

COURT OF APPEAL FOR ONTARIO

BEFORE: THE HONOURABLE JUSTICE
TROTTER

DATE: WEDNESDAY, SEPTEMBER 28,
2022



COURT FILE NO.: M53747.COA-22-CV-
0101

TITLE OF PROCEEDING: TOUSSAINT,
NELL V. AG OF CANADA

DISPOSITION OF COURT HEARING:

This is a motion to stay of the order of a Superior Court judge on a pleadings motion. It emerges in litigation with a long history, as set out in the motion judge's reasons for judgment: *Toussaint v. Canada (Attorney General)*, 2022 ONSC 4747.

The Attorney General brought a motion under Rule 21 for an order to strike out the Statement of Claim, and for other relief. No evidence was adduced on the motion. Indeed, the Attorney General had yet to file a Statement of Defence.

The Attorney General's motion was dismissed. In doing so, the motion judge made the following declarations: (1) "[t]his action is within the jurisdiction of the Ontario Court"; and (2) "[t]he action is timely, and not barred by a limitation period." The motion judge also ordered the Attorney General to file a Statement of Defence within a specified time. He prohibited the Attorney General from raising a defence based on a limitation period. This was despite the fact that, on the original motion, the plaintiff took the position that the limitations issue was best left to be decided as a defence to the action.

The Attorney General has appealed the motion judge's order. It now seeks a stay of the order pending the appeal. It contends that it is prejudiced by the motion judge's declarations and by his prohibition on pleading a limitations defence.

For the following reasons, I allow the application.

The parties agree that, for the purpose of this motion, the contested aspects of the motion judge's order are "final", thereby triggering the jurisdiction. I proceed on this basis, but it will be for the panel hearing this appeal to decide this issue.

Moreover, I am satisfied that all criteria for granting a stay of the motion judge's order have been satisfied: *RJR MacDonald v. Canada (A.G.)*, [1994] 1 S.C.R. 311, at p. 334. The overarching question is whether the interests of justice call for a stay: *Tisi v. St. Amand*, 2017 ONCA 539, at para. 4.

There are serious issues to be determined – whether the motion judge overstepped his bounds in the declarations that he made, and by limiting the scope of the Attorney General's pleadings. The Attorney General claims that it was taken by surprise by the motions judge's final determinations on important issues that are very much in dispute (i.e., the jurisdiction of the Ontario courts vs. the Federal Court, as well as whether the proceeding is time-barred). The respondent contends that the Attorney

General was not taken by surprise by the outcome of the procedural step that it initiated. These issues will be determined by the panel hearing the appeal.

The Attorney General will be prejudiced if it is forced to proceed while this preliminary pleadings litigation remains outstanding before this court. I accept that, a failure to stay the underlying order will result in a fragmented, inefficient, and unsatisfactory discovery process.

I acknowledge that the respondent has made constructive suggestions for moving forward. For example, during discoveries, it undertakes to permit questions to be answered relating to the matters that are presently foreclosed by the motion judge's order. The respondent also suggests that case management in the Superior Court could also provide solutions as the discovery process unfolds. Moreover, the respondent emphasizes the prejudice that the respondent will suffer health-related repercussions if the litigation is brought to a standstill by a stay order.

The balance of convenience also favours a stay. It would be unfair to force the Attorney General to move forward on this basis. The issues raised on this appeal must be resolved now so that the litigation may move ahead smoothly and not haltingly, in a bifurcated fashion. I am not persuaded that the respondent's proposals to move ahead will be problem-free.

I acknowledge the respondent's health concerns. But this may be addressed, at least to some extent, in the following way. This is an appropriate case in which to order that the appeal be expedited, especially given that it is presently stuck at the pleadings stage. If the parties cannot agree on the timing of the steps required to move this straightforward appeal to a hearing, either may seek directions from any member of this court, or request case management through the court's Executive Legal Officer.

The motion is allowed, a stay is imposed pending the determination of this appeal, and the appeal is ordered expedited. Costs of this motion are reserved to the panel that will hear this appeal.

 H. Katz J.A.