Federal Court of Appeal | Cour d'appel fédérale

Date: 20250926

Docket: A-228-25

Citation: 2025 FCA 174

Present: **LOCKE J.A.**

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

and

JENNY FERRIS

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on September 26, 2025.

REASONS FOR ORDER BY: LOCKE J.A.

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REASONS FOR ORDER

LOCKE J.A.

[1] The appellant, the Attorney General of Canada (the Crown), moves for an Order pursuant to paragraph 50(1)(b) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, staying the underlying Federal Court proceeding until final disposition of the appeal. In the alternative, the Crown seeks an Order pursuant to paragraph 398(1)(b) of the *Federal Courts Rules*, S.O.R./98-106, staying the underlying Federal Court Order until final disposition of the appeal.

[2] The respondent, Jenny Ferris, opposes both aspects of the Crown's motion.

[3] The Order under appeal (2025 FC 1029, per Justice Ann Marie McDonald, the FC Order) certified the proceeding in the Federal Court (File No. T-116-23, the certified action) as a class proceeding. The FC Order also identified the qualities of members of the class and the common questions. The Crown's notice of appeal takes issue with the Federal Court's definition of the class and the common questions. The notice of appeal also takes issue with the adequacy of the Federal Court's reasons and Ms. Ferris's pleadings, among other things.

[4] The Crown argues that the requested stay should be granted because there is a real and substantial possibility that the scope of the certified action may be significantly narrowed or changed on appeal. In the absence of a stay, the Crown argues, some steps in the certified action that would consume significant resources might have to be re-done.

[5] The parties have an important disagreement as regards the legal test for granting a stay pursuant to paragraph 50(1)(b) of the *Federal Courts Act*. The Crown argues that it is simply the interest of justice. However, as Ms. Ferris points out, and as the Crown's own cited authorities indicate, the test for granting a stay of proceedings in another Court (which is the case here) is more demanding than would be the case for proceedings before this Court: see *Viterra Inc. v. Grain Workers' Union (International Longshoreman's Warehousemen's Union, Local 333)*, 2021 FCA 41 at para. 23; *Mylan Pharmaceuticals ULC v. AstraZeneca Canada, Inc.*, 2011 FCA 312 at para. 5. In a case such as this, the Crown must meet the tripartite test set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, 1994 CanLII 117, [1994] 1 S.C.R. 311

(*RJR-MacDonald*). This requires the Crown to establish that (i) there is a serious issue to be tried, (ii) it would suffer irreparable harm if the stay were not granted, and (iii) the balance of convenience favours the Crown.

[6] The parties agree that the test in *RJR-MacDonald* applies to the Crown's alternative request for a stay pursuant to Rule 398. Accordingly, the legal test is the same under both provisions.

[7] The Crown argues that it meets all three elements of the test in *RJR-MacDonald*. Ms. Ferris argues that the Crown meets none of the elements.

[8] With regard to serious issue, the threshold is low. It is sufficient for the Crown to satisfy me that its appeal is neither frivolous nor vexatious: *RJR-MacDonald* at 337. As acknowledged by Ms. Ferris, the Crown's appeal raises five alleged errors in the FC Order. In order for the Crown to establish a serious issue, it is sufficient that I be convinced that at least one of these alleged errors is neither frivolous nor vexatious. Though Ms. Ferris addresses all of the alleged errors and explains her view that each fails to raise a serious issue, I am not convinced that this is so for all of them. It is not necessary for me to say more than that on this point. In my view, the Crown meets the requirement of raising a serious issue.

[9] I turn now to the requirement that the Crown will suffer irreparable harm if the stay is not granted. Irreparable refers to the nature of the harm suffered rather than its magnitude; it is harm which either cannot be quantified in monetary terms or which cannot be cured: *RJR-MacDonald*

at 341. On this aspect of the test, the Crown refers to the breadth and depth of the certified action, the significant resources that will be required to respond to it, and the real and substantial possibility that any such resources may be wasted or have to be re-applied in the event that the appeal is successful.

[10] Ms. Ferris argues that the Crown's obligation to devote resources to the certified action does not amount to irreparable harm, but she does not acknowledge the potential for wasted or re-applied resources if the appeal is successful, whether in whole or in part. This is where the harm occurs.

[11] Though the Crown does not make this point, I note that Rule 334.39 of the *Federal Courts Rules* provides that, with certain exceptions, no costs may be awarded in a class proceeding. This means that, in all likelihood, any resources that are wasted or have to be re-applied following this appeal cannot be compensated for in costs. I acknowledge the existence of some authorities to the effect that the unavailability of costs as compensation for harm is generally not sufficient to establish that the harm is irreparable: *Jiang v. Vancouver City Savings Credit Union*, 2019 BCCA 374 at para. 15; *Airbnb Inc. v. Ware*, 2025 BCCA 298 at para. 27; *Bell Canada v. Communications, Energy and Paperworks Union*, [1997] F.C.J. No. 207, 127 F.T.R. 44 at paras. 38-40 (F.C.T.D.); *Brocklebank v. Canada (Minister of National Defence*), 1994 F.C.J. No. 1496, 86 F.T.R. 23 at para. 11 (F.C.T.D.). However, these authorities allow for exceptions and, in any case, are not binding on this Court. I am of the view that the circumstances of this case are such that the potential harm to the Crown is irreparable. In combination with the unavailability of costs, I am particularly concerned about the number of

issues on appeal and the profound but unpredictable effects this Court's decision could have on the conduct of the certified action unless the appeal is dismissed in its entirety.

[12] Though I am not convinced that the magnitude of any irreparable harm to which the Crown may be exposed is large, I accept that the Crown will likely suffer some amount of irreparable harm if the stay is not granted.

[13] Finally, the third prong of the *RJR-MacDonald* test requires the Court to balance the harm to which the Crown will be exposed if the stay is not granted against the harm to which Ms. Ferris (and other members of the class) will be exposed if the stay is granted. The Crown argues that the only harm to which Ms. Ferris and other class members risk being exposed is a needless delay in the certified action if the appeal is wholly unsuccessful.

[14] For her part, Ms. Ferris argues that the Crown has already delayed in addressing the issues raised in the certified action by failing to respond to the findings of the Ontario Superior Court of Justice in 2020 in *Simpson v. Canada (Attorney General)*, 2020 ONSC 6465 (*Simpson*). Ms. Ferris also criticizes the Crown for bringing the present stay motion only after it missed a deadline in the FC Order. Even then, the Crown filed its motion only several weeks later.

[15] I accept that there is harm inherent in delayed proceedings, but I note that the Crown has met the deadlines contemplated in the *Federal Courts Rules* for the present appeal. It has filed its memorandum of fact and law, and the appeal could be in condition for filing a requisition for hearing within days. I also accept that it would have been preferable if the Crown had moved for

a stay before missing a deadline contemplated therein. However, the delay in moving for a stay did not have the effect of extending the duration of the stay and does not appear to have been a strategic choice. I take into account also that the delay in the certified action as a result of the requested stay is likely to be small compared to the amount of time that has already passed since the events in issue. Moreover, it is open to Ms. Ferris to request that this appeal be expedited.

[16] As regards *Simpson*, I will not comment on the extent to which it is relevant to the issues in the certified action, but I do note that the Crown's position is that *Simpson* addresses different issues.

[17] In my view, the balance of convenience favours the granting of the stay. Accordingly, I conclude that the Crown has met all of the requirements for a stay of the Federal Court proceeding.

[18] Though the Crown seeks costs of the motion, I agree with Ms. Ferris that an award of costs on this motion would be inappropriate in view of Rule 334.39.

"George R. Locke"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-228-25
STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA v. JENNY FERRIS

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	LOCKE J.A.
DATED:	SEPTEMBER 26, 2025

WRITTEN REPRESENTATIONS BY:

Kathryn Hucal Monisha Ambwani Oliver Backman	FOR THE APPELLANT
Louis Sokolov Adil Abdulla	FOR THE RESPONDENT
David Baker Daniel Mulroy	FOR THE RESPONDENT
Sujit Choudhry	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Shalene Curtis-Micallef Deputy Attorney General of Canada	FOR THE APPELLANT
Sotos LLP Toronto, Ontario	FOR THE RESPONDENT
Ross & McBride LLP Toronto, Ontario	FOR THE RESPONDENT

Circle Barristers
Toronto, Ontario

FOR THE RESPONDENT