IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
GENERAL DIVISION

Citation: *Sodexo Canada Limited v. Hotel Employees and Restaurant Employees International Union, Local 779*, 2019 NLSC 192
Date: October 29, 2019
Docket: 201901G2863

BETWEEN:

SODEXO CANADA LIMITED

APPLICANT

AND:

HOTEL EMPLOYEES AND RESTAURANT EMPLOYEES INTERNATIONAL UNION, LOCAL 779

RESPONDENT

Before: Justice Rosalie McGrath

Place of Hearing: St. John's, Newfoundland and Labrador

Date of Hearing: October 1, 2019

Summary:

The Court determined it had jurisdiction to hear an application for stay of an arbitral award that had been filed with the Court under section 90 of the *Labour Relations Act*. A partial stay was granted pending judicial review or further order of the Court.

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Appearances:

Gregory M. Anthony and Ashley E. Savinov	Appearing on behalf of the Applicant
Dana K. Lenehan, Q.C.	Appearing on behalf of the Respondent

Authorities Cited:

CASES CONSIDERED: *Archean Resources Ltd. v. Newfoundland (Minister of Finance)*, 2002 NFCA 43; *R. v. Greenwood* (1992), 10 C.R. (4th) 392, 15 W.C.B. (2d) 238 (Ont. C.A.); *Tremblett v. Tremblett*, 2013 NLCA 53; *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44; *Bradbury v. Carbonear (Town)*, 2019 NLSC 1; *Garland v. Consumers' Gas Co.*, 2004 SCC 25; *Memorial University of Newfoundland v. NAPE, Local 7804*, 2014 NLTD(G) 128; *British Columbia (Workers' Compensation Board) v. British Columbia (Human Rights Tribunal)*, 2011 SCC 52; *Boucher c. Stelco Inc.*, 2005 SCC 64; *Chutskoff Estate v. Bonora*, 2014 ABQB 389; *Fiander v. Mills*, 2015 NLCA 31; *Newlab Clinical Research Inc. v. N.A.P.E.*, 2003 NLSCTD 167; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311; *MacPhail v. Desrosiers*, 1998 NSCA 5; *R. v. Canadian Broadcasting Corp.*, 2018 SCC 5; *Simoni v. Blue Cross of Atlantic Canada*, (1999) 184 Nfld. & P.E.I.R. 136, 559 A.P.R. 136 (Nfld. S.C. (T.D.)); *MTY Tiki Ming Enterprises v. Azmy Enterprises Inc.*, 2018 NLSC 169; *M.A.H.C.P. v. Nor-Man Regional Health Authority Inc.*, 2011 SCC 59; *Access Health Care Services v. O.N.A.*, [2005] O.J. No. 5470, 144 A.C.W.S. (3d) 940 (Ont. S.C.); *Rees v. Royal Canadian Mounted Police*, 2005 NLCA 4; *Thorne v. Thorne*, 2018 NLCA 74; *Jones v. Bay Roberts (Town)*, 2017 NLTD(G) 134; *Daley Brothers Ltd., v. Taito Seiko Co.* (2000), 193 Nfld. & P.E.I.R. 260, 582 A.P.R. 260 (Nfld. S.C.(T.D.))

STATUTES CONSIDERED: *Labour Relations Act*, R.S.N.L. 1990, c. L-1; *Judgment Enforcement Act*, S.N.L. 1996, c. J-1.1.; *Judicature Act*, R.S.N.L. 1990, c. J-4; *Court of Appeal Act*, S.N.L. 2017, c. C-37.002; *Arbitration Act*, R.S.N.L. 1990, c. A-14

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RULES CONSIDERED: *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Sch. D; *Court of Appeal Rules,* NLR 38/16; *Labour Relations Board Rules of Procedure*, CNLR 746/96

TEXTS CONSIDERED: Black's Law Dictionary, 2nd. Ed., 2001

REASONS FOR JUDGMENT

MCGRATH, J.:

INTRODUCTION

[1] Sodexo Canada Limited ("Sodexo") seeks a stay of the Arbitration Award of Arbitrator David L. Alcock (the "Arbitrator") pending the outcome of the Originating Application for Judicial Review filed with the Court on April 25, 2019 (the "Judicial Review Application").

[2] The Arbitration Award that is the subject of the Judicial Review Application is comprised of Parts 1 and 2 dated April 16, 2018 (the "Penultimate Award"), Part 3 dated November 9, 2018 (the "Part 3 Award") and Part 4 dated February 25, 2019 (the "Final Award"). The Penultimate Award, the Part 3 Award and the Final Award are collectively referred to as the "Arbitration Award".

[3] The Arbitration Award arises from an earlier arbitration award finding in favour of the Hotel Employees and Restaurant Employees International Union, Local 779 (the "Union") dated July 21, 2014 (the "2014 Award"). In that award, the Arbitrator found that Sodexo was subject to a collective agreement in effect between the Construction Labour Relations Association of Newfoundland and Labrador Inc. (the "CLRA") and the Union in respect of a unit of employees providing accommodations and food services at the Tata Steel Timmins Camp (the "Camp") located in Labrador (the "Collective Agreement"). The Camp was part of the Tata Steel Minerals Canada Limited Direct Shipping Ore Project in Labrador (the "DSO Project").

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[4] The 2014 Award is not the subject of this Judicial Review Application as Sodexo filed a prior application for judicial review of that award. While this Court initially quashed the award, the Newfoundland and Labrador Court of Appeal restored it, with the Supreme Court of Canada refusing leave to appeal.

[5] The 2014 Award required Sodexo to pay wage compensation of $314,118.56 to affected Union members for the period December 18, 2013 to March 28, 2014 pursuant to the terms of the Collective Agreement. Compensation after March 29, 2014 and amounts for benefits owing to March 28, 2014 were to be determined based on the findings of the Arbitrator. Sodexo was also ordered to make wage and benefits payments to employees on a continuing basis from the date of the 2014 Award to the completion of the construction phase of the DSO Project. The Arbitrator remained seized of jurisdiction to determine matters related to the amount of compensation should the parties fail to reach agreement.

[6] Sodexo did not in fact make any payment in respect of the amount owing under the 2014 Award. While it continued to pay employees, it did not make such wage and benefits payments in accordance with the findings in the 2014 Award. Further, the parties were unable to agree on the amount of compensation. As a result, hearings began before the Arbitrator in the fall of 2017, followed by several rounds of written submissions.

[7] The issues in dispute related to the categories of payment, including payment for shift differential and overtime, and the period of time during which the Collective Agreement applied. The four-part Arbitration Award reflects the Arbitrator's findings on these issues, with the Final Award requiring Sodexo to pay the sum of $7,440,548.59 in respect of past wages and benefits.

[8] Schedules A, B and C of the Final Award detail how the total compensation is to be allocated:

a) Schedule A provides for the allocation of the wages owing to 190 named Union members in the amount of $5,165,744.97, less statutory deductions to

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be remitted to Canada Revenue Agency ("CRA"), to be paid via payroll cheques directly from Sodexo to the Union members;

b) Schedule B provides for the allocation of amounts per Union member to be paid to the health and welfare plan ($667,389.31), the pension plan ($1,112,315.52), and the benefit and industry funds ($495,098.78) in accordance with the Collective Agreement, for a total of $2,274,803.61; and

c) Schedule C provides for union dues owing to the Union, to be deducted from the wages to be paid to Union members, as outlined in Schedule A, and amounts to $287,027.21.

[9] The Final Award provides that payment was to be made by March 11, 2019, failing which interest from December 1, 2018 to the date of the actual payment was to be calculated by Harris Ryan Accountants. Those additional amounts would be payable and allocated accordingly.

[10] Sodexo did not pay any amount that was found to be due and owing under the Final Award, including the amount that was originally owing under the 2014 Award.

[11] Through its counsel, Sodexo indicated it intended to seek judicial review of the Arbitration Award. Counsel for the Union also advised counsel for Sodexo that it would be seeking enforcement of the Arbitration Award, notwithstanding any application for judicial review.

[12] On April 2, 2019, the Union filed the entire Arbitration Award, as well as the 2014 Award, with this Court. The filing was assigned Court file number 2019 01G 2301 ("Court File 2301"). Section 90 of the *Labour Relations Act*, R.S.N.L. 1990, c. L-1 (the "*LRA*") allows a decision of a single arbitrator made under a collective agreement to be filed with this Court and, once filed, the decision shall be entered in the same way as a judgment of or order of this Court and is enforceable as such. The filing requirements and effect of this section will be considered later in this decision.

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[13] On April 9, 2019, the Union filed the Arbitration Award that had been entered as a judgment or order of this Court with the Office of the High Sheriff for enforcement.

[14] While counsel for Sodexo had been aware that the Union would be seeking enforcement of the Arbitration Award, neither he nor his client were advised of its filing with this Court or the Office of the High Sheriff.

[15] On April 17, 2019, the Union sent instructions to the Office of the High Sheriff to garnish payments to Sodexo under its contract with Tata Steel Minerals Canada Ltd.

[16] On April 25, 2019, Sodexo filed the Judicial Review Application which was assigned Court file number 2019 01G 2863 ("Court File 2863"). This application was served on counsel for the Union on May 8, 2019.

[17] The Judicial Review Application seeks to have the Arbitration Award quashed as being unreasonable and not grounded upon the Arbitrator's own findings or the evidence presented during the hearing, on the following principal grounds:

a) The Arbitrator erred in finding that the Collective Agreement did not cease to apply to the employees of Sodexo when the DSO Project in Labrador commenced commercial production operations on April 1, 2015;

b) The Arbitrator erred in his application of the "proportionality" approach (the proportion of services Sodexo's employees were offering specifically to construction employees), to the extent that Sodexo is bound by the Collective Agreement for the period of April 1, 2015 and onward; and

c) Other grounds upon which the Arbitrator erred and exceeded his jurisdiction, namely:

i) The Arbitrator erred in finding that the Union "does not bear the onus of proving that shift work actually took place and identifying each employee involved", and erred in finding that Sodexo was required to compensate the bargaining unit employees for shift differential and in awarding a global amount for shift differential under the Collective Agreement;

ii) The Arbitrator's interpretation and application of the overtime provisions of the Collective Agreement, in awarding overtime payment for employees who worked on Fridays, is unreasonable and inconsistent with the language of the Collective Agreement; and

iii) The Arbitrator erred and exceeded his jurisdiction by rendering a decision with respect to overtime for work performed on Fridays that had the effect of amending or adding to the Collective Agreement.

[18] On May 14, 2019, the Office of the High Sheriff served former counsel for Sodexo, who is also Sodexo's agent for service in this Province, with a Statement of Verification. On that same date, a garnishee order was served on Tata Steel Minerals Canada Ltd.

[19] On May 15, 2019, the Union engaged counsel in Ontario to register the judgment and begin enforcement proceedings in that jurisdiction.

[20] Sodexo filed a Notice of Objection to enforcement proceedings with the Office of the High Sheriff on May 23, 2019. The stated grounds for the objection were that enforcement would cause irreparable harm to Sodexo as it would be difficult, if not impossible, to recover amounts paid to individual Union members. It also indicated its intention to apply to this Court for a stay of enforcement.

[21] On May 27, 2019, hearing dates for the Judicial Review Application were set for February 5 and 6, 2020.

[22] On June 3, 2019, the Respondent received notice from the Office of the High Sheriff that the Applicant's Notice of Objection was rejected because it did not raise valid reasons to stay enforcement proceedings under the *Judgment Enforcement Act*, S.N.L. 1996, c. J-1.1 (the "*JEA*"). The notice further advised that, under authority of section 163 of the *JEA*, Sodexo could apply to the Court for a determination of the issue.

[23] On June 11, 2019 Sodexo filed this interlocutory application for a stay and for a determination pursuant to section 163(1)(b) of the *JEA*. While the interlocutory application initially identified the style of cause as Court File 2301 (the file number assigned to the filing of the Arbitration Award), that file number at the top of the interlocutory application was crossed out and replaced with Court File 2863 (the Judicial Review Application file). At the hearing of this application, counsel for Sodexo advised that the original file number had been crossed out and replaced by a Court Registry clerk. The application was therefore filed in Court File 2863.

[24] While it may appear that the above paragraphs recite unnecessary and irrelevant details of administrative filings, the manner in which these filings were made has resulted in a preliminary dispute regarding this Court's jurisdiction to hear this interlocutory application.

[25] I received both written and oral submissions on the preliminary issue as well as the merits of the application for a stay. As will be seen from my reasons, I have decided this Court does have jurisdiction to hear this application for a stay of enforcement. As a result, this decision deals with both the preliminary objections and the substance of the application for a stay pending judicial review.

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ISSUES

1. Does this Court have jurisdiction to hear this interlocutory application?

2. If the answer to question 1 is yes, should I grant the stay pending the outcome of the Judicial Review Application?

Issue 1 – Does this Court have jurisdiction to hear this interlocutory application?

[26] At paragraphs 1 through 3 of its interlocutory application, Sodexo describes the relief sought as follows:

> 1. This is Sodexo's application for a stay of this proceeding, an arbitration award of Arbitrator David L. Alcock, filed with this Court by the Hotel Employees & Restaurant Employees International Union, Local 779 (the "Union"), entered the same way as an order of this Court, pursuant to the *Labour Relations Act*, RSNL 1990, C L-1 (the "***Labour Relations Act***").
>
> 2. The stay of proceedings is sought under section 97 of the *Judicature Act*, RSNL 1990, c J-4, and pursuant to this Honourable Court's inherent jurisdiction to control its own process. It is also sought pursuant to Rule 50.09 of the *Rules of the Supreme Court, 1986* since an application for judicial review has been commenced by Sodexo since the filing of the above noted arbitration award by the Union with the Court, as further detailed herein.
>
> 3. Sodexo also seeks a determination of the issue of whether or not to stay of (sic) enforcement proceedings, pursuant to section 163(1)(b) of the *Judgment Enforcement Act*, SNL 1996, c. J-1.1 (the "***JEA***").

Submissions of the Parties – Preliminary Objections

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[27] It is apparent from the above that Sodexo asks this Court to exercise jurisdiction to grant the stay on four grounds, certain of which may overlap: (1) section 97 of the *Judicature Act*, R.S.N.L. 1990, c. J-4, (2) section 50.09 of the *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Sch. D, (3) the Court's inherent jurisdiction to control its own process; and (4) section 163(1)(b) of the *JEA*.

[28] The Union takes the position that neither section 97 of the *Judicature Act* nor Rule 50.09 of the *Rules of the Supreme Court, 1986* grant this Court jurisdiction to hear this application. Further, Sodexo cannot rely upon the inherent jurisdiction of this Court. It also says that section 163(1)(b) of the *JEA* only contemplates this Court reviewing the correctness of the decision of the Office of the High Sheriff. It does not give this Court jurisdiction to grant a stay.

[29] The Union also raises other preliminary objections. It asserts that the whole of the Judicial Review Application is a collateral attack or an abuse of process. It further states that the proper avenue for Sodexo to seek a stay of enforcement would have been to appeal the judgment or order issued in Court File 2301 to the Newfoundland and Labrador Court of Appeal and seek a stay of enforcement under the rules dealing with a stay pending appeal.

[30] I will delve further into each of these grounds for the preliminary objections below.

Section 97 – Judicature Act

[31] Section 97 of the *Judicature Act* provides as follows:

Stay of proceedings

97.(1) The court may direct a stay of proceedings pending before it.

(2) A person, whether or not that person is a party to the proceeding

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(a) who would have been entitled, if The Newfoundland Judicature Act, 1889 had not been enacted, to apply to the court to restrain the prosecution of the proceeding; or

(b) who may be entitled to enforce an order, contrary to which proceedings may have been taken,

may apply in a summary way for a stay of the proceedings either generally or where necessary for the purposes of justice, and the court shall make the order that may be just.

[32] The Union submits that section 97 of the *Judicature Act* only gives this Court jurisdiction to stay proceedings pending before it. The court action now pending, and in which the interlocutory application was filed, is Court File 2863, the Judicial Review Application. As a result, Sodexo is seeking a stay of its own proceeding. The Union does not object to a stay of proceedings in Court File 2863.

[33] However, it is clear from the wording of the interlocutory application and the original style of cause on the document that Sodexo intended to file the interlocutory application in Court File 2301, rather than Court File 2868. As noted above, it was an administrative action of this Court that resulted in the filing of the interlocutory application in Court File 2863. The relief sought by Sodexo was not to stay the prosecution of the Judicial Review Application.

[34] Further, Sodexo states that it would have originally filed the Judicial Review Application in Court File 2301 had it known that the Arbitration Award had been filed by the Union. I understand the usual practice of the Court Registry is to file both a judicial review application and the underlying award filed under section 90 of the *LRA* in the same court file. However, that did not occur in these circumstances. This may have avoided some of these preliminary objections.

[35] With respect to section 97 of the *Judicature Act*, the Union further submits that Court File 2301 is no longer pending before this Court. As a result, even if the interlocutory application was filed in Court File 2301, as Sodexo intended, there is no ongoing proceeding to stay under section 97.

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[36] Sodexo states that the Judicial Review Application seeking to quash the Arbitration Award is pending before the Court; it is scheduled to be heard on February 5 and 6, 2020. Accordingly, the Court has jurisdiction to order a stay of proceedings in relation to the Arbitration Award.

Section 50.09 – Rules of the Supreme Court, 1986

[37] Sodexo states that Rule 50.09 of the *Rules of the Supreme Court, 1986*, permits the Court to grant a stay in the circumstances. Rule 50.09 reads as follows:

> **Stay of execution for matter occurring after entry of judgment or order**
>
> 50.09. When a party against whom an order has been granted, or any person against whom obedience thereof may be enforced, applies to the Court for a stay of execution thereunder **because of a matter that occurred after the date of the order**, the Court may grant the stay and any other relief upon such terms as it thinks just. [emphasis added]

[38] Sodexo states that Rule 50.09 applies since the Judicial Review Application was filed as an order of this Court after the filing of the Arbitration Award.

[39] On the other hand, the Union submits that Rule 50.09 only applies to court orders issued within a proceeding. Referring to Black's Law Dictionary, 2nd Ed., 2001, the Union submits that an "order" is not the same as a "judgment". An "order" can be defined as "a command, direction, or instruction" or "a written direction or command delivered by a court or judge". Conversely, a "judgment" is defined as "a court's final determination of the rights and obligations of the parties in a case. The term judgment includes a decree and any order from which an appeal lies". The Union says that an "order" as contemplated by this Rule applies to a direction to a party or a non-party within a proceeding that can be varied or satisfied within the proceeding. It does not include a final judgment issued from the Court on a matter.

[40] To support such an interpretation, the Union relies on principles of statutory interpretation, In particular, the Union refers to *Archean Resources Ltd. v.*

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Newfoundland (Minister of Finance), 2002 NFCA 43, in which the Court of Appeal noted the proper principle or approach to statutory interpretation is to consider words or expressions in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of the Act and the intention of Parliament.

[41] Taking this approach, the Union submits that the whole of Rule 50 deals with specific types of court orders. It contemplates the variance of such orders, and the circumstances in which certain orders will not be issued. In that context, the Union takes the position that Rule 50.09 is intended to apply when the court makes an order within a proceeding and pertaining to that proceeding. It does not apply to a final judgment previously issued from the Court.

[42] The Union also submits that, just as an "order" can be distinguished from a "judgment", so can a "stay of execution" be distinguished from a "stay of enforcement". The execution of an order forces a party to take action or refrain from action. Court File 2863 is the within proceeding and the court has not made any orders to which a stay of execution could apply. Court File 2301 is final and does not include any orders or directions within the meaning of Rule 50.09.

[43] Further, the Union states that Sodexo has asked for a "stay of proceedings" under Rule 50.09. The Union says not only is a stay of proceedings not available under that Rule, but neither is a stay of enforcement. The Rule refers to a stay of execution.

[44] In the alternative, the Union says that Rule 50.09 requires Sodexo to point to a matter occurring after the date of the order to justify granting a stay. The Union takes the position that a "matter occurring" applies to external occurrences that are not triggered, initiated, or controlled by either party, but rather factual changes to the circumstances on which the order was granted.

[45] Further, and in the alternative, even if a party against whom an order is made can take action and then rely on that action to seek a stay of enforcement, the Union

says such actions would not include that party making an application for judicial review after the date of the judgment.

[46] The Union notes that the *Rules of the Supreme Court, 1986* specifically state that a stay shall not be automatic if a party appeals a judgment (Rule 53A.01). Rule 42(1) of the *Court of Appeal Rules,* NLR 38/16 contains a similar provision. A "matter occurring" after the date of the judgment, as contemplated in Rule 50.09, therefore cannot include an appeal since an appeal is explicitly dealt with under separate rules. If an appeal cannot be a "matter occurring", it follows that a judicial review similarly cannot be a "matter occurring" that could trigger a stay under Rule 50.09. A conflict in principle and approach would result otherwise.

[47] The Union says its position with respect to the interpretation of these rules is supported by principles of statutory interpretation which require that, in an apparent conflict between two statutory provisions, the Court should presume the enacting body was consistent in its intention. In such a case, the provisions of a general statute yield to a special one. (Reference: *R. v. Greenwood* (1992), 10 C.R. (4th) 392, 15 W.C.B. (2d) 238 (Ont. C.A.).

Inherent Jurisdiction of the Court

[48] Sodexo further states that the Court has the inherent jurisdiction to control its own process, including its judgments and orders. As stated by Green, C.J.N.L. (as he then was) in *Tremblett v. Tremblett*, 2013 NLCA 53:

> 39 The jurisdiction to grant a stay of proceedings in the nature of execution, not pending appeal, derives from section 97 of the *Judicature Act*, RSNL 1990, c. J-4 and the inherent jurisdiction of a superior court to control its own process, including its judgments and orders. In *Kerr Controls Ltd. v. Yetman* (1995), 128 Nfld. & P.E.I.R. 271 (Nfld. T.D.), a case dealing with staying a judgment to allow for payment of a debt by installments, I observed:
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> > [19] So long as an execution order remains as an order of this court, the court will retain inherent jurisdiction over all judgments or execution orders which it has made and, in the exercise of that jurisdiction, may stay execution upon terms in appropriate circumstances that are relevant to a stay...

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[49] Accordingly, since the Arbitration Award has been registered as an order of this Court pursuant to the *LRA*, the Court has the power to control its own process and grant a stay.

[50] The Union did not specifically address the issue of the Court's inherent jurisdiction, presumably in light of the other preliminary objections noted above and below.

Collateral Attack and Abuse of Process

[51] The Union suggests that the whole of the Judicial Review Application, being Court File 2863, is actually a collateral attack on a completely separate judgment that is already issued as a final judgment or order in Court File 2301. It says Sodexo is not permitted to initiate this proceeding under the guise of Court File 2863 as a collateral attack on the judgment issued under Court File 2301. It is an abuse of process and a stall tactic to deny the Union its right to collect upon its judgment.

[52] The Supreme Court of Canada stated in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44:

> Another aspect of the judicial policy favouring finality is the rule against collateral attack, i.e., that a judicial order pronounced by a court of competent jurisdiction should not be brought into question in subsequent proceedings except those provided by law for the express purpose of attacking it …

[53] The Union also refers to a recent decision out of this Court, *Bradbury v. Carbonear (Town),* 2019 NLSC 1, in which I cited *Garland v. Consumers' Gas Co.*, 2004 SCC 25, for the proposition that, if a party could avoid the consequences of an order issued against it by going to another forum, this would undermine the integrity of the justice system.

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[54] In *Memorial University of Newfoundland v. NAPE, Local 7804*, 2014 NLTD(G) 128, Justice Paquette cited a more recent decision out of the Supreme Court of Canada in *British Columbia (Workers' Compensation Board) v. British Columbia (Human Rights Tribunal)*, 2011 SCC 52 dealing with collateral attacks. The Supreme Court of Canada referred to its prior decision in *Boucher c. Stelco Inc.*, 2006 SCC 64. In that decision, the Court noted the harm that could come to the justice system if parties were able to inappropriately circumvent the proper channels for challenging the correctness or fairness of judicial or administrative decisions.

[55] Similarly, in this instance, the Union asserts there is a proper mechanism at law to proceed with an application for a remedy that should not be ignored. As in *Boucher*, the decision to file a stay application in Court File 2863 instead of using the appeal process represents an impermissible collateral attack on the issued judgment in Court File 2301.

[56] The Respondent further states that the entirety of this application is an abuse of process, citing *Chutskoff Estate v. Bonora*, 2014 ABQB 389. That case sets out characteristics of matters that should be dismissed as an abuse of process, including those that can be described as a collateral attack and actions in which there are other indicia that a legal action is vexatious.

[57] The Union further submits this application is an abuse of process because it is a hopeless proceeding, brought without any legal basis. Further, it is intended to delay, force the Respondent to incur costs, and circumvent the legal process intended for a stay of enforcement. The Union cites the decision of the Newfoundland and Labrador Court of Appeal in *Fiander v. Mills*, 2015 NLCA 31, dealing with the filing of a baseless claim for an improper purpose.

[58] Sodexo disagrees with the position taken by the Union on both the doctrines of collateral attack and abuse of process.

Does jurisdiction lie with the Court of Appeal?

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[59] Finally, the Union submits that, even if a collateral attack on the other action was allowed, section 97 of the *Judicature Act* does not give this Court jurisdiction to issue a stay of any kind over a separate closed action out of this Court. Should a losing party take objection with respect to a judgment of or order of the Court, the proper avenue is to appeal that judgment to the Court of Appeal and seek a stay of enforcement in the interim. No such Notice of Appeal and application has been made.

[60] Section 6 of the *Court of Appeal Act*, S.N.L. 2017, c. C-37.002 states as follows:

> 6. (1) Subject to section 7 and the rules made under section 38, an appeal lies to the court
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> (a) from an order of the Supreme Court or an order of a judge of the Supreme Court; and
>
> ....
>
> (3) The court shall have and exercise appellate jurisdiction, with the original jurisdiction that may be necessary or incidental to the determining of any proceeding before the court, with appellate jurisdiction in civil and criminal proceedings, and jurisdiction and power to hear and determine appeals respecting an order or decision of a judge of the Supreme Court.

[61] The Union says that an appeal of the judgment duly issued in Court File 2301 is properly within the jurisdiction of the Court of Appeal. Had a Notice of Appeal been filed within the time limits prescribed, an application for a stay of enforcement of that judgment would have been available, either from this Court under Rule 53A, or through the Court of Appeal under Rule 42 of the *Court of Appeal Rules*. No such Notice of Appeal was filed.

[62] Sodexo states that the Union's position in this regard is not sustainable at law. The Arbitration Award which was filed in Court File 2301 is *the* matter pending before this Court in the Judicial Review Application.

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[63] Sodexo states that since the Arbitration Award is not under appeal but rather is subject to judicial review before this Court, the Court of Appeal would lack the jurisdiction to consider the matter.

Section 163(1)(b) of the JEA

[64] With respect to the Notice of Objection filed by Sodexo, the relevant sections of the *JEA* are sections 159 and 163(1). Section 159 reads:

> Notice of Objection
>
> 159. (1) Except as otherwise provided in this Act, a debtor who wishes to object to enforcement proceedings, including a claim that property in whole or in part is exempt shall, within 15 days from the day that the enforcement documents are served upon the debtor, deliver a notice of objection to the sheriff.
>
> (2) A notice of objection is not effective and shall be disregarded if
>
> (a) a reason for the objection, including a claim that the property is in whole or in part exempt, is not set out in the notice of objection;
>
> (b) the notice of objection is not served on the sheriff within the period provided for under subsection (1); or
>
> (c) in the opinion of the sheriff the notice of objection is frivolous or intended merely to delay or prolong enforcement proceedings.
>
> (3) This section shall not affect the right of a debtor to apply for a stay of enforcement under section 148.
>
> (4) For the purpose of this Act, a notice of objection is a notice in the required form by which the debtor may indicate an objection to enforcement proceedings, including a claim that property is in whole or in part exempt.

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[65] Section 163(1) reads:

Procedure

163. (1) Where a notice of objection or a notice of claim is not effective,

(a) the sheriff shall serve a notification of that decision to the third party and the debtor;

(b) the third party or the debtor may apply to the court within 15 days of the service of the decision for a determination of the issue;

(c) notice of an application under paragraph (b) shall be served on the creditors with related notices of judgment at the time the notice was to be given; and

(d) the property shall not be sold or money received as a result of enforcement proceedings distributed until

(i) the period for an application to the court under paragraph (b) has elapsed with no application being made,

(ii) the application is discontinued or dismissed, or

(iii) the court otherwise orders.

[66] Sodexo states that the Notice of Objection it filed was in compliance with sections 159(2)(a) and (b) of that Act. As Sodexo provided a reason for seeking the objection and served notice within the statutory time frame, the only reason the Sheriff could find it not effective was in accordance with section 159(2)(c), on the basis that it was "frivolous or intended merely to delay or prolong enforcement proceedings".

[67] It submits that the objection was not frivolous; nor was it intended to merely delay enforcement proceedings. As such, it did not violate section 159(2)(c). The reason for the objection was that the Judicial Review Application had been filed and irreparable harm would result should enforcement proceedings be carried out. Sodexo therefore states that the reason provided by the Office of the High Sheriff for the objection not being effective does not accord with section 159(2) of the *JEA*.

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[68] For its part, the Union firstly submits that the application under section 163(1)(b) ought to have been brought as an originating application since it has no application to Court File 2863.

[69] The Union further objects to the application as section 164(1) of the *JEA* states that the Court may "determine the issue" in accordance with Rule 13 of the *Rules of the Supreme Court, 1986*. Rule 13 governs interpleader relief. Rule 13.03(1) states that the application for this relief shall be made by originating application unless made in a pending proceeding. As there is no pending proceeding in Court File 2301, this Court has no jurisdiction.

[70] The Union again argues that the application under the *JEA* is a collateral attack and an abuse of process.

[71] The Union's final submission on the Notice of Objection is that the Office of the High Sheriff properly rejected the Notice of Objection by stating that "they [the concerns you have raised] are not valid reasons to stay enforcement proceedings under the *Judgment Enforcement Act*." The Union says that the objection process applies to a question of the debtor's interest in the property against which enforcement is being sought. For example, it may be that the property is exempt from enforcement, there is a question of priority in interest or there is a question with respect to the debtor's interest in the property. No such objections were raised by Sodexo.

Analysis – Preliminary Objections

[72] As I stated at the outset, I find that this Court has jurisdiction to consider and order a stay of enforcement of the Arbitration Award pending judicial review.

[73] Firstly, the objections with respect to the manner in which the interlocutory application was filed is a matter of form over substance. Sodexo had intended to file the application in Court File 2301, representing the file number in which the

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Arbitration Award was filed. It presented the application to the Registry with that style of cause and it was administratively changed by the Court Registry to reflect it being filed in Court File 2863.

[74] It is evident from the application itself that what Sodexo was effectively seeking was an order staying enforcement of the Arbitration Award that had been filed as a judgment of or order of this Court. It was not seeking to stay the ongoing judicial review proceeding itself. As suggested by Sodexo during the hearing of this matter, both Court files could be consolidated and this would easily deal with that argument.

[75] A number of other jurisdictional arguments advanced by the Union are, in large part, premised on the Arbitration Award becoming a judgment of or order of this Court for all purposes once filed pursuant to section 90 of the *LRA*. I do not agree that this is the effect of that section.

[76] Section 90 of the *LRA* reads as follows:

> 90. Where a trade union, council of trade unions, employee, employer, employers' organization or other person has failed to comply with the terms of the decision of an arbitration board or of a single arbitrator made under a collective agreement or this Act, a person affected by the decision may, after the expiration of 14 days from the date of the release of the decision or that date provided for compliance, whichever is later, file with the Trial Division a copy of the decision, **exclusive of the reasons for it**, in the form prescribed in rules made under section 22, and **the decision shall be entered in the same way as a judgment of or order of that court and is enforceable as such**. (emphasis added)

[77] Sodexo notes that other arbitral decisions may also be filed with the Court, thereby rendering the decision enforceable. Of note, the *Arbitration Act*, R.S.N.L. 1990, c. A-14 (the "*Arbitration Act*"), provides that a party must seek leave of the court to register an arbitration award in the cause book of the court as follows:

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Enforcement of award

> 15.(1) An award on a submission may, by leave of the court, be registered in the cause book of the court and enforced in the same manner as a judgment or order.
>
> (2) Where leave of the court is given under subsection (1), the judgment or order may be entered in terms of the award.

[78] Sodexo notes that, if it had received notice of the filing, it could have earlier and better dealt with the issue by filing its Judicial Review Application in the same Court file. However, section 90 of the *LRA* does not require that a party give notice of the filing. As a result, the Union is not in breach of the Act by not giving notice.

[79] I do, however, note that the *LRA* and the *Arbitration Act* sections noted above only refer to the award being either "registered" or "entered". As such, the sections are focused on the administrative act of the Court Registry of registering or entering and assigning a Court file number, as opposed to the act of making a judicial determination resulting in an order or judgment. Section 90 of the *LRA* further notes that the manner of the entry shall be "**in the same way** as a judgment of or order of the Court" and "is enforceable as such". This wording supports the interpretation that the award is not to be treated in all respects as a judgment or order of the Court; it is only treated as such for registration or entry and enforcement purposes.

[80] The need for such a provision and the legislative intent is evident, as the provision gives teeth to an otherwise potentially unenforceable award. A successful party to an arbitration award should have a means of seeking the fruits of its judgment, whether by means of enforcement with the Office of the High Sheriff or access to other enforcement mechanisms, such as contempt, pursuant to the *Rules of the Supreme Court, 1986.*

[81] The fact that the decision is to be filed exclusive of the reasons provides further support for this interpretation. The reasons are not to be considered the decision of this Court. In fact, it is this Court that has jurisdiction to review and either uphold or overturn the reasons of the arbitrator.

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[82] If the full Arbitration Award was to be considered an order or judgment of this Court for all purposes, including appeal, simply filing the full decision would oust this Court's jurisdiction on judicial review in favour of the Court of Appeal. Taking that to its logical conclusion, a party to an a labour arbitration could simply bypass the first avenue for judicial review by filing the award under section 90 while those parties who did not file would have to proceed through a review in this Court before appealing to the Court of Appeal. This interpretation is not logical.

[83] I note that, in oral submissions, counsel for the Union did acknowledge that he was not suggesting this Court would not have jurisdiction to judicially review the Arbitration Award but continued to take the position that Sodexo ought to have appealed the order or judgment filed in Court File 2301 and then used the stay provisions applicable to an appeal to the Court of Appeal.

[84] However, as I see it, the flaw in this submission is that section 90 does not actually convert the award into a judgment of or order of this Court for all purposes.

[85] I have looked at the words and expressions used in this section, in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of the Act and legislative intent. I find that section 90 only deals with the administrative act required to give effect to an arbitral award as if it was a judgment of or order of this Court and gives an interested party the right to enforce it as such.

[86] As the Arbitration Award did not become an order of this Court for all purposes, I also find that this Court is not being asked to collaterally attack a judgment or order of this Court issued in a separate proceeding. Further, since it is this Court that is the first avenue for judicial review of the Arbitration Award, the Court is not being asked to circumvent the proper avenue for judicial review, including the right of a reviewing court to order a stay pending judicial review (more will be said of this jurisdiction). With respect to the objection on the basis of abuse of process, this application does not have any indicia of a legal action whose sole basis is to be vexatious or circumvent the correct legal process.

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[87] With respect to the submission that Sodexo should have filed a notice of appeal, I find that section 90 does not render the Arbitration Award a judgment of or order of this Court for the purposes of section 6 of the *Court of Appeal Rules*. It also cannot be said that the award becomes an order or decision of a judge of the Court for the purposes of section 6 of the *Court of Appeal Rules* since at no time did the filing come before a judge for determination.

[88] The position taken by the Union ignores the fundamental question; if Sodexo had to file a notice of appeal with the Court of Appeal of Court File 2031, what would be the potential grounds of an appeal?

[89] If there was some dispute over a Court order dealing with enforcement of the Arbitration Award, in my opinion, an affected party could appeal an enforcement decision of this Court to the Court of Appeal (for example, this decision dealing with a stay of enforcement proceedings).

[90] As the only action of this Court to date was the administrative action in entering the judgment, it may also be that an affected party could appeal alleging defective filing requirements.

[91] Parenthetically, I note that the Union filed the full 330-plus page award, including the 2014 Arbitration Award, inclusive of reasons. As such, arguably, Sodexo could have appealed the entry of the award under section 90. While Sodexo did not do so, even if it had, in my view, that would have given the Court of Appeal jurisdiction to stay enforcement of the award only until the appeal dealing the filing requirements was determined, not pending judicial review of the Arbitration Award.

[92] In obiter, and in fairness to the Union, I note that while the Union filed the full award, including reasons, section 90 creates uncertainty in terms of the filing requirements. That section contemplates the Labour Relations Board creating a prescribed filing form under section 22 of the *LRA* (the section allowing the Board to makes rules of procedure and general application). However, Rule 23 of the *Labour Relations Board Rules of Procedure*, CNLR 746/96 merely states that:

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> 25. An order of a single arbitrator or arbitration board filed with the Registrar of the Supreme Court under section 90 of the *Labour Relations Act* shall be in the form prescribed by the Board.

[93] None of the experienced labour relations counsel who appeared before me on this application were aware of any such prescribed form and advised that no such form is available in the forms section of the Board's website. This circular reference to a prescribed form has the potential to create confusion and uncertainty as to how an arbitral award is to be filed and entered with this Court.

[94] Overall, having determined that appeals regarding compliance with section 90 and decisions of this Court relating to enforcement should be to the Court of Appeal, in all other respects, I find that it is this Court that has jurisdiction over initial decisions respecting the enforcement of the Arbitration Award.

[95] While the parties spent a great deal of time trying to peg this application within the narrow construct of specific rules, the Rules only provide for specific circumstances in which the Court may exercise its jurisdiction. It may be that more one rule applies to certain aspects of the relief sought. It may also be that no specific rule applies. The answer to the question of how the Court obtains its jurisdiction lies in the reasons of Green, C.J.N.L. (as he then was) in *Tremblett.* At paragraphs 40 and 41, he describes the interaction between the rules and the Court's inherent jurisdiction as follows:

> 40 The provisions in the rules of court (rules 50.09, 53A and 57.10) are merely manifestations of certain circumstances where the court's power to grant a stay is often exercised. They do not define the limits of the court's jurisdiction. The specific rules do not purport to occupy the whole of the court's inherent jurisdiction in this regard but merely deal with discrete individual aspects of it.
>
> 41 Although an application for a stay of a judgment may be made invoking a particular rule, once the jurisdiction of the court is engaged for the purpose of considering whether a stay should be granted, the court is not limited to a rote application of the parsed language of the particular rule. The jurisdiction may be exercised, according to proper principles, to do substantial justice in a given case, taking into account the interests of the parties as well as others affected by the proposed enforcement of the judgment.

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[96] And further at paragraph 51, Green, C.J.N.L. (as he then was) stated as follows, in response to the position that Rule 50.09 should be confined to a restrictive interpretation:

> 51 ...I see no reason why rule 50.09 could not refer to any event that occurs subsequent to judgment that renders it unjust to enforce the judgment immediately.
> ...

[97] The Union has attempted to parse out differences in wording between the *Judicature Act* and the *Rules of the Supreme Court, 1986* to suggest that Sodexo's application does not qualify as either a "stay of proceeding" under section 97 of the *Judicature Act* or a "stay of execution" under Rule 50.09. Further, as no appeal has been filed in Court File 2301, the stay provisions respecting appeals are not applicable.

[98] However, it is evident from a review of both the *Judicature Act* and Rule 50.09, as well as the case law that has arisen from them, that the term "stay of proceedings" in section 97 of the *Judicature Act* has been identified as giving jurisdiction to order a "stay of proceeding, including enforcement proceedings".

[99] In relation to the issue of "stay of execution" used in Rule 50.09, versus "stay of enforcement" or "stay of proceedings in the nature of execution", I note from case law that these terms have been used interchangeably. There is also nothing in Rule 50 that suggests that Rule 50.09 should not apply to any order, including any judgment (which could also be referred to as an order) made in the course of a proceeding or as a final order, when what is being requested is relief related to execution and not a request to challenge the validity of the order. I would not interpret Rule 50.09 so restrictively.

[100] As noted by Green, CJNL, in *Tremblett*, once the Court has jurisdiction over the subject matter before it, that jurisdiction encompasses the right and obligation of the Court to take into account the interests of the parties and others affected by the proposed enforcement of a judgment. The Court must then exercise its jurisdiction according to proper principles in order to give substantial justice in a given case.

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[101] This Court has jurisdiction with respect to enforcement of the Arbitration Award that, under section 90 of the *LRA*, is to be treated as a judgment of or order of this Court for enforcement purposes. Even if the Arbitration Award had not been entered into the records of this Court pursuant to section 90 of the *LRA*, this Court would have jurisdiction over the Judicial Review Application before it. The jurisdictional right to judicially review an award would necessarily include the right to make an order staying enforcement of that award pending judicial review, provided such an order would do substantial justice to the parties pending the decision of this Court. Such jurisdiction must be applied on proper principles.

[102] In the case of an application for a stay of enforcement, the proper principles are those to be applied to a stay of enforcement, as set out below. While I am not aware of any prior decision of this Court where the proper principles to be applied to a stay of enforcement pending judicial review was in contention, I note that in one of the cases filed by the Union on another issue, *Newlab Clinical Research In. v. N.A.P.E.*, 2003 NLSCTD 167, Adams, J. applied the general principles set out by the Supreme Court of Canada that are applicable to stays pending appeal. I find these are the proper principles designed to do justice to the parties. Further, both parties approached their submissions on the merits of the stay application on the basis of these general principles.

[103] Since I have found I have jurisdiction to hear the stay application without reference to the *JEA*, it is not absolutely necessary to come to a conclusion on the applicability of section 163(1)(6) of the *JEA*. However, since the parties have filed submissions on this issue, I will provide my views.

[104] I find that, since this Court has jurisdiction to judicially review the Arbitration Award and the award has been filed as a judgment of or order of this Court for enforcement purposes, this Court has jurisdiction to determine an application determining the issue of an objection under section 163 of the *JEA*. As there is a pending proceeding involving the parties to the award, I find the application under section 163 may be properly brought as an interlocutory application under either of the two Court file numbers. For the reasons outlined above, I also find such an application would not be either a collateral attack or an abuse of process.

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[105] However, with respect to the Union's position that the objection process applies to disputes over the property to which enforcement proceedings relate, I find there is some merit to this submission. The sections at issue are all contained in the Part XII of the *JEA* under the heading of "Disputes". All sections under this part deal with situations where there is a dispute over the nature or ownership of specified property against which enforcement is sought. The focus is on the property dispute, not the right to seek a stay. The objection must further state a reason that is recognized as a reason to stay enforcement under the *JEA*.

[106] The Union's submission that a section 159 objection is not intended to include a situation where a stay is the remedy sought is further supported by the wording in sections 159(3) and (4). Section 159(4) states that the debtor may use the notice of objection to enforcement proceedings, noting the specific instance where property is or may be exempt. 159(3) also states that nothing in the section affects the right of a debtor to apply for a stay of enforcement under section 148. That section allows the Court to stay enforcement with respect to exigible property or part of it, where it would be just and equitable to do so, and upon terms and conditions that the Court considers appropriate.

[107] The wording and interplay of these sections, within the context of the *JEA*, and read harmoniously with the scheme of the *JEA*, reveals that the purpose of section 159 is to allow a debtor to object to specific enforcement proceedings based upon objections related to the exigibility of and interest in property over which enforcement is sought. If a debtor wishes to object to enforcement over exigible property on the basis of just and equitable grounds, it is this Court that has jurisdiction to determine that issue in accordance with section 148 of the *JEA*. A more general stay of proceedings could also be obtained from this Court, under the *Rules of the Supreme Court, 1986*, section 97 of the *Judicature Act* or by calling upon this Court's equitable jurisdiction.

[108] The Office of the High Sheriff would not have its own equitable jurisdiction to determine the issue of a stay of enforcement. If it allowed the objection on the grounds suggested by Sodexo, it would be effectively deciding the issue of the stay. It was therefore correct for the Office of the High Sheriff to reject the Notice of Objection as not raising effective grounds. However, such a determination in no

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way abrogates from this Court's right to hear and determine an application for a stay of proceedings pending enforcement.

Issue 2: Should I grant the stay pending the outcome of the Judicial Review Application?

[109] Both counsel are in general agreement that the leading case with respect to an application for a stay is the Supreme Court of Canada decision in *RJR-MacDonald Inc. v. Canada (Attorney General),* [1994] 1 S.C.R. 311 in which the Court set out the following three factors to consider:

a) Is there a serious issue to be tried (or, in certain circumstances, a strong *prima facie* case)?;

b) Will the party requesting the stay suffer irreparable harm if the stay is not granted?; and

c) Does the balance of convenience favour the granting of the relief?

[110] In carrying out this three part analysis, it must be noted that the three factors are not rules, but only principles to guide the exercise of a judge's discretion. As stated by Cromwell, JA., (as he then was) in *MacPhail v. Desrosiers*, 1998 NSCA 5, at paragraph 9:

> 9 ... The elaboration of principles to guide the exercise of this discretion is essential to ensure that the discretion is exercised judicially. However, general principles must not be treated as inflexible rules. Such an approach undermines the true objective of granting judges the discretionary power to grant a stay of execution: that is, to achieve justice as between the parties in the particular circumstances of their case. ...

[111] I will therefore now consider this application for a stay of enforcement pending judicial review in light of the above-noted general principles.

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Serious issue to be tried versus prima facie case

[112] While the parties are in agreement on the tripartite principles to be applied, they do not agree as to the threshold I must apply when considering the first part of the analysis.

[113] Counsel for the Union refers to the more recent Supreme Court of Canada decision in *R. v. Canadian Broadcasting Corp.*, 2018 SCC 5 which contains extensive discussion on the first stage of the *RJR-MacDonald* analysis. *Canadian Broadcasting Corp.* affirms the test from *RJR-MacDonald*, noting that the threshold to meet at the first stage of the analysis is normally that of a serious issue to be tried but, in certain circumstances, an applicant must establish a strong *prima facie* case on the merits.

[114] The threshold test of whether there is a serious question to be tried is a rather low threshold. It is generally sufficient for a Plaintiff to satisfy the Court that its claim is not frivolous or vexatious.

[115] However, *RJR-MacDonald* noted two exceptions to the general rule that a judge should not engage in an extensive review of the merits. At paragraph 56, the Supreme Court of Canada noted that the first exception arises when the result of the interlocutory motion will, in effect, amount to a final determination of the matter. That would occur in a situation where the right the applicant seeks to protect can only be exercised immediately or not at all. It would also occur when granting the application would impose such hardship on a party as to remove any potential benefit of proceeding to trial.

[116] At paragraph 68 of *RJR-MacDonald*, the Court noted the second exception as arising when the question of constitutionality presents itself as a simple question of law alone.

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[117] *RJR-MacDonald* also notes, at paragraph 61, a potential third exception in cases where the factual record is largely settled prior to the application being made. As noted by Justices Sopinka and Cory, writing for the Court, if this exception exists at all, it should not be applied in *Charter* cases. The Court further noted that, at the interlocutory stage of considering an application for a stay, an appellate court will not normally have the time to properly consider even a complete factual record. As a result, a motions court should not attempt to undertake the careful analysis that may be required for consideration of the issues.

[118] The applicant in *Canadian Broadcasting Corp.* had applied for an interlocutory injunction requiring CBC to remove articles it had published in relation to a court matter prior to a publication ban coming into effect with respect of that action. CBC agreed not to publish any further materials in violation of the publication ban but refused to remove prior content.

[119] The Supreme Court of Canada determined that what the Applicant was seeking was an order in the nature of a mandatory injunction. In the case of a mandatory interlocutory injunction, the Court held that the appropriate threshold test to apply was that of a strong *prima facie* case. At paragraphs 15 and 16, the Supreme Court of Canada noted this is because it is often costly and burdensome for a defendant to take positive steps to restore the status quo or place the situation back to what it would have been. As well, there are often potentially severe consequences for a defendant resulting from a mandatory interlocutory injunction, including the effective final determination of the action in favor of the Plaintiff. This was a concern similar to those previously expressed by the Supreme Court of Canada under the first exception in *RJR-MacDonald*.

[120] Counsel for the Union also references a decision of Adams, J., of this Court decided prior to *Canadian Broadcasting Corp.* In the case of *Simoni v. Blue Cross of Atlantic Canada*, (1999) 184 Nfld. & P.E.I.R 136, 559 A.P.R. 136 (Nfld. S.C. (T.D.)), this Court also applied the threshold test of strong *prima facie* case in respect of an application for a mandatory injunction. Adams, J., described the strong *prima facie* test as requiring the applicant to make and show an unusually clear and sharp case. At paragraphs 19 and 20, he explains that a mandatory injunction pre-supposes

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that the plaintiff is likely to be successful at trial. As such, the application is an extraordinary remedy which should be used sparingly.

[121] Post-*Canadian Broadcasting Corp.*, this Court also had occasion to consider whether an application for an interlocutory injunction should be determined based upon the lower threshold of a serious issue to be tried or the higher threshold of a strong *prima facie* case. In *MTY Tiki Ming Enterprises v. Azmy Enterprises Inc.*, 2018 NLSC 169, I applied the higher threshold test of strong *prima facie* case after considering the comments of the Supreme Court of Canada in *Canadian Broadcasting Corp.*

[122] In *MTY*, the applicant was seeking to enforce a restrictive covenant which would expire long before the matter would be set down for trial. Enforcement of the restrictive covenant would have required the defendant to close its restaurant that it had been operating for several months. He would have also been required to terminate employment arrangements and dispose of inventory, amongst other things. I found that the order requested was, in essence, a request for a mandatory injunction which would likely dispose of the entire action, falling within the first exception to *RJR-MacDonald*.

[123] At paragraph 46, I noted that:

> 46. … These are considerations that should be at the forefront of the mind of an application judge when considering the threshold to be applied at the first stage of the *RJR — MacDonald test*. In *Canadian Broadcasting Corp.*, the Supreme Court of Canada directed that the real focus should be on the practical consequences of the relief being sought. …

[124] However, counsel for the Union suggests that *Canadian Broadcasting Corp.* stands for the proposition that, where an applicant requires a respondent to take steps to restore the situation to the status quo, the threshold test becomes that of a strong *prima facie* case. The Union says the application for the stay of enforcement sought by Sodexo requires it to take positive steps as the Union already registered its judgment in the Office of the High Sheriff and has provided instructions to garnish

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payments from a contract of the debtor. The Union has also sought to register its judgment in Ontario and that application for extra provincial registration will be heard early in 2020. In order to restore the status quo, the Union suggests that I would have to order the Union to withdraw its instructions to the Office of the High Sheriff in this jurisdiction and to discontinue its action in Ontario. As such, the strong *prima facie* case analysis should apply.

[125] On the other hand, Sodexo argues that none of the exceptions to the general principle requiring an applicant to show there is a serious issue to be tried exist in this case. There is no suggestion that the application for a stay of enforcement will result in a final determination of the matter. Further, looking at the practical consequences of the relief being sought, the stay will not render the hearing of the Judicial Review Application pointless. Sodexo says it is merely seeking a stay of execution. It is not seeking an order directing the Union to take any positive steps.

[126] Counsel for the Union also takes the position that Sodexo must establish a strong *prima facie* case given the nature of the test an applicant must meet on judicial review. The grounds set forth by Sodexo in its Judicial Review Application are all governed by the standard of reasonableness, with this Court being required to give substantial deference to the decision of the Arbitrator. In particular, counsel for the Union refers to the deference Courts must give to decisions of experienced labour arbitrators as noted in *M.A.H.C.P. v. Nor-Man Regional Health Authority Inc.*, 2011 SCC 59. In light of that high degree of deference, it should be incumbent upon Sodexo to convince me why it will be successful on this Judicial Review Application.

[127] However, I note that this same submission was made and rejected by Ratushny, J., in *Access Health Care Services v. O.N.A.*, [2005] O.J. No. 5470, 144 A.C.W.S. (3d) 940 (Ont. S.C.). At paragraphs 9 and 10, the Court stated as follows:

> 9. The respondent submits that the applicant is required to demonstrate a strong *prima facie* case in order to succeed on this criterion and that the effect of a privative clause under the *Labour Relations Act* of Ontario together with the specialized jurisdiction of the arbitrator should lead me to accord a very high degree of deference to the Decisions. The respondent relies on *Sobeys Inc. v. U.F.C.W., Local 1000A* (1993), 12 O.R. (3d) 157 (Ont. Div. Ct.), at 159 , per Steele J. and

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> *B.A.C. v. Ontario Provincial Conference of B.A.C.*, [1999] O.J. No. 4031 (Ont. S.C.J.) at para. 22a.
>
> 10. I do not understand, however, that the respondent's formulation of the threshold required to satisfy the first criterion is correct and I would think that the deference urged on me is more a matter of argument on the judicial review.

[128] Overall, having considered all authorities presented to me by the parties as well as the written and oral submissions, I am not satisfied that I should depart from the general principle that it is not appropriate at this interlocutory stage to engage in an extensive review of the merits by applying the higher threshold of strong *prima facie* case.

[129] In particular, I agree with the comments of the Court in *Access Health Care Services*. While I recognize that courts must give deference to experienced labour arbitrators, this does not mean that an applicant for a stay of enforcement pending judicial review must convince an applications judge of the merits of his or her grounds of review at an early interlocutory stage.

[130] Sodexo has put forward three primary grounds for its argument that the Arbitrator's decision was unreasonable. While the first ground, relating to when work within the industrial and commercial sector of the construction industry ended, is largely factually based, Sodexo refers to a fair amount of evidence in support of its position. It is not appropriate or possible for me to thoroughly review awards that are more than 330 pages long, along with the record, to determine whether there is a strong *prima facie* case to make out that ground of judicial review.

[131] The other two grounds of judicial review involve some aspect of determinations of law and of mixed fact and law. While the standard to be applied on judicial review is that of reasonableness, that is not to say that this Court could not find that the Arbitrator rendered an unreasonable decision on an issue of law or mixed fact and law. Again, it is not appropriate at this interlocutory phase to delve into the merits of these issues.

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[132] I am also satisfied that this application does not fall within any of the three established exceptions set forth in *RJR-MacDonald*. In my opinion, the comments of the Supreme Court of Canada in *Canadian Broadcasting Corp.* cannot be interpreted as broadly as suggested by the Union. The mere fact that the granting of a stay or injunction requires some positive action by a respondent does not mean that a Court must apply the high threshold test of a strong *prima facie* case.

[133] The focus must be on whether taking such positive steps would be costly or burdensome to the respondent or would have potentially severe consequences to that respondent. Such severe consequences could include whether the injunction or stay would amount to an effective final determination of the action (or in this case, judicial review) in favour of the applicant.

[134] Applying the threshold test of a serious issue to be tried, I am satisfied that the Judicial Review Application identifies serious issues; that is, issues that are not frivolous or vexatious. I will now consider whether or not Sodexo will suffer irreparable harm if I fail to grant this application for a stay of enforcement.

Irreparable Harm

[135] Sodexo submits that the second prong of the *RJR-MacDonald* analysis has been met as it would suffer irreparable harm if it paid out wages and benefits in accordance with the Arbitration Award.

[136] In dealing with the meaning of "irreparable harm", at paragraph 64 of *RJR-MacDonald*, the Supreme Court of Canada stated:

> 64. "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, usually because one party cannot collect damages from the other. …

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[137] Sodexo also refers to the decision of Cromwell, JA (as he then was) in *MacPhail* in which he discusses the challenges of defining the exact meaning of irreparable harm. At paragraph 12, he notes that the meaning of irreparable harm will take shape in the context of each particular case.

[138] At paragraph 14, he notes a number of decisions from judges of the Nova Scotia Court of Appeal on stay applications recognizing the risk that an appellant will not be able to recover funds paid in satisfaction of a judgment in the event the appeal is successful. Such a risk could constitute irreparable harm.

[139] Further, at paragraphs 20 and 21, Cromwell, JA noted that an appellate court should consider the extent of the risk of non-payment in the event that the appeal succeeds. While the successful plaintiff should be entitled to the fruits of its litigation, an appellant may be able to show, on a balance of probabilities, that it will suffer irreparable harm if a stay is not granted.

[140] In *MacPhail*, the issue before the Court of Appeal was whether to grant a stay pending appeal from a trial decision which awarded damages of approximately $725,000 in a personal injury action. A large amount of that award was attributable to the respondent's future loss of income. The Nova Scotia Court of Appeal was satisfied that the appellant seeking the stay had established there was some risk of difficulty in recovering the funds if they were paid out to the respondent and the appeal was successful. As such, the requirement for establishing irreparable harm had been met.

[141] Sodexo also points to a decision of this Court in which a stay of proceedings was granted pending judicial review. In *Newlab*, Adams, J. granted the applicant's request for a stay of proceedings of a certification order that the Labour Relations Board granted to N.A.P.E.. The employer had filed an application for judicial review. Adams, J. was satisfied that there was a serious issue to be tried and that the applicant would suffer irreparable harm if the stay was not granted.

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[142] In dealing with the issue of irreparable harm, Adams, J. was satisfied that the applicant employer would incur costs in entering into collective bargaining with N.A.P.E. which would not be recoverable from N.A.P.E. if the certification order was ultimately overturned.

[143] On the other hand, the Union states that it is the nature of the harm and not its magnitude that is relevant. In this case, while the Arbitration Award orders Sodexo to pay in excess of $7,000,000, the nature of the harm is only monetary. Further, there is nothing irreversible about paying the judgment as owed. The Union says that, just as Sodexo can make the payments, the Union and its workers can make the repayment.

[144] The Union refers to the decision of the Newfoundland and Labrador Court of Appeal in *Rees v. Royal Canadian Mounted Police*, 2005 NLCA 4, in which Wells, C.J. noted that it may be sufficient to meet the irreparable harm stage of the test if an appellant establishes a credible reason for uncertainty that the amount could be recovered.

[145] However, the Union submits that Sodexo has not established a credible reason for uncertainty. The Union submits that it has conducted itself in good faith and with full transparency throughout the dispute. It further suggests that, if necessary, it would provide undertakings or invoke other precautionary means that could nullify any repayment concerns at this stage.

[146] In that light, reference is made to *Thorne v. Thorne*, 2018 NLCA 74, where funds were disbursed in advance of the appeal, subject to an order that the respondents provide a written undertaking that they would repay the money if required as a result of the disposition of the appeal. This would alleviate any concerns with respect to irreparable harm.

[147] The Union also referenced the Ontario Superior Court of Justice decision of *Access Health Care Services* in which an employer applied to stay the decision of an Arbitrator and to quash or stay garnishment orders brought by a union following

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a favorable arbitration decision. The employer argued that it would suffer irreparable harm due to the difficulty in recovering wage payments if it was successful on appeal. Justice Ratushny held that evidence of irreparable harm must be clear and not speculative. In that case, the employer was required to pay approximately $133,000 plus pension plan contributions and statutory remittances to 14 of its former employees represented by the Union.

[148] The Court found that the only evidence the applicant gave of irreparable harm was proof of administrative inconvenience if it made the payments. In that case, it is notable that the union had expressly offered to accept a payment into court of the funds pending a disposition of the application for judicial review. As a result, that would make the garnishments unnecessary and alleviate any financial harm caused to the applicant. As payment into Court was an available alternative and there was no evidence the applicant could not make such a payment, the applicant had failed to establish irreparable harm.

[149] However, *Access Health Care Services* is distinguishable from the circumstances that have been placed before me. In this case, the wages and benefits that are owing pursuant to the Arbitration Award exceed $7,000,000, with more than $5,000,000 of that amount being payable directly to employees who had carried out project work rather than the Union or any pension or benefit funds. As the number of Union members to whom monies are owed is approximately 190, the difficulty, if not impossibility, of recovering wages from that many employees is not speculative.

[150] Further, the Union did not respond to this interlocutory application with an acceptance of the offer to pay the amount of the Arbitration Award into Court. Payment into Court was a suggestion made by the Sodexo as an alternative to its claim for a full and unconditional stay.

[151] In reply to that alternative claim for relief, the Union submitted that payment into Court will probably be inadequate because interest continues to accrue on the amount of the Arbitration Award. The accounting firm of Harris Ryan calculates that the Arbitration Award will increase by more than $500 in interest for each day

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that it is not paid. As a result, the amount of the award is not a static amount and will increase significantly by the time the judicial review is determined.

[152] The Union also suggested, in oral submissions, that the funds could be paid directly to the Union or an administrator answerable to the Union. While the Arbitration Award says that wages are to be paid and forwarded directly to the workers, the Union says there are ways of making the payment other than set out in the Arbitration Award. However, having said that, the Union did recognize that it could not guarantee that all money would be recoverable.

Balance of Convenience

[153] The third part of the tripartite analysis in *RJR-MacDonald* is for the Court to determine which of the two parties will suffer the greater harm from the granting or refusal of the stay pending a decision on the merits.

[154] At paragraph 85 of *MTY*, I referred to a prior decision in *Jones v. Bay Roberts (Town)*, 2017 NLTD(G) 134 in which the balance of convenience test from *RJR-MacDonald* was described more as a balance of inconvenience test as follows:

> 85. While courts have traditionally referred to this third prong of the test as requiring the courts to consider whether the balance of convenience favours the granting of the injunction or refusing it, the Court in *RJR-MacDonald* referred to this test as the balance of inconvenience. This is perhaps a more accurate term as the Court must assess which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits. The degree of irreparable harm and existence and the strength of an undertaking are factors to be considered in this determination. Where the application of the balance of inconvenience test leads to no clear resolution, the Court will normally seek to preserve the status quo.

[155] In this case, the Union says that it is the workers who will suffer greater inconvenience. They have waited for wage and benefit payments in good faith since

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the 2014 Award, despite the fact that there can be no question as to the validity of that award.

[156] The Union also points out that these workers were housekeeping staff who worked at a remote camp in Labrador. They have been waiting for years to reap the benefits of their work and have not been adequately compensated in accordance with the Collective Agreement. The number of workers affected is considerable and some are owed significant sums of money.

[157] The Union states that, in contrast, Sodexo is a wealthy multi-national corporation with over 400,000 employees around the world. In Canada alone, it has 13,000 employees, 185 clients. They operate at 233 different sites. It is not in a financially difficult position. The payment of wages to its employees would not tip the balance of inconvenience in favour of Sodexo.

[158] The Union submits that, further tipping of balance of inconvenience in its favour, is that Sodexo's corporate presence in this province appears to be minimal. There is no evidence that it has any presence or assets other than its operations at the Camp. As such, it could avoid payment.

[159] The Union also refers to a decision of Adams, J. of this Court in *Daley Brothers Ltd. v. Taito Seiko Co.* (2000), 193 Nfld. & P.E.I.R. 260, 582 A.P.R. 260 (Nfld. S.C. (T.D.)) in which a stay of enforcement was granted as the successful respondent had no corporate presence in the province.

[160] However, I note that case is distinguishable as there was evidence that the successful respondent may never again operate in the province and, should it refuse to pay, it would have been necessary for the appellant to enforce the judgment in a foreign country, the laws of which were uncertain. As well, Taito Seiko Co. had not even undertaken to the Court to repay any amount ordered by the Court if the appellant was successful on appeal.

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[161] The same concerns would not apply to a large corporation such as Sodexo that operates in multiple Canadian provinces. The difficulties of enforcing the Arbitration Award in another Canadian province is not comparable.

[162] Further, in this case, Sodexo has offered to pay the funds into Court or into an interest-bearing trust account, pending the determination of the Judicial Review Application. As such, while not to be discounted, the inconvenience to the employees is the delay in seeking payment of the amounts due, not the risk that the amount will not be recovered. With respect to the Union's concern over the amount of interest potentially not matching the amount payable pursuant to the Arbitration Award, in light of Sodexo's financial position, I do not find this to be a significant concern tipping the balance of inconvenience in favor of the Union.

[163] However, in considering whether payment into Court or an interest-bearing account would be an appropriate means of addressing this application and alleviating any inconvenience, I must consider the nature of the amount that was ordered to be paid.

[164] While it is not appropriate to delve into the merits of the action on an interlocutory stay application, it is appropriate to give some consideration to the relative merits of the case when analyzing the balance of convenience. I note that a preliminary review of the Arbitration Award indicates that, not only is Sodexo obligated to pay the amount of wages and benefits awarded pursuant to the 2014 Award, which are not the subject of the Judicial Review Application, there is a substantial amount of wages and benefits that are not in dispute on this judicial review relating to the period from March 29, 2014 to March 31, 2015.

[165] In particular, the Arbitrator noted at page 97 of Part 2 of the Arbitration Award that the employer took the position before him that the following amounts were owed:

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DECEMBER 18, 2013 - MARCH 28, 2014 (the period governed by the 2014 Award)

- $314,118.56 for wages
- $298,085.11 for benefits

MARCH 29, 2014 – MARCH 31, 2015

- $3,580,950.51 for wages and benefits

[166] As a result, there is an amount in the range of $4,193,154.18 plus interest that will be due and owing by Sodexo even if it is entirely successful on this Judicial Review Application. There is no reason why Sodexo has not paid, and should not now be obligated to pay, amounts for wages and benefits that are not in dispute.

[167] When I questioned Counsel for Sodexo and the Union on whether the amount that was not in dispute could be identified from the Arbitration Award, they were unable to point me to any specific exhibit or calculation showing that figure. However, both agreed that the amount could be readily calculated by Harris Ryan Accountants, who completed the accounting of amounts at the hearing stage. In light of the fact that this amount can be readily calculated and is payable notwithstanding the result of the Judicial Review Application, I will not grant a stay in respect of those amounts. In particular, the amounts that are not in dispute are the amounts owing for wages and benefits from December 18, 2013 to March 28, 2014 (the period governed by the 2014 Award), as well as the amount for wages and benefits from March 29, 2014 to March 31, 2015 (the period during which Sodexo acknowledges the Collective Agreement applied), excluding any wages or benefits related to shift differential/Friday overtime payments. No serious issues have not been established in respect of these amounts, there is no irreparable harm to the applicant if they are paid, and the balance of convenience analysis favours the Union.

[168] However, I find that the balance of convenience analysis favors the granting of a partial stay for the amounts that are actually in dispute. That remainder of the award still represents a significant sum of money due to approximately 190 employees. I find there is no reasonable probability that Sodexo will recover

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amounts paid out to individual employees should it be successful on this Judicial Review Application. As a result, it is appropriate to order a partial stay in respect of that portion of the Arbitration Award.

[169] However, in light of Sodexo's financial ability to pay that amount into Court or into an interest-bearing bank account to be held in trust by the solicitor for Sodexo, the balance of convenience favors placing conditions on the granting of the partial stay pending the outcome of the Judicial Review Application or further order of this Court. Such conditions, outlined below, will ensure there is little to no difficulty, delay or risk that the funds would not be paid to the workers and the Union should the Union be successful on this Judicial Review Application.

CONCLUSION

[170] I find that the Court has jurisdiction to grant a stay of enforcement of the Arbitration Award pending judicial review.

[171] It is hereby ordered as follows:

1. The Respondent shall obtain from Harris Ryan Accountants, or another qualified chartered professional accountant, a calculation of the amount of wages and benefits owing but not yet paid to Union members, in accordance with the findings of the Arbitrator, for the period from December 18, 2013 to March 31, 2015, less any amount of wages or benefits related to shift differential/Friday overtime payments. The up-front cost of obtaining such calculation shall be paid by Sodexo, subject to any order as to costs upon final determination of the Judicial Review Application. Such a calculation shall be provided to the Applicant and filed with this Court within two weeks of the date hereof, or such other date as counsel may agree in writing.

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2. A stay of enforcement is granted in respect of the portion of the amount owing pursuant to the Arbitration Award that represents the amount awarded plus interest accrued thereon, less the amount calculated in accordance with paragraph 1 above.

3. This stay is granted on the condition that the Applicant pay such amount into an interest-bearing account to be held by the solicitor for the Applicant in trust pending final determination of the Judicial Review Application or further order of this Court. Such amount shall be deposited to an interest-bearing account within two weeks of this filing of the calculation ordered pursuant to paragraph 1 above. Confirmation of such deposit shall immediately be provided to counsel for the Respondent and filed with this Court.

4. Costs of this application shall be in the cause.

ROSALIE MCGRATH
Justice