

## *Bearsfield Development Inc. v McNabb: Canada's First Judgment on the Intersection Between the Rules of Temporary and Permanent Stay of Proceedings*

In the recent decision of *Bearsfield Developments Inc. v McNabb*, Madam Justice B. R. Warkentin of the Ontario Superior Court of Justice delivered the first judgment on the intersection between the rules of temporary and permanent stay of proceedings.<sup>1</sup> Parties considering bringing forth a motion of a temporary stay (suspension) of proceedings should take note of this decision in order to avoid unnecessary cost ramifications.

### Facts

The former employers (the "**Plaintiff**") of Debra Ann McNabb (the "**Defendant**"), claimed that the Defendant embezzled \$700,000 of Company funds for home improvements. It was alleged that the Defendant then sold the property and used the proceeds to purchase a property in New Brunswick.

The Plaintiff commenced an action in Ontario and attempted to register a Certificate of Pending Litigation (the "**Certificate**") in New Brunswick on the Defendant's New Brunswick property. The New Brunswick Court refused to register the Certificate unless the action was commenced in New Brunswick. Consequently, the

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<sup>1</sup> 2013 ONSC 7063; the Plaintiff was represented by **David Debenham** of McMillan LLP.

Plaintiff commenced an identical action in New Brunswick for the sole purpose of obtaining and registering the Certificate in order to preserve the asset that could be traced to the embezzled funds. The Defendant's counsel was specifically advised by the Plaintiff not to take any steps with respect to the New Brunswick action.

Against the Plaintiff's instructions, the Defendant pleaded in the New Brunswick action and brought a motion to vacate the Certificate in conjunction with bringing a motion for a temporary stay of the Ontario Action pending the final outcome of the New Brunswick action under Rule 21.01(c) of the *Rules of Civil Procedure*<sup>2</sup> and sections 106 and 138 of the *Courts of Justice Act*.<sup>3</sup>

The Defendant argued that the Plaintiff should not be able to knowingly commence multiple proceedings and obtain some relief in New Brunswick while advancing an identical action in Ontario. The Defendant also argued that the proceeding should continue in New Brunswick because the claim is more advanced and wider in scope due to a counterclaim brought by the Defendant against another employee of the Plaintiff's corporation.

The Plaintiff opposed the Defendant's motion arguing that they are entitled to choose the jurisdiction of the proceedings on the basis of convenience for the Plaintiff, their witnesses and the experts, all of whom live in Ontario.

## Judgment

The Court dismissed the Defendant's action for a temporary stay of the Ontario proceedings, pending the outcome of the New Brunswick proceedings. The Court found that if it were to award a temporary stay of proceedings, the stay would become permanent

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<sup>2</sup> RRO 1990, Reg 194 [*Rules of Civil Procedure*].

<sup>3</sup> RSO 1990, c C 43 [*Courts of Justice Act*].

because of the identical action in New Brunswick, which would be unfair to the Plaintiff.

### Reasoning

As a general rule, the *Rules of Civil Procedure*,<sup>4</sup> the *Courts of Justice Act*<sup>5</sup> and jurisprudence favour litigation only once in the most appropriate forum (*forum conveniens*). In balancing the positions of the parties, the test to be applied for a temporary stay of proceedings in Ontario, where there are two identical proceedings in different jurisdictions, is set out in *Hollinger International Inc. v Hollinger Inc.* ("**Hollinger**").<sup>6</sup> The test requires consideration of:

- (i) whether there is substantial overlap of issues in the two proceedings;
- (ii) whether the two cases share the same factual background;
- (iii) whether issuing a temporary stay will prevent unnecessary and costly duplication of judicial and legal resources; and
- (iv) whether the temporary stay will result in an injustice to the party resisting the stay.<sup>7</sup>

In this case, it was clear that the first two elements of the test were satisfied. The last two elements regarding duplicative proceedings and temporary stays resulting in an injustice to a party were at issue. Additionally, the parties did not agree whether *forum conveniens* was applicable.

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<sup>4</sup> Rules of Civil Procedure, supra note 2.

<sup>5</sup> Courts of Justice Act, supra note 3.

<sup>6</sup> [2004] OJ No 3464.

<sup>7</sup> *Ibid*, at para 5.

On the one hand, the Defendant argued that a motion for a temporary stay of proceedings did not attract the principal of *forum conveniens* because they were not attempting to oust the Ontario Court's jurisdiction. Rather, it was argued that they were simply looking to avoid multiplicity of proceedings, decrease costs, reduce inconvenience to all parties and forestall inconsistent findings between two courts on identical proceedings.

On the other hand, the Plaintiff argued that the principal of *forum conveniens*, rather than the relief of a temporary stay of proceedings was applicable. The Plaintiff argued that if the Defendant was awarded a temporary stay of the Ontario proceedings, the stay would become permanent because of the identical action in New Brunswick. The Plaintiff relied on the fundamental legal principle of *res judicata* - the same case cannot be argued twice.

Ultimately, the Defendant failed to convince Madam Justice B.R. Warkentin that the sole purpose of bringing this motion for a temporary stay was to avoid multiplicity of proceedings. More importantly, the Defendant failed to show that there would be unnecessary and costly duplication of judicial and legal resources in refusing the stay of the Ontario action when the Plaintiff had clearly indicated that they do not intend to proceed with the New Brunswick action. Madam Justice B.R. Warkentin held that the only reason the action in New Brunswick is more advanced is because the Defendant had sought to move that action forward.

In addition, Justice B.R. Warkentin held that the *forum conveniens* argument put forth by the Plaintiff was appropriate because the Plaintiff had never intended to adjudicate in New Brunswick, and thus there was no risk of duplicate judicial proceedings and associated costs. To award a temporary stay of proceedings in Ontario, would render the action moot and deprive the Plaintiff of its right to choose Ontario as the *forum conveniens*. In the circumstances of this case, it was appropriate to look to the order and fairness of the situation, not just the *forum conveniens*.

## Takeaway

This decision is an interpretation of Hollinger wherein the Judge rightly determined that a party cannot circumvent the rules of the Court by rushing ahead to have the same issue determined by another court claiming *forum conveniens*. To allow such parallel proceedings would effectively stay the initial proceeding permanently under the guise of a temporary stay.

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### a cautionary note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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