COURT OF APPEAL OF
NEW BRUNSWICK

COUR D'APPEL DU
NOUVEAU-BRUNSWICK

27-19-CA

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF NEW BRUNSWICK, as represented by the Attorney General for the Province of New Brunswick

APPELLANT

- and -

NEW BRUNSWICK COUNCIL OF NURSING HOME UNIONS (CUPE)

RESPONDENT

- and -

NEW BRUNSWICK ASSOCIATION OF NURSING HOMES, INC.

RESPONDENT

New Brunswick v. New Brunswick Council of Nursing Home Unions (CUPE) et al., 2019 NBCA 33

CORAM:
The Honourable Justice Quigg
The Honourable Justice French
The Honourable Justice LeBlond

Appeal from a decision of the Court of Queen's Bench:
March 18, 2019

History of Case:

Decision under appeal:
2019 NBQB 064

Preliminary or incidental proceedings:
2019 N.B.J. No. 63

Appeal heard:
April 17, 2019

SA MAJESTÉ LA REINE DU CHEF DE LA PROVINCE DU NOUVEAU-BRUNSWICK, représentée par la PROCUREURE GÉNÉRALE pour la PROVINCE DU NOUVEAU-BRUNSWICK

APPELANT

- et -

CONSEIL DES SYNDICATS DES FOYERS DE SOINS DU NOUVEAU-BRUNSWICK (SCFP)

INTIMÉ

- et -

ASSOCIATION DES FOYERS DE SOINS DU NOUVEAU-BRUNSWICK INC.

INTIMÉE

Province du Nouveau-Brunswick c. Conseil des syndicats des foyers de soins du Nouveau-Brunswick (SCFP) et autre, 2019 NBCA 33

CORAM :
l'honorable juge Quigg
l'honorable juge French
l'honorable juge LeBlond

Appel d'une décision de la Cour du Banc de la Reine :
le 18 mars 2019

Historique de la cause :

Décision frappée d'appel :
2019 NBBR 064

Procédures préliminaires ou accessoires :
2019 A.N.B. nº 63

Appel entendu :
le 17 avril 2019

Judgment rendered:
April 25, 2019

Reasons for decision:
May 9, 2019

Reasons for judgment:
The Honourable Justice LeBlond

Concurred in by:
The Honourable Justice Quigg
The Honourable Justice French

Counsel at hearing:

For the Appellant:
Christian E. Michaud, Q.C. and Mathieu F. Girouard

For the Respondent New Brunswick Council of Nursing Home Unions (CUPE):
Joël Michaud and Brenda Laudia Comeau

For the Respondent New Brunswick Association of Nursing Homes, Inc.:
Justin M. Wies

THE COURT

The appeal was allowed with reasons to follow. These are those reasons.

Jugement rendu :
le 25 avril 2019

Motifs de décision :
le 9 mai 2019

Motifs de jugement :
l'honorable juge LeBlond

Souscrivent aux motifs :
l'honorable juge Quigg
l'honorable juge French

Avocats à l'audience :

Pour l'appelante :
Christian E. Michaud, c.r. et Mathieu F. Girouard

Pour l'intimé le Conseil des syndicats des foyers de soins du Nouveau-Brunswick (SCFP) :
Joël Michaud et Brenda Laudia Comeau

Pour l'intimée l'Association des foyers de soins du Nouveau-Brunswick inc. :
Justin M. Wies

LA COUR

L'appel a été accueillie avec motifs à suivre. Voici ces motifs.

The judgment of the Court was delivered by

LEBLOND, J.A.

## I. Introduction

[1] The Respondent, New Brunswick Association of Nursing Homes, Inc. is required to meet standards of care as prescribed by the *Nursing Homes Act,* S.N.B. 2014, c. 125 (as amended). The standards are set out in General Regulation 85-187, in ss. 17 to 24 for nursing homes having 30 beds or more. There are 46 such nursing homes governed by the Association.

[2] The *Essential Services in Nursing Homes Act*, S.N.B. 2009, c. E-10.5, was proclaimed on May 1, 2009. The *Act* sets out in ss. 5, 6 and 7 a mechanism that must be utilized to designate the level of essential services to be provided by a broad spectrum of classifications of nursing home employees. All parties acknowledge residents of these homes are vulnerable individuals in need of varying degrees of care and supervision. The designation mechanism seeks to achieve a balance between the protection and care of the residents and the labour and employment rights of the unionized employees in the event of the withdrawal or reduction of care and services during strike action. Under s. 12(2) of the *Act*, no employee employed in a designated position can participate in a strike.

[3] As will be seen below, during the period the parties were working their way through the legislated designation mechanism, a dispute arose regarding the level of services to be provided by two classifications of employees, namely licensed practical nurses and resident attendants.

[4] The dispute was referred to the Labour and Employment Board, in accordance with s. 8 of the *Act*, for determination. In addition, the Respondent New Brunswick Council of Nursing Home Unions (CUPE) served notice of a constitutional question before the determination of the level of services for the two disputed classifications of employees could be made. This constitutional issue alleged, in part, that

the *Act* violated s. 2(d) of the *Canadian Charter of Rights and Freedoms* because it denied certain employees the right to strike. The Notice of Constitutional Question was served on the Appellant, the Attorney General.

[5] Following release of the decision by the Board regarding the licensed practical nurses and resident attendants designation levels, it issued its decision on the constitutional question declaring s. 8 of the *Act* unconstitutional. It then dismissed the entire application which had been filed by the Association pursuant to s. 5 of the *Act*. The decision on the constitutional issue and the order dismissing the original application had the effect of placing CUPE in an immediate position to strike without having any designations of levels of care and services established for any of the employees.

[6] The Attorney General filed an Application for Judicial Review of the constitutional decision with the Court of Queen's Bench and further filed a motion seeking a stay of execution pending disposition of the judicial review. A temporary *ex parte* stay was granted by Smith, C.J.Q.B., as he then was, on March 9, 2019. This stay was to remain in effect for ten days.

[7] The Attorney General then proceeded before a different judge seeking an extension of the *ex parte* stay until disposition of the judicial review. On March 18, 2019, the motion judge refused to extend the stay. The Attorney General immediately sought leave to appeal the motion judge's decision and, by Notice of Preliminary Motion, sought an interim stay pending determination of the leave to appeal. French J.A. granted both the interim stay and the leave to appeal.

[8] On April 17, 2019, the Court heard the appeal of the motion judge's decision. On April 25, 2019, the appeal was allowed with reasons to follow. The motion judge's decision was set aside and the Court ordered a stay of execution pending disposition of the judicial review or until further order of the Court of Queen's Bench.

[9] These are the reasons in support of allowing the appeal.

## II. Factual Context

[10] Following a formal notice pursuant to s. 5 of the *Act* from the Association, requesting that levels of essential services be designated in the 46 nursing homes within its authority, an agreement was reached on August 28, 2013, with CUPE respecting 14 of the 16 classifications of services to be designated as essential as well as the levels of such services. It was further accepted this agreement would be with York Manor Inc. and would be used as a template for the Association and the bargaining units of the remaining 45 nursing homes to use when negotiating the service level designations for each of the homes.

[11] The only two classifications for which a resolution could not be reached were the licensed practical nurses and the resident attendants. Although there was agreement both of these groups provided essential services for the health, safety or security of the residents as contemplated in the *Act*, common ground could not be reached with respect to the "level" of services which would need to be maintained in the event of a strike.

[12] As a result, in accordance with s. 8 of the *Act*, that issue was referred to the Board for determination. Prior to the commencement of that hearing, CUPE issued a Notice of Constitutional Question to the Attorney General and the Association. The Attorney General had not been involved with the prior proceedings. The constitutional challenge was principally premised on the allegation that the *Act* violated the rights of CUPE's membership to strike, a right guaranteed by s. 2(d) of the *Charter*.

[13] The parties agreed resolution of the constitutional question would be deferred until after the Board issued its decision respecting the service designation levels for the licensed practical nurses and resident attendants and pending the release of the Supreme Court's decision in *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4, [2015] 1 S.C.R. 245.

[14] The hearing on the designation levels was held before Robert Breen, Q.C. acting as a single-person tribunal on behalf of the Board. Mr. Breen released the designation decision on October 31, 2014, in which he ruled, in part, as follows:

> […] the level of service to be maintained by the bargaining unit [York Manor] for the purpose of delivering these services [that are necessary in the interest of the health, safety or security of the residents in the event of a strike] is to be 90% of the York licensed practical nurses and resident attendants […]
>
> [para. 128 of the Designation Decision]

[15] Mr. Breen reconvened the hearing to deal with the constitutional question. On December 7, 2018, he released the constitutional decision in which he declared s. 8 of the *Act* unconstitutional, on the ground it violated s. 2(d) of the *Charter* and could not be justified under s. 1. Mr. Breen further issued an Order on March 6, 2019, in which, *inter alia*, he refused to suspend or stay the application of the constitutional decision.

[16] On March 1, 2019, the Attorney General filed a Notice of Application for the Judicial Review. The hearing of the judicial review is scheduled before the Court of Queen's Bench for May 24, 2019.

[17] On March 8, 2019, the Attorney General filed a Motion before the Court of Queen's Bench asking that the constitutional decision be stayed until disposition of the judicial review.

[18] On March 18, 2019, the motion judge rescinded the stay Order of Smith, C.J.Q.B. and refused to grant a further stay. Later that day, French J.A., by way of Notice of Preliminary Motion filed by the Attorney General, issued an interim Order staying execution of the effect of the declaration of unconstitutionality pending the hearing of the Attorney General's Motion for Leave to Appeal the motion judge's decision of March 18, 2019.

[19] On March 21, 2019, French J.A. heard and granted the Motion for Leave to Appeal. He ordered an extension of his earlier interim Order granting a stay of execution pending disposition of this appeal.

[20] On April 17, 2019, this Court heard the appeal and on April 25, 2019, allowed the appeal and further extended the stay of execution until disposition of the Judicial Review.

## III. Issue

[21] The Court is asked to decide the very narrow issue of whether the motion judge erred in refusing to extend a stay of execution with respect to the constitutional decision until disposition of the judicial review.

## IV. Standard of Review

[22] It was agreed by the parties that the motion judge's decision is to be reviewed on the standard of correctness. Although the factual context of this case required an exercise of discretion, it was established in *The Beaverbrook Canadian Foundation v. The Beaverbrook Art Gallery*, 2006 NBCA 75, 302 N.B.R. (2d) 161, that a discretionary order may be interfered with on appeal if, and only if, it is founded upon:

1. an error of law;
2. an error in the application of the governing principles; or
3. a palpable and overriding error in the assessment of the evidence.

## V. Analysis

[23] Resolution of the issue depends upon whether the motion judge correctly applied the test set out by the Supreme Court in *Manitoba (A.G.) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110, [1987] S.C.J. No. 6 (QL); and *RJR – MacDonald Inc. v. Canada (A.G.)*, [1994] 1 S.C.R. 311, [1994] S.C.J. No. 17 (QL).

[24] Application of the *RJR* test required the lower court judge to determine if:

1. the matter raised a serious issue to be tried;
2. the applicant (emphasis added) would suffer irreparable harm if the stay was not granted; and
3. the balance of convenience favoured the applicant.

A. *The matter raised a serious issue*

[25] The *RJR* test establishes that this criterion has a low threshold. The motion judge, as well as counsel before us, all agreed there was no need to debate this point as it was clearly met. I agree.

B. *The applicant would suffer irreparable harm if the stay was not granted*

[26] One of the interesting features of this appeal is that the "applicant" is the Attorney General. Counsel for the Attorney General clearly confirmed to the Court that it strictly represents the "public interest" and it is this interest which must feature in the analysis and application of the *RJR* test if the stay is to be extended. An assessment of the "position" of the public interest actually forms part of the analysis of the third criterion of the *RJR* test dealing with balance of convenience.

[27] Counsel for the Attorney General argued a fourth criterion in addition to the three *RJR* criteria ought to be considered, namely the "principle of necessity" discussed in jurisprudence dealing with legislation subjected to constitutional challenge. However, I am of the view that particular issue will more properly be dealt with by the judge who will hear the judicial review and need not be dealt with here to resolve the narrow issue of whether or not to extend a stay of execution for several weeks.

[28] On the assessment of the irreparable harm criterion, the motion judge was required to focus her attention strictly on the "applicant", i.e. the public interest

represented by the Attorney General. Instead, she focused on CUPE's members in dealing with this part of the *RJR* test. As a result, she committed a reversible error of law. Any impact of the requested extension of the stay of execution on CUPE's members can only form part of the analysis of the third criterion, the balance of convenience (see *Imperial Sheet Metal Ltd. et al. v. Landry and Gray Metal Products Inc.*, 2007 NBCA 51, 315 N.B.R. (2d) 328, at par. 25, 62 and 63).

[29] In assessing the irreparable harm criterion, the motion judge erred by misconstruing it as including "harm" to CUPE's members, arising from the collective bargaining dispute with the Association and the Province. At this stage of the *RJR* test analysis, harm to a party responding to a stay application is irrelevant. It only enters the debate at the third stage of the analysis and can only be considered for prospective harm, not past harm.

[30] As earlier stated, the only irreparable harm to be considered in this second criterion analysis is the harm to the applicant, the Attorney General, as representative of the public interest. In the context of a constitutional challenge, there is a "near" presumption of irreparable harm to the public interest. In *RJR*, the Supreme Court held:

> […] In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. […] The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon **some** indication that the impugned legislation […] was undertaken pursuant to that responsibility. Once these **minimal requirements** have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action. [p. 346]
>
> [Emphasis added.]

[31] It should be noted, however, that this presumption does not give rise to an automatic stay in favour of the public authority. Sharpe J. of the Ontario Court of Appeal, while citing the above passage from *RJR* in *Frank v. Canada (Attorney General)*, 2014

ONCA 485, [2014] O.J. No. 2981 (QL), noted that, in terms of the presumption, the court:

> […] will only grant a stay at the suit of the Attorney General where it is satisfied, after careful review of the facts and circumstances of the case, that the public interest and the interests of justice warrant a stay. […] [para. 16]

[32] In *Sauvé v. Canada (Chief Electoral Officer)*, [1997] 3 F.C. 628, [1997] F.C.J. No. 594 (QL), the Federal Court also noted the type of harm claimed by a public authority will necessarily be different from that claimed by a private applicant. It held that the public interest, "[…] as an aspect of irreparable harm, may be demonstrated at a lower standard" (para. 11).

[33] There can be no question in the case before us the "minimal requirements" of "some" indication that the *Act* was proclaimed with a view to protecting residents of nursing homes in New Brunswick are met, based on the admissible evidence entered before the motion judge. Indeed, the level of services of licensed practical nurses and resident attendants to be maintained in the event of a strike, as found by Mr. Breen in the designation decision, suffice to meet this requirement.

[34] To the extent the public interest includes the interests of vulnerable individuals in need of care as well as their families, I am satisfied the element of a high risk to the health, safety and security of nursing home residents in the event of a strike by nursing home employees is more than sufficient to meet the reduced onus on the Attorney General to establish irreparable harm. In the end, we need only concern ourselves with the "nature" of the harm and not its "magnitude" (see *RJR*, at p. 348).

C. *Balance of convenience*

[35] The public interest component weighs into the analysis of this third criterion of the *RJR* test. It is a "special factor which must be considered in assessing where the balance of convenience lies […]" (*RJR*, at p. 343).

[36] Because the courts should typically assume irreparable harm will occur to the public interest if legislation is suspended because of a constitutional challenge, the balance of convenience will almost always favour the public interest. This is particularly true in this case, where the public interest at issue includes some of the most vulnerable people in our society.

[37] As stated in para. 28 above, by misdirecting herself on the analysis of irreparable harm with a focus on CUPE, the motion judge also misdirected herself with respect to the analysis of the balance of convenience. This analysis must focus solely on the inconvenience caused by the impact of staying the constitutional decision. The ongoing collective bargaining dispute between CUPE, the Association and the Province is not an issue before the Court.

[38] There is no evidence that the harm the constituent members of CUPE might face while the stay is in place will exceed the harm which could occur to the public interest, presumed or otherwise, should the stay currently in effect not be extended.

[39] At any rate, the extension of the stay does not, in any way, affect the collective bargaining positions of the parties pending the imminent judicial review (see *British Columbia Teachers' Federation v. British Columbia*, 2014 BCCA 75, [2014] B.C.J. No. 315 (QL).

[40] In *Harper v. Canada (Attorney General)*, 2000 SCC 57, [2000] 2 S.C.R. 764, the Supreme Court held that legislation which purports to have been enacted to promote the public interest, such as the *Act* in the case before us, must be assumed to do so. Whether it in fact does so is not the main consideration. As a result, courts should refrain from rendering legislation enacted for the public interest inoperable until a thorough constitutional review is completed (see para. 9). Again, in this case, this review will occur on May 24, 2019.

[41] Given these considerations, I concluded the balance of convenience heavily favours the Attorney General in this case.

## VI. Disposition

[42] For these reasons, I joined with my colleagues in allowing the appeal setting aside the decision of the motion judge and ordering a stay of the declaration of unconstitutionality.

[43] To ensure the upcoming judicial review is not delayed pending the publication of these reasons, in accordance with s. 24(2) of the *Official Languages Act*, S.N.B. 2002, c. O-0.5, these reasons shall be published in English immediately, and, thereafter, at the earliest possible time, in French.

[44] With respect to costs, although named as a Respondent, the Association argued in support of the appeal. I award total costs against CUPE in the amount of $1,500 of which $1,000 is to be paid to the Attorney General and $500 is to be paid to the Association.