SUPREME COURT OF NOVA SCOTIA
Citation: Watkins v Hines, 2009 NSSC 182

Date: 20090609
Docket: Hfx. No. 272509
Registry: Halifax

Between:

Peter Watkins, of Porters Lake, Nova Scotia

Plaintiff

v.

Peter Hines, of Chezzetcook, Nova Scotia

Defendant

Decision

Judge: The Honourable Justice Kevin Coady

Heard: May 6, 2009 in Halifax, Nova Scotia

Decision: June 9, 2009

Counsel: Glen Jones, for the plaintiff
David Farrar, QC, for the defendant
Mark Rieksts, for Attorney General of Nova Scotia

By the Court:

[1] The Province of Nova Scotia enacted Section 113(b) of the **Insurance Act** R.S.N.S. 1989, c.231 and the **Automobile Insurance Tort Recovery Limitation Regulations** in 2003 and 2006. The effect of this legislation was the capping of general damages for minor injuries arising from motor vehicle accidents at $2500.00. These "cap" provisions applied to a significant number of cases and more continue to be filed with this court.

[2] Since the enactment of these provisions the Attorney General of Nova Scotia has been served with notices of constitutional challenge in more than 100 cases. Plaintiffs have challenged various parts of the **Motor Vehicle Tort Recovery Limitation** provisions as contrary to section 7 and 15 of the **Canadian Charter of Rights and Freedoms**.

[3] It is not surprising that the court was faced with a multitude of cases in which the same, or similar, challenges were being advanced. In an effort to address this reality, two of the personal injury cases which challenged the

constitutionality of the cap provisions (*Hartling et al v. AGNS* and *McKinnon v. Roy*) were permitted to proceed forward on the same time line as test cases.

[4] While awaiting the decisions in the test cases, there was considerable uncertainty as to what should happen to the many cases in the queue. The Attorney General of Nova Scotia wanted a stay of the constitutional questions. Some plaintiffs supported a stay of the proceedings. Some defendants wanted to proceed but most at least acquiesced in staying either the constitutional questions or the proceedings. Some of these arrangements were formalized while others were not. The uncertainty of the situation played out at Date Assignment Conferences. In the case at bar the parties agreed to an order staying the constitutional issues until the trial level decision in the test cases.

[5] Justice Goodfellow rendered his decisions in the two test cases on January 12 and February 9, 2009. He upheld the impugned legislation as constitutional. These decisions were appealed and hearing dates have been scheduled for October 13-15, 2009. It is unlikely that decisions will be released before 2010.

[6] The filing of the two appeals brought forward the issue of what should happen with the queue cases pending appellate review. The trial level stays expired with Justice Goodfellow's decision.

[7] This Defendant filed for a Date Assignment Conference to be held on March 6, 2009 before Justice Murphy. The Attorney General and the Plaintiff objected to setting trial dates while the appeals were outstanding. Justice Murphy directed the Plaintiff to file their stay application. The Attorney General also filed a Notice of Motion seeking a stay of the constitutional questions. Both applications were heard together on May 6, 2009.

[8] There are likely to be many queue cases where Plaintiffs will want a full stay until the Court of Appeal decisions. The position of the Attorney General of Nova Scotia is that there should be a further stay of the constitutional issues. This Defendant, and likely many others, take the view that they should be permitted to proceed to trial now that a trial level decision is in place. The court anticipates that this decision will provide for some procedural guidance to all cases in the queue.

[9] The parties in this application acknowledge that this court has the authority to grant a stay, either partial or full. There also is agreement that while a stay is a dramatic intervention, it is discretionary.

[10] This court has twice ruled on the issue of a stay in the non-test case of *Renick v. Steeves* (2007 CarswellNS 546 and the oral decision of Chief Justice Kennedy on March 10, 2008). It is helpful to review these decisions as a guide to this ruling. The decision of Murphy J on the first application is as follows:

> Stay of Proceedings:
>
> [11] The Attorney General requests an order that the constitutional issues in this case be temporarily [stayed], subject to any further case management order, pending resolution of the *Hartling* case.
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> [12] Notwithstanding any agreements which may have been reached among the parties in other cases, and I do not want to interfere with those, I believe there is an inconsistency between ordering that there be a stay of all proceeding with respect to the constitutional issues, and also directing parties to participate in case management of those issues. So I am not going to grant the order in the terms requested.
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> [13] I agree with the principle advanced by the Attorney General and the Plaintiff that a test case should go forward in the context of the constitutional issues which are developing in this case, the *Hartling* case, and other which have been made subject to case management. I am satisfied, based on what is before me, given the number of claims and the complexity of the constitutional issue which will arise and be repeated in each case, that it is appropriate to advance the test case. Based on what is known to me at this time, it would not be in the interest of the

administration of justice to move each case forward separately. They involve different parties and different facts, but all arise from a common fact situation to the extent at least that they involve motor vehicle accidents. At issue in each case will be the constitutionality of a single piece of litigation.

[14] The Court has power to grant a stay or similar order directing how this matter should proceed. I agree with the Attorney General's submission that authority arise under the **Judicature Act**, the **Civil Procedure Rules** and the inherent jurisdiction of the Court, as canvassed in 37 Halsbury's Laws of England, 4th Edition, Practice and Procedure, at p.20, para.12, and by Master I.H. Jacob, in The Inherent Jurisdiction of the Court in Current Legal Problems, 1970, at pp.23-52. The Court can grant either a complete stay or a partial stay.

[15] The immediate issue is whether this case should be scheduled for trial - the Defendant is anxious to do so, while the Plaintiffs and Attorney General do not want it to proceed in advance of the test case. During the next few weeks, the case management Judge will likely be addressing issues involving scheduling and the extent to which the Attorney General will participate. I am satisfied that this case should not proceed to trial at this time, but the case management Judge who will be apprised of all circumstances may have a different view, and I am not going to pre-empt his role.

[16] In order to allow *Hartling* case management to begin and the Judge to assess the degree of commonality with this case. I direct that no steps be taken during the 90 days following this hearing to set constitutional issues in this case for trial. Adjudication of the constitutional issues will be in abeyance until the case management procedure develops.

[17] In my view, it is not unfair to the Defendants to grant a 90-day delay before advancing the constitutional issue to trial. The case related to an accident which happened several years ago, and litigation was proceeding slowly even before notice was given concerning the constitutional issue. I am not granting the more complete stay of the constitutional issue requested by the Attorney General, nor am I limiting activity concerning issues other than constitutional. In prescribing case management, and directing that no steps be taken during a 90-day period to set the constitutional issues for trial, it is my intention to defer the request for a more comprehensive stay pending developments in case management, and not to finally dismiss the Attorney General's stay application so that it would be *res judicata*.

> [18] The order I will issue will not preclude any party from applying to the case management Judge or some other Judge to seek an extension of the 90-day time period, or to request a broader or more comprehensive stay of proceedings.

[11] Justice Murphy's decision amounted to a temporary stay and did not tie the hands of any party from applying for an extension or a broader stay. On December 7, 2007 the Attorney General applied for a broader stay, or in the alternative, an extension of Murphy J.'s 90 Day Order. That Defendant opposed any further stay. The Attorney General argued that there would be no significant prejudice to the Defendant if the stay was ordered, but there would be significant prejudice to the administration of justice if the stay was not granted. In other words, a multitude of cases would proceed to the court without any guidance from the test cases. The Attorney General argued that the test case approach would avoid duplication of evidence, the possibility of conflicting rulings and the overlapping of issues. This application was heard on March 10, 2008 before Chief Justice Kennedy.

[12] The decision of Chief Justice Kennedy in the second stay application is as follows:

[27] I find that I agree with the Attorney General's assessment. Two factors are principle to my finding. Firstly, I agree with the Attorney General's plan to deal with the constitutional issues in this case, *Renick*, and many other cases that are raising the same constitutional issues before this Court. I generally agree with the plan. I think it is the only reasonable way to go, as did Justice Murphy before me. Quoting from paragraph 13 of his decision:

> "I agree with the principle advanced by the Attorney General and the plaintiff that a test case would go forward in the context of the constitutional issues which are developing in this case, the *Hartling* case, and others which have been made subject to case management. I am satisfied, based on what is before me, given the number of claims and the complexity of the constitutional issue which will arise and be repeated in each case, that it is appropriate to advance the test case. Based on what is known to me at this time, it would not be in the interest of the administration of justice to move each case forward separately. They involve different parties and different facts, but all arise from a common fact situation to the extent at least that they involve motor vehicle accidents. At issue in each case will be the constitutionality of a single piece of legislation."

[28] I adopt Justice Murphy's assessment. I conclude that the Attorney General has in totality satisfied the onus to stay to the extent that what they propose addresses procedural fairness and efficiency. I agree that the stay process fosters procedural, fairness and efficiency which is one of the reasons that stays can be accomplished.

[29] Secondly, I accept that Justice Murphy intended that all activity on the constitutional issues, any action to move toward trial on the constitutional issues, cease during the period of his directed stay and conclude on the totality of the information before me that his directive should be continued. The best process to do that is in the form of a continued limited stay that would allow for the case management process to move forward, subject always to the decisions of the case management judge who will be in a better position to assess the situation, from time to time, and determine the proper course as the matter proceeds.

[30] I therefore direct that the order made by Murphy, J. on October 16th, 2007, that no party is to take any steps to set down or move for trial of the constitutional

> issues in this case, be continued until the date of the decisions in the test cases *Hartling v. Nova Scotia* and *McKinnon v. Roy Limited* stay will continue until the date of the decisions in the test cases. This order does not limit or affect any aspect of this proceeding which does not involve constitutional issues. I repeat, I direct that the order made by Murphy, J. on October 16th, 2007, that no party is to take any steps to set down or move for trial of the constitutional issues in this case, be continued until the date of the decisions in the test cases *Hartling v. Nova Scotia* and *McKinnon v. Roy*. This order does not limit or affect any aspect of this proceeding which does not involve constitutional issue. Thank you counsel.

[13] The issue now before this court is whether there should be a further stay. The following represents the parties position on a further stay pending appellate consideration.

- The plaintiff seeks a stay of the entire case, or at least the issue of damages. He further submits that if his request for a stay is granted, the Attorney Generals motion is moot as the constitutional issues are related to damages.

- The Attorney General seeks a stay of the constitutional issues only.

- The defendant opposes both stay applications and would like to see this case set down for trial. He takes the position that a decision has been made clearing the way for this case to proceed to trial.

[14] The onus on the applicant for a stay is significant and such an application seeks a dramatic intervention on the part of the court. Such relief should only be granted in the clearest of cases.

[15] In *Global Petroleum Corporation v. ICB Industries Incorporated*, [1997] N.S.J. 60 NSCA., the court indicated that the power to grant a stay was a significant one and should not be granted lightly. The court referenced Cullen J.'s comments in *Monoil Limited v. Canada* (1989), 27 F.T.R. 50 at page 51.

> The law is quite clear and best stated by Muldoon, J. in *Fruit of the Loom Inc. v. Chateau Lingerie Mfg. Co. Ltd.* (1984), 79 C.P.R. (2d) 274, at page 278:
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> > a genuine onus rests on the applicant seeking to interfere with a plaintiff's right to pursue a lawful cause of action. Such applicant must persuade the court that continuing the action would be an abuse of process in which the applicant would somehow be prejudiced and not merely inconvenienced.

Reed, J., in action No.T-266-88 writes:

> The applicant must also demonstrate that the respondent would suffer no appreciable prejudice or injustice if the stay is granted. As the applicable law points out it is not merely a balance of convenience test which is applied. The burden on the applicant is heavier than that.

[16] I take the view that these principles apply equally to plaintiff and defendant applicants.

[17] In *Canada Attorney General v. Marine Service MG Incorporated*, [2003] N.S.S.C. 26 Moir, J. offered the following remarks at paragraph 6:

> "I find it helpful to think of a stay as a remedy, and to allow that there are diverse circumstances in which the discretion might be exercised. It is the expected response to an abuse of process. However, a stay of proceedings may respond to circumstances that do not amount to abuse."

[18] And further:

> "The power to stay proceedings is ancient, and it is closely connected to the inherent jurisdiction of the court to control its own processes. I do not read the authorities to which counsel referred me as having restricted the exercise of power to cases of abuse of process. The power is to be approached with great caution. Its use is exceptional. The case for it must be clearly established."

[19] And further:

> To conclude this discussion of the law governing stays of proceedings. The stay is an ancient remedy which is inherent to the jurisdiction of this Court and which is closely connected to the inherent power to control the process of the Court. The remedy is routine where the applicant clearly establishes abuse of process or *forum non conveniens*, and it is sometimes employed to bring forward a test case in advance of others or to secure procedural fairness and efficiency where two cases must be tried separately although joint trial might normally have been more just and efficient. The power is invoked with great caution because of the plaintiff's interests in having access to the Court and in having that access as swiftly as procedural fairness allows. However, in my opinion the discretion is not restricted to categories of case or by rigid rules. In cases like the present, the flexible approach evident in *Boart Sweden AB* is warranted. That is, the Court should start by recognizing the caution and the importance of the plaintiff's access to the Court and weigh those in the balance with other factors relevant to the question of whether a stay is just.

[20] I am satisfied that the Applicant, the Attorney General of Nova Scotia, has met the onus for a stay. I agree that if a stay were denied, essentially the same constitutional issues would have to be argued and decided on many occasions. Such a situation would create duplicative proceedings and could result in conflicting rulings. A stay avoids a multiplicity of cases arguing the same issue. A stay secures procedural fairness and efficiency and is supported by the court's authority to control its process.

[21] I am also satisfied that the constitutional issues in this case and in the test cases are essentially similar. I also anticipate that the same can be said for the majority of the cases in the queue.

[22] The Defendant argues that the interests of fairness and efficiency no longer require that this proceeding be stayed. He submits that the decision of Justice Goodfellow in the test cases will enable queue cases to proceed. I respectfully disagree. The constitutional issues are complex and one should not assume any decision by the Court of Appeal.

[23] The Defendant also argues that continuing the present stay will work "significant prejudice" to the Defendant. He asserts that he has the right to have this case tried in the ordinary course, without undue delay. Again I respectfully disagree. The Attorney General of Nova Scotia is not a party per se and its interests are limited to the constitutional issues. The Applicant Plaintiff is delayed in having its case heard but that is a decision he made in order to challenge the legislation. I can see no prejudices to the Defendant beyond delay and there may even be some financial benefits to the defendant as a result of delay.

[24] This court embarked on the test case road as a way to efficiently and fairly resolve the constitutional issues. The stays to date have created an environment of procedural fairness. A further stay pending an appellate decision will bring

predictability to the trial process. It would be counter productive to abort the test case approach at this point in time.

[25] I am not persuaded that the Plaintiff has met the onus for a full stay, or in the alternative a stay of the damages issue. A judicial stay is a significant intervention into the affairs of private litigants. Therefore, it should be no more expansive than is necessary to achieve the goals of procedural fairness and efficiency. Further, a full stay could result in stalling the entire litigation process while the constitutional issues are under appeal. It should be open to the parties to advance their cases in all ways not affected by the constitutional stay.

[26] I recognize and appreciate that the Plaintiff's trial preparation costs will depend on whether or not the "cap" legislation applies. It is my view that procedural fairness, and efficiency trumps that concern. Further, it is a consequence of filing a Notice of Constitutional Challenge and, as such, should have been anticipated.

[27] The Defendant advanced an alternative solution in his submissions. He argues that I could deny these applications, allow trial dates to be set and then

require judges to assess provisional damages. It is my view that such an approach would not achieve the procedural fairness and efficiency offered by a stay.

[28] I am extending the Stay Order of Associate Chief Justice Smith until the Court of Appeal rules on the test cases. In addition there will be an order staying any party from obtaining trial dates in this case before that time. All other aspects of the case can proceed should any pre-trial activities remain outstanding.

[29] I will hear the parties on costs should they not be able to agree.

J.