



**IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR**

Citation: *Oleynik v. Memorial University of Newfoundland*,
2023 NLCA 29

Date: September 22, 2023

Docket Number: 202301H0034

BETWEEN:

ANTON OLEYNIK

RESPONDENT/APPELLANT

AND:

MEMORIAL UNIVERSITY OF
NEWFOUNDLAND

APPLICANT/FIRST RESPONDENT

AND:

MICHAEL HARVEY, in his capacity as THE
INFORMATION AND PRIVACY COMMISSIONER
OF NEWFOUNDLAND AND LABRADOR

SECOND RESPONDENT

Coram: K. J. O'Brien J.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador,
General Division 201701G6218
(2023 NLSC 86)

Application Heard: September 19, 2023

Memorandum of Disposition Filed: September 22, 2023

Counsel for the Respondent/Appellant: Self-Represented

Counsel for the Applicant/First Respondent: Koren A. Thomson and
Giles W. Ayers

Counsel for the Respondent: Andrew A. Fitzgerald, K.C.

Authorities Cited:

CASES CITED: *RJR — MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311; *Oleynik v. Memorial University of Newfoundland*, 2021 NLCA 40, 6 C.A.N.L.R. 715.

STATUTES CONSIDERED: *Access to Information and Protection of Privacy Act*, 2015, SNL 2015, c. A-1.2; *Court of Appeal Act*, SNL 2017, c. C-37.002, sections 7, 9; *Canadian Charter of Rights and Freedoms*.

RULES CONSIDERED: *Court of Appeal Rules*, NLR 38/16, rule 42.

MEMORANDUM OF DISPOSITION

K. J. O'Brien J.A.:

[1] Memorial University of Newfoundland (“Memorial”) seeks to postpone the appeal of the within matter pending the outcome of an application scheduled to be heard by the Supreme Court of Newfoundland and Labrador (the “Supreme Court”) on September 25, 2023. In that application, Memorial seeks, among other relief, to have Anton Oleynik declared a vexatious litigant (202101G4960, the “Vexatious Litigant Application”).

[2] The appeal that Memorial seeks to delay is an appeal by Mr. Oleynik of a Supreme Court case management judge’s decision to refuse to recuse himself from hearing an application for production of records under the *Access to Information and Protection of Privacy Act*, 2015, SNL 2015, c. A-1.2, and from other proceedings case managed by him (*Oleynik v. Memorial University of Newfoundland*, 2023 NLSC 86 (“Recusal Decision”). Specifically, Memorial seeks to delay the appeal until a decision is issued in the Vexatious Litigant Application.

[3] Mr. Oleynik opposes Memorial's application to postpone the appeal.

[4] The Information and Privacy Commissioner of Newfoundland and Labrador, who is the Second Respondent on the appeal, supports Memorial's application for a postponement but did not file a written brief or make submissions at the oral hearing.

Power to Delay the Appeal

[5] This Court has jurisdiction to postpone an appeal as part of its inherent jurisdiction to manage and regulate its own proceedings (*Court of Appeal Act*, SNL 2017, c. C-37.002, at ss. 7, 9).

[6] Mr. Oleynik submits that the appeal should be postponed only if Memorial satisfies the three-part test of *RJR — MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (the "RJR test"). I cannot agree.

[7] The RJR test is regularly applied by courts considering interim injunctive relief and by courts considering applications to stay enforcement of an order under appeal. In such cases, courts are asked to enjoin other entities from taking action that would otherwise be within their right to take. The present application is different. It does not involve directing another entity. Instead, it involves the Court determining its own proceedings.

[8] In *Oleynik v. Memorial University of Newfoundland*, 2021 NLCA 40, 6 C.A.N.L.R. 715 ("*Oleynik 2021*"), Welsh J.A. decided a similar procedural matter that also involved Mr. Oleynik and Memorial. Welsh J.A. noted that the *Court of Appeal Rules*, NLR 38/16, speak to achieving an orderly, expeditious, efficient and cost effective resolution of appeals for the benefit of all parties (*Oleynik 2021*, at para. 7). She stated further:

[12] Mr. Oleynik submits that, once an appeal has been perfected with the filing of the necessary documents, the Court has no authority to direct how the appeal will proceed. That proposition is incorrect. **The Court throughout the appeal process retains the authority to determine its own procedure and to give directions regarding the manner in which an appeal will be heard. Examples include delaying the hearing of an appeal pending a decision in another case,** requiring appeals to be heard together, or directing how materials are to be provided to the Court in a particular situation.

[13] Mr. Oleynik's submission that a delay in proceeding with his appeals amounts to a "stay" is incorrect. A stay, in contrast to a delay, refers to a stay of enforcement of the orders for which notices of appeal have been filed.

[14] **I am satisfied that it would not be consistent with the efficient administration of justice, fairness to the respondents, and the appropriate use of the resources of the Court and of the parties** to permit each of Mr. Oleynik's appeals to proceed separately.

(Emphasis added.)

[9] I will follow the same approach.

Application to Mr. Oleynik's Appeal

[10] I am satisfied that Memorial's application should be granted and the appeal should be postponed until a decision is rendered in the Vexatious Litigant Application. I will explain why.

[11] First, I agree with Memorial's submission that the decision in the Vexatious Litigant Application may reduce the issues on appeal. In the Vexatious Litigant Application, among other relief sought, Memorial asks the Supreme Court to place restrictions upon Mr. Oleynik's future dealings with that court. If Memorial is successful in this, Mr. Oleynik's matters at the Supreme Court may not continue before the case management judge whose recusal decision is under appeal.

[12] I agree with Mr. Oleynik that the outcome of the Vexatious Litigant Application is unlikely to render the present appeal entirely moot. For example, Mr. Oleynik's appeal of the costs award made against him in the Recusal Decision would not be affected by any future restrictions on him put in place by the Supreme Court. However, I cannot discount the possibility that the decision in the Vexatious Litigant Application may simplify the appeal. Fewer court and party resources will be needed if the issues on appeal are narrowed or reduced.

[13] Second, if the decision on the Vexatious Litigant Application is appealed, it may be appropriate for that appeal and the present one to be heard together. I make no finding as to the appropriateness of such action now because that issue is not before me, nor could it be at this early stage. However, I am satisfied that the court record indicates some legal and factual nexus between the present appeal and a possible future appeal of the Vexatious Litigant Application. I will elaborate.

[14] In the Recusal Decision, the case management judge stated that he was making no comment or determination as to whether Mr. Oleynik was a “vexatious litigant” (para. 40). He accepted that the application before him could be declared vexatious without determining and declaring Mr. Oleynik a vexatious litigant (para. 202). He subsequently found that the application was frivolous and vexatious (para. 204).

[15] One of Mr. Oleynik’s grounds of appeal is that the judge erred because “[n]o legal test of what makes an application vexatious was identified, let alone applied, which constitutes a first error of law” (Notice of Appeal, Appeal Book, at 5). As a result, the legal definition of “vexatious” may be at issue in the present appeal. It is reasonable to anticipate that the meaning of “vexatious” would also be at issue in a possible appeal of the Vexatious Litigant Application.

[16] Additionally, Memorial relies, in part, on Mr. Oleynik’s claims of judicial bias to found the Vexatious Litigant Application (Vexatious Litigant Application, Affidavit of Maggie Noseworthy, Exhibit B, at para. 340(l)(iii)). Mr. Oleynik’s claim of judicial bias against the case management judge is at the heart of the Recusal Decision.

[17] Whether these potential nexuses are sufficient to warrant hearing the appeals together is not a matter to be decided today. However, I am satisfied that there is a reasonable possibility that delaying the appeal pending the outcome of the Vexatious Litigant Application may result in a more efficient administration of justice by a joint hearing.

[18] The third consideration that favours allowing the postponement is the length of the anticipated delay. Given that the Vexatious Litigant Application is scheduled to be heard in the Supreme Court next week, I do not expect the amount of delay to be inordinate. Having commenced an appeal and taken the procedural steps required of him to date, Mr. Oleynik has a reasonable expectation that the appeal will proceed before this Court in an expeditious manner. However, expeditious does not mean as rapidly as possible. I am satisfied that the amount of delay that will likely be incurred by this postponement would not be unfair to Mr. Oleynik.

[19] Finally, I am not satisfied that Mr. Oleynik would be prejudiced in any meaningful way by granting the postponement. Although Mr. Oleynik has identified possible prejudice, I am satisfied that there are other ways to fairly address his concerns.

[20] The first concern he has is that the case management judge may adjudicate upon other matters that he has before the Supreme Court before this Court rules on the Recusal Decision. Mr. Oleynik does not currently have any matters scheduled before the case management judge. If a matter is to be scheduled at the Supreme Court before the present appeal is decided, Mr. Oleynik can raise his concern(s) at that time.

[21] The second concern he has is that Memorial continues to move toward enforcing the costs award from the Recusal Decision. If Memorial does not consent to staying enforcement of the costs award pending appeal now that they have sought to postpone the appeal, then Mr. Oleynik can apply to this Court for a stay pursuant to Rule 42 of the *Court of Appeal Rules*.

[22] I did not find the other allegations of harm raised by Mr. Oleynik to be persuasive. For example, I do not see any significant benefit to the respondents in having further time to prepare their factum. Nor do I consider that a postponement of the appeal gives Memorial any advantage in the Vexatious Litigant Application or, conversely, Mr. Oleynik any disadvantage. Although I understand that Mr. Oleynik wants to proceed with the appeal as quickly as possible, the appeal does not engage Constitutional questions or Mr. Oleynik's rights under the *Canadian Charter of Rights and Freedoms*.

[23] Mr. Oleynik advised that he will be seeking a stay of the Vexatious Litigant Application before the Supreme Court next week. To avoid any possible prejudice that might be caused by having both proceedings postponed indefinitely, I will account for this possibility in my order.

[24] Having considered all of the above factors, I am satisfied that a postponement of the within appeal pending a decision in the Vexatious Litigant Application will best achieve an orderly, expeditious, efficient, and cost effective resolution of the appeal in a manner that is not unfair or unduly prejudicial to Mr. Oleynik.

Disposition

[25] For the foregoing reasons, Memorial's application is allowed.

[26] The appeal of the within matter will be postponed until 30 days following the earlier of:

- a. A decision in the Vexatious Litigant Application being filed; or
- b. The Vexatious Litigant Application being stayed or adjourned to no fixed date.

[27] The Respondents' factums must be filed at the expiry of this postponement.

[28] Costs of this application shall be in the cause.

K. J. O'Brien J.A.