NOVA SCOTIA COURT OF APPEAL
Citation: *Schwartz v. HRM,* 2025 NSCA 14

Date: 20250303
Docket: CA 540837
Registry: Halifax

Between:

David Schwartz

Appellant

v.

The Halifax Regional Municipality, a body corporate pursuant to the *Municipal Government Act* of 1998 and Canadian International Capital Inc.

Respondents

Judge:	Bryson, J.A.
Motion Heard:	February 27, 2025, in Halifax, Nova Scotia in Chambers
Written Decision:	March 3, 2025
Held:	Motion for a stay dismissed with costs
Counsel:	David Schwartz, self-represented, appellant Edward Murphy and Rob Jollimore, for the respondent Halifax Regional Municipality Robert G. Grant, K.C., for the respondent Canadian International Capital Inc.

Decision:

Introduction

[1] David Schwartz lives in Brunello Estates, Timberlea. He owns a single-family home there. He bought the property in March of 2020.

[2] Mr. Schwartz's property backs on to land on which Canadian International Capital Inc. wishes to construct a nine-storey, 76-unit multi-residential building.

[3] Development of Brunello Estates is regulated by a Development Agreement adopted by Halifax Regional Municipality council in 2002. The Development Agreement contemplated that a multi-residential building may be constructed on the property behind Mr. Schwartz's home.

[4] On September 7, 2023, an HRM Development Officer approved amendments to the Development Agreement which the respondents describe as non-substantive.

[5] Mr. Schwartz brought a judicial review of that approval claiming that the Development Officer did not have authority to approve the amendments and, even if he did, his decision was not reasonable. He also complains that when he was buying his property, he was misled by Canadian International about pending development of the lot.

[6] The Honourable Justice Peter Rosinski dismissed Mr. Schwartz's judicial review, finding, among other things, that the amendments were properly approved by the Development Officer who had authority to make them.[1] Alternatively the judge said even if he were wrong, he would exercise his discretion and refuse Mr. Schwartz any relief.

[7] Justice Rosinski's decision on the merits was followed by one on costs.[2]

[8] Mr. Schwartz has challenged both decisions and now seeks a stay from this Court pending hearing of the appeal. The grounds of appeal are extensive but fundamentally question Justice Rosinski's findings that the Development Officer was authorized to amend the Development Agreement and that even if he had

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[1] 2024 NSSC 389.
[2] 2025 NSSC 34.

authority to do so, his decision was unreasonable. Mr. Schwartz adds that the judge was wrong that he had any discretion to deny relief.

[9] The well-known test for a stay pending appeal is described in *Fulton v. Purdy* routinely applied by this Court.[3] The *Purdy* criteria were subsequently referred to by the Supreme Court of Canada, which assimilated the tests for an interlocutory injunction and a stay:[4]

> Generally, the same principles should be applied by a court whether the remedy sought is an injunction or a stay. In *Metropolitan Stores*, at p. 127, Beetz J. expressed the position in these words:
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> > A stay of proceedings and an interlocutory injunction are remedies of the same nature. In the absence of a different test prescribed by statute, they have sufficient characteristics in common to be governed by the same rules and the courts have rightly tended to apply to the granting of interlocutory stay the principles which they follow with respect to interlocutory injunctions.

[10] A party applying for a stay must typically satisfy the Court that:

1. There is an arguable issue raised on the appeal;
2. If a stay is not granted and the appeal is successful, the appellant will suffer irreparable harm in the meantime;
3. The balance of convenience favours the appellant.

[11] These criteria are not exhaustive. The Court retains the jurisdiction to grant a stay where there are exceptional circumstances in which a clear injustice would arise even though the three requirements of the primary test may not be met.[5]

[12] The power to stay a judgment or order is referred to in Rule 90.41(2):

> **90.41 Stay of execution**
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> **(1)** The filing of a notice of appeal shall not operate as a stay of execution or enforcement of the judgment appealed from.
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> **(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**

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[3] *Purdy v. Fulton Insurance Agencies Ltd.*, 1990 NSCA 23. Recently applied in *Dempsey v. Pagefreezer Software Inc.*, 2024 NSCA 53.
[4] *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311.
[5] *Purdy*, at para. 28.

> **grant such other relief against such a judgment or order, on such terms as may be just.**
>
> [Emphasis in original.]

[13] The emphasized language is broad enough to encompass the stay of a declaration: *Nova Scotia (Attorney General) v. Morrison Estate*, 2009 NSCA 116, para. 43, commenting on *RJR–MacDonald Inc. v. Canada (Attorney General*), [1994] S.C.J. 17, which agreed such relief could be granted, (para. 31). Also see: *Municipal Association of Police Personnel v. McNeil*, 2009 NSCA 45 (paras. 5 and 6) regarding the court's jurisdiction under Rule 90.41(2).

Arguable issue

[14] An arguable issue is one that, if successfully demonstrated by an appellant, could result in the appeal being allowed.[6]

[15] In reply to Mr. Schwartz's grounds of appeal,[7] Canadian International refers to emphatic findings of Justice Rosinski that the Development Officer was authorized to approve the impugned amendments and that he correctly did so. Canadian International says that Mr. Schwartz has not made out any arguable issues.[8]

[16] For its part, HRM concedes that, with one exception, Mr. Schwartz may have raised some arguable issues. The one exception is his allegation that Canadian International fraudulently misrepresented to him what would be developed on their property which induced him to buy his house. That is not an issue susceptible to judicial review but is a matter of private law. Indeed, Mr. Schwartz has commenced an action in Supreme Court raising precisely this point.

[17] Mr. Schwartz also took issue with the judge's finding that, even if he were wrong, he would decline the relief sought:

> [66] Even if, strictly speaking, I am wrong that the DO - rather than a Community Council - had the authority to approve non-substantive amendments, I would nevertheless decline the relief sought by Mr. Schwartz, because the outdated reference in the DA to the "Community Council" was not rewritten to recognize the changes caused by the enactment of s. 245 (3A) of the *HRM*

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[6] *Westminer Canada Ltd. v. Amirault*, 1993 CanLII 3254 (NS CA) – other citations: 125 NSR (2d) 171 — 349 APR 171 — [1993] NSJ No 329 (QL)
[7] Para. [8] above.
[8] In particular, 2024 NSSC 389, at paras. 59, 63, 76, 81 and 127.

> *Charter* - see the unanimous reasons of the full Court in *Yatar v. TD Meloche Monnex*, 2024 SCC 8 at para. 54.

[18] As the Supreme Court has explained, remedies for judicial review are discretionary:[9]

> [37] ***Judicial review by way of the old prerogative writs has always been understood to be discretionary***. This means that even if the applicant makes out a case for review on the merits, the reviewing court has an overriding discretion to refuse relief: […] ***Declarations of right, whether sought in judicial review proceedings or in actions, are similarly a discretionary remedy: ". . . the broadest judicial discretion may be exercised in determining whether a case is one in which declaratory relief ought to be awarded"***
>
> [Emphasis added]

[19] The judge had a discretion because there was an alternative remedy available – the correct process could have been invoked. Recently the Supreme Court of Canada reiterated some of the factors informing exercise of the discretion to deny relief:[10]

> [52] In *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 135, Rothstein J. stated:
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> > The traditional common law discretion to refuse relief on judicial review concerns ***the parties' conduct, any undue delay and the existence of alternative remedies***: *Immeubles Port Louis Ltée v. Lafontaine (Village)*, 1991 CanLII 82 (SCC), [1991] 1 S.C.R. 326, at p. 364. As *Harelkin [v. University of Regina*, 1979 CanLII 18 (SCC), [1979] 2 S.C.R. 561,] affirmed, at p. 575, courts may exercise their discretion to refuse relief to applicants "if they have been guilty of unreasonable delay or misconduct or if an adequate alternative remedy exists, notwithstanding that they have proved a usurpation of jurisdiction by the inferior tribunal or an omission to perform a public duty". As in the case of interlocutory injunctions, ***courts exercising discretion to grant relief on judicial review will take into account the public interest, any disproportionate impact on the parties and the interests of third parties***. [Emphasis added.]
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> […]
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> [54] When an applicant brings an application for judicial review, a judge must consider the application: that is, at a minimum, the judge must determine whether judicial review is appropriate. If, in considering the application, the judge determines that one of the discretionary bases for refusing a

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[9] *Strickland v. Canada (Attorney General)*, 2015 SCC 37.
[10] *Yatar v. TD Insurance Meloche Monnex*, 20204 SCC 8.

> remedy is present, they may decline to consider the merits of the judicial review application (*Strickland*, at paras. 1, 38 and 40; *Matsqui*, at para. 31). ***The judge also has the discretion to refuse to grant a remedy, even if they find that the decision under review is unreasonable*** (*Khosa*, at para. 135; *Strickland*, at para. 37, quoting *Minister of Energy, Mines and Resources*, at p. 90).
>
> [Emphasis added]

[20] Even if Justice Rosinski erred in his analysis regarding the amendment approval process, he had a discretion to refuse relief. That means there is no arguable issue on appeal.

[21] Nevertheless, in light of the concession made by HRM and the arguments relied upon, the balance of the stay tests will be considered.

Irreparable Harm

[22] Mr. Schwartz must establish irreparable harm. To quote *RJR*:

> "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.[11]

[23] Application of the test is described in *Nova Scotia (Community Services) v. Campbell*,[12] 2014 NSCA 47:

> [16] The classic application of the test of irreparable harm comes from Lord Diplock in *American Cyanamid* at p. 510:
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> > … the governing principle is that the court should first consider whether if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. ***If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted***, however strong the plaintiff's claim appeared to be at that stage. ...

[11] *RJR*, at p. 341.
[12] 2014 NSCA 47.

> [17] Assuming that an applicant can demonstrate irreparable harm, the court has to consider the effect of the granting of the injunction (stay) on the respondent. Continuing with Lord Diplock in *American Cyanamid* at 510:
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> > If, on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff's undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason this ground to refuse an interlocutory injunction.
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> [Emphasis added]

[24] Mr. Schwartz claims he will suffer irreparable harm because:

1. If construction of Canadian International's building proceeds, an attractive tree buffer between the properties will be removed;
2. He will sustain a loss of privacy and enjoyment of property because he will be overlooked by a nine-storey multi-residential building;
3. Failing to grant a stay will render any future decision of the Court nugatory, assuming that the building would be constructed in the meantime.

Tree Buffer

[25] Mr. Schwartz's first submission does not describe irreparable harm. The trees on Canadian International's property are theirs to remove whether the development goes ahead or not. Any misrepresentation by Canadian International related to their continued presence is a matter for private litigation, not judicial review.

Loss of Enjoyment of Property

[26] Nor is loss of privacy or enjoyment of property irreparable harm in this case. Under the Development Agreement, Canadian International may legally develop the property by constructing a multi-residential building whether that is the building presently contemplated, or another. Mr. Schwartz could not complain. Even if construction occurred without proper amendment approvals, Mr. Schwartz

could be compensated in damages. An appraisal assessing any change in value of Mr. Schwartz's property as a result of construction would serve that purpose.

[27] There is no evidence that any construction is currently taking place or contemplated on Canadian International's property. Indeed, there is evidence from Canadian International that the current litigation has created uncertainty which dissuades investors and development. It seems highly unlikely that substantial construction could be started let alone completed before this appeal is heard in six months.

Nugatory Appeal

[28] The concern that an appeal may be nugatory if a stay is not granted is discussed by Justice Beveridge in *Colpitts v. Nova Scotia Barristers' Society*:

> [50] The potential impact on an appellant's right of appeal is relevant—particularly where the appellant would suffer the penalty imposed before the appeal challenging that penalty could be heard (see: *Grafton Street Restaurant Ltd. v. Nova Scotia (Utility and Review Board)*, 2002 NSCA 97; *Alementary Services Ltd. v. Nova Scotia (Alcohol and Gaming)*, 2009 NSCA 61 at paras. 7-9; *Dixon v. Nova Scotia (Public Safety)*, 2011 NSCA 15 at para. 12).
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> [51] But the fact that a denial of a stay may render an appeal nugatory does not automatically constitute irreparable harm (*La Ferme D'Acadie v. Atlantic Canada Opportunities Agency*, 2009 NSCA 5, paras. 16-17); *Canglobe Financial Group v. Johnson*, 2010 NSCA 46; *Lawton's Drug Stores Ltd. v. United Food and Commercial Workers Union Canada, Local 864*, 2016 NSCA 14).[13]

[29] Mr. Schwartz insists the merits should be given greater consideration if his appeal may be moot as a result of a stay refusal, citing *RJR*.

[30] It is true that the serious issue threshold test is sometimes discarded in favour of a more rigorous examination of the merits. But such cases are rare. If the application for injunction (or stay) disposes of the proceeding altogether, the Court will give greater consideration to the merits:

> Two exceptions apply to the general rule that a judge should not engage in an extensive review of the merits. The first arises when the result of the interlocutory motion will in effect amount to a final determination of the action. This will be the case either when the right which the applicant seeks to protect can only be exercised immediately or not at all, or when the result of the application will

[13] 2019 NSCA 45.

> impose such hardship on one party as to remove any potential benefit from proceeding to trial. Indeed Lord Diplock modified the *American Cyanamid* principle in such a situation in *N.W.L. Ltd. v. Woods*, [1979] 1 W.L.R. 1294 at p. 1307:
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> > ***Where, however, the grant or refusal of the interlocutory injunction will have the practical effect of putting an end to the action*** because the harm that will have been already caused to the losing party by its grant or its refusal is complete and of a kind for which money cannot constitute any worthwhile recompense, ***the degree of likelihood that the plaintiff would have succeeded in establishing his right to an injunction if the action had gone to trial is a factor to be brought into the balance*** by the judge in weighing the risks that injustice may result from his deciding the application one way rather than the other. [14]
>
> [Emphasis added]

[31] The second exception to the *American Cyanamid* prohibition against a searching review of the merits arises when there is a question of constitutionality on a question of law alone.[15] It obviously has no application here.

[32] It is clear that both respondents would suffer serious harm if a stay were granted. The evidence is that the legal proceedings alone have frustrated Canadian International's development of its property which has had significant financial impact on the company.

[33] For its part, HRM rightly claims the stay sought against it engages the public interest, although that is normally considered at the balance of convenience stage.[16]

Balance of Convenience

[34] *Campbell*[17] puts it this way:

> [18] It sometimes happens that both applicant and respondent can demonstrate that irreparable harm will occur whichever way the court decides. In such cases, the court must go on to consider the balance of convenience. This requires balancing which party will suffer greater harm from the granting or refusal of the injunction (stay) pending a decision on the merits. Again, Lord Diplock in *American Cyanamid*, at 511:

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[14] *RJR*, at p. 338.
[15] *RJR*, at p. 339.
[16] *360Ads Inc v Okotoks (Town)*, 2018 ASCA 319, at para. 13; *RJR*, at para. 64.
[17] *Nova Scotia (Community Services) v. Campbell*, 2014 NSCA 47

> It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of balance of convenience arises. It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case.
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> Where other factors appear to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the *status quo*. ...[18]

[35] Generally, the balance of convenience need not be considered where, as here, the applying party fails to establish irreparable harm.[19]

[36] It is unnecessary to consider the balance of convenience. But doing so would clearly favour the respondents, largely owing to the commercial and public interest factors in their favour.

Costs

[37] Regardless of the merits, there was no urgency to this case. There is no imminent threat to Mr. Schwartz from any pending development.

[38] The respondents were put to significant expense responding to a substantial and unnecessary motion on short notice. Mr. Schwartz will pay costs of $2,500.00 to each respondent ($5,000.00), forthwith.

Disposition

[39] The motion for stay is dismissed with costs.

Bryson, J.A.

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[18] *Campbell*, at para. 18
[19] *Nelson v. Dorey*, 2020 NSCA 34, at para. 62.