for fresh evidence is not required in relation to the stay motion.

[29] Mr. Robinson was unable to point me to any authority that fresh evidence in support of a motion to stay is required to be admitted according to the same process and criteria that applies in the context of an appeal. I am skeptical the

strictures of the test established by *R. v. Palmer*, [1980] 1 S.C.R. 759 for the admission of fresh evidence on appeal automatically apply in all circumstances where a stay is being sought. It strikes me that context is highly relevant to the issue.

[30] In this case it is germane to consider what purpose the PricewaterhouseCoopers report serves in relation to the stay motion. I view it as relevant to the "arguable issue" criterion. With Ms. Yeadon's concession, this aspect of the *Fulton* test is no longer in dispute. Mr. Robinson's "fresh evidence" objection is, therefore, rendered almost entirely moot.

[31] There is one paragraph in Mr. MacNeil's March 10th affidavit that relates not to the "arguable issue" ground but to whether Mr. MacNeil will suffer irreparable harm without a stay. Paragraph 25 states:

> 25. As noted in paragraph 48 of the Report prepared by PricewaterhouseCoopers LLP, payment of the judgment amount of $193,607 through a payment of dividends from JDM Law Inc. would result in a tax payment of $180,730, for a total payment of $373,337. The report notes at paragraph 48 that as of December 31, 2020, the Company held $201,042 in cash, $170,399 of which is invested in long-term investments. Should these be liquidated, they may also attract significant tax.

[32] I am not persuaded that a motion for the admission of fresh evidence is required for me to consider paragraph 25 on the stay motion. I find Mr. MacNeil is entitled to bring evidence to show there would be substantial tax implications if, prior to his appeal being determined, JDM Law's investments are cashed in to satisfy the retroactive child support he has been ordered to pay.

Mr. MacNeil's March 16th Affidavit

[33] Mr. MacNeil's March 16th affidavit primarily deals with the involvement of the Nova Scotia Maintenance Enforcement Program (MEP). MEP advised him they were in the process of enforcing Justice Cormier's February 14th, 2022 Order. He attached as exhibits letters he received on March 9th from MEP.

[34] Mr. MacNeil indicated in paragraph 5 of his affidavit he had called the author of the MEP letters, Kori Dean, who told him Ms. Yeadon's counsel had been in touch with the MEP office and "asked for enforcement to commence and be followed".

[35] One of the MEP letters indicated to Mr. MacNeil that unless payment arrangements satisfactory to the Director of Maintenance Enforcement were made, the Director may request the Registrar of Motor Vehicles to suspend or revoke his driver's licence. Mr. MacNeil further stated that on March 11th, his law firm was sent garnishment documents aimed at garnishing the full amount of the retroactive child support and the monthly child support. He also noted that he had been advised his passport can be suspended.

[36] In his brief on the motion to strike, Mr. Robinson objected to three paragraphs in Mr. MacNeil's March 16th affidavit. He submitted Mr. MacNeil's recounting of the conversation with Ms. Dean in paragraph 5 amounted to double hearsay. Ms. Chapman disputed this characterization, stating in her brief the evidence was not hearsay as it was not being offered for the truth of its contents but simply to show what was said to Mr. MacNeil that he relied on.

[37] It seemed to me any hearsay concerns raised by Mr. Robinson could be neutralized by his confirmation that he had contacted MEP as Ms. Dean claimed. His acknowledgement would dispel any issue about the reliability of the information. Therefore, I asked Mr. Robinson at the stay hearing to indicate why Mr. MacNeil's recounting of his conversation with Ms. Dean was problematic if he had been in contact with MEP as Ms. Dean stated. Mr. Robinson responded that it was an "outlandish" statement and illustrated the dangers of hearsay evidence. He told me it was absolutely incorrect that he had contacted MEP in this matter, it did not happen, and he did not even know the MEP phone number.

[38] Mr. Robinson did not press his hearsay objection in relation to paragraph 5. What is incontrovertible about MEP's involvement in this matter is that enforcement processes were initiated and underway as confirmed by Ms. Dean and evidenced by the letters Mr. MacNeil received. I indicated to counsel I viewed the letters as business records. Enforcement was brought to temporary halt by the Interim Stay Order I issued on March 21st.

[39] Mr. Robinson's remaining objections related to paragraphs 8 and 9 of Mr. MacNeil's March 16th affidavit. He withdrew his "fresh evidence" objection to paragraph 8 where Mr. MacNeil said:

> 8. I do not have the financial ability to pay the entire retroactive award nor the monthly child support without being provided significant time to make appropriate financial arrangements. As mentioned in my previous Affidavit,

> making such payments will have significant tax implications that could not be recovered or reversed.

[40] With a modification proposed by Ms. Chapman, paragraph 9 of the affidavit states:

> 9. Maintenance Enforcement has advised that they can have my driver's licence suspended and my passport suspended.

[41] Mr. MacNeil's affidavit set out a number of work-related trips in April, May and June to other provinces in the Atlantic region, as well as Toronto and Vancouver, and a week's vacation. He described the effect of a suspension of his driver's license and/or passport would have on the matters he was handling in Toronto, St. John's, Moncton and St. Andrews, New Brunswick:

> 11. While some of the foregoing matters could resolve or reschedule, all the matters are currently booked and confirmed with all parties involved. Any suspension would greatly impact my legal practice, my relationships with clients, my scheduling commitments to other counsel, the ability to move ongoing litigation matters forward, etc. There would be significant impact on my ability to practice law should a suspension occur. Maintenance Enforcement has made it clear to me that unless there is another Court Order issued, they must enforce the February 14th Order.
>
> 12. Additionally, I need my vehicle as on almost a daily basis I either attend meetings at a client's office, or I attend discovery examinations, or I attend court. To not be able to drive would cause a significant impact on my client relationships and the ability to service clients and practice law.

Mr. MacNeil's April 19th Affidavit

[42] Mr. MacNeil's April 19th Supplemental Affidavit attached copies of emails from Ms. Yeadon to: the parties' sons, the Director of Marketing and Communications at Events East Group, an organization on whose Board Mr. MacNeil sits as Vice Chair, and a colleague and law firm partner of Mr. MacNeil's. The latter two emails simply hyperlinked Justice Cormier's decision. In her email to their sons, Ms. Yeadon accused Mr. MacNeil of the "criminal offense" of perjury.

[43] Ms. Yeadon's email to T. and J. claimed that Mr. MacNeil continued to make "an outrageous amount of false claims" concerning her "financial role" in their lives. She told them:

> Whether I can "afford" it or not, we all know I assist you both financially as much as I see fit. To ensure your father doesn't get accused and charged with perjury and sentenced to something as severe as jail time, I highly recommend he clarify such information prior to making any further false, sworn statements to the Supreme Court of Nova Scotia – Family Division. I also encourage both of you to share such important details with him.

[44] I reject Mr. Robinson's submission that Mr. MacNeil's April 19th affidavit is irrelevant. I have concluded the contents of the affidavit are relevant to the issue of irreparable harm. I have taken the content into account.

The Evidence on the Stay Motion

[45] Once the motion to strike was dealt with, Mr. Robinson advised he had a few questions for Mr. MacNeil. He wanted to cross-examine Mr. MacNeil about a week's vacation he took with his wife from April 10th to 17th. Mr. MacNeil had listed this in his March 16th affidavit as a personal trip by plane. Mr. Robinson indicated all his intended questions related to Mr. MacNeil's vacation. I ruled this line of questioning to be irrelevant to the Stay Motion. As a result, no cross-examination occurred.

[46] The evidence I have considered on the stay motion are Mr. MacNeil's three affidavits, with the modifications noted above.

[47] Ms. Yeadon did not file an affidavit.

[48] I will now address the merits of the stay motion.

Arguable Issue

[49] As I noted earlier, Ms. Yeadon concedes Mr. MacNeil's appeal raises an arguable issue. This is a reasonable and appropriate concession.

[50] Mr. MacNeil's grounds of appeal include the claim that Justice Cormier erred when, without any explanation, she included JDM Law's retained earnings for the years 2017 through 2020 to calculate his income. This Court, in *Reid v. Faubert*, 2019 NSCA 42 found that where a payor spouse is a shareholder, director or office of a corporation, invoking consideration of section 18 of the *Federal Child Support Guidelines*, "Considering retained earnings as the sole factor or starting point of a s. 18 analysis has been found to constitute an error in principle" (para. 32).

[51] Ms. Chapman indicated she expects to make a motion to introduce as fresh evidence on appeal the PricewaterhouseCoopers "Guideline Income Report" to support the argument that Justice Cormier committed reversible error. It will be for the panel hearing the appeal to determine if the evidence is admissible (*Ashby v. McDougall Estate*, 2004 NSCA 50, at paras. 5 and 6).

[52] I am satisfied Mr. MacNeil has satisfied the "arguable issue" requirement of the primary *Fulton* test.

Irreparable Harm

[53] In a number of decisions, judges of this Court have found that the risk an appellant will not be able to recover money paid to satisfy a judgment that is then overturned on appeal constitutes irreparable harm. The most recent expression of this finding is *Wintrup v. Adams*, 2021 NSCA 88. Justice Bourgeois noted the decisions in *MacPhail v. Desrosiers*, 1998 NSCA 5; *Wright v. Nova Scotia Public Service Long Term Disability Plan Trust Fund*, 2006 NSCA 6; and *Szendroi v. Vogler*, 2011 NSCA 37, each of which recited the difficulty of repayment standard.

[54] There is substantial money in issue in this appeal. In his March 10th affidavit, Mr. MacNeil expressed "significant concerns" that he would have difficulty obtaining repayment from Ms. Yeadon in the event he is successful on appeal. As Ms. Yeadon did not file an affidavit in response to the stay motion, there is no evidence before me to counter the risk Mr. MacNeil identifies. She has not disputed the statement in Ms. Chapman's brief on the stay motion that it is a "clear fact he earns significantly more" than she does. I have no evidence of Ms. Yeadon's current financial circumstances. I do not know whether she would be able or willing to refund money she received if Mr. MacNeil was required to comply with Justice Cormier's Order in advance of the appeal being decided.

[55] I find there are other factors that support the probability Mr. MacNeil will experience irreparable harm in the absence of a stay. Without a stay, the MEP enforcement processes will continue. I accept Mr. MacNeil's evidence that MEP enforcement of Justice Cormier's Order will have a profound impact on his law practice and his ability to serve his clients. Mr. MacNeil has also identified significant tax implications associated with funding payment of Justice Cormier's Order. De-registering investments will attract tax consequences: it is reasonable for Mr. MacNeil to query how the payment of the associated taxes could be recovered

from the Canada Revenue Agency. Once the investments are liquidated, the tax obligations bite.

[56] There is also Ms. Yeadon's conduct as evidenced by Mr. MacNeil's April 19th affidavit in which he describes her emails to their sons, the Director of Marketing and Communications at Events East Group, and his colleague and law partner. These wholly inappropriate email communications do not suggest someone who would be inclined to preserve and then repay a large sum of money were Mr. MacNeil to be successful on appeal. In absence of any obvious reason for Ms. Yeadon to send the emails, this conduct suggests animosity toward Mr. MacNeil and a lack of restraint.

[57] In his March 10th affidavit Mr. MacNeil acknowledges the likelihood he will ultimately be required to pay some amount of retroactive child support. He proposes paying Ms. Yeadon $20,000 as lump-sum retroactive child support and continuing to pay monthly child support in the amount of $2300 pending the decision in his appeal. He will continue to pay 94.3 percent of the children's special or extraordinary expenses, as ordered by Justice Cormier.

Balance of Convenience

[58] The balance of convenience favours Mr. MacNeil. I find Mr. MacNeil will suffer greater harm if the stay motion is denied than Ms. Yeadon will suffer if it is granted. There is a significant likelihood Mr. MacNeil will experience considerable actual hardship if a stay is not granted. Ms. Yeadon will experience some further delay in the child support issue being settled. With the appeal scheduled for late September, the delay is relatively modest even taking account of the likelihood a decision of the Court will be reserved. In the meantime Mr. MacNeil will continue paying $2300 per month child support and has committed to providing a $20,000 lump-sum payment to Ms. Yeadon for retroactive child support.

[59] A further point on the balance of convenience: if a stay is not granted and Mr. MacNeil's law practice is compromised by MEP enforcement proceedings, Ms. Yeadon may not benefit from the ongoing monthly child support she has been receiving or the $20,000 Mr. MacNeil has committed to paying her.

Exceptional Circumstances

[60] As I am satisfied Mr. MacNeil has met his burden under the primary *Fulton* test for a stay, I do not need to consider the secondary test.

Conclusion

[61] The motion to strike met with partial success due to the modifications proposed by Ms. Chapman on Mr. MacNeil's behalf. I do not consider it to be an appropriate case for an award of costs.

[62] The motion for a stay is granted. Costs were not raised in Mr. MacNeil's Notice of Motion or Ms. Chapman's brief. Costs shall be at the discretion of the panel hearing the appeal.

Derrick, J.A.